

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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