

LIBERTY CITY LESBIAN, GAY, BISEXUAL AND TRANSGENDER DEMOCRATIC CLUB
2009 JUDICIAL PRIMARY ELECTION QUESTIONNAIRE

Name: Kevin Francis McCarthy Office Sought: Superior Court Judge Date: April 9, 2009

1) What is your experience with the LGBT community both generally and/or professionally?

I have not been politically active with the LGBT community previously, although I do have many friends who are members of the community. I have received the endorsement of the Stonewall Democrats of Allegheny County.

2) How have you advanced, through professional and personal achievements, the rights of the LGBT community, racial and ethnic minorities, and persons with disabilities?

Given the nature of my career, I have not had the opportunity to advocate for the rights of such citizens, but I have had the opportunity as a prosecutor to seek justice when they have been the victims of hate crimes.

3) Do you support the rights of LGBT people to the following:

- a. Marriage? No, to the degree that marriage in our country has a religious aspect and, consistent with the First Amendment, civil laws cannot force religious institutions to recognize or perform such marriages. I certainly believe that we can and should recognize a “civil marriage”.
- b. Civil Unions? Yes
- c. Domestic Partnership? Yes
- d. Second-parent adoption? Yes
- e. Protection from workplace discrimination? Yes
- f. Protection from housing discrimination? Yes
- g. Protection from acts of violence based on their sexual orientation or gender identity? Yes

4) Do you consider transgender rights a civil rights issue? Explain your answer.

I believe that all issues related to sexual orientation fall within the right of privacy as that right has been enunciated by the United States Supreme Court.

- 4) How should a judge support public accommodations for transgender individuals appearing before them or otherwise within the criminal justice system?

Pursuant to the Canons of Judicial Conduct, specifically, Canon 7 B (c), it is inappropriate for a candidate for judicial office to make statements committing to cases, controversies or issues that are likely to come before the court. The Superior Court is an error reversing court, and consistent with my oath to uphold the Constitution and laws of the United States and the Commonwealth of Pennsylvania, I pledge to evaluate each case on its merits and follow the law.

- 5) LGBT youth sometimes act out because of harassment at school or in the home due to their gender/sex identity. When ADAs prosecute cases against these members of our community, what will you do to prepare your staff to be sensitive to their issues? Additionally, LGBT youth who spend time in juvenile detention facilities face many dangers. What alternative sentences might you seek in their cases?

See answer to question 4, *supra*. Additionally, I believe corrections and juvenile authorities have a duty to protect inmates and their charges from all dangers and should be held accountable if they fail to perform this duty.

- 6) What has been the general nature of your practice and particular areas of concentration? Please describe any changes throughout the years?

I have for the past 18_ years been an Assistant District Attorney in the Appellate Unit of the Allegheny County District Attorney's Office. I have handled over 600 criminal appeals and argued 150 times before the Superior Court and 15 times before the Supreme Court. I am, in short, an appellate expert.

- 7) Describe a few of the most significant cases you have litigated. Please give a summary of the substance of the cases, the citations if available, and why you believe they were significant.

I represented the Commonwealth in *Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726 (2002), wherein the appellant's newly appointed counsel raised trial counsel's ineffectiveness in the stewardship of the trial. After failing to persuade a panel of the Superior Court of the merits of his claim, he sought and was granted allocatur on the issue of what is a criminal defendant's burden when alleging the ineffectiveness of his counsel on direct appeal. The Court further asked for input from the parties as to whether the Court should change existing practice of

requiring claims of ineffectiveness to be raised at the first opportunity with new counsel. I filed the Commonwealth's briefs in both the Superior and Supreme Court. I argued to the Supreme Court that the existing framework was sufficient, but asked that the Court provide a more definitive statement as to the quality and quantum of evidence in the offer of proof on appeal to grant a defendant relief in the form of remand for an evidentiary hearing to prove his claims. Instead, the Court took the opportunity to reverse more than 25 years of practice and pronounce that from that day forth, as a "general rule," all claims of ineffectiveness would be deferred for collateral review under the Post Conviction Relief Act. This has been one of the most significant changes to criminal practice in Pennsylvania in more than 20 years and has a profound effect upon the way in which claims collateral claims are raised and preserved for federal habeas review.

In *Commonwealth v. McPhail*, 547 Pa. 519, 692 A.2d 139 (1997), the defendant met with an undercover officer and sold a quantity of drugs in Washington County, but less than the amount previously arranged. The next day the defendant accompanied the undercover officer to Allegheny County and delivered the remainder of the agreed upon amount. The defendant was subsequently arrested and charged in each county for the delivery of the drugs provided therein. The defendant plead guilty in Washington County, then subsequently moved to dismiss the charges in Allegheny County alleging a violation of Section 110, Title 18, as the Commonwealth failed to bring all charges arising out of a single criminal episode in the same prosecution. The trial court denied the claim on the basis that jurisdiction is only county wide, and that the two deliveries could not have been brought in a single county. I briefed and argued the Commonwealth's position before the Superior Court, which affirmed. I then briefed and argued the case before the Supreme Court, which reversed, holding for the first time that the Unified Judicial System vested jurisdiction for criminal actions within all 67 counties and that the issue is simply one of venue. The case completely changed the understanding of jurisdiction in criminal cases.

In *Commonwealth v. Upshur*, *Appeal of WPXI*, 592 Pa. 273, 924 A.2d 642 (2007), the prosecutor introduced a recording of a jail tape during a preliminary hearing wherein the defendant was charged with a general count of criminal homicide as well as homicide by vehicle. The recording was of the defendant speaking to her boyfriend who was incarcerated in the jail and who was also dating the victim. During the conversation the defendant threatened the life of the victim, and therefore, the prosecutor introduced the tape to establish specific intent to kill. At the conclusion of the hearing, members of the media requested a copy of the tape, which the prosecutor refused. WPXI filed a motion to intervene in the Court of Common Pleas and requested a copy of the tape based upon the common law right of access to the courts. I represented the Allegheny County District

Attorney at an argument before President Judge Joseph James, but no evidence was presented. Judge James granted the motion and ordered the Commonwealth to provide a copy of the tape to WPXI. I appealed on behalf of the Commonwealth and the case was argued before a panel of the Superior Court comprised of Judges Hudock, Johnson and Popovich. The Court reversed and WPXI sought and obtained review before the Supreme Court. I filed the brief and argued that while there is a presumption of openness, the Commonwealth has an obligation to protect a defendant's right to a fair trial and that pretrial disclosure of such powerful evidence is contrary to that right. While the Supreme Court reversed the Superior Court, review of the four concurring and dissenting opinions makes clear that the Commonwealth has a right to object to the public dissemination of its evidence pretrial, even where it was introduced in a preliminary hearing, and that the Court of Common Pleas has the discretion to protect such evidence, and the Commonwealth's burden is high.

In *Commonwealth v. Firman*, 571 Pa. 610, 813 A.2d 643 (2002), the trial court suppressed all evidence seized as a result of a traffic stop by a Port Authority of Allegheny County Police Officer, concluding that the officer had no authority beyond Port authority property. I filed the appeal and brief on behalf of the Commonwealth and argued before the Superior Court that Street Railway police have jurisdiction beyond the property of the corporation under certain circumstances which were applicable here. The case was argued first before a panel of the Superior Court and then, *sua sponte*, before the Court *en banc*. The Superior Court held that pursuant to the Railroad and Street Railway Police Act, those officers have statewide jurisdiction. The defendant sought and obtained review before the Supreme Court. I filed the Commonwealth's brief. The Supreme Court affirmed the order of the Superior Court, but ruled that with only limited exceptions Railroad and Street Railway police officers may only exercise their authority when on their property, in the areas immediately adjacent thereto, and where the property and ridership is endangered. Significantly, the property at risk here was the police cruiser, which the defendant nearly struck. It is apparent from the Court's opinion that the extraterritorial authority of Railroad and Street Railway police includes the rolling stock of the corporation and the riding public.

- 8) State briefly why you are seeking the Democratic nomination to be a Superior Court Judge in Pennsylvania, and what qualities you believe you possess that would serve you especially well if you were elected to the Court.

I have committed my entire career to public service and the law. The Superior Court is for many people the only appeal of right they will receive. It is important that the judges on the Superior Court have the background, experience and intellect necessary to fulfill the obligations of that office. I believe there is no higher form

of service for a lawyer of my background and ability than to serve on the Superior Court. In my 18_ years in the Allegheny County District Attorney's Office, Appellate Unit, I have handled over 600 appeals before the Superior Court of Pennsylvania. I have argued over 150 times before the Superior Court and 15 times before the Supreme Court of Pennsylvania. In addition, I have tried in the Court of Common Pleas one homicide case to a jury and as well as two narcotics cases non-jury.

I began my legal career clerking for the Court of Common Pleas of Fayette County with Judges Fred C. Adams and William B. Franks, and then went on to clerk with Judge James E. Rowley of the Superior Court for nearly 2_ years. In that time, I dealt with all aspects of criminal and civil cases that appeared before the Court of Common Pleas and the Superior Court. Under Judge Rowley's tutelage, I learned the skills necessary to review and decide appellate cases. For the past 18_ years, I have honed those skills and been an effective advocate on behalf of the Commonwealth of Pennsylvania. In addition, I have taught Criminology at Carlow University and Post Conviction and Habeas Corpus Remedies at Duquesne University Law School, as well as continuing legal education for the Pennsylvania Bar Institute and the Pennsylvania District Attorney's Association.

- 9) What are the most pressing needs of reform in our judicial system in your opinion?

Despite being the third branch of government, the judiciary is the least understood by the public, and is often perceived as secretive. The Supreme Court has utilized the internet effectively to address this problem by creating the Unified Judicial System website which provides information about the courts at all levels, posts all published opinions and dockets, and the PCN network does televise *en banc* arguments for the Superior and Commonwealth Courts. Nonetheless, the courts at all levels must do more to educate the public as to the proper role and workings of the courts.

The case load in the Common Pleas courts continues to cause delay in the timely hearing of cases. Similarly, the volume of appellate cases in both the Superior and Commonwealth Courts contributes to long delays prior to the disposition of the appeals. The only real solution to these problems is the addition of judges and staffs to the courts.

- 10) For what organizations have you done pro-bono work?

None. Given my previous positions as a law clerk and my current position in the District Attorney's Office, I was not permitted to offer my services for such work.

- 11) Do you support a woman's right to choose?

I recognize the legal analysis and holding of the Supreme Court's decision in *Roe v. Wade* and its subsequent decisions. I have been a Roman Catholic all my life and respect the Church's teachings as an article of my faith. As a judge, however, I am duty bound to apply the law of the United States and the Commonwealth and the precedent established by case law in rendering any decision.

- 12) Have you ever been sanctioned for any alleged breach of ethics or professional conduct by any court, administrative agency, bar association, disciplinary committee, judicial conduct committee, or other professional group? If so, please explain the nature of the sanction.

No.

- 13) Have you been recommended by the Philadelphia Bar Association?

No, I did not submit myself for review by that organization, but was rated Highly Recommended by the Allegheny County Bar Association and rated Recommended by the Pennsylvania Bar Association.

Please return by Friday April 3rd via e-mail to matt@libertycity.org

Or via mail to:

Liberty City Lesbian and Gay Democratic Club

c/o Matthew Woodcock

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