No. 20-7214

OCTOBER TERM 2020

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

REPLY BRIEF OF PETITIONER

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REPLY

Respondent ignores entirely that Juror Martin was actually biased against Petitioner, a finding that was made not once, but twice by the Florida Supreme Court in determining that Petitioner was prejudiced by the seating of Juror Martin. Indeed, the Florida Supreme Court explained:

> … a defendant establishes the prejudice prong of an ineffective assistance of counsel claim concerning failure to challenge a juror by showing from the face of the record that a person who was actually biased against the defendant sat on the defendant's jury. We adhere to the conclusion that the juror in question was actually biased against Patrick. The postconviction court did not conclude otherwise after the evidentiary hearing.

Patrick v. State, 302 So. 3d 734, 740 (Fla. 2020)(internal citations omitted). Accordingly, Petitioner has explicitly met the prejudice prong of *Strickland v. Washington,* 466 U.S. 668 (1984)" and it cannot be said that the prejudice was presumed. In that sense, *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017) and *Ramirez v. State*, 212 A.3d 363, 387 (2019), *cert. denied,* 140 S. Ct. 1134 (2020), as suggested by Respondent to have abrogated *Hughes v. United States*, 258 F.3d 453 (6th Cir. 2001) and *Johnson v. Armontrout*, 961 F. 2d 748 (8th Cir. 1992), are irrelevant.

The Respondent's failure to address the actual bias and resulting prejudice is significant in that Respondent can then ignore the structural error that permeated Petitioner's entire trial. Just as a trial presided over by a judge that is not impartial, "the entire conduct of the trial from beginning to end is obviously affected" by the

presence of a juror who is not impartial. *Arizona v. Fulminante*, 499 U.S. 279, 309–10 (1991) "The presence of a biased juror is no less a fundamental structural defect than the presence of a biased judge." *Johnson v. Armontrout*, 961 F.2d 748, 756 (8th Cir. 1992)(citing *Arizona v. Fulimante*, 499 U.S. 279 (1991)).

Given that the seating of an actually biased juror is a fundamental structural defect, trial counsel's failure to remove the biased juror was "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington,* 466 U.S. 668, 687 (1984). Empaneling a jury that is not impartial cannot be strategic.

Contrary to Respondent's assertion, it is of little significance that Petitioner was actively participating in voir dire or that he stated he was "fine" with the jury. As *Hughes* explained, an ineffective assistance of counsel claim is not about whether the defendant is satisfied with trial counsel, but whether trial counsel's performance was objectively unreasonable. *Hughes* at 461. Similarly, the court in *Ramirez v. State* rejected the argument that a defendant's participation in voir dire renders counsel's decisions reasonable:

> [W]e do not attach significance to the circumstance that 'the record makes plain that Ramirez was actively involved in [ ] *voir dire*[ ], including the decision to challenge (or not challenge) prospective jurors.' It is the responsibility of defense counsel, not the defendant, to identify which prospective jurors to challenge. Indeed, nearly all defendants are laypeople, and a number of them have never witnessed a trial before. We decline to hold it against a petitioner who alleges ineffective assistance of counsel that he or she did not direct his or her trial counsel to challenge a particular prospective juror.

Ramirez, 212 A.3d at 387.

The existence of a structural defect renders any purported difference between a capital case and a non-capital case inconsequential. The actual bias of Juror Martin cannot be overcome by his statements regarding the death penalty. This juror did not suddenly become impartial during the penalty phase. No assurances were made by Juror Martin that he could set aside his bias upon convicting Petitioner, nor was he asked any follow-up questions in this regard. In fact, the exact opposite is true: Juror Martin acknowledged his bias towards homosexuals would affect his deliberations. (RT. 425). He did not distinguish between the guilt phase and the penalty phase. While the State had a strong case against Petitioner, the defense put forth a focused attempt to secure a verdict for a lesser offense than first degree murder, relying heavily on Mr. Patrick's statement and his candor and remorse therein. Regardless of whether trial counsel claimed the attorneys knew they would likely end up in the second phase, it is unreasonable to discount the guilt phase entirely particularly when faced with a juror whose bias would permeate the entire trial.

Furthermore, the circumstances present here are not akin to conceding guilt in the guilt phase in a capital trial so as to focus on the penalty phase. *In Florida v. Nixon,* despite counsel's concession of guilt, defendant retained the rights accorded a defendant in a criminal trial, i.e. the right to confront witnesses, the right to exclude prejudicial evidence, the right to have the State prove the essential elements of the crime *Fla. v. Nixon*, 543 U.S. 175 (2004). While not expressly mentioned by the Court, the defendant in *Nixon* was also afforded the right to an impartial jury. The

circumstances in *Nixon* do not involve the inclusion of an actually biased juror on the jury who by his own acknowledgement could not apply the law and serve impartially. In its attempt to reconcile the present issues with *Nixon*, the Respondent misconstrues the question before the Court. To be certain, Petitioner is not seeking "a bright-line rule that it is categorically unreasonable for capital counsel to prioritize securing a life sentence over securing an acquittal." (BIO at 11). Rather, Petitioner asks the Court to find that where an actually biased juror remains on the jury because counsel failed to strike the juror for cause, no strategy can justify what amounts to waiving a defendant's Sixth Amendment right to a fair and impartial jury. This was not decided in *Nixon*.

Finally, review is not unwarranted because the issue here is unlikely to recur or is particularly fact bound. In fact, this Court in *Weaver v. Massachusetts* acknowledged the scenario where structural errors may be raised in an ineffective assistance of counsel claim on collateral review.

> Neither the reasoning nor the holding here calls into question the Court's precedents determining that certain errors are deemed structural and require reversal because they cause fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process. See Murray, A Contextual Approach to Harmless Error Review, 130 Harv. L. Rev. 1791, 1813, 1822 (2017) (noting that the "eclectic normative objectives of criminal procedure" go beyond protecting a defendant from erroneous conviction and include ensuring " 'that the administration of justice should reasonably appear to be disinterested' " (quoting *Liljeberg v. Health Services Acquisition Corp.,* 486 U.S. 847, 869–870, 108 S. Ct. 2194, 100 L.Ed.2d 855 (1988))). Those precedents include *Sullivan v. Louisiana,* 508 U.S., at 278–279, 113 S.

> Ct. 2078 (failure to give a reasonable-doubt instruction); *Tumey v. Ohio,* 273 U.S. 510, 535, 47 S. Ct. 437, 71 L. Ed. 749 (1927) (biased judge); and *Vasquez v. Hillery,* 474 U.S., at 261–264, 106 S. Ct. 617 (exclusion of grand jurors on the basis of race). *See Neder, supra,* at 8, 119 S. Ct. 1827 (describing each of these errors as structural). This Court, in addition, has granted automatic relief to defendants who prevailed on claims alleging race or gender discrimination in the selection of the petit jury, *see Batson v. Kentucky,* 476 U.S. 79, 100, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986); *J.E.B. v. Alabama ex rel. T. B.,* 511 U.S. 127, 145–146, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994), though the Court has yet to label those errors structural in express terms, *see, e.g., Neder, supra,* at 8, 119 S. Ct. 1827. The errors in those cases necessitated automatic reversal after they were preserved and then raised on direct appeal. **And this opinion does not address whether the result should be any different if the errors were raised instead in an ineffective-assistance claim on collateral review.**

Weaver v. Massachusetts, 137 S. Ct. 1899, 1911–12 (2017) (emphasis added).

Petitioner has only urged the Court to view the totality of the record to the extent the record refutes counsel's testimony. The only conclusion that can be drawn from the totality of counsel's responses is that counsel's testimony amounts to speculation and hindsight. This is the sort of "'post hoc rationalization' for counsel's decision-making that contradicts the available evidence of counsel's actions" that courts cannot indulge. *Cullen v. Pinholster*, 563 U.S. 170, 230 (2011) (internal citations omitted). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. The record refutes that counsel was engaging in a strategy to seat biased jurors because every other

juror who expressed an inability to be fair and impartial where homosexuality was an issue was struck for cause without objection or by agreement from the defense. It cannot be said that Petitioner's jury was free of partiality. No sound trial strategy can support what amounted to a waiver of Mr. Patrick's Sixth Amendment right to a fair and impartial jury.

CONCLUSION

Petitioner's claim for relief properly presents this Court with a debatable or important unsettled question of constitutional law necessitating review. This Court should grant certiorari.

Respectfully submitted,

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