NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY KIRKLAND, Petitioner,

vs.

STATE OF OHIO, Respondent.

On Petition for a Writ of Certiorari to
the Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

(CAPITAL CASE: EXECUTION DATE IS SEPTEMBER 18, 2024)

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CAPITAL CASE:
EXECUTION DATE IS SEPTEMBER 18, 2024

QUESTIONS PRESENTED

I. Are a capital defendant's rights to a fair trial by an impartial jury, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments, denied when one of the empaneled jurors believes the death penalty should be used in all cases of murder?

II. Does defense counsel's failure to excuse or otherwise object to a juror who is biased in favor of the death penalty in all cases of murder, and thereby allows that juror to sit on the jury which will determine whether the defendant's sentence is life or death, deny the capital defendant the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments, warranting a new sentencing trial?

DIRECTLY RELATED CASES

1. *State v. Kirkland*, Case No. 2018-1265 (Supreme Court of Ohio), judgment entered August 18, 2020 & reconsideration denied Oct. 13, 2020

2. *State v. Kirkland*, Case No. 2010-0854 (Supreme Court of Ohio), judgment entered May 13, 2014 & reconsideration denied Sept. 24, 2014 & remanding for new mitigation and sentencing hearing May 4, 2016

3. *Kirkland v. Ohio*, Case No. 14-7726 (United States Supreme Court), cert. denied April 6, 2015

4. *State v. Kirkland*, Case No. C-1200565 (Court of Appeals of Ohio, First Appellate District), post-conviction appeal, pending and stayed

5. *State v. Kirkland*, Case No. C-100277 (Court of Appeals of Ohio, First Appellate District), appeal dismissed on November 24, 2010

6. *State v. Kirkland*, Case No. B-0901629 (Ohio Ct. of Common Pleas, Hamilton County), judgment of original death sentence entered on March 31, 2010 & current death sentence entered on August 28/29, 2018

7. *State v. Kirkland*, Case No. B-0904028 (Ohio Ct. of Common Pleas, Hamilton County), judgment of sentence in related case entered on March 31, 2010

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony Kirkland respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio in *State v. Kirkland*, 2020-Ohio-4079, 160 Ohio St. 3d 389, 157 N.E.3d 716 (2020).

OPINIONS BELOW

The opinion of the Supreme Court of Ohio for which Petitioner seeks a writ of certiorari is reported at *State v. Kirkland*, 2020-Ohio-4079, 160 Ohio St. 3d 389, 157 N.E.3d 716. (*Appx*-0001.)

The Supreme Court of Ohio's order of October 13, 2020, denying Petitioner's timely motion for reconsideration is reported at *State v. Kirkland*, 2020-Ohio-4811, 154 N.E.3d 109. (*Appx*-0050.)

The order of the Supreme Court of Ohio of May 4, 2016, remanding the case to the trial court for a new mitigation and sentencing hearing, is reported at *State v. Kirkland*, 145 Ohio St. 3d 1455, 2016-Ohio-2807, 49 N.E.3d 318. (*Appx*-0105.) The order of the Supreme Court of Ohio of November 9, 2016, denying reconsideration of the order of remand, is reported at *State v. Kirkland*, 147 Ohio St. 3d 1440, 2016-Ohio-7681, 63 N.E.3d 158. (*Appx*-00106.)

This Court's denial of certiorari of April 6, 2015, as to review of the Ohio Supreme Court's May 13, 2014 decision, is reported at *Kirkland v. Ohio*, 575 U.S. 952, 135 S. Ct. 1735, 191 L. Ed. 2d 705. (*Appx*-0104.)

The earlier opinion of the Supreme Court of Ohio of May 13, 2014, which affirmed the convictions and the initial death sentence, is reported at *State v.*

Kirkland, 140 Ohio St. 3d 73, 2014-Ohio-1966, 15 N.E.3d 818. (*Appx*-0051.) The order of the Supreme Court of Ohio of September 24, 2014, denying reconsideration, is reported at *State v. Kirkland*, 140 Ohio St. 3d 1442, 2014-Ohio-4160, 16 N.E.3d 684. (*Appx*-0103.)

The trial court's current sentencing opinion of August 28/29, 2018, and related judgment, in which that court—on remand and after a new mitigation and sentencing hearing in July/August 2018—sentenced Petitioner to death, are unreported. (*Appx*-0107.)

The trial court's initial sentencing opinion of March 31, 2010, and related judgment, in which that court sentenced Petitioner to death, are unreported. (*Appx*-0127.)

JURISDICTION

The Supreme Court of Ohio issued its opinion on August 18, 2020. (*Appx*-0001.) Petitioner filed a timely Motion for Reconsideration on August 24, 2020. On October 13, 2020, the Supreme Court of Ohio denied Petitioner's motion for reconsideration. (*Appx*-0050.) This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment, which provides in part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . .; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]

The Sixth Amendment, which provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment, which provides in part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. The first trial in 2010.

Petitioner was found guilty by a jury in Hamilton County, Ohio in 2010 of the aggravated murders of two teenagers, Esme K. (in 2009) and Casonya C. (in 2006), as well as, for each victim, capital specifications of aggravating circumstances; this required Petitioner's case to proceed to the penalty phase for a determination of whether his sentence would be life or death.

The pertinent aggravating circumstances were: (1) that Petitioner committed both aggravated murders while committing or attempting rape and/or aggravated robbery, and (2) that both aggravated murders were part of a course of conduct involving the purposeful killing of two or more people. That "course of conduct" specification was based on the purposeful killings of Esme K. and Casonya C. plus that of two other women, in or about 2006 and 2008, respectively: Mary Jo Newton and Kimya Rolinson. Petitioner pleaded guilty to those two murders on the first morning of his trial, and the trial thus proceeded before a jury on the two capitally-charged aggravated murders of Esme K. and Casonya C.

During the penalty phase in 2010, Petitioner presented evidence of remorse by way of his confessions to the murders, his suffering a personality disorder, and his extensive abuse during childhood by a sadistic and alcoholic father. The trial court summarized: "The defendant's biological father . . . was alcohol dependent and extremely violent toward the defendant and his mother. In addition to physically abusing the defendant, the defendant was forced to watch his father beat and rape

the defendant's mother." (2010 Sentencing Opinion at 7 (*Appx*-0135).)

The jury returned a verdict for the death sentence. The trial court imposed that sentence. (*Id.* at 8-14 (*Appx*-0136 to -0142).)

B. The first appeal to the Supreme Court of Ohio.

Petitioner appealed to the Supreme Court of Ohio, where Petitioner raised a number of issues. Among these were claims that the prosecutor had engaged in multiple instances of misconduct during the penalty-phase closing argument.

The Supreme Court of Ohio agreed, concluding that the prosecutor:

> (1) improperly argued that a sentence less than death is meaningless and would not hold Petitioner accountable for the two victims' deaths when Petitioner had already received a life sentence for Newton and Rolinson's murders;
>
> (2) improperly speculated about the victims' objective experiences during the crimes;
>
> (3) made arguments based on "facts" that were not in the record; and
>
> (4) improperly and repeatedly argued that the nature and circumstances of the murders themselves were aggravating circumstances, and asked the jury to weigh those against the mitigation.

State v. Kirkland (Kirkland I), 140 Ohio St. 3d 73, 83-87, 2014-Ohio-1966, ¶¶ 78-96 (2014). (*Appx*-0065 to -0071.)

The court also found that the prosecutor's closing argument prejudicially affected Petitioner's substantial rights: "In sum, we find that the state's closing remarks in the penalty phase were improper and substantially prejudicial." *Kirkland I*, 140 Ohio St. 3d at 87, 2014-Ohio-1966, ¶ 96. (*Appx*-0071.)

Nonetheless, the court declined to remand the case for a new sentencing

hearing because it determined that its own "independent evaluation of the capital sentence" would itself be capable of "cur[ing] errors in penalty-phase proceedings." *Kirkland I*, 140 Ohio St. 3d at 87, 2014-Ohio-1966, ¶97. (*Appx*-0071.) Upon conducting that evaluation, in which the court did "not consider the state's improper argument," *id.* at ¶ 98, the court affirmed Petitioner's death sentence. *Id.* at 95-98, 2014-Ohio-1966, ¶¶ 141-66. (*Appx*-0082 to -0087.)

There were three dissents; all three believed the case should be remanded for a new sentencing proceeding. Two of the dissenting justices believed the prosecutorial misconduct mandated that new sentencing proceeding; they believed the new penalty phase was necessary to "preserve the unique role of the jury in capital cases," *id.* at ¶ 194 (Lanzinger, J., dissenting), and to avoid "undermin[ing] the very foundation of the jury system in Ohio." *Id.* at ¶ 199 (O'Neill, J., dissenting). (*Appx*-0097, -0099.)

C. After *Hurst*, the Supreme Court of Ohio ordered a new sentencing phase.

On January 12, 2016, this Court issued its opinion in *Hurst v. Florida*, 577 U.S. 92 (2016). There, the Court made clear that the Sixth Amendment requires that a capital defendant's death sentence must be based on a jury verdict, not a judge's factfinding. *Id.* at 102 ("The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding.").

Relying upon *Hurst*, Petitioner filed in the Supreme Court of Ohio on March 3, 2016, a motion for order or relief, in which he asked that court to vacate his death sentence and remand the matter to the trial court for a new sentencing trial.

On May 4, 2016, the Supreme Court of Ohio issued an order granting Petitioner's motion and remanded the case to the trial court "for new mitigation and sentencing hearing." *State v. Kirkland*, 145 Ohio St. 3d 1455, 2016-Ohio-2807 (2016). (*Appx*-0105.) The State sought reconsideration, but that was denied on November 9, 2016. *State v. Kirkland*, 147 Ohio St. 3d 1440, 2016-Ohio-7681 (2016). (*Appx*-0106.)

D. The second penalty phase in 2018: The voir dire was rushed and totally ineffective.

After pretrial proceedings and a change in counsel, the new penalty-phase trial began on July 23, 2018 in the Hamilton County Court of Common Pleas; it was conducted over the next two weeks. Jury selection, by contrast, only lasted two court-days, July 23 and 24, 2018.

The importance of the *jury's* role in capital sentencing was in part what necessitated the new penalty-phase trial. Nonetheless, the process for selection of that jury for the resentencing trial was superficial and shockingly brief.

This hurried approach was for a death-penalty sentencing proceeding in which: (1) there were *four* female victims including two young teens, (2) the defendant had *already been found guilty* of all subject crimes and capital specifications and thus the critical question of the juror's ability to consider sentences other than death in the event of a guilty verdict was *no longer a hypothetical question*, unlike in most capital jury selections, and (3) the case presented highly sensitive issues of race and class, including, for example, that Petitioner is an indigent middle-aged Black man with severe mental illness, whose jury in 2018 would be tasked with determining his sentence—life or death—for aggravated murder and sexual assault against a white

teenager from a wealthy Cincinnati neighborhood (Esme K.) and another teenager of his own race (Casonya C.).

In the first part of the jury selection, the prospective jurors appeared on Thursday July 19 to complete a 15-page jury questionnaire. (T. 172-73, 193-94; Court Exhibit 7.) The prospects received some preliminary instructions from the court that day, and inquiries were made to the entire venire about any hardships. (T. 220-59.) Those prospects, whom were not excused with approved hardships, were then sent to another room upstairs to complete the questionnaire. (T. 258-59.)

After the prospective jurors finished the questionnaires on July 19, and before they left for a long weekend, the court brought them all back into the courtroom and asked for a show of hands as to two questions about the death penalty: **(1)** "is there any juror who believes because of your personal feelings on the death penalty you would never impose the death penalty, if given a choice?" (T. 322); and **(2)** "is there any Juror who believes because of your personal feelings on the death penalty, you would always impose the death penalty if given the choice? Anybody there? A couple people." (T. 323.)

Those who answered yes to either question—and there were only 15 prospects who did so (Juror Nos. 2, 8, 17, 21, 27, 54, 55, 63, 66, 68, 77, 87, 94, 99, 120)—were each instructed to appear back in court at 9:00 a.m. on Monday July 23, 2018. (T. 323-24.) Those who did not raise their hand were required to report back at 10:00 on July 23. (T. 324.) The trial court was thus planning *one hour* for "death penalty" voir dire of those 15 prospective jurors; the defense failed to object to that unconscionably

rushed schedule.

Most of those who had raised their hands, as being "always" or "never" for the death penalty, were responding consistently with their answers to the questionnaires. For example, nine of these 15 prospects answered Questions 42 and 43 to state that he/she was "opposed" to the death penalty "in all cases," and "strongly agreed" that "the death penalty should never be used as the punishment for any murder." (Juror Nos. 8, 27, 55, 68, 77, 87, 94, 99 and 120). One prospect—Juror No. 17—likewise responded that she was "opposed" to the death penalty "in all cases," and she "agreed" (as distinct from "*strongly* agreed") that "the death penalty should never be used as the punishment for any murder."

Two others—Juror Nos. 54 and 63—were staunchly *pro-death penalty*: they both answered Questions 42 and 43 to state that the death penalty is "appropriate in *every case* where someone has been murdered," and they both "strongly *agreed*" that "the death penalty should **always** [emphasis in original] be used as the punishment for every murder," and "strongly *disagreed*" (Juror No. 63) or "*disagreed*" (Juror No. 54) that the "the death penalty should **sometimes** [emphasis in original] be used as the punishment in certain murder cases."

One juror who evidently had *not* raised her hand, and was thus *not* one of the fifteen called back for the 9:00 a.m. session on July 23 was ***Juror No. 36***. Her responses to Questions 42 and 43 were very similar to those of staunchly pro-death prospective Juror Nos. 54 and 63. Like them, she responded that the death penalty is "appropriate in every case where someone has been murdered," and she ***"agreed"***

(as distinct from "strongly" agreed for Juror Nos. 54 and 63) that "the death penalty should **always** be used as the punishment for every murder," and she "*disagreed*" (like Juror No. 54, but unlike Juror No. 63 who "strongly" disagreed) that the "the death penalty should **sometimes** be used as the punishment in certain murder cases."

Indeed, ***Juror Nos. 36, 54, and 63*** (plus one more prospect Juror No. 95, who was never reached in the questioning) were the only prospects, of some *93 prospects* who completed questionnaires, to unambiguously express such strident pro-death-penalty views in their questionnaires.

Nonetheless, Juror No. 36 did not raise her hand. This may have been because the judge's question had been too broadly worded by not limiting his inquiry to *murder* cases: "is there any Juror who believes because of your personal feelings on the death penalty, you would always impose the death penalty if given the choice?" (T. 323.) But the inquiry of this prospective juror was *so exceedingly superficial*, as addressed more below, that no explanation was ever sought or provided as to why she did not raise her hand.

On the morning of July 23, 2018, the jury selection began with the fifteen hand-raising prospects, but obviously not with Juror No. 36 (who had not raised her hand). Before beginning on July 23, Petitioner's counsel orally asked the court that they be permitted to conduct individual sequestered voir dire for each of those 15 prospects. (T. 358-59.) The State opposed that oral request, and the trial court denied it. (T. 361 ("Your request to have individual sequestered questioning is overruled.").)

The court, then counsel for the parties, asked questions about the death penalty to each of the 15 prospects, *and they did so in front of all the other 15 prospects*. (T. 362-463.) The process was very rushed, taking only some 2 hours (a little longer than the one hour planned by the trial court), and was dominated by superficial questioning, rote questions, and follow-the-law platitudes. As a result, 11 of the 15 prospective jurors, who expressed opposition to the death penalty, were excused for cause at the State's request, and over Petitioner's objection. This included ***all nine*** who had responded in their questionnaires that he/she was "opposed" to the death penalty "in all cases," and that he/she "strongly agreed" that "the death penalty should never be used as the punishment for any murder" (*i.e.*, Juror Nos. 8, 27, 55, 68, 77, 87, 94, 99 and 120), plus Juror Nos. 2 and 66.

It also included the two staunchly pro-death-penalty prospects—Juror Nos. 54 and 63—who stated in their questionnaires that the death penalty is "appropriate in every case where someone has been murdered," "strongly agreed" that "the death penalty should **always** be used as the punishment for every murder," and "disagreed" (Juror No. 54) or "strongly disagreed" (Juror No. 63) that the "the death penalty should **sometimes** be used as the punishment in certain murder cases."

The remaining two of the 15 hand-raising prospects—Juror Nos. 17 and 21—were not excused and thus remained on the panel to proceed to the next phase of jury selection later that morning. (T. 381-411.)

The jury selection then immediately proceeded that morning to general voir dire of the entire group of the first 16 prospects in the box, with all the other prospects

still in the courtroom, but with the court's explicit instruction that questioning was only to be directed to the 16 in the box at the time. (T. 467-69.)

The prosecutor conducted a general voir dire of the 16 prospects. (T. 486-96, 519-46.) He described each of the four murders (Casonya C., Mary Jo Newton, Kimya Rolinson, and Esme K.) in some detail, explained that Petitioner had already been convicted of those four murders and the aggravating circumstances, and he called Petitioner a "serial killer." (T. 490-93, 526-27.) He expressly sought commitments from the prospects, asking them: "if we prove the aggravating outweighs the mitigating, [can you] come back in the courtroom with your signature on a verdict form saying this man right here should be sentenced to death?" (T. 530; *see also* T. 531-46.) The State passed for cause as to those 16. (T. 546.)

Defense counsel then conducted their general voir dire of the first 16 in the box. (T. 546-74, 578-601, 619-40.) The defense made two challenges for cause (Juror Nos. 6 and 17), which were denied. (T. 641-44.)

The court then sent those 16 upstairs to wait (T. 644-50), and the general voir dire proceeded, in the same fashion, with the next 16 prospects. After brief inquiry by the judge, the prosecutor conducted a general voir dire of that panel of 16. (T. 658-700.) The State made two challenges for cause as to those 16 (Juror Nos. 24 and 38) based on their views about the death penalty (T. 701-02), which were deferred by the court until after the defense counsel's opportunity to question that panel of 16. (T. 702.)

Thereafter, defense counsel conducted their general voir dire of that same

panel of 16 (T. 707-13), starting first with the two prospects (Juror Nos. 24 and 38) against whom the State had made challenges for cause. The State then promptly renewed those two challenges, and, over the defendant's objection, the court granted the challenge as to Juror No. 38, and denied it as to Juror No. 24. (T. 717-19.)

Defense counsel then resumed the general voir dire. In the box with this second group of sixteen was ***Juror No. 36***, whose responses to her jury questionnaire had plainly identified her as believing the death penalty is appropriate for every case of murder and that the death penalty should always be used as the punishment for every murder. Defense counsel, apparently noticing for the first time that this prospect had expressed strident pro-death penalty views like the two jurors earlier excused for cause (Nos. 54 and 63), briefly and ineptly addressed that issue with her:

> [DEFENSE COUNSEL]: I think you listed the death penalty is necessary?
>
> PROSPECTIVE JUROR [NO. 36]: Yes.
>
> [DEFENSE COUNSEL]: Did you mean necessary in some cases, all cases?
>
> PROSPECTIVE JUROR [NO. 36]: Some.
>
> [DEFENSE COUNSEL]: Thank you for correcting me so quickly. The death penalty should always be used as a punishment for every murder. You put you agreed with that.
>
> PROSPECTIVE JUROR [NO. 36]: In answering the question, yes, at the time, yes. I answered yes.
>
> [DEFENSE COUNSEL]: So you don't think it is appropriate in every case?
>
> PROSPECTIVE JUROR [NO. 36]: In listening to -- there are so many different cases that was discussed earlier today, I don't know how to

answer that honestly.

[DEFENSE COUNSEL]: That's all right. I didn't mean to put you on the spot.

(T. 748-49.) Neither defense counsel nor the court made any further inquiry. And defense counsel failed to seek her for-cause exclusion, which obviously would or should have been granted on the same basis as their successful exclusions of prospective Juror Nos. 54 and 63.

Due to the rushed and superficial inquiry, the general voir dire of that second panel was completed after lunch that same day, July 24, 2018. Both sides passed for cause as to that panel. (T. 725-35, 737-58.)

At that point, the court determined that enough prospective jurors had not been excused for cause (32 in total), so as to give the parties a sufficient number of prospects on which to exercise peremptory challenges (6 each, plus 2 each for alternates) and still have 16 remaining (12, plus 4 alternates) to sit as jurors for the case. (T. 759-62.) The court thus allowed the rest of the panel to be excused. (T. 759, 763-65.)

The parties then conducted the peremptory challenges on the afternoon of July 24. (T. 766-81.) The defense was only allowed six peremptory challenges and used all of them. (T. 768-79.) The defense did not use a peremptory on Juror No. 36; she sat on Petitioner's jury as a regular member (not an alternate). (T. 779.) The jury was sworn in that same afternoon. (T. 785.)

In total, the jury selection for this death-penalty sentencing proceeding *took less than two days of trial time.*

E. The second penalty phase trial resulted in a death sentence.

During his penalty-phase trial in July/August 2018, Petitioner again presented evidence of remorse and of the extensive abuse he suffered during childhood by his sadistic and alcoholic father.

Petitioner also presented testimony from a psychiatrist, with expertise in diagnostic brain imaging technology, establishing that Petitioner had been suffering with traumatic brain injuries for many years and at all times relevant to the murders. This was demonstrated using three different types of brain scanning technology and was corroborated by Petitioner's medical and mental health records, and his long history of diagnosed Axis I mental illnesses, including bipolar disorder.

Petitioner also presented testimony from a second expert, a psychologist, that he suffers with the serious mental illness of post-traumatic distress disorder—with dissociation. (T. 1353, 1406-57.) That expert described how Petitioner's serious mental illnesses have impacted his life and behavior, including his involvement in these crimes. (T. 1406-58.) She opined that, because of his severe mental illness, Petitioner was not able to conform his conduct to the requirements of the law. (T. 1354, 1450-58.)

After presentation of the evidence and argument, the jury returned a verdict for the death sentence. The trial court imposed that sentence. (2018 Sentencing Opinion (*Appx*-0107).)

F. The second appeal to the Supreme Court of Ohio.

Petitioner again appealed to Supreme Court of Ohio. He raised eleven propositions of law in his direct appeal brief, including as relevant here:

> PROPOSITION OF LAW THREE
> It was a violation of Due Process, a violation of the right to an impartial jury, and a violation of the right to a fair trial when the sentence was determined by a biased juror who felt the death penalty was always appropriate.

He also argued, in Proposition of Law Six, that his trial counsel had rendered constitutionally deficient performance, in failing to specifically question prospective Juror No. 36 on her views on the death penalty and failing to challenge her for cause.

The court rejected these and other propositions of law and affirmed the death sentence. *State v. Kirkland (Kirkland II)*, 160 Ohio St. 3d 389, 2020-Ohio-4079 (2020) (*Appx*-0001.)

REASONS FOR GRANTING THE WRIT

I. Petitioner was denied his constitutional rights to a fair trial by an impartial jury because a biased juror, who believed the death penalty should be used in all cases of murder, was permitted to sit on the jury that determined whether Petitioner should suffer death for his crimes.

The Sixth and Fourteenth Amendments guarantee a criminal defendant a trial by an impartial jury. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970); *Morgan v. Illinois*, 504 U.S. 719, 728 (1992); *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Principles of due process, under the Fifth and Fourteenth Amendments, also guarantee an impartial jury. *Ristaino v. Ross*, 424 U.S. 589, 595 n.6 (1976); *Morgan*, 504 U.S. at 727 ("due process alone has long demanded

that, if a jury is to be provided the defendant, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment.").

Importantly, the bias or prejudice of even a *single juror* is enough to violate these constitutional guarantees, and especially so in a capital case. *Morgan*, 504 U.S. at 729 (if even one juror who will automatically vote for the death penalty "is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence"); *Adams v. Texas*, 448 U.S. 38, 51 (1980) ("the Constitution disentitles the State to execute a sentence of death imposed" by a jury from which qualified jurors were improperly excluded). Accordingly, the presence of a biased juror, in a penalty-phase proceeding, cannot be harmless; the error requires a new penalty-phase trial and does not require a showing of actual prejudice.

"Voir dire plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality opinion). As a result, "[t]he exercise of [the trial court's] discretion, and the restriction upon inquiries at the request of counsel, [are] subject to the essential demands of fairness." *Aldridge v. United States*, 283 U.S. 308, 310 (1931); *Morgan*, 504 U.S. at 729-30.

These constitutional protections were denied in Petitioner's case because Juror No. 36 had a disqualifying bias in favor of the death penalty in all cases of murder.

She said in response to Question 41 that the "death penalty is necessary." With respect to her views on *usage* of the death penalty, as asked in Questions 42 and 43, she made her disqualifying-bias unmistakably clear. She checked the box for "**Appropriate in every case where someone has been murdered**," in response to Question 42, which is listed below:

> 42. Which of the following statements best reflects your view of using the death penalty (check one)?
>
> **X Appropriate in every case where someone has been murdered.**
>
> □ Appropriate with very few exceptions where someone has been murdered.
>
> □ Appropriate in some murder cases, but inappropriate in most murder cases.
>
> □ Opposed with very few exceptions.
>
> □ Opposed in all cases.

That response—"appropriate in every case where someone has been murdered"—is what Juror No. 36 checked as "**best reflecting**" her view about the use of the death penalty.

She made that view *even clearer* in her response to Question 43. There, she checked that she "disagree[s]" with the statement that "the death penalty should **never** be used as the punishment for any murder." She checked that she "agree[s]" with the statement that "the death penalty should **always** be used as the punishment for every murder." And, she checked that she "disagree[s]" with the statement that

"the death penalty should **sometimes** be used as the punishment in certain murder cases."[1]

Petitioner's case involved *four* murders including of two teens, in addition to rapes and attempted rapes. That Juror No. 36 was disqualified by her views from serving on Petitioner's case was, or should have been, obvious to both defense counsel and the trial judge.

The inquiry in the case of a prospective juror with a potentially disqualifying bias is whether the juror has demonstrated "actual bias." "Actual bias is 'bias in fact'—the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." *United States v. Wood*, 299 U.S. 123, 133 (1936). *See also Miller v. Webb*, 385 F.3d 666, 673 (6th Cir. 2004). If actual bias is discovered during voir dire, the *trial court* must excuse the prospective juror, even if the prosecutor or defense counsel fail to do so. *Frazier v. United States*, 335 U.S. 497, 511 (1948) ("duty reside[s] in the court to see that the jury as finally selected is subject to no solid basis of objection on the score of impartiality"); *Webb*, 385 F.3d at 673. *See also Hughes v. United States*, 258 F.3d 453, 459 (6th Cir. 2001).

Actual bias can exist when a juror makes an unequivocal statement of partiality and there was neither a subsequent assurance of impartiality nor rehabilitation by counsel or the court through follow-up questions. *See, e.g.*, *Hughes*, 258 F.3d at 460; *Miller v. Webb*, 385 F.3d at 674-75 ("As in *Hughes*, Juror Bell did not

[1] The **bold** emphasis is contained in the original text of all the questionnaires themselves.

unequivocally swear that she could set aside her opinion and decide the case on the evidence. . . . Neither counsel nor the judge followed-up on her statement of partiality. They did not ask whether she could 'lay aside [her feelings] and render a verdict based on the evidence presented in court.' . . . [W]hen the trial court is ultimately left with a statement of partiality, as in this case, that is coupled with a lack of juror rehabilitation or juror assurances of impartiality, we are left to find actual bias") (quoting *Irvin*, 366 U.S. at 722-23).

Here, the facts could not be more certain that Juror No. 36 was "in fact" biased in favor of the death penalty for all murders, so much so that she could not be impartial and faithfully fulfill her role as a juror in deciding if Petitioner lived or died. She never retreated from nor contradicted her biased views. And she was never asked whether she would or could lay aside her feelings about usage of the death penalty and render a verdict based on the evidence presented in court. She was never asked if she could fairly consider mitigation.

The presence of Juror No. 36's biased views is beyond dispute. The Supreme Court of Ohio *agreed* that her questionnaire "contains an expression of partiality on the part of prospective juror No. 36," and reveals that she would not act "with entire impartiality." *Kirkland II*, 2020-Ohio-4079 at ¶ 73 (quoting *United States v. Torres*, 128 F.3d 38, 43 (2d Cir.1997)). (*Appx*-0018 to -0019.) But the court continued that the "expression of partiality does not end the analysis. A court will find actual bias when a prospective juror's unambiguous statement of partiality is 'coupled with a lack of juror rehabilitation or juror assurances of impartiality.'" *Kirkland II*, 2020-Ohio-4079

at ¶ 74 (quoting *Miller*, 385 F.3d at 675). (*Appx*-0019.) And, in the court's view, Juror No. 36 had been "rehabilitated." *Kirkland II*, 2020-Ohio-4079 at ¶ 75. (*Appx*-0019.)

On that critical issue, the Supreme Court of Ohio is greatly mistaken. There was no rehabilitation. Contrary to the court's suggestion, Juror No. 36 did *not* indicate that she no longer held her biased opinion about the death penalty. The court relied on the following very brief exchange in concluding that Juror No. 36 had "contradicted" her questionnaire responses and has retracted her biased views:

> MR. CUTCHER [defense counsel]: I think you listed the death penalty is necessary?
>
> [Prospective juror No. 36]: Yes.
>
> MR. CUTCHER: Did you mean necessary in some cases, all cases?
>
> [Prospective juror No. 36]: *Some cases*.
>
> MR. CUTCHER: Thank you for correcting me so quickly. The death penalty should always be used as a punishment for every murder. You put you agreed with that.
>
> [Prospective juror No. 36]: In answering the question, yes, *at the time, yes*. I answered yes.
>
> MR. CUTCHER: So you don't think it is appropriate in every case?
>
> [Prospective juror No. 36]: In listening to—there are so many different cases that was discussed earlier today, I don't know how to answer that honestly.
>
> MR. CUTCHER: That's all right. I didn't mean to put you on the spot.

Kirkland II, 2020-Ohio-4079 at ¶ 70 (italics added by court). (*Appx*-0017 to -0018.)

But the foregoing exchange did not accurately characterize Juror No. 36's written responses, and did not directly (or even clearly) ask her about those

responses. She had not merely described the death penalty as "*necessary*." Her questionnaire stated the death penalty is "appropriate in *every case* where someone has been ***murdered***," she "*agreed*" that "the death penalty should **always** be used as the punishment for every ***murder***," and she "*disagreed*" that the "the death penalty should **sometimes** be used as the punishment in certain ***murder*** cases."

Thus, when Juror No. 36 said the words "some cases," in response to defense counsel's poorly-framed question about when the "death penalty is necessary," that response was fully consistent with, and did not retreat one iota from, her strongly-stated dogmatic views. Her questionnaire responses to Questions 42 and 43 had been limited, by the terms of the questions, to those cases where the offender had committed ***murder***.

Yes, she said "some cases." But what about "murder cases"? Defense counsel's question did not ask that. And what about "murder cases" with four murder victims? Defense counsel didn't ask that either. No one asked. Yet, Juror No. 36's *questionnaire* responses left no doubt where she stood on those more precise questions: The death penalty should always be used because those are murder cases.

What's more, Juror No. 36 said she was unable to answer the most important question in the above exchange, which was: "So you don't think it is appropriate in every case?" *Even if* "every case" is interpreted to mean "every murder case," Juror No. 36 bluntly responded: "**I don't know how to answer that honestly**." Instead of trying to get her to provide an answer or explain her inability to do so, and thereby avoid her dodge, defense counsel apologized for "putting her on the spot," and moved

on to the next prospect. No one else followed up with No. 36. The trial court did not do so, nor did the prosecutor.

In short, there is nothing in the above exchange that suggests Juror No. 36's in-court views about the death penalty were any different from, or had contradicted in any way, what she wrote in her questionnaire: The death penalty is necessary *and* it should be used in all cases of murder.

The only *other* support the Supreme Court of Ohio cited for its conclusion that Juror No. 36 had been "rehabilitated" and/or had "contradicted" her biased views is a group question defense counsel had posed to "the panel members as a group whether they understood that the death sentence is not automatic," and that just because Petitioner had been found guilty that did not mean the case was over. *Kirkland II*, 160 Ohio St. 3d at 401, 2020-Ohio-4079, ¶ 69 (relying on proceedings at page 557 of the trial transcript). (*Appx*-0017.) The court noted that none of the prospects responded to those group questions, thereby suggesting that Juror No. 36, by an alleged non-response, had somehow "contradicted" her written questionnaire. But the court's reliance on that group questioning is mistaken for two reasons.

First, such a general group inquiry is hardly sufficient to satisfy the requirement that the potentially biased juror must swear she can be impartial and can and will set aside her biased views. Juror No. 36's silence in response to general questions "did not constitute an assurance of impartiality." *Hughes*, 258 F.3d at 461; *see also Morgan*, 504 U.S. at 734-35 (rejecting the argument that "general inquiries

could detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath").

But, more fundamentally, Juror No. 36 was *not* in the group of 16 prospects to which defense counsel had posed the group questions relied upon by the Supreme Court of Ohio. Those questions were posed to the *first group* of 16 (T. 463-64, 474-76, 557); but Juror No. 36 was in the *second group* (T. 648-50), and defense counsel did *not* pose those group questions to the second set of prospective jurors. (T. 729-59.)

The record clearly affirms that Juror No. 36 never retreated from nor contradicted her biased views. But, even worse, she was never asked whether she would or could lay aside her feelings about the death penalty and render a verdict based on the evidence presented in court. The need for assurance that a potentially biased juror can lay aside his/her biases is absolutely critical. The relevant question is: "did [the] juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." *Patton v. Yount*, 467 U.S. 1025, 1037 (1984); *Irvin v. Dowd*, 366 U.S. 717, 723 (1961) (juror must be able to "lay aside his impression or opinion and render a verdict based on the evidence presented in court"); *Miller*, 385 F.3d at 675.

Juror No. 36 never provided that essential assurance. She was never even asked to do so. That failure to request the necessary assurance is a fundamental error by the trial court and by all trial counsel. Indeed, the only time Juror No. 36 was asked during the in-court proceedings about her ability to be fair on the death penalty

was when she was asked by the trial judge (as the judge asked every prospect) if she would be able to consider ***imposing*** a death sentence:

> THE COURT: [Juror No. 36], if the evidence warrants it and the law allows it, could you fairly consider the imposition of a sentence of death in a particular case?
>
> PROSPECTIVE JUROR [No. 36]: Yes.
>
> THE COURT: Thank you.

(T. 654.) Neither Juror No. 36, nor any of the others, was asked a comparable question, more relevant from Petitioner's perspective, as to whether he/she could fairly consider imposing a ***life sentence***. The answer to *that* question was critical with respect to Juror No. 36. There was no doubt from her questionnaire responses that she could impose *death*. What Petitioner and the court needed to know was whether she was capable of choosing *life*. That was never asked.

Astonishingly, Petitioner's trial counsel did not request the removal of Juror No. 36 or otherwise object to her service on Petitioner's penalty-phase jury, and that dismal performance separately violated Petitioner's right to the effective assistance of counsel. (*See infra* at Part II). When the biased-juror issue was raised in Petitioner's direct appeal before the Supreme Court of Ohio, that court, noting counsel's failure to object, determined the issue was reviewable only for "plain error" and was thus within the court's "discretion" to correct the constitutional error. *Kirkland II*, 160 Ohio St. 3d at 401-02, 2020-Ohio-4079, ¶¶ 67, 71-72. (*Appx*-0016, -0018.)

But it is not a matter of "discretion" whether Petitioner's federal constitutional

rights to a fair trial before an impartial jury are upheld, much less in the penalty phase of a capital case. The state trial court had a *duty* to ensure that no biased jurors were seated in Petitioner's trial, *Frazier*, 335 U.S. at 511; and, because a biased juror was so seated and she participated as a member of the jury which returned a sentence of death against Petitioner, the Supreme Court of Ohio had an obligation—under this Court's precedent and the U.S. Constitution—to vacate that death sentence and grant Petitioner the relief which law and justice requires.

The Supreme Court of Ohio's failure to follow this Court's precedent must be corrected. Indeed, the fact that its ruling may be cited by other state courts to justify similar violations of a capital defendant's right to an impartial jury underlines the imperative to clarify this Court's jurisprudence for capital jury selection and the protection of the defendant's right to have a fair and impartial jury decide whether he lives or dies.

II. Petitioner was denied his Sixth Amendment rights to effective assistance of counsel and an impartial jury because his trial counsel allowed Juror No. 36, a biased juror, to sit on the jury that determined whether Petitioner should suffer death for his crimes.

Juror No. 36's pro-death-penalty views made her ineligible to serve in a capital case; the trial court had a duty to excuse her in order to protect Petitioner's constitutional rights to a fair trial by an impartial jury. But separate from the trial court's failure, Petitioner's trial counsel rendered constitutionally deficient performance by failing to seek and obtain Juror No. 36's for-cause exclusion and failing to object to Petitioner's penalty-phase proceeding being determined by a jury

which included a juror so obviously biased in favor of death.

A claim of constitutionally deficient performance during voir dire, resulting in the seating of a biased juror, is subject to the Court's familiar two-pronged approach set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Both prongs—deficient performance *and* prejudice—are easily met here, and, accordingly, Petitioner is entitled to a new penalty phase trial.

A. Trial counsel's performance was grossly deficient.

One of trial counsel's most fundamental duties in a capital case is to ensure that the capitally-accused's constitutional rights are protected. *Morgan*, 504 U.S. at 729-30 (noting that part of the guarantee of a defendant's right to impartial jury is an adequate voir dire; without it, the trial judge cannot fulfill his or her responsibility to remove those who cannot impartially follow instructions and evaluate the evidence); *Miller v. Webb*, 385 F.3d at 672 ("'Among the most essential responsibilities of defense counsel is to protect his client's constitutional right to a fair and impartial jury by using voir dire to identify and ferret out jurors who are biased against the defense.'") (citation omitted).

Voir dire provides an opportunity for counsel to ensure that a jury will be impartial and indifferent to the extent provided by the Sixth Amendment. *Morgan*, 504 U.S. at 719.

The performance of Petitioner's trial counsel during the jury selection was grossly deficient, falling well short of the constitutional requirement to provide "effective" representation, and it even "amounted to incompetence under 'prevailing

professional norms.'" *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

The voir dire in Petitioner's case was deficient in so many ways; one singularly egregious example is trial counsel's prejudicially inept and inattentive questioning, and ultimate seating, of Juror No. 36. The jury selection was dominated by haste and superficial inquiry. It took less than two court-days to pick a supposedly death-and-life qualified jury for the penalty phase of a capital case involving four murders, where two victims were young teens, and the case also involved interracial sex crimes. Such an unconscionably rushed jury selection process was incapable of ensuring that Petitioner's right to an impartial jury was met. And it was not met.

The rushed process in Petitioner's case is starkly reflected in defense counsel's extremely superficial, inattentive, and ineffective approach with Juror No. 36. There were some 93 prospective jurors who had completed questionnaires as part of the selection process: only ***4 of those***—Juror Nos. 36, 54, 63, and 95—gave responses to Questions 42 and 43 that reflected an unambiguously strident belief that the death penalty should *always* be used with persons who commit murder and should not merely *sometimes* be used. Prospective Juror Nos. 54 and 63 were promptly excused for cause, after inquiry in which they each denied they could set aside their strident pro-death penalty beliefs and instead follow the law and instructions.[2] (T. 420-23, 428-30.)

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[2] Juror No. 95 was not reached in the questioning because he did not raise his hand when the judge asked for those "always" or "never" for the death penalty, and he was not on one of the two panels of 16 that were subjected to the in-court questioning on July 23 or 24, which followed the brief Monday morning questioning on July 23 of the 15 hand-raising prospects.

Juror No. 36, by contrast, was barely questioned, as noted above. Defense counsel did not even accurately or fully describe her written responses, saying: "I think you listed the death penalty is necessary." (T. 748.) But that was only a small part of her response. As stated before, she responded on the critical issue of the death penalty's *usage* that the death penalty is "appropriate in every case where someone has been ***murdered***," she "*agreed*" that "the death penalty should **always** be used as the punishment for every ***murder***," and she "*disagreed*" that the "the death penalty should **sometimes** be used as the punishment in certain ***murder*** cases."

Then, when Juror No. 36 said "some cases," in response to defense counsel's poorly-framed question about when the "death penalty is necessary," counsel failed to even notice that her response was not inconsistent with her previous strongly-stated dogmatic views quoted above which addressed the death penalty's use in cases of *murder*. Counsel's question had not asked about murders; he asked a more general question ("Did you mean necessary in some cases, all cases?"), and she responded in kind. Counsel likewise made no effort to follow up or pin her down when she bluntly said "I don't know how to answer that honestly" in response to his question about whether she still thinks the death penalty is appropriate in every murder case. Instead of following up, counsel apologized for putting her "on the spot," and moved on to the next prospect. (T. 749.)

The absence of any further inquiry into the prospective juror's ability to be impartial is startling, and constitutes grossly ineffective performance. Juror No. 36

had given a very clear indication in her responses to Questions 42 and 43 that she is deeply biased in favor of the death penalty in all cases of murder, and was opposed to the death penalty being used only "sometimes" in cases of murder. Petitioner's case involved *four* murders including of two teens, in addition to rapes and attempted rapes. "Neither counsel nor the judge followed-up on her statement of partiality. They did not ask whether she could 'lay aside [her feelings] and render a verdict based on the evidence presented in court.'" *Miller*, 385 F.3d at 675 (quoting *Irvin*, 366 U.S. at 722-23).

That inquiry had been made of equally-biased prospective Juror Nos. 54 and 63, based on their very similar questionnaire responses as Juror No. 36 to Questions 42 and 43. They were both promptly excused for cause when it was clear *they* could not lay aside their biases. (T. 420-23, 428-30.) Juror No. 36, however, was *never asked*, and thus she never provided the requisite unequivocal assurance that she could or would put aside her biased death-penalty views, that she would follow the law as instructed, or that she could or would consider mitigating factors. Defense counsel never asked her for an unequivocal assurance that, despite her views, she could be fair and impartial toward Petitioner. *Patton*, 467 U.S. at 1036.

The need to exclude Juror No. 36 was obvious, equally as obvious as the exclusion of Juror Nos. 54 and 63. Yet Petitioner's trial counsel made no effort to excuse Juror No. 36—either for cause or peremptorily—and counsel failed to object to allowing the penalty-phase to proceed with that biased juror on the panel which decided Petitioner's fate.

Allowing such an obviously biased juror to remain cannot be excused or defended as a matter of "trial strategy." Such a failure certainly cannot be forgiven in the context of a death penalty case. *Miller v. Webb*, 385 F.3d at 675 (citing *United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000) (holding that the seating of a biased juror who should have been dismissed for cause requires reversal of the conviction).

"[T]here is no sound trial strategy that could support what is essentially a waiver of a defendant's basic Sixth Amendment right to trial by an impartial jury. If, however, there could be such a strategic decision, this case does not present such a situation because [trial counsel's] articulated trial strategy was objectively unreasonable." *Miller v. Webb*, 385 F.3d at 675-76 (citing *Hughes v. United States*, 258 F.3d 453, 463 (6th Cir. 2001)); *Johnson v. Armontrout*, 961 F.2d 748, 755 (8th Cir. 1992) (prejudice requirement met because "[t]rying a defendant before a biased jury is akin to providing him no trial at all. It constitutes a fundamental defect in the trial mechanism itself."); *People v. Maffei*, 35 N.Y.3d 264, 292, 150 N.E.3d 1169, 1189 (2020) (Rivera, J., dissenting) (disagreeing with "strategy" justification for failure to excuse biased juror by noting "no one would get on a plane with a pilot who is not able to confirm they can fly the plane; no defendant should have to stand trial with a juror who is not able to confirm they can be fair").

"A juror who will automatically vote for the death penalty in every case" is not an impartial juror and must be removed for cause. *Morgan*, 504 U.S. at 729. Such views would "prevent or substantially impair the performance of [her] duties as a

juror in accordance with [her] instructions and [her] oath." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). No amount of "strategy" can defend allowing such a juror to sit in judgment in a capital case.

Trial counsel's failure to challenge Juror No. 36 for cause was outside the "wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Their conduct fell below an objective standard of reasonableness and constituted ineffective assistance of trial counsel.

B. Petitioner was prejudiced by the seating of the biased juror.

Petitioner was prejudiced by his trial counsel's deficient performance in this critical respect. Under *Strickland*, prejudice requires a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different, where a reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Prejudice exists if counsel fails to question a juror during voir dire or move to strike a juror and that juror is found to be biased, because this evinces "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Fields v. Brown*, 503 F.3d 755, 776 (9th Cir. 2007) (en banc) (quoting *Strickland*, 466 U.S. at 694).

Stated another way, when the Petitioner shows that a seated juror was actually biased against him, and that biased juror was empaneled, "prejudice under *Strickland* is presumed, and a new trial is required." *Hughes*, 258 F.3d at 463; *see also Treesh v. Bagley*, 612 F.3d 424, 436-37 (6th Cir. 2010); *Miller v. Webb*, 385 F.3d

at 676; *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000). This conclusion follows naturally from the due process requirement that the jury be "capable and willing to decide the case solely on the evidence before it," *Smith v. Phillips*, 455 U.S. 209, 217 (1982), and that a biased jury "violates even the minimal standards of due process." *Irvin*, 366 U.S. at 722. That is especially true in a capital case where the "the crime itself is likely to inflame the passions of jurors." *McKenzie v. Smith*, 326 F.3d 721, 727 (6th Cir. 2003).

The Supreme Court of Ohio applied the principle of presumed prejudice recently in *State v. Bates*, 159 Ohio St. 3d 156, 2020-Ohio-634 (2020). There, the defendant's trial counsel had failed to question a prospective juror about her questionnaire response which revealed obvious racial bias against Black persons in a capital case where the accused was Black. That juror was not challenged and she sat on the jury which convicted defendant and sentenced him to death. The court found actual bias and reversed the conviction and death sentence due to trial counsel's deficient performance:

> To be sure, the law requires actual bias in order to presume prejudice under *Strickland*. And if a juror provides some indications of impartiality notwithstanding statements that suggest bias, then whether that juror is actually biased and the defendant prejudiced may be a closer question. But that is not the case before us. ***Here, we have a juror's admission of bias with no reassurance of impartiality***. Speculation that defense counsel, the prosecution, or the trial judge could have sought such reassurance of impartiality from a juror who admitted bias cannot nullify the prejudicial impact of that juror's participation in the trial.

Bates, 159 Ohio St. 3d at 164, 2020-Ohio-634, ¶ 36 (emphasis supplied).

Petitioner's case likewise involves a juror's statement of obvious bias with no reassurance of impartiality. Juror No. 36 possessed an actual bias in favor of the death penalty in all cases of murder. Her bias was blatant and unambiguous; it was never disclaimed and she never gave an unequivocal assurance that she could be fair and impartial in spite of it. Nothing in the record can nullify the prejudicial impact of Juror No. 36's participation in Petitioner's trial.

Petitioner's death sentence must be set aside and he is entitled to a new penalty-phase trial. *Morgan*, 504 U.S. at 729 (if even one juror who will automatically vote for the death penalty "is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence").

The Supreme Court of Ohio's inconsistent application of this Court's precedent signals to similar bodies that either ambiguity exists in this Court's jurisprudence, on such an important constitutional issue in a capital case, or that this Court's precedent can be melded as lower courts deem fit in their discretion.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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