No. 20-7462

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2021

ANTHONY KIRKLAND

Petitioner

vs.

STATE OF OHIO

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO OHIO SUPREME COURT

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QUESTIONS PRESENTED

I. A CLAIM OF JUROR BIAS IS WAIVED IF THE JUROR IS NOT CHALLENGED FOR CAUSE. THERE IS NO BASIS TO CHALLENGE FOR CAUSE A JUROR WHO STATES SHE WOULD FOLLOW THE LAW AND THINKS THE DEATH PENALTY IS WARRANTED IN SOME, BUT NOT ALL, CASES IF THE EVIDENCE SUPPORTS IT.

II. STRATEGIC DECISIONS MADE BY DEFENSE COUNSEL ON HOW TO QUESTION PARTICULAR JURORS IN A CAPITAL TRIAL DO NOT AMOUNT TO INEFFECTIVE ASSISTANCE OF COUNSEL.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

There are no parties to the proceeding other than those listed in the caption. Under Rule 29.6, Respondent states that no parties are corporations.

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OPINIONS BELOW

The opinion for the Oho Supreme Court is reported at *State v. Kirkland*, 2020-Ohio-4079, 160 Ohio St.3d 389.

JURISDICTIONAL STATEMENT

Petitioner Kirkland claims jurisdiction under 28 U.S.C. ' 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case implicates the Fifth Amendment to the United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless upon presentment or indictment of a grand jury....; nor shall any person be subject to 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 [.]

This case also implicates the Sixth Amendment, which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy he right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Finally this case also implicates the Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

> 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 law.

STATEMENT OF THE CASE AND FACTS

Petitioner Kirkland was charged by the Hamilton County Grand Jury in two indictments, numbered B-0901629 and B-0904028. The indictments were consolidated for trial under the earlier number, B-0901629. The twelve counts charged involved four murder victims as follows:

(1.) **Casonya Crawford**: Attempted Rape, Aggravated Murder during an Attempted Rape with death specification (course of conduct, attempted rape), Aggravated Murder during an Aggravated Robbery with death specification (course of conduct, aggravated robbery), Aggravated Robbery, and Abuse of a Corpse. All offenses occurred on May 4, 2006.

(2.) **Esme Kenney**: Attempted Rape, Aggravated Murder during an Attempted Rape with two death specifications (course of conduct, attempted rape), Aggravated Robbery, Aggravated Murder during an Aggravated Robbery, with two death specifications (course of conduct, aggravated robbery) and Abuse of a Corpse. All offenses occurred on March 7, 2009.

(3.) **Mary Jo Newton**: Murder and Abuse of a Corpse. Both offenses occurred on June 14, 2006.

(4.) **Kimya Rolison**: Murder and Abuse of a Corpse. Both offenses occurred on December 22, 2006.

On March 4, 2010, after a jury was impaneled, the defendant entered a guilty plea to Counts 6 and 7 in Case B-0901629, and Counts 1 and 2 in case B-0904028. These were the murder and abuse of a corpse counts involving victims Mary Jo Newton and Kimya Rolison. (See T.p. 825-845) Sentencing was deferred.

Petitioner was found guilty as charged on the remaining counts in a jury trial. At the conclusion of the sentencing hearing on March 17, 2010, the jury recommended death on all the

capital counts. On March 31, 2010, the trial court did impose the death penalty as recommended by the jury and maximum consecutive sentences on the remaining counts.

The Ohio Supreme Court affirmed Kirkland's convictions and death sentence. *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818. The Ohio Supreme Court, however, granted Kirkland's motion for relief and remanded the case to the trial court for resentencing, in accordance with R.C. 2929.06(B), on the aggravated-murder convictions related to Casonya and Esme. *State v. Kirkland,* 147 Ohio St.3d 1440. 2016-Ohio-7681.

In July, 2018, upon remand a second jury recommended a death sentence for the aggravated murders of Casonya and Esme and the trial court again sentenced Kirkland to death. On August 18, 2020, the Ohio Supreme Court, in a unanimous decision, affirmed Kirkland's death sentence. *State v. Kirkland,* 160 Ohio St.3d 389, 2020-Ohio-4079, 157 N.E.3d 716.

In his petition, Kirkland argues that this Court should grant review because Kirkland was denied his constitutional right to a fair trial due to a biased juror. Kirkland also argues that his defense counsel were ineffective for not striking the alleged biased juror in violation of Kirkland's Sixth Amendment right to effective assistance of counsel.

The voir dire in this case took place on July 19, 23, and 24, 2018. It is transcribed in volumes 10, 11, and 12 of the transcript. (T.p. 220-785) A large number of jurors were summoned.

On the first day of voir dire, Thursday, July 19th, the trial judge informed prospective jurors they had been summoned in a criminal death penalty case involving Anthony Kirkland. The trial judge introduced Kirkland and the attorneys representing him and the prosecution to the jurors. The trial judge instructed the jurors to keep an open mind, to decide issues free from bias, prejudice and sympathy, and to answer questions truthfully. The conduct of voir dire was explained, and the jurors

were informed that the questions they were going to be asked were not meant to pry into their personal lives. Jurors were instructed to answer questions truthfully and sworn in by the court. (Volume 10, T.p. 222-230)

The trial judge explained the anticipated trial schedule, the possibility of juror sequestration, the fact jurors must agree to accept the guilty findings of a previous jury, and how much of the evidence would be admitted in a summary fashion through stipulations. (Volume 10, T.p. 230-244)

Next, the trial judge went through case procedure and posed several issues the jurors need to consider. These issues concerned the following topics: (1) the four possible penalties that they would be considering; (2) the prosecution's burden to prove the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt; (3) feelings about the death penalty and their willingness to follow the law in this regard (the trial judge emphasized that there were no right or wrong answers on how jurors responded to questions about their feelings on the death penalty, noting that their candor and cooperation on this issue is much appreciated); and (4) admonitions not to discuss the case with anyone or conduct outside research. (Volume 10, T.p. 245-251)

The trial judge excused potential jurors with valid hardships. (Volume 10, T.p. 258 et seq.) The remaining jurors completed a lengthy questionnaire at the jury commissioner's office. (Volume 10, T.p. 258-259, 321) The jury questionnaire covered all aspects of the jurors' backgrounds. The questionnaire contained a reminder of the presumption of innocence and the need for reasonable doubt, questions about the jurors' views of the death penalty, and media exposure. The questions were specifically worded so that counsel could easily identify jurors with problems in these areas.

The jurors who completed the questionnaire returned to the courtroom where the trial judge questioned them concerning their ability to follow the law regarding the death penalty. Fifteen jurors

indicated they had a personal concern about following the law on a death penalty case, and those jurors were asked to return on Monday, July 23rd. (Volume10, T.p. 322-324)

On Monday, July 23rd, Kirkland requested these fifteen jurors to be sequestered and individually questioned. Kirkland's request was denied. (Volume 11, T.p. 358-361) These jurors were then brought into the courtroom, and the trial judge asked each of them the following question, "[i]f the evidence warrants it and the law allows it, could you fairly consider the imposition of a sentence of death in a particular case?" The trial judge reminded the jurors the need to give truthful answers and assured them there was no right or wrong answer to this question. (Volume 11, T.p. 361-363). In response, twelve jurors expressed they personally opposed the death penalty under any circumstance (Volume 11, T.p. 364, 372-373, 399, 412, 424-425, 431, 435, 441, 445, 449, 453, 456) while three believed it should be imposed automatically in every murder case. (Volume 11, T.p. 381, 421, 429)

Based on these answers, the trial judge and counsel subjected these fifteen jurors to extensive questioning about their respective views on the death penalty in an effort to determine whether such views would substantially impair their ability to follow the law in this case. After such questioning, eleven of the twelve jurors indicated they would not be able to set aside their anti-death penalty views and this would affect their ability to follow the law. These jurors were removed for cause. (Volume 11, T.p. 373, 380, 420-421, 428, 434-435, 439-440, 444-445, 448-449, 452-453, 455-456, 461) Defense counsel lodged "formal" objections to all but one of the jurors removed for cause. (Volume 10, T.p. 428) Two of the three jurors who believed the death penalty should be automatic in murder cases were removed for cause. (Volume 11, T.p. 423, 431) The juror not removed for cause understood on further questioning that Ohio death penalty law does not make a death sentence

automatic in murder cases and promised to properly weigh the aggravating and mitigating factors in accordance with the law. (Volume 11, T.p. 392)

A break was taken and the jurors returned in the afternoon to begin general voir dire. (T.p. 464) The trial judge informed jurors that discussions during voir dire were not evidence. (T.p. 467) The jurors then agreed (1) to accept a previous jury's findings of guilt that qualifies this case for death penalty consideration; (2) follow the definition of reasonable doubt; (3) follow the Court's instructions on the law; (4) remain fair and impartial; (5) decide the case solely on the facts; and (6) set aside matters of race, religion, and sympathy. (Volume 11, T.p. 467-474)

(B) State:

The state's voir dire begins at T.p. 486, reviewing many of the same concepts the trial judge covered. The prosecutor gave a brief summary of the charges and identified the witnesses who would be testifying for the state. (Volume 11, T.p. 489-497) Prospective juror 37, who works at Cincinnati Children's Hospital as an advocate for "vulnerable women," questioned her partiality in a case like this, and was excused for cause. (Volume 11, T.p. 489-502)

The state's voir dire continued after a lunch break with a couple jurors indicating that they briefly seen media coverage of the case or had vague recollections of it but said that they could set this aside. (Volume 11, T.p. 518-521) The prosecutor then spent considerable time explaining what factors make this a death penalty case and questioning jurors about their ability to impose a death penalty. (Volume 11, T.p. 523-546) The prosecutor emphasized to jurors that if they imposed the death penalty, they should fully expect that it *will* be carried out. (Volume 11, T.p. 523) Satisfied that the jurors would follow the law, the prosecutor passed for cause. (Volume 11, T.p. 546)

(C) The Defense:

The defense voir dire begins at T.p. 546. Defense counsel bluntly explained that this is a serious matter and that Kirkland is a human being like every person in the courtroom, and that they will be deciding whether he will live or die. (Volume 11, T.p. 547) Defense counsel identified Kirkland's previous counsel and the witnesses expected to testify for the defense. Prospective Juror 21 knew Perry Ancona, one of Kirkland's previous lawyers, but said that relationship would not interfere with his ability to be fair and impartial. (Volume 11, T.p. 549-553) Defense counsel emphasized the need for jurors to be open and honest when answering questions and assured them their opinions would be treated with respect. (Volume 11, T.p. 553-554) Defense counsel throughout voir dire explained the importance that jurors keep an open mind and stressed the need to fairly consider all mitigation evidence. (Volume 11, T.p. 555, 557) Jurors agreed with this. (Volume 11, T.p. 555)

Defense counsel warned jurors of the gruesome nature of the facts and how they would be viewing pictures of dead girls and women whose bodies were burned and in various states of decomposition. Defense counsel asked jurors, as a group, if they would find this evidence so personally distressing that they could not sit on this case. No juror indicated this to be a problem. (Volume 11, T.p. 556-557)

The defense voir dire also discussed the jurors' ability to impose penalties other than death and the need to reach a decision not based on bias, sympathy, or prejudice. (Volume 11, T.p. 558, 566) Further, counsel carefully explained to jurors that even just one juror could prevent the death penalty from being imposed as "each juror has the lawful authority individually to determine that life imprisonment is appropriate if he or she wants to, each one of you." (Volume 11, T.p. 564) Defense

counsel then questioned individual jurors about these same topics with an added emphasis that jurors keep an open mind about considering Kirkland's mitigation evidence. (Volume 11, T.p. 566 et seq.) At the conclusion of questioning, defense counsel passed for cause. (Volume 12, T.p. 644)

The peremptory challenge process begins at T.p. 766. The state and the defense each exercised their allotted six peremptory challenges. (Volume 12, T.p. 770-779) The defense raised a *Batson* challenge to one juror struck by the state. (Volume 12, T.p. 772) The state explained that the juror in question initially said he could not sign a death verdict. (Volume 12, T.p. 772) The trial judge found this a race neutral explanation. The trial judge noted this juror previously expressed opposition to the death penalty that almost arose to a challenge for cause. (Volume 12, T.p. 773-774) The record shows the jury, as seated, contained one African-American juror. (Volume 12, T.p. 774, 778)

During the seating of alternate jurors, the state excused one juror and the defense excused two jurors. (T.p. 780-781) Once the jury was selected, it was sworn in, and the trial judge provided the jury with preliminary instructions. (Volume 12, T.p. 785-802)

REASONS FOR DENYING THE WRIT

II. A CLAIM OF JUROR BIAS IS WAIVED IF THE JUROR IS NOT CHALLENGED FOR CAUSE. THERE IS NO BASIS TO CHALLENGE FOR CAUSE A JUROR WHO STATES SHE WOULD FOLLOW THE LAW AND THINKS THE DEATH PENALTY IS WARRANTED IN SOME, BUT NOT ALL, CASES IF THE EVIDENCE SUPPORTS IT.

III. STRATEGIC DECISIONS MADE BY DEFENSE COUNSEL ON HOW TO QUESTION PARTICULAR JURORS IN A CAPITAL TRIAL DO NOT AMOUNT TO INEFFECTIVE ASSISTANCE OF COUNSEL.

Kirkland argues juror 36 was biased in favor of the death penalty because she marked agreed (not strongly agreed) to question 43 of the jury questionnaire that the death penalty should always be the punishment for murder.

A defendant waives a claim of juror bias if that juror is not challenged for cause even if defendant exhausted his peremptory challenges. *State v. Clinton*, 153 Ohio St.3d 422, 2017-Ohio-9423, 108 N.E.3d 1 at ¶ 93. Further, Kirkland bears the burden of establishing juror partiality. *Wainwright v. Witt,* 469 U.S. 412, 423, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). Juror bias cannot be presumed but must be affirmatively demonstrated in the record. *Clinton* at ¶ 76. As the Ohio Supreme Court has correctly held that "[e]ven if a juror shows a predisposition in favor of imposing the death penalty, the trial court does not abuse its discretion in overruling a challenge for cause if the juror later states that she will follow the law and the court's instructions." *State v. Treesh*, 90 Ohio St.3d 460, 468, 2001-Ohio-4, 739 N.E.2d 749.

Kirkland has waived this claim of juror bias because juror 36 was not challenged for cause. (Volume 12, T.p. 759); *Clinton* at ¶ 93

Even if this claim is addressed on the merits, the record refutes juror 36 was biased in favor of the death penalty.

First, juror 36 was *not* one of the fifteen jurors who indicated having an issue following the law in this case because of strong feelings either in favor of or against the death penalty. (Volume 11, T.p. 363-486) In fact, she informed the trial judge she would impose a sentence of death only if the evidence warrants it and the law allows it. (Volume 12, T.p. 654)

Second, in group voir dire, prospective jurors, including juror 36, were asked if they understood acceptance of a prior jury's guilty verdict convicting Kirkland of death eligible aggravated murder did not mean the death penalty should automatically be imposed on him. (Volume 11, T.p. 557) Juror 36 did not affirmatively respond she had an issue with this. Nor did she affirmatively respond that she had prejudged the case or was unable to keep an open mind in considering Kirkland's mitigation evidence and impose life sentencing options if the evidence warrants it. (Volume 11, T.p 558-562) Jurors were instructed a silent response to a question is a negative answer. (Volume 10, T.p. 229)

Third, defense counsel directly questioned juror 36 about her death penalty views. Juror 36 clarified her answer to question 43 that she thinks the death penalty is warranted in *some* cases, not every case. (Volume 12, T.p. 748-749)

Though Kirkland waived this issue of juror bias, the record shows juror 36 agreed to follow the law, keep an open mind, not prejudge the case, and consider Kirkland's mitigation evidence and life sentencing options.

Kirkland's underlying ineffective assistance of counsel claim based on his attorneys failure to strike juror 36 also fails. In order to have a case reversed based upon such ineffective counsel, defendant must prove that counsel violated an essential duty to the defendant and the defendant was prejudiced by that violation. *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989); *State v.*

Lytle, 48 Ohio St.2d 391, 358 N.E.2d 623 (1978); *see also Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Additionally, the reviewing court "should recognize that counsel is strongly presumed to have rendered adequate assistance and make all significant decisions in the exercise of reasonable professional judgment." *Strickland* at 668.

Kirkland specifically argues counsel provided deficient performance during voir dire by failing to adequately question juror 36, who indicated in her juror questionnaire that she agreed (not strongly agreed) the death penalty should always be used as punishment for every murder. But defense counsel did specifically address juror 36, and her answers showed she would follow the law. (Volume 12, T.p. 748-749)

The law is well established that, "[w]hen evaluating claims of ineffective assistance at voir dire, appellate courts will not 'second-guess trial strategy decisions' or impose 'hindsight views about how current counsel might have voir dired the jury differently.'" *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, ¶ 63, quoting *State v. Mason*, 82 Ohio St.3d 144, 157, 694 N.E.2d 932 (1998). In fact, "counsel is in the best position to determine whether any potential juror should be questioned and to what extent." *State v. Murphy*, 91 Ohio St.3d 516, 539, 747 N.E.2d 765 (2001). Likewise, "[t]he conduct of voir dire by defense counsel does not have to take a particular form, nor do specific questions have to be asked." *State v. Evans*, 63 Ohio St.3d 231, 247, 586 N.E.2d 1042 (1992)

At bar, juror 36 was *not* one of the fifteen jurors who indicated having an issue following the law because of strong feelings either in favor of or against the death penalty. (Volume 11, T.p. 363-486) In fact, she informed the trial judge she would impose a death sentence only if the evidence warrants it and the law allows it. (Volume 12, T.p. 654)

In group voir dire, defense counsel instructed prospective jurors that "just because Mr. Kirkland has been found guilty by a prior jury does not mean that Mr. Kirkland automatically gets the death penalty. Fair? Everyone gets that?" (Volume 11, T.p. 557) Defense counsel properly informed the jury under what circumstances they would be required to consider life options. (Volume 11, T.p. 558) Defense counsel then informed the jury on the meaning of mitigation and asked if any prospective juror had prejudged Kirkland. (Volume 11, T.p. 559) None of the prospective jurors, including juror 36, had any problem following these legal guidelines properly outlined by defense counsel.

Further, defense counsel directly questioned juror 36 about her death penalty views. Juror 36 clarified that she thinks the death penalty is warranted in *some* cases, not every case. (Volume 12, T.p. 748-749) Defense counsel passed for cause. (Volume 12, T.p. 759)

Although Kirkland claims, without explanation, he was prejudiced juror 36 was on the jury, he cannot demonstrate defense counsel's failure to ask specific questions on voir dire meets the two-pronged *Strickland* test for ineffective assistance of counsel. As the Ohio Supreme Court held in Kirkland's prior appeal, "Kirkland does not identify a question that his attorneys should have asked but did not, a question that they did ask but should not have, or a specific objection that they failed to raise. Therefore, we have no basis on which to conclude that his counsel's performance [in voir dire] was deficient." *Kirkland*, 140 Ohio St.3d 73, 88, 2014-Ohio-1966, 15 N.E.3d 818, 834, at ¶ 100.

At bar, defense counsel extensively delved into juror 36's feelings on the death penalty. This claim of ineffective assistance is completely meritless.

CONCLUSION

This case does not raise a federal constitutional issue or a compelling reason sufficient to invoke this Court's jurisdiction. The Ohio Supreme Court properly handled petitioner's juror bias claim and underlying ineffective of assistance of counsel claim.

Respectfully submitted,

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