

No. 21-7825

ORIGINAL

Supreme Court, U.S.

FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES WYCUFF,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Charles Wycuff #719867
Allen Correctional Institution
2338 N. West St.
Lima, OH 45801

Pro Se.- Petitioner

QUESTION PRESENTED

Whether the procedural default creates a miscarriage of justice that denies Petitioner his fundamental rights to due process as guaranteed by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution where the purported evidence of trial was both prejudicial and previously barred from presentation to the jury; denied Petitioner both equal protection; and effective assistance of counsel.

LIST OF PARTIES

All Parties appear in the caption of the case on the cover page.

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- Sixth Amendment U.S. Const.
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- 28 U.S.C. §1257(A)
- 28 U.S.C. §2254

Rules

- OH. S. Ct. Prac. R. 7.08

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

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

OPINIONS BELOW

For cases from federal court:

The opinions of the United States Court of Appeal appear at Appendices A-B to the petition and is reported at 2021 U.S. App. LEXIS 35223 and 2021 U.S. App. LEXIS 23703.

The opinions of the United States District Court appears at Appendices C to the petition and is reported at 2020 U.S. District LEXIS 236824.

For case from state court:

The opinion of the highest state court to review the merits appears at Appendix D-E to the petition and is reported at *State v Charles Wycuff* 2018 Ohio 1479.

JURISDICTION

For cases from the **federal court:**

The date on which the United States Court of Appeals decided my case August 9, 2021.

A timely petition for rehearing was denied by the United States Court of Appeals on November 29, 2021 and a copy of the order denying rehearing appears at Appendix A-B.

An extension of time to file the petition for writ of certiorari was granted to April 28, 2022 on February 17, 2022 in Application No. 21A428.

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 denied my case was August 15, 2018. A copy of that decision appears at Appendix D.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution states, "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; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment of the United States Constitution states, "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.*"

The Fourteenth Amendment of the United States Constitution states, "Sec. 1. [Citizens of the United States.] 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 jurisdiction the equal protection of the laws.*"

28 U.S.C. §2254 State custody; remedies in Federal Court. (Appendix F)

STATEMENT OF THE CASE

In the case sub judice the questions of whether Petitioner was denied his constitutional rights pursuant to the Fifth, Sixth, Fourteenth Amendments of the United States Constitution through a procedural default which created a miscarriage of justice where the purported evidence of trial was prejudicial and previously barred by the court from any presentation to the jury; denied Petitioner of his equal protection and double jeopardy protection, and effective assistance of counsel.

Petitioner was indicted on November 7, 2014 by an Auglaize County Grand Jury on 54 counts consisting of rape, gross sexual imposition, sexual battery, pandering sexual oriented matter involving a minor and sexual violent predator specifications.

On November 25, 2014 Auglaize County Court of Common Pleas determined that Petitioner could not receive a fair and impartial trial and subsequently ordered that venue be transferred to Franklin County.

On October 6, 2015 Petitioner commenced trial as charged and was subsequently adjudicated guilty on all charges except pandering sexual oriented matter involving a minor and sentenced to an aggregate term of four(4) consecutive life sentences and one hundred and five(105) years to be served consecutively to the life sentences to be served in the Ohio Department of Rehabilitation and Corrections. On November 6, 2015, through counsel, Petitioner filed a timely Notice of Appeal.

Petitioner appealed his conviction to the Ohio Tenth District Court of Appeals contending that he, in fact, was denied his right to due process and a fair trial where the State was allowed to present cumulative and overly prejudice evidence regarding alleged bad acts and prior bad acts which the trial court previously barred the State from presenting to the jury; and where counsel was ineffective for having not objected, all in violation of his Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

The Court of Appeals on April 17, 2018 disagreed and instead held that "to the extent that some of the physical abuse evidence may have been unnecessarily cumulative, the admission of such evidence amounts to harmless error."; that "although 'the prosecution may not initiate questioning to establish a criminal defendant's propensity for violence in a trial or violent offense', a defendant 'may introduce testimony, through himself or others of a relevant character trait that would tend to prove he acted in conformity therewith on a particular occasion'." "Thus, appellant testified N.F.'s conduct essentially provoked him to use physically violent means of discipline. Accordingly, when appellant testified that, in general, he was not a

violent person, he opened the door for the State to ask about specific instances of violence which were directed towards victims other than N.F.”; that “counsel’s choice not to object to the physical abuse evidence, or to request additional limiting instructions on the physical abuse evidence, were tactical decisions which do not support an ineffective assistance of counsel claim.”, that “the prosecutor’s comment was not improper vouching”, that “counsel was not deficient in failing to object to this statement [“I guess in any rape case the victim has to be lying. Right? Because if the victim is telling the truth, then the defendant has trouble. Right? So every defense in a rape case is the victim lying, and then” the defense has to “try to scramble to figure out a reason why.”] as the prosecutor was fairly responding to appellant’s testimony that N.F. had lied about the sexual abuse allegations. Moreover, there is no reasonable probability that, had counsel objected, the result of the trial would have been different.”, “Trial counsel could have reasonably chosen not to object to avoid drawing undue attention to the prosecutor’s brief and fleeting comment.”, “The verdict captions did not insinuate appellant’s guilt.”; Although appellant argues the failures of his trial counsel should be considered cumulatively, because none of appellant’s individual claims of ineffective assistance have merit, appellant cannot establish a right to relief simply by joining those claims together.”; “However, the verdict captions at issue do not present the manifest miscarriage of justice necessary to support a showing of plain error.”, Accordingly, because the record contains evidence which separately supports the conduct charged in each count, appellant fails to establish prejudice, and the misstatements in the verdict captions do no amount to plain error.” “Accordingly, as separate conduct supports the counts, the court merged the lesser-included offenses into the greater offenses and sentenced appellant only on the greater offenses. Appellant fails to demonstrate a double jeopardy violation”.

Petitioner sought a Jurisdictional Appeal to the Supreme Court of Ohio on May 23, 2018 contending the aforementioned. Absent any response by the State, the Supreme Court of Ohio subsequently declined to accept jurisdiction of the appeal pursuant to S. Ct. Prac. R. 7.08(B)(4) on August 15, 2018.

On July 13, 2018 Petitioner filed an Application to reopen with the Tenth Appellate District Court of Appeals. The State filed a Memorandum Opposing Application for Reopening. And on March 12, 2019 the appellate court denied Petitioner’s Application.

Petitioner also filed before the Court of Common Pleas, Franklin County a Petition to Vacate or Set Aside Judgment of Conviction or Sentence on June 17, 2017, and on December 18, 2019 a Delay Motion for Leave to File a Motion for New Trial and Post-Conviction Relief and

Motion for New Trial based on Newly Discovered Evidence and/or Post-Conviction Relief of which no ruling(s) have been rendered.

On August 11, 2019 Petitioner filed pursuant to 28 U.S.C. §2254 a Habeas Corpus petition seeking relief from his adjudication in the Franklin County, Ohio Common Pleas Court and subsequent State appellate court decisions which are contrary to or an objectively unreasonable application of clearly established precedent of the United States Supreme Court. 28 U.S.C. §2254(d)(1), *Harrington v Richter* 562 U.S. 86, 100 (2011), *Brown v Payton* 544 U.S. 133, 140 (2005), *Bell v Cone* 535 U.S. 685, 693-694 (2002), *Williams v Taylor* 529 U.S. 362, 379 (2000).

On November 4, 2019 Respondent filed an Answer/Return of Writ asserting that "There is no Supreme Court precedent that the trial court's decision could be deemed 'contrary to', under AEDPA", that "Petitioner's claims are not cognizable in federal habeas review", and are thus procedurally defaulted.

On February 3, 2020 the District Court Magistrate recommended that Petitioner's habeas corpus be dismissed due to the procedural default of his claims and/or the lack of a basis for relief. Subsequently on December 16, 2020 the District Court dismissed the habeas petition and declined to issue a certificate of appealability and *Forma Pauperis* status.

On December 30, 2020 Petitioner filed with the District Court a Notice of Appeal, and with the U.S. Sixth Circuit Court of Appeals a request for Certificate of Appealability which was subsequently denied August 9, 2021. Petitioner on October 11, 2021 filed a Petition for Panel Rehearing that was denied on November 29, 2021.

Petitioner contends that the federal district and appellate court abused its discretion and perpetuates a miscarriage of justice.

Petitioner asks this Court to review District Court's judgment and GRANT Petitioner's Writ of Certiorari.

REASON FOR GRANTING THE PETITION

The Court Should Grant Certiorari to Clarify Procedural Default in Relation to *Pro Se.* Filing and a Fundamental Miscarriage of Justice.

I. Procedural Default and *Pro Se.* Filing

This court should grant review in this case to provide guidance on how to apply the procedural default doctrine, an issue that has confounded, the lower courts.

The United States Supreme Court has emphasized that “as a general matter, the burden is on the petitioner to raise his federal claim in the State courts at a time when state procedural law permits its consideration on the merits, even if the State court could have identified and addressed the federal question without its having been raised.” *Bell v Cone* 543 U.S. 447, 451 n.3 (2005).

Normally, a federal habeas court will consider default in the State courts to have occurred if the last “reasonable state judgment rejecting a federal claim” makes a plain statement of such state procedural default. *Ylst v Nunnemaker* 501 U.S. 797, 803 (1991). No such statement is necessary if the relevant issues were presented at all to the state court(s). *Harris v Reed* 489 U.S. 225, 263 n.9 (1989).

This Court in *Gray v Netherland* 518 U.S. 152, 162 (1996) held that “failure to properly present the federal grounds to the State courts constitutes procedural default or waiver barring federal habeas review. And when the habeas petitioner has failed to fairly present to the State courts the claim on which he seeks relief in federal court, and the opportunity to raise that claim in State court has passed, the petitioner has procedurally defaulted that claim”. *O’Sullivan v Boerckel* 526 U.S. 838, 853-854 (1991).

In the case sub judice Petitioner sought relief to the Supreme Court of Ohio pursuant to S. Ct. Prac. R. 7.08(B)(4) utilizing a *Pro Se.* packet created by the Ohio Public Defender’s Office titled “*Pro Se.* Packet for Memorandum in Support of Jurisdiction (MISJ) to the Ohio Supreme Court”. In a section titled “Should I file?” it states:

You should file if you want to continue pursuing your appeal and think your case presents a “substantial constitutional question” or “an issue of public or great general interest”. This is a very difficult test to meet. The primary concern of the Supreme Court is not correct errors in lower court decisions, but to decide cases presenting issues of importance beyond the particular facts and parties involved.

You must file with the Ohio Supreme Court if you want to pursue your claim in federal court. Federal habeas actions are limited to the federal constitutional claims that were presented in you

direct appeal and later appeal to the Ohio Supreme Court. You must include references to U.S. Supreme Court cases and the U.S. Constitution in your argument if you want to be able to continue arguing your issues in federal court. If the Ohio Supreme Court does not accept your case, that will not reflect poorly on you in federal court or be considered a "decision on the merits".

Petitioner having absolutely no legal astute, legal training, attorney, or able to acquire assistance through the institutional law library at the facility where he was being housed left him with no option other than to file his timely *Pro Se*. Application according to the instructions in the best manner capable in order to preserve an appeal for federal review.

This Court held that pleadings "however inartfully pleaded" are held "to less stringent standards than formal pleadings drafted by lawyers..." *Huges v Rowe* 449 U.S. 5, 10 (1980) citing *Haines v Kerner* 404 U.S. 519, 520-521 (1972) where this Court also held "such a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. citing *Erikson v Pardus* 551 U.S. 89, 94 (2007) quoting *Estelle v Gamble* 429 U.S. 97, 106 (1976) where this this Court again held "*pro se*. document is to be liberally construed".

The lower courts are intentionally holding Petitioner to the exact standard it renders for an attorney, paralegal, or pundit vested with some degree of legal knowledge.

Petitioner posits that procedural default may be excused upon a showing of "cause" for the procedural default and "actual prejudice" from the alleged error. Demonstrating cause requires showing that an 'objective factor external to the defense impeded... efforts to comply with the state procedural rule. *Murray v Carrier* 477 U.S. 478, 488 (1986).

As shown Petitioner sought a timely appeal to the Ohio Supreme Court following the information on the *Pro Se*. application to the best of his comprehension. Petitioner contends that the State procedural rule on which the State relies to establish a procedural default is inadequate to bar federal relief. The State court did not dismiss or reject Petitioner's claims based on any failure to comply with procedural rules. Whereas this Court in *Cone v Bell* 556 U.S. 449, 463-469 (2009) held that "when a State court declines to find that a claim has been waived by a petitioner's alleged failure to comply with state procedural rules, our respect for the State court judgment counsels us to do the same. Although we have an independent duty to scrutinize the application of state rules that bar our review of federal claims...we have no concomitant duty to apply state procedural bars where State courts have themselves declined to do so", thus the lower courts cannot claim that the Petitioner's default deprived the State courts of a fair opportunity to dispose of the claim.

II. Constitutional Arguments

Both the Fifth and the Fourteenth Amendments forbid the denial of life, liberty, or property "without due process of law". And under the Sixth Amendment, criminal defendants have a right to trial by an impartial jury drawn from the State and district where the crime allegedly occurred. Petitioner was sentenced to an aggregated sentence of -4- consecutive Life terms plus 105 years to be served consecutive to the Life terms. The constitutionality of Petitioner's arguments lie in having been denied a fair and impartial trial, and effective assistance of counsel.

Petitioner set before the lower court the following four meritorious arguments,

Ground One: Petitioner was denied his fundamental rights to due process and a fair trial as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution when the State presented prejudicial and unindicted evidence regarding prior bad acts.

Ground Two: Petitioner was denied his fundamental rights to due process and a fair trial as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution when the trial court allowed the State to cross-examine petitioner on prior bad acts that were previously determined to be cumulative and prejudicial and barre from being presented to the jury.

Ground Three: Petitioner was denied his fundamental rights to due process and effective assistance of counsel as guaranteed by the Fifth Amendments of the United States Constitution where counsel failed to object to the overwhelming and prejudicial evidence.

Ground Four: Petitioner was denied his fundamental rights to due process and double jeopardy protections as guaranteed by the Fifth Amendment of the United States Constitution.

that announced to the lower court a shrewd deprivation of Petitioner's constitutional rights. The due process clause requires the State in criminal prosecutions to prove guilt beyond a reasonable doubt. *In re Winship* 397 U.S. 358 (1970). This Court has likewise determined the *Fourteenth Amendment* is to be construed liberally, to carry out purposes of its framers.

Strauder v West Virginia 100 U.S. 303 (1880). Further, that no hard fast rule can be laid down as to what is, or is not, due process, pattern of due process is picked out in facts and circumstances of each case. *Brock v North Carolina* 349 U.S. 424 (1953), and that protection of individual from arbitrary action is the very essence of due process of law. *Slochower v Board of Higher Education* 350 U.S. 551 (1956).

In respect to the miscarriage of justice the State was permitted to inject an extensive and overly prejudicial amount of "prior bad acts" evidence regarding unindicted acts of alleged physical abuse of Nathan Fisher. The trial court then failed to issue limiting instructions to the witnesses providing testimony of "prior bad acts" evidence, and further failed to provide jury

instructions on how jurors were to use "prior bad acts" evidence. These errors lie in violation of Petitioner's right to due process and to receive a fair and impartial trial according to *Fourteenth Amendment*, *Cupp v Naughten* 414 U.S. 141, 144, 94 S. Ct. 396 (1973). This testimony failed to produce probative value of any sort. In fact, the testimony of "uncharged incidents of physical abuse" became so inflammatory that the trial court, *sua sponte*, intervened during the State's first witness. And regardless to the court interjecting that "Nathan Fisher had testified sufficiently on this issue" the State continued its presentation of inflammatory and prejudicial testimony before the jury prompting the trial court to decline admitting exhibits related to this testimony, then subsequently barred an additional State's witness from testifying, thus proving just how overly concerned the court was regarding the State's presentation and the cumulative effect it suspected it would have upon the jury.

Petitioner contends that the Ohio Rules of Evidence, as does the Federal Rules of Evidence, prohibits this exact admissibility, i.e. other-acts or character evidence unless offered for a permissible purpose. Ohio Rule of Evidence 403, 404, and §2945.59 of the Ohio Revised Code, Ohio Rules of Evidence 402 further requires that only relevant evidence be admitted during trial. see also *Huddelston v United States* 485 U.S. 681, 688 (1988) where this Court held "the determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other factors appropriate for making decisions of this kind under rule 403". Moreover, this Court in *Michelson v United States* 335 U.S. 469, 475-476 (1948) held "courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, *Greer v United States* 245 U.S. 559 (1918), but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." Such actions thereby constitute a cause and prejudice that excuses procedural default.

The Jeopardy Clause of the *Fifth Amendment* provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb”. In *Benton v Maryland* 395 U.S. 784 (1969) this Court held the double jeopardy clause binding on State’s. The double jeopardy limitation may seem straightforward at a glance, but, as Justice Rehnquist noted in *Albernaz v U.S.* 450 U.S. 333, 343 (1981) the case law in the area of double jeopardy comprises “a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator”. The development of this right in the United States has not been limited to successive prosecutions. *Ex parte Lange* 85 U.S. 163, 173 (1873) this Court held that the “Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it”.

This Court in *North Carolina v Pearce* 395 U.S. 711, 717 (1969) outlines the three protections safeguarded by the Clause: “It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.” Petitioner contends that his right to be free from double jeopardy was violated through the State’s actions and which denied him a fair and impartial trial. And any procedural default for having not properly exhausted this argument with the State’s highest court should therefore be waived and Petitioner’s cause and prejudice substantiated.

II a. Ineffective Assistance of Counsel

This Court has keenly held that in order to establish ineffective assistance of counsel pursuant to the Sixth Amendment, Petitioner must demonstrate that his counsel’s performance was deficient and that he suffered prejudice as a result. *Strickland v Washington* 466 U.S. 688, 687 (1984), *Yarborough v Gentry* 540 U.S. 1, 5 (2003), *Padilla v Ky.* 559 U.S. 356, 371 (2010). To make this showing Petitioner must overcome the “strong presumption” that his counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, at 687-689. “Strategic choices made after thorough investigation of law and fact relevant to plausible options are virtually unchallengeable”. *Id.*, at 690, and where Petitioner fails to overcome the presumption that the challenged actions might be considered sound trial strategy a court may not find ineffective assistance. *Id.*, at 689.¹

¹ Quoting *Michel v Louisiana* 350 U.S. 91, 101 (1955), *Hodge v Haeberlin* 579 F.3d 627 (6th Cir. 2009)

In order to establish prejudice, Petitioner must prove that a reasonable probability exist that, but for counsel's errors, the result of the criminal proceedings would have been different. *Strickland*, at 694-695. This means Petitioner must show a substantial, not just "some conceivable" effect, on the outcome of the proceedings. *Id.*, at 693, *Harrington*, *supra*, at 791.

Petitioner contends trial counsel was ineffective when he failed to object to the State's usage of overwhelming and highly prejudicial evidence, failed to request a limiting instruction for each witness that offered testimony regarding "prior bad acts", failed to request final jury instruction regarding how the jury could consider the evidence in question, failed to object during closing regarding juror's usage of "prior bad acts" evidence for other purposes, failed to object to improper and prejudicial commentary from the State during trial and closing argument, and failed object to inflammatory and prejudicial language contained on the verdict from to differentiate similar counts. These actions of counsel denied Petitioner his right to effective assistance of counsel, and absence counsel's ineffective behavior the results of the trial would have produced a not guilty verdict, not just conceivable but substantial. *Id.*, at 112.

Trial counsel's action impressed upon the jury a level of prejudice and guilt the could not be cured through any instructive or curative statement. To allow "prior bad acts" evidence of physical abuse unrelated to the case in chief or allowing the State to posture that the "prior bad acts" was proof that Nathan Fisher's testimony was reliable or possibly accurate was wholly deficient and fell below an objective standard of reasonableness. Trial counsel's actions in not objecting to the State's closing argument that the evidence could be utilized for other purposes, or requesting limiting instruction was wholly deficient and fell below an objective standard of reasonableness.

Petitioner further argues that counsel's failure to object to the State's "impressing its own personal beliefs and opinions" when it stated "I would agree with that" where Petitioner, during cross-examination stated he thought it was stress that caused Nathan to wet his pants and concluded "something was going on". In a sarcastic mannerism the State commented "I would agree with that" as if to psychologically infer upon the jury something nefarious or insidious.

Trial counsel also failed to object to "incited inflammatory language" utilized in the verdict forms to depict and identify the alleged conduct specific to the indicted counts and testimony meant to heighten an idea of guilt. Language such as "Fellatio-Lori with Nathan Fisher-1st Incident" for count 38; "Fellatio-Victim on defendant, Lori present" for count 49; "Anal Intercourse-defendant on Victim, defendant's Bedroom Incident" for count 27; "Fellatio-Defendant on Victim – 1st Anal Incident" for count 17. The incendiary language written across the verdict forms expressed explicit ideas and/or opinions of Petitioner's guilt upon the jury.

Such could imply that every juror was being disingenuous or deceitful in their self-declared impartiality. And each juror's ability to disregard this prejudicial information diminishes when the prior exposure...evokes strong emotional responses or such an identification with those directly affected by the conduct. These biases often go unrecognized or ignored. *United States v McVeigh* 918 F. Supp. 1467, 1473 (1996). Moreover, such remarks are improper and prejudicially affects the substantial rights of the Petitioner. *United States v Dorr* 636 F.2d 117, 120 (1981) citing *United State v Garza* 608 F.2d 659, 663 (1979), *Berger v United States* 295 U.S. 78, 88 (1995). Comments that apply with equal force to Ohio prosecuting attorneys and of which trial counsel should have objected to, and upon which an cumulative ineffectiveness counsel's failures denied Petitioner his guaranteed right to effective assistance of counsel.

Petitioner contends that his counsel's conduct was objectively unreasonable based on the totality of circumstances so as to constitute ineffective assistance. *Strickland*, at 690, *Brower v Wolfe* 2008 U.S. Dist. LEXIS 35688 (Apr. 29, 2008), and that his actions produced prejudice to a level of warranting a "case by case" examination of the totality of circumstances, and that in determining whether an attorney's conduct is deficient, the court stressed that "the proper standard for attorney performance is that of reasonable effective assistance", *Strickland*, "viewed as of the time of counsel's conduct", and considered "in light of all the circumstances". *Id.*, at 690, which in itself shows that Petitioner can show that an objection by counsel would have in fact been successful. *Coley v Bagley* 706 F.3d 741, 752 (6th Cir. 2013). And that reasonable jurist would debate the lower courts determination that the State appellate court did unreasonably apply *Strickland* or make an unreasonable determination of the facts when it denied Petitioner's claim.

Because the lower courts are not applying the correct standards, this Court's review is warranted.

CONCLUSION

Petitioner Wycuff respectfully request this Court issue a writ of certiorari.

Respectfully Submitted,



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