[J-17-2019]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

JUSTICES DONOHUE, DOUGHERTY, WECHT, AND MUNDY
JUDGES MURRAY, DUBOW, AND MCCAFFERY[1]

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	:	

OPINION

JUSTICE DOUGHERTY **DECIDED: August 18, 2020**

This is one of several similarly situated capital appeals pending in this Court involving former Chief Justice Ronald D. Castille's role as the elected District Attorney of Philadelphia. On June 22, 2017, the Honorable Leon W. Tucker, Supervising Judge of the Criminal Division, Philadelphia Court of Common Pleas ("PCRA court"), granted appellant Anthony Reid relief under the Post-Conviction Relief Act, 42 Pa.C.S. §§9541-9546, in the form of *nunc pro tunc* reinstatement of his right to appeal the order denying his first timely PCRA petition. This Court previously affirmed the order denying appellant's first PCRA petition; however, the PCRA court concluded we must reconsider appellant's PCRA appeal anew — this time without the participation of Chief Justice Castille —

[1] A special complement of the Supreme Court of Pennsylvania has been assembled to address the issues presented in this case pursuant to I.O.P. §13.

pursuant to *Williams v. Pennsylvania*, __ U.S. __, 136 S.Ct. 1899 (2016) (holding Chief Justice Castille's failure to recuse where he earlier had significant, personal involvement as District Attorney in a critical decision regarding the defendant's case gave rise to an unacceptable risk of actual bias under the Due Process Clause and constituted structural error). While we agree Chief Justice Castille's participation in appellant's prior PCRA appeal implicates the same due process concerns at issue in *Williams*, we conclude the lower court lacked jurisdiction under the PCRA to reinstate appellant's *nunc pro tunc* right to appeal. Consequently, we also lack jurisdiction, and must quash this serial appeal as untimely.

I. Background

The facts underlying appellant's murder conviction and resulting death sentence, which we fully discussed in our May 24, 1994 opinion affirming appellant's judgment of sentence on direct appeal, are not relevant to our disposition. *See Commonwealth v. Reid*, 642 A.2d 453, 456-57 (Pa. 1994) ("*Reid I*"), *cert. denied,* 513 U.S. 904 (1994). Furthermore, we set forth the pertinent history concerning appellant's first PCRA petition in *Commonwealth v. Reid*, 99 A.3d 427, 434-35 (Pa. 2014) ("*Reid II*"), wherein we affirmed the November 19, 2007 order denying PCRA relief.[2] Significantly, Chief Justice Castille participated in and joined the majority opinion in *Reid II*, which was decided on August 20, 2014.

a. The *Williams* Decision

Nearly two years later, on June 9, 2016, the United States Supreme Court issued its opinion in *Williams*. The petitioner in that case, Terrance Williams, was convicted of

[2] In *Reid II*, the Court mistakenly referred to the date appellant's first PCRA petition was dismissed as November 16, 2008. *Reid II*, 99 A.3d at 435 n.9. Similarly, in their briefs in this Court the parties misstate the date as November 16, 2007. However, the order included in the certified record is dated November 19, 2007. We will refer to this proper date.

the 1985 murder of Amos Norwood and sentenced to death. *Williams*, 136 S.Ct. at 1903. Prior to trial, then-District Attorney Castille approved the trial prosecutor's request to seek the death penalty against Williams. *Id*. Over the next 26 years, Williams's conviction and sentence were upheld on direct appeal, post-conviction review, and federal habeas review. *Id*. at 1904.

In 2012, Williams filed his fourth PCRA petition, claiming the trial prosecutor had obtained false testimony from his co-defendant and suppressed material, exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *Id*. In the course of litigating that petition, the PCRA court ordered the Commonwealth to produce previously undisclosed files of the prosecution and police. Included within those files was the trial prosecutor's memorandum requesting approval to seek the death penalty, which was approved by District Attorney Castille. *Id*. Following an evidentiary hearing, the PCRA court granted Williams's PCRA petition, stayed his execution, and granted him a new penalty phase trial. *Id*.

The Commonwealth filed an emergency petition in this Court seeking to vacate the stay of execution. *Id*. Williams responded to the Commonwealth's petition; he also filed a motion asking Chief Justice Castille to recuse himself based on the discovery of his prior involvement in approving the trial prosecutor's request to seek the death penalty. *Id*. Chief Justice Castille denied the motion for recusal without explanation, and also declined Williams's request to refer the motion to the full court for decision. *Id*. Thereafter, the Court, including Chief Justice Castille, considered the Commonwealth's appeal upon full briefing, vacated the PCRA court's order, dismissed the PCRA petition, and reinstated Williams's sentence of death. *See Commonwealth v. Williams*, 105 A.3d 1234 (Pa. 2014). Two weeks later, Chief Justice Castille retired from the bench.

The United States Supreme Court subsequently granted Williams's petition for a writ of *certiorari* to consider whether Chief Justice Castille's failure to recuse violated the Due Process Clause of the Fourteenth Amendment and, if so, whether that due process violation was harmless. *Williams*, 136 S.Ct. at 1903, 1909. At the outset, the Court recognized its precedents did not set forth a specific test governing recusal in situations where a judge had prior involvement in a case as a prosecutor. *Id*. at 1905. Nevertheless, the Court explained "the principles on which [its] precedents rest dictate the rule that must control[,]" and held "that under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." *Id*.

The Court continued to consider whether District Attorney Castille's authorization to seek the death penalty against Williams constituted "significant, personal involvement in a critical trial decision." *Id*. at 1907. Recognizing the decision to pursue the death penalty is a critical choice in the adversarial process, the Court focused its examination on whether District Attorney Castille had a significant role in making that decision with respect to Williams. *Id*. The Court concluded he did, observing the decision to seek the death penalty "and the profound consequences it carries make it evident that a responsible prosecutor would deem it to be a most significant exercise of his or her official discretion and professional judgment." *Id*. In so concluding, the Court rejected the Commonwealth's portrayal of District Attorney Castille's approval of his subordinates' requests to seek the death penalty as "brief administrative act[s] limited to the time it takes to read a one-and-a-half-page memo." *Id*. (internal quotation and citation omitted). The Court remarked the Commonwealth's characterization "cannot be credited" and stated it would not assume District Attorney Castille "treated so major a decision as a perfunctory task requiring little time, judgment, or reflection on his part." *Id*. In support, the Court

noted that then-candidate Castille's "own comments while running for judicial office refute the Commonwealth's claim that he played a mere ministerial role in capital sentencing decisions[,]" because he repeatedly stated during his campaign that he sent 45 people to death row as District Attorney. *Id*. at 1907-08 (citation omitted).

Having determined the decision to seek the death penalty amounts to significant, personal involvement in a critical decision and thereby gives rise to an unacceptable risk of actual bias, the Court proceeded to resolve whether Williams was entitled to relief. *Id*. at 1909. The Court explained it had not previously considered whether a due process violation arising from a jurist's failure to recuse amounts to harmless error if the jurist is on a multimember court and the jurist's vote was not decisive. *Id*. However, the Court had "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." *Id*. (internal quotation and citation omitted); *see also id*. ("an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote"). Accordingly, the Court held Chief Justice Castille's participation in the appeal from the order granting Williams PCRA relief "was an error that affected [this Court's] whole adjudicatory framework[,]" and it vacated this Court's decision and remanded so that Williams could present his claims to the Court without Chief Justice Castille's involvement. *Id*. at 1910.[3]

b. <u>Appellant's Second PCRA Petition</u>

Exactly sixty days after the *Williams* decision issued, appellant, now represented by the Federal Community Defender Office ("FCDO"), filed a second PCRA petition in which he sought a new appeal from the denial of his first PCRA petition. *See* PCRA

[3] On remand to this Court, the PCRA court's order granting a stay of execution and a new penalty phase trial was affirmed by an equally divided Court. *See Commonwealth v. Williams*, 168 A.3d 97 (Pa. 2017).

Petition, 8/8/2016, at 2 (contending he was "entitled to relief in the form of a new PCRA appeal to an unbiased tribunal"). Appellant argued Chief Justice Castille's participation in *Reid II* violated due process since, as in *Williams*, he had previously "authorized the use of the death penalty against [appellant]." *Id*. at 14.

Recognizing his judgment of sentence became final in 1994 and his successive petition was patently untimely, appellant alleged he met "all three exceptions" to the PCRA's timebar. *Id*. at 4. Specifically, he argued he satisfied 42 Pa.C.S. §9545(b)(1)(i) (governmental interference exception) and 42 Pa.C.S. §9545(b)(1)(ii) (newly discovered fact exception) because *Williams* "illuminate[d] the factual basis" that the Commonwealth and Chief Justice Castille "for years made misleading statements minimizing and misrepresenting his role in capital prosecutions" and "fail[ed] to disclose documents and information reflecting his actual role[.]" *Id*. at 5. With respect to Section 9545(b)(1)(ii)'s due diligence requirement, appellant deemed this condition met as "the Supreme Court only recently ruled that [characterizations of District Attorney Castille's role in capital prosecutions as ministerial] are not credible[.]" *Id*. And finally, appellant claimed "*Williams* is retroactive on its face" and, therefore, his petition also satisfied 42 Pa.C.S. §9545(b)(1)(iii) (new constitutional right exception). *Id*.[4]

The PCRA court ordered the Commonwealth to respond to appellant's petition, and the Commonwealth complied by filing a motion to dismiss on March 20, 2017. In its response, the Commonwealth first argued appellant's claim was waived. *See* Motion to Dismiss, 3/20/2017, at 5-7. In the Commonwealth's view, "[p]lainly, [appellant] could have raised his recusal claim — *i.e.*, asked Chief Justice Castille to recuse — when his case

[4] Appellant filed a motion for discovery contemporaneously with his petition, seeking "disclosure of any authorization documents or other records in the possession or control of the [Commonwealth] reflecting former District Attorney Castille's personal involvement in this case." Motion for Discovery, 8/8/2016, at 2.

was before the Supreme Court on appeal of his first PCRA petition." *Id*. at 6. As support for its position, the Commonwealth pointed to other cases in which defendants filed similar recusal motions, even without the benefit of the *Williams* decision or possession of a death penalty authorization memorandum similar to the one discussed in *Williams*. *See id*. (collecting cases). As well, the Commonwealth highlighted "the very notable fact" that Williams himself had preserved the recusal claim that the United States Supreme Court reviewed in *Williams*. *Id*. at 7. The Commonwealth argued these recusal requests by other defendants, including Williams, proved appellant could have sought Chief Justice Castille's recusal in *Reid II*, and his failure to do so waived his claim such that he is not eligible for PCRA relief. *Id*., *citing* 42 Pa.C.S. §9543(a)(3).

Beyond waiver, the Commonwealth disputed all of appellant's purported bases for establishing an exception to the PCRA's timebar. First, the Commonwealth challenged appellant's argument it "suppressed" evidence of District Attorney Castille's involvement in appellant's capital prosecution as "utterly specious." *Id*. at 12. Contrary to appellant's claim he did not know — and could not have known earlier by the exercise of due diligence — that District Attorney Castille had significant, personal involvement in his case, the Commonwealth averred appellant knew or should have known this information "as far back as 1993" based on "the very newspaper articles" he cited in his petition, which stressed then-candidate Castille's death penalty record as District Attorney. *Id*. at 13, *citing* PCRA Petition, 8/8/2016, at 12-13 n.1. The Commonwealth submitted appellant must have been aware of this information for years since his counsel, the FCDO, were the ones who "brought those newspaper articles to the attention of the United States Supreme Court in the *Williams* case (and not the other way around)." *Id*. at 15, *citing*

Williams, 136 S.Ct. at 1907-08 (referring to Chief Justice Castille's comments while running for judicial office and to articles written about his 1993 election campaign).[5]

The Commonwealth further argued "[l]ongstanding public awareness of Castille's role in the death penalty approval process while he was District Attorney is likewise reflected in the recusal motions filed by other capital defendants[,]" which began as early as 1998. *Id*. at 13 (citations omitted). In fact, the Commonwealth noted, one of those recusal requests resulted in a published, single-justice opinion from Chief Justice Castille in which he "explicitly describ[ed] his role in authorizing pursuit of the death penalty while he was District Attorney." *Id*., *citing Commonwealth v. Rainey*, 912 A.2d 755, 757-58 (Pa. 2006) (Castile, J.) (adopting the Commonwealth's description of his role in approving requests to seek the death penalty). "Obviously," the Commonwealth contended, it could "not 'suppress' information about the District Attorney's role in authorizing pursuit of the death penalty that was expressly set forth in a publicly available opinion" a decade before appellant filed the instant petition. *Id*. at 14.

To the extent appellant claimed the *Williams* decision itself constituted a new fact pursuant to Section 9545(b)(1)(ii), the Commonwealth argued that claim failed under settled precedent. *See id*. at 15, *citing Commonwealth v. Watts*, 23 A.3d 980, 987 (Pa. 2011) ("subsequent decisional law does not amount to a new 'fact' under [S]ection 9545(b)(1)(ii) of the PCRA"). Even if the *Williams* decision could be considered a new fact, the Commonwealth continued, appellant's petition would still be untimely, as 42 Pa.C.S. §9545(b)(2) requires a petition invoking a timebar exception to be filed within 60

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[5] The Commonwealth cited as additional support a January 1994 newspaper article regarding a recusal motion filed by the Defender Association of Philadelphia. *See* Motion to Dismiss, 3/20/2017, at 14 n.9, *citing* Emilie Lounsberry & Henry Goldman, *Castille Says He Won't Step Aside*, PHILADELPHIA INQUIRER (Jan. 24, 1994). That article, according to the Commonwealth, "contained a quote from a lawyer who had been chief of the homicide unit under Castille stating that, as the District Attorney, Castille was involved in 'approving to seek the death penalty.'" *Id*. at 14.

days of the date the claim could have been presented; the Commonwealth believed the "date when [appellant] first could have discovered (or did in fact discover) information about Justice Castille's role in capital prosecutions" triggered Section 9545(b)(2)'s application, not the date the *Williams* decision issued. *Id*.

The Commonwealth also contested appellant's claim that his petition was timely on the basis *Williams* supposedly recognized a new constitutional right that has been held to apply retroactively. *See id*. at 15-18. As an initial matter, the Commonwealth emphasized that neither the United States Supreme Court nor this Court has held that *Williams* applies retroactively, which it argued was dispositive. *See id*. at 16, *citing Commonwealth v. Abdul-Salaam*, 812 A.2d 497, 501 (Pa. 2002) ("The language 'has been held' [in Section 9545(b)(1)(iii)] . . . mean[s] that the action has already occurred, *i.e.*, 'that court' has already held the new constitutional right to be retroactive to cases on collateral review. By employing the past tense in writing this provision, the legislature clearly intended that the right was already recognized at the time the petition was filed."). Moreover, the Commonwealth rejected any notion that *Williams* itself implicitly ruled its holding applies retroactively to cases on collateral review. *See id*., *citing* PCRA Petition, 8/8/2016, at 5 (arguing *Williams* is "retroactive on its face" because the Supreme Court "applied both of its holdings retroactively to a successive PCRA proceeding"). The Commonwealth explained the decision in *Williams* applied to the proceeding that had just occurred in this Court — *i.e.*, Chief Justice Castille's refusal to recuse and his ensuing participation in the decision reversing the order granting a stay of execution — not to Williams's collateral attack on his conviction, which he explicitly disavowed in seeking *certiorari*. *See id*. at 17. As the Commonwealth put it, "[t]here was nothing 'collateral' about the proceedings in the [United States] Supreme Court at all; they were **direct review** of the process — not the substantive ruling — in [this Court]. That is why the

[United States] Supreme Court never said a word about applying its ruling 'retroactively.'" *Id*. (emphasis in original).

In sum, the Commonwealth concluded appellant's recusal-based due process claim was waived and, in any event, his petition was facially untimely and failed to meet any exception to the PCRA's timebar. As such, the Commonwealth alleged the PCRA court was without jurisdiction to consider the merits of appellant's petition and requested that it be dismissed without a hearing. *See id*. at 18.

On April 3, 2017, appellant filed a reply to the Commonwealth's motion to dismiss. In response to the Commonwealth's waiver argument, appellant countered that he "was not obligated to move for recusal at an earlier time . . . because the facts upon which [his] claim is based were being suppressed and misrepresented by government officials[.]" Reply to Motion to Dismiss, 4/3/2017, at 4. Appellant reiterated his position that District Attorney Castille's personal involvement in capital prosecutions was misrepresented for years, and argued those misrepresentations "retained the force of law until the United States Supreme Court ruled in *Williams* that they 'cannot be credited.'" *Id*. at 5, *quoting Williams*, 136 S.Ct. at 1907. Additionally, appellant contended a finding of waiver would be inappropriate because the constitutional rule upon which his claim is premised was not announced until *Williams*. *See id*. at 4. As appellant saw it, he "could not waive a claim whose legal basis, like its factual basis, was not available at the time of his prior appeals." *Id*. at 6.[6]

Appellant next disputed the Commonwealth's timeliness arguments. He deemed "unpersuasive" the Commonwealth's insistence that it did not suppress information about

[6] Although appellant suggested his due process claim did not exist until the *Williams* decision was handed down, he also argued Chief Justice Castille had an affirmative duty to disclose his actual role in capital prosecutions and to recuse *sua sponte* pursuant to the Pennsylvania Code of Judicial Conduct. *See* Reply to Motion to Dismiss, 4/3/2017, at 5 (citations omitted).

District Attorney Castille's true role in capital prosecutions. For example, he noted that in the *Rainey* decision relied on by the Commonwealth, Chief Justice Castille characterized his approval of requests to seek the death penalty "'an administrative formality[.]'" *Id*. at 5 n.4, *quoting Rainey*, 912 A.2d at 757. Appellant also cited a 1995 letter in another capital case in which the Commonwealth informed this Court, in response to a recusal request, that "Justice Castille did not personally participate in the investigation or prosecution of [that capital defendant]." *Id*. at 6-7 (citation omitted). This statement was untruthful, appellant argued, because the *Williams* decision revealed that District Attorney Castille did personally participate in such cases, by reviewing and signing off on death penalty authorization memoranda. *See id*. at 7.

Appellant also sought to clarify his view regarding what he believed to be the new "fact" that rendered his petition timely. To that end, he explained the *Williams* decision "provided a factual trigger under [Section] 9545(b)(1)(i) and (ii)" because "the Supreme Court ruled that the Commonwealth's longstanding factual defense to such claims — *i.e.*, that Castille's only role in capital prosecutions 'amounted to a brief administrative act' — 'cannot be credited.'" *Id*. at 8, *quoting Williams*, 136 S.Ct. at 1907. Appellant submitted this Court's decision in *Watts* supported his argument, as it "recognizes the distinction between legal and factual triggers." *Id*., *citing Watts*, 23 A.3d at 987 ("A 'fact,' as distinguished from the 'law,' is that which is to be presumed or proved to be or not to be for the purpose of applying or refusing to apply a rule of law.") (citation and alterations omitted).

Finally, appellant stood by his claim that *Williams* "is retroactive on its face." *Id*. at 9. According to appellant, "federal law recognizes that, where the High Court applies a rule to a case on collateral review, the rule applies retroactively to all such cases." *Id*. at 9-10, *citing Teague v. Lane*, 489 U.S. 288, 300 (1989) (plurality) ("[O]nce a new rule is

applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated.").

Following argument on April 24, 2017, the PCRA court granted appellant's motion for discovery and directed the Commonwealth to produce "any and all documents or records in the possession or control of the [Commonwealth] showing former District Attorney [ ] Castille's personal involvement in" appellant's case. Order, 5/19/2017, at 1. In response, the Commonwealth submitted a letter brief in which it alerted the PCRA court it was "unable to locate a memorandum authorizing pursuit of the death penalty in [its] files." Letter Brief, 6/1/2017, at 1. Notwithstanding its inability to locate the memorandum, however, the Commonwealth conceded "there was a memorandum in this case" and indicated the parties had "reached a stipulation" to that effect. *Id*. at 1-2.[7] Appellant then filed an amended petition in which he declared the Commonwealth's concession "strongly supports [his] assertions that these factual bases were suppressed . . . for nearly three decades, and that these facts were unknown to and not ascertainable by [him] during that time[.]" Amended PCRA Petition, 6/15/2017, at 3.

[7] Previously, in its motion to dismiss, the Commonwealth indicated it did "not have the Death Penalty Request Memorandum in this case." Motion to Dismiss, 3/20/2017, at 3 n.1. However, it appears the Commonwealth located similar memoranda in two other cases against appellant, and the Commonwealth therefore assumed one must have existed in this case as well, even though it could not locate it. *See* Letter Brief, 6/1/2017, at 1; Reply to Motion to Dismiss, 4/3/2017, at 2 n.1. We note that, as in this case, the PCRA court reinstated appellant's *nunc pro tunc* right to appeal in his other cases, one of which is also pending before this Court. *See Commonwealth v. Reid*, 748 CAP. Appellant's third case, which did not result in a capital sentence, was recently addressed by the Superior Court in an unpublished memorandum decision. *See Commonwealth v. Reid*, 1925 & 1928 EDA 2017, 2019 WL 476717 (Pa. Super., Feb. 7, 2019) (reargument denied Apr. 11, 2019). In that case, as discussed *infra*, the Superior Court *sua sponte* concluded the PCRA court lacked jurisdiction over appellant's petition, reversed the order reinstating his *nunc pro tunc* appellate rights, and quashed his appeal. Appellant has filed a petition for allowance of appeal in that case, which this Court held pending a decision in this matter. *See Commonwealth v. Reid*, 236 & 237 EAL 2019.

On June 22, 2017, the PCRA court granted appellant PCRA relief, in the form of *nunc pro tunc* reinstatement of his right to appeal the order denying his first PCRA petition, "as mandated by due process as set forth in *Williams* [ ] and the applicable Pennsylvania Code of Judicial Conduct[.]" Order, 6/22/2017, at 1. As for its jurisdiction to entertain the petition, the PCRA court reasoned that appellant "ha[d] proven by a preponderance of the evidence that 'the facts upon which the claim is predicated were unknown to [him] and could not have been ascertained by the exercise of due diligence.'" *Id*. at 1 n.1, *quoting* 42 Pa.C.S. §9545(b)(1)(ii).

The Commonwealth filed a notice of appeal from the PCRA court's order on July 11, 2017, and filed an unsolicited statement of matters complained of on appeal on the same date. In its Pa.R.A.P. 1925(b) statement, the Commonwealth raised the following issues: "(a) whether the PCRA court was without jurisdiction where the petition was untimely and no timeliness exception applied; (b) whether [appellant]'s claim was waived under the PCRA; and (c) whether *Williams v. Pennsylvania* applies retroactively on collateral review." Pa.R.A.P. 1925(b) Statement, 7/11/2017, at 1. On July 20, 2017, appellant filed his own notice of appeal "from each and every aspect of the order denying discovery, expert funds, an evidentiary hearing, and post-conviction relief entered by [the PCRA court] on November 1[9], 2007." Notice of Appeal, 7/20/2017, at 1. Appellant stated his appeal was "taken pursuant to [the PCRA court's] order dated June 22, 2017, reinstating [his] PCRA appeal rights *nunc pro tunc*." *Id*.

c. <u>The PCRA Court's Opinion</u>

The PCRA court issued an opinion on November 6, 2017, limited to "the alleged errors claimed by the Commonwealth in its 1925(b) Statement." Trial Ct. Op., 11/6/2017, at 6. After analyzing the *Williams* decision, the PCRA court specified — consistent with its order granting relief — that it had exercised jurisdiction over appellant's facially

untimely petition because it "fell under the newly-discovered fact exception[.]" *Id*. at 7. The court described the relevant new "fact" as follows: "To be clear, the newly discovered fact is not that District Attorney Castille's signature was required for the trial prosecutor to seek the death penalty; instead, the newly-discovered fact is that District Attorney Castille played a meaningful role in all capital prosecution cases in which he acquiesced [to] a death penalty memorandum." *Id*. at 12. From the PCRA court's perspective, "[t]his newly discovered fact came to light upon the publication of the *Williams* decision on June 9, 2016" and, thus, appellant's August 8, 2016 petition was timely filed within 60 days of the date the claim first could have been presented. *Id*. at 10; *see also id*. at 12 ("the clock began to run after publication of the *Williams* decision, as the decision was the factual predicate for the constitutional claims raised in [appellant]'s PCRA petition").

In reaching its conclusion, the PCRA court expressed its awareness of our settled law holding judicial decisions cannot satisfy the newly discovered fact exception to the timebar. *See id*. at 10, *citing Watts*, 23 A.3d at 987. But the court also posited that "there may be instances when [an] appellate court goes beyond merely reporting undisputed core facts and instead makes factual findings" and, in those circumstances, the "judicial determination can serve as a factual predicate for a claim." *Id*. As support for this theory, the court invoked Justice Baer's concurring opinion in *Watts*, wherein he suggested there may be situations "where the issuance of a judicial opinion in one's own case triggers the [newly discovered fact] exception." *Watts*, 23 A.3d at 988 (Baer, J., concurring). The PCRA court also cited a divided Superior Court opinion in which the majority distinguished our decision in *Watts* and held the petitioner in that case could rely on the issuance of a judicial decision to satisfy the PCRA's timebar because the decision "provided a new theory or method for obtaining collateral relief." Trial Ct. Op., 11/6/2017, at 11, *citing Commonwealth v. Smith*, 35 A.3d 766 (Pa. Super. 2011), *allocatur denied*, 53 A.3d 757

(Pa. 2012). The PCRA court implied our decision to deny allowance of appeal in *Smith* signaled our approval of the rule crafted by the Superior Court majority in that case. *See id*. at 12.

Between Justice Baer's concurrence in *Watts* and the majority opinion in *Smith*, the PCRA court appears to have divined two exceptions to the principle that "subsequent decisional law does not amount to a new 'fact' under [S]ection 9545(b)(1)(ii) of the PCRA." *Watts*, 23 A.3d at 987. Those exceptions, as expressed by the PCRA court, "include when a defendant only becomes aware of a fact because of a judicial determination or when a judicial determination affords a defendant the first opportunity to present his claim." Trial Ct. Op., 11/6/2017, at 10. The court concluded appellant's reliance on the *Williams* decision satisfied both of these novel legal concepts.

First, the PCRA court found appellant only became aware of a fact — the fact supposedly being that District Attorney Castille's authorization to seek the death penalty amounted to more than a mere ministerial act — that "was not revealed or available until the United States Supreme Court's decision in *Williams*." *Id*. at 12. In this regard, the PCRA court was ostensibly of the opinion that the *Williams* Court engaged in fact-finding. *See id*. at 4 ("In addition to its conclusions of law, the United States Supreme Court took the extraordinary step of also making factual findings as to Justice Castille's involvement in the prosecution of Williams'[s] case."). The PCRA court plainly stated those purported factual findings were "paramount to [its] grant of relief to [appellant]." *Id*.

Second, the court held *Williams* "provided a new theory or method of obtaining collateral relief." *Id*. at 12. Although not entirely clear from its opinion, the court seemed to suggest *Williams* provided a new theory because it "elucidated the significance of District Attorney Castille's signature on the death penalty request memorandum." *Id*.; *see also id*. at 13 ("[T]his court found the issuance of the *Williams* opinion triggered the newly

discovered fact exception because [appellant] was unaware that Justice Castille was significantly and personally involved in a critical trial decision in [his] case until the Supreme Court of the United States declared it to be so[.]").

With respect to Section 9545(b)(1)(ii)'s due diligence requirement, the PCRA court held appellant "exercised a level of due diligence reasonably expected from someone in [his] circumstances" since he raised his claim within 60 days of the *Williams* decision. *Id*. at 14. The court also found it compelling that the Commonwealth previously maintained that District Attorney Castille only performed ministerial functions and was not personally involved in prosecuting death penalty cases, and concluded due diligence did "not require [appellant] to make the unreasonable assumption that Justice Castille's involvement was mischaracterized and would later be discredited by the Supreme Court of the United States." *Id*.

Concerning waiver, the PCRA court offered that "[w]hen a change in the law occurs after a petitioner's right to a direct appeal has lapsed, issues related to the change will not be waived if the petitioner raises them upon the first opportunity to do so." *Id*. at 15. Unable to provide any authority from this Court holding to that effect, the court instead cited as persuasive the Superior Court's decision in *Commonwealth v. Stark*, 698 A.2d 1327, 1329 (Pa. Super. 1997) (declining to find waiver where the defendant was denied parole based on changes in parole release rules that occurred after defendant's right to appeal had expired). Relying upon yet another Superior Court decision, the PCRA court alternatively averred that "[w]hen a PCRA petition raises ethical concerns such as the violation of the Pennsylvania Code of Judicial Conduct, Pennsylvania courts may review such claims in the interest of justice." *Id*. at 16, *citing Commonwealth v. Townsend*, 850 A.2d 741, 742-43 (Pa. Super. 2004) (addressing conflict of interest claim in the first

instance where the defendant alleged prosecutor who handled the PCRA proceedings directly below had previously represented him as counsel in that same case).

Finally, even though the PCRA court had not indicated in its order granting relief that appellant's petition was timely under the new constitutional right exception, the court employed the seminal *Teague v. Lane* framework for determining the retroactivity of a new constitutional law and held *Williams* "recognized a new watershed rule of criminal procedure, which applies retroactively on collateral review." *Id*. at 18. The PCRA court explained *Williams* announced a new rule that "[i]f a judge served as a prosecutor and then the judge . . . there is a finding of automatic bias and a due process violation." *Id*. at 19. In the PCRA court's view, this putative new rule is "[j]ust as monumental as the right for an indigent defendant to have counsel in criminal proceedings," and it "alters the understanding of bedrock procedural elements because it completely explains the recusal of judges' analysis." *Id.* As the court believed the right to an unbiased tribunal touches upon the fundamental fairness and accuracy of criminal proceedings, it concluded the *Williams* decision announced a watershed rule of criminal procedure, thereby satisfying one of *Teague*'s two exceptions to the general rule against retroactive application of new constitutional law to defendants on collateral review. *Id*.

II. Analysis

Before we address, again, the various claims raised in this purported appeal from the order denying appellant's first PCRA petition, we first consider how jurisdiction factors into our analysis. *See, e.g.*, *Commonwealth v. Albrecht*, 994 A.2d 1091, 1093 (Pa. 2010) ("[I]f a PCRA petition is untimely, neither this Court nor the trial court has jurisdiction over the petition. Without jurisdiction, we simply do not have the legal authority to address the substantive claims.") (citations omitted).

As discussed, in the lower court the Commonwealth consistently and forcefully disputed that appellant's petition satisfied any of the PCRA's timeliness exceptions. After the PCRA court held otherwise and granted appellant relief, the Commonwealth appealed to this Court, specifically challenging the PCRA court's exercise of jurisdiction over appellant's claims. *See Commonwealth v. Reid*, 751 CAP. The Commonwealth also appealed in several other capital cases where the PCRA court granted similar *nunc pro tunc* relief to those petitioners, and indicated it intended to raise the identical jurisdictional challenges. *See Commonwealth v. Reid*, 747 CAP; *Commonwealth v. Daniels*, 740 CAP; *Commonwealth v. Murphy*, 742 CAP. The petitioners in those cases separately filed their own notices of appeal with this Court, seeking to effectuate the grants of *nunc pro tunc* relief ordered by the PCRA court. *See Commonwealth v. Reid*, 748 CAP; *Commonwealth v. Daniels*, 739 CAP; *Commonwealth v. Murphy*, 741 CAP.

On January 4, 2018, we granted the petitioners' unopposed request to consolidate the Commonwealth's appeals, as those appeals raised identical issues. *See* Pa.R.A.P. 513 (consolidation is appropriate when "the same question is involved in two or more appeals in different cases"). We further granted the petitioners' unopposed request to stay their own appeals pending resolution of the Commonwealth's consolidated appeals, on the basis that the jurisdictional challenges raised in the Commonwealth's appeals, if successful, would effectively moot the defense appeals. Curiously, however, without any explanation, the Commonwealth filed a praecipe to discontinue its appeals only two months later, leaving only the *nunc pro tunc* defense appeals — including appellant's instant appeal — remaining.

Presently, in their principal briefs, the parties do not discuss jurisdiction at all, except to note the PCRA court reinstated appellant's right to appeal *nunc pro tunc*. *See* Appellant's Brief at 5-6; Commonwealth's Brief at 10. However, in his reply brief,

appellant, no doubt aware of the Superior Court's recent *sua sponte* jurisdictional analysis in his non-capital *nunc pro tunc* appeal, stresses "the Commonwealth has raised no issue regarding the timeliness of [his] petition, and the Commonwealth discontinued its own appeal[.]" Reply Brief at 1 n.1. Appellant argues that under these circumstances the PCRA court's timeliness finding "is res judicata." *Id., citing Connellsville Twp. Supervisors v. City of Connellsville*, 322 A.2d 741, 742 (Pa. Cmwlth. 1974) (a court's "unappealed final determination of its subject matter jurisdiction — albeit erroneous — is Res judicata"). We begin our analysis by considering this argument and, more broadly, whether the Commonwealth's decision to withdraw its appeal from the PCRA court's order in this case renders jurisdiction irrelevant for present purposes.[8]

a. Effect of the Commonwealth's Withdrawn Appeal

"A post-conviction court's award of *nunc pro tunc* relief in a form that gives rise to jurisdiction in another court — which jurisdiction simply would not exist in the absence of the relief — is obviously a unique and multi-faceted subject." *Commonwealth v. Walter*, 119 A.3d 255, 295 n.3 (Pa. 2015) (Saylor, C.J., dissenting). Indeed, as far as we are aware, we have not squarely addressed a case presenting these exact circumstances. But that does not mean our precedents fail to provide any guidance.

[8] In his reply brief, appellant requests we order supplemental briefing in the event we have "any concern about the reviewability or correctness" of the PCRA court's timeliness finding. Reply Brief at 1 n.1. We decline this request. For one thing, appellant extensively set forth his arguments regarding timeliness in his multiple pleadings in the PCRA court, as previously discussed. For another, we have repeatedly stated that even when the parties or a PCRA court do not address the timeliness of a PCRA petition, "this Court will consider the issue *sua sponte*, as it is a threshold question implicating our subject matter jurisdiction[.]" *Commonwealth v. Whitney*, 817 A.2d 473, 478 (Pa. 2003) (citation omitted). Appellant was thus aware jurisdiction would be at issue, but simply declined to discuss it given the Commonwealth's sudden silence on the matter. As appellant had ample opportunity to discuss the issue in his briefs but chose not to — and because he has not filed a formal request for supplemental briefing — we see no reason to further delay the disposition of this case.

In *Walter*, upon the parties' consent, the PCRA court reinstated Walter's *nunc pro tunc* right to file a direct appeal from her judgment of sentence of death. *Id*. at 260 n.5. The Commonwealth did not appeal the order, and this Court subsequently considered Walter's serial direct appeal. *Id*. Chief Justice Saylor dissented from the Court's decision to do so, on the basis the PCRA court had not made the requisite judicial finding — specifically, that Walter suffered a deprivation of her right to appellate counsel so severe as to be tantamount to a complete denial of counsel — that would support the grant of *nunc pro tunc* relief. *Id*. at 294. Instead, the PCRA court only granted relief upon the agreement of the parties. *Id*. Chief Justice Saylor voiced his opinion "that jurisdiction in this Court which does not otherwise exist simply cannot be created by agreement and without a proper, supported substantive basis." *Id*. at 295 n.3. (emphasis omitted).

The majority saw things somewhat differently. While it recognized a lack of appellate jurisdiction is nonwaivable by the parties and may be considered *sua sponte*, the majority took the position that Chief Justice Saylor had conflated the "rationale for the PCRA court's order with its jurisdiction to grant relief[.]" *Id*. at 260 n.5 (emphasis omitted). Importantly, the majority observed Walter had "filed a **timely** PCRA petition, vesting the PCRA court with the jurisdiction to grant PCRA relief." *Id*. (emphasis added), *citing Commonwealth v. Peterkin*, 722 A.2d 638, 641 (Pa. 1998) (noting that, where a petitioner filed an **untimely** PCRA petition, the PCRA court lacked jurisdiction to grant PCRA relief); *Commonwealth v. Bennett*, 842 A.2d 953, 959 (Pa. Super. 2004) (*en banc*) (holding that, where a petitioner filed an **untimely** PCRA petition, the PCRA court lacked jurisdiction to reinstate appellate rights *nunc pro tunc*, and quashing the appeal) (emphasis in original). As it was beyond dispute the PCRA court had jurisdiction over Walter's timely petition, the majority was unconvinced by Chief Justice Saylor's implicit proposition that the PCRA

court's failure to support its grant of relief with appropriate judicial findings rendered the order granting reinstatement of appellate rights *nunc pro tunc* "extrajurisdictional." *Id*.

The majority's discussion in *Walter* is consistent with other cases in which we have considered the timeliness of *nunc pro tunc* appeals even where the Commonwealth failed to separately appeal the reinstatement of those rights. For example, in *Commonwealth v. Robinson*, 837 A.2d 1157 (Pa. 2003), the PCRA court granted relief from the petitioner's untimely third petition, in the form of reinstating his *nunc pro tunc* right to appeal the denial of a previous PCRA petition. *Id*. at 1159. The Commonwealth did not appeal the order granting relief, but nevertheless raised jurisdiction as an issue in the Superior Court. *Id*. The Superior Court rejected the Commonwealth's argument based on the theory that the untimely serial PCRA petition upon which relief was granted was an extension of a timely previously-dismissed petition. *Id*. This Court granted allowance of appeal and explicitly rejected the Superior Court's extension theory, reiterating that "the PCRA confers no authority upon this Court to fashion *ad hoc* equitable exceptions to the PCRA time-bar in addition to those exceptions expressly delineated in the Act." *Id*. at 1161 (internal quotation and citation omitted); *see also id*. ("neither the language of the statute nor this Court's decisional law authorizes suspension of the time-bar in instances where the petitioner is seeking *nunc pro tunc* appellate relief").

The result in *Commonwealth v. Bennett*, 930 A.2d 1264 (Pa. 2007), is similar. In that case, the PCRA court granted Bennett's second untimely PCRA petition in which he sought reinstatement of his right to appeal the order dismissing his first timely petition. *Id*. at 1266-67. The Superior Court *en banc* quashed the appeal, concluding Bennett's second PCRA petition, from which his appellate rights were reinstated *nunc pro tunc*, was untimely and the PCRA court therefore had no jurisdiction to grant relief. *Id*. at 1267 (citation omitted). This Court granted allowance of appeal to consider whether the

Superior Court erred in quashing the appeal, and ultimately held it did — but not because the Commonwealth had failed to appeal the PCRA court's order reinstating Bennett's *nunc pro tunc* right to appeal. *Id*. Instead, the Court was sharply divided over whether Bennett's petition invoked a proper exception to the timebar, with the majority holding that when a petitioner claims he was abandoned on appeal by former counsel, under certain circumstances he may invoke the newly discovered fact exception to the timebar. *Id*. at 1273.

It is apparent this Court's concerns regarding jurisdiction underlay the analysis in each case discussed above. In *Walter*, the Court relied upon the timeliness of Walter's petition to dispel the notion the Court was without jurisdiction to consider his *nunc pro tunc* serial direct appeal. Conversely, in *Robinson*, the Court reversed the PCRA court's order reinstating Robinson's *nunc pro tunc* appellate rights after concluding no recognized exception to the timebar applied. And in *Bennett*, the Court remanded the PCRA court's order reinstating Bennett's *nunc pro tunc* appellate rights, but only to determine if he could prove his petition satisfied the newly discovered facts exception. Significantly, in none of these cases did the Commonwealth appeal the order reinstating the petitioners' *nunc pro tunc* appellate rights.[9]

The principle that derives from these decisions is a familiar one: "[I]f a PCRA petition is untimely, neither this Court nor the trial court has jurisdiction over the petition. Without jurisdiction, we simply do not have the legal authority to address the substantive claims." *Commonwealth v. Chester*, 895 A.2d 520, 522 (Pa. 2006) (quotation and citation

[9] As additional support, we observe the Superior Court routinely considers the timeliness of PCRA petitions *sua sponte* where those petitions lead to the reinstatement of *nunc pro tunc* appellate rights. *See, e.g.*, *Commonwealth v. Ballance*, 203 A.3d 1027, 1030-31 (Pa. Super. 2019); *Commonwealth v. Huddleston*, 55 A.3d 1217, 1220 (Pa. Super. 2012); *Commonwealth v. Geer*, 936 A.2d 1075, 1077 (Pa. Super. 2007); *Bennett*, 842 A.2d at 959; *Commonwealth v. Fairiror*, 809 A.2d 396, 397 (Pa. Super. 2002).

omitted).[10] For that reason, to confirm proper jurisdiction, it is appropriate for an appellate court to consider *sua sponte* the timeliness of a PCRA petition from which *nunc pro tunc* appellate rights have been reinstated, even where the Commonwealth has not separately appealed (or appeals but then withdraws its appeal) from the order granting relief. *See*

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[10] Based on this principle, we reject outright appellant's claim that the Commonwealth's failure to appeal the PCRA court's order constitutes *res judicata*. *See* Reply Brief at 1 n.1. As explained, the one year time limitation imposed for filing a PCRA petition is a bar to the court's exercise of jurisdiction. *See, e.g.*, *Whitney*, 817 A.2d at 478 (PCRA timebar implicates subject matter jurisdiction). In this sense, the jurisdictional time limit goes to the PCRA court's "right or competency to adjudicate a controversy." *Commonwealth v. Fahy*, 737 A.2d 214, 222 (Pa. 1999). *Res judicata* operates only where there is a "final, valid judgment on the merits by a court of competent jurisdiction[.]" *Balent v. City of Wilkes-Barre*, 669 A.2d 309, 313 (Pa. 1995). If a PCRA court lacks jurisdiction to grant relief because a petition is untimely, any order by the court granting relief is simply not a valid judgment on the merits by a court of competent jurisdiction. Indeed, this Court has clearly explained that "[w]here a court is without jurisdiction it is without power to act and thus, any order that it issues is null and void." *Commonwealth v. Morris*, 771 A.2d 721, 735 (Pa. 2001) (citations omitted); *see also In re Simpson's Estate*, 98 A. 35, 38 (Pa. 1916) ("When the jurisdiction does not exist . . . then all the acts of the tribunal are void and of none effect, and may be so treated in any collateral proceeding. Where there is no jurisdiction there is no authority to pronounce judgment, and consequently a judgment so entered is so but in form and similitude, and has no substance, force, or authority.") (citations and internal quotations omitted). Thus, *res judicata* is inapplicable in these circumstances.

Even if the law were otherwise (it is not), the doctrine of *res judicata* surely would not prevent this Court, at least, from passing upon the lower court's order reinstating appellant's *nunc pro tunc* appellate rights, because "[t]his Court has the power to strike down any illegal act of a lower [c]ourt regardless of antecedents." *Smith v. Gallagher*, 185 A.2d 135, 146 (Pa. 1962), *overruled on other grounds by In re Biester*, 409 A.2d 848, 850 (Pa. 1979). On this front, we have recognized "[a]n order which is illegal in its inception does not gain legality or validity because it is not appealed from." *Id*. That is to say, we are not bound to blindly accept the erroneous assumption of jurisdiction by a lower court, or any orders that issue pursuant to that unlawful assumption of authority, merely because the Commonwealth does not appeal — for whatever reason — the lower court's finding of jurisdiction. In much the same way that "[j]urisdiction of subject matter can never attach nor be acquired by consent or waiver of the parties," *McGinley v. Scott*, 164 A.2d 424, 428 (Pa. 1960), neither can the Commonwealth thrust jurisdiction upon this Court by sheer virtue of its failure to, or strategic decision not to, lodge an appeal from an order reinstating a defendant's *nunc pro tunc* appellate rights.

generally Whitney, 817 A.2d at 478 ("even where the PCRA court does not address the applicability of the PCRA timing mandate, this Court will consider the issue *sua sponte*, as it is a threshold question implicating our subject matter jurisdiction and ability to grant the requested relief") (citation omitted); *Commonwealth v. Yarris*, 731 A.2d 581, 587 (Pa. 1999) ("Because the timeliness implicates our jurisdiction, we may consider the matter *sua sponte*.") (citation omitted).

b. Timeliness of Appellant's Petition

We now proceed to consider whether appellant's petition was timely. To be eligible for post-conviction relief, a petitioner must prove by a preponderance of the evidence that his conviction or sentence resulted from one of several enumerated circumstances, *see* 42 Pa.C.S. §9543(a)(2), and that the claims have not been previously litigated or waived, *see* 42 Pa.C.S. §9543(a)(3). "The PCRA requires that a petition seeking relief thereunder must be filed within one year of the date the petitioner's judgement of sentence becomes final." *Commonwealth v. Cox*, 146 A.3d 221, 227 (Pa. 2016). "[A] judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." 42 Pa.C.S. §9545(b)(3).

There is no dispute appellant's judgment of sentence became final on October 3, 1994, when the United States Supreme Court denied his petition for a writ of *certiorari*. Appellant's petition is therefore untimely on its face.[11] However, in his petition, appellant alleged he met all three exceptions to the PCRA's timebar. These exceptions are:

[11] As part of the 1995 amendments to the PCRA, a grace period permitted defendants, like appellant, whose convictions became final before the amendments' effective date to file their first PCRA petition by January 16, 1997. *See Commonwealth v. Williams*, 828 A.2d 981, 987 n.9 (Pa. 2003). The instant petition is not appellant's first, nor was it filed within the applicable grace period.

> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania 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)(i)-(iii). "The PCRA petitioner bears the burden of proving the applicability of one of the exceptions." *Commonwealth v. Spotz*, 171 A.3d 675, 678 (Pa. 2017) (citation omitted). Additionally, a petition invoking an exception "shall be filed within 60 days of the date the claim could have been presented." 42 Pa.C.S. §9545(b)(2).[12]

i. Governmental Interference & Newly Discovered Fact Exceptions

We begin by addressing the governmental interference and newly discovered fact exceptions. To determine whether appellant's 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, *see* 42 Pa.C.S. §9545(b)(1)(i), we first must identify the precise contours of his claim. Similarly, to determine whether the facts upon which that claim is predicated were unknown to appellant and could not have been ascertained by the exercise of due diligence, *see* 42 Pa.C.S. §9545(b)(1)(ii), we must pinpoint the new fact he invokes. The answer to the former inquiry is rather straightforward; resolving the latter inquiry is a more difficult task.

[12] As of December 24, 2018, Section 9545(b)(2) now permits a PCRA petition invoking a timeliness exception to be filed within one year of the date the claim first could have been presented. *See* Act 2018, Oct. 24, P.L. 894, No. 146, §2, effective in 60 days [Dec. 24, 2018]. This amendment does not apply to appellant, who filed his petition in 2016.

With respect to the nature of appellant's claim, he plainly pleaded in his petition a recusal-based due process claim. *See, e.g.*, PCRA Petition, 8/8/2016, at 11 ("Due Process under both the Pennsylvania and United States Constitution required that former Pennsylvania Supreme Court Justice Ronald Castille recuse himself from [appellant]'s PCRA appeals."). This claim implicates 42 Pa.C.S. §9543(a)(2)(i) (relief is available if the conviction or sentence resulted from a constitutional violation that "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place"), and is simple enough to understand.[13]

The new fact that allegedly supports this claim, however, is far more elusive. The PCRA court and appellant provided differing — and, at times, inconsistent — views as to exactly what "fact" is newly discovered. The PCRA court, on the one hand, unequivocally explained its position: the new fact "**is not** that District Attorney Castille's signature was required for the trial prosecutor to seek the death penalty[,]" but it "**is** that District Attorney Castille played a meaningful role in all capital prosecution cases in which he acquiesced [to] a death penalty memorandum." Trial Ct. Op., 11/6/2017, at 12 (emphasis added). The PCRA court averred the United States Supreme Court made this "factual determination" in *Williams*, "a judicial decision which provided a new theory or method of obtaining collateral relief." *Id*.

Appellant, on the other hand, suggested the new fact **is not** the *Williams* decision itself, but it **is** the *Williams* Court's "rul[ing] that the Commonwealth's longstanding factual defense to such claims — *i.e.*, that Castille's only role in capital prosecutions 'amounted

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[13] On May 12, 2020, appellant filed an application for leave to file post-submission communication regarding our recent decision in *Commonwealth v. Koehler*, ___ A.3d ___, 2020 WL 1973876 (Pa. Apr. 24, 2020). There, as is relevant here, all participating jurists agreed that "a due process challenge to the impartiality of an appellate jurist is cognizable under Section 9543(a)(2)(i) of the PCRA." *Id*. at *9. As we have taken into account *Koehler*'s import on this limited point, we grant appellant's application and accept the notice of supplemental authority.

to a brief administrative act' — 'cannot be credited.'" Reply to Motion to Dismiss, 4/3/2017, at 8, *quoting Williams*, 136 S.Ct. at 1907. Appellant also claimed the Commonwealth's June 1, 2017 concession that District Attorney Castille approved a request to seek the death penalty against him was itself a newly discovered fact. *See id*. ("the Commonwealth's recent disclosure of Castille's actual role in this case provides a factual trigger that moots the parties' other timeliness arguments").

From these various assertions we distill the following purported new "facts": (1) the *Williams* Court's holding that District Attorney Castille's approval of the decision to seek the death penalty amounted to significant, personal involvement in a critical trial decision; (2) the *Williams* Court's remark that characterizations of District Attorney Castille's participation in death penalty cases as ministerial "cannot be credited"; (3) the *Williams* decision itself, which provided a new theory or method of obtaining collateral relief; and (4) the Commonwealth's concession that District Attorney Castille approved a request to seek the death penalty against appellant. We address each in turn.

The first purported new "fact" is easy to reject as a basis to support jurisdiction, as it is not a fact at all. Rather, it is a judicial determination about a fact's legal significance — that fact being District Attorney Castille's authorization to seek the death penalty against Williams. *See Williams*, 136 S.Ct. at 1907 (addressing the "question whether Chief Justice Castille's authorization to seek the death penalty against Williams amounts to significant, personal involvement in a critical trial decision"). As we have held, judicial determinations do not satisfy the newly discovered fact exception because "an in-court ruling or published judicial opinion is law, for it is simply the embodiment of abstract principles applied to actual events. The events that prompted the analysis, which must be established by presumption or evidence, are regarded as fact." *Watts*, 23 A.3d at 987; *id*. at 986-87 ("'Law is a principle; fact is an event. Law is conceived; fact is actual. Law

is a rule of duty; fact is that which has been according to or in contravention of the rule."), *quoting* BLACK'S LAW DICTIONARY 592 (6th ed. 1991). The *Williams* Court's holding that District Attorney Castille had significant, personal involvement in a critical decision in Williams's case unquestionably fits the definition of law, as it embodies due process principles applied to the factual situation where a judge had prior involvement in a case as a prosecutor. In short, this holding in *Williams* is a legal conclusion, not a factual finding, and it cannot trigger the newly discovered fact exception. *See Watts*, 23 A.3d at 987.[14]

For similar reasons, appellant and the PCRA court are incorrect that the *Williams* Court's rejection of characterizations of District Attorney Castille's involvement in death penalty cases as ministerial is a new "fact" for purposes of Section 9545(b)(1)(ii). Again, the relevant fact in *Williams*, which was not in dispute, was District Attorney Castille's authorization to seek the death penalty against Williams. What was in dispute was the legal consequence of that fact: whereas Williams argued District Attorney Castille's involvement in approving the request to seek the death penalty was sufficient to constitute significant involvement in a critical trial decision, the Commonwealth argued that fact was

[14] We need only briefly entertain the PCRA court's reliance on Justice Baer's concurring opinion in *Watts* for the proposition that "there are instances when a judicial determination can serve as a factual predicate for a claim[,]" such as "when a defendant only becomes aware of a fact because of a judicial determination[.]" Trial Ct. Op., 11/6/2017, at 10. As the PCRA court conceded, *see id*. at 13, even Justice Baer's proposed exception — which was not adopted by a majority of the Court — was limited to judicial opinions issued in a petitioner's own case, a requirement Justice Baer deemed "critical." *Watts*, 23 A.3d at 988 (Baer, J., concurring). More importantly, Justice Baer's hypothetical exception presumed an actual new fact would be revealed in the judicial opinion, not just a court's determination of the legal significance of an undisputed fact. *Id*. Indeed, Justice Baer expressly agreed with the *Watts* majority that it is improper for a PCRA petitioner to use another defendant's legal victory as a trigger for the newly discovered fact exception, particularly where the petitioner could have "become" that other defendant had he advanced the issue himself. *See id*. ("Section 9545(b)(1)(ii) is not designed to reward this type of piggyback litigation; instead, it is designed to provide a limited timeliness exception for [newly]-discovered facts in one's own case.").

insufficient because District Attorney Castille oversaw a large prosecutor's office and approved many death penalty requests as a matter of course. *See Williams*, 136 S.Ct. at 1907. The Court considered these competing arguments about the legal significance of District Attorney Castille's approval to seek the death penalty and ultimately sided with Williams, remarking the Commonwealth's position "cannot be credited." *Id*. This remark, however, is not a "factual finding." *Cf.* Trial Ct. Op., 11/6/2017, at 4 (asserting the Supreme Court "took the extraordinary step of also making factual findings as to [District Attorney] Castille's involvement in the prosecution of Williams'[s] case"). It is merely a rejection of the Commonwealth's legal argument that District Attorney Castille's approval to seek the death penalty did not amount to "significant" involvement in a critical trial decision — the very legal question the Court explained it was deciding immediately preceding its remark. *See Williams*, 136 S.Ct. at 1907. Simply stated, just as a court's adoption of a winning party's legal argument in a judicial opinion cannot constitute a new fact under Section 9545(b)(1)(ii), *see Watts*, 23 A.3d at 987, neither can a court's rejection of a losing party's competing argument be construed as a new fact.

We now turn to the third purported new "fact" — the *Williams* decision itself. As we have related quite a few times, "subsequent decisional law does not amount to a new 'fact' under [S]ection 9545(b)(1)(ii) of the PCRA." *Watts*, 23 A.3d at 987. Recognizing this principle, appellant expressly disavowed any notion that the *Williams* decision itself — as opposed to the "factual findings" allegedly rendered in that decision, which we have already debunked — could satisfy the newly discovered fact exception to the timebar. *See* Reply to Motion to Dismiss, 4/3/2017, at 8. But the PCRA court took a different approach, concluding *Williams* could serve as a new fact because it is "a judicial decision which provided a new theory or method of obtaining collateral relief." Trial Ct. Op., 11/6/2017, at 12. The court reasoned this exception to the general principle announced

in *Watts* was sanctioned by a split panel of the Superior Court in *Smith*. We briefly review that decision.

Smith followed on the heels of our decisions in *Bennett* and *Watts* and, like those cases, dealt with the issue of abandonment of counsel on appeal. Specifically, Smith's first timely PCRA appeal was dismissed in 2001 after his counsel failed to file a brief. *Smith*, 35 A.3d at 767. Less than two months later, Smith filed a second PCRA petition seeking reinstatement of his *nunc pro tunc* right to appeal the denial of his first petition, which the PCRA court granted. *Id*. The Superior Court quashed the *nunc pro tunc* appeal after determining it was untimely, and this Court denied allowance of appeal. *Id*. at 768. Then, in 2007, we issued our decision in *Bennett*, holding attorney abandonment may constitute a factual basis for the newly discovered fact exception where the petitioner acts with due diligence in ascertaining the fact of abandonment. 930 A.2d at 1273. Within 60 days of our decision, Smith filed a third PCRA petition claiming it was timely because *Bennett* afforded him a new method for obtaining collateral review. *Smith*, 35 A.3d at 769. The PCRA court dismissed the petition as untimely, but a divided Superior Court panel reversed, concluding Smith, unlike Watts, had previously attempted to "become Bennett" by seeking allowance of appeal in this Court but was unsuccessful. *Id*. at 771-72. The Superior Court majority recognized the factual predicate of Smith's claims was the dismissal of his first PCRA petition in 2001 due to counsel's abandonment, but determined the change in law that occurred in 2007 with the *Bennett* decision afforded Smith his first opportunity to present his claim. *Id*. at 772. Under those combined circumstances, the Superior Court majority held Smith's petition, which was filed within 60 days of the *Bennett* decision, satisfied the newly discovered fact exception. *Id*.

As noted, the PCRA court in this case concluded *Smith* stands for the broad proposition that a petition is timely under the newly discovered fact exception if it is filed

within 60 days of a judicial decision recognizing a new theory or method of obtaining relief on collateral review. *See* Trial Ct. Op., 11/6/2017, at 12. This conclusion is faulty on multiple levels. First of all, *Smith* dealt with the discrete issue of counsel abandonment, and on its face has no applicability here. More foundationally, the *Smith* majority appears to have seized the "new theory or method of obtaining relief on collateral review" language from our decision in *Watts*. There, we used the identical phrasing to describe the Commonwealth's argument that "while a judicial opinion may establish a new theory or method of obtaining relief on collateral review, it does not fall within the purview of [S]ection 9545(b)(1)(ii) because it does not form an independent basis for a new claim; the legal principles derived from the opinion must be applied to a set of pre-existing facts." *Watts*, 23 A.3d at 983. Importantly, we ultimately agreed with the Commonwealth on this point, holding "judicial determinations are not facts." *Id*. at 986.

The PCRA court's decision to extend the *Smith* majority's "new theory or method of obtaining collateral relief" rationale to appellant's case is unmistakably at odds with our holding in *Watts*.[15] As the Commonwealth aptly observed in *Watts*, "under appropriate circumstances, a judicial opinion can provide an independent basis for a new PCRA claim pursuant to 42 Pa.C.S. §9545(b)(1)(iii), which creates a limited exception" for new constitutional rights that have been held to apply retroactively. *Id*. at 983 n.3. But a judicial opinion — even one which may establish a new theory or method of obtaining

[15] We recognize *Smith* applied to a discrete factual scenario — *i.e.*, where a petitioner's first PCRA appeal was dismissed for failure to file a brief; a *nunc pro tunc* appeal from a second PCRA petition was quashed as untimely and this Court denied allowance of appeal; and a third petition was filed within 60 days of the decision in *Bennett*. Obviously, these factual circumstances cannot recur. Nevertheless, we expressly disapprove of the analysis employed by the *Smith* majority to the extent it contradicts our holding in *Watts*. *See Watts*, 23 A.3d at 986 ("We did not authorize courts to grant post-conviction relief in every instance where a petitioner has been abandoned by appellate counsel, and we neither stated nor implied that petitioners could circumvent the statutory filing deadline by citing *Bennett* as an independent basis for a new claim of ineffectiveness.").

relief — "does not amount to a new 'fact' under [S]ection 9545(b)(1)(ii) of the PCRA." *Id*. at 987. The *Williams* decision itself, therefore, cannot serve as the factual predicate for appellant's claimed exception to the timebar.

Having determined neither the *Williams* decision itself nor the legal conclusions contained therein constitute a new fact for purposes of Section 9545(b)(1)(ii), we are left with appellant's claim that District Attorney Castille's authorization to seek the death penalty in his case, as now conceded by the Commonwealth, is a new fact. We consider this argument in conjunction with appellant's governmental interference claim, which hinges on the premise that the Commonwealth withheld or mischaracterized the evidence of District Attorney Castille's involvement in the decision to seek the death penalty in his case.

Of all the theories raised by appellant and the PCRA court regarding what new "fact" implicates Section 9545(b)(1)(ii), it would appear the discovery of District Attorney Castille's actual role in authorizing the death penalty in his case might be most compelling. This is because, in the context of due process, "there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." *Williams*, 136 S.Ct. at 1905. Thus, where a petitioner learns of a fact upon which such a claim is predicated — in other words, a petitioner learns of a judge's significant, personal involvement as a prosecutor in a critical decision in his own case — Section 9545(b)(1)(ii) is implicated. Relatedly, where governmental officials interfere with a petitioner's ability to bring a recusal-based due process claim by, for example, suppressing evidence of a judge's prior significant, personal involvement as a prosecutor in a critical decision in the petitioner's case, Section 9545(b)(1)(i) is implicated.

Surprisingly, however, the PCRA court expressly denied that District Attorney Castille's role in approving the death penalty was the new fact. *See* Trial Ct. Op., 11/6/2017, at 12 ("To be clear, the newly discovered fact is not that District Attorney Castille's signature was required for the trial prosecutor to seek the death penalty[.]"). Similarly, appellant's extensive reliance on the alleged "factual findings" contained within the *Williams* decision demonstrated his reluctance to rely on District Attorney Castille's role in approving the death penalty against him as the primary factual trigger, at least until the Commonwealth conceded there was a death penalty memorandum in his case. *See* Reply to Motion to Dismiss, 4/3/2017, at 8-9 ("In any event, . . . the Commonwealth's recent disclosure of Castille's actual role in this case provides a factual trigger that moots the parties' other timeliness arguments. . . . We now know that he was presented with a memorandum seeking authorization to request a sentence of death against [appellant.]"). We presume, and will demonstrate below, that the PCRA court and appellant took a tepid approach in identifying District Attorney Castille's authorization to seek the death penalty as the factual predicate to appellant's due process claim because this argument cannot surmount the PCRA's due diligence requirements.

To satisfy the newly discovered fact exception, appellant was required to establish "that the fact upon which he bases his claim was unknown to him and that he could not have discovered it through due diligence." *Cox*, 146 A.3d at 230. Moreover, with respect to both the governmental interference and newly discovered fact exceptions, appellant was required to prove he filed his petition within 60 days of the date the claim could have been presented. 42 Pa.C.S. §9545(b)(2). "We have established that this 60-day rule requires a petitioner to plead and prove that the information on which his claims are based could not have been obtained earlier despite the exercise of due diligence." *Commonwealth v. Edmiston*, 65 A.3d 339, 346 (Pa. 2013).

Put in proper perspective, the factual predicate for appellant's recusal-based due process claim is uncomplicated: District Attorney Castille's authorization of a request to seek the death penalty against him. That factual event did not occur when the United States Supreme Court issued its decision in *Williams*, but has existed since District Attorney Castille actually authorized a trial prosecutor's request to seek the death penalty against appellant approximately 30 years ago. The salient question, therefore, is whether appellant established that he could not have ascertained this fact through the exercise of due diligence. We conclude appellant failed to meet this burden because the fact upon which his claim is predicated was publicly available for more than two decades before he filed his petition.

Evidence of District Attorney Castille's role in capital cases began to emerge as early as 1993, while he was running for judicial office. As the United States Supreme Court observed in *Williams*, then-candidate Castille routinely made comments during his campaign that emphasized his "willingness to take responsibility for the death sentences obtained during his tenure as district attorney[.]" *Williams*, 136 S.Ct. at 1907-08. In fact, in his petition, appellant cited nearly a dozen articles from the 1993 campaign indicating Castille personally accepted responsibility for sending 45 people to death row. *See* PCRA Petition, 8/8/2016, at 12-13 n.1, *citing, e.g.*, Katharine Seelye, *Castille Emphasizes Law-and-Order Image*, PHILADELPHIA INQUIRER (Oct. 21, 1993) ("When he is asked why he wants to serve on the Supreme Court, what qualifies him, why voters should support him, he starts with his experience in Vietnam, works up to his record as Philadelphia [D]istrict [A]ttorney and caps his pitch by declaring that he put 45 murderers on death row."; "Castille's TV spots conclude: 'If you are looking for a law-and-order guy — Ron Castille. He put 45 murderers on death row[.]'"); Frank Reeves, *Castille Preaches Law-and-Order Message to Voters*, PITTSBURGH POST-GAZETTE (Oct. 18, 1993) ("'When I start talking

about court reform, people's eyes glaze over,' [Castille] said. 'When I tell them about [my] sending criminals to death row or how I fought the Mafia in Philadelphia, then they're interested.'"); Tim Reeves, *High Court Hopefuls Pressing for Change*, PITTSBURGH POST-GAZETTE (Oct. 17, 1993) ("Castille and his prosecutors sent 45 people to death row during their tenure. . . . Castille wears the statistic as a badge."). This information — which appellant surely was aware of well before he filed his petition in 2016, since his counsel brought these same articles to the attention of the United States Supreme Court in *Williams* — should have alerted him Castille was personally involved in the decision to pursue the death penalty against him.

Even assuming for argument's sake that these articles were insufficiently specific to put appellant on notice that District Attorney Castille personally approved requests to seek the death penalty, other media coverage following Castille's ascendance to this Court is even less ambiguous. In January 1994, *The Philadelphia Inquirer* reported on a recusal motion filed by the Defender Association of Philadelphia,[16] including a quote from a lawyer who had been chief of the homicide unit under District Attorney Castille. *See* Emilie Lounsberry & Henry Goldman, *Castille Says He Won't Step Aside*, PHILADELPHIA INQUIRER, Jan. 24, 1994, at B1. "In capital cases," said the former homicide chief, "[District Attorney Castille] had a limited role, **approving to seek the death penalty**. There is involvement in these death penalty cases, but I don't know whether it would be enough to force his recusal." *Id*. (emphasis added). In our view, this publicly-reported statement left no room for doubt about District Attorney Castille's role in capital cases.

[16] We note the FCDO, which represented Terrance Williams and represents appellant in this case, "operates as a distinct sub-unit of the Defender Association of Philadelphia." *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 462 (3d Cir. 2015), *as amended* (June 16, 2016), *cert. denied sub nom*. *Pennsylvania v. Def. Ass'n of Phila.*, 136 S.Ct. 980 (2016), and *cert. denied sub nom. Pennsylvania v. Fed. Cmty. Def. Org. of Philadelphia*, 136 S.Ct. 994 (2016).

Certainly, these various articles proved more than enough to prompt other capital defendants to file recusal requests beginning in the 1990s. *See, e.g.*, Motion for Recusal of Justice Castille, *Commonwealth v. Rollins*, 192 CAP (filed Oct. 13, 1998) (attached to Motion to Dismiss, 3/20/2017, at Appendix A) (alleging District Attorney Castille "was personally involved . . . in specifically authorizing the Commonwealth to seek the death penalty against [Rollins]"). And perhaps most importantly, one of those requests resulted in a published opinion by then-Justice Castille in which he acknowledged his actual role in all capital cases. *See Rainey*, 912 A.2d at 756. In that case, Rainey, also through his counsel the FCDO, filed a motion for recusal alleging, *inter alia*, District Attorney Castille "decided to seek the death penalty" against him. *Id*. The Commonwealth responded by describing its office policy with respect to the role of the elected District Attorney in the decision to seek the death penalty as follows:

> [T]he decision to seek the death penalty is initially approved by the Chief of the Homicide Unit, after reviewing a memorandum prepared by the trial prosecutor. The recommendation to seek the death penalty is then referred to the Deputy District Attorney for the Trial Division and subsequently to the First Assistant District Attorney. If both the Trial Deputy and First Assistant concur in the recommendation, it is submitted to the District Attorney for final authorization. The District Attorney's authorization constitutes a concurrence in the judgments of the First Assistant, Trial Deputy and the Chief of the Homicide Unit that the trial prosecutor has demonstrated a statutory basis for seeking the death penalty.

Id. at 757. In declining to recuse, Chief Justice Castille quoted this description and attested that the "Commonwealth's account of office policy respecting such preliminary decisions to seek the death penalty is an accurate description of the manner in which such decisions were made during my tenure." *Id*. at 758.

Appellant attempted to minimize the relevance of this published judicial opinion in the PCRA court by pointing to other assertions in *Rainey* that he argued mischaracterized the significance of District Attorney Castille's role in the death penalty process. *See* Reply

to Motion to Dismiss, 4/3/2017, at 4 ("Chief Justice Castille adopted his former office's misleading and inaccurate description of his role in capital cases as being 'nothing more' than a concurrence in [his subordinates'] judgment that the death penalty statute applied.'"), *quoting Rainey*, 912 A.2d at 758; *see also id*. at 5 n.4 ("Castille called his involvement 'an administrative formality[.]'"), *quoting Rainey*, 912 A.2d at 757. But these attempts to trivialize *Rainey* fail for the same reason we rejected appellant's claim that the *Williams* Court allegedly engaged in fact-finding: it confuses "fact" with an "argument about a fact." The relevant "fact" announced in *Rainey* was that all memoranda seeking approval to pursue the death penalty were "submitted to the District Attorney for final authorization." *Rainey*, 912 A.2d at 757. While the Commonwealth and Chief Justice Castille may have considered that fact to be an administrative formality or ministerial act, those beliefs about the legal significance of the fact did not negate the fact itself. Thus, even if we were to ignore the other articles discussed above, appellant still could not prove due diligence because he failed to pursue his recusal-based due process claim after the factual predicate for that claim was directly and publicly revealed by Chief Justice Castille himself in *Rainey*. *See, e.g.*, *Chester*, 895 A.2d at 523-24 (rejecting applicability of governmental interference and newly discovered fact exceptions "when the information was a matter of public record").

In concluding appellant did not exercise due diligence in ascertaining the fact upon which his claim is predicated, we find our decision in *Commonwealth v. Hackett*, 956 A.2d 978 (Pa. 2008), particularly instructive. In that case, Hackett and three codefendants were tried together for a double homicide. *Id*. at 980. During jury selection, one of the codefendants, Marvin Spence, raised an objection that the prosecutor, Jack McMahon, inappropriately struck African American jurors in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). *Id*. Hackett, who is Caucasian, did not make a *Batson* objection. *Id*. All four

defendants were convicted of first-degree murder, Hackett and Spence were sentenced to death, and this Court affirmed Hackett's judgment of sentence on direct appeal. *Id*.

Hackett filed a timely PCRA petition in 1997 raising multiple claims of ineffective assistance of trial counsel, including one premised on counsel's failure to raise a *Batson* objection. *Id*. at 981. The PCRA court rejected that claim due to an insufficient evidentiary record, and we again affirmed. *Id*. Hackett thereafter filed a second PCRA petition in 2002, and filed a supplement to that petition in 2004. *Id*. In his supplemental petition, Hackett argued he was entitled to a new trial because he learned Spence had secured a new trial based on evidence that McMahon employed discriminatory tactics during jury selection — that claim having been premised on a videotaped lecture released by the Commonwealth in April 1997 that showed McMahon advocating racial and gender-based discrimination in the selection of jurors. *Id*. at 981-82. The PCRA court granted Hackett a new trial pursuant to *Batson*, concluding his petition was timely under the newly discovered fact exception because it was filed within 60 days of the date Spence received a new trial. *Id*. at 982.

The Commonwealth appealed, contesting the PCRA court's timeliness conclusion. *Id*. at 983. In the Commonwealth's view, the factual predicate of Hackett's *Batson* claim was the discovery of the McMahon videotape, not the ruling awarding Spence a new trial; and because the videotape was publicly released in 1997, the Commonwealth argued Hackett failed to exercise due diligence in ascertaining the facts upon which his claim was predicated. *Id*. We credited this argument on appeal:

> [W]e agree with the Commonwealth that Appellee has failed to plead and prove the applicability of Section 9545(b)(1)(ii) and therefore the PCRA court had no jurisdiction to grant relief. Simply put, the facts upon which the *Batson* claim were predicated were ascertainable by Appellee upon the exercise of due diligence when the McMahon tape was released in April of 1997. There was nothing preventing Appellee from raising his *Batson* claim within sixty days thereafter. Appellee's attempt to circumvent the statutory language by asserting that the factual predicate of his claim is actually the

> PCRA court's ruling in *Spence* is specious. A PCRA petitioner cannot avoid the one-year time bar by tailoring the factual predicate of the claim pled in his PCRA petition in a way that unmistakably misrepresents the actual nature of the claim raised. Here, Appellee's *Batson* claim is not dependent upon what occurred in the PCRA matter of his codefendant and could have independently been raised by Appellee in a timely manner. Appellee, however, chose not to raise such claim until years after the McMahon tape was released to the public. As the *Batson* claim was untimely, the PCRA court lacked jurisdiction to grant relief.

Id. at 984 (internal citations omitted).

Similar to Hackett, appellant has gone to great lengths to obscure the factual predicate of his recusal-based due process claim and to tailor it to the issuance of the *Williams* decision. The *Williams* decision, however, much like the order granting Spence a new trial, is not the factual predicate to appellant's claim. Rather, as we have explained, the fact upon which appellant's due process claim is predicated is District Attorney Castille's authorization to seek the death penalty against him. That fact was ascertainable by appellant upon the exercise of due diligence beginning as early as 1993 when articles divulging that information were publicly reported in the press and in then-candidate Castille's campaign materials, and also in 2006, when then-Justice Castille authored a published single-justice opinion explaining his actual role in approving capital cases. At the very latest, appellant had reason to inquire into District Attorney Castille's role in approving the death penalty in his own case after his counsel in 2012 discovered a death penalty authorization memorandum in Williams's case.

But of course, appellant did not need the death penalty authorization memorandum in Williams's case, or even his own case — both of which only confirmed a fact that had been publicly available for decades — in order to raise his claim. To the contrary, as proven by other capital defendants who have been raising recusal claims since long before the death penalty authorization memorandum in *Williams* was discovered and the decision in that case was handed down, those materials were wholly unnecessary to

support a recusal claim, as they only validated a previously known fact. *See, e.g.*, *Commonwealth v. Marshall*, 947 A.2d 714, 720 (Pa. 2008) (the focus of the newly discovered fact exception is on "newly discovered **facts**, not on a newly discovered or newly willing source for previously known facts") (internal quotation and citation omitted) (emphasis in original). Nothing prevented appellant from raising a similar recusal claim, and had he exercised even a minimum level of diligence, surely he would have found in the public sphere the only fact necessary to raise such a claim.[17] Consequently, we conclude appellant failed to prove he satisfied the governmental interference or newly-discovered fact exceptions to the PCRA's timebar.

ii. New Constitutional Right Exception

In its order granting relief, the PCRA court explained it exercised jurisdiction over appellant's claims solely because it concluded his petition satisfied the newly discovered fact exception by a preponderance of the evidence. *See* Order, 6/22/2017, at 1 n.1. The court indicated the same jurisdictional basis in its opinion. *See* Trial Ct. Op., 11/6/2017, at 7. But the PCRA court in its opinion also decided — presumably because the Commonwealth had raised the issue in its Rule 1925(b) statement — that *Williams*

[17] The Superior Court *sua sponte* reached this exact conclusion in its recent decision quashing appellant's non-capital case. *See Reid*, 2019 WL 476717 at *4 ("Without averments of fact to even suggest that Reid made **any** efforts in the twenty-plus years prior to the filing of his petition to ascertain Justice Castille's potential conflict of interest due to his involvement in his case, let alone allegations that such attempts were thwarted by governmental interference, the PCRA court's determination that Reid satisfied a PCRA timeliness exception is unsupported by the record. As such, the PCRA court lacked jurisdiction to grant Reid relief in the form of partial reinstatement of his direct-appeal rights.") (emphasis in original). And in fact, the Superior Court itself has, on numerous occasions, reached almost every single conclusion we draw in this opinion with respect to *Williams* and its impact on the PCRA, although none of those decisions has yet been published. *See, e.g.*, *Commonwealth v. Williams*, 2020 WL 3415696 (Pa. Super., filed June 22, 2020) (*sua sponte* quashing *nunc pro tunc* appeal after concluding *Williams* fails to satisfy any exception to the PCRA's timebar); *Commonwealth v. Lee*, 2019 WL 4131429 (Pa. Super., filed Aug. 30, 2019) (same).

applies retroactively on collateral appeal. *Id*. at 18-19. This conclusion, if correct, could render appellant's petition timely pursuant to the new constitutional right exception under Section 9545(b)(1)(iii). We therefore proceed to address it.

We examined the terms of the new constitutional right exception in *Abdul-Salaam*:

> Subsection (iii) of Section 9545 has two requirements. First, it provides that the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or this court after the time provided in this section. Second, it provides that the right "has been held" by "that court" to apply retroactively. Thus, a petitioner must prove that there is a "new" constitutional right and that the right "has been held" by that court to apply retroactively. The language "has been held" is in the past tense. These words mean that the action has already occurred, *i.e.*, "that court" has already held the new constitutional right to be retroactive to cases on collateral review. By employing the past tense in writing this provision, the legislature clearly intended that the right was already recognized at the time the petition was filed.

812 A.2d at 501. Thus, for present purposes, we need only consider whether the *Williams* Court announced a new constitutional right and, if so, whether that right has been held to apply retroactively.[18]

We have little hesitation in concluding *Williams* embodies a new constitutional rule. *See Teague*, 489 U.S. at 301 ("In general . . . a case announces a new rule when it breaks new ground" or "was not **dictated** by precedent existing at the time the defendant's

[18] It is true that **this Court** "generally has looked to the *Teague* doctrine in determining retroactivity of new federal constitutional rulings." *Commonwealth v. Cunningham*, 81 A.3d 1, 8 (Pa. 2013). But the PCRA court erred insofar as it believed it was within its purview to conduct a retroactivity analysis of *Williams* in the first instance and then hold, based on that analysis, that appellant's already-filed PCRA petition satisfied the new constitutional right exception. *See Abdul-Salaam*, 812 A.2d at 501 ("By employing the past tense in writing this provision, the legislature clearly intended that the right was already recognized at the time the petition was filed."). In that vein, since we are here concerned only with the jurisdictional timeliness of appellant's petition, we focus only on whether *Williams* "has been held" retroactive by the United States Supreme Court. We do, however, address the position — forwarded *sua sponte* in Justice Donohue's dissent — that *Williams* qualifies as a substantive rule under *Teague*, and that *Abdul-Salaam*'s interpretation of the "has been held" language is no longer viable, *infra* at Section III.

conviction became final") (emphasis in original); *see also Graham v. Collins*, 506 U.S. 461, 467 (1993) (a rule is new "unless reasonable jurists hearing [a] petitioner's claim at the time his conviction became final 'would have felt compelled by existing precedent' to rule in his favor"), *quoting Saffle v. Parks*, 494 U.S. 484, 488 (1990). In fact, the *Williams* Court openly acknowledged its "due process precedents do not set forth a specific test governing recusal when, as here, a judge had prior involvement in a case as a prosecutor." *Williams*, 136 S.Ct. at 1905. The Court nevertheless derived "the rule that must control" from "the principles on which [its] precedents rest[,]" and held that "under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." *Id*. This holding articulates a new rule of constitutional law.[19]

The only question that remains is whether the new right announced in *Williams* "has been held by that court to apply retroactively." 42 Pa.C.S. §9545(b)(1)(iii). Appellant argued below that, because the new rule supposedly was applied "retroactively in a successive PCRA proceeding" in *Williams*, it "applies retroactively to all such cases." Reply to Motion to Dismiss, 4/3/2017, at 9-10, *citing, e.g.*, *Tyler v. Cain*, 533 U.S. 656, 668-69 (2001) (O'Connor, J., concurring) ("[I]f we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies

[19] At one point, the PCRA court described the rule announced in *Williams* in this way: "If a judge served as a prosecutor and then the judge, there is no separate analysis or determination required by the court, there is a finding of automatic bias and a due process violation." Trial Ct. Op., 11/6/2017, at 19. This interpretation of the holding in *Williams* is imprecise and would potentially have far-reaching consequences. For clarity's sake, we reiterate once more that the rule announced in *William*s is that "under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." *Williams*, 135 S.Ct. at 1905.

retroactively to cases on collateral review."). The Commonwealth, in contrast, strongly disputed that the *Williams* Court applied its new rule retroactively to Williams:

> [Appellant] contends that, because the United States Supreme Court granted review of a ruling by the Pennsylvania Supreme Court, and that Pennsylvania Supreme Court ruling happened to be a PCRA appeal, the [United States] Supreme Court's ruling was therefore **also** a PCRA appeal — in other words, a form of collateral review. So, contends [appellant], *Williams* was secretly applying its ruling 'retroactively — even though it never remotely suggested any such thing.
>
> That is a specious syllogism. When Williams was in the Pennsylvania Supreme Court, he was collaterally attacking his conviction — that is, the original judgment of sentence for murder. When he went on to the [United States] Supreme Court, Williams could have continued his collateral attack — that is, he could have asked the federal court to rule that his conviction and sentence were invalid, just as he had asked the state court to rule.
>
> Williams, however, did no such thing in the [United States] Supreme Court; indeed, he explicitly disavowed any such claim. Instead, he explicitly asked that court to rule only on the **process** by which the immediately preceding ruling — the ruling of the Pennsylvania Supreme Court — had been made. He framed the claim as one of procedural due process. He did not seek to collaterally disturb his conviction or sentence; he sought only more **process** — another round of appeal in the Pennsylvania Supreme Court.
>
> Of course, the [United States] Supreme Court applied its ruling to Williams — not to his collateral attack on his conviction (which was effectively on hold), however, but to the proceeding that had **just occurred** in the Pennsylvania Supreme Court. There was nothing 'collateral' about the proceedings in the [United States] Supreme Court at all; they were **direct review** of the process — not the substantive ruling — in the state court. That is why the [United States] Supreme Court never said a word about applying its ruling 'retroactively.' Its decision was neither 'collateral' nor 'retroactive.'

Motion to Dismiss, 3/20/2017, at 16-17 (emphasis in original).

We agree with the Commonwealth's position. Nothing in the *Williams* decision remotely suggests the Court intended for its holding to apply retroactively to cases on collateral appeal, and the mere fact that the due process violation at issue in *Williams*

happened to arise in the context of a PCRA appeal did not somehow render the decision affording Williams relief "collateral" or "retroactive." At this point in time, there is absolutely no basis for concluding *Williams* announced a new constitutional right that has been held by the United States Supreme Court to apply retroactively to cases on collateral appeal. Accordingly, appellant's petition could not successfully invoke the new constitutional right exception to the PCRA's timebar.

c. Waiver

As the above analysis demonstrates, appellant's petition was untimely, and the PCRA court was consequently without jurisdiction to address the claims raised therein, because appellant failed to establish an exception to the timebar. Moreover, we find additional error on an independent basis: appellant's claim is waived.

To be eligible for relief under the PCRA, a petitioner must plead and prove by a preponderance of the evidence, among other enumerated requirements, that "[t]he allegation of error has not been previously litigated or waived." 42 Pa.C.S. §9543(a)(3). *See Commonwealth v. Tedford*, 960 A.2d 1, 12 (Pa. 2008) ("A claim that has been waived is not cognizable under the PCRA."). "[A]n issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding." 42 Pa.C.S. §9544(b).

Without belaboring the point, we conclude appellant could have raised his due process claim by simply asking Chief Justice Castille to recuse himself in *Reid II*. While we do not deny appellant's assertion that the Commonwealth for years espoused "the party line" that District Attorney Castille only performed ministerial functions in capital cases, *see* Reply to Motion to Dismiss, 4/3/2017, at 4, the Commonwealth's position regarding the legal significance of Castille's involvement in death penalty cases did not absolve appellant of his duty to raise the recusal issue at the earliest possible opportunity.

As the Commonwealth observes, other capital defendants during the last two decades were undeterred from asking Chief Justice Castille to recuse based on his prior involvement in their cases as District Attorney. *See* Motion to Dismiss, 3/20/2017, at 6-7, *citing, e.g.*, *Rainey*, 912 A.2d 755 (Castille, J., denying recusal); *Commonwealth v. (Roy) Williams*, 732 A.2d 1167 (Pa. 1999) (full court, per Saylor, J., addressing and rejecting claim by petitioner's counsel that prior counsel was ineffective for not seeking Justice Castille's recusal on direct appeal); *Commonwealth v. Abu-Jamal*, 720 A.2d 121 (Pa. 1998) (Castille, J., denying recusal); *Commonwealth v. Jones*, 663 A.2d 142 (Pa. 1995) (Castille, J., denying recusal). In the same way these other capital defendants seized upon the public information revealing District Attorney Castille's role in death penalty cases and filed recusal requests, so too could have appellant.

We also reject the suggestion that appellant's claim is not waived because *Williams* announced a new constitutional rule. *See* Reply to Motion to Dismiss, 4/3/2017, at 6 (arguing he "could not waive a claim whose legal basis . . . was not available at the time of his prior appeals"); Trial Ct. Op., 11/6/2017, at 16 ("As this was the first opportunity for [appellant] to raise a claim following the change in recusal and due process jurisprudence, this court found [appellant] has not waived his constitutional claims."). Contrary to these assertions, the legal basis for appellant's recusal-based due process claim clearly existed before the *Williams* decision. *See, e.g.*, *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 881 (2009) (setting forth objective standards that require judicial recusal, which ask whether "the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias'"); *In re Murchison*, 349 U.S. 133, 136 (1955) (due process guarantees "an absence of actual bias" on the part of a judge, and an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case). While it is true the *Williams* Court devised a

"specific test governing recusal when . . . a judge had prior involvement in a case as a prosecutor[,]" the Court explained its new rule was based on "the principles on which these precedents rest[.]" *Williams*, 136 S.Ct. at 1905; *see id*. at 1906 ("[T]he constitutional principles explained in *Murchison* are fully applicable where a judge had a direct, personal role in the defendant's prosecution."). It cannot be said, then, that there was **no** legal basis for raising a recusal claim until *Williams* was announced; there certainly was, but appellant opted not to advance it.[20]

As the Commonwealth does, we find it significant that Williams himself preserved the recusal claim at issue in *Williams* by asking Chief Justice Castille to recuse from his PCRA appeal. This reality is perhaps the strongest proof that the legal basis for a recusal claim pre-dated the *Williams* decision. Indeed, had appellant asked Chief Justice Castille to recuse in *Reid II* and been rebuffed, he could have petitioned the United States

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[20] For this reason, we find the PCRA court's reliance on the Superior Court's decision in *Stark*, misplaced. *Stark*, which of course is not binding on this Court, dealt with an entirely different scenario in which a number of changes were made to the Board of Probation and Parole release rules after Stark pleaded guilty and was already sentenced. 698 A.2d at 1328. Since those changes — which resulted in the denial of parole to Stark — occurred after his right to file a direct appeal had expired, and he raised his claim as soon as he learned of it in a first PCRA petition, the Superior Court found the issue was not waived under Section 9543(a)(3). *Id*. at 1329. The situation in *Stark* is not at all comparable to the instant case.

We also disapprove of the PCRA court's creation of a non-statutory exception to Section 9544(b)'s definition of waiver for issues that "raise[ ] ethical concerns such as the violation of the Pennsylvania Code of Judicial Conduct[.]" Trial Ct. Op., 11/6/2017, at 16. In the case upon which the PCRA court cited for that proposition, the Superior Court excused the waiver of a conflict of interest claim under Pa.R.A.P. 302(a) where the defendant alleged for the first time on appeal that the prosecutor who handled the PCRA proceeding from which the defendant's appeal was taken was previously his trial counsel in that case. *Townsend*, 850 A.2d at 742-43. Thus, *Townsend*, like *Williams*, involved an issue with the process that had just occurred in the proceeding directly below; it did not, however, create a broad waiver exception for any issue that raises an ethical concern, or even mention Sections 9543(a)(2) or 9544(b) of the PCRA. The PCRA court's attempt to avoid a finding of waiver by crafting its own exception to these statutes "in the interests of justice" cannot be condoned.

Supreme Court to take his preserved claim and, quite possibly, could have "become" Williams by raising the same argument Williams did. But because he chose not to do so, appellant's recusal-based due process claim raised for the first time in 2016 in his untimely, successive petition is waived under Section 9543(a)(3).

III. Response to the Dissents

a. Justice Donohue's Dissent

Despite acknowledging our duty to confirm proper jurisdiction over this serial appeal, Justice Donohue nevertheless criticizes our jurisdictional analysis as "flawed[.]" Dissenting Op. (Donohue, J.) at 2. From there, Justice Donohue embarks on a tortured journey in search of some basis for concluding the PCRA court — and by extension, this Court — had jurisdiction over appellant's facially untimely petition. To what surely will come as a shock to the parties and the PCRA court alike, Justice Donohue finds what she believes is the solution to appellant's jurisdictional problem in a place where neither appellant himself nor the PCRA court dared venture: under *Teague*'s exception for new "substantive" rules. Even though neither appellant nor the PCRA court have ever argued as much, Justice Donohue concludes that "*Williams* announced a substantive rule that must apply retroactively in this case as a matter of constitutional law." *Id*. at 14. Along the way to reaching that remarkable conclusion, Justice Donohue would have us overrule this Court's decision in *Abdul-Salaam*; ignore the plain text of Section 9545(b)(1); and resurrect the long-since-abandoned doctrine of relaxed waiver, by declaring the PCRA's waiver requirements do not apply to this particular capital case. As shown below, this novel theory of jurisdiction proves even less persuasive, and far more radical, than those we have already rejected.

To begin, we question the propriety of Justice Donohue's attempt to inject her own theory of jurisdiction into this case, under the right for any reason doctrine, where

appellant himself never raised the theory in the PCRA court. *Cf.* PCRA Petition, 8/8/2016, at 5 (arguing only that *Williams* is "retroactive on its face" because the Supreme Court supposedly "applied both of its holdings retroactively to a successive PCRA"). The PCRA instructs that a petition must be filed within one year of the date the judgment of sentence becomes final "unless the petition alleges **and the petitioner proves** that" one of the timebar exceptions applies. 42 Pa.C.S. §9545(b)(1) (emphasis added). We have consistently maintained this clear statutory language means "**it is the petitioner's burden to allege and prove** that one of the timeliness exceptions applies." *Commonwealth v. Robinson*, 139 A.3d 178, 186 (Pa. 2016) (emphasis added); *see, e.g*., *Edmiston*, 65 A.3d at 346 ("We have repeatedly stated it is the appellant's burden to allege and prove that one of the timeliness exceptions applies."); *Marshall*, 947 A.2d at 719 ("We emphasize that is it the petitioner who bears the burden to allege and prove that one of the timeliness exception applies."); *Commonwealth v. Abu-Jamal*, 941 A.2d 1263, 1268 (Pa. 2008) ("It is the petitioner's burden to allege and prove that one of the timeliness exceptions applies."); *Fahy*, 737 A.2d at 218 ("As stated in the amendments, it is for the petitioner to allege in his petition and to prove that he falls within one of the exceptions found in [Section] 9545(b)(1)(i)-(iii)."). These dual statutory requirements that "the petition alleges" and the "petitioner proves" a particular timeliness exception could arguably suggest an appellate court may not affirm a finding of jurisdiction on a theory neither raised nor proven by the petitioner himself.

In this regard, we observe that in the past we have "had to consider the continuing viability of [other] judicial rules that find themselves in separation of powers tension with the governing terms of the PCRA." *Jones*, 815 A.2d at 610 (citation omitted). By way of example, in *Commonwealth v. Albrecht*, 720 A.2d 693 (Pa. 1998), we held relaxed waiver is no longer viable on PCRA appeals because "application of the doctrine of relaxed

waiver in a PCRA proceeding runs afoul of the very terms of the [PCRA], which excludes waived issues from the class of cognizable PCRA claims." *Id*. at 700. For similar reasons, it could be argued that an application of the "right for any reason" doctrine to the present context might undermine Section 9545(b)(1), which places the burden solely on the petitioner — not on members of an appellate tribunal — to allege and prove within the petition itself any applicable timeliness exception.

Relatedly, we also note that as judicial officers, we have an indispensable duty to function as neutral and impartial arbiters. *See, e.g.*, *Commonwealth v. Bell*, 211 A.3d 761, 773 n.12 (Pa. 2019), *cert. denied sub nom.*, 140 S.Ct. 934 (2020) (citing the "longstanding principle that courts should not act as advocates"); *Commonwealth v. Le*, 208 A.3d 960, 976 n.17 (Pa. 2019) ("It is not this Court's function to act as an advocate for the parties."); *Hrivnak v. Perrone*, 372 A.2d 730, 733 (Pa. 1977) (a court should "not assume the advocate's function of introducing theories not raised by the parties"). When an appellate court conjures up additional jurisdictional theories never raised or argued by the petitioner, it could risk upending the bedrock of our adversarial system. *See Greenlaw v. United States*, 554 U.S. 237, 244 (2008) ("[A]s a general rule, our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.") (citation and internal quotations and brackets omitted). Indeed, Justice Donohue's view appears to suggest a petitioner need only check off a box for each timeliness exception in his petition, without any further elaboration, and hope that an appellate court will later do the legal leg work by "proving" jurisdiction for him on appeal.

In any event, while these concerns give us pause, we decline to definitively decide this issue in this appeal. As demonstrated below, even assuming *arguendo* that the right for any reason doctrine is applicable in this context, Justice Donohue's *sua sponte* theory

of jurisdiction is no more viable than the theories appellant and the PCRA court actually raised. We therefore proceed to address the theory and the legal arguments raised in support of it.

Preliminarily, we set the record straight as to two assertions in Justice Donohue's dissent that are clearly incorrect. First, at several points she alleges appellant and Terrance Williams "are in identical postures[.]" Dissenting Op. (Donohue, J.) at 3 n.4; *see also id*. at 2 ("Reid is in an identical posture to Williams[.]"). They most definitely are not. While District Attorney Castille may have authorized subordinates to seek the death penalty against both appellant and Williams and later participated in panels that decided their appeals, that is where the similarities end. Most pertinent here, appellant, unlike Williams, never asked Chief Justice Castille to recuse from his appeal. And, because appellant failed to make such a request, it naturally follows that he never petitioned the United States Supreme Court to review Chief Justice Castille's refusal to recuse and, therefore, that Court never vacated this Court's decision in *Reid II*, as it did in *Williams*.

This leads to the second point: contrary to Justice Donohue's assertion, appellant's 2014 PCRA appeal is not "a nullity." Dissenting Op. (Donohue, J.) at 25. It is elementary that unless the United States Supreme Court reverses a decision of this Court, or this Court overrules its own prior decision, "the law emanating from the decision remains law." *Fiore v. White*, 757 A.2d 842, 847 (Pa. 2000). Thus, although Chief Justice Castille improperly participated in the decision in *Reid II*, it is not a nullity and, in fact, remains binding precedent unless and until this Court or the United States Supreme Court holds otherwise. It is imprudent to suggest our decision in *Reid II* (and, by implication, multiple other decisions issued under similar circumstances) is a "nullity," as this does nothing more than create needless uncertainty for our trial and appellate courts.

Worse yet is the unwarranted shadow of doubt Justice Donohue casts over other settled law from this Court which does not in any way concern *Williams*. Specifically, in order for her theory of retroactivity to succeed, Justice Donohue recognizes it must also overcome this Court's holding in *Abdul-Salaam* that the phrase "has been held" as used in Section 9545(b)(1)(iii), "mean[s] that the action has already occurred, *i.e.*, 'that court' has already held the new constitutional right to be retroactive to cases on collateral review." 812 A.2d at 501. After all, it would accomplish little to hold only that *Williams* announced a substantive new rule of constitutional law that applies retroactively, since *Abdul-Salaam* would still preclude a finding of jurisdiction. But Justice Donohue has a plan to remove this precedential roadblock as well: she would declare that *Abdul-Salaam*'s analysis is no longer correct following the United States Supreme Court's decision in *Montgomery v. Louisiana*, ___ U.S. ___, 136 S.Ct. 718 (2016). This position is untenable. While *Montgomery* is important insofar as it enshrined *Teague* as a constitutional command that extends to state post-conviction proceedings, it in no way alters the *Abdul-Salaam* Court's statutory interpretation of Section 9545(b)(1)(iii).

In *Montgomery*, the central issue before the Supreme Court was whether its prior decision in *Miller v. Alabama*, 567 U.S. 460 (2012) (prohibiting mandatory life sentences without parole for juvenile offenders), announced a new substantive constitutional rule that was retroactive on state collateral review. Before reaching that question, however, the Court first had to consider if it had jurisdiction to decide whether the Supreme Court of Louisiana properly refused to give retroactive effect to *Miller*, as federal precedent up to that point had "le[ft] open the question whether *Teague*'s two exceptions [to the bar on retroactive application of new rules] are binding on the States as a matter of constitutional law." *Montgomery*, 136 S.Ct. at 729 (citation omitted). The Court answered that threshold question in the affirmative. It explained that "when a new substantive rule of constitutional

law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *Id*. Importantly, though, the Court noted its holding is "limited to *Teague*'s first exception for substantive rules[,]" *id*., and applies only when "a state collateral proceeding is open to a claim controlled by federal law" and "the claim is properly presented in the case." *Id*. at 731-32.

Justice Donohue seizes upon this holding in *Montgomery* and argues that "[s]ince Pennsylvania's collateral review courts are open to retroactive application of new rights through the [S]ection 9545(b)(1)(iii) exception and a prisoner is permitted to allege due process violations once jurisdiction is established, it follows . . . that Pennsylvania is constitutionally obligated to give retroactive effect to *Williams* if it qualifies as a substantive rule." Dissenting Op. (Donohue, J.) at 18. Setting aside for a moment the fact that *Williams* does not qualify as a new substantive rule, the other obvious hole in Justice Donohue's argument is that it ignores the plain language of Section 9545(b)(1)(iii). The plain language makes clear that, when dealing with an otherwise untimely PCRA petition, our collateral review courts are only "open" to a claim that a new constitutional right applies when the right "has been held by that court to apply retroactively." 42 Pa.C.S. §9545(b)(1)(iii). In other words, because the "has been held" language "means that the ruling on retroactivity of the new constitutional law must have been made prior to the filing of the petition for collateral review[,]" *Abdul-Salaam*, 812 A.2d at 501, our state collateral courts are, in fact, **not** "open" to a claim that a new constitutional right applies, **unless** the right has already been held to apply retroactively.

In support of her resolve to overrule *Abdul-Salaam* and judicially stamp out the "has been held" language from the statute once and for all, Justice Donohue points to the *Abdul-Salaam* Court's supposed "qualifi[cation]" of its statutory analysis, *i.e.*, the Court's remark that "the question arises whether the salient restriction on serial, state post-

conviction review is a reasonable one[.]" Dissenting Op. (Donohue, J.) at 15, *quoting* *Abdul-Salaam*, 812 A.2d at 501. Ostensibly, Justice Donohue would hold the relevant restriction imposed by the legislature is no longer reasonable, on the basis that prisoners previously "had no constitutional basis to insist on retroactivity in the first place." *Id*. at 19. The problem with this argument is that the *Abdul-Salaam* Court's conclusion that the relevant limitation on serial state collateral review is "a reasonable one," 812 A.2d at 501, had nothing to do with whether *Teague* imposed a constitutional command on the states; indeed, strikingly absent from the analysis in *Abdul-Salaam* is any mention of *Teague* or its progeny. Rather, the Court explained its interpretation of the restriction imposed by the "has been held" language was reasonable where the claims "depend[ed] upon an evolving line of United States Supreme Court precedent involving an interpretation of the United States Constitution, and review within the federal judicial system over which that Court presides has not been shown to be foreclosed." *Id*. As the same is unquestionably true here, Justice Donohue's position that we should overrule *Abdul-Salaam* (which no one has asked us to do) and ignore the plain text of Section 9545(b)(1)(iii) (which we cannot do), is indefensible.[21]

Of course, as even Justice Donohue concedes, the patently incorrect conclusions drawn in her dissent are wholly irrelevant if *Williams* does not qualify as a substantive rule

[21] We also observe that, at times, Justice Donohue places great emphasis on the fact that this is a death penalty case. *See, e.g.*, Dissenting Op. (Donohue, J.) at 22 n.26 (asserting any interest in finality in this case is minimal because "the death penalty is at issue"). This strategy is not new; the defendant in *Abdul-Salaam* invoked similar sentiments in urging us not to interpret Section 9545(b)(1)(iii) in the manner we ultimately did. But we flatly rejected his positon, explaining that "in interpreting the exception in subsection (iii) to the jurisdictional time requirement, we are not at liberty to disregard the plain language of the statute." *Abdul-Salaam*, 812 A.2d at 502. Once more, our conclusion in *Abdul-Salaam* holds equally true here, and for that reason the concerns espoused by Justice Donohue that this is a death penalty case, and that *Williams* only applies to an "extremely small number of cases[,]" *see* Dissenting Op. (Donohue, J.) at 3, are misplaced.

in the first place. *See* Dissenting Op. (Donohue, J.) at 20 (stating *Williams* applies retroactively only "if it qualifies as a substantive rule"); *accord Montgomery*, 136 S.Ct. at 729 (explaining that its holding that state collateral review courts must give retroactive effect to new rules of constitutional law is "limited to *Teague*'s first exception for substantive rules"). And since it is undeniable that *Williams* did not announce a substantive rule of constitutional law, the entire house of cards upon which Justice Donohue's *sua sponte* theory of jurisdiction rests must fall.

The United States Supreme Court has explained that substantive rules "set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose." *Montgomery*, 136 S.Ct. at 729. "Substantive rules include rules forbidding criminal punishment of certain primary conduct, as well as rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Id*. at 728 (citations and internal quotations omitted). By contrast, procedural rules "are designed to enhance the accuracy of a conviction or sentence by regulating 'the **manner of determining** the defendant's culpability.'" *Id*. at 730, *quoting Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (emphasis in original). "They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Schriro*, 542 U.S. at 352. So whereas a conviction or sentence may still be accurate and, by extension, a defendant's continued confinement may still be lawful, even if a procedural error has infected a trial, "[t]he same possibility of a valid result does not exist where a substantive rule has eliminated a State's power to proscribe the defendant's conduct or impose a given punishment." *Montgomery*, 136 S.Ct. at 730.

Under this framework, *Williams* quite plainly does not embody a substantive rule. The *Williams* Court announced its new rule in this way: "under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." *Williams*, 136 S.Ct. at 1905. More precisely, here, as in *Williams*, the applicable rule is that where a prosecutor authorized pursuit of the death penalty against a defendant, he may not later serve as an appellate jurist in that particular defendant's case; he must recuse. Obviously, and as Justice Donohue agrees, this rule does not preclude the government from prohibiting particular conduct or deem any conduct constitutionally protected. *See* Dissenting Op. (Donohue, J.) at 22 ("There is no doubt that Reid was convicted for conduct that the States may validly punish."). Nor, for that matter, does *Williams*'s recusal rule place any class of persons or punishments off limits. The only constraint *Williams* imposes is on the **manner** in which recusal decisions must be made and appellate review is to be conducted. It is, therefore, a quintessentially procedural rule, not a substantive one.

In arriving at the opposite conclusion, Justice Donohue attempts to rewrite the Supreme Court's entire body of case law pertaining to *Teague* and retroactivity. Her dissent contends the definition of substantive rules encompasses not only rules that categorically place certain conduct and punishments altogether beyond the State's power to impose, but also "extends to new rules that touch on whether the prisoner may **remain** in jail in light of case law issued after the judgment of sentence became final, even though the underlying conduct was doubtlessly criminal." Dissenting Op. (Donohue, J.) at 22 (emphasis in original). Unsurprisingly, Justice Donohue includes no case support for this bold proposition of law, save for a statement that "the rationale employed by the High

Court in *Montgomery*" supports it. *Id*. Yet an honest reading of *Montgomery* proves the exact opposite.

The *Montgomery* Court expressed, in no uncertain terms, that "[b]ecause *Miller* determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, it rendered life without parole an unconstitutional penalty for a class of defendants because of their status — that is, juvenile offenders whose crimes reflect the transient immaturity of youth." 136 S.Ct. at 734 (internal citations and quotations omitted). The Court explained further, "[l]ike other substantive rules, *Miller* is retroactive because it necessarily carries a significant risk that a defendant — here, the vast majority of juvenile offenders — faces a punishment that the law cannot impose upon him." *Id*. (internal citations, quotations, and brackets omitted). Accordingly, the rationale employed by the *Montgomery* Court is squarely in line with that Court's longstanding articulation of retroactivity principles, and it did not expand the definition of substantive rules, as Justice Donohue imagines.[22]

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[22] Justice Donohue attempts to turn the rationale in *Montgomery* on its head by asserting "*Miller* explicitly recognized that there is no blanket prohibition against confining a juvenile convicted of homicide for life with no hope of release." Dissenting Op. (Donohue, J.) at 23, *citing Miller*, 567 U.S. at 483 ("Our decision does not categorically bar a penalty for a class of offenders or type of crime[.] . . . Instead, it mandates only that a sentencer follow a certain process — considering an offender's youth and attendant characteristics — before imposing a particular penalty."). To be sure, the selected quote from *Miller* seems at odds with *Montgomery*'s ultimate holding that *Miller* is retroactive precisely **because** it categorically barred a penalty for a class of offenders, a point which did not escape the *Montgomery* dissenters' notice. *See Montgomery*, 136 S.Ct. at 743 (Scalia, J., dissenting) ("it is impossible to get past *Miller*'s unambiguous statement that '[o]ur decision does not categorically bar a penalty for a class of offenders'") (citation omitted). Indeed, Justice Scalia went so far as to assert the majority was "not applying *Miller*, but rewriting it." *Id*. Perhaps this seeming inconsistency explains at least in part why the Supreme Court recently granted *certiorari* in *Jones v. Mississippi*, 285 So.3d 626 (Miss. Ct. App. 2017), *cert. granted*, 140 S.Ct. 1293 (2020), wherein the Court seems poised to remove all doubt regarding its holdings in *Miller* and *Montgomery*. But in any event, the critical point for our purposes is that *Montgomery* expressly announced *Miller* was retroactive because it announced a rule that bars a penalty "for a class of defendants

Justice Donohue's reliance on *Welch v. United States*, __ U.S. ___, 136 S.Ct. 1257 (2016), as "further support" for its interpretation, Dissenting Op. (Donohue, J.) at 26, suffers the same flaws. In that case, the United States Supreme Court held the rule announced in *Johnson v. United States,* ___ U.S. ___, 135 S.Ct. 2551 (2015) (striking down the residual clause of the federal Armed Career Criminal Act as void for vagueness), was substantive. The Court reasoned, "[b]y striking down the residual clause as void for vagueness, *Johnson* changed the substantive reach of the Armed Career Criminal Act, altering 'the range of conduct or the class of persons that the [Act] punishes.'" *Welch*, 136 S.Ct. at 1265, *quoting Schriro*, 542 U.S. at 353. *See also id*. ("*Johnson* affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied. *Johnson* is thus a substantive decision and so has retroactive effect under *Teague* in cases on collateral review."). The retroactivity determination in *Welch*, then, like the determination in *Montgomery*, hinged on a finding that the respective rule altered either "the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S. at 353.

In stark contrast, the new rule announced in *Williams* does not touch upon the range of conduct or the class of persons that the law punishes; it instead prescribes only the manner in which a jurist must decide his own participation in a case where he earlier had significant, personal involvement as a prosecutor in a critical decision regarding that case. *Williams*, 136 S.Ct. at 1905. Every court in the nation that has considered whether *Williams* is retroactive has reached this exact conclusion. *See Silversky v. Fletcher*, 770 F.App'x 859 (9th Cir. 2019) ("any rule announced in *Williams* . . . regulates only the

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because of their status[,]" 136 S.Ct. at 734 (internal citation and quotation omitted), a classic example of a substantive rule. It is therefore Justice Donohue that actually "ignore[s] *Montgomery*'s analysis[.]" Dissenting Op. (Donohue, J.) at 27 n.30, and her attempt to recast our position in this regard as being "based on the dissenting opinion in *Montgomery*," *id*., is unsustainable.

manner of determining the defendant's culpability and thus is not substantive") (internal citation, quotations, and brackets omitted; emphasis in original); *Houston v. Kallis*, No. 17-cv-1065, 2018 WL 2449191, *3 (C.D. Ill. May 31, 2018) (citing prior decisions holding *Williams* "did not announce a substantive rule applied retroactively" and "*Williams* is not retroactive"); *McCuthcen v. Wenerowicz*, No. 15-cv-2706, 2017 WL 9401169, *3 (E.D. Pa. Sept. 15, 2017) ("*Williams* did not announce a substantive rule . . . because it did not alter the range of conduct or class of persons that the law punishes.") (citation omitted). This unanimous persuasive authority serves as strong support for our conclusion that *Williams* did not announce a substantive rule, and cuts directly against Justice Donohue's contrary outlier position.[23]

As demonstrated, the theory of jurisdiction championed by Justice Donohue collapses at every level with minimal scrutiny.[24] Again, this outcome is not surprising

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[23] Justice Donohue considers that her nationally groundbreaking conclusion that *Williams* announced a substantive rule of law "is narrow[,]" and she stresses the fact that we have only seen five such cases over a four-year period. Dissenting Op. (Donohue, J.) at 25 n.29. Respectfully, we fail to see how this changes anything or is relevant at all. If it is meant to imply it is more acceptable to ignore the PCRA's clear statutory requirements where it only results in relief to a small number of individuals, we reject that unstated premise, for reasons along the lines of those we have expressed at length throughout this opinion. Further, while it is true that this Court has seen just five such cases over the past few years, Justice Donohue neglects the fact that the Superior Court has also dealt with its fair share of cases that fall directly under *Williams* but did not come directly to this Court because the defendants in those cases are no longer serving sentences of death. *See supra* 40 n.17. More concerning still are the untold ripple effects that would inevitably follow from Justice Donohue's approach to reaching her desired result, which ignores the "has been held" language of Section 9545(b)(1)(iii), by *sua sponte* overruling *Abdul-Salaam*, and ignores Section 9544(b)'s waiver requirement, by improperly resurrecting the doctrine of relaxed waiver. It is therefore apparent that while the substantive rule Justice Donohue would adopt is purportedly "narrow," her means for reaching that conclusion would have seismic consequences in the larger context of PCRA jurisprudence throughout this Commonwealth.

[24] We see no pressing need to quarrel with the additional position embraced in Justice Donohue's dissent regarding the PCRA's waiver requirements as those arguments, by her own terms, rest on the assumption that "a substantive rule is at issue." Dissenting

considering appellant never saw fit to raise the theory himself. *See Greenlaw*, 554 U.S. at 244 ("the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief") (internal quotations and citation omitted). But in the end, Justice Donohue's *sua sponte* theory of jurisdiction fares no better than the other failed theories that appellant actually raised.

b. Judge McCaffery's Dissent

Many of the erroneous assumptions and conclusions drawn by Justice Donohue similarly permeate Judge McCaffery's dissenting opinion. For example, he makes the same critical mistake of presuming appellant and Terrance Williams are in the same posture. *See* Dissenting Op. (McCaffery, J.) at 3 ("we must find a way to allow those capital defendant[s]/appellants who are situated as Williams was to receive an appeal free of structural error"). But, to reiterate the point once more, the notion that appellant is "situated as Williams was" is undeniably incorrect, because appellant never asked Chief Justice Castille to recuse, as Williams did. Thus, the answer to the so-called "Goldilocks" problem posed by Judge McCaffery — *i.e.*, "When was the time 'just right' for [appellant]

Op. (Donohue, J.) at 31. None is at issue here, as we have established. Still, we find it prudent to briefly rebut two points. First, Justice Donohue's claim that under our view "**no one** can ever secure relief" pursuant to Section 9545(b)(1)(iii) because the claim would either be waived or previously litigated, *id*. at 30 n.32 (emphasis in original), rests on a false premise. Our reason for declining to discuss the "previously litigated" aspect of Section 9543(a)(3) is because we do **not** believe, as Justice Donohue apparently does, that, if appellant had filed a recusal motion, his new *Williams*-based due process claim would be previously litigated. The explanation for this conclusion is simple: a jurist's personal decision whether to grant a motion to recuse clearly does not qualify as a "rul[ing] on the merits of the issue" by "the highest appellate court in which the petitioner could have had review as a matter of right[.]" 42 Pa.C.S. §9544(a)(2). Second, as it pertains to Justice Donohue's discussion of waiver principles as applied in capital cases — and, in particular, her reliance on relaxed waiver as articulated in *Commonwealth v. McKenna*, 383 A.2d 174 (Pa. 1978), *see* Dissenting Op. (Donohue, J.) at 29 n.32 —she ignores that this Court has long since applied strict waiver principles even to capital cases, especially in the post-conviction context. *See, e.g.*, *Albrecht*, 720 A.2d at 700 ("application of the doctrine of relaxed waiver in a PCRA proceeding runs afoul of the very terms of the [PCRA], which excludes waived issues from the class of cognizable PCRA claims").

to ask for fair, constitutional appellate review of his first, timely-filed petition?" *id*. at 8 — is plain and simple: during that first appeal. After all, that is precisely what Williams did, and his advancement of the issue before this Court and, later, the United States Supreme Court, is what actually led to relief in his own case. It cannot be stressed enough that nothing precluded appellant from proceeding in the exact manner that Williams did; he simply chose not to, and this failure is what differentiates him from Williams.

Another global problem with Judge McCaffery's position is that it sounds almost entirely in principles of equity and is unduly influenced — much like Justice Donohue's dissent — by the mere fact that the "body of cases impacted by *Williams* is small and unique[.]" *Id*. at 10; *see id*. ("It is hard to imagine that there would be many other scenarios like this one[.]"). But true as it may be that *Williams* affects only "a handful of capital cases in one county out of 67 across the Commonwealth[,]" *id*. at 7, as explained *supra* at 58 n.23, this is completely beside the point. We are here confronted with a routine jurisdictional analysis pursuant to the statutory terms of the PCRA, and there is no shortage of case law from this Court explaining that such an analysis is not subject to equitable considerations. *See, e.g., Robinson*, 837 A.2d at 1157 (collecting a multitude of cases in which this Court has rejected "various theories devised to avoid the effects of the one-year time limitation"). As demonstrated below, Judge McCaffery's "suggest[ed] solution" to the jurisdictional problem in this case, Dissenting Op. (McCaffery, J.) at 1, amounts to nothing more than another equitable theory created out of whole cloth and aimed at avoiding the plain terms of the PCRA, in an apparent effort to ameliorate his personal objection to the fact we lack jurisdiction to afford relief.

Although it is somewhat difficult to discern, Judge McCaffery's jurisdictional theory seems to proceed as follows: the Commonwealth now concedes District Attorney Castille approved a trial prosecutor's request to seek the death penalty against appellant; this

concession amounts to a fact; PCRA courts are factfinders; appellate courts must apply a deferential approach to the factfinding of lower courts; as such, we should "give the benefit of the doubt to the PCRA court's factual determination[ ] . . . that the Commonwealth's concession . . . is a new fact[.]" *Id*. at 11. In other words, although he never plainly states as much, Judge McCaffery seems to be of the view that appellant has satisfied the newly discovered fact exception to the PCRA's timebar set forth at 42 Pa.C.S. §9545(b)(1)(ii), and that we are bound to accept this conclusion simply because the PCRA court reached it. Oddly, though, even though this conclusion, if correct, would secure our jurisdiction and permit us to proceed to the merits, Judge McCaffery does not stop there. Instead, he inexplicably "urge[s] that this Court" should overrule (or, in his words, "fine-tun[e]") our decision in *Commonwealth v. Peterkin*, 722 A.2d 638 (Pa. 1998), wherein we held that the PCRA's timebar is jurisdictional in nature. Dissenting Op. (McCaffery, J.) at 10-11. We proceed to unpack and disprove these theories.

First, regarding Judge McCaffery's position concerning the newly discovered fact exception, his opinion's analysis is gravely flawed from inception. Without providing any support, it baldly asserts that when a "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." *Id*. at 4.[25] In point of fact, our case law instructs that the question of whether a PCRA petition is timely raises **a question of law**. *See, e.g.*, *Commonwealth v. Fahy*, 959 A.2d 312, 316 (Pa. 2008) ("Questions regarding the scope of the statutory exceptions to the PCRA's jurisdictional time-bar raise questions of law; accordingly, our standard of review is *de novo*.") (citation omitted). Moreover, we have explained that, as a general matter, the

[25] In fairness, his dissenting opinion does cite to *In re Vencil*, 152 A.3d 235 (Pa. 2017), but that case neither arose in the post-conviction context nor did it even mention the PCRA. As such, it actually offers no support for his position.

level of deference we afford to a lower court varies "depending upon whether the decision involved matters of credibility or matters of applying the governing law to the facts as so determined." *Commonwealth v. Reaves*, 923 A.2d 1119, 1124 (Pa. 2007) (citations omitted). Here, of course, we are not concerned with any matters of credibility, but rather the PCRA court's purely legal conclusion that appellant satisfied the newly discovered fact exception to the timebar. Thus, contrary to Judge McCaffery's erroneous view, no deference at all is owed to the PCRA court's timeliness finding in this matter; instead, as we have expressed in countless prior decisions, "this Court applies a *de novo* standard of review to [a] PCRA court's legal conclusions." *Commonwealth v. Paddy*, 15 A.3d 431, 442 (Pa. 2001).[26]

Having established that the framework under which Judge McCaffery's position emanates is faulty from the start, we now address the substance of his theory. However, it turns out there is not much that needs to be said because, in many ways, Judge McCaffery's argument is entirely self-defeating. Recall that to successfully invoke the newly discovered fact exception, appellant was required to prove that "the facts upon which the claim is predicated were unknown to [him] and could not have been ascertained by the exercise of due diligence[.]" 42 Pa.C.S. §9545(b)(1)(ii). As we explained at length

[26] Even if we were remotely inclined to disregard our settled precedent and afford some level of deference to a PCRA court's legal determinations, what Judge McCaffery truly advocates for is an appellate court's complete deference to a PCRA court any time the court concludes the newly discovered fact exception applies, at least where the parties are in agreement on that point. *See* Dissenting Op. (McCaffery, J.) at 4 ("Where the parties agree that jurisdiction lies . . . and the PCRA finds a jurisdictional basis in facts . . . , appellate courts **must** apply a deferential standard, in recognition of the trial court's fundamental role as factfinder.") (emphasis added); *see id*. at 9 ("where the parties agree to establishment of the 'new facts' exception it cannot be an abuse to accept that agreement"). This a dangerous proposition and, if accepted, inevitably would lead to situations where jurisdiction is forced upon appellate courts even when the law is clear that jurisdiction is lacking. We therefore reject Judge McCaffery's suggested alteration of our longstanding standard of review over a PCRA court's legal conclusions.

above, *see supra* at 32-40, appellant failed to meet this burden because District Attorney Castille's role in authorizing the death penalty in appellant's case was ascertainable by him upon the exercise of due diligence beginning as early as 1993. Judge McCaffery agrees. *See* Dissenting Op. (McCaffery, J.) at 7 ("The Majority is not wrong to conclude that many aspects of what the PCRA court found to be factually 'new' is actually old news."); *see id*. ("**of course** it was well-known that [Castille] . . . pursued the death penalty with vigor in many cases as District Attorney") (emphasis in original). To agree on this point yet simultaneously argue that appellant somehow satisfied the newly discovered fact exception, is simply irreconcilable. If appellant could have learned of District Attorney Castille's involvement in his case decades ago — as Judge McCaffery concedes — then he unquestionably failed to prove the newly discovered fact exception to the timebar. For this reason, even setting aside Judge McCaffery's misguided take on the issue of deference, his substantive argument fails.

We now dispatch Judge McCaffery's rather curious discussion of *Peterkin*. By way of background, *Peterkin* was the first case in which we interpreted Section 9545(b)(1) of the PCRA to be jurisdictional in nature. We concluded "the PCRA's time limitation upon the filing of PCRA petitions does not unreasonably or unconstitutionally limit Peterkin's constitutional right to *habeas corpus* relief." *Peterkin*, 722 A.2d at 643. In making this ruling, we noted that "the General Assembly amended the PCRA to require that, **as a matter of jurisdiction**, a PCRA petition must be filed within one year of final judgment[,]" citing Section 9545(b)(1). *Id*. at 641 (emphasis added). Thereafter, in *Commonwealth v. Fahy*, we elaborated "that the period for filing a PCRA petition [in Section 9545(b)(1)] is not subject to the doctrine of equitable tolling." 737 A.2d at 222. In so ruling, we opined that "[t]his [C]ourt has made clear that the time limitations pursuant to the amendments to the PCRA are jurisdictional." *Id*. For over two decades now, this Court has steadfastly

held to this view. *See, e.g.*, *Commonwealth v. Blakeney*, 193 A.3d 350, 366-67 (Pa. 2018) ("The PCRA time-bar at issue is jurisdictional in nature, and this Court has previously stated 'jurisdictional time limits go to a court's right or competency to adjudicate a controversy.'") (citations omitted); *Spotz*, 171 A.3d at 678 ("This time constraint is jurisdictional in nature, and is not subject to tolling or other equitable considerations.") (citations omitted); *Bennett*, 930 A.2d at 1267 (Pa. 2007) ("This limitation is jurisdictional in nature.") (citation omitted); *Commonwealth v. Morris*, 822 A.2d 684, 694 (Pa. 2003) ("This time requirement is jurisdictional; when the petition is untimely, a court cannot reach the substantive issues presented in the petition.") (citations omitted); *Morris*, 771 A.2d at 734-35 ("[I]n Peterkin, this court explained that the time bar is a jurisdictional requirement. More recently, we explained that '[j]urisdictional time limits go to a court's right or competency to adjudicate a controversy.'") (citations omitted); *Commonwealth v. Gamboa-Taylor*, 753 A.2d 780, 783 (Pa. 2000) ("It is also important to note that the time limitations of the 1995 amendments are jurisdictional.") (citations omitted).

Notwithstanding our decades-long adherence to *Peterkin*'s interpretation, Judge McCaffery now posits that Section 9545(b)(1) actually does "not place a temporal limit on jurisdiction[,]" and he argues *Peterkin*'s interpretation "is, to a significant degree, one of judicial crafting." Dissenting Op. (McCaffery, J.) at 9; *see id*. (contending *Peterkin*'s holding "is an example of judicial restraint"); *id*. at 10-11 (suggesting this Court's "jurisdictional approach to [S]ection 9545 is judicially crafted and therefore amenable to judicial fine-tuning"). We roundly reject Judge McCaffery's call for any "fine-tuning" of *Peterkin*'s analysis for purposes of this case. Judge McCaffery's primary position is that appellant satisfied the newly discovered fact exception to the timebar, thereby establishing jurisdiction over his petition. Why, then, could it possibly be necessary to also overrule an exceedingly extensive line of this Court's precedents holding that the

PCRA's timebar is jurisdictional in nature? The simple answer is that it's not — not even a little bit.[27]

Even if there were some pressing need to reconsider *Peterkin*'s viability for purposes of this case (though there most certainly is not), Judge McCaffery also fails to account for the principle of *stare decisis*. Adherence to precedent is "a foundation stone of the rule of law[.]" *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014). This Court has repeatedly declared that it honors the *stare decisis* doctrine to ensure "evenhanded, predictable, and consistent development of legal principles, foster[ ] reliance on judicial decisions, and contribute[ ] to the actual and perceived integrity of the judicial process." *Stilp v. Commonwealth*, 905 A.2d 918, 954 n.31 (Pa. 2006) (internal quotations and citation omitted); *accord Payne v. Tennessee*, 501 U.S. 808, 827 (1991). And we have recognized that changing course demands a special justification — over and above the belief that the precedent was wrongly decided — in matters involving statutory, as opposed to constitutional, construction. *See, e.g.*, *Commonwealth v. Doughty*, 126 A.3d 951, 955 (Pa. 2015) ("In cases resolved upon statutory interpretation, *stare decisis* does implicate greater sanctity because the legislature can prospectively amend the statute if it disagrees with a court's interpretation."), *citing Shambach v. Bickhart*, 845 A.2d 793, 807 (Pa. 2004) (Saylor, J., concurring) ("[*S*]*tare decisis* has

[27] Judge McCaffery expresses his fear that our inability to afford appellant relief based on our lack of jurisdiction means "the PCRA itself fails to afford sufficient due process and is therefore constitutionally infirm." Dissenting Op. (McCaffery, J.) at 2; *see also id.* at 3 (questioning whether it is reasonable to interpret the PCRA in a manner that "would put . . . all those similarly situated [to Williams] out of court"). The allegation of constitutional infirmity is completely unfounded; appellant has been "put out of court" only because he himself failed to preserve his claim or advance it at the opportune moment. Moreover, notwithstanding Judge McCaffery's discomfort with the fact that appellant is not entitled to relief under the PCRA, nothing precludes him from seeking relief in the federal courts. As well, should the United States Supreme Court in the future hold *Williams* applies retroactively on collateral review, appellant would presumably be able to invoke the new constitutional right exception to the PCRA and obtain relief that way.

'special force' in matters of statutory . . . construction [ ] because . . . the legislat[ure] is free to correct any errant interpretation of its intentions[.]"); *In re Burtt's Estate*, 44 A.2d 670, 677 (Pa. 1945) ("A statutory construction, once made and followed, should never be altered upon the changed views of new personnel of the court."); *see also Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (the principle that "in most matters it is more important that the applicable rule of law be settled than that it be settled right" is "commonly true even where the error is a matter of serious concern, provided correction can be had by legislation") (Brandeis, J., dissenting).[28]

In short, we respectfully decline Judge McCaffery's invitation to "refine" *Peterkin*, the result of which would be a drastic and massive shift in PCRA jurisprudence throughout this Commonwealth. Not only is there no present need for any such refinement, but principles of *stare decisis* and statutory construction weigh heavily against this course — especially in this particular case, where there is a total absence of any advocacy for such a radical change in the law.

IV. Conclusion

We appreciate the PCRA court's concern that "[t]he appearance of impropriety may overshadow even the most proper intentions." Trial Ct. Op., 11/6/2017, at 2. We can also understand the dissenters' fervent desire, if not their approaches, for creating some path by which appellant can avail himself of a remedy for the same due process

[28] Relatedly, Judge McCaffery neglects to note that when the Legislature recently amended Section 9545(b)(1) in 2018, it did not see any need to alter our longstanding interpretation of the statute as establishing a jurisdictional bar. *See, e.g., Fonner v. Shandon, Inc.*, 724 A.2d 903, 906 (Pa. 1999) ("The failure of the General Assembly to change the law which has been interpreted by the courts creates a presumption that the interpretation was in accordance with the legislative intent; otherwise the General Assembly would have changed the law in a subsequent amendment.") (citation omitted); *see also* 1 Pa.C.S. §1922(4) ("[W]hen a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language.").

violation that occurred in *Williams*. But we cannot just pretend appellant is on equal footing with Williams by ignoring the fact that he, unlike Williams, waived any issue concerning recusal. And even if we could overlook his waiver of the issue, we still could not override the strict jurisdictional mandates of the PCRA just because he presents a patently viable claim for relief which implicates structural error. *See, e.g.*, *Commonwealth v. Baroni*, 827 A.2d 419, 421 (Pa. 2003) ("The precept that structural errors can never be deemed harmless does not serve to create state court jurisdiction that otherwise is absent."); *accord Commonwealth v. Breakiron*, 781 A.2d 94, 100-01 (Pa. 2001) (explaining that "the bedrock nature of the [alleged] constitutional error," in and of itself, "has no bearing on the applicability of the PCRA's timeliness requirements"). *See also Bennett*, 930 A.2d at 1279 (Saylor, J., dissenting) ("Candidly, any formulation of a time limitation curtailing collateral judicial review must accept that some legitimate claims may possibly escape review.").

In this case, where appellant's petition failed to satisfy an exception to the PCRA's timebar, the PCRA court was without jurisdiction to consider appellant's untimely and waived due process claims. The court therefore lacked authority to reinstate appellant's *nunc pro tunc* right to appeal the denial of his first PCRA petition. In the absence of a valid reinstatement of those appellate rights, the instant appeal from the November 19, 2007 order denying post-conviction relief is untimely. *See* Pa.R.A.P. 903(a) (providing that a notice of appeal "shall be filed within 30 days after the entry of the order from which the appeal is taken"). As such, we have no choice but to quash this serial appeal. *See, e.g.*, *Commonwealth v. Bey*, 262 A.2d 144, 145 (Pa. 1970) ("The timeliness of an appeal and compliance with the statutory provisions which grant the right of appeal go to the jurisdiction of our Court and its competency to act. We are without the power to enlarge

or extend the time provided by statute for taking an appeal or to grant leave to file an appeal [*n*]*unc pro tunc*.") (citations omitted).

Appeal quashed.

Justice Mundy and Judges Murray and Dubow join the opinion.

Justice Donohue files a dissenting opinion in which Justice Wecht joins.

Judge McCaffery joins Section Three of Justice Donohue's Dissenting Opinion affirming the PCRA court's denial of relief in most respects but remanding for an evidentiary hearing regarding certain penalty phase claims.

Judge McCaffery files a dissenting opinion.