No. 15-5040

IN THE

Supreme Court of the United States

TERRANCE WILLIAMS,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR PETITIONER

LEIGH M. SKIPPER
Chief Federal Defender
STUART B. LEV*
SHAWN NOLAN
MATTHEW C. LAWRY
TIMOTHY P. KANE
KATHERINE E. ENSLER
FEDERAL COMMUNITY DEFENDER OFFICE
EASTERN DISTRICT OF PENNSYLVANIA
601 Walnut Street, Suite 545 West
Philadelphia, Pennsylvania 19106
(215) 928-0520
stuart_lev@fd.org

* *Counsel of Record* *Counsel for Petitioner*

Dated: November 30, 2015

262103

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

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

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

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

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

TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Cited Authorities

Page

Page

Page

Page

Page

Page

STATUTES AND OTHER AUTHORITIES

Page

Page

Page

Page

OPINIONS BELOW

On the Commonwealth's appeal of a post-conviction order granting a new sentencing hearing, Petitioner filed a motion to recuse Chief Justice Ronald Castille of the Pennsylvania Supreme Court, with a request that he refer the recusal motion to the full court if he declined to recuse himself. On October 1, 2012, Chief Justice Castille denied both requests. JA 171a.

On December 15, 2014, the Pennsylvania Supreme Court issued an opinion reversing the Philadelphia Court of Common Pleas' grant of post-conviction sentencing relief and reinstating the sentence of death. *Commonwealth v. Williams*, 105 A.3d 1234, 1236 (Pa. 2014) (JA 16a).

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1257(a). The final judgment of the Pennsylvania Supreme Court was entered on December 15, 2014. The Pennsylvania Supreme Court entered an order denying Petitioner's application for reargument on February 18, 2015. This Court granted Petitioner an extension of time to file a petition for writ of certiorari until June 18, 2015. The petition was filed on June 12, 2015, and granted on October 1, 2015.

CONSTITUTIONAL PROVISIONS INVOLVED

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

VIII. The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

INTRODUCTION

Due process requires disqualification of judges where the "'probability of actual bias . . . is too high to be constitutionally tolerable.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). The circumstances in this case meet that standard.

Before his election to the Pennsylvania Supreme Court, Ronald Castille served as the elected District Attorney of Philadelphia. As the District Attorney, Mr. Castille was responsible for managing the Commonwealth's criminal prosecutions and, in potential capital cases, making the final determination whether the Commonwealth would seek a death sentence. District Attorney Castille reviewed the relevant facts and made the ultimate decision to seek the death penalty against Mr. Williams. Years later, when Mr. Williams was facing a scheduled execution, the post-conviction court found on the basis of newly uncovered evidence that the trial prosecutor, who had obtained District Attorney Castille's approval to seek the death penalty, had suppressed material mitigating evidence. Based on new evidence which supported Petitioner's claim that the fifty-six-year-old victim had sexually abused Petitioner and other underage teens, and that the prosecutor had presented false evidence and argument, the state post-conviction court vacated Petitioner's death sentence.

The Commonwealth appealed that decision to the Pennsylvania Supreme Court, which was now presided over by Chief Justice Castille. Petitioner's case had come full circle: the validity of Petitioner's death sentence and the propriety of the District Attorney's office's conduct were now being judged by the former head of that office, who was personally responsible for seeking the death penalty in the first place. In light of these facts, and the fact that the Chief Justice had also campaigned for election to the court by emphasizing that he had put 45 people on death row while he was District Attorney, Petitioner requested that Chief Justice Castille recuse himself. The Chief Justice summarily denied Petitioner's recusal motion and Petitioner's request that he refer the matter to the full court.

On these facts, Chief Justice Castille should have recused himself and should not have participated in the state court's review of the Commonwealth's appeal. His actions violated Mr. Williams' due process and Eighth Amendment rights.

STATEMENT OF THE CASE

A. Events Leading to Petitioner's Conviction and Death Sentence

Petitioner committed two homicides in Philadelphia, the first as a seventeen-year-old and the second shortly after turning eighteen. The same Assistant District Attorney prosecuted both cases. In the first case, that prosecutor "aggressively sought a first degree murder conviction and imposition of the death penalty." JA 146a. However, at that trial, the evidence established that the

victim had sexually abused Mr. Williams as a minor, and the jury returned a verdict of third-degree murder. JA 146a-47a.

In the second case, Mr. Williams and his co-defendant, Marc Draper, were charged with murdering and robbing fifty-six-year-old Amos Norwood in the Ivy Hill Cemetery on June 11, 1984. Mr. Williams was appointed new counsel who evinced little familiarity with the prior murder case. Meanwhile, from evidence she and the police had gathered, the prosecutor recognized the "obvious implication that [Mr. Williams'] relationship with Amos Norwood was substantially similar to his relationship with [the first victim]." JA 149a. Discovery provided pretrial to the defense, however, omitted all evidence of Mr. Norwood's sexual abuse of minors. JA 101a.

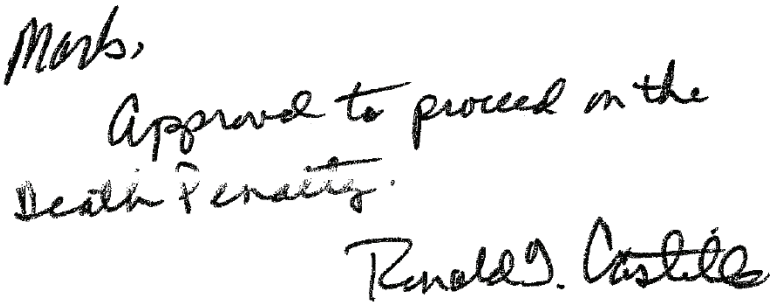
On January 21, 1986, the prosecutor requested the approval of her superiors to seek the death penalty against Mr. Williams. In a typed memorandum addressed to Mark Gottlieb, the Chief of the Homicide Unit, the trial prosecutor set forth facts supporting two statutory aggravating factors. The memorandum also discussed aggravating information beyond the statutory aggravating factors,[1] including that the defendants abducted the decedent "on the pretext of obtaining a ride home[,] . . . forced him into the cemetery, tied him with his clothes," and then Mr. Williams "went back to the car to obtain a tire iron

1. Under Pennsylvania law, evidence of non-statutory aggravating factors generally cannot be considered at capital sentencing. 42 Pa. Cons. Stat. § 9711(a)(2); *Commonwealth v. Hughes*, 865 A.2d 761, 798-99 (Pa. 2004) (evidence of prior bad acts that did not establish a statutory aggravating factor inadmissible at sentencing except as rebuttal).

and a socket wrench" with which the defendants beat the decedent to death; that Mr. Williams "returned with gasoline and burned the body"; and that Mr. Williams was awaiting trial on unrelated robbery charges. JA 424a-26a. The memorandum went on to discuss mitigating information, including Petitioner's youth, education, athletic achievements, and his description "by persons who know him as a Jeckyl-Hyde [sic] personality." JA 426a. The memorandum omitted mention of the victim's sexual misconduct. *See* JA 424a-26a.

The memorandum requested that the office "actively seek the death penalty," and concluded, "Please advise." JA 424a, 426a. At the bottom of the memorandum, Mr. Gottlieb placed a handwritten note: "Ron, I recommend seeking Death. M. Gottlieb 1/22/86." JA 426a.

District Attorney Castille had taken office earlier in the month, on January 6, 1986. After receiving the memorandum with Mr. Gottlieb's handwritten note, District Attorney Castille placed his own handwritten note at the end of the memorandum as follows:



JA 426a; *see also* Post-Conviction Relief Act Hearing ("PCRA") Tr. 11, 9/20/12 (a.m.) (trial prosecutor identifying District Attorney Castille's signature on this document as authorizing her to proceed on the death penalty).[2]

At trial, Mr. Williams' co-defendant, Mr. Draper, "was the sole Commonwealth witness to testify about the events leading up to Amos Norwood's death." JA 76a n.25. He testified that he and Petitioner beat Norwood to death and that the motive for the crime was robbery. The trial prosecutor also "elicited testimony from Draper indicating that his *only* agreement with the Commonwealth was that in exchange for his truthful testimony against [Petitioner], he would plead guilty to second degree murder, robbery and conspiracy for the murder of Amos Norwood." JA 155a-56a (emphasis in original). In the defense case, Mr. Williams, who met his new counsel the night before the trial, Trial Tr. 17-18, 22, 1/6/86, testified that he was not involved in the crime and did not know the deceased, *Commonwealth v. Williams*, 105 A.3d 1234, 1236 (Pa. 2014) (JA 17a). The jury convicted Petitioner of first-degree murder and robbery.

At the penalty phase, the Commonwealth presented evidence of Mr. Williams' prior convictions for an armed robbery and for the earlier third-degree murder. Defense counsel presented only three witnesses who gave "generic testimony" regarding "Williams' general good nature and athletic success." *Williams v. Beard*, 637 F.3d 195, 228 (3d Cir. 2011) (JA 317a).

---

2. As explained *infra*, the memorandum reflecting District Attorney Castille's personal authorization of the death penalty was first disclosed in 2012.

Despite her knowledge that the victim had sexually abused Petitioner and other teenage boys, the trial prosecutor argued at the penalty phase that Mr. Williams "has taken two lives, two innocent lives of persons who were older and perhaps unable certainly to defend themselves against the violence that he inflicted upon them. He thought of no one but himself, and he had no reason to commit these crimes." Trial Tr. 1876-77, 2/3/86. She likewise argued that Mr. Williams killed the decedent "for no other reason but that a kind man offered him a ride home." Trial Tr. 1873, 2/3/86.

The sentencing jury found two aggravating circumstances – that the murder was committed during a robbery and that Mr. Williams had a significant history of violent felony convictions. The jury found no mitigating circumstances, even though Mr. Williams was just three months past his eighteenth birthday at the time of the offense. Accordingly, the jury sentenced Mr. Williams to death, the only available punishment under Pennsylvania law when at least one aggravating circumstance and no mitigating circumstances are found. 42 Pa. Cons. Stat. § 9711(c)(1)(iv).

On appeal, the Philadelphia District Attorney's Office filed a brief in the Pennsylvania Supreme Court. On the brief, District Attorney Castille was listed among counsel for the Commonwealth. JA 205a-06a. In 1990, the Pennsylvania Supreme Court affirmed Mr. Williams' convictions and death sentence. *Commonwealth v. Williams*, 570 A.2d 75, 84 (Pa. 1990) (JA 404a-05a).

B. Candidate Castille's Election to the Pennsylvania Supreme Court

After his tenure as District Attorney ended in 1991, Mr. Castille campaigned in 1993 for a seat on the Pennsylvania Supreme Court. In his election campaign, he stressed his record as Philadelphia's District Attorney, proclaiming his responsibility for the death sentences obtained during his tenure. As one reporter put it, "Castille [ran] a law-and-order campaign, touting his 45 death-penalty convictions and saying [his opponent] was soft on crime." Tim Reeves, "Castille Leads GOP Sweep of Courts," *Pittsburgh Post-Gazette*, Nov. 3, 1993, at A1, *available at* 1993 WLNR 2163040.[3]

Other reporters similarly recounted candidate Castille's proclamations that, as District Attorney, he "sent 45 people to death rows." Katharine Seelye, "Castille Keeps His Cool in Court Run," *Phila. Inquirer*, Apr. 30, 1993, at B1, *available at* 1993 WLNR 1997262; *see also* Lynn A. Marks & Ellen Mattleman Kaplan, "Disorder in the Courts," *Pittsburgh Post-Gazette*, Nov. 14, 1993, at B1, *available at* 1993 WLNR 2150772 ("Some candidates . . . skated perilously close to saying how they might be expected to rule on issues that could come before them as judge. Take, for example, Supreme Court Justice-elect Ron Castille – who, while pursuing a job requiring him to

3. *See also* Frank Reeves, "Castille Preaches Law-and-Order Message to Voters," *Pittsburgh Post-Gazette*, Oct. 18, 1993, at B7, *available at* 1993 WLNR 2134084 ("Castille . . . hopes a law-and-order message . . . will help him win. . . . 'When I start talking about court reform, people's eyes glaze over,' he said. 'When I tell them about (my) sending criminals to death row or how I fought the Mafia in Philadelphia, then they're interested.'" (alteration in original)).

hear death-penalty appeals, bragged that he sent 45 people to death row when he was a prosecutor."); Tim Reeves, "High Court Hopefuls Pressing for Change," *Pittsburgh Post-Gazette*, Oct. 17, 1993, at C1, *available at* 1993 WLNR 2117584 ("Castille and his prosecutors sent 45 people to death row during their tenure, accounting for more than a quarter of the state's death row population. Castille wears the statistic as a badge. And he is running for the high court as if it were exclusively the state's chief criminal court rather than a forum for a broad range of legal issues. . . . Castille talks about bringing a prosecutor's perspective to the bench . . . .").

When asked his position on the death penalty, "Castille says if candidates take positions then they'll have to recuse themselves from any decisions in those cases. . . . 'You ask people to vote for you, they want to know where you stand on the death penalty. *I can certainly say I sent 45 people to death row as District Attorney of Philadelphia. They sort of get the hint.*'" Lisa Brennan, "State Voters Must Choose Next Supreme Court Member," *Legal Intelligencer*, Oct. 28, 1993, at 1, 12 (emphasis added). Mr. Williams was the first of those 45 people.

C. Chief Justice Castille's Treatment of Recusal

Mr. Castille was elected and assumed his position as a justice on the Pennsylvania Supreme Court in January 1994. He was Chief Justice from 2008 through 2014, when he retired.[4] During his tenure on the court, some

4. In the interest of simplicity, we will refer to former Chief Justice Castille during his tenure on the court as "Chief Justice Castille," even with respect to events that took place prior to his elevation to Chief Justice.

defendants who had been prosecuted by his District Attorney's office sought his recusal from their appeals. Initially, Chief Justice Castille denied such motions by emphasizing that he was "not aware of any materials indicating that [he] personally reviewed petitioner's criminal file or otherwise personally participated in the prosecution of petitioner's matter as an advisor, or as a trial or appellate attorney," and had "no factual information about petitioner's underlying criminal case other than the knowledge and information contained in the petitions and briefs that [he] ha[d] reviewed." *Commonwealth v. Jones*, 663 A.2d 142, 144 (Pa. 1995) (recusal opinion of Castille, J.); *see Commonwealth v. Abu-Jamal*, 720 A.2d 121, 123 (Pa. 1998) (recusal opinion of Castille, J.) (similar); *Commonwealth v. (Roy) Williams*, 732 A.2d 1167, 1174 (Pa. 1999) (similar).

In *Commonwealth v. Rainey*, 912 A.2d 755 (Pa. 2006) (recusal opinion of Castille, J.), a recusal motion alleged for the first time that then-District Attorney Castille had personally authorized his office to seek the death penalty. Chief Justice Castille again denied the motion. He acknowledged that he played a role in the decision to seek the death penalty but stated that his role was merely ministerial. *See Rainey*, 912 A.2d at 757 (describing his role as one in which "my signature was affixed onto every indictment and complaint as an administrative formality").

Describing a process different from the review of aggravating and mitigating evidence employed in this case, Chief Justice Castille, in *Rainey*, asserted that each decision to seek the death penalty was reviewed by multiple supervisors in the District Attorney's office – the Chief of the Homicide Unit, the Trial Deputy, and the

First Assistant – and that their approval indicated *only* that "the trial prosecutor has demonstrated a statutory basis for seeking the death penalty." *Id.* (quoting from District Attorney's office's brief in opposition to recusal); *see also id.* at 758 (endorsing District Attorney's office's description of the approval practice as an "accurate description of the manner in which such decisions were made during my tenure"). He concluded that "[m]y formal approval of such recommendations from my assistants, recommendations approved at all levels in the chain of command, simply represented a concurrence in their judgment that the death penalty statute applied, *i.e.*, that one or more of the statutory aggravating circumstances set forth in the Sentencing Code, *see* 42 Pa.C.S. § 9711(d), existed, and nothing more." *Id.*

D. Petitioner's Initial Post-Conviction Proceedings

Petitioner filed a state post-conviction petition alleging, *inter alia*, that trial counsel was ineffective for failing to investigate and present mitigating evidence at the penalty phase of trial. The Commonwealth objected to and disputed Petitioner's attempts to show through indirect evidence that Mr. Norwood sexually abused Petitioner and other underage boys. In response to a question from the court, the Commonwealth averred that there was no evidence that Mr. Norwood had a sexually abusive relationship with Petitioner. *See* PCRA Tr. 237, 4/8/98. The post-conviction court denied relief. A divided Pennsylvania Supreme Court affirmed, with Chief Justice Castille joining the majority opinion. *Commonwealth v. Williams*, 863 A.2d 505, 523 (Pa. 2004) (JA 342a, 375a).

Mr. Williams filed a petition for habeas corpus relief in federal court, where the Commonwealth continued to attack the allegations of sexual abuse as unsupported. The district court found that trial counsel's failure to investigate and present mitigating evidence was deficient performance, but that the state court was not unreasonable in finding that Mr. Williams was not prejudiced. *Williams v. Beard*, No. 05-cv-3486, slip op. at *86-97 (E.D. Pa. May 7, 2007).

The Third Circuit affirmed. *Williams v. Beard*, 637 F.3d at 234-38 (JA 329a-338a). In finding that Petitioner was not prejudiced by counsel's performance, the court accepted the Commonwealth's attacks on the credibility of the sexual abuse evidence. JA 321 n.26 (deeming the Commonwealth's argument that the allegations of sexual abuse were unsupported to be "well taken" and factoring the argument "into our prejudice analysis accordingly"). This Court denied certiorari. *Williams v. Wetzel*, 133 S. Ct. 65 (2012).

E. The Findings of Prosecutorial Misconduct and *Brady* Violations in the 2012 Post-Conviction Proceedings

On March 9, 2012, Petitioner filed a successor state post-conviction petition based on new information from Petitioner's co-defendant, Mr. Draper, who had previously been unwilling to talk to Petitioner's counsel. Mr. Draper attested that, before trial, the Commonwealth had threatened to prosecute him for an unrelated, unsolved murder, and that in response to the Commonwealth's threats and demands, he testified falsely at trial that the homicide was motivated by robbery. Mr. Draper now

explained that the murder was actually motivated by the sexual abuse Mr. Williams had endured at the hands of Mr. Norwood, as Mr. Draper had informed the detectives and the prosecutor during the original investigation. PCRA Tr. 177-79, 181-88, 9/20/12 (p.m.). Moreover, Mr. Draper now admitted that he had received a previously undisclosed benefit in the form of a letter[5] the trial prosecutor had promised to and did write on his behalf to the parole board. PCRA Tr. 194-95, 9/20/12 (p.m.). This statement conflicted with evidence elicited by the prosecution at trial, where Mr. Draper testified that his *only* agreement with the Commonwealth was to testify truthfully and plead guilty to lesser offenses for Mr. Norwood's death. JA 155a-56a.

On August 8, 2012, Pennsylvania Governor Tom Corbett signed a warrant setting Mr. Williams' execution for October 3, 2012. The state post-conviction court held an evidentiary hearing, at which Mr. Draper and the trial prosecutor testified regarding Petitioner's allegations that the prosecution coerced Mr. Draper to testify falsely at trial; intentionally concealed reports and information that Mr. Norwood had sexually abused teenage boys, including Petitioner; made false arguments at capital sentencing that were contradicted by the undisclosed evidence; and continued throughout the appellate and post-conviction process to suppress and falsely deny the existence of evidence in its possession concerning Mr. Norwood's sexual predations.

5. The letter was written on then-District Attorney Castille's letterhead. JA 208a.

The court ordered the District Attorney's office to produce previously undisclosed files of the prosecutor and police. The trial prosecutor's memorandum seeking approval to pursue a death sentence (bearing then-District Attorney Castille's handwritten authorization) was among the documents disclosed. The files also contained documents that provided, in the court's words, "[h]ard evidence" that "*directly* contradicted" the trial prosecutor's testimony. JA 150a (emphasis in original). At the close of the hearing, the state court made the following findings:

- the trial prosecutor – aware that the victim's sexual predations had prevented a first-degree murder conviction and death sentence in the prior case – "intentionally rooted out information" from the pretrial disclosures to the defense that would have "strengthened the inference of a homosexual connection between [Petitioner] and Amos Norwood," JA 152a;

- the trial prosecutor and police withheld evidence of Mr. Norwood's sexual misconduct with other teenage boys, both by completely failing to disclose evidence that he had groped a 16-year-old boy "on privates," JA 143a, and by providing "sanitized" versions of statements by the decedent's wife and Commonwealth witness Reverend Charles Poindexter, which omitted information about Mr. Norwood's conduct, JA 101a;

- the trial prosecutor and police coerced Mr. Draper to testify favorably by threatening to seek the death penalty against him with respect to an otherwise unrelated murder, JA 70a n.14;

- the trial prosecutor presented false evidence from Mr. Draper that the Norwood homicide was motivated only by robbery, rather than by the decedent's sexual abuse of Mr. Williams, JA 152a-53a;

- the trial prosecutor made a closing argument that "contradicted her own belief about the true nature" of the relationship between Petitioner and the deceased, JA 152a;[6]

- the trial prosecutor presented false evidence from Mr. Draper that his only deal with the Commonwealth was to testify in exchange for a guilty plea to second-degree murder, JA 155a, 159a; and

- the Commonwealth's suppression of evidence continued throughout, and undermined, the prior post-conviction proceedings in which the court had excluded Petitioner's proffered evidence of the deceased's sexual misconduct "[b]ased on the Commonwealth's affirmative misrepresentation," JA 86a-89a.[7]

---

6. The court further noted: "Not only did [the trial prosecutor] keep these 'issues' from being presented to the empaneled jury, but she also chose the jury with an eye towards weeding out jurors who might have been sympathetic to victims of sexual impropriety." JA 152a n.11.

7. The court subsequently issued a written opinion consistent with its September 28, 2012 ruling from the bench. *Commonwealth v. Williams*, No. CP-51-CR-0823621-1984 (Pa. C.P. Nov. 27, 2012) (unpublished) (JA 64a). The court attached a separate "Appendix," which it explicitly made part of the opinion, detailing how the

The "hard evidence" supporting these findings included, for example, a note in the prosecutor's own handwriting about the alleged molestation of a sixteen-year-old boy by Mr. Norwood, and other evidence that parishioners had complained to Commonwealth witness Reverend Poindexter about Mr. Norwood's sexual conduct with underage boys. *See* JA 150a-51a.[8] The prosecutor was also found to have withheld information memorialized in multiple handwritten notes referencing the sexual nature of the case, including one about "continued investig[ation] for faggot squad"; a note that Mr. Draper "knew that Terry made $ by going to bed w/men"; and reminders to ask Mr. Draper "did he [Mr. Norwood] know Terry – liked boys," "did he like boys," and "how long had he known Terry," JA 90a n.38. Similarly, the letter the prosecutor wrote to the Parole Board concerning Mr. Draper's cooperation, pursuant to an undisclosed agreement with Mr. Draper, was withheld at trial. JA 144a.

The court found that the prosecutor's testimony was not credible, and that she "was less than candid," "engaged in 'gamesmanship,'" and "knowingly suppress[ed] evidence . . . in order to secure a first degree murder conviction and death penalty sentence." JA 75a n.23. The court further

---

trial prosecutor's testimony before it and conduct during her prosecution of Petitioner led to its determination that she was "less than candid" during her testimony before the court. JA 75a n.23.

8. The trial prosecutor and the defense were permitted to review the prosecutor's file before she testified. JA 73a. However, the police file was not disclosed to the court or the defense until after the prosecutor testified that witnesses who were questioned about whether they knew of Mr. Norwood's sexual proclivities "all said no." PCRA Tr. 99, 106, 9/20/12 (p.m.).

found that the trial prosecutor played "fast and loose" with the truth, "took unfair measures to win," and "had no problem disregarding her ethical obligations," PCRA Tr. 37, 39, 45, 9/28/12, in violation of Petitioner's due process rights.

On September 28, 2012, the court granted a stay of execution and vacated Petitioner's death sentence based on Petitioner's claim that the prosecution withheld exculpatory evidence concerning Mr. Norwood's sexual abuse of other teenage boys in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).[9] That same day, the Commonwealth sought review of the ruling through an emergency application to the Pennsylvania Supreme Court to vacate the stay of execution.

On October 1, 2012, Petitioner filed an answer together with a motion requesting that Chief Justice Castille either recuse himself or refer the motion to the full court for decision, attaching, *inter alia*, the authorizing memorandum as an exhibit. JA 181a-82a, 204a. That same day, the Commonwealth filed a pleading opposing that request. JA 172a. Later that day, Chief Justice Castille issued a one-sentence order on the motion, which read: "AND NOW, this 1st day of October, 2012, [the] Motion for Recusal is DENIED, as is the request for referral to the full Court." JA 171a.

On October 3, 2012, the Pennsylvania Supreme Court denied the Commonwealth's application to vacate the

9. While that is the only claim on which the post-conviction court granted relief, the court found that the other allegations of prosecutorial misconduct had been proved, but were not timely. JA 155a-59a & n.15.

stay and ordered full briefing on the issues raised in the appeal. Approximately two years later, on December 15, 2014, the court, without dissent, reversed the lower court's grant of penalty phase relief and lifted the stay of execution. *Williams*, 105 A.3d at 1244-45 (JA 36a). It rejected Petitioner's claims of government interference and *Brady* violations on procedural grounds – because Petitioner had not earlier discovered and developed the evidence himself, including the facts disclosed in the files of the prosecutor and police. *See* JA 28a-34a. As a result, the court deemed it unnecessary to address the extent and impact of the prosecutorial misconduct. *See* JA 28a ("[T]he failure to explore or exploit [Norwood's] character was not a *result* of government interference . . . ." (emphasis added)). Justices Saylor and Baer concurred in the result but did not join the court's opinion. JA 36a.

Chief Justice Castille joined the court's opinion and filed a lengthy concurring opinion, in which he posited that any prosecutorial misconduct is relevant only where the claim at issue is both timely and meritorious. JA 41a (Castille, C.J., concurring). Chief Justice Castille referred to a finding of a *Brady* violation as "condemning officers of the court," *id.* – *i.e.*, the trial prosecutor he formerly supervised and other members of his former office. Chief Justice Castille also characterized the lower court's grant of discovery as "seizing and rummaging about in the government's files." JA 47a.

On January 13, 2015, then-Governor Corbett issued a new death warrant for Mr. Williams, setting an execution date for March 4, 2015. On February 13, 2015, newly inaugurated Pennsylvania Governor Tom Wolf established

a moratorium on executions, pending the issuance of a report on Pennsylvania's death penalty system.[10]

SUMMARY OF ARGUMENT

The principle that judges must be fair, neutral, and impartial is essential to our adversarial system of justice. This principle was turned on its head in this case. The District Attorney who decided to seek the death penalty against Petitioner became the Chief Justice who reviewed a lower court's ruling that his prosecutor's office had committed misconduct in securing Petitioner's death sentence. Chief Justice Castille acted as a judge of his own case, depriving Petitioner of the process he was due.

It is also essential to our justice system that appellate review is conducted through private, collegial deliberations by panels of judges. Privacy permits judges on a tribunal to freely discuss, negotiate, and persuade each other of the appropriate ruling in a case. If one judge is tainted by bias, then the end result of this collective enterprise is a tainted judgment of the court. The influence of bias on such a judgment could be ascertained only by sacrificing the privacy necessary to effective decisionmaking. Review by a panel that contains a biased judge thus undermines the very structure of the judicial process. Here, that defect requires that the judgment of the Pennsylvania Supreme Court be vacated and the matter remanded for *de novo* review of the lower court's findings of prosecutorial misconduct, without Chief Justice Castille's participation.

---

10. The Commonwealth is currently challenging this moratorium in the Pennsylvania Supreme Court. Oral argument on the Commonwealth's challenge was held on September 10, 2015. *Commonwealth v. Williams*, 14 EM 2015.

ARGUMENT

I. Chief Justice Castille's Refusal to Recuse Himself from the Review of the Commonwealth's Appeal Violated Due Process and the Eighth Amendment

Chief Justice Castille's involvement in this case – as the District Attorney who authorized seeking the death penalty, as a judge who reviewed the lower court's finding that his office committed misconduct that required a new sentencing, and as a candidate for judicial election who touted his obtaining death sentences in this and other cases – created a probability of bias that was constitutionally intolerable.

A. Due Process Requires an Objective Inquiry into Whether a Judge Is Likely To Be, or Appears To Be, Biased

A fair tribunal is essential to due process. *See In re Murchison*, 349 U.S. 133, 136 (1955). This principle "helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law," and "preserves both the appearance and reality of fairness." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (internal citation and quotations omitted). Moreover, in the capital context, the Eighth Amendment affords "heightened" due process protections to ensure the reliability of capital convictions and sentences. *See Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) ("'[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'" (quoting *California v. Ramos*, 463 U.S. 992, 998-99 (1983))); *Beck v. Alabama*,

447 U.S. 625, 637 (1980) ("'It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, *and appear to be*, based on reason rather than caprice or emotion.'" (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (emphasis added))).

This Court has "jealously guarded" the right to an impartial tribunal, *Marshall*, 446 U.S. at 242, and has described the inquiry into whether a judge's bias violates due process as follows:

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

Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 881 (2009) (internal quotations omitted).

The need for an objective standard is underscored by "the difficulties of inquiring into actual bias and the fact that the inquiry is often a private one." *Id.* at 883. To implement the principle that "no man is permitted to try cases where he has an interest in the outcome," *Murchison*, 349 U.S at 136, this Court has asked whether the relevant circumstances "offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant," or "might lead him not to hold the balance nice, clear, and true between the state and the accused." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

Due process requires disqualification only in "rare instances." *Caperton*, 556 U.S. at 887-88. These instances

come in different forms, but in each one, "'the average man as a judge'" would not likely be impartial. *Id.* at 878 (quoting *Tumey*, 273 U.S. at 532). A judge, for example, must recuse herself where she has a financial interest in the outcome of the case. *See Tumey*, 273 U.S. at 520 (mayor-judge received a salary supplement only for convictions); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972) (similar); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 823-24 (1986) (disqualification required where state supreme court justice was plaintiff in almost identical insurance case in lower state court). Recusal may also be necessary as a result of events involving judicial elections, where a litigant's campaign contributions have a "significant and disproportionate influence" in placing a judge on a specific case. *Caperton*, 556 U.S. at 884, 887.

The probability of bias also requires recusal where a judge had significant prosecutorial involvement in a criminal case. For instance, in *Murchison*, the Court held that the same judge may not serve as both a "one-man grand jury" and as the trier of contempt charges that he initiated. 349 U.S. at 134 (internal quotations omitted); *see also Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002) (describing *Murchison* as holding that the "judge violated due process by sitting in the criminal trial of defendant whom he had indicted"). Such a single-judge grand jury amounts to participation in the "accusatory process," and "[i]t would be very strange if our system of law permitted a judge to act as a grand jury and then to try the very persons accused as a result of his investigations." *Murchison*, 349 U.S. at 137; *see also Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971) (holding that a defendant in criminal contempt proceedings should be tried by "a judge other than the

one reviled by the contemnor"). A defining feature of our adversarial system of justice is "the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments . . . adduced by the parties." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 357 (2006). In short, no man should be "a judge in his own case." *Murchison*, 349 U.S. at 136.

Like these examples, this case is one of the "rare instances" that requires "resort to the Constitution." *Caperton*, 556 U.S. at 890; *see Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (comparing the constitutional requirement with stricter disqualification requirements under common law, statutes, and judicial codes of conduct).

B. Chief Justice Castille Was Objectively Likely To Be Biased

This case presents three objective circumstances that establish a probability of bias. First, then-District Attorney Castille personally decided to seek the death penalty against Mr. Williams. His office then obtained, and successfully defended on appeal, a death sentence. Second, the issue before the Pennsylvania Supreme Court in this case was whether his office committed misconduct in obtaining that death sentence, as the lower court had found. Alone and in combination, these first two circumstances establish "an unconstitutional potential for bias." *Caperton*, 556 U.S. at 881 (internal quotations omitted). Third, as a candidate for the Supreme Court, Mr. Castille "bragged that he sent 45 people to death row," Marks & Kaplan, "Disorder in the Courts," *supra* at B1, one of whom was Mr. Williams; and observed that voters

"'sort of get the hint'" about how he would rule in death penalty cases, Brennan, "State Voters Must Choose Next Supreme Court Member," *supra* at 12. Though protected by the First Amendment, his statements undermine "both the appearance and reality of fairness," *Marshall*, 446 U.S. at 242, by suggesting that, in this appeal, Chief Justice Castille would prejudge the validity of Mr. Williams' death sentence.

Given these three undisputed circumstances, the "average judge" in such a position was not "likely to be neutral." *Caperton*, 556 U.S. at 881 (internal quotations omitted). At a minimum, Chief Justice Castille's decision to preside over this appeal did not "satisfy the appearance of justice." *Murchison*, 349 U.S. at 136 (internal quotations omitted).

1. District Attorney Castille Personally Decided To Seek the Death Penalty

District Attorney Castille personally authorized the trial prosecutor to pursue a death sentence against Mr. Williams. His involvement in the prosecution and adjudication of Mr. Williams' case exemplifies the dual role of accuser and adjudicator that troubled this Court in *Murchison* and *Mayberry*, and which is foreign to our adversarial system:

> *Having been a part of [the accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused.* While he would not likely have all the *zeal of the prosecutor*, it can certainly not be said that he would have none of

> that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.

Murchison, 349 U.S. at 137 (emphasis added); *see Mayberry*, 400 U.S. at 465. In such instances, "it is difficult if not impossible for a judge to free himself from the influence of what took place" previously. *Murchison*, 349 U.S. at 138.

The decision to seek the death penalty is one of the most solemn and important decisions a prosecutor can make because "the death penalty is different from other punishments in kind rather than degree." *Solem v. Helm*, 463 U.S. 277, 294 (1983). In Pennsylvania, as in most states, a District Attorney's decision to seek the death penalty "is the heart of the prosecution function," *Commonwealth v. DeHart*, 516 A.2d 656, 670 (Pa. 1986) (citations omitted); *see also* 16 Pa. Cons. Stat. § 1402, and is subject to the District Attorney's "broad discretion," *Commonwealth v. Stipetich*, 652 A.2d 1294, 1295 (Pa. 1995).[11]

---

11. The significance of this decision has been widely recognized. *E.g.*, Hugo Adam Bedau, *Controversies from Prosecution to Execution*, *in The Death Penalty in America: Current Controversies* 313 (Hugo Adam Bedau ed., 1997) ("[T]he decision whether to seek the death sentence is perhaps the most far-reaching decision to be made in the whole arena of criminal justice."); David Wharton, "Asking for Death," *L.A. Times*, Feb. 24, 1985, *available at* http://articles.latimes.com/1985-02-24/local/me-24605_1_death-penalty-case (interviewing prosecutors on the decision to seek the death penalty, two of whom recounted: "[Y]ou realize your job really involves human life. It is an enormous responsibility."; "You weigh all these things and say, 'Is this the right guy for the death penalty?' . . . You don't want to be wrong.").

Chief Justice Castille's handwritten, personal authorization to pursue Mr. Williams' execution was not merely ministerial. To the contrary, while his subordinates recommended death and asked for his permission, then-District Attorney Castille made the final decision as to whether his office would seek the death penalty against Mr. Williams. JA 426a.

The memorandum – first disclosed in 2012 – also reveals a more involved approval process than previously acknowledged by the Chief Justice. *See supra* pp. 10-11 (describing Chief Justice Castille's opinion in *Rainey*). The trial prosecutor's memorandum is not limited to facts suggesting "that one or more of the statutory aggravating circumstances . . . existed, and nothing more." *Rainey*, 912 A.2d at 757-58. Rather, the memorandum addressed the likely presence of two statutory aggravating factors, *and* mitigating circumstances, *and* other aspects of the case that did not relate to any statutory aggravating factors. JA 424a-26a. The memorandum shows that, in contrast to the process described in *Rainey*, then-District Attorney Castille weighed whether seeking the death penalty was appropriate under the circumstances – not simply whether there was a statutory basis for the capital charge. There is no reason why these details would have been in the authorization-seeking memorandum if it were not understood that such information was relevant to District Attorney Castille's decision. The memorandum demonstrates that Chief Justice Castille's involvement was deliberate and significant, not an administrative formality.[12] In Chief Justice Castille's words: "I can

12. In contrast to his record of explaining, in prior opinions denying recusal, that recusal was unwarranted because he was not

certainly say *I sent* 45 people to death row." Brennan, "State Voters Must Choose Next Supreme Court Member," *supra* at 12 (emphasis added).

Moreover, the exercise of prosecutorial discretion is indispensable in administering capital punishment consistent with the Eighth Amendment. *McCleskey v. Kemp*, 481 U.S. 279, 311-13 & n.37 (1987). "[T]he capacity of prosecutorial discretion to provide individualized justice is firmly entrenched in American law." *Id.* at 312 (internal quotations omitted).[13] District Attorney Castille's exercise of this discretion cannot fairly be described as ministerial. *Cf. Bogan v. Scott-Harris*, 523 U.S. 44, 51 (1998) (ministerial acts are those in which government officials "lack[] discretion").

Where a prosecutor personally decides to seek the death penalty against a defendant, his later adjudication of that case as a judge violates due process. Such a dual

---

"personally involved," *see, e.g.*, *Rainey*, 912 A.2d at 757-58; *Jones*, 663 A.2d at 144, here, Chief Justice Castille provided no explanation for his decision not to recuse. *Cf. Caperton*, 556 U.S. at 882-86 (noting judge provided reasons for denying recusal and considering the reasons in analyzing due process claim). Chief Justice Castille also denied, without explanation, the request to refer the matter to the full court for review.

13. *See also* Jules Epstein, *Death-Worthiness and Prosecutorial Discretion in Capital Case Charging*, 19 Temp. Pol. & Civ. Rts. L. Rev. 389, 398 (2010) ("Prosecutorial discretion in deciding whether to seek the death penalty, either at the initial charging stage or thereafter in plea negotiations to withdraw the death notice in exchange for some quid pro quo, is a longstanding right and practice arguably essential to the continued function of the criminal trial process in most jurisdictions.").

role is also "fundamentally incompatible with the Eighth Amendment's heightened need for reliability in the determination that death is the appropriate punishment in a specific case." *Caldwell*, 472 U.S. at 340 (internal citations and quotations omitted).

2. Chief Justice Castille Reviewed Lower Court Findings of Prosecutorial Misconduct by His Former Office

The appeal before the Pennsylvania Supreme Court challenged lower court findings that the trial prosecutor employed and supervised by then-District Attorney Castille had committed misconduct material to Mr. Williams' sentencing. The lower court found that the District Attorney's office had coerced the prosecution's star witness to mislead the jury, presented false evidence and argument, and withheld favorable evidence of the victim's sexual predations – all while Chief Justice Castille was at the office's helm. If ever there was a case that "offer[s] a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused," *Caperton*, 556 U.S. at 878 (internal citations and quotations omitted), this is it.

Chief Justice Castille was "a judge in his own case." *Murchison*, 349 U.S. at 136. His interests and reputation were plainly implicated by the lower court's ruling that his office obtained Mr. Williams' death sentence by violating the law. The trial prosecutor was then-District Attorney Castille's subordinate and sought the death sentence at his direction. Chief Justice Castille thus had to pass judgment both on his former subordinate and on his own responsibility for his office's compliance with ethical and

constitutional obligations. Had he affirmed the lower court, Chief Justice Castille would have been admitting misconduct by his office. Such a clear nexus between the adjudicator and the issue being adjudicated cannot avoid the appearance or probability of bias:

> Given the institutional ties described here, the reasonable person might well question whether a judge who bore supervisory responsibility for prosecutorial activities during some of the time at issue could suppress his inevitable feelings and remain impartial when asked to determine [the propriety of his former office's actions], and to preside over whatever enquiry may ultimately be conducted.

In re Bulger, 710 F.3d 42, 48-50 (1st Cir. 2013) (Souter, J., sitting by designation) (ordering removal of judge who had a supervisory prosecutorial position during the investigation of the case).

Here, Chief Justice Castille judged his own office's culpability. His participation in the appeal created too much potential that extra-record knowledge of the facts, circumstances, or people involved in the events would influence his judgment and decision in the case. *See Murchison*, 349 U.S. at 138 ("Th[e] incident . . . shows that the judge was doubtless more familiar with the facts and circumstances in which the charges were rooted than was any other witness.").

This Court has found due process violated on facts much less egregious than these. *See, e.g.*, *id.* at 134-35 (requiring disqualification where judge played a

prosecutor-like role in a defendant's charge of contempt). Because Chief Justice Castille presided over this case between his former office and the man against whom he had sought the death penalty, and because the case concerned his own office's misconduct in securing the death sentence, Mr. Williams was denied "impartial, equal, exact justice." Cong. Globe, 39th Cong., 1st Sess. 1094 (1866) (statement of Representative John Bingham, principal drafter of the Fourteenth Amendment, explaining the amendment's purpose).

Due process is violated where a judge participates in reviewing findings of prosecutorial misconduct committed under his supervision by his former subordinate. When combined with the fact that the judge personally authorized the subordinate to seek the death penalty in the same case, the constitutional violation is even more pronounced.

3. Candidate Castille Touted the Death Sentences He Obtained as District Attorney

The probability of bias is greater still in light of then-candidate Castille's statements during his election campaign. Running on a get-tough approach to criminal justice, he adverted explicitly to – and took credit for – the death verdicts he had secured as District Attorney. When asked about his position on death penalty cases, Chief Justice Castille cited the number of people he "sent" to death row and explained that the voters "sort of get the hint." Brennan, "State Voters Must Choose Next Supreme Court Member," *supra* at 12. To enhance the hint, Chief Justice Castille invoked raw numbers – "45"

death sentences to be exact – a number that included Mr. Williams' death sentence. *See id.*

While Chief Justice Castille had the right to express his pro-death penalty approach to criminal justice, his electoral platform emphasized his personal decisions to seek the death penalty, undermining his own portrayal of such decisions as merely ministerial and heightening the concerns raised by his unexplained decision to preside over the appeal in this case. His public remarks are one more factor in the objective inquiry pointing to the appearance and probability of bias. Given the circumstances, recusal was necessary to ensure public confidence in the impartiality of the judiciary. *Cf. White*, 536 U.S. at 794-96 (Kennedy, J., concurring) (while judicial candidates' speech is protected, recusal may be used to insure judicial impartiality); *see also Republican Party of Minn. v. White*, 416 F.3d 738, 755 (8th Cir. 2005) (en banc) (on remand) ("Through recusal, the same concerns of bias or the appearance of bias that [the state] seeks to alleviate through [its regulation of political speech and association] are thoroughly addressed without 'burn[ing] the house to roast the pig.'" (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957))).

The objective circumstances of this case may well establish actual bias. At the very least, the undisputed facts establish there was "an unconstitutional potential for bias." *Caperton*, 556 U.S. at 881 (internal quotations omitted).

C. Chief Justice Castille's Refusal to Recuse Lies Far Outside the Mainstream of Judicial Ethics

Undersigned counsel is not aware of any prior case in the nation where a judge presided under circumstances equivalent to those described above. Chief Justice Castille's refusal to recuse placed him far outside the mainstream of judicial ethics and reported decisions.

Many state courts, including the Pennsylvania Supreme Court, have recognized that significant, personal involvement in a case as a prosecutor disqualifies a jurist from subsequently presiding over the same case. *Commonwealth ex rel. Allen v. Rundle*, 189 A.2d 261, 262 (Pa. 1963) (disqualification required where judge, as District Attorney, signed an indictment and was responsible for the prosecution of the charge against the defendant); *see, e.g.*, *Green v. State*, 729 S.W.2d 17, 20 (Ark. App. Ct. 1987) (disqualification required where the judge, as prosecutor, signed the plea and sentence recommendation); *People v. Julien*, 47 P.3d 1194, 1198 (Colo. 2002) (disqualification required where judge, as prosecutor, participated in the investigation or presentation of case, had "other involvement with the case, such as being a supervising attorney of the attorneys conducting the prosecution, or gain[ed] personal knowledge of disputed evidentiary facts of the case . . . ."); *State v. Connolly*, 930 So.2d 951, 954-55 (La. 2006) (similar); *Banana v. State*, 638 So.2d 1329, 1330-31 (Miss. 1994) (similar); *Mathis v. State*, 3 Heisk. 127, 128 (Tenn. 1871) (disqualification where the judge, as District Attorney, signed the indictment against petitioner); *In re K.E.M.*, 89 S.W.3d 814, 828-29 (Tex. App. 2002) (disqualification required where record shows "(1) personal participation by the judge as prosecutor in any

way, however slight, in the investigation or prosecution of the same case . . . ; or (2) supervisory authority by the judge as prosecutor at the time the case was investigated, prosecuted, or adjudicated over attorneys who actually investigated or prosecuted the same case").

Other state courts have gone even further, holding that disqualification is required where the judge was the District Attorney – without demonstrated personal involvement in the case – at the time that the defendant was prosecuted. *See, e.g.*, *State ex rel. Corbin v. Super. Ct. of Ariz.*, 748 P.2d 1184, 1186 (Ariz. 1987) (disqualification required because "[t]he presence of a former member of the prosecutor's staff on the bench at the capital sentencing of a case which has been prosecuted by that judge's former office raises substantial and unavoidable questions"); *King v. State*, 271 S.E.2d 630, 633-34 (Ga. 1980) (disqualification required where judge was District Attorney during the time that petitioner's case was pending); *McElroy v. State*, 133 P.2d 900, 902-03 (Okla. 1943) (similar); *cf. Ohio v. Dickerson*, No. L-91-214, 1993 WL 195806, at *2 (Ohio App. Ct. 2003) (unpublished) (remanding judicial bias claim where judge had been Chief of the District Attorney's Criminal Division at the time of defendant's capital case).

Similarly, federal judges are required to recuse when they "[have] served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." 28 U.S.C. § 455(b); *see, e.g.*, *Laird v. Tatum*, 409 U.S. 824, 829 (1972) (Rehnquist, J.) (mem. op.) (noting that, in *S & E Contractors, Inc. v. United States*, 406 U.S.

1 (1972), a case "in which I had only an *advisory* role which terminated immediately *prior* to the commencement of the litigation, I disqualified myself" (emphasis added)); *United States v. Vasilick*, 160 F.2d 631, 632 (3d Cir. 1947) (disqualification where judge signed the defendant's indictment as the District Attorney).

Many prosecutors-turned-judges, recognizing the potential for bias or the appearance of bias, have sought ethics opinions in far less extreme circumstances than those presented here; these ethics opinions uniformly require recusal. *See, e.g.*, *JEAC 2007-3*, 2007 WL 7603074, at *2, *5 (Del. Jud. Ethics Advisory Comm. June 29, 2007) (advising a former Attorney General that he is disqualified not only from all matters where, as Attorney General, he "had direct substantial involvement or made a direct, substantial decision," but also "from presiding over criminal cases that were filed by deputy attorneys general, without input from the Attorney General, during the judge's tenure in that office"). In many states, disqualification is necessary where a judge had no involvement in the prosecution except that the case was charged while the judge was the District Attorney. *See, e.g.*, *Advisory Op. 06-01*, 2006 WL 1148131, at *1 (Ariz. Sup. Ct. Jud. Ethics Advisory Comm. Apr. 18, 2006) ("[A] judge, whose name appeared on the charging document or other court papers while serving as chief city prosecutor, should recuse himself from any case originating or pending in the prosecutor's office while he held a supervisory position there."); *Advisory Op. # 3-89*, 1989 WL 1712315, at *1 (Ind. Comm. Jud. Qual.) (similar); *Mich. Eth. Op. JI-34*, 1990 WL 505821, at *1 (Mich. Prof'l Jud. Ethics Dec. 21, 1990) (similar); *Op. 09-3*, 2009 WL 8484514, at *1 (Wis. Sup. Ct. Jud. Conduct Advisory Comm. Aug. 6, 2009)

(similar); *see also Advisory Op.* (W. Va. Jud. Investigation Comm'n Jan. 5, 1993), http://www.courtswv.gov/legal-community/advisory-opinions.htm ("A judicial officer may not hear criminal cases handled by a prosecutor's office during the judicial officer's prior employment with that office."). That Chief Justice Castille's decision was so far outside the mainstream of judicial ethics emphasizes the extraordinary nature of this case and the need for constitutional protections.

* * *

For all of the reasons discussed above, the facts of this case are constitutionally intolerable. Chief Justice Castille violated the fundamental principle that no man shall be a judge of his own case. If due process requires recusal in cases in which a judicial candidate received substantial amounts of money in campaign support from a potential litigant, or in which a judge sat as a grand jury in proceedings that served as the basis for contempt charges, then it must require recusal in this case, in which the Chief Justice was to decide issues of prosecutorial misconduct that occurred under his supervision in a case where he personally authorized the decision to seek the death penalty.

II. Due Process and the Eighth Amendment Require Relief from the Decision of a Tribunal That Included a Biased Jurist

This case presents the question left open in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 827-28 (1986) – whether relief is required where due process was violated by a judge's participation in a case, but the judge did not

cast the deciding vote. *See id.* at 827 ("Our prior decisions have not considered the question whether a decision of a multimember tribunal must be vacated because of the participation of one member who had an interest in the outcome of the case.").

Three concurring Justices in *Lavoie* recognized the correct answer: yes. As they opined, the "mere participation in the shared enterprise of appellate decisionmaking – whether or not [the improperly seated judge] ultimately wrote, or even joined, the [court's] opinion – posed an unacceptable danger of subtly distorting the decisionmaking process." *Id.* at 831 (Blackmun, J., joined by Marshall, J., concurring); *accord id.* (Brennan, J., concurring) ("The description of an opinion as being 'for the court' connotes more than merely that the opinion has been joined by a majority of the participating judges."). Where the right to an impartial tribunal is violated by the presence of a biased member, the error undermines the very structure of the adjudicative process and threatens public confidence in the integrity of the judiciary. The majority of courts to consider the question have adopted this view, and social science research confirms it. Judges are influenced by the other judges on multimember tribunals. Moreover, it is impossible to isolate and evaluate the influence of the biased participant on the court's deliberations without abrogating the confidentiality necessary to the proper functioning of the courts. Here, Chief Justice Castille's participation in the appellate decisionmaking in this case impermissibly tainted the Pennsylvania Supreme Court's decision.

A. A Violation of the Right to an Impartial Tribunal Is Structural Error

A violation of the right to an impartial tribunal has long been recognized as structural error. *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) ("No matter what the evidence was against him, he had the right to have an impartial judge."); *Turner v. Louisiana*, 379 U.S. 466, 473 (1965) ("it would be blinking reality not to recognize the extreme prejudice inherent" in contact between jurors and prosecution witnesses throughout trial); *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986) ("[T]hese fundamental flaws, which . . . undermine[] the structural integrity of the criminal tribunal itself, [are] not amenable to harmless-error review."); *Rose v. Clark*, 478 U.S. 570, 577 (1986) ("[S]ome constitutional errors require reversal without regard to the evidence in the particular case [including] . . . adjudication by biased judge[]." (internal citations omitted)). Any suggestion that the error in Chief Justice Castille's participation in this case can be corrected by harmless error analysis, *see* Br. Opp'n at ii (contending that this Court should "apply the harmless-error doctrine to constitutionalized recusal claims"), is inconsistent with this authority.

This Court has identified two attributes of structural errors. First, a structural error affects "the entire adjudicatory framework." *Puckett v. United States*, 556 U.S. 129, 141 (2009); *see United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) ("[S]tructural defects . . . affect the framework within which the trial proceeds . . . ." (internal citations and quotations omitted)). The collegial decisionmaking process is an essential part of the "adjudicatory framework" of any multimember court

proceeding. Thus, where the shared decisionmaking process is infected with bias, the "entire adjudicatory framework" of the appeal is undermined. Just as it would be "blinking reality" to suggest that a jury's verdict should stand where its deliberations were improperly influenced by one party, *Turner*, 379 U.S. at 473, so too an appellate court's decision cannot stand where a biased judge was part of its decisionmaking process.

Second, structural errors are those for which the "'consequences . . . are necessarily unquantifiable and indeterminate.'" *Gonzalez-Lopez*, 548 U.S. at 150 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993)); *see also Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984) (violations of the right to a public trial are structural because "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance"). Appellate courts function effectively as institutions only because their deliberations occur *in private*, and the unquantifiable nature of a single judge's influence on deliberations is a necessary consequence of such privacy. If privacy were sacrificed in favor of a harmless error analysis, it would require "a speculative inquiry into what might have occurred in an alternate universe." *Gonzalez-Lopez*, 548 U.S. at 150.

Here, the only reliable way to remove Chief Justice Castille's influence from the case is by vacating the Pennsylvania Supreme Court's decision and remanding for *de novo* reconsideration of Petitioner's appeal.[14] Chief

14. Chief Justice Castille's tenure on the court ended on December 31, 2014, two weeks after the decision in this case. In November 2015, three new justices were elected and will take seats on the court in January 2016.

Justice Castille's participation in the deliberations and decisionmaking in this case injected a probability and appearance of bias that was structural error and denied Petitioner's rights under the Eighth and Fourteenth Amendments.

B. The Principle of Judicial Impartiality Encompasses a Judge's Participation in a Case, Not Just the Judge's Vote

As set forth above, given the collegiality of appellate court deliberations, the bias of one judge affects the adjudicatory framework of an appeal, and the private nature of the deliberations makes it impossible to discern the impact of improper influence. These same attributes – collegiality and privacy – also illustrate why the public would doubt the impartiality of a tribunal on which a biased judge sat (or, as here, over which he presided).

The duty to recuse has never been understood to be confined to a judge's vote; rather, it requires that the judge refrain from participating in the case at all. When a biased judge fails to recuse, however, her participation in the consideration of a case calls into question the legitimacy of the court, which "ultimately depends on its reputation for impartiality." *Mistretta v. United States*, 488 U.S. 361, 407 (1989). The purpose of the Due Process Clause is to ensure the provision of "impartial, equal, exact justice," Cong. Globe, 39th Cong., 1st Sess. 1094 (1866), but the public will naturally doubt the "impartial, equal, exact justice" of a court's decision when a biased judge participated in the decisionmaking process.

A court's power is institutional, not personal. "The description of an opinion as being 'for the court' connotes more than merely that the opinion has been joined by a majority of the participating judges." *Lavoie*, 475 U.S. at 831 (Brennan, J., concurring). As Circuit Judge Harry Edwards has written, "appellate judges act collectively as a court in disposing of cases," and "each judge can only contribute to a group product that is ultimately attributable to the court." Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. Pa. L. Rev. 1639, 1656, 1661 (2003). Because an appellate decision is an exercise of institutional power, bias and the appearance of bias affect the integrity of a court to the same extent that they affect any judge sitting on the court.

"[T]he hallmark of multimember courts" is that they undertake a shared decisionmaking process. *Lavoie*, 475 U.S. at 833 (Blackmun, J., concurring). Judges "exchang[e] ideas and arguments in deciding the case," and this "collective process of deliberation . . . shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed." *Id.* at 831 (Brennan, J., concurring). This observation has been confirmed by numerous social science studies conducted since *Lavoie*, which have produced overwhelming evidence that the collegial decisionmaking process influences how judges on multimember courts rule. *See infra* Part II.D. Accordingly, "mere participation in the shared enterprise of appellate decisionmaking – whether or not [the improperly seated judge] ultimately wrote, or even joined, the [tribunal's] opinion – pose[s] an unacceptable danger of subtly distorting the decisionmaking process." *Lavoie*, 475 U.S. at 831 (Blackmun, J., concurring).

This collegial process occurs out of public view. Thus, "based on objective and reasonable perceptions," *Caperton*, 556 U.S. at 884, a court's "reputation for impartiality," *Mistretta*, 488 U.S. at 407, will be undermined because the biased judge's influence on the court cannot be divined. The private nature of court deliberations makes it impossible for the public to determine "the actual effect a biased judge had on the outcome of a particular case," *Lavoie*, 475 U.S. at 833 (Blackmun, J., concurring), jeopardizing the public's confidence in judicial integrity.

The public therefore would have reason to doubt the impartiality of a multimember court on which a biased judge sat for the same reasons that this Court has held certain errors to be "structural." An error that undermines a court's collaborative process of deliberation and its unitary institutional voice plainly "affects the framework within which the [case] proceeds." As a court's deliberative process is confidential, such errors "are necessarily unquantifiable and indeterminate" and thus "unquestionably qualif[y] as structural error." *Gonzalez-Lopez*, 548 U.S. at 148-50 (internal quotations and alterations omitted).

C. Most Courts Apply the Structural Error Doctrine in These Circumstances

The vast majority of federal and state courts to consider the question have ruled that a tribunal decision cannot stand where due process required one judge's recusal, even though the judge did not cast the deciding vote. This case law provides strong evidence that public confidence in the impartiality of courts would be eroded by a contrary rule that permitted such a court decision to stand.

Six federal circuits have endorsed the principle that, where due process requires disqualification of one tribunal member, the tribunal's decision is tainted because "there is no way which we know of whereby the influence of one upon the others can be quantitatively measured." *Berkshire Emps. Ass'n v. NLRB*, 121 F.2d 235, 239 (3d Cir. 1941); *see Stivers v. Pierce*, 71 F.3d 732, 747-48 (9th Cir. 1995) ("The plaintiff need not demonstrate that the biased member's vote was decisive or that his views influenced those of other members. . . . [B]ias on the part of a single member of a tribunal taints the proceedings and violates due process."); *Hicks v. City of Watonga*, 942 F.2d 737, 748 (10th Cir. 1991) (citing and adopting the view of *Berkshire Emps. Ass'n*); *Antoniu v. SEC*, 877 F.2d 721, 726 (8th Cir. 1989) (proceedings were "nullified" because "there is no way of knowing" how tainted member's participation affected deliberations); *Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 592 (D.C. Cir. 1970) ("we adopt the position of our sister circuits on this point," citing *Berkshire Emps. Ass'n*, *supra*, and *Am. Cyanamid Co. v. FTC*, *infra*); *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 767-68 (6th Cir. 1966) (tribunal's decision tainted although biased member's "vote was not necessary for a majority").

Federal district courts in other circuits have followed the majority rule. *See Howell v. Marion Sch. Dist. One*, No. 4:07-cv-1811-RBH, 2009 WL 764445, at *7-*8 (D.S.C. Mar. 19, 2009) (observing that "a majority of the circuits to address the question have held that a decision issued by a multi-member panel must be vacated if a biased member participated in the decision" and "find[ing] the reasoning of the majority of courts addressing the issue to be persuasive"); *Butler v. Oak Creek-Franklin Sch. Dist.*,

172 F. Supp. 2d 1102, 1117 & n.5 (E.D. Wis. 2001) (noting that "five of the six circuits to address this question have held that the panel decision must be vacated" and following the majority rule).

Only one circuit has ruled otherwise. In *Bradshaw v. McCotter*, 796 F.2d 100 (5th Cir. 1986), a federal habeas proceeding brought by a state prisoner, the Fifth Circuit read *Lavoie* as having "emphasized in its opinion that the [improperly seated] justice's 'vote was decisive in the 5 to 4 decision.'" *Id.* at 101 (quoting *Lavoie*, 475 U.S. at 828). Without analysis, and without acknowledging the *Lavoie* concurrences, the Fifth Circuit concluded that "[l]acking a showing in this case that [the improperly seated judge's] vote was controlling, no prejudice has been shown." *Id.* The Fifth Circuit's conclusory holding misread *Lavoie* as having decided the very question that this Court declined to resolve.

Most state courts to address the question have endorsed the majority rule. *See Nationwide Mut. Ins. Co. v. Clay*, 525 So.2d 1339, 1340-41 (Ala. 1987) (following remand from this Court for reconsideration in light of *Lavoie*, Alabama Supreme Court rejected argument that its prior 6-3 decision could be affirmed and instead ruled that "a true 'appearance of justice' mandated" *de novo* redetermination of the case without the disqualified judge); *Sullivan v. Mayor of Elsmere*, 23 A.3d 128, 136 (Del. 2011) (adopting the "prevailing perspective . . . that the bias of one member of a multi-member adjudicatory tribunal taints the entire tribunal's decision and deprives the party subject to the tribunal's judgment of due process"); *Crump v. Bd. of Educ.*, 392 S.E.2d 579, 588 (N.C. 1990) ("One biased member can skew the entire process by

what he or she does, or does not do, during the hearing and deliberations."); *PETA v. Bobby Berosini, Ltd.*, 894 P.2d 337, 341-42 (Nev. 1995) ("Although Judge Lehman's vote in this case could be considered mere surplusage because three other justices of this court signed the opinion, we conclude that the role that collegiality plays in appellate decisions mandates full reconsideration of this matter."), *overruled in part on other grounds by Towbin Dodge, LLC v. Eighth Judicial Dist. Ct.*, 112 P.3d 1063, 1069-70 (Nev. 2005); *Kiger v. Albon*, 601 N.E.2d 603, 607 (Ohio 1991) ("[W]e adopt the reasoning of the *American Cyanamid* case and find [the] participation [of a biased tribunal member whose vote was not necessary to the required majority] to be a fundamental violation of due process and inherently prejudicial.").

Other state courts have vacated tribunal decisions based on the specific circumstances of those cases, without adopting or rejecting the majority rule. *See Johnson v. Sturdivant*, 758 S.W.2d 415, 415-16 (Ark. 1988) (vacating opinion written by disqualified author and recusing all justices from further consideration of the case); *Tesco Am., Inc. v. Strong Indus., Inc.*, 221 S.W.3d 550, 556 (Tex. 2006) ("[T]he judgment must be reversed because the opinion on which it was based was authored by a justice who was constitutionally disqualified; it would be stretching the Constitution too far to simply assume she was not involved.").

Only Pennsylvania has squarely embraced the minority rule. *See Goodheart v. Casey*, 565 A.2d 757, 762 (Pa. 1989). In *Goodheart*, as in the Fifth Circuit's opinion in *Bradshaw*, the Pennsylvania Supreme Court incorrectly read *Lavoie* as having "recognized the judgment need not

be disturbed where the participating 'interested' judges' votes were mere surplusage." *Id*. at 761. The Pennsylvania Supreme Court ruled that the votes of the two justices in *Goodheart* were "surplusage" because the votes were not decisive in the results, neither justice authored the court's opinions, and the court's opinions were not precedential. *Id*. at 761-62. The Pennsylvania Supreme Court neither acknowledged this Court's explicit deferral of the question in *Lavoie*, nor addressed the impact that the interested judges had on the court's deliberations.

The clear weight of precedent from state and federal courts endorses the view that such errors are structural. Commentators do the same. *See, e.g.*, Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of* Caperton, 123 Harv. L. Rev. 80, 102 (2009) ("Justice Benjamin's participation would have tainted the impartial administration of justice even if the state court had upheld the jury's verdict by a vote of four to one with Justice Benjamin in the dissent or had overturned the verdict by a supermajority that included him."); Ronald Rotunda, *Judicial Disqualification in the Aftermath of* Caperton v. A.T. Massey Coal Co., 60 Syracuse L. Rev. 247, 253 (2010) ("[O]ne should not conclude that *Lavoie* is limited to cases that are closely divided."); *accord* John R. Allison, *Ideology, Prejudgment, and Process Values*, 28 New Eng. L. Rev. 657, 714 (1994); Penny J. White, *Relinquished Responsibilities*, 123 Harv. L. Rev. 120, 145 (2009).

D. Social Science Research Supports the Majority Rule

Since *Lavoie*, "voluminous recent literature" has found that "judges' views are quite often influenced by

the composition of the courts on which judges sit." Karlan, *supra* at 102 n.121 (collecting citations). These studies, examining what are known as "panel effects," confirm not only that intragroup influence is real but also that it cannot be parsed with precision, particularly after the fact; thus the consequences of a failure to recuse "'are necessarily unquantifiable and indeterminate.'" *Gonzalez-Lopez*, 548 U.S. at 150 (quoting *Sullivan*, 508 U.S. at 282).

Studies demonstrate that "judges participating in a group decision concur with judicial outcomes that they would not have pronounced on their own – a behavioral phenomenon that can generally be referred to as 'conformity effects.'" Tomer Broude, *Behavioral International Law*, 163 U. Pa. L. Rev. 1099, 1147 (2015). Such effects are inherent in multimember courts. "[B]oth anecdotal and systematic evidence make clear that there is an affective component to the interactions between and among judges serving on appellate courts." Wendy L. Martinek, *Judges as Members of Small Groups*, in *The Psychology of Judicial Decision Making* 73, 75 (David E. Klein & Gregory Mitchell eds., 2010). Martinek explains: "[I]ndividuals participating in group decision making processes are susceptible to conformity effects," at least in part because "members of a group care about the evaluations of their fellow group members." *Id.* at 82; *see also* John W. Cooley, *How Decisions Are Made in Appellate Courts*, 26 Judges' J. 2, 3-4 (1987) ("[W]hat we all have long believed to be 'appellate decision making' is truly negotiation on a higher plane.").

A study of federal courts revealed that "[t]hese panel effects can be dramatic. In some areas of law, the political orientation of the other judges on a panel is an even better

predictor of a judge's vote than is the judge's own political orientation." Ahmed E. Taha, *How Panels Affect Judges: Evidence from United States District Courts*, 39 U. Rich. L. Rev. 1235, 1252 (2005). Although some commentators, including Judge Edwards, question such *explanations* for these effects, they do not doubt that the effects are real. *See* Edwards, *supra* at 1660-61 ("It is a complex conversation, both in conference and during the drafting of opinions, in which judges, individually and collectively, often come to see things they did not at first see and to be convinced of views they did not at first espouse.").[15] Suffice it to say, "the evidence of panel effects is overwhelming." Emerson H. Tiller, *The Law and Positive Political Theory of Panel Effects*, 44 J. Legal Stud. S35, S56 (2015).

Evidence of panel effects is particularly strong with respect to presiding judges. A presiding judge has more influence on the decisionmaking of colleagues than do the other judges on a court. *See* Edwards, *supra* at 1670 ("[P]eople tend to follow the suggestions of their leadership. This finding resonates with my experience as Chief Judge of my court from 1994 to 2001."); Theodore Eisenberg *et al.*, *Group Decision Making on Appellate Panels: Presiding Justice and Opinion Justice Influence in the Israel Supreme Court*, 19 Psychol. Pub. Pol'y & L. 282, 293 (2013) (study finding that "a presiding justice's colleagues are 31% more likely to vote in the direction of the presiding justice than their voting pattern suggests when the justice does not preside"); Stacia L. Haynie, *Leadership and Consensus on the U.S. Supreme Court*,

15. Judge Edwards collected articles by numerous other judges, including Justices on this Court, discussing the group decisionmaking process. *See* Edwards, *supra* at 1641 n.10.

54 J. Pol. 1158, 1166 (1992) (finding that the leadership of the Chief Justice of the United States affected the likelihood of coming to a consensus); Martinek, *supra* at 79 (describing the influence that formal leadership roles have on group decisionmaking). These studies indicate that there is an objectively greater risk of such influence due to his role as Chief Justice.[16]

One consequence of the collegial decisionmaking process is that unanimous decisions are the norm:

> The vast majority of cases in the federal courts of appeals elicit no dissent. Even in the Supreme Court, which has a central mission of resolving cases that have divided lower courts, the justices decide many cases unanimously. In the Court's 2013 term, the unanimity rate reached 64 percent.

Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. Chi. L. Rev. 1235, 1298 (2015); *see also* Pauline T.

16. The Chief Justice of Pennsylvania has significant administrative powers, including the power to assign the drafting of opinions. *See* Pa. Sup. Ct. Internal Operating Procedures § 3(A)(3) ("The Chief Justice shall preside at the conference, lead the Court's discussion, and call for a tentative vote on the decision of each case."); *id.* at § 3(B) ("The Chief Justice will assign submitted cases in a rotation schedule by seniority . . . . Capital PCRA appeals shall be assigned in a separate rotation, to ensure an even distribution of responsibility in those appeals. If it appears that there is an unequal distribution of cases or a delay in deciding cases, the Chief Justice may, as a matter of his or her discretion, alter the assignment order.").

Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. Pa. L. Rev. 1319, 1331 (2009) (noting that "the proportion of federal appellate decisions containing dissents is quite low – around 10%"); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 Sup. Ct. Econ. Rev. 1, 20 (1993) ("Even in a three-judge panel, provided that at least one judge has a strong opinion on the proper outcome of the case, or even that a law clerk of one judge has a strong opinion on the matter, the other judges, if not terribly interested in the case, can simply cast their vote with the 'opinionated' judge.").

Unanimous decisions are the typical goal of the group decisionmaking process. *See* Cooley, *supra* at 6 (survey of judges in which 100 percent responded that they strive for unanimity in important cases, confirming "the findings of previous research that appellate judges . . . do strive for unanimity – an agreed solution to the problem"); *see also* Posner, *supra* at 19-21; Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1377 (1995) ("[C]onsensus is a formidable constraint on what an opinion writer says and how she says it."); Diane P. Wood, *When To Hold, When To Fold, and When To Reshuffle: The Art of Decision-Making on a Multi-Member Court*, 100 Calif. L. Rev. 1445, 1462-63 (2012) (discussing "Chief Justice Earl Warren's efforts to ensure that *Brown v. Board of Education* would be issued as a unanimous decision, to deflect any concern at all that it was driven by politics rather than law . . . . [S]eparate opinions may create tension among the members of the court. . . . Most judges will therefore think carefully before writing separately, even if they sincerely

disagree with some or all of the proposed opinion."). Unanimous appellate decisions, including the decision in this case, do not undermine the proposition that judges influence each other's votes – they confirm it. Unanimity conceals negotiation, deliberation and disagreement; it can also conceal the corrosive influence of bias.

In sum, extensive research since *Lavoie* – much of it by, or based on the experiences of, judges – confirms that multimember courts typically issue decisions based on the influence and input of every judge on the court. A presiding judge's influence is even greater than that of the other judges, and unanimity is the usual goal of this group decisionmaking process. This research confirms the likelihood, and the objective observer's perception, that Chief Justice Castille influenced the other justices on the Pennsylvania Supreme Court in this case.

CONCLUSION

For the foregoing reasons, the judgment of the Pennsylvania Supreme Court should be vacated, and the case remanded for the Pennsylvania Supreme Court to conduct *de novo* review without the participation of Chief Justice Castille.

Respectfully submitted,

LEIGH M. SKIPPER
Chief Federal Defender
STUART B. LEV*
SHAWN NOLAN
MATTHEW C. LAWRY
TIMOTHY P. KANE
KATHERINE E. ENSLER
FEDERAL COMMUNITY DEFENDER OFFICE
EASTERN DISTRICT OF PENNSYLVANIA
601 Walnut Street, Suite 545 West
Philadelphia, Pennsylvania 19106
(215) 928-0520
stuart_lev@fd.org

Counsel for Petitioner

* *Counsel of Record*