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SUPREME COURT OF PENNSYLVANIA

No. 8 EAP 2019

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

ELWOOD SMALL,

Appellant.

BRIEF OF *AMICUS CURIAE* THE PENNSYLVANIA INNOCENCE PROJECT

Appeal From the Order of the Superior Court of Pennsylvania dated October 29, 2018, No. 250 EDA 2018, Reversing the December 14, 2017 Opinion of the Court of Common Pleas of Philadelphia County at No. CP-51-CR-0521601-1982.

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INTEREST STATEMENT OF *AMICUS CURIAE*

Amicus curiae the Pennsylvania Innocence Project (the "Project") is a nonprofit legal clinic and resource center with offices at Temple University's Beasley School of Law and the Duquesne University School of Law. Its board of directors and advisory committee include practicing lawyers, law professors, former United States Attorneys, former state court prosecutors, and the deans of the law schools of Temple University, Villanova University, Drexel University's Thomas Kline School of Law, Duquesne University, and the University of Pittsburgh School of Law. In collaboration with private counsel who serve *pro bono*, the Project provides investigative and legal services to indigent prisoners throughout the Commonwealth of Pennsylvania. These individuals have claims of actual innocence that are supported by the results of DNA testing or other powerfully exculpatory evidence, or have claims that, after a preliminary investigation, evince a substantial potential for the discovery of such evidence. In addition, the Project works to remedy the underlying causes of wrongful convictions to ensure that others will not be convicted and imprisoned for crimes they did not commit. The Project seeks to ensure that the innocent are not punished, and on the other hand, that no wrongdoer will escape justice because an innocent person was convicted in his or her place.

The instant case is of particular interest to the Project as in some instances, evidence of innocence does not come to light until long after the time for a Post-Conviction Relief Act ("PCRA") petition would become due. Further, an innocent but incarcerated individual does not have the same access to the public record at large, and has limited means to gain access to information in the outside world even if occasionally afforded limited representation by counsel. The Project seeks to ensure that those individuals are not refused justice simply due to the situational constraints of incarceration.

The Project files its *amicus* brief to request that this Court continue to resist mandatory application of presumptions in the analysis of whether a successive PCRA petition is timely without reference to the petitioner's actual circumstances. Instead, this Court should require that a court reviewing a post-conviction petition conduct an analysis, as required by the statute, considering whether the claimed newly-discovered evidence was truly unknown to the petitioner, and whether the petitioner could have ascertained that information by the performance of due diligence. Such an analysis requires courts to recognize the limitations of incarceration on such petitioners' access to information and the public record. Without such instruction from this Court, it is certain that future meritorious post-conviction claims based on newly-discovered evidence will be inequitably denied.

Amicus curiae respectfully submits this Brief to this Court to address the public importance of this issue apart from and beyond the immediate interests of the parties to this case.

SUMMARY OF *AMICUS* ARGUMENT

The PCRA, at 42 Pa. Cons. Stat. § 9545(b)(1)(ii), allows petitioners to file petitions outside the statute's one-year time frame if their petitions are based on newly-discovered facts. By its plain language, this provision requires courts to analyze whether petitioners have exercised due diligence in ascertaining the facts on which their petitions are based to determine whether the petitioners have successfully invoked this exception to the PCRA's time bar. The public record presumption applied by the Superior Court here has no legislative origin and it operates to sidestep the statutorily-mandated analysis.

In *Commonwealth v. Burton*, this Court recognized the problems inherent in presuming that incarcerated petitioners with little to no access to information in the outside world could obtain otherwise public documents to support PCRA claims. It thus acknowledged a *pro se* exception to the public record presumption, holding that, if a *pro se* incarcerated petitioner's claim is based on a public record, the analysis should not stop there; instead, a PCRA court should proceed to analyzing whether that petitioner, given his or her particular circumstances, had exercised due diligence in obtaining the public record on which his or her claim was based.

Mr. Small's case illustrates why this distinction between represented and *pro se* incarcerated petitioners is unworkable. Only once Mr. Small had *pro bono* counsel did he receive the transcript he had spent years trying to retrieve. On

August 29, 2017, *pro bono* counsel obtained the transcript of Bell's 1993 PCRA hearing, and Mr. Small received the transcript from counsel on September 3, 2017. On October 30, 2017, within 60 days of obtaining the transcript, Mr. Small's *pro bono* counsel filed an Amended PCRA petition.[1] The PCRA court awarded Mr. Small a new trial based on the new evidence and a due process violation raised in his PCRA petition. The Pennsylvania Superior Court reversed, holding that Mr. Small's claims were time barred.

At the crux of the Superior Court's reversal is the judicially fashioned "public records presumption," which provides that a PCRA petitioner can be held to have constructive knowledge of facts that exist in the public record. The Superior Court, in reviewing the PCRA court's grant of a new trial, found that Bell's testimony was not unknown based solely on the presumption. *Commonwealth v. Small*, No. 250 EDA 2018, 2018 Pa. Super. Unpub. LEXIS 4033, at *9 (Pa. Super. Ct. Oct. 29, 2018). The Superior Court acknowledged that *Commonwealth v. Burton* abrogated the presumption as to *pro se* petitioners, but also found that the PCRA court improperly applied the newly-discovered fact exception to Mr. Small, since he was, at times, represented by counsel. *Id.* at *9–

[1] This amendment was filed within 60 days of Mr. Small's receipt of the transcript. It was also filed within 60 days of counsel's obtaining the transcript, as the 60th day, October 28, 2017, fell on a Saturday.

10. The Superior Court thus determined that Mr. Small's petition was untimely and vacated the grant of a new trial.

Expecting that counsel, such as in Mr. Small's case, appointed to assist with a PCRA petition on a discrete issue, would have seen the unrelated 1998 opinion or recognized the implications of Bell's testimony, is unrealistic. To prevent a petitioner from bringing a claim based on newly-discovered evidence because their counsel failed to review unrelated case law is simply unfair, and violates the plain language and intent of the PCRA, which exists to provide "for an action by which persons convicted of crimes they did not commit . . . may obtain collateral relief." 42 Pa. Cons. Stat. § 9542.

This Court should now abandon any application of the presumption as to all incarcerated petitioners. Dismissing meritorious newly-discovered evidence claims based on the presumption is unnecessary; rather, courts should simply apply the plain language of the statute, in all cases, and analyze whether the facts were unknown to the petitioner and whether they could have been ascertained by due diligence. Any other approach is not only contrary to the statutory language, but will further promote the injustice that results from an unfair application of the presumption to incarcerated petitioners.

ARGUMENT

I. This Court Has Made Clear That The Public Records Presumption Should Not Apply to Those With Limited Access

A. Statutory Framework and the Development of the Public Records Presumption

In Pennsylvania, the PCRA, 42 Pa. Cons. Stat. §§ 9541-9546, provides limited grounds for challenging a conviction after judgment becomes final. Petitioners requesting relief pursuant to the PCRA not only have to meet strict substantive requirements, but must meet unbending time limitations for filing their petitions. Even a PCRA petition that raises substantive claims with unquestionable merit must be dismissed if untimely, as the PCRA's timing provisions have been held to operate as a jurisdictional bar to judicial review.

The statute provides limited exceptions to the strict one-year time constraint. 42 Pa. Cons. Stat. § 9545(b)(1) sets out three instances where a petitioner can overcome the one-year time limitation, including subsection (b)(1)(ii). This subsection allows for circumvention of the one-year filing deadline when the petitioner alleges and proves that "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence." Courts refer to this subsection as the "newly discovered fact" exception. To successfully invoke this exception, a petitioner must show: i)

that the fact was unknown to the petitioner, and ii) that the petitioner could not have ascertained the information with the exercise of due diligence.

Within the question of whether the alleged new facts were unknown to the petitioner, Pennsylvania courts have inserted a consideration of whether the facts in question are publicly available. Beginning with *Commonwealth v. Lark*, 746 A.2d 585 (Pa. 2000), and progressively developing through case law including *Commonwealth v. Chester*, 895 A.2d 520 (Pa. 2006) and *Commonwealth v. Taylor*, 67 A.3d 1245 (Pa. 2013), courts began using what is known as the "public record presumption" to find that petitioners did not meet the "unknown" requirement of subsection 9545(b)(1)(ii) if the information on which their claims were based could be deemed a matter of public record. If the information is available publicly, courts find, based on the presumption, that the petitioner is said to have "constructive notice" of the information and therefore it is not "unknown" as required by the PCRA. *See Commonwealth v. Lark*, 746 A.2d 585, 588 n.4 (Pa. 2000) .

The presumption originated from this Court's *dicta* in *Lark*, footnote 4, and from that point evolved into a bright-line rule to excuse courts from conducting the analysis required by the statute. This Court has recognized that the presumption presents clear issues that should not be ignored. *See Commonwealth v. Burton*, 158 A.3d 618, 635 n.20 (Pa. 2017) ("It may be that this Court should reconsider the public record presumption in general if that opportunity presents itself, but this

case does not involve such a broad issue."). The public record presumption has been developed and applied without the benefit of explanation or explicit instruction from this Court, and is "based upon the legal fiction that if a fact is available through some public resource, it is then ascertainable through the exercise of due diligence." *Burton*, 158 A.3d at 640–41, n.4. The dissent explicitly called the presumption's validity into question, stating, "Perhaps this Court should examine the whole of this presumption at some point in a future case when the issue is before us . . . ." *Id.* at 640. That issue is now before this Court, and therefore it is time for the presumption to be examined and eliminated.

There is no "public record presumption" identified in the statute; the presumption has instead operated as a judicially created short-cut for the analysis prescribed by subsection 9545(b)(1)(ii). This presumption has functioned to prevent likely meritorious claims based on newly-discovered facts from being reviewed. *See, e.g., Commonwealth v. Lopez*, 51 A.3d 195 (Pa. 2012) (PCRA petition dismissed summarily based on the presumption); *Commonwealth v. Taylor*, 67 A.3d 1245 (Pa. 2013) (PCRA petition dismissed based on the presumption; petitioner said to have knowledge of facts contained in docket). Since courts are barred from reviewing the merits of any claims not brought within the one-year time frame or that meet the exceptions of subsection 9545(b)(1), if a court determines that a petitioner's claim is untimely, even an innocent petitioner who

now has proof of his or her innocence would not be entitled to relief if the new evidence could be deemed to be "public."

This dilemma is illustrated by *Commonwealth v. Edmiston*, 65 A.3d 339 (Pa. 2013). In *Edmiston*, the petitioner's claim of newly-discovered evidence involved a National Academies of Science Report which called into question the forensic testing used to prove the petitioner's guilt. *Id.* at 350–52. The Report was published in 2009, and the petitioner filed a PCRA petition based on the Report, which the petitioner argued constituted newly-discovered evidence, within 60 days of the Report's publication. *Id.* at 352–53. However, the Court denied the petitioner's request for review, stating that the PCRA petition was untimely. *Id.* Notably, the Court held that because the data and research upon which the Report was based were publicly available prior to the publication of the Report in 2009, the petitioner did not meet the requirements of the newly-discovered fact exception to the PCRA time limits. *Id.* at 352 ("Specifically, the NAS Report refers to various studies and reports published in the public domain as early as 1974 and as recently as 2007. As such, the information relied upon by Appellant in the Report constitutes facts that were in the public domain . . . ."). Thus, the Court denied the petitioner's request for review due to untimeliness.

Since it can be used to shortcut full consideration of claims, including meritorious claims, the presumption is patently unfair when applied to incarcerated

petitioners. These are petitioners who, by the nature of their incarceration, do not have the same access to the public record as those on the outside. Not only is the presumption unfair in such circumstances, but it prevents courts from considering and properly analyzing the requirements of subsection 9545(b)(1)(ii). In the instant case, this Court is tasked with considering whether the presumption is fairly ascribed to any incarcerated petitioner. The answer to this question is that it is not. Moreover, the distinction between *pro se* and represented petitioners is rife with issues, unfairly ascribes access to petitioners whose counsel is unlikely to uncover the subject information, and will continue to lead to unjust outcomes.

B. The *Burton* Court Confirmed that the Presumption May Not Be Used to Arbitrarily Reject Claims Based on Newly Discovered Facts

In *Commonwealth v. Burton* this Court made clear that the presumption does not, and should not, apply to *pro se* prisoners. Instead, courts must consider whether the information was truly unknown to the prisoner and conduct a due diligence analysis, as required by the plain language of the statute. This analysis must occur regardless of whether the subject evidence could be deemed part of the public record. Simply put, to qualify for an exception to the PCRA's time limitations under subsection 9545(b)(1)(ii), a petitioner need only establish that the facts upon which the claim is based were unknown to him and could not have been ascertained by the exercise of due diligence. *Burton*, 158 A.3d at 629.

The *Burton* Court, in holding that the presumption cannot reasonably be applied to incarcerated *pro se* PCRA petitioners, relied on both the requirements of subsection 9545(b)(1)(ii) and the Court's holding *Commonwealth v. Bennett.* In *Bennett*, this Court held that the presumption that information that is of public record cannot be deemed "unknown" for the purposes of subsection 9545(b)(1)(ii) does not apply to incarcerated *pro se* petitioners. 930 A.2d 1264, 1474–75 (Pa. 2007). The *Bennett* Court reasoned that the application of the presumption to *pro se* petitioners was contrary to the plain language of subsection 9545(b)(1)(ii). Further, a strict application of the presumption operated as a bar to claims (including claims with merit) without any consideration of whether the petitioner had actual access to the information that was deemed to be of public record. *Bennett,* 930 A.2d at 1275. This was properly determined to be unfair, as well an incorrect application of subsection 9545(b)(1)(ii).

In order to correctly apply the statute as interpreted by *Bennett*, *Burton*, and their progeny, an analysis of subsection 9545(b)(1)(ii) requires the PCRA court to consider whether the information or evidence was actually unknown to the petitioner, and whether the petitioner, exercising of due diligence, would have been able to ascertain such information.

This is a fact-based inquiry and may not, in any event, be sidestepped by the presumption, and is only hindered by its application. As part of the knowledge

inquiry, a PCRA court **must** recognize that prisoners are not in the same position as others who have the ability to travel freely, access to the internet, can request transcripts, can more easily conduct due diligence, and have adequate means at their disposal to discover "public" facts. Despite the clear mandate of *Burton* and *Bennett*, lower courts have continued to dismiss PCRA petitions due to the alleged public availability of the subject information, instead of conducting the analysis laid out in the statute and that has been adopted, time and again, by this Court.

C. This Court's Mandate in *Burton* and *Bennett* Was Necessitated by the Unfairness and Injustice that Resulted From Applying the Presumption to Incarcerated Petitioners

The rationale behind the presumption is that in order to qualify for review of an otherwise untimely PCRA petition under subsection 9545(b)(1)(ii), the petitioner must demonstrate that the underlying evidence is a "new fact," and information that is part of the public record is not unknown. *See Commonwealth v. Edmiston*, 65 A.3d 339, 352 (Pa. 2013). Similarly, the information must "not merely [be] a newly discovered or newly willing source for previously known facts." *Id*. These exceptions are understandably narrow—if a petitioner intends to file a PCRA petition after the time limitations, there needs to be a good reason for the delay. Claims of legal error or issues with one's prosecution should be brought on direct appeal or through an initial PCRA petition and within a year of the judgment being finalized to promote finality. Further, when excessive amounts of

time lapse between the finalization of judgment and later PCRA petitions, evidence, information, and witnesses become difficult if not impossible to locate.

However, when new information surfaces, especially that which proves one's innocence or uncovers serious defects in the prosecution of a crime such as *Brady* claims, justice requires that such information be reviewed. If, years later, a witness recants testimony that was decisive in the conviction of the accused, courts must take the time to review the facts and determine whether the recantation is credible—otherwise, an innocent citizen, wrongfully accused and convicted, will continue to be illegitimately imprisoned based on that false testimony while a wrongdoer remains uncharged.

This Court recognized the importance of allowing review of claims based on newly discovered evidence when deciding *Burton* and *Bennett* because it recognized that the presumption often prevented petitioners from bringing claims even when the evidence at issue was truly unknown. This is because incarcerated petitioners do not have access to the public record. Due to the condition of incarceration, inmate petitioners are unable to access court information and their access to information is greatly limited and censored. Not only is access constrained, but inmates are not given unlimited time to do research, and instead, are restricted in the amount of time they can spend in out-of-date prison law

libraries. To hold these individuals to the same standard as free citizens with limitless access to information is flagrantly unfair.

In *Bennett*, this Court recognized that the public record presumption, while "attractive in its simplicity," did not assess the factual circumstances fairly and as required by subsection 9545(b)(1)(ii). *Bennett*, 930 A.2d at 1275. The newly-discovered facts in *Bennett* involved the appointment of counsel, including counsel's failure to file a notice of appeal, which prevented review of the petitioner's claims on appeal. *Id*. This Court acknowledged that the court records would not have been sent to the petitioner (since he was, at one point, represented by counsel), and that it would be unfair to apply the presumption. *Id*.

Burton builds on this concept, as the *Burton* Court determined that the presumption is not properly applied to those individuals who are incarcerated. 158 A.3d at 638. In *Burton*, this Court recognized the very limited access prisoners have to information. *Burton*, 158 A.3d at 636 (acknowledging the Exonerees' *amicus* brief which explained that prison law libraries do not have web-based research tools, and instead, prisoners must "view materials which have been loaded onto the computer from a CD-ROM and which are periodically updated."). The Exonerees, all previously incarcerated individuals who were proven innocent of their crimes and released, explained that none of them ever had any type of internet access during incarceration, never heard of others having such access, and

additionally noted that many prisoners would likely not know how to use such tools even if they had access to them. *Id*. Prisoners do not have access to dockets, and even if they are able to contact the clerk's office, they either will be ignored, told they are not allowed to access such information, or will not be able to pay the fees for copies. *Id*. at 636–37. The Exonerees also indicated that the time inmates are allowed to use the law library is very limited. *Id*. ("Exonerees note that prisoners have limited physical access to prison law libraries, as they must submit a request and be granted permission to use the library . . . Exonerees contend that they did not receive six hours of access per week.").

In *Burton*, this Court acknowledged that inmates simply do not have access to the public record and as a result, it would be unfair to apply the presumption that improperly ascribes that knowledge to them. *See also Commonwealth v. Brown*, 141 A.3d 491, 508 (Pa. Super. Ct. 2016) (finding that information related to petitioner's underlying *Brady* claim could constitute after-discovered evidence, triggering the newly discovered fact exception to the PCRA time bar, and thus requiring the PCRA court hold an evidentiary hearing); *Commonwealth v. Medina*, 92 A.3d 1210 (Pa. Super. Ct. 2014) (holding that witnesses' recantation of trial testimony met the requirements of subsection 9545(b)(1)(ii)); *Commonwealth v. Davis*, 86 A.3d 883, 888 (Pa. Super. Ct. 2014) (petitioner was not required to search for transcripts in unrelated case files when he did not know about the

witness's deal with the Commonwealth). Incarcerated petitioners are unquestionably limited in what information they have access to, and are greatly disadvantaged by the incorrect assumption that they can access public records.

II. Mr. Small's Case Demonstrates that the Presumption is Unworkable For *All* Incarcerated Individuals, Whether or Not They Are Represented.

Mr. Small's circumstances raise an additional concern as to how courts apply subsection 9545(b)(1)(ii) as interpreted by *Bennett* and *Burton*. The Superior Court determined that the information sought by Mr. Small—the Bell transcripts—was not "unknown" based on *Burton* because at times, Mr. Small was represented by counsel. *See Commonwealth v. Small,* No. 250 EDA 2018, 2018 Pa. Super. Unpub. LEXIS 4033, *10 (Pa. Super. Ct. Oct. 29, 2018) ("Based on the foregoing, for over four years, from September 30, 2008 until January 10, 2013, Appellee was not a *pro se* prisoner, and Bell's testimony could not be considered 'unknown.'"). The Superior Court's reasoning in this regard brings to light additional problems with the presumption.

In *Burton,* footnote 20, this Court recognized that there could be problems with the presumption generally for petitioners regardless of whether they are represented. *See Burton*, 158 A.3d at 635, n.20. While that issue was not before this Court in *Burton*, it certainly is present in the instant case. The Superior Court denied Mr. Small's petition based on the fact that the information in question

(Bell's testimony) could not be deemed to be unknown because he was represented by counsel at times, and therefore, *Burton* did not control.

This approach is problematic for a variety of reasons. Mr. Small's counsel was tasked with representing him on a limited issue, for a discrete period of time, and it is unlikely that counsel would have read the opinion where Bell's revisionist testimony was referenced. The Superior Court opinion referencing Bell's testimony was published in 1998—Mr. Small was not represented at that time. In 2007, the court had appointed counsel to represent Mr. Small with respect to a *pro se* PCRA petition which dealt with juror bias, a specific issue unrelated to Bell's then-pending PCRA petition. *Commonwealth v. Small*, No. 250 EDA 2018, 2018 Pa. Super. Unpub. LEXIS 4033, *2 (Pa. Super. Ct. Oct. 29, 2018). It would be unreasonable to expect or require appointed counsel, representing Mr. Small with respect to a claim of juror prejudice, to look into court opinions concerning unrelated issues for references to testimony of Mr. Small's co-defendant. In *Commonwealth v. Davis*, 86 A.3d 883, 888 (Pa. Super. Ct. 2014), the court agreed that a PCRA petitioner was not required to search for transcripts in unrelated case files—it would be unreasonable to expect counsel appointed for a limited issue, as was the case here, to do the same.

Mr. Small's case is just one example of where questions about representation illustrate problems with the presumption and its current application.

In *Commonwealth v. Brensinger*, No. 212 EDA 2017, 2018 Pa. Super. 48 (Pa. Super. Ct. Mar. 5, 2018), *vacated for arg. en banc*, 2018 Pa. Super. LEXIS 506 (Pa. Super. Ct. May 15, 2018) (*en banc* decision currently outstanding), the Superior Court affirmed the denial of a PCRA petition attempting to invoke the newly-discovered fact exception to the PCRA time limitations.[2] In *Brensinger*, the petitioner argued that expert opinions from 2015, which rejected the theory that Shaken Baby Syndrome caused the death of the petitioner's girlfriend's daughter (the victim of the criminal case against him), constituted newly-discovered evidence and permitted review of his otherwise untimely PCRA petition. *Id.* at 1–2. The petitioner was prosecuted in 1998, and the expert opinions supporting his claims were dated 2015, but relied on data and research spanning from as early as 2001. *Id.* at 6–7. The Superior Court accepted the testimony from experts who explained that the science involving Shaken Baby Syndrome had changed dramatically during this time period. *Id.* at 9.

The *Brensinger* Court noted that the petitioner filed his PCRA petition based on the expert reports within 60 days of receiving the reports, but "not within 60 days of scientific determinations supporting those opinions." *Id.* at 7–8. The Superior Court stated, "While the experts' reports prepared for [Mr. Brensinger's]

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[2] *Amicus curiae*, The Pennsylvania Innocence Project, represents Mr. Brensinger.

case were dated 2015, it is clear the science supporting those reports was known when those experts testified [in 2014]." *Id.* at 10. This provided a basis for determining that the underlying information regarding the change in understanding about Shaken Baby Syndrome was "public" for the purposes of the presumption, and thus, was deemed to be "known" to Mr. Brensinger.

The Superior Court further found that the PCRA court was justified in concluding that the petitioner was represented by counsel since at least 2009, and that the petitioner "did not prove he was unrepresented." *Id.* at 11–12. Thus, he did not qualify for the exemption from the public record presumption identified in *Burton*. Despite the fact that the petitioner provided evidence at the PCRA hearing that prevailing scientific norms about Shaken Baby Syndrome had changed since he was convicted, his petition was dismissed as untimely. *Id.* at 9–10.

Notably, the Dissenting Opinion by Judge Panella in *Brensinger* discusses two important issues to the instant case—the tension between the presumption and the newly-discovered facts exception, and issues related to the timing of representation. The *Brensinger* dissent notes that the *Burton* dissent opined that "it may be advisable for this Court to abandon what the [m]ajority has articulated as the public record presumption, in favor of an evidence-based criteria which reflects the plain language of the newly-discovered-facts exception." *Brensinger Dissent*, at 2, citing *Burton*, 158 A.3d at 642 n.6. Judge Panella likewise advocated for an

evidence-based analysis of whether facts are known for the purposes of the newly-discovered facts exception to the PCRA time limits, demonstrating that other Pennsylvania adjudicators have called the presumption's validity into question. *Id.*

The *Brensinger* dissent also disagreed with the factual findings of the PCRA court and majority opinion, which determined that Mr. Brensinger was represented since at least 2009, if not 2011, stating unequivocally that "the record does not support this finding." *Brensinger Dissent*, at 3. The opinion then discusses the factual questions related to when Mr. Brensinger was represented by Attorney Freeman and the Pennsylvania Innocence Project, finding that the record reflected that representation did not officially begin until 2015. *Id.* at 3–4. Further, the dissent took issue with a finding of representation by Attorney Freeman beginning in 2009 based on testimony that Attorney Freeman "reviewed the case for the first time in 2009." *Id.* at 5. Testimony by Mr. Brensinger indicated that he did not believe he was represented by either the Project or Attorney Freeman until 2015. *Id.* at 5–6. The record was clear, in the dissent's opinion, that Mr. Brensinger was only a prospective client until 2015.

Brensinger illustrates how even reasoned jurists can disagree as to questions of the timing of representation—a crucial consideration as to whether the presumption applies. It is undeniable that an adoption of the Superior Court's approach in Mr. Small's case will raise many additional questions as to how the

presumption should be applied. The distinction between *pro se* and "represented" PCRA petitioners, for the purposes of the presumption, creates more questions and concerns without necessity or logic.

A. What Qualifies As Representation?

The Superior Court's finding that Mr. Small was represented and thus did not qualify for the exemption from the public record presumption mandated in *Burton* raises the critical question of what representation means when applying the presumption. Although Mr. Small was represented from September 30, 2008 until January 10, 2013, after Bell's testimony in 1993 and the accompanying opinion in 1998, he was not represented at the time of the testimony itself, nor when the opinion that gave rise to Mr. Small's claim was published. Does this mean that petitioners that are represented **any time** after the alleged newly discovered evidence do not qualify for exemption from the public record presumption contemplated by *Burton*? What if the petitioner is represented by *pro bono* counsel with respect to civil constitutional claims against a prison pursuant to the Prison Litigation Reform Act—would that count as representation relevant to the presumption?

The determination that Mr. Small was represented, despite such representation being by appointed counsel and only occurring for certain periods of time and for unrelated topics, illustrates an ongoing problem for courts and PCRA

petitioners alike. Clearly it would be unfair for a court to hold that the presumption applied to bar review of a PCRA petition based on newly discovered facts due to subsequent representation in a claim against the prison based on conditions of confinement.

This approach also raises questions about the effectiveness of PCRA counsel in subsequent PCRA petitions. If counsel misses something, like Bell's testimony in Mr. Small's case, does that mean they were ineffective, since they missed information that would have gave rise to a meritorious PCRA claim that the petitioner is now barred from bringing before the courts? The implications could also have an effect on appointed or *pro bono* counsel, who may have concerns about whether they are now required to search through the case history of co-defendants (or any individual related to their PCRA client's prosecution). The Superior Court's determination that Mr. Small was "represented" demonstrates that there may be more issues with the question of "representation" than previously recognized.

B. Does the Scope of Representation Matter?

Most incarcerated petitioners bringing subsequent PCRA petitions, if represented at all, have appointed or *pro bono* counsel, and the scope of that representation is a critical issue. Certainly the Court recognizes the limitations of *pro bono* and appointed counsel, and it would be unreasonable to expect an

attorney, appointed to represent an indigent prisoner on a relatively limited issue on appeal, to spend hours searching the docket or conducting legal research for cases that could have any potential implications for their client or scouring the public domain for potentially relevant material. In Mr. Small's case, would it have been realistic to expect that counsel would have found the opinion or transcript with Bell's testimony? (Or recognize its value?) We respectfully argue that it is not.

The majority of PCRA petitioners, even when represented, typically have appointed or *pro bono* counsel, and the scope of that representation is at best limited and, at worst, unclear. Appointed counsel is unlikely to receive funds for investigative purposes outside investigation of the issues in the specific petition they were appointed to litigate. Appointed counsel is unlikely (or unable) to request every potentially relevant transcript to discern whether newly-discovered facts have come to light after the PCRA time limit has lapsed. Appointed counsel will generally be appointed for specific periods of time[3] and for specific and discrete issues.

Not only would scope of representation be an issue likely to be litigated time and again in the future, but it presents fact specific concerns that would make it

[3] Although, the timing of representation, as demonstrated in *Brensinger*, may also be a difficult question to answer conclusively.

difficult to create a bright line rule. If a bright line rule is adopted, it almost certainly will prevent incarcerated PCRA petitioners with meritorious claims based on newly-discovered facts from the benefit of judicial review of their claims. It would be unfair to punish petitioners by preventing their petitions from receiving review due to the fact that counsel did not ascertain facts that could give rise to relief under the PCRA.

Even competent and thorough counsel could be affected by the concerns that they could miss facts that might disadvantage their client or could give rise to subsequent PCRA petitions. This could even affect whether some attorneys would be willing to take on such appointments or *pro bono* assignments, due to concerns about the potential existence of currently unknown information or that they could be the subject of subsequent PCRA claims based on ineffective assistance if something is missed. It would also be unclear what the rule is for petitioners with appointed counsel—would counsel have one year after the date of appointment to discover new facts, or would new facts be discoverable any time during the period of appointed counsel's representation of the petitioner?

These are just the concerns and issues that come to mind based on consideration of this issue without the benefit of knowing how it will be applied in the future by PCRA courts or other issues that will come up over time. It is certainly likely that questions about scope of representation in this context that are

not contemplated here will also arise as a result of the Superior Court's reasoning. The most pragmatic, simple, and fair approach, considering all of these issues, would be to require courts to perform the knowledge and due diligence analysis, as contemplated by subsection 9545(b)(1)(ii), without relying on any public record presumption, regardless of whether or not the petitioner is represented.

III. Lower Courts Have Not Applied *Burton* in the Manner this Court Prescribed

Despite the thorough discussion of this issue in *Burton* and *Bennett*, courts have continued to prevent the review of the merits of claims based on the same reasoning, even if they do not say that the presumption provides that the facts could not have been unknown to the petitioner. This Court's attempt to instruct lower courts on the proper application of subsection 9545(b)(1)(ii) is unavailing. Based on the failure of lower courts to accept and apply this Court's mandate in *Bennett* and *Burton*, further instruction from this Court is warranted.

In *Commonwealth v. Robinson*, 185 A.3d 1055 (Pa. Super. Ct. 2018), the Superior Court rejected a PCRA petition that alleged that years after entering a guilty plea, the petitioner was informed that his plea counsel was a drug-user, confirming his concerns about the conduct of his counsel during his prosecution and plea entrance, and ultimately demonstrating that his counsel was ineffective. *Id*. at 1057–58. The PCRA court denied the petition based on the merits of the

claim, but the Superior Court affirmed the petition's denial on alternate grounds—that the petition was untimely. *Id*. at 1064–65.

Throughout the opinion it is clear that the court used the presumption without expressly stating that the presumption barred the petition. The Superior Court stated that the underlying claim of ineffective assistance provided reason for the petitioner to seek out the public information and his failure to do so indicated that the petitioner did not exercise due diligence.[4] *Id*. at 1063–64. However, the *Robinson* court did not consider whether incarceration prevented the petitioner from ascertaining the allegedly public information, as this Court instructed in *Burton*. The PCRA court in *Robinson* reasoned that the petitioner did not have a claim because trial counsel's plea to drug trafficking charges in 1994 (based on crimes committed in 1991 and 1992) could not have affected his representation a decade earlier. *Id*. at 1058. On the other hand, the Superior Court found that the petitioner should have known about trial counsel's drug issues due to his experience with counsel and based on earlier newspaper articles that alluded to

[4] Notably, the court in *Robinson* found that the failure of the petitioner to conduct due diligence was based (in part) on newspaper articles that came out about his counsel's drug use around the time of the subject representation; yet, this Court has stated that newspaper articles "are no more evidence than allegations in any other out-of-court situation," in *Commonwealth v. Castro*, 93 A.3d 818, 825 (Pa. 2014). Thus, the petitioner in *Robinson* may not have truly had a cognizable claim based on counsel's drug usage until his counsel's indictment and testimony during counsel's plea years later, which occurred long after the petitioner was represented by counsel. Any filing based on the newspaper articles would have been denied, and only once real evidence of counsel's drug issues came to light would the petitioner have had a cognizable claim. However, the merits of his claim were never reviewed.

counsel's drug problems.[5] *Id*. at 1064–65. Neither opinion considered whether the condition of incarceration prevented the petitioner from having actual knowledge about counsel's drug issues, which were first alleged by the newspaper articles and then confirmed in 1994 when the attorney testified that he had been using cocaine regularly since 1979. *See id*. at 1058.

The *Robinson* case demonstrates that courts have missed the instruction from *Burton*, namely, that when considering whether information was unknown to a PCRA petitioner, the constraints of incarceration, including lack of access to information, must be considered. The *Robinson* court did not recognize this, and instead, used the public nature of the information at issue to find the petitioner failed to conduct due diligence.

Lower courts would benefit from a reminder that they may not presume that information in the public record is accessible to incarcerated petitioners. In order to preserve the mandate set out in *Burton* and *Bennett*, courts must again be instructed to consider and analyze whether the information at issue could have been ascertained by the petitioner, or if the condition of incarceration prevented the information from being known or able to be accessed, even with the exercise of due diligence.

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[5] It is likely that the petitioner in *Robinson* was represented by counsel for his direct appeal and possibly his first PCRA—in any event, immediate appellate counsel similarly failed to learn of trial counsel's drug issues alleged in the newspaper articles or elsewhere.

IV. Courts Should Be Required to Analyze Subsection 9545(b)(1)(ii) Consistent with the Statute and this Court's Precedent

The attempts of this Court to instruct lower courts on the proper application of the public record presumption have been unsuccessful. After *Bennett*, courts continued to deny claims based on the presumption, and even after *Burton*, the same rationale is being used to prevent review of claims made timely by the newly-discovered facts exception. In any event, the presumption is simply unfair as applied to any incarcerated individuals, and is not supported by the language of the statute. In order to prevent further injustice and confusion, and to ensure that the statute is applied as written, the presumption must be struck down.

Distinguishing *pro se* inmates from "represented" inmates for the purposes of the newly-discovered facts exception to the PCRA time limits is problematic because representation does not extend into perpetuity and this approach will create additional analysis in each case regarding scope of representation. Questions about scope of representation, what is representation, who is represented, and the applicable time period of representation will increase the complexity of a relatively simple analysis posed by subsection 9545(b)(1)(ii).

Presuming that information is public knowledge for petitioners that, due to their incarceration, are not themselves in the public sphere, is unfair and unworkable. This was acknowledged in *Bennett* and *Burton*. However, the fact that a petitioner is represented does not present a complete safeguard as

contemplated by the distinction between *pro se* and represented petitioners. As discussed, appointed and *pro bono* counsel are unlikely or unable to catch every fact, opinion, or newspaper article that could have an effect on their PCRA client's case. Further, the expectation that they would catch every fact, opinion, or newspaper article that could have bearing on their PCRA client's rights is unrealistic and unreasonable. Eliminating the presumption would simply require courts, when considering whether a PCRA petitioner has met the requirements for an exception from the one-year deadline for filing, to analyze whether the subject information was unknown, and whether the petitioner had conducted due diligence.

This is a fairly straight-forward analysis, and must be conducted without reference to any presumption. This approach is necessitated by the fact that these petitioners are incarcerated—they do not have access to "public" information. Further, even when PCRA petitioners become aware of a fact, it might be nearly impossible for them to get access to it (as illustrated by Mr. Small's inability to get Bell's transcript despite multiple attempts).

Eliminating the presumption will also promote judicial economy. As demonstrated *supra,* the Superior Court's approach will only create more questions, and with that, more litigation. Who is represented, when representation occurred, when did representation end, what was the scope of representation—

these questions will likely result in additional litigation on this topic.[6] Instead of inviting later review, finality can be achieved by simply requiring the analysis set forth in the statute. This is the only way to ensure that meritorious claims based on newly-discovered facts are fairly reviewed, and that the innocent are provided the necessary access to justice that our system promises.

[6] This Court likely appreciates concerns about creating seemingly never-ending litigation on what seems discrete but ends up being an unclear concept; for example, decades later, courts are still dealing with the question of "what is a strike" with respect to the Prison Litigation Reform Act—a law with the purpose (ironically) of reducing the amount of litigation.

CONCLUSION

Courts are bound to apply the law as it is written. Yet, since its inception, the public record presumption has prevented exactly that—instead of conducting the petitioner-specific due diligence analysis required by the language of the PCRA, courts instead have weaponized the presumption to dismiss petitions claiming newly-discovered facts without considering whether the facts were actually unknown to the petitioner.

Incarcerated petitioners have no access to that which is public. That is, in part, what incarceration is—detention and removal from society. It must be acknowledged that the system is not perfect, and there are many innocent people who are convicted of crimes and imprisoned. One way that such grave injustices can be remedied is by permitting those persons, if the opportunity presents itself, to produce evidence to the court proving their innocence. This must be an available remedy regardless of whether the subject information could be deemed public, and regardless of whether an innocent petitioner was ever represented by counsel.

In order for the justice system to live up to its name, it must be just. Justice requires the law to be applied equally to all, both the guilty and the innocent. Elimination of the presumption will promote a fair, equitable, and just application of the law, for all incarcerated petitioners, by requiring courts to conduct the

analysis that was intended, as evidenced by the unambiguous language of the statute.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Pa.R.A.P. 2135 (d), this is to certify that the foregoing *Amicus Brief* for the Pennsylvania Innocence Project complies with the word count limit set forth in Pa. R.A.P. 2135 (a) (1). The word count of the word processing system used to prepare this brief states that those sections that shall be included in the word count under Rule 2135 (b) contain **6,846** words.

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