No. 19-6535

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

PETITIONER'S REPLY BRIEF

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REPLY

Petitioner Clarence Fry hereby incorporates into this Reply all the facts alleged, and arguments made, in his Petition for Writ of Certiorari. In any instance where Fry does not specifically respond to an argument or allegation, he is not conceding that his arguments lack merit, express or implied; rather, Fry relies upon his initial Petition.

The State spends the vast majority of its Response on its Statement of the Case discussing the evidence that Fry killed Tamela Hardison – and the State does so in an attempt to dissuade this Court from considering the relevant legal issue. However, Fry never disputed that he killed Hardison, and the other inflammatory facts that the State relies upon are largely irrelevant to this inquiry. The relevant question is whether trial counsel's actions deprived Fry of his constitutional right to testify in his own defense. Whether trial counsel thought it was a good idea for Fry to testify is not

the question. Fry had a constitutional right to testify. The right to testify on one's own behalf is a fundamental and personal right of the defendant, one which only he, himself, may waive. "We now reaffirm that a criminal defendant has a *fundamental* constitutional right to testify in his or her own behalf at trial. This right is personal to the defendant and cannot be waived by either the trial court or by defense counsel." *United States v. Teague*, 953 F.2d 1525, 1532 (11th Cir. 1992) (en banc). *Brown v. Artuz,* 124 F.3d 73, 74 (2d Cir. 1997); *United States v. Pennycooke,* 65 F.3d 9, 10 (3rd Cir. 1995); *Emery v. Johnson,* 139 F.3d 191, 199 (5th Cir. 1997).

Fry wanted to testify because he thought it was important for the jury to hear about the events leading up to the crime and the reasons why the crime occurred. Fry exercised that right by telling trial counsel that he wanted to testify. Despite what Fry told his counsel, who were supposed to protect his constitutional rights, counsel did everything in their power to deny Fry his right to testify in his own trial. Each time the issue of whether Fry would testify came before the trial court, Fry's counsel took affirmative steps to make sure that Fry did not hear their statements to the Court. Counsel met the Court in chambers, outside of Fry's presence, and told the Court Fry would not testify. Even though the jury had already been excused, counsel asked for a side bar so they could rest the defense case without calling Fry as a witness and do so in a way that Fry would not hear them.

Thus, despite Fry's clear intentions, trial counsel thwarted Fry's constitutional right to testify. Fry's only recourse was the ineffective assistance of counsel claim asserted in his postconviction petition. "Because it is primarily the responsibility of

defense counsel to advise the defendant of his right to testify and thereby to ensure that the right is protected, we believe the appropriate vehicle for claims that the defendant's right to testify was violated by defense counsel is a claim of ineffective assistance of counsel under *Strickland v. Washington*." *Teague*, 953 F.3d at 1534 (citing 466 U.S. 668 (1984)). This Court should grant the writ and find that, when a defendant is represented by counsel who know that their client desires to testify, the burden is on counsel to inform the trial court of that desire. Allowing counsel to subvert their client's constitutional right is unacceptable and unconstitutional, particularly in a capital case.

A. The State's arguments present no reason for this Court to deny Certiorari.

The State's Brief in Opposition to Certiorari attempts to divert this Court's attention from the constitutional error in this case by claims of defamatory statements. Rather than "defamatory" statements as the State avers, Fry's Petition includes accurate and truthful statements from the record regarding Fry's trial counsel. *See* Response to Clarence Fry's Cert Petition at pg. 11. Throughout the evidentiary record, there is evidence that trial counsel knew Fry wanted to testify. Defendant's Evidentiary Hearing Ex. B-2; Ev. Hr. Tr. July 14, p. 71-72; *See* Clarence Fry's Petition at 6-7; 9-10.

In fact, the State itself concedes in its response to Fry's Petition that, "Both Whitney and O'Brien testified that Fry had told them at various stages of the proceedings that he wanted to testify in his defense…." *See* Response to Clarence Fry's Cert Petition at pg. 6. With this single sentence, the State proves Fry's point.

At an June 12, 2006 in-chambers status conference, the trial court directly asked counsel whether Fry wanted to exercise his constitutional right to testify; counsel told the trial court that Fry did not***,*** *and had never vacillated in that decision***.** Counsel's statement to the trial court was patently false. As the State confirms, counsel were on notice that Fry wanted to testify, or, at the very least, that Fry wanted to testify at various points leading up to his capital trial. *See* Response to Clarence Fry's Cert Petition at pg. 6. Indeed, in the postconviction evidentiary hearing, trial counsel admitted that Fry had, in fact, vacillated in his decision whether or not to testify. Ev. Hr. Tr. July 14, p. 103-04. And trial counsel's own handwritten notes confirm that fact. That concession, and the corresponding notes, prove beyond all possible doubt, that trial counsel affirmatively misled the trial court with their statement that Fry had never vacillated about his purported decision not to testify. Recognizing the implications of trial counsel's testimony is not defamation; it is the truth, and both attorneys eventually admitted this truth during the evidentiary hearing.

Contrary to the State's arguments, the relevant events played out as follows: Fry told his counsel, the trial investigator, his brother Lawrence, and his sister Sharon, on more than one occasion leading up to trial, that he wanted to testify in his own defense. Ev. Hr. Tr. Dec. 7, p. 29-57. Despite those protestations, at a sidebar on Friday afternoon June 9, 2006 at the close of the State's case, Attorney O'Brien told the trial court, "I can tell you *categorically* and *emphatically* that Fry, the defendant, is not going to testify." *Id.* at 1667 (emphasis added). That weekend, on Sunday June

11, 2006, O'Brien then met again with Fry at the county jail. Fry, again, emphatically told O'Brien that he wanted to testify, and O'Brien's notes of that visit reflect this sentiment: "C.F. wants to testify!" Ev. Hr. Tr. July 14, p. 73-74. However, the very next day, on Monday June 12, 2006, Attorney Whitney then stated to the trial court, and out of the presence of this client, that, "[Fry] 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." Ev. Hr. Tr. July 14, p. 77-78 (reading from Trial Tr. 1693-1694); Defendant's Evidentiary Hearing Ex. A-3. The trial court made it clear to trial counsel that, if Fry had vacillated about his desire to testify, then she would ask Fry about his desire on the record in open court. *Id*. Trial counsel could not let this happen. Rather than be honest with the court about Fry's clear wish to testify, or at the very minimum vacillation about taking the stand, they lied to the court in an effort to keep their client from exercising his constitutional right.

Had trial counsel simply been honest with the trial court and informed her that Fry had made statements that he wanted to testify, she would have made the inquiry on the record, and Fry would have had the opportunity to make the court aware of his desire to testify. But for that misrepresentation, we would not be before this Court.

Next, the State speculates that Fry would have been "eaten alive" by the prosecution on cross-examination due to his prior convictions and the inculpatory statements he made prior to trial. However, the State is missing the point. Even if the decision to testify would have been ill-advised, it was Fry's decision alone to make.

Moreover, Fry's prior convictions were admissible because the aggravated murder charge that he was facing included an element that he had prior similar convictions. During their case in chief, the State was permitted to present evidence that Fry had three prior convictions related to a family or household member:two convictions for domestic violence and one for arson. Tr. 1570-1583. Additionally, Fry's inculpatory statements were admissible under the party admission exception to the hearsay rule. Evid.R. 801(D). Although he could have been additionally questioned about these statements, they were already admissible and were, in fact, introduced into evidence against him during his capital trial. Trial Tr. 881, 883-884, 894, 900, 942-947, 1570-1583, 1651.

The State of Ohio also argues that Fry "did not press" this issue in the lower court because, the State argues, Fry did not cite to, or discuss, the *Webber* case in the state appellate courts. *United States v. Webber*, 208 F.3d 545 (6th Cir. 2000). That is simply not accurate. The trial court and the court of appeals erroneously relied on *Webber* when it denied Fry's appeal. *State of Ohio v. Fry,* 9th Dist. Summit No. 28907, 2019-Ohio-958, ¶ 24, Appx. p. A-2. Fry cited to, and distinguished, *Webber* on pages 4 and 6 of his reply brief on direct appeal to Ohio's Ninth District Court of Appeals. Fry also cited to, and distinguished, *Webber* on pages 30-32 of his Memorandum in Support of Jurisdiction to the Ohio Supreme Court. The State's claim that Fry "did not press" this issue and did not address the *Webber* holding in the courts below is patently untrue.

Fry has appealed the same issue since he was denied postconviction relief in the trial court. At every level in the courts below Fry has asserted a bedrock constitutional claim: Clarence Fry was denied his right to testify, and the lower courts unconstitutionally placed a burden upon him to make his desires to testify known to the trial court when Fry was represented by counsel. There is no additional requirement placed on defendants to cite every available case on the topic. Fry pled this issue in the state courts, and, thus, this Court may consider it now.

B. State courts are split on this issue; this Court must grant certiorari to give the state courts guidance.

This issue is also one of great import and first impression. State courts across the country need guidance from this Court on whether the trial court must make an on-the-record inquiry of the defendant to waive this specific constitutional right, or if the burden is affirmatively on the defendant to inform the trial court of his desire to testify. *See e.g., United States v. Edwards*, 897 F.2d 445, 447 (9th Cir. 1990) (discussing: it would be problematic to allow a defendant who did not testify at his trial to obtain a new trial based on his ignorance to the right to testify.); *Ward v. Sternes*, 209 F.Supp.2d 950, 955 (Il. C.D. 2002) ("[T]he clearly established federal law is that fundamental constitutional rights require a knowing and intelligent waiver; the facts to which this law must be applied pertain to [the defendant's] waiver of his right to testify.*"); Brown v. Artuz*, 124 F.3d 73 (2nd Cir. 1997) ("Some state courts have ruled that because of the fundamental and personal nature of the right to testify, the trial judge should conduct an on-the-record colloquy with the defendant to inform him of the nature and existence of this right and to ensure that any waiver of the

right is knowing and intentional." *See, e.g., People v. Curtis*, 681 P.2d 504, 514 (Colo.1984); *Culberson v. State*, 412 So.2d 1184, 1186-87 (Miss.1982); *State of West Virginia v. Neuman*, 179 W.Va. 580, 371 S.E.2d 77, 81-82 (1988)).

This Court should additionally grant certiorari and find that placing the burden on a criminal defendant to specifically communicate his desire to the court is both unworkable and unfair. For instance, as the record demonstrates, when Fry attempted previously to speak out in court, Fry was removed from the courtroom. Tr. 2031. Had Fry then jumped out of his seat to communicate his desire to testify (as the state courts suggest he should have), he would have been facing contempt or other repercussions from the trial court. Fry was also resented by two counsel, which complicates this point further. Trial counsel are supposed to represent their client's interests and should bear the ethical and constitutional obligation to protect and advance their client's constitutional right to testify. A defendant, such as Fry, should not have to overcome the efforts of his own counsel to pursue his right to tell his story in court.

Much of the caselaw that the State relies upon in its response to Fry's Petition is completely different, and in no way comparable, to the situation here. For example, *Chatman v. Illinois* did not involve a capital murder trial. *See* 549 U.S. 1211 (2007). More due process, not less, is required in a death penalty case. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *State of Ohio v. Griffin*, 138 Ohio St.3d 108 (2013); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). *See also Evitts v. Lucey*, 469 U.S. 387, 401 (1985) ("When a State opts to act in a field where its action

has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause.").

The State of Ohio also cites to *Johnson v. Texas*, a circuit case out of Texas which has no binding authority over the Ohio state courts to support the allegation that "the majority position is that a trial court does not have a duty to ensure that a defendant understands his right to testify." *Johnson v. Texas*, 169 S.W.3d 223, 234 (Tex. 2005). *Johnson* must not be construed as a majority position. By relying *Johnson*, the State alleges that if a trial court were to inquire to ensure that a defendant understands his right to testify, that it would "interfere" with the attorney-client relationship and disrupt trial strategy. It is not trial strategy to lie to the trial court and misrepresent the wishes of your client. A colloquy would not interfere with strategy; instead, it would protect the client's right to assert his privilege, much like he is protected from waiving a jury, or entering a plea instead of proceeding to trial.

Certiorari must be granted in order to avoid a grave injustice. The State of Ohio alleges that lying to the tribunal, misleading the client, and denying a sacred fundamental right is *not* outrageous unprofessional conduct. The constitution, our system of justice, and fundamental fairness say otherwise. This Court should grant certiorari to provide clarity and provide a standard for the trial courts to protect criminal defendants' right to testify in their own defense.

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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