No. 25-878

IN THE

Supreme Court of the United States

TODD JEFFREY ROGERS,

Petitioner,

v.

OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When reviewing the totality of a prospective juror's statements during voir dire for the determination of actual bias and the existence of assurances of impartiality, whether a court must disregard the juror's responses to questions posed to the group of prospective jurors or whether a complete assessment of the juror's ability to be fair and impartial should consider the entire voir dire, which includes the juror's responses to both individual and group questions.

LIST OF PARTIES

The Petitioner is Todd Jeffrey Rogers, an inmate incarcerated at the London Correctional Institution in London, Ohio.

The Respondent is the State of Ohio.

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STATEMENT OF THE CASE

Petitioner Todd Jeffrey Rogers was charged with two counts of rape, two counts of attempted rape, and seven counts of gross sexual imposition, all involving his daughter ("Daughter") when she was between five and eight years old. (Record, Dkt. #3; Day Two and Three of Trial 6) After the State nolled three counts, the case proceeded to a jury trial. (Record, Dkt. #67, 98)

Daughter testified that Petitioner touched her "private part" with his finger over and under her underwear, touched "inside" of her private part on one occasion, and made her touch his "private part" with her hand. (Record, Day Two and Three of Trial 37-39, 40-41) Petitioner denied the abuse. (*Id.* at 166-172, 177)

Throughout trial, defense counsel emphasized the importance of honesty and characterized Daughter as a "particularly impressionable kid." (*Id.* at 194, 196) The defense theory was that Petitioner's wife manipulated Daughter into making the allegations against Petitioner. (Record, Day One of Trial 216; Day Two and Three of Trial 196-197)

At the beginning of voir dire, the judge asked the thirteen prospective jurors in the jury box:

> What about a child witness, is there anyone – I think we all have a tendency to – you know, smile when we see a child, empathize with children. But the truth of the matter is – you know, a child can send someone to prison for a long, long time.

> And you have to – to decide what the truth is in this case. You have to decide whether or not the State has proven the case again in this – beyond a reasonable doubt.
>
> You can't apply sympathy and you can't apply prejudice. It has to be fair when you're evaluating this case.
>
> Is there anyone who thinks they would have trouble doing that with a child witness? Yes, sir?

(Record, Day One of Trial 19-20) Juror McCarthy[1] spoke up and stated, "*I might have a hard time with it.* . . . Just being honest." (Emphasis added.) (*Id.* at 20) The court asked him, "Do you think you can follow the instructions I give to you in this case, knowing I'm having a hard time because this is a child witness and I tend to just want to favor this child? Can you put that aside and listen to the evidence and – and be fair?" (*Id.*) Juror McCarthy responded, "It's a good question. I don't have an answer for you." (*Id.* at 21) The court acknowledged the internal struggle that Juror McCarthy was experiencing and indicated that it would leave the issue for the attorneys to explore. (*Id.*)

The assistant prosecutor followed up on that topic with Juror McCarthy:

> MR. VIEUX: Anybody here say, hey, I don't want to – look, we're going to have the testimony

1. Respondent uses a fictitious name to refer to the challenged juror.

> of a kid. That's all I'm really going to hear. I don't know that I can do that, that I can make that kind of a decision. It's okay if you feel that way. I just want to know now.
>
> Are there people who are like hey, that's not my kinda case? Mr. [McCarthy], I see you shaking your head. You got –
>
> PROSPECTIVE JUROR [MCCARTHY]: I might be expressive. I apologize. Just – I'm sure all of us feel the same way. I –
>
> MR. VIEUX: I told you one of the things I'm trying to do is make you feel uncomfortable so that we get good answers, okay?
>
> PROSPECTIVE JUROR [MCCARTHY]: Yeah.
>
> MR. VIEUX: And I don't want to find out tomorrow that what you felt was – you know, hey, I – this is something I don't want to do. I'm not – I really didn't want to sit on this, right?

(*Id.* at 65-66) Satisfied that Juror McCarthy did not feel that way, the assistant prosecutor moved on to the next topic. (*Id.* at 66) Later in his voir dire, the assistant prosecutor addressed the State's burden of proof. (*Id.* at 78) He stated, "It is proof that, at the end of the day, you have heard the evidence, listen to the arguments, the instructions of law, and you feel confident that you have made the right decision. It is a moral decision on your part that could be a hard decision." (*Id.*) The assistant

prosecutor again singled out Juror McCarthy and three other prospective jurors, and asked them whether they were willing to take on that level of burden and make the decision with the weight of that decision. (*Id.* at 78-79) The prospective jurors whom the assistant prosecutor specifically asked that question, which included Juror McCarthy, indicated affirmatively. (*Id.* at 79)

In his voir dire, defense counsel addressed the presumption of innocence with the thirteen prospective jurors in the jury box as follows:

> MR. BABB: Who walked in today, show of hands, and saw Todd Rogers sitting next to me at this table and said, I wonder what he did?
>
> PROSPECTIVE JURORS: (Indicating.)
>
> MR. BABB: Yeah. We all thought that. That's – that's human nature. That's normal. Look at all the honesty I just got there, right?
>
> You've already been told by the Judge that you're supposed to disregard that, like that's a no-no. And yet – yet here you are, raising your hand. I really appreciate that. That's very normal, walk in, say, what did he do?
>
> Does anyone have a problem with the fact that we have to disregard that because right now he's presumed innocent? He is innocent as he sits here right now.
>
> So like Mr. [McCarthy], what would your verdict be if we asked your verdict *right now*?

> PROSPECTIVE JUROR [McCARTHY]: Well, I'd say when I first came in, that's my – I didn't know why I was here. . . . And that's the person that's there. So, yeah, that's the first question I had in my mind. . . . But then when the subject matter was revealed, then that was a different feeling and reaction.
>
> MR. BABB: Yeah. So good. So if you had to give us a verdict *right now*, guilty or not guilty, knowing that there's a presumption of innocence, that he's innocent as he sits here right now, what would your verdict be?
>
> PROSPECTIVE JUROR [McCARTHY]: I'd say *it'd be hard for me to say that's he's not guilty.*
>
> MR. BABB: It'd be hard for you to say –
>
> PROSPECTIVE JUROR [McCARTHY]: Yeah, because we're here. . . . And there's someone here from the police department that's . . . gonna talk. So, yeah, people don't wind up here from not doing anything.

(Emphasis added.) (*Id.* at 91-93)

After a short break, defense counsel returned to the topic of the presumption of innocence and the principle that the defendant was innocent until proven guilty by the State beyond a reasonable doubt. (*Id.* at 101-02) Defense counsel asked the prospective jurors, "Is there anyone that has a problem with that? Or anyone who says that

I can't play by those rules, I don't think that's fair?" (*Id.* at 102) He asked, "Is there anyone that disagrees with that or thinks that's not the right answer, that – that we shouldn't presume innocence or that our verdict wouldn't be not guilty if – if you were asked to give a verdict right now?" (*Id.* at 104-05) Juror McCarthy did not indicate that he had a problem with the presumption of innocence. Defense counsel questioned the prospective jurors about whether they thought that "the police ever arrest people that are later acquitted or even proven innocent." (*Id.* at 115) He asked if anyone disagreed with that premise. (*Id.*) The prospective jurors, which included Juror McCarthy, "[i]ndicated negatively" that they did not disagree. (*Id.*) He asked, "Does anyone feel that if the – if someone gets arrested or accused or indicted, that they really don't deserve the kind of Constitutional protections that we're talking about?" (*Id.* at 115-16) The prospective jurors, which included Juror McCarthy, "[i]ndicated negatively." (*Id.*)

Defense counsel challenged one of the prospective jurors for cause and exhausted his peremptory challenges. (Record, Day One of Trial 135, 166, 173, 188) He did not challenge Juror McCarthy.

The jury found Petitioner guilty of rape, attempted rape, and six counts of gross sexual imposition. (Record, Dkt. #98) Petitioner received fifteen years to life in prison. (Record, Dkt. #99)

The Court of Appeals of Ohio rejected Petitioner's claim of juror bias and ineffective assistance of counsel and affirmed his conviction. (Dkt. #124, 125) On October 22, 2025, the Supreme Court of Ohio likewise rejected

Petitioner's claim of juror bias and ineffective assistance of counsel and affirmed his conviction. *State v. Rogers*, 2025-Ohio-4794U, ¶ 62.

On January 20, 2026, Petitioner filed a petition for a writ of certiorari ("Petition"). The State of Ohio hereby responds.

ARGUMENT

REASONS FOR DENYING THE WRIT

I. This Court should deny certiorari review of Petitioner's Question Presented because the challenged juror's statements during voir dire did not evince actual bias, which the state appellate courts found. Furthermore, the juror's responses to both individual and group questioning provided sufficient assurances to the court and the attorneys that the juror was willing and able to be impartial, to listen to the evidence, to follow the court's instructions of law, and to fairly decide the case. Finally, Petitioner's request for a blanket rule that disregards a juror's responses to group questioning is overbroad under the facts of this case, and it is inconsistent with the many tangible and intangible factors that enter into voir-dire decision-making by trial judges and attorneys. A complete assessment of the juror's ability to be fair and impartial should consider the entire voir dire.

Petitioner claims that Juror McCarthy who was seated on the jury in his trial demonstrated a clear bias against him, and his attorney did not challenge him. Petitioner

contends that Juror McCarthy was not sufficiently rehabilitated by his individual responses or his responses to group questioning of the thirteen prospective jurors seated in the jury box. He asks this Court to accept this case for review, find the juror's statements to be biased, and establish a blanket rule that only responses to questions individually posed to the juror may rehabilitate a juror after the juror has made a statement expressing partiality.

On appeal to the state court of appeals, Petitioner argued that his counsel was ineffective for failing to challenge Juror McCarthy. *State v. Rogers*, 2024-Ohio-1637U, ¶ 9 (Ohio Ct. App.) Pet.App. 34a The court of appeals rejected Petitioner's claim. *Id.* at ¶ 9, 20. Pet.App. 34a, 40a Specifically, the court of appeals "disagree[d]" with Petitioner's "characterization of the record." *Id.* at ¶ 20. Pet.App. 40a The court of appeals expressly did not agree with Petitioner's assertion that the record firmly established that Juror McCarthy exhibited an actual bias against him. *Id.* The Supreme Court of Ohio likewise rejected Petitioner's argument that Juror McCarthy was biased. *State v. Rogers*, 2025-Ohio-4794U, ¶ 45, 51. Pet. App. 21a, 23a

Petitioner has appealed to this Court and has presented one question for this Court's consideration:

> Whether a prospective juror who admitted bias can be rehabilitated through silence or group answers in response to group questions.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee the right of an accused in all criminal prosecutions to a trial by an impartial jury.

Turner v. Murray, 476 U.S. 28, 36, fn. 9, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986); *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). When claiming juror bias in the context of ineffective assistance of counsel, a defendant must meet the test under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, ¶ 62, 873 N.E.2d 828. Pursuant to *Strickland*, a defendant must show both deficient performance and resulting prejudice. *Mundt*, at ¶ 62. To demonstrate deficiency, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Strickland*, at 688. Appellate review of counsel's performance is "highly deferential." *Strickland*, at 689. Trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Id.* at 690. Moreover, the adequacy of counsel's performance is reviewed in light of all the circumstances surrounding the trial. *Id.* "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Reviewing courts have "consistently declined to 'second-guess trial strategy decisions' or impose 'hindsight views about how current counsel might have voir dired the jury differently.'" *Mundt*, at ¶ 63.

Even assuming that counsel's performance was deficient, reversal is warranted only where the defendant demonstrates prejudice, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Mundt*, at ¶ 62. To satisfy the prejudice prong of *Strickland* based on

counsel's failure to challenge an allegedly biased juror, prejudice is not presumed or automatic – a defendant "*must* show that [a] juror was *actually biased* against him." (Emphasis in the original.) *Mundt*, at ¶ 67, quoting *Miller v. Francis*, 269 F.3d 609, 616 (6th Cir. 2001).

1. Petitioner fails to establish actual bias against him.

Petitioner characterizes Juror McCarthy's responses to questioning during voir dire as evincing clear "actual bias." As the state appellate courts found, the record does not support that Juror McCarthy was actually biased against Petitioner. *State v. Rogers*, 2025-Ohio-4794U, ¶45, 51 Pet.App. 21a, 23a; *State v. Rogers*, 2024-Ohio-1637U, ¶ 20 (Ohio Ct. App.) Pet. App. 40a

The proper test to determine a juror's bias is "whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality." *State v. Warner*, 55 Ohio St.3d 31, 34, 564 N.E.2d 18 (1990), quoting *Reynolds v. United States*, 98 U.S. 145, 156, 25 L.Ed. 244 (1878). The burden to show juror bias is on the defendant. *Warner*, at 34. "Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside." *Id.*, quoting *Reynolds*, at 157.

The Supreme Court of Ohio has defined actual bias as "'bias in fact' – the existence of a state of mind that leads to an inference that the person will not act with impartiality." *State v. Bates*, 159 Ohio St.3d 156, 2020-Ohio-634, ¶ 25, 149 N.E.3d 475. The Supreme Court of Pennsylvania has held that the defendant must demonstrate that the juror "possesses a *fixed*, *unalterable* opinion that would prevent

him or her from rendering a verdict based solely on the evidence and the law." (Emphasis added.) *Commonwealth v. Smith*, 518 Pa. 15, 36, 540 A.2d 246 (1988). This Court explained that jurors are objectionable if they have formed "*strong and deep impressions*, which will *close the mind* against the testimony that may be offered in opposition to them." (Emphasis added.) *Irvin v. Dowd*, 366 U.S. 717, 722, fn.3, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).

But "[t]o hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin*, at 723. *Accord Hand v. Houk*, 871 F.3d 390, 410 (6th Cir. 2017) ("A mere preconceived notion as to the guilt or innocence of the accused is not enough to rebut the presumption of a prospective juror's impartiality.") There is a critical difference between a prior belief and a bias that requires the juror's disqualification. *Griffin v. Bell*, 694 F.3d 817, 824 (7th Cir. 2012). An initial inclination or tendency is not unshakable bias that indicates an inability or unwillingness to faithfully and impartially apply the law. *Id. See also United States v. Ricketts*, 146 F.3d 492, 496 (7th Cir. 1998). *See also Irvin*, at 722, fn.3 ("Light impressions which may fairly be supposed to yield to the testimony that may be offered; which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror[.]")

Under this standard, Petitioner does not establish that Juror McCarthy was actually biased against him.

He cites two exchanges with Juror McCarthy. The first occurred at the beginning of voir dire when the court posed the following question to the thirteen prospective jurors in the jury box:

> What about a child witness, is there anyone – I think we all have a tendency to – you know, smile when we see a child, empathize with children. But the truth of the matter is – you know, a child can send someone to prison for a long, long time.
>
> And you have to – to decide what the truth is in this case. You have to decide whether or not the State has proven the case again in this – beyond a reasonable doubt.
>
> You can't apply sympathy and you can't apply prejudice. It has to be fair when you're evaluating this case.
>
> Is there anyone who thinks they would have trouble doing that with a child witness? Yes, sir?

(Record, Day One of Trial 19-20) Juror McCarthy spoke up and stated, "*I might have a hard time with it*. * * * Just being honest." (Emphasis added.) (*Id.* at 20) The court asked him, "Do you think you can follow the instructions I give to you in this case, knowing I'm having a hard time because this is a child witness and I tend to just want to favor this child? Can you put that aside and listen to the evidence and – and be fair?" (*Id.*) Juror McCarthy responded, "It's a good question. I don't have an answer for you." (*Id.* at 21) The court acknowledged the internal

struggle that Juror McCarthy was experiencing and indicated that it would leave the issue for the attorneys to explore. (*Id.*)

The second response that Petitioner challenges occurred during defense counsel's voir dire of the thirteen prospective jurors in the jury box:

> MR. BABB: Who walked in today, show of hands, and saw Todd Rogers sitting next to me at this table and said, I wonder what he did?
>
> PROSPECTIVE JURORS: (Indicating.)
>
> MR. BABB: Yeah. We all thought that. That's – that's human nature. That's normal. Look at all the honesty I just got there, right?
>
> You've already been told by the Judge that you're supposed to disregard that, like that's a no-no. And yet – yet here you are, raising your hand. I really appreciate that. That's very normal, walk in, say, what did he do?
>
> Does anyone have a problem with the fact that we have to disregard that because right now he's presumed innocent? He is innocent as he sits here right now.
>
> So like Mr. [McCarthy], what would your verdict be if we asked your verdict *right now*?
>
> PROSPECTIVE JUROR [McCARTHY]: Well, I'd say when I first came in, that's my – I didn't know why I was here.

MR. BABB: Yeah.

PROSPECTIVE JUROR [McCARTHY]: And that's the person that's there. So, yeah, that's the first question I had in my mind.

MR. BABB: Great.

PROSPECTIVE JUROR [McCARTHY]: But then when the subject matter was revealed, then that was a different feeling and reaction.

MR. BABB: Yeah. So good. So if you had to give us a verdict *right now*, guilty or not guilty, knowing that there's a presumption of innocence, that he's innocent as he sits here right now, what would your verdict be?

PROSPECTIVE JUROR [McCARTHY]: I'd say *it'd be hard for me to say that's he's not guilty.*

MR. BABB: It'd be hard for you to say –

PROSPECTIVE JUROR [McCARTHY]: Yeah, because we're here. We're –

MR. BABB: Ahh.

PROSPECTIVE JUROR [McCARTHY]: And there's someone here from the police department that's –

MR. BABB: Right.

> PROSPECTIVE JUROR [McCARTHY]: – that's gonna talk. So, yeah, people don't wind up here from not doing anything.

(Emphasis added.) (*Id.* at 91-93)

When looking at the statements, by themselves, neither amount to a fixed, unalterable opinion or an unshakable bias against Petitioner. Neither statement shows that Juror McCarthy's mind was closed and that he was unable or unwilling to listen to the evidence and the court's instructions and be fair and impartial.

a. Juror McCarthy's statement concerning a child witness does not demonstrate actual bias.

Petitioner characterizes the first exchange as showing that Juror McCarthy favored the child. Juror McCarthy's answer is not as clear as Petitioner portrays. It is not clear that Juror McCarthy was saying he would automatically believe the child and was biased against Petitioner, as Petitioner suggests. It is equally possible that Juror McCarthy was saying he would be skeptical of the child's testimony.

The court's question about a child witness posed the prospective jurors with two differing viewpoints – empathy or sympathy for the child, and the fact that a child "can send someone to prison for a long, long time," which suggested that a child witness's testimony should be carefully scrutinized and perhaps viewed with caution because it had serious ramifications. (Record, Day One of Trial 19) The court's question asked whether

those competing ideas or beliefs prevented any of the prospective jurors from deciding what the truth was in the case and whether the State had proved Petitioner's guilt beyond a reasonable doubt. Juror McCarthy could have fallen on either side of the spectrum – a person who would tend to believe the child, or a person who would tend to view the child's testimony with skepticism. His statement was unclear. Notwithstanding that the court interpreted Juror McCarthy's answer as "tend[ing] to just want to favor th[e] child," Juror McCarthy's later responses reveal that he may have been more inclined to distrust a child witness's testimony. When asked by defense counsel whether he believed Petitioner was guilty because he was sitting at the defense table in a criminal trial, Juror McCarthy stated that that was the first question he had in his mind when he (McCarthy) entered the courtroom. (*Id.* at 92) He continued, "But then when the subject matter was revealed, then that was a different feeling and reaction." (*Id.*) Juror McCarthy's progression of feelings from potentially guilty to potentially not guilty upon learning that he was there for jury selection in a child rape case suggests that he may have tended to view a child witness's testimony apprehensively.

Significantly, however, Juror McCarthy's statement did not show actual bias against Petitioner, such that a failure to challenge him was objectively unreasonable. Juror McCarthy never said he would automatically believe the child witness or that his views concerning the credibility of children would prevent him from listening to the other evidence in the case or from being fair and impartial. He also indicated a negative response to the question posed during the assistant prosecutor's voir dire examination concerning whether any of the prospective

jurors would be less likely to believe a child because it was a child. (*Id.* at 56) Juror McCarthy did not have a fixed opinion one way or the other. His statement was "I *might* have a hard time with it." (Emphasis added.) (*Id.* at 20)

Having a hard time or difficulty with a decision is not actual bias. Decisions about who to believe when there are differing accounts of what happened and whether to convict in a he-said/ she-said case are difficult. In *United States v. Ricketts*, 146 F.3d 492 (7th Cir. 1998), a prison riot case that involved an assault on corrections officers, several prospective jurors indicated that they would give more weight to the testimony of a guard than an inmate. *Id.* at 495. The court of appeals found no error in the trial court's refusal to strike the prospective jurors. *Id.* at 495-96. The court explained:

> [T]he record is woefully short of establishing support for a factual finding that the questioned jurors were not going to be impartial. In the abstract, it is certainly not unreasonable for an ordinary person to say she would generally tend to believe a prison guard over a prison inmate. But that certainly doesn't mean that in a given case, after hearing sworn testimony under oath and considering all the facts and circumstances, that that same juror would automatically believe a given guard over a given inmate.

Id. at 496. *Accord Commonwealth v. Smith*, 518 Pa. 15, 37-38, 540 A.2d 246 (1988) (jurors who initially indicated that policemen are more believable than other witnesses were properly not excused for cause). Likewise, in this case

Juror McCarthy's statement, before hearing any evidence, that he might have a hard time was not unreasonable. It conveyed that he did not know how he was going to feel about the child's testimony until he heard the evidence. *See Griffin v. Bell*, 694 F.3d 817, 824 (7th Cir. 2012) (juror resisted giving definitive answers to questions because she did not yet have the evidence). That is "the opposite of bias." *Id.* at 824. Furthermore, having a hard time with a decision is not actual bias, especially when it is not clear whether Juror McCarthy would tend to favor the child or distrust the child.

b. Juror McCarthy's initial feelings about Petitioner's guilt did not demonstrate actual bias.

Nor did Juror McCarthy exhibit actual bias against Petitioner when he told defense counsel during voir dire that it would be hard for him to say that Petitioner was not guilty. Defense counsel asked Juror McCarthy what his verdict would be "right now." (Record, Day One of Trial 92-93) Although his initial inclination in that moment was that Petitioner was guilty "because people don't wind up here from not doing anything," as in *Ricketts*, it was not unreasonable for an ordinary person to walk into the courtroom, see Petitioner sitting at the defense table, and tend to believe that he must have done something. That is precisely why defense counsel asked the question – because it is a common prior belief that many individuals have. The court of appeals explained in *Griffin v. Bell*, 694 F.3d 817 (7th Cir. 2012),

> A person told that X had been indicted, and asked whether he thought X guilty, might reply

> that he thought X probably was guilty because few innocent people are indicted. That would be a prior [belief]. It would be a bias only if it were irrational or unshakable, so that the prospective juror "would be *unable* to faithfully and impartially apply the law[.]"

(Emphasis in the original.) (Internal citations omitted.) *Id.* at 824, quoting *Thompson v. Altheimer & Gray*, 248 F.3d 621, 625 (7th Cir. 2001). *Accord Commonwealth v. Smith*, 518 Pa. 15, 37-38, 540 A.2d 246 (1988) (jurors who initially indicated that people charged with crimes are usually guilty of something were properly not excused for cause).

Juror McCarthy's statement concerning his belief about Petitioner's guilt "right now," before he had heard any evidence, was neither a *fixed*, *unalterable* opinion nor a *strong and deep impression* that prevented him from rendering a decision based on the evidence and the law. In fact, Juror McCarthy had changed his mind three times after entering the courtroom:

> Well, I'd say when I first came in, that's my – I didn't know why I was here. . . . And that's the person that's there. So, yeah, that's the first question I had in my mind. . . . But then when the subject matter was revealed, then that was a different feeling and reaction. . . . [Right now] I'd say it'd be hard for me to say that's he's not guilty.

(Record, Day One of Trial 93) Because it was a prior belief that was evolving minute by minute, it was not fixed and unshakable. It was not actual bias.

When looking at the statements, by themselves, Petitioner does not establish that Juror McCarthy held an actual bias against Petitioner. That conclusion is only strengthened by considering the totality of Juror McCarthy's statements. When considering the *totality* of the juror's statements during voir dire, as required when reviewing challenges based on juror bias, *see Haight v. Jordan*, 59 F.4th 817, 833 (6th Cir. 2024), Petitioner fails to demonstrate that Juror McCarthy was actually biased against him, that he was unable to be fair and impartial, and that defense counsel acted unreasonably when he did not challenge him.

2. Notwithstanding that the challenged statements themselves did not show actual bias against Petitioner, other exchanges and statements by Juror McCarthy reassured the court and counsel of his ability to remain impartial, to listen to the evidence, to follow the court's instructions of law, and to fairly decide the case.

As argued above, Juror McCarthy's statements, by themselves, did not demonstrate actual bias against Petitioner. Consequently, there was no statement of partiality. Nevertheless, when considering the entire voir dire, there were other exchanges and statements by Juror McCarthy that sufficiently reassured the court and counsel of his ability to remain impartial, to listen to the evidence, to follow the court's instructions of law, and to fairly decide the case.

After Juror McCarthy communicated that he "might have a hard time" with child testimony, the court asked

him, "Do you think you can follow the instructions I give to you in this case, knowing I'm having a hard time because this is a child witness and I tend to just want to favor this child? Can you put that aside and listen to the evidence and – and be fair?" (Record, Day One of Trial 20) Juror McCarthy responded, "It's a good question. I don't have an answer for you." (*Id.* at 21) The court acknowledged the internal struggle that Juror McCarthy was experiencing and indicated that it would leave the issue for the attorneys to explore. (*Id.* at 21)

The assistant prosecutor did subsequently and specifically explore that topic with Juror McCarthy:

> MR. VIEUX: Anybody here say, hey, I don't want to – look, we're going to have the testimony of a kid. That's all I'm really going to hear. I don't know that I can do that, that I can make that kind of a decision. It's okay if you feel that way. I just want to know now.
>
> Are there people who are like hey, that's not my kinda case? Mr. [McCarthy], I see you shaking your head. You got –
>
> PROSPECTIVE JUROR [MCCARTHY]: I might be expressive. I apologize. Just – I'm sure all of us feel the same way. I –
>
> MR. VIEUX: I told you one of the things I'm trying to do is make you feel uncomfortable so that we get good answers, okay?
>
> PROSPECTIVE JUROR [MCCARTHY]: Yeah.

> MR. VIEUX: And I don't want to find out tomorrow that what you felt was – you know, hey, I – this is something I don't want to do. I'm not – I really didn't want to sit on this, right?

(*Id.* at 65-66)

The assistant prosecutor asked a specific question of Juror McCarthy about whether he felt he could sit as a juror in this case despite his feelings about child witnesses. In light of Juror McCarthy's previous honesty, he certainly would have expressed to the assistant prosecutor if he felt he could not be fair and impartial. He remained silent. (*Id.* at 66) During this one-on-one exchange, the assistant prosecutor was in a position to observe Juror McCarthy's facial expressions and body language. The fact that the assistant prosecutor moved on to another topic after that question shows that Juror McCarthy's demeanor satisfied the assistant prosecutor that there was no reason why he could not serve as a juror in the case. The assistant prosecutor got his answer in Juror McCarthy's silence, and he moved on to the next question.

Later, the assistant prosecutor addressed the State's burden of proof beyond a reasonable doubt. (*Id.* at 78) He stated, "It is proof that, at the end of the day, you have heard the evidence, listen to the arguments, the instructions of law, and you feel confident that you have made the right decision. It is a moral decision on your part that could be a hard decision." (*Id.*) The assistant prosecutor again singled out Juror McCarthy and three other prospective jurors, and asked them whether they were willing to take on that level of burden and make the decision with the weight of that decision. (*Id.* at 78-79)

The prospective jurors whom the assistant prosecutor specifically asked that question, which included Juror McCarthy, indicated affirmatively. (*Id.* at 79) After that response, the assistant prosecutor concluded his voir dire and passed for cause. (*Id.*) Again, Juror McCarthy's answer, manner of answering, and any other non-verbal behavior satisfied the assistant prosecutor that the juror did not hold any bias that would disqualify him as a juror or prevent him from being fair and impartial.

During voir dire, the court instructed the prospective jurors that they could not consider the fact that the defendant did not testify, and they had to follow the law that the court provided to them, even if they disagreed with it. (*Id.* at 25-26) The court asked them if they could follow that instruction. (*Id.* at 26) All of the thirteen jurors in the jury box, which included Juror McCarthy, "[i] ndicated affirmatively." (*Id.*) The court also addressed the gravity of their responsibility if selected as jurors in the case – "I just want to impress upon you, you have to get this right. Whichever side it is – it is on, you have to get it right 'cause you don't want to do an injustice to anyone on either side." (*Id.* at 24-25)

The assistant prosecutor spoke about the law pertaining to rape, told the prospective jurors that it was "very important to follow the law that the Judge gives you" on what the State was required to prove and to set aside any prior beliefs about what they thought the law was, and asked them if everyone was willing to do that. (*Id.* at 32-36, 38, 44-46, 65) The prospective jurors, which included Juror McCarthy, "[i]ndicated affirmatively." (*Id.*) The assistant prosecutor asked the prospective jurors in the box if they were willing not to make any decisions in

the case until they heard the evidence. (*Id.* at 55-56) The prospective jurors, which included Juror McCarthy, "[i] ndicated affirmatively" that they were willing to do that. (*Id.* at 56) The assistant prosecutor asked the prospective jurors in the box whether any of them would not be able to make a decision if confronted with two different stories. (*Id.* at 67-68) The prospective jurors, which included Juror McCarthy, "[i]ndicated negatively" that they did not feel that way. (*Id.* at 68) All of the assistant prosecutor's questions and Juror McCarthy's responses to those questions occurred after Juror McCarthy's answer to the court's question about child witnesses.

Thereafter, defense counsel spoke about the presumption of innocence and the principle that the defendant was innocent until proven guilty by the State beyond a reasonable doubt. (*Id.* at 101-02) Defense counsel asked the prospective jurors, "Is there anyone that has a problem with that? Or anyone who says that I can't play by those rules, I don't think that's fair?" (*Id.* at 102) He asked, "Is there anyone that disagrees with that or thinks that's not the right answer, that – that we shouldn't presume innocence or that our verdict wouldn't be not guilty if – if you were asked to give a verdict right now?" (*Id.* at 104-05) Juror McCarthy did not indicate that he had a problem with the presumption of innocence. Defense counsel questioned the prospective jurors about whether they thought that "the police ever arrest people that are later acquitted or even proven innocent." (*Id.* at 115) He asked if anyone disagreed with that premise. (*Id.*) The prospective jurors, which included Juror McCarthy, "[i] ndicated negatively" that they did not disagree. (*Id.*) He asked, "Does anyone feel that if the – if someone gets arrested or accused or indicted, that they really don't

deserve the kind of Constitutional protections that we're talking about?" (*Id.* at 115-16) The prospective jurors, which included Juror McCarthy, "[i]ndicated negatively." (*Id.*) He asked, "Is there anyone that doesn't agree that they can follow the law as it's written – written and presented by the Judge?" (*Id.* at 126) The prospective jurors, which included Juror McCarthy, "[i]ndicated affirmatively" that they could follow the law. (*Id.*) All of defense counsel's questions and Juror McCarthy's answers to those questions occurred subsequent to the challenged statements by Juror McCarthy about child witnesses and Petitioner's guilt.

Throughout voir dire, the assistant prosecutor addressed Juror McCarthy multiple times to draw out his thoughts and feelings on various issues. (*Id.* at 30-31, 54, 65-66, 71-72, 79) Defense counsel did the same. (*Id.* at 92, 122, 123)

In turn, Juror McCarthy was very open and expressive about what he was feeling in the moment. (*Id.* at 54) On one occasion, the assistant prosecutor's attention was drawn to Juror McCarthy because he was making faces, and the assistant prosecutor followed up with him. (*Id.*) Juror McCarthy was not afraid to speak his mind and even challenged the assistant prosecutor's question at one point concerning whether a child would react differently to rape than an adult. (*Id.* at 54-55) His response established that he was going to base his decision on the circumstances presented. (*Id.* at 55)

Additionally, when reviewing the totality of Juror McCarthy's statements, his responses could have caused defense counsel to feel that he might be critical of the

testimony of a child witness and thus a favorable juror for the defense. The court's specific question on the issue of child witnesses was whether any of the thirteen prospective jurors in the jury box thought they would have trouble relying on the testimony of a child witness. (*Id.* at 19-20) That question followed another question about deciding what the truth was and finding that the State had proven its case beyond a reasonable doubt. (*Id.*) Juror McCarthy indicated that he "might have a hard time with it." (*Id.*) Additionally, when defense counsel asked the prospective jurors whether any of them believed that children were susceptible, impressionable, and wanted to please their parents, Juror McCarthy stated "[o]h, yeah." (*Id.* at 122) Juror McCarthy also stated that honesty was important to him. (*Id.* at 123) Based on these responses, defense counsel may have viewed him as a juror who would be inclined to be skeptical of the child's testimony and receptive to the defense theory, which was that Petitioner's wife manipulated Daughter into making the allegations against Petitioner. The entire voir dire examination of Juror McCarthy supports that defense counsel did not perform unreasonably in his questioning of and failure to challenge Juror McCarthy for cause.

3. A combination of Juror McCarthy's responses to both individual and group questioning provided sufficient assurances to the court and the attorneys that he was willing and able to be impartial, to listen to the evidence, to follow the court's instructions of law, and to fairly decide the case.

As set forth above, both the court and the attorneys questioned the thirteen prospective jurors in the jury

box, which included Juror McCarthy, sometimes as a group and sometimes individually. Petitioner argues that "a prospective juror who has expressed bias cannot sit on the jury unless that juror swears to 'cast aside her opinion and render a verdict based on the evidence present in court.'" (Petition, p. 14) Petitioner asks this Court to review his case and establish a blanket rule that requires "an individualized assurance of impartiality." (*Id.*) He argues that general confirmations from a group of prospective jurors that they will apply the law are not sufficient to rehabilitate or otherwise dispel the juror's expressions of partiality.

Initially, as set forth above, the record refutes Petitioner's contention that Juror McCarthy's responses were to *general* group questioning, which merely asked the prospective jurors if they agreed to "follow the law." Because this Court is not confronted with a statement of bias followed by a juror's responses to only *general* group questioning, the holding that Petitioner would ask this Court to make is overly broad and not required or supported by the facts of this case.

Petitioner argues that responses to group questioning are disfavored in the law. He cites *People v. Arnold*, 96 N.Y.2d 358, 753 N.E.2d 846 (2001), *Hughes v. United States*, 258 F.3d 453 (6th Cir. 2001), *Thompson v. Altheimer & Gray*, 248 F.3d 621 (7th Cir. 2001), *Johnson v. Armontrout*, 961 F.2d 748 (8th Cir. 1992), and *United States v. Kechedzian*, 902 F.3d 1023 (9th Cir. 2004) for his assertion that the "majority" of courts do not consider a juror's biased statements to be rehabilitated by responses or silence to generalized group questioning. Those cases are distinguishable.

In *Arnold*, a case in which the defendant was charged with assault for stabbing his former girlfriend and in which he intended to defend himself at trial by arguing self-defense, a prospective juror stated, "I have a problem with" sitting on the case because of her educational background in sociology and women's studies and her research on domestic violence and battered women's syndrome. *Id.* at 360. When asked if she would feel more comfortable sitting on another kind of case, the juror responded, "I think I would." *Id.* at 361. Later in the voir dire, defense counsel asked the entire panel whether they could follow the law as instructed by the court, and whether they agreed that they would not use the case as a "referendum" on crime, domestic abuse or violence in the streets. *Id.* The transcript reflected that the prospective jurors "indicat[ed] yes." *Id.*

In deciding whether the trial court erred in denying defense counsel's challenge of the juror for cause, the high court of New York found that the juror's statements "revealed that, because of her background, the juror herself questioned whether she could be impartial in any domestic violence case." *Id.* at 363. Furthermore, "the collective acknowledgment by the entire jury panel that they would follow the Judge's instructions and would not use this case as a 'referendum' on crime or domestic violence was insufficient to constitute an unequivocal declaration of impartiality" from the juror. *Id.*

The *Hughes* court also criticized the trial court's reliance on "unrelated group questioning," which it found did not address that neither counsel nor the court responded to or followed up with the challenged juror's admission that she did not think she could be fair. *Id.* at

458. Additionally, the juror offered no response to that questioning. *Id.* at 461. The court found that "silence in the face of generalized questioning" "did not constitute an assurance of impartiality." *Id.*

In *Johnson*, several jurors had previously served on a jury that convicted the accused co-defendant of the same robbery. *Id.* at 750. The court of appeals found that the collective silence of the entire jury panel in response to two questions about whether they could put aside evidence they had heard at the prior trial and rely on the evidence at the upcoming trial was insufficient to demonstrate the jurors' impartiality. *Id.* at 750, 755-756. *Accord Kechedzian*, at 1031 (silence in response to group questioning of the entire venire as to whether they could follow the principles of presumption of innocence and burden of proof was not enough to overcome the juror's equivocal statements of impartiality).

Finally, in *Thompson*, in a plaintiff's civil suit against her employer for racial discrimination, a juror stated that, as an employer and owner of a business, her background "will definitely sway my judgment in this case." *Id.* at 624. Later in the voir dire, the judge asked the jurors at large whether they would follow his instructions on the law even if they didn't agree with them and whether they would be able to suspend judgment until they had heard all of the evidence. *Id.* All either nodded their heads or said yes. *Id.* The court of appeals found that "the judge should have followed up by asking [the juror], as he later asked the jury *en masse*, whether she would follow his instructions on the law and suspend judgment until she had heard all the evidence. Instead, the matter was left dangling[.]" *Id.* at 626.

Significantly, this case does not involve a juror's statement of bias followed by the juror's response solely to generalized fairness and "follow the law" questions. Moreover, none of Petitioner's cases enunciated a blanket rule that a juror's responses to group questioning must be disregarded. The cases were based on their unique facts and, in the context of those cases, more was required to ensure an impartial jury.

Other courts have found sufficient rehabilitation in jurors' responses to group questioning. *See Canfield v. Lumpkin*, 998 F.3d 242, 248 (5th Cir. 2021), *cert. denied*, __U.S. __, 142 S.Ct. 2781, 213 L.Ed.2d 1018 (2022); *Torres v. Thaler*, 395 Fed. Appx. 101, 104-105 (5th Cir. 2010), *cert. denied*, 562 U.S. 1230, 131 S.Ct. 1496, 179 L.Ed.2d 325 (2011); *United States v. Martinez-Martinez*, 369 F.3d 1076, 1082-1083 (9th Cir. 2004), *cert. denied*, 543 U.S. 1013, 125 S.Ct. 637, 160 L.Ed.2d 480 (2004) (juror's silent response to the government's question "specifically committed him to 'put aside' his preconceived notions and apply the facts to 'the law that [the judge] will provide'"). *See also People v. Clemens*, 2017 CO 89, 401 P.3d 525 (2017), *cert. denied*, 584 U.S. 935, 138 S.Ct. 1546, 200 L.Ed.2d 748 (2018). These cases not only involved rehabilitation of jurors through group questioning, but rehabilitation based on the juror's non-response, or silence, to group questioning.

The issue in *Clemens* was whether the trial court abused its discretion when it relied on three prospective jurors' silence in response to questions asked of the entire venire to conclude that those jurors had been rehabilitated after they had previously expressed a preconceived opinion about the defendant's right to remain silent. *Id.* at ¶ 1. The Supreme Court of Colorado held that "a prospective juror's silence in response to rehabilitative questioning

constitutes evidence sufficient to support a trial court's conclusion that the juror has been rehabilitated when, in light of the totality of the circumstances, the context of that silence indicates that the juror will render an impartial verdict according to the law and the evidence submitted to the jury at the trial." *Id.* at ¶ 2. The Court recognized that, in some case, a juror's silence in response to group questioning "could reflect reluctance to disagree with the court" and "in that case, such silence, would not be indicative of the silent juror's mindset." *Id.* at ¶ 19. "As such, examination of the entire voir dire record is necessary to provide context." *Id.* Under the totality of the circumstances, the Court concluded that three jurors were rehabilitated by their silence to group questions. *Id.* at ¶ 22. The Court explained:

> The trial court observed these [three] jurors throughout voir dire and reasonably concluded that their silence in response to the court's and defense counsel's questions confirmed that they would obey the instructions regarding Clemens's right not to testify. In particular, we note that the venire was highly responsive to group questioning throughout voir dire. Many jurors, including Jurors 7, 10, and 12, volunteered answers to questions posed to the entire panel. Jurors 7, 10, and 12 were not hesitant to express their opinions even when they disagreed with the attorneys or the judge. Thus, the trial court fairly attributed their silence to their willingness to follow the law as instructed by the court as opposed to a fear of speaking up.

Id. at ¶ 22.

The holding in *Clemens* is consistent with the requirement that the court examine the *entire* voir dire when there is a claim that a juror is biased. *Haight v. Jordan*, 59 F.4th 817, 833 (6th Cir. 2024). It also takes into consideration another well-established principle of voir dire, which is that the trial court and the attorneys, who observe the jurors firsthand, are in the best position to assess a juror's credibility.

The question whether a prospective juror is biased "has traditionally been determined through voir dire culminating in a finding by the trial judge concerning the venireman's state of mind." *Wainwright v. Witt*, 469 U.S. 412, 428, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). "[S]uch a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province" and are entitled to deference. *Id.* This Court stated,

> Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth.

Id. at 434, quoting *Boyd v. Boyd*, 252 N.Y. 422, 429, 169 N.E. 632 (1930).

The same holds true of defense counsel. Indeed, the Supreme Court of Ohio explained:

> Few decisions at trial are as subjective or prone to individual attorney strategy as juror voir dire, where decisions are often made on the basis of intangible factors. The selection of a jury is inevitably a call upon experience and intuition. The trial lawyer must draw upon his own insights and empathetic abilities. Written records give us only shadows for measuring the quality of such efforts. . . . [T]he selection process is more an art than a science, and more about people than rules. For these reasons, we have recognized that counsel is in the best position to determine whether any potential juror should be questioned and to what extent.

(Internal quotation marks and citations omitted.) *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, ¶ 64-65, 873 N.E.2d 828.

Petitioner's proposed rule would prevent a court from considering the *entirety* of its interaction with the challenged juror, as well as the court's ability to assess not only the verbal responses to group questioning, but also the non-verbal responses and behavior exhibited by the juror during group questioning, which may speak volumes about how the juror truly feels. A complete assessment of the juror's ability to be fair and impartial requires consideration of the juror's responses to both individual and group questioning.

In this case, voir dire questioning was directed only to the thirteen prospective jurors in the jury box.

(Record, Day One of Trial 5-6, 11-12) The trial court and the attorneys were able to fully observe those prospective jurors and their body language at all times, whether they were answering individual questions or group questions.

Throughout voir dire, the assistant prosecutor addressed Juror McCarthy multiple times to draw out his thoughts and feelings on various issues. (*Id.* at 30-31, 54, 65-66, 71-72, 79) Defense counsel did the same. (*Id.* at 92, 122, 123)

Like the jurors who were challenged in *People v. Clemens*, 2017 CO 89, 401 P.3d 525 (2017), *cert. denied*, 584 U.S. 935, 138 S.Ct. 1546, 200 L.Ed.2d 748 (2018), Juror McCarthy was very open and expressive about what he was feeling in the moment. (Record, Day One of Trial 54) On one occasion, the assistant prosecutor's attention was drawn to Juror McCarthy because he was making faces, and the assistant prosecutor followed up with him. (*Id.*) Juror McCarthy was not afraid to speak his mind and even challenged the assistant prosecutor's question at one point concerning whether a child would react differently to rape than an adult. (*Id.* at 54-55) His response established that he was going to base his decision on the circumstances presented. (*Id.* at 55)

Juror McCarthy's statements as a whole when questioned by the attorneys assured the parties that he understood the gravity of his role in the trial, could be fair and impartial, would listen to the evidence, and would apply the court's instructions. When questions were asked of the group of prospective jurors, which included Juror

McCarthy, the jurors affirmatively responded, indicating their agreement to follow the law as given by the court, to not apply their own idea of what they thought the law should be, to not make a decision until they heard all the facts and circumstances, to not consider the defendant's decision not to testify, and to apply the presumption of innocence. (*Id.* at 25-26, 32-36, 38, 445-46, 50-51, 55-56, 65, 67-68, 102-05, 115) The trial court and the attorneys were able to observe whether Juror McCarthy was answering the group questions, as well as his demeanor and non-verbal behavior as he responded.

When reviewing the entire voir dire and the totality of Juror McCarthy's statements for the determination of actual bias and the existence of assurances of impartiality, the court is not limited to considering only Juror McCarthy's responses to questions individually posed to him. A complete assessment of Juror McCarthy's ability to be fair and impartial also includes consideration of his responses to group questions. Juror McCarthy's answers to both the individual questions and the group questions showed the court that he was not actually biased against Petitioner and that he was willing and able to remain impartial, to listen to the evidence, to follow the court's instructions of law, and to fairly decide the case. Because Petitioner does not establish actual bias, he does not demonstrate that his counsel's decision not to challenge Juror McCarthy was unreasonable or resulted in prejudice. Respondent asks this Court to deny Defendant's petition for a writ of certiorari.

CONCLUSION

For these reasons, Respondent asks this Court to deny Petitioner's petition for a writ of certiorari.

Respectfully submitted,

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