No. 8 EAP 2019

IN THE SUPREME COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

v.

ELWOOD SMALL,
Appellant.

BRIEF OF *AMICI CURIAE* THE PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA IN SUPPORT OF APPELLANT

On appeal from the Superior Court's October 29, 2018 Panel Decision, at 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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Authorities

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici, the Pennsylvania Association of Criminal Defense Lawyers and the American Civil Liberties Union of Pennsylvania, share a mission of working toward the fair administration of justice by advocating for the rights of persons charged with, convicted of, and imprisoned for crimes. *Amici* believe that the Commonwealth's power to restrict liberty should rest upon evidence and substance, rather than procedural technicalities, and that the Commonwealth's courts should have the ability to examine that evidence and substance when the interests of justice require it. *Amici* contend that this Court has incorrectly labeled the time limit set forth in Pennsylvania's Post Conviction Relief Act ("PCRA") as a jurisdictional deadline, rather than a statute of limitations, and by doing so has made the administration of justice less just, as well as less efficient. *Amici* urge this Court to use this appeal as an opportunity to revisit its prior pronouncements on this issue and hold that the time limits in the PCRA statute do not affect the jurisdiction of PCRA courts. *Amici* provide further information about each of their organizations' missions and interests below.[1]

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[1] No entity other than *Amici* and their counsel authored or paid for this brief.

THE PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Pennsylvania Association of Criminal Defense Lawyers ("PACDL") is a professional association of attorneys admitted to practice before the Supreme Court of Pennsylvania who are actively engaged in providing criminal defense representation. As *Amicus Curiae*, PACDL presents the perspective of experienced criminal defense attorneys who seek to protect and ensure by rule of law those individual rights guaranteed in Pennsylvania, and who work to achieve justice and dignity for defendants. PACDL includes approximately 900 private criminal defense practitioners and public defenders throughout the Commonwealth.

AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA

The American Civil Liberties Union of Pennsylvania ("ACLU") is an affiliate of the American Civil Liberties Union, a nationwide, nonprofit, nonpartisan public interest organization. The ACLU has an interest in the fairness of the criminal justice system. It has often participated as *amicus curiae* or as direct counsel in cases involving the fairness and workings of the criminal justice system, including cases involving post-conviction appeals. Like the PACDL, the ACLU has an interest in ensuring that the PCRA's time limits are applied fairly and equitably.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

"The principle of *stare decisis* does not demand that we follow precedents which shipwreck justice." *Flagiello v. Pa. Hosp.*, 208 A.2d 193, 205 (Pa. 1965). In this appeal, the Court will address the issue of whether the PCRA petition of Appellant, Elwood Small, falls within the statutory exception to the PCRA time limits set forth in 42 Pa. Stat. § 9545(b)(1)(ii). *Amici* agree that the petition falls within that exception, as the PCRA court held and as Appellant and *Amicus Curiae* Innocence Project of Pennsylvania demonstrate in their briefs, and that this Court should therefore reverse the Order of the Superior Court.

Amici, however, urge this Court to go a step farther, revisit its little-considered and legally incorrect precedent, and hold that the PCRA's time limits are not jurisdictional and PCRA courts may, when appropriate, apply equitable tolling to them. Appellant's experience – the fact that his diligent efforts to get to the bottom of his codefendant's changed testimony were rebuffed at every point by government representatives – illustrates perfectly why an unsupported and arbitrary jurisdictional deadline should not bar any PCRA court from considering whether justice and equity require equitable tolling of the PCRA deadlines.

When this Court first considered section 9545's time limits, it called them "jurisdictional" in *dicta* and without discussion. Since then, unfortunately, the Court has never addressed the question in any depth, but has continued to rely on

and repeat its original *dicta*. A complete analysis, which *Amici* ask the Court to conduct today, yields a different result. The plain language of the statute, its purpose, the legislative history, the application of important principles of statutory construction, and comparison to analogous federal and state statutes all show that the time limits are *not* jurisdictional.

The perpetuation of the Court's original *dicta* has done real harm; treating section 9545's time limits as jurisdictional has led to unjust results and unnecessary waste of court time. *Amici* submit that the Court should take this opportunity to steer a new course and hold that the PCRA time limits are not jurisdictional.

II. ARGUMENT

A. The Court Should Reexamine Its Precedents on the Jurisdictional Nature of the PCRA's Time Limits, Which Have Had Negative Consequences

1. The Court's Original Conclusion That Section 9545(b)'s Time Limits Are Jurisdictional Was Reached in *Dicta* and Without Analysis

The Court first addressed the PCRA's time deadlines in *Commonwealth v. Peterkin*, 722 A.2d 638 (Pa. 1998). Justice Flaherty, writing for the Court, stated, "on November 17, 1995, 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." 722 A.2d at 641 (emphasis added). That sentence fragment is the sum

total of *Peterkin's* analysis of the issue. Justice Flaherty did not explain why the deadline was jurisdictional. He quoted the entire text of section 9545(b) without pointing to any specific language;[2] he did not examine the statute's legislative history; he did not cite any precedent. *Peterkin*'s bare assertion that the deadline "is a matter of jurisdiction" was also dictum, because *Peterkin* did not turn on the question of whether the deadlines set forth in section 9545(b) were jurisdictional.[3] *See, e.g.*, *Stellwagon v. Pyle*, 133 A.2d 819, 823 (Pa. 1959) (language that goes beyond the issue decided "must be considered dictum"); *Giffear v. Johns-Manville Corporation*, 632 A.2d 880, 883-84 (Pa. Super. Ct. 1993) (court's purported holding on issue not actually before it was dictum).

Peterkin's bald and unexplained assertion that the time limits in section 9545(b) are "a matter of jurisdiction" has taken on a life of its own. This Court

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[2] Because *Peterkin* and its progeny took section 9545(b)'s "jurisdictional" nature as a given without citing any specific language, the Commonwealth cannot point to the canon of statutory interpretation that "when 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." 1 Pa. C.S.A. § 1922(4); *see Verizon Pa., Inc. v. Commonwealth*, 127 A.3d 745, 757 (Pa. 2015). When the General Assembly amended section 9545(b) in 2018 to extend certain deadlines, it had no guidance as to what element of the statutory language led to the Court's characterization of section 9545(b) as jurisdictional.

[3] The *Peterkin* Court noted that "we find nothing in Peterkin's circumstances" that would support an argument for equitable tolling. *Peterkin*, 722 A.2d at 643 n.7.

and the courts below have relied on *Peterkin*'s "as a matter of jurisdiction" language and stated that the time limits in section 9545(b) are jurisdictional. *See, e.g.*, *Commonwealth v. Fahy*, 737 A.2d 214, 217 (Pa. 1999); *Commonwealth v. Bennett*, 930 A.2d 1264, 1267 (Pa. 2007). This Court has never, however, analyzed the statute to determine whether *Peterkin* was correct. The closest it has come to a substantive look at the issue is in a concurrence by Justice Castille in *Commonwealth v. Brown*, 943 A.2d 264, 270 n.4 (Pa. 2008) (Castille, J., concurring). Justice Castille did not cite to any legislative history or rules of statutory construction, and his concurrence has no precedential value.

2. The Court's Characterization of the PCRA Time Limits Has Led to Injustice and Inefficiency

The Court's reliance on the *Peterkin* dicta has led to at least two undesirable outcomes. First, jurisdictional provisions, unlike statutes of limitations, cannot be equitably tolled, no matter how compelling the circumstances. *Commonwealth v. Fahy*, 737 A.2d at 222. This means that too often, deserving petitioners are deprived of what "fundamental fairness requires[:] the opportunity to present collateral claims 'at a meaningful time and in a meaningful way.'" *Commonwealth v. Peterson*, 192 A.3d 1123, 1130 (Pa. 2018) (internal citation omitted). "Ever since this Court construed the time limits provided by the [PCRA] as 'jurisdictional' … it has felt compelled to tolerate constitutional violation upon constitutional violation, sacrificing fundamental rights at the altar of finality."

Commonwealth v. Brown, 943 A.2d at 272 (Baer, J., dissenting). Justices of this Court and judges of the lower courts have frequently expressed discomfort with the inequitable results that stem from the "jurisdictional" characterization. *See*, *e.g.*, *id.* at 273 (Baer, J., dissenting) ("our reading of the PCRA has, in effect, painted us into a corner" in a case where a diligent petitioner was denied appeal); *Commonwealth v. Laird*, 201 A.3d 160, 163 n.1 (Pa. Super. Ct. 2018) ("Appellant has been denied an opportunity to challenge his PCRA counsel's effectiveness, despite that he has the right to effective representation on collateral review. Nevertheless, we are compelled to adhere to the aforementioned precedent …."); *Commonwealth v. Riddick*, No. 3480 EDA 2016, 2017 WL 6568212, at *6 (Pa. Super. Ct. Dec. 26, 2017) (Bender, J., concurring) ("I write separately only to express my utmost displeasure with the Post Conviction Relief Act's failure to facilitate justice in this case, where it is clear to all that it is likely that an innocent man sits behind bars …."); *Commonwealth v. Smallwood*, 155 A.3d 1054, 1070 (Pa. Super. Ct. 2017) (denying new trial on timeliness grounds; noting that "[t]his case is deeply troubling on several levels" because a jury hearing newly available evidence might well decline to convict petitioner); *Commonwealth v. Bennett*, 842 A.2d 953, 959 (Pa. Super. Ct. 2004), *vacated*, 930 A.2d 1264 (Pa. 2007) ("Given our Supreme Court's repeated pronouncements that the PCRA … time limitations

are jurisdictional … we are in the unenviable position of denying relief where there is no doubt that justice requires such relief.").

Treating time limits as jurisdictional can also waste courts' and parties' time, because jurisdictional limits cannot be waived. Thus, "[o]bjections to a tribunal's jurisdiction can be raised at any time, even by a party that once conceded the tribunal's subject-matter jurisdiction over the controversy. Tardy jurisdictional objections can therefore result in a waste of adjudicatory resources and can disturbingly disarm litigants." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013). In *Commonwealth v. Peterson*, for example, the petitioner's counsel erroneously filed his PCRA petition one day late. The proceeding moved ahead for more than eighteen years, through an evidentiary hearing and a ruling by the PCRA court, without anyone raising the timing issue. The Superior Court then noticed the missed deadline and quashed the petitioner's appeal. 192 A.3d at 1125-28. *See also Commonwealth v. Bennett*, 842 A.2d at 961 (Klein, J., concurring) ("[A] considerable amount of effort is devoted to determining if issues have been waived [under section 9545], when it would be more efficient in some cases to decide the substantive issue.").

B. Analysis of the PCRA Shows That Its Time Limits Cannot Be Read to Curtail PCRA Courts' Jurisdiction

1. The Statute's Plain Language and Structure Demonstrate that Section 9545(b)'s Time Limits Are Not Jurisdictional

The cardinal rule of statutory construction is that "the best indication of legislative intent is the plain language of a statute." *Malt Beverages Distribs. Ass'n v. Pa. Liquor Control Bd.*, 974 A.2d 1144, 1149 (Pa. 2009). "'[W]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage,' while any words or phrases that have acquired a 'peculiar and appropriate meaning' must be construed according to that meaning." *Id.* (quoting 1 Pa. C.S. § 1903(a)). "[T]he headings of a statute do not control the meaning of its plain language, but may be considered to aid in construction." *Dubose v. Quinlan*, 173 A.3d 634, 643 (Pa. 2017) (citing 1 Pa. C.S. § 1924).

The plain language of section 9545(b) demonstrates that it is a statute of limitations subject to both waiver and tolling, not a jurisdictional deadline that cannot be waived or tolled. First, neither the word "jurisdiction," nor any language suggesting jurisdictional limitations, appears in the subsection. Second, this Court has examined statutory language similar to that of section 9545(b)'s command that "[a]ny petition under this subchapter … **shall be filed** within one year …." and determined that it is "traditional statute of limitations

language," subject to equitable tolling. *See Dubose*, 173 A.3d at 647 (time limits in 40 P.S. § 1303.513(d), "the action **must be commenced** within two years …", and 42 Pa. C.S. § 5524(2), "The following actions and proceedings **must be commenced** within two years …" are "traditional statute of limitations language.").

Finally, the structure of section 9545 does not suggest that section 9545(b)'s time limits are jurisdictional. Section 9545 is titled "Jurisdiction **and** Proceedings" (emphasis supplied). The "**and**" in the title indicates that the statute does two different things: (1) it delineates the court's jurisdiction; and (2) it establishes "proceedings" to be followed in post-conviction matters. It achieves these two separate goals in separate subsections, titled as follows: (a) "Original jurisdiction"; (b) "Time for filing petition"; (c) "Stay of execution"; and (d) "Evidentiary hearing." Only one of those subsections, subsection (a), addresses jurisdiction:

> (a) Original jurisdiction.—Original jurisdiction over a proceeding under this subchapter shall be in the court of common pleas. No court shall have authority to entertain a request for any form of relief in anticipation of the filing of a petition under this subchapter.

In other words, only the Courts of Common Pleas have original jurisdiction over PCRA petitions. This subsection does not state that original jurisdiction is conditioned upon the timeliness of a petition, and cannot be read to imply that other, more specific limitations on the courts' jurisdiction exist.

The remaining subsections of section 9545 (subsections (b), (c) and (d)) address procedural matters: when petitions shall be filed, procedures for stays of execution, and the conduct of evidentiary hearings. Nothing in those provisions suggests that they are meant to limit the PCRA courts' jurisdiction to entertain a petition. Indeed, unlike subsection (a), none of them even mentions jurisdiction. This omission indicates that the General Assembly did not mean to give these subsections any jurisdictional effect.

2. Application of Canons of Statutory Interpretation Further Demonstrate that Section 9545(b)'s Time Limits Are Not Jurisdictional

Because the plain language of the statute is clear, no further analysis should be necessary. The application of other principles of statutory interpretation, however, buttresses the conclusion that the time limits of section 9545(b) are not jurisdictional.

First, "[p]rovisions decreasing the jurisdiction of a court of record" must be "strictly construed." 1 Pa. C.S. § 1928(b)(7). Before the PCRA was enacted in 1988, Pennsylvania courts had the authority to hear habeas corpus and coram nobis petitions. For several years after enactment, until 1995, the statute contained no time limits. Thus, section 1928(b)(7) requires a strict analysis of section 9545(b). Under this strict analysis, this Court cannot read into section 9545(b) jurisdictional limitations that are not explicitly stated. *See*

Beneficial Consumer Disc. Co. v. Vukman, 77 A.3d 547, 553 (Pa. 2013) (declining to construe notice requirements of Homeowner's Emergency Mortgage Act as jurisdictional and nonwaivable; "the lack of explicit language in Act 91 prescribing that such requirements are jurisdictional cautions against this Court treating them as such"); *Armstrong Sch. Dist. v. Armstrong Educ. Ass'n*, 595 A.2d 1139, 1144 (Pa. 1991) ("[I]f the scope of equity's common law jurisdiction was to have been diminished … the language therein should have been more explicit than was employed here by the legislature. The language of [the statute] makes no reference to a decrease in the equity court's jurisdiction and such a diminution may not be implied."); *In re Jones & Laughlin Steel Corp.*, 398 A.2d 186, 191 (Pa. Super. Ct. 1979), *aff'd*, 412 A.2d 1099 (Pa. 1980) ("[I]f the legislature's intention to limit jurisdiction is not clear, we should construe the act in question as imposing no limitation ….").

Second, the Court "must construe the provisions of the PCRA liberally 'to effect their objects and to promote justice.'" *Commonwealth v. Bennett*, 930 A.2d at 1270 (quoting 1 Pa. C.S. § 1928(c)) (emphasis added). Section 9545(b) "reflects a legislative balance between the competing concerns of the finality of adjudications and the reliability of convictions." *Commonwealth v. Renchenski*, 52 A.3d 251, 259 (Pa. 2012). An interpretation of the statute that gives PCRA courts no discretion to toll its time limits, no matter how strong

the equities or the evidence of actual innocence may be, does not promote "the reliability of convictions."

Finally, "[a]s a matter of statutory interpretation, although one is admonished to listen attentively to what a statute says … [o]ne must also listen attentively to what it does not say." *Kmonk-Sullivan v. State Farm Mut. Auto. Ins. Co.*, 788 A.2d 955, 962 (Pa. 2001) (citations omitted). An "intrinsic aid" to statutory construction is found in the maxim *expressio unius est exclusio alterius,* which means "where certain things are designated in a statute, 'all omissions should be understood as exclusions.'" *Commonwealth v. Charles,* 411 A.2d 527, 530 (Pa. Super. Ct. 1979) (citation omitted). Where the legislature easily could have included language in section 9545 to condition the PCRA court's jurisdiction on the timeliness of a PCRA petition, but did not do so, that omission must be viewed as intentional, and as reflecting its intent not to impose any such condition. *See, e.g.*, *Mishoe v. Erie Ins. Co.*, 824 A.2d 1153, 1159 (Pa. 2003) ("[I]f the General Assembly wanted to provide jury trials for section 8371 claims, it could have simply said so in that section."); *Commonwealth v. Wright*, 14 A.3d 798, 814 (Pa. 2011) (when General Assembly enacts a clear statute and purposely excludes language it could easily have incorporated, "it is not for the courts to add, by interpretation, to [the] statute, a requirement which the legislature did not see fit to include").

3. Interpreting Section 9545(b) as a Limitation of PCRA Courts' Jurisdiction Also Contradicts the Legislature's Intent as Reflected in the Legislative Debate

An interpretation of section 9545(b)'s time limits as affecting the PCRA courts' jurisdiction also contradicts the General Assembly's intent, as expressed in the legislative debate. "Official comments may be consulted in the construction of the original provisions of the statute if the comment was published or generally available prior to the consideration of the statute by the legislature." *Commonwealth v. Berryman,* 649 A.2d 961, 966 (Pa. Super. Ct. 1994). For that reason, "[s]tatements made by legislators during the enactment process, while not dispositive of legislative intent, may be considered as part of the contemporaneous legislative history." *Id.*

The legislative comments and debate preceding the 1995 enactment of the bill that became section 9545(b) show that the legislature did not intend to make the filing deadline jurisdictional. Before the 1995 amendments, the PCRA had no filing deadline, let alone a jurisdictional one. Thus, the very enactment of a filing deadline in 1995 was significant. The legislature would have recognized that making such a deadline jurisdictional would be truly revolutionary, as it would profoundly affect the PCRA itself and the thousands of inmates who use it each year to challenge their convictions. Had the legislature considered taking the drastic step of making PCRA jurisdiction depend on the new filing deadline it was

in the process of enacting, the legislators could be expected to have made some mention of doing so, and at the very least to have discussed, if not debated, the severe and often draconian ramifications of filing deadlines that would deprive PCRA courts of jurisdiction. The legislative history, however, is utterly silent on that issue. That the legislative history says nothing about the jurisdictional effect of any filing deadline, or, indeed, about any connection between the filing deadline and the courts' jurisdiction to hear PCRA petitions, strongly suggests the legislature did not intend such a connection.

Further evidence of the absence of such intent is that, in considering the bill that became section 9545(b), the bill's sponsor, Senator Stewart Greenleaf of Montgomery County, repeatedly characterized the filing deadline as a "time limit," not a limit on the PCRA courts' jurisdiction:

> In regard to this question here, there are certain **time limits.** If we are going to have an expedited appeal, if we are going to have an appeal that is going to consolidate but also to make sure that the appeal is taken in a timely manner, we have to put **time limits** on when you can files these appeals. And there are such **time limits.** I believe it is a year. If the appeal is not taken within a year, then there are certain indications or criteria that a defendant could still file an appeal if he can raise certain matters, such as a government official was involved in delaying the appeal in some way. … Also, it could deal with, let us say, after a discovery of evidence or a variety of reasons.
>
> . . .
>
> I think the purpose [of the 60-day limitation on the exceptions to the one-year filing deadline] is to **allow the person if there is a reason to file it and there is an exception provided that they can again file the petition at a later time once that is discovered.**

. . .

> It seems to me that it provides for the appropriate **time limits** and **that if there is a delay, that they still have the right to file the petition after the delay if there is a reason for the delay.**

Pa. Senate Journal, 1st Spec. Sess., June 13, 1995, at 214-15 (emphasis added). That the bill's sponsor characterized its one-year filing deadline only as a "time limit" strongly suggests that the General Assembly did not intend to make the deadline a condition for jurisdiction. *Cf. Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395 (1982) (looking to legislative history of amendments to Title VII, and specifically the reference in the legislative debate to the 180-day filing deadline as "time limitations," to hold that the legislature intended the deadline to operate as a statute of limitations rather than a jurisdictional requirement).

4. Other Courts, Interpreting Other Postconviction Relief Statutes, Have Identified Persuasive Reasons to Treat Analogous Time Limits as Nonjurisdictional

In recent years, the U.S. Supreme Court and several state Supreme Courts have dug into the question of whether analogous time limits in their own post-conviction relief statutes are jurisdictional. While their opinions do not, of course, bind this Court, the Court may find them instructive.

In decades of analysis of statutory time limitations, the U.S. Supreme Court has identified a number of factors to take into account when determining whether Congress intended to make a statutory time limit jurisdictional or whether to allow equitable tolling. In *Zipes*, that Court concluded that the 90-day deadline for filing

discrimination charges with the Equal Employment Opportunity Commission was akin to a statute of limitations and subject to waiver, estoppel, and equitable tolling. 455 U.S. at 392-94. The Court relied on, *inter alia*, the facts that Congress had not clearly stated that the limitation was jurisdictional, and that a "technical reading would be particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Id.* at 396-97 (quotations and citations omitted). Both of these factors apply here; the Pennsylvania legislature has never identified the section 9545 time limits as jurisdictional, and PCRA petitions are typically instituted by *pro se* prisoners. In *Sebelius*, 568 U.S. at 153, and more recently in *Fort Bend County, Texas v. Davis*, 139 S. Ct. 1843 (2019), the Court noted the practical problems that arise when a time limit is unwaivable. "Harsh consequences attend the jurisdictional brand …." *Id.* at 1849; *see supra* § II.A.2.

In *Day v. McDonough*, 547 U.S. 198 (2006), the Court concluded that the one-year time limit set forth in 28 U.S.C. § 2244(d) of the federal postconviction relief statute, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), is not jurisdictional.[4] The Court addressed the AEDPA time limits in

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[4] As Justice Castille noted in his concurrence in *Commonwealth v. Brown*, Congress enacted the AEDPA's time limit at around the same time as the General Assembly enacted section 9545, and the provisions had similar purposes. 943 A.2d at 270.

more detail in *Holland v. Florida*, 560 U.S. 631, 634 (2010), concluding that they are subject to equitable tolling. First, the Court reasoned, "equitable principles have traditionally governed the substantive law of habeas corpus … [W]e will not construe a statute to displace courts' traditional equitable authority absent the clearest command." *Id.* at 646 (citations and internal quotations omitted). As with the AEDPA, the PCRA replaced the writ of habeas corpus; as in *Holland*, this Court should not construe the statute to disturb courts' traditional authority.

Second, the *Holland* Court reasoned that AEDPA's time limits are not set forth in "unusually emphatic" terms and are not particularly long. "AEDPA's 1-year limit reads like an ordinary, run-of-the-mill statute of limitations." *Id.* at 647. Section 9545(b) shares these characteristics. Third, the *Holland* Court observed, tolling the AEDPA time limits would not affect the substance of claims; the same is true of the PCRA.

The AEDPA includes provisions, similar to the exceptions in section 9545(b), that delay the start of the limitations period under certain circumstances (including, as in section 9545(b), unconstitutional governmental interference, newly discoverable facts, and newly recognized constitutional rights). The *Holland* Court rejected the respondent's argument that by including these provisions in the statute, Congress signaled that it did not intend to permit equitable tolling. These provisions, the *Holland* Court held, were not tolling

provisions at all; they determined when the petitioner's claim accrued, not whether it could be tolled. *See* 560 U.S. at 647-48. The same analysis should apply to the PCRA, which has accrual provisions but no tolling provisions.

Finally, the *Holland* Court rejected the argument that equitable tolling was inconsistent with the AEDPA's purposes. While the AEDPA sought to eliminate delays, the Court found, it did not seek to "undermin[e] basic habeas corpus principles" and "did not seek to end every possible delay at all costs." *Id.* at 648-49. Similarly, the goal of the PCRA is not merely to speed up proceedings; it is to ensure that convictions are reliable. *See Commonwealth v. Renchenski*, 52 A.3d at 259.

Of the state courts that have considered analogous provisions, the most detailed and comprehensive opinion comes from the Minnesota Supreme Court. That court interpreted a provision of the Minnesota postconviction relief statute that, like the PCRA, includes a time limit, a list of exceptions to that time limit, and a second time limit for asserting those exceptions. *Carlton v. Minnesota*, 816 N.W.2d 590 (Minn. 2012); *see* Minn. Stat. Ann. § 590.01. The court concluded that the time limit for asserting exceptions was nonjurisdictional, and thus could be waived. *Carlton*, 816 N.W.2d at 606. It approvingly cited the points made in *Holland v. Florida*, discussed above, and drew other conclusions that should be persuasive here:

- The Minnesota court distinguished Minnesota precedents holding that when the legislature creates a statutory cause of action, any time limits that the legislature includes in the statutory cause of action are jurisdictional. *Id.* at 601. It held that because the Minnesota postconviction statute (like the PCRA) took the place of the common law writs of habeas corpus and coram nobis, these precedents did not apply. *Id.* at 602.

- The court pointed out that the "[i]f the [Minnesota] legislature had intended the time limit to alter drastically the [court's] jurisdiction …we would expect the deprivation of jurisdiction to be explicitly stated." *Id.* at 604. Similarly, the Pennsylvania General Assembly did not indicate that it intended to reduce PCRA courts' jurisdiction.

- "[T]he Legislature chose time limit language that reads like an everyday, run-of-the-mill statute of limitations." *Id.* (citations omitted). The language of section 9545(b) ("Any petition … shall be filed within one year ….") is, if anything, less emphatic than that of Minn. Stat. Ann. § 590.01(4) ("No petition for postconviction relief may be filed more than two years after ….")

The majority of other states that have considered the issue have concluded that time limits on post-conviction petitions are not jurisdictional.[5] The handful of

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[5] *See, e.g., In re Ward*, 46 So. 3d 888 (Ala. 2007); *State v. Herrera*, 905 P.2d 1377 (Ariz. App. 1995) (citing *State v. Pope*, 635 P.2d 846, 849 (1981)); *People v. Bonan*, 357 P.3d 231 (Colo. App. 2014); *Poth v. United States*, 150 A.3d 784 (D.C. 2016); *Stuart v. Idaho*, 149 Idaho 35 (2010); *People v. Moran*, 977 N.E.2d 801 (Ill. App. 2012); *Fetters v. Iowa*, 683 N.W.2d 127, 2004 WL 793729 (Iowa 2004); *Vontress v. Kansas*, 299 Kan. 607 (2014); *Puckett v. Mississippi*, 834 So. 2d 676 (Miss. 2002); *Williams v. Missouri*, 415 S.W.3d 764 (Mo. App. 2013); *State v. Crawford*, 291 Neb. 362 (2015); *Leonard v. Nevada*, slip op., 127 Nev. 1154 (2011); *Palmer v. Oregon*, 121 Or. App. 377 (1993), *aff'd*, 318 Or. 352 (1994); *Pelzer v. South Carolina*, 378 S.C. 516 (S.C. App. 2008); *Bluemel v. Utah*, 173 P.3d 842 (Utah 2007); *In re Bonds*, 196 P.3d 672 (Wash. 2008); *State v. Harris*,

state courts that have reached the opposite conclusion have, for the most part, interpreted statutes or court rules that, unlike the PCRA, explicitly limited courts' jurisdiction.[6]

C. *Stare Decisis* Does Not Require This Court to Defer to the *Peterkin* Dicta

"While *stare decisis* serves invaluable and salutary principles, it is not an inexorable command to be followed blindly when such adherence leads to perpetuating error." *Stilp v. Pennsylvania*, 905 A.2d 918, 967 (Pa. 2006) (citations omitted). "*[S]tare decisis* is not a universal, inexorable command. *Stare decisis* is not a vehicle for perpetuating error, but rather a legal concept that responds to the demands of justice and, thus, permits the orderly growth processes of the law to flourish. …" *Morrison Informatics, Inc. v. Members 1st Fed. Credit Union*, 139 A.3d 1241, 1249 (Pa. 2016) (Wecht, J., concurring) (internal citations and

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440 N.W.2d 364 (Wis. 1989). *See also Allen v. Butterworth*, 756 So. 2d 52 (Fla. 2000) (holding that procedural provisions in post-conviction relief statute encroached on separation of powers).

[6] *See, e.g.*, *Maxwell v. Arkansas*, 767 S.W.2d 303, 331 (Ark. 1989); *Robinson v. Delaware*, 584 A.2d 1204 (Del. 1990) (court rule provided that courts could not extend time periods); *von Thomas v. Georgia*, 748 S.E.2d 446, 449 (Ga. 2013) (statute provides that within one year of sentencing, court has "jurisdiction, power and authority" to correct sentence); *State v. Celestine*, 894 So. 2d 1197 (La. App. 2005) (statute provides that no out-of-time application "shall be considered"); *State v. Davenport*, 56 N.E.3d 227, 228 (Ohio App. 2015) (statute provides that "a court may not entertain" a late petition); *Weatherford v. Oklahoma*, 13 P.3d 987 (Okla. Crim. App. 2000).

punctuation omitted). This Court has not hesitated to revisit precedents that rest on shaky legal foundations, lead to incongruous results, or are unworkable in practice. *See, e.g.*, *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 446 n.49 (Pa. 2017) (declining to follow flawed precedents on the extent of judicial power); *Freed v. Geisinger Med. Ctr.*, 971 A.2d 1202, 1212 (Pa. 2009), *aff'd on reargument*, 5 A.3d 212 (2010) (overruling prior decision on expert witness qualifications that was inconsistent with existing precedent, poorly reasoned, and had proved difficult to apply); *In re Paulmier*, 937 A.2d 364 (Pa. 2007) (overruling line of cases that erroneously interpreted election rules).

The Court should revisit, and overrule, the *Peterkin* dicta.[7] First, this Court need not, and should not, rely on precedent that is unsupported and ill-considered. Offhand and unexplained statements like the one in *Peterkin* do not merit as much deference as reasoned opinions. *See William Penn Sch. Dist.*, 170 A.3d at 444 (disregarding precedents whose conclusions were "asserted baldly" "without development or citation of developed authority"); *Commonwealth v. Moore*, 103 A.3d 1240, 1250 (Pa. 2014) (overruling precedent that "completely ignored" line

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[7] Although Appellant has not challenged the validity of *Peterkin* and its progeny, the Court may nonetheless abrogate these precedents. "[I]f, in seeking to harmonize [prior] cases and apply them …we find that we cannot do so with due rigor, we cannot look the other way simply because to abrogate prior precedent in the process of resolving this case is more than Petitioners have asked us to do." *William Penn Sch. Dist.*, 170 A.3d at 446 n.49.

of cases, did not explain its decision to do so, and "provided minimal analysis"); *Freed*, 971 A.2d at 1210 (finding it "significant" that underlying opinion did not "provide any support for its conclusion").

Like this Court, other courts have found themselves constrained by a predecessor's overly broad use of the word "jurisdictional"; they have wisely decided to correct the problem by clarifying or overruling the offending precedents. The United States Supreme Court, for example, has acknowledged that it has been "less than meticulous" in its use of the words "mandatory and jurisdictional," causing confusion in the lower courts. *Eberhart v. United States*, 546 U.S. 12, 17-18 (2005) (citations omitted). "Jurisdiction … is a word of many, too many, meanings." *Fort Bend*, 139 S.Ct. at 1848. "This Court, no less than other courts, has sometimes been profligate in its use of the term ['jurisdictional']…[I]n recent decisions, we have clarified that time prescriptions, however emphatic, are not properly typed 'jurisdictional.'" *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510 (2006) (citations omitted).[8]

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[8] *See also Poth v. United States*, 150 A.3d at 788 (holding that *Eberhart* and other U.S. Supreme Court opinions had "cast doubt" upon the court's prior holdings that time limit was jurisdictional); *State v. Crawford*, 291 Neb. 362, 372 (2015) ("[I]n prior postconviction cases in which we stated that a court had no jurisdiction to grant postconviction relief, our language was imprecise and we … frequently used the term 'jurisdiction' too loosely") (citations and quotations omitted); *Carlton v. Minnesota*, 816 N.W.2d at 606 n.6 (Minn. 2012) (holding that statutory time limit on postconviction relief is not jurisdictional; acknowledging

Second, the principle of *stare decisis* should hold no sway here because this Court should not rely on precedent that was incorrect when decided. *Balentine v. Chester Water Auth.*, 191 A.3d 799, 812 (Pa. 2018) (Wecht, J., concurring) ("[A]gainst the critical importance of stability we must balance our duty as a court of last resort to refine or even abandon precedent when time and experience reveal its infirmity."); *William Penn Sch. Dist.*, 170 A.3d at 456 ("[W]e are not bound to follow precedent when it cannot bear scrutiny …"); *In re Paulmier*, 937 A.2d at 371 ("[T]he doctrine of *stare decisis* was never intended to be used as a principle to perpetuate erroneous rules of law."). As shown above, *supra* § II.B, the *Peterkin* dicta is inconsistent with section 9545's text, legislative history, and purpose.

Third, the Court should revisit its precedent because treating section 9545(b)'s time limits as jurisdictional has proved unworkable, undermining the purposes of the statute and creating inefficiencies in the court system. *See supra* § II.A.2. Evidence of this unworkability can be seen in the objections of judges and justices, *see id.*, and in the lower courts' attempts to find exceptions to *Peterkin*'s harsh rule. *See Commonwealth v. Bennett*, 930 A.2d at 1278 (Saylor, J.,

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earlier cases that had used the term "jurisdictional" without analysis); *Davis v. Montana*, 344 Mont. 300, 307 (2008) (holding that statutory time limit on postconviction relief is not jurisdictional; abrogating cases "where [the] Court … has been less than meticulous in its use of the term 'jurisdiction'").

dissenting) (noting that Supreme Court has "consistently rebuffed" the Superior Court's efforts to implement equitable exceptions to section 9545); *Commonwealth v. Robinson*, 837 A.2d 1157, 1157-58 (Pa. 2003) (listing half a dozen Supreme Court rejections of Superior Court "theories devised to avoid the effects of" the PCRA's time limits). As in *Freed*, 971 A.2d at 1212, "ill-supported attempts by the lower courts to distinguish and carve out exceptions to" a Court precedent show that the precedent itself is flawed, and weigh in favor of revisiting it.

Fourth, no significant reliance interests are at stake. "The policy considerations supporting *stare decisis* are less compelling when the issue involves a question of procedure. The role of *stare decisis* is reduced in the case of a procedural rule which does not serve as a guide to lawful behavior." *Freed*, 971 A.2d at 1212 (quoting *Commonwealth v. Persichini*, 558 Pa. 449, 456-57 (Pa. 1999) (Castille, J.) (citations and internal punctuation omitted)). If anything, any reliance on the *Peterkin* dicta may be pernicious; the doctrine gives government agents an incentive to stymie prisoners' efforts to learn more about their cases until the jurisdictional door has closed.

A final basis for overruling the *Peterkin* dicta is that it has caused, and will continue to cause, great harm to the wrongly convicted and to the justice system as a whole. The General Assembly, recognizing the negative effects of the time limits, has taken steps to lessen this harm, amending section 9545(b)(2) to give

petitioners one year (rather than 60 days) to file after an exception to section 9545 becomes available. *See* Act 146 of 2018; *see also* signing statement of Gov. Wolf dated October 24, 2018 ("'The 60-day requirement, established decades ago, was burdensome and needed to be changed,' Gov. Wolf said. 'It created a hardship for too many individuals in possession of evidence that could aid in post-conviction relief. The new one-year rule is fair and could make a positive difference in the lives of many incarcerated individuals.'"). While this amendment will allow some deserving petitioners to proceed, it does nothing for prisoners who cannot show one of the exceptions to section 9545 or who, like petitioner, have evidence to make out one of the exceptions, but whose access to that evidence was inequitably delayed.

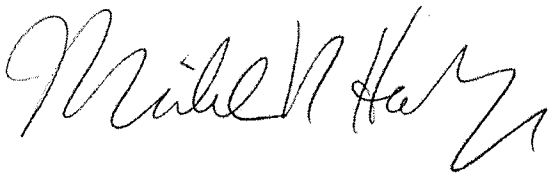
Stare decisis and respect for precedent cannot justify keeping a principle in place that rests on such a weak foundation and has caused so much harm. This Court should decline to perpetuate this error and should revisit its interpretation of the PCRA's time limits.

III. CONCLUSION

For the foregoing reasons, *Amici* respectfully urge the Court to reverse the Order of the Superior Court.

Dated: August 2, 2019

Respectfully submitted,



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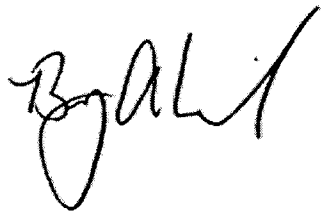

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CERTIFICATE OF WORD COUNT COMPLIANCE

Pursuant to Pa. R. A. P. 2135, the text of this *amicus curiae* brief consists of 6,354 words as counted by the Microsoft Word word-processing program used to generate this brief.

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

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IN THE SUPREME COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, Appellee	:	8 EAP 2019
v.	:	
Elwood Small, Appellant	:	

PROOF OF SERVICE

I hereby certify that this 2nd day of August, 2019, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

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IN THE SUPREME COURT OF PENNSYLVANIA

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