NO. _____

In The
Supreme Court of the United States

BOB LEE JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

James P. McLoughlin, Jr.
Pro Bono Counsel of Record
Frank E. Schall
MOORE & VAN ALLEN, PLLC
100 North Tryon Street, Suite 4700
Charlotte, North Carolina 28202
(704) 331-1054
jimmcloughlin@mvalaw.com
frankschall@mvalaw.com

Counsel for Petitioner

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THE LEX GROUP^{DC} ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

QUESTIONS PRESENTED

I. Whether the District Court's demonstration of bias against the defense in violation of the Judge's ethical canons and in front of the jury impeded Mr. Jones' right to a fair trial in violation of Mr. Jones' Due Process rights.

II. Whether the Circuit Court's application of the present sense impression exception to the hearsay rule is too narrow, when other circuit courts permit a longer lapse of time.

III. Whether the defense of involuntary intoxication is an admissible defense to certain federal charges requiring specific intent -- here, specifically a charge of felon in possession of a firearm.

LIST OF PARTIES

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

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears at Appendix (1a) to the petition. It is not reported in the Federal Reporter, but is available at 2018 U.S. App. LEXIS 19828; 2018 WL 3472031 (July 18, 2018). The judgment without written opinion of the United States District Court for the Western District of North Carolina appears at Appendix (10a).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), as Petitioner Bob Lee Jones appeals the final judgment in a criminal case entered by the United States District Court for the Western District of North Carolina and affirmed by the United States Court of Appeals for the Fourth Circuit. The District Court had jurisdiction under 18 U.S.C. § 3231. The District Court imposed a sentence from the bench on July 5, 2017; the written reasons and final judgment were entered July 19, 2017. Notice of appeal was filed July 26, 2017. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The United States Court of Appeals for the Fourth Circuit issued a judgment and written opinion affirming the District Court's judgment and sentence on July 18, 2018.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision involved is the Fifth Amendment to the United States Constitution, which reads as follows:

FIFTH AMENDMENT:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The statutes involved are Federal Rule of Evidence 803(1) and 18 U.S.C. § 922(g), which read as follows:

FEDERAL RULE OF EVIDENCE 803(1):

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) Present Sense Impression: A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

18 U.S.C. § 922(g):

(g) It shall be unlawful for any person –

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien –

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that –

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

INTRODUCTION

The Fifth Amendment ensures that "No person . . . shall be . . . deprived of life, liberty, or property without due process of law." Essential to this promise of due process is the right to a fair trial. Yet, the District Court denied Mr. Jones these rights by inserting its own bias into the proceedings. The District Court allowed its bias to infect the trial with repeated comments attacking Mr. Jones' trial counsel and the merits of his defense. But the District Court did not stop there—it also allowed its bias to affect its decision-making, rejecting a proposed jury instruction on the basis of gender stereotypes, and excluding exculpatory testimony for ambiguous reasons of reliability. The Court of Appeals for the Fourth Circuit effectively ignored the issue in its review, thereby abdicating its supervisory responsibilities.

Mr. Jones respectfully requests this Court exercise its supervisory powers where the court of appeals would not and assure not only Mr. Jones—but all citizens—of the justice system's fairness.

Furthermore, this Court should use this opportunity to provide uniform guidance across all circuits regarding the acceptable passage of time related to the present sense impression hearsay exceptions, and clarify that involuntary intoxication is available as a defense to federal crimes.

STATEMENT OF THE CASE

Events on the Night in Question

On August 2, 2016, Petitioner Bob Lee Jones was indicted for possession of a firearm by a convicted felon (18 U.S.C. § 922(g)(1)) based in part upon these facts. (28a). On June 9, 2016 a short time after 11:00 PM, Mr. Jones arrived at Room Nine,

a nightclub in Asheville, North Carolina located on College Street near the intersection of Spruce Street. (54a, 380a). To enter Room Nine, every person must use the front entrance and be patted down and searched for weapons using a metal detector wand. (298a). When Mr. Jones entered Room Nine that night he was required to pass through this security. (378a, 380a). There is no evidence that a weapon was found on Mr. Jones when he entered Room Nine that night. The manager of Room Nine, Bobby Dyer, testified at trial that he never saw Mr. Jones with a gun while inside Room Nine the night of June 9, 2016. (380a, 394a). Mr. Dyer testified that no one could get a gun into Room Nine unless it was carried in by a police officer. (395a). Also, Mr. Dyer testified at trial that he has known Mr. Jones for approximately one year and he has never known him to carry a gun. (376a).

Mr. Dyer and Julia Vargas, a friend who was with Mr. Jones in Room Nine that evening, testified at trial that while Mr. Jones was at Room Nine the night of June 9, 2016, he did not appear to drink any more than normal. Ms. Vargas testified that she had witnessed Mr. Jones drink alcohol on numerous occasions and was familiar with his responses to drinking. (299a). Both Mr. Dyer and Ms. Vargas testified that Mr. Jones appeared to be significantly and differently impaired that night. Ms. Vargas testified that she arrived at Room Nine that night around 11:00 PM, shortly before Mr. Jones. (301a-302a). When Mr. Jones arrived at Room Nine, Ms. Vargas described his demeanor as "[t]otally normal." (302a). While at Room Nine, Mr. Jones ordered bottle service, which requires a waitress to unlock the purchased bottle before drinks can be poured, controlling the amount of alcohol

individuals are served. (303a, 379a). Five people shared the bottle at Mr. Jones' table that night. (303a). Ms. Vargas testified that she never saw Mr. Jones take any medication, pills, or other drugs that evening. (304a). But, Ms. Vargas stated that approximately 30 minutes before they left, Mr. Jones became "incoherent," "not talkative," and "kind of slumped over in the booth." (304a). Ms. Vargas testified that Mr. Jones' behavior was drastically different than normal, and that it concerned her that evening. (304a, 332a). Mr. Dyer testified at trial that he has had drinks with Mr. Jones and has seen him drink various amounts in the past. (381a). Mr. Dyer testified that Mr. Jones "definitely was not himself" that night and that "[h]e was pretty messed up." (381a-382a).

Ms. Vargas testified that due to Mr. Jones' condition and her concern, she decided to take Mr. Jones home. (305a). Ms. Vargas and Mr. Jones left Room Nine a little before 2:00 AM. (302a). The walk from Room Nine to Ms. Vargas's car took no more than two minutes. (329a). Ms. Vargas testified that she did not see Mr. Jones with a gun throughout the time she was with him from 11:00 PM - 2:00 AM, and that she had never seen him with a gun in the past. (302a-303a). Ms. Vargas testified that Mr. Jones was stumbling while they were walking toward the parking lot and he had to be assisted in order to walk. (306a). When Mr. Jones and Ms. Vargas arrived at her 2005 black Ford Explorer SUV in a parking lot off of Spruce Street, approximately a block from Room Nine, she was attacked by 4-5 women who were in the car parked next to hers. (307a, 322a). Ms. Vargas testified that at some point during the attack she heard at least two gunshots. (308a). Ms. Vargas testified

that when she looked up, she saw Quron White, a/k/a "Q," holding a gun in the air. (308a). Ms. Vargas knew Q from Room Nine. (308a). Once the shots were fired, Ms. Vargas testified that the women who had been attacking her ran off in the direction of Spruce Street, the direction the police would come into the parking lot. (311a-312a). Ms. Vargas testified Q was standing near Mr. Jones. (325a). Ms. Vargas testified that she saw Q toss the gun aside and run after he fired again. (326a). Ms. Vargas then saw the police come into the parking lot from Spruce Street with their guns raised and headed straight for Mr. Jones. (312a). No witness at trial, including the officers, testified that Mr. Jones was the shooter. (174a, 195a, 210a). And, no one at the scene with whom the police spoke said that Mr. Jones had fired a gun. (174a).

Officers Dietiker and Welborn of the Asheville Police Department had been in their patrol car after having assisted breaking up a fight on College Street around 1:50 AM on June 10, 2016. (58a). The officers had returned to their car and been driving a loop ending approximately one block from Room Nine on Spruce Street. (46a). Shortly after turning onto Spruce Street, at approximately 2:07-2:08 AM, (127a), they came up behind stopped cars in the road outside of a parking lot approximately one block north of Room Nine, the same parking lot in which Ms. Vargas's car was located, (47a-48a). Officer Dietiker testified that their car windows were rolled down (48a), but Officer Welborn testified that his window was rolled up on the side of the car from which the sounds of gun shots came. (225a). The officers testified they had heard four or five pops that sounded like gunshots or fireworks (48a) at which time people began "pouring out of [the] parking lot… going in to Spruce

Street, getting into different vehicles, or just running through the street." (48a). The officers activated their lights and camera. Officer Dietiker testified that upon entering the parking lot an unidentified, black female who was leaving the parking lot yelled, "black man, dreads, black shirt." (109a-111a). However, the only "portion" of the statements picked up by the in-car recording system seemed to be "the dreads, the dreads." (73a-74a, 128a).

Officer Dietiker testified that a black male with dreads and a black shirt fitting the general description was standing toward the back of the parking lot and as he, Officer Dietiker, moved toward him the woman said "that's him." (110a). The man was identified by Officer Dietiker at trial as Mr. Jones. (129a-130a).

Officer Dietiker testified that he saw an object in Mr. Jones' hand from 15-20 feet away and *assumed* it was a firearm. (114a). Based on this belief, Officer Dietiker testified that he aimed his gun at Mr. Jones and began yelling commands at Mr. Jones to drop the gun. (116a). Mr. Jones did not respond. (116a). The officers testified they yelled loud, forceful commands repeatedly, approximately 10 times. (183a-185a). According to Officer Dietiker, as he approached Mr. Jones and came within ten to 15 feet of him, Mr. Jones responded to the commands by slowly turning and walking away. (116a). Officer Dietiker testified that Mr. Jones walked past a female in the parking lot, between two cars toward an exterior brick wall of a building, and "just stood there" facing the wall of the building. (116a, 131a-133a, 201a).

Officer Dietiker testified that there were no streetlights in the parking lot area that night and he did not use his flashlight. (178a-179a). Regardless, Officer Dietiker testified that, once Mr. Jones began walking, Officer Dietiker saw part of a firearm, the "upper receiver" or slide of the gun, in Mr. Jones' right hand while looking "between [Mr. Jones'] legs, his gait, while he was walking." (117a). Officer Welborn testified that he saw Mr. Jones with a small, dark-colored gun "as it passe[d] back behind his leg as he[] walk[ed]" from approximately 15-20 feet away. (230a, 231a). Officer Dietiker testified that while Mr. Jones was between the two cars, Officer Dietiker walked up within three to five feet behind Mr. Jones. (118a). Officer Dietiker continued to give commands to drop the gun but Mr. Jones "still stood there and didn't react." (118a). Officer Dietiker testified that he then heard a metal object hit the ground, but did not see Mr. Jones drop anything. (118a). Officer Welborn was also within three to five feet of Mr. Jones at this time, and he also did not see Mr. Jones drop a gun. (236a).

Eventually, Mr. Jones turned around and put his hands in the air, but still did not respond to demands from the officer to get on the ground. (119a). Officer Dietiker testified that Mr. Jones "just looked at me. He didn't make any kind of face or anything. He just stared at me." (119a). Officer Dietiker testified that Mr. Jones had blank eyes, and wasn't speaking or responding in any meaningful way. (186a). The officers eventually used force to arrest Mr. Jones. (119a). Officer Dietiker testified at trial, "I shoved him back with my left arm, pushed him back into a car. He just kind of looked at me again." (119a).

A firearm was recovered behind the front left tire of one of the SUVs, parked head-in toward the building, approximately four to six feet away from where the officers were located with Mr. Jones. (239a, 254a). The gun recovered at the scene was a black Smith & Wesson .380 semiautomatic pistol, model SW380. (189a, 249a). Spent casings were recovered near the back of the parking lot, and unspent casings were recovered near the front of the parking lot. (121a). However, none of the casings were found near where Mr. Jones had been standing when the officers arrived—despite the fact only twenty seconds passed from the time the officers heard the "pops" to when Mr. Jones allegedly dropped a gun. (174a). Upon arrest, an inventory search of Mr. Jones did not recover any weapons, bullets, or drugs of any kind. (194a).

The gun was submitted to forensics, but no fingerprints were found on the gun. (242a, 368a). There is no evidence from the police that Mr. Jones appeared to wipe the gun the officer thought he saw while Mr. Jones was walking away. A background check on the gun was run and it was not reported as stolen. (193a-194a).

Officer Dietiker testified at trial that he did not notice any odor of alcohol on or about Mr. Jones throughout the entire encounter (136a-137a), but testified that Mr. Jones was unresponsive when they went to remove him from the holding cell, had to rouse him to go before the magistrate, and when Mr. Jones awoke he thought he had already talked with the magistrate. (132a). Officer Welborn testified that he noticed an odor of alcohol on Mr. Jones at the jail, but not a strong odor. (269a-270a). Officer Dietiker testified at trial that "Officer Welborn actually had to yell pretty loudly just to wake him up. He woke up, told me he talked to the magistrate. He

seemed real sluggish. I remember his eyes being real bloodshot. He was kind of off balance." (132a). Officer Welborn testified that he yelled three to five times at Mr. Jones before he woke up. (210a). Officer Dietiker also testified that Mr. Jones speech was "kind of slurred" (132a) and that he believed Mr. Jones was impaired. (139a).

Exclusion of Exculpatory Evidence

During the trial, a voir dire of the Room Nine manager, Mr. Dyer, was conducted in regard to a proffer of statements made to him by Q, who had told Dyer that he, Q, had shot the gun. During the voir dire, Mr. Dyer testified that after Room Nine closed at 2:00AM on June 10, Mr. Dyer was standing by the front door when Q approached him. (336a). Mr. Dyer had known Q for approximately one year at this time, and on the night in question when Q approached Mr. Dyer he seemed normal and sober. (336a-337a). Without being prompted, Q had said that there had been a fight and he had to pull out his pistol and shoot it into the air to break it up. (337a-338a). Mr. Dyer testified that Q had said that after he shot the gun he "handed it off." (338a). Mr. Dyer understood that when Q came to him and made the statement that night it was "within a few minutes of the shooting." (339a).

During this voir dire, the District Court, on its own accord and without an objection from the government, attacked the credibility of Mr. Dyer: "I've got – I just have a question. Have you – did you report any of this to the police, once you learned that your friend was locked up for this charge and you knew that this Q guy had done it?" (346a). Mr. Dyer responded that he did not report anything to the police after he had learned Mr. Jones had been released, but when he was later informed that

Mr. Jones was back in jail he took it upon himself to get in touch with Mr. Jones' trial attorney. (346a-347a). The District Court continued to focus on Mr. Dyer's failure to contact the police:

> THE COURT: But you never talked to the -- never reported any of this to the police --
>
> THE WITNESS: No.
>
> THE COURT: -- so that Q could be questioned, subpoenaed, or whatever, to find out what he may have done?
>
> THE WITNESS: No, I did not.
>
> THE COURT: I'm going to take a recess.

(347a). After the recess, Mr. Jones' trial attorney argued, in part, that the statements made by Q to Mr. Dyer should be admitted as a present sense impression, as a statement against interest, and because it corroborated the testimony of Ms. Vargas, who testified that Q was the one who shot the gun in the parking lot to break up the attack. (347a-348a).

The District Court's reaction was to criticize the witness's failure to report the information to the police as an indictment of the witness's credibility and bias:

> It's very, very strange that it's never been reported by this churchgoing, law-abiding, fellow [Mr. Dyer] as soon as he finds out that his friend and good customer -- real good customer -- is in trouble, that he doesn't go and say I know who did it and it's Q. I mean he waits to tell the defense lawyer that brings nothing up here and no efforts at all to get Q in here or any efforts to have law enforcement find the right guy, and we hear about Q today. Let me hear from the government.

(348a). The government never argued Mr. Dyer's testimony should be excluded because he had not reported events to the police. Similarly, the government did not

comment on Mr. Dyer's churchgoing—and rightly so. The District Court once again addressed its own issues regarding Mr. Dyer's credibility:

> The problem on it with regard to reliability is the way this happened is totally -- it is totally beyond the pale. That what someone who is not involved in criminal conduct would have information that would set an innocent man free who is a friend of his and would withhold that information until the day of trial from the police, from authorities, and make him have to go through this trial. Because if there was somebody else that did it and there was information that somebody else had did it then that would need to be investigated. And if it wasn't investigated after being turned over that would be pretty darn good evidence in this trial to set him free. So I've got to look at, how is that reliable evidence? Just because somebody who is a bar manager, who has not been convicted of anything, who says he goes to church, says somebody came up to him, and then he doesn't report that to anybody in spite of the fact that this man has been under indictment in federal court for a while.

(349a-351a).

Mr. Jones' trial counsel addressed the government's argument regarding unavailability, making clear that he had tried to locate Q. (351a). The District Court ruled that there was insufficient evidence to find that Q was unavailable. (352a-353a). However, after discussion of other matters, the District Court refocused on Mr. Dyer's lack of credibility in making its ruling:

> All right. So I've looked at this. I can't -- with no -- it doesn't fit 804, and I can't find that it is otherwise reliable. If that testimony is true and Q did it, he should have been tracked down and be up here. I just don't know that there's enough reliability here to say that he didn't. It could have very well happened the way I said it. Why he's not here -- well he could have pulled out the gun to get the ladies off of her, if there was a fight out there in the parking lot, and then handed it to your client and then who if he possessed it knowingly, would have been guilty. And if he didn't -- I don't know what the jury might do but that's not, apparently, what happened.
>
> Based on the testimony of the lady that you put up here, Q threw the gun after he was over and done with it. So who knows? I can't allow him to testify about that. I'll allow the Biltmore Baptist to counteract

> the fact that he is -- even though that may well be more than I'm supposed to do there. He doesn't appear to be an outlaw bar owner or anything like that.

(356a-357a). Mr. Jones' trial attorney again argued that Mr. Dyer's testimony regarding Q's statements was also being offered for non-hearsay purposes for the corroboration of Ms. Vargas's testimony. (358a). In response, the District Court again ruled the testimony generally inadmissible because Mr. Dyer failed to report it to the police:

> I can't find it's reliable in any way based on the fact that he has -- he's not reported it anywhere. If he is what you're going to say that he is, and if this man is his friend -- and he's testified that he is -- to not go to the police and say you've got the wrong guy; this is my friend. This guy told me this at a time when this could be investigated instead of put before a jury. I can't find it's reliable testimony the way it's come before me. Now whether it could ever be reliable testimony if I had enough evidence? I don't know. On the evidence before me today I cannot find that it is -- that it's reliable enough to allow in for corroboration.

(358a).

There was no evidence presented that Mr. Dyer had been questioned by police that night, that he had seen the police (being in the front of the club, not around the block in the parking lot), or Mr. Dyer had ever been contacted by investigators later. Mr. Jones' trial attorney sought clarification regarding why offering Q's statements to Mr. Dyer for corroboration of Ms. Vargas' testimony that Q was the shooter in the parking lot required an analysis of Mr. Dyer's credibility. (358a-359a). The District Court responded with a focus on the fact the testimony was exculpatory, and concluded that had Mr. Dyer made a report to police beforehand, then the testimony would have been entered into evidence:

> -- if somebody can come into the courtroom on the day of trial having not reported it to the police and come up with a story like that, we're going to have a lot of acquittals, and it will be -- there will be a whole new industry out there of coming up with witnesses to say this. I'm not saying that this guy is one of those guys who would, but it will create a situation where this court will be letting that in when there's really nothing to rely or back that up. ***You know, if he had gone to the police and made a report and they have not followed up on it, then you're going to get your testimony***.

(359a) (emphasis added).

Mr. Jones' trial attorney argued that any question as to why Mr. Dyer did not make a report to the police should not go to the admissibility of the evidence but argued to the jury to balance the weight given to the testimony. (360a). The District Court was unmoved. (360a).

After Mr. Dyer was permitted by the court to testify to the jury about other issues, including Mr. Jones' intoxication, the District Court again took it upon itself to note the witness's demeanor and reiterated that he had excluded Mr. Dyer's testimony regarding Q's statements based on Mr. Dyer's conduct and in-court demeanor:

> All right. Let me put one other thing on the record. The Court -- ***I've now heard the witness, and I reiterate the fact that I'm going to exclude the testimony with regard to the out of court statements regarding this person named Q***. I've already done it for excited utterance and also with regard to the -- as a witness who is unavailable.
>
> ***
>
> ***Having heard the voir dire, and having watched the demeanor of the witness and heard all of the possibilities here, such out of court hearsay statements doesn't have the sufficient reliability as much as the witness failed to report this exculpatory statement to the police, despite knowing the defendant had been arrested, noting the close relationship that the defendant has to the witness, in addition to being a good customer***.

(J.A. 398a-399a) (emphasis added). When the District Court excluded Mr. Dyer's testimony, it based its reasoning on the potential for Mr. Jones' acquittal rather than the merits of the argument:

> - - if somebody can come into the courtroom on the day of trial having not reported it to the police and come up with a story like that, we're going to have a lot of acquittals, and it will be - - there will be a whole new industry out there of coming up with witnesses to say this.

(359a).

Involuntary Intoxication Defense

The Defense asserted involuntary intoxication as a defense. (408a). However, during the course of the trial the District Court expressed confusion over the merits of this defense. Out of the presence of the jury during a discussion between the District Court and counsel regarding a potential "spontaneous utterance" by the defendant, the judge quipped "Yeah. Right under the influence of Rohypnol." (164a). The District Court stated that without Mr. Jones affirmatively stating that he must have been involuntarily intoxicated, the government would not have to deal with the affirmative defense. (282a). The District Court made no comment indicating an appreciation of the fact that requiring Mr. Jones to testify to make the assertion violates Mr. Jones' Fifth Amendment right to stand silent. *See Blair v. United States*, 250 U.S. 273, 280 (1919). Further, in debating whether Mr. Jones had submitted sufficient evidence to establish a burden of production regarding involuntary intoxication, the District Court's response was a "law and order" sound bite: "Why don't we go ahead and open the jail[s] and turn everybody loose." (414a).

The District Court also questioned why Mr. Jones would have been drugged: "And, you know, it's -- I mean women are not going to slip a guy a -- something like that to take advantage of him because the advantage is lost." (411a). During the charging conference, the court explained: "I don't even know why they would do that." (435a). Mr. Jones' counsel offered an explanation:

> I think when we think about this, at times we think about this with a pretty closed mind that the date rape drug is something that can be used to take advantage of a woman. In a club like this, where you have a man who comes in and pays $200 for a table, it's also something that is used by people to get him so messed up that they can steal his money from him. And that happens fairly frequently.

(435a). The District Court declined to give the jury instruction.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for certiorari for the following reasons:

First, the District Court violated Mr. Jones' Due Process rights when it inserted its own biases into the trial through its repeated comments implying that Mr. Jones' defense lacked merit and that a witness offered on Mr. Jones' behalf may have been preparing to perjure herself.

Second, this Court should resolve a conflict among the courts of appeals about whether out-of-court statements made between ten and twenty minutes after observing an event are admissible under the present sense impression exception to the hearsay rule.

Third, the District Court committed reversible error by refusing to instruct the jury on the defense of involuntary intoxication, and this Court should provide guidance as to the applicability and elements of such a defense under federal law.

For the foregoing reasons, the petition for certiorari should be granted.

I. The District Court violated Mr. Jones' Due Process rights by inserting its own biases into the trial, evident by its comments throughout the trial against the defendant's trial attorney, the merits of Mr. Jones' defense, and all defense witnesses.

At this moment in history, the public's faith in the integrity of the justice system and the assurance of due process for all people who are subject to the ultimate power of the state is being tested. Consistent with these concerns, this Court has long recognized that "[a] fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." *In re Murchison*, 349 U.S. 133, 136 (1955). The circumstances of this case, where the District Court repeatedly discounted the testimony of defense witnesses, criticized defense counsel, and praised the valor of police officers, requires this Court's intervention to ensure the public's confidence in the judiciary.

Because "our system of law has always endeavored to prevent even the *probability* of unfairness," *id.*, the conduct of judicial officers is guided by both mandatory and prudential codes of conduct. Under 28 U.S.C. § 455(a), "[a]ny justice, judge, or [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Further, the Code of Conduct for United States Judges serves to meet the goal of fairness by articulating mandatory ethical canons that govern federal judges in and out of the courtroom. Relevant here are Canon 1, Canon 2, and Canon 3—all three of which the District Court violated by comments made to witnesses and counsel.

Canon 1 sets out the standard that "[a] judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved." The commentary provides that because "[d]eference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges," "[t]he integrity and independence of judges depend in turn on their acting without fear or favor." Likewise, Canon 2A provides that "[a] judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." This requires a judge to "avoid all impropriety and appearance of impropriety." (cmt.) Finally, Canon 3A(3) provides that "[a] judge should be patient, dignified, respectful, and courteous to *litigants*, jurors, *witnesses*, *lawyers*, and others with whom the judge deals in an official capacity." This duty is coextensive with the duty in Canon 2, *see* cmt., and "[t]he duty to be respectful includes the responsibility *to avoid comment* . . . that could reasonably interpreted as harassment, prejudice, or *bias*." (cmt.)

Consistent with these standards, this Court has recognized that inappropriate commentary made by a judge during trial can impact a defendant's due process rights. This Court has explained that although "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge," such remarks "*will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994)

(emphasis original).[1] Although "some hostility between attorneys and a trial judge may perhaps be inevitable, negative comments directed by a trial judge to a defendant or her counsel" can impact the fairness of the proceeding. *United States v. Donato*, 99 F.3d 426, 435 (D.C. Cir. 1996) (per curiam). Such unfairness is more likely to arise where the comments are frequent and disproportionate to the length of the trial, *id.*, and where comments are directed at the defendant or the merits of a case, *see United States v. El-Bey*, 873 F.3d 1015, 1022-23 (7th Cir. 2017); *cf. United States v. Carson*, 455 F.3d at 359 (rejecting claim of bias because, among other reasons, the "cited utterances were aimed at defense counsel's conduct and not at the defendants themselves or at the merits of the case.").

The Courts of Appeals have recognized that a new trial is warranted when a judge's repeated comments display such bias that the defendant did not receive a fair trial. For example, in *El-Bey*, the Seventh Circuit concluded that a new trial was warranted where comments made about a *pro se* litigant "indicated bias about [the defendant's] guilt or honesty to the jury" and were "aimed directly at the defendant while he was exercising his constitutional right to defend himself." 873 F.3d at 1020-21. Additionally, in *Donato*, the D.C. Circuit concluded that a new trial was required where the trial judge's "negative comments" were "concentrated, frequent, and critical." 99 F.3d at 435. There, the D.C. Circuit concluded that the "relative brevity" of the trial—two weeks—"ma[de] it more likely that that judge's negative comments

[1] Although *Liteky* is a statutory recusal case, courts apply the same principles where the relief sought is a new trial. *See United States v. Carson*, 455 F.3d 335, 355 n.17 (D.C. Cir. 2006).

colored the entire trial" and "were therefore more likely to affect the jury's ability to deliver a fair judgment." *Id.* Additionally, "the judge frequently berated, interrupted, and otherwise spoke negatively to the defendant's attorney." *Id.* Importantly, the court concluded that no single comment is required to impart bias, and that "the frequency, intensity, and one-sidedness of the court's hostility raise[d] a serious question as to whether the trial court evidenced sufficient bias that the defendant was unable to receive a fair trial." *Id.* at 437. Comments impugning the credibility of the defense's key witness "combined with the near-constant criticism of the defendant's counsel," were sufficient to warrant a new trial. *Id.* at 438.

The District Court's repeated comments attacking counsel, witnesses, and the merits of Mr. Jones' defense demonstrate violations of the ethical judicial canons and a judicial bias affecting Mr. Jones' ability to receive a fair trial. For example, the District Court violated Canon 1 and Canon 3A(3) during discussions of potential impeachment of one of the officers outside the presence of the jury, the judge admonished Petitioner's trial counsel for using the officer's lack of experience on cross examination, showing his bias toward the prosecution and his view of the credibility of the police officers:

> You always act like -- you go through the entire thing like somebody has only had two years, and this man ran toward fire that night. Mr. Lindsay, how many times have you run toward fire?

(160a.)

When the District Court excluded Mr. Dyer's testimony, he based his reasoning on the potential for Petitioner's acquittal rather than the merits of the argument:

> -- if somebody can come into the courtroom on the day of trial having not reported it to the police and come up with a story like that, we're going to have a lot of acquittals, and it will be -- there will be a whole new industry out there of coming up with witnesses to say this.

(359a). Similarly, in debating whether Mr. Jones had submitted sufficient evidence to establish a burden of production regarding involuntary intoxication, the District Court's response was "a law and order" sound bite: "Why don't we go ahead and open the jail[s] and turn everybody loose." (414a). These comments undermine public confidence in the integrity and impartiality of the judiciary. Taken together, the District Court's many comments—which occurred during the course of a two-day trial and in violation of the ethical canons imposed on federal judges—demonstrate a level of judicial bias toward the prosecution that deprived Mr. Jones of his constitutional right to a fair trial.

Importantly, the District Court's expression of its biases was not a mere abstract, technical violation of its ethical duties. Instead, the District Court's biases manifested in comments and decisions that alternatively implanted doubt in the minds of the jurors and withheld key decisions and information from the jury. First, the District Court's conduct did not occur exclusively outside the presence of the jury. Most egregiously, the District Court impugned the credibility of one of Mr. Jones' witnesses in front of the jury. During Ms. Vargas's testimony, at a sidebar with the witness and jury present in the courtroom, the District Court commented on Ms. Vargas's testimony identifying Q's picture by stating "…she's -- they're entitled to this testimony. Hopefully it's not *purge (sic) perjury*." (310a). This comment, made in front of the jury, "was of a sort most likely to remain firmly lodged

in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence." *Quercia v. United States*, 289 U.S. 466, 472 (1933); *see also Donato*, 99 F.3d at 438 ("[J]urors hold the robed trial judge in great awe and reverence and his lightest word or intimation is received with deference, and may prove controlling."). The District Court's comment surely prejudiced Mr. Jones' defense.

The District Court did more than just attack the veracity of Ms. Vargas. The District Court then allowed its biases to foreclose a decision by the jury on whether Mr. Jones was involuntarily intoxicated when the shooting occurred. The District Court repeatedly express skepticism of Mr. Jones' defense. Mr. Jones' trial counsel had forecast that he intended to argue Mr. Jones may have been "roofied" or drugged involuntarily. Out of the presence of the jury during a discussion between the District Court and counsel regarding a potential "spontaneous utterance" by the defendant, the judge quipped, "Yeah. Right under the influence of Rohypnol." (164a).

The District Court's later comments reveal that this skepticism was rooted in gender stereotypes. First, the District Court expressed its disbelief that a man, rather than a woman, could be drugged in his beverage: "And, you know, it's -- I mean women are not going to slip a guy a -- something like that to take advantage of him because the advantage is lost." (411a). The District Court again projected its flawed assumption when it rejected the requested involuntary intoxication

instruction, saying, "I don't even know why they would do that." (435a). Mr. Jones' counsel explained why this gender-based premise was false:

> I think when we think about this, at times we think about this with a pretty closed mind that the date rape drug is something that can be used to take advantage of a woman. In a club like this, where you have a man who comes in and pays $200 for a table, it's also something that is used by people to get him so messed up that they can steal his money from him. And that happens fairly frequently.

(435a). Nonetheless, the District Court refused the instruction. (435a). Relying on outdated stereotypes in rejecting jury instructions allowed the District Court's own biases to so infect that the trial that it removed an issue from the province of the jury.

Finally, the District Court's biases manifested in a decision to exclude the powerful exculpatory testimony of Mr. Dyer, the Room 9 manager, who was prepared to testify that Q admitted to firing the gun consistent with Ms. Vargas's testimony that Q fired the gun and then threw it away. Mr. Jones sought to admit the testimony of Mr. Dyer under an exception to the rule against hearsay as a present sense impression. However, the District Court's exclusion of Mr. Dyer's testimony was entirely outside the bounds of an analysis of hearsay exceptions and the Federal Rules of Evidence. District Court declined to apply the present sense impression exception based on a misguided conclusion that the out-of-court statement was not sufficiently reliable. Instead of addressing the parties' arguments regarding the timing of Q's statement, the District Court conducted its own assessment of the in-court witness's credibility based on Mr. Dyer's conduct

and demeanor. On this basis, the District Court wrongly reasoned that the statement was unreliable and therefore inadmissible:

> All right. So I've looked at this. I can't -- with no -- it doesn't fit 804, and I can't find that it is otherwise reliable. If that testimony is true and Q did it, he should have been tracked down and be up here. I just don't' know that there's enough reliability here to say that he didn't.

(356a-357a). The District Court also improperly considered the time between when Mr. Dyer heard the statement and reported it to the police, rather than the time between the declarant's—Q's—impression of the event and his statement to Mr. Dyer:

> You know, if he had gone to the police and made a report and they have not followed up on it, then you're going to get your testimony.

(359a). The District Court later reaffirmed this basis for excluding the testimony:

> All right. Let me put one other thing on the record. The Court -- I've now heard the witness, and I reiterate the fact that I'm going to exclude the testimony with regard to the out of court statements regarding this person named Q. I've already done it for excited utterance and also with regard to the -- as a witness who is unavailable.
>
> …
>
> Having heard the voir dire, and having watched the demeanor of the witness and heard all of the possibilities here, such out of court hearsay statements doesn't have the sufficient reliability as much as the witness failed to report this exculpatory statement to the police, despite knowing the defendant had been arrested, noting the close relationship that the defendant has to the witness, in addition to being a good customer.

(398a-399a)

Having disparaged Mr. Jones' trial counsel, attacked the credibility of a key witness, and mocked Mr. Jones' defense, the District Court searched for reasons to exclude this powerfully exculpatory testimony. In light of testimony raising an

inference that Q's statement occurred within 10 minutes of the shooting (336a-338a), the District Court did not—and likely could not—find that Q's statement was not a present sense impression. Instead, the District Court arbitrarily concluded that this witness, Mr. Dyer, simply could not be believed; the District Court never gave the jury a chance to decide this question on its own. If the jury had the opportunity to evaluate Mr. Dyer on its own, it could have reached the opposite conclusion.

Mr. Jones should not be made to suffer as a result of the District Court's bias, but the District Court is not alone in its failures. The Fourth Circuit, too, has undermined the integrity of the judicial system by remaining silent in the face of this conduct. Despite a record replete with inappropriate comments and unfounded decisions, the Fourth Circuit abdicated its supervisory responsibility and rubber stamped the District Court's decisions. But the District Court's conduct should not be excused with post-hoc justifications. Its behavior cannot be dismissed by suggesting the conduct did not impact the outcome. The District Court's biases caused it to undermine the credibility of a key witness, remove a defense from decision-making authority of the jury, and exclude exculpatory evidence. At a moment when citizens throughout the United States are concerned that the due process rights of those with the least political power are being trampled upon, this Court should not such conduct. The Fourth Circuit failed to right this wrong. This Court can, and should.

II. The Present Sense Impression Exception to the Hearsay Rule Should Be Clarified to Resolve Disparity in Its Application

The Fourth Circuit's opinion finds that Q's statement to Mr. Dyer was not "substantially contemporaneous" to the event to fall within the hearsay exceptions. According to testimony, these statements were made within minutes of the shooting. Ms. Vargas testified that from the scene of the shooting to the front of Room Nine takes two minutes to walk, and Q had run from the scene. Mr. Dyer testified that he spoke with Q within "minutes" of the shooting. While the courts of appeal nominally agree upon the standard for what constitutes a present sense impression, in application, the results are quite different. This inconsistency leaves courts—like the District Court here—hesitant to engage with and reluctant to apply the exception.

Federal Rule of Evidence 803(1) provides that "[a] statement describing or explaining an event or condition made while or immediately after the declarant perceived it" is not "excluded by the rule against hearsay." This present sense impression exception has been held to require the statement be "made while the declarant was perceiving the event or condition, or immediately thereafter." *United States v. Jackson*, 124 F.3d 607, 618 (4th Cir. 1997) (citing Fed. R. Evid. 803(1)). Importantly, the rule does not turn on the declarant's unavailability, and "[t]he underlying rationale of the present sense impression exception is that substantial contemporaneity of event and statement minimizes unreliability due to defective recollection or conscious fabrication." *United States v. Blakey*, 607 F.2d 779, 785 (7th Cir. 1979).

While "substantial contemporaneity" is commonly cited across circuits, the term itself lacks clear meaning and is applied in varying fashion across the circuits. Specifically, courts vary in how great the temporal difference can be between the time of the event observed and the statement. Courts generally have little issue concluding that a statement constitutes a present sense impression when it is made within five-to-seven minutes of the event. *See, e.g.*, *United States v. Hawkins*, 59 F.3d 723, 730 (8th Cir. 1995) (seven minutes permissible), *vacated on other grounds and remanded by* 516 U.S. 1168 (1996). Likewise, as the statement becomes further removed from the event—40 or more minutes—courts generally agree that such statements are not present sense impressions. *See, e.g.*, *United States v. Mitchell*, 145 F.3d 572, 576–577 (3d Cir. 1998) (at least forty minutes impermissible).

However, when a statement occurs between ten and twenty-five minutes from the time of the event, courts have diverged in whether the present sense impression exception applies. For example, some courts, like the Sixth Circuit and the D.C. Circuit, have held that a span of 15 minutes is too great to find a present sense impression. *See United States v. Penney*, 576 F.3d 297, 313 (6th Cir. 2009) (ten to fifteen minutes impermissible); *Hilyer v. Howat Concrete Co., Inc.*, 578 F.2d 422, 426 n. 7 (D.C. Cir. 1978) (fifteen to forty-five minutes impermissible). On the other hand, the Seventh Circuit has concluded that a statement made approximately twenty-three minutes later can constitute a present sense impression. *See United States v. Blakey*, 607 F.2d 779, 786 (7th Cir. 1979). Such varying interpretations of the same Federal Rule of Evidence causes defendants to be treated differently across

jurisdictions. Under the same set of facts, evidence helpful to the defense may be admissible in one circuit and inadmissible in another. *Compare United States v. Mejia-Velez*, 855 F. Supp. 607, 614 (E.D.N.Y. 1994) (finding sixteen minutes permissible); *Miller v. Crown Amusements, Inc.*, 821 F. Supp. 703 (S.D. Ga. 1993) (finding ten minutes permissible), *with Penney*, 576 F.3d at 313 (ten to fifteen minutes impermissible).

Here, the excluded testimony of Mr. Dyer falls squarely within this uncertain time period. Although there is limited testimony regarding precisely when Q made his statement, Mr. Dyer testified that, based on the time the conversation took place, he believed Q's statements were made within minutes of the shooting. (338a). Mr. Dyer testified that he spoke with Q shortly after 2:00AM. Because it is clear from the record that the shooting took place at approximately 2:07-2:08 AM, this statement would be sufficiently contemporaneous to be admissible.

At a minimum, common sense would dictate that Mr. Dyer meant by his testimony that he spoke with Q closer to 2:00 AM than 2:30 AM. However, even assuming Mr. Dyer and Q spoke at 2:30, this is approximately 23 minutes from when the officers left their car after hearing the shots at 2:07-2:08 AM. Under the Seventh Circuit's reasoning, this amount of time would be sufficiently contemporaneous to constitute a present sense impression. However, applying the rules of the Sixth and D.C. Circuits, Q's statement would be too far removed from the shooting to fall within the present sense impression exception. The admissibility of such a statement should turn on the rule—not where the conduct

occurred and the prosecution is brought. This divergence in interpretation should be addressed and guidance provided so that defendants are treated uniformly across the circuits.

III. The Court should clarify that involuntary intoxication is available as a defense under federal law.

The Court should clarify the scope and requirements of the involuntary intoxication defense to guide lower courts in their application of the defense. The involuntary intoxication defense is well-recognized under state law, *see United States v. Bindley*, 157 F.3d 1235, 1241 (10th Cir. 1998), and "[t]he practice of relieving a defendant of criminal responsibility, because of involuntary intoxication, extends back to the earliest days of common law," *United States v. F.D.L.*, 836 F.2d 1113, 1116 (8th Cir. 1988). However, "[t]he defense of involuntary intoxication is rarely used and has received scant attention from federal courts." *Faucett v. United States*, 872 F.3d 506, 510 (7th Cir. 2017). As a result, absent guidance from this Court, the contours of the defense and its application to defendants remain undefined.

Few courts of appeals have considered the involuntary intoxication defense. Generally, those courts "that have directly confronted a claim of involuntary intoxication have treated it as an affirmative defense akin to temporary insanity." *Faucett*, 872 F.3d at 520. This means that the defendant is "excused from criminality because intoxication affects the ability to distinguish between right and wrong," *F.D.L.*, 836 at 1116, and that the defendant "lack[s] . . . culpability . . . in causing the intoxication," *Bindley*, 157 F.3d at 1242. Yet even these courts have generally avoided defining and applying the defense.

Rather than explain and apply the defense, courts have generally short-circuited the analysis. For example, in *Bindley*, the Tenth Circuit reviewed the "four types of situations" where state courts have applied the defense. *Bindley*, 157 F.3d at 1242. The court found the defense inapplicable because the defendant had voluntarily ingested an illegal substance—marijuana—that was alleged to have contained the substance causing the intoxication. *Id.* at 1242–43. The Tenth Circuit followed the Eighth Circuit's lead in *F.D.L.*, where the defendants also alleged that foreign substances were included in their marijuana cigarettes. 836 F.2d at 1116–17. And in *Faucett*, the Seventh Circuit avoided determining the scope and application of the involuntary intoxication defense and relied on the district court's holding that the defendant "alleged no facts tending to show that he was intoxicated at the time of his crimes, much less that his mental faculties were so overcome that he was incapacitated." 872 F.3d at 511. In sum, the very limited case law on the involuntary intoxication defense concludes it does not apply where the defendant 1) voluntarily ingested an illegal substance, or 2) did not present evidence of intoxication.

The insufficiency of the case law surrounding the involuntary intoxication defense is evident here. No Fourth Circuit case directly addresses the issue. Indeed, the opacity around the defense is highlighted by the only case within the Fourth Circuit to address whether involuntary intoxication is a defense to a felon in possession charge. There, the court held that involuntary intoxication is not an available defense by relying on a Fourth Circuit decision discussing *voluntary*

intoxication. *See Davis v. United States*, No. 5:11-CR-311-BO-1, 2016 U.S. Dist. LEXIS 118062, at *11-13 (E.D.N.C. Sept. 1, 2016) (citing *United States v. Fuller*, 436 F. App'x 167, 168 (4th Cir. 2011)). It is therefore unsurprising that the Fourth Circuit offered no explanation in rejecting the defense here. After all, Petitioner's circumstances do not map onto the holdings of the Eighth and Tenth Circuits. There is no evidence that Mr. Jones voluntarily consumed any illegal substance. And Mr. Jones put forward sufficient evidence at trial to raise a presumption that he had involuntary ingested a substance. Evidence at trial established that Mr. Jones was acting normal when he arrived at Room Nine shortly after 11:00. (302a). However, even though Mr. Jones only shared one bottle of liquor with five other individuals, he was acting incoherent and slumped over in a booth shortly before 2:00 AM. (304a-305a, 379a). The waitress was the only person who could access the bottle and controlled service of drinks. (303a, 379a). Two witnesses testified that Mr. Jones had not consumed any more alcohol than usual for him, but that he seemed disproportionally disoriented. (304a, 381a-382a). Ms. Vargas testified that she did not see Mr. Jones take any pills, medication, or drugs while at Room Nine. (304a). Mr. Jones had to be assisted to leave Room Nine and was stumbling on the walk to Ms. Vargas's car. (306a).

Officers Dietiker and Welborn testified that although they did not identify a strong odor of alcohol, Mr. Jones was disoriented, had a blank stare, and didn't seem to understand what was taking place in the parking lot or respond in any meaningful way. (116a-119a, 132a, 136a-137a, 182a-184a, 186a, 269a-270a). Additionally, at the

jail Mr. Jones had to be roused before being brought before the magistrate, and upon awaking thought he had already talked with the magistrate. (132a, 210a). Such evidence raises a prima facie showing of involuntary intoxication.

Indeed, the District Court did not grapple with the evidence or the nature of the defense itself. Rather, in debating whether Mr. Jones had submitted sufficient evidence to establish a burden of production regarding involuntary intoxication, the District Court seemed to focus on the potential usage of a successful defense, rhetorically asking: "Why don't we go ahead and open the jail and turn everybody loose." (414a). Absent further guidance from this Court, valid defenses will continue to be discounted by courts.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

This 16th day of October 2018.

Respectfully submitted,

/s/ James P. McLoughlin, Jr.
James P. McLoughlin, Jr.
Pro Bono Counsel of Record
Frank E. Schall
MOORE & VAN ALLEN, PLLC
100 N. Tryon Street, Suite 4700
Charlotte, NC 28202-4003
(704) 331-1000
jimmcloughlin@mvalaw.com
frankschall@mvalaw.com

Attorneys for Bob Lee Jones