No.

IN THE

SUPREME COURT OF THE UNITED STATES

GARY BEASON -- PETITIONER

VS.

STATE OF INDIANA-- RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE INDIANA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Gary Beason, #955486

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QUESTION PRESENTED

I. Beason's trial judge made an election campaign promise to put more child molesters in jail before presiding over Beason's trial on child molestation charges. The judge based his subsequent election campaign on keeping that promise. Was Beason denied basic Due Process when a biased judge presided over his trial. If so, can the states permit the denial of this fundamental right by precluding the issue from review on collateral attack?

II. Beason's appellate counsel presented a claim of ineffective assistance of trial counsel on direct review. But, trial counsel did not address significant and obvious issues of trial counsel's ineffectiveness. Was appellate counsel ineffective in this regard?

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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TABLE OF AUTHORITIES CITED

OPINIONS BELOW

The opinion of the Indiana Supreme Court appears at Appendix A to the petition and is unpublished.

The opinion of the Indiana court of Appeals appears at Appendix B to the petition and is unpublished.

The opinion of the Madison Circuit Court appears at Appendix C to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided my case was October 15, 2018. A copy of that decision appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . 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."

STATEMENT OF THE CASE

On July 7, 1995, the State charged Beason with ten counts of Child Molest as Class B felonies and one count of Child Molest as a Class C felony. At the initial hearing, counsel was appointed for Beason. Beason, without counsel being present, requested a speedy trial, and trial was set for August 10, 1995. On July 26, 1995, counsel requested a continuance which was granted and the jury trial was reset for August 15, 1995. The trial concluded on August 22, 1995, and Beason was convicted as charged. Sentence on each count were entered and ordered to be served consecutively for an aggregate 208-year sentence

Beason appealed. On February 27, 1997, the Indiana Court of Appeals affirmed the conviction. Beason subsequently filed a petition for post-conviction relief. Following a bifurcated evidentiary process, the petition was denied. Beason appealed. The Court of Appeals affirmed and the Indiana Supreme Court summarily denied Beason's subsequent request for transfer.

REASONS FOR GRANTING THE PETITION

I. JUDICIAL BIAS

This Court has declared that "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal...." *Marshall v. Jerrico Inc.*, 100 S.Ct. 1610, 1613 (1980). "The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of one erroneous or distorted conception of the facts or the law. *Id.*, citing *Matthews v. Eldridge*, 424 U.S. 319, 344 (1976). Beason was denied this fundamental right.

Prior to Beason's trial, Judge Spencer based his judicial election campaign by promising his constituency that he would put more child molesters in jail. He based a subsequent election

campaign on having kept his original promise to put more child molesters in jail (PC. Ex. Vol., V. pp. 59-60). *See*, *In re Spencer*, 159 N.E.2d 1064 (Ind. 2001).

Judge Spencer has a documented and verifiable bias in child molestation cases. In two similar cases, the Indiana Supreme Court found Judge Spencer's comments and rulings demonstrated a lack of impartiality. *Abernathy v. State*, 524 N.E.2d 12 (Ind. 1988); *Everling v. State*, 929 N.E.2d 1281 (Ind. 2010). These cases demonstrate a long-lasting pattern that begins prior to Beason's trial and continues well after Beason's trial. Judge Spencer's conduct and comments during this case evince a strong bias against Beason. For instance, Judge Spencer made the following caustic, sarcastic comment toward Beason:

1. When defense complained about not granting discovery including taped statements until trial, the trial judge replied: "Read my lips. I'm George Bush. She gave it to your lawyer a week ago" [while] trial counsel was on vacation. (PC Ex. Vol. I, p. 153).
2. "Now if you want witnesses fine, but I am not granting you a continuance just because you won't do what we have been trying to get you to do since Monday." (i.e., waiving his speedy trial right without counsel present). (PC Ex. Vol. II., pp.141-142).
3. When explaining the need for subpoenas, Judge Spencer sarcastically addressed directly to Beason "Do you know what a name is, Mr. Beason?" (PC Ex. Vol. II, p. 142).
4. When there was an issue about serving subpoenas on defense witnesses Richard Hillenburg and Tammy Hankins, the trial judge had already refused to serve them at Indiana Beer and Wine (PC Ex. Vol. II, p. 240) and then chastised the defense

for not preparing subpoenas to serve them (PC Ex. Vol. III, p. 241), In response, trial counsel said, "You told us that you would not serve them on Indiana Beer and Wine. The trial judge retorted, "So What? You never prepared them gentlemen." (PC Ex. Vol. III, p. 241).

Aside from his comments, Judge Spencer demonstrated a lack of partiality in other ways: bringing Beason to court without counsel the day before trial, with the prosecutor present, and requesting that Beason waive his speedy trial request; denial of trial counsel' s request for a continuance on the morning of trial when it was known that trial counsel had just returned from a two-week vacation and that trial counsel admitted that he was unprepared and had just received discovery; refusing to allow defense counsel to depose or recall the girls as witnesses when he did not have the opportunity to view the pretrial statements; allowing instances of uncharged conduct to come before the jury; and the exorbitant sentence of 208 years.

As noted in the preceding paragraph, Judge Spencer denied Beason counsel at a critical phase of the proceedings. Without counsel, Beason was faced with both intricacies of law and the advocacy of the State's attorney.[1] Judge Spencer tried to force Beason to make a legal decision without the assistance of attorney and subsequently penalized Beason for refusing to do anything without his attorney present.

When Beason was brought before the court, Beason had not seen Dixon, did not know if Dixon was prepared for trial, and did not know the legal effect of a waiver of a speedy trial request. Also, the prosecutor at that hearing improperly asked Beason personally about his failure to provide discovery, including defense witnesses, even though he knew Beason already had an attorney. Faced with such bully-tactics, Beason's hesitancy to decide one way or the other

[1] This complete denial of counsel at a critical stage should also cause this court to reverse. *See, United States v. Cronic*, 466 U.S. 648 (1984) (prejudice presumed if governmental interference with the right to counsel makes it virtually impossible for counsel to act as an advocate).

without counsel being present was not unreasonable. Moreover, once represented, strategic decisions, such as whether or not to waive a speedy trial right for preparation, is within counsel's discretion, not the client's. Beason lacked the appropriate legal knowledge to make an uninformed choice without the assistance of counsel and was forced to go to trial with an attorney who was unprepared as a result. After consulting with counsel, Beason waived his speedy trial right and counsel requested a continuance, which was arbitrarily denied. The Judge made it clear that the continuance was denied simply because Beason had not waived his speedy trial right without consultation with his attorney. Thus, Judge Spencer impermissibly forced Beason to choose between his right to a speedy trial and his right to effective counsel in violation of this Court's precedents.

At Beason's sentencing, the judge further demonstrated bias against Beason when he lamented about giving a Burglar 224 years that subsequently reduced to 58 years because the sentence was disproportionate. The judge went on to note that proportionality did not apply to Beason when he said, "I am unaware of any standards for a person like this. So it appears that we are going to find out." (Ex. E).

Judge Spencer has made similar comments in other cases as well. For instance, in *State v. Gregory*, Cause Number 48C01-9803-CF-049, Judge Spencer mentioned giving a child molester 250 years only to have the Supreme Court cut it down to 92. (Ex. D).

The Indiana Court of Appeals did not address the judicial bias issue, finding that the issue was waived and not cognizable on collateral attack. This Court should grant certiorari to discuss whether a structural error, such as the lack of an impartial judge, can be properly mooted by state judicial doctrines.

Beason suggests that this Court should unequivocally inform that states that they cannot hide behind judicial doctrine to ignore structural errors. Such a ruling comports with the existing precedent, which Indiana so commonly ignores. For example, in *Harrison v. Anderson*, 300 F. Supp.2d 690 (S.D. Ind. 2004), the District Court provided a thoughtful analysis of existing precedent set by this Court, finding that Indiana's reliance upon "abuse of discretion" and "prejudice to the defendant" standards contravene this Court precedents, entitling the petitioner to *habeas corpus* relief. *Id.* at 702-703, *quoting United States v. Harbin*, 250 F.2d 532, 543 (7th Cr. 2001) ("Harmless error does not apply to claims of judicial bias, ever.").

The basis for this conclusion is that it is a structural error. "Structural errors have been found in a 'very limited class of cases.' *Johnson v. United States*, 520 U.S. 461, 468-469, 137 L. Ed 2d 718, 117 S.Ct. 1544 (1997) (citing precedent finding structural errors for: (1) a total deprivation of the right to counsel; (2) lack of an impartial trial judge; (3) unlawful exclusion of grand jurors on the basis of race; (4) denial of the right to self-representation at trial; (5) denial of the right to a public trial; and (6) an erroneous reasonable doubt instruction to the jury)." *Harrison*, 300 F. Supp.2d at 699. Thus, creating the explicit precedent Beason requests is automatically narrowed by the very definition of structural error and does not implicate *stare decisis* concerns. The limited circumstances of this case also reflect the importance of the right to an impartial judge. Other claims may not implicate the same fundamentals of the adversary system.

This court has noted that "[t]he errors impacting structural rights require automatic reversal because they impact the very foundation of a fair trial. The rule of automatic reversal is thus essentially a categorical application of the harmless error analysis." *Id.* The *Harrison* court also specifically noted that "[a] biased tribunal *always* deprives the accused of a substantial

right." *Harrison,* 300 F. Supp.2d at 699, citing *Bracy v. Gramley*, 520 U.S. 899 (1997), *Gomez v. United States*, 490 U.S. 858, 876 (1989), *Cartalino v. Washington*, 122 F.3d 8 (7th Cir. 1997).

In *McCoy v. Louisiana*, No. 16-8255, this Court acted in accordance with such precedents when it held that the Sixth Amendment guarantees a defendant the right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. Notably, the United States Supreme Court deviated from the standard ineffective assistance of counsel analysis under *Strickland* and its progeny and held that conceding guilt when the Defendant wanted to maintain his innocence was a structural error and the Defendant need not show prejudice on this issue.

This Court should address the structural error issue in the same way here. Otherwise, the Sixth Amendment is a sham, and states could effectively bar all constitutional claims through judicial doctrines. With the constricting of federal *habeas corpus* rights, states would be free to throw out the United States Constitution with the bathwater with virtual no oversight.

Indiana has already exhausted all freestanding claims on collateral attack, including structural errors. Indiana post-conviction practices is now limited to claims of ineffective counsel and newly discovered evidence. This, even though it is clear that Beason did not have an impartial judge presiding over his trial, Indiana courts refu3sed to address this issue. If Beason can be denied a bedrock principle entitled to all citizens – a right that this Court has already recognized impacts the very foundation of a fair trial – criminal trials are perfunctory and the American way of life implodes.

II. INEFFECTIVE APPELLATE COUNSEL

If the attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims. *See Coleman v. Thompson*, 501 U. S. 722, 754 (1991); *Evitts v. Lucey*, 469 U. S. 387, 396 (1985); *Douglas v. California*, 372 U. S. 353, 357–358 (1963). Beason maintains that appellate counsel was ineffective for raising a claim of ineffective assistance of trial counsel on direct appeal and then raising it incompletely. Appellate counsel did not avail himself of state court procedures to supplement the record and failed to raise record errors supporting his claim, which were significant and obvious.

Beason claims that appellate counsel should have included trial counsel's being unprepared for trial. Trial counsel confirmed this fact multiple times during the course of the trial. He had not contacted any of Beason's witnesses prior to trial and never talked to Beason prior to the sentencing hearing about character witnesses or about anything else. Beason had requested a speedy trial, but Dixon took a personal vacation, was unavailable in the days leading up to trial, and did not return from vacation until the night prior to trial. The State indicated that it had not provided its discovery to trial counsel until a week before the trial (while trial counsel was out of town on vacation).

Trial counsel had requested a continuance prior to leaving on vacation, but neglected to get Beason's signature on the motion. On the morning of trial, (Dixon had returned the night before), Dixon requested a withdrawal of Beason's speedy trial request and a continuance of the jury trial. The trial court refused to continue the trial.

Trial counsel's unpreparedness manifest in several ways to prejudice the defense. The State's discovery was tendered while Dixon was on vacation but did not personally received it and review it until the morning of trial. The two girls were the first witnesses to testify and the defense did not review videotapes of their prior statements until after they had testified. The statements included a statement by one of the girls that she was there for the interview because of what Beason had done to her sister – the implication being that nothing was done to her. That same witness testified at trial that she had never spoken about the molestations with her family, contrary to mentioning things that had happened to her sister. Not having seen the statement and not having taken pre-trial depositions. Dixon was unable to impeach the witness over her previous statement during cross-examination. Dixon's failure to impeach the witnesses also led to him not being able to admit as evidence the videotapes for prior inconsistent statements. Dixon's unpreparedness also caused him not to investigate prior allegations made by the girls that they had been molested by two other persons connected with their mother.

This information would have been relevant to the medical expert testimony presented at trial that both girls had hymeneal injury. This 1995 medical report was also contradicted by a Hamilton County medical examination performed on the girls in 1992, which was inconclusive. Dixon , due to his unpreparedness was unable to rebut the medical report, leaving the jury with the conclusion that only Beason could have caused the injuries. Also, Beason's name had not been mentioned by the girls when the other possible perpetrators were investigated by Hamilton County. This is yet another matter not investigated by counsel or presented at trial.

Aside from failing to object to improper prosecutor closing statements, which appellate counsel did bring up on appeal, trial counsel failed to object to the State's evidence of uncharged crimes committed by Beason. After testifying concerning a specific alleged incident with Beason, J.G. was asked by the deputy prosecutor if that was the only time something like that happened on Hendricks street and J.G. answered, "No," then she stated she did not remember how many times it happened. (PC Ex. Vol. I, p. 223). She was further asked by the State if it happened more times than she could count. (PC Ex. Vol. I, p. 223). She was asked if he had put his penis inside her vagina more than ten times to which she said, Yes. (PC Ex. Vol. II, p. 99). This evidence was prejudicial as it left the strong impression with the jury that Beason was somehow being given a break by only being charged with ten molestations.

Trial counsel also failed to object to a jury instruction which read, "A conviction my be sustained by the uncorroborated testimony of a single witness." (PC Ex. Vol. IV, p. 180). This instruction was struck down because it (1) unfairly highlighted the alleged victim's testimony, (2) presented an appellate standard of review that is irrelevant to a jury's function as fact-finder, and (3) possibly confused the jury by using the technical term "uncorroborated." *See Ludy v. State*, 784 N.E.2d 459, 461 (Ind. 2003).

With all the unpreparedness of trial counsel shown in the trial record, it is remarkable that appellate counsel chose the rather insignificant point of failing to object to statements made by the State's attorney in closing arguments as constituting ineffective assistance. Appellate counsel was ineffective for raising this issue on direct appeal, and Beason was prejudiced by counsel was foreclosing any collateral attack on counsel's performance. He did so without properly communicating with Beason, exploring whether or not further

the victim's testimony appears to be given special status. The jurors were essentially instructed that the girls' testimony should be given extra credit and that they should ignore inconsistencies, accept without question the girls' testimony, and ignore evidence that conflicted with the girls' version of events. Further, appellate counsel failed to include this issue with his inadequate ineffective assistance argument.

Appellate counsel also failed to address on appeal the issue that Beason was brought before the court the day before trial without his counsel being present to determine whether Beason would waive his speedy trial request and whether the trial would be continued. The post-conviction court held that Beason waived this issue since appellate counsel did not present this issue on appeal.

This hearing was a critical stage in the proceedings in that most of the problems of trial counsel's unpreparedness could have been cured had he been present for this hearing. It is noteworthy that when trial counsel was present the next day, Beason waived his speedy trial right so that the case could have been continued had Judge Spencer been so inclined. The trial court made much of Beason's failure to waive his speedy trial without the benefit of counsel during the course of the trial. It is also noteworthy that appellate counsel was unable to provide the post-conviction court with a legal definition of what constituted a critical stage of the proceedings. Appellate counsel's ignorance cannot be considered strategic. Since trial counsel's being forced to trial while being admittedly unprepared greatly affected Beason's right to a fair trial, it was ineffective assistance of appellate counsel to not raise this issue on appeal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Gary Beason

Date: 1-04-19