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NO.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

Respondent,

V.

JAMIE LYNN SILVONEK,

Petitioner.

PETITION FOR ALLOWANCE OF APPEAL
treated as a PETITION FOR REVIEW

Petition to Allow an Appeal from the October 3, 2019 Order of the Superior Court of Pennsylvania (No. 85 EDM 2019) Denying Petitioner's Petition for Review of the June 27, 2019 Order of the Court of Common Pleas, Lehigh County, Case No. CP-39-CR-0002141-2015.

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I. REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW

The Pennsylvania Superior Court's October 3, 2019 Order denying Petitioner's Petition for Review is attached hereto as Appendix A. The June 27, 2019 Order of the Lehigh County Court of Common Pleas denying Petitioner's Application to Amend the Interlocutory Order of June 6, 2019 to certify the Order for interlocutory appeal is attached hereto as Appendix B. Petitioner's motions for recusal and to have the recusal issue decided by another judge were denied by the Lehigh County Court of Common Pleas in a June 6, 2019 Order, attached as Appendix C, following a hearing on June 3, 2019, the transcript of which is attached as Appendix D.

II. THE ORDER IN QUESTION

On October 3, 2019, the Superior Court of Pennsylvania issued an Order denying Petitioner Jamie Silvonek's petition for interlocutory review of the trial court's denial of her Motion for Recusal. (*See* Appendix A.)

III. QUESTION PRESENTED

> Did the Superior Court err in refusing to grant interlocutory review of a denial of a recusal motion in a Post-Conviction Relief Act (PCRA) petition where the trial judge improperly participated in the parties' guilty plea negotiations and that improper participation forms the basis for a claim for relief in the PCRA petition?
>
> Suggested answer: Yes.

IV. STATEMENT OF THE CASE

In March 2015, at the age of fourteen, Petitioner Jamie Silvonek was arrested and charged with crimes relating to the death of her mother, Cheryl Silvonek. (*See* PCRA Petition ¶¶ 1, 46-56.) At the time of her arrest, Jamie had no history of criminal conduct—but a substantial history of emotional trauma—and she was involved in an abusive relationship with the twenty-year-old soldier who stabbed her mother to death. (*See id.* ¶¶ 1-2, 86-107.) Attorney John Waldron ("Attorney Waldron") represented Jamie in the criminal proceedings in the Lehigh County Court of Common Pleas, including a hearing on Jamie's motion to decertify the case to juvenile court, and on direct appeal to the Pennsylvania Superior Court and Pennsylvania Supreme Court. (Mot. for Recusal, Ex. A., ¶ 1.) Judge Maria Dantos presided over the decertification hearing and trial court action. In February 2016, after the denial of her motion for decertification, Jamie pled guilty to the charges and was sentenced to 35 years to life for first-degree murder and concurrent terms on associated charges—ten years beyond the statutory requirement. (*See generally* PCRA Petition, Procedural History, ¶¶ 11-24); *see also* 18 Pa. C.S.A. § 1102.1(a)(2) (providing for a minimum sentence of 25 years to life for first-degree murder for defendants under age fifteen). She is the only defendant her age or younger in the last thirty years to face such a conviction and sentence in this Commonwealth as the

non-principal in a homicide.[1] (*See* PCRA Petition ⁋ 4.)

On May 6, 2019, represented by new counsel, Jamie timely filed a petition under the Post-Conviction Relief Act ("PCRA Petition") challenging the effectiveness of her counsel in, among other things, his representation of Jamie in her decertification hearing and in connection with her guilty plea. *See* 42 Pa. C.S.A. § 9543(a)(1)-(3); *see also Commonwealth v. Collins*, 888 A.2d 564, 566 (Pa. 2005). (S*ee also* PCRA Petition ⁋⁋ 25-29.) Supported by numerous certifications from friends, family, community members, and experts in adolescent psychology, the PCRA Petition describes how Attorney Waldron repeatedly failed to meet even the minimal standards for effective representation of his client—failing to pursue obvious avenues of investigation that would have revealed critical information about Jamie's untreated emotional trauma and intimate partner abuse; failing to provide his experts with crucial evidence, leading to their impeachment; failing to introduce any favorable witnesses or other mitigating evidence; and failing to accurately advise Jamie as to the risks and benefits of her plea, among numerous other errors. (*See* PCRA Petition ⁋⁋ 8-10 & Appendices.)

Particularly relevant to this Petition for Allowance of Appeal, the PCRA

[1] The closest analog to Jamie's conviction is the 1999 case of Miriam White, an eleven-year-old girl with serious mental illness who brutally murdered a stranger on the street. *See Commonwealth v. White*, 910 A.2d 648 (Pa. 2006). Miriam was prosecuted in criminal court but allowed to plead guilty to *third*-degree homicide, for which she received a sentence of 18 to 40 years in prison. *See* Mensah M. Dean, *At 11, She Became City's Youngest "Adult"*, THE PHILADELPHIA INQUIRER (Nov. 23, 2011).

Petition argues, in part, that Attorney Waldron was ineffective in failing to seek appropriate relief as a result of Judge Dantos's improper involvement in the negotiations for Jamie's guilty plea agreement between the Commonwealth and Attorney Waldron. (*See generally* PCRA Petition, Section VIII(A), ¶¶ 264-270.) In support of the PCRA Petition, Attorney Waldron provided a signed certification attesting that he and Senior Deputy Attorney Jeffrey Dimmig ("DDA Dimmig") met with Judge Dantos at the outset of their plea negotiations, and that Judge Dantos—without having heard any testimony or argument from either party related to sentencing—informed them that she would not accept any plea agreement involving less than a 35-year sentence. (*See* Mot. for Recusal, Ex. A., ¶¶ 6-8.) This pronouncement from Judge Dantos effectively set the terms of the plea agreement, as Attorney Waldron understood that he had no choice but to pursue plea negotiations with a 35-year sentence as the minimum floor. (*See id.* ¶¶ 7-9.) He accordingly conveyed the Commonwealth's offer of 35 years to Jamie with the instruction that there was no room to negotiate the plea further due to Judge Dantos's explicit statements that she would reject any potential sentence of less than 35 years. (*See id.*) Attorney Waldron's recollection of Judge Dantos's involvement in the plea negotiations is supported by a letter he sent to Jamie in September 2017, wherein he states that "[t]he 25 year minimum was discussed in your case but Judge Dantos would not accept the 25 year minimum . . . she would only accept the 35 year

minimum." (*See* Mot. for Recusal, Ex. B.) And, although she describes Attorney Waldron's account as "factually flawed" (without any further explanation), Judge Dantos has substantially confirmed the relevant events, acknowledging in the June 6, 2019 Order that is the subject of this appeal that there was "a meeting with the Court to determine if [it] would reject a potential plea." (Appendix C, C2, n.1.)

As set forth in Section VIII of Jamie's PCRA Petition and below, Judge Dantos's direct participation in setting the terms of Jamie's plea agreement was contrary to the clear law of this Commonwealth and effectively rendered Jamie's guilty plea involuntary. (*See generally* PCRA Petition, Section VIII, ⁋⁋ 264-270); *see also infra* Section V.B. Because the adjudication of that PCRA claim necessarily will require an assessment of the propriety of Judge Dantos's conduct in Jamie's plea negotiations, Jamie filed a Motion for Recusal contemporaneously with her PCRA Petition, attesting to the above facts and requesting that Judge Dantos be recused from all proceedings relating to the PCRA Petition. (*See generally* Mot. for Recusal.) The Motion for Recusal further requested that another judge hear the recusal motion, as Judge Dantos's direct involvement in the circumstances forming the basis for the recusal motion makes her a material witness to the essential facts and creates a high risk of potential bias (or, at the very least, the appearance of bias). (*Id.*)

Judge Dantos heard argument on both Jamie's request to have her recusal

motion decided by a different judge and the recusal motion itself on June 3, 2019.[2] (*See* Appendix D.) She orally denied both motions at the June 3 hearing (*see id.* at D3, D17-18), followed by a written Order denying the motions on June 6, 2019 (*see* Appendix C). Both during the hearing and in her Order, Judge Dantos made unsworn factual assertions regarding her involvement in the plea negotiations, stating that "nothing inappropriate was done" (Appendix D, Tr. at D17), rejecting the certification of Attorney Waldron as "factually flawed" (without explanation) (Appendix C, C2 n.1), and asserting that "at no point did this Court directly participate in plea negotiations in this matter" (*id.*). Judge Dantos further refused to allow Jamie's counsel to call DDA Dimmig to testify as a witness (although he was in the courtroom for the June 3 hearing), and simply denied Jamie's recusal motion based on her own conclusory assertion that there was nothing inappropriate in the negotiation of Jamie's plea, notwithstanding Attorney Waldron's unrebutted

[2] The June 3 hearing was originally scheduled to resolve the disclosure of sealed documents in Jamie's case. Once the PCRA Petition and Motion for Recusal were filed, the hearing was updated to encompass those items as well. Due to confusion about whether the updated hearing was intended to be an evidentiary hearing on the PCRA Petition itself, both parties sought clarification from Judge Dantos as to the scope of the hearing. (*See* Pet. for Review, App. G, Email Exchange.) Defense counsel particularly sought clarification as to whether there was a factual dispute that would require evidentiary presentation and whether the court would be reaching the substance of the recusal motion or simply the request for another judge to hear the recusal motion. (*Id.*) Judge Dantos disclosed only that the discovery requests and recusal motion would be considered, leading to ongoing ambiguity about whether evidentiary presentation was needed during the June 3 hearing. (*Id.*) During the hearing, it became apparent that there was indeed a factual dispute, as described herein.

certification to the contrary and without addressing the legal issues raised by her admitted participation in Jamie's plea negotiations.[3] (Appendix D, Tr. at D17-18.)

On June 26, 2019, Jamie timely filed an Application to Amend the Order of June 6, 2019 to include a statement pursuant to 42 Pa. C.S.A. § 702(b) that the Order involved "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter," thereby certifying the order for interlocutory appeal pursuant to Pa. R.A.P. 1311. (*See* Application to Amend.) Judge Dantos summarily denied this application in a June 27, 2019 Order. (*See* Appendix B.) Jamie subsequently filed a timely Petition for Review of the denial of the application to amend in the Superior Court (*see* Pet. for Review), which was denied in a per curiam order on October 3, 2019 (*see* Appendix A). On October 10, 2019, Judge Dantos held a status conference and scheduled a one-week evidentiary hearing on Jamie's PCRA Petition to begin on March 30, 2020. (October 10, 2019 Order.)

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[3] Although early in the hearing Judge Dantos seemed potentially amenable to hearing testimony, it was unclear at that point whether there was a dispute of fact. (*See* Appendix D, Tr. at D4, D15.) As soon as the dispute of fact became apparent and defense counsel stated that "it sounds like we do need to present evidence" (*id.* at D17), Judge Dantos refused to allow any, stating that she "know[s] what [she] did and what was said" and that she was "not going to recuse [her]self." (*Id.*) Defense counsel then offered to call DDA Dimmig, who was present in the courtroom, to testify. (*Id.* at D17.) Counsel for the Commonwealth argued that such testimony was unnecessary because Judge Dantos had already ruled on the Motion for Recusal. (*Id.* at D17-18.) Judge Dantos agreed, reiterating her denial of the Motion without explanation, stating that she would draft "something . . . that contains [her] conclusions after this hearing." (*Id.* at D18.)

V. THE PETITION FOR ALLOWANCE OF APPEAL SHOULD BE GRANTED

This Petition for Allowance of Appeal should be granted as the Superior Court "has erroneously entered an order . . . dismissing" Jamie's petition for interlocutory review of the trial court's order denying recusal. *See* 210 Pa. Code R. 1114(b)(7). Judge Dantos's recusal from this case is vital to ensure a fair process for, and adjudication of, Jamie's PCRA Petition, as Judge Dantos has personal knowledge of highly relevant disputed facts and her own conduct forms the basis for one of Jamie's claims for relief. Given the clear need for recusal in this matter, interlocutory appeal is the appropriate mechanism for relief, as it is far more efficient and effective to decide the question of recusal early in the litigation, so that it can proceed properly from the outset. Further, this Court's interlocutory review of the recusal denial will provide necessary clarification of the proper scope of a trial court's role in guilty plea negotiations, an issue of "substantial public importance," that, as demonstrated by this case, requires prompt and definitive resolution" by this Court. *See* 210 Pa. Code R. 1114(b)(4).

A. This Court Should Grant Review Because the Superior Court Erroneously Dismissed the Petition for Interlocutory Review of the Trial Court's Denial of Recusal

Pursuant to this Court's precedent, recusal is necessary in this case, as Judge Dantos has personal knowledge of relevant disputed facts, and her role in the guilty plea negotiations—which forms the basis for one of the claims for relief in Jamie's

PCRA Petition—at a minimum creates an appearance of bias that undermines her ability to fairly preside over the Petition. Interlocutory review of Judge Dantos's order denying recusal is therefore both necessary and appropriate, as there is substantial ground for disagreeing with her refusal to recuse, and delaying resolution of the recusal question until there is a final order in the case would result in needless expenditure of resources and potential prejudice to Jamie's PCRA claims. The Superior Court's dismissal of the petition for interlocutory review was erroneous, and this Court should accept review to ensure Jamie has a fair chance at post-conviction relief.

1. This Court's precedent demands recusal when, as here, the presiding judge has personal knowledge of disputed facts

Because of her participation in an off-the-record meeting about the terms of Jamie's potential guilty plea, Judge Dantos has personal knowledge of contested facts relevant to resolution of the PCRA Petition, necessitating recusal under this Court's precedent.

In *Municipal Publications, Inc. v. Court of Common Pleas*, this Court ruled that recusal is required when a judge "not only had personal knowledge of disputed facts," but "was in a position to rule on objections as to his own testimony and to assess his own credibility in light of conflicting evidence." 489 A.2d 1286, 1290 (Pa. 1985). The presiding judge in that case was alleged to have had a personal relationship with counsel for the plaintiff and to have engaged in *ex parte* discussions

with said counsel about the case and a pending recusal motion—conduct that, if true, would necessitate recusal from the entire case. *Id.* at 1289. In deciding whether to recuse, the judge held a hearing and gave testimony concerning his own conduct. *Id.* This Court concluded that, in such a situation, the judge *must* recuse, explaining that where an evidentiary hearing "brings in question the credibility of the judge, it is obvious that the judge is not in the position to maintain the objective posture required to preside over the proceeding and to assume the role of the trier of fact in that proceeding." *Id.* The Code of Judicial Conduct reiterates this precept, requiring that a judge disqualify herself if she has "personal knowledge of facts that are in dispute in the proceeding," or is likely to be a "material witness" to the matter at issue. 207 Pa. Code § 33 Canon 2 Rule 2.11(A)(1) & (2).

That is precisely the situation here. Jamie has alleged that, during an off-the-record meeting among Judge Dantos, Attorney Waldron, and DDA Dimmig, Judge Dantos improperly dictated the terms of the proffered plea agreement, rendering Jamie's subsequent guilty plea invalid. (*See* PCRA Petition Section VIII(A); *see generally* Mot. for Recusal.) Specifically, Attorney Waldron describes how, at the outset of the parties' plea negotiations, Judge Dantos "made it clear that she would not accept a guilty plea agreement with a minimum sentence of 25 years in Jamie's case," and that "[t]he lowest sentence she was willing to accept was 35 years." (Mot. for Recusal, Ex. A, ⁋ 7; *see also id.* ⁋ 9 ("[T]he Judge had made her position clear."))

These factual allegations, supported by a certification by Attorney Waldron and a letter to Jamie describing the meeting, form the basis for both the Motion for Recusal and one of the claims for relief in Jamie's PCRA Petition. (*See* Mot. for Recusal, Ex. A & Ex. B; PCRA Petition, Section VIII(A).) Judge Dantos has acknowledged that such a meeting took place, but nevertheless contests Jamie's factual allegations.[4] Indeed, during the June 3 hearing she "state[d] very firmly that nothing inappropriate was done" (Appendix D, Tr. at D17), and in her subsequent order she rejected Attorney Waldron's sworn statement as "factually flawed" (without explanation) and asserted that "at no point did this Court directly participate in plea negotiations in this matter" (Appendix C, C2 n.1). Although she did not literally call herself as a witness, as the judge in *Municipal Publications* did, her conduct was arguably worse, as she both refused to allow Jamie to call DDA Dimmig—the only other participant in the acknowledged meeting that took place with Judge Dantos regarding Jamie's plea—and gave what amounted to unsworn testimony from the presiding judge used to rebut documentary evidence and a statement made under penalty of perjury

[4] Notably, the Commonwealth has not contested Jamie's factual allegations. Although the Commonwealth refused to stipulate to the facts as stated in Attorney Waldron's certification, it also declined to present testimony or even offer an unsworn statement as to any alternate version of events during the June 3 hearing. (*See* Appendix D, Tr. at D15-18.) Instead, the Commonwealth asserted that no evidence was needed because "[t]he Judge obviously can make an evaluation right here and now whether or not she believes she acted inappropriately in that manner and make a decision whether or not she needs to recuse herself." (*Id.* at 16.) The Commonwealth has also not responded via written filing to any of the factual allegations or legal arguments in Jamie's recusal motion or PCRA Petition.

offered by a party to the matter.

Because Judge Dantos has "personal knowledge of disputed facts" and effectively credited her own unsworn testimony over conflicting evidence, under *Municipal Publications* and the Code of Judicial Conduct she must recuse from deciding the recusal motion. *See* 489 A.2d at 1290; 207 Pa. Code § 33 Canon 2 Rule 2.11(A)(1) & (2). Further, because the same disputed facts form the basis for one of Jamie's claims for relief in her PCRA Petition, Judge Dantos must recuse at least from deciding that claim of the PCRA Petition, as resolution of that claim will again necessitate that she both "preside over the proceeding and [] assume the role of the trier of fact." *See Municipal Publications*, 489 A.2d at 1289.

2. Judge Dantos's involvement in, and statements defending her involvement in, the guilty plea negotiations at a minimum create an appearance of bias requiring recusal

In addition to the issues created by the underlying factual dispute, Judge Dantos's acknowledged involvement in the guilty plea negotiations, and her statements on the record defending that involvement, substantially call into question her ability to impartially decide Jamie's claim for post-conviction relief. Judge Dantos's statements defending her involvement in the guilty plea negotiations create a substantial appearance of prejudgment and bias that necessitates recusal.

Recusal is required when there is "evidence establishing bias, prejudice, or unfairness which raises a substantial doubt as to the jurist's ability to preside

impartially." *Commonwealth v. White*, 910 A.2d 648, 657 (Pa. 2006); *see also* 207 Pa. Code § 33 Canon 2 Rule 2.11(A) (A judge "should disqualify [her]self in a proceeding in which [her] impartiality might be reasonably questioned."). Although judges are presumed to be unbiased, a "showing of prejudgment or bias" by a judge can necessitate recusal, *Commonwealth v. Darush*, 459 A.2d 727, 731 (Pa. 1983), as can the *appearance* of bias, *Commonwealth v. Goodman*, 311 A.2d 652, 654 (Pa. 1973) ("[T]he appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of either of these elements."). As the United States Supreme Court has explained, the due process precepts underpinning recusal standards do not require a showing of "actual, subjective bias"; instead, the Court uses an "objective standard that requires recusal when the likelihood of bias on the part of the judge 'is too high to be constitutionally tolerable.'" *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1903, 1905 (2016) (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009)). Risk of bias is particularly acute when a judge is asked to assess the propriety of her own conduct. In *Williams*, the Supreme Court reiterated the "due process maxim that 'no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.'" 136 S. Ct. at 1906.

Here, there is an objective risk of bias created by the fact that one of the claims for relief in Jamie's PCRA Petition requires Judge Dantos to assess the propriety of

her own conduct. The PCRA Petition alleges that Judge Dantos met with Attorney Waldron and DDA Dimmig at the outset of their plea negotiations and, without having heard any argument or evidence as to the appropriate sentence, made clear to both parties that she would not accept a guilty plea that included a minimum sentence of less than 35 years (ten years beyond the statutory requirement). (*See* PCRA Petition Section VIII(A).) Through this statement, Judge Dantos not only effectively set the floor for plea negotiations, she also created tremendous pressure for Jamie to plead guilty rather than risk whatever sentence might be imposed if Jamie chose to go to trial. As described below, this involvement by the presiding judge in guilty plea negotiations is clearly prohibited, and in her PCRA Petition Jamie contends it rendered her guilty plea involuntary. *See infra* Section V.B. Thus, to assess that claim in the PCRA Petition, Judge Dantos would have to rule on the propriety of her own conduct, creating precisely the "objective risk of bias" requiring recusal under *Williams*. *See* 136 S. Ct. at 1905.

Moreover, since Jamie's filing of her recusal motion, Judge Dantos's on-the-record statements reveal that, without having heard any evidence, she has already prejudged the merits of that claim. During the hearing on the motion for recusal, Judge Dantos stated: "I know what I did and what was said and whether a plea was hitched [sic] for my approval or not, *but I will state very firmly that nothing inappropriate was done in this case*." (Appendix D, Tr. at D17 (emphasis added).)

Subsequently, in a footnote to her order denying the recusal motion, Judge Dantos asserted that "at no point did this Court directly participate in plea negotiations in this matter. Instead, trial counsel and the Commonwealth requested a meeting with the Court to determine if this Court would reject a potential plea." (Appendix C, C2 n.1.) From those statements, it is clear that Judge Dantos has prejudged not only the underlying disputed facts but also the ultimate merits of Jamie's claim that such a meeting amounts to improper participation in plea negotiations and renders her guilty plea involuntary. In other words, there is evidence of *actual* prejudgment by Judge Dantos of the PCRA claim involving the propriety of her actions, in addition to the objective risk of bias already presented by her alleged improper conduct which forms the basis for Jamie's claim for post-conviction relief. Thus, because there is "evidence establishing bias, prejudice, or unfairness which raises a substantial doubt as to the jurist's ability to preside impartially," recusal is necessary under this Court's precedent. *See White*, 910 A.2d at 657.

3. Interlocutory appeal of the recusal denial would ensure fundamental fairness and materially advance the ultimate termination of the matter

Interlocutory appeal is the appropriate mechanism for deciding the recusal issue, as there are substantial grounds for disagreeing with Judge Dantos's legal conclusions underpinning her denial of the recusal motion, and addressing recusal early in the litigation will materially advance the ultimate termination of the matter

by allowing both parties to effectively develop the record from the outset and avoid the needless expenditure of substantial court resources on the week-long evidentiary hearing currently scheduled before Judge Dantos.

Pennsylvania law permits interlocutory appeals when a trial court issues an order that "involves a controlling question of law as to which there is a substantial ground for difference of opinion" and "immediate appeal from the order may materially advance the ultimate termination of the matter." 42 Pa. C.S.A. § 702(b). When, as here, a trial court refuses to certify an interlocutory order for appeal pursuant to Section 702(b), an interlocutory appeal can still proceed "[i]f the appellate court determines that the lower court abused its discretion in not certifying the matter for appeal." *Commonwealth v. Tilley*, 780 A.2d 649, 651 (Pa. 2001) (citations omitted); *see also* Pa. R.A.P. 1311, Comment (permitting a petition for review to determine if a trial court's denial of an application to amend an order to permit interlocutory appeal "is so egregious as to justify prerogative appellate correction of the exercise of discretion by the lower tribunal").

As explained above, there is a substantial ground for differing with Judge Dantos's view that recusal is not needed in this case. Indeed, Jamie's recusal motion presents several distinct controlling questions of law as to which "there is a substantial ground" for disagreement with the Judge's ruling, including whether recusal is required where a presiding judge's own alleged improper conduct forms

the basis for a PCRA claim; whether the judge can preside over a recusal motion in which she, herself, is a necessary fact witness; and whether the court's improper involvement in guilty plea negotiations necessitates recusal. (*See* Pet. for Review at 10, 14-21.) As to each of these questions, precedent from this Court described above demonstrates a substantial ground for disagreement with the trial court's ruling.

Moreover, interlocutory appeal of the recusal denial would further the interests of justice and materially advance the ultimate resolution of this matter. Jamie's case is highly complex and unusual. At a time when this Court and the United States Supreme Court were embracing adolescent development research and moving away from imposing the harshest adult sentences on juvenile offenders,[5] Jamie was sentenced to ten years beyond the statutory requirement for a crime she was involved in when she was barely fourteen. Over the last thirty years, the only defendants her age or younger who have been prosecuted in adult court and convicted of either first- *or* second-degree homicide in Pennsylvania have been principals—children who actually committed the murder. (*See* PCRA Petition ⁋ 4.) As described in the PCRA Petition, the aberrational result in Jamie's case was the product of numerous errors by her prior counsel, and her Petition includes substantial evidence not originally presented to the trial court, including nineteen witness

[5] *See, e.g.*, *Commonwealth v. Batts*, 163 A.3d 410 (Pa. 2017); *Miller v. Alabama*, 567 U.S. 460 (2012); *Roper v. Simmons*, 543 U.S. 551 (2005); (*see also* PCRA Petition ⁋⁋ 5, 165.).

certifications, a new expert report, and substantial documentary evidence. (*See generally* PCRA Petition & Appendices.) The evidentiary hearing on her PCRA Petition, currently scheduled for March 2020, is expected to last a week—substantially longer than her original two-day decertification hearing. To proceed with presenting this volume of evidence before a judge who ultimately may need to recuse is highly inefficient, wasting judicial and legal resources on a lengthy and difficult hearing that will likely need to be re-done before a different judge.

Worse still, denial of interlocutory appeal may threaten Jamie's ability to develop necessary facts to carry her burden in showing that her prior counsel was ineffective in his representation. Jamie bears the burden of proof in this case, both because of the PCRA posture, and because the defendant has the burden of proving that decertification serves the public interest. *See* 42 Pa. C.S.A. § 9543(a)(2) (standard for relief under the PCRA); 42 Pa. C.S.A. § 6322(a) (burden of proof in decertification proceedings). Already, Judge Dantos has interfered with Jamie's ability to develop the record needed to satisfy her burden; she refused to allow Jamie to call DDA Dimmig as a witness during the recusal hearing, and denied the recusal motion without addressing the existing evidentiary proffer. (Appendix D, Tr. at D17-18.) In recognition of the "particular burden" the prosecution bears "to prove its case," Pennsylvania law gives the Commonwealth interlocutory appeals *as of right* in criminal cases whenever an interlocutory order will "substantially handicap the

prosecution." Pa. R.A.P. 311(d). Although Jamie does not fall within the protection of this rule, the principle behind it—that a biased judge can hinder a party's ability to satisfy its burden of proof—is relevant here, and supports the contention that permitting interlocutory appeal under these circumstances will materially advance the ultimate termination of the matter by ensuring that Jamie has an adequate opportunity to satisfy her burden.

For all of these reasons, the Superior Court erroneously dismissed Jamie's Petition for Review of the trial court's refusal to certify the recusal denial for interlocutory appeal, and this Court should grant her Petition for Allowance of Appeal.

B. The Court Should Grant Review to Provide Necessary Clarification of the Trial Court's Proper Role in Guilty Plea Negotiations.

It is also essential that this Court grant review in this case to provide needed clarification of the limits to the trial court's role in guilty plea negotiations. The permissible role of the trial court in plea negotiations is of utmost public importance, as it implicates the majority of criminal cases in the Commonwealth in which plea deals are considered. *See* 210 Pa. Code R. 1114(b)(4). Indeed, approximately two-thirds of all criminal cases in Pennsylvania are resolved through a guilty plea. The Unified Judicial System of Pennsylvania, Statewide Criminal Dashboard Common Pleas Court (2018), http://www.pacourts.us/news-and-statistics/research-and-

statistics/dashboard-table-of-contents/statewide-criminal-dashboard-common-pleas-court (last visited Nov. 4, 2019). And, as demonstrated by Judge Dantos's statements in this case defending her involvement in the parties' guilty plea negotiations, there is a need for this Court to provide "prompt and definitive resolution" to the specific question of whether a trial court judge can meet off-the-record with the parties to discuss potential terms of a plea deal. *See* 210 Pa. Code R. 1114(b)(4).

This Court has long held that a trial judge is prohibited from participating in a plea bargain with the parties, as such involvement renders the plea involuntary. *See Commonwealth v. Evans*, 252 A.2d 689, 691 (Pa. 1969) (reversing conviction and ordering new trial where court participated in plea negotiations); *see also Commonwealth v. McNeal*, 120 A.3d 313, 318 n.1 (Pa. Super. Ct. 2015) (stating that judges are prohibited from engaging in plea bargain discussions). "Indeed, a trial judge is forbidden from participating ***in any respect*** in the plea bargaining process prior to the offering of a guilty plea." *Commonwealth v. Johnson*, 875 A.2d 328, 331-32 (Pa. Super. Ct. 2005) (emphasis added).

As this Court has explained, fundamental fairness demands that the trial court not participate in plea negotiations:

> The unequal positions of judge and the accused, one with power to commit to prison and the other deeply concerned to avoid prison, at once raises a question of fundamental fairness. When a judge became a participant in plea bargain he brings to bear the full force and majesty

> of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not.

Evans, 252 A.2d at 691 (quoting *United States ex rel. Elksins v. Gilligan*, 256 F. Supp. 244, 254 (S.D.N.Y. 1966)). As the *Evans* court noted, "[a] defendant needs no reminder that if he rejects the [court's] proposal, [and] stands upon his right to trial and is convicted, *he faces a significantly longer sentence*." *Id.* (emphasis added). For these reasons, the only communication a trial court is permitted to have with the parties about plea negotiations is to "inquire of defense counsel and the attorney for the Commonwealth whether there has been any discussion of a plea agreement" or to "give counsel, when requested, of a reasonable period of time to conduct such a discussion." Pa. R. Crim. P. 590, Comment.

By her own admission, Judge Dantos's conduct in this case goes well beyond merely inquiring as to whether there has been any discussion of a plea agreement. In her June 6, 2019 Order Judge Dantos expressly confirmed Attorney Waldron's statement that, prior to the offering of Jamie's guilty plea, there was "a meeting with the Court to determine if this Court would reject a potential plea." (Appendix C, C2 n.1.) Notably, Judge Dantos did not actually rebut Attorney Waldron's recitation of what happened at that meeting. Instead, she stated only that "at no point did this Court ***directly*** participate in plea negotiations in this matter." (*Id.* (emphasis added).) Based on the record, Judge Dantos appears to be clearly misinterpreting well-

established Pennsylvania law regarding what constitutes impermissible "participation" in the negotiation process. *See Johnson*, 875 A.2d at 331-32 (holding "a trial judge is forbidden from participating in any respect in the plea bargaining process prior to the offering of a guilty plea").

The implications of this misinterpretation extend well beyond the scope of this case. Judge Dantos's defense of her participation in a meeting to determine whether she would reject a potential plea deal suggests she sees nothing wrong with that practice generally. Neither Attorney Waldron nor DDA Dimmig appear to have found her conduct in this case to be out of the ordinary; in fact, Attorney Waldron's certification states that they requested the meeting, suggesting that (apart from the impropriety of counsel in requesting such a meeting) it may be common practice in Judge Dantos's courtroom, or even in the county overall. (*See* Mot. for Recusal, Ex. A, ⁋ 6.) Therefore, notwithstanding the clarity of the current rule, it is essential that this Court accept review of this case to clearly establish that meeting with the parties to discuss the terms of a potential plea deal amounts to improper participation in plea negotiations by the trial court.

VI. CONCLUSION

For the foregoing reasons, this Court should grant the instant Petition for Allowance of Appeal and accept interlocutory review of the trial court's order denying Petitioner's motion for recusal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the word count limitation of Rule 1115(f) of the Pennsylvania Rules of Appellate Procedure. This brief contains 5,753 words. In preparing this certificate, I relied on the word count feature of Microsoft Word.

Dated: November 4, 2019

/s/ Marsha L. Levick
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