No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2025

TRINA MAE JOHNSON,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHERE THE TRIAL COURT PERSONALLY IDENTIFIED WITH PETITIONER'S VICTIM, EXPERIENCE AND SUFFERING AND EXPRESSED A DEEP SEATED FAVORITISM FOR HIM, WAS PETITIONER DENIED HER DUE PROCESS RIGHT TO BE SENTENCING BY A NEUTRAL TRIBUNAL?

SUPREME COURT OF THE UNITED STATES

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vs.

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

The Petitioner, Trina Mae Johnson, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

LIST OF PARTIES

Trina Mae Johnson, Petitioner

United States of America, Respondent

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STATEMENT OF JURISDICTION

The Eighth Circuit Court of Appeals handed down its opinion on January 5, 2023. Judgment was entered January 9, 2026. The Circuit's Mandate was filed January 27, 2026. This petition is timely, 28 U.S.C. 1254 (1) and Rule 13.1, Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISION

The Fifth Amendment provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . ."

STATUTE

18 U.S.C. 1153 (a) provides:

> Any Indian who commits against the person or property of another Indian or other person nay of the following offenses . . . (b) any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

Minn. Stat. 609.775, Subd. 2 provides: "A person who

tortures a child is guilty of a felony and may be sentenced to imprisonment for not more than 25 years or to payment of a fine of not more than $35,000, or both."

STATEMENT OF THE CASE

Ms. Johnson was indicted for the offenses of child torture, in violation of 18 U.S.C. 1151, 1153, with reference to Minn. Stat. 609.3775 (Count 1), with additional charges of Child Neglect Deprivation of Food and Health Care (Count 2), Child Endangerment (Court 3), and Assault with a Dangerous Weapon (Count 4). Her co-defendants, charged in Counts 3 and 4, were three of her sisters, Bobbi Jo Johnson, Ellie Mae Johnson, Patricia Ann Johnson, and her common law husband, Bertram Lussier. The latter three entered guilty pleas to Count 3.

After lengthy pretrial motions concerning the relevance and impact of McGirt v. Oklahoma, 591 U.S. 894 (2020) and Oklahoma v. Castro-Huerta, 597 U.S. 629 (2022) with respect the Minnesota Red Lake Reservation prosecutions, the Government offered to Ms. Johnson a contingent plea agreement. If Ms. Johnson's sister, Bobbie Jo, would plead guilty to the Child Neglect or Endangerment charges (referencing Counts 2 and 3), the Government would agree to recommend a range of ten to twelve years. Change of Plea (T. at p. 25).

When her sister declined the Government's offer, Ms. Johnson could not receive the benefit of any bargain through no fault of her own. Faced with the choice of standing trial (and forfeiting three points for acceptance of responsibility, U.S.S.G. Sec. 2E1.1) or entering a straight plea to all counts, Ms. Johnson chose the latter.

For a factual basis, Ms. Johnson acknowledged she was the foster care mother for L.D. from January 1, 2021 through April 29, 2022. (T. at p. 26). He was then between the ages 11 and 13. (T. at p. 40). The conduct occurred on the Red Lake Indian Reservation, where Ms. Johnson and L.D. are members of the Tribe. (T. at pp. 26-27).

While in her care, Ms. Johnson found L.D. difficult to discipline, her time and relationship with him described as "fraught." (T. at p. 28). She admitted to withholding food and observing his loss of weight, nearly 100 pounds. (T. at pp. 28-29). Ms. Johnson had L.D. stand in uncomfortable positions for long periods of time. L.D.'s arms, at times, would be bound by tape. At other times, he was hit with brooms and other objects. Medical care was not provided. Id. at p. 30. As a result of her conduct (and the conduct of her sisters and Mr. Lussier), Ms. Johnson acknowledged L.D. had suffered serious and substantial harm

to his physical, mental and emotional health. T. p. 31; see also Slip Op. at p. 2 -3 (describing the child's injuries).

At sentencing, L.D.'s statement was read into the record, indicating that he remained physically impaired, had difficulties getting in and out of cars and climbing stairs, and that the scars from his abuse remain. T. at pp. 10-11. "I really hope you have a hard time in jail," he wrote to Ms. Johnson, "for what you did to me." T. at p. 11. L.D. was asked if he wanted to make an oral statement. He replied, "No, thank you." Id. at p. 25.

This critical exchange followed:

> THE COURT: I know you put thought into your written statement. Okay. There is something I want to say to you, and it is that I think you might be the strongest person I have ever come across. And I have been involved in the criminal justice system for a really long time, so I've seen some tough people. But it takes extraordinary strength to survive what you survived, and it takes a lot of strength to keep on surviving. And I am so, so glad that you did. I'm so glad that you held on.
>
> And I'm really grateful to your foster family, that you landed somewhere wonderful, because I think we are going to see every day a little bit more the kind of sweet kid that is inside of you that's already come out.
>
> One of things that I am most struck by in the things that I've learned about you, and I've learned a lot, is the compassion that you show to other people. It's something

they talked about at Evergreen. It's something that the FBI agent talked about. It's something that your family talked about. And it's something that's clear to me when you talk about how much you worry about your niece and nephew.

One of the things that I've thought a lot about is that you weren't just fragile when you got to Evergreen. You were fragile when you got to Trina's house too. You had already been through more in your almost 12 years than anybody should, and that child deserved love and care and protection. That child already was struggling with a lot of stuff and you'd already been through. And it's heartbreaking that that didn't happen for you until now.

And the last thing I want to say is that I think I understand that your sister has passed away also?

L.D.: (Nods head.)

THE COURT: And I'm really sorry about that. But I know that – I know that she and everybody else in your family, whether they're here or not, is proud of you today. And I just wanted you to hear that from me.

T. pp. 25-27.

The AUSA's comments regarding the proposed plea agreement – the ten to twelve year window offered to Ms. Johnson if her sister would plead out guilt – was "really just how the government priced it, I guess." Id. at p . 20. The Government requested, twenty-years, this after her sister's trial Ms. Johnson has sought to avoid. T. at p. 21.

Ms. Johnson apologized for her conduct. "I am truly sorry from

the bottom of my heart," she said. T. at p. 28. "I wish I could start over," she said to the probation officer. PSR at p. 7.

With respect to the contingent plea agreement offer, the Court said, "I share Mr. Engh's feeling that there's something kind of unfair about that." Id. at 29. But the Court added, that had there not been Bobbie Jo Johnson's trial, photographs of L.D.'s physical condition would still have been reviewed; those "images haunt me." T. at p. 30.

The Court found aggravating circumstances "difficult to put into words." T. at p. 34. Noting "the positional holds," the Court said "[i]t sounds to me like Lonny spent the better part of the 485 days standing with his arms out. I used to say, when I had something difficult in front of me, a difficult case when I was a public defender or a difficult brief to write, oh, I can do anything; I can do anything for 30 days; I can do anything for a year. I could not do what Lonny did for 485 days." T. at 35.

The Court imposed a sentence of 18 years. "It's too much, and it's not enough." T. at 38. Less time "would not give adequate weight to the trauma that Trina has inflicted on such a long list of victims, the first of which is Lonny D, who I will quote again, saying, 'I am a kid and

you're an adult, and you're supposed to take care of me.' And to picture the 11-year-old and 12-year-old body that he was enduring this for 18 months is hard to do." T. at 38. The remaining counts were "to be run concurrently to one another." T. at 39.

Affirming the sentencing, the Eighth Circuit rejected Ms. Johnson's claim that the District Court was unfairly biased, that an undo empathy was expressed toward the victim and that, as a result, she was denied due process of law. "Judge Mendendez's statements at sentencing fall far short of this high bar for establishing bias." Slip Op. at p. 8.

The Circuit Court nonetheless opined that "[a] judge must recuse if his impartiality might be reasonably questioned because of bias or prejudice." Slip Op. at p. 7 (quoting 28 U.S.C. Sec. 455). Noting, too, that recusal "is appropriate in 'various situations . . . in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable,'" Ms. Johnson's was not such a case. Slip Op. at p. 7 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)). The Circuit thus turned away Ms. Johnson's argument that Judge Menendez's "brief expression of

sympathy and empathy toward the child" had "influenced the court's sentencing." Slip Op. at pp. 8-9. We disagree.

REASONS WHY CERTIORARI SHOULD BE GRANTED

The District Court's identification with the victim, how she stated, "I could not do what Lonny did for 485 days," how she wouldn't have had his kind of courage to survive what he did, "[a]nd I am so, so glad that you did. I'm so glad that you held on," and how the images from the trial continued to "haunt" transformed Ms. Johnson's sentencing hearing into an unfair empathy embrace.

It is axiomatic that "a fair tribunal is the basic requirement of due process." In re Murchison, 349 U.S. 133, 136 (1955). The Due Process Clause entitles Ms. Johnson "to an impartial and disinterested" judge. Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). A disinterest rooted in the "requirement of neutrality." Id. A neutrality that "safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process." Id.

As the Eighth Circuit had earlier observed, "the greatest virtue or

a fair and conscientious judge" is "impartiality." Reserve Mining Company, v. Honorable Miles W. Lord, et al., 529 F.2d 181, 186 (8th Cir. 1976). To reach the height of that virtue, a judge must have "no actual bias against the defendant or interest in the outcome of his particular case." Bracy v. Gramley, 520 U.S. 899, 904 (1997)(citing Rule 6(a), Rules Governing Sec. 2254 Cases).

The evaluation of bias is necessarily objective, requiring a "realistic appraisal of psychological tendencies and human weakness." Withrow, 421 U.S. at 47. "A judge best serves the administration of justice by remaining detached from the conflict between the parties." Reserve Mining Company, 529 F.2d at 186. "When a judge joins sides, the public as well as the litigants become overawed, frightened and confused." Id. What has to be voided wasn't here.

Liteky v. United States, 510 U.S. 540 (1994) cautioned that a Judge merely observing the trial and becoming "ill disposed towards the defendant, who has been sown to be a thoroughly reprehensible person," is not necessarily evidence of bias. Id. at 550. Liteky nonetheless recognized the "idiosyncratic nature of bias," Id. at 550. Indeed, the

probability of bias, as the Court has observed elsewhere, "cannot be defined with precision." Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822 (1986). A reversible bias exists if a judge displays "a deep-seated favoritism or antagonism that would make fair judgement impossible." Liteky, 510 U.S. at 555. "A favorable or unfavorable disposition can also deserve to be characterized as 'bias' or 'prejudice' because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment." Id. at 551. Our claim of "predisposition" must "go beyond what is normal and acceptable," Id. at 552, to a place of "deep-seated favoritism or antagonism that would make fair judgment impossible." Id. at 555. Where, for example, a judge has or develops a "personal" interest in a case. Caperton v. A.T. Massey Coal Col, Inc., 556 U.S. 868, 876 (2009)(quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927)). The District Court was too close to L.D.

Chief Justice Roberts if often quoted for this ideal: "Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The

role of the umpire and a judge is critical. They make sure everyone plays by the rules but it is a limited role. Nobody ever went to a ball game to see the umpire." Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing before the S. Comm. On the Judiciary, 109th Cong. 55 (2004).

By disappearing into the emotional rubric of "L. D.," becoming thereby joined with the victim, an umpire this District Court refused to be. The Court's sympathy and empathy fell over the hard edge of fairness, denying Ms. Johnson her process due.

The Eighth Circuit discounted the scholarship of empathy referenced in Ms. Johnson's brief. Slip. Op. at p. 8. As if the scholarship describing appropriate sentencing practices should be ignored, even though it is often cited in sentencing appeals. See e.g., Graham v. Florida, 560 U.S. 48, 73-74 (2010)(citing law review articles and the attendant "scholarly debates regarding the effectiveness of rehabilitation" to support the ruling that life sentences for juveniles convicted of non-murder violate the Eighth Amendment).

The scholarship is persuasive in our setting. Empathy is "an imaginative reconstruction of another person's experience." Martha C.

Nussbaum, "Upheavals of Thought: the Intelligence of Emotions" (Cambridge University press 2001) at p. 302. The word empathy is commonly defined as "[t]he power of projecting one's personality into and so fully comprehending the object of contemplation." Oxford English Dictionary (2nd Ed. 1989).

The "three basis phenomena captured by [empathy]" are these:

> (1) Feeling the emotion of another; (2) understanding the experience or situation of another both affectively and cognitively, often achieved by imagining one's self to be in the position of the other; and (3) action brought about by experiencing the distress of another (hence the confusion of empathy with sympathy and compassion.). The first two forms are ways of knowing, the third form a catalyst for action.

Lynne N. Henderson, "Legality and Empathy," 85 Mich. L. R. 1574, 1579 (1987).

The third form – the experiencing another's distress – was the "catalyst" for Ms. Johnson's enormous sentence, and proof of the Court's impartiality. On one hand, "[t]he primary virtue of empathy is that it tells us not to assume that we are right, or objective, or impartial." On the other, there is an attendant failure to be recognized once the Court "over-identifies with [her] own experiences that [s]he assumes them to

be universal. At that point, "[s]he cannot hear the experiences of others in any meaningful way, but [s]he also may be unable to hear the question actually being asked." Mary Ann Franks, "Lies, Damned Lies and Judicial Empathy," 51 Wasburn L.J. 61, 68, 71 (2011).

Ms. Johnson was made to feel as if her life was secondary, subsumed by the Court's misplaced fondness for the victim, an over-identification found in these sentences:

"He was the "strongest person I have ever come across."

The "images" of his abuse "haunt me"

"And to picture the 11-year-old and 12-year-old body that he was enduring this for 18 months is hard to do."

"I could not do what Lonnie did for 485 days." and

"I'm so glad you held on."

The common assumption that a judge is free from bias, Professor Franks observes, is merely "aspirational." Id. at p. 63. "[T]o refuse to recognize that the law is itself marked by bias," she writes, "is to naturalize those biases and insulate them from critique or correction." Id. at p. 64. That sentence is a description of the due process problem left unrecognized by the Eighth Circuit. Its opinion avoids critique,

refuses correction. The District Court's expressions of empathy, and the resulting "high degree of favoritism," made a fair and neutral sentence "impossible" reach. Liteky, 510 U.S. at 555.

The Eighth Circuit has "decided an important federal question that has departed from the accepted and usual course of judicial proceedings." Rule 10 (a), Rules of the Supreme Court of the United States.

CONCLUSION

Ms. Johnson requests her Petition be granted.

Dated: March 17, 2026

Respectfully submitted,

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ATTORNEY FOR PETITIONER

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2025

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APPENDIX

1. Decision of the Eighth Circuit Court of Appeals A.1-A.9

2. Judgement of the Eighth Circuit Court of Appeals..... A.10

3. Mandate of the Eighth Circuit Court of Appeals A.11

4. Judgement of the District Court.....A.12-A.18

United States Court of Appeals
For the Eighth Circuit

No. 24-2837

United States of America

Plaintiff - Appellee

v.

Trina Mae Johnson

Defendant - Appellant

Appeal from United States District Court
for the District of Minnesota

Submitted: June 11, 2025
Filed: January 5, 2026

Before LOKEN, ERICKSON, and KOBES, Circuit Judges.

LOKEN, Circuit Judge.

On the eve of trial, after rejecting the government's plea agreement offer of a 120-month mandatory minimum sentence, Trina Mae Johnson pleaded guilty without a plea agreement to child torture, child neglect, child endangerment, and assaulting a minor with a dangerous weapon in violation of Minn. Stat. §§ 609.3775, 609.05, 609.378 subdiv. 1(a)(1), 609.378 subdiv. 1(b)(1), and 18 U.S.C. §§ 113(a)(2) & 3559(f)(3). See 18 U.S.C. § 1153. Three of these major crimes offenses have neither

A.1

applicable nor analogous sentencing guidelines, so determining the appropriate sentence is controlled by 18 U.S.C. § 3553(a). See 18 U.S.C. § 3742(a)(4).

The Presentence Investigation Report (PSR) determined that the advisory guidelines sentencing range for the fourth conviction, assaulting a minor with a deadly weapon, is 120 months imprisonment with a 10-year mandatory minimum. At sentencing, the government requested a 20-year sentence. Expressing remorse, Johnson urged a sentence close to the government's plea agreement offer of a 120-month mandatory minimum sentence. The district court[1] overruled PSR objections unrelated to this appeal, considered the 18 U.S.C. § 3553(a) sentencing factors at length, and imposed a sentence of 216 months imprisonment. Johnson appeals, arguing the sentence is "plainly unreasonable" because the sympathy and empathy expressed by the court in addressing victim L.D. during the sentencing hearing violated Johnson's due process right to judicial neutrality in sentencing. Concluding that the court's statements to the victim during the hearing were insufficient to establish judicial bias, we affirm.

I. Background

In November 2020, when he was 11 years old, L.D. was placed in the foster care of Johnson. In April 2022, Johnson brought L.D. to a youth shelter, claiming he was "out of control" and harming himself. The youth shelter contacted Red Lake Minnesota Family and Child Services. An FBI investigation revealed that over the course of fifteen months, Johnson had subjected L.D. to sustained abuse, including sleep deprivation, starvation, denial of medical care, physical torture, and psychological torment. He lost 100 pounds, had multiple wounds and broken bones that improperly healed, scarring in multiple locations from being stabbed by a knife

[1]The Honorable Katherine M. Menendez, United States District Judge for the District of Minnesota.

and scissors on different occasions, brain injuries, and severe lasting mental and physical trauma. He was described as "completely unrecognizable" compared to when he was placed in Johnson's care. There were many serious abuses, carried out using a wide range of inhumane and violent methods. Johnson had facilitated and encouraged those around her to further the abuse, including her sisters, partner, and other foster children under her care. The abuse and L.D.'s condition were concealed during the COVID-19 pandemic by turning off his camera during online schooling, hiding him away when his sister visited, and demanding he tell others the injuries were self-inflicted under the threat of further harm to him and his family.

A federal indictment charged Johnson and four other participants in the abuse with the four federal and Minnesota offenses. Three co-defendants pleaded guilty to Count 3, child endangerment. The fourth, Johnson's sister, Bobbi Jo Johnson, did not plead guilty and was found guilty after a trial of child neglect and child endangerment. Prior to that trial, the government offered Johnson and Bobbi Jo a "wired" plea agreement, conditioned on both pleading guilty, of a 10-year mandatory minimum sentence and a maximum government-recommended sentence of 12 years. Because Bobbi Jo refused the agreement and proceeded to trial, Johnson could not accept the government's agreement. She instead pleaded guilty without an agreement. That plea is not at issue on appeal.

Prior to sentencing, Johnson argued that a sentence comparable to the 12 years proposed in the government's wired plea agreement was appropriate, claiming she was prevented from accepting the agreement by her sister's refusal. Johnson cited various mitigating factors, including prior personal traumas and post-offense rehabilitation efforts. Absent a plea agreement, the government requested a sentence of 240 months imprisonment based on the severity of the crimes, Johnson's minimization of responsibility in claiming L.D.'s misbehavior warranted punishment, and its review of various guideline provisions. The government urged the court to disregard its prior offer because it would have been non-binding on the court, and it

A.3

was offered to spare L.D. the trauma of testifying, which he was required to do at Bobbi Jo's trial.

During the sentencing hearing, the district court heard L.D.'s victim impact statement describing the treatment and lasting effects of the abuse, which was read into the record by his sister, and impact statements from L.D.'s new foster parents. After these statements, the judge directly addressed L.D.:

> There is something I want to say to you, and it is that I think you might be the strongest person I have ever come across. And I have been involved in the criminal justice system for a really long time, so I've seen some tough people. But it takes extraordinary strength to survive what you survived, and it takes a lot of strength to keep on surviving. And I am so, so glad that you did. I'm so glad that you held on.
>
> And I am really grateful to your foster family, that you landed somewhere wonderful, because I think that we are going to see every day a little bit more the kind and sweet kid that is inside of you that's already come out.
>
> One of the things that I am most struck by in the things that I've learned about you, and I've learned a lot, is the compassion that you show to other people. It's something that they talked about at Evergreen [youth shelter]. It's something that the FBI agent talked about. It's something that your family talked about. And it's something that's clear to me when you talk about how much you worry about your niece and nephew.
>
> One of the things that I've thought a lot about is that you weren't just fragile when you got to Evergreen. You were fragile when you got to Trina's house too. You had already been through more in your almost 12 years than anybody should, and that child deserved love and care and protection. That child was already struggling with a lot of stuff that you'd already been through. And it's heartbreaking that that didn't happen for you until now.

A.4

> And the last thing I want to say is that I think I understand that your sister has passed away also? . . . And I'm really sorry about that. But I know that -- I know that she and everybody else in your family, whether they're here or not, is proud of you today. And I just wanted you to hear that from me.

The district court then ruled on objections raised and proceeded to consider the § 3553(a) factors, extensively balancing the mitigating and aggravating factors in detail. The court noted Johnson's prior traumas, her time already served, her efforts for rehabilitation, and how there was something "kind of unfair" about being denied the plea agreement because her sister insisted on a trial. On the other hand, the court considered the extent and duration of the abuse, her engagement of others in the crimes, and her efforts at concealment. The judge concluded:

> The reason I am not giving the 240 months requested by the government is that I think it slightly undervalues the acceptance of responsibility of the straight plea, and I want to give credit for the six months that were served in Red Lake County Jail. But any less would not give adequate weight to the trauma that [Johnson] has inflicted on such a long list of victims, the first of which is [L.D.], who I will quote again, saying "I am a kid and you're an adult, and you're supposed to take care of me." And to picture the 11-year-old and 12-year-old boy that he was enduring this for 18 months is hard to do.

The court sentenced Johnson to 216 months imprisonment, below the government's requested sentence. Johnson did not object to the court's statement to L.D., its conduct toward the defense at sentencing, or argue that judicial bias warranted the court's recusal.

II. Discussion

On appeal, Johnson argues the district court's overwhelming empathy for victim L.D. as expressed at the sentencing hearing violated her procedural due

process right "to an impartial and disinterested tribunal," which is rooted in the "requirement of neutrality." Marshall v. Jerrico, Inc. 446 U.S. 238, 242 (1980). At or before sentencing, Johnson did not object or question the court's neutrality, whether the district judge should recuse, or whether the sentence imposed reflects undue bias and is therefore unreasonable. Therefore, she concedes that our review is for plain error. United States v. Minard, 856 F.3d 555, 557 (8th Cir. 2017) (citation omitted).

Unlike Johnson, the defendant in Minard filed a timely motion in the district court under Rule 35 of the Federal Rules of Criminal Procedure "alleging that the district court's statement to the crime victim at sentencing 'might have caused the Court to lack impartiality resulting in a harsher sentence.'" Id. at 556. But he did not object or move for recusal at sentencing, so our review was for plain error.[2] Unlike the defendant in Minard, Johnson did not file a timely Rule 35 motion to correct or reduce her sentence, so she gave the district court no opportunity to respond to her due process argument and claim of judicial partiality. Moreover, a timely claim for post-sentence relief under Rule 35 or 28 U.S.C. § 2255 would be based on the statutory bias and disqualification requirements of 28 U.S.C. §§ 144 and 455; a claimant must "utilize the procedures available to him under" those provisions. Holloway v. United States, 960 F.2d 1348, 1354 (8th Cir. 1992). "Relief under section 144 is expressly conditioned on the timely filing of a legally sufficient affidavit," and "claims under [§ 455] will not be considered unless timely made." Id. at 1355 (citations and quotations omitted). If these Holloway principles apply to the statutory claim of the bias alleged in this case, we would have no jurisdiction to consider the claim because it was not preserved in the district court. But there are cases where we have conducted plain error review of judicial bias claims first asserted

[2]We observed that "Minard cites no case, and we have found none, in which Rule 35 relief was granted because the sentencing judge failed to recuse *sua sponte*," Id. at 557. Not surprisingly, Johnson cites no case in which an unpreserved claim for due process relief was granted on appeal for this reason.

on appeal, and this case involves an unpreserved due process claim of judicial bias or lack of neutrality, not a statutory claim. Although the question has not been briefed nor apparently considered by any other circuit, we doubt that we have appellate jurisdiction to consider Johnson's unpreserved due process claim of judicial bias but conclude we need not decide the question.

Even if we do have jurisdiction to consider Johnson's due process claim, we conclude that it is without merit. Under plain error review, we will affirm unless "there was (1) an error, (2) that is clear and obvious, (3) that affected substantial rights, and (4) that seriously affected the fairness, integrity or public reputation of judicial proceedings." United States v. Ingram, 91 F.4th 1271, 1273 (8th Cir. 2024). "[A] judge is presumed to be impartial and the party seeking disqualification bears the substantial burden of proving otherwise." United States v. Ali, 799 F.3d 1008, 1017 (8th Cir. 2015) (quotations omitted).

Though "[a] judge must recuse if his impartiality might reasonably be questioned because of bias or prejudice," United States v. Burnette, 518 F.3d 942, 945 (8th Cir. 2008), quoting 28 U.S.C. § 455, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." Id., quoting Liteky v. United States, 510 U.S. 540, 555 (1994). "Rules against 'bias' and 'partiality' can never mean to require the total absence of preconception, predispositions and other mental habits." Id. (quotation omitted). Denial of due process requiring recusal is appropriate in "various situations . . . in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable," such as when "the adjudicator has a pecuniary interest in the outcome . . . [or] has been the target of personal abuse or criticism from the party before him." Withrow v. Larkin, 421 U.S.

35, 47 (1975). Judge Menendez's statements at sentencing fall far short of this high bar for establishing bias.

Focusing on the writing of "scholars" who have identified "phenomena captured by the word" empathy, Johnson argues that the empathy for victim L.D. expressed by the district court at the sentencing hearing "fell over the hard edge of fairness," and "[p]rejudice to Ms. Johnson is found in the uneasy balancing that empathy requires." This contention finds no support in reported recusal caselaw and is contrary to the principle that a judge's opinions formed "on the basis of facts introduced or events occurring in the course of the current proceedings . . . do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." Liteky, 510 U.S. at 555. Judge Menendez's comments, directed to a young victim struggling to express the impact of the horrible abuse he had endured, understandably expressed sympathy -- and empathy -- for enduring the physical and emotional harm caused by the defendant's crime. This is not a case where the judge "shed [her] robe . . . and . . . assumed the mantle of the advocate." Reserve Mining Company v. Lord, 529 F.2d 181, 185 (8th Cir. 1976). As in Minard, we conclude there was no bias or partiality reflected when the judge spoke directly to a victim after the victim addressed the court during sentencing and expressed empathy for the harm caused by the defendant's crime. 856 F.3d 555-57. We noted in Minard that "Congress has given crime victims the statutory rights 'to be reasonably heard at any public proceeding in the district court involving . . . sentencing,' and 'to be treated with fairness and with respect for the victim's dignity and privacy.'" Id., quoting 18 U.S.C. § 3771(a)(4) and (8). A judge's impromptu statement to a victim does not demonstrate bias toward the defendant; rather, it "further[s] the congressional policy of encouraging crime victim participation in the criminal justice process." Id.

Johnson provides no basis to conclude that Judge Menendez's brief expression of sympathy and empathy toward a child who had been required to recount the

A.8

traumatic and extreme abuse he suffered, first during Bobbi Jo's trial and again in his victim impact letter at sentencing, improperly influenced the court's sentencing. After noting and weighing the relevant § 3553(a) mitigating and aggravating factors in detail, the court sentenced Johnson below the government's requested sentence, noting it would never have reduced the sentence to the non-binding agreement previously offered by the government. That the court weighed relevant sentencing factors differently than Johnson would prefer does not warrant reversal or intervention by this court. United States v. Maluoth, 121 F.4th 1158, 1165 (8th Cir. 2024).

For the foregoing reasons, the judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-2837

United States of America

Plaintiff - Appellee

v.

Trina Mae Johnson

Defendant - Appellant

Appeal from U.S. District Court for the District of Minnesota
(0:23-cr-00023-KMM-1)

JUDGMENT

Before LOKEN, ERICKSON, and KOBES, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

January 5, 2026

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Susan E. Bindler

A. 10

DEFENDANT: TRINA MAE JOHNSON
CASE NUMBER: 0:23-CR-00023-KMM-LIB(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **216 month(s) as to count 1; 60 month(s) as to count 2; 60 month(s) as to count 3; 216 month(s) as to count 4. Said terms to run concurrent.**

☒ The court makes the following recommendations to the Bureau of Prisons:
That Ms. Johnson be designated to FCI Waseca, or as close to Minnesota as possible.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ **before_____ on_____. If no institution has been designated by that date, the defendant shall surrender to the United States Marshal for this district in Minneapolis, Minnesota by_____ on_____.**

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

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DEFENDANT: TRINA MAE JOHNSON
CASE NUMBER: 0:23-CR-00023-KMM-LIB(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **five years.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (*check if applicable*)
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: TRINA MAE JOHNSON
CASE NUMBER: 0:23-CR-00023-KMM-LIB(1)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at www.uscourts.gov.

Defendant's Signature _____ Date _____

Probation Officer's Signature _____ Date _____

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DEFENDANT: TRINA MAE JOHNSON
CASE NUMBER: 0:23-CR-00023-KMM-LIB(1)

SPECIAL CONDITIONS OF SUPERVISION

a. The defendant shall submit to substance abuse testing as approved and directed by the probation officer.

b. The defendant shall participate in a mental health evaluation. If treatment is recommended, the defendant shall participate in an approved treatment program and abide by all supplemental conditions of treatment to include medication as prescribed. Participation may include inpatient/outpatient treatment.

c. The defendant shall have no contact with the victim (including letters, communication devices, audio, or visual devices, visits, or any contact through a third party) without prior consent of the probation officer.

d. The defendant shall not associate with persons under the age of 18 except in the presence of a responsible adult who is aware of the nature of the defendant's background and current offense and who has been approved by the probation officer.

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DEFENDANT: TRINA MAE JOHNSON
CASE NUMBER: 0:23-CR-00023-KMM-LIB(1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$400.00	$.00	$.00	$.00	$.00

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name and Address of Payee	***Total Loss	Restitution Ordered	Priority or Percentage
TOTALS:	$0.00	$0.00	0.00%
Payments are to be made to the Clerk, U.S. District Court, for disbursement to the victim.			

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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DEFENDANT: TRINA MAE JOHNSON
CASE NUMBER: 0:23-CR-00023-KMM-LIB(1)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payments of $ _____ due immediately, balance due _____

☐ not later than _____ , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal 20 *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the Defendant shall pay to the United States a special assessment of $400.00 for Counts 1, 2, 3 and 4 , which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s): _____

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

See Preliminary Order of Forfeiture (docket no. _____)

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA Assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

A.18