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COURT OF COMMON PLEAS OF PHILADELPHIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA **CP-51-CR-0113571-1982**

v.

WESLEY COOK AKA MUMIA ABU-JAMAL **No. 289 EDA 2019**

SUPPLEMENTAL OPINION

LEON W. TUCKER, Supervising Judge **DATE: March 26, 2019**
Criminal Section – Trial Division

"[T]o perform its high function in the best way, justice must satisfy the appearance of justice." *Goodheart v. Casey*, 565 A.2d 757 (Pa. 2007) (internal quotation marks omitted). Justice is being conformable, human, and divine; fair, impartial, honest in administering, coordinating, and relating with others, no matter what. Not sometimes or most of the time, but at all times, be it at trial or on appeal.

This matter comes before the Pennsylvania Superior Court following the Commonwealth's (hereinafter "Appellant") appeal of this court's December 27, 2018 Order denying in-part, and granting in-part, Petitioner Wesley Cook's a.k.a. Mumia Abu-Jamal (hereinafter "Appellee"), Post-Conviction Relief Act ("PCRA")[1] petition, having prevailed by a preponderance. This Opinion supplements this court's December 27, 2018 Memorandum Opinion, setting forth the

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[1] 42 Pa. C.S. §§ 9541-9546.

reasons why, on constitutional due process claims, a convicted cop-killer should have his case reargued before the Pennsylvania Supreme Court. The only issue is whether Appellees should reargue before the Pennsylvania Supreme Court. This court, sitting as the PCRA Court, found that reargument should be had, nunc pro tunc, without new briefs. While statements in the Memorandum Opinion are repeated herein, their reason and purpose are amplified by the attention drawn to due process of law, one of the bedrocks and foundations of democracy that must be held fast and true at all times no matter what the crime, and no matter what stage of litigation.

I. Procedural History

The relevant facts and procedural history of this matter were set forth in this court's December 27, 2018 Memorandum Opinion and need not be restated here. On December 27, 2018, this court issued an Order denying in-part, and granting in-part, Appellee's August 7, 2016 PCRA petition. On January 25, 2019, Appellant filed a Notice of Appeal with the Pennsylvania Superior Court. Presumably, this matter will be transferred to the Pennsylvania Supreme Court. On January 28, 2019, this court issued an Order directing the Appellant to file a concise statement of the matters complained of on appeal ("1925(b) Statement") pursuant to Pa. R.A.P. 1925(b). Appellant filed a timely 1925(b) Statement on February 15, 2019, stating the following claims of error, verbatim:

1. Whether the PCRA court erred to the extent it reached an overly broad conclusion that recusal was necessary based on the simple fact alone that a member of the Pennsylvania Supreme Court was District Attorney when defendant's case was on appeal, thereby potentially requiring any lead prosecutor who becomes a judge to recuse in every case that was pending in that person's office when the now-judge was the lead prosecutor (*see* Op. at 33);

2. Whether the PCRA court erred to the extent it reached an overly broad conclusion that a judge must recuse himself merely because—as inevitably will happen to many or even all judges at some point—he is presented with a case that is similar

to other cases on which he expressed views during his prior time as an attorney (see Op. at 31-32);

3. Whether, to the extent the PCRA court based its decision on a perceived violation of the Canons of Judicial Ethics, it erred because the Canons cannot themselves establish a cause of action or provide a basis for a PCRA court to grant relief;

4. Whether the lower court erred in finding a due-process violation where defendant's evidence failed to establish, as an objective matter, that there was an unconstitutional potential for bias; and

5. Whether the PCRA court acted without jurisdiction where defendant's most recent petition was untimely filed. (1925(b) Statement).

While this court addressed its findings in the December 27, 2018, Memorandum Opinion and that decision still stands without modification, for the sake of clarity, this court will address the issues from the specific perspective presented in Appellant's 1925(b) Statement.

II. Discussion

To be clear, this court's grant of PCRA relief is based on newly-discovered evidence recently disclosed pursuant to this court's Discovery Order in the instant PCRA proceeding.[2] This evidence, a letter from then District Attorney Castille to then Governor Robert Casey, was not available to Appellee when Appellee originally sought recusal of Justice Castille during his 1998 PCRA appeal before the Pennsylvania Supreme Court. In relying on precedent set by our appellate courts, this court found that the recently disclosed June 15, 1990 letter from Mr. Castille to Governor Casey, at a minimum creates an unconstitutional appearance of bias, and would lead a significant minority of the lay community to reasonably question Justice Castille's impartiality when Appellee, a convicted police killer on death row, was before the

[2] See April 28, 2017 Discovery Order.

Pennsylvania Supreme Court where the former District Attorney was seated to hear Appellee's matter as a Supreme Court Justice. See *Commonwealth v. Bryant*, 476 A.2d 422, 426 (Pa. Super. 1984); *Commonwealth v. Darush*, 459 A.2d 727, 732 (Pa. Super. 1983). The court will address the Appellant's specific claims of error *infra.*

A. Appellant's Claims of Error

The Due Process Clause of the United States Constitution, applied to the states through the Fourteenth Amendment, and the Pennsylvania Constitution, guarantee a person is not to be deprived of life, liberty, or property without due process of law. U.S. Const. Amend. XIV; Pa. Const. Art I, § 9. Appellee contends that he was deprived of his life and liberty, among other things.[3] Inherent in the constitutionally mandated guarantee of due process is fundamental fairness in all criminal proceedings. At a minimum, due process requires a "fair trial in a fair tribunal," before an unbiased judge, regardless of the nature of the crime, or the guilt of the accused, notwithstanding the stage of the legal proceeding. *Rippo v. Baker*, 137 S.Ct. 905 (2017); *Winthrow v. Larkin*, 95 S.Ct. 1456 (1975); *In re Murchison*, 75 S.Ct. 623 (1955); *In Interest of McFall*, 617 A.2d 707, 714 (Pa. 1992).

1. **The PCRA Court's conclusion that recusal was necessary for a Pennsylvania Supreme Court Justice deciding a matter on appeal that was opposed by the District Attorney's Office during the Justice's tenure as the District Attorney of Philadelphia County is not overbroad.**

In the 1925(b) Statement, Appellant complains that this court erred to the extent that the court reached an overly broad conclusion stating, "that recusal was necessary based on the simple fact alone that a member of the Pennsylvania Supreme Court was District Attorney when Defendant's case was on appeal." 1925(b) Statement at ¶1.

[3] See Petitioner's Pet. dated August 7, 2016; Amend. Pet. dated July 9, 2018; Second Amend. Pet. 10/22/2018.

Due process requires the absence of actual bias in a judicial proceeding. *Murchison*, 75 S.Ct. at 625. However, our system of laws, rightfully so, endeavors to prevent even the appearance of bias. *Id.* To that end, "no man can be a judge in his own case," or where he has an interest in the outcome. *Id*; *McFall*, 617 A.2d at 714. "That interest cannot be defined with precision; [c]ircumstances and relationships must be considered." *Murchison*, 75 S.Ct. at 625. When a judge has previously served as an advocate for the state in a specific matter, the same matter the court is subsequently being asked to adjudicate, notwithstanding the passage of time, "a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal and/or professional interest in the outcome." *United States v. Williams*, 136 S.Ct 1899, 1906 (2016). Personal interest and professional interest are balanced as the same in this instance.

Considering the circumstances at hand, recusal by Justice Castille was necessary if only to maintain the appearance of propriety. The fact that a member of the Pennsylvania Supreme Court was the District Attorney of Philadelphia County when this case was on direct appeal, representing the Commonwealth and his office, is more than a "simple fact" as asserted by the Appellant. The gross fact is that Mr. Castille, as District Attorney, was the leader of the Philadelphia District Attorney's Office at the same time Appellee herein had an active matter, a direct appeal, being opposed by that very office which Mr. Castille held, oversaw, was the face of, and advocated on behalf of for six (6) years. As the leader of the District Attorney's Office, Mr. Castille was responsible for the actions taken by Philadelphia's Assistant District Attorneys, whether these actions were proper or improper. Mr. Castille was accountable for the overall public reputation of the office, and everything that occurred in that office during his tenure. As recognized by the *Williams* Court, "[w]ithin a large, impersonal system, an

individual prosecutor might still have an influence that is nevertheless significant." 136 S.Ct. at 1907. As a Justice of the Pennsylvania Supreme Court, the former District Attorney was called upon, on more than one occasion, to measure and address potential retribution of his former office, and potentially himself. To have the former leader of the District Attorney's Office decide the outcome of a dispute involving that office which occurred during his tenure as District Attorney, gives the appearance of being fundamentally unfair, unjust and improper. While complained of in its 1925(b) statement by Appellant as a **simple** fact, the consequences can be immeasurable, leading to a failure of due process.

Appellant's 1925(b) complaint that this court's conclusion will potentially require "any lead prosecutor who becomes a jurist to recuse in every case that was pending in that persons office when the now-judge was the lead prosecutor," is not valid. But yes, in every case where there was a **conclusion**, and the case then comes before that former lead prosecutor, now judge, from the same judicial district, for examination, recusal is necessary. That prosecutor, now judge, must appreciate that his personal desires and ambition to serve on the court do not surpass a defendant's (Appellee's) constitutional due process rights. The specific facts, procedures, and appearance of impropriety must be considered on a case by case basis. "[J]ustice must satisfy the appearance of justice;" the appearance of impropriety warrants recusal. *Aetna Life Ins. Co. v. Lavoie*, 475 US 813, 825 (1986). There are times when disqualification or recusal is required. However, disqualification or recusal when unwarranted, should not occur. Appellant alludes to the high number of cases that would result in recusal by this court's conclusion. Whether there is one (1) case that warrants recusal, or substantially more than one (1) case, the number of potential cases affected by recusal must not be a consideration when determining the guarantee of due process. That determination must be

made on the basis of fairness, impartiality, and the appearance of propriety. If the prevailing facts and circumstances engender a substantial question of fairness or impartiality in reasonable minds, then recusal must be had. See *Rippo*, 137 S.Ct. 905; *Withrow*, 95 S.Ct. 1456; *Williams*, 136 S. Ct. at 1905.

If the pertinent undisputed described facts, as set forth in this court's December 27, 2018 Memorandum Opinion, that were not previously disclosed, were placed of record for a motion for recusal before an independent arbiter, rhetorically, would recusal have happened, or not? The obligation for judges to decide cases must not stand in the way of the constitutional mandate of fairness, and the appearance of propriety. A judge must uphold and promote the independence, integrity, and impartiality of the judiciary, trial and appellate, and must always avoid impropriety and the appearance of impropriety, especially when there may be a perception of bias, personal or otherwise, or prejudice concerning a party or class of parties, or if there is a potential perception of more than a *de minimus* interest. Additionally, the appearance of due process is lacking when a judicial candidate known to have made public statements that commit that candidate to reach a particular outcome in matters that subsequently come before him, as his mind is already made. See Memorandum Opinion dated December 27, 2018; *Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir. 1985); *Commonwealth v. Darush*, 459 A.2d 727, 732 (Pa. 1983); *Commonwealth v. Rhodes*, 990 A.2d at 749 (Pa. Super 2009); *Commonwealth v. Lemanski*, 529 A.2d 1085 (Pa. Super 1987); *Commonwealth v. Bryant*, 476 A.2d 422, 427 n.1 (Pa. Super. 1984). Presumably when Mr. Castille was campaigning for a seat on the Pennsylvania Supreme Court he considered the possibility of conflicts of interest of cases on appeal of his former office, the impact on the citizens of the

First Judicial District, the Commonwealth and the appearance of impropriety relating to those cases.

Furthermore, to place the potentially biased arbiter in a collegial setting, a confidential session, for appellate review of a case overseen by him and his prior office, from a perspective that may potentially outweigh all others in the appellate deliberation room, creates the appearance of unfairness, impropriety, and most importantly, a lack of constitutional due process. If the appearance is not true and correct, the appearance is of impropriety and injustice.

2. The PCRA Court's conclusion was not overly broad.

In its 1925(b) Statement, Appellant complains that this court erred and reached an "overly broad conclusion that a judge must recuse himself **merely** because—as inevitably will happen to many or even all judges at some point—he is presented with a case that is similar to other cases on which he expressed views during his prior time as **an attorney**." 1925(b) Statement ¶ 2. (emphasis added). Appellant's assertion is a mischaracterization of the facts. At the time of the recently disclosed letter from Mr. Castille to Governor Casey, Mr. Castille was not "**merely**" an attorney expressing his personal views. Mr. Castille was the District Attorney of Philadelphia County who was advocating for the expedited issuance of death warrants, particularly "to send a clear and dramatic message to all police killers that the death penalty in Pennsylvania means something."[4] In fact, as the record reflects, not only did Mr. Castille write to the Governor urging the expedited issuance of death warrants, there were public statements, press releases, campaign statements, campaign endorsements, not **merely** but in a forceful

[4] "Death Warrants" Letter to Governor Casey dated June 15, 1990 ¶ 3.

manner. Considering the totality of factual circumstances including the law as set forth in *Williams*, there is nothing broad about the fact specific conclusion reached by this court.

Due process has no emotion, nor should emotion be involved. "Disqualification of a judge is mandated whenever a significant minority of the lay community could reasonably question the court's impartiality." *Rhodes*, 990 A.2d at 748; *Commonwealth v. Druce*, 796 A.2d 321 (Pa. Super. 2002) (quoting *Bryant*, 476 A.2d at 425); *Darush*, 459 A.2d at 727. Similar to the Judge's prior public statements expressing his dissatisfaction about sentencing laws against drug offenders in *Lemanski*, 529 A.2d 1085, this court finds that Mr. Castille's singling-out individuals convicted of killing police officers in a letter to the Governor urging the issuance of death warrants at a faster pace, along with his staunch public advocacy for finality in capital cases, lends itself to the appearance of impropriety from which a significant minority of the lay community could reasonably question Justice Castille's impartiality in Appellee's matter as presented to Justice Castille.

In the June 15, 1990 letter to Governor Casey, Mr. Castille, as the District Attorney, singled-out a particular class of litigants, individuals convicted of killing a police officer, to "send a loud and clear message that the death penalty actually means something."[5] During Mr. Castille's tenure as District Attorney, while he was staunchly advocating for the issuance of death warrants, particularly in cases involving "police-killers", Appellee was one of a few individuals on death row who had been convicted of killing a police officer. Arguably, Appellee is one of the most recognized convicted police-killers in the world, as evidenced by the attention generated by this case. Eight (8) years later, after denying the request to recuse[6],

[5] See "Death Warrants" Letter to Governor Casey dated June 15, 1990 ¶ 3.
[6] *Commonwealth v. Abu-Jamal*, 720 A.2d 121 (Pa. 1998).

Mr. Castille sat on the Pennsylvania Supreme Court and participated in the decision affirming the denial of Appellee's PCRA petition.[7] "The appearance of impropriety is sufficient to warrant the grant of new proceedings." *In re Lokuta*, 11 A.3d 427, 435 (Pa. 2011) (quoting *McFall*, 617 A.2d at 714). Here, the appearance of impropriety can be seen from afar and is elementary, and the failure to recuse resulted in the appearance of the lack of due process; an appearance of an unfair appellate tribunal.

3. The PCRA Court did not base its grant of relief on the Code of Judicial Conduct.

As discussed *supra*, it is clear that this court's decision was not based on the Code of Judicial Conduct. In fact, in the December 27, 2018 Memorandum Opinion, this court unequivocally states "this court is without jurisdiction to enforce the Judicial Code of Conduct." See December 27, 2018 Memorandum Opinion at 34. The court's decision is based upon the appearance of the lack of constitutional due process as set forth in controlling case law as explained in the Memorandum Opinion. See *Williams v. Pennsylvania*, 136 S.Ct. 1899; *Caperton v. Massey Coal Co., Inc.*, 129 S.Ct. 2252 (2009); *Aetna Life Ins. Co. v. Lavoie*, 106 S.Ct. 1580 (1986); *In re Murchison*, 75 S.Ct. 133 (1955). The fact that those cases are parallel to the Code of Judicial Conduct amplifies the severity of the issues raised which have been repeatedly mandated by the United States Supreme Court. *Id.*

4. Appellee's evidence established by a preponderance of the evidence that, as an objective matter, there was an unconstitutional potential for bias.

"Due Process guarantees the absence of actual bias." *Williams*, 136 S.Ct at 1905; *Aetna*, 106 S.Ct at 1580. Due process prohibits conduct that compromises or appears to compromise the integrity and impropriety of a judge. Actual bias does not have to be established when

[7] *Commonwealth v. Abu-Jamal*, 720 A.2d 79 (Pa. 1998).

determining whether bias exists. Instead, the United States Supreme Court "relies on an objective standard asking 'whether . . . as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." *Williams*, 136 S.Ct. at 1905. (quoting *Caperton*, 556 129 S.Ct. at 2252). Likewise, Pennsylvania case law requires recusal as an objective matter when a party proves "a reasonable observer might question a judge's impartiality." *Commonwealth v. Rhodes*, 990 A.2d 732, 743 (Pa. Super. 2009). Further, "a judge's removal may be compelled where his remarks reflect prejudgment of the case as one of a particular class of cases." *Id.* at 749; see *Lemanski*, 529 A.2d at 1088 ("[a] party is not limited to his own case in establishing bias, and may show temperamental prejudice on the particular class of litigation involved to support his allegations.").

Here, as stated *supra*, this court found that Appellee's evidence established, as an objective matter, an unconstitutional potential for bias. Mr. Castille was the District Attorney of Philadelphia County at the time the District Attorney's Office was opposing Appellee's direct appeal. Mr. Castille, in his role as District Attorney, was also a staunch advocate for the death penalty, particularly against convicted police killers of which Appellee was profoundly one of a few, if not the only police killer case on direct appeal by his former office. Appellee was also one of a few police killers in Philadelphia when Mr. Castille was urging the Governor to issue death warrants with haste "to send a clear and dramatic message to all police killers that the death penalty in Pennsylvania actually means something." Under these circumstances this court found that, as an objective matter, a reasonable observer would question the Supreme Court Justice's impartiality concerning capital cases involving convicted police killers,

particularly one whose direct appeal was opposed by the District Attorney's Office led by then Justice Castille[8], and again by then Chief Justice Castille, on a subsequent appeal.[9]

5. Jurisdiction

It is well-settled that this court has jurisdiction. As stated in this court's December 27, 2018 Memorandum Opinion, and April 28, 2017 Order, and worth repeating here for clarity and in the focused kolidscope context of Appellant's 1925(b) Statement, this court exercised jurisdiction over Appellee's facially untimely PCRA petition under newly-discovered fact and newly-recognized constitutional right exceptions to the timeliness requirement of the PCRA.[10] The newly-discovered fact being that the District Attorney's Office and District Attorney Castille's characterization of the role Mr. Castille played in capital prosecutions cannot be credited, came to light upon the United States Supreme Court's decision in *Williams*. 136 S.Ct. 1899. Similarly, this court found that the *Williams* decision constituted a new watershed rule of criminal procedure that applies retroactively on collateral review. It should be noted that Appellant withdrew its appeals in seven (7) similar cases where this court found jurisdiction as in the instant matter.[11]

Moreover, as set forth in *Commonwealth v. Townsend*, 850 A.2d 741 (Pa. Super 2004), because of the nature of the due process question involved in this matter, the merits of Appellee's claims should be reviewed in the interest of justice.

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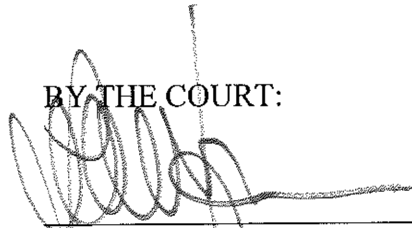
[8] *Commonwealth v. Abu-Jamal*, 833 A.2d 724 (Pa. 2003).
[9] *Commonwealth v. Abu-Jamal*, 941 A.2d (Pa. 2008).
[10] 42 Pa. Cons. Stat. §§ 9545(b)(1)(ii),(iii) (West 2018); Order dated April 28, 2017.
[11] See *Commonwealth v. Henry Daniels*, 739 CAP; *Commonwealth v. Percy Lee*, 2159 EDA 2017; *Commonwealth v. Craig Murphy*, 741 CAP, 742 CAP; *Commonwealth v. Kevin Pelzer*, 755 CAP; *Commonwealth v. Anthony Reid*, 751 CAP; *Commonwealth v. Anthony Reid*, 752 CAP; *Commonwealth v. Saharis Rollins*, 2483 EDA 2017.

6. **Conclusion**

Accordingly, the Appellee's Petition for Post Conviction Relief is GRANTED as to the claim of unconstitutional bias pursuant to the due process clause of the United States Constitution, and *Williams*, 136 S.Ct. 1899; *Caperton*, 129 S.Ct. 2252; *Aetna*, 106 S.Ct. 1580; *McFall*, 617 A.2d 707; and *Lemanski*, 529 A.2d 1085. Appellee should be permitted to reargue his appeal before the Pennsylvania Supreme Court.

BY THE COURT:



LEON T. TUCKER
Supervising Judge,
Criminal Trial Division

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COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
CRIMINAL TRIAL DIVISION

COMMONWEALTH v. WESLEY COOK a/k/a MUMIA ABU-JAMAL

CP-51-CR-0113571-1982

SUPPLEMENTAL OPINION

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing Court Order upon the person(s) and in the manner indicated below, which service satisfies the requirements of PA.R.CRIM.P. 114:

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Dated: 3/27/19

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