No. _____

In the Supreme Court of the United States

CLARENCE FRY,
Petitioner,

v.

STATE OF OHIO
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE OHIO COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

OFFICE OF THE OHIO PUBLIC DEFENDER

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CAPITAL CASE — NO EXECUTION DATE SET

QUESTION PRESENTED

A criminal defendant is afforded very few decisions where he is the sole decision maker: whether he will have a jury trial, whether he will represent himself, how he will plead, and whether he will testify in his own defense. "The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that 'are essential to due process of law in a fair adversary process.'" *Rock v. Arkansas*, 483 U.S. 44, 51 (1987), *citing Faretta v. California*, 422 U.S. 806, 819 (1975); *see also* U.S. Constitution amend. VI, XIV. Of the few decisions that are left up to the defendant, the most essential is the defendant's right to testify in his own defense. *Rock*, 483 U.S. at 52 ("Even more fundamental to a personal defense than the right of self-representation, which was found to be 'necessarily implied by the structure if the Amendment,' *ibid.*, is an accused's right to present his own version of events in his own words."). The right to testify is the most fundamental – yet there is no inquiry when a defendant seeks to waive the right to testify. Here, trial counsel misrepresented to the trial court Fry's desire to testify. Because of that misrepresentation, the trial court did not ask Fry – on the record – whether or not be desired to testify. In light of that history, this case presents the following question:

> **Is it unconstitutional for any Court to deny the Constitutional right to testify in one's own defense by placing the burden of making such desire known to the court on the criminal defendant when he is represented by counsel who knows that the defendant explicitly wants to testify?**

LIST OF PARTIES

Petitioner, Clarence Fry, an Ohio death row inmate housed at Chillicothe Correctional Institution, was the appellant in the Ohio Court of Appeals.

Respondent, the State of Ohio, was the appellee in the Ohio Court of Appeals.

RELATED PROCEEDINGS

All proceedings directly related to this petition include:

1. Ohio Supreme Court Direct Appeal Opinion: *State v. Fry*, 125 Ohio St.3d, No. 2006-Ohio-1502.
2. Trial Court Post-Conviction Opinion: *State v. Fry*, Case No. CR 05 08 3007.
3. Court of Appeals Post-Conviction Opinion: *State v. Fry*, 9th Dist. C.A. 26121, 2012-Ohio-2602.
4. Ohio Supreme Court denial of jurisdiction: *State v. Fry*, Entry, Ohio Supreme Court Case No. 2012-1275.
5. Trial Court Post-Conviction Opinion (after remand): *State v. Fry*, No. CR 05-08-3007, Summit County Court of Common Pleas, Journal Entry, Filed November 21, 2017.
6. Court of Appeals Post-Conviction Opinion (after remand): *State v. Fry*, 9th Dist. C.A No. 28907, 2019-Ohio-958.
7. Ohio Supreme Court denial of jurisdiction (after remand): *State v. Fry*, Entry, Ohio Supreme Court Case No. 2019-0616.

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PETITION FOR A WRIT OF CERTIORARI

The Office of the Ohio Public Defender, on behalf of Petitioner Clarence Fry, respectfully petitions for a writ of certiorari to review the judgment of Ohio's Ninth District Court of Appeals.

OPINIONS BELOW

The Journal Entry of the Supreme Court of Ohio, *State of Ohio v. Clarence Fry*, Ohio Supreme Court Case No. 2019-0616 (jurisdiction denied on August 6, 2019), is attached hereto as Appendix A (App.). The decision of Ohio's Ninth District Court of Appeals is available at *State v. Fry*, 9th Dist. Summit Co. No. 28907, 2019-Ohio-958, and is attached hereto as Appendix B. The Summit County Court of Common Pleas Journal Entry, *State of Ohio v. Clarence Fry*, Case No. 2005 08 3007, Summit County Common Pleas Court, Journal Entry, Filed August 29, 2011, is attached hereto as Appendix C.

JURISDICTIONAL STATEMENT

The Ninth District Court of Appeals issued its opinion on the merits on March 20, 2019. App. A. A Memorandum in Support of Jurisdiction was filed with the Ohio Supreme Court. Jurisdiction was denied by the Ohio Supreme Court on August 6, 2019. App. B. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

This case involves the following Amendments to the United States Constitution:

A. Sixth Amendment, which provides in pertinent part:

> 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…

B. Eight amendment, which provides in pertinent part:

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

C. Fourteenth Amendment, which provides in pertinent part:

> No State shall…deprive any person of life, liberty, or property, without due process of law….

STATEMENT OF THE CASE

On July 11, 2006, the trial court sentenced Clarence Fry to die without the opportunity to testify in his own defense. Fry has never disputed that he killed the victim. What has always been in dispute, though, are the facts leading up to the crime, and why the crime occurred. In opening statement, trial counsel announced to the jury that they would hear testimony from Fry to explain what happened in this case. Counsel believed this case should have been charged only as a voluntary manslaughter, not a death penalty case. Yet counsel proceeded to trial and failed to present any evidence, including testimony from Fry, to support the manslaughter instruction they asked for. Trial counsel went so far as to affirmatively deny Fry his right to testify, even though Fry was the sole witness that they had that could have supported counsel's request for voluntary manslaughter.

On numerous occasions, Fry told counsel, the trial team investigator, and his family that he wanted to testify. However, when the trial court asked counsel in chambers if Fry wanted to testify counsel affirmatively misled the trial court about Fry's intention to testify, stating that Fry had never vacillated in his decision *not* to testify. In reliance on counsel's misrepresentation, the trial court decided to vary from her normal practice and did not ask Fry, directly and on the record, whether he intended to testify. Trial counsel then rested their case at side bar to ensure that their client would not be able to exercise his right to testify. To understand the harm caused by trial counsel's action, one must understand the history of this case.

Fry is black, lost his father at an early age, and learned from his experiences growing up in a racially tense society, as well as his replacement father figure, not to trust anyone who is white. Because of his background and life experiences in the 1960s and 1970s, Fry asked at his arraignment whether there were any attorneys of his same race that could be appointed to his case. The court appointed Larry Whitney and Kerry O'Brien, both older white males, to his case. Fry attempted to work with them and build a relationship in good faith, but his instinctual hesitation and lack of trust only grew in the months that followed.

Fry's input, requests, and suggestions, regarding his defense, were ignored or disparaged. Counsel declined to seek out and interview witnesses Fry knew had important information, and they belittled Fry's desire to testify in his own defense. Whitney specifically told Fry that if he wanted to know how to behave in a crack house, he would ask Fry, but Whitney would rely on his own knowledge for how to

try a capital case. Based upon these interactions, Fry's conversations and contact with counsel became rife with hostility. Fry believed his attorneys were not working on his behalf or interested in presenting his case to a jury.

Fry tried to obtain new counsel and wrote a letter to the University of Akron School of Law's legal clinic requesting that someone please help him. When O'Brien learned of Fry's attempt to obtain new counsel, O'Brien did not sit down with his client to discuss the problems or communication barriers in their attorney client relationship. Instead, O'Brien informed the clinic that they were not to have contact with his client. Fry next attempted to write Judge Mary Spicer to voice his concerns and request assistance; this letter went unanswered. Fry received no help in his efforts to obtain new counsel. With his life literally on the line, Fry was forced to go to trial with two attorneys whom he believed were not working in his best interest, whose advice he did not trust, and who were seemingly disinterested in presenting his side of the case.

In opening statements, counsel told the jury that Fry would testify. The state called 29 witnesses in their case in chief, the vast majority being police personnel and other professionals. After the State rested its case, the trial court excused the jury and addressed the admission of the State's exhibits. While the jury was excused, but in open court, the trial court asked the defense if it was ready to proceed. Counsel requested a side bar, despite the jury not being present in the courtroom. At side bar, and outside of the presence of Fry (ensuring that he would not be able to hear them) Whitney explained the defense team's efforts to produce a missing witness, and their

need to continue the trial to secure her testimony. O'Brien then abruptly stated: "I can report to the Court that we were only going to have one witness for the defense, I can tell you categorically and emphatically that Fry, the defendant, is not going to testify." Trial Tr. 1667. All of this occurred on Friday.

Over the weekend, O'Brien met with Fry at the jail, and made notes of that meeting. The notes confirm that Fry assuredly wanted to testify in his own defense, and that O'Brien attempted to dissuade Fry from testifying. Despite Fry's insistence that he testify in his own defense over the weekend, and O'Brien's handwritten notes confirming the same, on Monday morning, again in chambers and outside the presence of Fry, the following colloquy occurred between defense counsel and the trial court:

> **THE COURT**: Did your witness ever show up?
>
> **MR. WHITNEY**: Yes, Your Honor. She's outside ready and raring to go. We have talked to Clarence of the last couple of weeks. I spent five or six hours invested talking to him, talking to the defendant about his testimony.
> *He has really not waivered. He's playing a little game, I think in my mind about it, but he has not wavered in his opinion that he would not testify today.*
> Kerry, I think, spent some time with him yesterday.
>
> **MR. O'BRIEN**: Yes. Sunday morning I spent some time in the Summit County Jail with Fry, and he indicated that he did not want to testify."
>
> **MR. WHITNEY**: And he was unequivocally against testifying Friday afternoon when we met with him in the courthouse upstairs.
>
> The deputies had him available for us for an hour. We talked to him and he was unequivocally opposed to it, so.

> **THE COURT**: All right. *If there was any vacillation*, the Court would ask him on the record. But you are indicating to the Court that he has decided of his own volition not to testify?
>
> **MR. WHITNEY**: That's correct.

Trial Tr. 1693-1694 (emphasis added)

Fry's counsel lied to the trial court, in chambers and outside Fry's presence, telling the court not only that Fry would not testify, but that he had never even wavered in that decision. Following this in-chambers conversation, counsel and the judge reconvened in open court with the jury present. Counsel put on one witness, Mary Reid.[1] At the conclusion of her testimony, defense counsel again requested a side bar. It was at that side bar, outside the presence and earshot of Fry, that counsel rested the defense case without ever having called Fry as a witness. Even if Fry had wanted to disrupt the proceedings to assert his right to testify, he had no opportunity to do so, and no way of knowing that now was the time.

Clarence Fry was convicted and sentenced to death on July 11, 2006. He timely filed a notice of appeal to the Ohio Supreme Court on August 8, 2006. On March 23, 2010, the Ohio Supreme Court affirmed his convictions and sentence. *State v. Fry*, 125 Ohio St.3d 163, 926 N.E.2d 1239 (2010). In its opinion, the trial court stated that there was nothing in the record to suggest that Fry wished to testify and specifically

[1] Mary Reid's direct examination, the entirety of the defense case in chief, was 13 transcript pages, and she was called to establish that Fry did not bring a knife with him to Hardesty's apartment. Ms. Reid was not able to provide any testimony other than seeing Fry pass by her door the morning of the crime.

quoted trial counsel's assertions to the trial court that Fry did not want to testify. *Id* at ¶ 120.

Concurrent to his direct appeal, on May 11, 2007, Fry filed a 14 claim post-conviction petition. He filed two subsequent amendments (on April 6, 2011 and April 12, 2011) adding 2 additional claims and new supporting documentation. The trial court denied the post-conviction petition on August 29, 2011 with a five-page opinion where the trial court summarily denied all claims or found them to be barred by res judicata.

On September 28, 2011, Fry timely filed his appeal of the trial court's decision to the Ohio Ninth District Court of Appeals. On June 13, 2012, the Court of Appeals remanded the case to the trial court with specific instructions to consider the evidence presented outside the record as it related to the claim that Fry wanted to testify at trial. The court of appeals concluded that Fry's claim could not have been fairly determined on direct appeal. *State v. Fry*, 9th Dist. Summit No. 26121, 2012-Ohio-2602, ¶ 38-39.

On June 13, 2016, the trial court, with the same trial judge presiding, scheduled an evidentiary hearing to consider the claim that Fry wanted to testify at trial, but sought to exclude Fry, ordering he could only participate via video-conference.[2] On July 14, 2016, the trial court held an evidentiary hearing. Before any

[2] Fry's right to attend his evidentiary hearing is specifically provided for by statute in Ohio. O.R.C § 2953.22 post-conviction relief hearing, which states: "If a hearing is granted pursuant to section 2953.21 of the Revised Code, the petitioner shall be permitted to attend the hearing." After objection, the court ordered Fry's transportation to the hearing via court order on July 5, 2016.

witnesses could be called, the trial court announced the issues as follows: (1) "whether or not the defendant wanted to take the witness stand and [(2)] whether or not there was conversation between the defendant and his counsel regarding this issue." Ev. Hr. Tr. July 14, p. 4-5. The trial court also agreed that Whitney, O'Brien, and Fry would all be called as court witnesses.

The trial court called both Fry's trial counsel as the court's first witnesses: first, Whitney and then O'Brien. Both admitted under oath that they knew their client wanted to testify at some point during their representation. O'Brien also admitted that, the day before he stated to Judge Cosgrove that Fry absolutely did not want to testify—Fry had not even vacillated on this decision—that O'Brien wrote in his notes that Fry wanted to testify and had also written it down on other occasions prior. Whitney also testified that his theory was to prove manslaughter but admitted that he did not call any witnesses to support that theory.

Post-conviction counsel next attempted to call the third member of the trial team, investigator Thomas Fields, but the trial court insisted that Fry be the next witness called. During his testimony, Fry stated repeatedly under oath that he wanted to testify in the defense case-in-chief during his capital trial. He further testified that when discussing this testimony with his trial counsel he phrased the matter as "when I testify," not "if I testify."

Fry estimated that he told his counsel at least 20 times that he was going to get up on the stand and tell the jury his story. Fry further stated that he gave a list of witnesses to his trial counsel and that he expected his story to be told—through

himself as well as through corroborating witnesses—but neither was done. Fry testified that he not only told his trial counsel that he wanted to testify, he also repeatedly told his defense investigator, Thomas Fields, his brother, Lawrence Fry, his sister Sharon Brandon, and his now-deceased mother, Ethel Fry.

Fry repeatedly told everyone, throughout the trial process and the 10 months leading up to trial, that he wanted to testify in his own defense. Fry never wavered in his position that he needed to take the stand because there was no other way for the jury to understand what happened and even consider a voluntary manslaughter conviction.

Fry also testified about a conversation at the defense table with his trial counsel shortly before the trial ended. He said that his counsel kept telling him why he should not testify, and he kept telling them why he needed to testify. Fry recalled O'Brien and Whitney going up to the bench multiple times for side bars. He recalled the last time that they both came back to counsel table and that it was just over. At that time, Fry did not know that this was his chance, that is was now or never, and that he was expected to speak up. He thought that he would still be able to tell his side of the story because that was his plan all along. Fry did not know what he could have done and, unsurprisingly, was not familiar with the complexities of capital trial procedure. He also did not know he would have to represent his own interests himself when he had two attorneys with a duty to present his testimony to the court as Fry wished.

When post-conviction counsel attempted to call their next witness, Thomas Fields, the State objected and claimed all three of the scheduled witnesses would only be presenting inadmissible hearsay. The trial court took a recess and asked to meet with counsel in chambers. The parties then discussed the hearsay objection and the exceptions to the hearsay rule. Counsel for Fry offered two additional reasons that the witnesses were necessary and relevant to the proceedings. The conversation then turned to foundation and whether counsel had laid a proper foundation to impeach the trial attorneys with additional witnesses, as to whether Fry had maintained that he wanted to testify throughout his pretrial period and through trial.

The trial court then telephoned Whitney and discussed with him the testimony that he had just given, and whether he was available to return to court. She then instructed post-conviction counsel to tell Whitney what Fields testimony would be, and they did so. The trial court asked if Whitney recalled Fields telling him that Fry wanted to testify, and he said that he thought so. Whitney then complained that he had been blindsided by the cross examination he underwent by the defense and vented his frustration about the same. The trial court asked Whitney if he were to be called back to the stand if his testimony would materially change and he said it would not. The trial court then ruled in chambers that she would not allow any of the testimony of Fry's witnesses and concluded the chambers discussion.

The court then announced in open court that post-conviction counsel did not lay the proper foundation in asking Whitney if he was told by any of the witnesses that Fry wanted to testify and abruptly concluded the hearing.[3]

When the hearing resumed on December 7, 2016, the trial court gave conflicting reasoning for why the court had interrupted and abruptly concluded the proceedings from July. Fry was then allowed to call his witnesses beginning with investigator Thomas Fields. Fields testified that he had visited with Fry at the jail on numerous occasions and that Fry wanting to testify was a constant theme. Fields also testified that as an investigator it was his regular practice to pass that information on to trial counsel.

Fry's sister, Sharon Brandon, was the next witness. Brandon and Fry stayed in contact via phone, written letters, and in-person both before and during Fry's capital trial. During those conversations, Fry would tell her not to worry and that he would explain to the jury what happened. She testified that Fry never wavered from that decision. Brandon also testified that, on the day the defense case was scheduled to start, she asked either O'Brien or Whitney when Fry was going to testify. She recalled them simply saying they did not think it was a good idea.

The final witness called by the defense was Fry's younger brother, Lawrence Fry. Lawrence testified that the brothers were close and kept in constant contact

[3] Fry filed a motion to resume the evidentiary hearing on July 21, 2016, he argued that proper foundation had in fact been laid, and the testimony was not hearsay. In its response, the State withdrew its objection and the court reconvened the evidentiary hearing on December 7, 2016.

leading up to the trial and throughout the capital proceedings, talking almost daily. Before the trial, Fry consistently told his brother that there was a story to be told and that he wanted to be heard. Lawrence specifically recalled questioning whether Fry really wanted to get up there and testify, and Fry told him that no one could tell his story but him. Lawrence checked in with his brother about the case regularly, and his brother never once changed his position on wanting to testify.

Lawrence also recalled trying to call Whitney by phone the day before Mary Reid, the sole defense witness was called to testify, after the trial had recessed early for the day. The following morning, Whitney called Lawrence out into the hall prior to the starting court for the day. Whitney asked Lawrence if he knew his brother wanted to testify. Lawrence said he did and told Whitney what Fry had said to him, repeating that that no one could tell Fry's story but Fry. Lawrence recalled that Whitney said he did not think it was a good idea.

On cross-examination, the State asked Lawrence if he heard O'Brien state in open court that Fry did not want to testify. Lawrence said that he did not. During re-direct, counsel requested that the court take judicial notice that the conversation where O'Brien stated on the record to the trial court that Fry would not be testifying was a "side bar," as noted in the transcript by the official court reporter. The State objected, and the trial court sustained that objection.

The trial court then, on its own accord, called Ms. Walls-Alexander, the prosecutor who had just questioned Lawrence about the issue, to the stand, to allow her to rebut Lawrence's testimony, as she was also the one of the prosecutors who

tried Fry's case. The court called her as a court's witness, without the request of either party, seemingly for the express purpose of rebutting the testimony just given by Lawrence. The sum-total of Ms. Walls-Alexander's testimony was an attempt to prove that this "side bar" where O'Brien informed the trial court that Fry would not be testifying was not actually a side bar, but instead a conversation at the bench in open court for all counsel and spectators (including Fry) to hear. Fry was then recalled to the stand and confirmed that he did not hear O'Brien—while at side bar—tell the trial court that he did not want to testify.

On November 21, 2017, the trial court issued its Order Denying Relief after finding no merits to the arguments raised, and thus, denied post-conviction relief. Despite the order from the Ohio Ninth District Court of Appeals that the trial court consider the evidence presented outside the record as it relates to Fry's claims that he wanted to testify, the trial court's November 21, 2017 order failed to discuss how these notes contradicted the statements of O'Brien to the trial court at the time of trial or the testimony of O'Brien at the evidentiary hearing. In fact, the trial court did not even mention the notes except to acknowledge that the remand was ordered based on them and that they were introduced during O'Brien's testimony. The trial court described the testimony of both attorneys as extremely credible despite this glaring inconsistency.

Fry timely appealed the decision of the trial court on December 21, 2017. The Ohio Ninth District Court of Appeals affirmed the trial court's decision on March 20, 2019. The decision was largely based on the presumption that attorneys follow the

rules of professional conduct and that Fry could not prove a negative in showing that he was denied his right to testify. Despite Fry having five witnesses, who consistently testified that he never wavered in his desire to testify, and trial counsel's notes confirming that testifying was a consistent theme in their discussions, the court of appeals' decision fails to address the issue that the same court specifically sent back to the trial court for consideration. *See State v. Fry*, 9th Dist. Summit No. 28907, 2019-Ohio-958, attached in Appendix at A-2.

The Ohio Supreme Court declined to accept jurisdiction. *State of Ohio v. Clarence Fry*, Ohio Supreme Court Case No. 2019-0616 (jurisdiction denied on August 6, 2019), attached in Appendix at A-1.

REASONS FOR GRANTING THE WRIT

It is unconstitutional for any Court to deny the Constitutional right to testify in one's own defense by placing the burden of making such desire known to the court on the criminal defendant when he is represented by counsel who knows that the defendant explicitly wants to testify.

A. Introduction

The right to testify in one's own trial is "essential to due process of law in a fair adversary process" and is thus protected by the Fifth and Fourteenth Amendments. *Rock, 483 U.S. at 5*1, quoting *Faretta*, 422 U.S. at 819. "The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call 'witnesses in his favor'–which, of course, would include himself." *State v. Primm*, 2016-Ohio-5237, ¶ 50 (8th Dist. 2016). The right to testify

is "a necessary corollary to the Fifth Amendment's guarantee against compelled testimony." *Id.* citing *Faretta*, 422 U.S. at 819. The right to testify in one's own defense is *more* fundamental than that of self-representation, and the denial of that "opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness." *Id.* Accordingly, a defendant's decision whether to testify at his trial is a fundamental and personal right that only the defendant, himself, may waive. *Id.*, citing *State v. Vaughn*, 8th Dist. Cuyahoga No. 87245, 2006-Ohio-6577, ¶ 32.

Fry gathered significant evidence undercutting the State's case against him, demonstrated constitutional violations by his own counsel, and presented this evidence to the trial and appellate courts. But he has not yet been provided with the process he is due. The undisputed evidence shows that, at trial, Fry's counsel decided to substitute their will for Fry's right, unilaterally waiving Fry's right to testify despite knowing that he wanted to testify in his own defense, and affirmatively misleading the trial court about Fry's insistence that he be permitted to do so.

B. The lower courts denied Fry his constitutional right to testify and trial counsel violated their constitutional obligation to comply with Fry's desire to testify on his own behalf at trial.

O'Brien met with Fry on December 1, 2005. O'Brien's notes of that meeting include this statement: "Trial Tactics. Wants to Take Stand." Defendant's Evidentiary Hearing Ex. B-2; Ev. Hr. Tr. July 14, p. 71-72. O'Brien testified that his notes meant that Fry wanted to testify in his own defense. While this note was early in the preparations for trial, it begins a consistent theme and pattern of behavior

where Fry expressed his desire to testify and tell his story, as only he could. Fry's insistence is consistent with trial counsel's notes, and none to the contrary were produced. Further, the notes are bolstered by the collective memories of four witnesses, each expressing that testifying was a constant theme throughout Fry's time in jail and in preparation for trial. *See supra*, Statement of Facts at pgs 6-7; 9-10.

It was apparent that Fry wanted to testify in his own defense. In his first meeting with his attorneys, Fry told them he wanted to testify. In opening statement,[4] trial counsel told the jury that Fry would testify in his own defense. As trial was ongoing, O'Brien again met with Fry, and again his notes reflect a discussion regarding Fry providing testimony at trial.

When the State rested its case, the trial court excused the jury while the court ruled on the admission of the State's Exhibits in open court. At the conclusion of that discussion, the trial court asked if the defense was ready to proceed. This moment marks the beginning of trial counsel's active efforts to deceive the trial court and to subvert Fry's right to testify in his own case.

When the trial court asked if the defense was ready, trial counsel responded, "Wait one second, Judge" and then asked for a side bar. Trial Tr. 1664. The Court responded, "Let's have a side bar conference." *Id. At side bar*, and outside of the presence of Fry, Whitney explained his problems with securing the attendance of

[4] Whitney, in opening statement, said: "Clarence has been waiting a long time to come here and tell you what happened and why it happened, and have a jury determine his guilt and innocence." Trial Tr. 897.

witness "Mary Reid" who had not yet appeared. Whitney explained the efforts the defense team had taken to secure Mary Reid's attendance. *Id.* To support the defense request to continue the trial so the defense could secure Ms. Reid's testimony, O'Brien said, "I can report to the Court that we were only going to have one witness for the defense, I can tell you *categorically* and *emphatically* that Fry, the defendant, is not going to testify." *Id.* at 1667 (emphasis added). The defense proffered Ms. Reid's expected testimony and the trial court attempted to confirm whether Ms. Reid was served with a subpoena. Ultimately, the court agreed to continue the defense case to Monday morning. Finally, while the jury was still out of the courtroom, the trial court ruled on the admission of defense exhibits.

All of this occurred outside the presence of the jury, and Fry was not present at, nor invited to participate in, the side bar. At the end of the side bar, the record reflects the Court called the jurors back into the courtroom, informed the jurors that the trial would be in recess until Monday, June 12, 2006, admonished the jury, and formally released them for the weekend.

On Sunday, June 11, 2006, O'Brien met with Fry at the jail, and again took notes of that meeting. Those notes indicate, "C.F. wants to testify! (Reasons given for not testifying)." Defendant's Evidentiary Hearing Ex. B-4; Ev. Hr. Tr. July 14, p. 73. No further notes indicate that Fry had a change of heart. The only notes of that meeting reflect the emphatic desire of Fry to take the stand.

On Monday, June 12, 2006, the trial court held an in-chambers meeting with counsel, again, outside the presence of Fry. The meeting initially discussed jury

instructions. Trial Tr. 1681-93. The following colloquy then occurred between defense counsel and the trial court:

> THE COURT: Did your witness ever show up?
>
> MR. WHITNEY: Yes, Your Honor. She's outside ready and raring to go.
>
> We have talked to Clarence of the last couple of weeks. I spent five or six hours invested talking to him, talking to the defendant about his testimony.
>
> *He has really not waivered. He's playing a little game, I think in my mind about it, but he has not wavered in his opinion that he would not testify today.*
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> Kerry, I think, spent some time with him yesterday.
>
> MR. O'BRIEN: Yes. Sunday morning I spent some time in the Summit County Jail with Fry, and he indicated that he did not want to testify.
>
> MR. WHITNEY: And he was unequivocally against testifying Friday afternoon when we met with him in the courthouse upstairs.
>
> The deputies had him available for us for an hour. We talked to him and he was unequivocally opposed to it, so.
>
> THE COURT: All right. *If there was any vacillation*, the Court would ask him on the record. But you are indicating to the Court that he has decided of his own volition not to testify?
>
> MR. WHITNEY: That's correct.

Ev. Hr. Tr. July 14, p. 77-78, (reading from Trial Tr. 1693-1694); Defendant's Evidentiary Hearing Ex. A-3 (emphasis added). It was incumbent upon counsel at that point to inform the trial court, at a minimum, that Fry had, in fact, vacillated and that the court should inquire on the record. Not only was it incumbent upon counsel to inform the trial court, but the trial court failed to confirm with Fry that it was his wish not to testify. Fry's own counsel failed him by misleading the court, and

the trial court failed him by not inquiring directly with Fry about his wishes to testify despite that being her usual practice.

In his direct examination at the postconviction evidentiary hearing, O'Brien admitted that, during this in-chambers meeting outside of Fry's presence, he and Whitney represented to the trial court that Fry did not want to testify in his case. As the quoted exchange makes clear, at trial, O'Brien and Whitney described Fry's decision not to testify as one that had not wavered, that Fry was unequivocal, and that Fry never vacillated about that decision. Yet, at the evidentiary hearing, O'Brien testified that Fry said he wanted to testify on December 1, 2005, was planning to testify when counsel made opening statement on June 2, 2006, was unsure (accordingly only to O'Brien) whether he wanted to testify on June 7, 2006, and emphatically stated he wanted to testify on June 11, 2006. Even. O'Brien would describe Fry's desire to testify in his own defense as having vacillated between December 1, 2005 and June 11, 2006. Nonetheless, trial counsel expressly misrepresented to the trial court that Fry had never vacillated and always denied any intention of testifying in his own behalf. Had attorneys O'Brien and Whitney given the court an honest recitation of Fry's position on his testimony, we would not be here today. The court would have inquired of Fry on the record as the court stated it was inclined to do, and Fry would have told the court he wanted to testify.

There is only one logical reason why trial counsel would ask for a side bar conference at a time when the jury has already been excused: trial counsel wanted to communicate something to the court and did not want others in the courtroom

(including their client) to hear the information. Here, the information that trial counsel concealed was their unilateral decision to waive Fry's right to testify in his own defense and to mislead the court into thinking that it was actually Fry's decision not to testify. The evidence all points to that conclusion. Lawrence did not hear O'Brien's statement; Fry did not hear O'Brien's statement.

Trial Counsel did not stop with their effort to conceal their intentions from Fry; they rested the case at side bar as well, preventing Fry from even knowing that his opportunity to present evidence had concluded. Trial Tr. 1723. The trial court then immediately moved into closing argument by the state. Fry had no way of knowing that his opportunity to testify was over.

In sum, trial counsel's notes show that Fry wanted to testify on his own behalf six months before trial and that he repeatedly told trial counsel of that desire. Trial counsel told the jury, in opening statement, that Fry would testify. The most compelling proof is trial counsel's own note of his interview with Fry on Sunday, the day before the defense case began. Those notes show that Fry informed his attorneys that he wanted to testify a mere 24 hours before trial counsel told the trial court the exact opposite: that Fry has always held an unwavering decision not to testify. The only reason for counsel to mislead the court was to deter the trial court from asking Fry, directly, if Fry wanted to testify in his own defense. Trial counsel knew that if the court made that inquiry, Fry would assert his right to testify. To prevent that inquiry, trial counsel lied the trial court about Fry's wishes and denied Fry his right to make an informed decision whether to testify in his own defense. Trial counsel then

rested their case at a side bar conference, again outside of Fry's presence. Finally, we have Fry's own testimony, and that of his family members and trial investigator, supporting Fry's intention to testify in his own defense.

Whether it was prudent for Fry to testify was not trial counsels' decision to make, nor was it something the trial court could consider. Similarly, it is not something for this Court to consider. *McCoy v. Louisiana,* 138 S.Ct. 1500, 1509 (2018) [When a client expressly asserts the objective of his defense, his lawyer must abide by that objective]. Rather, Fry, and Fry alone, had the legal power to make the decision whether he would testify in his defense or he would waive the right to testify. *Rock,* 483 U.S. at 51; *Faretta*, 422 U.S. at 819; *Primm*, 2016-Ohio-5237, ¶ 50 (8th Dist.). *See, also,* Prof. Cond. R. 1.2(a): "A lawyer shall abide by the client's decision as to … whether the client will testify." By their actions, trial counsel sabotaged Fry's constitutional right to testify in his own defense and deprived him of that constitutional right. The lower courts faulted Fry for failing to disrupt the courtroom proceedings and tell the trial court he wanted to testify in his own defense. The Court of Appeals specifically sidestepped the constitutional question by holding that a defendant who wants to testify at his own trial must affirmatively speak up to assert that right. That court relied on a non-capital case, *United States v. Webber*, 208 F.3d 545 (6th Cir. 2000), to hold that "the defendant's assent may be presumed when a tactical decision is made to not have the defendant testify." 208 F.3d 545, 551 (6th Cir. 2000); *State v. Fry*, 9th Dist. Summit No. 28907, 2019-Ohio-958, ¶ 24, Appx p. 60. This case is inapposite, as the record in *Webber* clearly demonstrates that the trial

judge expressly stated, in Webber's presence, the court's understanding that Webber would not be testifying.

Here, trial counsel actively concealed from Fry their statement to the trial court that Fry would not testify. Fry was not invited to the sidebars and in chambers discussions where his trial counsel decided to (1) tell the trial court that Fry unequivocally did not want to testify, and (2) that the defense was resting its case, leaving Fry unable to testify. Fry did not hear his trial counsel rest its case in open court, like the defendant in *Webber* did. *Webber*, 208 F.3d at 550. When trial counsel rested the defense case at side bar, Fry did not know what was happening, and he did not know that would be his last opportunity to testify under oath.

C. A Defendant's Right to Testify Must be Protected.

This Court has held that the defendant is often the most important witness in his trial and there is "no justification today for a rule that denies an accused the opportunity to offer his own testimony." *Rock*, 483 U.S. at 52. The constitution, and the Rules of Professional Conduct, require that trial counsel respect a defendant's desire to testify in his own defense. The Constitution cannot require a defendant to disrupt the trial by speaking up when trial counsel take active steps to hide their efforts to deny the defendant the right to testify. This Court should grant the writ.

CONCLUSION

For all the aforementioned reasons, Fry was denied his rights to a fair trial and to due process as guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 2, 5, 9, 10, and 16 of the Ohio Constitution.

The evidence presented supports a conclusion that trial counsel unconstitutionally prevented Fry from testifying in his own defense. The Court should grant the writ of certiorari, vacate the conviction, and remand the case to state court for a new trial where Fry will be afforded an opportunity to testify in his own defense.

Respectfully Submitted,

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