21-6636

IN THE
SUPREME COURT OF THE UNITED STATES

LEROY FEARS
PETITIONER

vs.

COMMONWEALTH OF PENNSYLVANIA
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

LEROY FEARS
STATE CORRECTIONAL INSTITUTION AT PHOENIX
1200 MOKYCHIC DRIVE
COLLEGEVILLE, PENNSYLVANIA 19426

QUESTIONS PRESENTED

I. Was Due Process Violated when A State Supreme Court Justice Showed Partiality In Sending And Receiving Derogatory Emails Of Female Abuse, Racism, Homophobia, Religiuos Bigotry, Et Cetera?

II. Did The State Supreme Court Violate The Due Process Clause When It Utterly Failed To Ensure A Fair And Impartial Appellate Review?

III. Is Pennsylvania's Death Penalty Scheme Constitutionally Deficient?

THE PARTIES

Leroy Fears is the Petitioner and is a death-sentenced prisoner petitioning the Court as a Pro se litigant.

Commonwealth Of Pennsylvania is the Respondent and has prosecuted Petitioner at trial and throughout this case.

RELATED CASES

* Commonwealth v. Fears, 836 A.2d 52(Pa. 2003), Direct Review Pennsylvania Supreme Court. Judgment Entered: Nov. 20, 2003.

* Commonwealth v. Fears, 86 A.3d 795(Pa. 2014), 1st Collateral (PCRA) Appellate Review Supreme Court of Pennsylvania. Judgment Entered: Feb. 19, 2014.

* Fears v. Beard/Fears v.Wetzel, No. 05-cv-1421, U.S. District Court for the Western District of Pennsylvania. Judgment Entered: Pending in Abeyance.

* Commonwealth v. Fears, 250 A.3d 1180(Pa. 2021). 2nd Collateral (PCRA) Appellate Review Supreme Court of Pennsylvania. Judgment Entered: May 18, 2021.

* Commonwealth v. Fears, 781 CAP (Pa. 2021), Reconsideration/Rehearing Supreme Court of Pennsylvania. Judgment Entered: Jul. 8, 2021.

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below.

OPINIONS BELOW

For The State Court

The Opinion for the Highest State Court to review the merits appears at APPENDIX A2 to this Petition and is reported at Commonwealth v. Fears, 250 A.3d 1180(Pa. 2021).

The Opinion of the Post-Conviction Relief Act(PCRA) lower Trial Court appears at APPENDIX B2 to this Petition.

JURISDICTION

This Court enjoins jurisdiction pursuant to 28 U.S.C. § 1257(a). Under State Court jurisdiction, the date upon which the Supreme Court of Pennsylvania decided this case was May 18, 2021.

Petitioner filed a timely petition for reconsideration/rehearing which, thereafter, was denied on July 8, 2021. A copy of the reconsideration/rehearing's denial is provided at APPENDIX A-3.

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment 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

Procedural History

On December 8, 1994, Petitioner pled guilt to first degree murder and related offenses at a bench trial for the killing of a twelve year old boy. The details are set within Commonwealth v. Fears, 836 A.2d 52(Pa. 2003)("Fears I"). On February 7, 1995, the trial court imposed a sentence of death with consecutive sentences.

Afterwards, counsel failed to file a notice of appeal to the Supreme Court of Pennsylvania for a direct appeal but abandoned Petitioner. On January 12, 1996, Petitioner filed a Pro se Post-Conviction Relief Act(PCRA) petition to obtain his Post-Sentence motion and direct appeal right reinstated nunc pro tunc. The PCRA trial court appointed counsel for Petitioner.

On April 16, 1999, the court reinstated Petitioner's Post-Sentence motion and direct appeal rights nunc pro tunc. On June 4, 1999, Petitioner's counsel filed a notice of appeal and a Concise Statement of Matters Complained of on Appeal. On June 8, 1999, counsel moved for an evidentiary hearing which occurred on June 27-28, 2000. On July 9, 2001, the trial court denied post-sentence motion.

After appellate briefing, the State Supreme Court denied direct appeal on November 20, 2003 and On February 19, 2004 reconsideration/rehearing was denied. Here, during appellate review, Justice J. Michael Eakin was part of the Majority of the Court. A Writ of Certiorari was filed and passed

upon.(See, Fears v. Pennsylvania, 545 U.S. 1141(2005).

On October 11, 2005, Petitioner's federal counsel filed motions for a stay of execution, appointment of counsel and leave for In Forma Pauperis status in the U.S. District Court For Western Pennsylvania. On October 17, 2005, the District Court granted these motions and held the case in administrative abeyance pending state exhaustion.(See, Fears v. Beard/Fears v. Wetzel, No. 05-cv-1421).

This was the first "stay and abey" requests. (This abeyance was opened on July 23, 2014 when federal counsel filed a Petition for Writ of Habeas Corpus and Consolidated Memorandum of Law after the exhaustion of Petitioner's February 19, 2014 PCRA review.("Fears II"). APPENDIX C.

Albeit, again. Back on June 15, 2006, state counsel filed Petitioner's first PCRA petition. And, on October 15, 2007 it was denied in the lower court. Thus, Counsel filed a notice of appeal and on February 19, 2014 the State Supreme Court affirmed the lower court's denial.(See, Fears II). Relevant to Certiorari here, Justice J. Michael Eakin wrote the Majority Opinion in Fears/II with Justice Seamus P. McCafferty joining.

After state exhaustion, Petitioner's federal counsel filed a Writ of Habeas Corpus and Consolidated Memorandum of Law on July 23, 2014.(See, Fears v. Wetzel, No. 05-cv-1421). During this habeas litigation, Justice Eakin's derogatory email involvement surfaced in the public domain and, thus, it became known to Petitioner on December 8, 2015.

Hence, on February 8, 2016 Petitioner filed a second PCRA petition in

the lower state court -Pro se. At its filing, federal counsel simultaneously filed a Supplemental to Petitoner's active habeas petition in the U.S. District Court containing the judicial partiality claim regarding the email scandal.

The District Court issued the second abeyance order for the exhaustion of the judicial bias claim in state court. The abeyance order is still/now in effect for exhaustion of Certiorari here. After the filing of this second PCRA petition, state counsel was appointed by the court. However, on April 23, 2018, Petitioner flied to obtain his self-representation right.

On June 19, 2018, the court held a hearing to assess Petitioner's voluntariness to waive counsel. At this hearing, the court granted the motion and allowed standby counsel. Standby counsel's service later proved to be devastating and counterproductive.

On August 23, 2018, Petitioner filed a timely "Supplemental" to his PCRA petition containing a constitutional challenge to Pennsylvania's death penalty scheme. Petitioner sought leave for his supplemental. On October 1, 2018, Respondent filed its answer to Petitioner's PCRA petition. On October 4, 2018, Petitioner filed a motion to attach his EXHIBIT A.

EXHIBIT A is the "June 2018 Capital Punishment in Pennsylvania: The Report of the Task Force and Advisory Committee generated by the Joint State Government Commission of the General Assembly of the Commonwealth of Pennsylvania". Petitioner bases his supplemental on EXHIBIT A. On October 31, 2018, Petitioner filed his Response to Respondent's Answer.

On March 29, 2019, the court issued its Notice of Intent to Dismiss Petitioner's PCRA petition based upon an untimely in filing of it. However, on April 17, 2019, Petitioner filed a response to the dismissal notice arguing -- inter alia -- that Respondent had conceded that the PCRA petition was timely filed.

On May 21, 2019, the court reversed its intent to dismiss the PCRA petition on untimeliness grounds and, nonetheless, dismissed it as frivolous. On June 12, 2019, Petitioner filed a Notice of Appeal to the State Supreme Court. On August 7, 2019 he filed a Rule 1925(b) Statement of Errors. On October 2, 2019, the PCRA Court issued its Opnion.(See APPENDIX B).

On February 25, 2020, Petitioner filed his Appellant's Brief to the State Supreme Court and on May 19, 2020, He filed an Application to Supplement his Unconstitutional Death Penalty Scheme claim. On June 8, 2020, Respondent filed its Response Brief. However, Respondent failed to serve a copy of its Brief upon Petitioner.(Later, Respondent would recognize that Petitioner may not have received its Response.(See, 2/18/2021 Commonwealth's Answer In Opposition To Appellant's Application To Strike Commonwealth's Brief For Appellee at ¶¶ 2,9,11,12).

Nevertheless, depleted by Respondent's non-service, on June 18, 2020, Petitioner was compelled to file a Reply Brief wherein he had to "assume" what Respondent's counter-arguments were. Petitioner complained of Respondent's non-service within this informal Reply.

Albeit, on July 13, 2020, Petitioner was able to file a formal, comprehensive Reply Brief after the Court's Honorable Prothonotary's Office

sent him a copy of the Response. Petitioner had to submit his formal Reply via the State Supreme Court's Post-Submission Communication procedure at Pa.R.A.P. 2501(a). Between December 22, 2020 and April 22, 2021, Petitioner made an effort to strike Respondent's June 8, 2020 Response Brief due to the non-service of it.

On May 18, 2021, the State Court issued its judgment rendering a split decision. Namely, three(3) of its seven(7) Justices recused themselves. And, the four(4) remaining Justices equally divided themselves. One side issued an Opinion In Support of Affirmance(OISA) and the other side issued an Opinion In Support of Reversal(OISR). APPENDIX A1-A2. This divide left the affirmance of the lower court to stand. Further, the divided court negated any presumption of correctness on its behalf.

On June 2, 2021, Petitioner filed for Reconsideration/Rehearing and on July 8, 2021, the same equally divided court -- with the same recused Justice configuration -- issued its denial. APPENDIX A3.

FACTUAL HISTORY

As Petitioner federal habeas was proceeding, after the exhaustion of his first PCRA appeal of Fears II, on December 8, 2015, the Pennsylvania Judicial Conduct Board(JCB) filed formal charges against Justice Eakin in the Pennsylvania Court of Judicial Discipline(CJD) in regard to his involvement in sending/receiving derogatory emails. APPENDIX D1. (See, In Re: J. Michael Eakin, 13 JD 2015). The JCB's charging hit the public domain on December 8, 2015 which is when Petitioner came to know of it.

On December 8, 2015, a fellow deathrow prisoner shared a short one(1) or two(2) sentence email with Petitioner about the JCB's charging of Justice Eakin. Later, Petitioner wrote or called his federal counsel and she confirmed the event and sent much of the JCB's charging file. Afterwards, counsel sent even more information as details were continuously evolving and surfacing.

Specifically, the emails contained derogatory and degrading themes of -- inter alia -- female abuse, racism, homphobia, domestic abuse, incest, religious bigotry, pornography(including, "Kiddie porn"), a great indifference to incarcerated persons and an elitist attitude toward common folk. Justice Eakin sent and received some of these emails. Further, Petitioner submits that he, himself, is the subject of one of these inflamatory emails.

In reviewing the JCB's charging file, Petitioner found Justice Seamus P. McCafferty's own separate, distinct inappropriate email involvement. Appendix D2. And, Justice McCafferty's act of blackmailing and/or extortion of Justice Eakin. Appendix D3.(Excerpt from JCB's charging file at pp. 12-28); D4(10/17/14 Justice Eakin Letter); D5(10/20/15 Deposition of Justice Eakin[IN RE: The Honorable J. Michael Eakin, JCB File No. 2015-601]). On February 8, 2016, Petitioner filed a timely second PCRA petition.

Herein, Petitioner factually alleged that due to Justices Eakin and McCafferty's respective sending and receiving of derogatory emails -- during or, prior to, their adjudication of his first PCRA appellate review -- demonstrated judicial partiality against him in violation of his Fourteenth Amendment Due Process right.

The bias nature of most of these emails(many with video clips) are desceribed within Petitioner's PCRA petition and reveal:

> A video clip entitled "What have we done" of a black woman speaking to the camera about Barack Obama's election and saying that, because of that, black people won't have to "pay bills." She later bemoans the fact that black people will "have to get jobs" and will, consequently, no longer get a government assistance check.
>
> A video clip of a woman throwing out a "cheap pair of Kmart earrings" on Christmas morning to find that her husband has actually purchased a new Cadillac SUV for her. When she gets in the Cadillac and starts it, it explodes. The video concludes with the words "Merry Christmas, Bitch."
>
> A video clip containing an audio track of a man prank calling a cable company about a new gay and lesbian channel. The audio contains profanity and jokes portraying a negative view of gays and lesbians based on stereotypes.
>
> A series of jokes entitled "rotten but funny," which includes jokes about race, gender and ethnicity.
>
> A series of "Motivational Posters" or "Demotivational Posters." One picture asks, "Dear Abby, I'm an 18 year-old virgin in Arkansas. Are my brothers gay? [A joke about incest].
>
> A joke about robot golf caddies. According to the joke, the silver color of the robot caddies blinded the other golfers, and the golfer using the robot asks, "Why didn't you paint them black?" The man in the golf shop said, "We did. Then four of 'em didn't show for work, two filed for welfare, one of them robbed the pro shop, and the other thinks he's the President."

A joke entitled "Instant Spark," which implies that a man tasered a 'beautiful woman" who he saw in a park and then raped her.

A joke entitled "Leroy's Hearing Problem" wherein "leroy" asks a Preacher to pray for help with his hearing, the Preacher prays and asks how his hearing is, and Leroy says, "I don't know, Reverend, it ain't till next Wednesday."

A joke picture of the "Home Alone" movie poster. In it, the robber's face behind Macaulay Culkin is replaced with a smiling Jerry Sandusky.

An email with the phrase "Jerry Sandusky as Santa Claus with a crying baby boy on his lap..."

A joke entitled "Sex in the shower." The joke states that, "in a survey 86% of inner city residents(almost all of whom are registered democrats) said that they have enjoyed sex in the shower. The other 14% said that they have not been to prison yet."

-- 2/8/2016 PCRA Petition at pp. 16-18.

Within his PCRA petition, Petitioner demonstrated that he was subjected to acute domestic abuse throughout his youth. Also, Petitioner recounted that he suffered stringent physical abuse and was vilified and alienated by his foster mother and father for being gay. Moreover, Petitioner detailed how he was raped a couple of times as a young child by his foster brother and foster cousin. Also, Petitioner detailed his troubled life history and severe mental illness.

Due to the uncontested facts above, along with the existence of the prejudice, bigotry and the elitist disparagement that the emails reveal, Petitioner claimed judicial bias against Justices Eakin and McCafferty for their involvement in these emails. The JCB's file can be located at Fears v. Wetzel, 2:05-cv-01421[ECF 65](or, Document 65).

While the lower court was proceeding, the Task Force and Advisory Committee of the Joint State Government Commission of the General Assembly of Pennsylvania finally released it Report in regard to Pennsylvania's death penalty scheme. Due to this Report, on August 23, 2018, Petitioner filed a timely Supplemental claiming that the state's death penalty scheme was unconstitutional.

Further, Petitioner clearly requested leave to amend his Supplemental -- which will be of discussion later -- to his petition within the Supplemental itself. APPRNDIX D4.

The Supplemental alleges that -- inter alia -- Pennsylvania's death penalty is constitutionally deficient in that the decision upon whom the death penalty is imposed is more dependent on where the crime occurs and the race of the people involved than on the nature of the crime and the offender. Other factors include, broad prosecutorial discretion, problems with defense representation, the absence of state-wide supervision or standards for defense counsel.

The large number of broadly interpreted aggravating factors, the large number of appellate and post-conviction reversals, the absence of

proportionality data and review, the over-inclusion of people with intellectual disabilities and serve mental illnesses, the conviction and sentencing of those who are innocent and other systemic indicators of arbitrariness and unreliability.(See, 8/23/18 Supl. at pp. 20-30).

The lower PCRA court dismissed the PCRA petition as "patently frivolous and without support in the record". APPENDIX B1. Here, the court's rationale reflects that "Petitioner has demonstrated that his instant PCRA petition was timely filed...within the 60-day period following the discovery of the new facts". APPENDIX B1 at (unnumbered) p. 5.

However, on the subject of frivolousness and the lack of "support in the record", the court's rationale held that under the dictates of 42 Pa.C.S. § 9543(a)(2)(vi) and Commonwealth v. Pagan, 950 A.2d 270(Pa.Super. 2008) Petitioner must satisfy a four(4) prong test.

Namely, the newly discovered evidnce: (1) could not have been obtained prior to the conclusion of the trial by exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) would likely result in a different verdict if a new trial were granted. APPENDIX B1 at (unnumbered) pp. 5-8.

In relying upon Pagan, the court misconstrued the judicial bias claim resulting in a wrongful decision. For example, Petitioner never alleged that the judicial bias evidence applied to his criminal conviction. (See, 2/8/16 PCRA Pet. at ¶¶ 55, 72-73). Instead, Petitioner alleged that the newly

discovered evidence was a Due Process violation in regard to his first PCRA appeal at Fears I. APPENDIX C. Thus, he was entitled to a new PCRA appellate review.

The lower PCRA court should have reasoned this due to it being a part of its own Opinion.(See, APPENDIX B1 at (unnumbered) pp. 2-3, ¶ 3); (See also, attached pp. 1-2, ¶ 3 which are reproductions of Petitioner's Statement of Matter/Errors Complained of on Appeal).

As to the unconstitutionality of the State death penalty scheme claim, the lower court issued no rationale.(See, APPENDIX B1). Further, the lower court gave no say on Petitioner's claim of government interference in the non-disclosure of the Justice Eakin email cache.(See, Fears, II at FN.13). APPENDIX A2. Moreover, the lower court has never ruled upon any of Pro se Petitioner's motions for leave of court.(See, Commonwealth v. Fears, DOC No. CP-02-CR-0008705-1994 Entries: 115/1, 116/1 & 121/1).

Petitioner raised similar judicial bias and death penalty unconstitutionality claims to the Supreme Court of Pennsylvania as he had previously in the lower PCRA court.(See, 2/25/2020 Appellant Brief at pp. 16-37 and 40-67, respectively). However, Petitioner expounded upon arguments due to the lower court's Opinion.(Id.).

And not to belabor this point but during the state court appeal, Respondent failed to serve its Response Brief upon Petitioner.(APPENDIX D5). Hence, defaulting on any future defense. Yet, due to the State Court's strict deadline policy, Petitioner filed an "informal" 6/18/20 Reply Brief wherein

he was forced to 'assume" what Respondent's counterclaims were.

Later, however, after getting Respondent's Response from the State's Prothonotary's Office, Petitioner filed a "formal" Reply Brief where he recounted Justice Eakin's emails of racism and homophobia which Respondent claimed non-existant and/or inapplicable to Petitioner.(See, 7/13/20 Aplt's Reply Brief at ¶¶ 11-41).

Petitioner provided parts of Justice Eakin's CJD deposition.(See, JCB File No. 20115-601 Deposition of J. Michael Eakin). Especially where Justice Eakin consistently testified that although he did not "recall" doing so he did not deny sending and receiving the derogatory emails.(See, Oct. 8, 2015 Dep. Tr. at pp. 16-17, 19, 21, 23-26, 43-45, 51).

After 3 State Court Justices recused themselves, an equally divided Court of 2 to 2 issued split Opinions. APPNDIX A2. The OISA split opined that because Petitioner became aware of the JCB File regarding the emails on December 8, 2014 and not the email newspaper report published by the Philadelphia Inquirer on October 8, 2014 his PCRA petition is, thus, deemed untimely.(See, Commonwealth v. Fears, 250 A.3d 1180 at 1190).(APPENDIX A2).

The OISA also questions "how or when" Petitioner came to know of "any of the preceding information".(Id.). Next, the OSIA expresses confusion as to why Petitioner alleges Justice Eakin's email involvement and not Justice McCafferty's(Id., at p. 1191).

Futher, the OSIA incorrectly relied upon the "after-acquired evidence" standard -- just as the lower PCRA court had -- to support Petitioner's

supposed jurisdictional time-bar failure.(Id., at pp. 1191-1193). However, Petitioner never alleged that this evidence applied to his trial stage but only to his first PCRA appeal review.(cf. gen., Id., at pp. 1193-1194). Yet, the Opinion In Support Of Affirmance("OSIA") dispensed the judicial bias claim. Here, the OISA tries to absolve Justice Eakin by demanding a showing of actual bias.(Id., at 1192).("Justice Eakin "in his written judicial opinions, ever demonstrated an overt bias due to the race, gender, ethnicity, or sexual orientation of a litigant or witness"").

Only the **appearance** of bias is needed to show judicial partiality.(See, Caperton v. A.T. Massey Coal Co., 556 U.S. 868 at 881). Next, the OISA excuses the severity of Justice Eakin's derogatory email share blaming others who sent emails of "invidious subject matter" to him.(OISA at 1192). The OISA relies upon the misconception that Petitioner is required to plead that his judicial bias claim effected his trial stage for time-bar excusal.(Id., at 1192-1193). Yet, the OSIA addresses Petitioner's judicial bias claim within the context of his first PCRA appeal.(Id., at 1192-1193).

Here, the OISA concedes that the lower PCRA court "fails to address the viability of Appellant's claim to the grounds of a constitutional violation during appellate review of his first PCRA petition".(Id., at 1193). However, although the OISA sees the validity of Petitioner's claim, it solely speaks upon the claim's inability to show actual bias while neglecting the claim's showing of the appearance of judicial bias.(Id., at 1193-1194).

The appearance of bias standard is embedded in federal and state law.(See, Caperton, supra, at 881; Commonwealth v. Koehler, 2020 WL 1973876 *9 & *18).

The OISA is oblivious to this fact. Lastly, the OISA rejects Petitioner's unconstutitional death penalty claim due to his supposed fail to seek leave of court to file his Supplemental.(OISA at 1194). However, Petitioner did seek leave for this Supplemental.(See, APPENDIX D4).

The other side of the split Court issued an Opinion In Support Of Reversal ("OISR")(Id., at 1195-1209) and its rationale is in-line with the facts of Petitioner's PCRA petition. For example, the OISR establishes the nexus of his life history identity and the derogatory theme of the Justice Eakin emails.(Id., at 1202-1203, 1209). The OSIR reasons the true application of Petitioner's judicial bias claim under the law.(Id., at 1205-1207).

The OISR also correctly reasons the established "Appearances of Bias" standard.(Id., at 1208-1209)("A sophisticated jurist (or even an unsophisticated one) who harbors prejudices against a particular group or individuals is unlikely to air his animus openly ... That is why it is well-settled that proof of a judge's actual bias **is just one way** to establish a due process violation. **Appearances matter, too**".).(See, Id., at 1202).

Further, the OISR agreed that: The lower PCRA Court failed to rule on Petitioner's "alternative" time-bar exception of government interference.(Id., at FN.13, FN.19); Petitioner's judicial bias claim is predicated upon fact.(Id., at 1201); "The lower PCRA court's analysis of Fears'[Petitioner] claim[judicial bias] as one of after-discovered evidence was, therefore, erroneous".(Id., at 1205).

Petitioner's "claim is not grounded in Williams.(Williams v. Pennsylvania, 136 S.Ct. 1899).(OISR at 1206); "The remedy for demonstrating that an

appellate tribunal included a jurist with an unconstitutional likelihood of bias would be a new appeal to that tribunal without the participation of the partial jurist".(Id., at 1207); and, The depth and severity which the enormous amount of these egregious, demeaning emails -- which circulated the Judiciary and beyond for years -- could extend.(Id., at 1208-1209).

Albeit, the OISR reaches conclusions that Petitioner refutes, viz., he failed to seek leave of court to file his Supplemental challenging the death penalty.(Id., at 1200; FN.14). Contrarily, Petitioner sought leave for this. APPENDIX D4. Further, the OISR held that Petitioner is entitled to an evidentiary hearing and further discovery for the 90% of emails regarding Justice Eakin that was not included in the CJD/Justice Eakin stipulation.(Id. at 1208; FN.21).

However, as to the OSIR's/OISR's reasonings, Petitioner avers that due to the equal division of a 2 to 2 split Court a cancellation effect of the OISA/OISR occurred nullifying any precedential, authoritative ruling; solely leaving the lower PCRA court's enunciation in effect -- by operation of state law. APPENDIX A1. Yet, Petitioner avers that the OSIR is greatly in-line with the facts of this case and of his judicial bias claim.

After Fears II was decided, Petitioner filed for rehearing.(See, 7/8/2021 Application for Reconsideration). Here, Petitioner avers that: He never alleged that his judicial bias claim applied to this trial stage but only to Fears I.(Appl. Recons. at ¶¶ 9-10); He spoke of the application of the "appearance of bias" concept in regard to the judicial bias as opposed to the "actual bias" concept.(Id., ¶ 11); When he became aware of the emails

and how he first came to know of them.(Id., ¶¶ 12-13); He retorted the OSIA as to its inaccuracy over his inability to plead various derogatory, racist and demeaning emails sent by Justice Eakin.(Id., ¶ 14).

Respondent's defaulted defense due to failing to service Petitioner with its Response Brief.(Id., ¶ 15); Justice McCafftery's blackmail of Justice Eakin and his own email involvement since the Fears II Court ignored his extra-judicial trespasses.(Id., ¶ 16); and, His seekage for leave of court for his Supplemental.(Id., ¶¶ 18-19).

Lastly, Petitioner identified a claim against the State Court for violating his Due Process right to a fair and impartial appellate tribunal.(Id., ¶¶ 1-8, 17). Here, a 3 Justice recusal occurred resulting in a 2-2 split Court. The full Court knew that this scenario played out before in regard to the Justice Eakin emails.(See, Commonwealth v. Robinson, 204 A.3d 326(2018); Commonwealth v. Blakeney, 193 A.3d 350(2018); Commonwealth v. Taylor, 218 A.3d 1275(2019); and, OISA at FN.19).

However, in Koehler, a single Justice initiated Pa.R.J.A. 701(C)(1) to have 3 substitute Justices temporarily transferred from the Superior Court of Pennsylvania to remedy the prolonged stalemate of the High State Court surrounding the emails. APPENDIX D6. Fears II was decided one year after Koehler.

Koehler concerned a lower court ruling that it could not grant a new PCRA appellate review on a judicial bias claim regarding the emails. The State Court -- no longer stagnant due to the 701(C)(1) transfer -- ruled that it could.(See, Koehler at *1, *18). Also, in Koehler, the lower court did not

rule on timeliness nor did the Court do a sua sponte timeliness analysis but remanded to allow the lower court to decide timeliness. Koehler, at *18.

In Fears III, the remedy of 701(C)(1) was neglected and a court-desired effect(viz., to avoid the Justice Eakin email scandal by allowing the split decision -- and, thus a deadend -- to predominate) was enacted. Also, no remand was ordered even though the OSIA and OISR found lower court failures.(OISA at 1193; OISR at FN.13 and FN.19).

In neglecting to equitably initiate 701(C)(1) for Fears III, like it did in Koehler(although for a different purpose, viz., for the efficient administration of judicial review) the Court placed its Judiciary over the justice of Due process. It put the Establishment(judicial operation) above Petitioner's guarantee of Constitutional provision and equity.

Further, in this vein, by differentiating the course within which the State Court compels the Rule Of law to take -- Here, in its utilization of 701(C)(1)(or, lack thereof) -- is completely arbitrary and capricious running afoul to Constitutional principles of heightened reliability.

On July 8, 2021, the Justice recused/equally divided split Court configuration denied to entertain Petitioner's Rehearing Application. APPENDIX A3.

[REASONS FOR GRANTING THE PETITION]

I. Was Due Process Violated when A State Supreme Court Justice Showed Partiality In Sending And Receiving Derogatory Emails Of Female Abuse, Racism, Homophobia, Religiuos Bigotry, Et Cetera?

Execution is unlike all other punishments due to its irrevocability necessitating a reliable determination for its imposition.(See, Harmelin v. Michigan, 111 S.Ct. 2680)(holding the "Quantitative difference between death and all other penalties".). Woodson v. North Carolina, 428 U.S. 280("There is a corresponding difference in need for reliability in the determination that death is the appropriate punishment..."). Heiney v. Florida, 83 LED.2d 237 at 238("It has often been noted that one of the most fearful aspects of the death penalty is its finality".).

As such, the penalty must be ascertained to a heightened degree of objective certainty. "Death is different in both its severity and its finality". Gardner v. Florida, 430 U.S. 349. "Overall, the finality of the death penalty requires 'a greater deal of reliability when it is imposed'"." Murray v. Giarrantano, 592 U.S. 1 (quoting Lockett v. Ohio, 438 U.S. 604. "While absolute certainty is impossible to achieve in any criminal proceeding, "heightened reliability" jurisprudence has made it clear that such certainty is particularly desirable in the capital arena". Murray, supra.

Thus, in adjudicating a death sentence the Judiciary must effectuate the constitutional principle that the penalty is "quantitatively different from all other forms of punishment" due to its "finally and severity". Hence, "There is a corresponding difference in need for reliability in the determination that death is the appropriate punishment" in the sense that a "heightened reliability" is required.

State appellate courts fall within this ambit of having a duty to contemplate and ensure this constitutional principle as well. Thus, significance is given to the impartiality of a State Justice in procuring constitutional provisions which guarantees the heightened reliability determination objective that execution is the appropriate punishment.(See, Saffle v. Parks, 108 LED.2d 415 at 436)(Separate Opinion).

Conversely, the impropriety of judicial bias defeats this constitutional principle and, thus, has no basis in the determination process of heightened reliability within the appellate review of a death sentence. As such, Appellant contends that due to judicial bias he did not receive a fair and impartial state post-conviction collateral review(PCRA) of his direct appeal.

As stated above within Petitioner's Statement Of The Case(SOTC) section, a direct appeal was taken.(See Commonwealth v. Fears, 836 A.2d 52(Pa. 2003). Later, a PCRA appeal followed.(See, Commonwealth v. Fears, 86 A.2d 791(Pa. 2014)("Fears II"). It was here that judicial bias occurred causing Petitioner to raise the claim in Commonwealth v. Fears, 250 A.3d 1180(Pa. 2021)("Fears III").(SOTC at pp. 2-6).

Judicial bias transpired when state court Justices' sent, received and circulated derogatory emails of -- inetr alia -- female abuse, racism, homophobia, rape and pornography.(STOC at pp. 6-9). One of these emails pertain directly to Petitioner.(Id., at p. 9; Fears III at FN.11). Further, there is an event of Justice McCafferty blackmailing Justice Eakin in regard to the emails' public revelation.(SOTC at pp. 7, 17).

As such, these improprieties violated Due Process and the State's

Constitution's Article V, § 17(b).("Justices and Judges shall not engage in activity prohibited by law and shall not violate any Canon of legal or judicial ethics prescribed by the Supreme Court."). In Pennsylvania, judicial bias or, the appearance thereof, is prohibited and is volatile of the State's Constitution.(See, In re: Bruno, 2014 Pa.LEXIS 2595; In re: McFall, 617 A.2d 707; In re: Eakin, 150 A.3d 1042; Commonwealth v. Druce, 2004 Pa.LEXIS 1152; In re: Glancey, 527 A.2d 997 and Pa Const. Art. V, § 17(b)).

In Commonwealth v. Banks, 989 A.2d 1, the State Court held,

> "In order for the integrity of the Judiciary to be compromised, we have held that a judge's behavior is not required to rise to a level of actual prejudice, but the appearance of impropriety is sufficient".(Per Curiam).

These state decisions forbidding judicial bias parallel this Honorable Court's enunciations in Tumey v. Ohio, 273 U.S. 510; Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868; Marshall v. Jerrico, 446 U.S. 238 and Glasser v. U.S., 315 U.S. 60. In Caperton, this Court stated,

> "A judge shall avoid impropriety and the appearance of impropriety. A test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."

Yet, the Fears III Court failed to abide by these authorities to avoid judicial bias claims against Justices Eakin and McCafferty. Here, 3 Justices recused themselves. These recusals were not legitimate or practical due to these Justices previously voting to suspend and/or terminate Justice Eakin

from the Bench.(See, In re: Eakin, 150 A.3d 1042). Justice McCafferty was previously suspended but he "retired" prior to his probable termination.(See, In re: McCafferty, No. 430 JAD 2014).

Thus, in voting to oust these Justices for their extra-judicial offensive conduct while, at the same time, abstaining from rectifying the damage done to those Appellants whom these Justices left in their wake is impractical. Moreover, if these recusals were necessary, neglecting to invoke Pa.R.J.A. 710(C)(1) as a remedy to adjudicate claims of these Justices' judicial bias is illegitimate.

Yet, a stalemated 2-2 court resulted from this lapse which caused a non-binding holding to arise allowing the lower court's rationale and ruling to predominate and stand. APPENDIX A1 & A2. The lower court ruled that Petitioner's PCRA petition was timely filed. However, the lower court reasoned that Petitioner failed to show warranted relief due to his failing to show that judicial bias effected his trial stage.(PCRA Ct. Op. at p. 8).

Petitioner did not raise his claim toward his trial stage but only to his first PCRA appellate review where the judicial bias occurred. And, as the OISA admits, the lower PCRA court failed "to address the viability" of Petitioner's judicial bias claim.(See, OISA at p. 1193). Thus, the lower court left a vacuum within its ruling by not addressing Petitioner's Due Process claim of judicial bias.

Here, the OSIA attempted to fill the vacuum with its non-binding sua sponte jurisdictional dispute that Petitioner did not show due diligence in

presenting his judicial bias claim because he could have raised the claim two(2) months prior -- as another prisoner had done(See, OISR at p. 1209; FN.15) -- than when he did based upon newspaper reports that were totally unknown to him.(OISA at p. 1190). However, since the due diligence standard is an individualized excursion into uncovering obscure evidence, Petitioner can not be expected to necessarily obtain unknown evidence at the same time, by the same method or through the same means as another PCRA litigant.

If the OSIA were truly committed to adjudicating Petitioner's claim, they could have remanded this case to the lower court instructing that it rule on the judicial bias issue that it had neglected. Instead, the OSIA issued a non-binding Opinion vindicating the offending Justices.(SOTC at pp.).

Further, on the subject of his due diligence endeavors, the OISR concluded that Petitioner is entitled to an evidentiary hearing in the lower court to explain how and where he came upon the JCB/CJD file relating to the derogatory emails of Justices Eakin and McCafferty.(OSIR at pp. 1202-1205). The OSIR sentiments are amiss in that it attempts to remedy the non-biding rationale of the OSIA.

It would have been more noble of the OSIR to have offered persuasiveness toward a remand to the lower court to correct its neglecting to address Petitioner's claims of judicial bias and his governmental interference since the OISR recognized both.(OSIR at pp. 1204-1209; FN13).

It is clear that the equal division of the State Court left the lower court's ruling untouched and controlling -- by operation of state law -- without any binding effect upon it from the Fears III review. So, since the

lower court's ruling is isolated from the State Court and, since the lower court was fairly presented with Petitioner's judicial bias claim under the Due Process Clause but neglected to address it, the Due Process claim is ripe for Writ of Certiorari consideration.

As stated above, the imposition of execution is to be exerted to a heightened degree of objective certainty that death is the appropriate sentence due its quantitative difference in finality and severity so much so that a greater deal of reliability is required to effectuate the sentence as the appropriate punishment. Harmelin v. Michigan, supra and its progeny.

Judicial partiality injected into the appellate review of a death sentence disengages the Constitutional principle of a heightened reliability and objective certainty that execution is appropriate. Petitioner endured judicial bias when State Court Justices sent and received derogatory emails depicting as ridicule - inter alia - homophobia, female abusiveness, racism, religious bigotry and domestic violence. In this, Petitioner's Due Process right to a fair and impartial PCRA appellate review was violated.

II. Did The State Supreme Court Violate The Due Process Clause When It Utterly Failed To Ensure A Fair And Impartial Appellate Review?

A recusal of 3 Justices in Fears III resulted in an equally divided Court. This allowed the lower PCRA court's rationale/ruling to stand controlling without any binding force from Fears III. APPENDIX A1 & A2. Petitioner had a substantive Due Process Liberty right to appeal to the State Court on collateral review and, in turn, a procedural Due Process right to a fair and impartial appellate review.

While appealing, Petitioner knew that his judicial bias claim would enter into the fierce arena of the Justice Eakin and McCafferty email improprieties based on prior State Court cases.(See, Commonwealth v. Robinson, 204 A.3d 326(2018); Commonwealth v. Blankeney, 193 A.3d 350(2018) and Commonwealth v. Taylor, 218 A.3d 1275(2019). Here, the equally divided State Court design resulted in a predicable stalemated stagnancy and, thus, an avoidance in addressing the Justice Eakin and McCafferty email issue.

However, when Commonwealth v. Koehler, 2020 WL 1973876 arose, a single Justice, frustrated with this stagnancy, invoked Pa.R.J.A. 701(C)(1) to break the stalemated stagnancy of the divided Court. APPENDIX D6. Due to the 701(C)(1) request, 3 Justices of the Superior Court of Pennsylvania served as substitutes for the 3 recused State Court Justices.

Therefore, a viable remedy existed to address the predicable, recurrent stalemate of the State Court regarding the Justice Eakin and McCafferty judicial bias email event.(Koehler, supra). In Koehler, the lower PCRA court believed that it lacked the authority to grant a new PCRA appellate review -- nunc pro tunc -- based upon a claim of judicial bias against a Justice

of the State Supreme Court.

After the initiation of 701(C)(1), the now full State Court -- which included the 3 substitute Justices -- overturned the lower court's ruling opining its lack of authority and remanded for a judgment on timeliness. Hence, a viable remedy exists for the inblocking of a stalemated State Court under Pa.R.J.A. 701(C)(1).

The Due Process Clause guarantees Constitutional protection for a Defendant over that of Discretionary State Court review ventures of picking and choosing where, when, to which instance or to what degree to apply state legal remedy. Although often used by lower court judges, Petitioner avers that upon his research he could not locate any instance other than that of Koehler where the State Court specifically used 701(C)(1) itself.

Therefore, Koehler made the use of 701(C)(1) precedential when it comes to the State Court remedying divided State Courts due to recusals. It is clear that 701(C)(1) is a remedial cure in this instance and it is also clear that it is now precedential. Permitting the State Court to use 701(C)(1) at its discretion when that discretion is fueled by avoidance, bias or passion -- as it did in Fears III -- runs afoul to the Due Process Clause.

Further, Petitioner questions the 3 Justice recusal in that they previously voted to oust and/or suspend Justices Eakin and McCafferty from the Bench for their inappropriate email conduct yet consistently abstain from rectifying the constitutional damage done to Appellants -- including Petitioner -- in regard to this event.

Petitioner also questions the judicial integrity of the 2-2 equally divided State Court in that based upon some of its prior decisions and divided Court has agreed upon common ground and took action.(See, Commonwealth v. Hutchinson, 25 A.3d 277 at FN.18 and Commonwealth v. Johnson, 86 A.3d 182 at FN.3. Hence, there exists a record of the State Court providing resolve in a divided state.

As such, Petitioner submits that the Fears III Court should have agreed to remand so that the lower PCRA court could have addressed his judicial bias claim under Due Process which it failed to do previously especially since the State Court recognized such failures.(OSIA at p. 1193; OSIR at pp. 1205-1207, FN.13 &19). It is arbitrary and capricious work for the State Court not to have done so.

Albeit, Petitioner avers that it is favorable to him that the lower PCRA court's rationale is controlling and not governed by the Fears III nonbinding Opinion. Notably, because in failing to decide Petitioner's judicial bias claim under Due Process, the lower PCRA court left it up to the federal habeas court to conduct a de novo review. Further, the State Court forfeited any presumption of correctness on its behalf, due to its non-binding position, on federal appeal. Also, warranting de novo review.

- Nevertheless, Petitioner has a right to a fair and impratial appeal before the State Court for which he had filed for. Hence, in light of the above, Petitioner contends that his Due Process right to a fair and impartial PCRA appellate review was violated.

III. Is Pennsylvania's Death Penalty Scheme Constitutionally Deficient?

Regarding Pennsylvania's death penalty scheme, Petitioner raised 14 areas of deficiency based upon the June 25, 2018 findings of the Joint State Government Commission(JSGC) Report generated by the Task Force and Advisory Commission on Capital Punishment.(See, 2/25/20 Aplt.Brf. at pp. 50-57).

Areas of deficiencies include, but not limited to, Geographical Bias, Racial Bias, Defense Counsel, Prosecutorial Discretion, the Extraordinary Large Number of Appellate Reversals of Capital Trials and Death Sentences and the Inclusion of People with Intellectual Disabilities and Serious Mental Illness. Some of these areas apply to Petitioner.

It is well-settled that death is different than all other punishments due to its irreversibility requiring a reliable determination for its imposition.(See, Harmelin v. Michigan, 111 S.Ct. 2680)(holding the "Quantitative difference between death and all other penalties".). Woodson v. North Carolina, 428 U.S. 280("There is a corresponding difference in need for reliability in the determination that death is the appropriate punishment...").

Although he grounded his unconstitutional death penalty claim upon state law(See, Aplt.Brf. at ¶¶ 1-2, 4-15, 22), Petitioner also rested his claim upon federal law that support and correspond to state law.(Id., ¶¶ 3, 22, 40-54). Petitioner did this to inform the State Court that his claim is supported by state and federal law and to satisfy comity.

The origin of Petitioner's unconstitutional death penalty claim did not

begin by ordinary means. Here, the State's Executive Branch initiated the JSGC Report because it suspected unfairness and unreliability regarding the death penalty.(See, 8/23/18 Supplemetal and its EXHIBIT A).

Years prior to the JSGC Report, the State's Executive Branch had no confidence in the death penalty scheme that it enacted a moratorium, refused to issue any further death warrants and issued reprieves to those condemned whose appeals expired. In retaliation, the State's Legislature stripped power from the Governor to issue death warrants, when he refused to sign them, and gave the issuing power to the State Secretary of Corrections.

This is particularly troubling because it violates Pa.C.S. § 9711(i). § 9711(i) directs the Governor to review the record of each capital case conviction after direct appeal for arbitrary and capriciousness. Under the Legislative strip, when the Governor reviews the record and refuses to sign a death warrant due to his opposition, the record is not reviewed of a single capital case by the Secretary of Corrections before a warrant is issued.

The State Governor's power to issue execution reprieves was also attacked by the Commonwealth.(See, Commonwealth v. Williams, 129 A.3d 1199(Pa. 2015)). This was the State Court's first interaction with the Governor's efforts in questioning the death penalty. The Executive Branch's effort to initiate an inspection of the reliability of the state's death penalty scheme is extremely courageous to say the least.

As one of 3 Branches of state government, its duty is to enforce the Rule of Law of both the Judicial and Legislative Branches. If, the Executive Branch

itself, being the executor of state executions, questions or discovers deficiencies within the death penalty scheme, and employs its conscience that these infirmities exists in the applicability of the death penalty, the other 2 Branches should be an attentive audience and not impediments.

This scenario demonstrates that the state's death penalty scheme is politicized and, thus, riddled with arbitrary and capriciousness. The State Court had its second interaction in regard to the State Executive Branch's endeavors to expose deficiencies in the death penalty's application when the JSGC's report was issued. Here, the Federal Community Defender Office(FCDO) of Philadelphia filed a King's Bench petition based upon the JSGC Report.(See, Cox v. Commonwealth, 218 A.3d 384(Pa. 2019)).

The State Court shunned the challenge by deeming the King's Bench request a "class action" where King's Bench authority had no jurisdiction.(See, APPENDIX D7). The State Court held that evidence of the JSGC Report "will proceed in the individual cases". However, prior to this, on 8/23/18, Petitioner filed a timely Supplemental to his PCRA petition containing claims of constitutional deficiencies reflected in the JSGC Report. Petitioner requested Leave of Court to file his Supplemental. APPENDIX D4.

The lower PCRA court ignored Petitioner's Supplemental. The evenly divided State Court opined that Petitioner did not request Leave to file his Supplemental in order to preserve his claim for appeal. The State Court relied upon Commonwealth v. Baumhammers, 92 A.3d 708(Pa. 2014)("[I]t is clear from the rule's text that leave to amend must be sought and obtained, and hence, amendments are not 'self-authorizing').(citing, Pa.R.Crim.P. 905(A)).

It is wholly incorrect that Petitioner did not seek leave of court to amend his Supplemental to his PCRA petition because APPENDIX D4 clearly shows that I did. Thus, the focus shifts to whether Petitioner "obtained" leave. Petitioner avers that the lower PCRA court foreclosed him from obtaining leave by it completely ignoring his leave of court request.

Petitioner's case presents several snapshots of the unreliability arbitrary and capriciousness that is inherent within the state's death penalty scheme.

* State Court Justices Eakin and McCafferty found it easy and inconsequential to send and receive derogatory emails depicting abusiveness toward females, racism, homophobia, rape, incest, religious bigotry, racial stereotyping, etc., etc.

* Court-appointed counsel, while serving as stand-by counsel, purposefully derailed Pro se Petitioner's ability to review relevent material evvidence after the lower PCRA court ordered him to do so.

* The lower PCRA court failed to address all of Pro se Petititoner's Leave of Court motions regardless of his seekage for such.(Including his leave for his Supplemental).

* The lower PCRA court neglected to address Pro se Petitioner's claim of judicial bias under the 14th Amendment Due Process Clause.

* Respondent intentionally failed to serve its state court Response Brief upon Pro se Petitioner derailing his ability to effectively defend his claim from government scrutiny of his appellate claim(s) and arguments. Due to Respondent's act in this regard, Petitioner never had the opportunity to place a "formal", comprehensive Reply Brief in rebuttal.

* Justices of the 2-2 evenly divided State Court failed to pro- failed to provide the legitimate state remedy of Pa.R.J.A 701(C) to cure the stalemated Court in regard to the persistant judicial bias claim.

* The evenly divided State Court failed to remand this case back for the lower PCRA court to adjudicate Petitioner's judicial bias claim and government inference claim which it had failed to do. But, left these claims unadjudicated.

* The State Court failed to remand this case back to the lower PCRA court so that Petitioner could **obtain** a ruling on his Supplemental which the lower PCRA court failed to provide.

Petitioner contends that the above adverse occurrences, singularly or culuminatively, reflect the arbitrary and capricious conditions that are immersed within the state's death penalty scheme. And, many of them are listed within the areas of constitutional deficiencies that the JSGC report revealed.(See, Supplemental Exhibit A).

These factors undermined the heightened reliability determination standard detailed in Murray v. Giarrantano, 592 U.S. 1 and Lockett v. Ohio, 438 U.S. 607 gauging whether death is the appropriate sentence. Woodson v. North Carolina, 428 U.S. 280.

Definitively, other than his Supplemental, the JSGC Report(EXHIBIT A of the Supplemental) and the unconstitutional death penalty claims set within his appellate Response and Reply briefs filed in State Court, Petitioner can point to no other comprehensible source of evidence than the Response Brief filed by the Commonwealth of Pennsylvania wherein it concedes to the arbitrary and capriciousness embedded within the State's death penalty

CONCLUSION

As such, Petitioner prayerfully requests that Certiorari be granted in this case.