

No. 22-7697

In the Supreme Court of the United States

KENNETH BROWN, JR.,
Petitioner

v.

PENNSYLVANIA, *ET AL.*
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

RESPONDENTS' BRIEF IN OPPOSITION

MICHELLE A. HENRY
Attorney General
Commonwealth of Pennsylvania

J. BART DELONE
Chief Deputy Attorney General
Appellate Litigation Section

SEAN A. KIRKPATRICK
Senior Deputy Attorney General
Counsel of Record

HANNAH KOGAN
Honors Fellow

Office of Attorney General
Strawberry Sq. Fl. 15,
Harrisburg, PA 17120
(717) 705-2331

QUESTIONS PRESENTED

The questions presented, as phrased by Petitioner, are as follows:

1. Whether Act 84, 42 Pa.C.S. § 9728(b)(5) is Unconstitutional on its Face as Violative of the Commonwealth of Pennsylvania Constitution and/or the Separation of Powers Doctrine?
2. Whether the Amendment to Act 84 is Unconstitutional as Applied to Petitioner as Violative of Both Pennsylvania and United States Constitution[s]?
3. Whether Petitioner's Guilty Plea and Sentence is Void because Act 84 is Void ab Initio on its face, or as applied to Petitioner?

PARTIES TO THE PROCEEDINGS

Petitioner is Kenneth Brown, Jr., a Pennsylvania inmate. Respondents are the Commonwealth of Pennsylvania and the Pennsylvania Department of Corrections.

RELATED PROCEEDINGS

Brown v. Commonwealth of Pennsylvania, et al., 29 M.D. 2021, Commonwealth Court of Pennsylvania. Judgment was entered on December 30, 2021.

Brown v. Commonwealth of Pennsylvania, et al., 24 MAP 2022, Supreme Court of Pennsylvania. Judgment was entered on December 21, 2022.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

<i>Beavers v. Pennsylvania Dep’t of Corr.,</i>	
271 A.3d 535 (Pa. Cmwlth. 2021)	12
<i>Boyd v. Pa. Dep’t of Corr.,</i>	
831 A.2d 779 (Pa. Cmwlth. 2003), <i>aff’d</i> , 886 A.2d 222 (Pa. 2005)	13
<i>Brown v. Commonwealth of Pennsylvania,</i>	
271 A.3d 554 (Pa. Cmwlth. 2021)	1
<i>Brown v. Commonwealth of Pennsylvania,</i>	
286 A.3d 712 (Pa. 2022)	1
<i>Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.,</i>	
492 U.S. 257 (1989)	11
<i>Bundy v. Wetzel,</i>	
184 A.3d 551 (Pa. 2018)	10
<i>City & Cnty. of San Francisco, Calif. v. Sheehan,</i>	
575 U.S. 600 (2015)	8-9
<i>Collins v. Youngblood,</i>	
497 U.S. 37 (1990)	13
<i>Commonwealth v. Brown,</i>	
48 A.3d 1275 (Pa. Super. 2012)	1
<i>Commonwealth v. Ford,</i>	
217 A.3d 824 (Pa. 2019)	7, 8
<i>Commonwealth v. Piper,</i>	
328 A.2d 845 (Pa. 1974)	12
<i>Cutter v. Wilkinson,</i>	
544 U.S. 709 (2005)	12

<i>Johnson v. Fankell</i> , 520 U.S. 911 (1997).....	6
<i>Paroline v. United States</i> , 572 U.S. 434 (2014).....	11
<i>Richardson v. Pa. Dep’t of Corr.</i> , 991 A.2d 394 (Pa. Cmwlth. 2010)	13
<i>Spotz v. Commonwealth</i> , 972 A.2d 125 (Pa. Cmwlth. 2009).....	2, 11
<i>Sweatt v. Dep’t of Corr.</i> , 769 A.2d 574 (Pa. Cmwlth. 2001)	13
<i>Sweeney v. Lotz</i> , 787 A.2d 449 (Pa. Cmwlth. 2001)	11
<i>Wardius v. Oregon</i> , 412 U.S. 470 (1973).....	6
<i>Washington State Department of Licensing v. Cougar Den, Inc.</i> , 139 S.Ct. 1000 (2019)	6
<i>Washington v. Pennsylvania Dep’t of Corr.</i> , 271 A.3d 555 (Pa. Cmwlth. 2021)	12
<i>Washington v. Pennsylvania Dept. of Corr.</i> , 13 MAP 2022 (Pa.)	12
<i>Will v. Michigan Dep’t of State Police</i> , 491 U.S. 58 (1989)	8
Constitutional Provisions	
U.S. Const. Art. I, § 8.....	9
U.S. Const. Art. III, § 1.....	9
U.S. Const. Art. IV, § 1	10
U.S. Const. Amend. 8.....	3-5, 7, 10, 11
U.S. Const. Amend. 14.....	3-4, 7, 10
Pa. Const. Article I, § 13.....	3
Statutes	
18 Pa.C.S. § 1106	7
42 Pa.C.S. § 9541 <i>et seq.</i> (PCRA)	7
42 Pa.C.S. § 9726	3
42 Pa.C.S. § 9728	2-9, 11-13
42 U.S.C. § 1983.....	8
Act of Dec. 18, 2019, P.L. 776, No. 115, § 4 (Act 115).....	2, 4, 12
Act of June 18, 1988, P.L. 640, No. 84, § 4 (Act 84).....	2, 11-12
Rules	
Pennsylvania Rule of Appellate Procedure 302	12
Pennsylvania Rule of Criminal Procedure 720.....	7
Pennsylvania Rules of Appellate Procedure 901 <i>et seq.</i>	7
S.Ct. Rule 10	6, 9

Department of Corrections

Policy No. DC-ADM 005	2
Policy No. DC-ADM 804	3

OPINIONS BELOW

The Commonwealth Court's non-precedential opinion is reported as *Brown v. Commonwealth of Pennsylvania*, 271 A.3d 554 (Pa. Cmwlth. 2021). The Pennsylvania Supreme Court's *per curiam* order affirming the Commonwealth Court's ruling is reported as *Brown v. Commonwealth of Pennsylvania*, 286 A.3d 712 (Pa. 2022).

STATEMENT OF THE CASE

Kenneth Brown, Jr., murdered a woman after an argument in a car. Brown "grabbed and choked the decedent before [a] friend intervened." *Commonwealth v. Brown*, 48 A.3d 1275, 1278 (Pa. Super. 2012). When the woman attempted to flee, Brown "continued to assault her on the sidewalk in front of witnesses," using "his fist and feet to punch and stomp her." *Ibid.* After Brown murdered her, he ran over her body with the car. *Ibid.*

Brown pled guilty to this gruesome murder, along with flight to avoid apprehension; false imprisonment; abuse of a corpse; and tampering with physical evidence. *Id.* at 1277. Brown was sentenced in January 2010 to serve an aggregate 30 to 60-year term of imprisonment and pay restitution and costs. Cmwlth. Ct op. at 2, 8.¹ He did not appeal this sentence or file any post-sentence motions. *Brown*, 48 A.3d at 1277.²

¹ A copy of the docket in Brown's criminal case can be found at <https://ujsportal.pacourts.us/Report/CpDocketSheet?docketNumber=CP-36-CR-0000353-2009&dnh=nn%2BP0STD6yrmhxX091rSSA%3D%3D>. The restitution and costs sentenced by the criminal court can be found on page 26 of the docket.

² Brown later unsuccessfully sought relief under the Post Conviction Relief Act based on ineffectiveness of counsel. *Brown*, 48 A.3d at 1277, 1279.

Long before Brown was sentenced, the Pennsylvania General Assembly enacted Act 84 of 1988, which established procedures for the Department of Corrections to deduct funds from inmates' accounts to cover court ordered restitution, costs, and fines. Act of June 18, 1988, P.L. 640, No. 84, § 4. This act became Section 9728 of the Sentencing Code, 42 Pa.C.S. § 9728, and permitted the Department of Corrections "to make monetary deductions from inmate personal accounts for the purpose of collecting restitution." 42 Pa.C.S. § 9728 (b)(5) (prior to Dec. 18, 2019). The General Assembly did not specify how much to deduct, leaving it up to the Department "to develop guidelines relating to its responsibilities under this paragraph." *Ibid.* The Department promulgated a policy of deducting "monthly payments of 20% of the preceding month's income provided the account balance exceeds \$10.00[.]" *Spotz v. Commonwealth*, 972 A.2d 125, 130 (Pa. Cmwlth. 2009) (quoting Policy No. DC-ADM 005, 2015 version).

In 2019, the General Assembly amended Section 9728 through passage of Act 115. Act of Dec. 18, 2019, P.L. 776, No. 115, § 4 (Act 115). Act 115 requires the Department of Corrections to "make monetary deductions of at least 25% of deposits made to inmate wages and personal accounts for the purpose of collecting restitution[.]" 42 Pa.C.S. § 9728(b)(5)(i) (current). The Department of Corrections amended its policy to comply with this new minimum. Policy No. DC-ADM 005 at § 3(A)(2)(e)(2).³

³ A copy of DC-ADM 805 can be found at <https://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/005%20Collection%20of%20Inmate%20Debts.pdf>.

Upon Brown's incarceration in 2010, the Department began deducting money from his inmate account to pay the court ordered restitution and costs. In January 2020, Brown challenged the monetary deductions by filing a grievance through the Department of Corrections' inmate grievance system, Policy No. DC-ADM 804.⁴ Cmwlth. Ct. op. at 14-15.⁵ His grievance was denied. *Ibid.*

Brown brought this action in the Pennsylvania Commonwealth Court's original jurisdiction against the Commonwealth of Pennsylvania and Department of Corrections. The gravamen of his Petition for Review centered on the criminal court ordering him to pay restitution and costs without a hearing on his ability to pay. App. 3a.⁶ Brown argued that this violated 42 Pa.C.S. § 9726(c)⁷ and his rights against "excessive and cruel and unusual punishment under Article I, Section 13 of the Constitution of the Commonwealth of Pennsylvania, and the Eighth Amendment to the United States Constitution," and his due process rights under the Fourteenth Amendment to the U.S. Constitution. *Ibid.* According to Brown, because his sentence is allegedly invalid, any money the Department withdraws from his account to pay

⁴ A copy of DC-ADM 804 can be found at <https://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/804%20Inmate%20Grievances.pdf>.

⁵ Brown attached the Commonwealth Court's opinion as Appendix A to his Petition for Writ of Certiorari. Respondents will cite to that decision as "Cmwlth. Ct. op." followed by the original page number.

⁶ A copy of Brown's Petition for Review, titled "Complaint," is reprinted without the exhibits at Appendix A to this Brief in Opposition.

⁷ This Pennsylvania statute provides that a criminal court "shall not sentence a defendant to pay a fine unless it appears of record that: (1) the defendant is or will be able to pay the fine; and (2) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime." 42 Pa.C.S. § 9726(c). Brown was not ordered to pay a fine; he was ordered to pay restitution and costs.

restitution is purportedly unconstitutional under the Pennsylvania and United States Constitutions. App. 6a.

Although phrased as a challenge to 42 Pa.C.S. § 9728, Brown's complaint centered on the criminal court's alleged failure to afford him "adequate notice that because he pled guilty in his criminal case he would have to pay [restitution]." App. 6a-7a.

Brown also alleged the restitution imposed was "unconstitutional as violative of the separation of powers doctrine, the ex post facto clause, the Eighth Amendment, and the Fourteenth Amendment due process and privileges and immunities clause." App. 8a. According to Brown, Section 9728 infringes on the powers of Pennsylvania state courts, subjects him to punishment inconsistent with the terms of his sentence, and deducts funds without an initial determination of his ability to pay. App. *Ibid.* Lastly, Brown challenged the court-ordered restitution on the ground that the victim of his crime is deceased and, therefore, cannot be repaid. App. 9a. This somehow also renders Section 9728 unconstitutional. *Ibid.*

Brown did not complain about the 2019 amendment to Section 9728 (Act 115). *See generally*, App. 1a-10a.

Respondents filed a Preliminary Objection in the nature of a demurrer to Brown's Petition for Review, which the Commonwealth Court sustained on December 30, 2021. The Commonwealth Court rejected Brown's constitutional claims as "without merit." Cmwlth. Ct. op. at 11. That court determined that Section 9728 provides the authority and method for the Department to collect fines, costs, and

restitution pursuant to a court order. *Id.* at 1 n.1, 10–12. As Brown’s sentence by the trial court judge requires him to pay costs and restitution, the Department is authorized to make deductions from funds in his prison account. *Id.* at 12–13.

Likewise, Section 9728 is a “procedural mechanism * * * to facilitate the enforcement of an inmate’s criminal sentence,” and “is not penal in nature.” *Id.* at 10 (internal quotations omitted)) Therefore, it does not violate the Eighth Amendment. *Id.* at 10–11.

The Commonwealth Court noted that prisoners are entitled to an opportunity to challenge the withdrawal of funds to pay court costs, fines, and restitution. Cmwlth. Ct. op. at 8–9. Pointing to Brown’s own Petition for Review, that court found he received a meaningful opportunity to object to any errors in the Department’s calculation of his total monetary obligations and the rate at which funds would be deducted. *Id.* at 9. That opportunity satisfied his due process rights. *Id.* at 9.

The Commonwealth Court also dismissed Brown’s due process claims concerning the Department of Corrections’ administrative processes based on Brown’s own non-compliance with the “Inmate Grievance System.” *Id.* at 14–15. Finally, the Commonwealth Court noted that the other claims by Brown regarding restitution owed or imposed are challenges to the legality of his sentence, and could not be brought through a Petition for Review. *Id.* at 10, 10 n.13, 11 n.14, 13 n.16.

After Brown’s request for reargument was denied, he appealed to the Pennsylvania Supreme Court. That court summarily affirmed the Commonwealth Court’s order on December 21, 2022. This Petition for Writ of Certiorari followed.

REASONS FOR DENYING THE PETITION

This Court grants a petition for writ of certiorari “only for compelling reasons.” S.Ct. Rule 10. Having no compelling reasons, Brown invites this Court into a morass of meritless state and federal claims containing jurisdictional pitfalls. We begin with a map of those hazards.

I. This Action Contains Significant Jurisdictional Defects.

1. Brown’s claims based on the Pennsylvania Constitution are not properly before this Court. A bedrock feature of our system of federalism is that state supreme courts are the ultimate expositors of state law. *See, e.g., Wardius v. Oregon*, 412 U.S. 470, 477 (1973) (“It is, of course, true that the Oregon courts are the final arbiters of the State’s own law.”). “Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State.” *Johnson v. Fankell*, 520 U.S. 911, 916 (1997); *see also Washington State Dep’t of Licensing v. Cougar Den, Inc.*, 586 U.S. __, 139 S.Ct. 1000, 1010 (2019) (“[T]his Court is bound by the Washington Supreme Court’s interpretation of Washington Law[.]”).

The Commonwealth Court correctly held that Section 9728 did not violate the Pennsylvania Constitution. The Pennsylvania Supreme Court affirmed that holding. Brown’s attempt to have this Court override the Pennsylvania Supreme Court’s interpretation of its own constitution is improper.

2. Also improper is Brown’s attempt to overturn his criminal sentence through this civil action. Pet. at questions presented; Cmwlth Ct. op. at 10-11. In his

Petition for Review, Brown conceded that the Department of Corrections is merely “relying on [Section 9728] to deduct the restitution and costs order[ed] by the [criminal trial] court.” App. 6a. The fault, in Brown’s mind, lies with the criminal court, which allegedly failed to afford him “adequate notice that because he pled guilty in his criminal case he would have to pay whatever the court ordered him to pay” without a hearing on whether he was able to pay that amount. App. 6a-7a, 2a-3a. Brown’s complaint is that the *criminal court* violated his Eighth Amendment and Fourteenth Amendment rights.

These allegations reveal the true nature of this case—Brown seeks to overturn or modify his sentence. But Brown may not collaterally attack his criminal sentence through a civil action. Under Pennsylvania law, he must challenge the legality of his sentence through one of the following avenues: a motion for modification of the sentence under Pennsylvania Rule of Criminal Procedure 720; a direct appeal of the sentence under Pennsylvania Rules of Appellate Procedure 901-911; a petition for postconviction relief under the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546; or a petition to amend an order of mandatory restitution under 18 Pa.C.S. § 1106(c)(2)(iii). All of these avenues require pursuing the challenge through the criminal docket. A petition for review filed in the Commonwealth Court’s original jurisdiction “is not a proper mechanism to obtain the modification of a purportedly illegal sentence.” Cmwlth. Ct. op. at 11 n.14.

Browns’ heavy reliance on the Pennsylvania Supreme Court case *Commonwealth v. Ford*, 217 A.3d 824 (Pa. 2019), further reveals the true nature of

his complaint. That was a criminal case where the Pennsylvania high court concluded that the criminal defendant “received an *illegal sentence* when the trial court imposed non-mandatory *fines* without any evidence that [the defendant] was (or would be) able to pay them.” *Ford*, 217 A.3d at 831 (emphasis added). Unlike *Ford*, this is a civil action that does not involve fines. Brown’s citation and reliance on *Ford* confirms that what he actually seeks is to overturn his sentence. But as the Commonwealth Court repeatedly explained, Brown cannot challenge his sentence through this civil action. Cmwlth. Ct. op. at 11 n.14.

This Court should not be “snookered” by Brown. *See City & Cnty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 621 (2015) (Scalia, J. concurring in part). His challenge to Section 9728 is, and has always been, about a criminal defendant who pled guilty and then had buyer’s remorse. Brown’s goal of overturning his guilty plea and sentence, however, cannot be obtained through challenging the constitutionality of a statute that simply provides procedures for the Department of Corrections to collect fines, costs, and restitution imposed by the courts. Brown cannot obtain the relief he seeks through this action.

3. Brown does not state the mechanism through which he brings his federal claims. To the extent he seeks any relief through 42 U.S.C. § 1983, the Commonwealth and the Department of Corrections—the only parties he sued—are not “persons” under that statute. *See Will v. Michigan Dep’t of State Police*, 491 U.S. 58 (1989). He cannot obtain the relief he seeks.

II. Brown Presents No Important Federal Question or Compelling Reason to Grant His Petition.

If the above pitfalls were not enough to dissuade this Court from wading into this morass, Brown also presents no “important federal question” worthy of this Court’s review. S.Ct. Rule 10 (b)-(c). Brown raises three reasons for granting his petition. All three reasons are hollow.

1. Brown begins by arguing that the Pennsylvania courts “erred” by not addressing some of his arguments. Pet. at 8. This Court is famously not “a court of error correction.” *Sheehan*, 575 U.S. at 621 (Scalia, J. concurring in part). And the arguments he cites as being overlooked are facially meritless. For example, he cites to Article I, Section 8 of the United States Constitution, which grants Congress certain powers. He made no argument below, and makes no argument here, why Section 9728 implicates Congress’s powers under this section of the Constitution.

Brown cites to Article III, Section 1 of the United States Constitution, which vests the judicial power of the United States into this Court and such lower courts as Congress establishes. Section 9728 does not involve federal courts. It provides procedural authority for the Pennsylvania Department of Corrections and Pennsylvania county probation departments to collect restitution, fees, and costs ordered by Pennsylvania courts. Section 9728 does not invade this Court’s province.

Brown cites to the Full Faith and Credit Clause in Article IV, Section 1 of the United States Constitution. Pet. at 8. Once again, Brown provides no explanation as to why this clause is relevant to his challenge.⁸

Brown cites to the Fourteenth Amendment to the United States Constitution without meaningful argument. He is incorrect to say the Pennsylvania courts failed to address these claims. On pages 8-9 and 14-15 of the Commonwealth Court's opinion, that court examined and rejected both claims.

Under Pennsylvania law, the Department of Corrections is required to "(a) inform the inmate of the total amount of his financial liability as reflected in his sentencing order, as well as the Department's policy concerning the rate at which funds will be deducted from his account and which funds are subject to deduction; and (b) give the inmate a reasonable opportunity to object to the application of the Department's policy to his account." *Bundy v. Wetzel*, 184 A.3d 551, 558-559 (Pa. 2018). The Commonwealth Court correctly held that the Department's inmate grievance system—which Brown used—satisfied this requirement. Cmwlth. Ct. op. at 9 (citing *Johnson v. Wetzel*, 238 A.3d 1172, 1182 (Pa. 2020); *Bundy*, 184 A.3d at 557). The mere fact that Brown disliked the outcome of that process did not render the process deficient.

Finally, Brown makes an oblique reference to his Eighth Amendment right against the imposition of "excessive fines." Pet. at 3. This Court long ago explained that "the Excessive Fines Clause [of the Eighth Amendment] was intended to limit

⁸ Brown also cites to provisions of the Pennsylvania Constitution. As discussed above, the Pennsylvania Supreme Court is the final interpreter of its own constitution.

only those fines directly imposed by, and payable to, the government.” *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 268 (1989). Brown was not fined. He was ordered to pay costs and restitution, which do not implicate the Excessive Fines Clause. But even if they did, the amount of costs and restitution ordered was clearly not “excessive” given the brutality of his crimes. *Cf. Paroline v. United States*, 572 U.S. 434, 455 (2014) (suggesting that “holding a single possessor [of child pornography] liable for millions of dollars in losses collectively caused by thousands of independent actors” *might* trigger the Excessive Fines Clause).

More to the point, Section 9728 does not order Brown to pay restitution. That obligation was ordered by the criminal court. This law “merely provides the procedural mechanism for collecting items such as costs, fines and restitution from incarcerated judgment debtors.” *Sweeney v. Lotz*, 787 A.2d 449, 452 (Pa. Cmwlth. 2001). Nothing in Section 9728 implicates, let alone offends, the Eighth Amendment.

2. Brown next argues that Act 84, which became Section 9728, constitutes an *ex post facto* law because it increased the restitution repayments from 20% of his income to 25%. Pet. at 8. Brown is confused.

Under Act 84 of 1988, the Department was free to decide how much money to deduct each month to comply with the criminal court’s sentence and chose to deduct 20%. *Spotz*, 972 A.2d at 130. The General Assembly amended that law in 2019 with the enactment of Act 115, setting the minimum deductions the Department must withdraw at 25%. 42 Pa.C.S. § 9728(b)(5)(i) (current).

Brown appears to make two separate *ex post facto* arguments. In the Pennsylvania courts below, he argued that Act 84 constituted an *ex post facto* law. This argument was correctly rejected by the Commonwealth Court, as Act 84 was enacted in 1988, long before Brown was sentenced in 2010. Cmwlth. Ct. op. at 4 n.9. There was no retroactive application.

Brown now argues, for the first time, that the 2019 amendment to Section 9728—Act 115—constitutes an *ex post facto* law. Brown forfeited this argument by failing to make it below. *See* Pennsylvania Rule of Appellate Procedure 302(a) (“Issues not raised in the trial court are waived and cannot be raised for the first time on appeal.”); *Commonwealth v. Piper*, 328 A.2d 845, 847 (Pa. 1974) (same). And because of this failure, the Pennsylvania courts did not address this argument. This is “a court of review, not of first view.” *Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005). This Court should not address an argument in the first instance.⁹

Further, an *ex post facto* law is one that “punish[es] as a crime an act previously committed, which was innocent when done; []or make[s] more burdensome the punishment for a crime, after its commission; []or deprive[s] one charged with crime of any defense available according to law at the time when the act was

⁹ For another example, Brown does not clearly articulate how Section 9728 violates his due process rights. To the extent he now argues that the Department’s compliance with Act 115 violates his due process rights, that argument is equally forfeited for failing to raise it below. Pennsylvania Rule of Appellate Procedure 302(a). Had Brown raised this argument below, the Pennsylvania courts would have squarely examined this claim, as they have done in other *pro se* inmate cases. *See, e.g., Beavers v. Pennsylvania Dep’t of Corr.*, 271 A.3d 535 (Pa. Cmwlth. 2021); *Washington v. Pennsylvania Dep’t of Corr.*, 271 A.3d 555 (Pa. Cmwlth. 2021). In fact, this issue is currently percolating before the Pennsylvania Supreme Court. *Washington v. Pennsylvania Dept. of Corr.*, 13 MAP 2022 (Pa.). This Court should not short-circuit that court’s review by taking a case where the inmate fails to articulate the claim in his petition for writ of certiorari and forfeited the issue below.

committed.” *Collins v. Youngblood*, 497 U.S. 37, 51 (1990). The 2019 amendment does none of these. It “neither defines a criminal offense committed by [an inmate] nor imposes additional fines and/or punishment against him.” *Sweatt v. Dep’t of Corr.*, 769 A.2d 574, 577 (Pa. Cmwlth. 2001). The amendment did not increase the amount of restitution or costs Brown owed, only the monthly amount which the Department of Corrections is required to withdraw. For this reason, Pennsylvania courts have long held that 42 Pa.C.S. § 9728 is not penal in nature, but rather merely a procedural mechanism for the Department of Corrections to collect court costs and restitution. *See Sweatt*, 769 A.2d at 577. Section 9728 does not implicate the *Ex Post Facto* Clause. *See Collins*, 497 U.S. at 51.

3. Brown finishes by arguing that Section 9728 violates separation of powers principles, citing to several Pennsylvania court cases. This final argument demonstrates why this case is particularly inappropriate for this Court’s review. Whether Section 9728 of Pennsylvania’s Sentencing Code trespasses on the province of Pennsylvania courts is a matter for the Pennsylvania courts to examine. And those courts have already decided that the statute does not violate separation of powers principles. *See, e.g., Richardson v. Pa. Dep’t of Corr.*, 991 A.2d 394, 396 (Pa. Cmwlth. 2010); *Boyd v. Pa. Dep’t of Corr.*, 831 A.2d 779, 783 n.8 (Pa. Cmwlth. 2003), *aff’d*, 886 A.2d 222 (Pa. 2005). This case presents no important *federal* questions or compelling reasons warranting this Court’s review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHELLE A. HENRY
Attorney General
Commonwealth of Pennsylvania

J. BART DELONE
Chief Deputy Attorney General
Chief, Appellate Litigation Section



SEAN A. KIRKPATRICK
Senior Deputy Attorney General
Counsel of Record

HANNAH KOGAN
Honors Fellow

October 2023

COUNSEL FOR RESPONDENTS

APPENDIX
TABLE OF CONTENTS

	Page
Appendix A – Petition for review, titled complaint, without exhibits (Feb. 9, 2021)	1a

APPENDIX A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

KENNETH BROWN, JR.,	:	No. _____
Plaintiff	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF CORRECTIONS OF	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
Defendant	:	

COMPLAINT
(In the nature of Mandamus)

Plaintiff alleges:

1. This Honorable Court has original jurisdiction under 42 Pa.C.S. § 761.
2. Plaintiff is seeking mandamus relief, damages, and costs against the defendants pursuant to Pa.R.Civ.P. 1092-1095; injunctive and declaratory relief as a result of the defendants' unconstitutional acts described herein.
3. The defendants have state-wide jurisdiction in the state of Pennsylvania.

PARTIES

4. Plaintiff, Kenneth Brown, Jr., is an incarcerated individual presently confined in the State Correctional Institution at Coal Township [SCI Coal Township], serving 30 yrs. to 60 yrs. imposed by the Honorable Dennis E. Reinaker, Judge, in the Lancaster County Court of Common Pleas at Docket No. CP-36-0000353-2009, and his Institution I.D. Number is JL-0563.

5. Defendant, Commonwealth of Pennsylvania, is a sovereign state, a commonwealth government responsible for the general welfare of all citizens and prisoners in Pennsylvania, charged with the power and duties to support and thus

enforce and protect the Constitution of the United States and to make and enforce laws which do not abridge the privileges or immunities of citizens of the United States, and is represented by the Attorney General of Pennsylvania, located at Strawberry Square, 15th Floor, Harrisburg, PA 17120.

6. Defendant, Department of Corrections, is a government unit of the Commonwealth of Pennsylvania, charged with the care, control, and custody of all prisoners in state correctional institutions in Pennsylvania and making and enforcing policies regarding all state correctional institutions, enforcing laws of the Commonwealth of Pennsylvania and the Constitution of the Commonwealth of Pennsylvania and the United States, and the Secretary of the Department of Corrections is responsible for the operation of all state correctional institutions (i.e. John E. Wetzel, is the Secretary of Corrections, located at, 1920 Technology Parkway, Mechanicsburg, PA 17050).

REASONS WHY RELIEF SHOULD BE GRANTED

7. Plaintiff was sentenced to pay restitution and costs, and to serve 30 yrs. to 60 yrs. of incarceration pursuant to a negotiated plea, by the Honorable Dennis E. Reinaker, Judge, in the Lancaster County Court of Common Pleas, at Docket No. CP-36-CR-0000353-2009 on January 29, 2010, without it appearing of record that Plaintiff was/is able to pay same pursuant to 42 Pa.C.S. § 9726(c), in violation of Plaintiff's protection against excessive and cruel and unusual punishment under Article 1, § 13 of the Constitution of the Commonwealth of Pennsylvania, and the Eighth Amendment to the United States Constitution, and in further violation of

Plaintiff's right not to be deprived of his property without due process of law under the Fourteenth Amendment to the Constitution of the United States.¹

8. Despite the above and Plaintiff making a good faith effort to have the monetary deductions stopped based on the deductions being unauthorized and illegal, and thus have the money deducted from his prison account returned (i.e. he be given full refund), the Superintendent, aka the Facility Manager of Plaintiff's place of confinement, i.e. the State Correctional Institution at Coal Township, agreed with his Grievance Officer's response to Plaintiff's initial grievance, and thus stated in his response to Plaintiff's appeal to him: "Ms. Wilson is accurate in her statement that Act 84 of 1998 did away with the need for a hearing or court order for deductions. If it remains your contention that it was not the Courts intent for these deductions to occur, then the burden of proof falls on you. You will need to secure official court documentation noting this and provide it to the business office for review." The Facility Manager also stated in his response: "Mr. Brown I have read your grievance, the response to this grievance, and your appeal to this response. Additionally, I have reviewed the available documentation regarding these concerns." See Exhibit "C," Official Inmate Grievance, Initial Review Response, Inmate Appeal To Facility Manager, and Facility Manager's Appeal Response, attached hereto.

¹ Specifically, Plaintiff was ordered to: "Pay restitution in equal monthly installments. To be paid in full within the period of supervision. Pay all other financial obligations in accordance with a payment plan established by APPS-CEU. DNA sampling + pay costs §250," and costs for each charge Plaintiff plead guilty to. See Sentencing Order/Sentencing Conditions Order, Exhibit "A," attached hereto. See also Excerpts of Criminal Docket, Exhibit "B," attached hereto.

9. As a result of the Facility Manager's above response, Plaintiff mailed an appeal to the Secretary of Corrections, namely, Secretary John E. Wetzel, for Final Review, however, on April 7, 2020, Amanda West, Grievance Review Officer of the Secretary's Office of Inmate Grievances and Appeals, sent an "Action Required" notice to Plaintiff advising him to provide missing documents (i.e. a copy of the attached Exhibits, Exhibits marked as Exhibit "C") within 15 working days, by forwarding same to the Secretary's Office of Inmate Grievances and Appeals, and therefore, on April 15, 2020, Plaintiff requested and obtained a copy of all the missing documents, and forwarded a copy of same to the Secretary's Office of Inmate Grievances and Appeals on April 17, 2020, and as of this date he have not received a response to his appeal from Defendant Department of Corrections (i.e. the Secretary's Office of Inmate Grievances and Appeals). See Letter from Wayne Inniss, Exhibit "D," attached hereto; Action Required, Exhibit "E," attached hereto; cash slip for copies, Exhibit "F," attached hereto; cash slip for postage for mail sent 4-17-20, Exhibit "G," attached hereto.

10. Furthermore, as a result of Plaintiff not receiving a response to his appeal to Defendant Department of Corrections for final review of his grievance, he sent a request slip to the Business Manager of SCI Coal Township and attached Page 3 of 3 Sentencing Condition Order, Exhibit "A," attached hereto, to show that there is/was not an order by the Judge telling Defendant Department of Corrections to deduct money from his prison account. However, Jacob Damiter, Accountant, responded to Plaintiff's request slip and merely stated thereon that: "The form you attached shows

you must pay restitution.”² See Inmate’s Request To Staff Member, Exhibit “H,” attached hereto. In reply to the Accountant’s response, Plaintiff submitted a request slip to him, advising him that the document merely say “Pay restitution in equal monthly installments. To be paid in full within the period of supervision. Pay all other financial obligations in accordance with a payment plan established by APPS-CEU.” However, as of this date, Plaintiff has not received a response from the Accountant even though Plaintiff requested in his request slip that he provide Plaintiff with documentation that gives Defendant, Department of Corrections authority to take money from his prison account every time he receive money, or stop taking it, or he will take court action. See Request to Jacob Damiter, Exhibit “I,” attached hereto.

11. Plaintiff had also sent a Request Slip to, Ms. Kerry Hoffman, Parole Supervisor, inquiring about his Sentencing Conditions Order requirements, and requesting a copy of 50-Act 84 of 1998 for his review. See Request to Ms. Kerry Hoffman, Exhibit “J,” attached hereto. However, as of this date, Plaintiff have not received a response to said Request.

12. In light of Defendant, Department of Corrections and staff members of said Defendant not responding to Plaintiff’s appeal for Final Review and/or his Request Slips mentioned herein, Plaintiff believes and thus avers that they failed to respond to same to thwart him from exhausting his administrative remedies through the grievance process, thus access to the court, and/or they failed or refused to respond

² Despite Plaintiff citing Commonwealth v. Ford, 217 A.3d 824, 2019 Pa. LEXIS 5422 (Sep. 26, 2019) in his request slip to the Business Manager, and the Ford case indicated that no court can order Plaintiff to pay fines without it appearing of record that he is able to pay same, the case was ignored.

because they were aware of the decision in Commonwealth v. Ford, 217 A.3d 824, 2019 PA LEXIS 5422 (Sep. 26, 2019), and/or because Plaintiff's Sentencing Order and Sentencing Conditions Order does not give Defendant, Department of Corrections authority to deduct restitution, costs or fines from Plaintiff's prison account every time he receive money in his account and/or they knew or should have known that the money deducted in the manner that it has been and is continuing to be deducted is unconstitutional as violative of Plaintiff's protection against excessive fines and/or cruel and unusual punishment and deprivation of his money without due process of law under both state and federal constitution. See Monthly Account Statement (indicating that money has been deducted every time Plaintiff received money in his prison account), Exhibit "K," attached hereto. See also Sentencing Order/Sentencing Conditions Order (indicating that restitution is to be paid in equal monthly installments and that all other financial obligations is to be paid in accordance with a payment plan established by APPS-CEU) at Page 3 of 3, Exhibit "A," attached hereto.

13. Notwithstanding the staff of Defendant, Department of Corrections relying on Act 84 to deduct the restitution and costs order by the court, the Act conflict with the court's Sentencing Conditions Order and the holding in the Ford case and it also conflict with Plaintiff's protection against excessive fines and cruel and unusual punishment and his right not to be deprived of his property without due process of law, in that Plaintiff was not afforded adequate notice that because he pled guilty in his criminal case he would have to pay whatever the court ordered him to pay, and

that the money would be deducted from his prison account by Defendant, Department of Corrections every time he receive money in his account, or by said Defendant at all (i.e. that money could or would be deducted by Defendant Department of Corrections from Plaintiff's prison account), without it first appearing of record that Plaintiff was/is able to pay whatever he was ordered to pay, or that he agreed to a payment plan. See Sentencing Order/Sentencing Conditions Order, Exhibit "A," attached hereto; Excerpts of Criminal Docket, Exhibit "B," attached hereto; Act 84, Exhibit "L," attached hereto. See also Commonwealth v. Ford, 217 A.3d 824, 2019 PA LEXIS 5422 (Sep. 26, 2019) (citing 42 Pa.C.S. § 9726(c)).

14. As a result of all the above, Plaintiff believes and thus avers that the grievance system was/is ineffective, inadequate, improper to protect and/or enforce his due process rights (i.e. substantive and procedural due process rights), where Defendant Commonwealth of Pennsylvania implemented Act 84 and the staff of Defendant, Department of Corrections rely on the Act herein and/or where Defendant, Department of Corrections require Plaintiff to produce and present legible copies to the Secretary's Office of Inmate Grievances and Appeals of all the documents pertaining to his grievance and appeal for "Final Review" instead of require the Grievance Officer or Facility Manager to forward a copy of all the documents to the Secretary's Office of Inmate Grievances and Appeals pertaining to Plaintiff's appeal for "Final Review," and thereby protect Plaintiff from being denied Final Review of his grievance for failure to produce legible copies of all the documents pertaining to his grievance and appeal and present them with his appeal to Final Review. See

Exhibit "C," Official Inmate Grievance, Initial Review Response, Inmate Appeal To Facility Manager, and Facility Manager's Appeal Response, attached hereto; Exhibit "E," Action Required, attached hereto. See also Exhibit "H" and "I," attached hereto (indicating that the grievance system is/was ineffective, inadequate).

15. Moreover, as a result of all the above, Plaintiff also believes and thus avers that Defendant, Commonwealth of Pennsylvania and Defendant, Department of Corrections knew or should have known that interference with the Sentencing Order and Sentencing Conditions Order herein and the statute and rules governing the trial court's authority to impose restitution, costs and fines is unconstitutional as violative of the Separation of Powers doctrine, the Ex Post Facto clause, the Eighth Amendment, and the Fourteenth Amendment due process and privileges and immunities clause, thus Act 84 is unconstitutional, in that it infringes upon the judicial powers of the court of common pleas and the Supreme Court of Pennsylvania, and thus subjects Plaintiff to punishment, penalties, costs, restitution contrary to the court's Sentencing Conditions Order and without the court or Defendant, Department of Corrections first determining that he has the financial means to pay the restitution and costs pursuant to Pa.R.Crim.P. 706(A) and/or that he had/have agreed to pay 25% of his prison wages and gifts (i.e. personal money) deposited into his prison account at the time he entered into the negotiated guilty plea even though he was indigent and was appointed counsel to represent him at the time of his guilty plea. See Exhibit "A," Sentencing Conditions Order; Exhibit "L," Act 84, 42 Pa.C.S. § 9726(c); Pa.R.Crim.P. 706(A); Constitution of the United States, Article I, 10, Article III, §§ 1

and 2, Article IV, § 1, Amendments 8 and 14; Constitution of the Commonwealth of Pennsylvania, Article 1, §§ 1, 13, 17 and 26, and Article V, § 10(c).

16. Furthermore, as a result of Defendant, Commonwealth of Pennsylvania initiating a criminal prosecution against Plaintiff, for allegedly committing a criminal homicide, and therefore, the alleged victim is deceased, thus, Plaintiff cannot pay the victim restitution, even if he is/was able to financially, because of the victim being deceased, and because Plaintiff was accused of committing the homicide and criminal proceedings was instituted against him by Defendant, Commonwealth of Pennsylvania and both United States and Pennsylvania Constitution provide for salary, costs, fees, for services performed for the general welfare of the United States, and for the county or any other government unit and fees incidental to the conduct of any county office and other charges, mandatory payment of costs and any other costs and fees associated with Plaintiff's criminal prosecution is unconstitutional, thus Act 84 implemented by Defendant, Commonwealth of Pennsylvania and enforced by Defendant, Department of Corrections is unconstitutional on its face and as applied herein. See United States Constitution, Article I, § 8; Pennsylvania Constitution, Article III, §§ 24 and 32, 1, 5, 8, and Article IX, § 4. See also Act 84, Exhibit "L," attached.

17. Plaintiff has no other adequate remedy at law available to him to protect and enforce his due process rights.

PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, Plaintiff prays that this Honorable Court declare that the Act herein is UNCONSTITUTIONAL; ENJOIN further enforcement of the Act; Command Defendants to pay Plaintiff all of the money back that was deducted from his prison account associated with his criminal prosecution and the Act herein, and to pay the cost of this proceeding; and Command Defendant, Department of Corrections to require the Facility Manager or Grievance Officer at each Correctional Facility to provide the Secretary's Office of Inmate Grievances & Appeals with a copy of all the documents that an inmate submitted relating to his or her grievance and appeal at his or her Facility when the inmate seek final review of same.

Respectfully submitted,

s/Kenneth Brown Jr.
Pro Se Plaintiff

VERIFICATION

I verify under the penalties of 18 Pa.C.S. § 4904, relating to falsification to authorities, that the foregoing facts are true and correct.

Respectfully submitted,

s/Kenneth Brown Jr.
Pro Se Plaintiff
Date: February 8, 2021