OCTOBER TERM 2014

No. 15-5040

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Dated: August 7, 2015

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Petitioner, Terrance Williams, files this reply brief in support of his Petition for Writ of Certiorari, and prays that the Court issue its writ of certiorari to review the denial of Petitioner's motion to recuse then-Chief Justice Ronald Castille of the Pennsylvania Supreme Court, and the subsequent judgment of that court reversing the lower court's grant of sentencing relief based upon the Commonwealth's violations of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny.[1]

ARGUMENT

This case squarely presents a question that, as the Commonwealth does not and cannot dispute, has divided federal circuit courts and state courts, and now begs for resolution—does the bias of one tribunal member impermissibly taint the judgment of the whole tribunal regardless of whether the biased member cast the deciding vote? Petitioner's case is an ideal vehicle for this question because Chief Justice Castille, as the Philadelphia District Attorney, made the final decision to seek death against Petitioner, and then, as the Chief Justice, reviewed a ruling that his office (while he was District Attorney) committed prosecutorial misconduct at the capital sentencing proceeding by failing to disclose favorable evidence to the defense. Although Chief Justice Castille did not cast the deciding vote in reversing the lower court's ruling, his associate justices could not reasonably be expected to rule that their Chief Justice's office had committed misconduct, and the tribunal's deliberations had, at a minimum, the appearance of impropriety.

This question—whether the participation of a biased judge in the adjudicatory process so taints the fairness, or the appearance of fairness, of appellate review as to violate due process—

[1] All emphasis herein is supplied unless otherwise indicated. Relevant state court decisions were included in the Appendix filed with the Petition for Writ of Certiorari and are cited herein as "A-" followed by the page number. A Supplemental Appendix containing Petitioner's motion to recuse Chief Justice Castille is cited as "SA-" followed by the page number and is included with this brief.

has split the courts below. Its resolution is important not only to the litigants in this case, but to the public at large, who have a vested interest in insuring that the decisions within the justice system, and particularly the decision to affirm a sentence of death, are made by tribunals that are free from the taint of bias.

In opposing the petition, the Commonwealth argues that this issue is "unpreserved and purely abstract." Respondent's Brief in Opposition (BIO) at 13. Neither argument is accurate. The question is anything but abstract: it is integral to the recusal request.

Citing Petitioner's failure to explicitly discuss, in his recusal motion, the impact that Chief Justice Castille's participation would have on his colleagues, the Commonwealth asserts that Petitioner has not preserved this issue. BIO at 14. But this argument would make sense only if Petitioner's motion for recusal were read as seeking Chief Justice Castille's recusal only *in the event that* he cast the deciding vote, which it did not. Petitioner sought the recusal of Chief Justice Castille because he was a member of the multi-member tribunal that would be adjudicating the appeal, and Petitioner explicitly argued that the Chief Justice's participation in the case would cause bias or, at a minimum, the appearance of bias. SA-1-2, 9.

Moreover, Petitioner requested that the recusal motion be referred to and decided by the full court in the event that Chief Justice Castille declined to recuse himself. SA-14-16. Chief Justice Castille denied this request too. Contrary to the Commonwealth's argument, Petitioner's recusal motion necessarily included the question whether the bias of one tainted the opinion of all.

Furthermore, this question developed into a distinct issue only when Justice Castille participated in the adjudication of Petitioner's case *after* denying Petitioner's requests.

As this Court has explained when discussing its jurisdiction:

> If the question [is] only an enlargement of the one mentioned in the assignment of errors [presented in state court], or if it [is] so connected with it in substance as to form but another ground or reason for alleging the invalidity of the personal judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued.

Dewey v. City of Des Moines, 173 U.S. 193, 197-98 (1899); *see also Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992) (a litigant seeking review in this Court "generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below"). If an issue is "necessarily connected" to the claim presented to the state courts—in other words if the question cannot avoid "touching the question" included in the presentation of error to the state court—this Court properly exercises jurisdiction over the question presented. *See Dewey*, 173 U.S. at 198. The issue of whether Chief Justice Castille's participation in the tribunal's adjudication of Petitioner's appeal violated due process and the Eighth Amendment is "necessarily connected" to the issue of whether Chief Justice Castille's failure to recuse himself itself violated due process and the Eighth Amendment.

The Commonwealth also argues that due process did not require Chief Justice Castille's recusal. BIO at 9. To the contrary, this is a textbook example of judicial 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 v. Massey Coal Co.*, 556 U.S. 868, 878 (2009), this is it.

The Commonwealth cites the practices of this Court's own members in an attempt to justify Chief Justice Castille's decision not to recuse himself. BIO at 10. However, those practices actually support Petitioner's position. In *Laird v. Tatum*, 409 U.S. 824 (1972), then-Justice William H. Rehnquist agreed that a former Justice Department official should be

disqualified if he signed a pleading or brief or actively participated in any case. *Id.* at 828. Citing one of his prior recusals, Justice Rehnquist noted that in *S & E Contractors, Inc. v. United States*, 406 U.S. 1 (1972), a case "in which I had only an *advisory role* which terminated immediately *prior to* the commencement of the litigation, I disqualified myself."[2] *Laird*, 409 U.S. at 829. Justice Rehnquist did not recuse himself in *Laird* only because he had "never participated, either of record or in any advisory capacity . . . in the government's conduct of the case." *Id.* at 828. Likewise, in *Schneiderman v. United States*, 320 U.S. 118 (1943), Justice William F. Murphy did not recuse himself from a case where the basis for recusal was the fact that the case was brought and tried while he was Attorney General. *See Laird*, 409 U.S. at 830. Of these examples,[3] *S & E Contractors*, where recusal was found to be warranted, is the only case in which the sitting justice had any role in the case while working for the Justice Department.

Further, the Commonwealth's comparison of the Philadelphia District Attorney's Office to the Department of Justice, BIO at 11, is inapt. As noted in *Laird*, the recusal issue with respect to former Justice Department officials, particularly Attorneys General, is "special" because the Department of Justice "is the largest law office in the world and has cases by the hundreds of thousands and lawyers by the thousands. For the most part, the relationship of the Attorney General to most of those matters is purely formal." 409 U.S. at 829 (internal quotations

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[2] Justice Rehnquist was never the Attorney General. *See, e.g.*, *Laird*, 409 U.S. at 825-27.

[3] The Commonwealth also cites Chief Justice John Marshall's authoring of *Marbury v. Madison*, 5 U.S. 137 (1803), despite his prior involvement in the case as Secretary of State. Petitioner finds no record of either party in *Marbury* requesting Chief Justice Marshall recuse himself and notes that the Chief Justice's prior involvement was not part of the "accusatory process." *See In re Murchison*, 349 U.S. 133, 137 (1955).

and citations omitted). The comparison is particularly ill-suited in this case, where the District Attorney personally authorized his office to pursue the death penalty.

The Commonwealth also compares Petitioner's case to a list of purportedly "identical recusal requests," BIO at 10, which Chief Justice Castille previously denied. However, it fails to note the obvious controlling distinctions. In denying the other recusal motions, Chief Justice Castille relied on the fact that he was *not* the District Attorney during the defendants' trials, had *no* personal involvement or participation in the matters, and had *not* prejudged the cases in any way. *See Commonwealth v. Beasley*, 937 A.2d 379, 381 (Pa. 2007) (opinion denying recusal); *Commonwealth v. Rainey*, 912 A.2d 755, 757-58 (Pa. 2006) (opinion denying recusal) ("I was not personally involved in . . . the charging decisions that were made in [t]his case . . . ."); *Commonwealth v. Abu-Jamal*, 720 A.2d 121, 122-23 (Pa. 1998) (opinion denying recusal) ("I personally neither contributed to, nor participated in, the prosecution of appellant's case[4] . . . . I was not privy to any special information that could possible hamper my ability to fairly and impartially decide this appeal. . . . I have not prejudged appellant's matter . . . ."); *Commonwealth v. Jones*, 663 A.2d 142, 143-45 (Pa. 1995) (opinion denying recusal).

The Commonwealth also cites Chief Justice Castille's claim that his "formal approval of [capital charging] recommendations" was simply a "concurrence in [his assistants'] judgment that the death penalty statute applied, *i.e.*, that one or more of the statutory aggravating circumstances . . . existed, and nothing more." BIO at 11-12 n.6 (first alteration in original) (internal quotations and citations omitted). Chief Justice Castille has stated: "My concurrence in

[4] Chief Justice Castille noted that it was then-mayor of Philadelphia, Edward Rendell, who was the District Attorney at the time of Mr. Abu-Jamal's trial and who approved the Commonwealth's pursuit of the death penalty against Mr. Abu-Jamal. *Abu-Jamal*, 720 A.2d at 122 n.1.

the judgment of my assistants that notice should be provided to a murder defendant of potential aggravating circumstances is not . . . a level of involvement" that requires recusal. *Rainey*, 912 A.2d at 758.

Chief Justice Castille's description of the grave decision to seek the death penalty as a mere ministerial act is entirely unpersuasive. Whether there is sufficient evidence to support an aggravating factor does not, ipso facto, determine whether a death sentence is sought. The Commonwealth does not assert that it was Chief Justice Castille's policy as District Attorney to capitally charge every case in which there was evidence to support at least one aggravating factor. Rather, the decision to seek death is a most serious exercise of discretion. *See Wayte v. United States*, 470 U.S. 598, 607-08 (1985).

In any event, the record in this case does not reflect a mere concurrence in providing notice of potential aggravating circumstances. Rather, the trial prosecutor sent a memorandum to her superiors requesting that she be authorized to seek the death penalty. The prosecutor's memorandum described the facts of the crime, the aggravating circumstances, and the mitigating circumstances. A-110-11. In personally approving her request to seek death, then-District Attorney Castille participated directly and significantly in the prosecution of this case. If the decision to seek death in a particular case is not part of the "accusatory process," *see In re Murchison*, 349 U.S. at 137, it is unclear what would be.

The Commonwealth dismisses Petitioner's case as unworthy of this Court's attention on the ground that it is fact-bound and non-recurring in light of Chief Justice Castille's retirement from the court and the lapse in time since his service as District Attorney. BIO at 12-13. In fact, cases where an appellate judge was previously involved in the case as a prosecutor are quite likely to recur, as are cases challenging one tribunal member's bias and its impact on the court as

a whole. This latter issue will arise any time that a recusal motion is filed with respect to one judge on a multi-member appellate tribunal.

CONCLUSION

This Court should issue its writ of certiorari to resolve the uncontested split among lower courts and to review the decisions of Chief Justice Castille and the Pennsylvania Supreme Court.

Respectfully submitted,

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PROOF OF SERVICE

I, Shawn Nolan, certify that on this 7th day of August, 2015, I caused a copy of the foregoing *Reply in Support of Petition for Writ of Certiorari* 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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