No. 18-5396

In the Supreme Court of the United States

CALVIN MCMILLAN,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari to the
Alabama Court of Criminal Appeals

BRIEF IN OPPOSITION

STEVE MARSHALL
Alabama Attorney General

James Roy Houts*
Deputy Attorney General
OFFICE OF ALABAMA ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
jhouts@ago.state.al.us
*Counsel of Record

Counsel for Respondent

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QUESTION PRESENTED (REPHRASED)

McMillan concedes that he does not seek certiorari review for any of the compelling reasons outlined in Rule 10 of this Court's rules. (Pet. at 9 (citing *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016).) Rather, McMillan's petition is predicated on his assertion that this case involves the egregious misapplication of settled law by the lower courts. (*Id.*)

The factual underpinnings of the alleged "egregious misapplication" involve his defense team's second-chair counsel having clerked for the trial judge in 2003, four years prior to McMillan's offense, six years prior to his trial, and eleven years prior to the challenged postconviction proceeding. McMillan also alleged judicial bias or prejudice based on his defense's first-chair attorney donating $1000 to the trial judge's reelection campaign in 2006, as well as the second-chair attorney donating $500 in the same election cycle. The trial judge raised $59,000 during that campaign, which was a year prior to McMillan's offense, three years prior to his trial, and eight years prior to the challenged postconviction proceeding. Finally, McMillan alleged bias or prejudice in the trial court's observations concerning trial counsel's performance at trial, which was based on the judge's observations made throughout the course of McMillan's criminal trial.

Thus, the highly fact-bound question presented by McMillan would be more appropriately expressed as:

> Did the state court properly apply the objective recusal standard of *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 881 (2009), as informed by the extrajudicial-source factor discussed by the Court in *Liteky v. United States*, 510 U.S. 540 (1994), (1) where the source of the alleged prejudice or bias arose three years prior to McMillan's criminal trial and the appointment of his trial counsel and eight years prior to the challenged proceeding; (2) where McMillan's trial and subsequent postconviction petition were not reasonably foreseeable at the time of the challenged campaign contributions; and, (3) where the trial court's original characterization of trial counsel's performance was based on personal observations and knowledge gleaned from McMillan's criminal trial?

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STATEMENT OF THE CASE

On August 29, 2007, Calvin McMillan arrived at a Walmart in Millbrook, Alabama, armed with a handgun, with the intention of stealing an automobile from the parking lot. McMillan scouted the parking lot for a long period of time before targeting a Ford truck driven by James Martin. McMillan waited for Martin to return from the store, where Martin had purchased diapers for his infant daughter and a package of Reese's Peanut Butter Cups. When Martin began climbing into his truck, McMillan approached, shot Martin multiple times, pulled his body from the truck, and again shot Martin multiple times as he lay in the parking lot. McMillan then fled to the interstate in Martin's truck.

McMillan was captured the next day. A search of Martin's truck revealed that McMillan had added his signature to a banking document to list himself as a co-borrower for the truck loan. The shorts McMillan was wearing at the time of Martin's murder were also recovered, and they contained the half-eaten package of Reese's Cups purchased by the victim the previous evening.

McMillan attempted to place the blame for Martin's murder on an individual named Melvin Ingram Browning, as McMillan needed to explain the presence of most of his personal effects in the victim's truck. He claimed that Melvin Ingram Browning had given him a ride to move his belongings, but that Browning instead had run off

with McMillan's things. At trial, evidence established that Browning was in jail in Auburn, Alabama, during the days leading up to and following the victim's murder.[1]

McMillan was convicted of the capital murder of James Martin and sentenced to death. His conviction and sentence were affirmed on direct appeal. *See McMillan v. Alabama*, 134 S. Ct. 1760 (2014); *McMillan v. State*, 139 So. 3d 184 (Ala. Crim. App. 2010). The evidence of his guilt was overwhelming.

In 2015, McMillan filed a state-court petition for postconviction relief with the trial court. McMillan sought the recusal of the trial judge on the basis that one of his trial counsel had contributed $1000 to the trial judge's 2006 re-election campaign, while the other had contributed $500. Additionally, McMillan identified the fact that one of his lawyers had previously clerked for the trial judge. Finally, McMillan took issue with the fact that the trial court had characterized McMillan's attorneys in the sentencing order as having provided effective representation, based on the court's observations of the trial proceedings.

Defense counsels' financial contributions to the trial judge's re-election campaign were made prior to McMillan's offense and capital murder trial. Those donations were a small fraction of the $59,000 raised by the judge during that election cycle. Further, the counsel who had served as the trial court's law clerk had done so in 2003, four years prior to the murder, six years prior to McMillan's trial, and eleven

[1] A detailed statement of the facts of McMillan's offense can be found in the Alabama Court of Criminal Appeals' decision affirming his conviction and sentence on direct appeal. *See McMillan v. State*, 139 So. 3d 184, 190-93 (Ala. Crim. App. 2010).

years prior to the filing of his state-court petition for postconviction relief. Because these facts did not warrant recusal, and because the forgoing facts did not constitute "good cause," the trial court remained assigned to McMillan's petition pursuant to Rule 32.6(d) of the Alabama Rules of Criminal Procedure.

McMillan pursued forcing the trial court's recusal through a petition for writ of mandamus in the Alabama Court of Criminal Appeals. That court declined to issue the extraordinary writ. *Ex parte McMillan*, 207 So. 3d 854 (Ala. Crim. App. 2015) (table). Thereafter, McMillan instituted original writ proceedings in the Alabama Supreme Court, which denied the petition in April 2015.

The trial court denied McMillan's petition for postconviction relief. On appeal, McMillan again challenged the court's refusal to recuse. Once more, the Alabama Court of Criminal Appeals found no basis for the trial court to recuse from McMillan's postconviction proceedings. *McMillan v. State*, __ So. 3d __, 2017 WL 3446604 at *22-23 (Ala. Crim. App. 2017). The Alabama Supreme Court found no issue worthy of certiorari review in McMillan's petition for review in that court. *Ex parte McMillan*, No. 1170215 (Ala. Feb. 23, 2018).

REASONS FOR DENYING THE WRIT

McMillan's petition opens by conceding that he does not seek certiorari review for any of the compelling reasons outlined in Rule 10 of this Court's rules. (Pet. at 9 (citing *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016).) Rather, McMillan's fortunes rest upon his bald assertion that this case involves the egregious misapplication of settled law by the lower courts. (*Id.*) Because no misapplication of law occurred below, certiorari review is unwarranted.

McMillan concedes the lower court correctly identified the proper legal standard. (Pet. at 10.) Because of this concession, the crux of his argument rests upon his fallacious interpretation of a single sentence in a thirty-six-page decision; one he characterizes as an egregious misapplication of settled law. That sentence noted that:

> The mere fact that Judge Bush made a comment in his sentencing order on the performance of trial counsel does not mean that Judge Bush is incapable of rendering a fair decision on McMillan's claims of ineffective assistance of counsel in his post-conviction proceeding.

(Pet. App. 32a.) Far from establishing an egregious misapplication of settled law, that sentence warrants the denial of McMillan's petition.

In the sentencing order entered at McMillan's trial, the court made a comment describing his observations of the performance of McMillan's counsel during the trial and sentencing proceedings. Under Alabama law, the sentencing judge is traditionally assigned to consider any petition for postconviction relief unless "good cause" exists to depart from this practice. Ala. R. Crim. P. 32.6(d). This is because "a judge who presided over the trial or other proceeding and observed the conduct of the

attorneys at the trial or other proceeding need not hold a hearing on the effectiveness of those attorneys based upon conduct that he observed." *Ex parte Hill*, 591 So. 2d 462, 463 (Ala. 1991). To ensure that a judge's decision is based on personal knowledge obtainable from presiding over a trial, any decision on an attorney's effectiveness resulting from a court's personal knowledge must contain the reasons for the denial of the claim in a written order. *Ex parte Walker*, 800 So. 2d 135, 135, 138 (Ala. 2000) (quoting *Sheats v. State*, 556 So. 2d 1094, 1095 (Ala. Crim. App. 1989)).[2]

Generally, information coming to a judge through judicial proceedings and observations within the courtroom are not a source of bias or prejudice for purposes of judicial recusal. *See Liteky v. United States*, 510 U.S. 540 (1994). As this Court has observed:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to the completion of the judge's task. "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions." *In re J.P. Linahan, Inc.*, 138 F.2d 650, 654 (2nd Cir. 1943). Also not subject to deprecatory characterization as "bias" or "prejudice" are opinions held by judges as a

[2] This practice was observed by the trial court in this case. The fact that McMillan does not identify any questionable decision by the trial court in its application of these rules, as evidenced by its written order, is indicative of the petition's lack of merit. As this Court has noted, statements in a judicial ruling are appropriate for appeal, not recusal.

> result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.

Liteky, 510 U.S. at 550-51. Although it is not impossible for judicial prejudice or bias to arise from information gleaned during judicial proceedings, it is a highly uncommon basis that will only "sometimes (albeit rarely) suffice." *Id.* at 554.

As such, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Id.* at 555 (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966)). To the extent that a ruling could form the basis for a bias or partiality recusal motion, it would have to "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.* That did not happen, and McMillan's petition does not come close to presenting a certiorari-worthy question on that topic.

Finally, McMillan's effort to cobble together an argument from *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), and *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009), should fail. First, this is not a situation where the judge served personally as an advocate for the State during a previous iteration of the case. To suggest that *Williams* has direct application to this case is absurd. Additionally, the fact that McMillan's lead trial counsel contributed $1000 to the trial judge's reelection campaign *three years* prior to McMillan's capital murder trial and *eight years* prior to the filing of his state petition for postconviction relief does not meet this Court's definition of "an exceptional case." *Caperton*, 556 U.S. at 884. There is simply no way

that McMillan's crime, trial counsels' appointment to defend McMillan, or the state petition for postconviction relief were "reasonably forseeable[] when the campaign contributions were made." *Id*. at 886. Nor does McMillan contend that his trial counsels' actions "had a significant and disproportionate influence *in placing the judge on the case*." *Id*. at 884 (emphasis added).

This is not a case where McMillan's trial counsel possessed "significant and disproportionate influence" or where there was a temporal relationship between his counsel's support of a trial judge and the contested state petition for postconviction relief. Not only did the lower court cite the appropriate legal standard, as McMillan concedes, but it also reviewed the facts under an appropriate reading of *all* of this Court's relevant precedent, including *Liteky*. As such, McMillan's petition does not meet the requirements for this Court's rare granting of certiorari "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

CONCLUSION

For the above-mentioned reasons, this Court should deny the petition.

Respectfully submitted,

STEVE MARSHALL
Alabama Attorney General

/s James R. Houts
James Roy Houts*
Deputy Attorney General
OFFICE OF ALABAMA ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
jhouts@ago.state.al.us
Counsel for State of Alabama

*Counsel of Record

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