No. 20-7214

IN THE

Supreme Court of the United States

ERIC KURT PATRICK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Florida Supreme Court

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Petitioner Eric Kurt Patrick murdered Steven Schumacher, with whom he had been living. Petitioner was homeless and Schumacher offered to help him; in exchange, Petitioner allowed Schumacher to perform certain sex acts on him, even though Petitioner did not identify as a homosexual and claimed to have been repulsed by such sexual activity. According to Petitioner, on the night of the murder, Schumacher attempted to engage in a sex act that Petitioner had not previously allowed and to which Petitioner did not agree. Petitioner then beat Schumacher to death.

During voir dire in this capital case, one juror said that he believed homosexuals were morally depraved. That same juror also indicated that he would be reluctant to impose the death penalty. Petitioner's counsel concluded for strategic reasons that including that juror on the jury was beneficial to the defense. At the end of voir dire, Petitioner advised the court that he was "fine" with the jury and that his attorneys had consulted with him about the jurors.

After a trial in which overwhelming evidence of guilt was presented, including a confession and DNA evidence, the jury found Petitioner guilty of first-degree murder and the trial court imposed the death penalty.

Petitioner challenged his conviction based on trial counsel's ineffectiveness for failing to strike the juror.

During an evidentiary hearing, counsel explained that he thought the juror would be beneficial to the defense in both the guilt and penalty phases of the trial. As to the guilt phase, he thought the juror would be receptive to Petitioner's defense that he killed the victim in a rage provoked by the victim's unwelcome sexual advances, and thus that Petitioner was guilty of at most a lesser offense. As to the penalty phase, counsel thought the juror would be less likely than others to recommend death.

The question presented is: Whether, on the specific facts of this case, counsel provided ineffective assistance by strategically choosing to seat the juror.

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STATEMENT

1. When Petitioner met Steven Schumacher, Petitioner had been recently released from prison and was homeless. Pet. App. 16a. Schumacher allowed Petitioner to stay at his home while he got "back on his feet." *Id.* at 17a. In exchange, Petitioner allowed Schumacher to "perform certain sex acts on him." *Id.* at 2a. Petitioner does not identify as homosexual. *Id.* However, at various points throughout his life as he "struggle[ed] with homelessness," Petitioner met men at bars and "let them perform sex acts on him in exchange" for money. *Id.* On the night Petitioner killed Schumacher, "Schumacher tried to engage in a sex act that [Petitioner] had not previously allowed and did not agree to." *Id.* When Schumacher persisted, Petitioner, in his own words, "cut loose" on him. *Id.* at 17a.

Petitioner beat Schumacher to death in his own bedroom. *Id.* Although Petitioner initially struck Schumacher with his fists, he switched to a wooden box when his hands began to hurt. *Id.* He broke Schumacher's nose and teeth. *Id.* When Schumacher screamed for help, Petitioner tied him up and taped his mouth shut. *Id.* He eventually moved him to the bathtub and left the apartment. *Id.* Afterwards, Petitioner took Schumacher's "truck, ATM card, watch, and some money from his wallet." *Id.* at 2a.

The evidence of guilt was overwhelming. Petitioner confessed to law enforcement. *Id.* at 17a. Eyewitnesses identified him as the man staying with Schumacher the night of the murder. *Id.* at 10a–11a.

Police "found no evidence of forced entry." *Id.* at 17a. There were bloody footprints on the floor; blood spatter on the dresser, wall, sheets, and headboard of Schumacher's room; and a broken box covered in blood under the dresser. *Id.* When Petitioner was arrested, he "had injuries on his knuckles" and "abrasions on his upper body." *Id.* He was carrying a duffel bag, which contained "blood-stained boots, jeans, briefs, and socks." *Id.* DNA tests confirmed it was Schumacher's blood on Petitioner's clothing, and the boots matched the bloody shoeprints at the scene. *Id.* at 17a, 19a.

2. Petitioner was indicted and tried for first-degree murder, kidnapping, and robbery. During voir dire, the prosecutor asked jurors about their feelings on homosexuality. *Id.* at 11a. As relevant here, one venireman who was ultimately seated on the jury, Juror Martin, stated, "[p]ut it this way, if I feel the person was a homosexual I personally believe that the person is morally depraved enough that he might lie, might steal, might kill." *Id.* When asked for his views on the death penalty, Juror Martin stated, "[h]onestly I don't think any of us in here want to bear that burden when we leave here whether he's found innocent or guilty of thinking wow, I just sent somebody off to be executed, oh my God, I hope we all make the right decision." *Id.* at 3a.

At the conclusion of the jury selection process, Petitioner took the stand and he confirmed under oath that he understood and agreed with counsel's performance. *See id.* at 13a. The court also confirmed with Petitioner that he had actively discussed the jury-selection process with counsel, that they had

answered all his questions, and that they had listened to him throughout the process. *Id.* at 4a, 13a. The court asked Petitioner "if he had a gut feeling about [any of] the jurors, that maybe his attorneys liked the juror but he didn't. His response was 'I'm fine.'" *Id.* at 13a (quoting the trial record).

Petitioner was convicted on all counts. After a penalty-phase proceeding, the jury recommended death, and the trial judge agreed with the recommendation and imposed the death penalty. *Id.* at 17a. Petitioner's convictions and sentence became final on October 7, 2013, when this Court denied certiorari. *Patrick v. State*, 104 So. 3d 1048 (Fla. 2012), *cert. denied* 571 U.S. 839 (2013).

3. Petitioner later filed a habeas petition with the Florida Supreme Court requesting resentencing under *Hurst v. Florida*, 577 U.S. 92 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). He also requested a new guilt phase due to ineffective assistance of counsel based on trial counsel's failure to challenge a biased juror for cause. The Florida Supreme Court granted Petitioner a new penalty phase under *Hurst*. Pet. App. 16a. The court also remanded for an evidentiary hearing on one aspect of the ineffectiveness claim: whether Petitioner's counsel pursued an objectively reasonable strategy during voir dire when he failed to challenge Juror Martin. *Id.* at 21a. The Florida Supreme Court held that Juror Martin "showed actual bias stemming from [Petitioner's] sexual activity" because during voir dire he stated that he believed "homosexual[s]" are "morally depraved enough" to commit crimes, and he admitted that this bias might influence his

deliberations. *Id.* at 20a. Although Petitioner denied that he was a homosexual, evidence at trial showed that he had a history of participating in sexual acts with men, including the victim, before the night of the murder. *Id.* at 20a–21a. Given this evidence, the court dismissed the State's theory that because Petitioner was not a homosexual and the victim was, the juror's bias was against the victim. *Id.* Instead, it held that "by the juror's own acknowledgment on the record, he was predisposed to believe [Petitioner] is morally depraved enough to have committed the charged offenses" *Id.*

The trial court held an evidentiary hearing at which Petitioner's trial counsel testified. Petitioner's lead attorney, George Reres, testified that he had tried 22 or 23 capital and murder cases. *Id.* at 10a. He opined that "the State had a very strong case" against Petitioner "[b]ecause there was so much evidence." *Id.* In light of this overwhelming evidence, Mr. Reres "candidly admitted that he was looking at the penalty phase and that Juror Martin was better for that phase." *Id.* at 12a. Although Mr. Reres acknowledged that Juror Martin "was better for the defense in the penalty phase than the guilt phase," *id.* at 6a, he "embraced two reasons that this juror was desirable from a defense perspective under the particular facts of this case, which he opined made a strong case for guilt," *id.* at 3a.

First, Juror Martin "'was probably a good juror for the defense' in the guilt phase" because his bias against homosexuals "would have made him predisposed to accept" the defense's theory that Schumacher "preyed on" Petitioner and that

Petitioner "beat Schumacher in reaction to Schumacher's sexual advance and therefore committed something less than first-degree murder." *Id.* (quoting Mr. Reres). Mr. Reres sought "jurors who 'would be predisposed to listen carefully to' the defense theory that the killing was done . . . simply in a rage in response to Schumacher's repeated sexual advances." *Id.* at 6a (quoting Mr. Reres). Mr. Reres thought that Juror Martin's bias against homosexuals "favored" this theory. *Id.*

Second, Mr. Reres "concluded unequivocally that [Juror Martin] was good for the defense for the penalty phase." *Id.* at 3a. Mr. Reres testified that juror Martin's statements about the death penalty indicated that "this juror was reexamining his feelings concerning the death penalty during the course of voir dire, which suggested that he might lead other jurors down the same path." *Id.*; *id.* at 6a ("Reres testified that the juror at issue was favorable for the defendant in the penalty phase given his statements about the death penalty versus a life sentence and his evolving view during the course of jury selection.").

Finally, Mr. Reres also testified that Petitioner "had the ultimate say regarding the jurors." *Id.* at 12a. Petitioner's other attorney confirmed that Petitioner was involved during voir dire and that "no juror was struck or kept without [Petitioner's] approval." *Id.* at 10a.

The trial court ultimately denied Petitioner's ineffectiveness claim. *Id.* at 15a. Crediting Mr. Reres's testimony at the evidentiary hearing, the Florida Supreme Court affirmed, holding that "the decision to seat the juror at issue was a strategic one" and that

the strategy underlying that decision "was not objectively unreasonable." *Id.* at 6a. The court opined that counsel's "belief that the juror in question would serve [Petitioner's] personal interests in the trial was objectively reasonable." *Id.* It also noted that Petitioner "was actively and intelligently involved in the jury selection." *Id.* Ultimately, the court concluded that "it was logical for [Mr.] Reres to believe that the juror's bias created a higher probability that he, as compared to other potential jurors, would return a verdict of a lesser degree of murder and that, if the jury convicted [Petitioner] of first-degree murder, this juror was more likely than other potential jurors to recommend a life sentence." *Id.*

Petitioner seeks review of that ruling while he awaits his *Hurst* resentencing in trial court.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW IS CORRECT.

Petitioner argues that the Florida Supreme Court erred when it denied his *Strickland* claim based on counsel's alleged ineffectiveness in failing to exclude Juror Martin. Pet. 18. Namely, he asserts that "there simply is no sound trial strategy" (Pet. 19) that might justify counsel's decision to empanel a juror who harbored a bias that might, in some sense, be thought to run against both Petitioner and the murder victim, even if that juror might simultaneously have been predisposed to agree with Petitioner's defense theory, and even if that juror would be favorable to Petitioner in the penalty phase. He is wrong.

This Court recognized in *Strickland* that a reviewing court "must indulge a strong presumption

that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (quotations omitted). And it has since emphasized that "counsel has wide latitude in deciding how best to represent a client." *Yarborough v. Gentry*, 540 U.S. 1, 5–6 (2003). A defendant's task in "[s]urmounting *Strickland*'s high bar is never an easy" one. *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). Were it otherwise, "[a]n ineffective-assistance claim [might] function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial . . . threaten[ing] the integrity of the very adversary process the right to counsel is meant to serve." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

The Florida Supreme Court concluded that counsel's performance was not deficient under *Strickland* for two reasons. *First*, "it was logical for [Mr.] Reres to believe that the juror's bias created a higher probability that he, as compared to other potential jurors, would return a verdict of a lesser degree of murder." Pet. App. 6a. That is, the juror might have been predisposed to believe that the victim's sexual aggressions mitigated the offense and warranted a finding of guilt only as to second-degree murder or manslaughter. *Second*, assuming Petitioner would ultimately be convicted of a capital offense, "this juror was more likely than other potential jurors to recommend a life sentence." *Id.* In other words, it was not constitutionally unreasonable for counsel to believe that Juror Martin would make a

good penalty-phase juror, even if he held a bias that might be thought to run against both Petitioner and his victim. Pet. App. 6a. And counsel's decision not to challenge Juror Martin was strategic because there was overwhelming evidence of guilt that was likely to preclude an outright acquittal: Petitioner confessed; eye witnesses identified Petitioner as the man staying with the victim the night of the murder; Petitioner had bloody clothing in his bag when he was arrested that had the victim's DNA on it; Petitioner had abrasions on his hands and upper body when he was arrested, which matched the method of murder; and the shoes in Petitioner's bag at the time of his arrest matched the victim's blood and the shoe prints at the murder scene. *Id.* at 10a-11a, 17a,19a. Because of the overwhelming evidence against Petitioner, Mr. Reres "was looking at the penalty phase and [believed] that Juror Martin was better for that phase." *Id.* at 12a. Given this evidence, trial counsel's strategic choice to focus on the penalty phase was objectively reasonable. *Id.* at 6a. Ultimately, "[b]ecause the seating of the juror in question was part of a reasonable strategy that [Mr.] Reres implemented to serve [Petitioner's] interests in this trial, it cannot be said that [Mr.] Reres 'was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," which is the concern of *Strickland*'s performance prong." *Id.* at 7a (quoting *Strickland*, 466 U.S. at 687).

Even setting aside counsel's view that seating Juror Martin would assist Petitioner in obtaining a favorable result in the guilt phase, counsel's strategy was manifestly reasonable as to the guilt phase. In *Nixon v. Florida*, this Court recognized a clear distinction between capital and non-capital cases. In

the former, courts use a bifurcated procedure to determine guilt and sentencing, with a single jury presiding at both the guilt and penalty phases. Accordingly, counsel may pursue strategies in a capital case that cannot be effectively pursued in a non-capital case:

> [T]he gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus. Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous. In such cases, avoiding execution may be the best and only realistic result possible.

543 U.S. 175, 190–91 (2004) (citations and quotations omitted). Or, put differently, while in non-capital cases "guilt is almost always the only issue for the jury," *McCoy v. Louisiana*, 138 S. Ct. 1500, 1514 (2018) (Alito, J., dissenting), in a capital case counsel "may reasonably decide to focus on the trial's penalty phase, at which time counsel's mission is to persuade the trier that his client's life should be spared," *Nixon*, 543 U.S. at 191.

If, as *Nixon* held, defense counsel in a capital case can *concede* guilt to focus on the penalty phase, then counsel can surely seat a juror deemed highly

favorable to the defense for purposes of the penalty phase even if that juror is not as good for the defense during the guilt phase—particularly where, as here, that juror's views would *also* arguably favor the defense theory during the guilt phase. *Cf. Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1243–44 (11th Cir.), *cert. denied*, 565 U.S. 1035 (2011).

That is particularly true where the evidence of guilt is overwhelming. Indeed, focusing on the penalty phase here may have been the only reasonable strategy. And Juror Martin's statements during voir dire indicated that he was predisposed against the death penalty. As he stated: "Honestly I don't think any of us in here want to bear that burden when we leave here whether he's found innocent or guilty of thinking wow, I just sent somebody off to be executed, oh my God." Pet. App. 3a. Had Petitioner's counsel simply conceded his guilt and focused exclusively on the penalty phase—a strategy sanctioned by this Court in *Nixon*—Juror Martin would undoubtedly have been a prime candidate for a defense-friendly jury. It cannot be that seating Juror Martin suddenly becomes a constitutionally prohibited strategy when, though guilt is not explicitly conceded, the evidence of guilt is strong. Thus, the Florida Supreme Court correctly held that Petitioner failed to show performance that fell below a constitutionally mandated threshold.

Finally, the Florida Supreme Court recognized correctly that Petitioner was "actively and intelligently involved in the jury selection," that counsel discussed each juror with Patrick, and that

Petitioner stated in court that he was "fine" with the final panel.[1] Pet. App. 6a–7a.

Petitioner seeks a bright-line rule from this Court that it is categorically unreasonable for capital counsel to prioritize securing a life sentence over securing an acquittal. Pet. 25. But this Court has already rejected that theory. *See Nixon*, 543 U.S. at 189–91.

Nor should this Court adopt a rule that counsel's performance is deficient per se whenever a biased juror is seated[2]—an error Petitioner describes as "structural." Pet. 25. A defendant cannot point to a purported "structural" defect and claim that it relieves him of any obligation to prove counsel erred at all. Pet. 24–25. The Florida Supreme Court's ruling properly found that showing only prejudice does not "end [the] inquiry." Pet. App. 3a. Instead, as this Court has repeatedly noted, the "costs and

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[1] This Court's decision in *McCoy v.* to counsel's strategy, *i.e.*, he did not "vociferously insist[]" on a different strategy. 138 S. Ct. at 1505. And electing to seat a juror who is better for the defendant at the penalty phase than the guilt phase is nothing akin to a lawyer conceding his client's guilt. The latter invades a defendant's "[a]utonomy to decide that the objective of the defense is to assert innocence," while the former is a matter of "[t]rial management," which is plainly within "the lawyer's province." *Id.* at 1508.

[2] To make any such rule administrable, the Court would also need to establish standards for determining whether a juror's bias against the defendant with respect to the guilt phase is more strongly held than his bias against the victim, his bias against capital punishment, what balance of biases is constitutionally permissible, and whether counsel's assessment of these biases is reasonable.

uncertainties of a new trial are greater" in the postconviction context, and accordingly both prongs of *Strickland* must always "be applied with scrupulous care" in such cases. *Weaver v. Massachusetts*, 137 S. Ct. 1912, 1912 (2017) (quoting *Premo v. Moore*, 562 U.S. 115, 122 (2011)).

Thus, the decision below represents a faithful application of this Court's Sixth Amendment jurisprudence, and further review is not warranted.

II. THE LOWER COURTS ARE NOT SPLIT ON THE QUESTION PRESENTED.

Next, Petitioner fails to identify any split among the lower courts on the question presented. Indeed, no split exists.

In an attempt to manufacture a split, Petitioner cites cases from the *non*-capital context. Pet. 23–25. For instance, the Sixth Circuit in *Hughes* found in a non-capital case that the "seating of a biased juror who should have been dismissed for cause requires reversal of the conviction." *Hughes v. United States*, 258 F.3d 453, 462–63 (6th Cir. 2001) (overturning a conviction of theft of government property and being a felon in possession of a firearm because counsel was ineffective where neither the district court nor counsel followed up on a venireperson's admission that she could not be fair in deciding defendant's guilt); *see also Johnson v. Armontrout*, 961 F. 2d 748, 754 (8th Cir. 1992) (finding defendant convicted of robbery had been denied effective assistance of counsel because his attorney failed to strike jurors who had previously convicted his co-conspirator of the same crime and

thus were convinced defendant was guilty before the trial even started).

But these cases are inapposite. In non-capital cases, "guilt is almost always the only issue for the jury, and therefore admitting guilt"—or, perhaps, seating a juror likely to find guilt—would "achieve nothing." *McCoy*, 138 S. Ct. at 1514 (Alito, J., dissenting). In non-capital cases, it is thus "hard to imagine a situation in which a competent attorney might take that approach." *Id*. Put another way, in non-capital cases, there can be no strategic reason for seating a juror who might harbor a bias as to the question of guilt. However, a different goal may exist in a capital case—avoiding execution—and counsel's decision-making therefore must be judged differently. *Nixon*, 543 U.S. at 190–91. This is especially so in a case where the evidence of guilt was overwhelming. *Id.* at 191. Accordingly, *Hughes* and *Johnson* do not conflict with the Florida Supreme Court's opinion. They instead address an entirely separate legal question.[3]

Ultimately, Petitioner fails to point to a single contrary decision of any lower court holding that defense counsel renders constitutionally ineffective

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[3] To the extent *Hughes* and *Johnson* presumed prejudice for structural errors raised on collateral appeal, their holdings have been abrogated by this Court's ruling in *Weaver*. *Weaver v. Massachusetts*, 137 S. Ct. at 1913; *see Ramirez v. State*, 212 A.3d 363, 388 n.11 (Md. 2019) ("*Hughes* was issued in 2001, prior to the Supreme Court's holding in *Weaver*. Supreme Court . . . case law make[s] clear that, in the event of structural error, the doctrine of harmless error does not apply on direct appeal; but, in an ineffective assistance of counsel case, the petitioner must still prove prejudice.").

assistance by agreeing to seat a juror in the specific and unusual circumstances present here. That failure renders this Court's review unwarranted.

III. THE QUESTION PRESENTED IS FACT-BOUND AND UNLIKELY TO RECUR.

Review is also unwarranted because the issue here is unlikely to recur. The question presented arises only when (1) a juror harbors a bias that could be thought to run against both the defendant and the victim, (2) the bias at issue arguably made the juror more receptive to the main defense theory during the guilt phase, (3) the evidence of the defendant's guilt was overwhelming, (4) the juror was unlikely to recommend a death sentence and was therefore highly desirable as to what was likely to be the critical issue for the jury, and (5) defense counsel consulted with the defendant and the defendant approved the juror's selection. Indeed, Petitioner identifies no other cases raising this confluence of facts.

Cases like this one are rare because the issue is particularly fact-bound. For instance, Petitioner argues that the Court should look to the "totality of the record" to conclude that counsel's strategy was "unreasonable." Pet. 25–26. That suggestion shows not only that the issue is cabined and rare, but also that the Petition is a classic plea for sheer error correction. In other words, Petitioner does not contend that the Florida Supreme Court misstated *Strickland*'s two-prong test; he says instead that the Florida Supreme Court misapplied that test to the unique facts before it. But this Court does not grant certiorari merely to correct errors, *see* Sup. Ct. R. 10; *United States v. Johnston*, 268 U.S. 220, 227 (1925)

("We do not grant a certiorari to review evidence and discuss specific facts."); *Salazar-Limon v. Houston*, 137 S. Ct. 1277, 1278, (2017) (Alito, J., concurring in denial of certiorari) ("[W]e rarely grant review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case"), and this case should be no exception. Were this Court to grant review, it would have to wade through Juror Martin's unique comments at voir dire; the State's particular theory of guilt; the defense theory; and the evidence for and against each, including the overwhelming evidence of guilt.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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