19-7468

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DONALD R PHILLIPS — PETITIONER
(Your Name)

vs.

COMMONWEALTH OF KENTUCKY — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

KENTUCKY COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DONALD R PHILLIPS
(Your Name)

NORTHPOINT TRAINING CTR., P.O. BOX 479
(Address)

BURGIN, KENTUCKY
(City, State, Zip Code)

_____
(Phone Number)

Questions Presented

1. Does the Constitution require the implied bias doctrine?

2. Should the implied bias doctrine apply only in the limited circumstances suggested by Justice O'Connor's dicta in her concurring opinion in Smith v. Phillips?

3. Does a juror's responsibility to answer honestly material questions on voir dire continue through trial?

4. How does a juror's motive for providing a false answer, or no answer at all to a material question posed to her on voir dire affect a claim of implied bias?

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

PHILLIPS V. WHITE, No. 6:08-CV-00368, U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY. JUDGMENT ENTERED DECEMBER 03, 2014.

PHILLIPS V. WHITE, No 15-5629, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT, JUDGMENT ENTERED MARCH 15, 2017.

PHILLIPS V. COMMONWEALTH, No. 2017-CA-002028-MR, KENTUCKY COURT OF APPEALS. JUDGMENT ENTERED MARCH 22, 2019.

PHILLIPS V. COMMONWEALTH, 2019-SC-000301-D (KY. S.C. OCTOBER 24, 2009)

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384 U.S. 333 (1966) 17

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the Kentucky Supreme Court court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[✓] For cases from **state courts:**

The date on which the highest state court decided my case was OCTOBER 24, 2019. A copy of that decision appears at Appendix B.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a), AND WEARRY V. CAIN, 136 S.CT. 1002, 1008 (2016).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

Statement Of The Case

Petitioner did not receive a fair trial before an impartial jury as guaranteed by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

Petitioner was convicted of murder in the shooting deaths of Osa Lee Maggard, and Geneva Young following a three day trial. The shooting occurred at the Maggard home in Thousandsticks, Kentucky on July 22, 1999.

In 1999, the population of Thousandsticks, Kentucky in 1999 consisted of only Seventy-three (73) people. (census.efoia@census.gov).

Of the seventy-three (73) people living in Thousandsticks, Kentucky, in 1999, three (3) of them played major roles in Petitioner's trial: the shooting occurred at the Maggard residence, and Mr. Maggard was a victim; Kathy Davidson was Mr. Maggard's neighbor, and the prosecution's only witness to even arguably connect Petitioner to the crime; and Suzette Napier, another neighbor, sat on the jury that heard and decided the case.

In addition to the spatial connection between the victim, the prosecution's witness, and the juror decribed above, the juror and the prosecution's witness were close childhood friends.

Juror Napier, and Ms Davidson - the prosecution witness - attended Big

CREEK ELEMENTARY SCHOOL WHICH IS LOCATED ON BOB FORK, LESLIE COUNTY, KENTUCKY. BOB FORK IS ANOTHER SMALL RURAL COMMUNITY WHERE THESE TWO WOMEN WERE NEIGHBORS, AND WHERE THEY ATTENDED ELEMENTARY SCHOOL TOGETHER IN THE SAME CLASS FOR NINE YEARS - K THROUGH EIGHTH GRADE. DURING THESE FORATIVE YEARS, THESE TWO CHILDREN PLAYED ON THEIR SCHOOL'S BASKETBALL TEAM TOGETHER, AND VISITED ONE ANOTHER'S HOMES - EVEN SPENDING THE NIGHT TOGETHER. IN FACT, THEY WERE "FRIENDS."

AFTER GRADUATING ELEMENTARY SCHOOL TOGETHER, JUROR NAPIER AND MS. DAVIDSON, THE PROSECUTION'S WITNESS ATTENDED LESLIE COUNTY HIGHSCHOOL WHERE THEY GRADUATED TOGETHER IN 1996.

THREE YEARS LATER, DURING VOIR DIRE QUESTIONING AT PETITIONER'S TRIAL ALL OF THE PROSPECTIVE JURORS - INCLUDING MS NAPIER - WERE ASKED IF THEY KNEW KATHY DAVIDSON, MS NAPIER DID NOT RESPOND. MS NAPIER WAS ULTIMATELY SEATED AS A JUROR, HEARD THE CASE, AND AFTER THE REMOVAL OF TWO (2) ALTERNATE JURORS AT THE CLOSE OF THE EVIDENCE, VOTED TO CONVICT PETITIONER BASED ALMOST ENTIRELY UPON THE CONTRADICTED - AND CONTRADICTORY - TESTIMONY OF HER CHILDHOOD FRIEND, KATHY DAVIDSON.

IN 2005, AFTER LEARNING OF THE RELATIONSHIP BETWEEN PROSECUTION WITNESS DAVIDSON, AND JUROR NAPIER, PETITIONER SOUGHT RELIEF IN THE TRIAL COURT PURSUANT TO KENTUCKY'S RCr 11.42, ASSERTING A CLAIM OF JUROR BIAS.

ON MARCH 03, 2006, THE TRIAL COURT CONDUCTED AN EVIDENTIARY HEARING

CONCERNING, INTER ALIA, THE CLAIM OF JUROR BIAS. JUROR NAPIER, PROSECUTION WITNESS KATHY DAVIDSON, AND TRIAL COUNSEL STEPHEN CHARLES TESTIFIED. MS. NAPIER AND MS DAVIDSON TESTIFIED THAT THEY HAD ATTENDED BIG CREEK ELEMENTARY SCHOOL TOGETHER; THAT THEY HAD VISITED ONE ANOTHER'S HOMES - STAYING OVERNIGHT ON AT LEAST ONE OCCASION; PLAYED BASKETBALL ON THEIR SCHOOL'S TEAM TOGETHER; ATTENDED AND GRADUATED HIGHSCHOOL TOGETHER; AND THAT THEY WERE IN FACT "FRIENDS."

TRIAL COUNSEL TESTIFIED THAT HE HAD NOT BEEN AWARE OF THE RELATIONSHIP BETWEEN THE TWO WOMEN PRIOR TO OR DURING TRIAL; THAT HE ONLY BECAME AWARE OF THAT RELATIONSHIP AS A RESULT OF PETITIONER'S RCr 11.42; AND, THAT HAD HE BEEN MADE AWARE OF THE RELATIONSHIP HE WOULD HAVE MOVED TO HAVE MS NAPIER STRIKEN FOR CAUSE, "WHICH THE TRIAL COURT WOULD HAVE CERTAINLY GRANTED," OR HE WOULD HAVE EXERCISED A PEREMPTORY CHALLENGE TO REMOVE HER.

JUROR NAPIER TESTIFIED FURTHER THAT SHE REMEMBERED - AS LATE AS MARCH, 2006 - BEING ASKED DURING VOIRE DIRE QUESTIONING IF SHE KNEW KATHY DAVIDSON; THAT SHE REMAINED SILENT WHEN ASKED IF SHE KNEW MS. DAVIDSON BECAUSE SHE DID NOT RECOGNIZE HER "MARRIED NAME"; BUT, THAT SHE RECOGNIZED MS DAVIDSON THE MOMENT SHE SAW HER ENTER THE COURT TO TESTIFY; AND, THAT THE REASON SHE REMAINED RETICENT THROUGHOUT THE REMAINDER OF THE TRIAL - AND FOR THE FOLLOWING SIX (6) YEARS - WAS THAT SHE "DIDN'T KNOW WHAT TO DO," DESPITE THE FACT THAT SHE HAD BEEN EMPLOYED AS A LEGAL SECRETARY SINCE BEFORE SHE EVEN GRADUATED HIGHSCHOOL.

KATHY DAVIDSON'S TESTIMONY IS THE ONLY EVIDENCE TO EVEN ARGUABLY CONNECT PETITIONER TO THE CRIME. THAT TESTIMONY'S IMPORTANCE TO THE PROSECUTION'S CASE WAS RECOGNIZED BY THE PROSECUTOR HIMSELF WHEN HE TOLD THE JURY DURING ARGUMENT THAT "IF YOU DON'T BELIEVE KATHY DAVIDSON, THEN SHAME ON ME, AND YOU LET THIS MAN GO HOME."

MS DAVIDSON'S TESTIMONY IS CONTRADICTED BY HER STATEMENT TO POLICE; HER HUSBAND'S STATEMENT TO POLICE; AND, THE PROSECUTION'S FORENSIC EXPERT'S TESTIMONY; IT WAS ATTACKED ON CROSS-EXAMINATION BY TRIAL COUNSEL, NONETHELESS, THE JURY OBVIOUSLY CHOSE TO BELIEVE IT. HOWEVER, IT IS IMPOSSIBLE TO DETERMINE WHAT EFFECT JUROR NAPIER'S BELIEF IN HER FRIEND'S HONESTY HAD ON THAT CHOICE, A BELIEF JUROR NAPIER TESTIFIED SHE FORMED PRIOR TO TRIAL BASED ON THAT FRIENDSHIP.

ON JUNE 24, 2008, THE TRIAL JUDGE ENTERED AN INTERLOCUTORY ORDER CONSISTING OF PRECISELY FIVE (5) PARAGRAPHS. (ATTACHED HERETO A APPENDIX C). AS IS READILY APPARENT ON ITS FACE, THIS ORDER DOES NOT ADDRESS PETITIONER'S CLAIM OF JUROR BIAS. NOR - ACCORDING TO JUDGE MARICLE - WAS HIS INTERLOCUTORY EVER INTENDED TO ADDRESS THE CLAIM OF JUROR BIAS. (AFFIDAVIT OF JUDGE MARICLE, ATTACHED HERETO AS APPENDIX D). NONETHELESS, EVERY COURT THAT HAS REVIEWED THIS ISSUE IN THE INTERVENING TWELVE (12) YEARS HAS BASED THEIR DECISION ON THE FALSE IMPRESION THAT THE "TRIAL JUDGE OVERRULED PETITIONER'S CLAIM OF JUROR BIAS." THE FACT REMAINS, NO ONE WHO EVER OBSERVED THE DEMENOR OF, OR HEARD THE TESTIMONY OF JUROR NAPIER HAS ENTERED A RULING ON PETITIONER'S CLAIM OF JUROR BIAS.

Reasons For Granting The Writ

I. Does the Constitution require the implied bias doctrine? The current state of United States Supreme Court jurisprudence on this issue is detrimental to its stated goals of finality and encouraging public confidence in the American judicial system. The lack of guidance provided to the lower courts on the question of the implied bias doctrine has incouraged a hodgepodge of conflicting answers that have resulted in literally thousands of claims of error by defendants who allege that biased jurors were improperly empanelled.

While there appears to be some unanimity amoung the various State appellate courts that suggests the Sixth Amendment's guarantee of trial by a fair and impartial jury requires application of the implied bias doctrine, see e.g. Commonwealth v. Colon, 299 A 2d 326, 327-28 (PA. Super. 1981); Ward v. Commonwealth, 695 SW2d 404, 407 (Ky. S. Ct. 1985); Killingsworth v. State, 82 So. 3d 761, 764 (Ala. 2010); Peddle v. Terry, 30 Cal. App. 4th 97, 100 (Cal 1994); Ramirez v. State, 7 N. E. 3d 933, 943 (IN. 2014); State v. Cho, 30 P. 3d 496, 503 (Wash. App. 2001); and State v. Gesh, 482 N. W 2d 99, 100 (Wis. 1992), the are those that do not. See e.g. Uranga v. State, 330 SW3d 301, 304 (TX 2010)(the "federal constitution has not been held to require an 'implied bias' doctrine.").

The Federal Circuit Courts are divided on the issue as well. See e.g.

United States v. Tucker, 243 F3d 499, 509 (8th Cir. 2001)("Only actual bias violates the Sixth Amendment."); and Uranga v. Davis, 893 F3d 282, 288 (5th Cir. 2018)("... The Fourth and Ninth Circuits have found that the doctrine is clearly established law, the Sixth Circuit takes a position that it is not...").

The two most resent United States Surreme Court decisions to touch on the question of implied bias are Smith v. Phillips, 455 U.S. 209 (1982), and Mc Donough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984), neither of which will ever be recognized as a bastion of clarity on the subject. In fact, in both cases Justices felt compelled to write concurring opinions to carve out exceptions in attempts to preserve the doctrine of implied bias: Justice O'Connor in Smith, said "I... write separately to express my view that the opinion does not foreclose the use of 'implied bias' in appropriate circumstances." Id @ 221; and Justices Brennan and Marshall, concurring in McDonough, said "When applying this standard, a court should recognize that 'the bias of a prospective juror may be actual or implied'...." quoting United States v. Wood, 299 U.S. 123, 133 (1936). Id @ 558.

As long ago as 1807, Chief Justice John Marshall recognized the important role the implied bias doctrine plays in American jurisprudence. Presiding over the trial of Aaron Burr for treason in the killing of Alexander Hamilton, Chief Justice Marshall wrote:

THE END TO BE OBTAINED IS AN IMPARTIAL JURY, TO SECURE THIS END, A MAN IS PROHIBITED FROM SERVING ON IT WHOSE CONNECTION WITH A PARTY IS SUCH AS TO INDUCE A SUSPICION OF PARCIALITY. THE RELATIONSHIP MAY BE REMOTE; THE PERSON MAY NEVER HAVE SEEN THE PARTY; HE MAY DECLARE HE FEELS NO PREJUDICE IN THE CASE; AND YET THE LAW CAUTIOUSLY INCAPACITATES HIM FROM SERVING ON THE JURY BECAUSE IT SUSPECTS PREJUDICE, BECAUSE IN GENERAL PERSONS IN A SIMILAR SITUATION WOULD FEEL PREJUDICE.

UNITED STATES V. BURR, 25 F. CAS. 49, 50 (D. VA. 1807).

THE DECISIONS IN SMITH, AND MCDONOUGH, BEAR ABSOLUTELY NO RESEMBLANCE TO THAT OF CHIEF JUSTICE MARSHALL'S IN BURR, AND IT IS THAT DIFFERENCE THAT HAS LED DIRECTLY TO RULINGS THAT THE "FEDERAL CONSTITUTION HAS NOT BEEN HELD TO REQUIRE AN 'IMPLIED BIAS' DOCTRINE." URANGA V. STATE, SUPRA, AND "IF BIAS IS NOT DELIBERATELY CONCEALED, BIAS MAY NOT BE INFERRED. INSTEAD, THE MOVANT MUST SHOW ACTUAL BIAS." UNITED STATES V. SOLORIO, 337 F3d 580, 595-96 (6TH CIR 2003).

KNOWLEDGE OF THE FACT THAT AMERICAN COURTS HAVE SLID SO FAR FROM THE IDEAL OF A FAIR AND IMPARTIAL JURY AS EXPRESSED BY CHIEF JUSTICE MARSHALL TO A PLACE WHERE FRIENDS, AND EVEN FAMILY MEMBERS OF PROSECUTORS, WITNESSES, AND VICTIMS ROUTINELY SIT AS JURORS WOULD CERTAINLY SHOCK THE PUBLIC CONCIENCE.

Should The Implied Bias Doctrine Be Limited To Those Types Of "Extreme Situations" Described In Justice O'Connor's Concurring Opinion In Smith v. Phillips?

Thomas Jefferson, the author of our Declaration of Independence and the most conspicuous of American apostles of democracy, in his first inagural address listed prominetly "trial by juries impartiall selected" among those principles forming "the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation." (Cir. 1801) Quoted from Ozark Border Electric Cooperative v. Stacy, 348 S.W.2d 586, 590 (Missouri App. 1961).

Some six (6) years later, Chief Justice John Marshall wrote, in United States v. Burr, 25 F. Cas. 49, 50 (D. Va. 1807), that

> The end to be obtained is an impartial jury, to secure this end, a man is prohibited from serving on it whose connection with a party is such as to induce a suspicion of partiality. The relationship may be remote; the person may never have seen the party; he may declare he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice. (Emphasis added).

THE "BRIGHT CONSTELLATION" REFERED TO BY PRESIDENT JEFFERSON WAS THE ENGLISH COMMON LAW. "THAT IS THE SYSTEM FROM WHICH OUR JUDICIAL IDEAS AND LEGAL DEFINITIONS ARE DERIVED." SCHICK V. UNITED STATES, 195 U.S. 65, 69 (1904). AND IT IS BEYOND QUESTION THAT BOTH, THOMAS JEFFERSON AND JOHN MARSHALL, WERE INTIMATELY FAMILIAR WITH BLACKSTONE'S COMMENTARIES, AND THE DEFINITION OF A "PRINCIPAL CHALLENGE" CONTAINED THEREIN:

> A PRINCIPAL CHALLENGE IS SUCH WHERE THE CAUSED ASSIGNED CARRIES WITH IT A PRIMA FACIE EVIDENT MARKS OF SUSPICION EITHER OF MALICE, OR FAVOR; AS A JUROR IS OF KIN TO EITHER PARTY WITHIN THE NINTH DEGREE; THAT HE HAS BEEN AN ARBITRATOR ON EITHER SIDE; THAT HE HAS AN INTEREST IN THE CAUSE; THAT THERE IS AN ACTION DEPENDING BETWEEN HIM AND THE PARTY; THAT HE HAS TAKEN MONEY FOR HIS VERDICT; THAT HE HAS FORMERLY BEEN A JUROR IN THE SAME CAUSE; THAT HE IS THE PARTY'S MASTER, SERVANT, COUNSELLOR, STEWARD, OR ATTORNEY, OR OF THE SAME SOCIETY OR CORPORATION WITH HIM; ALL OF THESE ARE PRINCIPAL CAUSES OF CHALLENGE; WHICH, IF TRUE CANNOT BE OVERRULED, FOR JURORS MUST BE OMNI EXCEPTIONE MAJORES. BL. COM. 363.

BECAUSE THE SIXTH AMENDMENT DOES NOT SPECIFY BY WHAT METHOD ITS ASSURANCE OF AN "IMPARTIAL JURY" IS TO BE IMPLEMENTED, IT "MUST BE READ IN THE LIGHT OF THE COMMON LAW." SCHICK, Id. THEREFORE - IT CAN BE ARGUED - THE RIGHT OF "PRINCIPLE CHALLENGE" IS GUARANTEED BY THE SIXTH AMENDMENT, AND ANY RESTRICTIONS ON THAT RIGHT NOT GROUNDED IN THE ENGLISH COMMON LAW IS

A VIOLATION OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUITION.

IN OTHER WORDS THE IMPLIED BIAS DOCTRINE IS REQUIRED BY THE SIXTH AMENDMENT, AND ANY RESTRICTION OF IT BEYOND THAT SUGGESTED BY BLACKSTONE'S COMMENTAIRES, THE ENGLISH COMMON LAW, OR CHIEF JUSTICE MARSHALL IS A CONSTITUTIONAL VIOLATION. IN CRAWFORD V. UNITED STATES, 212 U.S. 183, 196 (1909), THIS COURT'S PREDECESSOR SAID:

> BIAS OR PREJUDICE IS SUCH AN ELUSIVE CONDITION OF THE MIND THAT IT IS DIFFICULT, IF NOT IMPOSSIBLE TO ALWAYS RECOGNIZE ITS EXISTENCE, AND IT MIGHT EXIST IN THE MIND OF ONE (ON ACCOUNT OF HIS RELATIONS WITH ONE OF THE PARTIES) WHO WAS QUITE POSITIVE THAT HE HAD NO BIAS, AND SAID THAT HE WAS PERFECTLY ABLE TO DECIDE THE QUESTION WHOLLY UNINFLUENCED BUT THE EVIDENCE. THE LAW THEREFORE MOST WISELY SAYS THAT WITH REGARD TO SOME OF THE RELATIONS WHICH MAY EXIST BETWEEN THE JUROR AND ONE OF THE PARTIES, BIAS IS IMPLIED, AND EVIDENCE OF ITS ACTUAL EXISTENCE NEED NOT BE GIVEN.

IN LINE WITH THE ENGLISH COMMON LAW - BLACKSTONE - BURR - AND CRAWFORD, THE PENNSILVANIA SUPERIOR COURT, IN COMMONWEALTH V. COLON, 299 A.2d 326, 327 (1971), HELD THAT UNDER THE SIXTH AMENDMENT, A POTENTIAL JUROR SHOULD BE EXCUSED FOR CAUSE "WHEN THE POTENTIAL JUROR HAS SUCH A CLOSE RELATIONSHIP, BE IT FAMILIAL, FINANCIAL OR SITUATIONAL, WITH PARTIES, COUNSEL, VICTIMS, OR

WITNESSES THAT THE COURT WILL PRESUME PREJUDICE." WHILE THIS STATEMENT OF IMPLIED BIAS HAS BEEN WIDELY ADOPTED BY OTHER STATES, IT IS BY NO MEANS UNIVERSALLY ACCEPTED. See e.g. Ward v. Commonwealth, 695 SW2d 404, 407 (Ky 1985); State v. Galino, 774 N.W.2d 190, 222-23 (Neb. 2009); State v. Pamplin, 138 S.W. 283 (Tenn. App. 2003); State v. Brunn, 60 A.3d 610, 612 N.3 (Vt. 2012); and Mikesinovich v. Reynolds Mem'l Hosp., Inc., 640 S.W.2d 560, 562 (W. Va. 2006). All using the language quoted above to describe their respective standards for implied bias.

In addition, all of the courts whose implied bias standard comports with Colon, also apply what the Court of Appeals for the Armed Forces (CAAF) refers to as "the liberal grant mandate." United States v. Elfayoumi, 66 M.J. 354, 357 (CAAF 2008). See e.g. Ordway v. Commonwealth, 391 SW3d 762, 780 (Ky 2013) ("... when there is uncertainty about whether a prospective juror should be stricken for cause, the prospective juror should be stricken..."); People v. Wilson, 187 P3d 1041, 1061 (Cal. 2008) (A defendant's "right to a fair and impartial jury is a vital constitutional concern, trial courts should err on the side of caution when marginal cases arise...."); State v. Plaster, 813 SW2d 349, 352 (Missouri App. 1991) (Same); People v. Culhane, 305 N.E.2d 469, 481 N.3 (N.Y. 1973) ("It is always wise for a trial court to err on the side of disqualification... Even if a juror is wrongly but not arbitrarily excused, the worst the court will have done in most cases is to have replaced one impartial juror with another impartial juror).

While the application of these two standards in conjunction with one

ANOTHER WOULD SEEM TO OFFER A WORKABLE SOLUTION TO A QUESTION OF IMPLIED BIAS, IN PRACTICE IT APPARENTLY LEAVES SOMETHING ON THE TABLE. IN ORDWAY V. COMMONWEALTH, 391 SW3d 762, 780 (2013), THE KENTUCKY SUPREME COURT NOTED:

> IN RECENT CASES WE HAVE INDICATED THAT, WHEN THERE IS UNCERTAINTY ABOUT WHETHER A PROSPECTIVE JUROR SHOULD BE STRIKEN FOR CAUSE, THE PROSPECTIVE JUROR SHOULD BE STRIKEN. THE TRIAL COURT SHOULD ERR ON THE SIDE OF CAUTION BY STRIKING THE DOUBTFUL JUROR; THAT IS, IF A JUROR FALLS WITHIN A GRAY AREA, HE SHOULD BE STRIKEN. WE HAVE ATTEMPTED TO MAKE THIS FUNDAMENTAL RULE CLEAR IN A SERIES OF CASES.... NEVERTHELESS, ALL TOO OFTEN TRIAL COURTS, AS HERE, INEXPLICABLY PUT AT RISK NOT ONLY THE RESOURCES OF THE COURT OF JUSTICE BUT THE FUNDAMENTALLY FAIR TRIAL THEY ARE HONOR-BOUND TO PROVIDE, BY SEATING JURORS WHOSE ABILITY TO TRY THE CASE FAIRLY AND IMPARTIALLY IS JUSTIFIABLY DOUBTED....

NOR ARE APPELLATE COURTS IMMUNE FROM THE VAGARIES OF THIS STANDARD. IT IS QUITE COMMON TO FIND DIAMETRICALLY OPPOSED DECISIONS IN CASES WITH STRIKINGLY SIMILAR FACT CIRCUMSTANCES. SEE e.g. FUGATE V. COMMONWEALTH, 993 SW2d 931, 939 (KY 1999) (OVERTURNING CONVICTION WHERE TRIAL COURT REFUSED TO STRIKE PROSPECTIVE JUROR WHO PLAYED LITTLE LEAGUE BASEBALL AND ATTENDED HIGH SCHOOL WITH PROSECUTION WITNESS TEN (10)

YEARS BEFORE TRIAL); FREEMAN V. COMMONWEALTH, 2004 KY. UNPUB LEXIS 37 (KY. S.CT. 2004) (UPHOLDING TRIAL COURT'S DECISION TO REPLACE JUROR WITH ALTERNATE ON PROSECUTION'S MOTION BECAUSE SHE HAD BEEN CHILDHOOD FRIEND OF WITNESS); COMPARE, PHILLIPS V. COMMONWEALTH, 2019 KY APP UNPUB LEXIS 172 (KY APP 2019) (CHILDHOOD FRIENDSHIP BETWEEN JUROR AND PROSECUTION WITNESS WHO PLAYED BASKETBALL AND WENT TO HIGHSCHOOL TOGETHER THREE (3) YEARS BEFORE TRIAL NOT SUFFICIENT TO IMPLY BIAS); COE V. SPRAYBERRY, 2018 U.S. DIST. LEXIS 209703 (S.D. GA. 2018) (NO "INDICATION OF ACTUAL OR IMPLIED BIAS" WHERE JUROR WAS CHILDHOOD FRIEND OF VICTIM'S WIFE); STATE V. RODGERS, 132 So. 819 (1969) (NO BIAS FOUND WHERE JUROR WAS CHILDHOOD FRIEND, AND DID BUSINESS WITH VICTIM BECAUSE HE STATED, "THAT HIS DECISION WOULD BE NO DIFFERENT IN THE INSTANT MATTER FROM A DECISION HE WOULD MAKE IF A WHITE PERSON WERE ON TRIAL"); PARKER V. HERBERT, 2009 U.S. DIST. LEXIS 91796 (W.D. N.Y. 2009) (BECAUSE "EYE WITNESS" WAS FRIEND OF VICTIM "YEARS BEFORE," THERE IS A REASONABLE INFERENCE TO BE DRAWN THAT SHE "AT LEAST, WAS NOT IMPARTIAL).

AS AN ASIDE, IT IS WORTH NOTING THAT THE COURTS OF MILITARY JUSTICE HAVE ALSO STRUGGLED WITH THIS ISSUE, AT TIMES ALSO REACHING ANTITHETICAL DECISIONS AS WELL. SEE "CLARIFYING THE IMPLIED BIAS DOCTRINE: BRINGING GREATER CERTAINTY TO THE VOIR DIRE PROCESS IN THE MILITARY JUSTICE SYSTEM," 2011 ARMY LAW. 17, MAJOR PHILIP STATEN.

IN TURNER V. LOUISIANA, 376 U.S. 466, 473 (1965), THIS COURT'S PREDECESSOR HELD THAT THE SIXTH AMENDMENT WAS VIOLATED WHERE JURORS KNEW KEY PROSECUTION

WITNESSES FOR THREE (3) DAYS. BECAUSE THE SEATING OF EVEN A SINGLE BIASED JUROR VIOLATES A DEFENDANT'S SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY, IRVIN V. DOWD, 366 U.S. 717, 722 (1961), A FORTIORI, PETITIONER'S SIXTH AMENDMENT RIGHTS WERE VIOLATED WHERE A JUROR KNEW THE PROSECUTION'S KEY WITNESS FOR YEARS. IT IS TO BE EMPHASIZED THAT THE WITNESS'S TESTIMONY WAS NOT CONFINED TO SOME UNCONTROVERTED OR MERELY FORMAL ASPECT OF THE CASE FOR THE PROSECUTION. ON THE CONTRARY, THE CREDIBILITY WHICH THE JURY ATTACHED TO THE TESTIMONY OF THIS KEY PROSECUTION WITNESS DETERMINED WHETHER PETITIONER WAS CONVICTED OR ACQUITTED, AS THE PROSECUTOR HIMSELF TOLD THE JURY. TO BE SURE, THE WITNESS'S CREDIBILITY WAS ASSAILED BY TRIAL COUNSEL ON CROSS-EXAMINATION IN OPEN-COURT. BUT THE POTENTIALITIES OF WHAT TRANSPIRED BETWEEN THE JURORS IN LIGHT OF JUROR NAPIER'S BELIEF IN HER CHILDHOOD FRIEND'S HONESTY MADE WELL HAVE MADE THE COURTROOM PROCEEDINGS LITTLE MORE THAN A FORMALITY. (PARAPHRASING TURNER, Id.).

IF IT IS TRUE THAT "UNDER OUR SYSTEM OF JURISPRUDENCE THERE IS NO FEATURE OF A TRIAL MORE IMPORTANT AND MORE NECESSARY TO THE PURE AND JUST ADMINISTRATION OF JUSTICE THAN THAT EVERY LITIGANT SHALL BE ACCORDED A FAIR TRIAL BEFORE A JURY OF HIS COUNTRYMEN WHO ENTER UPON A TRIAL TOTALLY DISINTERESTED AND WHOLLY UNPREJUDICED," OZARK BORDER ELECTRIC COOPERATIVE V. STACY, 348 SW2d 586, 590-91 (MISSOURI APP. 1961). A SYSTEM OF LAW WHICH CLAIMS IT "HAS ALWAYS ENDEAVORED TO PREVENT EVEN A PROBABILITY OF UNFAIRNESS," SHEPPARD V. MAXWELL, 384 U.S. 333, 352 (1966), CANNOT TOLERATE A CONVICTION RETURNED BY A JURY THAT INCLUDED IN ITS NUMBER A SECRET FRIEND OF THE

PROSECUTION'S KEY WITNESS, A FORTIORI, A SECRET FRIEND OF THE PROCEVTION, WITHOUT BELYING THAT CLAIM.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

RESPECTFULLY SUBMITTED,

Donald R Phillips

DONALD R. PHILLIPS, PRO SE

JANUARY 21, 2020
DATE

CERTIFICATION

I HEREBY CERTIFY UNDER PENALTY OF PERJURY THAT ALL STATEMENT OF FACT, INFORMATION, AND ALLEGATION CONTAINED HEREIN ARE TRVE AND CORRECT.

EXECUTED ON JANUARY 21, 2020.

Donald R Phillips

DONALD R PHILLIPS, PRO SE