CASE NO. 24-6038 (CAPITAL CASE)
OCTOBER TERM 2024

In The
Supreme Court of the United States

ROBERT WHARTON,

***Petitioner*,**

v.

SUPERINTENDENT, S.C.I. PHOENIX, ET AL.,

***Respondents*.**

Reply in Support of Petition for Writ of Certiorari

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

ARGUMENT

This Reply responds to the arguments raised by Respondents in the Brief in Opposition ("BIO") as well as the arguments raised by Pennsylvania Office of the Attorney General in its amicus brief ("AB").

I. THIS COURT SHOULD ADRESS THE PROPER APPLICATION OF THE ONE JUROR STANDARD OF PREJUDICE WHEN WEIGHING BOTH POSITIVE AND NEGATIVE EVIDENCE.

The crux of both Respondents' and amicus' arguments is that Petitioner has failed to present a question worthy of review. Ultimately, that is a question for this Court to decide. Ironically, however, amicus' brief demonstrates why this case presents an important question that should be reviewed.

Amicus argues that there is no analytical distinction when determining the prejudice prong of a claim of ineffective assistance between the "one juror would decide the matter differently" standard of prejudice applicable to a capital sentencing and the "jury would reach a different result" standard applicable to reviewing the conviction. *Compare Wiggins v. Smith*, 539 U.S. 510, 536 (2003)), *with Strickland v. Washington*, 466 U.S. 668 (1984). *See* AB at 19 ("Nor does the supposed "one juror standard" add any novelty"). Amicus sees no difference between the reasonableness of "one juror" and "juries as a whole." *Id.*

This argument fails to account for differences between a capital sentencing in a state like Pennsylvania where a non-unanimous jury verdict will result in a life sentence, and a trial where a unanimous jury verdict is required for both guilt and acquittal. At a Pennsylvania capital sentencing, a single juror's vote for life will

lead to a life sentence, but a single juror's vote to acquit will not result in any verdict at all and will lead to a new trial.

These differences are important and shape the prejudice determination. In *Wiggins*, 539 U.S. at 537, this Court recognized that in a state that does not require a unanimous verdict for a life sentence, the prejudice standard to be used in reviewing counsel's ineffectiveness is whether "there is a reasonable probability that at least one juror would have struck a different balance." *Id.* "[P]rejudice here requires *only* a reasonable probability that at least one juror would have struck a different balance regarding [Wharton's] moral culpability." *Andrus v. Texas*, 590 U.S. 806, 822 (2020) (emphasis added, internal quotations omitted).

Like the Third Circuit panel below that paid lip service to, but failed to actually apply, the "one juror" standard, amicus refuses to accept the different analyses of prejudice that are required when the verdict need not be unanimous. Indeed, amicus seems to question the validity of the one juror standard. AB at 19 (referring to the *supposed* "one juror" standard) (emphasis added). Amicus' intransient refusal to accept this Court's precedent demonstrates the need for this Court to clarify the application of the one juror standard, in a case such as this, so that other courts and prosecutors do not make the same mistake. That is why this case presents an important question worthy of this Court's review.

Respondents insist that Petitioner merely seeks error correction and fails to present any question of importance. BIO at 10-12. To be sure, Petitioner believes that the lower court erred. This is no surprise. Most petitioners come to this Court,

having lost below, believing that the lower court erred. But that is no reason to deny certiorari where the petition also presents an important question of law that this Court should settle. After all, this Court frequently will grant certiorari to correct a lower court's misapplication or misunderstanding of its precedent. In cases such as *Cullen v. Pinholster*, 563 U.S. 170 (2011), *Harrington v. Richter*, 562 U.S. 86 (2011), and *Porter v. McCollum*, 558 U.S. 30 (2009), this Court granted petitions in order to address issues concerning the proper application of the habeas statute, but also to decide whether the Courts of Appeals had properly applied the law. Here, Wharton's presentation of a question concerning the proper application of the one juror standard of prejudice, along with his contention that the Third Circuit erred, is just as worthy of review as the issues presented in *Cullen, Harrington,* and *Porter. See Andrus*, 590 U.S. 807 (granting certiorari, vacating**,** and remanding because the lower court erred in finding that counsel was not deficient).

Thornell v. Jones, 602 U.S. 154 (2024), likewise exemplifies this Court's continuing recognition that the proper application of *Strickland* prejudice is an important question worthy of this Court's review. In *Thornell*, this Court granted certiorari to determine if the Court of Appeals had improperly undervalued the weight to be given to the aggravating circumstances, and ultimately determined that it had. *Id.* at 163-64. Certiorari review was necessary to clarify and restore the proper balance of weighing aggravating and mitigating circumstances to determine *Strickland* prejudice.

Thornell did not address the impact of the one juror standard, since capital sentencing in Arizonaat that time was determined by a judge, not a jury. Thus, the important question of a proper *Strickland* balance presented in *Thornell* takes on an even greater importance here, where *Strickland* and *Wiggins* require the court to consider the impact of the evidence on any one juror. This case presents that question.

Here, the Court of Appeals grossly undervalued the weight to be given to the positive aspects of Mr. Wharton's prison behavior by any one juror. Indeed, the mitigating aspects of Mr. Wharton's record are substantial. At the time of the resentencing trial, Mr. Wharton had been in state custody for over six years. If counsel had obtained the prison records, he could have presented evidence that in the three years prior to resentencing, Mr. Wharton displayed exemplary conduct. Counsel could have presented many positive reports about his conduct, the absence of any reports of violence or threatening behavior, and expert testimony that, if sentenced to life, he could be safely housed by the DOC.

The yearly Prescriptive Program Plans documented that Mr. Wharton "maintain[s] misconduct free behavior," "sustain[s] positive housing reports," "exercise[s] routinely," "maintain[s] counselor contacts," and "continue[s] with educational development." AII-10 (citations omitted). Mr. Wharton maintained contact with family and friends. He received regular visits. He attended chapel services. Most importantly, "Wharton received no negative housing reports or negative psychiatric reports." AII-11.

Even amicus' experts conceded at the evidentiary hearing that Mr. Wharton's prison records showed significant positive attributes. Amicus' corrections expert acknowledged that Mr. Wharton's attendance at religious services, educational pursuits, good housing reports, contact with family, and lack of violence were all evidence of positive adjustment to incarceration. AII-1162, 1167, 1200, 1213, 1221.

Dr. O'Brien, the amicus mental health expert, also agreed that Mr. Wharton displayed positive traits while in custody. He agreed that Mr. Wharton's efforts to further his education represented a constructive use of his time. AII-778. He acknowledged that his prison progress reports reports documented that Mr. Wharton was polite, cooperative, and interactive with staff, and that his PPP reports showed that Mr. Wharton met his yearly institutional goals of maintaining positive contacts with his counselor, pursuing his education, and engaging in physical exercise. AII786–87; AII-828.

Even when balanced against the negative evidence of the two major misconducts committed during the earlier part of his incarceration, and the seven year old escape attempt while in county custody, there is a reasonable probability that one or more jurors would have concluded that the mitigating aspects of his record were significant, and outweighed the aggravating evidence. This is particularly true given the jury's difficulty in reaching a unanimous verdict, exemplified by the deadlock note the jury sent after seven hours of deliberation. One or more jurors wanted to vote for life. The strong mitigating evidence

contained in the prison records would have provided even greater support for that decision.

The Third Circuit, however, gave scant consideration to the mitigating aspects of the records and the positive aspects of the expert testimony—and dismissed any consideration of the jury deliberations and deadlock note. In the same way that the Court of Appeals in *Thornell* had devalued the aggravating evidence in that case, the Third Circuit devalued the mitigating evidence here. As in *Thornell*, certiorari is worthy here in order to guide the Courts to restore the proper balance to *Strickland* prejudice in light of the one juror standard of *Wiggins*.

Amicus echoes the Third Circuit's erroneous approach, albeit with sarcasm and vitriol, and likewise tries to diminish the mitigating aspects of the prison records. Amicus asserts that the positive aspects of the prison records show only that Mr. Wharton was "polite and participated in various prison activities." AB at 16. As the above discussion indicates, this is a remarkable understatement that ignores Mr. Wharton's record of non-violence over the last six years.[1] Amicus simply refuses to acknowledge that different jurors could weigh the positive and negative evidence in different ways, knowing that such an acknowledgement would concede prejudice under the one juror standard. Amicus are Pennsylvania's top prosecutors, and their unwillingness to fairly credit the positive aspects of the

[1] Amicus' allegations that Wharton assaulted a guard during a City Hall escape lack any evidentiary support and such charges were dropped at the time of his plea to the escape. Regardless, such allegations do not refute his record of no threatening or assaultive behavior in state custody.

prison records or engage with the role played by the one juror standard underscores the importance of this Court's review and guidance.

II. THE THIRD CIRCUIT'S IMPROPER APPLICATION OF HARMLESS ERROR STANDARDS SHOULD BE REVIEWED.

Again, Respondents and amicus both argue that Petitioner fails to assert any significant legal issue, but simply asks for error correction. Here too, they are mistaken.

Amicus' brief epitomizes the important legal questions in play. Mr. Wharton has argued that, under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the prosecution has the burden to prove that a constitutional error did not have a substantial or injurious effect on the verdict. Amicus denies this burden of proof, arguing that under *O'Neal v. McAninch*, 513 U.S. 432, 436-37 (1995), *Brecht* does not allocate any burden of proof. AB at 21.

The allocation of a burden of proving harmless error in a habeas corpus proceeding is an important legal question that will arise whenever a habeas court determines that constitutional error occurred during trial. The question has broad application and has not been clearly answered by this Court's precedent.

Brecht held that habeas review of the prejudicial impact of a constitutional violation examines the "substantial and injurious effect or influence in determining the jury's verdict" standard set forth in *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). *Brecht*, 507 U.S. at 622-23. The plurality opinion did not designate any burden of proof. In his concurring opinion, which provided the fifth and decisive vote, Justice Stevens wrote that the test "places the burden on prosecutors to

explain why those errors were harmless." *Brecht*, 507 U.S. at 640-41 (Stevens, J. concurring).

Amicus cites *O'Neal* for the proposition that there is no burden under *Brecht*. AB at 21. *O'Neal* reviewed a lower court's determination that placed the burden of proving harmless error on the habeas petitioner. This Court held that it was more appropriate to view harmless error in terms of grave doubt, than burden of proof. *Id.*, 513 U.S. at 437. Nevertheless, this Court held that the "risk of doubt [is] on the state." *Id.* at 439. In other words, it is the state's burden to overcome any grave doubt about whether the constitutional error had an injurious effect on the verdict. *Id.* It is error to place that burden upon the petitioner.

At best, *O'Neal* is ambiguous and that ambiguity between *O'Neal* and Justice Stevens' concurring opinion in *Brecht* should be resolved by this Court.

Mr. Wharton has argued that the harm in the confrontation error was that it allowed the jury to use his co-defendant's confession to defeat his claim that his confession had been coerced. The co-defendant's statements that Wharton killed both victims provided the jury with substantial evidence upon which to reject his claim that he was coerced, by physical violence, to confess to the police.

Amicus claims that it was not the co-defendant's confession that led to the jury's rejection of his defense, but because the evidence of involuntariness was flimsy. AB at 21. Amicus argues that the only evidence corroborating Wharton's claim that he was physically assaulted by the police was a small bruise on his head that the police testified occurred at the time of his arrest. AB at 22. This

description is at best incomplete. At trial the Commonwealth stipulated that Wharton's injury was "small laceration on the scalp" and "abrasions on the right side of his neck." NT 6/28/85, 32-33.

Regardless, it was the police testimony that was specious, because the paperwork created at the time of Wharton's arrest made no mention of any force or any injury. A report completed by Detective Brown at the time of Mr. Wharton's arrest stated, "Defendant Wharton was arrested in maroon colored, multi-length leather zipper jacket" and "did not appear to be under the influence of alcohol or narcotics and *had no apparent injuries*." AI-5174. Another detective testified at a motion to suppress that Mr. Wharton was arrested peacefully and without the use of force.[2] AI-0694. With this evidence, a jury could easily find that the police lied about the injuries at the time of the arrest and that Wharton had been injured by police using force to coerce a confession.

Amicus also argues that Mr. Wharton understates the other evidence against him by describing the prior interactions between him and the victims as mere "ill will." AB at 23. Amicus goes even further to suggest that the use of this term was an attempt to blame the victims for their own murders. *Id.* This is a feckless argument. Mr. Wharton did not coin the phrase "ill will," the Third Circuit did. The court wrote, "[t]he Commonwealth's other evidence established Wharton's ill-will toward the Harts (particularly Bradley)." *Wharton v. Vaughn*, 722 Fed. App'x

[2] This evidence also refutes amicus' claim that Wharton tried to flee at the time of his arrest.

268, 276 (2018). Amicus's spurious attack on Petitioner for using the same language used by the Court of Appeals underscores its desperate attempt to avoid this Court's review.

Granted, there was other evidence of Mr. Wharton's involvement, including previous burglaries and thefts against the Harts.[3] But his alleged confession was the centerpiece of the prosecution's case against him, and the attack on the voluntariness and truthfulness of the alleged confession was the only defense he had. The confrontation clause error undermined that defense and changed the nature of the trial.

Amicus suggests in a footnote that "it is at best unclear" whether this Court should not address the Third Circuit's application of *Brecht* because Petitioner did not seek certiorari from the Third Circuit's 2018 opinion on this ground. AB at 15, n.6. This argument is frivolous. The Third Circuit's 2018 opinion and judgement was not a final disposition of the case because it remanded the case to the district court for further consideration of the sentencing issue. Thus, it was not appropriate to seek certiorari at that time.[4]

[3] Amicus fails to acknowledge that Wharton challenged much of the other evidence it relies upon. For example, Wharton claimed that Thomas Nixon had a motive to cooperate with the prosecution, made inconsistent statements, and lied about Wharton's alleged statements to him.

[4] Although Petitioner filed a pro se certiorari petition challenging the Third Circuit's ruling on another issue, this Court's denial of such an interlocutory petition does not preclude review of other claims once judgement in the case became final following the proceedings on remand.

Finally, Respondents contend that this case is not an appropriate vehicle for review, because the Third Circuit's assumption that Petitioner's confrontation clause rights were violated is no longer valid under *Samia v. United States*, 143 S. Ct. 2994 (2024). Respondents argue that this Court would have to decide whether *Samia's* allowance of a redaction that replaces the defendant's name with "the other guy" undermines Mr. Wharton's claim that a similar redaction violated his constitutional right. BIO at 15-16.

This case is different from *Samia* because a detective's testimony that the two co-defendants (Wharton and Mason) implicated each other broke whatever protection the redaction had provided. The detective's testimony let the jury know that the "other guy" that Mason was referring to was Mr. Wharton. And since Mr. Wharton had no opportunity to cross examine Mason, his confrontation rights were violated.

In any event, granting certiorari would not require this Court to address the merits of the Sixth Amendment claim. This Court would be free to address the *Brecht* questions raised herein, and then, if necessary, remand the case to the Third Circuit to consider any remaining issues.

However, should this Court want to consider the application of *Samia* to the detective's testimony, it is free to do so. Whether the detective's testimony by itself violated Petitioner's Sixth Amendment rights and whether Petitioner's rights were violated because such testimony broke redaction are important issues, squarely presented in this case, and this Court could expand the grant of certiorari to include

these issues. If anything, Respondents' argument presents even more reason to grant review, not less.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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