

1 didn't change the essential point of the -- of -- of the
2 argument. And, in fact, Petitioner said here today that
3 even if the district attorney had a flat policy and
4 didn't look at any individual cases, that would still be
5 a recusal problem.

6 And I -- I think that the -- the
7 participation or the involvement of other justices is --
8 is really one of the core problems here. Because under
9 the Petitioner's point of view, it really can't happen,
10 because they -- they will be tainted by the justice who
11 they're looking at. They're collegial. It's a
12 collegial process, he says. And because of that, they
13 can't really know what they're -- whether they've been
14 affected by what he did. And so we really have a -- a
15 dead end or -- or a circularity here, Your Honor,
16 because there's -- there's nowhere to go.

17 And if you look to -- to pick up on earlier
18 questions, if you look at this Court's historic
19 practices, as it's termed in recusal matters, it is to
20 refer a recusal motion to an individual justice, and
21 that's it.

22 Now, under Petitioner's approach, I think
23 that's seriously problematic, a difficulty for the
24 Court.

25 You have two options: Either to continue

1 that practice, having held, if you adopt Petitioner's
2 point of view, that the failure to recuse, the erroneous
3 failure to recuse, taints the votes of every other
4 justice on the Court, but the Court declines to look at
5 the issue; or you adopt a new practice in which the
6 Court, in fact, looks at the recusal of -- the
7 individual recusal and makes a decision for itself,
8 which puts it in the position of deciding who the
9 members of the Court will be on any particular case.

10 JUSTICE SOTOMAYOR: I'm a little confused by
11 this, and this line of argument.

12 What is Pennsylvania? Each individual judge
13 decides whether to recuse, right?

14 MR. EISENBERG: Actually, in Pennsylvania,
15 Your Honor, there was the opportunity for full court
16 review, and Petitioner just didn't avail himself of it
17 in this case. He did in the prior case. So we know the
18 procedure --

19 JUSTICE GINSBURG: I thought we were told
20 that he had to go through the judge who wants to recuse.
21 He cannot make a motion directly to the panel. He has
22 to say, Judge, you should recuse, and I want you to
23 refer the question.

24 MR. EISENBERG: That is a -- a misstatement
25 of the internal operating procedures, Your Honor. The

1 Court held in the Goodheart case, that is cited in
2 Petitioner's brief, that while the decision was in the
3 first instance for the individual judge -- justice, the
4 full court will look at the matter and, if necessary,
5 would tell that justice that he has to recuse.

6 And, in fact, the Court followed the
7 practice of looking at it in the previous case --

8 JUSTICE GINSBURG: One thing is look at it.
9 What triggers the look? That is, is the defendant
10 permitted to say I want the judges who did not
11 participate to make this decision?

12 MR. EISENBERG: Yes, Your Honor.

13 JUSTICE GINSBURG: So --

14 MR. EISENBERG: And counsel did so in a
15 prior case only several years ago. They filed a motion
16 for reconsideration. Justice Castille recused himself
17 on that motion, and the full court went on to decide it.

18 Under the OIPs, motions for consideration go
19 to the individual justice, not to the Chief Justice. So
20 if Petitioner's theory were correct, Justice Castille
21 could have blocked that reconsideration. He did not.
22 He recused himself and passed it to the rest of the
23 court.

24 When, under the OIP, a matter is assigned to
25 an individual justice on the Pennsylvania Supreme Court,

1 a full court matter is assigned to an individual
2 justice. Section 2 of the OIP states explicitly that
3 the assignment neither enhances the power of the
4 assigned judge or diminishes the power of the other
5 Justices ensured to proper disposition.

6 JUSTICE SOTOMAYOR: All right. That's
7 really wonderful. And how about if they got it wrong?

8 MR. EISENBERG: They were never --

9 JUSTICE SOTOMAYOR: Meaning -- it doesn't
10 mean that if a whole court looks at something, it's got
11 it right.

12 MR. EISENBERG: Of course, it --

13 JUSTICE SOTOMAYOR: If there's an ethical
14 standard that says the judge who's been involved in a
15 case shouldn't be there, then they got it wrong on their
16 own rules. If -- if there's a constitutional standard,
17 it doesn't mean they were right, either. They got it
18 wrong if they let him sit.

19 MR. EISENBERG: Yes, Your Honor, but they
20 still face a dilemma, because they have to make a
21 decision about whether the --

22 JUSTICE SOTOMAYOR: But they have to do it
23 no matter what, meaning if -- if the State is telling
24 them look at this, and recuse someone if it's
25 appropriate to do so, then the State has imposed that

1 obligation on them.

2 MR. EISENBERG: Well, the question is
3 whether the Constitution imposes the obligation for the
4 full court to look at. And, in fact, in his recusal --

5 JUSTICE SOTOMAYOR: Nothing about a decision
6 in this case would require that. That's --

7 MR. EISENBERG: In --

8 JUSTICE SOTOMAYOR: That's a feature unique
9 to Pennsylvania. In many other States, including this
10 Court, it goes up to the individual judge.

11 MR. EISENBERG: In his recusal motion, Your
12 Honor, at page 200 in the Joint Appendix -- I'm sorry,
13 at page 202 in the Joint Appendix, you'll see that the
14 Petitioner made exactly this argument.

15 He said, "Indeed, due process requires" --
16 emphasis in the original -- "requires that the full
17 court decide due process-based recusal claims."

18 And I think on Petitioner's theory, that
19 would be true because it's a constitutional issue, and
20 the failure to decide it potentially taints the rest of
21 the court so that the action of the entire court is
22 automatically invalid.

23 And that's, I think, not what due process
24 requires, because at the appellate level, the process is
25 not the individual judge, it's the court. And the

1 recusal or nonrecusal of an individual judge does not in
2 and of itself automatically result in a deprivation of
3 due process, because he is not the process. The court
4 is the process.

5 And you look at a variety of circumstances
6 to decide whether the other members of the court --
7 under an objective standard, you can't know what they
8 are doing subjectively, of course. But under the same
9 objective standards applied in Caperton, to determine
10 whether there is a probability of actual bias on the
11 part of the other members of the court, whether it's a
12 court of three, or a court as some en banc courts can
13 be, a court of 15. Under the Petitioner's view, even
14 the 15-to-nothing vote would be automatically,
15 constitutionally invalid. And we don't think that
16 that's --

17 JUSTICE KENNEDY: But if -- if we say that,
18 then we say that being a judge on a 15-judge court
19 doesn't really make much difference. You -- you don't
20 have a duty, and you don't have an obligation. You
21 can't persuade your colleagues. It's very hard for us
22 to write that kind of decision.

23 MR. EISENBERG: May I, Your Honor?

24 Your Honor, I think the answer is what the
25 Pennsylvania Supreme Court states in its Section 2 of

1 its IOPs. On every court of every size, it is the duty
2 of each individual justice to make an independent
3 determination following his oath to do the right thing,
4 and that is why the court is not automatically invalid.

5 Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Mr. Lev, four minutes remaining.

8 REBUTTAL ARGUMENT OF STUART B. LEV

9 ON BEHALF OF THE PETITIONER

10 MR. LEV: Thank you.

11 Let's start with the passage of time. In
12 our view, the passage of time isn't the relevant factor.
13 It's that it's the same case.

14 This is -- even though this case has lasted
15 a very, very long time through numerous different
16 hearings and delays, this is the same case. And so what
17 you had was Chief Justice Castille participating in this
18 case as both the prosecutor and a judge in the same
19 case. And that's where the problem -- that's where the
20 due process problem starts.

21 What separates this out from the ethical
22 rules is that this is an extreme and rare case. That's
23 what Caperton was talking about, where the ethical rules
24 were not sufficient to cover the problems here. And we
25 know that this is an extreme and rare case because

1 there's no other case like it, right? There's no other
2 case that Respondents have cited to, and none that we
3 found, where a judge in this situation has sat and
4 decided on the case.

5 JUSTICE ALITO: Well, this may be an extreme
6 case, but if we do not say any personal participation
7 requires recusal under the Constitution, what other
8 clear line can you give us?

9 MR. LEV: Well, to the extent that Caperton
10 is not a clear line, I think we're -- we're still with
11 Caperton. If you want to clarify the line of Caperton,
12 it is about the -- the judge's participation in a
13 significant decision-making in the case. And where the
14 issues before them are related to that decision-making,
15 that's -- that's the line I would suggest that you can
16 draw in this case.

17 On -- on question two, if you accept the
18 Respondent's position, what you would be saying is it's
19 okay to have one -- one biased judge on an appellate
20 panel, or two, or three, so long as the majority voted
21 in favor were not biased. And that's not appropriate
22 under the Due Process Clause, the idea of fairness, the
23 public confidence in the integrity of the fairness of
24 the system requires that each judge be free from bias.

25 And lastly, I would say about referring to

1 the full court, we did that. We asked, if you look at
2 our motion to recuse that's in the Joint Appendix, I
3 think at Section 4 of our motion says if Judge Castille
4 denies this, we ask that the full court hears it. And
5 Justice Castille, using his power as the Chief Justice,
6 blocked that. He said, I'm going to deny the motion to
7 recuse, and I'm going to deny referral to the full
8 court.

9 So we did what we could to have the full
10 court hear it, and we weren't able to get that.

11 Thank you very much.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 The case is submitted.

14 (Whereupon, at 11:56 a.m., the case in the
15 above-entitled matter was submitted.)

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