

21-5151

No. _____

Supreme Court, Ohio
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IN THE
SUPREME COURT OF THE UNITED STATES

KENAN IVERY — PETITIONER, *pro se*

vs.

STATE OF OHIO — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE
OHIO COURT OF APPEALS, NINTH APPELLATE DISTRICT

PETITIONER'S MOTION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

FIRST QUESTION PRESENTED FOR REVIEW:

IS A PETITIONER DENIED DUE PROCESS OF LAW WHEN HE IS CONVICTED FOR OFFENSES OF WHICH THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO HAVE FOUND HIM GUILTY BEYOND A REASONABLE DOUBT OF EVERY ESSENTIAL ELEMENT OF THE OFFENSES?

SECOND QUESTION PRESENTED FOR REVIEW:

IS A PETITIONER DENIED DUE PROCESS OF LAW WHEN A TRIAL COURT IMPROPERLY REMOVES A PETIT JUROR WITHOUT SHOWING ADEQUATE CAUSE?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW.....	a
JURISDICTION.....	b
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	c
STATEMENT OF THE CASE.....	1
REASONS FOR GRANTING THE WRIT	
I. THE COURT SHOULD GRANT THE WRIT BECAUSE PETITIONER WAS DENIED DUE PROCESS, WHERE THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO HAVE FOUND HIM GUILTY BEYOND A REASONABLE DOUBT OF EVERY ESSENTIAL ELEMENT OF AGGRAVATED MURDER, MURDER, AND ATTEMPTED MURDER.....	13
II. THE COURT SHOULD GRANT THE WRIT BECAUSE THE PETITIONER WAS DENIED DUE PROCESS OF LAW WHEN THE TRIAL COURT IMPROPERLY REMOVED PETIT JUROR RON BARNES WITHOUT SHOWING ADEQUATE CAUSE	24
CONCLUSION.....	29

INDEX TO APPENDICES

APPENDIX A – Decision of the Ohio Ninth District Court of Appeals, <i>State v. Ivery</i> 2020-Ohio-3349, Case No. 28551.	
APPENDIX B – Decision of the Ohio Supreme Court, <i>State v. Ivery</i> 2021-Ohio-1201, Case No. 2021-0154.	

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<i>Austin v. United States</i> , 382 F.2d 129 (1967).....	19
<i>Berk v. Matthews</i> , 53 Ohio St. 3d 161 (1990).....	24
<i>Cavazos v. Smith</i> , 565 U.S. 1 (2011).....	14
<i>Fiore v. White</i> , 531 U.S. 225 (2001).....	13
<i>In re Winship</i> , 397 U.S. 358 (1970).....	13
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).....	14
<i>Lingafelter v. Moore</i> , 95 Ohio St. 384 (1917).....	24
<i>McHam v. State</i> , 2005 OK CR 28.....	20
<i>McNeil v. Cuyler</i> , 872 F.2d 443 (3 rd Cir. 1986).....	20
<i>Mullaney v. Wilbur</i> , 421 U.S. 684, 704 (1975).....	18
<i>Renico v. Lett</i> , 559 U.S. 766 (2010).....	14
<i>State v. Adams</i> , 62 Ohio St. 2d 151 (1980).....	24
<i>State v. Ivery</i> , 2020-Ohio-3349.....	16, 28
<i>State v. Jenks</i> , 61 Ohio St.3d 259, 574 N.E.2d 492 (1991).....	14
<i>State v. Moss</i> (9 th Dist.), 2009-Ohio-3866.....	25, 28
<i>State v. Nelson</i> (8 th Dist.), 2017-Ohio-5568.....	18
<i>State v. Walker</i> , 150 Ohio St. 3d 409 (2016).....	14, 16
<i>Taylor v. Louisiana</i> , 419 U.S. 522 (1975).....	24
<i>United States v. Frady</i> , 456 U.S. 152 (1982).....	19
<i>United States v. Guyon</i> , 717 F.2d 1536 (6 th Cir. 1983).....	19

STATUTES AND RULES

18 USCS § 1112.....	18
O.R.C. § 2901.22(A).....	15
O.R.C. § 2903.01(A).....	14, 16
R.C. § 2903.02(A).....	20, 21
R.C. § 2903.02(B).....	21
O.R.C. § 2903.03.....	18
O.R.C. § 2923.02.....	23
O.R.C. § 2945.25.....	24
USCS Supreme Court Rule 10.....	13

OTHER

Fifth Amendment to the U.S. Constitution.....	13
Fourteenth Amendment to the U.S. Constitution.....	13, 24
Sixth Amendment to the U.S. Constitution.....	24

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

☒ reported at *State v. Ivery*, App. Case No. 28551, 2020-Ohio-3349; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the Ohio Supreme Court appears at Appendix B to the petition and is

☒ reported at *State v. Ivery*, Case No. 2021-0154, 2021-Ohio-1201; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States court of appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____ and a copy of the order denying rehearing appears in Appendix _____

☐ An extension of time to file the petition for writ of certiorari was Granted to and including _____ (date) on _____ (date) in Application No. ____A_____.

The jurisdiction of this Court is invoked under U.S.C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was April 13, 2021.

A copy of that decision appears at Appendix B.

☐ A timely petition for rehearing was thereafter denied on the following date: _____ and a copy of the order denying rehearing appears at Appendix ____.

☐ An extension of time to file the petition for writ of certiorari was Granted to and including _____ (date) on _____ (date) in Application No. ____A_____.

The jurisdiction of this Court is invoked under U.S.C. § 1257(A).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Involved herein are Amendments V, VI, and XIV to the United States

Constitution:

Amendment V:

"No person shall be deprived of life, liberty, or property, without the due process of law..."

Amendment 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..."

Amendment XIV:

"...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On November 15, 2014, the Petitioner, Kenan Ivery, was involved in an altercation at Papa Don's Pub in Akron, Ohio, which resulted in the shooting death of Justin Winebrenner, and the injuring of David "Big Dave" Wokaty, Jennifer Imhoff, Michael Capes, and Thomas Russell. Also involved in the altercation was David Eisele. All of these individuals were patrons of Papa Don's that evening. Winebrenner and Russell were off-duty police officers, but not acting in any capacity as officers that evening. (Tr. 3344-45, 2810) All of the individuals directly involved in the case are Caucasian, with the exception of Ivery, who is African-American.

Winebrenner was transported from Papa Don's to the hospital where he was pronounced dead. (Tr. 3506) The cause of death was determined to be "gunshot wounds to his torso." (Tr. 3487) A forensic toxicology report indicated Winebrenner had been legally intoxicated with a blood alcohol level of 0.139. (Tr. 3509, 3512)

As a result, Ivery was indicted on the following counts: Count 1, aggravated murder under R.C. 2903.01(A) of Justin Winebrenner, unclassified felony, with a death penalty specification under R.C. 2929.04(A)(5), a peace officer specification under R.C. 2941.1412, and a firearm specification under R.C. 2941.145; Count 2, murder under R.C. 2903.02(A) of Justin Winebrenner, unclassified felony, with a peace officer specification under R.C. 2941.1412, and a firearm specification under R.C. 2941.145; Count 3, murder under R.C. 2903.02(B) of Justin Winebrenner, unclassified felony, with a peace officer specification under R.C. 2941.1412, and a firearm specification under R.C. 2941.145; Count 4, felonious assault under R.C.

2903.11(A)(2) of Justin Winebrenner, first degree felony, with a peace officer specification under R.C. 2941.1412, and a firearm specification under R.C. 2941.145; Count 5, attempted murder under R.C. 2903.02(A)/2923.02 of David Wokaty, first degree felony, with a firearm specification under R.C. 2941.145; Count 6, attempted murder under R.C. 2903.02(A)/2923.02 of Jennifer Imhoff, first degree felony, with a firearm specification under R.C. 2941.145; Count 7, attempted murder under R.C. 2903.02(A)/2923.02 of Michael Capes, first degree felony, with a firearm specification under R.C. 2941.145; Count 8, attempted murder under R.C. 2903.02(A)/2923.02 of Thomas Russell, first degree felony, with a firearm specification under R.C. 2941.145; Count 9, attempted murder under R.C. 2903.02(A)/2923.02 of David Eisele, first degree felony, with a firearm specification under R.C. 2941.145; Count 10, felonious assault under R.C. 2903.11(A)(2) of David Wokaty, second degree felony, with a firearm specification under R.C. 2941.145; Count 11, felonious assault under R.C. 2903.11(A)(2) of Jennifer Imhoff, second degree felony, with a firearm specification under R.C. 2941.145; Count 12, felonious assault under R.C. 2903.11(A)(2) of Michael Capes, second degree felony, with a firearm specification under R.C. 2941.145; Count 13, felonious assault under R.C. 2903.11(A)(2) of Thomas Russell, first degree felony, with a peace officer specification under R.C. 2941.1412, and a firearm specification under R.C. 2941.145; Count 14, felonious assault under R.C. 2903.11(A)(2) of David Eisele, second degree felony, with a firearm specification under R.C. 2941.145; Count 15, having weapons while under disability under R.C. 2923.13(A)(3), third degree felony; Count 16, carrying a concealed weapon under R.C. 2923.13(A)(2), fourth

degree felony; Count 17, illegal possession of a firearm in a liquor premises under R.C. 2923.121, third degree felony; and Count 18, tampering with evidence under R.C. 2921.12(A)(1), third degree felony. Prior to trial, at the State's request, Counts 6, 7 and 8 were dismissed by the trial court, and Counts 9-18 were renumbered to Counts 6-15. (Tr. 3950-53)

Ivery pleaded not guilty to all charges and the case proceeded to trial, where the State of Ohio presented numerous witnesses, some of whom provided the following testimonies.

Ann Marie Kuzio was also a patron at Papa Don's. She was there with friends, including her boyfriend Revawn Wilson. While sitting at the bar she began to be spoken to by Ivery, who "just kept wanting me to come over there and talk to him." (Tr. 2406) After she had pointed out her boyfriend to Ivery he responded, "I don't care. I have a 40." (Tr. 2406) She assumed he was talking about beer (Tr. 2407), although there is nothing in the record to show that Ivery ever ordered or possessed a 40-ounce beer that night. She left Ivery and ran to Wilson and Tiffany Miller, the manager of Papa Don's, to tell them "how aggressive I felt that [Ivery] was being and that it made me nervous." (Tr. 2408) She testified that when Ivery saw her talking to Miller he came over angry. (Tr. 2408-09) Her next recollection was seeing Ivery having returned and being confronted by "Big Dave" Wokaty, who loudly told Ivery, "Don't ever touch her or speak to her ever again." (Tr. 2415, 2443) Kuzio stated that Ivery never touched her. (Tr. 2444) She witnessed Miller "just trying to calm Dave

down and just tell him to just let it go.” (Tr. 2415, 2444-45) At that point Wilson called her back over to their table. (Tr. 2416-17)

Another bar patron, Natalie Linn, observed Ivery “intoxicated, just talking, trying to hit on a lot of girls, just trying to buy drinks for everyone...Wasn’t really acting like mean or angry at this point during the night, just trying to hit on people.” (Tr. 2878) She described his reaction to being rebuffed by Kuzio as “angry, says that he has a 40, starts kind of laughing.” (Tr. 2881) Linn then testified that, “After the shooting I just put two and two together not thinking that it was a 40 of beer, thinking that it was a .40-caliber.” (Tr. 2904)

Bar manager Tiffany Miller testified that she and her fiancé, Justin Winebrenner, went to the pub that evening to hang out with friends. (Tr. 2299) According to Miller, her friend Kuzio approached Miller and told her that Ivery made comments to her that made her feel uncomfortable. (Tr. 2310) Miller said that she was then approached by Ivery who was “yelling. He’s angry. He was loud.” (Tr. 2912) About five minutes later Miller asked Ivery to leave. (Tr. 2315) During the time Miller was talking to Ivery, Winebrenner approached and asked her if she was okay, to which she affirmatively responded, and testified that, “I didn’t want him to get involved. I didn’t want Kenan to feel like there was more than just myself asking him to leave.” (Tr. 2317) Miller then asked the bartender to bring Ivery his check and a box for chicken wings he had ordered but not yet eaten. (Tr. 2320) She said Ivery then “offered to buy me a drink and resolve this situation, to which I declined.”

(Tr. 2321) Miller then witnessed Ivery leave the bar alone, unforced and under his own accord at 1:45 am. (Tr. 2322, 2328)

Miller saw Ivery reentering the bar at about 1:53 am. (Tr. 2332, 2366) She testified that she immediately approached him and asked him to leave. (Tr. 2332) She recalled that "[Ivery's] not as angry, he's not as visibly upset. He's more calm." (Tr. 2333, 2367) As she was telling Ivery to leave "Big Dave" Wokaty came up beside her asking if she needed assistance, to which she assured him she did not. (Tr. 2335) As Wokaty confronted Ivery Miller saw Ivery flash a gun in the top of his pants and went to Winebrenner for assistance. (Tr. 2337) She saw Winebrenner and "[a] few other bar patrons realize what seems to be going on and come over to help as well, at which point I can see him reach for the gun." (Tr. 2338) Upon seeing the gun being drawn she ducked out of the way and "didn't see anything after that." (Tr. 2339)

"Big Dave" Wokaty is well over 6' tall and weighed 386 lbs. at the time. He worked part-time as a bouncer at another bar, but was not employed by Papa Don's Pub in that or any other capacity. (Tr. 2503-04) Wokaty had noticed the initial confrontation between Ivery and Miller, and had become aware that she had kicked him out. (Tr. 2512-13) He testified that he observed Ivery walk up and say something to Winebrenner on his way out of the bar, but did not hear what was said nor see Winebrenner respond. (Tr. 2516-18) Wokaty claimed that upon seeing Ivery return to the bar Tiffany approached him and said Ivery "needs to leave...he's not welcome here," at which point Wokaty told him, "You're going to have to leave. Nobody wants you here. You know, you're not welcome here." (Tr. 2520-21) He did not see recall

seeing Ivery with a gun at that point. (Tr. 2522) He clearly remembered

Winebrenner then coming up and putting hands on Ivery. (Tr. 2523-24) He did not see Dave Eisele join them. (Tr. 2524) He then remembered "all of a sudden like this mass of people, Mr. Ivery, Justin, myself and Tiffany included, all just start like moving toward the door area of the bar, at which that point I was shot in the arm and it kind of knocked me back." (Tr. 2525) Wokaty was injured by a single shot that went through his arm and then entered and exited his lower back. (Tr. 2526-27) While being treated at the hospital for his wounds, a blood alcohol test was administered and returned a reading of 0.131 – "more than one and a half times the legal limit for intoxication." (Tr. 2552)

David Eisele is 6'2" and weighs about 215 lbs. (Tr. 3336) He testified that Ivery walked backed into Papa Don's at a normal pace, not cursing or yelling, with nothing in his hands. (Tr. 3342) Once Ivery had returned inside, Eisele observed "Big Dave" Wokaty standing in Ivery's way. (Tr. 3343) Eisele testified that he then "saw [Ivery] start fiddling around with something on his side. I remember saying to my friend -- he kind of pulled his shirt up a little bit each time -- 'Is that a phone or is that a gun?'" (Tr. 3317, 3344) He became convinced "It was a gun. You could see the butt of it sticking out." (Tr. 3319) Eisele then observed that "Winebrenner went over and was confronting him." (Tr. 3321) Eisele admitted that the video showed Ivery stepping back with nothing in his hand. (Tr. 3345) Eisele initially testified that he started to walk towards Ivery, at which point he "saw him pull a gun, and he had a gun in his right hand." (Tr. 3320) But upon reviewing surveillance video from

the bar that Eisele agreed showed Ivery surrounded by Wokaty, Winebrenner and himself, Eisele acknowledged that no shots had been fired at that point. (Tr. 3347-48) Eisele admitted that he then "grabbed [Ivery's] arm, and we kind of shoved him into the inflatable Browns guy...and it was almost just like a big dog pile. And I remember falling down by the front door and hearing a shot." (Tr. 3321) Eisele agreed with the defense's summation that "you grab Mr. Ivery along with maybe some pushing and shoving from Mr. Winebrenner and Mr. Wokaty, and you pull him back, you hear a yell, then you hear the first shots." (Tr. 3351)

Revawn Wilson, Kuzio's boyfriend, saw Ivery return to Papa Don's, thinking maybe he had forgotten something. (Tr. 2471) He saw "Big Dave" Wokaty telling Ivery to leave. (Tr. 2472) The next thing he remembered was seeing a scuffle, though he did not see how it started. (Tr. 2474, 2480) He saw Ivery "pushed back over a table; just tripping back over the table." (Tr. 2482) After that he then began hearing "pops" and seeing "the flash of a gun." (Tr. 2474, 2482)

Chad Sprague was another bar patron and also a friend of Kuzio. (Tr. 3002) Sprague observed that "Big Dave" Wokaty "proceeded to tell Kenan that he needed to leave Ann Marie the 'F' alone, and so they started kind of talking back and forth." (Tr. 3011) He testified that "the next thing I remember, there was a lot of commotion and people struggling...and that's when I saw the first shot." (Tr. 3012-13)

Jeffrey Bates worked as the "bar back" at Papa Don's. (Tr. 3361) He recalled that earlier in the evening Miller had "asked for a to-go box" for Ivery, and that "[i]t looked like he was leaving on his own accord to me." (Tr. 3371) Bates missed the

initial commotion, but upon hearing a shot “turned around quick and I see Kenan and Justin rushing outside tied up together as if they were wrestling, like high school wrestling.” (Tr. 3386) He then “heard a shot, and they started to fall and the gun flew free, and then Dave [Eisele] was flying through the air as if he was Superman.” (Tr. 3386-87) Bates picked up the gun and tossed it into a trash hopper to secure it until authorities arrived. (Tr. 3388)

Of those injured in the shooting, Jennifer Imhoff testified to having no clear memory of that night. (Tr. 2633) She was shot in the left arm, although there was no internal injury. (Tr. 2637) EMS took her to the hospital where she was treated and released. (Tr. 2637) Thomas Russell was not directly involved in the altercation that led to the shooting, and testified that he did not see much of what went on that night. (Tr. 2834) He was grazed by a bullet from one of the shots fired, but did not require medical attention. (Tr. 2828, 2831) Michael Capes testified that he saw “three or four” “people coming together in a little bit of a hostile way.” (Tr. 3124-25) He answered with certainty that there was a scuffle before he heard gunfire. (Tr. 3126) Capes watched “the whole pile of people moving that way [towards the door], and I saw like flashes out of it.” (Tr. 3127) When asked “the position of the shooter when the gun went off,” he testified that Ivery “was falling down.” (Tr. 3128) Capes “heard the shots and saw some muzzle flashes and...noticed my foot hurt.” (Tr. 3105-06) He “looked down and saw the hole in my boot.” (Tr. 3108) Capes was taken by EMS to the hospital where x-rays revealed three broken metatarsals...a big entrance and exit wound.” (Tr. 3112-13)

Ivery's trial counsel presented an affirmative defense that in firing four shots Ivery was acting in self-defense. Testifying on his own behalf, Ivery recalled getting to Papa Don's around 12:15-12:30 am. (Tr. 3733) He considered himself a regular there. (Tr. 3731) While there, Ivery ordered wings and drinks for himself and some females sitting at the bar. (Tr. 3735-36) Ivery admitted to offering to buy a drink for Kuzio, which she declined, and threatened to get her boyfriend. (Tr. 3740) Ivery stated that he "felt it was kind of threatening because I just asked her for a drink. And I say, 'I have a 40 on me.'" (Tr. 3741) This was in reference to a .40-caliber pistol Ivery admits to having brought into the bar with him when he first arrived. (Tr. 3741) Asked why he was carrying a gun that night, Ivery testified it was "[f]or personal protection. And because my brother was murdered in 2011 and I've been robbed two times." (Tr. 3732)

Ivery witnessed Kuzio take off running to "a table with a black man [Revawn Wilson] and she get to pointing." (Tr. 3742) Ivery proceeded to head over to the table "to make sure everything was kind of cool" and when he got to the table Tiffany Miller was there. (Tr. 3742-43) After several minutes of discussion over what Ivery had allegedly said to Kuzio, Miller let it be known to Ivery that she believed Kuzio and wanted him to leave. (Tr. 3743-46) Ivery expressed that at the time he felt "more kind of shocked...a little disappointed, but that's about it." (Tr. 3746) Ivery informed Miller that he needed a box for his uneaten wings. (Tr. 3746) He proceeded to sit at the bar waiting to pay his tab and collect his wings. (Tr. 3746-48) After paying his tab Ivery left. (Tr. 3748-49) On his way out, Ivery stopped at a table where Justin

Winebrenner was sitting to ask if he heard Ivery "call anybody a bitch." (Tr. 3751) He was not sure of Winebrenner's response, but believes it may have been, "Nah." (Tr. 3752) Ivery then exited Papa Don's and got in his car to head home. (Tr. 3753)

A mile or so from the bar Ivery realized that he had forgotten his wings at the bar, and turned around to go back for them. (Tr. 3755) Before going back into Papa Don's Ivery retrieved several phones out of his car. (Tr. 3758-59) Ivery admitted to still having the gun in his waist, which was covered up with his shirt and jacket. (Tr. 3762) Ivery testified that upon reentering the bar he "was about to proceed to ask Tiffany if my wings was at the bar." (Tr. 3768) But Ivery was halted by "Big Dave" Wokaty, who had stepped in his way, warning him, "Don't fucking touch her or talk to her again or I'll kick your black ass." (Tr. 3768-69) Ivery stepped back as Miller stepped in between the two men. (Tr. 3769, 3854) As Miller attempted to calm down Wokaty (not Ivery), Ivery lifted up his jacket to display his gun and let Wokaty know he was armed. (Tr. 3770) He reasoned that Wokaty was "threatening me. Look, he's big, and I didn't want no problems." (Tr. 3849) Ivery continued to back up from the hostile Wokaty and flashed his gun twice more. (Tr. 3771-72) Ivery had not pulled his weapon at that point, or was even touching it. (Tr. 3772, 3848, 3853)

Ivery testified that this is when Winebrenner approached him from Ivery's left side "with his hands out" and "immediately put his hands on me." (Tr. 3775, 3861) He felt Winebrenner touching him "kind of like my waist" where the gun was located. (Tr. 3776) Shortly thereafter David Eisele joined the confrontation, causing Ivery to feel "fear." (Tr. 3777-78) No shots had been fired. (Tr. 3779) Winebrenner then

began grabbing Ivery who was being "[k]ind of forced backwards." (Tr. 3780) Next Ivery felt Eisele "[t]ouching me, grabbing me," and soon after Ivery was "almost being thrown over a table." (Tr. 3780) Ivery had still fired no shots, but testified to believing he was being "assaulted." (Tr. 3781) Ivery testified that it was at this point he drew out his gun, "Because they was reaching and I didn't want them to get it," fearing that, "They will take it and kill me." (Tr. 3781, 3864) He added that, "This is when I'm surrounded. That's when Eisele grabs me. That's when it kind of comes out. Eisele, he's grabbing me with the gun in my hand like he's trying to get it. He's already pushing me." (Tr. 3865) Ivery recalled letting out a scream as he was falling backwards: "I feared that once I was fallen, that's when my fear hit its highest point and that's when I screamed. (Tr. 3783-85) Regarding the four shots subsequently fired, Ivery testified that he "never aimed. I was falling...I'm falling to the ground when the first shot is fired...I was scared...I couldn't see, my glasses is off, and I'm getting bum rushed and they was trying to get my gun." (Tr. 3866-67) He added that, "I wasn't trying to shoot anyone. I was scared; flat out scared. That's all, man. There wasn't no intention for him or nothing. I was scared. And that's why I let out that scream. I was scared." (Tr. 3869) Ivery remembered tumbling outside of the bar and the gun falling away from him, and then "I take off running because I was scared they would shoot me with my gun." (Tr. 3784-85)

After the multi-day trial the jury found Ivery guilty of all counts, with the exception of renumbered Count 15, including the death penalty specification attached to Count 1. Upon further deliberation the jury recommended a sentence of life

without parole. After merging some of the counts and specifications, the trial court sentenced Ivery to an additional prison term of sixty-five years, along with a mandatory five-year period of post-release control.

Ivery filed a timely notice of appeal and was appointed appellate counsel. His counsel raised four assignments of error which the Ohio Ninth District Court of Appeals either overruled or declined to address. See *State v. Ivery*, App. Case No. 28551, 2018-Ohio-2177 (*Ivery I*). On appeal of that decision the Ohio Supreme Court declined to accept jurisdiction for non-specific reasons under Ohio S.Ct.Prac.R. 7.08(B)(4).¹ See *State v. Ivery*, Case No. 2019-Ohio-173 (*Ivery II*). Ivery then filed a petition for writ of certiorari to this Court, which was denied on October, 7, 2019. See *Ivery v. Ohio*, 140 S.Ct. 84 (2019).

Ivery also filed an Ohio App.R. 26(B) application for reopening, which was granted by the appellate court, which was granted on June 13, 2019, and he was again appointed appellate counsel. The reopened appeal presented four assignments of error (differing from his original appeal), all of which were overruled by the appellate court. See *State v. Ivery*, App. Case No. 28551, 2020-Ohio-3349 (*Ivery III*). On appeal of that decision the Ohio Supreme Court again declined to accept jurisdiction. See *State v. Ivery*, Case No. 2021-Ohio-1201 (*Ivery IV*). Ivery now files this timely petition for writ of certiorari.

¹ Under this rule, the Ohio Supreme Court may decline to accept jurisdiction for any of the following reasons: (a) The appeal does not involve a substantial constitutional question and should be dismissed; (b) The appeal does not involve a question of great general or public interest; (c) The appeal does not involve a felony; (d) The appeal does involve a felony, but leave to appeal is not warranted.

REASONS FOR GRANTING PETITION

Introduction – USCS Supreme Court Rule 10 provides that:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
- (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
- (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

- I. THE COURT SHOULD GRANT THE PETITION BECAUSE PETITIONER WAS DENIED DUE PROCESS, WHERE THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO HAVE FOUND HIM GUILTY BEYOND A REASONABLE DOUBT OF EVERY ESSENTIAL ELEMENT OF AGGRAVATED MURDER, MURDER, AND ATTEMPTED MURDER.

This Court has long held that "the Due Process Clause [of the 5th and 14th Amendments to the U.S. Constitution] protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358 (1970). Thus the Due Process

Clause “forbids a state to convict a person of crime without proving the elements of the crime beyond a reasonable doubt.” *Fiore v. White*, 531 U.S. 225 (2001).

“To determine whether a conviction is supported by sufficient evidence, ‘[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.’ *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).” *State v. Walker*, 150 Ohio St. 3d 409 (2016) at ¶ 12.

Ivery recognizes that “a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court was ‘objectively unreasonable.’” *Cavazos v. Smith*, 565 U.S. 1 (2011), quoting *Renico v. Lett*, 559 U.S. 766 (2010).

Herein, Ivery will establish that the State of Ohio failed to prove beyond a reasonable doubt every element of the offenses of aggravated murder, murder, and attempted murder, and that the appellate court’s rejection of Ivery’s sufficiency of the evidence challenge was objectively unreasonable.

Aggravated Murder

Ivery was found guilty in Count 1 of the aggravated murder of Justin Winebrenner under O.R.C. § 2903.01(A), which provides that: “No person shall *purposely*, and *with prior calculation and design*, cause the death of another or the

unlawful termination of another's pregnancy." (Emphasis added.) In order to obtain a conviction on Count 1 the State of Ohio had to prove beyond a reasonable doubt that Ivery *purposely* caused the death of Winebrenner, and that he did so with *prior calculation and design*.

O.R.C. § 2901.22(A) defines *purposely* as follows: "A person acts purposely when it is the person's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is the offender's specific intention to engage in conduct of that nature." Applied to the present case, the court instructed the jury as follows:

"A person acts purposefully when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of the defendant a specific intention to cause the death of Justin Winebrenner. Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result. To do an act purposely is to do it intentionally and not accidentally...You will determine from those facts and circumstances whether there existed in the mind of the defendant a specific intention to cause the death of Justin Winebrenner." (Tr. 3968-69)

The facts and testimonies presented at trial – including those of the multiple State's witnesses – establish there was clearly no evidence of a specific or conscious intent by Ivery to cause the death of Winebrenner. Ivery was being physically accosted by Winebrenner and two other large white men, and only pulled and fired his gun as he was being knocked back over a table. Ivery never specifically targeted Winebrenner, but rather struck him inadvertently in the process of wildly firing four random shots as he was knocked off-balance backwards. If not a case of self-defense,

at worst, Ivery acted recklessly, which does not support a conviction for aggravated murder under O.R.C. § 2903.01(A).

Regarding aggravated murder, the Supreme Court of Ohio has held that, “The phrase ‘prior calculation and design’ by its own terms suggests advance reasoning to formulate the purpose to kill. Evidence of an act committed on the spur of the moment or after momentary consideration is not evidence of a premeditated decision or a studied consideration of the method and the means to cause a death. The General Assembly has determined that it is a greater offense to premeditate or to plan ahead to purposely kill someone. * * * Aggravated murder is a purposeful killing that also requires proof of prior calculation and design: forethought, planning, choice of weapon, choice of means, and the execution of the plan.” *State v. Walker*, 150 Ohio St. 3d 409 (2016) at ¶ 18, 28.

In overruling Ivery’s sufficiency of evidence challenge, the appellate court offered the following reasoning:

“The State presented evidence at trial indicating that Mr. Ivery left the bar after an argument, retrieved a gun, and then returned to the bar about eight minutes later. Upon his return, he told at least one bar patron that he was not alone anymore, and lifted his shirt several times to reveal a gun tucked into his waistband. As [Winebrenner] and other bar patrons approached him, Mr. Ivery drew the gun from his waistband. A struggle ensued, and Mr. Ivery fired several shots, two of which struck [Winebrenner] in the abdomen.”

State v. Ivery, 2020-Ohio-3349 at ¶ 11.

The opinion of the appellate court does not agree with the facts of the case (as provided herein) on several substantive points, and relies on unproven assertions presented by the State. It is undisputed that Ivery left the bar and returned about

eight minutes later. His given reason for returning was to retrieve an order of wings that he had left behind earlier. (Tr. 3755, 3763, 3794)

It was the State's assertion that Ivery only retrieved the gun on his return to the bar, but did not have it on his person earlier. However, bar patron Ann Marie Kuzio testified that Ivery informed her he had "a 40" earlier that evening. (Tr. 2406) Another bar patron, Natalie Linn, testified that, "After the shooting I just put two and two together not thinking that it was a 40 of beer, thinking that it was a .40-caliber." (Tr. 2904) And indeed, while Ivery did possess a .40 caliber handgun, there is no evidence that he ever ordered or possessed a 40 ounce beer that night.

Even if the State's assertion was correct (a point Ivery does not concede), at least one Ohio appellate court has found that, "The mere fact that defendant was carrying a gun on this occasion but was not carrying a gun on some earlier visit to a different bar is not sufficient to demonstrate a prior calculation and design to kill someone at this bar." *State v. Davis*, 8 Ohio App. 3d 205 (8th Dist. 1982). Thus, even if the State had been able to definitively prove that Ivery did not have a gun on him earlier in the evening, his possessing a gun upon return into Papa Don's is not itself sufficient to prove prior calculation and design.

Next, Ivery does not dispute that he flashed the gun in his waistband several times to Dave Wokaty upon his return into the bar. However, the appellate court was manifestly incorrect in opining that Ivery drew his gun as he was *approached* by any of the bar patrons. In fact, as testified to by a number of the State witnesses, he did not draw and fire the gun until *after* Winebrenner and David Eisele had put their

hands on him and, with Wokaty, began pushing Ivery backwards over a table. (Tr. 2474, 2482, 2523-25, 3012-13, 3126-28, 3321, 3347-48, 3386-87)

Furthermore, if Ivery had truly returned to the bar with a premeditated intent to shoot and kill anyone present, why did he not enter the establishment gun drawn and immediately firing? Ivery's actions in drawing his weapon and firing it were clearly a *spur of the moment* response to the physical assault he was suffering at the hands of Winebrenner, Eisele, and Wokaty. See *State v. Nelson* (8th Dist.), 2017-Ohio-5568 at ¶ 34.

At trial, the defense requested a lesser included offense instruction on voluntary manslaughter under O.R.C. § 2903.03. Under this statute, which bears resemblance to 18 USCS § 1112, "No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another[.]" The request was denied by the trial court. While that rejection is not at issue here, it is arguable that the sufficiency of the evidence presented at trial weighs in favor of Ivery having been convicted of the voluntary manslaughter of Winebrenner, not aggravated murder.

This Court has previously held that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975). The defense presented at trial should

establish that Ivery was acting in the heat of passion and sudden provocation, rather than with premeditated, purposeful intent.

The facts of the case show that upon reentry to Papa Don's Ivery was verbally, then physically, accosted by the three large white men: Winebrenner, Wokaty and Eisele, who collectively weighed over 400 lbs. (Wokaty alone weighing almost 400 lbs.). Asked why he eventually pulled his gun out, Ivery, who is black, testified it was "[b]ecause they was reaching and I didn't want them to get it," fearing that, "They will take it and kill me." (Tr. 3781, 3864) "I feared that once I was fallen [as he was pushed by the men back over a table], that's when my fear hit its highest point and that's when I screamed. (Tr. 3783-85) Regarding the four shots subsequently fired, Ivery testified that he "never aimed. I was falling...I'm falling to the ground when the first shot is fired...I was scared...I couldn't see, my glasses is off, and I'm getting bum rushed and they was trying to get my gun." (Tr. 3866-67) He added that, "I wasn't trying to shoot anyone. I was scared; flat out scared. That's all, man. There wasn't no intention for him or nothing. I was scared. And that's why I let out that scream. I was scared." (Tr. 3869)

"An unlawful killing in the sudden heat of passion -- whether produced by rage, resentment, anger, *terror or fear* -- is reduced from murder to manslaughter only if there was adequate provocation, such as might naturally induce a reasonable man in the passion of the moment to lose self-control and commit the act on impulse without reflection." (Emphasis added.) *United States v. Frady*, 456 U.S. 152 (1982), quoting *Austin v. United States*, 382 F.2d 129 (1967). See also *United States v. Guyon*, 717

F.2d 1536 (6th Cir. 1983) (“‘heat of passion’ could include the passion of fear”); *McHam v. State*, 2005 OK CR 28 (Court of Criminal Appeals of Oklahoma 2005) (“The fear of being injured or killed, such as might justify using deadly force in self-defense, is a kind of ‘passion’ contemplated by the offense of heat-of-passion manslaughter”); *McNeil v. Cuyler*, 872 F.2d 443 (3rd Cir. 1986) (“If [the killing] was committed under the influence of an uncontrollable fear of either death or great bodily harm caused by the circumstances but without the presence of all the ingredients necessary to excuse the act on the ground of self-defense, the killing is manslaughter and not murder”).

The testimonial evidence presented at trial, by both Ivery and the State witnesses, should establish that if not acting in self-defense, Ivery was certainly acting under the strong provocation created by Winebrenner and the other two large men; an assault that had Ivery fearing for his life. This clearly meets the standard of voluntary manslaughter – not aggravated murder.

Given the facts and circumstances of this case, it is quite evident that the requisite elements of “purposeful” intent and “prior calculation and design” necessary to support Ivery’s conviction for the aggravated murder of Winebrenner did not exist. Hence, there was insufficient evidence to support a conviction for aggravated murder, and the appellate court’s overruling of the sufficiency challenge was objectively unreasonable.

Murder

Ivery was found guilty in Count 2 of the murder of Winebrenner in violation of R.C. § 2903.02(A). Under this statute, similar to the Count 1 aggravated murder, “No

person shall purposely cause the death of another[.]” So here again, for the same reasoning as it applies to purposeful intent as it related to aggravated murder above, there was insufficient evidence to find Ivery guilty of the murder of Winebrenner as charged in Count 2.

Ivery was found guilty in Count 3 of the murder of Winebrenner in violation of R.C. § 2903.02(B). Again, as argued above, he should have been found guilty of no worse than voluntary manslaughter. There was insufficient evidence to support a conviction for either count of murder, and the appellate court’s overruling of the sufficiency challenge for those counts was likewise objectively unreasonable.

Attempted Murder

Ivery was found guilty in Count 5 of the attempted murder of David Wokaty, and in Count 6 of the attempted murder of David Eisele, both in violation of O.R.C. § 2903.02(A) and 2923.02. As such, these counts required the same proof of “purposeful” conduct as Count 1. But again, there is no evidence, physical or testimonial, that Ivery specifically targeted either Wokaty or Eisele. Rather the evidence indicates that Wokaty was inadvertently struck by one shot, and Eisele was never harmed at all, as Ivery was – arguably recklessly – wildly firing four random shots as he was being knocked backwards over a table.

It is notable here that after the State and defense had rested and the parties were reviewing the proposed jury instructions with the trial court, the State moved to dismiss Counts 6, 7 and 8, which originally also charged Ivery with the attempted murder under R.C. § 2903.02(A) and 2923.02 of Jennifer Imhoff, Michael Capes, and

Thomas Russell, respectively. (Tr. 3950) The motion was granted by the court and the original Counts 6, 7 and 8 were dismissed, and the original Counts 9-18 were renumbered 6-15. (Tr. 3947-53)

In moving to have the original Counts 6, 7 and 8 dismissed, the State reasoned that Imhoff, Capes and Russell "were three victims that were clearly off to the side at the time of the shooting, yet they were all struck in one fashion or another with the bullet." (Tr. 3950-51) Yet there is no greater evidence that Ivery was targeting Wokaty or Eisele (or, for that matter, Winebrenner) than that he was targeting Imhoff, Capes or Russell. So if in the State's mind there was insufficient evidence to prove that Ivery was *purposely* intending to cause the latter trio's deaths, then there was likewise not sufficient evidence of Ivery's intent to cause the death of Wokaty or Eisele either.

Significantly, in reviewing the harm done to each of the five individuals above, records show that Wokaty suffered the most serious injury, having been struck by a bullet through the arm and torso. (Tr. 2526-27) Eisele was not injured at all. Imhoff was struck by a bullet in the arm that took a few months to heal. (Tr. 2637-38) Capes was struck by a bullet in the foot and had to take three months off work. (Tr. 3108, 3113-14) And Russell was only grazed by a bullet that did not even require medical treatment. (Tr. 2828-31) Thus there is no correlation between the actual harm suffered by the different victims and which of them Ivery was convicted of attempted murder. If the sufficiency of evidence was based solely on the harm done to the

individual victim, why were the charges of attempted murder against Imhoff and Capes dismissed, while Ivery was found guilty of the attempted murder of Eisele?

Clearly the dismissal of the attempted murder charges relating to Imhoff, Capes, and Russell further support Ivery's argument that there was insufficient evidence to convict him of the attempted murder of Wokaty and Eisele. This would also further support Ivery's argument above that he did not act *purposely* in causing the death of Winebrenner.

In overruling Ivery's sufficiency challenge to these counts, the appellate court opined that "Mr. Ivery fired his gun in a crowded bar. The bullets struck and/or grazed several bar patrons. Viewing this evidence in a light most favorable to the State, we conclude that a rational trier of fact could have found the essential elements [which would include a *purposeful* intent to cause death] of attempted murder proven beyond a reasonable doubt." *Ivery* at ¶ 16. Here again, while it is undisputed that Ivery fired four shots inside a bar, the facts and evidence show that he did so only after being physically assaulted by three men and knocked backwards over a table. No reasonable jurist would conclude that this shows a *purposeful* intent to cause the death of any of the bar patrons.

So again, there was insufficient evidence to support a conviction for any of the attempted murder charges, and the appellate court's overruling of the sufficiency challenge for those counts was likewise objectively unreasonable.

II. THE COURT SHOULD GRANT THE PETITION BECAUSE THE PETITIONER WAS DENIED DUE PROCESS OF LAW WHEN THE TRIAL COURT IMPROPERLY REMOVED PETIT JUROR RON BARNES WITHOUT SHOWING ADEQUATE CAUSE.

"[T]he Sixth Amendment's provision for jury trial is made binding on the States by virtue of the Fourteenth Amendment." *Taylor v. Louisiana*, 419 U.S. 522 (1975). "It is beyond question that the right of trial by jury guaranteed by the constitution carries with it by necessary implication the right to a trial by a jury composed of unbiased and unprejudiced jurors. This right being guaranteed, all courts are charged with the imperative duty of affording every litigant the opportunity of having his cause tried by an impartial jury." *Lingafelter v. Moore*, 95 Ohio St. 384 (1917).

The Supreme Court of Ohio has held that "the decision to disqualify a juror for bias is a discretionary function of the trial court. Where a trial court is vested with such authority, reversal on appeal is justified only if its exercise thereof constitutes an abuse of discretion." (Internal citation omitted.) *Berk v. Matthews*, 53 Ohio St. 3d 161 (1990). In Ohio courts, "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Id.*, quoting *State v. Adams*, 62 Ohio St. 2d 151 (1980).

O.R.C. § 2945.25 provides in relevant part that "[a] person called as a juror in a criminal case may be challenged for the following causes:

(B) That he is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial[.]"

“As long as a trial court is satisfied, following additional questioning of the prospective juror, that the juror can be fair and impartial and follow the law as instructed, the court need not remove that juror for cause.” *State v. Moss* (9th Dist.), 2009-Ohio-3866 at ¶ 11.

Law and Argument

Ivery contends that it was an abuse of discretion for the trial court to remove petit juror Ron Barnes for cause where it was not proven that he could not be a fair and impartial juror. During the course of Ivery’s trial it came to the court’s attention that Barnes had made contact after leaving the courtroom with an individual who had been present in the jury gallery. Thereafter, outside the presence of the rest of the jury Barnes was examined by the court. Barnes admitted to approaching an individual he saw in the gallery in the parking deck outside of the courthouse. (Tr. 2914) His explanation for doing so was that, “It was just somebody that I saw, I saw them together one time, and I just asked where her friend was. That was all. Wasn’t no conversation or nothing.” (Tr. 2914) He further explained, “I don’t even know her. I have no idea what her name is, or I don’t know her at all. I just seen her with the young lady once and, you know, when we was in the hallway or something. And yeah, I have no idea who she is, you know, at all.” (Tr. 2914-15) Barnes was subsequently asked twice by the defense counsel whether this had influenced his ability to be a fair-minded jurist. Barnes responded, “No, No, No, not at all. No.” (Tr. 2916) “No, because I had no idea who they were, who, you know, who they was here to see or nothing like that, you know. No, no, no, nothing at all. Nothing.” (Tr. 2917) Asked

if he knew what relationship, if any, either individual had to the case he responded, "Not at all. No idea." (Tr. 2917)

Barnes was dismissed from the courtroom after which a discussion was held between the court, the prosecution and the defense. It was decided that further questioning of Barnes was necessary. (Tr. 2921) After expressing some forgetfulness as to which day it was he saw the young woman and which day it was he inquired about the young woman to the other individual, Barnes determined that he had seen the two together in the gallery on Tuesday, but only the individual in the gallery on Wednesday. (Tr. 2924-25) He was then dismissed again.

Thereafter, the court indicated, "That's problematic. That's approaching somebody that's in the courtroom knowing they were in the court after I told them not to." (Tr. 2926) The prosecution then asked to have Barnes removed for cause. (Tr. 2927) After the defense strongly objected (Tr. 2928), and further argument was had, the court offered the following judgment:

"These jurors are honor bound by their oath that they must follow the instruction of the Court. The Court was so concerned about this that I actually put them all in writing, I presented orders to them on the first day, and I had them each sign the orders. They have a written copy of these orders and they had to sign indicating that they had received them. And I have reminded them of these orders every single time we take a break. So in order for the process to have integrity, this Court must have confidence these jurors are following their oaths. And this juror has violated the Court's order about *contacting people outside of the courtroom* and he got caught lying to the Court." (Tr. 2941-42 – emphasis added.)

But did Barnes truly violate the trial court's order? A review of the record shows that entering into the trial's first recess, the court's actual instructions to the jury were as follows:

"I'm going to remind you about all the admonitions regarding this case, which is you're not to *discuss this case* with anyone. You're not to permit anyone to discuss it with you or in your presence. You're not to investigate this case in any fashion. You are not to make any final decisions until you've heard all the evidence." (Tr. 2266 – emphasis added.)

The court's specific instruction was that the jurors were not to discuss the case with anybody (nor have it discussed with them). The court ordered no such prohibition against a juror speaking with anyone regarding matters *de hors* the case. The interview of Barnes by the trial court does not yield any evidence that he ever discussed anything relating to the case itself with the individual (or anyone else). The record establishes that Barnes was merely expressing to that individual interest in a young woman he viewed in the gallery on an earlier day. Further, there is no evidence Barnes had knowledge of any connection that either the individual or the other young woman might have had to the defendant Ivery.

Notably, the trial court never actually asked Barnes if after his brief conversation with the individual outside the courtroom he could remain impartial. The court's failure to ask such an important follow-up question certainly does not create the presumption that Barnes could *not* be fair and impartial. Conversely, Barnes did reassure the court that he could be fair and impartial in answering the question posed by defense counsel over whether he would be influenced by his brief conversation with the individual. (Tr. 2916-17)

As for the trial court's opinion that Barnes had got caught lying and was not following his oath to the court (i.e. "the law"), this is an unsubstantiated conclusion. That Barnes expressed some confusion during questioning (which could easily have been perceived by him as an interrogation) can be attributed to nervousness and some level of forgetfulness – not any intentional deception. Barnes was not caught in any outright lies and openly admitted speaking to the individual he had viewed in the courtroom. And as demonstrated above, Barnes did abide by the specific instruction given by the court not to discuss the case with any other individuals.

Thus applying the standard of *Moss*, here the trial court had no justifiable reason not to be satisfied that Barnes could follow the law and continue the trial as a fair and impartial juror. Consequently, removing him for cause was both arbitrary and unreasonable. For this cause, Ivery's convictions in the present case must be vacated and the matter remanded for a new trial.

On appeal, the appellate court concluded that "as the trial court made clear on the record, the trial court removed the juror for cause on the basis that the juror violated its admonition to not communicate with anyone in the courtroom, and then lied to the court about doing so. Under these facts, this Court cannot say that the trial court abused its discretion when it removed the juror at issue for cause." *Ivery* at ¶ 27. Yet, as established above, Barnes did *not* violate the specific admonition of the trial court; nor was it proven that he could not be fair and impartial. Thus, the appellate court's overruling of the juror removal challenge was objectively unreasonable

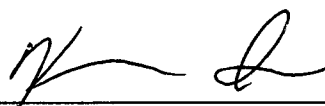
CONCLUSION

The Petition for Writ of Certiorari should be granted review due to the grounds presented herein, which demonstrate clear due process violations relating to convictions that are against the sufficiency of evidence and a petit juror removed without good cause.

Wherefore, the Petitioner, Kenan Ivery, humbly prays this Honorable Court will grant his petition and allow further review of the issues raised herein.

Respectfully submitted,

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