[J-61-2020]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 781 CAP
Appellee	:	Application for Reconsideration
v.	:	
LEROY FEARS,	:	
Appellant	:	

ORDER

PER CURIAM

AND NOW, this 8th day of July, 2021, the Application for Reconsideration is hereby **DENIED**.

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

A True Copy Phoenicia D. W. Wallace, Esquire
As Of 07/08/2021

Attest: Phoenicia D. W. Wallace
Deputy Prothonotary
Supreme Court of Pennsylvania

APPENDIX - A3

[J-61-2020]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 781 CAP
	:	
Appellee	:	Appeal from the Order dated May 16, 2019 in the Court of Common Pleas, Allegheny County, Criminal Division at Nos. CP-02-CR-0008705-1994, CP-02-CR-009095-1994 and CP-02-CR-0009201-1994.
v.	:	
	:	
LEROY FEARS,	:	
	:	SUBMITTED: July 7, 2020
Appellant	:	

ORDER

PER CURIAM **DECIDED: May 18, 2021**

AND NOW, this 18th day of May, 2021, the order of the court of common pleas is affirmed by operation of law, as the votes among the participating Justices are equally divided. Appellant's ancillary application for sua sponte judgment, application to clarify prayer for relief, application to supplement Appellant's claim regarding the death penalty's constitutionality, application for post-submission communication pursuant to Pa.R.A.P. 2801(a) (sic), application for post-submission communication to strike Appellee's response brief, and motion for leave of court are denied as moot.

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

Judgment Entered 05/18/2021

Patricia A. Johnson
Chief Clerk
Supreme Court of Pennsylvania

APPENDIX-A1

250 A.3d 1180
Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee
v.
Leroy FEARS, Appellant

No. 781 CAP
|
Submitted: July 7, 2020
|
Decided: May 18, 2021
|
Reconsideration Denied July 8, 2021

Synopsis

Background: Petitioner, whose guilty plea to first-degree murder, corruption of minors and involuntary deviate sexual intercourse and abuse of a corpse was affirmed, 836 A.2d 52, appealed order of Court of Common Pleas, Allegheny County, Criminal Division, Nos. CP-02-CR-0008705-1994, CP-02-CR-009095-1994 and CP-02-CR-0009201-1994, John A. Zottola, J., which denied relief pursuant to Post-Conviction Relief Act (PCRA).

Holdings: For an equally divided court, the Supreme Court, No. 781 CAP, Mundy, J., held that:

it lacked jurisdiction over petitioner's untimely petition for post-conviction relief; but

assuming it possessed jurisdiction over petition, petitioner was not entitled to post-conviction relief on basis of after-acquired evidence; and

petitioner was not entitled to post-conviction relief, despite contention that his conviction and sentence were result of judicial bias violative of Fourteenth Amendment's Due Process Clause.

Ordered accordingly.

Procedural Posture(s): Post-Conviction Review; Appellate Review.

*1182 Appeal from the Order dated May 16, 2019 in the Court of Common Pleas, Allegheny County, Criminal Division at Nos. CP-02-CR-0008705-1994, CP-02-CR-009095-1994 and CP-02-CR-0009201-1994, John A. Zottola, Judge

Attorneys and Law Firms

Mr. Leroy Fears, Pro Se.

Ronald Eisenberg, Esq., Pennsylvania Office of Attorney General, Rushen R. Pettit, Esq., Paul R. Scholle, Esq., Michael Wayne Streily, Esq., Allegheny County District Attorney's Office, for Appellee.

ORDER

PER CURIAM

AND NOW, this 18th day of May, 2021, the order of the court of common pleas is affirmed by operation of law, as the votes among the participating Justices are equally divided. Appellant's ancillary application for sua sponte judgment, application to clarify prayer for relief, application to supplement Appellant's claim regarding the death penalty's constitutionality, application for post-submission communication pursuant to Pa.R.A.P. 2801(a) (sic), application for post-submission communication to strike Appellee's response brief, and motion for leave of court are denied as moot.

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

OPINION IN SUPPORT OF AFFIRMANCE

JUSTICE MUNDY

In this capital case, Appellant Leroy Fears appeals from an order of the Court of Common Pleas of Allegheny County denying relief pursuant to the Post-Conviction Relief Act, 42 Pa.C.S. §§ 9541- 9546 ("PCRA"). We

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consider whether the circulation of inappropriate emails by former members of this Court during the consideration of Appellant's direct and post-conviction appeals constitutes a deprivation of Appellant's constitutional rights. We conclude it does not.

I. Background

On December 8, 1994, Appellant pled guilty to one count of first-degree murder, one count of corruption of minors, and two counts each of involuntary deviate sexual intercourse and abuse of a corpse. A penalty hearing was conducted on February 2, 1995, at the conclusion of which Appellant was sentenced to death. Appellant appealed his sentence for reasons unrelated to his current petition. In 2004, this Court affirmed his judgment of sentence. *Commonwealth v. Fears*, 575 Pa. 281, 836 A.2d 52, 56-58 (2004), *cert. denied*, 545 U.S. 1141, 125 S.Ct. 2956, 162 L.Ed.2d 891 (2005).

Subsequently, Appellant filed his first counseled petition pursuant to the PCRA. Appellant set forth claims regarding, *inter alia*, trial counsel's ineffectiveness, the voluntariness of Appellant's jury trial waiver, and violations of his due process rights. *See Commonwealth v. Fears*, 624 Pa. 446, 86 A.3d 795 (2014). The PCRA court denied Appellant's claims, and he appealed. This Court denied Appellant's requested relief on February 19, 2014. Relevantly, Justice Eakin authored the majority opinion, and was joined by Justices Baer, Todd, McCaffery, and Stevens.[1]

Following the conclusion of Appellant's direct and collateral appeals, news accounts revealed that Justice Seamus McCaffery was involved in circulating inappropriate ***1183** emails with members of the Office of the Attorney General ("OAG").[2] The emails were discovered during an investigation conducted by former Attorney General Kathleen Kane regarding an unrelated matter. The emails sent and received by then-Justice McCaffery included images that contained demeaning portrayals of various segments of the population, in addition to emails comprised of crude language on sensitive subject matters. Justice McCaffery retired from his service on this Court in October 2014.

Thereafter, Justice Michael Eakin was implicated in the scandal. In October 2015, the Philadelphia Inquirer reported that media outlets had come into possession of multiple emails from Justice Eakin's private email account. The emails had been in the possession of the OAG, which obtained them when they were sent to the official email addresses of several OAG employees with whom Justice Eakin communicated informally.[3] The Inquirer detailed the content of several of the emails, many of which referenced race, religion, gender, sexual orientation, ethnicity, or class.[4] An October 30, 2015 report by the Special Counsel further described many of the emails. Report of the Special Counsel Regarding the Review of Justice Eakin's Personal Email Communications, Joseph A. Del Sole, Oct. 30, 2015. It specified that Justice Eakin did not send many of the racist or discriminatory emails, although he received a substantial number of them. *Id.* at 13. The emails that originated from Justice Eakin were characterized as "insensitive, chauvinistic and offensive to women." *Id.* The Special Counsel included in its report that the emails were repugnant in the eyes of the public. *Id.* at 24.

On February 8, 2016, Appellant filed the current PCRA petition, his second.[5] Appellant claimed Justice Eakin's emails demonstrated judicial bias, asserting they mocked minorities, victims of sexual abuse, and those involved with the criminal justice system, as well as containing homophobic content. Petition, 2/08/2016, at 15-18. Appellant alleged the emails directly related to Justice Eakin's ability to fairly adjudicate his case since Appellant, who is African-American, was sexually abused as a child. *Id.* at 16.

After filing his initial, counseled petition, Appellant wished to temporarily suspend his representation and proceed *pro se*. Following a hearing, the PCRA court determined Appellant adequately waived his right to representation and appointed Attorney Michael Machen as standby counsel. Hearing, 6/19/2018, at 9.

Appellant proceeded to file a series of amended petitions. In his first amended petition, he alleged Justice Eakin demonstrated an unconstitutional bias against groups with which Appellant identified through Justice Eakin's failure to actively participate in the Attorney General's investigation. Amended Petition, 7/31/18, at ***1184** 2-6. Approximately one month later, Appellant again amended his petition to include the same claims of judicial bias against Justice McCaffery. Amended Petition, 9/21/18, at 2-7. As a result of Justice Eakin and Justice McCaffery's actions, Appellant argued the panel deciding his direct appeal and first amended PCRA petition was imbued with an insurmountable structural defect, which rendered these proceedings fundamentally unfair. *Id.* at 22 (citing *Johnson v. United States*, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997)). Thus, Appellant alleged

the proceedings violated his state and federal constitutional right to due process. *Id.* at 20 (citing *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 (1927)).

Lastly, in a document Appellant labeled as a supplement to his petition, Appellant argued the constitutionality of the death penalty under Pennsylvania law. Supplemental Petition, 8/17/18, at 2. Specifically, Appellant cited to the findings contained in the Joint State Government Commission's Report ("JSGC Report") to argue the death penalty violated Article I, Section 13 of the Pennsylvania Constitution. *Id.* at 11-34. As a result of the aforementioned arguments, Appellant's requested relief included, *inter alia*, the vacatur of his guilty plea and death sentence, and an order for a new trial and/or sentencing proceeding. *Id.* at 23. In acknowledgment of his facially untimely petition, Appellant alleged both avenues of relief relied on newly discovered facts, and thus qualified under the same exception to the PCRA's timeliness requirement. *Id.* at 12 (citing 42 Pa.C.S. § 9545(b)(1)(ii)).[6]

On October 1, 2018, the Commonwealth filed an answer to the petition, conceding the timeliness of Appellant's pleading, but refuting his claim of judicial bias. Specifically, the Commonwealth argued the Court of Judicial Discipline found that Justice Eakin's actions did not prejudice the administration of justice in any of the cases with which he was involved, and thus could not form the basis of a judicial bias claim. Commonwealth Answer at 13 (citing *In re Eakin*, 150 A.3d 1042 (Pa. Ct. Jus. Disc. 2016)). It pointed out Justice Eakin was one of a number of justices to participate in the resolution of Appellant's case, and was joined by others in his majority opinion regarding Appellant's first PCRA petition. *Id.* at 14. Lastly, the Commonwealth asserted Justice Eakin's involvement was mainly limited to receiving emails, which does not per se establish the presence of bias. *Id.* (citing *Commonwealth v. Shannon*, 184 A.3d 1010 (Pa. Super. 2018)).

On March 29, 2019, the PCRA court filed a notice of its intention to dismiss Appellant's PCRA petition without an evidentiary hearing pursuant to Pa.R.C.P. 907. Appellant filed a response to the court's notice, which was subsequently denied. The PCRA court dismissed Appellant's petition on May 16, 2019. Appellant filed a timely notice of appeal to this ***1185** Court. In his concise statement, which Appellant filed on August 7, 2019, he raised the following claims *verbatim*:

> 1. This court has jurisdiction under 42 Pa.C.S. § 9545(b)(1) to address the substance of my claims.
>
> 2. My judicial bias claim was timely under 42 Pa.C.S. § 9545(b)(1). This court's summary dismissal of my amended and supplemental petitions without a hearing violated my due process and equal protection rights where my claim was first filed within 60-days of when the facts supporting the claim were publically [sic] revealed in the Judicial Conduct Board complaint filed against Justice Eakin. *In re J. Eakin*, 13 JD 2015 [150 A.3d 1042].
>
> 3. My judicial bias claim based on the email scandal was not frivolous. Justice Eakin was a party to emails which revels [sic] an inappropriate bias against African American person, gay persons, victims of domestic violence and persons involved in the criminal justice system. As a result, I did not receive a fair adjudication of my direct and post-conviction appeals, in violation of the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, and Article 1, §§ 9 & 13 of the Pennsylvania Constitution.
>
> 4. My judicial bias claim is based on the Join [sic] State Government Commission's report regarding the death penalty (Capital Punishment in Pennsylvania: The Report of the Task Force and Advisory Committee, June 2018), was timely under the newly discovered facts and supplemental petitions without a hearing violated my due process and Sixth Amendment rights where my claim was filed within 60 days of when the facts supporting the claim were publically revealed in the report.
>
> 5. My claim based on the Join [sic] State Government Commission's report regarding the death penalty (Capital Punishment in Pennsylvania: The Report of the Task Force and Advisory Committee, June 2018) was not frivolous. Pennsylvania's capital punishment system is broken and violates Article I, Section 13 of the Pennsylvania Constitution and the Eighth Amendment to the United States Constitution.
>
> 6. The court violated my due process rights by not allowing for discovery.

Rule 1925(b) Statement, 9/07/2019.

On October 2, 2019, the PCRA court filed its Rule 1925(a) statement. In regards to the timeliness of Appellant's petition, the court found it satisfied the requirements of the newly discovered fact exception. PCRA Ct. Op., 10/02/2019, at *6. Citing *Commonwealth v. Bennett*, 593 Pa. 382, 930 A.2d 1264 (2007), the court stated the exception set forth in Section 9545(b)(1)(ii) "does not require any merits

analysis of the underlying claim." *Id.* at *4. Without further examination, the PCRA court concluded that "[Appellant] has demonstrated that his instant PCRA petition was timely filed within the exception to the one-year requirement under the newly discovered evidence requirements, and was ... timely filed within the 60-day period following the discovery of new facts." *Id.* at *5.

Despite finding the petition timely, the court concluded Appellant's collateral claims regarding Justice Eakin's emails were ultimately meritless under the after-acquired evidence provision of the PCRA statute. The court relayed that pursuant to Section 9543, which governs a petitioner's eligibility for relief on the merits, relief may be owed to a party where a litigant demonstrates, by a preponderance of the evidence, that the evidence: "(1) could not have been obtained prior to the conclusion of trial by the 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 ***1186** (4) would likely result in a different verdict if a new trial were granted." *Id.* at *5 - *6 (citing 42 Pa.C.S. § 9543(a)(2)(vi); *Commonwealth v. Pagan*, 597 Pa. 69, 950 A.2d 270 (2008)). Specifically, the court concluded Appellant did not satisfy the fourth prong since he failed to demonstrate "the judicial bias would have altered the outcome of any of his proceedings, including the direct appeal of his initial PCRA petition." *Id.* at *8. The PCRA court relied on the fact that independent sources had concluded there was no evidence that Justice Eakin ever demonstrated overt bias in his written opinions, and had decided each case in accordance with the facts and the law. *Id.* at *8.

II. Jurisdiction

This matter is properly before this Court pursuant to 42 Pa.C.S. § 9546(d) ("A final court order under this subchapter in a case in which the death penalty has been imposed shall be directly appealable only to the Supreme Court pursuant to its rules."). However, in order to evaluate the merits of Appellant's claim, we must first have jurisdiction over the matter. *See* 42 Pa.C.S. § 9545. Without jurisdiction, we are unable to consider the merits of Appellant's argument. *See* *Commonwealth v. Fahy*, 558 Pa. 313, 737 A.2d 214, 220 (1999) (holding that where a party fails to satisfy the PCRA time requirements, this Court has no jurisdiction to entertain the petition). Should Appellant establish jurisdiction, we then consider whether the PCRA court's ruling is supported by the record and free from legal error. *Commonwealth v. Rainey*, 593 Pa. 67, 928 A.2d 215, 223 (2007). We review the PCRA court's legal conclusions *de novo*. *Commonwealth v. Williams*, 649 Pa. 471, 196 A.3d 1021 (2018).

III. The Parties' Arguments

As we glean from Appellant's submitted brief, he contests the PCRA court's decision because it deprived him of impartial judicial review by an unbiased panel of this Court. Appellant contends Justice Eakin's email account and the contents therein evidence the Justice's inability to decide cases impartially, including Appellant's.[7] Further, he argues the PCRA court erred in requiring he demonstrate actual bias in satisfaction of the after-acquired evidence provision of the PCRA statute, claiming only the appearance of bias is required. He further states the court erred in determining that the evidence of Justice Eakin's email account would not have changed the outcome of any of his proceedings, including his direct appeal.

Citing *Williams v. Pennsylvania*, —— U.S. ——, 136 S.Ct. 1899, 195 L.Ed.2d 132 (2016), Appellant contends Justice Eakin's alleged bias resulted in a structural defect in the adjudication of his case. In support of this argument, Appellant again restates the content of Justice Eakin's email account, and the subject matter contained therein. Lastly, Appellant questions the PCRA court's reliance on special counsel's determination regarding the presence of bias in Justice Eakin's decisions.

Similarly, Appellant also contends a deprivation of his constitutional rights based on judicial bias stemming from Justice McCaffery's email scandal. Appellant claims Justice McCaffery's email activity demonstrates his inability to decide the cases before him in an objective and fair manner. In support of his claim, Appellant details the contents of several emails discovered during the investigation into Justice McCaffery's account. Appellant argues a "heightened reliability standard" applies ***1187** in death penalty cases, and that under this standard, he did not receive a fair determination based on the Justices' biases. As a result of this alleged judicial bias, Appellant claims this Court violated his due process rights pursuant

to the Constitutions of the United States and this Commonwealth.

Appellant further contests the PCRA court's decision, claiming he was precluded from viewing the contents of Justice Eakin and Justice McCaffery's email accounts that were not released to the public. He implicates standby counsel's actions, claiming counsel's alleged refusal to assist to him in reviewing the material.

Lastly, Appellant disputes the propriety of the death penalty in Pennsylvania. In a lengthy passage spanning nearly twenty-five pages, Appellant discusses the findings contained in the JSGC Report.[8] Appellant claims the JSGC Report demonstrates that Pennsylvania's capital punishment system is unconstitutional and arbitrarily imposed.

In response, the Commonwealth argues that the PCRA court correctly decided that Appellant failed to prove he is due any relief, as he fails to demonstrate Justice Eakin's emails constitute after-acquired evidence within the parameters of the PCRA statute.[9] Commonwealth's Brief at 23 (citing *Commonwealth v. Pagan*, 597 Pa. 69, 950 A.2d 270 (2008) ("In order to obtain relief based on after-acquired evidence, Appellant must demonstrate that the evidence: (1) could not have been obtained prior to the conclusion of the trial by the exercise of due 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.")). Specifically, the Commonwealth asserts that Appellant failed to show there was any unconstitutional bias during the course of his first PCRA appeal that would have changed its outcome. It argues that for the most part, Justice Eakin passively received emails rather than participated in sending them. The emails that he did send contained no racial animus or otherwise. It notes that only two emails sent by Justice Eakin even mention race, but asserts that mention of the topic does not prove animus. Commonwealth's Brief at 28 (citing *In re Eakin*, 150 A.3d 1042, 1048 (Pa. Ct. Jus. Disc. 2016)).

Alternatively, even if the emails demonstrated bias, the Commonwealth asserts that it does not follow that such bias affected Justice Eakin's decisions. It claims that Appellant has not presented any evidence of such bias in Justice Eakin's jurisprudence, as evidenced by his adherence to the facts and law of each case. Commonwealth's Brief at 32 (citing *In re Eakin*, 150 A.3d at 1060 (noting that the Judicial Conduct Board has not produced any evidence that Justice Eakin has ever demonstrated any overt bias in his written judicial opinions.)). The Commonwealth highlights the fact that Appellant has provided no evidence that Justice Eakin exercised any bias while penning the majority opinion in his first PCRA. Moreover, it ***1188** points out, Justice Eakin was one of five Justices who affirmed the lower court's decision. Thus, if the decision had been biased, the Commonwealth reasons the opinion would not have garnered a majority at all.

Next, the Commonwealth argues that Appellant's claims regarding Justice McCaffery's alleged bias do not entitle him to relief, in part because they are waived, and in part because of the same reasons Appellant's previous claim fails. The Commonwealth reiterates that it is unlikely that the decision in Appellant's first PCRA case would have been joined if it demonstrated any bias.

Based on the futility of Appellant's preceding claims, the Commonwealth maintains he was properly denied discovery. The Commonwealth asserts that he is not entitled to discovery since he has failed to show any need for the compact discs containing Justice Eakin's or Justice McCaffery's emails.

Lastly, the Commonwealth asserts that Appellant is not entitled to relief on his claim regarding the constitutionality of the death penalty since it does not satisfy the jurisdictional requirements set forth under the newly-discovered fact exception. It argues that much of the information contained within the JSGC Report was within the public domain before June 2018, or when Appellant claims he discovered it. Commonwealth's Brief at 51 (citing *Commonwealth v. Lark*, 560 Pa. 487, 746 A.2d 585 (2000) (asserting that publicly available information does not constitute a newly discovered fact.)). Even assuming *arguendo* that the Report passed jurisdictional muster, the Commonwealth argues its admission either during trial or during Appellant's first PCRA petition would not have changed the outcome of his adjudication since the death penalty remains legal in Pennsylvania.

IV. Analysis

A. Timeliness of Appellant's Second PCRA Petition

Preliminarily, Appellant does not present a petition that meets the jurisdictional requirements of this Commonwealth's PCRA statute.[10] Specifically, Appellant fails to present a "fact" that meets the jurisdictional requirements of our PCRA statute, and fails to set forth any information regarding the statute's due diligence requirement.

As we have stated before, to be eligible for post-conviction relief, a party must prove by a preponderance of the evidence that his conviction or sentence resulted from one of the statute's enumerated circumstances, *see* 42 Pa.C.S. § 9543(a)(2), and that the issues have not been previously waived, *id.* § 9543(a)(3). A PCRA petition, including a second PCRA petition, must be filed within one year of a final judgment, unless a party pleads and proves he is entitled to one of the exceptions to the general rule. 42 Pa.C.S. § 9545(b). This limitation is jurisdictional. *Commonwealth v. Bennett*, 593 Pa. 382, 930 A.2d 1264 (2007). As stated above, Appellant claims his petition is timely under our collateral relief statute pursuant to Section 9545(b)(1)(ii). Accordingly, appellant is charged with establishing "1) the *facts* upon which the claim is predicated were *unknown* and 2) could not have been ascertained by the exercise of due diligence." *Bennett*, 930 A.2d at 1272 (italics in original). If a petitioner can establish both components, then jurisdiction over ***1189** the matter may be exercised. *Commonwealth v. Blakeney*, 648 Pa. 347, 193 A.3d 350 (2018). Without jurisdiction, this court does not have the legal authority to address substantive claims. *See Commonwealth v. Cox*, 636 Pa. 603, 146 A.3d 221, 226 (2016) ("a court may not address the merits of any claim raised unless the petition was timely filed or the petitioner proved that one of the three exceptions to the timeliness requirement applies"); *Commonwealth v. Abu-Jamal*, 596 Pa. 219, 941 A.2d 1263, 1267-68 (2008) ("The PCRA's timeliness requirements are jurisdictional in nature and must be strictly construed; courts may not address the merits of the issues raised in a petition if it is not timely filed.").

While the law provides that Appellant need not provide a nexus between the newly discovered fact and his conviction, he still must provide a connection between the fact and his underlying claim. *See Bennett, supra*, at 1273; *see also Commonwealth v. Robinson*, 651 Pa. 190, 204 A.3d 326, 354 (2018) (Dougherty, J. OISA) ("While I appreciate the test for application of when newly-discovered facts will overcome the PCRA time bar prohibits a merits analysis, the test does require that the claim be predicated on previously unknown facts.").[11] Appellant fails to meet his burden, as he does nothing more than set forth vague claims of various types of bias that allegedly permeated the review of his direct and collateral appeals. Appellant essentially proposes the unsavory nature of Eakin's email account per se establishes his underlying claims regarding the violation of his Constitutional rights. However, upon a careful evaluation of the sources cited by Appellant, support for his claim falls short. Appellant attempts to maintain his burden by citing to the Judicial Conduct Board opinion and Special Counsel report. Both renderings determined that Justice Eakin did not send any emails implicating the topics alleged by Appellant, and received only a few emails invoking the invidious subject matter. As the Commonwealth argues in its brief (though in a different portion than that addressing timeliness), there is a profound difference between sending and receiving emails. Commonwealth's Brief at 26; *See also Blakeney*, 193 A.3d at 378 ("We should not overlook the fact that the allegation of bias here is based on the receipt of an email[.]"). The mere receipt of invidious emails "should not be elevated to a finding of the existence of judicial bias as a material fact." *Commonwealth v. Blakeney*, 648 Pa. 347, 193 A.3d 350, 378 (Pa. 2018) (Dougherty, J. OISA).

As has been reiterated before, the undesirable content of these emails does not excuse a party from meeting the basic standards of this Commonwealth's pleading requirements. *Id.* at 367 ("Of course the emails are repugnant, but their mere existence does not demonstrate the fact of bias."). Even though our jurisdictional query is not (and should remain separate from) an analysis of the merits, Appellant is still required to state his claim and ***1190** demonstrate how those issues will be proved. *Commonwealth v. Rivers*, 567 Pa. 239, 786 A.2d 923, 927 (2001). Permitting a party to overcome the PCRA's jurisdictional requirements with such scant evidence predicating his claim of unconstitutional bias weakens the exception, which this Court relies on to safeguard against groundless claims.

Moreover, Appellant fails to demonstrate he exercised due diligence in ascertaining the very facts he asserts. In *Commonwealth v. Reid*, — Pa. ——, 235 A.3d 1124 (2020), this Court evaluated the propriety of a PCRA petition filed well after the one year timeline prescribed under the statute. Following the Supreme Court's decision in *Williams v. Pennsylvania*, — U.S. ——, 136 S.Ct. 1899, 195 L.Ed.2d 132 (2016), Reid, the appellant, claimed, *inter alia*, that jurisdiction over his petition existed based on the newly discovered fact that Chief

Justice Castille, in his previous capacity as District Attorney, had authorized the trial prosecutor's request to seek the death penalty. *Reid*, 235 A.3d at 1149. Specifically, Reid claimed this fact, to which the Commonwealth later conceded, created an impermissible risk of actual bias that violated his Constitutional rights. *Id.* at 1148 (citing *Williams*, 136 S.Ct. at 1905). This Court determined Reid did not meet his burden in establishing jurisdiction because evidence of District Attorney Castille's involvement in capital cases began emerging as early as 1993, when articles divulging this information were publicly reported. *Id.* at 1152. Since Reid failed to exercise due diligence in ascertaining the facts he alleged predicated his claim, this Court determined he failed to satisfy the exception to the PCRA time bar. *Id.* at 1153.

Similarly, Appellant fails to demonstrate he meets the requirements of due diligence. In fact, Appellant sets forth no information regarding his ascertainment of the information which he alleges. *See* *Commonwealth v. Yarris*, 557 Pa. 12, 731 A.2d 581, 590 (1999) (60 day requirement of section 9545(b)(2) not satisfied where defendant failed to explain why alleged information could not, with the exercise of due diligence, been obtained earlier); *see also* *Commonwealth v. Breakiron*, 566 Pa. 323, 781 A.2d 94 (2001). Rather, he merely asserts he timely filed his petition exactly sixty days after December 8, 2015, or when the Judicial Conduct Board first filed a complaint against Justice Eakin. However, the information upon which Appellant's claims are predicated was ascertainable upon the exercise of due diligence nearly two months before, or when the Philadelphia Inquirer article was first published on October 8, 2015. Like Reid, Appellant at this point had reason to question the propriety of his case in light of publicly available information. However, Appellant did not, nor did he explain in his petition how or when he became aware of any of the preceding information. He does not explain to this Court or the court below how he was attuned to the Judicial Conduct Board's court filings, and not a widely publicized newspaper article concerning a topic of broad public importance.[12]

***1191** Confusingly, Appellant implicates only Justice Eakin's emails in his bid for jurisdiction. However, had Appellant attempted to establish jurisdiction by asserting the revelation of Justice McCaffery's email account as a newly discovered fact, our determination would not have been altered. In such a situation, Appellant's petition would not have been filed within sixty days of the date his claim could have been presented, considering the Judicial Conduct Board rendered a decision regarding the McCaffery emails on October 20, 2014. *See In re McCaffery*, 430 Judicial Administrative Docket (Pa. 2014). Accordingly, based on the information Appellant sets forth, he has failed to demonstrate that he has brought his claim within sixty days of when his claim "could have been presented." 42 Pa.C.S. § 9545(b)(2). Since Appellant fails to satisfy the requirements of the newly discovered fact exception to the PCRA statute's time bar, this Court is unable to exercise its jurisdiction over his claims.

B. Merits of Appellant's PCRA Claims

1. PCRA Court correctly determined Appellant's claim did not satisfy the after-acquired evidence rule.

While our inquiry could end based on the lack of jurisdiction, because this Court has an established disagreement on the topic of jurisdiction, we will alternatively address the merits of Appellant's claims. *See* *Commonwealth v. Blakeney*, 648 Pa. 347, 193 A.3d 350 (2018); *see also* *Commonwealth v. Robinson*, 651 Pa. 190, 204 A.3d 326 (2018). We conclude the PCRA court correctly determined Appellant's claims do not warrant relief under our collateral relief statute.[13] As stated above, Appellant seeks to obtain relief as a result of the information that came to light regarding Justice Eakin and Justice McCaffery's email accounts. In its 1925(a) statement, the PCRA court determined Appellant implicated the after-acquired evidence basis for relief.[14]

In order to obtain relief under our PCRA statute, a party must demonstrate by a preponderance of the evidence that his conviction or sentence resulted from several stated bases of relief. *See* 42 Pa.C.S. § 9543(a)(2). Under Section 9543(a)(2)(vi), relief may be due where a party demonstrates "the unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced." In order to obtain relief based upon exculpatory, after-discovered evidence, a party must demonstrate that: "(1) the evidence has been discovered

after trial and it could not have been obtained at or prior to trial through reasonable diligence; (2) the evidence is not cumulative; (3) it is not used solely to impeach credibility; and (4) it would likely compel a different verdict." *Commonwealth v. D'Amato*, 579 Pa. 490, 856 A.2d 806, 832 (2004).

On appeal from the dismissal of Appellant's PCRA petition, our review is limited to examining whether the trial court's determination is supported by the evidence of record and free of legal error. *Commonwealth v. Ali*, 624 Pa. 309, 86 A.3d 173, 177 (2014). Our review of issues of law ***1192** is de novo, and our scope of review is plenary. *Commonwealth v. Jette*, 611 Pa. 166, 23 A.3d 1032, 1036 (2011).

We have little trouble concluding that the PCRA court properly dismissed Appellant's claims.[15] Specifically, the court was correct in concluding that Appellant did not demonstrate that the emails, or any alleged bias he purports they reflect, would have altered the outcome of his proceedings. As the PCRA court aptly points out, Appellant avers no facts that would have resulted in a different outcome in any of his proceedings. The Court of Judicial Discipline found there was no evidence that Justice Eakin "in his written judicial opinions, ever demonstrated any overt bias due to the race, gender, ethnicity, or sexual orientation of a litigant or witness." *In re Eakin*, 150 A.3d 1042, 1048 (Pa. Ct. Jus. Disc. 2016).

Even if we were to ignore the well-reasoned conclusions of the Court of Judicial Discipline, a quick survey of Justice Eakin's email account supports our conclusion. As the Commonwealth points out and as discussed *supra*, Justice Eakin only participated in sending a small number of emails. The overwhelming majority of emails implicated in this incident were sent by others, including all of the emails containing the invidious subject matter cited by Appellant. Though we do not condone participating in exchanging emails of this ilk, this Court would be hard pressed to find any connection between the inappropriate and offensive subject matter and Justice Eakin's execution of his responsibilities as a member of this Court.[16]

Moreover, the constraints of our post-conviction relief statute make it unlikely this Court is able to grant Appellant's requested relief. Under the PCRA statute, when considering the propriety of affording relief based upon the alleged presence of after-acquired evidence, we are limited to examining the effect of the evidence on the litigant's *trial*. Clearly, the fundamental timing requirement of our statute as specified by our legislature precludes relief in Appellant's case for multiple reasons. First, Appellant never stood trial; rather, he entered an open guilty plea in February 1994. Second and most critical is the fact that none of these emails were in existence at the time of Appellant's trial-level proceedings. ***1193** The earliest known emails originated in 2008, which far postdates the time during which Appellant's case was in the guilt-determining phase. Fundamentally, this avenue of relief remains inapplicable to the very facts which Appellant presents in his petition for relief and brief before this Court. Appellant makes no argument otherwise, and does not attempt to reimagine Section 9545(a)(2)(vi) in a way that would suggest it exists as a viable theory providing relief. Accordingly, we affirm the PCRA court's determination that Appellant does not establish he is due any relief based on the after-acquired evidence rule under the PCRA statute.

2. Appellant's claim does not warrant relief since neither his conviction nor sentence resulted from any constitutional defect.

Notably, the PCRA court fails to address the viability of Appellant's claim to relief on the grounds of a constitutional violation during appellate review of his first PCRA petition. Considering Appellant makes it a central part of his petition to contest the constitutionality of the adjudication of his first PCRA appeal, we find it necessary to weigh in on these claims. As stated above, Appellant argues his first PCRA petition was not decided fairly as a result of judicial bias. Due to this alleged judicial bias during the consideration of appellate review of his petition, Appellant claims a violation of his due process rights under the United States Constitution, as well as the Constitution of this Commonwealth.[17] He claims the proper remedy includes but is not limited to: the vacation of his guilty plea, a new trial/sentencing proceeding, or the *nunc pro tunc* reinstatement of his ability to appeal prior post-conviction proceedings.[18]

Under our PCRA statute, relief may be due where a conviction or sentence results from "a violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(i). The Fourteenth Amendment guarantees that no state "shall ... deprive any person of life, liberty, or property without due process of law." U.S. Const. XIV, Sec. 1.

Due process concerns extend to the actions of the judiciary; accordingly, litigants are guaranteed an absence of actual bias on the part of any judge adjudicating their case. *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). The concept of bias encompasses matters in which an adjudicator has "a direct, personal, substantial, [or] pecuniary interest" in the outcome of the matter. *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 441, 71 L.Ed. 749 (1927). While a fair trial is indeed "a basic requirement of due process," *Murchison, supra*, 349 U.S. at 136, 75 S.Ct. 623, "most matters relating to judicial disqualification [do] not rise to a constitutional level." *FTC v. Cement Institute*, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948). In order to determine whether a judge harbors an unconstitutional level of bias, the inquiry is an objective one ***1194** wherein the requisite question is whether "the average judge ... is likely to be neutral, or whether there is an unconstitutional potential for bias." *Williams v. Pennsylvania*, —— U.S. ——, 136 S.Ct. 1899, 195 L.Ed.2d 132 (2016) (citing *Caperton v. Massey Coal Co., Inc.*, 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009) (internal citations excluded)). The Supreme Court has determined that there is an impermissible risk of actual bias when a judge has had "significant, personal involvement ... in a critical decision regarding [the litigant's] case." *Williams*, 136 S.Ct. at 1905.

Even assuming Appellant is entitled to his requested relief,[19] we are unable to discern even a hypothetical basis upon which relief could be granted. Unlike in *Williams*, where the High Court determined that Justice Castille's[20] previous involvement as a prosecutor constituted a significant personal involvement, no one adjudicating Appellant's direct appeal or previous PCRA petition was involved in prosecuting this case. Justice Eakin did not have any prior interaction with Appellant's case prior to it being argued before this Court. Moreover, Justice Eakin's email account and the content contained therein does not render him a biased jurist. His participation in the inappropriate email activity had no bearing on his ability to fairly apply the law to the facts of Appellant's case. As stated above, an independent evaluation confirmed what should be a common sense conclusion: that none of Justice Eakin's written opinions contained any bias, and certainly none that reached the levels of constitutional interference. *In re Eakin*, 150 A.3d 1042, 1048 (Pa. Ct. Jus. Disc. 2016). Thus, to the extent Appellant even attempts to litigate this issue, we conclude Appellant would be unable to establish his right to collateral relief under the theory that his conviction or sentence was the result of a constitutional defect.

3. Appellant is due no relief on his claim regarding the Joint State Government Commission Report.

In his brief to this Court, Appellant lastly argues he is due relief under the PCRA statute as a result of the findings contained within the JSGC Report. Notably, Appellant does not include this argument in his petition for PCRA relief. Rather, he argues this for the first time in a supplement to a petition, as noted *supra*. Thus, we find Appellant has waived this argument based on his failure to properly plead this issue by seeking leave to amend his petition. Pa.R.Crim.P. 905(A) ("The *judge* may grant leave to amend or withdraw a petition for post-conviction collateral relief at any time." (emphasis included)). As is clear from our rules of criminal procedure, a party must seek leave to amend, as amendments (or supplements) are not self-authorizing. *See Commonwealth v. Porter*, 613 Pa. 510, 35 A.3d 4, 12 (2012); *see also Commonwealth v. Baumhammers*, 625 Pa. 354, 92 A.3d 708, 730 (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'.").

V. Conclusion

After a review of the PCRA court's decision to dismiss Appellant's claim without an evidentiary hearing, we agree that the court did not err in its actions. Appellant is unable to set forth a claim under the ***1195** PCRA statute pursuant to which he is entitled to collateral relief. First, Appellant does not establish jurisdiction over his claims regarding Justice Eakin and Justice McCaffery's emails. He is unable to provide a connection between the facts he alleges and the Constitutional violations he claims they predicate, nor how he obtained this information with due diligence. Regardless of Appellant's ability to establish an exception to the PCRA statute's timeliness requirement, the PCRA court did not err in dismissing his claims. Appellant fails to set forth any evidence he is due relief on his conviction or sentence based on the presence of after-acquired exculpatory evidence, or that his conviction resulted from a constitutional defect. Moreover, Appellant waives his argument regarding the contents of the JSGC

Report, as he improperly declined to seek leave of the PCRA court in order to amend his petition. Accordingly, the PCRA court correctly dismissed Appellant's petition without affording any relief.[21]

Justice Dougherty joins this Opinion in Support of Affirmance.

OPINION IN SUPPORT OF REVERSAL

JUSTICE WECHT

The instant appeal arises from the dismissal of a serial petition filed by Leroy Fears under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541, *et seq.*, on February 8, 2016. Therein, Fears asserted a claim of relief on federal due process principles based upon the revelation in 2015 of a trove of emails containing offensive stereotypes and slurs about homosexuals, African-Americans, and victims of domestic and sexual violence, that were connected to the private email account of former Pennsylvania Supreme Court Justice J. Michael Eakin. Fears alleged that the content of those emails reflected an intolerable risk of judicial bias against groups with which Fears identifies, such that his due process rights were violated by Justice Eakin's participation in this Court's 2014 dismissal of Fears' previous collateral appeal. *See Commonwealth v. Fears*, 624 Pa. 446, 86 A.3d 795, 802 (2014) ("*Fears II*"). Fears requested discovery and an evidentiary hearing, which the PCRA court denied. The court also denied relief on Fears' constitutional claim.

The Opinion in Support of Affirmance ("OISA") proffers alternative grounds for affirming the lower court's dismissal order. First, the OISA *sua sponte* reviews the timeliness of the petition, concluding that Fears failed to exercise due diligence in presenting his allegation of judicial bias. According to the OISA's own assessment, the facts upon which the claim was predicated were publicly available in October 2015, two months before Fears claimed to have discovered them, and, thus, could have (or should have) been discovered sooner. Consequently, the OISA finds that the PCRA court lacked jurisdiction to entertain the claim. Next, the OISA considers Fears' assertion that Justice Eakin's email practices demonstrated an unconstitutional risk of bias necessitating reconsideration of Fears' earlier claims in a new appeal before this Court untainted by Justice Eakin's alleged animus. The OISA dismisses this claim as meritless.

I would not reject either claim presently. Instead, because the PCRA court did ***1196** not permit discovery or substantively address Fears' efforts to obtain the information upon which his claim is grounded, neither the due diligence issue nor the ultimate constitutional question regarding Justice Eakin's potential bias is capable of thorough resolution on the record before us. Accordingly, I would vacate the PCRA court's dismissal order and remand the case to that court for additional fact-finding.

I. Procedural History

On June 18, 1994, Leroy Fears molested twelve-year-old Shawn Hagan on the banks of the Monongahela River in Allegheny County. When Hagan threatened to tell his parents what had happened, Fears strangled Hagan to death. He then had anal intercourse with Hagan's body, tied a tire rim around Hagan's neck, and swam with the body out into the river until it sank below the surface. When Hagan's remains were discovered days later, Fears confessed to the murder, took detectives to the crime scene, and provided a videotaped confession. *Commonwealth v. Fears*, 575 Pa. 281, 836 A.2d 52, 56-57 (2003) ("*Fears I*").

After pleading guilty to first-degree murder and related charges, Fears was sentenced to death on February 7, 1995. He did not appeal. In January 1996, Fears, acting *pro se*, filed a petition for post-conviction relief, alleging that counsel had failed to file an appeal on his behalf. The Commonwealth agreed to the reinstatement of Fears' post-sentence motion and appellate rights, which the trial court granted in May 1999. Thereafter, the court denied relief in July 2001. This Court affirmed the judgment of sentence in a unanimous opinion on November 20, 2003.[1] *Id.* at 58, 74. The Supreme Court of the United States denied Fears' petition for a writ of certiorari on June 27, 2005. *Fears v. Pennsylvania*, 545 U.S. 1141, 125 S.Ct. 2956, 162 L.Ed.2d 891 (2005).

Fears filed his first counseled PCRA petition in June 2006, in which he raised numerous challenges to the effectiveness of his trial and appellate counsel. Relevant

here, Fears alleged that trial counsel was ineffective for failing to present mitigating evidence of, among other things, the sexual abuse Fears allegedly suffered during adolescence at the hands of his foster brothers and a male cousin, as well as a family history of mental illness, alcohol abuse, and sexual violence on his mother's side. He also included a derivative claim alleging that appellate counsel was ineffective for failing adequately to litigate the issue of trial counsel's stewardship on direct appeal.[2] As part of his evidentiary proffer in support of his claims, Fears presented the results of a comprehensive psychiatric evaluation performed on him and the resultant diagnosis of "major depressive disorder with psychotic features." *Fears II*, 86 A.3d at 813 (citing Decl. of Dr. Richard G. Dudley, 5/25/2006, at 1-2). During that evaluation, Dr. Dudley documented that Fears "was ashamed from the sexual abuse" that he experienced while in foster care and "also felt shame from feeling he was gay, which was exacerbated because ***1197** the family's religious views condemned homosexuality." *Id.* (citing Dudley Decl. at 4). The PCRA court dismissed Fears' petition without an evidentiary hearing.

On February 19, 2014, this Court affirmed the PCRA court's denial of relief in an opinion authored by Justice Eakin. As to the mitigation issue, we observed that Fears' allegation "of trial counsel's ineffectiveness for failing to explore mitigating circumstances was developed by appellate counsel" on direct appeal and was rejected as meritless by this Court in 2003. *Id.* at 816. For those reasons, we dismissed Fears' derivative challenge to appellate counsel's purported "failure to properly litigate trial counsel's ineffectiveness." *Id.* at 817.

Following our 2014 decision, an email scandal came to light as a result of

> an investigation by former Attorney General Kathleen Kane into her predecessor's handling of an unrelated matter. This investigation uncovered emails sent from and received by members of her office on Commonwealth owned computers that contained racist, sexist, misogynistic, homophobic, and religiously and ethnically insensitive content. Their piecemeal release revealed individuals from all three branches of the Commonwealth's government as having sent and/or received these emails.

Commonwealth v. Robinson, 651 Pa. 190, 204 A.3d 326, 327 (2018) (Opinion in Support of Reversal ("OISR")); *see also* *Commonwealth v. Blakeney*, 648 Pa. 347, 193 A.3d 350, 354-56 (2018) (OISR).

As was thoroughly recounted in *Robinson* and *Blakeney*, the Attorney General's email investigation implicated two former members of this Court: Justice Seamus McCaffery and Justice Eakin. Details of Justice Eakin's involvement began to be released publicly in the fall of 2015. On October 1, 2015, then-Attorney General Kane announced that she had turned over to the Judicial Conduct Board "more than 1,500" emails in the possession of the Attorney General's Office that Justice Eakin had received or sent, some of which involved " 'racial, misogynistic pornography' " and "jokes" about domestic violence.[3] The next day, the *Philadelphia Daily News*, a newspaper owned by the parent company of *The Philadelphia Inquirer*, revealed that it had obtained some of Justice Eakin's emails. In describing their contents, the article noted generally that, "One mocks gay people. Some make fun of Mexicans or African-Americans. Some are pornographic. Some make fun of women. Some might just be considered juvenile."[4]

One week later, on October 8, 2015, the *Daily News* printed an extensive examination of the emails that it had obtained and reviewed. Among the graphic descriptions of more than twenty individual emails, the article indicated that Justice Eakin had sent at least one email containing a "joke" about a woman who was beaten by her husband, and that he had received a number of emails containing "slurs about homosexuals" and "poking fun at Muslims" and African-Americans.[5] The article also ***1198** detailed that Justice "Eakin's email address repeatedly appears within a network of law enforcement officials who received inappropriate emails on their government accounts," including the district attorney of Dauphin County; two judges on the Dauphin County Court of Common Pleas; the county's chief public defender; four assistant United States attorneys; a senior deputy Pennsylvania attorney general; a chief of police; a federal judge's deputy clerk; a top aide to former Governor Tom Corbett; a lawyer with the Pennsylvania Gaming Control Board; and an employee of the U.S. Fish and Wildlife Service, among others. The article was reprinted in the *Reading Eagle* the next day, and the emails were covered in varying degrees in numerous publications and television news stories throughout the Commonwealth in the ensuing weeks.[6]

On October 22, 2015, Attorney General Kane publicly released forty-eight emails that Justice Eakin sent or

received between January 1, 2008, and December 31, 2012, four of which originated from his private email account.[7] At that time, she described the tranche, which largely consisted of "images of topless and nude women as well as sexual jokes," as "only a subset of pornographic, misogynistic and racist emails received and sent by Justice Eakin on his private email address."[8]

After reviewing the emails turned over by the Attorney General's Office, the Judicial Conduct Board filed a complaint against Justice Eakin on December 8, 2015, alleging violations of the Code of Judicial Conduct and Article V of the Pennsylvania Constitution arising from his email practices. The complaint included a survey of the emails sent by Justice Eakin to employees of the Attorney General's Office, along with those received by him from members of that office, between 2008 and 2014. In total, the complaint documented that Justice Eakin sent 157 emails and received 786. Compl. at 23, ¶¶56-64. Of the 157 emails sent by Justice Eakin, according to the complaint, "a number of these emails contained subject matter that involved nudity, gender stereotypes, and ethnic stereotypes." *Id.* at 25, ¶78. Included among the eighteen emails sent by Justice Eakin that were described in the complaint were the previously reported "joke" about a wife who was beaten by her husband, *id.* at 27-28, ¶78(h), and two "off color jokes" regarding the biracial identities of professional golfer Tiger Woods and President Barack Obama. *Id.* at 29-30, ¶78(m)-(n).

As for the 786 emails received by Justice Eakin, the complaint details seventy-nine of them, which included "pictures of nude women; sexually-suggestive themes; gender ***1199** stereotypes; homophobic content; socioeconomic stereotypes; violence towards women; racial humor; ethnically-based humor; and stereotypes of religious groups." *Id.* at 31, ¶80(a); 38, ¶81(a). A number of these emails were described in the October 8, 2015 *Daily News* article.[9]

The Court of Judicial Discipline ("CJD") issued an interim suspension of Justice Eakin on December 22, 2015, barring him from his judicial and administrative duties until further order.[10]

Within two months of the publication of the complaint, Fears filed the instant PCRA petition, in which he asserted that this Court's denial of relief in his previous PCRA appeal was tainted by the involvement of Justice Eakin because he had "sent and/or received emails that showed a bias against persons of color and gay persons and victims of sexual abuse, domestic abuse and incest." PCRA Pet., 2/8/2016, at 1, ¶1.[11] Fears requested the appointment of counsel; discovery; "an evidentiary hearing on all claims involving disputed issues of fact"; and relief in the form of vacatur of his guilty plea and death sentence, a new trial or sentencing proceeding, the reopening of his post-conviction proceedings, and "such other and further relief as is just and necessary." *Id.* at 23.

Conceding the facial untimeliness of his petition—which he filed more than a decade after his judgment of sentence for first-degree murder and related crimes became final—Fears pleaded that he satisfied the newly-discovered facts exception to the PCRA's jurisdictional time-bar. To satisfy that exception, a petitioner must demonstrate that "the facts upon which the claim is predicated were unknown to the petitioner and could not be ascertained by the exercise of due diligence." 42 Pa.C.S. § 9545(b)(1)(ii). In *Commonwealth v. Bennett*, 593 Pa. 382, 930 A.2d 1264 (2007), we clarified that the timeliness exception for newly-discovered facts "does not require any merits analysis of the underlying claim." *Id.* at 1271. Rather, that exception has just two components that a petitioner must establish. He must allege and prove that: (1) "the *facts* upon which the claim was predicated were *unknown*"; and (2) that those facts "could not have been ascertained by the exercise of *due diligence*." *Id.* at 1272 (emphasis in original). "If the petitioner alleges and proves these two components, then the PCRA court has jurisdiction over the claim under" Section 9545(b)(1)(ii). *Id.* Additionally, at the time that Fears filed his petition, the PCRA mandated that a petition invoking a time-bar ***1200** exception be filed "within 60 days of the date the claim could have been presented." *Id.* § 9545(b)(2).[12]

In his petition, Fears pleaded generally that "the facts upon which the claim is predicated were unknown to [him] and could not have been ascertained by the exercise of due diligence until now." PCRA Pet., 2/8/2016, at 13, ¶49. He also averred that he filed his petition within "60 days of the Complaint being filed against Justice Eakin by the Court of Judicial Discipline; his public apology and admission of sending and receiving the emails and his temporary suspension pending trial." *Id.* Significantly, Fears said nothing substantive about his inability to discover the facts upon which his claim was predicated earlier with the exercise of due diligence.[13] He noted, however, that he filed his claim "at this time in an abundance of caution, and to avoid any statute of limitations defenses, based upon information currently available through publicly-available filings and proceedings with the Court of Judicial Discipline." *Id.* at 14, ¶51.

Fears subsequently filed a number of amended petitions

and miscellaneous documents purporting to supplement his initial submission, only one of which expanded upon his initial averments with regard to his due diligence.[14] In his first amended petition, Fears suggested that the filing of the complaint on December 8, 2015, triggered the sixty-day clock for raising his claim because the "descriptions of the various emails ... were introduced into the public" on that date. 1st Amend. PCRA Pet., 6/28/2018, at 17, ¶57. Although Fears noted that "[t]he emails themselves were introduced as Exhibit 1 at the December 21, 2015 proceeding in the Court of Judicial Discipline," he conceded that the complaint "was the first publicly-available and reliable document" charging Justice Eakin with ethical violations and describing "in painstaking detail" the "racist, homophobic and otherwise inappropriate content" contained in the emails. *Id.* Fears also addressed his due diligence in slightly greater detail. He explained that, before "the substance of the emails" was made public with the filing of the complaint, he "could not have accessed the emails because they were on the Office of the Attorney General's computer servers and initially gathered as part of a confidential investigation." ***1201** *Id.* at 18, ¶59. He also averred that production of the emails by the Attorney General "was selective and calculatingly timed." *Id.* Fears did not address how he came to learn about the complaint or his knowledge of the foregoing news reports.

The Commonwealth did not challenge the timeliness of Fears' petition. Perhaps in light of that concession, the PCRA court, without analysis, summarily concluded that the petition was "timely filed within the 60-day period following the discovery of the new facts." PCRA Ct. Op., 10/2/2019, at unpaginated 5. Nevertheless, the court dismissed Fears' petition, concluding that he did not satisfy the PCRA's substantive provision for relief based upon after-discovered evidence. *Id.* at unpaginated 5-8.

II. Analysis

Presently, Fears challenges the PCRA court's failure to permit discovery, to hold an evidentiary hearing, and to grant relief on the substantive claim based upon the presence of judicial bias in the disposition of his earlier appeal.

A. Timeliness

The OISA begins its review by *sua sponte* investigating the timeliness of Fears' petition, concluding that the petition "fails to present a 'fact' that meets the jurisdictional requirements of our PCRA statute, and fails to set forth any information regarding the statute's due diligence requirement." OISA at 1188. I respectfully disagree with the OISA's timeliness analysis. Despite acknowledging that Fears is not required to "provide a nexus between the newly discovered fact and his conviction," *id.* at 1189, the OISA effectively imposes a heightened nexus requirement by engaging in a merits-based inquiry under the guise of a timeliness analysis. The OISA shows its hand by relying upon an apparent distinction between email senders and recipients posited by the Commonwealth in "a different portion [of its brief] than that addressing timeliness" in order to refute Fears' satisfaction of the time-bar exception. *See id.* at 1188-90. For support, the OISA identifies sources cited by Fears indicating that "Justice Eakin did not send any emails implicating the topics alleged by [Fears], and received only a few emails invoking the invidious subject matter." *Id.* at 1189. The OISA's focus is misplaced.

Setting aside for the moment the question of whether a fact was unknown to the petitioner, *Bennett* requires a simple series of inquiries when presented with a PCRA petition invoking the newly-discovered fact exception: What is the fact? What is the claim? Is the claim predicated on the fact? Here, the answer to these questions is straightforward. The revelation of a trove of emails in the fall of 2015 indicating potential judicial bias on Justice Eakin's behalf against, *inter alia*, homosexuals, African-Americans, and victims of domestic and sexual violence, plus the claim that said bias violated Fears' constitutional right to due process of law by tainting review of his previous appeal, equals a claim predicated upon a fact. For present purposes, then, the identities of the senders and recipients of particular emails, and whether those emails in fact betrayed biases that could have tainted prior proceedings, are irrelevant at this stage. Those are issues germane to the substantive merits-based claim, not to the timeliness inquiry. What matters first is that, before October 2015, no one other than Justice Eakin and the network of individuals with whom he exchanged emails knew of the offensive subject matter being shared between Pennsylvania prosecutors and a member of the Commonwealth's highest court.

Contrary to the OISA's view, it is not the case that "the unsavory nature of Eakin's email account *per se* establishes" Fears' underlying claim. *Id.* Rather, it is

***1202** the *specific* content of those emails—homophobic slurs, racist tropes, and callous disregard for abuse victims—that suggests a bias against particular groups with which Fears identifies. When members of the judiciary hold those potential biases, the due process rights of the criminal defendants whose convictions those jurists review are implicated. Likewise, when those prejudices casually are shared with the very prosecutors who are charged with defending those convictions, the public's trust in the criminal justice system is unquestionably shaken. *See In re Glancey*, 515 Pa. 201, 527 A.2d 997, 999 (1987) ("Public confidence is eroded by irresponsible or improper conduct by judges.") (citation omitted). Again, though, recognizing these points merely informs an analysis of the merits of Fears' underlying claim, rather than the timeliness of his petition. Shorn of its improper considerations, the OISA's inquiry can reach no other conclusion than that Fears raised a colorable constitutional challenge of judicial bias (or the appearance thereof) predicated upon a fact—*i.e.*, the revelation of "offensive emails displaying cultural biases which implicate his case," OISA at 1189 n.11—that came to light in 2015. In doing so, he has satisfied his burden of proof as to these preliminary matters.

That leaves one important question: Was the fact of Justice Eakin's "indecent inbox," upon which Fears' claim of judicial bias was predicated, *unknown to Fears* within sixty days of when he filed his petition? Fears asserted that it was, at least in the most general of terms. *See* PCRA Pet., 2/8/2016, at 13, ¶49. In previous appeals raising similar claims, members of this Court, including this author, concluded that the facts upon which claims of judicial bias against Justice Eakin were predicated were made public as early as October 8, 2015, when the *Daily News* published its detailed examination of Justice Eakin's email practices.[15] That article, which subsequently was reprinted in other publications throughout the Commonwealth, expressly indicated that Justice Eakin's emails contained homophobic slurs, racist stereotypes about African-Americans, and commentary demeaning to victims of sexual abuse and domestic violence—the very prejudices that Fears alleges tainted review of his previous appeal. In fact, the *Daily News* article provided more specific details about emails denigrating the first of these groups than were later contained in the disciplinary complaint ***1203** filed against Justice Eakin by the Judicial Conduct Board. *See supra* note 9. Given the extensive public reporting about the emails' alarming subject matter, the "facts" contained in the complaint were not unknown when the complaint was filed—at least not to the public. Therein lies the rub.

At the time Fears filed his petition, this Court continued to recognize the so-called "public records presumption," pursuant to which PCRA petitioners were precluded from asserting that matters of public record were unknown to them when attempting to satisfy the newly-discovered facts exception.[16] Although we narrowed the presumption's applicability in *Commonwealth v. Burton*, 638 Pa. 687, 158 A.3d 618 (2017), by holding that it did not apply to "*pro se* prisoner petitioners," *id.* at 690-91, 158 A.3d 618, that decision would have afforded no benefit to Fears, who, by his own admission, has been represented by attorneys with the capital *habeas* unit of the Federal Public Defender's Office for the Western District of Pennsylvania since at least July 2014. *See* PCRA Pet., 2/8/2016, at 10, ¶40. Accordingly, Fears wisely focused upon the time that the facts giving rise to his claim entered the "public domain." *See* 1st Amend. PCRA Pet., 6/28/2018, at 17, ¶57 (citing *Commonwealth v. Edmiston*, 619 Pa. 549, 65 A.3d 339, 352 (2013)). As noted, that occurred on October 8, 2015, four months before Fears filed his petition, a fact that both the Commonwealth and the PCRA court misapprehended in conceding its timeliness.

Although the OISA disclaims reliance upon the public records presumption, OISA at 1190 n.12, it implicitly resorts to that now-defunct presupposition when it invokes the "publicly available" nature of the information in order to probe purported deficiencies in Fears' PCRA petition. *See id.* at 1190-91. As with the unknown fact issue, the OISA identifies a pleading gap in Fears' filings relating to his due diligence obligations that also turns upon the presumption. The PCRA requires petitioners who invoke the newly-discovered facts exception to allege and prove that "the facts upon which the claim is predicated were unknown to the petitioner *and could not have been ascertained by the exercise of due diligence*." 42 Pa.C.S. § 9545(b)(1)(ii) (emphasis added). The OISA observes that Fears did not "explain in his petition how or when he became aware of" the information contained in the December 8, 2015 complaint, or how he was able to discover that obscure filing but none of the earlier public reporting on the subject. OISA at 1190. In doing so, the OISA necessarily leans heavily upon the public records presumption in concluding that Fears could have discovered that reporting two months earlier with the exercise of due diligence. *See id.* at 1190-91 ("[T]he information upon which [Fears'] claims are predicated *was ascertainable* upon the exercise of due diligence nearly two months before, or when the Philadelphia Inquirer article was first published on October 8, 2015.... [Fears] at this point had reason to question the propriety of his case *in light of publicly available information*.")

(emphasis added).[17]

Unlike the OISA, I would not hold the public reporting of Justice Eakin's email practices against Fears without first ordering additional fact-finding pertaining to his knowledge and diligence (or lack thereof). Significantly, we abolished the public ***1204** records presumption during the pendency of Fears' appeal to this Court. *See* *Commonwealth v. Small*, —— Pa. ——, 238 A.3d 1267 (2020). In *Small*, we confronted the dichotomy left in *Burton*'s wake, whereby those defendants who retained counsel while incarcerated were presumed to be aware of facts in the public domain, while those without counsel were not. We acknowledged that "the plain language of the newly discovered fact exception does not call for any assessment of whether the asserted facts appear in the public record." *Id.* at 1283. Instead, the statute "plainly calls for a circumstance-dependent analysis of the petitioner's knowledge, not that of the public at large." *Id.* (citing *Burton*, 158 A.3d at 632 ("In requiring that the facts be *unknown to the petitioner*, the statute itself contains no exception, express *or* constructive, regarding information that is of public record.")). Having acknowledged and corrected our own mistaken precedent, we restored "the primacy of the statutory language" from which we departed two decades earlier. *Id.* Courts no longer can presume that incarcerated defendants could have discovered publicly available information with the exercise of due diligence, whether or not they had the benefit of legal representation.

It is solely within our power to ensure that the dead hand of a legal error propagated by this Court, once corrected, no longer burdens petitioners by strangling their otherwise viable claims from beyond the grave. *See* *id.* at 1284 ("[O]ur duty is not to streamline the process of denying potentially meritorious claims."). The public records presumption was purely of extra-textual judicial provenance. We engrafted it onto the PCRA, notwithstanding the statute's plain language, "in a single footnote and with little accompanying analysis." *Id.* at 1290 (Dougherty, J., concurring and dissenting) (citing *Lark*, 746 A.2d at 588 n.4). It applied exclusively in the context of post-conviction collateral challenges. Even then, in its last gasps it affected only a narrow class of incarcerated defendants who invoked the specific time-bar exception at issue here based upon facts that came into the public domain while those defendants were represented by counsel. Given the constrained parameters within which the presumption operated, those petitioners whose cases were awaiting disposition when *Small* was decided ought to benefit from its abolishment.

In his petition, Fears pleaded that the fact of Justice Eakin's email practices was unknown to him and undiscoverable with the exercise of due diligence before the Judicial Conduct Board filed its complaint on December 8, 2015. That pleading could have been contested by the Commonwealth or probed by the PCRA court. It was not. Although the OISA is on firm ground in questioning the timeliness of a PCRA petition for the first time on appeal, *see* *Commonwealth v. Reid*, —— Pa. ——, 235 A.3d 1124, 1143 (2020), this Court should proceed cautiously before attempting to resolve fact-intensive issues left unaddressed by the PCRA court. Here, Fears has been afforded no opportunity to respond to the OISA's *sua sponte* inquest or to supplement the record regarding his knowledge and diligence, which were not challenged below. This Court has no inherent insight into the degree of public information available to a given prisoner, which may vary by prison, let alone one contending with the restrictions placed upon a capital defendant. Absent additional fact-finding, we have no way of determining whether, or how, Fears could have discovered the *Daily News* article or the reporting that followed.[18] Questions about Fears' ***1205** knowledge and capacity to ascertain information in the public domain should be addressed in the first instance by the PCRA court sitting as fact-finder. Accordingly, I would remand this matter to the PCRA court to consider whether Fears was duly diligent in raising his claim in light of the information regarding Justice Eakin's emails that was in the public record as of October 8, 2015.[19]

B. Merits

Given my proposed disposition, I would not reach the merits of Fears' underlying claim of judicial bias. However, because the OISA ventures to resolve that question against Fears, the deficiencies in its analysis warrant delineation. Despite the absence of a complete record, the OISA draws sweeping conclusions based upon the descriptions of a smattering of emails in the Judicial Conduct Board's possession. The OISA proclaims that "Justice Eakin's email account and the content contained therein does not render him a biased jurist"; that "[h]is participation in the inappropriate email activity had no bearing on his ability to fairly apply the law to the facts of [Fears'] case"; and that "none of Justice Eakin's written opinions contained any bias, and certainly none that

reached the levels of constitutional interference." OISA at 1194. With these bare threads, the OISA endeavors to weave a narrative that absolves Justice Eakin from any further examination of his questionable email practices. The errors of this approach readily are apparent.

As a threshold matter, the PCRA's after-discovered evidence rule is not the correct analytical framework to address allegations of an appellate jurist's bias. That provision entitles a petitioner to relief upon requisite proof that his "conviction or sentence resulted from ... [t]he unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced." 42 Pa.C.S. § 9543(a)(2)(vi). Proof that an appellate jurist's apparent bias tainted review of a criminal appeal does not constitute evidence that would *exculpate* the defendant of his guilt. Nor is it clear how such proof would change the outcome of a trial, to say nothing of overcoming evidentiary rules governing relevance and admissibility. The PCRA court's analysis of Fears' claim as one of after-discovered evidence was, therefore, erroneous. The ***1206** OISA's determination that the lower court "was correct in concluding that [Fears] did not demonstrate that the emails, or any alleged bias he purports they reflect, would have altered the outcome of his proceedings," OISA at 1192, similarly misses the mark because it conflates Fears' burden to establish a risk of judicial bias with the inapposite standard of proof for after-discovered evidence claims.

Claims of judicial bias implicate Section 9543(a)(2)(i) of the PCRA, which concerns "violation[s] of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(i). That is so because proof of judicial bias contravenes state and federal due process principles. *Williams v. Pennsylvania*, — U.S. —, 136 S.Ct. 1899, 1905-06, 195 L.Ed.2d 132 (2016).

That said, the OISA nonetheless errs by attempting to view Fears' claim through the lens of the unique circumstances at issue in *Williams*. That decision turned upon the participation of former Chief Justice Ronald D. Castille in this Court's review of Terrance Williams' PCRA appeal. As the District Attorney of Philadelphia, former Chief Justice Castille had authorized his subordinates to pursue the death penalty at Williams' murder trial. Thereafter, as a member of this Court, he declined to recuse himself from Williams' appeals. *Id.* at 1903-05. Reasoning that "there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case," the Supreme Court of the United States concluded that former Chief Justice Castille's recusal declination violated Williams' rights under the Fourteenth Amendment's Due Process Clause. *Id.* at 1905. The Court further clarified that, for appellate jurists, "an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote." *Id.* at 1909.

Williams thus offers a bright-line test for a unique category of due process claims: A judge may not sit in review of the convictions that he had a significant, personal role in securing as a prosecutor. To do so would constitute error *per se* and would necessitate a new appeal. Fears has never claimed that Justice Eakin had a significant, personal involvement in his case as a prosecutor. For that reason, his claim is not grounded in the rule announced in *Williams*. Although the *Williams* Court declared that the " 'absence of actual bias' on the part of a judge" is a guarantee of due process, *id.* (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955)), the Court also reaffirmed the notion that the test for judicial bias in most other circumstances is an objective one. Faced with an allegation of bias such as the one Fears presents here, a reviewing court "asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, 'the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.' " *Id.* (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009)). Viewed objectively, a judge whose conduct suggests an impermissible potential for bias for or against any party, whether due to pecuniary interests or other potential prejudices, must recuse from any case involving that party.

Following *Williams*, in *Commonwealth v. Koehler*, 229 A.3d 915 (Pa. 2020), we addressed whether "PCRA courts are vested with the authority to remedy appellate-level constitutional violations in the form of a new appeal to the appellate ***1207** court, if warranted by the factual development of the case." *Id.* at 929. We held that "[a]n issue challenging the impartiality of an appellate judge ... constitutionally relates directly to the validity of the decision upholding the underlying conviction and sentence. It is an attack upon the truth-determining process, a process that logically

includes collateral attacks on the judgment of sentence." *Id.* at 931. "Consequently," we concluded that "a due process challenge to the impartiality of an appellate jurist is cognizable under Section 9543(a)(2)(i) of the PCRA." *Id.* We further held that "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 933-34.

Like Fears, Koehler filed a facially untimely, serial PCRA petition asserting a due process challenge arising from Justice Eakin's participation in Koehler's previous collateral appeal. "Koehler asked for the opportunity to prove his due process violation and, if he prevailed on the merits, to obtain reinstatement of his PCRA appellate rights *nunc pro tunc*." *Id.* at 935. While we agreed with Koehler that the PCRA court mistakenly believed that it lacked the authority to grant the relief he requested, we declined to address his substantive claims in the absence of "the evidentiary and factual development that would be needed to substantiate a claim of appellate-level judicial bias." *Id.* at 937. We explained:

> This Court is not equipped to receive evidence, assess that evidence, or make credibility determinations. A claim of judicial bias may be supported, as it was in this instance, by requests for discovery, leave to amend the petition as the case develops, and requests for an evidentiary hearing to resolve disputed facts. We can expect that claims of judicial bias would require precisely the kind of factual development best suited to the courts of common pleas. ...
>
> We are an appellate court. We require for our appellate review the development of a record as warranted and, where a hearing is appropriate, an assessment of the facts by the trial court hearing the evidence. ...
>
> The proper forum to consider the allegations and evidence of judicial bias is the PCRA court. Once factual and evidentiary development occurs in that forum as needed, and the PCRA court makes its rulings, the appellate court can review those rulings on appeal in due course.

Id. Those observations apply with equal force here.

The OISA suggests that we "would be hard pressed to find any connection between the inappropriate and offensive subject matter and Justice Eakin's execution of his responsibilities as a member of this Court." OISA at 1192. I disagree. Even a cursory review of the OISA's conclusions based upon the limited record before us confirms the need for additional fact-finding before the allegations lodged against Justice Eakin can be resolved one way or another.

Pertinently, the OISA relies upon a finding of the Court of Judicial Discipline that "there was no evidence that Justice Eakin 'in his written judicial opinions, ever demonstrated any overt bias due to the race, gender, ethnicity, or sexual orientation of a litigant or witness.' " *Id.* at 1192 (quoting *Eakin*, 150 A.3d at 1048). The CJD's conclusion that the evidence it reviewed demonstrated no *overt bias* on Justice Eakin's part is of no moment. A sophisticated jurist (or even an unsophisticated one) who harbors prejudices against a particular group or individual is unlikely to air his animus openly, whether in legal opinions or via email, no matter how private or secure. That is why it is well-settled that proof of a judge's actual bias is just one ***1208** way to establish a due process violation. Appearances matter, too. In that regard, a reviewing court must be satisfied that a judge's conduct *objectively* does not give rise to an unconstitutional "potential for bias." *Caperton*, 556 U.S. at 881, 129 S.Ct. 2252. Even the passive receipt over a period of years of homophobic and racist emails could suggest at least a tolerance for bigotry.

Furthermore, the CJD specifically found that the Judicial Conduct Board failed to produce evidence of overt bias. The only evidence of record reproduced in the appendices attached to the CJD's opinion was the descriptions of emails copied verbatim from the summary of the emails contained in the Board's complaint. But the Board's survey significantly was circumscribed. For instance, the Board limited its review to those emails that were in the possession of the Attorney General's Office between 2008 and 2014. *Accord* *Robinson*, 204 A.3d at 345 (OISR) ("The only emails sent or received by Eakin that have been disclosed to date are those that were housed on the OAG's server."). It also stipulated that it examined 943 emails sent or received by Justice Eakin despite Attorney General Kane's public pronouncement that more than 1,500 emails had been turned over for review.[20] Even then, only eighteen of the 157 emails that originated from Justice Eakin's account were described in the Board's complaint, amounting to approximately 11.5% of the total number of emails that he sent. Likewise, the complaint summarized just seventy-nine of the 786 emails received by the justice—barely 10%. *See* Compl. at 31, ¶80(a) (noting that the emails received by Justice Eakin "contain material including, *but not limited to*, the following") (emphasis added).

While it is true that the "overwhelming majority" of emails turned over by the Attorney General's Office to the Judicial Conduct Board "were sent by others," OISA

at 1192, it is difficult to accept general characterizations of the emails' contents when so few actually were summarized or entered into evidence. Yet the CJD simply relied upon the Board's stipulated summary of the limited sample in rendering its judgment. Fears' efforts to prove his unique claim of judicial bias, through targeted discovery if necessary, should not be prejudiced by the CJD's reliance upon the Board's condensed review or the stipulation agreed to by Justice Eakin in lieu of a trial—negotiations to which Fears was not a party. Moreover, Justice Eakin's interest in agreeing to the Board's curated stipulation rather than having the totality of his emails entered into the public record could not be more apparent. As noted, a number of emails, at least one of which contained homophobic stereotypes, were identified in the *Daily News* article but did not appear to be described in the Board's complaint. With almost 90% of the total number of emails excluded by choice from the CJD's review, it is not farfetched to think that similar content so far has escaped public accounting. And it certainly is not so implausible that it justifies precluding Fears forever from examining the entirety of the collection of emails.[21]

***1209** As with the question of Fears' diligence, the issue of Justice Eakin's bias—or, rather, the objective risk of his bias emanating from his emails—cannot be determined without a more thorough examination of the messages that he sent or received. Moreover, it is noteworthy that both *Robinson* and *Blakeney*—which we affirmed not on their merits but as a consequence of this Court's even divide—involved *ex parte* communications between Justice Eakin and members of the Attorney General's Office and the Dauphin County District Attorney's Office. Because those offices prosecuted Robinson and Blakeney, respectively, the allegations raised in those cases suggested a distinct appearance of bias not immediately apparent here. Given the incomplete email summary produced by the Board, we are unable to determine whether there exist any emails between Justice Eakin and employees of the Allegheny County District Attorney's Office, which prosecuted Fears. If prosecutors in that office possessed additional evidence of communications with Justice Eakin containing homophobic slurs, racist stereotypes, and "jokes" about victims of domestic and sexual violence, those messages—and the threat of their revelation—could give rise to a potential risk of bias in favor of the Commonwealth's position in Fears' prior appeals similar to that alleged in *Robinson* and *Blakeney*.

In sum, Fears' claim of bias could be satisfied in at least two ways. The first turns on whether the sheer volume and content of emails sent or received by Justice Eakin reflect an objective risk of bias against homosexuals, African-Americans, or victims of abuse, the groups with which Fears identifies. That approach would require a full accounting of the trove of emails in the Board's possession. The second would depend upon whether Justice Eakin exchanged similar communications with Allegheny County prosecutors that might indicate a bias in favor of that office in criminal matters in light of the reputational harms that could result from the public release of those messages. Additional disclosures and rigorous fact-finding by the PCRA court is necessary for a merits review of those claims. *Cf. Koehler*, 229 A.3d at 937. Where, as here, glaring evidence of suspect email practices already has been thrust into the public sphere, a third party's limited evaluation of that evidence will not suffice to satisfy the demands of discovery on collateral review. Because neither Fears nor this Court is privy to the full breadth of the emails at issue, we cannot fairly conduct a merits review of his claims on this record. For these reasons, I would remand for further proceedings consistent with this opinion.

Justice Donohue joins this Opinion in Support of Reversal.

All Citations

250 A.3d 1180

Footnotes

1 Chief Justice Castille concurred in the decision, and then-Justice Saylor dissented.

2 See Karen Langley, High Court Justice Sent Emails with Explicit Content, Pittsburgh Post Gazette (Oct. 2, 2014), https://www.post-gazette.com/news/state/2014/10/02/Pennsylvania-environmental-secretary-resigns-amid-emailcontroversy/stories/201410020392

[3] Justice Eakin resigned from this Court on March 15, 2016.

[4] William Bender, A Supreme Court Justice's Indecent Inbox, The Philadelphia Inquirer (Oct. 8, 2015), https://www.inquirer.com/philly/news/20151008_A_Supreme_Court_justice_s_indecent_inbox.html

[5] In 2014, Appellant filed a petition for writ of habeas corpus in the Western District of Pennsylvania. Appellant alleged various claims of ineffective assistance of counsel and constitutional violations. Following Appellant's filing of the instant petition, Appellant agreed to stay the federal habeas matter pending the resolution of this petition.

[6] At the time Appellant filed his second PCRA petition, Section 9545(b) provided as follows:

(b) Time for filing petition.--

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence.

...

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

42 Pa.C.S. § 9545(b).

[7] At various points in his brief, Appellant suggests his direct appeal was also impartially decided. Appellant's direct appeal was written by Chief Justice Cappy and decided in 2004, which was before Justice McCaffery joined the Court.

[8] "Capital Punishment in Pennsylvania: The Report of the Task Force and Advisory Committee," Joint State Government Commission Report, June 2018.

[9] The Commonwealth concedes Appellant meets the jurisdictional requirements of the PCRA statute pursuant to Section 9545(b)(1). According to the Commonwealth, Appellant satisfies the exception to the time bar because his petition was based on the newly-discovered fact of Justice Eakin's emails—facts which were neither known nor able to be ascertained by the exercise of due diligence. Since Appellant filed his PCRA petition within sixty days of December 8, 2015, the date the disciplinary complaint was filed against Justice Eakin, the Commonwealth asserts jurisdiction has been satisfied.

[10] This Court is entitled to consider jurisdictional questions *sua sponte*. *See e.g., DEP v. Cromwell Twp., Huntingdon Cty.*, 613 Pa. 1, 32 A.3d 639, 646 (2011) ("The question whether a court has jurisdiction ... may be raised at any time in the course of the proceedings, including by a reviewing court *sua sponte*.").

[11] The Opinion in Support of Reversal (OISR) submits that our analysis here imposes a heightened nexus requirement, under which we effectively engage in a merits-based inquiry. OISR at 1201. As we have stated before, a petitioner bears the burden of proving the applicability of one of the timeliness exceptions. *Commonwealth v. Pursell*, 561 Pa. 214, 749 A.2d 911, 914 (2000). Moreover, whether a petitioner has carried his or her burden is a threshold inquiry prior to considering the merits of any claim. *See Commonwealth v. Beasley*, 559 Pa. 604, 741 A.2d 1258, 1261 (1999). Thus, we require Petitioner prove the new "fact" (i.e., offensive emails displaying cultural biases which implicate his case) upon which his claim is predicated. *See e.g.,* *Commonwealth v. Blakeney*, 648 Pa. 347, 193 A.3d 350, 367 (2018).

12 By asserting that we "implicitly [rely] upon the public record presumption," the OISR misses the import of this passage. OISR at 1203. We do not charge Petitioner with the knowledge of these records based upon their availability to the public. The OISR is correct that such a requirement would be in violation of our holding in *Commonwealth v. Small*, —— Pa. ——, 238 A.3d 1267 (2020). Rather, in finding Petitioner failed to establish jurisdiction, we rely on the dearth of information provided by Petitioner regarding any exercise of diligence at all. While the OISR would allow Petitioner a second chance to include more of the right kind of information, we submit it is the responsibility of a petitioner to plead the information upon which jurisdiction may be exercised and relief may be afforded.

13 Appellant's petition and brief before this Court are poorly drafted, particularly in the manner in which he seeks to articulate discrete legal bases upon which relief may be granted.

14 As this Court has noted before, this test for "after-acquired evidence" offers a substantive basis for relief. It differs in form and function from the test outlined in the previous section describing the "newly discovered fact" test, which provides an exception to the jurisdictional time bar. *See* *Commonwealth v. Bennett*, 593 Pa. 382, 930 A.2d 1264, 1270-72 (2007).

15 This is not to say the PCRA court correctly assumed Appellant implicated the after-acquired evidence basis for relief. In fact, after a review of Appellant's PCRA petition, we find no mention of relief on the basis of after-acquired evidence.

16 The OISR argues that, for several enumerated reasons, the Judicial Conduct Board's review does not provide the right kind of information, and as a result, additional fact-finding is necessary. OISR at 1207. We disagree. First, the Judicial Conduct Board examined "only" 943 emails because that's exactly how many were submitted by the Attorney General's office. *See* JCB Compl., at 23, ¶ 64. Second, while the Board "only" described a small portion of the emails submitted by the Attorney General's office, OISR at 1208, it still examined the full panoply of emails and labeled them according to the invidious subject matter which each demonstrated. Lastly, the CJD relied on a factual recitation substantially similar to the one put together by the JCB because the parties entered into a joint stipulation in lieu of trial. *In re Eakin*, 150 A.3d 1042, 1047 (Pa. Ct. Jus. Disc. 2016) ("In addition to factual stipulations, the parties have also stipulated to the authenticity and admissibility of all exhibits set forth in their respective pre-trial memoranda ...."); *see also* Joint Stipulations of Fact in Lieu of Trial and Waiver of Trial, 2/22/16. We thus disagree with the assessment that "90% of the total number of emails [were] excluded by choice from the CJD's review." OISR at 1208. Rather, from our perspective, the CJD relied upon the information submitted to it and agreed upon by the parties, who evaluated and organized the information for efficient review. Unlike the OISR, we are satisfied that an objective evaluation of any alleged bias can be (and has been) determined. OISR at 1208.

17 Appellant also confusingly implicates nearly every other constitutional right that has any arguable relevance in a heading located in a section of his petition entitled "Claim for Relief." PCRA Petition, 2/08/16, at p. 15. However, Appellant only addresses the due process clause and judicial bias claims substantively. Since Appellant does not include any argument regarding any other constitutional clauses, we only address issues related to the Fourteenth Amendment right to due process.

18 This is what we assume Appellant seeks in his prayer for relief, wherein he requests relief in the form of "reopen[ing] post-conviction proceedings." PCRA Petition, 2/08/16. p. 23.

19 This Court has fiercely debated a lower court's ability to grant *nunc pro tunc* relief in response to an appellate court's error. *See Commonwealth v. Taylor*, —— Pa. ——, 218 A.3d 1275 (2019), *Commonwealth v. Koehler*, —— Pa. ——, 229 A.3d 915 (2020).

20 Justice Castille was a member of this Court until his retirement in 2014.

21 Based on this Court's decision regarding Appellant's central petition, we dismiss as moot Appellant's outstanding ancillary application for sua sponte judgment, application to clarify prayer for relief, application to supplement Appellant's claim regarding the death penalty's constitutionality, application for post-submission communication pursuant to Pa.R.A.P. 2801(a) (sic), application for post-submission communication to strike Appellee's response brief, and motion for leave of court.

1 Justice Eakin joined the Court's opinion.

2 Ordinarily, defendants must wait until collateral review to raise claims of ineffective assistance of counsel. *Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726, 738 (2002). We departed from that general rule in Fears' direct appeal in 2003. We found consideration of his challenge to trial counsel's stewardship to be "appropriate" at that time because "trial counsel had testified at an evidentiary hearing, and the trial court had addressed [Fears'] allegations in its opinion." *Fears II*, 86 A.3d at 802. Therefore, we "reviewed those [ineffectiveness] claims that were fully litigated below, and dismissed without prejudice those not ripe for review." *Id.* (citing *Fears I*, 836 A.2d at 59 & n.7, 69, 71).

3 Craig R. McCoy, Angela Couloumbis, and Laura McCrystal, *Kane says Justice Eakin Exchanged Porn Emails on State Servers*, PHILA. INQUIRER (Oct. 1, 2015), https://www.inquirer.com/philly/news/politics/20151002_Kane_says_Justice_Eakin_exchanged_porn_emails_on_state_servers.html.

4 William Bender, *New Emails Surface in Kathleen Kane Saga*, PHILA. DAILY NEWS (Oct. 2, 2015), https://www.inquirer.com/philly/news/20151002_New_emails_surface_in_Kathleen_Kane_saga.html.

5 William Bender, *A Supreme Court Justice's Indecent Inbox*, PHILA. DAILY NEWS (Oct. 8, 2015), https://www.inquirer.com/philly/news/20151008_A_Supreme_Court_justice_s_indecent_inbox.html.

6 *See, e.g.*, Karen Langley, *Pa. Supreme Court Sends Review of Justice Eakin's Email to Conduct Board*, PITTSBURGH POST-GAZETTE (Nov. 2, 2015), https://www.postgazette.com/news/state/2015/11/02/Pennsylvania-Supreme-Court-No-discipline-for-judge-Eakin-who-exchanged-offensive-emails-kane/stories/201511020136.

7 The Attorney General's Office selected emails from these dates because they "corresponded to the dates of the Jerry Sandusky criminal investigation and prosecution by" that Office. Jud. Conduct Bd. Compl. ("Compl."), 12/8/2015, at 7 n.1.

8 Karen Langley, *Attorney General Kane Releases Justice's Emails*, PITTSBURGH POST-GAZETTE (Oct. 22, 2015); https://www.post-gazette.com/news/state/2015/10/22/Attorney-General-Kathleen-Kane-s-office-to-release-emails-of-state-Supreme-Court-Justice-J-Michael-Eakin/stories/201510220178. The *Post-Gazette* article referred to the October 8 *Daily News* report. *See also* Staff & Wire Report, *Kathleen Kane Releases Emails from Supreme Court Justice's Private Account*, MORNING CALL (Oct. 22, 2015), https://www.mcall.com/news/pennsylvania/mc-pa-kathleen-kane-eakin-emails-102220151022-story.html.

9 In comparing the *Daily News* article to the complaint, it is apparent that the article contains descriptions of several emails not included among those summarized by the Board. Those include additional homophobic stereotypes "about homosexuals being promiscuous and unable to sit through a documentary because they are too busy performing oral sex"; "quips about ... nuns' breasts"; and at least two images of women with references to alcohol. *See* Bender, *supra* note 5.

10 Justice Eakin resigned from this Court on March 15, 2016. On March 24, 2016, the CJD issued an opinion concluding

that Justice Eakin had violated the Code of Judicial Ethics and the Pennsylvania Constitution. *In re Eakin*, 150 A.3d 1042 (Pa. Ct. Jud. Disc. 2016) (*per curiam*).

11 In his pleadings, Fears claimed that one of the emails Justice Eakin received "pertained directly to him." Mot. to File 2d Amend. PCRA Pet., 7/31/2018, at 4, ¶8.

> Presented in the form of a joke, the email entitled "Leroy's Hearing Problem" reads: "[L]eroy 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.' "

PCRA Pet., 2/8/2016 at 18, ¶¶59-60. Calling the email "alarming" and "shocking" to him, Fears averred that it was intended "to make fun of an African-American man named 'Leroy,' who was preparing for an impending legal proceeding." *Id.* at 18, ¶60.

12 Because the sixtieth day following the publication of the Board's complaint on December 8, 2015, fell on a Saturday, Fears filed his petition on Monday, February 8, 2016, in accordance with 1 Pa.C.S. § 1908. The PCRA now requires that such petitions be filed within one year of the date that the claim could have been presented.

13 Fears also suggested that he "may also meet" the governmental interference exception to the time-bar "because neither the Attorney General, the Courts nor the prosecutor in [Fears'] case disclosed to [him] the existence or content of the emails in question." PCRA Pet., 2/8/2016, at 13, ¶50. Because the Commonwealth conceded the timeliness of Fears' petition, the PCRA court did not address this alternative exception.

14 The remaining filings largely raised new arguments regarding Justice McCaffery and the administration of the death penalty in Pennsylvania generally. *See, e.g.*, Mot. for Leave of Court to File 2d Amendment to Initial PCRA Pet., 7/6/2015; Mot. for Leave of Court to File an Amendment – Through Incorporation by Reference – to Initial PCRA Pet. in Conjunction with PCRA Amendments I & II, 8/2/2018; Supp. to Pet. for Writ of *Habeas Corpus* and for Collateral Relief Pursuant to the PCRA, 8/17/2018; Mot. to File an Amendment to Initial PCRA Pet. and in Conjunction to PCRA Amendments I & II, 9/21/2018; Mem. of Law: Higher Court Decisions Recent Instruction Supporting Appellant's Judicial Biasness [*sic*] Claim, 10/16/2018. I agree with the OISA that Fears is due no relief on these belated claims because his supplemental filings were not self-executing and he did not obtain leave of court to amend his petition in order to raise them. OISA at 1194-95.

15 *See* *Robinson*, 204 A.3d at 342 (OISR) ("[A]lthough there was some publicly available information about Eakin's involvement in the email scandal in 2014, those news articles did not contain the facts upon which the claim raised in Robinson's third PCRA petition is predicated. Those facts were not knowable or made public until October 8, 2015, when the information concerning Eakin's sending and receiving of offensive emails became publicly available. ... Not until the release of these newly disclosed emails did the 'fact' of Eakin's active participation in the transmission of offensive emails become known."); *id.* at 344 ("[T]he facts underlying Robinson's claim could not have been discovered through the exercise of due diligence until October 8, 2015."); *Blakeney*, 193 A.3d at 361 (OISR) ("The fact upon which the claim [of judicial bias] is predicated is the group of emails, and the bias of Justice Eakin that they suggest. With the publication of the newspaper reports, Blakeney, an African-American and a Muslim, learned that a member of this Court had exchanged emails denigrating African-Americans and Muslims."); *id.* at 362 ("Blakeney could not, by the exercise of due diligence, have ascertained that Justice Eakin sent and received offensive emails. This fact was not made public until the *Inquirer* and *Eagle* articles. ... [T]he existence of the offensive emails, the content of which was revealed to the public with the publication of the newspaper reports and which serve as the factual predicate for Blakeney's underlying claim, satisfies the exception for newly discovered facts."); *accord Commonwealth v. Koehler*, —— Pa. ——, 229 A.3d 915, 923 (2020).

16 *See, e.g.*, *Commonwealth v. Taylor*, 620 Pa. 429, 67 A.3d 1245, 1248 (2013); *Commonwealth v. Chester*, 586 Pa. 468, 895 A.2d 520, 523 (Pa. 2006); *Commonwealth v. Whitney*, 572 Pa. 468, 817 A.2d 473, 478 (2003);

Commonwealth v. Lark, 560 Pa. 487, 746 A.2d 585, 588 n.4 (2000).

17 The OISA does not suggest *how* that information was ascertainable by Fears.

18 The OISA would have Fears proactively deny his awareness of these news reports in order to satisfy his burden of proving the undiscoverability of the "publicly available" information pertinent to his claims, notwithstanding the fact that the very existence of those reports may have been unknown to him when he filed his petition. Had the Board cited that reporting in its complaint, those references might have sufficed to put Fears on notice that some of the information upon which he relied was available through other sources, thus prompting him to plead more precisely that he could not have obtained those particular articles with the exercise of due diligence. But the complaint cites none of the public reporting the knowledge of which the OISA now admonishes Fears for failing to disavow. Hence, Fears pleaded that he first learned of Justice Eakin's email practices on or about December 8, 2015, after the Board's complaint became public, and that he could not have discovered the information contained therein sooner with any degree of diligence. Based upon those assertions, it is unclear what more information "of the right kind" Fears could have included in his petition to meet his pleading obligations. OISA at 1190 n.12. The PCRA does not require petitioners to be clairvoyant. In any event, under these circumstances, the proper venue for testing one's due diligence, which the Commonwealth opted not to do here, is an evidentiary hearing in the trial court.

19 The OISA does not address Fears' alternative ground for satisfying the PCRA's time-bar pursuant to Section 9545(b)(1)(i), *i.e.*, that his failure to raise his present claim earlier was the result of interference by government officials. *See* 1st Amend. PCRA Pet., 6/28/2018, at 17, ¶58. That allegation also demands additional scrutiny by the PCRA court.

20 If the number of emails that the Attorney General referenced included duplicates, it is not apparent from the complaint or the CJD's factual findings.

21 Notwithstanding these concerns, the OISA steadfastly defends its reliance upon the Board's limited descriptions by noting that the Board "still examined the full panoply of emails and labeled them according to the invidious subject matter which each demonstrated." OISA at 1192 n.16. Absent an independent review by the PCRA court of the emails in the Board's possession, how the Board chose to label the 846 emails that it did not describe in its complaint is *dehors* the record and meaningless for present purposes. The OISA effectively has taken judicial notice of Justice Eakin's apparent lack of bias without a single email in the Board's possession having been turned over for examination by a court *in these proceedings*. While that approach certainly makes for "efficient review," *id.*, any efficiency to be gained will come at Fears' expense.

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