Note

Williams v. Pennsylvania: The Intolerable Image of Judicial Bias

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In Williams v. Pennsylvania, *the Supreme Court established a new recusal rule, narrowly tailored to situations in which a judge previously participated as a prosecutor in the same case. In keeping with the Court's decisions in* Caperton v. A.T. Massey Coal *and In re* Murchison*, the Court correctly determined that such direct, prior involvement created an impermissible appearance of judicial bias, such that a judge must recuse himself or herself from the decision. Furthermore, the Court's recusal requirement is necessary in light of the ever-changing political environment and the public's growing distrust of the independence and neutrality of the judiciary. As a result of* Williams*, the Court may find itself turning inward to further examine its own recusal decisions, requiring greater attention to circumstances in which the Justices may have a personal connection to a case or controversy, such that it would create the appearance or existence of actual judicial bias.*

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INTRODUCTION

From the birth of the United States, due process has always been understood to require a trial before an impartial decisionmaker.[1] In the Declaration of Independence, the Founders affirmed "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness."[2] Similarly, the Fourteenth Amendment requires that no state deprive any person of life, liberty, or property without due process of the law, nor deny a person equal protection of the laws.[3]

As a part of these protections guaranteed by the Fourteenth Amendment, due process also guarantees an absence of bias on the part of judges.[4] Under the Due Process Clause, there is an impermissible risk of bias when a judge had prior, significant, and personal involvement as a prosecutor in a critical decision regarding the defendant's case.[5] This risk, therefore, necessitates the judge's disqualification in those instances.[6] Stemming from English common law, the U.S. judicial system further elaborates on the concept of personal involvement, asserting that no man can be a judge in his own case and no man is permitted to try cases in which he has an interest in the outcome.[7] Due

1. Gabriel D. Serbulea, *Due Process and Judicial Disqualification: The Need for Reform*, 38 PEPP. L. REV. 1109, 1110 (2011); *see* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 276 (1855) (asserting that due process traces all the way back to the Magna Carta).

2. Serbulea, *supra* note 1, at 1110 (emphasizing that both the Declaration of Independence and Constitution contain the phrases "life" and "liberty." The Declaration of Independence cites these as "unalienable rights[,]" while the Constitution declares that neither life nor liberty can be deprived without "due process of the law."). *See generally* The Declaration of Independence pmbl. (U.S. 1776) (stating that both "life" and "liberty" are unalienable rights).

3. U.S. CONST. amend. XIV, §1. The due process clause guarantees due process of the law from the states as well as the federal government. *See* Hurtado v. California, 110 U.S. 516, 534 (1884) (holding that the Fourteenth Amendment due process clause restricts the states in the same manner in which the Fifth Amendment due process clauses restricts the federal government).

4. U.S. CONST. amend. XIV, §1 ("Nor shall any State deprive any person of life, liberty, or property without due process of law."); Tumey v. Ohio, 273 U.S. 510, 532 (1927) (asserting that these Amendments' explicit inclusion of "due process of law" reflects a commitment to an impartial and fair judicial system, one that requires judges to "hold the balance nice, clear, and true").

5. U.S. CONST. amend. XIV, §1; By the time the Framers drafted the Constitution, the idea that judges should be impartial was already a well-recognized concept. Dating back as early as the seventeenth century, English common law recognized that neutral judges were crucial to the fair administration of justice, allowing disqualification in cases where judges had both a substantial and a pecuniary interest. *See* Brief for The Constitutional Accountability Center as Amici Curiae Supporting Petitioner at 6, Williams v. Pennsylvania, 136 S. Ct. 1899 (2016) (No. 15-5040) [hereinafter "Brief for The Constitutional Accountability Center"]; *see, e.g.*, Dr. Bonham's Case, 77 Eng. Rep. 638 (C.P. 1610); John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609 (1947).

6. Brief for The Constitutional Accountability Center, *supra* note 5, at 6; *see, e.g.*, *Dr. Bonham's Case*, 77 Eng. Rep. at 652; Frank, *supra* note 5, at 609.

7. In the seventeenth century, Sir Edward Coke, Chief Justice of England's Court of Common

process thus entitles defendants to judicial proceedings in which they may present their case with the promise that no member of the court is predisposed to rule against them.[8] Disqualification of a justice, judge, or magistrate judge is required in any proceeding in which his or her impartiality might be reasonably questioned.[9] Judges are further required by U.S. statutory rules to recuse themselves where they have a personal bias concerning a party or personal knowledge of evidentiary facts in question that concern the proceeding.[10]

It is out of this impartiality requirement and the necessity of absence of bias, actual or perceived, that *Williams v. Pennsylvania* arose. In *Williams*, the Court sought to answer whether a prosecutor who first approved a capital-punishment charge could then, after becoming a judge, adjudicate the defendant's claim that the prosecutor's own office had engaged in misconduct in a subsequent civil proceeding.[11] This case raises two related questions: Did the Constitution require Chief Justice Castille to recuse himself from the case? And, if so, what relief should be granted to Williams?[12] Relying upon prior precedent that effectively

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Pleas, decreed that "no man shall be a judge in his own case," where the phrase "own case" was interpreted to mean a "direct financial interest." *Dr. Bonham's Case*, 77 Eng. Rep. at 652 (K.B. 1609) (holding that members of a board that determined physicians' qualifications could not impose fines and receive those fines); Serbulea, *supra* note 1, at 1113; *see also* Frank, *supra* note 5, at 610 (stating that Coke set standards for his time by putting forth the proposition that no man shall be a judge in his own case).

8. One scholar noted:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him to not hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

Serbulea, *supra* note 1, at 1127 (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927)).

9. *Id.* at 1143.

10. *Id.* at 1121 (citing the Model Code of Judicial Conduct, Rule 2.11, which provides that reasons for disqualifying judges include personal knowledge of disputed facts within the proceeding, or bias); *id.* at 1154 (citing the Connecticut Code of Judicial Conduct requiring that judges recuse themselves in the case of bias, CONN. CODE OF JUDICIAL CONDUCT R. 2.11 (2011) (West, Westlaw through Feb. 1, 2011 legislation)); *id.* at 1158 (citing Iowa code that personal bias is grounds for disqualification, IOWA CODE ANN. §602.1606 (West, Westlaw through 2010 Reg. Sess.)); *id.* at 1159 (citing the Kentucky Code of Judicial Conduct, which mandates recusal for personal bias or for personal knowledge of disputed evidentiary facts, KY. REV. STAT. ANN. §26A.015(2)(a)–(e) (West, Westlaw through 2010 legislation)); *id.* at 1159 n.477 (citing the Louisiana criminal statute, which includes bias or personal interest as grounds for disqualification, State v. Brown, 874 So. 2d 318, 322 (La. Ct. App. 2004)); *id.* at 1161 (citing Michigan Court Rule 2.003, which lists personal bias and personal knowledge of disputed evidentiary facts as ground for disqualification, MICH. CT. R. 2.003(C) (West, Westlaw through June 1, 2010 legislation)).

11. Richard M. Re, *Argument preview: When must a prosecutor-turned-judge recuse from a capital case?*, SCOTUSBLOG (Feb. 23, 2016, 6:47 AM), http://www.scotusblog.com/2016/02/argument-preview-when-must-a-prosecutor-turned-judge-recuse-from-a-capital-case/.

12. *Id.*

established modern-day recusal law, the Court held that "where a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision in the defendant's case, the risk of actual bias in the judicial proceeding rises to an unconstitutional level."[13] As a result, the Court affirmed that due process entitled the defendant, Terrance Williams, to "a proceeding in which he may present his case with assurance" that no member of the court is "predisposed to find against him."[14]

Though both dissents argued that the significant lapse in time and the difference between Williams' earlier criminal proceedings and his current civil complaint did not require recusal, the majority's rule correctly reflects the maxims most recently established in *Caperton v. A.T. Massey Coal Co., Inc.*[15] Because both the appearance and the reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself, *Williams* elevated a widespread state recusal rule to constitutional status—an important step in the creation of a new constitutional law of recusal.[16]

Part I of this Article provides an overview of federal and state statutory requirements that guide judicial recusal procedures.[17] Part I also outlines the background pertaining to the development of the Supreme Court's jurisprudence regarding the Fourth Amendment and judicial recusal.[18] Part II addresses the court's decision in *Williams v. Pennsylvania*, as well as both Justice Roberts' and Justice Thomas' dissenting opinions.[19] Part III analyzes the Court's decision in the context of the Fourteenth Amendment and against prior Supreme Court precedent, in addition to providing an analysis of the potential for perceived bias as compared to the risk of actual bias.[20] Finally, Part IV discusses the impact the decision will have on future judicial recusals and the potential issues that judges

13. Williams v. Pennsylvania, 136 S. Ct. 1899, 1910 (2016); *see also* Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 876–81 (2009) (discussing the current state of the Court's recusal rules).

14. *Williams*, 136 S. Ct. at 1910.

15. *Caperton*, 556 U.S. at 886–87.

16. Richard M. Re, *Opinion analysis: Another step toward constitutionalizing recusal obligations*, SCOTUSBLOG (June 9, 2016, 2:20 PM), http://www.scotusblog.com/2016/06/opinion-analysis-another-step-toward-constitutionalizing-recusal-obligations/.

17. *See generally infra* Part I.A. (discussing the general statutory requirements both at the state and federal level for mandatory judicial recusal).

18. *See generally infra* Part I.B. (explaining prior Supreme Court cases pertaining to judicial recusal under the Fourteenth Amendment).

19. *See infra* Part II (discussing the case at issue in this Note).

20. *See infra* Part III (discussing why the majority opinion is in line with current Supreme Court jurisprudence).

and the Court may face.[21]

I. BACKGROUND

Protecting the reputation of the judiciary is the primary objective of the laws governing judicial recusal in the United States.[22] The need to foster public confidence in the impartiality of the judiciary, in order to protect its reputation, motivated Congress in 1974 to enlarge and clarify the standards for judicial disqualification law.[23] Thus, judicial recusal is governed by statutory provisions at both the state and the federal level.[24] Furthermore, the United States Supreme Court has established a line of precedent that aims to define an objective standard for governing the recusal of judges in cases where the potential for or actual bias exists. This Part will first cover the statutory provisions establishing the rules for recusal and will then discuss the Court's key cases that establish precedent regarding when a judge must recuse himself or herself from the bench.

A. Statutory Requirements for Recusal

Disqualification, or recusal, in the federal courts is governed by two statutes: 28 U.S.C. §§ 144 and 455.[25] Section 144 allows litigants to disqualify a district court judge by filing an affidavit in which they allege facts that create a reasonable inference of bias or prejudice.[26] However,

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21. *See infra* Part IV (explaining the impact this decision will have on future Supreme Court decisions and its corresponding social impact).

22. Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 531 (2005); *see also* Christopher R. Carton, *Disqualifying Federal Judges for Bias: A Consideration of the Extrajudicial Bias Limitation for Disqualification Under 28 U.S.C. § 455(a)*, 24 SETON HALL L. REV. 2057, 2057 (1994) (asserting that "[i]t has long been recognized that the success of the judiciary depends . . . on public confidence in the judicial system").

23. 28 U.S.C. § 455 (1988); Carton, *supra* note 22, at 2057. Section 455 of the United States Code, the general judicial disqualification provision, was amended in 1974. Act of Dec. 5, 1974, Pub. L. No. 93-512, § 1, 88 Stat. 1609. The main purpose behind the section's amendment was to "broaden and clarify the grounds for judicial disqualification" and "to promote public confidence in the impartiality of the judicial process." H.R. REP. NO. 93-1453, at 5 (1974), *reprinted in* 1975 U.S.C.C.A.N. 6351, 6351, 6355.

24. *See infra* notes 25–41 (describing the federal and state statutory provisions governing judicial recusal).

25. *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 737 (1973) [hereinafter "Disqualification of Judges"]; *see also* 28 U.S.C. §§ 144, 455 (1988). A third provision also states that "[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him." 28 U.S.C. § 47 (1988).

26. *Disqualification of Judges*, *supra* note 25, at 737–38; *see also* Carton, *supra* note 22, at 2058–59 (outlining how "Section 144 sets out the procedural requirements that must be complied with by a party seeking recusal for bias or prejudice"). The statute governing judicial recusal states:

> Whenever a party to a proceeding in a district court makes and files a timely and

this portion of the statute applies only to district courts and does not purport to establish general standards of judicial propriety.[27] Section 455, in comparison, has a broader application.[28] This section is directed at judges generally and applies not only in the district courts, but also in the courts of appeals and the Supreme Court.[29] Section 455 states:

> [A]ny justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.[30]

Disqualification for state judges is determined pursuant to state statutes or court rules.[31] Currently, forty-five states and the District of Columbia have adopted the American Bar Association Model Code of Judicial Conduct ("the Code"), either verbatim or in a substantially similar format.[32] Those remaining states that have not officially adopted the Code have promulgated rules based upon standards similar to the Code or are considering adopting the Code itself.[33]

The Code is similar to the federal judicial disqualification statutes, as outlined in Sections 144 and 455.[34] The Code states that "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."[35] The Code elaborates on

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> sufficient affidavit that the judge before whom the matter is proceeding has a personal bias or prejudice against him or in favor of the adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such a proceeding. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists.

28 U.S.C. § 144.

27. *Disqualification of Judges, supra* note 25, at 738.

28. *Id.* Section 455, unlike Section 144, has no procedural requirements with which a party alleging bias must comply. Instead, Section 455 is self-enforcing and mandates disqualification whenever any of its provisions are violated. Carton, *supra* note 22, at 2065; *see also* 28 U.S.C. § 455(a) (noting that any judge must disqualify himself). Section (b) also supports the requirement that the judge holds the primary responsibility for recusing himself. *Id.* at § 455(b).

29. *Disqualification of Judges*, *supra* note 25, at 738.

30. *Id.* at 738.

31. Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 29 (1994).

32. *Id.*; The Code was established in 1972 and revised in 1990 to create a single set of ethical standards for judges and to preserve the overall honor of the judicial branch. *See* LESLIE W. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3 OF THE CODE OF JUDICIAL CONDUCT 3 (2d ed. 1992) (stating that the Code is designed to create a uniform set of ethical standards in order to preserve the integrity of the judiciary); Serbulea, *supra* note 1, at 1122 (explaining that state recusal law takes the form of constitutional provisions, court rules, and statutes).

33. Nugent, *supra* note 31, at 29. *See generally* MODEL CODE OF JUDICIAL CONDUCT CANON 2.11 (2007) (providing a list of instances in which a judge shall recuse himself or herself).

34. *See* Marie McManus Degnan, *No Actual Bias Needed: The Intersection of Due Process and Statutory Recusal*, 83 TEMP. L. REV. 225, 228 (2010) (stating that "28 U.S.C. § 455 governs recusal of *federal* judges and substantially incorporates the Model Code") (emphasis added).

35. *Id.* at 29; *see also* MODEL CODE OF JUDICIAL CONDUCT CANON 2.11 (2007) (providing an

circumstances in which judges must disqualify themselves.[36] There are four circumstances in which judges must recuse themselves from a case.[37] First, when a judge has a personal bias against a party or a party's attorney.[38] Second, when a judge has actual knowledge of disputed facts concerning the proceeding.[39] Third, when a judge or any member of the judge's family living in the judge's household has an economic interest in the subject matter at-bar, or is a party to the proceeding, or has any other more than *de minimis* interest that could be affected by the case.[40] The fourth and final circumstance exists when the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (i) is a party to the proceeding in some capacity (whether personally or as an agent for another); (ii) is acting as an attorney in the case; (iii) is known by the judge to have a more than minimal interest that could be materially affected by the case; or (iv) the judge is aware that he or she is likely to be a material witness in the case.[41]

In response to growing criticism over the subjective nature of Section 455, as well as the "duty to sit" rule, Congress adopted the American Bar Association's Code of Judicial Conduct, Canon 3C, which was subsequently codified with minor changes.[42] Congress had three main objectives in adopting Canon 3C: (1) to conform Section 455 to the ABA Code; (2) to increase public confidence in the impartiality of the judiciary by establishing an objective standard, thus removing the subjectivity at issue in the prior version of Section 455; and (3) to remove the "duty to

express list of circumstances in which a judge is required to recuse himself or herself).

36. Nugent, *supra* note 31, at 29. Without the presence of the circumstances expressly described in the Code, it is less likely that courts would require judges to recuse themselves. To illustrate, if a judge presided over a prior criminal proceeding and thus acquired knowledge of the facts of the case, such as in *Williams v. Pennsylvania*, that judge must then recuse himself in a subsequent proceeding involving one of the parties. State v. D'Ambrosio, 616 N.E.2d 909, 913–14 (Ohio 1993).

37. Nugent, *supra* note 31, at 29–30.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*; *see also* MODEL CODE OF JUDICIAL CONDUCT CANON 2.11 (2007) (listing instances in which a judge must recuse himself or herself).

42. Carton, *supra* note 22, at 2068–69. In April 1973, the Judicial Conference of the United States created the "Code of Judicial Conduct for United States Judges." Code of Judicial Conduct for United States Judges, 69 F.R.D. 273 (1975). The Code was founded upon the American Bar Association's "Code of Judicial Conduct." *Id*. For a brief history of the Judicial Conference, *see* Warren E. Burger, *The Courts on Trial*, 22 F.R.D. 71 (1958). *See generally A Review of the Activities of Judicial Conference Committees Concerned with Ethical Standards in the Federal Judiciary*, *1969-1976*, 73 F.R.D. 247 (1976) (providing a survey of the efforts of Judicial Conference committees that concern ethical standards).

sit" rule.[43] Currently, Section 455 and the ABA Code of Judicial Conduct are nearly identical, as most courts apply an objective test when determining if recusal is warranted, and the notion that judges have a duty to sit has been abandoned.[44]

B. Supreme Court Decisions

Both the federal standards of judicial recusal and the Code aim to create an objective standard mandating when judges should recuse themselves.[45] Similarly, the Supreme Court has, over time, also established an objective standard regarding judicial recusal.[46] In *Tumey v. Ohio*,[47] certain Ohio statutes provided that for those accused of violating the state's Prohibition Act, their trial would overseen by the mayor of the village.[48] Because of the mayor's pecuniary and other personal interests pertaining to the outcome of the trial, the Court was faced with the question of whether this action deprived the accused of due process, and therefore violated the Fourteenth Amendment.[49]

Tumey, the defendant in the case, was arrested and brought before the mayor of the village of North College Hill and subsequently charged with unlawfully possessing alcohol.[50] Because of Ohio state statutes, in addition to his regular salary, the mayor received or retained the amount of his costs in each case he heard.[51] The fees received by the mayor in these cases, however, were only to be paid by the defendant if convicted.[52] The mayor could not receive this supplemental

43. Carton, *supra* note 22, at 2069–70. Congress stated in the legislative history accompanying Section 455 that "the language . . . has the effect of removing the so-called 'duty to sit' and that elimination of this 'duty to sit' would enhance public confidence in the impartiality of the judicial system." H.R. REP. NO. 93-1453, at 5 (1974), *reprinted in* 1975 U.S.C.C.A.N. 6351, 6351, 6355.

44. Carton, *supra* note 22, at 2070–71; *see, e.g.*, United States v. Haldeman, 559 F.2d 31, 139 n.360 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977) (acknowledging that there was a duty to sit before Section 455 was amended, but determining that one of the stated reasons for the new Section 455 was to abolish that duty).

45. Nugent, *supra* note 31, at 30.

46. *See* Degnan, *supra* note 34, at 244 (stating that the Supreme Court's standard under *Caperton* was objective in nature).

47. 273 U.S. 510 (1927).

48. *Id.* at 514–15.

49. *Id.*

50. *Id.* at 515. Tumey was tried and convicted by the Mayor of the Village of North College Hill, Ohio, under Ohio's Prohibition Act. The statutes at issue allowed the mayor to collect $12 in costs for himself and a $100 fine for the village on the condition that Tumey be convicted. Due to this pecuniary interest, Tumey moved to disqualify the mayor, who ultimately denied that request. Mark Andrew Grannis, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382, 392 (1987).

51. *Tumey*, 273 U.S. at 519–20.

52. *Id.* at 520.

compensation if he did not convict those brought before him.[53]

The Court held that this system could only be consistent with due process if the fees typically imposed were small enough in size to be considered *de minimis*.[54] A procedure that offers a possible temptation to a judge to forget the burden of proof required to convict the defendant or to fail to hold the balance "clear and true" between the state and the accused denies the accused due process of law.[55] As a result, the Court held that the Due Process Clause incorporated the common-law rule that "a judge must recuse himself when he has a 'direct, personal, substantial pecuniary interest' in a case."[56] Therefore, the disqualification in *Tumey* resulted both from the mayor's direct pecuniary interest in the outcome and his official motive.[57]

In re Murchison has long been cited as one of the pivotal cases in the development of recusal law, as the Court built upon the objective standard it established in *Tumey*.[58] *Murchison* dealt with a Michigan statute that authorized judges to act as a so-called "one-man grand jury," in which the judge could compel witnesses to appear before him in secret to testify

53. *Id.* Should the mayor convict the defendant before him, sums from the criminal fines were then also deposited to the village's general treasury fund for village improvements and repairs. *See id.* at 521.

54. *Id.* at 531. Because the fees and costs were neither small nor negligible, the Court held that it could not be found to be fair to each defendant brought before the mayor that the prospective of such a large pecuniary loss by the mayor should weigh against his acquittal. *See id.* at 532 (finding that the process of convicting defendants was a violation of their Fourteenth Amendment rights and deprived them of due process of law because the mayor had a financial interest in convicting defendants brought before him); *see also* Brief for The Constitutional Accountability Center, *supra* note 5, at 10 (noting that the Court considered a situation in which the judge had a financial interest, though small in scope, in the outcome of the case because he would receive an addition to his salary if he convicted the defendant).

55. *Tumey*, 273 U.S. at 531.

56. *Id.* at 523. In *Ward v. Village of Monroeville*, considered a companion case to *Tumey*, the Court further elaborated the test established in *Tumey*. 409 U.S. 57 (1972). The Court held that the financial system in place with respect to the case tried in the village was a due process violation that created a possible temptation for bias, as established in *Tumey*. The Court asserted that the fact that the mayor in *Tumey* personally profited from the fines procured did not itself establish the limits of the principle the holding created. In fact, the Court in *Ward* established that the mayor's responsibility for the financial condition of the village created a possible temptation to the average man as a judge to neglect the burden of proof required to convict the defendant because a conviction would ultimately benefit the financial standing of the village. Marie McManus Degnan*, No Actual Bias Needed: The Intersection of Due Process and Statutory Recusal,* 83 TEMP. L. REV. 225, 231 (2010).

57. Grannis, *supra* note 48, at 392. Either ground of disqualification would have been sufficient by itself, as held in *Dugan v. Ohio*, 277 U.S. 61 (1928). In *Dugan*, the Court upheld a conviction and fine imposed by the mayor of Xenia, Ohio, stating that the mayor received a salary that is not dependent on a conviction in a case, and that the mayor has "no executive, and exercises only judicial, functions." *Id.* at 63–65.

58. 349 U.S. 133 (1955).

about suspect crimes.[59] In this case, the petitioners, Murchison and White, were called as witnesses before a one-man, one-judge grand jury.[60] After questioning, both Murchison and White were tried in open court by the same grand jury judge and were sentenced to contempt.[61] Murchison and White objected to being tried by the same judge, arguing that trial before the judge, who had brought forth the complaint against the two men and had also both indicted and prosecuted their case, was a denial of the fair and impartial trial required by the Due Process Clause.[62]

The Court, in rendering its decision, highlighted that a fair trial in a fair tribunal is a basic requirement of due process.[63] To establish fairness, there must be an absence of both actual bias and the probability of unfairness in the trial of cases.[64] As a result, the Court asserted that no man can be a judge in his own case and no man is allowed to try cases in which he has a personal or pecuniary interest in its outcome.[65] Drawing from the precedent established in *Tumey*, the Court further stated that every procedure that offers even a possible temptation to the average man as a judge to not be impartial is a denial of due process.[66] While this rule may bar a judge with no actual bias, in order to function properly courts must have the appearance of justice.[67] Thus, the Court held that it would be improper for a judge to act as a grand jury and later try the very same person accused as a result of the judge's investigations.[68] A fair trial is

59. *Id.* at 133.

60. *Id.* at 134.

61. *Id.* at 135. Murchison was interrogated at length during the judge's secret hearing, during which he was asked about suspected gambling in Detroit and bribery of policemen, as he himself was a Detroit policeman. His responses to the judge's questioning persuaded the judge that Murchison had committed perjury. White also appeared as a witness before the same one-man grand jury, during which the judge questioned him about gambling and bribery. White, however, refused to answer, asserting that under Michigan law he was entitled to have counsel present with him. As a result, the judge charged White with contempt and ordered him to appear and show cause along with Murchison. *Id.* at 134.

62. *Id.*

63. *Id.* at 136. *See also* Herbert B. Chermside, Jr., Annotation, *Disqualification of judge, justice of the peace, or similar judicial officer for pecuniary interest in fines, forfeitures, or fees payable by litigants,* Art. I, 72 A.L.R.3d 375 (1976) (stating that due process of law, as guaranteed by the Fourteenth Amendment and by comparable state constitutional provisions, requires that a party be given a trial by an impartial body).

64. *In re* Murchison, 349 U.S. 133, 136 (1955).

65. *Id.*; *see also* Frost*, supra* note 22, at 538–49 (stating that the rule that "[n]o man shall be a judge in his own case" had been recognized in English law since at least the seventeenth century, operating to disqualify judges from hearing only those cases in which they had a direct pecuniary interest).

66. *Murchison*, 349 U.S. at 136 (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927)).

67. *Id.*; *see also* Offut v. United States, 348 U.S. 11, 14 (1954) (holding that "[J]ustice must satisfy the appearance of justice").

68. *Murchison*, 349 U.S. at 137.

too important to a free and democratic system of governance to allow prosecuting judges to also be trial judges over the charges they previously levied.[69]

The Court continued to establish the relationship between the Due Process Clause and judicial recusal in *Aetna Life Insurance Co. v. Lavoie*, a case that many consider a modern application of *Tumey*.[70] In *Aetna*, a justice on the Supreme Court of Alabama, Justice Embry, cast the determining vote upholding a jury verdict against an insurance company while simultaneously deciding another case pending against a different insurer for the same legal issue.[71] At the time Justice Embry wrote the court's opinion, in addition to having cast the deciding vote, he had a similar bad-faith-refusal-to-pay lawsuit pending against Blue Cross in another Alabama court.[72] Because the decisions of the Alabama Supreme Court are binding on all Alabama courts, Justice Embry's opinion for the Alabama Supreme Court had the effect of strengthening both the legal status and the settlement value of his own case.[73]

As a result, the Court held that when Justice Embry rendered his judgment, he acted as "a judge in his own case."[74] The Court further underscored that its decision answered only the question of under what circumstances the Constitution requires disqualification.[75] The Court

69. *Id.*; *see also* Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 IOWA L. REV. 181, 183 (2011) (highlighting that the "notion of an impartial trial under the direction of an unbiased, neutral judge is a central precept of our system of justice"); *see generally* State v. Bradish, 70 N.W. 172, 172 (1897) (finding that judicial officers who had an interest in the matter before them were disqualified from hearing the case).

70. 475 U.S. 813 (1986); Serbulea, *supra* note 1, at 1130.

71. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 816–17 (1986). In this case, Aetna Life Insurance refused to pay Lavoie's claim for health care expenses related to her hospital stay. Lavoie subsequently filed suit against Aetna, demanding payment for health care expenses and punitive damages for the tort of bad faith refusal to pay a valid claim. Lavoie was ultimately awarded $3.5 million in punitive damages against Aetna after her claims were remanded and brought in front of a jury. Carlton Hilson, Note, *Constitutional Law–Due Process Clause–Litigant's Contributions to Judge's Election Campaign Required Judge's Recusal.* Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009), 40 CUMB. L. REV. 607, 615 (2009–2010).

72. *Lavoie*, 475 U.S. at 822. *See Hilson, supra* note 71, at 615 (noting that "[i]n a five to four per curiam decision authored by Justice Embry, the Alabama Supreme Court affirmed the jury's punitive damages award"). Both of Justice Embry's claims alleged bad faith failure to pay a claim and made a demand for punitive damages. Additionally, Justice Embry's claim against Blue Cross-Blue Shield was a class action, whose class potentially included all justices of the Alabama Supreme Court as members. *Id.*

73. *Lavoie*, 475 U.S. at 823–24.

74. *Id.* at 824 (quoting *Murchison*, 349 U.S. at 133); *see, e.g.*, Serbulea, *supra* note 1, at 1130 (asserting that "the Court's opinion did not decide whether the Alabama justice was actually biased; it only considered whether there was a 'possible temptation . . . not to hold the balance nice, clear and true'").

75. *Lavoie*, 475 U.S. at 828.

elaborated that the Due Process Clause creates the outer boundaries of judicial disqualification; Congress and the states remain at liberty to impose and create stricter standards for judicial disqualification as they see fit.[76]

As new problems emerged, the Court continued to identify additional instances which objectively require recusal.[77] Until *Caperton v. A.T. Massey Coal Co*., Inc., there were only two areas in which due process mandated disqualification: (1) where the judge had a direct, personal, substantial pecuniary interest in the case, and (2) where the judge acted as judge, jury, prosecutor, and complaining witness, and subsequently adjudicated that same case in his or her judicial capacity only.[78] In *Caperton*,[79] the Court was faced with the question of whether the Due Process Clause was violated when a justice on the Supreme Court of Appeals of West Virginia denied a recusal motion despite having received campaign contributions from the board chairman and principal officer of the corporation found liable for the damages.[80] In August 2002, the jury returned a verdict against A.T. Massey Coal Co. ("Massey"), which Massey appealed.[81]

Massey's chairman, Don Blankenship, decided to support Brent Benjamin as a candidate to replace an existing justice on the Supreme Court of Appeals of West Virginia after the verdict, but before the appeal; Benjamin ultimately won.[82] As a result, Caperton moved to disqualify now-Justice Benjamin for lack of due process due to the appearance of impartiality caused by the large amount of political contributions Benjamin received from Blankenship.[83] Justice Benjamin denied the

76. *Id.* at 823 (quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927)). Consistent with the holding in *Tumey*, the Court determined that not every question of judicial disqualification may involve a constitutional question. Thus, matters of kinship, personal bias, state policy, and remoteness of interest may be left up to the discretion of the legislative branch. *See* Hilson, *supra* note 71, at 611. The Court also held that the majority of issues pertaining to judicial disqualification do not rise to a constitutional level. *Lavoie*, 475 U.S. at 820 (quoting FTC v. Cement Inst., 333 U.S. 683, 702 (1948)).

77. Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 877 (2009).

78. Ronald D. Rotunda, *Judicial Disqualification in the Aftermath of* Caperton v. A.T. Massey Coal Co., 60 SYRACUSE L. REV. 247, 247–48 (2010); *Caperton*, 556 U.S. at 890 (Roberts, C.J., dissenting).

79. 556 U.S. 868 (2009).

80. *Id.* at 872.

81. *Id.* The Court awarded Caperton a total of $50 million in damages for fraudulent misrepresentation, concealment, and tortious interference with contractual relations. Massey's appeal was filed after its post-trial motions challenging the verdict were denied. *Id.*

82. In total, Blankenship contributed $3 million to Justice McGraw's campaign, more than the total amount spent by all other Benjamin supporters; Benjamin ultimately won. *Id.* at 873.

83. Richard Gillespie, Note, *Buying A Judicial Seat for Appeal:* Caperton v. A.T. Massey Coal Company, Inc*., is Right out of a John Grisham Novel*, 30 J. NAT'L ASS'N ADMIN. L. JUDICIARY

motion, indicating that he found no objective information to indicate he would be less than fair and impartial.[84] After a rehearing resulting from an additional request for recusal due to photos surfacing of another justice on the court vacationing with Blankenship, the court again reversed the jury verdict in a 3-to-2 decision.[85]

Expounding upon the principles established in *Tumey*, *LaVoie*, and *Murchison*, the Court found a serious risk of actual bias where a person with a personal stake in a case has a significant and disparate influence in electing the judge presiding over the case, either by raising funds or by overseeing the judge's election campaign.[86] The Court's inquiry centered around the contributions' size relative to the total amount of money contributed to the campaign, the total amount spent in the election, and the effect the contributions had on the outcome.[87] The Court also took into consideration the judicial reforms the state had implemented to eliminate both actual partiality and the appearance of partiality, highlighting that the West Virginia Code of Judicial Conduct requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."[88] With these standards in mind, in light of the totality of the circumstances presented in the case, the Court found that Justice Benjamin's failure to recuse himself violated the Due Process Clause and reversed the judgment of the Supreme Court of Appeals of West Virginia.[89]

309, 315 (2010). Caperton moved to disqualify now-Justice Benjamin under the Due Process Clause and West Virginia Code of Judicial Conduct based on the conflict caused by Blankenship's campaign donations. *Caperton*, 556 U.S. at 873–74.

84. Following Justice Benjamin's refusal to recuse himself, in November 2007, the court reversed the $50 million verdict against Massey. *Caperton*, 556 U.S. at 874.

85. Massey also submitted a recusal motion based on Justice Starcher's public criticism of Blankenship's role in the 2004 elections, a request which was granted by Justice Starcher. In his recusal memorandum, Justice Starcher urged Justice Benjamin to also recuse himself, noting that Blankenship's friendship and bestowal of wealth had created a "cancer in the affairs of [this] Court." *Id.* at 875.

86. *Id.* at 884. *See also* Gillespie, *supra* note 83, at 333 (noting that the Due Process Clause had previously not been applied to political contributions, as stated in both Chief Justice Roberts' and Justice Scalia's dissents, because it is an area typically regulated at the state level or through Congress).

87. *Caperton*, 556 U.S. at 884.

88. *Id.* at 888–89 (quoting W. Va. Code of Judicial Conduct, Canon 3E(1)); *see also* U.S.C. § 455(a) (stating that "[a]ny justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned"); *see generally* Carol Morello, *W. Va. Supreme Court Justice Defeated in Rancorous Contest*, WASH. POST (Nov. 4, 2004), http://www.washingtonpost.com/wp-dyn/articles/A23669-2004Nov3.html (during the judicial campaign, Benjamin vowed to "recuse himself in cases involving Blankenship and his company").

89. *Caperton*, 556 U.S. at 890. A totality of the circumstances test considers all the circumstances pertaining to the alleged violation, rather than specified elements. *See* BLACK'S LAW

Despite the concern that the majority had created a rule both overbroad in scope and poorly defined that would "do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case," the Court in *Caperton* highlighted the extreme and rare circumstances under which the case was brought forth.[90] Following the decision, lower federal courts and state courts focused on the majority's "extreme facts" language when reviewing *Caperton* motions.[91] As a result, a litigant faces significant obstacles when challenging a judge's refusal to recuse himself or herself under the *Caperton* standard.[92]

II. DISCUSSION

On October 1, 2015, the U.S. Supreme Court agreed to hear *Williams v. Pennsylvania*, an appeal from the Supreme Court of Pennsylvania concerning judicial bias in a death penalty case. This Part will first discuss the case's factual background, then the majority's decision and the two dissenting opinions.

A. Factual Background

In 1984, Terrance Williams allegedly murdered fifty-six-year-old Amos Norwood in Philadelphia.[93] During the trial in state court, the Commonwealth of Pennsylvania presented evidence that Williams and his friend, Marc Draper, had been standing on a street corner when Norwood drove by.[94] The two requested a ride home from Norwood and directed him to a cemetery instead of the boys' homes.[95] Once there, "Williams and Draper tied Norwood in his own clothes and beat him to

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DICTIONARY POCKET EDITION 726 (3d ed. 2006). Though some factors may occur more frequently than others, the importance of a factor depends upon the particular facts of the case. Whether or not a factor is present also does not determine the outcome of the test. *Caperton*, 556 U.S. at 890.

90. *Caperton*, 556 U.S. at 891 (Roberts, C.J., dissenting); Degnan, *supra* note 56, at 240. In his dissent, Chief Justice Roberts noted that "[h]ard cases make bad law." *Caperton*, 556 U.S. at 899 (Roberts, C.J., dissenting). Justice Scalia, however, emphasizes that the relevant question is if the Court does more good than harm by aiming to correct an imperfection previously created through an expansion of the Court's constitutional mandate. *Id.* at 903 (Scalia, J., dissenting).

91. Degnan, *supra* note 56, at 241.

92. *Id.*

93. Williams v. Pennsylvania, 136 S. Ct. 1899, 1903 (2016). Williams committed two homicides in Philadelphia, the first as a seventeen-year-old and the second shortly after turning eighteen. The same Assistant District Attorney prosecuted both cases. In the first case, at issue in this Article, that prosecutor "aggressively sought a first degree murder conviction and imposition of the death penalty." Brief for Petitioner at 3–4, Williams v. Pennsylvania, 136 S. Ct. 1899 (2016) (No. 15-5040) [hereinafter "Brief for Petitioner"]. However, at that trial, the evidence established that the victim had sexually abused Mr. Williams as a minor, and the jury returned a verdict of third-degree murder. *Id.*

94. *Williams*, 136 S. Ct. at 1903.

95. *Id.*

death."[96] During his testimony at trial, Draper intimated that robbery was the motive for the crime.[97] Williams took the stand on his own behalf and asserted that he was neither involved in the crime, nor did he know the victim.[98]

Also during trial, the prosecutor for the Commonwealth directly asked for permission from her supervisors in the district attorney's office to pursue the death penalty as the desired punishment for Williams.[99] In support of her request, the prosecutor prepared a memorandum that set forth the details of the crime, as well as information regarding two statutory aggravating factors and mitigating facts.[100] Then-district attorney of Philadelphia, Ronald Castille, wrote "[a]pproved to proceed on the death penalty" at the bottom of the document.[101] The prosecutor argued that Williams should receive the death penalty because he killed Norwood "for no other reason but that a kind man offered him a ride home."[102]

The jury found two aggravating circumstances—the murder was committed during the course of a robbery and Williams had a significant history of violent felony convictions—but no mitigating circumstances, and sentenced Williams to death.[103] Over the course of twenty-six years, Williams' conviction and sentence were upheld on appeal, state post-conviction review, and federal habeas review.[104] In 2012, Williams filed a petition pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA").[105] The petition was based on new information provided by Draper, who told Williams' counsel that he informed the Commonwealth

96. *Id.*

97. *Id.* Because the prosecutor had previously worked Williams' first case, evidence following the trial showed that she had in fact recognized the "obvious implication that [Williams'] relationship with Amos Norwood was substantially similar to his relationship with [the first victim]." However, discovery provided to the defense before trial omitted all evidence of Norwood's sexual abuse of minors. Brief for Petitioner, *supra* note 93, at 3–4.

98. *Williams*, 136 S. Ct. at 1903.

99. *Id.*

100. *Id.*

101. *Id.* As the District Attorney, Castille was responsible for managing the Commonwealth's criminal prosecutions and, in potential capital cases, making the final determination of whether the Commonwealth would seek a death sentence. Brief for Petitioner, *supra* note 93, at 2.

102. *Williams*, 136 S. Ct. at 1903 (quoting Brief for Petitioner, *supra* note 93, at 7 (quoting the prosecutor's argument during trial that "Mr. Williams has taken two lives, two innocent lives of persons who were older and perhaps unable certainly to defend themselves against the violence that he inflicted upon them. He thought of no one but himself, and he had no reason to commit these crimes")).

103. *Williams*, 136 S. Ct. at 1903–04.

104. *Id.* at 1904.

105. *Id.*; *see also* Post Conviction Relief Act, 42 PA. CONS. STAT. §9541 *et seq*. (2007) (describing the circumstances for a post-conviction appeal).

in advance of trial that Williams had been in a sexual relationship with Norwood and that relationship was the real motive behind Norwood's murder.[106] Draper asserted that the Commonwealth instructed him to give false testimony that Williams killed Norwood in order to rob him.[107]

The Philadelphia Court of Common Pleas ("PCRA Court") held an evidentiary hearing based on Williams' claims.[108] During the hearing, both Draper and the trial prosecutor testified regarding Williams' allegations of false testimony and suppression of evidence.[109] The PCRA Court ordered the district attorney's office to produce the undisclosed prosecutor and police files.[110] Based on these files and the evidentiary hearing, the PCRA Court found that the trial prosecutor had suppressed material and exculpatory evidence that violated the principals set forth in *Brady v. Maryland* and engaged in "prosecutorial gamesmanship."[111] The PCRA Court stayed Williams' execution and ordered a new sentencing hearing.[112]

In response to the PCRA Court's stay of execution, the Commonwealth submitted an emergency application to the Pennsylvania Supreme Court—nearly three decades after Williams' prosecution.[113] As a result of the disclosure of the trial prosecutor's sentencing memorandum during the PCRA proceedings, Williams was aware of Chief Justice Castille's involvement in the decision to seek the death sentence in his state court trial.[114] For this reason, Williams filed both a response to the Commonwealth's application and a motion asking Chief Justice Castille to recuse himself or, should he decline to do so, to refer

106. *Williams*, 136 S. Ct. at 1904; *see also* Brief for Petitioner, *supra* note 93, at 2 (stating that this new evidence supported Williams' claim that the fifty-six-year-old victim had sexually abused Williams and other underage teens).

107. Draper also revealed that the prosecutor had promised to write a letter on his behalf to the state parole board in exchange for his testimony, a benefit he had previously not disclosed at trial. *Williams*, 136 S. Ct. at 1904.

108. Williams alleged in his petition that "the prosecutor had procured false testimony from Draper and suppressed evidence regarding Norwood's sexual relationship with Williams." *Id.*

109. *Id.*

110. Included in these documents were the trial prosecutor's sentencing memorandum, inclusive of then-District Attorney Castille's authorization to pursue to death penalty. *Id.*

111. *Id.* at 1904; *see also* Brady v. Maryland, 373 U.S. 83, 95 (1963) (holding that a prosecutor's suppression of evidence violated the Due Process Clause). The *Williams* trial court further noted: "Not only did [the trial prosecutor] keep these 'issues' from being presented to the empaneled jury, but she also chose the jury with an eye towards weeding out jurors who might have been sympathetic to victims of sexual impropriety." Brief for Petitioner, *supra* note 93, at 15 n.6.

112. *Williams*, 136 S. Ct. at 1904.

113. At this point, Castille had since been elected to a seat of the State Supreme Court and was currently serving as its Chief Justice. *Id.*

114. *Id.*

the recusal motion to the full court for decision.[115] "Without providing any explanation, Chief Justice Castille denied the motion for recusal and the request for its referral."[116] Just two days later, the Pennsylvania Supreme Court denied the application to vacate the stay and ordered the parties to fully brief the issues raised in the appeal.[117] Subsequently, the Pennsylvania Supreme Court vacated the PCRA Court's order granting relief for the penalty phase of the trial and reinstated the original death sentence.[118]

In addition to joining the majority decision, Chief Justice Castille also authored a concurrence in which he argued that the PCRA Court had "lost sight of its role as a neutral judicial officer" and had stayed Williams' execution for "no valid reason."[119] Chief Justice Castille further stated that the court misapplied the substantive status of *Brady* law.[120] Two weeks after the Pennsylvania Supreme Court's decision, Chief Justice Castille retired from the bench.[121] On October 1, 2015, the United States Supreme Court granted Williams' petition for certiorari.[122] Williams argued that Chief Justice Castille's previous decision to pursue a death sentence against him as a district attorney effectively precluded the chief justice from presiding over Williams' petition to overturn that sentence.[123] Williams also asserted that Castille violated the Due Process Clause of the Fourteenth Amendment by acting as both prosecutor and judge in his case.[124]

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115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 1904–05. Chief Justice Castille and Justices Baer and Stevens joined the majority opinion written by Justice Eakin. Justices Saylor and Todd concurred, though they did not issue a separate opinion. *Id.* at 1905. In its majority opinion, the court rejected Williams' claims of government interference and *Brady* violations on procedural grounds, asserting that Williams had not previously discovered and developed the evidence himself, including the facts disclosed in the files of the prosecutor and police. Brief for Petitioner, *supra* note 93, at 18.

119. *Williams*, 136 S. Ct. at 1905 (citing Commonwealth v. Williams, 105 A.3d 1234, 1245 (Pa. 2014)).

120. *Williams*, 136 S. Ct. at 1905. Chief Justice Castille also denounced what he termed as the "obstructionist anti-death penalty agenda" of Williams' counsel from the Federal Defender's office. He urged the PCRA courts to stay vigilant when it comes to activities of this particular advocacy group, or else the Defender's office could turn post-conviction proceedings into a circus, with themselves as the proverbial ringmasters. *Williams*, 136 S. Ct. at 1905 (quoting *Williams*, 105 A.3d at 1247).

121. *Williams*, 136 S. Ct. at 1905.

122. *Id.*; *see* Williams v. Pennsylvania, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/williams-v-pennsylvania/ (last visited Oct. 9, 2017) (outlining the timing and procedural stages for the case).

123. *Id.*

124. *Id.*

B. Majority Decision

While the Court's due process precedent did not set forth a specific test governing recusal under the facts presented in Williams' case, the majority, led by Justice Kennedy, held that when a judge has prior involvement in a case as the prosecutor, the principles established by the Court in prior recusal decisions must apply.[125] The Court held that under the Due Process Clause, there is an impermissible risk of actual bias when a judge had prior significant and personal involvement as a prosecutor in a decisive decision pertaining to the defendant's case.[126]

The Court explained that due process requires an absence of bias on the part of the judge.[127] Because bias is difficult to discern in oneself, the Court's prior holdings apply an objective standard that avoids having to determine whether actual bias is present.[128] In lieu of asking whether a judge harbors a real, subjective bias, the Court looks to whether a judge in that position is likely to be neutral or whether there is a potential for bias.[129] Relying on *Murchison*, the Court held that an unconstitutional potential for bias exists when the same person serves as both the accuser and the adjudicator in a case.[130] This risk of bias is reflected in the idea that no man can be a judge in his own case and cannot try cases in which he has an interest in the outcome.[131]

This guarantee that no man can be a judge in his own case, according

125. *Id.* Though the Court had not specifically dealt with the factual circumstances of *Williams* previously, the Court had identified a number of scenarios in which a judge's involvement in a case proved to create either the actual existence or the probability of bias such that it required recusal. For more on the circumstances previously identified as impermissible bias, *see supra* Part I for a discussion of prior precedent.

126. *Williams*, 136 S. Ct. at 1905.

127. *Id.* at 190 (quoting *In re* Murchison, 349 U.S. 133, 136 (1955) (finding that fairness requires an absence of actual bias in the trial of cases and that our system of law has always endeavored to prevent even the probability of unfairness)).

128. This objective standard, according to Justice Kennedy, is necessary to establish an enforceable and workable framework that the Court can apply in future circumstances. *Williams*, 136 S. Ct. at 1905.

129. *Id.* (quoting Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 881 (2009) (noting that the objective inquiry is "not whether the judge is actually, subjectively biased, but whether the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.")); *see generally* Mayberry v. Pennsylvania, 400 U.S. 455, 466 (1971) (holding that the Due Process Clause requires that a defendant receive a trial before a judge "other than the one reviled by the contemnor").

130. *Williams*, 136 S. Ct. at 1905 (citing *Murchison*, 349 U.S. at 136–37 (asserting that "every procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law") (quoting Tumey v. State of Ohio, 273 U.S. 510, 532 (1927)).

131. *Williams*, 136 S. Ct. at 1905–06 (quoting *Murchison*, 349 U.S. at 136 ("[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.")).

to Justice Kennedy, would have no substance if it did not disqualify a former prosecutor from sitting in judgment of a case in which he or she made a critical decision.[132] Again relying on *Murchison*, the Court held that a judge cannot be wholly disinterested in the conviction or acquittal of the accused after being a part of the accusatory process.[133] According to Justice Kennedy, no attorney is more integral to the process than a prosecutor who participates in a major adversarial decision such as which penalty to pursue in sentencing.[134] When a judge has advocated for the state in the same case that the judge is asked to adjudicate, a serious question arises as to whether he or she can set aside personal interest in the outcome of the case.[135] Justice Kennedy argued that there is a risk that the judge would be "psychologically wedded" to his or her previous role as a prosecutor, and that he or she would attempt to avoid the appearance of having erred or changed position.[136] Additionally, the judge's own personal knowledge of the case may carry more weight than the parties' arguments to the court.[137]

The Commonwealth argued that *Murchison* does not create a rule that due process requires disqualification of a judge who had significant involvement in making a critical decision.[138] Though the facts of *Murchison* differ from those in *Williams* in many respects, as well as the fact that *Murchison*'s holding did not explicitly apply to the given facts, the Court nevertheless found that *Murchison* applied to the case-at-hand.[139] Factual differences aside, the Court held that the principles

132. *Williams*, 136 S. Ct. at 1906.

133. *Id.* (*citing Murchison*, 349 U.S. at 137). Here the Court notes that the case involved a one-man judge-grand jury proceeding in which the judge called witnesses to testify about suspected crimes. *Id.* The court in *Murchison* overturned this conviction "on the ground that the judge's dual position as accuser and decisionmaker in the contempt trials violated due process." *Id. See Murchison*, 349 U.S. at 137.

134. *Williams*, 136 S. Ct. at 1906.

135. *Id.* The Court makes a similar analysis to that in *Murchison*, in which the Court held that a judge who has been a part of the accusatory process cannot be wholly disinterested in the conviction or acquittal of those who have been accused. *See Murchison*, 349 U.S. at 137.

136. *Williams*, 136 S. Ct. at 1906 (finding that a judge "would consciously or unconsciously avoid the appearance of having erred or changed [his or her] position") (citing Withrow v. Larkin, 421 U.S. 35, 57 (1975)).

137. The Court noted:

> [T]he judge whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination.

Williams, 136 S. Ct. at 1906 (citing *Murchison*, 349 U.S. at 138).

138. *Id.*

139. *Id.* The Court distinguishes the facts presented in *Murchison* by noting they included a single official who investigated suspected crimes, made the decision to charge witnesses, subsequently heard evidence on the charges he brought forth, and finally issued judgments of

explained in *Murchison* are applicable when a judge had a direct, personal role in the defendant's prosecution.[140] Though the majority pointed out the significant lapse of time between the original state court trial and the current proceedings, it explained that the involvement of other actors and the passage of time were simply consequences of a complex criminal justice system in which a single case may be litigated through multiple proceedings over a long period of time.[141] The Court held that this only heightens the need for objective rules to prevent the operation of bias that could otherwise be concealed.[142] Within this large adversarial system, a single prosecutor may still have an influence that is nevertheless significant, bearing the responsibility for any number of critical decisions.[143] Even if a significant period of time passes before the prosecutor is once again involved in the matter, the case may implicate the effects of his or her original decision.[144] In such circumstances, Justice Kennedy argued, there remains a serious risk that a judge would be influenced by an improper, even if inadvertent, motive to both validate and preserve the result previously obtained.[145] According to the Court, having a number of different parties involved in trying the case, in addition to the time elapsed between the current case at-bar and the original proceedings, does not negate the duty to withdraw.[146] Rather, the former prosecutor must recuse himself or herself in order to ensure the neutrality of the judicial process, specifically when it involves evaluating circumstances his or her own critical decision may have caused.[147]

With these factors in mind, the Court concluded that Chief Justice Castille's authorization to seek the death penalty was a significant, personal involvement in a critical trial decision.[148] As a result, Chief Justice Castille's failure to recuse himself from Williams' case presented

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conviction and imposed sentences. *Id.* By contrast, *Williams* presents a case in which a judge had an earlier involvement in a prosecution and could have been one of several prosecutors working on the case. *Id. See also Murchison*, 349 U.S. at 135 (asserting that the petitioners in the case objected to a "trial before the judge who was at the same time the complainant, indicter and prosecutor").

140. *Williams*, 136 S. Ct. at 1906–07.

141. *Id.*

142. *Id.*

143. *Id.* (noting that while not as visible as a one-man grand jury, a prosecutor such as Justice Castille could have been responsible for critical decisions including what charges to bring, whether to extend a plea bargain, and which witnesses to call).

144. *Id*.

145. *Id.*

146. *Id.*

147. *Id.* This is a critical factor on which the dissenting judges base their argument. It is because of this passage of time that they believe Chief Justice Castille's involvement is not improper, as it cannot be considered a single case. *E.g.*, *Williams*, 136 S. Ct. at 1914 (Thomas, J., dissenting).

148. *Williams*, 136 S. Ct. at 1908.

an unconstitutional risk of bias that violated the Due Process Clause.[149] According to Justice Kennedy, there can be no doubt that the decision to seek the death penalty is a critical choice in the adversarial trial process.[150] The decision to ask a jury to end the defendant's life is one of the most serious discretionary choices a prosecutor can make.[151] The Court also found that there was no doubt that Chief Justice Castille had a significant role in making that decision.[152] Without his consent, the Commonwealth would not have been able to seek a death sentence for Williams.[153] Chief Justice Castille's own comments while running for judicial office also evidenced his personal responsibility in capital sentencing decisions.[154] During his election campaign, multiple news outlets reported that he stated that he "sent forty-five people to death rows" as the District Attorney.[155] The Court stated that Chief Justice Castille's willingness to take responsibility for the death sentences imposed during his time as District Attorney indicated that, in his own opinion, he played an important role in those sentencing decisions and considered his involvement to be an important duty required of his position and his office generally.[156]

Additionally, the Court cited to recusal standards that required disqualification under the circumstances of the case.[157] At the time

149. *Id.*

150. *Id. See also* Evan Bernick, Williams v. Pennsylvania*: Supreme Court Holds Judge Can't Hear Case He Once Prosecuted*, THE FEDERALIST SOCIETY (June 13, 2016), http://www.fed-soc.org/blog/detail/williams-v-pennsylvania-supreme-court-holds-judge-cant-hear-case-he-once-prosecuted (noting that Justice Kennedy pointedly stated that the Court would "not assume that then-District Attorney Castille treated so major a decision as a perfunctory task requiring little time, judgment, or reflection on his part").

151. *Williams*, 136 S. Ct. at 1907; *see also* Richard A. Oppel Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES (Sept. 25, 2011), http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html?_r=0 (highlighting that our legal system places an incredible concentration of power in the hands of prosecutors, and that so much influence now resides with prosecutors that "in the wrong hands, the criminal justice system can be held hostage").

152. *Williams*, 136 S. Ct. at 1907–08.

153. *Id.*

154. *Id.* at 1907.

155. *Id. See* Brief for Amici Curiae Former Judges with Prosecutorial Experience in Support of Petitioner at 13, Williams v. Pennsylvania, 136 S. Ct. 1899 (No. 15-5040) [hereinafter "Brief of Former Judges with Prosecutorial Experience"] (quoting Katharine Seelye, *Castille Keeps His Cool in Court Run,* PHILA. INQUIRER, (Apr. 30, 1993) (reporting Castille as saying, "we locked up Nicky Scarfo . . . I've sent 45 people to death rows")); *see also* Lisa Brennan, *State Voters Must Choose Next Supreme Court Member*, LEGAL INTELLIGENCER, (Oct. 28, 1993) (presenting how the candidates for the Pennsylvania Supreme Court plan to handle special interest groups' influence on the race and Castille citing his record for how such groups may be able to distinguish his position on key topics without explicitly asking).

156. *Williams*, 136 S. Ct. at 1907–08.

157. *Id.* at 1908; s*ee* Brief for American Bar Association as Amici Curiae Supporting Petitioner

Williams filed his recusal motion with the Pennsylvania Supreme Court, Pennsylvania's Code of Judicial Conduct required judges to recuse themselves from any proceeding in which "they served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer, concerning the matter."[158] In light of the standards in place in many jurisdictions and Chief Justice Castille's own admissions regarding his role in the sentencing to death of forty-five individuals during his time as District Attorney, the Court concluded that Chief Justice Castille's significant, personal involvement in a critical decision in Williams' case gave rise to an unacceptable risk of actual bias.[159] This risk gravely endangered the appearance of neutrality, and Chief Justice Castille's participation in the case, according to the Court, "must be forbidden if the guarantee of due process is to be adequately implemented."[160]

Having decided that Chief Justice Castille's participation in Williams' proceedings violated due process, the Court turned to whether Williams was entitled to relief.[161] Previously, the Court did not have to decide whether a due process violation stemming from a jurist's failure to recuse amounts to harmless error if the jurist is on a multimember court and the jurist's vote was not the deciding vote.[162] In *Williams,* the Court concluded that a due process violation that results from the participation of an interested judge is a defect that is not amenable to harmless-error review, regardless of whether the judge's vote was dispositive.[163] The fact that the interested judge's vote was not the determining vote could simply indicate that the judge was successful in persuading most

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at 15 n.19, Williams v. Pennsylvania, 136 S. Ct. 1899 (2016) (No. 15-5040) [hereinafter "Brief for American Bar Association"]("Prosecutors with managerial authority and supervisory lawyers must make reasonable efforts to ensure that all lawyers and non-lawyers in their offices conform to the Rules of Professional Conduct.") (quoting ABA Comm'n on Prof'l Ethics & Responsibility, Formal Op. 467 (2014) (citing MODEL RULES OF PROF'L CONDUCT r. 5.1, 5.3)); *see also* MODEL CODE OF JUDICIAL CONDUCT r. 2.11(A)(1), (A)(6)(b) (2011) (stating that no judge may participate "in any proceeding in which the judge's impartiality might reasonably be questioned," including where the judge "[s]erved in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding").

158. *Williams*, 136 S. Ct. at 1908 (citing PENN. CODE OF JUDICIAL CONDUCT, Canon 3C (1974, as amended)).

159. *Williams*, 136 S. Ct. at 1908.

160. *Id*. at 1907–08 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

161. *Williams*, 136 S. Ct. at 1909.

162. *Id*. (reasoning that the Court's previous reasoning in *Lavoie* now fails under a due process test); *see also* Aetna Life Ins. Co., v. Lavoie, 475 U.S. 813, 827–28 (1986) (deciding "whether a decision of a multimember tribunal must be vacated because of the participation of one member who had an interest in the outcome of the case," where that member's vote was outcome determinative).

163. *Williams*, 136 S. Ct. at 1909 (citing Puckett v. United States, 556 U.S. 129, 141 (2009)).

members of the court to accept his position, and therefore does not lessen the unfair impact this may have on the affected party.[164] The Court further stated that the appearance of neutrality is not based solely on one jurist, but on the larger institution of which he or she is a part.[165] Both the appearance and reality of impartial judges are necessary to the public's trust in judicial pronouncements and thus to the rule of law itself, according to the Court.[166] As a result, the Court held that an unconstitutional failure to recuse constitutes structural error[167] even if the judge in question did not cast a deciding vote.[168] The Court, therefore, vacated the judgment of the Supreme Court of Pennsylvania and remanded for further proceedings.[169]

C. Chief Justice Roberts' Dissent

Chief Justice Roberts, joined by Justice Alito, dissented, asserting that the Due Process Clause does not require Chief Justice Castille's recusal.[170] Chief Justice Roberts argued that the majority's reliance on *Murchison* failed to recognize the critical differences between *Williams* and *Murchison*.[171] In *Murchison*, the Court found a violation of the Due Process Clause when a judge resolved the same legal question, based on the same facts, that he had already considered as a grand juror in that same case.[172] In contrast, Williams did not allege that Chief Justice Castille had any prior knowledge of the contested facts at issue in Williams' habeas petition.[173] Nor did Williams assert, according to Chief Justice Roberts, that Chief Justice Castille previously made any decision

164. *Williams*, 136 S. Ct. at 1909.

165. *Id.*

166. *Id.*

167. *See* Weaver v. Massachusetts, 137 S. Ct. 1899, 1907 (2017) (defining a structural error as one that affects the framework of how the trial proceeds, instead of being simply an error in the trial process).

168. *Williams*, 136 S. Ct. at 1909–10.

169. *Id.* at 1910 (Roberts, C.J., dissenting).

170. *Id.* Chief Justice Roberts contends that the majority opinion rests on "proverb" instead of actual precedent, specifically that of "no man can be a judge in his own case." *Id.* at 1910.

171. *Id.* at 1910. Chief Justice Roberts contends that to overcome the presumption of honesty and integrity in those serving as judges, the majority relies on *Murchison* to its own detriment. *See also* Withrow v. Larkin, 421 U.S. 35, 47 (1975) (holding that there is "a presumption of honesty and integrity in those serving as adjudicators").

172. *Williams*, 136 S. Ct. at 1910 (Roberts, C.J., dissenting); *see also In re* Murchison, 349 U.S. 133, 138 (1955) (noting that the judge in question "was doubtless more familiar with the facts and circumstances in which the charges were rooted than was any other witness").

173. *Williams*, 136 S. Ct. at 1910–11 (Roberts, C.J., dissenting). Similar to the position forwarded by Justice Thomas, Chief Justice Roberts here appears to make the distinction between Williams' prior criminal case and his current petition for habeas corpus as two distinct cases in controversy. *See id.*

on the questions raised by that specific petition.[174]

Chief Justice Roberts further asserted that *Murchison* did not support the majority's rule for two reasons.[175] First, *Murchison* found a due process violation because the judge had accused the witnesses of contempt while sitting as grand jury, and subsequently presided over their trial on that same charge while sitting as a judge.[176] Because the judge presided directly over the initial phase of the case, he had made up his mind about the only issue in the case before the trial even started—a prejudgment that violated the Due Process Clause.[177] Secondly, *Murchison* did not apply to *Williams* because *Murchison*'s central concern regarded the judge's recollection of the testimony he heard as grand juror, giving way to the likelihood that it would "weigh far more heavily with him than any testimony" given at trial.[178] For that reason, "the Court found the judge was at risk of calling on his own personal knowledge and impression of what had occurred in the grand jury room."[179]

Chief Justice Roberts further asserted that neither of the two due process concerns raised in *Murchison* were present in Williams' case.[180] According to Chief Justice Roberts, this case concerned whether Williams may overcome the procedural bar on filing an untimely habeas petition, requiring him to show that the government interfered with his ability to raise such claims.[181] Neither the procedural question nor Williams' merits claim concerned the pretrial decision to pursue the death

174. *Williams*, 136 S. Ct. at 1911 (Roberts, C.J., dissenting). Chief Justice Roberts notes that this case arises out of Williams' fifth habeas petition, filed in state court in 2012. *Id.* Specifically, his habeas petition raises the issue of whether he was entitled to a new sentencing proceeding because at trial the prosecution failed to turn over certain evidence. *Id.*

175. *Id.* at 1913. In acknowledging that *Murchison* differs in many respects from the current case, Justice Roberts contends that this Court makes a significant understatement and fails to recognize the critical differences between the two cases. *See also Murchison*, 349 U.S. at 133 (discussing the facts of the case, in which a Michigan law authorized the same person to sit as both judge and jury in the same case).

176. *Williams*, 136 S. Ct. at 1913 (Roberts, C.J., dissenting); *see also Murchison*, 349 U.S. at 134–35 (describing how the judge charged the witnesses, from whom he had previously heard testimony, with criminal contempt, presided over their trial and finally, convicted them).

177. *Williams*, 136 S. Ct. at 1913 (Roberts, C.J., dissenting).

178. *Id.* (citing *Murchison*, 349 U.S. at 138).

179. *Williams*, 136 S. Ct. at 1913 (Roberts, C.J., dissenting) (determining that the testimony the judge had previously heard while serving as a grand juror was "likely to weigh far more heavily with him than any testimony given" at trial) (citing *Murchison*, 349 U.S. at 138).

180. *Williams*, 136 S. Ct. at 1913 (Roberts, C.J., dissenting).

181. The only claim Williams sought to raise on the merits was that the prosecution failed to turn over specific evidence. *Id.* at 1913. *Murchison*, on the other hand, presented the problem of whether having been a part of the accusatory process precluded the judge from being wholly disinterested when called upon to decide that exact same issue. *See Murchison*, 349 U.S. at 137.

penalty.[182] Chief Justice Roberts contended that Chief Justice Castille had not made up his mind about both the evidence in question or the legal question at-issue in Williams' habeas petition, neither of which were ever presented to him while serving as a prosecutor.[183] Williams did not assert that Chief Justice Castille had any prior knowledge of the alleged failure of the prosecution to turn over undisclosed evidence, nor did he assert that Chief Justice Castille made any prior decision with respect to that particular evidence in his role as prosecutor.[184]

As a result, Chief Justice Roberts challenged the majority decision, asserting that the Due Process Clause did not prohibit Chief Justice Castille from presiding over Williams' case.[185] Chief Justice Roberts did, however, concede that this does not mean it was appropriate for Chief Justice Castille to do so. Regardless of whether it was ethical or appropriate, Chief Justice Roberts contended that because the Due Process Clause does not mandate recusal in this case, state authorities are the proper channel to determine whether recusal should be required.[186]

D. Justice Thomas' Dissent

Justice Thomas also filed a dissent, asserting that the majority's conclusion—that Chief Justice Castille's review of Williams' petition for state post-conviction review violated the Due Process Clause—was flawed.[187] Justice Thomas argued that the specter of bias itself in a judicial proceeding is not sufficient to establish a deprivation of due process.[188] Rather, he contended that the Court should have left this decision to the judgment of legislatures, bar associations, and individual adjudicators.[189]

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182. *Williams*, 136 S. Ct. at 1913 (Roberts, C.J., dissenting).

183. *See id.* at 1914 (noting that the one-and-a-half-page memo prepared by Assistant District Attorney Foulkes did not discuss the evidence that Williams claims was withheld by the prosecution at trial).

184. *Id.* Chief Justice Roberts goes on to assert that even if Chief Justice Castille remembered the contents of a memo delivered to him almost thirty years later, the memo could not have given him any special impression of facts or issues not raised specifically in that memo. *Id.*

185. Chief Justice Roberts further contends that there was no objective risk of actual bias present in this case, and thus, it was not fundamentally unfair for Chief Justice Castille to participate in the decision of an issue that had nothing to do with his prior participation in the case. *Id.*

186. *Williams* cites to a number of state court decisions and ethics opinions that prohibit a prosecutor from later serving as a judge in a case that he has in some fashion previously prosecuted, which Chief Justice Roberts notes do have value. *Id.*

187. *Id.* at 1914 (Thomas, J., dissenting).

188. *Id.*

189. *See id.* at 1915 (asserting that to rule in Williams' favor would be to ignore the Court's own posture and precedents commanding less of state post-conviction proceedings than those involving criminal prosecutions that involve defendants whose convictions are not yet final).

Justice Thomas focused his dissent on the fact that Williams was not a criminal defendant, a fact overlooked by the majority's ruling.[190] Williams' complaint was, rather, that the due process protections in his state post-conviction proceedings—an entirely separate civil matter—were lacking.[191] As a result, Justice Thomas contended that this was not a continuation of the original criminal trial.[192] Thus, a "single case" in which Chief Justice Castille acted as both a prosecutor and an adjudicator did not exist.[193] Chief Justice Castille was serving in the district attorney's office when Williams' criminal proceedings ended and his death sentence became final.[194] Justice Thomas further argued that Williams' filing of a petition for state post-conviction relief did not resurrect or continue his already finalized criminal proceeding.[195] Justice Thomas asserted that a post-conviction proceeding is not part of the criminal proceeding itself but "is in fact considered to be civil in nature," bringing with it far fewer procedural protections.[196] As a result, Justice Thomas believed that Williams' case presented a far different question from that posited by the majority.[197] Instead, the issue was whether a judge may review a petition for post-conviction relief when that judge was previously district attorney during the time when the petitioner's criminal case was pending.[198]

In light of the historical changes within disqualification,[199] Justice Thomas emphasized that disqualification is required only when the newly appointed judge served as counsel in the same case.[200] Looking to *Carr*

190. *Id.*

191. *Id.*

192. Here, Justice Thomas highlights the fact that Williams' sentence has been final for more than twenty-five years. Only on the fourth appeal did Williams ask Chief Justice Castille to recuse himself. Williams' fourth petition was filed over twenty years after his judgment of sentence became final. *Id.* at 1916.

193. *Id.*

194. *Id.* at 1917.

195. *Id.*

196. *Id.* (quoting Pennsylvania v. Finley, 481 U.S. 551, 556–57 (1987)); *see, e.g.*, District Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 68–69 (2009) (explaining that the right to due process in post-conviction proceedings "is not parallel to a [criminal] trial right").

197. *Williams*, 136 S. Ct. at 1917 (Thomas, J., dissenting) (asserting that because Williams' case is in fact civil, fewer procedural protections exist as compared to criminal proceedings).

198. *Id.*

199. *See* Bassett, *supra* note 69, at 210 (discussing Congress' abolishment of the duty-to-sit doctrine).

200. *Williams*, 136 S. Ct. at 1918 (Thomas, J., dissenting). From a historical standpoint, the first federal recusal statute required disqualification not only when the judge was concerned in interest but also when he had been counsel for either party. *See Chapter 36, 2 Congress, Session 1, An Act: For process in the Courts of the United States, and compensation for the officers of the said courts, and jurors and witnesses.,* 1. Stat. 275, 279 (stating that in any case where the judge has been counsel of either party it shall be the duty of such judge to enter the fact into the minutes of the

v. Fife,[201] Justice Thomas stated that the Court rejected the argument that a judge is required to recuse himself or herself on the grounds that he or she previously served as counsel for some of the defendants in another matter.[202] *Taylor v. Williams*[203] reached a similar conclusion, holding that a judge was not interested in a case simply because he or she participated in a different case that included the same parties or title.[204] A broader rule, according to Justice Thomas, would wreak havoc and would be at odds with the Court's historical practice.[205] Past judges have ruled on cases that involved their former clients in the private sector or their former offices in the public sector.[206] Both *Tumey* and *In re Murchison* arguably reflect traditional conceptions of what constitutes a required judicial disqualification.[207] Traditionally, "judges disqualified themselves when they had a direct and substantial interest in the case or when they served as counsel in the same case."[208]

These historical understandings of judicial qualification, according to Justice Thomas, resolve Williams' case.[209] Even assuming Chief Justice

court and to order an authenticated copy of the proceedings to be certified to the next court who shall hear the case as if it had originated in that court); *see, e.g.*, Wilks v. State, 11 S.W. 415, 416 (Tex. App. 1889) (noting that "states followed suit by enacting similar disqualification statutes or constitutional provisions expanding the common-law rule"). *But see* Owings v. Gibson, 9 Ky. 515, 517–18 (Ky. Ct. App. 1820) (holding that it was for the judge to choose whether he could fairly adjudicate a case in which he had previously served as a lawyer).

201. 156 U.S. 494 (1895).

202. *Williams,* 136 S. Ct. at 1918 (Thomas, J., dissenting) (quoting Carr v. Fife, 156 U.S. 494, 497–98 (1895)).

203. Taylor v. Williams, 26 Tex. 583 (1863).

204. *Williams,* 136 S. Ct. at 1918–19 (Thomas, J., dissenting) (quoting Taylor v. Williams, 26 Tex. 583, 586 (1863)) (". . . his having been of counsel in another cause involving the same title."). *See also* Wolfe v. Hines, 20 S.E. 322, 329 (Ga. 1894) (finding that "[a] judge is not disqualified to try an action because he had been counsel in a prior action by the same plaintiff in relation to the same land, where he has no interest in the pending action, and none of the questions involved therein were involved in the prior action"); Cleghorn v. Cleghorn, 5 P. 516 (Cal. 1885) (holding that ". . . a judge is not disqualified because, before his election to the bench, he had been attorney for one of the parties in another action, involving one of the issues in the case on trial").

205. *Williams,* 136 S. Ct. at 1919 (Thomas, J., dissenting); *see also* Blackburn v. Craufurd, 22 Md. 447, 459 (1864) (noting the potential for the most eminent members of the bar to be, as a result of their extensive professional relations and experience, "rendered ineligible or useless as judges").

206. *Williams,* 136 S. Ct. at 1919 (Thomas, J., dissenting); *see also* Marbury v. Madison, 1 Cranch 137 (1803) (discussing how then-Secretary of State John Marshall failed to deliver William Marbury's commission and then later, as newly appointed Chief Justice, decided whether mandamus was an available remedy).

207. *Williams,* 136 S. Ct. at 1919–20 (Thomas, J., dissenting).

208. *Id.* at 1920; *see also* Tumey v. State of Ohio, 273 U.S. 510, 514–15 (1927) (forbidding a judge with a direct, pecuniary interest in the outcome of a case from adjudicating that case).

209. While Chief Justice Castille's participation may have been unwise, it was within the bounds of historical practice. *Williams,* 136 S. Ct. at 1921 (Thomas, J., dissenting); *see also* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 28 (1991) (Scalia, J., concurring) (asserting that "it is not for Members of this Court to decide from time to time whether a process approved by the legal

Castille's supervisory role as District Attorney could qualify as serving as counsel in Williams' criminal case, that case ended nearly five years before Chief Justice Castille was elected to the Supreme Court of Pennsylvania.[210] While Chief Justice Castille may have been "personally involved in a critical trial decision," Justice Thomas asserted that the trial in question was Williams' criminal trial and not the post-conviction proceedings currently before the Court.[211] Because Chief Justice Castille did not act as counsel and judge in the same case, his participation in the post-conviction proceedings in question did not violate the Due Process Clause.[212] The majority's holding, Justice Thomas concluded, departs both from common-law practice and precedent by ignoring the important distinction between criminal and post-conviction proceedings.[213]

III. ANALYSIS

In creating a new, albeit narrow, constitutional rule pertaining to judicial recusal, the Court in *Williams* continued the current trend in Supreme Court jurisprudence regarding judicial recusal and the Fourteenth Amendment.[214] This Part first demonstrates how the Court's decision in *Williams* is in keeping with Supreme Court precedent.[215] Second, this Part examines how the Court's holding is in line with stricter statutory and ethics codes provisions pertaining to judicial recusal.[216] Finally, this Part highlights how *Williams* is reflective of the need for public confidence in the government, and specifically the judiciary, in light of the current political climate.[217]

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traditions of our people is 'due' process").

210. As a result, Justice Thomas contends that Castille did not serve as both prosecutor and judge in the case at hand. *Williams*, 136 S. Ct. at 1921.

211. *Id.* (noting that this post-conviction proceeding cannot be considered an extension of Williams' criminal case but is instead a new civil proceeding). *See also* Pennsylvania v. Finley, 481 U.S. 551, 556–57 (1987) (finding that the state-created right to counsel on postconviction review did not require the appointed counsel to withdraw when that counsel previously found the case frivolous on direct appeal).

212. *Williams*, 136 S. Ct. at 1921 (Thomas, J., dissenting).

213. *Id.*

214. *See* Bernick, *supra* note 150 (noting that the Court in its holding in *Williams* continued the vitality of the legal principal that "no person may be a judge in his own cause").

215. *See* Bernick, *supra* note 150 (discussing how the "Due Process of Law Clauses of the Fifth and Fourteenth Amendments have long been understood by the Supreme Court to guarantee (among other things) impartial adjudication—adjudication free from bias or even the probability of bias").

216. *See infra* note 261 (highlighting the stricter state statutory requirements for mandatory judicial recusal).

217. *See* Michael L. Buenger, *The Need for Solid Court Leadership: Reflections on the National Symposium on Court Management*, NATIONAL CENTER FOR STATE COURTS (2011), http://ncsc.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/1842 (discussing the importance of

The requirement of an impartial judicial system is central to the constitutional guarantee that all persons are entitled to due process of the law.[218] A touchstone of the Court's recusal law, first proliferated by President James Madison, is that no man is allowed to be a judge in his own case, as his interest would bias his judgment and thus corrupt his integrity.[219] The Court has long recognized, and reiterated most recently in *Caperton,* that a fair trial by a fair body is the core requirement of due process.[220] It is from this adage that the Court determined that Chief Justice Castille's participation in Williams' proceedings violated the Due Process Clause. In doing so, the Court reaffirmed that the Due Process Clause's interdiction against biased judges includes circumstances in which a judge's interest in the case may cause him or her to fail to "hold the balance clear and true," as required by *Tumey*.[221]

The current standard for determining whether a judge's refusal to recuse himself or herself violates due process is an objective one: whether the circumstances of the case would create a possible temptation for the average man as a judge to lead him to fail to hold the balance clear and true.[222] Under this standard, the question that must be asked is whether an average judge in a similar position would likely be neutral, or, put another way, whether there is a potential for bias, not whether the judge is actually and subjectively biased.[223] This objective analysis requires an evaluation of both a person's psychological tendencies and general human weaknesses, as well as a determination of whether the interest poses a risk of bias or prejudgment.[224] Recusal is required when, after

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the public's perception of an impartial and fair judiciary branch).

218. Brief for The Constitutional Accountability Center, *supra* note 5, at 1; *see, e.g.*, Bassett, *supra* note 69, at 183 (stating that "[t]he notion of an impartial trial under the direction of an unbiased judge is a central tenet of our system of justice").

219. Brief for The Constitutional Accountability Center, *supra* note 5, at 1; *see also* THE FEDERALIST NO. 10, at 47 (James Madison) (Clinton Rossiter ed., 1999) (stating that no man should be the judge of his own cause because his own interest would bias his judgment and therefore corrupt his integrity).

220. Brief for The Constitutional Accountability Center, *supra* note 5, at 1; *see also* Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 876 (2009) ("[A] fair trial in a fair tribunal is a basic requirement of due process.") (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

221. Brief for The Constitutional Accountability Center, *supra* note 5, at 4.

222. Brief of Former Appellate Court Jurists as Amici Curiae in Support of Petitioner at 4–5, Williams v. Pennsylvania, 136 S. Ct. 1899 (No. 15-5040) [hereinafter "Brief of Former Appellate Court Jurists"]; *see also* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822 (1986) (quoting Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972) ("[T]he issue is whether the 'situation is one which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'").

223. Brief of Former Appellate Court Jurists, *supra* note 222, at 5 (quoting Mayberry v. Pennsylvania, 400 U.S. 455, 466 (1971)).

224. *Id. See also* Withrow v. Larkin, 421 U.S. 35, 47 (1975) (stating that the objective analysis

making such an inquiry, the likelihood of bias is too high to be considered constitutionally tolerable.[225]

The Court has also, over time, identified circumstances in which a judge's interest in the outcome should disqualify the judge from participation.[226] In *Tumey v. Ohio*, the Court determined that, if an average judge sitting on a case is offered the possible temptation not to "hold the balance nice, clear, and true," the judge must recuse himself or herself.[227] Another circumstance requiring recusal occurs when an attack by a party or counsel on a judge's character or actions would cause an average judge in that position not to be neutral.[228] Finally, the third circumstance, as established by *Caperton*, is when a party to the case who has a personal stake in its outcome makes a significant contribution to the reviewing judge's election campaign.[229] While the dissent argues that there is no established precedent for the precise circumstances found in *Williams,* the Court has nevertheless recognized that the term "interest" cannot be defined with precision; circumstances and relationships must be considered on a case-by-case basis when determining whether a judge's interest is direct enough to merit recusal.[230]

The Court's holding in *Williams* applies the objective standard set forth in *Lavoie* and builds upon the approach taken in *Caperton*, as the majority looked to the totality of the circumstances presented when determining that bias did, in fact, exist.[231] There are few circumstances in which a former prosecutor who subsequently becomes a judge can "hold the balance nice, clear and true" when reviewing an action he or she took on

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examines whether the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.").

225. Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 872 (2009) (quoting *Withrow*, 421 U.S. at 47).

226. Brief of Amicus Curiae on Behalf of The American Academy of Appellate Lawyers in Support of Petitioner at 5, Williams v. Pennsylvania, 136 S. Ct. 1899 (No. 15-5040) [hereinafter "Brief of The American Academy of Appellate Lawyers"].

227. Tumey v. Ohio, 273 U.S. 510, 532 (1927); Brief of The American Academy of Appellate Lawyers, *supra* note 222, at 5.

228. Brief of The American Academy of Appellate Lawyers, *supra* note 226, at 5; *see generally Mayberry*, 400 U.S. at 466 (holding that "a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor").

229. Brief of The American Academy of Appellate Lawyers, *supra* note 226, at 5; *see Caperton*, 556 U.S. at 876 (recusing a judge as a matter of due process because of campaign contributions).

230. *In re* Murchison, 349 U.S. 133, 136 (1955). *See also* CHARLES GARDNER GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 1 (Kris Markarian ed., 2nd ed. 2010) (noting that a judge's ability to impartially perform his duties is dependent on decisionmaking that is free from conflicts of interest).

231. *See* Brief of The American Academy of Appellate Lawyers, *supra* note 226 at 5 (stating that the "Court required that the possibility of bias be measured objectively, based on the likely effect on an 'average judge'").

behalf of his or her former department.[232] When a judge reviews something he or she did as a prosecutor, there is, at the very least, the appearance of bias and a serious risk of actual bias.[233] To ask a person to sit in judgment of his or her own past performance with a neutral approach would be imprudent.[234]

As noted by the majority, a prosecutor who participates in a major adversarial decision is the most central attorney in the trial process at large.[235] A prosecutor is responsible for a number of critical decisions, including sentencing.[236] The chief prosecutor, as noted in the National Prosecution Standards of the National District Attorneys Association, is also ultimately responsible to the community for the performance of the prosecutorial process and the performance of his or her entire office.[237] In light of this responsibility, the actions of these prosecutors can be directly imputed to the chief prosecutor when analyzing whether he or she should be required to recuse himself or herself in a later proceeding.[238] From an institutional and community perspective, the District Attorney is ultimately responsible for the entire office's prosecutions; as a result, the actions of all of the assistant district attorneys could be imputed to Chief Justice Castille for the purposes of a due process analysis.[239]

Though the dissenters urge that Chief Justice Castille himself did not directly pursue the death sentence in Williams' prior criminal

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232. Brief of The American Academy of Appellate Lawyers, *supra* note 226, at 6. *See also Tumey*, 273 U.S. at 532 (reaffirming a judge's decision not to recuse himself).

233. Brief of The American Academy of Appellate Lawyers, *supra* note 226, at 6.

234. *Id. See also* Jennifer K. Robbennolt and Matthew Taksin, *Can Judges Determine Their Own Impartiality?*, 41 MONITOR ON PSYCHOL., no. 2, 2010, at 24, 24 (stating that "[p]eople believe they are objective, see themselves as more ethical and fair than others, and experience a 'bias blind spot,' the tendency to see bias in others but not in themselves").

235. Williams v. Pennsylvania, 136 S. Ct. 1899, 1906 (2016).

236. *Id.* at 1907–08.

237. Brief of Former Judges with Prosecutorial Experience, *supra* note 155, at 13. *See also* NAT'L DIST. ATT'YS ASSOC., NATIONAL PROSECUTION STANDARDS 14 (3d ed.); David A. Harris, *The Interaction and Relationship Between Prosecutors and Police Officers in the United States, and How this Affects Police Reform Efforts*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 54, 59 (Erik Luna & Marianne Wade, eds., 2012) ("The elected prosecutor sets office policy, hires and fires staff, serves as the public face of the office, and sometimes makes important decisions in individual cases . . . The elected nature of the position means that the state prosecutor is ultimately accountable only to the voters of the jurisdiction.").

238. Brief of Former Judges with Prosecutorial Experience, *supra* note 155, at 14; *see, e.g.*, United States v. Arnpriester, 37 F.3d 466, 467 (9th Cir. 2014) (holding that the "[r]esponsibility for prosecution and the precedent investigation is that of the United States Attorney in his district; other attorneys are only his assistants"); United States v. Ostrer, 597 F.3d 337, 339 n.4 (2d Cir. 1979) (noting that "[e]ven if [the former prosecutor] did not review these papers himself, knowledge of their contents is imputable to him because of his supervisory status").

239. Brief of Former Judges with Prosecutorial Experience, *supra* note 155, at 14.

proceedings, it is difficult to see how Chief Justice Castille's approval of pursuing such a severe penalty could not be deemed a direct, personal involvement.[240] Even if the actions of the prosecutors were not imputed to Chief Justice Castille, his involvement in the case at a personal level should nevertheless require his recusal.[241] Without his approval, the Commonwealth would not have been able to seek a death sentence against Williams.[242] Though the Commonwealth asserted that the act of approving the request to pursue the death penalty amounted to nothing more than a brief administrative act, there is little indication that Chief Justice Castille treated such a decision with so little judgment or reflection.[243] Rather, while campaigning for his seat on the Supreme Court of Pennsylvania, Chief Justice Castille highlighted his record of placing forty-five individuals—a list inclusive of Williams—on death row.[244] The now-Chief Justice further went on to champion his support of the death penalty in the media.[245] In a newspaper article published during Chief Justice Castille's election campaign, when asked where he stood on the death penalty, he asserted that he sent forty-five people to death row and that those questioning him "get the hint."[246] While these statements in favor of the death penalty are not directly tied to *Williams*, they are relevant in that they demonstrate that Chief Justice Castille took responsibility for the death penalty convictions given out during his time as District Attorney.[247]

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240. *Id.* at 14–15; *see also Ostrer*, 597 F.2d at 339 n.4 (holding that "[e]ven if [the former prosecutor] did not review these papers himself, knowledge of their contents is imputable to him because of his supervisory status"). *See generally Arnpriester*, 37 F.3d at 467 ("Responsibility for prosecution and the precedent investigation is that of the United States Attorney in his district; other attorneys are only his assistants.").

241. Brief of Former Judges with Prosecutorial Experience, *supra* note 155, at 14; *see* PA. R. PROF. CONDUCT 3.8(a) (stating that, among other things, "[t]he prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause").

242. Brief of Former Judges with Prosecutorial Experience, *supra* note 155, at 14.

243. *Id.* at 14–15.

244. Brief of The American Academy of Appellate Lawyers, *supra* note 226, at 7.

245. *Id.*

246. *Id.* An article published on October 28, 1993, quoted Castille as stating: "There's really no solution to it. . . . You ask people to vote for you, they want to know where you stand on the death penalty. I can certainly say I sent 45 people to death row as District Attorney of Philadelphia. They sort of get the hint." Lisa Brennan, *State Voters Must Choose Next Supreme Court Member*, Legal Intelligencer, Oct. 28, 1993, at 4.

247. Brief of Former Judges with Prosecutorial Experience, *supra* note 155, at 18. Chief Justice Castille's comments regarding his involvement in the decision to grant the death penalty have been contradictory. During his electoral campaign, Chief Justice Castille asserted that he was responsible for sending these defendants to death row. *See* Brennan, *supra* note 246. However, when asked to recuse himself for this reason, Chief Justice Castille asserted that his role in the authorization of the death penalty was an administrative formality. *See* Commonwealth v. Rainey, 912 A.2d 755, 757–

The focus of Williams' post-conviction proceedings also puts Chief Justice Castille's neutrality into question, as the main concern of the Pennsylvania Supreme Court's review of the PCRA Court's decision was whether the alleged misconduct by the prosecutor caused the suppression of exculpatory evidence and if the exclusion of this evidence materially impacted Williams' sentencing.[248] The content of Williams' allegations directly implicates the conduct of the prosecutors who were under Chief Justice Castille's supervision.[249] While the idea of prosecutorial misconduct does not directly translate to a personal interest in the case, had the Pennsylvania Supreme Court decided differently, there could have been broader implications for the office that would have directly impacted Chief Justice Castille.[250] If the court determined that a prosecutor in the office overseen by Chief Justice Castille had in fact engaged in misconduct, a larger inquiry might have been made to determine if such misconduct was systemic or if Chief Justice Castille himself condoned or encouraged such behavior.[251] The comments made by the PCRA Court create the inference of the presence of such systemic misconduct, as the PCRA Court determined that Chief Justice Castille's office had "engaged in 'gamesmanship' in order to secure a death sentence."[252]

In his dissent, Justice Thomas asserts that the majority's holding is, in fact, contrary to current Court jurisprudence.[253] Relying upon *Tumey* and *Murchison*, Justice Thomas highlights the historical underpinnings of judicial recusal that traditionally required judges to disqualify themselves if they had both a direct and substantial pecuniary interest, or if they had previously served in the role of counsel in the same case.[254] Because Chief Justice Castille did not act as both counsel and judge in the same

58 (Pa. 2006).

248. Brief of Former Appellate Court Jurists, *supra* note 222, at 5; *see also* Williams v. Pennsylvania, 136 S. Ct. 1899, 1904 (2016).

249. Brief of Former Appellate Court Jurists, *supra* note 222, at 5.

250. *Id.* at 5–6.

251. *Id.* at 6.

252. The Former Appellate Court Jurists, in their amicus brief, also assert that "Chief Justice Castille's strong statements in concurrence further call into question his impartiality and the degree of influence that his passionately held views may have had on his colleagues," and that "[e]ven if the attack in his concurring opinion were warranted, Chief Justice Castille left his impartiality, and thus the integrity of the decision, open to serious question. . . ." *Id.*

253. *Williams*, 136 S. Ct. at 1919 (Thomas, J., dissenting) (noting that the Due Process Clause compels judges to recuse themselves only in narrow circumstances); *see also* Tumey v. Ohio, 273 U.S. 510, 523 (1927) (cautioning that "all questions of judicial qualification may not involve constitutional validity"); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828 (1986) ("The Due Process Clause demarks only the outer boundaries of judicial disqualifications.").

254. *Williams*, 136 S. Ct. at 1919 (Thomas, J., dissenting).

case, according to Justice Thomas, Chief Justice Castille's participation in the post-conviction proceedings did not violate the Due Process Clause.[255] Justice Thomas thus asserts that "the holding departs both from common-law practice and the Supreme Court's prior precedents by ignoring the critical distinction between criminal and post-conviction proceedings."[256]

However, his arguments that Chief Justice Castille had no "direct, personal, substantial pecuniary interest" in the adjudication of Williams' fourth post-conviction petition, and that Chief Justice Castille did not serve as both prosecutor and judge in the case before the court, are unpersuasive.[257] Though the case in which Chief Justice Castille directly participated as District Attorney was a criminal proceeding, whereas the current case is civil in nature, he would still be asked to review an action that he took both directly and indirectly by considering the issue of misconduct.[258] When a judge is forced to review his or her own actions, as in this case, there is at least an appearance of bias and at most a serious risk of bias that is constitutionally intolerable.[259] Similar to the judge at-issue in *Murchison*, Chief Justice Castille would likely be unable to set aside his view of the Williams' case he developed when overseeing the prosecution of the case, whether or not it was part of the same criminal or civil proceeding.[260]

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255. *Williams*, 136 S. Ct. at 1920 (Thomas, J., dissenting) (noting that even assuming Chief Justice Castille's role as District Attorney was the equivalent to serving as counsel, the case ended almost five years before Castille ever joined the Supreme Court of Pennsylvania).

256. Justice Thomas highlights that in his criminal trial, Williams was presumed innocent and the Constitution guaranteed him counsel and a public trial by a jury, and empowered him to confront those witnesses against him. But, in his post-conviction proceedings, this presumption of innocence has disappeared. *Id. See generally* Herrera v. Collins, 506 U.S. 390 (1993) (discussing the presumption of innocence). *See also* Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963); Powell v. Alabama, 287 U.S. 45, 68–69 (1932).

257. Evan Bernick commented:

> [E]ven if one grants the validity of the dissenters' distinction between a criminal proceeding and a post-conviction proceeding, the majority's argument that Castille was likely to be psychologically wedded to his initial decision to seek the death penalty for Williams in determining whether to vacate a stay of Williams's execution went unanswered.

Bernick, *supra* note 150.

258. *Williams*, 136 S. Ct. at 1919 (Thomas, J., dissenting); *see also* Brief of The American Academy of Appellate Lawyers, *supra* note 226, at 6.

259. Brief of The American Academy of Appellate Lawyers, *supra* note 226, at 6. (noting that because the meaning behind judicial review is the requirement for a fair and unbiased review by neutral parties, "[w]hen a judge undertakes to review an action that he or she took as an executive branch official, there is at least an appearance of bias, and a serious risk of actual bias").

260. *See* Brief of Former Judges with Prosecutorial Experience, *supra* note 155, at 15 (stating that "[g]iven this prior involvement, Chief Justice Castille's participation in Petitioner's case seriously impugns the public perception of the judiciary and threatens the integrity and legitimacy

The Court's decision in *Williams* is also in keeping with the current recusal provisions of the Pennsylvania Code of Judicial Conduct and Model Codes of Judicial Conduct ("the Code") that work in tandem with the constitutional due process requirements set forth in the Fourteenth Amendment.[261] Due to the greater restrictions and greater protections found in state codes of judicial conduct, as stated by the majority in *Caperton*, the Due Process Clause "demarks only the outer boundaries of judicial disqualifications," with due process violations arising only in extreme circumstances.[262] The Model Code of Judicial Conduct requires the integrity and impartiality of judges to promote overall public confidence in the fairness and integrity of the judiciary.[263] The Code has historically stated that recusal is specifically required when a judge previously participated in the case as counsel.[264] Even without this direct mandate at the federal level, all states, including Pennsylvania, have required recusal in such a circumstance for several decades.[265]

The Pennsylvania Code, based on the 1972 Model Code, and in place at the time of Williams' request for Chief Justice Castille's recusal, provides that judges should disqualify themselves in a proceeding where their neutrality could reasonably be questioned.[266] The Pennsylvania Code further provides a list of potential circumstances in which recusal is required, including instances where the judge has a personal bias or prejudice concerning a party, or personal knowledge of the disputed facts related to the proceeding, or where the judge previously served as a lawyer in the case at bar.[267] Therefore, the ethics codes at both the state and federal levels prohibit a judge from participating in a case where his

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of the judicial process."); *see also* State Bar of Michigan, Advisory Opinion JI-34 (Dec. 21, 1990) (asserting that "a judge who was the chief prosecutor in the county is disqualified from hearing any portion of a criminal or civil case involving the state or county which was initiated or pending while the judge served as prosecutor").

261. Brief for American Bar Association, *supra* note 157, at 7.

262. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 889–90 (2009) (quoting Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828 (1986)); Bassett, *supra* note 69, at 196.

263. Brief for American Bar Association, *supra* note 157, at 8; *see also* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1666 (2015) (noting that this has been recognized by the Court as a "vital state interest . . . of the highest order").

264. Brief for American Bar Association, *supra* note 157, at 12.

265. *Id.*

266. *Id.* at 12–13. *See generally* Penn. Code of Judicial Conduct R. 2.11 (2014) (explaining when a judge should disqualify himself or herself from a proceeding).

267. Penn. Code of Judicial Conduct Canon 2.11 (1974, as amended); *see also* Brief for The American Bar Association, *supra* note 157, at 13. The official commentary to the Code indicated that a government lawyer is not always imputed with the conflicts of the lawyer's former colleagues. However, a judge formerly employed by a governmental agency should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of his association. *See* MODEL CODE OF JUDICIAL CONDUCT CANON 3C(1) CMT. (1972).

or her neutrality could likely be questioned.[268] Because the Code and the Due Process Clause work in tandem, the failure to recuse in this case not only is unethical under the standards laid out by the Code, but also simultaneously violates due process under the Fourteenth Amendment.[269]

The *Williams* decision is reflective of the increasing need for public confidence in the judiciary in light of the current political environment.[270] As the Court held in *Williams-Yulee v. Florida Bar*, "[t]he importance of public confidence in the integrity of judges stems from the place of the judiciary in the government."[271] Its authority depends largely on the public's willingness to respect and follow its decisions.[272] As a result, public perception of judicial integrity is of the utmost importance.[273] The Code also requires judges to treat and honor the judicial office as a public trust, aiming to preserve and enhance legitimacy and confidence in the legal system.[274] Additionally, judges should act at all times in a way that promotes public confidence in the independence and impartiality of the judiciary and must avoid at a very minimum the appearance of impropriety.[275]

A biased decisionmaker is not only constitutionally unacceptable, but also the very type of unfairness that the American system of law has

268. Brief for American Bar Association, *supra* note 157, at 14; *see also* E. Thode, Reporter's Notes to Code of Judicial Conduct at 63 (1973) ("If the former [governmental] agency lawyer, now a judge, served as a lawyer in the matter in controversy, he is disqualified.").

269. *See generally* Brief for American Bar Association, *supra* note 157 (arguing that Chief Justice Castille violated "uniform ethics rules and due process protections" when he failed to recuse himself).

270. *See* John Ingold, *Why Today's Political Climate Scares Judges*, THE DENVER POST (June 12, 2016), http://www.denverpost.com/2016/06/12/ethics-political-trump-judgeswhy-todays-political-climate-scares-judges/ (discussing then-presidential nominee Donald Trump's attempts to politicize the judiciary and attack the credibility of the justice system as independent in nature); *see generally* Brief of The American Academy of Appellate Lawyers, *supra* note 226 (arguing that lack of confidence in the judicial system causes societal unrest).

271. Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1666 (2015).

272. Brief of The American Academy of Appellate Lawyers, *supra* note 226, at 4–5; *see also* Williams-Yulee, 135 S. Ct. at 1666 (discussing the need for the public's confidence).

273. Brief of The American Academy of Appellate Lawyers, *supra* note 226, at 4–5; *see also* Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 889 (2009) ("Judicial integrity is . . . a state interest of the highest order.").

274. Brief for American Bar Association, *supra* note 157, at 10; *see generally* Penn. Code of Judicial Conduct pmbl. (2014); MODEL CODE OF JUDICIAL CONDUCT pmbl. (2007).

275. Brief for American Bar Association, *supra* note 157, at 13; Penn. Code R. 1.2 (2014); Model Code r. 1.2 (2007); *see also* Penn. Code Canon 2 (1974) (stating that judges are required to avoid the appearance of impropriety and to conduct themselves in a manner that promotes integrity and impartiality in the judiciary); Model Code Canon 5A(3)(a) (2003) ("[A] candidate for a judicial office shall . . . act in a manner consistent with the impartiality, integrity and independence of the judiciary. . . .").

always endeavored to prevent.[276] The Supreme Court has emphasized the appearance of fairness as a crucial tenet of a free society, holding that "[t]he power and the prerogative of a court to [elaborate principles of law] rest, in the end, upon the respect accorded to its judgments."[277] The public's respect for the courts—and the judiciary as a whole—depends upon the issuing court's complete probity.[278] In *Caperton*, the Supreme Court emphasized that the common law ban on judges serving in cases in which they have a specific pecuniary interest does not establish nor define the outer reaches of the Due Process Clause's protections.[279] As a result, application of the Due Process Clause is not limited to cases involving actual bias, but can include those that present a potential for bias.[280] Rather, due process seeks to protect the appearance of potential bias or impropriety to ensure public confidence in the judiciary and thus to protect its integrity.[281] To decide whether a judicial conflict violates the Due Process Clause, the question the Court should ask is whether, under a realistic appraisal of psychological tendencies and human weakness, the interest creates a risk of actual bias or prejudgment such that the judge must recuse himself or herself to ensure that the guarantee of due process is adequately upheld.[282]

When a judge plays a direct role in prosecuting a criminal defendant in prior proceedings, the judge's later participation in reviewing that same defendant's conviction and sentencing violates the defendant's right to due process of law, creates the appearance of misconduct, and also likely

276. Brief for The Constitutional Accountability Center, *supra* note 5, at 12; *see* Withrow v. Larkin, 421 U.S. 35, 47 (1975) ("Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'") (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

277. Brief for The Constitutional Accountability Center, *supra* note 5, at 12 (quoting Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002)).

278. *Id.*; *Republican Party of Minn.*, 536 U.S. at 793 (noting that judicial integrity is a state interest of the highest order).

279. Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 882 (2009); Brief of The American Academy of Appellate Lawyers, *supra* note 226, at 5.

280. *Caperton*, 556 U.S. at 883 ("[T]he Due Process Clause has been implemented by objective standards that do not require proof of actual bias.").

281. *See* Gannett Co. v. DePasquale, 443 U.S. 368, 379–80 (1979). Disagreeing with the *Gannett* majority, however, Justice Blackmun argued that the Sixth Amendment's guarantee of a public trial reflects "the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice.'" *Id.* at 412 (Blackmun, J., concurring in part and dissenting in part) (quoting Levine v. United States, 362 U.S. 610, 616 (1960)).

282. Brief for The Constitutional Accountability Center, *supra* note 214, at 4 (discussing that the "conflict of interest inquiry under the Due Process Clause asks whether under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented"); *see also Caperton*, 556 U.S. at 883–84 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

creates the appearance of an unconstitutional conflict of interest.[283] Therefore, circumstances where a judge participates both as a prosecutor and as a reviewer negatively impacts the public's perception of the courts and violates the defendant's right to due process of law.[284] The fear of potential impropriety is magnified when the judge is a former prosecutor who focused his campaign for the judiciary on having "sent forty-five people to death row," one of whom is the defendant now before that judge.[285]

Judicial authority is ultimately generated from the public's trust that a trial will be fair.[286] Because bias or the potential for bias can negatively impact the public's perception of the judicial system as a whole, due process requires that decisions be put forth by a neutral court, without any judges that have any form of bias present.[287] Avoiding bias is more than a formality—it is an essential condition of due process.[288] Accordingly, the purpose of recusal is to protect actual judicial impartiality, as well as the appearance of judicial impartiality, which are both necessary to ensure due process.[289] The procedural protections provided by the rules of evidence and judicial procedures are of little value if a judge has an interest in the outcome, or is partial toward one of the litigants prior to ever hearing the evidence at bar.[290] Thus, the constitutional requirement for judicial impartiality requires recusal in the face of both actual and perceived biases.[291]

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283. Brief for The American Academy of Appellate Lawyers, *supra* note 226, at 3.

284. *Id. See* Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 617–18 (1993) (emphasizing the need both to "satisfy the appearance of justice" and to avoid "the possibility of bias").

285. Brief of The American Academy of Appellate Lawyers, *supra* note 226, at 3.

286. Haluck v. Ricoh Electronics, Inc., 151 Cal. App. 4th 994, 1008 (Cal. Ct. App. 2007); *see generally* Buenger, *supra* note 217 (addressing what the court system needs to do to adjust to the new realities facing courts).

287. Brief of The American Academy of Appellate Lawyers, *supra* note 226, at 3; *see* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864–69 (1992) (holding that "[t]he Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands").

288. Brief of The American Academy of Appellate Lawyers, *supra* note 226, at 4 (noting that "[j]udges wear robes not merely out of tradition, but to signal that whatever their individual views, they act as objective neutrals, not as partisans, when they serve the law).

289. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821–22 (1986) (indicating that an impartial tribunal is required for due process); *see also* Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (determining that "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases").

290. *Lavoie*, 475 U.S. at 821–22; *see also* Brief of The American Academy of Appellate Lawyers, *supra* note 226 (arguing against a "no harm no foul" rationalization when an unbiased judge fails to recuse himself or herself).

291. Peters v. Kiff, 407 U.S. 493, 502 (1972) (holding that "[e]ven if there is no showing of

The Court's decision in *Williams* arises out of a social and political environment in which there is an ever-increasing need to instill public confidence in the government at large.[292] Alexander Hamilton once stated that the powers possessed by the executive branch, specifically those enabled within the judiciary, have neither force nor will, but simply judgment.[293] The power of the courts to keep the public's trust and confidence in its administration of justice lies in the soundness of its judgment.[294] The American public's trust in the judicial branch of the federal government has fallen significantly in recent years, with a 2015 Gallup poll noting a record-low 53 percent of those surveyed say they have "a great deal" or "a fair amount" of trust in the judiciary.[295] Though the public has consistently had a higher level of trust in the judiciary as compared to the legislative and executive branches, total trust in all three branches of government has trended downward, indicating widespread dissatisfaction with government overall.[296]

As noted in the Model Code of Judicial Conduct, the American Bar Association states that, to promote public confidence in the judiciary, a judge must act at all times in a fashion that avoids impropriety or the appearance of impropriety.[297] It is out of this maxim that *Williams* emerges, and it is for this very purpose that the majority created its new rule for recusal: maintaining trust in the judiciary in an era of significant governmental distrust.

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actual bias in the tribunal, . . . due process is denied by circumstances that create the likelihood or the appearance of bias").

292. *See* Ingold, *supra* note 270 (noting that as the political environment continues to become more antagonistic, legal observers have begun to fear that the notion of an independent judiciary is also at risk); *see generally* Buenger, *supra* note 217 (addressing what the court system needs to do adjust to the new realities facing courts).

293. THE FEDERALIST NO. 78 (Alexander Hamilton); Buenger, *supra* note 217.

294. Buenger, *supra* note 217.

295. These results are based on Gallup's Sept. 9–13 Governance poll, which has measured trust in the three branches of the federal government annually since 2001. Gallup's full trend analysis on the public's trust in government reaches back to 1972, with regular updates conducted beginning in 1997. Jeffrey M. Jones, *Trust in the U.S. Judicial Branch Sinks to New Low of 53%*, GALLUP (Sept. 18, 2015), http://www.gallup.com/poll/185528/trust-judicial-branch-sinks-new-low.aspx.

296. The judicial branch retains higher public trust than either of the other branches of government at 53 percent, compared with 45 percent for the executive branch and 32 percent for the legislative branch. Compare this with the statistics taken only six years ago, when 76 percent said they trusted the judicial branch, 61 percent said they trusted the executive branch and 45 percent said they trusted the legislative branch. Jones, *supra* note 295.

297. MODEL CODE OF JUDICIAL CONDUCT Canon 1, r. 1.2 (stating the standard for a judge's behavior to promote confidence in the judiciary); *see also Fourth National Symposium on Court Management*, NATIONAL CENTER FOR STATE COURTS (2010), www.ncsc.org/4thsymposium ("Given the natural constitutional and political tensions that are inherent in our system of government . . . the judiciary must work constantly to explain itself.").

IV. IMPACT

By holding that there is an impermissible risk of actual bias when a judge had significant, personal involvement as a prosecutor in a critical decision with respect to the defendant's case, the Court in *Williams* created a new constitutional recusal rule.[298] Although the immediate effects of the Court's decision are narrow in scope, the decision could ultimately be considered an important step in the creation of a new constitutional law of recusal.[299] Though the Court offered some relief for possible instances of judicial bias, the rule is constricted in nature, as the Court limits its holding to prosecutorial experience as a specific instance of intolerable bias.[300] The rule applies at the case-level, meaning it requires the recusal of a judge who had previously been involved in deciding one component of the case and currently presides over that same case.[301] This prohibition on prior prosecutorial decisions appears to be absolute in nature.[302]

The Court also offered helpful distinctions pertaining to the nature of judicial bias, stating that, for instance, bias is easy to discern in others and difficult to notice objectively in oneself.[303] In emphasizing that the relevant inquiry is objective, the Court stated that the analysis required is whether the average judge in a similar position is likely to be unbiased or whether there is an intolerable and unconstitutional potential for bias.[304] The Court also elaborated on the concept of bias, noting several specific

298. Richard M. Re, *Opinion Analysis: Another Step Toward Constitutionalizing Recusal Obligations*, SCOTUSBLOG (June 9, 2016, 2:20 PM), http://www.scotusblog.com/2016/06/opinion-analysis-another-step-toward-constitutionalizing-recusal-obligations/.

299. *See id.* This narrow ruling stems from concern regarding a bright-line rule and its potential effects on the judiciary. Eisenberg emphasized this issue by noting during oral arguments that "we don't want to have a situation where the only people who can become judges and sit on cases are people with no prior experience." Re, *supra* note 11.

300. *See* Re, *supra* note 298 (noting that the rule did not extend beyond the facts presented in the case). Arguably, the Justices were worried about creating a broader recusal rule that might prevent judges with governmental service, even including themselves, from performing their jobs. Re, *supra* note 11.

301. Re, *supra* note 298. It is interesting to note that Justice Alito remarked near the end of oral arguments that he couldn't see a clear rule that would encompass the situation presented in *Williams* "other than a rule that said that a judge is required by the Constitution to recuse in a case in which that judge had personal participation as a prosecutor." Re, *supra* note 11.

302. Re, *supra* note 298.

303. *Id.*; *see also* Williams v. Pennsylvania, 136 S. Ct. 1899, 1905 (2016) (asserting that because bias is difficult to discern in oneself, the Court must apply an objective standard that avoids having to determine whether actual bias is present).

304. Tumey v. Ohio, 273 U.S. 510, 532 (1927); Mayberry v. Pennsylvania, 400 U.S. 455 (1971); Re, *supra* note 298.

types of psychological effects that can potentially bias a judge.[305] For instance, a judge who has previously acted as an accuser may not be able to set aside any personal interest in the outcome, or may be "psychologically wedded" to his or her prior position out of a desire to maintain an appearance of consistency.[306] Finally, the judge's personal knowledge about the case may have an unbalanced effect on his or her weighing of the evidence that detracts from the strengths and weaknesses in the parties' actual arguments.[307]

The decision in *Williams* will likely have the most striking impact within the Court itself, as it may force the Court to look inward at its own recusal practices.[308] Supreme Court Justices ultimately have the final say on their recusal obligations in each case presented and, unlike recusal decisions in lower courts or state courts, no avenue for the appeal of that decision exists.[309] Therefore, an unclear standard has developed that can lead to an appearance of impropriety regardless of whether any real impropriety exists.[310] As a result, public trust in the Court has declined to an all-time low in recent years.[311] Decisions rendered by judges who appear biased increase public skepticism of the judiciary and undermine the overall integrity of the courts.[312] Whether or not it is responsible for this decrease in public confidence, the Court's current recusal standard is

305. *See* Re*, supra* note 298 (outlining the types of bias provided by the majority in *Williams* that should be considered impermissible).

306. *Id.*; *see also Williams*, 136 S. Ct. at 1906 (citing Withrow v. Larkin, 421 U.S. 35, 57 (1975)).

307. *Williams*, 136 S. Ct. at 1906 (citing *In re* Murchison, 349 U.S. 133, 138 (1955)); *see also* Brief for American Bar Association, *supra* note 157, at 13–15 (discussing why the Pennsylvania Code of Judicial Conduct required Chief Justice Castille to recuse himself).

308. *See* Adam Liptak, *Supreme Court, in Recusal Case, May Find Itself Looking Inward*, N.Y. TIMES (Jan. 4, 2016), http://www.nytimes.com/2016/01/05/us/politics/supreme-court-in-recusal-case-may-find-itself-looking-inward.html?_r=1 (exploring the recusal decision by the Supreme Court for Ronald D. Castille); *see also* Richard M. Re, *Argument Analysis: Seeking A Recusal Rule That The Justices Can Live With*, SCOTUSBLOG (Feb. 29, 2016, 6:13 PM), http://www.scotusblog.com/2016/02/argument-analysis-seeking-a-recusal-rule-that-the-justices-can-live-with/ (commenting that in discussing the remedy issue presented in the case, Justice Breyer noted, "[w]ell, this is common in the situation where someone's appointed to this Court").

309. Luke McFarland, *Is Anyone Listening? The Duty to Sit Still Matters Because the Justices Say It Does*, 24 GEO. J. LEGAL ETHICS 677, 677 (2011); *see* Cheney v. U.S. Dist. Court for the Dist. of Columbia, 541 U.S. 913, 915–16 (2004) (mem.) (discussing the different effects of recusal of appellate judges and recusal of Supreme Court Justices).

310. McFarland, *supra* note 309, at 677.

311. *Confidence in Public Institutions*, GALLUP, http:// www.gallup.com/poll/1597/confidence-institutions.aspx (last visited Aug. 25, 2017) (finding the current level of public confidence in the Supreme Court at 36 percent). Gallup has measured confidence in the Court since 1973, with the lowest level registered at 32 percent in 2008. *Id.*; McFarland, *supra* note 309, at 684.

312. Statement of Recusal Policy, 114 S. Ct. 52 (1993), *reprinted in* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 1068–70 (1996); McFarland, *supra* note 304, at 684.

neither strict nor transparent enough to protect its credibility. This comes at a time when the public has a heightened skepticism toward the United States' long-standing institutions.[313] Congress attempted to eliminate the duty to sit by amending 28 U.S.C. § 455 in 1974 in an effort to reestablish public confidence in the judicial system.[314] Despite this effort, the fear that the duty to sit has been revived by the Court in recent years prevails.[315]

Though Congress abolished the duty-to-sit doctrine over forty years ago, some courts still attempt to rely on the doctrine to mitigate the potential for recusal.[316] The duty to sit dictates that the judge assigned to a case must hear the case unless an unambiguous demonstration of bias is made.[317] Invoking the duty to sit allows the judge-at-issue to undergo a balancing test, weighing the effect of recusal with the duty to sit—a test that ultimately limits recusal to only those circumstances where the appearance of bias offsets the duty to sit.[318] This determination is highly susceptible to the judge's subjective viewpoint of the circumstances and allows for the impermissible likelihood that the judge will "tip the scales."[319] Therefore, this balancing test ultimately allows the judge to evade the intended effect of the recusal standard.[320]

Two recent cases illustrate the need for an introspective look into the recusal practices of the Supreme Court.[321] In 1972, then-Justice Rehnquist, a former Justice Department official, published a statement justifying his participation in a decision about Army surveillance of domestic political groups, despite his previous defense of the spying program in congressional testimony and his criticism of the lawsuit during his tenure as a government lawyer.[322] In 2004, Justice Scalia

313. *See* Editorial, *Recusals and the Court*, N.Y. TIMES, Oct. 7, 2010, at A26 ("The court's voluntary system of recusal isn't enough to protect its impartiality and credibility. The justices decide on their own when their 'impartiality might reasonably be questioned.' There is no review, no requirement for explanation and no code of discipline as a check.").

314. *See* U.S. Dep't of Justice, Operating Policies and Procedures Memorandum 05-02: Procedures For Issuing Recusal Orders (Mar. 21, 2005) at 5 (discussing the duty to sit, witnesses at the hearing on the 1974 amendments unanimously agreed that abolishing the doctrine "would enhance public confidence in the impartiality of the judicial system").

315. McFarland, *supra* note 309, at 685.

316. Bassett, *supra* note 69, at 202.

317. *Id.*; McFarland, *supra* note 309, at 685.

318. Bassett, *supra* note 69, at 202.

319. *Id.*

320. *Id.*

321. *See generally* Laird v. Tatum, 409 U.S. 824 (1972) (Justice Rehnquist holding that he was not required to recuse himself in a case in which he had not participated, either of record or in any advisory capacity); *see also* Liptak, *supra* note 308.

322. *Laird*, 409 U.S. at 827.

justified his participation in a case involving the actions of Vice President Dick Cheney in his official capacity as Vice President, despite the fact that the two had recently gone duck hunting together.[323] On his decision not to recuse himself from *Cheney v. U.S. District Court of Columbia,* Justice Scalia dismissed any public concern regarding his potential impropriety, asserting that those who cannot trust a Supreme Court Justice should "get a life."[324] Justice Scalia also stated that a rule requiring members of the Court to remove themselves from cases in which the official actions of friends were at issue would be crippling.[325] *Cheney* also raised concerns within the legislature, as several senators penned a letter to Chief Justice Rehnquist addressing the specifics of the case and inquiring whether a mechanism was available to the Court to disqualify a Justice or to review that Justice's decision not to disqualify himself.[326]

A more recent example with respect to the increasing need for the Court to reexamine its recusal practices arises out of Justice Ginsburg's commentary on then-presidential candidate Donald Trump.[327] Though Ginsburg has gained notoriety and support for her oft-outspoken public comments, some argue that her statements with respect to now-President Trump could open the door to questioning her impartiality should she be required to hear a case that involves the President.[328] For this reason, Justices generally avoid making such public comments, as they may be

323. Cheney v. U.S. Dist. Court for the Dist. of Columbia, 541 U.S. 913, 914–16 (2004); *see also* Liptak, *supra* note 308.

324. Justice Scalia once remarked, "For Pete's sake, if you can't trust your Supreme Court Justice more than that, get a life." Joel Roberts, *Scalia Proud He Stayed On Cheney Case*, CBS NEWS (Apr. 12, 2006), http://www.cbsnews.com/stories/2006/04/12/supremecourt/main1493940.shtml (last visited Oct. 2, 2017) (quoting Justice Scalia as stating, "I think the proudest thing I have done on the bench is not allow myself to be chased off that case").

325. Michael Janofsky, *Scalia Refusing To Take Himself Off Cheney Case*, N.Y. TIMES (Mar. 19, 2004), http://www.nytimes.com/2004/03/19/us/scalia-refusing-to-take-himself-off-cheney-case.html; McFarland, *supra* note 309, at 685.

326. McFarland, *supra* note 309, at 685; Ross E. Davies, *Reluctant Recusants: Two Parables of Supreme Judicial Disqualification*, 10 GREEN BAG 2d 79, 86 (2006) (citing a letter from Senators Patrick Leahy & Joseph I. Lieberman to Chief Justice William H. Rehnquist, Jan. 22, 2004, *reprinted in* Irrecusable & Unconfirmable, 7 GREEN BAG 2d 277, 278–79 (2004)).

327. *See* Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. TIMES (Jul. 10, 2016), https://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html?_r=1 (quoting Justice Ginsburg as stating, "I can't imagine what this place would be—I can't imagine what the country would be—with Donald Trump as our president").

328. Aaron Blake, *In bashing Donald Trump, some say Ruth Bader Ginsburg just crossed a very important line*, WASH. POST (Jul. 11, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/07/11/in-bashing-donald-trump-some-say-ruth-bader-ginsburg-just-crossed-a-very-important-line/?utm_term=.0552a16e0bbb.

required to hear cases involving political issues and figures.[329] Voicing their unsolicited opinions about such topics could lead to questions of prejudice and potential recusal from future cases.[330] Justice Ginsburg's comments would cast doubt on her impartiality in decisions that implicate President Trump's policies, as she has expressed that she opposes President Trump.[331] Accordingly, her vote to strike down a Trump administration policy would be clouded with possible partiality.[332] Though the precise holding from *Williams* does not implicate this type of personal or political conflict as grounds for recusal, it nevertheless highlights that the Court will be required to further adjust and expand its recusal jurisprudence.

Additionally, while the procedural impact of *Williams* may be narrow, it may still mitigate public perception of judicial impartiality. Allowing a judge with prior prosecutorial involvement in a case to preside over the case on appeal would undermine judicial impartiality, and the majority's ruling helps mitigate that possibility.[333] Even a risk of bias could tarnish the appearance of a fair, independent, and impartial judiciary.[334]

The American Bar Association explains that the Model Code of Judicial Conduct requires judges to promote public confidence in the judiciary through the continued appearance of fairness in proceedings and judicial behavior.[335] To allow a judge whose office prosecuted a case to preside over that same case on appeal could potentially destroy the public's confidence in the judiciary, which rests on the fairness and integrity of judges.[336] A judge's prior prosecutorial role could make it

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329. *Id.*

330. *Id.* Louis Virelli, a Stetson University law professor who wrote a book on Supreme Court recusals titled *Disqualifying the High Court*, once noted:

> [P]ublic comments like the ones that Justice Ginsburg made could be seen as grounds for her to recuse herself from cases involving a future Trump administration. I don't necessarily think she would be required to do that, and I certainly don't believe that she would in every instance, but it could invite challenges to her impartiality based on her public comments.

Id.

331. *Id.*

332. *Id.*

333. Re, *supra* note 298.

334. Brief for American Bar Association, *supra* note 157, at 2.

335. *Id.*; *see generally* American Bar Association, *ABA Mission and Goals*, http://www.americanbar.org/about_the_aba/aba-mission-goals.html; Penn. Code of Judicial Conduct Canon 2 (1974) (requiring judges to avoid the appearance of impropriety and to conduct themselves in a manner that promotes integrity and impartiality in the judiciary).

336. Brief for American Bar Association, *supra* note 157, at 11; *see also* Haluck v. Ricoh Electronics, Inc., 151 Cal. App. 4th 994, 1008 (Cal. Ct. App. 2007) (stating that the "source of judicial authority lies ultimately in the faith of the people that a fair hearing may be had"); *see generally* LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 4–5 (1992) ("[T]he

difficult, if not impossible, for the judge to "hold the balance clear and true" in reviewing an action he or she took during his or her prior role.[337] Thus, asking a judge to neutrally review a case he or she previously prosecuted calls for the near impossible, as judges would likely try to justify their prior prosecutorial decisions.[338] Because the appearance of neutrality and objectivity in the judiciary is crucial to maintaining the public's trust in the system, every litigant should be entitled to review by judges whose impartiality cannot reasonably be questioned.[339] Thus, the Court should, as it did in *Williams*, continue to categorically forbid a judge from reviewing a determination that he or she was responsible for as a prosecutor or as the head of an executive department.[340]

Though the Court's decision in *Williams* could impact appellate judges' ability to make discretionary recusal determinations, the social implications of the decision outweigh any potential procedural difficulties.[341] Even the appearance of bias can cause the public to lose both its respect for and its confidence in the judicial system.[342] Thus, appellate courts and supreme courts must lead by example in setting a high standard to prevent the appearance of bias.[343] To allow the current

danger caused by the appearance of impropriety consists in damaging public confidence in the judiciary.").

337. Brief of The American Academy of Appellate Lawyers, *supra* note 226, at 6; *see* Jennifer K. Robbenolt & Matthew Taskin, *Can Judges Determine Their Own Impartiality?*, 41 AMERICAN PSYCHOLOGICAL ASSOCIATION JUDICIAL NOTEBOOK NO. 2, 24 (2010) (asserting that "people believe they are objective and see themselves as more ethical or fair than others from a subjective standpoint, but experience a blind spot in that they tend to see bias in others and not in themselves"); *see also* RICHARD A. POSNER, HOW JUDGES THINK 121 (2008) ("We use introspection to acquit ourselves of accusations of bias, while using realistic notions of human behavior to identify bias in others.").

338. Brief of The American Academy of Appellate Lawyers, *supra* note 226, at 6.

339. *Id.* at 7–8; *Principles of State Appellate Judicial Disqualification*, AMERICAN ACADEMY OF APPELLATE LAWYERS (Apr. 2010), https://www.appellateacademy.org/publications/policies/recusal_standards.pdf; *see also In re* Murchison, 349 U.S. 133, 136 (1955) ("[A] fair trial in a fair tribunal is a basic requirement of due process.").

340. Brief of The American Academy of Appellate Lawyers, *supra* note 226, at 8.

341. *See Williams v. Pennsylvania (15-4030)*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/supct/cert/15-5040 (last visited Oct. 9, 2017) (concluding that the Court's decision "will impact the appellate judge's ability to make discretionary recusal determinations, as well as potentially impact the degree of impartiality and objectivity in the judiciary").

342. Brief of The American Academy of Appellate Lawyers, *supra* note 226, at 8; *Principles of State Appellate Judicial Disqualification*, AMERICAN ACADEMY OF APPELLATE LAWYERS (Apr. 2010), https://www.appellateacademy.org/publications/policies/recusal_standards.pdf.

343. Brief of The American Academy of Appellate Lawyers, *supra* note 226, at 8. To adjust to the changing realities of an increasingly complex world, state courts must establish a well-defined governance structure and provide a uniform message not only to the other branches of government, but also to the public. Buenger, *supra* note 217.

downward trend in public confidence in the judiciary to continue would destroy the very foundation of American government and promote further unrest and dissatisfaction.[344] Additionally, to allow bias to permeate the appellate court's decisionmaking in a singular case could extend the taint of that bias to every future litigant whose case may be affected by that decision under *stare decisis*.[345]

The appellate courts' oversight of the trial courts also helps bring consistency to the greater legal system.[346] Unlike the executive branch, which can formulate and promulgate a single, uniform message, or the legislative branch, whose adoption of law is ultimately a single message, the structure of the judiciary as a whole makes it difficult to create coherent institutional messages.[347] Because the majority of state courts have already adopted a stricter set of standards requiring judicial recusal, the Court's decision in *Williams* reflects the need for a continued message of uniformity within the judiciary to reinforce public confidence in its decisionmaking, and ultimately, its institutional credibility.[348]

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344. Brief of The American Academy of Appellate Lawyers, *supra* note 226, at 8–9; *see also* State v. Allen, 778 N.W.2d 863, 878 (Wis. 2010) (quoting *In re* Hon. Charles E. Kading, 235 N.W.2d 409 (Wis. 1975) (explaining that a lack of confidence in the integrity of the courts "rocks the very foundations of organized society, promotes unrest and dissatisfaction, and even encourages revolution")).

345. Brief of The American Academy of Appellate Lawyers, *supra* note 226, at 9; *see also* Daniel J. Meador, Maruice Rosenberg and Paul D. Carrington, *Appellate Courts: Structures, Functions, Processes, and Personnel* xxxi–xxxii (Michie 1994) (explaining that appellate opinions "collectively form what a trial judge does, even if no appeal is ever taken in a particular case"); *see generally Principles of State Appellate Judicial Disqualification*, *supra* note 339. The decisions of appellate courts also determine the advice that lawyers give to their clients, the subsequent actions those clients take based on that advice, and even the content of legal forms that people may use. Therefore, the precedent established in an opinion deciding a single case may have as much effect on potential future litigants and on those who depend of the state of the law as it does for the actual parties to an immediate case at issue. *Principles of State Appellate Judicial Disqualification*, *supra* note 339.

346. *See generally Principles of State Appellate Judicial Disqualification*, *supra* note 339 (promoting the adoption of consistent judicial conduct policies); *see also* Brief of The American Academy of Appellate Lawyers, *supra* note 226, at 9 (noting that this oversight must be exercised without any implication of bias).

347. The structure of many state judicial systems creates fragmented administration and, thus, fragmented messaging. Increasing competition between state authorities and local authorities can also work to undermine the institutional standing of courts and portray to the public an appearance of a fractured and highly disjointed system that fails to maintain organizational coherence. Additionally, the nature of judicial selection and the selection of important court personnel can create an individualized environment that challenges the idea of cohesive institutional messaging. *See* Buenger, *supra* note 217. *See also* Symposium, *Working Group 2 Summary, Report on the Fourth National Symposium on Court Management*, NAT'L CTR. FOR ST. CTS. (Oct. 27, 2010) (demonstrating that the "messages concerning the interests of the entire judiciary should not be sent with competing messages").

348. *See generally* Buenger, *supra* note 217 (discussing the need for the American court system to have a well-defined governance structure).

CONCLUSION

Williams v. Pennsylvania is a continuation of the Supreme Court's current Fourteenth Amendment jurisprudence, expanding the situations in which a judge is forced to recuse himself or herself from the bench. The Court does not ignore the distinction between civil and criminal cases as related to the single case requirement for recusal, as Justice Thomas suggests in his dissent. Rather, the rule established in *Williams* requiring a judge to step down from the bench in a case in which he or she previously participated as a prosecutor further demonstrates the Court's commitment to preventing even the image of intolerable bias in the judiciary. Because the judiciary gains its authority from the trust and confidence of the public, wiping out the appearance of improper influence and impropriety in the courts is essential. Thus, despite having only participated in a criminal decision several years prior to overseeing a related, yet separate, civil proceeding, Chief Justice Castille's failure to recuse himself created an impermissible stain of bias on the court and the case itself.