No._____

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD MITCHELL TEDFORD,
Petitioner,
vs.
COMMONWEALTH OF PENNSYLVANIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Donald Mitchell Tedford, by counsel, Adam, B. Cogan, Esquire, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania.

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QUESTIONS PRESENTED

The question presented in this case is:

Whether the Post-Conviction Relief Act procedures of Pennsylvania law were applied to Petitioner in violation of his Fifth and Fourteenth Amendment rights to Due Process of Law when he was denied the opportunity to seek merits consideration of his claim that hundreds of pages of discoverable information were wrongly withheld from him solely on the basis of the *per se* ineffectiveness of his prior counsel?

LIST OF PARTIES

Petitioner, Donald Mitchell Tedford, was the defendant in the trial court and the appellant in the Supreme Court of Pennsylvania. Respondent, the Commonwealth of Pennsylvania, was the plaintiff in the trial court and the appellee in the Supreme Court of Pennsylvania.

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PETITION FOR A WRIT OF CERTIORARI

Donald Mitchell Tedford respectfully petitions this Court for a writ of certiorari to review the Supreme Court of Pennsylvania's judgment denying him post-conviction relief in this death penalty case.

OPINIONS BELOW

The Opinion and Order of the Supreme Court of Pennsylvania affirming the trial court's denial of post-conviction relief is reported at Commonwealth v. Tedford, 228 A3d 891, 905 (Pa. 2020) and attached hereto as Appendix A.

JURISDICTION

The Opinion and Order of the Supreme Court of Pennsylvania affirming the denial of post-conviction relief were entered on April 22, 2020. On March 19, 2020, this Court extended the time to file a petition for a writ of certiorari due on or after that date to 150 days from the date of the judgment in question. The jurisdiction of this Honorable Court is invoked pursuant to Title 28, United States Code, §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issues raised herein concern the Fifth and Fourteenth Amendment, Section 1, to the United States Constitution.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due

> process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment, Section 1, to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The most focused summary of this matter begins with the murder of Jeannine Revak in western Pennsylvania in 1986.

The police investigation focused entirely upon Donald Tedford, a man who was on work release from an assault conviction and employed as a manager in a home furnishings store in Butler County, Pennsylvania called the Finishing Touch. Revak had applied for a job there and went missing on a day where she mysteriously called off from work, claiming an illness she did not have and not telling her husband that she was going to meet with Tedford at the Finishing Touch. Her husband never reported her missing at all the rest of that day or that night and only called the police the next day. When he was called to identify her body, police on the scene reported that Jeanine Revak's husband made an incriminating statement that could readily be construed as a confession to her murder ("I'm sorry, I couldn't help it" or "I'm sorry, I didn't mean it").

Jeanine Revak's body had been found by hunters in a rural area of Washington County, Pennsylvania many miles away from the Finishing Touch. From the outset, Tedford emphatically proclaimed his innocence. He admitted that he and Revak had an affair, including sex that day at the store, but testified that she left unharmed thereafter.

The lack of physical evidence linking Tedford to Jeanine Revak's murder should have led to Tedford's acquittal.

When Jeanine Revak' body was discovered on January 11, 1986, her clothing was drenched with blood from a severe blow to her head that caused a laceration to her scalp which resulted in profuse bleeding. Around her neck was a deep strangulation wound that appeared to have been caused by a very thin garrote. In order for Tedford to have been guilty, he would have to have murdered Revak at the Finishing Touch in the middle of his work shift and then disposed of her body in the distant Washington County wooded area much later that evening.

But the medium sized Finishing Touch had wall-to-wall carpeting and was literally crammed with carpets, lampshades, drapes and a variety of other textile materials that were especially susceptible to soaking up *any* blood the extreme blow to Revak's head produced. If Tedford murdered Revak in the store by violently striking her head with such force that a huge blood loss immediately ensued and followed it up with a garrote that dug deep into her neck, the Finishing Touch should have been strewn with traces of Revak's blood. Yet despite prompt and thorough forensic examination by the Pennsylvania State Police (hereinafter PSP),

no speck of blood whatsoever was found at the Finishing Touch to support the theory that Revak was brutally murdered there.

Nor was any trace of blood or other evidence found in the tight hatchback car the Commonwealth alleged Tedford used to transport Revak's bloody body on the 50 plus mile trip from Butler County to the backwoods of Washington County where her body was found.

And at no point did the Commonwealth produce a murder weapon, a fingerprint or any shed of physical evidence to tie Tedford to the murder or establish the Finishing Touch was the site of Ms. Revak's demise.

Nevertheless, Tedford was put on trial in Butler County Pennsylvania and the Commonwealth sought the death penalty.

His lawyer did absolutely nothing to prepare for the trial. The lawyer did not file a discovery motion or press the Commonwealth for any discovery. Then and now the rules of discovery in the Commonwealth of Pennsylvania were much like the rules in every jurisdiction requiring the Commonwealth to turn over the statements of the defendant, statements of witnesses, physical evidence, the results of scientific tests, identification procedures and any exculpatory evidence pursuant to the *Brady* Rule. But Tedford's defense lawyer accepted at face value the Commonwealth's assurance that they had given him everything that he was entitled to receive by way of discovery. He hired no private investigator and did no independent investigation of the matter on his own.

The only meaningful forensic evidence the Commonwealth presented at trial came from a PSP criminalist trained in microscopic hair and fiber analysis by the FBI.

The criminalist testified that he found a pubic hair on Revak's underpants that did not match her or her husband but was consistent with Tedford's based upon his "microscopic analysis." The criminalist additionally testified that he compared vegetable fibers found on Revak's clothing with fibers from twine found at the Finishing Touch as well as carpet backing fibers from the store and concluded that they were consistent. The criminalist elaborated that the vegetable fibers on Revak's clothing absolutely could not have come from where her body was found or from her residence. In addition, the criminalist testified that he removed fibers from the decedent's blouse and Tedford's ski sweater and that the fibers had the same "microscopic characteristics" "optical properties" and additional similarities.

Unbeknownst to Tedford at the time of trial, however, the criminalist's testimony was junk science.

Indeed, it was not until April 20, 2015, that the FBI announced the results of a review of cases in which FBI trained analysts, like the PSP criminalist at Tedford's trial, testified for the prosecution. In their report, the FBI concluded that examiners' testimony in at least 90 percent of trial transcripts the Bureau analyzed as part of its review contained erroneous statements and that 26 of 28 FBI agent/analysts either provided testimony with erroneous statements or submitted laboratory reports with erroneous statements. *Report of the United States*

Department of Justice, the Federal Bureau of Investigation, the Innocence Project and the National Association of Criminal Defense Lawyers (April 20, 2015).

The PSP criminalist's testimony was, however, taken at face value.

The thrust of the Commonwealth's case at trial hinged on the testimony of two jailhouse informants who testified that Tedford confessed to her rape and murder.

The more extensive testimony of the informants was given by Michael Ferry. Ferry alleged that Tedford made incriminating statements to him (including a statement about Tedford having "hot nuts" upon which the Commonwealth's theory of the case) while incarcerated at the Butler County Jail awaiting trial.

Since the trial, however, Ferry recanted his trial testimony and stated firmly that he testified falsely against Tedford as a result of promises of leniency that were never made known to Tedford's attorney.

Indeed, Ferry only came forward with his story after the police went on television *asking for help in explaining why Revak's vehicle was located where it was found* and Ferry admitted to making up Tedford's confession to benefit himself by filling in an otherwise impossible gap in the timeline of the case.

Furthermore, at least two witnesses were available to testify that Ferry concocted his story to falsely implicate Tedford in order to secure leniency from the Commonwealth.

Neither of these witnesses, however, was called at trial.

The other Commonwealth informant was Christopher White, a lifelong petty thief who blandly testified that Tedford confessed to him that he raped and murdered Jeanine Revak without any corroborating details whatsoever.

Since Tedford's conviction, however, information surfaced indicating that White suffered substantial mental health problems which predated his trial testimony. Indeed, White revealed to Tedford's private investigator that he suffered serious mental health problems throughout his life and he was housed in an institution dedicated to treat inmates with severe mental health issues at the time of the private investigator's interview.

None of this was disclosed by the Commonwealth and White's testimony went virtually un-impeached at trial.

Not surprisingly, Tedford was found guilty of Murder in the First Degree and Rape. Tedford's steadfast belief in his own innocence compelled him to direct his lawyers not to put on any evidence in mitigation, although such evidence most certainly existed. Tedford refused to beg for his life from a system which had wrongfully convicted him. The jury recommended and the judge imposed the death penalty.

After his direct appeals failed, Commonwealth v. Tedford, 567 A.2d 610 (Pa. 1989), Tedford secured new counsel who returned to the courts of Pennsylvania and filed a petition under the Post-Conviction Relief Act, Title42, Pa.C.S. §9541 et seq. That act is discussed in more detail later. Conjoined with that petition was a request for discovery material but that request was rejected by the trial court and

affirmed by the Supreme Court of Pennsylvania on two grounds. First, the nature of the request was a boilerplate filing with no specificity and was rejected under the limited discovery rules of Pennsylvania for PCRA actions for lack of specificity. But more importantly, the request was denied because the Commonwealth continued to represent to the court that there was no further information that could be discovered. Tedford lost his first PCRA application after a perfunctory hearing granted him on a question of conflict of interest, and the denial was affirmed by the Supreme Court of Pennsylvania. Commonwealth v. Tedford, 781 A.2d 1167 (Pa. 2001).

With the same lawyers, Tedford moved for Habeas Corpus relief pursuant to Title 28, U.S.C. §2254 in the United States District Court for the Western District of Pennsylvania. Tedford v. Beard, et. al., Civil No.: 09-409 (W.D.Pa. 2010).

Once again, he requested discovery and once again the Commonwealth (represented by the Attorney General of Pennsylvania since Tedford's first PCRA was pending), assured the court on the record that there was no further information to be discovered. The discovery request was denied.

Essentially, for 25 years, the Commonwealth assured Tedford and the Court that all of the information he was entitled to receive had been tendered and that no further discovery existed which could have been disclosed.

Putting it bluntly, these representations were false.

In the midst of his federal habeas corpus litigation, Tedford's lawyers filed a Right to Know Law request under the law of Pennsylvania, Title 65, P.S. §§ 67.101

et seq., and while that request was formally denied, they received a letter dated March 4, 2011 from the Pennsylvania State Police which acknowledged that 800 pages of information gathered during the investigation was in their possession.

By the most generous rendering, Tedford received only 40 to 45% of that material prior to his trial.

What Tedford knows about these pages is the categories in which the state police had them organized. Those categories bare names such as "crime report", "incident report", "interviews", "investigative action", "property recovered", "medical information", "suspect information", "diagrams" "Cranberry Township Police information", and "psychiatric reports" amongst others.

These categories of information more than strongly suggest the presence of *Brady* material within them. There are approximately 56 pages of "suspect" files, although nothing that was revealed to Tedford prior to trial suggested that the police had investigated any person as a suspect in this homicide other than Tedford.

Moreover, there are 31 pages in two separate files of "psychiatric records." From the outset of the inception of charges, however, Tedford protested his factual innocence and he did not defend this case on the basis of any form of insanity, diminished capacity, or any other mental infirmity defense. As he steadfastly asserted his innocence, he refused to offer any penalty phase evidence in mitigation. Jailhouse informant White could well have been the subject of those reports but nothing about White's mental condition was disclosed to Tedford for the purpose of impeaching White's testimony at trial.

While Tedford was asking the Habeas Court to rectify this problem, the lawyers he had at that time, without his knowledge, filed papers raising issues regarding the mitigation of his sentence. Tedford discharged those lawyers for going so directly against his wishes.

His new lawyers, those currently representing him in this matter, were appointed approximately one year after his previous lawyers had received the March 4, 2011 letter. At that point, they attempted to get the federal court to order discovery, but the District Court refused saying that the state court judgment on discovery was a legal impediment to the federal courts overruling those decisions. Tedford v. Beard, et. al., No. 09-409 DE 197 (Opinion and order dated September 29, 2014) (W.D.Pa. 2010).

The United States District Court, however, then suspended its actions and allowed Tedford time to return to state court to try to correct the previous rulings which had categorically denied him discovery there.

Tedford then commenced a second PCRA action in Butler County Court. He made extraordinarily detailed discover requests based upon the categories of information now known to exist as reflected in the March 4, 2011 letter. The Commonwealth could no longer deny the existence of these documents but instead turned to the well-worn road the Commonwealth tries to lead many PCRA applicants down, the road upon which the petition is dismissed without considering its merits on the basis that it is untimely. The trial court ultimately agreed and dismissed the case without a hearing and without addressing the outrageous

misrepresentations that the Commonwealth had previously made denying the existence of discovery, the blatant errors of his trial counsel, and thus a huge error committed by his first Habeas Corpus/PCRA counsel which failed to return to the Pennsylvania courts within 60 days of the time they received the March 4, 2011 letter in an action which under the Pennsylvania PCRA statute would have arguably given him the opportunity to assert that the second petition was timely.

The Pennsylvania Supreme Court then summarily affirmed the dismissal, ignoring its own precedent that would have given Tedford the opportunity to have had his petition considered on the merits. That ruling plainly forfeited his right to consideration because of the gross ineffectiveness of his trial and PCRA counsel. The outrageous misrepresentations by the Commonwealth attorneys regarding discovery were similarly buried as an insignificant matter to the court.

REASONS FOR GRANTING THE WRIT

THE PENNSYLVANIA SUPREME COURT'S APPLICATION OF PENNSYLVANIA'S POST-CONVICTION PROCEDURES VIOLATED PETITIONER'S RIGHTS TO DUE PROCESS UNDER THE FIFTH AND FOURTTENTH AMENDMENTS BY ARBITRARILY ENFORCING A JURISDICTIONAL TIME BAR CREATED SOLELY BY HIS PRIOR COUNSEL'S INEFFECTIVENESS WHILE DENYING THE PETITIONER THE OPPORTUNITY TO CHALLENGE THAT INEFFECTIVENESS IN ANY WAY.

Tedford has been severely prejudiced by the application of the Pennsylvania Post-Conviction Relief system which, in this case and others, operates in the following way in violation of his 5th and 14th Amendment Due Process rights:

1. While Pennsylvania Courts have recognized:

a. the obligation to provide persons convicted with a vehicle to raise Federal Constitutional challenges to their conviction;
b. that by providing such a post-conviction relief procedure, that procedure must conform to standards of Due Process required by the 5th and 14th Amendments; and,
c. that by providing that counsel will be appointed for individuals accessing the post-conviction procedure, such counsel must provide Constitutionally effective assistance;

2. in direct contradiction to these principles, Pennsylvania courts afford *no procedure* for any defendant to meaningfully challenge the effectiveness of the counsel appointed; and,

3. the Pennsylvania courts compound this unconstitutional defiance by ratifying a system whereby the ineffectiveness of counsel may forfeit for the defendant the right to raise substantive Constitutional claims through counsel's failure to meet strictly enforced timeliness requirements for filing, leaving the defendant without a means to obtain merits consideration of his claims and without the ability to assert his counsel's failure to act in a timely manner.

The critical flaws in this system are not merely alleged by Tedford. As demonstrated *infra.,* they are flaws the Pennsylvania Court system has *admitted* exist but which It refuses to remedy.

This systemic failure has worked a very specific prejudice for Tedford. It has kept from him over half of the 800 pages of discovery materials he should have had before trial which would assist in him proving that he is innocent of the crime charged.

From the moment Don Tedford was accused of the rape and bloody murder of Jeanine Revak he has adamantly proclaimed his innocence. He underscored that proclamation by categorically refusing to allow his lawyers to ever put forth evidence to mitigate his punishment despite the fact that such evidence was readily available. His reasoning was simple and profound: *As I did not commit this horrible crime, I will not beg for my life from those who seek to wrongly take it from me.*

What Tedford rightfully expected was that the Commonwealth of Pennsylvania would fulfill the essential promise of Due Process It and every other jurisdiction must make to a criminal defendant pursuant to the Fifth and Fourteenth Amendments to give them an opportunity to fully and fairly oppose the effort of the government to strip them of their presumption of innocence. For Tedford, that promise meant that he would have an honest forum in which to show that his protestations of innocence were not just the desperate cries of a man seeking to avoid execution but represented something he believed the system was supposedly dedicated to searching for: the truth about who did kill Jeanine Revak.

But over the decades since he was charged, convicted and now awaits execution, it is abundantly clear that no one in the Pennsylvania Court system has taken this promise seriously.

Most egregiously, the promise has been breached by the failure of the Pennsylvania courts to apply Its post-conviction collateral relief rules to give Tedford merits consideration of his claim that he was systematically denied access

to a vast amount of discoverable information (which is still hidden from him) due to the ineffectiveness of his prior counsel and the willful misrepresentations of Commonwealth agents that no such information existed when documentary evidence now demonstrates that the majority of the 800 pages of investigative reports on this case have never been disclosed. The window into the truth of this case has been slammed shut. Unless that window is to be opened and these hundreds of pages of information wrongfully withheld provided to him now, the public that will witness his execution will never know that the right man has died for Revak's death and that the true killer did not escape justice.

Were this a theatrical performance, calling this case a "search for the truth" would make it a comic farce except for the fact that in the last scene an innocent man is executed. That truth remains buried under layers of Constitutional errors the Pennsylvania Courts callously refuse to uncover.

First, Tedford's trial counsel *never sought discovery from the Commonwealth prior to trial.* At that time, discovery in Pennsylvania was governed by Rule 305 of the Rules of Criminal Procedure, a Rule adopted in 1977 to replace an old system in which all discovery had to be sought by petition to the Court. See, Madeline Hartsell Lamb, *Pretrial Discovery and Inspection-New Criminal Rules For Pennsylvania,* 23 Villanova Law Review 308 (1978). The new Rule required the parties to make a good faith effort to resolve discovery but mandated that the Commonwealth turn over: *Brady* material, the defendant's statements, identification procedures, scientific tests conducted, tangible objects gathered, and

wiretap evidence. Id. at 314-317. The Rule also required that to obtain the names and statements of eyewitnesses and any other evidence the defendant could "establish that its disclosure would be in the interest of justice" Id. at 318-319, however, the defendant had to seek an order of court compelling such disclosure. Counsel filed nothing. He accepted the Commonwealth's assurance that he had everything he needed.

Second, Tedford's first post-conviction counsel failed to properly seek discovery by using a boilerplate motion but, of course, the ultimate dismissal of that request was certainly also the result of the continued assurance by Commonwealth attorneys that nothing else existed which could be discovered. But a March 4, 2011, letter from the Pennsylvania State Police in response to a state Right to Know Law request admitted that more than half of the 800 pages of investigatory reports gathered on the case had not be disclosed. The representations made by the Commonwealth over the previous 25 years that no additional material was available were utterly false. At that moment, counsel needed to return to the Pennsylvania Courts within 60 days with a new Post-Conviction Relief Act (PCRA) petition to comport with timeliness rules then applicable. They failed to do so.

And when Tedford discharged them months later for trying to argue mitigation of sentence against his expressed orders, new counsel tried to get the federal habeas corpus court to order discovery, only to have that court rule that the failure to present the proper discovery request in state court deprived the District Court of that authority.

But it is in the third layer of error that the true mockery of Tedford's Fifth and Fourteenth Amendment rights to Due Process occurred. For when the federal court stayed its proceedings to allow Tedford to return to state court to correct the errors regarding discovery caused by his counsels' ineffectiveness and the Commonwealth's deceptive representations, Pennsylvania's draconian application of its own post-conviction rules deprived Tedford of merits consideration on the basis that his attorney's ineffectiveness made his current application untimely.

Those rules, as applied, violate Tedford's federal Due Process rights and, pursuant to Rule 10(c) of the Rules of this Court, Tedford respectfully asserts that the Pennsylvania Supreme Court [PASC] has decided an important question of federal law that has been decided in a way that conflicts with the relevant decisions of this Court. Thus, the grant of certiorari review here is of utmost importance.

The importance of revealing these hundreds of pages of discoverable information cannot be understated. The Commonwealth's case was razor thin. There were no eyewitnesses. No physical evidence established that a bloody murder occurred in a store filled with fabrics or that a bloodied body was transported many miles in a car trunk; forensic analysis of both areas yielded nothing. What the Commonwealth relied upon to convict Tedford would today easily constitute the majority of features typical of constituting a wrongful conviction. See, Colby Duncan, *Justifying Justice: Six Factors of Wrongful Convictions and Their Solutions*, Research Journal of Justice Studies and Forensic Science, Volume 7

Article 6 (2019). Of bad forensics,[1] the use of jailhouse informants,[2] government misconduct,[3] ineffective trial counsel,[4] faulty eyewitness identification, and a false confession by the defendant to police, Tedford's case contains the first four.

To assume that nothing in the 800 pages would not have illuminated the truth is to be willfully blind to reality.

But while any lay person would see the justice in allowing a death row inmate to see the investigative reports he should have had before trial at some point before he dies by lethal injection, the Pennsylvania Court, through the arbitrarily, capricious and callous application of its post-conviction relief process, has turned a blind eye and deaf ear to that common sense mandate.

The vehicle used by the Courts to achieve this unconstitutional application is Tile 42, Pa.C.S. §9545, the timeliness provision of the PCRA which is not just viewed as a statute of limitations subject to normal tolling processes but as a jurisdictional bar which may never be breached.

Any post-conviction pleading (initial or subsequent) must be filed within one year of the date the judgment becomes final, being the date on which direct appeal would have to have been filed before this Honorable Court. See, §9545. If filed after that deadline, a petitioner must rely upon one of three narrow exceptions: that government officials interfered with his filing, that "the facts upon which the claim

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[1] The fiber analysis was offered by a Commonwealth "expert" who trained under FBI techniques the Bureau now publicly repudiates.
[2] One of whom thereafter recanted and the other of whom was likely insane then as he is now.
[3] Twenty-five years of denial that other discovery existed.
[4] Detailed through this pleading.

is predicated were unknown to the petitioner and could not have been ascertained the exercise of due diligence", or that he asserts a new right to be applied retroactively per this Court or Pennsylvania's Supreme Court. § 9545(b)(1)(i-iii). If one of these applies, at the time relevant to Tedford's case, the petitioner had only 60 days to reinitiate a petition.[5] If the 61st day comes without a filing, the Court has no jurisdiction to hear it regardless of whether an atrocious miscarriage of justice occurred.

While scholars disagree that the section is jurisdictional,[6] it is unassailable dogma in Pennsylvania jurisprudence. It has been held Constitutional as according with due process principles. Commonwealth v. Peterkin, 722 A.2d 638, 643 (Pa. 1998). The Pennsylvania Supreme Court espouses this doctrine while, at the same time, recognizing that the PCRA statute is the exclusive means by which any post-conviction remedy can be obtained. See, Title 42, Pa.C.S. § 9542; Commonwealth v. Peterkin, Supra. at 643. And while the Court has acknowledged this section "envisions that persons convicted of a crime be permitted one review of their collateral claims" Commonwealth v. Bennett, 930 A.2d 1264, 1267 (Pa. 2007), it has categorically denied its protections in many contexts.[7]

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[5] The Pennsylvania legislature recently expanded that to one year.

[6] See, Thomas Place, *The Claim Is Cognizable But The Petition Is Untimely,* Temple Political & Civil Rights Law Review 49 (2000), arguing that there is no support in this statute for the jurisdictional limit and that whenever a time for filing provision is made applicable to a lay person, it is particularly egregious to find that such a time limit is jurisdictional. Id. at 19-22, citing Zipes v. TWA, 455 U.S. 385 (1982).

[7] This statutory scheme categorically excludes certain types of cases from review regardless of how ineffective the attorney was who represented the defendant to its conclusion. It does not apply to civil commitment proceedings or to any case

Tedford does not attack the PCRA system on its face. Rather, he undertakes the suggestion the Pennsylvania Supreme Court itself has made that §9545 may be attacked as unconstitutional as applied. See, Commonwealth v. Brown, 943 A.2d 264, note 4 (Pa. 2008). Recognizing that the statute "envisions" that he will get one review of his collateral claims, he respectfully insists that such review be one that accords with the principles of Due Process which specifically pertain to state post-conviction review processes as this Court has enunciated them.

First, a state must provide a mechanism for defendants to assert that their conviction violated federal Constitutional principles. Case v. Nebraska, 381 U.S. 336 (1965); Carter v. Illinois, 309 U.S. 173, 175 (1946). Indeed "State PCRA is …. a primary device by which the federal Constitution is enforced." Lee Kovarsky, *Structural Change in State Post-Conviction Review*, 93 Notre Dame L. Rev. 443, 445

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involving a juvenile adjudication. Commonwealth v. Tinsley, 200 A3d 104 (Pa. Super 2018); In re: K.A.T., 69 A.3d 691 (Pa. Super. 2013). The jurisdictional bar does not admit of an "actual innocence" exception as recognized in McQuiggin v. Perkins, 569 U.S. 338 (2013), finding that "our jurisprudence" has deemed such decisions as pertaining only to Habeas Corpus proceedings and not to PCRA actions. Commonwealth v. Brown, 143 A.3d 418, 420 (Pa. Super. 2016). No form of equitable tolling is permitted. Commonwealth v. Callahan, 103 A.3d 118, 122 (Pa. Super. 2014). And where a defendant receives a short sentence such that a direct appeal would eat up the time they were serving the sentence making them ineligible for a PCRA application which requires that the sentence still be extant, the solution of the Court in Commonwealth v. Turner, 88 A.3d 754 (Pa. 2013) was to advise a defendant that if they wish to attack the ineffectiveness of their trial lawyer, they would have to do it initially in post sentence motions and ask the trial court to exercise its discretion to consider the matter then. Of course, as the dissenting Justice in that case pointed out, such a procedure is practically impossible. It would require a lay defendant to know that counsel had been Constitutionally ineffective, fire that counsel, and get new counsel who raise adequately the question of ineffectiveness, all within the 10-day period that rule strictly permits. Commonwealth v. Turner, Id. at 348.

(2018). While the United States Constitution does not require a state to set up a PCRA system, Pennsylvania v. Finley, 581 US 551 (1987), if the state does create such a process, the procedures used "must comport with the demands of the Due Process and Equal Protection Clauses of the Fourteenth Amendment." Evitts v. Lucey, 469 US 387, 393 (1985).

The Pennsylvania Courts have consistently recognized the paradigm that in implementation of the PCRA statute, the rigorous standards of Due Process pursuant to the Fifth and Fourteenth Amendments must be met. Commonwealth v. Smith, 121 A.3d 1049, 1053 (Pa. Super. 2015) (due process requires the post-conviction process be fundamentally fair); Commonwealth v. Turner, Supra. 80 A.3d, 765 to 766, citing Evitts; Commonwealth v. Bennett, Supra. at 930 A.2d 1273 ("[D]ue process requires the post-conviction process be fundamentally fair" also citing Logan v. Zimmerman Brush Company, 455 U.S. 422, 437 (1982), that a petitioner must be given a chance for the "presentation of claims at a meaningful time and in meaningful manner.") In Commonwealth v. Morris, 771 A.2d 721, n. 10 (Pa. 2001), the Court additionally noted that besides the statutory provision for PCRA relief, the Pennsylvania Constitution gives a right to appeal from a court of record to an appellate court, making it "insincere" for the PASC to conclude that no right of appeal exists from the judgment of the lower court in a PCRA matter.

The second key paradigm Pennsylvania acknowledges is that Due Process demands that the post-conviction process afforded actually offer a substantive opportunity for a petitioner to gain relief. Critical to principle is that while a state

need not necessarily appoint counsel in its post-conviction process, once it does that, the appointed counsel must give effective representation to fulfill Due Process standards. The services of a lawyer for virtually every lay person seeking to contest on appeal a claim with the government is necessary for the proper presentation of any form of merits review. Evitts v. Lucy 369 US at 393, 396; Kimmelman v. Morrison, 477 U.S. 365, 377 (1986) (the right to counsel is the right to effective counsel).

As Pennsylvania does afford appointed counsel to indigents like Tedford in PCRA proceedings, the Pennsylvania courts admit that the counsel must be effective. In Commonwealth v. Haag, 809 A.2d 271, 283 (Pa. 2002) (cited in Commonwealth v. Smith, 121 A.3d at 1053) the PASC held that since Pennsylvania provides a form of relief and counsel to pursue that relief, "not only does a PCRA petitioner have the 'right' to counsel, but also he has the right to effective assistance to counsel." See also, Commonwealth v. Albrecht, 720 A.2d 693, 700 (Pa. 1998) (a defendant has an enforceable right to effective post-conviction counsel); Commonwealth v. Morris, Supra. 771 A.2d 721 at n.10.

The right to post-conviction review and to effective assistance of counsel with respect to that review are thus inextricably intertwined. As the Evitts Court held "a state may not distinguish [the right to appeal] because another right of the appellant --- the right to effective assistance of counsel --- has been violated." 469 U.S. at 399 to 400. Clearly, the failure of counsel to properly preserve a petitioner's appellate rights and capacity to be heard by a higher Court affects the overall

integrity of the proceeding and constitutes an act of ineffectiveness. Commonwealth v. Little, 2020 Pa. Super. 207 (August 24, 2020) *citing* Davis v. Department of Corrections, 341 F.3d 1310 (11th Cir. 2003).

But recognizing these paradigms and conscientiously enforcing them are two very different things. The solemn and enforceable promise to individuals like Tedford that they will get at least one full and fair opportunity to seek post collateral relief, Commonwealth v. Bennett, Supra. at 1267, and effective counsel to secure that opportunity has been, by rulings of the Pennsylvania appellate courts, rendered a nullity at best and a cruel joke at worse. In Tedford's case and others, that opportunity has been foreclosed by the draconian interpretation given to the timeliness provisions of §9545 and other sections of the PCRA which not only deny petitioners the ability to challenge the effectiveness of their PCRA counsel but which use that ineffectiveness as a justification to create a jurisdictional bar to hearing claims of serious Constitution violations on the merits.

Three cases illustrate this point but, perhaps most troublingly, the PASC has *admitted* this structural failure of its system.

Under the PCRA, once the petition has been filed and an answer of the Commonwealth has been received, instead of holding a hearing, the trial court can give notice to the defendant that his petition will be summarily dismissed 20 days hence. See, Rules 907 and 909 of the Pennsylvania Rules of Criminal Procedure. At this point, a defendant is undoubtedly represented by the attorney whose performance may have constituted ineffectiveness and led to the issuance of the

dismissal warning. In response to that notice, the defendant is to file an objection and, as the Pennsylvania courts have repeatedly held, this response is the *only chance* a defendant has to raise the ineffectiveness of the attorney who continues to represent him. Indeed, in Commonwealth v. Rykard, 55 A.3d 1177 (Pa. Super 2012), and Commonwealth v. Smith, 121 A.3d 1049 (Pa. Super. 2015), the Pennsylvania Courts held that the defendant *must* raise ineffective assistance in the Rule 907 reply *or forever waive it*. Id. at 1054. The Smith Court added that the Court has "no duty" to tell a defendant how to preserve his rights to effective assistance of counsel. Id. The absurdity of requiring an indigent lay defendant to assess his counsel's performance particularly while his counsel is still performing, and make those thoughtful objections within 20 days or, in the alternative, fire that lawyer, find sufficient funds to retain a new one and then have this new attorney make an effective argument about the prior attorney's Constitutional deficiency, all in that short period of time, is palpable.

And note that when a defendant is afforded any sort of hearing regarding his PCRA filing, no Rule 907/909 notice issues and thus, in those cases, there is *no chance at all for him to claim his counsel was ineffective.*

A Panel of the Superior Court has had the integrity to recognize the Constitutional violation this system creates. In Commonwealth v. Laird, 201 A.3d 160 (Pa. Super. 2018), the defendant filed a second PCRA claiming that the counsel in his first PCRA was ineffective for not raising certain critical issues. Laird pointed out that under Pennsylvania process, since he was granted a hearing by the

trial court, a Rule 907 notice never issued and he was not able to challenge his first attorney's effectiveness while the appeal of his first PCRA was pending. When that appeal was over, it was now more than one year past the time for him to file a new PCRA without invoking one of the three limited statutory exceptions. As none of the narrow exceptions fit, Laird had no chance at all to be heard on whether his Due Process rights to a fair hearing were denied because of an ineffective lawyer.

In footnote 1 of the Laird Opinion, the Panel plainly acknowledged that the petitioner there was "deprived of his opportunity to challenge the effectiveness of his PCRA counsel. Given the fact that he had a hearing, the Rule 907 notice, as the only avenue open for such a challenge, was never presented to him." The Panel further acknowledged that a serial petition would most unquestionably be considered untimely and that the ineffectiveness could not be raised in any subsequent filing. The Court candidly concluded "[t]herefore, appellant has been denied an opportunity to challenge PCRA counsel effectiveness, despite that he has the right to effective representation on collateral review. Nevertheless, we are compelled to adhere to the aforementioned precedent and affirm the order denying the Appellant's present position." Id.

Laird was not the first time a Pennsylvania Court admitted this glaring deficiency of process. In Commonwealth v. Holmes, 79 A.3d 562 (Pa. 2013), the PASC admitted that there is no "formal mechanism" to review the effectiveness of PCRA counsel and that "this Court has struggled with the question of how to enforce this 'enforceable' right to effective PCRA counsel within the strictures of the

PCRA." Id. at 584. While admitting that the "question of whether and how to vindicate the right to effective PCRA counsel has been discussed at length" in the end "no definitive resolution has emerged." Id. The hole in this critical process has thus been seen but no effort has been made to repair it.

Due process in the context of the PCRA in Pennsylvania is thus an unfulfilled promise of fair procedure. It is a siren's song, luring defendants seeking one fair hearing of their post-conviction claims to an ultimate tragic demise.

Tedford's situation parallels Laird. In the first PCRA, a hearing was held and Tedford then had no opportunity to allege counsel's ineffectiveness for filing a boilerplate discovery motion. As they continued to represent him at and after the receipt of the March 4, 2011 letter, he had no opportunity to contest their failure to return to the state court within the short 60-day window arguably opened. It was only after he discharged them because of their insistence on arguing issues regarding mitigation that he was appointed new counsel who first attempted to obtain the necessary discovery through the federal court process then ongoing but when that Court ruled that it could not give relief because the state court had never addressed the discovery issue on the merits, Tedford returned to the Pennsylvania state courts. But the result of that effort was a ruling by the PASC that the ineffectiveness of Tedford's prior lawyers in not bringing the claim back to Pennsylvania state court within 60 days of the day they received the March 4, 2011, letter is an unchallengeable act that forever forecloses Tedford from obtaining the

discovery that could prove that his cries of innocence for over three decades are an abiding statement of the truth.

The arbitrariness of that ruling is underscored by the fact that to rule this way the PASC had to overlook its own precedents to the contrary.

On occasions spurred perhaps by the clear inequities of the situation, the PASC has found an avenue around the statute of limitations it otherwise enshrines as jurisdictional. This has been achieved by focusing on §9545(b)(1)(ii) and holding that the ineffectiveness was a "new fact" that allowed the petitioner relief from the jurisdictional bar. This consideration has been given on three distinct occasions but was arbitrarily and capriciously not applied to Tedford's case although his situation is indistinguishable from the others.

In Commonwealth v. Bennett, Supra., PCRA counsel failed to file a brief and the case was ultimately dismissed. When Bennett brought his subsequent PCRA, he was told that it was untimely since it was filed more than a year after his conviction was final. The Supreme Court, however, found that the failure to preserve the basic avenue of appeal constituted a complete denial of counsel that mandated a presumption of prejudice requiring that his petition be allowed to proceed. In so ruling, the Court relied upon Roe v. Flores-Ortega, 528 U.S. 470 (2000).

In Commonwealth v. Rosado, 150 A.3d 425 (Pa. 2016), PCRA counsel somehow managed to raise on appeal only the issues which had *not* properly been preserved for appellate review and abandoned all preserved issues otherwise ripe

for merits consideration. The Court found again that this constituted ineffective assistance of counsel per se and that counsel's actions effectively denied the petitioner the capacity to appeal. Id. at 433. Errors that "foreclose merits review" are per se errors that permit a defendant's claim to proceed.

And in Commonwealth v. Peterson, 192 A.3d 1123 (Pa. 2018), counsel filed the PCRA petition one day late, a fact only discovered *sua sponte* by the Superior Court when the matter reached appeal. The PASC held that "counsel's untimely filing . . . constituted ineffectiveness per se, as it completely deprives [appellant] of any consideration of his collateral claims under the PCRA." Id. at 1130. Once again, since counsel deprived the defendant of a chance for review, the PASC permitted the circumvention of the otherwise rigid jurisdictional bar.

But when Tedford's prior counsel's inaction also foreclosed his chance to obtain a merits review of a discovery request made viable by the revelation that the Commonwealth had misled the Courts for decades about the discovery that was available, the Pennsylvania Supreme Court conveniently and arbitrarily ignored this precedent in violation of basic Due Process norms.

The PASC began by intoning its oft stated maxim that claims of ineffectiveness assistance of counsel "do not overcome the statutory time limitations of the PCRA statute" and that Courts have no power to carve out exceptions. Commonwealth v. Tedford, 228 A3d 891, 905 (Pa. 2020). This, of course, ignored the exceptions carved out by Bennett, Peterson, and Rosado. The PASC then attempted to cast Peterson as a unique case involving ineffectiveness assistance of

counsel *per se*, allegedly unlike Tedford's. Id. at 906. The problem with that reasoning, of course, is that the same sort of ineffectiveness identified in Peterson also crippled Tedford's opportunity to be heard on the critical matter of discovery. Because his counsel failed to return to the Pennsylvania courts within 60 days of the March 4, 2011 letter, Tedford has been deprived of the ability to receive a merit's determination of this critical claim. That failure deprived him of appellate review of this issue as completely as the failures of the attorneys in Bennett, Peterson, and Rosado deprived those petitioners of their opportunity to have a merits consideration.

The attempt by the PASC to circumvent this gross inconsistency by saying that somehow Tedford was not deprived of his collateral review because the lower court did consider his challenge to the hair/fiber analysis set forth in his second PCRA, Id. 906, borders on being specious. The issue of the hair/fiber analysis was an issue separately arising and timely presented by Tedford after the FBI admitted that the hair/fiber analysis it had engaged in, and which it taught to state court analysts like the one who testified in Tedford's case, was essentially junk science. Had that admission not been made, the hair/fiber claim would never have been made and the lower court would have dismissed Tedford's claim without any merits consideration, putting him in exactly the same position as others whose prior counsel's ineffectiveness was not set as a bar to the further litigation of the claims.

The PASC dismissed Tedford's "as applied" challenge without ever considering it in light of the precedent it established which would have at least paid

some lip service to the need to have the proceedings conform to federal Due Process standards. In doing so, the PASC violated the most fundamental norm of Due Process in arbitrarily failing to follow its own precedent. The admonition of Justice Frankfurter in United States v. Bethlehem Steel, 315 U.S. 289, 326 (1942) is apropos: "Is there any principle which is more familiar or more firmly embedded in the history of Angler American Law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice?" The inequity and injustice here has a specific face: Tedford remains on the road to execution when over half of the 800 documents which could prove his innocence remain arbitrarily hidden from him with the blessing of Pennsylvania's highest court.

The egregious violation of Due Process here is not the only time in which the PASC's arbitrary and draconian interpretation of its PCRA statute has spawned fundamentally unjust results. Tedford has already described the circumstances in Commonwealth v. Laird in which the Superior Court itself recognized a situation in which a defendant's right to effective assistance of counsel in a PCRA setting was completely denied by operation of the PASC's rulings. In Commonwealth v. Callahan, 108 A.3d 118 (Pa. Super. 2014), the petitioner's first PCRA application resulted in a split decision, winning a reinstatement of his right to direct appeal but losing other substantive issues regarding his prior counsel's ineffectiveness. Callahan elected to persist in his appeal of the other issues denied by the PCRA trial court instead of abandoning the continuance of his PCRA appeal and pursuing

his direct appeal. After his PCRA appeal was concluded, he then filed a second PCRA to effect his direct appeal which was dismissed as untimely because, by not undertaking his direct appeal upon the grant of relief, the Court found that one year elapsed since his conviction became final. Since there are no exceptions to the one-year filing requirement, and since there is no equitable tolling under the PCRA statute, whatever merit might lie in the issues he could have raised on direct appeal, were now lost forever. Id. at 122.

In Commonwealth v. Lark, 746 A.2d 585 (Pa. 2000), the PASC reiterated that a defendant cannot file a second PCRA when the first is still pending on appeal, presenting a defendant with the Hobson's choice of either abandoning the first PCRA or foregoing the argument that his counsel was ineffective since, the Pennsylvania appellate process takes far longer than the one year window will allow.

In Commonwealth v. Baroni, 827 A.2d 419 (Pa. 2003), the PASC held that even if a defendant asserts that a structural error (not properly instructing the jury to find him guilty beyond a reasonable doubt) occurred, a violation of the PCRA statute of limitations means that such an error is lost to the annals of history forever.

In 2019, the Supreme Court used the PCRA time limits in a manner almost as egregious as it has done in Tedford's case. In Commonwealth v. Natividad, 201 A.3d 11 (Pa. 2019), the defendant was convicted of a homicide that occurred at a gas station. He had professed his innocence. In his collateral attack in federal habeas

proceedings, he was granted discovery. In the hundreds of pages of never-before revealed materials he received on March 6, 2012 was included a cryptic police note that alluded to the possibility that someone may have witnessed the shooting. The note mis-identified the name of the alleged witness and gave very little details of what he supposedly saw. His lawyer immediately tried to identify and locate the individual and, through a private investigator, finally tracked the man down. Natividad obtained an affidavit from him which was filed with the court on August 9, 2012. In that affidavit, the witness stated that he was a security guard in the area who was in the gas station and witnessed the shooting. While the witness was not a friend of Natividad, he knew Natividad and stated categorically Natividad was not the shooter. This overwhelming exculpatory evidence, however, will never be heard by a jury because the PASC calculated that August 9th is more than 60 days from March 6th. Natividad remains on death row.

The stinging criticisms Tedford had used in this pleading are wholly justified. Indeed, a Justice of the PASC, the Honorable Max Baer, has used words similarly acerbic regarding the unconscionable way in which his Court has given a false promise to individuals that a truly fair post-conviction collateral process exists in the Commonwealth which comports with the requirement of the Fifth and Fourteenth Amendments. The dissent of Justice Max Baer was issued in a case in which a PCRA was dismissed as untimely in circumstance almost as bizarre and inexplicable as the one involving Tedford.

In Commonwealth v. Brown, 943 A.2d 264 (Pa. 2008), the defendant was convicted in a drug case. At his sentencing, his lawyer made an oral post-sentence motion which the court felt was of sufficient substance to require the matter be taken under advisement. While counsel had pledged that he would follow up the oral motion with a written one, he failed to do so. Eleven months later the trial court issued an order denying the oral post-sentence motion and the defendant then filed notice of appeal. Id. at 265. The Commonwealth moved to quash the appeal because under Pennsylvania's rules only a *written* post-sentence motion will stop the 30-day time period for filing a notice of appeal from running. After mulling the matter over, the Superior Court agreed with the Commonwealth and dismissed the appeal on its face.

Naturally, the defendant immediately filed a PCRA claiming that his attorney was ineffective for failing to preserve his appellate rights. But once again the cold hard mathematics of the Pennsylvania PCRA statute reared its ugly head and was enforced despite the obvious inequities of the situation. The one year limit for the filing of a PCRA began 30 days after the sentence, the PASC held, and with the trial court's lengthy consideration of the motion and the Superior Court's determination to quash the appeal, that one year had expired by the time Brown filed his PCRA. After all, the PASC noted, "there is no generalized equitable exception to the jurisdiction of one-year bar." Id. at 267. While acknowledging that an as-applied Constitutional challenge was possible to the application of the statute,

Id. at note 4, Brown had made no such argument and the dismissal of his PCRA was affirmed.

Justice Baer dissented. He wrote that ever since the Supreme Court had ruled that the time limits on the PCRA statute are jurisdictional the Court "has felt compelled to tolerate Constitutional violation upon Constitutional violation, sacrificing fundamental rights at the altar of finality." Id. at 272. This is a grave mistake, he stated since "the United States and Pennsylvania Constitutions, however, do not countenance finality at the expense of Constitutional rights; rather, as a matter of due process, they promise convicted defendants one substantive appeal of their convictions and also the effectiveness of counsel throughout that appeal." Id. He chastised the majority for using the ineffectiveness of Brown's counsel to justify the deprivation of Brown's right to appeal and embraced the Evitts Court holding that ineffective assistance of counsel can never be the basis for a defendant to lose the substantive opportunity to pursue an appeal. Id. His final condemnation was that the PASC's unduly restrictive reading of the Pennsylvania PCRA statute "has painted us into a corner." Id. at 273.

But the Pennsylvania Supreme Court, painted as it may be into a corner, will not face execution. Donald Tedford will unless the unconstitutional deprivation of his basic due process rights that has occurred here is not vindicated by this Court.

Reduced to its essence, this case about the false promise of justice made by the Courts of Pennsylvania that Tedford would receive a fair trial and the opportunity to properly litigate his case on appeal and on collateral review. The

decision of the PASC here ratifies the action of Commonwealth agents who mislead the court for 25 years into believing that no other documents of a possible discoverable nature existed when over 400 pages of the discovery never been seen by the defense lies in a PSP evidence vault. It not only excuses the ineffectiveness of Tedford's prior attorneys, but it perversely uses that ineffectiveness to justify shutting him out of court when he sought to overturn prior discovery denials which were primarily predicated on those false representations. The PASC decision is truly the worst kind of Due Process violation imaginable since it reeks of the bitter hypocrisy of claiming that the PCRA process comported with Due Process safeguards and protected Tedford's right to the effective assistance of counsel when, in its application here, it systematically used the denial of the latter to justify the obliteration of the former.

Tedford does not come to this Court begging for his life. He does not invoke esoteric doctrines of far flung, novel legal theories. He asks for nothing more than that which is the most rudimentary principle of Due Process. He asks to be given the chance to prove that what he has cried out from his jail cell for all of these years is true: that he did not kill this woman. In a vault in the State Police Barracks somewhere in Pennsylvania are hundreds of pages of documents Tedford should have had before trial even commenced. Through the PASC's callous and unconstitutional disregard of the fundamental principles of Due Process of law, those documents remain hidden not just from Tedford but from a public which has the right to know on the day of Tedford's execution that there is no meaningful

doubt but that he was the killer of Jeanine Revak. Can any society which hopes to call itself just execute this man without permitting a public examination of what has been unlawfully hidden for all of these years? Will Pennsylvania Court System be permitted to black out the window into the truth by its capricious administration of a process which, were It acting according to Constitutional norms, would give the defendant a fair opportunity to demonstrate his innocence but which, in the manner in which it has been applied in this case, strangles that truth in the womb?

CONCLUSION

The petition for a writ of certiorari be granted.

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