No. 21-6636

IN THE
SUPREME COURT OF THE UNITED STATES

LEROY FEARS,
Petitioner

V.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITALCASE

QUESTIONS PRESENTED

1. Should the writ be denied because the Pennsylvania Supreme Court, by an equally divided vote, upheld the dismissal of Petitioner's post-conviction collateral petition for lack of jurisdiction under Pennsylvania statutory law, presenting only a question of state law?

2. Should the writ be denied because the Pennsylvania Supreme Court's Opinion in Support of Affirmance correctly found that federal constitutional Due Process was not violated and Petitioner has failed to provide this honorable court with any reason to conclude otherwise?

3. Is not Petitioner's claim that his Due Process right to a fair and impartial appellate review of his post-conviction petition was violated an insufficient basis for granting the writ?

4. In view of the fact that Petitioner's claim regarding the alleged constitutional deficiency of Pennsylvania's death penalty scheme was determined by the Pennsylvania Supreme Court to have been waived for violation of a state rule of criminal procedure, which presents only a question of state law, should not a writ be denied?

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OPINION BELOW

The Order and Opinion of the Supreme Court of Pennsylvania affirming the denial of post-conviction relief has been included as an Appendix to the Petition for a Writ of Certiorari filed by the petitioner, Leroy Fears.

JURISDICTION

The petitioner has invoked jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

A. Factual History

In its Opinion in the direct appeal of Petitioner's judgment of sentence, the Supreme Court of Pennsylvania set forth the facts giving rise to Petitioner's convictions as follows:

> The record, developed at the suppression hearing, guilty plea proceeding and sentencing hearing, reveals that, on June 18, 1994, twelve-year-old Shawn Hagan and thirteen-year-old James Naughton met with other teenagers and Appellant, age thirty-two, at a fishing hole on the Monongahela River. The day before, Appellant had paid Naughton to bring a bottle of his parent's vodka from his home. Appellant and the boys spent the day drinking, swimming and fishing. Appellant, Hagan and Naughton eventually separated from the other boys and continued to fish farther down the river. When it began to get dark, Naughton left the area and Hagan continued to swim.
>
> Upon coming to shore, Hagan removed his outer shorts to hang dry. Hagan sat down next to Appellant at which time Hagan's arm brushed Appellant. Appellant became aroused, told Hagan to stand, pulled Hagan's boxer shorts down, and performed oral sex on him. Appellant then asked Hagan what he was going to do about the incident. Hagan responded that he was going to tell his parents that Appellant had kidnapped him. Appellant then pushed Hagan to the ground, sat on top of him, and choked him for approximately five minutes. When Hagan stopped moving, Appellant removed his hands from Hagan's throat. Once Hagan started to revive and cough, Appellant choked him a second time for approximately ten minutes until Appellant was satisfied that Hagan was no longer alive. Appellant then rolled Hagan on to his stomach. Appellant again became aroused and performed anal sex on him. Appellant then placed Hagan's body in the river and kept watch for approximately twenty minutes. Appellant searched the riverbank, found a tire rim and tied it to Hagan's neck. He then swam Hagan's body out into the river where it sank below the surface.
>
> On June 19, 1994, the City of Pittsburgh Police began an investigation into the disappearance of Hagan. They encountered Appellant while searching the area where Hagan had last been seen. Appellant offered to help the police and advised them that he was the

last person to have seen Hagan. Appellant also told the officers that he was concerned that neighbors may suspect him in the disappearance because of a prior sexual contact he had with a young boy. After spending several hours with detectives, Appellant voluntarily agreed to accompany them to the Pittsburgh Police Detective Bureau.

In his initial statement, Appellant discussed fishing with Hagan, but did not admit to any criminal activity. As this was occurring, the police learned from another source that Appellant had paid Naughton to provide him with alcohol. Appellant overheard other officers discussing this information, and blurted out that he had given the boy money for vodka, but denied making the boys drink it. The detectives advised Appellant of his rights pursuant to *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and presented him with a pre-interrogation warning form. Appellant responded that he was willing to provide the police with a written statement, but that he would no longer speak with the officers. All questioning ceased. The police charged Appellant with corruption of minors and incarcerated him on that charge.

The following day, police discovered a boy's body in the Monongahela River, which was later identified as that of Shawn Hagan. The detectives sought to question Appellant and he exhibited a willingness to speak to them. Appellant was then transported from the Allegheny County Jail to the Pittsburgh Police Station and completed a pre-interrogation written waiver form. Appellant was orally advised of his *Miranda* rights, and executed another pre-interrogation written waiver form. When the detectives advised Appellant that they had discovered Hagan's body and could link him to his death, Appellant confessed to the murder. After the confession, Appellant took the detectives to the scene of the crime and explained how he committed the offense. He then agreed to provide a video-taped confession wherein he again relayed details regarding the manner of death.

Commonwealth v. Fears, 836 A.2d 52, 56–57 (Pa.2003).

B. Procedural History

Petitioner was charged in the Court of Common Pleas of Allegheny County, Pennsylvania, at No. CC 199409201 with one count of Corruption of Minors (in connection with victim James Naughton). At No. CC 199408705, Petitioner was

charged with one count of Criminal Homicide (in connection with the murder of victim Shawn Hagan), which provided a Notice of Intent to Seek Death Penalty. At No. CC 199409095, Petitioner was charged with two counts of Involuntary Deviate Sexual Intercourse (IDSI) and one count of Abuse of Corpse (against victim Hagan). Docket Entry (DE) 2.

1. Pre-Trial & Guilty Plea Proceedings.

Petitioner, through Assistant Public Defender Sumner L. Parker, filed pre-trial motions seeking to suppress his videotaped statement to police. DE 5. Following a suppression hearing, on December 8, 1994, the Honorable David S. Cercone concluded that Petitioner's statement was voluntary and denied the suppression motion. At that time, Petitioner completed the Guilty Plea Explanation of Defendant's Rights form and advised the trial court that he wished to enter a plea of guilty to First-Degree Murder and the remaining counts. 2F DE 6. Petitioner indicated that he wanted to proceed non-jury for purposes of sentencing. Testimony from the suppression hearing was incorporated for purposes of the penalty proceeding which was postponed to obtain a psychological evaluation of Petitioner.

2. Penalty / Sentencing Proceedings.

On February 2, 1995, Petitioner appeared before the Court for the non-jury penalty/sentencing hearing. The Commonwealth initially proceeded on the aggravating circumstances of a killing while in the perpetration of a felony and a significant history of felony convictions; however, the significant history aggravator was ultimately dismissed. Petitioner presented mitigation evidence that he had no

significant prior criminal history, and evidence concerning the circumstances of the offense. After hearing testimony, the trial court found the aggravating circumstance outweighed the mitigating circumstances.

On February 7, 1995, Petitioner was formally sentenced to death and a consecutive aggregate sentence of 12 to 25 years imprisonment. DE 9.

3. Post-Sentence Motions & Direct Appeal.

On June 27 and 28, 2000, Petitioner appeared before Judge Cercone for an evidentiary hearing. The parties briefed the issues following the two-day hearing. The Post-Sentence Motions were denied on July 9, 2001. DE 46.

Petitioner, through counsel, filed an appeal, which was docketed in the Supreme Court of Pennsylvania at No. 351 CAP.

Petitioner's case was argued before the Pennsylvania Supreme Court and on November 20, 2003, that Court affirmed the judgment of sentence. *Commonwealth v. Fears* 836 A.2d 52 (Pa.2003). Petitioner filed an Application for Reargument, which was denied by the state Supreme Court on February 19, 2004.

On July 19, 2004, Petitioner filed a Petition for Writ of *Certiorari* in this Honorable Court, which was docketed at No. 04-5659. This Court denied the petition on June 27, 2005.

4. Initial Post Conviction Relief Act (PCRA) Petition.

Petitioner's case was reassigned to the Honorable John A. Zottola because Judge Cercone had been appointed as a Federal District Judge. Petitioner filed a counseled Petition Pursuant to the Post-Conviction Relief Act (PCRA), 42 Pa.C.S.

§9541 *et seq.,* on January 24, 2006 and requested leave to amend.

On June 15, 2006, Petitioner, through of the Federal Community Defender Office for the Eastern District of Pennsylvania, filed an Amended PCRA Petition and Consolidated Memorandum of Law. DE 76. The PCRA Court denied the petition on December 1, 2008.

Petitioner filed an appeal in the Pennsylvania Supreme Court, docketed at 579 CAP, challenging the dismissal of his PCRA Petition. DE 97. On February 19, 2014, the state Supreme Court affirmed the denial of the PCRA Petition. *Commonwealth v. Fears*, 624 Pa. 446 (2014). DE 99. Former Justice Eakin wrote the majority opinion, which was joined by then-Chief Justice Castille, Justice Todd, Justice Baer, and former Justice McCaffery. Justice Castille wrote a concurring opinion. Justice Saylor wrote an opinion in dissent. *Id.*

5. Federal Habeas Corpus Petition.

On July 23, 2014, Petitioner filed a Petition for Writ of *Habeas Corpus* and Consolidated Memorandum of Law in the federal District Court for the Western District of Pennsylvania, which was docketed at CA 05-1421. Petitioner raised eleven (11) issues in the habeas petition alleging various claims of ineffectiveness of counsel and constitutional violations.

Meanwhile, in state court, Petitioner filed a PCRA petition on February 8, 2016. As a result, the parties agreed to stay the federal *habeas corpus* matter pending resolution of the state court PCRA petition. On March 30, 2016, an Order of Court was entered in the federal court staying the *habeas corpus* proceedings.

6. Second or Subsequent PCRA Petition.

As stated, Petitioner's PCRA petition was filed on February 8, 2016. DE 100. Attorney Michael Machen entered his appearance on Petitioner's behalf on March 17, 2016 (DE 102). However, Petitioner wished to proceed *pro se* and filed a motion to that effect on April 23, 2018. DE 107. Following a hearing, the court deemed Petitioner's waiver of his right to counsel to be knowing, intelligent and voluntary. Petitioner proceeded *pro se* with Attorney Machen as standby counsel. DE 113. Petitioner filed several supplements to his PCRA petition. DE 111, 118.

The Commonwealth filed its Answer to the PCRA petition on October 1, 2018. DE 122. Petitioner filed a Reply thereto on October 31, 2018. DE 126. The PCRA court filed its Notice of Intention to Dismiss (NID) Petitioner's PCRA petition on March 29, 2019. DE 129. Petitioner filed a response to the NID on April 17, 2019. DE 131. The petition was denied on May 21, 2019. DE 132. Petitioner filed a timely Notice of Appeal on June 12, 2019. DE 134. The court then ordered Petitioner to file a Concise Statement of Matters Complained of On Appeal pursuant to Pennsylvania Rule of Appellate Procedure (Pa.R.A.P.) 1925(b). DE 137. Petitioner filed his Concise Statement on August 7, 2019. DE 139. Therein, he raised the following issues:

> 1. This court has jurisdiction under 42 Pa. C.S. §9545(b)(l) to address the substance of my claims.
>
> 2. My judicial bias claim was timely under 42 Pa.C.S. §954S(b)(l,). 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 the when the facts supporting the claim were publically revealed in the Judicial Conduct Board complaint filed against Justice Eakin. *In re. J. Michael Eakin*, 13

JD 2015.

> 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 persons, gay persons, victims of domestic and sexual 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 biased [*sic*] claim is based on the Joint State Government Commission's report regarding the death penalty (CAPITAL PUNISHMENT IN PENNSYLVAIA: 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 Joint 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.

Thereafter, the PCRA Court filed its Opinion pursuant to Pa.R.A.P. 1925(a).

7. PCRA Review in the Pennsylvania Supreme Court.

The appeal of Petitioner's second PCRA petition was docketed in the Pennsylvania Supreme Court at No. 781 CAP. *Commonwealth v. Fears*, 250 A.3d 1180 (Pa.2021). Chief Justice Baer and Justices Saylor and Todd did not participate in the consideration or decision of the appeal. *Id.* at 1182. Justice Mundy wrote the opinion in support of affirmance, which was joined by Justice Dougherty. Justice

Wecht wrote the opinion in support of reversal, which was joined by Justice Donohue. As the votes of the participating Justices were equally divided, the order of the Common Pleas court was affirmed by operation of law. *Id.* Reconsideration was denied on July 8, 2021.

On December 16, 2021, Petitioner filed his Petition for Writ of *Certiorari* in this Honorable Court and Respondent, Commonwealth of Pennsylvania, now responds.

REASONS FOR DENYING THE WRIT

I. THE WRIT SHOULD BE DENIED BECAUSE THE PENNSYLVANIA SUPREME COURT, BY AN EQUALLY DIVIDED VOTE, UPHELD THE DISMISSAL OF PETITIONER'S POST-CONVICTION COLLATERAL PETITION FOR LACK OF JURISDICTION UNDER PENNSYLVANIA STATUTORY LAW, PRESENTING ONLY A QUESTION OF STATE LAW.

Petitioner, Leroy Fears, initiated this litigation by filing a facially untimely petition under Pennsylvania's Post Conviction Relief Act, 42 Pa.C.S.A. § 9541 *et seq.* (PCRA) in the Court of Common Pleas of Allegheny County. The petition was dismissed by that court and Petitioner filed a notice of appeal from that dismissal. Because Petitioner's judgment of sentence was death, his appeal was to the Pennsylvania Supreme Court, which hears capital appeals in PCRA cases. *See* 42 Pa.C.S.A. § 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.").

The central assertion of Petitioner's state court post-conviction petition was that he had been denied due process of law in the appeal of a previous, timely PCRA petition. Specifically, he asserted that J. Michael Eakin, a former justice of the state supreme court, who had voted to affirm the dismissal of his previous PCRA petition and written the court's opinion in that matter, thereby deprived him of his due process rights due to invidious bias against him based on racial and/or gender categories to which he belonged. Petitioner claimed that such bias was evinced by a media scandal which arose after his appeal was decided. Media reports had disclosed that former Justices Eakin and Seamus P. McCaffery had sent and/or received certain

email messages containing unsavory racial and/or gender stereotypes. Both justices ultimately resigned their positions.

As stated, former Justice Eakin wrote the majority opinion denying relief in the appeal of Petitioner's earlier, timely PCRA petition. *Commonwealth v. Fears,* 86 A.3d 795, 801 (Pa.2014). He was joined in the majority, *inter alia*, by the Honorable Debra Todd and the Honorable Max Baer. *Id.* at 824. The Honorable Thomas G. Saylor filed a dissenting opinion. *Id.* Those three justices "did not participate in the consideration or decision of [the instant] matter." *Commonwealth v. Fears*, 250 A.3d 1180, 1182 (Pa.2021). As a result, four members of the state supreme court (none of whom had been on the court when Petitioner's previous PCRA appeal was decided) participated in the appeal which Petitioner now challenges. Those four justices split their votes evenly; thus, the court's *per curiam* order stated that "the order of the court of common pleas is affirmed by operation of law, as the votes among the participating Justices are equally divided." *Id.* The Opinion in Support of Affirmance (OISA) was authored by the Honorable Sallie Updyke Mundy and joined by the Honorable Kevin M. Dougherty.

The PCRA "provides for an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief." 42 Pa.C.S.A. § 9542. Relief may be available due to, *inter alia*, 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.A. § 9543(a)(2).

The PCRA contains strict timeliness/jurisdictional limitations. It provides that "[a]ny 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 [*inter alia*] 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.A. § 9545(b)(1)(ii) (emphasis added). Regarding invocation of the "newly discovered facts" exception to the PCRA's jurisdictional timeliness requirement, the Pennsylvania Supreme Court has explained that

> the timeliness exception for newly discovered facts has two components that the petitioner must allege and prove. The petitioner must "establish that: 1) the *facts* upon which the claim was predicated were *unknown*, and 2) could not have been ascertained by the exercise of *due diligence*. If the petitioner can establish both of these components, then the PCRA court has jurisdiction over the claim.

Commonwealth v. Blakeney, 193 A.3d 350, 361 (Pa.2018) (citations and internal quotation marks omitted; emphasis added). *See also Commonwealth v. Perrin*, 947 A.2d 1284, 1285 (Pa.Super.2008) ("Any and all PCRA petitions must be filed within one year of the date on which the petitioner's judgment became final, unless one of three statutory exceptions applies.").

The timeliness requirements of the PCRA are mandatory and jurisdictional. Therefore, no court has the authority to consider the merits of a facially untimely PCRA petition as to which the petitioner has failed to prove that his case comes

within one of the statutory exceptions to timeliness. *See Commonwealth v. Howard*, 788 A.2d 351, 356 (Pa.2002) ("Because the PCRA's timeliness requirements are mandatory and jurisdictional in nature, no court may properly disregard or alter them in order to reach the merits of the claims raised in a PCRA petition that is filed in an untimely manner.") (citations and internal quotation marks omitted). *See also Commonwealth v. Cox*, 146 A.3d 221, 226 (Pa.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").

Petitioner's judgment of sentence became final on June 27, 2005 when this Honorable Court denied his petition for writ of *certiorari* after his direct appeal was concluded in the state supreme court. *See Fears v. Pennsylvania*, 125 S.Ct. 2956 (U.S.2005) (Mem.). From that date, Petitioner had one year (that is, until June 27, 2006) within which to file a PCRA petition, including a "second or subsequent" one. *See* 42 Pa.C.S.A. § 9545 ("Any petition under this subchapter, *including a second or subsequent petition*, shall be filed within one year of the date the judgment becomes final….") (emphasis added). Petitioner filed the PCRA petition at issue instantly on February 8, 2016, that is, more than nine years after the statutory deadline. Docket Entry (DE) 100. Therefore, Petitioner's PCRA petition was patently untimely and he could successfully invoke a court's jurisdiction *only* if he proved that it satisfied one of the three statutory exceptions to the statutory time-bar.

As the OISA stated, Petitioner "claims his petition is timely under our collateral relief statute pursuant to Section 9545(b)(1)(ii)" (the "newly discovered

facts" exception). *Fears, supra,* 250 A.3d at 1188. "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." *Id.* (internal quotation marks and citation omitted; emphasis in original). The OISA elaborated:

> 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 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.").

Fears, supra, 250 A.3d at 1188.[1]

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[1] The court also noted that at the time appellant's petition was filed the PCRA provided that "[a]ny petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented." *Fears, supra,* 250 A.3d at 1184. The 60-day requirement was subsequently lengthened to one year by P.L. 894, No.

Ultimately, the OISA determined that Petitioner had not carried his burden of establishing that he fell within the newly discovered facts exception to the PCRA's timeliness requirement. Specifically, it found that Petitioner had not fulfilled his statutory burden of establishing his entitlement to the time-bar exception for newly discovered facts because he had not established the existence of a newly discovered material fact connected to his underlying claim. Essentially, the OISA determined that appellant's claims of judicial bias were too vague and too disconnected from the allegedly new fact to overcome the PCRA's jurisdictional time-bar. As Justice Mundy explained:

> 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."). 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

146, § 2 (effective December 24, 2018).

> 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).

Fears, supra, 250 A.3d at 1189 (footnote omitted). The OISA was careful to stress that its rationale for this determination was based on the preserving the strict statutory pleading requirements, not on an analysis of the merits of Petitioner's claim.

> 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 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*.

Id. at 1189–1190 (emphasis added). The OISA emphasized that

> whether a petitioner has carried his or her burden is a threshold inquiry prior to considering the merits of any claim. 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.

Id. at 1189 n.11 (citations omitted; emphasis added). The OISA explained that "in finding Petitioner failed to establish jurisdiction, we rely on the *dearth of information* provided by Petitioner regarding *any exercise of diligence at all*" and "it is the *responsibility of a petitioner to plead* the information upon which jurisdiction may be exercised and relief may be afforded." *Id.* At 1190 n.12 (emphasis added).

Under Pennsylvania's appellate jurisprudence, "[i]t is the *petitioner's burden to* allege and *prove* that one of the timeliness exceptions applies." *Commonwealth v. Abu-Jamal*, 941 A.2d 1263, 1268 (Pa.2008) (emphasis added). Thus, the OISA made it clear that, in his successive, facially untimely PCRA petition, Petitioner failed to demonstrate that he had exercised the due diligence necessary to establish the jurisdiction of the court *via* the narrowly-drawn time-bar exception. Importantly, as Pennsylvania appellate courts have often stated, "[t]he 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." *Id.* at 1267–1268 (emphasis added). *See also Commonwealth v. Stokes*, 959 A.2d 306, 309 (Pa.2008) ("…the Act's timeliness restrictions are jurisdictional in nature and are to be strictly construed.").

Instantly, the OISA concluded:

> Preliminarily, Appellant does not present a petition that meets the jurisdictional requirements of this Commonwealth's PCRA statute. 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.

Fears, supra, 250 A.3d at 1188 (footnote omitted). This was the OISA's primary reason for upholding the dismissal of Petitioner's PCRA petition. *See id.* at 1191 ("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.").

This Honorable Court "repeatedly has held that state courts are the ultimate expositors of state law…and that we are bound by their constructions except in extreme circumstances…." *Mullaney v. Wilbur*, 95 S.Ct. 1881, 1885–1886 (U.S.1975) (internal citations omitted). The OISA's finding that appellant had failed sufficiently to plead his claims under Pennsylvania statutory law, as construed by the state's highest court, is unquestionably a pure matter of state law. As such, the state supreme court is the ultimate expositor of the governing law, and that court's resolution of the jurisdictional bar in the OISA is entitled to deference under this Honorable Court's jurisprudence.

For all of the foregoing reasons, the Writ should not be granted.

II. THE WRIT SHOULD BE DENIED BECAUSE THE PENNSYLVANIA SUPREME COURT'S OPINION IN SUPPORT OF AFFIRMANCE CORRECTLY FOUND THAT FEDERAL CONSTITUTIONAL DUE PROCESS WAS NOT VIOLATED AND PETITIONER HAS FAILED TO PROVIDE THIS HONORABLE COURT WITH ANY REASON TO CONCLUDE OTHERWISE.

Petitioner claims that "due process [was] violated when a state supreme court justice showed partiality in sending and receiving derogatory emails of female abuse, racism, homophobia, religious bigotry, et cetera." Petition for Writ of *Certiorari*, p. 21 *et seq*. (capitalization and punctuation altered) (hereinafter "Pet."). For the following reasons, the Commonwealth submits that the Petition should not be granted on that basis. The background of this issue is as follows.

On October 30, 2015, the Special Counsel to the Pennsylvania Supreme Court issued a Report describing the emails involved in the scandal which forms the basis of Petitioner's claims. In particular, the Special Counsel noted that former Justice Eakin sent or forwarded many emails that were "insensitive, chauvinistic and offensive to women. Report of the Special Counsel Regarding the Review of Justice Eakin's Personal Email Communications, Joseph A. Del Sole, Oct. 30, 2015, at p. 11. Although Justice Eakin did not send any emails that the Special Counsel characterized as racist, homophobic, or otherwise discriminatory to any group other than women, the Special Counsel noted that Justice Eakin also received "a substantial number of emails with jokes which are racially insensitive and disparaging of women and other groups." *Id*. at 13.

On December 8, 2015, the Judicial Conduct Board filed a complaint against

Justice Eakin for violations of Code of Judicial Conduct alleging that he participated in the exchange of emails with friends and professional acquaintances that were insensitive and contained inappropriate references. *In re Eakin*, 150 A.3d 1042, 1045 (Pa.Ct.Jud.Disc.2016).

Following a hearing before the Board, Justice Eakin was placed on temporary suspension on December 22, 2015 and trial was scheduled for March 29, 2016. Justice Eakin resigned his position on March 15, 2016 and shortly thereafter he and the Board filed joint Stipulations of Fact in Lieu of Trial. *Id*. at 1046.

On March 24, 2016, the Court of Judicial Discipline of Pennsylvania, No. 13 JD 15, issued its Opinion, *In re: J. Michael Eakin, Justice of the Supreme Court of Pennsylvania*, finding a violation of Canon 2A, the derivative constitutional provision, and imposed a $50,000 fine. *In re Eakin, supra*, 150 A.3d at 1061.

Petitioner has presented no evidence, either in the Pennsylvania Supreme Court or in the instant petition, that former Justice Eakin generally exhibited racial bias in his jurisprudence. *See* BA and Pet. *generally*. Moreover, he has not shown that Just Eakin departed from the facts and the law in making decisions. Indeed, the judiciary of Pennsylvania are presumed to be knowledgeable, honorable and fair in their application of the law. Pennsylvania's High Court "presumes judges of this Commonwealth are honorable, fair and competent…." *Commonwealth v. Druce*, 848 A.2d 104, 108 (Pa.2004) (internal quotation marks omitted). Petitioner has put forward no evidence or argument in support of denying the benefit of that presumption to former Justice Eakin either before this Honorable Court or before the

Pennsylvania Supreme Court. *See* Pet. at pp. 21-26.

As a matter of fact, the Court of Judicial Discipline of Pennsylvania specifically opined that Justice Eakin's conduct did not prejudice the proper administration of justice. *In re Eakin, supra*, 150 A.3d at 1060. That court included among its Findings of Fact that "[t]he Judicial Conduct Board has not produced any evidence that the Respondent, 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 1048. Similarly, the court found as a fact that "[n]one of the e-mails set forth more fully below discuss or were related to matters pending before the Supreme Court or involve the business of the Judiciary of Pennsylvania." *Id.*, 150 A.3d at 1049. Finally, the court summarized as follows:

> We note Respondent's arguments in mitigation, and the following factors which suggest tempering our sanction from that which might have been imposed after trial. Respondent's conduct was not criminal, nor did it prejudice the proper administration of justice. The Board has submitted that this case involves the "appearance of impropriety," and has not alleged that judicial decisions were made for or influenced by improper reasons. We also acknowledge that Respondent has not contested the factual predicates of the case. Respondent also presented credible witnesses that his *judicial opinions were not reflective of any of the biases expressed in any of the emails*, *but instead were decided, in each case, in accordance with the facts and law*. Respondent's *longtime judicial service was otherwise exemplary*, and, according to Respondent's witnesses, Respondent is well-regarded as a jurist.

Id., 150 A.3d 1060–1061 (footnotes omitted; emphasis added). The Commonwealth submits that, while the findings of the Court of Judicial Discipline's Opinion are not binding on this Honorable Court, they are very persuasive that justice was not prejudiced and that Justice Eakin's judicial opinions were not biased.

The Commonwealth submits that the legal analysis contained in the OISA is perfectly sound. The OISA concisely summarized this Honorable Court's jurisprudence regarding allegations of judicial bias:

> 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 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.

Fears, supra, 250 A.3d 1180, 1193-1194. Under the foregoing standards, Petitioner has failed to show that there is an unconstitutional potential for the probability of prejudice with regard to his first PCRA appeal. Applying the foregoing law, the OISA, per Justice Mundy, first distinguishes this Honorable Court's decision in *Williams v. Pennsylvania*, 136 S.Ct. 1899 (U.S.2016), noting that "[u]nlike in *Williams*, where the High Court determined that Justice Castille's 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" adding that

"Justice Eakin did not have any prior interaction with Appellant's case prior to it being argued before this Court." *Fears, supra,* 250 A.3d at 1194 (footnotes omitted). In addition, Justice Mundy addressed the question of unconstitutional bias directly:

> 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.

Id. at 1194. The Commonwealth submits that the foregoing reasoning is sound, and that in his Petition, Petitioner has offered no substantive or persuasive rebuttal. *See* Pet. at pp. 21-26. Consequently, there was no due process violation when former Just Eakin sat in judgment of Petitioner's first PCRA petition and the OISA did not err in so finding. Accordingly, the Writ should be denied.

III. PETITIONER'S CLAIM THAT HIS DUE PROCESS RIGHT TO A FAIR AND IMPARTIAL APPELLATE REVIEW OF HIS POST-CONVICTION PETITION WAS VIOLATED IS NOT A SUFFICIENT BASIS FOR GRANTING THE WRIT.

In his second claim, "…Petitioner contends that his Due Process right to a fair and impartial PCRA appellate review was violated." Pet. at p. 29. For the reasons that follow, this claim provides no basis for granting the Writ.

The Commonwealth notes initially that this claim does not concern Justice Eakin's alleged bias with respect to the appellate review of Petitioner's first PCRA petition. Rather, it relates only to the Pennsylvania Supreme Court decision in *Commonwealth v. Fears*, 250 A.3d 1180 (Pa.2021) from which Petitioner petitioned this Honorable Court for review.

Petitioner complains that three Justices who sat with former Justice Eakin—Justices Saylor, Baer and Todd—recused themselves from the appeal of the dismissal of his untimely, successive PCRA petition. That left four justices, who divided equally, resulting in the affirmance of the dismissal of his PCRA petition by operation of law. *See id.* at 1182 ("…the order of the court of common pleas is affirmed by operation of law, as the votes among the participating Justices are equally divided."). Although it is not perfectly clear, Petitioner believes that he was somehow injured by the fact that the state Supreme Court did not appoint substitute judges pursuant to Pennsylvania Rule of Judicial Administration (Pa.R.J.A.) 701(C)(1) to participate in deciding his case. That rule of state judicial administration provides in pertinent part: "[w]henever a president judge deems additional judicial assistance necessary

for the prompt and proper disposition of court business, he or his proxy shall transmit a formal request for judicial assistance to the Administrative Office." Pa.R.J.A. 701(C)(1). This claim is not appropriate for discretionary review by this Honorable Court. It is purely a state law concern and one of particular narrow scope, that is, judicial administration.

The Commonwealth submits that the claim is deficient in every aspect which might make it appropriate for this Honorable Court's review. Petitioner attempts to frame this claim as one of federal Due Process. He states that "[t]he Due Process Clause guarantees protection for a Defendant over that of Discretionary State Court review ventures of picking and choosing where, when to which instance or to what degree to apply state legal remedy." Pet. at p. 28. Petitioner offers no legal authority whatsoever for that proposition and, in any event, the proposition is virtually incomprehensible and legally meaningless.

Petitioner's claim has no relation to federal Due Process. Clearly, the claim is only concerned with the non-application of a Pennsylvania rule of judicial administration. *See* Pet. at pp. 27-29. Petitioner does not cite any legal authority—Pennsylvania or federal—for the proposition that a litigant has the right to have his case decided by any particular number of judges, much less for the proposition that that the failure of a court to assign substitute judges for recused judges offends Due Process.

Appellant has failed to offer any legal authority suggesting that such a claim might have even a remote relationship with federal constitutional Due Process. The

Commonwealth notes that *certiorari* review is not granted lightly of in the absence of compelling reasons. *See* U.S.Sup.Ct. Rule 10, 28 U.S.C.A. ("Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons."). The Commonwealth submits that Petitioner has presented no compelling reasons for review. Accordingly, the Writ should be denied.

IV. PETITIONER'S CLAIM REGARDING THE ALLEGED CONSTITUTIONAL DEFICIENCY OF PENNSYLVANIA'S DEATH PENALTY SCHEME WAS DETERMINED BY THE PENNSYLVANIA SUPREME COURT TO HAVE BEEN WAIVED FOR VIOLATION OF A STATE RULE OF CRIMINAL PROCEDURE; A WRIT SHOULD NOT BE GRANTED ON THIS ISSUE BECAUSE IT PRESENTS ONLY QUESTION OF STATE LAW.

Appellant's third and final claim is that "Pennsylvania's death penalty scheme [is] constitutionally deficient." Pet. at p. 30. This claim is based on the June 2018 "CAPITAL PUNISHMENT IN PENNSYLVANIA: The Report of the Task Force and Advisory Committee." For the following reasons, this Honorable Court should not grant review on this claim.

The Supreme Court of Pennsylvania disposed of this claim in the OISA by reference to Pennsylvania Rule of Criminal Procedure (Pa.R.Crim.P.) 905(A). That Rule requires PCRA petitioners to bring their claims in the initial PCRA petition. Any supplementation of the initial PCRA petition may only be done pursuant to prior leave of court. In this case, Petitioner did not bring the instant claim in his initial petition, but nevertheless included it in a purported supplemental petition as to which he had not sought prior leave of court. The OISA therefore found that the claim had been waived and so denied relief. The OISA explained:

> 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'.").

Fears, *supra,* 250 A.3d at 1194 (bold emphasis added).

As noted above, this Honorable Court "repeatedly has held that state courts are the ultimate expositors of state law…and that we are bound by their constructions except in extreme circumstances…." *Mullaney v. Wilbur*, 95 S.Ct. 1881, 1885–1886 (U.S.1975) (internal citations omitted). The OISA's finding that appellant had waived an issue pursuant to a rule of criminal procedure is unquestionably quintessentially a pure matter of state law. As such, the state supreme court is the ultimate expositor of the governing law, and that court's resolution of the waiver issue in the OISA is entitled to deference under this Honorable Court's jurisprudence. For this reason, this Honorable Court should not grant review.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests this Court deny the Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,

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