NO. _____

In the
Supreme Court of the United States

JUDY MORROW WRIGHT AND DAVID MORROW, JR,
Petitioners,

v.

MATTHEW G. BUYER, ESQ., AND SUNTRUST BANK,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Tennessee

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Per *Williams v. Pennsylvania*, 579 U.S. 1, 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016) ("*Williams*"), because Petitioners' Fourteenth Amendment right to have a trial judge (Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 617–18 (1993); Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004); Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980); North v. Russell, 427 U.S. 328, 345 (1976); Ward v. Vill. of Monroeville, Ohio, 409 U.S. 57, 61–62 (1972).) who has no appearance of undermined neutrality is a structural right (*Williams*, 136 S. Ct. at 1909 ("An unconstitutional failure to recuse constitutes structural error . . . 'not amenable' to harmless-error review, regardless of whether the judge's vote was dispositive." (citing Puckett v. United States, 556 U.S. 129, 141 (2009))); see also Weaver v. Massachusetts, 137 S. Ct. 1899, 1907–08, 198 L. Ed. 2d 420 (2017); Neder v. United States, 527 U.S. 1, 8 (1999); Ruelas v. Wolfenbarger, 580 F.3d 403, 410 (6th Cir. 2009); State v. Rodriguez, 254 S.W.3d 361, 371 (Tenn. 2008); Cottingham v. Cottingham, 193 S.W.3d 531, 537 (Tenn. 2006); Tumey v. Ohio, 273 U.S. 510, 535 (1927).), is it constitutionally impossible for rules of the Tennessee Supreme Court to place unreasonable restrictions on

Petitioners, which if not complied with, are considered a **waiver** of Petitioners' right to raise a question about having a judge who is burdened with the appearance of an undermined neutrality adjudicate Petitioners' case?

2. Because the COA 2021 Opinion affirmed the trial court's denial of Petitioners' motion to recuse, for no reason other than a so-called **waiver** by Petitioners, for noncompliance with Rule 10B § 1.01 of the Rules of the Supreme Court of the State of Tennessee ("Rule 10B"), as applied by the COA 2021 Opinion, is Rule 10B a violation of Petitioners' structural constitutional right?

3. As applied by the COA 2021 Opinion, did Rule 10B unconstitutionally impede, obstruct, and deny Petitioners' access to Petitioners' structural right to be judged by a trial judge as to whom there was no disqualifying pre-case state of mind (*Williams*, 136 S. Ct. at 1906 ("There is, furthermore, a risk that the judge 'would be so psychologically wedded' to his or her previous position . . . that the judge 'would consciously or unconsciously avoid the appearance [pre-case] of having erred [pre-case] or changed [a pre-case] position.'") (emphasis added).) that risked (*Williams*, 136 S. Ct. at 1905-06 ("This objective **risk** of bias is

reflected in the due process maxim that 'no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.'") (emphasis added).) the appearance (*Williams*, 136 S. Ct. at 1908-09 ("Chief Justice Castille's significant, personal involvement in a critical decision in Williams's case gave rise to an unacceptable risk of actual bias. This risk so endangered the **appearance** of neutrality that his participation in the case 'must be forbidden if the guarantee of due process is to be adequately implemented.'"). (emphasis added).) of undermined (*Williams*, 136 S. Ct. at 1902, 1909 ("A multimember court must not have its guarantee of neutrality **undermined**, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part.") (emphasis added).) neutrality?

4. Per *Williams*' standards (gleaned from the information used by the Court to disqualify Chief Justice Castille), was the affidavit (APP 94-102) filed by Petitioners to establish that the trial judge was disqualified insufficient because, as the trial judge ruled, the affidavit was "**supposition" and "innuendo**" (thus not evidence)? (APP. 28 n. 6, 37, 80-84) (emphasis added).

Herein Petitioners use "pre-case state of mind" as a parallel to what *Williams* refers to as a judge being "psychologically wedded." Petitioners interpret "psychologically wedded" to encompass, in some way shape or form: sympathies; personal dispositions; predilections; persuasions; preferences; personal opinions; convictions; or prior life experiences. The aforementioned eight nouns encompassed in "psychologically wedded" are all in stark contrast to what the trial judge stated was determinative of whether or not to recuse herself. The trial judge wrote that she did not need to recuse herself because she had "no animosity" toward Petitioners or their counsel. (APP. 37)

Parties to the Proceeding Below

The only Petitioners are Judy Morrow Wright and David Morrow, Jr., and the only respondents are Matthew G. Buyer, Esq. and SunTrust Bank.

Corporate Disclosure

Petitioners are private parties with no corporate affiliations. SunTrust Bank is a banking association, and Buyer, at times relevant to this case, was a private individual who was an employee of SunTrust and sued only in his capacity as an employee of SunTrust.

Statement of Related Proceedings

Neither the instant Petition nor the herein described federal related proceeding have anything to do with the merits of any adjudication, save only the refusals to recuse, and the adjudications of the recusal motions are not of critical importance.

The issues here are whether the failure of the judges to withdraw, *sua sponte*, violated the Petitioners' rights. So, for purposes here, Petitioners, *arguendo* only, stipulate the correctness of the rulings on the merits of the underlying dispute.

The dispute commenced on October 21, 2010 by Petitioner Morrow filing, in Probate Court, Memphis, Shelby County, Tennessee a Petition to

probate the Estate of Goza, a deceased person (APP. 101, 102, 108).

During those proceedings, on April 29, 2011, the Goza Estate filed a motion for Respondent SunTrust to show cause why revocable living trusts in Tennessee are not unlawful, thus, why SunTrust should not be required to deliver funds held under the guise of the revocable living trust to the Goza Estate.

For reasons stated in two affidavits (APP. 43-56, 58-61), Petitioner Morrow, for the Goza Estate, filed a motion for the Probate Judge ("Judge Benham") to recuse. Judge Benham denied the recusal motion and granted, SunTrust's motion to dismiss the show cause order.

From May 27, 2011, through January 14, 2016, the dispute concerning the revocable living trust wound its way through the courts of Tennessee with Judge Benham's order, on the grounds of *res judicata*, being upheld. Judge Benham's denial of the recusal motion was not part of the appeals between May 27, 2011 through January 14, 2016.

On June 9, 2016, six months after the January 2016 conclusion of the appeals in state court, this Court decided *Williams*. Petitioners considered *Williams* to be a game-changer.

Based on standards in *Williams* not theretofore known, Petitioner Wright, on March 3, 2020, initiated a claim (APP. 106-108), in the United States Court for the Western District of Tennessee ("District Court"), having nothing to do with the merits of the adjudications of the underlying disputes and claiming only that Judge Benham, as the trial judge, when he adjudicated the show cause dispute, was disqualified to adjudicate and, by adjudicating, violated a structural constitutional right of Petitioner Wright, a beneficiary of the Goza Estate.

In an exceptionally caustic memorandum opinion (In re May 27, 2011 Ord., 2020 WL 6532850, at *1 (W.D. Tenn. Nov. 5, 2020)), the District Court dismissed the federal action with prejudice and without any findings of fact or conclusions of law, even though no person, other than Petitioner Wright, made an appearance to make a claim of interest to the *res*; consequently, no claim, other Petitioner Wright's claim, was before the District Court making any claim or contesting any claim made by Petitioner Wright.

The federal case is now pending scheduled for submission on brief on December 7, 2021 in the Sixth Circuit styled and docketed as *In Re: May 27, 2011 Order et al.*, Case No. 21-5511 (6th Cir.). ("Sixth Circuit Case").

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Petition for Certiorari

Petitioner respectfully requests the Court to issue a writ of certiorari to the Tennessee Supreme Court to transmit to this Court the case and record described below for a ruling by this Court concerning whether the rulings of the Tennessee courts violated structural constitutional rights protected by the Fourteenth Amendment, Due Process Clause ("Fourteenth Amendment") and the Supremacy Clause, by applying Rule 10B § 1.01 and § 2 of the Rules Of The Supreme Court Of The State Of Tennessee, even though Rule 10B is facially unconstitutional.

Opinions Below

The Opinion (APP. 1) which opened the door to the instant Petition is the order of the Tennessee Supreme Court in *Judy Morrow Wright et al. v. Matthew G. Buyer, et al.,* W2019-01157-SC-CV (June 15, 2021).

That order denied permission to appeal the judgment in (APP. 2-18) in *Wright v. Buyer,* No. W2019-01157-COA-R3-CV, 2021 WL 796701 (Tenn. Ct. App. Mar. 2, 2021) ("COA 2021 Opinion").

The COA 2021 Opinion adopted the opinion in *Wright v. Buyer,* 2018 WL 3546784 (Tenn. Ct. App. July 24, 2018) **(**APP. 19-29**)** ("COA 2018 Opinion").

Jurisdiction

This Court's appellate jurisdiction is invoked pursuant to Title 28, United States Code § 1257(a).

Constitutions, Statutes & Regulations

United States Constitution, Process Due Clause, Amend. 14, Article I, § 8.

United States Constitution, Supremacy Clause, Article VI, paragraph 2.

Title 28, United States Code § 1257(a).

Rule 10B § 1.01 and § 2 of the Rules Of The Supreme Court Of The State Of Tennessee.

Statement of the Case

This Petition presents for review whether the Supremacy Clause and Fourteenth Amendment mandate reversal of the COA 2021 Opinion (APP. 2-18) holding that Petitioners **waived** their structural constitutional right to a judge free from the appearance of undermined neutrality.

This case is about nothing other than *Williams* and the holdings of *Williams* applied to undisputed objective facts of record.

The case was initiated in probate court by heirs-at-law (Petitioners) against a large regional bank, the trustee of a revocable living trust being used as an estate planning device, and the bank's trust officer (Respondents).

The legal dispute underlying this case turned on whether, under controlling precedent, revocable living trusts are unlawful in Tennessee. The presence of this specific legal question and the nature of the trial judge's previous legal work concerning revocable living trusts result in the appearance of prejudgment and undermined neutrality on the part of trial judge.

The probative significance of Chief Castille's prior experience, 28 years earlier, pales by comparison with the probative significance of the prior experience of trial court judges as trust and

estate lawyers advocating and producing for clients, for decades, revocable living trusts in Tennessee on which the clients and the clients' heirs continue to rely while the judges adjudicated the question of whether revocable living trusts in Tennessee are lawful or unlawful.

Petitioners filed motions to recuse the presiding Judge Gomes. Before he retired, Petitioners filed a motion to recuse the trial judge's predecessor, Judge Benham.

Petitioners, as support for the motions to recuse, as explicitly stated in the motions and briefing, relied, via the Supremacy Clause, exclusively on the holdings of *Williams'* concerning how a pre-case state of mind, to which a judge is psychologically wedded, is the key determinant of whether a judge is disqualified as the adjudicator in a particular case.

The trial judge denied the motion to recuse. Eventually, Petitioners appealed a judgment dismissing Petitioners' case. Significantly, the one and only error on appeal raised by Petitioners was the trial court's denial of Petitioners' motions to recuse.

It is significant that Petitioners did not, on appeal, rely on any state law grounds to support Petitioners' motions to recuse. This is not to say that there were not state law grounds, but it is to say that

unless and until the *Williams'* pre-case state of mind requisites were satisfied, state law was/is irrelevant.

Additionally, Petitioners pled for the *Williams'* holding that the right to be judged by a judge who is not burdened by an appearance of undermined neutrality is a structural constitutional right and what being a structural constitutional right implicates. Tennessee law has no counterpart rule of law.

The Tennessee Court of Appeals ruled on no issue but the recusal issue; so, as presented, the Petition presents for review by the Court nothing but whether the COA 2021 Opinion, upholding the trial court's denial of the recusal motion, complies with or violates the law of the land.

The COA 2021 Opinion never visits the merits of Petitioners' motions to recuse but, based purely on state law grounds, holds that Petitioners **waived** their right to question whether the trial judge was disqualified by a pre-case state of mind that, per *Williams*, is an appearance of an undermined neutrality.

The COA 2021 Opinion placed Petitioners in the position of having to suffer a judgment adjudicated by a judge with an appearance of undermined neutrality handicapped by a state law constructed "**waiver**" that prohibited Petitioners

from questioning whether this Court's *Williams* mandates disqualified the trial judge.

This Petition places before the Court whether states can make rules that, if not complied with, deny state court litigants access to the structural constitutional rights announced by this Court in *Williams*.

Williams held that the right to be judged by an adjudicator who has no appearance of undermined neutrality is a structural constitutional right. The COA 2021 Opinion simply remarks that constitutional rights can be **waived**, with no recognition that structural constitutional rights are a category separate and apart from non-structural constitutional rights.

Therefore, this Petition squarely presents the issue as to whether what *Williams* declared to be a structural constitutional right is **waivable** by any litigant under any circumstances. Petitioners argue that the structural constitutional right at issue is not **waivable**.

Because the trial judge ruled that the recusal motion was denied because the supporting affidavits were "**innuendo and suppositions**" and "no evidence," which the COA 2021 Opinion endorses by dictum, the Petition squarely presents the necessity for the Court to compare the "evidence" on which the Court relied to find Chief Justice Castille disqualified

with what the trial judge dismissively called "**innuendo and suppositions**" and "no evidence." (emphasis added).

The necessity comes from the fact that a reversal and remand, without the Court ruling that the quantum and quality of information ("evidence") able to be accessed by courts to decide whether a trial judge is beset by a pre-case state of mind that risks an appearance of undermined neutrality, the trial judge can deny the recusal, again, as "**innuendo and suppositions**" and "no evidence." (emphasis added).

Considering the question in *Williams* to be Chief Justice Castille's state of mind in 2012, not 28 years before 2012, the trial judge below held, without serious rebuke, that the four circumstances the Court found sufficient, were "**innuendo and suppositions**" and "no evidence." (emphasis added).

On point, the information that the trial judge declared "**innuendo and suppositions**" and "no evidence," (APP. 28 n.6, 37, 80-84), extrapolating, the "evidence" used by the Court in *Williams* is more "**innuendo and suppositions**" and "no evidence." (emphasis added).

Without the Court opining on what constitutionally is enough information (e.g., less than probable cause, probable cause, preponderance, clear and convincing, beyond a reasonable doubt) and

whether the rules of evidence control, *Williams* is subject to death by whim and caprice governed by the eye of the beholding judge.

In sum, the Petition gives opportunity for the Court to make *Williams* the force for good Petitioners presume the Court intended it to be when it was published. Petitioners respectfully suggest that what has been missing, since *Williams* was published, is:

> (1) clarifying that the structural right *Williams* proclaims is not, for the reasons herein discussed (*infra* at 21-24), subject to **waiver**; and
>
> (2) clarifying the quantity and quality of information needed to conclude that the pre-case state of mind to which a judge need be wedded is a quantity and quality like that on which the Court relied to find Chief Justice Castille disqualified.

Petitioners respectfully suggest that, until these missing no **waiver** and strength of proof elements are added by the Court, *Williams* will continue to flounder as a decision and breed disparate holdings.

Finding that litigants **waive** their structural constitutional right to a neutral judge deprives litigants of due process, and unfortunately, erodes

confidence in the courts for current and prospective litigants.

Sequence Of Events Below

On October 21, 2016, Petitioners, as the survivors of a predeceased cousin to whom Petitioners are heirs-at-law, filed the document initiating the case in the Probate Court for Shelby County, Tennessee.

On April 10, 2018, the Probate Court entered an order dismissing Petitioners' lawsuit. On May 14, 2018, Petitioners filed a superseding motion to recuse the presiding Judge Gomes (APP. 66-68) supported by Petitioners' May 14, 2018 affidavit (APP. 94-102). The affidavit is key to this appeal. The affidavit exhaustively provided information evidencing the appearance of the judge's prejudgment, i.e., that the probate court judge was psychologically wedded to the conclusion that revocable living trusts are lawful in Tennessee.

On May 21, 2018, the trial judge entered an order (APP. 33-39) denying the May 14, 2018 superseding motion to recuse, finding that the affidavit (APP. 94-102) supporting the motion was "**innuendo and suppositions**" and included "no evidence." (APP. 28 n.6, 337, 80-84). (emphasis added).

On June 14, 2018, Petitioners initiated an interlocutory appeal (APP. 69-90) of the trial judge's May 21, 2018 order denying the May 14, 2018 recusal motion.

On July 6, 2018, Petitioners filed, in the trial court, a motion pursuant to Tennessee Rule of Civil Procedure 60.02 to set aside the April 10, 2018 order (APP. 40-42) on the ground that the trial judge was disqualified by the standards in *Williams* from adjudicating the April 10, 2018 order. In support of the Rule 60.02 motion, Petitioners attached an affidavit (APP. 94-102).

On July 24, 2018, the Tennessee Court of Appeals published the COA 2018 Opinion including the following words:

> Petitioners admit that they did not promptly file the recusal motion after the facts forming the basis for the motion became known. As such, Petitioners **waived** their right to challenge the probate judge's impartiality. The record is also insufficient to support a finding of error on the part of the probate judge because the motion for recusal was unaccompanied by an affidavit as required by the rules. (emphasis added).
>
> ***
>
> (at *3)

Fn. 5

While this case was pending on appeal, Petitioners filed a motion to dismiss their petition for recusal appeal. According to Petitioners, "by oversight," their substituted and superseding motion to recuse did not quote "the precise and exact words" contained in § 1.01 of Rule 10B. . . . Petitioners seek dismissal for purpose of filing a new motion to recuse, including any missing language. We deny the motion to dismiss the petition for recusal appeal. (emphasis added).

***

In Tennessee, litigants "have a fundamental right to a 'fair trial before an impartial tribunal.'" (Citations omitted). This **right is not absolute**, however; the party seeking recusal must file the recusal motion "promptly after the facts forming the basis for the motion become known." (Citation omitted). (emphasis added).

***

We conclude Petitioners **waived** their right to challenge the probate judge's impartiality in this case. (emphasis added).

***

(at *4)

> Even if the issue was not **waived** . . . Rule 10B § 1.01 provides that the motion to recuse "**shall** be supported by an affidavit under oath or a declaration under penalty of perjury on personal knowledge." (Citation omitted). . . . Petitioners did not support their recusal motion with an affidavit . . . .[6] (emphasis added).

***

(at *4)

> [FN 6] According to the probate court judge, "[t]he accusations and allegations [in the substituted and superseding motion to recuse] are based on **innuendo and suppositions**, and not based on fact." We agree . . .. (emphasis added).

See Wright v. Buyer, No. W2018-01094-COA-T10B-CV, 2018 Tenn. App. LEXIS 412, 2018 WL 3546784 (Tenn. Ct. App. July 24, 2018).

The COA 2019 Opinion remanded the case to the probate court for further disposition. On remand, the trial court dismissed the lawsuit with prejudice ("Trial Court Dismissal Order") (APP. 40-42).

On May 30, 2019, the probate court held a hearing on Petitioners' Set Aside Motion. (APP. 60-68). At the hearing, the probate judge quashed the subpoenas supporting the Rule 60.02 Set Aside Motion and released the subpoenaed witnesses. Subsequently, the probate court overruled (APP. 30-32) Petitioners' Set Aside Motion. The Set Aside Motion relied on *Williams* asserting that the probate court was disqualified by an appearance of undermined neutrality derived from a pre-suit state of mind to which the trial judge was psychologically wedded.

Petitioners filed an appeal challenging the Trial Court Dismissal Order. On November 19, 2019, Petitioners timely filed in the court of appeals Petitioners' Appellants' Brief raising one issue stated as follows (APP. 91-94):

> Editorial Note:
> Does the Fourteenth Amendment, United States Constitution, per *Williams v. Pennsylvania*__ U.S.__,136 S.Ct. 1899, 195 L.Ed.2d 132 (2016) . . . combined with the Fourteenth Amendment "first instance" doctrine defined in (citations omitted) create, for state court litigants in all states, an inviolate right to be judged by trial court adjudicators as to whom there exists no risk of an appearance that the adjudicator might . . . be adjudicating the litigant's dispute with a temptation that

> might undermine the Fourteenth Amendment required neutrality of the adjudicator . . . ?
>
> ***
>
> That is, the disposition of this appeal is 100% dependent on the impact of ***Williams*** . . . combined with the "first instance" doctrine . . . (citations omitted). (emphasis added).

On March 2, 2021, the Tennessee Court of Appeals entered the COA 2021 Opinion (APP. 2-18) including the following (2021 WL 796701, at *1):

> [T]he plaintiffs moved for relief from the judgment claiming that the trial judge should have recused herself. The court denied the motion for relief, and this appeal followed. We previously considered [COA 2018 Opinion] the plaintiffs' claims of the judge's "appearance of a predispositional bias" in .... In that appeal, we determined that the plaintiffs had **waived** their right to challenge the judge's impartiality. (emphasis added).
>
> ***
>
> (at 3)

During the pendency of the interlocutory appeal, the plaintiffs moved to set aside the order of dismissal in the probate court. (Citation omitted).

***

> [p]laintiffs argued that the order of dismissal was "void *ab initio* . . . per se, a violation of the Fourteenth Amendment Due Process."

***

(at *3)

But unlike their previous effort, they supported their factual assertions with an affidavit by their counsel . . . .

***

(at *3–4)

We addressed that same factual claim in the prior appeal. Wright, 2018 WL 3546784, at *2 [COA 2018 Opinion] and we deemed it **waived**. *Id.* at *4. (emphasis added).

***

(at 6)

> We disagree that *Williams* is inconsistent or incompatible with Tennessee law.
>
> ***
>
> [D]ue process rights may be **waived**. (Citation omitted). And in the previous appeal, we determined [COA 2018 Opinion] that all the plaintiffs' claims about the probate judge had been **waived**. *Wright*, 2018 WL 3546784, at *4. (emphasis added).

See Wright v. Buyer, No. W2019-01157-COA-R3-CV, 2021 Tenn. App. LEXIS 79 (Tenn. Ct. App. Mar. 2, 2021).

On June 15, 2021, the Tennessee Supreme Court, with no comment, entered an order (APP. 1) denying Petitioners' application (APP. 109-112) for permission to appeal the COA 2021 Opinion (APP. 4-18). *See* Wright v. Buyer, No. W2019-01157-SC-R11-CV, 2021 Tenn. LEXIS 200 (Tenn. June 15, 2021) (per curiam).

Outcome Below

The COA 2021 Opinion (APP. 2-18) affirmed the trial court final judgment (APP. 33-39) dismissing Petitioners' case by concluding that Petitioners **waived** Petitioners' right to ask that the

trial judge to recuse herself because she adjudicated with the appearance of undermined neutrality.

The Tennessee Supreme Court denied (APP. 1) the application (APP. 109-112) of Petitioners asking the Tennessee Supreme Court to permit an appeal of the COA 2021 Opinion (APP. 4-18) to the Tennessee Supreme Court to opine on the force and effect of *Williams* in Tennessee.

This Court's Relevant Precedent

Interpreting Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 883–84, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009) and Withrow v. Larkin, 421 U.S. 35, 47 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975) to identify "bias" and "prejudgment" as two separate disqualifiers, this Petition is not about "bias" but instead concerns "prejudgment."

In *Rippo v. Baker*, ___ U.S. ____, 137 S.Ct. 905, 197 L.Ed.2d 167 (2017) (per curiam) ("*Rippo*"), this Court issued an opinion reaffirming *Williams*. Additionally, in a 2019 concurring opinion, Justice Sotomayor opined:

> The risk that a judge might "be so psychologically wedded to his or her previous position" that he or she will "consciously or unconsciously avoid the appearance of having erred or changed position." And it [Supreme Court] has

> warned that a judge's "personal knowledge and impression" of a case may sometimes outweigh the parties' arguments."

Isom v. Arkansas, 140 S. Ct. 342, 344 (2019) (Sotomayor, J., concurring).

The *Williams* standard is objective, meaning absolute. An iota of appearance of undermined neutrality is the same as a ton of appearance of undermined neutrality.

This Case

Petitioners respectfully contend that reading the affidavit (APP. 94-102) filed by Petitioners which detail the basis for the claim of the trial judge's disqualification ends the necessity for any further inquiry as to whether the trial judge, according to *Williams*, was disqualified to adjudicate any case where the question was whether revocable living trusts are lawful in Tennessee. This is especially so when considered in combination with the affidavit (APP. 43-57, 58-63) filed in support of the motion to recuse the trial judge's retired predecessor. Not a single statement in any of the affidavits has ever been refuted or questioned for accuracy.

Petitioners respectfully refer the Court to the affidavit (APP. 94-102) to compare the descriptions in the COA 2021 Opinion and the COA 2019 Opinion. Respectfully, Petitioners suggest that the affidavit

(APP. 94-102.) is substantially more informative than described by the trial judge or the COA 2019 Opinion the COA 2021 Opinion, which materially downplay what appears in the affidavit.

More important is the information the Court, in *Williams*, found enough to disqualify Chief Justice Castille in comparison with the information in Petitioners' affidavit (APP. 94-102).

One of the four bits of information on which the Court relied, in *Williams*, was the concurring opinion Chief Justice Castille wrote in the case at issue there. *See Williams*, 136 S. Ct. at 1905. The trial judge below, in the order denying the superseding recusal motion (APP. 30-32), brushed off the affidavit (APP. 28 n.6, 37, 80-84) as "**innuendo and suppositions**" and "no evidence," thereby, bespeaking a state of mind that, when considered with other circumstances, is a relevant bit of information probative of the disqualification question. (emphasis added). The Court also found other information relevant: (1) the 28-year-old memorandum signed by Chief Justice Castille giving approval to an assistant district attorney to seek the death penalty in the prosecution; (2) 19-year-old newspaper articles covering Chief Justice Castille's campaign for election to the Pennsylvania Supreme Court reporting that Chief Justice Castille stated he was in favor of the death penalty; and (3) the notion that because Chief Justice Castille's former assistant was found to have committed *Brady* violations, Chief

Justice Castille may have formed a pre-case state of mind to respond to criticism of the DA office. *See Williams*, 136 S. Ct. at 1903, 1907-08.

Thus, *Williams* teaches that information garnered to establish that a judge is disqualified by an appearance of presuppositional prejudgment need not be "evidence," in the sense that the information need be admissible evidence under rules of evidence.

Williams additionally teaches that an appearance of dispositional prejudgment is the product of circumstances, some with minimal and some with greater probative significance, tacked together, even if no one of the circumstances standing alone might establish an appearance of undermined neutrality.

The COA 2021 Opinion provides information which is probative of a state of mind which is counter to judicial neutrality, like the words of Chief Justice Castille in Chief Justice Castille's concurring opinion. Standing alone, the words in Chief Justice Castille's concurring opinion would not be enough information but, as with all circumstantial evidence, it is the cumulative effect of evidence made up of bits and pieces.

The COA 2021 Opinion goes to extraordinary lengths to evade dealing, head-on, with what the trial judge did. Instead, to bury the trial judge's appearance of undermined neutrality, the COA 2021

Opinion sweeps the egregious abandonment of the trial judge's neutrality under the "**waiver**" rug and, eliminates altogether even an appraisal of the affidavit (APP. 94-102). If **waiver** is a means to suppress "evidence" of a disqualifying pre-case state of mind, *Williams*, in practical effect, is lame.

The magnitude of a litigant **waiving** the litigant's right to have a neutral judge adjudicate the litigant's case cannot be overstated. It is unimaginable that a sane litigant would choose to be judged by a nonneutral person. The only reason to come to court is to have a dispute adjudicated by a neutral person, i.e., a judge.

The point is the fact that the right of a litigant to have a claim adjudicated by a judge who is neutral is a Fourteenth Amendment **structural** constitutional right. This places the decision as to whether the judge must be a neutral judge out of the hands of the litigant.

Yet, the COA 2021 Opinion adjudicates that, even an involuntary "**waiver**," by a litigant handicaps a litigant so that, no matter how nonneutral/non-impartial the judge might be, the litigant is forced to endure the injustice to disable the litigant from raising a question about whether the trial judge is disqualified.

Per *Williams,* because the Fourteenth Amendment right to a trial judge who is not

burdened by an unconstitutional appearance of undermined neutrality is a structural constitutional right, no litigant can **waive** the right; thus, any state law that purports to make possible a **waiver** violates the Supremacy Clause.

Williams holds that a state judge who refuses to withdraw from adjudicating a litigant's claim where there exists an objectively discernable appearance of undermined neutrality, even accepting that the litigant experienced no adverse effect because of the state court judge's undermined neutrality, the adjudication had to be reversed because a judge adjudicating with undermined neutrality is a structural violation of the Fourteenth Amendment. *See Williams*, 136 S. Ct. at 1909.

This is no different from subject matter jurisdiction. No court nor any court's adjudicator can adjudicate a litigant's claim if the court does not have attached jurisdiction over the subject matter.

There is no set of circumstances, no consent and no **waiver** and no court order, from anywhere and any level in the judicial hierarchy, that can empower the jurisdictionless court to adjudicate any claim.

Why should an adjudication by a judge who adjudicates with a predispositional state of mind that casts doubt on the neutrality of the judge be any different from an adjudication by a jurisdictionless

court? Petitioners contend that there is no justification for any difference.

The reason **waiver** and consent cannot be efficacious is because conceding that a jurisdictionless court can adjudicate anything renders the structure of the system by which justice is administered inoperative.

This Court has been circumspect in its designation of constitutional errors which are so important to get the special treatment accorded structural constitutional errors. On point, this Court stated as follows in *Neder v. United States*, 527 U.S. 1, 8–9 (1999):

> We have recognized that "most constitutional errors can be harmless." *Fulminante, supra,* at 306, 111 S.Ct. 1246. "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Rose v. Clark,* 478 U.S. 570, 579, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986). Indeed, we have found an error to be "structural," and thus subject to automatic reversal, only in a "very limited class of cases." *Johnson v. United States,* 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (citing *Gideon v. Wainwright,* 372

U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (complete denial of counsel); *Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased trial judge); *Vasquez v. Hillery,* 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins,* 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of self-representation at trial); *Waller v. Georgia,* 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (denial of public trial); *Sullivan v. Louisiana,* 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (defective reasonable-doubt instruction)).

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Those cases, we have explained, contain a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Fulminante, supra,* at 310, 111 S.Ct. 1246. Such errors "infect the entire trial process," *Brecht v. Abrahamson,* 507 U.S. 619, 630, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), and "necessarily render a trial fundamentally unfair," *Rose,* 478 U.S., at 577, 106 S.Ct. 3101.

As noted, in 1927, this Court held that an adjudication by a judgment by a nonneutral judge is a structural constitutional error. Tumey v. Ohio, 273 U.S. 510 (1927). By *Williams*, this Court ruled that, even if there is neutrality, an objective appearance of a presuppositional state of mind that might undermine the judge's neutrality, like actual nonneutrality, is a structural constitutional error.

Williams, practically speaking, reduced actual bias to a nonfactor, indeed, an immateriality.

The infection of the entire process can be accomplished, if litigants, one by one, can be found by courts to have **waived** the structural Fourteenth Amendment right to have their case adjudicated by a judge not disqualified by the appearance of presuppositional state of mind.

The Tennessee Court of Appeals below affirmed the trial court's refusal to recuse for no reason other than the COA's opinion that Petitioners **waived** Petitioners' right to assert that the trial judge adjudicated with an objective appearance of a presuppositional state of mind that undermined the judge's neutrality. In short, the **waiver** was found to be that Petitioners' recusal motion was not fully compliant with Rule 10B.

Rule 10B requires that, for a litigant to challenge whether a judge is disqualified, the litigant must file a timely recusal motion to be decided by the

judge whose qualifications are being questioned. The penalty for the litigant who fails to file a Rule 10B recusal motion is a **waiver** of the litigant's structural constitutional right to be adjudged by a judge unburdened by an objective appearance of a presuppositional state of mind that undermines the judge's neutrality.

Petitioners contend that Rule 10B is facially unconstitutional because Rule 10B §1.01 puts in place a barrier to access to the rights, privileges and guarantees, protected by the Fourteenth Amendment and the Supremacy Clause, for litigants in Tennessee to have the litigants' cases adjudicated by a judge unburdened by an objective appearance of a presuppositional state of mind that undermines the judge's neutrality.

Between the date of the COA 2019 Opinion and the date of the COA 2021 Opinion, the Tennessee Supreme Court decided Cook v. State, 606 S.W.3d 247 (Tenn. 2020) wherein it held that a litigant need not file a motion to recuse or be held to timeliness requirements, if the judge's departure from neutrality standards was "egregious." Thus, Cook holds that, if the reason for the disqualification is egregious, a Rule 10B recusal motion is not required.

What Cook considered egregious was the trial judge, in open court candidly pouring out his state of mind that overwhelmingly voiced that he was

nonneutral, though never so admitting. *See* Cook, 606 S.W.3d at 257.

Williams has not one word that allows for prerequisite motions to recuse as portals through which litigants must climb to expose a judge with an objective appearance of undermined neutrality.

Petitioners contend that what is more egregious than the outspokenness of the trial judge in Cook, in terms of destruction of the structure, are the mute judges or those who deny their disqualifying states of mind.

It is telling to contemplate that, if the trial judge in Cook had remained mute about his state of mind, it would never have been known that the litigant would have been judged by a judge disqualified by a disqualifying state of mind.

Even more disconcerting is the thought that the trial judge in Cook could know of his unstated state of mind and pause for 10 seconds in not *sua sponte* withdrawing from the case.

How many prior cases of prior litigants did the Cook trial judge adjudicate with the same disqualifying state of mind?

The instant Petition is presenting a case where the trial judge both remained mute, then, when

challenged by a recusal motion denied a mind proven by the affidavits to be disqualifying state of mind.

In Tennessee, today, a litigant can be forced to have the litigant's dispute adjudicated by a nonneutral judge if the litigant "**waived**" (by not complying with a curable procedural filing requirement technicality) the litigant's Fourteenth Amendment structural constitutional right to be judged by an adjudicator without even an appearance of undermined neutrality.

Reasons for Granting the Petition

Petitioners recognize that the Court generally avoids granting certiorari merely because there has been a gross miscarriage of justice in a private dispute between litigants in state courts.

Petitioners suggest that the problem in the country that the instant Petition presents is the same problem in the country that attracted the Court's attention in 2015, except the problem has multiplied in intensity and magnitude, and, despite *Williams'* five (5) year history as the law of the land, is still a problem growing day-in-and-day-out.

The problem, as Petitioners see it, was and remains the constantly deteriorating public confidence in courts and judges. In 2015 and today, Petitioners respectfully observe, from the fact that the Court's Justices are openly speaking in the public

forum about the problem, that there remains a problem.

This Court's decision in *Williams* explained that the appearance of undermined neutrality in the court system damages the "public legitimacy" of the courts. 136 S. Ct. at 1909. Logically, the courts' legitimacy is based upon public confidence in the courts.

Nothing destroys public confidence in judges and courts more than the appearance of non-neutrality. This is consistent with the principles expressed in *Williams* making clear that the inquiry is not whether non-neutrality was present, but whether objectively, the potential for non-neutrality is present. 136 S. Ct. at 1905.

The words of Justice Frankfurter explaining his decision to recuse himself from a 1952 case before this Court bear quoting:

> The guiding consideration is that the administration of justice should reasonably appear to be disinterested [neutral] as well as be so in fact. (emphasis added).
>
> This case for me presents such a situation. My **feelings** are so **strongly engaged** . . . that I had better not participate in judicial judgment upon it [subject matter to be adjudicated]. (emphasis added).

Pub. Utilities Comm'n of D.C. v. Pollak, 343 U.S. 451, 467 (1952).

Like none other, granting the instant Petition is the opportunity for the Court to reverse the trend in a public way that sends a message to the public and the judiciary in which the public must vest confidence, if a necessary minimum efficiency in administration of justice is to prevail.

Petitioners argue that *Williams* rightly identified the problem behind the problem. What causes the distrust of courts and judges?

Increasingly, Petitioners suggest that observation evidences that, in the public's mind, judges adjudicate concerned about precedent only to the extent that precedent leads to an outcome satisfactory to the judge.

Petitioners contend that *Williams* was well-intended to staunch judges who may have a cavalier view that precedent can be sublimated to judges' personal view of what a "good" and a "just" outcome is.

If *Williams* recognized the problem and the problem behind the problem, why has *Williams* not had the salutary effect that it was intended to have?

Why has the problem behind the problem exacerbated during the five (5) years *Williams* has

been the structural constitutional law of every state in the United States?

How can the Court put the missing effect in *Williams* by granting the Petitioners' Petition?

Study of the data which granting this Petition requires to be examined will reveal that judges have shunned *Williams*, rather than embraced *Williams*. The Petition presents a case illustrating this phenomenon in Tennessee as the case wound its way through Tennessee's courts.

Petitioners respectfully contend that a deficit in *Williams* is that *Williams* does not overtly root out the phenomenon that causes some judges to simply ignore *Williams* to death.

On point, since the Court's 2016 decision in *Williams* declaring, via the Supremacy Clause, the law of the land concerning the Fourteenth Amendment Due Process Clause and judge disqualification, through May 2021, 127 appellate court decisions affirming trial courts denial of recusal motions, and **38 were based on waivers** for failing to comply with **Rule 10B.**

There were 79 trial court denials that were affirmed for lack of sufficient evidence. Who knows what the adjudicating judges considered "evidence?" There is no constitutionally mandated standard. What "evidence" of a pre-case state of mind that risks

the perception of an appearance of undermined neutrality is in the eye of the beholding judge. Purely resting on the luck of the draw. Who could consider this to be acceptable to Anglo-American jurisprudence?

Some of the 79 cases were because the evidence was not sufficiently pervasive (implying that non-persuasive lack of neutrality is not a violation), others were because the evidence of lack of neutrality did not prejudice the litigant, i.e., a clear violation of the structural constitutional right rule.

Including the Tennessee Supreme Court's Cook case, considering all 206 cases decided mentioning recusal in any form, only 2 decisions even acknowledge the existence of *Williams*. (APP. 113-150).

Applying the *Williams* standards for when a reasonable third person might detect a risk of an appearance of an undermined neutrality allows for searching self-examination by judges, with doubts resolved in favor of withdrawal. If judges are "hyper-vigilant" in self-examination, before taking on a case, judges are able to maintain the judge's privacy and the risk of an appearance of undermined neutrality is averted.

Williams fails, also, clearly to articulate that a "hyper-vigilant" approach on the part of judges lessens the chance of unseemly recusal motions

which, inherently, are disruptive to the administration of justice, pitting a litigant and a judge in an adversarial relationship.

Petitioners respectfully suggest that there are two other deficits in *Williams* which leaves *Williams* falling short of attempts to solve the problem and the problem behind the problem.

Granting the instant Petition gives the Court an opportunity to eliminate both deficits.

The first deficit Petitioners respectfully suggest is that *Williams* leaves the opportunity to give or force on litigants artificial "**waivers**."

This creates the possibility, as in the case which the Petition presents, that litigants, with a structural constitutional right to have the litigants' case adjudicated by a judge with no appearance of undermined neutrality, wind up having the litigants' case adjudicated by judges with overt and egregious appearances of undermined neutrality.[1]

If, by any means, judges with appearances of undermined neutrality can be placed in a position as a judge of litigants' cases, the system (structure) for administration of justice is tarnished every time that happens.

It is for this same reason that no litigant is permitted to consent to a ruling by a court with no subject matter jurisdiction. It is not the litigant

which is jeopardized by a jurisdictionless court adjudicating. It is the whole structure (system) which is in jeopardy.

Petitioners respectfully suggest that the second *Williams*' shortfall is that there is no clear-cut standard for the burden of proof, more particularly the quality and quantity of information that is probative on the question of whether a judge might adjudicate or has adjudicated with an appearance of undermined neutrality.

In the case presented by the Petition,[2] a judge, with no rhyme or reason, simply declared the information submitted to be "no evidence" and, even if as grossly disqualified as the judge below, the judge proceeded to adjudicate the case, and Petitioners were helplessly sucked into a black hole with Petitioners' apparently useless structural constitutional right in hand. This Petition presents the Court a case fitted to eliminate this second shortfall in *Williams*.

With these three (3) clarifications of *Williams*, Petitioners respectfully contend that the problem behind the problem will be reversed as the public begins to absorb that the judges are adjudicating with no pre-case state of mind able to raise a question as to any judge's neutrality. This very simple and easily implementable change might stir up the status quo, which is largely responsible for the problem and the problem behind the problem, but a

new status quo will restore missing public confidence.

When a litigant can go into a courtroom confident that she/he/it will come out with his/her/its case having been adjudicated by a judge who had no pre-case state of mind that appeared to interfere with undiluted rule of law, evenly applied, public confidence will be restored.

Presently, there are too many horror stories, like the plight of Petitioners, that cause litigants to go to court with fingers crossed hoping that the outcome is one not controlled by a pre-case state of mind of the judge, but with little or no confidence on which to base a belief that the hope will come true.

There are other reasons why the Court should grant this Petition.

How the Court decides this case effects every single citizen and other person who depends on the judges who occupy seats on every bench in the United States. This includes those who never go to court. Without courts, those who do not go to court are left in a lawless state of being.

If the Court exercises its indubitable unfettered discretion to deny this Petition, for what seems to the Court to be good reason, the message will overpower the reason. The public confidence is at stake, again.

Petitioners are part of the "public" whose confidence courts and judges must have for Anglo-American justice to survive. Experiences like the Petitioners' experience are repeated and passed on from person to person, multiplied over and over and surface as the public's confidence or lack thereof in courts and judges.

This is a Petition from Petitioners who, by personal sacrifice, sheer persistence, and grit, have been able to hang on to get to the Court's door asking for not one thing more than an adjudication by a neutral trial judge.

Petitioners hope not to be turned away because they are in that class of citizens who endure the plight of regular people who have come to expect, when they contest establishment movers and shakers, to be shuffled to the side. That said, Petitioners have made it to the Court's door because there is still a residue of belief that this is the country they have trusted and a residue of hope that there remains a place for Petitioners on the Court's docket to plead for their structural constitutional right to be judged by neutral trial judges.

Finally (and most importantly), Petitioners are representative of the mass of everyday civil litigants across the country who go into court with ordinary civil disputes expecting a neutral judge to apply nothing but the rule of law and resolve the dispute.

These masses of litigants never get a hearing before the Court and rarely are ever heard by any appeal because such litigants (1) do not have the wherewithal to pay skilled appellate lawyers, especially to this Court, (2) do not have disputes sizable enough to justify appeals, if they had the resources to appeal, (3) do not have hot button issues to attract funding sources with ideological or pragmatic agendas and (4) are in an income/assets level making them ineligible for public assistance, even though they are not normally prone to accept public assistance.

Conclusion

The Petition presents three intertwined issues the resolution of which rectifies the violation of Petitioners' structural constitutional right and, at the same time, gives the Court opportunity to assess whether *Williams*, since 2016, has had the effect on jurisprudence in the United States that the Court, in 2016, intended *Williams* to have.

Petitioners were denied all right to press Petitioners' claims that the trial judge adjudicated Petitioners' case was burdened by a pre-case state of mind that risked the appearance of undermined neutrality. The only reason, according to the COA 2021 Opinion, was because Petitioners inadvertently failed to comply with a filing detail of Rule 10B, and this failure was a forever "**waiver**" of Petitioners' right to be adjudged by a neutral trial judge.

The next issue presented by Petitioners segues from the first issue. Rule 10B is facially a structural violation of the Fourteenth Amendment and, as such, is facially null and void.

The third issue would be unnecessary but for the trial judge's holding that the affidavit submitted by Petitioners was simply "**innuendo and suppositions**" and "no evidence." (emphasis added).

The necessity of the third issue arises because, even if Rule 10B is declared unconstitutional, the effect is a remand to the trial court. On remand, the trial judge could repeat the "**innuendo and suppositions**" and "no evidence" holding and overrule the reinstated motion to recuse and Rule 60.02 Set Aside Motion. (emphasis added).

If, as Petitioners contend, the information in the submitted affidavit is sufficient information according to *Williams*' standards, the appellate process would simply start over, if the trial court reinstated the ruling that the recusal motion is based on information that was not evidence.

Collaterally, the fact that *Williams* does not expound on the quantum or quality, or burden of proof leaves a gaping hole in *Williams*' that leaves it ineffective.

For the reasons hereinbefore stated Petitioners request the Court to grant this Petition and:

1. Hold that Rule 10B is facially unconstitutional, null, and void, thus, no basis for the COA 2021 Opinion to negate Petitioners' recusal motion or Petitioners' Rule 60.02 Set Aside Motion.

2. Hold that Petitioners did not **waive** Petitioners' structural constitutional right to present for adjudication whether the trial judge's pre-case state of mind risked the appearance that the trial judge might or might have adjudicated Petitioners' case burdened by undermined neutrality.

3. Hold that Petitioners' affidavit in support of Petitioners' recusal motion and Petitioners' Rule 60.02 Set Aside Motion included sufficient probative information to find that the trial judge was disqualified to adjudicate Petitioners' case.

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