No._____

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In The
Supreme Court of the United States

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Carlos Cornwell
Petitioner,
v.
State of Tennessee
Respondent

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On Petition for Writ of Certiorari to the Court of Criminal Appeals of Tennessee, Eastern Division at Knoxville

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has recognized there are cases that turn on scientific or technical evidence where "the only reasonable and available defense strategy requires consultation with experts or introduction of expert testimony." *Hinton v. Alabama*, 571 U.S. 263, 273 (2014). The sole issue at trial in Mr. Cornwell's case was whether he accidentally backed over his wife in his car or intentionally ran over her while moving forward. There were no eyewitnesses and the determination of guilt or innocence turned entirely on the interpretation of forensic pathology and accident reconstruction evidence. Mr. Cornwell's trial counsel retained a forensic pathologist and accident reconstructionist, but did not effectively investigate the forensic evidence, thereby preventing counsel from effectively challenging the conclusions of the prosecution's forensic experts and effectively preparing and presenting countervailing expert evidence. The Court of Criminal Appeals of Tennessee held that Mr. Cornwell did not receive ineffective assistance of counsel and, in conflict with *Strickland v. Washington*, 466 U.S. 668 (1984), assessed each of counsel's errors in isolation.

Mr. Cornwell was also deprived of a fair trial because at all relevant stages of Mr. Cornwell's trial proceedings, the trial judge was abusing narcotics, engaged in other unethical and criminal conduct and harbored a motive to favor the prosecution to avoid detection of his own illicit behavior. Trial before a biased, incompentent judge is a structrual defect requiring reversal absent a showing of particularized prejudice, but the Court of Criminal Appeals of Tennessee misapplied *Bracy v. Gramley*, 520

U.S. 899 (1997), when it determined relief was unwarranted because there was no evidence the trial judge was biased specifically against Mr. Cornwell.

The questions presented are:

1. In a case wholly dependent on forensic evidence, did the Court of Criminal Appeals of Tennessee depart from *Hinton v. Alabama*, 571 U.S. 263 (2014), and *Strickland v. Washington*, 466 U.S. 668 (1984), by analyzing in isolation each of trial counsel's errors in effectively investigating, challenging, and presenting expert testimony?

2. Whether the Court of Criminal Appeals of Tennessee misapplied *Bracy v. Gramley*, 520 U.S. 899 (1997), and departed from this Court's precedent on structural constitutional error by holding that structural error exists with judicial misconduct and bias only when there is proof of actual bias against the defendant?

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Petitioner, Carlos Cornwell, respectfully prays that a writ of certiorari issue to review the opinion of the Court of Criminal Appeals of Tennessee, Eastern Division at Knoxville.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Tennessee affirming the denial of post-conviction relief by the Knox County Criminal Court is unreported but can be accessed at *Cornwell v. State*, No. E2016-00236-CCA-R3-PC, 2017 WL 5957667, 2017 Tenn. Crim. App. LEXIS 994 (Tenn. Crim. App. Dec. 1, 2017), (App. 4). The Order from the Tennessee Supreme Court denying discretionary review is unreported but can be accessed at *Cornwell v. State*, No. E2016-00236-SC-R11-PC, 2018 Tenn. LEXIS 214 (Tenn. Apr. 18, 2018), (App. 3) The opinion of the Court of Criminal Appeals of Tennessee affirming Mr. Cornwell's conviction on direct appeal is unreported but can be accessed at *State v. Cornwell*, No. E2011-00248-CCA-R3-CD, 2012 Tenn. Crim. App. LEXIS 868 (Tenn. Crim. App. Oct. 25, 2012), (App. 29). The Order from the Tennessee Supreme Court denying discretionary review of Mr. Cornwell's direct appeal is unreported but can be accessed at *State v. Cornwell*, No. E2011-00248-SC-R11-CD, 2013 Tenn. LEXIS 246 (Tenn. 2013), (App. 28).

STATEMENT OF JURISDICTION

The Court of Criminal Appeals of Tennessee entered an Opinion and Judgement denying post-conviction relief on December 1, 2017. Mr. Cornwell sought timely discretionary review from the Tennessee Supreme Court, but review was denied on April 18, 2018. On July 11, 2018, Justice Kagan extended time to file a petition to and including September 15, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment states in relevant part:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defense."

The Fourteenth Amendment states in relevant part:

"No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law…"

STATEMENT OF THE CASE

In 2009, petitioner Carlos Cornwell ("Mr. Cornwell") was tried and convicted of second-degree murder for the death of his wife, Leoned Cornwell ("Mrs. Cornwell"). Mr. Cornwell's trial centered around whether Mr. Cornwell had intentionally driven over his wife or if he had accidentally backed over her. With no eyewitnesses to what occurred, the determination of Mr. Cornwell's guilt or innocence turned exclusively on expert testimony concerning the interpretation of forensic evidence on Mr. Cornwell's vehicle and Mrs. Cornwell's body.

A. Trial Counsel failed to investigate critical forensic evidence on Mr. Cornwell's vehicle, preventing the defense accident reconstructionist from challenging the conclusions of the state's experts.

Mark Stephens, the Knox County, Tennessee Public Defender, was appointed to Mr. Cornwell's case shortly after Mr. Cornwell was charged. (App. 13). Mr. Stephens quickly learned that Mr. Cornwell's vehicle – the alleged murder weapon – was an important piece of evidence. (P.C.R. Vol. V, PC Hr'g Tr. Vol. III, p. 334, ln. 12-15). Law enforcement investigators had examined the vehicle in the early morning hours after the accident and towed the car to an impound lot for storage. (P.C.R. Vol. I, PC Hr'g Tr., Ex. 2, Tr. of the Evid., Vol. I, p. 12-15, p. 18, ln. 2-4). The state claimed that the location of blood spatter and "dirt rub" on the vehicle evidenced that Mr. Cornwell's vehicle was moving forward when he ran over his wife. (App. 10).

Despite knowing the importance of the forensic evidence on the vehicle, trial counsel did not investigate the vehicle until after Mr. Cornwell was indicted – several months after Mr. Cornwell was charged. (P.C.R. Vol. V, PC Hr'g Tr. Vol. III, p. 335,

ln. 9-20). When trial counsel and Alan Parham, who was retained as an expert in accident reconstruction, finally did view the vehicle, they discovered that it had been stored outside, exposed to the elements. (App. 12; *see also* P.C.R. Vol. V, PC Hr'g Tr. Vol. III, p. 335, ln. 23-25, p. 336, ln. 1). The forensic evidence on the vehicle had degraded to the point where Mr. Parham could not determine whether the "dirt rub" indicated that the vehicle was moving forward or backward when Mrs. Cornwell was struck. (App. 12). It was also discovered that due to the poor quality of the photographs taken by law enforcement, Mr. Parham could not determine whether any evidence indicating direction of travel existed on the front or back of the vehicle at all at the time of the accident. (*Id.*).

Trial counsel filed a pre-trial motion seeking a remedy for the failure to preserve the vehicle, but because he was "frustrated" with the trial judge, the only remedy he requested in the written motion was dismissal of the case. (App. 14; *see also* P.C.R. Vol. V, PC Hr'g Tr. Vol. III, p. 337, ln. 25, p. 338, ln. 1-15, p. 339, ln. 5-15). The trial court granted a hearing, but Mr. Stephens did not effectively present Mr. Parham's testimony to convey the evidence on the vehicle had been materially altered by being stored outside, and the trial court denied relief on the issue. (P.C.R. Vol. V, PC Hr'g Tr. Vol. III, p. 435, ln. 21-25, p. 436, ln. 1).

At trial, the state's accident reconstruction expert, Knoxville Police Department Officer Ron Trentham, testified that he viewed and documented areas of the front bumper where dirt was definitively rubbed off by Mrs. Cornwell's body as the car moved forward over her. (*See e.g.*, P.C.R. Vol. I, PC Hr'g Tr., Ex. 2, Trial R.,

Tr. of the Evid. Vol. V, Trial Tr. at p. 465:19-466:7; Vol. VI, Trial Tr., p. 551:20-22). He also testified that the dirt on the back bumper of Mr. Cornwell's car was not disturbed. (P.C.R. Vol. I, PC Hr'g Tr., Ex. 2, Trial R., Tr. of the Evid. Vol. VI, Trial Tr., p. 555:23-25). Officer Trentham told the jury that Mr. Parham could not challenge his findings because "he [(Parham)] wasn't there [at the scene] …I was there" and the law enforcement photographs did not accurately depict the evidence Officer Trentham personally observed on the vehicle. (P.C.R. Vol. I, PC Hr'g Tr., Ex. 2, Trial R., Tr. of the Evid. Vol. VI, Trial Tr. p. 544, ln. 7-12, p. 545, ln. 4-15).

Mr. Parham was unable to rebut these assertions. Whereas the state's accident reconstruction experts testified to their conclusions with certainty, Mr. Parham testified that it was his belief that the evidence in the case had been compromised to such an extent that the likelihood of his ability to accurately reconstruct the accident had been "severely diminished." (P.C.R. Vol. I, PC Hr'g Tr., Ex. 2, Trial R., Tr. of the Evid. Vol. VI, Trial Tr. p. 1000, ln. 2-9).

B. Trial counsel failed to effectively investigate or challenge the conclusions of the state's forensic pathologist.

Even more critically, trial counsel did not effectively deal with the forensic evidence on Mrs. Cornwell's body either. Mr. Stephens received the report from the state's forensic pathologist, Dr. Darinka Mileusnic-Polchan, containing her findings from the autopsy she performed on Mrs. Cornwell's body. (App. 14). The report contained two succinct conclusions – that the injury patterns and marks on the street where the accident occurred "indicate[d] that the victim was dragged under the

vehicle for a short distance while the vehicle was moving forward" and that "[t]he manner of death is homicide." (P.C.R. Vol. IV, PC Hr'g Tr., Vol. III, p. 440, ln. 13-25).

After receiving the report, Mr. Stephens and his co-counsel, Bob Edwards, met with Dr. Mileusnic-Polchan to interview her. (P.C.R. Vol. IV, PC Hr'g Tr. Vol. II, p. 165, ln. 21-24). At the meeting, Dr. Mileusnic-Polchan described the injuries on Mrs. Cornwell's abdomen as having been caused by something on the vehicle with sharp edges, causing a "cheese-grater effect." (App. 14). Mr. Edwards realized that the injuries were likely caused by the heat shield underneath the vehicle and that, based on Dr. Mileusnic-Polchan's description of the injuries, the vehicle had to have been traveling backwards – the opposite of the state's theory of the case. (*Id.*). Mr. Edwards brought this to Dr. Mileusnic-Polchan's attention and she said she would reserve offering a final opinion until she could view the vehicle. (App. 14; P.C.R. Vol. IV, PC Hr'g Tr. Vol. II, p. 178, ln. 19-24; P.C.R. Vol. V, PC Hr'g Tr. Vol. III, p. 345, ln. 3-5). Mr. Stephens testified at the post-conviction hearing that he "had no intentions of going back out to look at the car…. We knew we had – she had confirmed what [Mr. Cornwell] said happened in that parking lot." (P.C.R. Vol. V, PC Hr'g Tr. Vol. III, p. 347, ln. 4-25, p. 348, ln. 1-3; *see also* App. 11-12).

After the meeting, Mr. Stephens retained a well-qualified forensic pathologist, Dr. Gregory Davis, who reviewed the autopsy report and provided Mr. Stephens with a written report stating that he did not believe the evidence supported Dr. Mileusnic-Polchan's conclusions that the manner of death was a homicide or that the vehicle hit Mrs. Cornwell while moving forward. (P.C.R. Vol. I, PC Hr'g Tr., Ex. 7, p. 585; P.C.R.

Vol. IV, PC Hr'g Tr. Vol. II, p. 165, ln. 1-8; P.C.R. Vol. V, PC Hr'g Tr. Vol. III, p. 350, ln. 20-25, p. 351, ln. 1-8). Dr. Davis' report did not address whether Dr. Mileusnic-Polchan's methods were reliable or whether she had appropriately applied the underlying foundational science to reach her conclusions. (P.C.R. Vol. V, PC Hr'g Tr. Vol. III, p. 351, ln. 17-20). Mr. Stephens filed a motion requesting a pre-trial hearing on the admissibility of Dr. Mileusnic-Polchan's testimony but did not attach Dr. Davis' report to his motion and did not raise the factual or legal issues necessary to effectively illustrate why a *pre-trial* hearing was necessary. (App. 15; P.C.R. Vol. V, PC Hr'g Tr. Vol. III, p. 350, ln. 8-10, p. 351, ln. 3-8, 21-25).

The trial court did not grant a pre-trial hearing concerning Dr. Mileusnic-Polchan's testimony, but held a jury-out hearing at trial on the afternoon before Dr. Mileusnic-Polchan's testimony the next morning. (App. 12). At the jury-out hearing, Dr. Mileusnic-Polchan offered multiple opinions on the cause of the injuries and manner of death that were more expansive than what were contained in the autopsy report. (*See* P.C.R. Vol. I, PC Hr'g Tr., Ex. 2, Trial Tech. R. Vol. I, Memorandum of Law in Support of Defendant's Motion for New Trial, at p. 124-25). On cross-examination at the hearing, trial counsel did not effectively question Dr. Mileusnic-Polchan to challenge whether her conclusions were supported by the underlying science of forensic pathology. (*See* P.C.R. Vol. I, PC Hr'g Tr., Ex. 2, Trial R., Tr. of the Evid. Vol. VIII at p. 726-748).

Dr. Davis testified at the jury-out hearing that he did not agree with Dr. Mileusnic-Polchan's conclusions about the circumstances of Mrs. Cornwell's death.

(P.C.R. Vol. I, PC Hr'g Tr., Ex. 2, Trial R., Tr. of the Evid. Vol. VIII at p. 752-759). Dr. Davis testified that a forensic pathologist can generally only determine whether a set of injuries is "consistent with" a scenario, but Mr. Stephens did not question Dr. Davis at all about how Dr. Mileusnic-Polchan's conclusions were scientifically unreliable or the limitations of the underlying science supporting those conclusions. (*Id.*).

The following morning, Dr. Mileusnic-Polchan testified before the jury and offered additional opinions for the first time that were even further beyond her expertise as a forensic pathologist. (App. 17; *see also* P.C.R. Vol. I, PC Hr'g Tr., Ex. 2, Trial Tech. R. Vol. I, Memorandum of Law in Support of Defendant's Motion for New Trial, at p. 126-129). Perhaps most damaging, Dr. Mileusnic-Polchan told the jury, *without objection*, that "I created or formulated my opinion that it actually it was intent, and that it was a homicide." (P.C.R. Vol. I, Ex. 2, Trial R., Tr. of the Evid., Vol. X at p. 788, ln. 4-5). She also definitively testified that Mrs. Cornwell was not affected by the residual effects of marijuana and therefore would not have stumbled and fallen behind the vehicle as Mr. Cornwell was reversing. (P.C.R. Vol. I, Ex. 2, Trial R, Tr. of the Evid., Vol. X, p. 837, ln 17-19). Although Dr. Mileusnic-Polchan was not qualified as an accident reconstructionist or blood spatter expert, she also testified that the "dirt rub" on the vehicle, the location of Mrs. Cornwell's body in relation to the vehicle and the blood spatter on Mrs. Cornwell's shirt evidenced that Mr. Cornwell intentionally killed his wife. (*See* P.C.R. Vol. I, Ex. 2, Trial R., Tr. of the Evid., Vol. X, p. p. 796, ln 12-25; p. 797, ln 1-9, p. 816, ln 22-25, p. 817, ln 1-13 p. 819, ln 23-25). Trial counsel failed to object to many of these improper opinions and conclusions.

Cross-examination did not mitigate the failure to object. Mr. Stephens attempted to impeach Dr. Mileusnic-Polchan with the conversation they had in her office and said, "after our discussion and after you telling us that the car would have to have been backed over her in order to make that pattern, the cheese grater analogy, [], you told us if it went with the slats it would not leave a pattern on her skin." (App. 15-16). Dr. Mileusnic-Polchan replied that "just that statement made was actually a lie," that she "never, ever said" that the car backed over the victim, but that she told them that she would have to look at the car again, which she did, alone. (App. 13). When Mr. Stephens attempted to interrupt her to clarify, she said, "Please let me finish. It was a lie." (*Id.*). Trial counsel never objected to Dr. Mileusnic-Polchan's outburst, moved for a mistrial or requested a curative instruction. (App. 17).

Mr. Stephen's credibility was never rehabilitated because had not memorialized the meeting in a way that could be used to impeach Dr. Mileusnic-Polchan at trial. Mr. Stephens chose not to put his co-counsel, Mr. Edwards on the stand to testify about the meeting and also did not call his investigator, Walter Davis – who had also attended the meeting – a witness because of Mr. Davis' inexperience. (App. 17). This was particularly damaging to Mr. Cornwell because Mr. Stephens told the jury in his opening statement about the meeting with Dr. Mileusnic-Polchan and indicated it was her opinion the "cheese-grater" injuries could only have been caused if the vehicle was traveling backwards. (App. 13). Mr. Stephens never made an offer of proof on this issue. (App. 18).

Dr. Mileusnic-Polchan's testimony was not effectively challenged by the defense case-in-chief, either. Dr. Davis testified at trial that Mrs. Cornwell's injuries were "consistent with" the vehicle moving backwards when she was struck but he could not offer an opinion on whether the manner of death was homicide. (App. 11). Mr. Stephens failed to question Dr. Davis about the residual effects of marijuana and whether Mrs. Cornwell's marijuana use could have caused her to fall behind the vehicle. (App. 15). Mr. Stephens did not present testimony about why Dr. Mileusnic-Polchan's definitive conclusions were scientifically unreliable or why Dr. Davis could only testify that the injuries were "consistent with" a scenario.

Ultimately, Mr. Cornwell was convicted of second degree murder and sentenced to serve thirty-five years. (App. 29). Mr. Cornwell filed a petition and amended petition for post-conviction relief and a post-conviction hearing took place on October 8, 9, and 29, 2015 before the Knox County Criminal Court. (App. 12).

C. The testimony at the post-conviction hearing established that Mr. Cornwell was prejudiced by trial counsel's deficient performance.

At the post-conviction hearing, Dr. Davis testified that Dr. Mileusnic-Polchan's testimony "went beyond the bounds not only of her expertise by of forensic pathology in general in offering opinions that did not have a basis in sound forensic pathology practice" and that four critical opinions she offered were unsupported by science. (App. 18). Concerning Mr. Cornwell's intent, Dr. Davis testified, "to get into the head of a defendant in a criminal case is beyond the bounds not only of her and my expertise, but that of any forensic pathologist." (P.C.R. Vol. IV, PC Hr'g Tr. Vol. II, p. 283, ln. 2-5). Dr. Davis also testified that Dr. Mileusnic-Polchan could not reliably

conclude the vehicle's direction of travel, that injuries on Mrs. Cornwell's face were caused by the tire driving over her fact, or that Mrs. Cornwell was not – as a matter of fact – affected by the residual effects of marijuana usage. (P.C.R. Vol. IV, PC Hr'g Tr. Vol. II, p. 281, ln. 20-25, p. 282, ln. 1-9, 18-25, p. 283, ln. 1-24; *see also* App. 18).

Dr. Davis said that he did not provide detailed trial testimony countering the improper testimony of Dr. Mileusnic-Polchan because he had only been provided with her autopsy report pre-trial and most of her opinions, forensic findings, and interpretation of the evidence were not documented in the report and were being offered for the first time at trial. (*See* App. 11; P.C.R. Vol. IV, PC Hr'g Tr. Vol. II, p. 280, ln. 11-16; 281, ln. 4-8). Dr. Davis said that this lack of pre-trial information also prevented him from being able to effectively assist Mr. Stephens in preparing to cross-examine Dr. Mileusnic-Polchan. (App. 18). Dr. Davis also stated that he had not been called to testify at the motion for new trial hearing and at no point had Mr. Stephens asked him to offer an opinion on which aspects of Dr. Mileusnic-Polchan's trial testimony were unsupported by forensic science. (P.C.R. Vol. IV, PC Hr'g Tr. Vol. II, p. 299, ln. 2-8.).

Mr. Stephens testified at the post-conviction hearing that many of his errors were not tactical decisions, they were mistakes. For example, Mr. Stephens testified that the failure to attach Dr. Davis' report to the motion for a pre-trial hearing on the admissibility of Dr. Mileusnic-Polchan's testimony was not strategic or tactical, he just "[d]idn't think to do it." (App. 15). Trial counsel also acknowledged that "factual issues" "concerning the soundness of the science" were not raised in the motion or put

before the trial court. (P.C.R. Vol. V, PC Hr'g Vol. III, p. 351, ln. 21-25). Mr. Stephens testified that he had intended to use the hearing as a "discovery device." (App. 26).

Mr. Stephens explained that while Dr. Mileusnic-Polchan was testifying at trial, he was "struggling" to reconcile her trial testimony with the jury-out hearing testimony and was trying to re-write his cross-examination while determining how her new testimony impacted the defense. (P.C.R. Vol. V, PC Hr'g Tr. Vol. III, p. 355, ln. 9-23; *see also* App. 16). He also testified that that his failure to object or ask for a remedy after Dr. Mileusnic-Polchan's outburst challenging his credibility was not a tactical decision, but it was because he was stunned by the remarks and his "head was about ready to explode at that point." (*Id.*).

D. During the pendency of Mr. Cornwell's case at the trial level, the trial judge Richard Baumgartner was in the middle of a spiral into drug addiction and corruption that would lead to his removal from the bench and conviction of federal charges.

Former Judge Baumgartner presided over each stage of Mr. Cornwell's case, including his May 2009 jury trial until the conclusion of the hearing on the motion for new trial on January 27, 2011. At all relevant portions of Mr. Cornwell's case, the former judge was taking opiates that he obtained illegally and via multiple prescriptions from multiple doctors. (*See* App. 12). Not including the drugs he obtained illegally, the former judge obtained painkillers from at least twelve doctors (including a veterinarian) and was prescribed 2,243 pills in 28 months.[1]

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[1] *See* "A chronology of events in the Richard Baumgartner scandal, Knoxville News Sentinel, Feb. 12, 2013, accessible at https://www.knoxnews.com/story/news/crime/2018/01/24/chronology-events-richard-baumgartner-scandal/1060882001/ (last accessed Sept. 12, 2018).

Additionally, in 2009, former Judge Baumgartner began an illicit affair with Deena Castleman, a probationer in his court, that involved her procuring prescription pain pills for him. (App. 12; *United States v. Baumgartner*, 581 Fed. Appx. 522, 525 (6th Cir. 2014)). Former Judge Baumgartner also began eliciting favors from other judges and an assistant district attorney on behalf of Ms. Castleman. *Baumgartner*, 581 Fed. Appx. at 525-26.

Records obtained by the Tennessee Bureau of Investigation and introduced at the post-conviction hearing show that former Judge Baumgartner was consuming massive amounts of narcotics during all relevant time periods of Mr. Cornwell's case. The records show that he filled a 42-day prescription for Hydrocodone on May 22, 2008, five days before appointing counsel for Mr. Cornwell and setting a date for trial. (P.C.R. Vol. III, PC Hr'g Trans., Vol. l, Ex. 1, Prescription Records, DA/TBI-000466). He filled another prescription for 30 Hydrocodone only eight days later. *Id.* He filled a prescription for 20 Hydrocodone on May 1, 2009, the very day he denied Mr. Cornwell's motion for a pretrial hearing pursuant to challenge the admissibility of Dr. Mileusnic-Polchan's testimony. (*Id.*) He filled a prescription for 20 Hydrocodone on May 5, 2009, the second day of Mr. Cornwell's trial. (*Id.*). In addition to the heavy use of these prescriptions, former Judge Baumgartner was taking an additional 10-20 Hydrocodone per day or 20-30 Roxycodone every 2-3 days, which he purchased from Chris Gibson or Ms. Castleman. (P.C.R. Vol. III, PC Hr'g Trans., Vol. 1, Ex. 1, Int. with Chris Gibson DA/TBI-000443; Int. with Deena Castleman DA/TBI-000848-49; Int. with Crystal Uthe DA/TBI-000253).

The former judge did not refrain from taking narcotics while on the bench and his drug dealers would bring him pills during breaks in court. (P.C.R. Vol. III, PC Hr'g Trans., Vol. 1, Ex. 1, Int. with Chris Gibson, DA/TBI-000443; Int. with Deena Castleman, DA/TBI-000833).

E. Mr. Cornwell and his counsel observed the former trial judge's impairment during Mr. Cornwell's trial proceedings.

Those before the former judge on a regular basis began to take notice of his change in behavior and conduct. (*See* P.C.R. Vol. IV, PC Hr'g Tr. Vol. II, p. 209-10; Vol. III, p. 367-68). Mr. Stephens testified at the post-conviction hearing that the former judge's demeanor changed in 2008 and 2009; he became "aggressive, snarky, disrespectful, and snipey" and would make unprofessional, personal comments about lawyers in his courtroom – primarily members of the defense bar. (App. 12). Mr. Edwards testified at the post-conviction hearing about the same observations. (App. 13) (noting the former judge "seemed to be less happy, less attentive, more prone to anger, [and] certainly a lot less patient.").

Mr. Stephens testified that while Mr. Cornwell's case was pending, it was difficult to schedule hearings, hold hearings or get former Judge Baumgartner to recall the reason for the hearing or what had happened at prior proceedings. (App. 12). Mr. Cornwell was scheduled to have a hearing three days before trial to address the admissibility of Dr. Mileusnic-Polchan's testimony and other evidence under Tennessee Rule of Evidence 404(b). (P.C.R. Vol. V, PC Hr'g Tr. Vol. III, p. 377, ln. 3-6). However, on the day the hearings were scheduled, former Judge Baumgartner was unclear why the matters were set for that day and, before the matters were fully

addressed, declared "we're done" and ended the hearing. (*Id.*) Mr. Edwards testified that he observed the former judge act irritated and impatient during all the pretrial proceedings, but particularly during their attempts to obtain a pre-trial hearing on the admissibility of Dr. Mileusnic-Polchan's testimony. (P.C.R. Vol. IV, PC Hr'g Tr. Vol II, p. 213, ln. 9-13).

Walter Davis testified at the post-conviction hearing that during Mr. Cornwell's trial, the former judge appeared bored, as if he wasn't paying attention, and held his head in his hands several times during the trial. (App. 10). Mr. Cornwell testified that he too saw the former judge appear not to be paying attention and possibly even asleep during the trial. (App. 13).

Mr. Stephens, Mr. Edwards and Mr. Cornwell testified that former Judge Baumgartner's issues were most evident at the last hearing on Mr. Cornwell's motion for new trial. Mr. Edwards stated the former judge was "particularly distracted that day" and appeared not to be focused at all. (*Id.*). Mr. Stephens testified that at the hearing former Judge Baumgartner was "paying no attention" to what was happening and appeared very confused. (App. 12-13). Mr. Cornwell said that during one of hearings on the motion for new trial, former Judge Baumgartner was sitting at the bench with his eyes closed and a "grin" that Mr. Cornwell associated with being intoxicated and that, at the last hearing on the motion for new trial, the former judge appeared "confused and shaky." (App. 13).

The final hearing date on Mr. Cornwell's motion for new trial was on January 27, 2011. (P.C.R. Vol. III, PC Hr'g Tr. Vol. I, Ex. 2, Tr. of the Evid. Vol. I, Mot. for

New Trial Hr'g Tr. at p. 1186). The former judge entered a one-page order denying the motion for new trial the following day. (App. 13; P.C.R. Vol. III, PC Hr'g Tr. Vol. I, Ex. 2, Tech. R. Vol. II, p. 173). It was later revealed that on or about January 24, 2011, the Tennessee Bureau of Investigation approached the former judge in his office and informed him he was the subject of an investigation and that they had photographs of him with a confidential informant they knew he was purchasing drugs from. (P.C.R. Vol. III, PC Hr'g Tr. Vol. 1, Ex. 1, TBI File, DA/TBI- 000527, Investigative Report 119).

F. While Mr. Cornwell's motion for new trial was pending, the former trial judge confessed to the prosecutor on Mr. Cornwell's case that he had been driving under the influence of pain killers.

Also revealed by the Tennessee Bureau of Investigation records is that while Mr. Cornwell's motion for new trial was pending, the prosecutor on Mr. Cornwell's case observed former Judge Baumgartner swerving all over the road on the interstate while returning to Knoxville after jury selection in a capital case being tried in Nashville. (P.C.R. III, PC Hr'g Trans., Vol. 1, Ex. 1, Int. with Leland Price DA/TBI-000892; Int. with Takisha Fitzgerald DA/TBI-000970). On April 12, 2010, the former judge called the prosecutor and her colleague into his chambers *ex parte* and confessed to them that he'd been driving while under the influence of pain medication. (R. III, PC Hr'g Trans., Vol. 1, Ex. 1, Int. with Leland Price DA/TBI-000892).

The post-conviction court issued a written ruling denying Mr. Cornwell's petition for post-conviction relief on January 22, 2016. (App. 15-17). The post-conviction court held that the integrity of the trial proceedings was not affected by

former Judge Baumgartner's misconduct based on the finding that Mr. Cornwell had not established the former judge was impaired during the proceedings or trial of his case. (App. 15-16). The post-conviction court also credited Mr. Stephen's decisions during Mr. Cornwell's case as "tactical" and held that Mr. Cornwell had not received ineffective assistance of counsel (App. 19-20).

The Court of Criminal Appeals of Tennessee affirmed the denial of post-conviction relief, holding Mr. Cornwell did not "present evidence of Judge Baumgartner's out-of-court" misconduct causing him to be biased specifically against the petitioner." (App. 21-22). The court also held Mr. Cornwell had not received ineffective assistance of counsel because the failure to investigate the vehicle resulted in the loss of exculpatory evidence, Mr. Parham had testified to his opinions at trial and that Dr. Mileusnic-Polchan's testimony was "thoroughly tested by the adversarial process." (App. 24-25). The court noted that Mr. Stephen's approach with respect the meeting with Dr. Mileusnic-Polchan may have been "ill-advised" but accredited the decision as tactical. (App. 24-25).

Mr. Cornwell timely appealed to the Tennessee Supreme Court and permission to appeal was denied on April 18, 2018. (App. 3).

REASONS FOR GRANTING THE PETITION

I. IN A CASE WHOLLY DEPENDENT ON FORENSIC EVIDENCE, DID THE COURT OF CRIMINAL APPEALS OF TENNESSEE DEPART FROM *HINTON V. ALABAMA*, 571 U.S. 263 (2014), AND *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984), BY ANALYZING IN ISOLATION EACH OF TRIAL COUNSEL'S ERRORS IN EFFECTIVELY INVESTIGATING, CHALLENGING, AND PRESENTING EXPERT TESTIMONY.

An accused's right to effective assistance of counsel is a fundamental tenet of the criminal justice system. Central to this right are the requirements that counsel effectively and timely investigate the case, prepare to counter the prosecution's case and, if necessary, present countervailing defense evidence. *See Strickland v. Washington*, 466 U.S. 668, 685 (1984) (noting counsel's purpose of affording defendants "'ample opportunity to meet the case of the prosecution'" and counsel's duty to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.") (citation omitted); *see also Rompilla v. Beard*, 545 U.S. 374, 387 (2005) ("It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.") (citation omitted).

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Id.*). The first prong of that test requires a determination of whether counsel's representation "fell below an objective standard of reasonableness." *Hinton v. Alabama*, 571 U.S. 263, 272 (2014) (citing *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010)). The standard of

reasonableness is gathered from "prevailing professional norms." *Id.* at 273. If the representation did fall below that standard of reasonableness, the second prong of the test examines whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* The effect of counsel's ineffectiveness must be determined in light of the totality of the circumstances. *Strickland v. Washington*, 466 U.S. 668, 695-96 (1984).

This Court has recognized that in cases turning on scientific or technical evidence, it may be that "the only reasonable and available defense strategy requires consultation with experts or introduction of expert testimony." *Hinton v. Alabama*, 571 U.S. 263, 273 (2014) (citing *Harrington v. Richter*, 562 U.S. 86, 106 (2011)). In *Hinton*, defense counsel hired an expert, but based on counsel's mistaken belief about availability of indigent defense funding and failure to research the relevant law, he did not retain an adequate expert. *Id.* at 274-75. Inherent in *Hinton* is that when a case requires expert assistance or presentation of expert testimony, counsel's duty of providing effective representation is not automatically satisfied by hiring a competent expert. *C.f.*, *Wiggins v. Smith*, 539 U.S. 510, 527 (2003) ("*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision…").

Strickland and its progeny also require counsel to conduct necessary investigation and preparation to effectively meet the state's case. In fact, this Court has stated that "[c]onfrontation is one means of ensuring accurate forensic analysis." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009) (holding Confrontation Clause barred admission of affidavits from lab technicians certifying the evidence

connected to the petitioner was cocaine); *see also Harrington v. Richter*, 562 U.S. 86, 110 (2011) ("In many instances cross-examination will be sufficient to expose defects in an expert's presentation."); *Rivas v. Fletcher*, 780 F.3d 529, 547-50 (2d Cir. 2015) (holding trial counsel ineffective for failing to investigate forensic evidence to rebut the state's theory as to time of death and instead presenting an incomplete alibi defense which "[i]n effect… amounted to no defense at all."); *Richey v. Bradshaw*, 498 F.3d 344, 362 (6th Cir. 2007) (granting habeas corpus relief where trial counsel hired an expert who agreed with the state's theory and defense counsel performed no investigation into the underlying science or the expert's conclusions to determine whether the state's theory was open to attack) *Hooper v. Mullin*, 314 F.3d 1162, 1171 (10th Cir. 2002) (finding ineffective assistance of counsel where counsel disregarded expert report that recommended further investigation); *Commonwealth v. Baker*, 800 N.E.2d 267, 276 (Mass. 2003) (finding counsel ineffective for failing to attempt to determine whether state's expert's conclusions were accurate, conduct independent testing or determine whether additional testing on the forensic evidence would assist the defense, noting "[t]he defendant's trial counsel was under a duty…to conduct an independent investigation of the forensic, medical or scientific evidence on which the Commonwealth intended to rely to prove the defendant's guilt.").

Effective confrontation necessarily entails adequate preparation and adequate understanding the of the underlying scientific or technical discipline at issue. *See e.g.*, *Dugas v. Coplan*, 428 F.3d 317, 331-32 (1st Cir. 2005) (finding counsel ineffective for failing to consult with expert or effectively educate himself about the underlying

science, noting "cross-examination demonstrated a clear lack of understanding of arson investigation and the principles invoked by the state's many expert witnesses."); *Driscoll v. Delo*, 71 F.3d 701, 709 (8th Cir. 1995) (holding trial counsel ineffective for failing to prepare to effectively confront the state's expert about the results of serological testing, noting, "a reasonable defense lawyer would take some measures to understand the laboratory tests performed and the inferences that one could logically draw from the results…..so that if the prosecution advanced a theory…at odds with the serology evidence, the defense would be in a position to expose it on cross-examination."); *King v. State*, 797 N.W.2d 565, 573 (Iowa 2011) (stating "[w]hen an attorney hires an expert to assist in the defense, effective counsel cannot simply present the file to the expert and ask for the opinion" but the attorney must develop a "basis working knowledge" of the subject matter and must consult with the expert and "competently explore the potential issues"); *People v. Jacobazzi*, 966 N.E.2d 1, 30-32 (Ill. Ct. App. 2009) (remanding for evidentiary hearing on trial counsel's basis for declining to present a certain defense strategy, noting "a lawyer who foregoes a defense theory based on his expert's recommendation before attempting to understand the basis for that opinion has no exercised tactical or strategic judgement"); *see also* Nat'l Comm'n on Forensic Science, *Presentation of Expert Testimony Policy Recommendations*, at p. 2-3 (2014)[2] ("attorneys have an obligation to understand the discipline – including its strengths and limitations –

[2] Accessible at https://www.justice.gov/sites/default/files/pages/attachments/2014/10/20/draft_on_expert_testimony.pdf (last accessed Sept. 12, 2018)

underlying the expert testimony that is presented at trial and to appreciate the importance of consulting with experts proper to trial.") (citations omitted).

Cases will also arise where meeting the prosecution's case requires effectively presenting countervailing expert proof. *See Thomas v. Clements*, 789 F.3d 760, 768-73 (7th Cir. 2015) (finding trial counsel ineffective for failing to consult with forensic pathologist to review state medical examiner's autopsy report, noting cross–examination did not mitigate failure to call an expert because without countervailing medical evidence, all trial counsel could do was ask the state's witness "whether she disagreed with her own diagnosis") (internal citation omitted).

In Mr. Cornwell's case, his trial counsel hired competent experts, but did not effectively investigate the critical forensic evidence, understand the underlying science, challenge the conclusions of the prosecution's experts or present the conclusions of the defense experts. The Court of Criminal Appeals of Tennessee held that Mr. Cornwell did not receive ineffective assistance of counsel, but, in conflict with *Strickland* and its progeny, the court examined Mr. Cornwell's claims of ineffective assistance in isolation, setting forth each claim under a different subheading and limiting its analysis of the effect of each claim in a vacuum. (*See* App. At 22-24). The court based its holding largely on the fact that defense experts testified at trial, so the jury heard Mr. Cornwell's side of the case, (*see* App. 22-24), however, since the court examined each error in isolation, it did not consider how the defense experts' abilities to counter the conclusions of the state's experts were hindered by trial counsel's deficient handling of the forensic evidence.

Review of the record with proper application of *Hinton* and *Strickland* reveals that trial counsel's errors fell below objective standards of reasonableness and compounded upon each other to prevent Mr. Cornwell from meeting the state's expert proof at trial, testing the state's case through the adversarial process and presenting a complete defense through countervailing expert testimony. Ultimately, due to Mr. Stephens' errors, the state's experts presented "proof" that Mr. Cornwell intentionally murdered his wife, while the defense experts could only testify the evidence was inconclusive or "consistent with" Mr. Cornwell's innocence. Mr. Stephens' decisions cannot be accredited as reasonable, though ill-fated, tactical decisions because he did not conduct the necessary investigation into the forensic evidence or underlying science to make strategic decisions.

In a case where credibility of expert testimony was the primary issue, Mr. Cornwell was severely prejudiced by the inability to effectively counter the state's expert testimony concerning the forensic evidence on the vehicle. Had Mr. Stephens effectively investigated and presented the forensic evidence in Mr. Cornwell's case, there is a reasonable probability of a different result at trial.

This Court has noted "the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts" and recognized that "'[s]erious deficiencies have been found in the forensic evidence used in criminal trials….One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases.'" *Hinton v. Alabama*, 571 U.S. 263, 276 (2014)

(citation omitted); *c.f.*, *Buck v. Davis*, 580 U.S. ___, 137 S.Ct. 759, 777 (2017) (noting increased prejudicial effect of improper testimony by a medical doctor because, based on his experience, jurors would be more likely to value his opinion).

The Court of Criminal Appeals' decision conflicts with decisions from this Court, decisions of federal circuit courts of appeal and other state courts that have interpreted counsel's duty of competence with respect to scientific and technical evidence. This Court should grant review to resolve the Tennessee appellate court's misapplication of *Strickland* and to provide further guidance on counsel's duty of competence with respect to the investigation and preparation of scientific and technical evidence. U.S. Sup. Ct. R. 10(a),(b).

II. THE COURT OF CRIMINAL APPEALS OF TENNESSEE MISAPPLIED *BRACY V. GRAMLEY*, 520 U.S. 899 (1997), AND DEPARTED FROM THIS COURT'S PRECEDENT ON STRUCTURAL CONSTITUTIONAL ERROR BY HOLDING THAT STRUCTURAL ERROR EXISTS WITH JUDICIAL MISCONDUCT AND BIAS ONLY WHEN THERE IS PROOF OF ACTUAL BIAS AGAINST THE DEFENDANT.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955) (holding it violated due process for judge to act as a "one-man judge grand-jury" and bring charges against the defendants, then convict and sentence them). Due process requires that a judge be both unbiased and mentally competent. *See Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912) ("Due process implies a tribunal both impartial and mentally competent to afford a hearing."); *Peters v. Kiff*, 407 U.S. 493, 502 (1972) (noting due process requires jurors be sane and competent to perform their fact-finding role at trial).

The deprivation of a fair and competent judge is structural constitutional error that impacts the foundation of a criminal proceeding and is not subject to harmless-error review. *See Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986) (noting "when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired" and stating this type of error "undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review.").

This Court's precedent is well–established: where circumstances create the likelihood or appearance of unconstitutional judicial bias, a defendant is not required to prove the judge was *actually* biased. This Court has stated,

> Due process guarantees "an absence of actual bias" on the part of a judge. Bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present. The 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.'"

See Williams v. Pennsylvania, 579 U.S. __, 136 S.Ct. 1899, 1907 (2016) (holding due process was violated by Pennsylvania Supreme Court Chief Justice's decision not to recuse himself in review of petitioner's post-conviction petition because as a district attorney the Chief Justice approved the decision to seek the death penalty against the petitioner – creating an unconstitutional risk of bias) (citations omitted)

Further,

> [e]very procedure which would offer a *possible* temptation to the average man as a judge to forget the burden of proof required to convict the

> defendant, or which *might* lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.

Tumey v. Ohio, 273 U.S. 510, 532 (1927) (emphasis added); *see also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) ("The Due Process Clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But… 'justice must satisfy the appearance of justice.'") (citation omitted); *In re Murchison*, 349 U.S. 133, 136 (1955) ("[O]ur system of law has always endeavored to prevent even the probability of unfairness").

The Ninth Circuit is the only Court of Appeals Mr. Cornwell has found that specifically applied this Court's precedent to a claim that a judge was impaired by drug use. The court noted, "corruption (a species of bias) and incapacity are cut from the same cloth" but an important distinction is that "a corrupt judge has a choice; by definition, an addict driven by compulsion does not. An addict is an addict seven days a week." *Summerlin v. Stewart*, 267 F.3d 926, 950-51 (9th Cir. 2001), *opinion withdrawn*, 281 F.3d 836 (9th Cir. 2002), *on reh'g en banc*, 341 F.3d 1082 (9th Cir. 2003), *rev'd and remanded sub nom. Schriro v. Summerlin*, 542 U.S. 348 (2004).[3]

[3] In 2001, Summerlin's case was remanded for a hearing as to whether the state trial judge was competent when he was deliberating on whether to impose the death penalty. Before the mandate issued, this Court granted certiorari in *Ring v. Arizona*, 536 U.S. 58 (2002) and the panel withdrew its decision pending the outcome of *Ring*. *Summerlin*, 341 F.3d at 1091. The Ninth Circuit granted rehearing *en banc* in light of *Ring*. *Ring* controlled the resolution of Summerlin's case, so the issue of judicial competency was not discussed again. *See Summerlin v. Shriro*, 427 F.3d 623, 643-44 (9th Cir. 2005).

The court stated:

> One's legal conscience simply recoils at the shocking thought that the due process clause of the Fourteenth Amendment is satisfied by a judge presiding over a criminal trial and making life or death sentencing decisions while under the influence of, or materially impaired by, the use of an illegal mind-altering substance. Such proceedings before a mentally incompetent judge would be so fundamentally unfair as to violate federal due process under the Constitution …. What was true two centuries ago is true today: Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges.

Id. at 956 (internal citations and quotations omitted).

However, this Court *has* addressed a similar situation to Mr. Cornwell's involving a judge's potential to rule in favor of the state to avoid detection of the judge's own misconduct. In *Bracey v. Gramley*, the petitioner claimed the judge's corruption and taking of bribes in other criminal cases motivated the judge to curry favor with the prosecutors to avoid scrutiny of his actions, even though no bribes were solicited or given in the defendant's case. 520 U.S. 899, 905-06 (1997). The Seventh Circuit Court of Appeals had previously conceded the "appearance of impropriety" in the petitioner's case was plausible, but not "sufficiently compelling…to justify presuming actual bias" and insufficient to warrant a new trial. *Id.* This Court did not address whether judicial bias is a structural constitutional error or whether actual bias may be presumed, only whether discovery could proceed on the claim.

This Court held the petitioner had shown "good cause" for discovery to proceed and noted,

> Ordinarily we presume that public officials have "properly discharged their official duties...." [Unfortunately, the presumption has been soundly rebutted: [the judge] was shown to be thoroughly steeped in

> corruption through his public trial and conviction. We emphasize, though, that petitioner supports his discovery request by pointing not only to [the judge's] conviction for bribe-taking in other cases, but also to additional evidence, discussed above, that lends support to his claim that [the judge] was actually biased *in petitioner's own case*.

Id. at 909.

This Court recently revisited and clarified *Bracy* and vacated the judgment of the Nevada Supreme Court denying a petitioner's post-conviction relief claim because the court required the petitioner to show that the trial judge was "actually biased" to establish a due process violation. *Rippo v. Baker*, 580 U.S. __, 137 S.Ct. 905 (2017) (per curiam). In *Rippo*, the petitioner learned the trial judge was the target of a federal bribery probe and the petitioner "surmised" that the county district attorney's office was also involved in the investigation. *Id.* at 906. The petitioner moved for recusal claiming the judge "could not impartially adjudicate a case in which one of the parties was criminally investigating him" but the judge did not recuse himself and the defendant was convicted. *Id.* The judge was indicted after the trial. *Id.* In post-conviction proceedings, the petitioner presented direct evidence that the county district attorney's office was involved in the investigation, but the Nevada Supreme Court, relying on *Bracy*, denied relief because the petitioner's allegations "d[id] not support the assertion that the trial judge was actually biased in this case." *Id.* at 906-07 (citing *Rippo v. State*, 368 P.3d 729, 744 (Nev. 2016)).

This Court vacated that judgement and clarified, "[u]nder our precedents, the Due Process Clause may sometimes demand recusal even when a judge "ha[s] no actual bias. Recusal is required when, objectively speaking, 'the probability of actual

bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.* at 907 (citations omitted). This Court also explained,

> Our decision in *Bracy* is not to the contrary: Although we explained that the petitioner there *had* pointed to facts suggesting actual, subjective bias, we did not hold that a litigant must show as a matter of course that a judge was "actually biased in [the litigant's] case," —much less that he must do so when, as here, he does not allege a theory of "camouflaging bias." The Nevada Supreme Court did not ask the question our precedents require: whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable.

Id. at 907 (citations omitted).

Applying these principles, the Ninth Circuit Court of Appeals recently addressed a similar "compensatory bias" issue to that raised here and in *Bracy. See Echavarria v. Filson*, 896 F.3d 1118 (9th Cir. 2018). In *Echavarria*, the defendant robbed a bank and killed a Federal Bureau of Investigation ("F.B.I.") agent in the process. *Id.* at 1120. The trial judge presiding over the case had been investigated several years earlier for corruption, fraud and perjury by the agent who was killed. *Id.* at 1123-24. The judge knew he had been investigated, though he was never prosecuted, and the relationship between the agent and the judge was disclosed to the prosecution pre-trial but not the petitioner. *Id.* at 1124-25.

The Ninth Circuit Court of Appeals held this situation created an unconstitutional risk of bias and violated the petitioner's right to due process. *Id.* at 1132. The court noted the importance of the petitioner's case to the F.B.I. and that the trial judge was "well aware" of their efforts to ensure a conviction. *Id.* at 1131. The court rejected the state's arguments that the risk of bias was no longer present because state and federal authorities had declined prosecution of the trial judge and

stated "[t]he question is whether an average judge in Judge Lehman's position would have feared that the F.B.I. might reopen its investigation or renew its advocacy for state prosecution if he made rulings favorable to Echavarria." *Id.* at 1132.

Despite this Court's well-established precedent, in Mr. Cornwell's case the Tennessee Court of Criminal Appeals held, "as appalling as Judge Baumgartner's out-of-court conduct was, the mere appearance of bias is not sufficient to establish a structural constitutional error. As stated in *Bracy*, the *Due Process Clause* requires a judge with 'no actual bias against the defendant.'" *Cornwell v. State*, No. E2016-00236-CCA-R3-PC, 2017 WL 5957667, 2017 Tenn. Crim. App. LEXIS 994 at *52 (Tenn. Crim. App. Dec. 1, 2017) (citing *Bracy v. Gramley*, 520 U.S. 899, 905 (1997)) (emphasis in original). The court denied relief because Mr. Cornwell "did not present evidence of Judge Baumgartner's out-of-court misconduct *causing him to be biased specifically against the petitioner*.... [T]here was nothing in the trial record or this court's opinion on direct appeal that would demonstrate a specific bias against the Petitioner in this case." *Id.* at *52-53 (emphasis added). At no point did the court cite *Rippo*.

The Court of Criminal Appeals' decision represents a growing line of cases in Tennessee misapplying this Court's precedent to require proof of a judge's actual bias against a defendant to establish a due process violation. *See e.g.*, *Fowler v. State*, No. E2013-01554-CCA-R3-PC, 2014 Tenn. Crim. App. LEXIS 696, *15-16 (Tenn. Crim. App. July 9, 2014) ("Petitioner has presented no credible evidence that the trial judge was impaired during the proceedings or that his misconduct outside of the courtroom

affected his ability to preside over petitioner's trial and sentencing hearing. Petitioner is not entitled to relief[.]"); *accord Rosa v. State*, No. E2013-00356-CCA-R3-ECN, 2013 Tenn. Crim. App. LEXIS 915, at *13 (Tenn. Crim. App. Oct. 21, 2013); *Hill v. State*, No. E2013-00407-CCA-R3-PC, 2013 Tenn. Crim. App. LEXIS 892, at *10 (Tenn. Crim. App. Oct. 16, 2013); *State v. Leath*, 461 S.W.3d 73, 116 (Tenn. Crim. App. 2013); *Irick v. State*, No. E2012-01326-CCA-R3-PD, 2013 Tenn. Crim. App. LEXIS 240, at *11 (Tenn. Crim. App. Mar. 18, 2013).

When this is examined under the proper standards established by this Court's precedent, Mr. Cornwell has established that former Judge Baumgartner's misconduct influenced the trial-level proceedings and created at least the appearance of unconstitutional bias. While Mr. Cornwell's case was pending trial, former Judge Baumgartner's demeanor changed and he became less attentive, more prone to anger and less patient, with the brunt of this attitude shift directed at the defense bar. Mr. Cornwell's lead trial counsel and trial co-counsel testified that it became difficult to schedule and conduct hearings before the former judge, particularly when lead counsel was attempting to obtain a pre-trial hearing concerning the forensic pathology evidence in Mr. Cornwell's case.

Mr. Cornwell, his trial counsel and an investigator in trial counsel's office all testified to specific instances where former Judge Baumgartner's intoxication and inability to focus was evidence during proceedings in Mr. Cornwell's case. This testimony is corroborated by prescription records showing that the former judge filled prescriptions for opioids in the days before hearings in Mr. Cornwell's case, as well

as on the second day of Mr. Cornwell's trial. Witness testimony also established that the former judge was taking ten to twenty Hydrocodone per day or twenty to thirty Roxicodone every two or three days.

This misconduct created an unconstitutional potential for the former judge to favor the prosecution to deflect any investigation into his illegal activity. During the pendency of Mr. Cornwell's case, his behavior aroused the suspicion of several members of law enforcement and the Knox County District Attorney General's Office and more importantly, while Mr. Cornwell's motion for new trial was pending, former Judge Baumgartner *admitted* to driving under the influence of pain medication to the very assistant attorney general prosecuting Mr. Cornwell's case at all stages of the trial proceedings.

Aside from these issues of bias, Mr. Cornwell was deprived of a competent tribunal. Under the standard applied by the Tennessee Court of Criminal Appeals, anything short of witnessing the former judge taking pills on the bench or visibly struggling to maintain consciousness does not warrant relief. However, the former judge was an addict who was consuming large quantities of narcotics at all times during the pendency of Mr. Cornwell's case. It is reasonable to conclude that former Judge Baumgartner did not curb his addiction on the days Mr. Cornwell's case was on the docket.

Further, mere days before Mr. Cornwell's motion for new trial was denied, the former judge was informed that he was the subject of a Tennessee Bureau of Investigation probe and there was evidence of his illicit activity. It is also reasonable

to conclude that when the former judge sat on the bench at the hearing on Mr. Cornwell's motion for new trial, the former judge had other things on his mind than ensuring that he fairly decided that issue. Mr. Cornwell is constitutionally entitled to have issues concerning his liberty decided by a judge who has not just learned his own liberty is in jeopardy.

"When the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired." *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986). The likelihood of judicial bias and incompetence in Mr. Cornwell's case infects the entire proceeding and is structural error and this Court should grant review to resolve the Tennessee Court of Criminal Appeal's clear misapplication of and departure from this Court's precedent. U.S. Sup. Ct. R. 10(a),(b).

CONCLUSION

For the above reasons, Mr. Cornwell respectfully prays that this Court grant his petition for writ of certiorari.

Respectfully Submitted,

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