No. ______

In the Supreme Court of the United States

MADISON COUNTY, ILLINOIS, *et al.*,
Petitioners,

v.

REGINALD PITTMAN, by and through his guardian and next friend, ROBIN M. HAMILTON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

John L. Gilbert
Counsel of Record
SANDBERG PHOENIX
& von GONTARD P.C.
600 Washington Ave., 15th Floor
St. Louis, MO 63101
314-231-3332
314-241-7604 (Fax)
jgilbert@sandbergphoenix.com

Attorney for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Appellate courts have universally accepted the abuse of discretion standard for reviewing evidentiary decisions. Under this standard, the circuit court determines if the district court made a legally erroneous decision that was prejudicial.

In this case, the United States Court of Appeals for the Seventh Circuit overturned the jury's verdict after concluding the District Court erroneously excluded from evidence a videotaped witness interview and the transcript from that interview. The specific questions presented are:

I. Did the Circuit Court have authority to make a finding of fact contrary to the District Court's findings regarding the existence of an agreement as to the admissibility of the videotaped interview and transcript?

II. Is a Circuit Court's determination that excluded evidence "could have" affected the jury's verdict sufficient to constitute prejudice when applying an abuse of discretion standard?

III. Can a District Court's decision to exclude cumulative evidence constitute prejudice when applying an abuse of discretion standard?

PARTIES TO THE PROCEEDING

Petitioners (Defendants-Appellees below): County of Madison, State of Illinois; Robert Hertz; Sergeant Randy Eaton; and Matt Werner.

Respondent (Plaintiff-Appellant below): Reginald Pittman, by and through his Guardian and Next Friend, Robin M. Hamilton.

RULE 29.6 STATEMENT

Petitioners consist of individuals and a governmental corporation. As such, none of the petitioners have a parent corporation or shares held by a publicly traded company. Therefore, a corporate disclosure statement is not necessary.

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Petitioners, the County of Madison, Illinois, Sheriff Robert Hertz, Sergeant Randy Eaton, and Matt Werner, respectfully pray that a writ of certiorari issue to review the United States Court of Appeals for the Seventh Circuit's judgment below.

OPINIONS BELOW

The Southern District of Illinois' September 27, 2011, Order and Judgment granting summary judgment is attached as appendix F. The Southern District of Illinois' September 4, 2012, Order denying Reginald Pittman's motion for new trial is attached as appendix E. The Seventh Circuit Court of Appeals' March 10, 2014, Opinion and Judgment reversing summary judgment is published at 746 F.3d 766 and is attached to this petition in appendix D.

The subsequent Southern District of Illinois' Clerk's Judgment, dated March 12, 2015, vacating the prior summary judgment is attached as appendix C. The Southern District of Illinois' July 28, 2016, Order denying plaintiff's motion for new trial is attached as appendix B. The Seventh Circuit Court of Appeals' July 14, 2017, Opinion at issue here is published at 863 F.3d 734 and is reproduced in appendix A. The Seventh Circuit Court of Appeals' Order dated August 18, 2017, denying rehearing en banc is attached in appendix G.

JURISDICTION

Petitioners seek review of the United States Court of Appeals for the Seventh Circuit's Opinion entered on July 14, 2017. Timely petitions for rehearing and rehearing en banc were denied on August 18, 2017. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) U.S. Const. amend. VII

   In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

2) 28 U.S.C. § 2111 – Harmless Error

   On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

STATEMENT OF THE CASE

Reginald Pittman ("Pittman") was detained at the Madison County Jail ("Jail") from August 16, 2007, to December 19, 2007. On December 19, 2007, Pittman used a blanket in an attempt to commit suicide by hanging. As a result, he experienced brain damage and became legally disabled.

Pittman filed suit against various defendants in the United States District Court for the Southern District of Illinois on December 16, 2008, for alleged 42 U.S.C. § 1983 and state law violations in which he claimed the defendants were deliberately indifferent to his suicide risk by failing to provide him medical attention and protection. The District Court granted defendants' summary judgment motion, which the Seventh Circuit affirmed in part, reversed in part, and remanded. *Pittman ex rel. Hamilton v. Cnty. of Madison*, 746 F.3d 766 (7th Cir. 2014). Specifically, the Seventh Circuit determined there was a fact issue regarding the claims against Petitioners Werner and Eaton (two jailers), which meant Petitioners Madison County and Hertz (jail supervisor) could be vicariously liable on Pittman's state law claims.

On March 2, 2015, an eight-day trial commenced against Petitioners Werner, Eaton, Hertz, and Madison County. One of Pittman's witnesses was Bradley Banovz, an inmate who occupied the cell next to Pittman and who Jail personnel interviewed on video shortly after Pittman's suicide attempt. At trial, Banovz was the only witness to testify Pittman on December 17, 2007, made a crisis intervention request (a request to speak with crisis counselors) to Petitioners and that Petitioners allegedly ignored the request. Banovz's testimony formed the basis for Pittman's state law claims, which alleged Petitioners knew Pittman's emotional state and failed to act appropriately in response.

During Banovz's trial examination, Pittman moved to admit and play the video interview and also moved to admit the written interview transcript. Petitioners objected on the basis of hearsay and improper foundation. Pittman suggested several hearsay exceptions applied but, more importantly, argued the interview video should be admitted because the parties had agreed to its admissibility prior to trial. Despite these arguments, the District Court sustained the objection and prohibited the admission of the video interview and its transcript.

Nevertheless, the District Court allowed Banovz to review the transcript of the videotaped interview during his trial testimony in order to refresh his recollection. With his memory refreshed, Banovz was able to provide to jurors the information he disclosed during the interview. Specifically, Banovz described Pittman as appearing depressed and worried during the days leading up to December 19, 2007. He also stated Pittman spoke with Petitioners Werner and Eaton and that Pittman during these conversations indicated he needed to see crisis members because he was depressed and suicidal. Further, Banovz indicated he urged Petitioners to oblige and allow Pittman to meet with crisis members, but no request for crisis was ever made. The District Court allowed both parties' counsel to use the transcript to refresh Banovz's recollection and to impeach him whenever Banovz's testimony deviated from his interview responses.

Banovz's testimony was sharply disputed. Jail nurse Barbara Unfried testified the jail utilizes sick slips, which inmates can use to indicate they are feeling physically or mentally unwell. Unfried testified Pittman never provided her a sick slip near the time of his attempted suicide. Similarly, Petitioner Eaton stated he would have acted and requested crisis had Pittman indicated he was depressed or suicidal. Petitioner Werner testified he could not recall Pittman ever making a crisis request and that Banovz never told him Pittman was suicidal. Additionally, Detective Presson testified Banovz admitted to being asleep at the time of the incident. Moreover, cross-examination of Banovz revealed he had been in the Jail at least 50 different times, felt medical personnel mistreated him, and was generally "pisse[d]" at the Jail.

The jury returned a verdict in Petitioners' favor on March 12, 2015, and judgment was entered the same day. Pittman's motion for a new trial was denied on July 28, 2016. Thereafter, Pittman appealed to the Seventh Circuit and argued, among other things, the District Court erred by excluding the Banovz interview video and transcript that the parties supposedly agreed was admissible.

A three-judge panel of the Seventh Circuit issued a split opinion in which the majority consisting of Circuit Judges Posner and Kanne reversed and remanded the case after concluding the District Court erroneously excluded the interview video and transcript. Circuit Judge Manion dissented because he determined an agreement on the video's and the transcript's admissibility was not established. Moreover, Judge Manion determined there was no prejudice in excluding these materials even if there was an agreement on admissibility because Banovz testified consistently with his previous interview. Nevertheless, the Seventh Circuit denied Petitioners' request for an en banc rehearing.

Petitioners now seek a writ of certiorari from this Honorable Court based on the important questions this case presents.

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUIT IMPROPERLY ENGAGED IN FACT FINDING AND ISSUED AN UNPRECEDENTED DECISION CONFLICTING WITH PRECEDENT FROM SISTER CIRCUITS.

The Seventh Circuit's decision to reverse the jury's verdict in Petitioners' favor relied solely on the District Court's exclusion of the interview video and transcript. *Pittman*, 863 F.3d at 736 (holding "Pittman's brief raises several other issues relating to how the judge conducted the trial. None of these arguments has merit."). The District Court excluded these materials after sustaining Petitioners' timely objection and after determining Pittman failed to provide sufficient foundation to admit these materials as (1) stipulated admissible statements or (2) an exception to the rule against hearsay. *Id.*

Instead of deferring to the District Court's discretion, the Seventh Circuit made its own finding of fact and then ***exclusively*** relied on this finding to reverse and vacate the District Court. *Id.* at 738-39. In particular, the Seventh Circuit found ***as a matter of fact*** that an informal, extrajudicial agreement (which only Pittman characterized as a "stipulation") existed between the parties and that the agreement concerned and confirmed Banovz's hearsay statements' admissibility. *Id.* In other words, as dissenting Circuit Judge Manion noted, the Panel's decision holds excluding evidence in the face of an out-of-court agreement ***whose existence is questionable*** is an abuse of discretion. *Id.*

A. The Seventh Circuit relied on inapplicable rules and authority to support its decision to overrule the jury's verdict.

Judges Posner and Kanne cite several authorities that supposedly support their belief Banovz's interview video and transcript were admissible. For example, the opinion references Fed. R. Civ. P. 36(a), which establishes the process by which "[a] party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters …." *Pittman*, 863 F.3d at 736. Under the Rule, a party may seek admissions as to "facts, the application of law to fact, [] opinions about either; and … the genuineness of any described documents." Fed. R. Civ. P. 36(a)(1)(A)-(B). If such an admission is made, it is "conclusively established." Fed. R. Civ. P. 36(b).

The problem with relying on Rule 36 to conclude the District Court erred in this case is the District Court was presented with no evidence of a Rule 36 admission. In fact, Petitioners made no Rule 36 admission as to the admissibility of Banovz's interview video and transcript.

Moreover, the Seventh Circuit cites Fed. R. Civ. P. 16(e) to support its opinion the interview video and transcript were admissible. *Pittman*, 863 F.3d at 736. Rule 16 discusses a district court's authority to hold a pretrial conference as well as what may and must be addressed in the conference. At the conference, the district court has the authority to obtain "admissions and stipulations about facts and documents to avoid unnecessary proof, and [may] rul[e] in advance on the admissibility of evidence." Fed. R. Civ. P. 16(c)(2)(C). Rule 16(e) then provides the district court with authority to hold a final pretrial conference and formulate "a plan to facilitate the admission of evidence" at trial. The problem is the District Court in this case did not obtain admissions and stipulations regarding the Banovz interview video and transcript at the pretrial conference. Consequently, Rule 16(e) does not form a basis for admitting the Banovz materials.

Finally, the Seventh Circuit cites *United States v. Mezzanatto*, 513 U.S. 196 (1995), to support its assertion that evidentiary agreements are binding even if no admission or stipulation is made. *Mezzanatto*, however, provides no guidance here because it involved an agreement to waive exclusionary provisions in the Federal Rules of Criminal Procedure regarding plea statements and the use of ***written stipulations*** in trial practice. *Id.* at 203 (recognizing "[p]rior to trial, parties often ***agree in writing to the admission of otherwise objectionable evidence***, either in exchange for stipulations from opposing counsel or for other strategic purposes") (emphasis added). The Seventh Circuit was mistaken when it relied on *Mezzanatto* because this is a civil case, no plea discussions are involved, and no written agreement or stipulation was established.

In sum, the Seventh Circuit did not cite any authority authorizing a district court to disregard foundation requirements in the face of a party's proper objections simply because the evidence's proponent alleges the existence of an unwritten, out-of-court agreement concerning the evidence's admissibility.

The Seventh Circuit's decision is thus entirely unprecedented.

B. The District Court properly concluded insufficient evidence existed to support the existence of an informal, out-of-court agreement as to the admissibility of Banovz's video interview and transcript.

The District Court on several occasions expressed its disbelief as to whether the parties agreed Banovz's video interview and transcript were admissible. Initially, the Court stated "sufficient foundation [had not been] laid to allow this statement in independently." (Tr. Tran. Day 2, 94:21-24.) After Pittman continued his attempts to offer the Banovz interview video and transcript, the Court began referring to the supposed agreement as "some agreement that [Pittman] allege[s] existed." (Tr. Tran. Day 2, 144:24-25.) Shortly thereafter, the Court questioned whether it was in a position to "somehow enforce an agreement that [Pittman] say[s] existed." (Tr. Tran. Day 2, 145:10-12.)

Ultimately, the District Court refused to admit the video and transcript because Pittman could not provide adequate support indicating the agreement truly existed. The supposed agreement was discussed on multiple occasions during the course of the trial, but the District Court concluded it was in no position to enforce some alleged agreement given the number of "variations" in the agreement presented. (Tr. Tran. Day 2, 148:04-09.)

Instead of following the normal channels for obtaining an agreement, such as seeking an admission in discovery or asking for a stipulation during the pretrial conference, Pittman decided to present the Court with an unwritten amorphous oral statement of an agreement. As a result, the District Court decided not to enforce this alleged agreement. Nevertheless, the Seventh Circuit decided to become fact finder and determined an agreement did exist, which was an invalid encroachment on the District Court's discretion that this Honorable Court should correct.

C. The Seventh Circuit's fact finding creates a direct conflict with precedent from sister Circuit Courts.

During trial, the District Court was presented with an ambiguous accounting of some alleged out-of-court agreement. Due to this ambiguity, the District Court determined the agreement either did not exist or did not require the admission of Banovz's interview video and transcript. Either way, the Seventh Circuit did not afford the District Court's decision any deference.

The Seventh Circuit's decision to engage in fact finding and to determine the existence and scope of an alleged agreement between the parties directly conflicts with precedent from numerous Circuit Courts. For example, the Eleventh Circuit has plainly stated a "district court's interpretation of [a] stipulation must be accorded great deference," something not done here. *United States v. Davis*, 787 F.2d 1501, 1504 (11th Cir. 1986) (finding ambiguous agreements should be defined by the district court). In the same vein, the Third Circuit has held "the legal resolution of any particular ambiguity in [a] stipulation's construction is not possible in the absence of factual findings by the district court as to what the parties intended the ambiguous provisions to mean." *Washington Hosp. v. White*, 889 F.2d 1294, 1299 (3d Cir. 1989).

The United States District Court for the Eastern District of Michigan in an analogous case reviewed Second Circuit precedent requiring district courts to determine an agreement's or stipulation's existence and scope. *Rose v. Saginaw Cnty.*, 353 F. Supp. 2d 900, 917 (E.D. Mich. 2005). In *Rose*, the plaintiff continually referenced a supposed agreement between the parties as to § 1983 liability and produced letters, deposition testimony, and an affidavit referencing the agreement. *Id.* Nevertheless, the United States District Court for the Eastern District of Michigan determined the agreement remained amorphous because there was "no clear and unequivocal expression of [the] agreement" and because the parties did not "reduce the stipulation to a signed writing." *Id.* at 918. Therefore, the Court refused to enforce any supposed agreement. *Id.*

Here, the District Court was given ***no*** evidence of an agreement, because Pittman produced neither a written agreement nor any clear and unequivocal expression of an agreement. As a result, the District Court refused to enforce the supposed agreement. Nevertheless, the Seventh Circuit concluded (1) it was the appropriate entity to determine whether an agreement existed and (2) there was in fact an agreement despite the District Court's contrary finding.

Currently, the Second, Third, and Eleventh Circuits state District Courts are authorized to determine whether an evidentiary agreement exists among the parties and, if so, the scope of any such agreement. The Seventh Circuit in this case, however, has held the Circuit Court is entitled to decide these issues. This Honorable Court should resolve this split among the Circuits.

II. THE COURT SHOULD USE ITS SUPERVISORY POWER BECAUSE THE SEVENTH CIRCUIT ORDERED A NEW TRIAL FOLLOWING A SUPPOSED EVIDENTIARY ERROR WITHOUT MAKING AN ADEQUATE FINDING OF PREJUDICE, A FINDING THAT ALL CIRCUITS REQUIRE.

This case involves evidentiary decisions district courts across the nation make every day and the deference those decisions are owed. The Seventh Circuit ordered a new trial following a district court's purported evidentiary error without conducting any sound prejudice analysis. This Court should grant certiorari because the Seventh Circuit's decision "so far depart[s] from the accepted and usual course of judicial proceedings … as to call for an exercise of this Court's supervisory power." Supreme Court Rule 10(a).

A. District courts are granted considerable discretion in making evidentiary decisions.

One of a trial court's essential functions is to hear objections regarding evidence to be offered to the trier of fact and then ruling on the evidence's admissibility. Fed. R. Evid. 102. Sometimes (e.g., motions in limine) the court is provided an extended period of time to receive well-researched and well-argued positions as to evidentiary items' admissibility. *In re Oak Rock Fin., LLC*, 560 B.R. 635, 637 (Bankr. E.D.N.Y. 2016). Often, however, objections are not made until a trial is in progress and the court is required to make an instantaneous ruling without the assistance of well-researched precedent. *See generally* Fed. R. Civ. P. 61. As a result, this Court has observed litigants cannot expect "perfect trials." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984). Even if perfection was attainable, our judicial system lacks the resources to provide it. *Id.* Rather than perfection, our judicial system has made a concerted effort to piece together a process that ensures fairness for all litigants. *Brown v. United States*, 411 U.S. 223, 231 (1973).

When an evidentiary objection is made in the course of a trial, the district court is in the best position to determine an objection's precise contours, to analyze the evidence's scope and nature, and to determine how that evidence fits within our system's evidentiary rules. *Collins v. Kibort*, 143 F.3d 331, 336 (7th Cir. 1998). Appellate courts are then responsible for reviewing these rulings and ensuring fairness has been provided. *Id.* In other words, the appellate courts are not simply looking for errors but rather ensuring no erroneous decision was made that affected the underlying proceeding's fairness. *Id.* This process has been coined an abuse of discretion review, which is highly deferential to the decisions made by the court closest to the evidence and the objections. *Id.*

B. The abuse of discretion standard entails a two-step review.

The appellate court performs a two-step analysis when conducting its abuse of discretion review. *Whitehead v. Bond*, 680 F.3d 919, 930 (7th Cir. 2012). First, the court considers whether an error was made. *Id.* Second, the court determines whether the error prejudiced the underlying proceedings. *Id.* An error occurs when a "trial judge's decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based that decision, or where the supposed facts found are clearly erroneous." *Collins*, 143 F.3d at 337 (quoting *Wheeler v. Sims*, 951 F.2d 796, 802 (7th Cir. 1992)) (internal citations omitted).

As stated, trials are seldom perfect. *McDonough Power Equip.*, 464 U.S. at 553. This is why errors alone are insufficient to justify overruling a lower court's judgment. *Id.* Instead, the district court must also make a prejudice finding based on whether the discovered "error has [had] a substantial and injurious effect or influence on the determination of a jury, and [whether] the result is inconsistent with substantial justice." *Whitehead*, 680 F.3d at 930 (quoting *Cerabio LLC v. Wright Med. Tech., Inc.*, 410 F.3d 981, 994 (7th Cir. 2005)).

The prejudice standard can be difficult to apply in practice and has therefore been encapsulated into an analysis of whether there was a "significant chance" the evidentiary error affected the trial's outcome. *Id.* An erroneous "evidentiary ruling [is] deemed harmless if the record indicates that the same judgment would have been rendered regardless of the error." *Blameuser* *v. Hasenfang*, 345 F. App'x 184, 186 (7th Cir. 2009) (quoting *Goodman v. Ill. Dep't of Fin. & Prof'l Regulation*, 430 F.3d 432, 439 (7th Cir. 2005)). Only when an evidentiary error casts serious doubt on a jury's decision should a reviewing court overturn the jury's verdict.

In the underlying proceedings, Pittman asserted *de novo* review was appropriate. Courts, however, have routinely reviewed stipulations and agreements for an abuse of discretion. *United States v. Kanu*, 695 F.3d 74, 82 (D.C. Cir. 2012); *Hunt v. Marchetti*, 824 F.2d 916, 918 (11th Cir. 1987); *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1097 (10th Cir. 1991); *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1368 (5th Cir. 1983). Nevertheless, even if *de novo* review is proper, it only applies in regards to interpreting the alleged agreement. *Kearns v. Chrysler Corp.*, 32 F.3d 1541, 1545-47 (Fed. Cir. 1994). The decision to admit or exclude evidence under an agreement, on the other hand, is a judgment decision within the trial court's discretion. *Id.* Therefore, prejudice must be demonstrated regardless of which standard of review is applied.

C. A prejudice analysis is applied universally throughout the Circuits.

Rule 61 of the Federal Rules of Civil Procedure originally dictated to the federal district courts that evidentiary errors should not result in a new trial absent a finding of prejudice. Fed. R. Civ. P. 61. This rule signaled the end of the era in which district courts were considered "citadels of technicality" and acknowledged perfection was unattainable. *McDonough Power Equip.*, 464 U.S. at 553. While Rule

61 was not necessarily binding on appellate courts, those courts nevertheless adopted the custom whereby appeals of evidentiary decisions were reviewed for harmless error. *Id*. at 554. Congress decided to bind appellate courts to this harmless error analysis officially by enacting 28 U.S.C. § 2111, which directs the reviewing court to disregard errors that "do not affect the substantial rights of the parties."

In the years following the enactment of this prejudice or harmless error analysis, each and every federal circuit court has fallen in line and refused to require new trials on the basis of evidentiary errors absent a finding of prejudice affecting the substantial rights of the parties. *Hernandez-Cuevas v. Taylor*, 836 F.3d 116, 127-28 (1st Cir. 2016); *Marshall v. Randall*, 719 F.3d 113, 116 (2d Cir. 2013); *Egan v. Del. River Port Auth.*, 851 F.3d 263, 276 (3d Cir. 2017); *Huskey v. Ethicon, Inc.*, 848 F.3d 151, 159-60 (4th Cir. 2017); *GIC Servs., LLC v. Freightplus USA, Inc.*, 866 F.3d 649, 660 (5th Cir. 2017); *United States ex rel. Carter v. Ross Corp*., 385 F.2d 564, 566 (6th Cir. 1967); *DeBiasio v. Ill. Cent. R.R.*, 52 F.3d 678, 685 (7th Cir. 1995); *Weitz Co., LLC v. MacKenzie House, LLC*, 665 F.3d 970, 975 (8th Cir. 2012); *Serv. Employees Int'l Union v. Nat'l Union of Healthcare*, 718 F.3d 1036, 1050 (9th Cir. 2013); *Hill v. J.B. Hunt Transp.*, 815 F.3d 651, 658-59 (10th Cir. 2016); *Young v. FedEx Express*, 432 F. App'x 915, 918 (11th Cir. 2011); *Standley v. Edmonds-Leach*, 783 F.3d 1276, 1281 (D.C. Cir. 2015). In sum, there is now universal acceptance that a jury verdict will not be set aside following a district court's evidentiary error absent a showing the error likely affected the case's outcome.

D. The Seventh Circuit in this case determined an evidentiary error required a new trial without conducting any prejudice analysis.

The Seventh Circuit satisfied step one of the abuse of discretion analysis when it concluded (albeit mistakenly) the District Court erred in excluding Banovz's videotaped interview because the parties supposedly agreed the interview was admissible. *Pittman*, 863 F.3d at 737. Step two of the analysis was disregarded, however, because the Seventh Circuit did not identify how the interview's exclusion prejudiced Pittman. In fact, the only mention of harm stemming from the District Court's error is contained within one sentence of the opinion: "The case being close, showing the video to the jury ***could have*** resulted in a verdict for the plaintiff – and so the judge's error was not harmless." *Id*. (emphasis added).

Significantly, the Seventh Circuit's opinion contains no statement of the law in regards to what constitutes prejudice, no citation to the United States Code or the Federal Rules of Civil Procedure, no mention of substantial justice, no discussion as to why the video could have changed the jury's verdict, and no discussion of how likely the video was to change the jury's verdict. There simply is no analysis of prejudice, a finding required to order a new trial.

The conclusion that the majority did not conduct an appropriate prejudice analysis is shared not only by the Petitioners but also by Circuit Judge Manion, who observed the majority opinion "lacks some detail" and required him to write separately. *Id.* at 738. Judge Manion provides a thorough review of the law in regards to an abuse of discretion analysis because the majority opinion neither provided nor applied the analysis. *Id*. at 738-39. He also accurately states an erroneous evidentiary decision by the trial court is not sufficient to order a new trial. *Id.* at 739. Rather, the court is "obliged to make a further determination: was this improper exclusion so prejudicial as to require disturbing the judgment below?" *Id.* Unfortunately, this determination is absent from the majority opinion.

Allowing an appellate court to order a new trial absent a prejudice analysis is dangerous precedent that should be corrected. Perfect trials are not possible because errors will occur and our judicial system lacks the resources and abilities to ensure otherwise. Here, however, the Seventh Circuit ordered a new trial without conducting any sort of arguably-sufficient prejudice analysis. To invalidate a jury's verdict and require the trial process to begin anew because the trial court merely committed some error without considering whether the error was prejudicial is both irresponsible and impractical. The Seventh Circuit's opinion is inconsistent with universally accepted judicial principles and lays the foundation for stretching our judicial system beyond its means.

E. Any prejudice analysis conducted in this case was fundamentally flawed and violated the universally accepted standards for ordering a new trial.

While Petitioners maintain the Seventh Circuit engaged in no true prejudice analysis, the opinion does contain a couple statements that could be construed as statements regarding prejudice. First, the Seventh Circuit's opinion contains one sentence directly discussing harm (the statement discussed above in subsection D). In that sentence, the Seventh Circuit stated, "[S]howing the video to the jury ***could have*** resulted in a verdict for the plaintiff." *Pittman*, 863 F.3d at 737 (emphasis added). This observation, however, is not the standard for concluding an error was prejudicial.

The prejudice analysis generally boils down to determining whether a "significant chance" exists that the evidentiary error "affected the outcome of the trial." *Whitehead*, 680 F.3d at 930. There is a fundamental difference between this universally accepted standard ("significant chance" the error "affected the outcome of the trial") and the standard the Seventh Circuit applied here ("could have" affected the jury's verdict). Merriam-Webster defines "significant" as "having or likely to have influence or effect." WEBSTER'S THIRD NEW INT'L DICTIONARY 2116 (unabridged 2002). On the other hand, "could" is the past tense of "can," which means "to be able to." WEBSTER'S THIRD NEW INT'L DICTIONARY 323 (unabridged 2002).

An evidentiary error that is ***able*** to affect or is ***capable*** of affecting a trial's outcome is not the same as an evidentiary error that ***likely*** had influence on the outcome. Consequently, the Seventh Circuit's opinion should be corrected to prevent adoption of a new and weaker standard for identifying whether an evidentiary error was prejudicial.

The Seventh Circuit's decision includes a few additional statements hinting at prejudice, but each lacks substance. For example, the opinion mentions "the passage of seven years had dimmed [Banovz's] recollection to a considerable extent." *Pittman*, 863

F.3d at 737. If Banovz's inability to recall information prevented the jury from hearing relevant evidence, this would certainly be a consideration when determining whether there is a significant chance the video's exclusion affected the jury's verdict. Banovz, however, was allowed to review the video transcript in order to refresh his memory. *Id.* "[W]ith his memory refreshed," Banovz was able to present the ***same testimony*** he provided in the videotaped interview. *Id.* The Court's opinion does a good job recounting the numerous facts elicited during Banovz's live testimony once his memory was refreshed and demonstrates the same evidence was adduced during his live testimony that would have been presented if Banovz's video interview would have been played. *Id*.

Moreover, the majority opinion contains a vague statement that "some details mentioned in the video interview were not included in Banovz's trial testimony." *Pittman*, 863 F.3d at 737. In particular, the majority seems to be referencing Banovz not testifying to his belief the jailers thought Pittman was joking about suicide. *Id.*

Pittman's trial counsel shoulders the responsibility for not eliciting testimony regarding the missing portions of the Banovz interview. Specifically, Pittman's counsel was provided a full opportunity to refresh Banovz's memory and impeach his testimony if necessary. Counsel never took this opportunity and Pittman therefore cannot claim he was prejudiced by virtue of the fact jurors might not have heard important elements of Banovz's prior statements.

The majority opinion also seems to assert the video's exclusion was prejudicial because Banovz's demeanor at trial was noticeably different than his demeanor in the video interview. The parties, however, did not stipulate or agree to this "finding." Similarly, the District Court did not make any finding on whether Banovz's video interview demeanor was any different from his trial demeanor. Finally, this "fact" is not self-evident. Pittman's counsel engaged in very little to no coaxing of Banovz in order to elicit the nearly-identical testimony provided in the recorded interview. Of course, whether a witness performs better testifying in one environment versus another is a subjective analysis the majority was unable to make considering they did not view Banovz's trial demeanor.

Further, the Seventh Circuit's opinion provides no support for the majority's apparent belief that the exclusion of a video containing preferable demeanor evidence is sufficient to make a finding of prejudice. Rather, the Eighth Circuit has held excluding videotaped testimony containing beneficial demeanor evidence is ***not*** an abuse of discretion. *United Fire & Cas. Co. v. Historic Pres. Trust*, 265 F.3d 722, 728 (8th Cir. 2001).

A witness' demeanor should have no bearing on whether his or her prior statements are admissible. Take for example Rule 32 of the Federal Rules of Civil Procedure addressing the admissibility of depositions in court proceedings. Rule 32 provides four specific circumstances in which an unavailable witness' deposition may be read or played at trial along with a fifth "catchall" exception that permits a deposition's use if "exceptional circumstances make it desirable." Nowhere, however, does Rule 34 suggest a witness' prior deposition testimony (which is similar to a videotaped interview but otherwise more reliable considering the witness is under oath at a deposition) can be used at trial if the witness performed better during his or her deposition than he or she did testifying live. Fed. R. Civ. P. 32.

The judicial gymnastics on display in this case may be explainable. In his recent book released in September 2017, Judge Posner explains how he had a change of heart in March 2017 (just two months before this case was argued), at which time he says he began feeling empathy for the first time for incarcerated litigants. Richard A. Posner, *Reforming the Federal Judiciary* 137 (2017). Judge Posner's recently-discovered empathy might have made Pittman a more sympathetic figure and might explain why he provides considerable assistance to Pittman in the opinion.

Here, the jury decided not to hold Petitioners liable for Pittman's injuries despite having heard Banovz's full testimony while using the video interview to refresh his recollection. This may have been because the jury was presented with testimony from numerous witnesses directly contradicting or refuting Banovz's statements or because the jury simply did not believe Banovz. Jurors have every right to disbelieve a witness' testimony and had numerous reasons to disbelieve Banovz, including the fact he was asleep at the time of the incident, the fact he was an inmate at the time of the incident, the fact he had been an inmate at the Madison County jail at least 50 times prior to this incident, the fact he had a grudge against Madison County because he felt mistreated, and the fact he was admittedly "pisse[d]" at Madison County. (Tr.

Tran. Day 2, 163:10-13; 169:09-170:13; 171:03-14; 171:15-172:03.)

Whatever the reason, the jury was empowered to decide who to believe and who not to believe. "It's the jury's job – not the district court's job or the job of a panel of appellate judges – to figure out who's telling the truth." *Whitehead*, 680 F.3d at 928-29. The jury heard Banovz testify and yet determined Petitioners were not liable for Pittman's attempted suicide. Whether or not the video interview and transcript were admitted, the jury's decision would likely remain the same. Pittman's trial was not prejudiced by the District Court's decision to exclude this evidence.

F. Pittman was given an opportunity to argue prejudice at the trial and failed to establish any prejudice that would result from the exclusion of this evidence.

The Seventh Circuit's opinion makes no reference to the fact the District Court specifically and unequivocally asked Pittman's counsel to explain why excluding the video was prejudicial. (Tr. Tran. Day 2, 146:12-19.) In response, Pittman's counsel failed to mention ***any*** prejudice that would be suffered. (Tr. Tran. Day 2, 146:20-147:02.) Pittman's counsel's inability to articulate prejudice resulting from the video's exclusion is highly indicative of the harmless nature of the District Court's supposed error.

Allowing the Seventh Circuit's opinion to have precedential value is dangerous because the opinion lays the framework for ordering a new trial absent any finding of prejudice. At a minimum, the opinion lowers the bar for ordering a new trial to whether the evidence "could have" altered the jury's verdict. Further, the opinion will permit appellate courts to make factual findings traditionally left to the district courts' sound discretion. Finally, the opinion allows appellate courts to find prejudice even in circumstances where the district court specifically asked for a statement of prejudice and was not provided one.

III. THE SEVENTH CIRCUIT'S DECISION IS CONTRARY TO EXTENSIVE PRECEDENT ESTABLISHING THE EXCLUSION OF CUMULATIVE EVIDENCE IS NOT PREJUDICIAL.

While prejudice is generally determined on a case-by-case basis, there is a class of evidence routinely found non-prejudicial when erroneously excluded from trial. "The exclusion of ***cumulative*** evidence does ***not*** affect a party's substantial rights." *Moench v. Marquette Transp. Co. Gulf-Inland, LLC*, 838 F.3d 586, 594 (5th Cir. 2016) (emphasis added). Cumulative evidence's exclusion is considered non-prejudicial because such evidence merely restates information already presented to the jury. *See Haygood v. Auto-Owners Ins. Co.,* 995 F.2d 1512, 1517 (11th Cir. 1993) (holding cumulative evidence cannot be the "crucial piece of information" that would have altered the jury's verdict).

A. Numerous federal courts have found the exclusion of similar evidence to be non-prejudicial.

Circuit Courts across the country have found the exclusion of cumulative evidence to be non-prejudicial in numerous cases similar to this one. In *Jones v. Sandusky County*, the district court erroneously excluded portions of a detective's investigation report that should have been admitted as non-hearsay. 652 F. App'x 348, 356 (6th Cir. 2016). Notably, however, jurors were able to hear live testimony from the persons who provided the erroneously excluded statements in the investigation report. *Id.* The witness was impeached with his prior statement whenever there was a deviation from the information contained in the investigation report. *Id.* Consequently, the Sixth Circuit determined excluding the detective's investigation report, while erroneous, did not result in prejudice because the report constituted cumulative evidence. *Id.* at 357.

Similarly, in *United Fire*, the Eighth Circuit determined the District Court may have erroneously excluded videotaped deposition testimony. *United Fire*, 265 F.3d at 727. Nevertheless, excluding the videotaped deposition testimony from trial was not prejudicial because the District Court allowed the parties to use a transcript of the deposition testimony for impeachment purposes. *Id.* Significantly, the Eighth Circuit determined the videotaped deposition testimony's exclusion was not prejudicial despite one party's assertion the videotaped testimony was important "demeanor and attitude" evidence. *Id.* at 728. *See also* Fed. R. Civ. P. 32 (the fact a witness performs better during a deposition than at trial does not render the witness unavailable and his or her deposition admissible).

B. Banovz's videotaped interview would have been cumulative evidence.

The District Court excluded Banovz's videotaped interview and the interview transcript at the trial. This evidence, however, was cumulative of Banovz's live testimony because Banovz testified at trial as to everything he said during the videotaped interview. Whenever Banovz's memory failed, the Court allowed Banovz to refresh his recollection with a copy of his interview transcript. (Tr. Tran. Day 2, 151:12-153:07.) Similarly, whenever Banovz's testimony deviated from his interview statements, the Court allowed him to be impeached with his prior interview statements. (Tr. Tran. Day 2, 160:16-162:07.) In other words, the videotape and transcript would have provided the jury with no additional evidence, and the exclusion of these items at trial was not prejudicial.

CONCLUSION

The United States Supreme Court should grant this petition for a writ of certiorari in order to correct these significant errors in the Seventh Circuit's opinion. This petition is not based on a simple error the Circuit Court made in applying the law. Rather, the petition seeks certiorari based on findings and holdings that conflict with clear precedent established and applied universally throughout the Circuits. Moreover, certiorari should be granted because the Seventh Circuit's opinion demonstrates a profound departure from the accepted and usual course of proceedings, requiring the Supreme Court to exercise its supervisory powers.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

John L. Gilbert
Counsel of Record
SANDBERG PHOENIX
& von GONTARD P.C.
600 Washington Ave., 15th Floor
St. Louis, MO 63101
314-231-3332
314-241-7604 (Fax)
jgilbert@sandbergphoenix.com

Attorney for Petitioners