THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-1132

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DONALD JONES

Appellant

vs.

AL LUEBBERS

Respondent

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Appeal From the United States District Court
For the Eastern District of Missouri
The Honorable Andrew W. Bogue, District Judge

# APPELLANT'S BRIEF

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## SUMMARY OF THE CASE

A state trial court sentenced Donald Jones to death for the murder of his grandmother, Dorothy Knuckles. After exhausting his remedies in state court Mr. Jones sought federal habeas corpus relief pursuant to 28 U.S.C. § 2254. He claimed (1) that he had been denied due process of law because the state trial judge bore great animosity toward one of his trial attorneys and made numerous adverse discretionary rulings throughout the case, (2) that his trial attorneys had been ineffective in moving for the recusal of the judge, and (3) that he had been denied due process because the biased judge adjudicated the question of his own fitness to try the case. Mr. Jones alleged several additional claims of constitutional deprivation arising from his state court proceedings.

The United States District Court for the Eastern District of Missouri denied relief and declined to issue a certificate of appealability. Mr. Jones filed a notice of appeal and requested that this Court consider granting a certificate of appealability. This Court granted a certificate of appealability with respect to the issues enumerated in this summary.

This is a capital case. The issues addressed in this brief are substantial and complex. Mr. Jones requests that the Court allow each side 30 minutes for oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Cont'd)

## STATEMENT OF JURISDICTION

Mr. Jones invoked the jurisdiction of the United States District Court pursuant to 28 U.S.C. §§ 2241 and 2254(d). (App. at 8-77.) He sought federal habeas corpus relief based upon claims that his sentence and detention violated rights guaranteed to him by the United States Constitution. (App. at 48-76.)

Mr. Jones invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 2253(a) and Fed.R.App.P. 4(a). This is an appeal from a final judgment of the United States District Court for the Eastern District of Missouri. The judgment disposed of all claims asserted by the parties. The District Court entered its judgment on October 1, 2001, and its order denying Mr. Jones' motion to alter or amend that judgment on December 11, 2001. (App. at 6-7, 196.) Mr. Jones filed his notice of appeal to this Court on December 17, 2001. (App. at 234-35.)

## ISSUES PRESENTED FOR REVIEW

I.

Whether the District Court erred in denying Mr. Jones' petition for a writ of habeas corpus because the record demonstrates that the state trial judge was biased against the defense and that judicial bias deprived Mr. Jones of a fair trial and due process of law.

*In re Murchison,* 349 U.S. 133 (1955)

*Gardner v. Florida,* 430 U.S. 349 (1977)

*Ford v. Wainwright,* 477 U.S. 399 (1986)

*Williams v. Taylor,* 529 U.S. 362 (2000)

II.

Whether the District Court erred in denying Mr. Jones' petition for a writ of habeas corpus because his attorneys were ineffective in failing to make an adequate motion for recusal of the trial judge, as a consequence of which (1) the judge was enabled to preside over the adjudication of his own bias and capacity for fairness and (2) Mr. Jones was subjected to trial before a judge who was biased against the defense and thereby was deprived of a fair trial.

*Strickland v. Washington,* 466 U.S. 668 (1984)

*In re Murchison,* 349 U.S. 133 (1955)

*Williams v. Taylor,* 529 U.S. 362 (2000)

## STATEMENT OF THE CASE

### (a) Nature of the Case

This is a state prisoner's action for habeas corpus relief pursuant to 28 U.S.C. § 2254. The state of Missouri charged Mr. Jones with first degree murder, first degree robbery, and two instances of armed criminal action. (Resp.'s Exh. F at 14-15.) A jury found him guilty of those crimes and recommended that he be executed for the homicide and imprisoned for the robbery and the armed criminal action offenses. (Resp.'s Exh. F at 8, 1211-12.) The trial court subsequently sentenced Mr. Jones to death and to a prison term. (Resp.'s Exh. F at 2108-09.) Mr. Jones sought post-conviction relief in the state trial court without success. (Resp.'s Exh. H at 1, 4, 47, 311-47.) The Missouri Supreme Court affirmed the judgment of conviction, sentence, and denial of post-conviction relief. *State v. Jones,* 979 S.W.2d 171 (Mo. 1998).

Mr. Jones sought federal habeas corpus relief pursuant to 28 U.S.C. § 2254. (App. at 8-77.) He claimed (1) that he had been denied due process of law because the state trial judge bore great animosity toward one of his trial attorneys and made numerous adverse discretionary rulings throughout the case, (2) that his trial attorneys had been ineffective in moving for the recusal of the judge, and (3) that he had been denied due process because the

biased judge adjudicated the question of his own fitness to try the case. (App. at 49-52, 69-70.) Mr. Jones alleged several additional claims of constitutional deprivation arising from his state court proceedings. (App. at 48-76.)

B. Proceedings in the District Court

The District Court entered its judgment denying Mr. Jones' petition for habeas corpus relief on October 1, 2001. (App. 196.) Mr. Jones filed a motion to alter or amend the judgment pursuant to Fed.R.Civ.P. 59 on October 11, 2001. (App. 221-26.) The District Court denied that motion in an order entered on December 5, 2001. (App. 7.) Mr. Jones filed his notice of appeal on December 17, 2001. (App. 234-35.) On February 4, 2002, the District Court entered its order declining to grant Mr. Jones a certificate of appealability.

C. Statement of Facts

The case against Mr. Jones was assigned to a Missouri trial judge named Charles D. Kitchin on November 19, 1993. (Resp.'s Exh. F at 3.) On April 21, 1994, the two public defenders assigned to represent Mr. Jones filed a motion seeking Judge Kitchin's disqualification and requesting that the matter of recusal be heard and decided by another judge. (Resp.'s Exh. F at 245-55.) The attorneys were Karen E. Kraft and Ellen A. Blau. (Resp.'s

Exh. F at 239, 254-55.) The motion alleged that Judge Kitchin harbored and had exhibited prejudice against Ms Blau. (Resp.'s Exh. F at 246-53, 874-75, 877-79.) It claimed also that Judge Kitchin had expressed prejudice against Sadashiv Parwatikar, M.D., a psychiatrist who would testify for the defense if the trial reached the penalty phase. (Resp.'s Exh. F at 246-53.)

In a supporting affidavit Ms Kraft stated that she was a managing attorney in the public defender's capital case office and that she was responsible for designating attorneys to handle pending cases. (Resp.'s Exh. F at 873.) She recounted that Ms Blau had begun working in the capital case office on January 1, 1994, and that she had assigned Ms Blau to assist in Mr. Jones' representation at that time. (Resp.'s Exh. F at 873.) After Ms Kraft had assigned Ms Blau to Mr. Jones' case, Ms Blau informed Ms Kraft of the animosity that Judge Kitchin had exhibited toward her in two prior cases. (Resp.'s Exh. F at 874.) Ms Kraft explained: "Due to scheduling and case loads it is not possible to replace Ms Blau with another attorney to represent [Mr. Jones], nor is it possible to try the case without using Dr. Parwatikar as a defense witness." (Resp.'s Exh. F at 874-75.)

In her own affidavit Ms Blau stated that Judge Kitchin had accused her of improper conduct and suggested that the prosecuting attorney charge her with a crime and lodge a complaint against her with the state's

disciplinary counsel. (Resp.'s Exh. F at 878-79.) She said that it had been her practice since those incidents "to request a change of judge whenever my cases are assigned to Judge Kitchin for trial because it is my belief that Judge Kitchin has strong opinions about me that would result in bias and prejudice against my clients." (Resp.'s Exh. F at 879.) Ms Blau explained that she had been assigned to Mr. Jones' case more than 30 days after the case had been assigned to Judge Kitchin, and thus that the governing Missouri rule of criminal procedure precluded her from making a peremptory demand for a change of judge. (Resp.'s Exh. F at 879.)

Defense counsel also filed the affidavit of an attorney named John Klosterman, who previously had worked in the public defender's office. (Resp.'s Exh. F at 880-83.) Mr. Klosterman recounted his own involvement in one of the cases in which Ms Blau had run afoul of Judge Kitchin. (Resp.'s Exh. F at 881-82.) He stated that that Judge Kitchin had "indicated his extreme personal displeasure" with Ms Blau's conduct during the case, "indicated his personal dislike for her and her actions," and urged the prosecuting attorney to "seriously consider pursuing sanctions and/or criminal charges against Ms Blau." (Resp.'s Exh. F at 882.) Mr. Klosterman attested: "During the intervening time . . . Judge Kitchin has referred to Ms Blau's actions in a disparaging manner while holding conversations

regarding other matters." (Resp.'s Exh. F at 882-83.) He stated his opinion that Judge Kitchin "holds a high disregard" for Ms Blau. (Resp.'s Exh. F at 883.)

Judge Kitchin conducted a hearing on Mr. Jones' recusal motion on May 4, 1994. (Resp.'s Exh. D at 3.) An assistant public defender named Richard Scholz appeared initially on behalf of Mr. Jones. (Resp.'s Exh. D at 3-4.) At the beginning of the hearing Mr. Scholz requested "that this case be presented to a different judge." (Resp.'s Exh. D at 4-5.) The judge denied the request and Mr. Scholz asked for the basis of the denial. (Resp.'s Exh. D at 4.) Judge Kitchin replied: "Your basis for this in the affidavits is something that happened in two other situations involving Ellen Blau, not the very case of the defendant Donald Jones." (Resp.'s Exh. D at 4-5.)

Mr. Scholz called Ms Kraft as the first witness in support of the motion to disqualify Judge Kitchin. (Resp.'s Exh. D at 6.) Ms Kraft testified that she had assigned Ms Blau to Mr. Jones' case when Ms Blau joined the public defender's capital case office during January, 1994. (Resp.'s Exh. D at 17, 20, 64.) She acknowledged that the time allowed under the state criminal procedure rules for automatic disqualification of a trial judge had expired by that time and that the case had been scheduled for trial during June, 1994. (Resp.'s Exh. D at 20.) She stated that it had been

impossible for her to remove Ms Blau from the case "because there was no one that would be . . . . able to get the case worked up and ready for trial" in accordance with Judge's Kitchin's schedule. (Resp.'s Exh. D at 21-22.) Ms Kraft testified that Ms Blau would be taking "an active role" in Mr. Jones' trial. (Resp.'s Exh. D at 19.)

Ms Kraft recalled a telephone conversation several days earlier in which Judge Kitchin had criticized Ms Blau's conduct in earlier cases "in very strong terms" and "wanted me to raise the issue that she had acted improperly." (Resp.'s Exh. D at 12, 16.) She testified that she had told Judge Kitchin "that I could not do that because in my opinion she had acted properly." (Resp.'s Exh. D at 16.) At that point in Ms Kraft's testimony, Judge Kitchin interjected:

> THE COURT: I'll put that in the order. If you want me to state right on the record I believe her conduct was improper in those other matters not having anything to do with this case, I intend to write that in whatever order I make, okay . . . . I believe it was improper. I'll say it fifty times in the record today, sir, and I'm going to put it in the order. There is no question about that, if that's what you want.

(Resp.'s Exh. D at 12-13.)

During the ensuing colloquy between counsel and the court Mr. Scholz suggested that "we may have to call you as a witness in this matter." (Resp.'s Exh. D at 15.) Judge Kitchin responded: "I'll run this courtroom and you'll call whatever witnesses I let you call." (Resp.'s Exh. D at 15.) Shortly thereafter Mr. Scholz sought to make a record regarding the judge's demeanor because "it is apparent the Court is exhibiting behavior right now that is certainly hostile toward myself." (Resp.'s Exh. D at 15.) Judge Kitchin responded: "You're exhibiting behavior that is ridiculous." (Resp.'s Exh. D at 15.) Mr. Scholz then noted his observation that the judge had pointed at counsel and raised his voice and "certainly through the body language on the bench there indicat[ed] both impatience and a certain strong hostility toward me." (Resp.'s Exh. D at 16.)

Ms Kraft testified about a recent telephone conversation in which Judge Kitchin "made some comments to me about the fact that he knows why we choose Dr. Parwatikar for our evaluations, that he's the most liberal of those guys." (Resp.'s Exh. D at 11.) She stated that Dr. Parwatikar would be "an important defense witness" in Mr. Jones' case. (Resp.'s Exh. D at 12.) Ms Kraft also testified about another case in which Judge Kitchin had addressed Dr. Parwatikar during his testimony and announced that he did not believe the witness. (Resp.'s Exh. D at 22-24.) Judge Kitchin

acknowledged that he had told Dr. Parwatikar that he disbelieved him. (Resp.'s Exh. D at 27-28.) But he recalled having decided that case on other grounds: "I was not commenting in my order when I made the judgment . . . on his credibility at all." (Resp.'s Exh. D at 28.)

During cross-examination Ms Kraft testified that Dr. Parwatikar would be a witness at the guilt phase of Mr. Jones' trial with respect to the defense of diminished capacity and that he would testify further regarding various mitigating factors if there was a penalty phase. (Resp.'s Exh. D at 23-24.) She explained her concern about Judge Kitchin's attitude toward Dr. Parwatikar: "If the jury hangs on punishment . . . Judge Kitchin will be the sentencer of my client and, therefore, he will be a fact-finder." (Resp.'s Exh. D at 24.)

Judge Kitchin stated:

> The thing she's talking about is the remote possibility they would kick it back to me for a decision on the punishment. That is speculation. There's a lot of other possibilities in the sense of the verdicts the jury could return.

(Resp.'s Exh. D at 26.) He concluded: "There's no use in pursuing this." (Resp.'s Exh. D at 27.)

After the prosecuting attorney had completed his questioning of Ms Kraft, Judge Kitchin began to examine her. (Resp.'s Exh. D at 34.) He asked repeatedly how many times she had called upon Dr. Parwatikar and whether she "used him more than anyone else." (Resp.'s Exh. D at 34-35.) Ms Kraft testified that she "certainly [did] not use him in every case" and denied that she used him more frequently than she used other psychiatrists. (Resp.'s Exh. D at 34-35.)

Mr. Scholz objected to the court's line of inquiry and asked leave to "inquire as to the purpose of the line of questioning." (Resp.'s Exh. D at 35.) Judge Kitchin explained:

> [W]hen the plaintiff's bar attacks a defense doctor they ask how many times he's testified for that particular lawyer, that particular law firm, and how many times, if any, he's testified for the defense. The cases uphold this kind of questioning in an expert witness . . . If you don't understand that body of case law or are not aware of it I suggest you read it sometime. Now that's the subject I'm pursuing.

(Resp.'s Exh. D at 35.) Judge Kitchin overruled the objection. (Resp.'s Exh. D at 34-36.) Ms Kraft then answered: "I have used Dr. Parwatikar once as a witness in a case in ten years." (Resp.'s Exh. D at at 36.)

Judge Kitchin continued to question Ms Kraft. He asked: "Do you feel he's the most liberal of any of the others?" (Resp.'s Exh. D at 37.) Ms Kraft testified that she did not. (Resp.'s Exh. D at 37.) Then Judge Kitchin asked why Ms Kraft had chosen Dr. Parwatikar in Mr. Jones' case. (Resp.'s Exh. D at 37.) Mr. Scholz objected that the question might require Ms Kraft to divulge privileged information in the presence of the prosecuting attorney. (Resp.'s Exh. D at 37.) Judge Kitchin responded: "You've opened it up by this subject. No, you've opened it up. You're opening that up." (Resp.'s Exh. D at at 37.)

Mr. Scholz then asked leave to note that Judge Kitchin was "yelling" at him and "moving around in a chair behind the bench in a manner that certainly indicates unhappiness, anger, and prejudice." (Resp.'s Exh. D at 37.) Judge Kitchin then asked Mr. Scholz twice whether he had "ever read the canons of ethics." (Resp.'s Exh. D at at 38.) He again explained his interrogation of Ms Kraft:

> I'm asking . . . why she chose Parwatikar in this case. She's elicited to a phone conversation that I said something to the fact he was the most liberal of those guys and that's why she chose him. I'm asking her why she chose him. The subject has been opened up.

(Resp.'s Exh. D at 38.)

Judge Kitchin then repeated the question. (Resp.'s Exh. D at 38.) Ms Kraft responded: "Judge, I don't feel it's appropriate to answer." (Resp.'s Exh. D at 38-39.) The court asked: "So you refuse to answer the question then?" (Resp.'s Exh. D at 39.) Mr. Scholz objected: "The issue is not why she chose him, it's the statements made by you regarding your opinions about Dr. Parwatikar." (Resp.'s Exh. D at 39.) Judge Kitchin stated: "I'm not denying I said it. I'm going to put that in the order." (Resp.'s Exh. D at at 39.)

Judge Kitchin asked Ms Kraft what Dr. Parwatikar's reputation was among criminal defense lawyers. (Resp.'s Exh. D at 40.) She responded: "He's a competent, credible doctor." (Resp.'s Exh. D at 40.) Judge Kitchin asked:

> Isn't his reputation that of being extremely liberal and more likely to find a person unable to deliberate through diminished capacity and more likely to find NGRI under Chapter 552? Has not he had that reputation for years with the defense bar?

(Resp.'s Exh. D at 40.) Mr. Scholz objected to the form of the question because it contained "several questions" and suggested that Ms Kraft already had stated "what she knows to be the reputation of Dr. Parwatikar within the

defense community." (Resp.'s Exh. D at 40.) Judge Kitchin replied: "She has not stated that. She hasn't even been asked that." (Resp.'s Exh. D at 40.)

When Mr. Scholz objected that the court was "harassing the witness" and asked to have the court reporter read back recent questions and answers, Judge Kitchin said:

> No, the court reporter will not read back anything because you direct her to . . . . You're harassing the Court by your arrogance and the snotty way you're addressing the Court. I want the record to show you're addressing the Court in a snotty, arrogant way. You have interrupted me constantly. Now I suggest you not do it again.

(Resp.'s Exh. D at at 41.) The judge proceeded to ask Ms Kraft:

> What is his reputation with the criminal defense bar? Is not it a fact that his reputation with the criminal defense bar is that he is more likely to find a diminished capacity under Chapter 552 in a murder first case and or a defense of NGRI also under Chapter 552?

(Resp.'s Exh. D at 41-42.) The following then occurred:

> A. I would not –

MR. SCHOLZ: Objection.

A. – reputation.

THE COURT: She answered the question.

(Resp.'s Exh. D at 42.)

Judge Kitchin then asked Ms Kraft how many times Dr. Parwatikar had been retained by capital case attorneys from the state public defender's office in Columbia, Missouri, and Ms Kraft replied: "I don't know, judge. That's a totally separate office." (Resp.'s Exh. D at 42.) Judge Kitchin made a statement regarding another case in which several public defenders from the Columbia office had appeared for the defendant, and then asked Ms Kraft: "How many do they have up there that have occasion appeared in the Twenty-Second Circuit?" (Resp.'s Exh. D at 42-43.) Mr. Scholz objected to the court's combination of questioning the witness and reciting facts. (Resp.'s Exh. D at 43.) An exchange between Mr. Scholz and Judge Kitchin ensued, culminating with:

THE COURT: I'm asking the witness to answer a question.

Don't interrupt me again.

MR. SCHOLZ: Is Your Honor overruling –

THE COURT: I'm ordering you not to say anything. You're testing my patience. One more time –

MR. SCHOLZ: One more time what?

THE COURT: One more time you make a remark you will be in contempt of court.

MR. SCHOLZ: Is Your Honor –

THE COURT: I'm saying you keep quiet right now or else.

MR. SCHOLZ: – that I can't say anything else through the rest of the hearing or what, judge?

THE COURT: Don't let this man leave the courtroom. Stay in the courtroom. Let's go in the back.

(Resp.'s Exh. D at 43-44.) After the recess and a hearing regarding the possibility of punishing Mr. Scholz for contempt, Judge Kitchin again asked Ms Kraft whether she agreed that Dr. Parwatikar enjoyed a reputation among criminal defense lawyers as "one of the most liberal . . . and often giving you people a defense." (Resp.'s Exh. D at 44-53.) Ms Kraft responded: "I would not necessarily agree with the court's view of Dr. Parwatikar's reputation in the defense community." (Resp.'s Exh. D at 54.)

Ms Blau also was called to testify. (Resp.'s Exh. D at 67.) After Mr. Scholz and the prosecuting attorney had completed their questioning, Judge Kitchin examined her. (Resp.'s Exh. D at 102-04.) Mr. Scholz stated the following in response to the court's second question: "Judge, I would note

for the record that your voice was raised very high." (Resp.'s Exh. D at 104-05.)

Mr. Scholz objected to a subsequent question and the court responded: "Answer the question." (Resp.'s Exh. D at 106.) When Mr. Scholz began to state the basis of his objection, Judge Kitchin overruled the objection and admonished Mr. Scholz: "Go ahead. It's overruled. Go ahead, ma'am. Please stop talking. That's what you were doing before." (Resp.'s Exh. D at 107.) The colloquy between the court and counsel on a subsequent objection consisted of:

> MR. SCHOLZ: . . . I have an objection to that, Judge, on several bases.
>
> THE COURT: Okay, it's overruled.
>
> MR. SCHOLZ: May I state the bases, Your Honor?
>
> THE COURT: No. Let's proceed.
>
> MR. SCHOLZ: Can I ask [that the court] withdraw the question?
>
> THE COURT: Answer the question.

(Resp.'s Exh. D at 121.)

Mr. Scholz then objected again: "Objection, Your Honor. She did not only answer that question, but it has now gotten to the point where you

are more than cross-examining the witness. You're attacking her in a particularly partisan way." (Resp.'s Exh. D at 122.) When Mr. Scholz next objected, Judge Kitchin admonished him: "Excuse me. I'm not talking to you. I'm asking her." (Resp.'s Exh. D at 122-23.) The judge repeated his question, Mr. Scholz objected again, and the judge then told him:

> I'm telling you, sir, you are going to do thirty days so fast it will make your head spin if you continue, and if you think I'm bluffing you'll be taken into custody tonight. I'm warning you—I have warned you repeatedly—when I tell you not to open your mouth not to open it . . . One more time and that's it. Is that clear?

(Resp.'s Exh. D at 123.) Mr. Scholz responded: "It is not, sir." (Resp.'s Exh. D at 123.) Mr. Scholz then conferred with his own counsel and requested and was granted leave to withdraw from the case. (Resp.'s Exh. D at 123-24.)

Ms Kraft then assumed the role of primary counsel for the remainder of the disqualification hearing. (Resp.'s Exh. D at 124.) She called Mr. Klosterman to testify. (Resp.'s Exh. D at 145.) After Mr. Klosterman denied having had improper communications with Ms Blau during a prior case, the following exchange occurred between Judge Kitchin and Ms Kraft:

MS KRAFT: Your Honor, I'd like the record to reflect that the court is laughing at Mr. Klosterman's response.

THE COURT: I'm drinking water.

MS KRAFT: In other words, the Court does not believe Mr. Klosterman's response.

THE COURT: Pardon me?

MS KRAFT: That the inference is the court does not believe Mr. Klosterman's response.

THE COURT: That's absolutely correct, I do not believe it.

(Resp.'s Exh. D at171-72.)

Judge Kitchin asked Mr. Klosterman: "[H]ad you known I thought your representation of this man was improper, do you believe that I would have shown prejudice against you for any and all future cases?" (Resp.'s Exh. D at 174.) Ms Kraft objected to the question as irrelevant and Judge Kitchin overruled her objection. (Resp.'s Exh. D at 175.) Mr. Klosterman, who had denied having known of the court's disapproval in the earlier case, responded that the mere expression of that disapproval would not have been enough for him to decide that the judge harbored ongoing prejudice against him. (Resp.'s Exh. D at 175.)

Ms Kraft subsequently asked Mr. Klosterman whether he had "observed a bias on the part of Judge Kitchin" against Ms Blau. (Resp.'s Exh. D at 178.) The prosecuting attorney objected and Judge Kitchin sustained the objection. (Resp.'s Exh. D at 178.) The following colloquy ensued:

> MS KRAFT: Your Honor, I believe the Court has opened the door with regard to your questions that you just asked Mr. Klosterman about your attitude toward him.
>
> THE COURT: It's a conclusion of the witness. The objection is sustained . . . .
>
> MS KRAFT: Your Honor, at this point in time I would like to ask that question again as an offer of proof for the Court of Appeals to rule on whether or not—
>
> THE COURT: . . . The objection is sustained.
>
> MS KRAFT: Are you denying my offer of proof at this time?
>
> THE COURT: Yes, let's move on.

(Resp.'s Exh. D at 178.)

Judge Kitchin then stated his belief that Ms Blau "came near to a situation of perpetrating a fraud on the court or suborning perjury" in the first of the two prior cases in which they had been involved, and that her

conduct in the second case "was wholly improper." (Resp.'s Exh. D at 179.) In response to an inquiry by Ms Kraft, Judge Kitchin stated that Ms Blau had been an unfit and unethical attorney at that time. (Resp.'s Exh. D at 181.) He explained:

> There's no question I think it was a gross violation of the canons of ethics and totally improper and a total outrage that such a thing was done. I been in this business thirty years. I know of no other case where any attorney went to a state's witness, got the state's witness a lawyer who later told him to take the Fifth.

(Resp.'s Exh. D at 181.) Judge Kitchin noted that he had discussed Ms Blau's conduct with "several other judges of this Court." (Resp.'s Exh. D at 181.)

Judge Kitchin entered an order denying the motion for his recusal on May 5, 1994. (Resp.'s Exh. F at 903-12.) He stated his recollection and interpretation of Ms Blau's conduct in their prior encounters and concluded: "The Court . . . believed then and believes now that Ellen Blau's action in that matter were both improper and unethical." (Resp.'s Exh. F at 911.) Judge Kitchin recited a canon of the Code of Judicial Conduct, found that he should be disqualified only if he had "a personal bias or prejudice

concerning the proceeding." and concluded that the reference to a proceeding "has to mean the very case the judge is going to try [and] not some other case handled by the judge in the past." (Resp.'s Exh. F at 911.) Judge Kitchin also noted that he had been shown no authority "holding flatly" that he could not preside over a hearing into his own state of mind. (Resp.'s Exh. F at 911-12.) He concluded also that Mr. Jones' motion was "dilatory" because it had been filed three months after Ms Blau's assignment to the case. (Resp.'s Exh. F at 912.)

During jury selection Ms Blau made the following objection to a question by the prosecuting attorney:

> Judge, I'm going to object at this time. I think that [the prosecutor] has already had the opportunity to discuss the law with people if there are specific questions that he has for individuals, but I think, first of all, he's improperly defining some things here and going over some things—

(Resp.'s Exh. E at 777.) Judge Kitchin called counsel to the bench and the following exchange occurred:

> THE COURT: I don't want any more objections made in the form of speeches, do you understand that? You are to come up here with a legal objection. You made a long speech in front of

the jury with a deliberate attempt apparently to influence them. Make objections like that up here. Is that clear? Do you understand me?

MS BLAU: Yes, Judge. I would also like to make a brief record at this point. It seems to me . . . based on the court's tone and demeanor that it is angry with what I have just done.

THE COURT: I certainly am, because you have no business making a long, rambling speech and statement that was not in fact a legal objection in the presence of the jury. That kind of thing should be done at the bench.

(Resp.'s Exh. E at 777-79.)

During the instruction conference Judge Kitchin circulated an instruction that he had drafted in response to a recent Missouri Supreme Court decision. (Resp.'s Exh. E at 1719-20.) Ms Blau asked the court to make the proposed instruction part of the record. (Resp.'s Exh. E at 1720-21.) Judge Kitchin denied the request, stating that it was "ridiculous" and that he resented it. (Resp.'s Exh. E at 1721.) Ms Kraft made a statement noting that Judge Kitchin's characterization of Ms Blau's remarks was inaccurate. (Resp.'s Exh. E at 1721-22.) Ms Blau later repeated her request

and Judge Kitchin stated again that the request was "ridiculous" and that he resented her references to his draft. (Resp.'s Exh. E at 1729.)

Judge Kitchin conducted a sentencing hearing on July 21 and 22, 1994. (Resp.'s Exh. G.) Ms Kraft submitted an affidavit executed by Ms Blau regarding a telephone conversation between her and Judge Kitchin on July 13, 1994. (Resp.'s Exh. F at 2098-2101; Resp.'s Exh. G at 6-7.) Judge Kitchin had advised Ms Blau that he would be sentencing Mr. Jones on July 14 or 15. (Resp.'s Exh. F at 2099.) Ms Blau testified that Judge Kitchin became "angry," "abusive," and "threatening" after she informed him that Ms Kraft would be out of town on both of those dates and requested that he schedule the sentencing at a time that would enable Ms Kraft to attend. (Resp.'s Exh. F at 2099.) According to Ms Blau, Judge Kitchin then agreed to conduct the sentencing on July 21, 1994, and warned her that either she or Ms Kraft must be present "or we would be held in contempt." (Resp.'s Exh. F at 2100-01.)

During the sentencing hearing Ms Blau again stated that the court had threatened to hold her in contempt twice during the telephone conversation on July 13, 1994. (Resp.'s Exh. G at 115-17.) Judge Kitchin denied having made such a threat and said that Ms Blau's statement was "false and a direct lie." (Resp.'s Exh. G at 116.) He explained: "I said there would be

sanctions imposed if you didn't show up today." (Resp.'s Exh. G at 116.) Ms Blau said that her statements were not lies and Judge Kitchin replied: "Oh, yes they are, young lady, and you know it." (Resp.'s Exh. G at 117.)

After Judge Kitchin had sentenced Mr. Jones to a term of imprisonment and ordered his execution, Mr. Jones sought post-conviction relief pursuant to Mo.R.Crim.P. 29.15. (Resp.'s Exh. H at 4-37, 47-96.) Among the claims that he asserted in support of that motion was that he had been deprived of the effective assistance of counsel because his trial attorneys had failed "to take actions necessary to insure [that he] was not tried before a biased judge" and because Ms Blau had not withdrawn from the case. (Resp.'s Exh. H at 57-58.) Mr. Jones alleged that he had been prejudiced by those failures "because his convictions and sentences resulted from being tried before a judge who was biased and unfair." (Resp.'s Exh. H at 58.) A judge found the claim untenable because Mr. Jones alleged "no facts . . . which would support a claim of bias" and because "[a] claim of trial court bias is a ground for direct appeal" rather than post-conviction relief. (Resp.'s Exh. H at 16.)

Mr. Jones appealed to the Missouri Supreme Court from the judgment of conviction, sentence of death, and denial of post-conviction relief. (Resp.'s Exh. F at 2114-24; Resp.'s Exh. H at 647.) He claimed that he had

been denied due process of law by (1) Judge Kitchin's refusal to disqualify himself from serving as trial judge despite his "personal animosity toward and accusations about" Ms Blau and (2) Judge Kitchin's refusal to allow the recusal motion to be heard by another judge. (Resp.'s Exh. J at 17-18.) Mr. Jones also claimed that the post-conviction court had erred in denying his claim of ineffective assistance of counsel with respect to the failed recusal motion. (Resp.'s Exh. J at 20.)

The Missouri Supreme Court afforded Mr. Jones no relief. *State v. Jones, supra.* The court held that "[q]uestions concerning a judge's qualifications to hear a case usually are not constitutional questions" and proceeded to resolve the issue on the basis of common law, statute, and canons of judicial ethics. *Id.,* 979 S.W.2d at 177-78. It found only one instance in which Judge Kitchin had expressed anger toward Ms Blau and noted that "it is not clear that the judge's anger was shown . . . in front of the jury [or] only at the bench out of the jury's hearing." *Id.* at 178-79. The court stated its opinion that "[i]t is relatively easy for a party in litigation to claim that he cannot get a fair trial because the judge dislikes his lawyers." *Id.* at 179.

The Missouri Supreme Court also found that the recusal motion filed by Ms Kraft and Ms Blau had failed to allege "sufficient facts to

require recusal" and thus was "substantially deficient" and inadequate to require that the allegations be heard by another judge. *Id.* The court then dismissed the attendant ineffective assistance of counsel claim: "The issue has already been addressed. The record, moreover, reflects that both attorneys functioned quite capably." *Id.* at 181.

Mr. Jones next sought federal habeas corpus relief. (App. at 8-77.) His claims included an allegation that he had been deprived of due process of law by Judge Kitchin's refusal to disqualify himself or to allow another judge to hear the recusal motion and an allegation that his trial attorneys had been ineffective because the motion was inadequate. (App. at 49-52, 69-70.)

The District Court found no due process violation in Judge Kitchin's refusal to disqualify himself because "the issue being argued is a state law question . . . not cognizable in federal habeas corpus review." (App. at 202.) The court found that Mr. Jones had included "this exact challenge" in his direct appeal "and it was denied because insufficient facts were cited to support this state law challenge." (App. at 202-03.) Citing *Dyas v. Lockhart,* 705 F.2d 993, 995 (8th Cir. 1983), the District Court observed that "[w]ithout clear and convincing evidence of Judge Kitchin being not 'neutral, detached, and free from actual bias' there can be no constitutional violation." (App. at 202.) The District Court also deferred to the Missouri

Supreme Court's dismissal of the complaint that another judge should have presided over the recusal proceeding. (App. at 203.)

With respect to Mr. Jones' claim that his trial counsel had been ineffective in their effort to avoid trial before Judge Kitchin, the District Court found "a wholesale lack of evidence to support [the] allegation," particularly because of "the repeated attempts by defense counsel to have Judge Kitchen disqualified." (App. at 203-04.) The court also noted again its finding that Mr. Jones had made "a completely inadequate demonstration of any bias" on the part of Judge Kitchin. (App. 203-04.)

## SUMMARY OF ARGUMENT

Mr. Jones raises two issues in this appeal, each rooted in the due process right of a criminal defendant to trial before a neutral judge and in the patent hostility of Mr. Jones' judge toward the defense. First Mr. Jones claims that the trial judge's demonstrated inability to separate his personal interests from the needs of the case was likely to have affected the outcome of this capital case and thus cannot be reconciled with governing United States Supreme Court precedent. In particular, Mr. Jones relies upon *In re Murchison,* 349 U.S. 133 (1955), which held that "[a] fair trial in a fair tribunal is a basic requirement of due process," *Id.* at 136, and *Weiss v. United States,* 510 U.S. 163 (1994), which recognized that "[a] necessary component of a fair trial is an impartial judge." *Id.* at 178. Second Mr. Jones contends his trial counsel failed to provide him with effective representation because they did not take readily available measures to avoid a trial in which that judge presided and the particular defense lawyer toward whom his animosity was directed was on the defense team. Mr. Jones argues that the Missouri Supreme Court's resolution of his Sixth Amendment claim cannot be reconciled with the standards articulated by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984).

In his first point Mr. Jones notes evidence of the state trial judge's longstanding and unrelenting anger toward one of the public defenders assigned to his defense. Mr. Jones points out that the Missouri Supreme Court declined to consider his claim of unfairness resulting from trial before a biased judge as a constitutional issue. In view of the United States Supreme Court's unequivocal and recurring recognition that trial before a neutral judge is a fundamental requirement of due process, Mr. Jones contends that the state court resolution of the issue without reference to the Due Process Clause of the Fourteenth Amendment was contrary to clearly established federal law. Mr. Jones posits that he was entitled to federal habeas corpus relief on the authority of substantive decisions such as *Murchison* and *Weiss,* and upon the procedural authority of *Williams v. Taylor,* 529 U.S. 362 (2000).

To a significant extent Mr. Jones' second point revolves around two conclusions of the state supreme court: at once the court rejected a significant aspect of Mr. Jones' biased judge argument because his motion for recusal in the trial court was "substantially insufficient" and denied his ineffective assistance of counsel claim by finding that his attorneys had "functioned quite capably." *State v. Jones,* 979 S.W.2d 171, 179, 181 (Mo. 1998). Mr. Jones notes the United States Supreme Court's recognition that

the Sixth Amendment guarantees criminal defendants the effective assistance of counsel "in order to protect the fundamental right to a fair trial" and that the "overarching duty" of criminal defense counsel is "to advocate the defendant's cause." *Strickland* at 688. Relying again upon the due process requirement of trial before a neutral judge recognized in cases such as Murchison and Weiss, Mr. Jones contends that his attorneys were not effective because they did not take available steps to insure that he was not tried before a judge who could not control his anger toward one of his trial attorneys.

## ARGUMENT

### I.

The District Court erred in denying Mr. Jones' petition for a writ of habeas corpus because the record demonstrates that the state trial judge was biased against the defense and that judicial bias deprived Mr. Jones of a fair trial and due process of law.

> **Standard of Review:** This Court reviews the legal conclusions of a District Court in a habeas corpus proceeding *de novo*. *Siers v. Weber,* 259 F.3d 969, 972 (8th Cir. 2001). The constitutional rulings of state courts are reviewed in such cases to determine whether the rulings were either contrary to or made unreasonable application of clearly established federal law. *Id.* (citing *Williams v. Taylor* 529 U.S. 362, 404-05 (2000).

Judge Kitchin's animosity toward defense attorney Ellen Blau was palpable. He stated without equivocation that he had found her to be an unfit and unethical attorney in the past. (Resp.'s Exh. D at 181.) He had gone so far as to discuss her purported misconduct with "several other judges" of the court in which she practiced and to encourage a prosecuting attorney to charge her with a crime and report her to the state bar

disciplinary authority. (Resp.'s Exh. D at 181; (Resp.'s Exh. F at 878-79.) His examination of her during the hearing into his fitness was a blatant vendetta. (Resp.'s Exh. D at 104-42.) Before Mr. Jones' prosecution was concluded he accused her of lying in an affidavit and in courtroom colloquy. (Resp.'s Exh. G at 115-17.)

The judge's anger spilled over onto other lawyers associated with the defense in Mr. Jones' case. Mr. Scholz was tongue-lashed, threatened, generally bullied, nearly jailed for contempt of court, and finally compelled to withdraw from his role in the case. (Resp.'s Exh. D at 15-16, 35, 37-38, 41, 43-44, 121-24; Resp.'s Exh. C.) Mr. Klosterman clearly expressed his professional and personal regard for Judge Kitchin. (Resp.'s Exh. D at 175-77.) But after he denied that he and Ms Blau had engaged in the professional wrongdoing that seemed to be an article of faith with Judge Kitchin, the judge effectively accused him of perjury and, in open court and over repeated objections, indulged himself in a gratuitous and utterly irrelevant recollection of a private event from Mr. Klosterman's past. (Resp.'s Exh. D at 171-72, 176-77.)

The record in this case is larded with Judge Kitchin's unbridled antipathy toward Mr. Jones' defense. Mr. Jones' initial brief in the Missouri Supreme Court was a veritable catalog of the judge's hostile statements and

actions. That court was wrong in concluding that Mr. Jones had not raised a viable due process claim based upon having been subjected to trial before a judge whose capacity for fairness was impaired. The District Court's approval of the state court's analysis and ruling perpetuated this constitutional deprivation. The judgment of the District Court should be reversed for that reason.

Under § 2254(d)(1) a federal court should issue a writ of habeas corpus when a state court's judgment on the merits "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A state court's decision is contrary to clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor,* 529 U.S. 362, 413 (2000). A state court's decision involves an unreasonable application of Supreme Court precedent when the state court "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Id.* at 407.

In *In re Murchison,* 349 U.S. 133 (1955), the United States Supreme Court recognized that "[a] fair trial in a fair tribunal is a basic requirement of due process." *Id*. at 136; *see also Weiss v. United States,* 510 U.S. 163, 178 (1994) (quoting *Murchison* and holding that "[a] necessary component of a fair trial is an impartial judge"); *Dyas v. Lockhart,* 705 F.2d 993, 995 (8th Cir. 1983) (quoting *Murchison*). *Murchison* reiterated the following proposition: "Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." *Id.* (quoting *Tumey v. Ohio,* 273 U.S. 510, 532 (1927)). The Court has explained: "Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'" *Withrow v. Larkin,* 421 U.S. 35, 47 (1975) (quoting *In re Murchison, supra,* 349 U.S. at 136); *see also Dyas v. Lockhart, supra, 705* F.2d at 996 (quoting *Withrow v. Larkin*).

The Supreme Court also articulated this corollary of the Fourteenth Amendment's "fair tribunal" requirement: "[T]o perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *In re Murchison, supra* (quoting *Offutt v. United States,* 348 U.S. 11, 14 (1954)). Elsewhere the Court has noted that the indicia of judicial bias requiring

recusal include "an abiding impression" that the trial court allowed itself to become personally "embroiled" in disputes, evidence that the court was "provoked" to act upon "emotional reflex," or indications that the court was "unable to hold the balance between vindicating the interests of the court and the interests of the accused." *Ungar v. Safafite,* 376 U.S. 575, 585-86 (1964). In declining to recognize the applicability of the Due Process Clause to Mr. Jones' allegation that he had been tried by a biased judge, the Missouri Supreme Court reached a decision that was contrary to clearly established federal law.

The District Court appears to have based its ruling that Mr. Jones was not entitled to habeas corpus relief upon following proposition: "Without clear and convincing evidence of Judge Kitchin being not 'neutral, detached, and free from actual bias,' there can be no constitutional violation." J*ones v. Bowersox, supra,* mem. op. at 7. In fact the allegations of Mr. Jones' federal petition, drawn exclusively from the state court record as reflected in the prison warden's exhibits, was replete with evidence of Judge Kitchin's embroilment in disputes and inability to hold the balance between vindicating its own interests and protecting the interests of the defendant on trial.

The due process maxim that a defendant must be tried before an impartial judge has a special significance in a capital case. As the Supreme Court emphasized in *Gardner v. Florida,* 430 U.S. 349 (1977):

> [D]eath is a different kind of punishment from any other which may be imposed in this country . . . From the point of view of the defendant, it is different both in its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice or emotion.

*Id.,* at 357-58 (internal citations omitted).

The principle that death is different pervades the Supreme Court's modern death penalty jurisprudence. The Court has made it clear that increased scrutiny is required throughout every capital prosecution to ensure that death is an appropriate penalty. *See Caldwell v. Mississippi,* 472 U.S. 320, 329 (1985). It has mandated a "heightened standard of reliability" at every step of a capital case. *Ford v. Wainwright,* 477 U.S. 399, 411 (1986). This heightened standard of reliability is "[the] natural consequence of the

knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." *Id.*

Nor can one reasonably conclude that Judge Kitchin's hostility toward the defense lacked consequence for Mr. Jones. The judge exercised his discretion on dozens of identifiable occasions during Mr. Jones' trial. Those rulings were interlaced with his exercises of pique. It is impossible to know whether—or how often—the interplay of pique and discretion kept the judge from separating "the interests of the court and the interests of the accused." *See Unger v. Safafite, supra,* 376 U.S. at 585-86. The following is a partial listing of discretionary rulings that may have had a decisive impact on the outcome of Mr. Jones' trial:

• The prosecuting attorney challenged four veniremen for cause based upon their attitudes toward the death penalty and Judge Kitchin struck those individuals over the objections of defense counsel. (Resp.'s Exh. E at 385, 444-46, 769, 803-04.) The Missouri Supreme Court affirmed those rulings as valid exercises of trial court discretion. *State v. Jones, supra,* 979 S.W.2d at 184.[1]

[1] Veniremen may not be excluded from jury service solely because of their objections to the death penalty. *Gray v. Mississippi,* 481 U.S. 648, 657 (1987). The test is "whether the juror's views would prevent or substantially impair the

• Defense counsel challenged a venireman because he had grown up in the same neighborhood as the prosecuting attorney, had known the prosecutor and his parents for many years, and interacted with the prosecutor's parents "all the time." (Resp.'s Exh. E at 87-88, 297.) The venireman denied that his acquaintance with the prosecuting attorney and his parents would have an impact on his service as a juror. (Resp.'s Exh. E at 298, 376, 450-52.) Judge Kitchin exercised his discretion by overruling defense counsel's initial challenge and a renewal of that challenge. (Resp.'s Exh. E at 450-52, 1074-75.) The Missouri Supreme Court affirmed that exercise of discretion. *State v. Jones, supra,* 979 S.W.2d at 184.

• Mr. Jones is a black man. The prosecuting attorney used five of his nine peremptory strikes to remove black veniremen from the panel. (Resp.'s

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performance of his duties." *Wainwright v. Witt,* 469 U.S. 412, 424 (1985). Veniremen personally opposed to the death penalty may serve as jurors if they are willing to temporarily set aside their personal views and follow judicial instruction. *Gray* at 658. Each of the four veniremen stricken for cause in this case indicated some degree of willingness and capacity to follow the trial court's instructions. (Resp.'s Exh. E at 156-57, 257-60, 332-34, 581-82, 619-20, 697, 736.) Judge Kitchin necessarily exercised his discretion in ruling upon the state's challenges for cause and defense counsel's objections to those challenges.

Exh. E at 1086-87, 1140; Resp.'s Exh. F at 1213-16.) Defense counsel challenged the peremptory removal of one of those individuals pursuant to *Batson v. Kentucky,* 476 U.S. 79 (1986), and claimed that the prosecutor's explanation of the strike was pretextual. (Resp.'s Exh. E at 1096.) Judge Kitchin exercised his discretion to accept the state's rationale and deny the *Batson* challenge. (Resp.'s Exh. E at 1096.) The Missouri Supreme Court affirmed that exercise of discretion. *State v. Jones, supra,* 979 S.W.2d at 185. Only one member of the jury that found Mr. Jones guilty and recommended his execution was black. (Resp.'s Exh. E at 1098; Resp.'s Exh. F at 1213-16, 2078, 2080.)

• Defense counsel sought to examine prospective jurors regarding their capacity to refrain from recommending a death sentence in the face of evidence that the defendant had committed murder after ingesting drugs. (Resp.'s Exh. E at 350-55.) The prosecutor objected and Judge Kitchin sustained the objection, limiting the inquiry into juror predisposition. (Resp.'s Exh. E at 355.) The Missouri Supreme Court found no abuse of discretion and affirmed the ruling. *State v. Jones, supra,* 979 S.W.2d at 182.

• During the penalty phase of Mr. Jones' trial the prosecuting attorney objected to defense counsel's examination of a jail official regarding his experience supervising Mr. Jones and other inmates. (Resp.'s Exh. E at

1793-94.) Judge Kitchin exercised his discretion to sustain the objection, truncating the testimony of that mitigation witness. (Resp.'s Exh. E at 1793-94.) The Missouri Supreme Court affirmed that exercise of discretion. *State v. Jones, supra,* 979 S.W.2d at 182-83.

• During the penalty phase defense counsel sought to cross-examine the state's mental health expert about his finding that Mr. Jones suffered from drug dependence. (Resp.'s Exh. E at 1620.) The prosecuting attorney objected to the inquiry, defense counsel explained that she sought to have the jury informed about the distinction that the witness would draw between drug dependence and the less serious condition of drug abuse, and Judge Kitchin sustained the objections. (Resp.'s Exh. E at 1620-27.) The Missouri Supreme Court affirmed the trial court's exercise of its discretion. *State v. Jones, supra,* 979 S.W.2d at 181-82.

• During the penalty phase several people related to both Ms Knuckles and Mr. Jones testified regarding their opposition to the death penalty on moral, philosophical, and religious grounds. (Resp.'s Exh. E at 1750-1825.) Counsel for the state assured the jury that members of the victim's family would have insisted upon the death penalty if the killer had been a stranger and urged jurors to ignore the requests for leniency made by several of those relatives. The prosecutor argued: "If the killer of Dorothy Knuckles was a

stranger they'd be sitting on this side of the courtroom . . . supporting us in asking for the death penalty. Families support us maybe even when it's or asking us to do it even when it's not justified." (Resp's Exh. E at 1850.) Defense counsel objected to the prosecutor's insinuation of extra-judicial knowledge effectively disparaging the credibility of mitigation witnesses. (Resp.'s Exh. E at 1850-51.) Judge Kitchin overruled the objection. (Resp.'s Exh. E at 1850-51.) The Missouri Supreme Court found no abuse of discretion. *State v. Jones, supra,* 979 S.W.2d at 176-77.

Mr. Jones' due process claim is not dependent upon proof that he suffered actual prejudice. To be sure, "most constitutional errors can be harmless." *Arizona v. Fulminante,* 499 U.S. 279, 306 (1991). But "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error," and "[t]he right to an impartial adjudicator . . . is such a right." *Gray v. Mississippi, supra,* 481 U.S. at 668; *see also Gomez v. United States,* 490 U.S. 858, 876 (1989) (recognizing the right to an impartial judge as "[a]mong those basic fair trial rights that can never be treated as harmless"); *United States v. Nelson,* 277 F.3d 164, 204 n. 48 (2nd Cir. 2002) (noting a "very limited class of cases" in which the constitutional error is "structural," requiring "automatic reversal," and recognizing that denial of the right to an impartial judge is "precisely such a case"). It is

enough that Mr. Jones was tried before and sentenced to death by a judge whose "embroilment" in disputes and whose propensity to act on "emotional reflex" were patent, who thus could not be depended upon "to hold the balance between" his personal agenda and the interests of the defendant and the public in a capital trial, and whose discretionary rulings were inextricably intertwined with the outcome of the case. *See Ungar v. Safafite, supra,* 376 U.S. at 585-86.

It is impossible to read the disqualification hearing transcript without recognizing Judge Kitchin's animosity toward Ms Blau, his inability to refrain from visiting his hostility and his personal agenda on others who were associated with Ms Blau, and his abiding personal embroilment in a vendetta at the expense of thoughtful adjudication. That he sat in judgment of his own fitness to try this case—injecting his own testimony at will, verbally manhandling and threatening to jail the attorney who had the temerity to suggest that he might be called to the witness stand, and swatting down objections as if they were flies at a picnic—was a travesty. That he proceeded to preside over Mr. Jones' trial for capital murder deprived the defendant of due process. It is lamentable that Mr. Jones has yet to secure a review of the merits of his constitutional claim. Hopefully this appeal will end that drought.

II.

The District Court erred in denying Mr. Jones' petition for a writ of habeas corpus because his attorneys were ineffective in failing to make an adequate motion for recusal of the trial judge, as a consequence of which (1) the judge was enabled to preside over the adjudication of his own bias and capacity for fairness and (2) Mr. Jones was subjected to trial before a judge who was biased against the defense and thereby was deprived of a fair trial.

> **Standard of Review:** This Court reviews the legal conclusions of a District Court in a habeas corpus proceeding *de novo*. *Siers v. Weber,* 259 F.3d 969, 972 (8th Cir. 2001). The constitutional rulings of state courts are reviewed in such cases to determine whether the rulings were either contrary to or made unreasonable application of clearly established federal law. *Id.* (citing *Williams v. Taylor* 529 U.S. 362, 404-05 (2000).

Mr. Jones' trial attorneys were the font of knowledge about the challenge in store for their client if Ms Blau was on the defense team and Judge Kitchin was on the bench. The judge had bad-mouthed Ms Blau all around the courthouse and sought to have her subjected to criminal prosecution and professional discipline. (Resp.'s Exh. D at 181; (Resp.'s

Exh. F at 878-79.) Ms Blau testified that she routinely requested a change of judge when one of her cases was assigned to Judge Kitchin in order to protect clients from his hostility. (Resp.'s Exh. D at 69; Resp.'s Exh. F at 879.) But those attorneys failed to replace Ms Blau as Ms Kraft's co-counsel, did not file a recusal motion until some three months after Ms Blau was assigned to the case, and then, according to the state supreme court, filed a motion that was "substantially insufficient" to require recusal. *State v. Jones, supra,* 979 S.W.2d at 179.

Judge Kitchin's long-standing anger and unmistakable hostility toward Ms Blau and her regular practice of refusing to represent clients in his court were established without controversy in Mr. Jones' state court proceedings. The failure of defense counsel to avoid subjecting Mr. Jones to a trial burdened by that impertinent emotion was a fait accompli by the time the case reached the state supreme court. It defies logic and United States Supreme Court precedent that the Missouri court declined to recognize the Sixth Amendment deprivation suffered by Mr. Jones.

The United States Supreme Court has made it clear that the Sixth Amendment guarantees criminal defendants the effective assistance of counsel "in order to protect the fundamental right to a fair trial." *Strickland v. Washington,* 466 U.S. 668, 684 (1984). The Court has made it equally

clear that Mr. Jones thus had a fundamental due process interest in avoiding such a trial. *In re Murchison, supra.* 349 U.S. at 136. The "overarching duty" of criminal defense counsel is "to advocate the defendant's cause." *Strickland* at 688. The obligation of Mr. Jones' trial attorneys to protect Mr. Jones from a trial involving both Judge Kitchin and Ms Blau—whether by prosecuting an adequate recusal motion or by replacing Ms Blau—was inherent in that constitutional authority and in counsel's own unequivocal declarations that an unfair trial otherwise would ensue.

In finding that Mr. Jones' trial attorneys had failed to file a motion adequate to require recusal and proceeding to find that both attorneys had "functioned quite capably," it seems clear enough that the Missouri Supreme Court has applied to dictate of *Strickland* and *Murchison* reasonably to the facts of Mr. Jones' case. *See Williams v. Taylor, supra,* 529 U.S. at 413. In his appeal Mr. Jones claimed that Judge Kitchin had erred in presiding over the hearing at which defense counsel sought to establish that he was biased and in presiding over the trial. (Resp.'s Exh. J at 17-18, 48-52.) The state court rejected his contention because Mr. Jones' recusal motion was "substantially insufficient" to require either Judge Kitchin's recusal or the assignment of another judge to hear the motion. *State v. Jones, supra,* 979 S.W.2d at 179. In the same appeal Mr. Jones claimed that his trial attorneys

had been ineffective in their efforts to disqualify Judge Kitchin and had failed to protect him from Judge Kitchin's animosity toward Ms Blau. (Resp.'s Exh. at 69-70.)[2] The state supreme court dispatched this contention by concluding that it could find no appreciable manifestation of bias to the jury and because "both defense attorneys functioned quite capably." *Jones* at 181.

Those conclusions cannot be reconciled with each other. More to the point, the finding that Mr. Jones' trial attorneys performed adequately—despite their "substantially insufficient" motion and their failure to simply replace Ms Blau—cannot be reconciled with the United States Supreme Court's interpretations of the Sixth Amendment right to the effective assistance of counsel and the Fourteenth Amendment right to trial

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[2] Mr. Jones' brief in the Missouri Supreme Court called attention to evidentiary proffers from the post-conviction proceeding, including Ms Blau's acknowledgments that she should have withdrawn from the case because of Judge Kitchin's prejudice against her and that she had failed to object to all of Judge Kitchin's hostile remarks and admonitions to defense counsel during the trial and in the presence of the jury. (Resp.'s Exh. J at 69-70.) Of course the brief was replete with citations to Judge Kitchin's rulings and remarks before and during the trial. (Resp.'s Exh. J at 36-51.)

before a neutral judge. The District Court's judgment approving the state court's ruling should be reversed for that reason.

In this case the conviction of experienced trial attorneys that one of them could not be confident of fair treatment for her clients before a particular judge collided with resource allocation issues in the lawyers' office. Ms Kraft testified:

> I am in charge of assigning people to cases in my office . . . . [B]ecause of time constraints, because of conflict situations within various cases in the office, and the new people that we had hired with trial schedules, I didn't feel like it was possible to take [Ms Blau] off of this case because there was no one that would be in the position to be put on it to be able to try it as quickly as Judge Kitchen wanted it tried . . . I considered it. I didn't feel like we could do it under the circumstances.

(Resp.'s Exh. D at 21-22.) She stated that she had not attempted to replace Ms Blau with an attorney from the public defender's capital case office in Columbia or with a private "contract public defender." (Resp.'s Exh. D at 58-59.)

That the conflict between Mr. Jones' interest in avoiding trial before a judge predisposed against the defense and the public defender's manpower

issues was resolved in favor of the latter is shocking indeed. That the state supreme court effectively sanctioned that resolution is a matter of constitutional magnitude. That a citizen continues to spend his days under the shadow of a death sentence that might not have been imposed by a judge who came to the case without personal emotional baggage is a crying shame. The judgment of the District Court should be reversed to right that constitutional wrong.

## CONCLUSION

The Missouri Supreme Court's resolution of Mr. Jones' constitutional claims cannot be reconciled with clearly established federal constitutional law as articulated by the United States Supreme Court. Because Mr. Jones has asserted viable claims arising under the Sixth Amendment and the Fourteenth Amendment and the record of state court proceedings establishes the facts necessary to prove those claims, the District Court erred in refusing to grant habeas corpus relief pursuant to 28 U.S.C. § 2254. Alternatively, if the record of state court proceedings is not adequate to establish the facts necessary to prove Mr. Jones' claims, the District Court erred in refusing to grant Mr. Jones an evidentiary hearing. This Court should reverse the judgment of the District Court and order either that a writ of habeas corpus issue in favor of Mr. Jones or that he be allowed to present additional evidence in support of his constitutional claims.

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## FED.R.APP.P. 35(a)(7)(C) AND 8TH CIR. R. 28A STATEMENT

This brief has been prepared pursuant to Fed.R.App. 32(a)(7)(B). The brief has been printed in 14-point Times New Roman font using Microsoft Word 2001 for Macintosh. Based upon the word-count feature of that word processing application, the brief contains 10,978 words. The diskette filed with this brief has been scanned for viruses and found to be virus-free. The brief has been recorded on that diskette in Microsoft Word X format.

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Michael A. Gross

CERTIFICATE OF SERVICE

Two printed copies of the appellant's brief and one computer diskette upon which the brief was recorded were sent by first class mail on August 7, 2002, to:

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