

No.

IN THE
Supreme Court of the United States

WILLARD ANTHONY,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FIFTH CIRCUIT COURT OF APPEAL
JEFFERSON PARISH, LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Willard Anthony's jury trial for aggravated rape and human trafficking should have been an ordinary credibility battle between the accused (he said) and the accuser (she said). The State's allegations and the credibility of the prosecution's witnesses were flawed from the outset, and Mr. Anthony testified in his own defense.

In an extraordinary departure from ordinary trial practice, however, the State was permitted to call the grand jury prosecutor to the stand to testify in his official capacity. The prosecutor testified at length and over repeated objections and mistrial motions from the defense that he firmly believed in the credibility of the "victims," the guilt of the defendant, the strength of the State's evidence (both known and unknown to the jury), and his opinion (at times incorrect) about the law applicable to the case.

Following the prosecutor's testimony, the jury resolved the credibility disputes in favor of the State.

The questions presented by this case are:

1. Whether the presumption of innocence, the right to confrontation, and the right to a fair trial permit a court to allow the grand jury prosecutor to take the stand and offer such testimony.
2. Whether the admission of such prosecutorial testimony constitutes structural error or, instead, is subject to harmless error review.
3. Whether a reviewing court's conclusion that the evidence at trial supports the defendant's

convictions even excluding the grand jury prosecutor's testimony meets the State's burden of proving harmless error beyond a reasonable doubt.

RELATED PROCEEDINGS

State v. Anthony, 17-372 (La. App. 5 Cir. 02/20/19), 266 So.3d 415 (“*Anthony I*”) (original Fifth Circuit panel decision granting a new trial).

State v. Anthony, 19-476 (La. 06/26/19), 275 So.3d 869 (Louisiana Supreme Court writ grant remanding to the state Fifth Circuit for a harmless error analysis).

State v. Anthony, 17-372 (La. App. 5 Cir. 12/30/20), 309 So.3d 912 (“*Anthony II*”) (new Fifth Circuit panel decision following remand).

State v. Anthony, 21-176 (La. 10/12/21), 325 So.3d 1067 (denying supervisory writs without published opinion).

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Willard Anthony respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeal of Jefferson Parish, Louisiana.

INTRODUCTION

In its decision in *United States v. Young*, 470 U.S. 1 (1985), this Court explained,

[the] prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the

charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

Young, 470 U.S. at 18-19. The *Young* court found that the prosecutor's closing argument, which was not objected to, crossed permissible bounds but was not sufficiently prejudicial to overcome waiver.

Willard Anthony's trial did not simply involve impermissible prosecutorial closing argument. It contained far-reaching prosecutorial testimony, which the trial judge permitted over some 16 defense objections and 4 mistrial motions. The testimony consumed 70 pages of the transcript, and it covered nearly every aspect of the State's case against Mr. Anthony and even extended beyond the evidence actually admitted at trial.

In its original opinion in this case, the state appellate court panel (*Anthony I*) unanimously concluded that the prosecutor's testimony so fundamentally "infringed on defendant's presumption of innocence and prevented him from receiving a fair trial" that "harmless error standards cannot be applied." The court held the errors to be structural.

After the State sought review of that ruling, however, the Louisiana Supreme Court remanded Mr. Anthony's case back to the state appellate court with instructions to conduct a harmless error analysis.

On remand, the newly-composed panel (*Anthony II*) then purported to conduct a harmless error analysis, concluding that “[t]he evidence at trial supports defendant’s convictions, even excluding [the prosecutor’s] testimony.” Judge Fredericka Homberg Wicker, a member of both panels, filed a lengthy dissent. Judge Wicker stated that she could not agree that the testimony “did not contribute to the jury’s verdict in this case nor can I consent to such behavior in a court of law.”

Whether reviewed as structural error or using a harmless error analysis, Mr. Anthony submits that the prosecutor’s testimony was patently reversible error in this case. The appellate court’s ultimate analysis, however, applied neither standard, instead acting as if the prosecutor’s extraordinary testimony had never happened at all.

Notwithstanding the fact that this case involved an egregious breach in the adversarial trial process, the Louisiana courts were flummoxed by the analytical framework to apply to this prosecutorial misconduct.

Mr. Anthony now seeks this Court’s assistance in resolving the dispute that the prosecutor’s pre-judicial testimony has created. This Court’s review is necessary not only to provide courts with guidance about the appropriate legal standard to apply but also to prevent this kind of manifest injustice from occurring in an American court of law.

OPINIONS BELOW

The order of the Supreme Court of Louisiana denying Mr. Anthony's application for a supervisory writ (App. 103a) is unpublished but available at *State v. Anthony*, 21-176 (La. 10/12/21), 325 So.3d 1067.

The rulings of the appellate court (App. 1a; App. 34a) are published and are available at *State v. Anthony*, 17-372 (La. App. 5 Cir. 02/20/19), 266 So.3d 415, 430 ("*Anthony I*"), and *State v. Anthony*, 17-372 (La. App. 5 Cir. 12/30/20), 309 So.3d 912 ("*Anthony II*").

JURISDICTION

The Supreme Court of Louisiana denied Mr. Anthony's application for a supervisory writs on October 12, 2021. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides in relevant 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, . . . to be confronted with the witnesses against him . .

The Fourteenth Amendment to the U.S. Constitution provides in relevant part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

A. Factual Background And Trial Proceedings

1. On July 16, 2015, Willard Anthony was indicted for two counts of aggravated rape, two counts of human trafficking, one count each of second degree battery, aggravated battery (with a handgun), and sexual battery. R. 53. Mr. Anthony's co-defendant Pierre Braddy was also indicted of multiple offenses, including human trafficking, aggravated rape, and obstruction of justice. R. 6.

2. The charges against Mr. Anthony and Braddy arose from an alleged crime spree that the two men went on with Nadia Lee, Brittany Grisby, C.W., and Catrice Hunt, from Florida to New Orleans. At Mr. Anthony's jury trial, only Nadia Lee (R. 887) and C.W. (R. 1364) testified about the events occurring during the dates in question, and Mr. Anthony (R. 1511) testified in his own defense. The prosecution's remaining evidence regarding the events was circumstantial.

In his testimony, Mr. Anthony conceded some of the counts of the indictment, including second degree battery of C.W. which Nadia Lee and Brittany Grisby also participated in. Third Supp. R. 61, 66. The remaining counts were the subject of competing testimony at trial, with the testimony of Lee and C.W. at times diverging.

Following the testimony of Lee but before the testimony of C.W., the prosecution called Assistant District Attorney Tommy Block, R. 1061. Mr. Block had presented the case against Mr. Anthony and Braddy to the grand jury, R. 54, and he had screened the cases against Nadia Lee and Brittany Grisby before deciding to refuse charges, R. 1073. Mr. Block also conducted Mr. Anthony's bond hearing, R. 366.

During Mr. Block's testimony, defense counsel objected 16 times and moved for mistrials four times, arguing, *inter alia*, that Mr. Block was improperly offering his opinion about guilt and witness credibility and was presenting hearsay evidence from his own investigation. *See* R. 1066, 1071, 1074, 1075, 1076-77, 1081-82, 1087, 1090, 1125. All of counsel's objections were overruled, and his motions for mistrial were denied, but he maintained a continuing objection throughout the testimony.

On November 11, 2016, the jury found Mr. Anthony guilty as charged. R. 333. On December 14, 2016, Mr. Anthony received, *inter alia*, a mandatory life sentence for aggravated rape. R. 337.

B. Original Fifth Circuit Opinion (*Anthony I*)

Mr. Anthony then filed a direct appeal to the state Fifth Circuit Court of Appeal. On February 20, 2019, the Fifth Circuit held in a unanimous ruling that Mr. Anthony was entitled to a new trial due to the improper admission of the exhaustive trial testimony of Jefferson Parish Assistant District Attorney Thomas Block:

In the present case, considering the entirety of Mr. Block's testimony, we find that defendant did not receive a fair

trial. Unlike many reported cases in which a defendant claims that the trial prosecutor made improper comments during opening statements, closing arguments, or trial, the present case involves a situation in which the screening prosecutor was called as a witness and provided testimony that covers approximately 70 pages of transcript. Mr. Block did not simply testify regarding the lack of any “deal” with Ms. Lee or other State witnesses in exchange for their testimony. Rather, Mr. Block vouched for the credibility of the State’s witnesses and improperly commented on defendant’s guilt, while using the prestige and dignity of his office to bolster the State’s case.

App. 24a, *State v. Anthony*, 17-372 (La. App. 5 Cir. 02/20/19), 266 So.3d 415, 430. The Court found that the prosecutor’s testimony “infringed on defendant’s presumption of innocence and prevented him from receiving a fair trial.” App. 29a.

The Court further assessed whether the prosecutor’s testimony was “trial error” subject to harmless error review or “structural error”:

[T]here are exceptions to the harmless error rule because some constitutional rights are so basic to a fair trial that the violation of those rights can never be considered harmless error. [*State v.*] *Thompson*, [15-886 (La. 9/18/17),] 233 So.3d [529] at 561, *citing Weaver v.*

Massachusetts, -- U.S. --, 137 S.Ct. 1899, 1907, 198 L.Ed.2d 420 (2017).

App. 28a. The Court concluded that the prosecutor's testimony so fundamentally undermined the framework of the trial and the presumption of innocence that it constituted structural error:

Because the errors in the present case violated defendant's right to a fair trial and the presumption of innocence, we find that they are structural errors affecting the framework of the trial to which harmless error standards cannot be applied. Accordingly, finding that defendant has not received a fair trial in this matter, as guaranteed by the laws of this state and our country, we vacate defendant's convictions and sentences on all counts and remand for a new trial.

App. 29a.

C. Louisiana Supreme Court Remand

Following a writ by the State, the Louisiana Supreme Court granted review and remanded the case back to the Fifth Circuit with directions to conduct a harmless error analysis:

While we presently express no opinion on whether the testimony of the screening prosecutor contained errors, we find that any such defects were not structural in nature and would instead constitute trial errors subject to a harmless error analysis. *See Weaver v. Massachusetts*, 582 U.S. , 137 S.Ct. 1899, 1907, 198 L.Ed.2d 420 (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.’”); *see also State v. Langley*, 06-1041, p. 11 (La. 5/22/07), 958 So.2d 1160, 1167, *cert. denied*, 552 U.S. 1007, 128 S. Ct. 493, 169 L. Ed. 2d 368 (2007) (setting forth the limited classes of recognized structural errors). The ruling below is vacated and the matter remanded to the court of appeal for a determination of whether guilty verdicts actually rendered in this trial were surely unattributable to the alleged errors in Mr. Block’s testimony. *See Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993).

App. 31a-32a.

D. Fifth Circuit Opinion Following Remand (*Anthony II*)

On remand, Judge Hans Liljeberg, who was the author of the unanimous opinion granting Mr. Anthony a new trial on the basis of the improper prosecutorial testimony, recused himself from participation in the remand on the ground that “the facts and merits of this particular case were made a primary issue during my campaign for the Louisiana Supreme Court.” App. 33a.

Following his self-recusal, Judge Liljeberg was replaced by Judge Robert Chaisson who then joined in holding that the prosecutorial testimony was harmless. Concluding that any error was harmless, the majority explained, “The evidence at trial supports defendant’s convictions, even excluding Mr. Block’s testimony, for the following reasons.” App. 47a; *see also*

App. 50a (“the record shows that there was sufficient evidence to support defendant’s convictions”). The majority opinion did not mention the prosecutor’s testimony in its analysis.

In a lengthy dissent to the majority’s brief decision not to grant Mr. Anthony a new trial as it had originally done, Judge Fredericka Homberg Wicker opined that the court was obligated under the law to order a new trial even in cases where the allegations involve a “horrific series of events sufficient to disrupt the usual measured professional approach of even seasoned jurists and prosecutors.” App. 68a. Judge Wicker analyzed the harm occasioned by the prosecutor’s far-reaching testimony as well as the weakness of the prosecution’s other witnesses, concluding,

When Mr. Block told the jury that he would never bring charges against anyone without proof of guilt beyond a reasonable doubt, and when he definitively opined that ‘Willard Anthony’ was guilty of doing x, y, and z, he gave the jury clear permission to find Defendant guilty, even if the jury did not find the State’s evidence compelling enough, on its own, to convict. After Mr. Block’s testimony, the jury was aware that additional witnesses and evidence existed to confirm Defendant’s guilt, and they could trust the word of the grand jury prosecutor that he was guilty beyond a reasonable doubt.

App. 102a. Articulating the harmless error legal standard, Judge Wicker stated that she could not agree that the testimony “did not contribute to the

jury's verdict in this case nor can I consent to such behavior in a court of law." *Id.*

The Louisiana Supreme Court denied Mr. Anthony's request for supervisory writs. App. 103a. Justice Jefferson Hughes dissented, stating that he would grant relief "for the reasons assigned by Judge Wicker." *Id.*

Mr. Anthony now seeks review from this Court.

REASONS FOR GRANTING THE PETITION

I. PROSECUTORIAL TESTIMONY LIKE THAT SANCTIONED IN THIS CASE WAS ANTITHETICAL TO THE PRESUMPTION OF INNOCENCE AND THE FAIR TRIAL RIGHTS THAT PROSECUTORS ARE SWORN TO UPHOLD.

1. This Court has long emphasized that the American prosecutor is the "representative not of an ordinary party to a controversy, but of a sovereignty whose obligation [is] to govern impartially" and "whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

The prosecutor, therefore, has a "double burden": he owes an obligation to the government to zealously advocate its position, but "he must remember also that he is the representative of a government dedicated to fairness and equal justice to all and, in this respect, he owes a heavy obligation to the accused." *Handford v. United States*, 249 F.2d 295, 296 (5th Cir. 1957). A criminal prosecutor "may prosecute with earnestness and vigor—indeed, he should do so. But,

while he may strike hard blows, he is not at liberty to strike foul ones.” *Berger*, 295 U.S. at 88.

2. Accordingly, this Court has recognized that statements or arguments by the prosecutor opining about the truthfulness of witnesses or the guilt of the defendant and invoking his official status are improper and undermine the defendant’s constitutional trial rights. *See United States v. Young*, 470 U.S. 1 (1985).

The Courts of Appeal have likewise consistently disapproved of such arguments by the prosecutor. *See, e.g., United States v. Bennett*, 874 F.3d 236, 254 (5th Cir. 2017) (“The prosecutor, by alluding to evidence not presented at trial, personally opining on the case and his witnesses, and denigrating the presumption of innocence, ‘roam[ed] beyond the evidence presented at trial,’ opting for the ‘improper, even pernicious’ route of invoking his ‘personal status as the government’s attorney’ to serve as a basis for the conviction of Ms. Bennett—a route that we have time and again denounced.”) (citing cases, including, *inter alia*, *United States v. Garza*, 608 F.2d 659, 662 (5th Cir. 1979) (“This entire line of argument presumed that the whole government apparatus, and the prosecutor individually, had reached a determination of the defendant’s guilt before the trial and implied that the jury should give weight to this fact in making its determination.”); *United States v. Gracia*, 522 F.3d 597 (5th Cir. 2008) (noting that “case law is replete with examples of improper bolstering found to be reversible plain error” and listing cases); *United States v. Smith*, 814 F.3d 268 (5th Cir. 2016) (granting a new trial and noting, “Improper bolstering statements are ‘easily recognized’ and include ‘personal expressions such as

‘I think,’ ‘I know,’ ‘*I believe*,’ or other expressions that either explicitly or implicitly convey the prosecutor’s personal impressions.”)).

3. In the instant case, the screening prosecutor, Assistant District Attorney Thomas Block, shattered the norms established by *Young* and its progeny when he made these sorts of statements directly from the witness stand.

4. The screening prosecutor’s testimony constituted more than 70 pages of the trial transcript, and it included characterizing both present and absent State’s witnesses as victims, and Mr. Anthony—who was entitled to have both credibility and guilt determined by a jury and not by an individual prosecutor—as the person who victimized them. For instance:

Based upon the actions of Willard Anthony, in particular, there is an affirmative defense to the “crimes,” quote, unquote -- I’ll put quote around “those crimes” -- committed by say for instance, Nadia Lee, she has an affirmative defense to the charges of prostitution or say crime against nature insofar as **she was a victim of human trafficking as a result of his actions, Willard Anthony’s actions.**

R. 1074-75 (emphasis added). In offering his opinion about Ms. Lee being a victim, and Mr. Anthony being guilty of victimizing her, Mr. Block referenced his own personal investigation as well as inadmissible police reports and interviews with another witness, Brittany Grisby, whom Mr. Block characterized as a victim but

who was not present to be cross examined by Mr. Anthony:

BY MR. FREESE:

Q. Assuming for the moment that this jury has heard sufficient information to persuade them that Nadia Lee committed one or more crimes, including prostitution and battery here in Jefferson Parish, would that information that they are aware of be something that you were aware of when you screened the case?

A. Yes, I was aware. **I had police reports and I had interviews that the detectives had done with both of the ladies, Ms. Grisby and Ms. Lee, that I was aware of.** And based upon the totality of the circumstances as it relates to - -

R. 1074-75 (emphasis added); *see also* R. 1063 (“I interview witnesses myself and victims.”). Again, Mr. Block referenced his independent investigation and how it led him to believe that Nadia Lee should be considered the perpetrator of a crime or the victim of a crime:

Q. In addition to prostitution related charges, had there been an arrest made for second degree battery for Ms. Lee and possession of cocaine for Ms. Lee?

A. Yes.

Q. Why was she not charged with those two offenses?

A. Well, first of all, the second degree batteries that both ladies were facing,

although they struck the victim, Ms. [C.W.], **they did so because they were told to do so by Willard Anthony and they recognized that if they did not comply with his demands to beat [C.W.] after he had already beaten her**, that they themselves would have sustained beatings.

And at the time that I had made my determination not to charge them, **I had already gone with Detective Abadie on May the 27th and driven from Gretna down to Pensacola and met with [C.W.] for several hours and interviewed her myself and was told by [C.W.] that, yes, although Ms. Grisby and Ms. Lee struck –**

R. 1080 (emphasis added).

Likewise, Mr. Block was allowed to reference Brittany Grisby's inadmissible statement(s), which he claimed corroborated the statements of the other witnesses and led him to conclude that she too was a victim of Mr. Anthony's:

Q. At the time that you were making the decision to not charge **Brittany Grisby and not charge Nadia Lee, did you find their statements regarding what happened to be consistent with each other?**

A. Yes.

Q. Did you find when you first reviewed [C.W.'s] videotaped interview and then when you met with [C.W.] that her

statements to you and her statements to the police gave you reason to believe it was not appropriate to charge Ms. Grisby and Ms. Lee?

A. Yes.

R. 1124-25. Again, during direct examination, the prosecutor elicited testimony from Mr. Block that he “knew based upon the investigation” that Mr. Anthony and his codefendant “were using drugs as a means” to control the female victims, although neither of the alleged victims made any such claim:

BY MR. FREESE:

Q. What information did you develop during your interview with [C.W.] that persuaded you that it was a correct decision not to charge Nadia Lee or Brittany Grisby in connection with the battery committed upon them, upon [C.W.]?

A. That she was – she being [C.W.] – was aware that the only reasons Ms. Grisby and Ms. Lee participated in the battery upon her were as a result of orders by this defendant, Willard Anthony, instructing them to beat her and that if they did not comply with his demands, [C.W.] believed that they would have been beaten as well.

Q. Also, there was cocaine found in the room. Why were neither of those two ladies charged with the cocaine?

A.We know or I knew based upon the investigation that the defendants, Pierre Braddy and Willard Anthony, were using drugs as a means to get the three ladies or the three female victims to commit the crimes for them as it relates to the human trafficking. That was just one of the things that they used to gain control over the females so I did not believe that it was an appropriate charge to charge either one of those three individuals with the cocaine that was located in the room.

R. 1084-85.

Moreover, Mr. Block explicitly reminded the jurors repeatedly that he was not an ordinary witness and possessed a higher degree of credibility: "I have a responsibility based upon my oath that I have taken to be an Assistant District Attorney as well as an officer of the Court and I take my job very seriously." R. 1070. Mr. Block repeatedly put the authority of his office behind Ms. Lee's status as a victim:

Q. Okay. So did you make a deal with her in return for her testimony?

A. No. In fact, to the contrary. **I have a responsibility as I mentioned to you before and an obligation as an officer of the Court and a representative of the people of Jefferson Parish and the State of Louisiana not to just charge someone with an offense**

that cannot be proved under the law or beyond a reasonable doubt.

R. 1086 (emphasis added). Again, Mr. Block invoked his role as a prosecutor to bolster his testimony:

A. I have, I have a responsibility and obligation as an officer of the Court when I was sworn in in 1993 as a lawyer and then sworn in as a prosecutor to prosecute in good faith pursuant to the laws in the State of Louisiana and take only those cases that we can prove beyond a reasonable doubt, a good faith prosecution, not a bad faith or an vindictive prosecution which is what that would be. I would never do that.

Q. In this case, Nadia Lee has testified. Are you going to turn around and prosecute her now?

A. No.

Q. If Brittany Grisby doesn't come into this courtroom and testify, are you going to turn around and prosecute her?

A. No.

Q. Could you do that in good faith?

A. I would not do that and no for the reasons I've stated. They are victims of sex trafficking. There are affirmative defenses under the code, as well as under the Code of Evidence as to why they cannot be prosecuted. They're victims.

R. 1128 (emphasis added). The trial judge overruled all of the defense's objections to Mr. Block's far-reaching testimony.

Again, Mr. Block put the weight of his personal morals behind his belief that Ms. Lee was a victim who required protection, and Mr. Anthony was guilty of victimizing her:

A. Absolutely not. She wasn't from here. She's not from here. **She's a victim.** In no uncertain terms, she's a human being. She deserves respect. She deserves protection under the law. **Morally, I don't believe that it would have been right. I know Detective Sergeant Locascio agreed with me.** To turn her back out onto the street to do what? She wanted to get help to get out of the **lifestyle that she found herself in, that Willard Anthony took advantage of and perpetuated.** And there was no -- other than if you want to say we did the right thing, there was no expectation of a promise or a reward. Ultimately, she was going to have to come before you, ladies and gentlemen, and tell her story and then it would be up to you to determine whether or not you believed her.

R. 1087. Mr. Block then reiterated this testimony on redirect:

Q. And regardless of what prescriptive period there is, however much more time there would be to bring the **charges against Ms. Grisby or Ms. Lee,** it

could be a hundred years, the rest of your life, are you ever going to go back and charge them with that crime?

A. **I believe** that they have an affirmative defense. **I believe that they were victims of Willard Anthony and Pierre Braddy on a human trafficking, sex trafficking enterprise. I believe** that they were witnesses to the crimes that this defendant before you stands accused of. **I would never in good conscience** bring charges against them for the reasons I have stated to you, ladies and gentlemen, today.

R. 1126 (emphasis added).

As Judge Wicker forcefully laid out in her 26-page dissent in this case, the prosecutor in his testimony

(1) usurped the exclusive province of the trial judge to instruct the jury as the law it must apply to the facts as it finds them; (2) usurped the exclusive province of the jury to weigh the evidence, including the credibility of all witnesses, and to arrive at the facts necessary to determine whether the Defendant is guilty beyond a reasonable doubt of the offenses with which he is charged; (3) testified concerning evidence the State received from Brittany Grisby, a witness who did not testify at trial, evidence the jury did not otherwise hear; (4) bolstered the credibility of State's witnesses; and (5) gave an opinion as to the ultimate issue

of fact: the Defendant's guilt beyond a reasonable doubt.

App. 68a-69a.

The prosecutor's testimony in this case was antithetical to the presumption of innocence and the fair trial rights that prosecutors are sworn to uphold. As the Fifth Circuit in *United States v. Garza* explained,

A criminal trial provides a neutral arena for the presentation of evidence upon which alone the jury must base its determination of a defendant's innocence or guilt. Attorneys for both sides, following rules of evidence and procedure designed to protect the neutrality and fairness of the trial, must stage their versions of the truth within that arena. That which has gone before cannot be considered by the jury except to the extent it can be properly presented at the trial and those things that cannot properly be presented must not be considered at all. . . *It is particularly improper, even pernicious, for the prosecutor to seek to invoke his personal status as the government's attorney or the sanction of the government itself as a basis for conviction of a criminal defendant.*

Garza, 608 F.2d at 662 (emphasis added).¹

This Court should grant review.

¹ The Court further recognized that the trial judge has an important role to play as well: "We think important to note that in such circumstances the trial judge has an obligation to intervene to assure protection of defendant's right to a fair trial."

II. ALLOWING A PROSECUTOR TO TESTIFY REGARDING THE CREDIBILITY OF WITNESSES, THE GUILT OF THE DEFENDANT, AND EVIDENCE NOT ADMITTED AT TRIAL WHILE INVOKING THE SANCTITY OF HIS OFFICE CONSTITUTES STRUCTURAL ERROR.

In light of the fundamental trial rights undermined by the admission of the prosecutor’s trial testimony, the Louisiana Fifth Circuit in its initial ruling concluded that the prosecutor’s testimony constituted structural error. *See* App. 28a (*Anthony I*) (citing *Weaver v. Massachusetts*, 582 U.S. ___, 137 S.Ct. 1899 (2017)).

By contrast, the Louisiana Supreme Court declined to opine on whether the prosecutor’s testimony contained errors at all, holding merely that “any such defects were not structural in nature and would instead constitute trial errors subject to a harmless error analysis.” App. 31a. The Louisiana Supreme Court cited this Court’s decision in *Weaver v. Massachusetts* for the proposition that “the 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.’” *See id.* Following the instruction of the Louisiana Supreme Court, the state Fifth Circuit then assessed the prosecutorial testimony as “trial error.” App. 34a (*Anthony II*).

The Louisiana courts’ conclusion that the admission of the testimony of the grand jury prosecutor in his official capacity that the defendant is guilty, that the State’s witnesses are telling the truth, and that evidence not presented to the jurors confirms his firm beliefs cannot constitute “structural error” misapprehends the nature of the inquiry and the harm.

1. In *Weaver v. Massachusetts*, 137 S.Ct. 1899 (2017), this Court addressed the application of the doctrine of structural error. The Court both provided guidance on the meaning of the term and demystified it.

First, the Court explained that the “purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial.” *Weaver*, 137 S.Ct. at 1899. But the Court also explained, “Despite its name, the term ‘structural error’ carries with it no talismanic significance as a doctrinal matter. It means only that the government is not entitled to deprive the defendant of a new trial by showing that the error was ‘harmless beyond a reasonable doubt.’ *Chapman*, 386 U. S., at 24, 87 S. Ct. 824, 17 L. Ed. 2d 705.”

The Court then went on to identify “three broad rationales” for concluding that an error is structural. First, an error may be structural “if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest.” *Id.* at 1908 (citing, *inter alia*, the right to conduct one’s own defense); *see also McCoy v. Louisiana*, 138 S.Ct. 1500 (2018). Second, an error may be deemed structural “if the effects of the error are simply too hard to measure.” *Id.* (citing, *inter alia*, the right to counsel of choice). Third, an error may be deemed structural “if the error always results in fundamental unfairness.” *Id.* (citing, *inter alia*, the right to attorney, the right to a reasonable doubt instruction). The Court concluded, however, that these categories “are not rigid. In a particular case, more than one of these rationales may be part of the explanation for why an

error is deemed to be structural.” *Id.* Additionally, an error “can count as structural even if the error does not lead to fundamental unfairness in every case.” *Id.*

2. Applying the principles set forth in *Weaver* to the improper prosecutorial testimony allowed in this case over vociferous objections and mistrial motions, structural error occurred.

First, as the original Fifth Circuit opinion recognized, the prosecutorial testimony in this case fundamentally undermined Mr. Anthony’s presumption of innocence. *See Coffin v. United States*, 156 U.S. 432, 453 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”). The prosecutor was allowed to tell jurors that, through his own pre-trial, or extrajudicial, fact gathering and credibility assessment, he had already concluded that the witnesses were victims, and Mr. Anthony was the perpetrator such that the cloak of innocence was removed from Mr. Anthony before jurors even began deliberating.

Second, a criminal trial in which the State is permitted to advocate in favor of a finding of guilt while, at the same time, usurp the role of the judge to explain the law applicable to the case and the role of the jury to determine credibility and guilt will always result in a fundamentally unfair trial.

This conclusion is consistent with this Court’s other jurisprudence surrounding the right to a jury verdict. In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court explained that the use of a flawed reasonable doubt instruction is structural error because a

verdict so obtained does not satisfy the right to a “jury verdict”:

It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are inter-related. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.

Sullivan, 508 U.S. at 278. Accordingly, where jurors have been given a flawed reasonable doubt instruction, the error is not amenable to harmless error review under *Chapman v. California*, 386 U.S. 18 (1967):

Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless.

Id. at 280.

In the same way, a trial in which the prosecutor decides guilt in advance of the jurors and then

provides that decision to jurors from the witness stand is also not a true jury verdict beyond a reasonable doubt such that it is amenable to harmless error review.

Third, considering both the rights at issue and the expansive scope of the prosecutor's testimony in this case, it is impossible to isolate and measure the precise impact it had on the jurors. Writing for a unanimous Court, Justice Scalia explained in *Sullivan*:

The right to trial by jury reflects, we have said, "a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S. at 155. The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."

Sullivan, 508 U.S. at 281-282.

Contrary to the guidance provided in *Weaver*, the Louisiana Supreme Court reached the conclusion that the prosecutorial testimony could never constitute structural error without first assessing the underlying error.

This Court should grant review.

III. IN A CASE WHERE THE ONLY QUESTION FACING THE JURY WAS WHETHER TO CREDIT THE STATE'S FLAWED WITNESSES OR THE DEFENDANT, THE PROSECUTOR'S VOUCHING AND EXTRA-JUDICIAL TESTIMONY COULD NOT BE HARMLESS ERROR.

Just as the Louisiana Supreme Court misapprehended the nature of the structural error analysis

under *Weaver*, so too did the Louisiana Fifth Circuit misapprehend the nature of the harmless error inquiry under *Chapman v. California*, 386 U.S. 18 (1967), and *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

Following the Louisiana Supreme Court's remand back to the state Fifth Circuit to conduct a harmless error analysis, the newly-composed panel upheld Mr. Anthony's convictions and life sentences on the ground that "[t]he evidence at trial supports defendant's convictions, even excluding Mr. Block's testimony . . ." App. 47a; *see also* App. 50a ("the record shows that there was sufficient evidence to support defendant's convictions"). The standard applied to the error occurring in this case wholly omitted consideration of the error itself, imagining a trial without the error.

The Louisiana court's analysis conflicted with this Court's and the federal Fifth Circuit Court's harmless error analysis, and the result is that the prosecutor's improper testimony was not reviewed in the context of this case. Properly assessing harmless error, the prosecutor's testimony could not be harmless.

1. In *Chapman v. California*, this Court held that a constitutional error requires reversal of the conviction unless the State can show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24.

In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court subsequently made clear that the harmless error inquiry does not involve an assessment of the error in isolation, nor does it involve an assessment of

the admissible evidence in isolation; rather, the error must be assessed in terms of the case:

[T]he question [*Chapman*] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. . . . The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.

Sullivan, 508 U.S. at 279.

3. This Court has on more than one occasion exemplified the application of the harmless error standard to cases involving improper prosecutorial argument.

In *Berger v. United States*, 295 U.S. 78 (1935), the Court addressed both the magnitude of the prevalence of the prosecutor’s improper statements as well as the strength and nature of the government’s case against the defendant. In granting a new trial, the Court noted that the prosecution’s case depended on the testimony of “an accomplice with a long criminal record”:

In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence. If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt “overwhelming,” a different conclusion might be reached. . . . Moreover, we have not here a

case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential.

Berger, 295 U.S. at 89 (citations omitted).

Likewise, in *Chapman* itself, the Court addressed a prosecutor's repeated, improper references to the defendant's failure to testify on his own behalf, concluding that the error was not harmless because the State's case was not so strong as to preclude all doubt about guilt, and the prosecutor's argument was specifically targeted to remove that doubt:

And though the case in which this occurred presented a reasonably strong "circumstantial web of evidence" against petitioners, 63 Cal. 2d, at 197, 404 P. 2d, at 220, it was also a case in which, absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts. Under these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions. Such a machine-gun repetition of a denial of constitutional rights, designed and calculated to make petitioners' version of the evidence worthless, can no more be considered harmless than the introduction against a defendant of a coerced confession.

Chapman, 386 U.S. at 25-26.

Consistent with this Court, the United States Fifth Circuit Court of Appeal has also repeatedly “reversed convictions in the past for improper prosecutorial comments when the ‘most important problem facing the jury was its decision whether to credit the testimony of the . . . government witnesses, or that of the defendant[s].” *United States v. Bennett*, 874 F.3d 236, 256 (5th Cir. 2017) (citing *Garza*, 608 F.2d at 666 (holding prosecutor’s improper vouching constituted reversible error when conviction turned on credibility); *see also*, *e.g.*, *United States v. Gracia*, 522 F.3d 597 (5th Cir. 2008) (same); *Smith*, 814 F.3d 268 (5th Cir. 2016) (same); *United States v. Beaulieu*, 973 F.3d 354 (5th Cir. 2020).

4. Properly applying the harmless error standard to the facts of this case, the prosecutor’s testimony was not harmless beyond a reasonable doubt considering the magnitude and prevalence of the impropriety and the credibility disputes at the heart of this prosecution. This was precisely the conclusion of dissenting Judge Wicker. *See* App. 68a.

a. The magnitude of the prosecutorial impropriety in this case cannot be understated. During his 70 pages of testimony, Assistant District Attorney Block repeatedly expressed his belief in the credibility of the prosecution’s witnesses and in Mr. Anthony’s guilt, all the while reminding the jury of his special status as a prosecutor. Comparing a case in which a police officer called as an expert is improperly asked to give an opinion about guilt, dissenting Judge Wicker noted, “Mr. Block’s position is one that commands the same or greater respect and trust from the members of the jurors and the public, and his testimony did not even

enjoy the disguise of a hypothetical. It was a direct opinion on the guilt of the Defendant. . . [A] prosecutor clearly may not opine to the jury that in his or her opinion the offender is guilty.” App. 96a (citations omitted).

Nor did this case involve mere prosecutorial argument like the cases cited above did. Rather, the improper prosecutorial statements in the present case came directly from the witness stand. As Judge Wicker observed,

Mr. Block’s offense here is much more egregious. He was a sworn witness. His testimony was evidence to be considered by the jury in its deliberations as per the judge’s pre deliberations instructions to the jury.

App. 99a.

b. And the testifying prosecutor did not simply rely on the evidence that was before the jury to express his opinions. Rather, as Judge Wicker in her dissent explained, “Mr. Block vouched for the credibility of one witness who had not yet testified and another witness who never testified, and he basically testified that Defendant was not credible at all.” App. 92a (citations omitted). Describing Mr. Block’s testimony with respect to Brittany Grisby, who did not testify at Mr. Anthony’s trial, Judge Wicker recounted:

Mr. Block testified that upon his review of Ms. Grisby’s statements to investigators as well as C.W.’s comments about Ms. Grisby’s actions during his interview with her in Florida, Ms. Grisby’s version of events was consistent with those given by both C.W. and Ms. Lee. Mr. Block’s testimony on this issue

clearly lent further credibility to the testimony of both C.W. and Ms. Lee. For instance, Ms. Grisby was the only witness who could have corroborated C.W.'s testimony that Defendant pulled a gun while in the car on the way from Pensacola to New Orleans and told her "you're part of my family now." Because of Mr. Block's testimony, the jury was left with the impression that Ms. Grisby's testimony would have confirmed C.W.'s testimony. Mr. Block himself, however, never interviewed Ms. Grisby. Therefore, Mr. Block based this testimony on what other people told him Ms. Grisby said to them — hearsay on hearsay. Even more importantly, since Ms. Grisby never testified at trial, this is evidence the jury heard only through Mr. Block, evidence it would not have otherwise heard. This alone necessitates reversal.

App. 94a.

Likewise, Mr. Block asserted that Mr. Anthony was controlling the prostitutes with whom he was working by manipulating them with drugs, yet, as the dissent noted, no such evidence was presented by the State:

As to the testimony that the Defendant used drugs as a means to get the three female victims to commit crimes for them, neither C.W. nor Ms. Lee testified to that fact. C.W. admitted to using drugs, and Ms. Lee testified that the group, including C.W., voluntarily participated in recreational drug use. While Sergeant Locascio testified in two sentences or less that, in general, a certain

type of pimp may look for girls who are on drugs or who like to party and “feed them drugs”, Mr. Block informed the jury that he had conclusive proof from the investigation that the Defendant was using drugs to control the actions of the female victims. As none of the female witnesses testified to this information, it can hardly be said that Mr. Block based his conclusion on facts within evidence.

App. 93a.

Additionally, Judge Wicker noted in dissent, “because Mr. Block was asked about C.W.’s encounters with police *prior to* the incident giving rise to this matter, the jury also could have believed that Mr. Block had evidence of mistreatment that was not introduced by prior testimony.” App. 93a.

c. The prosecutor’s testimony was also misleading, and even incorrect, about both the facts and the law. For instance, as Judge Wicker noted in dissent, Mr. Block asserted that the witnesses were victims even where they did not themselves believe they were victims:

Despite Mr. Block’s assertion that it was the consistent testimony of three women that led him to the conclusion that all three were victims of human trafficking, both C.W. and Ms. Lee testified at trial that they were not forced to prostitute and that they did not consider themselves kidnapped. Furthermore, Ms. Lee’s testimony contradicted C.W.’s in that Ms. Lee testified that C.W. was given a choice to either stay in the

hotel in Florida or accompany the rest of the group to New Orleans.

App. 92a.

Similarly, Mr. Block gave extensive testimony about the grand jury process and, in doing so, misrepresented the law to the jurors. Again, as detailed by Judge Wicker in dissent,

[H]e informed that jury that he had a duty to make sure the elements of the offense were met beyond a reasonable doubt before he presented witnesses, whose testimony he believed was not perjured, and legally admissible evidence to the grand jury. . . In fact, as discussed above, Mr. Block actively misinformed the jury as to the grand jury standard for indictment, which is probable cause, not guilt beyond a reasonable doubt, and also as to the rules of evidence, which do not apply to grand jury proceedings. *See* La. C.Cr.P. art. 442; *Qualls*, 377 So.2d at 296; *Kaley*, 571 U.S. at 328; La. C.E. art. 1101(C)(6); *Molaison*, 142 So.3d at 352. . . In so testifying, Mr. Block led the jury to believe that a mini trial had occurred in the grand jury proceeding, in which the rules of evidence were followed, and the grand jury found the Defendant guilty. His testimony was excessive, informed the jury of evidence it would otherwise not have heard, misinformed the jury on the law, and led it to believe it was merely a rubber stamp on the actions already taken by the grand jury.

App. 94a.

d. Finally, Mr. Block's testimony was offered in a case that was dependent on believing the testimony of Ms. Lee and C.W., both of whom possessed all of the hallmarks of unreliable witnesses. As Judge Wicker summarized in her dissent:

The State's case was built on the testimony of three female witnesses: the victim C.W., Nadia Lee, and Brittany Grisby; Ms. Grisby did not testify at trial. All three women had credibility issues. On the same night that C.W. was taken to the hospital with serious injuries—inflicted, at least in part, by Ms. Lee and Ms. Grisby—the two women were also arrested for prostitution and drug-related offenses. C.W. had a history of drug use and criminal activity, including prostitution, as well as a history of mental health issues.^[2] Ms. Lee took responsibility for the narcotics found in the hotel room on the night of her arrest, and she testified that the group, including C.W., voluntarily participated in recreational drug use. When defense counsel insinuated, during his cross-examination of Ms. Lee, that she had received favorable

² C.W. admitted that she had at various times been diagnosed and placed on medications for depression, anxiety, insomnia, and bipolar disorder. R. 1460. Her mother placed her in a mental health hospital for evaluations when she was approximately 17 years old, and police placed her in another hospital for mental issues when was 22 or 23 years old. R. 1461-62. She also began having seizures at the age of 23, R. 1468, and she admitted to suffering from confusion at times ever since she was involved in a car accident at the age of 16 which damaged her frontal lobe. R. 1469. She admitted to having some memory problems as well. R. 1470.

treatment from the State in exchange for her testimony, Ms. Lee acknowledged that she had not been charged in relation to the events from which this matter arose, including her participation in the beating that rendered C.W. “unrecognizable.”

App. 69a.

Further, with respect to the most serious charge in the case, the aggravated rape of C.W., the only direct witnesses were C.W. and Mr. Anthony, and they directly contradicted each other. While C.W. testified that Mr. Anthony “forced himself” on her when they were in the hotel room alone, Mr. Anthony testified that they had consensual sex only, and it occurred earlier in their time together. R. 1539.

The allegation that C.W. had been raped by Mr. Anthony was contradicted by the other evidence in the case. For instance, C.W.’s allegation that she was raped was contradicted by her initial statements to the emergency room physician treating her. According to the medical records introduced at trial, C.W. said that she had been beaten by her pimp, but she specifically denied that she had been sexually assaulted. R. 619-21. When she was given a rape kit at the hospital after she had denied being raped, C.W. testified that the detectives with her must have “filled [the doctor] in” about the alleged rape. R. 1479.

That C.W. had been raped was, however, not corroborated by the physical evidence either. While at the hospital, C.W. was given a sexual assault kit, apparently at the urging of the detectives, which showed no signs of trauma consistent with a rape having occurred. R. 617.

In a case where the only question facing the jury was whether to credit the State's flawed witnesses or the defendant, the prosecutor's vouching and extra-judicial testimony could not be harmless error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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