

PERSONAL DATA QUESTIONNAIRE

1. State your full name:

Kevin Francis McCarthy

Have you ever been known by any other name? If so, please list.

No.

2. Office address (include zip code):

Allegheny County District Attorney's Office
Appellate Unit
401 Allegheny County Courthouse
436 Grant Street
Pittsburgh, PA 15219

Office telephone (include area code):

(412) 350-4377

Name of law firm, if associated:

Allegheny County District Attorney's Office

3. Date and place of birth:

August 14, 1961
Pittsburgh, Pennsylvania

4. Are you a naturalized citizen? If so, give date and place of naturalization:

No

5. Family status:

a) Are you married? If so, state the date of marriage and your spouse's full name, including maiden name, if applicable:

Married on December 2, 1989
Susan Kay McClain McCarthy

b) Have you been divorced? If so, state the date, the number of the case and the court:

No

(ii) Law Clerk to William B. Franks, J.
Court of Common Pleas of Fayette County
Fayette County Courthouse
61 East Main Street
Uniontown, PA 15401
June 1987 to March 1988

(iii) Law Clerk to James E. Rowley, J.
Superior Court of Pennsylvania
Beaver, PA 15009
March 1988 to June 1990

b) Whether you practiced alone and, if so, the addresses and the dates:

Not applicable

c) The dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected and the nature of your connection with each:

Allegheny County District Attorney's Office
Appellate Unit
401 Allegheny County Courthouse
436 Grant Street
Pittsburgh, PA 15219
July 1990 to present

d) Any other relevant particulars:

None

10. With respect to your practice:

a) What has been the general character of your practice, dividing it into periods with dates if its character has changed over the years?

I am primarily responsible for representing the Commonwealth in criminal appeals filed by convicted defendants, as well as those filed by the Commonwealth from orders granting suppression or dismissal. I also review and evaluate requests for appeals from orders granting suppression of evidence, decertification to juvenile court, new trials, etc. In addition to writing briefs, I assist and counsel trial attorneys with all aspects of criminal litigation. I have also supervised the legal internship program of the District Attorney's Office, which included teaching brief writing skills and generally mentoring law students within the Office. Earlier in my tenure in the District Attorney's Office, I had occasion to act as amicus counsel on behalf of the Pennsylvania District Attorneys

Association. Since 2000, I have served as an advisor to District Attorney Stephen Zappala.

- b) Describe your typical clients and mention the areas, if any, in which you have concentrated your practice:

The Commonwealth of Pennsylvania

11. With respect to the last five years:

- a) Did you appear in court regularly, occasionally, or not at all? If the frequency of your appearances in court has varied during this period, describe each such variance, giving the dates thereof:

Over the past five years, I have appeared before the Superior Court 40 times for oral argument and before the Supreme Court two times. The number of oral arguments has varied over my 18 years in the District Attorney's Office. I also personally handled several hearings in the Court of Common Pleas following remand from the Superior Court.

- b) What percentage of these appearances was in:

- | | |
|----------------------------|------|
| 1. Federal courts: | 0% |
| 2. State courts of record: | 100% |
| 3. Other courts: | 0% |

- c) What percentage of your litigation was:

- | | |
|--------------|------|
| 1. Civil: | 0% |
| 2. Criminal: | 100% |

- d) State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel or associate counsel:

None

- e) What percentage of these trials were:

- | | |
|--------------|----------------|
| 1. Jury: | Not applicable |
| 2. Non-jury: | Not applicable |

12. Summarize your experience in court prior to the last five years, indicating as to that period:

- a) Whether your appearances in court were more or less frequent:

A greater number of my appeals were argued prior to 2000.

- b) Any significant changes in the percentages stated in your answers to question 11(b), (c) and (e):

No

- c) Any significant changes in the number of cases per year in courts of record you tried to verdict or judgment (rather than settled), as sole counsel, chief counsel or associate counsel.

I retried one homicide before a jury after the defendant had been awarded a new trial following collateral relief pursuant to the Post Conviction Relief Act, and I was unsuccessful in my appeal of that order to the Superior Court of Pennsylvania. The case was *Commonwealth v. Thornhill*, No. CC 9207550. The trial judge was the Honorable Donna Jo McDaniel. The case began on March 26, 2001, and lasted one week.

13. Describe five of the most significant litigated matters which you personally handled and give the citations thereto, if the cases were reported. Give a capsule summary of the substance of each case and a succinct statement of what you believe to be the particular significance of the case. Identify the party or parties whom you represented and describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case a) the dates of the trial periods; b) the name of the court and the judge before whom the case was tried; and c) the individual name, address and telephone numbers of co-counsel for each of the other parties;

- (1) On two separate occasions in my capacity as a representative for the Commonwealth, I successfully appealed orders vacating first degree murder convictions. In *Commonwealth v. Watley*, 548 Pa. 547, 699 A.2d 1240 (1997), the Superior Court granted a new trial after accepting the defendant's argument that trial counsel was ineffective for failing to request a specific instruction regarding the reasonableness of the defendant's belief that the victim was armed based upon his history of violence. The victim had been a violent gang member and was actively searching for the defendant and his accomplice because they had stolen drugs from the victim. Despite the fact that the victim was unarmed at the time of the shooting, the defendant argued that counsel was ineffective for not requesting a specific instruction explaining that a person may successfully put forth a justification defense if, under the circumstances, he operated under a belief that the victim may have been armed, and that this belief was reasonable based upon the victim's history of violence, of which the defendant was aware. Having filed the Commonwealth's brief in the Superior Court, I successfully petitioned the Supreme Court to grant the appeal, and then convinced the Court that the Superior Court's reasoning was an unwarranted extension of the Supreme Court's decision in *Commonwealth v. Stonehouse*. The case was argued September 19, 1996, before Chief Justice Flaherty, and Justices Zappala, Cappy, Castille, Nigro and Newman.

Robert A. Crisanti, Esq., represented the defendant.

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In the second case, *Commonwealth v. Terrel Johnson*, the trial court granted post conviction relief, vacated the judgment of sentence and ordered a new trial, finding trial counsel was ineffective for failing to properly investigate and impeach the Commonwealth's eyewitness. On behalf of the Commonwealth, I successfully argued to a panel of the Superior Court that the record failed to support the trial court's finding and the judgment of sentence was reinstated. While I take great pride in my successful handling of this case, it has no significance beyond its outcome, and I offer it only as a point of interest.

William Difenderfer, Esq., represented the defendant.

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- 2) In *Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726 (2002), 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. The case was argued on March 21, 2001, before Chief Justice Zappala, and Justices Cappy, Castille, Nigro, Newman, and Saylor.

William C. Kacznski, Esq., represented the defendant.

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- 3) 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. The case was argued March 4, 1996, before Chief Justice Flaherty, and Justices Zappala, Cappy, Castille, Nigro and Newman.

John Dean, Esq., then of the Allegheny County Public Defenders Office, represented the defendant.

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- 4) 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. The case was argued on September 11, 2006, before Chief Justice Cappy, and Justices Castille, Saylor, Eakin, Baer, Baldwin and Fitzgerald.

Walter P. DeForest, Esq. and Jacqueline A. Koscelnik, Esq., represented WPXI.
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- 5) 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. The case was argued on September 10, 2002, before Chief Justice Zappala, and Justices Cappy, Castille, Nigro, Newman, and Saylor.

Brian Neft, Esq., represented the defendant.

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14. If a substantial period of your practice has been before administrative boards, commissions or agencies during the past five years, identify the boards, commissions or agencies before which you have practiced and estimate percentages of practice time devoted thereto:

Not applicable

15. If a substantial portion of your practice has been before Appellate courts during the past five years, identify the Appellate Courts before which you have practiced and estimate percentages of practice time devoted thereto:

As a member of the Post Conviction/Appellate Unit of the Allegheny County District Attorney's Office for over 18 years, my practice has been conducted almost completely before the Superior and Supreme Courts of Pennsylvania.

16. a) Have you ever held judicial office? If so, give dates and details, including the courts involved, whether elected or appointed, periods of services, and a description of the jurisdiction of each of such courts with any limitations upon the jurisdiction of each court:

No

- b) Have you ever held public office other than judicial office? If so, give details, including the office involved, whether elected or appointed, and the length of your service, giving details:

No

17. Have you ever been an unsuccessful candidate for elective, judicial, or other public office? If so, give details, including dates:

I ran unsuccessfully for Democratic District Committee for the 19th Ward, 16th District in Pittsburgh, twice while in college in 1980 and 1982.

18. Have you ever been engaged in any occupation, business or profession other than the practice of law or the holding of judicial or other public office? If so, give details, including dates:

No

19. Are you now an officer or director or otherwise engaged in the management of any business enterprise?

No

- a) If so, give details, including the name of your enterprise, the nature of the business, the title or other description of your position, the nature of your duties and the term of your service.

Not applicable

- b) Is it your intention to resign such positions and withdraw from any participation in the management of any such enterprises if you are elected and confirmed? If not, give reasons:

Not applicable

20. Have you ever been arrested, charged with or convicted of violating any federal law or regulation, state law or regulation, or county or municipal law, regulation or ordinance? If so, give details. Do not include summary traffic offenses:

No

21. Are you under any ongoing federal, state or local investigation or indictment for possible violation of a criminal statute? If so, give particulars:

No

22. Has a tax lien or other collection procedure been instituted against you by federal, state or local authorities? If so, give particulars:

No

23. Have you ever been sued by a client? If so, give particulars:

No

24. Have you ever been a party or otherwise involved in any other legal proceedings? If so, give the particulars. Do not list proceedings in which you were merely a guardian ad litem or stakeholder. Include all legal proceedings in which you were a party in interest, a material witness, were named as co-conspirator or a co-respondent and any grand jury investigation in which you figured as a subject or in which you appeared as a witness:

No

25. Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative agency, bar association, disciplinary committee, or other professional group? If so, give the particulars:

No

26. What is the present state of your health? (If any medical condition or issue exists, you may be requested to execute a medical record authorization form as part of the interview process.)

Excellent

27. Do any circumstances exist that would affect your ability to perform the function of the position you seek or fulfill the term of office? If so, please explain.

None

28. Furnish at least five examples of legal articles, law review articles, briefs, or other legal writings which reflect your personal work. If briefs are submitted, indicate the degree to which they represent your personal work:

The following writing samples were written by me alone and are representative of my practice within the District Attorney's Office:

- (1) Commonwealth v. Upshur, Appeal of WPXI, No. 2 WAP 2006;
- (2) Commonwealth v. Firman, No. 29 WAP 2002;
- (3) Commonwealth v. Green, No. 2369 WDA 2006;
- (4) Commonwealth v. Elias, No. 1074 WDA 2004;
- (5) Commonwealth v. Tielsch, No. 2182 WDA 2002;
- (6) Commonwealth v. Cornelius, No. 584 WDA 2002.

29. List all bar associations and professional societies of which you are a member and give the titles and dates of any offices which you have held in such groups. List chairmanships of any committees in bar associations and professional societies and memberships on any committees which you believe to be of particular significance (e.g., judicial selection committee, disciplinary committee, grievance committee).

Pennsylvania District Attorneys Association
Allegheny County Bar Association

30. List your experiences in teaching and lecturing, including law school, continuing legal education and to non-legal audiences.

- I have taught Criminology at Carlow University since the winter term of 2002.
- I am currently teaching Post Conviction Remedies and Habeas Corpus with Kenneth Benson at Duquesne University Law School for the third time.
- I have taught continuing legal education classes for the Pennsylvania District Attorneys Association covering the subjects of warrants, seizure of the person, and evidence.
- I taught continuing legal education classes for the Pennsylvania Bar Institute in 2007 and 2008 on the topics of the Post Conviction Relief Act Update and Recent Appellate Decisions.
- I have taught once at the Allegheny County Police Academy.

31. List all organizations other than bar associations, professional associations or societies of which you are or have been a member, including civic, charitable, religious, educational, social and fraternal organizations:

St. Pamphilus Roman Catholic Church – Finance Council, 17 years
Ancient Order of Hibernians – Irish heritage organization
Lucchese Nel Mondo – Italian social organization

32. List any honors, prizes, awards or other forms of recognition which you have received (including any indication of academic distinction in college or law school) other than those mentioned in answers to the foregoing questions.

None

33. State any other information which may reflect positively or adversely on you or which you believe should be disclosed in connection with consideration of you for an election to an Appellate Court of Pennsylvania.

I have sat as an arbitrator on more than 25 occasions and have had the opportunity to gauge the credibility of witnesses. I understand how jurors and judges weigh various factors in judging and weighing evidence and the deference that should be accorded those findings on appeal.

I am unaware of any information which would be adverse to my qualifications for a position on the Superior Court.

34. Why do you wish to become a Justice or Judge? What special strengths do you feel you possess that would particularly well qualify you for the position of Justice or Judge?

An appeal to the Superior Court is for most people their only appeal of right and the last chance to seek redress for any error that may have occurred in their case. It is, therefore, essential that the judges of the Superior Court appreciate this role and their duty to the parties and the law.

My entire practice of law has been devoted to public service, first as a judicial law clerk on the Court of Common Pleas, then as a law clerk on the Superior Court, and for the past 18 years, as an Assistant District Attorney. Virtually all of my practice has been devoted to appellate work. To serve as a Judge on the Superior Court would be both the logical and the highest form of service that I could perform as an appellate practitioner. Given my more than 20 years of practice working for and then appearing before the appellate courts of Pennsylvania, I believe I have a profound understanding of appellate practice and the role of an appellate judge.

While clerking for Judge Rowley, I learned the nuances of appellate practice, from issue preservation and appealability, to jurisdiction, to scope and standard of review. For the past 18 years, I have put those lessons to work representing the Commonwealth in over 600 criminal appeals, in cases ranging from rape and murder to disorderly conduct and driving under the influence. I have argued over 150 times in the appellate courts, including 15 times before the Pennsylvania Supreme Court.

In addition, I understand the importance of allowing attorneys to argue their case while keeping them focused on the issues and preventing them from going far afield. Most importantly, I have a keen awareness of the proper role of an appellate court including the limitations placed upon an appellate court by its scope and standard of review and the deference to be afforded a lower court's decision.

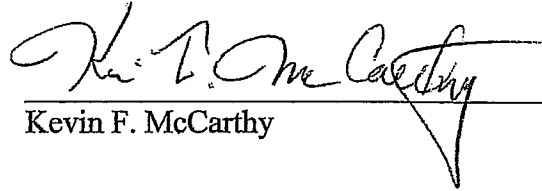
35. Did you sign the PBA Judicial Campaign Advertising Guidelines? (Please return signed pledge with completed questionnaire.)

Yes – attached hereto

CERTIFICATION STATEMENT

The undersigned certifies that all of the statements made in this questionnaire are true, complete and correct to the best of his knowledge and belief and are made in good faith.

Dec. 19, 2008
Date


Kevin F. McCarthy