

24-7063

No. \_\_\_\_\_

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

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FILED  
APR 11 2025

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

RANDY W. DUCK,

*Petitioner,*

v.

DEXTER PAYNE, Director;  
ARKANSAS DIVISION OF CORRECTION;  
STATE OF ARKANSAS

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO  
THE EIGHTH CIRCUIT COURT OF APPEALS

\*\*\*\*\*

PRO SE PETITION FOR WRIT OF CERTIORARI

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## **QUESTION PRESENTED**

Mr. Duck alleged that his trial counsel was ineffective for failing to remove presumed impartial jurors that sat on the jury. Should they have been dismissed for cause?

Did the Eighth Circuit err in deferring to the state and district court finding that Mr. Duck was not prejudiced by his trial counsel's failure to remove jurors for cause when a juror who states she would "lean towards" the state when the state presents their evidence; and responded that her work at the Prosecuting Attorney's Office would make it difficult for her to sit on the case. She was the jury Fore-person.

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**PETITION FOR WRIT OF CERTIORARI TO  
THE ARKANSAS SUPREME COURT**

The petitioner, Randy Duck, respectfully prays that a Writ of Certiorari issue to review the judgment of the Eighth Circuit Court of Appeals, rendered in these proceedings on October 10, 2024.

**OPINION BELOW**

The Eighth Circuit Court of Appeals affirmed (dismissed) Appeal Case No. 24-2660. The opinion is unpublished, and reprinted in the appendix to this petition at page 1a, *infra*. The order of the Eighth Circuit Court of Appeals denying rehearing en banc and the petition for rehearing is reprinted in the appendix to this petition at page 29I, *infra*. The application for extension of time within which to file a petition for a Writ of Certiorari.

**JURISDICTION**

The original judgment of the Eighth Circuit Court of Appeals was entered October 10, 2024. A timely motion to that court for rehearing was denied November 25, 2024. The jurisdiction of this court is invoked under 28U.S.C. §1254.

## **STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED**

The following statutory and constitutional provisions are involved in this case.

### **U.S. CONST., AMEND. VI**

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 Assistance of Counsel for his defence.

### **U.S. CONST., AMEND. XIV**

Section 1. 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**

**(a)** The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

**(b)(1)** An application for a writ of habeas corpus of behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

- (A)** the applicant has exhausted the remedies available in the courts of the State; or
- (B)(i)** there is an absence of available State corrective process; or
- (ii)** circumstances exist that render such process ineffective to protect the rights of the applicant.

**(2)** An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

**(3)** A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

**(c)** An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

**(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 on the 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.

**(e)(1)** In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

- (2)** If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

**(A)** the claim relies on--

**(i)** a new rule of constitutional law, made retroactive to cases on collateral review by the

Supreme Court, that was previously unavailable; or

**(ii)** a factual predicate that could not have been previously discovered through the  
exercise of due diligence; and

**(B)** the facts underlying the claim would be sufficient to establish by clear and convincing  
evidence that but for constitutional error, no reasonable factfinder would have found the  
applicant guilty of the underlying offense.

**(f)** If the applicant challenges the sufficiency of the evidence adduced in such State court  
proceeding to support the State court's determination of a factual issue made therein, the  
applicant, if able, shall produce that part of the record pertinent to a determination of the  
sufficiency of the evidence to support such determination. If the applicant, because of  
indigency or other reason is unable to produce such part of the record, then the State shall  
produce such part of the record and the Federal court shall direct the State to do so by order  
directed to an appropriate State official. If the State cannot provide such pertinent part of the  
record, then the court shall determine under the existing facts and circumstances what weight  
shall be given to the State court's factual determination.

**(g)** A copy of the official records of the State court, duly certified by the clerk of such court to  
be a true and correct copy of a finding, judicial opinion, or other reliable written indicia  
showing such a factual determination by the State court shall be admissible in the Federal  
court proceeding.

**(h)** Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

**(i)** The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

## STATEMENT OF THE CASE

Duck was convicted by a jury in the Circuit Court of Union County, Arkansas on the 29<sup>th</sup> day of September 2015 within and for the 13<sup>th</sup> Judicial District.

A direct appeal was filed 09-29-2015 from a denial of a directed verdict motion for insufficient evidence to support his conviction.

It was affirmed appeal from the Union County Circuit Court Case No. [70CR-2015-71-1].

The opinion was delivered December 07, 2016, see *Duck v. State*, 2016 Ark. App. 596, 509 S.W. 3d5.

Duck then filed a petition for post-conviction relief under Ark. R. Crim. P. 37.1.

The petition was filed on February 24, 2017 for ineffective assistance of counsel. That trial counsel failed to dismiss petit jurors for cause. To raise objection of the chain of custody of certain evidence. That trial counsel failed to fully and adequately challenge to the sufficiency of the evidence.

The trial court denied that petition without an evidentiary hearing on October 09, 2018, see *State v. Duck* Case No. [70CR-2015-71-1] order denying for post-conviction relief pursuant to Rule 37.1.

The petitioner, Randy Duck, appeals to the Arkansas Court of Appeals from the order entered in this case on October 29, 2018 denying his petition for post-conviction relief under Ark R. Crim. P. 37.1.

Duck filed appeal brief April 09, 2019 bringing forth the same points as the Rule 37.

The Court of Appeals put a procedural default on the case.

The State said such a claim is a direct attack on the verdict and not cognizable claim in a petition for Rule 37.1 relief.

The bar imposed by the Arkansas Court of Appeals does not appear to be firmly established or regularly followed in the Arkansas cases, and so it is inadequate to support a defense of procedural default, see *Duck v. State* 2020 Ark. App. 161 [No. CR-19-110].

The opinion was delivered March 04, 2020.

Duck the petitioned the Arkansas Supreme Court for review.

The Arkansas Supreme Court denied the petition for review for a rule violation on May 21, 2020.

Duck the filed a petition for habeas corpus relief under 28 U.S.C. §2254 on the 19<sup>th</sup> day of November, 2020, Case No. 4:20-CV-01301-KGB. This petition for habeas corpus relief has been brought pursuant to the one year statue of limitations pursuant to 28 U.S.C. §2254. Duck claims that he received ineffective assistance of trial counsel and ineffective assistance of post- conviction counsel. Duck claims he was tried by an impartial jury and counsel was ineffective for failing to object to the introduction of state's exhibits 2 & 3 on the grounds that the state failed to establish a proper chain of evidence, and counsel failed to interview or call any witnesses on Duck's behalf, and failing to investigate to present a complete defense, for not doing a proper voir dire.

Recommended disposition was filed on 09-26-2022, see *Duck v. Payne* Case No. 4:20-CV-01301-KGB-JTR.

Petitioner Duck filed timely objections to the recommended disposition.

The 28 U.S.C. §2254 habeas corpus was dismissed on March 26, 2024.

Notice of appeal, application for certificate of appealability and motions for leave to proceed on appeal in forma pauperis 15<sup>th</sup> day of April, 2024 was dismissed.

The petition for rehearing is also denied, see *Duck v. Payne* Case No. 24-2660.

The application for an extension of time was granted to the Petitioner to file a petition for a Writ of Certiorari.

## REASONS FOR GRANTING THE WRIT

### I. THE EIGHTH CIRCUIT'S ERROR IN DISMISSING THE APPEAL

As put forth in Ducks rule 37.1 to this court. That Hope Bean was impartial juror. Hope Bean clearly and unambiguously expressed that she could not be impartial. Bean was asked if she worked at the Prosecuting Attorney' Office, Bean responded (yes) (T.147). She goes on to agree that her work at the Prosecuting Attorney's Office would make it difficult for her to sit on the case. She was asked "so if we presented our evidence to you would you be more likely to lean toward the state?". Bean responds, (yes) (T.147).

Once the jury was returned and seated in the courtroom, Hope Bean asked to address the court, where upon a discussion was held at the bench. She stated "Your Honor, honestly, I feel like knowing the judicial system as I do, I don't think we would be here has Ms. Gilreath

not felt that there was a case. I just don't know that I can be impartial in thinking that he's guilty". (T170) In *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78, Justice O'Connor concurring opinion states, pg. 222 "while each case must turn on its own facts, there are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation that the juror is an actual employee of the prosecuting agency. Whether or not the state proceeding result in a finding of "no bias", the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances." As the record shows, Bean worked for the same prosecuting agency that prosecuted Duck. the Honorable Judge Hamilton Singleton works for the 13<sup>th</sup> Judicial District with Mr. David Buttler as the Prosecuting Attorney.

Sandy Carter was a bias juror his family was a victim of murder. Carter claimed a breakdown and ineffectiveness of the judicial system was responsible for the murder (T164). Carter also stated that he was bothered by the type of case, (T131) Ms. Gilreath inquires of the potential jurors, "does anyone have a problem because of the type of case it is?", Sandy Carter answered in the affirmative. Neither Duck's counsel nor the court questioned Sandy Carter as to the relevance of this affirmative response. This juror was selected to sit on the jury. This juror was selected to sit on the jury. This juror was biased and could not be impartial. If an adequate voir dire to identify unqualified jurors, *Dennis v. United Stated*, 339 U.S. 162, 171-172, 70 S.Ct.159, 523, 524, 94 L.Ed. 734 (1950) also *United States v. Johnson*, 495 F.3d 951, 964-965 (8<sup>th</sup> Cir. 2007) "The seating of any who should have been dismissed for cause... requires reversal."

## **II. THE EIGHTH CIRCUIT DECISION IS IN CONFLICT WITH OTHER CIRCUITS.**

Implied bias cause for removal *United States v. Gonzalez*, 214 F.3.d 1109 (CA 9<sup>th</sup> 2000) p. 1111. The Sixth Amendment guarantees criminal defendants a verdict by an impartial jury. *Dyer v. Calderon*, 151 F.3d 970, 973, (9<sup>th</sup> Cir. 1998). The bias or prejudice of even a single juror is enough to violate that guarantee, *Id*. Accordingly, [t]he presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice. *Dyer*, 151 F3d at 973, n2; see also *United States v. Martinez-Salazar* 528 U.S. 305, 120 S.Ct. 774,782, 145 L.Ed 2d 792 (2000).

Challenges for cause are the means by which partial or biased jurors should be eliminated. To disqualify a juror for cause requires a showing of either actual or implied bias

that is... bias in fact or bias conclusively presumed as a matter of law. 47 AM. Jur. 2d Jury §266 (1995). Although [b]ias can be revealed by a juror's express admission of that fact, ... more frequently, jurors are reluctant {112} to admit actual bias, and the reality of their biased attitudes must be revealed by circumstantial evidence. *United States v. Allsup*, 566 F.2d, 68, 71 (9<sup>th</sup> Cir. 1977). Because determinations of impartiality maybe based in large part upon demeanor, this court typically accords deference to the district court's determinations, and the reviews a court's findings regarding actual juror bias for "manifest error" or abuse of discretion. See *United States v. Alexander*, 48F. 3d 1477, 1484 (9<sup>th</sup> Cir. 1995). In contrast, implied bias presents a mixed question of law and fact which is reviewable de novo. *Dyer*, 151 F.3d a 979.

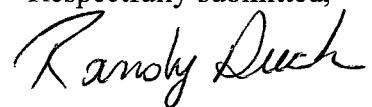
In essence, [a]ctual bias is "bias in fact"- the existence of a state of mind that leads to an inference that the person will not act with entire impartiality. "United States v. *Torres*, 128 F.3d 38, 43 (2<sup>nd</sup> Cir. 1997). Accordingly, courts have found actual bias where, based upon personal experience, a potential juror stated he could not be impartial when evaluating a drug dealer's testimony, *Torres*, 128 F.3d a 44, where a juror in a case involving embezzlement from a labor union emphasized his negative experiences with unions and responded equivocally when asked if he could render a fair and impartial verdict despite those views, *United States v. Nell*, 526 1223, 1228-1229 (5<sup>th</sup> Cir. 1976). [9,10] Although actual bias is the mere common ground for excusing jurors for cause, "[i]n extraordinary cases, courts may presume bias based upon the circumstances. "Dyer, 151 F.3d at 981; see also *Smith v. Phillips*, 455 U.S. 209, 222, 102 S. Ct. 940, 71 L.Ed 2d 78 (1982). "Unlike the inquiry for

actual bias, in which we examine the juror's answers on voir dire for evidence that show was in fact partial, the issue for implied bias is whether an average person in the position of the juror in controversy would be prejudiced." *United States v. Cerrato Reyes*, 176 F.3d 1253, 1260-1261 (10<sup>th</sup> Cir. 1999) (emphasis added (quoting *Torres*, 138 F.3d at 45)). Accordingly, we have held that prejudice is to be presumed "Where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." *Tinsley v. Borg*, 895 F.2d 520, 527 (9<sup>th</sup> Cir. 1990).

## CONCLUSION

For the foregoing reasons, this Court should issue the Writ of Certiorari discharging Mr. Duck from his unlawful conviction and sentence in this matter.

Respectfully submitted,



April 11, 2025  
Date

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**CERTIFICATE OF COMPLIANCE**

No. \_\_\_\_\_

RANDY W. DUCK,

*Petitioner,*

v.

DEXTER PAYNE, Director;  
ARKANSAS DIVISION OF CORRECTION;  
STATE OF ARKANSAS

*Respondent.*

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 3,506 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 11, 2025

  
\_\_\_\_\_  
RANDY W. DUCK, *Pro Se*  
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