No. 19-3343

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ROBERT GACHO,	)	
	)	
	)	Appeal from the U.S. District Court
Petitioner-Appellant,	)	for the Northern District of Illinois
	)	
	)	
	)	Case No. 1:17-cv-00257
	)	
	)	
v.	)	Hon. Robert Gettleman
	)	
FRANK LAWRENCE,	)	
	)	
Respondent-Appellee.	)	

BRIEF AND REQUIRED SHORT APPENDIX OF APPELLANT ROBERT GACHO

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ORAL ARGUMENT REQUESTED

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-3343

Short Caption: Gacho v. Lawrence

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Robert Gacho

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

The Keleher Appellate Law Group, LLC, May Oberfell Lorber, State Appellate Defender's Office

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

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(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

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Attorney's Signature: s/ Christopher Keleher Date: May 4, 2020

Attorney's Printed Name: Christopher Keleher

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3d. Yes X

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JURISDICTIONAL STATEMENT

This is a habeas corpus appeal. Robert Gacho sought a writ of habeas corpus under 28 U.S.C. § 2254. Doc. 1. The district court has jurisdiction under 28 U.S.C. §§ 1331, 2241, and 2254. On October 29, 2019, the district court issued Gacho a certificate of appealability on one claim and rejected the other seventeen. Doc. 25, attached here, Appendix at 1. In issuing a certificate of appealability under 28 U.S.C. § 2253(c), the court found "reasonable jurists could debate the Court's resolution of the judicial bias claim, but not of any other claim in this case." Doc. 25 at 56. Gacho did not file a motion to reconsider.

Gacho filed a timely notice of appeal on November 22, 2019. Doc. 28. Appellate jurisdiction exists via 28 U.S.C. § 2253 and 28 U.S.C. § 1291 as this is an appeal from a final order of the district court.

STATEMENT OF THE ISSUES

I. Judge Thomas Maloney presided over Robert Gacho and Dino Titone's murder trial. Maloney sought and Titone paid a $10,000 bribe. Under the deal, for Titone to go free Gacho would need to be convicted. Tried together, both men were found guilty, Gacho by a jury and Titone by the judge. Maloney is later found guilty himself for selling acquittals in other murder cases during the Gacho-Titone trial timeframe.

Was Judge Maloney impartial?

II. Gacho's trial attorney Robert McDonnell did not tell Gacho he simultaneously represented Rosario Infelise, the brother of Tullio Infelise, a murder victim in the Gacho-Titone case.

Was McDonnell conflicted?

III. McDonnell, a twice-disbarred ex-con mob lawyer, stipulated to a damaging document, elicited prejudicial testimony, and allowed questions about Gacho's other crimes.

Was McDonnell ineffective?

STATEMENT OF THE CASE

Judge Thomas Maloney

Cook County Circuit Judge Thomas Maloney presided over the Gacho-Titone trial in October 1984. Doc. 25 at 8. Federal prosecutors later convicted Maloney of fixing three murder cases during this timeframe. *Id.*; *United States v. Maloney*, 71 F.3d 645, 650 (7th Cir. 1995).

Maloney's corruption predated his investiture. Doc. 25 at 9; *Bracy v. Gramley*, 520 U.S. 899, 902 (1997). As an attorney, Maloney "fixed" cases. *Bracy v. Schomig*, 286 F.3d 406, 414 (7th Cir. 2002) (*en banc*). This included arranging the payment to Cook County Circuit Judge Frank Wilson, who acquitted Outfit hitman Harry Aleman of murder. *Id.*; *People v. Aleman*, 667 N.E.2d 615, 617-18 (Ill. App. Ct. 1996).

Through First Ward Secretary Pat Marcy's connections, Maloney became a Cook County Circuit Judge in 1977. *See* Jerold Solovoy, *The Illinois Supreme Court Special Commission on the Administration of Justice* 18-19 (Dec. 1993); Robert Cooley, WHEN CORRUPTION WAS KING 15 (2004). Attorneys considered Maloney a hanging judge; a reputation federal prosecutors would say was calculated. Doc. 25 at 9; *United States ex rel. Collins v. Welborn,* 49 F.Supp.2d 597, 604 (N.D. Ill. 1999). "Showing defendants little mercy had the effect of diverting any conceivable suspicion from Maloney while at the same time giving defendants a strong motivation to cough up big bribery dollars." 49 F.Supp.2d at 604.

Gacho's First Attorney Daniel Radakovich

Robert Gacho first retained Daniel Radakovich to defend him. Doc. 22-1 at 76. Radakovich told Gacho the price for a Maloney acquittal was $60,000. *Id*. at 79; *People v. Gacho*, 53 N.E.3d 1054, 1058 (Ill. App. Ct. 2016), attached here, Appendix at 58. Gacho contacted his mother Edith Rhoades and his aunt Margaret Suhr to raise money. Doc. 22-1 at 80; 53 N.E.3d at 1058; Doc. 25 at 11. Radakovich told Rhoades that if she got $60,000 for Gacho "things would go well for him" and he "would walk." *Gacho*, 53 N.E.3d at 1058-59. Rhoades asked Gacho's sister Linda McGregor for aid. *Id*. Gacho came up empty and did not pay a bribe. Doc. 22-1 at 81.

Titone's Attorney Bruce Roth

Gacho's jury trial was conducted with co-defendant Dino Titone, who opted for a bench trial with the prosecution-inclined Maloney. Doc. 22-1 at 83, 107; Doc. 23-3 at 53; Doc. 23-4 at 63-64. Maloney also sought $60,000 from Titone but the sum was too steep. Doc. 22-6 at 50-54; Doc. 23-14 at 69. Titone's "crooked lawyer" Bruce Roth negotiated with Maloney. Doc. 23-14 at 69; *United States v. Roth*, 860 F.2d 1382, 1383 (7th Cir. 1988). Roth returned to Titone's father Salvatore Titone and told him that Maloney would take $10,000 for an acquittal. Doc. 22-6 at 52-54; Doc. 23-14 at 69; Doc. 16-7.

At a hotel lounge in March 1983 Salvatore and Roth settled on $10,000 for the fix and $20,000 for Roth's fee. Doc. 22-6 at 53; Doc. 16-7 at 22; *Schomig*, 286 F.3d at 412; *United States ex rel. Titone v. Sternes*, No. 02-c-2245, 2003 WL 21196249, at *1

(N.D. Ill. May 15, 2003) (Zagel, J.). Salvatore admitted his complicity and explained later going to Roth's office with a brown paper bag stuffed with cash. Doc. 16-7 at 22-23. A giddy Roth counted the bills and assured Salvatore that "everything was going to be okay and that he would take the money to McGee to give to the judge." Doc. 22-6 at 53; Doc. 23-14 at 69; Doc. 16-7 at 23. "McGee" was Robert McGee, Maloney's bagman and later casualty of FBI's Operation Greylord. Doc. 25 at 9; *United States v. McGee*, No. 97-c-3129, 1997 WL 757411 (N.D. Ill. Nov. 21, 1997). Titone's bribe was paid a year before Gacho's pre-trial motions. Doc. 16-7 at 22; Doc. 21-1 at 127. In Titone's habeas case, Judge Zagel found "evidence that [Roth] paid Judge Maloney $10,000 to find [Titone] not guilty." *Titone*, 2003 WL 21196249, at *1.

Roth told Salvatore that to maintain appearances, Maloney would need to ensure the other two defendants were convicted. Doc. 22-6 at 53-54; Doc. 25 at 10. Maloney faced a retention vote in the fall of 1984. Doc. 22-6 at 53-54; Doc. 23-14 at 70. Maloney was further skittish as Operation Greylord stirred—the investigation went public in 1983. Doc. 22-6 at 53-54; Doc. 23-14 at 70; 71 F.3d at 656. Roth assured Maloney he was loyal. Doc. 22-6 at 53-54; Doc. 23-14 at 70. Salvatore Titone's 1989 affidavit explains:

> Judge Maloney was coming up for an election for judicial retention in the fall of 1984. Roth said that as long as Maloney got two out of the three it would be enough. This meant that as long as my son's two co-defendants were found guilty, Judge Maloney could get away with letting Dino go free and Judge Maloney could still get elected.

Doc. 22-6 at 53-54.

Salvatore Titone's 1994 affidavit elaborates:

> In one or more of our conversations during the course of 1983 and the Spring of 1984, Roth told me that Judge Maloney was very nervous about the federal Greylord investigation and wanted to be assured that Roth would not say anything to the authorities that would inculpate Maloney. Roth told me that he had assured the judge that he was a stand-up guy and that he would not be talking to the authorities. Roth also told me that Maloney was coming up for a retention election in the fall of 1984. Roth stated that Maloney could be re-elected so long as he "got two out of three" in Dino's case, meaning that Dino could be acquitted so long as his two co-defendants were convicted.

Doc. 16-7 at 22.

Gacho's Second Attorney Robert McDonnell

Gacho testified at his post-conviction hearing that when the $60,000 bribe was beyond his means, Daniel Radakovich lost interest. Doc. 22-1 at 80-81; Doc. 25 at 11. Gacho then retained Robert McDonnell. Doc. 22-1 at 81-82; Doc. 25 at 11. A former associate of Maloney, McDonnell was a twice-disbarred mouthpiece for the mob. Doc. 25 at 12; *Schomig*, 286 F.3d at 414. "Maloney and McDonnell knew each other and associated in some manner with Chicago organized crime families." 286 F.3d at 414. The association rubbed off on McDonnell as he conspired to distribute counterfeit money and went to prison for two years in 1966. Doc. 25 at 12; *United States v. Di Pietto*, 396 F.2d 283 (7th Cir. 1968). He committed income tax evasion two years later. Doc. 25 at 12; 286 F.3d at 414. Finally, he conspired to defraud the government and served six years in prison in 1989. Doc. 25 at 12; *United States v. Taglia*, 922 F.2d 413 (7th Cir. 1991). McDonnell died in 2006. Doc. 25 at 12.

At Gacho's pre-trial hearing the State noted that McDonnell had represented a relative of the underlying murder victim Tullio Infelise. Doc. 22-1 at 150-51; Doc. 23-1 at 4. The prosecutor explained, "defense counsel, on prior occasions, at the same time he was representing Mr. Gacho, represented one of the victim's family." Doc. 22-1 at 151; Doc. 23-1 at 5. McDonnell countered, "that case is over with. The other case that they are talking to is over and done with." Doc. 22-1 at 151; Doc. 23-1 at 5. Judge Maloney then asked if Gacho knew about these circumstances. Doc. 22-1 at 152. He did. *Id.*; Doc. 23-1 at 5.

> The Court: And you have no objection to whatever has occurred in the past regarding Mr. McDonnell's representation of a family member of one of the victims here?
>
> Gacho: No, I don't.

Doc. 22-1 at 151; Doc. 23-1 at 5-6; 53 N.E.3d at 1058.

McDonnell did not tell the court he still represented Tullio Infelise's brother, Rosario Infelise. Doc. 22-1 at 84-85; Doc. 25 at 28; Doc. 23-4 at 5-6. Nor did Gacho know. Doc. 22-1 at 154. A certified clerk's record showed McDonnell represented Rosario in Cook County Circuit Court case 84-c-16401 from January 1984 to September 1984. Doc. 16-7 at 53-58; 53 N.E.3d at 1058. Rosario faced attempted rape, kidnapping, and battery charges. Doc. 16-7 at 53-58.

The Gacho-Titone Trial

The State's case consisted of information Tullio Infelise gave authorities before

dying and the testimony of Gacho's girlfriend Katherine DeWulf. Doc. 25 at 3-4; Doc. 23-7 at 61-68. On December 11, 1982, defendants Gacho, Titone, and Sorrentino met two cocaine dealers, Tullio Infelise and Aldo Fratto, at Gacho's Bridgeport home. *People v. Gacho*, 967 N.E.2d 994, 998 (Ill. App. Ct. 2012), attached here, Appendix at 68. The cocaine deal went sour and the defendants bounded Infelise and Fratto and tossed them into the trunk of car. *Id*. Gacho rode in a car with DeWulf and they followed Sorrentino and Titone's car carrying Infelise and Fratto. *Id*. They left Chicago and drove 30 minutes to a desolate strip along the Des Plaines River in Lemont, Illinois. *Id*.; *People v. Gacho*, 522 N.E.2d 1146, 1150 (Ill. 1998); Doc. 23-3 at 79-80. DeWulf heard gunshots, and then Titone and Sorrentino came to their car claiming Infelise and Fratto were dead. 967 N.E.2d at 998; Doc. 23-7 at 66-68. But Infelise survived for two weeks and before succumbing to his wounds said the culprits were "Robert Gotch, Dino, and Joe." 522 N.E.2d at 1150-52; 792 F.3d at 733.

McDonnell's Trial Performance

Three items are relevant to Gacho's ineffective assistance of counsel claim. First, Gacho moved to suppress his confession. 522 N.E.2d at 1152-53. Authorities arrested Gacho at his home on December 12, 1982. *Id*.; Doc. 23-3 at 41-43. They brought him to the City of Burbank police station where they slapped and kneed him in the back. 522 N.E.2d at 1152-53; Doc. 23-3 at 12-13; Doc. 23-9 at 91-93. A medical technician at the Cook County Jail examined Gacho a few weeks later. Doc. 23-10 at 80-81; 86-89. Gacho complained of kidney pain from police torture. Doc. 23-

3 at 2-6, 11. He also told the technician that he had been in a car accident but had not been hurt. *Id*. The technician's treatment record noted the car accident but incorrectly indicated it caused the kidney injuries. Doc. 23-10 at 82, 89. The State presented the incorrect treatment record and McDonnell stipulated to it. Doc. 23-3 at 29; 67-68. The State then used the record to parry Gacho's torture claims.

Second, an ailing Tullio Infelise made several incriminating statements about the three defendants to police. Doc. 23-3 at 60-61. Titone and Gacho successfully barred a transcript of those taped conversations. Doc. 23-4 at 60-61. But while cross-examining Officer Johnstone regarding his conversations with Infelise, McDonnell broached the recording. Doc. 23-7 at 41. The State on redirect then asked the officer to detail that previously excluded conversation, over Roth's "strenuous" objection, thereby admitting Tullio's damaging testimony naming the three defendants as his assailants. *Id*. at 42-44.

Third, when the State asked Gacho whether he used cocaine, McDonnell failed to object to the questioning. Doc. 23-9 at 124; 522 N.E.2d at 1157.

The Verdict

On October 4, 1984, a jury found Gacho guilty of murder, aggravated kidnapping, and armed robbery. Doc. 22-1 at 106-07; Doc. 23-12 at 118. Judge Maloney reached the same verdict for Titone. 522 N.E.2d at 1149-50. Co-defendant Joseph Sorrentino was later found guilty in a separate jury trial and sentenced to life. Doc. 23-4 at 65; Doc. 22-1 at 171. Gacho and Titone were both sentenced to

death. 522 N.E.2d at 1149-50. This apparently pleased Maloney, based on this pre-trial colloquy with the prosecution:

> Mr. Kaplan: To alleviate the problem, we anticipate, assuming there is a finding of guilty, we are proceeding with the death hearing.
>
> The Court: I should hope so.

Doc. 23-4 at 37.

The Illinois Supreme Court reversed Gacho's death sentence on direct appeal. 522 N.E.2d at 1166. In 1989 Maloney resentenced Gacho to life. 967 N.E.2d at 996.

The Aftermath

Operation Greylord ensnared Maloney and an indictment came in 1991. Doc. 25 at 8; 71 F.3d at 649-50. A jury convicted him of racketeering and extortion charges in 1993. Doc. 25 at 8. Three of the four bribes underlying Maloney's conviction involved murder trials. *Id*. All of the bribes occurred in the same courtroom and era as the Gacho-Titone case. 71 F.3d at 649-50. Maloney received 189 months in prison in 1994. Doc. 1 at 16. Maloney died in 2008. Doc. 25 at 9.

Operation Greylord also marked the demise of attorney Bruce Roth. Doc. 25 at 9; 860 F.2d at 1383. Roth had an extensive "resume of corruption" throughout the 1980s. *See* Steve Bogira, COURTROOM 302 217-19 (2006). The Court described Roth as a "crooked lawyer" and "bagman" who earned his keep bribing judges. 860 F.2d at 1383. Roth also connected unscrupulous members of the bench and bar. *Id*; Doc. 25 at 9. These services violated RICO and the Hobbs Act and netted Roth ten years in

prison. 860 F.2d at 1383. Prosecutors deemed Roth "one of the most serious offenders to be convicted in the entire Greylord probe." Doc. 22-6 at 68.

Meanwhile, Roth's former client Dino Titone sought postconviction relief based on the bribe to Maloney. Doc. 22-6 at 3. Cook County Circuit Judge Earl Strayhorn vacated Titone's death sentence in 1990 and ordered a resentencing based on Roth's woeful work—he offered zero mitigating evidence. Doc. 22-6 at 26-27; *People v. Titone*, 600 N.E.2d 1160, 1162 (Ill. 1992). But Judge Strayhorn denied the request for a new trial based on the bribe. 600 N.E.2d at 1162. The Illinois Supreme Court affirmed in 1992, noting the federal charges then pending against Maloney were "not germane." *Id.* at 1165.

The landscape changed in 1996 after a Cook County Circuit Judge ordered a new trial for El Rukn gang members Earl Hawkins and Nathan Fields based on their bribe to Maloney. *See Illinois v. Hawkins*, 690 N.E.2d 999 (Ill. 1998). Maloney had a "personal, substantial, pecuniary interest" in the outcome of Hawkins and Fields' murder trial after taking money. *Id*. at 1003.

Judge Strayhorn reversed himself in 1997 and awarded Titone a new trial based on the bribe. 53 N.E.3d at 1069 (Delort, J., dissenting). Granting Titone's post-conviction petition Judge Strayhorn lamented:

> Dino Titone did not receive the kind of a fair, impartial trial before a fair, unbiased, impartial judge that his constitutional right as a citizen required. And I am going to reconsider my prior denial of Titone's motion that this entire process be wiped out, this entire corrupt process be wiped off the books.

Id; Ian Ayres, *The Twin Faces of Judicial Corruption: Extortion and Bribery,* 74 DENV. U.L. REV. 1231, 1252-53 (1997), quoting *People v. Titone,* 83-c-127 (Cir. Ct. Cook County), Report of Proceedings heard before the Honorable Earl E. Strayhorn at 12 (July 25, 1997).

Gacho's Post-Conviction Proceedings

Gacho filed a *pro se* post-conviction petition in 1991 under the Illinois Post-Conviction Hearing Act, 725 ILCS 5/122-1. 53 N.E.3d at 1057; Doc. 23-15 at 3. He asserted, *inter alia*, that Maloney's corruption deprived him of a fair trial and ineffective assistance of counsel because McDonnell also represented Rosario Infelise. 53 N.E.3d at 1057. In 1997 appointed counsel amended Gacho's post-conviction petition. *Id*. This petition included Gacho's affidavit, alleging Radakovich suggested he bribe Maloney. *Id*. Also included were the affidavits of Gacho's mother and aunt. *Id*. Gacho's mother averred Radakovich told her that if she could get $60,000 for Maloney, Gacho "would walk." Doc. 22-1 at 87; 53 N.E.3d at 1057.

The glacial pace of state court proceedings prompted Gacho to seek habeas relief in 1997. 792 F.3d at 734-35. He filed another petition two years later which the district court consolidated. *Id*. The district court dismissed the petition in 2001 with leave to reinstate after the state post-conviction proceedings. *Id*. In 2007 Gacho moved to reinstate his 1997 petition. *Gacho v. Harrigton*, No. 13-cv-4334, 2013 WL 5993458, *2-3 (N.D. Ill. Nov. 7, 2013) (Gettleman, J.). The district court dismissed the petition and granted Gacho leave to reinstate by August 5, 2009. *Id*. No motion

was filed and the court entered judgment on August 23, 2009. *Id*.

Meanwhile, Cook County Circuit Judge Diane Cannon dismissed Gacho's petition without an evidentiary hearing in May 2009. 53 N.E.3d at 1057-58. Gacho appealed and the Illinois Appellate Court reversed the dismissal of Gacho's claim of an unfair trial due to judicial corruption and ineffective assistance of counsel. *Gacho,* 967 N.E.2d 994. The appellate court found the nexus between Maloney's corruption and Gacho's case "very strong." *Id.* at 1001. Regardless of whether Maloney steered Gacho's verdict, the fact Maloney had an interest to do so "means that the defendant did not receive a trial before an impartial tribunal." *Id*. at 1002. The court remanded for an evidentiary hearing to determine the propriety of a new trial. *Id*. at 1004.

An evidentiary hearing on Gacho's judicial bias and ineffective assistance claims occurred in September 2013. Doc. 23-22 at 66; Doc. 23-23 at 2; Doc. 22-5 at 47. Gacho testified that he retained McDonnell after Radakovich lost interest in his case once he learned Gacho had no bribe money. Doc. 22-1 at 80-81; 53 N.E.3d at 1058. Gacho also presented the affidavits from Salvatore Titone (now deceased) and the affidavits from Gacho's mother and aunt (both now deceased). Doc. 22-1 at 87; Doc. 22-5 at 47; Doc. 22-6 at 52. The State called Radakovich, who denied the bribe attempt. Doc. 22-5 at 48; 53 N.E.3d at 1059. Judge Cannon rejected both claims a month later. Doc. 22-5 at 46-48. She found Radakovich did not attempt to bribe Judge Maloney and saw no evidence of "slanted rulings" against Gacho. *Id*.

Maloney's "egregious conduct in other matters" had no nexus to Gacho's case. *Id.* Judge Cannon further deemed Gacho not credible. *Id.* Finally, she found Gacho waived any potential conflict with McDonnell. *Id.*

The Second Appeal

Gacho appealed (Doc. 22-6 at 95) and a divided Illinois Appellate Court affirmed. *People v. Gacho*, 53 N.E.3d 1054 (Ill. 2016). Relying on *Bracy v. Gramley*, 520 U.S. 899 (1997), and *People v. Fair*, 738 N.E.2d 500 (Ill. 2000), the majority described Gacho's corruption claim as one of "compensatory bias," requiring Gacho to establish "actual bias" resulting from Maloney's misconduct. 53 N.E.3d at 1062. Under *Fair*'s two-factor test, the court first found a nexus between Maloney's criminal conduct and his status as the judge in Gacho's case. *Id.* at 1062. But the second factor—evidence Maloney had a pecuniary interest or actual bias—was lacking. *Id.* Titone's bribe was "merely a suspicious circumstance that warrants further inquiry." *Id.* Titone's bribe did not mean bias for Gacho. *Id.* "The record in this case establishes only that the defendant was tried simultaneously with a co-defendant who . . . bribed a corrupt trial judge. . . ." *Id.* at 1063. Maloney's sordid past "cannot alone support an inference that he engaged in compensatory bias to the defendant's case." *Id.*

Justice Mathias Delort dissented. He rejected the idea that Gacho needed direct evidence for a new trial because the U.S. Supreme Court did not require evidence of actual bias. 53 N.E.3d at 1066 (Delort, J., dissenting). But even if actual

bias was necessary, Gacho "clearly" connected Maloney's conduct and the trial's outcome. *Id*. at 1068. Justice Delort cited the court's own 2012 reversal which held Maloney had an interest in the proceedings. *Id*., citing *Gacho*, 967 N.E.2d 994. Justice Delort urged the court not to isolate Gacho's case, "but instead acknowledge that the taint of Titone's case fatally infected the entire proceeding." 53 N.E.3d at 1068. "The egg, as it were, was irreversibly scrambled when Gacho's and Titone's cases were tried simultaneously using the same evidence and the same witnesses, and before the same judge, as a single judicial proceeding." *Id*.

The quarter-century-long state postconviction proceedings ended when the Illinois Supreme Court denied Gacho's petition for leave to appeal. *Illinois v. Gacho*, No. 120808, 60 N.E.3d 877 (Ill. Sept. 28, 2016).

The Federal Proceedings

Before Judge Cannon's October 2013 dismissal, Gacho filed a new habeas petition in May 2013. *Gacho v. Harrigton*, No. 13-cv-4334, 2013 WL 5993458 (N.D. Ill. Nov. 7, 2013) (Gettleman, J.). The district court dismissed the petition because Gacho failed to exhaust all available state remedies. *Id*. at *5-6. Gacho appealed and the Court affirmed. *Gacho v. Butler*, 792 F.3d 732 (7th Cir. 2015).

Gacho refiled his habeas petition on January 12, 2017 after the Illinois Supreme Court declined to take his case. Doc. 1. This is Gacho's fourth habeas corpus petition in the Northern District of Illinois. Doc. 25 at 2. But as the district court noted, the first petition for purposes of 28 U.S.C. § 2244(b). *Id*. Gacho raised 18

claims in his *pro se* habeas corpus petition:

A. Inordinate delay by the state courts in resolving Gacho's postconviction petition.

B. Maloney's participation in the case denied Gacho a fair and impartial trial.

C. Ineffective assistance of trial counsel when Gacho's counsel attempted to bribe Maloney.

D. Ineffective assistance of trial counsel when counsel suffered from an actual conflict.

E. Ineffective assistance of trial counsel for trial errors.

F. A Fourth Amendment violation when officers arrested Gacho at home.

G. The police interrogated Gacho after he invoked his right to counsel.

H. Maloney wrongly excused a juror.

I. The prosecution wrongly introduced impermissible out-of-court statements.

J. The prosecution wrongly raised improper out-of-court statements during closing arguments.

K. Sufficiency of the evidence.

L. The prosecution examined Gacho on improper subjects.

M. A prior consistent statement was wrongly admitted.

N. The prosecutor cross-examined Gacho's wife on improper subjects.

O. Gacho's wife's gun was wrongly admitted.

P. Improper hearsay evidence.

Q. The prosecution's closing argument minimized the burden of proof.

R. Ineffective assistance of appellate counsel.

Doc. 25 at 5-6.

The district court issued Gacho a certificate of appealability on the judicial bias claim and rejected the other 17. Doc. 25 at 56-57. The court labelled Maloney a "corrupt judge," a "felonious judge," and possessing a "corrupt presence." *Id.* at 34, 35. As for the judicial bias claim, the district court observed that "[o]ne might challenge the state court's analysis." *Id.* at 21. But given the deferential standard for habeas claims, the court "cannot say the state appellate court's decision to apply the compensatory bias standard is contrary to clearly established federal law." *Id.* at 22-23. Although reasonable jurists might contest the state appellate court's decision, its ruling "is not a well-understood error." *Id.*

Issuing a certificate of appealability under 28 U.S.C. § 2253(c), the court found reasonable jurists could debate the "resolution of the judicial bias claim, but not of any other claim in this case." Doc. 25 at 56-57. Gacho appeals. Doc. 29.

SUMMARY OF ARGUMENT

Innocent until proven broke was the perverted presumption of innocence for defendants facing Judge Thomas Maloney. Still, it is hard to imagine a case more emblematic of judicial bias than this one. Judge Maloney solicited bribes from Titone and Gacho. Titone paid, Gacho did not. Attorney Bruce Roth (later convicted) relayed what Judge Maloney (later convicted) said—for Titone to walk, Gacho would need to be found guilty to foil any suspicion of a fix. But a retention vote and Operation Greylord loomed and self-preservation prevailed. Titone and Gacho were both found guilty and sentenced to death.

A bribed judge may be biased to convict to avoid scrutiny or to punish a non-paying defendant. Such is the case here. "Maloney was a criminal, a racketeer, but these words do not convey just how serious his misbehavior was." *Schomig*, 286 F.3d at 412. When the gavel fell for the Gacho-Titone trial, Judge Maloney's chief concern was keeping his shakedowns secret. He had little time for the quaint notions of the rule of law and the right to a fair trial.

Yet the rot went deeper than Maloney. Gacho testified and his family confirmed that Radakovich solicited a bribe from Gacho. Gacho then retained Robert McDonnell (previously and later convicted). McDonnell buried an egregious conflict of interest by neglecting to tell Gacho, charged with the murder of Tullio Infelise, that he was representing Tullio's brother. When counsel is burdened by an actual conflict of interest which has an adverse effect on his performance, prejudice is

presumed. McDonnell's actual conflict of interest warrants a new trial.

A conflicted McDonnell made several devastating errors: (1) stipulating to a damaging and inaccurate document; (2) eliciting prejudicial testimony from a witness; and (3) failing to object to questions about Gacho's other crimes. These errors fell well below the standard of reasonableness and violate the Sixth Amendment right to effective assistance of counsel.

In short, courts have plundered the thesaurus for pejoratives to describe Maloney. Yet despite the significant opprobrium heaped on him, and the new trials given to Titone and El Rukn members Hawkins and Fields over 20 years ago, the fair trial guaranteed by the Constitution continues to elude Robert Gacho.

ARGUMENT

I. Standard of Review.

When reviewing the district court's decision on a habeas corpus petition, the Court examines factual findings for clear error and legal conclusions *de novo*. *Coleman v. Lemke*, 739 F.3d 342, 349 (7th Cir. 2014).

II. This Case Exemplifies Why Habeas Corpus Exists As The Illinois Appellate Court Contravened Supreme Court Precedent And Misconstrued The Facts.

Gacho's petition is governed by The Antiterrorism and Effective Death Penalty Act. 28 U.S.C. § 2254. The law allows a federal court to grant a writ of habeas corpus for a state court decision in tension with Supreme Court precedent. *Ward v. Sternes*, 334 F.3d 696, 703 (7th Cir. 2003). The Court may set aside a state court decision if it unreasonably applies established federal law. *Id*. Such an application can occur where a state court refuses to extend a principle to a new factual context. *Williams v. Taylor*, 529 U.S. 362, 407 (2000). The Court may also set aside a state court decision if it rests on an unreasonable reading of the facts. 28 U.S.C. § 2254(d)(2).

The Illinois courts failed to grasp the gravity of Titone's bribe on Gacho, describing it as "merely a suspicious circumstance." 53 N.E.3d at 1062. That bribe pervaded the trial in which Gacho and Titone were tried with the same evidence, victims, and judge. A judge more focused on avoiding the dock than on the two men facing death before him. Illinois' refusal to grant Gacho a fair trial defies precedent and results from an unreasonable reading of the record. Federal relief is required.

III. Due Process Was Eviscerated When Judge Maloney Solicited A Bribe From Gacho, Took Money From Titone, And Said Gacho Would Need To Pay For Titone's Acquittal.

A. A fair trial is the epitome of due process.

Due process is many things, if not commonsensical. It mandates that a trial judge have no bias against a litigant or interest in the outcome. *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997). Even the appearance or probability of corruption requires relief. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009); *In re Murchison,* 349 U.S. 133, 136 (1955). No one with an interest in the outcome can judge a case. *In re Murchison,* 349 U.S. at 136. "Defendants—especially defendants facing death—have a right under the Due Process Clause to a 'fair trial in a fair tribunal.'" *Bracy v. Schomig*, 286 F.3d 406, 419 (7th Cir. 2002) (*en banc*), quoting *Withrow v. Larkin,* 421 U.S. 35, 46 (1975).

The presumption that public officials properly discharge their duties has been shattered for the "thoroughly steeped in corruption" Maloney. 520 U.S. at 909; 286 F.3d at 409-10. However, that a judge took bribes in one case is not enough by itself to establish bias in another. *Cartalino v. Washington*, 122 F.3d 8, 10 (7th Cir. 1997). Additionally, harmless error does not apply to judicial bias claims. *Id.* at 9-10. "So it does not matter how powerful the case against the defendant was or whether the judge's bias was manifested in rulings adverse to the defendant." *Id*. A bribed judge is thus biased regardless of the facts. *Id.* Similarly, it is "irrelevant" that a petitioner was convicted by a jury because the judge's role in a jury trial is not ministerial. *Id.*

at 10, citing *Walberg v. Israel*, 766 F.2d 1071, 1076 (7th Cir. 1985). *See also Gacho*, 967 N.E.2d at 1001 (rejecting State's argument emphasizing the jury as factfinder because it "misses the point.").

B. Governing Supreme Court precedent does not require actual bias.

The judicial system seeks "to prevent even the probability of unfairness." *In re Murchison,* 349 U.S. at 136. But bias is often shrouded in a judge's ruling and thus rarely detectable. The Supreme Court acknowledged as much in *Vasquez v. Hillery*. "When the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review. . . ." *Vasquez v. Hillery,* 474 U.S. 254, 263 (1986). Actual bias is thus not a requirement of a judicial bias claim. *Caperton,* 556 U.S. at 883. Due process is implemented by objective standards "that do not require proof of actual bias." *Id*. This standard derives from *Tumey v. Ohio*, which held that any temptation which might lead a judge to not "hold the balance nice, clear, and true between the state and the accused" obviates due process. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). Thus, the dispositive question is whether an interest "poses such a risk of actual bias" that the practice must be forbidden to protect due process. *Caperton,* 556 U.S. at 870.

The Illinois Supreme Court applied *Tumey* and *Murchison* to Judge Maloney's conduct in the pre-*Caperton Hawkins*. *See Hawkins*, 690 N.E.2d at 1001-02 (Ill. 1998), citing *Tumey*, 273 U.S. at 532 and *Murchison*, 349 U.S. at 136. Maloney accepted bribes to acquit El Rukn members Hawkins and Fields but sensed scrutiny

and returned the money. 690 N.E.2d at 1001-02. He then convicted both men. *Id*. In granting Hawkins and Fields a new trial, the Illinois Supreme Court focused on Maloney's personal interest in the case rather than actual bias. *Id*. "Fairness at trial requires not only the absence of actual bias, but also the absence of the probability of bias." *Id.* at 1003. *Hawkins* is clear: a defendant "need not show actual bias" for a new trial. *Id*., quoting *Tumey*, 273 U.S. at 532.

C. The Illinois Appellate Court requires Gacho prove actual bias.

1. *Caperton* is sidestepped.

Contrast that quoted excerpt, and that from *Caperton*, with the Illinois Appellate Court's ruling: Gacho "failed to establish any actual bias against him . . . his claim of compensatory bias fails." 53 N.E.3d at 1063. Despite the clarity of *Caperton*, *Murchison*, *Tumey*, and the Illinois Supreme Court's decision in *Hawkins*, the Illinois Appellate Court did the opposite and demanded actual bias. It then found no actual bias and rejected Gacho's claim. 53 N.E.3d at 1063. In doing so the court misconstrued the nature of Gacho's claim and failed to apply the governing standard of a risk of bias. Justice Delort made this point in dissent. 53 N.E.3d at 1066-67 (Delort, J., dissenting).

Before delving further into the appellate ruling, it bears noting that the actual bias-risk of bias distinction is not a matter of semantics. Courts acknowledge actual bias is elusive: the "heavy burden of showing actual bias." *Schomig*, 286 F.3d at 411. A "challenging burden." *United States ex. rel. Wadley v. Hulick*, No. 06-c-258, 2008

U.S. Dist. LEXIS 86027, 2008 WL 4724429, *19 (N.D. Ill. Oct. 24, 2008) (Lindberg, J.). A "difficult hurdle to overcome." *United States ex. rel. Guest v. Page*, No. 95-c-5034, 2004 U.S. Dist. LEXIS 4679, 2004 WL 609308, *19 (N.D. Ill. March 22, 2004) (Hibbler, J.). Further adding to Gacho's burden is the age of the case and the passing of numerous witnesses. The Illinois Appellate Court's refusal to apply the governing, less stringent risk of bias standard thus has case-altering consequences.

A state court decision is contrary to clearly established federal law if the state court applies a rule that contradicts governing Supreme Court precedent. *Williams*, 529 U.S. at 405. Precisely what happened here. The decision at bar cannot stand because it flouts *Caperton*, *Murchison*, and *Tumey*. While the majority acknowledged *Tumey* and *Caperton*, it rejected them based on their facts. 53 N.E.3d at 1062. Those facts were distinguishable as they "established a direct, pecuniary and substantial influence upon the judges. . . ." *Id*. Yet those are the facts at bar. Titone's bribe rendered Maloney's interest in Gacho's case direct, pecuniary, and substantial because the cases were tried together with the same evidence, victims, arguments, and judge. *See* Doc. 23-4 at 33-35. The majority avoids this reality. It also says nothing about the bribe being made on the backs of Gacho and Sorrentino and that Operation Greylord and the retention vote pressured Maloney to convict. This bias-rich context is crucial.

Moreover, *Tumey* and *Caperton*'s facts are secondary to their explicit rejection of the actual bias standard. Pecuniary and personal interests come in many guises,

making the source of bias immaterial. Nor were the cases limited to political contributions (*Caperton*) or a tangential interest in the fines the court awarded (*Tumey*). Their worth is in their risk of bias standard.

2. *Bracy* and *Fair* are followed instead.

The Illinois Appellate Court majority adopted the *Bracy* paradigm because it involved Judge Maloney. While *Bracy* may initially appear on point, the presence of a bribe *in this case* renders *Bracy* inapplicable as discussed further below. Put simply, *Bracy* examined bias in the abstract, while the bias here is real because the bribe was paid here. Also undermining the majority's *Bracy* reliance is the Illinois Supreme Court's decision in *Hawkins*. The majority overlooked that *Hawkins* came after *Bracy*. *See Hawkins*, 690 N.E.2d at 1003. *Hawkins* in fact cited *Bracy*, but still used the risk of bias standard from *Tumey* and *Murchison* and concluded "defendants need not show actual bias." *Id*., quoting *Tumey*, 273 U.S. at 532. The majority thus forgoes the controlling *Hawkins*.

After endorsing *Bracy*, the majority then applied an Illinois Supreme Court case in *Bracy*'s vein, *People v. Fair*, 738 N.E.2d 500 (Ill. 2000). *Fair* involved a murder trial heard by Cook County Circuit Judge Paul Foxgrover, later convicted for bribery on the bench. *Fair*, 738 N.E.2d at 502. However, (as in *Bracy*) there was no allegation of a bribe in the underlying case. The petitioner instead argued Foxgrover's systemic corruption violated his right to a fair trial. *Id*. The Illinois Supreme Court reversed in part, granting discovery on the judicial bias claim. *Id*. at

505-06. But it is *Fair*'s test that is relevant here as the majority used it. *Fair*'s two-part judicial bias test requires a petitioner establish: (1) a nexus between the judge's corruption in other cases and the judge's conduct at petitioner's trial; and (2) actual bias resulting from the judge's extrajudicial conduct. *Id., citing People v. Titone,* 600 N.E.2d 1160, 1166 (Ill. 1992).

Fair is an outlier, as Justice Delort explained. 53 N.E.3d at 1067 (Delort, J., dissenting). *Fair* invokes no U.S. Supreme Court authority for its bias test. *Id*. It only cites the Illinois Supreme Court's *Titone. Id.* In sharp contrast, *Hawkins* is rooted in *Tumey*, *Murchison*, and other U.S. Supreme Court decisions. *See Hawkins*, 690 N.E.2d at 1003. *Fair*'s test thus contravenes governing Supreme Court precedent (both U.S. and Illinois) as it mandates actual bias. It also creates an incongruous result—Titone bribed Judge Maloney and received a new trial 23 years ago while Gacho still seeks a trial before a non-bribed judge.

In sum, the majority's application of *Fair* conflicts with clear U.S. Supreme Court precedent holding that actual bias is unnecessary: *Caperton*, 556 U.S. at 870; *Withrow*, 421 U.S. at 46; *Murchison*, 349 U.S. at 136; and *Tumey*, 273 U.S. at 532. Reviewed *de novo*, the more onerous standard of actual bias warrants habeas relief.

3. The Illinois Appellate Court's 2012 findings should control.

Another flaw in the majority opinion is the Illinois Appellate Court's inconsistency—its 2016 holding abandons its 2012 findings. The court in 2012 found it "difficult to conceive" how Maloney's misconduct in Titone's trial did not infect

Gacho's. *Gacho,* 967 N.E.2d at 1001. "The trials were held simultaneously, concerned the same set of murders, and were both presided over by a man the State concedes had an interest in the proceedings." *Id.* The court got it right in 2012. This 2012 rationale should have dictated the 2016 decision and prompted a new trial, regardless of whether the court used the correct risk of bias standard or the incorrect actual bias standard. Justice Delort made this point, but it went unanswered. *See* 53 N.E.3d at 1067 (Delort, J., dissenting).

The 2012 decision further highlighted the "evidentiary support" for a bribe by Titone, and that this evidence established a "nexus" between Maloney's corruption and this case. 967 N.E.2d at 1001. Yet the majority in 2016 suggested there was no evidence Titone bribed Maloney. 53 N.E.3d at 1063. Along with contradicting the 2012 decision, this also defies the *Bracy v. Schomig en banc*, Judge Strayhorn, and Judge Zagel. Backed into a corner, the majority eventually relents and "assumes" the case had a bribe due to the *en banc* decision and Judge Zagel opinion. *See* 53 N.E.3d at 1061. Still, this fluctuation and contradiction with the 2012 reversal should give the Court additional pause.

Ultimately, the issue presented here is straightforward—is a bribed judge a biased judge? This simple question is complicated by the majority misconstruing the governing Supreme Court standard. The majority also downplays the gravity of the situation: "The record in this case establishes *only* that the defendant was tried simultaneously with a co-defendant who . . . bribed a corrupt trial judge. . . ." 53

N.E.3d at 1063 (emphasis added). As if death-row-bound defendants often face a bribed judge. Regardless, the line of cases culminating in *Caperton* controls, and *Caperton* could not be clearer that the standard is risk of bias. *See* 556 U.S. at 883.

D. The risk of bias is plain where a bribe from one defendant requires convicting his co-defendants to cover it up.

Applying the governing Supreme Court risk of bias standard, Titone's bribe and the bribe sought from Gacho satisfies it. That the $10,000 bribe marred Titone's trial is undisputed. "The State concedes that Maloney was corrupt, and it further concedes that Maloney's corruption tainted the trial of Dino Titone." *Gacho,* 967 N.E.2d at 1001. As it must. The $10,000 bribe is an unavoidable temptation to upset the *Caperton-Tumey* "nice, clear, and true" balance Maloney swore to uphold. This is a risk of bias to Titone and Gacho as Maloney's interests concerning Titone cannot be severed from Gacho. More so since Gacho would have to be found guilty for a Titone acquittal. *See* Doc. 22-6 at 53-54. Gacho's guilt was thus integral to the bribe. Because Maloney trampled over the "nice, clear, and true" balance, Gacho establishes a risk of bias under *Caperton*, *Murchison*, and *Tumey*.

Support for a new trial can also be found in this Court. Recounting Maloney's misconduct, the Seventh Circuit noted that "Titone gave Maloney a $10,000 bribe" and Titone's conviction fell "because Maloney had a motive to convict Titone to deflect suspicion from himself." *Schomig,* 286 F.3d at 412. If a Titone conviction kept federal agents at bay, Maloney would also gain from a Gacho conviction. This risk of

bias violates due process.

Further instructive is another Maloney-created context: Outfit hitman Harry Aleman and the issue of double jeopardy. *See Aleman v. Honorable Judges of the Circuit Court of Cook County*, 138 F.3d 302 (7th Cir. 1998); *People v. Aleman*, 667 N.E.2d 615, 617-18 (Ill. App. Ct. 1996). Aleman never faced the danger of being convicted in his first trial due to a bribe, thus quelling double jeopardy concerns and enabling a retrial. Similarly, Gacho was never *not* in danger of being convicted, thus warranting a retrial under the Court's *de novo* review.

E. Actual bias exists because Maloney considered Gacho expendable.

Alternatively, if the Court bypasses *Caperton*'s risk of bias standard and instead requires actual bias, Gacho still prevails. According to the pre-*Caperton Bracy*, Gacho would need to prove bias either because (1) Gacho bribed Maloney, or (2) Gacho did not bribe him, but Maloney took bribes from defendants in other matters causing "compensatory bias." *See Bracy*, 520 U.S. at 905, 909 (1997). This framework is unsuitable as Gacho did not bribe Maloney, but Titone did *in this case*. Yet that is the framework the majority and district court applied. *See* Doc. 25 at 23.

1. Judicial bias can exist even without a bribe specific to that case.

Bracy's inapplicability aside, the case demonstrates that judicial bias can exist without a bribe. 520 U.S. at 901. In 1981, Bracy and Collins were convicted and sentenced to die before Judge Maloney for three murders. *Id*. at 900-01. Gacho's counsel Robert McDonnell represented Bracy. 286 F.3d at 413-14. A divided Seventh

Circuit affirmed the denial of habeas relief but the Supreme Court reversed. *See Bracy v. Gramley,* 81 F.3d 684 (7th Cir. 1996). While Maloney did not accept bribes in the Bracy-Collins' case, Maloney fixed other murder cases around that time. 520 U.S. at 901-02. The Supreme Court found potential compensatory bias. *Id*. at 909. Such bias occurs when a corrupt judge rules harsher against defendants who do not bribe him to stifle suspicion. *Id*. at 905. This interest violated due process and required discovery on the judicial bias claim. *Id*. at 909.

The district court on remand denied relief for the petitioners' convictions but granted relief on sentencing. *United States ex rel. Collins v. Welborn,* 79 F.Supp.2d 898 (N.D. Ill. 1999). A divided Seventh Circuit affirmed on the convictions but reversed on sentencing. *Bracy v. Schomig,* 248 F.3d 604 (7th Cir. 2001). An *en banc* decision vacated that opinion and affirmed the convictions but vacated the death sentences and remanded for new sentencings. 286 F.3d at 419.

Maloney's mere presence in *Bracy* sustained a bias claim. If a bribe can transcend one case to suggest bias against defendants in other cases, the bribe must bias the co-defendant of that same case. Maloney's misconduct here was far more damning than the *Bracy* speculation. Not only did Maloney have the same history as in *Bracy* of taking bribes before, during, and after Gacho's case, he was bribed in Gacho's case. Titone paid Roth $10,000 and in return, "as long as my son's two co-defendants were found guilty, Judge Maloney could get away with letting Dino go free and Judge Maloney could still get elected." Doc. 22-6 at 53-54. Judge Strayhorn

condemned the proceedings: "Dino Titone did not receive the kind of a fair, impartial trial before a fair, unbiased, impartial judge that his constitutional right as a citizen required." 53 N.E.3d at 1069 (Delort, J., dissenting); *People v. Titone,* 83-c-127 (Cir. Ct. Cook County, July 25, 1997). Replace "Dino Titone" with "Robert Gacho" and the sentence still holds.

2. Gacho has shifted the burden of actual bias to the State.

The $10,000 bribe to acquit Titone meant a conviction for Gacho. Doc. 22-6 at 53-54. This fact shifts the burden to the State to demonstrate no actual bias. So instructs *Cartalino v. Washington*, 122 F.3d 8 (7th Cir. 1997).

Cartalino and Bridges were tried for murder before Judge Close. *Cartalino*, 122 F.3d at 9. Cartalino was convicted and Bridges acquitted. *Id*. Cartalino presented evidence that Bridges bribed Judge Close and per the arrangement, Cartalino would take the fall, "which could mean that Judge Close would do what he could to see that the jury convicted Cartalino." *Id.* at 10. This "strong evidence" shifted the burden of persuasion to the State to show no actual bias. *Id*. at 10-11. The lack of slanted rulings did not matter. *Id*. The issue was the judge's bias, "regardless of how his bias may have manifested itself" because "a bribed judge is biased *per se*." *Id.* Worse, a judge once bribed is partial due to the incentives to retaliate against non-payors, show a bribing defendant "what a good deal he got," or convict non-payors to placate prosecutors. *Id*. at 10. The Court reversed the dismissal of habeas relief and remanded for an evidentiary hearing. *Id*. at 11.

Like the non-bribing co-defendant in *Cartalino*, the bias to Gacho was immediate and severe. And like Judge Close in *Cartalino*, Judge Maloney planned for Gacho to bear the bribe's brunt. Salvatore Titone makes this clear: "as long as my son's two co-defendants were found guilty, Judge Maloney could get away with letting Dino go free and Judge Maloney could still get elected." Doc. 22-6 at 53-54. Under *Cartalino* this shifts the burden to the State to establish no actual bias. Contrary to *Cartalino* the Illinois Appellate Court did not.

Instead, the majority used *Cartalino* to reject Gacho's claim. 53 N.E.3d at 1062. Citing *Cartalino*, it deemed Titone's bribe "merely a suspicious circumstance that warrants further inquiry." *Id*., citing 122 F.3d at 10. But the majority neglected to mention that *Cartalino* reversed the habeas dismissal. *See* 122 F.3d at 10-11. This reversal enabled the petitioner to conduct "further inquiry" via discovery. *See id*. Foreclosing Gacho's claim is thus incompatible with *Cartalino*. Moreover, downplaying Titone's bribe as "merely a suspicious circumstance" is a troubling understatement.

3. Gacho presents a textbook example of actual bias.

If Gacho has the burden to prove actual bias, he easily carries it. While Gacho incorporates the above arguments regarding the risk of bias, the best explanation for actual bias is in the *Bracy en banc* decision, which summarized the Maloney-McDonnell morass: "we have a corrupt judge with mob connections, who attempts to cover his tracks, and is now a convicted felon. We have a defense lawyer, also with

organized crime ties, who is also a convicted felon. Both are engaged in the trial of two men who are in serious danger of being sent to the death chamber." 286 F.3d at 414. An apt description for the Gacho-Titone trial, only making it two defense lawyers with such credentials instead of one.

Actual bias further exists because as the Illinois Appellate Court noted in 2012, the Gacho-Titone trial was "held simultaneously, concerned the same set of murders, and were both presided over by a man the State concedes had an interest in the proceedings." 967 N.E.2d at 1001. Maloney harbored a direct compensatory bias against Gacho before and during the trial. Recall that Titone paid Roth in March 1983, long before the October 1984 trial, thus discrediting the pre-trial rulings. Doc. 22-6 at 53; Doc. 16-7 at 22; Doc. 22-1 at 127. And Maloney would need Gacho to be found guilty to lull voters and federal investigators. Doc. 22-6 at 53-54. Like the trial of the El Rukn members in *Hawkins*, Maloney here "signaled his readiness to skew the outcome of the trial in order to earn $10,000 for himself." *See* 690 N.E.2d at 1003. And like *Hawkins*, Maloney here "possessed and actively cultivated a personal, pecuniary interest in the outcome." *See id*. The epitome of actual bias.

Moreover, this case bridges the *Bracy* compensatory-*Caperton* pecuniary divide. The bias here implicates both because the $10,000 paid to Judge Maloney (pecuniary) mandated he "get two out of the three" (compensatory). And Maloney's compensatory bias has already been established as a matter of law. Both this Court

and the Supreme Court determined that to compensate for the bribed cases, Maloney engaged in compensatory bias in other criminal cases by ensuring convictions to cover his corrupt acquittals. *Bracy*, 520 U.S. at 905 n.5; *Schomig*, 286 F.3d at 412. The compensatory bias is inescapable here because Maloney said he needed to compensate for the acquittal in this very case. Yet the majority minimized Titone's bribe as "merely a suspicious circumstance." 53 N.E.3d at 1062.

Gacho and Titone are inseparable because their trials involved the same evidence, victims, arguments, and judge. This fact dooms the State's position. Trying to isolate Gacho's case is futile because as Justice Delort observed, the egg "was irreversibly scrambled when Gacho's and Titone's cases were tried simultaneously." 53 N.E.3d at 1068 (Delort, J., dissenting). And as this Court noted, Maloney "camouflage[ed] his actions in some cases by compensating for it in others." 286 F.3d at 412. But in the Gacho-Titone trial, Maloney did not have the luxury to wait. The incentive to compensate against Gacho was irresistible given the multi-defendant, simultaneous trial scenario and the specter of Operation Greylord. Doc. 22-6 at 53-54. Actual bias exists because Maloney took $10,000 from Gacho's co-defendant.

The majority and district court strayed from the law again when they relied on the absence of questionable rulings against Gacho. *See* Doc. 25 at 24-25; 53 N.E.3d at 1063-64. The district court found "the state court properly looked to Maloney's performance" at the Gacho-Titone trial. Doc. 25 at 24-25. Reviewing Maloney's rulings was an "acceptable method" to determine if Maloney had compensatory bias.

Id. *Cartalino* says the opposite: "it doesn't matter . . . whether the judge's bias was manifested in rulings adverse to the defendant." 122 F.3d at 9-10. But *Cartalino* was disregarded as the district court agreed with the majority and Judge Cannon on the importance of not "one questionable ruling" by Maloney. Doc. 25 at 25.

Finally, unlike other bias cases, Gacho himself was shaken down. Radakovich sought $60,000 from Gacho for Maloney and told Gacho's mother that paying Maloney would enable Gacho to "walk." *Gacho*, 53 N.E.3d at 1059. Not paying cemented his conviction as the fact Maloney punished non-payors is supported by "the testimony presented at Maloney's trial." *Bracy*, 81 F.3d at 697 (7th Cir. 1996) (Rovner, J., dissenting). While the bribe scheme here collapsed as Maloney convicted Titone, Operation Greylord and the retention vote were the catalysts. *See* Doc. 23-14 at 70-71; Doc. 22-6 at 53-54. Ironically, Operation Greylord created more bias against Gacho and Titone because it motivated Maloney to overcompensate against defendants as the noose tightened around him. *Id*. Press and FBI scrutiny fueled Maloney's increasing detachment from objectivity as maintaining a corrupt-free façade was his first priority. The lives of Gacho and Titone a distant second.

4. Maloney's allegiance to the Outfit and Infelise family.

To say Judge Maloney was allied with the mob only scratches the surface. Maloney was as entrenched in the Outfit as any mob enforcer prowling the streets of early 1980s Chicago. Maloney owed his black robe to Outfit kingmaker Pat Marcy. *See* Jerold Solovoy, *The Illinois Supreme Court Special Commission on the*

Administration of Justice 18-19 (Dec. 1993); Robert Cooley, WHEN CORRUPTION WAS KING 15 (2004). And more than anything else, allegiance to Outfit overlords like Marcy ruled the day. *See also United States v. Marcy*, 814 F.Supp. 673, 675-77 (N.D. Ill. 1992) (outlining Marcy's racketeering and bribery). This reality further biased Maloney because the underlying victim was Tullio Infelise, brother of Rosario Infelise. The Infelises were members of the Outfit. Doc. 1 at 22-23. As Gacho's habeas petition explains, the Infelise family, including Rosario and Tullio, were aligned with the Angelo LaPietra crime family. *Id*. *See also United States v. Rocco Infelise*, 835 F.Supp. 1466, 1475 (N.D. Ill. 1993) (describing racketeering and mob murder of bookmaker by Rosario's uncle Rocco Infelise, and how Pat Marcy and Rocco Infelise bribed judges together).

Additionally, a cryptic colloquy during a pre-trial hearing makes sense now that Maloney's motives and the Infelise family's reach are known. Specifically, the prosecution wanted Gacho to name the partner in his Bridgeport autobody business. Doc. 23-3 at 20. McDonnell tried to stymie these efforts:

> Mr. McDonnell: Judge, deliberately trying to prejudice this Court by bringing in the name of a partner.
>
> The Court: No, I don't--I can assure you that the Court won't--
>
> Mr. McDonnell: Your Honor could very possibly recognize the name and counsel well know that.
>
> The Court: It's not going to make any difference on this motion.
>
> . . .
>
> Mr. Kaplan (prosecutor): Did you have a partner?

Mr. Gacho: I had somebody working there with me, right. Infelise.

Mr. Kaplan: Rosario Infelise?

Mr. Gacho: Right.

Mr. Kaplan: Well, did you take the police –

The Court: I don't know who that is. Just a name to me.

Doc. 23-3 at 20.

Of course, it was not just a name. It was Maloney's fellow Outfit member, one whose uncle worked closely with Pat Marcy. And Marcy pulled Maloney's strings. The incestuous Infelise-Marcy-Maloney ties (hinted at in this colloquy) were one more reason Tullio's death had to be avenged.

F. If the Court refuses a new trial, alternative relief is proper.

In the further alternative, if Gacho is not entitled to a new trial he deserves other relief. Specifically, a proceeding in which the State must prove the absence of actual bias, per *Cartalino*. As set forth above *Cartalino* held that the "strong evidence" of a co-defendant's bribe shifted the burden of persuasion to the State to show no actual bias. 122 F.3d at 10-11. Consistent with *Cartalino* the Court should reverse for such a showing by the State here.

Additionally, Gacho has at least demonstrated the need for discovery in federal court on his judicial bias claim. The Court approved discovery for a habeas petition in *Tabb v. Christianson*, 855 F.3d 757, 764 (7th Cir. 2017). More specifically,

such relief is proper under *Bracy*, *Cartalino*, and *Fair*. In fact, that is the holding of *Bracy* and *Fair* which did not even involve a bribe. *See Bracy*, 520 U.S. at 901-02; *Fair*, 738 N.E.2d at 502. It is also *Cartalino*'s holding, which involved the same bribery scheme of trading an acquittal for a conviction. *Cartalino*, 122 F.3d at 10.

While the Cook County Circuit Court begrudged Gacho a limited evidentiary hearing 23 years after he asked, the proceeding was perfunctory. Worse, thanks to a judicial and prosecutorial apparatus more interested in keeping Maloney's skeletons closeted than a defendant's right to a fair trial, this delay has rendered Gacho's ability to make his case that much harder. Nevertheless at a minimum, discovery on Gacho's judicial bias claim is needed. But the real relief is a new trial because a judge benefiting from two men going to death row is the nadir of a justice system.

IV. Gacho Experienced Ineffective Assistance of Counsel When McDonnell Had An Actual Conflict of Interest In Representing The Victim's Brother.

A. Standard of review.

Whether counsel was ineffective is a mixed question of law and fact reviewed *de novo*. *United States v. Shukri,* 207 F.3d 412, 418 (7th Cir. 2000).

B. McDonnell's ongoing representation of the victim's brother divided his loyalties.

The Sixth and Fourteenth Amendments of the United States Constitution guarantee counsel to criminal defendants. U.S. CONST. AMENDS. VI, XIV. The fundamental right to counsel ensures the fairness of the adversary process.

Kimmelman v. Morrison, 477 U.S. 365, 374-75 (1986). This includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Effective assistance also includes representation free from conflicts of interest. *Wood v. Georgia*, 450 U.S. 261, 271 (1981).

1. Attorneys must be devoted to their client's interests.

Two frameworks exist for analyzing ineffective assistance claims based on a conflict of interest. One framework applies if defense counsel labored under an actual conflict of interest. *Cuyler v. Sullivan*, 446 U.S. 335, 345-46 (1980). "Prejudice is presumed" under *Cuyler* if the petitioner establishes counsel had an actual conflict and the conflict adversely impacts counsel's performance. *Id.* at 348. The second framework applies if no actual conflict of interest is shown. *Strickland*, 466 U.S. at 687, 694. The petitioner must demonstrate counsel's representation fell below a reasonable standard of care and a reasonable probability that but for counsel's unprofessional errors the trial outcome would have differed. *Freeman v. Chandler,* 645 F.3d 863, 869 (7th Cir. 2011), citing *Strickland,* 466 U.S. at 687, 694. In the § 2254(d) context, the question is not whether counsel's actions were reasonable. *Harrington v. Richter,* 562 U.S. 86, 89 (2011). The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s standard. *Id.*

The *Cuyler* framework applies here because McDonnell represented the victim's brother. When assessing Sixth Amendment conflict-of-interest claims, a court should not view the attorney's performance under the "highly deferential"

standard spelled out in *Strickland* because *Cuyler*, *Holloway*, and *Glasser* establish that the attorney's duty of loyalty to the client is of fundamental importance. *Cuyler,* 446 U.S. at 346; *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978); *Glasser v. United States*, 315 U.S. 60, 70 (1942). Compromise that loyalty, and the attorney has negated the assumption underlying *Strickland*'s deferential approach to reasonable professional conduct, which is that the attorney must advocate the best interests of his client. *See Strickland*, 446 U.S. at 692 ("[P]rejudice is presumed when counsel is burdened by an actual conflict of interest.").

An impermissible conflict of interest can arise when an attorney represents multiple clients with potentially antagonistic interests. *Cuyler*, 446 U.S. at 345-46. The gravity of divided loyalties is exemplified by *Castillo v. Estelle*, 504 F.2d 1243, 1245 (5th Cir. 1974). In *Castillo,* the defense attorney also represented the victim of the charged crime, who was one of the two principal witnesses for the prosecution. 504 F.2d at 1244-45. The Fifth Circuit found it unnecessary to inquire into alleged instances of prejudice; the fact of conflicting duties was enough to create a "real" conflict. *Id*. at 1245. *See also United States ex rel. Miller v. Myers*, 253 F.Supp. 55, 57 (E.D. Pa. 1966) (granting habeas relief where defendant's attorney had also represented the victim of the burglary in an unrelated civil matter).

2. McDonnell labored under an actual conflict of interest.

Robert McDonnell had an actual conflict because he represented Tullio's brother Rosario while representing Gacho. The Illinois Appellate Court (unanimous

on the ineffective assistance issue) wrongly found "the record does not disclose the relationship of Rosario Infelise to the victim Tullio Infelise." 53 N.E. 3d at 1065. The court manifestly erred. The Illinois Supreme Court in Gacho's direct appeal explained "Tullio Infelise's brother, Frank, was also at the house and informed [the police] that he knew Robert Gacho because he worked with another brother, Rosario." 522 N.E.2d at 1152; Doc. 23-4 at 5-6. Moreover, the district court here acknowledged "Rosario and Tullio were brothers." Doc. 25 at 28. Thus, the Illinois Appellate Court's entire ineffective assistance analysis is premised on a fundamental flaw. Its decision was plainly incorrect, and resulted in an objectively unreasonable application of *Cuyler*.

But there is more. The Illinois Appellate Court mistakenly emphasized the pre-trial waiver of conflicts by Gacho. This waiver only concerned McDonnell's past representations. Judge Maloney asked, "you have no objection to whatever has occurred *in the past* regarding [your attorney's] representation of a family member of one of the victims here?" Doc. 22-1 at 151; Doc. 23-1 at 5-6; *Gacho*, 53 N.E.3d at 1058 (emphasis added). To which Gacho responded no. *Id*. Thus, the court only addressed McDonnell's past representation. The court was never apprised (and thus never inquired) of McDonnell's ongoing representation of the victim's brother. Nor did Gacho know. Gacho's waiver of past representations thus does not preclude a conflict of interest claim for contemporaneous representation. The Illinois Appellate Court's finding again misconstrues the record.

Additionally, Gacho testified that after the verdict, McDonnell told him that "he was still handling some legal matters" for Rosario. Doc. 1 at 26. The Illinois Appellate Court found "no evidence in the record" that McDonnell represented Rosario after August 15, 1984, other than Gacho's testimony. *Gacho*, 53 N.E.3d at 1064. This was incorrect. Along with Gacho's testimony was a certified clerk's record establishing McDonnell represented Rosario in Cook County Circuit Court case 84-c-16401 from January 1984 to September 1984. Doc. 16-7 at 53-58. Meanwhile, McDonnell's representation of Gacho for killing Rosario's brother began on December 15, 1983 and lasted until Gacho's sentence on November 28, 1984. Doc 22-7 at 6, 11. This concurrent representation is an actual conflict. The Illinois Appellate Court's finding to the contrary misreads the record. Although the standard set out in § 2254(d) is "difficult to meet," it remains a "guard against extreme malfunctions in the state criminal justice systems. . . ." *Harrington,* 562 U.S. at 89. Such a malfunction occurred here given the numerous misreadings of the record.

3. The Infelise family benefited from a Gacho conviction.

The dual representation alone divided McDonnell's loyalties. But Gacho also said McDonnell admitted discussing Gacho's representation with the Infelise clan. 967 N.E.2d at 998. McDonnell told Gacho "he discussed aspects of his representation of [Gacho] with the Infelise family" but McDonnell did not divulge the substance of those conversations. *Id*. Further, McDonnell's ties to the Infelise family and organized crime were noted in *United States v. Rocco Infelise*, 835 F.Supp. 1466,

1474-75 (N.D. Ill. 1993). Those opposing interests conflicted McDonnell. The Illinois Appellate Court in 2012 suspected as much: "[McDonnell] was motivated to maintain that the [Infelise] family's favor, and the defendant's acquittal was unlikely to advance that aim." *Gacho*, 967 N.E.2d at 1004. Once again, the 2012 characterization should have controlled the 2016 decision and prompted a new trial.

Rosario would benefit from Gacho being found guilty of Tullio's murder. Further, the Infelise family is an entity that would gain from Gacho's conviction. McDonnell's contemporaneous attorney-client relationship with Rosario during Gacho's trial for the murder of Rosario's brother is a relationship the Illinois Supreme Court deems a *per se* conflict. This is reflected by *People v. Coslet*, which holds that "once an attorney has been retained and received the confidence of a client, he cannot serve adverse interests regardless of how innocent his motives or how good his intentions." *People v. Coslet*, 364 N.E.2d 67, 70 (Ill. 1977).

Additionally, McDonnell's ties to Maloney present another conflict. The Court examined this dynamic in the *Bracy en banc* decision. *See* 286 F.3d 406. In awarding the defendants discovery on their compensatory bias claim, the Court emphasized that Maloney had appointed former associate McDonnell as the defendant's trial counsel. 286 F.3d at 414. A concurring Judge Posner further explained that McDonnell "might have been appointed with the understanding that he would not object to, or interfere with, a prompt trial, so that petitioner's case could be tried before, and camouflage the bribe negotiations." *Id.* at 420 (Posner, J. concurring).

That is the situation at bar.

Finally, the Illinois Appellate Court's decision is also contrary to or an unreasonable application of *Strickland* as interpreted by *Williams v. Taylor*, 529 U.S. 362 (2000). The *Williams* Court explained what is required to show a reasonable probability of a difference in the outcome where, due to ineffective assistance, the defendant was denied his right to present mitigating evidence. *Williams*, 529 U.S. at 393. The trial judge in *Williams* considered the possible effect of additional evidence on the outcome, and the Supreme Court agreed with the trial judge that the mitigating evidence may have altered the jury's selection of the penalty even if it did not undermine the prosecution's case. *Id.* at 397. Thus, the possibility to change a defendant's sentence satisfied the second prong of *Strickland*. *Id.* The Illinois Appellate Court's "dismissive and strained interpretation" of the evidence resulted in a decision based on an unreasonable determination of the facts in light of the evidence. *See* 28 U.S.C. § 2254(d)(2); *Miller-el v. Dretke*, 545 U.S. 231, 265 (2005). The Court should thus grant the writ of habeas corpus. Because Gacho's sentence, along with his guilt, could have been altered by a non-conflicted counsel, both, if not at least the sentencing, should be reversed.

In sum, McDonnell's Rosario-Tullio-Maloney connection was too substantial and constitutes an actual conflict of interest. The Illinois Appellate Court's finding that Gacho did not have conflicted counsel is contrary to and an unreasonable application of *Cuyler* and *Strickland* under the Court's *de novo* review.

V. The Twice-Disbarred McDonnell Committed Multiple Prejudicial Errors.

Corrupt practices twice precluded McDonnell from practicing law. Doc. 25 at 12; 286 F.3d at 414. An embattled McDonnell later withdrew his license before he could be disbarred a third time. 286 F.3d at 414. This history, McDonnell's undisputed Outfit connections, and his ongoing representation of the victim's family place his trial errors in a new light.

McDonnell's mistakes amounted to ineffective assistance of counsel under *Strickland* as defined above. *See* 466 U.S. at 687, 694. Each of McDonnell's errors alone is enough to influence the trier of fact. But their combined effect is unavoidable and confirms McDonnell's performance fell far below the *Strickland* standard.

A. McDonnell stipulated to prejudicial evidence.

Gacho first experienced ineffective assistance when McDonnell stipulated to a document rife with inaccurate and damaging information.

Gacho moved to suppress his stationhouse confession because officers beat it out of him. Chicago police arrested Gacho at his home and took him to the Burbank police station where they used violence to secure a confession. Doc. 23-3 at 12-13; Doc. 23-9 at 91-93. A medical technician at the Cook County Jail examined Gacho a few weeks later and Gacho complained of kidney pain from police torture. Doc. 23-3 at 2-6, 11. Gacho also told the technician that he had been in a car accident but had not been hurt. The technician completed a treatment record noting the car accident

but wrongly citing it as the source of the kidney injuries.

Gacho told McDonnell that medical records from Gacho's doctor would show the car accident caused no injuries, but McDonnell failed to obtain this critical evidence. Doc. 1 at 31-32. These records would have corroborated the police torture. McDonnell compounded this neglect during the motion to suppress hearing. The State presented the jail technician's incorrect treatment record. Inexplicably, McDonnell stipulated to it. The State then introduced the record to refute Gacho's police abuse claims and tie the injuries to the car accident. It then became clear McDonnell had not read the treatment record:

> Prosecutor: We would ask that this be marked as People's Exhibit No. 6.
>
> McDonnell: Judge, the only objection I would have is to the relevancy of it…
>
> Prosecutor: . . . He (Gacho) did not tell the medical personnel at the Cook County Jail that he received his injuries to his kidney as a result of an auto accident that had taken place in December . . . which goes to the motion that the Court is hearing at this time.
>
> McDonnell: I do not recall any testimony that he told somebody that (he) was –
>
> Prosecutor: It's been stipulated to. It is one of the documents that was stipulated to that was presented to his Honor.
>
> Court: There was testimony about him having been involved in an automobile accident?

> McDonnell: That is correct, Judge . . . I rest, Judge.

Doc. 23-3 at 67-68.

Gacho's motion to suppress the confession imploded because McDonnell was unprepared to counter the State's evidence. Doc. 23-3 at 70-71. McDonnell failed Gacho by not challenging the accuracy of the technician's treatment record. McDonnell then exacerbated this error by not obtaining verification from Gacho's doctor to prove Gacho was not injured in the car accident. It is unlikely that even an impartial judge would give Gacho's police brutality claim credence given another purported source of Gacho's injuries. The prejudice to Gacho is severe as Gacho's motion to suppress failed and the torture-induced confession was presented to the jury. McDonnell's inexcusable neglect satisfies *Strickland*.

B. McDonnell elicited damaging testimony after it was barred.

Tullio Infelise made several incriminating statements to police before he died. Doc. 23-4 at 47-52. During pre-trial motions, Titone and Gacho sought to exclude a transcript of taped conversations between Infelise and police. *Id*. Maloney barred the recording and any evidence derived from it because the answers as unreliable. Doc. 23-4 at 60-61. This was an important defense victory because Infelise implicated all three defendants on the tape. Doc. 23-4 at 57-59. But while cross-examining Officer Johnstone regarding his conversations with Infelise, McDonnell broached the recording, opening the door to its admission. Doc. 23-7 at 41. The question was

surreal—McDonnell simply asked if there was a recording and then immediately rested. *Id*. The State on redirect asked Officer Johnstone, over an objection by a baffled Roth, to detail the previously barred conversation, thereby exposing Tullio's devastating testimony naming the three defendants as his assailants. Doc. 23-7 at 42-44. Tellingly, at a sidebar on Roth's objection, the prosecution noted to Maloney that McDonnell "said he did it on purpose." Doc. 23-7 at 43.

McDonnell's conduct was criminal. He knew the statement crippled Gacho as he joined Titone's motion to bar. Doc. 23-3 at 60-61; Doc. 23-4 at 47-52. Yet McDonnell asked about it, guaranteeing its admission. This was a gift to the Infeliese family and Maloney as Tullio's deathbed statements swayed the jury and decimated Gacho's defense. This is prejudice under *Strickland*.

C. McDonnell failed to object to questions about Gacho's other crimes.

Under Illinois law, evidence which suggests the defendant engaged in prior criminal activity is inadmissible unless relevant. *People v. Lewis*, 651 N.E.2d 72, 92 (Ill. 1995). Further, other crimes are inadmissible when elicited to show a defendant's propensity for crime. *People v. Kliner*, 705 N.E.2d 850, 883 (Ill. 1998). Yet when the State asked Gacho whether he used cocaine, McDonnell failed to object. Doc. 23-9 at 124. This falls far below the *Strickland* standard of reasonableness. The improper line of questioning enabled the jury to consider that Gacho had a propensity to commit the charged crimes. Such prejudice satisfies *Strickland*.

Considering the combined impact of the conflicted McDonnell's errors, Gacho's right to effective assistance of counsel was violated. A new trial with an attorney who is not representing the victim's brother and does not have mob ties, multiple convictions, and multiple disbarments is needed.

CONCLUSION

The Illinois Appellate Court described Titone's $10,000 bribe as "merely a suspicious circumstance" and concluded the record showed "only" that Titone bribed Judge Maloney. Gacho's 25-year post-conviction process was thus reduced to a triviality. Meanwhile, bribers like Titone, Hawkins, and Fields were granted new trials decades earlier. Because denying a new trial violates *Caperton*, *Murchison*, *Tumey*, and *Bracy*, the Court should order Cook County to retry Gacho in three months or release him.

Respectfully submitted,

s/ Christopher Keleher
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