No. 18-937

In The
Supreme Court of the United States

ABELINO MANRIQUEZ,

Petitioner,

v.

RALPH DIAZ, ACTING SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of California

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

I. INTRODUCTION

The petition for certiorari ("Pet.") lays out an entrenched conflict about the test for deciding whether a juror's life experiences are so similar to the case's facts that the juror must be disqualified for bias under the Sixth and Fourteenth Amendments. The California Attorney General's ("AG") brief in opposition ("BIO") does not dispute that this Court's cases provide almost no guidance on how to resolve this recurring issue. The lower courts continue to apply different, inconsistent tests, and have for least 40 years. (Pet. 25-34.)

The AG's brief confirms the problem. He tacitly concedes that state-court jurors must sometimes be disqualified based on the similarity of their life experiences to the case's facts. (BIO 9.) Yet he cannot articulate a rule of law governing *when* such disqualification is required, beyond statements that are either circular (*e.g.*, a juror may be biased when her "impartiality" is objectively in doubt) or unhelpful (courts "address each case on its own facts"). (*See* BIO 15.) And while the AG floats various legal arguments, they repeatedly conflict with this Court's precedents or the AG's own statements elsewhere in his brief, and still do not harmonize the lower courts' decisions.

The absence of precedent from this Court is intolerable. The California Supreme Court declined to meaningfully address implied bias – an issue indispensable to the validity of Petitioner's death sentence – because the existing lower-court implied-bias cases are "nonprecedential." (App. 54 n.4.) An opinion from this

Court is needed to resolve the conflict and bind state courts.

This case is an ideal vehicle. As a dissenting justice pointed out below (App. 66 n.2), there is no need to infer Juror C.B.'s state of mind. She directly testified about her nearly decade of abuse similar to Petitioner's, admitted that this experience was the basis for her conclusion that a history of abuse is not mitigating, and testified that she had formed this conclusion before trial. (*See* App. 10-14; Pet. 10-14.) And the right test for bias matters to the outcome. The California Supreme Court majority held that C.B. permissibly relied on her history of abuse because "jurors generally are *expected* to interpret the evidence presented at trial through the prism of their life experiences." (App. 48.) It acknowledged that "certain life experiences may create impermissible biases and others will not." (App. 51.) It gave no substantive reason for deciding that C.B. was not impliedly biased. The Question Presented dictates whether in this case what the California court called a "prism" was really unconstitutional bias.

The Court should grant certiorari. On the merits, it should adopt the lower courts' leading test for implied bias in this situation, holding that jurors are impliedly biased under the Sixth and Fourteenth Amendments when similarity between their life experience and the case facts presents the potential for substantial emotional involvement, adversely affecting impartiality.

II. ARGUMENT

A. The AG's Attempts To Avoid Inquiry Into Implied Bias Confirm The Need For Review.

1. The Prohibition On Implied Bias Applies In State Courts.

The AG wrongly questions whether state courts are required to disqualify jurors for implied bias, claiming "this Court has never held that the Constitution requires disqualification of a juror in a state court trial for 'implied' rather than actual bias." (BIO 11.) But whatever the rule of law on implied juror bias is after this Court's fragmented decisions in *Smith v. Phillips*, 455 U.S. 209 (1982) and *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), that rule applies in state courts. This Court long ago established that implied bias is prohibited by the Sixth Amendment: "The *Sixth Amendment* requires that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.' *The Amendment* prescribes no specific tests. The bias of a prospective juror may be actual or *implied*; that is, it may be bias in fact or *bias conclusively presumed as matter of law*." *United States v. Wood*, 229 U.S. 123, 133 (1936) (emphasis added). The Sixth Amendment prohibition on juror bias applies to the states through the Fourteenth Amendment. *Morgan v. Illinois*, 504 U.S. 719, 726-728 (1992). Thus, the "Sixth and Fourteenth Amendments . . . ensure the impartiality of any jury that will undertake capital sentencing." *Morgan*, 504 U.S. at 728.

The AG gets no further in speculating that the lower-court conflict might involve "federal courts subject to this Court's supervisory powers" rather than "application of any federal constitutional implied-bias rule to proceedings in state courts." (BIO 13.) The federal-court cases cited in the petition for certiorari rest the prohibition on implied juror bias on the Sixth and Fourteenth Amendments and this Court's cases interpreting those Amendments. Many arise in the setting of habeas corpus petitions challenging state-court convictions.

For example, Justice O'Connor concluded that implied bias is prohibited by the Sixth Amendment, and applies to the states, in her pathbreaking concurrence in *Smith v. Phillips*, 455 U.S. 209 (1982). *Smith* arose on habeas corpus review of a state-court conviction. Justice O'Connor explained that some situations "justify a finding of implied bias," and that "[w]hether or not the state proceedings result in a finding of 'no bias,' the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances." *Smith*, 455 U.S. at 222 (O'Connor, J., concurring); *see also United States v. Gonzalez*, 214 F.3d 1109, 1111-1113 (9th Cir. 2000) (applying Sixth Amendment to implied bias); *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977) (relying on *Irvin v. Dowd*, 366 U.S. 717, 722 (1961), which applied Fourteenth Amendment prohibition of juror bias on habeas review of a state-court conviction); *Gonzales v. Thomas*, 99 F.3d 978, 983 (10th Cir. 1996) (Sixth Amendment; habeas review of state-court conviction); *United States v. Torres*, 128 F.3d 38, 42-43,

45 (2d Cir. 1997) (Sixth Amendment and *Wood*); *Sampson v. United States*, 724 F.3d 150, 163 (1st Cir. 2013) (Sixth Amendment); *Burton v. Johnson*, 948 F.2d 1150, 1155-1159 (10th Cir. 1991) (*Irvin*, Sixth Amendment and Fourteenth Amendment; habeas review of state-court conviction); *Hunley v. Godinez*, 975 F.2d 316, 318 (7th Cir. 1992) (Sixth Amendment; habeas review of state-court conviction); *Jackson v. United States*, 395 F.2d 615, 617 (D.C. Cir. 1968) (Sixth Amendment); *Sanders v. Norris*, 529 F.3d 787, 791-794 (8th Cir. 2007) (*Wood* and Justice O'Connor's *Smith* concurrence; habeas review of state-court conviction).

But the AG's observation that "[t]his Court has never held" that implied bias applies in state courts underscores one important point. The absence of precedent from this Court has led to deeply divided courts and confusion. With no binding precedent from this Court, lower courts can avoid grappling with the issue, as the California Supreme Court avoided it here. Stating that the federal court of appeals implied-bias cases cited by Petitioner were "nonprecedential" – *i.e.*, not binding on state courts – the majority summarily rejected Manriquez' implied-bias claim, revealing only that implied bias would not change its decision. (App. 54 n.4.) We cannot know its basis, if any, for rejecting implied bias, because the majority did not explain its reasoning. Yet C.B.'s similar past was so concerning that two dissenting justices found her actually biased. (App. 62-71.)

2. The AG's Suggested Test For Implied Bias Cannot Be Reconciled With The Lower Courts' Decisions.

Next the AG argues that the examples of implied bias in Justice O'Connor's *Smith* concurrence are "susceptible to an objective and simple binary inquiry" of whether the juror "falls within a predetermined and narrow category describing immediate personal connections to the crime itself or to the criminal or courtroom actors." (BIO 12.) *See Smith*, 455 U.S. at 222 (O'Connor, J., concurring). At best, this assertion is the AG's trial balloon for what he *wants* the law to be if the Court grants certiorari. It is not a rule of law applied in the lower courts or a description of what the lower courts actually do. To the contrary, the AG's suggestion is flatly inconsistent with numerous cases. The Wisconsin Supreme Court in *State v. Delgado*, 588 N.W.2d 1, 5-8 nn.4, 5 (Wis. 1999); the Ninth Circuit in *Gonzalez*, *Allsup*, and *Eubanks*; the First Circuit in *Sampson v. United States*, 724 F.3d 150 (1st Cir. 2013); and the Tenth Circuit in *Burton* all held that jurors were impliedly biased under the Sixth Amendment because their *life experiences* were similar to the case facts and either the evidence demonstrated that the juror was emotionally involved or the similarity of experiences was such that substantial emotional involvement was presumed. None applied a "simple binary inquiry" or identified a "predetermined and narrow category," and the jurors they held biased did not have "immediate personal connections to the crime itself or to the criminal or courtroom actors." Justice O'Connor suggested

no such constricted implied-bias inquiry. She provided "examples" of an implied bias, 455 U.S. at 222, not an exhaustive list.

Even the AG admits that lower courts do not follow his proposal. Just three pages after suggesting a "binary" inquiry based on "predetermined and narrow categor[ies]," the AG asserts that lower courts do just the opposite: they have *not* "formulated strict categories" of implied bias but "tend to address each case on its own facts." (BIO 15.) That is the problem, not the solution. Some courts' ad hoc "I know it when I see it" approach to bias, with no governing principle, cannot fulfill the Sixth Amendment's guarantee of an "unbiased" jury.

B. The Prohibition On "Life Experience" Bias Applies To Capital Sentencing.

The Constitution "ensure[s] the impartiality of any jury that will undertake capital sentencing." *Morgan*, 504 U.S. at 728. "Because the death penalty is unique 'in both its severity and its finality' . . . we have recognized an acute need for reliability in capital sentencing proceedings." *Monge v. California*, 524 U.S. 721, 732 (1998). The AG nevertheless implies that the Constitution tolerates *more* bias in capital sentencing, arguing that the cases prohibiting "life experience" bias do not apply here because they mostly involve guilt-or-innocence determinations. (BIO 14.) That cannot be. Bias that would be intolerable in deciding guilt

or innocence is not permissible in deciding whether to put a person to death.

The Court should adopt the dominant test for disqualifying jurors for implied bias based on similar experience. This test looks to whether the similarity presents the potential for "substantial emotional involvement," adversely affecting impartiality. *E.g.*, *Delgado*, 588 N.W.2d at 7-8; *Gonzalez*, 214 F.3d at 1112; *Allsup*, 566 F.2d at 71; *United States v. Russell*, 595 F.3d 633, 641 (6th Cir. 2010); *Gonzales*, 99 F.3d at 989. Under this Court's cases, substantial emotional involvement impairing impartiality also requires disqualification at the sentencing stage. This Court has repeatedly held that capital sentencing must not be based on jurors' emotions. "'It is of vital importance' that the decisions made in that context" – the penalty phase of a capital trial – "be, and appear to be, based *on reason rather than caprice or emotion.*" *Monge*, 524 U.S. at 732 (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977)) (emphasis added). "It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary." *Saffle v. Parks*, 494 U.S. 484, 493 (1990); *accord Tuilaepa v. California*, 512 U.S. 967, 973 (1994). At the sentencing phase – just like the guilt-or-innocence phase – if a juror's similar experiences pose the potential for substantial emotional involvement adversely affecting impartiality, the juror must be disqualified.

The AG's purported basis for distinguishing capital sentencing from guilt-or-innocence determinations also ignores the substantive claim of bias here. The AG contends that death-penalty sentencing decisions, involving "moral and discretionary judgments" shaped by the jurors' "varied backgrounds and experiences," differ from the guilt-phase task of "find[ing] historical facts in determining objectively whether the defendant committed a charged crime." (BIO 14.) But here, C.B. did not just put a thumb on the scale in making a subjective moral judgment. Her unusually similar, traumatic past caused her to *categorically reject* Manriquez' mitigating evidence *without individually considering it*, as the dissenting justices below explained. (App. 56, 63, 65, 70; *see* Pet. 13-14, 17-19, 35-36.)

Whatever may be the case with juror experience that puts a thumb on the scale of a moral decision, experience that causes the juror *not to give individual consideration at all* to the defendant's mitigating evidence crosses a bright line established by this Court. Such a juror is not doing her job: the defendant is entitled to an "*individualized* judgment as to whether the defendant deserves the sentence of death," *Turner v. Murray*, 476 U.S. 28, 34 (1986) (emphasis added); *Clemons v. Mississippi*, 494 U.S. 738, 751-752 (1990), and the sentencer "may not refuse to consider[] any constitutionally relevant mitigating evidence." *Buchanan*, 522 U.S. at 276; *Hitchcock v. Dugger*, 481 U.S. 393, 398-399 (1987) (reversing death sentence on this basis); *Eddings v. Oklahoma*, 455 U.S. 104, 113-117 (1982) (reversing death sentence on this basis).

C. The Numerous Petitions For Certiorari Asking The Court To Clarify Implied-Bias Law Confirm That The Law Needs Settling.

The confusion about implied bias in the wake of *Smith* and *McDonough* has led to multiple petitions for certiorari. The AG cites four petitions over the existence of and test for implied bias in the wake of these cases. BIO 10 & n.2; *see McKinney v. Johnson*, 137 S. Ct. 1228 (2017) (No. 16-854); *Tucker v. United States*, 534 U.S. 816 (2001) (No. 00-1726) (petition for certiorari in criminal case based on lower-court conflict about continued vitality of implied-bias doctrine and test for implied bias after *Smith* and *McDonough*); *Skaggs v. Otis Elevator Co.*, 528 U.S. 811 (1999) (No. 98-1771) (petition for certiorari in civil case to address vitality of implied-bias doctrine after *Smith* and *McDonough* and resolve conflict over standard for implied bias); *United States v. Greenwood*, 513 U.S. 929 (1994) (No. 94-277) (petition for certiorari to resolve whether, after *Smith* and *McDonough*, juror's implied bias is basis for new trial in criminal case). Our research has identified at least three more petitions. *See Zora v. Winn*, 138 S. Ct. 2627 (2018) (No. 17-1415) (question presented was "Whether, in light of *Smith v. Phillips*, 455 U.S. 209 (1982), the doctrine of implied bias still exists and what the appropriate remedy is" for implied bias during trial); *Caterpillar Inc. v. Sturman Industries, Inc.*, 545 U.S. 1114 (2005) (No. 04-1340) (questions presented included whether Seventh Amendment mandates disqualification of jurors for

implied bias in civil cases); *Adair v. Smith*, 537 U.S. 1109 (2003) (No. 02-676) (arguing that Ninth Circuit misunderstood test for implied bias).

The AG suggests that the denials of certiorari indicate that the disarray over implied bias does not warrant review. Not at all. The Court keeps receiving petitions for certiorari on the existence and test for implied bias because it is a recurring issue important to many cases, left unsettled by the Court's fragmented decisions in *Smith* and *McDonough*.

D. The Cases Conflict.

As mentioned, the AG asserts that lower federal courts "agree" that bias may be implied, but says they "tend to address each case on its own facts." (BIO 15.) That describes *some* of the cases. As the Petition notes, some courts engage in ad hoc factual inquiries with no apparent governing rule of law. (Pet. 25-34.) But the AG's own parentheticals describing these cases confirms that – as the Petition demonstrates – *other* courts apply rules of law, often the "substantial emotional involvement adversely affecting impartiality" test for implied bias. (*See* BIO 15-16 (summarizing cases); Pet. 25-34 (discussing lower-court cases and various approaches).) Under this test, there is a substantial likelihood that Petitioner would be entitled to a new penalty trial. *Cf. Delgado*, 588 N.W.2d at 5-8 nn.4, 5 (Wis. 1999) (applying Sixth Amendment and state law to hold juror impliedly biased under similar circumstances); Pet. 25-26. And still *other* courts hold that a

juror must be disqualified where her similar life experiences result in actual bias. (*See* Pet. 25-34.) We submit actual bias is present here: Juror C.B. admittedly did *not* lay her impressions aside and decide based solely on the evidence. (Pet. 35-36.)

E. The California Supreme Court Did Not Deny That C.B. Was Emotionally Involved.

In a final effort to sweep the bias problem away, the AG misconstrues the California Supreme Court's factual findings. The AG asserts that the California Supreme Court "conclu[ded] that there was no overly emotional involvement on C.B.'s part." (BIO 20.) Perhaps the AG means to say there was no potential of substantial emotional involvement, the dominant test for implied bias. The AG's citation, however, addresses a different issue. The cited page of the opinion addresses what the California Supreme Court called the "first basis" for actual bias: the similarity of the rape C.B. had suffered and the uncharged rape Manriquez allegedly committed. (*See* App. 43-46.) That "first basis" is not the basis for Manriquez' petition for certiorari.

The implied bias here rests on what the court called the "second basis" (App. 46), the similarity between Manriquez' and C.B.'s childhood experiences of growing up abused on a farm for years. The majority did *not* conclude that these years of abuse did not evoke an emotional response by C.B. Instead, it held that under California law, jurors are "*expected* to interpret the evidence presented at trial through the prism

of their life experiences," while acknowledging that some life experiences create impermissible biases and others do not. (App. 48, 49, 51.[1]) The test for when the Sixth and Fourteenth Amendments prohibit bias based on similar "life experiences" – the Question Presented – determines whether the California Supreme Court's majority was correct, notwithstanding two dissents, and so whether Manriquez was permissibly sentenced to death.

III. CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[1] These citations discuss actual bias. The majority articulated no reasons for rejecting implied bias, beyond declaring implied-bias cases nonprecedential. (App. 54 n.4.)