

Capital Case

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2020

DAVID WAYNE ALLEN, Petitioner

vs.

BETTY MITCHELL, Warden, Respondent

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

PETITION FOR A WRIT OF CERTIORARI WITH APPENDIX

JOHN J. RICOTTA, (OH #0000778)

Counsel of Record

1360 East 9th Street, Suite 910

Cleveland, Ohio 44114

(216) 241-0715

(216) 241-9434 - fax

jjricotta@aol.com

Counsel for Petitioner

David Wayne Allen

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

Did the trial court's refusal to dismiss a biased juror from a Death Penalty Panel, deprive Petitioner Allen of protection under the Sixth and Fourteenth Amendments and were subsequent findings of the Ohio Supreme Court contrary or an unreasonable application of Supreme Court precedent?

LIST OF PARTIES

The parties are the same as those listed in the caption.

STATEMENT OF RELATED PROCEEDINGS

Opinion and Order, March 24, 2020, by the Court of Appeals for the Sixth Circuit, in *Allen v. Mitchel*, No. 02-4145, affirming the denial of Petitioner Allen's petition for a writ of habeas corpus.

Opinion and Order, October 3, 2002, by the United States District court for the Northern District of Ohio, in *Allen v. Mitchell*, No. 4:06 CV 451 denying all of Allen's habeas claims.

Opinion, by the Ohio Supreme Court, in *State v. Allen*, 653 N.E. 2d, 25 (Ohio 1995)

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW.....	i
LIST OF PARTIES	ii
STATEMENT OF RELATED PROCEEDINGS	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
CITATIONS TO OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL AND STATUTORY PROVISIONS.....	3
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE WRIT	7
CONCLUSION.....	13
APPENDIX	
Opinion in the United States Court of Appeals for the Sixth Circuit (March 24, 2020)	App. 1
Memorandum of Opinion and Order in the United States District Court for the Northern District of Ohio Eastern Division (October 3, 2002)	App. 23
Opinion in the Supreme Court of Ohio (April 25, 1995)	App. 127

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Brooks v. Drake</i> , 418 F. 3d, 328 (5th Cir. 2006)	12
<i>Conway v. Polk</i> , 453 F.3d 567 (4th Cir. 2006)	11
<i>Irvin v. Dowd</i> , 366 U.S. 717 (1961)	5, 7
<i>McDonough, Power Equip. Inc. v. Greenwood</i> , 464 U.S. 548 (1984)	11
<i>Morgan v. Illinois</i> , 504 U.S. 719 (1992)	5, 7, 8, 10
<i>Patton v. Yount</i> , 467 U.S. 1025 (1984)	6, 8, 9
<i>Sanders v. Norris</i> , 329 F. 3d 787 (8th Cir. 2008)	12
<i>Smith v. Phillips</i> , 455 U.S. 209 (1982)	10, 11
<i>State v. Tyler</i> , 50 Ohio St. 3d 24 (1990)	5, 7
<i>United States v. Burr</i> , 25 F. CAS. 49 (D.Va. 1807)	10
<i>United States v. Wood</i> , 299 U.S. 135 (1936)	6, 9
 Constitution and Statutes	
U.S. Const. amend. VI	3, 7
U.S. Const. amend. XIV	3, 7
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2254(d)	3

PETITION FOR WRIT OF CERTIORARI

David W. Allen, an inmate housed at the Chillicothe Correctional Institution in Chillicothe, Ohio under a sentence of death, respectfully petitions the Supreme Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

CITATIONS TO OPINIONS

The Order and Opinion of the Court of Appeals for the Sixth Circuit affirming the denial of Petitioner Allen's petition for a writ of habeas corpus is at *Allen v. Mitchell*, No. 02-4145, (6th Cir. March 24, 2020, and is reproduced in the Appendix beginning at App. 1.

The Memorandum of Opinion and Order of the United States District Court for the Northern District of Ohio denying all of Allen's habeas claims, *Allen v. Mitchell*, N.D. Ohio Oct. 3, 2002 is reproduced in the Appendix beginning at App. 23.

The Ohio Supreme Court's Opinion affirming Allen's conviction and sentencing *State v. Allen*, 653 N.E. 675 (Ohio 1995), is reproduced in the Appendix beginning at App. 127.

JURISDICTIONAL STATEMENT

Petitioner, David W. Allen, timely filed a Petitioner for a Writ of Habeas Corpus in the United States District Court, Northern District of Ohio, On May 5, 1999. On October 3, 2002, the District court denied relief on all of Allen's claims, but granted a Certificate of Appealability on the first ground for relief.

Allen filed a timely appeal from the denial of his habeas claim for which a COA had been granted: Claims 1, Allen was denied due process and a fair trial when trial court permitted prospective juror, Patricia Worthington to be empaneled on the jury. On March 4, 2020, the United States Court of Appeals for the Sixth Circuit denied this claim. *Allen v. Mitchell, No. 02-4145, published (6th Cir. March 24, 2020).*

On March 19, 2020, as the result of the pandemic, the Supreme Court ordered the deadline to file a Petition for Writ of Certiorari to be extended for 150 days from the date of the lower court judgment.

This petition timely follows. Petitioner Allen is asking this Court to grant this petition, vacate or reverse the Sixth Circuit's opinion affirming the district court and either grant the writ or remand this case for such further proceedings as may be appropriate.

Jurisdiction is appropriate under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution grants criminal defendant's "a right to a speedy and public trial by an impartial jury."

The Fourteenth Amendment to the United States Constitution states: "No State shall deprive any person of life, liberty, or property, without the due process of law."

28 U.S.C. § 2254(d), as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") states:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:

1. Resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
2. Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

STATEMENT OF THE CASE

Mr. Allen was convicted of Aggravated Robbery and Aggravated Murder of Chloe English, with capital specifications. The State's case against Mr. Allen was circumstantial and relied primarily on a partial fingerprint identified as Allen's found on English's eyeglasses.

On June 12, 1991, Mr. Allen's capital trial commenced, and the first phase was completed on June 15, 1991 with the jury finding Allen guilty on all counts.

The trial court before conducting the voir dire, advised the prospective jurors to let her bailiff know if they had a specific problem with serving on the jury. Juror Worthington immediately addressed the court in front of the entire panel and indicated she did not know this was a criminal case, and that her brother had been shot and killed two years earlier in Cleveland, Ohio. The Court informed her this would be addressed in the general voir dire.

The Court then conducted the death penalty qualification for each juror individually to ascertain if any potential juror had moral or philosophical beliefs, that would impair their ability to sentence Allen if convicted and to recommend the death penalty, or life imprisonment. Worthington simply responded "No".

The real red flags occurred during the individual voir dire questioning of Worthington. Worthington expressed a reluctance to serve, she told the trial court the man charged with her brother's murder had been acquitted and she did not believe justice had been served.

Worthington concluded she harbored feelings of bitterness and resentment because of the outcome of the trial.

The Court inquired if she could set aside those feelings of bitterness from your experiences there and evaluate this defendant and reach a verdict with regard to this defendant solely on the evidence that comes out in open court? Juror Worthington stated “Yes” and added “because the prosecution did everything they could.”

Defense counsel’s questioning of Worthington revealed answers which clearly demonstrated bias. Worthington stated she had a ten-year friendship with a member of the Cleveland Police. She went on to describe how she still stays in contact with the prosecutor and the detectives who handles her brother’s case. Worthington added the detectives still regularly check in on her mother.

Allen having exhausted all preemptory strikes challenged Worthington for cause. The trial court denied Allen’s motion, and Worthington sat on the jury, which found Allen guilty and imposed the Death Penalty.

The Ohio Supreme Court in a four to three ruling affirmed the trial court’s decision to permit Worthington to sit on the panel. The court determined the standard governing a challenge for cause will not be disturbed unless it was unsupported by the record and the trial court was in the best position to observe the juror and her demeanor to determine impartiality, with its only case authority being *State v. Tyler*, 50 Ohio St. 3d 24 (1990). Justice Wright authored the dissent, and examined the entire record, cites *Morgan*, *Witt*, and *Dowd* and concludes “I do

not see how any fair minded individual can suggest Ms. Worthington did not indicate a state of mind and view that cast the most serious sort of question on her ability to render an impartial verdict.”

The district court on review denied Allen’s habeas claims on the merits. The court noted nothing on the record overtly indicated bias, failed to examine *Patton v. Yount*, 467 U.S. 1025 (1984) or apply the doctrine of implied or presumed bias, contrary to clearly established Federal law found in *United States v. Wood*, 299 U.S. 135, (1936).

The Sixth Circuit analysis was similarly flawed as the court reviewed Allen’s jury bias claim under *Patton v. Yount*, 467 US. 1025 (1984), but ignores the second part of the test, i.e. Should Ms. Worthington’s protestation of impartial ability have been believed. This court also ignored the doctrine of implied bias and affirmed the district court’s denial of Allen’s petition for writ of habeas corpus. This petition for writ of certiorari followed.

REASONS FOR GRANTING PETITION

The Ohio Supreme Court's decision was contrary to and was an unreasonable application of clearly established Federal law.

The Sixth Amendment made applicable through the Fourteenth Amendment guarantees a criminal defendant a trial by an impartial jury. *Morgan v. Illinois*, 504 U.S. 719 (1992).

(A) “In essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, “indifferent jurors.” *Irvin v. Dowd*, 366 U.S. 717 (1961).

Mr. Allen has maintained juror Worthington was a bias juror, and as such the trial court should have excused her.

In *Morgan, supra*, the Court found that general inquiries regarding whether the juror “could be fair” or “could they follow the law” were not enough to uncover the jurors bias, “their protestations to the contrary notwithstanding.” *Morgan at 2233*. As *Morgan* court reasoned, jurors could in all truth and candor respond that they could be fair, unaware the views they hold would prevent them from doing so. Juror Worthington's responses when asked if she “could be fair,” does not meet the *Morgan* standard and does not provide the “substantial” testimony required by *Tyler*. Mr. Allen argued in this proposition of law that the seating of Juror Worthington on his jury denied him a fair and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. However, absent from the majority's opinion on this issue is any citation to the United States

Constitution or the *Morgan* decision. As the *Allen* dissent points out “The bedrock of our criminal justice system is the constitutional right to a trial by jury. At the heart of this basic grant and due process of law is the constitutional guaranty that jurors who decide a defendant’s fate will be fair, impartial and free from bias or prejudice.”

Most jury bias claims –“actual bias” must be founded on evidence that a juror was disposed to ignore the evidence and find against the defendant.

In *Patton v. Yount, supra*, the question to be determined in juror bias cases: (1) Did a juror swear he could set aside any opinion he might hold and decide the case solely on the evidence, and (2) should the jurors protestation of impartiality have been believed.

A review of the entire voir dire examination of Ms. Worthington clearly demonstrates an individual who was unwilling or at best reluctant to serve to sit on a capital murder trial.

The state court relied on her assurances she could be fair and impartial, but under *Patton* the question is should the trial court have believed her.

Juror Worthington exhibited bias by her answers raised on voir dire. Beginning with the initial remarks by the Court, Worthington came forward stating she wasn’t aware this was a criminal case (murder) and her brother had been shot and killed two (2) years earlier. The trial court examined her as did the state and defense counsel and her answers should have resulted in her being excused for cause. Worthington clearly was dissatisfied with the results of the recent murder

trial, which led to the acquittal of the person accused of murdering her brother.

Worthington conceded she is still friendly with the detective and prosecutor involved in the case, and they still kept in contact with her and her mother. The county prosecutor office was the same office currently prosecuting Allen.

Worthington did give assurances she could be fair and impartial but the question to be reviewed under *Patton* is should the trial court have believed her since persona experiences impaired her ability to be fair. The trial court should have understood most jurors are reluctant to admit bias and her equivocal assurances of impartiality should have caused the trial court to question her ability to be fair and impartial to Allen particularly in a capital murder case.

The *Ohio Supreme Court* and the reviewing Federal Court's failed to examine and apply implied or presumed juror bias when reviewing the trial court's failure to dismiss Ms. Worthington for cause, and was contrary to Unites States Supreme Court precedent found in *United States v. Wood*, *supra*.

(B) The doctrine implied bias is premised on the understanding that certain circumstances or personal experiences create too great a risk of affecting a juror's decision-making process, even if the individual is not consciously fully aware of the impact it may have on this task.

Bias or prejudice is often an elusive condition of the mind, thus making it difficult at times to always recognize its existence. Here, Worthington is

continually expressing her concerns on sitting on a capital case, which was quite similar to the recent murder trial of her brother's killer.

In Allen's case the doctrine of implied bias should have been applied, thus disqualifying Worthington from serving on the jury. The failure of the trial court to exclude her from his jury dictates that Allen whose fate was decided by such a jury, has been denied his constitutional rights to a fair trial by "impartial and indifferent jurors. *Morgan, supra*.

The implied doctrine exists principally to disqualify jurors who have high probability of being influenced in their deliberations by the extraneous considerations, in Worthington's case the recent acquittal of her brother's alleged killer, in the same courthouse, with the same prosecutor's office, same coroner's office and trace evidence people, and her close ties with the police and the detectives.

The circuits are split as to whether implied bias may presumed as a matter of law or whether actual prejudice must be demonstrated under *Smith v. Phillips*, 455 U.S. 209 (1982) by further questioning the juror, to establish prejudice.

(C) Presumed bias has a long history in our legal system going back to Aaron Burr's trial for treason. Justice Marshall wrote "individual under the influence of personal prejudice is presumed to have bias on his mind which will prevent an impartial decision of the case, according to testimony." *United States v. Burr*, 25 F. CAS. 49 (D.Va. 1807).

The *Smith* Court declined to presume such bias in a setting where a juror had applied for employment with the prosecutor's office during the defendant's trial, and a hearing disclosed no indication that the juror was, in fact, biased. *See* 455 U.S. at 212-13, 102 S. Ct. 940. Nothing in the *Smith* decision, however, indicates that the Court intended to discard the doctrine of implied or presumed bias. Indeed, Justice O'Connor wrote separately on this point, expressing her "view that the [majority] opinion does not foreclose the use of 'implied bias' inappropriate circumstances," such as a close familial relationship. *Id.* at 221-22, 102 S. Ct. 940 (O'Connor, J., concurring). And in *McDonough, Power Equip. Inc. v. Greenwood*, 464 U.S. 548 (1984) decided by the Court two years after *Smith*, five Justices wrote or joined concurring opinions emphasizing that the doctrine of implied bias was yet available. *See McDonough*, 464 U.S. at 556-57, 104 S. Ct. 845 (Blackmun, J., concurring, joined by Stevens, J., and O'Connor, J.) (observing that "in exceptional circumstances, facts are such that bias is to be inferred"); *id.* at 558, 104 S.Ct. 845 (Brennan, J., concurring in the judgment, joined by Marshall, J.)(recognizing that "because the bias of a juror will rarely be admitted by the juror himself ... it necessarily must be inferred from surrounding facts and circumstances")

Many circuits have held under *Smith v. Phillips*, 455 U.S. 209 (1982) that habeas petitioners had to demonstrate "actual prejudice" not implied bias as a matter of law to prevail.

In *Conway v. Polk*, 453 F.3d 567 (4th Cir. 2006), the petitioner was convicted of first degree murder. On appeal it was discovered the jury that convicted Conway

contained a jury who was a “double cousin” of one of the co-defendants that testified at trial, and had never revealed this fact during voir dire questioning.

The Fourth Circuit concluded the juror having failed to disclose his relationship to the witness and met the first prong of the McDonough test.

The court found the juror was biased as a matter of law and declined to impose the second prong of the McDonough test did the juror’s concealing information affect the fairness of the trial.

In *Brooks v. Drake*, 418 F.3d 328 (5th Cir. 2006), the court found implied bias as a matter of law. A juror during Brooks’ capital murder trial was arrested and booked for carrying a loaded pistol into the courthouse on the day of Brooks’ sentencing hearing started. The jury now facing being prosecuted by the same prosecutor seeking the death penalty.

The Court concluded the prosecutor’s power over the juror prevented intolerable risk, which denied petitioner his constitutionally entitled impartial jury, and as such implied bias as a matter of law applied.

In contrast in *Sanders v. Norris*, 329 F. 3d 787 (8th Cir. 2008), an Arkansas jury convicted Mr. Sanders of two (2) capital murder charges. Mr. Sanders in a habeas petition, an ineffective assistance claim against his counsel’s performance for failing to question juror Reed, the county coroner, who was present when the police recovered the victims’ bodies, arranged for the autopsies of the bodies, and acting as a mortician conducted the funeral of the victims whom he was distantly related by marriage.

Sanders maintained that the connection between Mr. Reed and his criminal case created a legal presumption of bias.

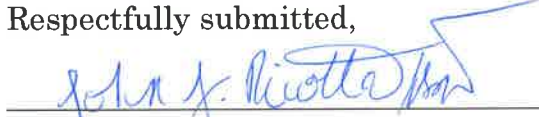
The Eighth Circuit Court concluded however, Sanders had not shown that juror Reed was biased either in fact or implied and could not prevail on this IAC claim against a juror.

This case presents the proper opportunity to resolve the conflicts in the court of appeals on the fundamental question of implied juror bias, and to clarify whether the second prong of the McDonough test is necessary to establish actual prejudice is in all circumstances, or may be determined as a matter of law.

CONCLUSION

This petition for a Writ of Certiorari should be granted.

Respectfully submitted,



JOHN J. RICOTTA, (OH #0000778)

Counsel of Record

1360 East 9th Street, Suite 910

Cleveland, Ohio 44114

(216) 241-0715

(216) 241-9434 - fax

jjricotta@aol.com

Counsel for Petitioner

David Wayne Allen