

IN THE SUPREME COURT OF THE UNITED STATES

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No. 20-1011

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CYRUS MARK SANAI,  
*Petitioner,*

v.

D. JOSHUA STAUB, an individual; FREDERICK BENNETT,  
an individual; PHU CAM NGUYEN, an individual;  
CHRISTOPHER MCINTIRE,  
*Respondents,*

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
NO. 19-55427

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CYRUS MARK SANAI,  
*Petitioner,*

v.

MARK BORENSTEIN, an individual;  
*Respondent,*

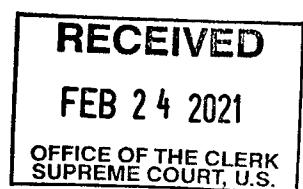
IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
NO. 19-55429

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SUPPLEMENTARY BRIEF ON NEW AUTHORITY IN SUPPORT OF  
PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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CYRUS SANAI  
SANAI  
9440 SANTA MONICA BOULEVARD #301  
BEVERLY HILLS, CA 90210  
Telephone (310) 717-9840  
[cyrus@sanaislaw.com](mailto:cyrus@sanaislaw.com)



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On Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeals

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## SUPPLEMENTARY BRIEF ON NEW AUTHORITY IN SUPPORT OF PETITION FOR REVIEW AND AMENDED QUESTIONS PRESENTED

### INTRODUCTION

This supplementary brief is filed pursuant to Supreme Court Rule 15.8, which permits the filing of supplemental briefs addressing new relevant authority, which is the United States Court of Appeal's recent decision in *Gacho v. Wills*, No. 19-3343, (7th Cir. February 8, 2021)(slip op.). Petitioner also amends his Questions Presented, in particular the Fifth Question presented, to account for the new authority.

### GACHO IS RELEVANT TO THE FIFTH QUESTION PRESENTED

#### A. *The Fifth Question Presented*

The Fifth Question presented in the petition is whether the Ninth Circuit erred in finding that *Younger* abstention applied to a action where the complaint alleged state court bias and conflict of interest of specific state court judges because the bias did not arise from a direct financial interest in the litigation.

This question arose in in the second filed action that is the subject of this petition, *Sanai v. McDonnell* (now *Sanai v. Borenstein*), CDCA no. 18-5663. In that case, District Court Judge Klausner held that *Younger* abstention applied. He addressed the extraordinary circumstances and biased tribunal exceptions by holding that the former only applied to challenges of statutes, and the latter only applied if the bias arose from a financial interest. [18-5663 Docket #70 at 3-4, App.

reviewed that decision under 28 U.S.C. § 2254 and denied habeas relief.

We reverse. The Due Process Clause secures a right to trial before a fair and impartial judge. Evidence that the presiding judge was actually biased is sufficient to establish a due-process violation but it's not necessary. Constitutional claims of judicial bias also have an objective component: the reviewing court must determine whether the judge's conflict of interest created a constitutionally unacceptable likelihood of bias for an average person sitting as judge. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 878-86 (2009). The state court cited *Caperton* but ignored the objective test, holding that Gacho's failure to establish actual bias was fatal to his claim.

That ruling was contrary to federal law as explained in *Caperton*, so we review the claim without deference to the state court. We hold that the acute conflict between Maloney's duty of impartiality and his personal interest in avoiding criminal liability created a constitutionally unacceptable likelihood of compensatory bias in Gacho's case.

*Gacho*, slip. op. at 1-3.

The analysis rejected by the Seventh Circuit is the same analysis as utilized in *Sanai v. Borenstein*: it holds that *Caperton* does not control situations governed by prior United States Supreme Court case law:

The fact that Maloney was bribed in some cases does not establish that he was not impartial in others. *Fair*, 193 Ill.2d at 261, 250 Ill.Dec. 284, 738 N.E.2d 500; *People v. Titone*, 151 Ill.2d 19, 29, 175 Ill.Dec. 702, 600 N.E.2d 1160 (1992). The proposition may even hold true when, as in this case, "the bribe involves a codefendant and the two defendants are tried together, albeit one to the jury and the other to the judge." *Cartalino v. Washington*, 122 F.3d 8, 10 (7th Cir.1997). It is merely a suspicious circumstance that warrants further inquiry. *Cartalino*, 122 F.3d at 10. The fact that Titone bribed Maloney does not in and of itself establish Maloney's lack of impartiality in the defendant's trial. *Cartalino*, 122 F.3d at 10.

The defendant asserts that the "unrebutted facts establish that \*\*\* Maloney harbored a direct compensatory bias" against him. There is no question that the defendant would have been deprived of due process and entitled to relief under the Act if Maloney harbored a compensatory bias against him to camouflage the bribe which he took from Titone or his criminal activity in other cases. *See Bracy*, 520 U.S. at 906, 117 S.Ct. 1793. However, a defendant "who alleges that his trial judge's corruption violated his right to a fair trial must establish (1) a 'nexus' between the judge's corruption or criminal conduct in other cases and the judge's conduct at [the defendant's] trial; and (2) actual bias resulting from the judge's extrajudicial conduct." *Fair*, 193 Ill.2d at 261, 250 Ill.Dec. 284, 738 N.E.2d 500. The dissent asserts that "the success of a judicial bias claim does not depend on whether the claimant can make a showing of actual bias." In support of the proposition, the dissent cites to *Tumey*, 273 U.S. 510, 47 S.Ct. 437 and *Caperton vs. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009). **We believe that *Tumey* and *Caperton*, are factually dissimilar from the circumstances in this case.** In *Tumey* and *Caperton*, the facts established a direct, personal and substantial influence upon the judges, either by reason of a pecuniary interest in the outcome of the litigation involved (see *Tumey*, 273 U.S. at 523, 47 S.Ct. 437) or because the officers of the litigant corporation had contributed \$3 million to the judge's election (see *Caperton*, 556 U.S. at 872-73, 129 S.Ct. 2252). In such circumstances, the Supreme Court held that no actual bias on the part of the judge need be shown in order to establish a due process violation. When, however, the Supreme Court was faced with a case involving a charge of compensatory bias, as asserted in this case, it found that the defendant was entitled to discovery to establish actual judicial bias in the trial of his case. *See Bracy v. Gramley*, 520 U.S. 899, 908-09, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997). *Fair* also involved a claim of compensatory bias and held that, when a defendant alleges a deprivation of due process as the result of compensatory bias on the part of a corrupt trial judge, he must establish actual bias resulting from the judge's conduct. *Fair*, 193 Ill.2d at 261, 250 Ill.Dec. 284, 738 N.E.2d 500; see also *People v. Titone*, 151, 1063\*1063 Ill.2d 19, 30-31,

175 Ill.Dec. 702, 600 N.E.2d 1160 (1992).  
*People v. Gacho*, 53 N.E.3d 1054, 1062-3 (Ill. App. Ct. 2016)(bold emphasis added)

The Illinois Appellate Court's analysis rejected by the Seventh Circuit is the same analysis employed by the District Court in *Sanai v. Borenstein* and affirmed by the Ninth Circuit. Judge Klausner ruled that the exception for biased tribunals to *Younger* abstention was limited solely to cases of financial interest, because that was the situation in *Gibson v. Berryhill*, 411 U. S. 564, 577 (1973). [18-5663 Docket #70 at 3-4, App. J 4-5.] The Illinois Appellate Court ruled that the *Caperton* standard only applied in cases of financial interest. Under the analysis of the Illinois Appellate Court in *Gallo* and the District Court and Ninth Circuit in *Sanai v. Borenstein*, the all-purpose objective standard articulated in *Caperton* only applies to *Caperton* and other instances where financial interest was at issue.

Accordingly, the Ninth Circuit's analysis in *Sanai v. Borenstein* is in conflict with the analysis of the Seventh Circuit, demonstrating a circuit conflict that merits resolution by this Court. The view adopted by *Sanai v. Borenstein* is not some outlier. The Illinois Circuit Court in Gallo's state habeas proceeding and the Illinois Appellate Court both adopted it, as did the federal District Court in *Gallo*. Outside the Seventh Circuit, there's no reason to believe that state or federal courts will adopt the Seventh Circuit's views; indeed, the Illinois Appellate Court directly considered the position urged by Gallo and adopted by the Seventh Circuit, and rejected it. This case therefore shows a conflict between two circuits and between circuits and state courts.

**THE QUESTIONS PRESENTED THE IN THE PETITION, IN PARTICULAR  
THE FIFTH QUESTION PRESENTED, MUST BE AMENDED**

Petitioner's petition focused on the conflict between the Ninth Circuit's view on judicial disclosure and the position taken in the Sixth Circuit, Seventh Circuit, Eleventh Circuit and Federal Circuit regarding judicial disclosure. This issue was presented in the first four of the six Questions Presented. The Fifth Question presented a question of judicial error, and not conflict amongst federal circuits.

The Fifth Question Presented is no longer appropriate after the publication of *Gacho, supra*, because the question does not present the conflict between the Ninth Circuit's position in *Sanai v Borenstein*, which follows the analysis of the Illinois courts in *People v. Gacho, supra*. An amended questions presented is therefore attached to this brief, and separate pages are furnished herewith. The pages should be substituted for the same numbered pages in the petition. The other five Questions Presented are unchanged.

**CONCLUSION**

Petitioner's petition presented four questions presented that arose from the conflict between the Ninth Circuit's position on judicial disclosure of information that could bear on disqualification and the opposite approach taken by the Sixth Circuit, Seventh Circuit, Eleventh Circuit and Federal Circuit. The Fifth and Sixth Questions Presented are important questions presented by the underlying cases, but as phrased, are not subject of inter-circuit conflict.

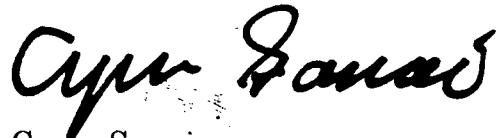
The Fifth Question is presented is no longer completely correct, as it does present inter-circuit conflict for resolution by this Court. In addition, the number of

Courts that have taken the position that the Seventh Circuit rejected outnumber it by four to one. Therefore the petition presents two separate instances where the positions of the Ninth Circuit conflict with the positions of the Seventh Circuit, and as to judicial disclosure, other circuits as well.

This Court should therefore grant the petition to decide these important legal issues. While the issues are the subject of bona fide conflict, the Seventh Circuit has worked out the issues in sufficient depth that this Court does not need to put the case on its argument calendar, and may simply resolve it with a per curiam decision if it so chooses.

Dated this February 19, 2021

Respectfully submitted,



Cyrus Sanai  
Sanais  
9440 Santa Monica Blvd.  
#301  
Beverly Hills, CA 90212  
(310) 717-9840

**AMENDED QUESTIONS PRESENTED**

## **QUESTIONS PRESENTED**

1. Did the Ninth Circuit Court of Appeals err when it refused to follow the unanimous holdings of the Sixth Circuit, Seventh Circuit, Eleventh Circuit and Federal Circuit that federal judges have an obligation to disclose on the record information which the parties or their lawyers might consider relevant to the question of disqualification?
2. Do federal judges have an obligation to disclose on the record information about personal or professional relationships with a defendant or witness in a case where such information is explicitly requested by a party?
3. Do federal judges have an obligation to disclose on the record information about their past and current relationship to a disgraced former federal judge who is a defendant in a lawsuit along with his colleagues who retaliated against a litigant for disclosing the former federal judge's misconduct and whose whistleblowing played a critical role in his downfall?
4. Does the Ninth Circuit's decision that a District Court Judge was not required to recuse himself in a case where a defendant previously was the District Court's lawyer and defended him in state and federal court in a personal capacity, in direct conflict with published precedent from the same District and other Circuits and state courts, constitute reversible error?
5. Did the Ninth Circuit err in finding that *Younger* abstention applied to a case premised on

state court bias and conflict of interest of specific state court judges because the bias did not arise from a direct financial interest in the litigation, which analysis conflicts with the Seventh Circuit's recent decision, *Gacho v. Wills*, No. 19-3343, (7th Cir. February 8, 2021)?

6. May an interlocutory order relating to judicial recusal and disclosure be appealed in an appeal from the final judgment of dismissal for intentional refusal to serve the complaint, or must it be re-challenged by a post-judgment motion to vacate under F.R.C.P. 60?