COURT OF COMMON PLEAS OF PHILADELPHIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

v.

WESLEY COOK aka **CP-51-CR-0113571-1982**

MUMIA ABU-JAMAL

MEMORANDUM OPINION

LEON W. TUCKER, Supervising Judge, Criminal Division **DATE: 12/27/2018**

This matter comes before this court as the result of the conviction of an act that occurred on December 9, 1981, a trial, and a sentencing that occurred on May 25, 1983. Our legislature allows individuals who are convicted of crimes to have everlasting access to the courts should an incident permitted by the Post-Conviction Relief Act[1] (hereinafter "PCRA") occur.

While there may be many issues surrounding this case in the minds of the parties and many others, the only current issue before this Court is that presented in *Williams v. Pennsylvania*, 136 S.Ct. 1899 (2016.) The specific issue of guilt or innocence is not before this court. The very pointed issue before this court is whether the former Chief Justice of the Pennsylvania Supreme Court, Ronald Castille, had significant personal involvement in a critical

[1] 42 Pa. Cons. Stat. §§ 9541-9546 (West 2018).

decision of Petitioner's case during Mr. Castille's tenure as the District Attorney of Philadelphia County, and subsequently participated in Petitioner's PCRA appeals before the Supreme Court of Pennsylvania, as a justice of that court without bias. To be stated alternatively, whether Petitioner's PCRA appeals to the Pennsylvania Supreme Court were tainted by Justice Castille's refusal to recuse, even if Justice Castille's participation was not determinative of Petitioner's PCRA appeals; and was the appellate PCRA tribunal an unbiased tribunal as mandated by the due process clause of the United States Constitution and *Williams*. *Id.* 136 S.Ct. 1899.

Following lengthy and arduous PCRA proceedings, two years of discovery and hearings, and careful consideration of same, this court finds that Petitioners petition as presented is not without merit but, lacks foundation as to prior personal significant involvement by District Attorney Castille as presented by *Williams*. However, the claim of bias, prejudice, and the refusal of former Justice Castille to recuse himself from Petitioner's PCRA appeals is worthy of consideration as true justice must be completely just without even a hint of partiality, lack of integrity, or impropriety. Regardless of the underlying guilty verdict of the first degree murder charge, and regardless if the tribunal was trial or appellate, Petitioner is entitled to an unbiased tribunal, without even the appearance of impropriety.

I. Background

The United States Supreme Court's decision in *Williams*, precipitated the instant PCRA proceeding as a result of a new due process requirement. *Id.* In *Williams*, the Court held *inter alia* "[w]here 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" in violation of the Due Process Clause of the United States Constitution and entitles a petitioner to have his case heard before an unbiased tribunal. *Id.* In *Williams*, the

petitioner, Terrance Williams, faced charges of first-degree murder for his role in the death of a 56-year old man here in Philadelphia. At the time of Williams' trial, the Philadelphia District Attorney's Office was led by Ronald Castille, who served as District Attorney of Philadelphia County from January 6, 1986 to March 12, 1991. As District Attorney, Castille was responsible for granting permission to trial Assistant District Attorneys, who sought the death penalty in first-degree murder cases, such as the case against Terrance Williams. Castille reviewed a memorandum detailing the request to seek the death penalty for Williams and ultimately personally approved the request. Williams was convicted of first-degree murder and sentenced to death. Williams went on to challenge his conviction and sentence via direct appeal, state post-conviction review, and federal habeas review. *Id.*

Simultaneously, District Attorney Castille went on to become Justice Castille of the Pennsylvania Supreme Court after campaigning statewide on a law and order platform touting the number of defendants sent to death row under his tenure as Philadelphia District Attorney. *Id.* at 1908. Justice Castille joined the Pennsylvania Supreme Court on January 3, 1994 and was later elevated to Chief Justice on January 14, 2008. He served in that capacity until he retired from the bench on December 30, 2014, fourteen (14) days after authoring a concurring opinion in the Pennsylvania Supreme Court's Williams' PCRA decision. *Commonwealth v. Williams*, 105 A.3d 1234 (Pa. 2014). In 2012, at a PCRA evidentiary hearing in the Philadelphia Court of Common Pleas, previously hidden and unrevealed evidence of Justice Castille's personal involvement in the Williams trial came to light, twenty-six (26) years post-trial. Based on the production of previously hidden and unrevealed material evidence by the Commonwealth, the PCRA court stayed Williams' execution, and ordered a new sentencing hearing. Upon appeal by the Commonwealth to the Pennsylvania Supreme Court, which Justice Castille was then a member, Williams filed a motion

for Justice Castille's recusal because of his prior involvement in the case as District Attorney. The motion for recusal was personally and summarily denied by Justice Castille. With Justice Castille participating in the decision of the Pennsylvania Supreme Court, notwithstanding the request for recusal and his previous personal approval of the death penalty, the Pennsylvania Supreme Court vacated the PCRA court's order staying execution and reinstated Williams' death sentence. *Id.*

Upon application by Williams, the United States Supreme Court granted certiorari and held: (1) when a judge has earlier significant personal involvement as a prosecutor involving a critical decision in a defendant's case, there is an impermissible risk of actual bias under the Due Process Clause of the United States Constitution; and (2) whether a judge who failed to recuse himself casts the dispositive vote in a case is of no consequence because an unconstitutional failure to recuse is structural error. *Williams v. Pennsylvania*, 136 S.Ct. 1899 (2016).

In addition to its conclusions of law, the United States Supreme Court took the extraordinary step of also making factual findings as to Justice Castille's involvement in the prosecution of Williams' case. The United States Supreme Court found the Commonwealth's portrayal that then District Attorney Castille's "approval of the trial prosecutor's request to pursue capital punishment in Williams' case amounted to a brief administrative act limited to 'the time it takes to read a one-and-a-half-page' . . . cannot be credited. *Id* at 1907. "The Court will 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." *Id.* The Court referenced Chief Justice Castille's own public statements about sending defendants to death row, as evidence of his involvement and subsequent mischaracterization of his role in capital sentencing decisions. "Chief Justice Castille's willingness to take personal responsibility for the death sentences obtained during his tenure as

District Attorney indicate that, in his own view, he played a meaningful role in those sentencing decisions and considered his involvement to be an important duty of his office." *Id.* at 1908.

II. *Williams v. Pennsylvania* recognized a new watershed rule of criminal procedure, which applies retroactively on collateral review.

Pennsylvania courts employ the seminal *Teague v. Lane*, 489 U.S. 288 (1989), framework when determining the retroactivity of a new constitutional law in collateral review proceedings. 489 U.S. 288 (1989); *Commonwealth v. Washington*, 142 A.3d 810 (Pa. 2016); *Commonwealth v. Riggle*, 119 A.3d 1058, 1065 (Pa. Super. 2015). *Teague* allows for two exceptions to the general rule against the retroactive application to defendants on collateral review. The first exception allows for retroactive application of new rules that protect certain private individual conduct beyond a state's power to punish. *Teague*, 489 U.S. at 307. The second exception is for watershed rules of criminal procedure, which touch on the fundamental fairness and accuracy of criminal proceedings. Although the Court did not define when specific rules are presumed to be watershed, courts should consider a new procedural rule to be watershed "if it is necessary to prevent an impermissibly large risk of an inaccurate conviction and alters the understanding of the bedrock procedural elements essential the fairness of a proceeding." *Riggle*, 119 A.3d at 1066.

In *Commonwealth v. Washington*, when the court was determining whether *Alleyne v. United States*, announced a groundbreaking, watershed rule, the court focused on the discretionary aspects of sentencing which were not changed under *Alleyne*. 142 A.3d 810, 813-19 (Pa. 2016); 133 S. Ct. 2151(2013). Pre-*Alleyne*, judges were able to increase sentences based on finding facts by a preponderance of the evidence. Following *Alleyne*, that particular fact-finding function was shifted to the jury and increased the burden of proof to beyond a reasonable doubt. *Id.* at 819. The *Williams*' decision is not like a discretionary sentencing regime and a shift in the burden of proof; instead it establishes a constitutional violation if a District Attorney with personal involvement

then reviews the matter, as an appellate judge. The only procedural change post-*Alleyne* was that the jury, rather than a judge, must find beyond a reasonable doubt facts which increase a mandatory minimum sentence. This shift between jury and judge is not watershed.

There is a new procedural rule. If a judge served as a prosecutor and then the judge, there is no separate analysis or determination required by the court, there is a finding of automatic bias and a due process violation. *Williams*, 136 S. Ct. at 1906. Just as monumental as the right for an indigent defendant to have counsel in criminal proceedings, is the right to an unbiased tribunal. In the *Williams* matter, the impermissible large risk is that of a tainted judicial review. *Id.* This rule alters the understanding of bedrock procedural elements because it completely explains the recusal of judges' analysis. *Williams* establishes an automatic finding of subjective and actual bias. *Id.* The Pennsylvania Superior Court in *Riggle* declined to find *Alleyne* was entitled to retroactive application because it did not impact the fundamental fairness of criminal proceedings. 119 A.3d at 1058. Here, the United States Supreme Court's decision in *Williams* is entitled to retroactive application because a potentially biased tribunal impacts the fundamental fairness of criminal proceedings.

III. Procedural History

Petitioner herein, Wesley Cook also known as Mumia Abu-Jamal, through a PCRA petition before this court, filed within sixty (60) days[2] of the United States Supreme Court decision in *Williams*, contends he was similarly denied fundamental due process because then District Attorney Castille had significant, personal involvement as a prosecutor in a critical decision in the Commonwealth's opposition of the direct appeal in his case. Petr's Second Am. Pet. at 4.

[2] Pursuant to the PCRA, "any petition invoking an exception . . . shall be filed within 60 days of the date the claim could have been presented." 42 Pa. Cons. Stat. § 9545(b)(2)(West 2018).

In what has become one of the most polarizing criminal cases in Philadelphia history, the nation, and perhaps worldwide, Petitioner was found guilty of murder by a jury for the shooting death of Philadelphia police officer Daniel Faulkner and sentenced to death on May 25, 1983. Currently, Petitioner is serving a life sentence without the possibility of parole due to that conviction.[3] During Petitioner's trial, Mr. Castille was an Assistant District Attorney and not assigned to Petitioner's case. On January 6, 1986, Mr. Castille became the District Attorney of Philadelphia County. Mr. Castille continued to serve as District Attorney throughout the preparation and litigation of Petitioner's pending death sentence direct appeal before the Supreme Court of Pennsylvania. On March 6, 1989, prior to Mr. Castille becoming Justice Castille, Petitioner's direct appeal to the Pennsylvania Supreme Court was denied. *Commonwealth v. Abu-Jamal*, 555 A.2d 846 (Pa. 1989). Petitioner's writ of certiorari was denied by the United States Supreme Court on October 1, 1990. *Abu-Jamal v. Pennsylvania*, 498 U.S. 881 (1990).

On January 3, 1994, Mr. Castille was elected as Justice to the Pennsylvania Supreme Court. Petitioner filed his first PCRA petition on June 5, 1995. *Pennsylvania v. Abu-Jamal*, 30 Phila 1, 1995 Cty Rptr LEXIS 38 (1995). Petitioner's PCRA petition was denied by the trial court on September 15, 1996. *Id.* The denial of post-conviction relief was appealed to the Pennsylvania Supreme Court which Mr. Castille then sat as an Associate Justice. Petitioner moved to have Justice Castille recuse himself from the consideration of Petitioner's pending PCRA appeal due to then Justice Castille's previous tenure with the Philadelphia District Attorney's Office during the trial as an unaffiliated Assistant District Attorney with this case, and direct appeal of this case as

[3] On August 13, 2012, the Court of Common Pleas resentenced Petitioner to life without parole following a 2011 United States Court of Appeals for the Third Circuit decision that declared Petitioner's death sentence unconstitutional. See *Commonwealth v. Abu Jamal*; see *Abu-Jamal v. Secretary*, 643 F.3d. 370 (3rd Cir. 2011).

District Attorney. *Commonwealth v. Abu-Jamal*, 720 A.2d 121 (Pa. 1998).[4] Justice Castille denied Petitioner's motion for recusal and the Pennsylvania Supreme Court affirmed the trial court's denial of PCRA relief. *Commonwealth v. Abu-Jamal*, 720 A.2d 79 (Pa. 1998). Petitioner subsequently filed three additional PCRA petitions, each denied by the trial court whose decision was affirmed by the Pennsylvania Supreme Court with Justice Castille participating in each those appeals. *Commonwealth v. Abu-Jamal*, 833 A.2d 719 (Pa. 2003); *Commonwealth v. Abu-Jamal*, 941 A.2d 1263 (Pa. 2008); *Commonwealth v. Abu-Jamal*, 40 A.3d 1230 (Pa. 2012).

Following the United States Supreme Court's decision in *Williams*, Petitioner filed a PCRA petition on August 7, 2016.[5] On April 28, 2017, this court found that it had jurisdiction over the matter under the newly-discovered fact exception of the PCRA and granted Petitioner's motion for discovery on the basis of the due process guarantees as set forth in *Williams*.[6] Since then, this court has engaged in a lengthy, meticulous discovery process and its findings are detailed *infra*.

IV. Legal Analysis

The Pennsylvania Legislature has provided a mechanism by which individuals who have exhausted the direct appeal process may seek post-conviction relief. Under 42 Pa. Cons. Stat. §§

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[4]In his motion for recusal, Petitioner requested Justice Castille recuse himself from Petitioner's pending PCRA appeal because: 1.) Mr. Castille served as an Assistant District Attorney unaffiliated with this case and as the District Attorney of Philadelphia County during the time Petitioner's direct appeal; 2.) Petitioner claimed Mr. Castille, as a former prosecutor, had a "vested interest" colleagues at the District Attorney's Office and would be unable to remain impartial while analyzing claims of prosecutorial misconduct; and 3.) the Fraternal Order of Police, presumably which the decedent Police Officer Daniel Faulkner was a member, endorsed Mr. Castille in his campaign for the Supreme Court of Pennsylvania. *Commonwealth v. Abu-Jamal*, 720 A.2d 121 (Pa. 1998).

[5] Petitioner claims exception to the PCRA timing requirement under all three (3) timelines exceptions of the PCRA: governmental interference, newly-discovered evidence, and newly recognized constitutional right. 42 Pa. Cons. Stat. §9545(b)(1)(i)(ii)(iii) (West 2018).

[6] This court also found a showing of exceptional circumstances, which authorizes discovery pursuant to Pa.R.Crim.P. 902(E)(1). Order dated April 28, 2017.

9541-9546, commonly known as the Post Conviction Relief Act, a petitioner is required to plead and prove only by a preponderance of the evidence that he was convicted or sentenced as a result of one of the grounds enumerated in subsection (a)(2) to obtain post-conviction relief. *Id.* § 9543(a)(2) (2015). A "preponderance of the evidence is tantamount to 'more likely than not.'" *Commonwealth v. $6,425.00 Seized from Esquilin*, 880 A.2d 523, 529 (Pa. 2005). Petitioners must also prove the claimed errors were not previously litigated or waived and "the failure to litigate the issue prior to or during trial . . . or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel." 42 Pa. Cons. Stat. § 9543(a)(4). An issue is considered previously litigated if "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue." *Id.* § 9544(a)(2). An issue is considered waived "if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state post-conviction proceeding." *Id.* § 9544(b).

a. Jurisdiction

This court exercised jurisdiction over Petitioner's PCRA petition even though it was filed outside of the statutory one-year deadline because this court found that Petitioner's claims fell under the newly-discovered fact exception for untimely PCRA petitions.[7]

A petitioner must file a PCRA petition, including second and subsequent petitions, within one year of the date when the judgment becomes final. *Id.* § 9545(b). A judgment is considered final at the close of direct review or when the time to seek review expires. *Id.* § 9545(b)(3). There are three exceptions to the one-year time limitation:

[7] 42 Pa. Cons. Stat. §§ 9545(b)(1)(ii),(iii) (West 2018); Order dated April 28, 2017.

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

Id. § 9545(b)(1). All three exceptions must be asserted within 60 days of when the claim first became available. *Id.* § 9545(b)(2). Pennsylvania courts have no jurisdiction to address the substantive merits of untimely PCRA petitions and an untimely petition will not be addressed solely because it involves a capital case. *Commonwealth v. Fahy*, 737 A.2d 214, 223 (Pa. 1999). If the petitioner's claims are cognizable under the PCRA, any common law and statutory remedies are subsumed by the PCRA and not separately available to the petitioner. *Id.*

Petitioner's judgment of sentence became final on October 1, 1991, when the United States Supreme Court denied Petitioner's direct appeal writ of *certiorari*. For cases that became final prior to the 1995 enactment of the one-year timeliness requirement, a first PCRA petition is considered timely if filed within one year of the effective date of the amendments. *Commonwealth v. Crawley*, 739 A.2d 108, 109 (Pa. 1999). This grace period does not extend to second or subsequent PCRA petitions. *Id.*

Petitioner filed the PCRA petition, which is the basis of this appeal, on August 7, 2016 – well beyond the one-year time period. Petitioner seeks an exception for his untimely petition under the governmental interference, newly-discovered fact, and newly-recognized constitutional right exceptions of the PCRA.

1. Newly-discovered fact exception for Untimely Petitions

The legislature has carved out a newly-discovered fact exception for petitions filed outside of the one-year deadline. Specifically if "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence," the petitioner's untimeliness will be excused. 42 Pa.C.S. § 9545(b)(1)(ii). The legislature, through the PCRA, allows petitioner to file a petition for relief on the newly-discovered fact within sixty (60) days of the date the claim could have been presented. *Id.* § 9545(b)(2). So each time, as here, a new fact is discovered the PCRA permits another PCRA petition, no matter how many PCRA petitions have been previously filed and litigated by the petitioner.

i. Newly-discovered fact

This court found that the newly-discovered fact in this case was the United States Supreme Court's decision in *Williams* and addressed the merits of Petitioner's claim. As a general notion, judicial determinations of law typically do not qualify under the newly-discovered fact exception, as judicial determinations are law not facts. *Commonwealth v. Watts*, 23 A.3d 980, 987 (Pa. 2011). However, there is a very narrow set of circumstances when a judicial determination can, in fact, be a newly-discovered fact.

The distinction between law and fact is usually well-defined: "an in-court ruling or published judicial opinion is law, for it is simply the embodiment of abstract principles applied to actual events. The events that prompted the analysis, which must be established by presumption or evidence, are regarded as fact." *Id.* at 987. Black's Law Dictionary defines fact as "[a]n actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation." FACT, Black's Law Dictionary (10th ed. 2014). While most judicial opinions are

the embodiment of legal principles applied to the facts of the case, there are instances when a judicial determination can serve as a factual predicate for a claim.

These instances are when a defendant only becomes aware of fact because of a judicial determination or when a judicial determination affords a defendant the first opportunity to present his claim. In a concurrence opinion, Justice Baer of the Pennsylvania Supreme Court noted a possible exception "where the issuance of a judicial opinion in one's own case triggers the [newly discovered fact] exception." *Watts*, 23 A.3d at 988 (concurrence by J. Baer). In the context of abandonment of counsel, Justice Baer opined ". . . a defendant may not know that counsel has abandoned him until an appellate court declares it to be so." *Id.* In *Watts*, the petitioner sought post-conviction relief based on *Commonwealth v. Bennett*, 930 A.2d 1264 (Pa. 2007) (holding a petitioner who was abandoned on appeal by former counsel may successfully invoke the newly discovered fact exception). The Court rejected Watts's reliance on the *Bennett* decision because Watts had the opportunity to pursue a claim on abandonment of counsel when he first learned his counsel abandoned him but instead Watts delayed four (4) years until the publication of *Bennett* to pursue his claim. *Watts*, 23 A.3d at 986-87.

Although Watts was not successful, other petitioners were successful in using *Bennett* as a trigger for a newly-discovered fact. These decisions further explore how a judicial determination may serve as a newly-discovered fact. For example, in *Commonwealth v. Smith*, 35 A.3d 766 (Pa. Super. 2011), the Court permitted the petitioner to rely on *Bennett* for the newly-discovered fact exception because "although the factual predicate of Smith's claims for the purposes of [the newly discovered fact exception] was the dismissal of his first PCRA petition in 2001 due to counsel's abandonment, the subsequent change in law that occurred in

2007 with the *Bennett* decision afforded Smith his first opportunity to present his claim pursuant to section 9545(b)(2)." *Id.*

Accordingly, this court found that the United States Supreme Court's holding in *Williams*, that there is an impermissible risk of actual bias when a judge earlier had significant personal involvment as a prosecutor in a critical decision regarding a defendant's case, constitutes a newly-discovered fact that was previously unknown to Petitioner for the purposes of an exception to the PCRA timeliness requirement.

ii. Due Diligence

To succeed on the newly-discovered fact exception, the petitioner must also establish the facts could not have been ascertained earlier with the exercise of due diligence. The touchstone of due diligence is reasonableness. Courts should not engage in hindsight speculations but instead focus on the context of the evidence and what can reasonably be expected from a petitioner. *Commonwealth v. Burton*, 121 A.3d 1063 (Pa. Super. 2015). Petitioners are not required to exhaust every possible opportunity to uncover new evidence or facts. Rather courts should look to whether a petitioner's efforts were reasonable based on the surrounding circumstances. *Commonwealth v. Davis*, 86 A.3d 883, 886 (Pa. Super. 2014).

Petitioner proved the facts, by a preponderance, upon which the claim is predicated – the United States Supreme Court recently ruled decision in *Williams v. Pennsylvania*, 136 S.Ct. 1988 (2016) – was previously unknown to Petitioner and could not have been ascertained earlier by the exercise of due diligence. Thus, this court found exception to this otherwise untimely petition and will address the substantive merits of Petitioner's claim.

b. Waiver

To be eligible for post-conviction relief, the petitioner must establish that his claims have not been previously litigated or waived. 42 Pa. Cons. Stat. § 9543(a)(3). If the petitioner could have raised the claim during trial, appellate proceedings, or previous PCRA proceedings and failed to do so, then the claim is waived under the PCRA. *Id.* § 9544(b).

When a change in the law occurs after a petitioner's right to a direct appeal has lapsed, issues related to the change in law will not be waived if the petitioner raises them upon the first opportunity to do so. The PCRA specifies "an issue is waived if the petitioner **could have** raised it but failed to do so . . . ." *Id.* § 9544(b) (emphasis added). If a petitioner relies upon a change in law for his claims, it follows that he could not have previously raised those issues. For example, a petitioner's PCRA claims which were centered on a change in parole release rules were not waived because the change in the rules occurred after his right to a direct appeal had expired. *Commonwealth v. Stark*, 698 A.2d 1327, 1329 (Pa. Super. 1997). The Court determined the issues were not waived as the petitioner raised the claim in his first PCRA petition following the rule change. *Id.*

Similarly, this court found Petitioner's claims were not waived as he raised his *Williams*-based claims at the first opportunity to do so. The Supreme Court of the United States decided *Williams* on June 9, 2016. The Petitioner filed his PCRA petition raising constitutional claims pursuant to *Williams* on August 7, 2016. As this was the first opportunity for Petitioner to raise a claim following the change in recusal and due process jurisprudence, this court found Petitioner has not waived his constitutional claims.

In addition to the specific rules on waiver under the PCRA, petitioners must also comply with the Pennsylvania Rules of Appellate Procedure. Specifically "issues not raised in the lower

court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). However, Pennsylvania courts have reviewed the merits of an otherwise waived claim in the interest of justice. *Commonwealth v. Townsend*, 850 A.2d 741 (Pa. Super. 2004).

When a PCRA petition raises ethical concerns such as the violation of Pennsylvania Rules of Professional Conduct, Pennsylvania courts may review such claims in the interest of justice. *Id.* at 742-43. For example, the Pennsylvania Superior Court reviewed the merits of an appellant's conflict of interest claim even though the petitioner had not previously raised the claim during previous proceedings. *Id.* In *Townsend*, an assistant district attorney represented the Commonwealth during PCRA proceedings involving an appellant, who had previously met with and confided in the assistant district attorney when the attorney worked as private defense counsel. *Id.* The appellant failed to raise this conflict of interest during the PCRA proceedings, including an evidentiary hearing. *Id.* It was not until the appeal on the dismissal of his PCRA petition that appellant first raised this issue. *Id.* Although the appellant failed to establish that his claim was not waived under the Post-Conviction Relief Act or the Rules of Appellate Procedure, the Superior Court still reviewed the merits of the claim, and ultimately reversed and remanded the matter for a new PCRA hearing, in the interest of justice. *Id.*

Likewise, this court found Petitioner's claims were not waived and should be reviewed in the interest of justice. Just as the appellant in *Townsend* raised a claim involving a violation of the Rules of Professional Conduct, Petitioner raises a similar ethical concern – the violation of the Pennsylvania Rules of Judicial Conduct. The Pennsylvania Code of Judicial Conduct, at the time of Petitioner's appeal, mandated "Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances where: (a) they have a personal bias or prejudice concerning a party, or personal knowledge of

disputed evidentiary facts concerning the proceeding; (b) 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. . . ." Pa. Code of Judicial Conduct, Canon 3(C)(1) (1974, as amended).

This court found Petitioner's claims were not waived as Petitioner could not have previously raised his *Williams*-based claims. However, even if the Court finds Petitioner could have raised his claims in prior proceedings, Petitioner should be afforded appellate review in the interest of justice. Petitioner brings to light an ethical concern, specifically a violation of the Pennsylvania Code of Judicial Conduct by the former Chief Justice of the Pennsylvania Supreme Court – review of such a claim is proper in the interest of justice, as set forth in *Williams*.

c. *Williams*-based Claim

Petitioner contends that like in *Williams*, evidence disclosed during the instant PCRA proceeding proves that Mr. Castille, in his capacity as District Attorney, had significant personal involvement in the Commonwealth's opposition of Petitioner's direct appeal. Petr's Second Am. Pet. at 12-31. Specifically, Petitioner argues that Mr. Castille's significant personal involvement in Petitioner's case is evidenced by: 1.) Public statements made by Mr. Castille; 2.) Mr. Castille's alleged policy of urging death warrants; and 3.) Mr. Castille's involvement in high-profile capital cases involving police victims. *Id.* While this court agrees with Petitioner's assertion that the holding in *Williams* is not limited to its specific facts, this court finds that the Petitioner has not offered any evidence of significant personal involvement in a critical decision made by then District Attorney Castille in the instant case akin to the signing of the death penalty authorization memorandum in *Williams*.

Public Statements. General public statements made by District Attorney Ronald Castille.

General Public statements alone are insufficient to prove significant personal involvement in a critical decision. In *Williams* the United States Supreme Court found that then District Attorney Castille's express authorization to seek the death penalty as evidenced by Mr. Castille personally signing death penalty authorization memorandum, constituted significant personal involvement in a critical trial decision. 136 S.Ct. at 1907.

Petitioner asserts that in *Williams*, the Supreme Court found public statements made by Mr. Castille regarding death penalty cases "highly significant" in the Court's finding that Mr. Castille as District Attorney was significantly and personal involved in the Williams' case. Likewise, Petitioner noted that this Courts grant of relief in *Commonwealth v. Aaron Jones*, CP-51-CR-1035061-1991, relied on public statements made by Mr. Castille as evidence of significant personal involvement in Mr. Jones'case. Petitioner argues that the multiple public statements made by Mr. Castille, and other employees of the Philadelphia District Attorney's Office regarding Mr. Castille's involvement in death penalty cases "raises an inference of significant personal involvement in Mr. Abu-Jamal's case." Petr's Second Am. Pet. at 15. Petitioner herein brought no evidence that linked Petitioner to or showed that Mr. Castille was referring directly to Petitioner in his statements, as in *Jones*.

Petitioner's assertion is incorrect. In *Williams*, the Court *noted* Mr. Castille's comments to the media that he "sent 45 people to death row" as District Attorney showed Mr. Castille's willingness to take personal responsibility for the death sentences obtained during his tenure as District Attorney. *Williams*, 136 S.Ct. at 1907-1908.[8] However, the decision in *Williams* was not based on those statements, but on the death penalty authorization memorandum signed by Mr.

[8] This was to refute the Commonwealth's argument that the act of signing a death penalty authorization memorandum "amounted to a brief administrative act." See *Williams*, 136 S.Ct. at 1907.

Castille in his capacity as District Attorney that authorized prosecutors to seek the death penalty in that case. *Id.* Similarly, in *Jones*, this court's decision to grant relief in that case was based on an immunity petition personally signed by then District Attorney Ronald Castille for witness testimony against Mr. Jones in a previous case. *Jones*, CP-51-CR-1035061-1991. Both the United States Supreme Court's and this court's findings of significant personal involvement in the aforementioned cases were primarily based on actual evidence – a signed death penalty authorization memorandum in *Williams*, and a signed immunity petition in *Jones* – of Mr. Castille's involvement in those cases, not on inferences raised in general public statements. General public statements, without reference to Petitioner and without further evidence such as a signed death penalty authorization memorandum or immunity petition, are insufficient to establish that Mr. Castille was significantly and personally involved in a critical decision in Petitioner's case.

Policy. Policy to expedite death warrants.

Petitioner argues that evidence disclosed in the instant discovery proceedings show that Mr. Castille, as District Attorney, had a policy to "actively seek the issuance of death warrants after the completion of direct appeal in all capital cases," especially those involving the killing of police officers. Petr's Am. Pet. at 15; Petr's Second Am. Pet. at 15. Petitioner contends that this alleged policy to expedite death warrants is "just as, if not more critical than, the decision to authorize the seeking of a death sentence at issue in *Williams*." *Id.* To attempt to prove this claim Petitioner highlights various documents disclosed by the Commonwealth as part of discovery herein including: 1.) July 16, 1987 news release by Mr. Castille in his capacity as District Attorney about the Pennsylvania District Attorney's Association adopting a resolution urging former Governor Bob Casey to sign death warrants in cases that had been finalized; 2.) May 25,

1988 letter from Assistant District Attorney Kathleen McDonnell to State Senator D. Michael Fisher detailing the status of "certain death row inmates"; 3.) September 23, 1988 letter from District Attorney Castille to Senator Fisher urging passage of an amendment to the death penalty law; 4.) March 27, 1990 memo from Deputy District Attorney Gaele Barthold to Mr. Castille advising Mr. Castille of the status of death penalty cases; 5.) A June 15, 1990 letter from Mr. Castille to Governor Casey imploring him to expedite the issuance of death warrants. Petr's Pet. at 15-23.

This court notes that a policy to expedite the issuance of death warrants implemented during Mr. Castille's tenure as District Attorney could affect Petitioner because Petitioner was on death row for the murder of a police officer at that time. However, the existence of such a policy is not evidence of significant personal involvement in a critical decision in Petitioner's case because there is no evidence that a policy to expedite death warrants was implemented to target Petitioner. While there were statements, speeches, and correspondence made by Mr. Castille advocating the District Attorney's policies, none of these things specifically referred to Petitioner herein. Furthermore, by Petitioner's own admission, Petitioner's case was not ripe for the issuance of a death warrant at the time this alleged policy to expedite death warrants was being developed by Mr. Castille as District Attorney as Petitioner's direct appeal had not been exhausted because the United States Supreme Court had not yet denied certiorari on Petitioner's direct appeal. *See* Petr's. Second Amended Pet. at 17.

In *Williams,* the Court noted multiple instances where a prosecutor may be significantly and personally involved in a critical decision of a case including: deciding what charges to bring, whether to offer a plea bargain, and deciding which witnesses to call. While this list is not exhaustive, each example offered demonstrates a narrow decision made in a specific case against

a specific defendant, which did not occur here. This is far different than the broad implementation of a policy that would affect many more than Petitioner. To find significant personal involvement in this alleged policy, without any evidence that the alleged policy was implemented because of this particular Petitioner, would be to significantly broaden the scope of *Williams*. This court, under *Williams*, cannot do so.

Involvement in high-profile capital cases.

Petitioner contends that newly-disclosed evidence sought and received in these court proceedings establishes that Mr. Castille was deeply interested in, biased against, and involved in capital cases, specifically those involving the deaths of police officers. Petr's. Second Am. Pet. at 23. Specifically, Petitioner notes an August 21, 1990 memorandum from Deputy District Attorney Gaele Barthold to then District Attorney Castille. The memorandum details the Commonwealth's strategy for opposing a federal writ of habeas corpus petition filed by Leslie Beasley, a defendant who was also convicted of causing the death of a police officer. In the memorandum Ms. Barthold outlines the Commonwealth's strategy for handling the *Beasley* federal habeas corpus petition and asks Mr. Castille to advise if he disagrees with the proposed strategy or has any questions regarding the strategy. In her April 30, 2018 deposition regarding this case, Ms Barthold stated this level of involvement by Mr. Castille "was done." Deposition of Gaele Barthold, June 12, 2018 Tr. At 125:19-20.

Again, Petitioner's attempt to broaden the scope of *Williams* is impermissible. Currently, there is no evidence that Mr. Castille had a similar level of involvement in Petitioner's case as it appears he had in the *Beasley* case. Following the significant personal involvement standard of *Williams*, Petitioner has not presented any evidence of Mr. Castille's personal significant involvement in this case. Without conclusive evidence such as the signed death penalty

authorization memorandum in *Williams*, Petitioner lacks sufficient evidence to advance this claim, under *Williams*.

Spoliation of Evidence.

The petitioner contends that due to the Commonwealth's failure to produce two documents sought by Petitioner in this case, an adverse inference is warranted under the spoliation doctrine that the "documents would provide additional evidence of Mr. Castille's [significant] personal involvement" in petitioner's case. Petr's. Second Am. Pet at 24. The documents sought by petitioner are: (1) A memorandum written by Mr. Castille, as District Attorney, to deputy district attorney Gaele Barthold requesting a status update on death penalty cases; (2) A 1998 request from State Senator Fisher for status information on certain capital cases.

On April 28, 2017, this court granted Petitioner's Discovery motion and Ordered the Commonwealth to "produce any and all documents or records" regarding this case. April 28, 2017 Discovery Order. On May 30, 2017, the Commonwealth responded to the court's Discovery Order and produced fifty-four (54) pages of discovery without verification. At Petitioner's request, on June 22, 2017, the court issued a second Discovery Order, Ordering the Commonwealth to resubmit complete verified discovery. June 22, 2017 Discovery Order. On July 14, 2017, the Commonwealth resubmitted verified discovery. On July 28, 2017, the Petitioner filed a renewed discovery motion noting that the Commonwealth's verification refers to records that were not disclosed. Mot. for Compete Discovery July 28, 2017. In response to the piecemeal manner in which discovery was being produced by the Commonwealth, this court Ordered *in camera* review of the Commonwealth's complete file regarding the prosecution of Petitioner's case. Order dated September 7, 2017. The Commonwealth complied and delivered

thirty-two (32) banker boxes of evidence to this court's chambers on September 21, 2017, which this court examined the contents of thirty-two (32) banker boxes page by page. Within the thirty-two (32) boxes of discovery, this court found a responsive document from Deputy District Attorney Gaele Barthold to then District Attorney Ronald Castille that stated "pursuant to your request for the above information by March 27, 1990 (copy of your memo and list attached)…". There was no request memo from Mr. Castille attached to Ms. Barthold's letter. On September 28, 2017, this court issued an Order to produce the memo request from Mr. Castille that was referenced in Ms. Barthold's letter. On October 2, 2017, the Commonwealth responded to the September 28, 2017 Order to Produce stating that the memo had not been located. Since September 28, 2017, this court has engaged in a lengthy discovery process in an attempt to locate missing documents that should have been in the Commonwealth's possession.

On August 15, 2018, the Commonwealth filed a third-supplemental discovery verification stating that it overlooked 193 file boxes in its initial search.[9] Disclosed in this discovery was a May 25, 1988 responsive document from Assistant District Attorney Kathleen A. Mcdonnell to Senator Michael Fisher. The letter starts "Pursuant to Senator Fisher's request the following is the current status of certain death row inmates". Petitioner's name is the first name of the list of nine (9) death row cases. It is unknown how this request was made or who made the request because the Commonwealth has been unable to locate the request that prompted Assistant District Attorney Kathleen Mcdonnell's response. Petitioner is requesting an

[9] The overlooked boxes were boxes regarding other capital cases during the time Petitioner's case was pending a death warrant. The Commonwealth has verified that all of Petitioner's boxes have been accounted for and searched. See Commw. Third Supplemental Verification and Correction to the Commw. April 27, 2018 Verification in Commonwealth v. Mumia Abu-Jamal, CP-51-CR-0113571-1982.

adverse inference be drawn that the two missing documents would have been unfavorable to the Commonwealth under the spoliation doctrine.

Spoliation of evidence is the failure to preserve, or the significant alteration of evidence for pending or future litigation. *Pyeritz* v. *Commonwealth*, 32 A.3d 687, 692 (Pa. 2011). The doctrine of spoliation attempts to compensate the non-spoliating party for the loss or destruction of evidence by sanctioning the spoliating party responsible for the unavailability of evidence. *Mchugh v. Mchugh*, 40 A. 410, 411 (Pa. 1898). 'The spoliation doctrine is broadly applicable to cases where relevant evidence has been lost or destroyed." *Rodriguez v. Kravco Simon Co.*, 111 A.3d 1191, 1196 (Pa. Super. 2015) (quoting *Mount Olivet Tabernacle Church v. Edwin L. Wiegand Div.*, 781 A.2d 1263, 1269 (Pa. Super. 2001). In Pennsylvania, courts are permitted to exercise their discretion when determining the range of sanctions against the spoliator. *Pyeritz*, 34 A.3d at 692; *See* also *Schroeder v. Commonwealth Department of Transportation*, 710 A.2d 23,27 (Pa. 1998). In *Schroeder*, the Pennsylvania Supreme Court sets forth the test to determine the appropriate sanction against the spoliating party in a spoliation of evidence claim: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct. 710 A.2d at 23.

When evaluating the first prong of the test, "degree of fault on part of the party who altered or destroyed the evidence", the court analyzes two components: Responsibility and the presence or absence of bad faith. *PTSI, Inc.* v. *Haley*, 70 A.3d 304 (Pa. Super. 2013) (quoting *Mount Olivet Tabernacle Church*, 781 A.2d 2001 (Pa. Super. 2001)). Regarding responsibility, a litigant has the duty to preserve relevant evidence where: (1) the litigant knows that litigation is pending or likely; and (2) it is foreseeable that discarding the evidence would be prejudicial to

the other party. Although the scope and duty to preserve evidence is not boundless, when the duty to preserve arises, evidence must be preserved. *Id.* at 1270. Bad faith is not dispositive of whether or not a sanction should be imposed.

Here, this court finds that the Commonwealth had a duty to preserve the memo by Mr. Castille to Ms. Barthold. The Commonwealth argues that there was no duty to preserve the memo. However, the Commonwealth has been involved in post-conviction death penalty case litigation regarding this particular case since 1983. Therefore, the Commonwealth knew or should have known that litigation in this death case matter was likely and preservation of all documents relating to this case should be preserved. It is ironic that the Commonwealth accepts no responsibility for the preservation of the memo request from Mr. Castille yet has been able to retain the responsive document from Ms. Barthold that the memo request from Mr. Castille was attached to. Likewise, this Court finds that it was foreseeable that the misplacement of the death penalty case documents could be prejudicial to the Petitioner.

Although bad faith is not alleged on part of the Commonwealth, nor is bad faith apparent from the facts of this case, bad faith is not dispositive of the determination of whether or not a party should be sanctioned. *See Oxford Presbyterian Church* v. *Weil-Mclain Co., Inc.*, 815 A.2d 1094 (Pa. Super. 2003) (upholding trial court's adverse inference despite lack of bad faith on part of spoliator.); *Eichman* v. *Mckeon*, 824 A.2d 305 (Pa. Super. 2003) (upholding adverse inference sanction despite absence of bad faith and little fault on part of spoliator); *Creazzo* v. *Medtronic Inc.*, 903 A.2d 24 (Pa. Super. 2006) (upholding summary judgment despite absence of bad faith in product defect case). This court finds that although there is no evidence or any allegation of bad faith on part of the Commonwealth, the fact that they searched for the memo for months does not ameliorate the fact that two (2) pieces of potentially crucial evidence was misplaced.

The second prong of the test to determine the degree of sanction on the spoliating party is the "degree of prejudice suffered by the opposing party". *Schroeder*, 551 Pa. 243, 250. The court finds that the Petitioner was in fact unduly prejudiced by the loss of the memo request from Mr. Castille to Ms. Barthold. The Petitioner's claim is based on Mr. Castille's personal significant involvement in his case during Mr. Castille's time as the District Attorney. It is crucial to Petitioner's claim that he have the Commonwealth's complete file of his case, specifically documents that may reference or inquire about Petitioner by District Attorney Castille. The unavailability of such documents may prejudice Petitioner.

The third prong of the test to determine the degree of sanction for the spoliating party is "the availability of a lesser sanction that will protect the opposing party's rights and deter future similar conduct". *Shroeder*, 710 A.2d at 27. The decision of whether and how to sanction a party rests within the sound discretion of the trial court. *Pyeritz*, 34 A.3d at 692. The most common and least severe sanction is an adverse inference, instructing the finder of fact that the missing evidence would have been unfavorable to the party responsible for its loss. *Schroeder*, 710 A.2d at 26. Courts are also permitted to issue summary judgment, however, while this sanction is permitted in spoliation cases, its severity makes it inappropriate in all but the most egregious cases. *Tenaglia* v. *Proctor & Gamble, Inc.*, 737 A.2d 306 (Pa. Super. 1999). ("Summary judgment is not mandatory simply because the plaintiff bears some degree of fault for the failure to preserve the product.").

Because Petitioner is seeking an adverse inference, and there is no evidence that the conduct of the Commonwealth rises to the level of egregiousness to warrant granting Petitioner's petition due to the unavailability of these documents alone, this court agrees with Petitioner, that an adverse inference is warranted for each of the documents the Commonwealth was unable to

produce. The documents in question: (1) a memo request from Mr. Castille to Ms. Barthold; and (2) a 1988 request from Senator Fisher for status information on certain capital cases, were in the complete control and possession of the Commonwealth. Petitioner may be prejudiced by the misplacement of the documents. Further, Petitioner is seeking the least severe sanction, one that is appropriate and will protect his rights and deter similar conduct in the future. However, the content of the misplaced Castille document may have been remedied simply by deposing Justice Castille, as was done with Gaele Barthold, by either party.

Although this court finds that an adverse inference is warranted, Petitioner still has not satisfied the preponderance burden of proving that Mr. Castille had significant personal involvement in a critical decision in this case. Adverse inferences simply allow a trier of fact to deduce a clear, logical, reasonable, and natural conclusion from the look of the evidence presented. *Commonwealth v. Shaffer*, 288 A.2d 727, 735 (Pa. 1972). An adverse inference is not evidence, and does not count in calculating whether a party has met its burden of proof. *See Harmon v. Mifflin County School Dist.*, 713 A.2d 620, 623-624 (Pa. 1998) (holding that an inference can be drawn from a parties failure to testify however the inference alone is not enough to satisfy the burden of proof.); *see also Fitzpatrick* v. *Philadelphia Newspapers, Inc*, 567 A.2d 684 (Pa. Super. 1989) ("if a plaintiff has not supplied evidence sufficient to meet his burden of proof, the adverse inference . . . will not supply it for him"). It would be improper to use an adverse inference to support a finding of fact because an adverse inference alone does not constitute evidence. *Harmon*, 713 A.2d at 623-624. There is no evidence of record that shows that Castille was involved in a critical decision in his underlying case.

Accordingly, Petitioner's *Williams* personal significant involvement based claim is denied as Petitioner has not proved beyond a preponderance of the evidence that Mr. Castille as

Assistant District Attorney or District Attorney had significant personal involvement in a critical trial decision in Petitioner's case as required by *Williams*.

d. Claim of Judicial Bias

True justice requires patience, integrity, independence, impartiality, and propriety. The appearance of impropriety by reasonable persons can overshadow even the most proper intentions.

Among the claims raised by the Petitioner is a claim of recusal that should have been exercised by Justice Castille when Petitioner's matter was presented before the Pennsylvania Supreme Court on appeal from the denial of Petitioner's PCRA petition. Petitioner contends that evidence recently disclosed in the instant PCRA proceedings establishes that Mr. Castille "harbored disqualifying bias against Mr. Abu-Jamal as a person convicted of killing a police officer." Petr's Second Am. Pet. ¶ 30.

"Due process guarantees the absence of actual bias on the part of the judge." *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016) (quoting *In re Murchison*, 349 U.S.133, 136 (1955)). However, when considering claims of judicial bias, the United States Constitution does not require evidence of actual bias. *Rippo v. Baker*, 137 S.Ct. 905, 907 (2017); *Commonwealth v. Darush*, 459 A.2d 727, 732 (Pa. 1983). Recusal may be warranted "even when a judge has no actual bias." *Id*; *id*. Courts employ an objective standard that requires recusal when the likelihood of bias on the part of the judge is too high to be constitutionally tolerable. *Caperton v. Massey Coal Co.*, Inc, 556 US 868, 872 (2009). The Pennsylvania Supreme Court has held that "a judge's behavior is not required to rise to a level of actual prejudice, but the appearance of impropriety is sufficient" to warrant recusal. *In Interest of Mcfall*, 617 A.2d 712 (Pa. 1992). "A party is not limited to his own case in establishing personal bias, and may show temperamental

prejudice on the particular class of litigation involved to support his allegations." *Commonwealth v. Lemanski*, 529 A.2d 1085 (Pa. Super 1987);*Commonwealth v. Bryant*, 476 A.2d 422, 427 n.1 (Pa. Super. 1984); *see also Commonwealth v. Rhodes*, 990 A.2d 732, 749 (Pa. Super. 2009); *Commonwealth v. Bryant*, 476 A.2d 422, 427 n.1 (Pa. Super. 1984).

Recusal is warranted when "a significant minority of the lay community could reasonably question the court's impartiality." *Darush*, 459 A.2d at 732. In *Darush*, the Pennsylvania Supreme Court found that the appellant was entitled to resentencing before a different judge because of alleged derogatory remarks made about the appellant by the sentencing judge. *Id.* There was no evidence of actual bias. The Pennsylvania Supreme Court stated that even though there was no evidence of bias and the court was convinced the judge acted in a proper manner, the appellant was entitled to resentencing by another judge because "certain remarks the judge was said to have made about appellant could raise a reasonable question concerning his impartiality . . ." *Id.* at 730.

Further highlighting the importance of the appearance of impartiality, the Pennsylvania Code of Judicial Conduct imposes a standard of conduct upon the judiciary. Canon 3(c) Pa. Code of Judicial Conduct (as amended 1974). The Code of Judicial Conduct is promulgated by the Judicial Conduct Board of Pennsylvania, and consists of Canons of judicial ethics as referenced in Article 5 § 17 of the Pennsylvania Constitution which states, in pertinent part: "Justices and judges shall not engage in any activity prohibited by law and shall not violate any Canon of legal or judicial ethics prescribed by the Pennsylvania Supreme Court. Pa. Const. Art. V, § 17b. The current Code of Judicial Conduct became effective July 1, 2014. Prior to that time, Canon 3(c) of the then existing code, entitled "Disqualification," stated: "Judges should disqualify themselves

in a proceeding in which the impartiality might reasonably be questioned including but not limited to instances where:

a) they have a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

b) they served as a lawyer in a matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

The commentary to Canon 3(c) states: "a lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; judges formerly employed by a governmental agency, however, *should* disqualify themselves in a proceeding if their impartiality might reasonably be questioned because of such association."[10] Canon 3(c) Pa. Code of Judicial Conduct (1974, as amended) emphasis added. The use of the word "should" can be said to have made a command aspirational or permissive instead of mandatory, leaving the decision to recuse largely to the discretion of the judge.[11]

Here, Petitioner asserts a letter recently disclosed in this PCRA proceeding from then District Attorney Castille to then Governor Robert Casey establishes that Mr. Castille "harbored disqualifying bias against Mr. Abu-Jamal as a person convicted of killing a police officer." Petr's

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[10] The Ethics Committee of the Pennsylvania conference of State trial judges is designated as the approved body to render advisory opinions. The ethics committee acknowledges that the effects of the comments is unclear. The Pennsylvania Supreme Court having adopted the cannons made no mention of the comments, although they are published with the code. Nonetheless the Ethics Committee, of which this jurists is an Ethics Committee member, uses the comments to determine the purpose, meaning, and proper application of the cannons. This is consistent with the American Bar Association's revised model code of judicial conduct.

[11] It should be noted that the use of the word recusal is not in the code; it is entitled Disqualification.

Second Amend. Pet. ¶ 30. Petitioner also asserts that the discussion on Canon 3(c)(1)(b) in *Williams* further supports Petitioner's claim that Justice Castille should have recused himself because of his prior involvement in Petitioner's case. Petr's'. Memorandum of Law dated December 17, 2018 at 2. This court has found that there was no personal significant involvement by Justice Castille as a prosecutor in this matter. The court will now address the claim of disqualifying bias against Petitioner as a person convicted of killing a police officer and the effect of Canon 3(c) and case law that should have prevented Justice Castille from participating in Petitioner's PCRA appeals before the Pennsylvania Supreme Court.

In the June 15, 1990 letter entitled "Death Warrants", then District Attorney Castille urges the Governor to issue death warrants for cases whose direct appeal process had concluded. The letter includes a paragraph where the District Attorney highlights the case of a convicted police killer as a case that is ripe for a death warrant. Petr's Am. Pet. exhibit 6. The District Attorney states "Mr. Beasley's case is especially pertinent now. . .", "I urge you to send a clear and dramatic message to *all* police killers that the death penalty in Pennsylvania actually means something." *Id.* (emphasis added). Petitioner argues that the language in the June 15, 1990 letter urging the Governor to "send a clear and dramatic message to *all* police killers that the death penalty in Pennsylvania actually means something," would cause a significant minority of the lay community to reasonably question Justice Castille's impartiality in matters involving individuals convicted of killing police officers. Specifically, Petitioner contends that because the letter to Governor Casey was previously undisclosed, Justice Castille "was able to deny Mr. Abu-Jamal's recusal motion in 1998 by asserting that" Petitioner "failed to demonstrate facts that would demonstrate bias, interest or other disqualifying events." Petr's Am. Pet. ¶ 36.

The Commonwealth contends the June 15, 1990 letter would not have compelled Justice Castille to recuse himself from Petitioner's PCRA appeal before the Pennsylvania Supreme Court. The Commonwealth argues the letter is not proof of disqualifying bias against individuals who had been convicted of killing a police officer, but merely a letter to the Governor to request the Governor sign death warrants in cases where the appeals process had concluded. Commw. Supp. Response at 20. Notwithstanding the June 5, 1990 draft and the June 15, 1990 letter that was sent specifically referencing "all police killers." The Commonwealth further asserts that "there is nothing remarkable about a DA being concerned about police officer killings; that concern does not give rise" to disqualifying bias. *Id.*

This court finds that recusal by Justice Castille would have been appropriate to ensure the neutrality of the judicial process in Petitioner's PCRA appeals before the Pennsylvania Supreme Court. As noted by the Pennsylvania Supreme Court in *Darush*, recusal is warranted when "a significant minority of the lay community could reasonably question the court's impartiality." 459 A.2d at 732. Proof of actual bias is not required. *Id.* Rather, the appearance of impropriety is sufficient to warrant recusal. *Mcfall*, 617 A.2d 712. If due process requires recusal where there is no evidence of bias as in *Darush*, then surely recusal would be required here, where a significant minority of the lay community could reasonably question Justice Castille's impartiality due to the June 15, 1990 letter to the Governor urging the issuance of death warrants, particularly against individuals convicted of killing police officers. A party is not limited in establishing personal bias in his own case. *Lemanski*, 529 A.2d at 1088; *see also Rhodes,* 990 A.2d at 749. A showing of bias against a particular class of defendants is sufficient to warrant disqualification. *Id*; *Commonwealth v. Bryant*, 476 A.2d 422, 427 n.1 (Pa. Super. 1984).

The Commonwealth asserts that the rulings in *Lemanski* and *Rhodes* are distinguishable from the instant matter because both of those cases involved judges who exhibited prejudicial behavior against a particular class of defendants while on the bench, unlike here where the alleged bias – the letter from Mr. Castille advocating the issuance of death warrants, particularly against police killer – was written when Mr. Castille was the District Attorney, not as a judge. However, there is no distinction that mandates judges only be disqualified on allegations of bias that occurred while on the bench. *See Case of Snyder*, 152 A. 33, 37 (Pa. 1930) (the court found recusal appropriate where the judge had animosity against a respondent prior to the judge being appointed to the bench). Factual differences notwithstanding, the constitutional principles relied on in *Lemanski* and *Rhodes* are similarly applicable to the instant matter because Mr. Castille's singling-out individuals convicted of killing police officers in his letter to the Governor urging the issuance of death warrants could create an appearance of bias, or prejudice just "as damaging to public confidence in the administration of justice as would be the presence of actual bias." *Lemanski*, 529 A.2d at 1088.

Furthermore, at the time petitioner filed his motion for Justice Castille to recuse himself, Pennsylvania's Code of Judicial Conduct disqualified judges from any proceeding where there impartiality might be reasonably questioned, including but not limited to where they served as a lawyer in a matter in controversy or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter. Canon 3(c) Pa. Code of Judicial Conduct (1974 as amended). As noted by the Court in *Williams*, "due process demarks only the outer boundaries of judicial disqualifications," "most questions of recusal are addressed by more stringent and detailed ethical rules," like the Pennsylvania Code of Judicial Conduct. 136 S.Ct. at 1908 (quoting *Aetna Life Ins. Co. v. Lavoie*, 106 S.Ct. 1580).

Mr. Castille served as District Attorney of Philadelphia County from 1986 until 1991, when he was elected to the Supreme Court of Pennsylvania. While he did not appear to have personal significant involvement in Petitioner's direct appeal – as outlined in *Williams* – he was the District Attorney in charge of the entire office. There is no indication that Justice Castille was directly involved in this case as a prosecutor, but it would be difficult for a judge in his position not to view a case being reviewed on appeal that was handled by his office when he was the District Attorney, as a criticism of his former office and perhaps of his own leadership. The Commonwealth contends that then District Attorney Castille was far removed the handling of the Petitioner's direct appeal and that he had no concerns with this particular case. However, considering the high profile of this case, the Commonwealth's characterization of the handling by the District Attorney's Office of this case like in *Williams*, cannot be credited. *Id.* at 1907. Any potential flaws in the law or procedure by the District Attorney's Office during Mr. Castille's tenure were under review in the Pennsylvania Supreme Court and subject to criticism by that court, the court that the former District Attorney sat, and refused to recuse or disqualify himself, resulting in the appearance of impropriety. *Aetna*, 475 US at 813. "The involvement of multiple actors and the passage of time do not relive the former prosecutor of the duty to withdraw in order to ensure the neutrality of the judicial process." *Williams*, 136 S.Ct. at 1907.

The participation of the Justice in Petitioner's PCRA appeals before the Pennsylvania Supreme Court lends itself to the appearance of impropriety as a result of the campaign speeches, campaign endorsements, and letters urging the issuances of death warrants *inter alia.* Justice would best be served by allowing Petitioner reargument before the Supreme Court of Pennsylvania, before a complete and clearly unbiased tribunal. Within a large impersonal system, the leader, the District Attorney at the time of the direct appeal of Petitioner, while not

intimately involved, gives the appearance of being involved from the lay perspective hence the appearance of impropriety.

This court believes that in the interest of justice, disqualification of Justice Castille in this matter would have been appropriate pursuant to Canon 3(c) of the Pennsylvania Judicial Code of Conduct. While this court is without jurisdiction to enforce the Judicial Code of Conduct[12], the same rights are conferred by controlling case law. The prohibition against bias as set forth in Canon 3(c) is set forth, perhaps more explicitly, in case law in the Commonwealth. *See Mcfall*, 617 A.2d at 707; *Darush*, 459 A.2d at 757; *Commonwealth v. Berrigan*, 535 A.2d at 91 (Pa. Super. 1987); *Aetna*, 106 S.Ct. 1580; *Caperton*, 129 S.Ct. at 2252.

Moreover, the deliberation on the appellate level being confidential, it cannot be ascertained whether a potentially biased judge influenced the views of other judges on the appellate panel during the discussion and deliberating sessions. As set forth in *Aetna*, each appellate judge helps to shape the decision and the ultimate disposition of a case. 106 S.Ct. at 1589. The public expectation of impartial justice is necessary. The slightest appearance of bias or lack of impartiality undermines the entire judiciary hence the mandate of not only propriety, but the appearance of propriety.

Because of Justice Castille's participation in the Pennsylvania Supreme Court's decision regarding the post conviction relief act, re-argument before that court would best serve the appearance of justice. This is not to say as a matter of fact that Justice Castile was an influence, but only to raise the question: was due process possible for Justice Castille perhaps not to hold

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[12] The Pennsylvania Constitution grants the Pennsylvania Supreme Court the exclusive right to enforce the Code of Judicial Conduct. Pa. Const. art. V, § 17(b); *Commonwealth v. Kearney*, 92 A.3d 51, 62 (Pa. Super. 2014); *see also Reilly by Reilly v. Southeastern Pennsylvania Transp. Authority*, 489 A.2d 1291, 1298 (Pa. 1985).

the balance nice, clear, and true as set forth in the case addressing this matter. *Tumey vs. Ohio*, 273 U.S. 510, 532 (1927). Re-argument before the Pennsylvania Supreme Court would be best to perform the heart of the function of the appearance of justice. Argument only on the past submitted briefs will avoid the unacceptable danger of having the slightest appearance of impropriety. While we cannot know what would lead each justice on the Pennsylvania Supreme Court to the position reached on Petitioner's PCRA appeal when Justice Castille participated, a rehearing without even the potential of bias would eliminate the powers of persuasion that may have been put into play, and would avoid the possibility that the collegial decision making process of the multimember appellate court was influenced during the exchange of ideas when the court was reviewing Petitioner's issues and deliberating. Obviously it would be impossible to determine if there was bias, and if the bias affected the collegial exchange of ideas that occurred during the Pennsylvania Supreme Court's deliberations to the extent that it influenced the votes and views of the then members of that Court.

In lieu of exclusive reliance upon the personal inquiry by a judge, or on appellate review of the judge's determination respecting actual bias, the due process clause is implemented in the area of judicial recusal by objective standards which do not require proof of actual bias. In defining the standards, the court must ask whether under the realistic appraisal of the psychological tendencies and human weakness, the interest in question poses such a risk of actual bias, or pre-judgment that such a practice must be forbidden if the guarantee of due process is to be adequately implemented. *See Caperton*, 129 S.Ct. at 2255 (quoting Winthrow v. Larkin, 95 S.Ct. 1456 (1975).

No one can point to actual bias or activity in this case that could be termed improper nor can there be a determination that there was actual bias. However, the purpose of the law, the

Constitution, logic, experience and commonsense, are neutrality and fairness that must come into play for a respectful and resulting meaningful judgment. Most of the recusal cases of the United States Supreme Court are illustrative to the extent that the probability of bias could not be defined with precision. *Caperton*, 129 S.Ct. at 2261.

Conclusion

Accordingly, Petitioner's Petition for post conviction relief is **DENIED** as to the *Williams* claim of personal significant involvement and **GRANTED** as to the claim of unconstitutional bias pursuant to the due process clause of the United States Constitution, and *Aetna*, *Caperton*, *Lemanski,* and *Mcfall*, *inter alia*. 106 S.Ct. 1580; 129 S.Ct. 2252; 529 A.2d 1085; 617 A.2d 712.

BY THE COURT:

LEON W. TUCKER,
Supervising Judge

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

MEMORANDUM 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:

Counsel for Petitioner:	Samuel Spital NAACP Legal Defense & Education Fund, Inc. 40 Rector St., 5th floor New York, NY 10006
Type of Service:	( ) Personal (X) First Class Mail ( ) Other (X) Electronic
Counsel for Petitioner:	Judith Ritter, Esquire Widener University – Delaware Law School Pennsylvania Criminal Defense Clinic 4601 Concord Pike, P.O. Box 7474 Wilmington, DE 19803
Type of Service:	( ) Personal (X) First Class Mail ( ) Other (X) Electronic
District Attorney:	Tracey Kavanagh, Esquire PCRA Unit, District Attorney's Office Widener Building 3 South Penn Square Philadelphia, PA 19107
Type of Service:	(X) Inter-office ( ) First Class Mail ( ) Other (X) Electronic

Dated: 12/27/2018

Law Clerk's Signature