No. 21-6083
CAPITAL CASE

In the SUPREME COURT of the UNITED STATES

JAMES OSGOOD,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for a Writ of Certiorari to the
Alabama Court of Criminal Appeals

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED (REPHRASED)

James Osgood, while acting out a depraved rape and sodomy fantasy, murdered Tracy Lynn Brown. Osgood was subsequently charged and convicted of capital rape-murder and capital sodomy-murder and sentenced to death.

When asked during voir dire whether she could "vote to recommend a death sentence," prospective juror R.P. responded, "No." R. 585-86. After a single question from defense counsel, R.P. was removed for cause. Osgood challenged R.P.'s removal in the Alabama Court of Criminal Appeals (ACCA), but, finding record support for the trial court's dismissal of R.P., the ACCA held that the trial court did not abuse its discretion. The Alabama Supreme Court denied Osgood's petition for writ of certiorari.

Osgood's petition presents the following question: Did the Alabama Court of Criminal Appeals properly afford the trial court substantial deference and uphold its dismissal of R.P. for cause?

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STATEMENT OF THE CASE

James Osgood, along with Tonya Vandyke, murdered Tracy Lynn Brown while acting out a depraved fantasy wherein Osgood raped and sodomized Tracy before killing her.

When Tracy did not show up to her job at the Hatley Health Care Center ("the Center") on October 13, 2010, Debra Samson, a human resources manager at the Center, called Tracy's landlord, Lucille Martin. (R. 674–78, 1089–96.) When Ms. Martin went to check on Tracy, she noticed that the back door was unlocked, and when she went inside and called Tracy's name, there was no response. (R. 679–80, 687.) She found Tracy in her bedroom, dead, laying naked between the bed and the wall. (R. 679–80.) Ms. Martin called 911. (R. 680, 685.)

While Investigator Shane Lockhart with the Chilton County Sheriff's Office worked the scene, he was approached by Tonya Vandyke. (R. 747–50.) Later that evening, Vandyke and Osgood were interviewed by law enforcement. (R. 868–70.) In his interview with law enforcement, Osgood stated that he had spent time with Tracy earlier that day and had been in her home and bedroom, though they did not have sex, and he later learned from Tanya of Tracy's death. (R. 752–59.) Later in the interview, however, he told the investigators that he and Tonya had a "three-way" with Tracy in Tracy's bedroom. (R. 758–62.) During the interview, Investigator Lockhart noticed that Osgood had a cut on his hand. (R. 762–66.) At the end of the interview, Osgood was arrested. (R. 767.)

A month later, Osgood was interviewed again. During this interview, investigators read to him a statement obtained from a jail-house informant, though they led Osgood to believe that the statement was from Tonya. (R. 780–88.) After hearing the contents of the statement, Osgood began talking about his fantasies of kidnapping and torturing someone, how he saw that fantasy depicted on a television episode of "CSI", and how he saw himself doing something like that. (R. 788–89.) Osgood told the investigators that he and Tonya were looking for a victim and eventually decided it should be Tracy. (R. 789, 796.) Osgood told them that he and Tonya had attempted to kill Tracy on a previous night, they even brought a can of gasoline to her home to burn any evidence, but Tracy would not let them into her trailer because she did not feel well. (R. 789–90.)

Osgood told investigators that on the day of the murder he and Tonya surprised Tracy by showing up at her trailer, offering to take her to the Center so that she could pick up her paycheck. (R. 791.) Osgood and Tonya took Tracy to pay her power bill, to get food at Sonic, and to go look at a used car, before taking her back home. (R. 791–93.) Once back at Tracy's trailer and inside, Tonya slapped Tracy, which according to Osgood, was their signal to begin their assault. (R. 793–94.)

Osgood put Tracy in a chokehold, and she fell to the floor. (R. 794.) He and Tonya dragged Tracy down the hallway to her bedroom, tearing off her clothes along the way, and put her on the bed. (R. 794–95.) Osgood forced Tracy to perform oral sex on him, and he told Tonya to shoot Tracy in the head if she bit his penis. (R. 794–95.) Osgood and Tonya then forced Tracy to perform oral sex on Tonya while Osgood had

vaginal and anal sex with Tracy from behind. (R. 796.) Osgood then forced Tracy to perform anal sex on him, again. (R. 797.) Tracy tried to run out the back door of the trailer, but Osgood grabbed her and pulled her back inside. (R. 798.) Once back inside, Osgood again forced Tracy to perform oral sex on Tonya while Osgood had vaginal and anal sex with Tracy from behind. (R. 798.)

During the assault, Osgood went to the living room, put his revolver on the counter, and tucked a knife into his sock. (R. 799.) When Osgood returned from the living room, he and Tonya continued to sexually assault Tracy. (R. 800.) At some point during the assault, Osgood and Tonya looked at each other, nodded, and then Osgood retrieved the knife from his sock and cut Tracy's throat. (R. 800.) According to Osgood, he was trying to cut Tracy's jugular vein, but because she was not dying quick enough, he cut her neck several times and stabbed her in the back. (R. 800–01.) As Tracy fought for her life and struggled to breath, Osgood told her to "just let go." (R. 802, 804.) During the ordeal, Osgood and Tonya smeared feces on Tracy's body. (R. 810.) Afterwards, Osgood and Tonya had sex at Tonya's house. (R. 805.) Osgood wrote what he had told investigators in a statement (R. 809), and the events stated therein were corroborated with various pieces of evidence, including DNA evidence, collected during the investigation. (R. 714, 716, 720–21, 727, 792, 795, 803–04, 828, 880–83, 931–32, 944, 1059–60, 1063–65.)

On February 10, 2012, a Chilton County Grand Jury indicted Osgood for one count of capital rape-murder and one count of capital sodomy-murder. *See* ALA CODE § 13A-5-40(a)(3), (CR. 29–30.) On May 5, 2014, voir dire began. (R. 316.) During

individual voir dire, the following exchange occurred between the prosecutor and prospective juror R.P.:

> Q: [A]t the end of all the evidence if you felt—based on the Judge's instructions if you felt that it was appropriate, do you think you would be the kind of person that could raise your hand and vote to recommend a death sentence?
>
> A: No.
>
> Q: You don't. Do you just have feelings against it or what is it about it?
>
> A: Well, I feel like you should be punished but I don't know if I would feel comfortable in voting on him receiving the death penalty."

(R. 585–86.) Defense counsel then asked R.P. if she would be able to listen to the trial court's instructions and "make [her] determination of life without or death penalty based on the law that the Judge gives . . .", to which R.P. responded, "Yes." (*Id.*) The State subsequently moved to dismiss R.P. for cause, which the trial court granted. (*Id.*)

On May 6 the trial began. (R. 643–45.) On May 9, the jury returned a verdict finding Osgood guilty of both counts. (CR. 449; R. 1186–87.) The jury unanimously recommended a sentence of death. (CR. 455; R. 1412.) At the judicial sentencing hearing, the trial court followed the jury's recommendation and sentenced Osgood to death. (R. 1432–34.)

On appeal, the Alabama Court of Criminal Appeals (hereinafter "ACCA") found that the trial court did not abuse its discretion when it dismissed prospective juror R.P. for cause. *Osgood v. State*, CR-13-1416, 2016 WL 6135446, at *16, 29 (Ala. Crim. App. Oct. 21, 2016). According to the ACCA:

> [N]either party engaged in an extensive voir dire with R.P. After R.P. stated that she did not feel that she could vote to impose the death penalty, defense counsel asked if, despite her discomfort, she would be able to listen to the trial court's instructions and make a sentencing determination based on the law. R.P. responded "Yes." (R. 586.)
>
> The length and depth of voir dire of a prospective juror will not, on its [own], support a finding on appeal regarding the propriety of a trial court's grant or denial of a party's challenge for cause. However, we find it relevant here in light of the fact that a trial court's decision on such a matter is "based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." *Wainwright*, 469 U.S. at 428, 105 S. Ct. 844. As noted, "[the decision of the trial court on such questions is entitled to great weight and will not be interfered with unless clearly erroneous, equivalent to an abuse of discretion." *Albarran*, 96 So. 3d at 159 (internal citations and quotations omitted). "A judge abuses his discretion only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based his decision." *Hodges v. State*, 926 So. 2d 1060, 1072 (Ala. Crim. App. 2005) (internal citations omitted).
>
> In the present case, the trial court, who was in the best position to observe the prospective jurors' demeanor and to assess their credibility, was able to hear more detail regarding S.O.'s feelings about the death penalty and her ability to be a fair and impartial juror. However, the trial court did not hear the same detail regarding R.P.'s belief and her ability to be fair and impartial.

Id. at *15–16.

The ACCA ultimately upheld Osgood's conviction but reversed his death sentence because of an improper penalty instruction, remanding his case for a new penalty-phase. *Id*. at *29. On remand, Osgood waived his right to a jury sentencing recommendation and the trial court sentenced him to death. *Osgood v. State*, CR-13-1416, 2020 WL 2820637, *1 (Ala. Crim. App. May 29, 2020). On return to remand, the ACCA affirmed Osgood's death sentence. *Id.* at *22. The Alabama Supreme Court subsequently denied Osgood's petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

First and foremost, R.P.'s unequivocal initial statement that she considered herself unable to vote for the death penalty, taken at face value, would of course "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." *Witt*, 469 U.S., at 424. But even if the rest of R.P.'s statements could be thought to have injected ambiguity into the balance of her voir dire testimony, the State courts' decisions would squarely follow this Court's precedent, for "when there is ambiguity in the prospective juror's statements, the trial court, aided as it undoubtedly is by its assessment of the venireman's demeanor, is entitled to resolve it in favor of the State." *Uttecht v. Brown*, 551 U.S. 1, 7 (2007) (cleaned up).

What is more, even assuming Osgood could plausibly assert error in the State courts' decisions, this is a fact-bound case that presents no novel questions for this Court to answer and involves no circuit split requiring resolution. To the contrary, Osgood seeks only to attack the State courts' routine application of this Court's precedents, so the error Osgood asserts can only consist of "erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. Rule 10. But this Court "rarely grant[s] review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case." *Salazar-Limon v. Houston*, 137 S. Ct. 1277, 1278 (2017) (Alito, J., concurring in denial of certiorari). "Error correction is outside the mainstream of the Court's functions." *Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting) (cleaned up). And

"because the present case is so unique, it is hard to see how it meets [this Court's] stated criteria for granting review." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1515 (2018) (Alito, J., dissenting).

This Court should deny Osgood's petition.

ARGUMENT

I. The Trial Court Did Not Abuse its Discretion in Dismissing R.P. for Cause, and in Any Event Certiorari is Inappropriate for the Question Presented.

During individual voir dire, the following exchange occurred between the prosecutor and prospective juror R.P.:

> Q: [A]t the end of all the evidence if you felt—based on the Judge's instructions if you felt that it was appropriate, do you think you would be the kind of person that could raise your hand and vote to recommend a death sentence?
>
> A: No.
>
> Q: You don't, Do you just have feelings against it or what is it about it?
>
> A: Well, I feel like you should be punished but I don't know if I would feel comfortable in voting on him receiving the death penalty."
>
> Q: Is it fair for me to say that you prefer for somebody to be imprisoned for their entire life rather than have *anybody* on death row?
>
> A: Yes.

(R. 585–86) (emphasis added.) Defense counsel then asked R.P. if she would be able to listen to the trial court's instructions and "make [her] determination of life without or death penalty based on the law that the Judge gives . . .", to which R.P. responded, "Yes." (*Id.*) The State subsequently motioned to dismiss R.P. for cause, which the trial court granted. (R. 634–35, 639.) The ACCA upheld the trial court's dismissal. Osgood

claims that "[t]he lower court's holding that R.P. was not erroneously removed for cause because the trial court's decision could have been based on 'determinations of [R.P.'s] demeanor and credibility' . . . is a rejection of this Court's clear guidance in *Witherspoon* and its progeny." (Pet. at 9.) The ACCA neither misunderstood, nor misapplied, *Witherspoon* and its progeny.

In *Witherspoon v. Illinois*, 391 U.S. 510, 522–23, n. 21 (1968), this Court noted in dicta that excluding venire members for cause due to opposition to the death penalty should be limited to those who make it "unmistakably clear (1) that they would automatically vote against imposition of capital punishment . . . or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." This Court clarified this holding in *Wainwright v. Witt*, holding that a veniremen may be removed for cause due to opposition to the death penalty when his view would "prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath." 469 U.S. 412, 424 (1985).

This Court noted that the new *Witt* standard eliminated the previous *Witherspoon* reference to "automatic" decision-making and the requirement that bias be proved with "unmistakable clarity." *Witt*, 469 U.S. at 424. This Court reasoned:

> [D]eterminations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there

> will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.

Id. at 424–26. *See also id*. at 429 ("[T]he predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record."); *id.* at 428 ("[S]uch finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province."). [1] Thus, "deference must be paid to the trial judge who sees and hears the juror." *Id*. at 426. Moreover, even if R.P.'s later statements could be said to conflict with her initial concession of inability to vote for capital punishment, such a reading would only introduce ambiguity into the balance of her testimony. And considering that a trial court "is entitled to resolve" any "ambiguity in the prospective juror's statements" in the State's favor, *Uttecht v. Brown*, 551 U.S. at 7, even the most pro-Osgood interpretation of R.P.'s voir dire gets him nowhere.

Here, the trial court was in the best position to observe R.P.'s demeanor and credibility during individual voir dire, and the judge dismissed R.P. for cause—"a

[1] Osgood, however, argues that "where the record does not show that the trial judge actually made a determination concerning [a] juror's demeanor, the reviewing court cannot presume [the] judge credited that reason", citing *Snyder v. Louisiana*, 552 U.S. 472, 479 (2008). (Pet. at 10.) However, this Court in *Snyder* determined that, because nothing in the record indicated "that the trial judge credited the prosecutor's assertion that [the dismissed juror] was nervous", it could not presume that trial judge did so credit the *prosecutor's assertion*. *Snyder*, 552 U.S. at 479. Such holding does not preclude a presumption that a trial judge dismissed a potential juror based on *his own* "definite impression that a juror would be unable to faithfully and impartially apply the law" despite a "lack of clarity in the printed record" establishing as much. *Wainwright v. Witt*, 469 U.S. 412, 425–26 (1985).

finding [] based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." *Witt*, 469 U.S. at 428. Noting this fact, the ACCA afforded deference to the trial court "who [saw] and hear[d] the juror." *Id.* at 426; *accord Uttecht*, 551 U.S. at 7. Thus, the ACCA neither misunderstood, nor misapplied, this Court's precedents. Consistent with this Court's previous decisions, the trial judge, who observed R.P.'s demeanor as she unequivocally denied that she "could raise [her] hand and vote to recommend a death sentence" and affirmed that she would rather vote for life without parole rather than have "anybody" on death row, was in the best position to assess R.P.'s ability to be impartial.

This Court should reject Osgood's invitation to contravene its own precedent, second-guess the trial court's discretion, and engage in fact-bound error-correction.

CONCLUSION

For the reasons set forth above, this Court should deny Osgood's petition for writ of certiorari.

Respectfully submitted,

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