

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA,  
Plaintiff-Appellant

v.

EMMITT MARTIN, III,  
Defendant; and

DEMETRIUS HALEY; JUSTIN SMITH; TADARRIUS BEAN,  
Defendants-Appellees

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE

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BRIEF FOR THE UNITED STATES AS APPELLANT

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## **STATEMENT IN SUPPORT OF ORAL ARGUMENT**

The government respectfully requests oral argument. This appeal arises after a nearly four-week jury trial involving civil rights and obstruction-related charges. After trial but before sentencing, the district judge recused himself from further involvement in the case due to comments he made about a post-trial incident. Following his recusal, the three defendants who were convicted at trial moved for a new trial on the basis that the judge's post-trial comments indicated that he was biased against them during trial, violating their due process rights and the judicial recusal statute. A successor judge, reasoning that the risk that the district judge might have appeared biased violated the Due Process Clause, ordered a new trial.

A finding of unconstitutional judicial bias is rare and warrants close scrutiny. Given the consequential nature of the successor judge's order, the government believes oral argument is likely to aid the decisional process.

## **STATEMENT OF JURISDICTION**

This is an interlocutory appeal in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The successor judge entered an order granting appellees' motions for a new trial on August 28, 2025. Order, R. 919, PageID# 16565.<sup>1</sup> The government filed a timely notice of appeal on September 23, 2025. Notice of Appeal, R. 946, PageID# 16629-16631. The four captioned defendants subsequently filed cross appeals, which this Court dismissed on April 6, 2026. C.A. Doc. 36. This Court has jurisdiction under 18 U.S.C. 3731.

## **STATEMENT OF ISSUES**

1. Whether the successor judge erred in finding that two post-trial comments made by the district judge about a post-trial event gave rise to an unconstitutional risk of an appearance of judicial bias during trial, thereby warranting a new trial.

2. Whether the district judge, who recused himself upon one of the defendants' motion, was required to recuse prior to any motion

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<sup>1</sup> "R. \_\_" refers to documents on the district court's docket, which are cited by PageID# unless the document is sealed. "C.A. Doc. \_\_" refers to documents on this Court's docket. "Gov't Ex. \_\_" refers to trial exhibits.

pursuant to the judicial recusal statute, 28 U.S.C. 455, and, if so, whether he was required to recuse before trial.

3. Assuming recusal was required, whether a new trial was the appropriate remedy.

### **STATEMENT OF THE CASE**

This case stems from five former Memphis Police Department officers' fatal assault of 29-year-old Tyre Nichols.

#### **A. The defendants beat and kill the victim, then cover it up.**

On January 7, 2023, Memphis Police Department (MPD) officers and defendants Demetrius Haley and Emmitt Martin, along with a third officer, stopped Nichols's car for a misdemeanor traffic offense. Transcript, R. 674, PageID# 11931-11938. After the officers "snatched" Nichols from his car, threatened to "knock [his] ass the fuck out," pepper sprayed him, and tased him, Nichols ran. Hemphill Video, Gov't Ex. 8, 20:24:55-20:25:59; Transcript, R. 603, PageID# 8454; Transcript, R. 674, PageID# 11938-11946. Minutes later, after the third officer told Haley that radio communications indicated that other officers had found Nichols, Haley expressed, "I hope they get him," and the third officer

responded, “I hope they stomp his ass.” Hemphill Video, Gov’t Ex. 8, 20:32:38-20:32:41, 20:33:49-20:33:53.

The officers got their wish. Haley drove to where Martin, along with fellow officers and co-defendants Justin Smith, Tadarrius Bean, and Desmond Mills, had apprehended Nichols. Transcript, R. 603, PageID# 8467. The five officers—two of whom would later testify, along with other witnesses, about the “street tax” of using excessive force to punish those who run from the police—proceeded to assault Nichols. Transcript, R. 677, PageID# 12563-12565; Transcript, R. 676, PageID# 12819-12820, 12861; Transcript, R. 603, PageID# 8485; Transcript, R. 674, PageID# 11918, 11928.

Unbeknownst to the officers, a nearby surveillance camera captured the assault. Transcript, R. 603, PageID# 8490; *see also* Transcript, R. 646, PageID# 10188-10189; Transcript, R. 646, PageID# 10177. Video shows the officers repeatedly punching, kicking, and batoning a “helpless” Nichols. Transcript, R. 603, PageID# 8498; *see generally* SkyCop Video, Gov’t Ex. 5. Audio from the sole body-worn camera activated during the assault captures the officers yelling “hit him!”, “beat that man!”, and “I’m going to baton the fuck out of you.” Mills

Sync Video, Gov't Ex. 12, 20:34:53-20:35:15, 20:36:14-20:36:20; Transcript, R. 603, PageID# 8498, 8501; Transcript, R. 646, PageID# 10186. By the end of the assault, Nichols was unresponsive. Transcript, R. 675, PageID# 12163-12167.

As Nichols lie on the asphalt, the officers boasted about “hitting him with straight haymakers” and “rocking” him with punches. Mills Camera, Gov't Ex. 6, 20:41:20-20:42:39; Transcript, R. 673, PageID# 11564-11567; Transcript, R. 603, PageID# 8506-8508, 8516-8517. But when they spoke with the police dispatcher and paramedics who responded to the scene, the officers did not mention any haymakers; they said nothing about the punches, kicks, or baton strikes they inflicted, even after a bloodied, handcuffed Nichols couldn't sit up anymore. Transcript, R. 675, PageID# 12122-12125, 12128, 12130-12131, 12174-12176; Transcript, R. 603, PageID# 8517-8519; Transcript, R. 646, PageID# 10175, 10186. And when their supervisor arrived at the scene, the officers again said nothing about their blows. Mills Camera, Gov't Ex. 6, 20:42:36-20:45:45; Transcript, R. 603, PageID# 8509-8511; Transcript, R. 646, PageID# 10175.

Instead, based on the “understanding” they had among themselves, the officers lied about what happened—not only omitting what they had done, but falsely asserting that, among other things, Nichols tried to hit them with his car and reached for their guns, which the unresponsive Nichols could not refute. Transcript, R. 603, PageID# 8503-8511; Transcript, R. 646, PageID# 10176. They did so because, as one of them later put it, “we had to exaggerate what [Nichols] did so we could basically justify what we did.” Transcript, R. 603, PageID# 8509-8511; Transcript, R. 646, PageID# 10176. The officers repeated their false story to a coworker responsible for documenting the incident (Transcript, R. 644, PageID# 9766-9768, 9773-9782; Transcript, R. 603, PageID# 8521-8531), and two of them denied even being on the scene to medical staff at the hospital (Transcript, R. 646, PageID# 10258-10259; Transcript, R. 603, PageID# 8520). As the officers lied to their supervisor, their colleague, and medical staff, Nichols flatlined, his organs failed, and, days later, he died. Transcript, R. 671, PageID# 11239-11249, 11257; Transcript, R. 665, PageID# 10810-10811; Transcript, R. 675, PageID# 12168.

**B. The defendants are indicted, Mills and Martin plead guilty, and a nearly four-week jury trial results in several guilty verdicts.**

On September 12, 2023, a grand jury returned an indictment charging the five officers involved in the assault with four identical counts. Indictment, R. 2, PageID# 8-15. Count 1 charged each officer with a violation of 18 U.S.C. 242 for, while acting under color of law, willfully using unreasonable force in violation of the Fourth Amendment, resulting in Nichols's bodily injury and death; Count 2 alleged a violation of 18 U.S.C. 242 for exhibiting deliberate indifference to Nichols's medical needs after the assault, in violation of the Fourteenth Amendment, resulting in Nichols's bodily injury and death; Count 3 alleged a violation of 18 U.S.C. 1512(k) for conspiring to cover up the assault; and Count 4 alleged a violation of 18 U.S.C. 1512(b)(3) for providing false and misleading information about the assault, including to the officers' supervisor and to the officer responsible for documenting the incident. Indictment, R. 2, PageID# 8-14.

Mills and Martin pleaded guilty to Counts 1 and 3 and testified at trial as government witnesses. Mills Plea Agreement, R. 91, PageID# 267-276; Martin Plea Agreement, R. 499, PageID# 7230-7235.

Haley, Bean, and Smith proceeded to trial, over which Judge Norris presided.

Trial began on September 9, 2024. Transcript, R. 689, PageID# 13106. In addition to the surveillance video and body-worn camera footage capturing the assault, the evidence at trial included the defendants' admissions. For example, Martin testified that when he caught up to Nichols, he saw Bean and Smith "assaulting" Nichols by punching him in the head, even though Nichols posed no threat, and that although he knew he had an obligation to intervene, he didn't because he figured "that's what [Nichols] should get" (Transcript, R. 603, PageID# 8467, 8482-8485); that he kicked and punched Nichols because he was "angry that," among other things, Nichols "ran from" the traffic stop (Transcript, R. 603, PageID# 8485-8486, 8490-8491, 8495); that he threw his body-worn camera on the ground because he "didn't want to show" that the officers "were assaulting Mr. Nichols" (Transcript, R. 603, PageID# 8489); and that after the assault, as the officers discussed the "pieces" and "haymakers" they "were rocking" Nichols with, there was an "understanding" that this was "a team thing" and no one "was[] going to tell on" anyone (Transcript, R. 603, PageID# 8506-8508). Bean did not

testify at trial, but portions of his statement to the FBI were admitted, including that he punched Nichols in the face; watched as other officers kicked and punched Nichols in the face and implored them to do so by yelling “hit him”; and declined to tell paramedics about what happened because he wanted to protect the team, even though he “knew it was bad” because Nichols had a “lump on his head” and “had fallen over.” Transcript, R. 646, PageID# 10182-10186. Similarly, Smith admitted that: he personally hit Nichols in the face; he “should have stopped” other officers from doing the same; “he was wrong to hold up Mr. Nichols” as other officers unnecessarily assaulted Nichols; and, ultimately, that it was “his fault that Mr. Nichols had died.” Transcript, R. 646, PageID# 10174-10177. Haley did not testify or speak with the FBI, but he texted a friend a picture of a beat-up Nichols that prompted her to respond “Omg I thought he was dead,” told her that he was not involved in the incident, and later instructed her to delete the photo (Transcript, R. 644, PageID# 9841-9845; Photograph, Gov’t Ex. 54; Text Message, Gov’t Ex. 76); yet, in response to a text from a fellow officer asking, “Who beat dude [Nichols] up last night,” Haley responded, “Us.” (Text Message, Gov’t Ex. 91).

After a nearly four-week trial, the jury returned a verdict on October 3, 2024. Verdict, R. 627, PageID# 9509-9518. Haley was found guilty on all counts, although the jury found that his civil rights offenses, Counts 1 and 2, resulted in Nichols's bodily injury but not death. Verdict, R. 627, PageID# 9513-9515. Smith and Bean were found guilty only of the obstruction offense charged in Count 4. Verdict, R. 627, PageID# 9510-9512, 9516-9518.

**C. The district judge's law clerk is shot.**

On October 8, 2024, five days after the jury returned its verdict, the law clerk who assisted Judge Norris during trial was shot while at the home of another law clerk, who previously assisted Judge Norris on this case, in what investigators concluded was a burglary-related incident. Notice, R. 846, PageID# 15951-15952.

On June 13, 2025, the government filed a notice disclosing two comments made by Judge Norris about the shooting. Notice, R. 846, PageID# 15951-15954. In the notice, Assistant United States Attorney Beth Boswell, who was not a member of the trial team, wrote that federal investigators met with Judge Norris on May 30, 2025, to explain their determination that there was no federal nexus for the shooting and,

therefore, that federal charges would not be pursued. Notice, R. 846, PageID# 15952. According to the notice, during the meeting, Judge Norris “indicated that his theory or belief was that at least one of the defendants” in the present case “was in a gang and that the gang was responsible for the shooting of his clerk.” Notice, R. 846, PageID# 15952-15953. Judge Norris further “stated his belief that the intended target of the shooting was his former female law clerk who lived at the residence,” noting that “the defendant/defendants had seen the former female clerk during the trial in the courtroom.” Notice, R. 846, PageID# 15953.

AUSA Boswell wrote that after the meeting, she recalled an earlier comment from Judge Norris. Notice, R. 846, PageID# 15953. “Shortly after” the shooting, which occurred on October 8, 2024, Judge Norris “indicated to [Boswell] that he could not meet with any member of the Memphis Police Department to give a statement regarding the shooting of his clerk, as MPD is ‘infiltrated to the top with gang members.’” Notice, R. 846, PageID# 15953. This comment “was not in response or related to any case.” Notice, R. 846, PageID# 15953. Boswell further wrote that it “was clear” to her that Judge Norris “was extremely concerned about the well-being of” his clerk and “desirous that the perpetrators be held

accountable,” and he “evidenced reasonable frustration with the police investigation.” Notice, R. 846, PageID# 15952.

**D. The district judge recuses, and a successor judge orders a new trial.**

After the government filed its notice, Smith moved for Judge Norris’s recusal on the ground that “[i]nformation has just now been made available to the litigants and to the Court” suggesting that Judge Norris should recuse himself “from any further involvement” in the case. Motion for Recusal, R. 852, PageID# 16003. Judge Norris recused himself the same day. Order of Recusal, R. 854, PageID# 16006.

Shortly thereafter, Haley, Bean, and Smith moved for a new trial, asserting that Judge Norris’s post-trial comments about the shooting that occurred after trial illustrated that he was biased against them during trial, violating the Due Process Clause and the judicial recusal statute, 28 U.S.C. 455. Haley Motion, R. 861, PageID# 16018-16023; Smith Motion, R. 863, PageID# 16029-16035; Smith Adoption of Haley’s Motion, R. 865, PageID# 16038-16039; Bean Motion, R. 872, PageID# 16142-16146; Smith Adoption of Bean’s Motion, R. 873, PageID# 16150-16151.

A successor judge granted the motions for a new trial on August 28, 2025. Order, R. 919, PageID# 16555-16565. The successor judge found that Judge Norris had no actual bias and that his rulings throughout the case were “sound, fair, and grounded firmly in the law.” Order, R. 919, PageID# 16564. Similarly, the successor judge found that “Judge Norris’ decisions throughout this case were deliberate and searching,” and she could not find “a single example among the many allegedly biased decisions cited by [appellees] that was inconsistent with the law.” Order, R. 919, PageID# 16556. Nevertheless, the successor judge concluded that the “facts in this case, including its high-profile nature, the shooting of Judge Norris’ law clerk shortly after the trial’s conclusion, and the Judge’s subsequent meeting about the investigation into the shooting” presented “an extreme set of facts.” Order, R. 919, PageID# 16563-16564. On this basis, the successor judge concluded that because “the risk of bias here is too high to be constitutionally tolerable, and because ‘[j]udicial bias is structural error, not susceptible to . . . harmless error analysis[.]’” a new trial was necessary. Order, R. 919, PageID# 16563 n.6, 16565 (alterations in original; citation omitted).

## SUMMARY OF ARGUMENT

The successor judge correctly concluded that the district judge was not biased and that his decisions were “sound, fair, and grounded firmly in the law.” But the successor judge erred in throwing out the jury’s verdict on the basis that the “risk” that the district judge may have “appeared” biased violated the Due Process Clause—a standard reserved for extraordinary situations, and one that did not require recusal in this case.

Across a century of jurisprudence, courts have held that the Constitution demands recusal in only a handful of cases, all of which involved circumstances not present here. The allegations of bias in this case stem from two post-trial comments made by the district judge about a post-trial incident. No court has ever found—as the successor judge did here—that a purported appearance of judicial bias that arises after trial and stems from events occurring after trial violates a defendant’s due process rights during trial. Indeed, the Due Process Clause contains no such proscription.

And while recusal can be required by statute, the recusal statute did not require recusal here. Even assuming, however, that these post-

trial comments regarding a post-trial incident evinced some sort of impermissible bias, a new trial was not the proper remedy. The order granting a new trial should be reversed.

## ARGUMENT

### **I. The successor judge erred in granting a new trial because the Due Process Clause did not require recusal.**

The Due Process Clause guarantees a “fair trial in a fair tribunal,” which requires “an absence of actual bias in the trial of cases.” *In re Murchison*, 349 U.S. 133, 136 (1955). “[M]ost matters relating to judicial disqualification,” however, “[do] not rise to a constitutional level.” *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (second alteration in original; citation omitted); *see also Williams v. Anderson*, 460 F.3d 789, 814 (6th Cir. 2006) (“[T]he Constitution generally does not require disqualification on the basis of bias and prejudice . . . .”); *Hankins v. City of Inkster*, 832 F. App’x 373, 379 (6th Cir. 2020) (“[A] judge’s failure to recuse rarely amounts to a denial of due process.”). Rather, “the Constitution requires recusal” in only “extraordinary situation[s],” *Caperton*, 556 U.S. at 887—like when a judge accepts bribes to fix cases, then rules against those who do not offer bribes to deflect suspicion of his wrongdoing. *See Bracy v. Gramley*, 520 U.S. 899, 905 (1997).

“[A]ctual bias” against a defendant by a judge, “if disclosed,” would be “grounds for appropriate relief,” *Caperton*, 556 U.S. at 883, but in “the usual case,” a court “asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, ‘the average judge in his position is “likely” to be neutral, or whether there is an unconstitutional “potential for bias,”” *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) (quoting *Caperton*, 556 U.S. at 881).

Neither actual bias nor an unconstitutional potential for bias was present here. The successor judge properly found that the district judge did not harbor any actual bias. The successor judge erred, however, in finding that concerns about the “appearance of judicial bias” warranted a new trial. Order, R. 919, PageID# 16564 (citation omitted).

#### **A. Standard of review**

“Although [this Court] generally review[s] a district court’s grant of a new trial in a criminal case for abuse of discretion, [it] review[s] de novo the district court’s application of the proper legal standard, including the determination whether harmless-error review applies.” *United States v. Maund*, 167 F.4th 941, 947-948 (6th Cir. 2026).

**B. The successor judge erred in granting a new trial based on the risk of an appearance of judicial bias.**

Despite determining that no actual bias existed, the successor judge found that a new trial was warranted because the case presented an “extreme set of facts.” Order, R. 919, PageID# 16563-16564. She went on to conclude, in a paragraph reciting the legal standard but omitting any analysis, that “the risk of bias here is too high to be constitutionally tolerable.” Order, R. 919, PageID# 16564-16565. But the Due Process Clause does not require recusal simply because facts are “extreme,” and circumstances in which the “probability of actual bias” is “too high to be constitutionally tolerable” are exceedingly rare. *See, e.g., Johnson v. Morales*, 946 F.3d 911, 918 n.3 (6th Cir. 2020) (“It is unsurprising that [the defendant] does not substantially rely on the Supreme Court’s recusal precedents. After all, the Court has declined to find an unconstitutional risk of bias in all but a few narrow circumstances—none of which apply here.”). A review of those rare decisions makes clear that this case does not fall within the narrow confines in which the Constitution requires recusal, and, correspondingly, a new trial.

1. **Due process requires recusal in a limited class of cases in which the judge has a particular interest or gives the appearance of having a particular interest, which the district judge here did not have.**

Due process compels a judge's recusal in a sharply limited class of cases. This is not such a case.

The Supreme Court has identified three categories of cases in which the Due Process Clause requires recusal. First, the Court has found recusal warranted “where a judge had a financial interest in the outcome of the case.” *Caperton*, 556 U.S. at 877. This included where the judge, who was also the town mayor, had a “direct, personal, substantial pecuniary interest” in “convicting the defendant who came before him for trial” because the judge received a fee for his judicial service if the defendant was convicted—but not if the defendant was acquitted—and had the authority to set the fine the town would receive following a conviction. *Tumey v. Ohio*, 273 U.S. 510, 523, 532-535 (1927). In another mayor-serving-as-judge case, the Court found that the Due Process Clause precluded the mayor from adjudicating cases because he “had responsibilities for [the village’s] revenue production”—a “major part” of which stemmed from “the fines, forfeitures, costs, and fees imposed by

him in his mayor's court." *Ward v. Village of Monroeville*, 409 U.S. 57, 58-60 (1972).

Also encompassed in this category was a state supreme court justice who "cast the deciding vote and authored the court's opinion" in a case involving an insurer's bad-faith refusal to pay a valid claim. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 816, 822 (1986). While the case was pending before the state supreme court, the justice brought a "very similar" bad-faith lawsuit of his own, which was pending "[a]t the time" he cast the deciding vote and authored the opinion. *Id.* at 817, 822. "Soon after" the opinion was released, the justice received a settlement in his own suit. *Id.* at 824. The same "issues were present" in his case and in the case in which he authored the opinion; thus, his opinion had "the clear and immediate effect of enhancing both the legal status and the settlement value of his own case"—in other words, his opinion increased the likelihood that his lawsuit would succeed and that the payout would be higher. *Id.* at 823-824. Accordingly, the Court concluded that he had a "direct, personal, substantial, [and] pecuniary [interest]" in the outcome of the case and that he acted as "a judge in his own case." *Id.* at 824 (first

alteration in original) (first quoting *Ward*, 409 U.S. at 60; then quoting *Murchison*, 349 U.S. at 136).

Appellees have never alleged any type of financial bias in this case.

Second, the Court has found recusal constitutionally required when the judge participated in an earlier phase of the case. *See Caperton*, 556 U.S. at 880. In *Murchison*, due process required recusal when the judge served as a “one-man judge-grand jury” who examined witnesses to determine whether criminal charges should be brought, determined that the witnesses lied and improperly refused to answer questions, charged them with perjury and contempt, and then tried and convicted them. 349 U.S. at 134-135. Because the judge was part of the accusatory process, and “no man can be a judge in his own case” or “try cases where he has an interest in the outcome”—as one does when he both accuses and tries—recusal was required. *Id.* at 136-137.

Similarly, due process guarantees that a defendant in a criminal contempt proceeding be tried before a judge other than the one at whom the defendant’s contemptuous conduct was directed. *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971); *see also Offutt v. United States*, 348 U.S. 11 (1954). And more recently, recusal was required where a

state supreme court justice, who joined the court's opinion vacating a decision to grant post-conviction relief to a defendant, had been the district attorney who approved seeking the death penalty in the defendant's case. *Williams*, 579 U.S. at 4, 7-8. There, noting that *Murchison* found that an "unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case," the Court held that "there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." *Id.* at 8-9.

Appellees have never alleged any prior involvement by Judge Norris in this case.

Third, the Supreme Court has found the risk of bias too high "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Caperton*, 556 U.S. at 884. In *Caperton*, a company CEO "contributed some \$3 million to unseat the incumbent [state supreme court justice] and replace him" with the judge at issue; the CEO's contributions "exceeded by 300% the amount spent by [the judge's

own] campaign committee.” *Id.* at 873, 884. Once elected, the judge joined the court’s 3-2 opinion reversing a \$50 million verdict against the CEO’s company. *Id.* at 874-875. Noting that “[j]ust as no man is allowed to be a judge in his own cause, similar fears of bias can arise when . . . a man chooses the judge in his own cause,” the Court held that the CEO’s “significant and disproportionate influence—coupled with the temporal relationship between the election and the pending case—” offered “a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.” *Id.* at 886 (citation omitted). Therefore, due to the case’s “extreme facts,” the “probability of actual bias [rose] to an unconstitutional level,” and the judge was required to recuse. *Id.* at 886-887.

Appellees have never alleged any impropriety surrounding Judge Norris’s assignment to this case.

While the *Caperton* Court held that “the probability of actual bias” rose to “an unconstitutional level,” 556 U.S. at 887, the dissent expressed concern that the “probability” or “appearance” of bias had never been grounds for recusal under the Due Process Clause previously, observing that the Court had “recognized exactly two situations in which the

Federal Due Process Clause requires disqualification of a judge: when the judge has a financial interest in the outcome of the case, and when the judge is trying a defendant for certain criminal contempts.” *Id.* at 890 (Roberts, C.J., dissenting). In response, the Court caveated that the facts were “extreme by any measure,” noting that “the constitutional standard” implicated in the case would “be confined to rare instances.” *Id.* at 884, 887, 890.

This Court has heeded *Caperton*’s cautionary language, emphasizing that *Caperton*’s “narrow[]” holding, *Johnson*, 946 F.3d at 918 n.3, “did not intend to extend broadly the circumstances under which an individual can establish a Due Process violation by proving something less than actual bias,” *Gordon v. Lafler*, 710 F. App’x 654, 661 (6th Cir. 2017). Rather, the *Caperton* Court “took care to note that this was a unique case involving an ‘extreme’ set of facts, but that most cases did not warrant constitutional consideration.” *Ibid.*<sup>2</sup>

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<sup>2</sup> Indeed, *Caperton* was so heavily caveated and its facts were so unique that this Court held that a state court that required a defendant to show actual bias, rather than the mere appearance of bias, did not misapply *Caperton* because whether the appearance of bias standard applied outside of *Caperton*’s extreme facts was not clearly established. See *Gordon*, 710 F. App’x at 659-661.

Notwithstanding this admonishment, the successor judge found that this case warranted constitutional consideration. But three principles underlie the cases that warrant constitutional consideration: a judge may not serve in a case in which he has a financial interest in the outcome, *Tumey*, 273 U.S. at 523; *Monroeville*, 409 U.S. at 59-60; *Lavoie*, 475 U.S. at 824-825; *Murchison*, 349 U.S. at 136-137; a man may not be a judge in his own case by serving as both accuser and adjudicator, *Murchison*, 349 U.S. at 136-137; *Mayberry*, 400 U.S. at 465; *Williams*, 579 U.S. at 8-9; and a man may not choose the judge in his own case, *Caperton*, 556 U.S. at 886.

None of those principles applies here. No one contends that Judge Norris received a fee or improved his odds of success in a personal lawsuit based on his rulings in appellees' criminal case; that Judge Norris played any role in charging or prosecuting the appellees; or that this case was shopped to Judge Norris. Put simply, this is not one of those "rare instances" in which the Due Process Clause is implicated. *Id.* at 890.

This Court's precedents reinforce this conclusion. Like the Supreme Court, this Court has found recusal constitutionally required under very limited circumstances. Undersigned counsel has identified seven cases in

which this Court has found recusal required under the Due Process Clause.

Most recently, this Court found recusal required when *Williams's* admonition against acting “as both accuser and judge” was violated. *See Jackson v. Cool*, 111 F.4th 689, 699 (6th Cir. 2024) (quoting *Williams*, 579 U.S. at 8). In *Jackson*, the judge “secretly recruited” the prosecutor to “ghost write” the opinion “sentencing [the defendant] *to death*.” *Id.* at 696-699. The judge’s conduct was “egregious”—not only did he “involve the prosecution in th[e] critical decision” to impose the harshest penalty in the criminal justice system, but his misconduct did not stop there: when his actions came to light, he “refused to accept responsibility” and said that “he did ‘nothing wrong,’” despite a disciplinary counsel’s conclusion that he violated multiple ethical canons in the judicial code of conduct; subsequently refused to recuse or grant a new sentencing hearing and had to be directed to do so and to draft a new sentencing opinion evaluating the appropriateness of the death penalty; finally held a new sentencing hearing two years later “to ensure that he disposed of the case before it would be transferred to another judge upon his retirement”; “improperly denied” the defendant the opportunity to

present mitigating evidence at the sentencing hearing and “express[ed] his disagreement for the need to hold a resentencing hearing”; then issued an “almost identical” opinion again sentencing the defendant to death, in contravention of the court order directing him to prepare an “*entirely new sentencing entry.*” *Ibid.* (citation omitted). This conduct speaks for itself.

The other six cases in which this Court found unconstitutional judicial bias involved a different “line[] of reasoning.” *Allen v. Hawley*, 74 F. App’x 457, 459 (6th Cir. 2003). Rather than bias “stemming from a trial judge’s ‘personal interest,’ or ‘stake,’ in the outcome of a case, usually derived from some extrajudicial association with the cause or with one of the parties,” *id.* at 459-460 (citing *Murchison* and *Tumey*), this line of cases “is more appropriately described as the ‘judicial misconduct’ cases.” *Ibid.* In these “judicial misconduct” cases, “the trial judge is accused of conducting the proceedings in a manner that strongly suggests to the jury that the judge disbelieves the defendant’s case, or for other reasons, thinks the prosecution should prevail.” *Ibid.* These cases all involved the court effectively abandoning its duty as a neutral arbiter and instead taking on the role of an advocate—and doing so in front of the jury, which

this Court has recognized is particularly problematic. *See United States v. Morrow*, 977 F.2d 222, 225 (6th Cir. 1992). These cases include:

- *United States v. Hickman*, 592 F.2d 931, 932, 934-936 (6th Cir. 1979) (court “interjected itself in the proceedings over 250 times,” refused to permit defense to reserve their opening statements, “rarely ruled on an objection by one side or another” but would “[s]ua sponte interrupt” with the words “objection sustained” and explain why the testimony was objectionable, “intru[ded]” on and “limit[ed]” defense’s cross-examination, “assumed the prosecutor’s role” by rehabilitating government witnesses, “took over” examination of witnesses, made a statement expressing “contemptuous disbelief” of defense witnesses that “clearly [told] the jury” that it “did not believe the defense story,” interrupted defense counsel during opening statements and closing arguments, and took an “anti-defendant” demeanor and tone in a “non-complex, routine case” where trial lasted one day);
- *Anderson v. Sheppard*, 856 F.2d 741, 742-747 (6th Cir. 1988) (judge directed a verdict in favor of defendant and was reversed by this Court, leading judge to comment that this Court “put egg on [his] face” by reversing on what he called a “technicality”; judge then became involved in settlement negotiations between the parties and “had clearly determined” that the plaintiff should settle; he “assumed the posture of an advocate” and told plaintiff that “the odds were clearly against him at a second trial”; refused to allow plaintiff additional time for new counsel to prepare for trial, leading plaintiff to represent himself at the second trial, which resulted in court entering judgment for defendant on claims and jury returning a verdict of no cause of action on other claims (alteration in original; citation omitted));
- *Nationwide Mut. Fire Ins. Co. v. Ford Motor Co.*, 174 F.3d 801, 805-808 (6th Cir. 1999) (judge “interrupted plaintiffs’ opening statement six times”; engaged in “significant interruptions and

cross-examinations of” plaintiffs’ witnesses using an “intemperate tone”; “interrogated,” “admonished,” and “chastised” plaintiffs’ witnesses; “solicited objections by defense counsel” during plaintiffs’ examinations of witnesses; and interruptions were “so one sided” and “consistently derisive, in tone and content, of [plaintiffs’] theory of the case” that judge’s behavior “must inevitably have left the jury with the impression that the judge believed [plaintiffs’] actions were egregious and improper”), *overruled on other grounds by Adkins v. Wolever*, 554 F.3d 650 (6th Cir. 2009); *see also Dixon v. Federal Express Corp.*, 33 F. App’x 157, 160-165 (6th Cir. 2002), *Lyell v. Renico*, 470 F.3d 1177, 1186-1189 (6th Cir. 2006), *abrogated on other grounds by Johnson v. Williams*, 568 U.S. 289 (2013), *Baker v. Peterson*, 67 F. App’x 308, 309-311 (6th Cir. 2003) (describing similar conduct).

This line of cases is inapplicable. Appellees have only pointed to the court’s rulings and post-trial comments as evidence of bias (Haley Motion, R. 861, PageID# 16019-16021; Smith Motion, R. 863, PageID# 16029; Bean Motion, R. 872, PageID# 16145); they have never asserted that the court signaled its endorsement of the government’s case by engaging in inappropriate behavior before the jury, and the successor judge found that the district judge was not biased (Order, R. 919, PageID# 16556, 16564). Further, a “due process argument under” this line of cases “requires that hostility and bias be clear and open and that the bias be evident on the record.” *Gerber v. Veltri*, 702 F. App’x 423, 430 (6th Cir. 2017) (citation omitted); *see also ibid.* (noting that cases

asserting this sort of argument “typically recount lengthy, tense exchanges between litigants and the district court”). Because appellees “ha[ve] not made this showing,” *id.* at 432, their due process claim finds no support in this Court’s precedents.

In short, the Due Process Clause “demarks only the outer boundaries of judicial disqualifications.” *Caperton*, 556 U.S. at 889. It applies in the most “extreme,” *id.* at 887, “extraordinary,” *ibid.*, “egregious,” *Jackson*, 111 F.4th at 697, cases: when a judge gets paid if he rules a certain way (*Tumey*, *Monroeville*, *Lavoie*); when a judge serves as judge, jury, and executioner (*Murchison*, *Mayberry*, *Williams*); when a judge might as well be at counsel’s table instead of the bench (*Hickman*, *et al.*); when a judge’s vote is bought by a party (*Caperton*); when a judge enlists a prosecutor to play judge and sentence a defendant to death (*Jackson*). Nothing like that happened here. Accordingly, due process did not require the district judge’s recusal.

**2. The successor judge failed to apply the correct legal standard in determining whether the district judge should have recused from the trial proceedings.**

Indeed, the successor judge recognized that this case is different from those in which due process required recusal. She noted that the facts

of this case “bear little similarity to the cases in which the courts have determined recusal was necessary based on the probability of bias being too high to be constitutionally tolerable.” Order, R. 919, PageID# 16562-16563. Nevertheless, she opted to plow new ground. In doing so, she concluded that an unconstitutional risk of bias existed—without identifying what that bias was or when it arose. She reached that conclusion by applying an incorrect legal standard. Because the proper analysis reveals no constitutional violation, the order granting a new trial must be reversed.

Despite acknowledging that this case was “quite different” from those in which an unconstitutional risk of bias existed, the successor judge ordered a new trial on the basis that “[t]he facts in this case, including its high-profile nature, the shooting of Judge Norris’ law clerk shortly after the trial’s conclusion, and the Judge’s subsequent meeting about the investigation into the shooting . . . qualify as an extreme set of facts.” Order, R. 919, PageID# 16563-16564. This was error. Whether a case presents an “extreme set of facts” is not the standard for establishing a constitutional violation. *See United States v. Bass*, 17 F.4th 629, 638 (6th Cir. 2021) (“A district court abuse[s] its discretion by incorrectly

framing the legal standard.” (alteration in original; citation omitted)); *United States v. Allen*, 619 F.3d 518, 523-524 (6th Cir. 2010) (“A district court abuses its discretion when it . . . improperly applies the law or uses an erroneous legal standard.” (citation omitted)).

While the Court in *Caperton* recognized that each of the Court’s recusal cases “dealt with extreme facts,” 556 U.S. at 887, it was not purporting to establish a new “extreme facts” test for judicial recusal. Rather, the key was that those “extreme facts . . . created an unconstitutional probability of bias.” *Ibid.* And those cases the Court cited as presenting “extreme facts”—*Lavoie*, *Mayberry*, *Murchison*—are, again, entirely dissimilar to the facts here. *See Johnson*, 946 F.3d at 918 n.3 (describing the “few narrow circumstances” in which the Court has found an unconstitutional risk of bias and concluding that “[t]he situation here bears no resemblance to either *Caperton* or *Williams*”). The “extreme facts” in those cases—a judge presiding over a case that could facilitate a payout in his identical personal lawsuit, or presiding over a defendant’s contempt proceeding when the judge was the target of the defendant’s misconduct—related to the judge’s behavior and led to the judge having an interest in the outcome of the case. But the “extreme

facts” identified by the successor judge—the judge’s clerk was shot and the judge attended a meeting about the investigation into the shooting—stem from an event occurring after trial, not some preexisting circumstance that would incentivize the judge to decide this case a certain way.

The proper inquiry, as set out in *Caperton*, is “whether, ‘under a realistic appraisal of psychological tendencies and human weakness,’ the [judge’s] interest ‘poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.’” *Caperton*, 556 U.S. at 883-884 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). But the successor judge never identified what the district judge’s “interest” was, or how it posed a risk of bias or prejudgment.

In *Caperton*, that “interest” was specifically defined. *See id.* at 884 (“We turn to the influence at issue in this case . . . . [T]here is a serious risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”). The Court conducted a

searching analysis into how the CEO’s campaign contribution compared “to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.” *Ibid.*; *see also Lavoie*, 475 U.S. at 822-825 (concluding judge had “an interest in the outcome of this case” based on his similar pending lawsuit, for which he “received directly” \$30,000, which was “sufficient to establish the substantiality of his interest”). No equivalent analysis was conducted here.

Put another way, the court asks “whether, as an objective matter, ‘the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’” *Williams*, 579 U.S. at 8 (quoting *Caperton*, 556 U.S. at 881). But the successor judge never identified what “position” the district judge was in, or whether someone in that position would be likely to be neutral. This failure to conduct the proper analysis was error. *See United States v. Michigan*, 131 F.4th 409, 417 (6th Cir. 2025) (“An abuse of discretion occurs if the district court . . . applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment.” (citation omitted)).

While the successor judge recognized that, because due process requires “an absence of even the appearance of judicial bias,” she had to “appl[y] the requisite objective standard [for judicial bias] to the facts,” she never did so. Order, R. 919, PageID# 16564-16565 (citation omitted). She simply recited that test, then concluded, in the same paragraph, that “the risk of bias here is too high to be constitutionally tolerable.” Order, R. 919, PageID# 16564-16565. But “appl[ication of] the requisite objective standard to the facts” was missing; there was no explanation of what Judge Norris’s “interest” was, how that interest created an “appearance” of bias, or when that “interest” or “appearance” of bias arose. The failure to provide a reasoned explanation for concluding that there was an unconstitutional risk of bias was error. *See Caviness v. Commissioner of Soc. Sec.*, 681 F. App’x 453, 455 (6th Cir. 2017) (a district court abuses its discretion when it “fails to provide an explanation for its decision” or “fails to explain its reasoning adequately” (citation omitted)); *In re FirstEnergy Corp. Sec. Litig.*, 149 F.4th 587, 621 (6th Cir. 2025) (reversing where district court “failed to conduct any analysis at all” when it rejected defendant’s argument “in one sentence and concluded without any additional analysis” that legal standard was satisfied).

Instead, the successor judge identified three considerations that she found amounted to “an extreme set of facts.” Order, R. 919, PageID# 16563-16564. First, the successor judge cited the “high-profile nature” of the case. Order, R. 919, PageID# 16563. But judges are expected to, and indeed do, preside over high-profile cases. *See, e.g., United States v. Corrado*, 304 F.3d 593, 605 (6th Cir. 2002) (discussing jury-tampering incident “in this high-profile case”). Nothing suggests that a judge presiding over a “high-profile” case is more apt to be biased—or biased against a defendant, in particular—than one presiding over a more obscure case.

The successor judge also cited “the shooting of Judge Norris’ law clerk shortly after the trial’s conclusion, and the Judge’s subsequent meeting about the investigation into the shooting” as other “extreme” facts warranting a new trial. Order, R. 919, PageID# 16563-16564. This was improper for two reasons. First, nothing about these facts gives rise to an “unconstitutional ‘potential for bias,’” *Williams*, 579 U.S. at 8 (quoting *Caperton*, 556 U.S. at 881); these facts simply do not result in the judge having an interest in the outcome of the case due to, for example, prior participation in the case or a financial stake in the result.

*Cf.* pp. 17-28, *supra*. Second, the successor judge never reconciled how these events, which she recognized occurred “after the trial’s conclusion,” required a finding that the district judge was biased before and during trial, such that a new trial was warranted. As discussed in the next section, the successor judge erred in omitting this key consideration from her analysis. *See, e.g., Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 504 (6th Cir. 2015) (“An abuse of discretion occurs when we are left with the definite and firm conviction that the [district] court . . . committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors . . . .” (first and second alterations in original; citation omitted)); *Schafer v. City of Defiance Police Dep’t*, 529 F.3d 731, 736 (6th Cir. 2008) (“An abuse of discretion exists when the reviewing court is firmly convinced that a mistake has been made.” (citation omitted)).

**3. The successor judge erred by failing to reconcile how post-trial comments about a post-trial event resulted in an appearance of bias during trial.**

The successor judge ordered a new trial without considering whether any bias existed at the operative time: trial. Due process requires a “fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case.”

*Bracy*, 520 U.S. at 904-905 (internal citation omitted). Of course, a judge can only have an interest in the “outcome” of the case if the interest predates the resolution of the case. Put differently, “[d]ue process entitles [a defendant] to ‘a proceeding in which he may present his case with assurance’ that no member of the court is ‘predisposed to find against him.’” *Williams*, 579 U.S. at 16 (citation omitted). To be “predisposed” to find against a defendant, a judge necessarily must harbor his anti-defendant view before issuing a ruling. But here, the successor judge never explained, and apparently never considered, how the district judge’s post-trial comments about a post-trial event necessitated a finding that the risk of an appearance of bias was present during trial, thereby warranting a new trial.

The Court has emphasized the crucial role that timing plays in determining whether an unconstitutional probability of bias existed. In *Caperton*, the Court noted that “[t]he temporal relationship between the campaign contributions, the justice’s election, and the pendency of the case” was “critical.” 556 U.S. at 886. It was “reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice”; the campaign contributions “were made

at a time when [the CEO] had a vested stake in the outcome.” *Ibid.* The sequence of events—contributing millions of dollars to a justice’s campaign after an unfavorable jury verdict, knowing that the candidate, if successful, would hear the appeal—led to concerns about permitting “a man [to] choose[] the judge in his own cause.” *Id.* at 873-875, 886.

Likewise, in *Lavoie*, the Court underscored that the justice’s personal lawsuit against his insurer was pending “[a]t the time [he] cast the deciding vote and authored the court’s opinion” in the similar suit before the supreme court. 475 U.S. at 822. The sequence of events mattered there too: “while the [case] was pending before the Alabama Supreme Court,” the justice filed his suit; the suit was pending “[a]t the time” he cast the dispositive vote; the court’s opinion “had the clear and immediate effect” of improving his suit’s chances of success; and “[s]oon after” the opinion was issued, he received a payout in his suit. *Id.* at 817, 822-825. Based on that timeline, the Court held that the justice impermissibly “acted as ‘a judge in his own case’” and had a “direct, personal, substantial, [and] pecuniary” interest in the case’s outcome. *Id.* at 824-825 (alteration in original; first quoting *Murchison*, 349 U.S. at 136; then quoting *Ward*, 409 U.S. at 60).

Further, in rejecting the argument that the other justices similarly should have recused because they could have been members of the biased justice's potential class action, the Court distinguished their knowledge at the time of the court's decision from that of the other justice. *See id.* at 825-826. Unlike the justice whose recusal was required, nothing in the record "suggest[ed] that these justices had any knowledge of the class action *before the court issued a decision on the merits.*" *Id.* at 826 (emphasis added). "Thus, at most *only the decision to deny rehearing was even plausibly affected.*" *Ibid.* (emphasis added). The Court then concluded that any interest the other justices had "when they passed on the rehearing motion" was too speculative to require recusal. *Ibid.*

This Court, too, has stressed that timing matters. *See, e.g., Bailey v. Smith*, 492 F. App'x 619, 630-631 (6th Cir. 2012) (rejecting defendant's argument that judge demonstrated bias by congratulating jury on their work after returning a guilty verdict; "[T]his comment took place after the jury reached its verdict. Consequently, the Due Process clause is not implicated and Petitioner's claims of judicial bias fail." (internal citation omitted)); *United States v. Hartsel*, 199 F.3d 812, 820 (6th Cir. 1999) (recusal not required where there was "no evidence to show that the judge

expressed a bias or prejudice against the Defendant or maintained some preconceived notion about his guilt prior to [the defendant's] trial").

Indeed, even appellees recognized that, to warrant a new trial, any purported bias must have been present *during* trial. Haley Motion, R. 861, PageID# 16019 (claiming Judge Norris was biased "*during this trial*" (emphasis added)); Bean Motion, R. 872, PageID# 16143 (claiming Judge Norris was biased "*prior to, during, and after the trial*" (emphasis added)); Smith Motion, R. 863, PageID# 16032 (noting it is unresolved whether "the trial judge has held these beliefs *historically*" and that "logic dictates" that "the perceptions of the original trial judge *pre-dated* his statements, but *that has not been established* in the record as of yet" and asserting more information was needed "in order to make [a] decision on *whether or not* a fundamental right of the defendant has been violated by the original trial judge" (emphasis added)). The successor judge, however, never acknowledged this temporal requirement.

Despite their (necessary) insistence that Judge Norris exhibited bias throughout the proceedings, none of the appellees in this highly litigated case deemed a recusal motion worthwhile until after the government disclosed the post-trial comments. And when Smith did

eventually move for recusal, he did not ask for retroactive relief. Instead, noting that information “has just now” come to light suggesting recusal was warranted, he asked that Judge Norris recuse “from any further involvement” in the case. Motion for Recusal, R. 852, PageID# 16003; *see also* Motion for Recusal, R. 852, PageID# 16004 (asserting that recusal was required “at this time”).

But just as the successor judge never identified what the source of the bias was, she failed to grapple with the “critical” question of when any alleged bias arose. *Caperton*, 556 U.S. at 886. None of the three “extreme facts” cited by the successor judge affected Judge Norris’s disposition toward appellees during the legally relevant time: before or during trial. The first fact, the “high-profile nature” of the case (Order, R. 919, PageID# 16563), is, again, irrelevant to any assessment of judicial objectivity. And “the shooting of Judge Norris’ law clerk shortly after the trial’s conclusion, and the Judge’s subsequent meeting about the investigation into the shooting,” occurred “*after the trial’s conclusion*” (Order, R. 919, PageID# 16563-16564 (emphasis added)) and therefore could not have influenced Judge Norris’s decision-making before and during trial.

As in *Lavoie*, nothing in the record suggests that any alleged bias existed before the shooting of Judge Norris's clerk. Judge Norris's comments were made after trial about a post-trial incident. "Thus, at most only the decision to deny [post-trial motions] was even plausibly affected." *Lavoie*, 475 U.S. at 826. Even assuming, then, that recusal was required, a new trial was not the proper remedy. Instead, at most, appellees would be entitled to an impartial judge's review of any post-trial motions decided by the district judge after the shooting and an impartial judge's determination of the appropriate sentence.<sup>3</sup> The former has already happened, as the successor judge concluded that the district judge's decisions "throughout these proceedings" were "sound, fair, and grounded firmly in the law." Order, R. 919, PageID# 16564; *see also* Order, R. 919, PageID# 16556. Accordingly, if the Court determines that an unconstitutional bias existed after Judge Norris commented on the

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<sup>3</sup> The post-trial motions include Smith's Renewed and Supplemental Motion for Acquittal or for New Trial, R. 660, PageID# 10681-10696, and Bean's Motion for Judgment of Acquittal, R. 661, PageID# 10713-10717. *See also* Government's Response to Smith's Motion, R. 680, PageID# 13001-13016; Government's Response to Bean's Motion, R. 682, PageID# 13077-13091.

shooting, the Court should reverse the successor judge’s order granting a new trial and order the successor judge to sentence appellees.

In short, the abuse of discretion standard requires sound application of the law to the facts. Applying the wrong legal standard—as the successor judge did when she concluded that an “extreme set of facts” amounted to a due process violation—is an abuse of discretion. So is failing to conduct the right legal analysis—as the successor judge did when she failed to identify the district judge’s interest and evaluate whether the average judge in the district judge’s position was likely to be neutral. The successor judge then compounded these errors by neglecting to consider when any purported bias arose. Because the proper analysis reveals no constitutional violation, this Court should reverse the successor judge’s finding of an unconstitutional risk of bias.

#### **4. Due process did not require recusal.**

Application of the correct legal standard—“whether, as an objective matter, ‘the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias,’” *Williams*, 579 U.S. at 8 (quoting *Caperton*, 556 U.S. at 881)—reveals no constitutional violation. When applying this test in *Williams*, the Court noted that it

had previously “determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case.” *Ibid.* (citing *Murchison*, 349 U.S. at 136-137). The Court then applied that “constitutional principle[]” to conclude that an unconstitutional potential for bias exists “where a judge had a direct, personal role in the defendant’s prosecution,” which included where the judge previously authorized seeking the death penalty against the defendant. *Id.* at 9-11.

Similarly, in *Caperton*, the Court began by discussing “the principles described in” its recusal cases. 556 U.S. at 876-877, 881 (discussing *Tumey*, *Monroeville*, *Lavoie*, *Murchison*, and *Mayberry*). “Based on the principles described in these cases,” the Court “turn[ed] to” the factual scenario before it, applying *Tumey*’s principle that “no man is allowed to be a judge in his own cause” to conclude that similar concerns of bias can arise when “a man chooses the judge in his own cause.” *Id.* at 876-877, 881, 886. It then “appl[ied] this principle” to hold there was a “serious, objective risk of actual bias that required” recusal of the judge who received the \$3 million campaign donation. *Id.* at 886.

But none of the “constitutional principles” on which “[t]he Court’s due process precedents . . . rest dictate [a] rule that” applies here. *Williams*, 579 U.S. at 8; see pp. 23, 28, *supra*. Unlike, for example, where a judge gets paid only if he convicts, so he might think twice about acquitting (*Tumey*), or where a judge can create the precedent needed to succeed in his personal lawsuit (*Lavoie*), nothing about the setup of the proceeding gave Judge Norris an incentive to rule a certain way. The Due Process Clause is simply not implicated here. See *Bracy*, 520 U.S. at 904 (the Due Process Clause “establishes a constitutional floor,” so “most questions” concerning bias “are not constitutional ones”).

At best, appellees can speculate that Judge Norris might have been tempted to rule against them or sentence them more harshly because he thought they were responsible for shooting his clerk. But whether the “average judge in [t]his position is ‘likely’ to be neutral,” *Williams*, 579 U.S. at 8 (quoting *Caperton*, 556 U.S. at 881), is immaterial because, by definition, Judge Norris could only have this interest after the shooting, and he recused at that time.

Appellees may also theorize that Judge Norris, despite not knowing appellees, believed they were members of a gang from the outset of the

case. Accepting that premise requires mental gymnastics: both comments referenced the shooting, not gang affiliation in isolation, and the shooting had not happened at the outset of the case. *See* Notice, R. 846, PageID# 15952-15953. Additionally, the comment about MPD was “not in response or related to any case” (and appellees did not work for MPD at that time). Notice, R. 846, PageID# 15952-15953. This argument also relies on impermissible speculation—both comments referenced the shooting, and nothing in the record suggests Judge Norris had any view until then; indeed, if Judge Norris’s purportedly longstanding bias against the defendants was so pronounced as to render the entire case constitutionally infirm, one might think one of the defendants would have moved for his recusal before the shooting. *See* pp. 65-70, *infra*. This argument also overlooks the evidence of the gang-like behavior engaged in by the defendants and other MPD employees that Judge Norris heard during the proceedings; even at the outset of the case, he had an indictment alleging a criminal conspiracy to cover up a murder. *See* pp. 71-75, *infra*.<sup>4</sup>

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<sup>4</sup> Due to the Due Process Clause’s circumscribed reach, most caselaw analyzes recusal under 28 U.S.C. 455. For clarity, the

But even accepting appellees’ unsupported contention that Judge Norris believed they were gang members from the outset of the case, their argument still fails. Appellees did not explain below what they believe the import of such a comment is—nor did the successor judge cite it as one of the “extreme facts” warranting a new trial—but they seem to imply it means Judge Norris viewed them negatively and would not have treated them fairly. But “the average judge” who suspects a defendant is in a gang “is ‘likely’ to be neutral.” *Williams*, 579 U.S. at 8 (quoting *Caperton*, 556 U.S. at 881). Judges “are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.” *United States v. Morgan*, 313 U.S. 409, 421 (1941); *see also Diamond Alt. Energy, LLC v. EPA*, 606 U.S. 100, 122 (2025) (“Judges are not required to exhibit a naiveté from which ordinary citizens are free.” (citation and internal quotation marks omitted)). This Court has found similar comments insufficient to show bias under the judicial recusal statute’s “more exacting standard.” *See*

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government has separated the caselaw underlying each source in this brief, *see United States v. Sherman*, 168 F.4th 417, 433 (6th Cir. 2026) (discussing this confusion), but incorporates the overlapping principles to the extent the Court finds it helpful.

*United States v. Sherman*, 168 F.4th 417, 433 (6th Cir. 2026); see pp. 79-81, *infra*. And the Supreme Court rejected a comparable argument under the Due Process Clause in *Lavoie*.

There, the insurance company argued that the justice’s “general hostility towards insurance companies . . . as expressed in his deposition, requires a conclusion that the Due Process Clause was violated by his participation” in the case. *Lavoie*, 475 U.S. at 820. In rejecting this argument, the Court reiterated that “not all questions of judicial qualification” are ones of “constitutional validity,” and “matters of . . . personal bias” would “seem generally to be [a] matter[] merely of legislative discretion”; after all, “the traditional common-law rule was that disqualification for bias or prejudice was not permitted” under the Due Process Clause. *Ibid.* (citation omitted). Ultimately, the Court left open the question of whether the Due Process Clause could ever reach this sort of “allegation[] of bias and prejudice,” stating that it “need not decide whether allegations of bias or prejudice by a judge of the type we have here would ever be sufficient under the Due Process Clause to force recusal.” *Id.* at 821. It held that “only in the most extreme of cases would disqualification on this basis be constitutionally required,” and the

insurance company's arguments fell "well below that level." *Ibid.* Appellees' comparable argument does not present the "most extreme" case in which the Constitution mandates recusal.

**C. Even assuming the Due Process Clause required recusal, ordering a new trial was an improper remedy.**

Because the district judge's participation in this case did not violate appellees' due process rights, the successor judge erred in ordering a new trial. But even assuming this Court disagrees and concludes that the district judge's participation was unconstitutional, a new trial is not warranted.

"[T]he general rule [is] that a constitutional error does not automatically require reversal of a conviction." *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991). Rather, "the Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless." *Ibid.*

While this Court and the Supreme Court have sometimes stated that judicial bias constitutes structural error, *see, e.g., Williams*, 579 U.S. at 14; *Railey v. Webb*, 540 F.3d 393, 399 (6th Cir. 2008), that principle rests on the assumption that the judge was biased at the time he presided over the trial or issued the disputed decision. *Tumey*, the case from which

the principle stems, makes this clear. *See, e.g., Washington v. Recuenco*, 548 U.S. 212, 218 n.2 (2006) (citing *Tumey* for proposition that judicial bias is structural error); *Chapman v. California*, 386 U.S. 18, 23 n.8 (1967) (same). In concluding that the defendant there was entitled to a new trial before an impartial judge, the Court noted that the mayor-judge was biased from “the outset” of the case. *Tumey*, 273 U.S. at 535 (stating that judge was biased because of his direct pecuniary interest in the case’s outcome and because of his motive to convict the defendant and set a fine, both of which were “presented at the outset,” so the defendant, who “seasonably raised the objection,” was “entitled to halt the trial”). Naturally, then, the error was “structural” in that it affected the entire proceeding, as the judge’s bias was present the whole time.

In discussing why a biased judge is structural error, the Court has explained that “[t]he entire conduct of the trial *from beginning to end* is obviously affected . . . by the presence on the bench of a judge who is not impartial.” *Fulminante*, 499 U.S. at 309-310 (emphasis added). This sort of “structural defect” affects “the framework within which the trial proceeds,” the Court explained, thereby “defy[ing] analysis by ‘harmless-error’ standards.” *Id.* at 309-310.

That is not the case, however, when the judge’s purported bias develops after trial. When any purported bias arises after trial, the “entire conduct of the trial from beginning to end” is not affected, nor is the “framework within which the trial proceeds.” Only the post-bias rulings are affected. In that circumstance, the structural error analysis does not apply, and a new trial before an impartial judge is not warranted; the defendant already had a trial before an impartial judge.

Since *Tumey*, the Court has clarified that the principle for which *Tumey* is often cited—that some constitutional rights, such as the right to an impartial judge, are not amenable to harmless error review—is an oversimplification. See *Chapman*, 386 U.S. at 23. Importantly, in later cases, the Court has not automatically vacated a conviction or judgment after concluding that a judge’s failure to recuse violated due process. In *Lavoie*, for example, after holding that the state supreme court justice’s participation in the case violated the Due Process Clause, the Court “turn[ed] to the issue of the proper remedy for this constitutional violation.” 475 U.S. at 827. The Court ultimately vacated the state supreme court’s decision, reasoning that the justice played a “leading role

in the decision under review,” as his “vote was decisive in the 5-to-4 decision and he was the author of the court’s opinion.” *Id.* at 828.

Similarly, after finding a constitutional violation in *Williams*, the Court turned to “whether [the petitioner] [wa]s entitled to relief.” 579 U.S. at 14. The Court concluded that the petitioner was entitled to relief, even though “the judge in question did not cast a deciding vote,” as the judge “might have influenced the views of his or her colleagues during the decisionmaking process.” *Id.* at 14-15.

The common thread underlying the Court’s decision to grant relief in both cases was that the judge played some role in the case’s outcome. In *Lavoie*, that role was obvious: the judge’s vote was decisive. In *Williams*, that role was behind the scenes: the judge’s participation could have affected the rest of the court’s perspective. But when a judge does not develop a bias until after a jury has returned a verdict, the judge necessarily could not have affected that verdict.

The analysis from *Lavoie* and *Williams* applies here. If the Court concludes that an unconstitutional bias occurred, it should “turn to the issue of the proper remedy for this constitutional violation.” *Lavoie*, 475 U.S. at 827. The proper remedy for an unconstitutional bias that arises

after trial is not a new trial; it is an impartial judge's review of any post-trial motions decided by the prior judge and an impartial judge's determination of the appropriate sentence. *See* pp. 40-42 & n.3, *supra*. Reinstatement of the jury's verdict is warranted.

**II. There is no other basis to affirm the order granting a new trial.**

As this Court acknowledged, appellees may intend to present arguments advanced in the district court as an alternative basis for affirming the order granting a new trial. C.A. Doc. 36, at 5-6. The government anticipates that this may include arguments that (1) the district judge's rulings show that the judge harbored actual bias against appellees, or (2) recusal was required under 28 U.S.C. 455. Neither avenue presents a basis for affirming.

**A. The successor judge properly found that there was no actual bias.**

The successor judge, who could not find "a single example among the many allegedly biased decisions cited by Defendants that was inconsistent with the law," correctly concluded that "Judge Norris' decisions throughout these proceedings...were sound, fair, and grounded firmly in the law." Order, R. 919, PageID# 16556, 16564; *see*

*also* Order, R. 919, PageID# 16556 (noting that the “Due Process Clause may sometimes bar trial by judges who have no actual bias,” but that “justice must satisfy the appearance of justice” (citation omitted)). Appellees, whose claim of bias “must overcome a presumption of honesty and integrity in those serving as adjudicators,” cannot show that the district judge harbored any actual bias toward them. *Johnson*, 946 F.3d at 918 (quoting *Withrow*, 421 U.S. at 47); *cf. Bracy*, 520 U.S. at 905.

Take appellees’ first grievance as one example. Haley, Bean, and Smith complain that the district judge improperly limited their ability to cross-examine co-defendants Mills and Martin, who testified as government witnesses, because they were not permitted to ask about the precise number of months of incarceration Mills and Martin might receive when sentenced, given their cooperation. Haley Motion, R. 861, PageID# 16020-16021; Bean Notice of Appeal, R. 955, PageID# 16927; Smith Motion, R. 863, PageID# 16030-16031.

But the district judge properly allowed Haley, Bean, and Smith to probe Mills and Martin’s potential bias by eliciting testimony about the benefits the cooperators hoped to receive by testifying on behalf of the government, including that they were facing significant sentences that

might be reduced. *See, e.g.*, Transcript, R. 603, PageID# 8557-8558 (Martin’s testimony that he “hope[s]” to receive a lower sentence by cooperating); Transcript, R. 603, PageID# 8594 (cross-examining Martin about the “whole, whole, whole lot of time” he is “exposed to”); Transcript, R. 677, PageID# 12597-12598 (Mills’s testimony about the “long prison sentence” he might face and his hope that “by testifying today[,] the judge will reduce [his] sentence”); Transcript, R. 645, PageID# 10089-10092 (cross-examination of Mills about his plea agreement). The only limitation imposed by the district judge was to preclude Haley, Bean, and Smith from suggesting the “specific sentence[]” the cooperators, and, by extension, the remaining defendants on trial, might receive. Order On Motions Regarding Evidence of Possible Punishment, R. 513, PageID# 7290-7291; *see also* Transcript, R. 599, PageID# 8228-8236; Transcript, R. 885, PageID# 16204-16214; Transcript, R. 645, PageID# 9920-9928 (defense counsel’s suggestion that Mills could receive “zero time”; court’s admonishment that it does not “want [the jury] to hear about sentencing” because sentencing is the court’s “job, not [the jury’s]”).

This was proper. Not only do district courts enjoy wide discretion in imposing limits on cross-examination, *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986), but the district judge’s determination that punishment is not a proper consideration for the jury came directly from the Circuit’s Pattern Instructions. See Sixth Circuit Pattern Criminal Jury Instructions, 8.05 Punishment; see also Jury Instructions, R. 630, PageID# 9597. The court’s ruling provided the jury with adequate information to understand the trial defendants’ point—that Mills and Martin’s testimony might be colored by their incentive to receive reduced sentences—without inviting the jury to decide the case on an improper basis. See, e.g., *United States v. Callahan*, 801 F.3d 606, 624 (6th Cir. 2015) (concluding jury had sufficient information to assess bias when defense asked cooperator about, among other things, the lesser charge he pleaded guilty to and whether he expected a reduced sentence based on his cooperation). Moreover, this Court has affirmed previously the exact limitation imposed here by the district judge. See *United States v. Bilderbeck*, 163 F.3d 971, 978 & n.11 (6th Cir. 1999) (rejecting as “without merit” defendant’s argument that he “was improperly limited in the scope of his cross-examination of” a cooperating witness “about federal

narcotics penalties,” as “the jury might relate that penalty to what [the defendant] faced”). The district judge’s ruling, which was grounded in caselaw and the Circuit’s pattern jury instructions, was not an abuse of discretion, let alone biased.

Additionally, while appellees focus exclusively on the rulings with which they disagree, the district judge routinely ruled in their favor, which refutes the suggestion that the court was biased against them. *See Gordon*, 710 F. App’x at 665 (“In all, it cannot be said that the judge treated the defense unfairly or was too one-sided to be considered impartial. Indeed, as the district judge noted, there were various instances throughout the trial where the trial court ruled in defense counsel’s favor and against the prosecution.”); *cf. Lyell*, 470 F.3d at 1187 (finding judicial bias in part because the judge’s problematic behavior “ran in one direction”).

For example, the court, over the government’s objection, qualified a defense witness as an expert in “human factors.”<sup>5</sup> Transcript, R. 678,

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<sup>5</sup> The expert defined “human factors” as “those factors such as physiological, environmental, and what an officer sees that goes into their decision-making process, which then culminates into what an officer’s perception is.” Transcript, R. 678, PageID# 12656.

PageID# 12643, 12671; Motion to Exclude Jared Zwickey Testimony, R. 367, PageID# 4957-4966; Transcript, R. 678, PageID# 12642-12649. The court permitted this expert to testify about, among other things, the “fear” and “stressors a police officer experiences trying to make an arrest,” as well as how officers in high-stress situations, like an arrest, experience “inattentive blindness,” where they do not see what is going on around them, and “auditory exclusion,” where they do not hear what is going on around them. Transcript, R. 678, PageID# 12657-12659, 12704-12705. The expert then opined that if a hypothetical officer were presented with circumstances identical to those Smith experienced during the incident, the expert would expect “blindness” and “deafness” to “exist in that hypothetical officer.” Transcript, R. 678, PageID# 12715. Smith then cited “the fear,” “the blindness,” and “the deafness” he experienced when arguing that the jury should acquit him of violating the victim’s civil rights—which the jury did. Transcript, R. 691, PageID# 13617-13618, 13636-13637, 13645 (closing argument).

Despite the magistrate judge’s prior ruling apparently prohibiting the expert from offering this sort of testimony (Transcript, R. 476, PageID# 6316-6317 (identifying specific categories of permissible

testimony and excluding “[a]nything outside of that”)), the district judge revisited the issue at trial and permitted the expert to opine on this topic, without distinguishing the caselaw, cited by the government, excluding this sort of testimony from this sort of non-scientific expert. Motion to Exclude Jared Zwickey Testimony, R. 367, PageID# 4960-4966 (citing cases); Transcript, R. 678, PageID# 12642-12649 (discussing government’s objection at trial); Zwickey Expert Notice, R. 410-2, pages 1-5; see, e.g., *Bao Xuyen Le v. Reverend Dr. Martin Luther King, Jr. Cnty.*, No. C18-55 TSZ, 2019 WL 8273355, at \*1 (W.D. Wash. May 9, 2019) (prohibiting officer from opining on “human factors” because he did not have “the requisite training or education to provide expert testimony about matters of human behavior and psychology”). Contrary to appellees’ implication, the district judge did not exhibit any bias by consistently ruling “against” them.

At times, the district judge was even explicit about its efforts to be even-handed, which often played to appellees’ advantage. As one example, notwithstanding contrary authority and the government’s objection (Transcript, R. 690, PageID# 13351-13354, 13378), the court provided a “defense theory” jury instruction advancing each defendant’s

theory of the facts. *See* Jury Instructions, R. 630, PageID# 9547-9548. The court did so to strike a “balance” between the jury considering the indictment, *i.e.*, “the Government’s story,” with giving the defense the chance “to tell their story too.” Transcript, R. 690, PageID# 13352; *see also* Transcript, R. 690, PageID# 13379 (court noting that it would include the indictment with the defense theories in the jury instructions “so it doesn’t look lopsided”). So the court instructed the jury that, according to Smith, he “did not willfully use excessive force” or “aid and abet any other” officer in doing so, but merely “administered empty and closed-hand strikes” in order to “help fellow officers handcuff Mr. Nichols,” which “complied with his MPD training and experience.” Jury Instructions, R. 630, PageID# 9547-9548.

Not only was this position refuted by Smith’s own statement to the FBI, but this sort of “defense theory” instruction has been rejected by this Court. A defense theory instruction is appropriate when a defendant offers evidence to support “an affirmative defense,” like duress. *United States v. Capozzi*, 723 F.3d 720, 725 (6th Cir. 2013) (citation omitted)). But where “the proposed instruction does not state a distinct legal theory,” and instead merely offers a defendant’s spin on the facts, the

“issue should be left to argument.” Sixth Circuit Pattern Criminal Jury Instructions, 6.01 Defense Theory; *see also United States v. Blanchard*, 618 F.3d 562, 572-574 (6th Cir. 2010) (holding that district court did not err in refusing to provide defense’s proposed instructions, which “did not instruct the jury on a legal theory distinct from its instruction on willfulness, but rather represented [the defendant’s] view of the facts of the case”); *United States v. Vassar*, 346 F. App’x 17, 26 (6th Cir. 2009) (holding that district court did not err in declining to give defense’s instruction, which did not “constitute a statement of law, but rather represent[ed] a denial of the charges and [the defendant’s] view of the facts”). Indeed, the authority relied on by appellees in support of this instruction, *United States v. Garner*, held that it was error not to instruct the jury because the defendant provided evidence supporting an affirmative defense—that she “was coerced into committing the illegal actions with which she was charged.” 529 F.2d 962, 969-970 (6th Cir. 1976); *see also* Sixth Circuit Pattern Criminal Jury Instructions, 6.05 Coercion/Duress; Transcript, R. 690, PageID# 13354 (defense’s citation to *Garner*); Smith Proposed Instructions, R. 492, Ex. 1, pages 1-2.

That Smith “did not willfully use excessive force” (Jury Instructions, R. 630, PageID# 9547) is not an “affirmative defense”—it’s a denial of the Section 242 charge. Similarly, that he “administered empty and closed-hand strikes” to “help fellow officers handcuff Mr. Nichols” (Jury Instructions, R. 630, PageID# 9548) is not a “distinct legal theory”—it’s his view of the facts. Appellees did not provide evidence that they, for example, were somehow coerced into beating Nichols, into laughing about it afterward instead of providing medical assistance, or into concealing their actions; but, to make things “balance[d],” the court submitted their version of the facts to the jury anyway. Transcript, R. 690, PageID# 13352. Appellees’ assertion that the district judge was biased against them is refuted by the record.

At bottom, the district judge made hundreds of legal rulings over the lifespan of this case. Some of those rulings favored appellees; those that did not followed the law. A successor judge reviewed those rulings and determined “that they were sound, fair, and grounded firmly in the law.” Order, R. 919, PageID# 16564. The successor judge’s finding that the district judge was not biased was correct.

**B. The district judge was not required to recuse under the judicial recusal statute.**

The successor judge found that appellees were entitled to a new trial under the Due Process Clause (*see* Order, R. 919, PageID# 16563 n.6), but any argument that the district judge improperly failed to recuse under the judicial recusal statute, 28 U.S.C. 455, also fails.

The district judge recused himself from further proceedings the same day that Smith moved for recusal. Motion for Recusal, R. 852, PageID# 16004; Order of Recusal, R. 854, PageID# 16006. Effectively, appellees' argument is that the judge should have recused sooner, before any of them moved for recusal. To show that a new trial is warranted, then, appellees must show that there was a violation of the statute before or during the trial, thereby affecting the trial, and that a new trial is a proper remedy. Their argument fails in both respects.

**1. Section 455 was not violated.**

Under Section 455, a judge must disqualify himself if "his impartiality might reasonably be questioned" or "he has a personal bias or prejudice concerning a party." 28 U.S.C. 455(a), (b)(1). Appellees bear the burden of proving that recusal was required, *see Burley v. Gagacki*, 834 F.3d 606, 616 (6th Cir. 2016), and to do so, they must "overcome a

presumption of honesty and integrity in those serving as adjudicators,” *Withrow*, 421 U.S. at 47. “[T]he question is whether, given the facts, an objective ‘reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits.’” *Garrett v. Ohio State Univ.*, 60 F.4th 359, 369 (6th Cir. 2023) (citation omitted).<sup>6</sup>

**a. Any purported partiality or bias arose after trial, and appellees’ speculation cannot establish otherwise.**

In addition to the caselaw emphasizing the importance of identifying when any bias arose under the Due Process Clause, *see pp.* 35-39, *supra*, the Court has underscored the importance of timing in the

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<sup>6</sup> Section 455(b)(1) requires “actual bias or prejudice.” *Bell v. Johnson*, 404 F.3d 997, 1005 n.8 (6th Cir. 2005); *see also Duke v. Pfizer, Inc.*, 867 F.2d 611, 1989 WL 8124, at \*3 (6th Cir. Jan. 26, 1989) (unpublished table decision) (rejecting defendant’s attempt “to demonstrate actual bias in support of disqualification under 28 U.S.C. § 455(b)(1)”; *Liteky v. United States*, 510 U.S. 540, 567 (1994) (Kennedy, J., concurring in the judgment) (highlighting this distinction). Because the successor judge properly found that the district judge was not biased, *see* Section II.A, *supra*, any claim under Section 455(b)(1) fails. On occasion, however, this Court has appeared to apply the same objective test of whether a “reasonable person” would conclude that “the judge’s impartiality might reasonably be questioned” to Section 455(b)(1), *see, e.g., Burley*, 834 F.3d at 615-616 (citation omitted), so, in an abundance of caution, the government applies the objective standard to both provisions.

Section 455 context specifically. In *Liljeberg*, where a district judge sat on the Board of Trustees of a university that had plans to purchase land from one of the parties to the litigation before him, the Court wrote that “[t]o determine whether [the judge’s] impartiality in the Liljeberg litigation ‘might reasonably be questioned,’ it is appropriate to consider the state of his knowledge immediately before the lawsuit was filed, what happened while the case was pending before him, and what he did when he learned of the University’s interest in the litigation.” *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 856 (1988); *see also id.* at 852 (noting it was “necessary to relate the sequence” of the underlying events). The Court then devoted a significant portion of the opinion to establishing the timeline of the judge’s knowledge, *see id.* at 850-858, before concluding that the judge should have recused “when he obtained” knowledge of the university’s interest in the litigation, *id.* at 858, 861.

This Court has followed suit. *See, e.g., PNC Equip. Fin. v. Mariani*, 758 F. App’x 384, 391 (6th Cir. 2018) (rejecting argument that judge should have recused because judge’s spouse previously had loans forgiven by opposing party; among other things, there was no allegation that the judge’s spouse “still ha[d]” loans with the party at the time of the

proceeding “or that he and [the party] ha[d] any ongoing financial relationship”); *Patrick v. City of Detroit*, 906 F.2d 1108, 1109-1110 & n.4 (6th Cir. 1990) (rejecting argument that court’s comment that police officer, who was found liable for using excessive force, “was a ‘bad cop’” showed bias because the district court “made this statement . . . after the jury had returned its verdict and had been discharged”); *Bell v. Johnson*, 404 F.3d 997, 1005 (6th Cir. 2005) (holding that judge’s comment that he would continue to retry the case until the plaintiff received a verdict of at least \$9,000 “could not indicate that the judge was biased (or create an appearance of bias) in favor of one party winning the liability phase” because “the jury had already made a liability determination”).

While appellees assert—as they must, to warrant a new trial—that the district judge’s purported bias was present during trial, that contention is supported by nothing more than speculation, which is insufficient to establish bias. *See Smith v. Caterpillar, Inc.*, 304 F. App’x 391, 396 (6th Cir. 2008) (rejecting judicial bias claim because a party’s “subjective speculation alone is insufficient to form the basis of a judicial bias claim”); *Navistar Int’l Transp. Corp. v. EPA*, 941 F.2d 1339, 1360 (6th Cir. 1991) (“[A]ny alleged prejudice on the part of the decisionmaker

must be evident from the record and cannot be based on speculation or inference.”).

In fact, Bean and Smith do not even offer speculation; they point to nothing other than the rulings by the district judge with which they disagree as evidence of the court’s bias during trial. *See* Smith Motion, R. 863, PageID# 16029 (“Rulings by the original trial judge . . . were so erroneous and so basic that they could have only been a result of the previously undisclosed biases . . . .”); Bean Motion, R. 872, PageID# 16145 (arguing that the district court “showed consistent bias against Defendant Bean during pre-trial, during the trial, and post-trial” because it “denied several motions that were clothed with sound law, prohibited permissible cross-examination of cooperating witnesses during the trial . . . [and] den[ied] post-trial motions without a hearing”). This is insufficient: “judicial rulings alone almost never constitute a valid basis for a bias or partiality motion,” *Burley*, 834 F.3d at 617 (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)), and the successor judge properly concluded that Judge Norris’s decisions followed the law and were free from bias (Order, R. 919, PageID# 16556, 16564).

Haley, too, points to the court’s “legally erroneous rulings,” while also asserting that “it is simply illogical” to “surmise that Judge Norris didn’t have the opinion that the Memphis Police Department is ‘gang infested to the top’ during this trial,” given his “refusal to report and give a statement to MPD” about the shooting. Haley Motion, R. 861, PageID# 16019-16021. But “surmise” is just another word for “speculate,” and Haley must show more than speculation to establish a judicial bias claim. *See Getsy v. Mitchell*, 495 F.3d 295, 311-312 (6th Cir. 2007) (en banc) (rejecting judicial bias claim where defendant “offer[ed] nothing beyond” “conjecture” and “unsupported speculation” that the judge “might have been lying” about improperly communicating with prosecution); *see also ibid.* (distinguishing case where Supreme Court granted an evidentiary hearing to explore judicial bias claim because defendant rebutted presumption that public officials properly discharge their duties given judge had been publicly tried and convicted of accepting bribes in return for fixing cases; had defendant not overcome that presumption, the Court “might well [have] agree[d]” that defendant’s theory of bias was “too speculative to warrant discovery” (alterations in original) (quoting *Bracy*, 520 U.S. at 909)).

*Scott v. Metropolitan Health Corp.* underscores the point. 234 F. App'x 341 (6th Cir. 2007). There, this Court concluded that recusal was not required because the plaintiff “fail[ed] to tie the judge’s alleged” interest to “the judge’s rulings.” *Id.* at 355. Timing of any purported interest was dispositive: the judge’s ruling in the plaintiff’s case “could not affect” the judge’s alleged financial interest because the contract underlying that financial interest had been executed “well *before* the district court ruled on” the plaintiff’s claim. *Ibid.*

This Court also rejected the plaintiff’s attempt to speculate her way around the timing issue. The plaintiff contended “that the judge made up his mind” about how he would rule in her case ahead of time and could have communicated that to the team responsible for executing the contract. *Ibid.* This Court rejected such speculation as insufficient to show bias: “it is not enough for [the plaintiff] to throw out charges and then maintain that they cast a pall over the proceedings because they are not ‘inconceivable.’ The judge is presumed to be impartial, and [the plaintiff] ‘bears the substantial burden of proving otherwise.’” *Ibid.* (citation omitted). This Court continued: “[i]t is not the burden of the judge, or the prevailing party, to disprove or rule out any ‘conceivable’

chain of events the movant can dream up. [The plaintiff] offers nothing that would lead a reasonable, objective observer to suspect that the judge told anyone in advance how the case would turn out.” *Ibid.*

So too here. Appellees have “fail[ed] to tie the judge’s alleged” bias “with the judge’s rulings in this case.” *Ibid.* Any purported bias the court harbored from the shooting “could not affect” the court’s rulings in this case, as those rulings occurred “*before* the” shooting. *Ibid.* And while appellees speculate that “it is simply illogical to surmise that” the district did not have these views during trial (Haley Motion, R. 861, PageID# 16019), “it is not enough for [them] to throw out charges and then maintain that they cast a pall over the proceedings because they are not ‘inconceivable.’” *Scott*, 234 F. App’x at 355. “It is not the burden of the judge, or the [government] to *disprove* or rule out any ‘conceivable’” theory of bias; appellees have offered “nothing that would lead a reasonable, objective observer to suspect that the judge” harbored these views before the shooting. *Ibid.*

To the contrary, the facts would lead a reasonable observer to conclude that any purported views arose after the shooting. Both of Judge Norris’s alleged comments expressly relate to the shooting: according to

the notice, he stated that at least one of the defendants “was in a gang and that the gang was responsible for the shooting of his clerk” and that he “could not meet with any member of the [MPD] to give a statement regarding the shooting of his clerk, as MPD is ‘infiltrated to the top with gang members.’” Notice, R. 846, PageID# 15963. Additionally, a reasonable observer would be aware that these comments were made after the shooting, and that the shooting occurred at the clerk’s house just days after the jury’s verdict in a case containing evidence about the defendants using violence to retaliate. A reasonable observer, presented with these circumstances, would not believe that any alleged partiality or bias stemmed from anything but the shooting.

**b. Any opinion was based on the evidence and did not rise to an impermissible level.**

Even assuming Judge Norris had these opinions during trial, appellees’ bias claim would still fail. Judges “properly and necessarily” form opinions based on the knowledge they acquire “in the course of the proceedings.” *Liteky*, 510 U.S. at 550-551. And “upon completion of the evidence,” the “judge who presides at trial” may “be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or

prejudice.” *Id.* at 550-551; *see also* *Coley v. Bagley*, 706 F.3d 741, 750 (6th Cir. 2013) (“Even exposure to bad facts [about the defendant] and formation of an opinion based on them are not enough to establish bias.”).

Based on the knowledge Judge Norris acquired “in the course of the proceedings,” *Liteky*, 510 U.S. at 551, he had plenty of reason to believe that reporting a crime to MPD would not be fruitful; he had just heard four weeks of evidence establishing that the organization tasked with investigating crimes was, instead, committing them. Further, over the course of the nearly four-week trial and the preceding year of litigation, Judge Norris heard that appellees *had* engaged in gang-like behavior and that other MPD members participated in and encouraged that behavior. *See, e.g., Gang*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/gang> [<https://perma.cc/UL8K-DA4F>] (last visited May 18, 2026) (defining gang as “a group of persons working to unlawful or antisocial ends”). Judge Norris heard that, among other things:

- The defendants were members of a “Scorpion” team that inflicted a violent “tax” on arrestees who ran from the police. Transcript, R. 674, PageID# 11918, 11920 (identifying Scorpion team members); Transcript, R. 674, PageID# 11928 (Martin testifying: “[I]n your experience on the SCORPION team, what was your understanding of what happened to arrestees who ran from the police?” “I mean, you get your ass beat.”); Transcript, R. 677, PageID# 12564 (Mills’s testimony

that the “[s]treet tax” is a “punishment” where if “you run from the police or make police do anything extra that when they get a hold of you, you’re going to be punished” with “excessive use of force”); Transcript, R. 677, PageID# 12564-12565 (Mills describing incident the night before the Nichols incident in which Haley kicked a handcuffed arrestee who had run from the Scorpion team in the face); Transcript, R. 676, PageID# 12819 (describing tax); Transcript, R. 676, PageID# 12981 (same).

- The defendants had a vocabulary to describe their unlawful use of violence, some of which incorporated “street term[s],” and some defendants’ use of violence earned them nicknames. Transcript, R. 673, PageID# 11565 (testimony that Smith said “he ‘hit [Nichols] with so many pieces” and that “pieces” was a “[s]treet term” that had “kind of been integrated into police culture” and meant “punches”); Transcript, R. 676, PageID# 12858 (Martin and Haley were known as the “Smash Brothers” due to their size and “reputation for being overly aggressive”); Transcript, R. 677, PageID# 12561-12562 (Martin and Haley were called the Smash Brothers because they got “a lot of Blue Teams,” the report an officer writes when they use force (*see* Transcript, R. 673, PageID# 11549)); Transcript, R. 676, PageID# 12858 (Martin known as “Full Can” because whenever he would pepper spray someone, he would use the “entire can”).
- The defendants and their fellow officers concealed their actions and agreed to protect each other. Transcript, R. 603, PageID# 8508 (Martin describing the “understanding” among Scorpion team members that the team was going to “do what we need to do” to cover up the Nichols assault because “I know they wasn’t going to tell on me, and I wasn’t going to tell on them”); Transcript, R. 645, PageID# 9889-9891 (Mills’s testimony that the defendants “took the cameras off so that the conversation” in which they described their violence against Nichols “would not be caught” and that he was not worried that other Scorpion team members might tell their supervisor the

truth because there was a “nonverbal mutual agreement that what’s being said off camera is supposed to be off camera and not be reported to supervisors or in our report”); Transcript, R. 646, PageID# 10184, 10186 (testimony that Bean did not tell paramedics what happened to Nichols because he “didn’t want to throw his team under the bus” and omitted information in his first FBI interview because he “didn’t want to put the team in a bad position” and “didn’t want to be labeled a snitch”); Transcript, R. 677, PageID# 12564-12565 (Mills’s testimony that officers would “get away with the street tax” by not reporting it and by other officers on scene not reporting it; describing incident in which that happened); Transcript, R. 646, PageID# 10175 (testimony that Smith did not tell his supervisor about what happened to Nichols “because he wanted to stand with the team” and he thought “it would end up in a big fight” if he addressed it with the team); Transcript, R. 674, PageID# 11928-11929; Transcript, R. 677, PageID# 12561 (testimony about not using body-worn cameras and writing false reports); Sealed Notice, R. 146, page 5 (similar).

- Numerous MPD members were aware of this behavior and did nothing to stop it. Transcript, R. 676, PageID# 12981 (officer testimony that he learned about the tax “from officers when [he] was in patrol” and that he “[h]eard it all the time from older officers that had been on the job for a while”); Text Message, Gov’t Ex. 65 (officer texting Bean about trying to find a suspect who ran from the police and saying that the suspect “can’t be” far, that they “will find him,” and that when they do, “I know y’all gone give him that[] tax”); Transcript, R. 676, PageID# 12853-12854 (officer testimony that he “[a]bsolutely” should have informed a supervisor about an incident in which he saw Haley punch a handcuffed arrestee in the face as part of the tax, but did not); Transcript, R. 676, PageID# 12977-12978 (similar); Transcript, R. 677, PageID# 12563 (Mills’s testimony that he and an MPD lieutenant watched footage showing Haley punch a handcuffed arrestee; when Mills asked what the lieutenant was going to do about the punch, he said,

“I don’t know”; and that Haley never got in trouble for the incident).

- To the contrary, numerous MPD officers facilitated the behavior by covering for other officers; it was expected that they would do so; and they were scared to go against the rest of the group. Transcript, R. 676, PageID# 12981-12982 (officer testimony that it was understood that force used as part of the tax would not be reported and that the rationale was “it’s us against the world, basically, and how, like, the public hates us, and so we’re supposed to watch each other’s backs”); Transcript, R. 676, PageID# 12846-12855 (officer testimony that, after Haley told an arrestee “I’ve got something for you,” officer looked the other way to avoid capturing on camera Haley punching the handcuffed arrestee, who had previously run from officers, and turned another officer away to prevent that officer from witnessing Haley’s punch); Transcript, R. 676, PageID# 12978-12981 (officer did not report excessive force because he “didn’t want to be an outcast” because “[i]t’s nice to know you have help [as an officer] coming”).

The court also heard about specific instances of the Scorpion team’s violence against its perceived enemies. For example, after a man posted a photo online of him pointing a gun at one of the Scorpion team members (which the officer was unaware of in real time), the team “began doing research and trying to locate” the man, found him, and went to his house to arrest him. Transcript, R. 676, PageID# 12820-12828. There, they punched him in the face repeatedly, then, after he was handcuffed, “thr[ew him] into a couple of sliding doors, about twice.” Transcript, R.

676, PageID# 12820-12828. The team then walked the man outside, and after two team members communicated that their body-worn cameras were not on, they “shooed away” a third team member whose camera was on before punching the man in the face again. Transcript, R. 676, PageID# 12820-12828. That third team member, who knew that a fellow officer “might try to retaliate” against the arrestee given “the reason that [they] were there for the arrest,” covered his camera to prevent it from capturing the punch. Transcript, R. 676, PageID# 12820-12828.

In short, trial centered on the five defendants beating a man to death and conspiring to cover it up. Evidence established that this was not an isolated incident and that the defendants regularly demanded retribution from arrestees who ran from them in the form of a “tax,” the very notion of which—eye-for-an-eye behavior whereby the defendants would levy extra punches and kicks—is gang-like. Evidence further established that other MPD members actively abetted this behavior.

To the extent appellees assert that the district judge’s alleged views did not stem from this evidence, that argument fails. This Court has rejected a similar contention, where the plaintiff cited, among other things, the judge’s “tone” and “comments” that “vilif[ied]” her “on a

personal level” as evidence of bias. *Scott*, 234 F. App’x at 360. In rejecting that argument, this Court noted that there was “no reason to believe that the judge’s apparently negative opinion of [the plaintiff] stemmed from extrajudicial experiences or sources.” *Ibid.* Rather, “[a] reasonable observer would conclude merely that the judge formed a negative opinion of [the plaintiff] from the voluminous evidence in the case, and from the parties’ conduct in the litigation.” *Ibid.*

The same is true here. There is “no reason to believe that [Judge Norris’s] apparently negative opinion of” the defendants or MPD “stemmed from extrajudicial experiences or sources.” *Ibid.* “A reasonable observer would conclude merely that [Judge Norris] formed” any purported opinion of the defendants and MPD from “the voluminous evidence” that they engaged in gang-like behavior. *Ibid.*; *see also Alley v. Bell*, 307 F.3d 380, 387-388 (6th Cir. 2002) (rejecting judicial bias claim where judge appeared “unfavorably disposed toward” the defendant during trial, “engaged in undisclosed ex parte conversations with jurors during trial,” and subsequently complained that the “son of a bitch [defendant] will die of old age before he ever goes to the chair” because these opinions “all arose from what happened at trial”); *Dixon*, 33 F.

App'x at 161 (“[J]udges are not expected to refrain from forming opinions about witnesses’ credibility—how else would a judge be able to decide a case or pass on a motion for a new trial?—and the mere fact that the judge voices his opinion out of the presence of the jury does not irretrievably taint the trial.” (citation omitted)).

Where, as here, any opinions formed by the judge stemmed from “facts introduced or events occurring in the course of the current proceedings,” those opinions “do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.” *Liteky*, 510 U.S. at 555. Judge Norris’s comments do not “display a deep-seated favoritism or antagonism that would make fair judgment impossible.” *Ibid.* The successor judge concluded that Judge Norris exercised fair judgment, as she found that he harbored no actual bias and that his rulings were “sound, fair, and grounded firmly in the law.” Order, R. 919, PageID# 16564.

Additionally, there is no “favoritism” or “antagonism” that would make Judge Norris’s judgment not “fair”: the government called two of the defendants as key witnesses and called numerous other MPD officers

as witnesses.<sup>7</sup> Therefore, any purported negative feelings Judge Norris harbored toward the defendants or MPD officers would similarly have cut against the government. *See Sherman*, 168 F.4th at 435 (concluding court’s remarks “in no way r[o]se to the level of ‘a deep-seated favoritism or antagonism that would make fair judgment impossible’” in part because the district court “did not reserve its critique for defense counsel” but also “faulted the prosecutor” for behaving “similarly” (quoting *Liteky*, 510 U.S. at 555)); *United States v. Powers*, 500 F.3d 500, 513-514 (6th Cir. 2007) (rejecting judicial bias claim in part because court “displayed equal impatience with both counsel” and court’s “ill-advised” comments were “directed at both defense and government counsel in near equal measure”).

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<sup>7</sup> *See* Witness List, R. 628, PageID# 9519-9524; Transcript, R. 672, PageID# 11357 (Larnce Wright, MPD second lieutenant and instructor at Memphis police academy); Transcript, R. 674, PageID# 11917 (Emmitt Martin); Transcript, R. 675, PageID# 12094, 12108-12109 (Brittany Leake, MPD officer; Yentl Evans, MPD radio dispatcher); Transcript, R. 676, PageID# 12814-12815, 12974 (Kyle Coudriet, MPD officer; James Harvey, MPD officer); Transcript, R. 665, PageID# 10823-10824 (DeWayne Smith, MPD supervising lieutenant); Transcript, R. 644, PageID# 9764 (Valandria McKinnie, MPD officer); Transcript, R. 677, PageID# 12555 (Desmond Mills).

Moreover, these comments do not rise to the level of “a deep-seated . . . antagonism that would make fair judgment impossible.” *Liteky*, 510 U.S. at 555. Courts have found this difficult-to-reach standard, *United States v. Liggins*, 76 F.4th 500, 506 (6th Cir. 2023), satisfied when a judge has predetermined a defendant’s guilt based on an immutable characteristic of the defendant. *See, e.g., Liteky*, 510 U.S. at 555 (citing *Berger v. United States*, 255 U.S. 22 (1921) as an example); *Berger*, 255 U.S. at 28-29 (German American defendants argued judge was biased against them “because of their nativity” and cited judge’s comments that “If anybody has said anything worse about the Germans than I have I would like to know it so I can us[e] it” and “One must have a very judicial mind, indeed, not to be prejudiced against the German-Americans in this country. Their hearts are reeking with disloyalty.”).

For example, in *Liggins*, this Court found that the district court’s remarks demonstrated “a deep-seated . . . antagonism that would make fair judgment impossible” when the judge made “many disparaging remarks” about the defendant, including several that “demonstrate[d] clear prejudgment of [the defendant’s] guilt” and one that “indicate[d] a prejudgment of [the defendant’s] guilt based on [the defendant’s] physical

appearance” as “an African American man”; “twice denied [the defendant] the opportunity to speak for himself” regarding his request for new counsel; and misstated the legal standard for the burden of proof. 76 F.4th at 506-508 & n.2; *see also Sherman*, 168 F.4th at 436 (stating that the district court in *Liggins* “crossed the line by saying that the defendant ‘looks like a criminal’” and distinguishing present defendant’s case because the court’s remarks did not “prejudge [the defendant’s] guilt” (quoting *Liggins*, 76 F.4th at 503, 506)); *see also Liggins*, 76 F.4th at 507 (analogizing to *Berger*, which “prejudg[ed] the defendants’ guilt based on their German-American identity”).

By contrast, this Court has concluded that comments akin to the ones here do not demonstrate a “deep-seated” antagonism “that would make fair judgment impossible.” *Liteky*, 510 U.S. at 555; *see, e.g., United States v. Adams*, 722 F.3d 788, 837-838 (6th Cir. 2013) (judge’s pre-trial comments about “culture of corruption” in the county, where defendants were charged with vote-buying scheme in the county, did not show “that the district court relied on an extrajudicial source of bias” and merely “amount[ed] to criticism and disapproval of defendants and other coconspirators, not deep-seated favoritism or antagonism”); *United*

*States v. Ransom*, 428 F. App'x 587, 589-592 (6th Cir. 2011) (concluding judge's comments did not display deep-seated antagonism where judge called defendant a "crack head," said he "could not be believed by anyone," and expressed opinions about the "negative behavior that crack addicts stereotypically engage in," such as that "[t]hey'll rob their mother" and "do things like [commit robbery] all the time"—where defendant was being sentenced for robbery (citation omitted)); *Mason v. Burton*, 720 F. App'x 241, 245, 247 (6th Cir. 2017) (judge's comment, "All this stuff about jury trials and due process, what it really amounts to is crooks getting not-guilty verdicts," evinced "no propensity to favor the prosecution"); *Lewis v. Robinson*, 67 F. App'x 914, 923 (6th Cir. 2003) (court's statements "that it would not believe Petitioner" and "repeated name calling, including calling Petitioner a 'three or four time loser,' a 'dummy,' 'spoiled brat,' 'sham,' 'shill,' and a 'sociopath,'" did not "make fair judgment impossible"). Because Judge Norris's purported comments do not demonstrate a "deep-seated" antagonism "that would make fair judgment impossible," recusal was not required under Section 455. *Liteky*, 510 U.S. at 555.

## **2. A new trial is not the proper remedy.**

Finally, even assuming the district judge was required to recuse under Section 455, a new trial is not the proper remedy. The harmless error analysis applies to violations of Section 455, and the Supreme Court has cautioned against imposing “draconian” remedies for violations. *Liljeberg*, 486 U.S. at 862; *see also Smith v. ABN AMRO Mortg. Grp. Inc.*, 434 F. App’x 454, 466-467 (6th Cir. 2011) (applying harmless error doctrine to multiple subsections of Section 455). A new trial would be draconian, especially considering that a second judge reviewed the record and endorsed the district judge’s decisions. Indeed, the successor judge could not have been clearer on this point: “if the Court’s consideration of the motions [for a new trial] were based solely on the decisions Judge Norris made leading up to and during the trial of this matter, then a new trial would be unnecessary.” Order, R. 919, PageID# 16564; *see also* Order, R. 919, PageID# 16564 (finding that the court’s decisions “throughout these proceedings” were “sound, fair, and grounded firmly in the law”); Order, R. 919, PageID# 16556 (finding that the court’s decisions were “deliberate and searching” and that not one was “inconsistent with the law”).

Additionally, this Court will presumably address appellees' argument that the district judge's rulings were biased. *See* C.A. Doc. 36, at 5 (noting that appellees "want to preserve their right to present arguments" offering an alternative basis for affirming). Requiring yet another review of the docket on remand to confirm what the district judge, the successor judge, and possibly this Court, already found is unnecessary. *See Morgan v. Money*, No. 99-3251, 210 F.3d 372, 2000 WL 178421, at \*2 (6th Cir. Feb. 8, 2000) (unpublished table decision) (holding that district judge's failure to recuse was harmless because the resolution was clear and there was "no need to vacate the district court's decision and to remand to another district court judge to make the same clear determination"); *Blackmon v. Eaton Corp.*, 587 F. App'x 925, 935 (6th Cir. 2014) ("Under these circumstances, the two levels of *de novo* review Plaintiff received—first from the district court and now from us—would suffice to remedy a violation of § 455.").

That is all the more true given that a jury, not the judge, determined appellees' criminal responsibility. *See Duke v. Pfizer, Inc.*, 867 F.2d 611, 1989 WL 8124, at \*3 (6th Cir. Jan. 26, 1989) (unpublished table decision) ("[W]e would be hard-pressed to [find that] a judgment

should be vacated . . . for a violation of 28 U.S.C. § 455. In *Liljeberg*, close scrutiny was undoubtedly warranted, since the case had been tried to the court. The judgment in this case, by contrast, was the product of a trial to a jury.”); *Martin v. Monumental Life Ins. Co.*, 240 F.3d 223, 237 (3d Cir. 2001) (“We also believe that there must be a more compelling standard for recusal under § 455(a) after the conclusion of a trial than before its inception. After a massive proceeding such as this, when the court has invested substantial judicial resources and there is indisputably no evidence of prejudice, a motion for recusal of a trial judge should be supported by substantial justification, not fanciful illusion.”).

If the Court is inclined to apply the *Liljeberg* factors rather than rely on the successor judge’s finding of harmlessness, those factors support upholding the jury’s verdict. 486 U.S. at 864. The “risk of injustice” to appellees is minimal; a detached judge concluded that every ruling was fair and followed the law. *Ibid.* To the contrary, appellees receive a break: another chance at acquittal. The “risk of injustice” to the government, on the other hand, is significant; if the government were to retry the case, not only would it have to do so with witnesses with hazier memories—and possibly have to relitigate the entire case, depending on

the scope of any relief—but its trial presentation would likely be cabined, as double jeopardy precludes retrial on the acquitted charges.

As the successor judge recognized, the facts of this case, involving a random post-trial act of violence against judicial staff, are unique. Accordingly, there is little, if any, “risk that the denial of relief will produce injustice in other cases.” *Ibid.*

Finally, vacating the verdict runs a significant “risk of undermining the public’s confidence in the judicial process.” *Ibid.* Five police officers were caught on camera beating a man to death and laughing about it. Twelve members of the community paused their lives for a month to determine the officers’ criminal responsibility. To cast aside that verdict when appellees have not suffered any harm is contrary to justice.

## CONCLUSION

This Court should reverse the order granting a new trial and remand for sentencing. Alternatively, this Court should reverse the order granting a new trial and remand with instructions to rule on the two post-trial motions decided by the district judge. *See* p. 41 n.3, *supra*.

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## **CERTIFICATE OF COMPLIANCE**

On April 29, 2026, the Court granted the government's motion to file an oversized brief of up to 18,000 words. C.A. Doc. 40. This brief complies with the Court's order because it contains 17,997 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Rule 32(b)(1). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Century Schoolbook 14-point font using Microsoft Word for Microsoft 365.

s/ Katherine McCallister  
KATHERINE MCCALLISTER  
Attorney

Date: May 18, 2026

**ADDENDUM: DESIGNATION OF RELEVANT  
DISTRICT COURT DOCUMENTS**

| <b>Document Description</b>                                         | <b>Record<br/>Entry<br/>Number</b> | <b>PageID#<br/>Range</b> |
|---------------------------------------------------------------------|------------------------------------|--------------------------|
| Indictment                                                          | 2                                  | 8-15                     |
| Mills Plea Agreement                                                | 91                                 | 267-276                  |
| Government's Notice to Introduce<br>Other-Acts Evidence*            | 146                                |                          |
| Motion to Exclude Jared Zwickey<br>Testimony                        | 367                                | 4957-4968                |
| Jared Zwickey Expert Notice*                                        | 410-2                              |                          |
| 8/13/24 Transcript                                                  | 476                                | 6286-6321                |
| Smith Proposed Jury Instructions*                                   | 492-1                              |                          |
| Martin Plea Agreement                                               | 499                                | 7230-7235                |
| Order on Motions Regarding Evidence<br>of Possible Punishment       | 513                                | 7288-7291                |
| 9/18/24 Transcript                                                  | 599                                | 8215-8357                |
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| Verdict Form                                                        | 627                                | 9509-9518                |
| Exhibit and Witness List                                            | 628                                | 9519-9524                |
| Jury Instructions                                                   | 630                                | 9528-9601                |
| 9/23/24 Transcript                                                  | 644                                | 9693-9875                |
| 9/25/24 Transcript                                                  | 645                                | 9876-10098               |
| 9/26/24 Transcript                                                  | 646                                | 10099-10368              |
| Smith Renewed and Supplemental<br>Motion for Acquittal or New Trial | 660                                | 10681-10696              |
| Bean Motion for Judgment of<br>Acquittal                            | 661                                | 10713-10717              |
| 9/20/24 Transcript                                                  | 665                                | 10721-10927              |
| 9/11/24 Transcript                                                  | 671                                | 11136-11348              |
| 9/12/24 Transcript                                                  | 672                                | 11349-11460              |
| 9/13/24 Transcript                                                  | 673                                | 11461-11686              |
| 9/16/24 Transcript                                                  | 674                                | 11687-11950              |
| 9/18/24 Transcript                                                  | 675                                | 11951-12201              |
| 9/19/24 Transcript                                                  | 676                                | 12738-13000              |

|                                                                                                       |     |             |
|-------------------------------------------------------------------------------------------------------|-----|-------------|
| 9/24/24 Transcript                                                                                    | 677 | 12465-12636 |
| 9/30/24 Transcript                                                                                    | 678 | 12637-12725 |
| Government's Response to Smith's<br>Renewed and Supplemental Motion<br>for Acquittal or for New Trial | 680 | 13001-13016 |
| Government's Response to Bean's<br>Motion for Judgment of Acquittal                                   | 682 | 13077-13091 |
| 9/9/24 Transcript                                                                                     | 689 | 13106-13342 |
| 10/1/24 Transcript                                                                                    | 690 | 13343-13420 |
| 10/2/24 Transcript                                                                                    | 691 | 13421-13684 |
| Notice of Disclosure of Oral<br>Communications                                                        | 846 | 15951-15954 |
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| Smith Motion for New Trial                                                                            | 863 | 16027-16035 |
| Smith Adoption of Haley's Motion for<br>New Trial                                                     | 865 | 16038-16039 |
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| Order Granting Motions for New Trial                                                                  | 919 | 16555-16565 |
| Government Notice of Appeal                                                                           | 946 | 16629-16631 |
| Bean Notice of Appeal                                                                                 | 955 | 16927-16930 |

\*Indicates sealed document to which counsel has been denied access and therefore cannot see PageID#.