21-5684 ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

ZAIRE PAIGE,

PETITIONER,

-AGAINST-

STEWART ECKERT, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, AND **LETITIA JAMES,** ATTORNEY-GENERAL STATE OF NEW YORK,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS, SECOND CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether petitioner was denied his constitutional right to be present at his trial, where the judge ejected him after a single, brief, spontaneous, nonviolent courtroom outburst during a witness's testimony and never let him return for the rest of his trial, or even follow it remotely, despite petitioner's repeated assurances that there would be no further disruptions; and whether the Second Circuit's denial of relief was based on an unwarranted deference to the state court's factual and legal determinations, thereby undermining the fundamental principles set forth in *Illinois v. Allen*, 397 U.S. 337 (1970).

LIST OF PARTIES

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

RELATED CASES

- *People v. Paige*, 134 A.D.3d 1048 (N.Y. App.Div. 2015). Judgment entered Dec. 23, 2015.
- *People v. Paige*, 23 N.Y.3d 1073 (2016). Leave to appeal denied May 15, 2016.
- *Paige v. Eckert*, Dkt. No. 16-CV-6802 (MKB). Judgment entered July 9, 2020.
- *Paige v. Eckert*, 2021 WL 1115610 (2d Cir. 2021) Dkt. No. 20-2296. Judgment entered March 24, 2021.
- *Paige v. Eckert* (2d Cir. 2021). Rehearing denied May 12, 2021.

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SUPREME COURT OF THE UNITED STATES

PETITION FOR CERTIORARI

Petitioner Zaire Paige petitions for a writ of certiorari to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to this petition and is reported at 2021 WL 1115610 (2d Cir. 2021).

The opinion of the United States district court appears at Appendix B and is unreported.

The opinion of the highest state court to review the merits appears at Appendix D and is reported as *People v. Paige*, 134 A.D.3d 1048 (N.Y. App.Div. 2015).

JURISDICTION

The United States Court of Appeals decided petitioner's case on March 24, 2021. A petition for rehearing was timely filed and denied on May 12, 2021. A copy of the order denying rehearing appears at Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

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[1] Due to the COVID crisis, this Court has extended the time for filing certiorari petitions to 150 days after the lower court's denial of a timely petition for rehearing (Order, March 19, 2020) and permits the filing of a single paper copy of the document (Order, April 15, 2020), effective for filings prior to September 2021 (Order, July 19, 2021).

CONSTITUTIONAL AND STATUTORY PROVISIONS

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

STATEMENT OF THE CASE

Introduction

Zaire Paige, age 23, was sentenced to what is effectively life without the possibility of parole after a trial from which he was ejected after a single, brief, spontaneous, nonviolent courtroom outburst. He was never allowed to return despite his repeated promises to conduct himself properly. Prior to the outburst, he had sat quietly through many days of trial and pretrial proceedings. He was never alleged to be a threat to security. Yet, when defense counsel requested that petitioner at least be allowed to watch his trial remotely - which would have resolved any possible concerns about courtroom decorum - the

judge retorted, "Go to the Court of Appeals and tell me that I am wrong" (1174).[2]

As a result, petitioner was forced to be absent for crucial police testimony, summations, the jury charge, the jury's numerous questions, the judge's responses, and the rendering of the verdict.

The notion of a young man sitting in the courthouse pens begging to be admitted to his own trial where he faces a life sentence should be abhorrent to anyone charged with upholding the Constitution.

Half a century ago, this Court held that the right to be present is so fundamental that courts must indulge every reasonable presumption against its waiver. *Illinois v. Allen*, 397 U.S. 337 (1970). *Allen* created a narrowly tailored exception whereby a defendant may constructively waive his right to presence by conduct so disruptive "that his trial may not be carried on with him in the courtroom." Even then, he may "of course" reclaim this right "as soon as" he is "willing" or "promises" to conduct himself properly." *Id.* at 343-344. Thus, exclusion is not an all-purpose disciplinary tool for punishing annoying conduct. The "deplorable" remedy of "remov[ing] a man from his trial, even for a short time," is limited to when *his*

[2] Numbers in parentheses are the pages of the trial transcript on file with the Clerk of the Court in the Second Circuit.

presence in the courtroom makes it "exceedingly difficult or wholly impossible to carry on the trial." *Id.* at 338, 347 (emphasis added).

The state courts' denial of relief for this sweeping deprivation of the right to presence was based on an unreasonable determination of the facts and was contrary to, and an unreasonable application of the holding of *Allen*. *See* 28 U.S.C. 2254(d)(1),(2). The trial court had recited a litany of allegations against petitioner to justify denying readmission. Although these allegations are demonstrably contradicted by the record, the Appellate Division relied on them to conclude that petitioner had already waived his right to be present *even before the outburst*. The federal courts deferred to these findings on habeas review. As deferential as the standards of habeas review are, no deference is accorded to factfindings contradicted by the record.

Moreover, even if the judge's allegations had been supported by the record, none of them constituted conduct that made it "exceedingly difficult or wholly impossible to carry on the trial" with petitioner in the courtroom. *Allen* at 338.
It is an unreasonable application of *Allen* to extend its narrow definition of the kind of disruption that waives the right to presence to encompass whatever conduct the judge finds annoying.

Furthermore, *Allen* holds that a defendant who loses his right to presence through disruption can "of course" reclaim it if he is "willing" or promises to conduct himself properly. The Second Circuit has impermissibly added a restrictive gloss whereby a defendant's promise may be rejected unless he can meet the burden of "satisfactorily demonstrat[ing]" that he will not be disruptive again. That is an unreasonable application of *Allen's* holding. *See, e.g., Tennard v. Dretke*, 542 U.S. 274, 283 (2004)(unreasonable application of Supreme Court holding to add "restrictive gloss" or "screening test" to constitutionally required procedures). While a court may arguably reject a defendant's repeatedly broken promises, *Allen* does not permit a court to refuse readmittance in the face of promised good behavior based on animus, as was demonstrably the case here. To uphold such a sweeping and unreasonable deprivation of the right to presence is to put the principles of *Allen* at risk. Petitioner requests this Court to grant certiorari.

Procedural History

Petitioner was convicted after a jury trial of one count of second-degree murder (N.Y.P.L. 125.25(1)); three counts of first-degree assault (N.Y.P.L. 120.10(01)); one count of second-degree assault (N.Y.P.L. 120.05(2)); and one count of second-degree criminal possession of a weapon (N.Y.P.L. 265.03(3)).

He was sentenced to a total prison term of 107 years to life: 25 years to life on the murder count; consecutive terms of 25 years plus 5 years of post-release supervision (PRS) on each of the first-degree assault counts; 7 years plus 5 years of PRS on the second-degree assault count; and a concurrent term of 15 years plus 5 years of PRS on the weapons count (DelGiudice, J., at trial and sentencing).

Petitioner appealed as a poor person to the N.Y. Supreme Court Appellate Division, Second Department, which affirmed the conviction on December 23, 2015. *People v. Paige*, 134 A.D.3d 1048 (N.Y. App.Div. 2015). The N.Y. Court of Appeals denied leave to appeal on June 24, 2016. *People v. Paige*, 27 N.Y.3d 1073 (2016); *People v. Paige*, 27 N.Y.3d 1137 (2016) (Rivera, J.).

Petitioner timely filed a habeas petition in the Eastern District of New York. On July 9, 2020, the Honorable Margo K. Brodie denied the petition but granted a certificate of appealability. *Paige v. Eckert*, 16-CV-6802 (MKB).

The Second Circuit denied the habeas petition in a Summary Order on March 24, 2021. *Paige v. Eckert*, 2021 WL 1115610 (2d Cir. 2021). The court denied petitioner's motion for rehearing on May 12, 2021.

Trial

In the early afternoon of October 27, 2008, on a busy commercial street in Fort Greene, Brooklyn, Lethania Garcia was standing on the sidewalk after a court appearance, having a conversation with a group of other young men. Two men approached him firing shots. He fled into a hair salon where the gunmen followed and shot him dead. The bullets injured four uninvolved bystanders. The gunmen escaped in a car.

The lead detective testified that the police believed that Garcia, who had "Problem Solver" tattooed on his arms, had murdered Teddy McNichols two years earlier. They traced the getaway car to Paul Wint, whom they arrested the next day. Wint purported to identify petitioner and co-defendant Robert Crawford as the gunmen, saying that he himself was merely the driver.

Wint was indicted for second-degree murder, carrying a life sentence. He testified against petitioner and the co-defendant in exchange for an offer from the Brooklyn District Attorney's Office of a plea to reduced charges with a sentence of 4 to 12 years.[3]

Wint's credibility was repeatedly impeached for his criminal record and numerous instances of low dealing, to which

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[3] Wint was released after serving 4 1/2 years. *See* http://nysdoccslookup.doccs.ny.gov/

he unabashedly admitted. He also admitted to writing to another Rikers Island jail detainee that his accusations were fabricated.

Apart from Wint's testimony, there were no identifications, statements or relevant forensic evidence. Even the relevance of the phone records purportedly connecting petitioner to the shooting depended on crediting Wint's claim that petitioner was using a phone that day that was registered to someone else.

Petitioner's Two Instances of Being Produced Late

On the second day of his 2-week trial, petitioner was produced to court 50 minutes late. Corrections officers told the judge that petitioner had caused the delay by wanting to wear the clothes that his family had brought him for trial. The judge berated petitioner with comments such as, "This is not a haberdashery," and, "I will not permit clothes to be delivered to you during the trial. If you wear the orange jumpsuit, you wear the orange jumpsuit" (157).

Defense counsel explained that the family had tried to follow procedures by taking the clothes to Rikers the day before, but that Corrections had refused to accept them because petitioner was still in transit from court (158).[4] Nevertheless,

[4] This Court may take judicial notice that the Rikers Island jail is at a considerable distance from the Brooklyn Courthouse.

Corrections had apparently accepted the clothes when the family brought them to the courthouse that morning.

A few days later, petitioner was produced 15 or 20 minutes late from a 10-minute break. The judge said he was told that petitioner had caused the delay by "disrobing during break." He again berated petitioner, threatening, "Next time the case will proceed in your absence because I will consider it a voluntary tactic to delay the proceedings," and "You do that again, I will not have you in the courtroom or I will bring you out in cuffs in front of the jury. Do you understand that?" Petitioner answered, "Yes, I do." (643-644).

The record shows no further incidents prior to the outburst.

The Judge's Advice that Petitioner Testify, Petitioner's Outburst, and Subsequent Testimony in His Absence.

The prosecutor proposed to elicit from the arresting officer that petitioner had allegedly made an incriminating statement. When defense counsel objected to the lack of notice, the judge answered, "The best source for your information is your client himself. If he denies the statement he can take the stand" (948). No statement was introduced.

The prosecutor had the officer testify, over objection, about an unrelated, still-pending case where he had arrested petitioner in a house where there were guns of the same caliber

as those used in the shooting. This provoked petitioner's outburst, detailed below, and his removal from the courtroom.

With petitioner absent, the officer testified about chasing and capturing petitioner several months after the shooting. He attempted to explain how petitioner ended up in the hospital with a handcuff key in his lung (Police Officer Rashan LaCoste: 977-979).

The lead detective gave further testimony about the handcuff key, as well as petitioner's alleged motive and connection to the decedent (Detective Thomas Donohue: 1038-1072).[5]

The outburst occurred when the arresting officer read to the jury a list of guns recovered in the unrelated case and was prompted by the prosecutor to add that he also recovered a banana clip.

> PETITIONER: The shit wasn't mine. It wasn't at my house.
>
> COURT: Be quiet. If you want to testify, you can take the stand.
>
> PETITIONER: He's fucking lying.
>
> COURT: Officer, take charge of the defendant.
>
> PETITIONER: Come on, man. You are sitting up there fucking lying, man.

[5] The Appellate Division found that the testimony about the guns and the handcuff key should not have been admitted but that the errors were harmless. *People v. Paige*, 134 A.D.3d 1048, 1056-1057 (N.Y. App.Div. 2015).

COURT: Take charge of the defendant.

PETITIONER: He is sitting up there fucking lying.

COURT: Officer, take charge of the defendant.

PETITIONER: Get the fuck out of here, man (979).

Petitioner was removed. The judge dismissed the jury for the day, saying not to hold the outburst against petitioner (980).

As soon as the jury was gone, the judge said, "I consider Mr. Paige's outburst contemptuous." He told defense counsel to speak to petitioner over the weekend to see if petitioner's presence "will be worthwhile" (981).

The judge, observing that defense counsel was "trying to make a record to support your client if there is an appeal," stated, "I want to support the record so the Appellate Courts realize the tenure [*sic*] of what is going on in this court" (984). The judge accordingly began making his own record, alleging that petitioner was "consistently late," had made them late "at all times," and had disobeyed "repeated admonitions" not to communicate with the audience:

> You know the record should be clear he created issues about clothing and apparel, okay, was consistently late, would take his clothes off during luncheon recesses and insure we were late at all times, he consistently attempted to

> communicate with members of the audience despite my repeated admonitions not to do it, and now he creates an outburst, even though I admonished him not to talk, he resisted being cuffed by the officers, used expletives, raised his voice in quite a threatening manner.
>
> He is doing everything that he can to frustrate these proceedings.

The judge suggested that petitioner might not be in court on the following Monday, saying, "I wouldn't put it past him to make up some excuse through Corrections" (983).

He suggested that petitioner could be readmitted if he assured the court that he would "act like a gentleman," although "As far as I'm concerned, he waived his right to be present" (983-984).

On the following Monday morning the judge stated that he was told by "court personnel" that petitioner "decided he wanted to get a haircut and is delaying these proceedings," so that "suffice it to say, he's violated the rules under *Parker*, and the case will proceed without him" (990).[6]

Defense counsel immediately asked the judge to allow petitioner to be present (991). The judge answered, "Well, let me put this on the record," and expatiated on how defense counsel had opened the door to the arresting officer's testimony

[6] Referring to *People v. Parker*, 57 N.Y.2d 136 (1982), requiring courts to warn defendants that their trial will proceed if they voluntarily absent themselves.

about the unrelated, pending case. He then described petitioner's outburst as "shouting obscenities at the witness" and refusing the court's "lawful directive" to "be quiet" (992).

The judge repeated that "my staff" said that petitioner refused to come to court "because he allegedly wanted a haircut." He ruled that since petitioner had signed the *Parker* warnings, the trial could proceed without him. He again accused petitioner of "consistent disrobing between court adjournments" to delay the proceedings, as well as a "persistent pattern of disruptive conduct," and an "all-around general demeanor as being hostile to this Court." Based on this, the judge found that petitioner was voluntarily absent (994).

The judge faulted defense counsel for being unable to contradict "the reasons given by the court staff" for why petitioner was not timely produced (994).

Defense counsel renewed his request to readmit petitioner, saying, "If Mr. Paige is produced, I understand he's ready to apologize to the Court." Counsel referred to case law regarding the obligation to readmit and stated that petitioner would promise not to repeat the outburst. He noted that petitioner had been "a gentleman" until the outburst and requested that he be given one more chance (1026-1027).

The judge again accused petitioner of doing "everything to delay and disrupt these proceedings" so that an apology was not

"worthwhile" (1027). He told the jury "to disregard the defendant's conduct and his absence" (1029).

After the People rested, defense counsel informed the court that petitioner had been produced to the courthouse at 12:20. He had not intentionally delayed his transport by going to the barber as alleged, but had simply not been taken on the first bus from Rikers. Counsel explained, "He said that it was not because it was his fault. He said that he was ready to leave from the barber, he didn't care about the haircut and that he wasn't taken on the first bus" (1170).

Despite this factual dispute, the judge made no inquiry, now asserting that his information came from "the Corrections Department." The judge accused petitioner of stripping "naked" during a lunch break. He derided petitioner for asking his family to bring clothes, saying, "Another day he decides he doesn't like the clothes that he has, so he wants his momma to bring him clothes." The judge concluded, "And now when I get the information that he didn't want to come to court through the Corrections Department, I am supposed to believe him as opposed to everybody else?" (1171).

Counsel requested that petitioner at least be allowed to watch or hear the proceedings from another room. The judge answered, "I am not putting him in another room to let him see

what is going on. A waiver is a waiver. He waived his right to be present" (1173).

Counsel pointed out that another judge in the courthouse had arranged for defendants to follow their trial on video. The court responded that petitioner had "forfeited" his right to be present and that summations were not a stage of trial where he had the right to be present (1174).

The judge again complained about petitioner's mother:

> Go to the Court of Appeals and tell me that I am wrong. Now I have to alter the entire proceedings to the benefit of a destructive individual that orchestrated the disruption in cahoots with his mother who also attempted to frustrate justice since day one? It is not happening in front of me (1174).

Counsel, referring to the judge's having twice told petitioner that he had to testify if he wanted to rebut the arresting officer's testimony, explained that petitioner now felt that he had no choice but to testify (1171). The judge opined that this was "just a delaying, stalling tactic on his part." He again summed up for the record, alleging that petitioner had "refused to be properly dressed," "demanded that his family bring him clothes, outside the rules and regulations," "went strip naked during court breaks" and had deliberately delayed his transport to court by going to the barber (1200-1201).

The judge had petitioner brought into the courtroom where petitioner spoke with his attorney and took his advice not to testify. Petitioner did not say or do anything disruptive, nor did the judge inquire whether he was willing to conduct himself properly. Instead, he immediately ordered petitioner to be taken back down to the pens. Counsel again requested that he be allowed to stay. He argued that petitioner had never acted violently during trial, would not repeat the outburst and that he had the fundamental constitutional right to be present for summations and the jury charge. Counsel "respectfully beg[ged]" the court "in the interest of fairness and justice" to let petitioner stay.

The judge repeated that petitioner had forfeited his right to be present by his outburst. Petitioner's "delays" and his revisiting his decision whether to testify showed that he was "disingenuous and not believable" (1203).

During deliberations, when the jurors sent notes asking for exhibits and readbacks, defense counsel again related that petitioner had given assurances that he would "play like a gentleman" and asked that he be readmitted.

The judge repeated that petitioner had forfeited by his outburst his right to be present and again opined that petitioner's revisiting his decision whether to testify was a "subterfuge" and an attempt to "manipulate this Court. And I'm

not going to let it happen. Request denied" (1350). Petitioner was consequently absent for testimony, summations, jury deliberations, the court's responses to their many notes, and the rendering of the verdict.

State Appellate Court Decision

The Appellate Division decision found that "even prior to the defendant's outburst, he had engaged in a pattern of behavior that delayed and frustrated the proceedings," so that he "knowingly, voluntarily and intelligently waived his right to be present at the remainder of his trial." *People v. Paige,* 134 A.D.3d at 1052 (emphasis added). These "circumstances," together with the "profanity-ridden outburst," justified the judge's refusal to readmit him. *Id.* at 1053. Finally, under "the particular circumstances," it was not an abuse of discretion to refuse to allow petitioner to watch his trial remotely. *Id.*

District Court Decision

The District Court decision (hereinafter "Decision" or "D.") expressly rejected *Allen's* definition of conduct that waives the right to presence. Rather, "clearly established Supreme Court precedent holds that misconduct warrants removal, not if that conduct 'makes it impossible to conduct the trial with the defendant in the courtroom.'" Removal is warranted by any conduct that "permits our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and

obstructed by defendants" (D. 25)(citing *Allen*, 397 U.S. at 346)(emphasis added).

The Decision further rejected *Allen's* holding that a defendant can "of course" reclaim his right by being willing or promising to conduct himself properly. Rather, a defendant has the "burden" to "satisfactorily demonstrate that he would not be violent or disruptive" (D. 31).

Having dispensed with *Allen's* holdings, the Decision resolved the lack of record support for the judge's allegations by asserting that he had "noticed these delays on multiple prior occasions but did not place its observations on the record at every occurrence." "This conclusion is supported," the Decision explained, by the judge's repeating the allegations several times, thereby constituting "a substantial record" to justify refusing readmittance (D.26, 32).

The Decision listed four cases cited in petitioner's brief where the Second Circuit held that a judge must make a meaningful inquiry into the reason for a defendant's absence before proceeding with the trial. The Decision made no attempt

to distinguish them from petitioner's case where the record showed no such inquiry (D. 29).[7]

The Decision concluded that petitioner's remarks at sentencing, where he protested in earthy terms the court's perceived partiality towards the prosecution, retroactively justified his not being readmitted (D.28, 32-33).

Second Circuit Decision

The Second Circuit decision began by mistaking petitioner's argument, which is not that he was improperly ejected after the courtroom outburst, but that his permanent exclusion thereafter violated his constitutional right to be present.[8]

The decision recited *Allen's* holding but made no attempt to apply it. The Circuit invoked the "doubly deferential lens" of habeas review to find "no basis" for disputing the judge's allegations that petitioner was late to court "several times."

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[7] *See, e.g., U.S. v. Fontanez*, 878 F.2d 33, 36 (2d Cir. 1989)(court must conduct inquiry into whether defendant's absence is knowing and voluntary and whether he would soon be present). *Fontanez* further notes, "we must not condone a district court's findings, on which a decision of waiver is based, where they stand in direct contradiction to the evidence."

[8] The Circuit cited dicta from *Norde v. Keane*, 294 F.3d 401, 413 (2d Cir. 2002) that a defendant's conduct need not be as "egregious" as that of the defendant in *Allen* to warrant ejection (Circuit at 3). But the standard is not egregiousness, but whether the conduct makes it impossible to proceed with the defendant in the courtroom. Mr. Norde's "yelling" in court met that standard. In contrast to the judge in petitioner's case, however, the judge subsequently readmitted him. *Norde*, 294 F.3d at 406-407.

Nor did the decision consider whether being late justified refusing readmission for the rest of the trial (Circuit at 3). The court similarly relied on the "deferential standard of review" to uphold the judge's concluding without inquiry that petitioner's being produced late from Rikers was a voluntary absence (Circuit at 4).

The decision held that a defendant who has lost his right to be present cannot reclaim it unless he "satisfactorily demonstrates that he would not be violent or disruptive." (Circuit at 3-4).

As for petitioner's not being allowed to follow his trial remotely, the court treated it as a separate claim that required petitioner to find a holding by this Court that such accommodation is required (Circuit at 4).

Habeas Principles

The deferential standard of habeas review assumes that state courts have made "good-faith attempts to honor constitutional rights." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). AEDPA "preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents and "is so lacking in justification beyond any possibility for fairminded agreement." *Id.* at 102-103.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a petitioner is entitled to habeas relief when the state courts' denial of his constitutional claim is contrary to, or an unreasonable application of, clearly established Federal law, as determined by a holding of the U.S. Supreme Court. 28 U.S.C. 2254(d)(1). A decision is contrary to established federal law when it applies a rule that contradicts that law. A decision is an unreasonable application of the law if it identifies the correct governing legal principle but unreasonably applies it to the facts of the petitioner's case. *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011).

A habeas petition may also be granted where the state court's decision was based on an unreasonable determination of the facts. 2254(d)(2). Factual determinations by state courts are presumed correct unless shown to be incorrect by clear and convincing evidence. 2254(e)(1). "A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Brumfield v. Cain*, 576 U.S. 305, 314 (2005). "The standard is demanding but not insatiable." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).

REASONS FOR GRANTING THE PETITION

The Circuit Court's Deference to the State Courts' Unreasonable Factual and Legal Determinations Eviscerates the Holding of *Allen*.

The "doubly deferential lens" of habeas review is not a blindfold. The Second Circuit stands virtually alone in upholding the extreme and arbitrary deprivation of the right to be present demonstrated in petitioner's case. Petitioner knows of no decision where a judge refused readmittance to a defendant who repeatedly promised to conduct himself properly after a single, non-violent outburst, keeping him out for testimony, summations, the jury charge, deliberations and the rendering of the verdict, even to the extent of refusing to let him follow his trial remotely. The state court's factfindings are unsupported by the record and its application of *Allen* is so unreasonable as to eliminate its principles altogether.

Allen unambiguously announced a constitutional rule in a holding beginning with, "we explicitly hold today." *Allen*, 397 U.S. at 343. It held that the right to presence is so fundamental that courts must apply every reasonable presumption against its waiver. Therefore, the "deplorable" act of removing a man from his trial "even for a short time" is limited to when it is specifically the defendant's presence in the courtroom that obstructs the trial. *Allen* at 343, 347. Thus, the

deprivation of a defendant's right to presence must correlate to the disruptive effect of his presence. Exclusion may not be used as an all-purpose disciplinary tool.

Moreover, so fundamental is the right to presence that even when a defendant has caused a disruption making it impossible to proceed with him in the courtroom, he can "of course" reclaim his right "as soon as" he is "willing" or "promises" to conduct himself properly. *Id.* at 343, 344.

In petitioner's case, the trial judge openly used exclusion as punishment, piling on allegations that were not only indicative of afterthought, but which even if true, had no connection to whether petitioner's presence in the courtroom made it impossible to proceed. Notwithstanding that the allegations are contradicted by the trial transcript, the Appellate Division adopted them as fact and concluded that they constituted a "pattern of behavior" whereby even prior to the outburst, petitioner had *already* waived his right to presence *for the rest of the trial*. *People v. Paige,* 134 A.D.3d at 1052 (emphasis added). This conclusion, based on a non-existent "pattern" and impermissibly extending *Allen's* narrow definition of disruption "is so lacking in justification beyond any possibility for fairminded agreement." *Harrington v. Richter,* 562 U.S. 86, 102-03 (2011).

The Circuit Erroneously Deferred to Factual Conclusions Unsupported by the Record.

No deference is due to a state court's factual conclusions when unsupported by the record or based on clear factual error. *Brumfield v. Cain*, 576 U.S. 305, 316-317 (2005). This Court is not bound by a lower court's unreasonable interpretation or mischaracterization of the facts. *Miller-El v. Dretke*, 545 U.S. at 265 (rejecting lower courts' "dismissive and strained interpretation of petitioner's evidence" of discriminatory use of peremptory challenges). A habeas court need not accept a purportedly factual assertion that "reeks of afterthought." *Miller-El v. Dretke*, 545 U.S. at 241 (rejecting lower court's acceptance of prosecutor's explanation for peremptory challenge).

Transcripts of state court proceedings are accorded a presumption of regularity. *Bankhead v. LaVallee*, 439 F.Supp 156, 159 n.5 (E.D.N.Y. 1977)(collecting Second Circuit cases). Here, the transcript shows that, contrary to the state court's finding, there was no "pattern of behavior" whereby petitioner knowingly and voluntarily waived his right to presence, even before the outburst. *People v. Paige*, 134 A.D.3d at 1052. Contrary to the trial judge's retroactive allegations, petitioner was not "consistently late" nor did he ensure that

the proceedings started late "at all times" after lunch breaks and adjournments.

The record shows exactly two instances of petitioner's being produced late prior to the outburst. The first was after Corrections officials had refused to let petitioner's family deliver his clothes to the jail facility where he was being held, but accepted them at the courthouse the following morning. Thus, contrary to the judge's allegation, the family had not violated the rules. Nor was it a reasonable inference that petitioner's desire to dress well for his murder trial demonstrated an intent to disrupt or frustrate the proceedings.

The second incident was when petitioner was produced 15-20 minutes late from a 10-minute break. The court threatened that if he were late again, he would be excluded from his trial or displayed to the jury in handcuffs (644). Thus, if there had been any further lateness, it would appear in the transcript. No such incident appears.

Nor does the transcript show any instance of petitioner's defying even one order, much less "repeated" orders not to communicate with the audience, as the judge alleged.

In sum, there was no pre-outburst "pattern" of disruption. The state court's reliance on this non-existent pattern to find that petitioner had permanently waived his right to presence

even before the outburst was an unreasonable determination of the facts.

The District Court speculated that the incidents alleged by the judge must have occurred because he said so. Decision at 26. But a judge may not make himself an unsworn witness against the accused. If the transcript did not record any such incidents, the judge could not add them by fiat.

The Second Circuit roundly asserted that there was "no basis" to doubt the judge's allegations. Circuit at 4. On the contrary, the basis is the absence of these incidents from the presumptively correct trial transcript.

The judge's allegations about petitioner's post-outburst conduct were also either contradicted by the record or irrelevant to whether petitioner should be readmitted. If petitioner showed an "all-around hostile demeanor," and was "in cahoots with his mother," that may have been annoying conduct but they are not grounds for finding a knowing and voluntary waiver of the right to be present.

The judge mischaracterized the facts in alleging that petitioner "demand[ed] to testify. . . then comes into the courtroom and indicates that he doesn't want to testify," thereby demonstrating a "subterfuge" and an attempt to "manipulate this Court" (1350). As defense counsel explained, the judge had suggested to petitioner that he had to testify if

he wanted to contradict the arresting officer's testimony. Petitioner reasonably inferred that he had no choice but to testify. It was only after consulting with his attorney in the courtroom that he was persuaded not to do so. He did not speak out of turn or demonstrate any disruptive behavior at that time. Instead, he promised through his attorney that there would be no further disruptions and begged to be allowed to stay.

The judge's conclusion that petitioner was voluntarily absent when he was not timely produced from Rikers was based entirely on what it was told off the record by an unidentified member of its staff whose basis of knowledge was unknown. Even after petitioner explained that he had simply not been put on the early bus to court, the court made no inquiry.

No deference is accorded to legal conclusions based on inadequate factfinding procedures. *Panetti v. Quarterman*, 551 U.S. 930, 954 (2007)(court's denial of competency hearing based on ignoring procedures dictated by Supreme Court).

This Court and the federal and state courts require an on-the-record determination of whether a defendant's absence is voluntary. *Taylor v. U.S.*, 414 U.S. 17 (1973)(court determined voluntariness of defendant's absence after inquiry of his wife); *U.S. v. Tureseo*, 566 F.3d 77, 83 (2d Cir. 2008)(court must conduct record inquiry to determine whether defendant's absence is voluntary).

People v. Parker, 57 N.Y.2d 136 (1982), on which the trial judge relied, similarly does not permit a court to proceed without inquiry when the defendant does not appear. *Id.* at 142; *see also People v. Epps*, 37 N.Y.2d 343 (1975)(when defendant in custody fails to appear, court must conduct inquiry into whether absence is voluntary).[9]

When state law mandates procedures to protect the rights of the accused, a court's violation of them undermines any argument that it was a legitimate exercise of discretion. *Panetti v. Quarterman*, 551 U.S. at 950-951. In petitioner's case, contrary to the Second Circuit's conclusion, the judge's disregard of the procedures mandated by *Parker* and *Epps* was not entitled to deference when he relied on nothing more than uncorroborated rumor, unsupported by any inquiry.

In sum, the record shows that the state court's finding that petitioner waived his right to presence by conduct that "delayed and frustrated court proceedings" despite being "repeatedly warned," is unsupported by the record and based on unreasonable interpretations and mischaracterizations of the facts. *Paige* at 1052. No deference is due to these conclusions.

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[9] Contrary to the District Court's assertion, petitioner has never argued that he had to be personally present for the inquiry. But it is no answer that a court may dispense with the inquiry when "the facts are clear and undisputed." Decision at 29 n.11. Here, petitioner expressly disputed that he had deliberately caused himself to be produced late.

Brumfield v. Cain, 576 U.S. at 316-317; *Miller-El v. Dretke*, 545 U.S. at 265.

Finally, contrary to the Second Circuit's assumption, petitioner has never argued that the refusal to let him follow his trial remotely is a separate claim requiring him to find a Supreme Court holding on point (Circuit at 4). The refusal is simply additional proof that the judge impermissibly used exclusion as punishment for annoying conduct and not from any concern for courtroom decorum.

The Circuit Erroneously Deferred to the State Court's Ignoring the Holding of *Allen*.

No deference is owed to a state court's denial of habeas relief when based on an unreasonable application of this Court's holdings. *Panetti v. Quarterman*, 551 U.S. at 953-954. When this Court interprets and applies the Constitution to require standards or procedures, no other authority may dispense with them. *Dickerson v. U.S.*, 530 U.S. 428, 437 (2000) (overturning federal statute dispensing with requirement of *Miranda* warnings). No deference is due when a state court fails to provide the procedures mandated by clearly established Supreme Court holdings. *Panetti v. Quarterman*, 551 U.S. at 948-959 (granting habeas where state court's denial of competency hearing based on flawed interpretation of mandates of *Ford v. Wainwright*, 477 U.S. 399 (1986)).

Based on this principle, courts may not lower the threshold requirements of, or graft additional inquiries onto, constitutionally mandated standards or procedures. For example, where the *Strickland* test for ineffective assistance of counsel requires a petitioner to show only that but for his attorney's errors, there is a "reasonable probability" that the outcome would have been different, it was an unreasonable application of *Strickland* to require an additional inquiry into whether the errors rendered the proceeding "fundamentally unfair." *Williams v. Taylor*, 529 U.S. 362, 393, 397 (2000)(citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

Similarly, a court may not add "its own restrictive gloss" onto a constitutionally mandated procedure. *Tennard v. Dretke*, 542 U.S. 274, 283 (2004)(unreasonable application of established federal law for lower court to add "screening test" of "constitutional relevance" to requirement that jury in capital case be allowed to consider mitigating evidence).

Nor may a lower court impose a higher burden of proof on defendants than required by the Supreme Court. *Johnson v. California*, 545 U.S. 162, 168 (2005)(defendant alleging discrimination in jury selection may not be held to higher standard of proof than required under *Batson v. Kentucky*, 476 U.S. 79 (1986)).

The state court here impermissibly extended *Allen's* narrow definition of conduct that waives the right to presence to encompass conduct having nothing to do with whether petitioner's presence in the courtroom made it impossible to proceed with the trial. Petitioner knows of no decision holding that the right to presence is permanently waived by being produced late to court. Even assuming for the sake of argument that petitioner deliberately "frustrated the proceedings" by dawdling over his clothing, "Behavior that is merely disruptive is insufficient under *Allen* to justify removal." *U.S. v. Ward*, 598 F.3d 1054, 1058 (8th Cir. 2010)(citing *Tatum v. United States*, 703 A.2d 1218, 1223 (D.C.App.1997)).

The state court found that the "profanity-ridden outburst" further justified the judge's refusal to readmit him or even allow him to follow his trial remotely. *Paige*, 134 A.D.3d at 1053. That is directly contrary to *Allen's* holding that a defendant who loses his right to presence by disruptive conduct can "of course" reclaim it as soon as he is "willing" or "promises" to conduct himself properly. *Allen*, 397 U.S. at 343, 344.

The Second Circuit's deference to this overt departure from *Allen* is itself an unreasonable application of *Allen*. The Circuit impermissibly grafts an additional requirement whereby a defendant must not only promise but "satisfactorily

demonstrate," based his pre-disruption conduct, that he will not disrupt again. (Circuit at 4).

That is exactly the "restrictive gloss" or "additional inquiry" which this Court has held to be an unreasonable application of its holdings. Far from imposing a burden, *Allen* holds that "of course" the right may be reclaimed based on willingness or a promise. *Allen* at 434-344.[10]

The Denial of Petitioner's Right to Be Present Was Not Harmless.

The state court, having found no error, did not reach the question of whether it was harmless. Accordingly, there is no determination on that point to which this Court must defer in assessing whether petitioner has satisfied 2254(d). *Brumfield v. Cain*, 576 U.S. at 324.

Even assuming that this sweeping deprivation of petitioner's right to be present was a trial error and not structural, its sheer extent and unreasonableness, even to the point of not letting him follow his trial on video, so "infect[ed] the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." *Brecht v. Abrahamson*, 507 U.S.

[10] Even assuming that a court may inquire into the defendant's sincerity, the judge made no such inquiry here, where petitioner was returned to the courtroom and gave assurances through his attorney that there would be no further disruptions. The judge had already decided once and for all that petitioner had "waived" or "forfeited" his right to be present (1173, 1174).

619, 638 n.9 (1993). Petitioner was kept out of the courtroom for police testimony about his seizure and arrest, summations, the jury charge, the court's responses to their notes and the rendering of the verdict, where his absence had "a substantial effect on his ability to defend." *Snyder v. Massachusetts*, 291 U.S. 97, 105-106 (1934).[11]

Even applying harmless error analysis, the State cannot meet its burden of showing that the error did not have a "substantial and injurious effect influence on the verdict." *Brecht v. Abrahamson*, 507 U.S. at 638; *see also Glebe v. Frost*, 135 S.Ct. 429, 429 (2014)(state has burden to prove error not harmless).

A defendant's presence at trial enables him to assist in his defense and enables the jury to observe his demeanor. "It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table.

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[11] The right to presence applies "especially" to the rendition of the verdict. *Diaz v. U.S.*, 223 U.S. 442, 456 (1912). A defendant's presence is critical "because the jury in deliberating towards a decision knows that it must tell the defendant directly of its decision in the solemnity of the courtroom." *U.S. v. Canaday*, 126 F3d 352, 362 (2d Cir. 1997); *see also U.S. v. Fontanez*, 878 F2d 33 (2d Cir. 1989)(reversing where defendant involuntarily absent from jury deliberations). This right derives from the earliest traditions of Anglo-American jurisprudence. *See* Gullie B. Goldin, *Presence of the Defendant at Rendition of Verdict in Felony Cases*, 16 Columbia L.Rev. 18 (1916).

. . . At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional response or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial." *Riggins v. Nevada*, 504 U.S. 127, 142 (1992)(Kennedy, J., concurring).

Here, the jury saw petitioner forcibly removed from the courtroom, never to return. Not only were they deprived of the opportunity to observe his demeanor during critical stages of trial, they might well have wrongly surmised either that he was too dangerous to be allowed back into the courtroom or that he had decided not to cooperate in the trial.

Either way, this could only have had a substantial effect on the verdict. The evidence was not overwhelming that petitioner was one of the two gunmen in the shooting, where the conviction was largely based on the credibility of an accomplice testifying to avoid being convicted of the murder himself.

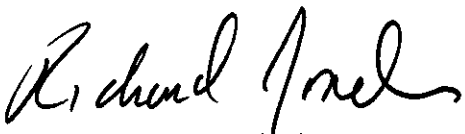
The right of an accused to be present is the oldest of trial rights, predating even the right to counsel. *See People v. Epps*, 37 N.Y.2d at 348-349 (tracing right to presence to "rudiments of our jurisprudence"). This Court has never retreated from its holding fifty years ago that trial courts must apply every reasonable presumption against a waiver. It has never modified or compromised the procedures set forth in *Allen*.

The Second Circuit's upholding of the state court's extreme and arbitrary deprivation of this right puts the principles of *Allen* at risk. Petitioner requests that certiorari be granted.

CONCLUSION

For the reasons given above, this Court should grant the application for a writ of habeas corpus and order Mr. Paige's immediate release from custody or, in the alternative, order retrial before a different judge of the Supreme Court of the State of New York, Kings County, within 120 days of such order, and if the state fails to retry him, he shall be released from custody upon expiration of that 120-day period; and grant any other and further relief that this Court finds just and proper.

Dated: New York, New York
August 2021



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