21-6772

No. _____

ORIGINAL

FILED
JAN 01 2022
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

JERRY LEE CANFIELD — PETITIONER
(Your Name)

vs.

BOBBY LUMPKIN, DIRECTOR — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JERRY LEE CANFIELD
(Your Name)

2661 FM 2054
(Address)

TENNESSEE COLONY, TEXAS 75884
(City, State, Zip Code)

NO PHONE
(Phone Number)

QUESTION(S) PRESENTED

QUESTION NUMBER ONE:

The Fifth Circuit has announced a newly created rule under the principle of "interpretati logica," and dclared: "Once a panelist in voir dire selection verbally expresses an actual bias, that Panelist will be rehabilitated as long as he or she remains silent for the remainer of jury selection." See Canfield v. Lumpkin, 998 F.3d 242 (5th Cir. 2021). Therefore, should this Honorable Supreme Court overrule the newly declared rule as being contrary to the founding Constitution and the many precedents set by this Supreme Court in Duncan v. Louisiana, Irvin v. Dowd, and Patton v. Yount?

QUESTION NUMBER TWO:

Because Counsel allowed an actually biased panelist to be seated as a juror, is Justice Willett's decision contrary to Strickland for holding prejudice is not automatic requiring a new trial under Weaver, and that Petitioner failed to prove prejudice necessitating a new trial? see Canfield v. Lumpkin, 998 F.3d 242 (5th Cir. 2021).

QUESTION NUMBER THREE:

Being that an impartial jury trial is the cornerstone of our American Justice System, when a panelist verbally declares to vote to convict even if the prosecution failed to prove guilt beyond a reasonable doubt, and announcing her impairment to perform her duties as a juror in accordance with her instruction and oath. Is the seating of an actually bias juror to determine guilt-innocence and punishment a structural error? If so, should this Honorable Court explicitly announce that the seating of a bias juror is a structural error, that cannot be considered harmless?

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:

RELATED CASES

Canfield v. Lumpkin, Director, TDCJ-CID, Application No. 21A47 (Justice Alito, granting extesion of time to and including January 3, 2022, on September 29, 2021).

Canfield v. Lumpkin, 998 F.3d 242 (5th Cir. May 21, 2021)(Pet. Reh'g denied on August 06, 2021, Case No. 18-10431).

Canfield v. Lumpkin, No. 4:16-CV-1000-Y (U.S.D.C. Northern District, Fort Worth Division, March 28, 2018)(Denied Federal Habeas Corpus)(Unpublished).

Ex Parte Jerry Lee Canfield, No. WR-85, 500-01 (Tex.Crim.App. September 07, 2016)(denied State Habeas Corpus, unpublished postcard).

The State of Texas v. Jerry Lee Canfield, No. 1317398R (Jury Trial that assessed guilt, and a 50 year sentence without possibility of parole on April 3, 2013).

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TABLE OF AUTHORITIES CITED

CASES: PAGE NUMBER

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

[X] For cases from **federal courts:**

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

[X] reported at 998 F.3d 242; 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 C to the petition and is

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

[ ] For cases from **state courts:**

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

[ ] reported at N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the N/A court appears at Appendix N/A to the petition and is

[ ] reported at N/A; 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 May 21, 2021.

[ ] 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: August 06, 2021, and a copy of the order denying rehearing appears at Appendix A.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including January 03, 2022 (date) on September 29, 2021 (date) in Application No. 21 A 47.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was N/A. A copy of that decision appears at Appendix N/A.

[ ] A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix N/A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. -- A ---.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, ARTICLE III, SECTION 2, CLAUSE 3:(2020): "The Trial of all Crimes, except in Cases of Impeachment, shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

UNITED STATES CONSTITUTION, AMENDMENT VI (2020): "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."

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1 (2020): "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

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 juridiction the equal protection of the laws."

TITLE 28 U.S.C., SECTION 2254(d)(2020): "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted with respect to any claim that was adjudicated on the merits in State Court proceedings unless the adjudication of the claim— (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on

an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding."

TITLE 28 U.S.C. SECTION 2254(e)(2020): "(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody purusant to the judgment of a State Court, a determination of a factual issue made by a State Court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. (2) If the applicant has failed to develop the factual basis of a claim in State Court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that— (A) the claim relies on— (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT OF THE CASE

On April 3, 2013, in the 213th Judicial District Court, Tarrant County, Texas, Case No. 1317398R, after entering a plea of not guilty, a jury found Petitioner guilty of continuous sexual abuse of a child under 14 years of age and assessed his punishment at 50 years confinement without parole. Appendix F. Petitioner's conviction was affirmed by the Seventh District Court of Appeals of Texas. See Appendix E. Petitioner did not file a Petition for Discretionary Review in the Texas Court of Criminal Appeals, but Petitioner filed a state habeas corpus application raising the claims presented in his petition, which was denied by the Texas Court of Criminal Appeals without written order on the findings of the trial court on September 7, 2016. See Appendix D.

Petitioner timely filed his federal habeas corpus application on October 24, 2016, and Terry R. Means, the United States District Judge for the Northern District Court found and held the following: Terry Means acknowledged that Counsel asserted he did not challenge [the biased] Juror Myla Tarver because she rehabilitated herself by her silence when the venire panel was asked: "Can everyone agree to hold the government to that burden [beyond a reasoanble doubt], that before we find someone guilty, if you say to yourself, I had a reasonable doubt, I will find the defendant not guilty? Can everyone agree to that?" See Appendix C, Pg. 12. Terry Means held Counsel's affidavit credible and concluded that "absent evidence that Juror Myla Tarver was biased, Counsel's decision not to challenge her for cause [was] the result of reasonable trial strategy," thus, not violating Strickland. Id., Pg. 14-15. Terry Means declared that based on M.T. not being biased, the state court did not unreasonably apply the standards set forth in Strickland. Id., Pg. 15-16. The Petitioner timely filed a notice of appeal, and the Fifth Circuit granted Petitioner's COA on February 15, 2019, then after briefing the Fifth Circuit filed their published

opinion on May 21, 2021. See Appendix B; Canfield v. Lumpkin, 998 F.3d 242 (5th Cir. 2021).

Justice Don R. Willett written the opinion for the majority denying Petitioner relief, and Justice Patrick E. Higginbotham fully dissented and opined to grant habeas relief. Canfield, 998 F.3d at 243, 249. Justice Willett left out pertinent facts of the colloquy dealing with M.T., the actually biased juror, and created a new rule that declared: "Once M.T. in voir dire selection verbally expresses an actual bias, M.T. was rehabilitated because she remained silent for the remainer of jury selection." Canfield, 998 F.3d at 244-245. Justice Willett then concluded that Counsel was not deficient because "M.T. was not in fact biased ... when the state court held M.T. rehabilitated herself by remaining silent during defense counsel's questioning." Therefore, "the TCCA was not unreasonable in concluding that M.T. was not biased and Counsel's performance deficient. Id., 998 F.3d at 247-48.

Justice Higginbotham disagreed and held: "This case closely resembles Virgil v. Dretke, 446 F.3d 598 (5th Cir. 2006). M.T., like Sumlin and Sims, demonstrated that she was biased. When the State asked whether any of the jurors would 'think [Canfield]'s guilty before we even start testimony,' she answered, 'I do,' and 'I feel that way.' And when asked whether she would find Canfield guilty even if the State's evidence was insufficient, M.T.'s response was straightforward: 'I probably will just becuase of where I am right now.' She indicated not just the 'mere existance' of a preconception of Canfield's guilt but a likelihood that she would vote to convict Canfield even if the State failed to prove his guilt beyond a reasonable doubt. Her statements amounted to an admission that her 'views would prevent or substantially impair the performance of h[er] instructions and h[er] oath.' At no point did she clearly express that she could 'lay aside on the evidence presented in court." As a result, Higgin-

botham concluded "Canfield's Counsel was obligated to use a peremptory or for-cause challenge on M.T. Because he failed to do so, his perfomance was deficient." Canfield, 998 F.3d at 252-53.

Further, Justice Willet held that because "Canfield's guilt is overwhelmingly one-sided evidence, there is no 'reasonably probability' that, but for M.T.'s presence, the jury—who deliberated Canfield's guilt for less than an hour—have acquitted." Id., 998 F.3d at 248-49. Thus, because Weaver v. Massachusetts, demands that Petitioner raised ineffective assistance and is not declared a structural error, Petitioner could not prove prejudice. Id., 998 F.3d at 248-49. Although Justice Higginbotham agreed that a presence of a biased juror is not a structural issue, he disagreed with the majority's prejudice analysis to look at the reliability of the proceeding instead. Justice Higginbotham then declared: "Due to Counsel's deficient performance there is a reasonable probability that the sentencing would have been different because the presence of a biased juror rendered Petitioner's sentence unreliable." Id., 998 F.3d at 256-258.

Finally, at issue here is the voir dire colloquy presented below, and Counsel's failure to challenge Juror Myla Tarver for cause, that rendered the structural issue of impaneling of an actually biased juror:

> **Mr. Nickols (Prosecution):** And let me ask you -- we've had cases before, in our experience, where 12 people get seated on a jury, and they've come back the next day and say, oh, well, I think he's guilty before we even start testimony. That's you it's a problem for everybody. It wastes the time of everyone who's set here, including yourselves. And so if that's the way you feel, tell us. We need to know now. Thank you. Mr. Jacobs. Anybody else feel that way?
>
> **Venireperson (Myla Tarver):** I do.
>
> **Mr. Nickols:** Let me open my sheet here.
>
> **Myla Tarver:** I feel that way.

Mr. Nickols: Ms. Tarver. Okay. Tell me why.

Myla Tarver: I don't know. I have an autistic grandson who cannot talk, and we'll never know, but we think something might have happened at the last autism program that he was in. My grandson cannot talk. We will never know. I'm sorry. This is just creeping me out really, really bad, being here. And just -- I'm freaking out.

Mr. Nickols: Okay. Let me ask you this: If we don't prove him guilty, if we don't prove it beyond a reasonable doubt guilty to you, are you going to find him guilty anyway?

Myla Tarver: I probably will just because of where I am right now. I mean, I just -- this is not a good --

Mr. Nickols: Okay. Thank you, ma'am." RR2, 73-74.

No further mention of, or interaction specifically with Ms. Myla Tarver appears in the record. Neither the Court nor Petitioner's Counsel sought a follow-up inquiry into Mr. Tarver's evident actual bias against the defense. Because Counsel failed to challenge Juror Myla, she was seated as juror number 12. RR2, 122. Therefore, Petitioner asserts that the presence of M.T. renders relief because the impaneling of an actual biased juror is a structural issue.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION:

"It is this Honorable Court's responsibility to say what the Constitution means, and once this Honorable Court has spoken, it is the duty of other Courts to respect that understanding of the governing rule of law." James v. City of Boise, 136 S. Ct. 685 (2016). The framers of our Constitution found the Institution of the jury so important that they made certain to preserve the jury through no less than four protections in the foundational document, making the jury the most frequently named safeguard of our freedom in the Constitution and its Amendments. See Juries and the Criminal Constitution, 65 Ala. L. Rev. 849, 850-51 (2014)(citing U.S. Const. Art. III, § 2 ("The trial of all crimes, except in cases of impeachment, shall be jury..."); 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, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger..."); 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..."); U.S. Const. Amend. VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the U.S., then according to the rules of the common law.")).

Truly, this Honorable Court has spoken and declared that a criminal defendant has a fundamental right to a fair, impartial, and indifferent jury, being the cornerstone of our justice system, who will verbally state that he or she can lay aside his or her impression or opinion and render a verdict based on the evidence presented in court. Cf. Duncan v. Louisiana, 391 U.S. 145, 149,

88 S. Ct. 1444 (1968)("We found this right to trial by jury in serious criminal cases to be 'fundamental to the American Scheme of Justice,' and therefore applicable in state proceedings."); Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639 (1961)(citing In re Oliver, 333 U.S. 257, 68 S.Ct. 499 (1948) and Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437 (1927))("[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process); & Patton v. Yount, 104 S.Ct. 2884, 2891 (1984) (juror impartially is plainly a historical fact to question "did a juror swear that he or she could set aside any opinion he might hold and decide the case on the evidence[.]").

The Petitioner presents this Honorable Court with an important, ripe, and necessary issue to determine what constitutes an actually biased juror, whether Counsel rendered ineffective assistance in failing to challenge the actually biased juror, and whether the impaneling of an actually biased juror constitutes a structural error. This Honorable Court should therefore grant certiorari on three fronts because the Fifth Circuit did not respect the understanding of the governing rule of law pertaining to juror impartiality, when it declared the following:

First, the Fifth Circuit's majority has published a new rule of law that conflicts with the foundational authority of this Court when it determined that: "M.T. was not bias because she rehabilitated herself for remaining silent for the rest of voir dire selection; after M.T. demonstrated actual bias admitting she felt Petitioner was guilty without hearing any testimony and that she would probably vote to convict him regardless of the strength of the evidence." See Canfield v. Lumpkin, 998 F.3d 242 (5th Cir. 2021).

Second, although Juror M.T. is actually bias, then impaneled without being

rehabilitated, by the result of Counsel rendering ineffective assistance, the Fifth Circuit erroneously declared Petitioner has to prove prejudice as determined by Weaver v. Massachusetts, and declared "based on state court's conclusion that M.T. was not biased, and lacking any materially indistinguishable Supreme Court precedent necessitating a different conclusion. The Court reasonably concluded that the result of the trial would not have been different if Counsel had challenged or struck M.T. from the jury." Canfield, 998 F.3d at 249.

And third, the Fifth Circuit declared that because the Supreme Court has never held that juror bias is structural error requiring automatic reversal, Petitioner cannot overcome "TCCA's conclusion that the result would not have been different if Counsel had challenged or struck M.T. from the jury. Canfield, 998 F.3d at 249. Therefore, as argued below this Honorable Court should grant certiorari, declare M.T. was actually biased, rendering counsel ineffective for allowing the impaneling of an actually bias juror that is a structural error.

II. THE FIFTH CIRCUIT CREATED A NEW RULE THAT DECLARES: "ONCE A PERSON VERBALLY EXPRESSES AN ACTUAL BIAS, THAT ONE WILL BE REHABILITATED AS LONG AS THE BIASED JUROR REMAINS SILENT FOR THE REMAINDER OF VOIR DIRE," IS NOT ONLY CONTRARY TO OTHER CIRCUITS, BUT ALSO CONTRARY TO THE HISTORY OF THE CONSTITUTION AND THIS COURT'S RULE OF LAW.

a. THE HISTORY OF THE CONSTITUTIONAL LAW AND SUPREME COURT DEMANDS A FAIR, IMPARTIAL AND INDIFFERENT JURY TO HEAR ALL CRIMINAL CASES.

In United States v. Brown, the Eleventh Circuit explained: "The Anglo-American legal court's tradition has regarded few rights as more sacred than that of a criminal defendant to be tried by the jury of her peers. To Blackstone, that a defendants conviction could be secured only "by the unanimous consent of twelve of her neighbours and equals" was "the glory of the english law," "The

most trancendant privilege," and "a constitution, that ... had, under providence, secured the just liberties of the English Nation for a long succession of ages." 3 William Blackstone, Commentaries * 379. And Mathew Hale wrote that "the law of England hath afforded the best method of trial, that is possible ... namely by a jury ... all concuring in the same judgment." 1 Mathew Hale, The History of the pleas of the Crown 33 (1736)(emphasis omitted)." Id. 996 F.3d at 1182.

The framers of our constitution found the institution of the jury so important that they made certain to preserve the jury though no less than four protections in the foundational document, making the jury the most frequently named safeguard of our freedom in the Constitution and its Amendments. See Juries and the Criminal Constitution, 65 Ala. L. Rev. 849, 850-51 (2014)(citing U.S. Const. Art. III, § 2 ("The trial of all crimes, except in cases of impeachment, shall be by jury..."); 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, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger..."); 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..."); U.S. Const. amend VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the U.S., then according to the rules of the common law.")).

The Eleventh Circuit in Brown further explained: "The right of trial by jury 'is no mere procedural formality, but a fundamental reservation of power in our constitutional structure just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their

control in the judiciary.' Blakely v. Washington, 542 U.S. 296, 305-06, 124 S.Ct. 2531 (2004); See also Flowers v. Mississippi, 139 S.Ct. 2228, 2238 (2019) ("Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process."). The institution of the jury raises the people itself ... to the bench of judicial authority and invests [them], with the direction of society. Powers v. Ohio, 499 U.S. 400, 407, 111 S.Ct. 1364 (1991)(alterations adopted)(quoting Alexis de Toequeville, 1 Democracy in America 334 (Henry Reeve Trans., Schocker 1st ed. 1961)). Trial by jury preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people - that is, ordinary citizens. Id. (internal quotations marks omitted.).

In particular, "the jury trial right protects defendants from being judged by a special class of trained professional who do not speak the language of ordinary people and may not understand or appreciate the way ordinary people live their lives." Pena-Rodriguez v. Colorado, 137 S.Ct. 855, 874-75 (2017) (Alito, J. dissenting). Jurors are ordinary people, they are expected to speak, debate, argue, and make decisions the way ordinary people do in their daily lives. Our Constitution places great value on this way of thinking, speaking, and deciding. Id., 137 S.Ct. at 874. The jury systems protects the accused by establishing a critical division of labor between the judge and the jury. Although the judges role is to instruct the jury on the law and to insist that the jury follow his instructions, it remains "the jury's constitutional responsibility both to determine the facts and to apply the law to those facts to draw the ultimate conclusion of guilt or innocence." U.S. v. Gaudin, 515 U.S. 506, 513-14, 115 S.Ct. 2310 (1995). As an inaugaral justice of the Supreme Court insisted long ago, "it is of the greatest consequence ... that the jury deter-

mine the fact. This well-known division between their provinces has been long recognized and established. 2 James Wilson, Lecture of Law, in the Works of the Honourable James Wilson 371 (Bird Wilson ed. Phila., Lorenzo Press 1804)." See U.S. v. Brown, 996 F.3d 1171, 1183-84 (11th Cir. 2021).

Axiomly, this Honorable Court has spoken and declared that a criminal defendant has a fundamental right to a fair, impartial, and indifferent, jury being the cornerstone of our justice system, who will verbally state that he or she can lay aside his or her impression or opinion and render a verdict based on the evidence presented in court. cf. Duncan v. Louisiana, 391 U.S. at 149 ("We found this right to trial by jury in serious criminal cases to be fundamental to the American scheme of justice, and therefore applicable in state proceedings."); Irvin v. Dowd, 366 U.S. at 722 (citing In re Oliver, 333 U.S. 257, and Tumey v. Ohio, 273 U.S. 510)("[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process); & Patton v. Yount, 104 S.Ct. at 2891 (Juror impartially is plainly a historical fact to question "did a juror swear that he or she could set aside any opinion he might hold and decide the case on the evidence[.]"). And thus, this Supreme Court has confirmed that the constitution requires an impartial jury to reach a unanimous guilty verdict to convict. Ramos v. Louisiana, 140 S.Ct. 1390, 1397 (2020).

Taken together, based on these principles the Supreme Court should overrule the Fifth Circuit's new rule of law that conflicts with the engraved principles in declaring a jury is rehabilitated if that jury remains silent after expressing actual bias to convict regardless of the evidence produced at trial. See Canfield, 998 F.3d 242.

b. THE FIFTH CIRCUIT'S MAJORITY HAS PUBLISHED A NEW RULE OF LAW THAT CON-

FLICTS WITH THE FOUNDATIONAL AUTHORITY PERTAINING TO JUROR IMPARTIALITY.

This Supreme Court has set out a principle of what constitutes a fair trial. Cf. Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436 (1986)(The Constitution entitles a criminal defendant to a fair trial, not a perfect one.). A fair trial is viewed: "[I]f the defendant had Counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] error that may have occurred are subject to harmless-error analysis." Rose v. Clark, 478 U.S. 570, 579, 106 S.Ct. 3101 (1986). But, what happens when the Fifth Circuit created a new rule that forced the Petitioner to undergo a trial where he is being tried by an actually biased jury and Counsel does nothing about it? The answer is simple: "voir dire [will not] play a critical function in assuring the [Petitioner] that his [Constitutional] right to an impartial jury will be honored." See the Repercusions of Anonymous Juries, 44 U.S.F. L. Rev. 531, 554 (Winter, 2010)(quoting Morgan v. Illinois, 504 U.S. 719, 729 (1992)(quoting Rosales-Lopez v. U.S., 451 U.S. 182, 188 (1981)); Gomez v. U.S., 490 U.S. 858, 876, 109 S.Ct. 2237 (1989)("Among those basic fair trial rights that can never be treated as harmless is a defendant's right to an impartial adjudicator, be it judge or jury.").

Therefore, Petitioner argues that M.T. has demonstrated an actual biased, and was tried by a biased jury. And, for this Honorable Court to refuse to grant certiorari, and stop the Fifth Circuit's newly declared rule, it will infect the United States with a deadly disease to violate all citizens foundational right to be tried by a fair and impartial jury. Cf. Parker v. Gladden, 385 U.S. 363, 366, 87 S.Ct. 468 (1966)([Petitioner] is entitled to be tried by 12, not 9 or even 10 or 11, impartial and unprejudiced jurors.); Canfield, 998 F.3d at 252-53 ("M.T. demonstrated that she was biased" ... and a "Juror's silence in the fact of generalized questioning of venireperson's by counsel and

the court did not constitute an assurance of impartiality.")(quoting Virgil v. Dretke, 446 F.3d 598, 606-07 (5th Cir. 2006)(quoting Hughes v. U.S., 258 F.3d 453, 460 (6th Cir. 2001))(internal quotation marks omitted); U.S. v. Parse, 789 F.3d 83, 110-11 (2d Cir. 2014)("[T]rying an accused before a jury that is actually biased" not only transgresses the express guarantee of the Sixth Amendment but also violates even the most minimal standards of due process. An impartial jury is one in which all of its members, not just most of them, are free of interest and bias.")(citations omitted); accord, U.S. v. Martinez-Salazar, 520 U.S. 304, 316, 120 S.Ct. 774 (2000)(an error "in the seating of any juror who should have been dismissed for cause ... would require reversal.").

Further, in applying the principle of "interpretatio logica," the Fifth Circuit relyed on the state court's decisions of Leadon v. State, 332 S.W.3d 600, 616 (Tex.App.--Houston [14th Dist] 2010, no pet.); and Cubit v. State, No. 03-99-00342-CR, 200 Tex.App.Lexis 2400 (Tex.App.--Austin, 2000, no pet)(unpublished opinion). See Canfield, 998 F.3d at 246. In Petitioner's case, Justice Don R. Willett then held for the first time: "Specifically, the TCCA pointed to Texas law to highlight that '[V]enire persons are rehabilitated by remaining silent when they do not affirmatively state that they cannot follow the law.' The court then determined that M.T. 'was rehabilitated by her silence' and that [Petitioner] 'failed to prove that [M.T.] was biased.'" See Canfield, 998 F.3d at 248.

How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, an actually biased juror whom declares guilt based on her past experience renders Petitioner's determination of guilt-innocence reliable? Irvin v. Dowd, 366 U.S. 717. Truly, this Supreme Court has long emphasized that the aim to "prevent[] bias ... lies at the very heart of the jury system." See Neuro-Voir Dire and

the Architecture of Bias, 65 Hastings L.J. 999, 1002 (May, 2014)(citing J.E.B. v. Alabama ex rel T.B., 511 U.S. 127, 154 (1994)(Kennedy J, Concurring)(quoting Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946))(internal quotations omitted). Courts have accordingly affirmed that the bias of "even a single juror would violate [the right to a fair trial" by "impartial, indifferent Juror." Id. (citing Dyer v. Calderen, 151 F.3d 970, 973 (9th Cir. 1998)(en banc).

Therefore, just as Justice Patrick E. Higginbotham, in his dissenting opinion, disagreed with the decision of the majority, the Petitioner argues that the "good law" Justice Willett declares is highly distinguishable to the factual pattern of what took place in Petitioner's case, and trends of the Supreme Court. Cf. Canfield, 998 F.3d at 250-58. In Leadon, the prosecution under the Batson claim still excluded two jurors who first declared they concluded they could not assess a life sentence as punishment, then later changed their answer. The Prosecution struck Robertson "because he passively rehabilitated himself by his silence." see Leadon, 332 S.W.3d at 613-617. In Cubit, during the race-neutral determinations, Counsel asked the entire pool if any panelist would consider the race of the defendant on the complainant in reaching a verdict. By their silence, all panelists indicating they would not. In other words, no panelist verbally spoke up. Cubit, 2000 Lexis 2400 at Lexas Page 2.

In contrast to the fact of the state cases, the majority relies on, Justice Higginbothom rightly declared that "this case closely resembles Virgil v. Dretke. ... M.T., like Sumlin and Sims, demonstrated that she was biased when the state asked whether any of the jurors would "think [Canfield]'s guilty before we even start testimony," she answered, "I do," and "I feel that way." And when asked whether she would find Canfield guilty even if the state's evidence was insufficient, M.T.'s response was straightfoward: "I probably will just because of where I am right now." She indicated not just the "mere existance" of a pre-

conception of Canfield's guilt but a likelihood that she would vote to convict Canfield even if the state failed to prove his guilt beyond a reasoanble doubt. See Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639 (1961). Her statements amounted to an admission that her "views would prevent or substantially impair the performance of h[er] duties as a juror in accordance with h[er] instructions and h[er] oath." See Canfield, 998 F.3d at 252-53; Soria v. Johnson, 207 F.3d 232, 242 (5th Cir. 2000)(internal quotation marks and citation omitted)(defining "Bias"); Austin v. Davis, 876 F.3d 757 (5th Cir. 2017)(A juror is biased if h[er] views would prevent or substantially impair the performance of her [illegible] duties as a juror in accordance with his instructions and her oath).

This Supreme Court has repeatedly affirmed that bias constitutes "any influence" that jurors acquire outside of the "evidence and argument [presented] in open court." 65 Hasting L.J. 999, 1002 (citing Skilling v. U.S., 130 S.Ct. 2896, 2913 (2010)(quoting Patterson v. Colorado, 205 U.S. 454, 462 (1907)(emphasis added))); BankAlantic v. Blythe Eastman Painwebber, Inc., 955 F.2d 1467, 1473 (11th Cir. 1992)("Actual bias may be shown either by express admission or by proof of specific facts showing such a close connection to the circumstances at hand that bias must be presumed."). Justice Higginbotham declared at no point did M.T. clearly express that she could "lay aside h[er] impression or opinion and render a verdict based on the evidence presented in court." See Canfield, 998 F.3d at 252-53 (citing Irvin, 366 U.S. at 723); see also, Wellons v. Warden, Georgia Diagnotic & Classification Prison, 695 F.3d 1202, 1211 (11th Cir. 2012)(quoting Smith v. Phillips, 455 U.S. 209, 217, 102 S.Ct. 940, 946 (1982))(Due Process requires "a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrances and to determine the effect of such occurrances when they happen."); U.S. v. Bernard Jones, 716 F.3d 851, 857 (4th Cir. 2013)(citing Murphy v. Fl[illegible]

Florida, 421 U.S. 794, 800 (1975))(It is sufficient if the juror can lay aside h[er] impression or opinion and render a verdict based on the evidence presented in court).

Therefore, this Honorable Court should grant certiorari to determine whether the Fifth Circuit's published decision should be overruled as contrary to the Constitution and the historical precedents pertaining to an impartial jury.

c. QUESTION NUMBER ONE:

THE FIFTH CIRCUIT HAS ANNOUNCED A NEWLY CREATED RULE UNDER THE PRINCIPLE OF "INTERPRETATIO LOGICA," AND DECLARED: "ONCE A PANELIST IN VOIR DIRE SELECTION VERBERALLY EXPRESSES AN ACTUAL BIAS, THAT PANELIST WILL BE REHABILITATED AS LONG AS HE OR SHE REMAINS SILENT FOR THE REMAINDER OF JURY SELECTION." THEREFORE, SHOULD THIS HONORABLE SUPREME COURT OVERRULE THE NEWLY DECLARED RULE AS BEING CONTRARY TO THE FOUNDING CONSTITUTION AND THE MANY PRECEDENTS SET BY THIS SUPREME COURT IN DUNCAN V. LOUISIANA, IRVIN V. DOWD, AND PATTON V. YOUNT?

The answer is yes. This Honorable Court should overrule the majority's newly declared rule, created in the principle of "interpretatio logica," on the basis of rehabilitation to a slient juror. Because nowhere in this historical context of the Constitution or in the Trends of the Supreme Court have reasoned that, once a Panelist verbally expresses an actual bias, whom declares a defendant guilty regardless of the prosecution's burden of proof, will be rehabilitated as long as that Panelist can remain silent for the rest of the voir dire selection! Thus, there is no exception, either, to a juror who announces they are biased towards the defendant, then declared impartial due to her silence. Cf. U.S. v. Flute, 929 F.3d 584, 589 (8th Cir. 2019)(citing Jungers, 702 F.3d at 1075 (stating "Congress knows how to craft an exception ... when it intends one.")(quoting Jonah v. Carmona, 446 F.3d 1000, 1007 (9th Cir. 2006))).

In other words, Petitioner, like any other defendant, has a personal right not to be convicted under a constitutionally invalid law. Cf. Bond v. U.S., 564 U.S. 211, 226, 131 S.Ct. 2355 (2011)(citing Fallon, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1331-33 (2000); Monaghan, 1981 S.Ct. Rev. 1, 3)); See also, North Carolina v. Pearce, 395 U.S. 711, 739, 89 S.Ct. 2072 (1969)(Black. J., concurring in part and dissenting in part) ("Due process ... is a guarantee that a man should be tried and convicted only in accordance with valid laws of the land.").

Again, this Honorable Supreme Court has continuously held that once a venire member verbally expresses an actual bias, that veniremember must verbally declare that he or she can set aside his or her past experiences, and verbally state he or she can render a verdict based solely on the evidence produced during trial. Patton v. Yount, 467 U.S. 1025, 1036, 104 S.Ct. 2885 (1985)(when a juror's impartially is at issue, the pertinent question is whether the juror [] swore "that [she] could set aside any opinion [she] might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed."); Allen v. Mitchell, 953 F.3d 858, 864 (6th Cir. 2020)(quoting Patton, 467 U.S. at 1038)("The question for this Court is simple 'whether there Court's conclusion that the juror [] here would be impartial[.]'"); Rose v. Clark, 470 U.S. 570, 577-78 (1986)(Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, See Powell v. Alabama, 287 U.S. 45 (1932); and no criminal punishment may be regarded as fundamentally fair).

Taken together, this Honorable Supreme Court should grant certiorari and take up the view of Justice Higginbotham pertaining to expressing impartiality versus silence of a panelist. Justice Higginbothom declared:

"Once a venire member has indicated bias, courts have looked for

persuasive evidence of disavowal before findings rehabilitation, such as a simple follow up by judge or counsel: "We need a yes or no, please?" In Virgil, we favorably discussed our decision in United States v. Nell, which ordered a new trial while noting that "[d]oubts about the existance of actual bias should be resolved against permitting the juror to serve, unless the prospective panelist's protection of a purge of preconception is positive, not pallid." See U.S. v. Nell, 526 F.2d 1223, 1230 (5th Cir. 1976); See also, Virgil, 446 F.3d at 606-07. Virgil also cited with approval the Sixth Circuit's decision in Hughes v. U.S, Virgil, 446 F.3d at 606-07 &nn. 30, 33 (citing Hughes v. U.S., 258 F.3d 453 (6th Cir. 2001)), and quoted its reasoning that an "express admission of bias, with no subsequent assurance of impartiality and no rehabilitation by counsel or the court by way of clarification through follow-up questions direct to the potential jurors," supports a finding of actual bias. Id. at 607 n.33 (quoting Hughes, 258 F.3d at 460). Hughes further found that a juror's "silence in the face of generalized questioning of venirepersons by Counsel and the court did not constitute an assurance of impartiality. Hughes, 258 F.3d at 461. And in several other cases, after a juror indicated her actual bias, the entire venire's silent response to a group question was not enough to establish the juror's impartiality. See e.g., U.S. v. Kechedzian, 902 F.3d 1023, 1031 (9th Cir. 2018)(finding on direct appeal that after a juror indicated bias, the silence of the panel in response to a question to the group "d[id] not indicate that [the juror] could be impartial"); Altheimer & Gray, 248 F.3d at 626 (finding juror bias on direct appeal where, after a juror indicated actual bias, the district court judge did not follow up with the juror individually, instead "ask[ing] the jury en masse, whether [they] would follow his instructions on the law and suspend judgment until [they] had heard all the evidence."); Johnson v. Armontrout, 961 F.2d 748, 754 (8th Cir. 1992)(granting § 2254 relief and holding that the court "cannot say that an ambiguous silence by a large group of venire persons to a general question about bias is sufficient to support a finding of fact in the circumstances of this case."); see also U.S. v. Corey, 625 F.2d 704, 707 (5th Cir. 1980)(noting that "[b]road, vague questions of the venire" are not enough to prove the impartiality of a juror indicating actual prejudice); U.S. v. Davis, 583 F.2d 190, 192, 198 (5th Cir. 1978)(holding, "[w]ithout establishing an inflexible rule" for voir dire, that because of significant pre-trial publicity, the trial court's inquiry was insufficient when the court merely "asked that any panel member raise his hand if he felt the publicity impaired his ability to render an impartial decision" and no juror responded).

"While in some cases the Venire's silence can support a finding a rehabilitation, this is not such a case. Here M.T. demonstrated actual bias when she admitted that she felt Canfield was guilty without hearing any testimony and that she would probably vote to convict him regardless of the strength of the evidence. Later, counsel asked the 60-person venire as a group: "Can everybody agree to hold the government to that burden, that before we find someone guilty, if you say to yourself, I had a reasonable doubt, I will find them not guilty? Can every-

> body agree to that? Does anyone have any reservations about that?" .. Neither M.T. nor any of the other 59 members of the venire responded. Silence, the State urges, demonstrated her impartiality. Yet, between her initial statement and absence of any response to the question put to the entire venire, there were no intervening events suggesting that M.T. had a change of heart. Indeed, after her colloquy with the prosecutor, M.T. did not speak for the remainder of the voir dire. She made no "protestation of a purge of preconception," let alone a "positive" or even a "pallid" one. Without something more, the silence of the entire venire is not enough to overcome her open statements when directly addressed. And there is no other footing for a finding of rehabilitation.

See Canfield, 998 F.3d at 253-54 (dissenting opinion, Higginbotham).

d. CERTIORARI SHOULD BE GRANTED FOR COUNSEL'S DEFICIENT PERFORMANCE IN FAILING TO CHALLENGE AN ACTUALLY BIASED JUROR

Counsel's affidavit makes plain that the failure to strike was not a conscious and informed decision on trial strategy. Counsel's affidavit explained incorrectly, that "[o]f the ten challenges for cause, a decision had to be made on which of these prospective jurors we would exercise challenges." But, Texas law does not place a limit on for-cause challenges only peremptory; therefore, Counsel's failure to challenge M.T. for-cause was the product of a misunderstanding of the law, not an informed decision. As evidence of M.T.'s rehabilitation, Counsel's affidavit also states that M.T. remained silent when he asked the jurors if they would be more likely to assume a defendant's guilt based on multiple prior accusations. But Petitoiner's claim is that M.T. is actually bias based on what happened to her grandson, not by her views on previous accusations. Counsel's affidavit offers no further strategic reasons for keeping M.T. on the jury. See Virgil, 446 F.3d at 610 (concluding defense Counsel's affidavit did not justify his performance, as it failed to explain why he did not challenge the jurors for cause or why he allowed them to serve on the jury); Neder v. U.S., 527 U.S. 1, 7 (1999)(only where the error was one that would "render a trial fundamentally unfair" should a court grant automatic reversal); Gonzalez-Lopez, 126 S.Ct. at 2570 ("The touchstone of a structural error is fundamental

unfairness and unreliability.").

Truly, when a venireperson expressly admits bias on voir dire, without a court response or follow-up for Counsel not to respond [to the statement of partiality] in turn is simply a failure "to exercise the custmary skill and diligence that a reasonably competent attorney would provide. See Hughes, 258 F.3d at 462 (quoting Armontrout, 961 F.2d at 754); see also, Miller v. Webb, 385 F.3d 666, 675 (6th Cir. 2004)(quoting Hughes); A Comprehensive Consideration of the Structural-Error Doctrine, 85 Mo. L. Rev. 965, 992 (Fall, 2020)(In Cronic, "Justice Stevens explained that 'unless the accused receives the effective assistance of counsel,' a serious risk of injustice infects the trial itself.")(Cronic, 466 U.S. 648, 656 (1984)(quoting Cuylen v. Sullivan, 446 U.S. 335, 343 (1980)). M.T.'s responses "Obligated Counsel to use a peremptory or for-cause challenge on [her]; and [n]ot doing so was deficient performance under Strickland. The State Court's conclusion was contrary to, or involved an unreasonable application of clearly established federal law." Canfield, 998 F.3d at 255.

III. JUSTICE WILLETT MISAPPLIED WEAVER AND DEMANDS PREJUDICE TO BE SHOWN.

Because Counsel's performance was deficient in failing to challenge an actually biased juror, Justice Willett erroneously declared that Weaver damands the Petitioner to prove prejudice and held:

> "The evidence of Canfield's guilt is overwhelming. The jury heard (1) testimony from the eight-year-old victim; (2) testimony from five outcry witnesses; and (3) testimony from an expert who personally interviewed the victim and noted that a coached child would **not** be able to provide the detailed information that the victim provided. The defense did not impeach the State's witnesses or otherwise cast doubt on the veracity of their testimony, and it did not offer any witnesses of its own. Based on this overwhelming one-sided evidence, there is no "reasonable probability" that, but for M.T.'s presence, the jury—who deliberated Canfield's guilt for less than an hour—would have acquitted.
>
> "But, if any doubt remains about our assessment of prejudice

> to Canfield, the TCCA's assessment controls. The TCCA correctly identified the proper prejudice standard under Strickland: a reasonable probability that the result of the proceeding would have been different absent Counsel's errors. And, based on its conclusion that M.T. was not biased, and lacking any materially indistinguishable Supreme Court precedent necessitating a different conclusion, the court reasonably concluded that the result of the trial would not have been different if counsel had challenged or struck M.T. from the jury."

See Canfield, 998 F.3d at 248-49.

First, this Honorable Court should grant certiorari becuase Justice Kennedy declared that Weaver only applies "specifically and only in the context of trial Counsel's failure to object to the closure of the courtroom during jury selection." Weaver v. Massachusetts, 137 S.Ct. 1899, 1907 (2017). In Weaver, the prejudice had to be shown because closure at voir dire stage from the public at large did not flow into the guilt-innocence phase, nor sentencing. Id., 137 S.Ct. at 1913. Weaver, also declared that Its decision did not call into question of a topic concerning a biased adjudicator. Id., 137 S.Ct. at 1911-12.

Second, this Honroable Supreme Court should grant certiorari because the evidence in Petitioner's case was not overwhelming, but rather weak on several elements of the charging instrument. M.C.'s, the complainant, version of the alleged facts are in conflict with the other "outcry witness's testimony that does not allege the same outcry pattern. M.C. never testified that it happened more than once. RR3, 223-40. Moreover, in a repeated manner, M.C. recanted and testified that "it did NOT happen a lot," and questioned the prosecution on whether she should say Petitioner made noises. RR3, 231-40. In fact, M.C. recanted everything the prosecution coached her to agree to. RR3, 223-40. Only after repeated being provoked by the prosecution, did M.C. change her testimony from "no" to an agreement that Petitioner touched her private parts in Ronda's home. RR3, 229. Further, no where in the record supports two or more acts over a 30-day duration period in the indictment.

Truly, it is already evident that Counsel misunderstood the law concerning the difference between perempatory and for-cause challenges. At trial, Counsel failed to challenge the extraneous offense in Tennessee to support any action, as the state relies on, to have occurred outside of a 30-day period. Cf. Appendix C, pgs. 7-10. There is a jurisdictional issue for the jury to determine and the evidence, rightly put, cannot support the offense of continuous sexual abuse. Although Petitioner maintains his innocence, the evidence at best only supports the lesser-included offense of aggravated sexual assault. Prejudice is seen here because, without M.T. being empaneled, the jury would have chose to aqquit or convict only on the less included offense at hand. The impact of the lesser-included would have set the punishment range to 5-99 years with parole benefits.

Accordingly, both courts and scholars have recognized the right to an impartial jury trial being the cornerstone of our justice system. See Juries and the Criminal Constitution, 65 Ala. L. Rev. 849, 857 (2014)(citing Duncan v. Louisiana, 391 U.S. 145, 149 (1968)(holding that "trial by [impartial] jury in criminal cases is fundamental to the American scheme of justice."); Laura I. Appleman, The Plea Jury, 85 Ind. L.J. 731, 734 (2010)("With its enshrinement of the trial, the Sixth Amendment delineates perhaps the most important right in our criminal jury trial right [has] been recognized as "fundamental to the American system of Justice.")). Therefore, the Petitioner asks this question for this Honorable Supreme Court to grant certiorari to determine:

Question Number Two:

BECAUSE COUNSEL ALLOWED AN ACTUALLY BIASED PANELIST TO BE SEATED AS A JUROR, IS JUSTICE WILLETT'S DECISION CONTRARY TO STRICKLAND FOR HOLDING PREJUDICE IS NOT AUTOMATIC REQUIRING A NEW TRIAL UNDER WEAVER, AND THAT PETITIONER FAILED TO PROVE PREJUDICE NECESSITATING A NEW TRIAL?

The answer is YES. Counsel's failure to challenge the seating of an actually bias juror cannot satisfy "the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty" ... The Sixth Amendment stands as a "constant admonition that if the constitutional safeguards it provides is lost, justice will not 'still be done.'" Gideon v. Wainwright, 372 U.S. 335, 344, 83 S.Ct. 792, 804 (1963)(quoting Johnson v. Zerbst, 304 U.S. 458, 462, 58 S.Ct. 1019 (1938). Additionally, Justice Blackmun rightly decalred: "because the impartiality of the adjudicator goes to the very intergrity of the legal system, the Chapman harmless-error analysis cannot apply. We have recognized that 'some constitutional rights [are] so basic to a fair trial that their infraction can NEVER be treated as harmless.'" Chapman v. California, 386 U.S. at 23. The right to an impartial adjudicator, be it judge or jury, is such a right. Id., at 23 n.8 citing among other cases, Tumey v. Ohio, 273 U.S. 510 (1927)." See Gray v. Mississippi, 481 U.S. 648, 668, 107 S.Ct. 2045, 2057 (1987).

Therefore, this Honorable Court should grant certiorari and take up the view of Justices Breyer and Kagan that "Counsel's failure to object to [the impaneling an actual biased juror] satifies the Strickland prejudice standard and requires reversal. The Justices reasoned: (1) an actually biased juror can never be treated harmless and always require a new trial; (2) Counsel failed to raise the actual bias juror being equivalent to a structural error, (3) but for Counsel's failure to raise the error, the Petitioner would have received a new trial; (4) therefore, the error was prejudicial." Cf. A Comprehensive Consideration of the Structural-Error Doctrine, 85 Mo. L. Rev. 965, 977 (Fall, 2020).

Stated differently, this Honorable Court should grant certiorari and overrule Justice Willett's opinion because a finding of prejudice turns not on fundamental unfairness but on the lack or reliability. See Virgil, 446 F.3d at

612 (quoting Strickland, 466 U.S. at 696)(Absent mechanical rules, "the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." We focus on ferreting out "unreliable" results caused by "a breakdown in the adversarial process that our system courts on to produce just results."); Cf. Weaver, 137 S.Ct. at 1915 (Alito J., concurring)("Weaver makes much of the Strickland Court's statement that 'the ultimate focus of inquiry must be on the fundamental fairness of the proceeding.' But the very next sentence clarifies what the court had in mind, namely, the reliability of the proceeding."). This Honorable Supreme Court should grant Certiorari because Petitioner, like Justice Higginbotham, cannot trace the path of the erroneous seating of M.T. to the jury verdict of guilt as charged, nor 50 years without parole, yet this indeterminacy shadows the reliability of both the guilt and sentencing verdicts, which is the heart of the Constitutional protection of trial by jury and the vital trust of jury verdicts. Strickland, 466 U.S. at 687 (emphasis added)(Prejudice "requires showing that Counsel's errors were so serious as to deprive the [Petitioner] of a fair trial, a trial whose result is reliable.").

For this reason, a successful challenge to the impartiality of a decision-maker leaves "a defect in the trial process that 'undermine[s] confidence in the outcome' in violation of Strickland" and thus a reasonable probability of a different outcome but for Counsel's errors. Virgil, 446 F.3d at 614 (quoting Strickland, 466 U.S. at 694). As a result, this Supreme Court should grant certiorari, due to the important interviening circumstances of Justice Willett's published opinion that conflicts with this Court's historical reasoning. Because the relevant law remains "clerly established federal law, that the seating of an acutal biased juror can never be treated harmless, as determined by this Honorable Supreme Court. 28 U.S.C. § 2254(d)(1).

IV. THIS HONORABLE SUPREME COURT SHOULD GRANT CERTIORARI TO EXPLICITLY DECLARE: "THE IMPANELING OF AN ACTUAL BIASED JUROR IS A STRUCTURAL ERROR THAT CAN NEVER BE TREATED AS HARMLESS."

It is well settled that a "jury is an essential instrumentiality 'an appendange' of the Court, the body ordained to pass upon guilt or innocence. The exercise of calm and informed judgment by its members is essential to proper enforcement of law." Turner v. Louisiana, 379 U.S. 466, 472, 85 S.Ct. 546, 549 (1965)(quoting Sinclair v. U.S., 279 U.S. 749, 765, 49 S.Ct. 471, 476 (1929)). This Honorable Supreme Court has repeatedly declared: "Jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability." Gomez v. U.S., 109 S.Ct. 2237, 2246 (1989)(citing Rosales-Lopez v. U.S., 451 U.S. 182, 188, 101 S.Ct. 1629, 1634 (1981); Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848 (1973); Dennis v. U.S., 339 U.S. 162, 70 S.Ct. 519 (1950); & Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639 (1961)); See also, 85 Mo. L. Rev. 965, 999 (2020)("After all, one of the primary functions of voir dire is to expose juror bias so as to ensure that a biased juror is not impaneled. Bodkin exposed her bias, and accordingly she was kept off the jury, voir dire served it purpose)(refering to Mach v. Stewart, 137 F.3d 630, 631-32 (9th Cir. 1997)); Allen v. Mitchell, 953 F.3d 858, 866 (6th Cir. 2020)(adequate voir dire to identify unqualified jurors is intergral to the right to trial by an impartial jury.)(citing Mogan, 504 U.S. at 729).

In Petitioner's case M.T., like Sumlin and Sims, demonstrated that she was biased. Patton v. Yount, 467 U.S. 1025, 1036 (1984)(juror bias is a factual finding); Virgil v. Dretke, 446 F.3d at 610. When the state asked whether any of the jurors would "think [Canfield's] guilty before we even start testimony," she answered, "I do," and, "I feel that way." And when asked whether she would

find Canfield guilty even if the State's evidence was insufficient, M.T.'s response was straightforward: "I probably will just because of where I am right now." She indicated not just the "mere existance" of a preconception of Canfield's guilt but a likelihood that she would vote to convict Canfield even if the State failed to prove his guilt beyond a reasonable doubt. See Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639 (1961); U.S. v. Ramirez-Castillo, 748 F.3d 205, 216 (4th Cir. 2014)("The right to a jury verdict of guilty beyond a reasonable doubt. This right is a 'basic protection whose precise effects one unreasonable, but without which a criminal trial cannot reliably serve its function.' The deprivation of the right, with consequences that are necessarily unquantifiable and indeterminate, on questionably qualifies as 'structural error.'")(quoting Sullivan v. Louisiana, 508 U.S. 275, 281, 113 S.Ct. 2078 (1993)).

Her statements amounted to an admission that her "views would prevent or substantially impair the performance of her duries as a juror in accordance with her instructions and her oath. At no point did she clearly express that she could "lay aside her impression or opinion and render a verdict based on the evideence presented in court. Cf. Soria v. Johnson, 207 F.3d 232, 242 (5th Cir. 2000)(defining bias); Irvin, 366 U.S. at 723; Canfield, 998 F.3d at 252-53. Therefore, the Petitioner presents his last question for this Honorable Supreme Court to resolve:

QUESTION NUMBER THREE:

BEING THAT AN IMPARTIAL JURY TRIAL IS THE CORNERSTONE OF OUR AMERICAN JUSTICE SYSTEM, WHEN A PANELIST VERBALLY DECLARES TO VOTE TO CONVICT EVEN IF THE PROSECUTION FAILED TO PROVE GUILT BEYOND A REASONABLE DOUBT, AND AN ANNOUNCING HER IMPAIRMENT TO PERFORM HER DUTIES AS A JUROR IN ACCORDANCE WITH HER INSTRUCTIONS AND OATH. IS THE SEATING OF AN ACTUALLY BIAS JUROR TO DETERMINE GUILT-INNONCENCE AND PUNISHMENT A STRUCTURAL ERROR? IF SO, SHOULD

THIS HONORABLE SUPREME COURT EXPLICITLY ANNOUNCE THAT THE SEATING OF A BIAS JUROR IS A STRUCTURAL ERROR, THAT CANNOT BE CONSIDERED HARMLESS?

The answer is YES! In Turner, this Honorable Supreme Court held that "a jury must base its verdict upon the evidence presented at trial." Id., 379 U.S. at 472, 85 S.Ct. at 549; See also, Mattox v. U.S., 146 U.S. 140, 149, 13 S.Ct. 50, 53 (1892)(finding it "vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbaised judgment.").

Trying an accused before a jury that is actually biased not only transgresses the express guarantee of the Sixth Amendment but also "violates even the most minimal standards of due process. U.S. v. Parse, 789 F.3d 83, 110-11 (2d Cir. 2014)(citations omitted). This Supreme Court declared an impartial jury is none in which all of its members, not just most of them, are free of interest and bias. U.S. v. Martinez-Salazar, 526 U.S. 304, 316, 120 S.Ct. 774 (2000) (an error "in the seating of any juror who should have been dismissed for cause ... would require reversal"); Parker v. Gladden, 395 U.S. 363, 366, 87 S.Ct. 468 (1966)(per curiam)(despite state law authorizing conviction by an affirmative vote of 10 juror, a new trial was required where at least two members of the 12 person jury were exposed to unauthorized communication [i.e. actual biased juror], Petitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors.").

Being that the right to an impartial jury trial is so important to the Framers of the Constitution, they placed it in at least four locations in the Constitution (65 Ala. L. Rev. at 850-51), what exactly constitutes a structural error? Arizona places a perfect standard for this Supreme Court to consider: "To be structural an error must: (1) affect the conduct of the trial from beginning to end, thus tainting the framework of the trial, and (2) deprive the

defendant of a basic protection so that the trial cannot function as a 'vehicle for guilt or innocence.'" See Violating the Inviolate: The Right to a Twelve-Person Jury in the Wake of State v. Soliz, 52 Ariz. L. Rev. 157, 164-65 (2010) (citing State v. Escobedo, 213 P.3d 689, 695 (Ariz. Ct. App. 2009)(quoting State v. Tucker, 160 P.3d 177, 195 (Ariz. 2007)).

Truly, the Petitioner argues that placing M.T., an actually biased juror constitutes a structural error because: (1) seating an actually biased juror affects the conduct of the trial from beginning to end, thus tainting the framework of the Constitution and trial; and, (2) seating an actually biased juror deprives Petitioner his basic rights to due process and a fundamentally fair trial, so that the right to an impartial jury trial cannot function as a vehicle for guilt or innocence, nor punishment. Id., see also, 85 Mo. L. Rev. 965, 967 (In short, structural errors have the effect of somehow "breaking" the proceeding in a fundamental, irreverible way."); Arizona v. Fulminante, 499 U.S. 279, 309-10 (1991)(At the core of the structural-error doctrine is the idea that some constitutional errors damage the framework of the trial so thoroughly that no aspect of the trial is reliable any longer): Ruiz v. U.S., 990 F.3d 1025, 1030 (7th Cir. 2021)(citing Weaver v. Massachusetts, 137 S.Ct. 1899, 1907)("The purpose of the structural error doctrine is to ensure insistance on certain basic, constitutional guarantees that should define the framework of any criminal trial."); Neder v. U.S., 527 U.S. 1, 8-9, 119 S.Ct. 1827 (1999)(Courts usually reverse criminal convictions tainted "the frame work within which the entire trial process" and undermining ultimate determination of "guilt or innocence."); Blankenburg v. Miller, 2017 U.S. Dist. Lexis 93840, Lx.Pg. 52, (U.S.D.C., Southern Distrist of Ohio, Western Division, 2017)(A trial jury which includes a juror who is determined to convict [based on actual] bias cannot return a verdict which can stand.).

Although the deciding panel in the Fifth Circuit has declared that "becuase this Supreme Court has not explicitly stated that a seating of an actual bias juror is structural, it declares this error not to be structural." Cf. Canfield, 998 F.3d at 249 n.25, 257-58. This does not mean that Petitioner is alone in his argument to this Supreme Court. Axiomly stated, the Petitioner is not alone in his argument that seating an actually biased juror is a structural error that can never be treated as harmless. Weaver, contrary to Justice Willett's opinion, has not called into question, among other precedents, Tumey v. Ohio, 27 U.S. 510, 535, 47 S.Ct. 437 (1927). Because in "those cases necessitated automatic reversal after they were preserved and then raised on direct review. AND this opinion does not address whether the result should be any different if the errors were raised instead in an ineffective-assistance claim on collatural review." Cf. Weaver, 137 S.Ct. at 1911-12; Canfield, 998 F.3d 242.

Further, Justice Alito's view disagrees with any assertion that all structural errors, as Justice Willett implies in Petitioner's case, sometimes do not require automatic reversal. 85 Mo. L. Rev. 965, 978. Justice Alito's disagreement is seen in his dissenting opinion in U.S. v. Gonzalez-Lopez: "In Fulminante, we used these terms ["trial error" and "structural defect"] to denote two poles of constitutional error that had appeared in prior cases, trial errors always lead to harmless-error [or prejudice] analysis, while structural defects always lead to automatic reversal." See 85 Mo. L. Rev. 965, 978 (citing U.S. v. Gonzalez-Lopez, 548 U.S. 140, 159 (2006)(emphasis added)).

Accordingly, this Honorable Supreme Court should grant certiorari because at least two circuits have explicitly concluded that the presence of a biased juror constitutes structural error. 85 Mo. L. Rev. 965, 989. In United States v. French, the First Circuit concluded that the presence of a biased juror is exactly the kind of error that deprives defendants of "basic protections" with-

out which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." Cf. U.S. v. French, 904 F.3d 111, 119 (1st Cir. 2018); cert denied sub nom, Russell v. U.S., 139 S.Ct. 949 (2019); Dyer v. Calderon, 151 F.3d 970, 973 n.2 (9th Cir. 1998); & Johnson v. Armontrout, 961 F.2d 748, 753 (8th Cir. 1992)(finding structural error only after Petitioner demonstrated jurors were actually biased). The presence of a biased judge, alters the fundamental framework of the trial and contaminates the entire course of the proceedings it is therefore structural. Cf. 85 Mo. L. Rev. 965, 989 (citing French, 904 F.3d at 119 (quoting Neder v. U.S., 527 U.S. 1, 8-9 (1999); Dyer, 151 F.3d at 973 n.2).

Furthermore, this Honorable Supreme Court also announce this view of an actual bias juror being a structural error since 1989, just not explicitly. In Gray v. Mississippi, Justice Blackmun, announced "[b]ecause the Witherspoon-Witt standard is rooted in the constitution right to an impartial jury, Wainwright v. Witt, 469 U.S. at 416, 105 S.Ct. at 848, and because the impartiality of the adjudicator goes to the very integrity of the legal system, the Chapman harmless- error analysis cannot apply. We have recognized that 'some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless-error.' Chapman v. California, 386 U.S. at 23, 87 S.Ct. at 827. The right to an impartial adjudicator, be it judge or jury, is such a right. Id., at 23, n.8, 87 S.Ct. at 828, n.8, citing among other cases, Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437 (1927)(impartial judge). As was stated in Witherspoon, a capital defendant's constitutional right not to be sentenced by a 'tribunal organized to return a verdict of death' surely equates with a criminal defendant's right not to have his culpubility determined by a 'tribunal organized to convict.' 391 U.S. at 521, 88 S.Ct. at 1776, quoting Fay v. New York, 332 U.S. 261, 294, 67 S.Ct. 1613, 1630 (1947)." See Gray, 481 U.S. 648,

107 S.Ct. 2045, 2057 (1987).

This Honorable Supreme Court should grant certiorari not only because this issue is conflicting in nature, but ripe enough for this Supreme Court to make the just decision to explicitly announce "the seating of an actual bias juror is a structural issue that cannot be deemed harmless regardless if it is raised in the context of ineffective assistance claim. Gomez, 490 U.S. 858, 109 S.Ct. at 2246 (Among those basic fair trial rights that "'can never be treated as harmless'" is a defendant's "right to an impartial adjudicator, be it judge or jury.")(quoting Gray, 481 U.S. at 668, 107 S.Ct. at 2057)(quoting Chapman v. California, 386 U.S. 18, 23, 87 S.Ct. 824, 827 (1967)).

Taken together, the Petitioner's structural right to an impartial jury, free from bias and prejudice, is one that cannot be overlooked, or viewed as harmless. Because all the decisions presented herein "all rest on the bedrock principle that 'the constitutional structure of our Government' is designed first and foremost not to look after the interests of the respective branches, but to ultimately protec[t] individual liberty.'" National Labor Relations Board v. Canning, 573 U.S. 513, 134 S.Ct. 2550 (2014)(citing Bond, 131 S.Ct. 2355).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jerry Comfort

Date: December 30, 2021