[J-17-2019] [MO: Dougherty, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 752 CAP
	:	
Appellee	:	Appeal from the Order entered on
	:	November 16, 2007 in the Court of
	:	Common Pleas, Philadelphia County,
v.	:	Criminal Division at No. CP-51-CR-
	:	1024821-1988 (Nunc Pro Tunc appeal
	:	rights reinstated on 06/22/2017).
ANTHONY REID,	:	
	:	SUBMITTED: February 4, 2019
Appellant	:	

DISSENTING OPINION

JUDGE MCCAFFERY[1]

I write separately to suggest a solution to the problems explored so thoroughly and ably in the Majority Opinion and Justice Donohue's Dissenting Opinion in this matter. As I read *Williams v. Pennsylvania*, __ U.S. __, 136 S.Ct. 1899 (2016), it does not create a new right, but instead highlights the importance of an old one, perhaps the oldest of them all: the right to a fair tribunal, without which pursuit of any other right in the justice system would be a dim prospect. *Williams* simply reiterated well-founded principles of constitutional due process law in finding that former Chief Justice Ronald Castille should never have sat on an appeal after having participated in and supervised the underlying prosecutorial decision to seek the death penalty. It created a risk of imperceptible bias

[1] Superior Court Judge sitting by special designation per I.O.P. §13; *see* Order of June 23, 2020; Order of June 25, 2020.

and the appearance of impropriety. Reid has a right to appellate review untainted with the stain of Chief Justice Castille's involvement.

All agree that Chief Justice Castille's participation in Reid's prior PCRA appeal implicates the same structural failure to provide due process at issue in *Williams*.[2] Thus, the question is whether the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546, fashioned as "the sole means of obtaining collateral relief . . . encompass[ing] all other common law and statutory remedies for the same purpose . . . including habeas corpus and coram nobis,"[3] may reach this due process violation, or whether an error of constitutional dimension lies outside of the power of the courts entirely.

The reasoning of the Majority is thorough, and its sources well-cited. My fear is that it leads too inexorably to the conclusion that the PCRA itself fails to afford sufficient due process and is therefore constitutionally infirm. This concern, as well as Justice Donohue's valid concern for the legitimacy of the courts, leads me to conclude that the canon of constitutional avoidance should be applied and the statute interpreted so as to avoid seeming to nullify a decision of the Supreme Court of the United States finding structural error in our highest state court. If anything, we must err on the side of deference to the Supreme Court and to the due process guarantees of our state and federal constitutions. Even if the Majority's statutory analysis is correctly grounded in the

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[2] "Chief Justice Castille's participation violated due process . . . ." *Williams*, 136 S.Ct. at 1909. *See* Majority Op. at 2 ("[W]e agree Chief Justice Castille's participation in appellant's prior PCRA appeal implicates the same due process concerns at issue in *Williams* . . ."); Dissenting Op. (Donohue, J.) at 2 ("Reid is in an identical posture to Williams").

[3] 42 Pa.C.S. § 9542.

decisional law of this Court, if the constitutional precepts are to retain their supremacy then we must find a way to allow those capital defendant/appellants who are situated as Williams was to receive an appeal free of structural constitutional error. "[W]hile there may be legislative limitations or judicial limitations on constitutional rights, such limitations must be reasonable." *Commonwealth v. Peterkin*, 722 A.2d 638, 642 (Pa. 1998) (citation omitted). Where the Supreme Court has granted certiorari and reversed an order of this Court, instructing us and the nation that a prior panel of this Court introduced a structural error of severe enough proportion to demand reversal, is it reasonable that the limitation on due process, as we attempt to apply the PCRA and *Williams*, would put Williams and all those similarly situated out of court?

"Under the canon of constitutional avoidance, if a statute is susceptible of two reasonable constructions, one of which would raise constitutional difficulties and the other of which would not, we adopt the latter construction." *Commonwealth v. Herman*, 161 A.3d 194, 212 (Pa. 2017). We must presume that the legislature "does not intend to violate the Constitution of the United States or of this Commonwealth." 1 Pa.C.S. § 1922(3). In *Williams*, the Supreme Court made clear that the Constitution of the United States was offended by Chief Justice Castille's participation in Williams' (and thus in Reid's) direct appeal.

Two things are true here: first, until quite recently the Commonwealth significantly downplayed former Chief Justice Castille's involvement in death penalty cases brought while he was District Attorney of Philadelphia, a position that our state courts did not discredit. This was not simply a legal position or an example of zealous advocacy in the form of argument; this was the Commonwealth in the position of prosecutor making a

factual claim about how it prosecuted the case at hand.[4] Second, after the High Court's decision in *Williams*, that position was revealed for what it is: an untenable take on both the facts and the law. Where the parties agree that jurisdiction lies (as they seem now to do) and the PCRA court finds a jurisdictional basis in facts rather than in an offbeat or novel interpretation of the law, appellate courts must apply a deferential standard, in recognition of the trial court's fundamental role as factfinder.[5] For these reasons, I conclude that the PCRA court correctly found grounds for jurisdiction in the *Williams* decision, and the concession made by the Commonwealth that Chief Justice Castille's prior involvement in Reid's case is akin to his prior involvement in Williams' case.

Williams is not only a clarification of the requirements of judicial conduct. In reversing this Court, the Supreme Court wrote that the Commonwealth's claim that Chief Justice Castille's only involvement in capital prosecutions "amounted to a brief administrative act . . . cannot be credited." *Williams*, 136 S.Ct. at 1907. "Chief Justice Castille's own comments while running for judicial office refute the Commonwealth's claim

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[4] The Commonwealth's position until recently, that former District Attorney Castille's participation in Reid's case was minimal at worst or merely ministerial, was one that could not be rebutted by any act of diligence without access (in this case, by court order in the PCRA proceedings below) to materials in the Commonwealth's sole possession and control. This is why the Commonwealth's concession that as District Attorney, Chief Justice Castille personally reviewed Reid's case and approved pursuit of the death penalty, profoundly alters the jurisdictional analysis. Nothing in this analysis constitutes a holding as to any case not involving this very specific sequence: a holding from a high court that a certain act constitutes "significant, personal involvement in a critical decision" in the case, *Williams*, 136 S.Ct. at 1908, coupled with a factual finding that such involvement occurred but was not discoverable by exercise of reasonable diligence at an earlier point, as the PCRA requires. *See* 42 Pa.C.S. § 9545(b)(ii).

[5] *See, e.g., In re Vencil*, 152 A.3d 235, 242-43 (Pa. 2017) (outlining traditional deference to factfinder in a number of different settings, when evaluating sufficiency of the evidence).

that he played a mere ministerial role in capital sentencing decisions." *Id.* This language punctures the factual assertions underpinning the Commonwealth's argument that Reid has not established jurisdiction under one of the three exceptions for untimely petitions under the PCRA, as outlined at 42 Pa.C.S. § 9545. *Williams* does more than discredit the Commonwealth's assertions minimizing then District Attorney Castille's involvement. It establishes that the violation is structural, and therefore not susceptible to "harmless error" analysis. *Williams*, 136 S.Ct. at 1909 ("The Court has little trouble concluding that a due process violation arising from the participation of an interested judge is a defect 'not amenable' to harmless-error review, regardless of whether the judge's vote was dispositive.") (citation omitted).

In *Marbury v. Madison*, 5 U.S. 137 (1803), the Court declared that the "very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury" and warned that a government cannot be called a "government of laws, and not of men . . . . if the laws furnish no remedy for the violation of a vested legal right." *Id.* at 163. "It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." *Id.* at 147 (citation omitted).

The General Assembly's recent 2018 amendment of the PCRA to extend the time in which certain claims may be brought emphasizes that, if the PCRA is to remain the sole avenue for collateral relief, it must empower courts to act when relief is warranted.[6] "It is settled beyond peradventure that constitutional promises must be kept." *William*

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[6] *See* Act 2018, Oct. 24, P.L. 894, No. 146 (Oct. 24, 2018, effective Dec. 24, 2018).

Penn Sch. Dist. v. Pennsylvania Dep't of Educ., 170 A.3d 414, 418 (Pa. 2017). "It must be remembered that statutes are presumptively constitutional and that courts must interpret them in that sense if possible . . . ." *English v. Sch. Dist. of Robinson Twp.*, 55 A.2d 803, 809 (Pa. 1947); *see also Herman*, 161 A.3d at 212.

The Commonwealth argues that Reid waived his due process recusal-based claim by failing to raise it at the earliest moment. This argument, while grounded in the settled principle that the PCRA may not be used to resuscitate waived claims or impose delay by empowering strategic unfolding of claims (a strategy with little appeal outside of the death penalty context), has some problems. First, I note Chief Justice Castille has denied other motions for recusal.[7] Further, while this Court may disagree as to how best to characterize the rule for which *Williams* stands, no one can dispute that if Reid had sought Chief Justice Castille's recusal, he would have been articulating a theory of due process that had not been recognized by this Court, rather than asserting a right to a fair appeal without structural constitutional error, as he now attempts. This difference is critical.

Even if the PCRA court was incorrect that the Supreme Court's *Williams* decision could constitute a new fact (though I find compelling the few exceptions to this rule), there remains the possibility that the Commonwealth's admission in its Letter Brief of June 1, 2017, in which it conceded that then District Attorney Castille must have personally reviewed and approved the office's decision to seek the ultimate sanction in this case,

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[7] *See, e.g., Commonwealth v. Porter*, 35 A.3d 4 (Pa. 2012) (Castille, C.J.) (denying recusal, affirming the PCRA court and directing further proceedings, including appointing new counsel "[i]f the conduct of the [Federal Community Defender's Office] unduly delays matters"); *Commonwealth v. Spotz*, 18 A.3d 244, 329 (Pa. 2011) (Castille, C.J., concurring) (criticizing the Federal Community Defender's Office for its strategy in state death penalty PCRA litigation).

supports jurisdiction. This concession is a fact; PCRA courts are factfinders. Appellate courts must maintain a deferential approach to the factfinding of the lower courts. Applying an appropriately deferential review of the PCRA court's opinion in this case allows us to reach the result the law mandates: that the PCRA court, and this one, are empowered to act, but no sea change has occurred. The fact of the concession as to the memorandum is very specific and will not be likely to recur beyond a handful of capital cases in one county out of 67 across the Commonwealth. Though the fact may be quotidian, though it may surprise no one, it is a finding of fact by a trial court, a fact that until recently the Commonwealth vigorously denied.

Part of the quandary this Court now faces is that **of course** it was well-known that Chief Justice Castille, who campaigned on his death penalty record, pursued the death penalty with vigor in many cases as District Attorney, opposed litigation strategies by those he saw as zealous anti-capital campaigners, and believed strongly in his legacy as District Attorney, as is apparent by the way he spoke of it in his campaign and elsewhere. This is why Williams likely sought his recusal in the first place. This is not a scenario where a shocking fact reveals previously-unimagined potential bias in a jurist, mandating recusal. The Majority is not wrong to conclude that many aspects of what the PCRA court found to be factually "new" is actually old news.

In so concluding, however, we must acknowledge that the Commonwealth was less than forthcoming about this old news, as was Chief Justice Castille himself. The Commonwealth asserted before the highest court in our nation that then District Attorney Castille's involvement in Williams' prosecution was merely ministerial. Chief Justice Castille himself, while acting as the head of this Court and of our entire third branch of

government, similarly dismissed any concerns that he might need to recuse himself in these cases. It was only the United States Supreme Court's determination that the Commonwealth's factual position was too specious to be credited that broke the Commonwealth's factual insistence that the emperor was fully clothed and had been the whole time. Even if everyone knows the truth, only a court willing to say the truth can entertain justice. If Chief Justice Castille's role as District Attorney is old news, it is news that is only very recently finding an audience in our courts.

This raises the prospect that Reid, and similarly-situated defendants sitting on death row, will hear from this Court that they have what we might call a "Goldilocks" problem. Asking Chief Justice Castille to make an honest, searching assessment of whether he might need to recuse, while he was sitting as a Justice, was a strategy bound to fail – it was before *Williams* and therefore "too soon." Now, seemingly, we are asked to conclude that it is "too late" even though Reid brought his claim within sixty days of *Williams*' paradigm shift. When was the time "just right" for Reid to ask for fair, constitutional appellate review of his first, timely-filed petition? What more can we ask of Reid and of similarly situated litigants, while maintaining that we are applying the Supreme Court's correction and vindicating our constitutions?

We must begin with the statute itself, to decide whether its discord with the present due process requirements is truly intractable. The PCRA specifies that "[o]riginal jurisdiction over a proceeding under this subchapter shall be in the court of common pleas" and "[n]o court shall have authority to entertain a request for any form of relief in anticipation of the filing of a petition under this subchapter." 42 Pa.C.S. § 9545(a). It is

otherwise silent as to jurisdiction.[8] In fact, subsection 9545(b), establishing the one-year limit and the three exceptions, does not mention jurisdiction or the courts **at all** – it appears to be directed entirely to potential petitioners.[9] "[W]e must accept that when the General Assembly selects words to use in a statute, it has chosen them purposefully." *Commonwealth v. Scolieri*, 813 A.2d 672, 673 (Pa. 2002) (*citing* 1 Pa.C.S. § 1921(b)).

In *Peterkin*, this Court held that "**as a matter of jurisdiction**, a PCRA petition must be filed within one year of final judgment." *Peterkin*, 722 A.2d at 641 (emphasis added). I note that the plain language of the PCRA does not articulate such a nexus between its timeliness provisions and a court's **jurisdiction** to hear a petition. At the same time, however, the legislature did not place a temporal limit on jurisdiction; thus, *Peterkin*'s holding is an example of judicial restraint. This means that the challenge we face is, to a significant degree, one of judicial crafting. Therefore this Court can, consistent with its precedent, clarify that within the jurisdictional strictures it has crafted to balance due process and other concerns such as finality, where the parties agree to establishment of the "new facts" exception it cannot be an abuse for a PCRA court to accept that agreement. For the same reasons, I would find that here, the Court may proceed to the merits of the petition.

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[8] This is true with one exception: 42 Pa.C.S. § 9543.1(f)(1) refers to "section 9545(b)(2) (relating to jurisdiction and proceedings)" – section 9545 is entitled "Jurisdiction and proceedings".

[9] By comparison, the federal courts apply the time bar for habeas corpus proceedings as a statute of limitations. *See Day v. McDonough*, 547 U.S. 198, 205 (2006) (deciding whether a district court may dismiss a habeas petition as untimely despite the state's failure to raise the time bar or its erroneous concession of timeliness; "A statute of limitations defense, the State acknowledges, is not 'jurisdictional,' hence courts are under no obligation to raise the time bar *sua sponte*.").

The body of cases impacted by *Williams* is small and unique, in that it is rare that this kind of structural error could be found. It is hard to imagine that there would be many other scenarios like this one, where the decision to seek the death penalty is approved at the highest level in the District Attorney's office, and the very person who makes the approval has the good fortune to become an appellate judge, and then happens to sit in judgment on the case in which they made that crucial decision. In the larger judicial districts, the District Attorney will not often set foot in a courtroom, let alone try a case. Surely we may hope that if an elected District Attorney in any county actually tries a case, that person would never subsequently sit in judgment as a jurist as to the same controversy. Then, the structural error would be hard to miss.

What makes this body of cases different is that the Supreme Court has instructed that the decision to seek capital punishment is one that "a responsible prosecutor would deem [ ] to be a most significant exercise of [their] official discretion and professional judgment." *Williams*, 136 S.Ct. at 1907. The Supreme Court in *Williams* did not make any broader a decision than that – a prosecutor who is the highest-level supervisor in their office, and who personally approves seeking the highest sanction, should not subsequently sit as a jurist in the same case. I share the Supreme Court's view that its decision in *Williams* "will not occasion a significant change in recusal practice." *Id.* at 1908. Nor should it occasion an ill-advised sprint to the courthouse for the vast majority of convicted persons.

Because we must balance the strictures of the PCRA with the fact that it is the sole path for collateral review and with the urgent ethical precept embodied by *Williams*, I would urge that this Court, noting that its jurisdictional approach to section 9545 is

judicially crafted and therefore amenable to judicial fine-tuning, rely on the broad discretion given to factfinders and give the benefit of the doubt to the PCRA court's factual determinations below, including that the Commonwealth's concession, a factual one, is a new fact for purposes of the PCRA. This is especially so given that pre-*Williams*, the Commonwealth was still insisting that then District Attorney Castille's role in these cases was absolutely minimal, that as a matter of fact, he did very little and spent very little time and thought on death penalty cases. This wise deference to factfinders, a venerable principle in its own right, provides the leeway this Court needs to clear an otherwise seemingly intractable logjam, to which the right of due process may never be subservient.

Accordingly, I conclude that the PCRA court correctly determined that it had jurisdiction to review the merits of Reid's PCRA petition. Further, I agree with Justice Donohue's Dissenting Opinion as to the merits of Reid's claims, and therefore I join Section Three of that Opinion, affirming the PCRA court's denial of relief in most respects but remanding for an evidentiary hearing regarding certain penalty phase claims.[10]

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[10] I do not join Justice Donohue's learned Dissenting Opinion as to its analysis of jurisdiction simply due to the principle that when a controversy raises both constitutional and non-constitutional issues, our courts prefer first to examine whether it may be decided on non-constitutional grounds. *See Ballou v. State Ethics Comm'n*, 436 A.2d 186, 187 (Pa. 1981); *Mt. Lebanon v. County Board of Elections*, 368 A.2d 648, 650 (Pa. 1977). *Accord, e.g., Lattanzio v. Unemployment Compensation Board of Review*, 336 A.2d 595 (Pa. 1975). This "fundamental rule of judicial restraint" is one we share with the federal courts. *Jean v. Nelson*, 472 U.S. 846, 854 (1985). I find in the deferential standard of review for factfinders a narrower structural root for the exercise of jurisdiction, and thus would not seek root in the constitutional firmament. However, the Dissenting Opinion's consistently thorough analysis, as applied to the merits of the appeal, enjoys my full assent.