No. 19A824

(CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

FRED FURNISH

Petitioner,

v.

DEEDRA HART, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITION FOR A WRIT OF CERTIORARI

Dennis J. Burke (KBA #87278)
Kentucky Dept. of Public Advocacy
2202 Commerce Parkway, Suite D
LaGrange, Kentucky 40031
(502) 564-4819
dennis.burke@ky.gov

Jamesa J. Drake (ME #009154)
Drake Law, LLC
P.O. Box 56
Auburn, Maine 04212
(207) 330-5105
(counsel of record)

March 30, 2020

QUESTIONS PRESENTED

1.

Furnish Furnish was found guilty on charges of, *inter alia*, murder, first-degree burglary and first-degree robbery, and he was sentenced to death. On direct appeal, the Kentucky Supreme Court affirmed Furnish's convictions, but reversed his sentence. The resentencing jury again recommended a sentence of death. On direct appeal, the Kentucky Supreme Court affirmed Furnish's second death sentence, so Furnish filed a motion to vacate and set aside his conviction as part of state habeas proceedings. These proceedings revealed important information about Furnish's resentencing jurors.

At all times relevant to this case, Furnish was employed by Kiwi Carpet Cleaners. On April 17, 1989, Furnish cleaned Betty Geiman's carpets. On May 19, 1998, Furnish cleaned Jean Williamson's carpets. While he was there, he saw Williamson's large jewelry collection and he stole several pieces of her jewelry. On June 12, 1998, Furnish returned to Geiman's home and asked to inspect her carpets. After Furnish left, Geiman realized that her wallet was stolen. The Commonwealth's theory of the case was that on June 25, 1998, Furnish used his employment as Kiwi Carpet to gain access to Williamson's home a second time to steal from her, and to kill her.

The foreperson of the resentencing jury testified before the judge assigned to Furnish's state habeas case. Remarkably, the foreperson revealed that he had used Furnish, through Kiwi Carpet, to clean his own carpets. The foreperson testified that

after jury selection, but before deliberations began, he realized that Furnish had been inside his own home, cleaning his own carpets – but the foreperson did not tell anyone about it until after he voted to sentence Furnish to death.

When the matter reached the Kentucky Supreme Court, it concluded that the foreperson "was not unqualified" to sit on Furnish's resentencing jury. The first question presented asks:

> When a juror realizes that he has been in an identical situation vis-à-vis the defendant as the victims of the defendant's crimes, is that juror unqualified to sit in judgment of the defendant?

2.

The state habeas court also heard from another juror on Furnish's resentencing jury, who testified that, in contravention of the resentencing court's order not to discuss the case with anyone, she consulted with her Roman Catholic priest to learn more about the Church's position on the death penalty. The state habeas court found that this juror was having "reservations" about imposing the death penalty until she discussed these "reservations" with her priest. After meeting with her priest, the juror was reassured that the Catholic Church was not "against" the death penalty. The juror subsequently voted to sentence Furnish to death. Although the juror claimed that she did not discuss her conversation with her priest with the other jurors, two resentencing jurors recall things differently. The Kentucky

Supreme Court concluded that the juror's consultation with her priest was error, but harmless. The second question presented asks:

> When a defendant's right to a neutral and impartial factfinder is violated, may a court dismiss the error by simply speculating that the error had no impact on the juror's verdict?

3.

During state habeas proceedings, it was revealed that Furnish was unable to hear all of the proceedings against him at his first trial because Furnish suffers from well-documented and uncontroverted hearing loss (he is deaf in one ear and has diminished hearing in the other ear) and because he was not afforded an accommodation such as amplifying headphones or a sign language interpreter to compensate for his hearing loss. The Kentucky Supreme Court concluded that Furnish failed to prove that such assistive technologies were available at the time of Furnish's trial and, anyway, Furnish was able to have one of his attorneys answer his questions about what was occurring during the proceedings. The attorney, who examined numerous witnesses during Furnish's trial, testified in the state habeas hearing that he had difficulty answering Furnish's questions while trying to pay attention to the ongoing trial. The third question presented asks:

> Is requiring a hard-of-hearing criminal defendant to ask his attorney what is happening a constitutionally-sufficient accommodation?

LIST OF PARTIES

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

PETITION FOR A WRIT OF CERTIORARI

Petitioner Furnish is a death-sentenced inmate. He respectfully petitions for a writ of certiorari to review the Memorandum Opinion of the Supreme Court of Kentucky.

OPINIONS BELOW

After Furnish was convicted and sentenced to death for the first time, he appealed. The opinion of the Kentucky Supreme Court affirming Furnish's convictions but remanding his case for a resentencing hearing is reported at *Furnish v. Commonwealth*, 95 S.W.2d 34 (Ky. 2002) and is attached as Appendix E. After Furnish was sentenced to death a second time, he appealed. The opinion of the Kentucky Supreme Court affirming Furnish's death sentence is reported at *Furnish v. Commonwealth*, 267 S.W.3d 656 (Ky. 2007) and is attached as Appendix D. Furnish then sought state habeas relief pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 in the Kenton Circuit Court. On May 20, 2013, that court entered an order denying requests for expert funds and denying the ineffective assistance of counsel claims to which those experts were relevant. A copy of that Order is attached at Appendix C. On June 2, 2017, the court entered an order denying the remainder of Furnish's claims. A copy of that Order is attached as Appendix B. Furnish appealed the denial of his state habeas claims. The opinion of the Kentucky Supreme Court affirming the Kenton Circuit Court's orders is reported at *Furnish v. Commonwealth*, __ S.W.3d __ (Ky. 2019) and is attached as Appendix A.

STATEMENT OF JURISDICTION

The Kentucky Supreme Court issued its decision on June 13, 2019. Furnish timely filed a petition for reconsideration, and the Kentucky Supreme Court issued its modified decision on November 14, 2019. This Court has extended the time to file a petition for certiorari to March 30, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the U.S. Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed…[and] to be confronted with the witnesses against him…." The Fourteenth Amendment to the U.S. Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law…."

STATEMENT OF THE CASE

A. The 1999 trial and the lack of an accommodation to aid Furnish in hearing the proceedings.

On June 25, 1998, 66 year-old Jean Williamson was discovered dead in her home. *Furnish v. Commonwealth*, 95 S.W.3d 34, 40 (Ky. 2002) (*Furnish I*). A search of the crime scene revealed no forced entry and no identifiable fingerprints. *Id.* Williamson's bedroom, as well as the bedroom of her daughter, Gail, was ransacked and jewelry and credit cards were stolen. *Id.*

On August 14, 1993, a Kenton County Grand Jury returned an indictment against Furnish, charging him with murder, first-degree burglary, first-degree robbery, receiving goods and services obtained by fraud, and theft by unlawful taking of property valued over $300 (this charge pertained to the theft of Geiman's wallet). 1-1TR 1, 7-12.[1] In addition, the prosecutor filed a notice of intent to seek the death penalty, relying on the aggravating circumstances of murder during the commission of a robbery in the first degree and a burglary in the first degree. 1-1TR 13.

At Furnish's trial,[2] he was not provided with an interpreter or with any assistive technology to aid him in hearing the proceedings. *Furnish v. Commonwealth*, __ S.W.3d __ (Nov. 14, 2019) (*Furnish III*) (Slip p. at 5). When Furnish could not hear something, he asked his attorneys what had happened, and they would provide him with a summary. *Id.*

---

[1] 1-1Tr. refers to the first volume of the transcript record for the first appeal; 3-2Tr. Refers to the second volume of the third appeal, etc.

[2] Trial counsel's failure to adequately prepare for Furnish's trial is well documented. Fifteen (15) days before the trial was scheduled to begin, trial counsel reported that they still needed to interview and subpoena "numerous" guilt phase witnesses; independently test fingerprint evidence; consult at least two experts; prepare for the cross-examination of several dozen witnesses; prepare for the direct examination of defense witnesses; prepare for both group and individual voir dire; prepare opening and closing statements; and ensure that case law "is readily available for the myriad of issues that may arise at trial." 1-1TR 109. Five (5) days before the trial was scheduled to begin, counsel filed a motion for leave to withdraw because counsel was so unprepared for trial that, if forced to proceed, counsel would be in "serious violation" of several Rules of Professional Conduct. 1-2TR 260-61. The trial court excoriated counsel for the lack of preparedness and inefficient delegation of work, and refused to move the trial date. 1-2TR 154-55.

The post-conviction court found "no evidence that his hearing loss impaired his ability to communicate with his attorneys and hear the trial proceedings generally" and that Furnish only "occasionally would ask his attorney to repeat something that had been said." *Id.* at 6.

However, Furnish's testimony at the hearing on his post-conviction motion paints a different picture. As the Kentucky Supreme Court acknowledged, Furnish testified that "a lot of time" he would have to ask his trial attorneys what was being said during the trial – this occurred approximately "six or seven times" a day during trial. *Id.* Furnish also testified that "a few times" when he couldn't hear what was said, he didn't even bother to ask his trial attorneys." *Id.*

Testimony from Furnish's trial attorneys confirmed Furnish's testimony. As the Kentucky Supreme Court recognized, Michael Folk, one of Furnish's lawyers, said that the entire trial team was "aware of Furnish's hearing difficulties from early in the case" and that Furnish "made several requests to have a hearing aid or a hearing test, and that it was obvious Furnish was unable to hear at times." *Id.* Folk testified that "it was difficult to both pay attention at trial and answer Furnish's questions, and that he did not repeat trial testimony verbatim to Furnish when asked what was said." *Id.* at 6-7.

Before Furnish's trial began, the judge addressed Furnish's hearing difficulties, saying: "I want to urge you, sir, that during the course of this trial…if you have any trouble hearing you need to inform your counsel so counsel can inform the court. The court will then either speak up or ask the witnesses to testify more loudly.

We'll do our best." *Id.* at 7. Neither Furnish, nor his attorneys, ever spoke up to ask for any other accommodation to assist Furnish in hearing and understanding testimony. *Id.*

Nevertheless, the Kentucky Supreme Court was unmoved. The court wrote:

> It is not clear from the record what assistive technologies were available at the time of trial or that trial counsel knew of their ability. …. They made some accommodations for Furnish, including having an attorney answer his questions about what was occurring during the proceedings. While perhaps counsel could have or should have requested assistance from the trial court in obtaining hearing assistance for Furnish, we do not find that trial counsel's performance fell outside the range of professionally competent assistance.
>
> Because we do not find Furnish's trial counsel's performance to be deficient, this Court declines to decide if, had there been an error, this error would have been structural as Furnish argues.

Id. at 7-8.

B. The 2002 resentencing trial and the lack of neutral jurors.

Because the Kentucky Supreme Court remanded the case for resentencing, only, the parties agreed to a narrative statement of the facts. The resentencing court read the narrative statement to the jurors, accompanied by a slide-show of photographs. The prosecution also introduced certified records of Furnish's prior convictions. In closing argument, the Commonwealth called Furnish "evil," an "animal," and a "wolf." The Kentucky Supreme Court chided the prosecution for those remarks, but found no reversible error. *Furnish v. Commonwealth*, 267 S.W.3d 656, 663 (Ky. 2008) (*Furnish II*).

1. The foreperson, "Juror A," recalled mid-trial that Furnish had been inside his own home, cleaning his own carpets.

As the Kentucky Supreme Court observed, "[t]he Commonwealth's theory of Furnish's guilt was that he used his employment as a carpet cleaner with Kiwi Carpet to gain access to his victim's home, to murder her, and to steal from her." *Furnish III*, Slip op. at 8. As the Kentucky Supreme Court further acknowledged, the foreperson of Furnish's resentencing jury, "Juror A," "realized, mid-trial, that Furnish had been inside of his home cleaning his carpets." *Id.* However, "Juror A did not reveal this information to the trial court." *Id.* at 8.

Nevertheless, the Kentucky Supreme Court found no error. It reasoned:

> Juror A testified at length at Furnish's RCr 11.42 hearing. He testified that he had used Kiwi Carpets and believed that Furnish had been inside of his home cleaning his carpets. He testified that he did not realize this until after he had been seated on the jury for the re-sentencing trial and had begun to hear evidence, but before the jury recommended a sentence of death. No testimony was elicited about how this familiarity with Furnish did or did not affect his deliberations. Juror A did not disclose this information to the court, counsel or other members of the jury during the resentencing trial. …. No testimony was elicited from Juror A that his prior knowledge of Furnish created bias, nor was there any implication that it created bias. Therefore, even under a structural error analysis, this Court finds that Juror A was not unqualified to sit on Furnish's resentencing jury and finds no error.

Id. at 9.

2. Juror B's consultation with her priest about the morality of the death penalty.

The Kentucky Supreme Court explained that "[d]uring individual voir dire as Furnish's resentencing trial began, Juror B was questioned about her views of the death penalty" and she stated "numerous times, unequivocally, that she could consider all the possible range of penalties, including the death penalty." *Id.* at 10. However, [a]t some point after she was empaneled as a member of the resentencing jury, Juror B consulted with her priest about the Roman Catholic Church's doctrinal stance of the death penalty." *Id.* at 10. Juror B's priest told her "that generally the Church opposed imposition of the death penalty but there were some exceptions." *Id.* at 10. "As the post-conviction court found, this extrajudicial conversation between Juror B and her priest was a clear violation of the admonition" not to discuss the case with others. *Id.* at 10.

Nevertheless, the Kentucky Supreme Court concluded that this error "is not subject to structural-error review…because there is no showing that this error affected Juror B's deliberative process." *Id.* at 11. The Kentucky Supreme Court mused:

> Before consulting with her priest, Juror B had already stated during voir dire that she could consider all possible penalties, including the death penalty. As the post-conviction court found, the conversation with her priest may have confirmed for Juror B that her beliefs about the death penalty were consistent with her church's doctrine. The conversation did not create those beliefs of cause her to change her beliefs from being unable to consider the death penalty to being able to consider it as a potential punishment. In fact, Juror B testified that the

> conversation with her priest discouraged her from recommending a sentence of death.

Id. at 11.

Making matters worse, Juror B did not keep her priest's advice to herself. As the Kentucky Supreme Court acknowledged: "Juror B shared her understanding of this consultation with other members of the jury." *Id.* at 12. One other juror testified that Juror B had "a discussion with her priest due to reservations on whether she could impose the death penalty." *Id.* Nevertheless, the Kentucky Supreme Court concluded that this did not amount to a violation of Furnish's right to a neutral and impartial jury and it declared any error harmless. *Id.* at 13-14.

REASONS FOR GRANTING THE WRIT

I. If the Commonwealth's theory of the case is to be believed, Juror A was unqualified to sit in judgment of Furnish because he was in the same position vis-à-vis defendant as was Williamson moments before she was killed.

Furnish readily admits that the facts of his case are so unusual and outlandish, and the Kentucky Supreme Court's decision so extreme, that it is difficult to find a contrast between his case and others. However, the Kentucky Supreme Court's decision does fly in the face of everything that this Court and others have said, generally, about juror disqualification based on similarity of life experiences. For this reason, and on this question presented, Furnish prays that this Court will grant review, vacate and remand with instruction to the Kentucky Supreme Court to consider this case-law.

It is constitutional bedrock that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI. An impartial jury is one "capable and willing to decide the case solely on the evidence before it." *McDonough Power Equip. Inc. v. Greenwood*, 464 U.S. 548, 554 (1984); *Smith v. Phillips*, 455 U.S. 209, 225 (1982) (Marshall, J., dissenting) ("Fairness and reliability are assured only if the verdict is based on calm, reasoned evaluation of the evidence presented at trial."). The right to an impartial jury is nowhere as precious as when a defendant is on trial for his life. *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988).

If even a single biased juror participates in the imposition of a death sentence, the sentence is infirm and cannot be executed. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992); *see also Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) ("When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm.").

It is likewise well-established that jurors are never trusted to judge their own ability to remain impartial and unbiased. The whole point of voir dire is for the court and the parties to make that final destination. Judges decide whether jurors can be impartial, not the jurors themselves. This may not be an easy task: a person who harbors a bias may not appreciate it and, in any event, may be reluctant to admit his lack of objectivity. *See Morgan v. Illinois*, 504 U.S. 719, 735 (1992) (Juror may, in good conscience, swear to uphold the law and yet be unaware of their own implicit

bias); *Phillips*, 455 U.S. at 221-22 (O'Connor, J., concurring) ("Determining whether a juror is biased…is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it."). As this Court explained over a century ago, "[b]ias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence." *Crawford v. United States*, 212 U.S. 183, 196 (1909).

Thus, to the extent that the Kentucky Supreme Court believed that the merits of this claim hinged on Juror A's statements about his own impartiality, the court erred. *See e.g. Furnish III*, Slip op. at 9 ("No testimony was elicited from Juror A that his prior knowledge of Furnish created bias….."). Impartiality is not evaluated solely according to a jurors statements or expressed personal views. As the foregoing confirms, a juror may not understand that he harbors implicit biases, and even if a juror is attuned to his own bias, he may be unwilling to express it. As the Court has repeatedly acknowledged, impartiality may also result from a juror's personal experiences that prevent or substantially impair the juror's ability to decide a matter based solely on the evidence.

The Kentucky Supreme Court further erred when it summarily concluded that there was no "implication" that Juror A's prior experience with Furnish and Kiwi Carpet Cleaning "created bias." *Id.* The similarity between a juror's life events and the subject matter of the trial is directly relevant to whether a juror has the capacity to decide a case solely on the evidence. The doctrine of presumed or implied bias recognizes that in rare cases, a court may employ a conclusive presumption that a

juror is biased. A finding of implied bias is appropriate where the relationship between a juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances. Examples of these rare, "extreme" circumstances include "that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." *Phillips*, 455 U.S. at 222 (O'Connor, J., concurring). From a practical standpoint, this explains why, in trials every day, all over the United States, potential jurors are questioned about their life experiences that might consciously or subconsciously impair an individual's ability to remain impartial.

There can be no doubt that if Juror A had realized during the voir dire process, and had communicated to the court and the parties then, that Furnish had been inside his own home, cleaning his own carpets on behalf of Kiwi Carpet Cleaning, that he would have been removed for cause.

It does not matter that Juror A realized these facts later-on in the process and then failed to communicate them altogether. The salient point is that Juror A made this connection between the facts at issue in the litigation and his own life experiences before deliberating over Furnish's life and ultimately deciding that Furnish deserved to die.

Under similar circumstances, other federal courts have granted relief, even in the habeas context. For example, in *Hunley v. Godinez*, 975 F.2d 316, 319 (7th Cir.

1992), the state's theory of the case at trial was that Hunley made an unforced entry with a key into Tyson's apartment, intending to steal small, concealable items, but, when she unexpectedly arrived home and startled him, he killed her. The Seventh Circuit observed: "These facts are profoundly similar to the jurors' experience during sequestration. During the night a burglar made an unforced entry with a pass key into two rooms housing four of the jurors and stole small, easily concealed items." *Id.* at 319-20. The Seventh Circuit decided that "the district court correctly concluded that the facts here present a situation in keeping with the cases in which the courts were willing to apply a presumption of bias. The burglar placed the jurors in the shoes of the victim just before she was murdered." *Id.* at 319.

The First Circuit has likewise observed that "[w]hen a juror has life experiences that correspond with evidence presented during the trial, that congruence raises obvious concerns about the juror's possible bias." *Sampson v. United States*, 724 F.3d 150, 167 (1st Cir. 2013). "In such a situation," the court explained, "the juror may have enormous difficulty separating her own life experiences from evidence in the case. For example, it would be natural for a juror who had been the victim of a home invasion to harbor bias against a defendant accused of such a crime." *Id.* at 167. The court granted habeas relief based in part on the fact that the jurors heard evidence that the defendant had substance abuse problems and that he threatened bank tellers at gunpoint and his murder victims at knife point, and Juror C "was frequently threatened by her then-husband once with a shotgun and other times with his fists" and Juror C "was forced to deal with the

substance abuse of both her husband and her daughter." *Id.* at 168. The First Circuit concluded: "These parallels raise a serious concern as to whether an ordinary person in Juror C's shoes would be able to disregard her own experiences in evaluating the evidence." *Id.* at 168; *see also Burton v. Johnson*, 948 F.2d 1150, 1159 (10th Cir. 1991) (a juror, sitting in a murder trial where the defendant's defense was battered wife syndrome, was presumed to be biased because the juror herself was involved in an abusive family situation at the time of trial); *United States ex rel De Vita v. McCorkle*, 248 F.2d 1, 8 (3d Cir. 1957) (en banc) (court imputed bias to a juror in a robbery case because the juror was the victim of a robbery prior to trial).

The Kentucky Supreme Court's decision and reasoning makes it an outlier with these courts and with this Court. This Court's case-law dictates that Juror A's life experiences severely compromised his ability to remain neutral and impartial, and to evaluate Furnish's case based solely on the evidence presented in the courtroom. The fact that Juror A came to this realization about his relationship with Furnish before he voted to impose the death penalty is reason enough to grant relief. Once Juror A made this connection, he was no longer qualified to sit in judgment of Furnish's punishment. The inclusion of even one biased juror is enough to render a trial fundamentally unfair and in violation of the Sixth and Fourteenth Amendment guarantees of a neutral and impartial jury.

If the Kentucky Supreme Court's decision is permitted to stand, than it is impossible to conceive a scenario whereby the similarity of life experiences could ever

be disqualifying. Kentucky would stand alone in this regard, and it should not be permitted to do so.

II. Juror B's conversation with her priest about the morality of the death penalty violated Furnish's right to a neutral and impartial jury, and the error was not harmless.

For over 100 years, this Court has held that the Sixth and Fourteenth Amendments guarantee to a criminal defendant the right to trial by an impartial jury and a verdict based solely on evidence in the trial record. It is an "'undeviating rule' that the rights of confrontation and cross-examination are among the fundamental requirements of a constitutionally fair trial." *Parker v. Gladden*, 385 U.S. 363, 364-65 (1966) (internal citation omitted). As this Court has repeatedly instructed:

> The Sixth Amendment right to an impartial jury and due process right to a fundamentally fair trial guarantee to criminal defendants a trial in which jurors set aside preconceptions, disregard extrajudicial influences, and decide guilt or innocence "based on the evidence presented in court."

Skilling v. United States, 561 U.S. 358, 438 (2010) (quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)); *see also Turner v. Louisiana*, 379 U.S. 466, 472 (1965) ("The requirement that a jury's verdict must be based upon the evidence developed at trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.") (internal citation omitted); *Mattox v. United States*, 146 U.S. 140, 149 (1892) ([I]n capital cases…the jury should pass upon the case free from external causes tending to disturb the exercise of deliberated and unbiased judgment.").

Here, Juror B initially expressed her willingness to consider the entire range of penalties before she sought-out the advice of her priest. *Furnish III*, Slip op. at 11.

If Juror B was steadfast in those beliefs, then there would have been no need for her to disobey the court and seek-out the opinion of anyone else. In fact, Juror B was having "reservations" about imposing the death penalty. *Id.* at 12. After discussing her "reservations" with her priest, Juror B returned to the court reassured that, under certain circumstances, the Catholic Church was not "against" the death penalty. *Id.* at 11. She then voted to sentence Furnish to death.

The Kentucky Supreme Court's refusal to remedy the error – or recognize that it was an error of constitutional proportion – puts it at odds with this Court's case-law and case-law from other courts. *See e.g. People v. Tafoya*, 164 P.3d 590, 624-25 (Cal. 2007) (Juror engaged in misconduct by discussing the Catholic Church's position on the death penalty with a retired priest and by describing this conversation to the penalty phase jury, but misconduct was not prejudicial because the juror was removed from the jury and the remaining jurors agreed to disregard the juror's comments); *Hernandez v. Martel*, 824 F.Supp. 2d 1025, 1122-29 (C.D. Cal. 2011) (granting relief where a Juror consulted with the rector of her church during a recess in penalty phase deliberations and announced to the jury that she had consulted with her minister but did not share the details of the conversation with her fellow jurors).

The Kentucky Supreme Court's conclusion that the error was not harmless is likewise an outlier. *United States v. Resko*, 3 F.3d 684 (3d Cir. 1993) ("Under these circumstances, *i.e.* where the jury misconduct was discovered mid-trial but there is no way for us to determine whether the defendants were or were not prejudiced, we will vacate the convictions and remand for a new trial, even though the defendants

have not established prejudice.").[3] Upon a showing that juror misconduct took place, the bar for whether that misconduct warrants a new trial is set exceedingly low. *Hickerson v. Burner,* 41 S.E.2d 451, 451 (Va. 1947) ("[O]nly slight evidence of influence or prejudice as a result of such misconduct of a juror should be required to warrant the granting of a new trial."); *Thompson v. Commonwealth*, 70 S.E.2d 284, 290 (Va. 1952) ("The test in a criminal case is not whether the jurors were actually prejudiced by the extraneous matter, but whether they might have been so prejudiced."). Such a low bar is appropriate because even a hint of prejudice casts serious aspersions upon the sanctity of the judicial process. *Id.* at 290 ("If they might have been prejudiced, then the purity of the verdict is open to serious doubt and the verdict should be set aside and a new trial awarded.").

At a minimum, Juror B's extrajudicial conversation with her priest influenced her own thinking. *Cf. Lawson v. Borg*, 60 F.3d 608, 613 (9th Cir. 1995) ("[E]ven a single juror's improperly influenced vote deprives the defendant of an unprejudiced, unanimous verdict."). And she further contaminated the deliberative process by sharing this extrajudicial information with her fellow jurors. Courts have long recognized that once a juror expresses her views in the presence of other jurors, she is likely to cling to that opinion, pay greater attention to evidence that comports with

---

[3] Likewise, it does not matter that Juror B may not have discussed any specific evidence in the case or received from the priest any new information about the nature of the offense or about Furnish. The extrajudicial evidence at issue was the priest's reassurance that Juror B could vote to impose the death penalty in certain circumstances. This information went to the heart of Juror B's qualifications as a juror and was material to her service on Furnish's jury.

that opinion, and in effect, shift the burden of proof to the defendant, who then has "the burden of changing by evidence the opinion thus formed." *United States v. Jadlowe*, 628 F.3d 1, 18 (1st Cir. 2010) (citing *Winebrenner v. United States*, 147 F.2d 322, 328 (8th Cir. 1945); *Resko*, 3 F.3d at 689; *People v. Flockhart*, 304 P.3d 227, 235 (Colo. 2013); *State v. Joyner*, 345 S.E.2d 711, 712 (S.C. 1986); *Commonwealth v. Kerpan*, 498 A.2d 829, 831-32 (Penn. 1985) (same).

In the end, the Kentucky Supreme Court deemed any error non-prejudicial based entirely on speculation: "the conversation with her priest *may* have confirmed for Juror B that her beliefs about the death penalty were consistent with her church's doctrine." *Furnish III*, Slip p. at 11 (emphasis added). Because, respectfully, this is not the way that a harmless error analysis works in the face of constitutional error, and because the Kentucky Supreme Court's decision is at odds with this Court's case-law and the case-law of other courts, Furnish prays that this Court will accept review of his case.

III. Requiring a defendant to communicate with this attorney is not a constitutionally-adequate accommodation for a defendant who is hard-of-hearing.

No federal constitutional provision expressly mandates that a court provide an accommodation for a deaf or hard of hearing defendant. However, such an accommodation is required as a matter of fundamental due process, the defendant's right to confront adverse witnesses, his right to understand the nature and cause of

the accusation, his right to be present at trial and assist in his defense, or some combination of all those rights.[4]

Because it is universally recognized that a person (whether he suffers from a physical disability or a language barrier) has a federal constitutional right to hear and comprehend the proceedings against him, there is "a striking scarcity of case law on the subject…." *See e.g.* Michele LaVigne & McCay Vernon, *An Interpreter Isn't Enough: Deafness, Language, and Due Process*, 2003 Wis. L. Rev. 843, 887 n. 192 (2003) ("A review of state and federal law from 1987 through 2002 revealed no appellate cases where the trial court had refused to appoint an interpreter for a deaf defendant or subject after a request had been made.").

However, several cases are instructive.[5] In *Mothershead v. King*, 112 F.2d 1004, 1105-6 (8th Cir. 1940), a habeas case brought by a petitioner who was deaf, the Eighth Circuit remarked that: "The conviction of a person whose infirmities are such that he cannot understand or comprehend the proceedings resulting in his conviction and cannot defend himself against such charges is violative of certain immutable

---

[4] In Kentucky, criminal defendants who are deaf or hard of hearing have a statutory right to the assistance of an interpreter at trial. *See* KRS 30A.410. Criminal defendants who are deaf or hard of hearing also have a statutory right to an accommodation, other than an interpreter, to assist them in understanding the proceedings. *See* KRS 30A.435(1) (providing for the use of assistive technology in lieu of or in addition to the services of an interpreter).

[5] Courts today also recognize, and have rejected, some common misconceptions about people who are deaf or hard of hearing, and the types of accommodations that may aid them. *See e.g. Strook v. Kedinger*, 766 N.W.2d 219, 230-31 (Wisc. Ct. App. 2009) (it is wrong to expect a deaf or hard-of-hearing defendant to simply read lips or write notes back and forth with his attorney; these are not legally adequate accommodations).

principles of justice." The court remanded the case for an evidentiary hearing to determine whether "because of his total deafness, his plea of guilty was [constitutionally infirm]" and, if so, ordered that "the petitioner should be released." *Id.* at 1006.

In *Negron v. New York*, 434 F.2d 386, 388 (2d Cir. 1970), the habeas petitioner "neither spoke nor understood any English." As a result, he and his attorney could not communicate without the aid of a translator and the petitioner was unable "to participate in any manner in the conduct of his defense, except for the spotty instances when the proceedings were conducted in [or translated into] Spanish." *Id.* at 388. The Second Circuit concluded that however astute the translator's summaries of the proceedings may have been, "they could not serve as a means by which Negron could understand the precise nature of the testimony against him…. Negron's incapacity to respond to specific testimony would inevitably hamper the capacity of his counsel to conduct effective cross-examination. Not only for the sake of effective cross-examination, however, but as a matter of simple humaneness, Negron deserved more than to sit in total incomprehension as the trial proceeded." *Id.* at 390.

The reasoning in *Negron* has been extended to deaf or hard of hearing criminal defendants. In *Farrell v. Estelle*, 568 F.2d 1128, 1129, vacated as moot due to death, 573 F.2d 86 (5th Cir. 1978), a deaf habeas petitioner's trial attorney asked the trial court to provide stenographers who could simultaneously transcribe the words spoken during trial; the court denied the motion, but told the attorney that unlimited requests for recess would be granted so that he could confer with the petitioner. The

Fifth Circuit held that the petitioner's constitutional "rights were reduced below the constitutional minimum" and that it could not say "that this deficit was harmless beyond a reasonable doubt. Thus a new trial [was] required." *Id.* at 1133.

The Supreme Court of Pennsylvania has also recognized that "[a] defendant's ability to use an interpreter encompasses numerous fundamental rights. The failure to understand the proceedings may deny him his right to confront witnesses against him, his right to consult with his attorney, or his right to be present at his own trial." *Commonwealth v. Pana*, 364 A.2d 895, 898 (Pa. 1976). Likewise, the Supreme Court of Ohio has instructed: "A defendant who cannot hear is analogous to a defendant who cannot understand English, and a severely hearing-impaired defendant cannot be tried without adopting reasonable measures to accommodate his or her disability." *State v. Schaim*, 600 N.E.2d 661, 672 (Ohio 1992); *see also State v. Barber*, 617 So.2d 974, 976 (La. App. 4th Cir. 1993) ("[T]he Constitution requires that a defendant sufficiently understand the proceedings against him to be able to assist in his own defense. Clearly, a defendant who has a severe hearing impairment, without an interpreter, cannot understand the testimony of the witnesses against him so as to be able to assist in his own defense.").

As the Kentucky Supreme Court acknowledged, Furnish testified that, "*a lot of time*" he was forced to "ask his trial attorneys what was being said during trial." *Furnish III*, Slip op. at 6. This happened "six or seven times" a day, during trial. *Id.* In other words, about once *every hour*, Fred told his attorneys that he could not hear, and he asked them for help. Furnish's lawyer said that "it was difficult to both pay

attention at trial and answer Furnish's questions, and that he did not repeat trial testimony verbatim to Furnish when asked what was said." *Id.* at 6-7. Even by the Kentucky Supreme Court's account, Furnish had to ask for help to hear what was happening at his *capital trial* multiple times throughout the day, every day of trial.

Perhaps most concerning is the Kentucky Supreme Court's curious statement that it is unclear "what assistive technologies were available at the time of trial…." *Id.* at 7. Long ago, Congress mandated courtroom interpreters in federal courts, in the Court Interpreters Act. The main provision of that Act is § 2(a), codified in 28 U.S.C. §§ 1827 and 1828. Particularly relevant here is § 1827, which presently provides for the establishment of "a program to facilitate the use of certified and otherwise qualified interpreters in judicial proceedings instituted by the United States." § 1827(a). Subsection (d) directs courts to use an interpreter in any criminal or civil action instituted by the United States if a party or witness "speaks only or primarily a language other than the English language" or "suffers from a hearing impairment" so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer…." This law was enacted in 1978. *See* Pub. L. 95-539, § 2(a), October 28, 1978.

Commenting on the Court Interpreters Act, members of this Court have recently cited, with approval, case-law recognizing that translation services for non-English speakers is essential to fundamental fairness. *See Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 579 (2012) (Ginsburg, J., dissenting) (recognizing *United States v. Mosquera*, 816 F.Supp. 168, 175 (E.D.N.Y. 1993) ("For a non-English

speaking [party] to stand equal with others before the court requires translation [of relevant documents]."); *Cf. also McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 488-91 (1991) (There is no dispute that the INS "routinely and persistently violated the Constitution…in processing SAW applications" by, *inter alia*, processing applications even though "non-English speaking Haitian applications were unable to communicate effectively with LO's because competent interpreters were not provided….").

Since 1994, Kentucky has had a similar statute, which provides that the court in any matter, civil or criminal, shall appoint a qualified interpreter or interpreters for persons who are hard of hearing. *See* KRS 30A.410(1)(a) (Ky Acts ch. 452, sec. 3, effective July 15, 1994). In addition, the Rehabilitation Act (first enacted in 1973) and the Americans with Disabilities Act (first enacted in 1990) both prohibit discrimination on the basis of disability by programs and activities that receive federal funds, such as the Kentucky court system. *See* 29 U.S.C. § 794, Pub. L. 93-112, title V, § 504, Sept. 26, 1973; 42 U.S.C. § 12101 *et seq.*, Pub. L. 101-336, § 2, July 26, 1990. Vigilance in protecting the rights of the disabled is therefore mandatory on Kentucky trial courts. Apart from the federal constitution, pursuant these statutes, the court had an obligation to provide an interpreter upon request. It is thus preposterous to conclude, as the Kentucky Supreme Court did, that it was unclear "what assistive technologies were available at the time of the trial or that trial counsel knew of their availability." *Furnish III*, Slip op. at 7. It defies credulity to suggest

that in the entire Commonwealth, no such qualified interpreter would have been available on any potential trial date.

McCoy v. Louisiana, 138 S.Ct. 1500 (2018) stands for the broad proposition that when an error impacts a defendant's Sixth Amendment autonomy, the *Strickland* harmless error analysis is inapt. *Id.* at 1511 ("Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural'; when present, such an error is not subject to harmless error review."). A defendant's Sixth Amendment-secured autonomy is implicated whenever the defendant is meaningfully denied the choices that the Sixth Amendment bestows on him, personally: autonomy to decide the objective of the defense, autonomy to testify in one's own defense, and the unencumbered ability to aid and assist counsel in the presentation of the defense. *Id.* at 1508. Sixth Amendment autonomy "is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Id.* at 1508. This autonomy – a defendant's ability to steer his defense – cannot be fruitfully exercised if the defendant cannot hear what is being said in court. In our country, we guarantee that anyone on trial *for his life* can hear and understand *all* of the proceedings against him. Respectfully, this issue is worthy of this Court's attention.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

/s/ Jamesa J. Drake

_____

Jamesa J. Drake*
Drake Law LLC
P.O. Box 56
Auburn, Maine 04212
(207) 330-5105
Jamesa_Drake@hotmail.com

/s/ Dennis J. Burke

_____

Dennis J. Burke
Kentucky Department of Public Advocacy
207 Parker Drive, Suite 1
LaGrange, Kentucky 40031
(502) 222-6682
dennis.burke@ky.gov

*Counsel of Record