No. 17-1608

In The

Supreme Court of the United States

RANDY HOLKESVIG,

Petitioner,

v.

STATE OF NORTH DAKOTA,

Respondent.

On Petition For A Writ Of Certiorari To The North Dakota Supreme Court

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner Randy Holkesvig respectfully moves this Court for an order to (1) vacate its order in No. 17-1608 dated October 1, 2018 which denied the petition for writ of certiorari filed by Holkesvig on May 23, 2018 and (2) grant the petition for certiorari on the grounds for rehearing as stated below.

REASONS FOR GRANTING REHEARING

In *Williams v. Pennsylvania*, 136 S.Ct. 1899 (2016) the Supreme Court established a new recusal rule that is applicable to any judge who previously participated as a prosecutor in the same case. In keeping with the Court's decisions in *Caperton v. A.T. Massey Coal*, 556 U.S. 868 (2009) and *In re Murchison*, 349 U.S. 133 (1955) the Supreme Court correctly determined that such direct, prior involvement created an impermissible appearance of judicial bias and that judge must recuse himself or herself from participating in the decision.

Moreover, the public's distrust and neutrality is forever tarnished and tainted by the retaliatory efforts of selective Judges, Magistrates and/or Justices who intentionally obstructed justice and knowingly violated due process in order to cover up the State's illegal acts by selective executives who refused to defend and explain their egregious conduct and vindictive acts. Holkesvig disclosed facts and evidence in his 3rd PCR filing in District Court in 2017-2018 that exposes

corruption and obstruction of justice that obviously indicates there is cesspool of improprieties with an appearance of prejudice and an existence of actual bias by Clapp, Hager and all NDSC Justices that violated due process under the U.S. and N.D. Constitutions.

Sonja Clapp had a direct, personal, substantial, pecuniary interest in reaching a conclusion against Holkesvig that started in 1999 long before the 6-5-08 plea hearing. The Fourteenth Amendment states in part and requires that no state can deprive any person of life, liberty, or property without due process of the law, nor deny a person equal protection of the laws. See *Tumey v. Ohio*, 273 U.S. 510, 523-532 (1927). The NDSC Justices, Magistrate Vigeland, Judges Christofferson and Hager, along with several other District Court Judges and executives, assisted Judge Clapp in covering up her illegal acts between 2008-2014 by corrupting the judicial process with retaliation using bias and prejudice between 2008 and 2018.

Judicial abuse of discretion occurs when a judge fails to consider the facts and law relating to a particular matter that can be arbitrary or unreasonable from settled judicial precedent. Judicial misconduct occurs when the legal standard is deliberately, knowingly or arbitrarily disregarded in ways that are considered to be dishonest, unethical or retaliatory. Judicial abuse of power and judicial malfeasance occurs when an unlawful, unethical or retaliatory judicial act is done in official capacity that affects official duties.

Disqualification of a judge, a justice or a magistrate judge is required in any proceeding in which his or her impartiality might be reasonably questioned. Judges are further required by N.D. and U.S. statutory rules and Codes to recuse themselves if they have a personal bias concerning a party or personal knowledge of evidentiary facts in question that concern the proceeding. See N.D. Code Jud. Conduct Rule 2.11 and 28 U.S.C. §§ 144 and 455. Because the Code and the Due Process Clause work in tandem, Judge Clapp's failure to disclose her prosecutor role in 1999 and recuse as a Judge on 6-5-08 is not only illegal, immoral and unethical under the standards laid out by the Code, it simultaneously violated due process under the Fourteenth Amendment as well as *Williams v. Pennsylvania*.

Clapp, Vigeland and all NDSC Justices had access to Eastling's 2008 letter she sent to Judge Jahnke in mid-January 2008. Holkesvig's due process rights to discovery were secretly and repeatedly violated by executives prior to 6-5-08. Meredith Larson illegally and repeatedly withheld exculpatory evidence and refused to appear for the 6-5-08 plea hearing. Clapp and replacement prosecutor Nancy Yon breached the plea agreement on 6-5-08. Holkesvig continued to investigate and uncover the corruptive acts after 6-5-08. Holkesvig filed new complaints, new facts and new evidence with +400 pages between 6-6-08 and 1-28-10 that Clapp, Vigeland, Welte, Larson, Yon and other executives and all NDSC Justices had access to prior to Holkesvig filing his 1st PCR claim on 10-22-11.

Clapp secretly met with NDSC Justices to terminate the deferred sentence early on 7-12-09 to cover up the executive's illegal acts that Holkesvig exposed. Due process and judicial oaths were violated by Clapp and Vigeland using retaliatory rulings and frivolous orders to cover up and protect the illegal acts committed by executives. Vigeland, Judges Clapp, Christofferson and all NDSC Justices displayed personal bias and prejudice concerning a party or a party's lawyer (Larson and Yon), as they all had prior, personal knowledge of facts that is material evidence that disputed, conflicted and contradicted all 2008 charges. It was fully disclosed in the 3rd PCR filing that obviously violated N.D. Code Jud. Conduct Rule 2.11(A)(1). Without any explanation or factual finding of fact, Clapp and other Judges/Justices simply ignored recusal violations and retaliated with vindictive rulings and orders. Disqualification for a state judge is determined by state statutes and/or court rules. "Recusal" and "disqualification" are used interchangeably.

The U.S. Supreme Court built the due process/recusal standard they established in *Tumey* with *In re Murchison*, supra, at 136 that has long been cited as one of the pivotal cases in the development of recusal law in which that court stated, "a fair trial in a fair tribunal is a basic requirement of due process." The U.S. Supreme Court continued to expand *Tumey* and the relationship between the Due Process Clause and a judicial recusal in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828 (1986) as the U.S. Supreme Court stated, "the Due Process Clause creates the

outer boundaries of judicial disqualification; Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today."

The U.S. Supreme Court identified additional instances which objectively required a recusal in *Caperton*, supra at 2254-2265, citing *Tumey* supra, at 532 with an additional instance that required a recusal where "the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable," *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). The constitutional requirement for judicial impartiality requires recusal in the face of both actual and perceived biases. "Even if there is no showing of actual bias in the tribunal, due process is denied by circumstances that create the likelihood or the appearance of bias." *Peters v. Kiff*, 407 U.S. 493, 502 (1972). Personal bias, prejudice, state policies are left to statutes and judicial codes. *Caperton*, supra, at 2268-2269. Under the objective bias test, determining whether a defendant's right to an impartial decision maker has been violated requires a court to consider, in addition to actual bias, the appearance of bias from the standpoint of a reasonable person – (Holkesvig). *Caperton*, supra at 2263-2264.

The Due Process of Law Clauses of the Fifth and Fourteenth Amendments have long been understood by the Supreme Court to guarantee impartial adjudication that is free from bias or even the probability of bias. No mechanical formula can be used to determine whether bias is actually or probably present and the

Court has not attempted to articulate one. It has rejected exclusive reliance upon common law rules requiring judicial recusal, instead looking to "all the circumstances of the case" to determine whether circumstances "offer a possible temptation to the average man as a judge . . . not to hold the balance, nice, clear and true." *Caperton*, supra, at 2254-2265.

Chief Justice Roberts stated that "hard cases make bad law." *Caperton*, supra, at 2272. Justice Scalia, however, emphasized that the relevant question is the Court does more good than harm by aiming to correct an imperfection previously created through an expansion of the Court's constitutional mandate. *Caperton*, supra, at 2275. When "all the circumstances of this case" are weighed objectively, (*Caperton*, supra, at 2259-2267), due process requires recusal. Due process is not confined to specific categories; rather, it requires consideration of "all the circumstances of this case." *Caperton*, supra, at 2257.

There are no circumstances in which a former executive branch officer who subsequently becomes a judge can hold the balance nice, clear and true, (*Tumey*, supra, at 532) in reviewing an action he or she took on behalf of the executive branch. When a judge is forced to review his or her own actions that he or she took as an executive branch official, there is at least an appearance of bias and at most a serious risk of bias that is constitutionally intolerable. Asking Judge Clapp to sit impartially or neutrally against the same two parties on 6-5-08 in judgment of her past performance as a former prosecutor from May-July 1999 calls for the

impossible task of being fair and impartial. Clapp secretly withheld her written letter in 1999 to the Sheriff's office. Executives involved in 1999 were also involved in 2008-2014. Therein lies your bias and prejudice that became corruption, conspiracy, collusion, retaliation and judicial cover up with due process violations at a constitutional level.

Clapp's silence regarding her 1999, 2008-2009 actions and Holkesvig's 2017-2018 PCR facts combined with NDSC Justices deceptive rulings from 2010-2018 indicates a high level of personal interest in covering up all PCR claims filed by Holkesvig. Former Justice Mary Maring's prejudgment comments on 5-30-12 and her subsequent participation in the 1st PCR deliberations behind closed doors clearly created not only the appearance of bias and unfairness but also the probability of it, both of which is prohibited under the Constitution and Due Process Clause. Clapp violated *Williams v. Pennsylvania*. All NDSC Justices and Judges Hager and Christofferson refused to recuse. They conspired and retaliated by corrupting and covering up Holkesvig's PCR appeals with meritless rulings.

Every Judge/Justice takes an oath of office. Every Judge/Justice involved received several judicial complaints. Every Judge/Justice retaliated against Holkesvig with frivolous orders and meritless rulings. Every Judge/Justice failed to acknowledge actual bias because it admits an inability to administer justice impartially that obviously violated their oath of office to support and uphold the N.D. and/or U.S. Constitution.

The spectacle of a biased or prejudicial judge sitting in judgment upon the rights of any litigant throws all courts and the administration of justice into disrepute. The lack of trustworthiness and honesty regarding the dignity and integrity of all Judges/Justices certainly rocks the constitutional foundation set forth in precedence for due process rights regarding a fair, impartial and unbiased judiciary.

New facts and new evidence submitted by Holkesvig in his 3rd PCR application clearly indicates systemic misconduct by the States Judiciary and executives. The NDSC Justices along with Judge Hager, Haley Wamstad, Penny Miller and both Clerks' offices, clearly "engaged in 'gamesmanship' in 2017-2018 in order to continue their cover up and secure the ill-gotten plea conviction from 6-5-08." Notice the State's eerie silence by Wamstad, Hager and the NDSC Justices to avoid addressing Holkesvig's claims, recusals and *Williams v. Pennsylvania*. Instead, a new retaliatory N.D.Sup.Ct.Admin.Rule 58 was illegally created by NDSC Justices and Sup.Ct. Clerk Miller in 2017-2018 and used with the intent and purpose to illegally cover up and defeat Holkesvig's PCR application that obviously obstructed justice and violated due process.

Due process protection falls within Article 1, Sections 9 and 12 of the N.D. Constitution. Disqualification in district court is initially handled by N.D.C.C. § 29-15-21. In North Dakota, a judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to

disqualify is filed. The ethics code at both the state and federal level are self-initiated that clearly prohibits any judge from participating in a case where his or her neutrality is likely to be questioned. The very purpose that *Williams v. Pennsylvania* emerged is that the majority created its new rule for recusal to maintain trust in the judiciary during a period of significant governmental distrust concerning the independence and neutrality of the judiciary.

When facts and evidence tied "1999 prosecutor Clapp to 2008 Judge Clapp," she turned to Judges Christofferson, Hager and the NDSC Justices to cover up her 2008-2014 illegal acts. The State's Judiciary intentionally and knowingly corrupted 3 PCR appeals that clearly violated N.D. Code Jud. Conduct Canons 1 and 2; CANON 1 – A Judge Shall Uphold and Promote the Independence, Integrity, and Impartiality of the Judiciary, and Shall Avoid Impropriety and the Appearance of Impropriety; CANON 2 – A Judge Shall Perform the Duties of Judicial Office Impartially, Competently, and Diligently.

In addition, Clapp and all Judicial officials named violated the following N.D. Code Jud. Conduct Rules which are all self-regulated; (**1**) Rule 2.2 states – "A judge shall uphold and apply the law, and shall perform all duties of judicial office, including administrative duties, fairly and impartially." (**2**) 2.3(A)(B) states – "A. A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice. B. A judge shall not, in the performance of all duties of judicial office, including administrative duties,

by words or conduct manifest bias or prejudice, or engage in harassment . . . and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so." (3) 2.6(A) states – "A. A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." (4) Rule 2.11(A)(1), (A)(2)(b), (A)(5)(a)(b)(c) were violated, which states; "A. A judge shall disqualify in any proceeding in which the judge's impartiality might reasonably be questioned, including the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding; (A)(2)(b) acting as a lawyer in the proceeding; (A)(5)(a)(b)(c) The judge: (a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association; (b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the matter, or has publicly expressed in such capacity an opinion concerning the merits of the matter in controversy; (c) was a material witness concerning the matter.

There is no record of Clapp, Christofferson, Hager or any NDSC Justices addressing recusals, disqualifications, bias, prejudice or other improprieties. Clapp's bias and prejudice contradicted and conflicted with her legal, moral and ethical duty to disclose her former prosecutor role from 1999 in open court on 6-5-08.

Prosecutor Clapp had a personal connection to Eastling. Clapp represented Eastling on behalf of the State in 1999. Clapp was a material witness to all 1999 events acting as a prosecutor. Judge Clapp knowingly, recklessly and intentionally failed to inform Holkesvig and his counsel about it on 6-5-08. Clapp, Vigeland, Welte, Larson, Yon and the NDSC Justices and other executives had personal knowledge of Clapp's 1999 letter, Holkesvig's +400 pages of complaints and 6 related lawsuits long before Holkesvig filed his 1st PCR on 10-22-11.

Because the N.D. Code Jud. Conduct and the Due Process Clause work in tandem, Clapp's failure to address her recusal in 2008 and PCR Judges Christofferson and Hager and all NDSC Justices refusal to recuse not only is illegal, immoral and unethical under the standards laid out by the Code, it obviously tipped the scales of justices that simultaneously violated due process under the Fourteenth Amendment. A judge's obligation not to hear and/or decide matters in which disqualification is mandated and ethically required applies to every District Court Judge and all NDSC Justices regardless of whether a motion to disqualify is filed. The standard for disqualification was set by the NDSC in *Graves v. State Bd. of Law Examiners*, 2004 ND 64, 677 N.W.2d 215. See *Matter of Estate of Risovi*, 429 N.W.2d 404, 406-408 (N.D.1988); *State v. Jacobson*, 2008 ND 73, ¶¶ 6-53, 747 N.W.2d 481. North Dakota Ethics Advisory Committee Opinion 93-1 affirms recusal is applicable to Judges Clapp, Christofferson, Hager and all NDSC Justices.

Williams v. Pennsylvania is a continuation of the Supreme Court's current Fourteenth Amendment jurisprudence that expands situations in which a judge is forced to recuse themselves from the bench. The Court does not ignore the distinction between civil or criminal cases as related to the single case requirement for recusal that Justice Thomas suggests in his dissent. Rather, the rule established in *Williams* requires a judge to step down from the bench in which he or she previously participated as a prosecutor further demonstrates the Supreme Court's commitment to preventing the image of intolerable bias in the judiciary. Every judiciary gains its authority from public trust. The public's confidence to wipe out, clean up and hold Judges, Justices and all courts accountable for appearances of judicial improprieties, misconduct, retaliation, bias and/or prejudice that violates the Oath, Constitution and/or due process, merits new recusal rulings in this case.

CONCLUSION

The "appearance of justice" will best be served by vacating the decision and remanding for further proceedings because of Judge Hager's deceptive acts to protect and cover up Clapp's devious acts as a 1999 prosecutor and as a judge on 6-5-08 and 7-12-09. The NDSC Justices corrupted Holkesvig's due process rights by creating and implementing new Administrative rules in 2017-2018 to cover up Prosecutor/Judge Clapp's egregious recusal errors that demonstrates

judicial misconduct and retaliation with bias, prejudice and fraud upon its own court to deny Holkesvig his certificate of innocence in his PCR application. *Williams*, *Caperton* and *Withrow* and due process violations compelled Clapp, Hager and all NDSC Justices to recuse. Abuse of power and adamant failure to recuse and/or address recusals obviously violated judicial oath, canons, codes and rules in clear violation of due process, established state and federal law and the N.D. and U.S. Constitutions.

Respectfully submitted,

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CERTIFICATE OF COUNSEL – RULE 44.2

As an unrepresented party and pro se litigant, Petitioner Randy Holkesvig hereby certifies this Petition for Rehearing is presented in good faith and not for delay.

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