No. 19-8197
CAPITAL CASE

IN THE SUPREME COURT
OF THE UNITED STATES

FRED FURNISH **PETITIONER**

v.

KENTUCKY **RESPONDENT**

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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Furnish murdered Jean Williamson and appealed his conviction.

In 1999, a jury convicted Fred Furnish of the murder of Jean Williamson in Kenton County, Kentucky.

On May 19, 1998, Furnish worked with Kiwi Carpet as a carpet cleaner. *Furnish v. Commonwealth*, 95 S.W.3d 34, 40 (Ky. 2002) (affirming Furnish's original conviction but remanding for a new penalty phase).[1] He was assigned to clean Jean Williamson's residential carpets. *Id.*

On June 25, 1998, Jean was murdered. *Id.* Furnish was also in the residence on the day of the murder. *Id.* Jean was found dead in her master bathroom. *Id.* Strangled by a washcloth, she was found in a kneeling position. *Id.* Her room and the room of her daughter had been ransacked. *Id.* Their jewelry and credit cards had been stolen. *Id.*

Police recovered Jean's stolen jewelry from some of Furnish's acquaintances. *Id.* And several banks' surveillance tapes revealed Furnish had obtained cash using Jean's ATM card. *Id.* He used the money

[1] This Kentucky Supreme Court case will be referred to as *Furnish I* and is found in Petitioner's Appendix E.

to buy crack cocaine. *Id.*

Furnish was arrested for Jean's murder and stood trial in 1999. *Id.* After the jury found him guilty, he was sentenced to death. *Id.* The Kentucky Supreme Court affirmed his conviction but remanded for a new penalty phase of the trial. *Furnish I*, 95 S.W.3d at 41.

During the new penalty-phase trial, the prosecution presented a narrative statement describing Jean's murder. The prosecution also presented one witness, Gayle Williamson Cummings—Jean's daughter. And, the prosecution presented several exhibits and proof of Furnish's prior convictions. Furnish called three witnesses and made a statement to the jury accepting responsibility for Jean's murder. As in his 1999 trial, the new jury recommended a sentence of death. Furnish's second death sentence was affirmed by the Kentucky Supreme Court. *Furnish v. Commonwealth*, 267 S.W.3d 656, 662-63 (Ky. 2007), *cert. denied,* 558 U.S. 831 (2009).[2]

Next, Furnish filed a state collateral challenge to his conviction in Kenton County Circuit Court. His challenge was pursuant to Kentucky

[2] This Kentucky Supreme Court case will be referred to as *Furnish II* and may be found in Petitioner's Appendix D.

Rule of Criminal Procedure 11.42 (Ky. RCr 11.42). He made various claims including the following: (1) his 1999 trial counsel was ineffective when he failed to request a listening device to compensate for Furnish's hearing difficulties; (2) a juror violated Furnish's right to an impartial jury because the juror knew Furnish had cleaned the juror's carpets; and (3) a juror violated Furnish's right to an impartial jury by speaking with her priest about the death penalty sometime before jury deliberations.

Furnish's hard of hearing claim relies on his testimony at a hearing to waive his appearance. However, that testimony was excluded by the circuit court. Furnish filed a motion to waive his appearance at his evidentiary hearing. At the waiver hearing, Furnish also presented his own testimony in support of several of his Ky. RCr 11.42 claims. The circuit court denied the waiver and excluded his testimony but allowed him to testify at the evidentiary hearing. He chose not to testify during the evidentiary hearing. The evidentiary hearing was held on multiple days. Furnish called multiple witnesses including some of the jurors from his second penalty phase trial.

The circuit court denied all of Furnish's post-conviction claims. The Kentucky Supreme Court affirmed the post-conviction court's decision.

Furnish v. Commonwealth, 2018-SC-000126-MR, 2019 WL 5617687 at 6* (Ky. 2019) (when affirming the court addressed multiple claims including the claims presented to this Court*)*.[3]

On March 30, 2020, Furnish's petition for a writ of certiorari was placed on the docket in this Court. On April 24, 2020, this Court granted Kentucky's request to file its response on or before July 6, 2020.

Facts relevant to Furnish's listening-device claim.

Before his original 1999 trial, Furnish claimed he was hard of hearing. In anticipation of the trial, the Kenton Circuit Court offered hearing assistance should Furnish need it. The court advised Furnish to let his counsel know if he needed such assistance during the trial. Also, defense counsel advised Furnish to let counsel know if he could not hear testimony.

Throughout the trial, Furnish had conversations with his counsel and took notes while listening to testimony. There were times throughout the trial that Furnish purpotedly did not hear parts of testimony. He asked counsel what was said and then counsel would repeat the

[3] This Kentucky Supreme Court case will be referred to as *Furnish III* and the slip opinion is found in Petitioner's Appendix A. All cites will be to the slip opinion.

testimony for him. However, his counsel never indicated to the trial court that Furnish needed a listening device. Furnish's hearing loss never impaired his ability to communicate with his attorneys and hear testimony at his trial. *Furnish III,* Slip Op. at 6.

Facts relevant to Furnish's juror bias claims.

Furnish's juror-bias claims revolve around Juror A, whose carpets Furnish cleaned, and Juror B, who discussed the death penalty with her priest during trial.

During voir dire for Furnish's second penalty-phase trial, all the jurors were questioned extensively, including Jurors A and B.[4] Neither party asked Juror A if he ever had Kiwi Carpet clean his carpets. When asked if he knew Furnish, he advised that he did not. Juror A indicated he took great pains to decide if he could be a fair and impartial juror and considered the entire range of penalties. Juror A was always concerned with keeping an open mind.

Similarly, Juror B answered she could consider the entire range of penalties. When asked whether she had a particular penalty she could

[4] As in Furnish's Petition for Certiorari, Juror A and Juror B are being used for the names of the jurors. Kentucky later identifies two other jurors by Juror C and D.

not consider, she responded she might find it hard to recommend the death penalty as a punishment. Yet, she maintained she would consider the entire penalty range.

During the post-conviction hearing, Juror A testified that after he saw Furnish in the courtroom and heard evidence regarding Kiwi Carpet, he thought Furnish might have been in his home cleaning carpets. Juror A never communicated this to the other jurors either before or during jury deliberations. He reaffirmed that he kept an open mind as a juror, tried to fair and impartial, and considered the entire penalty range when he decided to vote for death.

At the post-conviction hearing, Juror B testified that she consulted with her priest at some point before jury deliberations. They discussed the Roman Catholic Church's stance on the death penalty. The priest told her that "the Catholic view is that typically they are against the death penalty. However, you know there are extreme circumstances." They did not specifically discuss what the priest meant by extreme circumstances or exceptions. Juror B maintained she never shared with the other jurors any details of the conversation with her priest because she never talked about her religion.

During the post-conviction hearing, other jurors confirmed that Juror B never provided details about her conversation with her priest. Specifically, Juror C did not remember any conversation about another juror's religious beliefs. Juror C was adamant that she did not remember another juror discussing details of any conversation with a priest.

Juror D also confirmed that Juror B did not communicate the details of her conversation with her priest. Juror D testified that a female juror—whose name he could not recall—might have mentioned a discussion with her father. He thought the father was a former priest. Juror D remembered only that the female juror's father had told her that she had to decide for herself what she believed about the death penalty. He described the conversation with this other juror as short. He was uncertain whether it occurred before or during deliberations.

The circuit court denied all of Furnish's post-conviction claims. The Kentucky Supreme Court affirmed the post-conviction court's decisions in *Furnish III*.

REASONS TO DENY FURNISH'S PETITION

I. The Kentucky Supreme Court correctly found that Juror A was qualified to serve.

Furnish asserts that the Kentucky Supreme Court erred when it decided that Juror A was qualified to serve during Furnish's second penalty-phase trial. Pet. Cert. 8. Furnish argues that Juror A's prior incidental experience with him and Kiwi Carpet created jury bias denying Furnish's right to an impartial jury. Pet. Cert. 10-11. Furnish is incorrect because the Kentucky Supreme rendered an opinion that applied the correct law to the facts.

As affirmed by the Kentucky Supreme Court, there was no evidence of any bias on the part of Juror A that denied Furnish his right to an impartial jury. *Furnish III*, Slip Op. at 9. Juror A briefly knew Furnish as his one-time carpet cleaner. As the Kentucky court observed, there was no proof about how this incidental contact affected Juror A's impartiality. Furnish wrongly asserts the Kentucky Supreme Court believed that the merits of the claim hinged on Juror A's statements about his own impartiality. Pet. Cert. at 10. Instead, the Kentucky court based its ruling on the lack of evidence demonstrating bias. *Furnish III*, Slip Op. at 9.

The evidence in the record supported the Kentucky Supreme Court's opinion that Juror A was qualified to serve. Contrary to Furnish's claim, there was no evidence that Juror A felt he was standing in the position as one of Furnish's victims. *See* Pet. Cert 8. As Juror A watched the trial, he vaguely remembered something about Furnish cleaning his carpets as a Kiwi Carpet employee. He never told anyone on the jury that he recognized Furnish. While sitting on the jury, Juror A maintained he had an open mind in considering the full range of penalties. He had that open mind despite thinking that Furnish might have cleaned his carpets.

The Kentucky Supreme Court found that there was no bias because Furnish's allegations of bias were "pure speculation." *Furnish III*, Slip Op. at 9. Juror A's incidental contact with Furnish is no reason to overturn a conviction. As the Kentucky Supreme Court stated there was no evidence that Juror A's "prior knowledge of Furnish created bias, nor was there any implication that it created bias." *Id.*

The Kentucky Supreme Court's finding did not conflict with this Court's juror bias precedent. This Court has long held that the remedy for allegations of jury bias is a hearing where a defendant is given the opportunity to prove actual bias. *Smith v. Phillips*, 455 U.S. 209, 215

(1982); *Remmer v. United States*, 347 U.S. 227, 230 (1954). The remedy is not always a new trial. *Smith*, 455 U.S. at 216. It is virtually impossible to shield a juror from every contact that might theoretically affect his or her vote. *Rushen v. Spain*, 464 U.S. 114, 118 (1983) (holding that a post-conviction hearing adequately protected the defendant's right when it found that there was no jury bias).

A lower court must "determine the circumstances, the impact thereof upon the juror, and whether or not" there was prejudice. *Smith*, 464 U.S. at 215. A defendant's right to an impartial jury is preserved when the defendant has an opportunity to prove actual bias. *Smith*, 455 U.S. at 216 (quoting *Dennis v. United States*, 339 U.S. 162, 171-172 (1950)). Post-conviction hearings are adequate to protect a defendant's right when there is an allegation of jury bias. *Rushen*, 464 U.S. at 120.

Furnish was given adequate means to prove juror bias. He had a multi-day hearing where he extensively cross-examined Juror A. The only evidence found was that Furnish might have cleaned Juror A's carpets at some unknown time. Juror A never testified he felt like a crime victim. He never testified that the knowledge caused him to be impartial. There is no evidence that he communicated it to the other jurors.

Incidental contact is simply not enough to prove juror bias warranting a new trial. *See Vasey v. Martin Marietta Corp.,* 29 F.3d 1460, 1467-68 (10th Cir. 1995) (rejecting a presumption of bias when a juror has financial ties to a party); *U.S. v. Bradshaw*, 787 F.2d 1385, 1391 (10th Cir. 1986) (prior business dealings with a government witness insufficient to show juror bias).

To obtain a new trial, this Court has required that a party must demonstrate a juror failed to answer honestly a material question during voir dire. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984). Once that is proved, then the party must show a valid basis for a for-cause challenge. *Id.* Furnish had his opportunity to prove actual bias. He failed to demonstrate there was an actual or implied bias. He failed to show that Juror A was dishonest when asked a material question.

Furnish has failed to show that the Kentucky Supreme Court diverged from any of this Court's precedents. Juror A voted to recommend Furnish's death sentence based on the facts of the case. Furnish's petition is merely asking this Court to review the Kentucky Supreme Court's decision that applied the law to the facts. To invalidate the result of

Furnish's trial would be "to insist on something closer to perfection than our judicial system can be expected to give." *McDonough,* 464 U.S. at 555.

II. The Kentucky Supreme Court correctly found that any statements Juror B made regarding her consultation with her priest did not deprive Furnish of a substantial right.

Furnish also argues that the Kentucky Supreme Court's decision was at odds with this Court's precedents because Juror B's conversation with her priest influenced her own thinking and interfered with the deliberative process of the entire jury. *Furnish Pet. Cert* at 15. However, Furnish's argument stands at odds against the evidence in the record, which the Kentucky Supreme Court relied upon. *Furnish III*, Slip Op. at 11-12.

Juror B consulted with her priest sometime before jury deliberation. *Furnish III*, Slip Op. at 10. She asked her priest about the Roman Catholic Church's stance regarding the death penalty. *Id.* Her priest told her that the church generally opposed the death penalty but there were some exceptions. *Id.* They did not discuss the details of Furnish's case nor the details regarding the exceptions. *Id.* Juror B never conveyed the details of the conversation to the jury. *Id.*

The Kentucky Supreme Court affirmed the post-conviction court's finding that Juror B violated the admonition not to speak to anyone regarding the case. *Id.* at 9-10. The Kentucky Supreme Court further found that speaking with her priest was harmless error beyond a reasonable doubt. *Id.* at 14. The court reasoned that Juror B's deliberative process was not affected by the consultation with her priest. *Id.* at 11. And it further reasoned that any general statements to the jury had no effect on the deliberations. *Id.* at 14.

During voir dire, Juror B stated that she could consider the entire range of penalties including the death penalty. *Furnish III*, Slip Op. at 11. Juror B's testimony reaffirmed that she considered the entire range of penalties. The conversation with her priest did not cause her to change her beliefs and, to Furnish's benefit, actually discouraged her from recommending a sentence of death. *Furnish III*, Slip Op. at 11. Thus, if anything, Juror B's conversation with her priest erred to his benefit.

There was no evidence that Juror B's disclosure tainted the jury. *Furnish*, Slip Op. at 12. Her statements about the conversation were general and contained no details. Juror B never went into specifics and none of the jurors who testified in the post-conviction hearings gave any

indication that her statements affected jury deliberations.

When deciding whether to grant Furnish's petition, this Court cannot overlook what was actually discussed between Juror B and her priest: that the Catholic Church was opposed to the death penalty. As the Kentucky Supreme Court reasoned, their conversation—even if communicated in detail to the jury—would have made it more difficult for the jurors to vote in favor of the death penalty. *Furnish III*, Slip Op. at 14. That would have helped Furnish—not create bias prejudicial to him. *See Chapman v. California*, 386 U.S. 18, 24 (1967).

The Kentucky Supreme Court's ruling did not conflict with this Court's precedent relating to juror bias. As mentioned in Section I above, this Court's precedent does not require a new trial where there has been a hearing and a defendant has been given the opportunity to prove actual bias. *Rushen*, 464 U.S. at 118; *Smith,* 455 U.S. at 215; *Remmer*, 347 U.S. at 230. Post-conviction hearings adequately protect a defendant's right to an impartial jury. *Rushen*, 464 U.S. at 118. The lower court determines the factual circumstances, any impact on the juror, and whether there was prejudice. *Smith*, 464 U.S. at 215. A defendant's right to an impartial

jury is preserved when he or she has an opportunity to prove actual bias. *Smith*, 455 U.S. at 216.

This is exactly what happened in this case. The Kentucky Supreme Court analyzed the facts found by the circuit court. It agreed with the circuit court, finding that Juror B had committed error when she talked to her priest. It then evaluated the factual circumstances of that conversation and any prejudice to the jury deliberations.

It held that Juror B made only general statements. *Furnish III*, Slip Op. at 14. Those statements did not affect the deliberations as "none of the resentencing-trial jurors who testified offered any suggestion that Juror B's statements about her consultation with her priest affected jury deliberations." *Id.* Further, if there was any effect it would have made the jury less likely to vote in favor of the death penalty. *Id.* Any of the general statements Juror B may have made to other jurors were harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); *Fitzgerald v. Greene*, 150 F.3d 357, 365 (4th Cir. 1998) (juror bias claims are subject to harmless error analysis). Furnish's petition is merely asking this Court to review the Kentucky Supreme Court's decision which utilized correct law and applied it to the facts.

III. The Kentucky Supreme Court correctly determined that Furnish's trial counsel was not ineffective for failing to obtain a listening device for him at his 1999 trial.

Furnish argues he should have been provided a listening device during his 1999 trial. Pet. Cert. 18. However, the resolution of this issue by the Kentucky Supreme Court does not warrant this Court's review. Sup. Ct. R. 10. Furnish is requesting this Court make a determination that involves a fact-specific review to correct an alleged error of clearly established law. *Id*.

Before his 1999 trial, the trial court advised Furnish to let his attorneys know if he needed assistance to hear any testimony. During the trial, neither Furnish nor his counsel asked the trial court for hearing assistance for Furnish. As the Kentucky Supreme Court affirmed, his counsel was reasonable in accommodating the few times Furnish could not hear testimony. *Furnish III,* Slip Op. at 6-8. For example, when Furnish could not hear he would ask his counsel what a witness said. Counsel would either repeat the testimony or summarize it for Furnish. Despite these few times where Furnish needed assistance, he was actively engaged in listening to witnesses and was involved in his defense. These facts substantiate the Kentucky court's holding that his

hearing loss did not affect his representation by counsel.

Because of this evidence in the record, the Kentucky Supreme Court was correct in affirming the post-conviction court's finding. The Kentucky Supreme Court ruled that his trial counsel's performance fell within the range of professionally competent assistance. *Furnish III*, Slip Op. at 7-8. The court relied on *Strickland v. Washington*, 466 U.S. 668 (1984).

Strickland requires a defendant to show that (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced him. *Strickland*, 466 U.S. at 687. For a conviction to be overturned, counsel's deficient performance must have fallen below an objective standard of reasonableness and been so prejudicial that a defendant was deprived of a fair trial and reasonable result. *Id.* at 688.

Great deference is afforded to counsel's performance with a strong presumption that counsel's performance was reasonable and effective. *Id.* at 690. When evaluating trial counsel's performance, the appellate court focuses on the totality of the evidence before a judge or jury. *Id.* at 696. The court assesses the overall performance of counsel in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance.

Id. at 689. A defendant must also show that there is a reasonable probability that, but for any unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. Reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Here, there is no such probability that the proceeding would have been different but for the purported deficiencies.

Relying on the evidence presented at the evidentiary hearing, the Kentucky Supreme Court found the post-conviction court's factual findings were not clearly erroneous. The court then reviewed those facts and found that trial counsel's performance did not "fall outside of the range of professionally competent assistance." *Furnish III,* Slip Op. at 8. The Kentucky Supreme Court used *Strickland* in a proper analysis applying the law to the facts.

See also Anh Bi Lee v. United States, 362 F. App'x 752 (9th Cir. 2010) (failure to request interpreter not ineffective assistance of counsel where counsel took reasonable means to ensure defendant understood the nature of the proceedings).

See also United States v. Valdivia, 60 F.3d 594, 595 (9th Cir. 1995) (counsel's use of defendant's daughter as an interpreter not ineffective

assistance of counsel).

See also Gonzalez v. United States, 33 F.3d 1047, 1051 (9th Cir. 1994) (holding Gonzalez's counsel was not ineffective for failing to request a language interpreter).

Furnish cites *McCoy v. Louisiana*, __U.S.__,138 S. Ct. 1500 (2018) as a reason to grant his petition on this claim. Pet. Cert. 23. He overlooks obvious factual distinctions that render it inapplicable. McCoy repeatedly and adamantly declared his innocence and counsel acted in direct contradiction of McCoy's stated wishes and McCoy's own testimony. *McCoy*, 138 S. Ct. at 1506. McCoy asked the court to give him new counsel because he did not want to concede guilt. *Id.* McCoy's counsel conceded guilt throughout closing arguments and highlighted that concession during the penalty phase. *Id.* at 1507.

Unlike McCoy, the present case does not involve a defense lawyer's refusal to honor the defendant's desire to contest guilt. This makes all the difference in the world. Morever, Furnish did not make a plea for the trial court to provide him with a listening device. When Furnish requested help with hearing, his counsel provided adequate assistance in helping him to hear the trial. *Furnish III*, Slip Op. at 7. Unlike in *McCoy,*

there is no proof that Furnish's counsel acted contrary to any demands by Furnish. The factual disparity between Furnish's situation and that of the defendant in *McCoy* is such that the holding in *McCoy* is not in any way applicable to Furnish. Furnish remained silent throughout the trial and never made known to the court he needed a listening device. If he were granted a new trial under these circumstances, the doors of judicial system abuse would burst open. *See Validares v. United States*, 871 F.2d 1564, 1566 (11th Cir. 1989).

At most, Furnish's claim is nothing more than "the misapplication of a properly stated rule of law." Sup. Ct. R. 10. A writ of certiorari will be granted only for "compelling reasons." *Id.* Such petitions are "rarely granted." *Id.* This Court simply cannot devote itself to case-specific error correction. *See Tory v. Cochran*, 544 U.S. 734, 739 (2005) (Thomas, J., joined by Scalia, J., dissenting) (noting that the Court does not grant review for "case-specific error correction"); *Overton v. Ohio*, 534 U.S. 982, 985 (2001) (Breyer, J.) (statement respecting denial of certiorari) (noting that the Court "cannot act as a court of simple error correction"); *Calderon v. Thompson*, 523 U.S. 538, 569 (1998) (Souter, J. joined by Stevens, J., Ginsburg J., & Breyer, J., dissenting) ("it is … axiomatic that

this Court cannot devote itself to error correction."). But that is what Furnish is seeking here.

CONCLUSION

The Kentucky Supreme Court's holdings were reasonable—not to mention correct—applications of the law to the facts. His petition merely asserts that the Kentucky Supreme Court was wrong as to how it applied the law to the facts. Furnish does not present compelling reasons for this Court to grant his petition. None of the considerations highlighted in Rule 10 exist or create a legal basis for review by this Court. Based on the foregoing, Furnish's petition should be denied.

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FILING/PROOF OF SERVICE

The foregoing Brief in opposition was filed electronically on July 2, 2020 and was mailed to the Clerk of this Court.

Further, I, Jesse L. Robbins, a member of the Bar of this Court, hereby certify that on the 2nd day of July, 2020, a copy of this Brief was mailed via United States Postal Service, postage prepaid, and emailed to Hon. Dennis Burke (dennis.burke@ky.gov), Assistant Public Advocate, 5 Mill Creek Park. Section 101, Frankfort, Kentucky 40601 and Hon. Jamesa J. Drake (Jamesa_Drake@hotmail.com), Drake Law LLC, P.O. Box 56, Auburn, Maine 04212, - Counsel for Petitioner.

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