

June 1, 1998  
FOR PUBLICATION

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

7	STATE OF TENNESSEE,	(
8		(
9	Plaintiff-Appellee,	(
10		( Williamson County
11		(
12		( Hon. Donald Harris, Judge
13	v.	(
14		( S. Ct. No. 01S01-9704-CC-00089
15		(
16	JAMES J. BENSON,	(
17		(
18	Defendant-Appellant.	(

For Plaintiff-Appellee:

John Knox Walkup  
Attorney General & Reporter  
Nashville

Michael E. Moore  
Solicitor General  
Nashville

Gordon W. Smith  
Associate Solicitor General  
Nashville

Amy L. Tarkington  
Assistant Attorney General  
Nashville

Joseph D. Baugh, Jr.  
District Attorney General  
Franklin

For Defendant-Appellant:

William H. Farmer  
Stephen W. Grace  
Waller Lansden Dortch & Davis  
Nashville

<b>FILED</b>
<b>June 1, 1998</b>
<b>Cecil W. Crowson</b> <b>Appellate Court Clerk</b>

O P I N I O N

JUDGMENT OF TRIAL COURT AND  
COURT OF CRIMINAL APPEALS REVERSED;  
CASE REMANDED FOR NEW TRIAL.

REID, Sp. J.

This case presents for review the appeal by the

1 petitioner, James J. Benson, from the judgment of the Court of  
2 Criminal Appeals affirming the trial court's denial of his petition  
3 for post-conviction relief. The petitioner asserts that he was  
4 denied the right to a fair trial before an impartial judge because  
5 the judge who presided over his criminal trial solicited a bribe  
6 from him. The judgment denying the petition is reversed, and the  
7 petitioner is granted a new trial.

8  
9 **I**

10  
11 In 1987, the petitioner was convicted of two counts of  
12 aggravated kidnapping and one count each of armed robbery,  
13 conspiracy, and accessory before the fact to armed robbery. He  
14 received an effective sentence of 128 years. The convictions and  
15 sentences were affirmed on direct appeal and reaffirmed on petition  
16 to rehear. The application for permission to appeal was denied.

17  
18 The convictions arose out of an October 22, 1985,  
19 incident in which two armed masked men entered the home of George  
20 Khoury, a Davidson County jeweler who resided in Williamson County.  
21 While one of the men held the Khoury family at gunpoint, the other  
22 drove Mr. Khoury to his jewelry store and took \$350,000 worth of  
23 the jewelry from the store. Upon returning to the home, the two  
24 armed men bound the family with duct tape and took another \$35,000  
25 worth of jewelry from Mrs. Khoury, \$40 from the home safe, and \$70  
26 from Mr. Khoury's billfold.

1           An informant told investigators the identity of three men  
2 who were involved in the crime. On November 1, 1985, after seeing  
3 the petitioner loading something into an automobile at his home,  
4 Davidson County officers made a warrantless stop of the automobile.  
5 The officers seized a pair of sunglasses, a pistol, and four motel  
6 receipts. A search warrant was obtained for the petitioner's  
7 residence. The officers seized a gray sweatshirt and brown cotton  
8 work gloves which were later identified as being worn by one of the  
9 men involved in the robbery.

10  
11           All three co-defendants were charged in both Davidson and  
12 Williamson counties. All three were tried jointly before Judge  
13 Sterling Gray, Jr., who sat by interchange in Williamson County.  
14 On June 6, 1986, the petitioner's counsel filed motions to suppress  
15 the evidence seized during the search of the petitioner's  
16 automobile, person, and residence. Hearings on the petitioner's  
17 motions to suppress were held on July 11, July 31, and August 4,  
18 1986. On December 8, 1986, Judge Gray denied all of the motions.  
19 The case proceeded to trial in January 1987, and the jury convicted  
20 the petitioner of the aforementioned offenses. The court ordered a  
21 combination of concurrent and consecutive sentencing for an  
22 effective sentence of 128 years.

23  
24           On November 17, 1987, Judge Gray and his court officer,  
25 Irvin Oten, III, were indicted as a result of a two-year  
26 investigation by the Tennessee Bureau of Investigation concerning  
27 allegations of bribery and corruption. Gray resigned that same day.

1 On January 19, 1988, Gray killed his wife and then committed  
2 suicide. On March 7, 1988, Oten, in exchange for his cooperation  
3 with the State in prosecuting Judge Gray, was allowed to plead  
4 guilty to one count of aiding and abetting bribery of a judicial  
5 officer. He was given a three-year prison sentence, which was  
6 suspended, and placed on probation for three years.

7  
8 In 1993, the petitioner filed this petition for post-  
9 conviction relief. At the evidentiary hearing, the petitioner  
10 testified that he was approached on August 4, 1986, during a recess  
11 in the hearing on the motions to suppress, by Oten in the restroom  
12 at the Williamson County Courthouse. According to the petitioner,  
13 Oten told him that he looked like he needed a little help. The  
14 petitioner told Oten that he guessed he did. Oten replied that  
15 "everything has a price." When the petitioner asked what kind of  
16 price, Oten responded, "\$30,000 and \$100,000 in jewelry." The  
17 petitioner was also told that he had plenty of time to think about  
18 it.

19  
20 The petitioner's lead attorney, Robert Ritchie, noticed  
21 the petitioner talking to Oten and became extremely upset. Ritchie  
22 warned the petitioner to stay away from Oten. The petitioner  
23 stated that he did not tell his attorneys what Oten had said to  
24 him. Later in the day, Oten again followed the petitioner into the  
25 restroom and gave him the telephone number of a grocery store where  
26 Oten could be reached after hours. Ritchie saw the interaction  
27 between the petitioner and Oten and "blew his stack." Ritchie told

1 the petitioner that if he talked to Oten again, Ritchie would  
2 withdraw from the case.

3  
4 The petitioner testified that approximately two weeks  
5 later, out of curiosity, he dialed the number Oten had given him  
6 but was told that Oten was not there. The petitioner did not leave  
7 a name or number. The petitioner then testified that while at the  
8 Dayton Golf and Country Club on November 19, 1986, he received a  
9 message that a Judge Gray had called him and left a number where  
10 Gray could be reached. The petitioner called the number from a  
11 restaurant in Chattanooga and Gray answered. The petitioner  
12 testified that he knew Gray's voice because his ex-wife had been a  
13 court reporter in Gray's courtroom and he previously had spoken to  
14 Gray on the telephone on several occasions. Gray asked the  
15 petitioner if he would "be able to handle the business informed by  
16 Oten." The petitioner told Gray that he did not have the money.  
17 Gray told him to think about it because the charges against him  
18 were serious and Gray had not yet ruled on the petitioner's motions  
19 to suppress. According to the petitioner, Gray told him that he  
20 had until the first of December to come up with the money.

21  
22 The petitioner further testified that Gray called the  
23 petitioner's mother's home on the morning of December 19, 1986,  
24 eleven days after Gray had denied the motions to suppress, and  
25 asked that the petitioner call him. The petitioner called Gray  
26 from his aunt's home in Dayton. Telephone records substantiated  
27 the call. According to the petitioner, Gray told him that help

1 could still be had. Gray stated that he would like to have some  
2 jewelry to give his wife for Christmas. When the petitioner denied  
3 having any jewelry, Gray asked for half of the money received for  
4 the jewelry. The petitioner told Gray that he had no money.  
5

6 The petitioner never paid the bribe requested by Gray.  
7 The trial began on January 12, 1987. The petitioner did not tell  
8 his attorneys about the call from Gray because, according to his  
9 testimony, he was afraid they would not believe him and would  
10 withdraw from the case. On November 7, 1987, after his appeal had  
11 been briefed and argued but not decided and ten days before Gray  
12 and Oten were indicted, the petitioner told his other attorney,  
13 Charles Fels, about the bribery attempt. Fels told the petitioner  
14 that the attorneys would get back with him about what could be done  
15 with the information. The petitioner was told by his attorneys  
16 that they expected the appeal to be successful but, if he needed to  
17 raise the issue, it would have to be in a post-conviction  
18 proceeding.  
19

20 Several witnesses from the Dayton Golf and County Club  
21 corroborated the petitioner's testimony regarding the telephone  
22 call from Gray. The petitioner's former attorneys also testified  
23 on his behalf. Both attorneys had felt that the motions to  
24 suppress would be successful and were very surprised when they were  
25 eventually denied. They also felt that the four-month delay in  
26 ruling on the motions was unusually long. According to the  
27 attorneys, a motion in limine was denied after another unusual

1 delay. The attorneys stated that, based upon their experience, the  
2 sentence of 128 years was unusually long. They also stated that  
3 although most motions for a new trial are summarily denied from the  
4 bench, in the petitioner's case, the motion for a new trial was  
5 taken under advisement before it was denied. Both attorneys  
6 testified about seeing the petitioner and Oten together during the  
7 suppression hearing. Both were upset because they feared that  
8 someone was trying to "set up" the petitioner for additional  
9 charges.

10  
11 Several members of the Davidson County District  
12 Attorney's Office testified about the investigation of Oten and  
13 Gray. None of the attorneys was aware of a bribe solicitation in  
14 the petitioner's case. Special Agent Richard Wright with the  
15 T.B.I. testified that Oten admitted involvement in only two cases  
16 of bribery, but he knew Oten had accepted money in another case.  
17 Wright testified that to his knowledge there had never been any  
18 allegation of misconduct in the petitioner's case.

19  
20 Oten was the first witness called by the State. Oten  
21 admitted taking money from two defendants who had cases pending in  
22 Gray's court but adamantly denied ever speaking with the  
23 petitioner. Ed Yarbrough, the attorney who had represented Oten in  
24 his plea negotiations, testified that the district attorney's  
25 office had promised Oten that he would not be incarcerated if he  
26 was truthful and assisted them in their investigation of Gray. He  
27 advised Oten to cooperate and report any other cases in which a

1     bribe had been solicited.

2

3             The trial court denied the post-conviction petition,  
4     concluding that the petitioner had failed to prove that Gray had  
5     solicited a bribe from him. The Court of Criminal Appeals  
6     reversed this finding but affirmed the denial of the petition on  
7     the ground that the petitioner had waived the solicitation issue by  
8     not raising it pretrial or in his motion for a new trial.

9

10                             **II**

11

12             In order to obtain relief in a post-conviction  
13     proceeding, the petitioner must show that his "conviction or  
14     sentence is void or voidable because of the abridgment of any right  
15     guaranteed by the constitution of this state or the Constitution of  
16     the United States." Tenn. Code Ann. § 40-30-105 (1990 Repl.)  
17     (repealed 1995).<sup>1</sup> The right to a fair trial before an impartial  
18     judge is a fundamental constitutional right. See Chapman v. State  
19     of California, 386 U.S. 18, 23 n. 8, 87 S. Ct. 824, 828 n. 8, 17  
20     L.Ed.2d 705, 710 n. 8 (1967) (citing Tumey v. Ohio, 273 U.S. 510,  
21     47 S. Ct. 437, 71 L.Ed. 749 (1927)). Article VI, § 11 of the  
22     Tennessee Constitution provides that "[n]o Judge of the Supreme or  
23     Inferior Courts shall preside on the trial of any cause in the  
24     event of which he may be interested." The purpose of this

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<sup>1</sup>This was the statute in effect when the petitioner filed his post-conviction petition. The Post-Conviction Procedure Act of 1995, T.C.A. §§ 40-30-201, et seq. (1996 Supp.), governs all petitions for post-conviction relief filed after May 10, 1995. 1995 Tenn. Pub. Acts, ch. 207, § 3.



1 constitutional provision is to guard against the prejudgment of the  
2 rights of litigants and to avoid situations in which the litigants  
3 might have cause to conclude that the court had reached a prejudged  
4 conclusion because of interest, partiality or favor. Chumbley v.  
5 People's Bank & Trust Co., 165 Tenn. 655, 659, 57 S.W.2d 787, 788.  
6 (1933). The right to an impartial judge is also guaranteed by  
7 Article I, § 17 of the Tennessee Constitution, which provides that  
8 every citizen shall have his case tried "by due course of law." In  
9 re Cameron, 126 Tenn. 614, 659, 151 S.W. 64, 76 (1912).

10  
11 In In re Cameron, the Court emphasized that impartiality  
12 of the judiciary is a fundamental principle:

13  
14 The fundamental principle is that parties  
15 litigant are entitled to an impartial judge.  
16 It is only when the people are satisfied that  
17 impartial judges decide their controversies  
18 that they entertain feelings of reverence for  
19 the judgments of the courts of the land. . . .  
20 But it is of immense importance, not only that  
21 justice shall be administered to men, but that  
22 they shall have no sound reason for supposing  
23 that it is not administered. It is of lasting  
24 importance that the body of the public should  
25 have confidence in the fairness and uprightness  
26 of the judges created to serve as dispensers of  
27 justice. The continuance of this belief, so  
28 long entertained by the people of this country,  
29 and so well warranted by the history of the  
30 judiciary as a body, is largely essential to  
31 the future existence of our institutions in  
32 their integrity. We say it is a fundamental  
33 principle that the judge shall be impartial.  
34  
35

36 126 Tenn. at 658-59, 151 S.W. at 76.

37  
38 There is also a due process right under the federal

1 constitution to a fair trial before an impartial judge. However,  
2 as the United States Supreme Court recently noted, most questions  
3 of judicial disqualification are not constitutional:  
4  
5  
6

7 [M]ost questions concerning a judge's  
8 qualifications to hear a case are not  
9 constitutional ones, because the Due Process  
10 Clause of the Fourteenth Amendment establishes  
11 a constitutional floor, not a uniform standard.  
12 Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813,  
13 828 106 S. Ct. 1580, 1588-1589, 89 L.Ed.2d 823  
14 (1986). Instead, these questions are, in most  
15 cases, answered by common law, statute, or the  
16 professional standards of the bench and bar.  
17 See, e.g., Aetna, supra, at 820-821, 106 S.  
18 Ct., at 1584-1585; Tumey v. Ohio, 273 U.S. 510,  
19 523, 47 S. Ct. 437, 71 L.Ed. 749 (1927); 28  
20 U.S.C. §§ 144, 455; ABA Code of Judicial  
21 Conduct, Canon 3C(1)(a)(1980). But the floor  
22 established by the Due Process Clause clearly  
23 requires a "fair trial in a fair tribunal,"  
24 Withrow v. Larkin, 421 U.S. 35, 46, 95 S. Ct.  
25 1456, 43 L.Ed.2d 712 (1975), before a judge  
26 with no actual bias against the defendant or  
27 interest in the outcome of his particular case.  
28 See, e.g., Aetna, supra, at 821-822, 106 S. Ct.  
29 at 1585-1586; Tumey, supra, at 523, 47 S. Ct.,  
30 at 441.  
31  
32

33 Bracy v. Gramley, U.S. , 117 S. Ct. 1793, 1797 (1997).  
34

35 The facts of Bracy are similar to the present case. The  
36 judge who presided over Bracy's murder trial had accepted bribes  
37 from other criminal defendants. Bracy claimed that the judge's  
38 taking of bribes from some criminal defendants not only rendered  
39 him biased against the State in those cases but also induced a  
40 compensatory bias against defendants, like Bracy, who did not bribe  
41 him. The Court held that, if it could be proved, such compensatory  
42 bias on the judge's part in Bracy's own case would violate the Due

1 Process Clause of the Fourteenth Amendment. Id.

2  
3 \_\_\_\_\_The Court finds that bribery solicitation, if proven,  
4 would constitute the denial of the petitioner's fundamental  
5 constitutional right to a fair trial before an impartial judge.  
6 If, as the petitioner contends, Gray solicited but did not  
7 receive a bribe from the petitioner, then the likelihood of bias is  
8 even stronger than in Bracy where there was no affirmative  
9 solicitation. Before determining whether the petitioner met his  
10 burden in demonstrating that Gray solicited a bribe from him, the  
11 Court must address the threshold issue of whether the claim was  
12 waived for purposes of post-conviction relief.

13  
14 **III**

15  
16 Tenn. Code Ann. § 40-30-112(b)(1) (1990 Repl.) (repealed  
17 1995) provides that "[a] ground for relief is 'waived' if the  
18 petitioner knowingly and understandingly failed to present it for  
19 determination in any proceeding before a court of competent  
20 jurisdiction in which the ground could have been presented."  
21 Furthermore, "[t]here is a rebuttable presumption that a ground for  
22 relief not raised in any such proceeding which was held was  
23 waived." Tenn. Code Ann. 40-30-112(b)(2) (1990 Repl.) (repealed  
24 1995).

25  
26 In the present case, the Court of Criminal Appeals held  
27 that the petitioner had the opportunity both pretrial and in his

1 motion for a new trial to raise the solicitation issue and that his  
2 explanation -- that he feared his attorneys would withdraw from the  
3 case if he told them -- did not provide a legally sufficient reason  
4 to excuse his failure to raise the issue earlier.<sup>2</sup> The court  
5 therefore concluded that the petitioner had not overcome the  
6 presumption of waiver.

7  
8 This Court finds that the issue was not waived for  
9 purposes of post-conviction relief. The petitioner could not be  
10 expected to ask the judge to recuse himself on the ground that he  
11 had solicited a bribe from the petitioner. Judicial corruption  
12 is not a basis for disqualification about which the judge accused  
13 can make a determination. Cf. Tenn. S. Ct. R. 10, Canon 3E  
14 (setting forth circumstances under which a judge should disqualify  
15 himself because his impartiality might reasonably be questioned).  
16 The petitioner should not be penalized for not raising the issue  
17 until the investigation of Gray became public knowledge. Before  
18 that time, the petitioner understandably questioned whether even  
19 his attorneys would believe him. Furthermore, the issue could not  
20 be raised on direct appeal because it involved facts which were not  
21 in the record.<sup>3</sup> Under the facts and circumstances of this case,  
22 the post-conviction proceeding was the earliest opportunity at

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<sup>2</sup>The State concedes that once the petitioner informed his attorneys, they correctly advised him that the matter could not be litigated on direct appeal. See Wilson v. State, 882 S.W.2d 361, 364 (Tenn. Crim. App. 1994) (holding that issues cannot be raised for the first time in appellate court).

<sup>3</sup>When a claim of judicial bias is premised upon the comments of the judge during the trial or some other conduct reflected in the record, the issue is subject to waiver if it is not raised on direct appeal, and the petitioner will be bound by his attorney's failure to pursue it. See House v. State, 911 S.W.2d 705, 711 (Tenn. 1995).

1 which the issue could be have been presented; therefore, it was not  
2 waived within the meaning of Tenn. Code Ann. § 40-30-112(b)(1).

3  
4 **IV**

5  
6 Having determined that the solicitation issue was not  
7 waived, the next issue is whether the petitioner proved the factual  
8 allegations in his petition by a preponderance of the evidence.  
9 Davis v. State, 912 S.W.2d 689, 697 (Tenn. 1995).<sup>4</sup> The trial  
10 court's findings are conclusive on appeal unless the evidence  
11 preponderates against the judgment. Butler v. State, 789 S.W.2d  
12 898, 899 (Tenn. 1990). Reversing the trial court, the Court of  
13 Criminal Appeals concluded that the petitioner had carried his  
14 burden of proving that Gray solicited a bribe from him. The  
15 court stated:

16  
17 The state's only direct evidence that the  
18 petitioner was not solicited for a bribe was  
19 the testimony of Oten. However, the record is  
20 replete with instances in which Oten had  
21 falsely represented facts to T.B.I. officers.  
22 Oten testified more than once that he had never  
23 spoken to the petitioner under any  
24 circumstance, however this testimony is in  
25 direct contradiction to that of the  
26 petitioner's attorneys and the attorneys'  
27 investigator in this case. Oten also testified  
28 falsely concerning his prior record.  
29  
30

31 Furthermore, the testimony that Gray telephoned the Dayton Golf and

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<sup>4</sup>Under the new post-conviction procedure act, petitioners have the burden of proving factual allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-210(f) (1996 Supp.).

1 Country Club asking for the petitioner and that the petitioner  
2 returned his call was un rebutted. Also un rebutted was the call  
3 that Gray placed to petitioner and which petitioner returned from  
4 his aunt's home in Dayton, which was substantiated by the telephone  
5 records. The State provided no explanation for the unusually long  
6 delay in ruling on the petitioner's pretrial motions. This Court  
7 agrees with the Court of Criminal Appeals that the weight of  
8 evidence preponderates against the trial court's finding that the  
9 petitioner did not carry his burden in proving that he had been  
10 solicited for a bribe.

11  
12 v

13  
14 The final issue is whether the denial of the right to a  
15 fair trial before an impartial judge is subject to harmless error  
16 analysis. In State v. Bobo, 814 S.W.2d 353, 357 (Tenn. 1991)  
17 (citing other cases), the Court noted that the right to an  
18 impartial judge is one of the rights that are so basic to a fair  
19 trial that their infraction has never been treated as harmless. In  
20 Vasquez v. Hillery, 474 U.S. 254, 263, 106 S. Ct. 617, 623, 88  
21 L.Ed.2d 598, 609 (1986), the United States Supreme Court stated:

22  
23 When constitutional error calls into question  
24 the objectivity of those charged with bringing  
25 a defendant to judgment, a reviewing court can  
26 neither indulge a presumption of regularity nor  
27 evaluate the resulting harm. Accordingly, when  
28 the trial judge is discovered to have had some  
29 basis for rendering a biased judgment, his  
30 actual motivations are hidden from review, and  
31 we must presume that the process was impaired.

1           A trial is either fair or not. Evidence of judicial  
2 corruption requires reversal regardless of the other facts of the  
3 particular case. The denial of the petitioner's right to an  
4 impartial judge is a constitutional error which affects the  
5 integrity of the judicial process. A new trial is the only remedy.  
6 See Bobo, 814 S.W.2d at 358.

7  
8   **VI**  
9

10           In conclusion, the Court holds that the petitioner had a  
11 fundamental constitutional right to an impartial judge, that his  
12 failure to raise the issue earlier did not constitute waiver for  
13 purposes of post-conviction relief, that he proved by a  
14 preponderance of the evidence that the judge who presided over his  
15 criminal trial solicited a bribe from him, and that the denial of  
16 his right to an impartial judge defies analysis by harmless error  
17 standards and requires automatic reversal. Therefore, the  
18 judgments of the trial court and Court of Criminal Appeals denying  
19 post-conviction relief are reversed, and the case is remanded for a  
20 new trial.  
21

22           Costs are taxed against the State.  
23

24  
25   \_\_\_\_\_  
26   Lyle Reid, Special Justice

27 Concur:

28  
29 Anderson, C.J., Drowota, Birch,  
30 and Holder, JJ.