OCTOBER TERM, 2018

IN THE SUPREME COURT OF THE UNITED STATES

CASE NO. _____

ANTYANE ROBINSON,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

THIS IS A CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Where a state court denied a judicial bias claim based on another state court's finding that the judge in question had not demonstrated actual bias, did the state court fail to apply the correct legal standard, i.e., whether, objectively speaking, the probability of actual bias was too high to be constitutionally tolerable?

2. Given that the legal error here is the same that was reviewed by this Court in *Rippo v. Baker*, 137 S. Ct. 905 (2017), should this Court, as in *Rippo*, grant certiorari, vacate the state court decision, and remand for further proceedings?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Antyane Robinson, respectfully asks that the Court issue its writ of certiorari to review the decision of the Supreme Court of Pennsylvania in this capital case.[1]

OPINION BELOW

The Supreme Court of Pennsylvania's order affirming the denial of post-conviction relief by an evenly divided vote, *Commonwealth v. Robinson*, 198 A.3d 340 (Pa. 2018), was issued on December 14, 2018. Pet'r's App. 1.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257. The Supreme Court of Pennsylvania affirmed the denial of post-conviction relief on December 14, 2018. Although Petitioner's due process claim was ostensibly barred on timeliness grounds, Mr. Robinson demonstrates below that the timeliness bar was in fact intertwined with and not independent of the court's (erroneous) ruling on the merits of the due process issue. Accordingly, this Court has jurisdiction. *See Enter. Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917)

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[1] All emphasis herein is supplied, unless otherwise indicated. Relevant opinions and orders from the lower state court and the Pennsylvania Supreme Court are included in the Appendix to this petition (designated as "Pet'r's App."), followed by the appropriate page number in the Appendix.

("where the non-Federal ground is so interwoven with the [Federal ground] as not to be an independent matter, . . . our jurisdiction is plain.").

The Supreme Court of Pennsylvania denied relief on December 14, 2018. On March 8, 2019, Justice Alito granted Petitioner's application to extend the time to file his certiorari petition until April 13, 2019. This petition is filed pursuant to Supreme Court Rule 29 and is timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, which provides in relevant part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law.

The relevant post-conviction statutory provision is 42 Pa. C.S. § 9545(b), which provides:

> (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;
> >
> > [or]

> (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; . . .
>
> (2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

STATEMENT OF THE CASE

A. Procedural History

On March 13, 1997, following a jury trial, Mr. Robinson was convicted of first-degree murder, attempted criminal homicide, and related offenses. On March 14, 1997, following a penalty hearing, the jury rendered a death verdict.

The Pennsylvania Supreme Court affirmed Mr. Robinson's convictions and sentence of death on direct appeal. *Commonwealth v. Robinson,* 721 A.2d 344 (Pa. 1998) ("*Robinson I*"), *cert. denied,* 528 U.S. 1082 (2000).

Mr. Robinson filed a timely petition for state post-conviction relief on October 16, 2000. Following a hearing, the trial court denied that petition on April 22, 2002. The Pennsylvania Supreme Court affirmed. *Commonwealth v. Robinson*, 877 A.2d 433 (Pa. 2005) ("*Robinson II*").

Mr. Robinson filed a federal habeas corpus petition, which was denied by the district court. *Robinson v. Beard,* No. 05-1603, 2011WL4592366 (M.D. Pa.

Sept. 30, 2011). The Third Circuit affirmed. *Robinson v. Beard*, 762 F.3d 316 (3d Cir. 2014), *cert. denied*, 136 S. Ct. 53 (2015).[2]

In the fall of 2015, Mr. Robinson became aware of newly available grounds for relief, based on news articles that appeared in October 2015 concerning former Pennsylvania Supreme Court Justice Eakin. On November 30, 2015, Mr. Robinson filed his third state post-conviction petition. He raised constitutional claims regarding apparent and/or actual bias stemming from Justice Eakin's involvement in various email groups—including one or more in which the former prosecutor in this case was included—whose communications included messages reflecting racial, religious and gender biases.

The post-conviction court initially dismissed the petition for lack of jurisdiction, but after further proceedings that ruling was reversed by the Pennsylvania Supreme Court, and the case was remanded. Following the remand, after additional briefing and oral argument, the court entered an order and opinion notifying Mr. Robinson of its intent to dismiss the petition as untimely. Mr. Robinson filed objections to dismissal and moved for leave to amend the Petition, proffering an amendment. The post-conviction court issued an order dismissing

[2] A second state post-conviction appeal was also denied. *See Commonwealth v. Robinson*, 139 A.3d 178 (Pa. 2016) ("*Robinson III*").

the Petition and Petitioner's other requests. Pet'r's App. 44-45. The court subsequently issued an opinion explaining its denial of relief. Pet'r's App. 25.

The post-conviction court opined that the petition was untimely because it should have been filed in 2014, when a few articles linked Justice Eakin to the email scandal (which at that time primarily involved former Justice McCaffery). Pet'r's App. at 31. None of the Justices on the Pennsylvania Supreme Court adopted the lower court's reasoning, however, and two of them expressly rejected it. *See* Pet'r's App. 12 (Opinion in Support of Reversal) (hereafter "OISR").[3] Given that none of the Justices adopted the lower court's reasoning, the state court judgment is supported only by the OISAs.[4]

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[3] The Pennsylvania Supreme Court affirmed the post-conviction court by an equally divided vote. Two Justices joined the OISR, while two other Justices authored Opinions in Support of Affirmance (hereafter "OISA"). Justice Mundy joined Justice Dougherty's OISA except with respect to Justice Dougherty's treatment of some Pennsylvania precedents. Therefore, Justice Dougherty's OISA is effectively the lead opinion.

[4] When an appellate court is equally divided, the lower court's judgment is affirmed and becomes conclusive. *Neil v. Biggers*, 409 U.S. 188, 192 (1972). The affirmance is not entitled to precedential weight. *Id.* While the lower court's judgment was affirmed, however, its reasoning was expressly or impliedly rejected by all of the appellate judges who heard the case. Thus, the only existing basis for the judgment is the OISA. Given that the OISA's analysis of the merits is both erroneous and intertwined with its timeliness analysis, this Court can and should grant certiorari, vacate the judgment, and remand for further proceedings.

Justice Dougherty's OISA relied heavily on a previous ruling by the Pennsylvania Court of Judicial Discipline ("CJD") in disciplinary proceedings against Justice Eakin. In that ruling, based on the parties' stipulations, the CJD found that Justice Eakin

> sent out e-mails which mocked minorities and placed women in submissive sexual stereotypes. When these e-mails became public, all the more probable since he was using government equipment, and, at times, judicial and government internet servers, it resulted in harsh criticism ranging from private citizens to community leaders to legal and governmental officials. His actions were likewise widely reported in the news media both statewide and nationally. Based upon this history, we find that the Respondent's actions dramatically lessened public confidence in the integrity and impartiality of the entire Judiciary.

In re Eakin, 150 A.3d 1042, 1059-60 (Pa. Ct. Jud. Disc. 2016) (footnotes omitted).

In its ruling, the CJD also found that there was no proof that Justice Eakin had ever demonstrated *actual* bias in his *written opinions*. *Id.* at 1048, 1060. Relying on the latter finding, the OISA ruled that the petition was untimely, but only because the new evidence contained in the emails did not support a claim of *actual* bias. As Justice Dougherty explained it, the CJD

> in its comprehensive and independent evaluation found as fact that the Judicial Conduct Board (JCB) produced no evidence that Justice Eakin "in his written judicial opinions, ever demonstrated any overt bias due to the race, gender, ethnicity, or sexual orientation of a litigant or witness." *In re Eakin*, 150 A.3d 1042, 1048 (Pa. Ct. Jud. Disc. 2016). The CJD also acknowledged Eakin "presented credible witnesses that his judicial opinions were not reflective of any of the biases expressed

> in any of the emails, but instead were decided, in each case, in accordance with the facts and law." *Id.* at 1060.

See Pet'r's App. 20 (Dougherty, J., OISA).

Justice Dougherty then expressly ruled that the lack of merit of Petitioner's judicial bias claim—which he believed was established by the CJD's no-actual-bias ruling—rendered the claim untimely:

> [T]o overcome the PCRA time bar, a petitioner is required, at a minimum, to demonstrate some connection between the newly-discovered facts and the claim. . . . Whether there is a connection between the newly-discovered facts regarding Eakin's emails to appellant's underlying claim sufficient to overcome the time bar is not self-evident in this case. Here there is no admission of judicial bias; rather there was a denial of bias before the CJD, which *determined there was no evidence of bias*. . . . Accordingly, I would conclude appellant's third petition for PCRA relief was untimely filed and appellant failed to show any exceptions apply as the facts relied upon were not sufficiently connected to the claim. Moreover, even if the petition had been timely, no evidentiary hearing would be warranted, as the CJD found as fact no evidence of bias.

Pet'r's App. 21 (Dougherty, J., OISA).

In other words, Justice Dougherty's controlling reasoning was as follows: (1) for a claim in a successive petition to be timely, there must be a sufficient connection between the newly discovered facts and the claim asserted; (2) the CJD found no evidence of *actual* bias on Justice Eakin's part; (3) based on the CJD's finding, (a) there was an insufficient connection between the new facts regarding the emails and the claim asserted for the claim to be timely, and (b) the claim itself was without merit.

The OISR expressly rejected the lower court's ruling that the claim should have been filed in 2014. *See* Pet'r's App. 12 (Donohue, J., OISR) ("Based on the information publicly available in 2014, we conclude that Robinson did not have a basis to allege that Eakin was biased in order to bring his due process claim at that time."). The OISR also rejected the OISA's intertwined timeliness and merits analysis, pointing out that the OISA improperly required Robinson to "demonstrate that Eakin was biased in his decision making in order to overcome the timeliness hurdle," even though Eakin's alleged bias was the basis for Robinson's underlying claim. *Id.* at 14.

B. Relevant Facts

Shortly before trial, Mr. Robinson filed pro se motions that resulted in a hearing on whether to permit him to represent himself. The court permitted Mr. Robinson to proceed pro se and designated appointed counsel as stand-by counsel.

After the Commonwealth's opening statement, Mr. Robinson gave an opening statement in which he admitted that "everything I did was wrong." He argued that his whole life had been affected by racial discrimination, heart problems, and other perceived injustices. He noted that the jury was all white and claimed that his lawyers "turned against me from the beginning." The Commonwealth objected to these assertions, and the court twice instructed Petitioner about the proper scope of an opening statement. Following the direct

examination of the Commonwealth's second witness, Mr. Robinson first requested new counsel and then accepted representation by stand-by counsel.

In support of its case for first degree murder, the prosecution admitted a plethora of other crimes/bad acts evidence seized from Mr. Robinson's home, including: a gun that was unrelated to the crime; gun ammunition that was unrelated to the crime; a bulletproof vest that was unrelated to the crime; and a series of photographs of guns and of Mr. Robinson posing with guns, all of which were unrelated to the crime. *Robinson I*, 721 A.2d at 350. The prosecution argued that this evidence showed Mr. Robinson's character and propensity to kill, i.e., that he was a "big city" thug who came to (relatively rural) Cumberland County armed with a weapon with the specific intent to exact revenge for perceived "disrespect" by Ms. Hodge.[5]

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[5] On direct appeal, the Pennsylvania Supreme Court found the admission of this evidence erroneous but harmless. *Robinson I*, 721 A.2d at 351-52. The court noted that the Commonwealth used this evidence to contend that Petitioner's lifestyle and image "made him a person capable of committing the crimes in question," and that "the prosecutor intimated that [Petitioner's] possession and use of other weapons, demonstrated that appellant was capable of forming the specific intent to kill." *Id.* Although the court was "troubled" by the prosecutor's argument, it ruled that the evidence did not contribute to the verdict. *Id.* at 352-53; *but see Robinson II*, 877 A.2d at 452 (Saylor, J., dissenting) (the prosecutor's "character- and propensity-based arguments . . . had the potential to color" the jurors' sentencing decision).

In the initial post-conviction proceedings, Mr. Robinson alleged prosecutorial misconduct on the part of former District Attorney Ebert,[6] including his portrayal of Petitioner during opening as an inner-city African American "gangster" who should be convicted because he had no business coming into the jurors' reputable community (NT 3/12/97at 6);[7] and his argument in closing emphasizing the theme of racial/urban bias as a basis for finding Mr. Robinson guilty of first degree murder. (NT 3/13/97 at 273) ("Now *there was an image projected here*, and *it's that big city image* . . . . Man, I got to carry a gun wherever I go . . . . *This is the image of a kind of person capable of forming the specific intent to kill. This is a lifestyle.*"); (*id.* at 277-78) ("I would say an ordinary person doesn't want to do that, but *a person that wants to project this kind of image, the kind of guy that has to drive into Cumberland County and have guns in his waistband and his home has to have a bullet proof vest*, those are the kind of

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[6] Mr. Ebert had served with former Justice Eakin as an assistant district attorney in the Cumberland County District Attorney's office, and then as his first assistant district attorney, before being elected as a judge on the Cumberland County Court of Common Pleas. Mr. Ebert recently assumed the position of District Attorney again, having been appointed to serve the remainder of Mr. Freed's term of office. After Justice Eakin was linked to the email scandal, then-Judge Ebert, along with other Cumberland County judges, sent a letter supporting Justice Eakin to the Judicial Conduct Board.

[7] Transcripts in Pennsylvania are referred to as "notes of testimony" and are cited here as "NT" followed by the date and page number of the proceeding.

guys I submit to you that say I ain't going to be disrespected, disrespect me and you're going to have to pay . . . *[t]his isn't disadvantage. This is a question of image*") (emphasis supplied).

Petitioner also challenged the prosecution's incorporation of irrelevant non-statutory aggravation evidence of weapons, weapon paraphernalia, military clothing and photographs depicting Petitioner possessing weapons during the penalty hearing, thus continuing the racially offensive theme of characterizing Petitioner as an "urban gangster," and the prosecutor's closing argument, which both injected improper future dangerousness and commented on Petitioner's right to remain silent. The post-conviction court denied relief, and the Pennsylvania Supreme Court affirmed in a decision authored by Justice Eakin. *Robinson II*, 877 A.2d at 437, 450.

Information about a body of offensive email correspondence involving sitting jurists and other professionals in Pennsylvania's criminal justice system first began to emerge in 2014, discovered by the office of then-Attorney General Kathleen Kane in the course of her investigation of the prior Attorney General's handling of the Jerry Sandusky child abuse investigation. Newspapers reported that Kane learned that a number of former and current Attorney General staff had engaged in sending and/or receiving pornographic images and videos on state email accounts. *See, e.g.*, Steve Esack, *Kane Won't Release Explicit Emails to*

Media, Allentown Morning Call, Sept. 24, 2014, at A11 ("Attorney General Kathleen Kane's office has denied media requests to release allegedly pornographic emails found on agency-owned computers during a review of the Jerry Sandusky case.").

On October 2, 2014, news accounts revealed that the pornographic email chains included Justice Seamus McCaffery, reportedly from his personal email account. *See* Steve Esack, *Justice Sent Explicit Emails*, Allentown Morning Call, Oct. 2, 2014, at A1 ("Pennsylvania Supreme Court Justice Seamus McCaffery forwarded at least eight sexually explicit emails from his personal email account to an employee in the state attorney general's office who later shared them with more than a dozen others . . . .").

Between October 8 and October 16, 2014, it was disclosed publicly for the first time that the communications between Justice McCaffery and the Attorney General's Office were not limited to pornographic images and videos, but also included 2,800 additional emails of an undisclosed nature. Moreover, the emails were not confined to Justice McCaffery; an additional 1,200 emails were sent among other members of the Supreme Court and Attorney General staff. In total, it was reported that some 4000 ex parte emails were exchanged between sitting members of the Supreme Court and members of the Attorney General's Office (representing the Commonwealth). *See* Brad Bumsted & Adam Brandolph,

Castille Expects Emails' Delivery, Pittsburgh Tribune Review, Oct. 8, 2014 (noting that of 4,000 emails involving members of the "high court," 2,800 involved Justice McCaffery).

In October 2014, Justice McCaffery implicated Justice Eakin in the email exchanges, and an investigation regarding Justice Eakin was undertaken.[8] The published reports indicated only that Justice Eakin had received a single potentially racially offensive email. Following an investigation, Justice Eakin was cleared by the Judicial Conduct Board ("JCB"). (SA Exh. 3) (including 12/17/14 Letter of Robert A. Graci, JCB Chief Counsel, noting that Justice Eakin had received "mildly pornographic or sexually suggestive" emails, but "none" contained "racist" images or discussions of court business).[9] Justice Eakin was also cleared by an attorney who acted as special counsel to the Pennsylvania Supreme Court. (SA Exh. 4, pp. 4-5).

On or about October 8, 2015, however, Justice Eakin's involvement took on a new light. An on-line article appeared in *philly.com*, reporting that the news

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[8] Attached to the state petition were four exhibits numbered 1 through 4. References to those exhibits will be to the exhibit number. Petitioner also filed a supplemental appendix. The exhibits in the supplemental appendix will be referred to as "SA" followed by exhibit number and page or paragraph, as appropriate.

[9] Mr. Graci served under Judge Ebert when Ebert was Executive Deputy Attorney General, from 1989 to 1995.

outlet had come into possession of a number of emails sent by, or received from, Justice Eakin through a "private" Yahoo.com inbox that he had set up under the alias "John Smith." (Pet. Exh. 1). The article reported that "Eakin's email address repeatedly appears within a network of law-enforcement officials who received inappropriate emails on their government accounts," and then describes named and unnamed judges, prosecutors (including prosecutors from the Attorney General's Office) and police officials as either recipients or senders of various racist, sexist and culturally insensitive emails and attachments. (*Id.*).

The *philly.com* article and an October 9, 2015 article by *readingeagle.com* (Pet. Exh. 2) describe select emails and attachments, including:

> An email sent by Eakin containing a "joke" about a woman complaining to a doctor that her husband "beats me to a pulp," to which the doctor recommends that she "swish tea in her mouth" and not "swallow" until her husband is asleep, concluding: "You see how much keeping your mouth shut helps?"
>
> An email sent to Eakin attaching a video called "Craziest white man ever" featuring a man picking up immigrant day workers (referred to as "beaners" and "animals") "under the ruse that he needs help with his deck, then turning them in to U.S. immigration officials, then laughing hysterically as they scatter from his pickup truck and saying: "That's what I do every couple weeks just to get rid of - ya know, thin out the herd a little bit," . . . . "Make sure they don't overpopulate."
>
> An email sent to Eakin containing a "joke" in which a mother laments that Muslim children "blow up so fast, don't they?"
>
> An email with a video in which a black woman complains that President Barack Obama wants to create jobs. "You mean I'm not going to get my government check?" the woman asks.

(Pet. Exhs. 1, 2).

On or about October 23, 2015, an online article appeared in *pennlive.com* indicating that then-Judge Ebert (the prosecutor in Mr. Robinson's case) had been the recipient of at least one of the emails obtained by *philly.com*. (Pet. Exh. 3). The emails that were made public in October 2015 formed the basis for Petitioner's judicial bias claim.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI, VACATE, AND REMAND FOR FURTHER PROCEEDINGS BECAUSE THE STATE COURT COMMITTED THE SAME ERROR AS IN *RIPPO V. BAKER*.

As discussed above, the state court denied relief on Petitioner's judicial bias claim based on a finding by Pennsylvania's Court of Judicial Discipline that Justice Eakin (the jurist in question) had not demonstrated actual bias. Pet'r's App. 20 (Dougherty, J., OISA) (citing *In re Eakin*, 150 A.3d at 1048, 1060). The state court relied on that finding as conclusively showing both that there was not a sufficient connection between the emails and the bias claim for Petitioner to overcome a timeliness bar, and that the claim itself was without merit. *Id.*[10]

[10] The OISR questioned whether the CJD actually made a meaningful finding in that regard. Pet'r's App. 12-13 n.20. (Donohue, J., OISR). Moreover, Petitioner was not a party to the CJD proceedings, and the issues involved in disciplinary proceedings are distinct from those in a request for post-conviction relief.

The state court ruling that proof of actual bias is required to maintain a due process claim of judicial bias is inconsistent with longstanding precedent of this Court. As this Court recently emphasized, its precedents ask "not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) (internal quotation marks omitted) (citing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009)). A state court, like the court below, that applies a requirement of proving actual bias to a claim that judicial bias violates due process commits clear error.

This Court has not hesitated to correct such errors. In *Rippo*, the state court had denied a post-conviction judicial bias claim because the petitioner's "allegations 'd[id] not support the assertion that the trial judge was actually biased in this case.'" *Rippo*, 137 S. Ct. at 907 (quoting *Rippo v. State*, 368 P.3d 729, 744 (Nev. 2016)) (alteration in original).[11] This Court found that the Nevada court "did

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Nevertheless, the OISA relied on the CJD "finding" as the basis for its rulings with respect to the intertwined issues of timeliness and the merits of Petitioner's claim.

[11] In *Rippo*, as here, the state court relied on its bias holding to determine that Rippo could not overcome state procedural bars. *Rippo*, 137 S. Ct. at 907 n.*. This Court held that because the state court "did not invoke any state-law grounds 'independent of the merits of [Rippo's] federal constitutional challenge,' we have jurisdiction to review its resolution of federal law." *Id.* (quoting *Foster v.*

not ask the question our precedents require: whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable." *Id.* Having so found, this Court summarily vacated the state court judgment and remanded for further proceedings. *Id.*

Because the state court here made exactly the same error as the state court in *Rippo*, this Court should take the same action. While this petition primarily seeks correction of the state court's error, the error in this case is not isolated. The Pennsylvania Supreme Court reached a similar decision, again by an equally divided vote, in *Commonwealth v. Blakeney*, 193 A.3d 350, 367 (Pa. 2018) (Dougherty, J., OISA). Additionally, similar issues are pending before the Supreme Court of Pennsylvania in *Commonwealth v. Taylor*, No. 767 CAP, and *Commonwealth v. Koehler*, No. 768 CAP. Thus, the issue presented here may be a recurring one. That gives greater urgency to the need to correct the error committed by the court below.

Chatman, 136 S. Ct. 1737, 1746 (2016)) (alteration in original). The same is true here.

CONCLUSION

For all of the reasons set forth herein, this Court should grant certiorari, vacate the judgment below, and remand for further proceedings.

Respectfully submitted,

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Dated: April 12, 2019

OCTOBER TERM, 2018

IN THE SUPREME COURT OF THE UNITED STATES

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APPENDIX TO
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THIS IS A CAPITAL CASE

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Dated: April 12, 2019

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198 A.3d 340 (Mem)
Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee
v.
Antyane ROBINSON, Appellant

No. 720 CAP
|
Submitted: June 11, 2018
|
Decided: December 14, 2018

Appeal from the Order dated 12/8/2015, in the Court of Common Pleas, Cumberland County, Criminal Division at No. CP-21-CR-0001183-1996

ORDER

PER CURIAM

AND NOW, this 14th day of December, 2018, the order of the court of common pleas is affirmed by operation of law, as the votes among the participating Justices are equally divided. Appellant's Motion to Disqualify the Cumberland County District Attorney's Office is denied as moot.

Chief Justice Saylor and Justices Baer and Todd did not participate in the consideration or decision of this case.

OPINION IN SUPPORT OF REVERSAL

JUSTICE DONOHUE

In this capital appeal, we review the dismissal, on timeliness grounds, of the third petition for relief filed by Appellant Antyane Robinson ("Robinson") pursuant to the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546 ("PCRA").[1] Robinson's petition, raising a due process violation, is premised upon the receipt and delivery of offensive emails by former Pennsylvania Supreme Court Justice J. Michael Eakin ("Eakin") and possible ex parte communication between Eakin and members of the Office of the Cumberland County District Attorney (the "DA"). We are also asked to decide whether the DA should be disqualified from participating in this matter based on the connection between the DA and Eakin that was exposed through Eakin's disciplinary proceedings. For the reasons that follow, we would conclude that Robinson satisfied the newly discovered ***341** fact exception to the PCRA's one-year time requirement and filed his petition within sixty days of the date his claim could have first been brought. We further would conclude that the particular facts and circumstances of this case require the disqualification of the DA from further proceedings. We would hold that, on remand, the President Judge of the Cumberland County Court of Common Pleas must refer the matter to the Office of the Attorney General ("OAG") who, in the absence of a conflict, would represent the Commonwealth in this matter. The PCRA court would also be ordered to give renewed consideration to Robinson's requests to amend his PCRA petition, for discovery and for an evidentiary hearing.[2]

1 A PCRA petition must be filed within one year of the date a criminal defendant's judgment of sentence becomes final for a court to have jurisdiction to decide the merits of the claims raised therein. 42 Pa.C.S. § 9545(b)(1); *Commonwealth v. Mitchell*, 636 Pa. 233, 141 A.3d 1277, 1284 (2016). The PCRA provides several exceptions to the one-year time bar including circumstances wherein "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" and the petition is filed within sixty days of the date the claim could have been presented. 42 Pa.C.S. § 9545(b)(1)(ii), (2).

2 As we discuss herein, our decision regarding Robinson's PCRA claims are solely limited to whether Robinson satisfied an exception to the PCRA's timeliness requirements. We have not considered the merits of the substantive claims raised in the PCRA petition.

The backdrop of this case is an email scandal that first came to light in 2014 following an investigation conducted by former Attorney General Kathleen Kane into her predecessor's handling of an unrelated matter. This investigation uncovered emails sent from and received by members of her office on Commonwealth

owned computers that contained racist, sexist, misogynistic, homophobic, and religiously and ethnically insensitive content. Their piecemeal release revealed individuals from all three branches of the Commonwealth's government as having sent and/or received these emails.

Of relevance to the case at bar, in October 2014, news articles reported that former Pennsylvania Supreme Court Justice Seamus McCaffery sent and received numerous of these offensive emails. Shortly thereafter, Eakin was also implicated in the scandal. As discussed herein, the story of Eakin's involvement broke on or about October 8, 2014, and continued to evolve and develop through his suspension from judicial and administrative responsibilities on December 22, 2015, resignation on March 15, 2016, and decision by the Court of Judicial Discipline ("CJD") on March 24, 2016.

With this background in mind, we turn to the case before us. On March 13, 1997, a jury convicted Robinson of the attempted murder of Tara Hodge, Robinson's on-again/off-again paramour, and the first-degree murder of Rashawn Bass, Hodge's boyfriend.[3] The evidence at trial revealed that on June 29, 1996, sometime after receiving a letter from Hodge ending their relationship, Robinson drove from his home outside of Washington, D.C. to her apartment in Carlisle, Pennsylvania. Upon learning that she was not alone, Robinson and Hodge began to argue. Robinson requested that Hodge tell her guest to leave. When she refused, Robinson pulled a gun from his waistband and shot Hodge in the head. She lost consciousness but survived. Robinson then went into the bathroom where Bass was showering and shot him seven times, killing him almost instantly. Robinson then fled the scene.

3 *See* 18 Pa.C.S. §§ 2502(a), 901(a). The jury also convicted Robinson of related charges, including aggravated assault, using a firearm in the commission of a crime, and carrying a firearm without a license. 18 Pa.C.S. §§ 2702(a)(1), 6103, 6106(a)(1).

The elected DA at that time, Merle L. Ebert, Jr. ("Ebert"), tried the case on behalf of the Commonwealth. The theme of the prosecution was that Robinson was a gun-toting criminal from the "big city" who came to Cumberland County with the intent to kill because he had been "disrespected" by Hodge.[4] *See, e.g.*, N.T., ***342** 3/12/1997, at 6; N.T., 3/13/1997, at 271, 273, 277. In his defense, Robinson did not deny that he shot both Hodge and Bass, but contended that he lacked the intent to kill or to attempt to kill. *See* N.T., 3/13/1997, at 265-67; N.T., 3/14/1997, at 366-67.

4 For example, in his closing argument to the jury, DA Ebert stated:

> Now, there was an image projected here, and it's that big city image. You'll get to look at this. ["]Man, I got to carry a gun wherever I go.["] He's not the person in here that ["]all my life I've been treated so badly.["] This is the image of a kind of person capable of forming specific intent to kill. This is a lifestyle.
>
> * * *
>
> I would say an ordinary person doesn't want to do that, but a person that wants to project this kind of image, the kind of guy that has to drive into Cumberland County and have guns in his waistband and his home has to have a bullet proof vest, those are the kind of guys I submit to you that say ["]I ain't going to be disrespected, disrespect me and you're going to have to pay.["]

N.T., 3/13/1997, at 273, 277. This theme was buttressed at trial with the admission of guns and ammunition unrelated to the crimes at issue, photographs of money and unrelated firearms, pictures of Robinson posing holding several different guns (none of which were used in the perpetration of the crime in question), and a bulletproof vest. Commonwealth's Exhibits 36, 38, 39. The Commonwealth used these exhibits to demonstrate Robinson's "lifestyle and image" and that he "was capable of forming the specific intent to kill." *See Robinson I*, 721 A.2d at 351.

The jury sentenced Robinson to death the following day. This Court affirmed his judgment of sentence on November 24, 1998. *Commonwealth v. Robinson*, 554 Pa. 293, 721 A.2d 344 (1998) ("*Robinson I* "). The United States Supreme Court denied his petition for certiorari on January 10, 2000, at which time Robinson's judgment of sentence became final. *Robinson v. Pennsylvania*, 528 U.S. 1082, 120 S.Ct. 804, 145 L.Ed.2d 677 (2000); *see* 42 Pa.C.S. § 9545(b)(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.").

Represented by new counsel, Robinson filed a timely PCRA petition on October 16, 2000. Following an evidentiary hearing, the Honorable Edgar B. Bayley, who also served as the trial court judge, denied the petition on April 22, 2002.

Robinson appealed the denial of his PCRA petition to this Court. Robinson raised twelve issues for the Court's review. In a divided four-to-three opinion, this Court

affirmed. The majority opinion, authored by Eakin, found five issues were previously litigated and the remaining seven meritless. *Commonwealth v. Robinson*, 583 Pa. 358, 877 A.2d 433 (2005) ("*Robinson II* "). Notably, Robinson, an African-American man, raised a claim that the DA's portrayal of him as a big-city criminal who killed out of retribution for perceived disrespect "had a definite racial overtone" that constituted prosecutorial misconduct and that trial counsel was ineffective for failing to object to the DA's injection of race into the case.[5] *Id.* at 441. He further alleged counsel's ineffectiveness for failing to present evidence at his penalty phase hearing regarding, inter ***343** alia, his exposure to domestic violence. *Id.* at 438 n.3.[6]

5 A finding that trial counsel rendered ineffective assistance requires a PCRA petitioner to plead and prove that "(1) the claim has arguable merit; (2) counsel had no reasonable basis designed to advance the petitioner's interest for his/her act or omission; and (3) the petitioner suffered prejudice as a result, which, for PCRA purposes, means but for counsel's act or omission, there is a reasonable probability that the result of the proceeding would have been different." *Commonwealth v. Sepulveda*, 636 Pa. 466, 144 A.3d 1270, 1273 n.9 (2016) (citing *Commonwealth v. Treiber*, 632 Pa. 449, 121 A.3d 435, 445 (2015)).

6 Robinson's claim concerning his exposure to domestic violence was stated as an entitlement to PCRA relief based on "[t]rial counsel's failure to investigate and present at sentencing the readily available evidence of [Robinson's] increasingly paranoid behavior, paranoid schizophrenia, family dysfunction and abuse, diminished capacity and emotional trauma at the time of the offenses deprived him of his constitutional right to the effective assistance of counsel." *Robinson II*, 877 A.2d at 438 n.1.

In the majority opinion, Eakin did not specifically address the domestic abuse averment, but rather decided the issue based on trial counsel's efforts to obtain information about Robinson's family background. *See id.* at 448. The majority opinion addressed the race-related argument by finding that the Commonwealth did nothing improper: "Here, the prosecutor's remarks were not a deliberate attempt to destroy the objectivity of the jury, but merely summarized the evidence presented at trial with oratorical flair permitted during argument." *Id.* at 442. Because the DA did not mention Robinson's race, the majority concluded that the claim that trial counsel was ineffective for failing to object was without merit. Then-Justice (now-Chief Justice) Saylor authored a comprehensive dissenting opinion wherein he stated his view that the prosecutor's statements in this latter regard were improper. *Id.* at 451 (Saylor, J., dissenting).[7]

7 Justice Saylor ultimately agreed with the majority that Robinson's ineffectiveness claim could not succeed, however, based on Robinson's failure to meet the reasonable basis and prejudice prongs of the test for ineffective assistance of counsel. *Robinson II*, 877 A.2d at 451 (Saylor, J., dissenting). Notably, two Justices also in a dissenting posture – Justices Nigro and Baer – agreed with Justice Saylor that Robinson should receive a new penalty phase hearing based on trial counsel's ineffectiveness for failing to object to the section 9711(d)(6) aggravating circumstance (killing committed "while in the perpetration of a felony"). Justices Nigro and Saylor also would also have granted Robinson a new penalty phase hearing based on trial counsel's legally unsupportable concession that the grave-risk aggravator of section 9711(d)(7) applied where the two victims were shot separately and in different rooms. *Id.* at 452-53; *id.* at 450 (Nigro, J., dissenting).

In 2005, Ebert was elected to serve as a judge in the Cumberland County Court of Common Pleas and was succeeded as DA by Attorney David J. Freed ("Freed"). Robinson filed a counseled writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania, and Chief Deputy DA Matthew P. Smith ("Smith") and Assistant DA Charles J. Volkert, Jr. (now Chief Deputy DA) began representing the Commonwealth in this matter. The district court denied relief on September 30, 2011. The United States Court of Appeals for the Third Circuit affirmed the denial and the United States Supreme Court denied a petition for certiorari on October 5, 2015.

With his habeas petition pending before the Third Circuit, Robinson filed a second PCRA petition pro se in the Cumberland County Court of Common Pleas on September 30, 2013. The court appointed counsel on October 3, 2013, who filed an amended petition on Robinson's behalf. The PCRA court dismissed the petition as untimely, and this Court affirmed on June 20, 2016. *See Commonwealth v. Robinson*, 635 Pa. 592, 139 A.3d 178 (2016) ("*Robinson III* ").

Robinson filed the instant, counseled PCRA petition on November 30, 2015, while decision on his second petition was pending before this Court.[8] In this petition, Robinson sought reinstatement of his appellate ***344** rights from his first PCRA petition, alleging newly discovered facts regarding Eakin's transmission and receipt of offensive emails and possible ex parte communication with

prosecutors.[9] Robinson alleged a violation of his due process rights based on Eakin's bias or the appearance of bias. Robinson noted that he raised claims in his first PCRA appeal, decided by Eakin, concerning the improper injection of race into his guilt phase trial by Ebert and the failure of his counsel to present evidence of his exposure to domestic violence – abuse sustained by his mother and sister at the hands of his father – as a mitigating circumstance at his penalty phase hearing. PCRA Petition, 11/30/2015, ¶¶ 39-42.

[8] Robinson filed his third PCRA petition prematurely. *See Commonwealth v. Lark*, 560 Pa. 487, 746 A.2d 585, 588 (2000) (holding that "when an appellant's PCRA appeal is pending before a court, a subsequent PCRA petition cannot be filed until the resolution of review of the pending PCRA petition by the highest state court in which review is sought, or upon the expiration of the time for seeking such review," and that the petitioner must file the subsequent petition "within sixty days of the date of the order which finally resolves the previous PCRA petition, because this is the first 'date the claim could have been presented.' "). The holding in *Lark* was premised on a PCRA court's lack of jurisdiction to rule on the subsequent PCRA petition while the appeal of a prior PCRA petition in the case was pending. *Id.* Robinson recognized the jurisdictional concern, but because of the factual differences between *Lark* and the case at bar, stated that he filed the petition "in an abundance of caution to preserve [his] constitutional claims." PCRA Petition, 11/30/2015, ¶ 14. As this Court's review in *Robinson III* was completed by the time the PCRA court finally adjudicated Robinson's third PCRA petition, and because the Commonwealth does not raise an objection pursuant to *Lark*, in the interest of justice, we will regard as done that which ought to have been done and treat Robinson's third PCRA petition as though it was filed after our decision in *Robinson III*.

[9] In his petition, Robinson raised an additional argument to overcome the one-year time limitation, asserting that "the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim" based on "the relevant government officials conceal[ing] the relationships and emails." PCRA Petition, 11/30/2015, ¶¶ 11-12; 42 Pa.C.S. § 9545(b)(1)(i). In a later filing, he also claimed that his right to a new PCRA appeal was a newly recognized constitutional right by the United States Supreme Court in *Williams v. Pennsylvania*, —— U.S. ——, 136 S.Ct. 1899, 195 L.Ed.2d 132 (2016), that applies retroactively to his case. Response and Objections to Rule 909(B) Notice, 6/14/2017, at 7-9; 42 Pa.C.S. § 9545(b)(1)(iii); *see Williams*, 136 S.Ct. at 1910 (holding that a biased jurist's participation in decision of a case "was an error that affected the State Supreme Court's whole adjudicatory framework" in the matter). Because we would decide that Robinson's claim satisfies the newly discovered fact exception to the PCRA's timeliness requirement, we need not address the applicability of his other claimed exceptions.

According to Robinson, Eakin's involvement in the email scandal was not known until October 8, 2015, when an online news outlet, philly.com, published the content of some of the emails that Eakin had sent and received from a personal email account he created using the pseudonym "John Smith." *Id.*, ¶ 43 (citing William Bender, *A Supreme Court Justice's Indecent Inbox*, philly.com, Oct. 8, 2015). Further, Robinson averred that a news article further reported that Ebert had received at least one of the "blast" emails sent to Eakin, which Robinson stated showed "a close relationship" that too created "an actual bias or, at a minimum, the appearance of bias." *Id.*, ¶ 46 (citing Wallace McKelvey, *Porn emails raise questions about judicial ethics in Pa.*, pennlive.com, Oct. 23, 2015). Robinson asserted that because only emails from the OAG's server had been disclosed at that time, it was unknown whether there were additional emails exchanged between Eakin and members of the DA's office. *Id.*, ¶ 60.

Robinson contended that Eakin's conduct in both respects denied him his right ***345** to a fair and impartial court, and that this constituted a "structural error" requiring no showing of prejudice. *Id.*, ¶¶ 53-57, 61, 65 (citing, e.g., *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 (1927); *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955); *Johnson v. United States*, 520 U.S. 461, 468-69, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997); *Commonwealth v. Basemore*, 560 Pa. 258, 744 A.2d 717, 734 (2000)). According to Robinson, failing to provide review by an "impartial and disinterested tribunal" that was free of bias denied him his right to a full and fair review of his initial PCRA petition, as well as effective assistance of counsel. *Id.*, ¶¶ 65-67 (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980)).

Robinson acknowledged that Eakin's involvement in the email scandal was first suggested in 2014, but he noted that former Chief Justice Castille promptly cleared Eakin of any wrongdoing. *Id.*, ¶¶ 50-51 (citing Brad Bumsted, *Castille: No Justices Except McCaffery Involved in Porn Scandal*, Pittsburgh Tribune-Review Oct. 15, 2014). He stated that even at the time of the filing of his PCRA petition, the contents of the emails most relevant to his case had not been disclosed, but that he filed his petition "[i]n an abundance of caution ... within sixty days of the

first occasion on which he had any basis to raise the claim." *Id.*, ¶ 11. Robinson recognized the developing nature of the information disclosed regarding the emails. *Id.*, ¶ 34.

The Commonwealth filed a response, attacking the merits of the issue raised, but making no argument concerning Robinson's failure to overcome the PCRA's one-year time bar. On December 8, 2015, the PCRA court entered an order dismissing the petition "for lack of jurisdiction in light of [Robinson's] pending appeal" of his second PCRA petition. PCRA Court Order, 12/8/2015. Robinson filed a motion for reconsideration of that order, raising therein the PCRA court's failure to comply with Rule of Criminal Procedure 909,[10] and further attempting to distinguish the circumstances of his case from that of *Commonwealth v. Lark*, 560 Pa. 487, 746 A.2d 585 (2000), stating his concern that review of his claim regarding Eakin's bias would be forfeited. *See supra*, note 8. The PCRA court denied his request, but stated in its order that Robinson "clearly raised the issue of Justice Eakin's emails, which will be preserved pending the outcome of [Robinson's] current appeal." PCRA Court Order, 1/5/2016.

10 Rule 909 requires, in relevant part, that the PCRA court send a capital petitioner notice of its intent to dismiss a pending PCRA petition without a hearing, stating reasons for the dismissal, and provide the petitioner twenty days to respond to the notice. Pa.R.A.P. 909(B)(2).

The next day, Robinson filed a motion to vacate the above orders and sought recusal of the entire Cumberland County bench. He filed the motion upon learning that on December 18, 2015, all but one of the sitting judges[11] signed a letter that was sent to the CJD in support of Eakin after the Judicial Conduct Board ("JCB") filed formal charges against him.[12] The Honorable Albert H. Masland, who was sitting as the PCRA court judge, granted the order, recusing himself "to avoid the appearance ***346** of a conflict of interest and allow this matter to proceed on its merits," and vacated the December 8 and January 5 orders dismissing Robinson's petition. PCRA Court Order, 1/8/2016. Judge Masland referred Robinson's request for the whole court's recusal to the Honorable Edward E. Guido, President Judge of Cumberland County. Judge Guido entered an order the same day stating "that all Common Pleas Judges of the 21st Judicial District are recused from hearing this matter in order to avoid the appearance of a conflict of interest or impropriety." Order of President Judge Guido, 1/8/2016.

11 The exception was Senior Judge Wesley J. Oler, Jr.

12 The JCB filed its complaint against Eakin on December 8, 2015, alleging violations of the 1974 Code of Judicial Conduct and Article V, Sections 17(b) and 18(d)(1) of the Pennsylvania Constitution. *See* Petitioner's Motion to Vacate the Court's December 8, 2015 Order of Dismissal and Recuse the Cumberland County Court of Common Pleas, 1/6/2016, at Exhibit A.

In the meantime, on January 7, 2016, Robinson appealed the dismissal of his PCRA petition to this Court. On January 19, 2016, he informed the Court of the intervening change in circumstances and filed a motion to remand the case, which we granted. *See* Order, 3/18/2016.

On April 18, 2016, Robinson filed a motion in the common pleas court seeking the disqualification of the DA's office from participating further in the proceedings. The motion stated that Robinson had recently become aware that Freed had received at least one of the offensive emails in his work email account. Petitioner's Motion to Disqualify the DA's Office, 4/16/2016, ¶ 5; *see also id.* at Exhibit A. Further, Robinson had learned that both Freed and Smith sent letters in support of Eakin to the JCB. Petitioner's Motion to Disqualify the DA's Office, 4/16/2016, at Exhibits B and C. Robinson contended that these circumstances required the DA's disqualification because Freed's receipt of the email made him a witness to the events giving rise to Robinson's petition, and thus the DA's continued participation "runs afoul of the Advocate-Witness Rule." *Id.*, ¶¶ 14-15 (citing Pa.R.P.C. 3.7).[13] Further, Robinson asserted that Freed had a personal interest in the outcome of the petition, giving rise of an actual conflict of interest that precluded his representation of the Commonwealth in this matter. *Id.*, ¶ 16. According to Robinson, a judicial finding in his favor "would potentially affect the reputations of Ebert and Freed" because of their receipt of blast emails, which demonstrates "a personal stake in the outcome of the case and an actual conflict of interest that impairs the [DA's] independent judgment as a prosecutor." *Id.*, ¶¶ 17-18 (citing *Commonwealth v. Eskridge*, 529 Pa. 387, 604 A.2d 700, 701 (1992)). "Due process requires that a prosecutor be disinterested and impartial," the absence of which, Robinson stated, constitutes a violation of his "right to a fundamentally fair proceeding." *Id.*, ¶ 23 (citing, e.g., *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807-08, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987)). Even in the absence of an actual conflict, Robinson stated that the DA's continued participation creates "the

appearance of unfairness and undermines confidence in the proceedings." *Id.*, ¶ 24.

[13] Rule 3.7 of the Pennsylvania Rules of Professional Conduct provides:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
> (1) the testimony relates to an uncontested issue;
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
> (3) disqualification of the lawyer would work substantial hardship on the client.
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Pa.R.P.C. 3.7.

The Commonwealth filed a response. Therein, the Commonwealth advocated for the PCRA court to deny Robinson's motion ***347** because (1) the PCRA court lacked jurisdiction of the underlying PCRA petition pursuant to *Lark*; (2) the issues raised in the underlying PCRA petition were frivolous and should be dismissed out of hand; and (3) Robinson failed to demonstrate that the DA is burdened by bias or conflict. Judge Guido appointed Senior Judge Douglas W. Herman of Franklin County to specially preside and scheduled argument on the petition and the motion for June 17, 2016.

On June 15, 2016, Robinson filed a motion in which he requested discovery, permission to supplement and amend his PCRA petition, and an evidentiary hearing on his petition. Therein, Robinson asserted that the complaint filed by the JCB against Eakin revealed numerous additional racially insensitive and otherwise offensive emails (including several making light of domestic violence) that Eakin had sent and/or received, and that even more were entered as exhibits in the proceedings before the CJD. Robinson also identified emails that revealed an association between Eakin and members of the DA's office and between Eakin and Judges Bayley and Masland, respectively, as well as the aforementioned letters sent by Freed and Smith in support of Eakin, all of which were entered at the former Justice's disciplinary proceeding. Robinson contended that he should be entitled to amend his petition to include this information and additional allegations of bias, and claimed his entitlement to an evidentiary hearing on his petition. *See* Pa.R.Crim.P. 905(a) ("The judge may grant leave to amend or withdraw a petition for post-conviction collateral relief at any time. Amendment shall be freely allowed to achieve substantial justice.").

Further, he stated that his case presented "exceptional circumstances" to warrant the grant of discovery. Pa.R.Crim.P. 902(E)(1). The information disclosed to date, Robinson averred, included the disclosure of "thousands of emails" exchanged between prosecutors, defense attorneys and members of the judiciary, exhibiting "racial, ethnic, gender, class and religious bias," which "creates a grave question about the actual fairness, and appearance of fairness, of the judicial processes in which those parties were involved." Motion, 6/15/2016, ¶ 34. He noted, however, that until now, "investigation has been limited to those emails that remain on the servers of Pennsylvania's Attorney General," and asserts that discovery is required to uncover "the full scope and impact of improper biases on the resolution of [Robinson]'s case." *Id.* He thus requested discovery of the following:

> • Any and all electronic messages (including emails and text messages) and attachments exchanged between employees working in the Cumberland County District Attorney's Office or other law enforcement departments and judges of the Cumberland County Court of Common Pleas, Pennsylvania Superior Court and justices on the Pennsylvania Supreme Court from June 1996 to March 15, 2016 that relate to Petitioner or his case, or which may reasonably be deemed offensive because of content that relates to race, gender, ethnicity, violence toward women, xenophobia, homophobia, sexism, religious intolerance, class or immigration or stereotypes relating thereto[;]
>
> • Any and all communications, including but not limited to notes, letters, emails, text messages, attachments and facsimiles exchanged between Cumberland County District Attorney Employees, including District Attorney Freed, and Justice Eakin and/or his attorneys, including, but ***348** not limited to Attorneys Williams C. Costopolous, Heidi F. Eakin and David J. Foster[;]
>
> • Any and all communications captured on Cumberland County computer servers, including but not limited to notes, letters, memoranda, writings, records, emails, attachments and facsimiles exchanged between Cumberland County jurists, specifically Judge Ebert, Judge Bayley and Judge Masland, and Justice Eakin and/or Justice Eakin's attorneys, including, but not limited to, Attorneys William C. Costopolous, Heidi F. Eakin and David J. Foster[;]
>
> • Any and all communications, including but not

limited to emails, attachments, notes, text messages, letters, writings, records, memoranda and facsimiles exchanged between Cumberland County jurists relating to Justice Eakin's disciplinary hearing and/or emails involving Justices Eakin or McCaffery;

• Any and all documents previously disclosed to press organizations and/or otherwise made public;

• Any and all electronic communications (including emails and text messages), attachments, communications, writings, memoranda, documents or records, including all associated material on Cumberland County servers that have been sent from and/or sent to Pennsylvania Supreme Court Justice J. Michael Eakin's private email account(s), including but not limited to his yahoo email account: wap092001@yahoo.com;

• Any and all emails, attachments, communications, writings, memoranda, documents or records, including all associated material on Cumberland County servers that have been sent from and/or sent to Justice Eakin's state-issued email account: justice.eakin@pacourts.us;

• Any and all emails, attachments, communications, writings, memoranda, documents or records, including all associated material on Cumberland County servers sent from and/or sent to any email account used by Justice Eakin under any aliases, including but not limited to "John Smith"; and

• Any and all material exculpatory evidence arising from these communications for which the prosecution is under a continuing obligation to disclose. *See Brady v. Maryland*, 373 U.S. 83, 87 [83 S.Ct. 1194, 10 L.Ed.2d 215] (1963); *Imbler v. Patchman* [*Pachtman*], 424 U.S. 409, 427 n.25 [96 S.Ct. 984, 47 L.Ed.2d 128] (1979).

Id., ¶ 35.

Following argument on June 17, 2016, Judge Herman entered an order for additional briefing on Robinson's motion seeking the DA's disqualification. Both parties complied. In the interim, this Court issued its decision in *Robinson III* affirming the dismissal of Robinson's second PCRA petition as untimely.

In an opinion and order filed on November 28, 2016, the PCRA court denied Robinson's motion to disqualify the DA from the case. The PCRA court stated that removal of a prosecutor from a case is warranted only where there is "an actual conflict of interest affecting the prosecutor," and that mere allegations and animosity are insufficient. PCRA Court Opinion and Order, 11/28/2016, at 3 (Superior Court case citations omitted). Addressing Robinson's claims of bias and possible ex parte communication, the PCRA court found that Robinson made only a "generalized assertion of bias and impropriety" without ***349** "any examples of inappropriate ex parte communication between Freed and Justice Eakin." *Id.* at 4.

The PCRA court further found that the Advocate-Witness Rule was inapplicable because "Freed's passive receipt of an email that does not reference or implicate [Robinson] and his penning of a letter of support does not make him a necessary witness to the events referenced in the PCRA petition." *Id.* at 5. Once again, the court found that Robinson's failure to plead specific allegations related to the DA militated against disqualifying the DA from the case. PCRA Court Opinion and Order, 11/28/2016, at 6.

Lastly, the PCRA court found that Robinson's claim that the DA had a personal reputational interest in the outcome of the case lacked support. The court stated that Robinson failed to provide evidence that the outcome of his PCRA petition placed Freed's reputation in jeopardy or that he had any interest in preserving Ebert's reputation. *Id.* at 7. As Robinson did not establish that the DA had an actual conflict of interest, the PCRA court concluded that the DA's disqualification was unwarranted.

Thereafter, the Commonwealth filed a motion to dismiss Robinson's PCRA petition and discovery request without a hearing. This motion was again based on the Commonwealth's assessment of the merits of the case. In support, the Commonwealth pointed to two "email-controversy-based PCRA filings" that common pleas courts had recently dismissed without evidentiary hearings. Commonwealth's Request to Dismiss, 12/8/2016, at 2 (citing *Commonwealth v. Housman*, CP-21-CR-0246-2001, and *Commonwealth v. Shannon*, CP-22-CR-2306-2005)).

Robinson responded, seeking an extension of time to file an answer to the Commonwealth's motion to dismiss and renewing his request for discovery. Robinson also made an another request for permission to amend his PCRA petition, this time based on additional information he received following the completion of the investigation of and report compiled regarding the email scandal by Special Deputy Attorney General Douglas F. Gansler (the "Gansler Report"). On December 28, 2016, the PCRA court granted Robinson's requested time extension. On January 27, 2017, the PCRA court supplemented its order by authorizing "general discovery as requested in

[Robinson's] motion of June 15, 2016." Supplemental Order of the PCRA Court, 1/27/2017.

In response, the Commonwealth filed a new motion to dismiss and a request for the PCRA court to vacate and reconsider its grant of discovery, or, in the alternative, to allow the Commonwealth to appeal the grant of discovery. Of relevance to this appeal, for the first time, the Commonwealth asserted in this motion that the PCRA court lacked jurisdiction of the matter on timeliness grounds. The Commonwealth averred that its review of the Gansler Report revealed newspaper articles detailing Eakin's receipt of at least one racially insensitive email dating back to October 2014, including one published on philly.com, the same online media source that published the October 8, 2015 article relied on by Robinson in his PCRA petition. Commonwealth's Motion to Dismiss, 2/7/2017, ¶ 3 (citing Jeremy Roebuck, *Pa. Supreme Court meltdown over e-mails worsens*, philly.com, Oct. 18, 2014; Kate Giammarise and Bill Toland, *Pennsylvania Justice Eakin dragged into lewd email scandal; accuses McCaffery of blackmail*, Pittsburgh Post-Gazette, Oct. 18, 2014).

In addition to the news articles, the Commonwealth appended a press release authored on October 17, 2014 by Eakin, wherein he acknowledged that he received ***350** (but denied that he viewed) emails sent to his personal email address that contained inappropriate content. *Id.* at Exhibit H. Therein, he informed the media that he self-reported this to the JCB for its investigation as to whether his "unsolicited" receipt of these emails violated the canons of judicial conduct. *Id.*

Based on all of this information available in October 2014, the Commonwealth contended that Robinson's November 30, 2015 petition was not filed within sixty days of the date his claimed due process violation could have been presented. *Id.*, ¶ 2; *see* 42 Pa.C.S. § 9545(b)(2). Finding that the Commonwealth "raised a substantial question of fact and law" as to the PCRA court's jurisdiction, the PCRA court ordered Robinson to file an answer to the motion. It further vacated its January 27 order granting discovery, pending the resolution of the jurisdictional question.

Robinson filed a response to the Commonwealth's motion, asserting, in relevant part, that the 2014 articles did not provide a basis for his claim that Eakin's bias violated his due process rights. Robinson included a generalized timeline of the events leading up to the discovery of Eakin's involvement in the email scandal, averring that it was not until the 2015 articles (and the information that came to light thereafter), which detailed a pattern of sending and receiving offensive emails and connected both Eakin and prosecutors involved in Robinson's case, that his claim could have been made. Thus, by filing his petition on November 30, 2015, Robinson asserted that he met the sixty-day deadline.

The PCRA court held argument on the Commonwealth's motion to dismiss on April 7, 2017. Thereafter, on May 4, 2017, it entered an opinion and order pursuant to Rule of Criminal Procedure 909(B)(2), stating its intent to dismiss Robinson's PCRA petition without a hearing. The PCRA court recognized that Robinson's claims raised in the instant petition "were predicated upon [his] contention that the bias of Justice Eakin was demonstrated both through the sending and receiving of objectionable emails and the potential for inappropriate ex parte communication to have occurred through those emails." PCRA Court Opinion and Order, 5/4/2017, at 6. The court concluded, however, that the petition was not timely filed. In particular, the court found that "Justice Eakin was publicly tied to the email scandal on October 18, 2014, and potentially earlier." *Id.* The court stated that "the public availability of facts," and not "the publication of a specific report on or compilation of those facts," triggers the running of the sixty-day clock for filing a facially untimely PCRA petition. *Id.* at 6-7; *see Commonwealth v. Hackett*, 598 Pa. 350, 956 A.2d 978, 984 (2008). Further, because counsel represented Robinson at the time, the PCRA court concluded that Robinson was presumed to have been aware of the October 2014 publications, and therefore, that Robinson's November 30, 2015 PCRA petition was not filed within sixty days of the date the claim could have been raised. *Id.* at 7; *cf. Commonwealth v. Burton*, 638 Pa. 687, 158 A.3d 618, 638 (2017) (holding that "the public record presumption ... cannot reasonably be applied to pro se PCRA petitioners who are incarcerated") (emphasis omitted).

Robinson filed a response to the Rule 909 notice, renewing his request for permission to amend his PCRA petition, an evidentiary hearing, and discovery from the Commonwealth. He attached sixteen exhibits to his filing, divided into two volumes,[14] as well as a fifty-seven-page supplement ***351** to his third PCRA petition. The Commonwealth filed a response. In an order filed August 2, 2017, the PCRA court denied all of Robinson's requests and dismissed the petition as untimely.

14 The exhibits included:
(1) the December 2015 JCB Complaint;
(2) the Cumberland County judges' letter to the CJD in support of Eakin;
(3) an October 2015 press release issued by the CJD, October 2014 press releases issued by the

JCB and Eakin, and Eakin's 2014 letter self-reporting to the JCB;
(4) the 2014 report by Special Counsel Robert L. Byer regarding Eakin's emails;
(5) the JCB's 2014 letter dismissing its investigation of Eakin;
(6) the transcript of the October 20, 2015 deposition of Eakin for the CJD proceedings;
(7) a disc containing all of the offensive emails involving Eakin disclosed thus far;
(8) Eakin's answer to the JCB's 2015 complaint;
(9) the CJD's 2016 opinion;
(10) letters from Freed and Smith in support of Eakin;
(11) the Gansler Report;
(12) a press release issued by Attorney General Bruce Beemer;
(13) the resume and report of Dr. Jason Okonofua regarding implicit bias and bridging Eakin's deposition testimony and involvement in the email scandal with his decision on Robinson's first PCRA appeal;
(14) the report and resume of John Baugh regarding a survey conducted concerning the language used by the prosecution during Robinson's trial;
(15) the October 30, 2015 report of special counsel Joseph A. Del Sole recommending that the Court refer Eakin to the JCB, but not exercise extraordinary jurisdiction over the matter; and
(16) a May 2017 affidavit by a juror in Robinson's case stating, inter alia, that she believed the prosecution's theme "tapped into jurors' racial prejudice and Black Fear."

Robinson appealed the dismissal to this Court.[15] Thereafter, in December 2017, Freed left the DA's office and the Cumberland County Board of Judges appointed Ebert to fill the remainder of his term as DA. Ebert now represents the Commonwealth before this Court. On March 1, 2018, counsel for Robinson wrote to Ebert, requesting that he disqualify himself and his office from participating in the matter and to refer the case to the OAG. In a letter dated March 23, 2018, Ebert declined.

15 We have jurisdiction pursuant to 42 Pa.C.S. § 9546(b).

On appeal, Robinson raises the following issues for our review:

I. Did the court below err in concluding, without holding a hearing, that the claims in [Robinson's] successor PCRA petition were untimely pursuant to 42 Pa.C.S. § 9545(b)?

II. Are [Robinson's] claims for relief sufficiently meritorious to require a hearing, necessitating a remand to the court below?

III. Did the court below err in denying [Robinson's] motions to amend the petition?

IV. Did the court below err in denying [Robinson's] motions for discovery and to supplement his discovery request?

V. Did the court below err by denying [Robinson's] motion to disqualify the Cumberland County District Attorney's Office?

Robinson's Brief at 1-2.[16] We review the PCRA court's legal conclusions de novo and its findings of fact for record support. *Commonwealth v. Staton*, —— Pa. ——, 184 A.3d 949, 954 (2018).

16 On April 17, 2018, Robinson filed an additional motion before this Court to disqualify the DA from further proceedings based on Ebert's resumption of the position of DA. We address this motion in conjunction with our resolution of his claim of PCRA court error for denying the same request.

***352 Timeliness Exception**

In his first issue, Robinson challenges the PCRA court's determination that he failed to satisfy any of the exceptions to the PCRA's timeliness requirement.[17] Addressing the newly discovered facts exception of section 9545(b)(1)(ii), he asserts that the articles he relied upon, published in October 2015, were "the earliest publicly available source[s] of the facts upon which his claim was predicated." *Id.* at 18-19. Accordingly, he argues that his third PCRA petition, filed within sixty days of those publications, overcame the one-year time bar. Although recognizing that the PCRA court correctly found that the 2014 articles "publicly tied" Eakin to the email scandal, Robinson states that these articles did not contain the facts upon which his claim is predicated, i.e., that Eakin sent and received offensive emails and communicated ex parte with prosecutors. *Id.* at 20. To the contrary, Robinson states that the 2014 publications about Eakin's involvement in the email scandal all reported that he denied asking for or even opening the offending

messages, and did not indicate that he sent any offensive emails to anyone. Robinson also points to numerous investigations that the 2014 publications generated – including those conducted by the JCB and this Court – all of which had cleared Eakin of any wrongdoing.

17 The PCRA court's discussion of this issue in its opinion filed pursuant to Pa.R.A.P. 1925(a) mirrors, in pertinent part, its discussion of this claim addressed in its May 4, 2017 opinion and order. *Compare* PCRA Court Opinion, 10/23/2017, at 5-7, *with* PCRA Court Opinion and Order, 5/4/2017, at 4-7.

Moreover, Robinson contends that the content and volume of the emails (three) discussed in the 2014 publications did not give rise to a claim of bias on the part of Eakin or connect prosecutors involved in Robinson's case to the scandal. Robinson argues that these are the facts that form the basis of his claim, and he asserts that this information was not known until publication of the October 2015 articles. *Id.*

The Commonwealth responds, contending that Robinson's claim fails based on the absence of a connection between the newly discovered fact and the underlying substantive issue raised. Commonwealth's Brief at 14. In support of this argument, the Commonwealth points to our recent decision in *Commonwealth v. Chmiel*, 643 Pa. 216, 173 A.3d 617 (2017), stating: "[T]he majority of our Supreme Court believes that while we need not find a 'direct connection' between the newly-discovered facts and the claims asserted by a petitioner, the statutory language requires there be some relationship between the two." Commonwealth's Brief at 13 (citing *Chmiel*, 173 A.3d at 624-25).[18] The Commonwealth suggests that the newly discovered facts alleged here are too "attenuated" from the underlying claim to merit review. *Id.* at 15. It states that because the offensive emails exchanged by Eakin occurred "over a decade after [Robinson's] trial and several years after his 2005 initial PCRA case concluded," and there is no connection between the emails and either Robinson personally or his case, "the claims on their face are meritless and remand is not warranted." *Id.* at 17.

18 The Commonwealth incorrectly purports to quote this sentence from our decision in *Chmiel*. *See* Commonwealth's Brief at 13. Rather, this statement is a quote from the Superior Court's decision in *Commonwealth v. Shannon*, 184 A.3d 1010 (Pa. Super. 2018). *See id.* at 1017.

The Commonwealth also assails Robinson's claim that the information regarding Eakin's involvement in the email scandal were unknown to him in 2014, pointing to Eakin's 2014 press release and the news articles published at that time. **353** *Id.* at 17, 23-28. It contends, "The 'fact' [Robinson] champions as 'new' was easily decipherable from these public sources in 2014." *Id.* at 28. As to Robinson's claim of ex parte communications between the Commonwealth and Eakin, the Commonwealth states that this cannot constitute a new fact, as Robinson as failed to provide any instances of such communications. *Id.* at 20.

A PCRA petition is facially untimely, and a court lacks jurisdiction to decide the claims raised therein, if filed more than a year after the petitioner's judgment of sentence becomes final. 42 Pa.C.S. § 9545(b)(1); *Commonwealth v. Mitchell*, 636 Pa. 233, 141 A.3d 1277, 1284 (2016). One exception to this general rule, often referred to as the "newly discovered facts" exception, bestows jurisdiction upon a court to decide a facially untimely petition if "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." 42 Pa.C.S. § 9545(b)(1)(ii). Any petition asserting the newly discovered facts exception must be filed within sixty days of the date the claim could have been raised. 42 Pa.C.S. § 9545(b)(2).

As the PCRA court observed, an incarcerated petitioner represented by counsel at the time that information becomes publicly available is subject to the "public record presumption." *See, cf., Burton*, 158 A.3d at 638. As we have previously held, the "public record presumption" generally requires a court to find that facts and information that are a matter of public record are not unknown. *Commonwealth v. Taylor*, 620 Pa. 429, 67 A.3d 1245, 1248 (2013). In a similar vein, we have held that facts used to overcome the timeliness requirement of the PCRA must not merely be from "a newly discovered or newly willing source for previously known facts." *Commonwealth v. Edmiston*, 619 Pa. 549, 65 A.3d 339, 352 (2013). Robinson was indeed represented by counsel in October 2014, which was during the pendency of his second PCRA petition and his federal habeas petition. *See supra*, p. 343. Therefore, if the information publicly available in 2014 provided Robinson with information such that, with the exercise of due diligence, he could have discovered the facts underlying his claim, the 2015 articles do not save his third PCRA petition from dismissal on timeliness grounds.

Our review of the news articles, press releases, and other

information included in the record in this matter from 2014 reveals that they all state that at that time, Eakin had received three emails – two that were sexist and misogynistic and one that was racially insensitive. According to all of the publicly available sources of record, however, Eakin categorically denied that he either welcomed these emails or that he opened them to view their contents. *See, e.g.*, Roebuck, *Pa. Supreme Court meltdown over e-mails worsens*, philly.com;[19] ***354** Charles Thompson, *Colleague says Pa. Supreme Court Justice in porn email case threatened he was: "not going down alone"*, pennlive.com, Oct. 17, 2014. *See also* J. Michael Eakin, Press Release, Oct. 17, 2014 ("I have not seen the material, nor do I wish to"); J. Michael Eakin, Letter to the JCB, Oct. 17, 2014 ("To be clear, I still have not seen [the emails]. I have no reason to question the media's description of them, and that these were received, not sent."). In its disciplinary decision, the CJD found that unless Eakin responded to or forwarded an email, there was no way to refute Eakin's claim that he did not open them. *See In re Eakin*, 150 A.3d 1042, 1045-46 (Pa. Ct. Jud. Disc. 2016).

19 The Commonwealth misrepresents the contents of the October 2014 philly.com article, stating that it "definitively says the former justice 'opened' a 'racist' email on his private account." *See* Commonwealth's Brief at 25 n.12. In fact, the portion of the article that the Commonwealth quotes only states that Eakin "opened" an email account using the pseudonym "John Smith." Roebuck, *Pa. Supreme Court meltdown over e-mails worsens*, philly.com ("The messages - first reported by the Philadelphia Daily News - include at least three e-mails sent in 2010 to a Yahoo.com account Eakin had opened under the alias 'John Smith.' "). In a separate section, the article uses the term "racist" to describe the content of an email alleged to have been received by Eakin, but that Eakin denied that he opened that message. *Id.* ("Responding to reports that he had received racist and pornographic content on a private e-mail account, Justice J. Michael Eakin said he never viewed those messages and accused another colleague caught up in the scandal, Justice Seamus P. McCaffery, of threatening to leak them to the media.").

To the extent we could conclude that the uninvited receipt of three offensive emails put Robinson on notice in 2014 that Eakin may have been biased in his decision making, such a notion was put to rest by the various investigations conducted of the then-available emails Eakin sent and received. On October 15, 2014, a news outlet reported that former Chief Justice Castille stated that he reviewed 4000 emails that had been exchanged between the sitting Justices of the Pennsylvania Supreme Court and the OAG and "exonerate[d]" all Justices other than McCaffery of sending or receiving offensive emails. Bumsted, *Castille: No Justices Except McCaffery Involved in Porn Scandal*, Pittsburgh Tribune-Review.

On December 17, 2014, the JCB concluded its investigation of claims that Eakin received "racy" emails at his personal "John Smith" email account. *See* JCB Letter, 12/17/2014, at 2. The JCB conducted three interviews with Eakin and reviewed subpoenaed emails ranging from 2009-2012 from the OAG. The JCB determined that Eakin "did not receive any material that was illegal, such as obscenity, or any material that contained 'racist' images," and that although Eakin received some emails with "pornographic" content to his "John Smith" account, he did not send any such emails. *Id.* at 3. The JCB found no improper communications in the emails submitted by the OAG to or from his Court-issued email address. *Id.* The JCB concluded that Eakin's "receipt of a handful of mildly pornographic emails from a private attorney and from members of [his] personal circle of friends to [his] personal email address did not constitute a violation of the Constitution or the Code of Judicial Conduct," and dismissed the pending complaints. *Id.* at 4.

This conclusion was echoed in the December 19, 2014 report completed by Attorney Robert L. Byer, who was specially engaged by this Court to review email messages recovered by the OAG involving Justices of the Pennsylvania Supreme Court (hereinafter referred to as the "Byer Report"). Of relevance to the matter at bar, he concluded:

> 1. Other than the previously disclosed email messages from [McCaffery] transmitting pornographic materials, there were **no email messages of an improper nature sent by any Justice of the Supreme Court** to any representative of OAG **or from any representative of OAG to any Justice of the Supreme Court.**
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> * * *
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> 3. There was no reason for any Justice of the Supreme Court to be recused from any case as the result of any email communication or any relationship evidenced by email communication.

Byer Report at 1 (emphasis added). Attorney Byer detailed his review of emails ***355** provided to him from the OAG's server pertaining to each Justice. Regarding Eakin, he reviewed a total of 2234 emails that members of the OAG either sent to or received from Eakin, all of which Attorney Byer found to be "unremarkable." *Id.* at 4.

In conducting his review, Attorney Byer observed "a critical distinction between email messages sent from an account and email messages sent to an account," as a person does not have "control over what others send." *Id.* at 5. He noted that "there was one message received by Eakin that contained offensive sexual content," but stated that the "message was not from someone at OAG or associated with the judicial system, and Justice Eakin did not reply to or forward that message." *Id.* Attorney Byer found no messages discussing any cases or legal issues. *Id.* at 4.

Based on the information publicly available in 2014, we conclude that Robinson did not have a basis to allege that Eakin was biased in order to bring his due process claim at that time. As is evident from the investigations undertaken by this Court and the JCB, both of which requested all email communications (sent and received) between Eakin and members of the OAG, no amount of diligence could have uncovered the facts upon which Robinson's claim is predicated, i.e., that Eakin sent and received offensive emails. *See, e.g.,* JCB Complaint, 12/8/2015, ¶ 50 ("Despite the Board's prior subpoenas, OAG did not inform the Board of its possession of any emails from Justice Eakin's 'John Smith' email address beyond the 48 Outlook files received by the Board on November 5, 2014, and did not provide them to the Board until September 28, 2015.").

That all changed, however, in 2015, when news outlets revealed additional offensive emails that Eakin had not only received from various sources, but also had sent, in contradiction to his 2014 claim that he had never opened or welcomed these emails. On October 8, 2015, a report disclosed the existence of additional emails, which contained descriptions of racist, sexist, homophobic and misogynistic content, and which indicated that Eakin both received and sent these emails. These emails, sent to the media by the OAG, were also sent directly to the JCB by the OAG on discs on September 28, 2015 (but were not made public at that time) and October 15, 2015, and the JCB's complaint confirmed that the emails had not previously been disclosed. *Id.*, ¶ 67 ("Based on their review, Board staff concluded that the September 28, 2015 disc [sent by the OAG] contained emails that had not been seen by any Board staff member during the 2014 investigation of Justice Eakin.").

We considered analogous circumstances when deciding *Commonwealth v. Chmiel.* In that case, we held that the FBI's public acknowledgement (in the form of a press release that was published in several newspapers) that testimony regarding microscopic hair analysis was "flawed" in the great majority of cases constituted a "new fact" for PCRA purposes. *Chmiel,* 173 A.3d at 626. In so holding, we rejected the contention that earlier reports and articles that indicated that the FBI was questioning the validity of its methodology, or scientific studies challenging the reliability of the principles of hair analysis, rendered the press release "simply a confirmation of information that was already available in the public domain." *Id.* at 625. Instead, we held that the facts contained in the press release, including (1) the FBI's public admission about the flawed nature of its analysists' testimony and statements about microscopic hair comparison analysis and (2) the FBI's statement that it had trained state and local analysists to give the same flawed testimony in state criminal proceedings, were new. We thus found that the ***356** publication of the press release triggered the sixty-day window for the petitioner to file his claim concerning the microscopic hair comparison analysis testimony provided at his own criminal trial. *Id.* at 626. "Although the scientific foundation of such conclusory assertions was called into question beginning as early as 1974, and continually thereafter, this substantial shift in understanding was not embraced or acknowledged by the FBI until it went public with the preliminary results of its independent review." *Id.* at 627 (internal citation omitted).

As in *Chmiel,* although there was some publicly available information about Eakin's involvement in the email scandal in 2014, those news articles did not contain the facts upon which the claim raised in Robinson's third PCRA petition is predicated. Those facts were not knowable or made public until October 8, 2015, when the information concerning Eakin's sending and receiving of offensive emails became publicly available. This places Robinson's November 30, 2015 petition squarely within sixty days of that date. *See* 42 Pa.C.S. § 9545(b)(2). Not until the release of these newly disclosed emails did the "fact" of Eakin's active participation in the transmission of offensive emails become known. Indeed, the disclosure of these new emails prompted the JCB to open a new ethics investigation against Eakin, which resulted in the JCB filing a complaint against him, disclosing numerous additional offensive emails both sent and received by Eakin. *See* JCB Complaint, 12/8/2015, ¶¶ 78, 80-81 (detailing the emails disclosed in 2015); *id.*, ¶¶ 96, 99, 100 (alleging that Eakin's transmission and receipt of sexist, racist, homophonic, and religiously and ethnically insensitive emails constituted violations of the Pennsylvania Constitution and Canons of Judicial Conduct). The CJD ultimately sanctioned Eakin for these violations based on his exchange of these emails. *See In re Eakin,* 150 A.3d at 1061.[20]

20 The CJD did not make a finding of whether Eakin's

behavior reflected bias in his judicial decisions. It noted only that the JCB did not present any evidence that Eakin demonstrated bias in his written opinions and that Eakin presented witnesses to contest any such claim. *In re Eakin*, 150 A.3d at 1048, 1060. It observed, however, that Eakin's exchange of these emails "could cause citizens to wonder whether their cases received unbiased consideration by [him]." *Id.* at 1058.
Justice Dougherty's Opinion in Support of Affirmance ("OISA") misleadingly transforms the CJD's statement that the JCB did not present evidence that Eakin's writings demonstrated bias into a finding of fact of some importance. *See* OISA (Dougherty, J.) at 366 & n.2 (remarking upon the CJD's statement that the JCB failed to present this evidence and criticizing "the [Opinion in Support of Reversal's] minimization of this important aspect of the CJD's ruling"); *id.* at 368 (stating that the CJD "determined there was no evidence of bias"). Contrary to the OISA, the CJD did not find that there was no evidence of bias in Eakin's decisions, but simply that the JCB did not present any such evidence in the disciplinary proceeding. There are myriad reasons why the JCB may have opted not to present evidence of bias in Eakin's writings, including, most notably, the fact that Eakin resigned from service as a Justice of this Court prior to the disciplinary proceedings, rendering any findings related to his writings irrelevant and unnecessary to the question of the consequences for his behavior. The CJD certainly did not make a finding of fact that Eakin's writings did not reflect bias, instead finding it to be "significant[ ]" that the emails could suggest Eakin's bias in his consideration of the cases before him, which the CJD found "abhorrent to the principles to which [Eakin] has ostensibly dedicated his entire professional career." *In re Eakin*, 150 A.3d at 1058. It further observed, "A reasonable inference that [Eakin] lacked the impartiality required of judges also fundamentally lessens public confidence in the judiciary." *Id.* The question of whether the bigoted emails sent and received by Eakin reflect bias in his decision making remains an open question that should be decided by Pennsylvania courts.

The Commonwealth does not raise a claim regarding the overarching relationship ***357** between the facts and the claim (i.e., the emails reflect bias against people of color and those affected by domestic abuse). Rather, it argues that the emails postdate Eakin's participation in Robinson's first PCRA appeal and that the emails do not mention his case (or any case) in particular, rendering Robinson's underlying due process claim meritless. This argument implicates the merits of the claim raised, not the timeliness of the petition. Indeed, as stated hereinabove, the Commonwealth argues that the absence of a connection between the emails and Robinson's case renders the claims raised in his petition to be facially "meritless." Commonwealth's Brief at 17. "Whether a petitioner has carried his burden [of proving an exception to the PCRA's timeliness requirement] is a threshold inquiry that must be resolved prior to considering the merits of any claim." *Robinson III*, 139 A.3d at 186. The only elements required for the newly discovered facts exception to apply are that (1) the facts upon which the claim is predicated were unknown and (2) these facts could not have been discovered by the exercise of due diligence. 42 Pa.C.S. § 9545(b)(1)(ii); *Commonwealth v. Bennett*, 593 Pa. 382, 930 A.2d 1264, 1272 (2007)). We therefore find the Commonwealth's argument to be premature at this stage of the case.

In reaching a contrary conclusion, Justice Dougherty in his Opinion in Support of Affirmance ("OISA") overlooks not only the Commonwealth's concession that a nexus between the emails and Robinson's case implicates the merits of the claim, but also this Court's longstanding interpretation of the newly discovered fact exception as requiring only the establishment of the two elements, described above. The OISA contends that racist, sexist and misogynistic emails cannot serve as facts upon which a due process violation can be predicated because the emails that have been disclosed thus far do not specifically mention Robinson or his case. *See* OISA (Dougherty, J.) at 366–67. The notion that Robinson was required to establish an individualized case reference in order to establish a claim of bias under these circumstances is not only myopic, it is dangerous, and could serve to eviscerate the newly discovered fact exception.[21]

[21] Moreover, the OISA ignores that Robinson requested discovery, which, if permitted, would allow him to obtain emails from other sources and timeframes that might enable him to make the precise connection between the emails and his case that the OISA somehow believes to be necessary at this stage of the proceeding. The OISA also disregards that in his request to amend his PCRA petition, Robinson offered expert witnesses who, again, could potentially provide the connection between Robinson's case and the bigoted emails sent and received by Eakin that the OISA criticizes him for omitting.

The fundamental flaw in the OISA's approach is revealed in its conclusion that Robinson fails to meet the newly discovered fact exception because the "mere existence [of the emails] does not demonstrate the fact of bias." *See* OISA (Dougherty, J.) at 368 (quoting *Commonwealth v. Blakeney*, —— Pa. ——, 193 A.3d 350, 369 (2018) (Dougherty, J., Opinion in Support of Affirmance)). The newly discovered "fact" here is the email communications

by Eakin, not the existence of bias. According to Robinson, the emails reflect Eakin's bias; i.e., the claim (Eakin's bias in his decision making) is predicated on a newly discovered fact (the bigoted emails sent and received by Eakin). The OISA would require Robinson to demonstrate that Eakin was biased in his decision making in order to overcome the timeliness hurdle, but Eakin's bias is the underlying claim that Robinson has brought in the instant PCRA petition – Robinson asserts that a biased Court reviewed the resolution of his first ***358** PCRA petition, violating his right to due process. As stated hereinabove, and repeatedly throughout this Court's precedent, "the [timeliness] exception set forth in subsection (b)(1)(ii) does not require any merits analysis of the underlying claim. Rather, 'the exception merely requires that the 'facts' upon which such a claim is predicated must not have been known to appellant, nor could they have been ascertained by due diligence.' " *Bennett*, 930 A.2d at 1271-72 (quoting *Commonwealth v. Lambert*, 584 Pa. 461, 884 A.2d 848, 852 (2005)). In short, based on the record in this case and the precedent that binds this Court, the OISA's view is wholly unsupportable.

As the PCRA court correctly found, Eakin's transmission and receipt of offensive emails were the facts upon which Robinson's claimed due process violation was predicated, as Robinson contends that the exchange of these emails reflects Eakin's bias. PCRA Court Opinion, 10/23/2017, at 7. Its conclusion that these facts were ascertainable in October 2014, however, finds no record support. *See id.* As discussed herein, the facts underlying Robinson's claim could not have been discovered through the exercise of due diligence until October 8, 2015. As Robinson satisfies the newly discovered fact exception to the PCRA's time bar, we would vacate the PCRA court's decision dismissing Robinson's third PCRA petition on timeliness grounds.

Amendment to Petition and Evidentiary Hearing

Robinson next asks us to consider whether the PCRA court erred by failing to permit him to amend his third PCRA petition and by denying his request for an evidentiary hearing. Our review of the PCRA court's decision reveals that it denied both requests based solely on its conclusion that the petition was untimely. *See* PCRA Court Opinion, 10/23/20117, at 8, 11. In fact, the PCRA court stated that although it disallowed his request to amend his petition, it reviewed Robinson's proposed amended petition "for the purpose of determining if [the proposed amendments] might somehow cure [Robinson's] lack of timeliness in filing and grant jurisdiction to the [c]ourt." *Id.* at 10.

A PCRA petitioner must seek permission from the PCRA court to amend, and such requests are to be "freely allowed to achieve substantial justice," "at any time." Pa.R.Crim.P. 905(A). *See also Commonwealth v. Williams*, 573 Pa. 613, 828 A.2d 981, 993 (2003) ("the Rules demand liberal amendment of a PCRA petition"). Similarly, a PCRA court is required to hold an evidentiary hearing if it finds the petitioner raised any material issues of fact. Pa.R.Crim.P. 908(A)(2). Because the PCRA court found that it was without jurisdiction to reach the merits of the issues raised in Robinson's third PCRA petition, we do not fault the PCRA court for denying his requests on that basis. *See Commonwealth v. Marshall*, 596 Pa. 587, 947 A.2d 714, 723 (2008) (finding no error in the PCRA court's refusal to hold an evidentiary hearing for an untimely PCRA petition to which no exceptions applied); *Commonwealth v. Sepulveda*, 636 Pa. 466, 144 A.3d 1270, 1278 (2016) (stating that courts should allow amendment pursuant to Rule 905(A) to allow a petitioner "to avoid dismissal due to a correctable defect in claim pleading or presentation").

Because we would have found that the PCRA court has jurisdiction to decide the merits of Robinson's petition, on remand we would have ordered the PCRA court to reconsider its decision on Robinson's requests to amend his petition and for a hearing. *Cf., Commonwealth v. Stokes*, 598 Pa. 574, 959 A.2d 306 (2008) (stating that an analysis of the merits of the claims ***359** raised in a PCRA petition "is separate and distinct from" a consideration of the timeliness of the petition).

Discovery

We next consider whether the PCRA court erred by denying Robinson's request for discovery. In its Rule 1925(a) opinion, the PCRA court indicated that even if Robinson had timely filed his petition, Robinson was not entitled to discovery because he did not make "a showing of 'exceptional circumstances' " to support his request. PCRA Court Opinion, 10/23/2017, at 11-12; *see* Pa.R.Crim.P. 902(E)(1). Specifically, it found that he failed to adduce any proof that the exchange of offensive emails by Justice Eakin occurred "during the time of his conviction and appeal or that it affected his case in any

way." PCRA Court Opinion, 10/23/2017, at 14. Further, the PCRA court faulted Robinson for "cast[ing] a wide net" in his discovery request, referring to it as "generic, all-encompassing," and "a forbidden fishing expedition." *Id.*

These additional, non-jurisdictional bases for denying discovery are highly questionable. As stated hereinabove, the record reflects that the PCRA court, in fact, initially granted Robinson's June 15, 2016 discovery request. PCRA Court Order, 1/27/2017. It was not until the Commonwealth argued, and the PCRA court agreed, that the instant petition did not satisfy an exception to the PCRA's timeliness requirements that the court decided that Robinson was not entitled to discovery in this matter. We note that at least some of the information sought may be solely within the possession of the DA. However, the DA's arguments against the grant of discovery, and one of the PCRA court's alternative basis for denying Robinson's request, are based on Robinson's failure to present evidence in support of his claim. We further observe that there has been no fact finding conducted regarding the scope and breadth of this email scandal. The CJD did not conduct a full trial in Eakin's disciplinary matter (it adjudicated the case on stipulated facts) and the Disciplinary Board of the Pennsylvania Supreme Court has not reported any action taken against any of the attorney senders and receivers of these emails. The only emails sent or received by Eakin that have been disclosed to date are those that were housed on the OAG's server.

Nonetheless, as the issue of discovery implicates the merits of the claims raised, and because we would remand the case for the PCRA court to review the merits of his pending PCRA petition, we think it would have been prudent to allow the PCRA court to reconsider this issue as well. This would have allowed Robinson to file an amended request for discovery, modifying his request (if he deems it necessary) to address the concerns raised in the PCRA court's 1925(a) opinion. *See* Robinson's Brief at 58 ("To the extent, however, that the lower court thought the request was overly broad, it could have granted the discovery request only in part or directed Mr. Robinson to tailor a more narrow request.").

Disqualification of the DA from Further Proceedings

In his final issue on appeal, Robinson asserts that the PCRA court erred by denying his request to disqualify the DA from participating in further proceedings in this case. The PCRA court found that Robinson failed to establish that there were any ex parte communications between Eakin and the DA (or any members of the DA's office) or that an actual conflict of interest existed precluding the DA from representing the Commonwealth in this matter. It therefore found that he was not ***360** entitled to the appointment of a new prosecutor.

Robinson contends that this finding was erroneous. In his brief before this Court, he states that the receipt by both Freed and Ebert of Eakin's emails "potentially reflects on their reputations individually and on the reputation of the District Attorney's office" and "potentially colors their assessment of the offensiveness of the emails" and the impact they had on the appellate review of Robinson's case. Robinson's Brief at 61. Further, Robinson states that bias is established based on the letters sent to the CJD from Freed and Smith, both of whom indicated their close relationship with Eakin and expressed their personal opinions about the central issue involved in this case, i.e., whether Eakin exhibited bias in his judicial decisions. *Id.* at 61-62. He contends that they both have "personal stakes" in the claims raised in his PCRA petition "in ensuring that their longstanding friend suffered no consequences for his conduct." *Id.* at 62

In his motion before this Court, he asserts that Ebert's resumption of his role as DA continues to require the disqualification of that office in this matter. He observes that, as a judge, Ebert was a signatory to a letter sent to the CJD in support of Eakin, wherein he "candidly acknowledges the close personal ties" between the two. Robinson's Motion to Disqualify the DA's Office, 4/17/2018, ¶¶ 5, 7. This letter resulted in Judge Guido recusing the entire Cumberland County bench from deciding Robinson's PCRA petition based on "the appearance of a conflict of interest or impropriety," a finding that Robinson asserts necessarily should carry over to Ebert's decision making as the prosecutor in this matter. *Id.*, ¶¶ 6, 7. Further, Robinson states that the now-publicly available emails reveal Ebert to have been "a recipient of roughly twenty ... 'blast' emails that Justice Eakin also received, including a few that contained objectionable content." *Id.*, ¶ 9. Robinson states that this information regarding Ebert reveals his personal interest in defending against the claims raised in Robinson's PCRA petition, as he would want to "minimize the significance of the emails" for his personal reputation and that of Eakin, his close friend, and "impairs [his] independent judgment as a prosecutor." *Id.*, ¶¶ 13-14. He asserts that Ebert's conflict, when combined with the aforementioned information regarding Freed and Smith and their relationships with Eakin, compounds the reputational concerns of the DA as an office. *Id.*, ¶ 11.

According to Robinson, the continued participation of that office in his case "threatens the fundamental fairness of these proceedings, and violates [his] right to due process of law." *Id.*, ¶ 17.

In response, the Commonwealth contends that because this case is on appeal, any prejudice arising from the alleged conflict the DA has "is far less" as "the prosecution has far less discretion" at the appellate stage. Commonwealth's Response to Motion to Disqualify, 5/2/2018, at 1 (quoting *Commonwealth v. Harris*, 501 Pa. 178, 460 A.2d 747, 750 (1983) (plurality)). The Commonwealth asserts that Robinson was required to prove "an actual impropriety, which taints the proceedings," and that he has failed to satisfy this burden. *Id.* at 2 (quoting *Commonwealth v. Breakiron*, 556 Pa. 519, 729 A.2d 1088, 1092 (1999)). It states that Robinson "has not presented anything demonstrating bias in the opinions or proceedings of his case," and that the disqualification of the DA in this matter – which it contends is an "untimely, previously-litigated, and meritless serial PCRA petition" – is unsupported by Pennsylvania precedent and would be "a great disservice to the citizens of this Commonwealth." *Id.* at 3.

***361** A criminal prosecutor serves in a capacity unique from that of a traditional lawyer, as "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate." Pa.R.P.C. 3.8, Comment [1]. *See also Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935) (describing the role of the prosecutor as "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done").

A prosecutor's duty to act as a minister of justice does not end when a conviction is obtained. This role, and the responsibilities attendant to it, extend into the appellate and collateral stages of a criminal case. *See, e.g., Commonwealth v. Williams*, 624 Pa. 405, 86 A.3d 771, 788 (2014) (prosecutors have "an affirmative and continuing duty" under *Brady v. Maryland*[22] to disclose exculpatory information to a criminal defendant). *See also Chmiel*, 173 A.3d at 631 (Donohue, J., concurring) (stating that the prosecutor, as a minister of justice, had an ethical obligation, outside of the discovery process, to provide information that was solely within its possession to the defendant at the collateral stage of the proceeding).

22 *Brady* held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

A district attorney is not only subject to the Rules of Professional Conduct, which govern attorneys, but also to "the canons of ethics as applied to judges in the courts of common pleas of this Commonwealth insofar as such canons apply to ... conflict of interest." 16 P.S. § 1401(*o*).[23] The Rules of Professional Conduct provide that a lawyer has a conflict of interest that prohibits the lawyer from representing a client in a matter if, inter alia, "there is a significant risk that the representation ... will be materially limited ... by a personal interest of the lawyer." Pa.R.P.C. 1.7(a)(2). Canon 2 of the Code of Judicial Conduct requires, in relevant part, that a judge "disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." Pa.C.J.C. Rule 2.11(A); *see also id.*, Comment [2] ("A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed."). Further, Canon 1 provides that a judge must "avoid impropriety and the appearance of impropriety." Pa.C.J.C. Rule 1.2.

23 Act of Aug. 9, 1955, P.L. 323, § 1401, as amended.

Our prior precedent on the disqualification of a prosecutor because of an alleged conflict of interest generally proceeds along two lines. The first, relied upon by the Commonwealth, involves cases in which the actions of a prosecutor constitute an "actual impropriety" of sufficient severity to have tainted the proceedings and thus prejudiced the defendant. *See, e.g., Breakiron*, 729 A.2d 1088; *Harris*, 460 A.2d 747. The second, relied upon by Robinson (and the PCRA court), involves cases in which the prosecutor has an actual conflict of interest that threatens his or her independent judgment in fairly prosecuting the case in accordance with professional standards. *See, e.g., Commonwealth v. Briggs*, 608 Pa. 430, 12 A.3d 291 (2011); *Eskridge*, 604 A.2d 700; *see also Commonwealth v. Jermyn*, 551 Pa. 96, 709 A.2d 849 (1998).

***362** The first line of cases, which typically involve circumstances where defense counsel becomes the district attorney during the pendency of the case, originates with a two-Justice[24] plurality decision in *Harris*. In *Harris*, during the pendency of Harris' first collateral appeal, the attorney appointed to represent him was appointed to

serve as district attorney. Former counsel, now district attorney, assigned his first assistant to represent the Commonwealth in Harris' matter, as well as any other cases in which he was involved as a defense attorney. *Id.* at 748-49.

[24] Justice Zappala authored the plurality opinion, which Justice Larsen joined.

Harris subsequently filed a second petition for collateral review alleging, inter alia, ineffectiveness of his former counsel based on his appointment as district attorney, and asserting his right to withdraw his guilty plea on that basis. This Court unanimously agreed that Harris was not entitled to relief, but disagreed as to the reasoning. Justices Zappala and Larsen stated that the "appearance of impropriety" standard advocated by Harris was "not viable" because "it would allow a defendant to have his case dismissed any time a special prosecutor was not appointed to his case when a member of the public defender's staff has been appointed to the staff of the [d]istrict [a]ttorney during the pendency of the defendant's post-trial proceedings." *Id.* at 749. Instead, these Justices found that the question should require the application of "a more objective and flexible standard," on a case-by-case basis, to determine "whether the acts of a public prosecutor have actually tainted the proceedings so as to require a new trial with a special prosecutor appointed." *Id.* As such, they indicated that in situations where defense counsel switched to prosecutor during the course of criminal proceedings, they would require "that a defendant show an **actual impropriety** in order to establish the requisite prejudice to a defendant."[25] *Id.* (emphasis added).

[25] Although not employing the "actual impropriety" language, in a case decided just two days before *Harris*, this Court identified a circumstance in which the prosecutor's actions resulted in prejudice to the defendant and thus required a new trial. In *Commonwealth v. Lowery*, 501 Pa. 124, 460 A.2d 720 (1983) (per curiam), the attorney who had represented the defendant on a suppression matter in the trial court had become the district attorney at the time of appeal. *Id.* at 720. On appeal, he instructed his office to attack the adequacy of his own defense on the suppression issue. *Id.* In requiring a new trial, the Court indicated that an attack by an attorney on his own work is a "direct attack on the adversary system which undermines the total trust and confidence between an attorney and his client necessary to its functioning ... [since] all individuals must be assured that their lawyer can never assert his own failures against them." *Id.* at 721.

Justices Zappala and Larsen made clear that their decision was influenced in part by the procedural posture of the case when the switch occurred, i.e., at the appellate stage of the proceeding. They observed that counsel "was not privy to any confidences which may have been devulged [sic] during the pre-trial and trial stages," and "the resolution of the case rested upon arguments and conclusions of law which would be of no value to him when he became [d]istrict [a]ttorney." *Id.* at 750. "The danger of prejudice is far less when prosecutorial conflict arises during appellate proceedings. At this stage, the prosecution has far less discretion; its role is to answer arguments made by the defendant." *Id.* (quoting *Pisa v. Commonwealth*, 378 Mass. 724, 393 N.E.2d 386, 390 (1979)).

The remainder of the Court concurred only in the result reached by the two-Justice plurality. Chief Justice Roberts ***363** disagreed that the "appearance of impropriety" standard was not applicable, but concluded that there was no demonstrated impropriety, "actual or apparent," that would entitle Harris to the relief he sought (i.e., to withdraw his guilty plea). *Id.* at 750 (Roberts, C.J., concurring). Notably, Chief Justice Roberts stated that Harris would "at best ... be entitled to the disqualification of the District Attorney of Lehigh County on the present appeal from the denial of post-conviction relief," but because that was not the relief he sought, he declined to discuss further this avenue of relief. *Id.* at 751.

Justice Hutchinson, joined by Justice Flaherty, found that "[n]o conflict of any kind exist[ed]," but likewise disagreed with the plurality's decision to reject the "appearance of impropriety" standard. *Id.* at 751 (Hutchinson, J., concurring) ("I also believe we should not imply or even hint that the appearance of impropriety is generally excusable."). Justices Nix and McDermott concurred in the result without authoring separate opinions.

In *Breakiron*, the OAG assumed prosecutorial responsibility at the PCRA stage at the request of the district attorney because Breakiron's trial and direct appeal counsel (both former public defenders) became members of the district attorney's office. Shortly thereafter, Breakiron sought the removal of the OAG and the appointment of a special prosecutor because the OAG allegedly asked Breakiron's trial counsel to review a file that remained in the public defender's office and to review PCRA filings before filing them in court. *Breakiron*, 729 A.2d at 1092. This Court agreed with the PCRA court that removal of the OAG from the case was

unnecessary, as any prejudice suffered by the OAG's actions was de minimis. Further, and without discussion or recognition of *Harris*' lack of precedential value, the Court applied the *Harris* plurality's "actual impropriety standard." *Id.* ("Breakiron did not meet his burden of proof in showing that there was any actual impropriety in Attorney Graci's conduct.") (citing *Harris*).[26] Accordingly, the Court ruled that Breakiron was not entitled to the removal of the prosecutor. *Id.*

26 The holding in *Breakiron*, requiring proof of an "actual impropriety" and not the appearance of impropriety for the disqualification of a prosecutor, arguably conflicts with the Canon 1 of the Code of Judicial Conduct and the statute making the canons applicable to prosecutors. *See* 16 P.S. § 1401(*o*); Pa.C.J.C. 1.2.; *supra*, p. 360. Robinson does not argue this point or ask that we overrule *Breakiron*, and we therefore do not discuss this further in this Opinion.

The second line of precedent in this area, which does not require a showing of an "actual impropriety," involves prosecutors who have a personal interest in the outcome of the case. *See, e.g., Briggs*, 12 A.3d at 330-31; *Eskridge*, 604 A.2d at 701. In *Eskridge*, the district attorney's private law firm was engaged to represent the victims of a car accident, which also resulted in the filing of criminal charges against Eskridge. We found that this constituted an impermissible conflict of interest that preluded any members of the district attorney's office from prosecuting the defendant. In so concluding, the Court observed that a prosecutor could not proceed in a criminal matter if his professional judgment may be affected by extraneous considerations. "A defendant does not have a right not to be prosecuted; he does, however, have a right to have his case reviewed by an administrator of justice with his mind on the public purpose, not by an advocate whose judgment may be blurred by subjective reasons." *Eskridge*, 604 A.2d at 701 (quoting *Commonwealth v. Dunlap*, 233 Pa.Super. 38, 335 A.2d 364, 368 (1975) ***364** (Hoffman, J., dissenting)). We thus held that "a prosecution is barred when an actual conflict of interest affecting the prosecutor exists in the case; under such circumstances a defendant need not prove actual prejudice in order to require that the conflict be removed." *Id.* at 702.

Our more recent decision in *Briggs* involved a defendant's challenge to the appointment of the OAG following the district attorney's assertion of a conflict of interest that precluded his office's participation in the prosecution of the case. The district attorney requested that the OAG handle Briggs' prosecution because, of relevance here, the district attorney believed that there was a potential conflict of interest based on his close personal relationship with the murder victims (two sheriff's deputies). He was concerned that his relationship "would cloud his professional judgment and possibly interfere with his ability to make critically important legal decisions regarding the conduct of this prosecution." *Briggs*, 12 A.3d at 330-31. This Court found the district attorney's recognition of this potential conflict to be "commendabl[e]," and agreed, based on our prior holding in *Eskridge*, that "[h]is representations in the letter concerning this potential impairment were sufficient to establish a potential conflict of interest on his part sufficient to justify the attorney general's intervention under 71 P.S. § 732-205(a)(3)." *Id.* at 331.[27]

27 Pursuant to section 205(a)(3) of the Commonwealth Attorneys Act, "The Attorney General shall have the power to prosecute in any county criminal court ... [u]pon the request of a district attorney who lacks the resources to conduct an adequate investigation or the prosecution of the criminal case or matter or who represents that there is the potential for an actual or apparent conflict of interest on the part of the district attorney or his office." 71 P.S. § 732-205(a)(3), Act of Oct. 15, 1980, P.L. 950, No. 164, § 205.

Robinson's case falls squarely within the second line of cases. As with *Eskridge* and *Briggs*, this case centers on a claim that the current DA has a personal interest in the outcome of Robinson's PCRA proceedings.[28] The record establishes, and Ebert admits, that Eakin is a close, personal friend. *See* Answer to Motion to Disqualify the DA's Office, 4/30/2018, at attachment (Letter from Ebert to counsel for Robinson, 3/23/2018). Ebert and other members of his office have been vocal in their support of Eakin. Ebert, Freed and Smith all sent letters in support of Eakin to the JCB and advocated against disciplinary action for his conduct. The letter signed by Ebert and other members of the Cumberland County bench acknowledged his friendship with Eakin and expressed concern about "the reputation and career of Justice Eakin." Motion to Disqualify the DA's Office, 4/16/2016, at Exhibit A. Freed's letter, written on DA letterhead, was authored during the pendency of the instant PCRA proceedings below. The letter professed Freed's "bias as ... a great admirer of Justice Eakin," and described both his history with Eakin and that of other members of Freed's family. *Id.* at Exhibit C. ***365** Smith's letter referred to Eakin as his "friend, colleague, and mentor," and likewise detailed his longstanding relationship with him. *Id.* at Exhibit D.

28 The Commonwealth's reliance upon *Harris*' focus on

> the procedural posture of the case (i.e., on appeal) is unavailing in this case. As discussed below, the conflict of interest in the case at bar preceded this appeal and has pervaded all aspects of these PCRA proceedings. It has touched nearly every member of the DA's office who has been involved in representing the Commonwealth in the instant PCRA matter. Moreover, because we would remand this case for further proceedings, the DA would have had greater prosecutorial discretion in the PCRA court. He would no longer simply be responding to Robinson's arguments, but would make decisions regarding what position the Commonwealth would take as to the challenges leveled by Robinson before the PCRA court, and may have chosen to advocate and present evidence (or not) in support of or against those claims.

The letters submitted by Ebert, Freed and Smith in support of Eakin also downplayed the offensiveness of the content of the emails and included their personal opinions regarding a critical issue at the heart of this case, i.e., whether the emails were reflective of Eakin's bias. The letter signed by Ebert promoted the view that the emails in question merely constituted "private communications with [Eakin's] ... personal friends," and though perhaps not "political[ly] correct[ ]," did not warrant disciplinary action against him. *Id.* at Exhibit A.[29] Freed expressed his belief that regardless of the emails, Eakin's judicial decisions included no "indication of racism, misogyny or homophobia." *Id.* at Exhibit C. Smith similarly stated his view that "there is no evidence [that his sending or receiving the offensive emails] affected his judicial temperament or influenced his judgment," and referred to the emails as "[j]uvenile and puerile, but not unethical." *Id.* at Exhibit D.

[29] As stated hereinabove, the letter Ebert and the other judges signed caused the Cumberland County President Judge to conclude that no Cumberland County Common Pleas Court judge could preside over Robinson's case because of "the appearance of a conflict of interest or impropriety." *See* Order of President Judge Guido, 1/8/2016.

Moreover, Ebert and other members of the DA's office have received some of the emails that form the basis of Robinson's claim of Eakin's bias. It would seem incongruous for the DA to acknowledge that the emails are offensive and bigoted when he and members of his staff also received them, apparently without objection.

Based on the record before us, Ebert and other members of his staff have several "subjective reasons," outside of their "public purpose," to advocate against granting Robinson PCRA relief. *See Eskridge*, 604 A.2d at 701. Granting Robinson relief on the instant PCRA petition would result in a finding that the emails sent and received by Eakin reflected his bias against various types of crimes and classes of people. Ebert has a clear interest in advocating against such a finding to protect his own reputation, the reputation of his office, and that of his close friend, Eakin. These "extraneous considerations" could undoubtedly cloud Ebert's professional judgment. *See id.*

While any prosecutor may defend against Robinson's request for PCRA relief, the decision to do so must be pursuant to the law and guided by a public purpose. Prosecutorial discretion cannot be driven separately or simultaneously by the attorney's motivation to defend reputational concerns. In other words, as stated hereinabove, Robinson is entitled to a prosecutor whose judgment is neither "clouded" nor "blurred by subjective reasons." *See Eskridge*, 604 A.2d at 701; *Briggs*, 12 A.3d at 330-31.

As Ebert's personal interest in the outcome of the case could materially affect his representation of the Commonwealth in this matter, there exists a conflict of interest, and continued participation by Ebert would be improper. *See* Pa.R.P.C. 1.7(a)(2); Pa.C.J.C. Rules 1.2, 2.11(A). This conflict is not remedied by transferring the matter to another member of the DA's office; as we recognized in *Eskridge*, because the DA has a conflict of interest, the entire office is barred from handling the matter. *See Eskridge*, 604 A.2d at 701 (delegation of the case by the district attorney to another member of the office was insufficient to cure conflict as the prosecutor "remained subject to the district attorney's guidance, control, and supervision").

***366** The OAG has the power to act as prosecutor in a county criminal matter on the request of the president judge of the county in which the case is proceeding where the OAG agrees that the case is appropriate for its intervention. 71 P.S. § 732-205(a)(5). Because there exists a conflict of interest that precludes the DA's participation in this matter, on remand, we would direct the President Judge of the Cumberland County Court of Common Pleas to request the OAG's intervention in this matter. Absent a conflict of interest or other reason prohibiting the OAG's participation, the OAG would represent the Commonwealth in any further proceedings.

Jurisdiction relinquished.

Justice Wecht joins this opinion in support of reversal.

OPINION IN SUPPORT OF AFFIRMANCE

JUSTICE DOUGHERTY

Justice Donohue, in her Opinion in Support of Reversal (OISR), would hold articles published in October 2015 revealing a former justice of this Court sent and received offensive emails raised new facts sufficient for appellant to overcome the PCRA time bar. Thus, the OISR would vacate the PCRA court's order dismissing appellant's third PCRA petition as untimely filed. The OISR asserts it would merely decide a jurisdictional issue, and would not reach the merits of whether the new facts require an evidentiary hearing on appellant's claimed due process violation, namely, that alleged racial bias reflected in the emails injects doubt as to the propriety of the Court's disposition of appellant's first PCRA appeal. In my view, as the Commonwealth asserts, there is an insufficient nexus between the published reports and the alleged constitutional violation: the referenced "email traffic relates to a time period beginning over a decade after [appellant's] trial and several years after his 2005 initial PCRA case concluded; [appellant's] case is not referenced in the emails; and the content does not reflect any invidious discrimination or bias in any court case." Commonwealth's Brief at 16-17. The OISR explains its approach by characterizing the Commonwealth's argument as "implicat[ing] the merits of the claim raised, not the timeliness of the petition." OISR (Donohue, J.) at 357. I respectfully disagree.

In my view, the emails are simply not facts upon which the belated claim of a due process violation can be predicated.[1] Moreover, I would conclude appellant is not entitled to a merits examination, as the Court of Judicial Discipline (CJD) in its comprehensive and independent evaluation found as fact that the Judicial Conduct Board (JCB) produced no evidence that Justice Eakin "in his written judicial opinions, ever demonstrated any overt bias due to the race, gender, ethnicity, or sexual orientation of a litigant or witness." *In re Eakin*, 150 A.3d 1042, 1048 (Pa. Ct. Jud. Disc. 2016). The CJD also acknowledged Eakin "presented credible witnesses that his judicial opinions were not reflective of any of the biases expressed in any of the emails, but instead were decided, in each case, in accordance with the facts and law." *Id.* at 1060.[2]

1 The 2015 reports showed former Justice Eakin received and sent emails, the context and content of which might be described as crude attempts at humor involving sexist, misogynistic, homophobic, and racial or religious stereotypes and themes. None of the emails referenced appellant's case.

2 The OISR asserts the CJD made no finding whether "Eakin's behavior reflected bias in his judicial decisions[,]" but "noted only that the JCB did not present any evidence that Eakin demonstrated bias in his written opinions and that Eakin presented witnesses to contest any such claim." OISR (Donohue, J.) at 356, n.20, *citing In re Eakin*, 150 A.3d at 1048, 1060. The record is clear, however, the CJD "accept[ed] [the parties'] stipulations of fact ... as **the facts necessary** for the determination of this case[,]" *see* 150 A.3d at 1048 (emphasis added), and under the heading "FINDINGS OF FACT" included the fact that no evidence was presented showing Eakin's opinions reflected bias. I disagree with the OISR's minimization of this important aspect of the CJD's ruling.

***367** The OISR would additionally disqualify the Cumberland County District Attorney's Office (DAO) on conflict of interest grounds from proceeding further in the matter, and would direct the PCRA court to reconsider petitioner's requests for additional discovery, to amend his petition, and for an evidentiary hearing. Because, in my judgment, the PCRA court was correct in concluding it lacked jurisdiction to consider the petition, I would not reach the questions regarding an evidentiary hearing, disqualification of the DAO, or requests for petition amendment and additional discovery. In the alternative, if jurisdiction existed, I would conclude an evidentiary hearing, disqualification, petition amendment, and additional discovery are not warranted.

Timeliness[3] and Evidentiary Hearing

3 In opining the PCRA court had jurisdiction over the proceedings because new facts served to overcome the facially untimely nature of appellant's third petition, the OISR acknowledges another jurisdictional hurdle — the fact appellant filed his third petition prematurely. OISR (Donohue, J.) at 343 n.8. It is undisputed an appeal from appellant's second PCRA petition was pending before this Court when he filed the instant

petition, his third. The OISR cites *Commonwealth v. Lark*, 560 Pa. 487, 746 A.2d 585, 588 (2000) (subsequent PCRA petition cannot be filed while a pending petition remains unresolved), but treats the present petition as filed after his second petition was finally adjudicated. The OISR notes the Commonwealth presented no objection pursuant to *Lark* and this Court's disposition of appellant's appeal from the denial of his second PCRA petition was completed by the time the PCRA court finally adjudicated appellant's third petition. OISR (Donohue, J.) at 343 n.8. Without citation to authority, the OISR would determine "in the interest of justice, we will regard as done that which ought to have been done" and treat appellant's third petition as properly filed. *Id.* Respectfully, the proviso to regard as done that which ought to have been done has been employed by our courts almost exclusively in the interests of judicial economy. For example, where a party has inadvertently failed to file a praecipe for the entry of judgment or proper post-sentence motion, courts have occasionally, in the interests of judicial economy, permitted the appeal to proceed despite this minor procedural irregularity which would otherwise result in remand to perfect the record or quashal without prejudice to file a subsequent appeal once the trial court's final order has been reduced to judgment. *See McCormick v. Ne. Bank of Pa.*, 522 Pa. 251, 561 A.2d 328, 330 n.1 (1989). To apply the proviso in the present circumstances expands its effect. Normally, the proviso is used to permit an **appeal** from an otherwise **resolved** case despite the lack of a final order. Here, the OISR would employ the proviso to permit **post-conviction** proceedings to advance in an **unresolved** case. That being said, the Commonwealth has failed to object to the PCRA court's jurisdiction in the present appeal on the basis of the premature filing. It maintains, instead, the PCRA court lacked jurisdiction due to appellant's failure to satisfy any exception to the PCRA time bar.

To be entitled to PCRA relief, appellant must establish, by a preponderance of the evidence, his conviction or sentence resulted from one or more of the enumerated errors in 42 Pa.C.S. § 9543(a)(2). The only enumerated error applicable here is a constitutional violation which "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(i). The PCRA requires that a ***368** petition seeking relief must be filed within one year of the date the petitioner's judgment of sentence becomes final. 42 Pa.C.S. § 9545(b)(1). This timeliness requirement is jurisdictional in nature, and a court may not address the merits of any claim raised unless the petition was timely filed or the petitioner proves that one of the three exceptions to the timeliness requirement applies. *Commonwealth v. Cox*, 636 Pa. 603, 146 A.3d 221, 227 (2016). The pertinent exception here is "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[.]" 42 Pa.C.S. § 9545(b)(1)(ii). This court has explained that "the exception set forth in subsection (b)(1)(ii) does not require any merits analysis of the underlying claim." *Commonwealth v. Abu-Jamal*, 596 Pa. 219, 941 A.2d 1263, 1268 (2008) (citations omitted). Moreover, any petition invoking this exception "shall be filed within 60 days of the date the claim could have been presented." 42 Pa.C.S. § 9545(b)(2).

While I appreciate the test for application of when newly-discovered facts will overcome a PCRA time bar prohibits a merits analysis, the test does require that the claim be **predicated** on previously unknown facts. *See Commonwealth v. Bennett*, 593 Pa. 382, 930 A.2d 1264 (2007) (emphasis added). Accordingly, to overcome the PCRA time bar, a petitioner is required, at a minimum, to demonstrate some connection between the newly-discovered facts and the claim. The OISR asserts the facts upon which appellant's claim is predicated did not become available until the relevant articles were published in 2015. OISR (Donohue, J.) at 355–56, *citing Commonwealth v. Chmiel*, 643 Pa. 216, 173 A.3d 617 (2017). Whether there is a connection between the newly-discovered facts regarding Eakin's emails to appellant's underlying claim sufficient to overcome the time bar is not self-evident in this case — as it was in *Chmiel* (where the published press release contained an admission by the FBI that its microscopic hair analysis was flawed in the great majority of cases in which hair analysis evidence was presented). Here there is no admission of judicial bias; rather there was a denial of bias before the CJD, which determined there was no evidence of bias. As I noted in *Commonwealth v. Blakeney*, — Pa. —, 193 A.3d 350, 367 (2018) (Dougherty, J., Opinion in Support of Affirmance) (OISA), a case involving roughly analogous circumstances, "[o]f course the emails are repugnant, but their mere existence does not demonstrate the fact of bias[.]" Accordingly, I would conclude appellant's third petition for PCRA relief was untimely filed and appellant failed to show any exceptions apply as the facts relied upon were not sufficiently connected to the claim. Moreover, even if the petition had been timely, no evidentiary hearing would be warranted, as the CJD found as fact no evidence of bias.[4]

[4] Indeed, to permit an evidentiary hearing at which Eakin and his witnesses would presumably be called to testify on the question of bias would amount to the formalistic and pointless repetition of judicial proceedings, the outcome of which is undoubtedly a foregone

conclusion.

Petition Amendment and Additional Discovery

In my view, the PCRA court correctly determined it lacked jurisdiction to consider appellant's petition and thus I disagree with the OISR's preferred disposition that the PCRA court should reconsider permitting appellant to conduct additional discovery and file an amended petition. I would conclude, as the PCRA court did, appellant made no proper showing to permit petition ***369** amendment or additional discovery. With respect to petition amendment, the OISR cites *Commonwealth v. Sepulveda*, 636 Pa. 466, 144 A.3d 1270, 1278 (2016), for the proposition courts should allow amendment pursuant to Pa.R.Crim.P. 905(A) "to avoid dismissal due to a correctible defect in claim pleading or presentation." OISR (Donohue, J.) at 358. The PCRA court considered the proposed petition amendments "solely for the purpose of determining if they might somehow cure [appellant's] lack of timeliness in filing and grant jurisdiction to the [c]ourt[,]" and concluded "the changes proposed by [appellant] fail to cure the issue of timeliness." PCRA Court Op., 10/23/17 at 10.[5] If the claim were properly before us, I would determine the PCRA court correctly denied the requested petition amendment.

[5] Among other things, the court specifically determined there was no merit in appellant's claimed applicability to his case of *Williams v. Pennsylvania*, — U.S. —, 136 S.Ct. 1899, 195 L.Ed.2d 132 (2016) (justice's personal involvement in critical charging decision in defendant's case gave rise to unacceptable risk of actual bias endangering appearance of neutrality). The PCRA Court noted the facts underlying *Williams* are not substantially similar to appellant's case and *Williams* has no retroactive application in any event.

With respect to additional discovery, I am also aligned with the PCRA court's rationale for denying the request. The court noted discovery in PCRA proceedings is strictly limited and shall not be permitted except upon leave of court and a showing of exceptional circumstances. *Id.* at 11, *citing* Pa.R.Crim.P. 902(e). The court determined the discovery request was "wholly without merit" because appellant failed to demonstrate the existence of exceptional circumstances, and explained as follows:

> While the facts underlying his claim reflect a disturbing state of affairs within the Pennsylvania Judiciary, [appellant] did not demonstrate that this circumstance existed during the time of his conviction and appeal or that it affected [the outcome of] his case in any way. No evidence was produced or alluded to that discusses or touches on [appellant's] case specifically. Likewise, his discovery request was not for specific, known, material, but rather he cast a wide net, hoping to snare something of both relevance and substance. Such a discovery request within the framework of collateral relief is a forbidden fishing expedition. Assuming the instant PCRA petition was timely filed, [appellant] failed to demonstrate the exceptional circumstances required for **any** discovery and, even if discovery was appropriate, [appellant's] generic, all-encompassing discovery request would have been impermissible.

Id. at 11, 14 (emphasis in original).

Disqualification of DAO

In my view, because appellant's PCRA petition was untimely and no exceptions applied, disqualification of the Cumberland County DAO is unnecessary and improper, as no jurisdiction exists to entertain further proceedings. Even if jurisdiction existed, I would deny the disqualification request. The OISR asserts appellant's claim is one of a conflict of interest that does not require a showing of actual impropriety. OISR (Donohue, J.) at 362–63, *citing Commonwealth v. Briggs*, 608 Pa. 430, 12 A.3d 291 (2011); *Commonwealth v. Eskridge*, 529 Pa. 387, 604 A.2d 700 (1992). The OISR also acknowledges the Commonwealth relies on *Commonwealth v. Breakiron*, 556 Pa. 519, 729 A.2d 1088 (1999), to support its competing claim appellant must show an actual

impropriety. The OISR opines the holding in *Breakiron*, requiring proof of actual impropriety, was based on a *370 non-precedential plurality holding in *Commonwealth v. Harris*, 501 Pa. 178, 460 A.2d 747 (1983), and notes the rule of *Breakiron* arguably conflicts with Canon 1 of the Code of Judicial Conduct and the statute making the canons applicable to prosecutors. OISR (Donohue, J.) at 363 n.26, *citing* 16 P.S. § 1401(o) ("A district attorney shall be subject to the Rules of Professional Conduct and the canons of ethics as applied to judges in the courts of common pleas of this Commonwealth insofar as such canons apply to salaries, full-time duties and conflicts of interest."); Pa.C.J.C. 1.2 ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.")

I question the OISR's reliance on *Briggs* and *Eskridge*, as both cases involved the prosecutor's potential conflicts at trial. Here, as in *Harris* and *Breakiron*, the claim of conflict arises at the post-conviction stage. In *Harris*, the public defender who represented the defendant on collateral appeal and sought withdrawal of the defendant's guilty plea in that proceeding, was appointed District Attorney during the pendency of the appeal. The petition was denied. On a second petition, represented by new counsel, the petitioner claimed the ineffectiveness of his prior post-conviction counsel "due to the conflict of interest involving [counsel's] appointment as District Attorney[.]" *Harris*, 460 A.2d at 749. The petitioner sought to withdraw his guilty plea, arguing the appointment created an actual conflict of interest and an appearance of impropriety. A plurality of the Court held an appearance of bias was insufficient to disqualify the prosecutor or undermine his participation in the post-conviction proceedings and a post-conviction petitioner must show actual impropriety. The plurality reasoned this heightened standard should be applied because there is far less danger of prejudice when a prosecutorial conflict arises during appellate proceedings. *Id.* at 750. I would apply this same rationale to the instant matter. During collateral proceedings, a petitioner has the burden to prove entitlement to relief, while the prosecutor merely responds to petitioner's arguments; the prosecutor's role is quite different in collateral proceedings than at trial. Because the discretion of the prosecutor is reduced during collateral proceedings, any prejudice flowing from his or her continued participation is limited. Thus, if the petition to disqualify the DAO were properly before the Court in the instant matter, I would conclude appellant failed to substantiate entitlement to relief.

OPINION IN SUPPORT OF AFFIRMANCE

JUSTICE MUNDY

Consistent with my Opinion in Support of Affirmance (OISA) in *Commonwealth v. Blakeney*, — Pa. ——, 193 A.3d 350 (2018), I join Justice Dougherty's OISA in all respects, except to the extent he relies on *Commonwealth v. Chmiel*, 643 Pa. 216, 173 A.3d 617 (2017). In *Chmiel*, the defendant attempted to invoke the newly-discovered fact exception to the PCRA time-bar based on a newspaper article in which the Federal Bureau of Investigation acknowledged that its experts had provided flawed hair microscopy testimony at trials for many years. *Chmiel*, 173 A.3d at 622. The Majority in *Chmiel* concluded the time-bar exception applied, even though it was undisputed that the FBI did not have any direct or indirect involvement with his case. I continue to believe *Chmiel* was incorrectly decided. *See generally id.* at 631-33 (Mundy, J., dissenting).

*371 Nevertheless, *Chmiel* is distinguishable from this case. Robinson's assertions of judicial bias do not relate to his case as "the referenced email traffic relates to a time period beginning over a decade after appellant's trial and several years after his 2005 initial PCRA case concluded; appellant's case is not referenced in the emails; and the content does not reflect any invidious discrimination or bias in any court case." OISA of Dougherty, J. at 366 (quoting Commonwealth's Brief at 16-17) (internal quotation marks and brackets omitted). Such alleged instances of judicial bias cannot be material facts upon which Robinson's underlying claim for relief is "predicated." 42 Pa.C.S. § 9545(b)(1)(ii). As a result, I conclude that like the FBI forensic analysis in *Chmiel*, Robinson's allegations cannot satisfy the time-bar exception, "because the purported newly-discovered facts do not affect his case." *Chmiel*, 173 A.3d at 633 n.2 (Mundy, J., dissenting); *Blakeney*, 193 A.3d at 370 (Mundy, J., OISA). Accordingly, I would affirm the order of the PCRA court.

All Citations

198 A.3d 340 (Mem)

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COMMONWEALTH	IN THE COURT OF COMMON PLEAS OF CUMBERLAND COUNTY, PENNSYLVANIA
v.	
ANTYANE ROBINSON	CRIMINAL
	CP-21-CR-1183-1996

OPINION PURSUANT TO Pa.R.A.P. 1925(a)

HERMAN S.J., October 23, 2017.

Defendant, Antyane Robinson ("Defendant"), has filed an appeal from the order dated July 31, 2017, that dismissed his petition for relief under the Post Conviction Relief Act (PCRA), 42 Pa. C.S.A. Section 9541 et. seq. Defendant filed a statement pursuant to Pa.R.A.P. 551, 552 which included a list of questions presented for review. We now file this opinion in accordance with Pa.R.A.P. 1925(a).

Background

Defendant was sentenced to death in 1997 for the murder of Rashawn Bass and the attempted murder of Tara Hodge. The Supreme Court of Pennsylvania affirmed this conviction and judgment of sentence on direct review. *Commonwealth v. Robinson*, 721 A.2d 344 (Pa. 1998). Defendant's Petition for a Writ of Certiorari was denied by the Supreme Court of the United States on January 10, 2000, and for PCRA purposes his judgment sentence was rendered final on that day. *Robinson v. Pennsylvania*, 528 U.S. 1082 (2000); 42 Pa.C.S. § 9545(b)(1).

Defendant's initial PCRA petition was filed on October 16, 2000, and was denied following a full hearing by the trial court on April 22, 2002. The Supreme Court of Pennsylvania affirmed the denial of that Petition on March 12, 2003. *Commonwealth v. Robinson*, 877 A.2d 433 (Pa. 2005). On September 30, 2013, Defendant filed a second PCRA petition. The instant PCRA was filed on November 30, 2015, while Defendant's second PCRA petition was still pending on appeal. Though initially dismissed by the

trial court on December 8, 2015, this third PCRA petition was remanded on March 21, 2016, due to a failure to comply with notice provisions set forth in Pa.R.Crim.P. 909. Defendant's second PCRA petition was denied. On February 7, 2017, the Commonwealth filed a motion to dismiss based on a lack of jurisdiction and/or cognizability and Defendant filed a response on March 6, 2017. Argument on this motion was held on April 7, 2017. On May 4, 2017 the Court filed an opinion and order indicating its intent to dismiss Defendant's PCRA petition pursuant to Pa.R.Crim.P. 909. Defendant filed a Response to the Court's notice on June 14, 2017 in which he objected to the Court's intention to dismiss and made a motion to amend his PCRA petition. The Commonwealth filed a response to Defendant's response and amendment request on June 26, 2017 and Defendant filed a motion for leave to respond to the Commonwealth's response on July 3, 2017 which was met with an objection from the Commonwealth filed on July 10, 2017. Defendant's requests to amend his PCRA petition and to respond to the Commonwealth were denied and his PCRA petition was dismissed by the order dated July 31, 2017.

Discussion

I. PCRA Timeliness

Defendant contends that the Court erred by determining that the instant PCRA petition was untimely filed. This contention is without merit.

The Post Conviction Relief Act's time limit requirements are mandatory and jurisdictional in nature and the Court may not disregard them in order to reach the merits. *Commonwealth v. Roderick Johnson*, 863 A.2d 423, 425 (Pa. 2004); *see also Commonwealth v. Rienzi*, 827 A.2d 369, 371 (Pa. 2003); *Commonwealth v. Murray*, 753

A.2d 201, 203 (Pa. 2000); *Commonwealth v. Johnson*, 803 A.2d 1291, 1294 (Pa. Super. 2002). The Court does not have authority to "fashion ad hoc equitable exceptions to the PCRA time-bar in addition to those exceptions expressly delineated in the Act." *Commonwealth v. Robinson*, 837 A.2d 1157, 1161 (Pa. 2003) (citation omitted).

In order to be eligible for relief through a PCRA petition, a petitioner must claim that his conviction resulted from one of an enumerated list of factors, including a "violation of the Constitution of this Commonwealth or the Constitution or laws of the United States". 42 Pa.C.S. § 9543(a)(2)(i); *Commonwealth v. Breakiron*, 781 A.2d 94 n.3 (Pa. 2001). Generally, a PCRA petition, including a second or subsequent petition, must be filed within one year of the date the judgment becomes final. 42 Pa.C.S. § 9545(b)(1); *See Commonwealth v. Turner*, 73 A.3d 1283, 1285 (Pa. Super. 2013). A judgment is deemed final for purposes of the PCRA "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 review." 42 Pa.C.S. § 9545(b)(3); *Commonwealth v. Breakiron*, 781 A.2d 94, 97 (Pa. 2001). A notice of appeal must be filed within 30 days of the imposition of the judgement of sentence in open court. Pa.R.A.P. 903(c)(3).

There are only three narrow exceptions to this time requirement:

> (1) [I]nterference by government officials in the presentation of the claim; (2) newly discovered facts; and (3) an after-recognized constitutional right. 42 Pa.C.S.A. § 9545(b)(1)(i-iii). When a petitioner alleges and proves that one of these exceptions is met, the petition will be considered timely. *See Commonwealth v. Gamboa–Taylor,* 562 Pa. 70, 753 A.2d 780, 783 (2000). A PCRA petition invoking one of these exceptions must "be filed within 60 days of the date the claims could have been presented." *Id.* (quoting 42 Pa.C.S.A. § 9545(b)(2)). The timeliness requirements of the PCRA are jurisdictional in nature and,

> accordingly, a PCRA court cannot hear untimely petitions. *Commonwealth v. Robinson,* 575 Pa. 500, 837 A.2d 1157, 1161 (2003).

Commonwealth v. Brandon, 51 A.3d 231, 233-34 (Pa. Super. 2012). *See also Commonwealth v. Cintora*, 69 A.3d 759, 762 (Pa. Super. 2013), *appeal denied*, 81 A.3d 75 (Pa. 2013); *Commonwealth v. Robinson,* 837 A.2d 1157, 1161 (Pa. 2003); *Commonwealth v. Smith*, 818 A.2d 494, 498 (Pa. 2003). When a petitioner seeks to invoke one of the Section 9545(b)(1)(i)-(iii) exceptions, the petitioner has the burden to plead in the petition and subsequently to prove that an exception applies. *Commonwealth v. Beasley,* 741 A.2d 1258, 1261 (Pa. 1999). Furthermore, any petition attempting to invoke an exception to the general timeliness requirement must be filed within 60 days of the date the claim could have been presented. 42 Pa.C.S. § 9545(b)(2).

A petitioner may not avoid a time bar by tailoring the factual basis of his claim in such a way as to misrepresent the actual nature of the claim raised. The date of the public availability of facts, rather than the publication of a specific report on or compilation of those facts, controls for the purposes of the PCRA time bar. *See Commonwealth v. Hackett*, 956 A.2d 978, 984 (Pa. 2008); *Commonwealth v. Fisher*, 870 A.2d 864, 870 (Pa. 2005); *Commonwealth v. Lark*, 746 A.2d 585, 588 n.4 (Pa. 2000). Publically available information cannot generally be considered unknown. *See Commonwealth v. Taylor*, 67 A.3d 1245, 1248-49 (Pa. 2013). While access to information in the public domain is not presumed for incarcerated *pro se* petitioners, representation by counsel provides such access. *Commonwealth v. Burton*, 121 A.3d 1063, 1072 (Pa. Super. 2015).

The instant PCRA petition was filed on November 30, 2015. The crux of Defendant's claim is that he was denied his constitutional right to due process as a result of judicial bias, or the appearance thereof, on the part of Supreme Court Justice Eakin. Justice Eakin reviewed Defendant's appeal to the Pennsylvania Supreme Court and authored the majority opinion denying him relief. Defendant claims this bias was exposed and demonstrated through an email scandal in which certain Justices, including Justice Eakin, were involved in authoring and/or forwarding emails containing racially offensive jokes and pornographic images along with other objectionable material. These emails were distributed among the Justices, certain district attorneys, and other government employees.[1] As this petition was filed well beyond the traditional one year time bar, Defendant claimed that two exceptions to the time bar apply. Specifically, Defendant claimed that his failure to raise this claim at an earlier date was the result of governmental interference and that this claim is predicated on newly discovered evidence.[2] In order to meet the 60 day timeliness requirement, Defendant asserted that he first became aware of the facts underlying this petition (namely, the email scandal involving Justice Eakin) on October 8, 2015, when an online article reported that the news outlet Philly.com had obtained a number of racist emails which had been sent or received by Justice Eakin.[3]

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[1] Petition for Writ of Habeas Corpus and for Collateral Relief from Criminal Conviction Pursuant to the Post Conviction Relief Act, 42 Pa.C.S. § 9541 et seq., ¶¶ 31-34, 42-52, 59-61, filed on November 30, 2015.

[2] Id. at ¶ 11. In the supplement attached to Defendant's most recent motion to amend his petition, he claims that all three exceptions to the PCRA time bar apply and indicates that the recent case of *Williams v. Pennsylvania*, 136 S.Ct. 1899 (2016) is applicable and applies retroactively. *See* Petitioner's Response and Objections to the Court's Memorandum Opinion and Order Issuing Notice of Intent to Dismiss Pursuant to Pa.R.Crim.P. 909(B) and Motion to Amend Post-Conviction Relief Act Petition, Attachment ¶¶ 74-92, filed on June 14, 2017.

[3] Petition for Writ of Habeas Corpus and for Collateral Relief from Criminal Conviction Pursuant to the Post Conviction Relief Act, 42 Pa.C.S. § 9541 et seq., ¶¶ 12-13, filed on November 30, 2015.

In its motion to dismiss the Commonwealth argued that the facts underlying this PCRA were publically available before Defendant's claimed date of October 15, 2015.[4] Specifically, the Commonwealth provided news articles from October 2014, which included articles from the same news source Defendant used as the basis for his timing. These articles implicated Justice Eakin in the developing scandal which previously primarily involved Supreme Court Justice McCaffery and described several emails which had been received and opened by Justice Eakin. These emails were described as pornographic and racist by the publishing source.[5] Further, Defendant was represented by counsel at this time and therefore had access to public news sources.[6]

In response Defendant claimed that these earlier news articles were not enough to form the basis of a PCRA petition in that bias claims require a pattern of conduct which was not demonstrated by the earlier email revelations and only became known through the public receipt of large quantities of these emails.[7] As a result, Defendant asserted that filing a PCRA petition when Justice Eakin was first implicated would have been premature.[8]

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[4] Commonwealth's Motion to Dismiss Based on a Lack of Jurisdiction and/or Cognizability, and Motion to Vacate and Reconsider Discovery Order, or in the Alternative, Petition for Permission to Appeal under Pa.R.A.P. 1311 and Request for Addition of 42 Pa.C.S. § 702(b) Statement, ¶¶ 2-3, filed on February 7, 2017.

[5] Id. at ¶ 3.

[6] Petition for Writ of Habeas Corpus and for Collateral Relief from Criminal Conviction Pursuant to the Post Conviction Relief Act, 42 Pa.C.S. § 9541 et seq., ¶¶ 7-8, filed 11/30/2015; Commonwealth's Motion to Dismiss Based on a Lack of Jurisdiction and/or Cognizability, and Motion to Vacate and Reconsider Discovery Order, or in the Alternative, Petition for Permission to Appeal under Pa.R.A.P. 1311 and Request for Addition of 42 Pa.C.S. § 702(b) Statement, Memorandum of Law p. 19, filed on February 7, 2017.

[7] Petitioner's Response to Commonwealth's "Motion to Dismiss Based on a Lack of Jurisdiction and/or Cognizability, and Motion to Vacate and Reconsider Discovery Order, or in the Alternative, Petition for Permission to Appeal under Pa.R.A.P. 1311 and Request for Addition of 42 Pa.C.S. § 702(b) Statement", pp. 7-10, filed on March 6, 2017.

[8] Id. at p. 7.

The email scandal which forms the basis of Defendant's claim was widely publicized and occurred over the course of several years. In filing under one or more exceptions to the one year time bar, Defendant needed to file his petition within 60 days of the first day he could have filed a petition based on the relevant claims. In this case, those claims were predicated upon Defendant's contention that the bias of Justice Eakin was demonstrated both through the sending and receiving of objectionable emails and the potential for inappropriate ex parte communications to have occurred through those emails. Justice Eakin was publically tied to the email scandal on October 18, 2014, and potentially earlier. This information was public knowledge, having been published in news sources (including the source which Defendant used as the foundation of his petition, albeit at a much later date). While the full extent of the scandal was not known in October of 2014, the available information was sufficient to form the basis of Defendant's claim. As Defendant was represented by counsel at that time, it is presumed that he had access to this publically available information and was required to file this petition within 60 days of that date, by December 17, 2014. 42 Pa.C.S. § 9545(b)(2). This petition was filed on November 30, 2015, and was therefore untimely under 42 Pa.C.S. § 9545(b)(2).

II. PCRA Hearing Requirement

Defendant contends that the court erred by failing to have a hearing regarding the timeliness of the filing of his PCRA petition. This contention is without merit.

It is well settled that there is no absolute right to a hearing on a PCRA petition. *See Commonwealth v. Burton*, 121 A.3d 1063, 1067 (Pa. Super. 2015); *Commonwealth v. Wah*, 42 A.3d 335, 338 (Pa. Super. 2012); *Commonwealth v. Springer*, 961 A.2d

1262, 1264 (Pa. Super. 2008). The court may decline to hold a PCRA hearing if "there is no genuine issue concerning any material fact and the petitioner is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings." *Commonwealth v. Johnson*, 945 A.2d 185, 188 (Pa. Super. 2008) (quoting *Commonwealth v. Taylor*, 933 A.2d 1035, 1040 (Pa. Super. 2007)). If a PCRA petition is untimely filed, the court is without jurisdiction to hear the petition and does not err in dismissing the petition without a hearing. *Commonwealth v. Marshall*, 947 A.2d 714, 723 (Pa. 2008); *see Commonwealth v. Walters*, 135 A.3d 589, 591-92 (Pa. Super. 2016).

In the instant case, Defendant filed this petition, his third PCRA petition, on November 30, 2015 while his second PCRA petition was still pending. As Defendant's judgment became final on January 10, 2000, Defendant must first allege one of the timeliness exceptions listed in 42 Pa. C.S. § 9545 (b)(1) and secondly file his PCRA petition under this section within sixty days of the date his claim could have been presented. As Defendant failed to file this PCRA within sixty days of the public availability of the facts undergirding his claims, this Court was without jurisdiction to entertain his claims and no purpose would have been served by further proceedings.[9] The Court did not err by declining to hold a hearing on this petition.

III. PCRA Amendment

Defendant asserts that the Court erred by denying his motion to amend his PCRA petition. This assertion is without merit.

While a petitioner does not have an absolute right to amend a PCRA petition, "[a]mendment shall be freely allowed [by the court] to achieve substantial justice."

[9] See Section I PCRA Timeliness supra.

Pa.R.Crim.P. 905(a). The purpose of Rule 905 is to "provide PCRA petitioners with a legitimate opportunity to present their claims to the PCRA court in a manner sufficient to avoid dismissal due to a correctable defect in claim pleading or presentation." *Commonwealth v. Sepulveda*, 144 A.3d 1270, 1278-79 (Pa. 2016) (quoting *Commonwealth v. McGill*, 832 A.2d 1014, 1024 (Pa. 2003)). PCRA amendment is only permitted by direction or leave of the court and cannot be amended by the petitioner alone. *Commonwealth v. Baumhammers*, 92 A.3d 708, 730 (Pa. 2014). If a court permits the filing of a supplement and subsequently considers any additional issues raised in the supplement, it may be treated as an amendment to the PCRA petition. *See Commonwealth v. Boyd*, 835 A.2d 812, 816 (Pa. Super. 2003).

Following the Court's notice of intention to dismiss[10] Defendant filed both an objection to the proposed dismissal and a request to amend his PCRA petition on June 14, 2017.[11] Attached to this request was a "supplement" to Defendant's PCRA petition.[12] This supplement was 58 pages in length and further detailed the conduct of Justice Eakin and the findings of the Judicial Conduct Board which undergird the merits of Defendant's petition. Defendant also included discussion of the recent United States Supreme Court decision in *Williams v. Pennsylvania*, 136 S.Ct. 1899 (2016) claiming this decision is both retroactive and applicable to the case at hand and thereby cures

[10] Opinion and Order of Court, filed on May 8, 2017.

[11] Petitioner's Response and Objections to the Court's Memorandum Opinion and Order Issuing Notice of Intent to Dismiss Pursuant to Pa.R.Crim.P. 909(B) and Motion to Amend Post-Conviction Relief Act Petition, filed on June 14, 2017.

[12] Petitioner's Response and Objections to the Court's Memorandum Opinion and Order Issuing Notice of Intent to Dismiss Pursuant to Pa.R.Crim.P. 909(B) and Motion to Amend Post-Conviction Relief Act Petition, Attachment, filed on June 14, 2017.

any timeliness issue.[13] Finally, large excerpts from a recent report created by a social psychologist analyzing Justice Eakin's decision making in light of these emails make up the majority of the last fifteen pages of Defendant's supplement.[14]

While the Court did not permit Defendant to amend his original PCRA petition[15], his proposed amendments were considered solely for the purpose of determining if they might somehow cure Defendant's lack of timeliness in filing and grant jurisdiction to the Court. Even if it is determined that the Court's examination of Defendant's supplement is treated as an amendment under *Boyd* the changes proposed by Defendant fail to cure the issue of timeliness.

The recent decision in *Williams* has not been determined to apply retroactively on collateral review and the facts that form the basis of the *Williams* decision are not substantially similar to the facts in this case.[16] Additionally, the reports compiled by the social psychologist are based upon the same facts which form the foundation of this

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[13] Petitioner's Response and Objections to the Court's Memorandum Opinion and Order Issuing Notice of Intent to Dismiss Pursuant to Pa.R.Crim.P. 909(B) and Motion to Amend Post-Conviction Relief Act Petition, Attachment ¶¶ 77-81, filed on June 14, 2017. This discussion of *Williams* was also included in Petitioner's Motion for Discovery, an Opportunity to Supplement/Amend His Petition, an Evidentiary Hearing, and for Additional Time to Provide Exhibits and a Witness Certification, filed on June 15, 2016.

[14] Petitioner's Response and Objections to the Court's Memorandum Opinion and Order Issuing Notice of Intent to Dismiss Pursuant to Pa.R.Crim.P. 909(B) and Motion to Amend Post-Conviction Relief Act Petition, Attachment ¶¶ 122-135, filed on June 14, 2017.

[15] Order of Court, filed on August 2, 2017.

[16] In *Williams*, the defendant was convicted and sentenced to death. At the time of trial then District Attorney Ronald Castille approved the prosecutor's request to seek the death penalty for Williams. Nearly thirty years later a PCRA petition filed by Williams made its way to the Pennsylvania Supreme Court. In the intervening years, Castille had been elected to the Court and was serving as Chief Justice when Williams' petition arrived. Williams filed a motion requesting Chief Justice Castille recuse himself, however Chief Justice Castille denied this motion and took part in the decision and opinion of the Court on Williams' petition. *Williams v. Pennsylvania*, 136 S.Ct. 1899, 1904-05 (2016). After review by the United States Supreme Court, it was determined that Chief Justice Castille's personal involvement in a critical decision in Williams' case gave rise to an "unacceptable risk of actual bias" which "so endangered the appearance of neutrality" that Chief Justice Castille's participation in the PCRA decision violated due process. *Williams v. Pennsylvania*, 136 S.Ct. 1899, 1908-09 (2016). In the instant case Justice Eakin had no contact or involvement with Defendant or his case prior to hearing his initial appeal.

PCRA petition: the sending and receiving of emails containing abhorrent jokes of a racial and sexual nature. The existence of these emails was public knowledge over sixty days prior to the filing of the instant PCRA petition and a new report based upon these facts does not create a later date to raise a claim under the PCRA time bar.[17] Even if the Court permitted Defendant to file an amended PCRA petition there is nothing to indicate he could raise claims which this Court could entertain and the denial of his amendment request was proper.

IV. PCRA Discovery Request

Defendant contends that the Court erred by denying his motions for discovery. This contention is wholly without merit.

Discovery is strictly limited in PCRA petitions. "[N]o discovery shall be permitted at any stage of the proceedings, except upon leave of court after a showing of exceptional circumstances" or "on the first counseled petition in a death penalty case, no discovery shall be permitted at any stage of the proceedings, except upon leave of court after a showing of good cause." Pa.R.Crim.P. 902(e). A "showing of good cause requires more than just a generic demand for. . .evidence" which might support a defendant's allegations if he is permitted to review the requested materials. *Commonwealth v. Reid*, 99 A.3d 470, 500 (Pa. 2014). Subsequent PCRA petitions in capital cases are subject to the exceptional circumstances requirements of Pa.R.Crim.P.902(e)(1). *Commonwealth v. Lark*, 746 A.2d 585, 591 (Pa. 2000). Exceptional circumstances, such that discovery is warranted in a case, are to be determined by the PCRA court. *Commonwealth v. Frey*, 41 A.3d 605, 611 (Pa. Super.

[17] *See Commonwealth v. Hackett*, 956 A.2d 978, 984 (Pa. 2008); *Commonwealth v. Fisher*, 870 A.2d 864, 870 (Pa. 2005); *Commonwealth v. Lark*, 746 A.2d 585, 588 n.4 (Pa. 2000).

2012). Overly broad discovery requests in the PCRA setting are typically viewed with suspicion and cannot be all-encompassing generic demands for hypothetical evidence. *See Commonwealth v. Williams*, 86 A.3d 771, 789 (Pa. 2014); *Commonwealth v. Collins*, 957 A.2d 237, 272 (Pa. 2008). "Discovery in PCRA proceedings cannot be used as an excuse for engaging in a 'fishing expedition'." *Commonwealth v. Edmiston*, 65 A.3d 339, 353 (Pa. 2013) (internal citations omitted).

Initially we note that no discovery was warranted as this PCRA was untimely filed, however, assuming *arguendo* that the instant petition was timely filed, discovery was still unwarranted. Voluminous discovery requests have been a hallmark of the instant PCRA petition. While the initial filing only requested "such discovery as is necessary for full and fair resolution of the claims contained in [Defendant's] petition"[18] the subsequent lists of requested discovery documents belied this innocuous language.[19] Defendant's first motion for discovery included a request for:

> Any and all electronic messages (including emails and text messages) and attachments exchanged between employees working in the Cumberland County District Attorney's Office or other law enforcement departments and judges of the Cumberland County Court of Common Pleas, Pennsylvania Superior Court and justices on the Pennsylvania Supreme Court from June 1996 to March 15, 2016 that relate to Petitioner or his case, or which may reasonably be deemed offensive because of content that relates to race, gender, ethnicity, violence toward women, xenophobia, homophobia, sexism, religious intolerance, class or immigration or stereotypes relating thereto.
>
> Any and all communications, including but not limited to notes, letters, emails, text messages, attachments and facsimiles exchanged between Cumberland County District Attorney Employees, including District Attorney Freed, and Justice Eakin and/or his attorneys, including, but not

[18] Post Conviction Relief Act Petition, filed on November 30, 2015.

[19] See Petitioner's Motion for Discovery, an Opportunity to Supplement/Amend His Petition, an Evidentiary Hearing, and for Additional Time to Provide Exhibits and a Witness Certification, filed on June 15, 2016; Petitioner's Response and Objections to the Court's Memorandum Opinion and Order Issuing Notice of Intent to Dismiss Pursuant to Pa.R.Crim.P. 909(B) and Motion to Amend Post Conviction Relief Act Petition, filed on June 14, 2017.

limited to Attorney's Williams C. Costopolous, Heidi F. Eakin and David J. Foster.

Any and all communications captured on Cumberland County computer servers, including but not limited to notes, letters, memoranda, writings, records, emails, attachments and facsimiles exchanged between Cumberland County jurists, specifically Judge Ebert, Judge Bayley and Judge Masland, and Justice Eakin and/or Justice Eakin's attorneys, including, but not limited to, Attorneys William C. Costopolous, Heidi F. Eakin and David J. Foster.

Any and all communications, including but not limited to emails, attachments, notes, text messages, letters, writings, records, memoranda and facsimiles exchanged between Cumberland County jurists relating to Justice Eakin's disciplinary hearing and/or emails involving Justices Eakin or McCaffery;

Any and all documents previously disclosed to press organizations and/or otherwise made public;

Any and all electronic communications (including emails and text messages), attachments, communications, writings, memoranda, documents or records, including all associated material on Cumberland County servers that have been sent from and/or sent to Pennsylvania Supreme Court Justice J. Michael Eakin's private email account(s), including but not limited to his yahoo email account: wap092001@yahoo.com;

Any and all emails, attachments, communications, writings, memoranda, documents or records, including all associated material on Cumberland County servers that have been sent from and/or sent to Justice Eakin's state-issued email account: justice.eakin@pacourts.us;

Any and all emails, attachments, communications, writings, memoranda, documents or records, including all associated material on Cumberland County servers sent from and/or sent to any email account used by Justice Eakin under any aliases, including but not limited to "John Smith"; and

Any and all material exculpatory evidence arising from these communications for which the prosecution is under a continuing obligation to disclose....[20]

Defendant's proposed supplement to his petition included a similarly extensive list of requested discovery documents.

Discovery in collateral review is intended to be strictly limited, as indicated by the language of Pa.R.Crim.P. 902(e). This was not Defendant's first counseled PCRA

[20] Petitioner's Motion for Discovery, an Opportunity to Supplement/Amend His Petition, an Evidentiary Hearing, and for Additional Time to Provide Exhibits and a Witness Certification, ¶ 35, filed on June 15, 2016.

petition, and therefore he must demonstrate exceptional circumstances in order for the Court to grant his discovery request. Defendant failed to demonstrate these circumstances. While the facts underlying his claim reflect a disturbing state of affairs within the Pennsylvania Judiciary, Defendant did not demonstrate that this circumstance existed during the time of his conviction and appeal or that it affected his case in any way. No evidence was produced or alluded to that discusses or touches on Defendant's case specifically. Likewise, his discovery request was not for specific, known, material, but rather he cast a wide net, hoping to snare something of both relevance and substance. Such a discovery request within the framework of collateral relief is a forbidden fishing expedition. Assuming the instant PCRA petition was timely filed, Defendant failed to demonstrate the exceptional circumstances required for *any* discovery and, even if discovery was appropriate, Defendant's generic, all-encompassing discovery request would have been impermissible.

V. Cumberland County District Attorney Disqualification

Defendant contends that the Court erred by denying his motion to disqualify the Cumberland County District Attorney's office from representing the Commonwealth in this matter. This contention is without merit.

Defendant alleged that the Cumberland County District Attorney's office had an actual conflict of interest in this case or presented such an appearance of impropriety that it was necessary to disqualify the entire office. Defendant's argument can be broken into three separate contentions. First, that there was impropriety and the appearance of bias in the office due to improper communications between the District Attorney's office and the Supreme Court. Second, that the District Attorney inserted himself as a necessary witness to the events which form the foundation of the PCRA

petition. Third, Defendant alleged that the District Attorney had a vested personal interest in protecting his reputation as well as the reputation of a sitting judge.

In order to remove a prosecutor there must be "an actual conflict of interest affecting the prosecutor . . . in the case" and in a case where such a conflict exists, a defendant "need not prove actual prejudice in order to require that the conflict be removed." *Commonwealth v. Orie*, 88 A.3d 983, 1021 (Pa. Super. 2014) (quoting *Commonwealth v. Eskridge*, 604 A.2d 700, 702 (Pa. 1992)). However, "[m]ere allegation[s] of a conflict of interest . . . are insufficient to require replacement of a district attorney." *Commonwealth v. Stafford*, 749 A.2d 489, 494 (Pa. Super. 2000) (referencing *Commonwealth v. Mulholland*, 702 A.2d 1027, 1037 (Pa. 1997)). Courts are to closely examine the specific facts of a case in order to determine if an actual conflict of interest exists. *Commonwealth v. Sims*, 799 A.2d 853, 857 (Pa. Super. 2002). The disqualification of a district attorney due to a mere allegation of impropriety without an actual conflict of interest would place an enormous burden on the strained resources of that office. *Commonwealth v. Sims*, 799 A.2d 853, 857 (Pa. Super. 2002). Additionally, mere animosity on the part of the prosecution, directed toward the defendant, does not require the replacement of a prosecutor. *Commonwealth v. Stafford*, 749 A.2d 489, 495 (Pa. Super. 2000).

At the appellate level, there must be a showing of actual impropriety on the part of the prosecutor that taints the proceeding in order to warrant his disqualification and removal. *Commonwealth v. Breakiron*, 729 A.2d 1088, 1092 (Pa. 1999) (referencing *Commonwealth v. Harris*, 460 A.2d 747 (Pa. 1983)). The burden of showing such impropriety falls on the defendant. *Commonwealth v. Breakiron*, 729 A.2d 1088, 1092 (Pa. 1999).

Ex Parte communication is "the inclusion of one party in a consultation with a judge over the exclusion of another." *Commonwealth v. Murray*, 83 A.3d 137, 155 (Pa. 2013) (citing Black's Law Dictionary).

A. Improper Communications and the Appearance of Bias

Defendant's motion stemmed from the fact that Cumberland County Court of Common Pleas Judge Ebert was the District Attorney who initially prosecuted this case, and was party to at least one of the emails sent by Justice Eakin. The current Cumberland County District Attorney David Freed also received at least one similar email sent by Justice Eakin. Defendant claimed that Judge Ebert's receipt of this email created an appearance of bias and impropriety and constituted impermissible *ex parte* communications with the District Attorney's office.

This generalized assertion of bias and impropriety forms the basis of Defendant's underlying PCRA. However, in this motion Defendant failed to provide any examples of inappropriate *ex parte* communication between the *current* District Attorney David Freed and Justice Eakin. Freed's receipt of an impersonal email from Justice Eakin did not rise to the level of *ex parte* communication as it did not amount to "the inclusion of one party in a consultation with a judge over the exclusion of another." *Commonwealth v. Murray*, 83 A.3d 137, 155 (Pa. 2013). Moreover, this email did not appear to have any bearing on Defendant's current PCRA petition outside of mere allegation and vague innuendo that an inappropriate relationship existed between the District Attorney's Office and Justice Eakin. There did not appear to be any contact between Freed and Justice Eakin that would rise to the level of *ex parte* communication or impropriety.

B. District Attorney as Witness

Freed wrote a letter of support on behalf of Justice Eakin to the Court of Judicial Discipline after these emails came to light. Matthew P. Smith, the Chief Deputy District Attorney of Cumberland County, who previously was active in this case, also wrote a letter of support for Justice Eakin to the Court of Judicial Discipline. According to Defendant, the receipt of one of the referenced emails and writing the letter of support placed Freed in the position of a witness in Defendant's current PCRA petition which would run afoul of the Advocate-Witness Rule.[21]

Freed's passive receipt of an email that did not reference or implicate Defendant and his penning of a letter of support does not make him a necessary witness to the events referenced in the PCRA petition (bias and improper communication on the part of Justice Eakin and Judge Ebert) as proscribed by the Advocate-Witness Rule. In order to establish that an attorney is a necessary witness in a proceeding, the proposed testimony of that witness must be relevant and unobtainable elsewhere.[22] There is nothing to indicate that Freed's testimony would be required to prove any of Defendant's underlying allegations and indeed, Defendant has not even indicated the subject matter of any potential testimony from Freed. Defendant's general allegations, without specific

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[21] (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a *necessary witness* unless:
(1) the testimony relates to an uncontested issue;
(2) the testimony relates to the nature and value of legal services rendered in the case; or
(3) disqualification of the lawyer would work substantial hardship on the client.
Pa. R.P.C. 3.7 (emphasis added).

[22] While not binding, we find the analysis and conclusions of our sister courts to be persuasive in defining the term "necessary witness" as found in Pa. R.P.C. 3.7. See *Albert M. Greenfield & Co. v. Alderman*, 52 Pa. D. & C.4th 96, 115 (C.P. 2001) (finding a necessary witness is one with relevant and otherwise unobtainable information); *In re Lands Situate & Being in Scranton*, 46 Pa. D. & C.4th 66, 99 (C.P. 1998) (defining an attorney as a necessary witness only when no other witness can testify on the subject and the testimony will not be cumulative). *See also Rounick v. Fireman's Fund Ins. Co.*, No. Civ. A. 95-7086, 1996 U.S. Dist. LEXIS 6864, at *3 (E.D. Pa. May 20, 1996) (finding a witness is necessary if he has crucial information in his possession which must be divulged).

and relevant inappropriate actions or associations by District Attorney Freed, do not rise to the level of an actual conflict of interest or impropriety, particularly in an appellate setting. *See Commonwealth v. Sims*, 799 A.2d 853, 857 (Pa. Super. 2002); *Commonwealth v. Breakiron*, 729 A.2d 1088, 1092 (Pa. 1999).[23] A letter of support on behalf of a Justice to the Court of Judicial Discipline does not rise to the level of actual conflict of interest in this case. Just as mere animosity towards a defendant does not require the replacement of a prosecutor, similarly, mere goodwill towards the judge cannot demand the same. *See Commonwealth v. Stafford*, 749 A.2d 489, 495 (Pa. Super. 2000). The lack of inappropriate actions or associations on the part of District Attorney Freed militated against disqualification of the District Attorney's office.

C. Personal Interest

Defendant claimed that Freed had a vested and personal interest in the outcome of this case because it could affect the reputations of both Judge Ebert and Freed. Defendant provided no evidence to indicate that the reputation of Freed is in jeopardy based on the outcome of Defendant's PCRA petition. Defendant also failed to provide any evidence that Freed has a vested and personal interest in preserving Judge Ebert's reputation. Any interest the District Attorney's office may have in preserving the reputation of District Attorney Freed and Judge Ebert does not give rise to an actual conflict of interest as is required for disqualification. *See Commonwealth v. Orie*, 88 A.3d 983, 1021 (Pa. Super. 2014); *Commonwealth v. Sims*, 799 A.2d 853, 857 (Pa. Super. 2002); and *Commonwealth v. Stafford*, 749 A.2d 489, 494 (Pa. Super. 2000).

[23] District Attorneys have been disqualified for conflicts involving *specific* pecuniary interest and personal interest. *See Commonwealth v. Eskridge*, 604 A.2d 700, 701 (Pa. 1992) (finding a conflict where district attorney's law firm was involved in a personal injury suit against defendant); *Commonwealth v. Balenger*, 704 A.2d 1385, 1386 (Pa. Super. 1997) (granting a new trial where the prosecutor maintained a romantic relationship with the defendant's girlfriend).

Defendant did not meet his burden to show actual impropriety on the part of the Cumberland County District Attorney that tainted the proceeding and required the disqualification of him or his office. Therefore, this Court did not err in denying Defendant's motion to disqualify the Cumberland County District Attorney's office from representing the Commonwealth in these proceedings.

BY THE COURT:

Herman, D., S.J.

Distribution:

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Attorney for Petitioner

COMMONWEALTH v. ANTYANE ROBINSON	IN THE COURT OF COMMON PLEAS OF CUMBERLAND COUNTY, PENNSYLVANIA CRIMINAL CP-21-CR-1183-1996

IN RE: COMMONWEALTH'S MOTION TO DISMISS BASED ON A LACK OF JURISDICTION AND/OR COGNIZABILITY, AND MOTION TO VACATE AND RECONSIDER DISCOVERY ORDER, OR IN THE ALTERNATIVE, PETITION FOR PERMISSION TO APPEAL UNDER Pa. R.A.P. 1311 AND REQUEST FOR ADDITION OF 42 Pa. C.S. § 702(b) STATEMENT

BEFORE HERMAN, S.J.

ORDER OF COURT

AND NOW, this 31st day of **July, 2017**, upon consideration of Petitioner's Post Conviction Relief Act petition, filed on November 30, 2015, the Commonwealth's Motion to Dismiss, filed on February 7, 2017, Petitioner's response and amendment request to the Court's Notice of Intention to Dismiss filed on June 14, 2017, the Commonwealth's Response to Petitioner's response and amendment request filed on June 26, 2017, and Petitioner's Motion for Leave to File a Reply filed on July 3, 2017, it is hereby **ORDERED** as follows:

1. Petitioner's request to amend his PCRA is **DENIED** as Petitioner's intended amendments fail to address this court's jurisdiction where:
    a. Petitioner's supplemental averments discussing *Williams v. Pennsylvania*, 136 S.Ct. 1899 (2016) are not applicable to the instant Petition as Justice Eakin was not personally involved in Petitioner's case before it rose to the Pennsylvania Supreme Court on appeal; and

b. Petitioner's supplemental averments regarding recently completed reports asserting Justice Eakin exhibited implicit bias against Petitioner are based upon the same facts and evidence as Petitioner's initial averments; and

2. Petitioner's request to respond to the Commonwealth's Response to his Response and Amendment request is **DENIED** as there has been ample opportunity for discovery, amendment, argument and response to all issues relevant to the determination of the timeliness of the petition; and

3. It appearing that Petitioner's PCRA Petition is untimely and this court is without jurisdiction to hear his claims, Petitioner's PCRA petition is **DISMISSED**.

Douglas W. Herman, S.J.

Distribution:

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For the Commonwealth

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