NO. 18-6070

IN THE
SUPREME COURT OF THE UNITED STATES

CARLOS CORNWELL,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

I.

Whether Petitioner failed to prove that his counsel were ineffective in investigating, challenging, and presenting expert testimony.

II.

Whether Petitioner failed to prove that the trial judge's out-of-courtroom misconduct rendered him biased or incompetent in this case.

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The opinion of the Tennessee Court of Criminal Appeals affirming the denial of Petitioner's petition for post-conviction relief (Pet. App. 4-27) is unreported but may be found at *Cornwell v. State*, No. E2016-00236-CCA-R3-PC, 2017 WL 5957667 (Tenn. Crim. App. Dec. 1, 2017).

JURISDICTIONAL STATEMENT

The opinion of the Court of Criminal Appeals was filed on December 1, 2017. *Cornwell*, 2017 WL 5957667, at *1. Petitioner applied to the Tennessee Supreme Court for permission to appeal, which was denied on April 18, 2018. (Pet. App. 3.) Justice Kagan granted an extension of time until September 15, 2018, within which to file a petition for a writ of certiorari. *Cornwell v. Tennessee*, No. 18A41 (U.S. July 11, 2018). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). (Pet. 2.)

STATEMENT OF THE CASE

Petitioner Carlos Cornwell was convicted of the second-degree murder of his wife Leoned in May 2009. *Cornwell*, 2017 WL 5957667, at *2. In state post-conviction proceedings, he pressed claims of ineffective assistance of counsel and structural error due to the trial judge's abuse of prescription pain medication. *See id.* at *15-18, 20-23. Both the trial court and Court of Criminal Appeals found no merit to these claims. *Id.* at *2, 13-15, 23.

I. Trial Proceedings

Petitioner's wife was found dead in the parking lot of a Knoxville, Tennessee, credit union on March 5, 2008. *Id.* at *3, 5. Petitioner told police that he had accidentally backed over the victim as she walked away from the credit union and toward the street. *Id.* at *5-6. The State's evidence at trial called this account into question.

Accident reconstructionists determined that drag marks consistent with the victim's blood and denim jacket led from the street toward the credit union, contrary to Petitioner's explanation. *Id.* at * 7. They found that something had disturbed the dirt around the front license plate holder and the lower part of the front bumper of the car. *Id.* at *8. The victim's blood and more "brush-off" marks were discovered underneath the vehicle on the front passenger side. *Id.* Based on this and other evidence, the experts concluded that the victim was lying on the ground bleeding at the curb line when she was struck by the front of Petitioner's car. *Id.* at *9.

The detective who had interviewed Petitioner likewise noted that there was no damage to the hood or trunk of the car, leading him to believe that the victim was already on the ground when Petitioner ran over her. *Id.* at *6. When asked, Petitioner could give no explanation for the blood on the bottom front of the car. *Id.* The forensic pathologist who autopsied the victim compared the vehicular evidence with the victim's injuries and concluded that she was struck by the front of the vehicle. *Id.* at *11. The pattern of injuries to the victim's skin established the direction of movement of her body. *Id.* The victim's body also displayed indentations that could only have been made by the front tires because the rear ones were bald. *Id.* at *10.

Finally, police developed evidence that Petitioner had threatened to kill his wife that morning. *Id.* at *3.

Petitioner's lawyers presented two experts of their own: a forensic pathologist and an accident reconstructionist. *Id.* at *11-13. The pathologist disputed some of the medical examiner's findings and believed that the cause of death should have been classified as "undetermined". *Id.* at *12. His view of the physical evidence was that it was consistent with Petitioner's backing over the victim. *Id.* The expert in accident reconstruction testified that his examination was limited because the car had been stored outdoors exposed to weather, and he faulted the police's

documentation of the vehicle. *Id.* at *13. Nevertheless, he opined that the physical evidence was consistent with Petitioner's explanation of the incident. *Id.*

Following this battle of the experts, the jury convicted Petitioner of second-degree murder as a lesser-included offense of first-degree premeditated murder. *Id.* at *1. Petitioner's direct appeal was unsuccessful. *State v. Cornwell*, No. E2011-00248-CCA-R3-CD, 2012 WL 5304149, at *1 (Tenn. Crim. App. Oct. 25, 2012), *perm. app. denied* (Tenn. Mar. 5, 2013).

II. Post-Conviction Proceedings

In 2013, Petitioner filed a petition for post-conviction relief. *Cornwell*, 2017 WL 5957667, at *2. In it, he claimed that his trial counsel were ineffective for failing to challenge the State's forensic evidence. He also maintained that the trial judge was incompetent and biased on account of his abuse of prescription painkillers and that this misconduct amounted to "structural error".

A. Ineffective assistance of counsel

At the post-conviction evidentiary hearing, lead counsel testified that he waited to inspect Petitioner's vehicle until after he had received funding for an expert in accident reconstruction. *Id.* at *7. Upon inspection, counsel learned that the car had been stored outside at the police impound lot and was exposed to the elements. *Id.* He filed a motion to dismiss the indictment on grounds of spoliation of evidence. *Id.* The trial court denied the motion, finding that there was no due process violation because the underside of the vehicle had been preserved and there were photographs of the alleged dirt rub. *Id.* Counsel would later renew the motion, asking for a missing-evidence instruction. *Id.* This too was denied. *Id.*

Once Petitioner's attorneys received the autopsy report, they arranged a meeting with the State's pathologist. *Id.* at *8. Co-counsel directed the pathologist's attention to a "cheese grater" pattern of injuries on the victim's abdomen. *Id.* at *8-9. The pathologist linked this injury to the

slats on the heat shield of the vehicle. *Id*. Co-counsel suggested that the slats could have caused the injury only if the car had been moving backward. *Id.* The pathologist reserved a final opinion on the subject until she had an opportunity to look at the car. *Id.* Following the meeting, lead counsel requested a continuance to retain an expert in forensic pathology because he had learned that the medical examiner would opine that all of the victim's injuries were unidirectional and that her testimony would be consistent with the State's theory of the case. *Id.* at *9.

Lead counsel also filed a motion to test the admissibility of the medical examiner's opinion. *Id.* The purpose of the motion, counsel said, was not to challenge the pathologist's qualifications, but rather to discover what her testimony would be and to examine whether there was science to support it. *Id.* The hearing on the motion was not conducted until shortly before the pathologist's testimony at trial. *Id.* at *10. Counsel claimed that the pathologist offered new opinions during the hearing, and that the jury was immediately brought back into the courtroom once it was done. *Id*. The trial record, however, reflected that the court recessed for the day at the conclusion of the hearing, and that the pathologist did not testify in front of the jury until the next morning. *Id.*

During opening statements, lead counsel adverted to the "cheese grater" injury and the meeting with the State's pathologist. *Id*. He said that he would ask the pathologist "about her orientation on that cheese grater analogy," and that it would be interesting to see whether she "has changed her opinion about whether or not the cheese grater heat shield effect could only have occurred on her as the car was backing up . . . ." *Id*. On cross-examination, however, the pathologist testified that she had never said that the car backed over the victim, and she characterized counsel's statement as a "lie". *Id.* at *11. Lead counsel did not object or request a mistrial, but he continued to cross-examine the pathologist for several minutes. *Id.*

During a recess that followed this examination, Petitioner's attorneys discussed how to respond to the pathologist's testimony. *Id.* *12, 13. They considered calling their expert, who had attended the pre-trial meeting with the pathologist, to testify to the content of the conversation. *Id.* at *12. They decided that this would be unfair because the expert had only recently joined the staff at the public defender's office. *Id.* The lawyers also considered calling co-counsel to testify about the pre-trial meeting. *Id.* at *12, 13. Believing that this testimony could raise ethical concerns, counsel consulted with the trial judge. *Id.* The judge advised them that the tactic would likely have an adverse impact on jury. *Id*. Ultimately, lead counsel determined that he "was going to make a bad situation worse" by calling co-counsel as a witness, and that he "could handle" the situation without doing so. *Id.* at *12. The defense expert would go on to testify to his disagreement with the medical examiner's opinion regarding the tire marks on the victim's body, the direction the car was traveling, and the Petitioner's intent to harm the victim. *Id.* at *13.

Considering this evidence, the post-conviction trial court determined that Petitioner had failed to prove any deficiency on the part of trial counsel. Regarding the spoliation claim, the court found that counsel had devoted a considerable amount of effort and pretrial work to the issue. *Id.* at *14. The reason that no remedy was awarded was not because counsel had failed to effectively advocate for his client, but because the trial judge determined that no due process violation had occurred. *Id*.

As for the state pathologist's opinion, the court found that counsel were well prepared for the testimony, had retained rebuttal experts, and vigorously cross-examined the witness. *Id.* at *15. Counsel had tactical reasons for not calling witnesses to rebut the pathologist's testimony about the pre-trial meeting. *Id.* Despite the pathologist's having called one of lead counsel's statements a lie, the court ruled, counsel's cross-examination "was effective in demonstrating to

the jury" that the expert was not confident in the direction the car was traveling when confronted with the heat shield, and supported the defense theory that the authorities jumped to conclusions in the case. *Id*. The court concluded that the pathologist's statement did not damage lead counsel's credibility and that there was no basis for a mistrial or any kind of limiting instruction. *Id.*

The Court of Criminal Appeals affirmed. Citing *Strickland v. Washington*, the court held that Petitioner did not establish that he was prejudiced by the timing of counsel's inspection of the vehicle or the asserted failure to request multiple spoliation remedies. *Id.* at *20-21. The court had already ruled on direct appeal that there was no exculpatory evidence to be preserved on Petitioner's car. *Id.* at *21. More importantly, Petitioner's expert accident reconstructionist contradicted the testimony of the State's experts and was able to opine that the physical evidence was consistent with Petitioner's explanation of the incident. *Id.*

Turning to the testimony of the State's pathologist, the court concluded at the outset that lead counsel was not deficient in his preparation. *Id*. Counsel hired a consulting expert, met with the pathologist, and learned that she would opine that victim's injuries were "unidirectional" and that her testimony would be consistent with the State's theory of the case. *Id.* As for counsel's handling of the hearing concerning the admissibility of the pathologist's testimony, the court determined that Petitioner had failed to establish prejudice. *Id*. Counsel had time after the hearing to prepare for the pathologist's testimony and to consult with his own expert. *Id*. More significantly, the court had held on direct appeal that the pathologist's testimony was not outside her area of expertise, and Petitioner's expert testified at trial about his major areas of disagreement with her opinion. *Id.* at *21.

The court likewise held that counsel's examination of the pathologist was a matter of strategy and was not deficient. *Id.* at *22. The record established that counsel was aware of the

pathologist's opinions regarding the manner of death and direction of travel of Petitioner's car, that he had extensively prepared for her testimony, and that he had the benefit of the hearing the day before the pathologist testified before the jury. *Id*. While the court believed that counsel's attempt to impeach the pathologist with the pre-trial meeting was, in hindsight, ill advised, it was unable to conclude that this strategy was deficient because both lawyers believed that the pathologist had confirmed Petitioner's version of the incident and had weighed the possible benefits of impeaching her with the prior statement against the possible risks. *Id.* at *23. The court further ruled that lead counsel had strategic reasons for not calling potential witnesses to testify about the pre-trial meeting. *Id*.

B. Structural error

In support of his claim that the trial judge's abuse of opiate painkillers amounted to structural error, Petitioner introduced an investigative file of the Tennessee Bureau of Investigation (TBI). These records indicated that the trial judge, Richard Baumgartner, had purchased quantities of prescription narcotics in 2008. *See id.* at *5. In 2009, Judge Baumgartner began using a former offender in the Knox County Drug Court to procure hydrocodone for him. *Id.* The judge would be arrested in 2011. *Id.*

At the post-conviction evidentiary hearing, both lead counsel and co-counsel testified that they noticed a change in Judge Baumgartner's demeanor in 2008 and 2009. *Id.* at *5, 6. He became less attentive, less patient, and more prone to anger, directing "unprofessional" comments to defense counsel. *Id.* Nevertheless, counsel could not recall anything during the proceedings in Petitioner's case that caused them to think that judge was under the influence. *Id.* at *6. He did not slur his speech, display signs of drowsiness, or appear to lose interest. *Id.* At the hearing on

Petitioner's motion for new trial, however, counsel noted that Judge Baumgartner was "particularly distracted" and "very confused." *Id.*

For his part, Petitioner testified that he saw the judge asleep on a few occasions during his trial, though he did not tell counsel about these alleged incidents. *Id.* at *7. At the motion for new trial stage, Petitioner said, the judge had a "stupid grin on his face," which Petitioner recognized from his personal experience of "getting high." *Id.* Petitioner admitted that he did not think that Judge Baumgartner was intoxicated at the hearing, and that he only came to this conclusion after reading news reports about the judge's misconduct. *Id.*

The post-conviction trial court found that this evidence failed to establish that Judge Baumgartner was incompetent or biased during the course of Petitioner's trial. The court discredited Petitioner's testimony that he saw the judge fall asleep. *Id.* at *13. As for the judge's "confusion" at the final hearing on Petitioner's motion for new trial, the court observed that several months had passed between hearings and that Petitioner's motion was complex. *Id.* at *14. Once his memory was refreshed, Judge Baumgartner "demonstrated recall of the previous hearings and a complete understanding of the issues." *Id*.

The court likewise rejected Petitioner's claim that Judge Baumgartner's out-of-court misconduct caused him to be biased in favor of the State in an attempt to curry favor with prosecutors and deflect suspicion. *Id.* This argument was "not supported by the record" because the judge was investigated by TBI and a special prosecutor. *Id.* All told, the post-conviction court found that the trial record showed Judge Baumgartner "to be coherent, engaged, and thoughtful" during Petitioner's proceedings.

The Court of Criminal Appeals affirmed. Addressing Petitioner's claim of incompetence, the court adhered to the standard announced by the Tennessee Supreme Court in the first case to

consider the issues surrounding Judge Baumgartner: "a trial judge's out-of-court misconduct does not constitute structural error 'when there is no showing or indication in the record that the trial judge's misconduct affected the trial proceedings.'" *Id.* at *15 (quoting *State v. Cobbins*, No. E2012-00448-CCA-R10-DD, order at 3 (Tenn. May 24, 2012) (order granting extraordinary appeal) (per curiam)). On that standard, the Court of Criminal Appeals recognized, Petitioner's claim presented a question of credibility of the witnesses. *Id.* at *18.

> The post-conviction court accredited the testimony of lead and co-counsel over the Petitioner's testimony regarding Judge Baumgartner's appearance during the trial. Conversely, the post-conviction court disagreed with lead and co-counsel's assessment of Judge Baumgartner's performance during the motion for new trial hearings. The post-conviction court found after its review of the trial record that "[o]nce having his memory refreshed, [Judge Baumgartner] demonstrated recall of the previous hearings and a complete understanding of the issues" at the motion for new trial hearings and that the trial record overall showed Judge Baumgartner "to be coherent, engaged, and thoughtful." The post-conviction court concluded that the evidence did not show that Judge Baumgartner was impaired during the trial or in denying the Petitioner's motion for new trial.

Id. The court deferred to the trial court's factual findings. *Id*.

The Court of Criminal Appeals also rejected Petitioner's claim that Judge Baumgartner had "a motivation" to be biased in favor of the State "in order to prevent suspicion or investigation into his misconduct." *Id.* at *17. Citing *Bracy v. Gramley*, the court stated that the mere appearance of bias is not sufficient to establish structural constitutional error. *Id.* In this case, the court ruled:

> [T]he Petitioner did not present evidence of Judge Baumgartner's out-of-court misconduct causing him to be biased specifically against the Petitioner. Lead counsel and co-counsel both testified about a change in Judge Baumgartner's demeanor and their perception that Judge Baumgartner's behavior was directed at the defense bar in general. However, there was nothing in the trial court record or this court's opinion on direct appeal that would demonstrate a specific bias against the Petitioner in this case. Put another way, no evidence showed that Judge Baumgartner's out-of-court misconduct pierced the veil of judicial impartiality in the Petitioner's trial proceedings.

Id. Consequently, the court affirmed the denial of post-conviction relief with respect to Petitioner's claim of structural constitutional error. *Id.* at *18.

Petitioner now seeks a writ of certiorari.

REASONS FOR DENYING THE WRIT

Petitioner maintains that the Court of Criminal Appeals' ineffective assistance of counsel ruling conflicts with *Hinton v. Alabama*, 571 U.S. 263 (2014), and that its structural error ruling conflicts with *Bracy v. Gramley*, 520 U.S. 899 (1997). (Pet. 18, 24.) There is no conflict. Petitioner's ineffective assistance of counsel claim asserts the misapplication of properly stated rule of law. And the Court has already denied certiorari in a case presenting the question whether Judge Baumgartner's out-of-court misconduct, without more, amounts to structural error. *Davidson v. Tennessee*, No. 16-9278 (U.S. Oct. 2, 2017). The same fate should befall the present petition.

I. Petitioner's Ineffectiveness Question Challenges the Application of a Properly Stated Rule of Law.

Petitioner contends that the Court of Criminal examined his "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." (Pet. 22.) This analysis, Petitioner suggests, "departs" from *Hinton* (and *Strickland v. Washington* itself). (Pet. 18.) Petitioner is mistaken.

Strickland establishes that, under the prejudice prong of the ineffective assistance of counsel inquiry, the effect of counsel's errors must be considered cumulatively. 466 U.S. 668, 697 (1984) ("In making this [prejudice] determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury."). *Hinton* says nothing about the question. In that case, the Court held that "it was unreasonable for Hinton's lawyer to fail to seek additional funds to hire an expert where that failure was based not on any strategic choice but on a mistaken belief that available funding was capped at $1,000." *Hinton*, 571 U.S. at 273. That "inexcusable mistake of law," *id.* at 275, is not present in Petitioner's case; as he acknowledges, "trial counsel hired competent experts (Pet. 22).

The difficulty with Petitioner's claim of conflict is that the state courts made no finding that his attorneys rendered deficient performance. In the words of the post-conviction trial judge, "This court finds no deficiency in Mr. Stephens' representation of the Petitioner in this matter." (PC R. II, 152.) The Court of Criminal Appeals proceeded directly to *Strickland*'s prejudice prong in addressing two aspects of Petitioner's ineffectiveness claim—counsels' handling of the motions regarding spoliation and admissibility of expert testimony—but it did not overturn the trial court's findings of no deficiency. *Cornwell*, 2017 WL 5957667, at *21, 22. Because the lower courts did not find multiple instances of attorney error, there can be no conflict with *Strickland* (much less *Hinton*).

In reality, Petitioner asks this court to find deficiency where the state courts found none. That is, Petitioner does not dispute that the Court of Criminal Appeals appropriately invoked *Strickland*'s rule, *see id.* at 20, but he asserts that the court got the result wrong on the facts. That sort of fact-intensive, case-specific claim of error is ill-suited to certiorari review. And in a case in which counsel engaged in motion practice to limit the State's presentation of forensic evidence, retained a pathologist and an accident reconstructionist, and vigorously cross-examined the State's experts, *see id.* 21-23, further review is not apt to produce a different judgment. No writ should issue to address this question.

II. The Court of Criminal Appeals' Structural Error Ruling Accords with this Court's Precedent.

Petitioner next contends that he established that former Judge Baumgartner's misconduct deprived him of a competent tribunal and "created at least the appearance of unconstitutional bias." (Pet. 31, 32.) This Court has previously confronted a petition filed by a defendant who, relying solely on TBI's investigative file of the former judge, contended that the judge's drug abuse amounted to "structural error". *Davidson*, No. 16-9278 (U.S. Oct. 2, 2017). The Court denied

certiorari on October 2, 2017. *Id.* Here, Petitioner adds to the investigative file his own testimony and that of his attorneys concerning the judge's courtroom demeanor. The post-conviction trial court did not accredit Petitioner's testimony, and it disagreed with the lawyers' assessment of the judge's performance. *Cornwell*, 2017 WL 5957667, at *18. Petitioner's claim stands on little better footing than did Davidson's, and should meet the same end.

A. The Court's prior decisions leave no doubt that petitioner must prove that he was actually deprived of a mentally competent tribunal.

"Due process implies a tribunal both impartial and mentally competent to afford a hearing." *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912). The law is clear that Petitioner, as one claiming a due process violation on this basis, must prove that he was actually deprived of a mentally competent tribunal.

In *Jordan*, this Court considered whether a criminal defendant was entitled to a new trial for the alleged insanity of a trial juror. The trial court had conducted a post-trial evidentiary hearing on the question and found "by a fair preponderance of all the evidence as a fact that the juror . . . was of sufficient mental capacity during the entire trial . . . until after the verdict was returned, to intelligently consider the evidence, appreciate the arguments of counsel, the rulings of law, the charge of the court, and to arrive at a rational conclusion." *Id*. at 173. The Court found no due process violation when the juror's sanity was established by a preponderance of the evidence. *Id*. at 176-77.

In *Tanner v. United States,* 483 U.S. 107 (1987), the defendants sought a new trial based upon alleged alcohol and drug use by trial jurors. The district court applied Fed. R. Evid. 606(b) to disallow juror testimony on juror intoxication, and it found insufficient proof from the non-juror testimony to grant a new trial. The Court agreed that Fed R. Evid. 606(b) disallows juror testimony on this inquiry, and it found no other basis to allow for consideration of juror testimony. The

defendants argued that juror testimony should be admitted due to their right to "an impartial and competent jury." The Court responded that the district court conducted an evidentiary hearing, at which point the defendants had "ample opportunity to produce nonjuror evidence supporting their allegations." *Tanner*, 483 U.S. at 126-27. These "other sources of protection" were sufficient for the defendants to litigate their claim, which they failed to do successfully.[1] *Id*. at 127.

Neither of these decisions—nor any other decision by the Court cited in the petition for writ certiorari—excuses the burden of proving an actual due process violation. To the contrary, the Court affirmed the judgment in *Jordan* because the defendant failed to prove any constitutional error in the lower court's conclusion, under the proof presented, that the juror was competent. Likewise in *Tanner*, the defendants had "ample opportunity" to prove a due process violation but failed to do so. *Id*. Lower court decisions in cases comparable to this also require proof that alleged misconduct by a tribunal actually impacted trial proceedings. *See Thurmond v. McKee*, No. 1:06-cv-00580, 2009 WL 929001, at *18 (W.D. Mich. Apr. 2, 2009) ("[E]ven assuming the existence of some due-process principle at work in the present case, that principle would certainly require evidence that the judge's [alcohol addiction] had some substantial impact on the fairness of a criminal defendant's trial."); *State v. Stapleton*, No. 08-0685, 2008 WL 5170047, at *3 (La. Ct. App. Dec. 10, 2008) (finding no due process violation when presiding judge was on probation for substance abuse because there was "nothing to suggest that . . . [the judge] conducted himself in an inappropriate manner or committed any act during the course of the proceedings that prejudiced the defendant.").

[1] "While both *Jordan* and *Tanner* [ ] involved juries, their teachings can be applied to judges as well." *Summerlin v. Stewart*, 267 F.3d 926, 957 (9th Cir. 2001), *opinion withdrawn*, 281 F.3d 836 (9th Cir. 2002) (Kozinski, J., concurring in part and dissenting in part).

Thus, at a minimum, Petitioner was required to show some nexus between the trial judge's misconduct and the actions at trial—*i.e.*, that he was "mentally incompetent"—to show the constitutional necessity for a new trial.[2] "When the inquiry is limited to the judge's impairment while on the bench, it's at least theoretically possible that objective evidence can provide an answer; for example, the judge staggered to the bench, his speech slurred, his cheeks were flushed and his eyes were red." *Summerlin*, 267 F.3d at 963-64 (Kozinski, J., dissenting in part) (opining that habeas corpus petitioner failed to prove due process violation predicated on trial judge's marijuana abuse).

Below, Petitioner tried—but failed—to make such a showing. He testified that Judge Baumgartner nodded off during trial, but the post-conviction court discredited this testimony. *Cornwell*, 2017 WL 5957667, at *18. Petitioner's attorneys testified that the judge was confused and unfocused during the motion for new trial hearings. After review of the record, however, the post-conviction court found that "[o]nce having his memory refreshed, [Judge Baumgartner] demonstrated recall of the previous hearings and a complete understanding of the issues" at the motion for new trial hearings and that the trial record overall showed Judge Baumgartner "to be coherent, engaged, and thoughtful." *Id*. As the Court of Criminal Appeals recognized, the question of whether the judge was impaired during trial "is one of the credibility of the witnesses." *Id*. Those credibility determinations are poor candidates for certiorari, and the Court of Criminal Appeals did not depart from this Court's precedent in requiring a credible "showing or indication" that Judge Baumgartner was in fact impaired.

[2]Petitioner relies upon the Ninth Circuit's since-withdrawn split decision in *Summerlin*, but even there, the court did not grant relief based solely upon proof that the presiding judge had abused marijuana. Instead, the majority remanded for an evidentiary hearing "in order to develop the connection, if any, between the judge's chronic use of illegal drugs, his alleged addiction, and his performance during this case as a judge." *Summerlin*, 267 F.3d at 953. It is fully consistent with *Jordan* and *Tanner*, that the petitioner must prove an actual deprivation of the right to "mentally competent" tribunal, which was not done here.

B. Review of petitioner's claim that the trial judge was biased is unwarranted.

Petitioner likewise failed to prove his related claim of bias on the part of the former trial judge. But the decisions of this Court require such proof in support of that claim.

The Court has long held "that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A. T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). In evaluating a due process claim based on the presiding judge's alleged bias or prejudice, "[t]he Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton*, 556 U.S. at 881; *see also Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016). "In defining these standards the Court has asked whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton*, 556 U.S at 883 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Due process mandates recusal in circumstances when, viewed objectively, "experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id*. at 877 (quoting *Withrow*, 421 U.S. at 47); *see also Bracy v. Gramley*, 520 U.S. 899 (1997) (finding habeas corpus petitioner entitled to discovery on claim of bias by bribe-accepting trial judge against defendants who did not pay bribes).

Here, Petitioner chiefly complains that the Court of Criminal Appeals cited *Bracy* for the proposition that "the Due Process Clause requires a trial judge with '<u>no actual bias</u>' against the defendant," while failing to intone the reasonable probability standard that implements the

constitutional guarantee. (Pet. 30); *Cornwell*, 2017 WL 5957667, at *17 (quoting *Bracy*, 520 U.S. at 905).

Petitioner's claim is that Judge Baumgartner's out-of-court misconduct "created an unconstitutional potential for the former judge to favor the prosecution to deflect any investigation into his illegal activity." (Pet. 32.) But, as the trial court ruled,

> This claim is not supported by the record or by reason. As soon as the Knox County District Attorney's Office had reason to believe that the trial judge was engaged in potentially illegal activity, the case was assigned to a prosecutor outside of Knox County. This pro tempore prosecutor and the investigators with the Tennessee Bureau of Investigation had nothing to do with the Petitioner's case. Under the facts of this case, a reasonable person would not believe that the trial judge would favor the Knox County District Attorney's Office in this case in order to curry their favor. They had no power over him.

(PC R. II, 143.)

That ruling is correct. Were it otherwise, any lawbreaking judge would be disqualified from presiding over any criminal case, something this Court has never suggested. At core, Petitioner asks the Court to correct verbiage in an unpublished intermediate court opinion, though further review would not affect the judgment. No writ should issue to engage in that futile exercise.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been sent by first class mail, to: Stephen Ross Johnson, Ritchie, Dillard, Davies & Johnson, P.C., 606 West Main Street, Suite 300, Knoxville, TN 37902, on this the 14th day of November, 2018

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