OCTOBER TERM 2014

No. _______

IN THE SUPREME COURT OF THE UNITED STATES

TERRANCE WILLIAMS,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Pennsylvania

CAPITAL CASE
PETITION FOR WRIT OF CERTIORARI

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Dated: June 12, 2015

CAPITAL CASE
QUESTIONS PRESENTED

1. In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009), this Court held that due process requires an "objective" inquiry into judicial bias. The question presented is:

   Are the Eighth and Fourteenth Amendments violated where the presiding Chief Justice of a State Supreme Court declines to recuse himself in a capital case where he had personally approved the decision to pursue capital punishment against Petitioner in his prior capacity as elected District Attorney and continued to head the District Attorney's Office that defended the death verdict on appeal; where, in his State Supreme Court election campaign, the Chief Justice expressed strong support for capital punishment, with reference to the number of defendants he had "sent" to death row, including Petitioner; and where he then, as Chief Justice, reviewed a ruling by the state post-conviction court that his office committed prosecutorial misconduct under *Brady v. Maryland*, 373 U.S. 83 (1963), when it prosecuted and sought death against Petitioner?

2. In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), this Court left open the question whether the Constitution is violated by the bias, appearance of bias, or potential bias of one member of a multimember tribunal where that member did not cast the deciding vote. The circuits and states remain split on that question. The question presented is:

   Are the Eighth and Fourteenth Amendments violated by the participation of a potentially biased jurist on a multimember tribunal deciding a capital case, regardless of whether his vote is ultimately decisive?

TABLE OF AUTHORITIES

Federal Cases

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Terrance Williams, respectfully prays that a writ of certiorari issue to review the October 1, 2012 denial of Mr. Williams's motion to recuse the Chief Justice of the Pennsylvania Supreme Court and the judgment of the Pennsylvania Supreme Court entered on December 15, 2014, reversing the lower court's grant of a new penalty phase, reinstating Petitioner's sentence of death, and vacating Petitioner's stay of execution.

OPINIONS BELOW

On September 28, 2012, the Philadelphia Court of Common Pleas issued an order granting post-conviction sentencing relief and a stay of execution based upon the Commonwealth's violations of the rule set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Order (Sept. 28, 2012) (A-109).[1] The Commonwealth filed an emergency application with the Pennsylvania Supreme Court to review the order staying Mr. Williams's execution, which the court denied. Order (Oct. 3, 2012) (A-107).

On October 1, 2012, Petitioner filed a motion to recuse Chief Justice Ronald Castille of the Pennsylvania Supreme Court and a request that he refer the recusal motion to the full court if he declined to recuse himself. Chief Justice Castille issued an order on the same day, denying Petitioner's motion to recuse, as well as Petitioner's request that he refer the recusal motion to the full court. Order (Oct. 1, 2012) (A-108).

On December 15, 2014, the Pennsylvania Supreme Court issued an opinion reversing the Philadelphia Court of Common Pleas' grant of post-conviction sentencing relief, vacating the

[1] On November 27, 2012, the court issued a written opinion consistent with its September 28, 2012 ruling from the bench. *Commonwealth v. Williams*, No. CP-51-CR-0823621-1984, (Phila. Ct. Com. Pls. Nov. 27, 2012) (unpublished) (A-39). The court attached a separate "Appendix," which it explicitly made part of the opinion, detailing how the trial prosecutor's testimony before it and conduct during her prosecution of Petitioner led to its determination that she was "less than candid" during her testimony before the court. A-47 n. 23.

stay of execution, and reinstating the sentence of death. *Commonwealth v. Williams*, 105 A.3d 1234, 1236 (Pa. 2014) (A-2). On December 29, 2014, Petitioner filed an application for reargument, which the Pennsylvania Supreme Court denied on February 18, 2015. Order (Feb. 18, 2015) (A-1).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The final judgment of the Pennsylvania Supreme Court was entered on December 15, 2014. The Pennsylvania Supreme Court entered an order denying Petitioner's application for reargument on February 18, 2015. This Court granted Petitioner an extension of time to file a petition for writ of certiorari until June 18, 2015. This petition seeks review of the October 1, 2012 denial of Mr. Williams's recusal motion by Chief Justice Castille, as well as the December 15, 2014 opinion by the full court denying relief and refusing to consider the recusal issue.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

This case cries out for this Court's intervention. The Chief Justice of the Pennsylvania Supreme Court – and former Philadelphia District Attorney, who personally authorized the pursuit of Petitioner's death sentence – refused to recuse himself from his former office's appeal of a post-conviction court's order granting Petitioner a new penalty trial. The post-conviction court had ruled that the Chief Justice's former subordinates played "fast and loose," "[i]ntentionally rooting evidence out of [Petitioner's] prosecution in order to secure a first degree

murder conviction and death penalty sentence," constituting "gamesmanship" and a "penalty phase by ambush." A-105 n.24, A-47 n.23, A-99. The Chief Justice later joined the opinion reversing the grant of relief and vacating the stay of execution.

As the post-conviction court found, the victim in this case was a sexual predator who preyed on underage boys, including Petitioner, beginning when Petitioner was thirteen years old. Based on both documentary evidence and the testimony of the Commonwealth's key witness, Petitioner's co-defendant, the post-conviction court found that the Philadelphia police and trial prosecutor knew that the victim had sexually abused Petitioner; that the police and prosecutor knew that the eighteen-year-old Petitioner acted at the time of the offense in light of the victim's history of sexually abusing him; that the prosecutor coached the co-defendant to testify that the murder took place in the course of a random robbery; and that the police and prosecutor threatened to charge the co-defendant with another unsolved homicide and "sanitized" statements of other witnesses to conceal the victim's history of abusing other teenage boys.

The post-conviction court found that the prosecution had withheld favorable evidence that was material at capital sentencing because "the favorable evidence could reasonably be taken" to put the case "in such a different light as to undermine confidence in the verdict." *Banks v. Dretke*, 540 U.S. 668, 698 (2004); A-89-90. It therefore granted Petitioner sentencing relief and stayed his execution.

The Pennsylvania Supreme Court reversed the ruling of the post-conviction court. Among the members of the State Supreme Court who voted for reversal was Chief Justice Ronald Castille, who was the elected district attorney of Philadelphia at the time of Petitioner's trial, sentencing, and direct appeal, and *personally authorized* the pursuit of a death sentence in this case. Although Chief Justice Castille's vote was not decisive, the lower courts are split on

the issue of whether the presence of a potentially biased jurist on a multimember tribunal violates due process irrespective of the fact that his vote was not dispositive. This case provides an appropriate vehicle to address the important questions presented for review.

STATEMENT OF THE CASE

A. Trial and Direct Appeal Proceedings

Mr. Williams and his co-defendant, Marc Draper, were convicted of murdering and robbing fifty-six-year-old Amos Norwood in the Ivy Hill Cemetery in the Mount Airy neighborhood of Philadelphia on June 11, 1984. Mr. Williams and Mr. Draper beat Mr. Norwood to death with a tire iron and a wrench, and Mr. Williams subsequently returned to the cemetery to douse Mr. Norwood's body with gasoline and light it on fire. Mr. Williams, who was three months past his eighteenth birthday at the time of the offense, was sentenced to death. The trial prosecutor, Andrea Foulkes, argued during her penalty-phase closing argument that Mr. Williams killed Mr. Norwood "for no other reason but that a kind man offered him a ride home." Tr. 2/3/86 at 1873.

At the penalty phase, the Commonwealth presented evidence of Mr. Williams's prior convictions for the 1984 third-degree murder of Herbert Hamilton and the 1982 armed robbery of Don and Hilda Dorfman, both committed when Mr. Williams was a juvenile. Defense counsel presented three witnesses who "testified to Williams' general good nature and athletic success. In something of an understatement, the Pennsylvania Supreme Court found that this rather generic testimony was 'not compelling.'" *Williams v. Beard*, 637 F.3d 195, 228 (3d Cir. 2010) (quoting *Commonwealth v. Williams*, 863 A.2d 505, 520 (Pa. 2004)).

The sentencing jury found two aggravating circumstances – that the murder was committed during a robbery and that Mr. Williams had a significant history of violent felony convictions based on the Dorfman and Hamilton cases. The jury found no mitigating

circumstances and accordingly sentenced Mr. Williams to death, the only available punishment under Pennsylvania law when at least one aggravating circumstance and no mitigating circumstances are found. 42 Pa. Cons. Stat. § 9711(c)(1)(iv). On appeal, the Pennsylvania Supreme Court affirmed Mr. Williams's convictions and death sentence. *Commonwealth v. Williams*, 570 A.2d 75 (Pa. 1990).

B. Initial Post-Conviction Proceedings

Mr. Williams filed a petition under Pennsylvania's Post-Conviction Relief Act. The petition alleged, *inter alia*, that trial counsel was ineffective for failing to investigate and present mitigating evidence at the penalty phase of trial.[2] Post-conviction counsel presented evidence at a hearing showing that Mr. Williams was subjected to physical and sexual abuse throughout his youth, including sexual abuse at the hands of the victim, Mr. Norwood, starting at age thirteen. *Williams*, 637 F.3d at 229. The Commonwealth responded to this evidence by attacking the credibility of the post-conviction evidence of Mr. Williams's abusive past and attacking the opinions of his mental health experts as unfounded. *E.g.*, Brief for Appellee at *25, *Commonwealth v. Williams*, 863 A.2d 505 (Pa. 2004) ("The conclusions drawn by the defense experts were completely undermined by their unwavering trust in the self-serving accounts of physical and sexual abuse made by defendant, his family and friends."). The post-conviction court denied relief, and the Pennsylvania Supreme Court affirmed. *Williams*, 863 A.2d at 523. Two justices dissented from the denial of relief. *Id.* at 524, 528-35 (Saylor and Nigro, JJ., dissenting).

[2] Trial counsel, Nicholas Panarella, Esq., first met Mr. Williams the day before jury selection began. Tr. 1/6/86 at 30. Mr. Panarella was subsequently suspended from the practice of law after pleading guilty to a federal crime. *Office of Disciplinary Counsel v. Panarella*, 849 A.2d 1131, 1131 (Pa. 2004).

Mr. Williams filed a petition for habeas corpus relief in the United States District Court for the Eastern District of Pennsylvania. In federal habeas proceedings, the Commonwealth continued to attack the evidence of abuse and the mental health expert testimony presented in state court on the ground that there was no supporting evidence contemporaneous to the alleged abuse. Response to Penalty-Phase Claims in the Petition for Writ of Habeas Corpus at *89, *Williams v. Beard*, No. 05-cv-3486 (E.D. Pa. May 7, 2007) (disparaging testimony of former teacher James Villareal as being "based on gossip that Norwood molested young boys, which he had allegedly heard even before petitioner murdered Norwood – though he could not identify its source"). The district court found that trial counsel's failure to investigate and present mitigating evidence was deficient performance, but that the state court finding that Mr. Williams was not prejudiced was not unreasonable under the Antiterrorism and Effective Death Penalty Act. *Williams v. Beard*, No. 05-cv-3486, at *86-*97 (E.D. Pa. May 7, 2007) (unpublished).

The Third Circuit assumed, without deciding, that trial counsel's performance was constitutionally deficient, and affirmed the district court's ruling that the state court's no-prejudice ruling was not unreasonable. *Williams*, 637 F.3d at 226, 234-35. In finding that Mr. Williams was not prejudiced by his attorney's performance, the Third Circuit relied heavily on Respondent's attacks on the credibility of the sexual abuse evidence. *Id.* at 230 n.26 ("The Commonwealth assails these allegations of sexual abuse by pointing out that not one of the purported incidents was contemporaneously reported to medical or law enforcement officials. In fact, all of the sexual abuse testimony is based upon statements provided in anticipation of the PCRA hearing. As such, the Commonwealth's point is well taken and we factor it into our prejudice analysis accordingly."). On June 29, 2012, this Court denied Mr. Williams's petition for certiorari review. *Williams v. Wetzel*, 133 S. Ct. 65 (2012).

C. 2012 Post-Conviction Proceedings

On March 9, 2012, Mr. Williams filed another post-conviction petition in the Philadelphia Court of Common Pleas as a result of new information recently revealed by Mr. Draper. Mr. Draper revealed 1) that the Commonwealth had threatened to prosecute him on an unsolved homicide – a fact that was never before disclosed to defense counsel;[3] 2) that he had received a previously undisclosed benefit in the form of a letter the trial prosecutor had promised to write on his behalf to the parole board; 3) that at the Commonwealth's urging he testified falsely at trial that the homicide was motivated by robbery, when it was actually motivated by the childhood sexual abuse Mr. Williams had endured at the hands of Mr. Norwood; and 4) that he had been unwilling previously to disclose any of this information to Mr. Williams's counsel.

On August 8, 2012, Governor Tom Corbett signed a warrant setting Mr. Williams's execution for October 3, 2012. On September 7, 2012, Respondent filed a motion to dismiss the post-conviction petition, arguing, *inter alia*, that it was untimely. The post-conviction court, after holding two oral arguments and requiring an additional proffer from Mr. Williams's counsel, found that Mr. Williams had made a *prima facie* showing of timeliness, and accordingly scheduled an evidentiary hearing. At the evidentiary hearing, which took place on September 20 and 24, 2012, the court heard testimony from Mr. Draper and the trial prosecutor, Ms. Foulkes. During the hearing, additional evidence was uncovered, including previously undisclosed documents from the files of the prosecutor and police.

The hearing focused on Mr. Draper's recent revelation that he informed both police and prosecutors that this case was really about Mr. Williams's sexual "relationship" with the victim,

[3] Also withheld from the defense was the fact that Mr. Draper was given multiple polygraph examinations by the Commonwealth about the high-profile unsolved murder of a pregnant woman found dead in Philadelphia in 1984. Tr. 9/25/12 at 21-27, 33-36, 109-10; *see also* Post-Conviction Hearing Exhs. P-25, P-26.

rather than a robbery, as he had testified at trial. Mr. Draper testified to that effect at the hearing. Ms. Foulkes, by contrast, repeatedly testified that she never had any inkling that there was any sexual motive to the Norwood killing. Indeed, she specifically testified that she was actively searching for evidence that Mr. Norwood was in a sexual relationship with Mr. Williams, but was unable to find any:

> Like I say, I felt that we had a clearer motive in the Hamilton case[4] and a less clearer [sic] motive to why they did this to Mr. Norwood of all people, but there it was, that's all we had and I would have preferred to have more evidence of the homosexuality if it had existed.

Tr. 9/20/12 (p.m.) at 94.

Among the pieces of newly-revealed evidence, the post-conviction court found as fact that:

- During an initial interview with the police, Commonwealth witness Reverend Charles Poindexter told detectives "that he had 'in fact received a complaint about five years ago from the mother of a 17 year old parishioner that deceased had propositioned the 17 year old for sex.'" A-50 n.31 (quoting June 1984 police activity sheet). Reverend Poindexter also "told police 'in confidence' that Mr. Norwood 'may have been a homosexual.'" *Id.* (quoting June 1984 police activity sheet). The version of this interview "turned over to the defense omitted those portions of Rev. Poindexter's statement *entirely*. A-50-51, A-82-83 (emphasis in original). And "Revered Poindexter's trial testimony was devoid of any reference to Amos Norwood's homosexual ephebophilia.[5]" A-73 n.53.

- The prosecution suppressed exculpatory evidence from Mamie Norwood, the victim's widow. In a June 1984 police activity sheet, Mrs. Norwood told police about an early morning encounter between her husband and a young man, during which her husband claimed he had been abducted but wanted no involvement by the police. In the version of Mrs. Norwood's statement disclosed to the defense, "this entire account was omitted." A-50 n.31.

[4] Ms. Foulkes testified that she knew of the sexual connection between Mr. Williams and Mr. Hamilton. Tr. 9/20/12 (a.m.) at 18; *see also id.* at 34 (Ms. Foulkes was aware of the sexually-related activities involved in the Hamilton killing); *id.* at 34-35 (Hamilton investigation was sex-related; photos of "nude men [were] all over his place").

[5] An ephebophile is an adult who has a sexual attraction to teens. *See* A-51 n.32.

- The trial prosecutor suppressed her handwritten note memorializing "a conversation in which she learned that [R.H.], a 16-year-old boy in Amos Norwood's church, was groped 'on privates' by Mr. Norwood, and that there were other 'possible incidents.'" at A-50 n.30 (quoting Ms. Foulkes' handwritten note found in prosecutor's trial file). "[N]one of that information was turned over to the defense." A-84.

- The trial prosecutor's withheld handwritten notes indicating that an investigative task in Mr. Williams's case should be undertaken by the "faggot squad," A-56 n.38; a handwritten note that Mr. Draper "knew that Terry made $ by going to bed w/men," *Williams*, 133 S. Ct. at 34-35; "Marc Draper 12-27-85," included the following questions—"did he [Mr. Norwood] know Terry – liked boys," "did he like boys," and "how long had he known Terry," *id.*; and another that demonstrated that she "knew that [a detective]'s investigation produced specific information about Mr. Norwood's sexual involvement with parishioners at his church," A-97 & n.10 ("'D. Bennett talks to Rev. Poindexter who advises of other complaints by parishioners re. dec'd's homosexuality.'").

- The trial prosecutor suppressed her handwritten note that the deceased's wife told her that Mr. Williams was on her porch the day her husband disappeared. A-92.

- The trial prosecutor failed to turn over "a criminal complaint and an arrest warrant for a man named Andre Peterson, for having stolen Amos Norwood's credit cards and forged his signature at a jewelry store on June 13, 1984." A-104. At trial, Ms. Foulkes called the jewelry store clerk who sold jewelry to a man claiming to be Amos Norwood and who testified that it was Mr. Williams who purchased the jewelry. A-105. The court found this to be "yet another instance in which the prosecutor erred on the side of not disclosing evidence that could have been favorable to [Mr. Williams]." *Id.*

After hearing the testimony from Ms. Foulkes and Mr. Draper, and reviewing the police and prosecutorial files, the post-conviction court found that "evidence was plainly suppressed." A-79. Given that the evidence proving the *Brady* violation had been suppressed for nearly three decades by the Philadelphia District Attorney's Office, the post-conviction court found that the petition was timely and properly filed. A-52-62. The post-conviction court went on to state that the "pattern of non-disclosure" "calls into question the trial prosecutor's intent as the architect of the prosecution," and found that Ms. Foulkes engaged in "'gamesmanship,' choosing not to disclose evidence that would have supported the contention that [Mr.Williams] had been the

victim of Mr. Norwood's sexual advances." A-93; *see also* A-92-106 (court's 15-page Appendix solely addressing Ms. Foulkes' "gamesmanship").

The post-conviction court found that, collectively, this undisclosed evidence was material at sentencing, as "[w]ithout this evidence, [Mr. Williams]'s counsel was given a skewed and incomplete picture of the victim which effectively tied his hands while the prosecution elicited testimony at trial about his kind and caring character." A-64. If disclosed, the evidence would have explained "how Norwood's sexual advances amounted to a mitigating 'circumstance of the offense.'" *Id.* "In two different places during her penalty-phase closing argument, the trial prosecutor's comments about appellee's motive for the commission of this crime could have been effectively rebutted – or precluded – had the suppressed evidence been disclosed." A-85, A-87 ("Not only would reasonable defense counsel have directly rebutted the centerpiece of the Commonwealth's penalty-phase closing argument – that [Mr. Williams] killed Amos Norwood 'for no other reason but that a kind man offered him a ride home' – but that attorney would have then explained how the sexual pressure imposed on [Mr. Williams] by Norwood was a 'circumstance of his offense,' as it clouded his judgment." (footnote omitted)).

On the afternoon of September 28, 2012, the same day that the Court of Common Pleas issued its decision from the bench, Respondent sought review of the post-conviction court's ruling through an emergency application to the Pennsylvania Supreme Court to vacate the stay of execution. On October 3, 2012, the Pennsylvania Supreme Court denied Respondent's application for emergency relief. Order (Oct. 3 2012)(A-107). On December 15, 2014, the Pennsylvania Supreme Court, in an opinion joined by Chief Justice Castille, reversed the post-conviction court's grant of penalty-phase relief and lifted the stay of execution. Mr. Williams

filed an application for reargument on December 29, 2014, which the Pennsylvania Supreme Court denied on February 18, 2015.

On January 13, 2015, then-Governor Corbett issued a new warrant for Mr. Williams, setting his execution date for March 4, 2015. On February 13, 2015, Governor Tom Wolf issued a temporary reprieve to Mr. Williams pending the issuance of the legislative task force's report on the state of Pennsylvania's death penalty.[6]

D. Motion to Recuse Chief Justice Castille

Chief Justice Castille was the elected District Attorney for Philadelphia from January 6, 1986, until March 12, 1991. As such, he was the District Attorney throughout the trial, capital sentencing, post-trial, and direct appeal proceedings in this case. The trial prosecutor who was found to have violated her *Brady* obligations was a member of his staff.

Chief Justice Castille *personally authorized* his Office to seek the death penalty in this case. Chief Justice Castille's death penalty authorization is memorialized in a hand-written note on a typed memorandum from Andrea G. Foulkes to Mark Gottlieb, who was then the Chief of the Philadelphia District Attorney's Office's Homicide Unit. A-110-111. The two-page memorandum, dated January 21, 1986, begins with the following sentence: "In the event the jury in the above-referenced case currently on trial, returns a verdict of Murder I, I request that we actively seek the death penalty." A-110. The remainder of the memorandum includes a factual synopsis of the case and a discussion of aggravating and mitigating circumstances from the trial prosecutor's perspective.

[6] The Philadelphia District Attorney's Office is currently challenging this reprieve in the Pennsylvania Supreme Court. *See* Order (March 3, 2015) (ordering a briefing schedule be set "so that the parties may brief the issue of the propriety of this Court's exercise of King's Bench review as well as the merits of the issues raised").

At the bottom of the memorandum, there are two handwritten notes. The first is from Homicide Chief Mark Gottlieb, and it reads as follows:

> Ron,
> I recommend seeking Death
> M. Gottlieb 1/22/86

A-111. Just below the first notation is a second note, from then-District Attorney Castille, which reads as follows:

> Mark,
> Approved to proceed on the Death Penalty.
> Ronald D. Castille

Id.; *see also* Tr. 9/20/12 (a.m.) at 11 (identification by Ms. Foulkes of Chief Justice Castille's signature on authorization document).

Following Mr. Williams's conviction and death sentence, the Philadelphia District Attorney's Office filed a brief in the Pennsylvania Supreme Court on direct appeal, asking the Court to affirm Mr. Williams's convictions and death sentence. Then-District Attorney Castille is one of the listed counsel for the Commonwealth on the cover and the signature page of the brief. Brief of Appellee, *Commonwealth v. Williams*, 570 A.2d 75 (Pa. 1990).

In the current post-conviction proceedings, evidence was introduced that, on June 23, 1988, trial prosecutor Foulkes wrote a letter to the Pennsylvania Board of Probation and Parole on behalf of co-defendant Draper, the only eyewitness to the murder and the key Commonwealth witness at Mr. Williams's trial. *See* Post-Conviction Hearing Exh. P-15. Although Chief Justice Castille is not the signatory of the letter, the letter is written on the official letterhead of the Philadelphia District Attorney's Office and the sole name on the letterhead is "Ronald D. Castille, District Attorney." *Id.* The letter asks the Board to "consider [Mr. Draper's] cooperation . . . when determining his eligibility for parole or commutation," and notes that this

recommendation from the prosecutor was "the only benefit or promise conveyed to" Mr. Draper in exchange for his testimony against Mr. Williams. *Id.* Despite the existence of this promise to write the parole board, as expressed in the letter, Ms. Foulkes elicited from Mr. Draper at both the Norwood and the Hamilton trials that the full extent of his deal was a plea to second-degree murder and a life sentence. Tr. 9/20/12 (a.m.) at 163. Indeed, at the Hamilton trial Ms. Foulkes specifically elicited from Mr. Draper the fact that he understood that the District Attorney's Office would not write to the parole board on his behalf. *Id.* at 170. The trial prosecutor conceded at the recent post-conviction hearing that this promise to the Commonwealth's witness was not disclosed to the defense at trial and that she "would do it differently today." Tr. 9/20/12 (p.m.) at 25.

In its post-conviction ruling, the Court of Common Pleas cited this undisclosed inducement, among several other items, as evidence demonstrating that the trial prosecutor – an employee of then-District Attorney Castille – suppressed exculpatory evidence, played "fast and loose" with the truth, "had no problem disregarding her ethical obligations," and "took unfair measures to win." Tr. 9/28/12 at 37, 39, 45. Indeed, while the post-conviction court found that the undisclosed deal aspect of Mr. Williams's *Brady* claim was time barred, she specifically noted "that Ms. Foulkes' solicitation of false testimony on direct examination, *and* her failure to correct Draper's false testimony on cross-examination, could have been a potentially viable claim under *Giglio* [*v. United States*, 405 U.S. 150 (1972)], as non-disclosure of a promise made to a witness and subsequent testimony that there was a promise, violates a defendant's due process right to a fair trial if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'" A-101 n. 13.

In 1993, Chief Justice Castille campaigned for a position as a Justice on the Pennsylvania Supreme Court. His election campaign stressed his record as Philadelphia's District Attorney. In particular, then-candidate Castille emphasized his pursuit of capital punishment and the fact that, as District Attorney, he "put 45 people on death row," one of whom is Mr. Williams. Examples include:

- "Castille . . . campaigned as the tough-as-nails scourge of criminals . . . . Castille's career as Philadelphia's district attorney, where he built a reputation as a law-and-order crime buster, thrust him in the public eye." Katharine Seelye, "Castille Defeats Nigro for Seat on Supreme Court," PHILADELPHIA INQUIRER, Nov. 3, 1993, *available at* 1993 WLNR 1995447;

- "Castille . . . hopes a law-and-order message, coupled with name recognition in southeastern Pennsylvania, will help him win. . . . 'When I start talking about court reform, people's eyes glaze over,' he said. 'When I tell them about (my) sending criminals to death row or how I fought the Mafia in Philadelphia, then they're interested.'" Frank Reeves, "Castille Preaches Law-and-Order Message to Voters," PITTSBURGH POST-GAZETTE, Oct. 18, 1993, *available at* 1993 WLNR 2134084;

- "Castille and his prosecutors sent 45 people to death row during their tenure, accounting for more than a quarter of the state's death row population. Castille wears the statistic as a badge. And he is running for the high court as if it were exclusively the state's chief criminal court rather than a forum for a broad range of legal issues. . . . Castille talks about bringing a prosecutor's perspective to the bench . . . ." Tim Reeves, "High Court Hopefuls Pressing for Change," PITTSBURGH POST-GAZETTE, Oct. 17, 1993, *available at* 1993 WLNR 2117584;

- "Some candidates . . . skated perilously close to saying how they might be expected to rule on issues that could come before them as judge. Take, for example, Supreme Court Justice-elect Ron Castille – who, while pursuing a job requiring him to hear death-penalty appeals, bragged that he sent 45 people to death row when he was a prosecutor." Lynn A. Marks & Ellen Mattleman Kaplan, "Disorder in the Courts," PITTSBURGH POST-GAZETTE, Nov. 14, 1993, *available at* 1993 WLNR 2150772;

- Candidates "Castille, Nigro and Surrick are aware that special interest groups capable of giving money to control votes would love to hear their positions on gun control, abortion, the death penalty or any hot issue of the day. Under the current [legal] restrictions, Castille says if candidates take positions then they'll have to recuse themselves from any decisions in those cases. 'There's really no solution to it,' Castille says. 'You ask people to vote for you, they want to know where you stand on the death penalty. *I can certainly say I sent 45 people to death row as District Attorney of Philadelphia. They sort of get*

> *the hint.*'" Lisa Brennan, "State Voters Must Choose Next Supreme Court Member," LEGAL INTELLIGENCER, Oct. 28, 1993 (emphasis added).

Chief Justice Castille was elected and assumed his position on the Pennsylvania Supreme Court in January 1994.

On October 1, 2012, Mr. Williams filed a motion in the Pennsylvania Supreme Court requesting that Chief Justice Castille recuse himself in this case, or, should Chief Justice Castille decline to recuse himself, that the motion be referred to the full court for decision. Later that same day, the Philadelphia District Attorney's Office filed an opposition to Mr. Williams's recusal motion. Still later on October 1, Chief Justice Castille issued a one-sentence order on the motion, which reads as follows: "AND NOW, this 1st day of October, 2012, Respondent's Motion for Recusal is DENIED, as is the request for referral to the full Court." A-108. As noted, *supra*, Chief Justice Castille joined the opinion issued December 15, 2014, reversing the grant of relief.

REASONS FOR GRANTING THE PETITION

I. DUE PROCESS AND THE EIGHTH AMENDMENT REQUIRE THAT A DEATH PENALTY CASE BE DECIDED BY AN IMPARTIAL TRIBUNAL THAT "PRESERVES BOTH THE APPEARANCE AND REALITY OF FAIRNESS."

Chief Justice Castille's refusal to recuse himself from this case violated Mr. Williams's Due Process and Eighth Amendment rights. The "Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *accord In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). This Court has explained that

> [t]his requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law.

Marshall, 446 U.S. at 242 (internal citations omitted). An individual, the Court wrote, must be assured "that the arbiter is not predisposed to find against him." *Id.*

This due process right "has been jealously guarded by this Court" because it "preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done." *Id.* (citation and internal quotation marks omitted). This due process requirement takes on even greater significance in a capital case, because of the Eighth Amendment's heightened due process requirements. *E.g.*, *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

A "fair and impartial tribunal," guaranteed by the Eighth and Fourteenth Amendments, requires not just "an absence of actual bias" – there must not be "even the probability of unfairness" and "'justice must satisfy the appearance of justice.'" *Murchison*, 349 U.S. at 135-36 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). As the Court recently stated in *Caperton v. Massey Coal Co.*, 556 U.S. 868 (2009): "Under our precedents there are objective standards that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Id.* at 872 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

In *Caperton*, the Supreme Court of West Virginia reversed a $50 million trial judgment entered against Massey Coal Company by a vote of 3-2. One of the justices in the majority denied a recusal motion, which was based on the fact that the Massey CEO had contributed $3 million to the justice's election campaign. *Caperton*, 556 U.S. at 872. This Court found that under the circumstances of the case, due process required recusal. *Id.* The Court explained that

> [t]he inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is "likely" to be neutral, or whether there is an unconstitutional "potential for bias."

Id. at 881. With regard to the need for an objective standard, the Court noted that

> The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias. In defining these standards the Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."

Id. at 883-84 (internal citations omitted). These "objective standards" require recusal when the situation "offer[s] a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused." *Id.* at 878 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)); *id.* at 879 (same).

This Court also acknowledged the problems inherent in a system where "there is no procedure for judicial factfinding and the sole trier of fact is the one accused of bias." *Id.* at 885. This Court determined that while the justice "did undertake an extensive search for actual bias," this search is "just one step in the judicial process." *Id.* at 886. The Court held that regardless of whether such an inquiry may "sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," the "failure to consider objective standards requiring recusal is not consistent with the imperatives of due process." *Id.* This is so because "justice must satisfy the appearance of justice." *Offutt*, 348 U.S. at 14.

While the "possible temptation" standard "cannot be defined with precision," *Murchison*, 349 U.S. at 136; *Caperton*, 556 U.S. at 879, it applies here, where Chief Justice Castille was the District Attorney responsible for prosecuting Mr. Williams at trial and on direct appeal; where Chief Justice Castille in a handwritten note personally authorized his Office to

seek the death penalty for Mr. Williams; where Chief Justice Castille's name appears as counsel for the Commonwealth on the direct appeal brief seeking affirmance of Mr. Williams's convictions and death sentence; where the claims presented in this case include claims that the District Attorney's Office, then headed by Chief Justice Castille, violated due process by suppressing mitigating evidence and presenting false and misleading information to the jury; where Chief Justice Castille's name appears as District Attorney on letterhead of a document that is part of the evidence in this case; and where Chief Justice Castille's campaign for judicial office highlighted his obtaining the death penalty in a number of capital cases, including Mr. Williams's case.

Respondent respectfully submits that, considering "all the circumstances of this case, due process requires recusal." *Caperton*, 556 U.S. at 872. Moreover, consideration of some of the circumstances individually highlights why that is so.

Where a judge is part of the "accusatory process," there is cause for recusal. *Murchison*, 349 U.S. at 137; *see also Del Vecchio v. Ill. Dep't of Corr.*, 31 F.3d 1363 (7th Cir. 1994) (finding no due process violation where judge was prosecutor in prior unrelated prosecution of defendant but "did not serve dual role of prosecutor and judge" in the prosecution at issue). For example, in *Murchison*, the judge who presided at trial had conducted "'one-man grand jury' proceedings" that resulted in the defendant's indictment. *Id.* at 136. This Court held:

> Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.

Id. at 137; *see also Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002) (characterizing Murchison's holding by noting that the "judge violated due process by sitting in the criminal trial of defendant whom he had indicted"). This Court noted that in such instances, "it is difficult if

not impossible for a judge to free himself from the influence of what took place" previously, particularly because the judge would be "more familiar with the facts and circumstances in which the charges were rooted than was any other witness." *Murchison*, 349 U.S. at 138.

Here, the due process violation is even clearer than it was in *Murchison*. While the *Murchison* judge returned the indictment while acting as a judge and, thus, did "not likely have all the zeal of a prosecutor," *id.* at 137, then-District Attorney Castille was the prosecutor who personally authorized his Office to seek the death penalty in Terrance Williams's case.

Moreover, Chief Justice Castille then participated in the review of the lower court's denunciation of the actions of those under his supervision, including a finding that his office withheld exculpatory evidence and that "the suppression of this evidence . . . undermines confidence in the jury's death sentence." A-51. It is hard to imagine a claim more susceptible to bias. If ever there was a case that "offer[s] a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused," *Caperton*, 556 U.S. at 878, this is it.

The reports of and quotes from Chief Justice Castille's judicial election campaign further highlight the due process violation. The *Caperton* decision made clear that judicial elections can create circumstances under which due process requires judicial recusal. Justice John Paul Stevens has stated: "A campaign promise to 'be tough on crime,' or to 'enforce the death penalty,' is evidence of bias that should disqualify a candidate from sitting in criminal cases." John Paul Stevens, *Opening Assembly Address, A.B.A. Ann. Meeting*, 12 St. John's J. Legal Comment. 21, 30-31 (1996); *see also* Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification*, 52 Ariz. L. Rev. 317, 319 (2002) (under due process analysis required by *Caperton*, "tough-on-crime elective judges should recuse

themselves from all criminal cases"). But such a sweeping rule is not necessary here. Chief Justice Castille's campaign was not just "tough on crime" or pro-death penalty, it was based in part on his record as District Attorney of putting people on death row, *one of whom is Mr. Williams*. Under these circumstances, at least, due process counseled in favor of Chief Justice Castille's recusal.

This Court should grant certiorari review and vacate the Pennsylvania Supreme Court's ruling, which violates Mr. Williams's Eighth and Fourteenth Amendment rights.

II. This Court Should Grant Review to Decide the Question It Left Open in *Aetna Life Insurance Co. v. Lavoie*, on which State and Circuit Courts Are Split: Whether Due Process and the Eighth Amendment Require Relief from the Decision of a Panel that Included a Potentially Biased Jurist, Even When the Jurist Did Not Cast the Deciding Vote.

In this case, the judge whose recusal was sought did not cast a decisive vote. This Court has previously noted the open question of whether the bias, appearance of bias, or potential bias of a tribunal member violates due process even where he does not ultimately cast a decisive vote in the matter. The lower courts are split on this important question. Review is of particular importance in this capital case, where the Eighth Amendment's heightened procedural safeguards apply.

In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), the Court noted that it was an open question whether the disqualification of one member of a multi-member tribunal requires a decision to be vacated where the disqualified member did not cast a decisive vote:

> Our prior decisions have not considered the question whether a decision of a multimember tribunal must be vacated because of the participation of one member who had an interest in the outcome of the case. . . . [W]e are aware of no case, and none has been called to our attention, permitting a court's decision to stand when a disqualified judge casts the deciding vote. Here Justice Embry's vote was decisive in the 5-to-4 decision and he was the author of the court's opinion. Because of Justice Embry's leading role in the decision under review, we conclude that the "appearance of justice" will best be served by vacating the decision and remanding for further proceedings.

Aetna, 475 U.S. at 827-28 (footnotes omitted). *Caperton* provides an analogous scenario, given that the judge whose qualification to serve was challenged also provided a decisive vote. *Caperton*, 556 U.S. at 874-75.

Justice Brennan, concurring in *Aetna*, explained the impact of each participant in a tribunal's deliberations:

> The description of an opinion as being "for the court" connotes more than merely that the opinion has been joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition. The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates *necessarily* imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process.

475 U.S. at 830-831 (Brennan, J., concurring).

The circuits remain split on this question. In *Bradshaw v. McCotter*, 796 F.2d 100 (5th Cir. 1986), following *Aetna*, the Fifth Circuit concluded that one of the judges who heard the petitioner's appeal was "disqualified" and that his participation violated due process of law because his name had appeared on the state's brief on appeal as the state prosecuting attorney. Nevertheless, the court denied habeas relief because, "[l]acking a showing in this case that [the judge's] vote was controlling, no prejudice has been shown as the result of the conclusion that he should have recused himself." *Id.* at 101; *see also Richardson v. Quarterman*, 537 F.3d 466, 476-77 (5th Cir. 2008) (applying *Bradshaw*).

Other circuits, however, have found that the participation of a biased member of a tribunal requires relief even if that member does not cast the deciding vote. *See Stivers v. Pierce*, 71 F.3d 732, 746-48 (9th Cir. 1995) ("The plaintiff need not demonstrate that the biased

member's vote was decisive or that his views influenced those of other members. . . . [B]ias on the part of a single member of a tribunal taints the proceedings and violates due process."); *Antoniu v. SEC*, 877 F.2d 721, 726 (8th Cir. 1989) (proceedings "nullified" because "there is no way of knowing" how tainted member's participation affected deliberations); *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 767-68 (6th Cir. 1966) (result of Commission's decision tainted by participation of biased member although "his vote was not necessary for a majority"); *Berkshire Emps. Ass'n of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235, 239 (3d Cir. 1941) ("Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured."); *Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 591-92 (D.C. Cir. 1970) (following *Berkshire* and *American Cyanamid*); *cf. Hicks v. City of Watonga*, 942 F.2d 737, 748-49 (10th Cir. 1991) (if one member of tribunal is found to be biased, presence "will have tainted the tribunal and violated [litigant's] due process rights").

State courts, too, have taken a variety of approaches in the wake of *Aetna*. The Texas Supreme Court reviewed the diverging views in *Tesco American, Inc. v. Strong Industries, Inc.*, 221 S.W.3d 550, 554-56 (Tex. 2006), and concluded that "the judgment must be reversed because the opinion on which it was based was authored by a justice who was constitutionally disqualified; it would be stretching the Constitution too far to simply assume she was not involved." *Id.* at 556. Some states, including Pennsylvania, have refused to vacate judgments based on the votes of disqualified judges that are "mere surplusage." *See Goodheart v. Casey*, 565 A.2d 757, 762 (Pa. 1989); *see also State v. Lund*, 718 A.2d 413, 418 (Vt. 1998). Other states, in addition to Texas, hold that a disqualified participant, or at least a disqualified author, requires that the judgment be vacated. *See Nationwide Mut. Ins. Co. v. Clay*, 525 So.2d 1339,

1340-41 (Ala. 1987) (following remand from Supreme Court for further proceedings in light of *Aetna*, Alabama Supreme Court conducts complete rebriefing and redetermination of case with participation of full court of unbiased justices, even though "offending" justice did not cast deciding vote); *Sullivan v. Mayor of Town of Elsmere*, 23 A.3d 128, 136 (Del. 2011) (bias of one member of multimember adjudicatory tribunal deprives party of due process regardless of whether biased member's vote necessary to judgment); *Powell v. Anderson*, 660 N.W.2d 107, 123 (Minn. 2003) (vacating unanimous judgment as disqualification of authoring judge not cured by participation of two qualified judges); *Reg'l Sales Agency, Inc. v. Reichert*, 830 P.2d 252, 253-54 (Utah 1992) (vacating and remanding judgment authored by disqualified judge).[7] At least one state court has held that a disqualified author required recusal of the entire court. *See Johnson v. Sturdivant*, 758 S.W.2d 415, 415-16 (Ark. 1988).

In Mr. Williams's case, the participation of Chief Justice Castille violated due process even though his was not the deciding vote. Not only did his "involvement play[] a part" in the disposition, *see Aetna*, 475 U.S. at 830-31 (Brennan, J., concurring), but he was the Chief Justice and, as such, had the added responsibility and power of assignment. *See* Pa. Sup. Ct. Internal Operating Procedures § 3(B) ("The Chief Justice will assign submitted cases in a rotation schedule by seniority . . . . Capital PCRA appeals shall be assigned in a separate rotation, to ensure an even distribution of responsibility in those appeals. If it appears that there is an unequal distribution of cases or a delay in deciding cases, the Chief Justice may, as a matter of his or her discretion, alter the assignment order.").

[7] *See In re Inquiry Concerning Judge*, 81 P.3d 758 (Utah 2003) (declining to follow *Reichert* on other grounds).

If nothing else, Chief Justice Castille's prior participation in Mr. Williams's prosecution does not "satisfy the appearance of justice." *Offut*, 348 U.S. at 14. In addition to the Chief Justice's having already expressed, while District Attorney, his belief that a death sentence is appropriate in this case, Chief Justice Castille was privy to the facts regarding the crime and aggravating and mitigating factors as alleged in the Commonwealth's Memorandum seeking authorization to pursue the death penalty in Mr. Williams's case. A-110-11. This memorandum outlined the instant offense, as well as details of Mr. Williams's prior crimes, including noting a then-current robbery charge, which was subsequently dismissed. The memo noted only the following with regard to mitigating circumstances in the case:

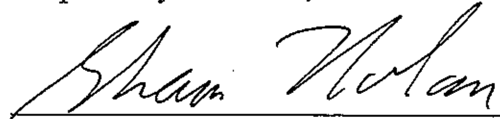
> defendant is 19 years old and went through one year of college at Cheney University. At Germantown High School, he was reputed to be a promising quarterback and his team won the City championship. He has been described by persons who know him as a Jeckyl-Hyde [sic] personality.

A-111. Thus, just as in *Murchison*, Chief Justice Castille was "more familiar with the facts and circumstances in which the charges were rooted" than anyone else on the tribunal. *Murchison*, 349 U.S. at 138. And it was no doubt "difficult if not impossible for [him] to free himself from the influence of what took place" previously. Indeed, the information contained in the Commonwealth's Memorandum seeking authorization is inaccurate and incomplete in light of the new, previously-withheld evidence uncovered during the course of the 2012 evidentiary hearing.

CONCLUSION

WHEREFORE, for all the reasons set forth above, Mr. Williams respectfully requests that the Court issue a writ of certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,



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Dated: June 12, 2015

No. _______

IN THE SUPREME COURT OF THE UNITED STATES

TERRANCE WILLIAMS,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PROOF OF SERVICE

I, Shawn Nolan, certify that on this 12th day of June, 2015, I caused a copy of the foregoing *Petition for Writ of Certiorari* and *Motion for Leave to Proceed In Forma Pauperis* to be served by FIRST CLASS MAIL, postage prepaid, upon all parties required to be served under SUP. CT. R. 29, listed below:

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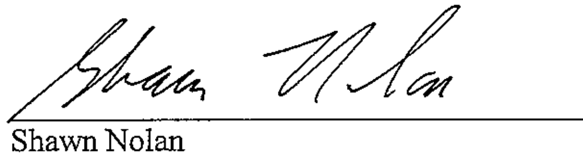

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