No. 19-6068

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

Michael S. Sites - PETITIONER

vs.

State of West Virginia - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

West Virginia Supreme Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR A WRIT OF CERTIORARI

Michael S. Sites
Mt. Olive Correctional Complex and Jail
One Mountainside Way
Mt. Olive, WV 25185

FILED
SEP 09 2019
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION(S) PRESENTED

1. Did the West Virginia Supreme Court violate the Petitioner's Constitutional Rights to be Present at ALL Critical proceedings, including the answering of jury questions during deliberations, when the Petitioner and his Counsel were not present for most of the seven (7) questions answered, and by using the harmless-error analysis in such a critical stage?

2. Did the Circuit Court Judge violate the Petitioner's Constitutional Right to be Present at ALL Critical proceedings when he answered the jury's seven questions without the Petitioner or his Counsel being present at all times?

3. Is it a Constitutional critical stage for the Petitioner and Petitioner's Counsel to be present when the Court answers jury questions during deliberations?

LIST OF PARTIES

☒ 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 judgement is the subject of this petition is as follows:

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES **PAGE NUMBER**

STATUTES

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

☐ For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix ___ to the petition and is

☐ reported at [**enter site code here**]; or,
☐ has been designated for publication but not yet reported; or
☐ is unpublished.

The opinion of the United States district court appears at Appendix ___ to the petition and is

☐ reported at [**enter site code here**]; or,
☐ has been designated for publication but not yet reported; or
☐ is unpublished.

☒ For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix **A** to the petition is

☐ reported at [**enter site code here**]; or,
☒ has been designated for publication but not yet reported; or,
☐ is unpublished.

The opinion of the [**enter any other tier court here**] court appears at Appendix ___ to the petition and is

☐ reported at [**enter site code here**]; or,
☐ has been designated for publication but not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was [**enter date here.**]

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for a rehearing was denied by the United States Court of Appeals on the following date: [**enter date here**], and a copy of the Order denying rehearing appears at Appendix ____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including [**enter date here**] on [**enter date here**] in Application No. [**enter application no. here.**]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

☒ For cases from **state courts:**

The date on which the highest state court decided my case was **February 7, 2019**. A copy of that decision appears at Appendix **A**.

☒ A timely petition for rehearing was thereafter denied on the following date: **April 12, 2019**, and a copy of the Order denying rehearing appears at Appendix **B**.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including **September 9, 2019** on **July 17, 2019**. in Application No. **19A71**.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT 8

Bail-Punishment.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT 14

Section 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

West Virginia Constitution, Article III

STATEMENT OF THE CASE

The Petitioner has a second grade comprehensive and reading education level and thereby had to heavily depend on Counsel. He did not and could not understand anything that was transpiring in any of his proceedings.

In January 2015, Petitioner Michael Sites was arrested by warrant on multiple felony offenses. The criminal charges arise from two (2) separate incidents on September 12, 2013 and September 16, 2013.

On September 12, 2013, the Petitioner picked up his prescriptions for Xanax and Percocet at a pharmacy in Winchester, Virginia. In the parking lot of that pharmacy, he shared those pills with his daughter "Jordan" and the victim in the instant case "Lexi". Later that night, Lexi came to the Petitioner's home. Over the next few days, Lexi confided in her friends that she felt sick and Jordan observed that Lexi did not seem able to leave Petitioner's home. Lexi, however, went on a motorcycle ride a few days later to Apex Farms and then returned to the Petitioner's home.

On September 16, 2013, the Petitioner's daughter "Jordan" was at the Petitioner's home doing laundry when she found Lexi dead in the Petitioner's bed.

Petitioner was not arrested until January 2015. Subsequently, in March 2015, Petitioner was indicted under one (1) indictment for both incidents for Count one (1) Murder; Count two (2) Holding Hostage of a Person; Count three (3) Possession of a Controlled Substance with Intent to Deliver Alprazolam (Xanax); Count four (4) Possession of a Controlled Substance with Intent to Deliver Alprazolam (Xanax); Count five (5) Possession of a Controlled Substance with Intent to Deliver Alprazolam (Xanax).

The Petitioner was denied severing the indictment charges due to they were two (2) different incidents. After multiple hearings, trial began on February 17, 2016. On February 18, 2016, the State moved to dismiss Count Four (4) of the indictment which was dismissed. On February 19, 2016, the jury retired to deliberate.

During deliberations, the jury sent a note to the court at about 1320 hours. The jury asked "[w]hat is the difference in Count 3 and Count 4?"[1] The record reflects that the ONLY persons present was the Petitioner (Defendant) and the Prosecutor. The Petitioner's trial Counsel was NOT present. A written response was sent back to the jury without the input of the Petitioner or the Petitioner's Counsel. Again, the Petitioner, with a second grade comprehensive understanding level did not at all understand what was transpiring and thereby the record reflects that the Petitioner (Defendant) said, "[o]kay. I didn't understand what it was." He did not understand any of the proceedings.

At about 1324 hours, the jury sent a second question to the court. Once again, a conference occurred at the bench on the record in the presence of the Petitioner and the Prosecutor but without the Petitioner's Counsel. The jury asked "[a]re we allowed to have access to the account listing that Mr. Ours[2] showed on the overhead projector?" Again, a written response was returned to the jury without the input of the Petitioner, although present but did not understand and did not give any input, or Petitioner's

---

[1] The original Count IV of the indictment, delivery of Oxycodone, was dismissed because it was the underlying offense for the felony-murder charge. In an effort not to confuse the jury during deliberation, the original Count V (delivery of Xanax) was renamed Count IV.

[2] Mr. John Ours was the Petitioner's Trial Counsel.

Counsel, which was not present.

At 1356 hours, the jury asked the third question "[w]as she detained on a certain date on Count II?" At 1440 hours, the jury asked the fourth question "[d]oes this pertain to Lexi?" At 1525 hours, the jury asked the fifth question "[w]e realize we cannot have the phone but can we have the print out of the text messages Exhibit # 8?" At 1635 hours, the jury asked the sixth question "[l]egal definition of detain?" At 1749 hours, the jury asked the seventh question "[l]egal definition of Beyond a Reasonable Doubt?"

The court did not go on the record for any of the last five (5) questions (3-7). The last five (5) jury questions were answered by the court when the Petitioner was not present and more importantly, Petitioner's Counsel was not present for each question with the exception for question # six (6). This means that the Petitioner nor the Petitioner's Counsel were present to give input to answer the jury questions but rather was answered by the Judge and the Prosecutor ONLY. Thereby, there was no adversarial process and the proceedings was one-sided. Petitioner's Counsel would have given input on some of the questions and most definitely objected to how some were answered.

At 1830, the jury finally reached a verdict. The court read the verdict in open court and the Petitioner was convicted of all counts. Subsequently, the Petitioner was sentenced to Life with mercy for Count 1 (Murder); three (3) to ten (10) years for Count 2 (Holding Hostage a Person); and one (1) to three (3) years on each of the two (2) remaining Counts (Possession of a Controlled Dangerous Substance with the Intent to Deliver. All sentences were ran consecutively for an aggregate sentence of twenty (20) years to life.

A Direct Appeal followed which the West Virginia Supreme Court remanded the case back to the lower Court "[s]o that the parties could further develop and supplemental the appendix record. That was ordered by the Supreme Court on January the 25th, 2017."[3] The hearing was "[f]or the limited purpose of establishing the record on issues related to the assignment of error of whether the Petitioner's rights were violated when the Circuit Court answered a serious of questions for the jury outside the presence of Petitioner or his counsel."[4] Strangely, the West Virginia Supreme Court of Appeals found it important to remand the case back to the lower court to hold a hearing on the questions, however, later found they were not prejudicial.

After the hearing was held on May 22, 2017, the stayed appeal was reviewed with the additional information. The State, in their response, gave options why Petitioner should not receive justice in the form of a new trial by stating Petitioner either waived being present or it was harmless for him not being present. The record showed the Petitioner did not waive being present and certainly the Counsel could not and did not waive being present. The West Virginia Supreme Court determined that it was error for the Petitioner nor Counsel to be present at the answering of the questions, but that the Petitioner was not prejudiced by the judge and Prosecutor answering the questions.

The fact that the Petitioner was or was not prejudiced is very subjective. It cannot be determined at such a critical point that the presence of at least Petitioner's Counsel was important to enter into an adversarial process in how the questions should

---

[3] Hearing Transcripts of May 22, 2017. This was quoted verbatim - errors and all.

[4] *Id.*

be answered. Answering the questions properly could have determined the outcome of the trial.

Therefore, Petitioner comes to this Court for a proper determination and the following of the law and the standards already set for years that the Petitioner and Counsel should be present.

REASON FOR GRANTING THE PETITION

There cannot be a doubt that when the jury asks questions, this should be a critical stage in the Petitioner's case, especially when the jury asks questions during deliberations that could affect the Petitioner's trial outcome. When Counsel is not present to give input when the jury asks questions allowing only the Prosecutor and the Judge to answer their questions, surely shows *ex parte* communication that could prejudice the Petitioner. "In a trial by jury, the judge is not a mere moderator, but is a governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. The influence of the trial judge on the jury is necessarily and properly of great weight, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word." *Campbell v. U.S.* No. 2:15-cv-01986 KJM GGH (LEXIS 173539) (2017) quoting *Bollenbach v. United States*, 326 U.S. 607, 612, 66 S. Ct. 402, 90 L.Ed. 350 (1946).

When a jury asks questions, it demonstrates they are deliberating if the Petitioner is guilty or not guilty on a certain issue. Therefore, it is imperative that the Petitioner, and most importantly, the Petitioner's Counsel be present at this critical stage of trial.

Thereby, this Court should GRANT Certiorari on the above questions dealing with the rights of a Petitioner (Defendant), and especially the Petitioner's Counsel, being present during jury questions based on the following reasons:

1. This Court has NEVER determined, or indicated if being present when answering jury questions is a critical stage of trial.

There seems to be some confusion among the States and various Circuit Courts

of Appeal what constitutes a critical stage of trial. Some do not consider the answering of questions from the jury as a critical stage. In *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L.Ed.2d 631 (1987), "a defendant...[has] the right to be present at any stage of the criminal proceedings that is critical to its outcome if his presence would contribute to the fairness of the procedure."

Many Circuits, however, has stated that this Court has never determined whether the answering of jury questions constitute a critical stage of the proceedings. In the Sixth Circuit Court's case *Herring v. Lazaroff* (Case No. 4:16-cv-2626; N. D. OH; 2018) quoting *Simons v. Sheets* (S. D. OH; 2011) "[T]he United States Supreme Court has not determined whether the answering of jury questions constitutes a critical stage of the proceedings at which a criminal defendant is constitutionally entitled to be present."

The Ninth Circuit, however, in *Campbell v. Paramo* (No. 2:15-cv-01986; E. D. CA; 2017) quotes *United States v Cronic*, 466 U.S. 648, 659 n.25, 104 S. Ct. 2039, 80 L.Ed.2d 657 (1985) which held that the Sixth Amendment guarantees assistance of counsel and has "uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." They went on to say, "Although none of these definitional cases mention the determination of jury questions, the Court discussed this issue as early as 1927 when, in *Shields v. United States*, 273 U.S. 583, 587-588, 47 S. Ct. 478, 71 L.Ed.787 (1927) the court pronounced the following: Given this well-developed body of Supreme Court law over time it seems clear that failing to include defense counsel in a decision regarding how the trial court will respond to a potentially

significant jury question is beyond doubt a "critical stage" of the trial process."

They continue: "The Ninth Circuit has also so held in *Musladin v. Lamarque*, 555 F.3d 830, 839 (9th Cir. 2009), the Circuit considered the very question at hand here, after noting that the precise question had not yet been addressed by the Court as it "has not provided a definitive list of Cronic" critical stages."

Only a very few of the Circuit Courts has stated "The Constitution guarantees a criminal defendant the right to be present "at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L.Ed.2d 631 (1987). The Court is not aware of any Supreme Court precedent establishing that responding to jury questions is a critical stage of criminal proceedings at which the defendant has a right to be present."

The Second, Sixth, and Ninth Circuits has indicated that the right to be present includes the right to be present, personally or through counsel, in conferences when jury notes are discussed. They all state, however, the Supreme Court has not done so.

The other Circuits either has not addressed the issue or has stated it is not a critical stage or it can be harmless.

Rule 43(a) of the Federal Rules of Criminal Procedure states: "[t]he defendant must be present at: (1) the initial appearance, the initial arraignment, and the plea; (2) every trial stage, including jury impanelment and the return of the verdict; and (3) sentencing."

Rule 43(a) of the West Virginia Rules of Criminal Procedure states: [T]he defendant shall be present at the arraignment, at the time of the plea, at every stage of

the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule."

West Virginia Code § 62-3-2 states "[A] person indicted for felony shall be personally present during the trial therefor."

Although it appears that West Virginia has established that being present at the answering of jury questions is a critical stage, it has determined that if the Petitioner or Petitioner's Counsel is not present, it can be determined by the harmless-error analysis. In West Virginia, the requirement that the accused be present at any critical stage in the criminal proceeding is subject to the harmless-error test. There are two defenses available when it is claimed that the accused's absence creates reversible error: First, that the absence occurred at a noncritical stage of the criminal proceeding; second, that even if at a critical stage, it was harmless error. If the state is to avoid, by the doctrine of harmless error, the consequence of the rule requiring the presence of the accused at all critical stages of the criminal proceeding, it must take the responsibility of preserving a record of such critical stage, in order that the harmlessness of the defendant's absence can be shown beyond a reasonable doubt. This can be highly prejudicial as to answering any questions as prejudice many times is subjective to the hearer of the answer. In the instant case, there was no preservation of the record. In Fact, no record at all was created on the last five (5) questions answered. The Judge gave his own answers.

Shields v. United States, 273 U.S. 583, 47 S. Ct. 478, 71 L.Ed. 787 (1927) "This Court has held there can be no doubt that an *ex parte* communication with a deliberating jury by a magistrate is improper." What this Court has not seemed to

establish is the critical stage of being present at the answering of jury questions.

Rogers v. United States, 422 U.S. 35, 95 S. Ct. 2091, 45 L.Ed.2d 1 (1975), this Court indicated that a juror's message should have been answered in open court and that the defendant's attorney should have been given an opportunity to be heard before the trial judge responded to the message.

In *State v. Hicks*, 198 W. Va. 656, 482 S.E.2d 641 (1996), they stated "[t]he United States Supreme Court...noted that the communication with the jurors in the absence of the defendant was improper and constituted reversible error." However, since 1996, the West Virginia Supreme Court seemed to have changed and now administers the harmless-error analysis.

In *Martin v. Fanies* (2010, CA8 Minn) 365 Fed Appx 736, cert den (2010, US) 131 S. Ct. 125, 178 L.Ed.2d 76, "[S]tage court did not violate prisoner's clearly established Fourteenth Amendment due process right to be present at every critical stage of criminal proceedings when trial judge answered four jury questions outside of his presence, as no U.S. Supreme Court case held that judge's receipt of and response to nonsubstantive jury questions during deliberation was one of those critical stages; since there was no Supreme Court case directly on point that held that right to be present during discussion of jury questions was one of fundamental rights that defense counsel could not waive, state court's decision was not objectively unreasonable application of clearly established Supreme Court precedent."

Although not explicitly defined, in *Kentucky v. Stincer*, 482 U.S. 730, 96 L.Ed.2d 631, 107 S. Ct. 2658 (1987), it was noted that (1) even in situations where the defendant is not actually confronting witnesses against him or her, the defendant has a

due process right to be present in person whenever his or her presence has a relation, reasonably substantial, to the fullness of his or her opportunity to defend against the charge; (2) although this privilege of presence is not guaranteed when the defendant's presence would be useless, due process requires that the defendant be allowed to be present to the extent that a fair and just hearing would be thwarted by the defendant's absence; and (3) thus, a defendant is guaranteed the right to be present at any stage of a criminal proceeding that is critical to its outcome if the defendant's presence would contribute to the fairness of the procedure.

In using the harmless-error analysis, in *Arizona v. Fulminante*, 499 U.S. 279, 113 L.Ed.2d 302, 111 S. Ct. 1246 (1991), this Court said that in applying harmless-error analysis to such constitutional violations, the court had been faithful to the belief that the harmless-error doctrine (1) was essential to preserve the principle that the central purpose of a criminal trial was to decide the factual question of the defendant's guilt or innocence, and (2) promoted public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. In the instant case, both prongs were violated. The factual question of the defendant's guilt or innocence was violated by the Judge himself answering the questions without defense input and that process certainly did not promote public respect as it was very unfair to the Petitioner. Again, one must remember the weight of a Judge's statement is heavy on the ears of the jury.

When the West Virginia Supreme Court of Appeals used the harmless-error analysis, it did not decide the fairness of the questions involved but decided it all was harmless, which is beyond the truth of the matter.

The Judge and the Prosecutor, in essence, had *ex parte* discussions with the jury outside the presence of the Petitioner and his Counsel. In addition to the *ex parte* communication, the last five (5) questions were off the record. In Reshen v. Spain, 464 U.S. 114, 78 L.Ed.2d 267, 104 S. Ct. 453, reh den 465 U.S. 1055, 79 L.Ed.2d 730, 104 S. Ct. 1336, where it had been alleged that an unrecorded *ex parte* communication between a trial judge and a juror in a state criminal trial violated the defendant's right to be present at trial, the Supreme Court held that the communication-in which the juror had told the judge of her personal acquaintance with a crime that was unrelated to the crimes at issue in the trial and that the juror failed to recall during voir dire-was harmless error. The Supreme Court, although acknowledging that the right to personal presence at all critical stages of a criminal trial was a fundamental right of each criminal defendant, concluded that the communication in question was harmless beyond a reasonable doubt, because (1) the communication was innocuous; (2) the judge and the juror did not discuss any facts in controversy or any law applicable to the case; and (3) the state courts had convincing evidence that the jury's deliberations, as a whole, were not biased by the communication.

In the instant case, the Judge's communication with the jury as a whole had everything to deal with the Petitioner's case.

Thereby, this Court should GRANT Certiorari on the questions above to answer if the Petitioner was being prejudiced by not being present with his Counsel at the answering of jury questions. This Court also should explicitly define the critical stages of trial.

2. Counsel was not present and thereby the answering of the questions was one-sided which was biased.

It is very important that this Court understands that not only the Petitioner, which was available to be present, but also the Petitioner's Counsel was not present at the majority of the questions when answered by the Judge. Petitioner's Counsel stated on the record that he was present for one (1) question from the jury which, he believes, was question number six (6). He would have answered some of the questions in a different manner to protect his client and would have objected to at least one of the questions all together that was answered. Thereby, out of seven (7) questions, Counsel was only present for one (1) of the questions.

The answers, thereby, without the input of the Petitioner's Counsel, was biased against the Petitioner. No matter how one looks at it, Petitioner and his Counsel should have been present to answer any and all questions from the jury. If this is not ceased by this Court, then the questions will become more prejudicial and the Judge will feel as if he may answer them himself. Then, when it is appeal time, many attorneys will not address that issue. This Court MUST GRANT Certiorari, not only to correct an error but to prevent more errors in the future of the justice system.

3. The Appellate Courts varies on what are "critical stages" during trial that the Defendant and Counsel needs to be present.

The District of Columbia Court says "Sixth Amendment requires presence of defense counsel and accused at all critical stages of prosecution, and resolving questions raised by jurors during jury poll after verdict is such stage." *United States v. McCoy*, 139 U.S. App D.C. 60, 429 F.2d 739 (1970, App D.C.).

If being present at the polling of the jury after the verdict is a critical stage, then surely it must be as critical, if not more, for the Petitioner and Petitioner's Counsel to be present at the answering of jury questions. However, this Court, according to District Appellate Courts across the nation, has never indicated if the answering of jury questions is a critical stage for the Petitioner and his Counsel to be present.

The State used *Martin v. Fanies*, 365 Fed Appx 736 (2010, CA8 Minn) cert den, 131 S. Ct. 125, 178 L.Ed.2d 76 (2010) to declare that being present at the answering of jury questions is not a critical stage. "State court did not violate prisoner's clearly established Fourteenth Amendment due process right to be present at every critical stage of criminal proceedings when trial judge answered four jury questions outside of his presence, as no U.S. Supreme Court case held that judge's receipt of and response to nonsubstantive jury questions during deliberation was one of those critical stages; since there was no Supreme Court case directly on point that held that right to be present during discussion of jury questions was one of fundamental rights that defense counsel could not waive, state court's decision was not objectively unreasonable application of clearly established Supreme Court precedent. *Martin v. Fanies* (2010, CA8 Minn) 365 Fed Appx 736, cert den (2010, US) 131 S. Ct. 125, 178 L.Ed.2d 76."[5]

However, in *Campbell v. Paramo*, No. 2:15-cv-01986 KJM GGH (2017 E.D. CA; LEXIS 173539) states "[g]iven this well-developed body of Supreme Court law over time it seems clear that failing to include defense counsel in a decision regarding how the trial court will respond to a potentially significant jury question is beyond doubt a "critical

---

[5] From the U.S. Constitution Annotations found in LEXIS.

stage" of the trial process." The Ninth Circuit Court of Appeals recognizes the answering of jury questions is a critical stage and that everyone should be present.

In the same case, they continued to state "[w]e first consider the significance of communications between the jury and the trial court during jury deliberations. Jury deliberations are the apex of the criminal trial. All the evidence and arguments presented to the jury are processed and weighed at that time. Jurors are particularly susceptible to influence at this point, and any statements from the trial judge - no matter how innocuous - are likely to have some impact."

It cannot be controversy that the Judge's statements lay heavily on a jury and the Petitioner's and Petitioner's Counsel's input would have assisted in the equality of justice. Otherwise, it was a lop-sided answer laying heavily on the conviction side.

Thereby, this Court should GRANT Certiorari.

4. Answering the jury questions were highly prejudicial to the Petitioner, especially when Petitioner or his Counsel were not present.

The jury asked seven (7) questions:

1. What is the difference in Count 3 and Count 4?

Answer: Count 3 is an allegation of possession of Xanax with the intent to deliver to Lexi; and Count 4 is possession of Xanax with the intent to deliver to Danielle Fann.

Note: Since the original Count 4 was dismissed, the jury only saw the new Count 4, which was the old Count 5 according to the hearing transcripts.

2. Are we allowed to have access to the account listing that Mr. Ours showed on the overhead projector?

Answer: No. You have received all you will get.

Note: Although not on the record, this question was highly prejudicial as it was evidence that was presented to the jury.

3. *Was she detained on a certain date on Count II?*

Answer: The ___ day of September 2013.

Note: This came from the indictment.

4. *Does this pertain to Lexi?*

Answer: Yes.

Note: Written by the Judge.

5. *We realize we cannot have the phone but can we have the print out of the text messages Exhibit # 8?*

Answer: Exhibit # 8 was sent to the jury.

Note: One exhibit was sent to the jury and yet another exhibit was not.

6. *Legal definition of detain?*

Answer: To detain as the possession of personality. To arrest, to check, to delay, to hinder, to hold or keep in custody, to retard, to restrain from proceeding, to stay, to stop.[6]

Note: There is no record as to where this definition came from.

7. Legal definition of Beyond a Reasonable Doubt?

---

[6] No one knows where this definition came from. This is what was written on the paper with the jury question. It did not come from Black's Law Dictionary. Input from the defense would have been really good for this question.

Answer: Gave definition.[7]

Note: Although not written down, during testimony in the hearing, it was stated the definition was taken from the Black's Law Dictionary (Pg. 70 of the hearing transcripts). This should have been given during the charge of the jury and given the same definition.

It is obvious from the hearing transcripts that Mr. Ours, Defense Counsel was not asked about how he would have answered the questions. The focus was only who was present when the jury questions were answered. Thereby, the adversarial process was thwarted and the Petitioner highly prejudiced.

In answering the questions, it cannot be disputed that some of the answers could have been and should have been answered differently. The act of answering questions and sending back written answers by the Judge without the input of the Petitioner, especially since he did not understand any of the proceedings, or Petitioner's Counsel must be deemed a critical stage and all parties must be present.

---

[7] This is what was written on the jury question for the hearing transcripts exhibits. No one knows for sure what definition was given. If it is true that the definition from the Black's Law Dictionary was given, it is different than that of the usual jury instructions.

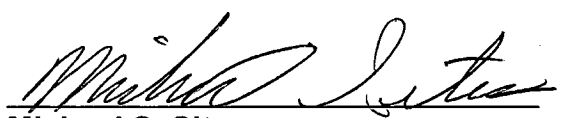
CONCLUSION

The petition for a writ of certiorari should be GRANTED because Defendants across the nation is being prejudiced by a Judge answering questions of the jury alone without the input of the Defendants and their Counsel. The various Circuit Courts of Appeal reviews this 'critical stage' in different ways. Most have recognized that this Court has not indicated and simply noted that it is a critical stage when the jury asks questions. Those Appellate Circuits that do not see it as a critical stage just dismisses any and all questions answered by the Judge, if it is even a claim on an appeal.

If this Court does not see this case as meritious, then it opens up a possibility of corruption throughout the justice system by Judges answering questions on their own, which has been the case over the years in many courts already.

THEREFORE, Petitioner humbly requests this Court to review this case and clarify if the answering of questions is a critical stage in the trial proceedings.

Respectfully submitted,



Michael S. Sites

Date: 9-6-19

VERIFICATION

I, **Michael Sites**, Petitioner, do swear and attest the Facts and Statements contained herein are True and Correct to the Best of my Knowledge and Belief. As to those Statements based upon information of others, of Facts represented by others or founded upon their testimonies, I believe same to be True and Correct and do so represent to this Court the same as True and Correct and True in Representation as believed by me under penalty of perjury. All information in this Petition is set forth thereby as Truth. All documents represented and set forth are True and accurate so presented. The Document has been sent to the parties listed on the Certificate of Service by placing the documents in the institutional mail system on the **6th** day of **September, 2019**. It is so Sworn.

Respectfully Sworn and Attested

Date: 9 6 19

Michael Sites, *pro se.*

STATE OF WEST VIRGINIA:

COUNTY OF FAYETTE, TO WIT:

Taken, SUBSCRIBED AND SWORN BEFORE ME, A Notary Public in and for the County of **Fayette** and the State of West Virginia on the **6th** day of **September, 2019**.

Affix Seal Below:

Notary Signature

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
Aaron Sargent
Mount Olive Correctional Complex & Jail
1 Mountainside Way
Mount Olive, WV 25185
My Commission Expires Dec. 13, 2023

Notary Seal