

No. _____

In the Supreme Court of the United States

TERRY FROMAN,
Petitioner,

v.

STATE OF OHIO
Respondent.

*ON PETITION FOR WRIT OF CERTIORARI TO
THE OHIO COURT OF APPEALS*

PETITION FOR WRIT OF CERTIORARI

OFFICE OF THE OHIO PUBLIC DEFENDER

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CAPITAL CASE — NO EXECUTION DATE SET
QUESTIONS PRESENTED

Six members of Terry Froman’s capital jury provided answers on their questionnaires that demonstrated that they harbored racial bias. None were meaningfully questioned about their bias nor were any struck, either by defense counsel or the trial court. In light of that history, this case presents the following questions:

- 1. Whether a capital defendant is denied his right to an impartial jury when admittedly racially biased jurors were allowed to determine his guilt and punishment.**

- 2. Whether a capital defendant is denied his right to counsel when his trial attorneys allowed admittedly racially biased jurors to determine his guilt and punishment.**

LIST OF PARTIES

Petitioner, Terry Froman, an Ohio death row inmate housed at Chillicothe Correctional Institution, was the appellant in the Ohio Court of Appeals.

Respondent, the State of Ohio, was the appellee in the Ohio Court of Appeals.

RELATED PROCEEDINGS

All proceedings directly related to this petition include:

1. Ohio Supreme Court Direct Appeal Opinion: *State v. Froman*, 162 Ohio St.3d, No. 2020-Ohio-4523.
2. Trial Court Post-Conviction Opinion: *State v. Froman*, Case No. 14 CR 30398, Warren County Common Pleas Court, Journal Entry, Filed November 4, 2020.
3. Court of Appeals Post-Conviction Opinion: *State v. Froman*, 12th Dist. Warren Co. No. CA2020-12-080, 2022-Ohio-2726.
4. Ohio Supreme Court denial of jurisdiction: *State of Ohio v. Terry Froman*, Entry, Ohio Supreme Court Case No. 2022-1188

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PETITION FOR A WRIT OF CERTIORARI

The Office of the Ohio Public Defender, on behalf of Petitioner Terry Froman, respectfully petitions for a writ of certiorari to review the judgment of Ohio's Twelfth District Court of Appeals.

OPINIONS BELOW

The Journal Entry of the Supreme Court of Ohio, *State of Ohio v. Terry Froman*, Ohio Supreme Court Case No. 2022-1188 (jurisdiction denied on December 27, 2022) is attached hereto as Appendix A (App.). The decision of Ohio's Twelfth District Court of Appeals is available at *State v. Froman*, 12th Dist. Warren Co. No. CA2020-12-080, 2022-Ohio-2726, and is attached hereto as Appendix B. The Warren County Court of Common Pleas Journal Entry, *State of Ohio v. Terry Froman*, Case No. 14 CR 30398, Warren County Common Pleas Court, Journal Entry, Filed November 4, 2020, is attached hereto as Appendix C.

JURISDICTIONAL STATEMENT

The Twelfth District Court of Appeals issued its opinion on the merits on August 8, 2022. App. B. A Memorandum in Support of Jurisdiction was filed with the Ohio Supreme Court. Jurisdiction was denied by the Ohio Supreme Court on December 27, 2022. App. A. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

This case involves the following Amendments to the United States Constitution:

A. Sixth Amendment, which provides in pertinent part:

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...

B. Fourteenth Amendment, which provides in pertinent part:

No State shall...deprive any person of life, liberty, or property, without due process of law....

STATEMENT OF THE CASE

On June 15, 2017, a panel that included at least six racially biased jurors recommended that Terry Froman be sentenced to death. The trial court followed the jury's recommendation and sentenced Froman to die on June 22, 2017.

These six jurors had each made their racial bias plainly known in their initial jury questionnaires. And yet, Froman's trial counsel did not seek to strike these jurors. Nor did counsel meaningfully address the issue of race in voir dire. Further, the trial court itself, aware of the racial bias admitted to by the members of the jury, failed to strike any of the jurors from the panel.

The racial bias of the jurors is not something that has to be inferred or assumed in this case – each of the six jurors in question provided answers on their questionnaires that explicitly indicate the presence of racial bias.

i. Juror #49.

Juror #49 indicated that she “strong[ly] agree[d]” that “some races and/or ethnic groups tend to be more violent than others”, and in the space provided wrote

“statistics show there are more black people commit (sic) crimes. And certain religions have violent beliefs.” She further noted that racial discrimination against Black people was “not a problem” and reiterated a “bad” experience she had with a Black man. *Id.* Juror #49 was seated as an alternate during the trial phase but was subsequently seated on the panel during the penalty phase and voted for death.

Trial counsel asked few questions of Juror #49 and failed to ask her even a single question designed to elicit whether she harbored racial bias even when she had expressly indicated that she did. Tr. vol. 41, pp. 110-16; vol. 42, p. 200. No challenge for cause or preemptory challenge was made. Tr. vol. 41, pp. 110-16; vol. 42, p. 200.

ii. Juror #23.

Juror #23 indicated that she “strong[ly] agree[d]” that “some races and/or ethnic groups tend to be more violent than others”, and in the space provided for further explanation, she wrote “radical [I]slam.” When asked if she believed whether racial discrimination against Black people is a problem in our society, she failed to respond to that specific question, and instead wrote that she “think[s] it goes both ways—[and] that is a problem.” *Id.* She further indicated that she agreed that “people are overly sensitive about racial and ethical jokes.” *Id.* 573, 574.

Trial counsel asked few questions of Juror #23 and failed to ask her even a single question designed to elicit whether she harbored racial bias even when she had expressly indicated that she did. Tr. vol. 40, pp. 285-95, vol. 42 pp. 144-46. No challenge for cause or preemptory challenge was made. Tr. vol. 42 pp. 146-47.

iii. Juror #46.

Juror #46 indicated that she “agree[d]” that “some races and/or ethnic groups tend to be more violent than others.” She offered no further explanation and trial counsel failed to ask a single question relating to this expression.

Trial counsel asked few questions of Juror #46 and failed to ask her even a single question designed to elicit whether she harbored racial bias even when she had expressly indicated that she did. Tr. vol. 42, pp. 184-88. No challenge for cause or preemptory challenge was made. Tr. vol. 42 pp. 51-54.

iv. Juror #5.

Juror #5 indicated that he “agree[d]” that “some races and/or ethnic groups tend to be more violent than others” and in the space provided, failed to offer any further explanation. When asked if he believed whether racial discrimination against Black people is a problem in our society, he indicated that he felt it is “[n]ot too serious” of a problem. *Id.*

Trial counsel asked few questions of Juror #5 and failed to ask him even single question designed to elicit whether he harbored racial bias even when he had expressly indicated that he did. Tr. vol. 40, pp. 233-34, 239, 253; vol. 42 pp. 85-6, 115, 122, 134-35. No challenge for cause or preemptory challenge was made. Tr. vol. 40, p. 253.

v. Juror #13.

Juror #13 indicated that he “agree[d]” that “some races and/or ethnic groups tend to be more violent than others” and in the space provided, failed to offer any further explanation. His response to being asked if he had been exposed to people

who exhibit racial, sexual, religious, and/or ethnic prejudice, was that he has friends that use inappropriate language. *Id.* Further, he believed racial discrimination against Black people is “[n]ot too serious” of a problem. *Id.*

Trial counsel asked few questions of Juror #13 and failed to ask him even single question designed to elicit whether she harbored racial bias even when she had expressly indicated that she did. Tr. vol. 40, p. 238; vol. 42, pp. 114, 123, 133-34. No challenge for cause or preemptory challenge was made. Tr. vol. 40, p. 254.

vi. Juror #19.

Juror #19 indicated that he felt racial discrimination against Black people is a “somewhat serious problem” and that being exposed to people who use racially offensive language “all the time[] is [just] life.” He also indicated that he had a “negative or frightening experience with a person of another race” stating that while working in a grocery store, he had been “threatened by [an] African-American with violence.” *Id.* He further indicated that he had no opinion as to whether certain races were more violent than others, even when presented with the option of disagreeing or strongly disagreeing with that statement. *Id.*

Trial counsel asked few questions of Juror #19 and failed to ask him even a single question designed to elicit whether he harbored racial bias even when he had expressly indicated that he did. Tr. vol. 40, pp. 286-87, 289-91; vol. 42, pp. 114, 132-33. No challenge for cause or preemptory challenge was made.

Despite the explicit bias openly indicated by the answers on their questionnaires, neither side nor the trial court addressed race with the venire in any

meaningful way. The prosecutor simply asked whether everyone agreed that “race should not play any role in your discussions” and whether being perceived as racist for voting for Froman’s death would prevent them from doing so. Tr. vol. 41, pp. 36–38, 92–94, 179–82, 243–45; Tr. vol. 42, pp. 51–53. Trial counsel limited their questions to whether White jurors would listen to a Black juror during deliberation. Tr. vol. 41, pp 44–45, 48; vol. 42, pp. 67, 132. Instead of meaningfully searching out racial bias within a panel that had made it explicit, trial counsel simply told potential jurors, “I assume none of you people are racist. There is no reason for me to believe that. That would be a totally false impression because there’s nothing to indicate that.” Tr. vol. 42, p. 55. The long form questionnaires of the jurors indicated otherwise.

The trial court similarly failed to make any meaningful inquiry with the jury about race. Instead, the court merely commented to the panel, “Is there anyone that would feel reluctant to vote for the death penalty for fear of how they may be perceived in this case? I see no hands. Does everyone agree that race shouldn’t play any factor at all in the decision making process as to whether Mr. Froman gets the death penalty of not?” Tr. vol. 41, p. 94.

The case proceeded to trial with the biased jurors on the panel, excepting Juror #49, who sat as an alternate. Following the guilt phase of the trial, Juror #49 was seated as part of the panel for the punishment phase. Terry Froman was sentenced to death on June 22, 2017.

He timely filed a notice of appeal to the Ohio Supreme Court, which ultimately affirmed his convictions and sentence. *State v. Froman*, 162 Ohio St.3d, No. 2020-

Ohio-4523 (2020). In its opinion, the Ohio Supreme Court stated that the trial record “does not demonstrate that the jurors were unable to be impartial.” *Id.* at ¶ 61.

Concurrent to his direct appeal, Froman filed a post-conviction petition on October 11, 2018. The petition was amended on September 6, 2019. The trial court denied relief on all claims in the post-conviction petition on November 4, 2020, relying principally on the doctrine of *res judicata*. *State v. Froman*, Case No. 14 CR 30398, Warren County Common Pleas Court, Journal Entry, Filed November 4, 2020, attached as Appendix C. Froman timely appealed that denial to Ohio’s Twelfth District Court of Appeals, which affirmed the decision of the trial court, agreeing with its *res judicata* analysis. *See State v. Froman*, 12th Dist. Warren Co. No. CA2020-12-080, 2022-Ohio-2726, attached as Appendix B.

The Ohio Supreme Court declined to accept jurisdiction. *State of Ohio v. Terry Froman*, Ohio Supreme Court Case No. 2022-1188 (jurisdiction denied on December 27, 2022), attached in Appendix at A.

REASONS FOR GRANTING THE WRIT

A capital defendant is denied his constitutional rights when his jury panel is tainted by racial bias.

A. Introduction

“[T]he Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury.” *Ross v. Oklahoma*, 487 U. S. 81, 85 (1988).

One of counsel’s “most essential responsibilities” is to protect that “constitutional right to a fair and impartial jury by using voir dire to identify and ferret out jurors who are biased against the defense.” *Miller v. Francis*, 269 F.3d 609,

615 (6th Cir.2001); *see also*, *United States v. Blount*, 479 F.2d 650, 651 (6th Cir.1973); *Rosales-Lopez v. United States*, 451 U.S. 182, 188, 101 S.Ct. 1629 (1981); *Mu'Min v. Virginia*, 500 U.S. 415, 431, 111 S.Ct. 1899 (1991). When done the right way, “voir dire can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise.” *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 143–44, 114 S.Ct. 1419 (1994).

While counsel has a duty to protect defendant’s from – and ferret out – racial bias in a jury, this Court has recognized that the “obligation to impanel an impartial jury lies in the first instance with the trial judge.” *Rosales-Lopez*, 451 U.S. at 189. If counsel fails in their duty, the responsibility to seat an impartial jury rests with the trial court, which has the authority to act sua sponte. *See Hughes v. United States*, 258 F.3d 453, 464 (6th Cir.2001).

This Court has held that racial bias not only deprives a defendant of his right to an impartial jury, but that the presence of such bias in a jury “poisons public confidence in the judicial process.” *Buck v. Davis*, 580 U.S. 100, 103, 137 S. Ct. 759, 778 (2017). When faced with such a deprivation of a constitutional right and an undermining of public confidence in our system of justice, the seating of even one racially biased juror cannot be allowed to stand.

B. The lower courts denied Froman his constitutional rights to an impartial tribunal and trial counsel failed in their constitutional obligation to protect Froman from racial bias in the jury.

Impartiality is the cornerstone of the Constitution’s jury trial protections. *Gray v. Mississippi*, 481 U.S. 648, 668, 107 S.Ct. 2045 (1987) (“[T]he impartiality of the

adjudicator goes to the very integrity of the legal system.”). Yet at least six jurors indicated they held racially biased views on their questionnaires. This implicit, harbored racism that these jurors held meant that “...the color of [Froman]’s skin made him more deserving of execution.” *Buck v. Davis*, 580 U.S. 100, 119, 137 S. Ct. 759, 775 (2017). Allowing even one to sit on the jury meant that Froman’s case was heard by a panel that could not be fair and impartial due to racial bias.

Trial counsel all but avoided the subject of race entirely in voir dire, asking simply whether White jurors would listen to a Black juror during deliberations. And despite six jury questionnaires to the contrary, trial counsel stated to the panel “I assume none of you people are racist. There is no reason for me to believe that. That would be a totally false impression because there’s nothing to indicate that.” Tr. vol. 42, p. 55. No searching voir dire was done on the issue of race, nor were the individual jurors whose questionnaire answers indicated bias directly questioned on the matter. Counsel failed to ask a single question about racial prejudice.

The trial court fared no better. It only addressed race in a cursory and generalized way, making the comment to the panel, “Is there anyone that would feel reluctant to vote for the death penalty for fear of how they may be perceived in this case? I see no hands. Does everyone agree that race shouldn’t play any factor at all in the decision making process as to whether Mr. Froman gets the death penalty or not?” Tr. vol. 41, p. 94. This was despite being on notice from the juror questionnaires that racial bias was alive in the panel before it. Neither counsel nor the trial court acted to protect Froman’s constitutional right to a jury free of bias.

In dispensing with Froman's claims on the basis of *res judicata*, the lower courts ignore the fundamental constitutional violations in this case, pass over the explicit evidence of racial bias in the jury panel, and waive away evidence that explicit and insidious racial bias poisoned Froman's jury.

C. A Defendant's Right to an Impartial Jury Must be Protected.

When left unaddressed, racial bias "would risk systemic injury to the administration of justice." *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 224, 137 S. Ct. 855, 868 (2017). The Constitution requires that trial counsel strive to protect defendants from racial bias, and to ferret it out of juries. Beyond the duty of counsel, trial courts have an obligation to ensure that empaneled juries are, in fact, impartial. When members of a jury panel have explicitly expressed racial bias, generalized statements that "race shouldn't play a factor" are far from adequate to ascertain the presence of bias. And when potential jurors have explicitly expressed racial bias, a panel cannot be impartial. As such, this Court should grant the writ.

CONCLUSION

For the aforementioned reasons, Froman was denied his rights to a fair trial and to due process as guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 2, 5, 9, 10, and 16 of the Ohio Constitution. The evidence presented supports a conclusion that trial counsel abdicated their duty to protect Froman from the racial bias in his jury panel and that the trial court failed in its duty to ensure an impartial jury was empaneled. The Court should grant the

writ of certiorari, vacate the conviction, and remand the case to state court for a new trial where Froman's case can be heard by a jury free of racial bias.

Respectfully Submitted,

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