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IN THE SUPREME COURT OF PENNSYLVANIA

9 WAP 2016

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

vs.

SHAWN LAMAR BURTON,

Respondent.

BRIEF FOR *AMICUS CURIAE* THE PENNSYLVANIA INNOCENCE PROJECT AND THE INNOCENCE NETWORK

Appeal from the *En Banc* Opinion of the Superior Court at No. 1459 WDA 2013, entered on August 25, 2015, which reversed the Post-Conviction Court's August 27, 2013 Order denying relief, in the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division at CC Nos. 9304017 and 9304276

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STATEMENT OF INTEREST

Amicus curiae the Pennsylvania Innocence Project ("Pa IP**")** 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, and Drexel University's Thomas Kline School of Law. In collaboration with private counsel who serve *pro bono*, the Project provides *pro bono* investigative and legal services to indigent prisoners throughout the Commonwealth of Pennsylvania whose claims of actual innocence are supported by the results of DNA testing or other powerfully exculpatory evidence or whose claims, 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 better to ensure that no one will be convicted and imprisoned for a crime he or she did not commit and to lessen the risk that a wrongdoer will escape justice because an innocent person was convicted in his or her place.

Although a former Pa IP staff attorney, Charlotte Whitmore, provided Shawn Lamar Burton ("Burton") with the material upon which he bases his claim, in May 2013, Pa IP has never represented Burton and takes no position at this time

on whether Burton can demonstrate actual innocence. Pa IP instead files the within Brief to request that this Court continue to resist mandatory application of presumptions without reference to the actual circumstances, such as Burton's, and add such consideration of circumstances to the framework for analysis of after-discovered facts claims and diligence.

Amicus curiae the Innocence Network (the "Network") is an association of more than sixty organizations dedicated to providing pro bono legal and investigative services to convicted individuals seeking to prove their innocence. The sixty-six current members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Canada, the United Kingdom, Ireland, Australia, New Zealand, and the Netherlands. Based on its experience exonerating innocent individuals and examining the causes of wrongful convictions, the Network has become keenly aware of the role that unreliable or improper evidence has played in producing miscarriages of justice.

Pa IP and the Network share an interest in ensuring that all prisoners in Pennsylvania have a meaningful opportunity for review of their convictions. The cases of criminal defendants convicted of a crime he or she did not commit accentuate that interest; their resulting incarceration strips them of access to resources to aid in their post-conviction challenges, including ready access to public records. Although the harm suffered from a wrongful conviction can never

be undone completely, Pa IP and the Network have an interest in seeing that the innocent are relieved to the maximum extent possible of the continuing and disabling consequences of a mistaken conviction, and are not unfairly prejudiced simply because they lack the access that a free person would have.

Because of this, Pa IP and the Network file this Brief in support of Burton as *amicus curiae*. Pa IP and the Network hope that this Court will provide direction to the lower courts regarding the appropriate application of a due diligence standard to prisoner litigants in this Commonwealth.

Amicus curiae respectfully submit 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.

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SUMMARY OF ARGUMENT

Burton's position as a *pro se* prisoner seeking redress for what he contends is a wrongful conviction is not a new or uncommon scenario. Many of the approximately 50,000[1] inmates in Pennsylvania's correctional institutions seek redress for flaws in the system, pursuit of their claims of actual innocence, or to otherwise avail themselves of their constitutionally protected rights, including access to the courts. Many are indigent, or otherwise cannot or choose not to avail themselves of outside legal counsel.

The Trial Court in this matter nevertheless clung to, and rigidly enforced, a presumption that a prisoner has knowledge of the contents of docket filings and public records, without considering whether or not that prisoner had any actual ability to access those materials any earlier than he did. The Trial Court failed to consider whether Burton, like many other prisoners, lacks the access non-prisoners (or represented prisoners) have, such as the ability to go to the courthouse or review materials on the Internet. Burton does not share the same freedoms and access as over 12 million[2] Pennsylvania residents and nearly 50,000[3] licensed

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[1] *See* http://www.cor.pa.gov/About%20Us/Newsroom/Documents/2016%20Press%20Releases/PA%20DOC%20Prison%20Population%20Records%20Largest%20Decrease%20in%2040%20Years%2001-19-2016.docx (last visited September 6, 2016).

[2] *See* http://www.census.gov/quickfacts/table/AGE275210/42 (last visited September 6, 2016).

[3] *See* http://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-2016.authcheckdam.pdf (last visited September 6, 2016).

attorneys, but the Trial Court proceeded as if he did. The result, if not corrected by the *en banc* decision of the Superior Court below, would have been inequitable, unjust, and easily replicated throughout the *pro se* prisoner population in this Commonwealth.

Presumptions and "legal fictions" have their place and utility in the law. But that place must take into account reality of the circumstances and be applied in a way that promotes justice. To suggest that an incarcerated prisoner has constructive knowledge of filings to which he has no access would be to turn a blind eye to reality and justice. Such application of a legal fiction cannot stand.

As the possibility of confusion by the courts in properly applying a due diligence standard continues, it becomes essential for this Court to clarify the proper scope of analysis and proper application of its precedent so that the lower courts may consistently afford justice for all.

ARGUMENT

I. THE LOWER COURTS AND LITIGANTS NEED THIS COURT'S GUIDANCE ON NAVIGATING APPLICABLE DUE DILIGENCE STANDARDS

A. PRISONERS SUCH AS BURTON FACE SIGNIFICANT CHALLENGES

The United States Supreme Court recognizes the unique circumstances prisoners, and particularly *pro se* prisoners, face. For example, the duty to actively monitor one's own docket, given the practical difficulties of doing so while

incarcerated, has been relaxed to reflect reality. *See Houston v. Lack*, 487 U.S. 266, 270-72 (1988). As the United States Supreme Court expressly recognized in *Houston* in the context of appeals and docket review:

> The situation of prisoners seeking to appeal without the aid of counsel is unique. **Such prisoners cannot take the steps other litigants can take to monitor** the processing of their notices of appeal and to ensure that the court clerk receives and stamps their notices of appeal before the 30-day deadline. **Unlike other litigants, *pro se* prisoners cannot personally travel to the courthouse** to see that the notice is stamped "filed" or to establish the date on which the court received the notice. Other litigants may choose to entrust their appeals to the vagaries of the mail and the clerk's process for stamping incoming papers, but only the *pro se* prisoner is forced to do so by his situation. And if other litigants do choose to use the mail, they can at least place the notice directly into the hands of the United States Postal Service (or a private express carrier); and they can follow its progress by calling the court to determine whether the notice has been received and stamped, knowing that if the mail goes awry they can personally deliver notice at the last moment or that their monitoring will provide them with evidence to demonstrate either excusable neglect or that the notice was not stamped on the date the court received it. ***Pro se* prisoners cannot take any of these precautions; nor, by definition, do they have lawyers who can take these precautions for them. Worse, the *pro se* prisoner has no choice but to entrust** the forwarding of his notice of appeal to prison authorities whom he cannot control or supervise and who may have every incentive to delay. No matter how far in advance the *pro se* prisoner delivers his notice to the prison authorities, he can never be sure that it will ultimately get stamped "filed" on time. And if there is a delay the prisoner suspects is attributable to the prison authorities, he is unlikely to have any means of proving it, for his confinement prevents him from monitoring the process sufficiently to distinguish delay on the part of prison authorities from slow mail service or the court clerk's failure to stamp the notice on the date received. **Unskilled in law, unaided by counsel, and unable to leave the prison, his control over the processing of his notice necessarily ceases as soon as he hands it over to the only public officials to whom he has access** - the prison authorities - and the only information he will likely have is the date he delivered the notice to those prison authorities and the date ultimately stamped on his notice.

Houston, 487 U.S. at 270-72 (emphasis added). This language is instructive, and should guide this Court's analysis of the issues presented by Burton in the instant matter.

The issues raised in *Houston* are undoubtedly relevant here. Burton, like all *pro se* prisoners, cannot take the same steps as represented prisoners or the free to monitor his own proceedings, let alone the proceedings of other prisoners in other matters. He lacks access to the courthouse, and the means to independently review dockets or filings. As in *Houston*, Burton cannot take the same precautions other litigants can.[4] He, ultimately, lacks control. To arbitrarily rely, as the Commonwealth suggests, on presumed knowledge without the benefit of a hearing to establish whether such knowledge was even ***possible*** would be against the spirit of the cautions set forth by the United States Supreme Court nearly 30 years ago.

B. RELEVANT AUTHORITY SUPPORTS A FACT-SPECIFIC INQUIRY FOR PRISONERS

Indeed, numerous other courts in the nation have relied upon the guidance expressed in cases such as *Houston*, and either relaxed or modified standards for diligence[5] and knowledge for petitioners, including *pro se* prisoners, adapting to

[4] *Pro se* prisoners have a constitutional privilege of reasonable access to the courts, either through counsel or access to legal materials such as a law library, but that access can only go so far if the ongoing limitations are not also recognized. *Bounds v. Smith*, 430 U.S. 817, 821(1977).

[5] In the federal *habeas* context, in order to determine whether a petitioner has exercised due diligence, courts apply an "objective standard," *Johnson v. Dretke*, 442 F.3d 901, 908 (5th Cir. 2006), and consider only what would have been discoverable through "a reasonable and diligent

the actual nature of the prisoners' situation in context. *See Montenegro v. United States*, 248 F.3d 585 (7th Cir. 2001) (while holding that prisoner should have been checking his own docket sheet, takes prisoner's limitations and lack of sophistication into account); *United States v. Cicero*, 214 F.3d 199 (D.C. Cir. 2000) (permitting equitable tolling for prisoners); *Smith v. Muccino*, 223 F. Supp. 2d 396, 403-04 & n.10 (D. Conn. 2002) (duty to monitor cases must be modified to reflect unique circumstances of *pro se* prisoners, balancing an interest in finality with the reasons for delay); *State v. Abdelrehim*, No. 96–07–0259, 2013 N.J. Super. Unpub. LEXIS 249, 2013 WL 275912 (N.J. Super. Ct. App. Div. Jan. 25, 2013) (evaluating petition based on circumstances of petitioner confined in Egyptian prison for five years following conviction); *People v. Tankleff*, 49 A.D.3d 160, 848 N.Y.S.2d 286, (N.Y. App. Div. 2007) (due diligence is "measured against the defendant's available resources and the practicalities of the particular situation"); *State v. Martin*, No. 20024, 2004-Ohio-73, P15, 2004 Ohio App.

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investigation." *McCleskey v. Zant*, 499 U.S. 467, 498 (1991); *see In re Boshears*, 110 F.3d 1538, 1540 (11th Cir. 1997). "28 U.S.C. § 2244 does not require 'the maximum feasible diligence' but only 'due, or reasonable diligence.'" *Starns v. Andrews*, 524 F.3d 612, 618 (5th Cir. 2008) (citation omitted). "The essential question is not whether the relevant information was known by a large number of people, but whether the petitioner should be expected to take actions which should lead him to the information." *Wilson v. Beard*, 426 F.3d 653, 662 (3d Cir. 2005). Courts must also take into account a petitioner's circumstances as part of the due diligence inquiry. *See Wims v. United States*, 225 F.3d 186, 190 (2d Cir. 2000) ("The proper task . . . is to determine when a duly diligent person in petitioner's circumstances would have discovered that no appeal had been filed."); *Easterwood v. Champion*, 213 F.3d 1321, 1323 (10th Cir. 2000) (considering circumstances such as "the realit[ies] of the prison system"); *accord Dicenzi v. Rose*, 452 F.3d 465, 470 (6th Cir. 2006); *Schlueter v. Varner*, 384 F.3d 69, 74 (3d Cir. 2004).

LEXIS 78, 2004 WL 41506 (Ohio Ct. App. Jan. 9, 2004) (imprisoned petitioner "unavoidably prevented from discovering facts upon which his claim relied" because of loss of contact with alibi witnesses after conviction); *People v. Hildenbrandt*, 125 A.D.2d 819, 509 N.Y.S.2d 919 (N.Y. App. Div. 1986) (reversing denial of post-judgment motion after analyzing circumstances of diligence, including defendant's inability to participate in his defense and investigation while in prison); *Brandon v. State*, 264 Ind. 177, 340 N.E.2d 756 (Ind. 1976) (reversing a trial court because there were no affirmative findings on diligence, and specifically noting that the prisoner was *pro se* and not legally educated).

Other courts have addressed knowledge or availability of public records, but in the context of prisoners (or non-prisoners) who actually had the benefit of counsel. *See, e.g.*, *Blanco v. Sec'y, Fla. Dep't of Corr.*, 688 F.3d 1211, 1243-44 (11th Cir. 2012) (attorney had access to public records); *Parker v. Allen*, 565 F.3d 1258, 1277 (11th Cir. 2009) (defendant had access through counsel); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987) (noting that the public record does not always end an inquiry, even for a free person with the benefit of counsel); *United States v. Boyd*, 833 F. Supp. 1277 (N.D. Ill. 1993) (allowing for excusable oversight, even for represented prisoners); *DeShields v. Snyder*, 830 F.Supp. 816 (D. Del. 1993) (petitioner's counsel had access); *State v. Lacey*, 2012-Ohio-1697,

2012 Ohio App. LEXIS 1486 (Ct. Ap. Ohio, Mar. 29, 2012) (noting public record available to a prisoner's counsel by exercise of due diligence); *Ward v. State*, 984 So.2d 650 (Ct. App. Fl. 2008) (remanding case because while a trial court might be able to take judicial notice of its own records, an evidentiary hearing was required to consider a claim rather than taking judicial notice of records from a separate matter); *State v. Reid*, 2007-Ohio-2427, 2007 Ohio App. LEXIS 7243 (Ct. Ap. Ohio, May 18, 2007) (noting public record available to a prisoner's trial counsel even though appellate counsel refused to turn over file); *Agan v. State*, 560 So.2d 222 (Fla. 1990) (counsel sought access to public records, but could have done so earlier).

Post-conviction rules and statutes, by their express language and through interpretation by the courts, permit and mandate following the plain text of the rules or statutes, even if that would require fact-specific inquiries into a petitioner's diligence in context. *See, e.g.*, Ala R. Crim. P. 32.2 (c) ("within six (6) months after the discovery of the newly discovered material facts"); Cal. Penal Code § 1473.6 (d) (1) (motion to vacate judgment must be brought within one year of "[t]he date the moving party discovered, or could have discovered with the exercise of due diligence, additional evidence"); Ky. Crim. R. 11.42 (10) (a) (allowing late filings if "the fact upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due

diligence"); N.Y. Crim. Pro. L. § 440.30 (1) (b) (ii) (excusing late filing if it is shown "that [the petitioner] has been pursuing his or her rights diligently and that some extraordinary circumstance prevented the timely filing of the motion" or "the facts upon which the motion is predicated were unknown to the defendant or his or her attorney and could not have been ascertained by the exercise of due diligence prior to the expiration of the statute of limitations"); Ohio R.C. § 2953.23 (exception where "the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief"); *Parrish v. Commonwealth*, 283 S.W.3d 675, 677 (Ky. 2009) (weighing consequences of probation on ability to obtain relief); *State v. Moore*, 651 N.E.2d 1319, 1321 (Ohio 1994) (" [e]very word in a statute is designed to have some legal effect."); *State v. Cunningham*, No. 1–15–61, 2016 WL 2957052, at *4 (Ohio Ct. App. May 23, 2016) (requiring application of statute "as written"); *State v. Hartman*, No. 25055, 2010 WL 4867370 (Ohio Ct. App. Nov. 24, 2010) (following "clear language and directives" of statute); *McCartha v. State*, 78 So.3d 1014 (Ala. Crim. App. 2011) (words such as those in Alabama Rule 32.2 "must be given their plain meaning"); *Smith v. State*, 918 So.2d 141, 144 (Ala. Crim. App. 2005) (procedural rules "must be given their plain meaning"); *People v. Germany*, 35 Cal. Rptr. 3d 110, 113 (Cal. Ct. App. 2005) ("[w]hen the language of the statute is clear, we need go no further"); *People v. Diguglielmo*, 21

Misc. 3d 1103, 873 N.Y.S.2d 236 (N.Y. Co. Ct. 2008), *rev'd on other grounds*, 75 A.D.3d 206, 902 N.Y.S.2d 131 (2010), *aff'd*, 17 N.Y.3d 771, 952 N.E.2d 1068 (2011) ("[i]n assessing due diligence, 'the practicalities of the situation must be kept in mind'").

C. THIS COURT HAS NOT AND SHOULD NOT USE INAPPLICABLE PRESUMPTIONS TO LIMIT THE RIGHTS OF PRISONERS IN BURTON'S POSITION

Pa IP and the Network agree with and incorporate the arguments set forth by Burton and fellow *amici*. However, Pa IP and the Network intend to set forth additional argument regarding the purpose of presumptions, this Court's prior precedent, and the Superior Court's analysis.

1. THE LIMITATIONS FACED BY *PRO SE* PRISONERS DO NOT JUSTIFY APPLICATION OF THE TRADITIONAL REASONS FOR PRESUMED KNOWLEDGE

(a) Purposes of Presumptions

Assuming *arguendo* that presumed knowledge of public records rises to the level of a legal presumption, it is clear that, in Pennsylvania, the purpose of any such presumption is to avoid gamesmanship by litigants, to maintain a level playing field, and to prevent sleeping on one's rights while feigning ignorance. As stated by this Court long ago:

> The rule of presumption, when traced to its foundation, is a rule of convenience and policy, the result of a necessary regard to the peace and

> security of society. No person ought to be permitted to lie by whilst transactions can be fairly investigated and justly determined, until time has involved them in uncertainty and obscurity, and then ask for an inquiry. Justice cannot be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away, and a new generation has appeared, unacquainted with the affairs of a past age and often regardless of them.

Gregory's Executors v. Commonwealth, 121 Pa. 611, 621, 15 A. 452, 453 (Pa. 1888)..

None of these factors apply here or to *pro se* prisoners generally; nothing regarding Burton's delay in filing for post-conviction relief impacts sleeping on one's rights, lying by, uncertainty, or obscurity. Even if some of these considerations did apply, certainly an evidentiary hearing would be the best way to determine whether any alleged delay was at all the fault of Burton, rather than solely a result of Burton's status as an indigent *pro se* prisoner litigant. Application of the presumption to Burton would be to ignore the facts in favor of a manufactured reality. *See City of Pittsburgh v. W.C.A.B.*, 620 Pa. 345, 67 A.3d 1194, 1205 (Pa. 2013) ("A presumption should always be based upon a fact, and should be a reasonable and natural deduction from that fact").

(b) Purposes of the Act

The stated purpose of Pennsylvania's Post Conviction Relief Act ("PCRA") is to offer **relief** to those convicted. *See* 42 Pa. C.S.A. § 9542 ("This subchapter provides for an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief.");

Commonwealth v. Morris, 565 Pa. 1, 32, 771 A.2d 721, 739 (Pa. 2001) ("this Court called for legislation governing collateral proceedings in order to afford 'an adequate corrective process for hearing and determining' alleged constitutional violations. . . [t]he purpose [] was to provide a procedure which encompassed *habeas corpus* and *coram nobis* and to decide challenges to convictions that were imposed without due process.").

The sole issue before this Court is was whether Burton's petition was within the exceptions to timely filing, a matter the Trial Court disposed of without a hearing. Burton was entitled to full and fair consideration of whether his petition was timely under 42 Pa. C.S.A. § 9545,[6] rather than a summary dismissal based upon presumed knowledge (whether or not he did or could, in fact, know what the Trial Court presumed on his behalf)

To reverse the Superior Court and reinstate this result would be unjust. The Commonwealth's position that anything in the public domain necessarily can be

[6] Although not applicable in the instant matter, Pa IP and the Network note that the Pennsylvania Legislature is considering amending the post-conviction statute to extend the time for post-conviction filings. *See* S.B. 1261, available at http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2015&sInd=0&body=S&type=B&bn=1261 (last visited September 6, 2016) (amending § 9545 to state that "[a]ny petition invoking an exception provided in paragraph (1) shall be filed within ~~60 days~~ ONE YEAR of the date ~~the claim could have been presented~~ WHEN THE GROUNDS FOR THE EXCEPTION WERE DISCOVERED OR REASONABLY COULD HAVE BEEN DISCOVERED); see also Memorandum, available at http://www.legis.state.pa.us//cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20150&cosponId=20064 (last visited September 6, 2016) ("given that the persons involved are often incarcerated with no attorney actively working on their case, it makes complying with the rule next to impossible").

discovered with the exercise of diligence impermissibly reads out of the statute the qualification that new facts be unknown "to the **petitioner**" in the exercise of diligence. *Id*. (emphasis added).

2. PRIOR DECISIONS OF THIS COURT CLEARLY DO NOT APPLY, OR SET FORTH ANY REASON TO APPLY, PRESUMED KNOWLEDGE OF PUBLIC RECORDS TO PRISONERS SUCH AS BURTON

(a) Plain Meaning and *Bennett*

Like the jurisdictions discussed above, this Court has repeatedly stressed the importance of applying the plain meaning of the PCRA. *See, e.g.*, *Commonwealth v. Bennett*, 593 Pa. 382, 930 A.2d 1264, 1270 (Pa. 2007) Hewing to the plain meaning of the statute, this Court held in *Bennett*:

> In rejecting the Commonwealth's argument, we made clear that the exception set forth in subsection (b) (1) (ii) does not require any merits analysis of the underlying claim. . . . Rather, subsection (b) (1) (ii) has two components, which must be alleged and proved. Namely, the petitioner must establish that: 1) "the facts upon which the claim was predicated were unknown" and 2) "could not have been ascertained by the exercise of due diligence." 42 Pa.C.S. § 9545(b) (1) (ii). If the petitioner alleges and proves these two components, then the PCRA court has jurisdiction over the claim under this subsection.

Id. at 1271-1272 (Pa. 2007) (internal citations and emphasis omitted). Burton **alleged** he satisfied these elements, but the Trial Court gave him no opportunity to **prove** them (despite his providing documents and witness list showing he intended to do so).

This failure by the Trial Court to allow Burton to move forward and prove his diligence is in direct contrast to this Court's holding in *Bennett*. In *Bennett*, a petitioner appealed a denial of collateral relief, but appointed counsel failed to file a brief resulting the dismissal of his appeal. This Court recognized that Bennett's former counsel failed to file that brief, in effect abandoning Bennett. This had the practical effect of leaving Mr. Bennett without counsel, and this Court expressly acknowledged that this lack of counsel had an immediate and lasting impact on Bennett's ability to access **any** public records. *See Bennett*, *id.* at 1275 ("[i]n light of the fact that counsel abandoned Appellant, we know of no other way in which a prisoner could access the 'public record.'"). This Court, therefore, looked at whether records were **actually accessible**, rather than available in theory as the result of any presumption. *Id*. ("in this case, the matter of 'public record' does not appear to have been within Appellant's access"). This Court expressly distinguished Mr. Bennett's situation from a situation in which a prisoner was represented. *Id*. at n.14 (distinguishing the *Chester* case discussed *infra* by noting that it "involved a 'public record' **extant at the time of trial** during which counsel was actively representing his client. Clearly, that is distinct from a situation in which counsel has abandoned his client and yet **counsel is the only way the client would have to access the information**") (emphasis added). Thus, as expressly

held by *Bennett*, Burton's lack of access as a *pro se* prisoner was a factor for the Trial Court to consider, not ignore.

(b) Inapplicable Prior Public Records Decisions

However, as noted by the Superior Court, both in its *en banc* majority opinion and dissent, as well as the Commonwealth in its brief, various prior decisions by this Court do suggest in varying degrees that despite the plain meaning of the PCRA's call to permit petitioners to allege **and** prove "due diligence," the contents of public records are in certain situations are not "unknown," eliminating the need for additional analysis.

Despite the Commonwealth's assertion that this is a "long-standing rule," *see* Petitioner's Brief at p. 33, in fact the first application of the rule in the PCRA context by this Court appears to be a footnote in *Commonwealth v. Lark*, 560 Pa. 487, 746 A.2d 585, 588 n. 4 (2000). In *Lark*, the trial court entertained oral argument on a post-conviction claim by Lark. Lark attempted to argue that a Philadelphia jury study indicated racial bias. In footnote 4, however, this Court asserted that the statistics that made up the study were, in fact public record and therefore "not unknown." *Id*. at 588 n.4. The footnote cited no authority and entertained no discussion. Similarly, *Commonwealth v. Whitney*, 572 Pa. 468, 817

A.2d 473, 474, 476 (2003), cited *Lark* for the same proposition (public records are not "unknown") and regarding the same study.[7]

In *Commonwealth v. Chester*, 586 Pa. 468, 895 A.2d 520, 523 (2006), Chester's appointed post-trial counsel discovered that trial counsel had a DUI, a fact not disputed by the Commonwealth. However, even though the PCRA Court held a hearing on the matter, this Court noted that the petition was untimely because trial counsel's DUI was a public record that was easily discernable by "the simple act of checking the clerk of court's file," making the petition untimely. *Id*. at 523.

Commonwealth v. Lopez, 616 Pa. 570, 51 A.3d 195, 198 (2012), was a *per curiam* decision. Without any reference to governing authority, the decision noted that, despite the trial court's finding of timeliness, trial counsel's prior disciplinary troubles were "easily discoverable." *Id*. at 196. They could have been discovered during the initial PCRA relief sought by Lopez, and the petition was untimely.

In *Commonwealth v. Edmiston*, 619 Pa. 549, 65 A.3d 339, 348 (2013), Edmiston sought post-conviction relief based on a 2009 National Academy of Science report questioning the science that convicted him. *Id*. at 344, 350. Edmiston claimed the newly discovered report entitled him to relief, and argued his

[7] "Pattern of jury discrimination" materials were also the source of decisions in *Commonwealth v. Marshall*, 596 Pa. 587, 947 A.2d 714, 721-23 (2008), *Commonwealth v. Hackett*, 598 Pa. 350, 956 A.2d 978, 983–984 (2008), and *Commonwealth v. Fahy*, 598 Pa. 584, 959 A.2d 312, 315 (2008).

petition was timely -- filed within sixty days of the report's publication. *Id*. at 350-51. This Court disagreed, holding the report was not newly-discovered evidence because it "compiled" previously-available analyses. *Id*. at 351-52. Edmiston's counsel, with due diligence, could have discovered the information in the report because it referred to studies published years earlier. *Id*.

In *Commonwealth v. Taylor*, 620 Pa. 429, 67 A.3d 1245, 1248 (2013), this Court continued to rely on the *Lark* footnote, stating that post-trial counsel's discovery evidence of the trial counsel's potential conflicts of interest could have been deduced from the review of dockets 15 years prior. *Taylor*, 67 A.3d at 1248-49. The trial court conducted a three-day evidentiary hearing, but ultimately this Court stated that public records are not "unknown" and the late discovery did not make the petition timely. *Id*.

(c) The Prior Decisions are Not Absolute, and *Bennett* Controls

To be clear, the prior decisions of this Court, discussed above, do not state that whether "presumed knowledge" of public records is, or should be, an absolute bar to post-conviction relief. Nor do those cases discuss whether such presumed knowledge applies without consideration of the applicable circumstances. On the contrary, rigid application of a public records "presumption" would create an unmistakable strain between applying the plain language of the PCRA (discussing diligence by the **petitioner**), and the opportunity of petitioners to both plead and

prove diligence, particularly in the case of prisoners with limited or no access to the allegedly "known" public records. *See, e.g.*, *Bennett*, *supra*.

In fact, despite claims by the Commonwealth to the contrary, this Court has **not** applied the "rule" without reference to the facts. Instead, as discussed above, this Court has expressly recognized the importance of **access** to the public information, not simply its theoretical availability. *See Bennett*, *id.* at 1275 ("[i]n light of the fact that counsel abandoned Appellant, we know of no other way in which a prisoner could access the 'public record.' Rather, we believe this situation is sufficiently distinct from the situation in *Chester*, since in this case, the matter of 'public record' does not appear to have been within Appellant's access.").

Simply put, this Court **has not forbidden the type of analysis performed by the *en banc* panel in this matter**. On the contrary, this Court has itself conducted such an analysis and has implicitly recognized its applicability to those without the benefit of legal counsel. *Bennet*. Nowhere has a fact-specific review by the lower courts been expressly restricted, nor has mandatory application of an (inapplicable) presumption been required. This Court should instead permit a review of the actual circumstances in cases such as Burton's. *See id*. at 1275 ("[w]hile the dissenting opinion is attractive in its simplicity, it does not give due consideration **to the circumstances** the instant case raises") (emphasis added).

The Commonwealth's argument, rejected by the Superior Court *en banc*, that this Court's prior rulings bar jurisdiction[8] is premised on an untenable reading of the PCRA that would place impossible demands on petitioners like Burton who seek to challenge their convictions but lack full access to dockets and public records. The General Assembly has prohibited adopting such an unreasonable interpretation, as has this Court. *See* 1 Pa. C.S. § 1922 (1) (Pennsylvania courts should presume that the "the General Assembly does not intend a result that is absurd, impossible of execution, or unreasonable"); *Bennet*. A court can and should ignore or strike any presumption that has no application to a particular case. *See, e.g.*, *Jacobs v. Halloran*, 551 Pa. 350, 357, 710 A.2d 1098, 1102 (Pa. 1998) (overruling prejudice presumption in light of its inconsistency with equitable principles); *Brinkley v. King*, 549 Pa. 241, 251, 701 A.2d 176, 181 (Pa. 1997) (refusing to apply paternity presumption where marriage was dissolved).

[8] As to the question of jurisdiction, this Court decided in *Commonwealth v. Peterkin*, 554 Pa. 547, 722 A.2d 638, 641 (1999) that § 9545 (b) (1)'s timing requirements are "jurisdictional" in one sentence, with almost no analysis. Although not specifically germane to the instant analysis, Pa IP and the Network would be remiss without mentioning that (1) the legislative history shows that even the sponsor characterized this provision as a "statute of limitations" and believed the courts should have some flexibility to hear meritorious claims even if they are filed after the time limit, *see* Pa. Senate Journal, 1st Spec. Sess., June 13, 1995, at 214-15, *available at* http://www.legis.state.pa.us/WU01/LI/SJ/1995/1/Sj19950613.pdf (last visited September 6, 2016); and (2) the plain language and structure of the statute, in which only § 9545(a) (titled "original jurisdiction"), not any other subsections of § 9545, speaks to jurisdiction. § 9545(b) should be treated as a statute of limitations subject to equitable exceptions, as the analogous federal habeas corpus provision is. *See, e.g.*, *Holland v. Florida*, 560 U.S. 631, 645 (2010).

Further, unlike Burton in the instant case below, **each** of the prisoners facing "presumed knowledge" in this Court's prior decisions had legal counsel.[9] Unlike Burton, those counsel undoubtedly had access to dockets, and arguably as a result some heightened standard might apply. In *Bennet*, on the other hand, where petitioner was not represented, this Court saw fit **not to penalize the petitioner for that failing** since he never saw the "public record" document, lacking access.

3. THE SUPERIOR COURT'S *EN BANC* DECISION SQUARELY ADDRESSES THE LANGUAGE OF THE POST-CONVICTION STATUTE AND THE UNIQUE POSITION OF PRISONERS

(a) The Trial Court Ignored Context

The Trial Court denied Burton relief based on timeliness, without giving him an opportunity to argue why his petition could fit into one of the stated exceptions to timeliness or to offer proof.[10] The Trial Court's opinion instead seemed to rely in large part on the fact that Burton's post-conviction efforts had a long procedural history and multiple attempts at relief. Of course, this long procedural history is wholly irrelevant -- it predated Goodwine's 2009 Motion for Expungement, in which Goodwine claimed self-defense (a claim which arguably

[9] Additionally, in many of the "presumed knowledge" cases, despite this Court's eventual application of presumed knowledge, the trial court still entertained argument, had an evidentiary hearing, or affirmatively found that the petitions were timely (*Lark*, *Chester*, *Fahy*, *Lopez*, *Edmiston*; *Taylor*). The Trial Court in this matter did not even make that attempt.

[10] *See also* Pa. R. Crim. P. 907, comment (noting Rule 907(a) permits the PCRA court "to summarily dismiss" a petition only "in certain limited cases").

negated the possibility of a conspiracy and the basis for Burton's conviction). The fact of a claim of self-defense was apparently unknown prior to 2009 (and, absent the application of a presumption, allegedly unknown to Burton as of May 2013). After-discovered facts are precisely that, and the Trial Court rejected Burton 's right to establish the basis for proceeding under the PCRA without considering the circumstances.

(b) The *En Banc* Decision Looked at Context

Rather than reflexively deny Burton's Petition, like the Trial Court, the Superior Court remanded so that Burton can have the opportunity to prove the existence of newly-discovered facts and his own diligence. *Commonwealth v. Burton*, 121 A.3d 1063, 1066 (Pa. Super. Ct. 2015). The Superior Court correctly noted that:

> Fundamentally, at issue here is the appropriate level of diligence required of an untimely PCRA petitioner. Section (b) (1) (ii) requires ''due diligence,'' without explanation or definition of the term. This omission poses little difficulty, however, as Pennsylvania courts have interpreted consistently the concept of due diligence in different contexts.

Id.

That interpretation of diligence, the Superior Court concluded, required reasonable efforts with an eye to the specific circumstances in each case. *Id*. at 1068-70 ("[t]here can be no reasonable dispute that the due diligence inquiry is fact-sensitive and dependent upon the circumstances presented.").

In remanding for a hearing on timeliness, the Superior Court observed that, "[a]t first glance," the petition ran "afoul of Pennsylvania Supreme Court precedent holding that publicly available information cannot predicate a timeliness exception." *Id*. at 1071. However:

> [T]he rule is not absolute. It must adhere to the statutory language of Section 9545 (b). The requirement is that Section 9545 (b) (1) (ii) facts are "unknown to the petitioner." This imparts a subjective element into the due diligence standard, easily accommodated by a reasonableness analysis, but not accurately reflected by a bright-line rule. An irrefutable presumption that public information cannot be "unknown" would disregard the standard of diligence required by untimely petitioners.

Id. at 1071-72 (internal citation omitted).

The Superior Court also held that, while the general public records "rule" may reasonable where the petitioner retains access to public information, such as when he is represented by counsel, the presumption of availability of public records does not make sense where the petitioner is unrepresented. *Id*. at 1072. Such petitioners are no longer members of the public due to their incarceration, and, "[w]ithout counsel's providing a conduit to publicly available information, a presumption of access is cynical, and the strength of the general rule falters." *Id*. The Superior Court permitted circumstantial analysis of an unrepresented petitioner's diligence. *Id*. at 1072-73.

Therefore, contrary to the Commonwealth's repeated arguments in its Brief, the Superior Court's remand, allowing Burton to make his case for diligence in an

evidentiary hearing, is not "shifting the burden of proof." Rather, the Superior Court gave Burton, and any indigent *pro se* prisoners similarly situated, a chance to demonstrate why they acted diligently to ascertain the newly discovered facts, without relying upon presumptions they likely can never overcome.

This contextual analysis properly gives weight to the plain meaning of the PCRA's text, placing the petitioner in his or her own shoes, instead of applying the same rules to all petitioners regardless of their actual circumstances. The Commonwealth may, as it sees fit, then counter this evidence by demonstrating that a *pro se* prisoner does, indeed, did or should have access to the public records in question. *Id*. at 1073 n.7. As the Superior Court noted, "[w]ithout a factual record developed by the PCRA court, it is impossible to conclude whether Appellant previously knew such facts." *Id*. at 1074. That is the purpose of an evidentiary hearing, and does not shift any applicable burden.

(c) This Court Should Continue to Recognize the Context and Differences in Circumstances

The Superior Court has correctly applied the precedent this Court has set forth regarding PCRA due diligence. This Court should affirm that effort, and confirm that such a fact-specific analysis is warranted and required, as it already has done in *Bennet*. As a matter of jurisprudence, the law can naturally and slowly evolve, or a court can expressly clarify or overrule inconsistent prior precedent as part of a "sea change." *See Lewis v. Workers' Compensation Appeal Board*, 591

Pa. 490, 500, 919 A.2d 922, 928 (Pa. 2007) (this Court "will not be bound by a decision that in itself is clearly contrary to the body of the law" and expressing a willingness to "removing an anomaly from an otherwise healthy body of law"). This is even more apt in this case, as there is no "sea change;" this Court should caution the lower courts and litigants that a fact-specific due diligence analysis involving *pro se* prisoners is mandated by the PCRA and this Court's precedent.

D. THIS COURT SHOULD TAKE THE OPPORTUNITY TO CONFIRM THE PROPER APPROACH

The instant case presents an opportunity for this Court to provide guidance in post-conviction cases, while eliminating any confusion by litigants that knowledge of public records is subject to iron-clad and immutable application. Discussion, adjustment, and confirmation of the existing case law would serve the interests of justice.

1. RISK OF CONFUSION

(a) This Court's Prior Decisions

As discussed in detail above, this Court's decisions such as *Lark*, *Chester*, *Lopez*, and *Taylor* apply presumed knowledge of public records in the context of PCRA actions involving represented prisoners. *Bennett*, on the other hand, refused to apply such presumed knowledge when "abandonment" left the petitioner unrepresented like Burton in the instant case. The lack of detailed discussion,

however, increases the potential for confusion in the trial and appellate courts (as demonstrated by the Commonwealth's position herein). Thus, this Court could take the opportunity presented by the instant matter to benefit from a detailed discussion regarding whether and how the courts **should** apply presumed knowledge, and address the proper standards for diligence.

(b) Pre-*Burton* Superior Court Decisions

Opinions from the Superior Court prior to the *en banc* decision in *Burton* establish that the Superior Court is willing to engage in a fact-specific diligence inquiry. *See, e.g.*, *Commonwealth v. Williams*, 35 A.3d 44, 53 (Pa. Super. Ct. 2011) ("[d]ue diligence demands that the petitioner take reasonable steps to protect his own interests") (*citing Commonwealth v. Carr*, 768 A.2d 1164, 1168 (Pa. Super. Ct. 2001)). However, as this case has made clear, the Commonwealth continues to push for non-fact-specific presumptions, citing this Court's precedent.

The Superior Court has also considered *pro se* appeals in the past, but did not fully consider the application of presumed knowledge of public records. For example, in *Commonwealth v. Davis*, 86 A.3d 883, 885 890-91 (Pa. Super. Ct. 2014), the Superior Court considered a *pro se* PCRA claim regarding allegations of perjury. In doing so, however, although there were public records available regarding deals made by prosecution witnesses, the Superior Court focused on whether the prisoner had any reason to believe that perjury had in fact occurred.

As Davis acted once he learned of the perjury, the Superior Court remanded for an evidentiary hearing on his petition. *Id*. at 891 ("[i]t would be unreasonable to expect a *pro se* prisoner such as [petitioner] to do that which a trial court could not [i.e., locate the transcript]"). In doing so, the Superior Court also used the definition of due diligence set forth by this Court in the context of Pa.R.Crim.P. 600 in *Commonwealth v. Selenski*, 606 Pa. 51, 994 A.2d 1083, 1089 (Pa. 2010) (due diligence is "fact-specific, to be determined case-by-case; it does not requires perfect vigilance and punctilious care, but merely a showing that the Commonwealth has put forth a reasonable effort"); *see also Burton*, 121 A.2d at 1069, 1071 (expressly adopting *Selenski* diligence standard for PCRA diligence).

Additionally, in *Commonwealth v. Medina*, 92 A.3d 1210 (Pa. Super. Ct. 2014) (*en banc*), several witnesses recanted their trial testimony implicating the prisoner in a murder. The Superior Court affirmed a grant of new trial by the PCRA court, not considering public records, but instead noting, as in *Davis*, that the petitioner was not in a position to know that the trial testimony was perjured. *Medina*, 92 A.3d at 1217-18. S*ee also Burton*, 121 A.2d at 1070 ("[t]hus, we concluded that the petitioner's efforts were reasonable under the circumstances").

As the Superior Court continues to consider this Court's decisions and apply diligence standards, and the litigants continue to differ on which precedent should

apply, the potential for confusion and inconsistency continues. An affirmance by this Court could help to alleviate some of those ongoing issues.

(c) *Brown*

As of the date of this filing, only one reported Pennsylvania case has cited or discussed the *Burton en banc* decision. In *Commonwealth v. Brown*, --- A.3d ---, 2016 Pa. Super. LEXIS 184; 2016 PA Super 73 (Pa. Super. Ct. 2016), the Commonwealth raised diligence in response to Brown's claims that he was not aware of a confession contained in certain wiretaps, noting that the wiretaps were part of another individual's public criminal record. The Superior Court found that there was a question of material fact regarding the presence in the file, but also that the presence or absence was no longer dispositive in light of *Burton*. The Superior Court also noted that there was no evidence that Brown should have been searching the dockets of a different criminal defendant, citing *Davis* and *Medina*. Importantly, the Superior Court reached a similar conclusion as the *en banc* decision in *Burton*:

> To be clear, we do not hold that Appellant has satisfied his burden of pleading and proving the applicability of the newly-discovered fact exception to the PCRA's timeliness requirement. Instead, we hold that Appellant's PCRA petition, along with the Commonwealth's response, and Appellant's reply, presents a genuine issue of material fact as to whether Appellant acted with due diligence in discovering the wiretap tapes and transcripts. If Appellant did act with due diligence, and the PCRA court concludes that the statements on the wiretap are admissible evidence, then Appellant has pled and proved the applicability of the newly-discovered fact exception to the PCRA's timeliness requirement. If Appellant has in fact

> pled and proved the applicability of the newly-discovered fact exception, the PCRA court possesses jurisdiction to consider the merits of Appellant's claims that relate to these newly-discovered facts.

Brown, --- A.3d ---, 2016 Pa. Super. LEXIS 184, *34-35.

2. CIRCUMSTANTIAL ANALYSIS WILL REDUCE UNCERTAINTY AND PROMOTE CONSISTENCY

There has always been a conflict and tension between the need for finality and the need to promote justice. To balance that tension, this Court has set out to give meaning to the plain text of the PCRA while also avoiding an endless cycle of petitions without reasonable basis. The 60-day requirement for after-discovered facts at issue here requires that petitioner plead and prove that the evidence was not previously known or discoverable. The PCRA courts are empowered to hold evidentiary hearings to test the limits of a petitioner's knowledge and diligence.

The Superior Court's *en banc* decision in this matter does nothing to upset that balance or disturb the existing framework. On the contrary, it simply clarifies the manner, first addressed in *Bennett*, in which courts should consider the totality of a petitioner's circumstances, and this Court should embrace that clarification.

Pro se prisoner litigants lack full access and resources, and the PCRA courts reviewing their petitions should include those limitations in the analysis of diligence. Applying a reasonable and fact-specific diligence analysis to post-conviction matters permits more certain and consistent application of the PCRA, for all petitioners in all circumstances and in all Courts in the Commonwealth.

CONCLUSION

Practically, it makes no sense to hold that unrepresented prisoners have presumed knowledge of every public filing in our courts. Further, dismissing prisoner petitions through application of a rule that defies reality is neither appropriate nor just. Those without merit can be disposed of after a fair hearing; PCRA courts will continue to be free to use their discretion to consider all of the facts presented, rather than be locked into a rigid application of presumption. To leave a prisoner in prison who can allege and prove a right to relief as a result of the automatic application of presumption is fundamentally unjust.

For all of the reasons set forth above, as well as those described by Burton and Pa IP and the Network's fellow *amici*, this Court should affirm the Superior Court's ruling. This Court should also set forth clear instructions to the trial courts and appellate courts in this Commonwealth regarding the appropriate role of due diligence analysis and presumed knowledge of "public records" in post-conviction reviews. Burton, like other *pro se* prisoners seeking post-conviction relief, is entitled to a full and fair opportunity to both plead and prove the circumstances warranting such relief.

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WORD COUNT CERTIFICATION

Pursuant to Pa.R.A.P. 2135 (d), this is to certify that the Brief for *amici* Pa IP and the Network 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 **7,105** words.

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