No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Keith Lewis, -- PETITIONER

v.

Rachelle Hadari -- RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

The New Jersey Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In a divorce case involving issues of mental health and custody, New Jersey Court Rule 5:3-3(h) was invoked to order cooperation with a medical expert engaged and paid for privately by a litigant.

The question presented for review is as follows:

Whether in custody cases a court can force one party to be evaluated by the opposing party's private medical expert. Is this an unconstitutional abuse of the fundamental right to a fair trial, an official court endorsement of a partisan expert that violates the 14th Amendment's guarantee of due process of the law?

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The New Jersey trial court's original decision requiring cooperation with Dr. Rosenberg, respondent's private medical expert, is reproduced below in Appendix A. The denial for reconsideration is copied in Appendix B. In Appendix C can be found the trial court's decision and statement of reasons requiring full cooperation with Dr. Rosenberg. The subsequent denial for leave to appeal by the New Jersey Appellate Division is in Appendix D, and finally the denial for leave to appeal by the New Jersey Supreme Court is contained in Appendix E.

JURISDICTION

The highest state court in New Jersey, the New Jersey Supreme Court, denied motion for leave to appeal on May 4, 2018. This court's jurisdiction is invoked under 28 U.S.C §1257(a), since in this case "the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution." Since this calls into question the constitutionality of a state rule, the Attorney General of New Jersey has been informed as required by Supreme Court Rule 29.4(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Amendment 14, Section 1 reads, in part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The New Jersey Court Rule [hereinafter N.J. R.] 5:3-3(h) reads, "Use of Private Experts. Nothing in this rule shall be construed to preclude the parties from retaining their own experts, either before or after the appointment of an expert by the court, on the same or similar issues." As the trial court made clear in a motion hearing on September 5, 2017, this is the basis on which I am being required to cooperate with Dr. Rosenberg. The entirety of N.J. R. 5:3-3 forms Appendix F.

STATEMENT OF THE CASE

In October 2014, Rachelle Hadari and I married. We were married for over a year when she began to frequently go into rages and attack me unprovoked -- insulting me, threatening me, and depriving me of sleep -- and neglect the care of our 7-month-old-daughter, Tzivia. She was diagnosed with Borderline Personality Disorder. This culminated in her attempting suicide and being committed to a mental health facility overnight. It was then that I told her I wanted a divorce and to take care of our daughter. She filed a Complaint for Divorce on November 22, 2016.

Clearly, this case demands an evaluation by a mental health professional for the court to determine what custody arrangement is in the best interests of our daughter, as I have raised serious concerns about Ms. Hadaris mental health. The question at hand is in what manner this investigation should be carried out.

Dr. Rosenberg was privately chosen and paid for by Ms. Hadari in June 2017. At the time he was engaged, the trial court had already ordered (on April 26, 2017) a best interest evaluation by a neutral party, to be chosen mutually. However, when I expressed reservations about being able to pay, the trial court ordered I see Ms. Hadari's private expert (June 21, 2017, Appendix A). At the motion hearing, I questioned his neutrality, and repeated my insistence for the appointment of an independent expert. The trial court, in response, read from the bench N.J. R. 5:3-3(b) that requires experts to act in a non-partisan way. Therefore, the court argued, Dr. Rosenberg was neutral.

I moved for the court to reconsider, again arguing that this evaluation was biased and one-sided, even expressing my intention to appeal to ensure a fair trial. The motion was denied September 5, 2017, although a neutral best interest evaluator, Dr. Mark Singer, was appointed by the Court. I immediately paid Dr. Singer's retainer and pledged full cooperation with him as a neutral expert.

On October 3, 2017, I went to an appointment with Dr. Rosenberg but refused to answer his questions or be evaluated, as he was biased and hired by Ms. Hadari.

For this reason, the trial court found on December 27, 2017, that I was in violation of Ms. Hadari's litigant's rights, must pay her legal fees, she did not have to go to Dr. Singer for the time being, and I must cooperate with Dr. Rosenberg or else a plenary hearing on custody would be held without my participation (Appendix C).

I moved for leave to appeal with the Appellate Division of New Jersey, which was denied on February 5, 2018. On March 26, 2018, I was ordered by the Appellate Division to pay Ms. Hadari's counsel fees in connection to this motion.

I then moved for leave to appeal with the Supreme Court of New Jersey, which was denied on May 4, 2018. A motion by Ms. Hadari for counsel fees is still pending before that court.

I have time and again in word and in deed cooperated with every neutral party in this process: Dr. Singer, the court-appointed medical expert; Adam Berner, the lawyer who mediated between us; even Chaim Jachter, the rabbi who guided us through the religious process of divorce.

So why should I be forced to be examined by someone Ms. Hadari has hired now for over a year and who is clearly not a neutral party?

At every stage of the process, I have made the argument that this is not a fair trial and that this is an issue that carries national import (in the motion for reconsideration -- "I cannot cooperate with him and will appeal the appointment of this biased evaluator if the order is maintained," and in both the appeals thus far: "I have faith in the courts of our country and am ready to appeal here and even all the way to the Supreme Court, where justices like the Honorable Neil Gorsuch uphold truth and justice and the rule of law.").

Therefore, I am asking the Supreme Court of the United States to consider my petition for certiorari in the interests of equal justice under the law.

REASONS FOR GRANTING WRIT

I. A Fair Trial

To be fair, an adversarial legal system such as ours demands two opposing views. Both parties argue, present evidence, and the fact-finder sifts through the opposing arguments to find the truth.

This model accepts that either side might be self-interested, disingenuous, or even deceptive, but relies on the opposing party to root out the other's deficiencies, and the judge to balance the scales and find the truth.

Experts are a part of this adversarial system. Although the courts are permitted to appoint neutral, independent experts under both state and federal rules (e.g. N.J. R. 5:3-3(a), found in Appendix F; Federal Rules of Evidence, Rule 706), the widespread practice is not to take advantage of this course of action. Instead, courts allow parties to hire their own experts, who often offer duelling perspectives, and then for the Court as trier of fact to determine the truth (see Notes of Advisory Committee on Proposed Rules, to Federal Rules of Evidence ibid.: "experience indicates that actual appointment is a relatively infrequent occurrence."; *McWilliams v. Dunn*, 582 U. S. ____ (2017), dissent: "While it is possible for a neutral expert to provide these services, in our adversary system they are customarily performed by an expert working exclusively for one of the parties.")

This paradigm is especially pronounced in the field of mental health, where conflicting theories and subjective analysis abound, and subjects often work hard to deceive their practitioners. As this Court recognized (*Ake v. Oklahoma,* 470 U. S. 68,

81-82 (1985)), "Psychiatry is not... an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms." Therefore, "the psychiatrists for **each** party enable the jury to make its most accurate determination of the truth on the issue before them." (emphasis added)

Indeed, for this reason the Court determined a constitutional right of access to such an expert for indigent defendants under the due process of law, even at the expense of the State. As was noted by the Court (ibid., 77, 85), "[M]ere access to the courthouse doors does not, by itself, assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense," i.e., experts "not beholden to the prosecution." In several courtrooms, this principle has even been applied to permanent custody proceedings (see *In re Shaeffer Children* , 85 Ohio App. 3d 683 (1993)).

Regardless of whether this is a desirable system in theory, in reality it is the system in place, and it is undeniably fair to both parties, who both retain an expert who speaks for them.

But, as we will see below, when one party and one party only engages a partisan expert, and incredibly the court endorses this biased expert to speak <u>for the other party</u>, this adversarial system breaks down.

II. An Unfair Trial

When one party selects and hires a private expert, it is an observable fact that this expert is biased. The trial court and Ms. Hadari have claimed that the statutory obligation requiring an expert to "conduct strictly non-partisan evaluations to arrive at their view of the child's best interests, regardless of who engages them," (N.J. R. 5:3-3(b), reproduced in Appendix F) is enough to guarantee independence. But this is a claim contradicted by logic, the law, and court precedent.

A. Logic

Any definition of due process and the fairness it guarantees must first and foremost rest on reason -- the law must coincide with common sense. As this Court has established, "The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." (*United States v. Sprague*, 282 U. S. 716, 731 (1931)) Thus, "due process" means, simply and primarily, a fair trial. And no ordinary or logical observer would suggest that an unopposed partisan expert is fair or unbiased.

Observers of our justice system have noted that, unfortunately, partisan experts are viewed by lawyers and judges as "prostitutes" (Gross, Samuel R., *Expert Evidence*, Wis. L. Rev. 1991. 1113, 1135 (1991)) and "'saxophones'... The idea is that the lawyer plays the tune, manipulating the expert as though the expert were a musical instrument on which the lawyer sounds the desired notes... Nobody likes to

disappoint a patron." (Langbein, John H., *The German Advantage in Civil Procedure*, 52, Univ. of Chicago L. Rev., 823, 835 (1985))

And this is because of the method by which they are selected: "The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern." (Note of Advisory Committee on Proposed Rules, ibid.) If an expert is known to help those who hire him, it follows that he will be hired.

Even absent an official or unofficial *quid pro quo*, however, private experts are still not neutral. Each expert has their personal biases, and parties will pick experts who have biases favorable to them. Some are more reticent to diagnose, some favor the mother as a caregiver, some are more knowledgeable in certain fields than others, etc., etc. And astonishingly, when I met with the expert in question, Dr. Rosenberg, he admitted to me of his own volition bias. Bias that, given my claims about the mental instability of Ms. Hadari, is not at all helpful to my side: "The only bias I have is that children have both parents in their lives. And even if one of the parents has major problems, they still can be involved in their child's life... Even if it means putting some protections in place, the children should know both their parents." (With his consent, I recorded our session.)

Perhaps this is a principle that should be considered as a criterion in custody proceedings. Perhaps not. But it is definitely not an established legal principle that is widely accepted by the psychiatric profession in undertaking custody evaluations

(see New Jersey's statutory guidelines for child custody NJ Rev Stat § 9:2-4 (2017), which mention nothing about either parent having "major problems").

Logically, how is a biased expert selected by an interested party different from a biased judge selected in judicial elections with the help of an inordinate amount of financial support by an interested party? Such was the case in *Caperton v. A.T. Massey Coal Co.*, 556 U. S. ____ (2009), and this was found to be a violation of due process. As noted there, "fears of bias can arise when—without the consent of the other parties—a man chooses the judge in his own cause." Do they not arise here as well?[1]

Obviously they do. And nothing in N.J. R. 5:3-3(b) requiring "non-partisan evaluations" changes this in any substantial way.

First, the rule does nothing to change the incentives that encourage an expert to act on behalf of his employer in the first place. Litigants can still "shop around" for a favorable expert. They can still end the engagement of this expert, and his continued pay, at any time (or explicitly/implicitly threaten to). Experts still have personal beliefs that shape their opinions, as mentioned above, and these beliefs are not changed by a simple rule. At best, the rule prohibits conspicuous displays of bias, but those are hardly common anyway, for they will not be looked upon favorably in the courthouse. This rule has left intact, crucially, the things that matter most to neutrality: selection and financial control by the hiring party, both

[1] This is not to confound the judge and private expert. Experts, in our system, need not necessarily be unbiased. However, the way in which private experts are selected -- in juxtaposition to the strictly non-partisan way judges must be -- shows that they are necessarily not. Therefore we need to accept this fact and treat them as such, with adequate safeguards to due process.

areas a judge must be extremely careful with in safeguarding neutrality (as above in *Caperton* and below in section C).

Ethics guidelines have existed for decades, yet have had no impact on the "venality" of the process. The American Psychological Association first developed its guidelines for custody evaluations over twenty years ago, in 1994, and called on the expert to "be impartial regardless of whether he or she is retained by the court or by a party to the proceedings." (American Psychological Association, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 49 American Psychologist, 677, 678 (1994)) Similarly, the American Academy of Matrimonial Lawyers published a set of guidelines in 2010, calling on custody evaluators to "strive to be accurate, objective, fair, balanced, and independent in gathering their data" and "use a balanced process in order to increase objectivity, fairness and independence." (AAML, *Child Custody Evaluation Standards*, 25 Journal of the AAML, 251, 269, 271 (2010))

But all of these guidelines and rules urging impartiality fail because they miss the essential point. An expert can "strive" to be impartial, but if he was selected in a way that compromises his neutrality and independence, it is irrelevant. Nowhere else do we simply recommend an evaluator to keep his partiality in check. Instead, we establish objective safeguards in action against his being biased, as in the case of a judge; or accept that he represents one side of the argument, as should be the case with opposing parties' experts.

Let us take the example of a judge, the quintessential independent figure. In order to protect this independence, we do not allow personal benefit of any kind to be derived from a verdict (e.g. in the cases of *Tumey v. Ohio*, 273 U. S. 510 (1927); *Connally v. Georgia,* 429 U.S. 245 (1977)). Even if the judge "undertake[s] an extensive search for actual bias... objective standards may also require recusal whether or not actual bias exists or can be proved." (*Caperton v. Massey* ibid.) This is based on the principle established by this Court that due process "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." (*In re Murchison,* 349 U.S. 133, 136 (1955)) It is unimportant whether he strives to be impartial or even concludes that he is, if the history of the case and his selection suggest otherwise, even just to "the average man." (*Tumey v. Ohio ibid.,* 532)

In short, even if the guidelines encouraging impartiality might be an important standard to aspire to, they are ineffectual in practice since they leave untouched the actual selection process.

And despite the numerous guidelines and rules, litigants still overwhelmingly use opposing partisan experts instead of agreeing on a single expert or relying on one appointed by the court (as noted on p. 5 above). Which brings us to the final point:

Why would they do so when the cost is often prohibitive? Is it not redundant to hire two experts when the "neutral" one of the other party will do? It would be if they actually were. But obviously, when push comes to shove, no one seriously

considers the other's expert to be neutral. And this is why litigants choose to spend so much money to pit expert against expert -- in order to properly reveal the truth.

The law, too, needs to reflect this reality that partisan experts are not neutral, independent experts. And it does, as the next section shows.

B. The Law

As a case study, we will look at New Jersey law and how it discriminates between partisan and court-appointed experts, despite its stated requirement that all experts "conduct strictly non-partisan evaluations" (ibid.).

The court-appointed expert is given by the court a mandate with sweeping powers. "[T]he court may order any person under its jurisdiction to be examined" by this appointed expert (ibid. (a)), and the expert "may make contact directly with any party from whom information is sought" (ibid. (e)).

In addition, the court is able to assess costs for this expert on either of the parties (ibid. (i)). The court is able to do so because the independent expert plays a vital role in ensuring justice is done: providing the court with expert advice and insight. Appointment is not obligatory but optional (ibid. (a)), so the court must have done it for a reason, i.e. to assist the judge in making a decision.

The contents of the appointed expert's investigation are also readily available to the court, again reflective of the special function that this expert fulfills. The expert makes a report to the court upon completion of the investigation that

includes "[a]ny finding]" (ibid. (f)) -- that is, nothing is withheld. No party can terminate the investigation once set in motion.

These three points are all non-trivial ways in which New Jersey law treats differently appointed and party experts, with the key theme that independent court-appointed experts are positioned to play a role aiding the court, officially, in a way that biased private experts can and should not.

And finally, a point that might seem to conflate private and appointed experts, but in fact brings them into greater contrast. The Rules read "Neither party shall be bound by the report of the expert so appointed... the court shall not entertain any presumption in favor of the appointed expert's findings." ((d) and (g)) This seems to say that the appointed expert is treated the same as any other witness. However, if we examine these remarks closer and in context, we see just the opposite.

Traditionally, the law has been wary of experts taking the place of the trier of fact. In fact, "older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions... to prevent the witness from 'usurping the province of the jury.'" (Notes of Advisory Committee on Proposed Rules to Federal Rule of Evidence 704)

The very fact that this New Jersey Rule must negate that the expert is presumed correct, specifically in the context of one appointed by the court, shows the high regard in which this expert is held. He might not be a judge, but he is someone who because of his independence and expert knowledge theoretically could

be. No one would even entertain such a notion in regards to a privately hired, not neutral and partisan expert.

So we see that unique position of an independent court-appointed expert is something that is even taken for granted by the law, in contrast to a private expert who is understood to not be neutral.

C. Court Precedent

The record of the Supreme Court in regards to fairness and experts is clear. Although *Ake* (ibid.) left unresolved whether expert aid to an indigent must be provided in a neutral or a partisan manner (see the extensive discussion in *McWilliams v. Dunn*, ibid.), it made clear that having it in some manner was a requirement.

And while this certainly applies in capital cases, where the "private interest" affecting the defendant is paramount (*Ake*, ibid. 78, 83, in applying the criteria established in *Matthews v. Eldridge*, 424 U.S. 319 (1976)), in a case such as this one where there is solely potential benefit and zero cost to the State, how much more so must the strictures of due process demand the testimony of an unbiased expert "not beholden" to the other side.

Not once does the Court in any of the above cases entertain the notion that a partisan expert is unbiased and can be a neutral source of information to the trier of fact. In fact, the opposite is true. The question left undecided by *Ake* was whether, since a partisan expert performed services <u>on behalf of the defense</u> in a manner that

a court appointed expert would not, due process and fairness required such a partisan expert to counterbalance the one employed by the prosecution.

In summary, it is clear that an independent expert is court-appointed, and that one chosen by one of the parties in fact represents that party, no matter the standards, guidelines or rules applied to him.

III. A Constitutional Question

In light of all the above, we can understand now the grievous injustice done by the court in converting a partisan expert into a neutral one, when, in fact, such a thing is not possible. Despite any aspirational guidelines or court rules, a partisan expert is biased to the side that hired it, and is accepted as such in the context of our adversarial legal system. When the court ordered me to go to Dr. Rosenberg, a biased expert hired by Ms. Hadari, it violated my right to a fair trial because it lessened my right to be heard in a balanced and equal way.

Due process is, in the words of this Court, the right to "be given a meaningful opportunity to be heard." (*Boddie v. Connecticut*, 401 U.S. 371, 377 (1971)) In this case, if I am forced to go to an expert who represents Ms. Hadari, my right to do so is abridged. My words will be understood and interpreted by an expert witness who was not when he was selected, is not now, and will not be neutral despite any statutory assurances to the contrary. It is a fact that I will not be heard in a manner equal to my opponent because I did not hire Dr. Rosenberg, and that this inequality is significant enough to upset the fairness of the trial.

I have neither the means nor inclination to hire someone to contradict him and testify for me, interpreting Ms. Hadari's words in return. This trial is clearly neither equal nor fair.

I am not seeking to locate within the due process clause any startling new rights. I am merely asking the court to apply reason and precedent to prevent a glaring breach of the fundamental right to fairness that is essentially included within it.

Whatever way the scales are weighed, this violation of due process rises to Constitutional levels. The remedy -- prohibiting forcing one party to be evaluated by a biased expert -- provides the certain benefit of preventing unfairness to litigants, has no added cost to the State (or even litigants for that matter), and ensures fairness remains within reasonable limits (balancing my right to be meaningfully heard, with Ms. Hadari's to call a witness on her behalf).

Even if we simply look at contemporary practice, we see that this is just not how things are done. Normally two partisan experts proffer their findings and the judge rules. At least that is fair. Here not only is there only one partisan expert but even that one has been supported by the court itself on the grounds that he is neutral.

This is my last resort and only remaining legal recourse.

My last attempt to reestablish my Constitutional right to "[a] fair trial in a fair tribunal" as "a basic requirement of due process." (*In re Murchison*, ibid. 136) I am fighting for a right that, as was once eloquently put, is "more precious than

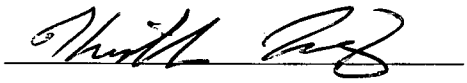
earthly possessions, a right so sacred that it was embodied in the Magna Carta, and of such an imperishable value as to be preserved in our Federal and all of our State constitutions." (*McGarty v. O'Brien*, 96 F. Supp. 704, 707 (1951))

This is why I ask you to grant my petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

X 

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