No. _____

In the

Supreme Court of the United States

CLARENCE FRY,
Petitioner,
v.
TIMOTHY SHOOP, WARDEN,
Respondent.

This is a Capital Case.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CAPITAL CASE — NO EXECUTION DATE SET

QUESTION PRESENTED

I.

a. When the undisputed factual record demonstrates the denial of the constitutional right to testify at a capital trial, but the State courts find to the contrary, do the federal courts err in affording deference to the State courts?

b. Where there is disagreement among lower courts on the type of error that occurs when the right to testify is denied, as well as on the appropriate way to ensure the vindication of the right, should this Court grant certiorari to establish a uniform understanding and protection of the right?

II.

a. Is a capital defendant's waiver of mitigation adequately knowing, intelligent, and voluntary when the waiver is predicated on a fundamental misunderstanding of proceedings and the utter dissolution of the attorney-client relationship?

LIST OF PARTIES

Petitioner, Clarence Fry, an Ohio death row inmate housed at Ross County Correctional Institution, was the appellant in the Sixth Circuit Court of Appeals, represented by the Federal Public Defender, Northern District of Ohio, and the Office of the Ohio Public Defender.

Respondent, Timothy Shoop, Warden, was the appellee in the Sixth Circuit Court of Appeals, represented by the State of Ohio.

RELATED PROCEEDINGS

All proceedings directly related to this petition include:

1. Ohio Supreme Court Direct Appeal Opinion: *State v. Fry*, 125 Ohio St.3d, No. 2006-Ohio-1502.
2. Trial Court Post-Conviction Opinion: *State v. Fry*, Case No. CR 05 08 3007.
3. Court of Appeals Post-Conviction Opinion: *State v. Fry*, 9th Dist. C.A. 26121, 2012-Ohio-2602.
4. Ohio Supreme Court denial of jurisdiction: *State v. Fry*, Entry, Ohio Supreme Court Case No. 2012-1275.
5. Trial Court Post-Conviction Opinion (after remand): *State v. Fry*, No. CR 05-08-3007, Summit County Court of Common Pleas, Journal Entry, Filed November 21, 2017.
6. Court of Appeals Post-Conviction Opinion (after remand): *State v. Fry*, 9th Dist. C.A No. 28907, 2019-Ohio-958.
7. Ohio Supreme Court denial of jurisdiction (after remand): *State v. Fry*, Entry, Ohio Supreme Court Case No. 2019-0616.
8. United States District Court, Northern District of Ohio, Eastern Division, denial of habeas: *Fry v. Shoop*, No. 1:19 CV 2307, 2023 WL 2456592 (N.D. Ohio Mar. 10, 2023)
9. United States Court of Appeals for the Sixth Circuit, affirming denial of habeas: *Fry v. Shoop*, 124 F.4th 1019 (6th Cir. 2025), (Doc. 48-1)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Clarence Fry respectfully petitions this Court for a writ of certiorari to review the judgment of United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the Sixth Circuit is available at *Fry v. Shoop*, 124 F.4th 1019 (6th Cir. 2025) and attached here as Petitioner's Appendix A (Pet. App.). The decision of the District Court is available at *Fry v. Shoop*, No. 1:19 CV 2307, 2023 WL 2456592 (N.D. Ohio Mar. 10, 2023) and is attached here as Pet. App. B. The Journal Entry of the Supreme Court of Ohio, *State of Ohio v. Clarence Fry*, Ohio Supreme Court Case No. 2019-0616 (jurisdiction denied), is attached here as Pet. App. C. The decision of Ohio's Ninth District Court of Appeals is available at *State v. Fry*, 9th Dist. Summit Co. No. 28907, 2019-Ohio-958, and is attached here as Pet. App. D. The Summit County Court of Common Pleas Journal Entry following remand, *State of Ohio v. Clarence Fry*, Case No. 2005 08 3007, Summit County Common Pleas Court, Journal Entry, Filed November 21, 2017, is attached here as Pet. App. E. The Journal Entry of the Supreme Court of Ohio, *State of Ohio v. Clarence Fry*, Ohio Supreme Court Case No. 2012-1275 (jurisdiction denied), is attached here as Pet. App. F. The first decision of Ohio's Ninth District Court of Appeals is available at *State v. Fry*, 9th Dist. Summit Co. No. 26121, 2012-Ohio-2602, and is attached here as Pet. App. G. The Summit County Court of Common Pleas Journal Entry, *State of Ohio v. Clarence Fry*, Case No. 2005 08 3007, Summit County Common Pleas Court, Journal Entry, Filed August 29, 2011, is attached here as Pet. App. H.

JURISDICTIONAL STATEMENT

In this petition, Fry seeks review of the Sixth Circuit's January 3, 2025, decision affirming the denial of habeas relief in his capital case. Pet. App. A. The Sixth Circuit denied a timely motion for rehearing en banc on February 28, 2025. The time for filing Fry's petition for certiorari was extended to July 28, 2025, by order of Justice Kavanaugh on May 13, 2025, No. 24A1090. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

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

A. Fifth Amendment, which provides in pertinent part:

> No person…shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law…

B. Sixth Amendment, which provides in pertinent part:

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

C. Eighth amendment, which provides in pertinent part:

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

D. Fourteenth Amendment, which provides in pertinent part:

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

STATEMENT OF THE CASE

On July 11, 2006, the trial court sentenced Clarence Fry to die without the opportunity to testify in his own defense and without a hearing in mitigation. Fry's trial turned on a dispute about the facts leading up to the crime, and why the crime itself occurred. In opening statement, trial counsel announced to the jury that they would hear testimony from Fry to explain what happened in this case. Counsel believed this case should have been charged only as a voluntary manslaughter, not a death penalty case. Yet counsel failed to present any evidence, including testimony from Fry, to support the manslaughter instruction they asked for. Trial counsel went so far as to affirmatively deny Fry his right to testify, even though Fry was the sole witness that they had that could have supported counsel's request for voluntary manslaughter.

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

Fry is black, lost his father at an early age, and learned from his experiences growing up in a racially tense society, as well as his replacement father figure, not to

trust anyone who is white. Because of his background and life experiences in the 1960s and 1970s, Fry asked at his arraignment whether there were any attorneys of his same race that could be appointed to his case. The court appointed Larry Whitney and Kerry O'Brien, both older white males, to his case. Fry attempted to work with them and build a relationship in good faith, but his instinctual hesitation and lack of trust only grew in the months that followed.

Fry's input, requests, and suggestions regarding his defense, were ignored or disparaged. Counsel declined to seek out and interview witnesses Fry knew had important information, and they belittled Fry's desire to testify in his own defense. Whitney specifically told Fry that if he wanted to know how to behave in a crack house, he would ask Fry, but Whitney would rely on his own knowledge for how to try a capital case. The attorney-client relationship became rife with hostility. Fry believed his attorneys were not working on his behalf or interested in fairly presenting his case.

Fry tried to obtain new counsel and wrote a letter to the University of Akron School of Law's legal clinic requesting that someone please help him. When O'Brien learned of Fry's attempt to obtain new counsel, O'Brien did not sit down with his client to discuss the problems or communication barriers in their attorney client relationship. Instead, O'Brien informed the clinic that they were not to have contact with his client. Fry next attempted to write Judge Mary Spicer to voice his concerns and request assistance. This letter went unanswered. With his life literally on the line, Fry was forced to go to trial with two attorneys whom he believed were not

working in his best interest, whose advice he did not trust, and who were seemingly disinterested in presenting his side of the case.

In opening statements, counsel told the jury that Fry would testify. The state called 29 witnesses in their case in chief, the vast majority being police personnel and other professionals. After the State rested its case, the trial court excused the jury and addressed the admission of the State's exhibits. While the jury was excused, but in open court, the trial court asked the defense if it was ready to proceed. Counsel requested a side bar, despite the jury not being present in the courtroom. At side bar, and outside of the presence of Fry, Whitney explained the defense team's efforts to produce a missing witness, and their need to continue the trial to secure her testimony. O'Brien then abruptly stated: "I can report to the Court that we were only going to have one witness for the defense, I can tell you categorically and emphatically that Fry, the defendant, is not going to testify." (ECF 14-2, PageID#6280). All of this occurred on a Friday.

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

THE COURT: Did your witness ever show up?

MR. WHITNEY: Yes, Your Honor. She's outside ready and raring to go.

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

ECF 14-2, PageID#6324-25 (emphasis added).

Fry's counsel lied to the trial court, in chambers and outside Fry's presence, telling the court not only that Fry would not testify, but that he had never even wavered in that decision. Following this in-chambers conversation, counsel and the judge reconvened in open court with the jury present. Counsel put on one witness, Mary Reid.[1] At the conclusion of her testimony, defense counsel again requested a side bar. It was at that side bar, outside the presence and earshot of Fry, that counsel rested the defense case without ever having called Fry as a witness. Even if Fry had

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

wanted to disrupt the proceedings to assert his right to testify, he had no opportunity to do so, and no way of knowing that now was the time. Unsurprisingly, in the absence of any evidence to support the defense's opening theory of manslaughter, the jury found Fry guilty of capital murder.

Openly fed up with the proceedings and the utterly degraded relationship with trial counsel, Fry chose to waive the presentation of mitigation evidence. Fry's remarks on the record and during the colloquy with the trial court lay bare that his waiver was motivated by the dissolution of his relationship with counsel and a fundamental misunderstanding of the appellate process he would face. During the colloquy, Fry repeatedly stated that he wished to be sentenced so that he could move directly to his appeal, stating at one point, "I would prefer to skip all this and get straight to the sentence thing so we can go where we got to go so we can get back in here on appeal." Fry also remarked "Thank God we got a safety new called the Supreme Court and the Court of Appeals." These statements were made openly to the trial court and in the presence of counsel. But no effort was made to correct Fry's obvious misunderstanding of the speed or certainty of the appellate process, nor to impress upon him the gravity of what he was facing.

Fry made additional statements during the colloquy showing that he believed he had been convicted – and expected to be sentenced to death – based on a misdemeanor charge of domestic violence. He stated, incredulously, "There's no way I can have my family come up here and say nothing to these people . . . They say I killed Tammy because of a misdemeanor. They found 12 people to say that?" (ECF

14-2, PageID#6547). Despite the dissolution of the relationship between Fry and his counsel, and these repeated declarations showing a gross understanding of his trial and the appellate system, the trial court accepted Fry's waiver of mitigation.

Clarence Fry was ultimately sentenced to death on July 11, 2006. He timely filed a notice of appeal to the Ohio Supreme Court on August 8, 2006. On March 23, 2010, the Ohio Supreme Court affirmed his convictions and sentence. *State v. Fry*, 125 Ohio St.3d 163 (2010). In its opinion, the court stated that there was nothing in the record to suggest that Fry wished to testify and specifically quoted trial counsel's assertions to the trial court that Fry did not want to testify. *Id* at ¶ 120.

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

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

On June 13, 2016, the trial court, with the same trial judge presiding, scheduled an evidentiary hearing to consider the claim that Fry wanted to testify at trial, but sought to exclude Fry, ordering he could only participate via video-conference.[2] On July 14, 2016, the trial court held an evidentiary hearing. Before any witnesses could be called, the trial court announced the issues as follows: (1) "whether or not the defendant wanted to take the witness stand and [(2)] whether or not there was conversation between the defendant and his counsel regarding this issue." (ECF 14-2, PageID#6712.) The trial court also agreed that Whitney, O'Brien, and Fry would all be called as court witnesses.

The trial court called both of Fry's trial counsel as the court's first witnesses: first, Whitney and then O'Brien. Both admitted under oath that they knew their client wanted to testify at some point during their representation. O'Brien also admitted that the day before he stated to Judge Cosgrove that Fry absolutely had never vacillated on this decision not to testify that O'Brien wrote in his notes that Fry emphatically wanted to testify and had also written it down on other occasions prior. Whitney also testified that his theory was to prove manslaughter but admitted that he did not call any witnesses to support that theory.

Post-conviction counsel next attempted to call the third member of the trial team, investigator Thomas Fields, but the trial court insisted that Fry be the next

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

witness called. During his testimony, Fry stated repeatedly under oath that he wanted to testify in the defense case-in-chief during his capital trial. He further testified that when discussing this testimony with his trial counsel he phrased the matter as "when I testify," not "if I testify."

Fry estimated that he told his counsel at least 20 times that he was going to get up on the stand and tell the jury his story. Fry further stated that he gave a list of witnesses to his trial counsel and that he expected his story to be told—through himself as well as through corroborating witnesses—but neither was done. Fry testified that he not only told his trial counsel that he wanted to testify, he also repeatedly told his defense investigator, Thomas Fields, his brother, Lawrence Fry, his sister Sharon Brandon, and his now-deceased mother, Ethel Fry.

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

when he had two attorneys with a duty to present his testimony to the court as Fry wished.

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

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

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

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

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

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

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

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

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

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

The trial court then, on its own accord, called Ms. Walls-Alexander, the prosecutor who had just questioned Lawrence about the issue, to the stand, to allow her to rebut Lawrence's testimony, as she was also one of the prosecutors who tried Fry's case. The court called her as a court's witness, without the request of either

party, seemingly for the express purpose of rebutting the testimony just given by Lawrence. The sum-total of Ms. Walls-Alexander's testimony was an attempt to prove that this "side bar" where O'Brien informed the trial court that Fry would not be testifying was not actually a side bar, but instead a conversation at the bench in open court for all counsel and spectators (including Fry) to hear. Fry was then recalled to the stand and confirmed that he did not hear O'Brien—while at side bar—tell the trial court that he did not want to testify.

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

Fry timely appealed the decision of the trial court on December 21, 2017. The Ohio Ninth District Court of Appeals affirmed the trial court's decision on March 20, 2019. *See State v. Fry*, 9th Dist. Summit No. 28907, 2019-Ohio-958, attached as Pet. App. D. The Ohio Supreme Court declined to accept jurisdiction. *State of Ohio v.*

Clarence Fry, Ohio Supreme Court Case No. 2019-0616 (jurisdiction denied on August 6, 2019), attached as Pet. App. C.

Fry filed his petition for writ of habeas corpus on August 6, 2020. The District Court ultimately denied Fry's habeas petition, finding that the state court's factual conclusions were reasonable based on the facts as described above. Following appeal to the Sixth Circuit, the decision of the District Court was affirmed on January 3, 2025.

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari, vacate the judgment below, and remand the case to state courts for a new trial.

a. The undisputed record demonstrates that Fry was denied his right to testify at his capital trial. The federal courts erred in affording deference to the State court findings that were contrary to the undisputed record.

A criminal defendant is afforded few decisions where he is the sole decision maker: whether he will have a jury trial, whether he will represent himself, how he will plead, and whether he will testify in his own defense. "The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that 'are essential to due process of law in a fair adversary process.'" *Rock v. Arkansas*, 483 U.S. 44, 51 (1987), *citing Faretta v. California*, 422 U.S. 806, 819 (1975); *see also* U.S. Constitution amend. VI, XIV. Of the few decisions that are left up to the defendant, the most essential is the defendant's right to testify in his own defense. *Rock*, 483 U.S. at 52 ("Even more fundamental to a personal defense than the right of self-representation, which was

found to be 'necessarily implied by the structure if the Amendment,' *ibid*., is an accused's right to present his own version of events in his own words.").

At his capital trial, Fry had a clearly established constitutional right to the effective assistance of trial counsel. *See* U.S. Const. Amends. VI and XIV. *See United States v. Cronic,* 466 U.S. at 648, 659 (1984); *see also Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). Counsel's duties are myriad, but asserting the rights and wishes of their clients, and zealously advocating both for their client's position and to ensure their client's rights are vindicated are among the most fundamental.

Despite these clear tenets of capital defense, at his trial, Fry's counsel unilaterally waived Fry's right to testify despite knowing that he wanted to testify in his own defense, substituting their will for his own. *See* Statement of the Case, *supra*. Trial counsel affirmatively misled the trial court concerning Fry's clear wishes that he be permitted to testify in his own defense.

On Sunday, June 11, 2006, the day before the defense's case in chief, trial counsel O'Brien met with Fry at the jail, and took notes of that meeting. Those notes indicate, "C.F. wants to testify! (Reasons given for not testifying)." (ECF 14-2, PageID 6780.) Those are the sole notes from that meeting, and those notes reflect the emphatic desire of Fry to take the stand. The next day, when Fry's counsel told the trial court he did not want to testify, the trial court said , "All right. If there was any vacillation, the Court would ask him on the record. But you are indicating to the Court that he has decided of his own volition not to testify?" Counsel responded, "That's correct." This exchange occurred outside of Fry's presence.

In the postconviction evidentiary hearing, O'Brien testified that Fry wanted to testify on December 1, 2005, was planning to testify when counsel made opening statement on June 2, 2006, was unsure whether he wanted to testify on June 7, 2006, and emphatically stated he wanted to testify on June 11, 2006. (ECF 14-2, PageID 6810-11.) Even O'Brien would describe Fry's desire to testify in his own defense as having vacillated between December 1, 2005, and June 11, 2006. (ECF 14-2, PageID 6811.) Nonetheless, trial counsel expressly misrepresented to the trial court that Fry had never vacillated. (ECF 14-2, PageID 6324-25.) Had Attorneys O'Brien and Whitney given the court an honest recitation of Fry's position on his testimony, the court would have inquired of Fry on the record as the court stated it was inclined to do, and Fry would have told the court he wanted to testify.

Then, when trial counsel rested their case at side bar, they solidified that Fry would not be able to testify in his capital case. There is only one logical reason why trial counsel would ask for a sidebar conference at a time when the jury has already been excused: trial counsel wanted to communicate something to the court outside the hearing of others in the courtroom, particularly their client. Here, that information that trial counsel sought to conceal was their unilateral decision to waive Fry's right to testify in his own defense. By doing this, they affirmatively misled the court. *See* Statement of the Case, *supra*.

Trial counsel's notes show that Fry wanted to testify six months before trial and that he repeatedly told trial counsel of that desire. (ECF 13-3, PageID 4258, 4259, 4260; *See* testimony of Clarence Fry *generally* ECF 14-2, PageID 6815-56.) Trial

counsel told the jury in opening statement that Fry would testify. (ECF 14-1, PageID 5441.) Trial counsel's notes show that Fry informed his attorneys that he wanted to testify a mere 24 hours before trial counsel told the trial court the exact opposite: that Fry has always held an unwavering decision not to testify. (ECF 14-2, PageID 6324-25; ECF 14-2, PageID 6810-11.) Trial counsel knew that if the court made an inquiry, Fry would assert his right to testify. To prevent that inquiry, trial counsel misled the trial court concerning Fry's wishes and denied him his right to make an informed decision whether to testify in his own defense. Trial counsel then rested their case at a sidebar conference again outside of Fry's presence. (ECF 14-2, PageID 6280; s*ee generally,* ECF 14-2, PageID 6277-91.)

Whether it was prudent for Fry to testify was not trial counsels' decision to make, nor was it something the trial court could consider. Fry, and Fry alone had the legal power to make the decision whether he would testify in his defense or waive the right to testify. *Rock,* 483 U.S. at 51; *Faretta*, 422 U.S. at 819. *See also,* Prof. Cond. R. 1.2(a): "A lawyer shall abide by the client's decision as to … whether the client will testify." Here, trial counsel subverted that right.

i. The trial court was on notice regarding Fry's wish to testify and had a duty to make a direct inquiry of Fry, even in the face of counsel's misrepresentations.

The trial court also failed to protect Fry's Sixth Amendment right to testify in his own defense when it failed to conduct an independent colloquy of Fry and instead moved forward with his trial based on statements made by trial counsel. This was a fundamental constitutional error, particularly when Fry was not even present for the

discussion between the court and trial counsel, or when trial counsel rested the defense case-in-chief.

While in chambers outside the presence of Fry, the trial court specifically asked trial counsel about whether or not Fry wanted to testify, as described above. In that exchange, trial counsel referred to Fry's deliberative process as "playing a little game." (ECF 14-2, PageID 6324.) With this information in hand, it was critical that the court then reaffirm on-the-record with Fry, himself, whether he wanted to testify. Yet, instead, the trial court just took trial counsel's word at face value and never questioned Fry.

The trial court was derelict in its duty to indulge "every reasonable presumption against waiver." *Johnson*, 458 U.S. at 484. As such, the trial court violated Fry's constitutional right to testify in his own defense. This was fundamental constitutional error.

ii. The lower courts erred in denying Fry relief.

A federal court may grant habeas relief on a claim when the merits were adjudicated in state court if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). The state court's factual determinations are presumed correct unless the petitioner shows clear and convincing evidence of error. *Id.* § 2254(e)(1). On the undisputed record of

this case, the decision of state courts was contrary to, or an unreasonable application of, clearly established federal law and was based on an unreasonable determination of the facts in light of the evidence presented in the state court.[4]

A review of the evidence from Fry's post-conviction evidentiary hearing, as outlined above, clearly and convincingly shows that the state court erred in finding that Fry failed to show he was denied his Sixth Amendment right to testify.

Despite this, the District Court also denied Fry habeas relief on his ineffective assistance of counsel claim regarding the denial of his right to testify. (ECF 62 PageID 8300-8310). The District Court found that the state appellate court "neither ignored nor discounted" the evidence presented in support of Fry's claim and points to the state court's conclusion that Fry failed to demonstrate that "he was actually *denied* his right to testify." (*Id.* at PageID 8309). The District Court granted a certificate of appealability on this claim, finding that this decision was one over which fair-minded jurists could disagree. *(Id.* at PageID 8310).

The Sixth Circuit affirmed the District Court's factual findings, saying "On this record, no reversible error occurred." *Fry v. Shoop*, 124 F.4th 1019 (6th Cir. 2025). But that finding was erroneous, and clearly so. Any fair-minded jurist would look at the evidence in Fry's case and recognize without question that Fry's counsel ignored Fry's wishes, misled the trial court, and actively, consciously prevented Fry from

[4] This Court's decision in *Loper Bright* suggests that AEDPA deference may be unconstitutional, as the federal have duty to enforce the Constitution as they read it independently of the state courts. *See Loper Bright Enterprises v. Raimondo*, 603 U.S. ___ (2024); Anthony G. Amsterdam & James S. Liebman, *Loper Bright and the Great Writ*, 56 Colum. Hum. Rts. L. Rev. 54 (2025).

exercising his constitutional right to testify in his own defense. The contrary findings below were unreasonable and must be overturned.

Regarding the denial of his right to testify through the failure of the trial court, the District Court found that the "dispositive issue for this claim is what the trial court understood regarding Fry's position on whether or not he wanted to testify." (*Id*. at PageID 8357). According to the District Court, because "Fry's counsel were clear in representing to the court that, at that point in time, Fry 'categorically,' 'emphatically,' and 'unequivocally' did not want to testify," and because Fry did not personally notify the trial court of his desire to testify, there was no constitutional deprivation and no relief is warranted.(*Id*. at PageID 8357-8359).

Under the District Court's assessment, as long as trial counsel convincingly misleads a trial court about the wishes of their client (with regards to testimony or, seemingly, anything else that implicates a fundamental right), then no remedy is owed for the subsequent constitutional violation. This does not comport with the guarantees of the Sixth Amendment and due process of law. The Sixth Circuit affirmed this decision, holding that in the absence of on-point caselaw from this Court, there is no showing that the state courts violated clearly established law.

Recently, this Court held that "A legal principle is clearly established for purposes of AEDPA if it is a holding of this Court. This Court has no occasion to defer to other federal courts' erroneous interpretations of its own precedent. Nor is such double deference necessary to prevent expansion of federal habeas relief to those who rely on "debatable" interpretations or extensions of our holdings. Andrew does not

rely on an interpretation or extension of this Court's cases *but on a principle this Court itself has relied on over the course of decades*." *Andrew v. White* 604 U. S. ____ (2025)(internal citations omitted)(emphasis added). Thus, the principle upon which Fry's claims below rested, and which he again asserts here, is plain: a defendant's right to testify is a fundamental right afforded by the United States Constitution.

In a capital case, every protection should be afforded such basic rights. This Court has recognized that the fundamental right to "life" deserves the highest protection possible under the Fourteenth Amendment's protection of "life, liberty and property." *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 290 (1998) (five Justices recognized distinct "life" interest protected by Due Process Clause in all stages of a capital case, above and beyond protected liberty and property interests). As is oft-repeated, death is different; and for that reason, more process is due, not less. *See Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

Accordingly, this Court should grant certiorari, vacate the judgment below, and remand the case to the state court for a new trial.

b. This Court should resolve the disagreement among lower courts regarding the proper error analysis and vindication of the right to testify in a capital case.

i. When a capital defendant is denied their right to testify, be it constructively by the actions of counsel or through the error of the trial court, the deprivation of right is so severe that it must rise to a structural error.

The structural error doctrine exists to "to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial."

Weaver v. Massachusetts, 582 U.S. 286, 294–95 (2017). "[T]he defining feature of a structural error is that it "affect[s] the framework within which the trial proceeds," rather than being "simply an error in the trial process itself." *Id*. at 295 (citing *Arizona v. Fulminante*, 499 U.S. 279, 306, (1991))

The right to testify in one's own trial is "essential to due process of law in a fair adversary process" and is thus protected by the Fifth and Fourteenth Amendments. *Rock v. Arkansas,* 483 U.S. 44, 51 (1987) (quoting *Faretta v. California*, 422 U.S. 806, 819 (1975)). A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel. *In re Oliver*, 333 U.S. 257, 273 (1948).

The Compulsory Process Clause of the Sixth Amendment grants a defendant the right to call "witnesses in his favor." This right extends to the states through the Fourteenth Amendment. *Washington v. Texas*, 388 U.S. 14, 17-19 (1967). The accused can call a witness, including himself, whose testimony is "material and favorable to his defense." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982); *see also Rock v. Arkansas*, 483 U.S. 44 (1987). The right to testify is also part of the Fifth Amendment's protection against compelled incrimination. *See Harris v. New York*, 401 U.S. 222, 225-230 (1971) ("Every criminal defendant is privileged to testify in his own defense, or to refuse to do so.").

Despite this Court having articulated that the right is "essential to due process," the federal courts do not uniformly recognize the deprivation of this right as a structural error. Indeed, depending on whether the denial is at the hand of the trial court or constructively through the actions of counsel, courts cannot even agree on how to analyze the denial of this right. The question of how to properly analyze the denial of a defendant's right to testify is central to Fry's case.

Surely, when a right so essential to due process is violated, it is not "simply an error in the trial process" but rather a deprivation that "affect[s] the framework of the trial itself." *Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). And yet, the federal courts disagree on when or even if the denial of this right creates a structural error. Even if the right does not qualify in all criminal trials as one of the "basic, constitutional guarantees" described in *Weaver*, this Court should find that it is such a guarantee in capital cases. *Weaver* at 294–95. Death is different; and thus more process is due, not less. *See Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

This Court should grant certiorari to establish that structural error occurs when a capital defendant's right to testify is violated, vacate the decision below, and remand the case to the state court for a new trial.

ii. Federal courts disagree on whether denying a defendant's right to testify is structural error.

This Court has not clearly established that the denial of the right to testify is considered a structural error. In the absence of guidance, the lower federal district and circuit courts disagree on whether it is a structural error.

The Sixth Circuit Court of Appeals held that it is not a structural error when a defendant is denied the right to testify, applying harmless error analysis when a trial court denied a defendant's request to testify after the close of evidence. *Solomon v. Curtis*, 21 Fed.Appx. 360, 363 (6th Cir. 2001). It reversed a district court's application of structural error and found the defendant's contention did not overcome a strong presumption that any errors that occur where a defendant has counsel and is tried before an impartial adjudicator are subject to harmless-error analysis. *Id*. (quoting *Rose v. Clark*, 478 U.S. 570, 579 (1986)).

The Seventh Circuit has refused to explicitly determine whether structural error occurs when the actions of defense counsel leads to the denial of the right to testify. *Hartsfield v. Dorethy*, 949 F.3d 307, 314 (7th Cir. 2020). The court found that prejudice is presumed in "absence-of-counsel" cases, such as actual or constructive denial of counsel, state interference with counsel's assistance, and conflicts of interest because these involve "the most extreme displays of professional incompetence." *Id (*citing *Sanders v. Lane*, 861 F.2d 1033, 1037 (7th Cir. 1988)). These "absence-of-counsel" cases were considered more extreme examples, and thus separate and distinct from cases involving mere ineffective assistance of counsel, which it found the denial of the right to testify to generally fall under. *Id*. at 315.

The U.S. District Court for the Western District of Virginia, in the Fourth Circuit Court of Appeals, found structural error when a defense attorney failed to inform his client that he had a constitutional right to testify, and prohibited him from testifying over his clearly expressed wishes. *Carter v. Clarke,* 667 F.Supp.3d 163, 201

(W.D. Va. 2023). The District Court found that the right to testify falls under the first rationale underlying a structural error enumerated by this Court in *Weaver*, protecting an interest other than preventing erroneous conviction. *Id*. (citing *Weaver* at 295). The court found that the right to testify is based on the same "fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty," as the defendant's right to conduct his own defense. *Id*. This Court found such a violation to be structural error. *Weaver* at 295.

The federal courts do not agree on the severity of the error when a defendant is denied their right to testify. But the right to testify in one's own defense is "a principle this Court itself has relied on over the course of decades." *Andrew v. White* 604 U. S. ____ (2025). And the answer to the basic question – whether or not a structural error occurs when a capital defendant is denied the right to testify – would be determinative in this case, because the actions of both trial counsel and the court equally and separately served to deprive Fry of his right. Importantly, Fry's case presents this Court the opportunity to answer this question and bring courts in alignment regarding this essential right.

iii. State and federal courts disagree on what is required of courts and of defendants to protect and assert the right to testify.

Presently, the high courts of at least six states (Alaska, Colorado, Wisconsin, Hawaii, Mississippi, and West Virginia) require judges to make an affirmative inquiry of criminal defendants about the right to testify. *See People v. Curtis*, 681 P.2d 504 (Colo.1984); *State v. Weed*, 2003 WI 85, ¶ 14; *Dizon v. State*, 749 So.2d 996

(Miss.1999); *State v. Neuman*, 179 W.Va. 580, 371 S.E.2d 77 (1988); *Tachibana v. State*, 79 Haw. 226, 236, 900 P.2d 1293, 1303 (1995); *LaVigne v. State*, 812 P.2d 217, 222 (Alaska 1991). Fundamentally, each of these state high courts has held that it is the duty of the trial court to advise a criminal defendant of his rights and to determine that the waiver of the right to testify is being made voluntarily, with full knowledge and understanding. In contrast, no federal circuit levies such an affirmative duty upon trial courts.

Four Circuits (the First, Sixth, Eighth, and Ninth) instead place affirmative duty on defendants, insisting that defendants must assert their right to testify if they wish to do so. *See United States v. Systems Architects, Inc.*, 757 F.2d 373, 375 (1st Cir. 1985); *Carson v. United States*, 88 F.4th 633 (6th Cir.2023); *United States v. Bernloehr*, 833 F.2d 749 (8th Cir.1987); *United States v. Nohara*, 3 F.3d 1239, 1244 (9th Cir. 1993). But there is a three-way federal circuit split on this issue.

The Second, Fifth, Seventh, and D.C. Circuits all reject a rule that requires a defendant to affirmatively assert their right to the court. *See Chang v. United States*, 250 F.3d 79, 83 (2d Cir.2001); *United States v. Mullins*, 315 F.3d 449 (5th Cir.2002); *Underwood v. Clark*, 939 F.2d 473 (7th Cir.1991); *United States v. Ortiz*, 317 U.S.App.D.C. 262, 82 F.3d 1066 (1996). The remining four circuits are silent on the direct question.

Where a critical fundamental right to testify is at issue, and the courts of this nation cannot agree on how to adequately and appropriately protect that right, this Court should step in to establish clearly what is required – of courts and defendants

– to ensure that the right is properly invoked, protected, and vindicated. Again, this question is critical in Fry's case, where the trial court, despite being on notice of Fry's desire to testify, failed to make any inquiry with Fry, and where Fry has also been denied relief because he failed to affirmatively assert his right.

iv. The time is ripe for this Court to close the open questions splitting the federal and state courts regarding the right to testify, and in so doing vindicate Fry's constitutional rights.

Despite being acknowledged as an essential, fundamental right, the right to testify is handled unevenly across federal and state courts. The level of protection afforded a defendant, the duty that falls upon the trial court or the defendant, and the error that arises out of the denial of such a fundamental right are all open questions with varied, uneven answers across our justice system.

In the case at bar, the factual record demonstrates without question that Fry was denied his right to testify. The actions of trial counsel denied him this right, when counsel misled the trial court. But the trial court itself could have spared Fry this deprivation, had it made any inquiry with him.

At his capital trial, with his life on the line, Fry was denied a right this Court has described as "essential to due process." Had he been tried in another jurisdiction, the trial court simply failing to inquire of him at all would have been reversible. Had he been tried in another jurisdiction, the federal courts would not have found that he had a duty to affirmatively assert his wish to testify. Had he been tried in another jurisdiction, the bare facts of this case would have been identified as having created

a structural error, and Fry would have been afforded the opportunity years ago to assert his constitutional right to testify on his own behalf in a new trial.

Where a right so fundamental as the right to testify is so inconsistently protected and assessed, this Court must step in and clearly establish guidance for the lower courts and the states. In reviewing the clearly established federal law that does exist from this Court, and in consideration of the importance of the right to testify, this Court should establish with certainty that the denial of the right in a capital case creates a structural error and that a colloquy with capital defendants is required for the right to be waived. This would ensure no future defendant suffers the same deprivation as Fry and would create a regime that protects this essential right in a way fundamentally similar to how other key due process rights are protected.

This court should grant the writ, cure the division in the lower courts, vacate the lower court decisions, and remand Fry's case to state court for a new trial.

II. A capital defendant's waiver of a constitutional right cannot be knowing, intelligent, and voluntary when such a waiver is predicated on the severe deterioration of the attorney-client relationship and gross misunderstanding of capital trial and appellate process.

It has long been established that a waiver of a constitutional trial right must be knowing, intelligent, and voluntary. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Id*. (citing *Aetna Ins. Co v. Kennedy,* 301 U.S. 389, 393; *Hodges v. Easton*, 106 U.S. 408, 412) (internal quotations omitted). This court has articulated that it is "unyielding in [its] insistence that a defendant's waiver of his trial rights

cannot be given effect unless it is 'knowing' and 'intelligent.'" *Illinois v. Rodriguez,* 497 U.S. 177, 183 (1990) (citing *Johnson,* 304 U.S. 458).

The determination of whether there has been a knowing, intelligent, and voluntary waiver depends "in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson*, 304 U.S. at 464. Courts must strictly adhere to this standard for constitutional trial rights. *Schneckloth v. Bustamonte*, 412 U.S. 218, 241 (1973). Abandoning this standard "leaves open the possibility that the trial reached an unfair result precisely because all the protections specified in the Constitution were not provided. *Id*. (acknowledging that the standard for waivers of constitutional trial rights is much higher than for constitutional rights that are not in place to protect the accused's right to a fair trial).

An individualized mitigation phase is a guaranteed right under the Eighth and Fourteenth Amendments. *Lockett v. Ohio,* 438 U.S. 586 (1978). This court has repeatedly emphasized the requirement that the factfinder consider all mitigating evidence. *Payne v. Tennessee,* 510 U.S. 808, 822 (1991) (mitigation evidence is "evidence that must be received"); *Woodson v. North Carolina,* 428 U.S. 280, 304 (1976) (finding the Constitution "require[s] consideration of the character and record of the individual offender . . . as a constitutionally indispensable part of the process of inflicting the penalty of death."); *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

In this case, the trial court erroneously failed to consider the particular facts and circumstances surrounding Fry's mitigation waiver as required by *Johnson v.*

Zerbst, 304 U.S. 458, 464 (1938). Those particular facts and circumstances would have shown that Fry's waiver was not made knowingly, intelligently, and voluntarily: the attorney-client relationship was irreparably broken at the time of the waiver, the waiver was born from the strain of that relationship, and Fry misunderstood the legal consequences of the verdict and his appellate rights. By accepting the waiver despite these facts and circumstances, the trial court violated Fry's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. And in affirming its validity, the reviewing courts have denied Fry any vindication of his rights.

a. Fry's waiver was invalid because the trial court failed to consider the facts and circumstances surrounding the case, as required by *Johnson v. Zerbst.*

The District Court concluded that, because this Court has not clearly established a specific procedure for a trial court to follow when a defendant seeks to waive mitigation in a capital trial, there could be no contravention of or misapplication of federal law in violation of 28 U.S.C. § 2254(d)(1). (ECF 62, PageID 8363.) The Sixth Circuit reached the same conclusion. *Fry v. Shoop*, 124 F.4th 1019 at 11 (6th Cir. 2025). ("We know of no Supreme Court precedent that required the trial court to do more before accepting Fry's waiver.").

However, this reasoning is flawed because it ignores this Court's well-established requirement that a waiver of a constitutional right be evaluated contextually, not mechanically. *Johnson* at 464. As this Court has explained, the validity of a constitutional waiver depends "in each case, upon the particular facts

and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.* The parameters for assessing the waiver of a right is "a principle this Court itself has relied on over the course of decades." *Andrew v. White*, 604 U. S. ____ (2025).

The facts and circumstances of Fry's case, taken as a whole, established that Fry's waiver was not made knowingly and intelligently. At a minimum, the facts and circumstances demanded further inquiry by the trial court. This court has long recognized that capital cases should be subject to heightened scrutiny because death "is different in both its severity and its finality." *Gardner v. Florida*, 430 U.S. 349, 357 (1977). Certainly this "heightened scrutiny" is required when a capital defendant seeks to waive a constitutional right.

Despite the gravity of this waiver, the trial court solely followed the standards for conducting a colloquy set forth by the Ohio Supreme Court in *State v. Ashworth,* 85 Ohio St. 3d 56, 62 (1999). The framework established in *Ashworth* requires that a trial court (1) inform the defendant of the right to present mitigating evidence, (2) explain what mitigating evidence is, (3) determine whether the defendant understands the importance of mitigating evidence, (4) ensure the defendant understands the use of mitigating evidence to offset the aggravating circumstances, (5) ensure the defendant understands the effect of failing to present mitigating evidence, and (6) determine whether the defendant wishes to waive mitigation. *Id*. While the trial court adhered to *Ashworth*, compliance with state procedural rules is not enough. The framework of *Ashworth* sets forth no requirement that a court assess

the specific facts and circumstances surrounding the waiver, which this Court has made clear is essential when evaluating the validity of a constitutional waiver. *See Johnson v. Zerbst*.

Importantly, the trial court was aware of the key circumstances bearing on Fry's waiver. It knew that the attorney client relationship had deteriorated beyond repair and that Fry misunderstood critical aspects of his case and the legal process. Yet, it failed to give those facts and circumstances the consideration they required under this Court's precedent. Given the consequences of this failure, there is little room for grace in weighing the validity of Fry's waiver.

In affirming the trial court's failure, the District Court erred, and the Sixth Circuit Court affirmed this error without affording the relevant facts and circumstances the significance they warranted under clearly established federal law. Those same circumstances were well known and obvious to the trial court. When those facts and circumstances are considered, the record speaks clearly: the waiver was not knowing, voluntary, and intelligent, and was therefore invalid.

b. The particular facts and circumstances surrounding the case show that Fry's mitigation waiver was not knowing, intelligent, and voluntary.

The record here underscores the constitutional inadequacy of Fry's mitigation waiver. Had the trial court properly considered the particular facts and circumstances of Fry's case, it would not have accepted his waiver of mitigation. After receiving a motion from Fry regarding waiving the presentation of mitigation evidence, the trial court conducted a colloquy pursuant to *State v. Ashworth*, 85 Ohio

St. 3d 56, 62 (1999). (ECF 14-2, PageID#6540). This colloquy revealed that the motives behind Fry's waiver were his dissatisfaction with his attorneys, misunderstanding of his death specifications, and mistaken belief that he could gain a new trial on appeal with ease. Despite these compelling indications of an invalid waiver, the trial court failed to take the particular facts and circumstances into consideration and erroneously accepted Fry's mitigation waiver.

i. The trial court erred in accepting Fry's mitigation waiver, as it was the product of a broken attorney-client relationship.

The trial court knew from the outset that Fry's relationship with counsel was problematic. Early in the proceedings, Fry expressed a strong desire for representation by African American attorneys. (ECF 14-1, PageID#4280). Despite this, the trial court appointed two white attorneys and never revisited the issue again with Fry. Over time, counsel's attitude towards Fry only deepened his distrust and lack of confidence in the representation provided.

At one point, Fry asked his counsel to explain the strategy behind his legal defense. Attorney Whitney met Fry with a blatant racially stereotypical response. He told Fry that "if he needed to know where to find a crack house and how to conduct himself in said crack house," he would contact Fry. (ECF 14-2 PageID#6726). But when it came to legal strategy, Whitney explained to Fry that he was out of his league. (*Id.*) Justifiably, Fry considered this comment to be racist and offensive.

Throughout the trial, Fry's counsel did nothing to foster a trusting relationship with Fry, leading to his skepticism and rejection of counsel's legal advice and strategic

decisions. The trial record is replete with instances of the breakdown of attorney-client relationship, which peaked after the jury convicted Fry. After his conviction, Fry, who had hit his breaking point, instructed his trial counsel to file a motion to waive any presentation of mitigation evidence. (ECF 14-2, PageID#6540). Trial counsel complied with this request, and the trial court conducted its colloquy to determine if Fry's waiver was knowing, voluntary, and intelligent. (*Id*. at PageID#6540-6571.)

The breakdown of the attorney-client relationship was the impetus for the waiver, and yet the trial court failed to inquire about or consider the relationship at all when evaluating Fry's waiver. The trial court was fully aware of Fry's displeasure with his counsel and the dissolution of their relationship: during the colloquy itself, Fry directly announced to the court his dissatisfaction with his attorneys. (ECF 14-2, PageID#6544-45.) Upon hearing this once again, the trial court should have inquired, especially given that the relationship was known to the trial court to be fraught throughout proceedings. Instead, the trial court fixated on mechanically satisfying the formal requirements of *Ashworth* rather than meaningfully engaging with Fry's concerns. Accordingly, the trial court erred in accepting a mitigation waiver that was the product of a broken attorney client relationship under the guise of the waiver colloquy's compliance with *Ashworth*.

ii. The court erred in accepting Fry's mitigation waiver despite his clear misunderstanding of the death specifications, his appellate rights, and his right to make an unsworn statement to the jury.

Not only was the waiver a product of the fractured attorney client relationship, but the trial court accepted it despite Fry's clear misunderstanding regarding several of the waiver's significant consequences. Instead of inquiring into Fry's evident misunderstandings, the Court ignored Fry's statements and focused instead on procedural compliance with *Ashworth*. The trial court erred in accepting Fry's mitigation waiver without considering, or even acknowledging, these grave misunderstandings.

First, Fry's statements made it obvious that he did not understand the serious ramifications of not presenting mitigation evidence during the penalty phase of his trial. *See* Statement of the Case, *supra*. Not only did this basically ensure a death sentence would be handed down at trial; but this uninformed decision has followed Fry. Both the trial court and counsel heard Fry make numerous statements to this effect; yet they failed each time to correct or inform him of his misunderstanding.

The trial court's colloquy with Fry also demonstrated Fry's improper belief that he was being sentenced to death based on the misdemeanor charge of domestic violence. See Statement of the Case, *supra*. Fry's statements made clear that he did not understand that the other specification alone was sufficient for a death sentence. Neither trial counsel nor the trial court intervened.

Finally, trial counsel failed to explain that even if Fry did not want to present evidence through his family members or expert testimony, he had the right to make an unsworn statement to the jury. Trial counsel had an obligation to explain Fry's

ability to testify, unsworn or otherwise. Instead, neither counsel nor the trial court informed Fry of this fundamental right during his capital proceeding.

These particular facts and circumstances unique to Fry's case were sufficient to put the trial court on notice that Fry's waiver of mitigation was not knowing, intelligent, and voluntary. Instead of conducting further inquiry into these issues or correcting Fry's misunderstandings, the trial court erroneously accepted the uninformed waiver. By failing to consider the particular facts and circumstances of Fry's case, the trial court violated its duty under *Johnson v. Zerbst.* While this Court has not articulated a specific procedure for the waiver of mitigation, the record demonstrates that the trial court – and the reviewing courts which affirmed the validity of Fry's waiver – failed to consider the facts and circumstances before it, as required by this Court in *Johnson v. Zerbst.* In allowing the waiver, and in allowing it to stand, Fry's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated. This Court should grant the writ.

CONCLUSION

For he aforementioned reasons, Fry was denied his rights to a fair trial and to due process as guaranteed by the Fifth, Sixth Eighth, and Fourteenth Amendments to the U.S. Constitution. 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 and present mitigating evidence.

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