No. 18A124

In The

Supreme Court of the United States

RICHARD JAMES BEASLEY,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For Writ Of Certiorari
from The Supreme Court of the State of Ohio,
Supreme Court of Ohio case number, 2014-0313

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

1. Does the right to due process guaranteed by the Fifth and Fourteenth Amendments, and upheld by the precedent of *Williams v. Pennsylvania*, 136 S.Ct 1899, 579 U.S. ___ (2016), require a finding of structural error where one member of the reviewing court is the son of the elected attorney general defending against the appeal?

PARTIES TO THE PROCEEDING BELOW

Defendant-Petitioner Richard Beasley was the Appellant in the direct appeal to the Supreme Court of Ohio.

Plaintiff-Respondent State of Ohio was the Appellee in the direct appeal to the Supreme Court of Ohio and represented by the Ohio Attorney General's Office as lead counsel, with the Summit County, Ohio Prosecutor's Office serving as co-counsel.

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A Summit County, Ohio grand jury issued an indictment against Petitioner Richard Beasley with death penalty specifications. After a jury trial in Summit County Common Pleas Court, the jury convicted Petitioner Richard Beasley of, inter alia, three counts of aggravated murder and one count of attempted murder.

The matter proceeded to a sentencing trial. Beasley's trial attorneys presented multiple witnesses and one psychologist to advocate against a death sentence. At the close of the sentencing trial, the jury issued a recommendation for a death sentence. The trial court followed the recommendation and imposed a sentence of death against Beasley.

The trial court appointed the Ohio Public Defender's Office as appellate counsel. Pursuant to Ohio law, the direct appeal immediately fell upon the docket of the Supreme Court of Ohio.

During the pendency of the direct appeal to the Supreme Court of Ohio, the Ohio Public Defender's Office filed a motion to withdraw from representation. The Supreme Court of Ohio granted the motion, and the Chief Justice of the Supreme Court of Ohio appointed two replacement attorneys for the indigent Appellant Beasley: Donald Gallick and Don Hicks.

On January 16, 2018, the Supreme Court of Ohio affirmed the convictions and death sentence, but reversed and remanded for resentencing on the non-capital sentences; however, Justice Dewine filed a dissent claiming that even the non-capital sentences should be affirmed. *State v. Beasley*, 2018-Ohio-493. (Exhibit A)

On January 30, 2018, an Ohio attorney, not associated with the litigation sub judice, filed a disciplinary complaint against Justice Patrick Dewine for participating in cases where the Ohio Attorney General Michael Dewine, his father, was a litigant. (Exhibit D)

The Supreme Court of Ohio denied a timely motion for reconsideration on May 8, 2018. (Exhibit B) A concurring opinion issued May 9, 2018 finding the motion for reconsideration meritless. (Exhibit C) This Petition seeking certiorari review is now proffered to this Supreme Court.

STATEMENT OF JURISDICTION

This capital case was presented and argued before the Supreme Court of Ohio. The Supreme Court of Ohio has mandatory jurisdiction as the first and last place for the direct appeal of a case resulting in a death sentence, pursuant to Ohio law.

The Supreme Court of Ohio affirmed all convictions and death sentence, and also denied a motion for reconsideration on May 9, 2018. On July 27, 2018, Justice Elena Kagan granted a motion to extend time to file a petition for a writ of certiorari until September 10, 2018.

This Court has jurisdiction to hear the controversy at bar pursuant to Article II, Section 2 of the Constitution of the United States.

Petitioner asserts that the instant controversy involves Constitutional questions of procedural and substantive due process, as protected by the Fifth and Fourteenth Amendments of the Constitution of the United States.

CONSTITUTIONAL ISSUES INVOLVED

This case concerns the Fifth and Fourteenth Amendments of the United States Constitution.

The Fifth Amendment states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment, Section 1 states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Richard James Beasley (Beasley) faced an indictment in Summit County, Ohio. The multi-count indictment alleged, inter alia, counts of aggravated murders that were presumably carried out along with a juvenile defendant.

A jury recommended a sentence of death, which was accepted and followed by the trial court.

A direct appeal commenced to the Supreme Court of Ohio. The Public Defender's Office initially represented Beasley due to his indigent status. That office eventually filed a motion to withdraw, and the Supreme Court of Ohio granted leave to withdraw. The Supreme Court of Ohio then appointed replacement counsel, Donald Gallick and Don Hicks, for the indigent appellant.

The appeal raised multiple issues of state law, as well as federal Constitutional issues, but the Supreme Court of Ohio affirmed the convictions in their entirety, affirmed the death sentence, but vacated and remanded the matter on the non-capital sentences. A timely motion for reconsideration was filed seeking a new oral argument due to the structural error of a jurist participating and voting on a case where his father's office served as lead counsel for appellee.

The issue of when a jurist must recuse due to a family member's involvement in a case is far from settled law in the state judiciaries across this nation. In fact, after the Supreme Court of Ohio denied the motion for reconsideration seeking a finding of structural error, and the issuance of a concurring opinion finding such a request meritless, Justice Dewine began recusing himself from civil cases where his father's office represented a party in the litigation. A bar complaint against Justice Dewine, due to the failure to recuse in a laundry list of cases where his father's office represented an appellate or appellee, remains pending at this time.

Justice Kagan granted a request to extend time to file a petition for a writ of certiorari until September 10, 2018. This petition now follows seeking review of two legal issues of federal Constitutional law.

REASONS FOR GRANTING THE WRIT

Question Presented:

Does the right to due process guaranteed by the Fifth and Fourteenth Amendments, and upheld by the precedent of *Williams v. Pennsylvania*, 136 S.Ct 1899, 579 U.S. ___ (2016), require a finding of structural error where one member of the reviewing court is the son of the elected attorney general defending against the appeal?

This Court holds that in some fact patterns, due process has "compelled" the recusal of a justice of a state supreme court when the likelihood of bias is "too high to be constitutionally tolerated." *Williams v. Pennsylvania*, 579 U.S. ____ (2016), 136 S.Ct 1899, 1903.

In *Williams*, this Court noted that even in the multimember court,"* * *the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part." *Id*. at 1909.

Although it is not binding on the state judges of Ohio, Petitioner suggests that the Code of Conduct for United States Judges offers guidance as to when a state court jurist should be required to recuse. Canon 2 is entitled, "A Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities." Petitioner notes the words "Appearance of Impropriety," suggesting that the purpose is to protect the image and prestige of the judiciary in the eyes of the general public. Canon 2(B) addresses the risk of appearance of impropriety when family relationships enter into a matter.

This Court opined that the due process protections in the Fourteenth Amendment cannot allow "harmless error" to affirm convictions where a jurist had a previously "significant, personal involvement" in the case. *Id*. at 1910, citing *Marshall v. Jerrico, Inc*., 446 U.S. 238 (1980).

In the case at bar, Justice Patrick Dewine participated in, and voted to affirm in its entirety, a high profile death penalty case where his father, Michael Dewine, was the elected officeholder representing the State of Ohio. The question that remains unresolved is whether or not the father-son relationship is cleansed because the father's subordinates litigated the case through the Ohio Attorney General's Office, i.e. does any theory of agency or imputed disqualification compel recusal if a jurist's son (or daughter, father, etc.) delegates the case to one of his many assistant attorney generals?

The issue of family members, and/or their subordinates, appearing before closely-related jurists is not as rare as one may believe. The pending bar complaint against Justice Dewine contains a list of cases where the Justice participated in cases involving his father's office. (Exhibit D, Disciplinary Complaint *Frick v. Dewine*, 2018-001, at lines 9-10, 20, 23, 44)

For reasons unknown to Petitioner, after the denial of Petitioner's motion for reconsideration, Justice Dewine began recusing himself from cases where his father's office was a litigant, as explained by one Ohio newspaper article. Randy Ludlow, *Justice Dewine recuses self from ECOT case – a year later*, Columbus Dispatch, July 9, 2018.

One journal article suggested that the rules of conflict of interest and judicial disqualification are murky at best and need clarification. Leslie Abramson, *Judicial Disclosure and Disqualification: The Need for more Guidance,* The Justice System Journal, Vol. 28, No. 3 (2007)

Yet another law review article explored the confusion regarding conflicts of interests from the prosecutor's viewpoint. Bruce Green, Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, Boston College Law Review, Vol. 58 (2017).

The concern about the appearance of a conflict of interest has long been a concern of legal scholars. One article from 1979 notes that Congress passed the 1974 revision to 28 U.S.C. § 455 due to, inter alia, a concern about the appearance of impropriety when a judge asserts authority over a case where a family member may benefit from the outcome of the litigation or due to a personal relationship with one of the litigants. See Patrick J. Ryan, *Judicial Disqualification Based on a Conflict of Interest*, 12 Loy. L.A. L. Rev. 1057, 1059. (1979).

In the case at bar, the father of Justice Dewine was not just the elected Attorney General of the State of Ohio during the merit decision of the Supreme Court of Ohio, but it is now a matter of public record that the Attorney General of the State of Ohio is seeking to be elected as the new Governor of the State of Ohio in November of 2018. To suggest that an elected attorney general, who also seeks promotion to the office of governor, would not benefit from prevailing in – or suffer political damage from losing – a high profile death penalty case against the "Craigslist Killer," is an insult to the intelligence of the Ohio electorate.

As the law review articles cited herein from 1979 to 2017, forcing judges to recuse in the interest of protecting the public trust in the judiciary has been a topic of conversation among legal scholars for several decades of recent history. Unfortunately, despite these long-standing concerns, the matter of when a judge must recuse due to the status of family member connected to the litigation has not been uniformly addressed by this Court, nor by the supreme courts throughout the country.

Even the concurring opinion from two Ohio Supreme Court justices noted the differing viewpoints of when a jurist has a conflict of interest overseeing cases involving members of their families, noting that Ohio's narrow view of judicial

bias and conflict of interest is proper because "* * *41 other states have similar judicial-conduct rules" *State v. Beasley*, denial of reconsideration ruling, May 9, 2018, concurring opinion of Justice Fischer and Justice O'Donnell at ¶9.

Multiple cases appear in this concurring opinion which Petitioner argues have an appearance of impropriety – and assault the prestige of the judiciary – yet Ohio jurisprudence currently tolerates. The opinion notes that there is no need to recuse when a judge's brother works at a law firm representing the plaintiff. *Id*. at ¶4, citing *In re Disqualification of Celebrezze*, 145 Ohio St.3d 1242. The opinion also notes that there is no need to recuse where a judge is "* * *the son of the duly elected prosecuting attorney of this large metropolitan county." *Id*. at ¶7, citing *In re Disqualification of Corrigan*, 47 Ohio St.3d 602, 603. Petitioner asserts this harms the judiciary.

The concurring opinion noted that "[o]nly Colorado has case law supporting Beasley's argument." *Id*. at ¶9, citing *Smith v. Beckman*, 683 P.2d 1214 (Colo.App.1984). In that Colorado example, the concurring opinion suggested that Colorado finds recusal necessary in criminal cases where a judge's spouse works for the prosecutor's office litigating the case. *Id*. at ¶9.

Petitioner asserts that the appearance of impropriety when jurists participate in cases concerning the law firm and/or elected office of their close family members or spouses is a nationwide problem – and a problem that undermines the public's confidence in the judiciary.

As one Supreme Court of Ohio decision opined, is whether or not a "* * *reasonable and objective observer would harbor serious doubts about the judge's impartiality." *In re Disqualification of Lewis*, 117 Ohio St.3d 1227, 2004-Ohio-7349.

Would a reasonable and objective observer believe a jurist might have a pro-family bias when his father's office represents one side of the

litigation and when the elected office holder, after the merit decision, announces that they have decided to seek election to the office of Governor of the State of Ohio?

The suggestion from the denial of Beasley's motion for reconsideration is that a judge or justice could oversee an appeal – even a death penalty appeal – where the elected attorney general or elected county prosecutor was the jurist's husband, sister, or daughter – so long as the family member did not actually sign a legal document or physically walk into the courtroom. Petitioner suggests that such a notion is facially absurd, that it damages the prestige of the judiciary, undermines the public's trust in the legal system, and constitutes structural error as it a denial of the Constitutional right to due process found in the Fourteenth Amendment for the reasons this Court's majority opinion declares in *Williams v. Pennsylvania*.

For these reasons, Petitioner moves this Honorable Court to grant a writ of certiorari to address this concern and possibly to extend the holding of *Williams v. Pennsylvania* to cure the harmful rules of permissive appearance of conflict of interest between jurists and their relatives – which may exist in 41 states if the concurring opinion is to be believed. (Exhibit C, at ¶9.)

CONCLUSION

Due to the nationwide implications concerning the appearance of judicial bias caused by jurists participating in appellate review of cases involving their family members, Petitioner moves this Honorable Court to issue a writ of certiorari to consider the scope of this Court's holding in *Williams v. Pennsylvania* as to family members overseeing cases of their relative's elected office.

Respectfully submitted,

THE LAW OFFICE OF DONALD GALLICK LLC

/s/ Donald Gallick

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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this Petition for a Writ of Certiorari and Motion for Leave to Proceed In Forma Pauperis was sent by regular US mail Summit County Prosecutor Sherri Bevan Walsh at 53 University Avenue, Akron, Ohio 44308 and to the Ohio Attorney General's Office at 30 East Broad Street, Columbus, Ohio 43215 on this seventh day of September, 2018.

/s/ Donald Gallick

_____

DONALD GALLICK

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 2,512 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct on this seventh day of September, 2018.

/s/ Donald Gallick

DONALD GALLICK