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SUPREME COURT OF THE STATE OF WASHINGTON

In re	)	NO. 200,577-2
	)	
BRADLEY R. MARSHALL,	)	ADDITIONAL AUTHORITIES
	)	IN SUPPORT OF
	)	SUPREME COURT
Lawyer,	)	DISQUALIFICATION
	)	
	)	
WSBA No. 15830	)	

COMES NOW the appellant Bradley R. Marshall and submits the document described below and attached hereto as additional authority under Rule 10.8 of the Rules of Appellate Procedure:

> *Hugh M. Caperton, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc. v. A.T. Massey Coal Company, Inc., et al.* **(BRIEF OF THE AMERICAN ACADEMY OF APPELLATE LAWYERS, AMICUS CURIAE, SUPPORTING PETITIONERS)**

The opinion of the Supreme Court of Appeals of West Virginia is not yet published but is electronically reported at 2008 W. Va. LEXIS 22. J.A. 485a. This matter was argued in March, 2009 before the United States Supreme Court on certiorari and the opinion of the Court is expected in July, 2009.

DATED: April 14, 2009.

BRADLEY R. MARSHALL
Appellant

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DECLARATION OF SERVICE AND FILING

On this day I provided a copy of the foregoing Additional Authorities in Support of Supreme Court Disqualification via email and posted a copy on April 15, 2009 with the U.S. Postal Service addressed to:

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On this date the said document was sent via email for filing with the Clerk of Court as follows:

Mr. Ronald Carpenter, Clerk
Washington State Supreme Court
Email address: supreme@courts.wa.gov

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Seattle, Washington on April 14, 2009.

Kay Gordon, Assistant to
Bradley R. Marshall, Appellant

American Bar Association
www.supremecourtpreview.org

No. 08-22

In The
Supreme Court of the United States

HUGH M. CAPERTON, *et al.*,

Petitioners,

v.

A.T. MASSEY COAL COMPANY, INC., *et al.*,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF OF THE AMERICAN ACADEMY OF APPELLATE LAWYERS, AMICUS CURIAE, SUPPORTING PETITIONERS

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BRIEF OF THE AMERICAN ACADEMY OF APPELLATE LAWYERS, AMICUS CURIAE, SUPPORTING PETITIONERS

The American Academy of Appellate Lawyers submits this brief as amicus curiae in support of petitioners.[1] The parties to the action have consented in writing to the filing of amicus briefs pursuant to Rule 37.3(a) of the Rules of this Court. The parties' letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The American Academy of Appellate Lawyers (the "Academy") is a non-profit, national professional association of lawyers skilled and experienced in appellate practice and related post-trial activity in

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[1] Pursuant to Supreme Court Rule 37.6, the Academy states that this brief was written by Fellows of the Academy, and was produced and funded exclusively by the Academy or its counsel. Although one of the counsel for the petitioners is a member of the Academy, he took no part in the decision whether to file this brief or in its preparation, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission. Some of the Fellows of the Academy are active or former judicial officers. No active judicial officer has participated in the decision to file this brief or in its preparation.

The Academy takes no position with respect to any issue or argument presented other than those expressed in the Academy's own brief.

state and federal courts, dedicated to the improvement and enhancement of the standards of appellate practice, the administration of justice, and the ethics of the profession as they relate to appellate practice. Membership in the Academy is by nomination or invitation only, and the Academy currently has 286 member "Fellows." The activities of the Academy are supported entirely by the dues and initiation fees paid by the Fellows.

By publishing newsletters and reports, conducting retreats and conferences, teaching appellate courses and seminars, and establishing a network of lawyers, the Academy brings together the leading attorneys in the nation who devote their practices to appellate representation. The Academy has submitted its views to Congress on legislative changes affecting appellate practice and has previously filed an amicus curiae brief in this Court.[2]

The Fellows of the Academy offer comprehensive knowledge of the roles of state and federal appellate courts and the leadership role of those courts in the development of American law. The Academy is filing this amicus brief because it believes that the Court should consider how the due process and public policy consequences of a litigant's campaign contribution to

---

[2] Brief of the American Academy of Appellate Lawyers Amicus Curiae Supporting Petition for a Writ of Certiorari, *Mountain Enterprises, Inc. v. Fitch*, 541 U.S. 989 (2004) (No. 03-1222).

a judge are magnified when the contribution is made to an appellate judge.

SUMMARY OF ARGUMENT

A lopsidedly large campaign contribution to a trial judge creates an appearance of impropriety and thereby raises concerns about deprivation of due process. When that contribution is made to one of the judges hearing an appeal those concerns are increased because of the institutional role appellate courts play in the judicial process. Appellate courts make law, interpret constitutions, and lead the judiciary in their jurisdictions. Bias or perceived bias influences not only the immediate case before the court but other cases and other legal transactions that depend upon precedents created by appellate decisions. The appearance of bias, let alone actual bias, results in the public's loss of respect for and confidence in the judicial system.

ARGUMENT

The Academy shares petitioner's view that in some circumstances the sheer size of a campaign contribution may result in a denial of due process. As the Court has noted, "[n]ot only is a biased decision-maker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness." *Withrow v. Larkin*, 421

U.S. 35, 47 (1975) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). The Academy wishes to emphasize that the effect of such unfairness is magnified in a case involving an appellate court, and to urge the Court to take that magnified effect into account when analyzing the due process concerns at issue here.

The judicial branch is under unprecedented attack in this decade. While "[e]veryone has a view regarding whether particular cases have been decided correctly . . . [p]ersistent attacks [on the judiciary] pose a problem because although courts will weather thoughtful criticism of specific judicial opinions, courts cannot survive a constant deluge of negative comments intended to undermine popular support for the entire judiciary." Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View From the Supreme Court,* 8 Journal of Appellate Practice and Process 91, 93 (2006).

I. THE SEVERAL ROLES OF APPELLATE COURTS.

A disproportionately large campaign contribution to an appellate justice hearing an appeal involving that contributor threatens the judicial system in at least four ways.

A. THE LAWMAKING ROLE

Trial judges determine parties' rights one case at a time. While significant, to the extent a campaign

contribution influences the outcome of a trial, only the rights of the litigants before the court are at risk. But if a contribution to an appellate justice affects his or her reasoning about an appeal, then the taint of that biased decision extends to every future litigant whose case may be affected by the appellate decision under the principle of *stare decisis*. This is because, as every law student learns the first few days of law school, appellate courts establish what is the law.

Appellate opinions "collectively form the body of the common law" and "govern what a trial judge does, even if no appeal is ever taken in a particular case. . . ." Daniel J. Meador, Thomas E. Baker, Joan E. Steinman, *Appellate Courts: Structures, Functions, Processes, and Personnel* v (2nd ed. 2006) (hereafter "Meador"). Apart from litigation, the decisions of appellate courts also guide the advice lawyers give their clients, the actions clients take based on that advice, even the content of legal forms people use. As Justice Breyer put it more colloquially in reference to this Court, "we decide matters that affect not only the two people on either side in the case before us, but millions of people who are not present in the courtroom." Breyer, *supra*, at 98.

The text of the opinion deciding the case may have as much effect on future litigants and on people making business and personal decisions that depend on the state of the law as it does for the immediate parties to a case. The common law will develop and generations of future citizens will shape their

behavior and measure their rights based on the opinions appellate courts write today.

For that reason, *why* an appellate court decides a case a certain way is as important as *what* the court decides. When any outside factor taints appellate decisionmaking, it does not merely affect the outcome; it also distorts the process of explaining judicial reasoning – i.e., writing opinions – that is at the heart of an appellate court's mission. Therefore, the Court must look beyond the outcome of a particular case in evaluating when judicial campaign contributions necessitate recusal.

Nor can the Court assume that the prejudicial effect of a judicial campaign contribution to an individual justice is mitigated on appeal because decisions are made by a panel rather than by a single judge. Justice Jackson wrote, "I think it was Mr. Justice Brandeis who said that a judge often must decide a case as if he were 100% convinced one way or the other, although usually he is not more than 55% convinced. Many decisions prevail by a narrow margin of Justices, and the Justices admit a large margin of doubt." Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 37 Cornell L.Q. 1, 13 (1951). To the extent that one justice is less than 100% certain of his or her views, a significant financial contribution or other outside influence that tips the scale for that one judge may have the effect of tipping the decision for the entire panel.

Thus, in addition to the due process implications for individual litigants, appellate courts must have effective mechanisms in place to avoid the untoward influence of excessive campaign contributions for the sake of every person whose actions and transactions are shaped in response to the decisions of appellate courts that develop the law and interpret statutes.

B. THE CONSTITUTIONAL ROLE.

This Court has noted that appellate courts play a key constitutional role arising from "[d]ifferences in the institutional competence of trial judges and appellate judges." *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 440 (2001). Indeed, in several contexts, this Court has explained the importance of allowing appellate courts to review decisions *de novo.*

For example, "in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-286 (1964)). Appellate courts must also examine independently whether historical facts amount to reasonable suspicion or to probable cause under the Fourth Amendment. *Ornelas v. United States*, 517 U.S. 690 (1996). In addition, appellate

courts decide *de novo* if punitive damage awards and fines are so excessive that they cross an "inherently imprecise" constitutional line. *Cooper Industries,* 532 U.S. at 434-35 (relying on *United States v. Bajakajian*, 524 U.S. 321, 336 (1997)).

Independent review helps to assure "'the uniform treatment of similarly situated persons that is the essence of law itself.'" *Cooper Industries*, 532 U.S. at 436 (quoting concurring opinion of Breyer, J., in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 587 (1996)). Thus, when a campaign contribution or other extraneous factor influences an appellate justice, the "essence of law itself" is injured.

C. THE ERROR CORRECTING ROLE.

Not every action by an appellate court creates precedent or resolves a constitutional dispute, of course. Correcting trial court error is another important role played by appellate courts. Appellate oversight of trial courts brings consistency to the legal system as a whole not only in the constitutional arena discussed above, but with respect to state substantive and procedural law. That oversight must be exercised without bias.

In many matters, trial courts have broad discretion and their factual determinations receive great deference on appeal. That deference leads to a high rate of affirmance, and in consequence many trial court decisions are effectively final. Yet there is general recognition that the resolution of disputes by

a sole, fallible human being is not always a satisfactory method, especially where the decision-maker may be subject to local prejudices or voters' pressure. As a result, due process requires that, when trial court decisions are reviewed, they must be reviewed carefully to be sure they are free of improper influence and that such review itself is free from taint.

Further, in most states in the Union, there is a statutory or state constitutional right to appellate review, and most states provide intermediate appellate review that offers an additional layer of protection against trial court error. This is not true in West Virginia, however, where the Supreme Court of Appeals is that state's only appellate court, and its jurisdiction is entirely discretionary. Where the specter of bias is raised in such circumstances, the need for close scrutiny is critical.

D. THE LEADERSHIP ROLE.

"Apart from their case-deciding functions . . . appellate courts perform important roles in the governance and operations of the judiciary through their supervisory and rule making powers." Meador, *supra*, at vi. Appellate judges' statewide prominence means that they must display probity and evenhandedness more clearly than other judges. They set examples for the rest of the bench and bar. As Petitioners' brief makes clear (Pet. Br. at 26-28), the conduct at issue in this case has substantially jeopardized the role of the West Virginia Supreme Court

of Appeals as an exemplar of judicial independence and impartiality.

II. THE DECISION OF THE WEST VIRGINIA SUPREME COURT OF APPEALS IMPLICATES EACH OF THE INSTITUTIONAL CONCERNS SPECIFIC TO APPELLATE COURTS.

As long as states continue to elect judges, contributions to judicial campaigns will remain necessary. Drawing the line between permissible contributions and those requiring recusal may sometimes prove difficult. Nevertheless, the magnitude of Mr. Blankenship's contribution to Justice Benjamin's campaign is so great that it is easy to say it crossed the line of impropriety. That contribution affected all four appellate court roles discussed in Section I.

A. The contribution affected the law-making process. According to the petition, the decision of the West Virginia Supreme Court of Appeals created numerous new points of West Virginia law. Pet. Br. at 10.

B. The underlying judgment for petitioners included punitive damages. But for the fact that the Supreme Court of Appeals set aside the entire decision, the outcome would have touched on that court's constitutional role in the evaluation of punitive damages.

C. The error-correcting function was obviously affected. The West Virginia Supreme Court of Appeals is that state's only appellate court, and its docket is completely discretionary. Here, Justice Benjamin participated in the vote to grant Massey's petition for review, as well as in the eventual decision to reverse the judgment in its entirety. Since the initial appellate decision in West Virginia is a litigant's only avenue for review, the potential effect of bias was multiplied exponentially.

D. The decision clearly tarnished the leadership role of the Supreme Court of Appeals. One of the disturbing facts in this case is that after Justice Benjamin refused to recuse himself, Chief Justice Maynard and subsequently Justice Starcher recused themselves from further participation in the case.[3] This left Justice Benjamin in a position to appoint the two lower court judges to replace Justices Maynard and Starcher.[4] One of those judges was part of the 3-2

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[3] According to Petitioners (Pet. Br. at 11-12), Chief Justice Maynard recused himself after photographs showed him vacationing on the French Riviera with Justice Benjamin's campaign contributor, Don Blankenship, the chairman, CEO, and president of Respondent A.T. Massey, while the appeal of this case was pending. Justice Starcher also recused himself because of the effect on the appearance of impartiality arising from his public statements criticizing Mr. Blankenship's contributions to Justice Benjamin's re-election campaign. *Id.* at 13.

[4] Also according to Petitioners, Justice Benjamin was put in that position because, before their recusals, the three justices in the majority in the first opinion voted to ignore the procedures that would have put a fourth justice, Justice Albright, ahead of

(Continued on following page)

majority that reversed the judgment in favor of petitioners. Thus Mr. Blankenship's extraordinary campaign contributions to Justice Benjamin's campaign raised doubts not only about Justice Benjamin's impartiality, but also raised doubts about the impartiality of the majority of the court that decided the case.

This manipulation of the appointment process by a justice who refused to recuse himself is likely to breed cynicism not only in the eyes of the public, but among the entire West Virginia trial bench.

Justice Benjamin to succeed to the position of chief justice. Pet. Br. at 12 n.2.

CONCLUSION

The decision of the Supreme Court of Appeals of West Virginia should be reversed and remanded.

Respectfully submitted,

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January 5, 2009

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Dear Mr. Carpenter: Attached for filing is the fifth of six of appellant's Additional Authorities in Support of Supreme Court Disqualification, submitted under RAP 10.8 pursuant to your request.
Thank you for your courtesies.

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