No. 21-6772

In The

SUPREME COURT OF THE UNITED STATES

JERRY LEE CANFIELD,

Petitioner,

Vs.

BOBBY LUMPKIN, DIRECTOR TDCJ-CID,

Respondent.

On Petition for a Writ of Certiorari to the

Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO THE RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JERRY LEE CANFIELD
#01848978 - COFFIELD UNIT
2661 FM 2054
TENNESSEE COLONY, TEXAS 75884
PRO SE LITIGANT
NO PHONE

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Petitioner, Jerry Lee Canfield, respectfully files this Reply Brief to the Respondent's brief in opposition to Petition for writ of certiorari.

I. INTRODUCTION:

This case is an appropriate vehicle to make not only one, but two, important decisions of fact that will either support the cornerstone of our American Justice System, or change the entire framework pertaining to impartial jury trials. The Petitioner wishes for this Honorable Court to support the integrity of our American Cornerstone of impartial jury trials free from juror bias, and explicitly announce that the seating of a bias juror is a structural error, that cannot be considered harmless. The Respondent wishes for this Honorable Court to change the entire framework of impartial jury trial by announcing that a juror whom expresses actual biased can be rehabilitated through her silence to generalized group questioning. As explained below, this Honorable Court has always implied that a juror whom expresses actual bias cannot assure impartiality by remaining silent, but to speak out and declare that she can be fair and

impartial. Therefore, even more so now, this Honorable Court should grant certiorari because this case is laced with important, ripe, and necessary questions that must be determined by this Court on what constitutes an actually biased juror, whether counsel rendered ineffective assistance in failing to challenge the actually biased juror, whether seating a biased juror is structural error, or whether a person can remain silent and by that silence will rehabilitate that juror?

II. THIS IS THE PROPER CASE TO RULE IN PETITIONER'S FAVOR BECAUSE THE RESPONDENT'S ARGUMENT THAT: "'THE STATE COURT WAS NOT UNREASONABLE TO SUPREME COURT PRECEDENT DUE TO THIS COURT HAVING NEVER HELD THAT A BIASED JUROR CANNOT BE REHABILITATED THROUGH SILENCE IN RESPONSE TO GROUP QUESTIONING,'" IS CONTRARY TO THIS HONORABLE COURT'S PREVIOUS DECISIONS.

On Page 7 of the Respondent's Brief in Opposition, the attorney general makes a futile argument based on "juror rehabilitation through slience." The Respondent states, "this Court has never held that a biased juror cannot be rehabilitated through silence in response to group questioning." See Brief in Opposition, Pg. 7. Then, the Respondent makes a conclusion that the state court cannot have been unreasonable, and in order for this Court to provide relief It must "overlook[] AEDPA's framework." Id.

The Petitioner argues that this conclusion cannot be further from the truth on the present issue at bar. The Respondent bases her argument as if M.T. never spoke up to express her actual bias. Contrary to the Respondent's factual predicate, Justice Higginbotham justly analyzed:

> "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 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." Irvin v. Dowd, 366 U.S. 717, 723 (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. Soria v. Johnson, 207 F.3d 233, 242 (5th Cir. 2000)(defining "bias.")."

Cf. Canfield v. Lumpkin, 998 F.3d 242, 252-53 (5th Cir. 2021); Brief in Opposition, Pgs. 2, 6 (ignoring the full colloquy that actually transpired).

The Respondent's statement of "this Court never held that a bias juror cannot be rehabilitated through silence in response to group questioning" is true. Nevertheless, the Respondent requests this Court to create a "new rule" of law that will declare a biased juror rehabilitated through silence to group questioning, after her verbal expression of actual bias. Cf. Brief in Opposition, Pgs. 8-10. If this Honorable Court agrees with the Respondent and essentially upholds the Fifth Circuit's majority to create this "new rule" of law; than, like the state court's justification that a juror can be rehabilitated through silence is completely against the trends of this Honorable Court's clearly established law that speaks otherwise. And thus, overrule over 100 years of precedent authority in order to agree with the Respondent. Cf. Id. This Honorable Court clearly established that when a juror verbally expresses an actual biased, it is the duty of Counsel to ask individually whether that juror can verbally express that she could "lay aside her impression or opinion and render a verdict based on the evidence presented in court." See Ducan v. Louisiana, 391 U.S. 145, 149 (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 to state proceedings."); Irvin v. Dowd, 366 U.S. at 722 (citing In re Oliver, 333 U.S. 257 (1948), and Tumey v. Ohio, 273 U.S. 510 (1927)("[T]he right to jury trial guarantess 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 impartiality is plainly a historical fact to question "did a juror swear that he or she could set aside any opinion [s]he might hold and decide the case on the evidence[.]"). As a result, "Canfield's Counsel was obligated to use a peremptory or for cause challenge on M.T. Because he failed to do so, his performance was deficient." Canfield, 998 F.3d at 253.

Further, voir dire is law french for "to speak the truth[,]" and refers to "[a] preliminary examination of a prospective juror by a "trial court" to decide whether [M.T.] is qualified and suitable to serve on a jury." Voir Dire, Black's Law Dictionary (10th Ed. 2014). In other words, voir dire means to speak the truth, not remain silent then let Counsel, and the court, speculate who could be fair and impartial. If this was the case, what use could voir dire examination possibly serve? None, and the effect is devastating and the cornerstone of our impartial jury right is void. Duncan, 391 U.S. at 149 (a criminal defendant has a fundamental right to a fair, and 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 at trial.).

On Pages 7-8 to Respondent's Brief in Opposition, the attorney general argues "because there is no Supreme Court authority holding that silent rehabilitation is inappropriate and Texas case law allows for silent rehabilitation;" therefore, as the Respondent erroneously asserts, Counsel was "not deficient because the State Court's reasoned that M.T. was rehabilitated by her silence in response to group questioning." See Brief in Opposition, Pgs. 7-8. To the contrary, this Honorable Court reasoned that jurors are ordinary people, they are expected to speak, debate, argue, and make decisoins the way ordinary people do in their daily lives. Our Constitution places great value on this way of thinking, speaking, and deciding," not to remain silent. Pena-Rodriguez v.

Colorado, 137 S.Ct. 855, 874-75 (2017). Truly, a silent jury deliberation never constitutes a verdict; likewise, silent rehabilitation never constitutes an assurance of impartiality. In ringing terms, silent rehabilitation to a group questioning after speaking out and expressing actual bias in a way ordinary people do, has never been the focus of our Constitution or the many precedent holdings of this Honorable Court concerning voir dire selection.

Furthermore, the Respondent cites to caselaw that speaks against her own argument, including the Texas authority. Not to mention the federal authority, the holding in Leadon v. State, the Houston court of appeals, declared that "venire persons are rehabilitated by remaining silent when they do not affirmatively state that they cannot follow the law." Id., 332 S.W.3d 600, 616 (Tex. App. -- Houston [14th Dist.] 2010, no pet.). In Leadon, no one spoke up like M.T. did. M.T. affirmatively stated that she cannot follow the law because "Canfield is guilty before we even start trial." Canfield, 998 F.3d at 252-53.

Axiomly, the Respondent's argument fails and this case is appropriate, even under the guidelines of Section 2254(d), because this Honorable Court's precedent has always required a juror to speak out and state she can "lay aside her impression or opinion and render a verdict based on the evidence presented in court," not to remain silent after her expression of actual bias. Cf. Canfield, 998 F.3d at 252-53 ("At no point did she clearly express that she could "lay aside h[er] impression or opinion and render a verdict based on the evidence presented in court.")(citing Irvin, 366 U.S. at 723).

Finally, this Honorable Court should grant certiorari to address whether a juror who demonstrates bias can be rehabilitated through silence, when answering this question will entitle Canfield to relief? To refuse to grant certiorari, and stop the Fifth Circuit's newly declared rule that a biased juror can be rehabilitated through silence, will infect the United States with a deadly

disease to violate all citizens foundational rights to be tried by an impartial jury. Cf. Petitioner's Principle Brief, Pgs. 11-19. In ringing terms, this Honorable Court should stop this infection and hold the Respondent's argument is not, nor is the Fifth Circuit's decisoin, in line with this Honorable Court's holdings. To the contrary, this Honorable Court has always ruled that once a juror expresses actual bias, that juror must be pinned down and asked individually to verbally speak out; then, declare that she can be fair and impartial by setting aside her impression or opinion and render a verdict based on the evidence presented in court. Irvin, 366 U.S. at 723 (citing Spies v. Illinois, 123 U.S. 131; Holt v. U.S., 218 U.S. 245; Roynolds v. U.S., 98 U.S. 145, 155 ("the theory of the law is that a juror who has formed an opinion cannot be impartial.")).

III. THIS CASE IS THE PROPER VEHICLE TO ADDRESS WHETHER JUROR BIAS IS STRUCTURAL ERROR, AND TO DECLARE THAT STRICKLAND'S PREJUDICE DOES NOT APPLY, IN THE CONTEXT OF COUNSEL BEING DEFICIENT FOR ALLOWING THE SEATING OF AN ACTUALLY BIASED JUROR, RESOLVING THESE QUESTIONS WILL RESULT IN CANFIELD OBTAINING RELIEF.

On Pages 10-13 in the Brief in Opposition, Respondent essentially declares that if this Court announces that a biased juror to be structural, it will be announcing a new rule of law. Thus, "there is no clearly established Supreme Court precedent on how to evaluate prejudice when Counsel's deficency implicates other structural errors, here—potentially—a biased juror. Since there is no clearly established Supreme Court precedent, the state court had no reason to find that a biased juror constitutes structural error or that a biased juror is the type of structural error that dictates presumed prejudice in the context of an ineffective assistance of counsel claim. See. Brief in Opposition, Pgs. 10-13.

First, the Respondent wishes for this Honorable Court to believe that "biased jurors have never been deemed structural error," citing some authority out

of the Fifth Circuit and from this court. See Brief in Opposition, Pg. 12. This statement is not true at all. Truly, the word "deem" in the Merriam-Webster's Collegiate Dictionary means "to come to think or judge, consider, "to have an opinion," believe. Id., Page 325 (11th Ed. 2012). Therefore, this statement made by the Respondent only means "biased jurors have never been considered or believed to be structural error." Again, as explained below, this statement and rationale of the Respondent is not true at all.

What constitutes a structural error as determined by this Honorable Court? In Neder, this Honorble Court explained that Structural errors are the ones that "affect[] the framework within which the trial proceeds, rather than simply an error in the trial process itself." See Neder v. U.S., 527 U.S. 1, 8 (1999). Such errors "infect the entire trial process" and "necessarily renders a trial fundamentally unfair." Id. (citations omitted). Put another way, these errors deprive defendants of "basic protections" within which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair." Id. In Weaver, this Honorable Court again, recognized, that some errors should not be deemed harmless beyond a reasonable doubt. Those errors came to be known as structural errors. The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it "affect[s] the framework within which the trial proceeds," rather than being "simply an error in the trial process itself." For the same reason, a structural error "def[ies] analysis by harmless error standards." Weaver v. Massachusetts, 137 S.Ct. 1899, 1907-08 (2017)(citing Arizona v. Fulminante, 499 U.S. 279, 309-10, 111 S.Ct. 1246 (1991)).

Both Petitioner and Respondent agrees that a biased judge under Tumey v.

Ohio is a structural error. See Tumey, 273 U.S. 510 (1927). Both Neder and Weaver declares a biased judge to be a structural error. Cf. Weaver, 137 S.Ct. at 1911; and Neder, 527 U.S. 1. As far as 1987, this Honorable Court declared in Gray v. Mississippi, that the seating of a biased juror is such a structural error when this Court reasoned: "Because the Witherspoon-Witt standard is rooted in the constitutional right to an impartial jury. Wainwright v. Witt, 469 U.S. 412, 416 (1985), 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 right [are] so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California, 386 U.S. 18, 23 (1967). 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)(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 culpability determined by a "tribunal organized to convict." 391 U.S. at 521 (quoting Fry v. New York, 332 U.S. 261, 294 (1927)." See Gray v. Mississippi, 481 U.S. 648, 668 (1987).

In 1989, this Honorable Court reaffirmed this conclusion with the holding "among those basic fair trial right that "'can never be treated as harmlessness,'" is a defendant's "right to an impartial adjudicator, be it judge or jury." See U.S. v. Gomez, 490 U.S. 858, 109 S.Ct. 2237, 2246 (1989)(citing Gray v. Mississippi, 481 U.S. at 668 (quoting Chapman v. California, 386 U.S. at 23)).

Even if this Honorable Court wishes to go against the very trends of this Court, prejudice in Petitoiner's case is present. The Respondent argues that the outcome would not have been different had M.T. been struck, due to the T.

Fifth Circuit's erroneous conclusion that the evidence overwhelming against the Petitioner. See Brief in Opposition, Pgs. 12-13.

Contrary to the Respondent's conclusion, the evidence in Petitioner's case is not overwhelming, but rather weak on several elements of the charging instrument. M.C.'s (the complainant) version of the alleged facts are in conclict 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 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. See Appendix C, Pgs 7-10 to Petitioner's Principal Brief. There is a jurisdictional issue for the jury to determine and the evidence, rightly put, cannot support the offense of continuous sexual abuse. Although Petitoiner maintains his innocence, the evidence at best only supports the lesser-included offense of aggravated sexual assault. Prejudice is present because without M.T. being empaneled, the jury would have chose to acquit or convict only on the lesser included offense at bar. The impact of the lesser-included would have set the punishment at 5-99 year with parole, instead of 25-99 without parole.

Nevertheless, this Honorable Court has declared long ago that a conviction,

due to a biased juror "could not constitutionally stand because the jury had been infected by prejudice before the actaul trial proceeding had commenced. Turner v. Louisiana, 319 U.S. 466, 471-72 (1965). Again, in the language of Lord Coke, a juror must be an "indifferent as he stands unsworne." Co. Litt. 155b. H[er] verdict must be based upon the evidence developed at the trial. Cf. Thompson v. City of Louisville, 363 U.S. 199. This is true, regardless of the heinousness of the crime charged the apparant guilt of the offense or the station in life which he occupies. It was so written into out law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807)("[Light] impressions which may fairly be supposed to yield to the testimony that may be offered; which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror, but that those strong and deep impressions [that M.T. has explicitly verbalized], which [she] will close [her] mind against the testimony that may be offered in opposition to them; which will combat that testimony and resist its force, do constitute a sufficient objection to [M.T.]."). The theory of law, here, is that a juror who has formed an opinion cannot be impartial. Reynolds v. U.S., 98 U.S. 145, 155 (1879)." See Irvin v. Dowd, 366 U.S. 717, 722 (1961). Therefore, regardless of the evidence at trial, the seating of M.T. is a type of a structural issue that defies harmless error analysis. Cf. Petitioner's Principal Brief, for the Petitioner has demonstrated that M.T. is actually biased, then seated to determine Petitioner's guilt/innocence and punishment.

Taken together, this Honorable Court should grant certiorari and declare a biased juror is structural error, and that prejudice is presumed because at least two Circuit, including this Honorable Court has ruled in this vein. The First Circuit in U.S. v. French, explicitly held that the seating of a biased juror is the type of structural error that dictates presumed prejudice

when the First Circuit held: "In any event, the decisive point is that we view the presence of a biased juror as structural error—that is, pre se prejudicial and not susceptible to harmlessness analysis. While we have not previously stated the matter so directly, precedent from this Court dictates that conclusion. The Supreme Court has explained that, though structural error is rare, it is the appropriate finding for "defect[s] affecting the framework within the trial proceeds, rather than simply an error in the trial process itself," Arizona v. Fulminante, 499 U.S. 279, 310 (1991), and for those errors that "deprive defedants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.'" Neder v. U.S., 527 U.S. 1, 8-9 (1999)(quoting Rose v. Clark, 478 U.S. 570, 577-78 (1986)). In that vein, the Supreme Court has held that trial before a biased judge is structrual error, Tumey v. Ohio, 273 U.S. at 522-24, 535, as is trial before a jury whose impartiality has been fatally compromised, Turner v. Louisiana, 379 U.S. at 471-74. See U.S. v. French, 904 F.3d 111, 119 (1st Cir. 2018). Truly, the First Circuit is not alone. In 1992, the Eighth Circuit in Armontrout, found structural error only after Petitioner demonstrated jurors were actually biased. See Johnson v. Armontrout, 961 F.2d 748, 753 (8th Cir. 1992); Cf. Princile Brief, Pgs. 25-34.

Finally, certiorari should be granted to address whether juror bias is structural error, and to declares that Strickland's prejudice does not apply. As applied, certiorari is a proper vehicle in this case because this Honorable Court can find that this Court has clearly concluded that a biased adjudicator, be it judge or jury, cannot be considered harmless. Therefore, the Respondent's argument is misplaced and this Honorable Court can find that Petitioner has met his burdens of proof to entitle him to relief, even under the AEDPA's doctrine of Section 2254(d).

IV. CONCLUSION:

For the reasons explained above, coupled with Petitioner's principal brief, this Honorable Court should reject the Respondent's futile assertions, and grant certiorari to determine the ripe and controverted issues at bar. Further, this Honorable Court should grant certiorari because, essentially, the Respondent agrees and request this Honorable Court to answer the Respondent's own questions presented in his brief in opposition. Therefore, this is the proper case to grant certiorari and answer the controverted issues at bar.

Respectfully Submitted,

Jerry Lee Canfield
#01848978 - Coffield Unit
2661 Fm 2054
Tenn. Colony, Texas 75884
Pro se litigant.

DATE: May 09, 2022.

V. INMATE DECLARATION:

I, Jerry Lee Canfield, being incarcerated in the TDCJ-CID, Coffield Unit in Anderson County, Texas, declares that the foregoing is true and correct under the penalty of perjury. Executed on this 9th day of May, 2022.

Jerry Lee Canfield
#01848978 - Coffield Unit
2661 FM 2054
Tenn. Colony, Texas 75884
Pro se litigant.