No. 00-0000

IN THE
Supreme Court of the United States

MARTIN HORN, COMMISSIONER
PENNSYLVANIA DEPARTMENT OF CORRECTIONS;
CONNER BLAINE, SUPERINTENDENT
STATE CORRECTIONAL INSTITUTION AT GREENE;
JOSEPH P. MAZURKIEWICZ, SUPERINTENDENT
STATE CORRECTIONAL INSTITUTION AT ROCKVIEW
Petitioners

v.

ANDRE STEVENS
Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(Capital Case)

1. Whether in violation of the Antiterrorism and Effective Death Penalty Act of 1996 the Court of Appeals in this habeas corpus case set aside a reasonable state-court determination of fact that a prospective capital sentencing juror was biased and properly excused for cause under *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1995), in favor of its own debatable interpretation of the record.

2. Whether the Court of Appeals misinterpreted *Witt* and erroneously affirmed the District Court's order vacating the state prisoner's death sentences and granting a new sentencing proceeding, because it failed to properly consider evidence of the juror's demeanor that so strongly contributed to the state trial court's decision to exclude her from service.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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The opinion and order of the Court of Appeals affirming the District Court is unpublished and is reprinted in Pet. App. 1a. The opinion and order of the District Court granting the petition for writ of habeas corpus in part is published and is reprinted in Pet. App. 1b. *Stevens v. Horn*, 319 F.Supp.2d 592 (W.D.Pa. 2004). The opinion and order of the Pennsylvania Supreme Court affirming the Beaver County Court of Common Pleas ("trial court") is published and is reprinted in Pet. App. 1c. *Commonwealth v. Stevens*, 559 Pa. 171, 739 A.2d 507 (1999). The opinion and order of the trial court denying state collateral relief is unpublished, and those portions relevant to this petition are reprinted in Pet. App. 1d.

STATEMENT OF JURISDICTION

The Court of Appeals affirmed the District Court's order granting the petition for writ of habeas corpus in part on July 7, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 28 of the United States Code provides in relevant part:

> (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.
>
> (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.

28 U.S.C. §§ 2254(d), (e)(1).

STATEMENT OF THE CASE

On April 21, 1993, after a non-jury trial, the respondent Andre Stevens was convicted in the Court of Common of Beaver County, Pennsylvania, of two counts of first-degree murder. The evidence presented during the trial established that on February 8, 1992, Stevens was a customer at Armando's bar, a local drinking establishment. Sometime before 1:00 a.m., his estranged wife, Brenda Jo Stevens ("Brenda Jo"), entered the establishment with friends. Brenda Jo proceeded past Stevens and sat near the end of the dance floor with Michael Love, an off-duty police officer and acquaintance whom she had met a few months before. When Brenda Jo and Love began dancing, Stevens left the bar and walked to his car to retrieve his

nine millimeter semi-automatic pistol loaded with hollow point bullets. He returned to the bar with the gun and walked across the dance floor toward Brenda Jo and Love, cocking the gun as he walked. As the two victims were leaving the crowded dance floor in different directions, Stevens opened fire on them, killing both. Stevens fired one of the shots into Love's scrotum area, which caused him to suffer a great deal of pain. Pet. App. 2c-3c, 31c.

Following the non-jury trial, the penalty phase of the capital trial began with the selection of a sentencing jury. During *voir dire* before the trial court, prospective juror Nancy Hartling was examined. The transcript of that proceeding, in relevant part, provides:

> THE COURT: As you know you are being considered as a juror in a case involve[sic] the deaths by homicide of Brenda Jo Stevens and Michael Love. This occurred on February 8, 1992 at Armando's Restaurant/Bar located in Rochester Township. The Defendant is Andre Stevens and the Commonwealth has secured a verdict of guilty of murder of the first degree with respect to both of those deaths. It is now up to a jury to determine whether to impose the penalty of death or the penalty of life imprisonment upon Mr. Stevens. Do you have an opinion about the death penalty which would prevent you from following the Court's instructions as to what penalty should be imposed?
>
> A I don't believe in the death penalty.
>
> THE COURT: Very well.
>
> [PROSECUTOR]: Challenge for cause, Your Honor.

> THE COURT: Very well. You are excused, thank you.

Pet. App. 2e-3e. Defense counsel did not object to the Commonwealth's challenge for cause or seek to question Hartling about her opinion. *Id.*

Based upon the evidence presented, the sentencing jury found the grave risk and multiple victim aggravating circumstances with respect to the murder of Brenda Stevens.[1] Pet. App. 3d-4d. In addition to these aggravating circumstances, the jury found the aggravating circumstance of torture with respect to the murder of Michael Love.[2] *Id.* As to mitigating circumstances the jury found that Stevens had no significant history of prior criminal convictions and that he was under extreme mental and emotional disturbance with respect to both victims.[3] *Id.* Having concluded that the aggravating circumstances outweighed the mitigating circumstances, the jury returned a verdict of death on both counts on April 29, 1993. *Id.* Stevens's convictions and death sentences were affirmed on direct appeal. *Commonwealth v. Stevens*, 543 Pa. 204, 670 A.2d 623 (1996), *cert. denied Stevens v. Pennsylvania*, 519 U.S. 855, 117 S.Ct. 151, 136 L.Ed.2d 96 (1996).

Stevens filed a state collateral petition alleging, *inter alia*, that the trial court improperly excused prospective juror Nancy Hartling based upon her views about the death penalty in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). This claim

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[1] 42 Pa.C.S. § 9711(d)(7)(11).

[2] 42 Pa.C.S. § 9711(d)(8).

[3] 42 Pa.C.S. § 9711(e)(1)(2).

was rejected by the Pennsylvania state courts. In so doing, the state courts clearly explained that the trial judge's assessment of the juror's demeanor strongly contributed to the decision to exclude her from serving on the sentencing jury. As the trial court explained:

> [W]hat cannot be discerned from the record is the tone of her response and her demeanor when she responded to our question. . . . Contrary to [Stevens's] allegation, we did not summarily dismiss Mrs. Hartling. Rather, our decision was based upon her statement *and the manner in which it was made*. Although we have no specific recollection of Mrs. Hartling and the transcript is incapable of reflecting the tone of her response as well as her demeanor is so responding, had this juror's answer not been emphatic and clearly conveyed her unwillingness to comply with the court's instructions, we would not have sustained a challenge for cause. As is apparent from the record, we repeatedly asked jurors whether they would be able to set aside their opinions -- whatever it might be -- and follow the court's instructions. Moreover, the Commonwealth's immediate challenge for cause, without objection from defense counsel, is corroborative of Mrs. Hartling's adamant position.

Pet. App. 7d-8d (emphasis supplied). In affirming the trial court's decision to strike Hartling for cause, the Pennsylvania Supreme Court observed:

> Here, the remainder of *voir dire* indicates that the trial court did not deny counsel the opportunity to question the venireman or to attempt to rehabilitate the prospective jurors if counsel chose to do so, and specifically

> directed [Stevens's] counsel to object if he thought the trial court's granting of the challenge for case was improper. Our review of *voir dire* indicates that with most other jurors, except where the cause for striking a juror was immediately clear, the court inquired as to whether that juror would be able to set aside his or her personal opinion of the death penalty and follow the instructions of the court. *We accept the statement of the trial court in its opinion when it stated that its decision not to conduct further inquiry with respect to this juror was based on its assessment of her demeanor in responding to the question*.

Commonwealth v. Stevens, 739 A.2d 507, 521 (Pa. 1999) (emphasis supplied). Pet. App. 26c-27c.

On November 24, 2000, Stevens filed a petition for writ of habeas corpus in the District Court raising fourteen (14) claims, including the *Witherspoon* claim.

On May 26, 2004, the District Court granted Stevens relief from his sentences of death.[4] *Stevens v. Horn*, 319 F.Supp.2d 592 (W.D.Pa. 2004). Pet. App. 1b. The District Court concluded that the trial court's factual finding of juror bias was unreasonable under Section 2254(d)(2) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(2), and that Stevens had overcome the presumption of correctness afforded to state factual determinations under 28 U.S.C. § 2254(e)(1). Pet. App. 23b. In so doing, the District Court focused exclusively on the questioning of the prospective juror, and ignored the trial court's assessment of the juror's demeanor, which so strongly contributed to its decision to

[4]The District Court denied Stevens's petition to the extent that it sought relief from his murder convictions.

exclude her. The District Court did not conduct a hearing on the claim, instead relying on prospective juror Hartling's testimony during *voir dire*.

On July 7, 2006, the Court of Appeals affirmed. Pet. App. 1a. The Court of Appeals held that the state court factual finding regarding the prospective juror's demeanor was not "fairly supported by the record" because it was not evident from the transcript of *voir dire*, but rather was contained in the state court opinions denying state collateral relief. Pet. App. 20a-21a (citing *Wainwright v. Witt*, 469 U.S. 412, 423, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)). In the alternative, the Court of Appeals held that even if the juror emphatically stated that she did not believe in the death penalty, this fact was not sufficient to support the trial court's factual finding of juror bias. Pet. App. 21a. Moreover, addressing the state court's representation that the trial court's decision not to conduct further inquiry of the prospective juror was based on its assessment of her demeanor, the Court of Appeals substituted its own explanation -- that the trial judge's failure to conduct follow-up questioning was an "oversight." Pet. App. 23a. Finally, addressing the Commonwealth's argument -- predicated on *Witt* -- that the failure of defense counsel to ask follow-up questions of the juror was evidence that the juror's bias was readily apparent to all in attendance, the Court of Appeals distinguished *Witt* on its facts because the trial court in the present case did not ask follow up questions. Pet. App. 24a-26a.

This petition follows.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for writ of *certiorari* for two reasons. First, the Court of Appeals set aside a reasonable state-court determination of fact that prospective capital sentencing juror Nancy Hartling was biased and properly excused for cause under *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1995), in favor of its own debatable interpretation of the record in violation of the Antiterrorism and Effective Death Penalty Act of 1996. *See Rice v. Collins*, 126 S.Ct. 969 (2006) (granting *certiorari* because the Court of Appeals "set aside reasonable state-court determinations of fact in favor of its own debatable interpretation of the record"). Second, the Court of Appeals misinterpreted this Court's ruling in *Witt* and erroneously affirmed the District Court's order granting state prisoner Andre Stevens's petition for writ of habeas corpus in part and vacating his death sentence, because it failed to properly consider evidence of Hartling's demeanor that so strongly contributed to the trial court's decision to exclude her from service.

In *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), the Court held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.* at 522. Under the *Witherspoon* standard, such veniremen could not be excused for cause unless it was "unmistakably clear" that "that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them" or that "their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." *Id.* at 523 n.21.

The Court modified the *Witherspoon* standard in *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1995), where it held that the standard for determining whether a prospective juror may be excluded for cause because of the juror's views of capital punishment "is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Id.* at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980)). The Court added that this standard does not require that a juror's bias be proved with "unmistakable clarity" as stated in *Witherspoon*. *Id.*

A. The Court Should Grant *Certiorari* Because The Court Of Appeals Set Aside Reasonable State Court Determinations Of Fact In Favor Of Its Own Debatable Interpretation Of the Record In Violation Of AEDPA.

Recently, in *Rice v. Collins*, 126 S.Ct. 969 (2006), the Court began its opinion by stating that it granted *certiorari* because it was "[c]oncerned that, in this habeas corpus case, a federal court set aside reasonable state-court determinations of fact in favor of its own debatable interpretation of the record . . . ." *Id.* at 972. The same concern exists in the present case.

The question of whether a venireman is biased is a factual determination subject to the "presumption of correctness" contained in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Witt*, 469 U.S. at 429. Under AEDPA, the federal courts must deny federal habeas relief on any claim that was adjudicated on the merits in a state court proceeding unless, *inter alia*, the adjudication "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." 28 U.S.C. § 2254(d)(2). Moreover, under AEDPA "a determination of a factual issue made by a State court

shall be presumed to be correct" and the "applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

In the present case, the state court opinions that address the disqualification of prospective juror Nancy Hartling clearly indicate that the trial judge's assessment of her demeanor strongly contributed to the decision to exclude her from serving on the sentencing jury. The trial judge wrote:

> [W]hat cannot be discerned from the record is the tone of her response and her demeanor when she responded to our question. . . . Contrary to [Stevens's] allegation, we did not summarily dismiss Mrs. Hartling. Rather, our decision was based upon her statement *and the manner in which it was made*. Although we have no specific recollection of Mrs. Hartling and the transcript is incapable of reflecting the tone of her response as well as her demeanor is so responding, had this juror's answer not been emphatic and clearly conveyed her unwillingness to comply with the court's instructions, we would not have sustained a challenge for cause. As is apparent from the record, we repeatedly asked jurors whether they would be able to set aside their opinions -- whatever it might be -- and follow the court's instructions. Moreover, the Commonwealth's immediate challenge for cause, without objection from defense counsel, is corroborative of Mrs. Hartling's adamant position.

Pet. App. 7d-8d (emphasis supplied). In affirming the trial court's decision to strike Hartling for cause, the

Pennsylvania Supreme Court reviewed the entire record of *voir dire*, and then observed:

> Here, the remainder of *voir dire* indicates that the trial court did not deny counsel the opportunity to question the venireman or to attempt to rehabilitate the prospective jurors if counsel chose to do so, and specifically directed [Stevens's] counsel to object if he thought the trial court's granting of the challenge for case was improper. Our review of *voir dire* indicates that with most other jurors, except where the cause for striking a juror was immediately clear, the court inquired as to whether that juror would be able to set aside his or her personal opinion of the death penalty and follow the instructions of the court. *We accept the statement of the trial court in its opinion when it stated that its decision not to conduct further inquiry with respect to this juror was based on its assessment of her demeanor in responding to the question*.

Commonwealth v. Stevens, 739 A.2d 507, 521 (Pa. 1999] (emphasis supplied). Pet. App. 26c-27c.

Although the Pennsylvania Supreme Court accepted the statement of the trial court that its decision not to conduct further inquiry of Ms. Hartling was based on its assessment of her demeanor, the Court of Appeals did not. Instead, as in *Rice*, the Court of Appeals substituted its own interpretation of the record:

> Our review of the partial record of *voir dire* provided to the District Court indicates,[5]

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[5]To the contrary, the Commonwealth provided the District Court with a complete copy of the *voir dire* proceeding. *See*

however, that only a few potential jurors were actually similarly situated to Hartling. Of those few potential jurors, perhaps seven, who responded to the judge's opening question about the death penalty with an answer suggesting opposition to the death penalty, the trial judge failed twice-in the case of both Hartling and a prospective juror named James L. Perrott to conduct any colloquy whatsoever to determine whether the venire members would be able to set aside their moral difficulties with capital punishment. The fact that the trial judge conducted a proper colloquy in the remaining handful of similar instances, then, is of little persuasive value. The remaining instances do not comprise a significant number-or, for that matter, a large enough percentage of the similar situations. Under these circumstances, we cannot easily attribute the absence of the proper colloquy in Hartling's case to something unremembered about her demeanor. Indeed, it may be noteworthy that Hartling was the first potential juror, and the only juror to do so on the first day of *voir dire*, who told the trial judge that she had moral qualms about the death penalty. This may suggest, if anything, that the trial judge's failure to conduct proper follow-up questioning was an oversight, although one of constitutional proportions. The trial judge may simply have not yet well-thought out how he would handle a potential juror who expressed moral opposition to capital punishment.

Horn v. Stevens, Civil Action No. 99-1918, Dkt. 14, App. 3-4, 6 (W.D. Pa.).

Pet. App. 22a-23a (footnote omitted).

As in *Rice*, the Court of Appeals' alternative interpretation of the record in the present case is "debatable." *Rice*, 126 S.Ct. at 972. Indeed, the "oversight" theory espoused by the Court of Appeals is belied by the language of the trial court's question to prospective juror Nancy Hartling:

> Do you have an opinion about the death penalty *which would prevent you from following the Court's instructions as to what penalty should be imposed*?

Pet. App. 2e (emphasis supplied). This question reveals that the trial court clearly understood that a prospective juror may be excluded for cause for his/her views of capital punishment only when those views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams v. Texas*, 448 U.S. at 45. The question also reveals that the trial court had a plan in advance for dealing with prospective jurors who may express moral opposition to capital punishment, which was to limit its questions in order to solicit only those opinions that would prevent the juror from following the court's instructions. By substituting its debatable "oversight" theory for the explanation supplied by the Pennsylvania state courts, the Court of Appeals misapplied "settled rules that limit its role and authority." *Rice*, 126 S.Ct. at 972.

The Court of Appeals believed that it was at liberty to substitute its own interpretation of the record for that of the state courts because it believed that the trial court's factual determination was not "fairly supported by the record." Pet. App. 20a-21a. However, there is ample support in the record for the trial court's factual determination that Hartling would not have been able to set aside her bias against the death penalty and apply the

law as instructed by the trial court. *First*, the trial court's conclusion is supported by its observation of Hartling's demeanor, which was described as "emphatic" and "clearly convey[ing] her unwillingness to comply with the court's instructions." Pet. App 7d-8d. *Second*, Hartling's statement -- "I don't believe in the death penalty" -- was provided in response to the trial court's question "Do you have an opinion about the death penalty *which would prevent you from following the Court's instructions as to what penalty should be imposed?*" Pet. App. 2e (emphasis supplied). When Hartling's statement is considered in the context of the question asked, her response implies that her opinion against the death penalty would prevent her from following the trial court's instructions. *See generally Witt*, 469 U.S. at 435 ("Respondent's attempt to separate the answers from the questions misses the mark."). *Third*, in the notes of testimony during *voir dire*, Stevens's counsel did not object to Hartling's disqualification or seek to rehabilitate her. Pet. App 2e-3e. The importance of the latter was described by the Supreme Court in *Witt*:

> Thus, whatever ambiguity respondent may find in this record, we think that the trial court, aided as it undoubtedly was by its assessment of [the juror's] demeanor, was entitled to resolve it in favor of the State. We note in addition that respondent's counsel chose not to question [the juror] himself, or to object to the trial court's excusing her for cause. This questioning might have resolved any perceived ambiguities in the questions; its absence is all the more conspicuous because counsel did object to the trial court's excusing other veniremen later on during the *voir dire.* Indeed, from what appears on the record it seems that at the time [the juror] was excused no one in the courtroom questioned the fact that her beliefs prevented her from

> sitting. The reasons for this, although not crystal clear from the printed record, may well have been readily apparent to those viewing [the juror] as she answered the questions.

Witt, 469 U.S. at 434-435. As a result, there is support in the record for the trial court's determination of bias.

B. The Court Should Grant *Certiorari* Because The Court Of Appeals Has Decided An Important Federal Question In A Way That Conflicts With The Court's Decision In *Wainwright v. Witt*.

In *Witt*, the Court noted the limited effectiveness of *voir dire* in determining juror bias in capital cases:

> [D]eterminations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"' these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite the lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Witt, 469 U.S. at 424-425.

Consistent with that assessment, the Court has emphasized the importance of demeanor and credibility in determining bias:

> [T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case.

Reynolds v. United States, 98 U.S. 145, 156-157, 25 L.Ed. 244 (1879]. Similarly, the Court has stated:

> Face to face with living 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. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.

Marshall v. Lonberger, 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

Despite the strong reliance the trial judge placed on his observations of Hartling's demeanor, the Court of Appeals dismissed this consideration:

> For that matter, even if we accepted the trial judge's supposition that he relied on something emphatic in Hartling's demeanor,

> the result would be no different. Even if Hartling emphatically stated that she did not "believe in" the death penalty, all that could reasonably by inferred is that her moral opposition to capital punishment was strongly felt.

Pet. App. 21a. In the Court of Appeals' view, it is more important what the prospective juror says than how the juror says it. Under this approach, therefore, if Hartling were to have jumped on top of the trial judge's bench and screamed at the top of her lungs "I do not believe in the death penalty!" it would still have been unreasonable under AEDPA for the trial court to conclude as a factual matter that her ability to perform her duties as a juror would be substantially impaired without asking follow-up questions. This elevation of the spoken word over other factors such as demeanor is contrary to the decisions of this Court described above. As a result, this petition should be granted.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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