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IN THE SUPREME COURT OF THE UNITED STATES

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TERRANCE WILLIAMS, :

Petitioner : No. 15-5040

v. :

PENNSYLVANIA. :

- - - - - x

Washington, D.C.

Monday, February 29, 2016

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:56 a.m.

APPEARANCES:

STUART B. LEV, ESQ., Assistant Federal Defender, Philadelphia, Pa.; on behalf of Petitioner.

RONALD EISENBERG, ESQ., Deputy District Attorney, Philadelphia, Pa.; on behalf of Respondent.

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1 P R O C E E D I N G S

2 (10:56 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next in Case 15-5040, Williams v. Pennsylvania.

5 Mr. Lev.

6 ORAL ARGUMENT BY STUART B. LEV

7 ON BEHALF OF THE PETITIONER

8 MR. LEV: Mr. Chief Justice, and may it  
9 please the Court:

10 Due process does not allow a district  
11 attorney to make the decision to seek the death penalty  
12 against the defendant, and then in the same case become  
13 a judge of the conduct of the prosecutor who carried out  
14 that decision and obtained that result.

15 In this case, at -- when he was district  
16 attorney, Chief Justice Castille made a discretionary  
17 individualized decision based upon a review of the facts  
18 that in his view, death was the appropriate sentence to  
19 seek.

20 CHIEF JUSTICE ROBERTS: Does that make a  
21 difference, the nature of his decision? Let's say he  
22 had a policy. He says, I think every case in which a  
23 defendant is convicted of first degree murder, that we  
24 ought to seek the death penalty and leave it to the  
25 jury. Maybe the jury will agree or not, but I'm going

1 to seek the death penalty in every case where there's a  
2 conviction of first degree murder.

3 Would you have the same recusal problem?

4 MR. LEV: I think there would be, yes,  
5 because that policy itself would be a decision that he  
6 makes. Pennsylvania law gives the district attorney --

7 CHIEF JUSTICE ROBERTS: Oh, no, I know that,  
8 but it's a categorical decision. In other words, he  
9 doesn't look at the particulars of that case. He has a  
10 policy that he's adopted -- you know, whether you think  
11 it's a good policy or not -- that doesn't depend upon  
12 the particular facts, simply on the facts of what the  
13 conviction is.

14 MR. LEV: That would still raise due process  
15 concerns, because that policy would have led to a major  
16 decision within the adversary process.

17 JUSTICE ALITO: Well, what if the case was  
18 simply in the office and he had supervisory  
19 responsibility over everything that occurs in the  
20 office, but it's a big office. If a question arose,  
21 somebody could bring it to him, but there isn't any  
22 indication of personal involvement. Would that be  
23 enough?

24 MR. LEV: Supervisory authority might be  
25 enough, depending upon the issue. When the issue goes

1 directly towards the conduct of the prosecutions in his  
2 office, it implicates the integrity of the office and  
3 the reputation of the leadership.

4 JUSTICE ALITO: You see, the problem --

5 MR. LEV: -- that narrow circumstance --

6 JUSTICE ALITO: Yeah. The problem that --  
7 that is presented by this case is not -- is where this  
8 constitutional line is going to be drawn. You want us  
9 to get into -- get pretty deeply into the issue of a  
10 constitutional recusal policy for judges. So it's  
11 really not enough to just say what happened here was  
12 bad.

13 Let's assume that -- that that is the case.  
14 Assume for the sake of argument -- I'm not saying one  
15 way or the other -- but how far does this go? And  
16 that's what I'm -- that's what I'm interested in.

17 So supervisory authority would be enough,  
18 you said, but it depends on the issue? Why would it  
19 depend on the issue?

20 MR. LEV: Because the issue is directly  
21 related to that supervisory authority.

22 JUSTICE KENNEDY: Well, what -- what is the  
23 rule, then, that you're formulating, so that we can  
24 answer Justice Alito's questions and similar questions?  
25 Recusal is required when, and fill in the blank.

1           MR. LEV:            When the prosecutor has direct  
2 personal involvement in a substantial decision in the  
3 case, and the issue before the court reflects upon that  
4 decision.

5           JUSTICE GINSBURG:        I -- I thought that  
6 your -- your particular position was that a judge cannot  
7 sit on any case where, as the district attorney, he  
8 signed on to the death penalty.

9           MR. LEV:            That would be, Your Honor, an  
10 appropriate decision, an appropriate due process rule  
11 for this Court to reach, but it's not a rule you need to  
12 reach in this case.

13          JUSTICE GINSBURG:        Well, what short of that  
14 is? I thought -- I thought critical element is, he was  
15 the district attorney, he signed off on the death  
16 penalty; some 20 odd years later, he -- he's a judge, he  
17 cannot sit on that case. I thought that was your  
18 position.

19          MR. LEV:            Our -- our case takes that, but  
20 also looks at the other circumstances of the case. That  
21 includes the nature of the issue.

22          JUSTICE ALITO:         But that's the -- that's the  
23 line-drawing problem. Why does it matter that it's the  
24 death penalty? What if it was not a capital case, but  
25 he -- he signed the indictment?

1           MR. LEV:           I think the death penalty only  
2 matters for Eighth Amendment purposes. If it was not a  
3 capital case, if he had direct personal participation in  
4 the case and faced an issue that was related to that  
5 level of participation, that -- that involvement that he  
6 had, that would still be a due process --

7           JUSTICE ALITO:        What if he signed the  
8 indictment?

9           MR. LEV:           I'm sorry?

10          JUSTICE ALITO:        He signed the indictment.  
11 Let's say the -- the former -- the then-prosecutor  
12 signed the indictment, and there are thousands of  
13 indictments in a county like Philadelphia, so --

14          MR. LEV:           That --

15          JUSTICE ALITO:        That would be enough?

16          MR. LEV:           No. The signing of the indictment  
17 would not enough. But if his assistants came to him and  
18 said we don't know if we have enough evidence to charge  
19 this person with this crime, what do you think? And he  
20 said I've reviewed the facts, and there's enough to  
21 charge, go ahead. That would be the direct personal  
22 involvement as opposed to the --

23          JUSTICE KAGAN:        You're saying that the  
24 signature would not be enough because that could be  
25 pro forma? Is that what you're saying?

1 MR. LEV: Yes.

2 CHIEF JUSTICE ROBERTS: What if you had a  
3 situation where he was directly involved in a matter  
4 that had nothing to do with the issue that came up  
5 later? You know, he -- the -- the assistant comes in  
6 and says we've got a real question here, you know, he  
7 wants a third extension of the trial date and should we  
8 oppose it or not. And he thinks about it and says,  
9 yeah, let's oppose it. And then 29 years later, there's  
10 an issue about a -- you know, a Brady violation.

11 Is he recused from sitting on that Brady  
12 violation case?

13 MR. LEV: If -- if the decision he's made  
14 was only about some procedural matter that had no  
15 substantive relationship to the crime, then that would  
16 certainly be a much weaker court. And in the absence of  
17 any other circumstances --

18 CHIEF JUSTICE ROBERTS: Can you give me --  
19 can you give me -- much weaker? Can you give me a  
20 yes-or-no on my hypothetical?

21 MR. LEV: I would say no. In the absence of  
22 any other circumstances, that would not be a due process  
23 case.

24 JUSTICE KENNEDY: Under that answer, then,  
25 why doesn't the Brady violation problem drop out of the

1 case? And that's not an argument for -- for -- an extra  
2 argument for recusal.

3 MR. LEV: Because I think in this case the  
4 Brady violation goes directly to his role in making the  
5 decision. This is a Brady violation about sentencing,  
6 and it relates to the decision he made to seek the death  
7 penalty. And in addition, it goes to his essential role  
8 as the chief prosecutor.

9 JUSTICE KENNEDY: Well, he didn't know about  
10 the Brady violation. The Brady violation basically  
11 occurred in -- in the course of trial.

12 MR. LEV: He -- the -- the record --

13 JUSTICE KENNEDY: I mean after they sought  
14 the death penalty.

15 MR. LEV: That -- that's correct. The  
16 record doesn't show that he had any personal knowledge  
17 of the Brady violation at the time, but -- but a  
18 substantial Brady violation certainly calls into  
19 question the integrity of the office as a whole, and not  
20 just the individual --

21 JUSTICE KENNEDY: Well, then, that doesn't  
22 follow with the rule that you gave me at the outset.  
23 You should recuse yourself when, and now -- now you're  
24 adding -- if there's a question that involves a  
25 substantial integrity -- a substantial question

1 involving the integrity of the office? So that's an  
2 added --

3 MR. LEV: In -- in that case --

4 JUSTICE KENNEDY: That's an added factor in  
5 your analysis?

6 MR. LEV: No. I think that in my analysis  
7 it's -- it's an issue that relates directly to the  
8 decision that's being made by the prosecutor --

9 JUSTICE KAGAN: So I'm -- I guess I'm --

10 MR. LEV: -- to their personal involvement.

11 JUSTICE KAGAN: I guess I'm a little bit  
12 unclear as to what you're arguing. I mean, one rule  
13 could be did the judge have some significant involvement  
14 in a critical trial decision as a lawyer. Is that your  
15 rule, or are you adding something to that rule?

16 MR. LEV: That would be, I think, a -- a  
17 rule consistent with this Court's ruling in Murchison  
18 that you can't have -- that a fair trial in a free  
19 society does not allow the prosecutor who prefers the  
20 charges to become the judge of that. But I don't think  
21 that's a rule you necessarily have to reach in this  
22 case. Caperton tells us to look at all of the  
23 circumstances of the case. And that's what I'm  
24 suggesting we do here: We look at all of the  
25 circumstances. And --

1 JUSTICE KENNEDY: I -- I still don't see how  
2 the Brady violation fits into the formula you want us to  
3 adopt, unless you're amending it to say anything that  
4 involves the integrity of the office while you were the  
5 head of the office.

6 MR. LEV: I think more importantly, Justice  
7 Kennedy, that the Brady violation fits in because that  
8 is how the trial prosecutor carried out the decision  
9 that Chief Justice Castille had made. And so her  
10 conduct in carrying out that decision has a direct  
11 relationship to the issue itself.

12 JUSTICE GINSBURG: We don't have a Brady  
13 issue before us. The only issue is the recusal, right?

14 MR. LEV: That's correct.

15 JUSTICE GINSBURG: So we don't have -- the  
16 merits of the Brady issue are not in the case. But even  
17 the question that you're raising, you have prior  
18 opportunities to do that. You didn't raise it when  
19 there were prior post-conviction applications. So why  
20 aren't you precluding?

21 MR. LEV: That we didn't raise the recusal  
22 issue? Is that what you're asking me --

23 JUSTICE GINSBURG: Yes.

24 MR. LEV: -- Your Honor?

25 In the prior post-conviction litigation, we

1 didn't have the information that we have at this time,  
2 and that's the two critical pieces of evidence of  
3 information here. One is the memorandum that authorized  
4 the death sentence that showed the kinds of factors  
5 District Attorney Castille looked at in making that  
6 decision and showed that it was he who made that  
7 decision. We didn't have that before.

8           The second factor would be the fact that it  
9 was a Brady issue, and that there had been evidence that  
10 had been suppressed and findings by a lower court judge  
11 that the prosecutor had done so willfully. So it was  
12 those two factors that were new to the case that caused  
13 us to file the recusal motion.

14           CHIEF JUSTICE ROBERTS:           There is a concern  
15 about sandbagging, though. I mean, if you do have a  
16 case where somebody has that information, I think the  
17 best thing to do would be to, you know, put it in a --  
18 the back drawer, take your chances on -- on getting an  
19 acquittal. And if you don't, then you say, aha, the  
20 judge could have recused him or herself, and our -- our  
21 remedy is we get to go back and do it all again.

22           MR. LEV:           I recognize the Court's concern of  
23 sandbagging. It's similar to the concern the Court  
24 expressed in Strickland in ineffectiveness cases, that  
25 lawyers would -- would try to create error so that they

1 could give a open door or back door to the defendant on  
2 appeal. I think that we've seen that judges across the  
3 States have been diligent in protecting against  
4 sandbagging.

5 CHIEF JUSTICE ROBERTS: Well, Strickland's  
6 very different. I mean, you may think it's pretty  
7 unlikely that attorneys are going to deliberately commit  
8 error so that they have a later problem. But it's  
9 another thing if you're talking about a fact about the  
10 judge's prior involvement.

11 MR. LEV: I'm not sure I can agree with you,  
12 Your Honor, that it's unlikely. I've had that argument  
13 raised many times during the course of my practice. But  
14 even --

15 CHIEF JUSTICE ROBERTS: Not against you.

16 MR. LEV: Not against me.

17 (Laughter.)

18 MR. LEV: But even if it is unlikely, I  
19 think sandbagging, for whatever concern, can be  
20 addressed by the lower courts and certainly isn't a  
21 reason to narrow or not apply a due process analysis.

22 CHIEF JUSTICE ROBERTS: Well, I guess it's  
23 not a case of sandbagging, but it's somehow related in  
24 that the information you're talking about would have  
25 been information that seriously undermined the defense

1 your client was presenting. In other words, the  
2 information goes to the nature of a prior relationship.  
3 And his whole argument and defense was, I didn't know,  
4 you know, who this person was. I had no contact with  
5 him at all.

6 So, you know, in what sense does that -- the  
7 material that you're complaining about now is the last  
8 thing he would want to have come -- come out at his  
9 trial.

10 MR. LEV: In at least two different senses,  
11 I think. One is, is if this material were produced  
12 before trial. Before Mr. Williams testified, before he  
13 chose what defense he would present, perhaps counsel who  
14 only met Mr. Williams the day before trial would have  
15 had the opportunity to talk to him about this evidence  
16 and -- and counsel him and confer with him of what would  
17 be appropriate.

18 My second part of the answer would be --

19 CHIEF JUSTICE ROBERTS: Is that -- well,  
20 just so I understand, you're saying the evidence might  
21 have been sufficient to persuade him not to lie?

22 MR. LEV: Might have been sufficient for  
23 counsel to be able to develop the -- the understanding  
24 with the defendant about what facts were important and  
25 what wasn't, and what might be a better defense than the

1 defense this 19-year-old -- this 19-year-old young man  
2 with little counseling hoped to present.

3 But -- but I would say even more is -- is  
4 the materiality in this case goes to sentencing. And  
5 there are many examples of capital cases where -- in  
6 evidence where a defense of not guilty was offered at  
7 trial.

8 JUSTICE SOTOMAYOR: Counsel, am I correct  
9 that Mr. Draper, his accomplice, did not come forward  
10 until later? So he didn't know that the accomplice  
11 would say that there was a different story to tell at  
12 all, correct?

13 MR. LEV: That's correct. He did not know  
14 that prior.

15 JUSTICE SOTOMAYOR: And he did not know that  
16 the sexual abuse could form a very potent defense to a  
17 death penalty because there was independent proof of it.

18 MR. LEV: For sentencing purposes, yes.  
19 And -- and the --

20 JUSTICE SOTOMAYOR: The prosecutor, in fact,  
21 told the trial judge that there wasn't any independent  
22 evidence of sexual abuse by this man of other people,  
23 correct?

24 MR. LEV: Correct.

25 JUSTICE SOTOMAYOR: And in fact, the records

1 show there was.

2 MR. LEV: Correct.

3 CHIEF JUSTICE ROBERTS: The independent  
4 evidence you're complaining about involved the defendant  
5 himself, correct?

6 MR. LEV: No. The independent -- well, let  
7 me step back. The -- the testimony from Marc Draper  
8 related to the defendant himself. The documents that  
9 were found within the prosecutor's file related to  
10 conduct between the deceased and other young men.

11 JUSTICE ALITO: What do you do with the fact  
12 that Chief Justice Castille was not solely responsible  
13 for the decision in this case? This was a decision by  
14 the Pennsylvania Supreme Court. Now, you say it was  
15 structural error. Suppose that the court had been  
16 divided and Chief Justice Castille voted to affirm the  
17 decision of the lower court. Would that decision still  
18 be invalid on the ground that he shouldn't have been  
19 participating?

20 MR. LEV: It might be. There would still be  
21 a taint to the decision-making process, but perhaps in  
22 that one narrow instance where he voted in the  
23 defendant's favor anyway. But even there, we don't  
24 know.

25 JUSTICE ALITO: Doesn't that mean it's not

1 structural error?

2 MR. LEV: I don't -- I don't think so  
3 because even there we don't know what his role within  
4 the decision-making process. Perhaps it was a case  
5 where he already saw a majority, he had already  
6 persuaded a majority of the judges -- justices to vote  
7 in his favor and so -- to vote against it and then he  
8 thought his vote was -- was a vote that he could make  
9 without injecting this issue. The problem is that --

10 JUSTICE ALITO: So he might have persuaded a  
11 majority to vote to reverse, and then he turned around  
12 and he wrote an opinion saying that there should be an  
13 affirmance.

14 MR. LEV: The problem is we don't know what  
15 happened within the decision-making structure, and we  
16 can't know what happened within the decision-making  
17 structure. And that's why the rules should be that --  
18 that a defendant should be entitled, anyone should be  
19 entitled to a panel of appellate judges where there are  
20 no judges with bias.

21 JUSTICE ALITO: If we agree with you,  
22 doesn't that lead inevitably to the rule that a majority  
23 of the judges on a multi-judge panel have the authority  
24 to require the recusal of a colleague?

25 MR. LEV: I -- that's an interesting

1 question.

2 (Laughter.)

3 MR. LEV: And I think it would depend upon  
4 the rules of each court. I don't think due process  
5 requires that there be any kind of review by some  
6 greater panel or --

7 JUSTICE ALITO: Well, wouldn't they --  
8 wouldn't that have to be the consequences? Suppose  
9 that -- suppose you make a recusal motion. You want  
10 Chief Justice Castille recused, and the other justices  
11 on the Pennsylvania Supreme Court say we think that he  
12 should be recused, and we're afraid that if we go ahead  
13 with this decision with his participation, the decision  
14 is going to be subject to attack down the road. And we  
15 can't allow that to happen, so we're going to require  
16 him to be recused in order to prevent him from tainting  
17 our decision-making process or creating at least the  
18 appearance that the decision-making process is tainted.  
19 So that would have to be a consequence of your rule,  
20 would it not?

21 MR. LEV: Not necessarily. The --

22 JUSTICE ALITO: They could just take their  
23 chances.

24 MR. LEV: Or the consequence of the rule  
25 could be that they informally go to the justice.

1 JUSTICE ALITO: And he says, no, I disagree  
2 with you.

3 MR. LEV: If -- if the rule in the State  
4 court -- if the rule of the court is that the ultimate  
5 decision lies with the justice, then that's the rule.  
6 And they -- and they take the chances because that's the  
7 rule that the courts adopted, and that's a perfectly  
8 appropriate and fine rule.

9 JUSTICE KAGAN: There's something --

10 JUSTICE BREYER: What's awfully difficult in  
11 this case is not your case for me. It's not your case.  
12 It's the hundreds -- or not hundreds -- but look at all  
13 the briefs filed. There -- there are disqualification  
14 rules all over the law, and suddenly to turn this into a  
15 constitutional matter as we did in Caperton, which we  
16 did with our eyes open, we don't know what we're getting  
17 into. I mean, there are congressmen who can become  
18 judges who voted on statutes that come before them, as  
19 Justice Black did. There are executive branch officials  
20 who decide all kinds of things, and later on, something  
21 with their name signed on it comes up. When does the  
22 Constitution require it or not? So that's why I think  
23 you're getting these questions.

24 My question is: Is there a way of avoiding  
25 this? And -- and the -- the thing that is suggested

1 by -- by the other side is that you did ask for  
2 reconsideration. Reconsideration would have taken place  
3 without the chief justice because he had retired.  
4 Reconsideration can be pretty perfunctory, or it might  
5 be serious and thorough.

6 Is there anything -- is there a way for us  
7 to send this back and say, you said you reconsidered it;  
8 we're not certain what that reconsideration consists of;  
9 reconsider it.

10 (Laughter.)

11 JUSTICE BREYER: I mean, is there a way to  
12 do that, and what do you think of that? That's what  
13 they're suggesting.

14 MR. LEV: Let -- there's a lot of -- of  
15 questions that fit in there. So let me try to start.

16 The -- in my view, the Pennsylvania Supreme  
17 Court did not reconsider this case because they denied  
18 the motion for reconsideration. Had they granted the  
19 motion for reconsideration and then said we'll take  
20 another look at this without Chief Justice Castille,  
21 that's the remedy that we --

22 JUSTICE BREYER: Can we tell them to do  
23 that?

24 MR. LEV: Yes.

25 JUSTICE BREYER: Yes.

1 MR. LEV: That's the remedy that we're  
2 asking for.

3 JUSTICE BREYER: So -- so we could say,  
4 given all the facts, of which there are quite a few, and  
5 the filing of a motion for reconsideration, and the fact  
6 that they may not have done it, go reconsider it,  
7 period. End of -- end of opinion. Can we do that?

8 MR. LEV: I would simply phrase it slightly  
9 differently, and --

10 (Laughter.)

11 JUSTICE BREYER: That's what I was hoping.

12 (Laughter.)

13 MR. LEV: And -- and say what we're not  
14 asking for is to reconsider the decision that's already  
15 been made. What we're asking for is to go back into the  
16 position before the error was committed and hear the  
17 case fresh.

18 JUSTICE KAGAN: Well, do they have  
19 to hear --

20 JUSTICE ALITO: Can we do that --

21 JUSTICE KAGAN: Excuse me.

22 JUSTICE ALITO: -- without holding that  
23 there was a dupe -- a constitutional violation? What  
24 would be our authority to require them to do it over  
25 again?

1           MR. LEV:           It would have to be because  
2 there's a constitutional violation.

3           JUSTICE KAGAN:        There's something  
4 unsatisfying about the remedy that you're requesting,  
5 right? Because if the idea is that one judge can affect  
6 a whole panel, which seems right to me, but presumably  
7 that effect doesn't go away the moment that we send it  
8 back and they have to deal with it again, so aren't --  
9 don't they continue to be tainted in some way?

10          MR. LEV:           You face that same issue in -- in  
11 the Caperton case and the Lavoie case in -- and -- and  
12 granted the relief of sending it back for a new appeal.  
13 That may be there, and it may be that -- that the  
14 remaining justices who heard the case -- and the  
15 Pennsylvania Supreme Court is constituted differently,  
16 should it go back. There were three new justices  
17 elected this last November and took office in January.

18           So the remaining justices may have to  
19 consider whether or not they can put aside the prior  
20 proceedings and start from fresh, or whether they're  
21 tainted. And we do that all the time. Whenever a case  
22 is reversed and sent back to a lower court judge,  
23 or that judge has to make a decision to look at this  
24 case in light of the guidance they've gotten from the  
25 higher court, then I trust that the judges will be able

1 to look at themselves and do that.

2 JUSTICE GINSBURG: But there's one big  
3 difference between, I think, what Justice Breyer was  
4 suggesting and I think what you're asking.

5 You wouldn't be satisfied if what the --  
6 what the Pennsylvania Supreme Court was asked to do was  
7 simply to rule, again, on the matter of rehearing. You  
8 want a de novo appellate review; isn't that right?

9 MR. LEV: That's correct.

10 JUSTICE KAGAN: What is the standard on  
11 rehearing? Is -- is -- it must be a very different  
12 standard, isn't it?

13 MR. LEV: It's compelling circumstances.  
14 And the -- the examples that are given in the commentary  
15 to the rule are things like a "known and obvious mistake  
16 of fact" or "mistake of law." But it's a narrow remedy,  
17 rarely granted, of compelling circumstances. And that's  
18 not what we're asking for. We're asking for a fresh  
19 start.

20 CHIEF JUSTICE ROBERTS: Counsel, I -- I  
21 understand your -- the first two of your three points,  
22 but I don't understand how the third works. This is --  
23 you're concerned that the -- the Chief Justice cited his  
24 record with respect to capital cases in campaigning for  
25 office. I -- that certainly wouldn't be a -- a recusal

1 issue without the other two points, right?

2 MR. LEV: That's correct.

3 CHIEF JUSTICE ROBERTS: Okay. So how does  
4 that have anything to do with the argument in this case?

5 MR. LEV: Our concern for that is that as --  
6 as a candidate, Chief Justice Castille was reported to  
7 have said on multiple occasions, I sent 45 people to  
8 death row. By saying that, he's taking the personal  
9 responsibility for those decisions and for those actions  
10 that I think reflect -- become an additional  
11 circumstance that reflect upon the two other  
12 circumstances we've been discussing, his decision making  
13 and --

14 CHIEF JUSTICE ROBERTS: It's an evidentiary  
15 point for you. It's not an independent ground for  
16 recusal.

17 MR. LEV: Absolutely. It's an added weight  
18 to the pile. But by itself, it would not be a due  
19 process violation.

20 JUSTICE GINSBURG: What weight, if any, do  
21 you think we should give to the current moratorium in  
22 Pennsylvania on the death penalty?

23 MR. LEV: The moratorium is really not  
24 particularly relevant to the question that's before the  
25 Court, and -- and not -- weight should not be given to

1 it. The moratorium is simply the Governor's action of  
2 delaying executions in Pennsylvania.

3 And in -- in Pennsylvania, the Governor has  
4 no power of -- of commutation by himself. Without  
5 having a unanimous recommendation from a Board of  
6 Parole, he can't reduce sentencing. His only power is  
7 to grant reprieve in individual cases, and he's done  
8 that for Mr. Williams to delay execution pending the  
9 receipt of a report from the legislature and possible  
10 action for it.

11 JUSTICE ALITO: When was the last time a  
12 prisoner was executed in Pennsylvania, other than those  
13 instances in which the prisoner decided that he did not  
14 want to pursue appellate remedies?

15 MR. LEV: The -- the three executions in  
16 Pennsylvania since the passage of the new statute in  
17 1978 were all -- were all cases of prisoners who gave up  
18 their rights. I think the last contested execution was  
19 sometime in the early 1960s.

20 JUSTICE ALITO: So what's at issue here is  
21 only the death penalty, not the conviction itself,  
22 correct?

23 MR. LEV: That's right.

24 JUSTICE ALITO: And nobody has -- nobody  
25 other than these so-called volunteers has been convicted

1 since 1978 -- has been executed since 1978?

2 MR. LEV: That's right.

3 But Mr. Williams remains on death row. He  
4 remains in solitary confinement, and subject to the  
5 strict limitations of death row.

6 If I may, Mr. Chief Justice, I'll reserve my  
7 time.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
9 Mr. Eisenberg.

10 ORAL ARGUMENT OF RONALD EISENBERG

11 ON BEHALF OF THE RESPONDENT

12 MR. EISENBERG: Mr. Chief Justice, and may  
13 it please the Court:

14 Petitioner argues that it is Judge  
15 Castille's supposed direct and personal and substantial  
16 involvement with this case that creates the  
17 constitutional due process recusal obligation. But as  
18 he has said here today, such direct involvement in the  
19 case is actually not necessary to his argument at all.  
20 He has said that if the D.A. merely promulgated a policy  
21 in favor of the death penalty and opposing the death  
22 penalty in every case without any involvement in the  
23 individual case, that that would still be a violation of  
24 the due process clause. And I -- I think that very  
25 fundamental --

1 JUSTICE SOTOMAYOR: What do you think of our  
2 jurisprudence that says you can't be judge -- you can't  
3 be prosecutor and judge. And so I'm -- I'm -- what does  
4 it mean to be a prosecutor, if you're not taking  
5 responsibility personally, as he claimed during the  
6 election, for the decision to execute someone, whether  
7 by policy or by individual review? And there was  
8 clearly individual review here.

9 At -- at what point do we give meaning to  
10 the constitutional command that you can't be prosecutor  
11 and judge? I know there's so many different kinds of  
12 recusals. This is the ideal case for someone to make a  
13 due process claim, because the judge here actually  
14 signed his name to his review of the facts and his  
15 decision to seek the death penalty.

16 What -- as I'm looking at most of the  
17 ethical codes, most of the ethical codes would have said  
18 you get off if you made this decision.

19 MR. EISENBERG: Your Honor, I think that's  
20 exactly the point, that the -- that it's the ethical  
21 codes or statutes that really control for this sort of  
22 situation. And that as a constitutional question, this  
23 is not the ideal case at all.

24 JUSTICE SOTOMAYOR: Why?

25 MR. EISENBERG: Because -- because in this

1 Court's Caperton decision, you made it very clear that  
2 it was the totality of the circumstances test that  
3 looked at the -- an intolerable probability of actual  
4 bias in the case, no bright lines, no automatic, no  
5 presumptions. You have to look at the actual -- the  
6 probability of actual bias in the case. And if Justice  
7 Castille's --

8 JUSTICE SOTOMAYOR: Do -- do you think that  
9 the public would find it unusual that someone who makes  
10 a decision as to whether to seek death penalty or not,  
11 that the public wouldn't perceive that as a great  
12 probability --

13 MR. EISENBERG: Your Honor -- I'm sorry.

14 JUSTICE SOTOMAYOR: -- of actual bias?

15 Now, I don't want to talk about -- I don't,  
16 for the moment, the history that there is some cases he  
17 disagreed with. But don't you think, as a reasonable  
18 probability, that that appearance of impropriety is just  
19 present?

20 MR. EISENBERG: I think, Your Honor, that  
21 after 30 years, maybe everybody wouldn't see it that  
22 way, especially if they looked at the rest of his  
23 record, as you have referred to.

24 And I think that the major point, Your  
25 Honor, is that any sort of prior conduct by a judge in

1 his prior life that gives rise to a -- an intolerable  
2 probability of actual bias as the test, it's not limited  
3 in some way to prosecutors, or even to people who  
4 previously had some brief involvement as counsel in a  
5 case.

6 So as the Court has said, one looks at the  
7 psychological tendencies of human beings. That's what  
8 the Court addressed in Caperton. And we know that there  
9 are many cases, as -- as Justice Breyer has referred to,  
10 where judges or justices have been far more involved in  
11 an issue that came before the court, once they became a  
12 judge or justice later on, than Justice Castille was in  
13 this case.

14 There are many instances where judges or  
15 justices worked on an issue, spearheaded an issue,  
16 fought for legislation, for example, for years and years  
17 and years, even may have had it named after them, and  
18 then sat in judgment on the constitutionality or scope  
19 of that legislation.

20 Now, I think that the public would see at  
21 least as much potential for bias in a situation like  
22 that, at least as much possibility that the -- that  
23 given human psychology, a justice in that position would  
24 be reluctant to overturn his or her own statute.

25 The reason that that's not a constitutional

1 violation is because I think that Caperton, and this  
2 Court's law generally, recognize that judges are human  
3 beings, they have prior lives, and that we don't want to  
4 have a situation where the only people who can become  
5 judges and sit on cases are people with no prior  
6 experiences.

7 JUSTICE KAGAN: It's --

8 JUSTICE KENNEDY: Well, the number of amicus  
9 briefs filed by former prosecutors and attorneys belies  
10 and refutes that -- that suggestion, it seems to me.  
11 And Section 455 of 28 U.S.C., where we have rather  
12 mechanical recusal standards, also refutes that.

13 MR. EISENBERG: Well, Your Honor, my point  
14 is not that there can be no bright lines adopted as a  
15 matter of code or of statute. Obviously there can be.  
16 And the court in Caperton was very clear to make clear  
17 in extended discussion that the due process test is  
18 merely a constitutional floor, and that the ceiling is  
19 set by those codes and statutes. That's where you can  
20 draw those sort of bright line tests, Your Honor. And  
21 in fact, as follow up --

22 JUSTICE KENNEDY: No, but you were arguing,  
23 well, this is going to be unworkable. And we know, both  
24 from the briefs and the statutes, that far more rigid  
25 recusal standards are in place and are quite workable.

1           MR. EISENBERG:           Well, they're -- they're  
2 workable, Your Honor, but it's very different to  
3 constitutionalize, in essence to raise the  
4 constitutional floor to the ceiling. And that's  
5 essentially what the defendant is asking for -- the  
6 Petitioner is asking for here, but in a way that is not  
7 really internally consistent --

8           CHIEF JUSTICE ROBERTS:           What would be --

9           MR. EISENBERG:           -- because --

10          CHIEF JUSTICE ROBERTS:           What would be your  
11 standard? I mean, I assume you would agree that in  
12 certain circumstances, a failure to recuse would raise a  
13 constitutional problem.

14          MR. EISENBERG:           Yes.

15          CHIEF JUSTICE ROBERTS:           So how would you  
16 articulate the appropriate test?

17          MR. EISENBERG:           I think the degree of the  
18 prior involvement, and the, among other factors, the --  
19 the timing, the recency of the prior involvement have to  
20 meet the Caperton standard of an intolerable likelihood  
21 of actual bias in the case.

22           And if the -- in a case like this where the  
23 district attorney presides over a large office, has  
24 many, many cases -- during his tenure there were over  
25 two thousand murders in the City of Philadelphia; a

1 great number of the them were death eligible. Even if  
2 20 percent were death eligible, that's 400 cases. He's  
3 not likely to remember the details of any particular  
4 case.

5 JUSTICE KENNEDY: Well, but here, of course,  
6 the essence of the Brady violation has alleged -- as  
7 alleged, is that the evidence was concealed for years;  
8 they didn't know about it.

9 MR. EISENBERG: And he didn't know about it  
10 either, Your Honor. As has been observed, there's  
11 absolutely no allegation that Justice Castille had  
12 anything to do with the violation. So to him, it was --

13 JUSTICE KENNEDY: He didn't know about it  
14 because subordinates in his -- his office, under his  
15 supervision, concealed the facts.

16 MR. EISENBERG: That's -- that was the  
17 allegation, Your Honor. And the assumption that the  
18 Petitioner wants the Court to adopt as a matter of law  
19 is that then, looking at the case 30 years later, he  
20 would be trying to protect himself by hiding that rather  
21 than, perhaps, angry at the people who had done  
22 something wrong. There's no basis in the law --

23 JUSTICE KAGAN: Mr. Eisenberg --

24 JUSTICE SOTOMAYOR: Mr. -- I'm sorry. Go  
25 ahead.

1 JUSTICE KAGAN: If I understood your answer  
2 to the Chief Justice, you said significant involvement  
3 in a critical trial decision would be a critical factor  
4 in deciding when a person had crossed the constitutional  
5 line. You then simply said that there's kind of a  
6 statute of limitations on it, and because this is  
7 30 years ago, that makes a difference.

8 Am I understanding you correctly?

9 MR. EISENBERG: I don't recall that I said  
10 significant involvement in a -- in a significant trial  
11 decision, Your Honor. Certainly, significant  
12 involvement in the trial, and whatever that -- that may  
13 be.

14 And while the death penalty decision --

15 JUSTICE KAGAN: I'm not sure I understood  
16 the difference there. You mean you have to be in trial  
17 in the courtroom as opposed to in the office making  
18 critical strategy decisions about how to prosecute a  
19 case?

20 MR. EISENBERG: No, Your Honor. But the --  
21 the former, actually trying the case, is obviously much  
22 more significant involvement.

23 I'm -- I'm simply saying that it's --

24 JUSTICE KAGAN: Well, just -- I mean, just  
25 go back to what the test is. So it's significant

1 involvement in what, at what time?

2 MR. EISENBERG: Significant involvement in  
3 any matter, in any case or cause that would be likely,  
4 over that period of time, to create a -- an intolerable  
5 probability of actual bias in deciding the issue in that  
6 case.

7 JUSTICE KAGAN: And what time is the  
8 critical time?

9 MR. EISENBERG: There --

10 JUSTICE KAGAN: Is it six months? Five  
11 years? Ten years?

12 MR. EISENBERG: There -- there is no bright  
13 line there, Your Honor, any more than there was in  
14 Caperton. In Caperton you had a judge who received \$3  
15 million in campaign funds during the time that the case  
16 that he was going to decide was pending and about to  
17 reach his court. Had he received \$3,000 or \$30,000, and  
18 had he received it from the same man but 10 or 20 or  
19 30 years earlier, it would have been a different case.

20 And the Caperton decision, in and of itself,  
21 doesn't tell us the answer to all of those other  
22 hypotheticals. But it is clear that those factors  
23 matter. And as they change, the likelihood of -- of an  
24 intolerable probability of actual bias reduced it.

25 JUSTICE KAGAN: But as I understand you, the

1 one factor that seems to be controlling here is the time  
2 limit. And other than that, there's -- everything  
3 points to due process demanding a recusal, except for  
4 the time limit.

5 MR. EISENBERG: It's -- it is, as always, a  
6 balancing of factors, Your Honor. If he had tried the  
7 case, if he had spent a year as the trial prosecutor in  
8 this case did, actually trying the case, going in on the  
9 first murder, going in on the second murder, 30 years  
10 isn't going to matter that much in this -- in that  
11 situation.

12 JUSTICE KAGAN: He made the most important  
13 decision that could be made in this case.

14 MR. EISENBERG: He -- he concurred in the  
15 recommendation to do that, Your Honor.

16 JUSTICE SOTOMAYOR: In what did he concur?

17 JUSTICE KAGAN: I'm sorry. Isn't there a  
18 difference between those two things?

19 MR. EISENBERG: Well, there's something of a  
20 difference in terms of the implication about the level  
21 of his involvement. And the reason that that's  
22 important, Your Honor, is because the question is what's  
23 he going to be remembering and thinking about and  
24 feeling personally committed to when he comes to this  
25 case 30 years later as a judge? That's how you assess

1 the likelihood of actual -- of actual bias.

2 And if, in fact, he spent the time it takes  
3 to read a one-and-a-half-page memo 30 years ago in a  
4 city where there were two thousand cases of murder and  
5 hundreds of other death penalty cases where he was  
6 reading similar murders --

7 JUSTICE KAGAN: Do you think he didn't take  
8 that decision extremely seriously?

9 MR. EISENBERG: I think he took it  
10 seriously, Your Honor, but I think that he took it less  
11 seriously than if he had been -- or involved less  
12 reflection on his part than if he had been making it for  
13 himself in the first --

14 JUSTICE SOTOMAYOR: Did all 2000 murders --

15 MS. EISENSTEIN: I'm sorry, Your Honor.

16 JUSTICE SOTOMAYOR: Did all 2000 cases get  
17 the death penalty treatment?

18 MR. EISENBERG: No, your Honor. But a lot  
19 -- a significant percentage of them --

20 JUSTICE SOTOMAYOR: Were there cases where  
21 he said no to some death penalties?

22 MR. EISENBERG: No, Your Honor. Not --

23 JUSTICE SOTOMAYOR: Were there policies he's  
24 established to establish when death penalty was  
25 appropriate?

1           MR. EISENBERG:           There was no sort of written  
2 policy, Your Honor.

3           JUSTICE SOTOMAYOR:        Ah, that's an  
4 interesting use of words.

5           MS. EISENSTEIN:           Well, I'm not aware of  
6 any --

7           JUSTICE SOTOMAYOR:        Somehow, someone had to  
8 make a decision of where to cut the line.

9           MS. EISENSTEIN:           They looked at each case on  
10 its merits. They looked at the aggravating  
11 circumstances under the statute, and they decided --

12          JUSTICE SOTOMAYOR:        I presume they looked at  
13 mitigators, too.

14          MR. EISENBERG:           Well, they may or may not  
15 have, Your Honor. At the time there was -- there would  
16 have been --

17          JUSTICE SOTOMAYOR:        Well, the memo required  
18 them to talk about some mitigating --

19          MR. EISENBERG:           That's not actually true,  
20 Your Honor.

21          JUSTICE SOTOMAYOR:        Well, this memo --

22          MR. EISENBERG:           This memo did spend a brief  
23 portion of time. In the 500 words of this memo, 450 of  
24 them addressed the facts of the crime relating to  
25 aggravating circumstances, and there were about 50

1 relating to mitigation, Your Honor.

2 Now, we don't know what Justice Castille  
3 thought was significant about the memo. When he read  
4 the memo, he was not required to underline this part or  
5 that part and say this part is important or not. We  
6 only know what he has said in prior cases where recusal  
7 was sought, which was that he treated all of these cases  
8 the same way. He had the same policy and procedure for  
9 all of these --

10 JUSTICE KAGAN: Suppose this case were  
11 exactly the same, except he had done it three years ago.  
12 What would your answer be to that?

13 MR. EISENBERG: I think that would be a much  
14 closer question, Your Honor.

15 JUSTICE KAGAN: What would your answer be?

16 MR. EISENBERG: I'm not sure, Your Honor.

17 JUSTICE ALITO: We're talking about --

18 JUSTICE KENNEDY: So the fact that he spent  
19 30 years in solitary confinement actually helps the  
20 State?

21 (Laughter.)

22 MR. EISENBERG: Well, Your Honor, as we  
23 addressed in our brief, it's -- it's not exactly  
24 30 years in solitary confinement. And the governor who  
25 issued the moratorium -- is in charge of the Department

1 of Corrections. And if he wants to change conditions on  
2 death row, he's certainly free to do so. I don't know  
3 if there's been any request by this defendant or others  
4 to rearrange things in light of his moratorium.

5 JUSTICE ALITO: We are talking about a  
6 constitutional recusal rule which would have very  
7 serious consequences. So if it's -- even if it isn't  
8 absolutely necessary that that rule be very clear,  
9 certainly it is highly desirable that it be very clear  
10 so that everybody can determine with a degree of  
11 certainty when the time -- when the decision is made  
12 whether recusal is constitutionally required or not.

13 And I really don't see a clear rule that  
14 would encompass this situation, other than a rule that  
15 said that a judge may -- is required by the Constitution  
16 to recuse in any case in which the judge had personal  
17 participation as a prosecutor.

18 Anything other than that seems to me to be  
19 pretty fuzzy, but that would be a pretty far-reaching  
20 rule. So can you think of one that is less -- that is  
21 not as far-reaching as that but nevertheless is clear?  
22 If we talk about the number of years that passed or how  
23 significant the -- how significant the issue was or  
24 things of that nature, those are all going to be subject  
25 to a lot of uncertainty and debate.

1           MR. EISENBERG:           They are, Your Honor, but  
2   that's exactly the situation in Caperton that this Court  
3   addressed and ruled on.  There were no such bright lines  
4   that arose out of Caperton, even on a -- a matter that  
5   is of great importance, which is the -- the nature of --  
6   of campaign contributions.

7           What did happen after Caperton, though,  
8   Your Honor, is that some -- there was a model rule, 4.4,  
9   adopted in which a bright line was drawn.  Any amount  
10  over X, \$3,000, \$4,000, is a violation of these rules,  
11  any amount under it is not.  A dollar more is a  
12  violation, a dollar less is not.  That's a clear rule,  
13  Your Honor.  But it was done by a rule, not by a  
14  constitutional mandate.  And it will be up to each  
15  individual jurisdiction what number they plug in there,  
16  what campaign amount they -- contribution amount they  
17  think is the appropriate amount.

18           Now there's also a rule, 211, and that is  
19  somewhat akin to the Federal statute 455 involving prior  
20  involvement by a government lawyer in -- in a case.  And  
21  that really is the argument that the Petitioner has been  
22  making.  He calls it a constitutional Caperton argument,  
23  Your Honor, but he uses the exact language of Rule 211.  
24  And that's -- that would certainly be making the  
25  constitutional floor into the -- into the statutory

1 ceiling. There would be no room in between.

2 But I would like to speak for a bit about  
3 the second question of the case, Your Honor, because I  
4 think it's actually even more troubling than the first  
5 one, and I think it would be a -- a radical departure  
6 from a previously -- from -- from previous practice.

7 The Petitioner's position is that because we  
8 can't know exactly what the other judges on the panel  
9 do, we have to throw out the whole case. We have to  
10 assume, in -- in essence, the worst. We have to assume,  
11 as a constitutional mandate, that all the other justices  
12 or judges were tainted. And that's a reversal of the  
13 essential premise of judicial review, which is that at  
14 least nonrecusable judges follow their oath to apply the  
15 law. And if we do abandon that principle, we have not  
16 just theoretical, but very practical problems.

17 JUSTICE KENNEDY: So I -- I suppose, for  
18 purposes of phrasing the question, to reach questions  
19 here, we -- we will assume that there is bias; we assume  
20 he should have recused. But then is it your submission  
21 that there is harmless error because it was a  
22 multimember panel?

23 MR. EISENBERG: I wouldn't call it --

24 JUSTICE KENNEDY: Is that a fair statement  
25 or not?

1           MR. EISENBERG:           I wouldn't actually -- I  
2   don't think that the phrase "harmless error" is the best  
3   way to describe the situation, Your Honor, because with  
4   a multimember court, the process is the court, not any  
5   individual judge.

6           At the trial level, the judge is literally  
7   the court. So if the judge is constitutionally biased,  
8   there's no issue there. But it's a very different issue  
9   at the appellate level.

10          CHIEF JUSTICE ROBERTS:           I -- just so I  
11   understand the scope of your argument, you would be  
12   arguing the same thing if there were three judges? One  
13   should have recused, that leaves two?

14          MR. EISENBERG:           What I would be arguing,  
15   Your Honor, is that, again, a totality of the  
16   circumstances test applies. Certainly the -- the vote  
17   matters, okay? If it's -- if it's three-to-nothing,  
18   that's better than two-to-one. If it's six-to-nothing,  
19   that's better than four-to-two. The vote is often going  
20   to be highly dispositive.

21          CHIEF JUSTICE ROBERTS:           But there could  
22   be --

23          JUSTICE KENNEDY:           The --

24          MR. EISENBERG:           I'm sorry, Your Honor.

25          CHIEF JUSTICE ROBERTS:           The main

1 circumstance is -- would seem to me to be is a -- a real  
2 fact matter is what the deliberations of the judges were  
3 like. I mean, if the individual who should have been  
4 recused occupied a dominant role in the discussion and  
5 was successful in persuading colleagues and all that --  
6 and of course, that's the sort of evidence you certainly  
7 can't have access to.

8 MR. EISENBERG: Your Honor, of course an  
9 individual justice can be persuasive to other judges or  
10 justices. On occasion, perhaps even a lawyer can be  
11 persuasive. But if so, it's by the power of their  
12 reasoning. And if they are -- if other justices are  
13 persuaded by something other than the power of the  
14 argument, then they're not fulfilling their oaths. If  
15 they're persuaded because they like the person or if  
16 they vote against because they don't like the person --

17 JUSTICE KENNEDY: Suppose you have a very  
18 brilliant trial judge, and the power of his reasoning  
19 is -- it's persuasive and -- and forceful but he's  
20 biased, end of case. You have -- he has to be recused.

21 MR. EISENBERG: Yes, Your Honor. But the  
22 difference here is that the other justices on the  
23 case -- other justices on the case don't have to be  
24 recused. And --

25 JUSTICE BREYER: Well, this is common in the

1 situation where someone's appointed to this Court.  
2 There are a series of cases where he had sat, that  
3 judge. And very often they are decided by the two  
4 people who remain. They don't rehear the whole case.

5 MR. EISENBERG: Yes, Your Honor. And I --

6 JUSTICE BREYER: And in that case, there was  
7 nothing wrong with the participation at the time.

8 MR. EISENBERG: But, Your Honor --

9 JUSTICE BREYER: The harder point is the  
10 judge from Guam, I think, who wasn't supposed to sit in  
11 the Ninth Circuit. And again, I think we -- the  
12 decisions went ahead. The same thing could come up with  
13 recess appointments, and there are many of those. And  
14 -- but I don't know where there's a disqualification of  
15 the judge because of bias. Now, in that kind of  
16 situation, is there any precedent that supports you, or  
17 maybe the other way?

18 MR. EISENBERG: Your Honor, I think that  
19 there are many cases where, after disqualification, the  
20 remainder of the panel goes on to decide the case.

21 JUSTICE BREYER: No, I'm not saying -- what  
22 I'm looking for is a disqualification because of bias,  
23 because in that circumstance there's something biased  
24 about that judge being in that panel. Now, in that  
25 situation --

1 MR. EISENBERG: Your Honor --

2 JUSTICE BREYER: -- I can think of a lot of  
3 others that I've just mentioned.

4 MR. EISENBERG: Your Honor --

5 JUSTICE BREYER: In that situation, are  
6 there instances -- how does it cut? What does the ABA  
7 say about that one and -- and what have you found?

8 MR. EISENBERG: I think it's addressed by  
9 Advisory Opinion No. 71 in the guide for -- for the  
10 counsel from the -- I believe from the judicial  
11 conference. I'm not sure exactly the -- the authority,  
12 but it's an advisory opinion for Federal judges. And it  
13 says that where a judge recuses during the process, the  
14 remaining judges can carry on. And I think that these  
15 recusals will often occur --

16 JUSTICE BREYER: Recuses because -- go  
17 ahead.

18 MR. EISENBERG: -- under -- under Section  
19 455, Your Honor, which, as this Court has described  
20 it --

21 JUSTICE BREYER: Uh-huh.

22 MR. EISENBERG: -- covers both actual bias  
23 and the possibility of actual bias.

24 JUSTICE BREYER: Uh-huh. Uh-huh.

25 MR. EISENBERG: And there's no such

1 distinctions made in the advisory rule. And many of the  
2 cases cited by either Petitioner or ourselves have  
3 actually relied on Advisory Opinion No. 71.

4 Now, under Petitioner's position, that's  
5 impossible because the -- the recused judge has already  
6 participated in the process. It doesn't matter if he  
7 gets out before the vote, and --

8 JUSTICE BREYER: No, no, but there --  
9 there's a difference, you see, where the judge recuses  
10 himself during the process. The remaining judges know  
11 that. And because they know that, they make an effort  
12 to decide it among the two.

13 Where the judge didn't recuse himself during  
14 the process, the other judges take his point of view  
15 into account, just as they would if they're in any  
16 ordinary circumstance. Now, in practice, I think that's  
17 a big difference.

18 MR. EISENBERG: Your Honor, they -- they  
19 always take the other judges' opinions.

20 JUSTICE BREYER: Not -- not in an instance  
21 where you know that you shouldn't because that judge --

22 MR. EISENBERG: But --

23 JUSTICE BREYER: -- should not have  
24 participated.

25 MR. EISENBERG: But under Petitioner's point

1 of view, Your Honor, we can't know that. His whole --

2 JUSTICE BREYER: You can't know it at the  
3 moment.

4 MR. EISENBERG: His whole --

5 JUSTICE BREYER: But -- but what you -- what  
6 you do know at the moment is that the two judges, or  
7 six, or whoever were there didn't think we must ignore  
8 his situation, what he thinks. They didn't think that,  
9 so of course, they didn't.

10 In the situation that they're talking about  
11 in the ABA, I take it the remaining judges do know that  
12 they are not to take into account the opinion of the  
13 judge who is out of it.

14 MR. EISENBERG: But they can't know whether  
15 they were biased by it, Your Honor. That is the  
16 Petitioner's position, is that we can't --

17 JUSTICE ALITO: In -- in --

18 MR. EISENBERG: -- rely on the other judges  
19 to know what may have biased them from whether they  
20 were.

21 JUSTICE ALITO: Well, I --

22 MR. EISENBERG: -- biased by the  
23 participation in some --

24 JUSTICE ALITO: In this case, did the other  
25 justices of the Pennsylvania Supreme Court know about

1 the recusal motion at the time of the decision?

2 MR. EISENBERG: The recusal motion was --  
3 was docketed, Your Honor, and so they undoubtedly knew  
4 about it. And they also knew that prior motions had  
5 been filed. And, in fact, in prior cases, as we've  
6 pointed out, the Petitioner actually essentially  
7 appealed from the individual decision of Justice  
8 Castille not to recuse, and asked the rest of the court  
9 to --

10 JUSTICE SOTOMAYOR: But in the other cases  
11 in which that was the case, no one knew that he was  
12 actually signing off on a review of the cases.

13 MR. EISENBERG: They -- they knew that the  
14 allegation was that he was personally approving them,  
15 Your Honor. That has been known all along. Prior  
16 recusal motions were based on that assertion that he was  
17 personally recusing them. Now, there's any number of  
18 ways in which he could have done that. He could have  
19 hold -- held a conclave. He could have had a week-long  
20 meeting to decide every individual case. He didn't do  
21 that. What he actually did was much less involvement  
22 than that sort of process would have entailed.

23 So the fact that they didn't have the memo  
24 didn't change the essential point of the -- of -- of the  
25 argument. And, in fact, Petitioner said here today that

1 even if the district attorney had a flat policy and  
2 didn't look at any individual cases, that would still be  
3 a recusal problem.

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

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

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

23 You have two options: Either to continue  
24 that practice, having held, if you adopt Petitioner's  
25 point of view, that the failure to recuse, the erroneous

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

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

10 What is Pennsylvania? Each individual judge  
11 decides whether to recuse, correct?

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

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

22 MR. EISENBERG: That is a -- a misstatement  
23 of the internal operating procedures, Your Honor. The  
24 Court held in the Goodheart case, that is cited in  
25 Petitioner's brief, that while the decision was in the

1 first instance for the individual judge -- justice, the  
2 full court will look at the matter and, if necessary,  
3 would tell that justice that he has to recuse.

4 And, in fact, the Court followed the  
5 practice of looking at it in the previous case --

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

10 MR. EISENBERG: Yes, Your Honor.

11 JUSTICE GINSBURG: So --

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

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

22 When, under the IOPs, a matter is assigned  
23 to an individual justice on the Pennsylvania Supreme  
24 Court, a full court matter is assigned to an individual  
25 justice. Section 2 of the IOP states explicitly that

1 the assignment neither enhances the power of the  
2 assigned judge nor diminishes the power of the other  
3 Justices ensured to proper disposition.

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

6 MR. EISENBERG: They were never --

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

10 MR. EISENBERG: Of course, it --

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

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

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

25 MR. EISENBERG: Well, the question is

1 whether the Constitution imposes the obligation for the  
2 full court to look at. And, in fact, in his recusal --

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

5 MR. EISENBERG: In --

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

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

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

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

21 And that's, I think, not what due process  
22 requires, because at the appellate level, the process is  
23 not the individual judge, it's the court. And the  
24 recusal or nonrecusal of an individual judge does not in  
25 and of itself automatically result in a deprivation of

1 due process, because he is not the process. The court  
2 is the process.

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

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

21 MR. EISENBERG: May I, Your Honor?

22 Your Honor, I think the answer is what the  
23 Pennsylvania Supreme Court states in its Section 2 of  
24 its IOPs. On every court of every size, it is the duty  
25 of each individual justice to make an independent

1 determination following his oath to do the right thing,  
2 and that is why the court is not automatically invalid.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 Mr. Lev, four minutes remaining.

6 REBUTTAL ARGUMENT OF STUART B. LEV

7 ON BEHALF OF THE PETITIONER

8 MR. LEV: Thank you.

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

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

19 What separates this out from the ethical  
20 rules is that this is an extreme and rare case. That's  
21 what Caperton was talking about, where the ethical rules  
22 were not sufficient to cover the problems here. And we  
23 know that this is an extreme and rare case because  
24 there's no other case like it, right? There's no other  
25 case that Respondents have cited to, and none that we

1 found, where a judge in this situation has sat and  
2 decided on the case.

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

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

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

23 And lastly, I would say about referring to  
24 the full court, we did that. We asked, if you look at  
25 our motion to recuse that's in the Joint Appendix, I

1 think at Section 4 of our motion says if Judge Castille  
2 denies this, we ask that the full court hear it. And  
3 Justice Castille, using his power as the Chief Justice,  
4 blocked that. He said, I'm going to deny the motion to  
5 recuse, and I'm going to deny referral to the full  
6 court.

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

9 Thank you very much.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 The case is submitted.

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

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<b>A</b>	<p><b>affirm</b> 16:16</p> <p><b>affirmance</b> 17:13</p> <p><b>afraid</b> 18:12</p> <p><b>aggravating</b> 37:10,25</p> <p><b>ago</b> 33:7 36:3 38:11 51:13</p> <p><b>agree</b> 3:25 13:11 17:21 31:11</p> <p><b>ah</b> 37:3</p> <p><b>aha</b> 12:19</p> <p><b>ahead</b> 7:21 18:12 32:25 44:12 45:17</p> <p><b>akin</b> 40:19</p> <p><b>alito</b> 4:17 5:4,6 6:22 7:7,10,15 16:11,25 17:10 17:21 18:7,22 19:1 21:20,22 25:11,20,24 38:17 39:5 47:17,21,24 56:3</p> <p><b>alitos</b> 5:24</p> <p><b>allegation</b> 32:11 32:17 48:14</p> <p><b>alleged</b> 32:6,7</p> <p><b>allow</b> 3:10 10:19 18:15</p> <p><b>amending</b> 11:3</p> <p><b>amendment</b> 7:2</p> <p><b>amicus</b> 30:8</p> <p><b>amount</b> 40:9,11 40:16,16,17</p> <p><b>analysis</b> 10:5,6 13:21</p> <p><b>angry</b> 32:21</p> <p><b>answer</b> 5:24 8:24 14:18 33:1 34:21 38:12,15 54:22</p> <p><b>anyway</b> 16:23</p> <p><b>appeal</b> 13:2 22:12</p> <p><b>appealed</b> 48:7</p>	<p><b>appearance</b> 18:18 28:18</p> <p><b>appearances</b> 1:14</p> <p><b>appellate</b> 17:19 23:8 25:14 42:9 53:22 56:17</p> <p><b>appendix</b> 53:10 53:11 56:25</p> <p><b>applications</b> 11:19</p> <p><b>applied</b> 54:7</p> <p><b>applies</b> 42:16</p> <p><b>apply</b> 13:21 41:14</p> <p><b>appointed</b> 44:1</p> <p><b>appointments</b> 44:13</p> <p><b>approach</b> 49:20</p> <p><b>appropriate</b> 3:18 6:10,10 14:17 19:8 31:16 36:25 40:17 52:23 56:19</p> <p><b>approving</b> 48:14</p> <p><b>arent</b> 11:20 22:8</p> <p><b>argues</b> 26:14</p> <p><b>arguing</b> 10:12 30:22 42:12,14</p> <p><b>argument</b> 1:12 2:2,5,8 3:3,6 5:14 9:1,2 13:12 14:3 24:4 26:10,19 40:21,22 42:11 43:14 48:25 50:9 53:12 55:6</p> <p><b>arose</b> 4:20 40:4</p> <p><b>articulate</b> 31:16</p> <p><b>aside</b> 22:19</p> <p><b>asked</b> 23:6 48:8 56:24</p> <p><b>asking</b> 11:22 21:2,14,15</p>	<p>23:4,18,18 31:5,6</p> <p><b>assertion</b> 48:16</p> <p><b>assess</b> 35:25</p> <p><b>assigned</b> 51:22 51:24 52:2</p> <p><b>assignment</b> 52:1</p> <p><b>assistant</b> 1:15 8:5</p> <p><b>assistants</b> 7:17</p> <p><b>assume</b> 5:13,14 31:11 41:10,10 41:19,19</p> <p><b>assumption</b> 32:17</p> <p><b>attack</b> 18:14</p> <p><b>attorney</b> 1:17 3:11,16 4:6 6:7 6:15 12:5 31:23 49:1</p> <p><b>attorneys</b> 13:7 30:9</p> <p><b>authority</b> 4:24 5:17,21 17:23 21:24 45:11</p> <p><b>authorized</b> 12:3</p> <p><b>automatic</b> 28:4</p> <p><b>automatically</b> 53:20,25 54:12 55:2</p> <p><b>avail</b> 50:14</p> <p><b>avoiding</b> 19:24</p> <p><b>aware</b> 37:5</p> <p><b>awfully</b> 19:10</p>	<p><b>basically</b> 9:10</p> <p><b>basis</b> 32:22</p> <p><b>behalf</b> 1:16,18 2:4,7,10 3:7 26:11 55:7</p> <p><b>beings</b> 29:7 30:3</p> <p><b>belies</b> 30:9</p> <p><b>believe</b> 45:10</p> <p><b>best</b> 12:17 42:2</p> <p><b>better</b> 14:25 42:18,19</p> <p><b>bias</b> 17:20 28:4 28:6,14 29:2 29:21 31:21 34:5,24 36:1 41:19 44:15,22 45:22,23 54:8 56:22</p> <p><b>biased</b> 42:7 43:20 44:23 47:15,19,22 56:17,19</p> <p><b>big</b> 4:20 23:2 46:17</p> <p><b>bit</b> 10:11 41:2</p> <p><b>black</b> 19:19</p> <p><b>blank</b> 5:25</p> <p><b>blocked</b> 51:19 57:4</p> <p><b>board</b> 25:5</p> <p><b>brady</b> 8:10,11 8:25 9:4,5,10 9:10,17,18 11:2,7,12,16 12:9 32:6</p> <p><b>branch</b> 19:19</p> <p><b>breyer</b> 19:10 20:11,22,25 21:3,11 23:3 29:9 43:25 44:6,9,21 45:2 45:5,16,21,24 46:8,20,23 47:2,5</p> <p><b>brief</b> 29:4 37:22 38:23 50:25</p> <p><b>briefs</b> 19:13</p>
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