No. 21-6435

In The Supreme Court Of The United States
October Term, 2021

James D. Worley,
Petitioner

vs.

State of Ohio
Respondent

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

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Brief In Opposition To The Petition For Writ Of Certiorari

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QUESTION PRESENTED

Whether Petitioner has established that he was denied his constitutional rights, and that the trial court abused its discretion by overruling Petitioner's Motion to Dismiss the entire jury panel, when the record reveals that each of the jurors who heard Petitioner's case was fair and impartial.

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

1. *State v. Worley,* 164 Ohio St.3d 589, 2021-Ohio-2207, 174 N.E.3d 754 (opinion of the Supreme Court of Ohio affirming conviction and sentence) (Petitioner's Appendix A-1);
2. *State v. Worley,* Fulton County Common Pleas Court Case No. 16CR106, April 18, 2016 Judgment Entry of Sentence (Judgment Entry of Sentence imposing death sentence) (Petitioner's Appendix A-62).

STATEMENT OF JURISDICTION

Petitioner James D. Worley claims jurisdiction under 28 U.S.C. 1254.

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

The pertinent Constitutional provisions are as follows:

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless

on a presentment or indictment of a Grand Jury, * * *; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *.

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. XIV

* * *. 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

I. THE TRIAL PHASE.

This matter involves the kidnapping and death of 20 year-old Sierah Joughin. Sierah went missing on July 19, 2016, and her body was discovered buried in a cornfield in rural Fulton County, Ohio, on July 22, 2016. *State v. Worley,* 164 Ohio St.3d 589, 2021-Ohio-2207, 174 N.E.3d 754, ¶¶3-48. The investigation quickly came to be focused on Petitioner James D. Worley ("Worley").

As a result of the investigation, Worley was ultimately tried on the following charges: (1) Abduction, in violation of O.R.C. 2905.02(A)(1); (2) Abduction, in violation of O.R.C. 2905.02(A)(2); (3) Kidnapping, in violation of O.R.C. 2905.01(A)(3); (4) Kidnapping, in violation of O.R.C. 2905.01(A)(4); (5) Kidnapping, in violation of O.R.C. 2905.01(B)(1); (6) Kidnapping, in violation of O.R.C. 2905.01(B)(2); (7) Felonious Assault, in violation of O.R.C. 2903.11(A)(1); (8) Felonious Assault, in violation of O.R.C. 2903.11(A)(2); (9) Murder, in violation of O.R.C.

2903.02(A); (10) Murder, in violation of O.R.C. 2903.02(B); (11) Aggravated Murder, in violation of O.R.C. 2903.01(A) (with death penalty specifications); (12) Aggravated Murder, in violation of O.R.C. 2903.01(B) (with death penalty specifications); (13) Possessing Criminal Tools, in violation of O.R.C. 2923.24(A); (14) Gross Abuse of a Corpse, in violation of O.R.C. 2927.01(B); (15) Tampering With Evidence, in violation of O.R.C. 2921.12(A)(1); (16) Having Weapons While Under Disability, in violation of O.R.C. 2923.13(A)(3); and (17) Having Weapons While Under Disability, in violation of O.R.C. 2923.13(A)(2). (TR 3683-85, 3708-12; April 17, 2018 Order, Document 368; April 18, 2018, Judgment Entry of Sentence, Document 369, Petitioner's Writ of Certiorari Exhibit A-62; April 30, 2018, Final Judgment Entry of Sentence, Document 373; May 1, 2018 Judgment Entry Nunc Pro Tunc, Document 374).[1]

The evidence of Worley's guilt was overwhelming. *Worley,* 164 Ohio St.3d 589, 2021-Ohio-2207, 174 N.E.3d 754, ¶3 ("Evidence adduced at trial showed that Worley kidnapped, restrained, and killed 20-year-old Joughin between July 19 and 22, 2016, in Fulton County. He attacked Joughin as she was riding her bike home one evening. He then struck her on the head with his motorcycle helmet and dragged her into a cornfield. Worley handcuffed Joughin, left her in the cornfield, and drove his motorcycle home. He returned to the cornfield after dark in his pickup truck and took her to a barn on his property. He dressed Joughin in lingerie, bound her, and shoved a rubber dog toy into her mouth and tied it in place, causing her death by suffocation. He then buried her body in a nearby cornfield."). The evidence that was presented by the State varied in its nature and type, but that varying evidence was consistent with and complementary of each other, creating an overwhelming case which established every element of each of the charged offenses

[1] All references to "TR" refer to the trial transcript.

beyond any reasonable doubt. (TR 3683-85, 3708-12; April 17, 2018 Order, Document 368; April 18, 2018, Judgment Entry of Sentence, Document 369, Petitioner's Writ of Certiorari Exhibit A-62; April 30, 2018, Final Judgment Entry of Sentence, Document 373; May 1, 2018 Judgment Entry Nunc Pro Tunc, Document 374; *Worley,* 164 Ohio St.3d 589, 2021-Ohio-2207, 174 N.E.3d 754, ¶¶3-48). Thus, following trial phase, the jury found that the State had proven every element of every remaining offense, including the relevant specifications, beyond a reasonable doubt. (TR 3275-3301).

With respect to the issue that has been raised in Worley's Petition for Writ of Certiorari, which solely addresses matters which occurred during voir dire, the most relevant issues from the trial phase are those which were mentioned by the trial judge in overruling Worley's Motion to Dismiss the entire panel of prospective jurors. The first of those issues involves certain stipulations that were entered into by the parties with respect to the counts that charged Worley with Having Weapons While Under Disability in violation of O.R.C. 2923.13(A)(2) and (A)(3). With respect to those counts, the State was required to establish that Worley was in possession of a firearm, and that he had previously been convicted of a felony offense involving the illegal possession or use of a drug of abuse and/or that he had been convicted of a felony offense of violence. (Worley having been previously convicted of the Illegal Manufacture or Cultivation of Marihuana in violation of O.R.C. 2925.04(A) and Abduction in violation of O.R.C. 2905.02(A)(2), Indictment Counts Eighteen and Nineteen, Document 1; *Worley,* 164 Ohio St.3d 589, 2021-Ohio-2207, 174 N.E.3d 754, ¶169).

As such, prior to the trial, and pursuant to the Supreme Court of Ohio's decision in *State v. Creech*, 150 Ohio St.3d 540, 2016-Ohio-8440, 84 N.E.3d 981, the parties stipulated that Worley

had previously been convicted of both a felony offense of violence and a felony offense involving the illegal possession, use, sale, administration, distribution or trafficking in a drug of abuse. (December 20, 2017 Stipulation re: Prior Convictions, Document 249; TR 455, 2526-27). The purpose of that stipulation was to present the jury with evidence from which it could find the element of a prior felony conviction for purposes of the counts that charged Worley with Having Weapons While Under Disability without the jury being advised about the specific offenses that Worley had been convicted of. *Creech*, 150 Ohio St.3d 540, 2016-Ohio-8440, 84 N.E.3d 981, ¶40; *Worley,* 164 Ohio St.3d 589, 2021-Ohio-2207, 174 N.E.3d 754, fn. 4 (the jury was not informed about the specific offenses that underlay the stipulation).

Thus, during the trial phase, and in accordance with that stipulation, the jury was advised that Worley had previously been convicted of a felony offense of violence and a felony offense involving the illegal possession, use, sale, administration, distribution or trafficking in a drug of abuse. (TR 2526-27). Moreover, at the conclusion of the trial phase, the trial judge instructed the jury that "[e]vidence was received that the defendant was previously convicted of a felony offense of violence and a felony offense involving the illegal use, sale, administration, distribution, or trafficking in a drug of abuse. That evidence was received because a prior conviction is an element of the offense of having weapons while under disability. It was not received and you may not consider it to prove the character of the defendant in order to show that he acted in conformity with that character". (TR 3253).

The second issue from the trial phase that is relevant to the trial judge's decision to overrule Worley's Motion to Dismiss the entire panel of prospective jurors involves the testimony of Robin Gardner, which was deemed admissible under the terms of Ohio Rule of Evidence 404(B). Ohio

Rule of Evidence 404(B) reads, in pertinent part, as follows:

> **(B) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts** is not admissible to prove the character of a person in order to show action in conformity therewith. It **may, however, be admissible for other purposes, such as proof of** motive, opportunity, **intent, preparation, plan**, knowledge, **identity**, or absence of mistake or accident. * * *.

(Emphasis added).

Ms. Gardner recounted a July 4, 1990 encounter that she had with Worley, an encounter which ultimately resulted in Worley being convicted of Abduction, and which shared numerous, specific and idiosyncratic features with the circumstances existing in the case at bar. *Worley,* 164 Ohio St.3d 589, 2021-Ohio-2207, 174 N.E.3d 754, fn. 4 ("The jury was not told that the incident about which Gardner testified resulted in Worley's conviction for abduction. Because Worley's conviction for abduction was relevant to the having-a-weapon-under-a-disability count in the indictment, the parties stipulated that the court would instruct the jury that Worley had been convicted of a felony offense of violence."). As such, they evinced Worley's *modus operandi* and constituted evidence identifying him as the person who kidnapped and murdered Sierah as permitted by the terms of Ohio Evidence Rule 404(B):

(1) Both cases involve young women riding bicycles alone, on rural roads, surrounded by cornfields (Sierah having been 20 years old and Gardner having been 26 years old);

(2) Both cases involve the young women being knocked off of their bicycles;

(3) Both cases involve the young women being struck in the head by their assailants (the evidence indicating that Sierah was struck in the head with Worley's motorcycle helmet and Gardner testifying that Worley hit her in the head with a

hammer);

(4) Both attacks took place in the daytime;

(5) Both cases evinced the use of a screwdriver (Worley having placed a screwdriver to Gardner's neck in an effort to get her to stop struggling and the case at bar showing the presence of Worley's screwdriver at the scene of the abduction);

(6) Both cases involve both young women being handcuffed by their assailants; and

(7) Both cases involve the use of a pick-up truck to facilitate the abduction/kidnapping (Worley struck Gardner with his pick-up and tried to use it to remove her from the scene and Worley drove his green, Dodge pick-up to the abduction scene on the night on question as a means of transporting Sierah from the abduction scene to his property).

Worley, 164 Ohio St.3d 589, 2021-Ohio-2207, 174 N.E.3d 754, ¶¶118-123 (*Id.,* ¶123 "The similarities between Worley's abduction of Gardner and the evidence of his kidnapping and assault of Joughin are striking. Indeed, the trial court correctly determined that Gardner's testimony was offered for a proper purpose—i.e., to prove the identity of Joughin's killer.").

II. MITIGATION PHASE/SENTENCING.

After the jury rendered their verdict, finding Worley guilty of the underlying offenses, including the relevant death penalty specifications, the jurors were presented with evidence during the mitigation/sentencing phase. (TR 3371-3546; State's Exhibit 326; Petition for Writ of Certiorari, Appendix p. A-76; *Worley,* 164 Ohio St.3d 589, 2021-Ohio-2207, 174 N.E.3d 754, ¶¶144-182).

Ultimately, the jury determined that the statutory aggravating circumstance that they were

to consider outweighed the mitigating factors beyond any reasonable doubt and they rendered a verdict recommending that a death sentence be imposed. (TR 3602-06). The trial court, as required by the terms of Ohio's capital punishment scheme, also considered all of the relevant evidence and likewise determined that the State had proven, beyond a reasonable doubt, that the aggravating circumstance outweighed any mitigating factors and sentenced Worley to death. (TR 3683-85; April 18, 2018, Judgment Entry of Sentence, Document 369, included in Petitioner's Appendix p. A-62). Finally, the Supreme Court of Ohio, as part of its independent sentence evaluation, likewise concluded that the aggravating circumstance outweighed any mitigating factors, that the imposition of the death penalty was appropriate and proportional, and it affirmed the imposition of the death penalty. *Worley,* 164 Ohio St.3d 589, 2021-Ohio-2207, 174 N.E.3d 754, ¶¶180-182.

With respect to the non-death penalty offenses, after various offenses were merged, the trial court imposed the following sentences: (1) eleven (11) years of incarceration for Kidnapping, in violation of O.R.C 2905.01(B)(2); (2) eight (8) years of incarceration for Felonious Assault, in violation of O.R.C. 2903.11(A)(2); (3) eleven (11) months of incarceration for Possessing Criminal Tools, in violation of O.R.C. 2923.24(A); (4) thirty-six (36) months of incarceration for Tampering With Evidence, in violation of O.R.C. 2921.12(A)(1); and (5) thirty-six (36) months of incarceration for Having Weapons While Under Disability, in violation of O.R.C. 2923.13(A)(2). The sentences were ordered to be served consecutively, for a total aggregate sentence of twenty-five (25) years and eleven (11) months. (TR 3683-85, 3708-12; April 30, 2018, Final Judgment Entry of Sentence, Document 373; May 1, 2018 Judgment Entry Nunc Pro Tunc, Document 374; *Worley,* 164 Ohio St.3d 589, 2021-Ohio-2207, 174 N.E.3d 754, ¶55).

III. ISSUES SURROUNDING JURY SELECTION AND THE IMPANELING OF A JURY.

A. The Agreed Upon Process For Impaneling A Jury.

The trial judge determined that, for the initial prospective jury pool, four hundred (400) individuals would be drawn. (September 12, 2017 Order, and documentation attached thereto, Document 215; September 8, 2017 Hearing, pp. 7-8; *Worley,* 164 Ohio St.3d 589, 2021-Ohio-2207, 174 N.E.3d 754, ¶78). The trial judge determined that the prospective pool would initially be provided with a questionnaire that would focus primarily on any statutory exemptions from jury service as described in the Ohio Revised Code (with various hearings to be held to address any claimed exemptions or other excuses). (September 8, 2017 Hearing, pp. 8-9). Thereafter, the remaining members of the prospective pool would be provided with a long form questionnaire that they were required to return to the court. (September 8, 2017 Hearing, pp. 8-9).

The remaining prospective jurors would be required to report to the trial court in two equal bodies, with each of those groups being subjected to general voir dire at different times. (September 8, 2017 Hearing, pp. 9-10). When the remaining prospective jurors reported for general voir dire, they would be required to complete a questionnaire that addressed the issue of pretrial publicity. (September 8, 2017 Hearing, p. 10; September 12, 2017 Order, Document 215, and the various documents attached thereto). After the various groups were subjected to general voir dire, and some of the prospective jurors were removed from the pool for cause, the remaining prospective jurors would be subjected to individual, sequestered voir dire. (September 8, 2017 Hearing, pp. 11-12).

As part of the individual voir dire process, the prospective jurors would be summoned in groups of ten, with the trial judge providing those prospective jurors with additional remarks before the trial judge and parties commenced with individual, sequestered voir dire. (September 8, 2017

Hearing, pp. 12-13). The plan was to arrive at a potential panel of fifty (50) capital-qualified prospective jurors, and once that number of prospective jurors was obtained, no more prospective jurors would be subjected to individual, sequestered voir dire. (September 8, 2017 Hearing, p. 13; TR 1739-43).

On the day that trial was to commence, the Court would return the fifty (50) capital-qualified prospective jurors to the courtroom and verify that there had not been any changes to their circumstances since the conclusion of the individual voir dire. (September 8, 2017 Hearing, p. 13; TR 1803-04). At that point, the parties would exercise their peremptory challenges and a jury of twelve, with six alternates, would be seated. (September 8, 2017 Hearing, pp. 13-14; TR 1739-43). The Court's process for selecting a jury was adopted, without objection. (September 8, 2017 Hearing, pp. 7-15; November 13, 2017 Hearing, pp. 3-4).

B. Dismissal Of Individuals Prior To The Commencement Of Voir Dire.

At the November 13, 2017 hearing, the jury commissioner testified that she was able to account for all four hundred (400) of the prospective jurors who were to be called as part of the initial jury pool. (November 13, 2017 Hearing, pp. 5-6). The prospective jurors had been provided with their initial questionnaires, and the November 13, 2017 hearing addressed those prospective jurors who had asked to be excused for various reasons or who were otherwise unavailable (i.e., the prospective juror had died, moved, were of a certain age or had medical excuses, were full-time college students out of the area, etc.). (November 13, 2017 Hearing, pp. 4-13, 24-30).

Approximately one hundred and fifty-two (152) prospective jurors were dismissed during the November 13, 2017 hearing, leaving a prospective jury pool of approximately two hundred and forty-eight (248) people. (November 13, 2017 Hearing, pp. 4-13, 24-30; November 15, 2017

Order, Document 227; November 17, 2017 Judgment Entry Nunc Pro Tunc, Document 236).

At the December 11, 2017 hearing, three (3) additional prospective jurors were excused. (December 11, 2017 Hearing, pp. 5-6).

At the February 12, 2018 hearing, nineteen (19) additional prospective jurors were dismissed (having moved, provided medical excuses or indicating that they would be on vacation, etc.). (February 12, 2018 Hearing, pp. 2-8). At the February 21, 2018 hearing, two (2) additional prospective jurors were excused (pre-planned vacations). (February 21, 2018 Hearing, p. 2; February 22, 2018 Order, Document 307). Thus, roughly two hundred and twenty-four (224) prospective jurors made it to the point of participating in general voir dire (400 prospective jurors in the jury pool – 176 prospective jurors who were excused prior to the start of general voir dire = 224 prospective jurors).

C. General, Group Voir Dire.

1. First Day Of Group Voir Dire.

a. Statements of Prospective Juror 4 and the trial court's curative instruction.

During the morning on the first day of voir dire, the trial judge instructed the prospective jurors that if they were selected for the jury, they would be required to decide the case based upon the evidence that was presented at the trial, not on matters that they had previously heard or been exposed to. (TR 69-71). Thereafter, Prospective Juror 4 made a vague reference to Worley's past, and after discussing the matter with counsel, the trial court instructed the jury that Worley was presumed innocent until proven guilty, that comments that were made during voir dire were not evidence, and that any decision would have to be rendered based upon the evidence produced at trial. (TR 69-77).

The record specifically reflects the following:

THE COURT: * * *. Before we go any farther, is there anyone here, those individuals who indicated that they've expressed an opinion as to the guilt or innocence of the defendant, would you please stand at this time? * * *.

The question is: Have you expressed an opinion as to the guilt or innocence of the defendant? All right, please be seated.

Now, I'm going to ask this question in a general format and we'll see if we can get through this.

All of you understand, as I've said before, that you will be required, if you are selected as a juror, to only consider the evidence that comes from the witness stand and from the exhibits and that you are going to be placed under oath and agree that you will follow the laws indicated by the Court in terms of how you are to deliberate and how you are to consider this evidence and weigh the evidence.

Is there anyone here who does not understand that? I'm not saying you'll do it. Don't understand it.

I did not want to cover these issues now, but it's apparent that I'm going to have to. Many of you may have heard something. And the question here that I'm stating here, or the proposition I'm stating, is "heard."

You may have heard something, you may have read something, you may have seen something on social media. None of that is evidence in this case.

First the media loves to sensationalize and exaggerate, because that's how they get ratings. If any of you believe anything on social media, you've got to be out of your mind, because that's all garbage, for the most part.

If any of you were on trial, I am certain you would not want the jury to make a decision based upon the information they've received from the press or from the radio or from social media. If that were the case, there'd be no reasons to have trials. I'm sure you would all agree with that.

So the question I'm putting to those of you who stood, for those of you who stood, is there any of you who cannot set aside those issues and decide the case based on the information that comes from the witness stand and based upon the instructions that the Court's going to give you?

Now, for those of you who believe they cannot, would you all please rise again?

Okay. Juror No. 4, you've formed an opinion?

JUROR 4: I know Sierah's family, they were at my wedding years ago. And based on that he did this 30 years ago, it's been --

THE COURT: Okay. Hold on, hold on. I didn't ask you for anything -- all right, now, look. I'm going to ask some specific questions and I'm trying to find an unbiased jury here. So if you would just refrain from making any additional commentary and base your answers on what I ask, I would very much appreciate it.

The question was: You don't believe you can base your answers on what comes from the witness stand; is that correct?

JUROR 4: Correct.

MR. BERLING: May we approach?

THE COURT: Yes.
(Bench discussion.)
MR. BERLING: Judge, I would move to dismiss this entire panel.

THE COURT: Court's going to take a recess.
(Recess.)
THE COURT: Record should reflect we're in chambers with the defendant and all counsel are present.
Motion?

MR. BERLING: Your Honor, my motion would be to dismiss this entire panel. The answers just given by the last juror reference something that happened 30 years ago. I think it clouds the judgment of the entire group of people present in court today.

I base that on the State of Ohio versus Troy Tenace, who murdered a woman in the state of New York and then came to Ohio and murdered somebody else, and it was ruled that they could not bring in the New York murder in this Ohio trial.

He was charged with a capital case, was ultimately found guilty but not sentenced to death. And then several jurors later were interviewed by the press and asked if they had known about the New York conviction, all of them would have convicted him and sentenced him to death immediately.

THE COURT: Mr. Kennedy?

MR. HASELMAN: Yes, Your Honor. For one, he didn't say any specifics with what happened 30 years ago. Additionally, the parties have already stipulated as to certain criminal convictions and the jury is going to be instructed on how they're permitted or not permitted to use those convictions.

And additionally, under 402(B), we intend to put on an individual to testify under that particular incident proper under 404(B), so we think there's no authority to have the panel dismissed. He did not go into specifics or anything of that nature.

MR. BERLING: That's true. There's been no structuring to this point. He just threw it out there.

MR. DECH: Judge, if I may, he stated he did this 30 years ago. He was very straightforward. There can be no other conclusion. This panel has been tainted

completely in terms of Juror No. 4's comments, which were unsolicited by anyone.

THE COURT: Okay. Go away. Court's going to take it under advisement.

(Recess.)

THE COURT: All right. We're back on record in chambers. Defendant is present along with counsel. I've also asked the jury commissioner, Mrs. Grant, to be present.

The Court is not going to dismiss this panel. The Court instead is going to give a curative instruction. I've drafted something, and I'm sure the defense is going to object regardless of what it says.

One, the State is correct that we've discussed prior convictions as being stipulated, although clearly not to this. But under the 404(B), I believe I previously made the ruling on rebuttal, the defense is going to be allowed to make that argument anyway, though it's going to be difficult to see how it comes in.

We will discuss with the jurors whether they can lay aside that comment and go forward from there. If there's an appearance that no one can lay it aside, then I will reconsider the defense's motion.

* * *

MR. HASELMAN: * * *. When you indicated you were going to inquire of the panel, were we going to do that during individual voir dire?

THE COURT: The comment I'm going to make is that the defendant is considered innocent until proven guilty beyond a reasonable doubt to any or all of these charges and the comments made during voir dire are not to be considered for any purpose in this case and that all of the jurors present must disregard those comments, that they are only to consider evidence that comes from the witness stand.

MR. HASELMAN: And further questioning is to occur during individualized voir dire.

MR. DECH: I think as a preemptive strike, we should dismiss Juror No. 4 immediately.

THE COURT: We'll excuse -- you don't have any objection, I'm assuming, Mr. Haselman.

MR. HASELMAN: No.

THE COURT: That's what's going to happen. Let's go back.

(Parties have returned to courtroom.)

* * *.

THE COURT: Juror No. 4, you are excused. * * *. Please report to the clerk. Thank you.

> Couple of comments before we proceed everyone should know. Everyone must understand that any individual charged with an offense in the United States is presumed to be innocent. That presumption carries to every defendant.
>
> Comments made during voir dire are not evidence because, as I've said before, the only evidence that a jury may consider is the evidence that comes from the witness stand, from the exhibits; and from other things, quite frankly, the Court tells you you may consider, and from nowhere else, certainly not during voir dire.
>
> So any comments you hear during voir dire related to something that someone supposedly did are just that. It's speculation, it's gossip. It's the stuff you read on the internet.
>
> Because absent being present, none of you know for sure what occurred in this case. No one. And Mr. Worley is presumed innocent as any of you would be if you were accused of a crime. So I'm instructing all of you to disregard any of the comments that you've heard, and we're going to move forward. * * *.

(TR 69-77; *Worley,* 164 Ohio St.3d 589, 2021-Ohio-2207, 174 N.E.3d 754, ¶¶81-84).

b. Generic Statements By Prospective Jurors That They Knew One Or More Of The Parties, Witnesses Or Attorneys.

i. Prospective jurors' knowledge of the victim's family, witnesses or attorneys involved in the case.

As one would expect during the voir dire of an exceptionally large pool of prospective jurors, some of the prospective jurors were previously aware of Worley, or knew the victim's family, members of law enforcement and/or the State's attorney. (TR 14-15, 17-18, 59-60, 80-82, 87-89).

ii. Prospective jurors' experiences with Worley.

With respect to the prospective juror's interaction with Worley, while Prospective Juror 53, who lived one-tenth of a mile from Worley, related an incident when Worley called the police on the Prospective Juror's son and his friends, Prospective Juror 53 went on to explain that the Prospective Juror's son and his friends had been riding their bicycles past the Worley residence at around 10:00 p.m., during a time when there had been a significant number of break-ins in the neighborhood. (TR 49-50). When the youths failed to identify themselves, Worley called the police

and followed them home. (TR 49-51). Prospective Juror 53 acknowledged that neighborhood tensions had been high at that time, and indicated that Worley had explained everything and that Worley was simply being a concerned neighbor. (TR 49-52). The incident was so benign that Prospective Juror 53 indicated that the incident would not affect her ability to impartially judge the evidence that was presented in the case. (TR 49). However, Prospective Juror 53 was ultimately removed from the panel because she had been questioned by law enforcement as part of the investigation. (TR 902-18).

Prospective Juror 102 indicated that, given his prior employment at the Corrections Center of Northwest Ohio, he did not believe that he could be unbiased and follow the trial court's instructions. (TR 68). Worley identifies a few other prospective jurors who did not believe that they could be unbiased. (Petitioner's Petition for Writ of Certiorari, pp. 6-8).

With respect to Prospective Juror 153, he indicated that his mother was a supervisor for Recovery Services of Northwest Ohio, a counseling service that provides therapists to the Corrections Center of Northwest Ohio, among others. (TR 33-37). However, contrary to Worley's claims, Prospective Juror 153's mother was not "in charge of the psychological diagnosis of Worley at the NCCO, the multi-county jail". (Petitioner's Petition for Writ of Certiorari, 8). Rather, Prospective Juror 153 indicated that he had no idea if his mother ever had any contact with Worley, and that, in any event, his mother's employment would not affect his ability to be a fair or impartial juror or to follow the trial court's instructions. (TR 33-36).

Next, with respect to Prospective Juror 159, the record indicates that that prospective juror made the Jury Commissioner aware of the fact that Worley had assaulted her daughter (Petition for Writ of Certiorari, p. 8; *Worley,* 164 Ohio St.3d 589, 2021-Ohio-2207, 174 N.E.3d 754, ¶¶82-

83). However, that information was brought to the trial court's attention while the parties were in chambers, and there is no indication that any other prospective juror was aware of the incident or that any other prospective juror overheard Prospective Juror 159 make her statement to the Jury Commissioner. (TR 73-75). Prospective Juror 159 was then dismissed without further inquiry, and without objection. (TR 75).

2. Second Day Of General, Group Voir Dire.

a. Statements of Prospective Juror 397 and the trial court's curative instruction.

On the second day of voir dire, the following exchange took place:

JUROR 397: I went to Evergreen High School and lived 3 miles from the guy's house, and he attended our church after his first imprisonment 25 years ago.

THE COURT: Mr. Kennedy.

MR. KENNEDY: No objection.
MR. BERLING: No objection.

MR. DECH: May counsel approach, Your Honor?
(Bench discussion.)
THE COURT: I'm assuming I'm going to hear the same objection as I heard yesterday; am I correct?

MR. DECH: Yes, Your Honor. I have case law on it. I just have to get it off my computer.

MR. HASELMAN: This is why we're having a pretrial publicity individualized voir dire, because he will not be the only person in the courtroom with the media here. So I don't think this particular panel sitting here today is going to hear about the conviction or the facts that led up to it. I don't think there's any reason to discharge this jury.

MR. DECH: As it relates to the 404(B), that has not yet been determined as it relates to the stipulation. That is pursuant to State versus Crete, Your Honor, as it relates to the weapons under disability rather than as it relates to anything under 404(B).

And for that reason, we would need to dismiss this panel. And I have a case. Unfortunately, it's on my phone and my computer and I will provide it to the Court

as soon as I can run it off my computer, which would be about three minutes.

THE COURT: All right. We'll take the matter under advisement.
(End of bench discussion.)
THE COURT: Sir, you can be excused.

So that we're clear, "yes" or "no" is all that I want to hear. Okay? Thank you. Next juror. (TR 454-56).
* * *

THE COURT: You're excused, sir. Thank you.

Couple of comments before we proceed further with voir dire. I'm certain that all of you understand that any individual accused of any offense has the presumption of innocence. I believe the expression I heard yesterday was that the individual is cloaked with innocence if they're charged. And that individual remains innocent of the offense unless the State has proven the defendant's guilt beyond a reasonable doubt.

And until that moment, the defendant is entitled to the Constitutional presumption of innocence. Now some comments may have been made today or you may have overheard something. None of what any of these prospective jurors has said in the courtroom is evidence.

The only matter that the jury can rely upon are those matters that are testified to in open court, the exhibits that will be received into evidence in this case, and your reliance on the Court's instructions.

You are all going to be placed under oath and promise to do those very things, promise to give that assurance to the defendant that he's presumed to be innocent until he's proven guilty by the State until and unless he is proven guilty by the State.

So I want to make certain that there is no one here who feels that they have somehow been biased by any comments that may have been made during this particular part of voir dire.

Is there any individual here who feels they cannot lay aside anything that they've heard here today and a render their verdict based on the instructions given to them by the Court, which is going to tell you you have to rely on the evidence you hear in the courtroom?

If there is, I want you to raise your hand at this time.

(No response.)
THE COURT: Thank you all. * * *.

(TR 460-61; *Worley,* 164 Ohio St.3d 589, 2021-Ohio-2207, 174 N.E.3d 754, ¶¶87-88).

b. Dismissal of various prospective jurors, without objection.

Worley next goes on to discuss how Prospective Jurors 214, 222, 230, 232, 265, 274, 276,

313, 316, 330, 337, 347, 348, 349, 371, 377, 384 and 396 were all excused without objection by either party. (Petitioner's Petition for Writ of Certiorari, pp. 9-10; TR 445-54). The rapid excusal of these witnesses followed the trial court's instructing the jury that he was going to inquire into whether the prospective jurors had a potential bias against either party, whether they had formed or expressed an opinion as to Worley's guilt or innocence and further instructing the prospective jurors that they would have to follow the trial court's instructions if selected to serve on the jury, and that the jurors would have to determine the case based solely on the evidence produced at trial, etc. (TR 444-46).

D. The Trial Court Denied Worley's Motions to Dismiss The Entire Panel.

The trial judge ultimately denied Worley's Motions to Dismiss the entire panel of prospective jurors. (TR 546). The trial judge, after having reviewed the transcript, and considering the statements of Prospective Juror 4 and Prospective Juror 397, reasoned that: (1) the evidence of Worley's past may ultimately be determined to be admissible under the terms of Ohio Evidence Rule 404 (which it was found to be); (2) the parties had stipulated, and the jury would be advised, that Worley had previously been convicted of a felony (which was relevant to the counts that charged Worley with Having Weapons While Under Disability), such that the fact that Worley would have gotten out of prison at some point would not have been surprising to anyone; (3) the trial judge had inquired of the prospective jurors as to whether they had been impacted by the statements that had been made and none of the prospective jurors indicated that they had been impacted by those statements; (4) the trial judge had gone out of his way to assure himself that the prospective jurors believed nothing that had been said and that they would rely upon the evidence that was going to be introduced at trial, the trial judge being "* * * completely satisfied that this

jury panel left at the moment has not been affected by those comments * * *"; (5) the prospective jurors were going to be subjected to individual voir dire, during which the parties were free to question the prospective jurors as to any potentially prejudicial effect that may have been associated with any statements that had been made during voir dire; and (6) with respect to Prospective Juror 4's comment, the trial judge stated that "I'm not sure that everybody even heard the comment". (TR 543-48).

E. Prospective Jurors Who Were Available For Individual Voir Dire.

Of the approximately two hundred and twenty-four (224) prospective jurors who made it to the general, group voir dire process, one hundred and seventeen (117) of them were excused. (TR 1-639). Thus, approximately one hundred and seven (107) prospective jurors made it to individual voir dire (224 prospective jurors – 117 prospective jurors who were removed during the process of general voir dire = 107 prospective jurors who were available for individual voir dire).

F. Individual Voir Dire.

Worley acknowledges that the trial court engaged in individual voir dire with the prospective jurors on the issues of pretrial publicity and capital punishment. (Petitioner's Petition for Writ of Certiorari, p. 5). In that regard, it should be noted that each of the jurors who were ultimately involved in rendering a verdict in this case (Jurors 3, 40, 42, 67, 71, 82, 101, 136, 141, 147, 162 and 170), indicated that they did not have an opinion as to Worley's guilt, that nothing that they may have previously heard about the case would impact their ability to render a fair verdict, and that they would decide the case based solely on the evidence that was presented in court. (TR 672-77, 863-67, 885-90, 936-41, 961-65, 1026-31, 1069-73, 1204-08, 1235-42, 1251-

56, 1278-82, 1294-98; see also, 3291-3297, 3602-06).

Moreover, it should be noted that Worley did not challenge any of the actual jurors "for cause", other than Juror 40. (TR 819-20, 947-49, 1079-83, 1215-18, 1304-05). Worley's motion to remove Juror 40 "for cause" appeared to be related to her views on capital punishment, not regarding her ability to be a fair and impartial juror given the things that she may have previously seen, heard or read about the matter. (TR 863-885, 948-949). That challenge was denied. (TR 948-49).

Of the one hundred and seven (107) prospective jurors who were available for individual voir dire, only eighty-one (81) of them needed to be questioned before the Court had a potential panel of fifty (50) capital-qualified prospective jurors. (TR 667-1803). At that point, the approximately twenty-six (26) remaining prospective jurors who had made it past the general voir dire process, but who had not been subjected to individual voir dire, were dismissed since their involvement was no longer required. (TR 1802-05).

Of the fifty (50) capital-qualified prospective jurors, forty-six (46) of them were passed-on for cause by both the State and Worley. (TR 667-1803, and specifically TR 819-20, 947-49, 1079-83, 1215-18, 1304-05, 1420-21, 1587-89, 1598-99, 1802).[2] Of the fifty (50) capital-

[2] On the first morning of trial, three (3) of the fifty (50) capital-qualified prospective jurors (Prospective Jurors 80, 90 and 196) were dismissed without objection by either party. The mother of Prospective Juror 80's girlfriend had had surgery the prior Friday, Prospective Juror 90 had received a citation for Operating a Vehicle Impaired over the course of the weekend, and Prospective Juror 196 had an out-of-town wedding to attend. (TR 1816-17, 1821-24).

qualified prospective jurors, Worley challenged Juror 40 as described above. He also challenged Prospective Jurors 23 and 24 in connection with matters having to do with pretrial publicity/partiality. (TR 819). Those challenges were also denied. (TR 819-20).

Prospective Juror 135 was originally passed for cause by both parties. (TR 1215-18). Worley made a later challenge to that prospective juror given some confusion as to which of several prospective jurors had been challenged for cause. (TR 1322-24, 1332-34). That challenge was later rejected by the Court. (TR 1597-98). If not for the late challenge of Prospective Juror 135, which appeared to be the result of later confusion rather than an actual concern about that prospective juror's ability to serve, then forty-seven (47) of the prospective jurors would have been passed for cause by both parties.

The process for selecting the jury in the case at bar was exhaustive and methodical, with the prospective jurors having been provided with questionnaires before the start of voir dire, and with four (4) days and roughly eighteen hundred (1800) pages of the transcript being dedicated to voir dire. (TR 1-1802).

REASONS FOR DENYING THE WRIT

I. PETITIONER'S CASE WAS DECIDED BY A FAIR AND IMPARTIAL JURY.

A. The Sixth Amendment Guarantees The Right To An Impartial Jury, Not To A Jury That Is Totally Ignorant Of The Facts Or Issues Involved.

Pursuant to the Sixth Amendment to the United States Constitution, a criminal defendant has the right to trial by an impartial jury. *Skilling v. United States,* 561 U.S. 358, 377, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010). An impartial jury is one that will determine the case based solely upon the evidence and arguments that are presented in open court, and not based upon any outside

influences. *Skilling,* 561 U.S. at 378; *Irvin v. Dowd,* 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961) ("[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent jurors'").

However, the right to an impartial jury does not mean that prospective jurors need to be "totally ignorant of the facts and issues involved". *Irvin,* 366 U.S. at 722; *Skilling,* 561 U.S. at 381 ("[P]rominence does not necessarily produce prejudice, and juror *impartiality*, we have reiterated, does not require *ignorance*." (Emphasis in the original)).

In the case at bar, Petitioner's argument focuses solely on events that occurred during voir dire, and he claims that statements that were made by several of the prospective jurors during the voir dire process violated his right to a fair and impartial jury under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.[3] Petitioner specifically claims that various statements that were made by some of the prospective jurors presented the other prospective jurors (including the jurors who ultimately determined his fate) with a derogatory history of Petitioner, and a positive history of the State's attorney and witnesses. (Petition for Writ of Certiorari, p. 19). However, the record reveals that there was no violation of Worley's constitutional right to a fair

[3] It should be noted that, in the Supreme Court of Ohio, Petitioner argued his claim that the trial court's refusal to grant his Motion for a New Venire violated his rights under the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 16 of the Ohio Constitution. He did not frame this particular issue as being violative of the Sixth Amendment to the United States Constitution as he has done in his Petition for Writ of Certiorari. *Worley,* 164 Ohio St.3d 589, 2021-Ohio-2207, 174 N.E.3d 754, ¶77.

and impartial jury.

B. All Of The Jurors Who Decided This Case Were Fair And Impartial.

There is simply no evidence in the record which would remotely suggest that any juror who was involved in rendering the verdicts in this case was anything other than fair and impartial, or that the trial court abused its discretion by refusing to dismiss the entire panel. Rather, each of the jurors who were ultimately involved in rendering a verdict in this case (Jurors 3, 40, 42, 67, 71, 82, 101, 136, 141, 147, 162 and 170), indicated that they did not have an opinion as to Worley's guilt, that nothing that they may have previously heard about the case would impact their ability to render a fair verdict, and that they would decide the case based solely on the evidence that was presented in court. (TR 672-77, 863-67, 885-90, 936-41, 961-65, 1026-31, 1069-73, 1204-08, 1235-42, 1251-56, 1278-82, 1294-98; see also, 3291-3297, 3602-06). *Irvin,* 366 U.S. at 723 ("To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court").

Furthermore, after Prospective Juror 4 and Prospective Juror 397 made their fleeting and isolated statements (the statements having been made in front of different portions of the potential jury pool), the trial judge provided the prospective jurors with curative instructions, instructing the prospective jurors that statements that were made by prospective jurors during voir dire were not evidence, and that they would be required to decide the case based upon the evidence that was admitted at trial. (TR 69-77, 460-61). *Penry v. Johnson,* 532 U.S. 782, 799, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (jurors are presumed to follow a court's instructions); *State v. Garner*, 74 Ohio

St.3d 49, 59, 1995-Ohio-168, 656 N.E.2d 623, *cert. denied* 517 U.S. 1147 (same).

C. The Trial Court Acted Within Its Discretion When It Overruled Worley's Motion To Dismiss The Entire Jury Panel.

When the trial judge denied Worley's Motions to Dismiss the entire panel of prospective jurors, he explained that, having reviewed the transcript, and considering the statements of Prospective Juror 4 and Prospective Juror 397: (1) the evidence of Worley's past may ultimately be determined to be admissible under the terms of Evidence Rule 404 (which it was found to be); (2) the parties had stipulated, and the jury would be advised, that Worley had previously been convicted of a felony (which was relevant to the counts that charged Worley with Having Weapons While Under Disability), such that the fact that Worley would have gotten out of prison at some point would not have been surprising to anyone; (3) the trial judge had inquired of the prospective jurors as to whether they had been impacted by the statements that had been made and none of the prospective jurors indicated that they had been impacted by those statements; (4) the trial judge had gone out of his way to assure himself that the prospective jurors believed nothing that had been said and that they would rely upon the evidence that was going to be introduced at trial, the trial judge being "* * * completely satisfied that this jury panel left at the moment has not been affected by those comments * * *"; (5) the prospective jurors were going to be subjected to individual voir dire, during which the parties were free to question the prospective jurors as to any potentially prejudicial effect that may have been associated with the statements that had been made during voir dire; and (6) with respect to Prospective Juror 4's comment, the trial judge stated that "I'm not sure that everybody even heard the comment". (TR 543-48).

The trial court's finding that the prospective jurors who remained had not been impacted by the statements that had been made during voir dire by other prospective jurors, and that the

prospective jurors who remained were impartial, is entitled to particular deference. *See, Patton v. Yount,* 467 U.S. 1025, 1031 and 1038, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984) (this Court recognizing that "the trial court's findings of impartiality might be overturned only for "manifest error", and that a trial court's determination that a juror can set aside any opinions he might hold, and decide the case on the evidence presented during trial, "is entitled, even on direct appeal, to 'special deference'" (internal citations omitted)); *Mu'min v. Virginia,* 500 U.S. 415, 427, 111 S.Ct. 1899, 114 L.Ed.2d. 493 (1991) ("[O]ur own cases have stressed the wide discretion granted to the trial court in conducting *voir dire* in the area of pretrial publicity and in other areas on inquiry that might tend to show juror bias. Particularly with respect to pretrial publicity, we think this primary reliance on the judgment of the trial court makes good sense."); *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-475, 23 N.E.3d 1096, *cert. denied* 577 U.S. 843, ¶98 ("* * * the judge 'who sees and hears the juror,' * * * has discretion 'to accept [a juror's] assurances that he would be fair and impartial and would decide the case on the basis of the evidence" (internal citations omitted)); *see also, State v. Adams,* 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, *cert. denied* 544 U.S. 1040, ¶¶40-46, 49 (party complaining about the misconduct of a prospective juror must establish prejudice, since claims of juror misconduct must focus on the jurors who actually heard the case, not those who were excused, and voir dire is the best test for determining whether a fair and impartial jury can be obtained); *Worley,* 164 Ohio St.3d 589, 2021-Ohio-2207, 174 N.E.3d 754, ¶90 ("We will not presume that a venire is tainted when a prospective juror makes improper comments during voir dire. * * *. 'The party challenging the entire jury panel has the burden to show either that the jurors were unlawfully impaneled or that the jurors could not be fair and impartial.' * * *. And the trial court retains wide discretion over the conduct and scope of voir

dire, including whether to grant a party's motion for a new venire." (Internal citations omitted)); *United States v. McKissick,* 204 F.3d 1282, 1299-1300 (10th Cir. 2000) (when an improper or prejudicial remark is made by a potential juror, "the test of juror impartiality is whether the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court", and the trial court's determination that the jurors are impartial is entitled to "great weight" (internal citations and quotations omitted)); *United States v. Lacey,* 86 F.3d 956, 968-969 (10th Cir. 1996), *cert. denied by* 519 U.S. 944 (recognizing that: (1) when improper or prejudicial remarks are made by a prospective juror, and heard by other prospective jurors, the test for juror impartiality is whether the juror can lay aside his impressions or opinions and decide the case based upon the evidence presented at trial since "* * * the partiality of the petit jury is evaluated in light of those persons ultimately empaneled and sworn, not those who are excused from service"; and (2) curative instructions to the panel after potentially improper or prejudicial remarks were made was a relevant consideration since the trial court "is in the best position to judge the effect of improper statements on a jury and the sincerity of the juror's pledge to abide by the court's instructions, its assessment is entitled to great weight" (internal citations and quotations omitted)).

Given the trial court's curative instructions, detailed analysis of the relevant issues, and ultimate determination that the prospective jurors who remained at the conclusion of group voir dire were impartial and had not been affected by any statements that had been made by other prospective jurors, it is clear that the trial court acted within its discretion when it denied Worley's Motion to Dismiss the entire jury panel. *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶151 (a trial court's decision as to whether or not an entire jury panel should be dismissed is reviewed for an abuse of discretion); *Worley,* 164 Ohio St.3d 589, 2021-Ohio-2207,

174 N.E.3d 754, ¶¶91, 93 ("[E]ach of the jurors who were ultimately empaneled was subjected to individual voir dire in sequestered sessions with the court and counsel present. The court asked those jurors whether they had formed any fixed opinions regarding Worley's guilt or innocence, whether they could decide the case solely on the evidence presented at trial, and whether they could follow the court's instructions and deliberate in a fair and impartial manner. Following thorough questioning, the trial court excused members of the venire who had formed fixed opinions about Worley's guilt. And none of the prospective jurors who referred to Worley's prior conviction during general voir dire was seated on the jury. * * *. Here, there is * * * no indication that the jurors could not follow the court's instructions and admonitions. The trial court gained the necessary assurances from every juror who served on Worley's jury. We reject Worley's claim that the trial court abused its discretion in denying his motion for a new venire"); *United States v. Gibbons,* 607 F.2d 1320, 1330 (10th Cir. 1979) ("The ruling on a motion to dismiss or for a mistrial based on improper statements during voir dire is within the sound judicial discretion of the trial court"); *United States v. Pope,* 934 F.3d 770, 773-774 (8th Cir. 2019), *cert. denied* 141 S.Ct. 350 (the denial of a motion for mistrial as a result of remarks that were made by a prospective juror during voir dire is reviewed for an abuse of discretion); *United States v. Vargas-Rios,* 607 F.2d 831, 837 (9th Cir. 1979) (rejecting the claim that a statement by a prospective juror during voir dire required a dismissal of the entire panel, and stating that "[w]e must remember that those called to serve as jurors are independent men and women each with a mind of his or her own. To assume that each is infinitely malleable * * * is to repudiate common experience"); *Harmon v. Anderson,* 495 F.Supp. 341, 342 (E.D. Mich. 1980) (the fact that one prospective juror stated that she knew and did not like the defendant was no basis to claim that the entire panel was tainted, and "[i]f such

were the case, every time a juror stated an opinion, favorable or unfavorable, about a party, and was later excused, it would be almost impossible to obtain a jury * * *").

D. Worley Has Not Presented A Cogent Argument As To Why The Jurors Who Ultimately Decided His Case Should Be Presumed To Have Been Negatively Affected By The Statements That Were Made By The Other Prospective Jurors During Voir Dire.

That this Court's review is unnecessary is underscored by the fact that Worley has not presented a cogent argument (or evidence from the record), which would indicate that the jurors who actually decided his case were adversely affected by the statements that were made by other prospective jurors during voir dire. Rather, it is respectfully submitted that, in these circumstances, prejudice cannot presumed. *See, Skilling,* 561 U.S. 358, fn. 24 ("Statements by nonjurors do not themselves call into question the adequacy of the jury-selection process; elimination of these venire members is indeed one indicator that the process fulfilled its function."); *Adams,* 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶150 ("[w]e will not presume that improper comments tainted an entire jury panel. * * *. The party challenging the entire jury panel has the burden to show either that the jurors were unlawfully impaneled or that the jurors could not be fair and impartial"); *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, *cert. denied* 537 U.S. 1023, ¶¶96-98 (where prospective jurors made statements in front of the other prospective jurors, the Supreme Court of Ohio recognized that "[n]othing in the record indicates that the statements at issue biased the other veniremen. Absent some such indication, we decline to speculate that hearing these opinions must somehow have irretrievably tainted the other prospective jurors"); *State v. Moore*, 81 Ohio St.3d 22, 25-26, 1998-Ohio-441, 689 N.E.2d 1 (rejecting claims that the remarks by two prospective jurors in support of the death penalty "contaminated" the entire venire, such comments having been isolated in nature, and their effect

on the prospective jurors being "purely speculative"); *United States v. Shannon,* 21 F.3d 77, 82 (1994), *cert. denied by* 513 U.S. 901 (the reviewing court will not speculate about possible jury bias resulting from statements that were made in the presence of the prospective jurors during voir dire); *United States v. Ortiz,* 603 F.2d 76, 80 (9th Cir. 1979), *cert. denied* 444 U.S. 1020 (rejecting the claim that a statement by a prospective juror during voir dire required a mistrial since the burden fell to defendant to show how the statement prejudiced him); *see also, McKissick,* 204 F.3d at 1299-1300 (finding that the trial court did not abuse its discretion when it refused to declare a mistrial because of remarks that were made by a prospective juror during voir dire, and deferring to the trial judge's conclusion that his "cautionary instruction was sufficient to cure any possible prejudice against the defendant"); *United States v. Wey,* 895 F.2d 429, 431 (7th Cir. 1990), *cert. denied by* 497 U.S. 1029 ("Jurors' knowledge that others were partial does not prevent service"); *United States v. Garcia-Flores,* 246 F.3d 451, 458 (5th Cir. 2001) ("The district judge was in the best position to evaluate the reaction of the jury panel to the prospective juror's comments and the affect of his curative instruction. We find that the district judge's thorough curative instruction adequately ensured the integrity of the jury pool."); *Pope,* 934 F.3d at 773-74 ("'There are compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance of possible juror bias.' * * *. An appellate court cannot sense the atmosphere of the proceedings from a cold record, or observe the demeanor and response of prospective jurors. * * *. The district court thought it sufficient to instruct the jury that it must consider only the evidence presented during trial, and that (defendant) was presumed innocent." (Internal citations omitted)); *Worley,* 164 Ohio St.3d 589, 2021-Ohio-2207, 174 N.E.3d 754, ¶¶144-182, ¶90.

More specifically, Worley does not provide a cogent argument for why, and the record is devoid of any indication that, the actual jurors were somehow biased in favor of the State because: (1) some of the prospective jurors who were ultimately excused knew the victim or her family members through church, school or otherwise; (2) some of the prospective jurors who were ultimately excused had worked with the State's lead investigator; and/or (3) a prospective juror who was ultimately excused had gone to high school with and ran track with the State's attorney. Indeed, if the mere fact that a prospective juror knows the parties does not prevent him or her from actually serving on the jury, then it is essentially impossible for the fact that a prospective juror who did not even serve as an actual juror knew or was aware of the parties for one reason or another to have rendered the jurors who actually served on the case something other than unbiased and impartial. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, *cert. denied* 556 U.S. 1168, ¶208 ("There is no constitutional prohibition against jurors simply knowing the parties involved or having knowledge of the case." (Internal citations and quotations omitted)); *McQueen v. Scroggy,* 99 F.3d 1302, 1320 (6th Cir. 1996), *overruled on other grounds by, In Re Abdur'Rahman,* 392 F.3d 174 (6th Cir. 2004) (there is not constitutional prohibition against the jurors simply knowing the parties involved in a matter).

As Respondent has previously addressed the purportedly "negative" comments by Prospective Juror 4 and Prospective Juror 397, it will not re-address those issues here. However, with respect to many of the other supposedly "negative" comments identified in Worley's Petition, he fails to explain, and it is in no way apparent, that they cast him in a negative light (i.e., (1) Worley called the police on Prospective Juror 53's son at a time when there had been break-ins in the neighborhood, with Prospective Juror 53 indicating that Worley was simply being a concerned

neighbor; (2) Prospective Jurors 214, 222, 265, 330, 349 and 384 stating that they had daughters or granddaughters and being excused without objection; (3) Prospective Juror 153's mother was a supervisor for Recovery Services of Northwest Ohio, a counseling service that provides therapists to the Corrections Center of Northwest Ohio, the regional jail, with Prospective Juror 153 stating that he had no idea if his mother ever had any contact with Worley, etc.).

E. The Impartiality Of The Jurors Who Decided Worley's Case Is Further Established By The Fact That Worley's Trial Counsel Did Not Seek To Challenge Any Of Those Jurors "For Cause" At The Conclusion Of Individual, Sequestered Voir Dire With Respect To A Purported Inability To Be Fair And Impartial Given Things They May Have Heard About The Matter.

Finally, the impartiality of the jury is further underscored by the fact that Worley did not challenge any of the actual jurors "for cause", other than Juror 40. (TR 819-20, 947-49, 1079-83, 1215-18, 1304-05). Worley's motion to remove Juror 40 "for cause" appeared to be related to her views on capital punishment, not regarding her ability to be a fair and impartial juror given the things that she may have previously seen, heard or read about the matter. (TR 863-885, 948-949). The fact that Worley's trial counsel did not seek to remove any of the actual jurors for cause, with respect to the issue of pretrial publicity or as to a purported inability to be impartial because of things that they may have been exposed to during voir dire, is strong evidence that trial counsel were convinced, after sequestered and individual voir dire, that the jurors were not biased, and that they had not formulated an opinion as to Worley's guilt. *Skilling,* 561 U.S. at 396, *citing, Beck v. Washington,* 369 U.S. 541, 557-558, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962)*, rehearing denied by* 370 U.S. 965; *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, *cert. denied* 548 U.S. 912, ¶32 (jurors who are not challenged for cause are presumed to be impartial).

Indeed, the fact that a panel of fifty (50) death qualified prospective jurors was obtained

(with 46-47 of them having been passed on for cause by both parties), and panels of prospective jurors were dismissed before being questioned during individual voir dire given the plethora of impartial, death qualified prospective jurors who were already available, clearly shows that this was not a case where the impartiality of the jurors who determined Worley's fate was realistically at issue. *Beck,* 369 U.S. at 556 ("* * * there could be no constitutional infirmity in these rulings if petitioner actually received a trial by an impartial jury").

CONCLUSION

This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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