No. 15-5040

# In the Supreme Court of the United States

TERRANCE WILLIAMS,
*Petitioner*,
v.
COMMONWEALTH OF PENNSYLVANIA,
*Respondent*.

*On Writ of Certiorari to the Supreme Court of Pennsylvania*

## BRIEF FOR RESPONDENT

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## Capital case

## Questions presented

1. Whether the Constitution dictated disqualification of a state supreme court justice because of his brief administrative involvement in the case as an elected district attorney 29 years earlier.

2. Whether the Constitution invalidated the votes of every other justice in the unanimous decision below.

## Table of contents

## Table of authorities

Cases:

Constitutions and Statutes:



Miscellaneous:

## Introduction

Twenty-nine years before the appellate decision below, Justice Ronald Castille of the Pennsylvania Supreme Court had a different job. He was the elected District Attorney of Philadelphia. He led a staff of almost 500, including 225 attorneys. In that capacity, it was his duty to sign off on a large variety of official documents – including memos recommending the death penalty in murder cases – that were passed up the chain of command for his signature. During his five-year tenure, there were scores of such capital authorization memos, including one in this prosecution. His signature on that memo, in January 1986, was his first, last, and only contact with this case.

There are now two questions before this Court. The first is whether Justice Castille was required by force of the United States Constitution to recuse himself, three decades later, from the Pennsylvania Supreme Court's unanimous decision in the case. The second is whether the Constitution also mandates an automatic presumption that every other justice on the court was biased, so that all of their votes must be nullified as well.

Nevertheless, petitioner spends a considerable portion of his brief addressing a different claim, on which he chose not to seek review in this Court: the merits of the underlying *Brady*-mitigation issue adjudicated in the court below. He is supported in his effort by an amicus brief from the ACLU that is

completely devoted to this issue, and which says nothing at all about the due process recusal questions actually before the Court.

Presumably, petitioner seeks to suggest that the ruling below was erroneous, and the error is evidence of bias. But this approach is of dubious relevance to the issues on which the Court granted review.[1] In any case, there was no error.

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[1] In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 895 (2009 (Roberts, C.J., dissenting), the dissenting justices raised exactly this question: "Does the due process [recusal] analysis consider the underlying merits of the suit? Does it matter whether the decision is clearly right (or wrong)?" The Court gave an implicit answer: it declined to discuss the merits of the underlying issue at all, even where it had resulted in an acrimonious, closely divided opinion in the court below. *See also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824 (1986) (declining to decide whether ruling below was consistent with existing law, "a judgment we are obviously not called on to make"); *Tumey v. State of Ohio*, 273 U.S. 510, 535 (1927) (rejecting argument that strength of evidence was relevant to due process analysis). Were it otherwise, every due process recusal claim would subside into a relitigation of the substantive issue below.

## Statement of the case

1. Petitioner chose perjury over readily available mitigation evidence; there was no "suppression."

Petitioner's *Brady* claim is premised on his own admitted perjury. Among his numerous other violent crimes, petitioner robbed and killed two gay men. He testified under oath at the first trial that he did not have a sexual relationship with the victim and did not kill him. He testified at the trial in this case that he never even knew the victim until the day of the crime, and had nothing to do with his murder. He rejected his lawyer's advice to plead guilty in exchange for a life sentence, and was convicted and sentenced to death.

More than a decade later, on post-conviction review in this case, petitioner reversed course. His lawyers now acknowledged that he had perjured himself at the trial. They asserted that in fact he had repeatedly had sex with the victim for money, as had other teenagers, and that the victim was therefore a homosexual child abuser. They said petitioner intentionally killed the victim out of anger over this abuse.

Petitioner claimed that, if the jurors had heard this evidence, they would have given him the life sentence he refused before trial instead of the death sentence he received. He said it was his trial lawyer's fault that he did not use this revenge killing theory as a

mitigation strategy, and if it was not the trial lawyer's fault then it was the trial prosecutor's fault.

Twelve judges – including the original trial judge and a unanimous federal court of appeals – have considered and rejected petitioner's various forms of this mitigation claim. These judges held that the allegations about the victim would not have changed the sentence, in light of the evidence of petitioner's own egregious acts in this and other cases. Joint App. at 15a-37a; 250a-339a; 342a-377a. Petitioner relies on the now-vacated ruling of a thirteenth judge, who was newly assigned to the case after the original judge retired, and who disagreed with the judges who ruled before and after her.

As every other court concluded, however, the *Brady*-mitigation claim was without merit. Petitioner had ample opportunity to develop his "sexual abuse" mitigation claim before trial – he himself was allegedly one of the victims, and his family, friends and neighbors said they were aware of others. But petitioner did not *want* a life sentence; he wanted an acquittal. As he recognized at the time, evidence of his sexual activity with his two murder victims would have blown up his defense of innocence. He *objected* at trial to the sexual activity evidence that he now claims would have been mitigating. And it was petitioner's own false testimony that prevented the defense from presenting such evidence itself.

**Trials, 1985-86**

The pattern was set at petitioner's first homicide trial, for murdering Herbert Hamilton. The main witness for the prosecution was Mark Draper, petitioner's friend. Petitioner had told Draper that Hamilton gave him money and gifts in exchange for sex, that Hamilton was getting jealous, and that petitioner was going to "take care" of the problem. Shortly thereafter petitioner told Draper that he "took care" of Hamilton by luring him to bed, where he had hidden a knife. The victim was found naked, beaten, and stabbed to death, his valuables gone (N.T. 2/14/85, 36-39, 51-55; 2/15/85, 57-79; 2/19/85, 271-77; 2/20/85, 342-74; 2/3/86, 1835-41).

In his defense, petitioner did not claim that Hamilton had been sexually abusing him; on the contrary. He objected from the very first time the subject of his sexual contact with the victim was mentioned, in the Commonwealth's opening statement. Then he took the stand and denied from his own lips that he had any sexual relationship with the victim. He claimed that he barely knew Hamilton, that Hamilton had made an advance, that he defended himself in order to get away, but that someone else must have come along later and killed him (N.T 2/14/85, 23, 30-34; 2/20/85, 346-49, 480-584; 2/21/85, 595-97; 2/22/85, 724-25).

The second homicide trial, for murdering Amos Norwood, went much the same way. Draper was again the main witness. This time, there was no testimony about a sexual relationship between petitioner and the

victim, for the simple reason that, in contrast to Hamilton, petitioner never told Draper that he was having sex with Norwood. He did tell Draper, however, that the victim "liked boys," and that they could blackmail him to get money for gambling. He and Draper asked Norwood for a ride, made him drive to a nearby cemetery, beat him to death with a wrench and a tire iron, and stole his money and car (N.T. 1/14/86, 68-70; 1/22/86, 664-86; 1/23/86, 812-15).

In his defense, petitioner did not claim that Norwood had been sexually abusing him; on the contrary. He took the stand and denied from his own lips that he had ever even seen the man before the day of the murder. He claimed that he left before anything happened to the victim, and that other people must have killed him later. At the penalty phase, when his prior murder conviction was introduced, he objected to any reference to the underlying facts, making sure the jury would not hear the evidence of his sexual activity with the other victim (N.T. 1/27/86, 1175-1301; 2/3/86, 1811-18).

Under these circumstances, it was hardly surprising that the prosecutor would not have viewed additional sexual activity evidence as possible mitigation, let alone likely to change the sentence to life. Evidence that Norwood indeed "liked boys," and that petitioner was one of them, would have destroyed his defense at trial, and would have defeated his effort at the penalty hearing to prevent the jury from hearing the details of his prior murder.

Post-conviction petitions, 1996-2012

Had petitioner really wished to present such evidence, however, it is clear from his own pleadings that he could have done so. More than ten years after the Norwood trial, in 1996, petitioner filed a state post-conviction petition claiming that he had killed Norwood after all, but with mitigation. He contended that allegations about Norwood's conduct with petitioner and others were readily available before trial, and that his lawyer had violated basic standards of competency by not presenting them.

In support he offered testimony from James Villarreal, a lifelong mentor and self-described "father" to petitioner. Villarreal attested that he knew from several people in the community that Norwood had been molesting young boys for years. He said he would have been able and willing to testify to his knowledge at trial, had he been asked to do so (N.T. 4/8/98, 226-37).

Petitioner also offered testimony from Donald Fisher, his lifelong friend. Fisher testified that Norwood "liked to have sex with kids," and that petitioner said he had traded sex with Norwood for money. He asserted that he would have presented this information at the time of trial, had he been asked to do so (N.T. 4/13/98, 593-618).

In 2012 petitioner expanded on the theme with a new post-conviction petition. This time he presented a statement from Rev. Charles Poindexter. Poindexter was a local clergyman known to petitioner

from pre-trial discovery materials, which revealed that police had questioned several neighbors about Norwood's homosexuality (N.T. 9/20/12 pm session, 97; Exhibit C-2).

Poindexter's statement asserted that he and a number of people in the church suspected Norwood of having inappropriate relationships with young men. He said that Norwood's wife would call him and ask him to help find her husband; she said he would disappear for several days at a time, and that young men would repeatedly come looking for him. Petitioner also produced a statement from Ronald House, a member of the church, who said Norwood propositioned him when he was a teenager (July 2012 Post-Conviction Petition, Appendix Tab 10, 11).

Again, petitioner maintained that all these allegations were readily available before trial, and that the lawyer's failure to present them to the jury constituted ineffective assistance of counsel. But doing so, of course, would have directly contradicted the allegations the client had chosen to present to the jury.

### Last-minute hearing, September 2012

By September 2012, having completed state post-conviction and federal habeas corpus review, petitioner was finally facing a firm execution date. Two weeks before that date, the newly assigned judge, declaring that "death is different," announced that she would grant petitioner a hearing despite jurisdictional limitations on successive petitions (N.T. 9/14/12, 69).

She ordered the Commonwealth to produce the original trial prosecutor in court, but not to speak to her (N.T. 9/14/12, 72-87). She ordered the Commonwealth to retrieve all old police and prosecution files related to petitioner's crimes, but not to look at them (Motion to Complete Record, 10/26/12, ¶¶ 7-10). She took over questioning of the prosecutor from the defense, and confronted her with various documents the judge had personally culled from the 30-year-old files; she marked these as "court exhibits" (N.T. 9/20/12 pm session, 106-40; 9/25/12, 43-50, 162-64).

Just before her scheduled ruling, she ordered the defense to amend its petition for relief to reflect the grounds on which she intended to rule (Motion to Complete Record, ¶13). She then read a 40-page statement into the record, later followed by a 100-page written opinion. She said she had discovered three notes in the file that referred to Poindexter's suspicions about Norwood, to the allegation about Ronald House, and to Mrs. Norwood's reports about her husband's disappearances with young men. She accused the prosecutor of hiding this information from the defense, and held that it constituted the crucial evidence that would have mitigated the sentence. Joint Appendix F, G, O.

This was almost exactly the same information, however, that petitioner had already developed from Poindexter and his other post-conviction witnesses, and which he said was readily available to the defense at the time of trial.

While the judge spent over 26,000 words excoriating the prosecutor[2] for not relaying these allegations, there was one subject on which she had virtually nothing to say: petitioner's perjury. Not until a footnote almost 50 pages into her opinion did the judge even mention petitioner's actual testimony at trial. She noted that it was "inconsistent" with his sexual abuse victim claim, which she characterized as "an alternate defense theory." She suggested that petitioner – a double murderer who had sex with men for money – was just like the young boys who were raped by former Penn State coach Jerry Sandusky, but were afraid to tell. Joint App. at 111a.

The record does not support this rationalization. Petitioner *did* tell his lawyer about having sex with men; he just never happened to mention that any of the men included *his victim*. Nor was he shy about any other aspect of his defense. He told counsel what he wanted him to do throughout voir dire and trial, and he made repeated pro se requests. And when the trial was over, he secured a new lawyer for post-verdict motions, in order to litigate ineffective assistance of counsel claims. But he didn't tell *that* lawyer about alleged sex abuse either. The "alternate defense theory" didn't emerge for another decade (N.T. 1/6/86, 14-39; 1/14/86, 3-15, 75; 1/30/86, 1480-82;

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[2] The prosecutor worked in the district attorney's office from 1976 to 1990, when she left to become an assistant United States Attorney in the Eastern District of Pennsylvania. She is still there. In the almost 40 years she has served as an officer of the court, no other judge, state or federal, has ever found that she committed prosecutorial misconduct of any type in any case.

1/31/86, 1520; 2/3/86, 1614-15; 7/1/87, 60; 4/17/98, 774-75, 795).

The reality is that petitioner's perjury was not just another "alternate defense theory." The belated victimization claim was the antithesis of the words that came out of his own mouth at trial. His lawyer did not script that strategy. Petitioner chose his own story and stuck to it throughout hundreds of pages of direct and cross-examination. There was no "suppression"; the jury heard what he wanted it to hear.

2. Petitioner's sentence was the product of his own conduct.

As the Third Circuit and Pennsylvania Supreme Courts concluded, petitioner's untimely "alternate theory" would not have changed the sentence in any case. It would only have opened the door to more evidence of his character.

A. His history of violent criminal acts.

Petitioner insists that his criminal behavior was just a reflex response to the sexual abuse he supposedly suffered. But the details of the crimes contradict that claim.

**First burglary**

Petitioner's first conviction was for a residential burglary. He broke into the home of a woman he apparently didn't know. There was no element of

abuse. Federal Habeas Response, 10/20/06, Ex. RR, p.18 (4/3/81).

### Mr. & Mrs. Dorfman

The next year, petitioner was caught after breaking into another home, on Christmas Eve. He found an elderly couple asleep in their bed, where he held a rifle to the woman's throat and fired three bullets just above her head before escaping with their belongings. He did not know the couple. They had not been abusing him (N.T. 2/3/86, 1820-23, 1834-40).

### Herbert Hamilton

A year later petitioner (while awaiting trial for the Dorfman case) committed his first murder. It was not on impulse; he hinted his plan to his friend days in advance, and carefully hid the murder weapon next to the bed where he had promised to have sex. There would have been no struggle but for the victim's unexpected resistance. Once he was safely dead, petitioner stole his credit cards. Petitioner later bragged to a friend about the killing, and showed off the scars he had received in the fight (N.T. 2/19/85, 271-76; 287-92; 2/20/85, 342-74, 404-05).

### Robert Hill

Hill knew Hamilton and petitioner. Several months after Hamilton's murder, petitioner went to see Hill, and Hill let him into his home, not realizing petitioner had killed his friend. Petitioner pulled out a gun and threatened to kill Hill and his elderly

mother unless Hill gave up his money (N.T. 9/24/12 am session, 67-80; Exhibit C-6).

Amos Norwood

This was a crime of opportunity; petitioner and Draper were gambling on a street corner near Norwood's home and ran out of money. Petitioner came up with the idea of extorting Norwood, then directed Draper to help kill him so they could take everything he had. Petitioner drove Norwood's car to Atlantic City and used his credit cards to gamble and buy jewelry (N.T. 1/14/86, 68-70; 1/15/86, 370-90; 1/22/86, 664-91, 702; 1/31/86, 1556-62).

B. His history of fabrication.

Petitioner claims his credibility has been unfairly undermined by ineffective counsel and prosecutorial misconduct. A sampling of his elaborate history of deception suggests a different picture.

Scholar-athlete

Even while carrying out his crimes, petitioner managed to maintain a public persona as an academic and athletic success story. He was a star high school quarterback who won the city championship and a scholarship to college, where he made the varsity team. He killed Herbert Hamilton in the middle of freshman year, then went back to class. He took off a day for the Dorfman trial, then completed the spring semester and killed Amos Norwood just after the start of summer vacation. Even through his last trial,

petitioner kept convincing character witnesses that he was innocent, though the number willing to testify did diminish as his convictions mounted up (N.T. 2/3/86, 1846-51; Joint App. 252a-254a, 327a-328a).

### Mirror message

After Hamilton's life-and-death struggle ended, petitioner took the time to have a bath at the victim's house. Then he scrawled a message on the mirror, in toothpaste: "I loved you." He confided that his plan was to throw off police by implicating one of Hamilton's former lovers (N.T. 2/14/85, 39, 52; 2/20/85, 342-74).

### Bloody palm print

Hamilton was beaten with a bat and stabbed with a knife. The murder remained unsolved for months. Petitioner was questioned, but absolutely denied any connection. Police eventually took petitioner's palm print, which turned out to be a perfect match to a latent print, left in blood, on the bat. Only at that point did petitioner's story change: this time he said he *had* been there, and touched the bat, but didn't inflict any of the fatal wounds (N.T. 2/7/85, 34-59; 2/8/85, 2-30; 2/15/85, 125, 166-80; 2/19/85, 319-32; 2/20/85, 416-26).

### Calling Mrs. Norwood

The day after robbing and killing Amos Norwood, petitioner wanted to see if the body had been discovered. He decided to call the widow herself,

pretending to be an acquaintance of Amos. When he realized she did not yet know her husband was dead, he proceeded with a shopping and gambling spree using the victim's credit cards (N.T. 1/14/86, 73-84; 1/15/86, 372-84; 1/22/86, 691-96).

### Letters to Draper

While in prison awaiting trial, petitioner wrote a series of letters to his co-defendant, Mark Draper, to coach Draper in various evolving lies to tell police. He instructed Draper, for example, to pin the Norwood murder on their friend Ronald Rucker; when he found out Rucker had a solid alibi, the next letter instructed Draper to name a different friend as the killer.

When the letters were discovered, petitioner swore they were written by someone else. When his own document examiner confirmed his handwriting, he claimed Draper had dictated the letters to him (N.T. 1/22/86, 617-26; 707-55; 1/23/86, 769-76, 842-47, 878-98; 1/27/86, 1227-34).

### Ketchup-stained shoes

Shortly after Norwood's murder, petitioner admitted it to a friend, who noticed that petitioner was wearing blood-stained shoes. When the friend testified against him at trial, petitioner manufactured evidence, taking a similar pair of shoes and staining them with ketchup, in order to provide an innocent explanation for what his friend had seen. But the witness was able to remember that the shoes he saw were a different style, and the stains had a different

shape (N.T. 1/15/86, 363-66; 1/27/86, 1190-91; 1/30/86, 1376-82; 1/31/86, 1550-55, 1573-75).

## Norwood's victim

Petitioner's lawyers have been claiming for years that he was the victim of horrible sexual abuse by Norwood and others. *Petitioner*, however, has never said a word about it. He has never testified to any abuse; he has never even signed a statement in his own name. Every single allegation has been submitted solely as hearsay, through the statements of third parties about what petitioner supposedly said to them.

It has been an ever-expanding story: from trial, where petitioner did not know Norwood at all, to the 1998 post-conviction petition, where petitioner was having sex with Norwood for money, to the 2012 post-conviction petition, where petitioner was raped by Norwood on the very night before the murder (July 2012 Post-Conviction Petition, Appendix Tab 12).

Petitioner has donned different identities over the years. As the courts below recognized, however, examination of the record did not support his claim for sentencing relief.

## Summary of argument

No one is born a judge. They come to the bench after other careers, often as advocates in particular causes, cases, and controversies. Prior involvement in the subject of litigation may sometimes lead a judge to an individual decision to recuse. But no case of this Court has applied a constitutional *mandate* to disqualify a judge because of previous professional activities.

This is a poor case to begin what would be a dramatic expansion of the Court's narrow Due Process Clause recusal precedent. The experienced state supreme court justice below was an elected district attorney decades earlier. His only contact with this case in that capacity was the day in 1986 he signed off on a memo from subordinates recommending the death penalty. It was office policy that the district attorney put his signature on all such memos; he signed scores of them, along with all the other managerial tasks of running one of the nation's largest prosecution offices.

That single administrative act, if sufficient to invoke constitutional disqualification, would also require disqualification of many other judges and justices from precisely their areas of real-world expertise, and would leave courts short-staffed in many cases.

Other arguments for a new constitutional recusal rule are even weaker. The former district attorney's mere status as the person at "the helm" of the office,

29 years before the decision in this case, was not sufficient basis for mandatory disqualification. Nor was his statement years later, as a judicial candidate, when he referred to his office's past record in securing capital sentences in order to answer voters' questions about his views on the issue of capital punishment.

The case is poorer still for another reason. The decision below was not Justice Castille's; it was the decision of a unanimous court written by a different justice. There is no reason to believe all the other justices failed in their duty to decide the case fairly just because of Castille's presence.

In fact we know that is not true. Upon Justice Castille's retirement days after the decision below, when he could no longer have even arguable influence over his former colleagues, they considered petitioner's request for reargument of the original decision. They came to the same unanimous result. This is the same relief petitioner asks for now.

But there was no need for petitioner to wait until after Castille's retirement. If he really wanted the full court to rule on the recusal issue in advance, he could have asked the full court to do so, as his lawyers did in other cases involving Justice Castille. He never did here. He should not be heard to complain that they sat with Castille when he never asked them to review Castille's individual decision to sit.

What petitioner seeks is a conclusive presumption that the non-recusal of one justice "contaminates" every other justice on the court. That presumption is

an even more radical expansion of settled precedent and practice than his first argument. The Constitution demands a probability of actual bias in order to invalidate justices' votes on due process grounds. No presumption can properly substitute for proof of that probability. There is no evidence, let alone proof, that the other justices were biased.

## Argument

### I. The Constitution did not dictate disqualification of Supreme Court Justice Castille.

Recusal claims become due process claims only when "extreme facts [create] the probability of actual bias ris[ing] to an unconstitutional level." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886-87 (2009). Petitioner's claim cannot meet that demanding test.

#### *A. Justice Castille's brief administrative involvement, dating back to 1986, did not create a probability of actual bias 29 years later.*

##### 1. The memo.

Several decades ago, Ronald Castille served as the elected district attorney of Philadelphia. The district attorney's office employed more than 200 lawyers, over several levels of supervision, who prosecuted roughly 50,000 cases (including 300 homicide cases) each year.[3]

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[3] *See* CRAIG HEMMENS, ET AL., CRIMINAL COURTS: A CONTEMPORARY PERSPECTIVE, 140, 144 (2010) (Philadelphia District Attorney's Office organizational chart) ("the elected prosecutor rarely works on specific cases or makes court appearances. Rather, his or her duty is to delegate day-to-day responsibility for the prosecution of cases to supervisors and assistant prosecuting attorneys, to manage the organization and long-term planning for the office, and to set overarching policies and priorities").

In January 1986, a line prosecutor wrote a 1½-page memorandum to her supervisor. The memo recommended that, on the relevant facts and law, it was appropriate to pursue a sentence of death for petitioner's second brutal murder. Because the office sought the death penalty in a significant percentage of murder cases, this was one of many such memos; there were dozens a year.

Under office practice, the memos were passed up the chain of command for the district attorney's signature to indicate official concurrence. No memos were generated in cases where the trial prosecutor and supervisors did not recommend the death penalty. Castille signed the memo in this case and it was returned to the file.[4] That administrative act was the entire extent of his involvement.

Five years later, in 1991, Castille left the district attorney's office and entered private practice. Three years after that, in 1994, he became a justice of the Pennsylvania Supreme Court. Eighteen years after that, in 2012, petitioner filed his recusal motion, based on the 1986 memo.

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[4] The memo was typed on the city's pre-printed memorandum forms. At the bottom of the page, the form stated: "Response to this memorandum may be made hereon in longhand." [These words are not reproduced in the version of the memo printed in the Joint Appendix.]. Petitioner asserts that there is special significance in the fact that Castille "placed his own handwritten note" on the memo. Brief for Pet. at 5. But in pre-digital 1986, that was the standard method of response to any memo.

Now petitioner insists that this one memorandum from the 1980's would so dominate Justice Castille's thinking that, even three decades later, he could not reasonably be expected to perform his sworn duty as a jurist to review the new *Brady*-mitigation claim that petitioner presented below. Petitioner argues that we must engage in such a presumption because of the "solemnity" and "importance" of the decision to seek the death penalty. Brief for Pet. at 25.

But the question is not the importance of capital punishment as a matter of policy; the question is the likely impact of this one memo on the justice's deliberations almost 30 years later. Castille did not investigate this case; he did not try it; he did not directly oversee the lawyer who tried it. He did not "hide" any evidence; he did not know of any "hidden" evidence. Under these circumstances, there is no objective reason to believe Justice Castille would even have recalled this particular document 29 years later.[5]

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[5] *See, e.g., Commonwealth v. Abu-Jamal*, 720 A.2d 121, 123 (Pa. 1998) (Castille, J., denying recusal). Justice Castille issued many opinions, both published and unpublished, in support of rulings on recusal motions. Petitioner repeatedly asserts that in this case Castille "provided no explanation" for his recusal decision. Brief for Pet. at 27, 31. As the record shows, however, there would have been no time to draft an opinion under the circumstances here. Petitioner filed his recusal motion only in connection with the Commonwealth's emergency application to lift the stay of execution. His filing was made on October 1, 2012, two days before the scheduled execution date. Castille denied the recusal motion the same day, but joined the court in denying the application to lift the stay on October 3. *See Commonwealth v.*

But even after petitioner's recusal motion brought the memo to his attention, there was no probability of actual bias. Petitioner suggests that the memo provided Castille with special knowledge, unavailable to his colleagues on the court, because the memo made him "privy" to the details of petitioner's prior criminal record, including an armed robbery charge that was later withdrawn after the two murder convictions. Cert. Pet at 24. By the time of this appeal, however, all of petitioner's other crimes, including the robbery, had been made part of the official record before the Pennsylvania Supreme Court,[6] which included far more unfavorable information than anything in the memo.

Ironically, at the same time he says Castille knew too much, petitioner also says the justice knew too little, since the memo of course did not include all the allegations about supposedly mitigating evidence, made years later on collateral review. Cert. Pet. at 24. But that fact only further negates the probability of bias. Petitioner was not asking the Pennsylvania Supreme Court to decide whether Castille's 1986 death penalty authorization was reasonable when

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*Williams,* No. 163 EM 2012, docket sheet available at https://ujsportal.pacourts.us/DocketSheets/AppellateCourtReport.ashx?docketNumber=163+EM+2012. Once the stay was in place, with Justice Castille's concurrence, petitioner never renewed his recusal effort. *See* n.20, *infra*; Argument II.B., *infra.*

[6] *See* 2012 post-conviction hearing, N.T. [notes of testimony] 9/24/12 am session, at 67-80; Ex. C-6.

made; he was asking it to decide whether a line prosecutor had "suppressed" mitigation evidence that Castille knew nothing about. The whole point of this narrow claim was that the additional facts might have changed the mind of a judge or juror who was otherwise disposed toward a death sentence. After 20 years in his no-longer new role as a jurist, Justice Castille was competent to evaluate the legal standards applicable to such a claim.

Nor does the memo indicate that Justice Castille would harbor some special motive to protect any case in which he had formally approved the death penalty while DA. On the contrary: his judicial record shows that he voted to reverse in numerous capital murders that occurred on his watch as DA. *See, e.g., Commonwealth v. Mikell*, 729 A.2d 566 (Pa. 1999) (granting new trial); *Commonwealth v. Rush*, 838 A.2d 651 (Pa. 2003) (reversing and remanding); *Commonwealth v. Rainey*, 928 A.2d 215 (Pa. 2007) (reversing and remanding); *Commonwealth v. Bracey*, 986 A.2d 128 (Pa. 2009) (remanding for *Atkins* hearing in murder of police officer).[7] Petitioner's presumption

[7] In most of these cases, the vote to remand for further proceedings ultimately resulted in reduction of the death sentence to life. Over the length of Castille's judicial tenure, there were 34 Philadelphia capital cases in which the defendant received relief from the court. Castille voted for the defense in 21. *See Commonwealth v. Keaton*, 45 A.3d 1050 (Pa. 2012); *Bracey*, 986 A.2d 128; *Commonwealth v. Hackett*, 956 A.2d 978 (Pa. 2008); *Commonwealth v. Gibson*, 951 A.2d 1110 (Pa. 2008); *Commonwealth v. Dennis*, 950 A.2d 945 (Pa. 2008); *Commonwealth v. Cooper*, 941 A.2d 655 (Pa. 2007); *Rainey*, 928 A.2d 215; *Commonwealth v. Carson*, 913 A.2d 220 (Pa. 2006);

of bias is at odds with these actual outcomes.

Indeed, even *in this very appeal* Justice Castille cast his original vote in favor of the defense, refusing to lift the stay of execution. While he later voted to reject petitioner's merits claim, it was the initial ruling that has proved the most important. By denying the Commonwealth's motion to vacate the stay, the court allowed the warrant of execution to expire. Now, three years later, the execution remains indefinitely suspended under the governor's indefinite reprieve, regardless of the result of the present proceedings.[8]

If bias is ever to be presumed under these circumstances, it must at least have a half-life. Remarkably, though, petitioner never even mentions the passage of time in this case – as if the memo had just been signed yesterday, as if Justice Castille had filled his mind with nothing else over the decades that

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*Commonwealth v. Sneed*, 899 A.2d 1067 (Pa. 2006); *Commonwealth v. Hughes*, 865 A.2d 761 (Pa. 2004); *Commonwealth v. Gribble*, 863 A.2d. 455 (Pa. 2004); *Commonwealth v. Smith*, 861 A.2d 892 (Pa. 2004); *Commonwealth v. DeJesus*, 860 A.2d 102 (Pa. 2004); *Commonwealth v. Brooks*, 839 A.2d 245 (Pa. 2003); *Commonwealth v. McGill*, 832 A.2d 1014 (Pa. 2003); *Commonwealth v. Harvey*, 812 A.2d 1190 (Pa. 2002); *Commonwealth v. Rizzuto*, 777 A.2d 1069 (Pa. 2001); *Commonwealth v. Nieves*, 746 A.2d 1102 (Pa. 2000); *Commonwealth v. O'Donnell*, 740 A.2d 198 (Pa. 1999); *Mikell*, 729 A.2d 566; *Commonwealth v. Brown*, 711 A.2d 444 (Pa. 1998); *Commonwealth v. LaCava*, 666 A.2d 221 (Pa. 1995).

[8] *See* Argument II.A., *infra*.

have actually elapsed.

Instead, petitioner relies primarily on *In re Murchison*, 349 U.S. 133 (1955), contending that the memo makes this case a match to that one. And yet *Murchison* is almost an exact antithesis. There the judge was literally designated as "a one-man grand jury"; he was the one witness to the alleged perjury before him, and its one victim; and the entire course of events occurred *within a single week* – from testimony, to show-cause order, to conviction and sentence. *In re White*, 65 N.W.2d 296, 297-98 (Mich. 1954) (opinion below).

Justice Castille's 1986 approval signature does not compare. It was one of hundreds of documents he signed more than a quarter century before. Its content, even if he could have remembered it, did not indicate prejudgment of the new mitigation claim that later came before his court. What it did show was that as district attorney Castille supported capital punishment, and that his signature was an expression of that general policy. As discussed below, that is not constitutional grounds for disqualification.

2. The helm.

Petitioner also argues that the Constitution mandated recusal because Justice Castille "was at the office's helm" during the course of the prosecution. Accordingly, the trial prosecutor was one of his 200+ subordinates, and he was therefore, says petitioner, responsible for her purported misconduct simply by virtue of his position. Brief for Pet. at 28-29.

Under petitioner's "helm" theory, of course, this would have been far from the only case in which recusal would have been required. A likelihood of bias would have to be presumed in an appeal from virtually any of the quarter million prosecutions arising during Castille's time as DA, as long as the defendant was careful to include a *Brady* claim or any other allegation he could characterize as "prosecutorial misconduct."

But such a presumption against Castille as justice could not hold up even at the beginning of his judicial career, let alone at the very end. In September 1995, a year and a half after he took the bench, the court heard the case of a Philadelphia cop killer who had been sentenced to death. The murder was committed and the crimes were charged while Castille was "at the helm"; the case was tried by one of his longtime subordinates a few months after he left office. Justice Castille voted to vacate the death penalty on grounds of prosecutorial misconduct; in fact he authored the opinion of the court. *Commonwealth v. LaCava,* 666 A.2d 221 (Pa. 1995).

What the "helm" theory may lack in predictive power, however, it makes up in overreach. Petitioner's approach would require any judge, who at any previous point in his or her career was ever at the head of any organization – a law firm, a state or federal office, a non-profit – to recuse, for life, from any case involving the alleged action of a prior employee. Simply by virtue of his former post, the judge would bear "his own responsibility," and could not rule

against the employee without "admitting misconduct" under his auspices. *See* Brief for Pet. at 28-29.

But petitioner himself appears to recognize that *respondeat superior* will not work as a constitutional recusal rule. He allows that no presumption of bias would apply to a former Attorney General of the United States, because the Justice Department is "the largest law office in the world," with thousands of lawyers and hundreds of thousands of cases. "The relationship of the Attorney General to most of those matters is purely formal." Cert. Reply Brief at 4, quoting *Laird v. Tatum*, 409 U.S. 824, 829 (1972).

This acknowledgement belies petitioner's premise. Even in organizations far smaller than the United States Department of Justice, it is impossible for the chief officer to engage fully with every action performed in his or her name. When Castille was District Attorney, he headed one of the biggest law offices in the state, and one of the biggest prosecutor's offices in the country. His relationship to almost every case was purely formal. [9] Of course in this case there

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[9] Petitioner makes the point himself, albeit indirectly. He claims that Castille appeared as "counsel" for the appellee during petitioner's direct appeal, simply because Castille's name was included at the bottom of a list on the front of the Commonwealth's brief. Brief for Pet. at 7. As the official appeal docket shows, however, there was never any entry of appearance for Castille, and he was not listed as counsel in the case. Resp. Brief App. 2; *see* Pa. R. App. P. 120. His name is on the brief as a matter of formality, just as the District Attorney's name appears on the front of every brief (1000-2000 a year) filed by the District Attorney's Office. The name does not indicate that the

was one thing more: the memo. But that was the beginning and the end of his involvement. His status as District Attorney adds nothing else to the recusal equation.

And just as size matters, so does time. Petitioner speaks as if Justice Castille were *currently* the District Attorney, as if he hadn't changed branches more than twenty years ago. Petitioner repeatedly refers to this Court's due process disqualification cases for the proposition that a judge cannot occupy "dual roles." Brief for Pet. at 24, 27-28. Yet in every one of these cases, the judge had two (or more) roles *at the same time*.[10] In this case, it has been a quarter century since Castille resigned as DA. His only obligation here was to his judicial oath.

Because no constitutional ruling of this Court applies, petitioner instead relies on a non-constitutional circuit court ruling. Citing *In re Bulger*,

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District Attorney has any personal involvement in the filing, or even personal knowledge of it.

[10] *See Murchison*, 349 U.S. at 134-35 (simultaneously witness, accuser, prosecutor, and judge of perjury); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) (simultaneously victim and adjudicator of contempt); *Tumey v. Ohio*, 273 U.S. 510 (1927) (simultaneously adjudicator of liquor fines and recipient of fines as personal salary); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (simultaneously adjudicator of traffic fines and mayor whose budget depended on those fines); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (simultaneously adjudicator of legal issue binding in judge's own pending lawsuit as civil plaintiff); *see also Caperton*, 566 U.S. at 886 ("temporal relationship" is "critical").

710 F.3d 42 (1st Cir. 2013), he suggests that the "institutional ties" of a former "supervisory" prosecutor are sufficient to require recusal. Brief for Pet. at 29. But he neglects the dispositive facts. The judge in *Bulger* had, as an Assistant United States Attorney, responsibility over matters that later became the subject of a major federal scandal and a formal Congressional inquiry and report. A former colleague had already testified, and the judge was likely to be called as a witness himself about his personal knowledge of an alleged immunity deal with organized crime figures who had bribed FBI agents and used government information to target their rivals for assassination.

Here, in contrast, petitioner charges that an assistant, five levels below the District Attorney, committed a *Brady*-mitigation violation – but makes no claim that Castille ordered it, was a witness to it, or ever even knew about it. Petitioner urges, in effect, that due process required Castille's disqualification simply because his name was on the door. Nothing in the Constitution or this Court's precedent supports that.

3. The "tout."

Petitioner insists that Justice Castille had to recuse himself because, during his judicial campaign over 30 years ago, he "touted" and "bragged" about his pursuit of capital prosecutions as District Attorney. Petitioner lifts these and similar characterizations from some 1993 newspaper stories, and even an op-ed. Brief for Pet. at 8-9. It should go without saying that

the curated conclusions of selected media members cannot create a recusal due process violation.

In the body of his argument, petitioner does rely on a passage actually quoted from candidate Castille; but even here petitioner cuts out key words and context. Brief for Pet. at 30-31. The quote is taken from a 1993, 5,000-word article in *The Legal Intelligencer*, the daily newspaper covering the legal profession in Philadelphia. The article reported an interview with all three of the candidates running for a seat on the Pennsylvania Supreme Court, covering a number of judicial issues.[11]

One section of the interview addressed state ethical provisions prohibiting judicial candidates from stating their views on pressing social questions such as "gun control, abortion, the death penalty or any hot issue of the day." Resp. Brief App. 11. One of the candidates said he would be in favor of "relaxing the rules about discussing issues." *Id.* Another candidate pointed out that he had gone so far as to challenge the constitutionality of the rules in federal court. *Id.* Castille, the third candidate, responded, "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." *Id.*

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[11] Lisa Brennan, *State Voters Must Choose Next Supreme Court Member: Three Candidates Answer Tough Questions on the Law, the Court and Justice in Pa.*, LEGAL INTELLIGENCER, October 28, 1993. The article, not available online, is reproduced in full at Resp. Brief App. 4-28.

Petitioner admits, as he must, that Castille had the right to say where he stood on the death penalty, Brief for Pet. at 31. *See Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). Yet he then criticizes Castille for doing exactly that. He says Castille's comment meant he was really hinting "about how he would rule" on specific appeals. Brief for Pet. at 24. He claims Castille's reference to 45 capital cases meant he was "emphasiz[ing] his personal decisions to seek the death penalty." Brief for Pet. at 31.

This is simply spin. Castille did not refer to the facts of any individual case; he did not mention the name of any individual defendant (let alone petitioner's); he did not state how he would vote on any individual issue in any capital appeal. He explained exactly what he was "hinting" about: his personal position on capital punishment. He made clear exactly why he was "hinting": because of restrictive state rules that even the other candidates opposed, and that eventually this Court struck down. He announced exactly why he was referring to his office's capital prosecutions: because citizens "want to know where you stand on the death penalty."

Petitioner's real complaint, therefore, is not that Castille took a stand on the death penalty; it is that the stand was pro rather than con. Because surely there would be no constitutional recusal issue in the other direction. If an *anti*-death penalty prosecutor, from an anti-death penalty jurisdiction, said that he had *never* sought the death penalty, even after 45 potential capital cases, people would get the "hint."

Indeed there would be no need to hint. If a judicial candidate or nominee – or even a sitting judge – announced openly that he or she thought the death penalty unwise or likely even unconstitutional, there is no court in the land that would impose a due process requirement of mandatory disqualification from all future capital cases.

The reality is that all judges come to the bench with opinions that might conceivably affect their analysis of future cases. *See Republican Party of Minnesota*, 536 U.S. at 777-78; *Laird*, 409 U.S. at 838-39.[12] Petitioner deprecates Castille as the "law-and-order," "get-tough-on-crime" candidate when he ran for office 23 years ago. Brief for Pet. at 8, 30. When an attorney becomes a judge, however, he assumes special duties. He or she is expected to adopt a new perspective. Petitioner presents no support for the proposition that former prosecutors – unlike all other new jurists – are constitutionally incapable of making that transition.[13]

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[12] Petitioner suggests that, while a judicial hopeful can express his views on the law when running as a candidate, due process will then require him to recuse if he is elected as a judge. In support he cites Justice Kennedy's concurring opinion in *Republican Party*. Brief for Pet. at 31. But he paraphrases rather than quotes the relevant passage, thereby reversing its import here. *See Republican Party*, 536 U.S. at 794 (Kennedy, J., concurring) (a state may not censor judicial candidates, but "[i]t may adopt recusal standards *more rigorous than due process requires*") (emphasis supplied).

[13] And there is certainly evidence to the contrary, as a prominent example suggests. In a campaign article that

Nor, contrary to petitioner, Cert. Pet. at 19, does this case provide any basis for adopting a special constitutional recusal rule for judges chosen by election as opposed to appointment. To be sure, elections potentially raise financial interest questions, as *Caperton* recognized. But there are no financial

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petitioner does not cite, candidate Castille proposed a series of reforms of the capital litigation process: streamlined appeals, filing deadlines, successive petition limits. *Supreme Court Candidates Agree on One Thing: Change*, ALLENTOWN MORNING CALL, Oct. 18, 1993, at A8. After Castille's election, the Philadelphia District Attorney's Office set to work drafting a proposed package of major reforms to the state statute governing the capital review process. Eventually, the state legislature passed an extensive new statutory scheme setting up a system of unitary review like that in some other states.

On enactment, the Defender Association of Philadelphia, petitioner's counsel, took the unusual step of filing a petition for extraordinary jurisdiction, challenging the legality of the new statute. Both the district attorney's office and the state attorney general defended the law. But the Pennsylvania Supreme Court struck it down – on the ground that it unconstitutionally encroached on the court's exclusive powers. *In re Suspension of the Capital Unitary Review Act*, 722 A.2d 676 (Pa. 1999). It was Justice Castille who wrote the opinion of the court.

And Justice Castille has hardly been the only former advocate to assume new duties as a jurist. His immediate predecessor as chief justice was the former Chief Public Defender of Pittsburgh. Sadie Gurman, *Obituary: Ralph J. Cappy, Retired Pennsylvania Chief Justice*, Pittsburgh Post-Gazzette, May 3, 2009.

issues here,[14] and any other concerns are not categorically different in an election process than in an appointment process. In both contexts, those who choose "want to know where you stand." The inclination to accommodate that desire may be even more concentrated under an appointive system, where there are relatively few decision-makers, with considerable power over the final outcome. *See Republican Party of Minnesota*, 536 U.S. at 781 n.8.[15]

Yet statements of ideology by prospective judges have not previously been considered disqualifying. If "judicial philosophy" were now to provide grounds for recusal motions under the Due Process Clause, then all judges would be subject to them, regardless of their method of selection.

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[14] Castille's main opponent in the 1993 election amassed four times as much money as the other candidates combined, and set a new state record for judicial election campaign spending. Tim Reeves, *Castille Leads GOP Sweep of Courts*, PITTSBURGH POST-GAZZETTE, Nov. 3, 1993, page A1.

[15] Notably, the question of judicial selection was one of the issues of the day addressed in *The Legal Intelligencer* article quoted above. Both Castille and his main opponent expressed support for an appointment process. But the third candidate, although a political outsider and reform proponent, stated that he could not support "merit" selection of the Pennsylvania judiciary. He explained his position with a reference to Vincent Fumo, at the time a state senator and powerful political broker in Pennsylvania (later convicted and sentenced to prison on various mail and wire fraud charges). Fumo, it was reported, was all in favor of appointing rather than electing judges –"because he can then do in 15 minutes what it used to take him six months to do." Resp. Brief App. 10.

### B. *Petitioner himself did not consider Castille's prior role as grounds for disqualification in his three previous appeals.*

The case before this Court arises from a collateral appeal decided by the Pennsylvania Supreme Court in 2014. But that was hardly the first time petitioner's sentence came before Justice Castille as a member of that court. In fact, petitioner filed three prior collateral appeals: in 1998, in 2005, and 2008. All of these appeals were filed after the justice's allegedly disqualifying conduct, all of which occurred before he took the bench in 1994; nothing relevant changed between the first three appeals and the last, except that the purported basis for bias had become ever more remote over the decades that have passed since January 1986.

Yet, as shown by the computerized court dockets,[16] petitioner never raised any objection to Justice Castille's participation in those adjudications of the very same judgment of sentence that he challenges here. His own assessment of no probable bias in the first three appeals counsels the same conclusion in the fourth.

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[16] Pennsylvania Supreme Court dockets from the late 1990's are available online at: https://ujsportal.pacourts.us/DocketSheets/Appellate.aspx

The 1998 appeal is at docket number 247 CAP; the 2005 appeal is at 476 CAP; the 2008 appeal is at 560 CAP.

Petitioner implies that he could not have claimed bias earlier because he only recently discovered Castille's personal role in the recusal process. He says that the first challenge to Justice Castille, on grounds that he personally approved death penalty prosecutions as district attorney, did not occur until the case of *Commonwealth v. Rainey* in 2005. Brief for Pet. at 10.

That is not accurate. Castille's role in the death penalty approval process was known publicly from at least the earliest days of his judicial tenure. And petitioner's counsel began filing recusal motions on that basis as early as 1998, before any of his collateral appeals in this case.

Media coverage of the recusal issue began from the first moments Castille ascended to the supreme court, three years after he left the district attorney's office. In January 1994, *The Philadelphia Inquirer* reported on a recusal motion filed by a member of the Defender Association of Philadelphia, petitioner's counsel here, who later appeared on the docket as counsel of record in petitioner's previous state supreme court appeals.[17]

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[17] Emilie Lounsberry & Henry Goldman, *Castille Says He Won't Step Aside*, PHILADELPHIA INQUIRER, Jan. 25, 1994, at B1. *See* petitioner's appeal dockets at 476 CAP and 560 CAP (identifying Helen Marino, Defender Association of Philadelphia, 601 Walnut Street, Philadelphia, PA, as counsel of record).

In this Court, petitioner's counsel identify themselves as the Federal Community Defender Office. That entity is a component of the Defender Association of Philadelphia, which is the name by which counsel identified themselves in petitioner's state court

The *Inquirer* article contained a quote from a lawyer who had been chief of the homicide unit under Castille – and whose name appears on the death approval memo in this case. Joint App. at 424a. "In capital cases," said the former homicide chief, "[Castille] had a limited role, *approving to seek the death penalty*. There is involvement in these death penalty cases, but I don't know whether it would be enough to force his recusal."

Thus, petitioner's counsel would have been well aware of the recusal issue all along. And by 1998 – not 2005, as petitioner states – petitioner's counsel began filing recusal motions in the Pennsylvania Supreme Court based precisely on Castille's "personal" role in the death penalty approval process. *See, e.g.,* Appellant's Motion for Recusal of Justice Castille, *Commonwealth v. Rollins*, No. 192 CAP (Pa.) (alleging that Castille "was personally involved … in specifically authorizing the Commonwealth to seek the death penalty against Appellant"). Resp. Brief

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appeals. A unit within the office (the "Capital Habeas Unit") receives federal funding from the Administrative Office of United States Courts, with which it represents most Pennsylvania capital defendants on collateral review, not only in federal court but in state court as well. *See* Petition for Writ of Certiorari, *Pennsylvania v. Federal Community Defender Office*, *cert. pending* at No. 15-491. This entity has represented petitioner since his first collateral petition.

App. 34.[18] The Rollins motion discussed much of the same due process recusal precedent on which petitioner relies today. The only difference is that now we are four steps further removed from the conviction under review, because on his first three collateral appeals petitioner discerned no unfairness in Justice Castille's participation.

Troublingly, while the recusal issue did not change over the course of petitioner's appeals, his procedural posture did. In the first three appeals, he was the appellant. In the fourth, he was the prevailing party below. That fact magnified the effect of any recusal he could secure, because a judgment will be affirmed by an equally divided court, or by a court that lacks a quorum.

As Justice Breyer has observed, "if I take myself out of a case in the Supreme Court[,] that could change the result because there is no one else to put in. And the parties knowing that—and I'm not saying they would, but it's possible—[could] try to choose your panel which is undesirable in the Supreme Court."[19]

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[18] *See* Rollins appeal docket at 192 CAP, identifying Robert Brett Dunham, Defender Association of Philadelphia, as co-counsel of record.

[19] *Considering the Role of Judges under the Constitution of the United States:* Hearing before S. Comm. on the Judiciary, 112th Cong. 27-28 (2011) (statement of Justice Stephen Breyer). *Accord*, *An Open Discussion with Ruth Bader Ginsburg*, 36 CONN L. REV. 1033, 1038 (2004) ("risk that one party or another" would take actions "aiming to take us out of the case").

Tactical recusal practice would, indeed, be undesirable. To reduce the danger, it is essential to consider the parties' own treatment of the issue over the course of the litigation. *See, e.g., Uttecht v. Brown*, 551 U.S. 1, 18 (2007) (failure to object to putative error, particularly where counsel has contemporaneously objected to other instances of similar error, is evidence that objection would have been without merit); *Darden v. Wainwright*, 477 U.S. 168, 178 (1986) (that "[n]o specific objection was made" suggests that subsequent claim lacked merit). As evidenced by petitioner's own behavior, recusal was not required in 2014 any more than it had been in 1998, 2005, or 2008.

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*See also* Michael Matza, *Heidnik Defense: Disqualify Castille*, PHILADELPHIA INQUIRER, April 24, 1997, at B1. This is another case in which a Pennsylvania capital defendant chose not to seek Justice Castille's recusal – at least not at first. Castille granted a temporary stay to allow for a last-minute competency hearing, but voted against extending the stay when the hearing was done. Only then did the defendant (represented by petitioner's counsel in this case) file a recusal motion.

Notably, Justice Castille *granted* that motion and did not participate in further proceedings involving Heidnik. *See In re Heidnik*, 720 A.2d 1016 (Pa. 1998); *Commonwealth v. White*, 734 A.2d 374 (Pa. 1999). The Heidnik case had commanded widespread public concern during Castille's term as district attorney. Unlike this case, Castille did have personal involvement, beyond affixing his signature to a death penalty approval memorandum. Castille also recused himself in other cases where he had significant personal involvement as an assistant district attorney. *See, e.g., Commonwealth v. Lark*, 698 A.2d 43 (Pa. 1997); *Commonwealth v. Basemore*, 744 A.2d 717 (Pa. 2000).

### *C. Petitioner's "prior involvement" rule conflicts with constitutional precedent and this Court's own practice.*

Petitioner contends that the Due Process Clause disqualifies a judge from a case in which he had prior involvement, because he therefore may be predisposed in favor of one party over another. Recusal may sometimes be advisable in such cases as a matter of ethics, or even required as a matter of statute. But it has never been mandated by the Constitution. Nor have prominent past Justices of this Court applied such a principle in their own actions.

As the Court has made clear, the Due Process Clause at ratification incorporated the common law: recusal was required if the judge had a financial interest in the case, but not because of an alleged pre-existing bias. *Caperton*, 556 U.S. at 876-77; *see* John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609 (1947) (rule "was clear and simple: a judge was disqualified for direct pecuniary interest and for nothing else").[20]

In the modern era, the Court has recognized two categories in which due process may require recusal:

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[20] "The law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820 (1986) (quoting 3 W. Blackstone, Commentaries at 361).

cases involving a broader notion of financial interest, and cases in which the judge simultaneously acted in two conflicting roles, such as victim of contempt and its adjudicator. *Caperton*, 566 U.S. at 877-81.[21]

Petitioner compares his claim to the second category, on the ground that even a prior, non-contemporaneous involvement makes a "man … a judge of his own case." Brief for Pet. at 35. He cites a bevy of non-binding authorities applying this principle to judges who at one time were prosecutors. Brief for Pet. at 32-35. But little of it is constitutionally based. And none explains why the prior involvement rule would apply only to former prosecutors, but not to other more direct forms of involvement.

Yet, as a survey of the Court's own history shows, prior justices have elected to participate in cases in which they had far greater – and far fresher – involvement than that claimed here. These are several examples.

- Chief Justice Marshall

  Marshall was the Secretary of State in 1802 whose efforts to seat a federal officeholder were thwarted by his successor and political opponent, James Madison. Marshall wrote the opinion of the Court in the case challenging Madison's conduct, *Marbury v. Madison*, 1 Cranch (5 U.S.) 137

[21] *See* note 9, *supra* note 10.

(1803).[22]

- Justice Chase

  As Secretary of Treasury during the Civil War, Chase was responsible for the passage of the Legal Tender Act establishing a national paper currency, and he had an engraving of his face placed on the first bills. After Lincoln appointed him as Chief Justice, he participated in the first case addressing the constitutionality of the Act, *Hepburn v. Griswold*, 8 Wall (79 U.S.) 457 (1871).

- Justice Black

  As a United States senator, Black spent several years shepherding the Fair Labor Standards Act to passage, and the bill at one point carried his name. After leaving the Senate in 1937 for the Court, Black participated in the first case addressing the constitutionality of the Act, *United States v. Darby*, 312 U.S. 100 (1941).

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[22] *See* James Sample, *Supreme Court Recusal from Marbury to the Modern Day*, 26 GEO. J. LEGAL ETHICS 95, 105-07 (Winter 2013).

Petitioner suggests that there is no record of a recusal petition filed in that case, thus excusing Marshall's participation. Cert. Reply at 4 n.3. But if petitioner's prior involvement rule is of constitutional dimension, then it would subsume any ethical rules of similar substance, and would therefore be self-executing. A judge with prior involvement in the case would be required to recuse himself, even if no one asked.

- Justice Frankfurter

  As a leading law professor, Frankfurter was a prime drafter of the Norris-LaGuardia Act (1932). After appointment as a Justice, he authored the opinion of the Court broadly interpreting the statute in *United States v. Hutcheson*, 312 U.S. 219 (1941) (the "Act removed the fetters upon trade union activities").[23]

- Justice Jackson

  As Attorney General in 1941, Jackson authorized the wartime presidential seizure of a striking factory. When the next president ordered another seizure, the first seizure was the main precedent argued to the Court. Jackson thought about recusing, but decided against it. He wrote an opinion justifying the first seizure and condemning the second. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring).[24]

- Justice Marshall

  Marshall was chief legal counsel of the NAACP and founded and headed the Legal Defense Fund for

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[23] *See Laird v. Tatum*, 409 U.S. at 831-32.

[24] *See* Adam J. White, *Justice Jackson's Draft Opinions in the Steel Seizure Cases*, 69 ALB. L. REV. 1107 (2006).

over 20 years, until taking the bench. He had a general policy to recuse in NAACP cases, but sometimes did not. *See, e.g.*, *Milliken v. Bradley*, 418 U.S. 717 (1974).[25]

None of these is a case in which the justice's prior participation was in any sense neutral. The justices-to-be had central, partisan, and intense involvement in the precise subject matter of the controversies they later adjudicated.

Petitioner says that is unconstitutional. He maintains that a judge's "interests and reputation" are "plainly implicated" by prior involvement in the subject of the litigation. Brief for Pet. at 28. That is a truism. It is only human nature to tend toward a prior position, and away from a challenge to it. This may especially be so, as in some of the cases above, where the prior involvement constitutes a significant part of a judge's life's work. In each of these instances, an objective observer might have seen factors that could "tempt adjudicators to disregard neutrality." *Caperton*, 556 U.S. at 878. Certainly the litigants would.[26]

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[25] *See* Ross E. Davies, *The Reluctant Recusants: Two Parables of Supreme Judicial Disqualification*, 10 GREEN BAG, 2d Series 79 (2006).

[26] "I do not doubt that a litigant in the position of respondents would much prefer to argue his case before a Court none of whose members had expressed the views that I expressed about the" issue in question. *Laird*, 409 U.S. at 833.

But that is the difficulty with the constitutional extension petitioner proposes. Some of the justices above voted exactly as might have been expected from their prior, partisan involvements. Others did just the opposite. But all of them acted in a completely new capacity. Their "interests" had changed.[27] A mandatory recusal rule, based on activities long before a judge assumed the bench, does not accommodate that new vantage.

Nor does petitioner confront other effects of his effort to generalize existing precedent – from cases of financial interest and simultaneous, conflicting roles, to all cases of "significant" past involvement.

As members of the Court have recognized, a justice's "duty to sit" is particularly strong "because if we recuse without absolutely finding it necessary to do so," there is no replacement.[28] That is the case not

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[27] *See, e.g., License Cases*, 5 How. 504, 575 (1847) (opinion of Taney, C.J.) ("I argued the case [as counsel] in behalf of the State, … and certainly I at that time persuaded myself that I was right, and endeavoured to maintain that the law of Maryland … was valid and constitutional…. But further and more mature reflection has convinced me" otherwise).

*See also* Sample, 26 GEO. J. LEGAL ETHICS at 128 (citing view of legal ethics expert that prior role in subject of litigation as advocate, years earlier, would no longer provide any reasonable basis to question justice's impartiality).

[28] Supreme Court Fiscal Year 2014 Budget (C-SPAN2 television broadcast Mar. 14, 2013), *available at* http://www.c-span.org/video/?311494-1/supreme-court-fiscal-year-2014-budget (Justice Kennedy addresses recusal standards at 1:20:48-

only on this Court. While many states choose to provide for replacement of recused justices of the court of last resort, several others – including Pennsylvania – do not.[29]

Statutes and codes of conduct can account for this difficulty by building in room for the exercise of discretion. But when recusal is constitutionalized, it becomes mandatory, and uniform. There will be many more empty seats on the bench under petitioner's approach. And there will be many experienced judges who will be excluded from exactly their areas of expertise.

Petitioner seeks to alter the constitutional test in another way as well; he asserts that recusal is required if prior involvement may cause even an *appearance* of bias. He makes this point over and over through his brief, *e.g.*, at 20, 21, 24, 29, 31, 34, 39, 40. In effect, he is insisting that Justice Castille must be disqualified under the Due Process Clause because his prior involvement "looked bad." *See Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363, 1371-72 (7th

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1:21:11); *accord, Ginsburg discussion*, 36 CONN. L. REV. at 1039 (2004); *Laird*, 409 U.S. at 837.

[29] *See Commonwealth v. Wetton*, 648 A.2d 524, 528 (Pa. 1994) (replacement only in cases of "indefinite unavailability of a member of the Court"); *see, e.g.,* Ky. Const. § 110 (replacement only if two or more justices unable to sit); Mich. R.C. 2.003(D)(4)(b) (replacement after recusal except for supreme court); Va. Const. Art. VI, § 4 (replacement for any "court of record except the Supreme Court"); Wis. Const. Art. VII, § 4(3) (same).

Cir. 1994).

But this is simply not the law. This Court was clear in *Caperton* about the high threshold it imposed: an "intolerable probability of actual bias." 556 U.S. at 882. The Court explicitly contrasted this rule with non-constitutional judicial conduct codes that address the appearance of impropriety. "States may choose to adopt [such] standards," but they are "more rigorous than due process requires." *Id.* at 888-89. In direct denial of *Caperton*, petitioner seeks to raise the "constitutional floor" up to "the ceiling set by common law, statute, or the professional standards of the bench and bar." *Id.* at 890.

Perhaps in the future the Court will be presented with "an extraordinary situation where the Constitution requires recusal," *id.* at 887, on the basis of a judge's extensive prior involvement in the subject of the litigation before he or she ascended to the bench. But this is not the appropriate case in which to extend current law.

## II. The Constitution did not invalidate the votes of every other justice on the Supreme Court.

### *A. Petitioner has already received the relief he now requests.*

In his certiorari papers, petitioner never specified the form of relief to which he would be entitled if his arguments prevailed. Having secured review, petitioner now says that what he seeks is the

reconsideration of his *Brady* claim by the remaining justices, without the participation of Justice Castille. Brief for Pet. at 19, 38, 51. He fails to note that he has already gotten that.

This case was decided by the Pennsylvania Supreme Court on December 15, 2014 – just two weeks before Justice Castille's scheduled retirement on December 31. In fact, Castille's retirement date was fixed by the state constitution, and had been known for over a decade: the last day of the calendar year in which he reached age 70. Pa. Const. Art. 5, § 16(b).

On December 29 – on the eve of Justice Castille's retirement – petitioner filed a timely application for reargument. Joint App. 9a. Having the benefit of the court's reasoning from its December 15 opinion, petitioner was able to explain all the ways in which he believed the court erred in denying his *Brady* claim.[30]

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[30] Petitioner's counsel were well-versed in the reargument procedure. *See, e.g., Kindler v. Horn*, 542 F.3d 70, 77 (3rd Cir. 2008) (defendant represented by petitioner's counsel) (rejecting Commonwealth's argument that reargument petitions are an exceptional form of relief or are not favored; "capital defendants in Pennsylvania routinely seek reargument when their claims for relief are denied, and the Pennsylvania Supreme Court has granted such motions on more than one occasion. See *Commonwealth v. Saranchak*, … 810 A.2d 1197 (2002) (on reargument, granting reinstatement of PCRA petition that had been dismissed on appeal) [defendant represented by petitioner's counsel]; *Commonwealth v. Young*, … 748 A.2d 166 (2000) (on reargument, granting relief on claim that was denied in original decision) [defendant represented by petitioner's counsel]"); *see also Commonwealth v. Duffey*, 889 A.2d 56, 75-76 (Pa. 2005) (Castille, J., concurring) (failure to seek reargument may

Castille, of course, could not participate in the consideration of the reargument application; he was already gone. It was left to the remaining justices to evaluate petitioner's claims. After review, the court denied the reargument petition on February 18, 2015 – more than a month and a half after Justice Castille's departure. Joint App. 7a.

In his statement of the case reciting the procedural history, petitioner makes no mention at all of the existence of this reconsideration process.[31] And yet it actually left him better off than he would have been had Justice Castille recused himself to begin with. Petitioner asserts that Castille was in a position to use his putative powers as chief justice to exert disproportionate influence on his colleagues. Brief for Pet. at 48. If petitioner's recusal motion had been granted, however, Castille would still have been on the court. Were he inclined by his putative bias to influence the vote, as petitioner suggests, his colleagues would have known that he could wield his putative powers either before or after the issuance of any opinion he did not like. At the reargument stage, in contrast, that was no longer a possibility.

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constitute waiver; it "suggests, at a minimum, that … counsel … was satisfied with the result") (defendant represented by petitioner's counsel).

[31] The single reference to the reargument application, anywhere in petitioner's brief, is on page one, in the Jurisdictional Statement, solely in relation to the timeliness of his certiorari petition. Brief for Pet. at 1.

Petitioner fails to explain what further relief is possible. He says he wants "*de novo*" reconsideration, and that new justices have now been elected to the court. But several of the justices who voted against him before, twice, are still there. If they were "influenced" by Castille's "bias," the influence either remains or it disappeared with his departure. In either case, a repeat reconsideration, in addition to the one petitioner already received, would amount only to a second bite at the apple.

Perhaps petitioner would contend that the "taint" can never be removed from those jurists exposed to now-former Justice Castille, and therefore they too should be permanently disqualified from this case. That was a position open to petitioner at the certiorari stage. But he has now disavowed it with the request for relief in his merits brief.

And if such "touch bias" really were the law, applying to any judge who came into contact with a supposedly biased source, relief would still be impossible in most cases in this Court, in the Pennsylvania Supreme Court, and in any other courts that cannot fill in for recused jurists.[32] Once a justice failed to recuse who should have, every other justice would be disqualified. Any decision they might have rendered would be void, and there would be no way to reach a new one.

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[32] *See* note 29, *supra*.

That would leave many appellants out of luck – especially criminal defendants, who are usually the moving party on appeal.[33] But it would be a boon for *appellees*, like petitioner, whose victory below would become unreviewable.

Be that as it may, petitioner has already received what he is here to get: consideration of his case without the participation of Justice Castille.

But there is also a second reason that further review is currently uncalled for: all Pennsylvania capital sentences have been suspended by a gubernatorial moratorium – and as a result of the moratorium, petitioner's counsel have successfully argued that federal court review of Pennsylvania capital sentences should be placed on hold.

The suspension of federal review arose in a pending Third Circuit appeal, *Fahy v. Comm'r*, No. 14-9002, shortly after the moratorium was declared. On March 2, 2015, the court of appeals directed the parties to address the effect of the moratorium on appeals presenting (like this case) only penalty phase challenges. The Commonwealth asked the court to proceed with the appeals.

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[33] And the impact would be particularly great in states like Pennsylvania, where the court of last resort has mandatory, direct appellate jurisdiction over classes of cases that can be heard in no other state court. In Pennsylvania, this would include all death penalty appeals. 42 Pa. C.S. § 722(4).

Petitioner's counsel, in contrast, repeatedly urged the court to place such cases in suspense. Noting that a legislative body is conducting a study of the capital punishment system, counsel argued that the moratorium "could … potentially render review of the sentencing issues in this case unnecessary." Fahy's Response at 2, *Fahy v. Comm'r*, No. 14-9002 (3rd Cir. filed Sept. 21, 2015). Counsel further argued that federal court review should be suspended to "show regard for the rightful independence" of pending state executive and legislative action. Fahy's Response at 3, *Fahy v. Comm'r*, No. 14-9002 (3rd Cir. filed Mar. 16, 2015).

The court of appeals accepted counsel's position and has suspended appellate litigation. The court directed the parties to notify it "if and when the moratorium is lifted." Order, *Fahy v. Comm'r*, No. 14-9002 (3rd Cir. June 2, 2015). *Accord Duffey v. Lehman*, No. 12-9004 (3rd Cir. June 3, 2015).

It is unclear when, or whether, that point will be reached. When the Governor declared the moratorium, he issued an indefinite reprieve of petitioner's sentence as "the first step" in implementing the state-wide suspension of the death penalty.[34] He further indicated that he would not be satisfied with the capital punishment system unless

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[34] https://www.governor.pa.gov/moratorium-on-the-death-penalty-in-pennsylvania/

and until it was "infallible."[35]

The Commonwealth challenged the legality of the reprieve in the Pennsylvania Supreme Court. That litigation was pending when certiorari was granted in this Court. On December 21, 2015, however, the state supreme court (consisting of all the justices who participated in consideration of petitioner's reargument application) rejected the challenge and upheld the Governor's power to issue the reprieve. *Commonwealth v. Williams*, 2015 WL 9284095 (Pa. 2015). Thus the moratorium, and the resulting federal court litigation suspension requested by petitioner's counsel, will remain in place indefinitely.[36]

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[35] Memorandum of Governor Tom Wolf at 1-2, available online at https://www.scribd.com/doc/255668788/Death-Penalty-Moratorium-Declaration.

[36] Petitioner's amicus asserts that he is under "agonizing … incarceration on Pennsylvania's death row in solitary confinement." Brief for ACLU at 18.

Last year the Judiciary Committee of the Pennsylvania House of Representatives held hearings on living conditions for capital prisoners. The committee heard testimony from Professor Robert Blecker, who has conducted a nationwide death row study through onsite visits and interviews. Prof. Blecker spent two days examining death row at a state correctional institution in Pennsylvania.

He reported that inmates there live in open-barred single cells on a common corridor. They must remain in cell but are permitted to interact among themselves throughout the day, both orally and visually by using mirrors. There is no mandatory lights out or quiet time; the inmates regulate their socializing and sleep. They receive one hour of daily recreation out of cell,

*B. In any event, petitioner was not entitled to disqualify all the remaining justices without first seeking their review of the recusal issue.*

One of petitioner's amicus briefs contends that, as a matter of due process, judges should no longer be permitted to make their own individual determination about recusal. Rather, the Constitution should mandate review of the judge's personal decision by some other group of judges. Brief for Brennan Center for Justice at 1, 4. That may well be a reasonable requirement as applied to the issue in the second question presented. If a litigant wishes to disqualify an entire court because one judge failed to recuse, the litigant should surely be obligated to ask the remaining judges to consider the matter first.

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during which they meet in the death row common space or use the basketball court. Reading material is available, along with cable TV.

On one out of every four days, inmates act as a custodian for the corridor. In that capacity they have free access to the unit hallway, and are permitted to interact with other inmates and employees as they perform janitorial duty. Judiciary Comm. Hearing, *Presentation on Pennsylvania's Death Penalty Moratorium*, June 11, 2015, at 147-48, 156-74, available at http://www.legis.state.pa.us/cfdocs/legis/tr/transcripts/2015_0113T.pdf.

Whether the moratorium will result in any change to this housing structure is a matter for the Governor in the exercise of his executive discretion over the department of corrections.

The amicus appears unaware, however, that exactly such a procedure was available here. Petitioner's counsel have availed themselves of it in other recusal challenges concerning Justice Castille, and simply chose not to do so in this case.

In *Commonwealth v. Rollins*, the defendant, represented by petitioner's counsel here, filed a lengthy motion seeking Justice Castille's recusal, and asserting that he was personally involved in authorizing the death penalty many years earlier. *See supra* at 38. After the justice denied the motion in his individual capacity, the defendant filed a "Motion to Entire Court for Recusal of Justice Castille." As the supreme court docket shows, the court considered the motion but denied it the following month.[37]

Similarly, in *Commonwealth v. Rainey*, the defendant, represented by petitioner's counsel here, also moved for Justice Castille's recusal based on his approval of the death penalty as DA, many years earlier. After the justice denied the motion in his individual capacity, the defendant filed a "Motion for Full Court Reconsideration of Order denying Recusal." This time the supreme court issued a published order, explicitly stating that it was granting review, but denying relief. The order specifically notes that "Justice Castille did not participate in the consideration or decision of this matter."

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[37] *See* note 18, *supra*.

*Commonwealth v. Rainey*, 911 A.2d 505 (Pa. 2006).[38]

As these cases demonstrate, petitioner plainly had the means for further review in this case. Petitioner asserts that he did ask Justice Castille to refer the matter to the full court. Cert. Reply at 2. By petitioner's own logic, however, that was no different than asking him to decide it by himself. The way to seek full court review was to ask the full court.

Yet petitioner seems to have gone out of his way not to do that, and not just once. He raised the recusal issue only one time, at the beginning of the case, in response to the Commonwealth's emergency application to lift the stay entered on the eve of execution. He targeted the motion explicitly to Justice Castille; but after Castille voted in his favor to maintain the stay, petitioner never mentioned the recusal issue again. Two more years passed before the court issued its opinion on the merits; petitioner never asked the court to prevent Castille's participation. And even *after* disposition of the case, and after Castille had retired, petitioner said nothing; his reargument application attacked the court's reasoning but said not a word about the "bias" that supposedly tainted the whole process.

If due process ever demands the disqualification of

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[38] *See also Commonwealth v. (Roy) Williams*, 732 A.2d 1167, 1174 (Pa. 1999) (full court, per Saylor, J., addressing and rejecting claim by petitioner's counsel that prior counsel was ineffective for not seeking Justice Castille's recusal on direct appeal; citing *Aetna Life*).

an entire court because of one member's failure to recuse, it certainly first requires notice to the remaining members that the issue exists. That did not happen here.

### *C. Petitioner's "total disqualification" rule is contrary to constitutional precedent and judicial practice.*

Petitioner's demand for relief also suffers from a more fundamental obstacle: Castille wasn't the only judge on the case. There have been two major rulings in petitioner's latest collateral appellate litigation. The first – the stay motion – he won, unanimously. The second – the merits decision – he lost, also unanimously. While his evidence of Justice Castille's supposed bias is attenuated, his evidence of any unfairness by the other justices is non-existent.

Petitioner proposes an easy solution: presumption. He insists we must simply assume that all five other justices on the Pennsylvania Supreme Court were likely to be biased, merely by virtue of their association on the case with Castille.

He calls this presumption "structural error." But the use of that label here serves only to sidestep the standard set by this Court in *Caperton*: whether the decision below was the product of "a constitutionally intolerable probability of bias." 556 U.S.at 882. Since the decision below was not Justice Castille's, but the court's, it is not enough for petitioner simply to note Castille's past and be done. He has to show that one judge's 30-year-old involvement would overpower not

only his own judicial duty, but that of every other judge who examined the case.

In place of doing that, petitioner invokes the concept of "collegiality." He cites various lower court opinions, and even psychological studies, for the idea that appellate judges interact with each other in deciding cases. No doubt they do. Petitioner never explains, however, why judicial influence would operate in only one direction – from the "tainted" judge to the untainted ones. In fact, just the opposite is the case. Each judge on the court must conduct an independent consideration of the legal issues before exercising his or her individual responsibility to cast a proper vote. In the exchange of viewpoints, extreme or ill-considered positions are moderated – or outvoted. That is why we have courts with more than one judge.

Petitioner's approach, in contrast, is the social science equivalent of a platitude: one bad apple spoils the bunch. But judges are not apples. The law presumes that judges will carry out their duty to maintain impartiality, even in the face of potentially prejudicial information. It is a venerable rule,[39] and a powerful one, applying even to evidence a judge hears but could not constitutionally consider.[40]

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[39] *See, e.g., Field v. United States*, 34 U.S. 182, 201 (1835); *United States v. King*, 48 U.S. 833, 854-55 (1849); *Sinclair v. United States*, 279 U.S. 749, 767 (1929).

[40] *See Harris v. Rivera*, 454 U.S. 339, 346 (1981); *Williams v. Illinois*, 132 S. Ct. 2221, 2234-35 (2012); *see also United States v.*

This principle – that judges do not automatically become tainted by exposure – is even more compelling at the appellate level than in the bench trial context where it usually applies. Findings of fact are a locked box: neither judges nor juries need explain their verdicts. But explanation is the essence of the appellate process. The rationale for decision is available for inspection. Instead of speculating on the thought processes of the remaining justices, we can read their opinion.

Petitioner gets this notion backwards. He contends that, because appellate courts deliberate in secret, we don't know what the judges are thinking in chambers, and we must fill in the gap by assuming that the presence of a non-recused judge has "infected" all other members of the court. Brief for Pet. at 38. In determining whether due process has been violated, however, "[t]he inquiry is an objective one." *Caperton*, 556 U.S. at 881. There is no basis for stacking the deck with petitioner's subjective assumption of "infection." The question is whether the objective circumstances created an intolerable probability that the other judges were themselves actually biased. Here there is

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*Brooks*, 355 F.2d 540, 542 (7th Cir. 1965) (coerced confession); *United States v. Cardenas*, 9 F.3d 1139, 1154-55 (5th Cir. 1993) (*Bruton* claim); *United States v. Foley*, 871 F.2d 235 (1st Cir. 1989) (applying "presumption of judicial regularity" concerning other-crimes evidence and racial epithets; if trial judge could not put aside prejudicial information, neither could appellate judges on review); *Republican Party of Minnesota*, 536 U.S. at 796 ("We should not, even by inadvertence, impute to judges a lack of firmness, wisdom, or honor") (Kennedy, concurring).

simply no evidence of that.

Petitioner's presumption is also inconsistent with judicial practice. Petitioner maintains that we must invalidate even a unanimous ruling because it is not the decision that matters but the deliberation. Thus, the "taint" is transferred to each member of the court unless the tainted judge refrains from "participating in the case at all." Brief for Pet. at 39. Yet there are many appeals in which a judge recuses only *after* he has devoted substantial judicial time to the case. It is common practice for the remaining members of the panel to proceed to a decision, even where the "tainted" judge participated in oral argument or beyond.[41] Under petitioner's rule, all that would have to stop. And by the same token, it would be impossible ever to "cure" a conflict mid-case; the damage would

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[41] *See, e.g.*, *Harned v. United States*, 511 F. App'x 829, 830 (11th Cir. 2013) (per curiam) (nonprecedential) (granting petition for rehearing to reflect that third member of panel recused herself following petition for rehearing and then reissuing opinion in name of two-judge quorum); *Woodlands Ltd. v. Nationsbank, N.A.*, No. 97-1813, 1998 WL 682156 (4th Cir. Sept. 23, 1998) (nonprecedential) (case decided by remaining two members of panel following third member's recusal after oral argument); *Whitehall Tenants Corp. v. Whitehall Realty Co.*, 136 F.3d 230, 232 (2nd Cir. 1998) (rejecting challenge to two-judge quorum's deciding case following recusal of third judge after oral argument), *Tagatz v. Marquette University*, 861 F.2d 1040, 1042 n. * (7th Cir.1988) (decision by two-judge quorum following post-argument recusal of third member); *Giacalone v. Abrams*, 850 F.2d 79, 80 n. * (2d Cir.1988) (same); *Love v. Young*, 781 F.2d 1307, 1308 n. * (7th Cir. 1986) (same).

already have been done.[42]

For this reason, petitioner's presumption cannot explain even his own cases. In most decisions he cites, courts vacated panel rulings where they determined that one member should have recused, and remanded for reconsideration by the remaining panel members. But if fellow judges were tainted by exposure to a "biased" judge, they were still tainted when they re-decided the same case: their minds were not erased, especially where that same judge was still sitting down the hall. And if they were *not* tainted when they re-decided the same case, there was no cause for invalidating their original, independent votes to begin with.

Any claim of "contamination" from Justice Castille's non-recusal is particularly forced given the circumstances of this case. Castille did not cast the deciding vote; indeed the decision was 6-0.[43] Castille did not author the opinion of the court; indeed he wrote a concurring opinion in which no other justice chose to join. Castille did not rush his colleagues to judgment; indeed he joined them in upholding a stay of execution that has now been in place for years and will remain so indefinitely.

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[42] *See, e.g., Federal Energy Regulatory Comm. v. Electric Power Supply Assoc.*, No. 14-840 (U.S. Oct. 15, 2015) (letter from clerk) (curing conflict after oral argument).

[43] The court is often divided; in petitioner's 2004 appeal, for example, the vote was 4-1-2. Joint App. S.

Petitioner nonetheless contends that Castille must have wielded improper influence by virtue of his status as chief justice. Brief for Pet. at 47-48. He misapprehends the nature of that position. The justices of the Pennsylvania Supreme Court maintain separate chambers around the state and come together for argument and conference sessions nine times per year. http://www.pacourts.us/courts/supreme-court/calendar. The Pennsylvania Constitution designates one of the justices as chief justice, solely on the basis of seniority on the court. Pa. Const. Art. 5, § 10(d).

But neither the constitution nor any statute gives the chief justice a single power over the other justices of the court. Petitioner cites to internal operating procedures that place various administrative responsibilities on the chief justice. But all IOP's and rules of judicial administration are, as a matter of constitutional mandate, within the exclusive province of the supreme court as a whole, *id.* at § 10(c); they are promulgated, enforced, and modified only by the act of a majority of the justices. The chief justice's only "powers" over his colleagues are those they afford him.

In any event, petitioner ignores the most salient fact about Castille's authority as chief justice: it was done. This was one of his final cases on the court before mandatory retirement. The other justices all knew that. If we would conclusively presume that he tainted them, when did it stop? If not then, why now?

## Conclusion

For the reasons set forth above, the Commonwealth respectfully requests this Court to affirm the judgment of the Pennsylvania Supreme Court.

Respectfully submitted,

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# APPENDIX

## APPENDIX

**Page**

**RELEVANT DOCKET ENTRIES FROM THE SUPREME COURT OF PENNSYLVANIA**
No. 98 E.D. APPEAL DOCKET 1987

*Commonwealth of Pennsylvania v. Terrance Williams*

* * * *

**Appeal from:** Order entered 7/1/87

**Court below:** C.P. Criminal

**County:** PHILADELPHIA

**No. below:** 2362-2367 August Term 1984

**Judge below:** David Savitt, J.

**Notice of Appeal filed below:** 7/21/87

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**NATURE OF CASE:** DEATH PENALTY

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**NOTICE OF APPEAL DOCKETED IN SUPREME COURT:** 7/24/87

**Fee Paid:** In Forma Pauperis: x

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**ORIGINAL RECORD FILED:**

10/19/87. Record, 21 vols. Testimony, 1 envl. Exhibits

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Appellant's Brief and
Reproduced Record due: *10/14/88*

Appellant's Brief filed: *9/27/88*

Reproduced Record filed: _____

Appellee's Brief due: *2/27/89*

Appellee's Brief filed: ~~*9/27/88*~~ *error rm*
*D.A.'s 2-27-89*
*A.G. 3-29-89*

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| **Date** | **Filings-Proceedings** | |
|---|---|---|
| | * * * * | |
| 10/23/89 | **ARGUED: J/159** | |
| 2/8/90 | DECISION: | The convictions and sentences imposed below are affirmed. McDermott, J. |
| 2/8/90 | Judgment entered. | |
| 2/28/90 | RECORD EXIT TO GOVERNOR CASEY. | |
| 5/22/90 | ORIGINAL RECORD, AS FILED, REMITTED. | |

**[THE LEGAL INTELLIGENCER, October 28, 1993]**

## State Voters Must Choose Next Supreme Court Member

### *Three Candidates Answer Tough Questions on the Law, the Court and Justice in Pa.*

BY LISA BRENNAN
*Of the Legal staff*

IN PICKING PENNSYLVANIA'S next Supreme Court justice, statewide voters will choose between three little known Southeastern Pennsylvanians – Philadelphia Common Pleas Judge Russell M. Nigro, former Philadelphia District Attorney Ronald D. Castille and West Chester attorney Robert B. Surrick.

They're running for one vacancy on a court that experts say is in the throes of the worst breakdown of collegiality in the court's history. All three candidates, Democrat Nigro, Republican Castille and Patriot Party candidate Surrick, contend that if elected, they'll bring integrity to the job and set an example for their colleagues.

The justices, like the better part of the voting public in this low-turnout election year, aren't likely to be paying much attention to this judicial race. They're sweating out the overdue results of a special grand jury investigation into Justice Rolf Larsen's charges last winter of case-fixing and bribe-taking against two colleagues, one of whom, Justice Stephen Zappala, he later accused of vehicular homicide. Investigators

promise to go public with the grand jury investigation results today.

Issues of particular interest to the legal community distinguish Nigro, 47, from Castille, 49, from Surrick, 60. They were explored by a group of lawyers familiar with the candidates' careers and credentials who are members of the *Editorial Board of The Legal Intelligencer*.

Michael Bloom, Benjamin Lerner, Nancy Wasser and board co-chair Seymour Toll spent 50 minutes apiece with each candidate. They talked about everything from campaign finance restrictions to the need for public accountability from a dilatory Supreme Court, which has immense administrative rulemaking and disciplinary powers that extend far beyond resolving legal disputes, and has never been held to the same oversight as other government agencies that spend taxpayer money. Here are some of the highlights.

**CAMPAIGN FINANCE RESTRICTIONS, MERIT SELECTION**

Castille, Nigro and Surrick understand the rigors of having to campaign and raise money. To get around that in the next Supreme Court race, Castille and Nigro support legislation calling for merit selection of statewide appellate judges. Both agree on imposing campaign finance restrictions in order to take judges out of the nasty business of having to raise money.

"I was driving around in a Corvette convertible recently throwing candy to kids on the side of the road

in a parade," begins Castille, relying on his greatest charm – a little homegrown humor – before trying to answer a question on campaign finance restrictions. "I said to my driver, 'Is this going to make me a better Supreme Court justice?'" He said it might. "Maybe some of our Supreme Court justices need to ride around in a parade."

Castille said the rigors of campaigning keep qualified candidates in high paying jobs from running for the high court.

"There are individuals who'd just love to sit on the Supreme Court of Pennsylvania, and would give up beautiful jobs – people who make $900,000-a-year. Bruce Kauffman would give up his job in an instant. But he doesn't want to do it because he doesn't want to go out there to places like Lower Turkeyfoot, … and Tinicum."

As long as judicial campaigns are necessary in Pennsylvania, Castille says campaign fundraising restrictions should be imposed. "The best one is public financing similar to some of the federal statutes – if you raise a certain amount public financing will kick in," he says.

Nigro, the most successful fundraiser in this race, goes even further. All judicial candidates, he says, should be given public funding "so they don't have to raise 10 cents."

Not that he expects public financing to happen anytime soon "because it took such a long time in the federal process just to get people to check off a dollar on

their tax returns and then have a matching funding situation."

"I'd love to be able to say, 'Here's X dollars, you don't have to raise it.['] But for that, we're forced to do it because there's no other way to get your message out. That's a sad set of circumstances."

To sidestep the built-in conflict-of-interest in accepting campaign contributions from members of the legal community, Nigro says he's tried to "reach out to as large a group of people as possible" to avoid an awkward situation, win or lose.

"I probably see more lawyers than any other judge because of my programs. We didn't want to be in that kind of situation, so I told the committee very early on to solicit its contributions from as wide a range of both non-lawyers and lawyers as possible."

Nigro's biggest regret is not being able to "have met all five and a half million registered voters." He says he tried. That effort, some estimate, could end up costing him $2 million. Last summer, for example, after sitting in court every weekday, Nigro says he "spent every weekend and evening out doing something."

"I spent a lot of time in my automobile, some time in a helicopter – and I'd rather not have been going over mountains in a helicopter – and some time in a twin-engine plane."

For all that's been made of Nigro's association with state Sen. Vince Fumo, the chairman of the Senate Appropriations Committee, the candidate has received

substantial campaign contributions from the mayor of Philadelphia and other sources that he controls.

If elected, Nigro says he won't get near cases involving the city or the senator in his governmental or personal capacity, unless he can be truly neutral, fair and even-handed.

"In my six years on the CP bench the senator hasn't had one case with me," Nigro, says. "I could have 100 lawyers agree that I decided the case on the merits and no one will believe it. He'll never be in my courtroom on the CP level or any other level.

"You may hear certain things about me, but you won't hear, 'He decides cases other than on the merits.' There's been ample opportunity for state and local bars to get some lawyers to come forward and say, 'The guy's a bad guy.' Nobody came forward. The reason is, it simply doesn't happen.["]

Nigro says Mayor Rendell made a $20,000 campaign contribution and a $100,000 loan, $80,000 of which has already been paid back.

"I'd like to think the contribution the mayor made is because he felt I was the best qualified candidate in this race," Nigro says. "He'll get no special treatment."

In contrast to Castille and Nigro, Surrick believes merit selection is doomed. He's calling for a constitutional convention to abolish the court and carve up the state into seven judicial districts. Voters in each geographical area would elect a justice whose campaign costs would be negligible, compared with the cost of

running statewide. Surrick contends there'd be no need for campaign finance restrictions.

"The problem is statewide election of appellate court judges," Surrick says. "Nobody knows who the candidates are. The Republican and Democratic parties control their nominating process.["]

"The way you win this election is if you get special interest money, and specifically, I'm talking about the Pennsylvania trial lawyers, who put hundreds of thousands of dollars into these races, for what reason we can only speculate on; and three weeks before the election, the candidates go on the boob tube and hope to convince people that they're the reform candidate. Russ Nigro running as the reform candidate is a little amusing to me."

Surrick calls judicial campaign fundraising "cigar store Indian contests – before they get a cigar store Indian, they say they can't say anything because of the Code of Judicial Conduct, and whoever raises the most wampum wins the election."

Relying on two charts, Surrick's solution is to fill the court with at least five justices who come from counties besides Allegheny and Philadelphia. His plan will be explained in more detail below. But his proposal does not free a judicial candidate from having to raise money.

"Justice Ralph Cappy spent $1.5 million on his campaign in 1989. I would guess Nigro's probably going to spend $2 million before this is over. And that only counts the hard money; it doesn't count the other

money. Under my plan, you wouldn't have to spend that."

Surrick was a longtime proponent of ending the election of statewide judges in favor of the merit selection process whereby the governor picks judges from a list of nominees provided by an appointed panel of lawyers and non-lawyers. He says he "got really turned off on merit selection when I read that Vince Fumo said in *Philadelphia Magazine* that he's in favor of merit selection because he can then do in 15 minutes what it used to take him six months to do."

*Philadelphia Inquirer* reporter Katharine Seelye wrote last week that Surrick misattributed the quote. It was from Fumo's longtime political mentor Buddy Cianfrani, who was speaking of Fumo. The quote was: "He won't have to worry every election. He'll do in five minutes what now takes months."

Surrick says the "biggest problem" with merit selection today is "who picks the pickers." Second to that, he says court reformers "caved into Fumo on the two-thirds senate confirmation."

"Nobody can get two-thirds unless a deal gets cut. It's like when John Herron was turned down five times by the Pennsylvania senate with Vince saying publicly, 'That boy doesn't know how to play the game.' It was only when he was elected as one of the Casey Five was he confirmed before the Senate.

"Humans being what they are, it can get perverted. We just change how we pervert the system."

**SPEAKING-OUT ON ISSUES THAT MIGHT COME BEFORE THE COURT**

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 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."

To solve the problem, Nigro believes that public financing of judicial campaigns should be combined with relaxing the rules about discussing issues and eliminating the need for recusal down the road.

"Then you don't have this special interest problem," says Nigro. "I won't be allowed and the committee won't be allowed to get any money from organizations. So, if I come out against a particular issue, and there isn't going to be any recusal potential, you don't have a problem and everybody's needs have been met."

No matter what his personal views are, Nigro pledges to decide cases on their merits.

"I may say constitutionally I have to do XYZ, but it still means that someone has to meet the burden of proving a particular element in a particular type case."

Nigro, like Surrick, prefers to speak his mind.

"It probably gets me in trouble half the time because I speak out on the way I feel and people just have to understand that that's the way I am."

After six years of being threatened with disbarment, Surrick took an appeal of a disciplinary board reprimand to the state Supreme Court and won 3-2, in 1989, during a brief spell when Justice Juanita Kidd Stout sat on the court. Surrick felt constrained to discuss the matter until West Chester attorney Sam Stretton succeeded, however briefly, in asking a federal judge to strike the prohibition against speaking out on issues that come before the court.

The decision by U.S. District Judge Clarence Newcomer was struck down on appeal.

"The 3rd Circuit reversed because it said the Judicial Inquiry and Review Board had agreed to a narrow interpretation of the meaning of those words in the Code of Judicial Conduct.

"What the 3rd Circuit decision really says is you can't pander to special interest groups and promise your vote in return in matters they might be interested in. I don't have any problem with that," Surrick said.

During the six years he fought disciplinary action for making a memo public that he'd received as a JIRB

member, Surrick says he spent $50,000 in legal fees. Surrick claims he's being investigated again for alleging that Larsen handled cases improperly.

"I believe I will always come down on the side of the ability of people to speak as opposed to being muzzled. Nothing good happens in the dark."

**IMPROVING COLLEGIALITY**

Moving from the election to the job itself, Castille, Nigro and Surrick say that, if elected, they'll be joining a group of people who can't stand to be in the same room together. All three candidates believe they can improve the internal workings of the court from deciding of cases to the making of rules and the setting of administrative policy.

Aside from a few challenges before the high court when he was District Attorney, Castille says he can foster collegiality on the court because "I don't come on to it with any enemies that I know of."

"I've had to call them publicly on a few things like the speedy trial rule. But I think I come in there as someone who no one up there has a vendetta against me, or wants to run me over with a car or anything like that."

Castille and his challengers believe that this election is "beginning a whole new change in the court."

"Within the next 10 years, there'll probably be about five more justices who'll turn 70," says Castille. "Justice Papadakos goes in two years, Justice Nix in 1997,

Flaherty's approaching his mid-60s, Zappala goes in 2003 or 2004. So that leaves Cappy and myself. It will be a total change; it will give people new outlooks, and their old hatreds will end with the passage of time."

Nigro says his collegial personality will help the process of healing the high court's rifts.

"From a personality standpoint, I get along with people," says Nigro. "This race is going to require the next person to go on that court to be able to mix to a degree."

Nigro believes the grand jury investigation results could be bad for Larsen. And he notes that Papadakos isn't long for the court either. The way he sees it, in a three-year period of time, there could be four new members of the court.

"It's without question that Justice Papadakos, at best, will serve one year, assuming he wins the retention election this year. The chief justice is already into his mid-60s, and one of the compelling reasons he remains on the court is not to allow Larsen to assume the role of chief justice.

"So I think you have to look at this election in terms of a) what can I do, to start with, come January and then, b) will I be the first in a group of four who will have a different mentality about public service?

"I would venture to guess that no matter who gets elected will have no relationship with Justice Larsen. I'd have to say that Bobby Surrick is going to be totally ineffective – he has maligned five of the six members of

the court he's going to sit on. How's he going to mix with the members of that court? If you call somebody a crook, it's going to be difficult to sit in a room with them and try to discuss cases.

"I think my personality is of a nature and my work ethic is of a nature that we're going to be able to make a lot of inroads and be able to move forward and do some things that will be positive in nature."

Surrick dismisses allegations that his presence would only make a bad situation worse.

"I don't accept that premise," says Surrick. "The very fact that someone of character and integrity is up there and says 'Hey this is wrong' is going to make a hell of a lot of difference up there.

"I'd like to think I'm a good lawyer. I'd like to think I could ably discharge my responsibilities as a justice and set a little bit of a standard. I don't think you've got that now and don't think you'll get it if either of my opponents get elected."

Surrick says his candidacy has made a change already, saying he was the one who focused the campaign on the high court's policy of reimbursing justices for up to $25,000 in annual expenses that don't have to be accounted for.

"If I get elected it's going to break the system open," Surrick says.

**CONTINUING LEGAL EDUCATION**

Castille, Nigro and Surrick agree that legal education in ethics ought to be mandatory for judges. The state Supreme Court has required it of lawyers and changes are underway now to increase the requirement by an hour, from five to six, and decrease the ethics requirement from five to two hours.

Castille says continuing education is especially important for lawyers with different concentrations to study new developments in their fields.

"Should they be mandatory?" he asks. "It's probably for the good of the profession. But there ought to be a discussion if any of that stuff is implemented."

"And if the judges are going to impose it on us, we ought to impose it on them. There's a lot of judges who want it. They're just afraid they'll make it a weeklong, all-day process. Let's talk about that and make a rational decision. The Supreme Court is the court of last resort, but it's certainly not the font of all knowledge."

As a member of the Philadelphia Common Pleas Court's Sheppard Committee, Nigro said his group voted unanimously "to indicate to the Supreme Court that they ought to take the lead and offer it to themselves."

"They were no[t] so inclined on the high court to get involved in it," Nigro says. "I understand it's still being talked about by judges on state trial level. I would venture to guess it will carry the day.

"Will I push for it on the court?" Nigro asks. "Lawyers have to participate. Judges ought to participate. I would individually participate and hope that the other six follow the lead. I can't make them do it. That goes without question. But I think I could set an example."

Surrick filed a petition for extraordinary relief with the state Supreme Court asking them to make ethics training mandatory for judges.

"I did it just to tweak them – I knew what the answer was going to be. First they denied it in a per curiam order and later denied my petition for extraordinary relief with no explanation."

But that wasn't the first time Surrick spoke up on the issue of mandatory judicial ethics training. In 1982, as a member of the Judicial Inquiry and Review Board, he put to a vote that the board require judges in the state one day a year to attend instruction on the Code of Judicial Conduct.

"Some judges, like Justice McDermott from Philadelphia, said he'd never read it and he didn't need a code of conduct, he had his own code," Surrick says.

"A lot of judges don't know what's in the code, a lot of lawyers don't know what's in the rules of professional responsibility. I don't have any problem with everybody taking it. I'd broaden it, though. There should be education in lots of areas."

**PUBLIC ACCOUNTABILITY**

Castille, Nigro and Surrick believe the high court should seek input from the bar before it issues administrative decrees and promulgates formal rules. They also believe the court should issue frequent, regular and public reports revealing its internal operations.

Castille says no group of seven can think of every possible ramification of its actions. He gave an example of how the high court's secretive rulemaking left his life in turmoil when he was District Attorney.

"On New Year's Eve one year, they came up with this rule that said anybody in prison who'd been charged with a crime has to be tried within 180 days or they're let out," Castille says. "And if they're not in prison they have to be tried in 360 days or their case is thrown out. We came back Jan. 2 and it was total turmoil, chaos, nobody knew what was going on. I actually had to go out and hire one of the top seven accounting firms to try and determine the practical effect of that decision.["]

"They ought to have a broad input into these things." Nigro says there has to be "someone at the top" making the decisions "otherwise, you're going to have extreme difficulties in terms of management." He promises, if elected, to go out in the weeks the court's not in session and get input from local bar groups, judges and community groups "in an effort to be a goodwill ambassador and educate the public about what the court system's about."

Surrick suggests creating a commission "to take away some powers – the power to discipline judges and lawyers and the power to deal with judicial disability."

"If you take those powers away from the court, I don't think we're going to have nearly the kind of problems we have," says Surrick.

On the specific issue of the Supreme Court exercising supervisory powers over local courts, Castille and Nigro said it was necessary two years ago in Philadelphia, even if people had legitimate complaints about the manner in which it was done.

"Our court had some problems back then," says Castille. "The justices are given supervisory authority for all the courts in the state and if there are problems in the system, they ought to exercise it.

"Maybe their approach should have been a little different with Papadakos coming in and screaming at everybody. Perhaps Justice Cappy's approach was better, 'Let's sit down and talk about what we can do.' The system might be better off for it because there was a lot of fat that was squeezed out."

**DISCIPLINARY BOARD RECOMMENDATIONS**

Castille, Nigro and Surrick are aware in varying degrees of the criticism that it depends on who you are on whether the lawyer disciplinary board recommendation is reversed and the sanction it recommends is upgraded or downgraded, and that findings of fact reached by the board have been overruled.

"The discipline process for lawyers and judges is extremely important," Castille says. "The court should defer to its own agencies."

Nigro is offended by the suggestion that the high court could overrule the disciplinary board's findings of fact.

"If you're going to ask an investigative process to take place and have the opportunity to have evidence from both sides, you should only be reviewing the record that's made to make sure it fits the recommendation as opposed to adding and subtracting based on their own personal feelings," says Nigro.

Surrick describes his personal experience with the process that was initiated at the request of Larsen, after Surrick made public details of a case before the JIRB 10 years ago involving Larsen. They have waged a bitter feud ever since.

"I went through six years of hearings with the disciplinary board," Surrick says. "They couldn't find anything. But they couldn't go six years and not do something, so the board said I ought to get a private reprimand.

It was a 2-1 decision with Gene Green of Montgomery County saying it seemed to him 'exquisitely inappropriate in the year of the 'veneration' of our constitution and John Peter Zenger that Bob Surrick should be subject to discipline for revealing to the world the manner in which the Pennsylvania court system had failed.'"

"I took an appeal from that to the Supreme Court and won on a 3-2 vote; Zappala and Papadakos against. One of them equated me to a cocaine smuggler and murderer, and it rolled off their tongues so easily that 'I would disbar this man without hesitation.'"

Surrick says he knows a lawyer who was suspended by the lawyer disciplinary board for five years, the Supreme Court reduced the suspension to four, and a connected lawyer was able to get the suspended lawyer's license reinstated.

"All of a sudden his license is back and he's practicing and not a thing is happening," says Surrick. "It's like 'I like you, you keep your ticket; I don't like you, it's pulled.' We've got to professionalize that whole business. The people who set up the disciplinary board did it in good faith believing that honorable people would administer it. It's not honorable it's full of politicization, and chasing me is an example of it."

## MANDATORY MINIMUMS AND SENTENCING GUIDELINES

Castille and Nigro, in the time they've spent trying and hearing criminal cases, have had experience with the imposition of mandatory and guidelines sentences. Nigro and Surrick believe the present system has failed because it doesn't strike an appropriate balance of judicial discretion versus legislative mandating. Castille, who claims to have authored 25 pieces of sentencing legislation, believes it has worked responsibly.

"I've done things such as write the mandatory minimum statute for drug dealers in Pennsylvania," Castille said. "But I've been responsible in writing it."

Nigro feels so strongly about the issue that he's already begun to speak to legislators about repealing legislation on mandatory and guidelines sentences.

"I think we would do far better to eliminate the sentencing guidelines and the minimum mandatories and let the judges mete out the punishment as fits each crime and as fits each circumstances that are presented before it," Nigro says.

"I happened to speak yesterday at the House Democratic Caucus and said to them if they wanted to be more responsive to the needs of the general public, specifically in the area of the courts, they ought to have more judicial input.

"I have been reversed a few times – it's been on the issue of mandatories. The interesting thing about it is when the cases come back on remand, the D.A.'s office allows me to sentence the same way I did the first time because I think they feel the pressure of this whole prison cap and all the people who have to be imprisoned.["]

Surrick also says he's against hamstringing judges so that they're unable to deal with the circumstances.

"I'm opposed to mandatory sentencing," says Surrick. "I think it's a good idea that failed. You get into the political spectrum and the law-and-order jingoism of tough judges and tough sentences and all

that kind of stuff. If you pay somebody $95,000 a year or $100,000 a year they ought to have some discretion."

**FULL DISCLOSURE OF COURT FINANCING**

The Beck Commission recommended full disclosure of the Supreme Court's budget and operating expenses and currently, there's no line item detail in the court's budget that's made available to the public. All three candidates believe the court should account for how it spends taxpayer dollars.

"I guess it comes from my previous political experience. My philosophy is don't spend a cent of taxpayer money unless they have a right to know where the money's going," Castille says.

"One of the things I've called for is the elimination of the $25,000 a year unaudited expense account that the justices have. I don't know whether that $25,000 covers what they spent at the Four Seasons, or if that's paid for by some other budget."

Nigro agrees that all taxpayer dollars should be accounted for in some public manner.

"I don't know how you can take taxpayer money and not tell them where you're spending the money," Nigro says. "I don't care what aspect of governmental life you're in. How do you take $5 out of his pocket and then say, 'Hey by the way, I'm not going to tell you where it's being spent.' I don't know how Justice Papadakos can say, for example, 'I don't want you to know where unreported expense money goes because I might

be out to dinner with somebody who you might not think I should be out to dinner with.'"

**SURRICK'S PLAN**

Surrick says he doesn't care about losing, but refuses to give up campaigning for abolishing the court. He says five other states have adopted a plan identical to his, including Illinois, "where the bookends at either end of the state are weighing the whole process down."

"I think it has a lot of appeal to a lot of groups," he says. "Every vote I get will add weight to my ability to go to the legislature with the plan." His plan pushes the concept of "judicial districts based on diversity." He explains why geographical diversity is significant on an appellate court as opposed to a legislature.

"All seven justices on the Pennsylvania Supreme Court have bubbled up through the corrupt or arguably corrupt political system," Surrick says. "You don't bubble up through those systems unless you have a go-along, get-along mentality. All of these people are products of that. We have seven of them. I think it would be healthy to have somebody from Lancaster or somebody from Columbia County or somebody from Centre County or somebody from Crawford County. They see the world differently."

**CASES BEFORE CASTILLE**

Given the cases out of Philadelphia in which prosecutors have been charged with misconduct either in the prosecution of the case or in closing arguments, does Castille feel comfortable hearing those cases?

"That shouldn't be a problem for me," he says.

## GENDER FAIRNESS

On the issue of appointing a gender fairness commission to evaluate gender issues throughout the state court system, Castille says if someone can show him there's a problem, he'll look into. Nigro called on the Supreme Court to form a gender bias task force during his campaign. And Surrick says he supports the idea.

"If there's a problem, it should be looked at," Castille says. ["]I don't know why the Supreme Court has twice refused to look at it. Before I'd form a commission, I'd have to see what has caused this. Have there been any studies? I've never been one to jump in unchartered waters. Let's see some evidence of the problem. If there is I'd be glad to address the problem."

## OUTPUT OF COURT

All three candidates say they will put pressure on the Supreme Court to increase its output. Over the past few years, the court has developed the practice of having long stretches of silence followed by the release of 30 or 40 opinions and then long stretches of silence again.

"I've found the Supreme Court's decision-making per justice has dropped about 50 percent in the last five years from 45 to about 23," opinions per justice, Nigro said. As we go around the state, the lawyers ask, 'Judge, if you become a member of the high court, can

I get my petition for allocatur denied in 90 days instead of two years? If you want to deny my case, it's okay, just let me tell my client it's over.'

"We indicated we'd go to the other justices and say we'll do more."

**CASTILLE'S EXPERIENCE**

Castille dismisses the criticism that his experience is too narrow.

"I'm the only one in my family who went to law school and at that rate I'll be the only one to sit on a state Supreme Court. I look to it as the ultimate challenge as a lawyer, as a public servant. People say you ran for mayor, you really didn't want to be mayor. To a certain extent I didn't because you really have to give up the law totally. I enjoy it. I enjoy trial work. I don't bring just the narrow perspective of prosecutor to the court because I've been more than that.

"The D.A. has to do many more things than prosecute cases, lock up criminals. I've been in private practice for two-and-a-half years. I've defended cases – [I've been] a plaintiffs' attorney down there in federal court, a plaintiffs' attorney over here in the state court. Nobody's got my administrative experience."

Three lawyer surveys have been taken showing large majorities of respondents think Papadakos unqualified for retention. At the same time the Pennsylvania Bar Association found him qualified.

Surrick says [he] criticized the state bar but apologized to the Philadelphia bar for putting it in the same category.

"In 1987, the PBA found Justice Larsen qualified for retention when everybody knew what kind of person he was. They found Papadakos qualified. They found Russell Nigro highly recommended in the primary and reduced Judge Doris Smith's rating. I'm glad she had the courage to scream. It's a shame the way it's been politicized.

"I have an apology to make to the lawyers of Philadelphia because I lumped the Philadelphia bar into the same pile as the Pennsylvania bar and I was dead wrong. I didn't participate in the Pennsylvania bar game because I knew it was a rigged game. And I didn't pay any attention to Philadelphia Bar chancellor Andre Dennis when he called me and asked 'would you please participate?'["]

**BALLOT QUESTION**

How does Surrick react to the effort of the Republican State Committee to keep him off the ballot?

"Let's view my answer against the backdrop of Pennsylvania probably being the toughest state in the country for third party access," Surrick says. "The people in Harrisburg have written the rules in such a way as to maintain third party continuity – to require third parties to go out and get enormous numbers of signatures every election.

"The manipulation of the court system for their gain to keep me in limbo is an inappropriate thing to do. We're not running for ward leader. We're running for the Supreme Court of Pennsylvania."

"But this entire campaign, I've been treated like a poor relation at a society wedding."

**IN THE**
**SUPREME COURT OF PENNSYLVANIA**
**EASTERN DISTRICT**

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NO. 192 CAPITAL APPEAL DOCKET

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COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

SAHARRIS ROLLINS,

Appellant.

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# APPELLANT'S MOTION FOR RECUSAL OF JUSTICE CASTILLE

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On Appeal from the Order of the Philadelphia County Court of Common Pleas (May 8, 1997) (Sabo, J.), Nos. 585-588 April Term 1986, denying relief under the Post-Conviction Relief Act and Habeas Corpus

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Dated: October 13, 1998.

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[Table of Contents
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**IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

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| COMMONWEALTH | : | No. 192 Capital Appeal Docket |
| Respondent/Appellee, | : | THIS IS A CAPITAL CASE |
| v. | : | |
| SAHARRIS ROLLINS | : | |
| Petitioner/Appellant | : | |

**MOTION FOR RECUSAL
OF JUSTICE CASTILLE**

Appellant, Saharris Rollins, respectfully moves for the recusal of Justice Ronald D. Castille from consideration of his case or, in the alternative, from the consideration of his Application for Remand.

In brief, the factual grounds of this motion arise from Justice Castille's service as District Attorney at times relevant to Appellant's charging, trial, and direct appeal, as well as his involvement in Appellant's particular case.[1] Justice Castille should not participate in hearing the case, because "he has personal knowledge of disputed evidentiary facts concerning the proceeding," because "his impartiality might reasonably be questioned," because "he served as a lawyer in the matter in controversy," because "a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter," and because such lawyer is "a material witness concerning it." Code of Judicial Conduct, Canon 3(C)(1)(a)-(b) (1998).

## I. Factual Background

Appellant, Saharris Rollins, is under death sentence following his conviction after a trial in February, 1987, for a homicide that occurred on or about January 22, 1986. Justice Ronald D. Castille, who was then District Attorney of Philadelphia County, was "the sole public official charged with the legal responsibility of conducting 'in court all criminal and other prosecutions, in the name of the Commonwealth.'" *Commonwealth v. Bauer*, 437 Pa. 37, 43, 261 A.2d 573, 576 (Pa. 1970), *quoting* 16 Pa. Cons. Stat. § 1402(a). Thus, all

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[1]Pursuant to Pa. R. App. P. 2151(b), Appellant is not filing a separate Reproduced Record with this motion, but is attaching to this motion a copy of an Order and Petition for Grant of Immunity referred to in the motion. All of the other papers referred to are in the original record, or in the partial Reproduced Record filed with Appellant's brief in chief on June 26, 1998, or appended to Appellant's Application for Remand filed on July 31, 1998.

filings made by the Commonwealth in Appellant's case, from the original information through trial and on direct appeal, were made in the name of District Attorney Castille, who also personally approved the decision to seek the death penalty in this case.

The only eyewitness to the homicide in question was Violeta Cintron, a cocaine dealer. District Attorney Castille personally petitioned for the grant of use immunity to Ms. Cintron in order to secure her testimony, and signed an affidavit to that effect. Petition for Grant of Immunity at 2-3.[2]

In opposition to the proposed summary dismissal of his PCRA petition, Appellant proffered evidence that it had been the official policy of the District Attorney's office to discriminate against African-Americans in jury selection, as evidenced in part by a training tape made at about the time of Appellant's 1987 trial that was reproduced in the name of District Attorney Castille. On appeal, Appellant has filed a pending motion seeking remand for consideration of this and other newly discovered statistical evidence showing extreme disparities in charging and sentencing during the Castille administration.

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[2]After an inquiry suggested by the trial judge, the prosecution also represented that District Attorney Castille would formally authorize a grant of use immunity to Appellant if he testified concerning an incident several days after the homicide as to which unrelated charges were pending against Appellant for aggravated assault. NTT (3/3/1987) 1477:15-1479:14; NTT (3/4/1987) 1523:14-1526:20. The aggravated-assault charges were later dismissed after witnesses gave testimony inconsistent with their testimony at Appellant's homicide trial.

## II. Argument

### A. Due Process Requires Justice Castille's Recusal.

The Due Process Clause requires "an impartial and disinterested tribunal in both civil and criminal cases," in order to "preserve[] both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done.'" *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (citation omitted). Where there is anything in the record that "'would offer a possible temptation to the average man as judge . . . not to hold the balance nice, clear and true between the [parties],'" due process forbids the judge's participation in the decision even if the judge in fact has no bias in the matter. *In re Murchison*, 349 U.S. 133, 136 (1955), *quoting Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *see Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (application to appellate court); *id.* at 833 (Blackmun and Marshall, JJ., concurring) (because public knows that "collegial decision making" is "the hallmark of multi-member courts," public cannot have confidence in decision in which biased judge participated).

Justice Castille has previously declined to recuse himself in a case in which his only involvement as District Attorney was to have had his name signed to *appellate* briefs, and in which there was no allegation of personal involvement or of bias or other interest on his part. *Commonwealth v. Jones*, 541 Pa. 351, 663 A.2d 142 (1995).

Here, by contrast, District Attorney Castille was personally involved, both in specifically authorizing the Commonwealth to seek the death penalty against Appellant and in personally offering immunity to a key trial witness or witnesses.[3] Unlike the situation in *Jones*, recusal on these bases would not threaten the Supreme Court's ability to hear tens or hundreds of thousands of cases with a full contingent of justices. *Id*. at 358-359, 663 A.2d at 146.

Moreover, Appellant's allegations concerning systemic racial and other bias during District Attorney Castille's administration create, or will at least be perceived to create, an interest on Justice Castille's part in the outcome of this case, whether or not Justice Castille himself is personally biased. *See id*. at 356, 663 A.2d at 145 (proponent of recusal must "allege facts tending to show bias, interest or other disqualifying events"). In other words, Justice Castille should recognize that he has at least a "temptation," *see In re Murchison*, to avoid a ruling overturning a death sentence he sought and successfully defended on direct appeal, in part on the basis that his administration

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[3]Appellant also contends that due process and the Code of Judicial Conduct require recusal because District Attorney Castille was the named lead attorney representing the Commonwealth and was thus directly responsible for Appellant's prosecution and the opposition to his appeal. *See, e.g., Laird v. Tatum*, 409 U.S. 824, 828 {1972) (Rehnquist, J.) (recusal would be required of justice who appeared "of counsel" in case); *Commonwealth v. Parrish*, 378 A.2d 884, 886 (Pa. Super. 1977) ("the appearance of judicial integrity and neutrality mandates that a judge who has represented a party in a proceeding remove himself from further participation in that case"). In any event, this is not a case of nominal involvement. *Cf. Commonwealth v. Jones*.

systematically discriminated against African-Americans in seeking the death penalty and empaneling juries in capital cases, including Appellant's. Deliberations in a *capital* case involving a Justice who may have outside-the-record knowledge of the case, or of the specific practices of his office while he served as District Attorney, may lead to the public perception that the case has been decided based upon information that Appellant had no opportunity to rebut or explain. *See Gardner v. Florida*, 430 U.S. 349 (1977).

The Pennsylvania and United States Constitutions require recusal in these circumstances.

**B. The Code of Judicial Conduct Requires Justice Castille's Recusal.**

The Code of Judicial Conduct provides:

> A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> > (a) he has . . . personal knowledge of disputed evidentiary facts concerning the proceeding;
> >
> > (b) he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it[.]

Code of Judicial Conduct, Canon 3(C)(1). These standards may, of course, require recusal even where the Constitution would not.

Justice Castille would appear likely to have "personal knowledge of disputed evidentiary facts concerning the proceeding." Canon 3(C)(1)(a). This is certainly true concerning whether the "training tape" made in his name was the policy of his office and whether his office was conscious that its policies would result in dramatically disparate sentences by race, such that a statistical expert has concluded that being African-American is a strong "aggravating factor" in Philadelphia, albeit a nonstatutory one. *See* pending Motion to Remand. It may also be true concerning the decisions to offer use immunity and other reasons the District Attorney sought the death penalty in this case, whether or not presented to the jury and the courts. Justice Castille's participation in this matter would not be proper.

Justice Castille also "served as lawyer in the matter in controversy." Canon 3(C)(1)(b). Indeed, he served as lead named attorney in prior proceedings in this matter. Moreover, the Commonwealth's trial attorney, George Shotzbarger, is "a lawyer with whom [Justice Castille] previously practiced law" who "served during such association as a lawyer concerning the matter." Canon 3(C)(1)(b). Although "[a] lawyer employed by a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection," Comment to Canon 3(C)(1)(b), Justice Castille was not merely another lawyer in the same department; he was Mr. Shotzbarger's direct superior.

*Commonwealth v. Jones*, *supra*, appears to assert Justice Castille's prerogative not to recuse himself on the sole alleged ground that he was the prosecutor's superior. However, both Mr. Shotzbarger and Jack McMahon, who reported directly to District Attorney Castille at the time, will be material witnesses concerning the matter if this Court reverses Judge Sabo's denial of PCRA relief without a hearing, *or* if the Court grants the Motion to Remand. Therefore, Justice Castille should disqualify himself, because "his impartiality might reasonably be questioned because of such association." Comment to Canon 3(C)(1)(b).

Canon 3 has been held to require the recusal of a judge who previously served as an assistant district attorney in a case, without recourse to a harmless-error analysis, even where the defendant had initially waived objections to the judge's participation in the case. *Turner v. State*, 114 Nev. 78, 1998 WL 400373 (July 16, 1998). The perception of fairness requires no less here, as do state and federal due-process guarantees.

## III. Conclusion

For all of the foregoing reasons, Appellant, Saharris Rollins, respectfully requests that Justice Castille decline to participate in the consideration or decision of this case or of the pending Motion for Remand.

Respectfully Submitted,

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Dated: October 13, 1998.

* * * *

[Attachments Omitted: Order and Petition for Grant of Immunity for Violeta Cintron]

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**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I caused a true and correct copy of the foregoing pleading to be served upon the persons and in the manner indicated below:

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