No.

IN THE

Supreme Court of the United States

ANDRE LEE THOMAS,

Petitioner,

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Under this Court's clearly established precedent, was Petitioner Andre Thomas—an African American man who, during a schizophrenic episode, killed his estranged white wife, their son, and her daughter—denied his constitutional rights:

(1) to be tried by an impartial jury, when three jurors at Thomas's capital trial expressed opposition to people of different races marrying and having children—writing on their voir dire questionnaires that such relationships are "against God's will," that we should "stay with our Blood Line," and that the children of interracial relationships are denied "a specific race to belong to"—and when the jurors never disclaimed those views or said they could set them aside to consider Petitioner's mental illness and make the individualized sentencing judgment required by the Constitution; and

(2) to the effective assistance of counsel, when defense counsel did not object to, or seek to strike, any of those three jurors, and failed to ask two of them a single question about their bias.

RELATED PROCEEDINGS

15th Judicial District Court of Texas (Grayson County):

State of Texas v. Andre Thomas, No. 051858 (Mar. 14, 2005)

Ex Parte Andre Thomas, No. 051858-15-A (Mar. 23, 2008)

Texas Court of Criminal Appeals:

Thomas v. State, No. AP-75,218 (Oct. 8, 2008)

Ex Parte Andre Lee Thomas, No. WR-69859-01 (Mar. 18, 2009)

United States District Court:

Andre Lee Thomas v. Lorie Davis, No. 4:09-CV-644 (E.D. Tex. Sept. 19, 2016)

United States Court of Appeals (5th Cir.):

Andre Lee Thomas v. Bobby Lumpkin, No. 17-7002 (5th Cir. Apr. 23, 2021)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES:

STATUTES, RULES & CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Andre Thomas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion denying habeas relief (App. 1a–54a) is reported as *Thomas v. Lumpkin*, 995 F.3d 432 (5th Cir. 2021). The district court's opinion and order (App. 57a–290a) is not reported but available at 2016 WL 4988257.

JURISDICTION

The Fifth Circuit's opinion denying habeas relief issued on April 23, 2021. Pursuant to this Court's March 19, 2020 Order, the time to file this Petition was extended to 150 days, to September 20, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . and to have the Assistance of Counsel for his defense.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides in relevant part:

> . . . 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.

The Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d), provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Suffering from severe schizophrenia and active psychosis, Andre Thomas followed the instructions of the voices in his head and murdered his estranged wife, their son, and her daughter before attempting to take his own life by stabbing himself in the chest. Five days after the murders, while sitting in his jail cell, Thomas—following the literal dictates of Matthew 5:29 that "if thy right eye offend thee, pluck it out, and cast it from thee"—gouged out his right eye.

Thomas is Black, and his wife was white. He was convicted and sentenced to death by an all-white jury. On their jury questionnaires, three jurors expressed opposition to people of different races marrying and having children. Their explanations reflected the deep roots of such views, i.e., that interracial relationships violate "God['s] inten[t]," mix "Blood Line[s]," and "harm[] . . . the children involved" by depriving them of "a specific race to belong to."

Defense counsel raised no objection to any of the three jurors, asked no questions of two of them about their bias, and asked the third only brief questions that did not address whether the juror could fairly consider Thomas's mitigating evidence in rendering an individualized sentence notwithstanding his bias. At trial, the prosecution appealed to these biases, eliciting irrelevant testimony about sexual relationships Thomas had with other white women. Then, in arguing that Thomas should be sentenced to death, the State asked the all-white jury: "Are you going to take the risk [that, if sentenced to life imprisonment and later released on parole] about him asking your daughter out, or your granddaughter out?

After watching the string of girls that came up here . . . that he could talk into being with him, are you going to take that chance?"

Thomas's case undermines principles this Court has repeatedly and forcefully protected: the right to an impartial jury, and the recognition that overt racial bias in the criminal justice system must be eradicated, as such bias undermines the rule of law itself. Under this Court's clearly established precedent, there is a constitutionally intolerable risk that jurors who harbored the views described above would have been "less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance," such that they could not fairly make the "highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves." *Turner v. Murray*, 476 U.S. 28, 33–35 (1986) (citations and quotation marks omitted). Nor, under this Court's clear case law, would any reasonable defense counsel have accepted these jurors without, at least, asking follow-up questions to determine if they could set aside their bias and accord Thomas a "fair trial" by an "impartial tribunal." *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

The decision of the divided Fifth Circuit panel below, which denied relief on federal habeas review, flies in the face of the fundamental precepts underlying multiple decisions of this Court, undermines confidence in the criminal justice system, and compels this Court's intervention.

I. STATEMENT OF FACTS

A. Thomas's History of Severe Mental Illness

Andre Thomas's life history was characterized by privation, abuse, and severe mental illness. Growing up, his family routinely lacked heat, running water, and electricity; Thomas and his siblings often slept on the floor in one room. ROA 583, 1418, 1445.[1] His mother Rochelle exposed Thomas to her numerous abusive romantic partners, including Thomas's largely absent father. ROA 435, 526, 583, 619. Both Thomas's mother and at least one brother have psychotic disorders. App. 293a n.1; ROA 401, 513.

Thomas began hearing voices—"demons"—when he was 10 years old. ROA 407. At that age, he began drinking alcohol, which made the voices in his head "seem less frightening," and tried to kill himself for the first time. ROA 1004, 1359. His second suicide attempt occurred when he was 15 years old. ROA 1004.

As a teenager, Thomas was committed to juvenile detention several times for minor offenses. 38 RR 61, 64, 106–07, 112–13. He repeatedly told authorities that he was having suicidal thoughts or attempted to commit suicide, and he asked for counseling. ROA 1366, 1488–89, 1494–96. Each time, staff put him on suicide watch but did nothing further. *See id.*

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[1] "ROA" refers to the record on appeal in the Fifth Circuit. "App." refers to the appendix being filed with this petition. "RR" refers to the "Reporter's Record" of trial proceedings. "CR" refers to the "Clerk's Record" of trial court filings. "SHCR" refers to the Clerk's Record of filings in the state habeas court.

On his eighteenth birthday, Thomas married his high-school sweetheart Laura Boren, with whom he had a son, Andre Jr., a year and a half earlier. ROA 1968. Thomas did his best to provide for his family, earning his GED and working multiple jobs. ROA 915, 1521. But Thomas and Boren's relationship soon deteriorated, and they separated a few months after their wedding. ROA 1968.

By the time he was 19, Thomas's mental decline was accelerating. His increasingly erratic behavior led most anyone around him to conclude "he was mentally ill." ROA 404–05. He "kept insisting that he had lived that day before, 'over and over.'" ROA 564–65. The voices Thomas heard were getting worse, including (as his brother recounted) the voice of God commanding him to do bizarre things, like "walk all night along the railroad tracks." ROA 435, 592. By the time Thomas turned 21 in the spring of 2004, his psychosis was undeniable. His mother observed that he would often "talk to himself and have conversations with people who were not there." ROA 620. He became convinced that "he [wa]s a fallen angel" who "w[ould] open up the gates of hell," and that "everyone he knew was a character in a video game he was playing." ROA 527, 1590. He was obsessed with the symbols on the dollar bill, certain that they "contain[ed] the meaning of life," and he repeatedly declared that he had "figured it out!" ROA 527.

In the three weeks before the murders, Thomas twice tried to kill himself. App. 60a, 295a–96a. After the first attempt, a neighbor took him to the local Mental Health and Mental Retardation facility,

which issued an involuntary commitment order, but local authorities never implemented it. App. 294a; ROA 765. After the second suicide attempt (two days before the crimes), Thomas was taken to a local hospital. During an evaluation, a social worker noted that he was experiencing delusions and religious preoccupations. App. 295a; ROA 779–80. A doctor also examined Thomas and concluded that he was psychotic, hearing voices, and suicidal. App. 295a; 31 RR 7–8. That same doctor sought an Emergency Detention Order to ensure Thomas would remain confined to a mental-health facility. App. 295a; ROA 769. Yet, Thomas was left unattended at the hospital and left before he was committed for treatment. App. 295a.

B. The Murders and Their Aftermath

In the morning of Saturday, March 27, 2004, Andre Thomas killed his estranged wife, Laura Boren Thomas, their four-year-old son Andre Jr., and her 13-month-old daughter, Leyha Hughes. As Thomas later told police, he believed Laura was Jezebel (the wife of the devil), Andre Jr. the anti-Christ, and Leyha an evil spirit. App. 296a. He brought three knives with him, using a different knife on each victim because he was convinced it was crucial to his religious mission not to "cross contaminate" their blood. *Id.* He attempted to remove each victim's heart, explaining later that "their hearts ha[d] been freed from evil." App. 2a. Beside Laura's body, Thomas left a one-dollar bill folded lengthwise, exposing the pyramid with the eye in the middle. 44 RR SX 13. He then stabbed himself in the chest and lay down next to Laura, expecting to die. App. 61a.

When he did not die, he got up and left, carrying the victims' organs "stuffed" in his pockets. *Id*. He walked to his father's house, where he attempted to call Laura. App. 62a. When he could not find her number, he called Laura's parents, leaving a voicemail: "Something bad is happening to me and it keeps happenin' and I don't know what is going on. I need some help. I, I think I'm in hell and, um, I need help." *Id*.

Later that day, Thomas went to the police station and confessed. After undergoing surgery for his stab wounds, Thomas gave two days of interviews to the police. App. 318a–19a. He continued to insist that Laura, Andre Jr., and Leyha were demons, and remained fixated on the images that appear on the dollar bill, stating "I am the 13th warrior on the dollar bill." ROA 68; 33 RR 104.

Five days after the murders, Thomas was in his cell reading his Bible. After reading Matthew 5:29 ("If thy right eye offends thee, pluck it out"), Thomas gouged out his right eye with his fingers. App. 63a.

C. Trial Proceedings

Thomas was evaluated by both a court-appointed and a prosecution expert, who agreed that he was incompetent to stand trial. The court declared Thomas incompetent and remanded him to Vernon State Hospital, a maximum-security psychiatric facility. Supp. CR 238–39. Thomas was treated for his schizophrenia at Vernon, and later throughout trial, with Zyprexa, a strong anti-psychotic drug. App. 309a, 332a. After just five weeks, two Vernon doctors asserted that the symptoms of Thomas's psychosis

were "exaggerated," "updated" his diagnosis to "Substance Induced Psychosis," and declared him competent to stand trial. ROA 1006–08.

The trial court appointed R.J. Hagood, who was suffering from severe pancreatitis, as Thomas's lead counsel, and Bobbie Peterson, who had no capital-case experience, as second chair. ROA 589, 2113. Upon Thomas's return from Vernon State Hospital for trial, defense counsel raised no issues concerning his competency. Thomas was indicted for the capital murder of Leyha Hughes and pled not guilty by reason of insanity. App. 317a.

1. Jury Selection

As initially assembled, the venire contained six prospective Black jurors among the first 20 people to be questioned. ROA 2444; 2525. The State requested a jury shuffle, which resulted in 10 of the 12 Black venire members being moved beyond the first 100 seats, effectively eliminating them as candidates for jury service. *See* App. 105a; ROA 2444; 2525–33. Only one prospective Black juror made it to individual voir dire, and she was struck by the State. 22 RR 74. Thomas's jury was all-white.

The jury questionnaire included a question asking prospective jurors to check one of four boxes that best described their feelings about "people of different racial backgrounds marrying and/or having children." Jurors could indicate either: (1) "I vigorously oppose people of different racial backgrounds marrying and/or having children and am not afraid to say so." (2) "I oppose people of different racial backgrounds marrying and/or having children, but I try to keep my

feelings to myself." (3) "I do not oppose people of different racial backgrounds marrying or being together, but I do oppose them having children." or (4) "I think people should be able to marry or be with anyone they wish." App. 393–94a.

Thomas's all-white jury included three jurors and an alternate who checked one of the first two options, indicating that they opposed both interracial marriage and people of different racial backgrounds having children. Juror Ulmer checked the first option ("vigorously" opposed to interracial marriage and "not afraid to say so"). App. 392a. Ulmer explained his views further, writing: "I don't believe God intended for this." *Id.* The other two jurors and the alternate all checked the second answer. App. 393a–98a. Juror Copeland volunteered that "we should stay with our Blood Line," and juror Armstrong declared that interracial marriage is "harmful for the children involved because they do not have a specific race to belong to." App. 394a–96a. In response to a separate question on the questionnaire, Jurors Ulmer and Copeland also noted their church or spiritual affiliation's position on interracial marriage as "[d]on't believe in this" (Ulmer) and "Should not be" (Copeland). App. 391a, 395a.

Thomas's counsel did not question Copeland, Armstrong, or Hintz (the alternate) about their racial bias, 16 RR 125–98, 256–301; 26 RR 102–47, and posed only three perfunctory inquiries to Ulmer, 16 RR 64–66. *See also* App. 10a–11a. Although these jurors appeared early in the jury selection process, defense counsel did not challenge any of them for cause, or exercise available peremptory strikes.

Ulmer, Armstrong, and Copeland were accepted as jurors #4, #5, and #6. 16 RR 68, 199, 306. Hintz was accepted as alternate juror #1. App. 112a–13a, 120a.

2. Guilt Phase

There was no dispute that Thomas committed the crimes and that he was experiencing active psychosis when he did so. 37 RR 28–30, 108; *see also* App. 316a (state habeas opinion). The guilt phase focused on Thomas's insanity defense. The prosecution claimed Thomas could not prove legal insanity, either because he knew his actions were wrong despite his psychosis or because his psychosis was not a defense under Texas law given its inducement by voluntary intoxication (i.e., his ingestion of Coricidin, which contains a cough suppressant, two days earlier). *See* App. 2a–3a; Tex. Penal Code § 8.04(a), (d). The jury returned a guilty verdict. 38 RR 4–7.

3. Penalty Phase

At the punishment phase, the prosecution emphasized the facts and circumstances of the crimes in urging a death sentence and, notwithstanding the testimony of their own experts, suggested that Thomas was faking his mental illness. 42 RR 37–42, 67–68; 1 Supp. CR 32–39; App. 298a, 301a, 305a, 327a, 332a–33a. The defense relied on mitigating evidence of Thomas's severe mental illness, including testimony regarding the insanity defense from both prosecution and defense witnesses during the guilt phase. 42 RR 45, 55–57.

In closing argument, the prosecutor asked the all-white jury if they could take the risk that Thomas, if

not executed, would eventually be released on parole, "come back to Grayson County," and "ask[ ] your daughter out, or your granddaughter out? After watching the string of girls that came up here and apparently could talk him into—that he could talk into being with him, are you going to take that chance?" 42 RR 41–42. The prosecutor's references to "the string of girls that came up here" concerned four white women and one Latina woman who testified during trial that they had been romantically involved with Thomas.[2] At the punishment phase, the prosecution elicited irrelevant testimony from one of those witnesses that she had become pregnant by Thomas and had a miscarriage. 39 RR 22.

The jury sentenced Thomas to death, and the judgment was affirmed on direct appeal. *See Thomas v. State*, No. AP-75,218, 2008 WL 4531976 (Tex. Crim. App. Oct. 8, 2008).

On December 8, 2008, as his mental illness persisted, Thomas removed his other eye and consumed it. App. 300a n.11. Since that time, Thomas has resided at TDCJ's Wayne Scott (formerly Jester IV) high security psychiatric facility.[3]

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[2] For four of these witnesses, this testimony was elicited, or highlighted, by the prosecution. *See* 27 RR 184; 29 RR 185; 33 RR 185–86; 36 RR 18, 45–46; 39 RR 55–56. Although the record does not specifically speak to the race or ethnicity of these witnesses, one of undersigned counsel was present at trial.

[3] Texas Department of Criminal Justice, Inmate Information Details, Andre Thomas, available at: https://inmate.tdcj.texas.gov/InmateSearch/viewDetail.action?sid=05855165 (last accessed Sept. 19, 2021).

II. STATE HABEAS PROCEEDINGS

In his state habeas application, Thomas presented two claims for relief related to juror bias. First, Thomas argued that the presence of jurors openly opposed to interracial marriage deprived him of a fair trial in violation of his rights under the Sixth and Fourteenth Amendments (Claim Number 20). Second, Thomas argued that his trial counsel rendered ineffective assistance by failing to inquire into venire members' bias and ensure that no juror harboring such bias was empaneled (Claim Number 21). SCHA 187–98.

Thomas supported his application with affidavits from his trial attorneys. Lead counsel R.J. Hagood admitted: "My failure to ask few, if any, follow up questions of the members of the jury who had indicated on their jury questionnaires that they were opposed to interracial marriage was not intentional; I simply didn't do it." ROA 491. Second-chair Bobbie Peterson explained that Thomas's trial was her first capital trial so she "was new at capital voir dire," and she remembered "[v]oir dire in this case was a nightmare." ROA 587.

The State responded to Thomas's state habeas application, attaching new affidavits from Hagood and Peterson. This time, both asserted in identical language: "For those jurors who expressed some problem with interracial relationships, either [co-counsel] or I questioned them to the extent necessary for us to request a strike for cause or make a decision to use a strike against them." App. 124a–25a. Neither attorney attempted to reconcile this assertion with their prior affidavits or with the voir dire transcript,

which shows that neither asked any questions of three of the four jurors who expressed hostility to interracial marriage.

The state habeas court recommended denial of relief without an evidentiary hearing. *See* ROA 2108. Although the court noted that trial counsel did not object to the jurors who expressed hostility to interracial marriage, *see* App. 329a, it did not find the juror bias claim waived. *Compare* App. 372a, 373a (finding other claims waived for failure to make a contemporaneous objection). The court denied Thomas's juror bias claim on the merits, stating: "[t]he applicant has failed to present by a preponderance of the evidence any proof of purposeful prosecutorial or jury discrimination in his particular case." App. 372a–73a. The only case the state habeas court cited in support of its conclusion was *County v. State*, 812 S.W.2d 303, 308 (Tex. Crim. App. 1989), a case about selective enforcement by prosecutors, not juror bias.

With respect to counsel's performance, the state habeas court stated that, "with hindsight, every attorney may have wished that additional questions were asked." App. 373a. The court then concluded that Thomas "failed to overcome the presumption that trial counsel was effective during voir dire questioning," and had not shown either deficient performance or prejudice. *Id.* The court did not address counsel's failure to ask any questions of three of the four jurors about their avowed opposition to interracial marriage and other biased statements.

The Texas Court of Criminal Appeals adopted the state habeas court's findings of fact and conclusions of

law. App. 292a. In a concurring statement, Judge Cochran observed that Thomas "has a severe mental illness," and acknowledged that "there is no dispute that [Thomas] was, in laymen's terms, 'crazy' at the time he killed his wife and the children." App. 293a, 305a.

III. FEDERAL HABEAS PROCEEDINGS

Thomas filed a federal habeas petition, re-urging his claims that he was denied a fair trial by an impartial jury, and that trial counsel rendered ineffective assistance by failing to inquire into jurors' admitted racial biases and ensure that no biased juror was empaneled. ROA 138–56. In its answer, Respondent recognized that the state habeas court had addressed both claims on the merits and defended its legal conclusions as "not so contrary to clearly established federal law as to warrant federal habeas relief." ROA 2280. The district court agreed, deeming Thomas's juror bias claim "speculative" and premised on "'racial stereotypes'" about the challenged jurors. App. 121a (citation omitted).

After granting a certificate of appealability, a split Fifth Circuit panel affirmed. App. 2a. The majority acknowledged that the state habeas court's analysis was "not directly on point as to whether any juror with a relevant bias that made him or her unable to be impartial was seated on the jury." App. 15a. Nonetheless, the panel determined that the state habeas court made an "implicit finding" that "any bias of a juror could be set aside in determining guilt or punishment." App. 16a. The panel concluded that this implicit finding was reasonable because even though "Armstrong and Copeland were not asked about their

racial attitudes in voir dire," App. 25a, their questionnaires reflecting opposition to interracial relationships were insufficient to show an unconstitutional risk of racial bias. App. 17a–18a. In reaching that conclusion, the Fifth Circuit did not address Copeland's concern about mixing racial "Blood Line[s]" or Armstrong's view that interracial marriage denies children "a race to belong to." As for Ulmer, the panel majority interpreted the state court as reasonably finding that his answers to counsel's brief questions made "clear that his moral judgment [against interracial relationships] would not affect his fact finding," such that he "could serve as an impartial juror." App. 17a.

The Court of Appeals acknowledged that Thomas's ineffective assistance of counsel claim presented a "difficult issue" with respect to Copeland and Armstrong. App. 23a. The panel ultimately denied relief, reasoning that counsel could have interpreted Copeland and Armstrong's questionnaire answers as not warranting follow-up because they did "not reflect[] the kind of animosities to a black defendant that would motivate them to convict regardless of the evidence." App. 29a.

Judge Higginson dissented in relevant part. Judge Higginson emphasized that "the fact of Thomas's interracial relationship with his victim was at the crux of the State's case," with the prosecution "urging the all-white jury to vote for capital punishment" by stating: "'Are you going to take the risk about him asking your daughter out, or your granddaughter out?'" App. 52a. Judge Higginson concluded that "clearly established Supreme Court law . . . forbid[s]

persons" from participating as jurors and making "life or death judgment" in capital cases "involving interracial marriage and offspring" when the jurors openly state they have bias against such relationships. App. 54a.

REASONS FOR GRANTING THE PETITION

This Court has committed to undertake "'unceasing efforts' to eradicate racial prejudice from our criminal justice system." *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987) (quoting *Batson v. Kentucky*, 476 U.S. 79, 85 (1986)). Such discrimination "'poisons public confidence' in the judicial process," injuring "not just the defendant, but the 'law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.'" *Buck v. Davis*, 137 S. Ct. 759, 779 (2017) (citations omitted). The Court recently reaffirmed that "blatant racial prejudice is antithetical to the functioning of the jury system" and damages "both the fact and the perception of the jury's role as a vital check against the wrongful exercise of power by the State." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868, 871 (2017) (citations omitted).

The Court has been particularly vigilant in ensuring that racial bias does not impact the administration of justice in capital cases. *See Flowers v. Mississippi*, 139 S. Ct. 2228 (2019); *Tharpe v. Sellers*, 138 S. Ct. 545 (2018); *Buck v. Davis*, 137 S. Ct. 759 (2017); *Foster v. Chatman*, 578 U.S. 488 (2016); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Miller-El v. Dretke*, 545 U.S. 231 (2005). These cases reflect the Court's recognition that such

discrimination not only violates federal law—it undermines the rule of law itself.

The Court's commitment to eradicating overt racial discrimination from the administration of justice, especially in capital cases, requires review of Andre Thomas's death sentence. Thomas, a Black man, killed his estranged white wife, their son, and her daughter, while Thomas was suffering from a severe mental illness that rendered him, "in laymen's terms, 'crazy.'" App. 305a. Yet three of the jurors tasked with fairly considering whether Thomas should be sentenced to death openly harbored racial bias directly implicated by the facts of this "extraordinarily tragic case." App. 292a. Each opposed "people of different racial backgrounds marrying and/or having children." App. 392a, 394a, 396a. One did so on the ground that "I don't believe God intended for this"; a second because "I think we should stay with our Blood Line"; and the third on the basis that interracial marriage is "harmful for the children involved because they do not have a specific race to belong to." App. 392a, 394a–96a. The latter two jurors were not asked a single question about their prejudiced statements; the first was asked only a few cursory questions—none of which addressed whether he could fairly consider Thomas's serious mental illness and make an individualized sentencing judgment notwithstanding the juror's "vigorous" opposition to interracial relationships like Thomas's.

Far from the 12 "impartial and unprejudiced jurors" required by clearly established law, *Parker v. Gladden*, 385 U.S. 363, 366 (1966), Thomas was convicted and sentenced to death by multiple jurors

who harbored—and did not disclaim—racial bias directly implicated by the facts of this case. And, under this Court's clear precedent, his trial counsel rendered ineffective assistance by failing to ensure Thomas had a "fair trial [i.e.,] one in which evidence subject to adversarial testing is presented to an impartial tribunal." *Strickland*, 466 U.S. at 685. They raised no objection to the seating of these biased jurors, and entirely failed to question two of them about their admitted racial biases.

A split Fifth Circuit panel nonetheless deferred to the state habeas court's denial of relief on Thomas's claims. In so doing, it contravened this Court's precedents concerning the right to trial by an impartial jury, the right to effective assistance of counsel, and the proper methodology for applying 28 U.S.C. § 2254(d). Because these conflicts concern an important issue of federal law, certiorari review is warranted. *See* Sup. Ct. R. 10(c).

I. THE FIFTH CIRCUIT'S DENIAL OF RELIEF ON THOMAS'S JUROR BIAS CLAIM CONFLICTS WITH THIS COURT'S DECISIONS ON AN IMPORTANT ISSUE OF FEDERAL LAW.

The right to trial by an impartial jury is one of the most "basic" constitutional rights, protected both by the plain text of the Sixth Amendment and by the Fourteenth Amendment's Due Process Clause. *See, e.g.*, *Morgan v. Illinois*, 504 U.S. 719, 727 (1992). It is a fundamental feature of American democracy derived from English common law traditions of "individual liberty," "dignity," and the "worth of every man." *Irvin v. Dowd*, 366 U.S. 717, 721–22 (1961).

And it means that a criminal defendant must be tried by "'indifferent' jurors," who are both disinterested and unbiased. *Irvin*, 366 U.S. at 722. The required impartiality applies to each individual juror; a defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." *Parker*, 385 U.S. at 366. This foundational right mandates, "of course, that a defendant has the right to an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice." *Georgia v. McCollum*, 505 U.S. 42, 58 (1992).

These principles are controlling here. Yet, the state habeas court failed to consider them, thereby reaching a decision that was both contrary to, and an unreasonable application of, this Court's clearly established law. *See* 28 U.S.C. § 2254(d)(1).

A. The Fifth Circuit Erred in Applying AEDPA Deference Based on Reasoning Inconsistent with the State Courts' Opinions.

The state habeas court, in an opinion adopted by the Texas Court of Criminal Appeals, concluded that Thomas had a fair trial even though three jurors who admitted to harboring racial bias that was directly implicated by the facts of his case were permitted to serve on the jury that sentenced Thomas to death. In reaching this conclusion, the state courts did not acknowledge any of this Court's decisions addressing the right to trial by an impartial jury. Instead, the state habeas court asserted that "[t]here is no evidence that the jury's decision was racially motivated," and that Thomas "failed to present by a preponderance of the evidence any proof of purposeful

prosecutorial or jury discrimination in his particular case." App. 329a, 372a–73a (citing *County v. State*, 812 S.W.2d 303, 308 (Tex. Crim. App. 1989)).

But none of this Court's decisions regarding juror bias require evidence that the jury's verdict was "racially motivated" or the product of "purposeful . . . discrimination." Instead, this Court has unequivocally held that the relevant inquiry in a juror bias case is whether all 12 jurors are impartial prior to being seated, i.e., whether each juror is "'indifferent as he stands unsworne.'" *Irvin*, 366 U.S. at 722. Therefore, the seating of a single juror who is openly biased and "'should have been dismissed for cause requires reversal.'" *Skilling v. United States*, 561 U.S. 358, 395–96 (2010) (quoting *United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000)) (alterations omitted). As the Court explained in a judicial bias case that rests on the same principles underlying *Irvin*, a reviewing court is "not required to decide whether in fact" the decisionmaker was influenced by bias in reaching a decision, but only whether the decisionmaker was biased. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (relying on *In re Murchison*, 349 U.S. 133, 136 (1955)); *Irvin*, 366 U.S. at 722 (relying on *In re Murchison*, 349 U.S. at 136).

Thus, when a juror who admits actual bias during voir dire is nonetheless seated on the jury, this Court's precedents are clear that reversal is required without any inquiry into whether that bias "motivated" the decisionmaking process in the defendant's case. *See Skilling*, 561 U.S. at 395–96; *Martinez-Salazar*, 528 U.S. at 316 (citing additional

cases); *Irvin*, 366 U.S. 717 (vacating conviction and death sentence where voir dire showed that jurors developed opinion of crime and defendant after extensive media coverage). By requiring Thomas to go beyond a showing that biased jurors sat on his jury, and demonstrate that the jury's decision was racially motivated, the state habeas court's decision was both "contrary to" and an "unreasonable application of" this Court's case law. 28 U.S.C. § 2254(d)(1).

The Fifth Circuit acknowledged that the state courts' focus on whether Thomas had proven that the jury's decision was racially motivated was not "directly on point" as to whether any seated juror possessed "a relevant bias that made him or her unable to be impartial." App. 15a. Nonetheless, the panel majority invoked *Harrington v. Richter*, 562 U.S. 86, 109 (2011), for the proposition that "a federal court will deny habeas relief 'if there was a reasonable justification for the state court's decision,'" even if it is not a justification the state court offered. *See* App. 15a–16a. This was error. The *Richter* standard applies only when the state court's decision is "unaccompanied by an explanation" relevant to its disposition of the claim. *Richter*, 562 U.S. at 98; *accord Wilson v. Sellers*, 138 S. Ct. 1188, 1195–97 (2018) (*Richter* does not apply when a lower state court provided reasons for denying relief, and it is fair to presume that the state supreme court relied on the same reasons).

Where, as here, a state court *does* provide reasons for rejecting a federal claim, and those reasons are contrary to or unreasonably apply this Court's precedents, "the requirement set forth in § 2254(d)(1)

is satisfied," and the federal habeas court "must then resolve the claim without the deference AEDPA requires." *Panetti v. Quarterman*, 551 U.S. 930, 932, 954 (2007). By requiring Thomas to show that the jury's verdict was "racially motivated," the state habeas court applied a legal standard that "contradicts the governing law set forth in [this Court's] cases." *Williams v. Taylor*, 529 U.S. 362, 405 (2000) (majority opinion of O'Connor, J.). The state habeas court's decision was thus contrary to this Court's precedent and not entitled to AEDPA deference. *Id.*; *see Panetti*, 531 U.S. at 977.

B. The Fifth Circuit's Substitute Basis for Denying Relief Is Also Unreasonable.

Even if the *Richter* presumption did apply here, habeas relief would still be required because "there was no reasonable basis for the state court to deny relief." 562 U.S. at 98. According to the Fifth Circuit, the state habeas court's denial of relief could have been based on an "implicit finding" that "any bias of a juror could be set aside in determining guilt or punishment." App. 16a. But had the state habeas court relied on such reasoning (and it did not), its decision would have been unreasonable in light of the nature of the racial animus espoused by those jurors, the lack of any evidence that Copeland and Armstrong could set aside that bias, and the lack of any evidence that Ulmer could fairly consider Thomas's mitigating evidence and render an individualized sentence.

1. The Jurors at Issue Harbored a Brand of Racial Bias that Was Directly Implicated by the Facts of This Case.

Opposition to interracial marriage represents a unique form of racial animus. *See, e.g.*, Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, 59 AM. U. L. REV. 469, 483–91 (2010) (discussing the historical origins of contemporary attitudes about interracial marriage). Prior to this Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967), such relationships were often prohibited by law, based on purported justifications such as preserving "racial integrity" and preventing "corruption of blood" and "the obliteration of racial pride." *Id*. at 7 (internal quotation marks and citation omitted). These justifications, the Court recognized in *Loving*, were "obviously an endorsement of the doctrine of White Supremacy." *Id*. Opposition to interracial marriage is also often rooted in the desire to protect white women from "oversexed and obsessed" Black men, feeding into the worst racist tropes. *See* Robin A. Lenhardt, *Beyond Analogy:* Perez v. Sharp*, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CAL. L. REV. 839, 874 (2008).

Three jurors in Thomas's case openly admitted that they opposed "people of different racial backgrounds marrying and/or having children." App. 391a–96a. They amplified that opposition by invoking the kinds of bias that make opposition to interracial marriage particularly dehumanizing: that interracial marriage is against God's will (Ulmer); leads to the mixing of "Blood Line[s]" and—according to his church/spiritual affiliation—"Should not Be"

(Copeland); and is harmful to children who lack a specific race to belong to (Armstrong). *See id.*; *Loving*, 388 U.S. at 11–12. Yet, these same jurors were permitted to sit on the jury in Thomas's capital trial, and the Fifth Circuit concluded it would be reasonable to determine that they were impartial. That was error.

2. There Is No Evidence that Armstrong and Copeland Could Fairly Assess Thomas's Moral Culpability Notwithstanding Their Bias.

The Fifth Circuit reduced Copeland's and Armstrong's voir dire responses to reflecting mere "disapprov[al] of interracial marriage," which they liked to "keep . . . to themselves." App. 17a. Based on these characterizations, the Fifth Circuit asserted that the state courts could have reasonably concluded that neither juror had indicated the kind of bias that would deprive Thomas of his right to a trial by an impartial jury. *See* App. 17a–18a.

This cursory discussion reflects a troubling failure to recognize the nature of the bias Copeland and Armstrong admitted to in their questionnaires. Notably, those questionnaires offered no appropriate response for jurors who vigorously opposed interracial marriage but chose not to broadcast their views. Jurors who opposed people of different races both marrying and having children had to choose between saying either "I *vigorously oppose* people of different racial backgrounds marrying and/or having children *and am not afraid to say so*," or "I *oppose* people of different racial backgrounds marrying and/or having

children, *but I try to keep my feelings to myself*." App. 396a, 398a (emphases added).

Copeland and Armstrong chose the second option, acknowledging that they opposed people of different races marrying each other and having children. And they elaborated on why. Copeland wrote specifically: "I think we should say stay with our Blood Line." App. 395a–96a. That invocation of the need to prevent the mixing of racial "Blood Line[s]" constitutes clear racial bias, which was directly relevant to this case. So too was Armstrong's statement that she opposed interracial marriage because it is "harmful to children" who "do not have a specific race to belong to." App. 396a. Indeed, both jurors' views mirror the attitudes harbored by proponents of the anti-miscegenation laws this Court rejected in *Loving*. *See* 388 U.S. at 7.

Copeland's and Armstrong's questionnaire responses demonstrate that they were not "impartial and unprejudiced," *Parker*, 385 U.S. at 366, nor "indifferent as [they stood] unsworne," *Irvin*, 366 U.S. at 722. As a consequence, Thomas was denied the basic constitutional requirement of trial by an impartial jury. *See id.* Concluding otherwise would be an unreasonable application of these precedents.

It would also be an unreasonable application of *Turner,* in which this Court explained the special risks of racial discrimination affecting capital proceedings, particularly in cases involving interracial crimes. The Court said that "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected."

476 U.S. at 35 (controlling plurality opinion). A juror who harbors racial animus against Black people as "violence prone or morally inferior" may well be influenced by those beliefs in making the "highly subjective, unique individualized judgment regarding the punishment that a particular person deserves." *Id.* at 33–35. Especially relevant here, the *Turner* Court emphasized that such a juror may "be less favorably inclined toward . . . evidence of mental disturbance as a mitigating circumstance." *Id.* at 35. In light of these considerations, *Turner* held that a defendant's "constitutional right to an impartial jury" in a capital case involving "interracial violence" is compromised when a trial judge forbids questioning jurors about such racial bias, even when there is no evidence that any juror was biased. *See id.* at 36–37.

It necessarily follows that the constitutional right to an impartial jury is denied when, as here, jurors in a capital case involving interracial marriage and children admit to harboring directly related racial biases and are still permitted to serve on the jury. A juror who believes "we should stay with our Blood Line[s]"—and who accordingly might view Thomas as a threat to the "racial integrity" of the white race, *Loving*, 388 U.S. at 7—might well be influenced by those beliefs in considering the "compassionate or mitigating factors stemming from the diverse frailties of humankind" required for constitutional imposition of a death sentence. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (joint opinion); *see Turner*, 476 U.S. at 35.

The Fifth Circuit panel majority stressed that a potential source of bias may not be disqualifying "if

the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." App. 15a (quoting *Irvin*, 366 U.S. at 723). With respect to Copeland and Armstrong, however, there is no evidence that they could set aside their bias and decide the case based solely on the evidence. During voir dire, neither defense counsel nor the prosecution asked Copeland or Armstrong whether they could set aside their animus and render a verdict based on the evidence alone. Where racial animus is "locked up entirely within the breasts of the juror[]" and the juror is not adequately "interrogat[ed]" about their prejudices, the verdict and sentence cannot stand. *Aldridge v. United States*, 283 U.S. 308, 311 n.1 (1931). That conclusion is only fortified where, as here, the jurors' racial biases are unabashedly declared.

Accordingly, there "was no reasonable basis," *Richter*, 562 U.S. at 98, for any court to determine that Copeland and Armstrong could set aside their admitted racial bias and act as the "impartial and unprejudiced" jurors required by the Constitution. *Parker*, 385 U.S. at 366; *see Turner*, 476 U.S. at 35; *Irvin*, 366 U.S. at 722.

3. Ulmer Did Not Say He Could Fairly Consider Mitigating Evidence in a Capital Case Involving Interracial Marriage.

The presence of Copeland and Armstrong on Thomas's jury is sufficient to set aside his death sentence, as the Constitution requires 12 impartial jurors. *Parker*, 385 U.S. at 366. But the Fifth Circuit likewise erred in concluding that it would be reasonable to determine that Ulmer's response to

counsel's cursory follow-up questions showed that he could set aside his bias, as required by *Irvin*. *See* 366 U.S. at 723. Although Ulmer was questioned generally about how his strong opposition to interracial marriage would affect his deliberations, he was never asked about the impact of his views on his ability to consider Thomas's severe mental illness or other mitigating evidence. *See Morgan*, 504 U.S. at 729 (general voir dire questions about ability to render a fair verdict are inadequate to ensure juror's ability to set aside partiality and render a fair verdict).

In fact, when Ulmer was asked about how he would feel about deliberating in a case where a Black man was charged with killing his white wife, he responded by repeating his view that "it's wrong to have those relationships" and then affirmed only his ability to be impartial in rendering a verdict in crimes involving individuals of the same race. *See* App. 115a (explaining "I don't care if it is white/white, black/black, that don't matter to me."). Shortly thereafter, Ulmer was asked whether he would consider the race of the defendant or the victim in deciding whether to impose death, and he said: "No. I wouldn't judge a man for murder or something like that according to something like that, no, I would not." App. 116a. But he was never asked about how the interracial nature of Thomas's marriage would affect his ability to consider mitigating evidence in Thomas's capital case.

Thus, even if the state courts could reasonably have determined that Ulmer's answers showed his "moral judgment [against interracial marriage] would

not affect his fact finding," as the Fifth Circuit posited, *see* App. 17a, nothing about his answers showed that he could set aside his views in considering Thomas's mitigating evidence and making the individualized moral judgment about the appropriate sentence required by the Eighth Amendment. Under the circumstances of this case, "the nature and strength" of Ulmer's vigorous opposition to interracial marriage as against God's will, and the absence of any evidence that he could set aside that partiality in considering mitigation, "necessarily raise the presumption of partiality," *Irvin*, 366 U.S. at 723 (internal quotation marks and alteration omitted).

II. THE FIFTH CIRCUIT CONTRAVENED THIS COURT'S PRECEDENT WITH RESPECT TO AN IMPORTANT ISSUE OF FEDERAL LAW IN DENYING THOMAS'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

The Fifth Circuit's decision upholding the state courts' denial of relief on Thomas's ineffective assistance of counsel claim also warrants this Court's review.

Protecting the right to a fair trial by an impartial tribunal is the foundation of this Court's ineffective assistance of counsel jurisprudence. In *Strickland*, the Court explained that its precedent dating from *Powell v. Alabama*, 287 U.S. 45 (1932), "recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland*, 466 U.S. at 684. As *Strickland* elaborated, the Constitution "defines the

basic elements of a fair trial largely through the several provisions of the Sixth Amendment," *id.* at 685, which include the right to be tried by an impartial jury. U.S. CONST. amend. VI.

This is a clear case of ineffective assistance of counsel under *Strickland*. By failing to object to four jurors who openly expressed hostility to interracial marriage, in a case in which a Black man with severe mental illness killed his estranged white wife and two of her children, trial counsel deprived Thomas of a fair trial: "one in which evidence subject to adversarial testing is presented to an impartial tribunal." *Id.* at 685. Indeed, counsel accepted three of those jurors (Copeland, Armstrong, and the alternate Hintz) without asking a single question about their opposition to interracial marriage. App. 11a. Thomas's counsel thereby failed to ensure that Thomas's "Sixth Amendment right to an impartial jury [would] be honored." *Rosales-Lopez*, 451 U.S. at 188.

The Fifth Circuit realized that the circumstances of this case presented a significant likelihood that racial prejudice might infect Thomas's trial, such that inquiry into racial prejudice was required under *Turner*. App. 27a. The Fifth Circuit nonetheless deemed *Turner* distinguishable because "unlike in *Turner*, some questions were asked at [Thomas's] trial about prospective jurors' racial attitudes." App. 28a. This purported distinction reflects a fundamental misapprehension of *Turner* and the constitutional principles upon which it rests.

Turner established that "the constitutional right to an impartial jury" is compromised when there is an

unacceptable risk that a juror's "racial prejudice may have infected petitioner's capital sentencing." *Turner*, 476 U.S. at 36. In *Turner*, the risk flowed from the fact that defense counsel was denied the opportunity to voir dire prospective jurors on racial prejudice in the quintessential racially charged case: where a Black man is accused of killing a white person.

Here, the risk that racial prejudice would influence Thomas's capital sentencing was not simply hypothetical: jurors openly admitted their racial prejudices on their voir dire questionnaire. Yet, trial counsel failed to ask three of them a single question about their admitted bias and permitted them to be seated. It necessarily follows from *Turner* that when the risk of racial prejudice is no longer just a risk—when prospective jurors have in fact *admitted* their biases—the constitutional right to an impartial jury is compromised. *See id*. In such cases, counsel must, at a minimum, "inquire into possible racial prejudice to assure an impartial jury." *Rosales-Lopez v. United States*, 461 U.S. 182, 190 (1981).

This principle is likewise clear from this Court's decisions prior to *Turner*. This Court has long recognized that there are times when "the Due Process Clause of the Fourteenth Amendment requires that . . . the [defendant] be permitted to have the jurors interrogated on the issue of racial bias." *Ham v. South Carolina*, 409 U.S. 524, 527 (1973). Such questions are not required for their own sake, but rather because allowing jurors who harbor racial bias to sit in judgment would perpetrate "a gross

injustice." *Aldridge*, 283 U.S. at 314.[4] In other words, such questioning is required whenever there is a "constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be as 'indifferent as (they stand) unsworne.'" *Ristaino v. Ross*, 424 U.S. 589, 596 (1976) (quoting Coke on Littleton 155b (19th ed. 1832)); *accord Rosales-Lopez*, 451 U.S. at 188 ("*Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored."). That constitutionally significant risk was clearly present here, as several jurors admitted biases on their pre-trial questionnaires. Yet counsel allowed them to be seated without asking Copeland, Armstrong, or Hintz a single question about their biases.

The Fifth Circuit's treatment of *Turner* is likewise inconsistent with this Court's clearly established law in ineffective assistance of counsel cases. *Wiggins v. Smith*, 539 U.S. 510 (2003), clearly established that, in assessing the reasonableness of counsel's performance, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.* at 527.

Here, that Copeland and Armstrong admitted harboring racial bias did not excuse defense counsel from conducting further inquiry; on the contrary,

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[4] Although *Aldridge* involved this Court's supervisory power, this proposition is clear as a constitutional matter because, as the Court affirmed in *Ham*, "[t]he inquiry as to racial prejudice derives its constitutional stature from the firmly established precedent of *Aldridge*." *Ham*, 409 U.S. at 528.

those jurors' comments made clear the need to move to excuse them for cause, strike them, or inquire further. Just as any reasonable attorney would have recognized the need to protect a capital defendant from racially biased expert testimony influencing the proceedings, *see Buck*, 137 S. Ct. at 775 (citing *Zant v. Stephens*, 462 U.S. 862, 885 (1983)), any reasonable attorney would have recognized the need to protect a Black client from racially biased persons serving on the jury.

Defense counsel's affidavits—even the ones submitted by the State—confirm the unreasonableness of their representation. Lead counsel Hagood attested: "For those jurors who expressed some problem with interracial relationships, either [co-counsel] or I questioned them to the extent necessary for us to request a strike for cause or make a decision to use a strike against them." App. 124a. The affidavit co-counsel Peterson gave the State contained an identical statement. *Id.* But, contrary to counsel's sworn recollections, they did not question Copeland or Armstrong "to the extent necessary . . . to request a strike for cause or make a decision to use a strike against them." *Id.* As the Fifth Circuit acknowledged: "Without doubt . . . Armstrong and Copeland were not asked about their racial attitudes in *voir dire*." App. 25a. Trial counsel's affidavits thus show that their failure to follow up on Copeland and Armstrong's professed racial biases stemmed from "inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S. at 526.

In the face of these affidavits, the Fifth Circuit offered its own speculation about why trial counsel

did not ask any questions of Copeland and Armstrong. The panel majority hypothesized that their "questionnaire answers *could* have been interpreted by counsel as not reflecting the kind of animosities to a black defendant that would motivate them to convict regardless of the evidence." App. 29a (emphasis added). But, as discussed, trial counsel's own affidavits show they recognized that jurors who expressed opposition to interracial marriage needed to be "questioned to the extent necessary . . . to request a strike for cause or to make a decision to use a strike against them." App. 124a. Counsel simply failed to ask such questions of Copeland and Armstrong and failed to strike them. The Fifth Circuit's defense of trial counsel's failures thus "resembles more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations" during voir dire. *Wiggins*, 539 U.S. at 526–27.

Moreover, opposition to interracial marriage on the ground that people should stay with their own "Blood Line[s]," or that interracial relationships are harmful to children who lack a "race to belong to," is not something a court or counsel can blithely look past. No reasonable attorney would have determined that such statements do not "reflect[] the kind of animosities to a black defendant" that could affect the consideration of mitigating evidence in a case such as this. App. 29a. Indeed, by focusing solely on whether Copeland and Armstrong's questionnaires showed they would likely "convict regardless of the evidence," *id.*, the Fifth Circuit did not even address the risk of these jurors' biases affecting their consideration of mitigation at the punishment phase.

Finally, although the Fifth Circuit did not address the issue—and this Court could remand for it to do so in the first instance—trial counsel's deficient performance prejudiced Thomas. This Court has "recognized that some constitutional rights are so basic to a fair trial that their infraction can never be treated as harmless error. The right to an impartial adjudicator, be it judge *or jury*, is such a right." *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (emphasis added and alterations omitted). The Fifth Circuit has therefore acknowledged that when the "deficient performance of counsel denied [petitioner] an impartial jury," counsel's errors "perforce establish[] *Strickland* prejudice," and any contrary state court decision is objectively unreasonable. *Virgil v. Dretke*, 446 F.3d 598, 614 (5th Cir. 2006). This rule is clear from *Strickland* itself, which establishes that the touchstone for assessing prejudice is whether counsel's deficient performance "deprive[s] the defendant of a fair trial," 466 U.S. at 687, and that a trial is not fair when the jury is not impartial, *see id.* at 685. As the Ohio Supreme Court recently put it in granting relief in a similar case, *Strickland* prejudice is "apparent," when, "as a result of counsel's objectively unreasonable performance during voir dire . . . an actually biased juror sat on the jury," thereby denying a defendant of "his constitutional right to be tried before an impartial jury." *State v. Bates*, 149 N.E.3d 475, 485 (Ohio 2020).

Thomas could also establish that confidence in his death sentence is undermined if that were the standard. *See Buck*, 137 S. Ct. at 777. As *Turner* teaches, a racially biased juror may "be less favorably inclined toward [a Black defendant's] evidence of

mental disturbance as a mitigating circumstance." 476 U.S. at 35. That is precisely the risk here: jurors' biases may well have caused them to discount Thomas's mental illness at sentencing. *See Turner*, 476 U.S. at 35. Indeed, the risk of bias affecting the sentencing decision was particularly pronounced, as the prosecution appealed to jurors' fears that Thomas could one day be released from prison and come looking to date their daughter or granddaughter. *See* 42 RR 41–42. Under these circumstances, a court cannot have confidence that 12 jurors unaffected by racial bias would have selected death, rather than life imprisonment, in a case where it was undisputed that Thomas was experiencing active psychosis at the time of the murders. *See Buck*, 137 S. Ct. at 777 (finding confidence in a death sentence undermined when racial bias, a particularly "toxi[c]" form of bias that is deadly even "in small doses," was introduced at the punishment phase of a capital case).

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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