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 *AMICI CURIAE* BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AND JUSTICE AT STAKE IN SUPPORT OF PETITIONER

MATTHEW MENENDEZ
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, N.Y. 10013
(646) 292-8358

DANIEL F. KOLB
Counsel of Record
DAVID B. TOSCANO
JEREMY T. ADLER
BRIAN RICHICHI
RONALD J. KROCK
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, N.Y. 10017
(212) 450-4000
daniel.kolb@davispolk.com

Counsel for Amici Curiae

December 7, 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTERESTS OF *AMICI CURIAE*

Amicus curiae Brennan Center for Justice at NYU School of Law is a non-profit, nonpartisan public policy and law institute that, among other things, advocates for fair and impartial courts as guarantors of liberty in our constitutional system.[1]

Amicus curiae Justice at Stake is a nonprofit, nonpartisan national partnership of more than fifty organizations that focuses exclusively on keeping courts fair and impartial through public education, litigation, and reform.

Amici have an interest in this case because of its exceptional importance in protecting judicial impartiality.

SUMMARY OF ARGUMENT

For the reasons stated by Petitioner, it is apparent that he was denied his due process right to a fair and impartial tribunal when Chief Justice Castille failed to recuse. *Amici* write separately to draw the Court's attention to one of the circumstances that contributed materially to the denial of Petitioner's due process rights: the absence of procedures in Pennsylvania for independent review of the justice's recusal decision. Because an objective review of the justice's decision would almost certainly have resulted in recusal, the

---

[1] Under Rule 37.3(a) of the Rules of this Court, the parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. This brief does not purport to convey the position of NYU School of Law.

circumstances here illustrate graphically the importance of procedures for independent review of decisions as to recusal.

This Court has held that the due process test for recusal is objective: whether, based on objective and reasonable perceptions, there is a serious risk of actual bias. Compliance with that standard is best assured when there is an independent review of the recusal decision by an objective party.

The importance of adequate procedures to ensure the fairness of a tribunal is embedded in this Court's precedents. The need for a procedure ensuring independent review under the circumstances presented in this case is supported by the history of recusal law and procedures and social science literature. There are instances where necessity precludes independent review but when there is no such compelling need independent review of recusal decisions should be provided.

This Court has long recognized that inadequacies in the *procedures* used to select a tribunal may unconstitutionally contribute to both the risk of actual bias, and the perception of bias. To promote fairness, the federal government and numerous States have adopted procedures that require recusal motions to be heard or reviewed by a judge other than the subject of the motion. This trend reflects a growing recognition that shielding recusal decisions from independent review significantly increases the risk that a party will face a biased decisionmaker and that there will be a perception of bias.

Social science literature from the last several decades further supports the need for independent review of recusal decisions. Among the forms of cognitive bias

recognized by social scientists is "egocentric" or "self-serving" bias, the tendency of individuals to overestimate their competence relative to others. Driven by such bias, judges are likely to believe that their judgments are less susceptible to other biases than those of other similarly situated judges. Egocentric bias can also cause judges to ignore or rationalize facts or ideas that threaten to undermine their preexisting self-image, which, for them, is often one of being necessarily impartial. The social science literature thus affords ample support for the fundamental precept of due process that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955).

ARGUMENT

I. THE ABSENCE OF PROCEDURES FOR SEEKING INDEPENDENT REVIEW OF CHIEF JUSTICE CASTILLE'S FAILURE TO RECUSE WAS AN IMPORTANT CIRCUMSTANCE THAT CONTRIBUTED TO THE DENIAL OF DUE PROCESS.

A. Due Process Analysis Requires Considering All of the Circumstances Relevant to Whether a Party Faced a Biased Tribunal.

This Court has held that all relevant circumstances "must be considered" when deciding whether a party was denied due process because the decisionmaker was biased or appeared to be. *Murchison*, 349 U.S. at 136; *see also Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868, 872 (2009) (finding that due process required recusal based on "all the circumstances of this case"); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821–25 (1986) (considering the challenged judge's

interest and involvement in the case as a whole and accounting for various factors bearing on the risk of bias).

As Petitioner demonstrates, the circumstances here compel the conclusion that Chief Justice Castille's denial of Petitioner's recusal motion violated due process: (1) Chief Justice Castille served as the Philadelphia District Attorney at the time of Petitioner's trial; (2) Chief Justice Castille substantially participated in Petitioner's prosecution by making the decision to seek the death penalty; (3) the decision being appealed vacated Petitioner's death sentence based on findings that the trial prosecutor, who was supervised by Chief Justice Castille, violated *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding exculpatory evidence; and (4) during his judicial campaign Chief Justice Castille touted his prosecutorial record of having sent forty-five people, including Petitioner, to death row.

An additional important circumstance that contributed to the denial of due process was the fact that Pennsylvania—unlike many other States—had no procedure for independent review of recusal decisions. Fourteen States have implemented procedures that either require motions to recuse judges on a state's highest court to be heard by a judge other than the subject of the motion, or provide a mechanism for independent review of recusal decisions. In contrast, Pennsylvania Supreme Court justices are free to decide motions seeking their own recusal, thereby shielding rulings on those motions from any form of independent review aside from the entirely discretionary review by this Court for constitutional infirmities. This Court's precedents, the historical development of judicial recusal law and procedures, and social science research on biases all compel the conclusion that the risk of facing

a biased tribunal in judicial proceedings increases substantially when, as in Pennsylvania, recusal decisions are not subject to independent review.

B. Inadequate Procedures for Selecting a Tribunal Significantly Enhance the Risk That a Party Will Face a Biased Decisionmaker.

Inadequacies in *procedures* for selecting a tribunal that will determine whether or not a defendant is guilty can deprive the defendant of due process by increasing the risk that the defendant will appear before a tribunal that is actually biased, as well as increasing the perception of bias. In *Peters v. Kiff*, 407 U.S. 493 (1972), this Court held that a defendant had the right to challenge his conviction on due process grounds based on deficiencies inherent in the procedures used to select the grand jury that indicted him.[2] Those procedures allegedly allowed the prosecutor to exclude all African-Americans from the jury pool on the basis of race. Although no single opinion was joined by a majority of the justices, six justices agreed that due process barred procedures that had the effect of excluding all

[2] Because the Fifth Amendment right to a grand jury does not apply in a state prosecution, the Court relied on the "general Fourteenth Amendment guarantees of due process" in finding that petitioner's constitutional rights had been violated. *See Peters*, 407 U.S. at 496 (plurality opinion) (citing *Hurtado v. California*, 110 U.S. 516 (1884)). Likewise, although the plurality opinion found that petitioner was also entitled to challenge the procedures used to select the petit jury that convicted him, it did not rely upon the Sixth Amendment right to a petit jury because that right was found not to apply to state trials that took place before the decision in *Duncan v. Louisiana*, 391 U.S. 145 (1968). *See Peters*, 407 U.S. at 496 (plurality opinion) (citing *DeStefano v. Woods*, 392 U.S. 631 (1968)).

members of a particular race from the grand jury. The opinion announcing the judgment explained that such procedures violated due process because they would "create the appearance of bias in the decisions of individual cases, and they increase the risk of actual bias as well." *Id.* at 503.

The need for adequate procedures to ensure that judges are unbiased, tailored to the circumstances of potential judicial bias, is no less significant than the need for procedures to ensure a fair and unbiased jury.[3]

C. The Development of Recusal Law and Procedures Demonstrates a Growing Recognition of the Importance of Independent Review.

The historical development of recusal rules, as well as the development of procedures for assuring compliance with those rules, reflects the widespread recognition that both adequate substantive rules and

---

[3] *Amici* recognize that independent review of recusal decisions is not possible in all circumstances: there will be times when there are no other judges available to review the recusal motion and in such circumstances the lack of independent review would be excused due to the rule of necessity. *See, e.g.*, *United States v. Will*, 449 U.S. 200, 214 (1980) (discussing the long history of the rule of necessity, in both state and federal courts, which holds that "wherever it becomes necessary for a judge to sit even where he has an interest—where no provision is made for calling another in, or where no one else can take his place—it is his duty to hear and decide, however disagreeable it may be" (quoting *Philadelphia v. Fox*, 64 Pa. 169, 185 (1870) (internal quotation marks omitted))). However, our modern judicial system is far removed from the realities of lone circuit riders, and there are many options available to both federal and state judges to ensure that an independent judge will almost always be available to hear recusal motions.

procedures are important to avoiding both the reality and perception of bias.

Rules intended to ensure the impartiality of judicial actors existed in precursors to the common law as far back as the third century. Although the Roman Code of Justinian permitted a party to "recuse" a judge who was "under suspicion" of bias,[4] the English common law that developed in the sixteenth and seventeenth centuries did not initially go that far, instead requiring recusal only when a judge's pecuniary interest in the case made it probable that the judge could not be fair.[5] Over time, the English common law came to require disqualification for more remote pecuniary interests and, by the mid-nineteenth century, came to require recusal when a judge had an "interest" creating a "real likelihood" of bias against one of the parties.[6]

The development of the law of judicial disqualification in the United States mirrored its development in England. The law of the pre-Revolutionary American colonies required disqualification when the judge had a pecuniary interest in a case,[7] but the circumstances requiring recusal have consistently expanded since then, especially in the twentieth century. On the federal side, Congress passed the first judicial disqualification statute in 1792. It authorized disqualification when the challenged judge was "concerned in interest"

---

[4] Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* § 1.2, at 5 (2d ed. 2007).

[5] *See* Dr. Bonham's Case, 77 Eng. Rep. 638, 8 Co. 114a (K.B. 1608); Flamm, *supra* note 4, § 1.2, at 6 n.7.

[6] Flamm, *supra* note 4, § 1.4, at 8 & n.3.

[7] *Id.* § 1.4, at 8.

or had been "of counsel."[8] The statute has since been amended five times, and in each instance Congress expanded the grounds for disqualification.[9]

Commentators have embraced the trend and called for further expansion. Through the promulgation of statutes or court rules, States have generally followed suit by expanding their own list of circumstances in which

---

[8] Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278.

[9] Flamm, *supra* note 4, § 1.4, at 9 (listing the acts and explaining their significance); *see also* John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. Rev. 237, 246 n.47 (1987). The initial act, passed in 1792, provided that a judge could be disqualified if he or she was "concerned in interest" or had been of counsel. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278. In 1821, Congress expanded the grounds for disqualification to include when the challenged judge was related to or connected with a party as to render it improper in the judge's opinion to sit. Act of Mar. 3, 1821, ch. 51, 3 Stat. 643. In 1891, the statute was amended to include the situation when a challenged judge had previously tried a matter. Act of Mar. 3, 1891, ch. 517, § 3, 26 Stat. 826. In 1911, Congress expanded the statute again to make any "personal bias or prejudice" a basis for recusal. Act of Mar. 3, 1911, ch. 23, § 21, 36 Stat. 1090. In 1948, Congress extended the reach of these grounds for disqualification to include appellate judges. Act of June 25, 1948, ch. 646, § 455, 62 Stat. 908. Finally, in 1974, Congress broadened the grounds for recusal to allow litigants to challenge judges whose "impartiality might reasonably be questioned." Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609. In this last amendment, Congress also clarified situations in which this might be the case including, but not limited to, when the judge has personal knowledge of disputed evidentiary facts, has certain past connections with the case or with a party's lawyer, or when the judge or his family have an interest that could be substantially affected by the outcome of the proceeding. The current version is codified as amended at 28 U.S.C. §§ 47, 144, 455.

disqualification is required.[10] Modern disqualification standards now encompass a range of recognized biases, potential and perceived, that go well beyond merely having a financial interest in a matter.[11]

As the list of circumstances in which judicial recusal is considered necessary has grown, there has been a parallel and related evolution of procedures for the independent review of recusal motions. In 1948, Congress enacted a provision requiring that recusal motions for district court judges be heard by a judge other than the subject of the motion.[12] Since that time, at least twenty-two States have adopted various procedures to ensure that recusal motions are decided or may be reviewed by a judge or justice other than the subject of the motion.[13] In several States, once the

---

[10] Leubsdorf, *supra* note 9, at 246–47.

[11] 28 U.S.C. §§ 144, 455.

[12] *Id.* § 144. *Amici* recognize that Section 144 does not apply to this Court, and note that this Court has developed its own methods for addressing ethical questions related to recusal. Chief Justice John Roberts*, 2011 Year-End Report on the Federal Judiciary* 7-9 (2011).

[13] *See, e.g.*, Alaska Stat. § 22.20.020(c); Ariz. R. Civ. P. 42(f)(2)(D); Ariz. R. Crim. P. 10.1; Cal. Code Civ. P. § 170.3(c)(1)–(6); Ga. Unif. Super. Ct. R. 25.4; Ga. Unif. Mag. Ct. R. 4.2.4; Ill. Comp. Stat. Ann. art. 735, tit. 5/2-1001(a)(3)(iii); Kans. Stat. Ann. § 20-311d; Ky. Rev. Stat. Ann. §§ 26A.015, .020; La. Code Civ. P. art. 155, 160; Mich. Ct. R. 2.003(D)(3)(a); Miss. Unif. Cir. & Cty. Ct. Prac. R. 1.15; Miss. R. App. P. 48B; Mont. Code § 3-1-805; Nev. Rev. Stat. Ann. § 1.235(5); Ohio Rev. Code Ann. §§ 2501.13, 2701.03; Okla. Dist. Ct. R. 15(a)–(c); Okla. Sup. Ct. R. 1.175; Or. Rev. Stat. Ann. §§ 14.250, .260; S.D. Codified L. Ann. §§ 15-12-21 to -23; Tenn. Sup. Ct. R. 10B, § 2.01–.07; Tex. R. Civ. P. 18a(f)–(g)(1); Utah R. Civ. P. 63(b)(1)(A), (b)(2), (b)(3)(A); Utah R. Crim. P. 29(c); Vt. R. Civ. P. 40(e)(3); Vt. R. Crim. P. 50(d); W. Va. Trial Ct. R. 17.01(b). Judges in at least one other state abide by informal procedures that are considered well-established, though

motion is made, it is considered in the first instance by another judge.[14] In other States, the challenged judge passes only on whether the recusal motion is "legally sufficient," and whether it is timely made. The substantive decision concerning recusal is left entirely to the discretion of another judge.[15] In still other States,

---

not codified. *See, e.g., State v. Poole*, 289 S.E.2d 335, 343 (N.C. 1982) ("[I]t is well-established in this jurisdiction that a trial judge should either recuse himself or refer a recusal motion to another judge if there is 'sufficient force' in the allegations contained in defendant's motion to proceed to find facts.").

[14] *See, e.g.*, Ill. Comp. Stat. Ann. art. 735, tit. 5/2-1001(a)(3)(iii) (providing that a hearing on a motion to recuse "for cause" shall be conducted by a judge other than the judge named in the motion); La. Code Civ. P. art. 155 (providing that a motion to recuse in a district court will be randomly assigned to another judge); *id*. art. 160 (providing that a motion to recuse a judge on a court of appeal will be tried by the other judges on that court); Mont. Code § 3-1-805 (providing that a motion to recuse a district court judge is immediately referred to the chief justice of the Montana Supreme Court, whereas a motion to recuse a lower court judge is immediately referred to the presiding district court judge in the district of the court involved to assign a new judge to hear the matter); Ohio Rev. Code Ann. § 2701.03(E) (requiring the chief justice of the Ohio Supreme Court, or another supreme court justice designated by the chief justice, to determine whether the alleged bias exists, in which case the original judge is disqualified from proceeding and another judge (or a retired judge) is randomly assigned to the matter).

[15] *See, e.g.*, Ga. Unif. Super. Ct. R. 25.3; *id*. 25.4 (providing that an impugned judge assesses whether a motion to recuse is factually sufficient and timely in the first instance and, if it is, the motion is assigned to another judge for hearing); Utah R. Civ. P. 63(b)(1)(A), (b)(2), (b)(3)(A); Utah R. Crim. P. 29(c) (requiring the reviewing judge to assign a recusal motion to another judge if he or she determines the motion and accompanying affidavit are timely filed, filed in good faith, and legally sufficient); W. Va. Trial Ct. R. 17.01(b), (e) (requiring immediate transfer of timely recusal motions to the chief justice of the West Virginia Supreme

the procedures require judges to issue a written decision explaining the grounds for any denial of a recusal motion, which is then appealable to an independent judge.[16] At least two States have enacted provisions that allow litigants to peremptorily challenge a judge assigned to their case premised exclusively on allegations of bias.[17] Several other States offer litigants the ability to peremptorily dismiss a judge without cause.[18]

At least fourteen States currently have procedures that provide independent review of a motion to recuse a judge of the highest court in the State.[19] Although

---

Court, accompanied by a letter containing the impugned judge's response to the motion, whereupon the chief justice may appoint another judge to matter).

[16] *See, e.g.*, Nev. Rev. Stat. Ann. § 1.235(5) (providing that an impugned judge's denial of a recusal motion be made in writing); S.D. Codified L. Ann. § 15-12-21.1 (same); Tenn. Sup. Ct. R. 10B, § 4.03 (same).

[17] *See, e.g.*, Haw. Rev. Stat. § 601-7(b) (providing that an impugned judge will be disqualified from hearing the recusal motion if the movant files an affidavit attesting to that judge's bias); Wash. Rev. Code. § 4.12.040 (providing that an impugned judge shall be disqualified from hearing both the recusal motion and underlying merits of a case if the movant files an affidavit attesting to that judge's prejudice).

[18] *See, e.g.*, Alaska Stat. § 22.20.022; Ariz. R. Civ. P. 42(f)(1); Ariz. R. Crim. P. 10.2; Cal. Code Civ. P. § 170.6(2); Idaho R. Civ. P. 40(d)(1); Ill. Comp. Stat. Ann. art. 735, tit. 5/2-1001(a)(2); Ind. Trial R. 76(B); Minn. R. Civ. P. 63.03; Mo. Sup. Ct. R. 51.05(a); Mont. Code § 3-1-804; Nev. Sup. Ct. R. 48.1; N.M. Stat. Ann. § 38-3-9; N.D. Century Code § 29-15-21; Wisc. Stat. Ann. §§ 801.58, 971.20; Wy. R. Civ. P. 40.1(b).

[19] *See, e.g.*, Alaska Stat. § 22.20.020(c); Cal. Code Civ. P. § 170.3(c)(1)–(5); Ga. Sup. Ct. R. 26, 57; Ky. Rev. Stat. Ann. §§ 26A.015, .020; La. Code Civ. P. Ann. art. 159; Mich. Ct. R. 2.003(D)(3)(b); Miss. R. App. P. 48C(a)(iii); Nev. Rev. Stat. Ann. § 1.225(4); Or. R. App. P. 8.30(3); S.D. Codified L. Ann. §§ 15-12-

the procedures vary from State to State, they all provide litigants with a mechanism for seeking independent review of a judge or justice's decision not to recuse. In several States, recusal motions are either automatically forwarded to the whole court, or one or more of the remaining judges on the court review the motion when recusal is denied. The court may proceed without the challenged judge in the event he or she is disqualified.[20] In other States, the challenged judge "certifies" the matter at the outset for decision by other members of the court.[21] In still others, the matter is referred to the chief judge of the highest court, who may decide the motion or, at his or her discretion, place the motion before the remaining judges.[22] Several States also provide for the appointment of replacement judges to restore a quorum.[23]

Following this Court's 2009 decision in *Caperton*, which reaffirmed that the test for determining when due process requires recusal is objective and acknowledged "[t]he difficulties of inquiring into actual bias and the fact that the inquiry is often a private one," *Caperton*, 556 U.S. at 883, two more

---

21.1, -12-32, -24-1; Tenn. Sup. Ct. R. 10B, § 3.03; Tex. R. App. P. 16.3; Utah R. Civ. P. 63(b)(1)(A), (b)(2), (b)(3)(A); Utah R. Civ. P. 1; Vt. R. App. P. 27.1(b).

[20] *See, e.g.*, Alaska Stat. § 22.20.020(c); La. Code Civ. P. Ann. art. 159; Cal. Code Civ. P. § 170.3(c)(5); Mich. Ct. R. 2.003(D)(3)(b); Tenn. Sup. Ct. R. 10B, § 3.03; Miss. R. App. P. 48C(a)(iii); Nev. Rev. Stat. Ann. § 1.225(4).

[21] *See, e.g.*, Tex. R. App. P. 16.3(b); Tex. Gov't Code Ann. § 22.005; Utah R. Civ. P. 63(b)(2); Vt. R. App. P. 27.1(b).

[22] *See, e.g.*, Ky. Rev. Stat. Ann. § 26A.015(3)(a); Or. R. App. P. 8.30(3)(b).

[23] *See, e.g.*, Ga. Sup. Ct. R. 57; Ky. Rev. Stat. Ann. § 26A.020(1); Vt. R. App. P. 27.1(b); Vt. Stat. Ann. tit. 4., § 22.

States—Michigan and Tennessee—have implemented procedures for seeking independent review of recusal decisions made by justices of each State's supreme court. In Michigan, the decision to create those procedures was specifically linked to this Court's decision in *Caperton*. In an opinion concurring in the adoption of the amended court rule concerning the disqualification of judges, Chief Justice Marilyn Jean Kelly of the Michigan Supreme Court emphasized that she understood *Caperton* to mean that "an independent inquiry into a challenged justices' refusal to recuse may be necessary to satisfy due process because the independent inquiry makes possible an objective decision." Order Adopting Amendment of MCR 2.003 (Mich. Nov. 25, 2009) (Kelly, C.J., concurring).

National organizations of judges and attorneys have also begun advocating for recusal procedures that include independent review because of concerns that the absence of such procedures increases the risk of actual bias, as well as the perception of bias. In January 2014, the National Conference of Chief Justices adopted Resolution 8, which urged members to "establish procedures that incorporate a transparent, timely, and independent review for determining a party's motion for judicial disqualification/recusal."[24] And the American Bar Association ("ABA") has issued multiple resolutions concerning recusal procedures, including an August 2011 resolution recommending that States implement rules encouraging the filing of

---

[24] Conference of Chief Justices, Resolution 8: Urging Adoption of Procedures for Deciding Judicial Disqualification/Recusal Motions: Ensuring a Fair and Impartial Process (adopted Jan. 29, 2014), *available at* http://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/01292014-Urging-Adoption-Procedures-Deciding-Judicial-Disqualification-Recusal-Motions.ashx.

written explanations of denied recusal motions,[25] and an August 2014 resolution urging States to adopt independent review procedures for recusal motions and to provide guidance and training to judges in deciding recusal motions.[26]

D. Decades of Scientific Research Confirms the Increased Risk of Bias When Judges Are the Sole Arbiters of Whether to Recuse Themselves.

The growing trend to provide procedures through which litigants may seek independent review of recusal decisions is consistent with decades of social science research demonstrating the pervasiveness of cognitive biases.[27] All individuals rely on such biases, or "heuristics," to help them absorb and interpret

---

[25] A.B.A. Standing Comm. on Judicial Independence, Report to the House of Delegates on Resolution 107, at 11 (revised July 22, 2011) (adopted Aug. 8–9, 2011), *available at* www.americanbar.org/content/dam/aba/administrative/judicial_independence/report107_judicial_disqualification.authcheckdam.pdf.

[26] A.B.A. Standing Comm. on Judicial Independence, Resolution 105C (adopted Aug. 11–12, 2014), *available at* www.americanbar.org/content/dam/aba/images/abanews/2014am_hodres/105c.pdf.

[27] In their foundational article on the subject, Professors Jolls, Sunstein, and Thaler propose a new model for understanding legal decision-making, proceeding from the baseline principle that all "[p]eople . . . display bounded rationality, bounded willpower, and bounded self-interest." Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471, 1476 (1998). Such departures from perfect rationality are highly predictable. *Id.* at 1477 (citing Daniel Kahneman & Amos Tversky, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Sci. 1224 (1974) (finding that people rely on mental shortcuts and rules of thumb to facilitate cognition, often leading to erroneous but predictable conclusions)).

information, creating order from the undifferentiated mass of data that they encounter every day.[28] But those same mental shortcuts that allow people to quickly process large quantities of information also cause them to make significant cognitive errors.[29]

One frequently observed cognitive error is the strong tendency to see oneself and one's conduct in the best possible light. Social scientists describe such bias as "egocentric" or "self-serving," referring to the tendency of individuals to overestimate their competence relative to others.[30] As psychologist Emily Pronin explains:

---

[28] *Id.* at 1477 ("We have limited computational skills and seriously flawed memories. People can respond sensibly to these failings; thus it might be said that people sometimes respond rationally to their own cognitive limitations, minimizing the sum of decision costs and error costs."); *see also* Keith J. Holyoak & Richard E. Nisbett, *Induction, in* The Human Psychology of Thought 50, 55 (Robert J. Sternberg & Edward E. Smith eds., 1988).

[29] *See, e.g.*, Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 Rutgers L.J. 1, 20 (1998) (noting the tendency "[d]uring the course of deciding a hard case, [for a] judge's mental representation of the dispute [to] evolve[] naturally towards a state of coherence").

[30] David M. Messick et al., *Why We Are Fairer Than Others*, 21 J. Experimental Soc. Psychol. 480 (1985); Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 Trends in Cognitive Sci. 37 (2006); Jennifer K. Robbennolt & Matthew Taksin, *Can Judges Determine Their Own Impartiality?*, 41 Monitor on Psychol. 24 (2010); *see also* Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 Vand. L. Rev. 1499, 1526 (1998) (citing Jon Elster, Solomonic Judgments: Studies in the Limitations of Rationality 57–59, 124 (1989)) ("What is interesting, and what Elster sees, is that individual cognitive biases may also have their origins in the need to make

> [P]eople rarely recognize their susceptibility to [ego-centric bias]. Although they rate themselves as "better than average" on a wide range of traits and abilities, most people also claim that their overly positive self-views are objectively true. Moreover their unwarranted claims of objectivity persist even when they are informed about the prevalence of the bias and invited to acknowledge its influence.

Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 Trends in Cognitive Sci. 37, 37 (2006). Egocentric bias causes individuals to construe information so as to protect or enhance their self-image or self-esteem.[31] Research demonstrates that this tendency is closely linked to cognitive dissonance: "people will adjust their attitudes and beliefs . . . in a way that justifies choices and commitments previously made."[32]

---

sense—to a greater degree than is justified—of a confusing, chaotic world, and that there is but a small step from this need to the social demands placed on law."); Mark C. Suchman, *On Beyond Interest: Rational, Normative, and Cognitive Perspectives in the Social Scientific Studies of Law*, 1997 Wis. L. Rev. 475, 484 (1997) ("Faced with a potentially confusing and ambiguous world, we construct cultural categories that impose method and coherence on our experiences and interactions. We then structure our behavior around these categories, to avoid disrupting our tacit agreements about who we are and what we are doing. Decision-making traces the contours of this cultural armature.").

[31] George Lowenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. Legal Stud. 135, 141 (1993).

[32] Donald C. Langevoort, *supra* note 30, at 1506 (citing George A. Akerlof & William T. Dickens, *The Economic Consequence of Cognitive Dissonance*, 72 Am. Econ. Rev. 307 (1982)); *see also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*,

Egocentric bias can manifest itself in at least two specific ways when a challenged judge decides whether to recuse. First, it has been demonstrated that individuals frequently believe that their "judgments are less susceptible to bias than the judgments of others." Joyce Ehrlinger et al., *Peering into the Bias Blind Spot: People's Assessments of Bias in Themselves and Others*, 31 Personality & Soc. Psychol. Bull. 680, 681 (2005). So while a judge may have no difficulty identifying biases in a similarly situated colleague, that judge may not ascribe those same biases to himself or herself, or may believe that he or she could readily overcome them.[33] Second, it has been demonstrated that individuals will often ignore or rationalize facts or ideas that threaten to undermine their preexisting self-image.[34] The significance of this research is further bolstered by empirical studies finding that judges' decision-making is in fact impacted by election pressures, particularly in the criminal context where "tough on crime" rhetoric is a regular part of campaigns and judges can face scrutiny for rulings perceived to be sympathetic to defendants. *See* Kate Berry, Brennan Center for Justice, How Judicial

---

117 Harv. L. Rev. 2463, 2498 (2004) (observing in the plea bargaining context that lawyers "tend to recall selectively the information that is favorable to their preexisting view and to interpret that information in self-serving ways").

[33] Chris Guthrie et al., *Inside the Judicial Mind*, 86 Cornell L. Rev. 777 (2001) (asking a group of federal magistrate judges to estimate how often their colleagues are overturned on appeal as compared to how often they are, discovering that approximately 87.7% of judges believe that at least half their colleagues had higher reversal rates than they).

[34] See Deborah L. Rhode, *Institutionalizing Ethics*, 44 Case W. Res. L. Rev. 665, 685–86 (1994) (discussing the effect of egocentric bias on the ability of lawyers to comport with their ethical duties).

Elections Impact Criminal Cases, 1, 3-6 (2015), *available at* www.brennancenter.org/publication/how-judicial-elections-impact-criminal-cases.

The social science research concerning egocentric bias thus strongly supports the proposition that a judge's decision not to recuse himself or herself may be inherently unreliable.

CONCLUSION

For the foregoing reasons, Pennsylvania's lack of a procedure for independent review of Chief Justice Castille's decision not to recuse was one of the important circumstances that contributed to Petitioner's being denied due process. There could be no better examples of judges whose decisions should have been subject to independent review than the justice here and the justice in *Caperton*.

Respectfully submitted,

MATTHEW MENENDEZ
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas,
12th Floor
New York, N.Y. 10013
(646) 292-8358

DANIEL F. KOLB
Counsel of Record
DAVID B. TOSCANO
JEREMY T. ADLER
BRIAN RICHICHI
RONALD J. KROCK
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, N.Y. 10017
(212) 450-4000
daniel.kolb@davispolk.com

Counsel for Amici Curiae

December 7, 2015