PREFACE

Can Public Defenders Become Fair Judges, And Other Stupid Questions

Marc Bookman*

When asked to write this Preface, I immediately began scrambling for a topic. Fortunately, the Senate Judiciary Committee was in session, so there was no dearth of material. Apparently, some of the members had taken issue with President Biden's "deeply-held conviction that the federal bench should reflect the full diversity of the American people–both in background and in professional experience."[1] The President had wasted little time fulfilling his commitment, nominating a series of highly qualified people of color, many of whom had served as public defenders in the past[2] and were representing "firsts" in various districts and circuits.[3] As a capstone, he had named Judge Ketanji Brown Jackson, the first Black female and first with a history as a public defender, to fill the vacancy on the United States Supreme Court left by the retirement of Associate Justice Stephen Breyer. These nominations created controversy on the Committee, and on the morning of March 2, 2022, the target of that controversy was Arianna Freeman, a Yale Law School graduate and longtime attorney with the Federal Community Defender Office in Philadelphia. Freeman had been nominated as the first woman of color to serve on the Third Circuit Court of Appeals.[4] Senator Dick Durbin, the Chairman, framed the issue thusly:

> We have a debate going on in this Committee that started under the Biden administration. I can't recall, having been here a few years, that we had it before. And it's a question of whether or not we should have people who were public defenders serve on our federal bench, either at the appellate level or at the trial level . . . I'd like you to comment, if you can, if you bring any particular bias to the role of circuit court judge based on your previous professional experience.[5]

Over the course of the morning, the debate over Ms. Freeman's ability to be a neutral judge—after having spent her career defending those accused of crime, and specifically those facing execution—was brought into sharp focus by three Republicans on the Committee, all of them lawyers. The question: could a public defender, and

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1. Press Release, White House, President Biden Announces Intent to Nominate 11 Judicial Candidates (Mar. 30, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/30/president-biden-announces-intent-to-nominate-11-judicial-candidates/.

2. *See* Charles P. Pierce, *These Public Defenders-Turned-Federal Judges Constitute Some of Joe Biden's Finest Work*, Esquire (Sept. 8, 2021), https://www.esquire.com/news-politics/politics/a37517657/joe-biden-appoint-public-defenders-federal-judges/.

3. *See supra* note 1 ("This group also includes groundbreaking nominees, including three African American women chosen for Circuit Court vacancies, as well as candidates who, if confirmed, would be the first Muslim American federal judge in U.S. history, the first AAPI woman to ever serve on the U.S. District Court for the District of D.C., and the first woman of color to ever serve as a federal judge for the District of Maryland.").

4. As of the time of publication, Arianna Freeman's nomination, deadlocked after a Judiciary Committee vote, was voted out of the committee 50–48 in a party-line vote on June 22, 2022. She has not yet proceeded to the full Senate for a vote on her nomination.

5. Confirmation Hearing on Federal Judicial Nominee Arianna Freeman Before the United States Senate Committee on the Judiciary, 117th Cong. (Mar. 2, 2022) (statement of Dick Durbin, Chairman, Senate Judiciary Committee).

particularly a public defender who had been representing someone on death row for committing a horrendous crime, possibly sit on the federal bench? While the answer to that question necessarily lay in the future, the hypocrisy of it was firmly entrenched in the past.

Republican Senators Josh Hawley and Ted Cruz concentrated their inquiries on two concerns: first, Ms. Freeman's representation of Terrance Williams, who had come within hours of execution in 2012; and second, the criticism of her federal defender office by a former Chief Justice of the Pennsylvania Supreme Court, Ron Castille. I happen to be deeply familiar with both issues,[6] so the readers of this Preface will have the benefit not only of the senators' opinions, but of the facts on which those opinions are based. In short, this Preface may be a forum for alternative opinions, but it will not be a forum for alternative facts.

To a great extent, however, the senators' comments are a magician's misdirection. After a careful review of the *Williams* and *Castille* matters, we must address the real issue as raised by the title of this Preface. Or, as Prufrock might say, the senators' inquiries lead us down "streets that follow like a tedious argument of insidious intent to lead you to an overwhelming question . . . Oh, do not ask, 'What is it?' Let us go and make our visit."[7]

THE TERRANCE WILLIAMS CASES

Senator Hawley, the Yale Law School-educated (for some reason, Hawley's Ivy League pedigree is inevitably listed) former Attorney General of Missouri, began his questioning of Ms. Freeman by reviewing the criminal history of Terrance Williams. He summarized Mr. Williams's two murder convictions in this way:

> He murdered Herbert Hamilton by bludgeoning him with a bat and stabbing him twenty times with a ten-inch butcher's knife . . . that is not, however, the murder for which he received the death penalty. Six months later, he brutally murdered Amos Norwood. He drove this individual, the victim, to a cemetery, made him lie down near a tombstone, bludgeoned Mr. Norwood with a socket wrench and then a tire iron before using Mr. Norwood's credit cards to go on a shopping spree . . . The court record reflects that one of the motivations apparently for the crime was that Mr. Norwood was gay.[8]

Senator Cruz, a Harvard Law School graduate, not one to undersell his point, added to the picture: "Terrance Williams is a bad guy. When you're faced with a repeat murderer, about whom there are no serious questions of guilt, nobody doubts that this guy is a serial murderer."[9] No one corrected Hawley and Cruz regarding their factual summaries of the Terrance Williams cases—until now.

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6. Many lawyers, mostly from the Philadelphia Federal Community Defender Office (FCDO), have represented Terrance Williams over the years. I have had the privilege of representing Mr. Williams at various times regarding both of his murder convictions, in my position as Executive Director of the Atlantic Center for Capital Representation. In addition, I have written extensively about Mr. Williams's case. *See, e.g.*, MARC BOOKMAN, A DESCENDING SPIRAL: EXPOSING THE DEATH PENALTY IN 12 ESSAYS (2021); Marc Bookman, *When A Kid Kills His Longtime Abuser, Who's The Victim,* MOTHER JONES (Nov. 30, 2015), https://www.motherjones.com/politics/2015/11/terry-williams-philadelphia-death-penalty-sexual-abuse/. I also have considerable familiarity with former Chief Justice Castille. *See generally* Commonwealth v. Padilla, 80 A.3d 1238 (Pa. 2013) *and* Commonwealth v. Spotz, 99 A.3d 866 (Pa. 2014), wherein he notes with considerable deprecation my close connection to the FCDO based on my decades of experience as a public defender in the Defender Association of Philadelphia. I currently serve on the Board of Directors of the Defender Association.

7. Thomas Stearns Eliot, *The Love Song of J. Alfred Prufrock*, *in* COLLECTED POEMS (1909-1962) 3 (2014).

8. Confirmation Hearing on Federal Judicial Nominee Arianna Freeman Before the United States Senate Committee on the Judiciary, 117th Cong. (Mar. 2, 2022) (statement of Josh Hawley, Member, Senate Judiciary Committee).

9. Confirmation Hearing on Federal Judicial Nominee Arianna Freeman Before the United States Senate Committee on the Judiciary, 117th Cong. (Mar. 2, 2022) (statement of Ted Cruz, Member, Senate Judiciary Committee).

Terry Williams was 17 years old when he killed Herbert Hamilton. At his trial, the young man testified that he did so in self-defense, stating that Hamilton had shown him pictures of nude males and tried to force him to pose naked as well.[10] A fight ensued, and Hamilton slashed Williams's lip and nose with a knife.[11] The prosecutor, Andrea Foulkes,[12] conceded photographs of nude males in the victim's apartment, claimed they were consensually taken, and disputed the self-defense testimony:

> Foulkes: Did you provide the name of that doctor [who you claim stitched you up] to your attorney?
>
> Williams: I didn't know the name. I still don't know his name.
>
> Foulkes: Did you provide the location where you had gone [to get stitched up] to your attorney before this trial?[13]

When asked the relevance of her questioning, Foulkes told the court that she was trying to prove "that he's making this story up . . . I'm trying to establish if he's making this up as he's going along."[14]

The question of making up a story might easily have been resolved, as Williams's attorney had crucial evidence to support his testimony—a medical record documenting the injuries. However, the top of the exhibit page was missing,[15] and thus any information identifying the patient was as well. The defense attorney had tried to secure a stipulation to the document[16], but Foulkes had refused. The judge defended her decision not to stipulate, noting that the record could not be verified as belonging to Williams.[17] Foulkes then argued in closing that "there is not a single piece of evidence to corroborate [Williams's] bold statement that it's now self-defense."[18] Although the prosecution had "aggressively sought a first degree murder conviction and imposition of the death penalty,"[19] the jury returned a third-degree murder verdict.

Almost one year later, Terry Williams went on trial for a crime he had committed shortly after his eighteenth birthday: the killing of Amos Norwood. Williams had a new lawyer for this case—a lawyer who had met him one day before trial.[20] Given the absurd lack of preparation, it is not surprising that Williams's attorney was completely unfamiliar with the facts of the third-degree conviction, and unaware that the evidence had revealed Terry was sexually abused as a minor by victim Hamilton. The jury heard that Terry and another 18-year-old friend, having lost their money gambling, waved down Amos Norwood for a ride, took him to a cemetery, and beat him to death with the socket wrench and tire iron referenced by Senator Hawley. The prosecutor told the Norwood jury that Williams had killed him "for no other reason

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10. Transcript of Record at 490-91, Commonwealth v. Williams, CP-51-CR-0823621-1984 (Pa. D. & C. 1985).

11. *Id*. at 493.

12. Foulkes was then an Assistant District Attorney in the Philadelphia District Attorney's Homicide Unit. Today, she is an Assistant United States Attorney in the Eastern District of Pennsylvania.

13. *Supra* note 9, at 508.

14. *Id*. at 509-12.

15. *See* Exhibit A, App. to Pet'r's Resp. to Commonwealth's Mot. to Dismiss Pet. for Post-Conviction Relief, in Commonwealth v. Williams, CP-51-CR0907971-1984 (filed Jan. 25, 2019) (on file with author).

16. *Supra* note 9, at 470.

17. *Id*. at 592-93.

18. *Id*. at 736.

19. Br. for Pet'r, J. App. 146A, in Williams v. Pennsylvania, 579 U.S. 1 (2016).

20. Transcript of Record at 17, Commonwealth v. Williams (Pa. D. & C. 1986). When the judge was informed that Williams's attorney had only met with him the day before, he stated: "It appears to me that [your attorney] has done everything that can be expected of him. He didn't see you every time you wanted him to see you but he did see you once and he had other lawyers or investigators see you three or four times." *Id*. 29.

but that a kind man offered him a ride home . . .. He has taken two lives, two innocent lives of persons who were older and perhaps unable certainly to defend themselves against the violence that he inflicted upon them. He thought of no one but himself, and he had no reason to commit these crimes."[21] The jury sentenced Terry Williams to death.

Contrary to the statements of Senators Hawley and Cruz, however, the Terry Williams story did not end after Mr. Williams received a death sentence. Indeed, the senators, each a highly educated attorney, appear to have made an amateurish mistake, if mistake it was: they failed to Shepardize the *Williams* cases.[22]

Had they done so, Senators Hawley and Cruz would have learned a lot, beginning with the third-degree murder conviction, the one where the prosecutor accused 17-year-old Terry of making up a self-defense claim, refused to stipulate to the medical record because of the lack of biographical information, and argued to the jury that there was no evidence supporting the young man's claim. 35 years later, in January 2019, District Attorney Larry Krasner[23] permitted Mr. Williams's defense team to have access to the District Attorney's file.[24] In the file, miraculously enough, was Terry Williams's medical record, not only confirming that he was slashed by a knife in the face and received five stitches, but indicating that the patient was, in fact, Terry Williams.[25] In other words, when the prosecutor argued to the jury that "there [was] not a single piece of evidence to corroborate [Williams's] bold statement that it's now self-defense," she actually had the strongest possible evidence in her own file, violating the fundamental rule of *Brady v. Maryland* and virtually every other cardinal tenet of criminal procedure as well. On January 29, 2020, the District Attorney dismissed the case.[26]

The death sentence Mr. Williams received in 1986, for which he was nearly executed in 2012, fared no better. The same judge who presided over the disclosure of the District Attorney's homicide file for the third-degree conviction in 2019 had also ordered the homicide file for the death sentence opened weeks before Williams's scheduled execution. She determined that the prosecutor, unhappy with the third-degree verdict in the first homicide case, had determined to avoid such an outcome in the next case.[27] How? By withholding some documents entirely, and "sanitizing" the

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21. Commonwealth v. Williams, 168 A.3d 97, 110 (Pa. 2017).

22. *See, e.g., id.* The senators might at least have done a Google search, which would have yielded countless news articles with critical updates on Mr. Williams's case.

23. Krasner was first elected District Attorney of Philadelphia in 2017, and he was reelected in 2021. He is among the most prominent of the new breed of progressive prosecutors elected to big city offices over the past five years. For more information, see Russell Berman, *Why Larry Krasner's Defeat Would Be "Disastrous" for Criminal-Justice Reform*, ATLANTIC (May 3, 2021), https://www.theatlantic.com/politics/archive/2021/05/larry-krasner-philadelphia-criminal-justice-reform/618764/; https://main-newyorker-condeus.content.pugpig.com/article/acts-of-conviction/pugpig_index.html.

24. *See* Pet'r's Resp. to Commonwealth's Mot. to Dismiss Pet. for Post-Conviction Relief, in Commonwealth v. Williams, CP-51-CR0907971-1984, at 4 (filed Jan. 25, 2019).

25. *Id.*

26. *See* Maurice Possley, *Terrance Williams*, The National Registry of Exonerations (Mar. 25, 2020), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5709.

27. *See* Order Granting Pet. under Pa. Post-Conviction Relief Act, in Commonwealth v. Williams, CP-51-CR-0823621-1984, at 3,7 (Nov. 27, 2012) ("Ms. Foulkes identified what she believed to be the reason that the jury returned a 'compromised' verdict. And then she attempted to eliminate evidence which caused the 'compromised' verdict from being presented to the jury . . .. The major difference between the Hamilton and Norwood cases is that evidence of a sexual relationship between the middle-aged victim and appellee was presented to the jury in the first, but not in the second. The Court is quite mindful that Ms. Foulkes had no duty to do the defense's job for them, and she had the right to present a different theory of the case that focused on a robbery of the victim and not on a relationship that existed or might have existed between the victim and

discovery provided to defense counsel.[28] It turned out that Amos Norwood, a middle-aged man like Herbert Hamilton, had been sexually abusing multiple young teenage boys, liked to inflict pain, and had in fact been sexually abusing Terry since he was 13 years old.[29] Three jurors from Williams's capital jury trial came forward and stated that they never would have voted for death had they known of Norwood's predatory behavior.[30]

So, to fact-check Senators Hawley and Cruz: Did Terry Williams kill Amos Norwood because he was gay? Only if you believe that all gay men have sexually abusive relationships with children. Is Terry Williams a serial murderer? Only if you consider a dismissal of one murder conviction based on self-defense evidence hidden by prosecutorial misconduct, and a reversal of a death sentence based on more misconduct by the same prosecutor, to be the stuff of serial murder.

The senators, of course, had a more important rhetorical goal than the simple defamation of Terry Williams. After asking that most rudimentary of questions ("How can you represent those people?"), their next task was an inquiry into how the legal establishment viewed such representation. And what better representative of the legal establishment than the Chief Justice of the State Supreme Court?

FORMER CHIEF JUSTICE OF THE PENNSYLVANIA SUPREME COURT RONALD CASTILLE

There are many good reasons a judge might criticize a lawyer or even an office of lawyers: shoddy work, missed deadlines, and violations of ethical codes of conduct or professional rules of responsibility, to name a few. But those were not the complaints that former Chief Justice Ronald Castille leveled against the Federal Community Defender Office where nominee Arianna Freeman worked. Here's how Senator Hawley put it:

> Common tactics of your office include multiple attempts to delay and obstruct cases like Mr. Williams's, as well as attempts to unsettle and undermine Pennsylvania law. That's the Chief Justice of the Pennsylvania Supreme Court. Those are very serious allegations[31] . . .. how can we have any confidence that you will follow the law as a federal officer yourself? . . .. All I can say is these allegations, and this record, frankly, is extremely, extremely disturbing, and the idea that the Chief Justice of the Pennsylvania Supreme Court would talk about an obstructionist anti-death penalty

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appellee. However, she did have a duty to provide the defense with that evidence, because it was exculpatory and 'material.'").

28. *Id.* at 12.

29. *See* Commonwealth v. Williams, 105 A.3d 1234, 1242 (Pa. 2014); *see also* Pennsylvania Board Of Pardons, Public Session, September 17, 2012 at page 9.

30. *See* Andrew Cohen, *A Funny Thing Happened on the Way to the Execution,* ATLANTIC (Oct. 1, 2021), https://www.theatlantic.com/national/archive/2012/10/a-funny-thing-happened-on-the-way-to-the-execution/263046/.

31. It should be noted that Castille is hardly the first to level such criticisms. In 1976, Georgia prosecutors declared that a bill for statewide funding of indigent defense was "the greatest threat to the proper enforcement of the criminal laws of this state ever presented." Hassan Kanu, *Ketanji Brown Jackson Hearings Spotlight Public Defenders' Maligned Role*, REUTERS (Mar. 24, 2022 at 6:05 PM https://www.reuters.com/legal/government/ketanji-brown-jackson-hearings-spotlight-public-defenders-maligned-role-2022-03-24/. In 1995, South Carolina Attorney General Charlie Condon criticized public defenders as "lobbyists whose only goal is to stop executions at any cost." *Id.*; *see also* Lis Wiehl, *A Program for Death-Row Appeals is Facing Elimination*, N.Y. TIMES (Aug. 11, 1995), https://www.nytimes.com/1995/08/11/archives/a-program-for-deathrow-appeals-is-facing-elimination.html.

> agenda, attempts to unsettle and undermine Pennsylvania law, suffice it to say I have very serious concerns about your nomination."[32]

And Senator Mike Lee of Utah, also an attorney, echoed his fellow senator's concerns:

> "It's a very rare thing to use words like describing a particular office as engaging in repeated attempts to unsettle and undermine the law. What I was perhaps even more troubled by was your response. If I understood you correctly, you said 'That was just his opinion.' There is a difference between an individual expressing his opinion and a judge before whom you're appearing making these arguments."[33]

These comments raise an important question: is "unsettling and undermining the law" a criticism, or a compliment? The answer may well lie in who is asking the question. Thus, before we explore that query, we must carefully examine the judge who is making the criticism. As it turns out, in much the same way the senators ignored the revelations of misconduct over the past decade in the *Williams* cases, their focus on the comments of former Chief Justice Ronald Castille ignored Castille's own misconduct, as detailed in the United States Supreme Court case *Williams v. Pennsylvania*.[34] Because this Preface is committed to a complete accounting of facts, and not simply the rhetoric of certain senators, it is necessary to revisit that ruling, and the events that led to it.

Before Ronald Castille became a justice, and then Chief Justice, of the Pennsylvania Supreme Court, he was the District Attorney of Philadelphia from 1986 until 1991. During his term, he was an enthusiastic advocate for capital punishment; when he ran for the Supreme Court, he campaigned on the fact that he had "sent 45 people to death row."[35] One of those people was Terry Williams. After Judge Teresa Sarmina[36] granted a stay of execution for Mr. Williams[37] as well as a new penalty phase,[38] Mr. Williams's case proceeded directly to the Pennsylvania Supreme Court.[39] That court reversed the grant of a new penalty phase, finding no *Brady* violations and determining that the claims were time-barred because Terry knew that he had been sexually abused by the victims.[40] Joining the majority opinion, Chief

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32. *Supra* note 7.

33. Confirmation Hearing on Federal Judicial Nominee Arianna Freeman Before the United States Senate Committee on the Judiciary, 117th Cong. (Mar. 2, 2022) (statement of Mike Lee, Member, Senate Judiciary Committee).

34. 579 U.S. 1 (2016).

35. *Id.* at 12.

36. The Honorable Teresa Sarmina, now retired from the Court of Common Pleas in Philadelphia, was a judge from 1997 until 2019. She had previously served as an Assistant District Attorney in the Philadelphia District Attorney's Office from 1984 until 1989, and she received her J.D. from Georgetown University Law Center.

37. *See* Commonwealth v. Williams, CP-51-CR-0823621-1984, at 9 (Pa. C.P. Nov. 27, 2012).

38. *See id.* at 52.

39. *See* Commonwealth v. Williams, 105 A.3d 1234 (Pa. 2014).

40. An entire Preface or more could be written about this astonishing opinion. The Court makes no mention of the fact that an 18-year-old Terry Williams met his trial counsel only one day before the start of his capital trial, yet concludes that it was his obligation to confide in his attorney about being sexually abused throughout his early teenage years. This conclusion is contrary to Philadelphia Grand Jury reports from 2003 and 2011. *See* Report of the Grand Jury, *In re* Cty. Investigating Grand Jury, Misc. No. 03-00-239 (Pa. D. & C. Sept. 17, 2003) (stating that "the experts have told us that this statute [of limitations for sex abuse charges] is still too short. We ourselves have seen that many victims do not come forward until deep into their thirties, forties and even later."); Report of the Grand Jury, *In re* Cty. Investigating Grand Jury XXIII, Misc. No. 0009901-2008 (Pa. D. & C. Jan. 21, 2011) (stating that most victims don't come forward "for many years, or even decades"). Indeed, even the District Attorney attempting to execute Terry Williams noted (in the context of prosecuting a priest) that "it is extremely difficult for sexual abuse victims to admit that the assault happened, and then to actually report the abuse to authorities can be even harder for them." Marc Bookman, *When a Kid Kills His Longtime*

Justice Castille also wrote a concurrence. He began by labeling the *Brady* claims "frivolous," but the point of his separate opinion was to castigate the federal defender office. It is from this concurring opinion that Senators Hawley and Lee took their language about the Defender's "attempts to unsettle and undermine Pennsylvania law."[41]

Once again, however, the senators failed to Shepardize the opinion they were so confidently quoting from. This time, they missed a United States Supreme Court case decided two years later. In *Williams v. Pennsylvania*, the Court noted that Castille, as District Attorney, authorized the capital prosecution of Terry Williams, and then judged the fairness of the prosecution as a judge:

> The due process guarantee that "no man can be a judge in his own case" would have little substance if it did not disqualify a former prosecutor from sitting in judgment of a prosecution in which he or she had made a critical decision. Chief Justice Castille's significant, personal involvement in a critical decision in Williams's case gave rise to an unacceptable risk of actual bias.[42]

The Court also found two other factors requiring a reversal of the *Williams* state court decision. First, "Chief Justice Castille's willingness to take personal responsibility for the death sentences obtained during his tenure as district attorney indicate that, in his own view, he played a meaningful role in those sentencing decisions and considered his involvement to be an important duty of his office."[43] Second, and perhaps most compelling of all, the Court noted Judge Sarmina's finding that prosecutor Foulkes had "engaged in multiple, intentional *Brady* violations during Williams's prosecution . . . would be difficult for a judge in [Chief Justice Castille's] position not to view . . . as a criticism of his former office and, to some extent, of his own leadership and supervision as district attorney."[44] In short, perhaps Senators Hawley and Lee might have found a better person to quote than a Chief Justice reversed by the United States Supreme Court for being a prosecutor and a judge in the same case.[45]

But what about the substance of the quote: given the context of Castille's comment about capital litigators "unsettling and undermining Pennsylvania law," it is reasonable to conclude that he meant it as a criticism. But is it? Consider the case of *Hitchcock v. Dugger*.[46] For years, from the late 1970s until 1987, death penalty lawyers in Florida had claimed the state's law was unconstitutional, as it limited a defendant's right to present evidence in support of a life sentence. Eighteen men were executed in Florida's electric chair while that state's Supreme Court, as well as federal district courts and the 11th Circuit Court of Appeals, denied the claim over and over.[47] The United States Supreme Court had repeatedly denied certiorari on the issue as well. Then, seemingly out of the blue, the Supreme Court granted certiorari

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Abuser, Who's the Victim?, MOTHER JONES (Nov. 30, 2015), https://www.motherjones.com/politics/2015/11/terry-williams-philadelphia-death-penalty-sexual-abuse/.

41. *Commonwealth v. Williams,* 105 A.3d at 1246. Senator Lee noted that he was "troubled" by Ms. Freeman's response to Castille's allegations that "that was just his opinion." *See supra* note 33. In fact, however, *that was just his opinion*, as none of the other justices joined his concurrence.

42. 579 U.S. 1, 9, 14 (2016).

43. *Id*. at 12.

44. *Id*. at 13.

45. Apparently, Senator Hawley was not troubled by Chief Justice's double duty as a prosecutor and a judge, or the *Brady* violations in the *Williams* cases. "The death sentence was not carried out because of a technicality involving a justice on the supreme court, the Pennsylvania Supreme Court, who refused to recuse himself 30 years later. It has nothing to do with the facts of the case," he said during the Freeman's confirmation hearing.

46. 481 U.S. 393 (1987).

47. *See* DAVID VON DREHLE, AMONG THE LOWEST OF THE DEAD 300-01 (1995); Michael Mello, *What Came Before We Killed Him: Deconstructing Execution #58*, 77 UMKC L. REV. 849 (2008–09).

and ruled 9-0 that in fact the Florida law *was* unconstitutional. Justice Scalia, writing for the unanimous Court, noted that their result "could not be clearer."[48] Did Craig Barnard, the Florida public defender who litigated the issue over and over until winning in the Supreme Court, undermine and unsettle Florida law? Yes. Did the public defenders—who pressed for and found innumerable *Brady* violations, then challenged the chief justice's right to judge his own case and prevailed—undermine and unsettle Pennsylvania law? Yes. Are we all the better for it? Damn right we are.

CAN PUBLIC DEFENDERS BECOME FAIR JUDGES?

When the senators painted Terry Williams as a monster rather than a teenager who killed his middle-aged abusers, or Ronald Castille as a fair arbitrator rather than a judge protecting his former office, they did not do so by accident. They had a very clear point to make—that someone who defends criminals is unfit for the judiciary. But what makes a judge fit for the judiciary?

Much has been written about judging and the qualities needed to elevate the bench.[49] In recent years Chief Justice Roberts's "balls and strikes" metaphor has been trotted out as the urtext of the fair judge:

> Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire …. I will remember that it's my job to call balls and strikes, and not to pitch or bat.[50]

The assumption of the metaphor is that judicial neutrality is possible,[51] and it is beyond the scope of this Preface to examine the philosophical underpinnings of such a proposition.[52] But if Chief Justice Roberts is correct, one might conclude that a fair judge—one who "plays by the rules"—is one who understands that the Bill of Rights are rights granted to the individual, not the government; and that four of the first ten amendments explicitly apply to those accused of crimes.[53] Indeed, while most of us

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48. 481 U.S. at 398.

49. *See, e.g.*, Randall T. Shepard, *Judicial Professionalism and the Relations Between Judges and Lawyers*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 223 (2000); G. David Miller, *Dancing with Itos – What Makes a Good Judge*, COLORADO LAWYER (Jan. 2010); Amalia Amaya, *Exemplarism and Judicial Virtue*, 25 LAW & LITERATURE 428 (2013); James E. Hambleton, *The All Time, All-Star, All-Era Supreme Court*, 69 A.B.A. J. 463 (1983).

50. Excerpted from the opening statement of John G. Roberts, Jr., at his confirmation hearing for Chief Justice of the United States.

51. *See generally* Daniel Hinkle, *Cynical Realism and Judicial Fantasy,* 5 WASH. U. JURISPRUDENCE REV. 289 (2013); Girardeau A. Spann, *Constitutionalization,* 49 ST. LOUIS U. L.J. 709 (2005).

52. While it may be beyond the scope of this Preface to fully explore the myth/reality of judicial neutrality, it is not beyond the scope of this footnote to at least question the concept. Attorneys tasked with representing those facing possible execution have seen more than their share of political decisionmaking disguised as neutrality—and this writer is far from the first to note it. Consider the dissent of Justice Marshall, joined by Justice Blackmun, in the case of *Payne v. Tennessee*, 501 U.S. 808, 845 (1991):

> Power, not reason, is the new currency of this Court's decisionmaking. Four Terms ago, a five-Justice majority of this Court held that "victim impact" evidence of the type at issue in this case could not constitutionally be introduced during the penalty phase of a capital trial. Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). By another 5–4 vote, a majority of this Court rebuffed an attack upon this ruling just two Terms ago. South Carolina v. Gathers, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989). Nevertheless, having expressly invited respondent to renew the attack, 498 U.S. 1076, 111 S.Ct. 1031, 112 L.Ed.2d 1032 (1991), today's majority overrules Booth and Gathers and credits the dissenting views expressed in those cases. Neither the law nor the facts supporting Booth and Gathers underwent any change in the last four years. Only the personnel of this Court did.

53. Consider what Associate Justice of the Supreme Court Ketanji Brown Jackson said at her confirmation hearing on March 22, 2022: "The Framers were concerned about government overreach in a lot of different

remember the Chief Justice's umpire metaphor from his confirmation hearing, another of his quotes from that same hearing is more apropos to this discussion:

> Mr. Chairman, when I worked in the Department of Justice in the Office of the Solicitor General, it was my job to argue cases for the United States before the Supreme Court. I always found it very moving to stand before the Justices and say, "I speak for my country." But it was after I left the Department and began arguing cases against the United States, that I fully appreciated the importance of the Supreme Court in our constitutional system. Here was the United States, the most powerful entity in the world, aligned against my client, and yet all I had to do was convince the Court that I was right on the law, and the Government was wrong, and all that power and might would recede in deference to the rule of law.[54]

All criminal defense attorneys have shared Chief Justice Roberts's experience; and when the government aligns itself against your client in a capital case, the feeling is unforgettable.

Yet Senators Hawley, Cruz, Lee, and others apparently believe such experience hinders one's ability to be a fair judge. Associate Justice Ketanji Brown Jackson, who was a federal public defender for a shorter period of time than she was a law student, was nonetheless criticized about her work for Guantanamo detainees. The Republican National Committee derided her for providing "advocacy for these terrorists" and "going beyond just giving them a competent defense."[55] Senator Mitch McConnell, the minority leader, attributed her strong backing from progressive groups in part to her history as a public defender, saying "the soft-on-crime brigade is squarely in Judge Jackson's corner."[56] Other senatorial attacks on Jackson-such as criticism of her sentencing practices as a federal district judge in child pornography cases-, while courting the insane Q-Anon vote, were no doubt directed at her time on the defense side of the aisle. As Hawley said, apparently in earnest: "[l]ike any attorney who has been in any kind of practice, they are going to have to answer for the clients they represented and the arguments they made."[57] He might as well have said that all criminal defense attorneys are in favor of crime.

But again, the senators saved their clearest condemnation of the defense function for the nomination of the woman who had dedicated her career to the representation of poor people accused of crime. One last time, consider the quotes of two of our elected officials in the Arianna Freeman hearing. First, Senator Hawley:

> [Terry Williams] was sentenced to death, and then you intervened. And you argued for years that Pennsylvania law shouldn't be carried out, that he shouldn't be actually executed according to the laws of Pennsylvania. Numerous courts rejected the claims you raised on behalf of this individual. Do you regret trying to prevent this individual, who committed these heinous crimes, having justice served upon him?[58]

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areas. The provisions of our Constitution are protecting individual liberty from government overreach. This is why we have provisions about limited government, and there are many provisions in the Constitution that are limiting government action when it comes to the deprivation of liberty, because the Framers understood how important liberty is to our society. And so there's the Fourth Amendment, there's the Fifth Amendment, there's the Sixth Amendment, there's the Eighth Amendment. These provisions are crucial, and it is zealous defense counsel that ensures that the government is protecting these rights . . .. and that people are getting due process in the criminal justice system. And that's to all of our benefits."

54. *Supra* note 50.

55. Carl Hulse, *As Jackson Faces Senators, Her Criminal Defense Record Is a Target*, N.Y. Times (Mar. 16, 2022), https://www.nytimes.com/2022/03/16/us/politics/ketanji-brown-jackson-criminal-defense.html.

56. *Id.*

57. *Id.*

58. *Supra* note 7.

And Senator Cruz: "[Senator Booker][59] rightly pointed out you could have been a prosecutor. Many of us on both sides of the aisle have been prosecutors. You didn't want to be a prosecutor. You wanted to stand with the criminals . . ."[60]

The implication of these quotes, if such a mild word can be used, is that prosecutors are suitable for the bench (or the Senate); but if you "stand with the criminals," if you unsettle and undermine the law, if you choose to be a public defender rather than a prosecutor, your choices disqualify you from the federal judiciary.

Given the reliance the senators have placed (or misplaced) on the *Williams* cases and former Chief Justice Castille's assessment of the Philadelphia Federal Community Defender Office, it seems reasonable to end this Preface by examining Castille's own court, and whether it functioned in an unbiased way. Of course, allegations of bias can often depend on the perspective of the accuser, and courts might lean conservative or progressive by dint of their makeup rather than an overt prejudice. An evaluation of Castille's own court requires no subtle calibration of tendencies or predispositions, however.

Consider the email scandal benignly[61] known to Pennsylvanians as "Porngate."[62] While the *Williams* case was being litigated in the Pennsylvania Supreme Court, and Chief Justice Castille was criticizing Williams's lawyers in his concurring opinion, some emails had come to light during an investigation of the Jerry Sandusky sex abuse case. One of these emails was from John Smith to Jeffrey Baxter about a woman who complained to her doctor that her husband had come home drunk and beat her "to a pulp." The doctor advised her to take a mouthful of sweet tea and not swallow until her husband was asleep; when it worked, he told her: "You see how much keeping your mouth shut helps?"[63] The email would have been relegated to the ether of odious misogyny were it not for three facts: It was received on a government server, Baxter was a high ranking official in Pennsylvania's Office of the Attorney General, and "John Smith" was actually state Supreme Court Justice Michael Eakin.[64] When the scandal unraveled, it turned out that several justices on the Court, including Eakin, were exchanging racist, homophobic, misogynistic, and anti-immigrant emails[65] with members of the Pennsylvania Attorney General's Office.[66]

The first to fall from the scandal was Justice Seamus McCaffery, a former longtime police officer who had been best known for establishing a courtroom in Veterans Stadium while a trial judge in Philadelphia. After sending and receiving nearly 200 of the emails, he was suspended from the Court. Shortly thereafter, he

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59. It must be pointed out that when Senator Booker questioned Ms. Freeman, he was applauding her choice to become a public defender rather than condemning it.

60. *Supra* note 8.

61. Why "benignly?" The emails in question were largely racist, homophobic, and misogynistic, but also often pornographic. Thus, it is not shocking that the Pennsylvania media might have seized on the most salacious rather than the most accurate nickname for the scandal.

62. *See generally* David Gambacorta, *The Great Pennsylvania Porn Caper,* ESQUIRE (Feb. 24, 2016), https://www.esquire.com/news-politics/a42234/porngate-pennsylvania-kathleen-kane.

63. David Gambacorta, *3 Eye-Opening Parts of Michael Eakin's Deposition*, PHILADELPHIA MAGAZINE (Mar. 18, 2016 at 1:58 PM), https://www.phillymag.com/news/2016/03/18/michael-eakin-deposition/.

64. *See* Kenneth Lipp, *Top Judge Joked About Raping, Tasing Women*, DAILY BEAST (Oct. 23, 2015), https://www.thedailybeast.com/top-judge-joked-about-raping-tasing-women.

65. While there is little point in going into detail about the nature of these emails, it is necessary to provide a few illustrations, if only to make it clear how noxious they actually were. One had a photograph of a smiling, badly beaten woman with the caption: "Domestic violence—because sometimes, you have to tell her more than once." Another was a poster labeled "BRAVERY At Its Finest" that showed a white man fighting his way through a crowd of African Americans with a box of Kentucky Fried Chicken.

66. A prominent defense attorney was also part of the email chains, but the great majority of those involved were judges and assistant attorneys general.

resigned from the bench,[67] and the legal establishment breathed a sigh of relief. "Now the state Supreme Court can get back to its important business of deciding cases without distraction," said the director of the reform group Pennsylvanians for Modern Courts.[68]

This proved to be wishful thinking. Before McCaffery stepped aside, he had threatened to implicate Michael Eakin (aka John Smith), his fellow Supreme Court justice. Yet, somehow, Eakin had been cleared of wrongdoing, not only by a prominent lawyer appointed by the Pennsylvania Supreme Court to investigate the matter,[69] but also by the Judicial Conduct Board. How was it that McCaffery had been suspended and Eakin cleared? It turned out the justice had some friends in high places.

Michael Eakin had been a longtime prosecutor and then District Attorney in Cumberland County, Pennsylvania, before being elected to the Superior Court and then Supreme Court. Over the years he had become good friends with Robert Graci, himself a longtime prosecutor and then a Superior Court judge. Indeed, Graci was such good friends with Eakin that he had been general counsel in the Justice's retention campaign.[70] All of this would have been fine had Robert Graci not also been chief counsel for the Judicial Conduct Board during its investigation of Eakin.[71] When the conflict was revealed in the media, a new investigation was ordered; Eakin subsequently was disciplined by the Court of Judicial Discipline for "insensitive and inappropriate" emails,[72] and resigned from the Pennsylvania Supreme Court three months before Chief Justice Castille was reprimanded in *Williams v. Pennsylvania*. Later that same year, the Honorable Gerald H. McHugh, Jr. of the United States District Court for the Eastern District of Pennsylvania, noted the following in a Pennsylvania death penalty case:

> One of Petitioner's potentially meritorious claims alleges that Philadelphia homicide detectives employed racist and sexist slurs and threats when they interrogated her

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67. McCaffery's statement upon his suspension included the following: "Unfortunately, personal, private emails between me and some longtime friends were never meant to be viewed by anyone else, but they were. I sincerely apologize for my lapse in judgment. I erred and if I offended anyone, I am truly sorry." Seamus McCaffery, *Statement of PA Supreme Court Justice Seamus McCaffery*, THE MORNING CALL (Oct. 16, 2014), https://www.mcall.com/mc-pennsylvania-supreme-court-justice-seamus-mccaffery-statement-20141016-story.html.

68. Steve Esack and Peter Hall, *Seamus McCaffery Retires Amid Porn Email Scandal*, MORNING CALL (Oct. 27, 2014), https://www.mcall.com/news/pennsylvania/mc-pa-seamus-mccafery-retires-porn-emails-20141027-story.html.

69. The appointed attorney, Robert L. Byer, declared that he had found "nothing improper" except for one email sent to Eakin that contained "offensive sexual content." Chief Justice Castille, who had appointed Byer to conduct the investigation, defended his appointment and claimed that the attorney general (Kathleen Kane), herself in considerable criminal trouble, had not provided all of the relevant emails to Byer while defending Eakin at the same time. "'They are lying. She is already charged with perjury—two counts of it,' Castille said, referring to a pending criminal case against Kane. 'Now, they've got her smearing Eakin's reputation. It's beyond reprehensible.'" It is not clear from Castille's quote who "they" is. Craig McCoy and Angela Couloumbis, *In Reversal, Kane Says Porn Emails Were Not Newly Discovered*, PHILADELPHIA INQUIRER (Oct. 2, 2015), https://www.inquirer.com/philly/news/politics/20151003_In_reversal__Kane_says_porn_emails_were_not_newly_discovered.html.

70. William Bender, *Glaring Conflict in Porngate Probe?*, PHILADELPHIA INQUIRER (Nov. 11, 2015), https://www.inquirer.com/philly/news/politics/state/20151111_Glaring_conflict_in_Porngate_probe_.html.

71. *Id.* It turned out that Graci was not the only conflicted member of the Judicial Conduct Board. Eugene Dooley, a police chief in Chester County, had received some of the emails in question from McCaffery. *Philadelphia Inquirer Says Judicial Ethics Panel Member Got Explicit Emails*, DELCO TIMES (Nov. 16, 2015), https://www.delcotimes.com/2015/11/16/philadelphia-inquirer-says-judicial-ethics-panel-member-got-explicit-emails/amp.

72. Debra Cassens Weiss, *Pennsylvania justice is suspended for 'insensitive and inappropriate' emails in interim order*, ABA JOURNAL (December 23, 2015), https://www.abajournal.com/news/article/pennsylvania_justice_is_suspended_for_insensitive_and_inappropriate_emails.

> about the murders in this case. I take judicial notice that two Pennsylvania Supreme Court Justices have admitted viewing and sharing racist and sexist pornography as they reviewed Pennsylvania Supreme Court appeals, including the period of time when Petitioner's [Post Conviction Relief Act] appeal was pending. A litigant's due process rights are violated when the circumstances of a judicial decision "give rise to an unacceptable risk of actual bias." *Williams v. Pennsylvania*, —— U.S. ——, 136 S.Ct. 1899, 1908, 195 L.Ed.2d 132 (2016). The fact that two Pennsylvania Supreme Court justices recreationally viewed—on state computers and on state time—numerous depictions of graphic sexual violence with captions degrading African Americans and endorsing abuse of women is cause for grave concern given Petitioner's background and its potential relevance to her claims for relief . . .. The principles served by independent federal review have particular resonance against this backdrop.[73]

Should we conclude from "Porngate" and *Williams* that Chief Justice Castille's Supreme Court was not a model of comportment, and that the Chief himself might have taken a more probing look at his own ethical obligations while keeping his glass house in order, rather than throwing stones at the Federal Community Defender Office? Most definitely. Should we conclude that prosecutors can never become fair judges? That would be . . . well, stupid.

CONCLUSION

In closing, it might be a good idea to return to Prufrock, this time to paraphrase: Has President Biden, by appointing public defenders to the judiciary, "dared to disturb the universe?"[74] The answer, judging by the hysteria on one side of the Senate Judiciary Committee, is clearly yes. But maybe the universe needs to be disturbed. Maybe it's a good thing to have judges who visited a client's family and saw pain and poverty, who felt the power of the government from the receiving end, who stood with an accused to take a verdict. No *maybe* about it.

You were promised in the title to this Preface that there would be other stupid questions besides "Can Public Defenders Become Fair Judges?" Here are two more:

1) In this day of outrageous misrepresentations, alternate facts, and Alice in Wonderland conspiracy theories, is it worthwhile to fact-check our elected officials?

2) Is "I stand with the criminals" another way of saying "I believe in the Bill of Rights?"

73. *Hill v. Wetzel,* 279 F.Supp.3d 550, 561 n.6 (E.D. Pa. 2016).

74. *See supra* note 6, at 4.