CAPITAL PUNISHMENT:
RACE, POVERTY & DISADVANTAGE

Yale University
Professor Stephen B. Bright

Class Eight - Judges

I. The Right to An Impartial Judge

Judges are to decide the legal issues before them "undisturbed by the clamor of the multitude."

- Judge William Cranch, quoted in 1 Charles Warren THE SUPREME COURT IN UNITED STATES HISTORY 303 (1923)

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

- *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)

Under our constitutional system, courts stand against winds that blow as havens for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. * * * No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield [the due process clause] deliberately planned and inscribed for the benefit of every human being subject to our Constitution – of whatever race, creed or persuasion.

- *Chambers v. Florida*, 309 U.S. 227, 241 (1940)

The Law is the true embodiment of everything that's excellent. It has no fault or flaw, and I, my Lords, embody the Law.

- The Lord Chancellor in Gilbert & Sullivan's *Iolanthe*

Victor Berger et al. v. United States

Victor L. Berger, the editor and publisher of a number of different newspapers, including the *Milwaukee Leader* (1911-1929), was a founder of the Socialist Party of America in 1901, and was the first Socialist to serve in the United States Congress, winning Wisconsin's Fifth congressional district seat in 1910.

Berger opposed the United States position in World War I and, after passage of the Espionage Act in 1917, he and four other Socialists were indicted under it in February 1918. Trial started in December, 1918 before Judge Kenesaw Mountain Landis, who later became the first commissioner of Major League Baseball. Berger was convicted on February 20, 1919, and sentenced to 20 years in federal prison. This appeal followed.

BERGER ET AL.
v.
UNITED STATES

United States Supreme Court
255 U.S. 22, 41 S.Ct. 230 (1921)

Mr. JUSTICE McKENNA delivered the opinion of the court.

Section 21 of the Judicial Code provides as follows:

> Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated * * * Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, * * * no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. * * *

[Defendants, charged with a violation of the Espionage Act, which prohibited actions to promote the success of enemies of the United States during time of war] invoked § 21 by filing an affidavit charging Judge Landis, who was to preside at the trial, with personal bias and prejudice against them, and moved for the assignment of another judge to preside at the trial. The motion was denied and upon the trial defendants were convicted and each sentenced to twenty years' imprisonment. * * *

The affidavit, omitting formal and unnecessary parts, is as follows:

> Petitioners (defendants) represent "that they jointly and severally verily believe that His Honor Judge Kenesaw Mountain Landis has a personal bias and prejudice against certain of the defendants, * * * That the grounds for the petitioners' beliefs are the following facts: That said Adolph Germer was born in Prussia, a state or province of Germany; that Victor L. Berger was born in Rehback, Austria; that William F. Kruse is of immediate German extraction; that said Judge Landis is prejudiced and biased against said defendants because of their nativity, and in support thereof the defendants allege, that, on information and belief, on or about the 1st day of November said Judge Landis said in substance: "If anybody has said anything worse about the Germans than I have I would like to know it so I can use it." And referring to a German who was charged with stating that "Germany had money and plenty of men and wait and see what she is going to do to the United States," Judge Landis said in substance: "One must have a very judicial mind, indeed, not be to prejudiced against the German Americans in this country. Their hearts are reeking with disloyalty. This defendant is the kind of a man that spreads this kind of propaganda and it has been spread until it has affected practically all the Germans in this country. This same kind of excuse of the defendant offering to protect the German people is the same kind of excuse offered by the pacifists in this country, who are against the United States and have the interests of the enemy at heart by defending that thing they call the Kaiser and his darling people. You are the same kind of a man that comes over to this country from Germany to get away

from the Kaiser and war. You have become a citizen of this country and lived here as such, and now when this country is at war with Germany you seek to undermine the country which gave you protection. You are of the same mind that practically all the German-Americans are in this country, and you call yourselves German-Americans. Your hearts are reeking with disloyalty. I know a safeblower, he is a friend of mine, who is making a good soldier in France. He was a bank robber for nine years, that was his business in peace time, and now he is a good soldier, and as between him and this defendant, I prefer the safeblower."

These defendants further aver that they have at no time defended the Kaiser, but on the contrary they have been opposed to an autocracy in Germany and every other country; that Victor L. Berger, defendant herein, editor of the Milwaukee Leader, a Socialist daily paper; Adolph Germer, National Secretary of the Socialist party; William F. Kruse, editor of the Young Socialists Magazine, a Socialist publication; and J. Louis Engdahl disapproved the entrance of the United States into this war.

* * *

The affidavit was accompanied by the certificate of Seymour Stedman, attorney for defendants, that the affidavit and application were made in good faith.

* * *

The * * * primary question under [the statute] is the duty and power of the judge – whether the filing of an affidavit of personal bias or prejudice compels his retirement from the case or whether he can exercise a judgment upon the facts affirmed and determine his qualification against them and the belief based upon them?

* * *

We may concede that § 21 is not fulfilled by the assertion of "rumors or gossip" but such disparagement cannot be applied to the affidavit in this case. Its statement has definite time and place and character, and the value of averments on information and belief in the procedure of the law is recognized. To refuse their application to § 21 would be arbitrary and make its remedy unavailable in many, if not in most, cases. The section permits only the affidavit of a party, and * * * it must be based upon facts antedating the trial, not those occurring during the trial. In the present case the information was of a definite incident, and its time and place were given. Besides, it cannot be the assumption of § 21 that the bias or prejudice of a judge in a particular case would be known by everybody, and necessarily, therefore, to deny to a party the use of information received from others is to deny to him at times the benefit of the section.


Victor Berger

We are of opinion, therefore, that an affidavit upon information and belief satisfies the section and that upon its filing, if it show the objectionable inclination or disposition of the judge, which we have said is an essential condition, it is his duty to "proceed no further" in the case. And in this there is no serious detriment to the administration of justice nor inconvenience worthy of mention, for of what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside? And any serious delay of trial is avoided by the requirement that the affidavit must be filed not less than ten days before the commencement of the term.

Our interpretation of § 21 has therefore no deterring consequences, and we cannot relieve from its imperative conditions upon a dread or prophecy that they may be abusively used. They can only be so used by making a false affidavit; and a charge of, and the penalties of, perjury restrain from that – perjury in him who makes the affidavit, connivance therein of counsel thereby subjecting him to disbarment. * * *

* * * To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed. The remedy

by appeal is inadequate. It comes after the trial and, if prejudice exist, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient.

* * *.

* * * [T]he affidavit of prejudice is sufficient to invoke the operation of the act. * * * Judge Landis had a lawful right to pass upon the sufficiency of the affidavit. * * * Judge Landis had no lawful right or power to preside as judge on the trial of defendants upon the indictment.

MR. JUSTICE DAY, dissenting.

* * *

* * * I am unable to agree that in cases of the character now under consideration the statement of the affidavit, however unfounded, must be accepted by the judge as a sufficient reason for his disqualification, leaving the vindication of the integrity and independence of the judge to the uncertainties and inadequacy of a prosecution for perjury if it should appear that the affidavit contains known misstatements.

* * *

It does not appear that the trial judge had any acquaintance with any of the defendants, only one of whom was of German birth, or that he had any such bias or prejudice against any of them as would prevent him from fairly and impartially conducting the trial. To permit an *ex parte* affidavit to become in effect a final adjudication of the disqualification of a judge when facts are shown, such as are here established, seems to me to be fraught with much danger to the independent discharge of duties by federal judges, and to open a door to the abuse of the privilege which is intended to be conferred by the statute in question.

MR. JUSTICE McREYNOLDS, dissenting.

* * * If an admitted anarchist charged with murder should affirm an existing prejudice against himself and specify that the judge had made certain depreciatory remarks concerning all anarchists, what would be the result? Suppose official stenographic notes or other clear evidence should demonstrate the falsity of an affidavit, would it be necessary for the judge to retire? And what should be done if dreams or visions were the basis of an alleged belief?

* * * Bias and prejudice are synonymous words and denote "an opinion or leaning adverse to anything without just grounds or before sufficient knowledge" – a state of mind. The statute relates only to adverse opinion or leaning towards an individual and has no application to the appraisement of a class, *e.g.*, revolutionists, assassins, traitors.

* * *

Defendants' affidavit discloses no adequate ground for believing that personal feeling existed against any one of them. The indicated prejudice was towards certain malevolents from Germany, a country then engaged in hunnish warfare and notoriously encouraged by many of its natives who, unhappily, had obtained citizenship here. The words attributed to the judge (I do not credit the affidavit's accuracy) may be fairly construed as showing only deep detestation for all persons of German extraction who were at that time wickedly abusing privileges granted by our indulgent laws.

* * * Intense dislike of a class does not render the judge incapable of administering complete justice to one of its members. A public officer who entertained no aversion towards disloyal German immigrants during the late war was simply unfit for his place. * * * It was not the purpose of Congress to empower an unscrupulous defendant seeking escape from merited punishment to remove a judge solely because he had emphatically condemned domestic enemies in time of national danger. * * *

* * *

Note - Further Developments

Although he did not win re-election in 1912, 1914 or 1916, Victor Berger was elected to the House of Representatives again in 1918, even though he was under indictment at the time. When

he arrived in Washington, a special Congressional committee determined that a convicted felon and war opponent should not be seated as a member of Congress and declared the seat vacant.

Berger won a second election to the seat on December 19, 1919. The House again refused to seat him, and the seat remained vacant until 1921, when Republican William H. Stafford defeated Berger in the 1920 general election. Berger defeated Stafford in 1922 and was reelected in 1924 and 1926. Berger lost to Stafford in 1928, and returned to Milwaukee and resumed his career as a newspaper editor until his death the following year.


Kennesaw Mountain Landis

Judge Landis, who was appointed to the district court by President Theodore Roosevelt in 1905, was appointed Commissioner of Baseball in 1920. He continued to serve as both a federal judge and baseball commissioner in 1921, despite intense criticism and calls for his impeachment. He resigned from the bench in February, 1922. He served as commissioner until his death in 1944, running baseball with an iron hand and maintaining racial segregation in the sport. The first signing of a black player by a major league team in the modern era – Jackie Robinson by the Brooklyn Dodgers – came less than a year after Landis's death.

Due process – pecuniary interest, the temptation not to hold the balance "nice, clear and true,"and the "appearance of impartiality"

The Supreme Court held that a judicial system in which a mayor sat in judgment of alleged violators and was not paid unless he convicted and fined at least some of those brought before him violated due process. *Tumey v. Ohio*, 273 U.S. 510 (1927).

The Court concluded such a system deprives the accused of due process in several ways. First, it "subjects [a defendant's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." Second, "It is certainly not fair to each defendant, brought before the Mayor for the careful and judicial consideration of his guilt or innocence, that the prospect of such a loss by the Mayor should weigh against his acquittal." Third, any system that

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

Fourth, given the mayor's position, "might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine?"

The Court found no due process violation in a case involving the mayor of Xenia, Ohio, who had judicial functions but only very limited executive authority. *Dugan v. Ohio*, 277 U.S. 61 (1928). Court found that the the finances and financial policy of the city were too remote to warrant a presumption of bias on the part of the mayor in cases in which he sat as judge. The city was governed by a commission of five members, including the Mayor, which exercised all legislative powers. A city manager, together with the commission, exercised all executive powers.

However, in *Ward v. City of Monroeville*, 409 U.S. 57 (1972), the Court found that due process was violated when a mayor of yet another Ohio city who had responsibilities for revenue production and law enforcement sat as judge in cases of ordinance violations and certain traffic offenses. The Court found that they mayor had "wide executive powers," which included accounting to the city council each year with regard to city finances A major part of village income was derived from the fines, forfeitures, costs, and fees imposed by the mayor. The Supreme Court identified the issue as "whether the Mayor can be regarded as an impartial judge" and, relying on its earlier decision in *Tumey* concluded:

> Although "the mere union of the executive power and the judicial power in him cannot be said to violate due process of law," the test is whether the mayor's situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused . . .." Plainly that "possible temptation" may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court. This, too, is a "situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, (and) necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him."

Justice White, joined by Justice Rehnquist, dissented. He first pointed out that the mayor had no direct financial stake in its outcome of any case, and then stated:

> To justify striking down the Ohio system on its face, the Court must assume either that every mayor-judge in every case will disregard his oath and administer justice contrary to constitutional commands or that this will happen often enough to warrant the prophylactic, per se rule urged by petitioner. I can make neither assumption with respect to Ohio mayors nor with respect to similar officials in 16 other States. Hence, I would leave the due process matter to be decided on a case-by-case basis * * *.

In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), the Court held that the failure of a justice of the Alabama Supreme Court to recuse himself from participation in the consideration of the case violated due process.

The case involved an claim against Aetna for punitive damages for the tort of bad-faith refusal to pay a valid claim. Aetna had paid part of the claim to the plaintiff, but not all of it. The trial court dismissed the bad faith claim for failure to state a cause of action. The Alabama Supreme Court reversed. On remand, the trial court granted summary judgment for Aetna on the bad faith claim. The Alabama Supreme Court again reversed. The bad faith claim was submitted to a jury which $3.5 million in punitive damages.

Aetna appealed challenging both the bad faith claim in light of its partial payment and asserting that the award was excessive. The Alabama Supreme Court affirmed both the judgment and the award in a 5-to-4 decision. An unsigned per curiam opinion expressed the view of five justices that the evidence demonstrated that appellant had acted in bad faith. Although earlier opinions of the court had refused to allow bad-faith suits where the insurer had made a partial payment of the underlying claim, the court held that partial payment was not dispositive of the bad-faith issue. The court also rejected appellant's argument that the punitive damages award was excessive.

While the case was pending on petition for rehearing, Aetna discovered that Justice Embry, one of the five members of the Alabama Supreme Court joining the per curiam opinion, had filed two actions against insurance companies in Alabama trial courts. Both actions included claims of bad-faith failure to pay a claim. One was brought as class action on behalf of the justice as a representative of a class of all other Alabama state employees insured under a group plan by Blue Cross-Blue Shield of Alabama, a class that included the other members of the Alabama Supreme Court. Both suits sought punitive

damages. Aetna later learned that Justice Embry had written the per curiam opinion, that he had expressed frustration with insurance companies that were late in paying claims, and that one of his cases had settled and the justice received $30,000.

The United States Supreme Court said that it was not necessary to decide whether the justice's "general hostility towards insurance companies that were dilatory in paying claims" violated due process, but commented, "[c]ertainly only in the most extreme of cases would disqualification on this basis be constitutionally required, and appellant's arguments here fall well below that level."

The Court then proceeded to decide the case on narrower grounds. It noted that the law regarding bad-faith-refusal-to-pay claims was unsettled at that time of the appeal; that the Alabama Supreme Court had not previously recognized the claim but had held that partial payment was evidence of good faith on the part of the insurer; that when the justice cast the deciding vote in the Alabama Supreme Court's 5-4 decision, he "did not merely apply well-established law and in fact quite possibly made new law"; that the decision against Aetna firmly established that punitive damages could be obtained where an insured's claim is not fully approved and only partial payment of the underlying claim is made; and that the court refused to set aside as excessive a punitive damages award of $3.5 million – the largest punitive damages award ever in Alabama. It also observed that the ruling on these issues and the affirmance of the punitive damages award "had the clear and immediate effect of enhancing both the legal status and the settlement value of [Justice Embry's] own case" against Blue Cross.

The Court concluded that Justice Embry's participation in this case violated Aetna's due process rights because his interest was "'direct, personal, substantial, [and] pecuniary'" and he acted as "a judge in his own case," and because of the justice's "leading role" in writing the 5-4 decision, the "appearance of justice" required vacating the decision. The Court emphasized:

> we are not required to decide whether in fact [the justice] was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "'would offer a possible temptation to the average . . . judge to . . . lead him to not to hold the balance nice, clear and true.'" The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'"

Although unnecessary to decide the case, the Court held that there was no basis for disqualifying the members of the Alabama Supreme Court who were members of the class in the suit brought by Justice Embry, finding that their interest was not as "'direct, personal, substantial, [and] pecuniary,'" and that

> [w]ith the proliferation of class actions involving broadly defined classes, the application of the constitutional requirement of disqualification must be carefully limited. Otherwise constitutional disqualification arguments could quickly become a standard feature of class-action litigation.

ABA MODEL CODE OF JUDICIAL CONDUCT
(2011 edition)

* * *

CANON 2
A judge shall perform the duties of judicial office impartially, competently, and diligently.

* * *

RULE 2.2 Impartiality and Fairness
A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

RULE 2.3 Bias, Prejudice, and Harassment
(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

RULE 2.4 External Influences on Judicial Conduct
(A) A judge shall not be swayed by public clamor or fear of criticism.

(B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.

(C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

* * *

RULE 2.11 Disqualification
(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

* * *

(4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge's campaign in an amount that [is greater than $[insert amount] for an individual or $[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity].

(5) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

* * *

John Patrick LITEKY, Charles Joseph Liteky and Roy Lawrence Bourgeois, Petitioners,
v.
UNITED STATES.

Supreme Court of the United States
510 U.S. 540, 114 S.Ct. 1147 (1994)

Scalia, J., delivered the opinion of the Court, in which Rehnquist, C.J., and O' Connor, Thomas, and Ginsburg, JJ., joined. Kennedy, J., filed an opinion concurring in the judgment, in which Blackmun, Stevens, and Souter, JJ., joined.

Justice SCALIA delivered the opinion of the Court.

Section 455(a) of Title 28 of the United States Code requires a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This case presents the question whether required recusal under this provision is subject to the limitation that has come to be known as the

"extrajudicial source" doctrine.

I

In the 1991 trial at issue here, petitioners were charged with willful destruction of property of the United States. The indictment alleged that they had committed acts of vandalism, including the spilling of human blood on walls and various objects, [at the School of the Americas] at the Fort Benning Military Reservation. Before trial petitioners moved to disqualify the District Judge pursuant to 28 U.S.C. §455(a). The motion relied on events that had occurred during and immediately after an earlier trial, involving petitioner Bourgeois, before the same District Judge.

In the 1983 bench trial, Bourgeois, a Catholic priest of the Maryknoll order, had been tried and convicted of various misdemeanors committed during a protest action, also on the federal enclave of Fort Benning. Petitioners claimed that recusal was required in the present case because the judge had displayed "impatience, disregard for the defense and animosity" toward Bourgeois, Bourgeois' codefendants, and their beliefs. The alleged evidence of that included the following words and acts by the judge: stating at the outset of the trial that its purpose was to try a criminal case and not to provide a political forum; observing after Bourgeois' opening statement (which described the purpose of his protest) that the statement ought to have been directed toward the anticipated evidentiary showing; limiting defense counsel's cross-examination; questioning witnesses; periodically cautioning defense counsel to confine his questions to issues material to trial; similarly admonishing witnesses to keep answers responsive to actual questions directed to material issues; admonishing Bourgeois that closing argument was not a time for "making a speech" in a "political forum"; and giving Bourgeois what petitioners considered to be an excessive sentence. The final asserted ground for disqualification – and the one that counsel for petitioners described at oral argument as the most serious – was the judge's interruption of the closing argument of one of Bourgeois' codefendants, instructing him to cease the introduction of new facts, and to restrict himself to discussion of evidence already presented.

The District Judge denied petitioners' disqualification motion, stating that matters arising from judicial proceedings were not a proper basis for recusal. At the outset of the trial, Bourgeois' counsel informed the judge that he intended to focus his defense on the political motivation for petitioners' actions, which was to protest United States government involvement in El Salvador. The judge said that he would allow petitioners to state their political purposes in opening argument and to testify about them as well, but that he would not allow long speeches or discussions concerning government policy. When, in the course of opening argument, Bourgeois' counsel began to explain the circumstances surrounding certain events in El Salvador, the prosecutor objected, and the judge stated that he would not allow discussion about events in El Salvador. He then instructed defense counsel to limit his remarks to what he expected the evidence to show. At the close of the prosecution's case, Bourgeois renewed his disqualification motion, adding as grounds for it the District Judge's "admonishing [him] in front of the jury" regarding the opening statement, and the District Judge's unspecified "admonishing [of] others," in particular Bourgeois' two pro se codefendants. The motion was again denied. Petitioners were convicted of the offense charged.

* * *

The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. * * * Also not subject to deprecatory characterization as "bias" or "prejudice" are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.

* * *

* * * It is enough for present purposes to say the following: First, judicial rulings alone almost never constitute valid basis for a bias or partiality motion. * * * Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. An example of the latter (and perhaps of the former as well) is the statement that was alleged to have been made by the District Judge in *Berger v. United States* * * *. Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration – even a stern and short-tempered judge's ordinary efforts at courtroom administration – remain immune.

III

Applying the principles we have discussed to the facts of the present case is not difficult. None of the grounds petitioners assert required disqualification. As we have described, petitioners' first recusal motion was based on rulings made, and statements uttered, by the District Judge during and after the 1983 trial; and petitioner Bourgeois' second recusal motion was founded on the judge's admonishment of Bourgeois' counsel and codefendants. In their briefs here, petitioners have referred to additional manifestations of alleged bias in the District Judge's conduct of the trial below, including the questions he put to certain witnesses, his alleged "anti-defendant tone," his cutting off of testimony said to be relevant to defendants' state of mind, and his post-trial refusal to allow petitioners to appeal *in forma pauperis*.[3]

All of these grounds are inadequate under the principles we have described above: They consist of judicial rulings, routine trial administration efforts, and ordinary admonishments (whether or not legally supportable) to counsel and to witnesses. All occurred in the course of judicial proceedings, and neither (1) relied upon knowledge acquired outside such proceedings nor (2) displayed deep-seated and unequivocal antagonism that would render fair judgment impossible.

Justice KENNEDY, with whom Justice BLACKMUN, Justice STEVENS and Justice SOUTER join, concurring in the judgment.

The Court's ultimate holding that petitioners did not assert sufficient grounds to disqualify the district judge is unexceptionable. Nevertheless, I confine my concurrence to the judgment, for the Court's opinion announces a mistaken, unfortunate precedent in two respects. First, it accords nearly dispositive weight to the source of a judge's alleged partiality, to the point of stating that disqualification for intrajudicial partiality is not required unless it would make a fair hearing impossible. * * *

I

* * *

A

* * * For present purposes, it should suffice to say that §455(a) is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a judge's rulings or findings. I think all would agree

3. Petitioners' brief also complains of the district judge's refusal in the 1983 trial to call petitioner Bourgeois "Father," asserting that this "subtly manifested animosity toward Father Bourgeois." As we have discussed, when intrajudicial behavior is at issue, manifestations of animosity must be much more than subtle to establish bias.

that a high threshold is required to satisfy this standard. Thus, under §455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.

The statute does not refer to the source of the disqualifying partiality. And placing too much emphasis upon whether the source is extrajudicial or intrajudicial distracts from the central inquiry. * * * The relevant consideration under §455(a) is the appearance of partiality, not where it originated or how it was disclosed.

* * *

There is no justification * * * for a strict rule dismissing allegations of intrajudicial partiality, or the appearance thereof, in every case. A judge may find it difficult to put aside views formed during some earlier proceeding. In that instance we would expect the judge to heed the judicial oath and step down, but that does not always occur. If through obduracy, honest mistake, or simple inability to attain self-knowledge the judge fails to acknowledge a disqualifying predisposition or circumstance, an appellate court must order recusal no matter what the source. * * *

* * * The Court holds that opinions arising during the course of judicial proceedings require disqualification under §455(a) only if they "display a deep-seated favoritism or antagonism that would make fair judgment impossible." That standard is not a fair interpretation of the statute, and is quite insufficient to serve and protect the integrity of the courts. * * *

* * *

When the prevailing standard of conduct imposed by the law for many of society's enterprises is reasonableness, it seems most inappropriate to say that a judge is subject to disqualification only if concerns about his or her predisposed state of mind, or other improper connections to the case, make a fair hearing impossible. That is too lenient a test when the integrity of the judicial system is at stake. Disputes arousing deep passions often come to the courtroom, and justice may appear imperfect to parties and their supporters disappointed by the outcome. This we cannot change. We can, however, enforce society's legitimate expectation that judges maintain, in fact and appearance, the conviction and discipline to resolve those disputes with detachment and impartiality.

The standard that ought to be adopted for all allegations of an apparent fixed predisposition, extrajudicial or otherwise, follows from the statute itself: Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified. Indeed, in such circumstances, I should think that any judge who understands the judicial office and oath would be the first to insist that another judge hear the case.

* * *

The PEOPLE, Plaintiff and Respondent,
v.
Gregory Allen STURM, Defendant and Appellant.

Supreme Court of California
129 P.3d 10 (2006).

MORENO, J.

A jury convicted defendant Gregory Allen Sturm of the first degree murders of Darrell Esgar, Chad Chadwick, and Russell Williams, among other offenses, and found true the special circumstance allegations that defendant committed multiple murders and that each murder was committed during the commission of a robbery. After a penalty phase mistrial, a second jury determined that the death penalty should be imposed. This appeal from the resulting judgment is automatic. For the reasons that follow, we affirm defendant's convictions, but reverse the death sentence.

* * *

Defendant pled guilty to the attempted escape charge and not guilty to the remaining charges. On May 8, 1992, the jury returned guilty verdicts on all counts and found true the weapon-use allegation and all special circumstance allegations. The jury did not return a verdict finding whether defendant committed premeditated and deliberate first degree murder. The penalty phase of the trial commenced, but on June 10, 1992, the jury announced it could not reach a penalty verdict, and the court declared a mistrial. A poll of the jury indicated that the jurors were split 10 to 2, with the majority favoring a sentence of life without the possibility of parole.

A second penalty phase jury trial began on October 20, 1992. On November 23, 1992, the jury determined that the death penalty should be imposed. * * *

* * *

*** * * [Second] Penalty Phase Evidence**

1. Prosecution Evidence

Because the second penalty phase jury had not been present at the guilt phase, the prosecution introduced evidence of the underlying crimes, including a description of the crime scene, the autopsies of the victims, and ballistic analysis. The prosecution also presented evidence of defendant's cocaine use * * *, evidence of defendant's attempt to purchase a motorcycle, interviews given to police by defendant, and testimony by defendant's former supervisor.

The prosecution also presented seven victim-impact witnesses: * * * The victim-impact witnesses largely testified to the emotional impact that the victims' death had upon them, and described the positive personal characteristics of each victim.

2. Defense Case

Numerous witnesses, including friends, neighbors, and teachers, testified on defendant's behalf that he was well-liked, was considered to be a helpful person and a good worker, and was like family to many people. A family friend and neighbor, who felt that defendant had been unhappy at home, had considered adopting defendant. Many witnesses testified that they would be devastated if he were given the death penalty.

* * *

Heidi Sturm[, the defendant's sister,] testified at length. Tom Sturm [the boyfriend of defendant's mother] often yelled at defendant, and began hitting defendant when he was a toddler. * * * Tom Sturm spanked defendant on a near-daily basis, hitting him with pieces of wood, a belt, fishing poles, and a paddle that had been made for the purpose of spanking defendant and his siblings.

* * *

Dr. Larry Stein, the chairman of the Department of Pharmacology at the College of Medicine at University of California at Irvine, testified at length about the general effects of cocaine abuse. * * *

* * * Dr. Stein explained that * * * [s]evere cocaine abuse acutely impairs a person's ability to judge the consequences of his actions, and also lowers impulse control. * * *

Dr. Susan Fossum, a clinical psychologist, performed a social history of the Sturm family * * *. In her opinion, defendant's family constituted a "malignant family system," which, as defined by Dr. Fossum, is much worse than a dysfunctional family; malignancy often involves criminal activities within the family and may involve life-threatening situations for the family members, especially for developing children.

* * *

II. DISCUSSION

* * *

B. Judicial Misconduct

Defendant contends that the trial judge belittled crucial defense witnesses and hamstrung their testimony and repeatedly disparaged defense counsel, giving the impression that the court was aligned with the prosecution.

A "trial court commits misconduct if it

persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression that it is allying itself with the prosecution." Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials. When "the trial court persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge . . . it has transcended so far beyond the pale of judicial fairness as to render a new trial necessary."

The trial judge in the present case belittled defense witnesses on several occasions. Dr. Stein * * * testified that he received about $4 million worth of federal grants over his 13 years with the University of California. The trial judge interjected the comment, "[i]n other words, you contributed to the federal deficit; is that correct?" Later, Dr. Stein was asked by defense counsel how he drew conclusions about the effects of drugs on people, given that he had only participated in animal studies. Dr. Stein attempted to answer the question, stating "The reason that the federal government puts millions of dollars . . ." but was cut off by the trial judge, who told him to "[t]ry and answer the question. Not whether the federal government spent millions of dollars. They spent too much already. Let's not get into that. . . . That would be very depressing and we will need cocaine." This statement appears to refer to evidence presented by the defense that some individuals use cocaine to self-medicate themselves as treatment for depression.

Defense counsel asked Dr. Fossum, a clinical psychologist[,] * * * to point out some examples of particular pathological behaviors in the Sturm family. Dr. Fossum responded that she "could cite to the rather constant message that Gregory Sturm got . . . ." The prosecutor did not object, but the trial judge cut off Dr. Fossum's response and admonished Dr. Fossum for overusing descriptive words in her testimony: "No, don't. You have a tendency to add to your testimony. Give us an example. Don't give a lot of adjectives and adverbs and so forth. . . . Just tell us what your answer is and then leave it up to the people that are determining the factual situation to make the necessary adjectives if they desire." Shortly thereafter, the trial judge *sua sponte* struck an answer by Dr. Fossum, telling her that "you embellish your answers, ma'am, which causes a problem for the court."

Later, defense counsel asked Dr. Fossum whether she could see signs of defendant's depression by examining his school records. After Dr. Fossum answered affirmatively, the trial court interjected: "What's the difference if she did or she didn't?" Later, the prosecutor objected when defense counsel asked Dr. Fossum what effect positive feedback from neighbors and friends had on defendant. In sustaining the objection, the trial judge stated * * * that he would not allow defense counsel to ask why positive reinforcement from defendant's neighbors and family friends failed to cure defendant's depression: "[i]t didn't, so why do we care? Isn't that the bottom line? I assume because he didn't get it [positive reinforcement] from the father figure or something. Really, where do we go?"

* * *

The trial judge also disparaged defense counsel in front of the jury. For instance, when defense counsel attempted to ask Cindy Medeiros whether her sons would be upset were defendant to receive the death penalty, the trial court *sua sponte* interjected: "Come on, Mr. Kelley [defense counsel], please. I don't like to interrupt. You know, there is no way you can get that in. You've been around enough and I don't want to chastise you in front of the jury but we have just gone through, you want to relate what her sons thought. . . . And we are here and holding the jury over late. . . . And clearly you know these questions are objectionable. Why ask them?" * * *

At another point, the trial judge chastised defense counsel for attempting to rephrase a question to which an objection had been sustained[.] The court cut off defense counsel, stating: "No, no, no. We are back to the same question number one again. I rule, I rule and then you go back and ask the question just a little bit different, *trying to sneak it by.* Is that the particular word I should use? Again, Mr. Kelley,

please. . . . So again, admonish the jury that Mr. Kelley's questions are not evidence, *as much as he would like them to be evidence.*" [Italics added.] * * *

On numerous occasions, the trial judge interposed his own objections to questions asked by defense counsel. For example, the trial court objected when defense counsel asked a defense witness whether defendant's biological father had had ongoing contact with defendant's sisters, stating: "Mr. Rosenblum [the prosecutor] is looking at the books for things and so forth and isn't that interested. But I'll interject myself. . . ." At one point during the presentation of mitigating evidence, the trial judge interrupted defense counsel's questioning of Dr. Fossum, and invited the prosecutor to object, stating: "It's your case, Mr. Rosenblum. Is there an objection on where we are going?" * * * On another occasion, the judge said "Let me interrupt. I see Mr. Rosenblum's lips are moving." During the presentation of mitigating evidence by the defense, there were over 30 occasions in which the trial judge either objected *sua sponte* or otherwise intervened to disallow a question asked by defense counsel in the absence of an objection by the prosecutor. In comparison, the trial judge intervened fewer than five times to preclude a witness from answering a question posed by the prosecutor.

The trial judge acknowledged the danger that his conduct appeared to favor the prosecution, but one attempt by the court to address this problem only made matters worse. After a particularly heated exchange between the court and defense counsel[,] * * * the trial judge gave the following lengthy admonition:

> I want to admonish the jury, just a bit. I've done it before. I don't want the jury, and I'm sure you wouldn't with a seriousness of this particular case, get into personality of the attorneys and so forth, whether you like the conduct, the way one attorney tries a case and the way the other one doesn't.
>
> They're both doing the best for their clients. And I don't want you to think that – I'm here, hopefully neutral and trying to rule on objections. But I think it's obvious to the jury that – I hope they aren't drawing any inference that I'm upset with Mr. Kelley or upset with Mr. Rosenblum. But I would have to say for the record *we have spent an inordinate amount of time whereby objections are raised with regard to questions by Mr. Kelley.*
>
> And I don't want the jury to think because *it appears that I'm ruling against Mr. Kelley 99 times out of 100 or making these comments,* but the reason I'm doing it is it seems to me that it is up to me to make the proper rulings.
>
> And I hope the jury isn't feeling that I'm upset with Mr. Kelley or I'm upset with Mr. Rosenblum. It wouldn't be proper for you to consider that. But it would be less than candid if it didn't appear that somewhere along the line that *Mr. Kelley and I aren't agreeing on some of these rulings that have come up repeatedly. . . .*
>
> * * *
>
> But I have a duty to hold [the evidence] to what I consider relevant and keep the case moving forward. * * * I'm probably what's known as an active judge and I like to hopefully keep things moving and so forth.
>
> But in the court's opinion, *we have ruled on the same thing four or five times this afternoon.* And I don't want you holding that against Mr. Kelley. If you feel the court is picking on Mr. Kelley in any way or Mr. Rosenblum having to object a lot while Mr. Kelley doesn't have to object, *it's a matter of the questions being asked.*
>
> * * *
>
> So there are certain rules. *And this is why attorneys go to school and supposedly learn the rules of evidence. I don't comment on that.* Whether they do or they don't, not picking on anybody. But I said, that's the bottom line. [Italics added.]

Although no objection was raised to several of the incidents now cited as misconduct, the People do not take the position that defendant has forfeited all judicial misconduct claims premised

on these events. As a general rule, judicial misconduct claims are not preserved for appellate review if no objections were made on those grounds at trial. * * *

Given the evident hostility between the trial judge and defense counsel during the penalty phase, it would * * * be unfair to require defense counsel to choose between repeatedly provoking the trial judge into making further negative statements about defense counsel and therefore poisoning the jury against his client or, alternatively, giving up his client's ability to argue misconduct on appeal. * * *

* * *

* * * A trial court commits misconduct if it "'persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge.'"

Under the unique facts of the present case, we hold that the trial judge's conduct during the second penalty phase trial constituted misconduct. The trial judge engaged in a pattern of disparaging defense counsel and defense witnesses in the presence of the jury, and conveyed the impression that he favored the prosecution by frequently interposing objections to defense counsel's questions.

The trial judge's comments during the testimony of defense expert witness Dr. Stein that the expert had "contributed to the federal deficit" and that such contribution was "very depressing and we will need cocaine" were inappropriate. While this apparently was an attempt at humor – always a risky venture during a trial for a capital offense – this court has repeatedly stated that a trial court must avoid comments that convey to the jury the message that the judge does not believe the testimony of the witness.

The trial court, in remarking upon the impact of federally funded drug studies upon the federal deficit, communicated to the jury that he felt that the federal government was spending too much money on funding the studies of drug experts like Dr. Stein. Even more troubling, the comments made by the trial judge also poked fun at a foundational theory of the defense case – that defendant had become addicted to cocaine in order to self-medicate for depression. Indeed, the trial judge's sarcastic statement that knowing the amount of federal money spent on studying the effects of drugs would be "very depressing and we [the judge and jury] will need cocaine" conveyed to the jury that the trial judge did not take seriously the defense theory in mitigation.

Several comments made by the trial court during the testimony of Dr. Fossum also were improper. * * * In the presence of the jury, the trial judge criticized Dr. Fossum for having a "tendency to add to [her] testimony," charged that she "embellish[ed] her answers," and advised her not to use "a lot of adjectives and adverbs and so forth" in her testimony because it was up to the jury to determine the "necessary adjectives." These statements questioned the reliability of the expert's testimony in general, and suggested to the jury that such testimony had not been based wholly upon the facts. * * *

* * * The trial court interrupted Dr. Fossum's testimony to: (1) ask "[w]hat's the difference if [Dr. Fossum] did or [ ] didn't" see signs of defendant's depression by looking at his school records; (2) indicate that he did not care why positive reinforcement from neighbors and friends did not cure defendant's depression; and (3) state that he "assumed" that defendant's depression was not cured because he did not get positive reinforcement "from the father figure or something."

In so doing, the judge conveyed the message to the jury that the trial judge thought that the substance of Dr. Fossum's testimony was of little consequence. * * * Additionally, the trial judge need not have expressed his assumption that defendant did not cure his depression because he "didn't get [positive reinforcement] from the father figure or something," which belittled Dr. Fossum's testimony by reducing it to a Freudian platitude, and communicated to the jury that the trial judge considered such testimony to be rote and therefore not worth considering.

The trial court continued to display impatience with Dr. Fossum, and at times himself answered questions that defense counsel addressed to Dr. Fossum[,] * * * conveying to [the jury] the message that the questions were so trivial and/or obvious that he himself was able to answer them without possessing the particular expertise of the witness.

* * * Such behavior, especially considered in the aggregate, conveyed to the jury the unfortunate message that the trial judge did not take seriously the testimony of the defense experts.

The trial judge exacerbated his mistreatment of defense witnesses by repeatedly and improperly disparaging defense counsel, which conveyed to the jury the message that the court was allied with the prosecution. Understandably frustrated by defense counsel's persistent attempts to push the boundaries of the trial court's evidentiary rulings, the trial judge repeatedly reprimanded defense counsel in front of the jury. * * *

* * *

* * * As one court colorfully observed, "[w]hen the judge figuratively descends from the bench and enters the arena he takes the risk that he will be besmirched with gore or sawdust, and that he will be criticized as interfering either on behalf of the bull or the matador." * * *

The jury had already heard the trial judge make comments such as "[l]et me interrupt. I see Mr. Rosenblum [the prosecutor]'s lips are moving," and "Mr. Rosenblum is looking at the books for things. . . . But I'll interject myself." These comments, in which the trial court noted that he was, in effect, filling in for an otherwise occupied prosecutor, communicated to the jury the message that the trial judge was collaborating with the prosecutor. * * *

* * *

* * * The trial court's duty is to control the proceedings of the trial, and to act – as the trial court had earlier characterized his role – "like an umpire," not as a color commentator on the relative success of counsel.

* * *

C. Prejudice

* * *

Considered in the aggregate, the inappropriate comments made by the trial judge spanned the entire penalty phase trial, from voir dire through the defense case in mitigation. "Perhaps no one of them is important in itself but when added together their influence increases as does the size of a snowball rolling downhill." * * *

* * *

George, C.J., Kennard, Werdegar, JJ., and Gomes, J. [Associate Justice, Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution] concurr.

Dissenting Opinion by **BAXTER, J.**

* * * [T]he majority * * * places exaggerated reliance on petty matters, many of which defendant has not challenged here or below. * * * Moreover, * * * the majority ignores the cold-blooded nature of this triple slaying. Reversal, and a remand for a *third* penalty trial, are unnecessary in my view.

* * *

As the majority seems to concede, none of the alleged misconduct on which it relies prompted a timely defense objection on that ground. * * * Hence, the majority wrongly assumes that the events used to reverse the judgment are properly before this court on appeal.

On the merits, judicial comments made during the examination of defense witnesses were hardly as significant as the majority suggests. The references to Dr. Stein's grant money and to cocaine's antidepressant effect were humorous quips of the kind that have not been deemed serious or harmful before.

In all the other incidents on which the majority relies, the trial court simply adopted a colloquial style when applying the rules of evidence, and excluding testimony that was irrelevant or

nonresponsive. * * * The majority does not find any error in the court's substantive rulings on these evidentiary points. * * *

Finally, I disagree with the majority that the trial court's actions had a cumulative prejudicial effect. In reaching this conclusion, the majority focuses exclusively on the disputed remarks themselves. Such an approach removes, in essence, the aggravating nature of the capital crimes from the prejudice analysis.

* * *

Unlike the majority, I do not attribute the death verdict to the manner in which the trial court conducted the legal proceedings. The blame rests squarely on defendant and the capital crimes he committed. * * *

CHIN, J., concurs.

Note

For other examples of judicial misconduct requiring reversal *see Diggs v. State*, 973 A.2d 796 (Md. 2009) (after noting "neither of the prosecutors presented the cases well, nor did the defense attorneys adequately represent their clients," the court holds that "the judge's egregious and repeated behavior reflecting partiality and bias" denied the defendants fair and impartial trials) and cases cited within it.

RACIAL PREJUDICE

When oppressed [African Americans] can bring an action at law but they will find only white men among their judges.

- Alexis de Tocqueville,
DEMOCRACY IN AMERICA 343 (1835)

Anthony Ray PEEK, Appellant,
v.
STATE of Florida, Appellee.

Supreme Court of Florida.
488 So.2d 52 (1986)

PER CURIAM:

[The Court held that collateral crime evidence was improperly admitted and required reversal of the conviction.]

Because of our decision on the [collateral crime evidence] issue, we need not discuss the other issues raised by the appellant, with the exception of one matter. For future guidance of the bench, we believe that we should address the circumstances requiring the original trial judge in this case to disqualify himself after the completion of the guilt phase of the trial. That disqualification resulted from comments made by the trial judge immediately after the appellant was convicted and as the trial judge and attorneys were discussing procedure for the penalty phase. The defense attorney stated the trial judge commented: "Since the nigger mom and dad are here anyway, why don't we go ahead and do the penalty phase today instead of having to subpoena them back at cost to the state." Another person heard the comment as: "Since the niggers are here, maybe we can go ahead with the sentencing phase." As a result of these statements, the defendant moved to disqualify the trial judge. The trial judge disqualified himself from the penalty phase and the chief judge of the circuit presided for the remainder of the trial.

Trial judges not only must be impartial in their own minds, but also must convey the image of impartiality to the parties and the public. Judges

must make sure that their statements, both on and off the bench, are proper and do not convey an image of prejudice or bias to any person or any segment of the community. This type of conduct is required of our judiciary because "every litigant . . . is entitled to nothing less than the cold neutrality of an impartial judge." We write about this incident to emphasize the need for all judges to be constantly vigilant about their comments and demeanor both inside and outside the courtroom to assure that their impartiality may not "reasonably be questioned." Code of Judicial Conduct, Canon 3 C(1).

* * *

STATE OF MISSOURI, Respondent,
v.
HERBERT SMULLS, Appellant.

Supreme Court of Missouri
935 S.W.2d 9 (Mo. 1996) (en banc)

WHITE, Judge.

A jury convicted defendant of first degree murder and other crimes. Defendant was sentenced to death for the murder conviction. Defendant's motion for post-conviction relief was overruled.

I.
* * *

Defendant was charged with first degree murder, first degree assault, two counts of first degree robbery and two counts of armed criminal action. * * * The jury found defendant guilty of first degree robbery of Florence Honickman but failed to reach a verdict as to the remaining counts. Upon retrial, the jury found defendant guilty of the five remaining counts. After the penalty hearing, the jury recommended the death penalty. The trial court sentenced defendant to death for the murder count and to concurrent terms of life imprisonment for each of the remaining counts.

* * *

XVII.

Defendant argues the trial judge erred by overruling defendant's original and supplemental motions to disqualify the judge * * *.

Defendant first contends the motion to disqualify should have been sustained because the trial judge could not fairly consider claims involving racial issues that were raised[.] * * *

* * *

Defendant's counsel filed a verified motion to disqualify the trial judge for cause. Among other things, the motion claimed that defendant would offer: (1) expert testimony that Judge Corrigan treated African-American litigants differently than caucasians in other cases in which he sat as the trial judge; (2) the testimony of another member of the judiciary that newspaper accounts of a racially derogatory statement made in 1983 by Judge Corrigan were accurate; (3) evidence that defendant's counsel filed a motion seeking a court reporter to report in-chambers proceedings, and that Judge Corrigan had overruled the motion, saying that "he didn't give a shit that [defendant's counsel] had brought [his] own court reporter," and that he subsequently made statements indicating bias in the absence of the court reporter. In addition, defendant's appellate counsel reminds the Court of a federal verdict of sexual harassment against the trial judge in which several sexist remarks were attributed to him, including "`This Court won't run smoothly until we get rid of these g__ d___ women.'" *Goodwin v. Circuit Court of St. Louis County*, 729 F.2d 541, 544 (8th Cir. 1984). Defendant further alleged in his motion that Judge Corrigan would likely be called to testify regarding these contentions. Those factual allegations, while not conclusive of defendant's claim of bias, are made compelling by the record of the trial.

According to the record, defendant's counsel sought a mistrial the morning following the trial court's decision to overrule defendant's claim that the selection process that led to the all-white jury violated *Batson* [*v. Kentucky*, 476 U.S. 79 (1986) (prohibiting the use of peremptory strikes based on race)]. In overruling the motion, the trial judge offered the following comments:

MS. KRAFT [Defendant's Counsel]: Judge, I believe I stated on the record yesterday when I made my record that Ms. Sidney was the only black juror remaining out of the 30.

THE COURT: You made that statement.

MS. KRAFT: Okay.

THE COURT: You see, I have a problem. I don't know what it is to be black. I don't know what constitutes black. And I never, in this Court, no matter what any appellate court may say, I never take judicial notice that anybody is black or that only one person or four persons or eight persons are black. That to me is something that I don't think this Court is wise enough or any other appellate court is wise enough unless there is direct evidence as to who is black and who is white and who is orange and who is purple. I do not under any circumstances in this division ever take judicial notice of the number of people who are black. And I believe that's counsel's responsibility to prove who is black and who isn't or who is a minority and who isn't. There were some dark complexioned people on this jury. I don't know if that makes them black or white. As I said, I don't know what constitutes black. Years ago they used to say one drop of blood constitutes black. I don't know what black means. Can somebody enlighten me of what black is? I don't know; I think of them as people. I listened to the responses of Ms. Sidney. I watched her attitude very briefly as it may have been, and I'm not going to sit here and say to you that Ms. Sidney is not black. But I'm not going to make a judgment as to whether anybody else on the panel was, so in any event, I'm merely telling you that for the record. I'd rather not even discuss it on the record. But, in any event, I'm going to deny your motion for a mistrial on the basis stated. Are we ready to proceed?

* * *

We restate our focus: the issue we address here is neither the propriety of the trial judge's ruling on the *Batson* issue, nor whether the trial itself was tainted. The relevant issue is whether this trial judge should have sustained a motion to recuse * * *. The standard by which we determine the question is not whether the trial judge is actually prejudiced. Instead, the standard is whether there is an objective basis upon which a reasonable person could base a doubt about the racial impartiality of the trial court.

Batson is a race-centered standard. The threshold question is the race of the challenged venireperson. * * * The trial court cannot add subtle burdens to the *Batson* process by refusing to take note of race where trial counsel properly places it at issue.

Courts must be vigilant in enforcing the laws of this state and nation that prohibit overt acts of racial prejudice by public servants. Those laws have not eradicated prejudice. Rather, they have forced prejudiced persons to disguise their bias by hiding behind neutral-sounding language. Therefore, we may not simply accept ostensibly neutral language as showing an absence of prejudice. Statements must be considered in the context in which they are offered.

Here, the trial judge made his remarks in the context of a *Batson* challenge. *Batson* is not race-neutral. It requires the trial judge to focus his or her attention solely on race. Race-neutral language has but one purpose in a *Batson* setting – to deny the effectiveness of the race-focused *Batson* inquiry. The trial judge's gratuitous statements raise serious questions about his willingness to do what *Batson* requires. His words suggest an inability or hostility to taking notice of a venireperson's race, no matter how obvious it is.[6]

A judge should recuse where "the judge's impartiality might reasonably be questioned . . . ." This rule expresses the obvious truth that, in our courthouses, judges set the tone. Judges control the participants. Judges define the boundaries of appropriate and inappropriate conduct. And judges make the decisions as to the rights and responsibilities of the participants in the course of

6. Both defense counsel and the prosecution had stated on the record that the challenged venireperson, Ms. Sidney, was black.

litigation.

Because judges control the courtroom, judicial behavior must be beyond reproach. Conduct of judges during trial that raises questions of racial bias, even when the conduct may seem relatively minor in its manifestation undermines the credibility of the judicial system and opens the integrity of the judicial system to question.

* * *

The judge's gratuitous remarks manifest a lack of understanding of the import of the issues underlying *Batson*, and of what the codewords "one drop of blood" mean to many participants in the judicial system.[7] It is not the judge to whom we should afford the benefit of the doubt. The rights and due-process based expectations of the parties are the Court's proper focus.

The reasonable-person, objective standard we employ is not hypersensitive. It merely acknowledges the fact that prejudice is most often subtle, sometimes masquerading in superficially neutral language. No one would dispute that a judge should never use words or terms that suggest racism. Where there is ambiguity, the Court's obligation is to construe language in favor of assuring the appearance of fairness to the litigants because "justice must satisfy the appearance of justice." *Aetna Life Co. v. Lavoie*, 475 U.S. 813, 825 (1985).

* * * We hold that the trial judge erred in overruling defendant's motions to disqualify him self * * *

LIMBAUGH, Judge, concurring in part and dissenting in part:

* * *

The majority's unbridled condemnation of the trial judge for what is perceived to be a racial slur is unjustified. Taken in context, the trial judge's remark that "one drop of blood constitutes black" is nothing more than the judge's observation that years ago that phrase was used to categorize persons as blacks who were of mixed white/black race to whatever degree. Although the phrase was used by those who would identify blacks in order to deprive them of the same status as whites or, at the very least, to invoke a racial slur, the evidence in this case is insufficient to show that the trial judge used the phrase in that fashion or for that purpose.

* * * Although the majority sets out the entirety of the judge's comments, which properly set the context, its focus is on a single phrase, and all the rest is simply ignored.

Taken as a whole, the judge's comments do nothing more than convey his difficulty in ascertaining which members of the jury panel are black in order to afford them proper consideration under *Batson*. The statements reflect his efforts to assure that the rights of black persons will be preserved, not to take them away. In context, the phrase does not constitute a racial slur. Indeed, after making that statement, the judge emphasizes his intent to be color-blind and unbiased by then stating "Can somebody enlighten me of what black is? I don't know; I think of them as people."

Admittedly, the fact that the phrase in question was used historically to disparage blacks makes its use in any context insensitive. A mere incident of insensitivity, however, which by all appearances was unwitting, does not rise to the level of "manifest bias or prejudice . . . based on race"

---

7. "One drop of blood" is an offensive phrase because it is reminiscent of the manner in which slaveholders sought to increase the supply of slaves, and by which laws denied many legal protections to mixed-race citizens. See, e.g., An Act Concerning Free Negroes and Mulattoes, §1, RSMo 1835, 413-14:

> Every person, other than a negro, of whose grandfathers or grandmothers any one is or shall have been a negro, although all his or her other progenitors, except those descending from the negro, shall have been white persons, who shall have one fourth or more negro blood, shall be deemed a mulatto.

And, Mo. Const. Art. III, §26 (1820):

> It shall be [the General Assembly's] duty, as soon as may be, to pass such laws as may be necessary, First. To prevent free negroes and mulattoes from coming to, and settling in this state, under any pretext whatsoever....

under Canon 3(c) [of the Code of Judicial Conduct], or "personal bias or prejudice concerning the proceedings" under Canon 3(d). In my view, when the remark is considered in context, there is not even an appearance of impropriety.

To be sure, the judge in question spouted a racial slur some ten years before the trial of this case. To assume from one isolated incident remote in time that the trial judge is forever prejudiced, never again worthy of passing judgment, is patently unfair. Few persons, judges included, whether black or white, can pass such scrutiny. The evidence has little or no relevance on the question of the trial judge's bias against the defendant in the case at hand.

* * *

STATE of Missouri, Respondent,
v.
Brian J. KINDER, Appellant.

Supreme Court of Missouri, En Banc.
942 S.W.2d 313 (1996)

LIMBAUGH, Judge.

A jury found Brian Kinder guilty of first degree murder, rape, and armed criminal action. He was sentenced to death and two consecutive life terms. The postconviction court overruled Kinder's motion [for postconviction relief] after an evidentiary hearing. On consolidated appeal, we affirm the conviction, sentence, and denial of postconviction relief.

* * *

II. PRETRIAL
A. MOTION TO DISQUALIFY JUDGE

Six days before the trial was scheduled to begin, the trial judge, who was facing an election that year, issued a press release announcing his decision to switch parties from Democrat to Republican. Kinder, an indigent African American, then filed a motion to disqualify on the ground that the press release reflected that the trial judge could not fairly serve on a case involving an unemployed African-American. The press release, which was the sole evidence Kinder presented in support of the motion, stated, in relevant part, as follows:

> The truth is that I have noticed in recent years that the Democrat party places far too much emphasis on representing minorities such as homosexuals, people who don't want to work, and people with a skin that's any color but white. Their reverse-discriminatory quotas and affirmative action, in the work place as well as in schools and colleges, are repugnant to me. . . . I believe that a person should be advanced and promoted, in this life, on the basis of initiative, qualifications, and willingness to work, not simply on the color of his or her skin, or sexual preference. While minorities need to be represented, or [sic] course, I believe the time has come for us to place much more emphasis and concern on the hard-working taxpayers in this country. . . . That majority group of our citizens seems to have been virtually forgotten by the Democrat party.

After a hearing, the motion was denied, and Kinder now presses the point on appeal.

It is presumed that judges act with honesty and integrity, *Withrowe v. Larkin*, 421 U.S. 35, 47 (1975), and will not undertake to preside in a trial in which they cannot be impartial. * * * That presumption is overcome, and disqualification of a judge is required, however, if a reasonable person, giving due regard to that presumption, would find an appearance of impropriety and doubt the impartiality of the Court. *See State v. Smulls*. The rule announced in *Smulls* * * * is drawn from our Code of Judicial Conduct, Canons 2 and 3(C), which provide that a judge should avoid the appearance of impropriety and shall perform judicial duties without bias or prejudice, and Canon 3(D), which provides that a judge should recuse in a proceeding in which the judge's impartiality might reasonably be questioned.

In this case, we do not agree that the statements in the press release, when coupled with all other relevant considerations, would cause a reasonable person to question the impartiality of the court. In context, the statements merely express the trial judge's dissatisfaction with affirmative action and

government entitlement programs. To the extent that the comments can be read to disparage minorities, there is little point in defending them, even as the political act they were intended to be. But they are a political act, not a judicial one, and, as such, they do not necessarily have any bearing on the judge's in-court treatment of minorities. At the hearing on the motion, the trial judge's response, ignored or disregarded by the defendant, should have set to rest any concern. The court stated:

> The Court is not prejudiced against this defendant or any black person in any degree. The Court, as a matter of fact, and the Court's record will show, having served in the Missouri legislature for 16 years, that there is no stronger believer in constitutional rights than this Court. People get confused sometimes when you talk about group rights, civil rights. Or white rights, or black rights, or yellow rights, when they start talking that way, they lost me. As far as this Court is concerned every individual and every citizen of this country is absolutely entitled to their individual constitutional rights, whether they are yellow, red, white, black, or polka dot. It doesn't make any difference to this Court. A person is a person, and an individual is an individual. I think people get off the track when they start talking about color. But insofar as this Court is concerned, there is no stronger defender of individual constitutional rights, and this Court and this defendant can rests assured and if he doesn't know it now he will know it after the trial, I am sure. This defendant can rest assured there is no prejudice on the part of this Court. If there is prejudice in any direction, it is prejudice toward upholding each individual's constitutional rights. As I say, whether the individual be white, black, red, yellow, or whatever, it doesn't make any difference to this Court. Therefore, the motion for recusal is overruled.

By all accounts, the trial judge was true to his word, and Kinder, himself, is unable to point to any statement or ruling or other conduct by the trial judge during the course of the trial that bears any hint of bias. Indeed, Judge Kennedy-Bader, who presided at the [postconviction] hearing, found specifically that the trial judge did not exhibit racial bias in the conduct of the underlying trial.

According to the dissent, *Smulls* requires disqualification of the judge whenever the judge has made any statement, in court or out of court, that might be considered offensive to minorities. In fact, *Smulls* turned largely on a narrower legal point. The trial judge made specific comments on the record in that case, raising genuine doubts as to his willingness to apply *Batson v. Kentucky*, 476 U.S. 79 (1986), and in particular, he expressed an apparent unwillingness to follow the law despite his disagreement with it. *Smulls* should be read no more broadly than for the proposition that a judicial statement – on the record or off – that raises a genuine doubt as to the judge's willingness to follow the law, provides a basis for recusal or, if the judge refuses to recuse, reversal on appeal. In that instance, the presumption of lack of judicial bias is overcome, and, as the Court stated in *Smulls*, the judge is at that point no longer afforded the benefit of the doubt. Therefore, this case is distinguished from *Smulls* because the judge made no statement that could reasonably be perceived as a threat to ignore the law in favor of his own policy preferences.

* * *

WHITE, J., dissents.

Problems do not disappear just because we close our eyes to them.

* * *

The majority's view is that Judge Blackwell's press release on the eve of the trial "merely express[es]" his "dissatisfaction with affirmative action and government entitlement programs." Judge Blackwell does express that idea, but that part of the statement is irrelevant to the issue of bias.[2] What the majority admits it cannot defend, but nevertheless condones, is the pernicious racial

2. It is, however, improper. A judge who "announce[s] views on disputed legal issues" violates the Code of Judicial Conduct, Canon 7(B)(1)(c). Obviously, there are few more hotly disputed legal issues than the status of affirmative action.

stereotype which is also expressed in the press release. The slur is not ambiguous or complex (nor, unfortunately, original): "While minorities need to be represented . . . , I believe the time has come for us to place much more emphasis and concern on the hard-working taxpayers in this country. . . ." No honest reading of this sentence can show that it says anything other than what it says: that minorities are not hard-working taxpayers. The majority does not even try to explain how this statement is consistent with its conclusion that "the press release would [not] cause a reasonable person to question the impartiality of the court." Instead, the majority chooses to focus on Judge Blackwell's self-serving comments at the disqualification hearing. The mere fact that a judge who issues a racially derogatory press release a week later claims to treat equally people who are "white, black, red, yellow, or whatever," hardly "set[s] to rest any concern" about his impartiality. I would feel much more comfortable with the judge's decision not to recuse if he had used his press release to trumpet his "prejudice toward upholding each individual's constitutional rights[,]" rather than filling it with race-baiting nonsense.

* * * The majority describes the requirement that judges recuse themselves from cases where a reasonable person would have an objective basis to doubt their impartiality as emanating from the code of judicial conduct. The rule has a far more important source – the Constitution. "A fair trial in a fair tribunal is a basic requirement of due process."[4] The majority's reliance on the post-conviction court's finding that Judge Blackwell made no obviously unfair rulings during the trial is misplaced. To satisfy the Constitution, actual fairness is necessary, but not sufficient:

> Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice."[5]

While the majority's refusal to address Mr. Kinder's constitutional argument is disconcerting, its distortion of the controlling precedent on this issue defies belief. The majority, without quoting from the case, tells us what *State v. Smulls* really meant to say. "*Smulls* should be read no more broadly than for the proposition that a judicial statement – on the record or off – which raises a genuine doubt as to the judge's willingness to follow the law, provides a basis for recusal." What *Smulls* actually said was: "fundamental fairness requires that the trial judge be free of the appearance of prejudice against the defendant as an individual and against the racial group of which the defendant is a member." * * *

That the majority is now pretending *Smulls* doesn't say what it says is at least understandable, since it directly contradicts their decision here. The dissenters in *Smulls* made exactly the same argument that the majority adopts today: that a judge is presumptively unbiased, despite racially provocative remarks. The Court conclusively rejected that approach[in *Smulls*.] * * *

In some regards, the judge's conduct here is more egregious than that alleged in *Smulls*[.] This is no impromptu remark, conducive to misunderstanding due to haste or inadvertent misphrasing. A lifelong Democrat and a former state senator, Judge Blackwell issued a formal press release explaining why he was switching parties months before an election. I do not doubt that the content and wording of such an important announcement were carefully considered by the judge before he disseminated it. Far from being a spontaneous outburst, this press release was a calculated attempt to influence voters by appealing to their racial prejudice. The majority tacitly admits that this is the case, but inexplicably

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

5. *Id*. (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

finds that this excuses the offensive conduct, rather than aggravating it. * * * [The majority's] distinction between "political" racism and "judicial" racism has no basis in logic or in reality. * * * The majority doesn't even try to make the argument – made in the *Smulls* dissent – that facially neutral comments are being distorted. Judge Blackwell's press release would have to be grossly distorted to be read to do anything but disparage the work ethic of minorities.

* * * Perhaps the majority sees all allegations of bias against judges as part of a "witch hunt," and fears that "even the most saintly of us may be the target of overzealous scrutiny and quite often, false claims." But judges' fear of being falsely accused of bigotry can not blind us to its presence in our midst. If the majority is going to submit to this fear and abandon the high standard of judicial conduct the Court outlined in *Smulls*, it should at least be forthright enough to admit that that is what it is doing.

We must not lose sight of what is at stake in this case. The high standard of impartiality we require from judges must be further raised when the punishment imposed is death. "[D]eath is different in kind from any other punishment [,]" and the burden of the death penalty has long appeared to be borne disproportionately by "people with a skin that's any color but white."[17]

* * * Since the judge here failed to sustain the motion that he recuse himself, Mr. Kinder must receive a new trial before a judge whose impartiality is beyond reproach. * * *

17. *See, e.g., McCleskey v. Kemp*, 481 U.S. 277 (1987) (study showing black defendants received death penalty at substantially greater rate than white defendants not sufficient basis for equal protection claim); *Furman v. Georgia*, 408 U.S. 238, 250-51 (1972) (Douglas, J., concurring) (providing evidence that death sentences are imposed disproportionately on black defendants).

For Consideration:

Did the Missouri Supreme Court correctly decide both *Smulls* and *Kinder*? How do you distinguish the two cases? Does the Court change the law?

Judge White's nomination for a federal judgeship

Judge Ronnie White, the author of the majority opinion in *Smulls* and the dissent in *Kinder*, was the first African American to serve on the Missouri Supreme Court. He served from 1995 to 2007. He was Chief Justice from July 2003 to June 2005.

President Clinton nominated Judge White for a federal district court judgeship in 1997. In the Senate debate on his confirmation in 1999, then-Senator John Ashcroft of Missouri opposed White's confirmation. Ashcroft told his colleagues that White had shown "a tremendous bent toward criminal activity," would substitute "personal politics" for the law and "improperly exercise his will" if confirmed. At the time, White had voted 18 times to reverse death sentences in 59 capital cases that had come before court while he was a justice. In 10 of the reversals, the vote was unanimous.)

All of Ashcroft's Republican colleagues joined him in voting against White and the nomination was rejected on a straight party-line vote. His opposition to White may have cost Ashcroft reelection to the Senate the next year. It galvanized African Americans, many of whom believe it had racial overtones, and resulted in a high turnout of blacks in the election. Ashcroft lost to Governor Mel Carnahan, who had died in a plane crash prior to the election.

However, President Bush nominated Ashcroft for Attorney General. Judge White testified at Ashcroft's confirmation hearing that Ashcroft willfully misrepresented his record, made unwarranted personal attacks on him and damaged his reputation. Nevertheless, Ashcroft was confirmed by the Senate.

President Obama nominated White for the a

judgeship on the Eastern District of Missouri on November 7, 2013. He was confirmed by the Senate on July 16, 2014, 17 years after he was first nominated by President Clinton.

POLITICAL PRESSURES

Selection of Judges in the State Courts

Excerpts from:

Judges and the Politics of Death: Deciding Between the Bill of Rights and the next Election in Capital Cases

Stephen B. Bright & Patrick J. Keenan
73 *Boston University Law Review* 759 (1995)
[footnotes omitted]

> The "higher authority" to whom present-day capital judges may be "too responsive" is a political climate in which judges who covet higher office – or who merely wish to remain judges – must constantly profess their fealty to the death penalty . . . . The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III.
>
> - Justice John Paul Stevens, dissenting in *Harris v. Alabama*

* * *

* * * In 1986, Governor George Deukmejian publicly warned two justices of the [California] supreme court that he would oppose them in their retention elections unless they voted to uphold more death sentences. He had already announced his opposition to Chief Justice Rose Bird because of her votes in capital cases. Apparently unsatisfied with the subsequent votes of the other two justices, the governor carried out his threat. He opposed the retention of all three justices and all lost their seats after a campaign dominated by the death penalty. Deukmejian appointed their replacements in 1987.

* * * In the [next] five years, the Court * * * affirm[ed] nearly 97% of the capital cases it has reviewed, one of the highest rates in the nation. * * * The once highly regarded court now distinguishes itself primarily by its readiness to find trial court error harmless in capital cases. The new court has "reversed every premise underlying the Bird Court's harmless error analysis," displaying an eagerness that reflects "jurisprudential theory" less than a "desire to carry out the death penalty."

The voice of "higher authority" has also been heard and felt in Texas * * *. After a decision by the state's highest criminal court, the Court of Criminal Appeals, reversing the conviction in a particularly notorious capital case, a former chairman of the state Republican Party called for Republicans to take over the court in the 1994 election. The voters responded to the call. Republicans won every position they sought on the court.

One of the Republicans elected to the court was Stephen W. Mansfield, who had been a member of the Texas bar only two years, but campaigned for the court on promises of the death penalty for killers, greater use of the harmless-error doctrine, and sanctions for attorneys who file "frivolous appeals especially in death penalty cases." Even before the election it came to light that Mansfield had misrepresented his prior background, experience, and record, that he had been fined for practicing law without a license in Florida, and that – contrary to his assertions that he had experience in criminal cases and had "written extensively on criminal and civil justice issues" – he had virtually no experience in criminal law and his writing in the area of criminal law consisted of a guest column in a local newspaper criticizing the same decision that prompted the former Republican chairman to call for a takeover of the court. Nevertheless, Mansfield defeated the incumbent judge, a conservative former prosecutor who had served twelve years on the court and was supported by both sides of the criminal bar. Mansfield was sworn in to office for a six-year term in January 1995. [After a term that included his arrest for

scalping his complimentary football tickets, Mansfield did not seek re-election.]

The single county in America responsible for the most death sentences and executions is Harris County, Texas, which includes Houston. Judge Norman E. Lanford, a Republican, was voted off the state district court in Houston in 1992 after he recommended in postconviction proceedings that a death sentence be set aside due to prosecutorial misconduct, and directed an acquittal in another murder case due to constitutional violations. A prosecutor who specialized in death cases, Caprice Cosper, defeated Judge Lanford in the Republican primary. Lanford accused District Attorney John B. Holmes of causing congestion of Lanford's docket to help bring about his defeat. In the November election, Cosper was elected after a campaign in which radio advertisements on her behalf attacked her Democratic opponent for having once opposed the death penalty.

Judges in other states have had similar campaigns waged against them. Justice James Robertson was voted off the Mississippi Supreme Court in 1992. His opponent in the Democratic primary ran as a "law and order candidate" with the support of the Mississippi Prosecutors Association. Among the decisions for which Robertson's opponent attacked him was a concurring opinion expressing the view that the Constitution did not permit the death penalty for rape where there was no loss of life. Robertson's opponent exploited the opinion even though the U.S. Supreme Court had held ten years earlier that the Eighth Amendment did not permit the death penalty in such cases. Opponents also attacked Robertson for his dissenting opinions in two cases that the U.S. Supreme Court later reversed.

Robertson was the second justice to be voted off the court in two years for being "soft on crime." Joel Blass, whom the Governor had appointed to fill an unexpired term on the court, was defeated in 1990 for a full term by a candidate who promised to be a "tough judge for tough times" and to put criminals behind bars, and whom, like Justice Robertson's opponent, the Mississippi Prosecutors Association had endorsed. Justice Blass expressed concern during the campaign that his opponent was misleading the public, explaining: "Neither a Supreme Court judge nor the whole court can send a person to prison."

The voice of "higher authority" can also be heard in less direct, but equally compelling ways. As Justice Stevens observed in his dissent in *Harris v. Alabama*, some members of the United States Senate have "made the death penalty a litmus test in judicial confirmation hearings" for nominees to the federal bench. Several challengers for Senate seats in the 1994 elections "routinely savaged their incumbent opponents for supporting federal judicial nominees perceived to be 'soft' on capital punishment."

* * * Justice Stevens [has also] observed, "Not surprisingly, given the political pressures they face, judges are far more likely than juries to impose the death penalty." In the * * * states that permit elected judges to override jury sentences in capital cases, judges override jury sentences of life imprisonment and impose death far more often than they override death sentences and impose life imprisonment. Judges have also failed to enforce constitutional guarantees of fairness. It has been observed that "[t] he more susceptible judges are to political challenge, the less likely they are to reverse a death penalty judgment." Affirmance rates over a ten-year period suggest that "[n]ationally there is a close correlation between the method of selection of a state supreme court and that court's affirmance rate in death penalty appeals." Even greater pressure exists at the local level. Elected trial judges are under considerable pressure not to suppress evidence, grant a change of venue, or protect other constitutional rights of the accused. An indigent defendant may face the death penalty at trial without one of the most fundamental protections of the Constitution, a competent lawyer, because judges frequently appoint inexperienced, uncaring, incompetent, or inadequately compensated attorneys. State trial court judges in many states routinely dispose of complex legal and factual issues in capital postconviction proceedings by adopting "orders" ghostwritten by state attorneys general – orders that make no pretense of fairly resolving the issues before the court.

* * *

II. THE POLITICS OF BECOMING AND STAYING A JUDGE

Judges in most states that have capital punishment are subject to election or retention. Although all judges take oaths to uphold the Constitution, including its provisions guaranteeing certain protections for persons accused of crimes, judges who must stand for election or retention depend on the continued approval of the voters for their jobs and concomitant salaries and retirement benefits. A common route to the bench is through a prosecutor's office, where trying high-profile capital cases can result in publicity and name recognition for a prosecutor with judicial ambitions. A judge who has used capital cases to advance to the bench finds that presiding over capital cases results in continued public attention. Regardless of how one becomes a judge, rulings in capital cases may significantly affect whether a judge remains in office or moves to a higher court.

A. Judges Face Election in Most States That Employ the Death Penalty

Almost all judicial selection systems fall into one of four categories. First, judges in eleven states and the District of Columbia are never subjected to election at any time in their judicial careers. Second, the judges of three states are elected by vote of the state legislature. Third, the judges of twenty-nine states are subjected to contested elections, either partisan or nonpartisan, at some point in their careers, whether during initial selection for the bench or after appointment by the governor. The fourth category of judicial selection systems includes those systems in which the judge or justice is at some time subjected to a retention election but never faces an opponent. Thirteen states employ such a system.

* * *

In nine states – including Alabama and Texas – judges run under party affiliations. The success of the party in national or state elections may have a significant impact on the judiciary. For example, Texas Republicans swept into state judicial offices as part of the party's general success in the 1994 elections. Republicans won every elected position they sought on the Texas Court of Criminal Appeals and the Texas Supreme Court. Republican straight-ticket voting contributed to the defeat of nineteen Democratic judges and a Republican sweep of all but one of the forty- two contested races for countywide judgeships in Harris County, Texas, which includes Houston. The dean of one Texas law school observed that "[i]f Bozo the Clown had been running as a Republican against any Democrat, he would have had a chance." Such straight-ticket voting, which comprised one-quarter of all votes cast in Harris County, also resulted in the removal of the only three black judges and left only one Hispanic on the bench.

The lack of racial diversity now found in Houston is consistent with the exclusion of minorities from the bench throughout the country. One reason for the lack of minority judges is that in many states – particularly those in the "death belt" states such as Florida and Texas – judges have long been elected from judicial districts in which the voting strength of racial minorities is diluted.

* * *

C. The Death Penalty's Prominence in the Election, Retention, and Promotion of Judges

With campaigning for the death penalty and against judges who overturn capital cases an effective tactic in the quest for other offices, it is not surprising that the death penalty has become increasingly prominent in contested and retention elections for judges. Not only the judge, but her political supporters as well, may suffer the consequences of an unpopular ruling in a capital case.

Judicial campaigns in which the death penalty is an issue can degenerate to almost Orwellian levels of absurdity, raising serious questions about the ability of judges to remain fair and impartial. An opponent can seize upon a judge's ruling in one case and, by focusing on the facts of the crime and completely ignoring the legal issue, make even the toughest judge appear "soft on crime." As one commentator has noted:

When the mother of a young daughter,

who was brutally murdered and mutilated, complains in a television commercial about a judge vacating the killer's death sentence, the judge has little recourse. A judge can explain that a defendant's right was violated, which warrants a new trial, but the public, unfamiliar with constitutional law, sees only the grieving mother and a picture of the innocent victim.

* * * A few rulings in highly publicized cases may become more important to a judge's survival on the bench than qualifications, judicial temperament, management of the docket, or commitment to the Constitution and the rule of law.

* * *

A judge's votes in capital cases can threaten his or her elevation to a higher court. No matter how well qualified a judge may be, perceived "softness" on crime or on the death penalty may have consequences not only for the judge, but also for those who would nominate or vote to confirm the judge for another court. For example, in 1992 groups campaigned against the retention of Florida Chief Justice Rosemary Barkett for the Florida Supreme Court because of her votes in capital cases. Then in 1994 Barkett's nomination to the U.S. Court of Appeals for the Eleventh Circuit came under fire because of her record on capital punishment during nine years on the Florida Supreme Court. After a long delay, the Senate finally confirmed Barkett by a vote of sixty-one to thirty-seven.

Despite Barkett's confirmation to the Eleventh Circuit, campaigns against her and other judges tagged as "soft on crime" continued. Bill Frist, in his successful campaign to unseat Tennessee Senator Jim Sasser, attacked Sasser for voting for Barkett and for having recommended the nomination of a federal district judge who, two months before the election, granted habeas corpus relief to a death-sentenced man. Frist appeared at a news conference with the sister of the victim in the case in which habeas relief had been granted. After the victim's sister criticized Sasser for recommending U.S. District Judge John Nixon for the federal bench, Frist said that Sasser's vote to confirm Judge Barkett showed that he "still hasn't learned his lesson."

* * *

III. THE IMPACT ON THE IMPARTIALITY OF JUDGES

The political liability facing judges who enforce the Bill of Rights in capital cases undermines the independence, integrity, and impartiality of the state judiciary. Judicial candidates who promise to base their rulings on "common sense," unencumbered by technicalities, essentially promise to ignore constitutional limits on the process by which society may extinguish the life of one of its members. Justice Byron White once observed, "If [for example,] a judge's ruling for the defendant . . . may determine his fate at the next election, even though his ruling was affirmed and is unquestionably right, constitutional protections would be subject to serious erosion." * * *

Rulings in a publicized case can have major political effects, such as loss of one's position or any hope of promotion, and judges are aware of this as they make controversial decisions, particularly in capital cases.

* * *

Overrides of Jury Sentences

Mario Dion WOODWARD
v.
ALABAMA.

Supreme Court of the United States
134 S.Ct. 405 (2013).

The petition for a writ of certiorari is denied.

Justice SOTOMAYOR, with whom Justice BREYER joins as to Parts I and II, dissenting from denial of certiorari.

The jury that convicted Mario Dion Woodward of capital murder voted 8 to 4 against imposing the death penalty. But the trial judge overrode the jury's decision and sentenced Woodward to death after hearing new evidence and finding, contrary

to the jury's prior determination of the same question, that the aggravating circumstances outweighed the mitigating circumstances. * * * In the last decade, Alabama has been the only State in which judges have imposed the death penalty in the face of contrary jury verdicts. * * *

I

A

In Alabama, a defendant convicted of capital murder is entitled to an evidentiary sentencing hearing before a jury. At that hearing, the State must prove beyond a reasonable doubt the existence of at least one aggravating circumstance; otherwise, the defendant cannot be sentenced to death and instead receives a sentence of life imprisonment without parole. The defendant may present mitigating circumstances, which the State may seek to disprove by a preponderance of the evidence. If it has found at least one aggravating circumstance, the jury then weighs the aggravating and mitigating evidence and renders its advisory verdict. If it finds that the aggravating circumstances do not outweigh the mitigating circumstances, the jury must return a life-without-parole verdict; if it finds that the aggravating circumstances do outweigh the mitigating circumstances, it must return a death verdict. A life-without-parole verdict requires a vote of a majority of the jurors, while a death verdict requires a vote of at least 10 jurors. After the jury returns its advisory verdict, the trial judge makes her own determination whether the aggravating circumstances outweigh the mitigating circumstances and imposes a sentence accordingly. Alabama's statute provides that "[w]hile the jury's recommendation concerning [the] sentence shall be given consideration, it is not binding upon the court."

B

* * *

II

This Court has long acknowledged that death is fundamentally different in kind from any other punishment. For that reason, we have required States to apply special procedural safeguards to "minimize the risk of wholly arbitrary and capricious action" in imposing the death penalty. One such safeguard, as determined by the vast majority of States, is that a jury, and not a judge, should impose any sentence of death.

Of the 32 States that currently authorize capital punishment, 31 require jury participation in the sentencing decision; only Montana leaves the jury with no sentencing role in capital cases. In 27 of those 31 States, plus the federal system, the jury's decision to impose life imprisonment is final and may not be disturbed by the trial judge under any circumstance. That leaves four States in which the jury has a role in sentencing but is not the final decisionmaker. In Nebraska, the jury is responsible for finding aggravating circumstances, while a three-judge panel determines mitigating circumstances and weighs them against the aggravating circumstances to make the ultimate sentencing decision. Three States – Alabama, Delaware, and Florida – permit the trial judge to override the jury's sentencing decision.

In *Spaziano v. Florida,* 468 U.S. 447 (1984), we upheld Florida's judicial-override sentencing statute. And in *Harris v. Alabama,* 513 U.S. 504 (1995), we upheld Alabama's similar statute. Eighteen years have passed since we decided *Harris,* and in my view, the time has come for us to reconsider that decision. * * *

In the nearly two decades since we decided *Harris,* the practice of judicial overrides has become increasingly rare. In the 1980s, there were 125 life-to-death overrides: 89 in Florida, 30 in Alabama, and 6 in Indiana. In the 1990's, there were 74: 26 in Florida, 44 in Alabama, and 4 in Indiana. Since 2000, by contrast, there have been only 27 life-to-death overrides, 26 of which were by Alabama judges.

* * * In sum, whereas judges across three States overrode roughly 10 jury verdicts per year in the 1980's and 1990's, a dramatic shift has taken place over the past decade: Judges now override jury verdicts of life in just a single State, and they do so roughly twice a year.

What could explain Alabama judges' distinctive proclivity for imposing death sentences in cases where a jury has already rejected that penalty? There is no evidence that criminal activity is more heinous in Alabama than in other

States, or that Alabama juries are particularly lenient in weighing aggravating and mitigating circumstances. The only answer that is supported by empirical evidence is one that, in my view, casts a cloud of illegitimacy over the criminal justice system: Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures. *See Symposium, Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?* 21 FORDHAM URBAN L.J. 239, 256 (1994) (comments of Bryan Stevenson) (concluding, based on "a mini-multiple regression analysis of how the death penalty is applied and how override is applied, [that] there is a statistically significant correlation between judicial override and election years in most of the counties where these overrides take place"); *see also* Equal Justice Initiative, *The Death Penalty in Alabama: Judge Override*, at 16 (noting that the proportion of death sentences imposed by override in Alabama is elevated in election years). One Alabama judge, who has overridden jury verdicts to impose the death penalty on six occasions, campaigned by running several advertisements voicing his support for capital punishment. One of these ads boasted that he had "'presided over more than 9,000 cases, including some of the most heinous murder trials in our history,'" and expressly named some of the defendants whom he had sentenced to death, in at least one case over a jury's contrary judgment. With admirable candor, another judge, who has overridden one jury verdict to impose death, admitted that voter reaction does "'have some impact, especially in high-profile cases.'" "'Let's face it,'" the judge said, "'we're human beings. I'm sure it affects some more than others.'" Alabama judges, it seems, have "ben[t] to political pressures when pronouncing sentence in highly publicized capital cases." *Harris,* 513 U.S., at 520 (Stevens, J., dissenting).

By permitting a single trial judge's view to displace that of a jury representing a cross-section of the community, Alabama's sentencing scheme has led to curious and potentially arbitrary outcomes. For example, Alabama judges frequently override jury life-without-parole verdicts even in cases where the jury was unanimous in that verdict.[7] In many cases, judges have done so without offering a meaningful explanation for the decision to disregard the jury's verdict. In sentencing a defendant with an IQ of 65, for example, one judge concluded that "'[t]he sociological literature suggests Gypsies intentionally test low on standard IQ tests.'"[8] Another judge, who was facing reelection at the time he sentenced a 19-year-old defendant, refused to consider certain mitigating circumstances found by the jury, which had voted to recommend a life-without-parole sentence. He explained his sensitivity to public perception as follows: "'If I had not imposed the death sentence, I would have sentenced three black people to death and no white people.'". These results do not seem to square with our Eighth Amendment jurisprudence * * *, and they raise important concerns that are worthy of this Court's review.

III

There is a second reason why Alabama's sentencing scheme deserves our review. Since our decisions in *Spaziano* and *Harris,* our Sixth Amendment jurisprudence has developed significantly. Five years after we decided *Harris,* we held in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), that the Sixth Amendment does not permit a defendant to be "expose[d] ... to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the

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7. As recently as May 2011, an Alabama judge overrode a 12-to-0 jury verdict to sentence Courtney Lockhart to death. Lockhart, a former army soldier and Iraq war veteran, was convicted of murdering a college student, Lauren Burk. The jury recommended life imprisonment without the possibility of parole, influenced by mitigating circumstances relating to severe psychological problems Lockhart suffered as a result of his combat in Iraq. (Lockhart spent 16 months in Iraq; 64 of the soldiers in his brigade never made it home, including Lockhart's best friend. The soldiers who survived all exhibited signs of posttraumatic stress disorder and other psychological conditions. Twelve of them have been arrested for murder or attempted murder.). The trial judge nonetheless imposed the death penalty.

8. After this sentence was reversed on appeal, the State agreed that the defendant was exempt from the death penalty because he is mentally retarded.

jury verdict alone." *Id.,* at 483 (emphasis deleted). When "a State makes an increase in a defendant's authorized punishment contingent on the finding of fact," we explained, "that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring* [*v. Arizona*], 536 U.S., at 602. * * * Two years later, we applied the *Apprendi* rule in *Ring v. Arizona* to invalidate Arizona's capital sentencing scheme, which permitted the trial judge to determine the presence of aggravating factors required for imposition of the death penalty. We made clear that "[c]apital defendants, no less than noncapital defendants, ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. * * *

* * * [A] defendant is eligible for the death penalty in Alabama only upon a specific factual finding that any aggravating factors outweigh the mitigating factors he has presented. The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is therefore necessary to impose the death penalty. It is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole. Under *Apprendi* and *Ring,* a finding that has such an effect must be made by a jury.

The facts of this case underscore why Alabama's statute might run afoul of *Apprendi* and *Ring*. After the State and Woodward presented evidence at the sentencing hearing, the jury found two aggravating factors, but it determined that the mitigating factors outweighed those aggravating factors, and it voted to recommend a sentence of life imprisonment without the possibility of parole. The judge then heard additional evidence before reweighing the aggravating and mitigating factors to reach the opposite conclusion from the jury. With respect to the first mitigating circumstance – Woodward's relationship with his children – the judge noted that he was "underwhelmed" by Woodward's family situation in light of the additional evidence that only he had heard. Rejecting the conclusion that Woodward had a positive influence on the lives of his young children, the judge opined: "What young child does not adore a parent?" The judge further reasoned that Woodward's criminal history rendered him a "very poor parenting role model." Moving to the second mitigating factor – Woodward's traumatic childhood – the judge concluded that the evidence of problems in Woodward's childhood did not "withstand close scrutiny." He * * * speculated that Woodward's "truncated academic career may well have been the result of his bringing weapons to school, not the result of family issues"; suggested that Woodward's mother did not actually send him to live with his abusive father because no mother would "sen[d] her children to live alone, unprotected with an abusive man"; and found that it "strain[ed] logic to accept the story that [Woodward's] father evicted him." * * * [H]e concluded that the aggravating factors "far outweigh[ed] the mitigating factors."[9] In other words, the judge imposed the death penalty on Woodward only because he disagreed with the jury's assessment of the facts.

Under our *Apprendi* jurisprudence, as it has evolved since *Harris* was decided, a sentencing scheme that permits such a result is constitutionally suspect.

* * *

Eighteen years have passed since we last considered Alabama's capital sentencing scheme, and much has changed since then. Today, Alabama stands alone: No other State condemns prisoners to death despite the considered judgment rendered by a cross-section of its citizens that the defendant ought to live. And *Apprendi* and its progeny have made clear the sanctity of the jury's role in our system of criminal justice. Given these developments, we owe the validity of Alabama's system a fresh look. I therefore respectfully dissent from the denial of certiorari.

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9. In discounting the jury's finding that the mitigating circumstances outweighed the aggravating circumstances, the judge noted that he had access to information that the jury did not hear (referring to the additional factfinding he had conducted after the jury made its findings), and "surmise[d]" that some members of the jury were "daunted by the task [of sentencing]" and fell prey to defense counsel's "powerful, emotional appeal."

COMMONWEALTH OF KENTUCKY
vs.
PETER BARD

Circuit Court of Jefferson County
Louisville, Ky.

Motion to Disqualify Present and Former Members Of Jefferson Circuit Court and Jefferson District Court And to Obtain Appointment of a Special Judge From Outside Jefferson County
(filed Nov. 9, 1993)

Comes now the defendant, Peter Bard, by counsel, and respectfully moves for an order disqualifying all members of the Jefferson Circuit Court and, for the same reasons, objects to the appointment of any former member of the Jefferson Circuit Court or any former or sitting member of the Jefferson District Court from acting as a special judge. This motion is made pursuant to [Kentucky statutes], the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Sections Two, Eleven and Seventeen of the Kentucky Constitution. In support of this motion the defendant, by counsel, states the following:

1. Mr. Bard is charged with the murder of Deputy Sheriff Floyd Cheeks.

2. This case is awash in both heartfelt emotion and politics. Mr. Cheeks' funeral was attended by thousands of people, including Jefferson County Judge Executive David Armstrong Louisville Mayor Jerry Abramson numerous Jefferson Circuit and Jefferson District Court judges, candidates for Jefferson County Sheriff Jim Vaughn and Melissa Mershon, numerous other dignitaries and Jefferson County officials and 500 police officers including some from as far away as Tulsa, Oklahoma. In an unprecedented act court officials closed the Hall of Justice the day of the funeral in honor of Mr. Cheeks. Mr. Cheeks was well known not only among his law enforcement brethren but also in the courthouse where he had once served as the courtroom sheriff for the Hon. Ellen Ewing, Chief Judge, Jefferson Circuit Court.

3. The shooting of Deputy Cheeks has aroused extraordinary passions and received saturation news coverage, particularly on television. Law enforcement officials have painted the shooting as an "ambush". Mr. Bard was indicted by the Jefferson County Grand Jury even as he stood being arraigned in Jefferson District Court in one of the speediest indictments ever returned in this county. Bond was set at the headline-grabbing amount of one million dollars.

4. In this climate, and given the intensity of community sentiment, no present or former judge in this county can be impartial or appear impartial. While counsel will set forth numerous facts to support this proposition, nothing illustrates the need for a special judge more clearly than the events of Friday, October 29, 1993, which counsel will recount in detail.

5. The shooting of Deputy Cheeks occurred Wednesday, October 27, 1993. Mr. Bard was arraigned Thursday, October 28, in Jefferson District Court, and was indicted by the Grand Jury, as already noted, as he stood being arraigned in District Court. Ordinarily, having been indicted Thursday, Mr. Bard would have been arraigned in Jefferson Circuit Court the following Monday, November 1, 1993, at the motion hour for the division to which his case was allotted. However, because the courthouse was going to be closed Monday for Deputy Cheeks' funeral, arraignments were being passed to Tuesday, November 2.

6. Given these circumstances, counsel, when he came to work Friday, October 29, had no idea that Mr. Bard would be arraigned in Circuit Court that very day. When counsel arrived at the Public Defender's office Friday morning, the office had already received two messages from Jefferson Circuit Court, Division Six, the court to which this case was assigned, stating that Division Six wanted to do Mr. Bard's arraignment as soon as possible. Counsel immediately went to the Hall of Justice. On the first floor, two deputy sheriffs told counsel that Mr. Bard's arraignment would be at 11:00 a.m. Counsel immediately went to the third floor to Division Six. The Hon. Daniel Schneider, the Judge of Division Six, summoned counsel into his Chambers. Also in Judge Schneider's Chambers was the Hon. Jim Shake, Judge, Division Two, Jefferson Circuit Court. Judge

Shake was in the midst of a hard-fought campaign against the Hon. Eleanor Garber to finish the unexpired term of the Hon. Pete Karem, formerly Judge of Division Two. Election day was just four days away – Tuesday, November 2. Judge Schneider told counsel that arraignment would be at 10:00 a.m. Judge Schneider then asked counsel directly whether counsel minded if Judge Shake did the arraignment, rather than Judge Schneider, because, in Judge Schneider's words, "Jim's on the ballot Tuesday." Counsel asked where the prosecutor was. Judge Schneider said this was not *ex parte*, and asked again if it was all right if Judge Shake did the arraignment to help in the election. Counsel again asked where the prosecutor was. Again, Judge Schneider told counsel not to worry. Judge Schneider then asked if counsel planned to file anything "substantive" at arraignment. Counsel said he had not had time to prepare anything substantive for arraignment, but at some point he was probably going to file a motion to recuse the Court. Judge Schneider asked counsel yet again if it was okay if Judge Shake did the arraignment. Counsel refused to respond to the request, said he wanted to speak to the prosecutor, and left.

7. Counsel returned to his office. At 9:50 a.m., counsel and co-counsel, the Hon. Ann Bailey Smith, returned to the Hall of Justice. Outside Division Six, counsel and Ms. Smith met and spoke with the two prosecutors on the case, the Hon. Joe Gutmann and the Hon. Susan Gibson. Counsel related to them what had occurred earlier in the morning. Counsel told the prosecutors that he thought what Judge Schneider had done was grossly improper and that at this point the damage had been done no matter who did the arraignment. Counsel also said to Mr. Gutmann that it would be fine with counsel if the prosecution told Judge Schneider what counsel had just told them. Mr. Gutmann said he didn't want to be trapped in the middle of this dispute. At this point, everyone was called into the courtroom for arraignment. Once inside the courtroom, counsel, co-counsel, and the prosecutors were all summoned back to Judge Schneider's Chambers. In Chambers, Judge Schneider once again asked counsel, in the presence of Ms. Smith, both prosecutors, and Judge Shake, whether counsel objected to Judge Shake doing the arraignment. It should be noted that the courtroom was filled with television cameras. Counsel told Judge Schneider that it was completely wrong and improper for him to make this request. Counsel, who by this time was very upset, repeated to Judge Schneider that his request to the defense regarding Judge Shake was both unfair and improper. Judge Schneider said he did not understand why counsel thought his actions were improper. Counsel repeated that what Judge Schneider had requested was wrong. Everyone then left Chambers. Both Judge Shake and Judge Schneider appeared angry at counsel.

8. Counsel and Ms. Smith went into the courtroom for arraignment. Judge Shake was in the back hallway with his judicial robe on. However, apparently because of counsel's comments, Judge Schneider conducted the arraignment rather than Judge Shake. During the arraignment, Judge Schneider made several comments, the import of which was that Mr. Bard was not being treated differently from any other criminal defendant.

9. The bottom line of this incident may be summarized simply. Judge Schneider is the presiding judge in Division Six. This indictment was allotted to his division. It was his duty to arraign the defendant. However, Judge Schneider, who was not up for election, sought to help Judge Shake's chances at the ballot box by having Judge Shake conduct the arraignment in front of numerous television cameras. This incident amply demonstrates why a special judge from outside Jefferson County must preside over this action.

10. Judge Schneider's actions were grossly improper, for the following reasons:

(a) Judge Schneider viewed Mr. Bard's arraignment as a political event, rather than a legal one;

(b) Judge Schneider sought to use the arraignment to obtain votes for his colleague;

(c) Judge Schneider, by making his request, made clear that he has no respect for defense counsel and apparently believes that defense counsel lacks integrity;

AND

(d) Judge Schneider by making his request believes that defense counsel is willing to provide only sham representation rather than zealous and sincere advocacy. Defense counsel's role in this case is to vigorously advocate for Mr. Bard. It is not counsel's role to represent the defendant with a wink or a nod, to provide mock representation, or to act as a cover for the system. That is, counsel's duty is to defend Mr. Bard, not to pretend to defend him. By asking counsel to become an accomplice in an election campaign ploy, Judge Schneider demeaned the criminal justice system.

11. Further, Judge Schneider's request undermines confidence in the integrity of the judicial system. Mr. Bard is an indigent African-American accused of killing a white deputy sheriff. Mr. Bard's family has expressed both great sympathy for the family of Mr. Cheeks and at the same time a fear that the defendant will not be treated fairly because of the fact that Mr. Cheeks was a law enforcement officer who was known by many in the courthouse. It hardly inspires trust in the judicial system for the judge presiding over this very sensitive case to ask defense counsel to collaborate with the Court to help the election chances of another judge.

12. Counsel is well aware of the pressures facing judges in contested elections, and recognizes that any person in the heat of a judicial race may have a lapse in judgment. * * * In this case however Judge Schneider cannot plead election pressure as an excuse. He was not on the ballot. He was not facing an opponent. He was not in a campaign. There is nothing which excuses or justifies the request to reap votes for a friend from the arraignment of Mr. Bard or any defendant. Counsel is aware also that the Court may have meant no great harm, that the Court may have viewed its request to counsel as a mere "political favor." Counsel would respectfully suggest that in a case in which a person is accused of killing a deputy sheriff there is no place for political favors from the defense or the prosecution.

13. Finally Judge Schneider's action demeaned, albeit unintentionally, Floyd Cheeks. Floyd had not even been buried and already his death was being viewed in the context of politics and votes.

14. [Kentucky Revised Statute] 26A.015(2)(e) states:

> Any . . . judge . . . shall disqualify himself in any proceeding:
>
> . . .
>
> where he has knowledge of any other circumstances in which his impartiality might reasonably be questioned.

15. * * * [B]oth the federal statute [28 U.S.C. Sec 455(a)] and state statute are worded similarly, and the United States Supreme Court's discussion of the purpose behind such disqualification statutes applies equally. * * *

* * *

16. The defense would also note that the attempted use of the arraignment for votes is just one of a series of extraordinary events in this case, including the following:

(a) Mr. Bard was arrested October 27, 1993. That evening, his pre-arraignment bond was set at one million dollars. The person who set this bond was Jefferson District Court Judge Matthew Eckert. Judge Eckert is a former Jefferson County Deputy Sheriff;

(b) Following his arrest, Mr. Bard was incarcerated in the Jefferson County Jail. The defense submits, upon information and belief, that the Jefferson County Department of Corrections has sought to move Mr. Bard to another jail in another part of the state, but no other jail has been willing to take him;

(c) As stated previously, Mr. Bard was indicted by the Jefferson County Grand Jury as he was being arraigned in Jefferson District Court;

(d) At both his arraignment in District Court and Circuit Court, security in the courtroom was provided by the Department of Corrections rather

than the Sheriff's Department. This is unprecedented;

(e) The Grand Jury proceeding which resulted in Mr. Bard's indictment was extraordinarily short. Testimony before the Grand Jury lasted approximately 65 seconds. Incredibly, not one grand juror had a question for the lone witness, Detective Allan Sherrard of the Louisville Police Department. Given the notoriety of the case, one can only wonder if someone had instructed the grand jurors not to ask questions so as to prevent the defense from obtaining any meaningful information.

These events, remarkable as they may be, pale in the face of Judge Schneider's request to counsel to let Judge Shake handle the arraignment to help in his election, and the closing of both Circuit and District Courts the day of Mr. Cheeks' funeral.

17. The defense submits that while these extraordinary events compel the appointment of a special judge from outside this county, such an appointment would be appropriate in this case even if these events had not occurred. The defense would note that it is impossible to exaggerate the effect of Deputy Cheeks' death on this county. * * *

* * *

18. In addition, the close relationship between the Jefferson County Sheriff's Department and Jefferson County judges would make it impossible for any judge in this county to be impartial or to maintain the appearance of impartiality. The Sheriff's Department carries enormous political influence and can make or break a judge's campaign. Separate and apart from political clout, judges rely on the Sheriff's Department to serve process, enforce court orders, guarantee security in the Hall of Justice, and to protect the lives of those who work in the courthouse including, of course, the judges themselves. Judge Eckert is not the only former deputy sheriff to become a member of the judiciary. Former Deputy Sheriff Martin McDonald won election last Tuesday to the District bench. The appearance at Deputy Cheeks' funeral of numerous judges, including the Hon. Ellen Ewing, Chief Judge of Jefferson Circuit Court, underscores the close relationship between the Sheriff's Department and the judiciary, and demonstrates how difficult it would be for any local judge to preside over this case.

19. Finally, it is not a challenge to the integrity of this local judiciary to point out that judges are subject to the same feelings and emotions which befall all human beings. In light of the close relationship between the Sheriff's Department and the Judiciary, and the specter of public scorn for any ruling even remotely perceived as pro-defense, it is evident that it would be impossible for any local judge to sit on this case. Indeed, as the impartiality of any local judge "*might reasonably be questioned* . . .", both law and fundamental fairness dictate appointment of a special judge. Because the Louisville media extends into surrounding counties, the special judge should have no ties to Jefferson County or the counties surrounding Jefferson County. Ordinarily, the defense would ask the Hon. Ellen Ewing, the Chief Regional Judge, to appoint a special judge. However, that would not be appropriate in this case because Deputy Cheeks formerly worked in her courtroom. For this reason, the defendant requests that the matter be referred to the Chief Justice of the Supreme Court of Kentucky for appointment of the special judge.

WHEREFORE, for all the reasons stated above, the defendant moves to disqualify all present and former members of Jefferson Circuit Court and Jefferson District Court from this case. The defendant moves that a special judge be selected with no ties to Jefferson County or the counties surrounding Jefferson County. Finally, the defendant moves that this matter be referred to the Chief Justice of the Supreme Court of Kentucky for appointment of the special judge.

The defendant respectfully moves for an evidentiary hearing on this motion.

* * *

For consideration - Should this motion be grated? Why or why not? Should all the Jefferson County judges be disqualified or only certain ones?

Tennessee Voters Decide Whether to Retain a Justice

Justice Penny White, a recent appointee to the Tennessee Supreme Court, raced a retention election in August, 1996. White has been elected trial judge in her hometown of Johnson City in 1990. Governor Phil Bredesen, a Democrat, appointed her to the state's Court of Criminal Appeals in 1992.She was elected to a full term on the Court without opposition in 1994. Gov. Bredesen appointed her to the Tennessee Supreme Court in 1994. She was to become the first woman chief justice of the Court in 1996.

By 1996, Tennessee had changed its laws from the direct election of judges – where candidates compete for a judgeship, as White did in being elected to the trial bench and in being elected to the Court of Criminal Appeal (although no one ran against her in that election) – to retention elections. Under that system, the governor appointed a judge or justice, who was then on the ballot for a retention election – one in which voters could vote "yes" or "no" with regard to retaining the appointee.

Because of when she was appointed to the Court, White was on the ballot for retention in an August election. No other judges were on the ballot in that election, which, being held in August, did not have a large turnout.

A campaign was launched to convince voters to vote against the retention of Justice White based primarily on the decision by the Tennessee Supreme Court in *State v. Odom*, the only capital case decided by the Court during the 19 months that Justice White served on it, as well a accusations that she was insufficiently concerned about the victims of crime and did not share the values of the average Tennessean. What follows is the opinion in the *Odom* case and mailings regarding it and other decisions that were sent to Tennessee voters.

STATE of Tennessee, Appellee,
v.
Richard ODOM, a/k/a Otis Smith, Appellant.

Supreme Court of Tennessee
928 S.W.2d 18 (1996)

BIRCH, Justice.

In this capital case, the defendant, Richard Odom, was convicted by a Shelby County jury of first-degree murder committed in the perpetration of rape. At the sentencing hearing, the jury found three aggravating circumstances beyond a reasonable doubt: (1) the defendant had been previously convicted of one or more violent felonies; (2) the murder was especially heinous, atrocious, or cruel; and (3) the murder was committed during the defendant's escape from lawful custody or from a place of lawful confinement. The jury found the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt and sentenced the defendant to death by electrocution.
* * *

* * * We conclude * * * that reversible error was committed in the sentencing phase in the following regard: (1) the intermediate court's conclusion that the "heinous, atrocious, or cruel" aggravating circumstance was supported by the evidence; * * * (3) the trial court's failure to permit the defendant to present mitigating evidence in the form of Dr. John Hutson's testimony[.]

* * *

FACTS

* * *

The record indicates that at approximately 1:15 p.m. on May 10, 1991, Ms. Mina Ethel Johnson left the residence of her sister, Ms. Mary Louise Long, to keep a 2:30 p.m. appointment with her podiatrist, Stanley Zellner, D.P.M. * * * [After he failed to make the appointment, Dr. Zellner] located her car in the parking garage and observed her body inside. He * * * notified officers.

Investigating officers found Johnson's body on the rear floorboard of her car with her face down

in the back seat. Her dress was up over her back, and an undergarment was around her ankles. One of several latent fingerprints lifted from the "left rear seat belt fastener" of Johnson's car matched a fingerprint belonging to the defendant, Richard Odom, alias Otis Smith.

The medical examiner testified that Johnson had suffered multiple stab wounds to the body, including penetrating wounds to the heart, lung, and liver. These wounds caused internal bleeding and, ultimately, death. The medical examiner noted "defensive" wounds on her hands. Further examination revealed a tear in the vaginal wall and the presence of semen inside the vagina. In the medical examiner's opinion, death was neither instantaneous nor immediate to the wounds but had occurred "rather quickly."

Three days after the incident, [Odum was arrested, waived his rights and confessed]. * * *

In his statement, the defendant said that his initial intention was to accost Johnson and "snatch" her purse after having seen her in the parking garage beside her car. He ran to her and grabbed her; both of them fell into the front seat. He then pushed her over the console into the rear seat. He "cut" Johnson with his knife. Johnson addressed him as "son." This appellation apparently enraged the defendant; he responded that "[he] would give her a son." He penetrated her vaginally; he felt that Johnson was then still alive because she spoke to him. * * *

* * *

SENTENCING HEARING

* * *

A. AGGRAVATING CIRCUMSTANCES

* * *

In proving the second aggravating circumstance – "the murder was heinous, atrocious, or cruel," – the State relied chiefly upon the evidence adduced during the guilt phase. As additional evidence, the State introduced photographs of the victim's body taken after it had been removed from the car. * * *

[The statute provides:]

> The murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death.

* * *

* * * [T]he statute] narrows and defines the meaning of "heinous, atrocious, or cruel" in that the act must involve "torture or serious physical abuse beyond that necessary to produce death." "Torture" has been defined as the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious. * * * [I]t must be assumed that the legislature intended the words "serious physical abuse" to mean something distinct from "torture." The word "serious" alludes to a matter of degree. The abuse must be physical, as opposed to mental, and it must be "beyond that" or more than what is "necessary to produce death." "Abuse" is defined as an act that is "excessive" or which makes "improper use of a thing," or which uses a thing "in a manner contrary to the natural or legal rules for its use." We find the language of the statute constitutionally sufficient to narrow the class of offenders subject to the death penalty.

The issue remains whether the evidence in this case was sufficient to uphold a finding of the aggravating circumstance. We well understand that almost all murders are "heinous, atrocious, and cruel" to some degree, and we have no purpose to demean or minimize the ordeal this murder victim experienced. In our view, however, rape (penile penetration) does not ordinarily constitute "torture" or "serious physical abuse" within the meaning of the statute. Were we to hold otherwise, every murder committed in the perpetration of rape could be classified as a death-eligible offense. Such a result, obviously, would not sufficiently narrow the class of perpetrators, nor would it distinguish the "worst of the worse" for whom the ultimate penalty must be reserved. In a similar vein * * * we must reject the conclusion that the three stab wounds evidenced in this case constituted "torture" or serious physical abuse beyond that necessary to produce death.

As we consider the circumstances here, we do not intend to diminish what surely must have been a terrifying and horror-filled experience for the victim. Most assuredly, the murder was reprehensible in the purest sense of the word – nearly all murders are. However, the aggravating circumstance under review must be reserved for application only to those cases which, by comparison or contrast, can be articulately determined to be the very "worst of the worse."

* * * We * * * conclude that * * * the record does not support the jury's finding of the "heinous, atrocious, and cruel" circumstance.

For the third aggravating circumstance, the State proved that the defendant had escaped on March 28, 1991, from the Mississippi jail where he was serving a life sentence for murder. This aggravating circumstance allows imposition of the death penalty upon a finding that "the murder was committed * * * during the defendant's escape from lawful custody or from a place of lawful confinement."

* * * Although Odom was, assuredly, an "escapee," by no stretch can we say that the murder occurred during the defendant's escape from lawful confinement or during the defendant's escape from lawful custody or from a place of lawful confinement. * * *

DR. HUTSON'S TESTIMONY

In mitigation, John Hutson, Ph.D., a practicing clinical psychologist since 1975, testified for the defendant. * * *

* * *

During the evaluation process, Hutson obtained a history from the defendant. As the defendant's counsel began to ask Hutson about some of the details of this history, the State objected on hearsay grounds. During a jury-out offer of proof, the defendant's counsel attempted to show the relevance of the personal history to the evaluation. The trial court sustained the hearsay objection to the testimony.

* * *

[The Tennessee statute governing the admissibility of evidence at a capital sentencing proceeding] expressly exempts evidence adduced in capital sentencing proceedings from the usual evidentiary rules. Hence, evidence concerning a capital defendant's personal or psychological history would clearly be admissible under the above statute. * * *

* * *

REID and **WHITE**, JJ., concur.

ANDERSON, Chief Justice, concurring and dissenting:

I fully concur in the majority's decision affirming the conviction in this case. I also agree with the majority that the trial court's refusal to admit into evidence as mitigation the testimony of Dr. John Hutson was error which requires a reversal and a remand for re-sentencing. However, I dissent from the majority's analysis of the constitutionality and sufficiency of the evidence to support the ["heinous, atrocious, and cruel"] aggravating circumstance.

* * *

* * * In this case, the defendant inflicted severe physical and mental pain upon the victim while she remained alive and conscious. The victim was alive when violently accosted, she pleaded with the defendant for mercy, but instead she no doubt experienced terror, when the defendant raped her as punishment for her use of the term "son." According to the defendant's own statement, she remained alive and conscious throughout the rape. Defensive stab wounds to her hands indicate that she struggled for survival as the defendant inflicted multiple penetrating stab wounds, which caused internal bleeding, and pain, but which did not cause immediate death. Though always utterly reprehensible, rape is not always torture. However, the facts and circumstances of this case, including the rape of the victim, in my opinion, establish torture. * * *

The Tennessee Conservative Union

★ CAMPAIGN FUND ★

Monday afternoon

Dear

78 year-old Ethel Johnson lay dying in a pool of blood.

Stabbed in the heart, lungs, and liver, she fought back as best she. could.

Her hands were sliced to ribbons as she tried to push the knife away.

And then she was raped.

Savagely. Brutally.

This poor woman suffered horrible tortures that I cannot even describe in print.

For a long time she lay on the floorboard of her car, clinging to life.

Finally, mercifully, she breathed her last.

Miss Johnson's attacker was arrested, convicted by a jury, and sentenced to death.

But her murderer won't be getting the punishment that he deserves.

Thanks to Penny White.

You may not know who Penny White is.

She's not exactly a household word.

But she is one of the most powerful officials in Tennessee.

845 Oak Street * Chattanooga. TN 37403 * 423/756-9660
Lloyd C. Daughert Chairman * John M. Davies, President

Penny White is a justice of the Tennessee Supreme Court.

And she voted to overturn the death sentence of Miss Johnson'S murderer.

Incredibly, she said 78 year-old Miss Johnson's rape was not "serious physical abuse.

Not serious! Not physical! Not abuse!

If the savage rape and bloody murder of a helpless 78 year-old woman is not "serious physical abuse" then what is???

This wasn't the first time her attacker had struck.

No indeed.

He was an escapee from a Mississippi prison where he was already serving a life sentence for another murder.

Yet Justice White voted to overturn his conviction.

Not on the evidence. Not because there was any doubt that he was the actual killer.

His conviction was overturned because Justice White said rape is not "serious physical abuse."

Now, Justice White is asking for your vote.

She wants to remain on the State Supreme Court.

She wants you to vote "Yes" for her in August.

"Yes" so she can free more and more criminals and laugh at their victims!

That's just plain WRONG!

Tennesseans must stand up and vote NO on August 1st.

NO to judges who allow the rape and murder of 78 year-old women to go unpunished.

NO to judges who re-write the law according to their personal views.

And NO to Penny White.

Unfortunately, the other two Supreme Court justices who voted to overturn the death sentence of Miss Johnson's killer are not up for election this year.

Penny White is the only judge we can send a message to.

We must do everything we can to defeat Justice White at the polls on August 1st.

Here's what The Tennessee Conservative Union Campaign Fund will do with your help:

1. Run radio and newspaper ads exposing Justice White's shameful Pro-Criminal voting record.

2. Mail 100,000 Fact Kits to citizen leaders.

3. Print 500,000 postcards for get out the vote" efforts. Our budget for this project is $45,000.

That's a lot of money to us. More than we have ever spent on a statewide race like this.

And frankly, it will not be easy to defeat Justice White.

* Every trial lawyer in the state will be pushing for her.

* Big Labor Unions will give her tons of cash.

* The American Civil Liberties Union loves her.

* Liberal Newspapers will endorse her.

But she still has to be voted on by the people.

And that's where we must make our stand.

Here's what I need for you to do right now.

1. RUSH the enclosed Emergency Reply Form back to me so I know I can count on you.

2. send an Emergency contribution of $25, $50, $100, $500 or even $1,000 back to me to help pay for this project.

This emergency campaign was not in our budget this year.

I obviously had no way of knowing Justice White would turn out to be as Liberal as she has.

But I cannot sit back and do nothing while one of the most liberal judges in the entire country is given even more power!

Please, I hope and pray I can count on your support to defeat Justice White on August 1st.

Sincerely,

John M. Davies
President

P.S. Justice White already has her campaign in full swing. We must move quickly to organize the opposition. Please let me hear from you today.

REPLY MEMO

TO: John Davies
Tennessee Conservative Union Campaign Fund
845 Oak Street
Chattanooga, Tenn. 37403

FROM:

Dear John,

( ) I agree that we must get rid of liberal judges like Penny White who let murderers off to roam our streets and kill again.

( ) To help you pay for this Emergency campaign to defeat Penny White, I've enclosed my donation of:

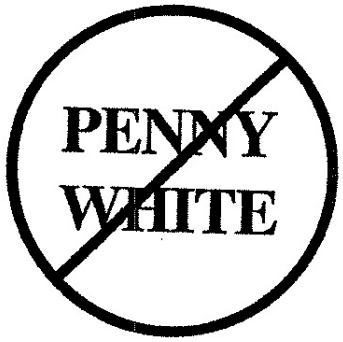
___ $30 ___ $50 Other $_____

The Tennessee Conservative Union Campaign Fund is a political campaign committee registered by the State of Tennessee. Because TCUCF works to defeat liberals and elect conservatives to public office, donations cannot be tax deductible.

JLY-TCU-EX

Tennessee Republican Party
P.O. Box 150368
Nashville, TN 37215-0368

JUST SAY NO!



Vote for Capital Punishment by
Voting NO on August 1st for Supreme Court Justice Penny White

PENNY WHITE'S LIBERAL RECORD...

puts the rights of criminals before the rights of victims.

Stale v. Odom
Richard Odom was convicted of repeatedly raping and stabbing to death a 78 year old Memphis woman. However, Penny White felt the crime wasn't heinous enough for the death penalty - so she struck it down.

Stale v. Wallen
In This case. Penny White voted that John Henry Wallen shouldn't be tried for first degree murder when he shot to death Tennessee Highway Patrolman Doug Tripp. Penny White believed this despite Wallen's confession that "I meant to kill him. I shot the rifle empty."

State v. Jones
In 1994, Edward Jones sexually assaulted a four year-old girl. Despite the child's graphic heart-breaking testimony of what Jones did to her. Penny White voted to reverse Jones aggravated sexual battery conviction.

These are just a few of the tragic examples where year after year and case after case

PENNY WHITE'S LIBERAL RECORD

Puts the rights of criminals before the rights of victims.

As *you can see, Penny White's record as a judge shows a pattern of Judicial activism and a clear pro- defendant judicial philosophy. She is far too liberal for the average Tennessean. The above cases are examples of a number of opinions and Appellate Court decisions rendered by Judge White that most Tennesseans will find totally offensive.*

A strong "NO" vote on August 1 sends a message that law-abiding Tennesseans feel it is time to get tough on crime. Our State law provides for the death penalty; and we need judges that will nor stand in its way when the criminal clearly deserves it. Tennesseans are fed up with judges that consider the rights of criminals over the rights of their innocent victims.

This is an issue that clearly cuts across party lines. We ask that you join with other concerned citizens, Democrats, Independents as well as Republicans in this effort to put the rights of victims ahead of the rights of criminals.

Voters should just say NO to Penny White.

Jim Burnett, Chairman, Republican Party Tennessee

The mailing of the Tennessee Conservative Union states that Odum's conviction was overturned, but it was upheld. Neither mailing disclosed that all five members of the Tennessee Supreme Court agreed that there had been at least one legal error which required a new sentencing hearing and the court remanded his case for a new sentencing hearing at which new jury would consider the death penalty. (Odum was sentenced to death at the retrial.) Nor did the mailings disclose that Justice White did not write the majority opinion or a concurring opinion, but made it appear that she had personally struck down Odom's death penalty because she did not think the crime was "heinous enough."

The "JUST SAY NO" mailing also criticized Justice White on its second page for two cases she participated in as a member of the Tennessee Court of Criminal Appeals. It told voters she voted to reverse the aggravated sexual battery conviction of Edward Jones "[d]espite the child's graphic heart-breaking testimony of what Jones did to her." However, White and two other members of the Court unanimously reversed the conviction because the state's expert made an improper comment on the credibility of the complaining witness.[1]

The mailing also said that White "voted that John Henry Wallen shouldn't be tried for first degree murder when he shot to death Tennessee Highway Patrolman Doug Tripp." But, again, the court's decision was based on a legal error not mentioned in the mailing. A panel of White and two other judges of the Court of Criminal Appeals reversed Wallen's conviction because statements obtained from him should not have been admitted at the trial.[2] Justice White filed a concurring opinion expressing the view that while there was sufficient evidence of premeditation, there was insufficient evidence of deliberation as defined in Tennessee law and thus Wallen could be retried for a lesser crime, but not first degree murder.[3]

Tennessee's governor, Don Sundquist, and both its United States Senators, Fred Thompson and Bill Frist, all Republicans, opposed White.[4] White had been appointed by a Democratic governor. Governor Sundquist, who would appoint White's successor if she was voted off the bench, promised that he would appoint only judges who supported the death penalty.[5]

In his campaign for the Senate, Frist had attacked the incumbent senator for voting to confirm Rosemary Barkett for a federal judgeship and for recommending the appointment of a federal district judge who granted habeas corpus relief in a capital case.[6] When first asked, Frist expressed support for White, but later said that after reading her opinions, he, like the governor and Senator Thompson, had reached the conclusion that Justice White "did not represent the views of the average Tennessean."

Verna Wyatt, whose sister-in-law had been murdered and a member of a victims' rights group, wrote an op-ed urging voters to reject Justice White. After recounting the Odum case, Ms. Wyatt said the reversal "was a blatant injustice to the victim and her family, to every woman who has ever been raped and to those who will be victimized in the future," and urged readers to vote against retention.[7]

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1. *State v. Jones*, No. 3C01-9301-CR-00024, 1994 WL 529397, at *17 (Tenn. Crim. App. Sept. 15, 1994).

2. *State v. Wallen*, No. 3C01-9304-CR-00136, 1995 WL 702611, at *17 (Tenn. Crim. App. Nov. 30, 1995).

3. *Id*. at *9 (White, J., concurring and dissenting).

4. Jeff Woods, *Public Outrage Nails a Judge*, NASHVILLE BANNER, Aug. 2, 1996, at A1.

5. See Duren Cheek & Kirk Loggins, *New Judges to Face Death-Penalty Test*, NASHVILLE TENNESSEAN, July 27, 1996, at 1A (quoting Governor Sundquist as saying it is "absolutely true" he would not appoint judges opposed to death penalty).

6. Political Notebook, COMMERCIAL APPEAL (Memphis, Tenn.), Oct. 8, 1994, at 3B.

7. Velma Wyatt, *Give them Death,"* NASHVILLE TENNESSEAN, July 22, 1996.

Justice White was defeated in the election on August 1, 1996. Governor Sundquist said voters defeated White because they "believe it's wrong that we haven't enforced the death penalty in 36 years, despite the overwhelming need and support for it."[8] Republican Party chair Jim Burnett said, "The public was fed up. We've had a death penalty since 1976 and we haven't had an execution yet."[9] But the *Odom* case was the only capital case which came before the Court during Justice White's service on it.

After Justice White lost the retention election, Sundquist, said: "Should a judge look over his shoulder [when making decisions] about whether they're going to be thrown out of office? I hope so."[10] Supreme Court Justice John Paul Stevens expressed a different view at the American Bar Association meeting the same month: "[I]t was 'never contemplated that the individual who has to protect our individual rights would have to consider what decision would produce the most votes.'"[11] Governor Sundquist reiterated his earlier promise to appoint only judges who support the death penalty.[12]

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8. Tom Humphrey, *White Ouster Signals New Political Era: Judges May Feel 'Chilling Effect,'* KNOXVILLE NEWS-SENTINEL, Aug. 4, 1996, at A1.

9. John Gibeaut, *Taking Aim*, A.B.A. JOURNAL, Nov. 1996, at 50, 51; *see also* Editorial, *Litmus Test vs. the Law*, NASHVILLE TENNESSEAN, Aug. 6, 1996, at 6A ("Without a doubt, many of the voters who voted against White were expressing their frustration with the fact that Tennessee has not executed a death row inmate in 36 years.").

10. Paula Wade, *White's Defeat Poses Legal Dilemma: How is a Replacement Justice Picked?*, COM. APPEAL (Memphis, Tenn.), Aug. 3, 1996, at A1, available in 1996 WL 11059250.

11. Justice John Paul Stevens, *Opening Assembly Address*, American Bar Association Annual Meeting at12 (Aug. 3, 1996) (citation omitted).

12. *See Governor Pledges to Replace White with Get-Tough Judge*, NASHVILLE BANNER, Aug. 20, 1996, at B-3 (reporting Governor Sundquist's promise to appoint judge who will support state's death penalty).

Challenges to Tennessee Justices in 2014 Fails

A campaign to remove Chief Justice Gary Wade and Justices Cornelia A. Clark and Sharon G. Lee, all appointees of Democratic Governor Phil Bredesen was waged in 2014. As was the case with White, a Republican governor would appoint their replacements if they were not retained.

Lt. Gov. Ronald L. Ramsey, a Republican, was among those who launched the campaign against the justices. His political action committee contributed at least $425,000 to the effort to remove them. The effort was also supported by Americans for Prosperity, which receives financial support from the billionaires Charles G. and David H. Koch, the Republican State Leadership Committee, a national organization, which spent at least $196,000 to oppose the justices, and other conservative groups.

Opponents of the justices said they were hostile to victims of crimes and business and called the court "the most liberal place in Tennessee."

In response, the challenged justices raised money and campaigned across the state to stay on the bench. Lawyers contributed and raised thousands of dollars to support the justices. Nearly $1 million was spent on television advertising in the campaign. Most of the advertisements supported the justices.

All three justices were retained in the election on August 7, 2014, receiving 54% of the vote.

See Alan Blinder, *Conservatives See Potential in Tennessee Judicial Race*, N.Y. TIMES, Aug. 5, 2014; Alan Blinder & Jonathan Weismanaug, *G.O.P. Senator and 3 Justices Prevail in Tennessee Election*, N.Y. TIMES, Aug. 8, 2014.

Thomas NEVIUS, Petitioner,
v.
WARDEN, NEVADA STATE PRISON, E.K. McDaniel; and Attorney General of Nevada, Frankie Sue Del Papa, Respondents.

Supreme Court of Nevada
944 P.2d 858 (1997)

PER CURIAM:

Petitioner/appellant Thomas Nevius claims that Justice Cliff Young is disqualified in these cases because: (1) the Attorney General, whose office represents the State, endorsed and publicly supported Justice Young in his successful 1996 reelection campaign, and (2) Justice Young stated [in campaign advertisements] that he upheld the death penalty seventy-six times while on the Court. The first ground for disqualification was made and rejected in *State ex rel. Dep't of Transp. v. Barsy*, 941 P.2d 969 (Nev. 1997), and that decision is dispositive of this ground for disqualification.

During the 1996 election, Justice Young's opponent attacked him for dissenting in a death penalty case. In response, Justice Young stated that he favored the death penalty in the appropriate case and pointed out that he had voted to uphold the death penalty seventy-six times. Nevius contends that Justice Young has an extra-judicial interest in keeping this tally as high as possible. We disagree.

Justice Young was simply responding to an assertion, based on one case, that he was soft on the death penalty and demonstrating to the electorate that the allegation against him was distorted. We have previously stated that reasonable latitude must be given a judge or justice to permit him or her to run an election campaign and respond to criticism. *See Las Vegas Downtown Redev. Agency v. Hecht*, 940 P.2d 127 (Nev. 1997). Nevius concedes that a general philosophical orientation, or a belief in a particular controversial legal position, is not normally a ground for disqualification. Citing Justice Young's record in upholding the death penalty was nothing more than showing that he will enforce Nevada law in an area very important to Nevada voters, and this does not constitute a disqualifying bias or the appearance thereof.

Accordingly, the motion to disqualify Justice Young is denied.[13]

SPRINGER, Justice, dissenting:

Nevius seeks rehearing principally because of evidence that a prosecutor made the following out-of-court comment to one of Nevius' attorneys: "You don't think I wanted all of those niggers on my jury do you?"

In my opinion rehearing should be granted. The judgment of conviction should be reversed, or, at the very least, the matter should be remanded so that the statement attributed to the prosecutor in this case can be carefully examined by the trial court.

Nevius contends that Justice Young cannot sit fairly in this matter because during the time that Nevius' death-sentence was under review by this court Justice Young formed a highly-visible political alliance with the State's attorney general, who in numerous campaign advertisements publicly "urged all Nevadans" to vote for Justice Young. Nevius claims that in addition to forming a close alliance with the State's chief prosecutor, Justice Young has publicly taken such a pro-prosecution, anti-accused stance as to make it impossible for Justice Young to sit in impartial judgment of his case. For example, not only did Justice Young describe himself in campaign advertisements as a judge who was "tough on crime"[14] he presented himself as being a judge

13. The Honorable Miriam Shearing, Chief Justice, voluntarily recused herself from participation in the decision of this appeal. The Honorable Cliff Young, Justice, did not participate in the decision of this matter.

14. "Tough-on-crime" claims might be overlooked as being generalized statements; but claiming to be a judicial crime-fighter is, arguably, in a different category. The problem with "tough on crime" statements and boasting of a "record of fighting crime"

who had a "record of fighting crime" and supported his judicial crime-fighting record by claiming that he had "[voted] to uphold [the death penalty] 76 times."

"Tough on crime" claims made by judges in election campaigns are so common in Nevada as to go almost unnoticed. Our judicial discipline authorities customarily ignore this kind of judicial misconduct once the judge becomes elected or reelected. It goes beyond "tough on crime" for a judge to claim that he is a "crime fighter," especially when, on top of this, the judge identifies his principal election supporter as being the State's attorney general. Judges are supposed to be judging crime not fighting it.

With regard to his alliance with the attorney general, Justice Young, during the pendency of this case, repeatedly published his appreciation for the attorney general's support and how much he "welcomed" her support in his election campaign because of the attorney general's "role as the State's top law enforcement officer." It is understandable that Nevius would feel aggrieved when he read that one of the judges who was going to decide if he were to live or die was being this strongly supported by the State's "top law enforcement officer." * * *

* * * Justice Young's saying that he has a judicial record of fighting crime and putting forth his 76-death-case record may not be the same as making a "pledge" that he well continue to fight crime on the bench or that he will "uphold" death penalty judgments in all future cases; nevertheless, if Justice Young enhances his crime-fighting record by raising his seventy-six death judgments to seventy-seven in this case, it seems to me that Nevius may have the right to complain that Justice Young should not have been sitting on his case.

If the public praise and endorsement of Justice Young by the attorney general were not enough in itself, Justice Young's putting forth his "record" of fighting crime rather than judging crime adds up, in my opinion, to an unacceptable appearance of bias in this case. I do not here contend that Justice Young ought to be disqualified in every case in which his political ally in law enforcement is counsel of record; however, given the fact that the Young-Top Law Enforcement Officer alliance was a matter of such widespread public attention during the pendency of this case and, given Justice Young's public flaunting of his "record of fighting crime" during the time that Nevius was watching and waiting the outcome of his death sentence appeal, I think that Justice Young should be disqualified from making any further decisions in this death case.

Further Developments in *Nevius*

The justices of the Nevada Supreme Court issued additional opinions on whether Justice Young should be disqualified on rehearing of an order dismissing Nevius' appeal and denying his habeas corpus petition. *Nevius v. Warden*, 960 P.2d 805 (Nev. 1998). Judge Springer again expressed the view that Justice Young should be disqualified. In a concurring opinion, Justice Rose stated:

> The only rationale for Justice Springer's decision to revisit previously resolved and unraised issues is apparently his desire to take yet another shot at two of his perceived enemies – Justice Young and the Nevada Attorney General – both of whom opposed the action taken by Justice Springer (along with a departed member of this court) against the Nevada Judicial Discipline Commission.
>
> Justice Springer demonstrated none of the high-minded conflict of interest principles stated in his dissent when he determined that even though an attorney and her law partner's

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is that such statements carry the implication that the judge would act in a biased manner (that is, in favor of the state) in criminal cases. In Washington, a judge was censured for campaign statements that he was "tough on drunk driving." *In re Kaiser*, 759 P.2d 392, 394-96 (Wash. 1988). Getting elected to judicial office seems to create an immunity against discipline proceedings relating to a judge's unethical campaign practices; but this does not mean that convicts condemned to death cannot raise issues relating to a judge's pro-prosecution campaign boasts.

aggregate election campaign contribution to a judge was over $100,000, this fact was insufficient to disqualify that judge from participation in the contested selection of the attorney to a State Bar committee. The attorney involved in the O'Brien case is the former law clerk and personal friend of Justice Springer. Justice Springer has consistently refused to disqualify himself from participation in motions to disqualify me filed by this attorney, even though his close relationship with this attorney is well known, as is his animus toward me.

Justice Rose went on to discuss the case involving the motion to disqualify him. Justice Springer responded by disputing some of the facts asserted by Justice Rose. Justice Rose concluded his concurrence:

> When this appeal from the denial of a writ of habeas corpus and post-conviction relief was disposed of in October of 1996, the issue of the improper preemption of prospective black jurors was carefully considered and rejected by a unanimous court. After analyzing the claim, this court, including Justice Springer, rejected the appellant's racial assertion as being "not credible." Now, Justice Springer's opinion has shifted 180 degrees and he finds that those very same allegations present a compelling claim for summary reversal.
>
> The only thing that has changed since our October 1996 resolution of this issue on the merits is that a motion to disqualify Justice Young has been denied[.] * * * It is indeed alarming that Justice Springer is willing to abandon his decision in a death penalty case simply to continue his one-sided campaign of enmity against the Attorney General and a justice on this court.
>
> The reason Justice Springer and the rest of this court found Nevius' allegations of racism in jury selection to be "incredible" is because they were raised many years after the racially repugnant statements were allegedly made, the prosecutor had no recollection of making any such statements and stated that he would not make such statements, and the state and federal district courts, in addition to the federal court of appeals all found that the peremptory challenges were exercised for a race neutral reason.
>
> The prosecutor denied that he "racially stacked a jury" and, up until now, Justice Springer agreed that the evidence did not support such claims. Justice Springer's new-found conviction that a black man is being executed because of the verdict of a "stacked jury" represents yet another effort in his quest to vilify his perceived long-standing enemies.
>
> Regrettably, Justice Springer's latest attacks do nothing more than discredit himself and our beleaguered judicial system.

Other Improper Influences or Misconduct

Texas Judge Rejected Post-5 P.M. Death Row Appeal

The Chief Judge of Texas' highest criminal court, Sharon Keller, invoked national attention when she refused to accept an appeal seeking to stay the execution of Michael Richard after close of business hours, resulting in Richard's execution later that day.[1]

On September 25, 2007, Richard's lawyers called the Texas Court of Criminal Appeals (CCA) to request permission to file their appeal 20 minutes after court closing, due to a computer failure. Judge Keller, speaking through the CCA general counsel because she was home dealing with a repairman, responded, "We close at 5."[2]

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1. *See, e.g.*, *Investigating Judge Keller*, N.Y. TIMES, Feb. 18, 2009, http://www.nytimes.com/2009/02/19/opinion/19thu2.html.

2. Hilary Hylton, *A Texas Judge on Trial: Closed to a Death-Row Appeal?*, TIME, Aug. 13, 2009, http://content.time.com/time/nation/article/0,8599,19

Richard was executed that evening by lethal injection.

Earlier on the day that Richard was scheduled to die, the U.S. Supreme Court agreed to review whether lethal injection in Kentucky (the same method used in Texas) amounted to cruel and unusual punishment. Richard's lawyers then rushed to refocus his appeal, which had previously centered on the unconstitutionality of the death penalty for mentally retarded individuals. Richard had an IQ of 64.[3] Two days after Richard died, the justices blocked another legal injection and later other ones so that no executions occurred except Richard's while the Kentucky case was under review.[4]

Shortly after Richard's death, Judge Keller told a local newspaper, "I just said, 'We close at 5.' I didn't really think of it as a decision as much as a statement."[5] Judge Keller also said that she did not know that the lawyers were having computer problems. Other judges have said that they were in the courthouse or were available by phone, and would have stayed late to hear the appeal had they known.[6]

Complaints were filed with the State Commission on Judicial Conduct. In February 2009, Judge Keller was charged with "willful and persistent" conduct that casts public discredit on the court.[7] The special master presiding over the ethics hearing found that she did not engage in serious wrongdoing, writing that her conduct was "not exemplary" but that "she did not engage in conduct so egregious that she should be removed from office."[8] Rather, the special master shifted blame onto the defense lawyers, to which the Texas Defender Service has responded, "Shifting the responsibility to ensure access to justice away from the court and to [the lawyers for Ricahrd] is akin to blaming a paramedic for a car crash victim's injuries."[9]

Keller was issued a "public warning" by the state Commission on Judicial Conduct, but it was overturned by a three-judge court which held that the Government Code and the state constitution provided that the Commission could issue a "warning" through an informal process, but not under the formal process used in Keller's case that included a public "trial" before a district judge.[10] Because the review court found that the proceedings used in the Keller inquiry could only result in a "censure," which requires a different finding than a warning, it dismissed the charges.[11] As a result, Keller was not sanctioned for her conduct.

She was, however, required to pay her attorneys fees. Keller claimed that she could not afford the costly lawyer representing her in the controversy, leading to an audit of her personal finances.[12]

15814,00.html.

3. *Id*.

4. Ralph Blumenthal, *Texas Judge Draws Outcry for Allowing an Execution*, N.Y. TIMES, Oct. 25, 2007, http://www.nytimes.com/2007/10/25/us/25execute.html?_r=1&adxnnl=1&oref=slogin&ref=us&adxnnlx=1193339527-1sUrqO8auSQGEa9YFH5ADA.

5. *Id*.

6. *Id*.

7. Hilary Hylton, *A Texas Judge on Trial: Closed to a Death-Row Appeal?*, TIME, Aug. 13, 2009, http://content.time.com/time/nation/article/0,8599,1915814,00.html.

8. John Schwartz, *Ruling Backs Judge Who Rejected Post-5 P.M. Appeal*, N.Y. TIMES, Jan. 20, 2010, http://www.nytimes.com/2010/01/21/us/21judge.html?_r=0.

9. *Id*.

10. Chuck Lindell, *Special court throws out Keller rebuke, ending case*, AUSTIN AMERICAN STATESMAN, Oct. 11, 2010, http://www.statesman.com/news/news/local/special-court-throws-out-keller-rebuke-ending-case/nRyct/.

11. *Id*.

12. David Saleh Rauf, *Keller settles record ethics fine*, HOUSTON CHRONICLE, Aug. 9, 2013, http://www.chron.com/news/houston-texas/houston/article/Keller-settles-record-ethics-fine-4721767.php.

When it was discovered that she had failed to include nearly $3.8 million in earnings and property on past financial disclosure forms, she was fined $100,000 by the Texas Ethics Commission, the largest fine in its history.[13] Keller appealed the fine to a state court, and then settled out of court in 2013, agreeing to pay $25,000 of the fine.[14]

Keller was reelected to the Court in 2012. Since Richard's death, the Texas Court of Criminal Appeals has begun to accept electronic filings.

STATE OF SOUTH CAROLINA
v.
COLIN J. BROUGHTON

State of South Carolina
Court of General Sessions
County of Berkeley

MOTION TO * * * RECUSE * * *
(filed August 31, 2009)

Colin Broughton, through undersigned counsel, respectfully moves this Court to recuse herself from the trial of this case. This motion is predicated upon the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, § 3, 14, and 15 of the Constitution of the State of South Carolina, the Judicial Canons, as well as statutory and jurisprudential authorities cited below.

In support, counsel states:

1. Colin Broughton is on trial for his life. The State has announced its intention to seek the execution of Mr. Broughton by electrocution or lethal injection. The State's decision to pursue a sentence of death imposes an extraordinary burden upon the Court, the State, and defense counsel to ensure the fairness, accuracy, and reliability of the trial and any subsequent sentencing proceeding. * * * As the United States Supreme Court has observed "[t]he fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (citations omitted). * * *

* * *

3. Undersigned counsel was appointed to represent Mr. Broughton on October 20, 2008. This trial is scheduled to begin on September 14, 2009. Co-counsel is Patricia Kennedy, the head of the Berkeley County Public Defender's Office. Given the demands of running that office, Ms. Kennedy's participation in preparing to defend the instant death penalty prosecution has been less than that of undersigned counsel. The additional assistance of Mr. Butler's services became available and notice of his enrollment as counsel to Mr. Broughton was filed * * * on July 10, 2009. Mr. Butler is a public defender in the Ninth Judicial Circuit, specifically, in Charleston. The prosecution, which has three (3) attorneys prosecuting its case, has not objected to Butler's enrollment * * *.

4. On August 13, 2009, at a previously scheduled motions hearing, Judge [Deadra] Jefferson, *sua sponte,* raised the issue of Mr. Butler's enrollment. The Court stated that the appointment statute was very clear in limiting Mr. Broughton to the two (2) lawyers that he already had. Further, Judge Jefferson indicated that Mr. Butler could work on the case, sit at defense table, pass notes, confer with the attorneys, but just not speak in court. Undersigned counsel objected to this ruling and offered to put on the record the extent to which the Defendant was prejudiced by this ruling. This was denied by Judge Jefferson.

5. On August 21, 2009, undersigned counsel filed a motion to allow Mr. Butler to speak in Court and fully participate in Mr. Broughton's defense (hereinafter "the motion"). This motion was delivered to Judge Jefferson with a letter

13. *Id*.

14. *Id*.

requesting that she rule as soon as possible as defense counsel intended to seek relief in the South Carolina Supreme Court if her ruling was adverse to our client. Not hearing from Judge Jefferson, undersigned counsel faxed another letter on August 26, 2009, again asking her to rule on the issue.

6. Several hours after faxing the above referenced letter, Mr. Patton Adams, the Director of the South Carolina Commission on Indigent Defense walked into undersigned counsel's office and stated he needed to talk to me about my Berkeley County case and the "shit storm" it had become. He indicated that Judge Jefferson had a "big fan" in Chief Justice Jean Toal [of the South Carolina Supreme Court], and that I needed to withdraw my motion. It became clear during our conversation that Judge Jefferson was requesting, through the Chief Justice, and subsequently through Patton Adams, that I withdraw the motion. Mr. Adams indicated that Jefferson had a great deal of support in "her boss at the Supreme Court" and that if I did not withdraw the motion I would anger Judge Jefferson, "her boss," the entire South Carolina Supreme Court, as well as alienating the entire Court to the detriment of my client. It also became clear during the course of our conversation that the primary concern of Jefferson was that her ruling on the motion not be reviewed by the South Carolina Supreme Court.

7. I indicated to Mr. Adams that it would be detrimental to my client if I withdraw the motion. First, I truly needed Mr. Butler's continued assistance given work necessary to prepare for trial. Second, I could not waive a significant legal issue for appellate review in a death penalty case. Further, I explained that this clearly appeared to be a personal issue with Judge Jefferson, and not a meritorious interpretation of the law.

8. Mr. Adams last words regarding the motion was that it "just was not going to work" or "just not going to happen" or words to that effect.

9. On Friday, August 28, 2009, the parties were before Judge Jefferson regarding juror requests to be excused. After taking up those requests the Court stated that she had [reviewed another motion, found it to be without merit, denied relief] and stated that seemed to take care of all pending matters.

10. Undersigned counsel stated that there was still the matter of the motion regarding Mr. Butler. The Court seemed to speak angrily through gritted teeth, stating "I thought that motion was going to be withdrawn," or words to that effect.[15] Undersigned counsel stated, "no, it is still pending." Judge Jefferson angrily stated that the motion was denied, that she had made a good record of her ruling, and that she would not revisit the issue.

11. It has become clear that Judge Jefferson's desire to prevent Mr. Butler from speaking in Court is due to her personal issues with Mr. Butler. Upon information and belief, in defending her conduct and inconsistent rulings in a separate case, she has falsely accused Mr. Butler of being untruthful or disingenuous with her in court. When Mr. Butler undertook to defend himself from these serious accusations, Judge Jefferson suggested that the matter in which he did so (getting affidavits from witnesses) would be unethical. [citing the case] Despite raising the serious and intimidating specter of unethical conduct, Judge Jefferson took no action to pursue what would appear to be, if true, a serious concern to any court.

12. Further evidence that this is personal with regard to Mr. Butler, is Judge Jefferson's decision to allow a different capital defendant to be represented by two (2) public defenders and one (1) lawyer from the private bar. The case is *State v. Jones*, 681 S.E.2d 580 (S.C. 2009) (reversing conviction and sentence due to Judge Jefferson's error in admitting certain inadmissible and unreliable evidence). The fact that Judge Jefferson would allow exactly what we request in another capital defendant's trial, but now claim that the

15. Apparently confirming both her request to another that undersigned withdraw the motion, and that she had some assurance from a person of influence that the motion would in fact be withdrawn.

law clearly and plainly requires a different result in the instant case belies the fact that the issue is lawyer specific. Judge Jefferson's judicial behavior in this regard is certainly not a consistent interpretation or equal application of the law.

13. Judge Jefferson has apparently chosen to have inappropriate influence placed on this attorney defending a death penalty case in an effort to prevent one of her rulings from being reviewed by the Supreme Court of South Carolina. Judge Jefferson has placed this attorney in the position of either being intimidated into waiving a significant legal issue to the detriment of his client in a death penalty case, or having to reveal the inappropriate and unfortunately unethical, conduct of Judge Jefferson. Undersigned counsel regrets having been placed in this position by Judge Jefferson.

14. Judge Jefferson has, due to her own personal issues emanating from her personal bias against Mr. Butler, ordered that Mr. Butler not be allowed to fully participate in defending Mr. Broughton in this death penalty prosecution. This was accomplished through a tortured reading of the appointment statute and a corresponding sham ruling that is directly contrary to her previous decision in the *Jones* case. Judge Jefferson has sought to bring inappropriate influence to bear through back door channels to secure a result, the forced withdrawal of a significant legal issue to the detriment of a capital defendant, that she knows she could not secure in the course of fair and open litigation in the public courts of record. Judge Jefferson has undertaken these extraordinary, and unfortunately unethical, steps to prevent a capital defendant's access to the courts and an appropriate, fair, analysis and review of her ruling.

WHEREFORE, Colin Broughton respectfully requests that this Court:

(1) recuse herself as trial judge in the instant case.

DATED this 31 day of August, 2009.

I swear that matters of personal recollection stated herein are accurate and consistent with my recollection.

William Sean McGuire
Attorney, Capital Trial Division

* * *

For consideration - What does this motion, assuming the truthfulness of the allegations, say about the state of the public defender system in South Carolina? The importance of independence of that program? The ethics of Judge Jefferson and Chief Justice Toal?

The Influence of Drugs

A panel of the Ninth Circuit Court of Appeals debated whether a judge's addiction to drugs violates due process in a decision that was later withdrawn.[1]

Warren Wesley Summerlin claimed that the judge who presided at his capital trial and sentenced him to death in Arizona in 1982, Philip Marquardt, was under the influence of marijuana. Judge Marquardt held a sentencing hearing on a Friday and then recessed over the weekend to deliberate about penalty. The following Monday, he sentenced Summerlin to death.

In support of the claim, Summerlin submitted a report from the Phoenix Police Department, which detailed a purchase of marijuana by Judge Marquardt from Barbara Moffett in May of 1991, which was intercepted from the United States mail by the police. The report stated that Judge Marquardt called Moffett to see if she had spoken

1. *Summerlin v. Stewart*, 267 F.3d 926 (9th Cir. 2001), *withdrawn*, 281 F.3d 836 (2002), *on rehearing en banc*, 341 F.3d 1221 (2002), *rev'd in part sub nom. Schriro v. Summerlin*, 542 U.S. 348 (2004) (holding that *Ring v. Arizona*, 536 U.S. 584 (2002), does not apply retroactively), *on remand*, 427 F.3d 623 (2005) (finding ineffectiveness of counsel at the penalty phase), *cert. denied*, 547 U.S. 1097 (2006).

to the authorities about the purchase, and when she told him she had not, Judge Marquardt told her that everything would "work out okay" because his daughter Tiffany's boyfriend Butch "was going to take the rap for the marijuana."

The police report also disclosed that Moffett told Phoenix police in 1991 that Judge Marquardt "was a frequent user of marijuana, had been when she met him [16 years earlier], and has continued to be so since." The envelope in which Judge Marquardt sent a cashier's check to Moffett for the marijuana carried the printed official heading, "Philip Marquardt, Superior Court Judge, Phoenix, Arizona." Judge Marquardt had been convicted in 1988 in Texas of misdemeanor possession of marijuana. For that offense, the Supreme Court of Arizona suspended him from his judicial position without pay for one year from September 2, 1988, through September 2, 1989. When the 1991 incident came to light, he was disbarred the next year.

Summerlin alleged that Judge Marquardt's drug use began no later than 1975, was that he was regularly smoking marijuana at the time of his trial and sentencing in 1982. The State acknowledged that "[t]here is no dispute that Judge Marquardt used marijuana during the 1980s." Nevertheless, the federal district court denied an evidentiary hearing on Judge Marquardt's drug use at the time of Summerlin's sentencing. A panel of the Ninth Circuit reversed, 2-1, holding that Summerlin was entitled to discovery.

Judge Trott, writing for himself and Judge Thomas, examined several of the Supreme Court's decisions on juror bias and, observing that at the time Summerlin was sentenced, the life-death decision was made by the judge alone without a jury, concluded that:

> Summerlin had a clearly established constitutional right in 1982 to have his trial presided over, and his sentence of life or death determined by, a judge who was not acting at that time under the influence of, or materially impaired by, a mind-altering illegal substance such as marijuana. * * * One's legal conscience simply recoils at the shocking thought that the due process clause of the Fourteenth Amendment is satisfied by a judge presiding over a criminal trial and making life or death sentencing decisions while under the influence of, or materially impaired by, the use of an illegal mind-altering substance. Such proceedings before a mentally incompetent judge would be so fundamentally unfair as to violate federal due process under the Constitution.

Summerlin v. Stewart, 267 F.3d 926, 950 (9th Cir. 2001). After reviewing other cases including *Bracy v. Gramley*, 520 U.S. 899 (1997) (finding Brady was entitled to discovery to see if a judge convicted of taking bribes was biased at his trial), and concluded that there was "a colorable 'reason to believe'" that Sommerline may have been deprived of his due process right to a competent tribunal. *Id*. at 953.

Judge Kozinski dissented for several reasons. First, he pointed out that the Court had no evidence as to "whether this addiction involved hourly, daily or weekly use of the drug" or "that the addiction affected Marquardt's judgment or interfered in any way with his judicial duties." *Id*. at 958-59. He noted, "[b]eing addicted, after all, means that one must use a substance on a regular basis; it doesn't mean that one is in a constant state of intoxication. Many addicts function normally in their professional lives, performing their jobs well enough so that their coworkers suspect no problem." *Id*. At 959. He distinguished the corruption in the *Bracy* case with mental impairment of a judge:

> Mental impairment – whether as a result of illness, injury, old age, family tragedy or substance abuse – is, unfortunately, the stuff of life. Judges, like other human beings, may on occasion have one too many drinks, or even become alcoholics. They may be prescribed pain killers to which they become habituated, or they may become dependent on sleeping pills. It would not be surprising to learn that some judges, like many others in our society, take

> Prozac or other mood-altering drugs. Judges get sick; they get senile; they get depressed; they suffer temporary or permanent mental impairments due to age or tragic events in their lives. All of these circumstances, of course, have the potential of impairing their judgment, but they also have an intensely personal and private aspect to them.

Id. at 960. Judge Kozinski also warned, "The incentives today's ruling creates for digging into the private lives of judges with shovels and pick-axes cannot be overstated. Of course, any judge who is disciplined for substance abuse or for driving under the influence of alcohol will be fair game for an inquiry; the number of judges involved is not trivial." *Id.* at 962.

Judge Trott responded in his majority opinion:

> [I]f Judge Kozinski's speculation about the vulnerable state of the judiciary should surprisingly turn out to be correct and that our benches are indeed occupied by judges against whom similar cases involving illegal drug usage and addiction can be made, this would seem to be an argument in favor of an inquiry, not a reason to look the other way. However, we seriously doubt the inflated assertion that thousands of state and federal judges will somehow fall within the ultraviolet rays cast by our holding.
>
> * * *
>
> The experts tell us that we can tolerate a certain number of insignificant parts of arsenic in our drinking water and a certain irreducible number of insect parts in our edible grain supplies, but we need not, and we should not, similarly tolerate a single drug addicted jurist whose judgment is impaired, especially in a case involving life and death decisions. Neither should we put to death any prisoner so condemned by such a wayward judge.

Id. at 954-55.

The Contempt Power

Narvel Tinsley, an African American, was convicted of the murders of two police officers after a 10-day trial in the Jefferson Circuit Court in Louisville, Kentucky. The "murders created some considerable sensation in Louisville . . . and . . . newspaper coverage was overly abundant."[1] The trial was very acrimonious. Throughout the trial, the judge, John P. Hayes, repeatedly cited the defense lawyer, Daniel T. Taylor, III, in contempt of court for his questioning of jurors and witnesses, failure to abide by the court's rulings, disrespect for the court and other perceived transgressions. After the jury returned its verdict on October 29, 1971, the following transpired in court before the jury:

> THE COURT: Mr. Taylor, the Court has something to take up with you sir, at this time.
>
> MR. TAYLOR: Well, I'll be right here, Judge.
>
> THE COURT: I've for two weeks sit here and listen to you. Now, you're going to listen to me. Stand right here, sir.
>
> For two weeks I've seen you put on the worst display I've ever seen an attorney in my two years of this court and 15 years of practicing law. You've quoted that you couldn't do it any other way. You know our court system is completely based upon, particularly criminal law, the Doctrine of Reasonable Doubt. That's exactly what it means, reason. It doesn't mean that its's based upon deceit; it doesn't mean that it's based upon trickery; it doesn't mean it's based upon planned confusion.
>
> Sometimes I wonder really what your motive is, if you're really interested in the justice of your client, or if you have some ulterior motive, if you're interested in Dan Taylor or Narvel Tinsley.

1. *Taylor v. Hayes*, 494 S.W.2d 737, 739 (1973).

It's a shame that this court has to do something that the Bar Association of this State should have done a long time ago.

As far as a lawyer is concerned, you're not. I want the jury to hear this; I want the law students of this community to hear this, that you're not the rule, you're the exception to the rule –

MR. TAYLOR: (Interrupting) Thank you.

THE COURT: I want them to understand that your actions should not be their actions because this is not the way that a court is conducted. This is not the way an officer of a court should conduct itself.

MR. TAYLOR: I would respond to you, sir –

THE COURT: (Interrupting) You're not responding to me on anything.

MR. TAYLOR: (Interrupting) Oh yes, I will.

THE COURT: Yes, you're not, either.

MR. TAYLOR: Yes, I will.

THE COURT: The sentence is on Count One –

MR. TAYLOR: (Interrupting) Unless you intend to gag me –

THE COURT: (Interposing) I'll do that –

MR. TAYLOR: (Interposing) My lawyers will respond to you –

THE COURT: (Interposing) I'll do that, sir.

MR. TAYLOR: My lawyers will respond to you, sir.

THE COURT: You be quiet, or you'll – there will be some more contempts –

MR. TAYLOR: (Interrupting) No, you heard what I said.

THE COURT: I have you [on] nine counts. First Count, 30 days in jail; Second Count, 60 days in jail; Third Count, 90 days in jail; Fourth Count, six months in jail; Fifth Count, six months in jail; Sixth Count, six months in jail; Seventh Count, six months in jail; Eighth Count, one year in jail; Ninth Count, one year in jail, all to run consecutive.

Take him away.

MR. TAYLOR: We will answer you in court.

THE COURT: I'd be glad to see you.

Taylor v. Hayes, 418 U.S. 488, 491 n.2 (1974). The Supreme Court reversed the contempt findings because Taylor was denied notice and opportunity to be heard and because judge became "embroiled in a running controversy" with Taylor and, therefore, contempt hearing should have been before a different judge.

Judges have broad authority to hold anyone who comes before them in contempt. If the conduct takes place before them, they may impose this sanction summarily – without notice or hearing – and it may include the immediate denial of liberty by imprisonment of up to six months. Justice Hugo Black called the summary contempt power of judges "perhaps, nearest akin to despotic power of any power existing under our form of government." *Green v. United States* 356 U.S. 165, 199-200 (1958) (Black, J. dissenting) (quotations omitted).

The power of judges to maintain order and decorum in their courtroom through the use of contempt has long been recognized as a power "inherent in all courts."[2] It is specifically authorized in Federal Rule of Criminal Procedure 42 and similar rules or statutes in the states. Rule 42 allows for both "disposition after notice" and

2. *United States v. Shipp*, 203 U.S. 563, 565 (1906); *see also Anderson v. Dunn*, 19 U.S. (6 Wheat) 204, 227 (1821) (noting the "universal acknowledgment" of the power of the courts to impose order and submission to their orders).

"summary disposition" if a judge saw or heard the contemptuous conduct.[3]

The Supreme Court recognized in *Bloom v. Illinois* that "criminal contempt is a petty offense unless the punishment makes it a serious one," and that "serious contempts are so nearly like other serous crimes that they are subject to the jury trial provisions of the Constitution." 391 U.S. 194, 198 (1968). Thus, any contempt carrying a punishment of six months or more is subject to trial by jury. *See Duncan v. Louisiana*, 391 U.S. 145, 159 (1968) (holding that crimes carrying possible penalties of up to six months do not require a jury trial). The Court cited the long-standing fear that the contempt power could lead to the arbitrary exercise of judicial power.[4]

As in *Taylor v. Hayes*, the Supreme Court has also held that where an accused's conduct is personally insulting to the judge or the accused becomes "personally embroiled" with the judge, the contempt citation must be certified to another judge for adjudication. In addition to *Taylor*, *see Mayberry v. Pennsylvania*, 400 U.S. 455, 464 (1971); *Offutt v. United States*, 348 U.S. 11 (1956); *Cooke v. United States*, 267 U.S. 517 (1925). If an adjudication of summary contempt is delayed until after trial, the accused is entitled to notice and an opportunity to be heard before the determination is made whether to impose sanctions. *Taylor v. Hayes*, 418 U.S. at 497-500.

However, if behavior that a judge perceives as contemptuous occurs in the judge's presence, that behavior may be punished with no notice, no opportunity to present evidence and no opportunity to be heard before the punishment is imposed. The judge may impose up to six months in jail without triggering the requirement to hold a jury trial.

While recognizing the need for judges to keep order in their courts, early cases warned that this power should be used only in "unusual situations" and where "immediate corrective steps are needed to restore the dignity and authority of the court." *See*, *e.g.*, *Johnson v. Mississippi*, 403 U.S. 212, 214 (1971); *United States v. Harris*, 382 U.S. 162, 167 (1965). Where "immediate corrective steps are needed to restore order and maintain the dignity and authority of the court," no process is due. *Johnson v. Mississippi*, 403 U.S. at 214. The Supreme Court has stated repeatedly that summary contempt during trial should only occur where the sanction is "necessary to protect the judicial institution itself," *United States v. Harris*, 382 U.S. 162, 167 (1965), or where the contemptuous conduct poses an "actual obstruction of justice," *In re McConnell*, 370 U.S. 230, 234 (1962), or a direct threat to the judicial process. *United States v. Wilson*, 421 U.S. 309, 319 (1975).

However, the Supreme Court upheld a trial court's summary imposition of six months imprisonment on two witnesses who refused to testify after being granted immunity in *United States v. Wilson*, 421 U.S. 309 (1975). The Court reversed a decision by the Second Circuit holding that the contempt hearing could be held only after notice and a reasonable time for the preparation of the defense. In an opinion by Chief Justice Burger, the Court held that the refusal to testify fell within the express language of Rule 42 (a), which allows summary punishment "if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." Justice Brennan, joined by Justices Douglas and Marshall, dissented, stating that he would uphold the judgment of the Court of Appeals.

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3. Part (a) of the Rule provides for "Disposition After Notice" stating, "any person who commits criminal contempt may be punished for that contempt after prosecution on notice." Part (b), providing for "Summary Disposition" states " * * * the court * * * may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies."

4. *Bloom v. Illinois*, 391 U.S. at 202, citing *Sacher v. United States*, 343 U.S. 1, 12 (1952) ("That contempt power over counsel, summary or otherwise, is capable of abuse is certain. Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir.")

The Supreme Court reversed the Ninth Circuit in a *per curiam* opinion and upheld a two-day jail sentence summarily imposed on defense attorney Penelope Watson for contempt in *Pounders v. Watson*, 521 U.S. 982 (1997). Watson was one of two attorneys representing William Mora in a murder trial in which he faced life imprisonment without the possibility of parole. Watson was not present at two bench conferences at which Judge Pounders informed her co-counsel to refrain from mentioning the potential sentence to be imposed in the presence of the jury. Two months later, Watson asked her client if he was facing life without parole. The judge found that Watson was aware of the orders not to mention the sentence and that mention of the sentence had "permanently prejudiced the jury in favor of her client" and that the prejudice "cannot be overcome." He held her in contempt and sentenced her to two days to be served after the trial.

The Ninth Circuit held that the summary contempt violated due process because Watson "did not engage in a pattern of repeated violations that pervaded the courtroom and threatened the dignity of the court" and because the record did not indicate she would have repeated the references to punishment unless she were held in summary contempt. 521 U.S. at 989.

In reversing, the Supreme Court stated that "[n]othing in our cases supports a requirement that a contemptor 'engage in a pattern of repeated violations that pervaded the courtroom,' before she may be held in summary contempt." *Id.* The Court pointed to the single refusal to testify in *Wilson*. It concluded: "While the Due Process Clause no doubt imposes limits on the authority to issue a summary contempt order, the States must have latitude in determining what conduct so infects orderly judicial proceedings that contempt is permitted." *Id*. at 991. Justice Stevens, joined by Justice Breyer, dissented, noting that Watson asked only two inappropriate questions during a three and a half month trial. *Id*. at 993.

Some trial judges abuse the contempt power by using it for conduct that merely displeases or inconveniences them, such as lawyers being late to court or even asking for a continuance. Contempt is often not subject to review because it is imposed instantly and may not last long – a few hours in the lockup, a day or a few days in jail.

Judges in New Orleans repeatedly held public defenders in contempt for representing their clients. Links to articles are provided on the Class 8 cover page.