

APPENDIX A

358 A.3d 469
Supreme Court of Pennsylvania.
COMMONWEALTH of Pennsylvania

v.
Lavar BROWN
Petition of: Family Members of Murder Victims
Michael Richardson and Robert Crawford

No. 32 EM 2023

|
Argued: March 5, 2025

|
Decided: June 16, 2026

Synopsis

Background: After summary affirmance of convictions for second-degree murder and related offenses, homicide offender filed a facially untimely petition for relief under the Post Conviction Relief Act (PCRA), claiming that the Commonwealth violated *Brady* when it withheld evidence that a cooperating co-conspirator falsely accused a certain individual of being involved in the murder, and the Commonwealth, represented by the Philadelphia County district attorney's office (DAO), confessed error. Victims' family members were allowed to intervene for the purpose of litigating an allegedly disqualifying conflict of interest of the DAO and were allowed to be heard on the merits as amici curiae. The Court of Common Pleas, Philadelphia County, No. CP-51-CR-0407441-2004, Glenn B. Bronson, J., accepted offender's and DAO's joint stipulations of fact and granted offender's petition, vacating his judgment of sentence for the murder. Family members filed a petition requesting that the Supreme Court exercise King's Bench jurisdiction over the case, which was granted.

Holdings: The Supreme Court, No. 32 EM 2023, Dougherty, J., held that:

offender did not meet his burden of proving by preponderance of evidence that cooperating co-conspirator falsely accused individual of being involved in murder;

post-conviction court was required to hold evidentiary hearing on offender's *Brady* claim;

DAO breached its duty of candor to post-conviction court;
manner in which DAO conducted its investigation prior to

confessing error amounted to violation of its duty to conduct reasonable investigation;

in PCRA cases in which DAO concedes relief, PCRA court, before ruling on the concession, shall afford the Office of Attorney General (OAG) notice and opportunity to intervene; and

if OAG elects to intervene, it will not replace or supersede DAO, but will become additional, full party.

Reversed and remanded with directions.

Brobson, J., filed a concurring opinion in which Mundy, J., joined.

McCaffery, J., filed a concurring opinion.

Donohue, J., filed a concurring and dissenting opinion in which Todd, C.J., joined.

Wecht, J., filed a dissenting opinion.

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

On King's Bench petition from the order of the Philadelphia County Court of Common Pleas at No. CP-51-CR-0407441-2004, dated May 5, 2023, Glenn B. Bronson, Judge, granting Brown's petition under the Post Conviction Relief Act and vacating the judgment of sentence entered on October 24, 2004, with the consent of the Commonwealth.

Attorneys and Law Firms

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Katherine Elizabeth Ernst, Esq., Thomas Charles Gaeta, Philadelphia District Attorney's Office of Open Records, for Commonwealth of Pennsylvania.

TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, McCAFFERY, JJ.

OPINION

JUSTICE DOUGHERTY

***476** The prosecutor does not decide whether a defendant is entitled to relief under the Post Conviction Relief Act (PCRA).¹ This is the exclusive province of the PCRA court. Nonetheless, while not dispositive, a prosecutor's concession of relief is undoubtedly influential. Courts have long been instructed to give such concessions "great

weight[.]" *Young v. United States*, 315 U.S. 257, 258, 62 S.Ct. 510, 86 L.Ed. 832 (1942). But when the prosecutor sides with a defendant, there generally is no adversarial testing of the defendant's entitlement to relief, and the court is left without the benefits of opposing advocacy, including the presentation of counterarguments and exposure of misrepresentations of fact and law. The PCRA court's review is limited to the record before it. If relevant evidence is withheld from the court, this pertinent information goes unconsidered. The court is not permitted to conduct its own independent investigation of extra-record materials, and it is not equipped to do so in any case. For these reasons, an unreliable prosecutorial concession substantially risks the erroneous grant of relief by the court. This is not to say a prosecutor should never concede relief. A prosecutor bears the responsibility of a minister of justice and not simply that of an advocate. Hence, a prosecutor is duty-bound to confess error, provided the facts and law call for it. But the proviso is critical. When relief is not dictated by the record and law but merely advocated for personal, political, ideological, policy, or other non-legal reasons, a prosecutor's concession does not minister justice; it facilitates injustice.

¹ See 42 Pa.C.S. §§ 9541-9546.

Here, in this case reviewed under our King's Bench jurisdiction, the Philadelphia District Attorney's Office (DAO), on behalf of the Commonwealth, conceded that Lavar Brown (Brown), a convicted murderer sentenced to death for a separate murder, was entitled to a new trial based upon a facially untimely claim under the PCRA. Upon careful review, we conclude this concession ***477** was not reliable. More specifically, we find the DAO conceded relief although none was warranted based on the existing record, violated its duty of candor to the PCRA court, withheld material evidence from the court, opposed efforts by *amici* to gain access to this evidence, submitted a false stipulation of fact, misstated facts in its pleadings, failed to conduct a reasonable investigation, and opposed a required evidentiary hearing. The predictable result was the erroneous grant of a new trial.

These circumstances, troubling as they are, would not warrant a remedy beyond reversal of the PCRA court's order in this particular case if they were confined to this one case. Unfortunately, they aren't. Since 2018, the DAO has conceded relief well over 100 times, mostly in murder cases like this one. There have been numerous instances of untrustworthy concessions, lack of candor, misrepresentations of fact, lack of adequate investigation, and avoidance of hearings. And the problems are poised to continue. There are apparently more than 1,000 cases yet

to be reviewed by the DAO's Conviction Integrity Unit (CIU), and the DAO vigorously defends its checkered concession program as a necessary corrective to past misdeeds by prior administrations.

The DAO's active, ongoing, and problematic concession program requires broader remedial action to promote just outcomes. Accordingly, in addition to reversing the PCRA court's grant of a new trial here, we also hold that in any PCRA case in which the DAO concedes relief, the PCRA court shall grant the Office of Attorney General (OAG) notice and the right to intervene in the case before ruling on the concession. Regardless of the OAG's position on the concession if it chooses to intervene — it may well agree relief is warranted — its independent assessment and participation will enhance the reliability of the proceedings and the PCRA court's ultimate decision.

I. Background

In December of 2002, Jamaar Richardson began working at a Rite Aid at the intersection of 12th Street and Girard Avenue in Philadelphia. On January 17, 2003, Jamaar was at his nearby house at 1218 N. 11th Street. He was there with his brother James Richardson, who also lived at the house, as well as Kiana Lyons, who lived directly behind the Richardson house, and Brown. Jamaar explained to James, Lyons, and Brown that he would be responsible for opening the Rite Aid the next morning, that there would be \$50,000 in cash in the store's two safes, and that the only other people who would be present at the store would be the manager and a delivery truck driver.

On the morning of January 18, 2003, at approximately 4:00 a.m., Delbert Wech, an assistant manager of the Rite Aid, arrived at the store. Thereafter, Jamaar also arrived at the store and assisted in unloading the delivery truck. After the delivery truck was unloaded, Wech exited the back door of the Rite Aid and put trash in the dumpster. As Wech returned to the back door, he encountered Brown, who was armed with a rifle or shotgun. Brown motioned for Wech to enter the store. Instead, Wech turned and ran. At that point, he noticed James standing approximately one car's length away. James fired a gunshot at Wech but missed, and Wech continued to flee. Lyons saw Brown, who was still armed, and James run through her backyard and enter the Richardson house.

Later that day, James met with Ronald Vann and Christopher Kennedy. James told the men he and another person had attempted to rob the Rite Aid, and the manager had gotten away.

***478** On January 19, 2003, Brown, Vann, James, Jamaar, Kennedy, and Lyons met at the Richardson house to plan another robbery of the Rite Aid. Their plan called for each of them to perform specific tasks. Specifically, they planned for Lyons to enter the store first and report back about how many people were inside, Vann to close the gates from the inside, Kennedy to take the manager to the safe and shoot him in the leg if he gave him any trouble, James to grab the security guard and prevent him from running out the door, and Brown to get everyone in the store onto the ground and make sure no one moved. In addition, Jamaar advised the group where the alarms were located and how to open the gate at the back of the store.

Following the meeting, Lyons entered the Rite Aid, bought a few items, and reported back that there was one security guard and two cashiers inside. Thereupon, Kennedy entered the Rite Aid while Brown, Vann, and James remained outside. Inside the Rite Aid, Kennedy followed the manager, Michael Richardson,² down an aisle. Moments later, a cashier working at the store, Dinlitha Banks, heard a gunshot and heard Michael Richardson cry out, “[b]ut I didn’t do anything. I didn’t do anything.” N.T. Trial, 7/20/04, at 63. Banks ran out of the store to a payphone and called the police. James approached a window to the Rite Aid and then ran back to Brown and Vann and said, “Chris did it.” N.T. Trial, 7/22/04, at 154. At that point, Brown, James, and Vann ran back to the Richardson house.

² Michael Richardson was not related to Jamaar and James.

The police responded to the scene and saw Kennedy run out of the back door of the Rite Aid with a gun and a trash bag. The police ordered Kennedy to stop but he kept running. They gave chase and eventually apprehended him. The officers recovered Kennedy's gun as well as the trash bag, which contained \$2,200 in cash. The police discovered Michael Richardson lying in a pool of blood in his office. He had a bullet hole in the side of his head near his left ear. Although he was still alive, he was gasping for air and could only respond to the police with a gurgling sound. He died a short time later at the hospital.

At approximately 8:45 p.m. that evening, approximately two hours and fifteen minutes after the murder at the Rite Aid, the police arrested Vann and Brown outside of the Richardson house. They were subsequently released.

Vann later gave a series of statements to the police regarding the Rite Aid murder. On January 21, 2003, at

approximately 11:15 a.m., he gave a statement to Detective Brian Peters of the Central Detectives Division (CDD)³ in which he implicated Kennedy and James in the murder. That same day, at approximately 1:55 p.m., he gave a statement to Detective Kevin Judge of the Homicide Division in which he again implicated Kennedy and James. He also noted “a girl” was at the Richardson house before the murder.

³ Detective Peters retired from the Philadelphia Police Department in 2021 and presently works as a Special Agent for the OAG. He is referred to herein as Detective Peters in accordance with his position at the time of the relevant events.

Next, on February 20, 2003, Vann gave a statement to Detectives Gregory Santamala and Timothy Brooks of the CDD. In this statement too he implicated Kennedy and James. Additionally, he alleged Jamaar⁴ was involved in the murder and told the police he believed Brown was involved in the failed robbery of the Rite Aid the day before the murder.

⁴ The statement referred to Jamaar as “Jamal.”

***479** On March 21, 2003, in a proffer session attended by Assistant District Attorney Bill Fisher (ADA Fisher), Detectives Santamala, Brooks, and Judge, Sergeant Andrew Byard, and Vann’s counsel, Vann gave another statement to law enforcement. This statement is memorialized in a memorandum to the file from ADA Fisher dated March 31, 2003 (March 2003 memorandum), which provides:

ADA spoke with defendant’s counsel alone and gave him a copy of defendant’s statements, also informed him that defendant had given an informal (oral) statement to Dets. Brooks and Santamala. ADA didn’t inform the defendant’s attorney about specific content of the oral statements, however, counsel was informed that the oral statements were more expansive or conflicted with the written statements.

Counsel was given an opportunity to speak in private with Vann, prior to our interview.

Vann was not immediately forthcoming — but eventually [h]e probably told most of the truth — in a patchwork, haltingly painful reluctant manner.

This is a summary of what he said:

On the day of the murder, 1/19/03 (about game time^[5])

he, James Richardson, Black (Lavar Brown), were in Richardson’s kitchen — Black and Richardson talked about the robbery of Rite Aid (1/18/03, 5:00 a.m.) — both admitted to their involvement of [sic] that robbery. James Richardson may have had a 9mm and Black a rifle. I think Vann said it was some type of assault weapon (W[e]ch said that the doer had shotgun — he knows is a hunter and knows guns.)

James Richardson shot at manager. (A 9mm FCC was found the next day by W[e]ch.)

At some point Jamaar Richardson and Chris Kennedy were in the kitchen. The robbery the previous night was discussed in Jamaar’s presence — it was not clear whether he helped plan this robbery.

Vann seemed to suggest that Black was the “leader” or “motivator”/“initiator” when the discussion turned to the plan for the robbery on 1/19/03. However, Jamaar provided specific information — only camera in front of store didn’t work; only panic button near the safe; no money pick-up on Sunday.

The original plan required Kinyana (a young black woman, 17-18 years old) to case the store — she went to the store prior to the robbery — bought a bottle of Nyquil — came back to house — told them the number of people working in the store and how many cars in parking lot.

Subsequently, Vann, Black, Kinyana, Chris and James went back to store — Chris had 40 + cal, Black had an assault rifle, and James had 9mm. Kinyana and Vann were unarmed (according to Vann).

Only Chris and Kinyana went into the store. It is not clear whether they entered together. I interviewed several witnesses — no one mentioned seeing a girl. One witness (store clerk not interviewed by the police) remembers seeing Chris Kennedy but no girl. Keith Quinn recalls seeing Chris Kennedy with short person with hoody (fits description of girl) walking towards the entrance of the store minutes before the robbery.

***480** [Kinyana may live immediately in back of James Richardson.]^[6]

After speaking with Vann, Sgt. Byard and K. Judge indicated they would follow-up on Kinyana (address-name) and research on Lavar Brown (Black). As of this writing I have not heard anything from either. Further, I have spoken with them about J[a]maar and the planning of the 1/19/03 robbery and the fact that J[a]maar still shows up periodically at Rite-Aid asking questions

about the case — the witnesses (employees) are scared to death of J[a]maar.

March 2003 memorandum at 1-2.⁷ Thus, in Vann’s March 21, 2003 statement, in addition to again implicating Kennedy, James, and Jamaar in the murder, he also identified Brown and Lyons as being involved in the killing.⁸

⁵ The Philadelphia Eagles played the Tampa Bay Buccaneers in the National Football Conference Championship Game of the National Football League on January 19, 2003.

⁶ This sentence is bracketed in the original.

⁷ Neither the DAO nor Brown provided the March 2003 memorandum to the PCRA court below. Instead, the King’s Bench petitioners, the family members of Brown’s murder victims Michael Richardson and Robert Crawford (Family Members), obtained the memorandum from a public court filing by co-defendant Kennedy in his own separate PCRA case and have included it in their supplemental appendix in this Court. *See* Family Members’ Brief at ii n.1; OAG’s Brief at 53 n.22; Brown’s Answer to Allegations of Oral Argument Misstatement[s] at 5.

⁸ The March 2003 memorandum referred to Lyons as “Kinyana.”

Finally, on July 22, 2003, Vann gave a lengthy and detailed statement to Detectives Baker and Judge, likewise implicating Kennedy, James, Jamaar, Brown, and Lyons in the murder.⁹ None of Vann’s statements referenced Kennisha Paige.¹⁰

⁹ The statement referred to Lyons as “Keyanna.”

¹⁰ Attached as exhibits to the OAG’s reply memorandum in support of Family Members’ petition for King’s Bench review, which this Court permitted and ordered docketed when we assumed King’s Bench jurisdiction, are declarations from Detectives Judge and Peters. The Judge declaration

alleges: “[w]hile I do not have a specific recollection of someone named Kennisha Paige, had she been identified at any point by Vann or anyone else as being involved or being in possession of any information about the homicide, that information would have been documented.” Declaration of Detective Kevin Judge at ¶16 (undated). Similarly, the declaration of Detective Peters asserts: “[a]t no time during my encounter and interactions with Vann at Central Detectives on January 21, 2003 did Vann ever say to me, or another detective/officer in my presence, that someone named Kennisha Paige was involved in the commission of the Rite Aid robbery/murder on January 19, 2003. If he did, I would have documented that information.” Declaration of Special Agent Brian Peters, 6/14/23, at ¶13. In addition, the Peters declaration claims: “[w]hile I do not specifically recall the name Kennisha Paige, I distinctly remember that Vann discussed two girls that lived in the area and hung around these suspects regularly.” *Id.* at ¶14.

On July 15, 2004, Brown’s jury trial for the Rite Aid murder began. He was tried jointly with Kennedy, James, and Jamaar. The evidence against him at trial included the testimony of Vann and Lyons.¹¹ The questioning of Vann, which included extensive cross-examination by counsel for each of the four co-defendants, elicited considerable information challenging his credibility. For example, Vann’s testimony revealed he had a separate open robbery case; pleaded guilty to selling drugs; had other drug convictions; violated his parole following *481 the Rite Aid murder and served nine months in prison; initially lied to the police about the murder “to keep [himself] out of it”; lied to the police “about three times”; hoped his testimony would help him with his own cases; and was the beneficiary of a testimonial immunity order providing that if he testified about the murder, the Commonwealth would not be able to use his testimony against him in any criminal prosecution. *See* N.T. Trial, 7/22/24, at 159-161, 171, 361-62. Ultimately, the jury convicted Brown of second-degree murder, two counts of criminal conspiracy, two counts of robbery, aggravated assault, and possessing an instrument of crime. The trial court sentenced him to life imprisonment for second-degree murder.¹² On September *482 20, 2006, the Superior Court affirmed Brown’s judgment of sentence, and this Court denied allowance of appeal on May 15, 2007.

¹¹ Jamaar also implicated Brown in the murder in his statement to police on February 10, 2004. Statement of Jamaar Richardson, 2/10/04, at 3.

This statement was introduced at trial, but the references to Brown therein were redacted. *See* N.T. Trial, 7/26/04, at 257-281. In addition, the trial court instructed the jury to consider Jamaar's statement against him only, and to not consider it in any way against any of the other defendants. *See* N.T. Trial, 7/28/04, at 227-28.

¹² On May 31, 2005, a jury convicted Brown of first-degree murder and related offenses for a second murder, the murder of Crawford, which he committed on December 10, 2003, before he was arrested for the Rite Aid murder. In that case, Brown and Rahsaan Anderson were standing on Girard Avenue in Philadelphia when Brown saw Crawford crossing the street. Brown stated, "There go that pussy." He then approached Crawford from behind and shot him multiple times in the back. Brown and Anderson began to run. Two police officers were nearby, one of whom pursued Brown and ordered him to stop. Brown, however, continued to flee. Other officers joined the chase, and the police eventually found Brown hiding under a car. A gun was recovered nearby. The jury sentenced Brown to death for the first-degree murder of Crawford. One of the aggravating circumstances supporting the death sentence was Brown's second-degree murder conviction for the Rite Aid murder.

Following the affirmance of his death sentence on direct appeal, Brown filed a petition under the PCRA. The petition was denied, and Brown appealed to this Court, raising thirteen issues. "On September 19, 2017, the Commonwealth filed a lengthy (ninety-eight-page) brief in which it opposed any and all relief on these thirteen issues." *Commonwealth v. Brown*, 649 Pa. 293, 196 A.3d 130, 141 (2018). Thereafter, however, on January 2, 2018, there was a change in administration at the DAO, and Lawrence S. Krasner became the District Attorney of Philadelphia (DA Krasner). On April 9, 2018, the DAO and Brown filed a joint motion with this Court confessing error with respect to one of Brown's claims: his allegation that trial counsel was ineffective for not developing and presenting mitigating evidence at the penalty phase of the capital trial. The joint motion requested this Court grant relief on the claim, vacate Brown's death sentence, and remand to the trial court for resentencing to life imprisonment. On April 23, 2018, this Court ordered the parties to submit supplemental briefing in support of the joint

motion and invited the OAG to participate as *amicus* and file a brief. In its brief in support of the joint motion, the DAO argued "when a district attorney makes a 'reasoned fact and policy-based decision not to defend a particular conviction or sentence,' this Court must immediately remand for imposition of the agreed-upon relief, as this Court may not 'second-guess legitimate exercises of prosecutorial discretion.'" *Id.* at 143, *quoting* DAO's Supplemental Brief at 3. The OAG, on the other hand, contended this Court cannot accept confessions of error by a prosecutor without conducting independent judicial merits review. This Court rejected the DAO's position and agreed with the OAG, holding that "neither the parties, by agreement, nor this Court, absent a finding of legal error, have the power or ability to order that the jury's verdict be commuted to a life sentence without parole." *Id.* at 144. Upon independent judicial review of the penalty phase claim conceded by the DAO, this Court disagreed with the DAO's assessment of its merits, and instead concluded no relief was due on the issue. *See id.* at 149-158. The Court denied the joint motion and affirmed the denial of PCRA relief. On September 9, 2021, Brown filed another PCRA petition, which remains pending in the PCRA court. He also has a pending petition for a writ of habeas corpus in federal court challenging his judgment of sentence in his capital case, which he filed on July 19, 2019. Among other claims, Brown's federal habeas petition raises the claim of ineffective assistance of counsel in the penalty phase rejected by this Court in 2018. On May 28, 2021, the DAO and Brown filed in federal court a joint motion for sentencing relief based on this claim. The joint motion alleged this Court's denial of the claim "was based on an unreasonable application of clearly established federal law and an unreasonable determination of the facts." *Brown v. Wetzel*, 10-5553, ECF No. 33, 5/28/21, at ¶13. The joint motion also argued that while the DAO's concession to relief on the mitigation ineffectiveness claim was "not binding" on the district court, it was nonetheless "entitled to substantial deference." *Id.* at ¶14. After oral argument was held in this matter, however, the DAO filed a motion for leave to withdraw the joint motion for sentencing relief. The DAO explained the joint motion did not align with "the DAO's current practice ... to file a fulsome merits response in every case," which "applies both when the DAO opposes relief and when the DAO agrees that some

form of relief is due.” *Brown v. Wetzel*, 10-5553, ECF No. 62, 10/6/25, at 3. The DAO’s motion to withdraw was granted on April 21, 2026.

On July 24, 2007, Brown filed a timely *pro se* petition under the PCRA. Lloyd Long, Esq., was appointed to represent him and filed an amended petition on his behalf.¹³ Attorney Long subsequently withdrew from the case and Brown’s current counsel, the Federal Community Defender Office for the Eastern District of Pennsylvania, entered their appearance and filed a supplemental amended petition. The Commonwealth opposed relief. The PCRA court conducted an evidentiary hearing at which James Funt, Esq., counsel for Lyons, testified.¹⁴ The PCRA court dismissed the petition, and the Superior Court affirmed.

¹³ Attorney Long was subsequently the law partner of DA Krasner, from January 2012 to June 2017. *See* DAO Response to Claim of Conflict of Interest, 12/10/21, at ¶12.

¹⁴ Attorney Funt is a partner in the law firm of Greenblatt, Pierce, Funt & Flores LLC. DA Krasner was associated with this firm from June 2017 to January 2018. *See id.* at ¶7.

On June 23, 2020, Brown filed a second PCRA petition. Thereafter, on June 28, 2021, he filed a Supplement and Amendment to Successor Petition for Writ of Habeas Corpus and for Collateral Relief from Criminal Conviction (Amended Second PCRA Petition). In the latter filing, Brown pertinently claimed the Commonwealth violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)¹⁵ when it “withheld [from Brown prior to trial] evidence that [Vann] falsely accused an individual named Kennisha Paige of being involved in the January 19, 2003 Rite Aid robbery/murder.” Amended Second PCRA Petition, 6/28/21, at ¶63. Specifically, he faulted the Commonwealth for failing to disclose four documents, which he attached as exhibits to the appendix to his Amended Second PCRA Petition. First, he claimed the Commonwealth failed to disclose a memorandum from Detective Baker¹⁶ to Detective Judge dated July 14, 2003, which provided:

Monday the 14th of July 2003
M03-14^[17]
Det. K. Judge

*483 Kevin I called Kennisha Paige at about 6:30 p.m.

and she said she would come down for an interview, she didn’t show. I called her back at about 7:30 p.m. and she said she was getting dressed, she never showed. She did however say that she was incarcerated until 6/03.

I called and spoke to her mother, seemed nice, she said she couldn’t control her daughter and that her daughter was living with a lady Marzetta (NFI) 1216 Stiles St.[]

I called Gannondale (School for girls) and they said she would get weekend passed [sic] but they could not tell when she was home, we would have to call tomorrow (7/15/[03]) and talk to Specialist Nancy Sabol at 814-899-7659.

I located a Marzetta in public housing, but Mom will have to ID.

I will attempt to get her tomorrow, after we talk to Gannondale. I would hate to drag her in and then find out that she was truly incarcerated and Vann was lying. After all he is the only one that mentioned her.

Envelope in my box[.]

Amended Second PCRA Petition, 6/28/21, at Appendix, Exh. 20.

¹⁵ “Under *Brady*, the State violates a defendant’s right to due process if it withholds evidence that is favorable to the defense and material to the defendant’s guilt or punishment.” *Commonwealth v. (Christopher Lynn) Johnson*, — Pa. —, 335 A.3d 685, 703 n.4 (2025), *quoting Smith v. Cain*, 565 U.S. 73, 75, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012).

¹⁶ Although Detective Baker’s memoranda to Detective Judge on July 14 and 15, 2003 are not signed, it is clear he wrote them. They are written in the first person and refer to Detective Baker receiving a fax from the Gannondale Residential Center for Girls on July 15, 2003. A copy of the fax confirms he received a fax from Gannondale on that date. Moreover, the parties agree Detective Baker authored these documents. *See* Family Members’ Brief at 38; OAG’s Brief at 52; DAO’s Brief at 19.

¹⁷ This was the case number for the Rite Aid murder. *See* Joint Stipulations of Fact, 11/8/22, at ¶18.

Second, Brown alleged the Commonwealth withheld another memorandum from Detective Baker to Detective Judge dated July 15, 2003, which provided:

Tuesday the 15th of July 2003
M03-014
Det. K. Judge 80627

On Monday the 14th of July at about 6:30 p.m. I called [redacted¹⁸] and spoke to Roslyn Paige, the mother of Kennisha Paige, who indicated that she was unable to control her daughter that when she turned eighteen she began staying with an older lady Marzetta who lived at 1216 Stiles Street. Also that Kennisha was incarcerated until Father's day 2003. Ms. Paige then put Kennisha on the phone and Kennisha told me that she didn't know anything about a murder but was willing to come to Homicide for an interview, that she was incarcerated.

At about 7:30 p.m. I called Kennisha and inquired if she was indeed coming in for an interview, she indicated that she was getting dressed and would be in. She never showed.

I contacted Gannondale residential center for girls (814-899-7659) and was informed that Kenneshia [sic] had been a client from 9/16/02 until 6/03 but did not get home passes. I was told that for more detail I would have to contact Nancy S[abol] during working hours.

On Tuesday the 15th of July 2003 at about 2:35 p.m. I spoke to Nancy Sabol and she affirmed that Kennisha was a client and not away from the Center during the time of the homicide. I requested and received a fax copy of the "Night log chart" which showed Kennisha in residence during the time of the homicide.

Gannondale i[s] located in Erie Pennsylvania.

Amended Second PCRA Petition, 6/28/21, at Appendix, Exh. 21.

¹⁸ This content is blacked out in the document.

Third, Brown accused the Commonwealth of failing to disclose a fax from Gannondale to Detective Baker on July 15, 2003. The fax included the night log chart indicating Paige¹⁹ was at Gannondale on January 19, 2003, the day of the Rite Aid murder.

¹⁹ The night log chart referred to Paige as "Kinnesia."

Fourth, Brown claimed the Commonwealth withheld an undated memorandum *484 titled "23rd Dist, 'A' Sector Robberies" (23rd District memorandum)²⁰ which provided:

23rd Dist, "A" Sector Robberies

On 1/21/03, defendant Ronald Vann PPN/867801 was arrested by CDD SIU for the robbery, point of handgun of a pizza delivery person, [redacted] (DC#03-23-00618)

Vann then co-operated with CDD SIU, providing in[f]ormation into the robbery of the Rite Aid, 1301 Girard Ave, on 1-18-03, and the homicide at the Rite Aid the following day, 1-19-03. Based on Vann's co-operation, defendants Christopher Kennedy 22/B/M, PPN/840063 and James Richardson 22/B/M, PPN/858783 have been arrested and charged with robbery & homicide. (DC#03-23-001770 and 03-23-001914)

Vann is continuing to co-operate with CDD SIU regarding robberies being committed in the 23rd dist area of Broad and Girard Ave, providing confidential information concerning the following:

Robbery/Homicide: Jama[a]r Richardson 21/B/M, 1218 N 11th St (no record), Kennisha Paige 17/B/F, 1116 Stiles St

Robberies: William Green 19/B/M, PPN/885936, [redacted] Anthony Frames 20/B/M, PPN/836622, aka "Spanky" Lavar Brown, 25/B/M, PPN/807547, 1222 N 11th, aka "Black" Stephen Kennedy 19/B/M, PPN/823690, [redacted] James Montgomery, 20/B/M, PPN/885941, [redacted] Naheem Johnson 20/B/M, PPN/851060, [redacted]

Amended Second PCRA Petition, 6/28/21, at Appendix, Exh. 12.²¹

²⁰ The Commonwealth provided a redacted version of the 23rd District memorandum to Brown in 2010 in connection with the litigation of his first PCRA petition. *See* Amended Second PCRA Petition, 6/28/21, at ¶60.

²¹ Although the 23rd District memorandum is not dated, it references the arrest of James, which occurred on February 4, 2003. *See* N.T. Trial, 7/26/04, at 110, 134. The memorandum also states

Jamaar has “no record[,]” indicating it was written before his arrest on February 10, 2004. *See id.* at 250. Hence, it appears the memorandum was drafted at some point between February 4, 2003, and February 10, 2004. Detective Peters described this document as follows:

I recognize this document generally as a summary prepared for a “CompStat” meeting. This is a monthly administrative meeting wherein each Captain and supervising officer provides a general briefing to Police Command about ongoing investigations and other matters of interest in their respective areas of command. Detectives do not attend these meetings. This document was not prepared by me or by any other detective in CDD. Generally, these CompStat summaries were prepared by one of two officers assigned to administrative duties that worked at CDD during this time. It is my belief, based on my knowledge of how and why these documents were prepared, that this document was generated by one of these administrative officers at CDD, and possibly based on handwritten notations taken by me or another Detective during my encounter with Vann.

Declaration of Special Agent Brian Peters, 6/14/23, at ¶16.

Brown argued “[t]he suppression of the paperwork about Kennisha Paige deprived the defense of evidence that could have been used at trial to show police knew Mr. Vann had provided untrue information and was capable of falsely implicating an innocent person **in this crime** simply to save himself.” Amended Second PCRA Petition, 6/28/21, at ¶68 (emphasis in original). “This is particularly important,” he contended, “because based on this false accusation, the jury could have surmised that Mr. Vann was also lying when he implicated Mr. Brown — given Mr. Vann made no mention of Mr. Brown being involved in this crime until later.” *Id.* According to Brown, “[t]he defense could have used the *485 suppressed paperwork to discredit not only Mr. Vann’s testimony implicating Mr. Brown, but also the investigation resulting in [Brown’s] conviction.” *Id.* Brown filed the Amended Second PCRA Petition under seal.

On August 18, 2021, Brown and the Commonwealth, represented by the DAO, filed a joint motion to unseal the Amended Second PCRA Petition. Additionally, Brown moved, without opposition by the DAO, to amend his Amended Second PCRA Petition to assert that the

allegations therein were based on “newly discovered evidence ... obtained from review of homicide detectives’ files (H-files) and Philadelphia District Attorney’s Office files in the Philadelphia District Attorney’s Office ... conducted in late 2020 and early 2021 and concluded when the Commonwealth provided [Brown’s] counsel with redacted copies of all documents flagged for copying on April 13, 2021.” Joint Motion to Unseal and Unopposed Motion to Amend Supplement and Amendment to Successor Petition and Appendix, 8/18/21, at ¶3. Brown claimed “[t]he [Amended Second PCRA Petition] is timely filed pursuant 42 Pa.C.S. § 9545(b)(1)(i) (government interference) and 42 Pa.C.S. § 9545(b)(1)(ii) (newly discovered evidence).” *Id.*

On November 1, 2021, the DAO filed a response to Brown’s PCRA petition. Therein, the DAO asserted that following a “thorough, independent review of the records in this case[,]” it “now agree[d]” with Brown that he was “entitled to a new trial.” DAO’s Response to Petition for Collateral Relief, 11/1/21, at ¶¶8,10. In particular, the DAO agreed with Brown that the Commonwealth violated *Brady* by failing to disclose evidence that Vann implicated Paige. *See id.* at ¶¶105-08. The DAO insisted the PCRA court was “in a position to do what the prior PCRA court could not — review Brown’s claims in light of a complete record.” *Id.* at ¶129. “Given the record as a whole,” the DAO “believe[d] Brown was likely involved in the robbery and homicide, but his trial and subsequent proceedings were infected by serious misconduct.” *Id.* at ¶138. The DAO emphasized “[t]he misconduct in this case is particularly troubling as Brown’s conviction served as an aggravator in a separate capital case.” *Id.* at ¶139 (footnote omitted). The DAO also accused the prior prosecutors in the case, both at trial and in the first PCRA proceeding, of exhibiting a “win at all costs mentality” and engaging in “misconduct [that] falls short of prosecutors’ legal, ethical, and constitutional obligations[.]” *Id.* at 59. In the DAO’s view, “this case [was] a stark example of what can go wrong when prosecutors cut corners and shirk their ethical and constitutional duties in order to obtain and defend convictions of defendants they believe are guilty.” *Id.* at 4.²²

²² In a footnote, the DAO referenced Vann’s March 21, 2003 statement. *See id.* at ¶74 n.8 (“The first formal statement implicating Brown in this crime was taken in July 2003, and there is no record of Vann discussing Brown informally prior to March 2003.”).

On January 24, 2022, Family Members filed a motion to intervene in Brown’s pending PCRA case “to litigate the disqualifying conflict of interest of the [DAO], and in the

alternative to provide th[e PCRA court] with a balanced account of the merits of [Brown's] current postconviction claims[.]” Motion for Intervention by Victims’ Families, 1/24/22, at 1. Family Members alleged the DAO had a disqualifying conflict of interest based, *inter alia*, on DA Krasner’s prior professional relationships with Attorneys Long and Funt, and the DAO’s apparent effort to “circumvent” this Court’s decision in *Brown* by conceding relief in his non-capital case which served as an aggravator for his *486 death sentence. *Id.* at 9. Alternatively, Family Members argued that “[e]ven if the [DAO] were not disqualified, ... intervention would still be essential to vindicate the interests of the victims’ families by permitting [them] the opportunity to review the full, lengthy file and prepare a thorough response to [Brown’s] claims. This Court cannot make a proper decision without hearing both sides of these factually and legally complicated issues.” *Id.* at 10. The DAO opposed intervention.

On July 8, 2022, the PCRA court issued an order denying Family Members’ request to disqualify the DAO. Additionally, in a separate order the same day, the court granted in part and denied in part Family Members’ motion to intervene. The court granted intervention solely for the purpose of litigating the conflict-of-interest issue, which it had decided in the DAO’s favor, but denied intervention for the purpose of litigating the merits of Brown’s PCRA petition. The court ordered Family Members could be heard on the merits of the pending PCRA petition as *amici curiae*.²³

²³ Family Members did not appeal these orders.

Regarding future proceedings, the PCRA court noted the existing record was insufficient to determine Vann in fact implicated Paige and to grant relief, and that an evidentiary hearing was required:

I will also state that I am not going to grant the petition based on the existing record. I’m going to require an evidentiary hearing. I’m going to require that all of the prosecutors who participated in this case and whose conduct is at issue be subpoenaed to testify.

I also — I agree with the [Family Members] on the insufficiency of the record; and in particular, I do want to see more evidence on the statement that Ronald Vann allegedly made implicating Kennisha Page [sic]. I agree with [Family Members’] argument that on the face of the documents that were submitted to me, I can’t tell that that, in fact, happened. And I also want to hear the perspective of all of the district attorneys who worked on this case and whose conduct is at issue and hear what

they believe happened and find out — get to the bottom of it.

But on the existing record, it’s my considered view — and I’ve spent a lot of time on this — that there is not enough information in the paperwork for me to grant the petition notwithstanding the fact that both parties are of the opinion that it should be granted.

N.T. PCRA Hearing, 7/8/22, at 6-7; *see also id.* at 10 (court noting that if there is no appeal by Family Members it will “schedule an evidentiary hearing”); *id.* at 11 (same).

On August 11, 2022, the PCRA court reiterated that Brown was not entitled to relief on the existing record and an evidentiary hearing was necessary. Responding to defense counsel’s argument “a hearing is not needed[.]” the court noted, “Well, that train has left the station. We’re having a hearing. I’ve already ruled on that at the last listing.” N.T. Hearing, 8/11/22, at 13. The court elaborated: “I’m interested in actually what happened, and I don’t think that’s clear just from the submissions that I received.” *Id.* The court ordered briefing regarding the witnesses to be presented at the evidentiary hearing, the scope of the hearing, and the role of Family Members at the hearing. *See id.* at 16.

In their opening brief, Family Members argued Brown’s second PCRA petition was “untimely[.]” Opening Brief of *Amicus Curiae* Victims’ Family to Dismiss Brown’s *487 Untimely and Meritless PCRA Claims, 9/9/22, at 10. In addition, Family Members’ brief included extensive discussion of the merits of Brown’s claims. They argued an evidentiary hearing was not warranted because it was clear Brown was not entitled to relief. *See id.* at 61-62 (“Rule 907 of the Pennsylvania Rules of Criminal Procedure provides that the PCRA court can deny a petition without a hearing when it determines ‘that there are no genuine issues concerning any material fact and that petitioner is not entitled to post-conviction collateral relief and no purpose would be served by any further proceedings’ Pa.R.Crim.P. 907. That is the case here.”). Alternatively, Family Members insisted that if the court ordered an evidentiary hearing, their participation therein was “essential ... to protect the sanctity and integrity of the criminal justice system in this case[.]” *Id.* at 62. Relatedly, they requested “access to the complete file in this case[.]” arguing this “would be the only way to make certain th[e PCRA court] was presented with all the relevant documentation in the case before making its determination — and not just those documents that the parties believe support their mission to vacate the conviction.” *Id.* at 67 (emphasis omitted).

The briefs of Brown and the DAO similarly argued an

evidentiary hearing was unnecessary because Brown was entitled to PCRA relief as a matter of law. *See* Brown's Memorandum on the Scope of the PCRA Hearing and Role of *Amicus Curiae* (Brown's Pre-Hearing Brief), 9/9/22, at 2 ("[T]here is no need for an evidentiary hearing because the pleadings and proffered evidence establish that there are no genuine issues of material fact and Mr. Brown is entitled to relief as a matter of law[.]"); DAO's Pre-Hearing Brief, 9/9/22, at 4 n.3 ("[N]o additional evidence is necessary to resolve the claim[.]"). Moreover, Brown and the DAO maintained Family Members' participation as *amici* should be limited to filing briefs, and they should not be allowed to review the DAO's files, obtain discovery from the DAO, or present or question witnesses. *See* Brown's Pre-Hearing Brief, 9/9/22, at 20 ("Here, the *amici* should not have any role other than filing briefs on the merits."); DAO's Pre-Hearing Brief, 9/9/22, at 8 ("*Amici*'s formal participation should be limited to the traditional role of *amicus curiae* — providing briefing to assist the Court in its resolution of the issues before it."). In particular, the DAO alleged Family Members' review of the prosecution's records was "unnecessary" because "the DAO is the Commonwealth's representative in this case and has already reviewed the prosecution file to ensure that any relevant evidence is provided for the [c]ourt's review." *Id.* at 9-10.

On October 7, 2022, the PCRA court continued the case for Brown to consider whether he wanted to request an evidentiary hearing. The court expressed skepticism as to why Brown was seeking a ruling without further factual development, as it was dubious the paperwork submitted by Brown, *i.e.*, the exhibits included in the appendix to his Amended Second PCRA Petition, alone established Vann falsely implicated Paige:

It's troubling. I mean, I raised this the first day we got this case. And [counsel for Family Members] has raised it and has argued it, and he makes some excellent points there. So I don't know why you would want to submit it in this posture, but if you do, that's up to you. Of course, if I were to rule against you on this, then I would have to reach the materiality issue that would be right [sic] for a decision. But this is a preliminary matter. First of all, did this happen? ...

*488 If it didn't happen then I don't have to figure out if it's material or not; right? I don't have an answer, I have to look at it more closely. But I'm still not understanding how everybody thinks that paperwork establishes that. I'm a little thick about this but, seriously, I just don't get it.... I don't know how you look at that paperwork and reach that decision. But I'm not going to make a decision now.

N.T. Hearing, 10/7/22, at 12-13. In addition, the court observed "the briefs that [counsel for Family Members] filed show that there are reasoned arguments to be made in support of maintaining the judgments of the conviction[.]" and these arguments "haven't been made by the prosecution." *Id.* at 23-24.

On November 8, 2022, the DAO and Brown filed joint stipulations of fact with the PCRA court. The joint stipulations alleged, among other things, that "[o]n Tuesday, July 22, 2003, Ronald Vann provided a third statement to homicide investigators. That statement was the first in which he implicated [Brown] or Kiana Lyons in the Rite Aid robbery/homicide." Joint Stipulations of Fact, 11/8/22, at ¶41.

The next day, at a status hearing before the PCRA court, the DAO explained the joint stipulations of fact were submitted "to clarify why there's no need for" an evidentiary hearing. N.T. Hearing, 11/9/22, at 16. The court raised the concern that the factual stipulations could be affected by the common position of the DAO and Brown in support of PCRA relief:

I could also see that in a situation where you had a commonality of view and a commonality of purpose to illuminate what otherwise would be real — I'm not saying this is happening. But believe me, just purely speaking theoretically, you can enter into stipulations on matters that could actually have them litigated as a matter of fact but for which you both have a common view since you both have a common position on the legal issues and therefore foreclose any further review.

Id. at 13. The court also repeated its view there were "arguments that can reasonably be made to support the conviction ... that haven't been made to support the conviction." *Id.* Thereafter, Family Members formally objected to the stipulations. *See* Reply Brief of *Amicus Curiae* Victims' Family to Petitioner's Joint Stipulations of Fact, 11/22/22, at 1 ("The *amicus curiae* objects to ¶¶'s 1 – 42 (including all subparagraphs) of Petitioner's November 8, 2022, Joint Stipulations of Fact, as: (1) conclusions of law to which no further response is required; (2) the docket/documents/writings speak for

themselves; and/or (3) otherwise, denied as stated.”).

On December 1, 2022, the PCRA court accepted the joint stipulations of fact submitted by the DAO and Brown. However, the court noted “the record in front of me including the stipulation does not resolve the factual question of whether Mr. Vann actually identified Kennisha Paige as a participant in the Rite-Aid conspiracy.” N.T. Hearing, 12/1/22, at 8; *see also id.* at 10 (“It seems to me there’s evidence on both sides, and I don’t know how anybody could conclude conclusively that Vann actually identified Paige as being one of the participants in the homicide based on this record. I don’t know how you know that.”); *id.* at 13-14 (“I’m pointing out that a key factual issue in my mind is not resolved on this existing record.”). The court observed the July 14 and 15 memoranda “were certainly circumstantial evidence that Mr. Vann did that.” *Id.* at 8. Yet, the court continued, the 23rd District memorandum “certainly doesn’t make it clear that Vann identified Paige for the Rite-Aid homicide” and “[a]ctually” presents “circumstantial *489 evidence that he did not[.]” *Id.* at 9. The court reasoned the paragraph of the memorandum discussing the Rite Aid murder does not reference Paige, and Paige is only referenced in a separate, subsequent section of the memorandum discussing other robberies. *See id.* at 8-9. If Vann had implicated Paige in the Rite Aid murder, the court explained, “[i]t certainly would’ve made sense to put that up in the paragraph where they’re talking about the Rite-Aid robbery.” *Id.* at 11. In addition, the court emphasized “the reports of interview[s] with Mr. Vann never mentioned Ms. Paige.” *Id.* at 9. It argued “if Vann had actually identified Paige, ... [t]here’s no detective who wouldn’t put that in following the ordinary course of business.” *Id.* at 12-13.²⁴ Notwithstanding the PCRA court’s clear and repeated determinations that it was confronted with a material issue of fact, *i.e.*, whether Vann in fact implicated Paige in the Rite Aid murder, the court nonetheless concluded it was “not going to have a hearing if everybody connected with the case thinks I shouldn’t.” *Id.* at 10.

²⁴ Brown argued the absence of Paige from Vann’s police statements could be explained by the fact the police “checked it out[.]” *i.e.*, investigated Paige’s possible involvement in the Rite Aid murder, “and it didn’t check out.” *Id.* at 13. The court responded this would not explain Paige’s omission from statements predating the police’s mid-July-2003 determination that Paige had an alibi for the Rite Aid murder. *See id.*

In February of 2023, Brown and the DAO submitted additional briefing in the PCRA court again arguing Brown

was entitled to a new trial because the Commonwealth violated *Brady* by not disclosing Vann’s purported false incrimination of Paige. Consistent with their joint stipulations of fact, they each represented to the PCRA court that Vann’s July 22, 2003 statement to the police was his first police statement in which he implicated Brown and Lyons in the Rite Aid murder. *See* Brown’s Response to *Amicus*’s Opening Brief (and Other Filings) and in Support of Successor Petition for Writ of Habeas Corpus and for Collateral Relief, 2/6/23, at 31 (“[I]n statements made prior to his final July 22, 2003 statement, Vann ... did not mention Kiana Lyons or [Brown] as being involved in the January 19 robbery/homicide.”); DAO’s Consolidated Response to Briefing by *Amici* and Petitioner, 2/21/23, at 15 (“They were first mentioned in Vann’s July 21 and 22, 2003, statements[.]”); *id.* (“[T]he statement [Vann] provided on July 22 ... implicated [Brown] and Lyons for the first time.”). Similarly, the DAO contended Vann’s identifications of Brown and Lyons came “**after** investigators determined that Vann had lied about Paige’s involvement in the Rite Aid robbery/homicide.” *Id.* at 15 (emphasis in original); *see also id.* (“Had the defense been apprised that Vann had told investigators that a demonstrably innocent person had been involved in the crime and only implicated [Brown] after being caught in the lie, their attacks on his credibility would have been more convincing to the jury.”).

On March 20, 2023, Family Members filed a reply brief asserting, *inter alia*, that “[a]ll of [Brown’s] claims are untimely and to overcome the time-bar, [Brown] had to plead and prove an exception.” Reply Brief of *Amicus Curiae* Victims’ Family, 3/20/23, at 45 n.14.

On May 5, 2023, the PCRA court issued an order granting Brown’s PCRA petition and vacating his judgment of sentence for the Rite Aid murder. *See Commonwealth v. Lavar Brown*, CP-51-CR-0407441-2004, Order, 5/5/23 (“AND NOW, this 5th day of May, 2023, it is hereby ORDERED, with the consent of the Commonwealth, that defendant’s petition pursuant to the Post *490 Conviction Relief Act, 42 Pa.C.S. § 9541, *et seq.*, is GRANTED. The judgment of sentence entered by the Court on October 24, 2004, is hereby VACATED.”). The court granted relief based on Brown’s claim that the Commonwealth violated *Brady* by failing to disclose to Brown prior to trial that Vann falsely incriminated Paige:

I’m going to find that the record establishes that the assigned detective in this case learned through investigation that witness, Ronald Vann, had falsely identified

Kennisha Paige as being a participant in the January 19th, 2003 robbery and murder here at issue, and that this false identification was not disclosed to the defense; that a critical witness had made a demonstrably false identification of someone as being a participant in the same criminal events that are the subject of the charges against [Brown] was, in my view, impeachment evidence of a different character than the impeachment material used at trial and I find that the suppressed evidence satisfies the standard for materiality under *Brady* and its progeny.

N.T. Hearing, 5/5/23, at 4. The court did not address whether this claim was timely under the PCRA's jurisdictional, one-year filing deadline. *See* 42 Pa.C.S. § 9545(b)(1).

On May 26, 2023, Family Members filed a petition requesting this Court to exercise King's Bench jurisdiction over the case.²⁵ On April 3, 2024, this Court granted Family Members' King's Bench petition and exercised King's Bench jurisdiction to review the PCRA court's order vacating *491 Brown's judgment of sentence.²⁶ The Court directed the parties to brief the issue of "[w]hether, and via what procedure, a common pleas court judge may grant PCRA relief based upon concessions of the parties." *Commonwealth v. Brown*, 32 EM 2023 (Pa. filed Apr. 3, 2024) (*per curiam*).²⁷*492 The Court also invited the OAG to participate as *amicus* and to participate in oral argument.

²⁵ On March 4, 2024, Brown filed a supplement to his pending PCRA petition in his capital case claiming that in light of the PCRA court's May 5, 2023 order vacating his conviction for the Rite Aid murder, his death sentence for the Crawford murder should be vacated as well. *See* Second Supplement to Petition for Writ of Habeas Corpus and for Collateral Relief, 3/4/24, at ¶41 ("[The PCRA court's] May 5, 2023 findings and order vacating Mr. Brown's second-degree murder conviction establishes that this aggravating circumstance was based on a constitutionally infirm conviction. Because the prosecution's use of this constitutionally invalid conviction influenced the jury's deliberations in reaching a verdict of death, Mr. Brown was denied due process, a reliable sentencing proceeding, and

effective assistance of counsel."). On April 9, 2024, the DAO filed an answer to Brown's PCRA petition, alleging that "[d]uring the initial interrogation of cooperating witness Vann [as part of the Rite Aid murder investigation], Vann told the police that a woman named Keneisha [sic] Paige (rather than Kiana Lyons) was involved in the planning and execution of the Rite Aid robbery." DAO's Response to PCRA Petition, 4/9/24, at 20. In addition, although the DAO had conceded penalty phase relief in Brown's capital case in federal court in May 2021 via a joint motion for sentencing relief, *see supra* n.12 (explaining that DAO subsequently moved to withdraw joint motion), it opposed penalty phase relief in state court. The DAO explained there were two factors supporting death penalty relief:

First, a PCRA court has awarded a new trial with respect to [Brown's] other murder case.... As a result, one of the aggravating circumstances found by his sentencing jury may no longer be applicable. Second, based on evidence assembled during [Brown's] first PCRA proceeding, there is a serious concern that [his] sentencing jury received incorrect information regarding a recognized mitigating factor — organic brain damage.

Id. at 34. However, the DAO maintained relief was nonetheless precluded for two reasons:

First, the law of the case [this Court's decision in *Brown* in 2018] precludes relief (or an evidentiary hearing) on the grounds that the jury received misinformation regarding [Brown's] organic brain damage. Second, the (possibly misinformed) jury found no mitigators and one aggravator in addition to [Brown's] prior murder.... "Where there are no mitigating factors found and there is a finding of at least one aggravating circumstance, the sentencing court has no discretion but to impose the death penalty."

Id. at 40, 42, quoting *Commonwealth v. Saranchak*, 544 Pa. 158, 675 A.2d 268, 278 (1996).

²⁶

At the time this Court granted King's Bench review, no Justice even wished to note their dissent to the Court's *per curiam* order. Now, however, Justice Wecht argues at length that the Court should reverse itself and deny King's Bench jurisdiction. *See* Dissenting Opinion at — — — — (Wecht, J.). Specifically, Justice Wecht insists we are reviewing a "routine" and "average" PCRA

case. *Id.* at — & n.26. This is hardly a run-of-the-mill PCRA matter — at least we certainly hope not. As detailed below, in the present PCRA litigation, the DAO unreliably conceded relief to a convicted two-time murderer after having its concession in his other murder case rejected by this Court, violated its duty of candor to the PCRA court, withheld material evidence, submitted a false stipulation of fact, misstated facts in its pleadings, failed to reasonably investigate the matter, and opposed a mandatory evidentiary hearing. Moreover, this matter raises very serious concerns regarding the fairness and integrity of the criminal judicial process in Philadelphia County, Pennsylvania’s largest county with its busiest criminal docket. Our King’s Bench review is amply justified here and accords with how we have treated similar matters for decades. *See, e.g., In re Office of Philadelphia District Attorney*, 125 EM 2019, Order, 2/24/20 (exercising King’s Bench jurisdiction to review claims of conflict of interest by DAO in murder case of Mumia Abu-Jamal); *Commonwealth v. Chimenti*, 510 Pa. 149, 507 A.2d 79 (1986) (exercising King’s Bench jurisdiction where DAO and Chimenti submitted plea agreement to single Superior Court judge on appeal from Chimenti’s conviction of first-degree murder, and appellate judge ordered trial court to accept plea agreement on remand). Justice Wecht argues the Abu-Jamal matter is distinguishable because it only involved “a single case.” Dissenting Opinion at — n.26 (Wecht, J.). But we think the fact the present matter implicates many cases, not just one, argues **for** the exercise of our King’s Bench authority, not against it. When the reliability of many proceedings is at stake, as opposed to the result of a single matter, the justification for our involvement is enhanced, not diminished. In addition, Justice Wecht submits “the remedy ordered by the *Chimenti* Court ... was limited to that which was necessary to resolve the case.” *Id.* This is a non sequitur. The ultimate remedy to be ordered is an entirely separate question from whether to exercise King’s Bench review in the first place. No less than in *Chimenti*, we are here confronted with “problematic” and “anom[a]lous” proceedings below fully justifying our review. *Chimenti*, 507 A.2d at 83. Finally, changing course now would be deeply unfair to the litigants. The parties and *amici* have clearly devoted considerable time and effort to this matter. There has been exhaustive briefing and extensive oral argument, as well as numerous ancillary filings.

This substantial outlay of energy and resources deserves our substantive consideration. For all these reasons, we decline to reverse ourselves and proceed to merits review.

27

Justice Wecht argues the question we ordered the parties to brief was “clearly” “answered” in *Brown*, and “[t]here is no reason for this Court to invoke our extraordinary King’s Bench authority just to repeat ourselves.” Dissenting Opinion at — (Wecht, J.). While the distinguished dissenting Justice may now have come around to the view *Brown* clearly resolved this issue, he raised uncertainty in this regard in his concurring opinion in *Brown*. There, he argued the circumstance of “the Commonwealth confess[ing] error directly to the PCRA court itself” — as opposed to a concession to relief for the first time on appeal, which is what occurred in *Brown* — was “a hypothetical scenario not presented” by the facts of that case. *Brown*, 196 A.3d at 196 (Wecht, J., concurring) (emphasis omitted). He maintained the majority opinion in *Brown* included only a “suggestion[,]” *i.e.*, not a binding holding, “that a confession of error can have no impact on a trial court’s review of the issues before it.” *Id.* He insisted “we must remain open to the possibility that it may be appropriate for a PCRA court to accept a future confession of error and defer to the prosecutor’s judgment that justice has not been served by the conviction under the circumstances there presented.” *Id.* at 197. This concurrence clouded the question of whether a Commonwealth concession is sufficient to support a PCRA court’s grant of relief. We herein clarify that the answer is no. *Brown*’s pronouncement that a confession of error by the Commonwealth is insufficient for any grant of relief under the PCRA applies to the same extent when the concession occurs in the PCRA court as it does when the concession comes for the first time on appeal. *See infra* p. 50. Moreover, we did not, of course, exercise King’s Bench jurisdiction “just” to address this issue. Dissenting Opinion at — (Wecht, J.). Again, in addition to the *Brown* question, this case implicates important and troubling issues regarding the fair and just administration of criminal justice in Philadelphia County.

II. King’s Bench Jurisdiction and Powers

“In addition to general powers of adjudication, supervision, and administration, this Court also has ‘the power generally to minister justice to all persons and to exercise the powers of the court, as fully and amply, to all intents and purposes, as the justices of the Court of King’s Bench, Common Pleas and Exchequer, at Westminster, or any of them, could or might do on May 22, 1722.’ ” *In re Domitrovich*, 668 Pa. 106, 257 A.3d 702, 714-15 (2021), quoting 42 Pa.C.S. § 502. The Court’s King’s Bench powers are “very high and transcendent.” *In re Bruno*, 627 Pa. 505, 101 A.3d 635, 669 (2014), quoting *Chimenti*, 507 A.2d at 81. Our standard of review is *de novo* and our scope of review is plenary. *See Ball v. Chapman*, — Pa. —, 289 A.3d 1, 18 (2023); *In re November 3, 2020 General Election*, 662 Pa. 718, 240 A.3d 591, 605 (2020); *Commonwealth v. Williams*, 634 Pa. 290, 129 A.3d 1199, 1213 (2015). Moreover, “[t]he exercise of King’s Bench authority is not limited by prescribed forms of procedure or to action upon writs of a particular nature; rather, the Court may employ any type of process necessary for the circumstances.” *Williams*, 129 A.3d at 1206. The Court may exercise King’s Bench jurisdiction “*sua sponte*” and “may assume plenary jurisdiction over a matter even where no dispute is pending in a lower court.” *In re Bruno*, 101 A.3d at 669.²⁸ Similarly, the remedial measures ordered under our King’s Bench powers need “not derive from any existing rules, statutes, or procedures.” *Id.* at 672. The only limits on the Court’s maximal powers at King’s Bench are those set forth in the Pennsylvania and United States Constitutions. *See id.* at 676 (“[T]he Supreme Court is neither divested *493 of its King’s Bench powers, nor is the supreme and general nature of these inherent powers limited, unless the divestiture or limitation is clearly expressed or necessarily implied in the Constitution.”). “In exercising King’s Bench authority, our principal obligations are to conscientiously guard the fairness and probity of the judicial process and the dignity, integrity, and authority of the judicial system, all for the protection of the citizens of this Commonwealth.” *Williams*, 129 A.3d at 1206 (quotation marks and citations omitted).

²⁸ Justice Wecht insists our King’s Bench jurisdiction “cannot be invoked” because Family Members could have appealed the PCRA court’s July 2022 order granting in part and denying in part their motion to intervene but “chose not to do so.” Dissenting Opinion at — (Wecht, J.). On the contrary, as noted, this Court may exercise King’s Bench jurisdiction where there is no case at all and our review has not even been requested. *See In re Bruno*, 101 A.3d at 669 (providing Court may assume King’s Bench jurisdiction “where no dispute is pending in a lower court” and may do so

“*sua sponte*”). Family Members’ decision not to pursue an interlocutory appeal to the Superior Court did not deprive this Court of jurisdiction. *See, e.g., In re Office of Philadelphia District Attorney*, 125 EM 2019 (granting King’s Bench jurisdiction to consider claim raised by victim’s family member even though she failed to first appeal Superior Court’s denial of her request to intervene). Moreover, we are not providing Family Members with “a mechanism to revive forfeited rights[.]” Dissenting Opinion at — n.52 (Wecht, J.). As Justice Wecht recognizes, the intervention of Family Members would require the “expansion of third-party rights.” *Id.* at —. Because the right to intervene never existed in the first place, Family Members never “forfeited” it, and it would be impossible for this Court to “revive” it. In any case, we do not grant intervention to Family Members. Rather, we reverse the grant of PCRA relief and order that the OAG be provided notice and an opportunity to intervene in concession cases.

III. Arguments

a. Family Members

Family Members argue the PCRA court’s grant of relief in this case was based on four factual inferences: (1) that Vann expressly implicated Paige in the Rite Aid murder; (2) that Vann maintained this identification through mid-July 2003; (3) that sometime after July 15, 2003, the police told Vann that Paige was incarcerated at the time of the murder; and (4) that Vann thereafter implicated Lyons in the murder for the first time on July 22, 2003. Family Members insist the March 2003 memorandum recounting Vann’s March 21, 2003 statement implicating Brown and Lyons, which was in the DAO’s files but was not provided to the PCRA court, refutes this sequence of events. Moreover, according to Family Members, Vann’s March 21, 2003 statement contradicts the stipulation of facts submitted by Brown and the DAO alleging Vann’s July 22, 2003 statement was the first in which he implicated Brown and Lyons. As such, they submit the PCRA court erred in awarding a new trial to Brown, and the court’s order should be reversed.

To safeguard against such an error occurring again, Family Members urge this Court to establish procedures for cases

in which the Commonwealth concedes relief. Specifically, they assert a PCRA court should be permitted to grant relief following a Commonwealth concession of error if the concession is based on “exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence — that was not presented at trial.” Family Members’ Brief at 53, *quoting Schlup v. Delo*, 513 U.S. 298, 324, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) (identifying type of evidence federal habeas petitioner must present to satisfy actual innocence gateway to merits review of procedurally barred claim of constitutional error). They claim the evidence discussed in *Schlup* can be objectively tested, verified, and made available to a reviewing court. In Family Members’ view, “[n]othing remotely close to that exists here.” *Id.* at 54.

On the other hand, Family Members contend that if a concession is premised on evidence subject to multiple reasonable interpretations, and/or there are reasonable arguments in support of the judgment of sentence that the Commonwealth refuses to make, the PCRA court should be permitted to order *in camera* review or appoint an intervenor. The intervenor, they emphasize, should be on equal footing with the Commonwealth and the defendant in terms of document access. They also stress that the circumstances of this case, in which the DAO did not interview a single police officer or former prosecutor and ignored inculpatory evidence in its own files, demonstrate why the option of appointing an intervenor is critical.

In addition, Family Members support requiring a specific prosecutor to attest under oath that the Commonwealth has provided the court with all relevant evidence related to the concession. They argue this procedure will incentivize the Commonwealth to ensure the record has been appropriately vetted and will avoid later claims of bureaucratic confusion or *494 attempts to shift blame between various individual prosecutors or their leadership teams.

Finally, Family Members posit that if the Commonwealth’s concession involves agreeing that police, prosecutors, or others engaged in unconstitutional or illegal conduct, those individuals must have an opportunity to be heard, if they choose, before having a court find misconduct. They insist such an opportunity to be heard is mandated by our Commonwealth’s Constitution, which places reputational interests on the highest plane and extends the protection of these interests to state actors functioning in their official capacity.

b. The OAG

The OAG argues multiple recent concessions of relief by the DAO, once examined under the adversary process, have proven unreliable. In particular, the OAG cites the federal habeas proceedings of Philadelphia murder defendants Robert Wharton, Javiar Artache, Kevin Johnson, and Rasean Malone,²⁹ as well as Brown’s unsuccessful appeal to this Court from the denial of PCRA relief in his separate Crawford murder case. In addition to these matters, the OAG alleges that since January of 2018, when DA Krasner took office, the DAO has conceded error, and relief has been granted, in 115 cases in which there was no adversarial testing. *See* OAG’s Brief at 15-30 (listing cases).

²⁹ *See Wharton v. Vaughn*, 2022 WL 1488038 (E.D. Pa. 2022); *Wharton v. Vaughn*, 2022 WL 4133291 (E.D. Pa. 2022); *Wharton v. Superintendent Graterford SCI*, 95 F.4th 140 (3rd Cir. 2024); *Wharton v. Superintendent Graterford SCI*, 95 F.4th 113 (3rd Cir. 2024); *Artache v. Superintendent SCI Forest*, 2023 WL 8468613 (3rd Cir. 2023); *Johnson v. Kerestes*, 683 F. Supp. 3d 452 (E.D. Pa. 2023); *Malone v. Smith*, 2023 WL 2351694 (E.D. Pa. 2023).

The OAG contends several concerning patterns emerge from these cases. Specifically, the OAG maintains that while virtually all the cases have involved disputable factual issues, almost none of them have been resolved through evidentiary hearings but rather either naked concessions by the prosecution or joint stipulations. It avers that many of the cases on its list have been repeatedly shuttled back and forth between state and federal court, as opportunities to concede receded or advanced in each forum. It submits this juggling between state and federal forums even resulted in the public censure of a prosecutor in one case, *Martinez v. Delbalso*, 2021 WL 510276 (E.D. Pa. 2021). It argues the DAO’s many concessions in federal court are especially questionable because claims adjudicated on the merits in state court are subject to an extremely demanding standard of review on federal habeas review, whereby relief is warranted only if the state court judgment was so lacking in justification as to be beyond any possibility for fair-minded disagreement. The OAG claims that in all but one of the 115 concessions, the DAO has not retried the defendant but instead has either dismissed the charges or negotiated a plea, often a plea of *nolo contendere*, to reduced charges. The OAG insists that none of the DAO’s concessions has ever resulted in the arrest and prosecution of a new perpetrator.

In light of the DAO’s problematic pattern of concessions, the OAG proposes the implementation of procedures to

ensure more reliable results. It recommends that when the DAO confesses error, the trial court should appoint the OAG or the Pennsylvania District Attorneys Association (PDAA), or private counsel if the OAG and PDAA are unable to fill the role, to participate as a third party and investigate the claims and present arguments in support of the judgment. The OAG submits the court should order the prosecution to make *495 available to the third party everything in the police and prosecution files that it makes available to the defense. In the OAG's view, the court should require an evidentiary hearing before granting relief premised on claims of fact, with full participation by the appointed third party. It urges that the third party should be designated by the court as a formal intervenor, entitled to appeal as of right.

Turning to the specifics of this case, the OAG argues this matter bears the hallmarks of many of the DAO's other questionable concessions of error. It contends that despite the PCRA court's repeated requests for actual evidence demonstrating that Vann implicated Paige, Brown and the DAO presented only a joint stipulation. It asserts Vann's undisclosed March 21, 2003 statement belies the allegation Vann actually identified Paige as a participant. The OAG notes Detectives Judge and Peters have provided declarations alleging Vann never identified Paige to them. It faults Brown and the DAO for never attempting to interview Detective Baker, who died in July 2022, or Vann, who died in December 2018. Finally, the OAG submits that even assuming Vann incriminated Paige, this fact would not have been material in light of the other circumstances impeaching his credibility and the evidence, including Lyons's testimony, corroborating Vann's account of the murder.

c. Brown

Brown responds this Court should affirm the PCRA court's grant of relief. He insists there is no question the evidence Vann falsely incriminated Paige was impeaching and undisclosed and thus the case turns on the issue of prejudice. In his view, the suppression of Vann's false identification was prejudicial because Vann was a critical witness against him, no physical evidence linked him to the crime, and no other witness besides Lyons identified him as being involved. Additionally, Brown seconds the PCRA court's conclusion that the misidentification of Paige would have provided impeachment evidence different in character from the impeachment evidence the jury heard because it would have shown Vann's willingness to falsely accuse an acquaintance of being involved in the murder. Brown rejects the possibility that Vann may have identified

Paige in a different murder, noting the undisclosed documents appeared in the files for this case, and the 23rd District Memorandum referred to co-defendant Jamaar. Also, he notes the July 2003 memoranda focused on Paige's whereabouts on the day of the murder, were marked with the case number for this murder, and were addressed to Detective Judge, the assigned detective for this case.

Brown maintains Vann's March 21, 2003 statement implicating Lyons is entirely consistent with, and does nothing to counter the impeachment value of, Vann's false accusation of Paige. A cooperating accomplice's demonstrably false accusation, says Brown, is damning impeachment evidence whether or not it coincided or alternated with other, possibly truthful accusations. He likewise submits the March 21, 2003 statement, which the Commonwealth did not disclose to Brown prior to trial, does not contradict the parties' factual stipulation in the PCRA court that Vann's statement on July 22, 2003 was the first in which Vann implicated him and Lyons. According to Brown, when viewed in context, the stipulation correctly provided that the July 22, 2003 statement was the first of Vann's three statements to homicide investigators disclosed pre-trial in which he implicated Brown and Lyons.

Alternatively, Brown forwards two other grounds for affirming the PCRA court's grant of relief. First, he accuses the Commonwealth of suppressing an untruthful *496 statement by Lyons in December 2003. Second, he alleges the Commonwealth suppressed other contradictory statements by Vann, as well as Vann's cooperation in other cases and the benefits he received from the Commonwealth.

Expanding his focus to PCRA concession cases generally, Brown argues current law, as set forth in the PCRA and the Pennsylvania Rules of Criminal Procedure, is adequate to ensure reliable dispositions. Moreover, although not expressly permitted by the PCRA or criminal procedural rules, Brown submits PCRA courts have the inherent authority to order the participation of *amicus curiae* where the court seeks, or non-parties voice, arguments and perspectives beyond those provided by the parties. However, Brown opposes the additional procedures proposed by the Family Members and the OAG in cases where the DAO concedes relief. Broadly, Brown insists the extra procedures are clearly intended to apply only in Philadelphia and only during the tenure of DA Krasner. As such, Brown contends, they exceed this Court's constitutional authority "to prescribe **general** rules governing practice, procedure and the conduct of **all** courts." Brown's Brief at 67, *quoting* PA. CONST. art. V,

§ 10(c) (emphasis added in brief). He also claims limiting the procedures to Philadelphia, where racial minorities account for a majority of the population, will have a starkly disproportionate racial impact: PCRA relief will be delayed predominantly for people of color.

More precisely, Brown contends the proposal for intervention by a third party such as the DAO, the PDAA, or private counsel, contravenes the constitutional prohibition against this Court “adopting rules that ‘abridge, enlarge [or] modify the substantive rights of any litigant.’” *Id.* at 68, *quoting* PA. CONST. art. V, § 10(c) (brackets added in brief). Additionally, the proposed intervenor rule, in Brown’s estimation, conflicts with the Commonwealth Attorneys Act (CAA),³⁰ which authorizes intervention by the OAG in criminal cases only in limited circumstances, none of which are implicated here, and precludes altogether intervention by the PDAA or private attorneys. Brown believes the proposals to provide the intervenor full discovery, to mandate evidentiary hearings when there are disputed claims of fact, and to guarantee those accused of misconduct an opportunity to be heard, like the intervenor proposal, are substantive in nature and thus beyond this Court’s authority under Article V, Section 10 of the Pennsylvania Constitution. He alleges too that the discovery proposal would conflict with Pa.R.Crim.P. 902(E)(1), the evidentiary hearing proposal would conflict with 42 Pa.C.S. § 9545(d)(1) and Pa.R.Crim.P. 907, and the opportunity-to-be-heard proposal would conflict with 42 Pa.C.S. § 9546(a).³¹ Lastly, *497 regarding Family Members’ proposal for prosecutorial affirmations that all relevant evidence has been produced, Brown asserts such a requirement should apply to all criminal proceedings, not just cases involving the DAO or concessions of relief.

³⁰ See 71 P.S. §§ 732-101-732-506.

³¹ Rule 902(E)(1) provides that except on a first counseled petition in a death penalty case, “no discovery shall be permitted at any stage of the [PCRA] proceedings, except upon leave of court after a showing of exceptional circumstances.” Pa.R.Crim.P. 902(E)(1). Section 9545(d)(1) provides: “(i) Where a petitioner requests an evidentiary hearing, the petition shall include a certification signed by each intended witness stating the witness’s name, address, date of birth and substance of testimony and shall include any documents material to that witness’s testimony. (ii) If a petitioner is unable to obtain the signature of a witness under subparagraph (i), the petitioner shall include a certification, signed by the petitioner or counsel, stating the witness’s name, address, date

of birth and substance of testimony. In lieu of including the witness’s name and address in the certification under this subparagraph, counsel may provide the witness’s name and address directly to the Commonwealth. The certification under this subparagraph shall include any documents material to the witness’s testimony and specify the basis of the petitioner’s information regarding the witness and the petitioner’s efforts to obtain the witness’s signature. Nothing in this subparagraph shall be construed to contravene any applicable attorney-client privilege between the petitioner and postconviction counsel. (iii) Failure to substantially comply with the requirements of this paragraph shall render the proposed witness’s testimony inadmissible.” 42 Pa.C.S. § 9545(d)(1). Under Rule 907, the PCRA court may dismiss a petition without a hearing “if ... there are no genuine issues concerning any material fact[,] ... the defendants is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings[.]” Pa.R.Crim.P. 907(1). Alternatively, “[a] petition for post-conviction collateral relief may be granted without a hearing when the petition and answer show that there is no genuine issue concerning any material fact and that the defendant is entitled to relief as a matter of law.” Pa.R.Crim.P. 907(2). Section 9546(a) provides: “[i]f the court rules in favor of the petitioner, it shall order appropriate relief and issue supplementary orders as to arraignment, retrial, custody, bail, discharge, correction of sentence or other matters that are necessary and proper.” 42 Pa.C.S. § 9546(a).

d. The DAO

The DAO argues the short answer to the question this Court identified for briefing is that PCRA courts cannot grant relief based upon the concessions of the parties, as this Court already ruled in Brown’s separate capital appeal. It insists, however, this is not what occurred here; rather, the PCRA court treated this case like any other and granted relief based on its independent judicial assessment of the facts and the law, not because the DAO conceded error. The DAO maintains the result below would not have been different if Family Members had been permitted to intervene, as the court welcomed their input as *amici*, and Family Members vociferously opposed an evidentiary hearing.

According to the DAO, the PCRA court's award of a new trial based on the nondisclosure of Vann's identification of Paige was fully supported by the record. It contends the documentary evidence gives rise to the "inescapable" conclusions Vann implicated Paige in this crime, this accusation was determined by investigators to be false, and this impeachment evidence of Vann was not disclosed to the defense. DAO's Brief at 45. The DAO concurs with the PCRA court's judgment this impeachment evidence would have provided a new and fertile avenue for the defense to undermine Vann's credibility and would have created a reasonable probability of a different outcome at trial.

The DAO disputes Family Members' arguments in support of reversal. Regarding Family Members' claim that Vann's March 21, 2003 statement implicating Lyons refutes the theory Vann first implicated Paige and then switched to Lyons after the police confirmed Paige's alibi, the DAO insists the parties never raised this switch theory, and the PCRA court did not rely on it in granting relief. Indeed, the DAO emphasizes it "noted in its answer to the [PCRA] petition below that Vann had informally implicated Brown in March 2003[.]" *Id.* at 47, *citing* DAO's Response to Petition for Collateral Relief, 11/1/21, at ¶74 n.8. Like Brown, the DAO argues the factual stipulation providing that Vann's July 22, 2003 statement was the first in which he named Brown or Lyons did not mislead the PCRA court because it was apparent the stipulation referred to disclosed statements. "While the stipulations could have been more clearly drafted to *498 refer explicitly to 'disclosed' statements," the DAO maintains, "they would not have confused anyone acquainted with this case and did not confuse the PCRA court." *Id.* at 52. As for the DAO's failure to provide the March 2003 memorandum to the PCRA court, it explains:

the Commonwealth did not include this document in its pleadings because it was irrelevant to any of Brown's claims. The Commonwealth's file in this case fills approximately twenty bankers' boxes. It was not reasonable to include every document. As it was, [the PCRA court] was already presented with thousands of pages of transcripts, appendices, and briefs; including unnecessary documents would only have hindered his decision.

Id.

The DAO submits the OAG's list of 115 instances in which the DAO has successfully conceded relief does not reflect any impropriety on its part. On the contrary, the DAO contends it is ethically obliged to agree to relief in appropriate cases, and its confessions of error represent a "painful but necessary course correction" from the practices of prior administrations, which had "a culture of non-disclosure and a win-at-all-costs approach to post-conviction litigation." *Id.* at 57, 61. The 115 number, the DAO argues, represents only approximately 1.2% of the approximately 7,600 cases the DAO's Law Division has briefed on post-conviction review since January 2018, and as such the frequency with which it agrees to relief is not particularly high or unusual. The DAO justifies its determination to either enter a plea deal or withdraw charges in effectively all of these conceded cases by noting the vast majority of criminal matters are resolved via plea, and it violates a prosecutor's duty to pursue charges when a *prima facie* case cannot be established through available and admissible evidence.

Echoing arguments raised by Brown, the DAO contends the current rules of procedure are adequate to protect the integrity of confessions of error in Philadelphia. It claims the designation of private parties as intervenors in uncontested PCRA petitions would be contrary to law and could wrest control of criminal proceedings from the Commonwealth's duly elected representatives. It likewise claims the designation of the OAG as an intervenor would be unlawful, as the OAG may intervene only in accordance with the provisions of the CAA, and nothing in the CAA authorizes the OAG to intervene in this context. The DAO submits that because the right to intervene is substantive rather than procedural in nature, under Article V, § 10(c) of the Pennsylvania Constitution this Court's rulemaking authority does not extend to designating non-parties such as Family Members or the OAG as intervenors. The DAO contends PCRA courts have the inherent authority to appoint *amicus curiae*. It emphasizes, however, that in the ordinary case, *amicus*'s role should be limited to briefing the merits of issues, and it should not be permitted to raise new issues or submit extra-record evidence. Moreover, it suggests that ordinarily the role of *amicus* would be best filled by the OAG because it is governed by the same ethical rules and legal restrictions applicable to the DAO.

e. Family Members' Reply

In their reply brief, Family Members find it "astonishing" the DAO now claims the March 2003 memorandum was

irrelevant to the PCRA court's disposition of Brown's petition yet, by its own admission, the DAO itself proffered selective facts from this document in its response to the petition. Family Members' Reply Brief at 7. Contrary to the DAO, Family Members insist Vann's March 2003 account documented in the memorandum directly addresses *499 the claims made by the parties below and was critically relevant. They submit Vann's March 21, 2003 statement would have been especially relevant to *Brady*'s materiality standard in two ways: first, it would have been evidence of a consistent statement provided before Detective Baker's July 2003 investigation established Paige had an alibi for the murder; and second, this statement would have weakened the causal relationship between Detective Baker's investigation and Vann's subsequent account. Family Members accuse the DAO and Brown of performing "linguistic gymnastics" to defend the accuracy of their factual stipulation regarding Vann's July 22, 2003 statement, and insist these efforts only prove Family Members' point that the stipulation was incomplete and confusing. *Id.* at 23. They claim the misrepresentation that Vann first identified Brown and Lyons in July of 2003 was repeated in the DAO's and Brown's briefing to the PCRA court. Family Members raise the possibility Detective Baker's July 2003 memoranda reflect his own misunderstanding that Paige was involved in the Rite Aid murder, rather than an actual identification of Paige by Vann.

f. The OAG's Reply

In the OAG's reply brief, it asserts the DAO's claim of a prior culture of *Brady* violations at the DAO, which must be remedied via concession, is largely circular since it relies on the DAO's own untested multitude of prior concessions. In any event, the OAG maintains every *Brady* claim is intensively fact-specific and must be evaluated individually; intoning "culture" cannot substitute for judicial review of actual evidence in individual cases. The OAG insists the DAO uses the wrong denominator in arguing it concedes only a small percentage of cases. According to the OAG, the DAO has focused its concession program on capital and life sentences, and it has been highly effective in reducing many of these sentences. The OAG reports that when DA Krasner took office, there were 47 Philadelphia defendants on death row, and the DAO has since conceded 35 of these sentences — a concession rate of 75%. The OAG also notes it has identified five more concessions in addition to the 115 enumerated in its initial brief. The OAG argues if, as the DAO contends, the March 2003 memorandum was so irrelevant that it would have just hindered the PCRA court

to provide the court with the document, "it shouldn't take seven pages and 2,000 words (and another seven pages and 1,700 words from the defendant) to explain why. Far simpler: just give the court the full facts and let it do its job." OAG Reply Brief at 23. Disagreeing with the DAO that intervention is a substantive right which only the General Assembly can grant, the OAG counters intervention is often a matter of procedure, as evidenced by the multitude of court procedural rules governing it, including Pa.R.Civ.P. 2327, Pa.R.A.P. 1531, Pa.R.A.P. 3775, and Pa.R.J.C.P. 1133. In particular, the OAG notes Pa.R.A.P. 521(b) acknowledges the ability of the OAG to intervene in limited circumstances, and this Court is free to expand those circumstances, and to enact a similar provision in the rules of criminal procedure.

g. *Amici*

In addition to the invited *amicus* participation of the OAG, numerous *amici* have filed briefs in support of Brown and the DAO: the Conviction Integrity Units of several different prosecutors' offices in the United States; nearly one dozen legal ethics scholars; former prosecutors and judges; the Pennsylvania Innocence Project and the Innocence Network; defense counsel in Philadelphia; professors of criminal law and procedure; forty-one current and former elected prosecutors *500 and Attorneys General, and former United States Attorneys and federal officials; and the Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania Carey Law School. These *amici* argue existing procedures are adequate to ensure the reliability of DAO concessions and urge us to reject the additional procedural safeguards proposed by Family Members and the OAG. *See* Conviction Integrity Units *Amici* Brief at 16 ("[T]he specific additional procedures [Family Members] and the [O]AG would impose on postconviction proceedings are unprecedented and unworkable."); Ethics Scholars *Amici* Brief at 13-14 ("This Court should decline to use King's Bench jurisdiction to impose new limits on Commonwealth prosecutors' concessions of relief when warranted."); Former Prosecutors and Judges *Amici* Brief at 21 ("Because the system already offers the appropriate flexibility and incentives to properly vet all PCRA petitions, even in the face of prosecutorial concessions, [*a*]mici urge the Court not to introduce unnecessary and harmful additional hurdles to the process."); Pennsylvania Innocence Project and Innocence Network *Amici* Brief at 21 ("[F]urther procedural requirements are unnecessary and potentially harmful."); Philadelphia Defense Counsel *Amici* Brief at 30 ("The OAG's desire to retry cases or to defend the prior actions or inactions of its current staff are

not compelling reasons for this Court to appoint it as a mandatory intervenor.”); Professors of Criminal Law and Procedure *Amici* Brief at 23 (“[T]he decision below should be affirmed.”); Current and Former Elected Prosecutors and Attorneys General *et al. Amici* Brief at 3 (“Sufficient guardrails are already in place to ensure that the admission of error is based on the facts of the case and consistent with the law. Mandating additional procedures in post-conviction cases where prosecutors admit error would be unwise and unnecessary.”); Quattrone Center *Amicus* Brief at 15 (“The integrity of the PCRA process is best ensured by the proper investigation and review by the prosecutor and the fully independent review and judgment of the PCRA court. In this process, the trial court may exercise its discretion to appoint *amicus curiae* should the judge feel a need for additional viewpoints. These guardrails are sufficient to ensure an outcome worthy of public trust.”).

h. Ancillary Filings

Beyond the extensive briefing of the parties and *amici*, also pending before the Court are six ancillary petitions.³² In the interest of maximizing the information and arguments available to us in resolving this highly important King’s Bench matter, we grant these petitions and consider these filings and their attachments in deciding this case.³³

³² Two other ancillary petitions have already been decided. In particular, the OAG filed an emergency petition to stay a joint PCRA evidentiary hearing in the cases of Brown’s co-defendants Kennedy, James, and Jamaar pending this Court’s decision in this case. In addition, the co-defendants filed a motion for leave to file an *amicus* brief responding to the OAG’s emergency petition. By *per curiam* order dated December 12, 2025, this Court denied the OAG’s emergency petition and granted the co-defendants’ motion.

³³ As noted, our King’s Bench authority is not limited by prescribed forms of procedure, and we “may employ any type of process or procedure necessary for the circumstances.” *Bruno*, 101 A.3d at 669; *see id.* at 671 (“We have often undertaken flexible measures deriving from our broad power at King’s Bench.”). We offer no opinion as to whether such ancillary applications would be appropriately granted in a case not involving the exercise of our King’s Bench jurisdiction.

*501 First, Brown has filed an application to notify this Court of the United States Supreme Court’s recent decision in *Glossip v. Oklahoma*, 604 U.S. 226, 145 S.Ct. 612, 221 L.Ed.2d 90 (2025). Brown insists *Glossip*, where the Supreme Court vacated the conviction, is “quite similar” to this case because in both cases “the defendant was charged as a conspirator, not as the actual killer ..., evidence that was first disclosed in successive postconviction proceedings established violations of” *Brady* and *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959),³⁴ “the suppressed evidence undermined the credibility of cooperating co-conspirators whose testimony was central to the prosecution’s case ..., [and] the State confessed error, but the victims’ families opposed relief as *amici curiae*.” Brown’s Pre-Submission Application to Notify the Court of Recent Authority, 3/3/25, at ¶10.

³⁴ The High Court in *Napue* “held that a conviction knowingly ‘obtained through use of false evidence’ violates the Fourteenth Amendment’s Due Process Clause.” *Glossip*, 604 U.S. at 246, 145 S.Ct. 612, *quoting Napue*, 360 U.S. at 269, 79 S.Ct. 1173.

In response, the OAG has filed its own ancillary petition seeking leave to answer Brown’s application, which it criticizes for providing more than “merely ‘notice’ of a new decision,” but instead “present[ing] four pages of new legal argument.” OAG’s Request for Leave to File Answer, 3/11/25, at 1. In its attached proposed answer, the OAG submits that “[b]ecause *Glossip* makes no new federal law and has no relevance to this Court’s supervisory powers at issue in this King’s Bench proceeding, [Brown’s] application should be denied.” Answer of OAG, 3/11/25, at 1.

In addition, Family Members have filed an application to notify this Court of testimony presented at a hearing on February 21, 2025 in the Philadelphia Court of Common Pleas in the case of *In re Appeal of Bochetto & Lentz, P.C.*, July Term 2021, No. 02373. *Bochetto* involves an appeal from the DAO’s denial of a request under the Right-to-Know Law (RTKL)³⁵ for records pertaining to the DAO’s filing of a motion for a *nolle prosequi* in *Commonwealth v. Patterson*, CP-51-CR-0012287-2007.³⁶ Family Members claim the testimony, which they attach to their application, “sheds light on the policies, practices, and procedures [of] the [DAO] under its current administration when agreeing to relief[,]” and “highlights yet another instance of the [DAO] proffering aversions of fact to support claims of egregious misconduct that were not appropriately investigated, vetted, or confirmed.” Family Members’ Pre-

Submission Application to Notify the Court of Recent Court Proceedings, 3/3/25, at ¶¶15-16. The DAO responds that the application should be denied “[b]ecause the testimony proffered in *Bochetto* relates to the DAO’s decision to withdraw criminal charges,” and thus “has little bearing on the question presented in this King’s Bench litigation.” DAO’s Letter in Lieu of Formal Objections, 3/4/25, at 1. Moreover, the DAO insists it is inappropriate to litigate open cases via these King’s Bench proceedings, especially considering this Court may be asked to resolve *Bochetto* in the future. Also, the DAO maintains “[c]ritical witnesses in *Bochetto*, including the District Attorney himself, remain subject to sequestration orders[,]” and “it would be untenable for the [DAO] to address before this Court the factual issues presented by *Bochetto* when counsel is unable to meaningfully consult the District *502 Attorney regarding the factual and legal positions that would entail.” *Id.* at 2.³⁷

³⁵ See 65 P.S. §§ 67.101-67.3104.

³⁶ *Patterson* involves one of the 120 DAO concessions noted by the OAG. See OAG’s Brief at 15.

³⁷ Subsequent to Family Members’ application and the DAO’s response, on March 17, 2025, the trial court in *Bochetto* granted the requester’s appeal and ordered the DAO to provide all requested records in redacted form. In addition, the court found “DAO members have acted in bad faith throughout the instant RTKL and related proceedings in a manner that has prejudiced the [r]equester and the public at large.” Order, *In re Appeal of Bochetto & Lentz, P.C.*, July Term 2021, No. 02373, 3/17/25, at 2. Accordingly, the court imposed the following sanctions on the DAO: reimbursement of all reasonable counsel fees and court costs expended by the requester; payments of \$10,000 each to former Assistant District Attorneys Elizabeth McCaffrey and Richard Sax, who were “unfairly maligned” by the DAO; payment of \$100,000 to the First Judicial District purgeable upon compliance with the other terms and conditions of the court’s order; twelve hours of mandatory ethics training focused on the Pennsylvania Rules of Professional Conduct for each member of the DAO paid for by the DAO and completed within nine months of the court’s order; preservation of all records that have been the subject of the RTKL request or are related to

Patterson; a thorough audit/inventory of all DAO records related to cases referenced in a report on prosecutorial misconduct in the DAO produced by the Peter L. Zimroth Center on the Administration of Criminal Law at New York University School of Law, to be provided to the court for *in camera* review; and preparation of a standard procedural manual for the DAO addressing the safeguarding of records. See *id.* at 3-6. On March 24, 2025, the DAO appealed this order to the Commonwealth Court, where the appeal is docketed at 297, 396, 418, 457-459 & 464 CD 2025.

Next, the OAG has filed an application for leave to file a post-submission communication addressing alleged misstatements by the DAO and Brown at oral argument before this Court. In its proposed filing, the OAG alleges Brown and the DAO misstated at argument that Family Members were allowed the same open file review as Brown. In addition, it claims Brown erroneously stated the March 2003 memorandum was not withheld but was in fact available to the PCRA court “on record.” OAG’s Post-Submission Communication to Address Oral Argument Misstatements, 3/11/25, at ¶4. Further, the OAG accuses the DAO of misrepresenting the record when it alleged at argument that it never resisted an evidentiary hearing, that Family Members would have been permitted to participate fully in an evidentiary hearing had one been held, and that Vann told Detective Peters two girls were involved in the Rite Aid murder. Brown and the DAO have filed answers arguing the alleged misstatements did not occur and the OAG’s application should be denied.

As well, the DAO has filed an application for leave to file a post-submission communication to clarify a footnote in its brief. In its proposed filing, the DAO explains that its brief presently provides:

Brown was later convicted of another murder for which he was sentenced to death. *Commonwealth v. Brown*, CP-51-CR-0208091-2004. The Commonwealth does not believe that the disposition of this case affects the judgment in that matter and has opposed both guilt and penalty phase relief in those ongoing post-conviction proceedings.

DAO's Proposed Clarification of Incomplete Statement, 4/9/25, at 1, *quoting* DAO's Brief at 8 n.2. However, the DAO now notes, Brown "has an action pending in federal court challenging his conviction and sentence in his capital case[.]" and in that ongoing post-conviction proceeding, "[i]n 2021, the [DAO] agreed that Brown's sentence should be vacated because Brown's sentencing counsel was ineffective for failing to present evidence of Brown's organic brain damage at sentencing." *Id.* at 1-2. The DAO submits "[a] more complete footnote providing this context would" provide:

***503** Brown was later convicted of another murder for which he was sentenced to death. *Commonwealth v. Brown*, CP-51-CR-0208091-2004. The Commonwealth does not believe that the disposition of this case affects the judgment in that matter and has opposed both guilt and penalty phase relief in those ongoing state post-conviction proceedings. However, Brown has a pending petition for a writ of habeas corpus challenging that conviction and sentence. *Brown v. Wetzel*, E.D. Pa. Civ. No. 10-5553. Consistent with its position before this Court, the Commonwealth has conceded that Brown is entitled to a new sentence based on the ineffective assistance of his sentencing counsel, though it has specified that that concession is not binding on the District Court. *Id.*, ECF No. 33 (filed May 28, 2021).

Id. at 2.³⁸ The DAO "apologizes for any confusion that may have been caused, which was unintentional." *Id.* Family Members have filed an answer taking no position on the DAO's request but emphasizing that the DAO's concession to relief in federal court on the mitigation ineffectiveness claim involved the allegation that this Court's rejection of the same claim in *Brown* was not merely wrong but an unreasonable application of clearly established federal law and an unreasonable application of the facts.

³⁸ As noted, *see supra* note 12, following the May 28, 2021 joint motion by the DAO and Brown in federal court for sentencing relief in Brown's

capital case, the DAO, on October 6, 2025, filed a motion to withdraw the joint motion, which was granted on April 21, 2026.

Finally, the DAO has filed an application for leave to file a post-submission communication concerning the case of *Hicks v. City of Philadelphia*, E.D. Pa. Civ. No. 2:22-cv-00977. A Philadelphia jury convicted Termaine Hicks of rape. The DAO, however, subsequently agreed to PCRA relief and *nolle prossed* the charges against him. Thereafter, Hicks filed a federal civil rights lawsuit against the City of Philadelphia and police officers involved in his case. The DAO's proposed post-submission filing advises that the jury in Hicks's federal case found in his favor. Specifically, the federal civil jury concluded by a preponderance of the evidence that Hicks's constitutional rights were violated, and he did not commit the rape. The jury awarded him \$3 million in compensatory damages.

IV. Analysis

a. Timeliness

"This Court has consistently held that the PCRA's time restrictions are jurisdictional in nature and that a PCRA court must, before considering the merits of [a] claim[] asserted in a PCRA petition, first make a threshold determination whether [the] claim was timely filed." *Commonwealth v. Tedford*, 658 Pa. 387, 228 A.3d 891, 904 (2020) (collecting cases). Generally, a PCRA petitioner must raise a claim within one year of the date his judgment became final. *See* 42 Pa.C.S. § 9545(b)(1). "[A] judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and [this Court], or at the expiration of time for seeking the review." 42 Pa.C.S. § 9545(b)(3). A claim may be raised beyond the one-year deadline only if "the petition alleges and the petitioner proves" one of three exceptions: "[(1)] 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; [(2)] the facts upon which the claim is predicated were unknown to the petitioner and could not have been ***504** ascertained by the exercise of due diligence; or [(3)] the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or [this Court] after the time period provided in this

section and has been held by that court to apply retroactively.” 42 Pa.C.S. § 9545(b)(1). A petitioner purporting to invoke one of these exceptions must raise his claim “within one year of the date the claim could have been presented.” 42 Pa.C.S. § 9545(b)(2). The exceptions to the PCRA time bar, as well as the one-year filing requirement of Section 9545(b)(2), “are claim specific, not petition based.” *Commonwealth v. Rivera*, — Pa. —, 324 A.3d 452, 468 (2024); *see also id.* at 469 n.19. “In other words, if one of several claims in a PCRA petition meets [an] exception and Section 9545(b)(2), that does not mean that a PCRA court has jurisdiction to entertain the other claims raised in that petition.” *Id.* at 469.

Here, following the Superior Court’s affirmance of Brown’s judgment of sentence, this Court denied allowance of appeal on May 15, 2007. Brown did not seek a writ of *certiorari* to the United States Supreme Court. Accordingly, his judgment became final for purposes of the PCRA on August 13, 2007, upon expiration of the ninety-day period for seeking *certiorari*. *See* U.S. Sup. Ct. R. 13.1.

Brown first raised the claim upon which the PCRA court granted relief — that the Commonwealth violated *Brady* by withholding Vann’s purported false identification of Paige — over thirteen years later, in his Amended Second PCRA Petition filed on June 28, 2021. This claim was thus facially untimely under the PCRA. The PCRA court had jurisdiction to consider the claim only if Brown successfully pleaded and proved an exception to the time bar.

Mistakenly treating the time bar as petition-based rather than claim-specific, Brown broadly alleged his Amended Second PCRA Petition satisfied the governmental interference and unknown facts exceptions to the time bar. *See* Joint Motion to Unseal and Unopposed Motion to Amend Supplement and Amendment to Successor Petition and Appendix, 8/18/21, at ¶3. Although the DAO conceded Brown was entitled to a new trial based on the Vann *Brady* claim, and thus implicitly agreed this claim was timely raised, *amici* Family Members argued all of Brown’s claims were untimely. *See* Opening Brief of *Amicus Curiae* Victims’ Family to Dismiss Brown’s Untimely and Meritless PCRA Claims, 9/9/22, at 10; Reply Brief of *Amicus Curiae* Victims’ Family, 3/20/23, at 45 n.14. The PCRA court, however, apparently did not even consider the requisite threshold issue of timeliness. Neither the court’s order granting relief nor its findings in support thereof address the time bar in any way. *See* N.T. Hearing, 5/5/23, at 4. It appears the court simply presumed it had jurisdiction to consider the merits of Brown’s *Brady* claim based on the DAO’s agreement with Brown that relief was due. On the contrary, as this Court recently and

unanimously held in *Rivera*, “[t]he agreement of the parties ... does not suffice to vest a court with jurisdiction; rather, a court must conduct an independent analysis of jurisdictional issues.” *Rivera*, 324 A.3d at 467. On remand, the PCRA court, before addressing the merits of any of Brown’s claims, should first conduct an independent assessment of whether it has jurisdiction to consider the issue in the first place. Substantive review should be limited to those claims, if any, satisfying a time bar exception and Section 9545(b)(2).

b. Merits

“The petitioner bears the burden to prove, by a preponderance of the *505 evidence, that he or she is eligible for PCRA relief.” *Commonwealth v. Murchison*, — Pa. —, 328 A.3d 5, 17 (2024); *see* 42 Pa.C.S. § 9543(a). “[A] preponderance of the evidence ... is ‘tantamount to a “more likely than not” inquiry[.]’ ” *Cent. Dauphin Sch. Dist. v. Hawkins*, — Pa. —, 286 A.3d 726, 741 (2022), *quoting* *Popowsky v. Pa. Pub. Util. Comm’n*, 594 Pa. 583, 937 A.2d 1040, 1055 n.18 (2007). “It is not possible for evidence that is inconclusive to be sufficient to meet the preponderance of the evidence standard.” *Povacz v. Pa. Pub. Util. Comm’n*, 674 Pa. 209, 280 A.3d 975, 1006 (2022). Similarly, “evidence of a mere possibility ... is never sufficient to meet a preponderance of the evidence standard.” *Id.* at 1007.

To establish a *Brady* violation, a defendant must prove three elements: first, that the evidence at issue is favorable to the defendant, either because it is exculpatory or because it is impeaching; second, that the prosecution suppressed the evidence, either willfully or inadvertently; and third, that the evidence is material. *See Commonwealth v. Thomas*, — Pa. —, 323 A.3d 611, 639 (2024). “[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Commonwealth v. Birdsong*, 611 Pa. 203, 24 A.3d 319, 327 (2011), *quoting* *Commonwealth v. Chambers*, 570 Pa. 3, 807 A.2d 872, 887-88 (2002). “The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense.” *Id.*, *quoting* *Chambers*, 807 A.2d at 887.

“[T]he PCRA requires judicial merits review favorable to the petitioner before any relief may be granted.” *Brown*, 196 A.3d at 145 (emphasis omitted). “A confession of error by the Commonwealth does not constitute a judicial ruling

in [the petitioner's] favor, and thus is insufficient for any grant of relief under the PCRA." *Id.* In conducting its independent judicial review, the PCRA court may dismiss a PCRA petition without a hearing if the court "is satisfied ... that there are no genuine issues concerning any material fact and that the defendant is not entitled to post-conviction collateral relief, and no purpose would be served by any further proceedings[.]" Pa.R.Crim.P. 907(1). Similarly, "[a] petition for post-conviction collateral relief may be granted without a hearing when the petition and answer show that there is no genuine issue concerning any material fact and that the defendant is entitled to relief as a matter of law." Pa.R.Crim.P. 907(2). On the other hand, "the judge shall order a hearing ... when the petition for post-conviction relief or the Commonwealth's answer, if any, raises material issues of fact." Pa.R.Crim.P. 908(A)(2). That is, "an evidentiary PCRA hearing is required when there is an outstanding issue of material fact." *Commonwealth v. Hutchinson*, 611 Pa. 280, 25 A.3d 277, 321 (2011).

Here, the PCRA court granted relief based on Brown's claim the Commonwealth violated *Brady* by withholding Vann's purported false identification of Paige. *See* N.T. Hearing, 5/5/23, at 4 ("I'm going to find that ... this false identification was not disclosed to the defense[.]"). This was error. Brown did not carry his burden to prove by a preponderance of the evidence that Vann in fact incriminated Paige in the first place. Obviously, the existence of this fact is a *sine qua non* of the claim. In the absence of the alleged misidentification of Paige by Vann, there can be no viable *Brady* claim. The Commonwealth, of course, cannot suppress evidence which does not exist, nor can a *506 nonexistent identification be impeaching, favorable, or material. *See (Christopher Lynn) Johnson*, 335 A.3d at 718 ("[T]he Commonwealth could not have withheld an agreement that never existed in the first place.").

In support of his *Brady* claim, Brown proffered four documents: the 23rd District memorandum, Detective Baker's July 14 and 15 memoranda, and the Gannondale fax. These documents do not render it more likely than not Vann incriminated Paige.

Beginning with the 23rd District memorandum, this document discusses the Rite Aid murder in the following paragraph:

Vann then co-operated with CDD SIU, providing in[f]ormation into the robbery of the Rite Aid, 1301 Girard Ave, on 1-18-03, and the

homicide at the Rite Aid the following day, 1-19-03. Based on Vann's co-operation, defendants Christopher Kennedy 22/B/M, PPN/840063 and James Richardson 22/B/M, PPN/858783 have been arrested and charged with robbery & homicide. (DC#03-23-001770 and 03-23-001914)

Amended Second PCRA Petition, 6/28/21, at Appendix, Exh. 12. Thereafter, the memorandum provides:

Vann is continuing to co-operate with CDD SIU regarding robberies being committed in the 23rd dist area of Broad and Girard Ave, providing confidential information concerning the following:

Robbery/Homicide: Jamar Richardson 21/B/M, 1218 N 11th St (no record), **Kennisha Paige** 17/B/F, 1116 Stiles St

Robberies: William Green 19/B/M, PPN/885936, [redacted] Anthony Frames 20/B/M, PPN/836622, aka "Spanky" Lavar Brown, 25/B/M, PPN/807547, 1222 N 11th, aka "Black" Stephen Kennedy 19/B/M, PPN/823690, [redacted] James Montgomery, 20/B/M, PPN/885941, [redacted] Naheem Johnson 20/B/M, PPN/851060, [redacted]

Id. (emphasis added).

Thus, the paragraph regarding the Rite Aid murder does not include any reference whatsoever to Paige. This passage refers to Kennedy and James by name, but not Paige. If Vann had identified Paige in this crime, one would expect to find this fact included in this paragraph of the memorandum. As the PCRA court put it, "[i]t certainly would've made sense to put that ... in the paragraph where they're talking about the Rite-Aid robbery." N.T. Hearing, 12/1/22, at 11. But it is not there. Rather, the memorandum's sole reference to Paige appears in the subsequent discussion of Vann's assistance in the investigation of **other crimes**. What's more, the memorandum simply notes Paige's name, age, race, sex, and address in connection with an unspecified "robbery/homicide." It does not specify Vann identified Paige. Plus, the memorandum was apparently written by an administrative officer for use at a CompStat meeting, not by an officer with firsthand knowledge of and involvement in the case. *See* Declaration of Special Agent Brian Peters, 6/14/23, at ¶16. In light of its opaque structure, vague phrasing, and clerical origins, the 23rd District

memorandum is far from conclusive proof Vann incriminated Paige, as the PCRA court duly recognized. In the apt words of the PCRA court, the memorandum “certainly doesn’t make it clear that Vann identified Paige for the Rite-Aid homicide[.]” and “[i]t’s actually ... some circumstantial evidence that he did not[.]” N.T. Hearing, 12/1/22, at 9.

Detective Baker’s July 2003 memoranda and the fax he received from Gannondale likewise fail to provide any level of certainty on this score. For the most part, these documents merely indicate the detective *507 investigated Paige in connection with the Rite Aid murder, not that Vann identified her as participating in the crime. The slim information arguably supporting Vann’s identification of Paige consists of a single line in Detective Baker’s July 14 memorandum in which he vaguely notes Vann “mentioned her.” Amended Second PCRA Petition, 6/28/21, at Appendix, Exh. 20. There is ample cause to question whether this thin reed supports the conclusion Vann in fact identified Paige. The memorandum does not specify Vann “mentioned” Paige as a **participant** in the murder, as opposed to merely a witness or associate of the suspects with potentially relevant information. Nor does it specify Vann “mentioned” Paige **to Detective Baker**. That is, it is not clear from the memorandum that the detective was writing from firsthand knowledge as opposed to relying on secondhand information. On the contrary, it appears the detective first met with Vann over one week later, on July 22, 2003, when he and Detective Judge took Vann’s final statement. *See* N.T. Trial, 7/26/04, at 50.

Moreover, as of the time of his July 14, 2003 memorandum, Detective Baker’s involvement in and knowledge of the investigation of the Rite Aid murder was limited.³⁹ Detective Baker was not the detective assigned to the case; Detective Judge was. *See id.* at 72. In fact, the detectives worked in entirely different squads in the Homicide Unit. *See* Declaration of Detective Kevin Judge at ¶13 (undated) (“Detective Baker worked in another squad in the Homicide Unit[.]”). Detective Baker assisted with the case only informally. *See id.* As such, the detective was not familiar with all the statements in the case and did not attend any supervisor meetings where the investigation was discussed. *See* N.T. Trial, 7/26/04, at 87 (Detective Baker testifying “I wouldn’t read every statement on every job. The assigned would.”); Declaration of Detective Kevin Judge at ¶15 (undated) (“As he was in another squad, Det. Baker ... would not have attended any meeting with my supervisors where this investigation was discussed.”). He likewise was not present when Vann gave his statements to the police on January 21, February 20, and March 21, 2003. Detective Baker’s lack of experience and familiarity with the case could well have led him to

conflate Lyons and Paige. The possibility of confusion on the part of Detective Baker was particularly pronounced given the salient similarities between Lyons and Paige. Both were teenage black females with similarly sounding first names beginning with “K” who lived in close proximity to the Richardson house where the Rite Aid murder was planned.

³⁹ Subsequently, Detective Baker, *inter alia*, participated in taking a statement from Vann on July 22, 2003, as well as a statement from Lyons on January 15, 2004.

The conclusion Vann incriminated Paige is also undermined by the fact this purported identification is not recorded in any of the statements he gave to law enforcement. It is certainly reasonable to presume that if Vann had actually identified Paige, this identification would have been memorialized. The PCRA court itself made this point emphatically. *See* N.T. Hearing, 12/1/22, at 13 (“There’s no detective who wouldn’t put that in following the ordinary course of business.”). Likewise, Detective Judge, who took Vann’s second statement on January 21, 2003 and his final statement on July 22, 2003, and who was also present at the March 21, 2003 proffer session where Vann identified Lyons but not Paige, has confirmed in his declaration: “had [Paige] been identified at any point by Vann or anyone else as being involved or being in possession of any information about the homicide, that information would have been documented.” Declaration of *508 Detective Kevin Judge at ¶16 (undated). Detective Peters has similarly declared: “[a]t no time during my encounter and interactions with Vann at Central Detectives on January 21, 2003 did Vann ever say to me, or another detective/officer in my presence, that someone named Kennisha Paige was involved in the commission of the Rite Aid robbery/murder on January 19, 2003. If he did, I would have documented that information.” Declaration of Special Agent Brian Peters, 6/14/23, at ¶13. But Vann’s multiple statements include no reference whatsoever to Paige.

The conspicuous absence of Paige’s name cannot be explained by police manipulation, as Brown argued below. Brown contended Vann may have implicated Paige, but the police kept his identification out of his statements because their investigation established she had an alibi. *See* N.T. Hearing, 12/1/22, at 13 (“There’s an explanation. They checked it out and it didn’t check out.”). This theory is refuted by the timing of Detective Baker’s investigation of Paige. Based on his memoranda, Detective Baker did not confirm Paige had an alibi until July 2003, by which point Vann had already given four statements to the police —

two on January 21, 2003, one on February 20, 2003, and one on March 21, 2003. When the police took these statements, they had not yet investigated Paige and had no reason to omit her name if she had in fact been mentioned by Vann.

In short, the inconclusive and disputable documents submitted by Brown did not carry his burden to prove it was more likely than not Vann actually inculpated Paige. And the joint stipulations of fact did not make up for his evidentiary shortfall, as they did not include a stipulation Vann implicated Paige. The PCRA court repeatedly recognized Brown fell short in sustaining his burden of proof. *See* N.T. Hearing, 7/8/22, at 6 (“I agree with the families on the insufficiency of the record; and in particular, I do want to see more evidence on the statement that Ronald Vann allegedly made implicating Kennisha Page [sic].”); *id.* (“I agree with [Family Members’] argument that on the face of the documents that were submitted to me, I can’t tell that that, in fact, happened.”); *id.* at 6-7 (“But on the existing record, it’s my considered view ... that there is not enough information in the paperwork for me to grant the petition notwithstanding the fact that both parties are of the opinion that it should be granted.”); N.T. Hearing, 8/11/22, at 13 (“I’m interested in actually what happened, and I don’t think that’s clear just from the submissions that I received.”); N.T. Hearing, 10/7/22, at 13 (“I’m still not understanding how everybody thinks that paperwork establishes that.... I just don’t get it.”); N.T. Hearing, 12/1/22, at 8 (“[T]he record in front of me including the stipulation does not resolve the factual question of whether Mr. Vann actually identified Kennisha Paige as a participant in the Rite-Aid conspiracy.”); *id.* at 10 (“It seems to me there’s evidence on both sides, and I don’t know how anybody could conclude conclusively that Vann actually identified Paige as being one of the participants in the homicide based on this record.”); *id.* at 13-14 (“I’m pointing out that a key factual issue in my mind is not resolved on this existing record.”). Nonetheless, without any further supplementation of the record, or explanation for its sudden about-face, the court granted post-conviction relief. This was error.⁴⁰

⁴⁰ Again, the claim upon which the PCRA court erroneously granted relief was that the Commonwealth violated *Brady* by failing to disclose Vann’s false identification of Paige. *See* N.T. Hearing, 5/5/23, at 4. The claim that the Commonwealth violated *Brady* by not disclosing Detective Baker’s July 2003 memoranda, the 23rd District memorandum, and the Gannondale fax does not warrant relief on the present record for similar reasons. As detailed above, these documents alone do not establish by a

preponderance of the evidence Vann incriminated Paige. As such, it cannot be concluded this paperwork was favorable and material as required by *Brady*.

***509** Relatedly, it was erroneous for the PCRA court to grant relief without holding an evidentiary hearing. As discussed, there was clearly an unresolved issue of material fact regarding Brown’s *Brady* claim: whether Vann in fact incriminated Paige. Accordingly, pursuant to our Rules of Criminal Procedure and case law, the PCRA court was required to hold an evidentiary hearing. *See* Pa.R.Crim.P. 908(A)(2); *Hutchinson*, 25 A.3d at 321. The lower court seemingly recognized as much, at least initially. *See* N.T. Hearing, 7/8/22, at 6 (“I’m going to require an evidentiary hearing.”); *id.* at 10 (“And if not, the next thing that will happen is I will schedule an evidentiary hearing.”); *id.* at 11 (“So if there’s no appeal, we will schedule an evidentiary hearing at that time.”); N.T. Hearing, 8/11/22, at 13 (“We’re having a hearing. I’ve already ruled on that at the last listing.”). However, the PCRA court ultimately ruled: “I’m not going to have a hearing if everybody connected with the case thinks I shouldn’t.” N.T. Hearing, 12/1/22, at 10. While Family Members argued Brown’s petition should be **denied** without a hearing, they did not concede relief could be **granted** without one. *See* Opening Brief of *Amicus Curiae* Victims’ Family to Dismiss Brown’s Untimely and Meritless PCRA Claims, 9/9/22, at 61-62 (“Rule 907 of the Pennsylvania Rules of Criminal Procedure provides that the PCRA court can deny a petition without a hearing when it determines ‘that there are no genuine issues concerning any material fact and that petitioner is not entitled to post-conviction collateral relief and no purpose would be served by any further proceedings ...’ Pa.R.Crim.P. 907. That is the case here.”).

In any event, the standard for ordering an evidentiary hearing under the PCRA is not whether the parties want one. A hearing is required when there is a material issue of fact, as there is in this case. The PCRA court is thus instructed on remand to conduct a hearing, after which it shall determine whether Brown has proven by a preponderance of the evidence that Vann in fact incriminated Paige in the first place.⁴¹ If so, the court is directed to reassess whether this evidence is material under *Brady*, *i.e.*, whether “there is a reasonable probability that, had the evidence been disclosed to” Brown before trial, “the result of the proceeding would have been different.” *Birdsong*, 24 A.3d at 327, *quoting* *Commonwealth v. Chambers*, 570 Pa. 3, 807 A.2d 872, 887-88 (2002).⁴²

⁴¹ In light of our remand for an evidentiary hearing, Justice Donohue finds it “curious and suspect that

[we] engage[] in an extensive evaluation of the probative value of the evidence.” Concurring and Dissenting Opinion at — (Donohue, J.). But how could we properly determine whether the evidence leaves an unresolved factual issue as to whether Vann in fact incriminated Paige, thereby necessitating an evidentiary hearing, without first evaluating that evidence? Obviously, we cannot simply assume the record is inconclusive as to this critical issue. In our view, it would be “curious” and “suspect” if we did **not** engage in a thorough analysis of the existing proof purportedly supporting a *Brady* violation, and instead summarily remanded for further proceedings.

⁴² We have explained that “[i]n evaluating whether a reasonable probability of a different outcome has been demonstrated, the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” (*Christopher Lynn*) *Johnson*, 335 A.3d at 717, *quoting* *Commonwealth v. Natividad*, 650 Pa. 328, 200 A.3d 11, 26 (2019); *see id.* (to obtain *Brady* relief a defendant must “show that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict”). The “whole case” here includes the other trial evidence impeaching Vann that did not dissuade the jury from convicting Brown, including that he had a separate open robbery case, pleaded guilty to selling drugs, had other drug convictions, violated his parole following the murder, served nine months in prison, initially lied to the police about the murder to exonerate himself, lied to the police three different times, hoped his testimony would help him with his own cases, and was the beneficiary of a testimonial immunity order providing that if he testified about the murder the Commonwealth would not be able to use his testimony against him in any criminal prosecution. In addition, we observe Vann’s testimony against Brown was corroborated by Lyons.

*510c. The DAO’s Conduct in this Case

We cannot ignore the reality that the PCRA court’s erroneous grant of relief in this case was abetted by the DAO’s lack of candor and failure to conduct a reasonable investigation.⁴³ Our rules of professional conduct impose on lawyers a duty of candor toward the tribunal. *See* Pa.R.P.C. 3.3. Lawyers are “officers of the court” who are duty bound “to avoid conduct that undermines the integrity of the adjudicative process.” Pa.R.P.C. 3.3 exp. cmt. [2]. A lawyer’s lack of candor to the court does just that. The duty of candor applies with special force to prosecutors, who are not mere advocates but also ministers *511 of justice. *See* Pa.R.P.C. 3.8 exp. cmt. [1]. Moreover, as the United States Court of Appeals for the Third Circuit recently explained in another concession case involving the DAO, “[c]andor is especially critical when proceedings are non-adversarial.” *Wharton v. Superintendent Graterford SCI*, 95 F.4th 140, 149 (3d Cir. 2024).⁴⁴ “The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective” of justice. *United States v. Cronin*, 466 U.S. 648, 655, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), *quoting* *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). When only one side is presented to the court because the parties agree, for whatever reason, then “the court is entitled to expect an even greater degree of thoroughness and candor.” *Wharton*, 95 F.4th at 149, *quoting* *Me. Audubon Soc’y v. Purslow*, 907 F.2d 265, 268 (1st Cir. 1990).

⁴³ Justice Wecht forwards the novel argument that identifying the DAO’s ethical violations in this case “exceeds” the “boundaries of our King’s Bench power” because there has been no “complaint to the Office of Disciplinary Counsel” and “adjudicat[ion] before the Court’s Disciplinary Board[.]” Dissenting Opinion at — (Wecht, J.). Not so. Indeed, in cases not involving our “very high and transcendent” King’s Bench authority, *In re Bruno*, 101 A.3d at 669, *quoting* *Chimenti*, 507 A.2d at 81, this Court has repeatedly indicated it may independently find an attorney to have behaved unethically without first referring counsel for disciplinary proceedings. *See, e.g., Cnty. of Fulton v. Sec’y of Commonwealth*, — Pa. —, 292 A.3d 974, 1018 (2023) (finding attorney “guilty of relentlessly dilatory, obdurate, vexatious, and bad-faith conduct before this Court and the Special Master” and “refer[ring] [him] to the Pennsylvania Attorney Disciplinary Board for further examination of his conduct”); *Commonwealth v. VanDivner*, 603 Pa. 318, 983 A.2d 1199, 1202-03 (2009) (“[T]he only derogation of duty here involves counsel’s present misrepresentation of the record to this Court. The

blatant, multiple material misrepresentations of the record that undergird the instant Application are beyond distressing.... Counsel should be mindful of her ethical duties, including her duty of candor toward the tribunal, which prohibits an attorney from knowingly making a false statement of material fact.”); *Commonwealth v. D’Amato*, 514 Pa. 471, 526 A.2d 300, 314 (1987) (“We will not hesitate, in appropriate cases, to refer matters of improper trial conduct of either the defense attorney or the prosecutor to the disciplinary board where the record suggests that the Code of Professional Responsibility may have been transgressed.”) (emphasis omitted); *Commonwealth v. Stoyko*, 504 Pa. 455, 475 A.2d 714, 724 n.7 (1984) (“[T]his Court will scrutinize the record for bogus ‘ineffectiveness’ tactics and should not hesitate, if the facts and inferences so warrant, to refer the matter to the disciplinary board.”). This is certainly no less true in the King’s Bench context, where our powers are at their maximum. *See, e.g., In re Bruno*, 101 A.3d at 686-87 (“The Supreme Court’s exercise of its supervisory authority does not intrude upon the CJD’s [Court of Judicial Discipline’s] constitutional authority to mete out disciplinary sanctions upon jurists, nor does it preclude the CJD from imposing disciplinary sanctions upon a later Board-filed complaint. ... Properly understood, any such supervisory action is not punishment, but instead represents action undertaken to preserve the integrity of the judiciary.”). Justice Wecht’s apparent view that it is somehow procedurally improper for this Court to identify attorney ethical lapses in cases pending before it unless the violations have first been “litigated before the Disciplinary Board” runs headlong into, and is directly contradicted by, a litany of precedent doing just that. Dissenting Opinion at — n.53 (Wecht, J.).

⁴⁴ Much like this Court is “not obligated to follow the decisions of the Third Circuit on issues of federal law[.]” *Hall v. Pa. Bd. of Prob. & Parole*, 578 Pa. 245, 851 A.2d 859, 865 (2004), neither are we bound to follow its interpretations of our Rules of Professional Conduct and Rules of Disciplinary Enforcement, which govern the conduct and discipline of attorneys in this Commonwealth. *See, e.g., Beyers v. Richmond*, 594 Pa. 654, 937 A.2d 1082, 1090-91 (2007) (“this Court’s exclusive authority in this area is founded on the separation

of powers” and derives from the “constitutional authority to regulate the practice of law” found in Article V, §§ 10(a) and (c) of our state charter). Still, where appropriate, we may consider such decisions for their persuasive value. We find *Wharton*’s discussion of the duty of candor to be particularly persuasive and adopt it as noted.

Under the duty of candor, “[a] lawyer shall not knowingly ... make a false statement of material fact ... to a tribunal[.]” Pa.R.P.C. 3.3(a)(1). “Candor means more than just not lying[; i]t also means not saying things ‘that are literally true but actually misleading.’ ” *Wharton*, 95 F.4th at 148, quoting *In re Taylor*, 655 F.3d 274, 283 (3d Cir. 2011). The duty of candor also requires that “[i]n an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.” Pa.R.P.C. 3.3(d). A non-adversarial proceeding in which both sides agree to relief is equivalent to an *ex parte* proceeding because in both situations the court is denied the benefit of adversarial advocacy. *See Wharton*, 95 F.4th at 149 (“At *ex parte* hearings, ... the customary checks and balances do not pertain[.] ... The same is true of proceedings that risk being collusive, like class-action settlements or guilty-plea colloquies.”) (quotation marks and citation omitted).

Here, the DAO, bearing the prosecutor’s responsibility of a minister of justice, confessed error in a non-adversarial proceeding. The conceded case could hardly be more serious: a murder conviction potentially implicating Brown’s death sentence for a second murder. As this Court emphasized in *Brown*, “[t]he community ... has an interest in the[se] verdict[s], which may ... be disrupted only if a court finds legal error.” *Brown*, 196 A.3d at 146. Under these circumstances, the DAO’s fidelity to its duty of candor should have been at its zenith. Regrettably, it was anything but.

For one, the DAO did not disclose the March 2003 memorandum to the PCRA court, which recounted Vann’s March 21, 2003 statement to police in which he identified Lyons and Brown by name as being involved in the Rite Aid *512 murder.⁴⁵ The DAO does not dispute it withheld this memorandum from the PCRA court, but rather insists it “did not include this document in its pleadings because it was irrelevant to any of Brown’s claims.” DAO’s Brief at 52. According to the DAO, the PCRA court “was already presented with thousands of pages of transcripts, appendices, and briefs” and “including [this] unnecessary document[] would only have hindered [its] decision.” *Id.*

We find this rationale entirely unconvincing. The DAO itself referred to the March 2003 memorandum in the PCRA court. In its response to Brown's PCRA petition, in which it conceded he was entitled to a new trial, the DAO asserted "there is no record of Vann discussing Brown informally prior to March 2003." DAO's Response to Petition for Collateral Relief, 11/1/21, at ¶74 n.8. This assertion was incorrect. Vann discussed Brown in his unsigned February 20, 2003 statement to Detectives Santamala and Brooks. See Interview of Vann by Detectives Santamala and Brooks, 2/20/03, at 1 ("Vann believes that the male with Richardson [during the failed robbery of the Rite Aid the day before the murder] may have been Lavare [sic] Brown, but is not sure."). But more to the present point, as the DAO acknowledges, its allegation about Vann accusing Brown in March 2003 "referenc[ed] the Fisher memorandum[.]" DAO's Brief at 47. Having specifically relied on the March 2003 memorandum in its briefing to the PCRA court below, the DAO's present contention this document was actually wholly irrelevant to the court's decision rings hollow and smacks of *post hoc* rationalization.

⁴⁵ Brown also did not provide this document to the PCRA court.

Indeed, the March 2003 memorandum was unquestionably relevant to the proceedings below. "Evidence is relevant if ... it has any tendency to make a fact more or less probable than it would be without the evidence[.] and ... the fact is of consequence in determining the action." Pa.R.E. 401. Again, the March 2003 memorandum reflected Vann identified Lyons (not Paige) in March of 2003. Thus, this evidence tended to support the fact Vann did not identify Paige, which, if true, would of course foreclose Brown's claim that the Commonwealth violated *Brady* by suppressing this alleged identification. The fact Vann identified Lyons in March of 2003, in addition to identifying her in his July 2003 statement and at trial, supported the inference he had consistently identified Lyons and had never implicated Paige. His repeated positive identifications indicated consistency over time. To be sure, the March 2003 memorandum was not **dispositive** of Vann's failure to identify Paige. It is possible that, notwithstanding this second pretrial identification of Lyons, Vann nonetheless also accused Paige at some other unspecified time, to some unspecified member of law enforcement, who inexplicably failed to record the identification. But the notion that the March 2003 memorandum was not even **relevant** to this question — that it had no tendency whatsoever to make it any less probable that Vann identified Paige — is simply not tenable.⁴⁶

⁴⁶ Whether the plainly relevant March 2003 memorandum is a "smoking gun" is of no moment. Concurring and Dissenting Opinion at — (Donohue, J.). The DAO's duty of candor obliged it to disclose all relevant documents to the PCRA court, not just smoking guns. The ultimate evidentiary weight to be given to the memorandum was for the PCRA court to decide, but it never got the chance because the DAO kept it to itself.

The March 2003 memorandum was also pertinent to the materiality prong of ***513** Brown's *Brady* claim, *i.e.*, whether, assuming Vann identified Paige, the introduction of this evidence would have created a reasonable probability of acquittal. The DAO argued below that "[i]f the Paige accusation had been disclosed, it would have proved fertile ground for cross-examination" of Vann. DAO's Consolidated Response to Briefing by *Amici* and Petitioner, 2/21/23, at 14. Specifically, the DAO claimed Vann "first mentioned" Lyons and Brown "**after** investigators determined that Vann had lied about Paige's involvement in the Rite Aid robbery/homicide.... Had the defense been apprised that Vann had told investigators that a demonstrably innocent person had been involved in the crime and only implicated [Brown] after being caught in the lie, their attacks on his credibility would have been more convincing to the jury." *Id.* at 15 (emphasis in original).

The March 2003 memorandum flatly belied these arguments. It showed Vann in fact identified Lyons and Brown on March 21, 2003, months **before** Detective Baker confirmed in July of 2003 that Paige had an alibi for the Rite Aid murder. That is, the 2003 memorandum refuted the DAO theory "Vann's July 22, 2003, statement was sanitized by the police in that it omitted the aspects of his earlier account that detectives had recently confirmed were false." DAO's Brief at 50. Rather, as Family Members note, the memorandum showed that "in both March and July 2003, Vann identified all five participants in both the aborted robbery on January 18, 2003 and the subsequent robbery-murder the following day, January 19 — both those who had been 'checked out' and those who had not — stated their respective roles, and never on[c]e mentioned Kennisha Paige." Family Members' Reply Brief at 16. The memorandum would have poured salt on the "fertile ground" for impeachment envisioned by the DAO.

The DAO did not merely withhold from the PCRA court the clearly relevant March 2003 memorandum; it also actively opposed Family Members' efforts to gain access to this document and share it with the court. As the DAO

recounts, after Brown filed his second PCRA petition in 2020, “in accordance with the DAO’s open-file discovery policy, the [DAO] allowed Brown’s counsel access to the entirety of its file in this case, as well as the Philadelphia Police Department’s homicide investigation file[.]” DAO’s Brief at 17. Subsequently, Family Members repeatedly requested the same open-file access in the PCRA court. Initially, in their motion to intervene, Family Members argued they should be permitted “the opportunity to review the full, lengthy file[.]” Motion for Intervention by Victims’ Families, 1/24/22, at 10. Likewise, in their opening brief below, Family Members argued “the most meaningful and effective participation by the *amicus curiae* would be best served by access to the complete file in this case (the trial prosecution file and the police homicide file).” Opening Brief of *Amicus Curiae* Victims’ Family to Dismiss Brown’s Untimely and Meritless PCRA Claims, 9/9/22, at 67. Seemingly anticipating the DAO’s suppression of the March 2003 memorandum, Family Members contended granting them open-file discovery “would be the only way to make certain th[e PCRA court] was presented with **all** the relevant documentation in the case before making its determination — and not just those documents that the parties believe support their mission to vacate the conviction.” *Id.* at 67 (emphasis in original).

The DAO steadfastly opposed these requests, insisting Family Members were not entitled to the same access it had readily accorded the murderer of their loved ones. *See* DAO’s Response to Motion *514 for Intervention by Victim’s [sic] Families, 4/5/22, at 4 (“This cannot be permitted.”); DAO’s Pre-Hearing Brief, 9/9/22, at 9 (“*Amici* have again requested to review the prosecution’s records. They are not entitled to do so and identified no statutory authority in support of their request.”).⁴⁷ The DAO assured the PCRA court that allowing Family Members to review its files was “unnecessary” because “the DAO is the Commonwealth’s representative in this case and has already reviewed the prosecution file to ensure that any relevant evidence is provided for the [c]ourt’s review.” *Id.* at 9-10. However, as is now clear based on the diligent efforts of Family Members following the PCRA court’s grant of relief, the DAO did not live up to this representation. The DAO did not provide the PCRA court with the plainly relevant March 2003 memorandum, in breach of its duty of candor.

⁴⁷ The DAO acknowledges it “opposed” Family Members’ discovery requests but notes it would have “view[ed] the discovery matter differently if the OAG were asking to review the file,” and that it offered two former prosecutors who had worked on Brown’s case “an opportunity to review the entire file.” DAO’s Brief at 41-42.

The joint stipulations of fact submitted by the DAO and Brown likewise lacked candor to the court. Specifically, the stipulations alleged: “[o]n Tuesday, July 22, 2003, Ronald Vann provided a third statement to homicide investigators. That statement was the first in which he implicated [Brown] or Kiana Lyons in the Rite Aid robbery/homicide.” Joint Stipulations of Fact, 11/8/22, at ¶41. This joint stipulation was false in multiple respects. Vann provided more than three statements to the police about the Rite Aid murder. He gave at least five statements about the murder: two on January 21, 2003, and one each on February 20, 2003, March 21, 2003, and July 22, 2003. Moreover, his July 22, 2003 statement was not the first in which he implicated Brown and Lyons. Per the March 2003 memorandum suppressed by the DAO in the underlying post-conviction proceedings, Vann incriminated Brown and Lyons months before his July 22, 2003 statement, at the proffer session on March 21, 2003.

The DAO concedes the joint stipulation at issue, stipulation 41, “could have been more clearly drafted” but nonetheless insists it “would not have confused anyone acquainted with this case” because it “plainly referred” only to Vann’s “disclosed” statements. DAO’s Brief at 51-52. On the contrary, prior to this stipulation regarding Vann’s third statement, the joint stipulations described Vann’s first and second statements as follows:

28. Ronald Vann surrendered to the police on January 21, 2003. He was charged with the January 6, 2003 robberies of pizza delivery drivers Hector Toledo and Mohammad Lalhhab at MC103/01-5386 and MC103/01-5387, respectively.

29. The same day, Vann provided a statement regarding the November 25, 2002, shooting of Kareem Ali, Def. Ex. 10, and the January 19, 2003, Rite Aid robbery/homicide, Def. Ex. 15.

30. On February 20, 2003, Vann provided a second statement to the police regarding the Rite Aid robbery/homicide. Def. Ex. 9.

Joint Stipulations of Fact, 11/8/22, at ¶¶28-30. The citation to “Def. Ex. 15” in stipulation 29 refers to exhibit 15 in the appendix to Brown’s amended second PCRA petition. *See id.* at 1 n.2 (“Unless otherwise stated, all Exhibit numbers correspond to Exhibits in Petitioner’s Appendix to [his Amended Second PCRA Petition] filed on June 2[8], 2021.”). The statement included *515 as exhibit 15 in Brown’s appendix was Vann’s statement on January 21, 2003 at 11:15 a.m. *See* Amended Second PCRA Petition,

6/28/21, at Appendix, Exh. 15. In light of this context, this same statement — *i.e.*, the one Vann provided on January 21, 2003 at 11:15 a.m. — was the first of the three statements by Vann referenced in stipulation 41. This statement was **not** disclosed to Brown’s trial counsel, as the joint stipulations themselves alleged. *See* Joint Stipulations of Fact, 11/8/22, at ¶24a (“The following documents are contained in the Philadelphia Police Department’s H-File for M03-14 and were not produced to trial counsel or to [Brown’s] PCRA counsel during the initial PCRA proceedings: a. January 21, 2003, 11:15 a.m., statement of Ronald Vann with two different versions of page 4, Def. Ex. 15[.]”); *see also* Brown’s Response to Amicus’ Opening Brief, 2/6/23, at 36 (“The Commonwealth failed to reveal one of two statements Vann gave on January 21, 2003, this one in the morning at 11:15 a.m. Pet. Ex. 15, Stip ¶24.a.”); Brown’s Brief at 7 (“The DAO did not disclose this statement pre-trial or in initial PCRA proceedings.”). Thus, stipulation 41 did not refer only to “disclosed” statements, “plainly” or otherwise. DAO’s Brief at 51-52. The DAO’s belated gloss on this false stipulation is itself false.⁴⁸

⁴⁸ In any event, the stipulation, which in no way specified it was confined to “disclosed” statements, was, at a minimum, misleading. *See Wharton*, 95 F.4th at 148 (“Candor means ... not saying things that are ... actually misleading.”) (quotation marks and citation omitted).

The DAO’s pleadings in the PCRA court also included misrepresentations of fact. The DAO repeatedly represented to the PCRA court that the court had been provided with all relevant information necessary for it to make an informed decision. *See* DAO’s Response to Petition for Collateral Relief, 11/1/21, at ¶129 (“This Court is in a position to do what the prior PCRA court could not — review Brown’s claims in light of a complete record.”); DAO’s Pre-Hearing Brief, 9/9/22, at 9-10 (“[T]he DAO is the Commonwealth’s representative in this case and has already reviewed the prosecution file to ensure that any relevant evidence is provided for the [c]ourt’s review.”). In fact, the court did not have the decidedly relevant March 2003 memorandum. The DAO represented to the PCRA court that Vann’s statement on July 22, 2003 was the first in which he inculpated Lyons and Brown. *See* DAO’s Consolidated Response to Briefing by *Amici* and Petitioner, 2/21/23, at 15 (“They were first mentioned in Vann’s July 21 and 22, 2003, statements[.]”); *id.* (“[T]he statement he provided on July 22 ... implicated [Brown] and Lyons for the first time.”). The suppressed March 2003 memorandum proves this is not so; the memorandum reflects that Vann identified Brown and Lyons on March

21, 2003, months before his July statement. The DAO claimed Vann did not discuss Brown informally prior to March 2003. *See* DAO’s Response to Petition for Collateral Relief, 11/1/21, at ¶74 n.8 (“[T]here is no record of Vann discussing Brown informally prior to March 2003.”). Actually, Vann discussed Brown in his unsigned February 20, 2003 statement. *See* Interview of Vann by Detectives Santamala and Brooks, 2/20/03, at 1 (“Vann believes that the male with Richardson [during the failed robbery of the Rite Aid the day before the murder] may have been Lavare [sic] Brown, but is not sure.”). The DAO alleged below that Vann identified Brown and Lyons only “**after** investigators determined that Vann had lied about Paige’s involvement in the Rite Aid robbery/homicide.” DAO’s Consolidated Response to *516 Briefing by *Amici* and Petitioner, 2/21/23 at 15 (emphasis in original). To the contrary, Vann incriminated them on March 21, 2003, long before Detective Baker confirmed Paige’s alibi in July of 2003.

A concomitant to the lawyer’s duty of candor is the obligation to conduct a reasonable investigation before making representations to a court. As the Third Circuit has put it: “[a]s officers of the court, lawyers must not mislead courts. So before they state facts, they must investigate reasonably.” *Wharton*, 95 F.4th at 151. In particular, given the special ethical responsibilities of a prosecutor and the community interests at stake, a prosecutor’s concession to relief in a criminal case should only follow a reasonable investigation, as *amicus* supporting the DAO confirm. *See, e.g.,* Quattrone Center *Amicus* Brief at 6 (“To be sure, factual stipulations and agreement to relief by prosecutors should only be made based on an independent investigation. This position is consistent with the prosecutorial function, prosecutorial ethics, and community interests of justice.”).

Presently, the DAO’s response agreeing to PCRA relief alleged it was doing so “[a]fter reviewing Brown’s current pleadings,” and “a thorough, independent review **of the records in this case.**” DAO’s Response to Petition for Collateral Relief, 11/1/21, at ¶8 (emphasis added). In other words, the DAO limited its review to Brown’s pleadings and the documents in the prosecution and police files. Its “investigation” did not go beyond a cold review of the inconclusive paperwork in its own records. It never interviewed a single witness. There were a number of individuals who could have potentially provided relevant information regarding the central issue of whether Vann in fact identified Paige, including Detectives Baker, Judge, and Peters, and ADA Fisher.⁴⁹ Indeed, Detectives Judge and Peters subsequently provided pertinent declarations when they were contacted by the OAG. However, the DAO never bothered to contact any of these people who could

have brought needed clarity to the critical factual question before the PCRA court. This investigative omission was obvious and inexplicable, so much so that the court commented on it directly. *See* N.T. Hearing, 12/1/22, at 10 (“I don’t know why it’s so hard to ask one of the many people who would actually have personal knowledge as to whether or not this happened[.]”).

⁴⁹ Detective Baker died on July 20, 2022, over eight months **after** the DAO filed its response conceding relief on November 1, 2021. *See* Family Members’ Brief at 56 & n.12. Vann himself died in December 2018, prior to the filing of Brown’s second PCRA petition in this case, but after the DAO had confessed error in his separate capital case. The DAO did not attempt to interview Vann either.

Amicus assures us:

In our experience and studies, a post-conviction review by a prosecutor’s conviction review unit involves an exhaustive investigation of the case that may take years to complete. Witnesses are identified, located, and interviewed; forensic evidence is tested or retested with more modern techniques; experts are consulted.

Quattrone Center *Amicus* Brief at 12; *see also* Conviction Integrity Units’ *Amicus* Brief at 10 n.3 (arguing this Court “can rest assured” that review procedures of conviction integrity units “are generally viewed as incredibly thorough and effective”). But none of this happened here, leaving us not at all “assured” of the reliability of the DAO’s confession of error. Instead, four months after Brown raised his *Brady* claim, the DAO, following a selective, papers-only review, confessed error *517 and agreed to a new trial. What’s more, the DAO confidently declared this case to be “a stark example of what can go wrong when prosecutors cut corners and shirk their ethical and constitutional duties in order to obtain and defend convictions of defendants they believe are guilty.” DAO’s Response to Petition for Collateral Relief, 11/1/21, at 4. Yet the DAO itself cut corners and shirked its duties in conducting its post-conviction “investigation.” Although the paperwork alone did not come close to presenting a clear basis for relief, the DAO nonetheless restricted its review to the inscrutable documentary evidence. This was

neither reasonable nor adequate to ensure the PCRA court was not misled.

d. The DAO’s Conduct in Other Concession Cases

Unfortunately, the DAO’s problematic concession in this case may not be dismissed as a troubling one-off. Since January of 2018, the DAO has made at least 120 concessions of relief. *See* OAG’s Brief at 5-30; OAG’s Reply Brief at 10 n.3.⁵⁰ Importantly, the DAO’s concession program is not an exoneration program. The DAO does not concede relief only in cases in which it believes the defendant is actually innocent. As in this case, the DAO also concedes relief when it is convinced the defendant is guilty. *See* DAO’s Response to Petition for Collateral Relief, 11/1/21, at ¶138 (“Given the record as a whole, the Commonwealth believes Brown was likely involved in the robbery and homicide[.]”); *see also* DAO CONVICTION INTEGRITY UNIT REPORT, OVERTURNING CONVICTIONS — AND AN ERA (CIU Report), 6/15/21, at 26 (“Although these cases did not warrant exonerations, they involved excessive and unjust punishments. In each of these instances, the CIU was able to seek justice only because it identified unrelated errors that gave the CIU an avenue to ensure they were resentenced to a fair and appropriate term of imprisonment.”).⁵¹ Consequently, as a matter of both fact and law, every concession by the DAO leading to relief is not an “exoneration.” The DAO apparently “views a person as exonerated when new evidence, or newly discovered evidence, results in the dismissal of all charges against them.” CIU Report, 6/15/21, at 19. On the contrary, the common meaning of exoneration is “[t]he clearing of someone’s name after that person has been accused of blameworthy conduct or wrongdoing; vindication.” *Exoneration*, Black’s Law Dictionary (12th ed. 2024). The dismissal of charges does not vindicate an individual’s actual innocence. *See Commonwealth v. Wright*, 609 Pa. 22, 14 A.3d 798, 819 (2011) (Castille, C.J., concurring) (“A grant of a new trial, like a subsequent prosecutorial determination not to reprosecute, does not necessarily represent a determination of actual innocence.”).⁵²

⁵⁰ Justice Wecht criticizes us for “[t]aking the OAG’s word for it” when it comes to the number of conceded cases. Dissenting Opinion at — (Wecht, J.). But so does the DAO. The DAO, which is obviously in a position to know the tally, and would not hesitate to correct the OAG if it were mistaken, does not dispute the general accuracy of the OAG’s calculation. Rather, the DAO merely quibbles that the OAG’s count is

“maximalist” because “it combines both the work of all of the DAO’s post-conviction units, including its [CIU] and law division; it includes claims challenging sentences ... and claims challenging convictions; it counts a failure to object to or appeal from an unfavorable judicial decision as a ‘concession;’ and it double-counts cases in which a petitioner won relief on numerous grounds, and considers co-defendants who won relief on the same claim(s) as individual concessions.” DAO’s Brief at 67.

⁵¹ Available at tinyurl.com/CIUreport (last visited June 12, 2026).

⁵² The point here is not to suggest prosecutors have a “duty to defend a conviction against any legal challenge, regardless of merit, unless there is clear evidence of actual innocence.” Dissenting Opinion at — (Wecht, J.). They don’t. As we state repeatedly throughout this opinion, their duty runs in the opposite direction: prosecutors are duty-bound to concede relief when the record and law call for a confession of error. Rather, the point here is to refute the false impression fostered by the DAO and others that its concession program is somehow an exoneration program; it is not.

***518** While the DAO does not confine its concessions to cases of actual innocence, it does, for the most part, limit its concessions to the most serious cases. Overwhelmingly, the DAO’s concessions have been in murder cases. Of the 120 concessions identified, 110 were in murder cases. There has been a particular focus on capital cases. The OAG reports that in January of 2018, “there were 47 Philadelphia defendants serving capital sentences[,]” and the DAO has “conceded 35 of those sentences[,]” a “concession rate” of “75%.” OAG’s Reply Brief at 10-11. Most of the DAO’s concessions have led to convictions being overturned. See DAO’s Brief at 67 n.36 (“Of the 115 cases [listed in the OAG’s principal brief], 29 were concessions of penalty relief due to ineffective capital representation.”).⁵³ The DAO has retried only one of these cases. See OAG’s Brief at 44 n.19. In 45 of these cases, the DAO has subsequently had the charges *nolle prossed*, and in numerous others the defendant has pleaded guilty to lesser charges, often with a plea of *nolo contendere*. See *id.* at 15-30, 39-42; OAG’s Reply Brief at 10 n.3. Some defendants awarded relief under the DAO’s concession

program have gone on to receive significant, multi-million-dollar payments from the City of Philadelphia in settlement of civil lawsuits.⁵⁴ At least one has gone on to become a suspect in new violent crimes.⁵⁵

⁵³ We do not emphasize the DAO’s concentration on death and life sentences because it has “led to convictions being overturned.” Dissenting Opinion at — (Wecht, J.). Nor do we “insinuat[e] that prosecutors’ responsibilities to justice and due process depend upon the nature of the crime.” Concurring and Dissenting Opinion at — n.16 (Donohue, J.). The significance of the DAO’s focus on only the most serious sentences is that it suggests “the tail may be wagging the dog[,]” OAG’s Reply Brief at 11 — that the concessions in these cases have been motivated by a policy-based opposition to the severe penalties imposed rather than legal considerations.

⁵⁴ See <https://www.phila.gov/2020-12-31-city-and-chester-hollman-announce-settlement-of-wrongful-conviction> (last visited June 12, 2026).

⁵⁵ See <https://www.inquirer.com/crime/arkel-garcia-murder-charges-philip-nordo-20260106.html> (last visited June 12, 2026) (reporting that Arkel Garcia is suspected of committing two new murders and shooting a third victim following his release from prison).

In addition to the present case, the DAO’s concession program targeting murder cases has involved numerous other instances in which the DAO has conceded relief where none was warranted and engaged in other unreliable conduct. The following cases illustrate the gravity and extent of the problem.

i. Robert Wharton

Robert Wharton and a friend forced their way into the home of Bradley and Ferne Hart at knifepoint, murdered the couple, and turned off the heat in the house. The murdered couple had a seven-month-old daughter, Lisa Hart, who was left in the house to freeze but ultimately survived. A jury convicted Wharton of first-degree murder and sentenced him to death. Wharton filed a federal habeas

petition, which the district court denied. The Third Circuit vacated on the issue of whether trial counsel was ineffective for not investigating and presenting evidence of Wharton's positive adjustment to prison *519 as mitigating evidence at the penalty phase. The Third Circuit ordered an evidentiary hearing on this issue and specified it should cover not only the mitigation evidence that went unrepresented, but also the anti-mitigation evidence that the Commonwealth would have presented in rebuttal.

On remand, the DAO, which had steadfastly defended the death penalty against Wharton for decades, abruptly reversed course and conceded Wharton's habeas claim. The DAO represented to the district court that it had decided to concede relief following communications with the victims' family and careful review of the facts and the law. The district court did not accept the concession and appointed the OAG as *amicus*. The OAG disclosed to the district court information about Wharton's adjustment to prison the DAO had not, specifically that Wharton had attempted to escape from custody and been shot twice, and that he accumulated six prison misconducts. The OAG also provided the court with evidence that the DAO's communication with the victims' family had been minimal.

Following a multiday evidentiary hearing, in which the OAG participated, the district court held, contrary to the DAO's concession, that Wharton was not entitled to relief because he had not shown prejudice. In addition, the district court ruled the DAO violated its duty of candor to the court in two respects. First, the court held, the DAO's claim that it had carefully reviewed the facts and law lacked candor in light of its failure to investigate and disclose Wharton's attempted escape and prison infractions. Second, the court determined the DAO's representation that it had contacted the victims' family was misleading because the DAO had only contacted Bradley's brother and had not contacted Lisa or any other family members. Moreover, in its minimal contact with the brother, the DAO had not explained the situation clearly. The district court sanctioned the DAO by ordering DA Krasner to apologize in writing to four of the victims' family members, and by ordering the DAO to provide a full and balanced explanation of the facts when it seeks to concede federal habeas relief before the court in the future. The district court also referred the matter for disciplinary proceedings.⁵⁶

⁵⁶ A prosecutor in the DAO involved in *Wharton* was subsequently ordered disbarred from the bar of the United States District Court for the Eastern District of Pennsylvania based on his conduct in the case. His appeal of this order is pending in the Third Circuit. See Third Circuit, Dkt. No. 25-3264.

On appeal, the Third Circuit likewise concluded the DAO displayed a lack of candor to the district court. In this regard, the Third Circuit pointedly noted: "Courts rely on lawyers' honesty; lawyers may not mislead them. But the Philadelphia District Attorney's Office did just that." *Wharton*, 95 F.4th at 143. The court also held the DAO "failed to investigate reasonably to ensure that the claim [it conceded] was well-grounded in law and fact[.]" *Id.* at 150 (quotation marks and citation omitted). Accordingly, the federal Court of Appeals affirmed the imposition of sanctions. Separately, the Third Circuit affirmed the denial of habeas relief because it found "Wharton cannot show that he suffered prejudice from his counsel's failure to offer his prison records as mitigating evidence at sentencing." *Wharton*, 95 F.4th at 127.

ii. Kevin Johnson

Kevin Johnson and an accomplice shot and killed a drug dealer. The jury convicted him of first-degree murder, and he was sentenced to life imprisonment. The DAO *520 and Johnson filed in federal court a compromise and settlement agreement for habeas relief. Among other things, the agreement asserted the three eyewitnesses who testified against Johnson at trial — James Smith, Opal Nickson, and Elisha Bennett — were not credible because they "were high on cocaine and marijuana[.]" "[l]ighting conditions were poor[.]" and "[i]t was nighttime." *Johnson v. Kerestes*, 13-3197, ECF No. 77, Settlement Agreement, 10/14/21, at ¶41. The parties claimed that "[a]ccording to what the science has taught us about eyewitness identifications, the facts surrounding the identifications in this case (*i.e.* the time and circumstances of the offense) suggest there is a significant risk of mistaken identifications." *Id.* at ¶44. The DAO and Johnson did not advise the district court that the eyewitnesses were previously acquainted with Johnson, and one (Nickson) had actually seen him earlier that same day. See *Johnson v. Mahanoy*, 144 F.4th 178, 182 (3d Cir. 2025) ("Smith, Nickson, and Bennett had all seen Johnson before[.]"); *id.* at 195 ("Nickson ... testified that she knew it was Johnson because she 'remembered his face real good' from the neighborhood and had seen him earlier that day.") (citation omitted).⁵⁷ Additionally, per the agreement, the DAO agreed to waive all non-jurisdictional defenses, including exhaustion and procedural default,⁵⁸ and also agreed that Johnson was entitled to habeas relief.

⁵⁷ Prior familiarity supports the reliability of an

eyewitness identification. See *Commonwealth v. Ali*, 608 Pa. 71, 10 A.3d 282, 303 (2010).

⁵⁸ Under the exhaustion requirement, “a state prisoner must exhaust available state remedies before presenting his claim to a federal habeas court.” *Davila v. Davis*, 582 U.S. 521, 527, 137 S.Ct. 2058, 198 L.Ed.2d 603 (2017). A claim is procedurally defaulted, and therefore not subject to federal habeas review, if it was denied in state court “based on an adequate and independent state procedural rule.” *Id.*

The district court declined to automatically grant relief. Instead, it ordered briefing and, “because the proceeding was no longer adversarial,” invited the OAG to participate as *amicus*. *Id.* at 184 (quotation marks and citation to record omitted). The OAG “objected that the waivers amount[ed] to forum-shopping — an effort to force the federal court to address claims that should have been resolved in state court in a bid to lower a sentence that a new DA disliked” — and “thus argued that the federal [d]istrict [c]ourt had discretion to reject those waivers.” *Id.* (quotation marks and citation to record omitted). The OAG also contended Johnson did not deserve habeas relief on the merits. Importantly, the OAG provided the district court with evidence and information the DAO had not, including that each of the three eyewitnesses was previously acquainted with Johnson before they witnessed him murder the victim. See OAG’s Brief at 9 n.1. The district court agreed with the OAG that the court had the discretion to decline the waivers, rejected the procedural-default waiver, and denied the habeas petition.

The Third Circuit affirmed. In rejecting Johnson’s argument that the district court had no discretion to reject the DAO’s knowing and intentional waiver of the procedural-default bar, the Third Circuit explained:

This case does not involve a normal confession of error. The DA[O]’s office did not just confess error, making its office an adversary to Johnson in name only. It also sought to evade judicial review of its own confession by waiving its defenses. In other words, rather than set Johnson’s petition up for meaningful review, *521 it tried to

clear his pathway to habeas relief through the [s]ettlement [a]greement. Johnson’s case is one in a striking pattern of state-court murder convictions that have been overturned in recent years using similar alleged stratagems.... When prosecutors couple a confession of error with waiver stratagems like this one, in the face of opposition from an *amicus* that also represents the state’s interests (the Attorney General), courts have discretion to consider whether accepting the DA’s tactics would undermine their core reviewing function.

Johnson, 144 F.4th at 187.

iii. Lavar Brown

As discussed, the present case is actually the second one involving Brown in which the DAO has unreliably confessed error. Following his conviction for the Rite Aid murder, Brown was separately convicted of first-degree murder and sentenced to death for murdering a second victim, Crawford. Following the denial of his first PCRA petition, he appealed to this Court. In September of 2017, the DAO filed a lengthy brief opposing relief. Thereafter, however, following the commencement of DA Krasner’s administration in January of 2018, the DAO did a complete about-face. In April 2018, the DAO filed a joint motion with Brown confessing error with respect to his claim that his trial counsel was ineffective for not developing and presenting mitigating evidence at the penalty phase. This Court invited the OAG to participate as *amicus* and file a brief. In the DAO’s brief in support of its joint motion, it argued its sudden concession was not merely persuasive but binding on this Court. The DAO insisted that “when a district attorney makes a ‘reasoned fact and policy-based decision not to defend a particular conviction or sentence,’ this Court must immediately remand for imposition of the agreed-upon relief, as this Court may not ‘second-guess legitimate exercises of prosecutorial discretion.’ ” *Brown*, 196 A.3d at 143, *quoting* DAO’s Supplemental Brief at 3. The OAG countered that this Court cannot accept confessions of error by a prosecutor without conducting independent judicial merits review.

This Court rejected the DAO’s position as to the binding

nature of its concession, as well as its assessment of the merits of the conceded ineffectiveness issue. The Court held in no uncertain terms that “neither the parties, by agreement, nor this Court, absent a finding of legal error, have the power or ability to order that the jury’s verdict be commuted to a life sentence without parole.” *Id.* at 144. In other words, the Court declaimed, “a district attorney’s concession of error is not a substitute for independent judicial review.” *Id.* at 146. Moreover, the Court disagreed with the DAO’s assessment of the merits of the conceded mitigation ineffectiveness issue, and instead “conclude[d] that the PCRA court did not err” in denying this claim. *Id.* at 161.

iv. Derek Murchison

Derek Murchison was convicted of first-degree murder and sentenced to life imprisonment for the strangulation of Linda Willis. The evidence against him at trial included testimony demonstrating he was close to the victim’s house at the time of the murder; he acknowledged he was coming from the victim’s house and she had just put him out; he confessed the murder in detail to the mother of two of his children; he told another woman he had gotten into a fight, the man’s girlfriend jumped in, and he hit her with a stick; he had a black eye, scratches on his face, and a busted lip around the time of the murder; and he twice attempted to escape *522 after he was arrested. In addition to this testimonial evidence, the Commonwealth introduced DNA evidence from the crime scene, none of which implicated Murchison. Following direct appeal and one round of PCRA review, Murchison filed a second PCRA petition alleging the results of new DNA testing constituted after-discovered evidence entitling him to relief. Murchison sought a new trial, or, in the alternative, offered to plead *nolo contendere* to third-degree murder in exchange for a reduced sentence of 20 to 40 years’ imprisonment. In response, on July 9, 2019, the DAO filed a short letter with the PCRA court advising that, “after thoroughly reviewing the DNA testing results and the trial notes,” it would agree to PCRA relief and accept Murchison’s plea offer. *Commonwealth v. Murchison*, — Pa. —, 328 A.3d 5, 12 (2024), quoting *Commonwealth v. Murchison*, 294 A.3d 1251, 1258 (Pa. Super. 2023) (*en banc*). Hence, the DAO’s pre-concession investigation was limited to reviewing the new DNA test results and the trial transcript. It did not consult with any DNA experts, seek any additional DNA or other forensic testing, or interview any of the multiple witnesses presented at trial. The PCRA court dismissed the petition, and the Superior Court *en banc* affirmed.

On appeal to this Court, the DAO continued to agree with

Murchison that he was entitled to relief. On the other hand, the OAG, which we invited to participate as *amicus*, argued the new DNA evidence was not likely to compel a different jury verdict. This Court unanimously agreed with the OAG that the after-discovered DNA evidence did not demonstrate that a different outcome would be likely and accordingly affirmed the Superior Court’s order.

v. Dontez Perrin

Dontez Perrin was convicted of robbing a pizza delivery man. Lynwood Perry, who participated in the robbery, testified against him at trial. Perrin subsequently filed a post-sentence motion alleging that Curtis Brown, who was incarcerated with Perry, heard Perry state Perrin was not involved in the robbery. At an evidentiary hearing, Brown testified that Perry told him he lied about Perrin at trial. The trial court denied Perrin’s post-sentence motion. The Superior Court, however, reversed and remanded for the determination of whether Brown’s testimony was credible so as to justify a new trial. Because the original trial judge was no longer sitting, the Superior Court directed the trial court to hold a new evidentiary hearing so it would not have to rely on a cold record to make its credibility determination.

Following the remand, the DAO interviewed Brown and, based on this interview and the supposed scarcity of evidence supporting Perry’s account, concluded that if Brown were to testify at a new evidentiary hearing, he “would do so credibly.” *Commonwealth v. Perrin*, — Pa. —, 291 A.3d 337, 341 (2023) (emphasis and citation omitted). The DAO did not attempt to interview Perry. Thereafter, the DAO and Perrin filed a joint memorandum of law and stipulations of fact providing that if Brown were called to testify at another evidentiary hearing his testimony would be consistent with his testimony at the prior hearing and credible; there was no need for an evidentiary hearing to hear Brown’s testimony a second time; and Perrin was entitled to a new trial. The trial court did not accept the stipulations, and after the parties repeatedly refused to participate in the evidentiary hearing ordered by the Superior Court, denied Perrin’s motion.

On appeal to this Court, the DAO contended trial courts are required to accept all factual stipulations proposed by the parties. On the other hand, the OAG, *523 which the Court appointed as *amicus*, insisted trial courts retain the discretion to decline to accept factual stipulations regarding ultimate, dispositive issues of fact. This Court sided with the OAG. The Court held “the parties’ attempt to stipulate as to Brown’s credibility intruded into the trial

court's jurisdiction and prerogative" and, thus, the joint stipulations filed by the DAO and Perrin were "neither valid nor enforceable." *Perrin*, 291 A.3d at 346; *see also id.* ("Parties cannot require the court to accept any such stipulation as binding during post-verdict fact-finding.").

vi. Javier Artache

Javier Artache shot a man in the head and was convicted of first-degree murder. He filed a petition for a writ of habeas corpus in federal court claiming his trial counsel was ineffective for not objecting to the trial court's consideration of his post-arrest silence at his bench trial. The district court denied the petition. On appeal, the DAO "confess[ed] error" and "recommended that [the Third Circuit] grant the appeal." *Artache v. Superintendent SCI Forest*, No. 22-1500, 2023 WL 8468613 at *4 (3d Cir. 2023) (unpublished). "Because '[i]t is the uniform practice of [a federal court] to conduct its own examination of the record in all cases where the Federal Government or a State confesses that a conviction has been erroneously obtained,' [the Third Circuit] appointed [*a*]micus to present counterarguments." *Id.* (citation omitted). Based on these counterarguments, the Third Circuit affirmed the denial of habeas relief. In particular, the Third Circuit rejected an argument by the DAO in support of granting Artache relief as unsupported by the record. *See id.* at *5 ("[T]he Commonwealth did not cite to the trial record for this proposition. Nor could it have.").

vii. Rasean Malone

Rasean Malone filed an unsuccessful federal habeas petition challenging his second-degree murder conviction. Thereafter, he filed two motions to amend the petition. "Although the [DAO] had fought him throughout the initial petition, it had a change of heart and consented to the motions. It's not clear why." *Malone v. Smith*, 2023 WL 2351694 at *2 (E.D. Pa. 2023). "Because our adversarial system works best when someone presents both sides, [the district court] solicited the Pennsylvania District Attorneys' Association [PDAA] to file an *amicus* brief if it had a view different from ... Malone and his newfound friends at the [DAO]." *Id.* The PDAA did, in fact, have a different view, and "with the benefit" of its briefing, the district court denied Malone's motions. *Id.* at 2-3.⁵⁹

⁵⁹ Malone appealed to the Third Circuit. While this federal appeal was pending, however, the DAO

conceded PCRA relief in state court and entered into a negotiated guilty plea with Malone.

viii. Isiah Miceals

Isiah Miceals shot and killed Jose Ortiz when Ortiz intervened to try to prevent Miceals from robbing a woman. "Miceals was unconditionally identified by an eyewitness multiple times, he matched the description of the person on the surveillance footage [depicting a man riding his bike away from the crime scene], and he voluntarily confessed to the murder." *Commonwealth v. Miceals*, 335 A.3d 13, 25 (Pa. Super. 2025). Based on this evidence, Miceals was convicted of second-degree murder and related offenses. Years later, he filed a second, untimely PCRA petition alleging a *Brady* violation. The DAO filed a response conceding the violation and asserting Miceals was entitled to a new trial. At a scheduled evidentiary *524 hearing on the petition, Miceals insisted he was entitled to relief based on the agreement of the DAO. The PCRA court responded "that it need not accept any agreement between Miceals and the DAO and that Miceals had the burden to establish that his [p]etition was timely." *Id.* at 19. Nonetheless, both Miceals and the DAO refused to present any evidence at the hearing.⁶⁰ Accordingly, the PCRA court dismissed the petition as untimely. On appeal, the Superior Court invited the OAG to participate as *amicus*, and it filed a brief in support of the PCRA court's order. The Superior Court concluded Miceals's petition was untimely and therefore "the PCRA court lacked jurisdiction to consider the [p]etition and jurisdiction could not be conferred on the PCRA court through an agreement with the DAO." *Id.* at 25.

⁶⁰ The DAO did, however, "attempt to add to the factual record" on appeal, which request was denied because the DAO " 'elected to present no evidence at the PCRA hearing when this evidence could have been entered into the record.' " *Id.* at 19 n.7, quoting Order, 3/26/25 (*per curiam*).

ix. Salvatore Chimenti

In 1982, Salvatore Chimenti shot Andrew Tucker seven times, killing him. He was subsequently convicted of first-degree murder. Then, in 1984, Chimenti and the

Commonwealth reached an agreement providing that if Chimenti cooperated in the Commonwealth's investigation of his trial counsel, his conviction would be vacated and he would plead guilty to murder generally, with a certification that the degree of guilt would rise no higher than third degree. The trial court sentenced Chimenti to a mandatory term of life imprisonment. Chimenti and the Commonwealth filed a joint petition with the President Judge of the Superior Court to effectuate their agreement. The President Judge granted the petition and ordered the case remanded to the trial court "for special assignment to a judge who shall, on application of the parties vacate appellant's sentence and ... accept [Chimenti's] negotiated guilty plea." *Commonwealth v. Chimenti*, 510 Pa. 149, 507 A.2d 79, 80 (1986). This Court, however, assumed plenary jurisdiction and vacated the President Judge's order:

This order reduced the prospective hearing judge to a "rubber stamp," empowered only to perform a ministerial function. Neither [the President Judge], nor the Superior Court at large, possessed such power. The order in question was also problematic on another score in that [the President Judge] effectively abrogated a jury verdict without any semblance of a record. We can in no way condone such an action[.]

Id. at 83.

Thereafter, on direct appeal, initial PCRA review, and habeas review, the Commonwealth opposed relief. However, on February 23, 2018, the DAO filed a letter in the trial court providing:

The history of this case has revealed that [Chimenti's] good faith reliance on a plea agreement, combined with this office's ongoing interference in effectuating the terms of that agreement, has resulted in an inability to effectively litigate and prove a violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States.

In order to remedy the constitutional violation recognized and agreed to by this office in 1984, we will no longer oppose the original plea agreement offered and entered into by The Honorable Edward Rendell when he was District Attorney. Accordingly, we agree *525

[Chimenti's] conviction and sentence should be vacated, a new trial granted and, pursuant to the terms of the 1984 plea agreement, he shall then enter a plea to murder (not to rise higher than third degree) and [p]ossession of an [i]nstrument of [c]rime. In turn, the Commonwealth will recommend that your client be sentenced to the maximum term of imprisonment legally allowed for those crimes at the time of the offense — 12.5 to 25 years.

Commonwealth v. Chimenti, 218 A.3d 963, 972 (Pa. Super. 2019), quoting DAO's Letter, 2/23/18. Three days later, Chimenti filed a serial PCRA petition, which he claimed was timely under the governmental interference exception to the PCRA's one-year filing deadline. See 42 Pa.C.S. § 9545(b)(1)(ii). Specifically, he argued the Commonwealth interfered with his ability to effectively litigate his claims by opposing relief prior to the DAO's February 23, 2018 letter, in contravention of the 1984 post-verdict agreement. The DAO filed an answer advocating for relief. The PCRA court dismissed the petition as untimely.

The Superior Court affirmed. It held "[t]he Commonwealth did not, as [Chimenti] contends, renege on its plea bargain negotiations, but rather zealously sought to uphold the plea in the Pennsylvania Supreme Court." *Chimenti*, 218 A.3d at 975, quoting *Commonwealth v. Chimenti*, 362 Pa. Super. 350, 524 A.2d 913, 919 n.2 (1987). Moreover, the Superior Court "reject[ed] [Chimenti's] claim of governmental interference that the Commonwealth should have abided by an alleged agreement which was voided by the Supreme Court of Pennsylvania." *Id.* The panel continued: "notwithstanding the fact the current District Attorney's Office 'agrees' its predecessors breached the agreement, and thus [Chimenti] is entitled to PCRA relief, we reject such an argument as it is beyond the power of the District Attorney. To adopt the position of the current District Attorney on the so-called plea agreement would allow the District Attorney to usurp the power of the judiciary, including that of our Supreme Court." *Id.* at 975-76. This Court denied allowance of appeal.⁶¹

⁶¹ Thereafter, Chimenti filed yet another PCRA petition, and the DAO again conceded relief. On November 16, 2023, the PCRA court vacated his sentence. In addition, he pleaded guilty to third-degree murder, the court resentenced him, and he was immediately released from custody.

x. Antonio Martinez

Antonio Martinez was convicted of first-degree murder and voluntary manslaughter for the shooting deaths of Hector and Luis Camacho. In 2019, he filed a serial petition for PCRA relief in state court. While that petition was still pending, he also filed a petition for habeas relief in federal court. In its response to the federal filing, the DAO agreed there had been *Brady* violations and that Martinez was entitled to relief. The DAO additionally advised the district court it was waiving all exhaustion and procedural default defenses because the district court was better equipped to address Martinez's claims in an expedient fashion, Martinez was represented by counsel in federal court but not in state court, the state court judge was not acquainted with the case, and the state courts were essentially closed due to the pandemic.

The DAO asserted Martinez's federal habeas petition necessitated immediate attention. Relying on these representations, the district court expended significant time and resources reviewing the merits of the petition and scheduled the matter for an evidentiary hearing. "In discussing the evidence to be presented at that hearing, [the *526 court] asked counsel whether they had interviewed either the [trial prosecutor] or the assigned detectives regarding the withheld *Brady* material and learned that neither counsel had done so." *Martinez v. DelBalso*, 19-5606, ECF No. 52, Order, 12/1/20, at 4. The court, on the other hand, viewed the trial prosecutor's testimony at the hearing "as indispensable information that any responsible prosecutor and/or judge would want to carefully consider before agreeing to overturn a double homicide state court conviction." *Martinez v. DelBalso*, 2021 WL 510276 at *1 (E.D. Pa. Feb. 11, 2021). In addition to thoroughly reviewing the matter and scheduling an evidentiary hearing at which the trial prosecutor was to testify, the court also took the highly unusual step of granting bail to Martinez pending the resolution of his federal habeas petition. However, the court was compelled to vacate this order two days later when the DAO informed the court that Martinez was wanted for homicide in Puerto Rico.⁶²

⁶² Information was subsequently received from Puerto Rico that it had no "present intent to prosecute" Martinez. *Id.* at *1 n.3 (citation omitted).

On October 23, 2020, a little over two weeks before the scheduled evidentiary hearing in federal district court at which the trial prosecutor was poised to testify, the federal proceedings were mooted by developments in state court which took the federal court by complete surprise. "[U]nbeknownst" to the district court, but with the prior agreement of the DAO, the state PCRA court granted

Martinez's PCRA petition, his judgment of sentence was vacated, the DAO dismissed the charges against him, and he was immediately released from prison. *Id.* at *1. Accordingly, that same day, the DAO and Martinez filed a stipulation of dismissal in federal court.

The district court concluded the DAO violated its duty of candor to the court by failing to advise it that Martinez's case was being fully and simultaneously litigated in state court:

[W]hat occurred here is not ... analogous to a civil or criminal matter that morphed from a trial to a settlement or plea agreement. Nor is it a lapse of "courtesy" on the part of the District Attorney. In the matter before me, lawyers from a very public office, held to the highest standard of candor to the court, either knowingly or through a lack of understanding of basic federal habeas principles, engaged in the clearly discouraged process of parallel state and federal post-conviction litigation and did so without advising the federal court that this was occurring. Last minute settlements, pleas, and amended pleadings are allowable by the law and are sometimes even encouraged. But ongoing, simultaneous state PCRA proceedings, in the midst of federal habeas litigation, is strongly disfavored....

Given the undeniable importance of state court exhaustion in habeas matters, and after affirmatively advising that it sought to litigate the claims raised in Petitioner's PCRA petition in federal, not state court, the District Attorney should have advised me well before October 23 that it was fully engaged in parallel state court litigation.

Id. at *12; *see also id.* ("In short, a fair reading of the record reflects that state court litigation, which commenced at least as far back as March 26, 2019, began proceeding simultaneously with the federal court habeas case, and triggered counsel's duty of candor obligation, in July 2020, when the state court began issuing [o]rders and the CIU Supervisor contacted the state court judge seeking to avoid dismissal of the PCRA petition."); *id.* at *9 ("Having *527 waived exhaustion and having provided specific reasons for doing [so], that were based upon the extraordinary needs of this particular case, candor required that the CIU Supervisor notify the federal court at once if and when, in her view, those extraordinary needs no longer existed."). Although the district court did not impose sanctions, it "admonish[ed]" the DAO in an opinion and directed that, "[g]oing forward, in habeas matters assigned to [its] docket in which the [DAO] chooses to affirmatively waive state court exhaustion, status reports will be required regarding any state court litigation." *Id.* at *13.

xi. Dontia Patterson

Dontia Patterson shot and killed Antwine Jackson. A jury convicted him of first-degree murder, and he was sentenced to a mandatory term of life imprisonment. On February 16, 2018, the PCRA court vacated the judgment of sentence and ordered a new trial. Three months later, on May 15, 2018, the DAO filed a motion to enter *nolle prosequi* requesting dismissal of the charges against Patterson. The motion was signed by the then-Supervisor of the DAO's Homicide Unit. Among other things, the motion alleged Patterson was "probably innocent," criticized the case against him as "illogical" because he and the victim were "friends," and contended his conviction was "an egregious example of police and prosecutorial misconduct." N.T. *In re Bochetto*, 2/26/25, at 36-37, 112-13. The next day, the trial court granted the DAO's motion and *nolle prossed* the charges.

Subsequently, the trial prosecutor in Patterson's case testified in RTKL proceedings related to the case. She testified the DAO's *nolle prosequi* motion included numerous false statements, including that an eyewitness did not identify Patterson from a surveillance video as testified to at trial, the two eyewitnesses did not previously know Patterson, he and Jackson were friends, and Patterson was distraught following the killing. See N.T. *In re Bochetto*, 2/21/25, at 45-47, 57-60; see also *id.* at 60 ("We will be here for a long time if we go through all of the issues with this motion. I mean, it is like nobody read the file."); *id.* at 61 (describing motion as "load of baloney"). The former Supervisor of Homicide who signed the motion, thereby verifying it was true and correct, testified he did not know if there were false statements in the motion, he did "virtually nothing" to assure himself of the accuracy of the motion, he did not read it before he signed it, and he did not agree the trial prosecutor engaged in misconduct. See N.T. *In re Bochetto*, 2/26/25, 148-49, 158, 162, 174. He acknowledged it was a "reckless act" and a "mistake" for him to sign "something that [he] did not review[.]" and he "shouldn't have done it." *Id.* at 172, 176. The court presiding over the RTKL action concluded the DAO's dismissal motion in the Patterson case "most certainly" reflected "a distinct lack of candor and provision of salient information" to the court which granted it. N.T. *In re Bochetto*, 3/13/25, at 6. In addition, the court determined:

the information that was provided
[to the court] in the motion for *nol*
pros blaming prior prosecutors had

no good faith basis. And there were
... factors that were recited that were
blatantly wrong. Inculpatory
information was omitted. And what
was presented to [the court] defies
all logical understanding. A
prosecutor has a duty well and
above a defendant's counsel. That
duty extends to justice for everyone,
including the defendant, the victims,
families of the respective persons,
the community at large. The
responsibility of a prosecutor is
reiterated within the Rules of ...
*528 Professional Conduct. I invite
everyone to read it again.

Id. at 6-7.⁶³

⁶³ Justice Donohue alleges "the [m]ajority simply accepts the OAG's summary of" these other problematic concession cases. Concurring and Dissenting Opinion at — n.5 (Donohue, J.). In fact, as is evident from the foregoing discussion of these matters, we have substantially relied on the opinions and judgments of the courts who presided over these cases, courts which Justice Donohue praises for having "effectively engaged in independent review[.]" *Id.* at —. The judicial opinions upon which we rely, seven of which were published, confirm as a matter of law that the DAO unreliably conceded relief or otherwise committed misconduct in these cases.

* * *

These cases, and the present one, likely represent only a fraction of the DAO's problematic concessions since January of 2018. For the most part, the DAO's many concessions have not been subjected to any sort of adversarial testing. Hearing from both sides is generally the best means to expose problems and ensure a reliable and just outcome; this is the "very premise of our adversary system of criminal justice." *Cronic*, 466 U.S. at 655, 104 S.Ct. 2039; *Herring*, 422 U.S. at 862, 95 S.Ct. 2550. Also, uncontested concessions generally produce scant records, which can make it difficult or impossible for courts to assess their reliability. The incidence of court findings of unwarranted concessions and other improprieties would almost certainly be higher, perhaps significantly so, if more of the concessions had been tested by opposing advocacy. However, the courts tasked with adjudicating the numerous

cases in which the DAO has conceded relief have generally lacked the vetting and truth-determining benefits of adversarial proceedings. Regardless, the problems evident in the present case and the others discussed above provide ample cause for concern.

To recap, in at least ten cases the DAO has been held by state and federal courts to have wrongly conceded relief where none was warranted under the law: this case, *Brown*, *Wharton*, *Johnson*, *Murchison*, *Perrin*, *Artache*, *Malone*, *Mickeals*, and *Chimenti*.⁶⁴ In addition, the DAO has violated its duty of candor to the court in a number of concession cases. Here, the DAO filed joint stipulations of fact falsely claiming Brown's July 22, 2003 police statement was the first in which Vann implicated Brown or Lyons, and it also submitted pleadings repeating this same falsehood as well as several others. In *Wharton*, the DAO lacked candor when it falsely claimed it had carefully reviewed the facts and the law and misleadingly *529 represented it had contacted the victims' family. The DAO in *Martinez* violated its duty of candor by failing to disclose to the federal court the parallel post-conviction proceedings occurring simultaneously in state court. And in *Patterson*, the DAO's motion to dismiss the charges included information that was blatantly wrong.

⁶⁴ Justice Wecht insists these cases "amply demonstrate[] that our criminal justice system is operating exactly as it should ... and requires no intervention or recalibration." Dissenting Opinion at — (Wecht, J.). Justice Donohue agrees. See Concurring and Dissenting Opinion at — (Donohue, J.) ("[F]rom my reading, these examples demonstrate that these courts effectively engaged in independent review in conducting concession of error proceedings."). This argument unreasonably assumes the courts are presently able to recognize each and every one of the DAO's unreliable concessions. But this is almost certainly not the case. Courts are substantially reliant on the arguments, representations, and record made by the parties. They cannot go beyond the record, conduct their own investigations, contact fact witnesses, or retain their own experts. Given these limitations, it seems to us all but inevitable that unreliable confessions of error go unidentified and relief is granted where it is not warranted. The present case is illustrative. But for this Court's extraordinary step of granting King's Bench jurisdiction, the unreliable concession here would never have been exposed. A criminal justice system in which the courts are able to catch only a fraction of the DAO's questionable confessions of error is not one "operating exactly as it should."

The DAO has also time and again withheld relevant evidence from the courts. Presently, the DAO withheld the March 2003 memorandum.⁶⁵ The DAO in *Wharton* did not disclose Wharton's escape attempt or prison misconducts. In *Johnson*, the DAO did not inform the court that the eyewitnesses were previously acquainted with Johnson. In *Patterson*, the DAO omitted inculpatory information from its motion for a *nolle prosequi*.

⁶⁵ This fact alone disproves Justice Donohue's contention the existing "tools at a [PCRA] court's disposal" are adequate to "ensure the effective administration of justice." Concurring and Dissenting Opinion at — (Donohue, J.).

In multiple cases, the DAO has failed to conduct a reasonable investigation before conceding. *Sub judice*, the DAO limited its investigation to the pleadings and its own records, declining to interview even one witness. In *Wharton*, notwithstanding its false claim of a careful review, the DAO did not even do simple checks of Wharton's criminal and prison records, which would have revealed his escape attempt and prison misconducts. In *Perrin*, the DAO did not attempt to interview the witness that the defense claimed had recanted. In *Murchison*, the DAO simply reviewed the new DNA test results and the trial transcript, and did not consult with any DNA experts, pursue any additional testing, or interview any witnesses.

Further, the DAO has repeatedly sought to avoid evidentiary hearings in cases where it has conceded. For instance, the DAO opposed an evidentiary hearing in this case. In *Wharton*, the DAO sought to forestall the evidentiary hearing ordered by the Third Circuit by filing its misleading concession notice on remand to the district court. In *Perrin*, following a remand by the Superior Court for an evidentiary hearing, the DAO filed joint stipulations insisting a hearing was unnecessary, and when the stipulations were rejected, refused to participate in the ordered hearing. The DAO in *Mickeals* refused to present any evidence at the evidentiary hearing ordered by the PCRA court. In *Martinez*, the DAO successfully preempted an evidentiary hearing in federal court by arranging, without the federal court's knowledge, to have relief granted in state court. The DAO's recurring reluctance to present evidence in open court casts serious doubt on the dependability of its concessions. The DAO's aversion to evidentiary hearings raises the question of why, if the defendant's entitlement to relief is truly so clear as to warrant concession, the DAO would not want the evidence supporting this result publicly aired.

To be clear, what is concerning about the DAO's concessions is not that it is conceding relief, or even that it is conceding relief in a great many cases. Although the list of DAO concessions is certainly long — not to mention disproportionately weighted to the most serious crimes — the “number alone” is not what draws concern. Dissenting Opinion at — n.55, — (Wecht, J.). Again, as a minister of justice and not simply an advocate, the DAO must concede relief when the facts and law call for it. *See* Pa.R.P.C. 3.8 exp. cmt. [1]. Rather, what concerns us is whether the DAO's concessions are reliable, that is, whether they are actually called for under the facts and the law. Because if a concession is not reliable — such as when it is *530 made for purely personal, political, ideological, policy, or other non-legal reasons — there is a grave risk it will result in the erroneous grant of relief, which is precisely what happened in this case.

More unreliable concessions and erroneous grants of relief seem certain to follow. We are informed “more than 1,000 cases still await review” by the CIU. Professors' *Amici* Brief at 15. And this is on top of the thousands of cases handled by the DAO's Law Division, which also routinely concedes cases. *See* DAO's Brief at 67. The DAO does not acknowledge any problem or need to reform its practices. As it has in the past when its concessions have been called into question by state and federal courts alike, the DAO has simply “doubled down,” *Wharton*, 95 F.4th at 150, insisting, despite considerable evidence and myriad court findings to the contrary, that there is nothing wrong. *See* DAO's Brief at 57 (“What is actually occurring is a painful but necessary course correction to ensure the office is complying with its prosecutorial duties[.]”); *id.* at 76 (“This case is what it looks like when the system works.”). In reality, there have been serious problems with the DAO's concessions and its conduct, both in this case and a number of others,⁶⁶ and the DAO's steadfast refusal to recognize as much contributes to the likelihood they will continue.⁶⁷

⁶⁶ Justice Donohue claims we have “equate[d] advancing arguments that are ultimately rejected [by a court] as misconduct by [the] DAO.” Concurring and Dissenting Opinion at — n.6 (Donohue, J.). A fair reading of this opinion plainly demonstrates otherwise. As detailed at length above, the misconduct that concerns us is not that the DAO is “acting as an advocate by presenting arguments ... to advance unresolved legal propositions[.]” *id.*, but that it is failing to conduct reasonable investigations before conceding cases, evading required evidentiary hearings, failing to show candor to courts, and withholding relevant information and evidence from courts.

⁶⁷ Throughout this opinion, we have elected to refer to “the DAO” generally when speaking of the conduct of its attorneys in the cases discussed. This was intentional. Although this Court is “responsible for the Rules of Professional Conduct that govern lawyers and attorney discipline[.]” *In re Bruno*, 101 A.3d at 665, *citing, e.g.,* PA. CONST. art. V, § 10(c), we did not exercise King's Bench jurisdiction to determine in the first instance whether particular attorneys involved may have violated the Rules of Professional Conduct; such is the purview of the Pennsylvania Attorney Disciplinary Board. Our primary concern here is with the demonstrated pattern of misconduct by the DAO as an entity under the leadership of DA Krasner.

e. Remedial Measures

Having identified the serious problems posed by the DAO's aggressive and unreliable concession program, we turn to remedies. “[O]ur Court possesses broad authority to craft meaningful remedies when required.” *League of Women Voters v. Commonwealth*, 645 Pa. 1, 178 A.3d 737, 822 (2018), *citing, e.g.,* PA. CONST. art. V, §§ 1, 2, 10. Significantly, we do not believe existing procedures for vetting the DAO's concessions are adequate to ensure correct and just outcomes. The DAO argues that “[p]ursuant to rules already in effect, common pleas courts have the discretion to appoint *amici curiae* where they believe *amicus* participation would be helpful[.]” DAO's Brief at 74. True enough, but the role of *amicus* is quite limited, as the DAO itself acknowledges. *See id.* at 83. “[A]n *amicus curiae* is not a party[.]” *Shirley v. Pa. Legislative Reference Bureau*, — Pa. —, 318 A.3d 832, 857 (2024), *quoting Commonwealth v. Cotto*, 562 Pa. 32, 753 A.2d 217, 224 n.6 (2000); *see United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991) (*amicus* “has never been recognized, elevated to, or accorded the full litigating status of a named party *531 or a real party in interest”). Rather, the participation of *amicus* is generally confined “to brief[ing] and argu[ing] as a friend of the court.” *Id.* Moreover, *amicus* “cannot raise issues not set forth by the parties.” *Banfield v. Cortes*, 631 Pa. 229, 110 A.3d 155, 172, n.14 (2015); *see Commonwealth v. Tharp*, 562 Pa. 231, 754 A.2d 1251, 1253 n.5 (2000) (“An *amicus curiae* is not a party and cannot raise issues that have not

been raised or preserved by the parties.”). Also, lacking party status, *amicus* has no right to appeal. *See* Pa.R.A.P. 501 (providing that “**any party** who is aggrieved by an appealable order ... may appeal therefrom”) (emphasis added); *In re Barnes Found.*, 582 Pa. 370, 871 A.2d 792, 794 (2005) (“[T]he general rule is that only parties may appeal a decision.”).

Given these constraints, *amicus* generally cannot conduct discovery, present its own evidence, challenge evidence adduced by the parties, raise new issues, participate in an evidentiary hearing, or seek appellate review. In other words, *amicus* is not sufficient to develop the fulsome record and engage in the robust adversarial testing crucial to a correct result. Take the PCRA proceedings in this case for instance. While Family Members sought to intervene to litigate the merits of Brown’s PCRA petition, they were granted only *amici* status and were accordingly limited to briefing and arguing the case, with no access to the DAO’s files. Despite their diligence in this circumscribed role, material evidence was nonetheless withheld from the court, the court accepted a false stipulation of fact, a required evidentiary hearing was not held, and relief was granted where none was warranted. It took the extraordinary step of this Court exercising its rarely invoked King’s Bench jurisdiction for the multiple problems with the PCRA proceedings to be fully revealed, and for the court’s erroneous award of a new trial to be undone. As the present case clearly exemplifies, when it comes to the DAO’s problematic concession program, the availability of *amicus* participation is inadequate to safeguard against erroneous grants of relief; more is required.

Under our state constitution, this Court has “the power to prescribe general rules governing practice, procedure and the conduct of all courts ... if such rules are consistent with th[e c]onstitution and neither abridge, enlarge nor modify the substantive rights of any litigant[.]” PA. CONST. art. V, § 10(c). The Court generally exercises its constitutional rulemaking authority through the rules committee process. This process certainly has “much to recommend” it. *Commonwealth v. Bradley*, 669 Pa. 107, 261 A.3d 381, 407 (2021) (Dougherty, J., concurring). As this author observed in *Bradley*:

Members of the rules committees are selected by this Court for their good judgment and expertise. They generally have varied backgrounds and bring diverse viewpoints and perspectives to their work. The committees operate by consultation and consensus. They receive outside

input through the public notice and comment process. They are empowered to empanel special subcommittees to focus on specific issues.

Id. However, referral to the appropriate rules committee(s) can be quite time consuming, and this Court has declined to follow this path where “we ought not to countenance any further delay.” *Id.* at 405 (majority opinion); *see Commonwealth v. Holmes*, 621 Pa. 595, 79 A.3d 562, 586 (2013) (Saylor, J., concurring) (endorsing “rulemaking” in “adjudicatory setting” “given the need for prompt clarification”); Pa.R.J.A. 103(a)(3) (“A proposed rule or amendment may be promulgated even though it has not been previously distributed *532 [by the Rules Committee] and published [in the Pennsylvania Bulletin] ..., where exigent circumstances require the immediate adoption of the proposal; or where the proposed amendment is of a typographical or perfunctory nature; or where in the discretion of the Supreme Court such action is otherwise required in the interests of justice or efficient administration.”). So too here we believe the pressing concerns raised by the DAO’s faulty concession program necessitate prompt action by this Court. *See In re Bruno*, 101 A.3d at 672 (“[T]he power of King’s Bench allow[s] the Court to innovate a swift process and remedy appropriate to the exigencies of the event.”). As we have previously, “we do so ‘with an eye towards reasonable fairness and the orderly administration of justice,’ ” and “subject to the possibility of future refinements, or the adoption of other alternatives through the rulemaking process.” *Bradley*, 261 A.3d at 383 n.2, *quoting Holmes*, 79 A.3d at 586 (Saylor, J., concurring).

Pursuant to this Court’s constitutional procedural rulemaking authority, we now hold that in any PCRA case in which the DAO concedes relief, the PCRA court, before ruling on the concession, shall afford the OAG notice and an opportunity to intervene. Importantly, if the OAG elects to intervene in the case, it will not “replace” or supersede the DAO; the DAO shall remain in the case. Dissenting Opinion at — (Wecht, J.). The OAG will merely become an additional, full party in the case providing its own perspective on the concession. The OAG may agree with the defendant and the DAO that relief is warranted, or it may not, but in either case its independent assessment and participation will foster reliable proceedings and correct results.⁶⁸

⁶⁸ In addition to third-party participation, the OAG requests access to the full files of the DAO, mandatory evidentiary hearings before relief is

granted based on claims of fact, and entitlement to appeal as of right. *See* OAG’s Brief at 47-50. The OAG can request discovery and evidentiary hearings pursuant to the existing rules governing these procedures. *See* Pa.R.Crim.P. 902(E), 907, 908, and 909(B). As a full party, the OAG may appeal the PCRA court’s decision as of right. *See* Pa.R.A.P. 501; *Barnes*, 871 A.2d at 794.

Our holding applies only in Philadelphia County, but that is because that is where the problem is.⁶⁹ It is only in Philadelphia County that there has been a pronounced, documented pattern of highly problematic prosecutorial concessions. This Court has “often undertaken flexible measures deriving from our broad power at King’s Bench” to render county-specific relief when warranted. *In re Bruno*, 101 A.3d at 671; *see id.* (“Perhaps the most notable examples of the flexibility necessary for this Court to ensure the integrity of the judiciary arose in our response to the revelation of criminal charges involving two trial judges in Luzerne County,” where we ordered a review of “all Luzerne County juvenile court adjudications and dispositions that had been affected by [the judges’] criminal actions” so we could take “appropriate remedial actions to rectify the situation as fairly and swiftly as possible.”). Moreover, the Court’s broad rulemaking power encompasses the promulgation of rules applicable to a specific county. For instance, the rules in Chapter 10 of the Pennsylvania Rules of Criminal Procedure apply only to proceedings in Philadelphia County. *See* Pa.R.Crim.P. 1000(A) (“The rules in this chapter govern all proceedings in the Philadelphia Municipal*533 Court, including summary cases; Municipal Court cases, as defined in Rule 1001(A); the filing of appeals from Municipal Court cases; the filing of petitions for writs of certiorari; and the preliminary proceedings in criminal cases charging felonies, Part A, and govern proceedings in summary traffic cases in Municipal Court Traffic Division, Part B.”).

⁶⁹ Nevertheless, we fully endorse Justice Brobson’s view that “PCRA courts throughout the Commonwealth will benefit from the lessons learned in this case when faced with similar circumstances.” Concurring Opinion at — (Brobson, J.).

Today’s ruling does not abridge, enlarge, or modify the substantive rights of any litigant in contravention of Article V, Section 10(c). A substantive right is “[a] right that can be protected or enforced by law; a right of substance rather than form.” *Substantive Right*, Black’s Law Dictionary (12th ed. 2024). In other words, “[s]ubstantive rights are

rights established by law. The term ‘substantive’ does not mean rights that are ‘important’ or ‘substantial,’ but rather those that have been conferred by the Constitution, by statute, or by the common law.” *Id.*, quoting 1 James W. Moore, Moore’s Federal Practice § 1.05[2][b], at 1-29 (3d ed. 2016). A procedural right, on the other hand, is “[a] right that derives from legal or administrative procedure; a right that helps in the protection or enforcement of a substantive right.” *Procedural Right*, Black’s Law Dictionary (12th ed. 2024). “Procedural rights include trial by jury, fair and impartial administration of justice, speedy arraignment and trial, reasonable bail, and representation by counsel.” *Id.*; *see Commonwealth v. Morris*, 565 Pa. 1, 771 A.2d 721, 738 (2001) (“As a general rule, substantive law is that part of the law which creates, defines and regulates rights, while procedural laws are those that address methods by which rights are enforced.”). “[T]he demarcation between procedur[al] and substantive rights” can be “shadowy and difficult to determine.” *Laudenberger v. Port Auth. of Allegheny Cty.*, 496 Pa. 52, 436 A.2d 147, 150 (1981).⁷⁰ Simply because the “performance” of a rule “will touch upon substantive rights” does “not mean that the rule is an inappropriate topic for Supreme Court rule-making.” *Id.* at 155. “This Court should not be prevented from exercising its duty to resolve procedural questions merely because of a collateral effect on a substantive right.” *Id.* “Most rules of procedure will eventually reverberate to the substantive rights and duties of those involved.” *Id.* Ultimately, “[w]e must ... seek to determine the purpose of the rule in order to properly characterize its nature” as substantive or procedural. *Id.* at 150.

⁷⁰ In *Craig v. Magee Memorial Rehabilitation Center*, 512 Pa. 60, 515 A.2d 1350 (1986), this Court suspended the mandatory provisions of the version of Pa.R.Civ.P. 238 (damages for delay in actions for bodily injury, death or property damage) upheld in *Laudenberger*. However, *Craig* specified: “We do **not** overrule the rationales of *Laudenberger*, for they have vitality of their own in the context of the ends sought.” *Id.* at 1353 (emphasis added).

Presently, the rights of the defendant and the DAO are not impacted whatsoever by notice to the OAG and the OAG’s opportunity to intervene. Assuming the OAG takes advantage of its opportunity to intervene, the defendant stays in the case as a full party and can continue to advocate for relief using every lawful process and procedure. The same goes for the DAO. It is not “displace[d].” Dissenting Opinion at — (Wecht, J.). The DAO remains a full party along with the defendant, and these parties are joined by a

third, the OAG, which is also headed by a prosecutor “duly elected” by “[t]he people of Philadelphia” (as well as those of the rest of the Commonwealth). *Id.* at —, —. The Attorney General, like the Philadelphia District Attorney, is also a “representative” “chose[n]” by the “Philadelphia electorate.” *Id.* at —. Likewise, today’s decision does not “override” or “manage” the *534 “discretion” of the DAO, “diminish[]” the DAO’s “authority[.]” or “interfere[] with [its] obligation to rectify the injustice of a conviction improperly obtained.” *Id.* at —, —; Concurring and Dissenting Opinion at — (Donohue, J.). The DAO retains the same discretion and authority it has always had to litigate cases as it sees fit (within permissible ethical bounds).

Certainly, the OAG gains the right to intervene. But this is a procedural right, not a substantive one. Like trial by jury, fair and impartial administration of justice, speedy arraignment and trial, reasonable bail, or representation by counsel, intervention assists in the protection and enforcement of substantive rights. *See* 59 Am. Jur. 2d Parties § 150 (“A statute or rule relating to intervention is purely procedural ... and does not create substantive rights.”). Indeed, this Court has promulgated numerous rules of procedure permitting intervention, none of which has ever been deemed to raise constitutional concerns. *See* Pa.R.C.P. 2327 (intervention in civil proceedings); Pa.R.J.C.P. 1133 (intervention in juvenile dependency cases); Pa.R.A.P. 1531 (intervention in petition for review proceedings); Pa.R.A.P. 3775 (intervention in proceedings against insurers). Of particular note, the Court has enacted procedural rules permitting intervention by the OAG. *See* Pa.R.C.P. 235 (in any civil proceeding “in which an Act of Assembly is alleged to be unconstitutional or a charitable bequest or trust is involved and the Commonwealth is not a party,” OAG “may intervene as a party or may be heard without the necessity of intervention”); Pa.R.A.P. 521(b) (if constitutionality of statute is called into question on appeal and Commonwealth is not party, OAG “may be heard on the question of the constitutionality of the statute involved without formal intervention[.]” or if OAG “files a brief concerning the question the Commonwealth shall thereafter be deemed to be an intervening party in the matter”).⁷¹ The procedural rule we announce today fits comfortably among these procedural rules governing intervention.⁷² In any event, any effect on substantive rights is unintended and collateral. The purpose of the rule is not to diminish or augment the rights of any party but rather to promote reliable *535 outcomes.⁷³ The goal is fair and just PCRA proceedings. As such, today’s decision does not exceed our constitutional rulemaking authority. *See Laudenberger*, 436 A.2d at 155 (“Clearly, Rule 238, when viewed from the perspective of its purpose and goal,

contributes to the orderly and efficient administration of justice in Pennsylvania, and must stand.”).

⁷¹ Parenthetically, we observe the Criminal Procedural Rules Committee has published a proposal to adopt a new rule of criminal procedure providing for notice to the OAG, and the opportunity for the OAG to intervene, in the event of a criminal proceeding in which an Act of Assembly is alleged to be unconstitutional. *See* Criminal Procedural Rules Committee, Publication Report, Proposed Adoption of Pa.R.Crim.P. 579.1 (Apr. 12, 2025) (available at <https://www.pacodeandbulletin.gov/Display/pabul1?file=/secure/pabulletin/data/vol55/55-15/485.html>) (last visited June 12, 2026). The modest notice-and-opportunity-to-intervene procedure we adopt herein is of the same ilk.

⁷² Permitting the OAG to intervene as a full party with “the ability to file pleadings, request discovery, participate in hearings, present evidence, and make substantive arguments” does not transform’s today’s constitutional procedural rule into an unconstitutional “substantive mandate.” Dissenting Opinion at —, — (Wecht, J.). Indeed, multiple existing procedural intervention rules constitutionally promulgated by this Court, including those specifically pertaining to the OAG, expressly permit full party status. *See* Pa.R.A.P. 3775(c)(2) (“When the applicant’s interest involves a discrete controversy relating to the administration of the insurer’s business or estate, the Court may grant the applicant limited intervention to participate **as a party** in the discrete controversy.”) (emphasis added); Pa.R.C.P. 235 (“The Attorney General may intervene **as a party** or may be heard without the necessity of intervention.”) (emphasis added); Pa.R.A.P. 521(b) (“If the Attorney General files a brief concerning the question the Commonwealth shall thereafter be deemed to be **an intervening party** in the matter.”) (emphasis added).

⁷³ Justice Donohue questions whether the involvement of the OAG will foster reliable results because “[a]fter [DA] Krasner was elected, many former prosecutors from [the] DAO relocated to the OAG[.]” and these attorneys have “a potential bias in favor of upholding convictions they procured[.]” Concurring and Dissenting Opinion at

——— n.11 (Donohue, J.). This Court has repeatedly invited the OAG to participate as *amicus curiae* in cases successfully prosecuted by a prior administration of the DAO in which the DAO under DA Krasner has subsequently conceded relief. *See Commonwealth v. Murchison*, — Pa. —, 315 A.3d 830 (2024) (*per curiam*); *Perrin*, 291 A.3d at 342; *Brown*, 649 Pa. at 313, 196 A.3d 130; *see also Commonwealth v. Drummond*, 669 Pa. 367, 261 A.3d 1035 (2021) (inviting OAG to participate as *amicus* where DAO conceded trial counsel was ineffective). To be sure, there is a “distinction between participating as *amicus* and as a party.” Concurring and Dissenting Opinion at ——— n.11 (Donohue, J.). But not when it comes to bias. If, as Justice Donohue suggests, the OAG is so invested in upholding convictions procured by prior administrations of the DAO that it is incapable of providing “neutrality of perspective[.]” this prejudice would have surfaced in its role as *amicus* in the many cases where we have called upon its input. *Id.* Yet we have never noted any sort of partiality or bias on the part of the OAG in these matters. To the contrary, we have praised the OAG’s advocacy and, where appropriate, endorsed its positions. *See Brown*, 196 A.3d at 145 (“As cogently explained by the Attorney General, the scope of prosecutorial discretion changes as a criminal case proceeds, narrowing as the case nears completion.”); *id.* at 194 (Dougherty, J., concurring) (“As the Attorney General cogently explains, a ‘prosecutor is of course privileged to take a position on that claim; indeed, duty requires that he or she do so, in accordance with her good faith understanding of the applicable law. But the statute does not empower her to assume the role of the court, which is to decide.’”) (quoting Attorney General’s Brief at 10); *Perrin*, 291 A.3d at 346 (agreeing with OAG’s position trial court was not required to accept parties’ post-verdict stipulation to credibility of witness). There is no reason to believe the OAG will not provide the PCRA courts the same objective and helpful input it has consistently provided to this Court in DAO concession cases. Like Justice McCaffery, we have every confidence the OAG will perform its duties “with the honor, integrity, and perhaps most importantly, the impartiality required.” Concurring Opinion at ——— n.19 (McCaffery, J.).

the contrary, Section 204 of the CAA squarely permits the OAG to intervene in PCRA cases. This section, titled “[l]egal advice and civil matters[.]” pertinently provides: “[t]he Attorney General shall represent the Commonwealth and all Commonwealth agencies and upon request, the Departments of Auditor General and State Treasury and the Public Utility Commission in any action brought by or against the Commonwealth or its agencies, and **may intervene in any other action, including** those involving charitable bequests and trusts or the constitutionality of any statute.” 71 P.S. § 732-204(c) (emphasis added). This provision grants broad authority to the OAG to intervene in civil matters. “The word ‘any’ is generally used in the sense of ‘all’ or ‘every’ and its meaning is most comprehensive.” *In re Beleski’s Estate*, 413 Pa. 365, 196 A.2d 850, 855 (1964); *see also United States v. Gonzales*, 520 U.S. 1, 5, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997) (“Read naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’”) (internal quotations and citation omitted). Moreover, the word “action” is defined for purposes of the CAA to broadly encompass “[a]ny action at law or in equity.” *53671 P.S. § 732-102. The word “including” also indicates the statute’s expansive scope. “[I]t is widely accepted that general expressions such as ‘including,’ ... that precede a specific list of included items are to be considered as words of enlargement and not limitation.” *Department of Environmental Protection v. Cumberland Coal Resources LP*, 628 Pa. 17, 102 A.3d 962, 976 (2014); *see also Pennsylvania Human Relations Comm’n v. Alto-Reste Park Cemetery Ass’n*, 453 Pa. 124, 306 A.2d 881, 885 (1973) (“The term ‘include’ is to be dealt with as a word of enlargement and not limitation[.]”) (cleaned up). The expansive language of Section 204(c) permitting the OAG to intervene in any civil action readily subsumes the OAG’s right to intervene in PCRA matters, which, as this Court has repeatedly recognized, are civil in nature. *See Commonwealth v. Haag*, 570 Pa. 289, 809 A.2d 271, 284 (2002) (“The PCRA system is not part of the criminal proceeding itself, but is, in fact, civil in nature.”); *Commonwealth v. Hill*, 609 Pa. 410, 16 A.3d 484, 495 n.14 (2011) (“Technically, the PCRA is civil in nature.”), *overruled on other grounds by Bradley*, 261 A.3d at 400; *see also Pennsylvania v. Finley*, 481 U.S. 551, 556-57, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987) (“Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature.”).⁷⁴

⁷⁴ Justice McCaffery agrees “the CAA provides the [OAG] the authority to intervene in any PCRA proceeding.” Concurring Opinion at ——— (McCaffery, J.). Additionally, he submits “the

Our decision likewise does not contravene the CAA. On

CAA ... expressly requires the [OAG] to represent the Commonwealth in PCRA proceedings.” *Id.* In Justice McCaffery’s view “the [OAG] not only has the right to intervene, but the obligation to represent the Commonwealth in PCRA proceedings.” *Id.* at —. He reasons that a PCRA petition is a civil action brought by a defendant against the Commonwealth, and “the CAA [via Section 204(c)] requires the [OAG] to represent the Commonwealth in any civil action brought against the Commonwealth.” *Id.* at —. Justice McCaffery forwards a textually rooted argument with logical force. However, the issue of whether the CAA requires the OAG to represent the Commonwealth in every PCRA case has not been raised by the parties or *amici*. Presently, the OAG seeks the opportunity to intervene as an additional party alongside the DAO, not to supersede the DAO as the sole representative of the Commonwealth. This Court has a “longstanding policy” against raising and deciding issues *sua sponte*. *In re Adoption of K.M.G.*, 663 Pa. 53, 240 A.3d 1218, 1234 (2020) (cleaned up). As such, we do not consider on our own motion the unraised question of whether the CAA mandates the OAG represent the Commonwealth in every PCRA proceeding. We leave that issue for another day.

Justice Donohue disagrees with our interpretation of Section 204(c) based on “the statutory construction doctrine of *ejusdem generis*[.]” Concurring and Dissenting Opinion at — (Donohue, J.) (*italics added*). Under this doctrine, “where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated.” *Friends of Danny DeVito v. Wolf*, 658 Pa. 165, 227 A.3d 872, 888 (2020), *quoting Indep. Oil & Gas Ass’n of Pa. v. Bd. Of Assessment Appeals*, 572 Pa. 240, 814 A.2d 180, 184 (2002). “Where the opposite sequence is found, *i.e.*, specific words following general ones, ... the doctrine is equally applicable, and restricts application of the general term to things that are similar to those enumerated.” *McClellan v. Health Maintenance Organization of Pennsylvania*, 546 Pa. 463, 686 A.2d 801, 806 (1996) (opinion in support of affirmance); *see also Marcellus Shale Coalition v. Department of Environmental Protection*, — Pa. —, 292 A.3d 921, 943 n.16 (2023) (opinion announcing judgment of court) (“The doctrine also applies to situations *537 where the generic words precede the list.”). “‘[W]hile *ejusdem generis* is a useful tool of statutory construction,’ it ‘must yield in any

instance in which its effect would be to confine the operation of a statute within narrower limits than those intended by the General Assembly when it was enacted.’” *Corman v. Acting Secretary of Pennsylvania Dep’t of Health*, 671 Pa. 345, 266 A.3d 452, 478 (2021), *quoting DeVito*, 227 A.3d at 889.

Presently, Justice Donohue submits that, pursuant to the *ejusdem generis* doctrine, the specific examples enumerated in Section 204(c), *i.e.*, actions involving charitable bequests and trusts or the constitutionality of a statute, limit the application of the general phrase “any other action” to “those matters in which [the OAG’s] interest has been explicitly recognized by statute.” Concurring and Dissenting Opinion at —. (Donohue, J.) (*emphasis omitted*). Had the General Assembly intended to simply cross-reference other statutory provisions, it would have done so. *See Commonwealth v. Wright*, 609 Pa. 22, 14 A.3d 798, 814 (2011) (“[A]s a matter of statutory interpretation, although one is admonished to listen attentively to what a statute says[,] one must also listen attentively to what it does not say.”), *quoting Kmonk–Sullivan v. State Farm Mut. Auto. Ins. Co.*, 567 Pa. 514, 788 A.2d 955, 962 (2001). The “common thread” between the specifically enumerated examples in Section 204(c) is not an independent statutory interest, but rather a pronounced history of OAG involvement. *Cumberland Coal*, 102 A.3d at 976. The OAG has traditionally been heavily involved in charitable trust matters as well as cases implicating the constitutionality of statutes. *See In re Voegtly’s Estate*, 396 Pa. 90, 151 A.2d 593, 594 (1959) (noting “the necessity of the Attorney General’s participation as an indispensable party in every proceeding which affects a charitable trust, whether the proceeding be one of invalidation, termination, administration or enforcement of such trust”); 71 P.S. § 732-204(a)(3) (“It shall be the duty of the Attorney General to uphold and defend the constitutionality of all statutes so as to prevent their suspension or abrogation in the absence of a controlling decision by a court of competent jurisdiction.”). PCRA proceedings fall into this same general class of matters in which the OAG has had a longstanding and active role. The OAG is routinely involved in PCRA litigation. *See* OAG’s Brief at 1 (“The Office of Attorney General has a longstanding interest in the preservation of valid judgments of sentence and the proper treatment of post-conviction concessions. That interest has extended over many administrations and at least four decades[.]”). Indeed, it is commonplace for the OAG to represent the Commonwealth in PCRA proceedings.⁷⁵

⁷⁵ *See, e.g., Commonwealth v. Taylor*, 674 Pa. 395, 283 A.3d 178, 181 (2022) (“[T]he Pennsylvania Office of Attorney General ... represented the

Commonwealth in opposing Taylor’s third PCRA petition.”); *Commonwealth v. Brown*, 141 A.3d 491, 497 (Pa. Super. 2016) (“The attorney in the OAG’s office who represented the Commonwealth with respect to Appellant’s third PCRA petition was not involved in Appellant’s original prosecution.”); *Commonwealth v. Ahmad*, 2025 WL 2808637 at *1 (Pa. Super. 2025) (non-precedential decision) (“The Pennsylvania Attorney General represented the Commonwealth [in Ahmad’s] PCRA [proceedings,] as Attorney Militello’s law partner, [Attorney] Weisbrod, [] was the District Attorney-Elect at the time [Ahmad] filed his PCRA petition.”), quoting PCRA court opinion; *Commonwealth v. Muhammed*, 2024 WL 4892509 at *1 n.1 (Pa. Super. 2024) (non-precedential decision) (“[T]he Office of the Attorney General represents the Commonwealth in these PCRA proceedings.”); *Commonwealth v. Miller*, 2023 WL 7179446 at *1 (Pa. Super. 2023) (non-precedential decision) (“On April 4, 2022, having received no correspondence from Counsel, the PCRA court entered an Order providing the Commonwealth, represented by Deputy Attorney General Gregory J. Simatic, with 20 days to file its Motion to Dismiss the PCRA petition for untimeliness.”); *Commonwealth v. Oglesby*, 2020 WL 7780108 at *3 (Pa. Super. 2020) (non-precedential decision) (“The Pennsylvania Office of the Attorney General represented the Commonwealth for the purposes of the instant PCRA.”), quoting PCRA court opinion.

***538** In any event, the OAG has a statutorily recognized interest in PCRA matters. The Pennsylvania Constitution provides that the “Attorney General ... shall be the chief law officer of the Commonwealth[.]” PA. CONST. art. IV, § 4.1. Consistent therewith, the General Assembly has declared the Attorney General “the chief law enforcement officer of the Commonwealth[.]” 71 P.S. § 732-206(a). Thus, the legislature has recognized the OAG’s interest in criminal judgments and issues. Although PCRA proceedings are civil in nature, they nonetheless clearly implicate these subjects. *Ejusdem generis* confirms our reading of Section 204(c) to authorize the intervention of the OAG in PCRA cases.

Furthermore, we are not “violat[ing] the separation of powers.” Dissenting Opinion at — (Wecht, J.); see also Concurring and Dissenting Opinion at — (Donohue, J.) (“This attempt to expand the duties beyond those established by the General Assembly violates the

separation of powers[.]”). Today’s decision does not “encroach[] upon the executive branch’s discretionary decision-making authority[.]” Dissenting Opinion at — (Wecht, J.). With respect to the OAG, the Court is not coercing it to join PCRA cases against its wishes. The OAG has, of its own volition, requested this Court craft a mechanism whereby it be notified and given an opportunity to intervene in the DAO’s concessions cases. While the Court invited the OAG to provide briefing and oral argument in this case, we never “solicited [the] remedy” of intervention. *Id.* at —. Intervention was the OAG’s idea. The Court is not imposing its will on the OAG; it is lawfully effectuating the discretionary will of the OAG. The OAG’s discretion to intervene is not self-executing. See *id.* (“There is no need for this Court to ‘effectuate’ the discretion that the OAG already has, and that the OAG can ‘effectuate’ on its own.”). Intervention must be court approved. See Pa.R.C.P. 2329. We are simply granting the OAG’s discretionary request for notice and the opportunity to intervene, and there is nothing in the Pennsylvania Constitution, CAA, or elsewhere in our law barring us from doing so. Should the OAG subsequently determine, either under its current administration or another one, that it no longer wishes to be notified and afforded an opportunity to intervene in the DAO’s concession cases, it is free to return to this Court and request a change of course.

Moreover, providing the OAG notice and an opportunity to intervene as a supplemental party does not in any way “override the discretion of ... the DAO.” Dissenting Opinion at — (Wecht, J.). As discussed, even assuming the OAG’s joinder, the DAO will retain the identical discretion it always possessed to litigate the case however it deems appropriate. It may be that the OAG’s involvement will impact the **court’s** ultimate decision, but it will in no way infringe on the DAO’s discretionary decision-making. And by no means are we invading “the lawmaking function of the legislative branch” or “manufactur[ing] an interest for the OAG that the General Assembly did not see fit to create.” *Id.* at —; Concurring and Dissenting Opinion at — (Donohue, J.). Rather, as detailed above, we are faithfully applying the plain terms of Section 204(c) of the CAA, wherein ***539** the legislature expressly authorized the OAG to intervene in PCRA cases.

Lastly, our decision today is consistent with this Court’s precedent. In *Commonwealth v. Carsia*, 512 Pa. 509, 517 A.2d 956 (1986), the OAG filed criminal charges against an attorney related to his attempt to bribe two municipal policemen. However, none of the charges fit within Section 205(a) of the CAA, which specifies the types of cases the OAG has the power to prosecute.⁷⁶ Accordingly, this Court held the OAG lacked prosecutorial authority over the criminal charges and affirmed the dismissal of the

information. In *Commonwealth v. Mulholland*, 549 Pa. 634, 702 A.2d 1027 (1997), following the declaration of a mistrial, the trial court *sua sponte* ordered that if the defendants were retried, the District Attorney of Allegheny County would be removed and replaced with the OAG. None of the provisions of Section 205(a) permitting supersession by the OAG was implicated. Rather, the trial court rationalized the removal of the local district attorney by asserting a cloud of conflict of interest and the suspicion that *540 the interests of justice were not being served. This Court reversed the replacement of the district attorney. The Court reasoned the assertion of a conflict of interest was unsupported by the record, and even if such a conflict did exist, the proper course of action would have been for the trial judge, through the president judge, to request the OAG's intervention in accordance with the statutory provisions of the CAA. Most recently, in *Commonwealth v. Mayfield*, 665 Pa. 115, 247 A.3d 1002 (2021), the trial court removed the DAO and appointed a private attorney to serve as a special prosecutor and represent the Commonwealth in probation revocation proceedings. This Court held there was nothing in the CAA authorizing the trial court's action, and the court lacked inherent authority to summarily remove the DAO and appoint a special prosecutor. Consequently, the Court vacated the trial court's appointment order.

⁷⁶ Section 205(a) provides:

(a) Prosecutions.--The Attorney General shall have the power to prosecute in any county criminal court the following cases:

(1) Criminal charges against State officials or employees affecting the performance of their public duties or the maintenance of the public trust and criminal charges against persons attempting to influence such State officials or employees or benefit from such influence or attempt to influence.

(2) Criminal charges involving corrupt organizations as provided for in 18 Pa.C.S. § 911 (relating to corrupt organizations).

(3) Upon the request of a district attorney who lacks the resources to conduct an adequate investigation or the prosecution of the criminal case or matter or who represents that there is the potential for an actual or apparent conflict of interest on the part of the district attorney or his office.

(4) The Attorney General may petition the court having jurisdiction over any criminal proceeding to permit the Attorney General to supersede the district attorney in order to prosecute a criminal action or to institute criminal proceedings. Upon the filing of the

petition, the president judge shall request the Supreme Court to assign a judge to hear the matter. The judge assigned shall hear the matter within 30 days after appointment and make a determination as to whether to allow supersession within 60 days after the hearing. The district attorney shall be given notice of the hearing and may appear and oppose the granting of the petition. Supersession shall be ordered if the Attorney General establishes by a preponderance of the evidence that the district attorney has failed or refused to prosecute and such failure or refusal constitutes abuse of discretion.

(5) When the president judge in the district having jurisdiction of any criminal proceeding has reason to believe that the case is a proper one for the intervention of the Commonwealth, he shall request the Attorney General to represent the Commonwealth in the proceeding and to investigate charges and prosecute the defendant. If the Attorney General agrees that the case is a proper one for intervention, he shall file a petition with the court and proceed as provided in paragraph (4). If the Attorney General determines that the case is not a proper case for intervention, he shall notify the president judge accordingly.

(6) Criminal charges investigated by and referred to him by a Commonwealth agency arising out of enforcement provisions of the statute charging the agency with a duty to enforce its provision.

(7) Indictments returned by an investigating grand jury obtained by the Attorney General.

(8) Criminal charges arising out of activities of the State Medicaid Fraud Control Unit as authorized by Article XIV (relating to fraud and abuse control), act of June 13, 1967 (P.L. 31, No. 21), known as the "Public Welfare Code," ... and the Federal law known as the "Medicare-Medicaid Antifraud and Abuse Amendments."

71 P.S. § 732-205(a) (footnote omitted).

In contrast to these cases, the role of the OAG here is not to act in place of or replace the local prosecutor's office, nor is its involvement contrary to the CAA. We herein permit lawful supplemental participation by the OAG, not an unauthorized prosecution as in *Carsia*, or illegal supersession of the proper prosecuting authority as in

Mulholland and Mayfield.

V. Conclusion

The DAO insists its many concessions over the past eight years in mostly murder cases “simply demonstrate[] that the DAO has embraced its responsibility as a minister of justice[.]” DAO’s Brief at 7. We endorse in the strongest possible terms a prosecutor’s duty to minister justice. Lest there be any uncertainty on this score, we reiterate that a prosecutor is ethically obliged to concede relief on PCRA review when (but only when) the facts and law support it. We also emphasize that our decision is not intended to “counteract [the] policy choices” of the DAO. Concurring and Dissenting Opinion at — (Donohue, J.). DA Krasner remains free “to exercise his discretion on behalf of the Commonwealth in Philadelphia’s criminal [and PCRA] cases.” Dissenting Opinion at — (Wecht, J.). But the means for achieving those ends cannot transgress the bounds of the law, and what we have seen in this case and too many others is the opposite of justice. Again and again, the DAO has made unreliable concessions unsupported by the facts and law. And when conceding relief, the DAO has repeatedly lacked candor to the court, misrepresented facts, failed to conduct adequate investigations, and inexplicably dodged necessary evidentiary hearings. This Court too has a “duty ... to minister justice.” *Commonwealth ex rel. Holly v. Ashe*, 368 Pa. 211, 82 A.2d 244, 248 (1951) (internal quotation and citation omitted). Indeed, our “principal obligations are to conscientiously guard the fairness and probity of the judicial process and the dignity, integrity, and authority of the judicial system, all for the protection of the citizens of this Commonwealth.” *In re Bruno*, 101 A.3d at 675. Our duty to safeguard justice compels us to order that in all PCRA cases in which the DAO concedes relief, the PCRA court shall afford the OAG notice and the opportunity to intervene before ruling on the concession.

The order of the PCRA court is reversed and the matter is remanded to that court for further proceedings consistent with this opinion.

Justices Mundy, Brobson and McCaffery join the opinion.

Justice Brobson files a concurring opinion in which Justice Mundy joins.

Justice McCaffery files a concurring opinion

Justice Donohue files a concurring and dissenting opinion in which Chief Justice Todd joins.

Justice Wecht files a dissenting opinion.

JUSTICE BROBSON, concurring

***541** I join the Majority Opinion in full. I write separately for two reasons. First, I would like to express my agreement with the Court’s decision to exercise its King’s Bench authority in this matter. Second, I wish to share my view that, although this matter concerns only Philadelphia County, common pleas courts throughout the Commonwealth should utilize the general principles to which the Majority alludes and I discuss below when faced with a prosecutor’s concession of error in the context of petitions filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa. C.S. §§ 9541-9546.

In civil and criminal matters, our judiciary relies on capable advocacy from opposing sides to dispense justice. In the PCRA setting, specifically, we have noted that our criminal justice system depends on the adversarial system to produce just results. *Commonwealth v. Lesko*, 609 Pa. 128, 15 A.3d 345, 383 (2011). Along these lines, it is well settled that the ineffectiveness of defense counsel can so taint a criminal proceeding that the very reliability of the proceeding is called into question, warranting a new trial. *Id.*

But what happens if the prosecutor acts in a way that calls into question the reliability of the PCRA proceeding itself? What happens if the prosecutor concedes error where none exists? Even worse, what happens if the prosecutor withholds record evidence that contradicts the prosecutor’s concession, causing a PCRA court to upend a lawful verdict against the interest of the community? Following this cascade, the absence of any adverse party at the table means the PCRA court’s erroneous action, based on misleading advocacy from the Commonwealth’s representative, escapes appellate review. Conversely, if a PCRA court denies relief under these circumstances, the petitioner and aligned prosecutor would jointly advocate for reversal on appeal, as Lavar Brown (Brown) and the Philadelphia District Attorney’s Office (DAO) did in *Commonwealth v. Brown*, 649 Pa. 293, 196 A.3d 130 (2018) (*Brown I*).

Importantly, however, a jury of Brown’s peers convicted him in Philadelphia County and sentenced him to life in prison for his crimes. As we explained in *Brown I*, the community “has an interest in the verdict, which may ... be disrupted only if a court finds legal error.” *Brown I*, 196

A.3d at 146. To me, that is what this case is about and why we invoked our seldom used King’s Bench authority here—to protect the community’s interest in a verdict from prosecutor misfeasance or malfeasance in a subsequent PCRA proceeding. I agree with the Majority that the DAO acted in such a way in this matter as to taint the reliability of the PCRA court’s decision below. While such an instance would require only reversal in the ordinary course, the Majority elucidates other examples that cast a pall on the reliability of the DAO’s concessions in PCRA matters, particularly where the petitioner is facing a sentence of death. We cannot allow any party, elected or otherwise, to engage in such a systematic manipulation of our justice system.

To that end, in *Brown I*, we stressed the importance of “independent judicial review,” even in cases where the prosecutor concedes error. *See Brown I*, 196 A.3d at 146. That pronouncement, however, was not adequate to deter the DAO from engaging in conduct that undermines the judiciary’s independence. To ensure the reliability and integrity of our criminal justice *542 system, and particularly the authority of PCRA courts to engage in independent judicial review, we must act. *See In re Bruno*, 627 Pa. 505, 101 A.3d 635, 688 (2014) (discussing breadth of Court’s “supreme” authority over Pennsylvania judiciary).

In doing so, the Majority employs remedies properly aimed only at Philadelphia County. I am of the view, however, that PCRA courts throughout the Commonwealth will benefit from the lessons learned in this case when faced with similar circumstances. More specifically, when the Commonwealth concedes that a petitioner is entitled to PCRA relief, the PCRA court initially must make an independent determination as to whether the petitioner triggered the court’s jurisdiction by timely filing the petition at issue. *See* 42 Pa. C.S. § 9545(b) (explaining jurisdictional time limits for seeking PCRA relief). If the PCRA court concludes that the petitioner failed in this regard, absent allowing amendment, the court must deny the petition as untimely filed.

If, on the other hand, the PCRA court determines that it does have jurisdiction to grant PCRA relief, this Court’s case law expressly holds that the PCRA court cannot order relief simply because the parties agree that relief is due to the petitioner. Rather, as noted above, “the PCRA requires *judicial merits review* favorable to the petitioner before any relief may be granted.” *Brown I*, 196 A.3d at 145 (emphasis in original); *see id.* (“A confession of error by the Commonwealth does not constitute a judicial ruling in [a PCRA petitioner’s] favor, and thus is insufficient for any grant of relief under the PCRA.”). Stated differently, “[t]he

prosecutor does not decide whether a defendant is entitled to relief under the [PCRA]. This is the exclusive province of the PCRA court.” (Maj. Op. at — (footnote omitted).)

In conducting this review, PCRA courts should scrupulously and independently assess the prosecutor’s concession of error on the record. While a PCRA court may rely upon stipulated facts, “for a stipulation to be enforceable[,] it must be valid.” *Commonwealth v. Perrin*, — Pa. —, 291 A.3d 337, 345 (2023). Logically, for a stipulated fact to be valid, the record must support the stipulation, and the stipulation must not tread on areas that “are inherently and traditionally the prerogative of the judiciary.” *Id.* For example, in PCRA proceedings, the PCRA court acts as the exclusive fact finder and makes credibility determinations. *Commonwealth v. Mitchell*, 636 Pa. 233, 141 A.3d 1277, 1282 (2016). Consequently, parties to a PCRA proceeding cannot stipulate to a fact when doing so infringes on the PCRA court’s role. In other words, a stipulated fact is invalid if its verity turns on witness credibility or related PCRA court functions, such as drawing inferences.

In my view, when a PCRA court is presented with a prosecutor’s concession of error, as well as, in some instances, valid stipulated facts, that demonstrate that relief is due to the petitioner, the PCRA court should grant the appropriate relief, but only in the clearest cases. In those cases that are not so clear, a PCRA court should consider the prosecutor’s concession of error, any stipulated facts from the parties, and the position of any intervenors or *amici*, all as a means to aid the court in its disposition of the PCRA petition. In addition, when any interested person seeks intervention to oppose a prosecutor’s concession of error, PCRA courts should grant intervention liberally, ensuring an adversarial proceeding and greater confidence in a just result.

Justice Mundy joins this concurring opinion.

JUSTICE McCAFFERY, concurring

*543

“Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes the

lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of criminal law the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.”

- *Olmstead v. U.S.*, 277 U.S. 438, 485, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., in dissent)

I. INTRODUCTION

I join the Majority in finding that our exercise of King’s Bench is both proper and appropriate to these circumstances. With that said, I am mindful of the well-stated concerns voiced by the Dissents and the rationale motivating those concerns. However, unlike the Dissents, I do not believe the specific concerns raised in this appeal are limited to one particular District Attorney, in one particular county, confined to a limited class of cases. To the contrary, I believe that the present appeal is symptomatic of larger considerations well documented by the Majority. These concerns are pervasive, ongoing and unless addressed, threaten to undermine the legitimacy of our judicial decisions in Pennsylvania’s largest county.

I write separately to note my recognition of the problem and the need to remediate, but would order a different procedure to address these concerns. My proposed resolution would, again, not be limited to one county, one District Attorney and one limited class of cases but would apply statewide to any case where a PCRA petition alleges prosecutorial misconduct as the basis for a new trial, since I believe the law requires disqualification of any District Attorney’s Office from investigating, evaluating, or litigating such a claim. Further, since the PCRA is civil in nature, the Commonwealth Attorneys Act and our Rules of Professional Conduct mandate that the Office of the Attorney General represent and defend the Commonwealth in all such proceedings.

In our adversarial system, courts decide disputes brought to them by parties. The parties frame the dispute, identify and present relevant evidence, and advocate for specific results based on their goals. This system arose in the context of the common law and therefore, an assumption that a court would act as a neutral arbiter between adversarial parties.

When our courts are tasked with implementing purely statutory schemes, however, that assumption no longer applies. Parties may agree on a legal outcome that is contrary to the statute enacted by the General Assembly. Since the court is exercising a purely statutory power, it is not empowered, let alone required, to grant the parties’ requested relief under such circumstances. Indeed, a court cannot endorse an agreement that is illegal, contrary to public policy, or unjust. A judge’s ultimate duty is to ensure justice based on the credible evidence. If a judge suspects an agreement is contrary to the law or based on a biased or one-sided recitation of facts, a judge must demand clarification *544 or further evidence before granting the requested relief.

Where the parties’ desired outcomes conflict with statutory commands, our courts are placed in a quandary that challenges the fundamental nature of our legal system. Judges are ill-equipped, by design, to assess the truth outside the clash of opposing positions.

Today, we address a crisis in confidence in our criminal justice system arising from non-adversarial proceedings under the Post Conviction Relief Act.¹ Under traditional practice, the only parties to such proceedings are convicted prisoners and the prosecuting office that convicted them. These two parties may, for whatever reason, conclude that a conviction should be vacated. However, the PCRA grants the power to vacate a conviction to courts, not prosecutors, and vacatur may only take place after the court is convinced the conviction or sentence is sufficiently tainted by legal error.

¹ This crisis is not limited to one case or even the current appeal. It is the cumulative result of at least 51 convictions overturned by agreement with no re-trial. In many of these cases, as the Majority points out in exceptional detail, both state and federal judges have questioned the basis for the relief.

With this in mind, I agree with the Majority that our exercise of King’s Bench jurisdiction is appropriate. Further, I agree that a remand for consideration of timeliness of the PCRA petition is necessary. In addition, if the PCRA court finds the petition timely, I would direct it to provide an explicit consideration (with accompanying factual findings) of the materiality of the alleged *Brady*² violation. However, I depart from the Majority on the question of who may participate in PCRA proceedings. I conclude the Attorney General has the obligation³ to represent the Commonwealth in PCRA proceedings.

Further, I would require a PCRA court to disqualify a prosecutor's office where the petition alleges a *Brady* violation or similar misconduct on the part of that office or any of its employees, even if a new prosecutor has been elected to head that office.

² *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (holding "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

³ This obligation is mandated and required by law and is distinct from the Majority's invitation to the Attorney General to participate.

II. EXERCISE OF KING'S BENCH POWERS

As I read the dueling opinions, the Majority and the Dissent do not disagree on the rules governing this Court's exercise of King's Bench Jurisdiction. Instead, they disagree over whether those rules counsel for the exercise of our King's Bench powers in these circumstances.

While I agree with the general thrust of the Majority's analysis, I emphasize different circumstances. Fundamentally, King's Bench Jurisdiction is an appropriate (if not necessary) **option** where questions of jurisdiction are implicated in a trial court's grant of relief and appellate review is foreclosed by circumstances.⁴ This is especially *545 true where the relief is granted pursuant to a purely statutory scheme, such as the PCRA. As always, courts do not have discretion to disregard the General Assembly's commands. *See* Maj. Op. at — (citing *Commonwealth v. Tedford*, 658 Pa. 387, 228 A.3d 891, 904 (2020)). "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp v. Ohio*, 367 U.S. 643, 659, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

⁴ The Dissent seems to misunderstand my analysis and suggestions. At no point have I suggested a "staggering new conception" of PCRA proceedings or appeals. To the contrary, I merely

point out that our existing Rules of Professional Conduct concerning conflicts of interest should be applied equally and evenly between defense counsel and prosecutors. Moreover, nothing herein suggests using this Court's King's Bench authority to "babysit" PCRA proceedings, Dissenting Opinion at —, or "mandate a restructuring of the relationships and responsibilities of locally-elected District Attorneys and the OAG." Dissenting Opinion at — n.4.

Thus, this Court has the power, and indeed the responsibility, to ensure that a lower court does not grant relief under the PCRA unless the PCRA's statutory conditions for jurisdiction have been met. *See Commonwealth v. Whitney*, 572 Pa. 468, 817 A.2d 473, 475 (2003). It is beyond peradventure that, sometimes, a PCRA petitioner has a valid claim for relief, but is ineligible for such relief because the PCRA court has no jurisdiction to grant it. *See Commonwealth v. Fahy*, 558 Pa. 313, 737 A.2d 214, 223 (1999). Even if jurisdiction is established, the power to grant relief under the PCRA is limited to those circumstances identified by the PCRA itself. *See Commonwealth v. Robinson*, 623 Pa. 345, 82 A.3d 998, 1005 (2013).

For example, if a PCRA court grants a new trial pursuant to an untimely PCRA petition, that order will be reversed on appeal. But what happens if there is no appeal? Does the District Attorney's failure to appeal the order somehow reverse engineer jurisdiction for the PCRA court? Obviously not.

But the Dissent contends that this error can be corrected after a new trial is held. This is problematic on several levels. First, the grant of a new trial does not ensure that a new trial will be held. Due to the passage of time, essential witnesses may have passed away. Memories fade. Other circumstantial evidence may degrade or disappear. For these reasons and others, the prosecuting office may rationally decide it can no longer meet the burden of proving its case beyond a reasonable doubt — and not because it believes the defendant is innocent.⁵ One need look no further than the facts of record concerning the current Philadelphia District Attorney's Office which has agreed to overturn at least 51 convictions since 2018 with no retrial.

⁵ As noted by the Majority (and other judges), often the Philadelphia District Attorney's Office has engineered new trials for defendants facing capital punishment or life sentences based on a philosophical opposition to the death penalty or life

imprisonment, not on the facts of the underlying conviction.

Perhaps more troubling, even if the prosecuting office presses on in the face of such barriers, it may lose at the new trial. The Commonwealth cannot appeal from a not-guilty verdict. Do we create an exception to this rule where the trial is the result of the previous grant of PCRA relief? If so, why would we not allow such an appeal **before** the expense and hardships engendered by the new trial? Or better still, apply our existing Rules of Professional Conduct and existing law as a prophylactic measure against such abuse by requiring disqualification and the appointment of independent counsel to review, analyze, and litigate such claims.

I see no good reason to avoid addressing the propriety of an order granting a new trial under the PCRA immediately, regardless of whether the prosecuting office files an appeal. These circumstances counsel close review by this Court to determine if the General Assembly's commands, as *546 embodied by the text of the PCRA, are being frustrated in the lower courts.⁶ Thus, this exercise of King's Bench Jurisdiction is appropriate, regardless of the outcome this Court finally reaches. The circumstances of this case reveal an issue of serious public importance that requires this Court's consideration.

⁶ I suggest that this Court refer the issue of a Rule instituting an automatic appeal from the grant of PCRA relief to our Civil Rules Committee.

Contrary to the Dissent's position, I cannot conclude that the grant of a new trial after a **non-adversarial** PCRA proceeding is "average." Dissenting Opinion at — n.26. A conclusion that legal error so tainted a trial as to invalidate a verdict is an extraordinary conclusion on any day. It is even more extraordinary if such a conclusion is reached after a non-adversarial PCRA proceeding. Its effect on the integrity of the criminal justice system is immeasurable.

Of course, the extraordinary nature of such a conclusion does not automatically render it suspect. Yet it is undeniably notable — akin to a headline of "man bites dog." And that conclusion has tremendous consequences. For the court system, it represents a significant sunk cost of resources and a potential significant cost in future resources for a new trial. Victims and witnesses also suffer from sunk costs and potential future monetary and emotional costs. The community, once assured that a criminal had been apprehended and appropriately

sentenced, must now consider what went so wrong as to lead to a vacated conviction. As Justice Anthony Kennedy noted, "[t]he dignity of a court derives from the respect accorded its judgments." *Degen v. United States*, 517 U.S. 820, 116 S.Ct. 1777, 135 L.Ed.2d 102 (1996). Perhaps most notable is the damage done to the public's confidence in a fair and impartial legal system. Such damage can hardly be undone simply by the grant of a new trial that never — or rarely — occurs.

The General Assembly was no doubt aware of the costs of vacating a conviction when it enacted the PCRA. It nevertheless provided explicit avenues for defendants to collaterally challenge their convictions. Importantly, however, it provided explicit limitations on the jurisdiction of courts to grant relief under the PCRA and express burdens to qualify for relief.

III. THE NATURE OF PCRA PROCEEDINGS

A. Adversarial versus Inquisitorial Proceedings

Having properly exercised King's Bench jurisdiction here, we must address the issue of how to best address the problems created by non-adversarial PCRA proceedings. A non-adversarial PCRA proceeding allows the parties, through the exercise of their discretion, the power to limit what is in the record before the PCRA court. As Justice Wecht has noted:

In its simplest terms, the adversarial process is one in which legal disputes are resolved by having the parties present their conflicting views of fact and law before an impartial and relatively passive decision-maker. ... Other models exist, but the adversarial process reigns in this country, where we rely upon it in the main to produce accurate verdicts, while also respecting individual autonomy.

With this definition of the adversarial process in mind, one sees clearly the *dramatis personae*, their respective roles, and the method to be used. Two rival sides, a neutral arbiter, the sharp clash of proofs, and the resulting impartial *547 (not infallible) judgment. Upset this dialectic, and the machinery of our jurisprudence can falter.

...

A scrupulously neutral decision-maker accedes to party control of the proceeding, and, in turn, that control lends the enterprise its legitimacy.

Quigley v. Unemp. Comp. Bd. of Review, 669 Pa. 645, 263 A.3d 574, 601 (2021) (Wecht, J., Concurring). The Supreme Court of the United States put it perhaps more bluntly: “Courts are essentially passive instruments of government. They do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties.” *U.S. v. Sineneng-Smith*, 590 U.S. 371, 140 S.Ct. 1575, 1579, 206 L.Ed.2d 866 (2020) (internal citations, quotation marks, and brackets omitted).

Because I agree that our justice system is adversarial in nature, I cannot join the Concurring and Dissenting Opinion’s conclusion that merely remanding to the PCRA court with instructions for the existing parties (but not the Attorney General) to participate in a hearing will cure the present problem. The PCRA court essentially **begged** the parties (and the Families) to present evidence at a hearing. Those parties (and the Families) instead argued that the existing evidence of record was sufficient to decide the relevant issues of fact.

In some sense, a hearing **was** held. When asked to present their witnesses, the parties declined and instead rested on a stipulated record. Were we to remand this case with the simple direction of holding a hearing, I presume a more formal version of the same process will occur. No witnesses will testify, and the record will be precisely the same as it is now. The PCRA court will once again render its decision on the same record.

I recognize this is how our adversarial system works. Like any system devised by humans, it is not perfect. Nonetheless, a determined Commonwealth attorney may, by selectively limiting the factual record supplied to the PCRA court, significantly impede that PCRA court’s ability to fairly assess whether the PCRA’s requirements have been met. The Concurring and Dissenting Opinion appears to favor transforming our PCRA courts into inquisitorial tribunals, empowered to investigate facts and call their own witnesses. Even if I were to agree that this is a sound solution (to be clear, I do not), our courts are simply not currently trained, equipped or funded to perform these functions.

To steal an aphorism from an unnamed associate of Winston Churchill, our adversarial system of justice is the worst system, except for all the alternatives.⁷ We always

should be striving to identify problems and improve the process. Nonetheless, this Court, as guardian of the judicial system in this Commonwealth, should take care not to destroy the core of the system while attempting to fix problems at its fringes.

⁷ “Indeed it has been said that democracy is the worst form of government except for all those other forms that have been tried from time to time...” Winston Churchill, November 1947 speech to the United Kingdom House of Commons.

As implemented by *Brown I*, PCRA proceedings are an outlier that do not fit comfortably within our adversarial system. Pursuant to *Brown I*, the parties do not fully control the contours of the dispute. They cannot reach an agreement that is binding on the PCRA court to grant relief. Moreover, the attorney for the Commonwealth may not, solely through the exercise ***548** of discretion in a PCRA proceeding, bargain away the community’s interest in an existing criminal conviction. In other words, the prosecutor and the petitioner are **not** the only parties to a PCRA proceeding. The PCRA court itself is no longer purely a neutral referee, but a guardian of the community’s interest in an existing conviction by ensuring the Act’s requirements are met before relief is granted.⁸

⁸ Contrary to the Dissents’ assertions, I do not suggest the court abandon its neutrality, especially with respect to fact-finding. I merely recognize that, pursuant to *Brown I*, a PCRA court is not bound by an agreement reached by the Commonwealth and the petitioner. The court is **required** to independently ascertain whether all of the requirements of the PCRA for relief have been satisfied. The “community interest” at stake is the interest in ensuring that the PCRA, as duly enacted legislation, is being followed, regardless of the desires of the nominal parties. It certainly would be novel to suggest that courts are acting improperly by ensuring that the law is followed.

This obviously creates tension with the traditional role of judges in our adversarial system. This tension has led to expressions of a crisis of confidence from all directions.⁹ District Attorney Krasner represents a portion of the public (who voted him into office) that believes the system covers up police and prosecutorial misconduct. He frequently publicizes overturned convictions and other established instances of police and prosecutorial misconduct. The families of murder victims represent the other side of public opinion, who perceive that District Attorney

Krasner consistently misleads courts in pursuit of a political agenda. They point to the laundry list of claimed and established ethical violations committed by District Attorney Krasner's office. Thus, the base dispute driving this case is political in nature, and this Court should tread warily, if it all, into such matters.

- ⁹ Public confidence in these matters and the attendant "crisis of confidence" is not the product of any personal animus toward DA Krasner or his policies. Rather, as chronicled in extensive detail by the Majority, it is the opinion of numerous state and federal judges, arrived at after dozens of proceedings wherein DA Krasner's office has misrepresented facts and omitted relevant and material evidence in pursuit of new trials for capital defendants.

Nevertheless, that does not mean we should just throw up our hands and pretend that this crisis in confidence does not exist. We are, indisputably, bound by the parameters of the PCRA and our organic charter in addressing the problem. Under our charter's scheme, the General Assembly enacts laws to address issues of state-wide significance, the executive branch oversees the enforcement of those laws, and the courts apply the laws to discrete disputes. As all parties recognize, the legislative enactment of the PCRA is central to the issues currently before this Court.

B. Statutory Mandates Regarding the Attorney for the Commonwealth

The PCRA is a duly enacted law that provides the parameters for collateral attacks on criminal convictions and sentences. While this Court is empowered to regulate the practice of law, we may not "abridge, enlarge [or] modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court[.]" PA.CONST. art. V, § 10(c). Further, as the Dissent notes, our Rule-making authority is limited by consideration of the separation of powers under our Constitution. *See* Dissenting Opinion at —. We therefore may not use our Rule-making powers to modify the clear commands of the PCRA.

The PCRA does not explicitly define the parties involved in a PCRA proceeding, *549 yet its procedures clearly address who may initiate a PCRA proceeding. The PCRA requires a person seeking relief to file a petition. *See* 42

Pa.C.S. § 9545(a) ("the filing of a petition under this subchapter"); (b) (entitled "Time for filing petition.").

Importantly, however, the Act does not explicitly require any response to the petition. Our rules governing PCRA procedure state that "an answer to a petition for post-conviction collateral relief is not required." Pa.R.Crim.P. 906(A). Furthermore, a failure by "the attorney for the Commonwealth" to file an answer "shall not constitute an admission of the well-pleaded facts alleged in the petition." *Id.*

Both the PCRA and our rules refer only to "the Commonwealth" or "the attorney for the Commonwealth" but fail to specifically define who is the attorney for the Commonwealth.¹⁰ *See* Pa.R.Crim.P. 900(B)¹¹; Rule 906(A) ("the attorney for the Commonwealth may elect to answer"); Rule 906(E) ("The Commonwealth shall file an answer..."); Rule 907(1) ("any answer by the attorney for the Commonwealth"); Rule 908 (repeatedly referencing "the Commonwealth's" motions or answers); Rule 909 (referencing "the Commonwealth[s] answer" and directing notice to "the attorney for the Commonwealth"). Existing practice, since the PCRA's enactment, has relied on local district attorney's offices to represent the Commonwealth. Pointing to existing practice, however, simply begs the question of what the General Assembly itself has said about who has the right or duty to represent the Commonwealth under the PCRA.

¹⁰ The one arguable exception is in 42 Pa.C.S. § 9543.1, where the Act imposes duties and grants rights to "the Commonwealth[.]" But the remedy provided by Section 9543.1 is an order directing DNA testing of evidence. *See id.* at (d). The petitioner is still required to file a separate PCRA petition seeking relief within one year of receiving the results. *See id.* at (f). Further, "the Commonwealth" does not distinguish between local district attorney offices and the office of the attorney general.

¹¹ Rule 900(B) explicitly only addresses capital cases. Nevertheless, it provides some guidance on identifying proper parties to a PCRA proceeding.

Both the Majority and the Dissent acknowledge that this Court has consistently held that PCRA proceedings are not criminal proceedings. *See* Maj. Op. at —; Diss. Op. at — (both citing *Commonwealth v. Haag*, 570 Pa. 289, 809 A.2d 271, 284 (2002)). Indeed, not only this Court, but the United States Supreme Court has held that PCRA

proceedings are “civil in nature.” *Haag*, 809 A.2d at 284; see also *Scott v. Pa. Bd. of Probation and Parole*, — Pa. —, 284 A.3d 178, 187 (2022) (recognizing that the High Court has declared post-conviction relief “not part of the criminal proceeding itself, and ... in fact considered to be civil in nature.”).¹²

- ¹² As I acknowledged above, this Court enacted procedural rules governing PCRA proceedings under the Rules of Criminal Procedure. However, this mere organizational choice does not control over our established precedent regarding the substantive nature of PCRA proceedings.

As both the Majority and the Dissent recognize, the Commonwealth Attorneys Act, 71 P.S. §§ 732-101 - 732-506, (the CAA) explicitly addresses who has the right to represent the Commonwealth **in a civil matter**. See Majority Opinion at —; Dissenting Opinion at — — —. The CAA instructs that the “Attorney General shall represent the Commonwealth and all Commonwealth agencies ... **in any [civil] action brought by or against the Commonwealth** or its agencies, **and may intervene in any other [civil] action[.]**” *55071 P.S. § 732-205(c) (emphasis supplied).¹³ Thus, the General Assembly, through the CAA, expressly requires the Attorney General to represent the Commonwealth in PCRA proceedings.¹⁴ At the very least, the CAA provides the Attorney General the authority to intervene in any PCRA proceeding.

- ¹³ The Dissent suggests that a PCRA petition is not an action brought against the Commonwealth. See Dissenting Opinion at —. It asserts that PCRA petitioners are not seeking relief from the Commonwealth. *Id.* at — — —. Apparently, it is not the Commonwealth who prosecuted and is imprisoning the petitioner, but some other, undefined entity. Further, even the Dissent acknowledges, albeit in other contexts, that elected officials, using taxpayer money, have traditionally responded to PCRA petitions. Finally, the petition in this case belies the Dissent’s idle theorizing: the named Respondent on the caption is the “Commonwealth of Pennsylvania[.]” not some unidentified entity. Apparently, the Dissent believes counsel for PCRA petitioners have been naming the wrong respondent for decades.

- ¹⁴ The Dissent’s concern about my “novel reading” of the CAA, Dissenting Opinion at —, provides little to no legal analysis. While the Dissent may certainly express its opinion that the existing

approach to PCRA litigation is *ipso facto* the correct approach, unprincipled resistance to questioning assumptions is not without its own historical faults. Moreover, concerning ourselves with the consequences of reordering PCRA defense in the Commonwealth appears to be drastically overstated (not that this Court should blindly fixate on the consequences of performing our interpretive obligations: “*Fiat justitia ruat caelum* (Let justice be done though the heavens fall)).”

In many of the precedents detailed by the Majority, the OAG has either filed *amicus* briefs or been asked to intervene. Participation by the OAG in matters where the adversarial process has been stymied is nothing new. As for the OAG becoming “responsible for the thousands of PCRA petitions filed each year in each of Pennsylvania’s sixty-seven counties[.]” *id.*, it is important to remember that although an additional burden may be imposed on the OAG, a corresponding reduction in workload accrues to the benefit of local district attorney’s offices. The proposed shift is meant to align with the commands of the CAA, comply with our existing Rules of Professional Responsibility, ensure the fair and impartial investigation, litigation, and where appropriate, concession of PCRA claims and promote the public’s confidence in the integrity of PCRA procedures through zealous and effective advocacy in a truly adversarial process. This is all we can ask for and precisely what the public demands in a fair and impartial criminal justice system.

The only contrary authority is found in legislation enacted in 1850. Prior to 1850, the Attorney General “was the sole repository of the power of law enforcement in this Commonwealth, enjoying the same powers and prerogatives that the Attorney General of England enjoyed at common law.” *Commonwealth v. Carsia*, 341 Pa.Super. 232, 491 A.2d 237, 242 (1985). Through the Act of May 3, 1850, P.L. 654, § 1, our General Assembly created an elected position previously unknown in Pennsylvania: the office of county district attorney. See *id.* That act granted district attorneys the powers that had previously been deployed by deputy attorney generals:

The officer so elected shall sign all bills of indictment, and conduct in court all criminal and other prosecutions in the name of the

Commonwealth, or when the State is a party, which arise in the county for which he is elected, and perform all the duties which now by law are to be performed by deputy attorney generals, and receive the same fees or emoluments of office: Provided, Said district attorney shall in no case whatever have authority to enter nolle prosequi in any criminal case, either before or after bill found, or to discharge a prisoner from custody, without first having obtained the approbation of the court in writing.

16 P.S. § 9952.¹⁵

¹⁵ The most current version of this statute is found in the County Code and applies explicitly to second through eighth class counties. See 16 Pa.C.S. § 14302.

***551** Despite the enactment of Section 9952, the delineation of powers between the Attorney General and district attorneys remained an issue of significant dispute for over a century. See *Carsia*, 491 A.2d at 242-246. Ultimately, the office of the Attorney General was enshrined in our Constitution, and the General Assembly enacted the CAA. See *id.* at 246. Pursuant to our organic charter, adopted in 1978, the Attorney General “shall be the chief law officer of the Commonwealth and shall exercise such powers and perform such duties as may be imposed by law.” PA. CONST. art. IV, § 4.1.

The CAA is one such law imposing duties on the Attorney General. As set forth above, the CAA requires the Attorney General to represent the Commonwealth in any civil action brought against the Commonwealth. See 71 P.S. § 732-205(c).

In contrast, the Act of 1850 does not grant district attorneys the power to **defend** civil actions. As mentioned above, PCRA petitioners seek relief from the Commonwealth through a civil collateral attack on their criminal convictions and sentences. This does not constitute an “other prosecution” on behalf of the Commonwealth under Sections 9952 and 14302. The CAA does not define “prosecution,” nor do Sections 9952 and 14302. The dictionary definition of the intransitive verb “prosecute” is “to **institute and carry on** a legal suit or prosecution.” www.merriam-webster.com/dictionary/prosecute, last visited March 6, 2026 (emphasis supplied). PCRA

petitions are prosecuted and instituted by a petitioner, not the Commonwealth. Moreover, the Commonwealth and its attorney need not even file an answer to a PCRA petition. Thus, it is the CAA that directly applies to PCRA proceedings, and not Sections 9952 and 14302.

C. Conflicts of Interest While Practicing Law

Beyond that, however, I will point to one area where our current practice is inconsistent with existing precedent in a way that contributes to the crisis in confidence plaguing our PCRA proceedings. Our precedent has, for 40 years, required disqualification of defense counsel when they attempt to argue their own previous ineffectiveness. See *Commonwealth v. McBee*, 513 Pa. 255, 520 A.2d 10, 13 (1986) (“When appellate counsel asserts a claim of his or her own [ineffectiveness] on direct appeal, the case should be remanded for the appointment of new counsel ...”). This disqualification applies to other lawyers employed by the same institution. See *Commonwealth v. Ciptak*, 542 Pa. 112, 665 A.2d 1161, 1161 (1995).

This rule has, however, never been applied to prosecutors in the PCRA setting. Yet, where a PCRA petition alleges that a prosecutor, or a fellow attorney in the same office, intentionally committed a *Brady* violation, it raises a perceived conflict of interest. If the allegation is true, this will have negative repercussions to the offending prosecutor’s reputation and raise the specter of professional discipline. See Pa.R.P.C. 3.1 (prohibiting counsel from advocating positions that do not have an adequate basis in law or fact); 3.3 (requiring candor toward the tribunal); 3.8(d) (requiring a prosecutor to timely disclose exculpatory evidence or information to the defense). That prosecutor, or an employee of the same office, may seek to avoid such consequences. In other words, the attorney for the Commonwealth in the PCRA proceeding ***552** may have a motive to continue to deny or even cover-up the existence of *Brady* material. Thus, the attorney for the Commonwealth in the PCRA proceedings is in a position where their “professional obligation will be in conflict with [their] personal desire or feelings and thereby threaten, or at least call into question, the performance of [their] professional duties.” *Commonwealth v. Balenger*, — Pa. —, 772 A.2d 86, 91 n.4 (2001).

This constitutes a clear and direct conflict of interest. A conflict of interest is “[a] real or seeming incompatibility between two interests that one possesses or is obligated to

serve, esp[ecially] when one of those interests might benefit the person to whom both are entrusted. A conflict arises when an official may benefit personally from a decision made in an official capacity.” Black’s Law Dictionary (12th Ed. 2024) (“CONFLICT OF INTEREST”). Under our existing rules regulating the practice of law, “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.” Pa.R.P.C. 1.7(a).

Allegations of prosecutorial misconduct and cover-up necessarily imply that the prosecutor or prosecutors may be called as witnesses. Under our Rules of Professional Conduct, neither the subject prosecutor nor any other member of the prosecutor’s office may act as an attorney in a proceeding where they are likely to be called as a fact witness. *See* Pa.R.P.C. 3.7(a); *Ciptak*.¹⁶

¹⁶ The Kentucky Supreme Court has held that, under a Kentucky statute, a prosecutor should recuse when they have knowledge that they are likely to be called as a witness in a collateral proceeding. *See Bowling v. Commonwealth*, 80 S.W.3d 405, 420 (Ky. 2002). However, the *Bowling* Court concluded the petitioner did not establish that he was prejudiced by the prosecutor’s failure to recuse. *See id.*

PCRA courts should not hesitate to disqualify any such prosecutor or prosecutor’s office in these circumstances. Indeed, we require disqualification of defense counsel under similar circumstances, even though non-indigent defendants have a constitutionally recognized right to counsel of their choosing. As demonstrated above, district attorneys have no constitutional or statutory right to defend PCRA petitions. Further, the possibility that an independent third party will review claims of prosecutorial misconduct can only have a salutary effect on prosecutors when exercising their ethical duties in a criminal prosecution.

Prosecutors occupy a unique position in our justice system. They are undoubtedly elected officers who fall under the executive branch of our government, regardless of whether that is at the state or county level. Yet they are also undisputably officers of the court, bound by the Rules of Professional Conduct like any other barred attorney. As such, this Court should remain mindful of democratic legitimacy of prosecutors exercising their discretion. Be it “tough on crime,” “reform,” or any other legal political position, they are accountable only to the electorate for matters properly within their discretion. The mirror image to this, however, is that prosecutors should remain mindful

of their ethical duties to the courts. They must not let their political zeal lead them to attempt to mislead judges or juries through the suppression of relevant evidence, whether it be exculpatory or inculpatory. This Court cannot police the political aspects of the prosecutor’s office, but it not only may, but must, police the prosecutor’s conduct in court the same as any other officer of the court.¹⁷ Thus, I believe that our law, our *553 Rules of Professional Conduct, and public policy all require disqualification of any prosecutor’s office accused of misconduct as a basis for a requested new trial.¹⁸ Correspondingly, I would appoint the Attorney General to represent the Commonwealth in all such civil proceedings.¹⁹ Such a procedure will remove the claimed taint and any illegality in the underlying prosecution while protecting the public’s interest in a fair and impartial proceeding.²⁰

¹⁷ The Dissent asserts that “[i]t is of no moment whether Justices of this Court” agree with Philadelphia’s voters regarding DA Krasner’s policies. Dissenting Opinion at 592. First, this is a misrepresentation of my position, as explicitly laid out above. I agree with the Dissent that DA Krasner’s discretionary policies are generally beyond this Court’s bailiwick. In contrast, DA Krasner’s, and his office’s, **performance** as officers of the court is an issue fundamentally within this Court’s purview. Multiple judges have identified and decried unprofessional conduct by members of the DAO since DA Krasner was first elected. Contrary to Justice Wecht, I believe this Court — not the electorate of Philadelphia — has the duty and responsibility to address issues the DAO owes to the courts, such as the duty of candor, especially in non-adversarial proceedings. Further, this Court has the power, and thus the duty, to regulate the practice of law. One such long-standing regulation requires attorneys to withdraw when they have a conflict of interest. I can find no wording in our Rules to support the Dissent’s belief that District Attorneys are exempt from conflict of interest rules because they won an election.

¹⁸ The Dissent notes that the United States Supreme Court has never “seen fit to disqualify prosecutors from responding to *Brady* claims[.]” Dissenting Opinion at 585. I do not doubt this is true, but I am equally certain this fact is irrelevant to the question at hand. The issues before us are ones of state law, not federal. This Court has never held that prosecutors are immune from claims of conflict of interest under our Rules of Professional Conduct.

Accordingly, the High Court would have no reason to apply state law in the first instance. Further, in construing these state authorities, the Dissent creates a new canon of construction, whereby tradition trumps text and intent. The Dissent desires to add the words “except for prosecutors” into Rule 1.7: “[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest.” Pa.R.P.C. 1.7(a). To even begin to justify such an addition, one would need to identify how the added text served the clear intent of the drafting body. The Dissent makes no such attempt, instead resting on the laurels of tradition as its interpretive polestar that the missing words are nonetheless part of the Rule. Instead of this novel and radical method of construing the CAA and our Rules of Professional Conduct, I fall back on accepted methods of construction, focusing on the text and its intent.

¹⁹ The Dissent seems to believe that allowing the OAG to review, investigate, and defend claims of prosecutorial misconduct by a locally elected DAO will result in the OAG automatically opposing relief, refusing to identify mistakes in prior prosecutions, and correcting errors “necessary in order to ensure that the defendant receives the fair trial to which he is constitutionally entitled.” Dissenting Opinion at 587. I see things differently and presume that the OAG will perform its constitutionally mandated duties with the honor, integrity, and perhaps most importantly, the impartiality required. At the very least, I fail to see how the OAG will act any less ethically than a local DAO which is operating under a conflict of interest.

²⁰ The Dissents insist that my remedy will result in “a complete upheaval and restructuring of the PCRA system by judicial fiat.” Concurring and Dissenting Opinion at 562, n.8. I disagree. Nothing in **this** Opinion changes the substance or procedure of PCRA proceedings. Applying basic principles of conflict of interest evenly (and uniformly across the Commonwealth, not just in one county) to prosecutors and defense attorneys, removing attorneys accused of prosecutorial misconduct in the PCRA context and replacing them with independent and impartial investigators and litigators protects both the spirit and the letter of

the PCRA statute. Both Dissents seem oblivious to these issues and instead rely upon the “this is not our job” philosophy.

Once again, I disagree. It is the job of the courts to ensure a fair and impartial process to identify prosecutorial error or conduct that results in wrongful convictions while simultaneously upholding the ethical standards of our profession. Indeed, “...courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.” *Wheat v. U.S.*, 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). The idea that courts should sit silently as injustices unfold under their very noses is bewildering. Judges occupy a rarefied position in our system of justice and are not just “potted plants” in this process. Bridget May McCormack, *Staying off the Sidelines: Judges as Agents for Justice System Reform*, 131 Yale L. J. 175, 178 (October 24, 2021).

Indeed, DA Krasner himself makes the most compelling case for removing prosecutors with a conflict of interest from PCRA proceedings. According to DA Krasner, prior Philadelphia District Attorneys have consistently engaged in prosecutorial misconduct, including the mishandling of *Brady* claims. *See Commonwealth Brief at 59-60; see also Prosecutorial Misconduct in the Philadelphia District Attorney's Office*, **no author listed**, Peter L. Zimroth Center on the Administration of Criminal Law (2024), at 6-8, 18. While the accuracy of these claims is beyond the scope of any single proceeding, it is beyond cavil that DA Krasner has identified an appearance of impropriety in the historical failure to recognize the inherent conflict of interest with a DAO defending its own prior conduct against *Brady* claims on collateral review.

Since his election in 2017, DA Krasner has accused generations of prosecutors and law enforcement officials over multiple administrations including those of former Governor Rendell, former Chief Justice of the Pa Supreme Court Ronald Castille, former Judge Lynn Abraham and DA Seth Williams and his successors of engaging in a vast conspiracy to frame innocent citizens of capital murder, planting incriminating evidence, burying exculpatory evidence and suborning perjury. *See Majority Opinion at 516-28* (summarizing cases where the DAO has conceded relief in collateral proceedings since DA Krasner took office).

Per DA Krasner and his Conviction Integrity Unit,

those crimes continued through appeals and PCRA proceedings spanning decades. What better evidence of the need to remove an entire prosecutor's office from defending against their own misconduct than those claimed by DA Krasner and his staff in their efforts to overturn multiple capital convictions and death sentences? If DA Krasner is correct, the wrongful convictions he has identified are not isolated incidents of prosecutorial misconduct to be rooted out in individualized adversarial proceedings. To the contrary, they would be the tip of the iceberg of a vast prosecutorial conspiracy. If true, the proverbial fox is guarding the henhouse. Who watches the watchers? Surely, our answer cannot be the watchers who allegedly abused their powers and hid the corruption for decades!

*554IV. PCRA PROCEEDINGS BELOW

A. Timeliness

I largely agree with the Majority's analysis of the instant PCRA proceedings. However, I find it important to emphasize the content of Brown's separate petitions regarding timeliness to clarify exactly how the reasoning supplied by the PCRA court was insufficient on its face.

Brown initiated the current proceedings by filing a second PCRA petition in June 2020. This petition was facially untimely. *See* R.R. at 10 (Second PCRA Petition at ¶ 16). Thus, Brown bore the burden of proving that an exception to the PCRA's timebar applied, otherwise the PCRA court did not have jurisdiction to address the petition. *See id.*; *see also Commonwealth v. Gamboa-Taylor*, 562 Pa. 70, 753 A.2d 780, 783 (2000). Further, appellate courts must address the timeliness of a PCRA petition even if the PCRA court itself did not. *See Commonwealth v. Whitney*, 572 Pa. 468, 817 A.2d 473, 478 (2003).

Initially, Brown alleged that his petition was timely because the "government interference" and "previously unknown facts" exceptions applied:²¹

18. This petition meets the requirements of 42 Pa. C.S. §

9545(b)(1)(i) & (ii) because many of the facts upon which the claim is predicated – a 1998 investigation and finding by the Internal Affairs Department ("IAD") of the Philadelphia *555 Police Department of misconduct by Detective Baker, for denying a suspect he interrogated the right to counsel, and the Commonwealth's knowledge that in 1991, Detective Baker, during the investigation of another Philadelphia murder case, engaged in unconstitutional and coercive interrogation tactics – were suppressed by the Philadelphia District Attorney's Office and by the Philadelphia Police Department since the outset of this case. *See* 42 Pa. C.S. § 9545(b)(1)(i). Similarly, because of those non-disclosures and mischaracterizations, the facts upon which this claim is predicated could not have been ascertained earlier by the exercise of due diligence. *See* 42 Pa. C.S. § 9545(b)(1)(ii).

19. Petitioner could not have discovered the facts set out in the preceding paragraph in the exercise of due diligence until June 24, 2019 when, in *Commonwealth v. Hollman*, CP-51-CR-093311-1991 (Phila. County C.C.P.), (a) the parties filed their Joint Stipulations of Fact of Petitioner Chester Hollman, III, and Respondent Commonwealth of Pennsylvania, and (b) the Commonwealth filed the Commonwealth's Answer to Counseled PCRA Petition. This Petition is timely filed as it is filed within one year of June 24, 2019. *See* 28 Pa. C.S. § 9545(b)(2).

20. In addition, Petitioner sets forth averments taken from the deposition of former Det. David Baker that was conducted on August 2, 2017 in the case, *Anthony Wright v. City of Philadelphia, et al.*, No. 16cv-0502 (E.D. Pa.). Petitioner was not aware that Det. Baker was deposed in that case until December 20, 2019 and the deposition transcript is not a publicly filed document. Petitioner's counsel learned about the deposition transcript when communicating with Wright's civil attorney on December 20, 2019. Before that neither Petitioner, nor his counsel, knew that Detective Baker had been deposed. Accordingly, Petitioner's reliance on the Baker deposition in this Petition is timely, as well.

R.R. At 6-7 (PCRA Petition at ¶¶ 17-20).

²¹ 42 Pa. C.S. § 9545(b)(1)(i) & (ii).

Importantly, Brown did not raise the claim which formed the basis of the PCRA court's grant of relief — Vann's alleged identification of Kennisha Paige as a conspirator — until a year later, when he filed an amended petition. However, the amended petition, while raising the substantive *Brady* claim based on Vann's alleged

identification of Kennisha Paige, did not explicitly allege that this new claim satisfied **any** timeliness exceptions. The joint stipulation subsequently filed with the PCRA court provided that the relevant documents had not been disclosed but did not otherwise explicitly address the issue of timeliness.

Much like the Majority, I make these observations not to declare Brown ineligible for PCRA relief. Instead, I am merely highlighting that we cannot infer the PCRA court's reasoning on timeliness from its terse resolution. The PCRA court issued a short order vacating Brown's judgment of sentence. That order is supplemented only by the judge's in-court statement:

I'm going to find that the record establishes that the assigned detective in this case learned through investigation that witness, Ronald Vann, had falsely identified Kennisha Paige as being a participant in the January 19th, 2003 robbery and murder here at issue, and that this false identification was not disclosed to the defense; that a critical witness had made a demonstrably false identification of someone as being a participant in the same criminal events that are the subject of the charges against [Brown] was, in my view, impeachment evidence of a different character than the impeachment *556 material used at trial and I find that the suppressed evidence satisfies the standard for materiality under *Brady* and its progeny.

R.R. at 1004 (N.T., 5/5/2023, at 4).

This statement makes clear the PCRA court found that Vann falsely identified Paige as a conspirator. However, notably absent from the court's statement is any consideration of the timeliness of the claim that Vann falsely identified Paige. As ably set forth by the Majority, this omission is critical, since the PCRA court had no power to grant relief absent jurisdiction. Accordingly, I agree with the Majority that a remand to the PCRA court for further fact-finding and analysis is justified.

B. Materiality Under *Brady*

Furthermore, while the PCRA court briefly discussed materiality under *Brady*, I would direct the court to expand this analysis on remand. Even if we concede that the PCRA court's factual finding regarding Vann's statement is supported by the record, it is not immediately apparent that disclosure of Vann's identification of Paige as a conspirator was material. "Evidence is material for *Brady* purposes when its absence caused prejudice. This is a high bar, as the mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the *Brady* context." *Commonwealth v. Thomas*, — Pa. —, 323 A.3d 611, 639 (2024).

Brady requires that: (1) the evidence was favorable to the defendant, whether it is exculpatory or mere impeachment; (2) the evidence was suppressed by the prosecution, whether willfully or inadvertently; and (3) prejudice ensued. *See Commonwealth v. Conforti*, — Pa. —, 303 A.3d 715, 725-726 (2023). That Vann lied to detectives about Paige's involvement is certainly evidence favorable to Brown, as it could be used to impeach Vann, who was one of two witnesses tying Brown to the robbery. The PCRA court found the Commonwealth failed to disclose this statement to the defense. Before granting such relief, however, the PCRA court was required to assess whether Vann's statement was material under *Brady*.

Given the "high bar" of materiality under *Brady*, the PCRA court's terse analysis is insufficient under the circumstances of this case. This is a complicated issue that requires an analysis of the specific circumstances. On the one hand, absent Vann's and Lyons's testimony, the Commonwealth presented no evidence that tied Brown to the robbery. And of the two, Vann's testimony was the most damaging. Nonetheless, Vann testified before the jury that he lied in his first two statements to detectives, as he was trying to avoid inculcating himself. *See* N.T., 7/22/2004, at 219-223; 229-230; 232-233; 249; 252; 259-260; 267; 272-274; 284; 287; 291; 297; 310; 365-366. Perhaps even more relevant, the trial court opined at sidebar that since Vann had already been called out on numerous lies in his statements to police, it did not necessarily help a co-defendant to point out more lies during cross-examination. *See id.* at 278.

Thus, Vann was caught in multiple lies across at least two statements and he admitted he provided false information to protect himself. While pointing out that he also lied about Paige's involvement could certainly have helped

impeach Vann, I am not easily convinced that there is a reasonable probability that this information, considering all the other lies Vann admitted to, would have caused the jury to change its mind about Vann's credibility. With that said, the PCRA court's explicit explanation leaves room for multiple theories of materiality. Since I would remand for a *557 discussion of timeliness, I would provide the PCRA court an opportunity to more fully address its finding of materiality should it conclude that Brown's petition met a timeliness exception.

V. Conclusion

In conclusion, I agree with the Majority that a remand for consideration of timeliness of the PCRA petition is necessary. If the PCRA court finds the petition timely, I would further direct it to provide an explicit consideration (with accompanying factual findings) of the materiality of the alleged *Brady* violation. With respect to the question of who may participate in PCRA proceedings, I conclude the Attorney General not only has the right to intervene, but the obligation to represent the Commonwealth in PCRA proceedings. Further, I would require a PCRA court to disqualify a prosecutor's office where the petition alleges misconduct on the part of that office or any of its employees, even if a new prosecutor has been elected to head that office.

JUSTICE DONOHUE, concurring and dissenting

While I agree with the Dissenting Opinion that King's Bench review should not have been granted in this case,¹ a majority of this Court disagreed. Given that decision, I address the issues for which we granted King's Bench review.

¹ Dissenting Op. at 570-78.

In granting the petition of the family members of murder victims, Michael Richardson and Robert Crawford ("Family Members"), we agreed to review the order of the Philadelphia County PCRA² court to determine whether or not it erred in granting Lavar Brown ("Brown") relief. Error review was the only extraordinary relief requested by the Family Members because as amici in the PCRA court, they did not have the right to appeal the PCRA court's order. In addition, we sua sponte directed the parties to address the procedure that must be followed by a PCRA

court in order to grant post conviction relief when that relief is based upon concessions of the parties. Order Granting King's Bench Jurisdiction, 32 EM 2023. As to the PCRA court order, I agree with the Majority that the PCRA court's failure to hold an evidentiary hearing violated our rules of criminal procedure. A remand is thus required. Majority Op. at 509. This is the extent of my agreement with the Majority. In all other respects, I dissent.

² Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546.

In my view, our decision in *Commonwealth v. Brown*, 649 Pa. 293, 196 A.3d 130 (2018) ("*Brown I*") answers the question of what procedure must be followed and sets the guardrails for granting relief based upon concessions of error. We instructed PCRA courts that an independent review of the record is required when considering such a petition. That mandate presumes that the PCRA court will utilize its authority to conduct the proceedings in such a way that it is satisfied that the record supports relief. The Majority's fabrication of a third-party intervention rule only in Philadelphia County proceedings is unnecessary. Moreover, it undermines the authority of PCRA courts in Philadelphia County to control their own courtrooms and underestimates the ability of these courts to ensure the adequacy of the record presented by the parties. Most critically, the rule crafted by the Majority far exceeds this Court's authority under the Pennsylvania Constitution.

The PCRA Court's Order

Rule of Criminal Procedure 908 provides that "[e]xcept as provided in Rule 907, the *558 judge shall order a hearing ... when the petition for post-conviction relief or the Commonwealth's answer, if any, raises material issues of fact." Pa.R.Crim.P. 908(A)(2). As observed by the Majority, it is not whether the parties want an evidentiary hearing, but whether one is required. Majority Op. at 509. "[A]n evidentiary PCRA hearing is **required** when there is an outstanding issue of material fact." *Commonwealth v. Hutchinson*, 611 Pa. 280, 25 A.3d 277, 321 (2011) (emphasis added). Here, throughout the proceedings, the PCRA court repeatedly articulated its belief that there were unresolved issues of material fact that needed to be resolved before a decision on the petition could be rendered.

At the outset, the PCRA court found the record to be

insufficient with respect to Ronald Vann’s (“Vann”) statement “allegedly made implicating Kennisha Pa[i]ge [(“Paige”)][,]” which is why initially it announced that an evidentiary hearing would be required in line with its role under Rule 908. N.T., 7/8/2022, at 6. Additionally, the court was “interested in actually what happened, and [it did not] think [it was] clear from the submissions that [it] received.” N.T., 8/11/2022, at 13. The PCRA court made similar statements repeatedly throughout these proceedings regarding evidence supporting the position that Vann actually implicated Paige in the robbery-homicide at Rite-Aid. *See, e.g.*, N.T., 7/8/2022, at 6-7 (“But on the existing record, it’s my considered view ... that there is not enough information in the paperwork for me to grant the petition notwithstanding the fact that both parties are of the opinion that it should be granted.”); N.T., 10/7/2022, at 13 (“I’m still not understanding how everybody thinks that paperwork establishes that ... I just don’t get it.”); N.T., 12/1/2022, at 8 (“[T]he record in front of me including the stipulation does not resolve the factual question of whether Mr. Vann actually identified Kennisha Paige as a participant in the Rite-Aid conspiracy.”); *id.* at 10 (“It seems to me there’s evidence on both sides, and I don’t know how anybody could conclude conclusively that Vann actually identified Paige as being one of the participants in the homicide based on this record.”); *id.* at 13-14 (“I’m pointing out that a key factual issue in my mind is not resolved on this existing record.”). The PCRA court announced that it would hold an evidentiary hearing and identified certain witnesses to be called to testify in order to “get to the bottom of” what actually happened with respect to Vann’s statements regarding Paige. *See, e.g.*, N.T., 7/8/2022, at 6-7 (“I’m going to require that all of the prosecutors who participated in this case and whose conduct is at issue be subpoenaed to testify.”). Ultimately, the only reason the PCRA court did not require a hearing was because “everybody connected with the case” did not think an evidentiary hearing was necessary as Brown, the Philadelphia District Attorney’s Office (“DAO”), and the Family Members as amici all believed that the record sufficiently supported their respective positions. N.T., 12/1/2022, at 10. However, to reiterate, it is wholly irrelevant whether the parties wanted a hearing or not. The judge was plainly aware that there were outstanding issues of material fact and a review of the record substantiates that conclusion. Pursuant to our Rules of Criminal Procedure, an evidentiary hearing was required. *See* Pa.R.Crim.P. 908(A)(2). Thus, failing to hold such an evidentiary hearing was an error of law. With these evidentiary issues unresolved, the PCRA court could not grant relief. The error requires a remand to the PCRA court for a hearing.

Since the Majority agrees that this PCRA case must be remanded for a hearing, Majority Op. at 509, it is curious

and *559 suspect that it engages in an extensive evaluation of the probative value of the evidence. In doing so, the Majority concludes not only that the evidence submitted does not resolve all factual issues, but it characterizes much of the evidence as detrimental to Brown’s position. This skewed evaluation of the evidence is inappropriate.

For example, the Majority strongly suggests that the placement of Paige’s name on the 23rd District memorandum must mean that she was referenced in relation to “**other crimes**,” rather than the Rite-Aid robbery and homicide. Majority Op. at 506–07 (emphasis in original). That may be true, or it may be that there is more than one reference to the robbery and homicide at Rite-Aid included in the memorandum. However, the Majority’s suggestion that this placement or its clerical origin indicates a definitive answer one way or the other is pure speculation. *Id.* at 506-07. It is merely support for the conclusion that this is a question that needs to be addressed at an evidentiary hearing. Additionally, I find troubling the Majority’s evaluation of Detective Baker’s memoranda wherein he recounts his search for Paige in response to Vann’s statement. The Majority suggests that Detective Baker was only “informally” involved in the case, and then it proposes that somehow Detective Baker confused Paige and Lyons without any evidence to support that theory, aside from, again, mere speculation. *Id.* at 506-07. According to the evidence presented, Detective Baker spent time over the course of at least two days specifically investigating Paige. I see no reason to call that into question without evidence to the contrary. Whether he sought her out as a participant in the crime or as a witness to the crime is material to Brown’s claims, which is precisely why an evidentiary hearing is necessary. On remand, the PCRA court must conduct an evidentiary hearing, and its failure to do so before ruling on Brown’s petition was error.

The Process in Concession of Error PCRA Proceedings

As for the second issue (i.e., what process should courts follow in matters involving post-conviction concessions of error), it is my position that we resolved this issue in *Brown I*. We specifically ruled that “a district attorney’s concession of error is not a substitute for independent judicial review.” *Brown I*, 196 A.3d at 146. As we made clear in *Brown I*, a prosecutor has the discretion during post-conviction review “through the exercise of effective advocacy, to persuade the courts to agree that error occurred as a matter of law.” *Brown I*, 196 A.3d at 146.

The concession between the prosecutor and the defendant, however, cannot compel the PCRA court to automatically grant relief. *Id.* PCRA courts are expected to engage in “all necessary and appropriate judicial review” before making their decision one way or the other. *Id.* Nothing has changed since *Brown I*. Here, as in *Brown I*, our expectation for PCRA courts remains clear—we trust them to engage in independent judicial review. I note that the eight amici writing in support of Brown and DAO recognize the capability of our PCRA courts to engage in independent judicial review and to utilize the various tools at their disposal to ensure the effective administration of justice.³ To these amici, we *560 need only reinforce our current system, not alter it by extraordinary means.⁴ Like the amici, I continue to trust that PCRA courts, including those in Philadelphia County, are fully capable of fairly and justly adjudicating proceedings involving concessions of errors without expanding the statutory provisions of the PCRA. *Id.* Clearly, the Majority does not.

³ See, e.g., Quattrone Center’s Amicus Brief at 7 (noting that, pursuant to *Brown*, PCRA courts may “permit[] relief only upon a showing of an underlying violation of the petitioner’s rights that justifies PCRA relief”); 41 Current and Former Officials’ Amici Brief at 17 (“[A]s neutral arbiters in our criminal legal system, judges have the responsibility to conduct ‘independent judicial review’ before accepting a confession of error.”); PIPs’ Amici Brief at 10 (“In *Brown I*, this Court advanced a workable rule to prevent trial courts from acting as ‘rubber stamps’ of district attorneys’ determinations on the merits of PCRA petitions.”); Former Judges and Prosecutors’ Amici Brief at 13 (“[C]ourts, faced with a questionable concession, are more than capable of getting to the truth.”).

⁴ See, e.g., Quattrone Center Amicus Brief at 14 (“A clear pronouncement by this Court reinforcing the requirement of an independent review of the record by the PCRA court and a broad discretion to appoint amicus will enhance the integrity of the final judgment.”); 41 Current and Former Officials’ Amici Brief at 18 (“Given the guardrails already in place in post-conviction litigation ... [the] proposed additional procedures are unwise and unnecessary.”); PIPs’ Amici Brief at 3 (“[T]he Court’s existing precedents, including its prior review of this case in [*Brown I*], offer sufficient guidance, balancing recognition of concessions’ important function in criminal proceedings with the need to preserve courts’ role as final—and independent—legal arbiters.”); CIUs’ Amici Brief

at 20 (“[T]rial courts should be accorded their traditional discretion to determine the appropriate procedures for resolving cases on their dockets, not handcuffed by mandatory procedural hurdles not endorsed by the legislature or necessary to the efficient and fair administration of justice.”); Former Judges and Prosecutors’ Amici Brief at 11 (“[T]rial courts are already proficient in the independent fact finding required in the case of a prosecutorial concession.”); Ethics Scholars’ Amici Brief at 12 (“[T]here is already a sufficient backstop that addresses Petitioners’ concerns because trial courts already are not bound by the concessions.”).

The Majority relies on cases handpicked by the Office of the Attorney General (“OAG”) to demonstrate “unreliable concessions and erroneous grants of relief” by DAO.⁵ Majority Op. at 530. To the contrary, from my reading, these examples demonstrate that these courts effectively engaged in independent review in conducting concession of error proceedings. The tools at a court’s disposal ensure the effective administration of justice. In each of the cases discussed by the Majority that involved factual concessions,⁶ the courts *561 denied relief, demonstrating independent review of concessions of error. The courts, inter alia, determined whether there was a need for an evidentiary hearing based on any inadequacies in the record, see, e.g., *Wharton v. Vaughn*, 2022 WL 1488038 (E.D. Pa. May 11, 2022); *Martinez v. Delbalso*, 2021 WL 510276 (E.D. Pa. Feb. 11, 2021); *Commonwealth v. Mckeals*, 335 A.3d 13 (Pa. Super. 2025); *Commonwealth v. Perrin*, — Pa. —, 291 A.3d 337 (2023); and invited participation of amicus curiae, see, e.g., *Wharton*, 2022 WL 1488038, at *1; *Johnson v. Kerestes*, 683 F.Supp.3d 452 (E.D. Pa. 2023); *Artache v. Superintendent SCI Forest*, 2023 WL 8468613, at *4 (3d Cir. Dec., 7 2023) (unpublished); *Malone v. Smith*, 2023 WL 2351694, at *2 (E.D. Pa. Mar. 3, 2023) (unpublished); *Brown I*, 196 A.3d 130; *Commonwealth v. Murchison*, — Pa. —, 328 A.3d 5 (2024); *Perrin*, 291 A.3d 337; *Mckeals*, 335 A.3d 13. In each of the cases discussed by the Majority, the courts utilized existing resources to resolve the petitions without reliance on a concession of error. We are continuing to see PCRA courts in Philadelphia County rely on these tools in concession of error proceedings throughout the pendency of this case. See, e.g., *Commonwealth v. Mckeals*, CP-51-CR-0000701-2013 (Phila. CCP Dec. 7, 2023) (denying a *Brady* claim based on DAO’s concession of error after holding an evidentiary hearing and independently reviewing the record).

⁵ The parties—the Family Members, Brown, and

DAO—barely, if at all, mention these cases. All of these cases have been laid out in the OAG’s amicus brief, wherein it treats the instant case as just another piece of a “pronounced pattern of questionable concessions” by DAO. OAG’s Amicus Brief at 44. The Majority simply accepts the OAG’s summary of those cases and its conclusions without the benefit of their respective records to justify its sua sponte rulemaking. Majority Op. at 518-28.

⁶ I take exception to the Majority’s undiscerning portrayal of DAO’s “misconduct” in the cases handpicked by the OAG to justify this extraordinary remedy. Majority Op. at 530 n.66. Some of these cases are examples of DAO acting as an advocate by presenting arguments to the court to advance unresolved legal propositions. *See, e.g., Johnson v. Kerestes*, 683 F.Supp.3d 452, 465 (E.D. Pa. 2023) (arguing that courts do not “have the discretion to ignore an intentional waiver of all non-jurisdictional defenses and address defenses such as exhaustion and timeliness sua sponte[,]” which was rejected); *Brown I*, 196 A.3d at 142 (arguing that courts “must defer to the District Attorney’s exercise of discretion in conceding sentencing error[,]” which we rejected) (internal quotations omitted); *Commonwealth v. Perrin*, 291 A.3d 337, 346 (Pa. 2023) (arguing that courts must accept “parties’ stipulation” as to a witness’s credibility, which we rejected). Advocates are entitled to make good faith arguments to extend or clarify the law. Pa.R.P.C. 3.1 (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”). Of course, we can reject those arguments. The Majority equates advancing arguments that are ultimately rejected as misconduct by DAO. This is palpably incorrect. Simply because we disagree with a legal argument advanced by a party does not transform that party’s advocacy into misconduct.

These same tools were available to the PCRA court in this case. Although that court erred by failing to hold an evidentiary hearing when it was required by our rules, it recognized its responsibility to exercise independent judicial review in accordance with the holding in *Brown I*.

In the instant matter, in lieu of an evidentiary hearing, the PCRA court erroneously concluded that it could resolve contested issues by considering “exhaustive[]” briefing and conducting a months-long review of the record. N.T., 5/5/2023, at 4-5. The PCRA court did not err by blindly accepting the concession of error. It erred because it was persuaded by DOA, Brown and the Family Members to forego the hearing required by Rule 908(A)(2). Here, it was clear that an independent review of the record could not be accomplished without an evidentiary hearing to resolve factual disputes in the record before it.

The PCRA court recognized that it had the means available to enhance the record. While it denied the Family Members’ intervention in the PCRA proceeding, the court permitted the Family Members to participate as amici to advance positions in opposition to Brown’s petition. Unfortunately, the PCRA court succumbed to the entreaties of DAO, Brown, and the amici that an evidentiary hearing was unnecessary. The outcome may have been different if the required hearing took place. It was the PCRA court’s original intention to require the testimony of prosecuting attorneys involved in the case whose conduct was questioned by DAO. *See* N.T., 7/8/2022, at 6-7 (“I’m going to require that all of the prosecutors who participated in this case and whose conduct is at issue be subpoenaed to testify.”). Likewise, the PCRA court was appropriately skeptical as to why a person with firsthand information about the facts was not offering evidence. *See* N.T., 11/1/2022, at 10 (“I don’t know why it’s so hard to ask one of the many people who would actually have personal *562 knowledge as to whether or not this happened[.]”). In this case, although certain individuals with firsthand information contained in the documents relied upon by Brown and DAO were deceased, several individuals with information about the documents and the investigation were not.⁷ If an evidentiary hearing had been scheduled, it would have been within the purview of the PCRA court to request the testimony of those available witnesses. Further, while the Majority suggests that amici are generally not permitted to examine witnesses, Majority Op. at 531, I am not aware of such a limitation on the court’s discretion to allow amici to cross-examine witnesses called by a party. In addition, it is clear that “where the interest of justice so requires, the court may examine a witness regardless of who calls the witness.” Pa.R.E. 614(b).⁸ Ultimately, the failure to produce evidence sufficient to resolve the disputed issues of fact would result in a denial of relief based upon Brown’s failure to meet his burden, by the preponderance of the evidence, to prove his entitlement to relief.

⁷ Detectives Judge and Peters, and ADA Fisher were arguably available to testify. Majority Op. at 516.

Detective Baker and Vann died before the proceedings commenced. *Id.* at 516 n.49.

⁸ In his concurring opinion, Justice McCaffery accuses me of “favor[ing] transforming our PCRA courts into inquisitorial tribunals,” based on his apparent disagreement with Pennsylvania Rule of Evidence 614(b). Concurring Opinion at 547 (McCaffery, J., concurring). I am of the belief that our PCRA courts are operating precisely how they are supposed to within the parameters of our existing laws. In fact, it is Justice McCaffery who wants to carry out a complete upheaval and restructuring of the PCRA system by judicial fiat. Under his scheme, the PCRA court would “no longer” act as a “neutral referee,” but rather serve as a “guardian of the community’s interest,” effectively transforming the PCRA court into an interested party. *Id.* at 548. I cannot condone this Court restructuring PCRA courts or their role in such proceedings. The PCRA courts have and should continue to act as neutral and independent arbiters utilizing the tools that are already at their disposal. However, if a petitioner fails to present necessary witnesses with knowledge of the facts or declines to examine such witnesses regarding pertinent information, the PCRA court can reasonably conclude that this serves as sufficient grounds to deny relief. Nothing about this idea is novel or earthshattering. I am confident that our PCRA courts can continue to exercise their independent judicial review and determine when it is appropriate to utilize or not utilize the tools already at their disposal.

The Majority is of the belief that DAO’s failure to present the March 2003 memorandum to the PCRA somehow disproves that PCRA courts can adequately handle these concession of error proceedings. Majority Op. at 529 n.65. It is this failure that the Majority relies upon as evidence that DAO has continued to engage in its alleged practice of misconduct in the instant case. *Id.* at 529 (“The DAO has also time and again withheld relevant evidence from the courts. Presently, the DAO withheld the March 2003 memorandum.”). And it is that purported failure that the Majority relies upon to justify its extreme course of enacting a rule specifically targeting Philadelphia County. However, I am of the opinion that the Majority overstates the significance of the March 2003 memorandum, in which Vann identified Lyons as part of the Rite-Aid murder.

Brown’s *Brady*⁹ claim is that the Commonwealth “withheld evidence that [Vann] falsely accused an individual named Kennisha Paige of being involved in the January 19, 2003 Rite Aid robbery/murder[.]” *563 Amended PCRA Petition, ¶ 63. Specifically, he maintains that detectives had investigated and suppressed the alleged false identification, “depriv[ing] the defense of evidence that could have been used at trial to show police knew Mr. Vann had provided untrue information and was capable of falsely implicating an innocent person in this crime simply to save himself.” *Id.* ¶¶ 63-68. The only relevant question then is whether Vann falsely implicated Paige. I fail to see how the March 2003 memorandum “tended to support the fact Vann did not identify Paige,” when it only shows that he identified Lyons and Brown in the crime. Majority Op. at 512. As the Majority acknowledges, this document is not “**dispositive** of Vann’s failure to identify Paige[.]” and Vann very well could have still identified Paige, Lyons or anyone else. *Id.* at 512-13 (emphasis in original). If it does not contradict the claim that Vann identified Paige, but merely shows that Vann identified others, I am uncertain as to its relevance with respect to Brown’s *Brady* claim. Hypothetically, there could be numerous other pieces of documentation that Vann identified other individuals, falsely or otherwise. That does not change the nature of Brown’s claim that Vann falsely identified this particular individual, Paige. All that is to say, this document does not seem to be the smoking gun the Majority thinks it is.

⁹ *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (holding that a state violates a defendant’s right to due process by withholding evidence that is favorable to the defense and material to guilt or punishment).

Regardless, I have every confidence that PCRA courts in Philadelphia County are more than capable of utilizing the tools already at their disposal to adjudicate PCRA petitions based on concessions of error. We recognized this in *Brown I* when we held that in matters of post-conviction concessions of error, the PCRA courts must engage in independent judicial review. *Brown I*, 196 A.3d at 146. To resolve the question that we accepted pursuant to our King’s Bench authority as to what procedure must be followed in these concession of error proceedings, we need only reinforce our holding in *Brown I* and remind the PCRA courts to utilize existing procedures to assure the adequacy of the record. PCRA courts in Philadelphia County, as in all counties, are currently well-situated to review the merits of PCRA petitions based on concessions of error pursuant to our mandate in *Brown I*.

Majority's Intervention Rule

Despite the adequacy of the requirement for PCRA courts to conduct independent judicial review of the record, the Majority crafts a new rule for Philadelphia County only:¹⁰

[I]n any PCRA case in which the DAO concedes relief, the PCRA court, before ruling on the concession, shall afford the OAG notice and an opportunity to intervene. Importantly, if the OAG elects to intervene in the case, it will not “replace” *564 or supersede the DAO; the DAO shall remain in the case The OAG will merely become an additional, full party in the case providing its own perspective on the concession. The OAG may agree with the defendant and the DAO that relief is warranted, or it may not, but in either case its independent assessment and participation will foster reliable proceedings and correct results.

⁶⁸ In addition to third-party participation, the OAG requests access to the full files of the DAO, mandatory evidentiary hearings before relief is granted based on claims of fact, and entitlement to appeal as of right. See OAG's Brief at 47-50. The OAG can request discovery and evidentiary hearings pursuant to the existing rules governing these procedures. See Pa.R.Crim.P. 902(E), 907, 908, and 909(B). As a full party, the OAG may appeal the PCRA court's decision as of right. See Pa.R.A.P. 501; *Barnes*, 871 A.2d at 794.

Majority Op. at 532 & n.68. The Majority views the OAG as a third-party participant as offering an “independent assessment” that “will foster reliable proceedings and correct results.” *Id.* at 532.

¹⁰ Stretching for a precedent to support the exercise of our King's Bench powers to effectuate its single-county rule, the Majority looks to the infamous “kids-for-cash” scandal, in which two former judges of the Luzerne County Court of Common Pleas received payments from two private for-profit juvenile facilities in exchange for the placement of juveniles. We exercised our King's Bench powers to investigate the scope of the scandal and provide relief to affected juveniles in the county. *In Re: Expungement of Juv. Recs. & Vacatur of Luzerne Cnty. Juv. Ct. Consent Decrees or Adjudications from 2003-2008*, 81 MM 2008 (Pa. 2009) (per curiam). The order was temporally limited and the relief afforded to the individual juveniles was not in itself extraordinary, only the

blanket nature of the order was. It was a remedy for a well-documented conspiracy by judicial officers who were criminally convicted. In contrast, here, the Majority fashions a prospective rule applicable to a subset of cases based upon findings of misconduct by DAO without due process in making the findings and further based on an assumption that all concessions of error by District Attorney Larry Krasner's office are suspect.

The Majority's intervention rule contravenes our Constitution's limited grant of authority to this Court to prescribe procedural rules. PA. CONST. art. V, § 10(c) (“The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts[.]”). Because our rulemaking authority extends only to procedural law, we cannot enact rules that establish or modify substantive law. Generally, “substantive laws are those which affect rights, while procedural laws are those which address methods by which rights are enforced.” *Morabito's Auto Sales v. Dep't of Transp.*, 552 Pa. 291, 715 A.2d 384, 386 (1998). Although the demarcation between substantive and procedural laws is sometimes difficult to determine, I believe it is quite clear that the Majority's rule is substantive in nature. *Id.* It is not merely a procedural rule that touches upon substantive rights, as it actually establishes substantive rights in the OAG where they otherwise do not exist.

The Majority dismisses the notion that its rule is substantive because it claims that the substantive rights of a petitioner and DAO are not impacted whatsoever by the intervention of the OAG. Majority Op. at 533–34. However, what it ignores is that, absent the Majority's proposed rule, the OAG¹¹ has no legal right or interest in *565 a PCRA proceeding. The Majority believes that because our procedural rules address intervention, its rule is on safe ground. Majority Op. at 534. However, without a pre-existing legal interest in the PCRA matter, the Majority's proposed intervenors fall outside the bounds of our procedural rules. For example, pursuant to Pa.R.C.P. 2327, a person is permitted to intervene in an action (subject to other rules) if the person can establish that they have an existing legal interest in the action or its outcome.¹² The Majority's rule bears no *566 relationship to our existing procedural rules governing intervention which provide the mechanism for persons with a legally recognized interest in an action or its outcome to participate in the action. The Majority attempts to circumvent this problem by asserting that the General Assembly has already established the proposed intervenors' legal interest. Majority Op. at 536 (citing 71

P.S. § 732-204(c)). However, the authority relied upon by the Majority does not establish the required legal interest for the OAG to intervene in a PCRA proceeding.

¹¹ The Majority is, at best, insensitive to public perception with its designation of the OAG as a welcome “intervenor” whenever District Attorney Larry Krasner’s office concedes post-conviction error. As identified by Brown, DAO, and many of the amici, the OAG is populated by attorneys who were part of DAO’s prior administration. After District Attorney Larry Krasner was elected, many former prosecutors from DAO relocated to the OAG. See Ryan Briggs, *Year of uncertainty sees top Philly DA staffers flee to AG Shapiro*, CITY & STATE PENNSYLVANIA, Jan. 18, 2018 <https://www.cityandstatepa.com/politics/2018/01/year-uncertainty-sees-top-philly-dastaffers-flee-ag-shapiro/364820/>. If DAO is conceding error in the prior administrations’ convictions, those former DAO prosecutors (now part of the OAG) will be tasked with litigating the propriety of their own prosecutions. In this case, the attorney who is the principal signatory to OAG’s amicus brief and who presented oral argument in this matter was involved in Brown’s first PCRA petition in a supervisory capacity. Brown’s Brief at 25-26; DAO’s Brief at 54-55; OAG’s Brief at 58. It is, in part, conduct under his supervision that is being conceded as error by the current DAO. Brown’s Brief at 26-27; DAO’s Brief at 54-55. In addition, DAO alleges that this same attorney “previously played a direct or supervisory role in at least 70 of the 115 cases identified in the OAG’s list of DAO concessions.” DAO’s Brief at 54. The designation as intervenor of an office staffed with attorneys with a potential bias in favor of upholding convictions they procured raises a question about the neutrality of perspective that would be provided to the PCRA court, if this is indeed what the Majority seeks. See Majority Op. at 532 (claiming that its rule provides that a third party will conduct an “independent assessment” to “foster reliable and correct results”).

The Majority observes that this Court has invited the OAG to participate as amicus in past cases where DAO has made concessions. Majority Op. at 535 n.73 (citing *Murchison*, 328 A.3d 5; *Perrin*, 291 A.3d 337; *Commonwealth v. Drummond*, 675 Pa. 304, 285 A.3d 625 (2022); *Brown I*, 196 A.3d 130). What the Majority ignores is the sharp distinction between participating as amicus and as a party. As to amicus participation, the examples it cites are not garden-variety PCRA matters. Each of

those cases involved first impression interpretations of law with a statewide impact. See, e.g., *Murchison*, 328 A.3d at 17 (holding that the standard for an after-discovered evidence claim based upon post-conviction DNA testing is preponderance of the evidence); *Perrin*, 291 A.3d at 346 (rejecting the argument that courts must accept parties’ stipulation as to fact and credibility of a witness); *Drummond*, 285 A.3d 625 (Pa. 2022) (addressing whether a “proof beyond a reasonable doubt” jury instruction analogizing jurors’ hypothetical decision-making regarding surgery involving a “precious one” violates a defendant’s due process rights); *Brown I*, 649 Pa. 293, 196 A.3d 130 (2018) (addressing whether a PCRA court must accept a district attorney’s concession of error to automatically grant relief). We invite the OAG to participate as amicus in such proceedings to benefit from its perspective on legal questions of statewide import. And we regularly do so in cases from counties other than Philadelphia. See, e.g., *Commonwealth v. Arnett*, — Pa. —, 353 A.3d 705 (2026) (inviting the OAG to participate as amicus to address the jurisdiction of courts of common pleas regarding SORNA registration requirement challenges and the applicability of *Commonwealth v. Torsilieri*, — Pa. —, 316 A.3d 77 (2024) in a case arising out of York County); *Commonwealth v. Rondon*, — Pa. —, 341 A.3d 700 (2025) (inviting the OAG to participate as amicus to address the interpretation of our laws governing forfeiture in bail proceedings in a case arising out of Cumberland County); *Commonwealth v. Butler*, 657 Pa. 579, 226 A.3d 972 (2020) (inviting OAG to participate as amicus to address the constitutionality of the procedure used to designate certain individuals convicted of sexual offenses as sexually violent predators in a case arising out of Butler County). In contrast, the Majority allows the OAG to become a party to a case, developing the record and potentially driving the outcome of the PCRA proceedings where attorneys on its staff may have been responsible for procuring a PCRA petitioner’s original conviction. This is in stark contrast to acting as a friend of the court.

¹²

Rule 2327 provides:

At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if

(1) the entry of a judgment in such action

or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or (2) such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; or (3) such person could have joined as an original party in the action or could have been joined therein; or (4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

Pa.R.C.P. 2327; *see also* Pa.R.J.C.P. 1133 (intervention in juvenile dependency cases); Pa.R.A.P. 1531 (intervention in petition for review proceedings); Pa.R.A.P. 3775 (intervention in proceedings against insurers).

The Majority asserts that Subsection 732-204(c) of the Commonwealth Attorneys Act (“CAA”) operates in such a way that the OAG could intervene in “any civil action.” *Id.* at 535-36. However, the Majority overstates the reach of Subsection 732-204(c) of the CAA. The CAA provides, in relevant part, the following:

(c) Civil litigation; collection of debts.--The Attorney General shall represent the Commonwealth and all Commonwealth agencies and upon request, the Departments of Auditor General and State Treasury and the Public Utility Commission in any action brought by or against the Commonwealth or its agencies, and **may intervene in any other action, including those involving charitable bequests and trusts or the constitutionality of any statute.** The Attorney General shall represent the Commonwealth and its citizens in any action brought for violation of the antitrust laws of the United States and the Commonwealth. The Attorney General shall collect, by suit or otherwise, all debts, taxes and accounts due the Commonwealth which shall be referred to and placed with the Attorney General for collection by any Commonwealth agency

... .

71 P.S. § 732-204(c) (emphasis added). Undoubtedly, Subsection 732-204(c) establishes the parameters for the types of civil litigation in which the OAG has a direct statutorily-defined interest. Initially, the statute sets forth that the OAG is the party expected to represent the Commonwealth when lawsuits are brought by or against

the Commonwealth or its agencies. *Id.* It then explains that the OAG “may intervene in any other action[.]” *Id.* The Majority construes this intervention language without limitation.

Although Subsection 732-204(c) states that the OAG may intervene “in any other action,” it then sets forth examples that clearly establish limitations on the types of civil matters where intervention is permitted. It is well-established that “general expressions such as ‘including,’ or ‘including but not limited to,’ that precede a specific list of included items are to be considered as words of enlargement and not limitation.” *Dep’t of Env’t Prot. v. Cumberland Coal Res.*, 628 Pa. 17, 102 A.3d 962, 976 (2014). Specifically enumerated items in a list are not meant to be exclusive of all other items in that list; however, we do not construe the surrounding terms in a statute as providing the broadest possible reading. *Id.* Under the statutory construction doctrine of ejusdem generis, “where specific terms setting forth enumeration of particular classes of persons or things follow general terms, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated.” *Id.* In other words, “the presence of such a term as ‘including’ in a definition exhibits a legislative intent that the list that follows is not an exhaustive list of items that fall within the definition; yet, *567 any additional matters purportedly falling within the definition, but that are not express, must be similar to those listed by the legislature and of the same general class or nature.” *Id.*

The examples enumerated in Subsection 732-204(c) of the CAA are civil cases that are separately addressed by statute which establish the OAG’s interest in the proceedings, giving rise to this Court’s procedural rules requiring notice to the OAG. Specifically, Subsection 732-204(c) provides that the OAG “may intervene in any other action, **including those involving charitable bequests and trusts or the constitutionality of any statute[.]**” *Id.* (emphasis added). The General Assembly has authorized the OAG’s involvement in these cases. *See* 20 Pa.C.S. § 7740.3(d)-(e) (highlighting that the OAG is to receive notice of matters involving charitable trusts); 20 Pa.C.S. § 7710(d) (“[The OAG] has ... the right to notice of any proceeding or nonjudicial settlement agreement in which there is a charitable interest or purpose.”); *see also* 71 P.S. § 732-204(a)(3) (“It shall be the duty of the Attorney General to uphold and defend the constitutionality of all statutes so as to prevent their suspension or abrogation in the absence of a controlling decision by a court of competent jurisdiction.”). It is this explicit legislative authorization that permitted this Court to promulgate rules directing parties to submit notice to the OAG in these types of

actions. *See* Pa.R.C.P. 235 (“In any proceeding ... in which an Act of Assembly is alleged to be unconstitutional or a charitable bequest or trust is involved and the Commonwealth is not a party, the party raising the question of constitutionality or the plaintiff in a proceeding involving a charitable bequest or trust shall promptly give notice thereof by registered mail to the [OAG.]”); *see also* Pa.R.O.C.P. 4.4(a) (“In every court proceeding involving or affecting a charitable interest ... at least 20 days advance written notice thereof shall be given to the [OAG.]”); *see also* Pa.R.A.P. 521 (“It shall be the duty of a party who draws in question the constitutionality of any statute in any matter in an appellate court to which the Commonwealth or any officer thereof, acting in his official capacity, is not a party ... to give immediate notice in writing to the [OAG.]”).

By providing these examples immediately after Subsection 732-204(c)’s pronouncement that the OAG may intervene in “any other action,” the General Assembly exhibited its intent to limit the OAG’s ability to intervene in only certain civil matters. Specifically, it narrows the OAG’s participation as an intervenor to those matters in which its interest has been explicitly recognized by statute. For example, the OAG has an express statutory right to bring a claim under the Unfair Trade Practices and Consumer Protection Law (“UTCPL”). 73 P.S. § 201-4. As a result, the OAG has the ability to intervene pursuant to Subsection 732-204(c) when another authorized entity brings the same type of lawsuit. Duality of legal interests are likewise recognized in, for example, the Clean Streams Law, 35 P.S. § 691.601(a), and nuisance and abatement provisions for nutrition and odor management under our agricultural laws, 3 Pa.C.S. § 514(c), setting the stage for the OAG’s intervention in proceedings commenced by another authorized entity.

There are likely many other instances in which the General Assembly has authorized the OAG’s participation in civil matters, thus triggering the authority to intervene pursuant to Subsection 732-204(c). However, one thing is patently clear: the PCRA does not authorize the OAG to participate *568 in such proceedings.¹³ Accordingly, nothing in Subsection 732-204(c) provides the OAG with a legal interest that transforms the OAG into the legislatively authorized intervenor that the Majority envisions in PCRA proceedings.¹⁴ Majority Op. at 538-39.

¹³ The Majority contends that the OAG’s status as “chief law enforcement officer” establishes its interest “in criminal judgments and issues.” Majority Op. at 538. However, under the CAA, the OAG has only a limited legal interest. The Majority completely ignores that even in criminal

cases, the OAG cannot simply intervene in a prosecution. It must go through the process of actually superseding a local district attorney’s office. 71 P.S. § 732-205(a)(4)-(5). Since, under the CAA, the OAG had no legal interest in Brown’s underlying criminal case, the OAG has no legal interest in this civil PCRA proceeding.

¹⁴ The Majority’s assertion that “it is commonplace for the OAG to represent the Commonwealth in PCRA proceedings” is not only hyperbole, but it ignores the limited circumstances in which the OAG represents the Commonwealth in such matters. Majority Op. at 537 & n.75. In at least three of the examples cited by the Majority, the OAG was involved in the original criminal proceedings, thus establishing its interest in defending the convictions it obtained in the subsequent PCRA matters. *See, e.g., Commonwealth v. Taylor*, 535 Pa. 266, 634 A.2d 1106 (1993) (OAG representing the Commonwealth in Taylor’s direct appeal from sentences of death); *Commonwealth v. Brown*, 141 A.3d 491, 497 (Pa. Super. 2016) (OAG prosecuted the underlying criminal proceeding); *Commonwealth v. Miller*, 2023 WL 7179446, at *1 (Pa. Super. Nov. 1, 2023) (same). In the remaining examples cited by the Majority, the OAG represented the Commonwealth where the relevant district attorney’s office had an actual or apparent conflict of interest. *See, e.g., Commonwealth v. Ahmad*, 2025 WL 2808637, at *1 (Pa. Super. Oct. 1, 2025) (OAG represented the Commonwealth because defendant’s counsel was the law partner of the District Attorney-elect at the time Ahmad filed his PCRA petition); *Commonwealth v. Muhammed*, 2024 WL 4892509, at *1 n.1 (Pa. Super. Nov. 26, 2024) (OAG represented the Commonwealth in PCRA proceeding because District Attorney Krasner had represented the defendant at trial); *Commonwealth v. Oglesby*, 2020 WL 7780108, at *4 (Pa. Super. Dec. 30, 2020) (“PCRA counsel ... is the former law partner of [District Attorney Krasner]. The [OAG] has handled all matters relating to Mr. Krasner’s former criminal defense practice to avoid any conflicts of interest or appearance of impropriety.”).

Article IV, Section 4.1 of our Constitution establishes the role of the Attorney General who “shall exercise such

powers and perform such duties **as may be imposed by law.**" PA. CONST. art. IV, § 4.1 (emphasis added). It is, therefore, the General Assembly, not this Court that has the authority to dictate when and how the Attorney General, through the OAG, is to exercise its duties.¹⁵ The CAA sets the parameters for how the OAG, headed by the Attorney General, is to exercise its powers and perform its duties. 71 Pa.C.S. §§ 732-201–732-208, 732-301, 732-303, 732-402–732-403, 732-501, 732-506. The Majority is attempting to manufacture an interest for the OAG that the General Assembly did not see fit to create. This attempt to expand the duties beyond those established by the General Assembly violates the separation of powers doctrine and creates substantive law outside of our constitutional grant of authority. Conferring the rights of a party on an entity that otherwise has no interest in the proceeding cannot be classified as a procedural rule, despite the Majority's insistence to the contrary. Such a proposal is undoubtedly substantive rulemaking. In sum, the Majority cannot create a procedure to provide the OAG with notice of a proceeding to solicit intervention where the OAG lacks a recognized legal interest, which only the *569 General Assembly can create. By doing so, the Majority violates our Constitution.

¹⁵ Although our Constitution refers only to the position of the Attorney General, its duties and responsibilities are carried out through the OAG, which is "headed by the Attorney General." 71 P.S. § 732-201(a).

Finally, this Court cannot invoke King's Bench powers to counteract policy choices of elected officials. By restructuring PCRA procedures in Philadelphia County where the elected District Attorney concedes error, the Majority abuses our King's Bench authority. Creating an intervention rule in these isolated concessions of error PCRA proceedings diminishes the District Attorney's authority and interferes with his obligation to rectify the injustice of a conviction improperly obtained.¹⁶ Our judges in Philadelphia County are capable of overseeing concession of error PCRA proceedings through an independent review of the record by conducting proceedings to satisfy themselves that the record either does or does not support relief. The Majority's flex of King's Bench power to restructure PCRA concession of error proceedings in this manner is an abuse of this extraordinary power.

¹⁶ The Majority suggests that DAO has an insidious agenda, emphasizing that it has conceded prosecutorial error that afforded defendants criminal and civil relief in predominantly capital murder cases. Majority Op. at 518 ("While the

DAO does not confine its concessions to cases of actual innocence, it does, for the most part, limit its concessions to the most serious cases. Overwhelmingly, the DAO's concessions have been in murder cases. ... There has been a particular focus on capital cases. ... Some defendants awarded relief under the DAO's concession program have gone on to receive significant, multi-million-dollar payments from the City of Philadelphia in settlement of civil lawsuits"); *id.* at 530 (insinuating that DAO has made these concessions for "purely personal, political, ideological, policy, or other non-legal reasons"). As a minister of justice, it is the prosecutor's "duty both to respect the rights of the defendant and to enforce the interests of the public," ensuring that "the defendant is accorded procedural justice [and] that guilt is decided upon the basis of sufficient evidence." *Commonwealth v. Clancy*, 648 Pa. 179, 192 A.3d 44, 52 (2018) (citations and quotations omitted); Pa.R.P.C. 3.8, cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."). Our laws mandate "that a fair trial be afforded in every cause regardless of the malevolence of the crime or the impressiveness of the evidence tending to establish guilt." *Commonwealth v. Richardson*, 476 Pa. 571, 383 A.2d 510, 514 (1978). This responsibility continues throughout every stage of criminal litigation, regardless of the severity of the crime. I reject the Majority's insinuation that prosecutors' responsibilities to justice and due process depend upon the nature of the crime.

I concur in the Majority's decision to remand this matter to the PCRA court to conduct an evidentiary hearing as required by Rule 908(a)(2). I dissent from the remainder of the Majority Opinion.

Chief Justice Todd joins this concurring and dissenting opinion.

JUSTICE WECHT, dissenting

In 2024, a majority of Justices chose to invoke this Court's rare and extraordinary King's Bench jurisdiction in order to review the merits of a common pleas court's order. That common pleas decision had vacated Lavar Brown's life sentence and had ordered a new trial on murder and related

charges. Intervening in that trial court process, a majority of Justices decided—*sua sponte*—to use Brown’s case to determine “[w]hether, and via what procedure, a common pleas court judge may grant PCRA¹ relief based upon concessions of the parties.”² I believe that this Court erred in agreeing to exercise our King’s Bench power here.³ And I believe *570 that, with that power now in hand, today’s Majority wields it in a manner that leads this Court much more deeply into error.

¹ Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-46.

² *Commonwealth v. Brown*, 32 EM 2023 (Pa. 2024) (*per curiam*).

³ Noting that no Justice dissented from this Court’s order granting King’s Bench, the Majority criticizes my decision to question the invocation of that power here. Maj. Op. at 491 n.26. As the public undoubtedly understands, not every *per curiam* order that this Court issues garners unanimous joiners from all Justices. More importantly, Justices and readers alike recognize that there are myriad reasons why a Justice might elect not to note his or her dissent on a *per curiam* order, some personal and some institutional, and that declining to note such dissent is a common practice undertaken by every Justice on this Court, both past and present. The Majority’s suggestion to the contrary is misleading, and does not in any event change the fact that exercising King’s Bench jurisdiction in this case was a mistake from the start and that the Majority’s use of that power here is unprecedented and unconstitutional.

Instead of confining its review to the case at bar, the Majority takes advantage of the breadth that it perceives in our King’s Bench authority in order to scrutinize decisions made by the Philadelphia District Attorney’s Office (“DAO”) in other, wholly unrelated cases. Having embarked upon that enterprise, the Majority finds what it believes to be a pattern of purportedly erroneous or unethical concessions by the DAO. The Majority then attempts to correct the deficiencies it perceives by fashioning an unprecedented and unconstitutional remedy. The Majority’s edict will force common pleas judges in our most populous county to disregard the will of the people’s duly elected prosecutor, to gratuitously involve Pennsylvania’s Office of the Attorney General (“OAG”), and to encourage the OAG to intervene on behalf of the

Commonwealth as a categorical matter in a class of PCRA cases. This novel procedure is neither mandated nor permitted by statute or rule. The Majority does not concern itself with the General Assembly’s prerogative to enact or amend statutes, nor with this Court’s constitutional process of rulemaking. Rather than referring its concerns to our Rules Committees, and rather than drawing upon the extensive and varied experience that the members of those Committees possess, the Majority eschews our proven processes and instead creates and imposes a remedy extemporaneously. Ironically, the Majority perceived no urgency in rendering this decision,⁴ yet now acts impulsively, circumventing our rulemaking procedures. There is no good reason for this.

⁴ See *id.* at 491 n.26 (noting that it has been two years since this Court agreed to exercise our King’s Bench jurisdiction).

The Majority claims that its remedy is necessary to “promote just outcomes.”⁵ While all aspire to that worthy goal, the manner in which the Majority seeks to effectuate it far exceeds the power and role of the judiciary. If Philadelphians do not approve of the way in which their elected prosecutor is performing his duties, they can replace him. It is not our job to do so.

⁵ *Id.* at 477.

King’s Bench jurisdiction is a sacred power entrusted to this Court. Although the power is “high and transcendent,”⁶ it must be wielded with “extreme caution.”⁷ I regret that today’s Majority misuses that power. I must respectfully dissent.

⁶ *Commonwealth v. Balph*, 111 Pa. 365, 3 A. 220, 230 (1886).

⁷ *Id.*

King’s Bench

The Supreme Court of Pennsylvania is at the “apex of the Unified Judicial System.”⁸ Though our Court sits atop

Pennsylvania's *571 judicial branch, its power is not boundless. Like all Pennsylvania courts, we are limited generally to those powers allotted to us by "the Constitution and laws of the Commonwealth."⁹ Those powers include the authority to adjudicate disputes and the "general supervisory and administrative authority over all the courts and [magisterial district judges]."¹⁰ We also possess "the power generally to minister justice to all persons and to exercise the powers of the court, as fully and amply, to all intents and purposes, as the justices of the Court of King's Bench, Common Pleas and Exchequer, at Westminster, or any of them, could or might do on May 22, 1722."¹¹ This authority to operate as did "the justices of the Court of King's Bench" stands alone among our powers, both in its breadth and in our ability to exercise it unchecked by any other court or branch of government.¹² For that very reason, "it is a power to be exercised with extreme caution.... That it may be abused is possible."¹³

⁸ *In re Bruno*, 627 Pa. 505, 101 A.3d 635, 663 (2014); see PA. CONST. art. V, § 2 ("The Supreme Court [] shall be the highest court of the Commonwealth and in this court shall be reposed the supreme judicial power of the Commonwealth ... and [] shall have such jurisdiction as shall be provided by law.").

⁹ *Bruno*, 101 A.3d at 659; see also PA. CONST. art. V, § 2; 42 Pa.C.S. § 502 ("The Supreme Court shall have and exercise the powers vested in it by the Constitution of Pennsylvania ... [and] (1) All powers necessary or appropriate in aid of its original and appellate jurisdiction which are agreeable to the usages and principles of law [and] (2) The powers vested in it by statute, including the provisions of this title.").

¹⁰ PA. CONST. art. V, 10.

¹¹ 42 Pa.C.S. § 502.

¹² *Bruno*, 101 A.3d at 676 ("As a corollary, the Supreme Court is neither divested of its King's Bench powers, nor is the supreme and general nature of these inherent powers limited, unless the divestiture or limitation is clearly expressed or necessarily implied in the Constitution.").

¹³ *Balph*, 3 A. at 230.

"By its supreme nature, the inherent adjudicatory, supervisory, and administrative authority of this Court at King's Bench is very high and transcendent."¹⁴ When our Court invokes this authority, it has not felt constrained by the traditional guardrails of the judicial process. This Court has espoused the belief that we are not "limited by prescribed forms of procedure or to action upon writs of a particular nature."¹⁵ Instead, we have "employ[ed] any type of process or procedure necessary for the circumstances."¹⁶ Nor is this Court's King's Bench authority limited by subject matter. King's Bench authority confers "comprehensive jurisdiction over civil and criminal causes, which includes the competence to examine and decide, or to review decisions, relating to the type of causes committed generally or otherwise to an inferior jurisdiction."¹⁷ In fact, our King's Bench jurisdiction is available even when there is "no dispute pending in a lower court."¹⁸

¹⁴ *Bruno*, 101 A.3d at 669 (internal quotation marks and citations omitted).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 670.

¹⁸ *Id.* at 669.

The unique and astounding breadth and reach of this power can tempt Pennsylvania's Supreme Court to disregard the need for prudence, humility, and restraint that is essential to the proper function, role, and operation of the judiciary. However "high and transcendent" the power may be,¹⁹ it is not "a license to make things up *572 as [we go] along."²⁰ Today's Majority succumbs to that temptation. The Majority's one-paragraph description of our King's Bench authority acknowledges only one of the well-established

limitations upon this power, a power that the Majority otherwise treats as subject to no meaningful constraints.²¹ The Majority notes that King’s Bench is limited by the duties and powers assigned to the various branches of government by our Constitutions.²² But, as I explain below, additional limitations exist as well.

¹⁹ *Balph*, 3 A. at 230.

²⁰ Benjamin Pontz, *Grounding Pennsylvania’s King’s Bench Jurisdiction*, 28 U. PENN. J. CONST. L. (forthcoming 2026) (manuscript at 61); *see id.* at 60-61 (explaining that King’s Bench jurisdiction derives from the powers granted by the King of England to the Court of King’s Bench and that those powers were limited “by law,” meaning that the Court of King’s Bench was not permitted to “make things up as it went along.”).

²¹ *See* Maj. Op. at 492–93.

²² *Id.* at 492–93. Ironically, as I discuss *infra*, even this acknowledged limitation is disregarded by the Majority in the course of imposing the unwarranted and unconstitutional remedy that it crafts.

Before proceeding further, it is necessary to identify the problem that the Majority believes we need to solve—the cause that warrants the exercise of our King’s Bench power. Put simply, the Majority thinks that the DAO too often concedes that criminal defendants are entitled by law to relief in murder cases. In this particular case, Lavar Brown was convicted of second-degree murder and related offenses following the shooting death of Michael Richardson. Brown was sentenced to life in prison without the possibility of parole. After losing on direct appeal, and after unsuccessful post-conviction litigation, Brown filed a second PCRA petition alleging that the DAO had violated its obligations under *Brady v. Maryland*²³ by withholding four documents which demonstrated that one of the Commonwealth’s key witnesses, Ronald Vann, had falsely implicated another person in the murder. Brown contended that this evidence constituted impeachment material that he could have used to undermine both Vann’s credibility and the police investigation of the murder. Concluding that its predecessors in fact had deprived Brown of critical evidence, the DAO agreed that Brown was entitled to relief as a matter of constitutional law.

²³ 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Richardson’s family members (“Family Members”) did not agree with the DAO’s decision. They filed a motion to intervene, seeking to have the DAO removed from the case and to provide their own views and arguments to the PCRA court. Given the familiar, settled principle that third parties lack standing in criminal cases,²⁴ the PCRA court denied the petition.²⁵ That court did not, however, bar the door to Family Members entirely. The court granted them *amicus curiae* status, and it considered their views and arguments on the merits of Brown’s PCRA petition. Family Members did not appeal the denial of their petition to intervene. After multiple rounds of additional briefing, the PCRA court declined to hold an evidentiary *573 hearing, and it ultimately decided to award Brown relief in the form of a new trial.

²⁴ *See Commonwealth v. Malloy*, 304 Pa.Super. 297, 450 A.2d 689, 694 (1982) (holding that only the Commonwealth and the defendant are parties to a criminal case and that victims, witnesses, and others thus lack standing).

²⁵ The PCRA court granted the petition in part in order to allow Family Members to litigate in support of their position that the DAO had a conflict of interest. The court then denied that claim. In all other respects, the court denied the petition to intervene.

PCRA petitions are adjudicated in courtrooms across Pennsylvania every day. Most of the time, PCRA courts reach the correct ruling. Occasionally, those courts make mistakes. When a mistake occurs, it is addressed in the ordinary course of appellate review. Those day-to-day decisions are rarely reviewed by this Court, because they are routine, and because they are subject to thorough consideration and error correction by our intermediate appellate court. Until now, PCRA rulings have not supplied warrant for invocation of this Court’s King’s Bench jurisdiction.²⁶

²⁶ The Majority’s protestations to the contrary notwithstanding, the legal issue that led to today’s opinion is, in fact, average. An incarcerated defendant filed a PCRA petition. The PCRA court granted it without an evidentiary hearing. Whether relief should have been granted, or whether the court should have held a hearing, are routine PCRA

issues that our lower courts handle with skill and expertise on a daily basis. The only reason that this case became one that caught this Court’s attention is because Family Members were unhappy with the position taken by their elected prosecutor and then failed to avail themselves of the normal procedures available to persons aggrieved by a court’s ruling. The Majority also insists that its treatment of this “matter ... accords with how we have treated similar matters for decades.” Maj. Op. at 491 n.26. But, the two examples that the Majority offers are anything but “similar” to the instant case. In *in re Office of Philadelphia District Attorney*, 125 EM 2019, Order, 2/24/2020, we exercised King’s Bench to inquire whether the DAO harbored a conflict of interest that prevented that office from litigating that particular case. Our focus was limited to the DAO’s involvement in a single case. It was not a sprawling attempt to redefine the roles of the parties in PCRA proceedings in Philadelphia. In *Commonwealth v. Chimenti*, 510 Pa. 149, 507 A.2d 79 (1986), this Court did not merely grant King’s Bench “where the DAO and Chimenti improperly submitted [a] plea agreement to [a] Superior Court judge for approval,” which is how the Majority describes it. *See* Maj. Op. at 491 n.26. This Court instead granted plenary review in order to determine whether a single Superior Court judge could enter an order compelling a trial court to accept a plea bargain reached by the parties while the case was pending on appeal. *Chimenti*, 507 A.2d at 80. More importantly, the remedy ordered by the *Chimenti* Court—vacating the single-judge order and remanding the case for a proper appeal—was limited to that which was necessary to resolve the case. *Id.* at 83. We did not impose upon the Superior Court new rules and procedures to ensure that the infraction never again occurred. Neither of the cases held up by the Majority as “similar” exercises of King’s Bench jurisdiction actually resembles the broad remedy the Majority fashions here.

Family Members did nothing to challenge the denial of their request to participate as full parties. Because they wished nonetheless to litigate the merits of Brown’s PCRA petition, they sought extraordinary action in this Court instead. Imprudently, this Court relented. Further, upon taking the case, this Court announced, *sua sponte*, that it would consider “[w]hether, and via what procedure, a common pleas judge may grant PCRA relief based upon concessions of the parties?”²⁷

²⁷ *Commonwealth v. Brown*, 32 EM 2023 (Pa. 2024) (*per curiam*).

Setting aside the fact that there is nothing that would justify treating concessions in PCRA cases differently than we would treat concessions in other areas of the law, we have in any event already answered this question. This is not Brown’s only murder case. In 2003, Brown approached a man crossing a Philadelphia street and shot him in the back.²⁸ Brown was convicted of first-degree murder and sentenced *574 to death.²⁹ During a subsequent appeal from the denial of PCRA relief, Brown and the DAO filed a joint motion asking this Court to vacate Brown’s death sentence and to direct that he be resentenced to life in prison without the possibility of parole. The DAO conceded to this Court that Brown was owed relief. Notwithstanding the parties’ agreement, we declined to provide such relief automatically upon the DAO’s concession. We rejected outright the argument by both parties that this Court, or any court for that matter, was required to defer to any prosecutor’s discretionary decision to concede a defendant’s entitlement to relief. We held instead that a court is empowered to overturn a jury’s verdict only when the court reaches the independent legal conclusion that an error has occurred.³⁰ We explained that an agreement between the parties does not grant this Court authority to undo what the jury determined, absent an independent finding of legal error.³¹ Ascertaining whether an error occurred, we emphasized, is a mandatory, exclusive duty that the PCRA assigns to courts, not to the parties.³² The PCRA allows relief to be granted only when a court “rules in favor of the petitioner,”³³ a circumstance which requires the petitioner to “plead and prove”³⁴ a substantive claim for relief under the PCRA.³⁵ A PCRA petitioner must “plead **and prove** [his claim], and this Court must **rule** in his favor.”³⁶ Leaving no doubt as to the legal impact of party concessions in PCRA proceedings, we emphasized that “the PCRA requires **judicial merits review** favorable to the petitioner before any relief may be granted.”³⁷ Thus, we explained, a “confession of error by the Commonwealth does not constitute a judicial ruling” and is “insufficient for any grant of relief under the PCRA.”³⁸

²⁸ *Commonwealth v. Brown*, 605 Pa. 103, 987 A.2d 699, 703 (2009).

²⁹ *Id.* at 703-05.

³⁰ *Commonwealth v. Brown*, 649 Pa. 293, 196 A.3d 130, 144 (2018).

³¹ *Id.*

³² *Id.*

³³ 42 Pa.C.S. § 9546(a).

³⁴ *Id.* § 9543(a).

³⁵ *See id.* § 9543(a)(1) and (2).

³⁶ *Brown*, 196 A.3d at 144-45 (emphasis in original).

³⁷ *Id.* at 145 (emphasis in original).

³⁸ *Id.*

We announced that clear decision in *Brown*. So one would be justified in wondering why this Court agreed to review this issue again. The answer to the question of “[w]hether, and via what procedure, a common pleas judge may grant PCRA relief based upon concessions of the parties” is clear: that answer is “no.”³⁹ *Brown* unambiguously held that a court may grant PCRA relief only when the petitioner has pleaded and proven an entitlement to relief. Party concessions are helpful, and can conserve time and judicial resources *575 by narrowing the range of issues in dispute. But concessions are not a substitute for independent judicial determinations using the applicable legal standards. None of this is new. We stated these principles clearly in *Brown*’s capital PCRA appeal. There is no reason for this Court to invoke our extraordinary King’s Bench authority just to repeat ourselves.

³⁹ Concurring in *Brown*, I expressed the view that we should limit our ruling to concessions made to

appellate courts in PCRA proceedings, as confessions of error at the court of common pleas level might warrant more lenient treatment. *Id.* at 196 (Wecht, J., concurring). My more limited view did not garner a majority of the votes and, thus, the *Brown* Majority’s broader ruling applies to all courts. The Majority nonetheless suggests that my concurrence in *Brown* “clouded the question of whether a Commonwealth concession is sufficient to support a PCRA court’s grant of relief.” Maj. Op. at 491 n.27. Aside from recounting some of my statements from that concurring opinion, the Majority does not explain how such cloudiness resulted, nor can it have done so given that a majority of the Court did not adopt my position.

But the Majority is onto a different project here. The facade that King’s Bench review is necessary here to address this familiar and already-answered legal question crumbles upon even the most cursory reading of the Majority Opinion. The Majority does not substantively address the question presented.⁴⁰ Instead, the Majority exhaustively analyzes the merits of the PCRA court’s ruling and concludes that the court erred in granting relief. Engaging in this form of error review rarely, if ever, is a reason for us to grant review, even in our *allocatur* docket. It certainly is no reason to exercise King’s Bench jurisdiction.

⁴⁰ *See id.* at 491–92 n.27 (resolving the question presented in this case in two lines of a footnote).

Even if we suspend sound principles and indulge the fiction that King’s Bench review is the appropriate mechanism to address the question at bar, this is not a viable case in which to do so. The PCRA court did not rule for *Brown* merely because the DAO agreed that it should. The court’s order was the product of an extensive, independent legal analysis—precisely as we directed in *Brown*. The PCRA court held status conferences, independently reviewed the parties’ stipulations, ordered and considered multiple rounds of briefing, and then rendered a ruling. The court explained:

[T]he record establishes that the assigned detective in this case learned through investigation that witness, Ronald Vann, had falsely identified Kennisha Paige as being a participant in the January 19, 2023 robbery and murder here at issue, and that this false identification was not disclosed to the defense; that a

critical witness had made a demonstrably false identification of someone as being a participant in the same criminal events that are the subject of the charges against Mr. Brown was, in my view, impeachment evidence of a different character than the impeachment material used at trial and I find that the suppressed evidence satisfies the standard for materiality under *Brady* and its progeny.⁴¹

⁴¹ Notes of Testimony (“N.T.”), 5/5/2023, at 4.

The PCRA court insisted that it was “going to treat this case like every other case,” and it vowed to “just follow the rules and attempt to treat it like every other PCRA.”⁴² The court stressed that the lack of adversarial litigation did not influence its decision. The court stated that it “did what [it] thought was right.”⁴³ Apparently, the DAO’s concession was not a dispositive factor in the PCRA court’s decision. To the extent that it is ever wise to wield this Court’s King’s Bench authority to review the propriety of relying substantively upon a party’s concession, we should, at the very least, await a case in which that reliance actually happened.

⁴² N.T., 10/07/2022, at 10.

⁴³ *Id.* at 10-11.

That this Court has chosen here to exercise our highest power in order to review a PCRA order for error is far from the only problem in this case. As noted earlier, despite the wide latitude that accompanies King’s Bench jurisdiction, there are substantive *576 limits upon its initial invocation. We have warned that this unchecked power must be “exercised with extreme caution” and is appropriate only “to avoid the deleterious effects arising from delays incident to the ordinary process of law,”⁴⁴ and only when “the issue requires timely intervention by the court of last resort of the Commonwealth and is one of public importance.”⁴⁵

⁴⁴ *Commonwealth v. Williams*, 634 Pa. 290, 129 A.3d 1199, 1206 (2015).

⁴⁵ *Bruno*, 101 A.3d at 670; *See also In re President Judge for 30th Judicial Dist.*, 420 Pa. 243, 216 A.2d 326, 326 (1966) (granting King’s Bench due to the “time element and the importance of the issues involved”); *accord In re Smith’s Estate*, 442 Pa. 249, 275 A.2d 323, 326 (1971) (concluding that the Court did not have jurisdiction to rule on an interlocutory appeal, noting that the case lacked “exceptional circumstances”).

The Majority’s displeasure with the DAO’s concessions, in this case and in others, does not implicate any larger public concerns that warrant displacement of traditional judicial practices and procedures. Let us speak plainly. This case is about the actions of one elected District Attorney, in one subset of cases, in one county. There is no reason (nor any evidence) to believe that the Majority’s distress over the number of prosecutorial concessions concerns a problem occurring in any other county in Pennsylvania, or that there is any risk that this will become a problem elsewhere. There is no evidence that our lower courts are failing to manage the Majority’s concerns. As discussed below, the evidence demonstrates just the opposite. Furthermore, the Majority’s actions will have no statewide application or precedential value. The Majority candidly admits that its decision applies only to one small portion of the cases in Philadelphia, and it fashions a remedy that applies only to the limited circumstances that may, or may not, occur again in Philadelphia.⁴⁶ The narrow ambit of this case does not implicate larger public concerns, whether now or in the future.

⁴⁶ *See Maj. Op.* at 532.

The fact that a majority of Justices of this Court apparently wants to correct what it believes to be erroneous discretionary decisions by one prosecutor’s office is not a circumstance that requires this Court’s immediate and extraordinary action. This case never required this Court’s “timely intervention,” an essential component in the King’s Bench calculus.⁴⁷ It has been almost three years since Family Members filed their petition for King’s Bench jurisdiction with this Court.⁴⁸ There was no need for imminent action. Had this Court not intervened, the only consequence would have been that a common pleas judge would have proceeded with Brown’s retrial. To the extent that this consequence can be considered prejudice, it was not irreparable. It only became so because Family Members chose not to pursue an earlier appeal of the denial of their intervention request. Their failure to preserve and protect their rights is not a justification for this Court to invoke the power of King’s Bench.

⁴⁷ See *Bruno*, 101 A.3d at 670.

⁴⁸ Family Members’ “Petition for Exercise of King’s Bench Jurisdiction” was filed on May 26, 2023.

This observation reveals another transgression here of the limitations on King’s Bench jurisdiction. It is well-established that King’s Bench authority cannot be invoked to “permit or encourage parties to bypass an existing constitutional or statutory adjudicative process and have a matter decided by this Court.”⁴⁹ King’s Bench *577 jurisdiction is not a mechanism to revive forfeited rights. Yet, the Majority allows Family Members to do just that. Those individuals sought intervention before the PCRA court. That court denied their request. Family Members could have appealed that ruling to the Superior Court, requesting an expansion of third-party rights in that case or in criminal cases generally, or arguing that the DAO’s concession altered the landscape of the collateral proceedings such that they should have been permitted to challenge the PCRA court’s ruling. Family Members chose not to do so. Only after the PCRA court granted Brown’s PCRA petition did Family Members seek this Court’s intervention. They were too late. And they were in any event barking up the wrong tree.

⁴⁹ *Bruno*, 101 A.3d at 670. The Majority refuses to apply this limitation. While insisting otherwise, the Majority improperly provides Family Members a second opportunity to advance their claims against the DAO and to relitigate the merits of Brown’s PCRA petition. See Maj. Op. at 492 n.28. The Majority justifies or rationalizes its invocation of King’s Bench jurisdiction by glancing down at the proceedings below and finding no “case at all.” *Id.* What the Majority consistently fails to acknowledge is that the reason that there is no case pending below is because Family Members chose to end their litigation there. Nothing prevented Family Members from appealing the denial of their petition to intervene. The Majority excuses Family Members’ failure to appeal the adverse ruling because “the right to intervene never existed in the first place.” *Id.* at 492 n.28. That is ironic, because the absence of that right did not stop Family Members from filing a petition to intervene “in the first place.” *Id.* And, more importantly, the fact that the law does not permit such intervention should give this Court pause before it allows the remedy the Majority imposes here. That success on appeal may have been difficult—insofar as Family

Members would have had to argue for an expansion of the law—does not mean that they were prohibited from pursuing that avenue for relief. Good faith arguments to change the law are hardly rare in this Court. Rather than holding Family Members to the same prerequisites as any other party, today’s Majority instead swoops in and rewards them for their failure to avail themselves of the avenues for advancing their claims that were available below. *In re Bruno*, the case upon which the Majority relies as support for its unwarranted intrusion into this matter, see Maj. Op. at 492 n.28, states unequivocally that rescuing parties from their own decisions is not a proper use of King’s Bench. *Bruno*, 101 A.3d at 670 (King’s Bench should not be used in a manner that would “permit or encourage parties to bypass an existing constitutional or statutory adjudicative process and have a matter decided by this Court”).

The Majority proclaims that it cannot “ignore the reality that the PCRA court’s erroneous grant of relief in this case was abetted by the DAO’s lack of candor and failure to conduct a reasonable investigation.”⁵⁰ The Majority identifies what it believes to be a litany of ethical violations committed by the DAO throughout the history of this case.⁵¹ The Majority does not explain how a discussion of those purported violations falls within the appropriate limits of our King’s Bench power. It bears repeating that King’s Bench cannot be invoked merely as an alternative to existing and available processes and procedures.⁵² All Pennsylvania lawyers must abide by our Rules of Professional Conduct. Any violations of those rules must be alleged first in a complaint to the Office of Disciplinary Counsel. These are adjudicated *578 before the Court’s Disciplinary Board, and this Court thereafter renders a final decision. In the face of this, the Majority nonetheless bypasses established procedures and publicly declares the DAO guilty of various ethical violations *sua sponte*—without hearings, counsel, briefing, or any other procedural protections. This endeavor far exceeds the intentions and boundaries of our King’s Bench power.⁵³

⁵⁰ Maj. Op. at 510.

⁵¹ See *id.* at 510–17.

⁵² The Majority misreads this point. See *id.* at 492 n.28. It is not the fact that there is no live appeal,

or that Family Members lack standing, that precludes our invocation of King's Bench, although both are true. It is that King's Bench cannot be used as a mechanism to revive forfeited rights or to circumvent already existing procedures. This is a substantial limitation upon this Court's vast power that the Majority ignores repeatedly. The King's Bench power was never meant to be a life vest that we toss to a party that could have pursued relief in the normal course but failed to do so.

adversarial proceedings. None of the cases cited by the Majority stands for the proposition that this Court can deem an entire office to have violated numerous ethical rules—again, without briefing, argument, evidentiary development, or procedural protections—and then use those *sua sponte* rulings to justify a sweeping new remedy that reorients how a statutory scheme operates.

⁵³ For the Majority, this is a “novel argument.” *Id.* at 510 n.43. However, there is nothing new or novel about the principle that King's Bench is not a substitute for litigating claims within the existing framework for such claims, assuming there is no emergency or exigency that would preclude such review. It is only novel in the Majority's eyes because the Majority refuses to recognize it as a limitation on what the Majority instead believes to be an unlimited power. If the DAO or its members have committed ethical violations, those transgressions should be litigated before the Disciplinary Board, not here on King's Bench review.

As noted, *supra* at n.27, the Majority offers a “litany” of cases that it contends provides adequate justification for its actions. These citations do not stand up to even minimal scrutiny. *See* Maj. Op. at 510 n.43. None of the cases cited by the Majority allows for the *sua sponte* adjudication of ethical violations by the DAO. First, in both *County of Fulton v. Secretary of Commonwealth*, — Pa. —, 292 A.3d 974, 1018 (2023), and *Commonwealth v. VanDivner*, 603 Pa. 318, 983 A.2d 1199, 1202-03 (2009), this Court addressed an attorney's conduct before this Court. Here, by contrast, the purported ethical violations occurred below, and we lack any record, briefing, or argument on these issues. None of the cases cited by the Majority suggests that we may discern ethical violations from our reading of the proceedings below and conclusively rule upon such violations without at the very least an evidentiary record. Similarly, *Commonwealth v. D'Amato*, 514 Pa. 471, 526 A.2d 300, 314 (1987), and *Commonwealth v. Stoyko*, 504 Pa. 455, 475 A.2d 714, 724 n.7 (1984), both suggest that, when such ethical violations are transparent on the record before us, the proper course of action is to refer those matters to our disciplinary board for fair and

The Remedy

Not content merely to overturn the PCRA court's order in this case, the Majority then turns its attention to other cases in which the DAO has conceded some form of relief. Unsurprisingly, the Majority finds the troubling pattern for which it went searching. To combat this perceived problem, the Majority mandates that, going forward, any time the DAO attempts to concede relief, a PCRA court must provide notice to the OAG and afford it the opportunity to intervene and represent the Commonwealth alongside the DAO.⁵⁴

⁵⁴ Maj. Op. at 532.

Taking the OAG's word for it,⁵⁵ the Majority explains that the DAO has conceded relief in at least one hundred and twenty cases, most of which are murder prosecutions.⁵⁶ We do not have certified records *579 for any of those cases. This Court did not, and could not, review any of the trial and hearing transcripts generated in those cases. This Court did not, and could not, evaluate any of the motions, briefs, and arguments made by parties in those cases, nor examine the propriety of those concessions. We do not even know why the DAO conceded relief in those cases or whether the courts granted such relief. Regardless, to the Majority, these concessions must all have been erroneous or predicated upon some improper motive.⁵⁷ For the Majority, the facts and circumstances of these cases are of no concern. It is the number alone that draws the Majority's ire.

⁵⁵ The Majority remarks that the DAO does not disagree with this number. *Id.* at 517 n.50. That does not alter the fact that the Majority does not independently verify the accuracy of this number of cases. The Majority also declines to identify the

number of cases in which the DAO has not conceded relief or the ratio in which the DAO concedes relative to the total number of cases it litigates. We are just meant to accept the Majority's belief that the number alone constitutes proof that the DAO has abdicated its duty to the point that this Court must intervene and bypass our normal rule-making process in order to create rules that apply only to the DAO.

⁵⁶ *Id.* at 516–17 (citing OAG's Brief at 5-30; OAG's Reply Brief at 10 n.3).

⁵⁷ The Majority concedes that what underlies its heavy-handed approach in this case is its belief that the DAO's concessions are predicated upon improper motivations. *See id.* at 518 n.53 (suggesting that the DAO's concessions "have been motivated by a policy-based opposition to the severe penalties imposed rather than legal considerations."). Aside from this Court's bird's eye view from afar, there is no record-based evidence to support this assertion.

In some of those cases, the Majority laments, the DAO conceded relief notwithstanding its belief that the defendant was guilty. The Majority apparently conceives the prosecutorial role to be a duty to defend a conviction against any legal challenge, regardless of merit, unless there is clear evidence of actual innocence. But even the most guilty defendant is entitled to a fair trial, or a retrial, if the first one is tainted by error or constitutional violation. The Majority would have prosecutors—officers of the court who are sworn to refrain from making frivolous arguments—automatically oppose any form of relief, so long as that prosecutor believes the defendant to be guilty. At this late date, it should (but apparently does not) go without saying that a prosecutor's role in our criminal justice system is not so narrow. The prosecutor must pursue truth and justice, obey his or her oath to our Constitutions and laws, adhere to rules of professional conduct, and ethically review and litigate criminal cases, even those that involve clearly guilty defendants. To carry out these functions, a prosecutor must be independent and free to make decisions without reprimand. A prosecutor should not be coerced by this Court, or any court, into staunchly opposing relief when the law says that relief is due, no matter how criminally culpable a defendant may appear.⁵⁸

⁵⁸ *See generally* *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935) (explaining that, because a prosecutor must respect the rights of the defendant and enforce the interests of the public, the prosecutor "is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer"); *Commonwealth v. Clancy*, 648 Pa. 179, 192 A.3d 44, 52 (2018) (noting that, as an officer of the court, the prosecutor has the responsibility to serve the public interest and to "seek justice within the bounds of the law, not merely to convict") (quoting *Commonwealth v. Starks*, 479 Pa. 51, 387 A.2d 829, 831 (1978)); *see also* Robert H. Jackson, *The Federal Prosecutor*, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940) (observing that "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous").

The Majority is especially troubled that the DAO has conceded relief in capital cases. This, according to the Majority, is a problem because "[m]ost of the DAO's concessions have led to convictions being overturned."⁵⁹ A statement of this nature coming from this Court is disconcerting, to say the least; it conveys the impression that this Court perceives our criminal justice system to be functioning improperly when convictions are overturned. Undeterred by this appearance of partiality, and without *580 reviewing evidentiary records, trial court opinions, or any other materials from these cases, the Majority assumes that the convictions were overturned in error. It is unfathomable to the Majority that those convictions were overturned because the courts were convinced that relief was required by law. The fact that relief was awarded after a DAO concession suffices to convince the Majority that the DAO abdicated its duty in every one of these cases.

⁵⁹ Maj. Op. at 518.

The data paint a different picture, one that does not warrant the extreme remedy imposed by the Majority in this case. Those data suggest that our lower courts are more than capable of sifting through the DAO's many concessions and awarding relief when appropriate. There is no evidence to suggest that those courts are indiscriminately granting relief any time the DAO agrees to it. That certainly is not what the PCRA court did in the case at bar. Nor is there any reason to believe that those courts need us to micromanage them. That many of the "DAO's concessions have led to convictions being overturned"⁶⁰ does not suggest that the

lower courts will not be able to continue their work without our heavy-handed intervention. It actually suggests that, because the courts in those cases found that those defendants were, by law, entitled to relief, the DAO was right to concede. The fact that relief has not been granted in every case in which the DAO concedes is further evidence that those courts are reviewing both the claims for relief and the DAO's concessions thoughtfully and independently, just as this Court envisioned in *Brown*.

⁶⁰ *Id.*

In an attempt to justify its remedy, the Majority lists eleven cases in which the DAO “conceded relief where none was warranted and engaged in other unreliable conduct.”⁶¹ That list, however, does not show the “gravity and extent of the problem,” as the Majority claims.⁶² Instead, it shows that both Pennsylvania courts and federal courts have proven more than capable of sorting through the DAO's concessions, denying relief when those concessions are inconsistent with the facts of a case or the applicable law, and imposing sanctions when the DAO's actions or concessions warrant. The Majority has proven that, in nearly every instance, regardless of whether the PCRA judge granted or denied relief, our courts are independently examining the DAO's advocacy and taking appropriate action.

⁶¹ *Id.* at 518–19.

⁶² *Id.*

The fact that “in at least ten cases the DAO has been held by state and federal courts to have wrongly conceded relief where none was warranted under the law”⁶³ amply demonstrates that our criminal justice system is operating exactly as it should (at least in this regard) and requires no intervention or recalibration.⁶⁴ That our courts recognize errors and then remedy them is cause for commendation, *581 not for heavy-handed fixes. The Majority steps in nonetheless, imposing upon Philadelphia and Pennsylvania an unprecedented and unjustifiable remedy—one that encroaches upon the rights, duties, and powers of another branch of our government.

⁶³ *Id.* at 528.

⁶⁴ The Majority does not perceive from these illustrations evidence that our lower courts are

skilled and effective at discovering prosecutorial improprieties. Instead, the Majority sees inability and impotence. *Id.* at 528 n.64. This, the Majority asserts, is because courts are limited to the arguments and representations of the parties and to the certified record before the court. The Majority insists that courts cannot overcome these hindrances and that it would be unreasonable to expect them to do so. The ten cases cited by the Majority, cases in which courts did precisely what the Majority proclaims they are incapable of doing, offer compelling evidence that the Majority's lack of faith in our courts is unwarranted.

In applying the Majority's remedy, PCRA courts have no discretion or flexibility.⁶⁵ That remedy is an immutable command from this Court. Nor does the new rule merely invite the OAG to participate in an advisory role. When the DAO concedes relief, the OAG is given full party status. Whatever the DAO can do, the OAG can do. This is no mere procedural rule. Given that the DAO is elected by the citizens of Philadelphia to serve as their voice in these matters, the OAG's intervention will have a substantive impact on the DAO's prescribed role in these cases. The Philadelphia electorate no longer will be represented solely by the representative that it chose.

⁶⁵ *Id.* at 532 (“[W]e now hold that in any PCRA case in which the DAO concedes relief, the PCRA court, before ruling on the concession, *shall* afford the OAG notice and an opportunity to intervene”) (emphasis added).

The Majority claims that this new procedure falls within the parameters of this Court's King's Bench jurisdiction and within this Court's constitutional supervisory powers. It does not. This extreme remedy encroaches upon the executive branch's discretionary decision-making authority and upon the lawmaking function of the legislative branch. Both of these encroachments violate the separation of powers, which is the one limitation upon King's Bench jurisdiction that even the Majority recognizes.⁶⁶

⁶⁶ *See id.* at 492 (“The only limits on the Court's maximal powers at King's Bench are those set forth in the Pennsylvania and United States Constitutions.”) (citation omitted).

The Pennsylvania Constitution “vests legislative power in the General Assembly; executive power in the Executive

Department consisting, *inter alia*, of the Governor, the Attorney General, and various administrative agencies, as provided by law; and judicial power in a unified judicial system and, ultimately, in the Supreme Court.⁶⁷ The legislative branch writes the laws. The executive branch executes them. The judicial branch interprets and applies them.⁶⁸ Today's Majority presumes to override these familiar and foundational distinctions, arrogating to itself a breathtaking compendium of powers.

⁶⁷ *Robinson Twp., Washington Cnty. v. Com.*, 623 Pa. 564, 83 A.3d 901, 991 (2013); *see also* PA. CONST. art. II, § 1; art. IV, § 1; art. V, § 1.

⁶⁸ *See Robinson Twp.*, 83 A.3d at 991 (citations omitted); *see also* PA. CONST. art. IV, § 2.

The separation of powers doctrine ensures that no one branch encroaches upon the constitutional authorities and obligations of the other. In this Commonwealth, “the roots of the ... doctrine run deep.”⁶⁹ A corollary to our constitutional system of checks and balances,⁷⁰ this principle is “[o]ne of the distinct and enduring qualities of our system of government.”⁷¹ It has been enshrined in our Constitution since its very first draft.⁷²

This separation depends on two distinct concepts, as embraced by the framers of both the [F]ederal and Pennsylvania [C]onstitutions: (1) no branch may usurp *582 a function belonging to another and each must operate within its own separate sphere of power; and (2) a system of checks and balances exists, which prevents one branch from acting unchecked.⁷³

This fundamental tenet “prevents one branch of government from exercising, infringing upon, or usurping the powers of the other two branches,”⁷⁴ ensuring that no one branch of government accumulates too much power, thus preserving and protecting the existence and functioning of the other two.⁷⁵ In order to “avert the danger inherent in the concentration of power in any single branch or body,” no branch may exercise the functions delegated to another branch.⁷⁶

⁶⁹ *Renner v. Ct. of Common Pleas of Lehigh Cnty.*, 660 Pa. 255, 234 A.3d 411, 420 (2020).

⁷⁰ *Id.*

⁷¹ *Commonwealth v. Mockaitis*, 575 Pa. 5, 834 A.2d 488, 499 (2003).

⁷² *Jubelirer v. Rendell*, 598 Pa. 16, 953 A.2d 514, 529 (2008).

⁷³ *Jefferson Cnty. Ct. Appointed Emps. Ass’n v. Pennsylvania Lab. Rels. Bd.*, 603 Pa. 482, 985 A.2d 697, 706 (2009) (citations omitted).

⁷⁴ *Renner*, 234 A.3d at 419.

⁷⁵ *Id.* at 419-20 (citing *Jefferson County*, 985 A.2d at 706-07).

⁷⁶ *Id.* at 419 (quoting *Jefferson County*, 985 A.2d at 706-07).

The Majority suggests that authority for its remedy may be found in this Court’s constitutional power to prescribe rules “governing practice, procedure and the conduct of all courts.”⁷⁷ To be sure, this Court possesses broad and exclusive authority over the “practice, procedure, and the conduct of all courts,” such that no other branch of government constitutionally may act in this arena.⁷⁸ This broad power is not limited to promulgating procedural rules governing hearings and trials; it extends to lawyers, court personnel, and other judicial employees. It includes the authority to manage judicial personnel and to supervise attorneys who appear in our courts. “[T]he judiciary’s authority over court personnel ‘is essential to the maintenance of an independent judiciary.’”⁷⁹ The exercise of these and other inherent powers is essential in order to “preserve the efficient and expeditious administration of Justice and protect it from being impaired or destroyed.”⁸⁰

⁷⁷ *See* Maj. Op. at 531–32 (quoting PA. CONST. art. V, § 10(c)).

⁷⁸ *Pennsylvania State Ass'n of Jury Comm'rs v. Commonwealth*, 621 Pa. 360, 78 A.3d 1020, 1032 (2013) (recognizing this Court's authority over our lower courts and reiterating that "neither the legislative branch nor the executive branch of government may constitutionally infringe on this judicial prerogative").

⁷⁹ *Jefferson County*, 985 A.2d at 707 (quoting *County of Lehigh v. PLRB*, 507 Pa. 270, 489 A.2d 1325, 1327 (1985)).

⁸⁰ *Com. ex rel. Carroll v. Tate*, 442 Pa. 45, 274 A.2d 193, 197 (1971).

But the remedy crafted by the Majority is no mere regulation of lawyers who appear in one of our courts. Under the broad umbrella of these powers, the Majority effectively amends existing legislation in order to coerce our PCRA courts into implementation of a procedure that requires them to notify and invite the OAG to perform what is undoubtedly a discretionary act: intervention in a post-conviction, collateral proceeding in a single county. The authority that the Majority wields to manufacture this remedy, like all powers, "is not unlimited."⁸¹ To the contrary, in order for our system of checks and balances to endure, "each branch must be kept from controlling or coercing the other."⁸²

⁸¹ *Jefferson County*, 985 A.2d at 707 (citation omitted).

⁸² *Renner*, 234 A.3d at 420; see also *Mockaitis*, 834 A.2d at 500 (explaining that one branch of government "cannot constitutionally impose upon [another] branch powers and obligations exclusively reserved to [another] branch; nor can it in essence deputize [another branch's] employees to perform duties more properly reserved to another of the co-equal branches of government.").

***583** Lawrence Krasner, Esquire, is the elected District Attorney in Philadelphia. The people of Philadelphia have repeatedly elected him to exercise his discretion on behalf of the Commonwealth in Philadelphia's criminal cases.

The Majority (and I) may disagree with how District Attorney Krasner chooses to exercise that discretion. But that is of no moment. Such disagreement does not authorize us to displace Mr. Krasner when the voters have not chosen to do so. By compelling courts to induce the OAG's participation, the Majority elects to impose upon District Attorney Krasner a babysitter, the OAG, upon whom it bestows full party status. The Majority's novel remedy is a clear violation of the separation of powers. *Sua sponte* and by fiat, the Majority enables an executive branch entity to serve alongside another duly elected executive branch entity in circumstances not contemplated or authorized by the Commonwealth Attorneys Act ("the CAA").⁸³ To make this happen, today's Majority writes a provision into the CAA that the legislative branch did not see fit to include. The Majority's judicial legislation is all in service of an extraordinary effort to override the discretion of one executive branch entity, the DAO.⁸⁴

⁸³ 71 P.S. § 732-101.

⁸⁴ The Majority protests that allowing the OAG to intervene in Philadelphia PCRA cases has no impact upon the DAO's discretion in those cases. Maj. Op. at 107. This is manifestly incorrect. In every county, the elected District Attorney and his or her representatives have the discretion to decide how to litigate criminal cases, including post-conviction proceedings. This discretion includes decisions to terminate a prosecution or to concede relief. When the Majority requires a trial court to consider alternative suggestions by outside parties, it unlawfully intrudes upon the District Attorney's province to exercise prosecutorial discretion. It is improper for this Court to force a PCRA judge to consider an alternative perspective merely because today's Majority does not agree with the way in which Philadelphia's elected District Attorney has prosecuted cases in the past. This undermines and effectively sidelines the lawful prerogatives of the prosecutor chosen by the Philadelphia electorate to exercise discretion in the manner approved of by that electorate.

The Majority's notice procedure cannot be found anywhere within the statute that authorizes the OAG's participation in criminal or civil cases. To the contrary, the remedy conflicts with critical portions of that statute. The CAA, a comprehensive statutory scheme enacted by our General Assembly, governs the OAG's ability to participate in legal matters. In criminal matters, for example, the CAA states that the OAG "shall" have the power to participate in cases

in which criminal charges are filed against state officials or corrupt organizations, or in cases referred by a state agency arising out of that agency's enforcement provisions, or in which a county district attorney or president judge *requests* the OAG's assistance.⁸⁵ The CAA contains no provision that permits what today's Majority commands. Nothing in the criminal case provisions of the CAA requires, or even allows, a PCRA court to notify the OAG and then to permit the OAG to intervene and serve as a full party alongside an elected district attorney in routine PCRA litigation. By the CAA's plain and unambiguous statutory terms, only an elected district attorney or a president judge can make such a request.

⁸⁵ 71 P.S. § 732-205(a)(1)-(3), (5), (6) (emphasis added).

In civil cases, the OAG generally is required to "represent the Commonwealth and all Commonwealth agencies, and upon request, the Departments of Auditor General and State Treasury and the Public Utility Commission in any action brought *584 by or against the Commonwealth or its agencies."⁸⁶ As far as civil cases go, that is all the OAG is statutorily required to do. Thus, to the extent that the PCRA is civil in nature,⁸⁷ the OAG has no obligation to participate in such proceedings. The CAA does endow the OAG with some discretion to intervene in civil cases. Indeed, the OAG "may intervene in any other" civil action.⁸⁸ But, as in the CAA's criminal provisions, there exists in the CAA no statutory obligation requiring courts to provide notice to the OAG when a prosecutor makes a concession and further requiring them to invite the OAG to exercise its civil case discretion. Statutory modification is a job for the General Assembly, not this Court. The Majority protests that it is not revising the statute, but is merely "lawfully effectuating the discretionary will of the OAG."⁸⁹ Not so; the CAA already provided and defined the OAG's discretion to intervene in civil cases.⁹⁰ There is no need for this Court to "effectuate" the discretion that the OAG already has, and that the OAG can "effectuate" on its own.

⁸⁶ *Id.* § 732-204(c).

⁸⁷ *See Commonwealth v. Haag*, 570 Pa. 289, 809 A.2d 271, 284 (2002); *Commonwealth v. Hill*, 609 Pa. 410, 16 A.3d 484, 495 n.14 (2011).

⁸⁸ 71 P.S. § 732-204(c).

⁸⁹ Maj. Op. at 539–40.

⁹⁰ 71 P.S. § 732-204(c).

The Majority disavows responsibility for its far-reaching actions, claiming instead that it is simply acceding to the OAG's request.⁹¹ Presumably, we are to believe that the question of how the remedy came to the Majority's attention is irrelevant. Having solicited this remedy,⁹² the Majority now has adopted it. And it then imposes that remedy upon our common pleas courts. Moreover, even regardless of who came up with the idea, it remains a mechanism that this Court is unauthorized to add to the CAA from the bench.

⁹¹ Maj. Op. at 538–40 (claiming that this Court is not "coercing" the OAG "against its wishes" to participate in PCRA proceedings through its notice remedy.) *Id.* at 539–40. The Majority asserts that it has not thrust this remedy upon the OAG, noting that the OAG "has, of its own volition, requested this Court craft a mechanism whereby it be notified and given an opportunity to intervene in the DAO's concession cases." *Id.*

⁹² *See* Order, 4/3/2024 (*per curiam*) (inviting the OAG to file a brief and present oral argument).

The Majority insists nonetheless that it merely is acceding to the OAG's request. The Majority tells us that, if the OAG desires to decline this intervention authority, the OAG may simply return to this Court and request that the notice protocol be terminated. This begs the question: is this Court creating a new constitutional procedural rule, as the Majority claims, or is the Court merely granting temporary intervenor status to the OAG? Or is it doing both? It is exceptional, to say the least, for this Court to create in a judicial opinion a new constitutional rule of procedure that only applies in one circumstance, in one county, and then to announce that the rule exists for only as long as the OAG wants it to exist.

The Majority insists that the right which it recognizes today—"the right to intervene"⁹³—is procedural, not substantive, and one that this Court is empowered to invent under our constitutional rulemaking authority. That is incorrect. In fact, the Majority itself explains why the right

it manufactures today breaks new ground: it emphasizes that the OAG will now “become an additional, full party in *585 the case.”⁹⁴ The Majority’s restructuring invites and encourages the OAG to intervene in an entire class of cases in which the General Assembly has not assigned it a role. When the OAG invokes this new, judicially-invented authority, it will gain the ability to file pleadings, request discovery, participate in hearings, present evidence, and make substantive arguments.⁹⁵ In other words, the OAG will be able to engage in the same substantive actions as the DAO or the PCRA petitioner. If the primary parties’ role is substantive in nature, then so too is the OAG’s. The Majority’s attempt to reframe the “right to intervene” as merely procedural is unconvincing.

⁹³ *Id.* at 533–34.

⁹⁴ *Id.* at 532.

⁹⁵ *Id.* at 532 n.69 (“The OAG can request discovery and evidentiary hearings pursuant to the existing rules governing these procedures. *See* Pa.R.Crim.P. 902(E), 907, 908, and 909(B). As a full party, the OAG may appeal the PCRA court’s decision as of right. *See* Pa.R.A.P. 501; [*In re Barnes Found.*, 582 Pa. 370, 871 A.2d 792, 794 (2005)].”).

Justice McCaffery’s Concurring Opinion

My esteemed colleague Justice McCaffery endorses the Majority’s exercise of King’s Bench jurisdiction as a corrective measure against the DAO’s alleged indiscretions and misconduct. But Justice McCaffery would go even further than the Majority. Without input from our Rules Committees or legislative authorization, Justice McCaffery would wield this Court’s power so broadly as to mandate a reconstruction of the relationships and responsibilities of District Attorneys and the OAG. Such an imposition of judicial will would be manifestly improper and beyond any lawful bounds. Justice McCaffery believes that every *Brady* claim requires a District Attorney to step aside and allow an OAG takeover, regardless of whether such claim is made before or after trial, on appeal, or during post-conviction proceedings.⁹⁶ Justice McCaffery maintains that

it is the OAG, not the District Attorney, that must represent the Commonwealth in all PCRA proceedings.⁹⁷ Neither the United States Supreme Court nor this Court has ever seen fit to disqualify prosecutors from responding to *Brady* claims at any point in time since the *Brady* ruling was announced in 1963.⁹⁸ And no court has ever *586 held that only the OAG must represent the Commonwealth in PCRA litigation since the General Assembly passed the PCRA in 1995. No drastic rearrangement should be mandated *sua sponte* by judicial fiat now. A change of such magnitude (even if it was advisable) should be made only with (and after) deliberation, consultation with our Rules Committees, deference to legislative authority, and input from the public and interested parties.

⁹⁶ *See* Conc. Op. (McCaffery, J.) at 543.

⁹⁷ *Id.*

⁹⁸ Since 1963, countless *Brady* claims have been raised and litigated in our courts. Routinely, a criminal defendant will allege that a prosecutor or police officer failed to disclose *Brady* material, whether intentionally or otherwise. Often, such claims are resolved by the prosecutor’s demonstration through records, emails, photocopies, or letters that such material had been turned over. On other occasions, the prosecutor must explain why such materials were not provided to the defense. Justice McCaffery would upend over six decades of practice by mandating that, every time a defendant raises a *Brady* claim, a conflict of interest automatically arises such that the OAG must be substituted for the elected District Attorney. Justice McCaffery would deny the DA the opportunity to defend himself and would instead sideline the DA and add to the growing (and likely unmanageable) burden that this Court is placing upon the OAG.

To repeat, in the sixty-three years that have elapsed since *Brady*, neither the United States Supreme Court nor this Court has ever required such an extreme remedy. That is not an interpretation of a statute, rule, or constitutional provision. It is certainly not “a new canon of construction” that rests “on the laurels of tradition as [the] interpretive polestar.” *Id.* at 553 n.18. It is a recognition of the striking novelty of Justice McCaffery’s position. Of the thousands of Justices and Judges that have addressed *Brady* claims over the decades (including those serving on the Court

that decided *Brady*), I am not aware of even one that has ever seen what Justice McCaffery now tells us is as plain as day.

Justice McCaffery's assertions notwithstanding, I attempt no reinterpretation or addition to the language of Rule 1.7 of Pennsylvania's Rules of Professional Conduct. The rule is plain and unambiguous. *See* Pa.R.P.C. 1.7(a) ("[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest."). What is ambiguous and uncertain is Justice McCaffery's assumption that every *Brady* claim automatically constitutes a conflict of interest requiring immediate replacement of the elected prosecutor. Neither the United States Supreme Court nor this Court has ever stated what Justice McCaffery believes is the law. Justice McCaffery assumes a component of Rule 1.7 that has yet to be established.

Justice McCaffery proposes a staggering new conception⁹⁹ of this Court's role in PCRA appeals. Notwithstanding that this Court has always treated these matters on a discretionary basis, Justice McCaffery now envisions a mandatory and far more active role, one that would require this Court to intervene—apparently under an ongoing exercise of King's Bench jurisdiction—in all cases in which a prosecutor fails or declines to appeal a grant of PCRA relief.¹⁰⁰ Setting aside that this Court lacks the resources to babysit PCRA litigation in Pennsylvania's sixty-seven counties, this, too, is an improper use of King's Bench jurisdiction. Justice McCaffery suggests that this intervention is necessary because a PCRA petitioner might obtain relief in a circumstance where PCRA jurisdiction had not first been established. Such a thing could happen. If it did, it would be one more consequence (among many) of an inherently imperfect system. While our judicial system strives in every case to fairly and correctly administer justice, courts at times can (and do) get things wrong. That some small percentage of cases may slip through the jurisdictional cracks is no warrant for sweeping intervention by this Court.

⁹⁹ Justice McCaffery's "analysis and suggestions" include disqualifying prosecutors automatically from litigating *Brady* claims, mandating that the OAG, and not District Attorneys, defend judgments of sentence in post-conviction collateral proceedings, and converting neutral PCRA courts into interested parties. *See id.* at 544–45 n.4. To my knowledge, none of these "suggestions" has ever before been proposed, much less implemented, in Pennsylvania. Justice McCaffery's protests

notwithstanding, it is fitting and accurate to characterize these "suggestions" as both staggering and new.

¹⁰⁰ *Id.* at 545.

It is true that retrials do not always yield guilty verdicts. It also is true that, sometimes, no retrial will occur. No legal system is infallible. Disappointment is one of many byproducts of the discretion that elected prosecutors are afforded in ours. Sometimes, the guilty go free. Sometimes, constitutional violations prevent the guilty from facing trial. Justice does not always prevail. These consequences are unfortunate. They are a tax we pay for the least-worst system whose fruits we enjoy. That these deficiencies are possible does not merit "close review" by this Court. Any irregularities apparent in the case at bar are insufficient to warrant this Court's intervention, let alone the unprecedented heavy hand that Justice McCaffery would bring to bear.

Justice McCaffery maintains that the grant of a new trial in a non-adversarial proceeding is "extraordinary," so much so that the "integrity of the criminal justice *587 system" is "immeasurabl[y]" impacted.¹⁰¹ Justice McCaffery asserts that such rulings create lasting and "notable damage" to the "public's confidence in a fair and impartial legal system."¹⁰² As I have stated elsewhere, it is beyond cavil that cases are best resolved through the adversarial process.¹⁰³ That does not mean that party concessions are inherently wrong or undesirable. To the contrary, the functioning of our legal system relies upon agreements and concessions between adverse parties. Guilty pleas, civil settlements, and stipulations ensure that our system operates fairly and efficiently. Parties should not be deterred from or penalized for agreeing that relief is due in some appropriate circumstance.

¹⁰¹ *Id.* at 545–46.

¹⁰² *Id.*

¹⁰³ *See Quigley v. Unemp. Comp. Bd. of Review*, 669 Pa. 645, 263 A.3d 574, 601 (2021) (Wecht, J., concurring).

Justice McCaffery's view that public confidence in the judicial system suffers irreparable damage when a prosecutor concedes relief is a view that assumes the concession must be erroneous or must be offered for improper reasons. It is just as likely, and surely more likely, that public confidence in our legal system is bolstered when a prosecutor who discovers an error in a prior prosecution agrees that correction of that error is necessary in order to ensure that the defendant receives the fair trial to which he is constitutionally entitled.¹⁰⁴ It beggars common sense and experience to believe that public confidence in our legal system relies precariously upon prosecutors who will refuse to admit that a demonstrable legal error has occurred and who will fight to ensure that those defendants who deserve relief will be denied it. Philadelphia's voters have chosen to elect Lawrence Krasner as District Attorney three times. This reality may not please Justices on this Court, but it does undermine any claim that our intervention is necessary in order to maintain or restore the people's confidence.

¹⁰⁴ Justice McCaffery misconstrues this point. This has nothing to do with the integrity, honor, or impartiality of the OAG. Nor do I question or doubt that OAG agents and attorneys act accordingly on a daily basis. Conc. Op. (McCaffery, J.) at 552 n.16. The point is that, unlike Justice McCaffery, I do not assume that every concession by a prosecutor is improper or that each concession diminishes the public's faith in our criminal justice system. To the contrary, the public desires the type of prosecutor that evaluates every case individually, on its own merits, and without reflex or rote opposition. A prosecutor must be free to approach each case with an open mind and to make those choices necessary to achieve justice. The public's faith is tethered to a prosecutor free to pursue whatever course legally is available to ensure such a result. This Court's insistence that a prosecutor exercise discretion in only one way does nothing to increase the public's confidence in the reliability or fairness of our criminal justice system.

Justice McCaffery would hold that the PCRA court abdicated its duty in this case, not because the court committed any legal error, but because the court apparently was playing the wrong role. In this reimagining of the PCRA, the court's role is far more expansive than application of the relevant law to the facts of the case. Justice McCaffery would have the PCRA court shed its traditional role of neutral referee. The PCRA court would transform from an impartial arbiter into an interested party,

one that represents, and serves as the "guardian" of, the "community's interest."¹⁰⁵ Neither the PCRA statute, nor any other law, envisions a court's role thus. A court is not a party, and it never has been. A court does not, and cannot, represent a *588 person or an interest. A court must always be a "neutral referee,"¹⁰⁶ lest the judicial system no longer lay claim to impartiality and disinterest. The community's interest in a case is represented by the District Attorney that the voters of that community have elected. A court may not expand its constitutional lane in order to assume a responsibility that a District Attorney failed, or chose not, to shoulder. A court has one role: apply the applicable law to the facts of the case fairly, accurately, and without bias. A court has no stake in the outcome of a case. It represents no interest, whether that interest is labeled "the community's interest" or something else. There is no hole in Lady Justice's blindfold. The public has an option when an elected official fails to serve as the "guardian of the community's interest." It can replace that official via the ballot box. A PCRA court has no authority to serve as that guardian in the meantime.

¹⁰⁵ Conc. Op. (McCaffery, J.) at 547–48.

¹⁰⁶ *Id.*

Notwithstanding his claim that the "PCRA court itself is no longer purely a neutral referee, but a guardian of the community's interest in an existing conviction by ensuring the Act's requirements are met before relief is granted," Justice McCaffery disclaims any wish that the court abandon its neutrality.¹⁰⁷ Yet, even he concedes that his new conception of the PCRA court's role "obviously creates tension with the traditional role of judges in our adversarial system."¹⁰⁸ Justice McCaffery cannot have it both ways. A court cannot abandon its traditional role as an unbiased arbiter—one with no interest in the outcome or the parties—and still be viewed by the public as neutral and impartial. Justice McCaffery suggests that it is necessary for a PCRA court to take on the "guardian of the community's interest" role in order to ensure that "duly enacted legislation" is "being followed, regardless of the desires of the nominal parties."¹⁰⁹ Following the law is not unique to the PCRA. All courts, whether civil or criminal, are obligated to ensure that the law is followed. It is critical to our system of justice that every court performs that function fairly and impartially, regardless of outcome. Both the functioning, and the faith, in our legal system deteriorate when any court forsakes its impartiality and abandons its role as a "neutral referee." This Court should not encourage such divergence.

¹⁰⁷ *Id.* at 548 n.8.

¹⁰⁸ *Id.* at 548.

¹⁰⁹ *Id.* at 548 n.8.

Justice McCaffery justifies his reimagination of the PCRA court's role by invoking his own personal view that there is "a crisis of confidence."¹¹⁰ On one side, he tells us, there is "a portion of the public" (which, he tells us, "District Attorney Krasner represents") that supports the DAO. On "the other side," Justice McCaffery tells us, are families of murder victims who do not support the DAO. Such political punditry is uncommon in judicial opinions. And rightly so. To the extent that "crises of confidence" or other political problems exist, they must be addressed by the voters, not by courts. Divisions in public opinion are why we have elections. The Philadelphia electorate has spoken. And it will speak again. Its choices are not our affair. This Court cannot, and should not, choose sides in political debates. Whether or not Justices like voters' choices is, and must always be, irrelevant.

¹¹⁰ *Id.*

Like the Majority, Justice McCaffery would use King's Bench jurisdiction to give Family Members a free pass to leapfrog *589 their failure to pursue the legal avenues available to them. Justice McCaffery argues that King's Bench jurisdiction is "an appropriate (if not necessary) option where questions of jurisdiction are implicated in a trial court's grant of relief and appellate review is foreclosed by circumstances."¹¹¹ That is not what happened here. The DAO chose—a decision that, as is true for any District Attorney, falls within the bounds of prosecutorial discretion—not to contest the merits of Brown's PCRA petition. Appellate review was not "foreclosed;" the DAO chose not to pursue that course of action. Nor were Family Members "foreclosed" from appealing the order denying intervention. Like the DAO, Family Members chose a course of action during litigation. It is not this Court's job to save them from the effects of their informed decisions. And this Court has no duty to reforge voluntary litigation choices into "foreclosures" in order to do so.

¹¹¹ *Id.* at 544–45.

Justice McCaffery innovates a different interpretation of the CAA as well. According to Justice McCaffery, for decades now, countless state courts (including this one), federal courts, PCRA petitioners, and prosecutors have all been wrong in believing that District Attorneys (and their assistants) can represent the Commonwealth in PCRA litigation. This uniformity of practice notwithstanding, Justice McCaffery views the last several decades as a benighted period of profound and universal error. Even though, as far as I can tell, the OAG has never before claimed it, Justice McCaffery now would assign the OAG an exclusive role: he construes the CAA as mandating that the only party authorized by law to represent the Commonwealth in PCRA cases is the OAG.¹¹² If this is true, then every argument, filing, and appeal offered by a District Attorney (or his or her assistants) since the enactment of the PCRA in 1995 has been a legal nullity.

¹¹² Justice McCaffery claims that my disagreement with his proposed remedy reveals me as "oblivious" to the "spirit and letter of the PCRA statute." *Id.* at 552–53 n.17. He protests too much. By its own terms, the "spirit" of the PCRA is to "provide[] 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. § 9542. The General Assembly did not enact the PCRA with the goal of replacing District Attorneys who have an interest in the outcome of their county proceedings with the statewide OAG. Justice McCaffery cites no cases from this (or any) Court even hinting that the "spirit" of the PCRA necessitates his proffered remedy. Even less compelling is Justice McCaffery's claim that the remedy accords with the "letter" of the PCRA. Needless to say, the "letter" of the PCRA mandates no such remedy, and Justice McCaffery points to none.

That the PCRA is "civil in nature"¹¹³ does not mean that a PCRA petition is a "civil action" as contemplated by the CAA.¹¹⁴ The CAA obligates the OAG to represent the Commonwealth only in those civil actions that are "brought by or against the Commonwealth."¹¹⁵ A PCRA petition is not "brought by" the Commonwealth. A PCRA petition can be filed only by a person convicted of a crime and serving a sentence.¹¹⁶ The OAG would be statutorily *590 obligated to represent the Commonwealth in every PCRA case only if a PCRA petition is an action filed "against the Commonwealth."¹¹⁷ The PCRA is not such an action, and it never has been held to be one. A PCRA petition is not a lawsuit. It is a collateral attack on the judgment of sentence. The Commonwealth is not the object

of the action. It is not being sued, and it is not suing anyone. The Commonwealth is a named party only because it prosecuted the charges that led to the judgment of sentence. The PCRA petitioner seeks “collateral relief”¹¹³ in the form of a new trial or sentence. The PCRA petition does not seek an injunction (or other equitable relief) against the Commonwealth, nor does it seek to hold the Commonwealth financially liable for its actions, as is the case in ordinary civil matters. Indeed, the PCRA action is governed by the Rules of Criminal Procedure, not the Rules of Civil Procedure. PCRA litigation is civil in nature because the litigation does not end with a conviction and judgment of sentence. In other respects, it is *sui generis* in our law. Under no reasonable interpretation can a PCRA claim be considered an action “brought ... against the Commonwealth.”

¹¹³ See *supra* n.88.

¹¹⁴ See 71 P.S. § 732-205(c).

¹¹⁵ *Id.*

¹¹⁶ 42 Pa.C.S. §§ 9542 (“This subchapter provides for an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief.”); 9543(a)(1) (“To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence ... [t]hat the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted ... currently serving a sentence of imprisonment, probation or parole for the crime[.]”).

¹¹⁷ 71 P.S. § 732-205(c).

¹¹⁸ 42 Pa.C.S. § 9542.

Justice McCaffery ignores the language of the CAA in its entirety. So long as the Commonwealth is named in the caption of a case, he discerns a case “brought by or against the Commonwealth.”¹¹⁹ The Commonwealth prosecuted

and imprisoned the PCRA petitioner,¹²⁰ but a PCRA petition does not seek to hold the government liable for that conviction and sentence. It is a legal mechanism that seeks collateral relief. The PCRA petitioner requests a new trial or sentence or a full discharge. Most of the claims authorized by the PCRA have nothing to do with the Commonwealth. For instance, a PCRA petitioner can allege that his guilty plea was unlawfully induced, that new evidence demonstrating his or her innocence has been discovered, that the sentence was illegal, or that the trial court lacked jurisdiction.¹²¹ Perhaps the most common PCRA claim is a challenge to counsel’s effectiveness. In no reasonable understanding of the PCRA can a claim against defense counsel be construed as a claim “brought by or against the Commonwealth.” Justice McCaffery ignores these particulars and assumes that, because the PCRA is “civil in nature,” and because the word “Commonwealth” appears in the caption of the case, the CAA must apply. Even the most rudimentary interpretation of the PCRA demonstrates that it is not the type of action contemplated by the CAA. This conclusion is not, as Justice McCaffery claims, “unprincipled resistance to questioning,” nor is it bereft of legal analysis. It is instead a straightforward understanding of the terms and purposes of the PCRA, as they have been understood by every court since the PCRA was enacted.

¹¹⁹ Conc.Op. (McCaffery, J.) at 550 n.13.

¹²⁰ *Id.*

¹²¹ 42 Pa.C.S. § 9543(a)(2).

The consequences of Justice McCaffery’s novel reading of the CAA would be severe. For one thing, that reading would open the door to a never-ending stream of litigation, inasmuch as, under that view of the CAA, thousands of PCRA petitions have been litigated by parties without standing or legal authority to act. For another, the OAG would suddenly become responsible for the thousands of PCRA petitions filed each year in each of Pennsylvania’s sixty-seven counties. If Justice *591 McCaffery’s interpretation of the CAA were to prevail, imagine the OAG’s surprise when it learns that it must shoulder this immense burden and immediately assume the obligation of litigating every PCRA petition filed in every Pennsylvania county, and with nothing more than the personnel and resources that it currently possesses.¹²² Fortunately, the CAA requires no such thing.

¹²² Justice McCaffery waves away this considerable burden to the OAG by speculating that the burden will be offset by the decrease in burden for District Attorney offices. Conc. Op. (McCaffery, J.) at 550 n.14. This will be no solace to the OAG. Justice McCaffery seems to believe that the OAG and District Attorney offices pool resources. They do not. Although District Attorneys undoubtedly would welcome the reduced workload, that does nothing to add to the personnel and resources necessary for the OAG to take on every PCRA case in Pennsylvania.

Justice McCaffery finds it “bewildering” that “courts should sit silently as injustices unfold under their very noses.” The unfortunate reality is that, not only is this a common occurrence, but it also is mandated in many ways by the law. Jurisdictional bars, such as the PCRA’s one-year time limit, and our strict waiver doctrine, frequently require courts to slam the door in the faces of litigants, even those to whom the law would otherwise provide relief. We demand that courts erect those barriers regardless of circumstance, merits, or resulting injustice. The law applies equally to one and all. That unhappy results may ensue provides no license for us to rewrite or circumvent the law.

Conclusion

The Majority is correct that, as an officer of the court and minister of justice, a prosecutor is “duty-bound to confess error, provided that the facts and law call for it.”¹²³ There is a system in place for determination of instances in which the facts and law did not call for the prosecutor’s concession. As Justice Brobson explains, when a concession is made in a case where it is not clear that a defendant is entitled to relief, “a PCRA court should consider the prosecutor’s concession of error, any stipulated facts from the parties, and the position of any intervenors or *amici*, all as a means to aid the court in its disposition of the PCRA petition.”¹²⁴ That is exactly what the PCRA court did in this case. There is no need to invoke our King’s Bench jurisdiction in order to create a new procedure to achieve what already has been done. There is ample evidence proving that courts are managing prosecutorial concessions successfully, and to a degree that renders our intervention unnecessary and gratuitous. Pennsylvania courts and Federal courts alike have proven

adept at sifting through the DAO’s confessions of error, rejecting those that are unwarranted, and giving due weight to those that are. We should continue to trust those courts, subject to ordinary appellate review.

¹²³ Maj. Op. at 476–77.

¹²⁴ Conc. Op. (Brobson, J.) at 542.

The Majority refuses to do so. The Majority forces PCRA courts in Philadelphia to notify the OAG when the DAO concedes that relief is due, and to invite the OAG’s participation. This is not merely a supervisory procedural mechanism. It is a substantive mandate.¹²⁵ The Court’s engrafting *592 of this mandate upon the CAA is a glaring violation of our constitutional duty to maintain the separation of powers.

¹²⁵ The Majority insists that its remedy is but a “constitutional procedural rule,” and not a substantive mandate. Maj. Op. at 534 n.72. As support, the Majority cites several procedural rules that allow the OAG to intervene as a party. *Id.* (citing Pa.R.A.P. 3775(c)(2); Pa.R.C.P. 235; and Pa.R.A.P. 521(b)). None of the rules cited by the Majority was promulgated and imposed by fiat in an opinion of this Court. Instead, each rule went through our established rulemaking process, a deliberative and painstaking enterprise in which this Court, assisted by expert practitioners, and informed by public notice and comment, ensures that a rule is necessary and proper and that the subject matter falls within this Court’s constitutional authority. King’s Bench jurisdiction is not a license to excise from this process valuable and thoughtful input from those who have more ongoing experience in the current, daily practice of law than the Justices of this Court. That expertise is essential to our ability to create and publish fair and workable rules.

The Majority’s actions stem from its palpable distaste for the discretionary decisions that the current prosecutors—under the direction of District Attorney Krasner—in the DAO routinely make. The Majority fervently believes that the DAO concedes relief too often. It is not this Court’s job to manage the manner in which an elected prosecutor exercises his or her discretion. District Attorney Krasner has been abundantly clear in how he has exercised, and will continue to exercise, that discretion. Like it or not, the Philadelphia electorate has expressed its will in the voting

booth, and it has elected District Attorney Krasner three times. It appears that Philadelphia voters approve and endorse the manner in which District Attorney Krasner executes the duties of his office. It is of no moment whether Justices of this Court agree with them.¹²⁶ It is not our job to provide a second opinion simply because this Court believes the job should be done in a different or more traditional way, or by someone more to this Court's liking.

¹²⁶ This Court should not unilaterally circumvent any District Attorney's policy judgments or discretionary decisions. Unlike Justice McCaffery, I believe DA Krasner's "**performance**" (see Conc. Op. (McCaffery, J.) at 552–53 n.17 (emphasis in original)), like the "performance" of any elected District Attorney, is assessed by the citizens of his county rather than by the Justices of this Court. It is not this Court's responsibility or role to override the voters' will by providing a different perspective on every PCRA case in which DA Krasner exercises his discretion in a manner contrary to what Justices of this Court might expect or prefer from a prosecutor. Rather than responding to my view that this Court should exercise King's Bench jurisdiction with restraint, and that any perceived problems should be resolved through legislative amendment or our well-established rule-making process, Justice McCaffery chooses instead to erect a strawman: he asserts that I would exempt DAs "from conflict of interest rules because they won an election" *Id.* This is a flawed assertion that

conflates unrelated principles. Nothing about my disagreement with this Court's overzealous invocation of King's Bench jurisdiction here suggests that DA Krasner, or any other prosecutor or lawyer, cannot be held responsible for violations of our Rules of Professional Conduct. There are well-established procedures by which we address such violations. Those procedures should be followed in every case in which potential ethical breaches exist. There is no Krasner exception. No rule or principle allows this Court to treat one prosecutor's office differently and adjudicate claims regarding that office without a record or hearing.

When the electorate is unsatisfied with the performance of an elected official, the remedy lies in the ballot box. It does not lie in this Court. This Court should have rejected Family Members' attempt to circumvent our settled processes. Because this Court should not have exercised King's Bench jurisdiction in this case, I respectfully dissent.

All Citations

358 A.3d 469