IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 576 CAPITAL APPEAL DOCKET

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

v.

MARK NEWTON SPOTZ,
Appellant.

APPELLANT'S MOTION FOR THE WITHDRAWAL OF THE OPINION OF CHIEF JUSTICE CASTILLE WITH REQUEST FOR REFERRAL TO THE FULL COURT

Appellant, through undersigned counsel,[1] hereby moves for the withdrawal of the Opinion authored by Chief Judge Castille in the above captioned case.[2] In support, Appellant states:

On April 29, 2011, this Court decided this capital PCRA appeal. Commonwealth v. Spotz, 576 CAP, 2011 WL 1601629. Chief Justice Castille authored a "Concurring Opinion" ("*Opinion*," page citations to Westlaw version). Because Chief Justice Castille's *Opinion* does not comply with this Court's Internal Operating Procedures, and contains a number of unwarranted and unfounded accusations of misconduct against undersigned counsel and his staff, counsel move to have the

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[1]Undersigned counsel, Michael Wiseman, has been employed by the Defender Association of Philadelphia, Federal Community Defender Office, Eastern District of Pennsylvania ("FCDO") (i.e. the Federal Public Defender) since 1995. He, along with the Chief Federal Community Defender, Leigh Skipper, and First Assistant Federal Community Defender, Rebecca Blaskey, is responsible for the administration and operation of that portion of the Federal Community Defender Office assigned to the litigation of capital post-conviction cases. He is fully familiar with and aware of all facts asserted in this *Motion*. Mr. Wiseman is joined in this *Motion* by one of the lawyers who represents Appellant Spotz, Eric Montroy.

[2]All emphasis herein is supplied unless otherwise indicated.

Opinion withdrawn.

I. CHIEF JUSTICE CASTILLE'S *OPINION* DOES NOT CONFORM TO THIS COURT'S INTERNAL OPERATING PROCEDURES

This Court's Internal Operating Procedures ("IOP"), § 4(B)(2) define a "concurring opinion":

> An opinion is a "concurring opinion" when it agrees with the result of the lead opinion. A Justice who agrees with the result of the lead opinion, but does not agree with the rationale supporting the lead opinion, in whole or in part, may write a separate "concurring opinion."

Chief Justice's Castille's *Opinion* states: "I join the Majority Opinion *in its entirety*. I write separately to note and address *broader issues* implicated by the role and performance of federal counsel in purely state court collateral proceedings in capital cases, such as this one." *Opinion* *66.

Because Chief Justice Castille's *Opinion* "join[s] the Majority Opinion in its entirety" and because it addresses "broader issues" that are *unrelated to the result reached by the Majority Opinion*, the *Opinion* fails to meet the definition contained in this Court's IOP.

Instead, Chief Justice Castille's *Opinion* constitutes a broad-based challenge to undersigned counsel's appearance in the courts of the Commonwealth, the ethics and integrity of counsel's staff and the performance of the critical role played by the Federal Community Defender Office ("FCDO") in capital post-conviction cases in Pennsylvania. Accordingly, and respectfully, counsel asserts that the *Opinion* is not a proper concurring opinion and should be withdrawn.

II. CHIEF JUSTICE CASTILLE'S *OPINION* MAKES UNWARRANTED AND UNFOUNDED ACCUSATIONS AGAINST THE FCDO

The *Opinion* makes a number unwarranted and unfounded accusations of misconduct against the FCDO and its employees. In this *Motion* we rebut those accusations, to the extent that we are able to do so in this forum.

Chief Justice Castille's accusations demonstrate a misperception about the role and responsibility of capital post-conviction counsel. Those misperceptions will be addressed in section A, below. Chief Justice Castille also makes specific and unfounded assertions about particular

actions taken by FCDO personnel. Those will be addressed in section B, below.

Before addressing those points, we address Chief Justice Castille's suggestion that the FCDO may be misusing federal funds by appearing in state court. E.g. *Opinion* *66. This is incorrect. As we have previously explained, the FCDO "is in full compliance with applicable federal administrative rules and regulations and has a separate source of funding to support its [litigation in] state court." Commonwealth v. Hill, — A.3d —, 2011 WL 832941, *5 (Pa. Mar. 11, 2011).

A. Chief Justice Castille's Misperceptions about the Role and Responsibility of Capital Post-Conviction Counsel.

Chief Justice Castille misperceives the role and responsibility of capital post-conviction counsel. Chief Justice Castille's view may be summarized as follows: the FCDO devotes unwarranted resources, "border[ing] on the perverse," as part of a "global agenda," that is not "legitimate zealous defense of particular clients," but rather the "pursuit of ... a political cause: to impede and sabotage the death penalty in Pennsylvania"; this agenda is carried out by "abusive," "obstructionist," "contemptuous," and "obstreperous" tactics, such as briefing many claims, to "maximize[] the burden on this Court's resources and time, so as to create delay," because "each day of delay the abuse generates is another delay of the day of eventual reckoning." *Opinion* *67-*71.

The suggestion that the goal of either the FCDO or of individual FCDO lawyers representing individual clients is "delay" as opposed to "legitimate zealous defense of particular clients," is easily refuted by reference to reported decisions. Over the past fifteen years, we served as counsel in fourteen (14) capital cases in which this Court ruled that either the conviction or the death sentence should be vacated.[3] During this same time period, we served as counsel in nineteen (19) other capital

[3] Commonwealth v. Smith, 995 A.2d 1143 (Pa. 2010) (vacating death sentence); Commonwealth v. Sattazahn, 952 A.2d 640 (Pa. 2008) (same); Commonwealth v. Miller, 951 A.2d 322 (Pa. 2008) (same); Commonwealth v. Williams, 950 A.2d 294 (Pa. 2008) (same); Commonwealth v. Gibson, 925 A.2d 167 (Pa. 2007) (same); Commonwealth v. Gorby, 909 A.2d 775 (Pa. 2006) (same); Commonwealth v. Sneed, 899 A.2d 1067 (Pa. 2006) (same); Commonwealth v. May, 898 A.2d 559 (Pa. 2006) (same); Commonwealth v. Collins (Ronald), 888 A.2d 564 (Pa.

cases in which the United States Court of Appeals for the Third Circuit or the United States Supreme Court ruled that either the conviction or the death sentence should be vacated.[4] We have also served as counsel in numerous cases in which courts of common pleas and federal district courts have granted relief, although given that such grants of relief are not final we will not enumerate them here.

By any objective measure, this is a record of both "zealous" and successful representation of the interests of particular clients, especially considering the daunting procedural and legal obstacles to relief in many of those cases. These rulings, in the thirty-three (33) cases enumerated above and in dozens we have not listed, were *all* based upon findings of significant constitutional error, findings made by dozens of Pennsylvania and federal jurists.

The FCDO did not achieve these successes by means of a "global agenda" of delay and obfuscation, or of any other "global agenda" unrelated to the specific needs of its individual clients. If this record highlights any "global agenda," it is to provide the best possible representation to individual clients.

Part of Chief Justice Castille's assertion of a "global strategy" of obfuscation and delay

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2005) (same); Commonwealth v. Zook, 887 A.2d 1218 (Pa. 2005) (same); Commonwealth v. Moore, 860 A.2d 88 (Pa. 2004) (same); Commonwealth v. Ford, 809 A.2d 325 (Pa. 2002) (same); Commonwealth v. Chambers, 807 A.2d 872 (Pa. 2002) (same); Commonwealth v. Strong, 761 A.2d 1167 (Pa. 2000) (vacating conviction).

[4]Rompilla v. Beard, 545 U.S. 374 (2005) (sentencing); Kindler v. Horn, Nos. 03-9010 & 03-9011 (3d Cir. April 29, 2011) (reinstating grant of sentencing relief after remand from Supreme Court); Breakiron v. Horn, 2011 WL 1458795 (3d Cir. April 18, 2011) (conviction); Lambert v. Beard, 633 F.3d 126 (3d Cir. 2011) (conviction); Rollins v. Horn, 386 Fed. Appx. 267 (3d Cir. 2010) (sentencing); Wilson v. Beard, 589 F.3d 651 (3d Cir. 2009) (conviction); Simmons v. Beard, 590 F.3d 223 (3d Cir. 2009) (conviction); Hardcastle v. Horn, 332 Fed. Appx. 764 (3d Cir. 2009) (conviction); Bond v. Beard, 539 F.3d 256 (3d Cir. 2008) (sentencing); Holland v. Horn, 519 F.3d 107 (3d Cir. 2008) (sentencing); Wallace v. Price, 243 Fed. Appx. 710 (3d Cir. 2007) (conviction); Laird v. Horn, 414 F.3d 419 (3d Cir. 2005) (conviction); Jacobs v. Horn, 395 F.3d 92 (3d Cir. 2005) (conviction); Holloway v. Horn, 355 F.3d 707 (3d Cir. 2004) (conviction); Carpenter v. Vaughn, 296 F.3d 138 (3d Cir. 2002) (sentencing); Jermyn v. Horn, 266 F.3d 257 (3d Cir. 2001) (sentencing); Appel v. Horn, 250 F.3d 203 (3d Cir. 2001) (conviction); Frey v. Fulcomer, 132 F.3d 916 (3d Cir. 1997) (sentencing); Smith v. Horn, 120 F.3d 400 (3d Cir. 1997) (conviction).

appears to be based upon a his belief that the FCDO raises "too many" claims and commits "too many" resources to its capital cases. However, there are valid reasons why capital post-conviction cases require counsel to raise many different arguments and to expend greater resources than one would expect to see in other litigation. The FCDO's approach to capital representation is an approach that is common among experienced capital post-conviction counsel nationwide, and that is well summarized by the American Bar Association, in its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913 (2003) ("ABA Guidelines"). The ABA Guidelines address some of Chief Justice Castille's misperceptions.

Regarding the criticism that FCDO counsel raise "too many claims," as this Court is aware, in order to pursue federal constitutional claims in federal habeas proceedings the facts and law related to those claims must be "exhausted" in state court. See 28 U.S.C. § 2254(c). PCRA proceedings are the last opportunity to do so. Attorneys and jurists familiar with capital direct appeals in Pennsylvania are well aware that many direct appeal briefs raise a paltry number of issues, in a weak manner, and that many of those issues are raised only under state law, even when federal law analogues to the state law issue are available. Federal issues not properly exhausted on direct appeal must be raised in PCRA or they will be forever forfeited, both for PCRA review and for federal habeas review.

According to the ABA: "Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are *arguably meritorious* under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review." ABA Guidelines at 1079.[5]

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[5] See also Explanatory Comment to Rule of Professional Conduct 3.1: "[T]he law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.... What is required of lawyers ...

> [I]t is of critical importance that ... post-conviction counsel [proceed] in a manner that maximizes the client's ultimate chances of success. "*Winnowing" issues in a capital appeal can have fatal consequences*. Issues abandoned by counsel in one case, pursued by different counsel in another case and ultimately successful, cannot necessarily be reclaimed later. When a client will be killed if the case is lost, counsel should not let any possible ground for relief go unexplored.

ABA Guidelines at 1083 (footnotes omitted).[6]

Legal scholars also explain the reasons for this comprehensive approach:

> [T]he courts have shown a remarkable lack of solicitude for prisoners – including ones executed as a result – whose attorneys through no fault of the prisoners were not sufficiently versed in the law to recognize relatively novel or subtle but meritorious federal claims, did not consider the possibility that a claim long rejected by local, state, and federal courts nonetheless might succeed in the future or in a higher court, or simply failed to conduct enough of an investigation to discover facts supporting meritorious federal constitutional claims.

Liebman & Hertz, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE 532 (5th ed.).

Allied to the notion of "too many" claims is the accusation of raising "frivolous" claims. "Frivolous," however, is often in the eye of the beholder. In Spotz itself, the majority refers to the prosecutorial misconduct claim as "frivolous," 2011 WL 1601629 at *21, but Justice Saylor rejected such a characterization of the claim, id. at *87 (Saylor, J., concurring). There are cases in which

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is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions."

[6] The ABA Guidelines give the example of Smith v. Murray, 477 U.S. 527 (1986), in which appellate counsel failed to raise a claim that had been rejected by the Virginia Supreme Court but was subsequently found meritorious by the United States Supreme Court. The claim was neither sufficiently novel to excuse counsel's failure to raise it, nor so obviously meritorious that counsel's failure to raise it constituted ineffective assistance. The client was executed. See ABA Guidelines at 1083-84 n.342. Another example is Hitchcock v. Dugger, 481 U.S. 383 (1987). Hitchcock involved a jury instruction claim that had been repeatedly rejected by both the Florida Supreme Court and the Court of Appeals for the Eleventh Circuit. The United States Supreme Court rejected certiorari petitions raising the issue in numerous cases; sixteen men who had raised the issue were executed. Certainly one could say that claim was "frivolous." Yet the Supreme Court unanimously granted relief on it in Hitchcock. See David von Drehle, AMONG THE LOWEST OF THE DEAD: THE CULTURE OF DEATH ROW, 300-01 (1995). If Hitchcock's lawyer had "winnowed" this "frivolous" claim, Hitchcock would also have been executed.

relief was ultimately granted on claims that had been labeled by this Court as frivolous, lacking in merit, specious, or words to that effect. Compare Rompilla v. Beard, 545 U.S. 374 (2005) (granting relief on claim of ineffective assistance at penalty phase), with Commonwealth v. Rompilla, 721 A.2d 786, 790 (Pa. 1998) (same claim "lacks arguable merit"); Lambert v. Beard, 633 F.3d 126 (3d Cir. 2011) (granting relief on Brady claim), with Commonwealth v. Lambert, 884 A.2d 848, 855 (Pa. 2005) (same claim is "purely speculative at best"); Bond v. Beard, 539 F.3d 256 (3d Cir. 2008) (granting relief on claim of ineffective assistance at penalty phase), with Commonwealth v. Bond, 819 A.2d 33, 47 (Pa. 2002) (describing same claim as "meritless" and "specious").

We do not contend that it would be appropriate, even in a capital case, to raise a claim that is truly "frivolous" in that no legitimate argument could be made in its favor. We confidently assert, however, that the claims raised in Spotz and in other cases handled by the FCDO meet both the "arguably meritorious" standard of the ABA Guidelines, and the standard of the Pennsylvania Rules of Professional Conduct, i.e., that a lawyer not raise a claim "unless there is a basis in law or fact for doing so that is not frivolous, *which includes a good faith argument for an extension, modification or reversal of existing law*." Rule 3.1, Pennsylvania Rules of Professional Conduct.

Chief Justice Castille's belief that "too many" resources have been provided to clients by the FCDO begs the question of what resources *should be* devoted to a capital post-conviction case. The ABA has studied Pennsylvania's capital post-conviction system and has concluded that, in those cases in which the FCDO are not counsel, assigned counsel are provided with woefully inadequate resources. See ABA, Evaluating Fairness and Accuracy in Death Penalty Systems: The Pennsylvania Death Penalty Assessment Report (October 2007).[7] This report found a number of areas in which Pennsylvania's post-conviction death penalty system "faltered" and for which "reforms" were recommended, including: failure to protect against poor defense lawyering; no state funding of

[7]http://www.americanbar.org/content/dam/aba

capital indigent defense services; and inadequate access to experts and investigators.

In contrast, the FCDO follows the standards promulgated by ABA Guidelines, according to which at every stage of a capital case there should be a "defense team" that "consist[s] of *no fewer than two* [qualified] attorneys ..., an investigator, and a mitigation specialist." Id. at 952.

With respect to state post-conviction representation in particular, the ABA Guidelines note:

> Counsel's obligations in state collateral review proceedings *are demanding*. Counsel must be prepared to thoroughly reinvestigate the entire case to ensure that the client was neither actually innocent nor convicted or sentenced to death in violation of either state or federal law....
>
> Like trial counsel, counsel handling state collateral proceedings must undertake a thorough investigation into the facts surrounding all phases of the case. It is counsel's obligation to make an independent examination of all of the available evidence – both that which the jury heard and that which it did not – to determine whether the decisionmaker at trial made a fully informed resolution of the issues of both guilt and punishment.
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> Since the reinstatement of the death penalty in 1976, there have been more than 110 known wrongful convictions in capital cases in the United States.[8] ... Because state collateral proceedings may present the last opportunity to present new evidence to challenge the conviction, it is imperative that counsel conduct a searching inquiry to assess whether any mistake may have been made.
>
> Reinvestigation of the case will require counsel to interview most, if not all, of the critical witnesses for the prosecution and investigate their backgrounds. Counsel must determine if the witness's testimony bears scrutiny or whether motives for fabrication or bias were left uncovered at the time of trial. Counsel must also assess all of the non-testimonial evidence and consider such issues as whether forensic testing must now be performed ....
>
> Counsel must conduct a similarly comprehensive reevaluation of the punishment phase to verify or undermine the accuracy of all evidence presented by the prosecution, and to determine whether the decisionmaker was properly informed of all relevant evidence, able to give appropriate weight to that evidence, and provided with a clear and legally accurate set of instructions for communicating its conclusion.

ABA Guidelines at 932-35 (footnotes omitted).

In this context, the resources devoted by the FCDO to Spotz in particular, and to other capital

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[8]As of October 2010, there were 138 exonerations in capital cases, including 6 in Pennsylvania. See Death Penalty Information Center, deathpenaltyinfo.org.

post-conviction cases in general, are not excessive but, instead, are well within the norms and expectations of experienced capital defense practitioners.[9]

Paradoxically, Chief Justice Castille both notes the heavy burden of establishing ineffective assistance of counsel and criticizes the FCDO for calling "too many" witnesses in attempting to meet that burden. *Opinion* *68. In litigating an ineffectiveness claim, we must establish deficient performance by the lawyer *and* show how the defendant was prejudiced. It is, therefore, neither "abusive" nor "perverse" to call the witnesses we think necessary, in our professional judgment, to meet that burden.[10]

B. FCDO Responses to Specific Allegations of Misconduct

In this section we respond to Chief Justice Castille's specific allegations of misconduct.

"UNAUTHORIZED APPEALS"

Chief Justice Castille states: "On multiple occasions, the Defender has taken unauthorized appeals in capital PCRA matters against its former clients' wishes." *Opinion* *75. The cited examples are Commonwealth v. Sam, 952 A.2d 565 (Pa. 2008), Commonwealth v. Ali, 10 A.3d 282 (Pa. 2010), Commonwealth v. Saranchak, 810 A.2d 1197 (Pa. 2002), and Michael v. Horn, 459 F.3d

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[9]Chief Justice Castille makes much of the fact that several lawyers have, at different times, worked on Spotz. *Opinion* *67. The FCDO staffs cases in accordance with the ABA Guidelines, which require a *minimum* of two attorneys, and support personnel, and consideration of the needs of specific condemned clients.

[10]Chief Justice Castille himself has made clear that expert mental health evidence is frequently indispensable in postconviction claims. See Commonwealth. v. Smith, 675 A.2d 1221, 250-51 (Pa. 1996) (Castille, J., dissenting). This is also made clear by decisions from this Court and the United States Supreme Court that rely on post-conviction testimony of mental health experts and other mitigation witnesses in granting relief. E.g., Sears v. Upton, 130 S.Ct. 3259, 3263-64, 3267 (2010) (relying on postconviction testimony of mental health experts); Porter v. McCollum, 130 S.Ct. 447, 451, 456 (2009) (same); Commonwealth v. Zook, 887 A.2d 1218, 1235 (Pa. 2005) (relying on expert testimony of organic brain damage to establish prejudice); id. at 1236 (Castille, J., concurring) (evidence of bad childhood would not have established prejudice, but expert testimony of brain damage did).

411 (3d Cir. 2006). See *Opinion* *75-*76. Chief Justice Castille's attack on FCDO counsel is baseless. Counsel have acted ethically and responsibly under difficult circumstances.

In **Commonwealth v. Sam**, 952 A.2d 565 (Pa. 2008), it is *undisputed* that Mr. Sam is and was *incompetent* to decide whether or not to pursue PCRA remedies, because of his severe mental illness. Id. at 568 (Commonwealth and defense experts both found Mr. Sam was "suffering from delusions and ... mentally incompetent to participate in PCRA proceedings"); id. at 569 ("the Commonwealth and the defense stipulated that [Sam] was presently 'incompetent for purposes of proceeding in a courtroom'"); id. at 571 n.8 (same); id. at 576 n.15 ("all parties agree that [Sam] remains incompetent to decide whether to pursue post-conviction relief"); id. at 590 (Baer, J., dissenting) ("it is undisputed that when this PCRA petition was filed, Appellee Sam was – and remains – legally incompetent, and therefore unable to either retain counsel to prosecute the PCRA or to proceed *pro se*").

It also is *undisputed* that *no suitable "next friend" could be located* to litigate for Mr. Sam because of, *inter alia*, "(1) the lengthy term of confinement that [Mr. Sam] has already served; (2) the fact that the individuals who most commonly seek appointment as next friends (i.e., family members) were the very victims of the murders ...; and (3) logistics and language barriers as [Mr. Sam] is an immigrant from Cambodia." Id. at 578.

Under these extraordinary circumstances in Sam – a severely mentally ill and incompetent death row prisoner for whom a next friend could not be located – counsel filed a PCRA petition for Mr. Sam in which counsel expressly explained that Mr. Sam "is not presently competent and does not have a rational understanding of these proceedings or of his rights. Accordingly, this form is being filed on his behalf in order to preserve his rights and seek appointment of counsel." Sam, 952 A.2d at 568 (quoting PCRA petition).

Counsel's actions in Sam were an entirely appropriate attempt to protect the rights of a

severely mentally ill, incompetent man who was alone in the world and who could have been executed absent counsel's assistance. Indeed, even the Commonwealth recognized that counsel's actions were aimed at protecting this incompetent death-row prisoner from losing his rights. See Sam at 579 ("The Commonwealth laudably does not advocate dismissal of [Mr. Sam's] PCRA petition as unauthorized, which would mean that appellee's right to PCRA review has expired").

In **Commonwealth v. Ali**, 10 A.3d 282 (Pa. 2010), FCDO counsel's actions were appropriate for reasons similar to those in Sam.

FCDO counsel became involved in Ali after Mr. Ali requested their representation on PCRA appeal. Before FCDO counsel became involved, Mr. Ali had a history of difficult relationships with counsel and of vacillating between seeking representation by counsel and asking to waive counsel and proceed *pro se*. See, e.g., Ali, 10 A.3d at 289-90 (describing appointment and dismissal of two prior PCRA lawyers); Commonwealth v. Ali, No. 9011-0300, 1/1 (Phil. CCP), NT 1/28/04, 6 (PCRA judge's statement: "I'm not going to permit him to represent himself again, because what he's been doing since the very beginning of this matter is going back and forth, back and forth representing himself, not representing himself ... I can't do it again."); Commonwealth v. Lester, 722 A.2d 997, 1004 (Pa. 1998)[11] (Mr. Ali sued first trial counsel, who withdrew; Mr. Ali then sued new counsel and punched new counsel in front of the jury; new counsel's motion to withdraw was denied "because a similar situation had occurred with prior counsel and the court feared the scenario would be repeated *ad infinitum*.").

FCDO counsel also had good reason to believe that Mr. Ali was incompetent to waive counsel. Indeed, before FCDO counsel became involved in Ali, "*the PCRA court [had] found [Mr. Ali] incompetent* to proceed *pro se*," and declined to allow him to waive counsel. Ali, 10 A.3d at 289. After FCDO counsel became involved, counsel had further good faith reasons to believe Mr.

[11]At the time of his direct appeal, Mr. Ali was known as Emanuel Lester.

Ali was incompetent, based upon his history, counsel's own interactions with him, and the observations of a mental health expert. Accordingly, the "Federal Defender [informed the PCRA court] that in its view, [Mr. Ali] was not competent to waive counsel and that it had a written report from a doctor who did not believe [Mr. Ali] was competent. The Federal Defender sought to have a competency proceeding held," but the PCRA court declined to allow it. Id. at 290. The Commonwealth subsequently agreed that a competency hearing should be held and asked the Pennsylvania Supreme Court to remand for such a hearing, and for appointment of counsel, but the Pennsylvania Supreme Court denied the Commonwealth's motion. Id. at 290 n.3 ("A motion subsequently filed by the Commonwealth requesting a remand, another competency hearing, and appointment of counsel was denied by order of this Court dated September 28, 2007.").

In short, FCDO counsel in Ali originally entered the case at Mr. Ali's request; counsel had good reason to believe that Mr. Ali was not competent to waive counsel; counsel knew that Mr. Ali had in the past vacillated about whether to proceed *pro se* or with counsel; counsel sought a competency hearing, which the courts declined to hold even when the Commonwealth agreed that such proceedings were appropriate, and counsel tried to protect Mr. Ali's rights by filing pleadings in support of his constitutional claims for relief. This was laudible, not unethical, conduct.

FCDO counsel's actions also were appropriate in **Commonwealth v. Saranchak**, 810 A.2d 1197 (Pa. 2002).

FCDO counsel were appointed for Mr. Saranchak's PCRA proceedings. 810 A.2d at 1198. Pursuant to their appointment, FCDO counsel filed a PCRA "petition and pursue[d] post-conviction review." Id. "Pending hearing on this petition, however, Saranchak ... indicat[ed] that he wished to discharge his attorneys and forego further legal proceedings." Id. at 1198. The PCRA court removed FCDO counsel and dismissed the PCRA petition.

Based upon FCDO counsel's interactions with Mr. Saranchak and the opinion of an expert

psychiatrist, FCDO counsel had reason to doubt Mr. Saranchak's competency to make the waiver; thus, FCDO counsel "filed a notice of appeal challenging the PCRA court's order, together with a motion seeking a stay of execution (which was then scheduled ...), pending appellate review of the waiver determination." Saranchak, 810 A.2d at 1198; see also id. at 1203 (Castille, J., dissenting) (noting FCDO counsel's proffer "that the PCRA hearing testimony of ... a psychiatrist who had previously examined Saranchak ... cast[s] doubt on the PCRA court's finding that Saranchak was competent to waive counsel and collateral review").

This Court *recognized that FCDO counsel had a reasonable argument*, and "held the matter in abeyance pending supplementation of the record with expert, psychiatric opinion concerning Saranchak's competency to effectuate a knowing, voluntary, and intelligent waiver of his right to counsel and to pursue further collateral proceedings." Id., 810 A.2d at 1198. FCDO counsel also obtained a stay of execution so that the competency proceedings could take place. Id. at 1198-99.

In short, the Saranchak "unauthorized appeal," about which Chief Justice Castille complains, was based upon FCDO counsel's good faith belief that Mr. Saranchak might be incompetent to waive counsel, and FCDO counsel's desire to protect Mr. Saranchak's rights. The Pennsylvania Supreme Court majority did not question the propriety of FCDO counsel's actions but, instead, recognized that there were legitimate competency issues that required further competency proceedings.

Moreover, subsequent developments in Saranchak confirm that FCDO counsel's actions did protect Mr. Saranchak's right to present his constitutional claims to the courts. Had FCDO counsel not acted as they did, Mr. Saranchak would have been executed. After FCDO counsel obtained the stay of his execution, Mr. Saranchak realized that *he did not want to waive counsel* and *did not want to waive review*. 810 A.2d at 1199. FCDO counsel, acting with Mr. Saranchak's specific approval, then asked this Court to reinstate his PCRA proceedings, and this Court granted that reinstatement.

Id. at 1199-1200 & n.2 (finding "that Saranchak's [FCDO] counsel are presently acting with his authority," and reinstating PCRA proceedings). Since that time, Mr. Saranchak, represented by FCDO counsel, has been pursuing post-conviction relief on the merits of his claims, which are significant. See Saranchak v. Beard, 616 F.3d 292 (3d Cir. 2010) (reversing District Court's grant of habeas relief on three guilt-phase claims, remanding for consideration of remaining claims).

FCDO counsel also acted appropriately in **Michael v. Horn**, 459 F.3d 411 (3d Cir. 2006). Mr. Michael had a long history of making, but later retracting, waivers of counsel and review, starting at the time of trial. After exhausting state court remedies under the PCRA with the assistance of FCDO counsel, Mr. Michael asked the federal District Court to dismiss FCDO counsel from his case and to dismiss his federal habeas proceedings so that he could be executed. The District Court held an evidentiary hearing at which it heard from a defense expert, who questioned Mr. Michael's competency and opined that further observation and evaluations were required. A court expert opined that Mr. Michael was competent. The District Court credited the court expert, relieved counsel and dismissed the habeas petition. See 459 F.3d at 412-15.

FCDO counsel knew that Mr. Michael had changed his mind in the past, and had sought to retract waivers of counsel and waivers of review. FCDO counsel also had reason to doubt Mr. Michael's competency, despite the District Court's competency finding, based upon their interactions with Mr. Michael, historical records of Mr. Michael's depression and other mental disturbances, and the opinion of the defense expert. FCDO counsel therefore filed a notice of appeal, which was the only way to seek appellate review of the District Court's competency finding and to protect Mr. Michael's right to federal habeas review if he changed his mind about waiving his rights, as he had done in the past. Cf. Smith v. Armontrout, 865 F.2d 1502, 1503-04 (8th Cir. 1988) (District Court found Smith competent after holding "an extensive and searching evidentiary hearing"; Smith decided to waive habeas review, "and asked that the case be dropped. His court-appointed counsel,

acting out of a commendable abundance of caution, filed a notice of appeal anyway"), subsequent history, Smith v. Armontrout, 865 F.2d 1515 (8th Cir. 1989) (Smith retracted earlier waiver and decided he wished to litigate; Court reinstated appeal that had been filed by counsel).

The Third Circuit's ruling in Michael further vindicates FCDO counsel's decision to file a notice of appeal in that case.[12] First, the Third Circuit "granted a Certificate of Appealability (COA) on the question of whether the District Court violated 21 U.S.C. § 848(q)(4)(B) [the federal statute that provides a right to counsel in capital habeas proceedings] in dismissing Michael's counsel." Michael, 459 F.3d at 416. Second, the Third Circuit found *"substantial reason" to doubt whether Mr. Michael actually was competent*, and *remanded to the District Court for further competency proceedings*. Id. at 419-20. Third, on the remand to the District Court, Mr. Michael *did change his mind* about waiver – he informed the Court that he wants federal habeas review and wants counsel to represent him. See Michael v. Horn, No. 96-CV-1554, Order of Dec. 11, 2007 (M.D. Pa.).

For all of the reasons set forth above, Chief Justice Castille's suggestion that FCDO counsel acted unethically or otherwise improperly in Sam, Ali, Saranchak and Michael is baseless. In addition, Chief Justice Castille's discussion of these cases fails to recognize the profoundly difficult situations capital defense counsel encounter in such cases.

The American Bar Association has recognized the serious attorney-client difficulties that capital defense counsel often encounter because of their clients' impaired mental states and stressful circumstances:

> Many capital defendants are ... severely impaired in ways that make effective communication difficult: they may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they may be mentally retarded or have other cognitive impairments that affect their judgment and understanding; they may be depressed and even suicidal; or they may

[12]Chief Justice Castille discusses only Judge Greenberg's concurring opinion in Michael, which criticized the FCDO for filing a notice of appeal "without Michael's authorization." *Opinion* *75. Judge Greenberg did not write for the Court.

> be in complete denial in the face of overwhelming evidence. In fact, the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that "[i]t must be assumed that the client is emotionally and intellectually impaired."

ABA Guidelines at 1007-08 (footnote omitted). Moreover, "the mental condition of many capital clients will deteriorate the longer they remain on death row. This may result in suicidal tendencies and/or impairments in realistic perception and rational decisionmaking." Id. at 1082.

Because of these common problems, and the irreversible nature of the death penalty, capital counsel have special "duties respecting uncooperative clients." ABA Guidelines at 1009 (capitalization altered). For example:

> Some clients will initially insist that they want to be executed—as punishment or because they believe they would rather die than spend the rest of their lives in prison; some clients will want to contest their guilt but not present mitigation. It is ineffective assistance for counsel to simply acquiesce to such wishes, which usually reflect the distorting effects of overwhelming feelings of guilt and despair rather than a rational decision in favor of a state-assisted suicide. ...
>
> Counsel in any event should be familiar enough with the client's mental condition to make a reasoned decision—fully documented, for the benefit of actors at later stages of the case—whether to assert the position that the client is not competent to waive further proceedings.

ABA Guidelines at 1009-10 (footnotes omitted); see also Christy Chandler, Note, Voluntary Executions, 50 Stan. L. Rev. 1897, 1902-03 (1998) (many death-row inmates express a desire to die, but most change their minds); Richard W. Garnett, Sectarian Reflections on Lawyers' Ethics and Death Row Volunteers, 77 Notre Dame L. Rev. 795, 801 (2002) (most capital defendants "at one point or another, express[] a preference for execution over life in prison. Most of them, though, change their minds." (footnote omitted)); Pa. R. Prof. Conduct 1.14(b) ("When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action").

The cases cited by Chief Justice Castille as examples of supposedly abusive and unethical

actions by FCDO counsel actually are examples of FCDO counsel's attempts to comport with the highest standards of ethical representation in a difficult area of capital defense.

COMMONWEALTH MOTIONS TO REMOVE FCDO COUNSEL

Chief Justice Castille states: "In [some] instances, the Defender's conduct has been so inexplicable (inexplicable when measured by professional ethical standards), that the Commonwealth has moved for the Defender's removal." Spotz at *76. Chief Justice Castille cites Commonwealth v. Bracey, 986 A.2d 128 (Pa. 2009); and Commonwealth v. Hill, 2011 WL 832941 (Pa. 2011), as examples. See *Opinion* *76-*80. Neither the general claim asserted, nor the specific cases cited, support the suggestion of misconduct.

Chief Justice Castille's suggestion that Commonwealth motions to remove FCDO counsel are a good barometer of supposed misconduct is misplaced. Commonwealth requests to remove defense counsel should be viewed with great suspicion. As Pennsylvania's Superior Court has observed, studies "suggest that the government's primary motive in bringing disqualification motions is to disqualify the most competent lawyers and firms." Commonwealth v. Cassidy, 568 A.2d 693, 695 n.1 (Pa. Super. 1989) (internal quotation marks omitted); see also id. at 698 n.4 (to grant government request for disqualification of defense counsel will "too easily set the stage for disqualification of the most reputable members of the Pennsylvania Bar; bringing a disqualification motion against the most competent lawyers and firms is certainly not a novel idea"); Wheat v. United States, 486 U.S. 153, 163 (1988) ("the Government may seek to 'manufacture' a conflict in order to prevent a defendant from having a particularly able defense counsel at his side").

Chief Justice Castille's specific references to Bracey and Hill fare no better. Chief Justice Castille suggests that FCDO counsel in Bracey and Hill deliberately defaulted or tried to default

federal constitutional claims in the expectation of receiving more favorable review in federal court.[13] Chief Justice Castille's suggestion that the FCDO has a "strategy" to deliberately default claims in state court is untenable. "No reasonable lawyer would forgo competent [state court] litigation of meritorious, possibly decisive claims on the remote chance that his deliberate dereliction might ultimately result in federal habeas review." Kimmelman v. Morrison, 477 U.S. 365, 383 n.7 (1986). Nor is there any support in the record for Chief Justice Castille's suggestion that FCDO counsel deliberately defaulted claims in Bracey and Hill.

In **Commonwealth v. Bracey**, FCDO counsel made clear that counsel's aim was to preserve an argument that Mr. Bracey had the right to a jury trial on his Atkins mental retardation claim. See *Opinion* *76. While the *Opinion* suggests that FCDO counsel's jury trial argument was a sham aimed at "[l]uring [the Pennsylvania Supreme] Court into finding the Atkins claim waived," that suggestion is belied even by the Pennsylvania Supreme Court's opinion in Bracey, authored by Chief Justice Castille, which finds that the jury trial issue has significant "*importance ... for the administration of criminal justice in Pennsylvania capital cases*," Bracey, 986 A.2d at 145; finds that FCDO counsel "fully briefed" the jury trial issue, id.; observes that FCDO counsel cited decisions from the United States Supreme Court and several state courts, as well as statutory provisions in several states, in support of the jury trial argument; and devotes approximately twelve pages of the Atlantic Reporter to addressing the jury trial argument. Id., 986 A.2d at 135-38, 140-47.

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[13] E.g., *Opinion* *76 (stating that Commonwealth "colorably" asserted "that the Defender's strategy is aimed not at fairly raising and exhausting federal claims in state court, but at positioning the case in such a way that Pennsylvania courts would deem them defaulted, while laying the groundwork to attempt to proceed *de novo* in federal court"); id. at *76-*77 ("summary of the Commonwealth's description of the [FCDO's] tactic" as "a strategy to bypass the state courts" by "[l]uring this Court into finding the Atkins claim waived" in order to obtain "*de novo* habeas corpus review in the local federal courts"); id. at *77 ("Like the Commonwealth, we recognized the Defender's gambit for what it was"); id. at *80 (suggesting that FCDO counsel are "deliberately engaging in the most overt of defaults, daring the state court to apply" procedural bar rules).

Regarding **Commonwealth v. Hill**, Chief Justice Castille suggests that FCDO counsel "deliberately ignore[d] a Rule 1925 order" as part of "a global agenda" of "luring" the state courts into a default ruling. *Opinion* *79. Again, there is simply no basis for this assertion. FCDO counsel's position in Hill is and always has been that we did *not* "deliberately ignore" the PCRA court's Rule 1925 order but that, instead, we *substantially complied* with that order.

In Hill, the PCRA court (Judge Berry) had granted penalty-phase relief and vacated the death sentences, but declined to grant relief from the convictions. Ms. Hill appealed, while the Commonwealth did not. Together with her notice of appeal, FCDO counsel filed a Jurisdictional Statement, which set forth the issues counsel intended to raise on appeal. Counsel served it on Judge Berry and the Commonwealth. On February 9, 2007, Judge Berry ordered counsel to file a Rule 1925 statement regarding issues to be raised on appeal. As set forth in the Application for Reargument filed by FCDO counsel in Hill, counsel sought and received clarification from Judge Berry's chambers of the type of statement Judge Berry sought, and ultimately filed a statement of appellate issues that provided *exactly what Judge Berry had requested*:

> [In a telephone call with Judge Berry's chambers,] counsel noted that we had filed a Jurisdictional Statement, which itself provided a concise statement of the issues to be raised on appeal. In a follow-up call from Judge Berry's chambers, chambers noted that it had received the Jurisdictional Statement and requested that counsel submit an additional "list" of the issues. Complying with chambers' request, counsel forwarded an additional statement of "PCRA Appellate Issues" to Judge Berry and the Commonwealth, again listing the issues to be raised on appeal. In a subsequent telephone call, Judge Berry's chambers confirmed that the additional list of issues had been received and satisfied Judge Berry's request. Judge Berry requested no additional submission, and subsequently issued his opinion on September 6, 2007.
>
> * * *
>
> In his September 6, 2007 ..., Judge Berry *expressly recognized* that Appellant's matters to be raised on appeal were those set forth in Appellant's Jurisdictional Statement, which counsel had served on Judge Berry, and which counsel had told Judge Berry's chambers set forth the appellate issues. See Opinion of Sept. 7, 2007 (Berry, J.) at 3 ("This Court is basing its opinion on the jurisdictional statement" that was filed "on Sept[ember] 6 2006"). Judge Berry did not invoke any Rule 1925-based "waivers" against Appellant's claims.

Commonwealth v. Hill, 521 CAP, Application for Reargument (filed 5/25/11).

Moreover, two Justices of this Court found FCDO counsel's argument compelling enough that they would have remanded for a hearing to determine if counsel substantially complied:

> I supported the rule of substantial compliance advanced in the lead opinion in Berg v. Nationwide Mutual Insurance Co., ___ Pa. ___, 6 A.3d 1002 (2010) (opinion announcing the judgment of the Court), because I believed it was consistent with my previous expressions in the Rule 1925 arena, the direction the Court had taken in recent amendments to the rule, and the original design of the Rules of Appellate Procedure incorporating liberal construction to secure the just and timely resolution of legal controversies under Rule 105(a). See id. at___, 6 A.3d at 1014 (Saylor, J., concurring and dissenting). Similarly, I favor a limited remand here, as proposed by Appellant as an alternative, to determine whether there was substantial compliance with the PCRA court's instructions.

Hill, 2011 WL 832941 at *11 (Saylor, J., joined by Todd, J., dissenting).

"IMPROPER APPEALS IN SERIAL CAPITAL PCRA" CASES

Chief Justice Castille asserts that FCDO counsel have taken "improper," "bogus" or "dubious" appeals on successive PCRA petitions in Commonwealth v. Abdul-Salaam, 996 A.2d 482 (Pa. 2010), and Commonwealth v. Porter, No. 557 CAP. *Opinion* *80-*83. This, too, is unfounded.

Commonwealth v. Abdul-Salaam: Chief Justice Castille makes unfounded accusations of "deceptive, unprofessional, and frivolous conduct by the Defender" in Abdul-Salaam. *Opinion* *81.

Chief Justice Castille states that FCDO counsel filed a successive PCRA petition in Abdul-Salaam as a ploy for "building in delay in cases which should be proceeding to resolution in federal court." *Opinion* *80. Nothing could be further from the truth.

FCDO counsel actually *tried* to obtain "resolution in federal court," but the *Commonwealth* opposed FCDO counsel's attempts to obtain federal review; the *Commonwealth* insisted that FCDO counsel first seek relief in state court; and the federal court accepted the *Commonwealth*'s arguments and *required* FCDO counsel to litigate in state court before obtaining federal review. See Abdul-Salaam v. Beard, 2008 WL 2704605, *14-*18 (M.D. Pa. July 7, 2008) (describing FCDO

arguments that Mr. Abdul-Salaam should *not* be required to return to state court); id. at *16 (describing *Commonwealth* argument that Mr. Abdul-Salaam *should* be required to return to state court "because he has an adequate remedy at law in the state courts" under the PCRA); id. at *18-*19 (ruling that Mr. Abdul-Salaam must return to state court).

Thus, Chief Justice Castille chastised FCDO counsel for pursuing state court remedies when it was the *Commonwealth* that insisted those remedies must be pursued, and when FCDO counsel objected to and argued against having to pursue those remedies.

Chief Justice Castille also states that FCDO counsel "deceptively labeled" the PCRA petition – which the *Commonwealth* insisted be litigated – as a "Protective" petition, thereby "leading to the lower [PCRA] court taking no action." *Opinion* *80. This, too, is unfounded.

FCDO counsel filed the PCRA petition while proceedings were still pending in federal court, to ensure that the PCRA's 60-day time limit was satisfied. Counsel labeled the PCRA petition "Protective" because counsel believed it *was* protective – counsel believed that the claims were ripe for immediate *federal court* adjudication, and filed the PCRA petition only in an abundance of caution in case counsel's view of the law was incorrect. Counsel explained this in the petition. See Third Protective PCRA Petition ¶ 4 ("counsel file this protective pleading to preserve Petitioner's right to litigate in this Court in the event counsels' legal judgment in this regard is incorrect").

After the federal court's July 7, 2008 ruling accepted the *Commonwealth*'s argument that Mr. Abdul-Salaam did have to exhaust the claims in the PCRA petition, FCDO counsel notified the PCRA court of that ruling and asked the PCRA court to schedule an evidentiary hearing on the claim. See Supplement to ... Third Protective Petition and ... Motion for Evidentiary Hearing (filed in Court of Common Pleas on Aug. 26, 2008) ¶ 4 ("[O]n July 7, 2008 the federal court stayed further federal proceedings in the habeas matter so that the new evidence and claims arising from it could be presented to the state courts. Thus, *Petitioner's Third Petition is now ripe for adjudication*.");

id. ¶ 6 (request for evidentiary hearing). Several months later, in April 2009, FCDO counsel filed another supplement in the PCRA court, again asking that an evidentiary hearing be scheduled. There was nothing "deceptive" in the state court filings.

When the PCRA court failed to take any action on the PCRA petition, despite counsel's notification that the petition was "ripe for adjudication," counsel in August 2009 appealed to the Pennsylvania Supreme Court, asking that Court to either grant relief or compel the PCRA court to act. Chief Justice Castille characterizes this appeal as an "improper and disingenuous" "maneuver" designed to create "delay" because FCDO counsel supposedly "never made a request for a ruling" before taking the appeal and because the Pennsylvania Supreme Court eventually deemed the appeal procedurally improper. These criticisms are unfounded. First, as set forth above, FCDO counsel actually had *twice* asked the PCRA court to rule, first in August 2008 (shortly after the federal court required counsel to seek state court remedies), and again in April 2009. Second, while the Pennsylvania Supreme Court in June 2010 held that FCDO counsel had taken a procedurally erroneous approach to seeking appellate review, FCDO counsel did not know this would be the outcome when they filed the appeal in August 2009. FCDO counsel did not file the appeal for purposes of "delay," but, rather, in response to the lower court's failure to act on a petition that otherwise lay dormant.

Commonwealth v. Porter: Chief Justice Castille's assertions about Porter, *Opinion* *81-*83, are remarkable in that the Porter appeal is *pending before the Pennsylvania Supreme Court*. See Pa. Code of Judicial Conduct, Canon 3(A)(6) ("Judges should abstain from public comment about a pending proceeding in any court"). After the *Opinion* was released, FCDO counsel in Porter filed a motion seeking Chief Justice Castille's recusal from Porter because the *Opinion* prejudges one of the central issues presented on appeal – the timeliness *vel non* of a Brady claim, see *Opinion* at *83 (asserting that FCDO's aim in Porter is to "drag out the disposition of the time-barred Brady claim")

– and because of the animosity toward FCDO counsel expressed in the *Opinion*.

A copy of the Porter Recusal Motion is appended. It describes in detail why Justice Castille's accusations against FCDO counsel in Porter are inaccurate. In summary form:

> First, ... Chief Justice Castille criticized undersigned counsel because the PCRA court stayed Appellant's Atkins claim. See Spotz at [*83]. But, as set forth earlier in the Procedural History, the request to stay the Atkins claim was *made by the Commonwealth*. ...
>
> Second, ... Chief Justice Castille criticized the undersigned because "Nolas appealed the [PCRA court's] non-final order" denying the Brady claim. Spotz at [*83]. Again, however, this ... was a good faith effort to protect Appellant's rights.
>
> As set forth in the Procedural History, undersigned counsel asked the PCRA court to not dismiss the Brady claim, but to allow an evidentiary hearing; in the alternative, counsel asked the PCRA court to at least allow a deposition of the key witness (who, counsel noted, was elderly and ill) before deciding whether to dismiss. The PCRA court rejected counsel's arguments and dismissed the claim. The PCRA court specifically notified counsel that a notice of appeal should be filed within 30 days.
>
> Counsel timely filed a notice of appeal, as any responsible lawyer would have done under those circumstances. ... [N]either the Commonwealth, nor the PCRA court, nor the Pennsylvania Supreme Court expressed any jurisdictional concern about the appeal ....
>
> Nor did the Commonwealth raise any jurisdictional concerns in its briefing on appeal. The jurisdictional issue was first raised *sua sponte* by this Court when it issued its order of October 13, 2010, quoted in Spotz at [*81], six (6) months *after* the appellate briefs of the parties had been filed.
>
> In response to this Court's specific, *sua sponte* request, Appellant's counsel researched the jurisdictional issue, reached the conclusion that the order was non-final, and informed the Court of this conclusion. The Commonwealth itself, through its counsel, did the same thing and reached the same conclusion on the jurisdictional question the Court had posed. ...
>
> Third, Chief Justice Castille ... suggested that undersigned counsel has somehow tried to trick the state courts and the federal courts in this case. This is unfounded. At every stage of the proceedings, undersigned counsel has filed regular status reports in the Third Circuit discussing the status of the state court proceedings. Counsel also has informed the state courts of what is happening in the federal courts, as demonstrated even by the PCRA court transcript quoted in Chief Justice Castille's opinion, where the *Commonwealth's attorney agrees that the undersigned has accurately described the federal court proceedings*. See Spotz at [*82-*83] ....

Porter Recusal Motion ¶¶ 45-52 (paragraph numbers omitted).

MOTIONS TO EXPEDITE

Chief Justice Castille suggests that FCDO counsel engaged in misconduct by seeking to expedite appellate review in Commonwealth v. Dougherty, No. 585 CAP, Commonwealth v. Hutchinson, No. 517 CAP, and Commonwealth v. Douglas, No. 495 CAP. *Opinion* *73.[14]

We are aware of no other case in Pennsylvania in which counsel has been criticized for seeking to expedite review. Pennsylvania's Rules of Appellate Procedure recognize the availability of expedited review, see Rule 105(a), Pennsylvania's Rule of Professional Conduct 3.2 urges counsel to "make reasonable efforts to expedite litigation consistent with the interests of the client," and Pennsylvania's courts allow expedited review, e.g., Petition of Wasser, 589 A.2d 204 (Pa. 1991); Consumers Ed. and Protective Ass'n v. Schwartz, 432 A.2d 173, 175 (Pa. 1981); Free Speech, LLC v. City of Philadelphia, 884 A.2d 966, 970 (Pa.Cmwlth. 2005); Coghlan v. Borough of Darby, 844 A.2d 624, 627 (Pa.Cmwlth. 2004).

Moreover, there is nothing abusive about the specific reasons FCDO counsel gave for seeking expedited review in the cases cited by Chief Justice Castille – Dougherty, Hutchinson and Douglas. FCDO counsel's actions were entirely reasonable advocacy.

In **Dougherty**, FCDO counsel sought to expedite post-conviction proceedings in a case where *the Commonwealth agreed that a remand for an evidentiary hearing was appropriate.* See id., 2011 WL 1601798, *3 (Saylor, J., concurring and dissenting) (quoting Commonwealth's Brief: "[T]he Commonwealth submits that a remand for an evidentiary hearing would not be inappropriate if this Court so prefers, and might enhance further review.").

Just one day before Chief Justice Castille issued his *Opinion* criticizing FCDO counsel's

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[14]Again, it is troubling that Chief Justice Castille would comment on these cases when each was pending before the Court when Chief Justice Castille wrote his *Opinion*. See Pennsylvania Code of Judicial Conduct, Canon 3(A)(6) ("Judges should abstain from public comment about a pending proceeding in any court"). The Court ruled in Dougherty on the day before it ruled in Spotz. The appeals in Hutchinson and Douglas remain pending.

actions in Dougherty, the Pennsylvania Supreme Court ordered that the Dougherty case *should be remanded*, and also ordered recusal of the Common Pleas Judge who had orginally denied the PCRA petition because of the Judge's personal attacks on Mr. Dougherty, personal attacks on FCDO counsel for seeking her recusal, and alteration of a transcript. See id., 2011 WL 1601798, *1 (per curiam order); id. at *1-*3 (Baer, J., concurring). In short, the Pennsylvania Supreme Court's ruling in Dougherty vindicated FCDO counsel's position that the client had been treated unfairly and deserved proper review by an unbiased PCRA court.

In **Hutchinson**, FCDO counsel filed a motion to expedite in February 2011, explaining that Mr. Hutchinson's death sentence was vacated by the Court of Common Pleas in August 2006, after the Commonwealth stipulated that his death sentence was unconstitutional; that, despite the fact that he no longer had a death sentence, Mr. Hutchinson "remained confined on death row, subject to the harsh conditions and severe limitations consistent with that level of incarceration"; and that appellate briefing in the case had been completed for more than 2½ years. Commonwealth v. Hutchinson, No. 517 CAP, Motion to Expedite Decision ¶¶ 1-3. Again, there is nothing abusive about this. A prisoner who has spent more than four years on death row *without a death sentence* has every right to demand quick resolution of his case.

Finally, in **Douglas**, FCDO counsel sought expedited review because our client has been *diagnosed with terminal pancreatic cancer*. See Commonwealth v. Douglas, No. 495 CAP, Motion for Expedited Review (filed in Feb. 2011). Mr. Douglas' death sentence was vacated by the Court of Common Pleas in November 2005, when the court found trial counsel was ineffective at capital sentencing; the Commonwealth *did not appeal* the Court of Common Pleas vacation of the death sentence; Mr. Douglas appealed the denial of guilt-phase relief; the case was fully briefed on appeal in October 2008; Mr. Douglas, like Mr. Hutchinson, remains on death row despite the fact that he does not have a death sentence. Id. ¶¶ 1-5.

Absent a quick resolution of his pending appeal, Mr. Douglas may die on death row, despite the absence of a death sentence, without ever receiving appellate review of his significant challenges to his conviction. Chief Justice Castille dismissed this compelling case for expedited review with a brief parenthetical, *Opinion* *73 ("Commonwealth v. Douglas, 495 CAP (alleging, without supporting documentation, recent diagnosis of potentially fatal cancer, and arguing that diagnosis warrants preferential expedition of decision)"), but, surely, it is a legitimate request by FCDO counsel. Cf. Berg v. Nationwide Mutual Insurance Co., 6 A.3d 1002, 1004 n.5 (Pa. 2010) ("This Court has the utmost trust in and respect for the lawyers who appear before us, as they are officers of the court, and we accord them the benefit of accepting their factual representations unless such representations are contradicted by the record.").

OTHER CASES REFERRED TO BY CHIEF JUSTICE CASTILLE

Chief Justice Castille referred to other cases as purported examples of FCDO misconduct. Again, the accusations are unfounded.

Commonwealth v. Banks, Nos. 461, 505 & 578 CAP: Chief Justice Castille makes unfounded claims of FCDO misconduct in Banks, see *Opinion* *83, a case in which the hearing court has *three times* found Mr. Banks to be incompetent.

Chief Justice Castille's allegations center around arguments FCDO counsel made to the Pennsylvania Supreme Court on two issues: (1) whether the hearing judge properly precluded the Commonwealth's mental health expert from testifying because the Commonwealth violated the judge's order to notify defense counsel before the Commonwealth's expert met with the defendant; and (2) whether defense counsel should be notified before the Commonwealth's expert makes further contact with the defendant, so that the defense can be present or, at least, arrange for videotaping of the expert's evaluation. FCDO counsel's arguments on these issues cannot by any stretch of the imagination be fairly characterized as abusive or improper.

As to the first issue, the *hearing judge* and *two Justices of the Pennsylvania Supreme Court agreed with FCDO counsel's arguments*. See Commonwealth v. Banks, 943 A.2d 230, 239 (Pa. 2007) (Cappy, C.J., joined by Baldwin, J., dissenting) ("I dissent. The Majority grants a new competency hearing merely because the trial court precluded the testimony of the Commonwealth's psychiatric expert, Dr. Michals, six weeks before the competency hearing was conducted. Contrary to the Majority, my examination of the record leads me to conclude that the Commonwealth created its own predicament when it failed to abide by the trial court's directive and failed to refute the overwhelming evidence establishing George E. Banks' incompetence. Accordingly, I would affirm the findings and conclusions of law of the Court of Common Pleas of Luzerne County, establishing that Banks is incompetent to pursue clemency proceedings and incompetent to be executed."). As to the second issue, FCDO counsel plainly had a good faith basis for the argument, which is reasonable, supported by Supreme Court precedent, and aimed at ensuring the reliability of the evaluation. E.g., Panetti v. Quarterman, 127 S. Ct. 2842, 2856-57 (2007) (due process requires that prisoner whose competence to be executed is at issue have reasonable opportunity to rebut state experts); Estelle v. Smith, 451 U.S. 454 (1981) (use against defendant of competency evaluation at which counsel was not present violates Fifth and Sixth Amendments).

Regarding **Commonwealth v. Lambert**, 884 A.2d 848 (Pa. 2005), the *Opinion* states:

> Commonwealth v. Lambert ... details a distinct form of unauthorized Defender (mis)conduct. See id. at 853 (noting finding of supervising judge of criminal division of Philadelphia Court of Common Pleas, who concluded that Defender illegally abused subpoena power to circumvent PCRA discovery rules and obtain archived police files in approximately 25 capital cases, including Lambert's, leading to disciplinary referral).

Opinion *76 n.7. Chief Justice Castille's comments about Lambert, an opinion he authored, are notable for two reasons.

First, the "disciplinary referral" to which Chief Justice Castille refers was *dismissed* by the Disciplinary Board in 2003, before Chief Justice Castille authored the Lambert opinion. Second, the

"archived police files" obtained by FCDO counsel in Lambert contained *material, exculpatory evidence that the Commonwealth had withheld from the defense at trial*, based upon which the United States Court of Appeals for the Third Circuit *found a violation of Brady v. Maryland*, 373 U.S. 83 (1963), and *vacated Mr. Lambert's conviction*. Lambert v. Beard, 633 F.3d 126 (3d Cir. 2011); see also id. at 134 (describing Chief Justice Castille's opinion denying relief on the Brady claim as "patently unreasonable"); id. at 135 (Chief Justice Castille's opinion "that Lambert had not met the requirements of Brady was an unreasonable application of clearly established Supreme Court precedent"). Chief Justice Castille says not a word about the *Commonwealth's misconduct* in suppressing exculpatory evidence in a capital case, resulting in almost three decades of unconstitutional confinement; instead, Chief Justice Castille's ire is reserved for the FCDO counsel who uncovered the Commonwealth's misconduct.

SUPPOSED BRIEFING ABUSES IN SPOTZ

The *Opinion* complains about the number of claims and sub-claims raised in Spotz, and about the formatting of the brief, e.g., use of lengthy footnotes and omitting a narrative statement of facts in favor of discussion of relevant facts in the body of each claim. The *Opinion* characterizes such practices as "contemptuous," "obstreperous" and "abusive." *Opinion* *69-*71. The *Opinion*'s suggestion that FCDO counsel are attempting to do anything other than raise and exhaust claims within the existing rules is unfounded.

Both in Spotz itself and in other cases before this Court, FCDO counsel have made a good faith effort to comply with this Court's briefing rules, while at the same time raising and exhausting their clients' claims. Briefing rules have been a source of considerable controversy on the Court, a controversy that has (apparently) been resolved by requiring increasing detail, and even repetition, with respect to each claim that is briefed. See, e.g., Commonwealth v. McGill, 832 A.2d 1014, 1020-23 (Pa. 2003) (elaborate scheme for pleading and briefing "layered" claims of ineffective

assistance of counsel). Members of the Court continue to disagree in individual cases about whether these rules have been satisfied. Compare Commonwealth v. Steele, 961 A2d 786, 798-802 (Pa. 2008) (only one of several related claims was adequately briefed) with id. at 839 (Saylor, J., dissenting) ("I see no need for Appellant to have repeated these assertions [regarding prejudice] within every subpart of his claim ..., when the gist of his argument is express and apparent. In my view, the [majority's] finding of a deficiency in the briefing on this point, as well as several others, results from an unduly formalistic and/or compartmentalized approach to the arguments presented.") (footnote omitted). In Spotz, and in every other FCDO case, the brief has been accepted for filing under the Court's rules.

Ultimately, the *Opinion*'s complaint appears to be about the number of claims raised more than the manner in which they are briefed. If the FCDO raised only two or three claims in each brief, it would be relatively straightforward to comply with any existing or future briefing rules. As explained above, however, it would be ethically improper for the FCDO to "winnow" claims in that fashion in a capital post-conviction appeal. Given that we have an ethical duty to raise and exhaust claims on behalf of our clients, we make every effort to accomplish that task within the letter of the Court's briefing rules.

III. CHIEF JUSTICE CASTILLE'S OPINION SHOULD BE WITHDRAWN

If the *Opinion*'s allegations against FCDO personnel were true, the *Opinion* would *still* need to be withdrawn because it is not a proper "concurring opinion" as defined by this Court's IOPs. For the reasons stated in § I, we submit that the *Opinion* should be withdrawn.

The inaccuracy of the *Opinion*'s attacks on FCDO counsel makes the need to withdraw the *Opinion* compelling.

FCDO counsel are confident that we have not committed misconduct, but have attempted to provide the high quality representation required in capital cases, in conformity with professional and

ethical standards such as the ABA Guidelines and Pennsylvania's Rules of Professional Conduct. However, the *Opinion*'s unfounded attacks on FCDO counsel may have a "chilling effect on [other] attorneys," Mudd v. United States, 798 F.2d 1509, 1512 (D.C. Cir. 1986), who may justifiably fear that appropriately zealous representation will bring the same attacks down on their heads. The *Opinion* thus threatens to "dilute[] the protection afforded by the right to counsel," Maine v. Moulton, 474 U.S. 159, 171 (1985), in cases where that protection is most essential.

Further, the *Opinion*'s unfounded accusations against several *expressly named* FCDO attorneys and personnel violate the Pennsylvania Constitutional right to "reputation," Art. I, §§ 1, 11, a right that "the Pennsylvania Constitution establishes ... as one of the fundamental rights that cannot be abridged without compliance with state constitutional standards of due process and equal protection." Hatchard v. Westinghouse Broadcasting Co., 532 A.2d 346, 350 (Pa. 1987); see Wolfe v. Beal, 384 A.2d 1187, 1189 (Pa. 1978) (government records containing information that can subject a party to stigmatization are a "threat" to that person's constitutionally protected reputation); Pennsylvania Bar Ass'n v. Commonwealth, 607 A.2d 850, 854 (Pa. Cmwlth. 1992) (where public records contain "names of attorneys involved in 'suspected fraudulent claims[,' it] inevitably leads to the injury of these attorneys' reputations, based upon suspicion alone").[15]

The *Opinion* should be withdrawn.

[15]Obviously, actual misconduct would not implicate the constitutional right to reputation. It is nonetheless worth noting that even complaints to the Disciplinary Board of the Supreme Court of Pennsylvania are kept confidential, as are all case records following the dismissal of a formal disciplinary charge. See Pennsylvania Disciplinary Rules and Procedures, § 93.101, et seq. (2009).

CONCLUSION

For all of the above reasons, undersigned counsel respectfully move the full Court to Withdraw the concurring opinion of Chief Justice Castille authored in connection with the case of Commonwealth v. Spotz, 576 Capital Appeal Docket, 2011 WL 1601629 (Apr. 29, 2011).

Respectfully Submitted,

Michael Wiseman
Pa. Bar Number 75342
Eric Montroy
Pa Bar Number 90949
Federal Community Defender Office
Eastern District of Pennsylvania
Suite 545 West – The Curtis Center
Philadelphia, PA 19106
215-928-0520

Certificate of Service

I, Michael Wiseman, hereby certify that on this 13th day of May, 2011 I served the foregoing on the following person by United States Mail, First Class, Postage Prepaid:

Jaime M. Keating, Esq
First Assistant District Attorney
Office of the Cumberland County District Attorney
One Court House Square
Carlisle, Pennsylvania 17103

Michael Wiseman

EXHIBIT

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee, v. ERNEST PORTER, Appellant.	)	No. 557 CAP

APPELLANT'S MOTION FOR
RECUSAL OF CHIEF JUSTICE CASTILLE
WITH REQUEST FOR REFERRAL TO THE FULL COURT

Appellant, Ernest Porter, through counsel, moves for recusal of Chief Justice Ronald D. Castille from the instant appeal. Appellant respectfully requests that this recusal motion be referred to the full Court. In support of this motion, Appellant states as follows:[1]

INTRODUCTION

1. This is a capital PCRA appeal. The issues pending before the Court are the merits and timeliness under the PCRA of Appellant's claim that the Commonwealth violated Brady v. Maryland, 373 U.S. 83 (1963), and its progeny by withholding exculpatory evidence from the defense at trial. After the parties briefed the Brady and timeliness issues, the Court *sua sponte* raised jurisdictional and other questions, on which the parties submitted supplemental briefs.

2. On April 29, 2011, the Pennsylvania Supreme Court issued a ruling in Commonwealth v. Spotz, No. 576 CAP, a capital PCRA case. Chief Justice Castille wrote a concurring opinion ("Spotz"), Exhibit 1, in which he "join[ed] the Majority Opinion in its entirety" as to its discussion of the substantive issues in the Spotz case, but wrote "separately to note and address broader issues implicated by the role and performance of federal counsel in purely state court collateral proceedings in capital cases." Id. at 1.

[1]All emphasis herein is supplied unless otherwise indicated.

3. In the 34-page concurring opinion in Spotz, Chief Justice Castille launched a broad attack upon the integrity, ethics and methods of undersigned counsel and undersigned counsel's office. Chief Justice Castille included assertions about several cases that are currently pending before the Pennsylvania Supreme Court, including Appellant's pending appeal.

4. Throughout the Spotz concurring opinion, Chief Justice Castille characterizes the actions and written submissions of undersigned counsel and other attorneys in counsel's office – in Spotz and in several other cases, including Appellant's – as "abusive," "unethical," "inappropriate," "dubious," "frivolous," "improper," "prolix," "obstructionist," "flouting," and "obstreperous," and as involving "shenanigans," "deliberate violation[s]," "sabotage," and efforts to "dismantle" governing state law.

5. Of particular relevance to Appellant Porter, Chief Justice Castille discussed at some length the instant *pending appeal* in Appellant's case. See Spotz at 27-31. Chief Justice Castille asserted that undersigned counsel has engaged in "shenanigans in Porter," and stated that counsel's motivation in Porter is to "drag out the disposition of the time-barred Brady claim." Spotz at 30.

6. In short, Chief Justice Castille expressly *accused undersigned counsel of misconduct* in Appellant's pending case, and Chief Justice Castille expressly *articulated an opinion about the merits of the appeal* in Appellant's pending case, by concluding that Appellant's Brady claim is "time-barred."

7. In light of Chief Justice Castille's statements in Spotz about Appellant's pending appeal, we are obliged to seek Chief Justice Castille's recusal. As we also describe below, Chief Justice Castille's assertions about the Porter case are themselves not accurate.

PROCEDURAL HISTORY

8. In February 1986, Appellant was tried, convicted and sentenced to death in the Philadelphia Court of Common Pleas. The Pennsylvania Supreme Court affirmed, Commonwealth

v. Porter, 569 A.2d 942 (Pa. 1990) ("Porter-1"), and certiorari was denied, 498 U.S. 925, reh'g denied, 498 U.S. 1017 (1990).

9. Appellant filed a *pro se* PCRA petition. The PCRA court appointed counsel, Ronald J. Sharper, Esquire, who "filed a 'no merit' letter, pursuant to Commonwealth v. Turner, 518 Pa. 491, 544 A.2d 927 (1988), [i.e., a 'Finley letter,'] stating that none of the issues raised in Appellant's petition were of arguable merit. Furthermore, he concluded that his review of the matter revealed no additional issues which could be raised in a counseled, amended petition." Commonwealth v. Porter, 728 A.2d 890, 893 (Pa. 1999) ("Porter-2") (footnote omitted). On "May 25, 1995, the PCRA court dismissed Appellant's petition and permitted counsel to withdraw." Id.

10. Undersigned counsel assumed Appellant's representation on appeal from that denial of relief. Undersigned counsel's office investigated the case and, as the United States District Court would later conclude, found significant constitutional claims, including jury instruction errors, ineffective assistance of counsel, violations of Brady and its progeny, and racial discrimination by the prosecutor during jury selection. Appellant presented these claims to this Court, but the Court affirmed the denial of PCRA relief. Porter-2.

11. Appellant sought federal relief from his convictions and death sentence, filing a habeas corpus petition in the United States District Court for the Eastern District of Pennsylvania. Porter v. Horn, No. 99-cv-2677 (E.D. Pa.).

12. While habeas proceedings were pending in the District Court, the United States Supreme Court decided Atkins v. Virginia, 536 U.S. 304 (2002), holding that a death sentence for a person with mental retardation violates the Eighth Amendment to the United States Constitution.

13. In August 2002, Appellant timely filed a second PCRA petition raising an Atkins claim for Appellant.

14. On June 26, 2003, the District Court granted habeas relief as to the death sentence,

finding a jury instruction error of constitutional magnitude, but denied relief as to the convictions. Porter v. Horn, 276 F.Supp.2d 278 (E.D. Pa. 2003). Of significance here, the Atkins claim had been filed in the Court of Common Pleas ten (10) months *before* the District Court granted relief as to the death sentence.

15. The Commonwealth appealed the District Court's grant of penalty-phase relief, and Appellant cross-appealed the denial of guilt-phase relief. The District Court granted Appellant a certificate of appealability on eight (8) guilt-phase claims raised by Appellant, thus finding that they are significant claims that should be reviewed by the Third Circuit. Porter v. Horn, 276 F.Supp.2d at 364-65; see 28 U.S.C § 2253(c)(2) ("certificate of appealability" allowed "only if the applicant has made a substantial showing of the denial of a constitutional right").

16. The penalty-phase claim on which the District Court granted relief and the eight guilt-phase claims for which it granted a certificate of appealability are claims that undersigned counsel had raised in the PCRA appeal in Porter-2, after court-appointed PCRA counsel asserted that there were *no arguable claims* and filed a Finley letter.

17. On August 13, 2003, shortly after the District Court granted habeas relief from the death sentence, *the Commonwealth wrote to the PCRA judge, asking the PCRA judge to "stay any further proceedings" on the Atkins claim*:

> Counsel for [Mr. Porter] ... has filed a second PCRA petition in which he seeks to have this Court declare that defendant is mentally retarded, and therefore, pursuant to the decision of the United States Supreme Court in Atkins v. Virginia, 122 S.Ct. 2242 (2002), he is ineligible for the death penalty. For the reasons set forth below, the Commonwealth, respectfully suggests that, in the interests of preserving your Honor's limited judicial resources, the Court should *stay any further proceedings* on defendant's present petition at this time.
>
> First, although a jury originally imposed a death sentence in this case, that sentence was recently vacated by ... the United States District Court for the Eastern District of Pennsylvania .... Therefore, defendant is not presently even subject to a death sentence. Accordingly, his current mental retardation claim could properly be addressed at the time any new penalty hearing might be held in this case.[]
>
> Second, staying any further consideration of defendant's Atkins mental

> retardation claim, at least until such time as any further penalty proceedings may occur, is especially appropriate here because the Pennsylvania legislature is presently in the process of enacting legislation that will establish the specific procedures and criteria that trial courts must follow when deciding Atkins mental retardation claims.
>
> * * *
>
> Under these circumstances, it is quite possible that any action this Court might presently take on defendant's Atkins petition, after what would undoubtedly be lengthy evidentiary proceedings, will ultimately be rendered a nullity, because those actions may not comply with the procedures and standards that are later enacted by the legislature. Of course, your Honor can avoid this possibility altogether by simply *staying further proceedings* on defendant's Atkins petition until such time as the legislature has finished the current process of enacting further authority on this topic. Because this defendant is not even subject to a sentence of death at this time, he certainly would not be prejudiced by an order *staying further proceedings* on his Atkins petition at this time.

Exhibit 2 (Aug. 13, 2003 Letter from Assistant District Attorney Andrew S. Gibson to Court of Common Pleas Judge Peter F. Rogers).

18. The Court of Common Pleas (Rogers, J.) stayed further proceedings on the Atkins claim. Of significance here, as set forth above, the request to stay the proceedings had been made by the Commonwealth.

19. On June 15, 2006, Appellant filed a PCRA claim under Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, which submitted that an important prosecution trial witness (Vincent Gentile) gave false testimony implicating Appellant; that the prosecutor knew the witness would give false testimony, and pressured him to do so; and that the witness now admits that his testimony was false and that the prosecution knew it.

20. Appellant sought a PCRA evidentiary hearing in the Court of Common Pleas and, at a minimum, a deposition to preserve the testimony of the witness (Mr. Gentile), who was elderly and ill.

21. Appellant informed the Third Circuit of the filing of this Brady claim in the Court of Common Pleas. The Third Circuit reviewed Appellant's submission on the claim and, on February 2, 2007, the Third Circuit held Appellant's federal habeas corpus proceedings in abeyance so that

the state courts of Pennsylvania could consider the Brady claim. See Porter v. Horn, Nos. 03-9006 & 03-9007 (3d Cir. Feb. 2, 2007). Under United States Supreme Court precedent, the Third Circuit would not have done so if it believed that the claim lacked merit, or that the claim would not be entertained by the Pennsylvania courts, or that Appellant was not diligent. See Rhines v. Weber, 544 U.S. 269 (2005).

22. Appellant submits regular reports to the Third Circuit, informing the Third Circuit of the status of the state court proceedings on the Brady claim. In these status reports, Appellant informed the Third Circuit of his hope that the Pennsylvania Courts would grant an evidentiary hearing and relief, including a deposition to preserve the testimony of the elderly witness. See, e.g., Exhibit 3 (April 2007 Status Report); Exhibit 4 (June 2009 Status Report).

23. In the PCRA court, the Commonwealth moved to dismiss the Brady claim as untimely under the PCRA. Appellant opposed the Commonwealth's motion to dismiss, and continued to seek an evidentiary hearing on the Brady claim, or at least a deposition of the elderly witness. The Commonwealth did not modify its request to stay the Atkins claim, or otherwise seek to alter the status of that claim in the Court of Common Pleas.

24. The parties appeared before the PCRA court on September 25, 2007, at which time the PCRA judge stated that he intended to dismiss the Brady claim without a hearing "on the ground that it is not timely and it does not meet the requirements for Brady." Spotz at 28 (quoting NT 9/25/07).

25. Undersigned counsel argued that the PCRA court should not dismiss the Brady claim but, instead, should hold an evidentiary hearing, because the claim is meritorious and because "the Third Circuit ... has held the [federal] case in abeyance so this issue could be resolved," and is "waiting for Your Honor to decide" the merits of the Brady issue. NT 9/25/07 at 8, 14; see supra (describing Third Circuit's February 2, 2007 ruling and relevant law under Rhines v. Weber)

26. Undersigned counsel also argued that, at the very least, the PCRA court should not dismiss the Brady claim without allowing the parties to take a deposition of the witness central to the Brady claim, Mr. Gentile, because Mr. Gentile is "elderly and in a nursing home, and it would be a shame if we don't have a chance to put his testimony under oath." NT 9/25/07 at 8.

27. The PCRA court rejected all of undersigned counsel's arguments and, on November 8, 2007, dismissed the Brady claim without allowing an evidentiary hearing or a deposition of Mr. Gentile. The PCRA court continued to stay the Atkins claim, as the Commonwealth had originally requested. Undersigned counsel explained to the PCRA court that this situation was "strange," that counsel had never been in such a situation before, and that counsel's goal was to have the Brady claim heard, or at least to obtain permission for a deposition of the witness. NT 9/25/07 at 8, 14-15.

28. When the PCRA court dismissed the Brady claim, it notified counsel that "you shall have thirty (30) days within which to take an appeal." Exhibit 5. Accordingly, counsel timely filed a notice of appeal, and the Prothonotary of the Pennsylvania Supreme Court set a briefing schedule. Neither the Commonwealth nor the PCRA court expressed any jurisdictional concern about the appeal; indeed, as set forth above, the PCRA court had stated that an appeal should be taken within 30 days.

29. On appeal, the parties briefed the merits and timeliness of the Brady claim, with Appellant arguing that the case should be remanded for an evidentiary hearing, and the Commonwealth arguing that the PCRA court should be affirmed. See Initial Brief for Appellant (2/5/10); Brief for Appellee (3/5/10); Reply Brief for Appellant (4/15/10). The Commonwealth did not question this Court's appellate jurisdiction.

30. A possible appellate jurisdiction issue was first raised *sua sponte* by this Court when it issued its order of October 13, 2010, quoted in Spotz at 27. In response to this Court's specific request, Appellant's counsel further researched the Court's appellate jurisdiction, reached the

conclusion that the PCRA court's order technically was non-final, and informed the Court of this conclusion. See Appellant's Supplemental Brief (11/12/10); Appellant's Supplemental Reply Brief (12/23/10). The Commonwealth also further researched the Court's appellate jurisdiction, and reached the same conclusion. See Supplemental Brief for Appellee (12/15/10).

31. The appeal is pending before this Court. On April 29, 2011, Chief Justice Castille filed his concurring opinion in Spotz. Appellant now files this recusal motion.

ARGUMENT

32. Chief Justice Castille's recusal from this appeal is required by Pennsylvania law, the Due Process Clause of the Fourteenth Amendment, and the Eighth Amendment.

33. Pennsylvania's Code of Judicial Conduct requires recusal when a judge's "impartiality might reasonably be questioned." Id., Canon 3; see also Joseph v. Scranton Times, 987 A.2d 633, 634 (Pa. 2009) (per curiam) ("appearance of impropriety" requiring recusal where "there are factors or circumstances that may reasonably question the jurist's impartiality in the matter").

34. As set forth herein, there are legally valid reasons to question the impartiality of Chief Justice Castille in this case; thus recusal is required under Pennsylvania law.

35. Due process guarantees the right "to an impartial and disinterested tribunal." Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980); accord In re Murchison, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). This basic due process right "has been jealously guarded by [the Supreme] Court" because it "preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done." Marshall, 446 U.S. at 242 (citation and internal quotation marks omitted). This constitutional requirement takes on even greater significance in a capital case, because of the Eighth Amendment's heightened due process requirements. E.g., Lockett v. Ohio, 438 U.S. 586, 604 (1978); Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

36. A fair, "impartial and disinterested tribunal," as required by the Eighth and Fourteenth Amendments, requires not just "an absence of actual bias" – there must not be "even the probability of unfairness," and "'justice must satisfy the appearance of justice.'" In re Murchison, 349 U.S. at 136 (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)). As the Supreme Court most recently stated in Caperton v. Massey Coal Co., 129 S.Ct. 2252 (2009): "Under our precedents there are *objective standards* that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" Id. at 2257 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)). The Supreme Court further explained:

> The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.

Caperton, 129 S.Ct. at 2263. These "objective standards" require recusal when the situation "offer[s] a possible temptation to the average man as a judge ... not to hold the balance nice, clear and true between the State and the accused," Caperton, 129 S.Ct. at 2260 (quoting Tumey, 273 U.S. at 532); id. at 2261 (same).

37. While the "possible temptation" standard "cannot be defined with precision," Murchison, 349 U.S. at 136, Appellant respectfully submits that it applies to Chief Justice Castille here, and requires recusal.

I. CHIEF JUSTICE CASTILLE'S STATEMENTS IN THE SPOTZ CONCURRENCE, WHICH REASONABLY CAN BE READ TO PRE-JUDGE THE MERITS OF APPELLANT'S PENDING APPEAL AND REASONABLY CAN BE READ TO EXPRESS ANIMOSITY TOWARD APPELLANT'S COUNSEL, REQUIRE CHIEF JUSTICE CASTILLE'S RECUSAL

38. As set forth above, in his concurring opinion in Spotz, Chief Justice Castille *commented on Appellant's pending appeal in the instant case*, in a manner detrimental to Appellant's submission. See Spotz at 27-31.

39. Chief Justice Castille's comments on Appellant's pending appeal were not directed toward peripheral matters, but went to central issues before the Court. Chief Justice Castille stated his belief that Appellant has asserted a "time-barred Brady claim." Spotz at 30.

40. Given Chief Justice Castille's comments on this pending case – which *expressly prejudged the appeal* – Chief Justice Castille's recusal from this appeal is appropriate. Canon 3(A)(6) ("Judges should abstain from public comment about a pending proceeding in any court"); In re Boston's Children First, 244 F.3d 164, 167 (1st Cir. 2001) (recusal required where judge made comments on pending case which "arguably suggested that the petitioner's claims ... were less than meritorious"); United States v. Microsoft Corp., 253 F.3d 34, 109 (D.C. Cir. 2001) (recusal required where judge made comments on pending case that included a statement of "his distaste for the defense of technological integration – one of the central issues in the lawsuit"); Webbe v. McGhie Land Title Co., 549 F.2d 1358, 1361 (10th Cir. 1977) (recusal required where statements of judge to parties suggested that judge had pre-judged the case); Nicodemus v. Chrysler Corp., 596 F.2d 152, 155-57 (6th Cir. 1979) (same).

41. Chief Justice Castille's comments in Spotz about undersigned counsel also require recusal, because of the animosity toward counsel that they reasonably can be read to exhibit. See, e.g., Commonwealth v. Dougherty, — A.3d —, 2011 WL 1601798, *2 (Pa. April 28, 2011) (Baer, J., concurring) (issued the day before Spotz) (explaining that when judge "chastised an assistant

district attorney who requested her recusal ..., this Court determined that such remarks increased the appearance of impropriety, and, indeed, necessitated the reversal of the judge's refusal to recuse" (citing Commonwealth v. White, 910 A.2d 648 (Pa. 2006)); id. at *2 ("to attack counsel personally for requesting recusal, when the law requires such motions to be put forth before the judge whose actions are in question in the first instance, is obviously inappropriate"); Offutt v. United States, 348 U.S. 11, 17 n.3 (1954) (recusal required where judge criticized counsel as giving a "disgraceful and disreputable performance on the part of a lawyer who is unworthy of being a member of the profession; and I, as a member of the legal profession, blush that we should have such a specimen in our midst"); Fairley v. Andrews, 423 F.Supp.2d 800, 821 (N.D. Ill. 2006) (recusal required where judge made comments that could have been interpreted as prejudgment of the case against defendants, "especially in the wider context of the Court's negative interactions with Defendants' counsel"); United States v. Meyerson, 677 F.Supp. 1309, 1315 (S.D.N.Y. 1988) (judge recused self because judge "resent[ed] unsupported assertions" and "tactics" of counsel); Marshall v. Georgia Pacific Corp., 484 F.Supp. 629, 631 (E.D. Ark. 1980) (recusal where reasonable observer "could assume that the court would view [statements by counsel] with considerable displeasure").

42. We submit that Chief Justice Castille's remarks about Appellant's counsel warrant recusal. Further, we now explain that they are also unfounded.

43. As set forth in the Introduction above, much of Chief Justice Castille's Spotz opinion can reasonably be read as an attack on the ethics and motivations of undersigned counsel and counsel's office. The instant motion is not an appropriate forum in which to respond to all the sweeping accusations made in the Spotz concurrence, which cover multiple cases, including Spotz itself, *where the undersigned was not counsel of record at any time*. Suffice it to say for purposes of this motion that Chief Justice Castille's remarks were made without allowing the undersigned or any other named lawyer an opportunity to respond, to address the accusations, or to be heard on the

allegations against counsel.

44. Here, we respond to Chief Justice Castille's specific statements in Spotz about counsel's representation in Appellant Porter's case, which comprise almost five (5) pages of Chief Justice Castille's concurring opinion. Chief Justice Castille asserted that undersigned counsel has engaged in unethical "shenanigans" in Appellant Porter's case. Spotz at 30. However, the record shows that there were no "shenanigans" by undersigned counsel.

45. First, in discussing Porter in the Spotz concurrence, Chief Justice Castille criticized undersigned counsel because the PCRA court stayed Appellant's Atkins claim. See Spotz at 31. But, as set forth earlier in the Procedural History, the request to stay the Atkins claim was *made by the Commonwealth*. Thus, Chief Justice Castille accused undersigned counsel of "shenanigans," Spotz at 31, because the PCRA court granted a request made by the Commonwealth.

46. Second, in discussing Porter in the Spotz concurrence, Chief Justice Castille criticized the undersigned because "Nolas appealed the [PCRA court's] non-final order" denying the Brady claim. Spotz at 31. Again, however, this was not "shenanigans" by counsel. It was a good faith effort to protect Appellant's rights.

47. As set forth in the Procedural History, undersigned counsel asked the PCRA court to not dismiss the Brady claim, but to allow an evidentiary hearing; in the alternative, counsel asked the PCRA court to at least allow a deposition of the key witness (who, counsel noted, was elderly and ill) before deciding whether to dismiss. The PCRA court rejected counsel's arguments and dismissed the claim. The PCRA court specifically notified counsel that a notice of appeal should be filed within 30 days.

48. Counsel timely filed a notice of appeal, as any responsible lawyer would have done under those circumstances. Had counsel failed to abide by the PCRA court's notice that an appeal had to be filed within 30 days, counsel would have risked forfeiture of a federal constitutional claim

that the United States Court of Appeals had found substantial enough to permit Appellant to pursue in state court. See Coleman v. Thompson, 501 U.S. 722 (1991) (death-sentenced state prisoner forfeited federal habeas review of federal constitutional claims when he failed to file notice of appeal in state post-conviction court within 30 days allowed by state procedures). Not appealing would have been unethical and ineffective. Appealing was the action that any ethical, competent lawyer would have taken.

49. When counsel filed the notice of appeal, neither the Commonwealth, nor the PCRA court, nor the Pennsylvania Supreme Court expressed any jurisdictional concern about the appeal; indeed, as stated above, the PCRA court had stated that an appeal should be taken.

50. Nor did the Commonwealth raise any jurisdictional concerns in its briefing on appeal. The jurisdictional issue was first raised *sua sponte* by this Court when it issued its order of October 13, 2010, quoted in Spotz at 27, six (6) months *after* the appellate briefs of the parties had been filed.

51. In response to this Court's specific, *sua sponte* request, Appellant's counsel researched the jurisdictional issue, reached the conclusion that the order was non-final, and informed the Court of this conclusion. The Commonwealth itself, through its counsel, did the same thing and reached the same conclusion on the jurisdictional question the Court had posed. As the undersigned had informed the PCRA court, this was an unusual situation that counsel had never dealt with in the past.

52. Third, Chief Justice Castille's discussion of Porter in the Spotz concurrence also suggested that undersigned counsel has somehow tried to trick the state courts and the federal courts in this case. This is unfounded. At every stage of the proceedings, undersigned counsel has filed regular status reports in the Third Circuit discussing the status of the state court proceedings. Counsel also has informed the state courts of what is happening in the federal courts, as demonstrated even by the PCRA court transcript quoted in Chief Justice Castille's opinion, where

the *Commonwealth's attorney agrees that the undersigned has accurately described the federal court proceedings*. See Spotz at 28-30; see also Appellant's Supplemental Reply Brief (filed in this Court on Dec. 23, 2010), at 3-4 (describing federal court status reports).

53. In sum, there were no "shenanigans" and there was no abuse. The undersigned regrets that he was not given an opportunity to address such assertions before Chief Justice Castille made them in a published opinion. At this point, Chief Justice Castille's opinion in Spotz requires his recusal *both* because of its prejudgment of Appellant's appeal and because of its unfounded attacks on Appellant's counsel.

II. ADDITIONAL CONSIDERATIONS SUPPORT THE NEED FOR CHIEF JUSTICE CASTILLE'S RECUSAL

54. Chief Justice Castille was Philadelphia's District Attorney from January 1, 1986 until March 12, 1991. Thus, he was the District Attorney during Appellant's pre-trial, trial, capital sentencing and direct appeal (including certiorari) proceedings. As such, then-District Attorney Castille's name appears as counsel for the Commonwealth on pleadings filed by the Commonwealth urging denial of relief to Appellant. See, e.g., Exhibit 6 (Commonwealth's Appellee Brief, asking Pennsylvania Supreme Court to affirm Appellant's conviction and death sentence on direct appeal); Exhibit 7 (Commonwealth's Brief in Opposition, asking United States Supreme Court to deny certiorari).

55. In 1993, Chief Justice Castille campaigned for a position as a Justice on the Pennsylvania Supreme Court. Chief Justice Castille's election campaign stressed his record as Philadelphia's District Attorney and, in particular, emphasized his pursuit of capital punishment and that, as District Attorney, he "put 45 people on death row," one of whom is Appellant. See, e.g., Lisa Brennan, "Republicans Win Court Seats," LEGAL INTELLIGENCER (Nov. 4, 1993) (available on Westlaw, 11/4/1993 TLI 1) ("Castille had campaigned as the law-and-order candidate, airing television commercials portraying [his opponent] as being soft on crime."); Associated Press,

"Castille Wins Top Court Seat," ALLENTOWN MORNING CALL (Nov. 3, 1993) (available on Westlaw, 1993 WLNR 1864290) ("Castille, a former Philadelphia district attorney, had campaigned as the self-proclaimed law-and-order candidate, airing television commercials portraying his Democratic opponent as soft on crime."); Katharine Seelye, "Castille Defeats Nigro for Seat on Supreme Court," PHILADELPHIA INQUIRER (Nov. 3, 1993) (available on Westlaw, 1993 WLNR 1995447) ("Castille, the former prosecutor who campaigned as the tough-as-nails scourge of criminals, ... might have seemed an unlikely winner. ... He never served as a judge and received only a so-so recommendation from the state bar association. But Castille's career as Philadelphia's district attorney, where he built a reputation as a law-and-order crime buster, thrust him in the public eye."); Tim Reeves, "Castille Leads GOP Sweep of Courts," PITTSBURGH POST-GAZETTE (Nov. 3, 1993) (available on Westlaw, 1993 WLNR 2163040) ("Castille [ran] a law-and-order campaign, touting his 45 death-penalty convictions and saying [his opponent] was soft on crime. ... 'My campaign was basically that I've spent 20 years in law enforcement as a prosecutor, and the citizens want somebody who's tough on crime. My record's been just that,' Castille said early this morning."); Katharine Seelye, "Castille Emphasizes Law-and-Order Image," PHILADELPHIA INQUIRER (Oct. 21, 1993) (available on Westlaw, 1993 WLNR 1992136) ("[W]hen he is asked why he wants to serve on the Supreme Court, what qualifies him, why voters should support him, he starts with his experience in Vietnam, works up to his record as Philadelphia district attorney and caps his pitch by declaring that he put 45 murderers on death row. Because he served in combat and as a prosecutor, he says, he is a proven law-and-order guy, tough on crime, eats nails for breakfast." "Castille used his first television ads to attack [his opponent], saying [his opponent] was lenient on drug dealers. ... Castille's TV spots conclude: 'If you are looking for a law-and-order guy – Ron Castille. He put 45 murderers on death row and has been endorsed by the over 36,000 professional police officers in Pennsylvania.'"); Frank Reeves, "Castille Preaches Law-and-Order Message to

Voters, PITTSBURGH POST-GAZETTE (Oct. 18, 1993) (available on Westlaw, 1993 WLNR 2134084) ("Castille ... hopes a law-and-order message, coupled with name recognition in southeastern Pennsylvania, will help him win .... 'When I start talking about court reform, people's eyes glaze over,' he said. 'When I tell them about (my) sending criminals to death row or how I fought the Mafia in Philadelphia, then they're interested.'"); Tim Reeves, "High Court Hopefuls Pressing for Change," PITTSBURGH POST-GAZETTE (Oct. 17, 1993) (available on Westlaw, 1993 WLNR 2117584) ("Castille and his prosecutors sent 45 people to death row during their tenure, accounting for more than a quarter of the state's death row population. Castille wears the statistic as a badge. And he is running for the high court as if it were exclusively the state's chief criminal court rather than a forum for a broad range of legal issues. ... Castille talks about bringing a prosecutor's perspective to the bench"); "Nigro, Castille Begin TV Campaign," LEGAL INTELLIGENCER (Oct. 14, 1993) (available on Westlaw, 10/14/1993 TLI 3) ("Castille's [TV] ad portrays [his opponent] as soft on crime and offers Castille, a former Philadelphia district attorney, as the 'law-and-order' alternative. ... The ad ... says Castille has put 45 people on death row and has received the endorsement of more than 36,000 police officers in the state."); Katharine Seelye, "Judicial Candidates Begin Courting the TV Audience," PHILADELPHIA INQUIRER (Oct. 12, 1993) (available on Westlaw, 1993 WLNR 1991534) (same).

56. During the election campaign, it was reported that Chief Justice Castille stated the following in an interview:

> [Candidates] Castille, Nigro and Surrick are aware that special interest groups capable of giving money to control votes would love to hear their positions on gun control, abortion, the death penalty or any hot issue of the day.
>
> Under the current [legal] restrictions, Castille says if candidates take positions then they'll have to recuse themselves from any decisions in those cases.
>
> "There's really no solution to it," Castille says. "You ask people to vote for you, they want to know where you stand on the death penalty. *I can certainly say I sent 45 people to death row as District Attorney of Philadelphia. They sort of get the hint*."

Lisa Brennan, "State Voters Must Choose Next Supreme Court Member," LEGAL INTELLIGENCER (Oct. 28, 1993) (available on Westlaw, 10/28/1993 TLI 1); see also Lynn Marks & Ellen Kaplan, "Disorder in the Courts," PITTSBURGH POST-GAZETTE (Nov. 14, 1993) (available on Westlaw, 1993 WLNR 2150772) ("Some candidates ... skated perilously close to saying how they might be expected to rule on issues that could come before them as judge. Take, for example, Supreme Court Justice-elect Ron Castille – who, while pursuing a job requiring him to hear death-penalty appeals, bragged that he sent 45 people to death row when he was a prosecutor.").

57. Chief Justice Castille was elected and assumed his position on the Pennsylvania Supreme Court in January 1994.

58. Undersigned counsel's office sought Chief Justice Castille's recusal from several Philadelphia capital PCRA cases, arguing that recusal was appropriate because of his dual role as District Attorney during some earlier stage of the case and his current judicial role. Chief Justice Castille declined recusal in those cases. See, e.g., Commonwealth v. Beasley, 937 A.2d 379 (Pa. 2007) (recusal opinion of Castille, J.); Commonwealth v. Rainey, 912 A.2d 755 (Pa. 2006) (recusal opinion of Castille, J.); Commonwealth v. Jones, 663 A.2d 142 (Pa. 1995) (recusal opinion of Castille, J.); Commonwealth v. Williams, 732 A.2d 1167, 1174 (Pa. 1999).

59. Chief Justice Castille's most recent opinions denying recusal, in Rainey and Beasley, suggested that undersigned counsel acted in bad faith in seeking Chief Justice Castille's recusal. See, e.g., Rainey, 912 A.2d at 759 (accusing undersigned counsel of "reckless disregard" and writing "scurrilously"); id. at 760 ("Mr. Nolas's unsupported 'factual' averments are utterly false ..."); id. at 760 n.3 ("It bears noting, given the nature of the instant allegations, that the attorney's oath of office includes a pledge to 'use no falsehood.' ... In addition, the Rules of Professional Conduct prohibit lawyers from knowingly making a false statement of material fact or law to a tribunal...."); id. at 761 ("I certainly hope that the Chief Defender did not personally review and approve as a

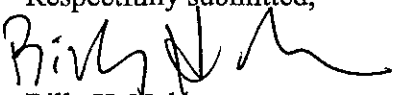
'policy' matter the falsehoods that are the basis for Mr. Nolas's argument contained herein."); id. at 761 ("Mr. Nolas's allegations are as bereft of factual support as they are distressingly unmindful of his sworn duties as a lawyer and officer of this Court."); id. at 761 ("reckless nature of Mr. Nolas's baseless allegation"); Beasley, 937 A.2d at 381 (accusing undersigned counsel of "false statements," "mischaracterizations" and "ethical lapses"); id. at 382 (asserting that undersigned counsel made "scandalous misrepresentations in Rainey"); id. at 382 (asserting that counsel's actions in Rainey were "unethical representation"); id. at 383 (suggesting that undersigned counsel "betray[ed] contempt for ethical standards" and "contempt for [the] court"); id. at 383 (asserting that undersigned counsel is in "dogged pursuit of a poor reputation"). These assertions can reasonably be read as reflecting an antipathy toward undersigned counsel, especially now when considered alongside the concurrence in Spotz.

60. Chief Justice Castille's position as the District Attorney during the pre-trial, trial, capital sentencing, post-trial and direct appeal of this case; the role played in the election campaign by Chief Justice Castille's record as District Attorney, especially in death penalty cases; and the antipathy toward undersigned counsel expressed by Chief Justice Castille in denying prior recusal motions and, especially, now in the Spotz concurrence, further support the need for his recusal. See cases cited above; Commonwealth ex rel. Allen v. Rundle, 189 A.2d 261 (Pa. 1963) (judge who was district attorney at time defendant was indicted must recuse himself from defendant's post-conviction proceedings); Caperton (recusal requirement arising from election campaign).

PRAYER FOR RELIEF

For the reasons stated above, Appellant respectfully requests that Chief Justice Castille recuse himself from the instant appeal. Appellant respectfully requests that the recusal motion be referred to the full Court. Appellant firmly believes that recusal is required on the record before this Court. Appellant alternatively should be afforded an evidentiary hearing on the recusal issue.

Respectfully submitted,



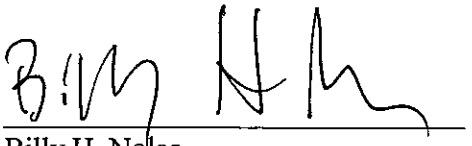
Billy H. Nolas
Pa. Bar No. 83177
Federal Community Defender
Eastern District of Pennsylvania
Suite 545 West - Curtis Center
Philadelphia, Pennsylvania 19106
215-928-0520

Counsel for Appellant, Ernest Porter

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a copy of the above to be served by first class mail, postage prepaid, upon the following person at the address indicated below:

Hugh Burns, Esquire
Appeals Unit
Office of the Philadelphia District Attorney
3 Penn Center Square South
Philadelphia, PA 19107



Billy H. Nolas

DATED: May 9, 2011