20-7169

No.

IN THE
Supreme Court of the United States

LAWRENCE E. NUNLEY.

Petitioner,

v.

RICHARD BROWN,

Respondent.

On Petition for a Writ of Certiorari to the
Seventh Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Lawrence E. Nunley
#198710
Wabash Valley Correctional Facility
P.O. BOX 1111
Carlisle, IN 47838

Petitioner *Pro Se*

QUESTIONS PRESENTED

I. During the criminal trial, the prosecutor orchestrated a stunt to have a child witness write down the most critical portion of her testimony while on the witness stand. The trial judge, *sua sponte*, entered the writings into evidence as the ***Court's Exhibits***, which were made available to the jury during deliberations. In doing so, the trial court judge ripped the veil of neutrality and assumed the role of a prosecutor. Was trial counsel ineffective for silently acquiescing to the structural error, allowing undue emphasis to be placed on the critical testimony, and guaranteeing her client's conviction?

II. Was appellate counsel ineffective for failing to raise the trial court's error in allowing the written testimony and entering it into evidence, thereby placing undue emphasis on the testimony and assuming the role of a prosecutor?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Lawrence E. Nunley, respectfully petitions this Court for a writ of certiorari to review the judgment of the Seventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The Order of The Seventh Circuit Court of Appeals, denying Nunley's Petition for a Certificate of Appealability is unpublished and attached hereto as Exhibit A.

The Order of The District Court for the Southern District of Indiana, dismissing Nunley's Petition for a Writ of Habeas Corpus is unpublished and attached hereto as Exhibit B.

The Order of The Supreme Court of Indiana, summarily denying Nunley's Petition for Transfer is unpublished and attached hereto as Exhibit C.

The Order of The Indiana Court of Appeals, denying Nunley's appeal from the denial of post-conviction relief is unpublished and attached hereto as Exhibit D.

The Order of the trial Court, denying Nunley's Petition for Post-Conviction Relief is unpublished and attached hereto as Exhibit E.

JURSIDICTION

The Seventh Circuit Court of Appeals' order denying a certificate of appealability was issued on November 20, 2020. The District Court's dismissal of Nunley's Petition for a Writ of Habeas Corpus was issued on March 30, 2020. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution states: "1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any

of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate

legislation, the provisions of this article."

INTRODUCTION

This case aligns perfectly with the Court's criteria for granting review. The question presented calls into question two diametrically opposed lines of precedent from this Court. It is nationally important: Without a fair and impartial judge, public confidence in the judiciary will crumble. Moreover, this case provides an ideal vehicle to answer the question. Nunley preserved the issue thoroughly; however, each step ignored the pivotal question, striking a blow against our principles of fundamental fairness and due process of law.

STATEMENT OF THE CASE

Lawrence Nunley was tried and convicted of sexual crimes on the basis of the uncorroborated testimony of a single witness. A.Y. accused Nunley of licking her "pee-pee" and making her suck on his "weenie-bob." There is no medical or forensic evidence, linking Nunley to any wrongdoing. Nunley vehemently denies the allegations.

During the criminal trial, A.Y. was permitted to write down the most critical portion of her testimony. (R. 438, 444). This event was staged/planned by the prosecutor, which was revealed when the child witness asked, "Are we still going to do the writing deal?" (R. 440). A.Y. proceeded to write the most critical portion of her testimony – the allegation against Nunley that she refused to speak. The judge, *sua sponte*, entered the writings into evidence as

the Court's Exhibits 1 and 2. The Court subsequently reassigned them as "Joint Exhibits." The written testimony was subsequently made available to the jury during deliberations. Trial counsel did not object to the witness being permitted to write her testimony or its being made available to the jury during deliberations. No limiting instructions were given or requested.

Nunley filed a petition for post-conviction relief. Trial counsel testified at the hearing, but did not offer a strategic or tactical reason for her failure to object. Counsel testified that the written testimony of A.Y. placed undue emphasis on the testimony and that she had "never seen that happen before. Before or since." (PC Vol. II, 30-31). She thought it placed undue emphasis on the testimony. (PC Vol. II, 30-31). But, she did not offer any strategic or tactical reason for failing to object or otherwise protect Nunley's rights.

The post-conviction court denied the petition, and Nunley appealed. The Court of Appeals denied the appeal. Nunley sought to transfer the case to the Supreme Court of Indiana. Discretionary review was summarily denied. Nunley filed a Petition for a Writ of Habeas Corpus, which was dismissed and a certificate of appealablity (COA) was not issued. Nunley unsuccessfully sought a COA from the Seventh Circuit Court of Appeals.

REASONS FOR GRANTING THE PETITION

I. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

> "The judicial system depends on its reputation for impartiality; it is public acceptance, rather than the sword or the purse, that leads decisions to be obeyed and averts vigilantism and civil strife." *Baver v. Shepard,* 620 F.3d 704, 712 (7th cir. 2010).

The questions presented in this petition strike at the very heart of the public's confidence in the judiciary. At the same time, if this Court does not intervene, trial judges across the nation can abandon impartiality and inject themselves into the adversarial process in ways neither contemplated nor condoned by our Constitution. If this Court believes that our system of Justice is worth saving, then it has a duty to grant certiorari and issue a decision that demands the impartiality of this nation's judicial officers and fundamental fairness in the trial process.

A. The Court should accept this case to declare that undue emphasis should not be placed on one party's evidence

Mr. Nunley alleges that his trial attorney, Susan Schultz, should have objected to A.Y.'s being permitted to write down a portion of her testimony, which was then entered into evidence by the Judge, *sua sponte,* and made available to the jury during deliberations. A.Y. was capable of testifying and articulating her story to the jury. She had testified about the incident before. There was no reason she could not do it during the trial.

The record on this subject is clear. Prior to lunch, A.Y. was permitted to write a portion of her testimony, even though she had previously answered the questions. (R. 438, 444). The written testimony was a staged/planned event. The witness asked, "Are we still gonna do the writing deal?" (R. 440). The prosecutor had a tablet and crayons, waiting on her request. (R. 440). Prior to A.Y. writing down her testimony, Ms. Schultz indicated that she had

no objection. (R. 440). The Judge entered the writings into evidence, as the Court's Exhibits 1 and 2, just before the lunch recess. (R. 444).

Following the lunch break, A.Y. began writing testimony again. (R. 449). The state entered the writings into evidence. (R. 454). The State moved to formally admit State's exhibits 3, 4, and 5 and also moved to admit court's exhibits 1 and 2. The Court made it clear that 1, 2, and 5 were part of her testimony and published the documents to the jury. (R. 454-455). These documents were available to the jury during deliberations as all exhibits are and were labeled as Joint Exhibits. (PC Vol. II, 31). Ms. Schultz did not interpose an objection to any of the writings being entered into evidence. (R. 449-455).

Ms. Shultz had no recollection of whether or not she objected, but she agreed with Mr. Nunley's proposition that the written testimony placed undue emphasis on A.Y.'s testimony. In fact, during her post-conviction testimony, Ms. Schultz testified as follows:

> Q. Okay. Prior to his trial, had you ever seen a witness be permitted to write down a portion of their testimony?
>
> A. I don't – I don't recall ever having been – having seen that happen. I know that in some occasions people will draw diagrams or pictures of what they're testifying about, but as afar as actually writing down their testimony instead of stating it to the jury, I have never seen that happen before. Before or since.
>
> Q. Did you find that odd?
>
> A. Yeah, I think it's pretty odd. Different anyway.

Q. Do you think that it placed undue emphasis on a portion of her testimony?

A. Well, if you think about it from the prospective (sic) that the jury is allowed to take the exhibits and the Judge uses that as an exhibit, then I would think that it perhaps could because what I had seen so many times in trials is if a jury has a question about something, you don't want to replay a witness's testimony – just one witness's testimony and put additional emphasis on that part of the testimony. So, it would seem to me that if you're showing that to the jury, you are putting more emphasis on that specific piece of testimony that the witness gave as opposed to everything else that was admitted during the trial

(PC. Vol. II, 30-31).

Ms. Schultz was absolutely correct: replaying a portion of testimony can add undue emphasis to the testimony and require reversal. For instance, in *United States v. Richard*, 504 F.3d 1109 (9th coir. 2007), the Ninth Circuit Court of Appeals reversed for this reason. *See also, United States v. Hernandez*, 27 F.3d 1403 (9th Cir. 1994).

In *United States v. Wilson*, 160 F.3d 732 (DC Cir. 1998), the DC Court of Appeals recognized two "inherent dangers" in sending transcripts to the jury: 1) the jury may accord undue emphasis to the testimony; and 2) the jury may apprehend the testimony out of context. Moreover, cases such as *United States v. Hensley*, 982 F.3d 1147 (8th Cir. 2020) demonstrate that undue emphasis should not be placed on one party's evidence.

Therefore, if Ms. Schultz would have objected, the objection would have been sustained. We can be certain of this because the trial court had already

sustained an objection on the same grounds. The trial record reveals that Ms. Schultz interposed an objection to the juror's being allowed to rewatch a video interview on the grounds that it placed undue emphasis on the importance of the testimony over other evidence. (R. 615). The then presiding judge sustained the objection with a lengthy explanation, stating that the law prohibits the jury from rehearing testimony without a specific request and then only where there is a dispute about the testimony (R. 616-618). It stands to reason that the then presiding judge's comments on this topic indicate that a properly interposed objection would have been sustained. Thus, trial counsel's performance was certainly deficient for failing to do so.

During post-conviction proceedings, Nunley argued:

> Unlike the situations permitted in the existing case authority, permitting A.Y. to write down a portion of her testimony was significantly more egregious because: (1) the then presiding judge initiated the written testimony's being introduced into evidence, thereby altering the jurors of its particular importance; (2) it had a theatrical quality that bolstered the account of how A.Y. initially revealed the alleged incident to her parents; and (3) the written testimony was available to the jurors during deliberations, permitting the jurors to refer to that portion of the testimony over and over again.

(Habeas Ex. K, 24).

As noted above, the theatrical quality of A.Y.'s being permitted to write a portion of her testimony bolstered the testimony regarding the way in which she initially revealed the incident to her parents. According to the trial record, Tonya and Richard Caves picked up A.Y. from Nunley's house and,

while in the car, A.Y. revealed that she and Nunley had a secret. (R. 436), 477-478, 508, 537). A.Y. would not reveal the secret, but she is alleged to have written it on an envelope for her parents after Richard Caves helped her write it. (R. 437, 450-451, 477-478, 479, 480, 508, 538, 558). After confronting Nunley with a baseball bat (R. 540), Tonya Caves went to the police and is alleged to have provided A.Y.'s note to the police. (R. 452, 481, 511-512, 626, 636). The envelope was allegedly lost and was not introduced at trial.

A.Y.'s testimony in the courtroom bares a remarkable similarity to the way in which she is alleged to have revealed the secret to her parents. Thus, the theatrics serve to highlight the version of the initial reveal, which served to validate an incident that would have otherwise been viewed with skepticism. This is especially true when one considers the "loss" of the envelope, coupled with the fact that A.Y. testified that she told her parents out loud what happened in the car then stated that she wrote it down with Richard's help (R. 450, 479, 480). Richard denied helping her. The jurors would be more apt to credit the initial reveal because they watched the planned/staged event of wanting to write the testimony unfold before their eyes.

Indiana has a prohibition on written testimony, based upon the Model Rules of Evidence. In *Thomas v. State*, 259 Ind. 537, 289 N.E.2d 508 (1972), the Supreme Court of Indiana noted that "[i]n most jurisdictions, depositions are not permitted in the jury room for the reason that undue influence would

most likely be placed on that particular testimony." *Id.* at 539. The court went on to quote the Models Rules of Evidence as follows: "An exhibit consisting of a writing which contains prior statements of a witness ***or the contents of his testimony*** or similar matter will not usually be sent to the jury room. To put such a writing where the jury could study it at their leisure would be to invite them to give undue weight to a portion of the evidence.: *Id., quoting The ABA Model Code of Evidence* (1942), Rule 105, clause (m) (emphasis added). This issue directly impacted Nunley's rights under the United States Constitution to effective counsel, a fair trial, as well as Due Process of Law and Fundamental Fairness. For the reasons set forth below, the error of which Nunley complains was significant enough to rise to a structural error. A state procedural rule is not adequate to bar federal review if that "state procedural rule frustrates the exercise of a federal right." *Hoffman v. Arave,* 236 F.3d 523, 531 (9th Cir.), *cert denied,* 534 U.S. 944 (2001); *See also Staub v. City of Baxley*, 355 U.S. 313, 319-320 (1958); *Reece v. Georgia*, 350 U.S.. 85, 88-90 (1955).

B. The Court should accept this case to declare that trial court judges cannot rip the veil of neutrality and assume the role of a prosecutor

None of the reviewing courts have taken into account that the written testimony was highlighted and given greater importance by the fact that the presiding judicial officer, *sua sponte*, entered the written pages into evidence,

entering them into evidence as the ***court's exhibits***. This fact mandates a finding of undue emphasis and structural error since the trial court undertook the role of a prosecutor to enter evidence against Nunley.

The general principals concerning a defendant's due process right to an impartial judge are clear in the jurisprudence of this Court. "[T]he Due Process Clause clearly 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 case." *Bracy v. Gramley,* 520 U.S. 899, 904-905, 138 L.Ed.2d 97, 117 S.Ct. 1793 (1997); *see also, In re Murchison,* 349 U.S. 133, 136, 99 L. Ed 942. 75 S.Ct. 623 (1955). A biased decision-maker is constitutionally unacceptable. *Withrow v. Larkin*, 421 U.S. 35, 47, 43 L.Ed.2d 712, 95 S.Ct. 1456 (1975).

Although this right encompasses an absence of actual bias, the contours of this right cannot be defined with precision. Indeed, this Court has made it clear that, when the presiding judge is not impartial, there is a "structural defect[] in the constitution of the trial mechanism" that "defies analysis by harmless error standards." *Arizona v. Fulminante*, 499 U.S. 279, 309, 113 L.Ed.2d 302, 111 S.Ct. 1246 (1991); *See also Edwards v. Balisok*, 520 U.S. 641. 647. 137 L.Ed.2d 906, 117 S.Ct. 1584 (1997); *Franklin v. McCaughtry*, 378 F.3d 955, 960-961 (7th Cir. 2005), *citing Bracy v. Schomig,* 286 F.3d 406, 414 (7th Cir. 2002) (en banc). Moreover, judicial bias is a structural defect both when actual and when merely unconstitutionally

probable. *Arizona v. Fulminante*, 499 U.S. at 309-310. If either type of judicial bias is proven, *Strickland* prejudice need not be proven. *Strickland v. Washington*, 466 U.S. 668, 691-696, 80 L.Ed.2d 674, 164 S.Ct. 2052 (1984).

There is virtually universal acceptance regarding the need for the judge to be impartial. However, there is a split regarding what exactly needs to be established to demonstrate judicial bias and what the appropriate remedy is if the claim is sufficiently established. In Indiana, "A defendant asserting judicial bias must show that a trial judge's actions and demeanor showed partiality and prejudiced the case. *Woods v. State*, 98 N.E.3d 656 (Ind. Ct. App. 2018). However, the Seventh Circuit has said that "actual bias is not required, the appearance of bias is sufficient to disqualify a judge." *Bracy v. Schomig,* 286 F.3d at 410-411.

As noted above, this Court has said that judicial bias is a structural error that defies harmless error analysis. *Arizona v. Fulminate, supra.* However, this Court has also said that defendants must show a level of bias that made "a fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 127 L.Ed.2d 474, 114 S.Ct. 1147 (1994). These inconsistencies need to be addressed.

Indiana has long recognized that respect for the presiding judge "can lead jurors to accord great and perhaps decisive significance to the judge's every word and intimation. It is therefore essential that the judge refrain from any actions indicating any position other than impartiality." *Kennedy v.*

State, 280 N.E.2d 611, 620-621 (Ind. 1972); *See also* Ind. Judicial Canon 3(B)(4). Similarly, this Court has recognized that the jury may be swayed by the judge's "lightest word or intimation." *Starr v. United States*, 153 U.S. 614, 626, 39 L.Ed. 841, 14 S.Ct. 919 (1894). Furthermore, this Court has condemned a judge's taking on the role of a prosecutor acting "as part of the accusatory process." *In re Murchison,* 349 U.S. at 137.

The trial judge abandoned his neutrality when he, *sua sponte*, entered evidence against Nunley for the jury to consider. The appearance of the judge formally entering evidence against a criminal defendant is bias because it aligns the judge with the prosecution in the eyes of the jury. "A biased tribunal *always* deprives an accused of a substantial right," constituting structural error. *Bracy v. Grumley, supra*; *Gomez v. United States,* 490 U.S. 858, 876 (1989).

In *McCoy v. Louisiana*, 132 S.Ct. 1500 (2018), this Court reversed a claim of ineffective assistance of counsel, holding that the Sixth Amendment guarantees a defendant the right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt, even when counsel's experience-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. Notably, this Court deviated from the normal *Strickland* analysis, presuming prejudice for the structural error. The same is true here. The prejudice prong of *Strickland* should be presumed for Nunley's judicial bias issue.

This Court must recognize – as it has in the past – that jurors accord great respect to the judge. This necessarily means that the error was exacerbated. Nunley faced the undue emphasis that necessarily results by having the state's key witness write down the most critical portion of her testimony and allowing the written testimony to be available to jurors during deliberations. However, greater emphasis was still placed on this testimony because it would have been viewed as the "judge's evidence." After all, the jurors saw the judge, without prompting, enter those pages into evidence and instructed that they be labeled as the "Court's Exhibits." (R. 444). This act had a profound effect on these proceedings and eviscerated the rights accorded to Nunley by the United States Constitution. The fact that these exhibits were subsequently reassigning them as "Joint Exhibits" was not curative.

If viewed as the "Court's Exhibits," the customary respect for the judge emphasizes the writings as evidence against Nunley, which was endorsed by the presiding judge. Moreover, the fact that the state moved to formally enter the "Court's Exhibits" into evidence (R. 454-455) sent the jurors the message that the Judge was aligned with the State and helping with the prosecution of Nunley thereby negating Nunley's presumption of innocence.

If viewed as "Joint Exhibits," the writings become tantamount to a stipulation in the jurors minds. This is also prejudicial. As this Court has observed: "When a defendant's own lawyer puts in the offending evidence, it

admit the "Court's Exhibits." The reassignment does nothing to diminish the jurors' perception that the trial judge is aligned with the prosecution against Nunley. This error is structural and is in the nature of the type of error that this Court has historically deemed inherently prejudicial. *See Bracey, supra, Gomez, supra, McCoy, supra,* and *Strickland, supra.*

The written testimony was the only evidence; there was no physical, forensic, or medical evidence that any crime had occurred. This case was merely one person accusing another without any substantive, corroborating proof. Thus, placing emphasis on the writings guaranteed Nunley's conviction Counsel was, therefore, ineffective for failing to protect the rights of her client, and this Court should reverse this conviction.

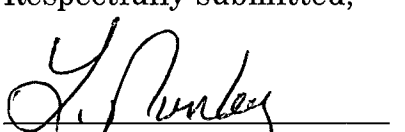
II. INEFFECTIVE APPELLATE COUNSEL

Nunley also contends that his appellate attorney was ineffective for failing to raise the issues previously. The arguments in Section I are relevant to this claim and are incorporated herein by reference.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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