No. 21-444

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

REPLY IN SUPPORT OF CERTIORARI

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REPLY IN SUPPORT OF CERTIORARI

Respondent sidesteps the fact that racial bias was at the center of Andre Thomas's case. Three jurors charged with deciding whether Thomas would live or die openly embraced their opposition to interracial marriage in their pretrial questionnaires, on the grounds that such relationships are not what "God intended," promote the mixing of "Blood Line[s]," and leave children without "a specific race to belong to." App. 391a–96a. Those beliefs directly implicated the facts of the case: Thomas's killing of his estranged white wife, their son, and her daughter. The State appealed to this bias in arguing for a death sentence, asking the all-white jury if they could risk that Thomas, if not executed, would be released on parole and "come back to Grayson County" and "ask[] your daughter out, or your granddaughter out?" *See* Pet. 12.

The jurors' racial bias impugned two fundamental constitutional principles: the Sixth Amendment's impartial jury guarantee and the Eighth Amendment right to individualized sentencing. *Turner v. Murray* recognized what is at stake when jurors harbor racial bias implicated by the facts of a capital case: "Because 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. 28, 35 (1986). A juror who views Black people as "morally inferior" may well be influenced by that belief in making the "highly subjective, 'unique, individualized judgment regarding the punishment that a particular person deserves.'" *Id.* at 33–35 (citation omitted).

This unconstitutional risk of racial prejudice affecting capital sentencing was present here. Thomas's profound mental illness was at the center of his trial.[1] Yet, as *Turner* recognized, racially biased jurors may "be less favorably inclined toward [a Black defendant's] evidence of mental disturbance as a mitigating circumstance," 476 U.S. at 35.

This Court has repeatedly recognized that overt racial discrimination in the criminal justice system, especially in capital cases, warrants its intervention. Such discrimination not only violates a defendant's fundamental rights, but it also undermines the integrity of the entire justice system. *See* Pet. 17 (citing cases). Consistent with its longstanding commitment to eradicate the influence of race in the administration of justice, this Court should grant certiorari.

ARGUMENT

I. Thomas's Juror Bias Claim Is Not Defaulted.

Respondent starts by arguing that Thomas's impartial jury claim is procedurally defaulted. But procedural default "does not bar consideration of a federal claim" unless the state court "'clearly and expressly' states that its judgment rests on a state

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[1] Respondent does not once acknowledge Thomas's severe mental illness, suggesting that the psychosis Thomas suffered at the time of the crime can be attributed to his consumption of "large amounts of cough syrup," and euphemistically describing Thomas's gouging out his eye with his fingers as "further injur[ing] himself." Opp. 1–3.

procedural bar." *Harris v. Reed*, 489 U.S. 255, 263 (1989) (citation omitted). Although the state habeas court recited Texas's waiver rule, App. 363a, it did so among 7 pages of generic statements of the law, not in application to any individual claim. App. 358a–64a. The court noted that counsel did not object to the biased jurors, but stopped there, never mentioning waiver or default. *See* App. 375a. When it reached the juror bias claim, it addressed the claim on the merits, with no mention of procedural default. *See* 372a–73a; Pet. 14. In contrast, when the state habeas court rejected claims as waived, it said so explicitly. *See, e.g.*, App. 371a–72a, 374a.

Thus, Respondent's assertion that "the state habeas court concluded, and clearly expressed, that such objections and any fair-trial claim based on those jurors were waived and barred," Opp. 13 (citing App. 363a, 375a), is wrong. Because the state habeas court did not "'clearly and expressly' state[] that its judgment rests on a state procedural bar," Thomas's juror bias claim is not barred. *Harris*, 489 U.S. at 263 (citation omitted).

Respondent's procedural default argument also fails for a second reason: it is waived. Although Respondent concedes he asserted procedural default for the first time in the Fifth Circuit, Respondent argues this "does not necessarily result in waiver." Opp. 13–14. To the contrary, procedural default is "a 'defense' that the State is 'obligated to raise' and 'preserv[e]' if it is not to 'lose the right to assert the defense thereafter.'" *Trest v. Cain*, 522 U.S. 87, 89 (1997) (citation omitted). Even if this Court has left open the possibility that a Circuit Court may raise the

issue *sua sponte*, *see* Opp. 14, in this case the Fifth Circuit declined to do so. Respondent cites no authority for his assertion that it is "of no consequence that [the] Fifth Circuit chose not to address procedural default below," Opp. 14, because, Respondent speculates, the Circuit Court could change its mind should this Court remand this case.

II. 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.

Thomas's right to trial by an impartial jury was denied when three jurors openly opposed to interracial marriage sat in judgment in his racially charged capital case. Respondent does not deny that the jurors' beliefs reflected racial bias. Instead, Respondent asserts the jurors affirmed they could "reach an unbiased result," and "set biases aside and determine the outcome based on the facts . . . and the law." Opp. 16, 19. The record belies Respondent's representation. Jurors Copeland and Armstrong were not asked a single question about whether they could set aside their biases against interracial marriage. *See* Pet. 25–28. Rather, as Respondent recounts, the questions asked merely led them generally to affirm their ability to listen to and render a verdict based on the evidence presented. *See* Opp. 17–18.

These answers to conventional fairness questions were insufficient to satisfy the impartial-jury standard, which requires evidence that the "juror can lay aside his impression" with respect to the specific bias at issue. *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). Indeed, the jurors provided similar answers in *Irvin*.

Id. at 724–25. *See also Morgan v. Illinois*, 504 U.S. 719, 734–35 (1992) ("general fairness and 'follow the law' questions" are insufficient to "detect those jurors with views preventing or substantially impairing their duties"); *Ham v. South Carolina*, 409 U.S. 524, 526 (1973) (general questions about juror partiality are insufficient to ensure juror impartiality in a case implicating potential racial prejudice). Respondent's reliance on Armstrong's and Copeland's responses to general questioning in this case is especially inadequate, where no questions addressed their bias or their ability to consider Thomas's mental illness and render an individualized judgment at the penalty phase. *See* Opp. 17.

Juror Ulmer's voir dire responses concerning his strong opposition to interracial marriage were also inadequate to show that he could "lay aside" his bias. *Irvin*, 366 U.S. at 723; *see* Pet. 28–30. Ulmer's first response was to reaffirm his belief that "it's wrong to have those relationships." App. 115a. While he said that he "wouldn't judge a man for murder or something like that according to something like that," App. 116a, Ulmer was never asked if the interracial nature of Thomas's marriage and the offense would affect his ability to be impartial in rendering a verdict or sentence. App. 115a–116a; Pet. 29. But even putting Ulmer aside, the seating of Copeland and Armstrong, who were not asked a single question about their biases, requires reversal. *See, e.g.*, *United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000).

Respondent cites *Tharpe v. Sellers*, 138 S. Ct. 545 (2018) (per curiam) and *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), to argue that a juror's

expression of racial bias alone is not enough to warrant reversal and that a further showing of prejudice is required. Opp. 19–21. However, unlike this case, *Tharpe* came to this Court via an appeal of the denial of a certificate of appealability respecting a motion to reopen the judgment, and the Court was addressing a procedurally defaulted claim. *See Tharpe*, 138 S. Ct. at 545–46. Moreover, both *Tharpe* and *Peña-Rodriguez* involved juror bias claims based on statements made by jurors after the trial or in the jury room. *See Tharpe*, 138 S. Ct. at 546; *Peña-Rodriguez*, 137 S. Ct. at 861. Because those claims create a particular risk of compromising the finality of verdicts and interfering with the jury's deliberative process, this Court set a very high bar to overturn a conviction based on evidence of juror bias revealed after the jury is seated. *See Peña-Rodriguez*, 137 S. Ct. at 861, 869. However, this Court's precedents unequivocally hold that, when a seated juror's disqualifying bias is revealed *prior* to the jury being seated, the right to an impartial jury is violated and a new trial is required. *See, e.g.*, *Martinez-Salazar*, 528 U.S. at 316.

Finally, contrary to Respondent's assertion, the state habeas court's decision denying relief on Thomas's juror bias claim—premised on its requirement that Thomas present evidence that the jury's verdict was motivated by race—is both "contrary to" and an "unreasonable application of" this Court's clearly established precedent. *See* Pet. 22. No holding of this Court requires proof that a jury's verdict was motivated by race to sustain a fair trial claim. Instead, this Court's clearly established precedent requires that Thomas demonstrate that a

seated juror was not "'indifferent as he [stood] unsworne.'" *Irvin*, 366 U.S. at 722; *see* Pet. 20–23. Respondent does not contest this controlling standard, and the Fifth Circuit acknowledged that the state habeas court's reasoning was "not directly on point" with respect to the impartiality standard established by this Court's precedent. App. 15a.

The Fifth Circuit nonetheless relied on *Harrington v. Richter*, 562 U.S. 86, 109 (2011), for the proposition that it "should consider any 'reasonable justification for the state court's decision'" under 28 U.S.C. § 2254(d)(1). App. 16a. However, the *Richter* standard applies only when the state court does not provide any reasons for its opinion. *See* 562 U.S. at 98; Pet. 20–23. Respondent does not dispute this, instead insisting that the Fifth Circuit relied on the state court's "necessary implicit finding" that "no juror would base his decision on race rather than on the evidence presented." App. 16a. But it was only by relying on the *Richter* presumption that the Fifth Circuit posited this "implicit finding" about juror bias being set aside—a line of reasoning that is absent from the state's court's decision. *See* App. 16a, 372a–75a. Characterizing this as an "implicit finding" does not change the fact that the state court's actual "adjudication of [Thomas's] claim [was] dependent on an antecedent unreasonable application of federal law," such that "the requirement set forth in § 2254(d)(1) is satisfied," and a "federal court must then resolve the claim without the deference AEDPA otherwise requires." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007).

In his Petition, Thomas also discussed *Parker v. Gladden*, 385 U.S. 363 (1966), *Irvin*, and *Turner* as controlling precedents demonstrating that the state court's decision is not entitled to AEDPA deference. Pet. 26–28. Respondent attempts to distinguish those cases by pointing to irrelevant factual distinctions. *See* Opp. 23–24. But the touchstone under § 2254(d)(1) is the "controlling legal standard" established by this Court's precedent, *Panetti*, 551 U.S. at 953; thus, the factual distinctions cited by Respondent are irrelevant. This Court's cases clearly establish that Thomas had a right to 12 unbiased jurors that did not view him or his case through the lens of racial bias. *See Parker*, 385 U.S. at 366; *Irvin*, 366 U.S. at 722; *Georgia v. McCollum*, 505 U.S. 42, 58 (1992). That clearly established principle was violated here, and the state court's contrary decision was unreasonable.

Further, contrary to Respondent's assertions, Opp. 24, *Turner* holds that a defendant's right to an impartial jury in a capital case requires a new sentencing hearing when there is even a *risk* of juror racial bias in a racially charged case and the jurors are not questioned about such bias during voir dire. *See* 476 U.S. at 36–37. Here, three jurors openly embraced their biases. *See* Pet. 27. The denial of the "constitutional right to an impartial jury," *Turner*, 476 U.S. at 36, is therefore even clearer here than it was in *Turner* itself. Factual distinctions notwithstanding, the "controlling legal standard" set forth in *Turner* squarely governs this case.

III. The Fifth Circuit's Denial of Relief on Thomas's Ineffective Assistance Claim Conflicts with This Court's Precedents Concerning an Important Issue of Federal Law.

Thomas's trial counsel were aware that three of the prospective jurors openly opposed interracial marriage, and that their views were directly implicated by the facts of Thomas's case. Counsel rendered ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), by allowing two of the three jurors to be seated without asking a single question about the racial bias expressed in their questionnaires.

Central to this claim are the four affidavits trial counsel submitted. Both lead counsel (Hagood) and second chair (Peterson) provided affidavits to both parties, which, as the Fifth Circuit stated, "almost seem to be describing different events." App. 23a. Hagood's first affidavit, given to defense counsel, stated that his failure to voir dire the racially biased jurors "was not intentional; I simply didn't do it." *Id*. Counsel's second affidavits asserted, in identical language, that they questioned jurors "to the extent necessary" to make a decision about a strike. App. 124a–25a. Despite the "strikingly different representations" App. 24a–25a, the Circuit Court relied only on the affidavits trial counsel gave to the state. *See* App. 25a–29a. The state habeas court did not reference any of the affidavits in addressing this claim. App. 375a.

Relying solely on Hagood's and Peterson's second affidavits, Respondent argues trial counsel "had

strategic reasons for declining to press harder on issues of racial bias . . ." Opp. 26. But even those affidavits refute Respondent's claim that counsel made a strategic choice for accepting Copeland and Armstrong without asking them a single question. *See* Pet. 33–35. Trial counsel admitted in those second affidavits that they *did* recognize the need to question jurors "who expressed some problem with interracial relationships" "to the extent necessary for us to request a strike for cause or make a decision to use a strike against them." Opp. 26. And, while counsel vaguely alluded to a concern about "worse" jurors, *see id*. at 2, 26, they did not even exercise all their peremptory strikes. App. 344a. Thus, by counsel's own account, they recognized the need to ask *some* questions of jurors who expressed bias against interracial marriage. For Copeland and Armstrong, they simply failed to do so.

Respondent offers justifications for counsel's failures by asserting that, because "Copeland and Armstrong . . . indicated less strong views" about interracial marriage, they "received less questioning." Opp. 27. Yet Copeland and Armstrong were unabashedly opposed to both interracial marriage and people of different races having children, further explaining that their belief derived from hostility to mixing "Blood Line[s]," and concern about children "not hav[ing] a specific race to belong to," Pet. 10. Such views hardly justify "less" questioning, let alone no inquiry at all.

Respondent speculates about other reasons counsel could have had for accepting Copeland and Armstrong, highlighting portions of the record

Respondent believes "show[] that each of the challenged jurors . . . would be favorable to the defense." Opp. 28. But trial counsel's affidavits never invoked any of those reasons to explain why they accepted Copeland and Armstrong. Like the Fifth Circuit, *see* Pet. 35, Respondent provides "a *post hoc* rationalization of counsel's conduct" as opposed to an accurate retelling of trial counsel's stated bases for their choices. *Wiggins v. Smith*, 539 U.S. 510, 526–27 (2003).

Finally, Respondent argues that Thomas cannot show he was prejudiced by trial counsel's deficient performance. *See* Opp. 31. Because the Fifth Circuit did not pass on the prejudice question, this Court should not either. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (explaining this Court ordinarily does not consider arguments "not addressed by the Court of Appeals").

Moreover, the Fifth Circuit has already held that the seating of a biased juror establishes prejudice for an ineffective assistance of counsel claim. *See Virgil v. Dretke*, 446 F.3d 598, 614 (5th Cir. 2006). While Respondent seeks to disregard *Virgil* because this case is governed by § 2254(d)(1), *see* Opp. 31, *Virgil* was also governed by § 2254(d)(1) and represents the Fifth Circuit's interpretation of this Court's clearly established precedent. *See Virgil*, 446 F.3d at 607. Indeed, the denial of the right to a fair jury can "never be treated as harmless." *Gray v. Mississippi*, 481 U.S. 648, 668 (1987). And *Strickland* itself recognizes that

a trial cannot be fair when the jury is not impartial. 466 U.S. at 685.[2]

In any event, Thomas was prejudiced. Respondent claims that the jurors' death "verdict was determined by the horrific facts of the crime." Opp. 22. But it is undisputed that those facts were related to Thomas's "severe mental illness," which meant that he "was, in laymen's terms, 'crazy' at the time he killed his wife and the children." App. 293a, 305a. This Court cannot have confidence that 12 unbiased jurors would have discounted Thomas's severe mental illness in concluding that a death sentence was warranted. *See Strickland*, 466 U.S. at 694. Prejudice is especially clear because the prosecution repeatedly sought to capitalize on jurors' biases, highlighting that Thomas had been in interracial relationships and, in closing, asking the all-white jurors if they could take the risk that Thomas would one day be released from prison and "ask[] your daughter out, or your granddaughter out." Pet. 12.

CONCLUSION

The petition should be granted.

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[2] This case is unlike *Weaver v. Massachusetts*, where the Court declined to presume prejudice because "not every public-trial violation will lead to a fundamentally unfair trial." 137 S. Ct. 1899, 1904 (2017).

Respectfully submitted,

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