

No. _____

IN THE
Supreme Court of the United States

Kenneth Roshell Isom,

Petitioner

v.

State of Arkansas,

Respondent

**On Petition for Writ of Certiorari to the
Arkansas Supreme Court**

PETITION FOR WRIT OF CERTIORARI

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****CAPITAL CASE****

QUESTION PRESENTED

Sam Pope, as elected prosecutor for Arkansas's Tenth Judicial District, brought charges against Kenneth Isom three times in the span of 13 months. Isom was fully acquitted by separate juries on two of those charges. After being found guilty on a third charge, Isom was lawfully paroled. Hearing of Isom's release, Pope lobbied the Governor unsuccessfully for Isom's parole to be rescinded and for Isom to be returned to prison. The question presented is:

Whether Pope and Isom's significant adversarial history created an unconstitutional risk of bias under the due process clause when Pope later sat as the trial judge in Isom's unrelated coram nobis hearing.

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PETITION FOR A WRIT OF CERTIORARI

Kenneth Isom respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court.

OPINIONS BELOW

The order of the Arkansas Supreme Court denying rehearing is unreported. (App. 33). The order of the Arkansas Supreme Court affirming the dismissal of the *coram nobis* petition is reported at 563 S.W.3d 533 (Ark. 2018). (App. 1–23). The order of the Drew County Circuit Court dismissing the petition for writ of error *coram nobis* is unreported. (App. 37–46). The order of the Drew County Circuit Court denying the motion to recuse is unreported. (App. 34).

JURISDICTION

The Arkansas Supreme Court issued its opinion on December 20, 2018. The Arkansas Supreme Court denied a timely petition for rehearing on January 31, 2019. This Court granted Petitioner an extension of time to file a petition for writ of certiorari until May 31, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

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.”

INTRODUCTION

Sam Pope has a “special animus” for Kenneth Isom. (Hart, J. dissenting, App. 26). Pope brought criminal charges against Isom three times in just over a year’s time. The cases were rather pedestrian, involving alleged thefts and burglaries. Twice Isom won total acquittals from a jury. On a third charge, Isom was found guilty and received prison time. When Isom was lawfully paroled on that charge, Pope was so upset that he had not been given the opportunity to oppose the parole, he asked for and was granted a personal meeting with the Governor’s staff. The staffer could find no way to send Isom back to prison and Isom’s parole stood. The staffer treated Pope’s request with such gravity that he copied the district’s state representative and several other government officials on his letter detailing his efforts. As dissenting Justice Hart noted, “Judge Pope’s prior dealings with Mr. Isom, including his extraordinary efforts to get the governor to annul a lawful decision by the parole board, made him especially familiar with Mr. Isom.” (App. 26). Because of Pope’s unique adversarial history with Isom, and his extraordinary efforts to return Isom to prison, there was at least an appearance that he could not fairly adjudicate the rarely-granted coram nobis hearing. To the extent Pope and Isom’s history leaves any doubt regarding the potential bias, Pope’s conduct at the hearing showed him to be “an advocate *opposed* to Mr. Isom, not a neutral arbiter.” (Hart, J. dissenting, App. 28). Certiorari should be granted.

STATEMENT OF THE CASE

1. Sam Pope Prosecutes Kenneth Isom.

Sam Pope, before ascending to the bench, was the elected prosecutor for Arkansas's tenth judicial district. The district covers five rural counties. Though Pope was the elected prosecutor, he personally handled each of the three cases against Isom.

On January 22, 1991, Prosecutor Pope charged Isom with burglary and theft of property alleging that he entered Brown Calhoun's store and took a firearm. Pope also alleged that Isom had committed four or more prior felonies and was thus a habitual offender, a fact that, if proven, would enhance Isom's sentence. Isom took the charges to trial and was acquitted by a jury. (App. 139–143).

On February 22, 1991, Prosecutor Pope again charged Isom with Theft of Property. Isom was found guilty at trial and he was sentenced to 15 years in the Department of Correction. (App. 171). From the facts in Court of Appeals opinion upholding the conviction, the crime was one of opportunity. (App. 175–183). Isom was hitch-hiking and was picked up by a motorist. The driver became tired and let Isom drive. The owner asked to stop for the bathroom. While he used the bathroom, Isom drove away with the car, a gray 1983 Buick Skylark. The car "contained various items of personal property, including a microwave oven." (App. 177). The microwave was sold for \$40 and the Buick was found the next day abandoned at a car wash. *Id.*

On January 29, 1992, Prosecutor Pope again charged Isom with Burglary and Theft of Property for the alleged theft of a 35 mm camera valued at \$50 from the Class Act Clothier. (App. 271). Prosecutor Pope offered Isom a plea deal for 10 years to run consecutively with the time he was already serving. (App. 319). His plea offer stated that “20 years is the minimum [Isom] will get if convicted of burglary or [as a habitual criminal].” *Id.* Isom rejected the plea offer and again was acquitted by a jury. (App. 270).

Isom was paroled from the Department of Correction in February of 1994. Prosecutor Pope was so concerned about Isom’s parole that he contacted the Governor’s office seeking to annul the decision. On March 2, 1994, Prosecutor Pope personally met with Jack Gillean, the Governor’s Executive Assistant for Criminal Justice, in an attempt to have Isom returned to prison. Gillean characterized Pope’s position in a letter following the meeting, “I know you were hoping Mr. Isom could be returned to prison. After reviewing the facts, it appears his parole was proper, and I know of no way to rescind it.” (App. 321). Gillean sent a copy of his letter to the state representative in Pope’s district, the Chief of Police, the Director of the Department of Corrections, and two members of the Post Prison Transfer Board.

2. Capital Murder Trial and Appeal

In 2001, Pope and Isom met again. Pope was now the Tenth Judicial District’s circuit court judge. Isom was accused of capital murder, attempted murder, rape, and burglary. Sam Pope presided over the trial and all subsequent

trial level state proceedings. Isom was ultimately convicted of all charges and sentenced to die.

The facts of the crime were grizzly. William Burton was a 79-year-old man in the care of his 71-year-old sister-in-law, Dorothy Lawson. According to Lawson's account, a black man knocked on the door of Burton's home on the evening of April 2, 2001, pushed his way inside, and demanded money. Wielding a pair of scissors, the intruder forced Lawson and Burton to the ground. Lawson was raped and beaten. Burton was stabbed and bludgeoned. A neighbor found them the next morning. Burton was dead but Lawson survived.

Investigators sought to have Lawson identify her attacker by using a photo line-up. At a pre-trial hearing to suppress the photo line-up, lead investigator Scott Woodward testified that the only time Lawson looked at a line up was the afternoon of April 5, 2001 and that she *only* identified Isom and without hesitation. Tr. R. 321. Pope denied the motion to suppress the photo line-up.

Also during the pre-trial period, an inmate at the jail told investigators that he knew the location of the scissors used to kill Burton. Deputy Prosecuting Attorney Frank Spain went with investigators on a search for the murder weapon. The inmate, Kevin Green, was released from jail on his own recognizance. The defense subpoenaed Spain as a witness at trial. After Spain testified that there was nothing found in the search, Pope quashed Spain's subpoena. Tr. R. 386

At trial, an investigative memo was revealed which showed when Lawson looked at the April 5th line-up she identified Isom *and another person*—"it's one or

three.” Tr. R. 1159. Nevertheless, Lawson implicated Isom at trial, stating “I’ll never forget his face as long as I’m living.” Tr. R. 1405. The prosecuting attorney argued to the jury that Lawson’s testimony alone was sufficient to convict Isom. Tr. R. 1494.

On direct appeal, Isom argued *inter alia* that the photo line-up should have been suppressed because the other men in the line-up did not resemble Isom. Specifically, all the persons in the photo line-up other than Isom had facial hair. Lawson’s identification of her attacker did not mention facial hair. The Arkansas Supreme Court decided this issue on a procedural point, finding that because Isom’s trial counsel failed to object to Lawson’s in-court identification, any complaint about the photo line-up was waived. *Isom v. State*, 148 S.W.3d 257 (Ark. 2004).

3. State Post-Conviction

In state post-conviction proceedings, Isom alleged that his trial counsel was ineffective for failing to put on alibi witnesses and for failing to object to Lawson’s in-court identification. In a state postconviction hearing, Deputy Prosecuting Attorney Frank Spain testified, contrary to his pre-trial testimony, that scissors *were* recovered with Kevin Green’s information. R. 37 R. 730–31. Judge Pope denied the state postconviction petition and held with regard to the eye-witness identification that the court held a “through (sic) hearing” on the out-of-court identification and that any issue regarding the in-court identification would have failed on appeal. R. 37 R. at 498. The dismissal was upheld on appeal. *See Isom v. State*, 370 S.W.3d 491 (Ark. 2010).

4. Coram Nobis Proceedings

Reinvestiture

After his federal habeas proceedings were stayed for the exhaustion of state remedies, Isom filed in the Arkansas Supreme Court an Application to Reinvest Jurisdiction in the Circuit Court to Consider a Petition for Writ of Error *Coram Nobis*. The Application contended *inter alia* that Isom's conviction was the result of state suppression of evidence which showed that 1) Lawson was given two opportunities to pick Isom out of a photo line-up and failed on the first attempt and equivocated between Isom and another man on the second and 2) a prosecuting attorney gave inconsistent testimony (at a hearing to quash his subpoena and at the postconviction hearing) regarding whether a search for a murder weapon resulted in physical evidence. The Arkansas Supreme Court found the claims to have apparent merit and reinvested jurisdiction in the circuit court. *Isom v. State*, 462 S.W.3d 662 (Ark. 2015). (App. 328–333). As Justice Hart explained in dissent, the grant of such hearing is rare. (App. 27).

The Petition

Isom filed a Petition for Writ of Error *Coram Nobis* in the Circuit Court alleging *Brady* violations committed by law enforcement and prosecuting attorneys of Drew County. (App. 47–131).

Line-Up Claims: Isom contended that the police concealed the fact that a photo line-up was shown to Lawson on April 4th, that the line-up included Isom's photo, and that Lawson did not select Isom as her attacker. (App. 79). Isom's claim

was supported by contemporaneous medical records which memorialized the encounter:

Police here asking for Ms. Lawson to ID suspect from photos. Attempts ID. Police offer to enlarge photos + bring them back tomorrow. Ms. Lawson agrees to view enlarged photos tomorrow.

(App. 80). Isom alleged that police not only failed to disclose this attempted ID but lied to conceal it. Woodward testified at the pre-trial hearing that he was “not involved” and “had not been told” of a previous identification attempt. Tr. R. 321. And at trial, another investigator testified that they showed the line-up once. Tr. R. 1130; 1153.

Isom alleged that because Lawson couldn’t make an identification, the police concocted a photo array designed to highlight Isom. (App. 81–82). Woodward personally took all the photos for the line-up and included Lawson’s neighbor as a “filler.” Isom’s face was the only one to appear on both line-ups and every man in the line-up except Isom had prominent facial hair. Even with the highly suggestive line-up, Lawson viewed the photos for six minutes before identifying Isom *and another man*---“it’s one or three.” (App. 83). Isom alleged that Lawson’s equivocation was suppressed until it was too late to make effective use of it.

Scissors Claim: Isom also alleged that police suppressed physical evidence pointing to the guilt of alternative suspects. Frank Spain, a prosecuting attorney, gave conflicting testimony as to whether a pair of scissors, purporting to be the murder weapon, were indeed found using inmate Green’s tip.

Discovery Motion

The coram nobis petition was supported by thirteen exhibits showing a basis for many of the factual assertions. (App. 47–131). Isom also moved for discovery, requesting in part to depose key state actors (Spain, Woodward) who refused to be interviewed by Isom prior to the hearing. Pope denied the motion for discovery and implied that counsel should be sanctioned for requesting discovery:

Isom has made some serious allegations against the state which if true would constitute violations of the state’s obligations under Brady v. Maryland. Rule 3.1 Arkansas Rules of Professional Conduct provide that a lawyer may only bring assertions on an issue if there is a factual reason to do so. Additionally by reference only, Arkansas Rule of Civil Procedure, Rule 11(b)(3) require a lawyers signature on a pleading be based on a reasonable inquiry that the factual contentions in a pleading have evidentiary support.

(App. 35).

The Recusal Motion

Before the coram nobis hearing Isom moved for Judge Pope to recuse. Isom alleged that Pope’s acts as a prosecutor, his serial prosecution of Isom and attempts to have his parole revoked, were disqualifying. (App. 132–327). Isom alleged that there was at least an appearance of bias which violated his federal right to due process.

Pope denied the motion to recuse, allowing that “nothing in the factual allegations regarding the Judge’s prior action as prosecutor in the years 1991 and 1994 is incorrect.” (App. 34). However, Pope found the argument that his attempt to rescind Isom’s parole was “extraordinary” to be “far-fetched,” writing that “[i]t has

happened and will continue to happen in this State by active and through (sic) prosecutors.” *Id.*

The Hearing

At the coram nobis hearing, Isom presented the testimony of Kristy Waxley, the nurse who authored the April 4, 2001, note memorializing the attempted identification. Coram Nobis Record [hereinafter CN] 555–56. The nursing notes themselves were introduced and Waxley testified that the entry was accurate and that she wrote down what she saw happen that day. *Id.*

Woodward testified that he in fact did go to the hospital in the afternoon on April 4th with the purpose of showing Lawson a line-up but contended that he did not actually do so. He admitted that the line-up that he brought on April 4th was a line-up made of stock mug shots which included Isom. CN 583. Woodward’s testimony was in direct contradiction with his pre-trial testimony that he went to the hospital on the morning of April 5th with the purpose of showing a line-up. CN 582. His testimony was also contradicted by the testimony of Nurse Waxley and the hospital records which show that an attempt was made on April 4th. CN 555–56.

As to the physical evidence claim, Agent Rick McKelvey testified regarding the search for the scissors. He initially appeared to recall the search with inmate Green and prosecutor Spain, and testified that the search resulted in the discovery of a pair of scissors. CN 514, 516, 518–19. This testimony was favorable to Isom and essential to the factual dispute the Arkansas Supreme Court reinvested the circuit court with jurisdiction to determine. (App. 332–33) (Explaining that if scissors were

found there would be a “fundamental error of fact extrinsic to the record” which is the showing necessary to prevail in coram nobis). Judge Pope then inserted the idea that McKelvey’s answers could be explained because “Mr. McKelvey has hearing problems sometimes.” CN 524. The court broke for lunch; the prosecution recalled McKelvey; and he testified that his prior testimony was mistaken, he had misspoken earlier, and on further questioning repeatedly expressed inability to hear counsel for Isom. CN 528–531.

Dismissal

After a hearing, Judge Pope denied the coram nobis petition, making several discretionary rulings and credibility determinations against Isom. (App. 37–46). As to the line-up claims, Pope found that there was no line-up shown to Lawson on April 4, 2001. (App. 42). Pope discounted the testimony of Nurse Waxley and the April 4th note which read “Police here asking for Ms. Lawson to ID suspect from photos. Attempts ID.” Pope reasoned that Waxley “offered no testimony about what she meant by ‘attempt.’” (App. 40). Pope instead credited the pre-trial hearing of Woodward in which he claimed to have gone to the hospital for the purpose of showing a photo array on the morning of April 5th. (App. 41–42). This finding was in direct contradiction with Woodward’s coram nobis testimony. CN 582.

Pope looked to the trial transcript for support and misquoted testimony to fit his ruling. Lawson was asked at trial “Did you have your glasses on when you looked at the pictures?” According to Pope’s Order, Lawson replied “I’m not sure about *the day*.” (App. 41) (emphasis added). In fact, Lawson replied “I’m not sure

about *that* day.” Tr. R. 1422. (emphasis added). The rest of Lawson’s answer supported Isom’s contention that she had looked at photos on April 4th. She continued “so that’s when I looked at the pictures *again* and I picked out, I picked out the man.” *Id.* (emphasis added).

Affirmance

Isom appealed. The Arkansas Supreme Court affirmed Pope’s ruling over the dissent of two justices. (App. 1–31). The majority largely deferred to the discretionary calls Pope made as trier of fact. Though Isom argued that the word “attempt” used in the nursing note did not need to be defined, the Arkansas Supreme Court held that “the circuit court did not adopt Isom’s definition of ‘attempts ID’ or give great weight to the note. Determining the weight of the evidence is a matter for the fact-finder.” (App. 8). As to Pope’s misquoting of Lawson’s trial testimony, the majority agreed but concluded it was a “typographical error” and Pope’s interpretation of Lawson’s testimony was a “fair reading.” (App. 9). As to whether Pope credited Woodward’s testimony that had been proven false, the majority held “the inconsistencies within Woodward’s testimony, or between his testimony and that of others, were matters for the circuit court to resolve when making credibility determinations. We will not reverse a circuit court’s findings merely because we would have viewed the evidence differently.” (App. 10) (internal citation omitted).

Isom also appealed Judge Pope’s failure to recuse under both federal and state law. The court held that Pope’s efforts to rescind Isom’s parole were part of his

ordinary duties as a prosecutor. (App. 21). Arkansas law requires an appellant challenging the failure to recuse to identify points in the record where bias or prejudice was exhibited. Isom did so, pointing to the implied threat of Rule 11 sanctions in Pope’s ruling on a pre-hearing discovery motion and Pope’s suggestion, during testimony favorable to Isom, that the witness was hard of hearing. The Arkansas Supreme Court held that counsel for Isom was “doing her job” and “the judge’s reference to sanctions was not warranted.” (App. 22). However, the court disagreed that the treatment of the discovery motion showed hostility warranting recusal. *Id.* The court likewise held that Pope’s interjections during testimony were “unnecessary” but “did not show bias against Isom.” *Id.*

Two justices dissented arguing that Isom was entitled to a new hearing with an impartial judge. (App. 24–31). Justice Hart reasoned that Judge Pope should have recused because of “an obvious appearance of impropriety” and “strong circumstantial evidence of actual bias.” (App. 24). Hart disputed the majority’s characterization of Pope’s trip to Little Rock to convince the Governor to annul Isom’s parole as “ordinary.” (App. 24–25). She explained that whatever statutory authority a prosecutor may have to give input on parole decisions *before* the parole board has made its decision “does not mean after the parole board has made its decision” and certainly “does not require a prosecutor to travel to Little Rock¹ to use the power of his office to attempt to persuade the governor to annul a decision made

¹ Little Rock, Arkansas’s capital city, is approximately 90 miles away from Monticello, Arkansas, the county seat of Drew County.

by the parole board.” (App. 25). Instead, Hart reasoned that “Prosecutor Pope’s extraordinary efforts to reverse Mr. Isom’s lawfully granted parole can only be attributed to some special animus that Prosecutor Pope held toward Mr. Isom.” (App. 25–26).

Hart also considered what could be the source of Prosecutor Pope’s “special animus” toward Isom. (App. 26). She reasoned that although prior prosecution of a defendant itself is insufficient to warrant recusal, “the circumstances of Judge Pope’s prior involvement with Mr. Isom as a prosecutor are remarkable.” *Id.* Hart reasoned that acquittals in criminal trials in Arkansas “are not common” and “a defendant’s acquittal in two separate criminal trials is obviously even rarer.” *Id.* Hart declined to “speculate whether these rare failures instilled in Prosecutor Pope an animus toward Mr. Isom, or whether a preexisting animus caused Prosecutor Pope to twice take Mr. Isom to trial without sufficient evidence.” *Id.* Regardless of the reason, Hart concluded that “Judge Pope’s prior dealings with Mr. Isom, including his extraordinary efforts to get the governor to annul a lawful decision by the parole board, made him especially familiar with Mr. Isom.” *Id.* Hart continued that Pope’s familiarity with Isom persisted when Pope became a judge and (1) “presided over Mr. Isom’s criminal trial,” (2) in which he ruled “on Mr. Isom’s motion to suppress an identification made by Dorothy Lawson” finding “that the photo array the police showed to Ms. Lawson was not unduly suggestive even though Mr. Isom was the only man in the array photos who did not have facial hair,” and (3) “presided over Mr. Isom’s Rule 37 hearing . . . den[ying] Mr. Isom

postconviction relief.” *Id.* Hart reasoned that it was untenable for Pope to preside over the coram nobis hearing when the hearing implicated his previous findings of fact. (App. 27).

Hart offered that Pope’s actions during the coram nobis hearing showed his lack of impartiality. She explained that Pope’s threat of sanctions in response to the discovery request showed that he was an “advocate *opposed* to Mr. Isom, not a neutral arbiter.” (App. 28). In regard to Pope’s suggestion that Officer McKelvey was hard of hearing, Hart reasoned that “[w]hen a circuit judge, sitting as the finder of fact, takes it upon himself to rehabilitate a witness and then orders a recess that could reasonably be interpreted as giving the State a chance to woodshed that witness, the judge’s impartiality might reasonably be questioned.” (App. 29).

As to the ultimate determination of the merits, Hart reasoned that “[c]redibility determinations and the weight to be assigned conflicting evidence determined all the substantive issues in this case.” (App. 30). Hart contended that the “great deference to the finder of fact to resolve questions of witness credibility and the weight to be afforded conflicting pieces of evidence” “crumbles under even the most cursory scrutiny” “when this deference rests on a foundation of actual or perceived bias and lack of impartiality.” *Id.*

Justice Wood dissented separately and echoed some of the same sentiments as Justice Hart. Wood provided that it was not inappropriate for Prosecutor Pope to request that the Governor reconsider Isom’s parole grant, but that having done so

“in totality with the history between Judge Pope and Isom, there is at least an appearance of bias in this matter.” (App. 31). Wood echoed Hart’s analysis that the merits of Isom’s case “ultimately depended on the number of close discretionary decisions made by Judge Pope, especially those pertaining to Ms. Lawson’s attempted identification of Isom at the hospital, the officers’ testimony concerning the scissors, and the scope of discovery afforded Isom.” *Id.* Wood concurred that “each of these decisions weighed against Isom when the witnesses’ testimony appeared to be inexplicably inconsistent.” *Id.* Wood concluded that the “circuit court determines the credibility of witnesses, resolves conflicts and inconsistencies in testimony, and assesses the weight to be given the evidence in a coram nobis hearing. However, it is difficult to afford the circuit court the deference our law requires given the extensive history between Judge Pope and Isom.” (App. 32).

The Arkansas Supreme Court denied a Petition for Rehearing but stayed the issuance of its mandate to allow Isom to seek review in this Court. (App. 33).

REASONS FOR GRANTING THE PETITION

This Court has previously explained that its “recusal cases” have dealt with “extreme facts that created an unconstitutional probability of bias.” *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 887 (2009). This is such a case. Isom drew the ire of the elected prosecutor of Drew County when he twice beat theft charges at trial, earning complete acquittals by two juries. Pope had charged Isom as a habitual criminal and had Pope prevailed on the burglary charge Isom would have faced 20 years in prison. (App. 319). Isom was found guilty of a third theft charge, wherein

he drove off in a man's car (but didn't keep it) and profited \$40 from a microwave he found within. When the Parole Board let Isom out of prison on that charge, Pope met personally with the Governor's office, asking that the decision be annulled and Isom be returned to prison. It is implausible that Pope's indignation over Isom's release on a relatively trivial offense was not related to the acquitted charges. Indeed, if Pope had succeeded at the two trials, parole would have been a distant dream for Isom.

Pope later ascended to the position of trial judge and sat on Isom's capital murder trial where Isom was sentenced to death. Pope heard and dismissed Isom's petition for postconviction relief. And most recently, when the Arkansas Supreme Court made the "rare grant of permission for an inmate to pursue a writ of error coram nobis" (App. 27), Pope dismissed that as well.

Isom has a death sentence and the underlying proceedings raised troubling questions regarding the propriety of his conviction. The dismissal of Isom's petition "ultimately depended on [a] number of close discretionary decisions made by Judge Pope" and "each of these decisions weighed against Isom when the witnesses' testimony appeared to be inexplicably inconsistent." (Wood, J. dissenting, App. 31). Especially because this is a death penalty case, the extreme facts warrant this Court's rare intervention. *Cf. Strickland v. Washington*, 466 U.S. 668, 704 (1984) (Brennan, J. concurring in part) ("we have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding.").

1. Prior prosecution can create an appearance of bias.

The Due Process Clause requires a judge with “the impersonal authority of the law” hear a case. *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971).

Impartiality is crucial to public confidence in the judiciary. The question is “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*, 556 U.S. at 881. In determining whether there is a potential for bias, “[t]he judge’s prior relationship with the defendant” is of “critical import.” *Caperton*, 556 U.S. at 881. Recusal may be warranted when, as the result of prior proceedings, a judge becomes “embroiled in a running, bitter controversy” that makes it unlikely for him to “maintain that calm detachment necessary for fair adjudication.” *Mayberry*, 400 U.S. at 465.

If a prosecutor-turned-judge had a significant adversarial history with a defendant, there is at least a possibility that under certain facts he cannot appear “wholly disinterested” in the outcome of a new criminal matter. *In re Murchison*, 349 U.S. 133, 137 (1955). And “[w]hile he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal.” *Id.* The due process clause protects against situations in which there is a “temptation” to “forget the burden of proof required to convict the defendant” or “not to hold the balance nice, clear, and true between the state and the accused.” *Tumey v. Ohio*, 273 U.S. 510, 532, (1927).

The Arkansas Supreme Court failed to take into account these principles when it found no appearance of bias. It rejected Isom’s claim, holding that because Prosecutor Pope was “carrying out his ordinary duties as a prosecutor when he contacted the governor’s office about Isom’s parole eligibility” that “Isom has failed to demonstrate actual bias or the appearance of bias sufficient to require recusal.” (App. 21). The holding that Pope’s efforts were ordinary stretch the meaning of the word. As Justice Hart explained in dissent, while it may be ordinary for a prosecutor to give his input before the parole board makes its decision, there is no precedent, either in statute or practice, for a prosecutor to seek to annul parole after the fact. (App. 25). Indeed, the letter to Pope from the Governor’s staffer is evidence of the impossibility. He wrote, “it appears [Isom’s] parole was proper, and I know of no way to rescind it.” (App. 321).

But even if Pope was perfectly within the scope of his ordinary duties in seeking to rescind Isom’s parole, he was nevertheless impaired to later sit in detached judgment of Isom. The Court’s bias inquiry has not focused on whether the judge’s prior acts themselves were extraordinary or improper. For example, in *Caperton*, a case with an appearance of bias based on campaign contributions to a judicial election, there was no suggestion that the judge wrongly accepted or benefited from the company’s financial contribution. 556 U.S. at 882. Certainly, in *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971), the judge was the target of rank verbal abuse. The Court found that although he did not “seek[] combat” he was nevertheless the “target of petitioner’s insolence” which disqualified him from

adjudicating the contempt charges. *Id.* And in *Williams v. Pennsylvania*, the disqualifying conduct was certainly an “ordinary” aspect of then-prosecutor Castille’s job—he reviewed a memo from a deputy prosecuting attorney and approved the pursuit of the death penalty. 136 S.Ct. at 1903. Even if it is ordinary for a prosecutor to meet with gubernatorial staff in hopes of reversing a proper grant of parole, the effort can still establish sufficient hostility between prosecutor and defendant to later create an appearance of bias. Certiorari should be granted to establish that a prosecutor who through his ordinary duties develops a special animus for a defendant cannot later sit in judgment of that defendant.

2. Judge Pope’s prior prosecutions created an intolerable appearance of bias.

In *Williams v. Pennsylvania*, 136 S.Ct. 1899, 1903 (2016), the Court held that the likelihood of bias is too high to be constitutionally tolerable when a judge had a “significant, personal involvement” in a “critical trial decision” in the same case. *Williams* did not, however, find that the same risk of bias could not be demonstrated from a judge’s involvement with an unrelated prosecution.

The instant case demonstrates that a prosecutor-turned-judge may develop a disqualifying disdain for a defendant from unrelated prosecution. Indeed, there was a greater risk of bias between Judge Pope and Isom than between Judge Castille and Terrance Williams. Under the “circumstances and relationships,” (*Murchison*, 349 U.S. at 136) Pope was keenly familiar with Isom and openly opposed to his

freedom. The following comparisons make clear that the facts of Pope's unrelated prosecution of Isom are more troubling than the personal involvement in *Williams*.

Monticello, Arkansas versus Philadelphia, Pennsylvania

Sam Pope encountered Kenneth Isom when he was the elected prosecutor for the Tenth Judicial District in Arkansas. That district encompasses Drew County, a rural county. Its largest city is Monticello. In the 1990 census, Monticello's population was a little more than 8,000. *See* 1990 Census of Population, General Population Characteristics Arkansas, available at: bit.ly/2waWp8L. In contrast, Ronald Castille was the district attorney of Philadelphia, Pennsylvania, a major metropolitan city. In the 1980's, when Terrance Williams's case was in Castille's office, the population of Philadelphia was at least 1.5 million. *See City of Philadelphia v. Klutznick*, 503 F.Supp. 663, 668 (E.D. PA, 1980) (City of Philadelphia alleging census count of 1,607,070 underrepresented its population.) The number of cases in Castille's office would have been many magnitudes more than those in Pope's. Indeed, this Court noted in its opinion that during Judge Castille's time in the prosecutor's office he oversaw 45 cases which resulted in death sentences. *Williams*, 136 S.Ct. at 1907–08. That number outstrips the total number of Arkansas's statewide death row. Given the relative size of the jurisdictions and the operations of each office, Pope necessarily would have been more familiar with Isom than Castille was with Williams.

Seven words versus 180 miles

Pope was much more involved in Isom's prosecutions than Castille ever was in Williams'. In *Williams*, the Court resisted the notion that Castille's role in the case was "ministerial" but the facts show fairly minimal involvement. *Id.* Castille supervised, but did not personally handle, Williams' prosecution. His deputy prepared a one and a half page memorandum setting forth the facts of the case and the reasons she wanted to seek the death penalty. *Id.* at 1903, 1907. Castille reviewed the memorandum and wrote seven words on the bottom of the document: "Approved to proceed on the death penalty." *Id.* at 1903. Even if, as the Court held, Castille took "personal responsibility for the death sentences obtained during his tenure" and he "considered his involvement to be an important duty of his office," his role was peripheral to the prosecutor who actually took the case to trial. *Id.* at 1909.

In contrast, Pope personally brought charges against Isom in three separate cases in a 372 day period. And though most criminal prosecutions resolve with a guilty plea (*see Padilla v. Kentucky*, 559 U.S. 356, 372–73 (2010) ("pleas account for 95% of all criminal convictions")), Isom took his charges to trial and won two of three times. As Justice Hart noted in her dissent "[a]cquittals in criminal trials are not common in Arkansas; a defendant's acquittal in two separate criminal trials is obviously even rarer." (App. 26). Even if it wasn't a "preexisting animus" that caused Pope to "twice take Mr. Isom to trial without sufficient evidence," there should be no doubt that Pope was "especially familiar with Mr. Isom." *Id.*

When Isom was lawfully paroled on the convicted charge, Pope traveled to Little Rock (about 180 miles roundtrip) to meet with Jack Gillean, the Governor's executive assistant for Criminal Justice. The reason for the meeting was that Pope wanted Isom's parole "rescind[ed]" and Isom "returned to prison." (App. 321). On Gillean's letter back to Pope, he copied Monticello's state representative, the Chief of Police, the director of the state prison system, and two members from the Post Prison Transfer Board. (App. 322). Gillean's response showed the gravity of Pope's concern with Isom. Even if Pope's entreaty to the Governor was part of his "ordinary" duties, as the Arkansas court found, it demonstrated a magnitude of interest and involvement far and above that shown in *Williams*.

Multi-judge panel versus a fact-finder

Just as Pope had deeper involvement with Isom as a prosecutor, his judicial role was greater as well. Whereas Chief Justice Castille sat on a multi-judge panel deciding an appeal, Pope sat as the finder-of-fact in Isom's coram nobis hearing. As Justice Wood observed Pope made a "number of close discretionary decisions" and "each of these decisions weighed against Isom when the witnesses' testimony appeared to be inexplicably inconsistent." (App. 31). Because of the nature of appellate review, Pope's factual findings were reviewed only for clear error. Indeed, the Arkansas Supreme Court's opinion gave tepid acceptance to Judge Pope's factual findings, acknowledging inconsistent testimony and conflicting evidence but acceding to the fact-finder's ability to determine the "weight of the evidence" and to make "credibility determinations" that will not be reversed "merely because we

would have viewed the evidence differently.” (App. 8, 10). The Court should grant review because of the heightened need for reliability where the death penalty is concerned. *Cf., Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (explaining the heightened need for reliability in sentencing decisions where the death penalty is involved).

3. Any doubt regarding Pope’s disdain for Isom is dissolved by his conduct at the hearing

Though Isom is not required to show actual bias, any doubt left by the previous prosecution is settled by Judge Pope’s treatment of the coram nobis case. As set forth in Justice Hart’s dissent, when Isom sought discovery at the heart of the reinvestiture, “Judge Pope acted as an advocate *opposed* to Mr. Isom, not a neutral arbiter” by “threaten[ing] Mr. Isom’s attorney with Rule 11 sanctions.” (App. 28). When one of the investigating officers gave testimony favorable to Isom on the same issue, Judge Pope “interjected” with the suggestion that “[the witness] has hearing problems sometimes” and “declared a recess.” (App. 29). As Justice Hart explained “[w]hen a circuit judge, sitting as the finder of fact, takes it upon himself to rehabilitate a witness and then orders a recess that could reasonably be interpreted as giving the State a chance to woodshed that witness, the judge’s impartiality might reasonably be questioned.” *Id.*

Justice Hart and Justice Wood agreed that all the “close ‘discretionary’ calls” and “credibility determinations” in the case went against Isom. (App. 29–30, 31). Most egregiously, Judge Pope credited testimony from a pre-trial hearing that was

expressly abandoned by the witness at the coram nobis hearing. Judge Pope strained convention to find facts adverse to Isom. Isom presented a contemporaneous medical record that stated quite clearly that Lawson attempted an identification on April 4th and presented the testimony of the author of the note who stated it was accurate. But Judge Pope disregarded the note because the nurse did not define the common word “attempt.” (App. 40). Such contortions with the evidence show a failure to “hold the balance nice, clear, and true between the state and the accused.” *Tumey*, 273 U.S. at 532.

CONCLUSION

WHEREFORE, for all the reasons set forth above, Isom respectfully requests that the Court issue a writ of certiorari to the Supreme Court of Arkansas.

Respectfully submitted,

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