No. 20-7865

In the Supreme Court of the United States

TERRY LEE FROMAN,

Petitioner,

v.

OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether Petitioner establishes that he was denied his rights to a fair and impartial jury and the effective assistance of counsel under the Sixth and Fourteenth Amendments when he does not prove that jurors in his case were actually biased, and when his counsel questioned prospective jurors in voir dire on the topic of race, challenged prospective jurors who exhibited racial bias, did not question some jurors about race when the prosecutor had already asked those questions, and did not challenge jurors who unequivocally assured the court that race would not play a role in the decisionmaking process.
2. Whether Petitioner may properly raise a structural error argument for the first time in this Court.

LIST OF PARTIES

The Petitioner is Terry Lee Froman, an inmate at the Chillicothe Correctional Institution in North Chillicothe, Ohio.

The Respondent is the State of Ohio.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

State of Ohio v. Froman, 2020-Ohio-4523, 165 N.E.3d 1198 (Opinion of Supreme Court of Ohio affirming conviction and sentence)

State of Ohio v. Froman, 2020-Ohio-5332, 157 N.E.3d 800 (Decision of Supreme Court of Ohio denying Motion for Reconsideration)

State of Ohio v. Froman, No. 14CR30398 (June 22, 2017) (Warren County Common Pleas Court, Judgment Entry of Sentencing Opinion on Aggravated Murder with Death Specifications Pursuant to R.C. §2929.03(F)

STATEMENT OF JURISDICTION

This Court has jurisdiction to review decisions from the highest court of a State involving a federal question. 28 U.S.C. § 1257; *Pieper v. American Arbitration Ass'n, Inc.*, 336 F.3d 458, 461 (6th Cir. 2003). Section (a) of 28 U.S.C. § 1257 provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Petitioner's Question Presented claims a violation of the Sixth Amendment right to a jury trial and the right to effective assistance of counsel.

The Ohio Supreme Court affirmed Petitioner's convictions and sentence on September 24, 2020. *State v. Froman*, 2020-Ohio-4523, 165 N.E.3d 1198 (Ohio), at ¶187. On November 24, 2020, the Supreme Court of Ohio denied his motion for reconsideration. *State v. Froman*, 2020-Ohio-5332, 157 N.E.3d 800 (Ohio). On March 19, 2020, in light of the COVID-19 pandemic, this Court extended the deadline to file petitions for writs of certiorari in all cases due on or after the date of that order to 150 days from the date of the order denying a timely petition for rehearing. Therefore, Petition's petition had to be filed on or before April 23, 2021. It was filed on April 22, 2021.

STATEMENT OF STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the 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 the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. XIV

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.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

On September 12, 2014, Defendant-Petitioner Terry Lee Froman ("Defendant") murdered Kimberly Thomas, whom he had dated for approximately four years, and Thomas' 17-year-old son, Michael Eli Mohney ("Eli"). *State v. Froman*, 2020-Ohio-4523, 165 N.E.3d 1198 (Ohio), ¶1, 3. Thomas had ended her relationship with Defendant on August 20, 2014. *Id.* ¶3. The following day, Defendant told Thomas' supervisor at work, "Kim has made me lose everything, now I will make her lose everything no matter the cost." *Id.* ¶5.

Around 5:00 a.m. on September 12, 2014, Defendant went to Thomas' house in Mayfield, Kentucky with a Hi-Point .40 caliber semiautomatic pistol, got Thomas out of her room, and "tried to * * * get her to walk out the door" with him. *Id.* ¶16, 23. Thomas started screaming Eli's name. *Id.* ¶16. When Eli came to his mother's aid, "[t]hat was it" according to Defendant. *Id.* ¶16. He shot Eli in the abdomen at close range and in the back of the head. *Id.* ¶11, 13, 25. The gunshot wounds were fatal. *Id.* ¶25.

Defendant forced Thomas into his SUV and drove north. *Id.* ¶8. Just after 7:00 a.m., a 9-1-1 caller reported that a woman had been abducted at a gas station in Paducah, Kentucky. *Id.* Surveillance video from the gas station showed Defendant inside the gas station's store, and his white GMC Yukon with Illinois license plate bearing the name "TRICKE1" parked at a gas pump. *Id.* The video showed Thomas, who was naked, exit the vehicle and start to run away. *Id.* Defendant rushed out of the store, grabbed Thomas by the hair, dragged her back to the SUV, and forced her back inside. *Id.* He then drove away. *Id.*

Police crews started looking for Defendant. *Id.* ¶9. They pinged his cell phone to determine his location. *Id.* ¶12. The information they obtained showed that he was heading into Ohio. *Id.*

As he drove, Defendant called his good friend, David Clark. *Id.* ¶13. He told Clark that he

had killed Eli and that he (Defendant) was "a couple of hours away." *Id.* ¶13. Clark, who was a police informant, contacted a Paducah officer with whom he had worked, and subsequently met the officer at the police station, where Clark's calls to and from Defendant were videotaped. *Id.* ¶16.

In those videotaped calls, Defendant told Clark that Thomas was sleeping "off and on" in the back of the SUV. *Id.* ¶17. Clark implored Defendant to surrender himself. *Id.* In response to Clark's suggestion that he let Thomas go, Defendant said, "It's too late. I mean it ain't too late, but, I just can't, I can't, I can't, I can't. I just got to. No if, ands, or buts about it." *Id.* He stated, "I know you're trying to talk me down, baby I appreciate it and all. But like I said, I mean it's just not going to happen." *Id.* He advised Clark, "I already took one life, and I'm about to go ahead and take two [more]." *Id.*

In another phone call, Defendant told Clark that he was in Ohio, and the police were behind him. *Id.* ¶18. Defendant repeated that he intended to kill Thomas.: "I'm gonna kill her dude." *Id.* As Clark begged Defendant to pull over and "[d]on't do nothing," Defendant stated, "I can't do it man," and the call was disconnected. *Id.* A short time later, Clark called Defendant back. *Id.* ¶19. At that time, Defendant advised Clark, "She dead. * * * I shot myself, and I shot her three times." *Id.*

Ohio law enforcement officers had pulled Defendant over on the side of I-75 in Warren County, Ohio when they heard gunshots. *Id.* ¶20. They moved in and apprehended Defendant, who was sitting in the driver's seat of his car with a gun in his hand. *Id.* ¶20-21. Defendant had a bullet wound in his left upper chest near his shoulder. *Id.* ¶21. Thomas' dead body was in the back seat of the SUV. *Id.* Thomas had sustained gunshot wounds to the back of the head, right upper chest, right breast, and right upper abdomen. *Id.* ¶26. She also had a broken jaw, one of her teeth had been knocked out, and she had blunt force injuries, lacerations, and abrasions to her head, face,

torso, inner thighs, and extremities. *Id.*

On October 20, 2014, a Warren County Grand Jury indicted Defendant with two counts of aggravated murder in violation of Ohio Rev. Code Ann. §2903.01(A) and (B), two counts of kidnapping in violation of Ohio Rev. Code Ann. §2905.01(A)(3) and (B)(2), and discharge of a firearm on or near a prohibited premises, with a firearm specification. (Docket Entry 3.) The prosecutor later dismissed the charge of discharge of a firearm on or near a prohibited premises and its specification. (Docket Entry 415.)

Each of the aggravated murder counts had the same three specifications: (1) an aggravating circumstance (death penalty) specification under Ohio Rev. Code Ann. §2929.04(A)(5) that charged that the offense was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the defendant; (2) an aggravating circumstance (death penalty) specification under Ohio Rev. Code Ann. §2929.04(A)(7) that charged that the offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, and the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design; and (3) a firearm specification under Ohio Rev. Code Ann. §2941.145(A). (Docket Entry 3.) Attached to each kidnapping count (Counts 3 and 4) was a firearm specification under Ohio Rev. Code Ann. §2941.145(A). (*Id.*)

The case proceeded to trial on June 5, 2017. Although there was media coverage of the case, it was not pervasive. As the prosecutor noted during a status conference, the media had not been present for every hearing, and Defendant's case had the least amount of media coverage compared to other homicide cases in Warren County. (1/19/17 Transcript of Proceedings ("Tr."), at 43-44.) The trial court's questioning during voir dire successfully identified those members of the

venire who had been exposed to pretrial publicity. (6/5/17 Tr. 198-99, 257; 6/6/17 Tr. 6, 64, 134, 208; 6/7/17 Tr. 12.) When the questioning identified those individuals, further inquiry was conducted. (6/5/17 Tr. 198-201, 257-58; 6/6/17 Tr. 6-7, 64-66, 134-36, 208-10; 6/7/17 Tr. 12-13.) The record shows that when there was even the possibility that a member of the venire could not set aside what he or she had seen in the news and decide the case based solely on the evidence, he or she was excused and did not serve on the jury. (6/5/17 Tr. 159-75; 6/6/17 Tr. 64-65, 127, 135, 195, 209-11, 259-60; 6/7/17 Tr. 12-13, 70.) The questioning during voir dire established that the jurors who were seated on the jury were able to put aside any information that they had seen or heard. (6/5/17 Tr. 200-01, 258; 6/6/17 Tr. 6-7, 134, 208-09; 6/7/17 Tr. 13.) They all indicated that they would decide the case based on the evidence presented at trial, and nothing else. (6/5/17 Tr. 201, 258; 6/6/17 Tr. 6-7, 134, 208-09; 6/7/17 Tr. 13.)

Furthermore, the record shows that Defendant's trial counsel questioned prospective jurors on the issue of race, some of which are jurors he now challenges as racially biased. (6/6/17 Tr. 44-45; 6/7/17 Tr. 132.) Counsel questioned some prospective jurors extensively about racial bias and their answers on the questionnaire that were related to race. (6/7/17 Tr. 119-20, 157-58.) Counsel challenged those who demonstrated racial bias. (6/5/17 Tr. 75-77, 153; 6/7/17 Tr. 119-20, 138-39.) To the extent that counsel did not specifically question some of the challenged jurors about race, the prosecutor inquired of them on the topic of race, and their answers revealed that they were not racially biased. (6/5/17 Tr. 227-30; 6/6/17 Tr. 36-38, 92-94.) They agreed that race should not play any role in the decisionmaking process. (6/5/17 Tr. 230; 6/6/17 Tr. 36-38, 94.) One of the jurors seated in Defendant's case specifically characterized the decision as being "colorblind." (6/6/17 Tr. 44-45.)

On June 13, 2017, the jury returned a verdict in the trial phase – guilty on all counts and specifications. (Docket Entry 432.) Testimony in the sentencing phase began on June 15, 2017. On the same day, the jury returned a sentencing verdict, finding that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt and that the sentence of death be imposed upon Defendant. (Docket Entry 435.)

On June 22, 2017, the trial court merged the aggravated murder counts, independently determined that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt, and sentenced Defendant to death for the aggravated murder in Count 1. (Docket Entry 438.) The court sentenced Defendant to eleven years in prison for kidnapping, to be served consecutively to the sentence imposed for the aggravated murder, with additional, consecutive three-year prison terms for each of the firearm specifications attached to the aggravated murder and kidnapping counts. (Docket Entry 439.)

Defendant filed a direct appeal in the Supreme Court of Ohio. (Docket Enry 448.) The Supreme Court of Ohio affirmed his convictions and sentence on September 24, 2020. *Froman*, 2020-Ohio-4523, 165 N.E.3d at ¶187. Defendant asked the Supreme Court of Ohio to reconsider its decision, which the State opposed. On November 24, 2020, the court denied his motion for reconsideration. *Ohio v. Froman*, 2020-Ohio-5332, 157 N.E.3d 800 (Ohio).

On April 22, 2021, Defendant filed a petition for a writ of certiorari ("Petition") and a motion for leave to proceed *in forma pauperis* in this Court. The State of Ohio hereby responds.

ARGUMENT

Reasons for Denying the Writ

I. Defendant's First and Second Questions Presented should be denied because the Supreme Court of Ohio applied governing state and federal case law to the unique facts of this case in a way that is consistent with this Court's decisions interpreting the Sixth Amendment, and Defendant did not make a structural error argument in the Supreme Court of Ohio.

Defendant challenges his conviction and death sentence under the Sixth and Fourteenth Amendments to the United States Constitution. He claims that "[a]t least four seated jurors expressed racially biased views on their juror questionnaires." (Petition, at p. 6.) As reasons for granting the writ of certiorari, Defendant asserts that he "was denied his constitutional right to a fair and impartial jury due to trial counsel's ineffectiveness and due to the trial court's failures during voir direct to identify and exclude unqualified jurors." (Petition, at p. 6.)

Respondent State of Ohio asks this Court to deny his petition because the Supreme Court of Ohio applied governing state and federal case law to the unique facts of this case in a way that is wholly consistent with this Court's decisions interpreting the Sixth and Amendment right to a trial by an impartial jury and right to counsel. Additionally, Defendant did not make a structural error argument in the Supreme Court of Ohio. He is raising it for the first time in this Court.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee the right of an accused in all criminal prosecutions to a trial by an impartial and unbiased jury. *Morgan v. Illinois*, 504 U.S. 719, 727, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992); *Turner v. Murray*, 476 U.S. 28, 36, n. 9, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986); *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). Voir dire examination is designed to "protect [this right] by exposing possible biases, both known and unknown, on the part of potential

jurors." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984).

"If actual bias is discovered during voir dire, the trial court must excuse the prospective juror." *Miller v. Webb*, 385 F.3d 666, 673 (6th Cir. 2004). *See also, Hughes v. United States*, 258 F.3d 453, 459 (6th Cir. 2001). "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." *Miller*, 385 F.3d at 673, quoting *United States v. Torres*, 128 F.3d 38, 43 (2d Cir. 1997), citing *United States v. Wood*, 299 U.S. 123, 133, 57 S.Ct. 177, 81 L.Ed. 78 (1936).

In determining whether a defendant has proved that a juror is actually biased, a court may consider the juror's assurances of impartiality. *Hughes*, 258 F.3d at 459-60. The standard for juror impartiality has been described as follows:

> [T]o hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin, 366 U.S. at 723.

The trial court gave the parties several opportunities to question the jurors about their views on the death penalty and any racial or other biases they harbored. They first questioned the prospective jurors in two written questionnaires. One was a case-specific questionnaire about the prospective jurors' familiarity or knowledge about the case and their views on the death penalty. The other contained 141 questions about the prospective jurors' backgrounds, experiences, and attitudes, including their attitudes about and experiences with members of other races or ethnic groups. They further questioned the prospective jurors about racial biases and

biases for or against the death penalty in small panel voir dire. Finally, they questioned the potential jurors in large group voir dire.

In voir dire, Juror 49 "totally agree[d]" that race should not play any role in the decisionmaking process whatsoever. (6/6/17 Tr. 94.) Defense counsel did not challenge her for cause or use a peremptory challenge on her likely due to this statement. Despite her clear statement that race would not enter into her deliberations, Defendant argues that she was racially biased because of her answers to multiple-choice questions on the jury questionnaire.

In response to one question, she indicated that the issue of racial discrimination against African-Americans in our society was "[n]ot a problem." (Questionnaire of Juror 49.) This statement does not show a bias against African-Americans. The only way that it could show a bias against African-Americans is to interpret the answer as stating a belief that racial discrimination against African-Americans is acceptable, and that simply is not what the question asked. To reach the conclusion that Juror 49 was racially biased, Defendant misinterprets her answer and gives it its most damaging connotation. The question asked whether she believed that racial discrimination is still a problem in our society. Her answer was that it was not a problem. That answer does not demonstrate a bias against African-Americans.

When asked in the questionnaire, "Have you ever had a negative or frightening experience with a person of another race," she described an encounter with an African-American male who approached the group she was in and called them names and made derogatory remarks. (*Id.*) It appeared to be a single, isolated occurrence for which there was no time frame. Although that one experience may have been negative or frightening to her, it too did not demonstrate an across-the board fear of or bias against African-Americans. Indeed, she checked

"[n]o" to the question whether there were any racial or ethnic groups that she did not feel comfortable being around. (*Id.*)

The questionnaire asked the prospective jurors their opinion about the statement, "Some races and/or ethnic groups tend to be more violent than others." (*Id.*) The questionnaire provided five choices from which the juror had to select: "[s]trong[ly] agree," "[a]gree," "[n]o opinion," "[d]isagree," "[s]trongly disagree." (*Id.*) Juror 49 checked the box for "[s]trong[ly] agree." Her explanation for why she checked that box does not indicate a personal bias against African-Americans. She was asked a specific question. Her answer was not based on some deep-seated personal ill will but, rather, was based on her understanding of statistical information (to which she was apparently exposed) indicating that "there are more black people [who] commit crimes and certain religions have violent beliefs." (*Id.*) Regardless of whether or not her understanding is accurate or misplaced, nothing in that statement demonstrates that she herself carries a bias that renders her incapable of being a fair and impartial juror.

Indeed, her handwritten explanation did not address whether she believed that some races were more violent than others. Significantly, she stated that "certain *religions* have violent beliefs." (*Id.*) (emphasis added.) Thus, although she checked that she "[s]trong[ly] agree[d]" that "[s]ome races and/or ethnic groups tend to be more violent than others," her handwritten explanation did not address race and violence. (*Id.*) Her specific statement was that, based on her understanding of statistical information, "there are more black people [who] commit crimes," not that there are more black people who commit *violent* crimes. (*Id.*) Consequently, her handwritten explanation did not link violence with race. It certainly did not indicate that Defendant committed a violent act and deserved a death sentence because of his race.

To the extent that her written answers may have been ambiguous, the purpose of the questionnaire was to identify areas where the court and counsel would want to inquire further. That's just what happened in this case. When counsel did inquire further into the race issue during voir dire, it was clear that Juror 49 was not racially biased and would not use race as a factor or consideration in determining guilt or in determining the appropriate sentence in this case.

In small panel voir dire, the prosecutor specifically addressed the issue of race to ensure that none of the potential jurors would allow racial considerations to enter into their deliberations. (6/5/17 Tr. 227-29, 283-85; 6/6/17 Tr. 36-38, 92-94, 179-81, 243-45; 6/7/17 Tr. 51-53.) To the panel containing Juror 49, he stated:

> The victim of the aggravated murder in this case is a white female. Her son, who was murdered in Kentucky, is also white. The Defendant is African American. As you will remember from filling out those 23 page questionnaires a while back, there were numerous questions on there about race. And one of the reasons that there were questions about race on there is because nobody wants someone on this jury who would automatically vote for the death penalty because an African American is accused of killing a white person. Does that make sense to everybody?
>
> As I have said many times over, what the State is looking for are jurors who can fairly and impartially weigh the aggravating circumstances against the mitigating factors. Race should have no role in your discussions about whether the death penalty is appropriate. Does that make sense to everybody? To that end, I also want to make sure that we do not have any jurors who would be reluctant to consider the death penalty in this case for fear that you may be perceived as being racist or making your decision based on race given the fact that the Defendant is African American and the victim is white.

(6/6/17 Tr. 92-93.) In response to the prosecutor's inquiry of her on that issue, Juror 49 stated that she had no concerns that the relative races of the victims and Defendant would make her reluctant to consider the death penalty. (6/6/17 Voir Dire Tr. 93-94.) As stated above, she "totally agree[d]" that race should not play any role in the decisionmaking process whatsoever. (6/6/17 Voir Dire Tr. 94.) Accordingly, she was able to be fair and impartial and was not a juror

that should have been challenged for cause or excused for cause on the basis of racial beliefs or biases.

The Supreme Court of Ohio considered Juror 49's answers on her jury questionnaire and in voir dire, and it applied the above case law and legal analysis to determine whether Defendant had established that Juror 49 was actually biased. *State v. Froman*, 2020-Ohio-4523, 165 N.E.3d at ¶49-57. The court found that he had not made that showing. *Id.* ¶57. The court explained:

> On the whole, we conclude that juror No. 49's responses on her general questionnaire do not show her inability to be impartial in this case, based on her assurance during voir dire that she could set aside her opinions on race and decide the case based on the evidence. When the prosecutor asked juror No. 49 if she agreed that race should not play any role in the decisionmaking process whatsoever, she responded, "I totally agree." In light of this assurance of impartiality, the record does not support Froman's argument that juror No. 49 was actually biased against him. Thus, we reject Froman's claim in proposition of law No. 3 that he was denied his right to an impartial jury due to the seating of juror No. 49. For the same reason, we reject Froman's ineffective-assistance claim in proposition of law No. 4 with respect to juror No. 49.

Id. ¶57. *Accord Holder v. Palmer*, 588 F.3d 328 (6th Cir. 2009).

Defendant argues that Jurors 5, 13, and 46 were also racially biased because they agreed with the statement in question No. 54 on the questionnaire that "[s]ome races and/or ethnic groups tend to be more violent than others." The Supreme Court of Ohio also rejected this argument. *Froman*, 2020-Ohio-4523, 165 N.E.3d at ¶61.

Contrary to Defendant's assertions, the jury questionnaires of Jurors 5, 13, and 46 do not reveal racial bias. The statement on the questionnaire and the jurors' answers did not identify which race or ethnic group they believed tended to be more violent than others or even whether it was a race or an ethnic group. They also did not reveal the basis for their answers. There is simply not enough information in the questionnaire for Defendant to jump to the conclusion that they were racially biased. The Supreme Court of Ohio noted that the questionnaires of Jurors 5,

13, and 46 "indicated that they had more neutral or sensitive views on the topic of race than indicated by their responses to question No. 54." *Id.* ¶59. The court explained:

> For example, question No. 52 asked, "Have you ever had a negative or frightening experience with a person of another race?" All three jurors responded with the answer "No." Question No. 53 asked, "Have you ever been exposed to persons who exhibited racial, sexual, religious, and/or ethnic prejudice?" Juror No. 13 responded affirmatively explaining, "Friends using words that shouldn't be used." Question No. 50 asked about "the issue of racial discrimination against African-Americans in our society." Juror No. 46 checked a box indicating she believed it is "[a] very serious problem."

Id. ¶59.

Furthermore, their answers during voir dire did not reveal any racial bias, such that they would be excused for cause. All of the jurors expressed agreement when the prosecutor asked their small-group panel, "Do all of you agree that race should not play any role in the decisionmaking process whatsoever?" (6/5/17 Tr. 230; 6/6/17 Tr. 38.) Consequently, they were not subject to being challenged for cause, and the court properly did not remove them from the jury.

The challenged jurors' answers on the jury questionnaires also did not establish that counsel's representation of Defendant during voir dire was ineffective. To prevail on a claim of ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To demonstrate deficiency, a defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id.* Trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Id.* Moreover, the adequacy of counsel's performance is reviewed in light of all the circumstances surrounding the trial. *Id.* Even assuming that counsel's performance was ineffective, the defendant must still show that the error had an effect on the judgment. *Id.* Reversal is warranted

only where the defendant demonstrates that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.*

Trial counsel is entitled to deference when conducting voir dire. *Miller*, 385 F.3d at 672. Indeed, the Supreme Court of Ohio has recognized that

> [f]ew decisions at trial are as subjective or prone to individual attorney strategy as juror voir dire, where decisions are often made on the basis of intangible factors. The selection of a jury is inevitably a call upon experience and intuition. The trial lawyer must draw upon his own insights and empathetic abilities. Written records give us only shadows for measuring the quality of such efforts. * * * [T]he selection process is more an art than a science, and more about people than rules. For these reasons, we have recognized that counsel is in the best position to determine whether any potential juror should be questioned and to what extent.

(Internal quotation marks and citations omitted.) *State v. Mundt*, 2007-Ohio-4836, 873 N.E.2d 828 (Ohio), at ¶64-65. "A strategic decision cannot be the basis for a claim of ineffective assistance unless counsel's decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness." *Miller*, 385 F.3d at 672-73.

Defendant asserts that his counsel failed to meaningfully examine the jurors on the issue of race. The record shows that defense counsel did question prospective jurors on the issue of race, some of which are jurors which he challenges as racially biased. (6/6/17 Tr. 44-45; 6/7/17 Tr. 132.) Counsel questioned some prospective jurors extensively about racial bias and their answers on the questionnaire that were related to race. (6/7/17 Tr. 119-20, 157-58.) Counsel challenged those who demonstrated racial bias. (6/5/17 Tr. 75-77, 153; 6/7/17 Tr. 119-20, 138-39.) To the extent that defense counsel did not specifically question some of the challenged jurors about race, counsel need not repeat questions about topics already covered by the court or opposing counsel. *See State v. Watson*, 572 N.E.2d 97, 108 (Ohio 1991) (overruled on other grounds). The prosecutor inquired of those jurors about race, which specifically included Juror 49, and their answers revealed that they were not racially biased. (6/5/17 Tr. 227-30; 6/6/17 Tr.

36-38, 92-94.) They agreed that race should not play any role in the decisionmaking process. (6/5/17 Tr. 230; 6/6/17 Tr. 36-38, 94.)

The Supreme Court of Ohio applied governing state and federal case law to the unique facts of this case in a way that is wholly consistent with this Court's decisions interpreting the Sixth Amendment's right to a trial by an impartial jury and right to counsel. This case does not present compelling reasons for granting a writ of certiorari. Additionally, Defendant did not make a structural error argument in the Supreme Court of Ohio. He is raising that issue for the first time in this Court. The State asks this Court to deny Defendant's petition for a writ of certiorari.

CONCLUSION

This case does not present compelling reasons for granting a writ of certiorari. The Supreme Court of Ohio applied governing state and federal case law to the unique facts of this case in a way that is wholly consistent with this Court's decisions interpreting the Sixth Amendment's right to a trial by an impartial jury and right to counsel. Defendant also did not make a structural error argument in the Supreme Court of Ohio. It is being raised for the first time in this Court. For the reasons set forth in the above argument, Respondent asks this Court to deny Defendant's petition for a writ of certiorari.

Respectfully Submitted,

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