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
	)	
ALEX JONES,	)	
	)	
Respondent-Appellee.	)	

REPLY BRIEF OF APPELLANT ROBERT GACHO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

I. The Response Brief Avoids The Central Issue Of This Appeal.

Comparing the amount of ink litigants spill on an issue is not always the best guide as to who should prevail. But it is here. Gacho's lead argument is simple—the Illinois Appellate Court should have applied the risk of bias standard instead of actual bias. His risk of bias argument spans nine pages. Opening at 21-29. The State counters with a paragraph. Response at 18. Gacho invokes five Supreme Court cases in support of risk of bias: *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009); *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986); *Withrow v. Larkin*, 421 U.S. 35, 46 (1975); *In re Murchison*, 349 U.S. 133, 136 (1955); and *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). The State ignores them.

The State's lone paragraph on the risk of bias is so thin and perfunctory it constitutes waiver. Compelling this conclusion is *Swyear v. Fare Foods Corporation*, 911 F.3d 874 (7th Cir. 2018). "Because Swyear failed to develop these issues at all in her briefs, despite the fact that Fare Foods' main argument in their brief was that Swyear had not alleged damages, she has waived the issue." 911 F.3d at 886. That depicts the situation at bar. The State inexplicably says nothing about the *Caperton-Murchison-Tumey* line that propelled this appeal and Justice Delort's dissent.

But even if the State's four-sentence paragraph survives waiver, it fails on the merits. The first two sentences summarily deem Gacho's contentions "meritless" and "wrong." Response at 18. The next two sentences are quotes about actual bias from

the distinguishable *Bracy*. *See id.*, quoting *Bracy v. Gramley*, 520 U.S. 899, 509 (1997), and *Bracy v. Schomig*, 286 F.3d 406, 411, 421 (7th Cir. 2002) (en banc). Nothing else. The State thus cedes the risk of bias issue as it offers no counterpoint to anything in pages 21-29 of the Opening.

Worse, the State ignores Gacho's dissection of *Bracy*. *See* Opening at 29-35. There, Gacho explains how the pre-*Caperton Bracy* only addressed scenarios where the defendant himself bribed the judge, or the judge took bribes from defendants in other cases. *See* 520 U.S. at 905, 909. The Opening emphasizes that the *Bracy* compensatory framework is unsuitable if such facts are lacking. Opening at 29. And here they are as Titone bribed Maloney in Gacho's case. Yet the State evades this critical distinction. Instead, the operative paragraph recites two quotes from *Bracy* that do nothing to overcome its inapplicability.

While the State rests its case on *Bracy*, there was no bribe in *Bracy*. The courts in *Bracy* were thus disinclined to make a blanket declaration that every conviction emanating from Maloney's courtroom was a fraud. Granting Gacho relief here would not undermine that concern because a bribe was paid in Gacho's case. The abstract bias of *Bracy* cannot be reconciled with the real bias at bar, and the State makes no effort to do so.

To reiterate, *Caperton*, which cites *Bracy* on unrelated grounds, could not be clearer: due process is implemented by objective standards "that do not require proof of actual bias." *Caperton*, 556 U.S. at 883. Any temptation which might lead a judge

to not "hold the balance nice, clear, and true between the state and the accused" tramples due process. *Tumey*, 273 U.S. at 532. 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. On this, the State has no comment.

It is elementary that one with an interest in the outcome cannot sit in judgment. For the reasons set forth in the Opening and untouched in the Response, Gacho asks the Court to follow the *Caperton-Murchison-Tumey* line and apply the risk of bias standard.

II. Even If Actual Bias Is The Test, Gacho Prevails Because The State Views Titone's Bribe In A Vacuum.

The State's disengaged approach to the Opening is not limited to the risk of bias issue. The Opening discusses Maloney's motivations to ensure Gacho's guilt: Operation Greylord; the upcoming retention vote; placating Maloney's Outfit connections; and Titone's bribe. Opening at 24, 34-35. Yet the State bypasses the Opening's contentions about Maloney and his partners in crime, attorneys Robert McDonnell and Bruce Roth.

The State's disregard for the context of Titone's bribe, along with the impact of Titone's bribe on Gacho, sinks its actual bias argument. Indeed, the State says nothing about Titone's bribe being made on the backs of Gacho and Sorrentino other than noting Gacho "failed to prove it at the evidentiary hearing." Response at 21.

That the central witnesses died years ago as the 25-year-long state post-conviction process stagnated is shrugged off. Next, the State ignores Operation Greylord and the retention vote pressuring Maloney to convict. Finally, and most critically, the State cannot refute that Gacho and Titone were tried together with the same evidence, victims, arguments, and judge. Yet these factors are why Titone's bribe rendered Maloney's interest in Gacho's case direct, pecuniary, and substantial.

Ignoring these points, the State assures the Court that all is well because Gacho presented no evidence of actual bias at his evidentiary hearing. Response at 21. The bribe is the evidence. A judge is disqualified when he has a financial incentive in the case's outcome. *See*, *e.g.*, *Rippo v. Baker*, 137 S. Ct. 905, 906 (2017) (per curiam); *Caperton*, 556 U.S at 877-78; *Bracy*, 520 U.S. at 906, 909. And the State is on record conceding "that Maloney was corrupt, and . . . that Maloney's corruption tainted the trial of Dino Titone." *People v. Gacho*, 967 N.E.2d 994, 1001 (Ill. App. Ct. 2012). The Opening argues that Maloney's pecuniary interests concerning Titone could not be isolated because the Gacho-Titone trial was one proceeding. Opening at 33-34. The State never articulates how Maloney's admitted corruption as to Titone would not impact Gacho. This inability is why the State's case collapses.

Further, Salvatore Titone, who had no incentive to perjure himself for his son's accomplice, twice swore that Gacho and Sorrentino were the price for a Titone acquittal. Doc. 22-6 at 53-54. Even if the Court sets aside Titone's assertion about

the bribe's terms, bias still exists as Gacho and Titone were tried simultaneously. Friction was inevitable as Maloney undoubtedly realized that guilty verdicts for Gacho and Sorrentino were necessary to cover his crime. Doubt must be cast on the entire process.

The frailty of the Response is further reflected in the State's attack on the Illinois Appellate Court's 2012 decision. Response at 20. The Court in 2012 reversed the trial court's dismissal of Gacho's post-conviction petition based on the possibility of bias since "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." *Gacho*, 967 N.E.2d at 1001. This was a clear indictment of the corrupted proceedings. The State dismisses the Court's finding as a byproduct of the procedural posture in 2012, which favored Gacho. Response at 20. While Gacho's allegations were accepted as true at that juncture, the Court's 2012 statement cannot be discarded so easily. Indeed, nothing the Court said requires accepting Gacho's allegations as true: the trials were held simultaneously, concerned the same set of murders, and were before Maloney, who the State admitted had an interest in the case. *See Gacho*, 967 N.E.2d at 1001. The State's contention thus falters.

Additionally, while the State does much to suggest that Gacho is guilty, it bears repeating that harmless error is inapplicable to judicial bias claims. *See Cartalino v. Washington*, 122 F.3d 8, 9-10 (7th Cir. 1997). "It does not matter how powerful the case against the defendant was. . . ." *Id.*

In sum, the actual bias test is improper because Titone's bribe occurred in this case. Nevertheless, in pocketing a litigant's cash, Maloney had a vested interest in the case—actual bias. Again, the unique nature of this case bridges the *Bracy* compensatory-*Caperton* pecuniary divide. *See* Opening at 33. The bias here implicates both frameworks because the $10,000 paid to Maloney (pecuniary) mandated he "get two out of the three" (compensatory). The compensatory bias is also inescapable because Maloney needed to compensate for Titone's acquittal in this case. *See* Doc. 22-6 at 53-54. The State is again silent.

III. The Lack of Questionable Rulings Is Irrelevant Because A Judge's Promise To Acquit A Co-Defendant Has An Immeasurable Impact.

The State touts the majority's finding that no questionable rulings against Gacho could be found. Response at 17. But this argument is foreclosed by *Cartalino*: "it does not matter . . . whether the judge's bias was manifested in rulings adverse to the defendant." *Cartalino*, 122 F.3d at 9-10. The State and the majority are thus wrong to claim the lack of questionable rulings demonstrates Maloney had an ethical epiphany.

But even if the Court deviates from *Cartalino* and considers the lack of questionable rulings, bias still exists because the bribe rendered Maloney incapable of an objective stance on any issue in the Gacho-Titone proceedings. Maloney's overriding concern was maintaining his scam, not the facts, law, or justice. And on this point, the parties could not be further apart. The State contends there were no

questionable rulings. For Gacho, the bribe and its attendant ills accompanied every ruling like a shadow. In the State's uncritical examination of the bribe, it fails to grasp the bribe's corrosive effect which rendered the entire case a sham.

Additionally, the Court recognizes the difficulty in discerning motives for rulings. Attempting to show bias to the Court, the *Bracy* petitioners raised unfavorable rulings on multiple evidentiary issues. 286 F.3d at 415. The Court was not persuaded. "Findings of this sort, which judges often make favoring a law enforcement version of conflicting events, do not support a claim of actual bias." *Id*. *See also Vasquez*, 474 U.S. at 263 (judge's actual motivations are hidden from review.).

Thus, it is no surprise that in mining the record for "questionable" rulings—however the State and the majority define that amorphous term and whatever standard they use—none are found. *See* Response at 17. By the time the Gacho-Titone trial began, Maloney was a hardened felon who knew how to balance the scales of justice to cover his crimes. This was Maloney at his most manipulative. A retrospective psychological examination of his motivations is of little worth as such analyses are inherently complex. The Court should reject the State's position.

IV. The State Cannot Defend The Majority's Flawed Reliance.

Gacho recognizes that U.S. Supreme Court precedent is the lodestar in habeas proceedings. However, the majority's decision rests on a faulty foundation. While that foundation is (outside of *Bracy*) mainly Illinois Supreme Court precedent, the

Opening addresses that reliance to highlight the majority's misapplication of the actual bias standard. *See* Opening at 25-26.

The State misses that point. While the Opening dismantles the majority's reliance on *People v. Fair*, 738 N.E.2d 500 (Ill. 2000), the State ignores this discussion and never addresses *Fair*. The State only challenges Gacho's reliance on *Illinois v. Hawkins*, 690 N.E.2d 999 (Ill. 1998). It argues that *Hawkins* "is an Illinois Supreme Court decision, and a claim that a state court misapplied state law is not cognizable on habeas review." Response at 18-19. The State is correct on that front. Acknowledging that limitation, *Hawkins* (and its risk of bias test) is still instructive because it clashes with *Fair* and the majority's opinion. Moreover, the State distorts Gacho's reliance on *Hawkins*. It quotes the Opening's contention that "*Hawkins* is clear: a defendant 'need not show actual bias' for a new trial." Response at 18, quoting Opening at 23. But the State omits what *Hawkins* is quoting: *Tumey*, for the proposition that a party "need not show actual bias." *See Hawkins*, 690 N.E.2d at 1001-02 (Ill. 1998), quoting *Tumey*, 273 U.S. at 532. Thus, the foundation of *Hawkins* is *Tumey* and *Murchison*. *Fair* and the majority's decision have no such footing. Justice Delort examines the *Hawkins-Fair* divergence in dissent but the State does not acknowledge him.

Finally, the State scolds Gacho for relying on the Court's decision in *Cartalino*. Response at 18. While the State is again correct that Supreme Court precedent controls in habeas proceedings, its criticism rings hollow as it repeatedly cites

Cartalino. *See* Response at 16, 17, 18, 22, 23, 24, 25. This hypocrisy aside, *Cartalino* cannot save the State. It embraces *Cartalino* because the case "held that 'the fact of a codefendant's having bribed the judge does not in and of itself establish the judge's lack of impartiality in the defendant's trial.'" Response at 22, quoting 122 F.3d at 10. The State's reliance has three flaws. First, *Cartalino* precedes *Caperton* by a decade, and *Caperton*'s risk of bias test more definitively addresses the subject of judicial bias. Second, the State evades the affidavit in *Cartalino* that stated the co-defendant would bear the brunt of the bribe, like Titone's affidavit here. Third, the State's quotation above is undercut by the Court concluding that "[a]lthough we do not think that the bribing of a simultaneously tried codefendant in the circumstances presented by this case is conclusive proof of judicial bias, it is such strong evidence—much stronger than the evidence in *Bracy*—that we think it shifts the burden of persuasion to the state, to show that there was no actual bias." 122 F.3d at 10-11. *Cartalino* thus imperils the State's case.

As the Opening's conclusion notes, Messrs. Titone, Hawkins, and Fields bribed Maloney and were awarded new trials due to his bias. Gacho endured that same biased judge yet is denied a new trial.

V. The Ineffective Assistance of Counsel Issue Is Properly Before The Court.

The State contends that the certificate of appealability is limited to the judicial bias claim. Response at 26. The Court should reject this assertion given the unique facts and the 25-year-long state post-conviction process. But even if the State

is correct that Gacho exceeded the scope of the certificate of appealability, he asks that the Court treat the Opening as a request to amend the certificate to include the ineffective assistance claim.

A certificate should be amended if a party can make a substantial showing of the denial of a constitutional right. *George v. Smith*, 586 F.3d 479, 483 (7th Cir. 2009) (granting implicit request to amend certificate of appealability). A petitioner makes a substantial showing where reasonable jurists could debate whether the petition should have been resolved "in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal citation omitted). Gacho's Opening makes a substantial showing that he was denied his constitutional rights due to the ineffective assistance of the conflicted McDonnell. Further, given McDonnell's connections to the biased Maloney, the judicial bias and ineffective assistance issues are symbiotic. The Court should thus consider the ineffective assistance issue.

As to the merits, the standard for granting habeas relief is demanding but not insurmountable. The Court regularly reverses district courts and finds that state appellate courts unreasonably applied the guidelines of *Strickland v. Washington*, 466 U.S. 668 (1984). *See, e.g.*, *Shaw v. Wilson*, 721 F.3d 908, 915-16 (7th Cir. 2013); *Harris v. Thompson*, 698 F.3d 609, 648 (7th Cir. 2012). The unique facts and procedural history of this case satisfy those demanding standards. The totality of the circumstances here establish that Gacho's Sixth Amendment right to effective

assistance of counsel was violated because his attorney was conflicted and he suffered prejudice from McDonnell's multiple trial errors.

An impermissible conflict of interest can arise when an attorney represents multiple clients with potentially antagonistic interests. *Cuyler v. Sullivan*, 446 U.S. 335, 345-46 (1980). Such is the case here. The pre-trial waiver of conflicts by Gacho 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. To which Gacho responded no. *Id*. Along with Gacho's testimony was a certified clerk's record establishing McDonnell represented the victim's brother in Cook County Circuit Court case 84-c-16401 from January 1984 to September 1984. Doc. 16-7 at 53-58. These facts establish McDonnell's concurrent representation is an actual conflict of interest. The State does not counter.

In sum, the Opening sets forth a substantial showing of the denial of Gacho's constitutional right to effective assistance of counsel. The certificate of appealability should be amended to include it.

CONCLUSION

The Opening posed the question at the heart of this appeal: Is a bribed judge a biased judge? The State never answers. The Due Process Clause of the Fourteenth Amendment guarantees litigants an impartial judge and a fair trial. Robert Gacho received neither. Maloney was a law onto himself and the State has let his corrupted adjudication stand, Gacho's death row stint and life sentence notwithstanding. Because justice was subverted, habeas relief is warranted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7), RULE 32(g), and CIRCUIT RULE 32(c)

The undersigned, counsel of record for the Appellant, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7):

I hereby certify that this brief conforms to the provisions of F.R.A.P. Rule 32(a)(7) for a brief produced with a monospaced font. The length of this brief is 2,885 words according to the Microsoft word count function.

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CERTIFICATE OF SERVICE

The undersigned, counsel for Robert Gacho, hereby certifies that on July 29, 2020, two copies of the Appellant's Reply Brief as well as a digital version containing the brief, were delivered by U.S. mail to:

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