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Lawyers, Guns, and Money: What Price Justice

Timothy R. Terry

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LAWYERS, GUNS, AND MONEY: WHAT PRICE JUSTICE?

Bracy v. Gramley, 117 S. Ct. 1793 (1997)

I. INTRODUCTION

In *Bracy v. Gramley*,[1] the United States Supreme Court held that a triple-murder defendant, William Bracy, who was convicted by a judge who was subsequently convicted of bribery, showed "good cause" for discovery on his due process claim of judicial bias.[2] The Court stated that the Due Process Clause[3] guarantees a fair trial before a disinterested judge.[4] Here, the presumption in favor of a public official's probity was rebutted by Judge Thomas J. Maloney's criminal convictions.[5] Therefore, the defendant, who made specific allegations that his trial judge was biased against him and that his attorney was complicit in the corruption, deserved an opportunity to show that he was entitled to relief.[6]

This Note argues that the very fact that Judge Maloney presided over the Bracy trial was a due process violation in and of itself because it denied the accused his right to a fair and impartial judge.[7] This Note also contends that the Court's well established position on judicial bias claims demanded something more than the diffidence shown here; Bracy's conviction should have been reversed outright with orders for a new trial.[8] This Note explores and discounts the possible reasons for the Court's reluctance to act boldly in this case.[9] Finally, this Note concludes that little will change as a result of the *Bracy* decision un-

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[1] 117 S. Ct. 1793 (1997).

[2] *Id.* at 1795.

[3] U.S. CONST. amend. XIV, § 1. *See infra* note 29 for the text of this constitutional provision.

[4] *Bracy*, 117 S. Ct. at 1797.

[5] *Id.* at 1799.

[6] *Id.*

[7] *See infra* Part V.A.

[8] *See id.*

[9] *See infra* Part V.B.

less lower court judges take the initiative the Supreme Court declined to exercise.[10]

II. BACKGROUND

A. HABEAS CORPUS

Bracy petitioned the federal district court for habeas corpus relief.[11] The writ of habeas corpus[12] provides a unique and exclusive federal shield for protecting individual liberty from lawless or arbitrary state action.[13] The writ provides a remedy to state prisoners for any form of unacceptable restraint.[14] Rule 6 of the rules governing habeas corpus dictates discovery procedures in habeas corpus matters.[15] Unlike the ordinary civil litigant in federal court—who is automatically entitled to discovery—the habeas petitioner's access to discovery is left to the discretion of the court under Rule 6(a).[16] Moreover, be-

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[10] *See infra* Part V.C.

[11] Bracy v. Gramley, 868 F. Supp. 950, 950 (N.D. Ill. 1994).

[12] Latin for "you have the body," the term "habeas corpus" denotes a form of collateral attack designed to bring a prisoner before a judge or tribunal. "The office of the writ is not to determine prisoner's guilt or innocence, and [the] only issue which it presents is whether [a] prisoner is restrained of his liberty by due process." BLACK'S LAW DICTIONARY 709 (6th ed. 1990). The term is generally understood to refer to that process securing release from illicit detainment, *see Ex Parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807), also known as the writ of *habeas corpus ad subjiciendum*. *See* Stone v. Powell, 428 U.S. 465, 474-75 n.6 (1976); *see also* U.S. CONST. art. I, § 9; 28 U.S.C. § 2241 (1994).

[13] Harris v. Nelson, 394 U.S. 286, 290-91 (1969). Sir William Blackstone called it "the great and efficacious writ, in all manner of illegal confinement." W. BLACKSTONE, COMMENTARIES 131 (Lewis ed. 1902). Oliver Wendell Holmes, Jr., said that "habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside . . . and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell." Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).

[14] Peyton v. Rowe, 391 U.S. 54, 65-67 (1968); *see also* Preiser v. Rodriguez, 411 U.S. 475, 489-90 (1973).

[15] Rules Governing § 2254 Cases, Rule 6, 28 U.S.C. § 2254, Rule 6 Advisory Committee Note (1994). The committee explained:

> This rule contains very little specificity as to what types and methods of discovery should be made available to the parties in a habeas proceeding, or how, once made available, these discovery procedures should be administered. The purpose of this rule is to get some experience in how discovery would work in actual practice by letting district court judges fashion their own rules in the context of individual cases.

Id.

[16] Bracy v. Gramley, 117 S. Ct. 1793, 1796-97 (1997); *see also* Rules Governing § 2254 Cases, Rule 6, 28 U.S.C. § 2254 (1994). Rule 6(a) provides in part: "A party shall

cause the writ does not authorize "fishing expeditions" supported by mere conclusory allegations, any petitioner requesting either discovery or an evidentiary hearing must make sufficiently specific factual allegations.[17] Rule 6(a) is intended to prevent such abuse by mandating prior court approval of all discovery requests.[18] Therefore, federal courts have the power to entertain habeas petitions "as law and justice require" by fashioning "appropriate modes of procedure."[19]

A habeas petitioner must clear a number of procedural hurdles before she may even be heard. First, a petitioner must be "in custody"[20] in order to seek habeas relief.[21] Second, prior to seeking collateral relief in federal court, a state prisoner first must exhaust his state court remedies.[22] The exhaustion doc-

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be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." *Id.* Rule 6(a) is meant to be consistent with the Court's decision in *Harris v. Nelson*, in which the Court expressed "no intention to extend to habeas corpus, as a matter of right, the broad discovery provisions . . . of the new [Federal Rules of Civil Procedure]." *Harris*, 394 U.S. at 295. However, noting the dearth of ways for a habeas petitioner to gather information, the Court offered an alternative method for securing information in habeas proceedings. *Id.* at 298. The Court in *Harris* indicated that "courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage." *Id.* at 299.

[17] Harris v. Johnson, 81 F.3d 535, 540 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 1863 (1996).

[18] Rules Governing § 2254 Cases, Rule 6, 28 U.S.C. § 2254 (1994). The Advisory Committee Notes state in part:

> We are aware that confinement sometimes induces fantasy which has its basis in the paranoia of prison rather than in fact. But where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. Obviously, in exercising this power, the court may utilize familiar procedures, as appropriate, whether these are found in the civil or criminal rules or elsewhere in the "usage and principles."

Id.

[19] *Bracy*, 117 S. Ct. at 1797. Federal courts may entertain a state prisoner's habeas corpus petition pursuant to 28 U.S.C. § 2241 (1994).

[20] Commentators have written that "[t]he courts have construed 'custody' liberally to include not only actual physical custody, but significant restraints on personal liberty as well." Amos E. Hartson & Jay Gonzalez, *Habeas Relief for State Prisoners*, 83 GEO. L.J. 1392, 1394 (1995).

[21] 28 U.S.C. § 2254(a) (1994).

[22] 28 U.S.C. § 2254 (b) (1997) states in part: "An application for the writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies

trine grants state courts an opportunity to hear a claim and consider allegations of legal error free of federal interference.[23] While presenting a claim to the highest state court meets the exhaustion mandate,[24] federal courts will consider only those claims of petitioners meeting certain requirements;[25] a claim must present a cognizable issue for review[26] and must clear certain other procedural hurdles[27] for federal jurisdiction to apply.[28] Only those violations of state or federal law rising to a constitutional level, resulting in fundamental unfairness in violation of the Due Process Clause,[29] are cognizable in habeas proceedings.[30]

Once the procedural hurdles have been cleared, the court will evaluate the alleged error. In *Brecht v. Abrahamson*,[31] the Supreme Court held that when the error complained of is a consti-

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available in the courts of the State." *See also* Vasquez v. Hillery, 474 U.S. 254, 257 (1986).

[23] Rose v. Lundy, 455 U.S. 509, 515 (1982).

[24] Picard v. Connor, 404 U.S. 270, 275 (1971).

[25] Hartson & Gonzalez, *supra* note 20, at 1404.

[26] Congress amended the habeas corpus statutes in 1996, decreeing that applications for such relief be denied unless the state court's resolution of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254 (d) (Supp. 1997).

[27] Aside from the exhaustion doctrine, there are several procedural requirements for habeas review. For example, 28 U.S.C. § 2244(b) precludes review of "successive" petitions raised on identical, previously ruled upon grounds. However, it should be noted that a petition may not be procedurally prohibited if a petitioner can show "cause" for his default. *See* Murray v. Carrier, 477 U.S. 478, 488 (1986). As the Court in *Murray* explained, the "existence of cause for some procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule . . . [such as, for example, by showing that the] factual or legal basis for a claim was not reasonably available to counsel." *Id.*

[28] Hartson & Gonzalez, *supra* note 20, at 1404.

[29] The Fourteenth Amendment states in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

[30] Hartson & Gonzalez, *supra* note 20, at 1401-02; *see also* Pulley v. Harris, 465 U.S. 37, 41-42 (1984).

[31] 507 U.S. 619 (1993).

tutional trial error, the remedy of habeas corpus is appropriate only if the error "had substantial and injurious effect or influence in determining the jury's verdict."[32] However, the Court distinguished constitutional *trial* errors from constitutional *structural* errors, noting that the latter variety, because of their very insidiousness, require automatic reversal.[33] The Court reasoned that "[t]rial error . . . is amenable to harmless-error analysis because it 'may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on trial].'"[34] Judicial bias, however, is a structural defect not amenable to harmless-error analysis.[35] That is, the Due Process Clause *requires* that a defendant receive a fair trial before a disinterested judge.[36]

B. JUDICIAL BIAS

The test used to evaluate judicial bias claims was established in *Tumey v. Ohio*.[37] Ed Tumey was arrested, charged with unlawful possession of an intoxicating liquor, and brought before the

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[32] *Id.* at 623 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

[33] *Id.* at 629-30.

[34] *Id.* (quoting Arizona v. Fulminante, 449 U.S. 279, 307 (1991)). Continuing, the Court said that "[a]t the other end of the spectrum of constitutional errors lie structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards . . . [t]he existence of such defects . . . requires automatic reversal of the conviction because they infect the entire trial process." *Id.*

[35] Sullivan v. Louisiana, 508 U.S. 275, 283 (1993) (Rehnquist, C.J., concurring); *see also* Arizona v. Fulminante, 499 U.S. 279, 290 (1991) (listing judicial bias as one of the "three constitutional errors that could not be categorized as harmless error"); Bracy v. Gramley, 81 F.3d 684, 688 (7th Cir. 1996) (commenting that "judicial bias is one of those structural defects . . . that automatically entitle a petitioner for habeas corpus to a new trial").

[36] *Bracy*, 117 S. Ct. at 1799. In *Marshall v. Jerrico, Inc.*, the Supreme Court said:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. . . . The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

446 U.S. 238, 242 (1980) (quoting Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)).

[37] 273 U.S. 510 (1927).

mayor[38] of North College Hill, Ohio.[39] Tumey moved for dismissal arguing that, because the mayor and his village received a portion of any fines collected,[40] the mayor was biased against him and therefore barred from trying him under the Fourteenth Amendment's Due Process Clause.[41] The mayor denied the motion, convicted Mr. Tumey, and imprisoned him pending payment of a fine.[42] The Ohio Court of Common Pleas reversed, holding that the mayor should have disqualified himself because of his interest in the trial's result.[43] That decision in turn was struck down by the Ohio Court of Appeals.[44] The Ohio Supreme Court dismissed the petition in error[45] for lack of a debatable constitutional question, and the United States Supreme Court granted review.[46]

The Court cited a series of lower court decisions for the proposition that disqualification is required when those acting in a judicial or quasi-judicial role have an interest in the controversy to be decided.[47] The real question, the Court continued, is "to what degree or nature" the interest must be.[48] The Court noted that the Fourteenth Amendment's due process guarantee clearly is violated if the judge has "a direct, personal, substantial pecuniary interest in reaching a conclusion against [a defendant] in his case."[49] It is "certainly not fair . . . [for a defendant to have] the prospect of [a prospective] loss by the [judge] . . .

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[38] Mayor Pugh was authorized by Ohio statute to sit in judgment of one accused of violating the State's Prohibition Act. *Id.* at 514.

[39] *Id.* at 515.

[40] During the period in question (May 11 through Dec. 31, 1923), the village court collected over $20,000 in fines for prohibition violations. The state received $8,992.50, the village received $4,471.25, and the mayor received $696.35 for his fees and costs, in addition to his regular salary. *Id.* at 521-22.

[41] *Id.* at 515.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] The defendant's petition in error asked that the appellate court's decision be reversed on constitutional grounds. *Id.*

[46] *Id.*

[47] *Id.* at 522.

[48] *Id.*

[49] *Id.* at 523. However, the Court also indicated that "[a]ll questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion." *Id.*

weigh against his acquittal," because such concerns lie outside the issue of guilt or innocence.[50]

The Court established a strict standard by which future tribunals would evaluate judicial bias claims:

> *Every* procedure which would offer a *possible* temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which *might* lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.[51]

The Court emphasized that, even though all judges might not be tempted by the prospect of a $12 windfall,[52] such a hair-trigger standard was necessary.[53] The Court explained that "the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and greatest self-sacrifice could carry it on without danger of injustice."[54] This served as the standard in the few Supreme Court judicial bias cases that have come to bar in the seventy years since *Tumey*.[55]

Following the same tack as the *Tumey* Court, the Court in *In re Murchison* concluded that a judge may not preside over a case in which he or she has an interest.[56] A judge with a stake in the outcome of a trial violates the due process guarantee of a fair trial before a fair tribunal.[57] This guarantee, at the very least, necessitates the absence of actual bias at trial.[58] The Court clari-

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[50] *Id.* at 532.

[51] *Id.* (emphases added). Some commentators have noted that, notwithstanding the test's sweeping and broad language, the *Tumey* Court's "direct, personal, substantial pecuniary interest" language has become the *de facto* standard for adjudicating judicial bias cases. *See, e.g.*, Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 500 (1986) (commenting that the Court unjustifiably has been "extremely reluctant to disqualify a judge when no direct financial interest is involved").

[52] The mayor received $12.00 for his fees and costs as a result of Tumey's conviction. *Tumey*, 273 U.S. at 531.

[53] *Id.* at 532.

[54] *Id.*

[55] *See, e.g.*, Ward v. Village of Monroeville, 409 U.S. 57, 59-60 (1972).

[56] *In re* Murchison, 349 U.S. 133, 136 (1955). The Court addressed the question of "whether a contempt proceeding . . . complies with the due process requirement of an impartial tribunal where the same judge presiding at the contempt hearing had also served as the 'one-man grand jury' out of which the contempt charges arose." *Id.* at 134. The Court held in a 6-to-3 decision that, under these circumstances, the petitioners' due process rights were violated. *Id.* at 139.

[57] *Id.* at 136.

[58] *Id.*

fied that the American judicial system requires an unusually strict standard for the adjudication of judicial bias claims: "[O]ur system of law has always endeavored to prevent even the probability of unfairness."[59] Whether a claim presents such a possibility depends upon the context and the nature of the interest.[60] Characterizing the *Tumey* standard as appropriate, the Court voiced its intention to err on the side of caution: "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'"[61]

In a case remarkably similar to *Tumey*, the Supreme Court in *Ward* again held that a defendant tried before a mayor's court was denied the due process right to a fair trial before an impartial judicial officer.[62] The Court based its holding on the principles laid down in *Tumey*, specifically invoking the *Tumey* "test."[63] The Court further asserted that for a judge to be deemed biased he need not share directly in the fines levied by his court.[64] This condition "did not define the limits of the principle" governing judicial bias claims.[65] That principle requires nothing more than a *possible temptation* that *might* lead a judge to be biased.[66] The Court concluded that the circumstances under which the petitioner was convicted were constitutionally infirm:

> Plainly that "possible temptation" *may* also exist when the mayor's executive responsibilities for village finances *may* make him partisan to maintain the high level of contribution from the mayor's court. This [as in *Tumey*] is a "situation in which an official perforce occupies two practi-

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[59] *Id.*

[60] *Id.*

[61] *Id.* (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)).

[62] Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972). The defendant in *Ward* was convicted in a local mayor's court of two traffic offenses. *Id.* at 57. After the Supreme Court of Ohio upheld the conviction, the United States Supreme Court reversed. *Id.* at 62. The Court reasoned that, because the mayor was responsible for village finances—some portion of which derived from fines levied by his court—the defendant had been denied the due process right to a trial before a disinterested judicial officer. *Id.* at 59-60.

[63] *See id.* at 59.

[64] *Id.* at 60.

[65] *Id.*

[66] *See supra* note 51 and accompanying text.

cally and seriously inconsistent positions, one partisan and the other judicial, and necessarily involves a lack of due process of law."[67]

Two 1986 cases reaffirmed the *Tumey* test.[68] The first, *Vasquez v. Hillery*, involved a habeas corpus petition challenging a murder conviction on equal protection grounds because African-Americans were systematically excluded from the grand jury.[69] In upholding the habeas challenge, the Court said:[70]

> When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. Accordingly, when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired.[71]

The Court bolstered this proposition with reference to *Tumey*, noting that the *Tumey* Court reversed the conviction despite the lack of evidence that bias actually played a role in the decision-making process.[72] In *Tumey*, it was the mayor's financial interest in the proceedings that satisfied the "possible temptation" requirement.[73] Similarly, the Court in *Vasquez* concluded that "when a petit jury has been selected upon improper criteria . . . we have required reversal because the effect of the violation cannot be ascertained."[74]

In *Aetna Life Insurance v. Lavoie*, the Court held that a judge's participation in adjudicating an insurance claim violated the insurer's due process rights where the judge had personally filed similar claims against other insurance companies in the state.[75] Alabama Supreme Court Justice Embry participated in a

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[67] *Ward*, 409 U.S. at 60 (emphasis added) (quoting Tumey v. Ohio, 273 U.S. 510, 534 (1927)). Justices White, joined by Justice Rehnquist, dissented, arguing against striking down the Ohio system on its face and insisting that a prophylactic, per se rule was inappropriate. *Id.* at 62 (White, J., dissenting). The dissenters further argued that *Tumey* was not controlling in *Ward* because, in the latter case, the mayor lacked a direct pecuniary interest. *Id.* (White, J., dissenting).

[68] Vasquez v. Hillery, 474 U.S. 254, 255-56 (1986); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 819 (1986).

[69] *Vasquez*, 474 U.S. at 255-56. African-American defendant Booker T. Hillery was indicted for murder by one of the many all-white grand juries personally selected by Superior Court Judge Meredith Wingrove. *Id.*

[70] Justice Marshall delivered the opinion of the Court, in which Justices Brennan, Blackmun, White and Stevens joined.

[71] *Vasquez*, 474 U.S. at 263.

[72] *Id.* (citing Tumey v. Ohio, 273 U.S. 510, 535 (1927)).

[73] *Id.*

[74] *Id.*

[75] Aetna Life Ins. v. Lavoie, 475 U.S. 813, 819 (1986).

5-to-4 decision affirming a jury verdict for the insured in a bad-faith insurance claim.[76] The court awarded the insured compensatory and punitive damages.[77] At the time of the decision, Justice Embry himself had filed claims against two other Alabama insurance companies, each alleging bad-faith failure to pay a claim.[78] Examining the factors that might have influenced Embry's decision or given him "an interest in the outcome," the Supreme Court held that Embry's interest was "direct, personal, substantial, and pecuniary."[79]

The Court was quick to point out, however, that Embry's interest surpassed the threshold necessary to constitute a due process violation:

> Justice Embry's participation in this case violated appellant's due process rights as explicated in *Tumey*, *Murchison*, and *Ward*. We make clear that we are not required to decide whether in fact Justice Embry *was* influenced, but only whether sitting on the case . . . would offer a *possible* temptation to the average judge to lead him not to hold the balance nice, clear and true.[80]

The Court concluded by asserting that "the appearance of justice will best be served by vacating the decision."[81]

III. FACTS AND PROCEDURAL HISTORY

On November 12, 1980, William Bracy, Roger Collins, and Murray Hooper abducted three men[82] from an apartment at 2240 South State Street in Chicago, Illinois.[83] Bracy, Collins, and Hooper bound the three men with rope, drove them to a viaduct at Roosevelt Road and Clark Street, and shot them to death.[84] A minor participant in the crime, Morris Nellum, pleaded guilty to three counts of concealing a homicide and

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[76] *Id.* at 816. Justice Embry cast the decisive vote in this decision. However, the Court did not specifically make this a factor in the opinion. Instead, the majority merely commented that, while some courts will not overturn a decision "where a disqualified judge's vote is mere surplusage . . . we are aware of no case . . . permitting a court's decision to stand when a disqualified judge casts the deciding vote." *Id.* at 827-28.

[77] *Id.* at 816.

[78] *Id.* at 817.

[79] *Id.* at 824.

[80] *Id.* at 825 (emphases added).

[81] *Id.* at 828.

[82] The three men were Richard Holliman, Frederick Lacey, and R.C. Pettigrew.

[83] Petitioner's Brief at 3, Bracy v. Gramley, 117 S. Ct. 1793 (1997) (No. 96-6133).

[84] *Id.*

agreed to cooperate with the prosecution and serve as its main witness in exchange for a state-recommended three year sentence in protective custody.[85]

Nellum testified that on the evening of November 12, 1980, he was with his girlfriend, Regina Parker, at her apartment at 2222 South State Street.[86] He testified that Collins showed up at approximately 9:30 p.m. and asked him to go to apartment 206 at 2240 South State Street to help him "take care of something."[87] Nellum arrived at the apartment several minutes later and saw Collins, Bracy, and Hooper holding the three bound victims at gun-point.[88] Collins handed the keys to his Cadillac to Nellum, asking that Nellum pick him up after he (Collins) "drop[ped] some people off."[89] Nellum then watched as they placed the three victims in a red Oldsmobile.[90] Collins drove the Oldsmobile to the viaduct, with Hooper in the passenger seat and the three victims in the rear.[91] Bracy followed in his own car.[92] At Collins' request, Nellum waited several minutes after the other two vehicles left before following them to the viaduct.[93] Upon arriving at the viaduct, Nellum heard a number of gunshots.[94] He saw Bracy, carrying a sawed-off shotgun, and Hooper emerge from the viaduct and run to Bracy's car.[95] Collins got into the Cadillac with Nellum, and the two cars returned to the parking lot at 2240 South State Street.[96] Collins and Nellum then drove to Lake Michigan where they disposed of two handguns.[97]

In 1981, Bracy and Collins were tried jointly on charges of armed robbery,[98] aggravated kidnapping, and murder, before

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[85] Bracy v. Gramley, 868 F. Supp. 950, 959 (N.D. Ill. 1994).

[86] People v. Collins, 478 N.E.2d 267, 272 (Ill. 1985).

[87] *Bracy*, 868 F. Supp. at 959.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.* at 959-60.

[97] *Id.*

[98] Evidence at trial indicated that $1,800 had been taken from the victims. *Id.* at 960.

Judge Thomas J. Maloney in the Circuit Court of Cook County, Illinois.[99] The jury found Bracy guilty on all counts, and Judge Maloney sentenced him to death.[100]

Throughout the criminal proceedings, Judge Maloney made numerous discretionary rulings[101] that "potentially affected the outcome of" Bracy's case.[102] For example, Maloney appointed his former associate, Robert McDonald, to represent Bracy throughout the trial and sentencing hearing.[103] Judge Maloney excused for cause the only African-American jury panel member.[104] Maloney denied co-defendant Collins' motion to suppress evidence and his request for a separate penalty hearing.[105] He rejected jury instructions proffered by the defense and, prior to the penalty phase and despite McDonald's claimed lack of preparedness, declined to grant a continuance.[106] Finally, over defense counsel's objection, Judge Maloney admitted evidence of an unadjudicated Arizona homicide that implicated Bracy.[107]

Notwithstanding the suspect nature of these rulings, on direct appeal the Supreme Court of Illinois affirmed Bracy's convictions and two of the three sentences—reducing the aggravated kidnapping penalty to thirty years imprisonment.[108] The court also affirmed the trial court's denial of a continuance prior to the death sentencing hearing.[109] While in prison, Bracy filed a petition for relief pursuant to the Illinois Post Conviction

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[99] *Id.* at 958. Murray Hooper was tried separately. People v. Collins, 478 N.E.2d 267, 272 (Ill. 1985).

[100] Petitioner's Brief at 5, *Bracy* (No. 96-6133).

[101] *Black's Law Dictionary* defines "discretionary acts" as:

> Option open to judges and administrators to act or not as they deem proper or necessary and such acts or refusal to act may not be overturned without a showing of abuse of discretion, which means an act or failure to act that no conscientious person acting reasonably could perform or refuse to perform.

BLACK'S LAW DICTIONARY, *supra* note 12, at 467.

[102] Petitioner's Brief at 5, *Bracy* (No. 96-6133).

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] People v. Collins, 478 N.E.2d 267, 289 (Ill. 1985).

[109] *Id.* at 287.

Hearing Act.[110] The Circuit Court of Cook County denied the petition without an evidentiary hearing.[111]

Meanwhile, on June 26, 1991, a federal grand jury indicted Judge Thomas J. Maloney.[112] The charges in the indictment included bribery, racketeering, income tax evasion, extortion under color of official right, and obstruction of justice.[113] The case went to trial in March, 1993.[114]

When news of Maloney's indictment first became public in June of 1991, Bracy immediately attempted to file an additional claim alleging judicial misconduct.[115] However, Bracy's case was already in the latter stages of post-conviction proceedings.[116] Consequently, the judicial corruption issue was raised for the first time in the reply brief of the postconviction appeal.[117] The Supreme Court of Illinois affirmed the circuit court's denial of the post-conviction petition, declining to consider the new issue.[118]

On April 16, 1993, a jury in the United States District Court for the Northern District of Illinois convicted Maloney on all counts.[119] Among the counts for which he was found guilty was accepting bribe money in exchange for acquittals in murder cases.[120] Maloney was sentenced to fifteen years and nine months in a federal penitentiary.[121]

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[110] 725 ILL. COMP. STAT. 5/122-1 (West 1996); *see also* Petitioner's Brief at 2, *Bracy* (No. 96-6133).

[111] *Collins*, 478 N.E.2d at 287.

[112] United States v. Maloney, 71 F.3d 645, 652 (7th Cir. 1995). Judge Maloney fell victim to the federal investigation dubbed "Operation Greylord." Maurice Possley, *Alleged Hit Man Back In Court After His Tainted Acquittal*, CHI. TRIB., Sept. 21, 1997, at A7. During a 1975 organized crime probe, federal agents overheard an attorney talking about how he could fix gambling cases by bribing Cook County judges. *Id.* When confronted, the attorney agreed to cooperate with federal investigators in what would become "Operation Greylord." *Id.* Aimed at uncovering the long-suspected corruption within the Cook County Judicial System, Greylord saw its first indictments in 1983. *Id.* Ultimately, Greylord helped send over 100 officials to prison, including nearly two dozen judges. *Id.*

[113] *Maloney*, 71 F.3d at 649.

[114] *Id.* at 652.

[115] Petitioner's Brief at 6, *Bracy* (No. 96-6133).

[116] *Id.*

[117] Bracy v. Gramley, 868 F. Supp. 950, 991 (N.D. Ill. 1994).

[118] *Id.*

[119] *Maloney*, 71 F.3d at 652.

[120] *Bracy*, 868 F. Supp. at 990.

[121] Amicus Brief of Concerned Illinois Lawyers and Law Professors in Support of Petitioner at 7, Bracy v. Gramley, 117 S. Ct. 1793 (1997) (No. 96-6133).

In August, 1993, having exhausted his state remedies, Bracy petitioned the federal district court for habeas corpus relief.[122] Bracy alleged a violation of his constitutional right to due process by reason of judicial corruption.[123] He claimed that, because of Judge Maloney's practice of taking bribes from certain defendants in exchange for acquittal, the judge was actually biased *against* the defense in those cases in which he was *not* paid off.[124] Bracy further alleged that Maloney's bias against him, intended to camouflage his corruption and allay any suspicion of wrongdoing, resulted in pro-prosecution rulings, particularly on discretionary matters.[125] Bracy's new attorney, handling the habeas corpus matter, argued that many of Maloney's discretionary rulings disfavored the defense; he sought additional discovery on the issue of actual bias.[126] Newly discovered evidence indicated that Judge Maloney received bribes in criminal cases in the early 1980s, contemporaneous with Bracy's case.[127] In fact, the evidence confirmed that Maloney fixed murder trials immediately prior to and after Bracy's trial.[128]

In response to this newly obtained information, Bracy made various discovery requests.[129] First, he sought review of the sealed transcript of Maloney's trial, as well as any information possessed by the government lawyers who prosecuted Judge Maloney.[130] He also asked to depose the Government's witnesses, hoping to unearth evidence about Maloney's conduct in cases in which he received no payoffs.[131] Finally, Bracy requested to examine Maloney's discretionary rulings for any telltale pattern of bias.[132]

The district court, finding sufficient cause for not raising the judicial corruption issue in state courts,[133] nonetheless held that Bracy's allegations were not specific enough and lacked

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[122] *Bracy*, 868 F. Supp. at 958; *see also* 28 U.S.C. § 2241 (1994).
[123] Petitioner's Brief at 6, *Bracy* (No. 96-6133).
[124] *Bracy*, 868 F. Supp. at 990.
[125] *Id.*
[126] *Id.* at 990-91.
[127] Petitioner's Brief at 7, *Bracy* (No. 96-6133).
[128] *Id.*
[129] *Id.*
[130] *Id.* at 7-8.
[131] *Id.* at 7.
[132] *Id.* at 7-8.
[133] *See supra* note 27.

good cause to justify further discovery.[134] Accordingly, the court denied Bracy's discovery requests and dismissed his petition.[135] Bracy appealed his case to the Court of Appeals for the Seventh Circuit.[136]

In 1996, the Seventh Circuit affirmed the district court judgment.[137] While acknowledging the possibility of underestimating "the cumulative effect of [Maloney's] rulings," the court was reluctant to speculate on the possible impact of Maloney's corruption.[138] The court deemed Bracy unable to show that Maloney's favorable rulings were so few as to lead inescapably to the inference that he was biased in favor of the prosecution.[139] Furthermore, if such a showing were even feasible, a full-blown investigation would not help; a mere perusal of the transcript would be sufficient.[140] Noting that the Illinois Supreme Court found no errors in the rulings, the Seventh Circuit concluded that the likelihood was slim that any of Maloney's discretionary

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[134] Bracy v. Gramley, 868 F. Supp. 950, 990-91 (N.D. Ill. 1994). In ruling, the district court relied principally on the Seventh Circuit decision in *Del Vecchio v. Illinois Department of Corrections*, 31 F.3d 1363 (7th Cir. 1994) (en banc) (denying prisoner's habeas petition following murder conviction and death sentence, and finding that the convicting trial court judge was not disqualified for bias merely because he had been involved in prosecuting the same defendant for murder 14 years earlier). The district court noted that there was no evidence that Maloney solicited or received bribes in Bracy's case. *Bracy*, 868 F. Supp. at 990. Furthermore, Bracy could not identify any unfavorable ruling that would have gone the other way had another judge presided. *Id.* at 991. Even if Bracy were able to demonstrate that Maloney favored the prosecution in non-payoff cases, the court reasoned, any analogies to Bracy's case were mere speculation and therefore insufficient to establish a claim of actual bias. *Id.*

[135] *Bracy*, 868 F. Supp. at 990-91.

[136] Bracy v. Gramley, 81 F.3d 684, 687 (7th Cir. 1996).

[137] *Id.* at 696.

[138] *Id.* at 690.

[139] *Id.*

[140] *Id.* The court argued that "[s]ome of Maloney's rulings went against the defendants . . . but they have not shown that there were so few rulings in their favor that the judge must have been biased in favor of the government." *Id.* To sentiments such as these Judge Rovner responded in dissent:

> But if petitioners can be faulted for not making the most of the available material, we can be faulted for being naïve about what the cold page of the trial record will reveal. . . . Maloney was by no account stupid. When he sold an acquittal, he wanted facts that he could hang his hat on . . . if he wanted to cultivate a pro-prosecution record to protect his interests as a bribe taker, he had the ability to do so discretely, [sic] without appearing to have abused his discretion as a trial judge.

Id. at 698-99 (Rovner, J., dissenting).

acts was the product of a pro-prosecution bias.[141] In support of its judgment, the court announced, "[A]n appearance of impropriety does not constitute a denial of due process."[142] Judge Ilana Diamond Rovner dissented from the majority's opinion.[143]

The United States Supreme Court granted certiorari[144] to determine whether, based on Bracy's showing, he was entitled to discovery under Habeas Corpus Rule 6(a) to support his claim of judicial bias.[145]

IV. SUMMARY OF THE COURT'S OPINION

Writing for a unanimous court, Chief Justice Rehnquist reversed the Seventh Circuit and remanded the case for further proceedings.[146] The Court held that Bracy showed good cause for discovery on his due process claim of judicial bias.[147] Although the broad discovery provisions promulgated by the Federal Rules of Civil Procedure do not apply in habeas corpus proceedings,[148] the United States Constitution requires "a fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular

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[141] *Id.* at 690.

[142] *Id.* The Seventh Circuit emphasized that, because habeas corpus is such an extraordinary remedy—upsetting as it does a court's final judgment—discovery must be granted only for "good cause." *Id.* Bracy's discovery requests, the court found, were either unnecessary or frivolous. *Id.* at 690-91. First, the request to examine Maloney's bribery-free cases for a pro-prosecution pattern did not require formal discovery since those cases were a matter of public record. *Id.* Second, the request to view Government materials pertaining to the Maloney prosecution would be satisfied upon a reading and analysis of the transcript. *Id.* at 691. Though admitting that the trial record had been sealed since August of 1994, the court implied that a year and a half to search the record should have been sufficient. *Id.* The court dismissed as a fishing expedition the third discovery request to depose some of Maloney's former associates on the subject of non-bribery cases. *Id.* at 690-91. Because these readily available alternatives to formal discovery uncovered no evidence of bias in Bracy's trial, "the probability is slight that a program of depositions aimed at crooks and their accomplices and likely to be derailed in any event by real and feigned lapses of memory will yield such evidence." *Id.* at 691.

[143] *Id.* at 696 (Rovner, J., dissenting).

[144] Bracy v. Gramley, 117 S. Ct. 726 (1997).

[145] Bracy v. Gramley, 117 S. Ct. 1793, 1795 (1997).

[146] *Id.* at 1799-800.

[147] *Id.* Bracy's was a habeas corpus petition. The claim was that Judge Maloney's interest in the outcome of Bracy's case violated the fair trial guarantee of the Due Process Clause. *Id.* at 1795.

[148] *Id.* at 1797.

case."[149] Accordingly, Chief Justice Rehnquist stated, if Maloney's bias against non-paying defendants were proved, Bracy would have a strong case for claiming a violation of his due process rights.[150]

Having determined that Bracy's underlying premise of judicial bias merited evaluation, the Court addressed whether Bracy showed good cause for discovery to substantiate that premise.[151] The Court relied on three factors to conclude that good cause was shown.[152] First, Bracy's attorney, Robert McDonald, was a former associate of Maloney's.[153] McDonald was appointed by the judge to defend Bracy in June 1981 and claimed to be ready for trial just a few weeks later.[154] Moreover, McDonald did not request additional time to prepare for the State's possible introduction of aggravating evidence at the penalty phase, in the event there was a penalty phase.[155] Second, at least one of Maloney's former law associates, Robert McGee,[156] also was involved in Maloney's corruption, sometimes bribing the judge himself.[157] Third, Bracy's case was squeezed in between two other murder trials in which Judge Maloney received bribes.[158]

In order to establish entitlement to discovery, a party must produce "some evidence tending to show the existence of the

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[149] *Id.* However, as Chief Justice Rehnquist noted, because "the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard," issues addressing the fitness of a judge to hear a case rarely rise to the level of a constitutional question. *Id.*

[150] *Id.* Bracy alleged that "Maloney's taking of bribes from some criminal defendants not only rendered him biased against the *State* in those cases, but also induced a sort of compensatory bias against *defendants* who did *not* bribe Maloney." *Id.* (emphases in original). He also claimed that "[t]here is cause to believe that Judge Maloney's discretionary rulings in this case may have been influenced by a desire on his part to allay suspicion of his pattern of corruption and dishonesty" and to avoid the appearance of being soft on crime. *Id.* at 1798.

[151] *Id.* at 1797-98. Noting only that Bracy's convictions had been upheld twice by the Illinois Supreme Court, the Supreme Court offered no opinion on whether these discretionary rulings were correct. *Id.* at 1798 n.6.

[152] *Id.* at 1798-99.

[153] *Id.* at 1798. This was relevant because other former associates of Maloney, including attorneys, played key roles in the bribery scheme.

[154] *Id.* This presumably provided the Court with further circumstantial evidence that Maloney intentionally appointed a confederate who would not object to the timing of the case.

[155] *Id.* at 1798-99.

[156] Mr. McGee was an attorney at Maloney's former law firm. *Id.* at 1798.

[157] *Id.* at 1799.

[158] *Id.*

essential elements" of a claim.[159] The Court explained that "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry."[160] Bracy relied not only on Maloney's proven history of bribe-taking, but also upon "specific allegations" against his own lawyer.[161] Bracy alleged that Robert McDonald was in league with Judge Maloney and privy to his corrupt practices and therefore had agreed to take the case on a no-hassle fast-track basis so as to camouflage the suspicious circumstances of the two contemporaneous, fixed trials.[162]

The Court particularly focused on Maloney's extensive corruption.[163] Relying on the United States proffer,[164] the Court noted that "although [it is] difficult to imagine, Thomas Maloney's life of corruption was considerably more expansive than proved at trial."[165] Maloney "fixed serious felony cases regularly while a practicing criminal defense attorney" and this corruption continued into his judicial tenure.[166] Through his political and organized crime connections, Maloney maintained an ongoing relationship with corrupt judges, deputy sheriffs, bailiffs, several lawyers, and scores of underworld figures.[167] The Court

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[159] United States v. Armstrong, 116 S. Ct. 1480, 1488 (1996). The Court in *Armstrong*, after offering a variety of alternative labels for the showing such as "colorable basis, substantial threshold showing, substantial and concrete basis, or reasonable likelihood," appeared to settle on "some evidence tending to show the existence of the essential elements." *Id.*

[160] *Bracy*, 117 S. Ct. at 1799 (quoting Harris v. Nelson, 394 U.S. 286, 299 (1969)). Recall that this proposition is meant to be consistent with Habeas Corpus Rule 6. *Id. See supra* note 16; *see also* Rules Governing § 2254 Cases, Rule 6, 28 U.S.C. § 2254, Advisory Committee Notes (1994).

[161] *Bracy*, 117 S. Ct. at 1799.

[162] *Id.*

[163] *Id.* at 1798. For this information the Court relied primarily on the petitioner's brief, his submission of a newspaper article reporting testimony from Maloney's trial, a copy of the Maloney indictment, a supplemental motion for discovery, and the United States Proffer of Evidence in Aggravation in Maloney's case. *Id.*

[164] Prior to Maloney's sentencing, the United States Attorney for the Northern District of Illinois presented to Judge Leinenweber evidence in aggravation and the Government's memorandum supporting consideration of that evidence.

[165] *Bracy*, 117 S. Ct. at 1798.

[166] *Id.*

[167] *Id.* at 1798-99. The Court, particularly persuaded by the testimony of William Swano (a corrupt attorney and former Maloney "customer"), remarked: "According to Swano, Maloney retaliated against one of Swano's clients in one of the rare cases

concluded that the evidence, coupled with Maloney's conviction for bribe-taking, made sufficiently plausible Bracy's claim that Maloney was actually biased against Bracy in his own case.[168]

The Court acknowledged that public officials are presumed to have carried out their responsibilities properly, and that, were this presumption not "soundly rebutted," it might have concurred with the Seventh Circuit decision that Bracy's theories were too speculative to warrant discovery.[169] However, based on Bracy's showing, the Court held that he should have been granted discovery pursuant to Habeas Corpus Rule 6(a) to further develop his plausible claims of judicial bias.[170] The Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings.[171]

V. ANALYSIS

Although the Supreme Court in *Bracy v. Gramley* correctly ruled that Bracy had shown "good cause" for discovery on his judicial bias claim, it should have gone further. The *Bracy* Court confined its review to the narrow habeas question, refusing to acknowledge that issue's ultimate irrelevance compared to the violation of Bracy's due process rights.[172] Judge Maloney's presiding over the Bracy trial was a due process violation in and of itself, which deprived Bracy of his right to a fair and impartial judge. As such, Bracy's conviction should have been reversed outright.

Judicial bias infected Bracy's trial. This is true irrespective of whether one applies the narrow or broad *Tumey* standard.

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when Swano failed to offer Maloney a bribe and, in bribe negotiations in a later case, Maloney's bag man Robert McGee admitted as much." *Id.* at 1797 n.5. A former public defender, Swano testified that he learned that, in order "to practice in front of Judge Maloney . . . we had to pay." *Id.*

[168] *Id.* at 1799.

[169] *Id.*

[170] *Id.*

[171] *Id.* at 1799-800.

[172] In a footnote the Court commented:

> The dissenting [7th Circuit] judge insisted that petitioner had shown "good cause" for discovery to support his judicial bias claim, and went on to state that, in her view, petitioner was entitled to relief whether or not he could prove that Maloney's corruption had any impact on his trial. The latter conclusion, of course, would render irrelevant the discovery-related question presented in this case.

Id. at 1796 n.4 (internal citations omitted).

The broad and sweeping propositions found in post-*Tumey* judicial bias cases have been circumscribed and tempered somewhat by invocation of *Tumey*'s "direct, personal, substantial pecuniary" language.[173] Despite the Court's bold words stating that "*every* procedure" offering a mere "*possible* temptation" to be biased violates due process,[174] the Court rarely disqualifies judges who do not have some sort of *pecuniary* interest in the outcome of a case.[175] Arguably, *Tumey* offers a narrower, more financially focused standard than that found in *Murchison* or *Ward*.[176] However, the Court has never stated this; it appears to view *Tumey* and its progeny as one coherent monolith, the latter completely consistent and compatible with the former.[177] Additionally, some commentators argue that there are actually two standards for evaluating judicial bias claims—the broad standard established by the *Tumey* test proscribing "every procedure which would offer a possible temptation;" and the narrow standard, also originating in *Tumey*, implying that an interest must be "direct, personal . . . [and] pecuniary."[178] Even under the most restrictive reading of *Tumey*, Maloney still should be condemned as biased because he had a "pecuniary" stake in the outcome of Bracy's trial. Moreover, Judge Maloney's interest was sufficiently "direct." However, this narrow reading requiring a pecuniary interest is inappropriate; an arbitrary financial/non-financial distinction is not strongly supported by the most prominent judicial bias decisions. In fact, the language in *Tumey* and its progeny more strongly supports the broader standard[179] for evaluating judicial bias claims. Under this broader reading,

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[173] Tumey v. Ohio, 273 U.S. 510, 523 (1927). *See supra* note 51 and accompanying text.

[174] *Tumey*, 273 U.S. at 532 (emphasis added).

[175] Redish & Marshall, *supra* note 51, at 500-01.

[176] That is, although the Court in *Tumey*, *Murchison*, and *Ward* speaks of a "stringent rule" broadly proscribing "*every* procedure" which *may* lead to a "*possible* temptation" to be biased, it is arguable that the *Tumey* Court's reference to a "direct, personal, substantial pecuniary interest" has become the *de facto* standard for assessing judicial bias claims. *See Tumey*, 273 U.S. at 532; *In re* Murchison, 349 U.S. 133, 136 (1955); Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972). *See also supra* note 51.

[177] *See, e.g.*, *Aetna*, 475 U.S. at 821-22 (describing the conclusions in *Tumey* and *In re Murchison* as "similar").

[178] *Tumey*, 273 U.S. at 523. *See supra* note 51 and accompanying text; *see also* Redish & Marshall, *supra* note 51, at 500.

[179] *See supra* text accompanying note 51 (discussing the broad "*Tumey* test" of judicial bias claims).

Judge Maloney is clearly disqualified in light of the extraordinary extent of his corruption. Moreover, neither the evidence offered against Bracy, nor the fact that his conviction was twice upheld by the Illinois Supreme Court, should be relevant to whether his conviction warrants reversal. Dread of opening the floodgates to costly re-hearings is no excuse for judicial diffidence in Bracy's case. Lastly, if *Bracy* is to have significant impact, lower court judges will need to fashion remedies beyond the point where the Supreme Court feared to tread.

A. BRACY'S CONVICTION CALLED FOR OUTRIGHT REVERSAL

The *Bracy* Court strenuously resisted admitting the irrefutable conclusion that Maloney's presiding over the *Bracy* trial stripped that proceeding of any semblance of justice. Instead, turning a blind eye to the mandate established in *Tumey* and its progeny,[180] the Court immersed itself in the procedural minutia of the habeas question. Indeed, the Court appeared to relegate the constitutional due process question to the status of a postulate of the procedural habeas corpus inquiry, all but admitting Maloney's constitutional inadequacy in order to explain why the petitioner was entitled to discovery to prove Maloney's constitutional inadequacy.[181]

The Court found the presumption in favor of Maloney's fairness "soundly rebutted."[182] It acknowledged the possibility that Bracy's trial attorney, privy to the corrupt scheme, may have agreed to take the case on a no-hassle fast-track to deflect suspicion from his suddenly risk-averse former associate (Maloney).[183] However, the Court disingenuously discounted these probative findings as mere "additional evidence" and "specific allegations" necessary to support his discovery request.[184] The Court should

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[180] There is no more fundamental due process right than that to be tried before a fair and impartial judge. Johnson v. Mississippi, 403 U.S. 212, 216 (1971) (per curiam); *In re* Murchison, 349 U.S. 133, 136 (1955). *See generally* Redish & Marshall, *supra* note 51, at 475. In *Tumey v. Ohio*, the Supreme Court laid the foundation of what has become a bulwark against twentieth century judicial bias. *Tumey*, 273 U.S. at 523. *See also* Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972).

[181] An analogy could be made to a team of surgeons arguing that, because it has been discovered that the patient has a grapefruit-sized brain tumor, he has shown "good cause" to be granted permission to return to his doctor to try to persuade her that the original diagnosis of migraine was not the true cause of his headaches.

[182] Bracy v. Gramley, 117 S. Ct. 1793, 1799 (1997).

[183] *Id.*

[184] *Id.*

have found a prima facie showing of judicial bias and dispensed with the less important procedural question. Even assuming an improbably narrow reading of *Tumey*—that only a judge with a "direct, personal, substantial pecuniary interest"[185] may be deemed impermissibly biased[186]—the *Bracy* Court should have reversed.

1. Maloney's Direct, Pecuniary Interest In The Bracy Trial

Judge Maloney *had* a financial stake in *Bracy*. Thomas Maloney's corruption began while he was a practicing attorney and took on a new dimension when he assumed the bench in 1977.[187] Before being snared in the Greylord investigation, Judge Maloney regularly received considerable cash payments from defendants facing him.[188] Maloney's judicial office was, first and foremost, a money-making operation.[189] Convicting those defendants who did not pay (such as William Bracy) served Judge Maloney's financial interest in three ways. First, it encouraged a defense attorney to "ante up" the next time he appeared before Maloney.[190] Second, it sent a message to inter-

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[185] *Tumey*, 273 U.S. at 523.

[186] This position is unlikely, especially in light of the Court's subsequent decisions in *In re Murchison*, 349 U.S. 133 (1955), *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), and *Aetna Life Ins. v. Lavoie*, 475 U.S. 813 (1986). Nonetheless, it does have some support. For example, the Court in *Tumey* expressly stated that "matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion." *Tumey*, 273 U.S. at 523. Moreover, in *Ward*, Justices White and Rehnquist argued that *Tumey* should not be extended to control when the judge-mayor has no direct financial stake in the outcome of the trial. *Ward*, 409 U.S. at 62 (White, J., dissenting). *See also* Redish & Marshall, *supra* note 51, at 500 (commenting that the Court unjustifiably has been "extremely reluctant to disqualify a judge when no direct financial interest is involved").

[187] Bracy v. Gramley, 81 F.3d 684, 696 (1996) (Rovner, J., dissenting) ("It would seem, in any event, that by the time Maloney ascended to the bench in 1977, he was well groomed in the art of judicial corruption.").

[188] United States v. Maloney, 71 F.3d 645, 650-51 (7th Cir. 1995). For example, the court found that, in one murder prosecution, Maloney agreed to accept a bribe of $10,000. *Id.* at 655.

[189] *Bracy*, 81 F.3d at 696 (Rovner, J., dissenting). Judge Rovner noted the "abundant proof (and a federal jury's finding) that justice was for sale in Maloney's courtroom." *Id.* (Rovner, J., dissenting).

[190] Recall the testimony of defense attorney William Swano: after having bribed the judge on several occasions, Swano neglected to do so on a slam-dunk case Swano described as "a not guilty in any courtroom in the building." *Id.* at 697 (Rovner, J., dissenting). When Maloney convicted his client anyway, Swano concluded that "to practice in front of Judge Maloney . . . we had to pay." *Id.* (Rovner, J., dissenting). Judge Rovner wrote, "One may infer from Swano's testimony that Maloney saw the

ested members of the legal community (attorneys and clients) that "justice" was available—for a price. As Judge Rovner put it, "fixed cases were a source of profit, whereas unfixed cases were an opportunity . . . to 'advertise' in the defense bar."[191] If word got out that Maloney's courtroom was at all legitimate and a defendant could win a case on its merits, the judge's "credibility" would suffer. Third, convicting as many non-paying defendants as possible helped to keep Maloney in business.[192] Judge Rovner commented that this protected the "franchise by currying favor with law and order minded voters and avoiding the ire of the law enforcement community."[193]

Continuing, for the moment, under the assumption that a financial stake is required to show judicial bias, how much is enough? The *Tumey* standard firmly established in American jurisprudence that any interest suffices that might "offer a *possible temptation* to the average man as a judge to forget the burden of proof . . . or which *might* lead him not to hold the balance nice, clear, and true."[194] A better question then, is "how much and how direct a financial interest must there be to create the 'possible temptation?'"[195] Two Supreme Court cases suggest that the interest need not be so direct, nor so substantial after all.[196]

Though similar to *Tumey*, *Ward* differed factually in one key respect—there, the mayor-judge did not share *directly* in the fines levied by his court.[197] Nonetheless, in *Ward*, the mayor's responsibility for village finances apparently was deemed a direct enough interest when a part thereof derived from court-imposed fines.[198] The *Ward* Court implied that the "direct, per-

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Davis prosecution, in which no bribe was tendered, as an opportunity to teach Swano a lesson that would ensure bribes in future cases." *Id.* (Rovner, J., dissenting).

[191] *Id.* (Rovner, J., dissenting).

[192] *Id.* (Rovner, J., dissenting).

[193] *Id.* (Rovner, J., dissenting).

[194] Tumey v. Ohio, 273 U.S. 510, 532 (1927) (emphasis added); *see also* Redish & Marshall, *supra* note 51, at 495.

[195] Redish & Marshall, *supra* note 51, at 495. The authors conclude that "[i]n light of the severe practical barriers to conducting such analyses and the substantial dangers to judicial independence that derive from such financial pressures, it seems reasonable to conclude that *any* financial temptation, regardless of how indirect or insubstantial, presents a *possibility* of temptation." *Id.* at 495-96.

[196] *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 829 (1986); Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972).

[197] *Ward*, 409 U.S. at 60. *See supra* note 62 and accompanying text (discussing *Ward*).

[198] *Ward*, 409 U.S. at 60.

sonal, substantial pecuniary" language in *Tumey* was more illustrative than exhaustive: "[t]he fact that the mayor [in *Tumey*] shared directly in the fees and costs did not define the limits of the principle."[199]

Likewise, in *Aetna*, Justice Brennan specifically explained that he did "not understand that by this [direct, personal, substantial, pecuniary] language the Court states that only an interest that satisfies this test will taint the judge's participation as a due process violation."[200] In fact, the *Aetna* Court held Judge Embry's interest to be "direct, personal, substantial, and pecuniary" even though the judge had no direct financial stake.[201] A closer look at the facts of that case, however, again indicates that the Court used that language loosely. The Court founded its conclusion that Judge Embry had a "direct" interest on the theory that the Alabama Supreme Court's decision in *Aetna* supposedly "raised the stakes . . . [and enhanced] the legal status and the settlement value of his own case."[202] If the Court deemed these clearly indirect financial interests sufficiently "direct," then surely it should have concluded that Maloney's interests were also sufficiently direct. Therefore, because Maloney had a "direct, personal, substantial pecuniary interest" at stake in *Bracy*, the Supreme Court should have reversed the case outright.

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[199] *Id.*; *see also Tumey*, 273 U.S. at 532 (noting that "the pecuniary interest of the Mayor in the result of his judgment is not the only reason for holding that due process of law is denied to the defendant here").

[200] *Aetna*, 475 U.S. at 829 (Brennan, J., concurring). *See supra* note 75 and accompanying text; *see also* Withrow v. Larkin, 421 U.S. 35, 47 (1975) (pecuniary interest is merely *among* the "various situations [that] have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable"); Del Vecchio v. Illinois Dep't of Corrections, 31 F.3d 1363, 1373 (7th Cir. 1994) (en banc) (noting that "[o]f course, the Supreme Court has held the due process clause requires disqualification for interests besides pecuniary interests").

[201] *Aetna*, 475 U.S. at 824.

[202] *Id.* at 823-24. In other words, the Alabama Supreme Court's *Aetna* decision, by providing a favorable precedent for Justice Embry's own pending cases against Blue Cross, supposedly increased Blue Cross's incentive to settle. *Id.* The Court in *Aetna*, after discussing the particular issues of that defendant's suit against the Aetna Life Insurance Company, noted sharply that "[a]ll of these issues were present in Justice Embry's lawsuit against Blue Cross." *Id.* at 823. Because of the similarities between the Alabama Supreme Court's *Aetna* decision and Justice Embry's pending lawsuits, the Court in *Aetna* held "that when Justice Embry made that judgment, he acted as a judge in his own case." *Id.* at 824. *See also supra* note 75 and accompanying text.

2. *A More Plausible Reading of* Tumey *and its Progeny Urges The Same Result*

Even though Bracy satisfied the narrower *Tumey* test, he should not be burdened with its arbitrary distinction between financial and non-financial interests. The decision in *Tumey* offered no guidance in explaining why the former rises to a constitutional level but the latter does not.[203] Even discounting the financial interests involved, Judge Maloney had an equally urgent non-pecuniary motive—i.e., the desire to deflect suspicion from two contemporaneous, fixed cases. As Justice Brennan commented in *Aetna*: "[A]n interest is sufficiently direct if the outcome of the challenged proceeding substantially advances the judge's opportunity to attain some desired goal even if that goal is not actually attained in that proceeding."[204]

The Court's post-*Tumey* judicial bias cases suggest a broader standard than the "financial interest only" interpretation.[205] Under this more plausible reading of the *Tumey* principle, the case for reversing Bracy's conviction is unassailable. The language of the judicial bias cases themselves, coupled with the extraordinary nature of Maloney's bias, demanded bold action by the Court. Moreover, public policy reinforces this conclusion.

The strongest support of an outright reversal of Bracy's conviction lies in the principle established in *Tumey*: that having any interest that "offer[s] a *possible temptation* to the average man as a judge to forget the burden of proof . . . or which *might* lead him not to hold the balance nice, clear, and true" disqualifies a judge from presiding over a case.[206] This concept has been con-

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[203] As Redish and Marshall write:

> This distinction in constitutional treatment between personal bias and financial interest cannot be justified by a difference in the degree of temptation involved. A judge is likely to be far more concerned with giving his brother-in-law a break than with securing $5.00 for a traffic conviction. Similarly, the temptation to get revenge against a party that the judge dislikes may be as alluring as pecuniary gain.

Redish & Marshall, *supra* note 51, at 501.

[204] *Aetna*, 475 U.S. at 830 (Brennan, J., concurring).

[205] That is, the Court's interpretation in *In re Murchison*, 349 U.S. 133 (1955), *Ward v. City of Monroeville*, 409 U.S. 57 (1972), *Vasquez v. Hillery*, 474 U.S. 254 (1986), and *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) inform and extend the original standard set forth in *Tumey*.

[206] Tumey v. Ohio, 273 U.S. 510, 532 (1927) (emphases added). Again, although some argue that the Court in *Tumey* indicated that the interest must have a financial element, this Note argues that this is an implausibly narrow reading of *Tumey*, particularly in light of the more expansive language found in later judicial bias decisions.

firmed repeatedly in subsequent cases. It is clear that this country's judicial system will not tolerate even the *possibility* of judicial unfairness.[207]

Actual bias or influence need not be shown.[208] The rule is necessarily and deliberately stringent.[209] Thus, Bracy should not be required to provide evidence that Maloney employed a camouflaging bias in favor of the prosecution in non-bribe cases. As the Seventh Circuit acknowledged in Bracy's case, "[W]hen the trial judge is tainted by a pervasive conflict of interest—in other words, one not limited to a particular litigant or type of case—evidence that the taint had a discernible effect on a given case is unnecessary."[210] Clearly, due process is not served when a defendant such as William Bracy is convicted by a corrupt judge who, though sworn to uphold the law, is actually absorbed in his own illicit enterprise.[211]

The Court, while recognizing that this rigorous screening may result in disqualifying judges who are capable of holding the balance "nice, clear, and true,"[212] nonetheless insisted that "justice must satisfy the appearance of justice."[213] Close adher-

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[207] *Murchison*, 349 U.S. at 136.

[208] For example, the Court in *Tumey* reversed despite no indication whatsoever that this potential bias actually influenced the lower court's decisions, concluding that the prospect of a loss of twelve dollars in court costs was temptation enough. *Tumey*, 273 U.S. at 532. The Court in *Aetna*, though holding that the judge had a far more direct interest in the outcome of that case than was necessary for a bias claim, insisted that they need not decide whether a judge *was* influenced, but only whether presiding over the case might offer a "possible temptation." *Aetna*, 475 U.S. at 824-25. Similarly, the Court in *Ward* specifically rejected the argument that an Ohio statute was sufficient without federal interference to protect against judicial bias, arguing that "[i]f this means that an accused must show special prejudice in his particular case, the statute requires too much and protects too little." *Ward*, 409 U.S. at 61.

[209] *Murchison*, 349 U.S. at 136; *see also* United States v. Guglielmini, 384 F.2d 602, 605 (2d Cir. 1967) ("Few claims are more difficult to resolve than the claim that the trial judge, presiding over a jury trial, has thrown his weight in favor of one side to such an extent that it cannot be said that the trial has been a fair one.").

[210] Bracy v. Gramley, 81 F.3d 684, 698 (7th Cir. 1996).

[211] *See Ward*, 409 U.S. at 60. The Court in *Ward* commented: "This . . . is a situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, and necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him." *Id.*

[212] *Tumey*, 273 U.S. at 532.

[213] *Aetna*, 475 U.S. at 825; *see also* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 865 n.12 (1988); Schweiker v. McClure, 456 U.S. 188, 196 (1982); Marshall v. Jerrico, Inc., 446 U.S. 238, 243 (1980); Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971); *Murchison*, 349 U.S. at 136; Offutt v. United States, 348 U.S. 11, 14 (1954). *Cf.* J.E.B. v. Alabama, 511 U.S. 127, 161 n.3 (1994) (Scalia, J., dissenting) ("Wise ob-

ence to this principle serves two public policy purposes. First, because not all improprieties are discernible,[214] such a rule lowers what could otherwise be prohibitively high evidentiary hurdles facing a petitioner.[215] The Court clearly has chosen to err on the side of caution by disqualifying a judge if she has some discernible *possible* bias. Second, endeavoring to avoid even the *appearance* of impropriety serves to reinforce the faith of the American people in the criminal justice system.[216] In other words, it accomplishes the critical goal of "generat[ing] the feeling, so important to a popular government, that justice has been done."[217]

Lastly, the very pervasiveness of Judge Maloney's corruption required that Bracy's conviction be overturned. It is true that the Supreme Court recognizes that not every "possible temptation" mandates judicial disqualification.[218] To weed out frivolous bias claims, the Court has enhanced the burden of persuasion, requiring the moving party to "overcome a presumption of honesty and integrity in those serving as adjudicators."[219] This presumption inoculates a judge from disqualification for a minor but "possible" biasing influence. As the *Bracy* Court commented, "Ordinarily, we presume that public officials have properly discharged their official duties . . . [b]ut, unfortunately, the presumption has been soundly rebutted: Maloney was shown to be thoroughly steeped in corruption through his

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servers have long understood that the appearance of justice is as important as its reality.").

[214] Redish & Marshall, *supra* note 51, at 483. *See also* Bracy v. Gramley, 81 F.3d 684, 698-99 (7th Cir. 1996) (Rovner, J., dissenting) (criticizing the majority "for being naïve about what the cold page of a trial record will reveal").

[215] *See, e.g., supra* note 140.

[216] *See* Amicus Brief of Concerned Illinois Lawyers and Law Professors at 17, *Bracy* (No. 96-6133).

[217] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 172 (1951); *see also* Redish & Marshall, *supra* note 51, at 483-84. Messrs. Redish and Marshall note:

> Few situations more severely threaten trust in the judicial process than the perception that a litigant never had a chance because the decisionmaker may have owed the other side special favors. . . . The Supreme Court has forcefully recognized this truth. . . . Indeed, if there exists any reasonable doubt about the adjudicator's impartiality . . . provision of the most elaborate procedural safeguards will not avail to create this appearance of justice.

Id.

[218] *See Aetna*, 475 U.S. at 826 (remarking that, at some point, a "biasing influence . . . will be too remote and insubstantial to violate the constitutional constraints").

[219] Withrow v. Larkin, 421 U.S. 35, 47 (1975).

public trial and conviction."[220] Therefore, with Judge Maloney stripped of this protective presumption, the impact of his "possible temptation" should have been presumptively greater.

Moreover, it should not be overlooked that the Court evaluates judicial bias claims against the measuring stick of the "average" judge.[221] Maloney was far from average.[222] As his string of convictions proved, Judge Maloney acquitted murderers for a small payment of blood money.[223] As Judge Rovner remarked, "The victims of those crimes, their families, the people of Illinois, the concept of justice,[[224]] were apparently worth no more to him."[225] Faced with a judge as corrupt as Maloney, the *Bracy* Court erred in applying a standard designed for the "average man." After all, as the Court asserted in *Vasquez*, "[w]hen the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired."[226] William Bracy deserved nothing less.

B. THE COURT'S RELUCTANCE TO REVERSE CONVICTION

There are several reasons why any court might resist overturning the conviction of a defendant like Bracy. The evidence against Bracy appears overwhelming.[227] However, the right to due process is not a function of the nature of the evidence offered against the accused.[228] The inculpatory evidence in *Tumey*

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[220] Bracy v. Gramley, 117 S. Ct. 1793, 1799 (1997).

[221] *See Aetna*, 475 U.S. at 825; Tumey v. Ohio, 273 U.S. 510, 532 (1927).

[222] *See* Bracy v. Gramley, 81 F.3d 684, 700 (7th Cir. 1996) (Rovner, J., dissenting). Judge Rovner argues:

> Maloney's bribetaking . . . [was not] just another "bias" or "influence," something external to his personality, or at least some severable part of it, that at most "might" have given him the "incentive" to behave in a particular fashion on occasions when he was not bribed. . . . Maloney's bribetaking removes him from the category of the "average" man . . . [and implicates] a far darker set of impulses than we confront in the usual bias case.

Id. (Rovner, J., dissenting).

[223] *Id.* (Rovner, J., dissenting).

[224] As Judge Rovner acidly noted, "The question we should be asking ourselves is not what impact the lack of a bribe had on Maloney's decisionmaking in a particular case, but what his willingness to accept a bribe tells us about his view of judging." *Id.* (Rovner, J., dissenting).

[225] *Id.* (Rovner, J., dissenting).

[226] Vasquez v. Hillery, 474 U.S. 254, 263 (1986).

[227] *Bracy*, 81 F.3d at 702-03 (Rovner, J., dissenting).

[228] *Id.* at 703 (Rovner, J., dissenting).

was equally decisive.[229] Nonetheless, the Court in *Tumey* asserted that "[n]o matter what the evidence was against him, he had the right to have an impartial judge."[230]

The availability of appellate review proves an equally meritless reason to resist overturning a conviction before a biased judge. For example, the respondent in *Ward* argued that any such unfairness would be remedied by the procedural safeguard of appellate review.[231] However, the Court in *Ward* specifically rejected this argument.[232] The Court in *Bracy*, while not specifically making this argument, implied as much when it commented that the Illinois Supreme Court twice affirmed Bracy's sentence and conviction.[233] The *Ward* Court asserted that "the State's trial court procedure . . . [is not rendered] constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance."[234] Similarly, the Court in *Ward* doubted that the prospect of being reversed on appeal had any impact on a judge's incentive to convict.[235] Judge Maloney was no exception.[236]

It also has been suggested that in bench trials a judgment need not be vacated if the disqualified judge cast other than the

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[229] Tumey v. Ohio, 273 U.S. 510, 535 (1927).

[230] *Id.*

[231] Ward v. Village of Monroeville, 409 U.S. 57, 61 (1972).

[232] *Id.* Note that this argument would also violate the principle that constitutional *structural* defects in a case, such as judicial bias, require automatic reversal. *See* Sullivan v. Louisiana, 508 U.S. 275, 283 (1993).

[233] Bracy v. Gramley, 117 S. Ct. 1793, 1798 n.6 (1997). The Court said, "We express no opinion on the correctness of the various discretionary rulings cited by petitioner as examples of Maloney's bias. We note, however, that many of these rulings have been twice upheld, and that petitioner's convictions and sentence have been twice affirmed, by the Illinois Supreme Court." *Id.* (citation omitted).

[234] *Ward*, 409 U.S. at 61-62. Furthermore, Judge Rovner took issue with this line of thinking:

> It is no answer to the charge of corruption that Maloney's discretionary rulings on their face appear to fall within the realm of reason . . . [W]e assume that the reasonable judge does not act for malignant ends . . . [However, if] a judge exercises her discretion for invidious reasons, she has exceeded her authority.

Bracy v. Gramley, 81 F.3d 684, 702 (7th Cir. 1996) (Rovner, J., dissenting).

[235] *Ward*, 409 U.S. at 61-62.

[236] As already explained, Maloney's incentive to convict was considerable. Moreover, even if the possibility of reversal was of concern to him, Judge Maloney knew how to arrive at an appeal-proof result. As Judge Rovner remarked, "A judge who wishes to be tough on the defendant need not adopt the manner of the Tasmanian Devil to do it." *Bracy*, 81 F.3d at 698-99 (Rovner, J., dissenting). *See also supra* note 140.

deciding vote.[237] However, whether a constitutional violation has occurred should not depend on conjecture about who cast the decisive vote. This may lead to incorrect assumptions and should be irrelevant to the analysis.[238] Bracy was convicted by a jury, but in a jury trial a judge still exercises great influence, "if not directly upon the jury, then upon the myriad events that culminate in the jury's decision."[239]

The Court in *Bracy* declined to adjudicate the due process issue and declined to follow the clear mandate of the Constitution and its own precedent, choosing instead to resolve only the narrow habeas question.[240] Given the role that cost/benefit balancing played in the Seventh Circuit's analysis in *Bracy*, it seems likely that the costly ramifications[241] of a reversal of Bracy's conviction influenced the Supreme Court's decision to avoid the issue altogether.[242] Even admitting the possibility of Maloney's bias in Bracy's trial and acknowledging the plausibility of the idea that "a judge's corruption is likely to permeate his judicial conduct rather than be encapsulated in the particular cases in which he takes bribes,"[243] the Seventh Circuit declined to grant a new trial or additional discovery.[244] The Court concluded that the consequences of such an outcome were "unacceptable."[245]

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[237] *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 827 (1986).

[238] *Id.* at 831 (Blackmun, J., concurring). In *Aetna*, regardless of that judge's role in the final decision, his mere presence posed an intolerable risk of subtly distorting the judicial process. *Id.* (Blackmun, J., concurring). Thus, the "violation of the Due Process Clause occurred when Justice Embry sat on this case." *Id.* at 833 (Blackmun, J., concurring).

[239] *Bracy*, 81 F.3d at 701 (Rovner, J., dissenting). Elaborating, Judge Rovner said:

> I mean the extraordinary ability of the trial judge to shape the trial itself. It is she who decides what evidence the jury may hear, how counsel may behave in front of the jury, what arguments may be made, how they may be made, what legal principles the jury must apply, and even, to a significant degree, who will sit on the jury.

Id. (Rovner, J., dissenting).

[240] Bracy v. Gramley, 117 S. Ct. 1793, 1796 n.4 (1997).

[241] During his judicial tenure, Judge Maloney sat on over 6000 cases. *Bracy*, 81 F.3d at 689.

[242] There is some evidence that this sentiment exists on the current Court. *See, e.g.*, Vasquez v. Hillery, 474 U.S. 254, 277 (1986) (O'Connor, J., concurring) ("[T]he Court's remedy must stand or fall on its utility as a deterrent to government officials who seek to exclude particular groups from grand juries, weighed against the cost that the remedy imposes on society.").

[243] *Bracy*, 81 F.3d at 689.

[244] *Id.* at 690-91.

[245] *Id.* at 689.

In his depressingly empirical fashion, Judge Posner asserted that any "automatic rule must be interpreted circumspectly, with due recognition of the cost to society of overturning the convictions of the guilty in order to vindicate an abstract interest in procedural fairness."[246] Judge Posner seems to have forgotten that the most fundamental principle of constitutional adjudication is that we have a government of laws, not men,[247] and that what he calls "abstract interest[s] in procedural fairness" are also known as the Bill of Rights.

In her scathing dissent to the Seventh Circuit decision, Judge Rovner reminded the majority that this was not an empirical matter, implying that its cost/benefit analysis was misplaced.[248] Judge Rovner then asked: "What are we to say to Bracy and Collins, that they had the right to an honest, impartial judge but that the breadth of past corruption in the Illinois judiciary makes it too costly to enforce that right?"[249] Justice Rovner is correct. This is a matter of principle, not empiricism. The judicial process is necessarily "principle-prone and principle-bound," and courts are "a most unsuitable instrument for the formation of policy" based on empirical pragmatism.[250]

VI. THE POST-*BRACY* FUTURE

By itself, the decision in *Bracy* appears to amount to little more than a vacuous truism—i.e., because William Bracy had a biased and corrupt judge in his trial, he should be permitted discovery in order to show that he had a biased and corrupt judge in his trial. The Court's exceedingly narrow holding on an arcane procedural point resulted in a missed opportunity to send a stronger message on the more substantive constitutional issues. On the other hand, MacArthur Justice Center's Locke E. Bowman opined that *Bracy* will still be significant because it "takes very seriously the point that a criminal defendant is entitled to an unbiased judge and it doesn't require a showing of an

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[246] *Id.*

[247] STEPHEN B. PRESSER, RECAPTURING THE CONSTITUTION 33 (1994). Professor Presser criticizes the Court for "approach[ing] the matters brought before it on an ad hoc basis, weighing the competing interests of the parties in a manner which traditionally was supposed to be done by legislatures." *Id.* at 50.

[248] *Bracy*, 81 F.3d at 701 (Rovner, J., dissenting).

[249] *Id.* at 703 (Rovner, J., dissenting).

[250] ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 175 (1970).

actually biased ruling in the particular case in order to require further investigation. That would have been a very difficult hurdle for Bracy to have met."[251] Any hope of leadership or salutary impact from this decision rests solely with the lower court judges. Judge Maloney sat on over 6000[252] cases.[253] As some of those who were convicted in his court now resurface with claims of judicial bias, and as courts begin to grapple with the fiendishly difficult evidentiary issues, the most frequently asked question will be, "What should we do when we simply do not know whether a defendant received a fair trial?"

We do not know now, nor are we likely ever to know what Judge Maloney's true disposition towards Bracy was.[254] Of course, we need not *know* anything; a mere likelihood or possibility of bias is sufficient for a claim to prevail, particularly given the unique circumstances of Maloney's corruption.[255] However, it is instructive that one of the first post-*Bracy* hearings resulted in a vacated conviction and a new trial.[256] Relying heavily upon

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[251] Marcia Coyle, *New Trial for Six on Death Row?*, NAT'L L.J., June 23, 1997, at A10.

[252] This number is not as daunting as it sounds. Many of these resulted in acquittals or guilty pleas, and many of the convicted have already served their time. *Id.* Mr. Bowman indicated that he "can't quantify the number [of cases] in which there might be some challenge [as a result of *Bracy*], but it's certainly much, much smaller than 6,000. . . . Each individual would have to meet this threshold of circumstantial evidence." *Id.* Even had the Court reversed Bracy's conviction and retried him (as this Note argues it should have done), the Cook County judicial system would not have been plunged into the confusion and anarchy the Seventh Circuit predicted. Professor Marshall urges an alternative:

> Leaving matters . . . to the courts to straighten out is no solution. Besides the often insurmountable procedural barriers that face inmates raising new claims years after their convictions have become final, most inmates whose convictions have become final have no attorneys and no resources. . . . An independent commission . . . should be created to study each of the cases involving Maloney.

Lawrence C. Marshall, *Righting the Wrongs In Our Criminal Justice System*, CHI. TRIB., June 16, 1997, at A7.

[253] *Bracy*, 81 F.3d at 689.

[254] *Id.* at 699 (Rovner, J., dissenting).

[255] *See supra* text accompanying notes 180-226; *see also* Vasquez v. Hillery, 474 U.S. 254, 263 (1986) (noting that "when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired").

[256] People v. Titone, No. 83-C-127 (Circuit Court of Cook County, Ill. July, 1997). This was the post-conviction hearing of Dino Titone, convicted of murder and sentenced to death in 1984 by Judge Maloney. Titone alleged that Judge Maloney solicited a bribe from his family in return for an acquittal, but returned the bribe and convicted him when he correctly perceived that he was a possible target of Operation Greylord. Though the request was only for discovery and an evidentiary hearing, Judge Strayhorn vacated the conviction entirely.

Judge Rovner's dissent in *Bracy*, Cook County Circuit Court Judge Earl Strayhorn said,

> I can't answer the question of was he tried in a fair tribunal before a judge who gave him a fair and honest trial. . . . Honestly I don't know. . . . [However,] no amount of procrastination on my part, no amount of reluctance on my part can wipe out the fact that under the circumstances that have been presented here what went on in that courtroom as to Dino Titone was not justice. And that 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.[257]

The Seventh Circuit in *Bracy* concluded that "the probability is slight that a program of depositions aimed at crooks . . . will yield" the evidence being sought by Bracy.[258] Such complacency must not be replicated in the lower courts. "We cannot, therefore, hide behind the jury's verdict . . . [w]e cannot turn our backs on the Constitution."[259]

VII. CONCLUSION

In *Bracy v. Gramley*, the Court ruled that a habeas corpus petitioner had shown "good cause" for discovery on his due process claim of judicial bias.[260] The defendant had been convicted before a judge who was subsequently found to have been engaged in a pattern of bribery, extortion, and racketeering at the time of the defendant's trial. The Court relied on the facts of the judge's conviction as well as "additional evidence" and "specific allegations" in order to adjudicate the discovery issue.

The Court in *Bracy* should have reversed the petitioner's conviction outright. First, the Court should have embraced a broad reading of the *Tumey* standard, amply supported by post-*Tumey* judicial bias decisions. Even under the most narrow interpretation of *Tumey*, this particular judge would be disqualified. Instead, the Court immersed itself in the procedural minutia of the habeas corpus and discovery questions, refusing to address the clear due process violation that occurred when the judge first sat for the case. The threshold showing for judicial bias is intentionally low, the rule necessarily stringent. Once a probability of bias has been found, the entire trial is presumed infected. Moreover, judicial bias is the type of structural

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[257] *Id.*

[258] *Bracy*, 81 F.3d at 691.

[259] *Id.* at 702-03 (Rovner, J., dissenting).

[260] Bracy v. Gramley, 117 S. Ct. 1793, 1795 (1997).

constitutional defect that defies harmless-error review and demands automatic reversal. The *Bracy* decision may be seen as a pragmatic compromise between denying any form of relief and "opening the floodgates" with the more dramatic remedy called for here. Under these conditions, however, given the extraordinary depth and breadth of this judge's corruption, anything short of outright reversal smacks of unfortunate judicial complacency.

TIMOTHY R. TERRY