21-5198 ORIGINAL

No. _____

FILED
JUN 30 2021
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Dustin Lawrence — PETITIONER
(Your Name)

vs.

State of Ohio — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Supreme Court of Ohio
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Dustin T. Lawrence #A734-936
(Your Name)

P.o. Box 57
(Address)

Marion, Ohio 43301
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. When a judge openly admits bias against an appellant in which he was not only the trial judge but also the sentencing, shouldn't the remedy afforded to the appellant be a new trial in front of a fair and impartial judge. That the appellants right to the due process of law may not be violated?

2. When an appellant's conviction was against the manifest weight of the evidence and was not proven beyond a reasonable doubt, shouldn't the conviction be overturned?

3. If an appellant proved to his sentencing court that the Presentencing Investigation provided before sentencing was incorrect and the appellant's past criminal history was nearly non-existent, shouldn't the courts sentencing be proportionate when considering consecutive sentences?

LIST OF PARTIES

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

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

RELATED CASES

CR 2016 - 10 - 1598

CA 2017 - 06 - 0078

CA 2018 - 11 - 0208

CA 2019 - 03 - 0048

Ohio Sup Ct. 2019 - 1136

Ohio Sup Ct. 2020 - 1285

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 judgment 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 _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix K to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Twelfth Appellate District court appears at Appendix J to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, 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 _____ (date) on _____ (date) in Application No. ___A_____.

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

[X] For cases from **state courts:**

The date on which the highest state court decided my case was Feb-2-2021.
A copy of that decision appears at Appendix K.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, 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 _____ (date) on _____ (date) in Application No. ___A_____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5TH AMENDMENT

14TH AMENDMENT

JUD.COND.R. 2.3(A)

JUD.COND.R. 2.11(A)

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STATEMENT OF THE CASE

I. PROCEDURAL POSTURE

A Butler County grand jury returned an indictment charging appellant with eight counts, all for conduct alleged to have occurred on March 15-16, 2016. T.d. 1. Appellant was charged with one count of gross sexual imposition and one count of domestic violence, both felonies of the fourth degree, in addition to five counts of rape and one count of kidnapping, all felonies of the first degree. *Id.* Judge Charles Pater was assigned to the case, and Appellant proceeded to a jury trial. The jury found Appellant guilty of all counts, and Judge Pater sentenced Appellant to an aggregate prison term of thirty-three years. T.d. 37.

Appellant timely appealed. Notice of Appeal 5/15/17. The first attorney appointed to represent Appellant in this matter filed an *Anders* brief. Appellant's Br. 11/1/17. Appellant's family retained attorney Eric Eckes to represent him in post-conviction relief proceedings. Attorney Eckes filed a petition for post-conviction relief ("PCR Motion") on August 24, 2018. T.d. 52. On October 1, 2018 the 12th District Court of Appeals rejected the Anders brief and appointed Tyler W. Nagel to represent Appellant in the instant appeal. Decision 10/1/18.

On October 3, 2018, Judge Pater ruled on the PCR Motion, denying Appellant's request to vacate his convictions, but granting Appellant's request for a new sentencing hearing. T.d. 59. On October 24, 2018, attorney Eckes and the prosecuting attorney met with Judge Pater in chambers, and Judge Pater disclosed that his own daughter "had been kidnapped and raped when she was of a similar age to the victim in [Appellant's] case." T.d. 72. Due to Judge Pater's admitted possible bias against Appellant at the sentencing hearing, Judge Pater recused himself on November 2, 2018, and the case was reassigned to Judge Howard. T.d. 63. At the conclusion of Appellant's second sentencing hearing, Judge Howard imposed an aggregate prison term of

twenty-seven years. T.d. 73. Appellant timely appealed from that sentence in case # CA2019-03-0048, which the 12th District Appellate Court consolidated with the instant appeal. Notice 3/15/19; Entry of Consolidation 4/1/19. On 3/9/20 the 12th District Appellate Court affirmed sentencing court's decision case # CA2017-06-0078, CA2019-03-0048. Finally, on 2/2/21 the Ohio Supreme Court declined jurisdiction case # 2020-1285.

II. STATEMENT OF THE FACTS

A. Trial

By the time the alleged crimes occurred on the evening of March 15-16, 2016, Appellant had been in a romantic relationship with Luisa Ortiz ("Ortiz") for five years. T.p. 3/30/17, 95. Ortiz had a daughter, S.K., from a previous relationship with Thomas Kinch. T.p. 3/29/17, 10. S.K., then age 16, was in Kinch's legal custody, but Ortiz had regular visitation with S.K. and her siblings. I.d. at 10-11. S.K. had a good relationship with Appellant; in the approximately five years they had known each other, she "never" had a problem with him until the night of March 15, 2016. T.p. 3/30/17, 122; T.p. 3/29/17, 98-99.

In March of 2016, Appellant and Ortiz were living in the attic of the home they shared with Ortiz's mother and stepfather. T.p. 3/29/17, 13,16. Ortiz's mother and stepfather slept on the first floor, in a bedroom directly below the attic bedroom. T.p. 3/30/17, 127. When visiting her mother, S.K. slept in the attic bedroom with her mother and Appellant. T.p.3/29/17, 96. On March 15, S.K. attended nursing classes during the day, had dinner with a friend, and returned to the home around 9:00 or 10:00 that night. I.d. at 35-36. She fell asleep on a futon while doing homework on a computer. I.d. at 106.

Around 11:30 pm, Ortiz left home to meet Appellant at a nearby bar after he got off work. T.p 3/30/17, 102. Ortiz testified the two had "a couple drinks." Id. They got into an argument after Ortiz received a text message from Kinch. I.d. at 102 -103. Appellant was upset because he believed Ortiz cheating on him with Kinch, whom he also believed had met Ortiz

at the bar prior to Appellant's arrival. *Id.* at 218-219, 246. The altercation became physical between Appellant and Ortiz on the short car ride back to the Ortiz residence. *Id.* at 102, 246-250.

According to S.K.'s account, she awoke to find Appellant and Ortiz "really drunk." T.p. 3/29/17, 108. S.K. testified she had fallen asleep on the futon; Ortiz recalled S.K. being on the bed upon her return. *Id.* at 106; T.p. 3/30/17 at 119. S.K. testified Ortiz "wanted [S.K.'s] food," and Appellant was assisting Ortiz crawl across the floor. T.p. 3/29/17, 36, 109. Ortiz testified she did not crawl on the floor and needed no assistance standing up. T.p. 3/30/19, 116. S.K. fell back asleep, and awoke again to Appellant and Ortiz arguing over Ortiz's alleged infidelity. T.p. 3/29/17, 36. S.K. saw Appellant with her hands around Ortiz's neck. *Id.* at 37. Despite having her phone in her hand and an unobstructed path downstairs where her grandparents were in their bedroom, S.K. neither called police nor went downstairs to alert anyone; she did nothing. *Id.* at 114-117. After this alleged attack, S.K. initially testified she saw Ortiz going down the hallway and heard Ortiz going down the stairs. *Id.* at 37. Inexplicably, S.K. later testified that she never saw Ortiz go down the stairs, nor did she "hear anything." *Id.* at 122. Ortiz testified that she went into a closet in the attic after Appellant choked her, staying for a few minutes before going down the stairs. T.p. 3/30/19, 104. S.K. testified she saw Ortiz in the closet, gesturing for S.K. to be quiet. T.p. 3/29/19, 118. Ortiz testified she could not see into the room from the closet (she saw "nothing but a wall"), did not see S.K. from the closet, and did not signal for S.K. to be quiet. T.p. 3/30/19, 106, 120.

After Ortiz either went into the closet or went downstairs, Appellant was "crying" and "upset." T.p. 3/29/17, 40. S.K. consoled Appellant, and the two shared a "pleasant" hug. *Id.* at 121. After he finished crying, S.K. testified Appellant removed her pants and put his tongue on

her vagina. *Id.* at 129, 132. Appellant then went downstairs. *Id.* at 132. S.K. went downstairs, and Appellant went back upstairs. *Id.* at 134. With Appellant still upstairs, S.K. went to the bathroom, which was located next to her grandmother's bedroom. *Id.* at 136. S.K. then went back upstairs, where she alleges Appellant committed various acts of digital and vaginal penetration while she lay on a mattress soaked with urine. *Id.* at 70-72, 67. Two days later, S.K. reported the allegations to her father. *Id.* at 82. Per her own testimony, at no time on the night of these alleged events did S.K. yell, kick, punch, or scratch Appellant, call out for her grandparents or otherwise attempt to alert them, call 911, or leave the property. *See id.* at 126, 129, 132, 136.

Appellant presented a vastly different version of what occurred after he and Ortiz returned from the bar. According to Appellant, he arrived home without Ortiz. T.p. 3/30/17, 213. He made his way past Ortiz's mother's bedroom, where he could see the television was on through the open door. *Id.* at 215. S.K. was awake in the attic, sitting on the futon with the light on. *Id.* at 216. After S.K. consoled a tearful Appellant, he changed into his pajamas and went downstairs to use the restroom and eat. He then took some food upstairs, ate, and went to sleep. *Id.* at 220-221. The next morning, he woke up and took S.K. to school, as was customary. *Id.* at 226; T.p. 3/29/17, 98.

Heidi Schindler, a Sexual Assault Nurse Examiner, completed a forensic examination of S.K. on May 17, 2016. T.p. 3/30/17, 8, 10. Schindler photographed bruising to S.K.'s upper arms and thigh. *Id.* at 10. She could not say when the bruises were sustained or who, if anyone, inflicted them. *Id.* at 22. Schindler also described injuries to S.K.'s genitalia, which were not photographed. *Id.* at 16. She collected vaginal, rectal, and oral DNA swabs from S.K., all of which tested negative for the presence of semen. *Id.* at 16, 35.

Schindler also collected the underwear that S.K. was wearing at the time of the examination. *Id.* at 17. This was not the same underwear S.K. was wearing the night of the alleged sexual assault—unbelievably; that pair of underwear was collected by none other than Kinch, unaccompanied by law enforcement, at the direction of the detective investigating the case. *Id.* at 19, 173, 182-183. The underwear Kinch collected was not tested for the presence of DNA, but was tested for the presence of semen and amylase. *Id.* at 53. No semen was detected. The amylase test indicated a presumptive positive result for amylase. *Id.* at 54. Nicole Law, a forensic biologist with the Bureau of Criminal Investigations and Identification ("BCI"), explained that this meant there was a "good indication" that "something" in terms of bodily fluids might be present. *Id.* at 54. No confirmatory testing was done on the underwear, apparently because BCI's laboratory did not have the capability. *Id.* at 55.

The only DNA evidence linking Appellant to the alleged rapes consisted of a Y-STR DNA profile from S.K.'s vaginal swab. *Id.* at 81. This Y-STR profile was consistent with Appellant's DNA, but could not exclude Appellant's male relatives as the source, could have been transferred from urine, and was also consistent with approximately 1 in 115 people. *Id.* at 81, 85-86. By contrast, traditional STR profile frequencies can range "up into the quadrillions, quintillions, and so on." *Id.* at 70.

B. Post-conviction revelation of judicial bias

Following his conviction, Judge Pater sentenced Appellant to an aggregate prison term of thirty-three years. T.d. 37. Pater granted in part Appellant's motion for post-conviction relief, agreeing that Appellant was entitled to a new sentencing hearing because the court based its sentence partly on erroneous information concerning Appellant's criminal history in the Presentence Investigation Report then before the court. T.d. 59. At a meeting in chambers on

October 24, 2018, Judge Pater disclosed to Appellant's attorney and the prosecutor "that he had been thinking about [Appellant's] sentence for a long time. He was happy to have a chance to revisit the sentence. As part of that discussion, Judge Pater stated that his daughter had been kidnapped and raped when she was of a similar age to the victim in Mr. Lawrence's case." T.d. 72. Judge Pater further disclosed that he was "afraid that he had allowed the situation with his daughter to affect his sentence in [Appellant's] case," and "he was afraid that he was biased at sentencing . . . because of the nature of the crime and the similarity of his daughter's situation and the victim in [Appellant's] case." *Id.* There is nothing in the record to suggest Judge Pater gave any indication of his potential bias against Appellant at any time prior to October 24, 2018, after Appellant had been indicted, tried, convicted and sentenced.

ARGUMENT

I. THE TRIAL COURT ERRED BY FAILING TO DISCLOSE POTENTIAL BIAS AGAINST APPELLANT AT THE EARLIEST OPPORTUNITY.

Issue Presented for Review and Argument:

The trial court's failure to disclose its potential bias against Appellant, in violation of the Ohio Code of Judicial Conduct, led directly to Appellant's conviction in contravention to his Fifth Amendment right to Due Process of Law.

"An independent, fair, and *impartial* judiciary is indispensable to our system of justice. The United States legal system is based upon the principal that an independent, *impartial*, and competent judiciary . . . will interpret and apply the law that governs our society." (Emphasis added.) Preamble of the Rules of the Code of Judicial Conduct. A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice. Jud.Cond.R. 2.3(A). A judge "shall disqualify himself . . . in any proceeding in which the judge's *impartiality* might

reasonably be questioned, including . . . the following circumstances: (1) [t]he judge has a personal bias or prejudice concerning a party." (Emphasis sic.) Jud.Cond.R. 2.11(A). A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification. *Id.*, Comment 5.

The appearance of judicial bias can be just as damaging to public confidence as actual bias. *Lingenfelter v. Lingenfelter*, 9th Dist. Wayne No. 15AP0062, 2017-Ohio-235, ¶ 20, citing *In re Disqualification of Burge*, 138 Ohio St. 3d 1271, 2014-Ohio-1458, 7 N.E.3d 1211, ¶ 9. Disqualification is warranted if a reasonable person would conclude that the appearance of impropriety exits. *Lingenfelter* at ¶ 9. An objective test is employed to determine whether a judge should be removed from a case: "A judge should step aside or be removed if a reasonable and objective observer would harbor serious doubts about the judge's impartiality." *Lingenfelter* at ¶ 10, citing *In re Disqualification of Farmer*, 139 Ohio St.3d 1202, 2014-Ohio-2046, 10 N.E.3d 718, ¶ 7. "The law requires not only an impartial judge but also one who appears to the parties and the public to be impartial." *Burge* at ¶ 7, quoting *In re Disqualification of Corrigan*, 110 Ohio St.3d 1217, 2005-Ohio-7153, 850 N.E.2d 720, ¶ 11. Despite the Ohio Supreme Court's exclusive jurisdiction to disqualify a biased judge, intermediate appellate courts have the authority to review the issue of judicial bias as grounds for reversal on appeal. *State v. Gregory*, 4th Dist. Galia No. 16CA3, 2016-Ohio-7940, ¶ 13, citing *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 34-35.

In the instant case, Judge Pater was concerned enough with the possibility that he was biased that he disclosed as much to counsel in his chambers on October 24, 2018. T.d. 72. He subsequently recused himself from further proceeding in the case by an entry dated November 2,

2018. T.d. 63. While Judge Pater's actions are certainly commendable, and, one would surmise, the product of immense self-reflection and courage, they amounted to a case of "too little, too late" as far as Appellant's right to Due Process is concerned.

The indictment in this case was filed on October 31, 2016. T.d. 1. Between then and when the trial began nearly five months later, Judge Pater could have notified counsel (on or off the record) of the similarities between the instant case and the case involving his own daughter. This would have facilitated an array of possibilities, any of which could have prevented the situation in which the parties involved now find themselves. Most likely, Judge Pater would have done what he did after Appellant was convicted and sentenced, and recused himself voluntarily. If not, armed with the knowledge of the potential of a biased trial judge, Appellant's counsel could have filed an affidavit of disqualification pursuant to R.C. 2701.03.

Pursuant to the Rules of Judicial Conduct, a trial judge is required to recuse himself from any case in which his impartiality might reasonably be questioned. Jud.Cond.R. 2.11(A). As the preamble to those rules makes clear, judicial impartiality is nothing to be taken lightly; it is *indispensable* to the American justice system. The test for whether a judge should be removed from a matter, voluntarily or otherwise, is whether an objective observer would have "serious doubts" as to whether the judge is biased. This is because, "bias-in-fact" notwithstanding, the mere *appearance* of bias undermines public confidence in the judiciary.

Here, if Judge Pater himself had doubts regarding his possible bias serious enough to disclose to the parties' counsel and recuse himself from the proceeding, it follows that an objective observer with full knowledge of the judge's personal history would harbor similar doubts. The Ohio Supreme Court has stated that the law requires a judge who (1) is actually impartial, and (2) who appears to the parties and the public to be impartial. *In re Disqualification*

of Corrigan, 110 Ohio St.3d 1217, 2005-Ohio-7153, 850 N.E.2d 720, ¶ 11. The fact that Appellant did not learn of Judge Pater's lack of impartiality until it was too late should not preclude him from receiving a trial in accordance with his Fifth Amendment right to due process of law. Because Judge Pater failed to inform the parties of the unique personal situation that, per his own admission, "may have impacted the Court's original sentencing determination" until after Appellant was tried and convicted in Judge Pater's courtroom, Appellant was effectively deprived of the opportunity to assert his statutory and constitutional rights to a trial before an impartial judge.

II. APPELLANT WAS DEPRIVED OF HIS RIGHT TO A TRIAL BEFORE AN IMPARTIAL JUDGE, IN VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS.

Issue Presented for Review and Argument:

Appellant's trial before a biased judge is structural error, which can only be cured by a new trial.

The Fifth Amendment to the Constitution, made applicable to the states by the Fourteenth Amendment, provides in part that no criminal defendant shall be deprived of life or liberty without due process of law. It is axiomatic that the Due Process Clause requires a fair trial, in a fair tribunal, before an impartial judge who has neither actual bias against the defendant nor interest in the outcome of his particular case. *State v. Gray*, 8th Dist. Cuyahoga No. 106589, 2018-Ohio-3678, ¶ 31, citing *Bracy v. Gramley*, 520 U.S. 899, 905, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997). A criminal trial before a biased judge is "fundamentally unfair" and denies a defendant due process of law. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 34. This principle applies whether a defendant is tried to the bench or a jury. *See, e.g.*,

State v. Dean, 127 Ohio St.3d 140, 2010-Ohio-5070, 937 N.E.2d 97 (conviction after trial by jury reversed due to finding of judicial bias). Judicial bias is "*a hostile feeling or spirit of ill will* or undue friendship or favoritism *toward one of the litigants* or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts." (Emphasis added.) *LaMar* at ¶ 34.

The presence of a biased judge is structural error, which, if demonstrated, requires reversal without resort to harmless-error analysis. *State v. Sanders*, 92 Ohio St.3d 245, 278, 750 N.E.2d 90 (2001). This is because a structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 50, quoting *Arizona v. Fulminante* (1991), 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302. "Unlike a garden-variety trial error, a structural error 'transcends the criminal process' by depriving a defendant of those 'basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" *Drummond* at ¶ 271 (Moyer, C.J., dissenting), citing *United States v. Padilla* (C.A.1, 2005), 415 F.3d 211, 219, quoting *Rose v. Clark* (1986), 478 U.S. 570, 577-578, 106 S.Ct. 3101, 92 L.Ed.2d 460. Unlike ordinary trial errors, which are subject to harmless-error analysis, structural errors are "per se cause for reversal." *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, 884 N.E.2d 45, ¶ 15. Trial errors, which occur during the presentation of a case to a jury, may be quantitatively assessed in the context of other evidence presented to determine whether harmless beyond a reasonable doubt; structural errors are not subject to harmless-error analysis because they affect the framework within which the trial proceeds. *State v. Gray*, 8th

Dist. Cuyahoga No. 106589, 2018-Ohio-3678, ¶ 30. The remedy for a trial tainted by judicial bias is a new trial. *Dean* at ¶ 2.

Appellant was plainly denied his constitutional right to a trial before an impartial judge in this case. As discussed above, Judge Pater admitted that the circumstances of his daughter's rape and kidnapping may have affected his sentencing determination. If Judge Pater's ability to be fair and impartial at sentencing was questionable, there exists a strong possibility, if not a probability, that his ability to be fair and impartial throughout the proceedings was impaired. To question whether Judge Pater's admitted potential bias was narrowly circumscribed to the sentencing phase is akin to gambling with Appellant's fundamental constitutional rights.

Although Appellant need not point to specific instances in the course of the trial to substantiate his claim of structural error, there are examples in the record of how Pater's bias may have affected the course of the trial. For example, Judge Pater allowed S.K. to take a "break" and talk to the victim advocate in the middle of direct examination, over Appellant's objection. T.p. 3/29/17, 41. The court admonished the advocate not to talk about the alleged crime. *Id.* at 43. The break occurred during a critical part of S.K.'s direct examination, while the prosecutor was attempting to elicit testimony regarding the alleged sexual assaults. In response to a question about "what happened when [Appellant] sat next to you," S.K. indicated she "couldn't really remember." Undeterred, the prosecutor then asked "[w]hat's the next thing you remember happening? What's the next thing that happened, S.K.?" S.K. responded "I don't know." The prosecutor then asked "[w]hat did he do at that point?", to which S.K. again responded she didn't know. *Id.* at 41. The break then occurred, and the prosecutor proposed the victim advocate, then a second victim advocate, talk to S.K. *Id.* at 42, 46. After the break, the duration of which is unclear from the record, the prosecutor again asked S.K. what happened after Appellant sat next

to her on the futon. This time, S.K. unhesitatingly replied, "He was getting closer to me." *Id.* at 56.

On the first day of trial, Judge Pater repeatedly referred to Ortiz as a "victim" in the presence of the jury *Id.* at 48-52. At the beginning of the second day of trial, Judge Pater referred to S.K. as "the victim," also in the presence of the jury. T.p. 3/30/17, 4. Later on the second day, during Appellant's testimony, the prosecutor made a hearsay objection. *Id.* at 227. At a sidebar conference at the bench, the court suggested an objection based on relevance would be more appropriate. *Id.* at 228. The court then sustained the objection on the basis of relevance, despite the fact that the prosecutor never raised relevance in her objection. *Id.* at 229.

Appellant's resentencing before a different judge does not cure the structural error inherent in his trial before Judge Pater. As the case law makes clear, due to the structural nature of this defect, this Court need not resort to harmless-error analysis to reverse Appellant's conviction and remand this matter to the trial court for a new trial. Absent a new trial before an unbiased judge, it would be improper and imprudent to presume the validity of Appellant's conviction.

III. APPELLANT'S CONVICTION WAS AGAINST THE M ANIFEST WEIGHT OF THE EVIDENCE.

Issue Presented for Review and Argument:

The jury clearly lost its way when it found Appellant guilty against the greater weight of the evidence.

In determining a manifest weight challenge, an appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and

created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Vansickle*, 12th Dist. Fayette No. CA2013-03-005, 2014-Ohio-1324, ¶ 86. Appellate courts do this by examining the inclination of the greater amount of credible evidence offered at trial to support one side of the issue rather than the other. *State v. Marcum*, 12th Dist. Butler No. CA2012-03-054, 2012-Ohio-5007, ¶ 11.

Here, the jury clearly lost its way when it found Appellant guilty of multiple counts of rape. For one, the testimony of the State's two key witnesses, Ortiz and S.K., was rife with inconsistencies. The physical evidence was minimal, and the DNA evidence was inconclusive; Appellant was convicted largely on the testimony of Ortiz and S.K. Finally, it is incredible to believe that Appellant was upset and crying at one moment, and sexually assaulting S.K. the next.

While S.K. testified that she fell asleep on the futon, Ortiz testified S.K. woke up on the bed. T.p. 3/29/17 at 106; T.p. 3/30/17 at 119. S.K.testified Ortiz was "really drunk," and required Appellant's assistance to crawl across the floor. T.p. 3/29/17, 108. Ortiz denied being overly intoxicated, and emphatically denied crawling on the floor. T.p. 3/30/17, 116. S.K. testified she saw Ortiz signaling for her to be quiet from the closet. T.p. 3/29/17, 118. Ortiz testified she did not see S.K., nor did she signal for her to be quiet. T.p. 3/30/17, 106, 120. Taken individually, inconsistencies such as these may seem insignificant. Taken together, in conjunction with the other gaps in the State's case, they cast serious doubt on the foundation upon which the conviction is based.

Further casting doubt upon the weight of the State's evidence, there are a number of things in the State's narrative that simply defy logic. S.K. neither called 911, nor went downstairs to alert her grandparents, after witnessing Appellant assault her mother. T.p. 3/29/17,

115-116. Her cell phone was readily accessible, and there was nothing obstructing her path to the stairs. *Id.* After S.K. consoled a sobbing Appellant, she alleges he performed cunnilingus on her. *Id.* at 129, 132. After that, she went downstairs. While Appellant was back upstairs, S.K. did not avail herself of the clear opportunity to either (1) call 911, (2) alert her grandmother or step-grandfather, or (3) simply walk out of the house and seek assistance. Instead, if her testimony is to be believed, she went back upstairs where Appellant was waiting. *Id.* at 132-136. Appellant's account of events, by contrast, seems entirely plausible: he came home, prepared and ate some food, and went to sleep. T.p. 3/30/17 at 220-221.

As the testimony of S.K. and Ortiz could not establish Appellant's guilt beyond a reasonable doubt, neither could the physical evidence presented. There was no photographic evidence of the alleged injuries to S.K.'s vagina. *Id.* at 16. The photographs from the rape examination that the State did present showed only bruising of unknown origin, to her arms and thigh. *Id.* at 10, 22. No semen was ever found. *Id.* at 16, 35, 54. The Y-STR DNA found on the vaginal swab could not eliminate any of Appellant's male relatives as possible contributors, and was consistent not only with Appellant's DNA, but with approximately 1 in 115 persons in the world. Perhaps more importantly, this Y-STR DNA could have been transferred to S.K.'s vagina from the urine soaked mattress upon which she was allegedly assaulted. *Id.* at 81, 85-86.

IV. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT SENTENCED APPELLANT TO THREE CONSECUTIVE NINE YEAR PRISON TERMS.

Issue Presented for Review and Argument:

The trial court's second sentence was predicated upon improper considerations.

When reviewing a challenged sentence, appellate courts employ a two-step process: (1) review the sentencing court's compliance with applicable rules and statutes to determine whether a sentence is clearly and convincingly contrary to law, then (2) if the first prong is satisfied, review the sentence for abuse of discretion. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 26. There is a statutory presumption in favor of concurrent sentences in Ohio. R.C. 2929.41(A). When formulating a sentence, a sentencing court must consider the purposes of felony sentencing, which are: (1) protecting the public from future crime by the offender and others, (2) punishing the offender, and (3) promoting the effective rehabilitation of the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. R.C. 2929.11. Although a trial court has broad discretion to fashion an appropriate sentence, a sentence must be based on the factors provided in R.C. 2929.12 and other factors relevant to the proceeding. *State v. Murphy*, 2d Dist. Clark No. 2010 CA 81, 2011-Ohio-5416, ¶ 22. A trial court abuses its discretion when it "considers an improper factor" in its sentencing analysis. *Id.* at ¶ 21.

In resentencing Appellant, the trial court here seemed to fixate on two factors it considered aggravating: Appellant's lack of genuine remorse for the crimes for which he had been convicted, and an apology Appellant made to S.K. the day after the alleged crimes. Although a lack of remorse is a factor listed for consideration in the sentencing statute, it should be considered in context. Appellant had a direct appeal pending on the day of his resentencing

hearing, a fact that was acknowledged by the court. T.p. 3/13/19, 27. As he was represented by counsel, and continued to maintain his innocence, one would expect Appellant was advised not to make any admissions on the record. Nonetheless, the trial court repeatedly chastised Appellant at the sentencing hearing for his failure to express remorse.

The trial court made the following references to Appellant's perceived lack of remorse. "And I do find that based upon the statutory factor—I know Mr. Eckes touched on it, but he doesn't, in my opinion, show any genuine remorse over what happened here." T.p. 3/13/19, 26. "But not at any time in the PSI or in this letter have you expressed any remorse and apologized for the pain, emotional, physical, that you inflicted upon this child." *Id.* at 27. "And what I gather from the trial transcript and from the PSI and from your letter is that none of this happened. That this is a lie, that this was made up, that maybe it was done because she saw you arguing with her mother. I don't know, but I get the impression from you that this just didn't happen, that this just didn't happen . . . So I don't think you've shown any remorse. I don't think you've shown any contrition. I don't think you've accepted any responsibility in regard to what happened here." *Id.* at 28.

The other overriding issue the trial court considered at sentencing was Appellant calling or texting S.K. the day after the alleged crimes to apologize to her; the implication being that this apology was an admission of guilt to the offenses. The trial court stated "[y]ou have regrets, but I don't think that you have the right regrets; and the fact that you don't acknowledge that this happened, we—*I don't know why you called [S.K.] the next day or texted her while she was at the hospital and apologized if you didn't think you did anything wrong.* So I don't—that's the *one thing* that sticks out in my mind. Why would you try to contact [S.K.] and apologize for something that didn't happen or that you didn't do?" (Emphasis added.) *Id.* at 29.

A review of the record reveals that the text message apology apparently referenced by the trial court here was a bone of contention between the parties at trial—with Appellant attempting to get it into evidence and the State fighting to keep it out. On the first day of trial, counsel for *Appellant* posed this question to S.K. on re-cross examination: "[t]he day after this happened, did you text [Appellant] back and forth? Were you texting with him?" T.p. 3/29/17, 170. After S.K. responded in the affirmative, counsel for the State asked to approach the bench to object. *Id.* The court sustained the State's objection as outside the scope of redirect. *Id.* On the second day of trial, counsel for Appellant again endeavored to elicit testimony regarding the text message, this time on Appellant's direct examination. At sidebar, counsel for the State preemptively objected to the admission of Appellant's apology text message. Counsel for Appellant anticipated that "probably that's the one you don't want me to ask, is the one that says 'I'm sorry for talking your head off last night . . . That's [Appellant] saying that.'" T.p. 3/30/17, 230. These exchanges show that Appellant, far from trying to hide the text message apology to S.K. (as would be expected if he considered the conversation to be inculpatory), went out of his way to try to get it admitted into evidence. They also beg the question: what was S.K.'s response?[1] To the extent that the trial court apparently considered this apology a damning admission of guilt, it erred to the prejudice of Appellant.

[1] Counsel for the State did not want the jury to hear S.K.'s response. During this sidebar discussion, the trial court inquired as to the "issue about the text messages." Counsel for the State responded, "[o]ne of my-- well, one of the issues is again, I think they are hearsay messages. Definitely, any of her responses, I think, are hearsay. You know, the fact that they texted, and she responded, but the content of those messages -- they don't come in. That's my first part." T.p. 3/30/17, 230.

REASONS FOR GRANTING THE PETITION

"[A] criminal trial before a biased judge is fundamentally unfair and denies a defendant due process of law." State v. LaMar, 95 Ohio St.3d 181, 2002-Ohio-2128,767 N.E.2d 166, ¶ 34. See also Rose v. Clark (1986), 478 U.S. 570,577, 106 S.Ct. 3101, 92 L.Ed.2d 460; and Tumey v. Ohio (1927), 273 U.S. 510,534, 47 S.Ct. 437,71 L.Ed. 749. "The term 'biased' implies a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the and the facts." State v. Cepec, 149 Ohio St.3d 438, 2016-Ohio-8076, 75 N.E.3d 1185, ¶73, quoting State ex rel. Pratt v. Weygandt, 164 Ohio St. 463, 132 N.E.2d 191 (1956), paragraph four of the syllabus. "The presence of a biased judge is structural error, which, if demonstrated, requires reversal." Cepec at ¶73, citing to State V. Sanders, 92 Ohio St.3d 245,278, 750 N.E.2d 90 (2001). See also State v. Sanders, 2001-Ohio-189, 92 Ohio St.3d 245,278,750 N.E.2d 90,127 ("The presence of a biased judge on the bench is, of course, a paradigmatic example of structural constitutional error, which if shown requires reversal without resort to harmless-error analysis."); and State v. Stafford, 2004-Ohio-3893, ¶58, 158 Ohio App.3d 509,523,817 N.E.2d 411,421 ("A biased trial court is a structural constitutional error and, if shown, requires reversal without resorting to a harmless-error analysis.").

There is no rule, or dicta, that suggests a movant for a new trial on the basis of judicial bias must demonstrate bias through specific instances of judicial conduct occurring during trial. However, in all Ohio cases where "new trial" is within the same paragraph as "judicial bias," the movant does cite to specific instances of judicial bias. Granted, As I pointed out, the only evidence movants in the cases would have is specific examples of judicial bias.

In the Lawrence case, a motion for new trial on the basis of judicial conduct can be based on the contents of the Entry of Recusal without the need for additional references to specific instances of judicial conduct that occurred during the trial. I expect the State to argue that, because all of the cases on point do involve specific examples of bias, such proof is required. However, requiring specific examples in the Lawrence case, is tantamount to a harmless-error analysis which does not apply.

CONCLUSION

For the foregoing reasons, Appellant requests this honorable Court reverse his conviction and remand this matter to the trial court for a new trial. In the alternative, Appellant requests his sentence be set aside and the matter be remanded for a new sentencing hearing.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dustin Lawrence

Date: 6-23-21