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

REPLY TO ALABAMA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PATRICK MULVANEY
Counsel of Record
MICHAEL ADMIRAND
SOUTHERN CENTER FOR HUMAN RIGHTS
83 Poplar St. NW
Atlanta, GA 30303
Phone: (404) 688-1202
Fax: (404) 688-9440
pmulvaney@schr.org

August 23, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

REPLY TO ALABAMA'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Imagine that a judge who presided over a pretrial suppression hearing ended the hearing by finding the defendant guilty of the charged offense. In such a scenario, the defendant would have ample reason to move for judicial recusal with respect to the ensuing bench trial. After all, the judge would have found the defendant guilty before the defendant had a chance to present his defense and before the question of guilt or innocence was before the judge.[1]

That hypothetical is indistinguishable from what occurred below. At the conclusion of McMillan's trial, the circuit judge rendered a judicial finding that resolved McMillan's ineffectiveness claims before they were even presented. When McMillan later was given the opportunity to present those claims, the circuit court should have recused itself to ensure that the claims were heard before a neutral factfinder. Instead, the circuit court simply abided by its prior finding and dismissed the claims without a hearing. Due process forbids that result.

I. The Circuit Court's Prejudgment Deprived the Proceedings of the Appearance of Impartiality and Violated the Due Process Clause.

In response to McMillan's petition, the State attempts to minimize the importance of the judge's finding that McMillan's trial counsel performed effectively, characterizing it as "a comment describing [the circuit judge's]

[1] *Cf. Liteky v. United States*, 510 U.S. 540, 550 (1994) (noting that a factfinder's disposition can be "*wrongful* or *inappropriate* . . . because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant's prior criminal activities that he will vote guilty regardless of the facts)") (emphasis in original).

observations of the performance of McMillan's counsel during the trial and sentencing proceedings." Alabama's Br. at 4. The State's approach mirrors that of the Alabama Court of Criminal Appeals, which rejected McMillan's claim by ignoring the circuit judge's improper finding. *See* Pet. App. 46a (quoting the circuit judge's comments but omitting his finding that McMillan's counsel provided effective representation).

The State's description is misleading. The circuit judge did not merely comment on the performance of trial counsel. He made an explicit finding, couched in the language of *Strickland v. Washington*, 466 U.S. 668 (1984), that trial counsel performed effectively:

> McMillan's attorneys were well prepared, diligent, and performed admirably in their defense of McMillan. Based on the overwhelming evidence against McMillan in this case and the eventual outcome, this Court finds that McMillan's attorneys provided effective assistance throughout these entire proceedings.

Pet. App. 166a. That finding resolved both prongs of the *Strickland* test before McMillan had an opportunity to investigate, much less present, an ineffectiveness claim.

The State nevertheless insists that the finding was properly rendered because judges are permitted to rely on in-court observations in their assessments of attorneys' effectiveness. Alabama's Br. at 4-5. But the problem is not that the circuit judge relied on in-court observations of the attorneys; it is that he resolved the ineffective-assistance claim before that issue was presented to him. Indeed, as this Court has repeatedly recognized, an ineffective-assistance claim "normally

requires a different attorney, [and] it often 'depend[s] on evidence outside the trial record.'" *Trevino v. Thaler*, 569 U.S. 413, 422 (2013) (quoting *Martinez v. Ryan*, 566 U.S. 1, 13 (2012)). *See also Martinez*, 566 U.S. at 13 ("Abbreviated deadlines to expand the record . . . may not allow adequate time for an attorney to investigate the ineffective-assistance claim."); *Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017) ("Because it is difficult to assess a trial attorney's performance until the trial has ended, a trial court ordinarily will not have the opportunity to rule on such a claim.").

The State principally relies upon this Court's decision in *Liteky v. United States*, 510 U.S. 540 (1994), to suggest that judicial recusal is only warranted when there is an extrajudicial source for the judge's bias. Alabama's Br. at 5-6. The *Liteky* Court explicitly rejected that argument, holding that an extrajudicial source "is not a *necessary* condition for 'bias or prejudice' recusal." *Liteky*, 510 U.S. at 554 (emphasis in original). There is nothing in *Liteky* to support the State's contention that it was proper for the circuit court to resolve a legal claim before that claim was presented to it.

Considered objectively, the circuit judge's premature resolution of McMillan's ineffectiveness claim created "an unconstitutional potential for bias" when he presided over McMillan's state postconviction proceedings. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016).

II. Based on the Totality of the Circumstances, a Reasonable Observer Would Question the Circuit Judge's Impartiality.

The State's secondary argument isolates the factors supporting recusal and then distinguishes McMillan's case from *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), and *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009). Alabama's Br. at 6-7.[2] The State's argument misrepresents McMillan's claim and reflects a misunderstanding of this Court's precedents governing judicial recusal.

This Court has made clear that the question is "not whether the judge is actually subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton*, 556 U.S. at 881. To determine whether that potential exists, this Court asks "whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable." *Rippo v. Baker*, 137 S. Ct. 905, 907 (2017).

McMillan did not assert that the campaign contributions alone warranted recusal—as they did in *Caperton*—nor did he argue that the circuit judge previously served as a prosecutor in this case—as occurred in *Williams*. Instead, McMillan alleged that under the totality of the circumstances, there was "such a risk of actual bias or prejudgment" that recusal was required. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). *See* Pet. for Cert. 13-16. In this case, the circuit judge:

[2] By isolating the factors and trivializing their importance, the State repeats the same error the Alabama Court of Criminal Appeals made. *See* Pet. App. 46a-49a. That analysis reflects a misapplication of this Court's precedent and warrants this Court's review. *See Rippo v. Baker*, 137 S. Ct. 905, 907 (2017) (reversing because state court "did not ask the question our precedents required: whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable").

(1) prematurely resolved McMillan's ineffectiveness claims;

(2) accepted campaign contributions from both trial attorneys;

(3) personally mentored one of the trial attorneys;

(4) attempted to control McMillan's ability to litigate judicial recusal; and

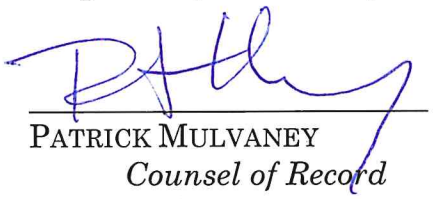
(5) overrode the jury's life verdict and sentenced McMillan to death.

Those circumstances removed "the appearance . . . of impartial justice" from the proceedings. *Williams*, 136 S. Ct. at 1909. Due process therefore required recusal.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse the decision below.

Respectfully submitted,



PATRICK MULVANEY
Counsel of Record
MICHAEL ADMIRAND
SOUTHERN CENTER FOR HUMAN RIGHTS
83 Poplar St. NW
Atlanta, GA 30303
Phone: (404) 688-1202
Fax: (404) 688-9440
pmulvaney@schr.org