No. 14-_____

Supreme Court of the United States

RANDY WHITE, WARDEN,

Petitioner,

v.

ROGER L. WHEELER,

Respondent.

CAPITAL CASE

On Petition for Writ of Certiorari to the U. S. Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

For the third time in four years, the Sixth Circuit has exceeded the strict limitations of 28 U.S.C. §§2254(d)(1) and (d)(2) and reversed a Kentucky death sentence. This Court reversed the Sixth Circuit in the two prior cases. *See*, *Parker v. Matthews*, 132 S.Ct. 2148 (2012) (*per curiam*) and *White v. Woodall*, 134 S.Ct. 1697 (2014). Here, the Sixth Circuit decided *de novo* that Juror 638 was not biased, was improperly struck for cause, and the Kentucky Supreme Court therefore unreasonably applied *Witherspoon v. Illinois*, 391 U.S. 510 (1968) and *Wainwright v. Witt*, 469 U.S. 412 (1985).

Witherspoon provides that the Sixth Amendment is violated in a capital case when a prospective juror is removed for cause simply because he has "conscientious scruples" against the death penalty. *Witt* clarifies that a juror may be excluded for cause if his views on the death penalty would "prevent or substantially impair the performance of his duties[.]" *Id*. at 424. When a trial judge makes a factual finding of juror bias, "deference must be paid to the trial judge who sees and hears the juror." *Id*. at 426.

Juror 638 never unequivocally said that he could realistically consider the death penalty. Juror 638 "believe[d]" that he "probably" could consider the death penalty "after some deep reflection" but admitted "it's difficult for me to judge how I would I guess act." Juror

638 agreed that he was "not absolutely certain" he could "realistically consider" imposing the death penalty. Juror 638 twice said "I don't know" if the state should have the power to impose a death penalty. Later, Juror 638 stated that, with aging and having children, he was not sure "whether or not we have the right to take that life." Taking all these answers into account, the trial judge granted the prosecutor's motion to strike Juror 638 for cause under *Witt*. The Kentucky Supreme Court affirmed. The District Court denied habeas relief. A divided panel of the Sixth Circuit overturned Wheeler's death sentence, finding *de novo* that Juror 638 was not biased, was improperly struck for cause, and, therefore, *Witherspoon* and *Witt* were violated. Finding the error to be structural per *Gray v. Mississippi*, 481 U.S. 648 (1986), the Sixth Circuit ordered a new sentencing trial. The questions presented are:

1. **Did the Sixth Circuit disregard the highly deferential standards Congress imposed in 28 U.S.C. §§2254(d)(1), (d)(2) and (e)(1), and the deference owed to trial court's factual finding of juror bias required by *Wainwright v. Witt*, when it granted habeas relief on Wheeler's *Witherspoon/Witt* claim.**

2. **Should a violation of *Witherspoon/Witt* be subject to harmless error analysis?**

PARTIES TO PROCEEDING

The parties to the proceeding are (1) Randy White, Warden (successor to Thomas Simpson, Warden) and (2) Roger L. Wheeler, a condemned inmate.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Miscellaneous

Statutes

PETITION FOR WRIT OF CERTIORARI

Randy White, Warden (successor to Thomas Simpson) respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's Opinion is reported as *Wheeler v. Simpson*, 779 F.3d 366 (6th Cir. 2015). Petitioner's Appendix ("App") 1a-77a. The Opinion of the Kentucky Supreme Court is reported as *Wheeler v. Commonwealth*, 121 S.W.3d 173 (Ky. 2003). App 88a - 119a.

STATEMENT OF JURISDICTION

The Sixth Circuit entered the judgment from which relief is sought on February 20, 2015. App 1a. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury[.]"

The Fourteenth Amendment to the United States Constitution provides, in relevant par: "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]"

28 U.S.C. §2254 (d)(1) provides: "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 the State court proceedings unless the adjudication of the claim 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[.]"

28 U.S.C. §2254(d)(2) provides: "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 the State court proceedings unless the adjudication of the claim 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(e)(1) provides: "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.

Kentucky Rule of Criminal Procedure 9.36 provides, in relevant part: (1) Challenges for cause shall be made first by the Commonwealth and then by the defense. No peremptory challenge shall be permitted before the

voir dire has been completed for all parties. When there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified.

(2) After the parties have been given the opportunity of challenging jurors for cause, each side or party having the right to exercise peremptory challenges shall be handed a list of qualified jurors drawn from the box equal to the number of jurors to be seated plus the number of allowable peremptory challenges for all parties. Peremptory challenges shall be exercised simultaneously by striking names from the list and returning it to the trial judge. If the number of prospective jurors remaining on the list exceeds the number of jurors to be seated, the cards bearing numbers identifying the prospective jurors shall be placed in a box and thoroughly mixed, following which the clerk shall draw at random the number of cards necessary to comprise the jury or, if so directed by the court, a sufficient number of cards to reduce the jury to the number required by law, in which latter event the prospective jurors whose identifying cards remain in the box shall be empaneled as the jury.

STATEMENT OF THE CASE

A. Facts of the Crimes. On or about October 2, 1997, Wheeler murdered Nigel Malone and Nairobi Warfield inside the victims' apartment. Malone was found in a hallway with nine stab wounds, including two chest wounds. Warfield was found in her bedroom, and she died as a result of manual strangulation. Warfield "was found in a seated position, leaning against a bedroom wall. She was covered with a blanket or quilt and a scissors was protruding from her neck." App 89a. When the blanket was removed, a drop of blood was observed on Warfield's thigh. Blood was also found wiped on a bed sheet in the same bedroom. Subsequent DNA testing revealed Wheeler as the source of the dropped and wiped blood.

Wheeler repeatedly denied being in the apartment. But after DNA testing revealed his presence, Wheeler testified and offered an unconvincing alternate perpetrator. Wheeler testified that, as he entered the apartment, he was confronted by a knife-wielding man wearing Army fatigues, a Halloween mask and latex gloves. Wheeler claimed that he was cut while struggling with this fictitious invader. Even then, Wheeler denied being in Warfield's bedroom. Wheeler was seen moments after the murders in a convenience store with blood on his person. *Wheeler v. Commonwealth*, 2008 WL 5051579 (Ky. 2008).

A fair and impartial jury found Wheeler guilty of two counts of intentional murder and sentenced him to death. App 120a - 124a. This petition concerns *voir*

dire and the trial court's decision to excuse Juror 638 for cause per *Wainwright v. Witt*, 469 U.S. 412 (1985).

B. The *Voir Dire* and Exclusion of Juror 638.

A transcript of Juror 638's *voir dire* is contained in the Appendix, pages 125a - 140a. The most relevant portions of the *voir dire* are provided herein (with emphases added):

> Judge: . . . Would you be able to consider the entire range of penalties, including the death penalty?
>
> Juror 638: **Probably with some deep reflection**. App 125a.
>
> *****
>
> Judge: . . . Do you think the Commonwealth of Kentucky should have the authority to seek the death penalty in certain cases?
>
> Juror 638: Um, I don't know.
>
> Judge: All right.
>
> Juror 638: I don't know. App 125a - 126a.
>
> *****
>
> Prosecutor: . . . And I think the question is given, uh, your philosophy and your beliefs with respect to the death penalty and the penalty ranges and whatnot, **do you, uh, feel as though you could realistically consider each penalty option before making a decision**.

Juror 638: Well, obviously, I've never been confronted with that situation in a, in a real-life sense of having to make that kind of determination. [Interrupted]. **So it's difficult for me to judge how I would I guess act**, uh -. App 131a.

*****

Prosecutor: Uh, I think, uh, it's just whether - and, and, and if I understand you correctly, maybe you're, **you're telling me that, at this point, you're not absolutely certain whether you could realistically consider it or not**, because you -

Juror 638: **I think, I think that would be the most accurate way I could answer your question**. App 132a..

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Defense: . . . Can you tell me a little bit more about some of the things that have gone through your mind that you've thought about when, uh, when you have thought about the issue of the death penalty, some of the concerns of whatever it is you have thought about.

Juror 638: Yes, sir, I'll try and be concise, uh -

Defense: Sure.

Juror 638: - on a very philosophical topic, I think a very difficult one. **Um, the older I get, uh, perhaps the more I understand, uh, a lot more**

things about values and, life itself. I have four children, and those things are important to me. So, uh, perhaps I'm a bit more contemplative on the issue of taking a life and, uh, whether or not we have the right to take that life. App 133a.

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Defense: **And you do feel that you can consider all of the options presented**.

Juror 638: **I believe I can**, sir. App 134a.

At the conclusion of Juror 638's *voir dire*, the prosecutor moved to strike Juror 638 for cause. The prosecutor argued that Juror 638 could not realistically consider the death penalty. The trial judge stated that her initial impression was that Juror 638 "would take this job very seriously" but "had serious reservations about the death penalty." App 137a - 138a. Nonetheless, the trial judge initially provided that " if you look at the totality of the questioning, what he's indicating, uh, that I understood was that he would take it very seriously but that he could consider the entire range." App 138a.

The trial court then asked "I didn't hear him say that he couldn't realistically consider the death penalty. Did he actually say that?" App 138a. When the prosecutor answered in the affirmative, the trial court said that she would review the video recording of Juror 638's *voir dire* and reserve her ruling.

The next morning, after reviewing the *voir dire* video recording and after extended reflection and contemplation,[1] the trial court found that Juror 638 was biased and could not "realistically consider" the death penalty, as required by *Witt*. The trial court held:

> Also Mr. Kovatch, who we had yesterday, um, can't remember his juror badge number, just a second here, uh here we go, Mr. Kovatch is #638. Uh, the Commonwealth moved to strike Mr. Kovatch, uh, because of his expressed, uh concerns about considering the entire range. And when I went back and reviewed his entire testimony, Mr. Dathorne concluded with saying, "Would it be accurate to say that you couldn't, couldn't consider the entire range?" And his response is - I think was, "I think that would be pretty accurate." So, I'm going to sustain that one, too. So that's 638 and 585 that are gone for cause. App 139a - 140a.

The Kentucky Supreme Court affirmed the trial court, holding that the trial court did not abuse its discretion in making its finding of fact that Juror 638 was biased. While not citing *Witt*, the Kentucky Supreme Court applied the *Witt* standard and correctly affirmed that Juror 638 was biased and properly struck for cause. App 90a - 92a.

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[1] In Kentucky, trials are video recorded rather than manually transcribed. The video recording was also made part of the record before the Sixth Circuit. The Sixth Circuit ordered a written transcript of the *voir dire*.

It should be noted that, in Kentucky, peremptory challenges are not used until the conclusion of all *voir dire*, immediately prior to the random selection of jury from the remaining pool. *Kentucky Rule of Criminal Procedure* 9.36. Thus, at the time of Juror 638's *voir dire*, the prosecutor possessed his entire complement of peremptory challenges.

C. Federal Habeas Corpus Proceedings.

1. **District Court**. Wheeler filed a petition for writ of habeas corpus in the United States District Court for the Western District of Kentucky. Along with other claims, Wheeler claimed a *Witherspoon/Witt* claim relative to Juror 638.

The District Judge adopted the "Findings of Fact, Conclusions of Law and Recommendation" of the Magistrate Judge. App 78a - 79a. The Magistrate Judge found that the Wheeler did not overcome the 28 U.S.C. §2254(e)(1) presumption of correctness attached to the trial court's finding of bias concerning Juror 638. App 84a. The Magistrate Judge also held that the Kentucky Supreme Court's Opinion did not unreasonably apply of *Witt* or *Witherspoon v. Illinois*, 391 U.S. 510 (1968). App 80a - 87a.[2]

2. **The Sixth Circuit majority opinion.** A divided panel of the Sixth Circuit reversed the District Court. The majority held that Juror 638 "**expressly**

[2] The Magistrate Judge's "Findings of Fact, Conclusions of Law and Recommendation" total 174 pages. In the Appendix, the Warden has included only those portions relevant to this petition.

stated that he could consider the full range of punishment—including the death penalty—after earlier expressing reservations and uncertainty about its wisdom. (Emphasis added.)"[3] App 5a, 9a. Although the majority acknowledged that *Witt* and *Uttecht v. Brown*, 551 U.S. 1 (2007) require that "great deference" be given to a trial judge's decision to excuse a juror, it declined to defer to the trial court's ruling for several reasons. The majority opinion was written by Circuit Judge Merritt.[4]

First, the Sixth Circuit criticized as "inaccurate" the trial judge's paraphrase of Juror 638's response to the prosecutor's question. The trial judge paraphrased that the juror agreed with the prosecutor that he "couldn't consider the entire range[.]" The Sixth Circuit stated that the juror actually agreed with the prosecutor that he was "not absolutely certain whether [he] could realistically consider it or not." App 6a. The Sixth Circuit found this paraphrase to be a "material[ ]" difference and pointed out that the juror later said

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[3] Juror 638 "expressly stated" that he "believe[d]" he could consider all possible sentences and that he "probably" could consider the death penalty. App 125a, 134a.

[4] It is interesting to note that this Court summarily and unanimously reversed in four other federal habeas cases in which Judge Merritt wrote opinions invalidating death sentences. *See*, *Bobby v.* Dixon, 132 S.Ct. 26 (2011) (*per curiam*); *Bobby v. Mitts*, 131 S.Ct. 1762 (2011) (*per curiam*); Bobby *v. Van Hook*, 558 U.S. 4 (2006) (*per curiam*); and, *Mitchell v. Esparza*, 540 U.S. 12 (2003) (*per curiam*).

(once) that "he could consider the full range of penalties."[5] App 8a, 9a..

Second, the Sixth Circuit found *Witt* deference to the trial judge was unwarranted because the trial judge initially thought Juror 638 should not be excused; but, upon extended reflection after reviewing the video of the *voir dire,* she concluded otherwise. The Sixth Circuit characterized the trial court's initial assessment as being based upon Juror 638's "demeanor and answers" while its final ruling was based upon a mistaken paraphrase. App 12a - 13a.

Based upon this *de novo* finding that Juror 638 was not biased and was erroneously struck for cause, the Sixth Circuit held that "the Kentucky court unreasonably applied clearly established Supreme Court law—namely, *Witt* and its progeny—when it held that Mr. Kovatch's removal for cause was constitutional. (Footnote omitted.)" App 13a.

Wheeler argued for *Witt* relief under both §§2254(d)(1) and (d)(2). In a footnote, the majority "observed" that Wheeler's claim "may" warrant relief under §2254(d)(2) as an "unreasonable determination of the facts." App 13a.

Having found a *Witt* error, the majority turned to Wheeler's remedy. Citing *Gray v. Mississippi*, 481 U.S. 648 (1986), the majority declared that structural error existed and held that harmless error analysis was

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[5] In response to a question from defense counsel, Juror 638 stated that "I believe I can" consider the full range. App 134a.

inapplicable. App 14a - 15a. Wheeler was awarded a new sentencing trial.

3. **The Sixth Circuit dissenting opinion**. Judge Griffin dissented. Judge Griffin correctly noted that the trial court's finding of bias was a finding of fact presumed correct per *Witt* and 28 U.S.C. §2254(e)(1) and that Wheeler did not meet his burden of overcoming this presumption with clear and convincing evidence. App 29a. Because Wheeler did not meet his burden, Judge Griffin reasoned, the Kentucky Supreme Court did not unreasonably apply *Witt*.

Judge Griffin also correctly noted that because of Juror 638's ambiguity and equivocation, "fairminded jurists" could have "fairminded disagreement"concerning Juror 638's bias. App 37a - 38a. *White v. Woodall*, 134 S.Ct. 1697 (2014) and *Harrington v. Richter,* 562 U.S. 86 (2011).

Judge Griffin addressed the majority's aforementioned footnote concerning 28 U.S.C. §2254 (d)(2). While this Court has not addressed the application of the "fairminded jurist" and "fairminded disagreement" standards of in §2254(d)(2) cases , the dissent seemingly harmonized both "fairminded" standards with §2254(d)(2):

> In other words, if reasonable minds could differ about the correctness of the state trial court's fact-finding, its factual determinations are not unreasonable under §2254(d)(2). Here, reasonable minds could readily differ because

> Mr. Kovatch equivocated in his answers about his ability to apply the death penalty. App 33a.

Judge Griffin then concluded that Wheeler failed to show that the state court unreasonably applied *Witt* per §2254(d)(1). Judge Griffin noted that *Witt* established that "[t]he juror's impartiality need not be demonstrated with 'unmistakable clarity'" and that "'[c]ourts reviewing claims of *Witherspoon-Witt* error ..., especially federal courts considering habeas petitions, owe deference to the trial court, which is in a superior position to determine the demeanor and qualifications of a potential juror.'" App 35a (*quoting Uttecht*, 551 U.S. at 22)

Judge Griffin stated that the "majority opinion ignores these principles by asking not whether there is evidence in the record to support the trial judge's finding of substantial impairment—which is what AEDPA requires—but instead whether, in its judgment," the juror was biased. App 36a - 37a. Judge Griffin, pointing to various instances where Juror 638 declined to say he could impose the death penalty, had little difficulty finding that "there is support in the trial record for the trial court's ruling." App 37a.

Judge Griffin also addressed Wheeler's remedy. Judge Griffin disagreed that the structural error rule of *Gray v. Mississippi*, applies herein. Though *Gray* was a death penalty case, he noted that *Gray* "represents a rare case" because "in the typical situation there will be a state-court finding of substantial impairment; in *Gray*, the state courts had found the opposite." App 38a (*quoting Uttecht* at 9).

In other words, the dissent provided that *Gray* does not apply where the state court erroneously found juror bias. *Gray* only applies where the state court did not find *Witt* bias but nonetheless removed the juror for cause.

Judge Griffin further stated that the majority "paint[ed] an incomplete picture" of the harmless error doctrine by failing to mention *Ross v. Oklahoma*, 487 U.S. 81 (1988). Judge Griffin explained that *Ross*--decided one year after *Gray*–"cast doubt on *Gray's* sweeping rationale. App 39a. This Court in *Ross* held that "the statement that any error which affects the composition of the jury must result in reversal defies literal application." App 39a (*quoting Ross* at 87 n. 2).

REASONS FOR GRANTING THE WRIT

This petition is governed by 28 U.S.C.§§2254(d)(1), (d)(2) and (e)(1)–Congressional mandates that federal habeas courts defer to reasonable state-court judgments and findings of fact. Relief is available only if the state court decision was "contrary to or involved an unreasonable application of" controlling federal law, or "was based on an unreasonable determination of the facts[.]" *Id*.

The Court has made clear that relief should be granted under §2254(d)(1) only where "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Harrington v. Richter*, 562 U.S. 86 (2011). The state court prisoner "must show that the state court's ruling . . .was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id* at 786-87. *See also*, *White v. Woodall*, 134 S.Ct. 1697 (2014), *Parker v. Matthews*, 132 S.Ct. 2148 (2012) (*per curiam*), and *Yarborough v. Alvarado*, 541 U.S. 652 (2004).

When deciding claims under §§2254(d)(1) and (d)(2), the federal court must also abide the presumption of correctness attached to state court findings of fact per 28 U.S.C. §2254(e)(1). Per *Wainwright v. Witt*, 469 U.S. 412 (1985), a state court finding of juror bias–unable to "realistically consider" the death penalty-- is a finding of fact entitled to deference and, arguably, the presumption of correctness.

Substantial deference is owed to a trial court's decision to excuse a juror for cause on the ground that the juror is "substantially impaired in his ability to impose the death penalty." *Uttecht v. Brown*, 551 U.S. 1, 17 (2007). Ambiguity regarding bias must be "resolved in favor of the State." *Id.* at 7. Here, Juror 638 equivocated and gave ambiguous and contradictory answers to the controlling question of whether he could realistically consider the death penalty. The Kentucky Supreme Court acted reasonably per *Witt* when it affirmed the trial court's removal of the juror for cause.

The Sixth Circuit violated §§2254(d)(1), (d)(2) and (e)(1) by engaging in *de novo* review, finding that Juror 638 was not biased and was, therefore, improperly struck for cause. Based upon this improper *de novo* finding, the Sixth Circuit then concluded that the Kentucky Supreme "unreasonably applied" *Witt*–a juror should be struck for cause in a death penalty case only if he cannot "realistically consider" the death penalty.

The Court should grant the petition and reverse, either summarily or after plenary review. If the Court grants plenary review, it should also address the Sixth Circuit's additional holding that the purported *Witt* error herein is structural and therefore not subject to harmless error analysis. Where, as here, the prosecutor had his full complement of peremptory challenges that could have been used on Juror 638 had the trial court not excused him for cause, a *Witt* error should be considered harmless.

I. The Sixth Circuit disregarded the highly deferential standards Congress imposed in 28 U.S.C. §§2254(d)(1), (d)(2) and (e)(1), and the deference owed to trial court's factual finding of juror bias required by *Wainwright v. Witt,* when it granted habeas relief on Wheeler's *Witherspoon/Witt* claim.

This case represents the third time in four years that the Sixth Circuit has granted federal habeas corpus relief and reversed a Kentucky death sentence. *See, Matthews v. Parker*, 651 F.3d 489 (6th Cir. 2011) and *Woodall v. Simpson*, 685 F.3d 574 (6th Cir. 2012). This Court granted certiorari review and reversed the Sixth Circuit in both prior cases, finding that the Sixth Circuit failed to abide the strict limitations of 28 U.S.C. §§2254(d)(1) and/or (d)(2). *See, Parker v. Matthews*, 132 S.Ct. 2148 (2012) (*per curiam*) and *White v. Woodall*, 134 S.Ct. 1697 (2014). The Court should do so again here.

Here, the Sixth Circuit held that the Kentucky Supreme Court unreasonably applied *Wainwright v. Witt* and *Witherspoon v. Illinois*, 391 U.S. 510 (1968) by affirming the trial court's strike for cause of a juror found qualified to serve only by the Sixth Circuit majority. To achieve this result, the Sixth Circuit disregarded the strict, highly deferential limits Congress imposed in 28 U.S.C. §§2254(d)(1), (d)(2)[6] and

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[6]As noted on page 11, Wheeler raised his *Witt* claim under both §§2254(d)(1) and (d)(2). The Sixth Circuit stated, in a footnote, that Wheeler "may" be entitled to relief per §2254(d)(2) as an "unreasonable determination of the facts." App 13a.

(e)(1), as well as numerous decisions of this Court elaborating on the meaning of AEDPA and the presumption of correctness.

In *Witherspoon*, this Court held that a defendant's Sixth Amendment right to an impartial jury is violated when potential jurors are excluded for cause simply because they expressed general "conscientious or religious scruples against capital punishment" without further individual examination. *Id.* at 520.

The Court clarified *Witherspoon* in *Witt*. In *Witt*, the Court held that a juror may be excluded for cause if his views would "prevent or substantially impair the performance of his duties in accordance with his instructions and his oath." *Id.* at 424. To be properly excused for bias per *Witt*, the juror need not "make it unmistakably clear . . . that [she] would automatically vote against imposition of the death sentence." *Id.* at 419.

The Court reminded that "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Darden v. Wainwright*, 477 U.S. 168, 178 (1986) *(quoting Witt* at 424). "[T]here 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." *Witt* at 425-26. And when a trial judge finds bias in these situations, "deference must be paid to the trial judge who sees and hears the juror." *Id.* at 426.

Determinations of juror credibility and demeanor lie "peculiarly within a trial judge's province." *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) *(quoting Witt* at 428). And, deference must be given to the state court's factual finding of juror bias. *Uttecht* at 22. In cases like this case, "where there is ambiguity in the prospective juror's statements, 'the trial court, aided as it undoubtedly [is] by its assessment of [the juror's] demeanor, [is] entitled to resolve it in favor of the State.'" *Id.* at 7 *(quoting Witt* at 434).

The trial judge found that Juror 638 was biased and not qualified per *Witt*. The trial judge, who is now a member of the Kentucky Supreme Court, did not make a knee-jerk decision. The trial judge wisely took the matter under submission when the content of Juror 638's *voir dire* was disputed. The trial judge reviewed the video recording of the *voir dire*. The following morning, after exercising an extremely high degree of contemplation and deliberation, the trial judge exercised her sole discretion and made a reasoned decision that Juror 638 was not *Witt* qualified. *Snyder*; *Uttecht*.

When deciding whether the state court unreasonably applied *Witherspoon* and *Witt*, the federal habeas corpus court is guided, and greatly limited by 28 U.S.C. §§2254(d)(1) and (d)(2). The question is not whether the state court decision was incorrect or erroneous. To reverse, the federal court must find that the state court decision was "objectively unreasonable." *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). A state court's decision is not objectively unreasonable if "fairminded jurists could disagree" as

to the result. *Richter*, 562 U.S. 86, 88 (2011)(*quoting Yarborough v. Alvarado*, 541 U.S. 652, 654 (2004)). The federal court cannot engage in its "own independent inquiry into whether the state court was correct as a *de novo* matter." *Yarborough* at 665.

The §2254(d)(1) standard was "meant to be" difficult. *Richter* at 86. To obtain relief, the inmate must show that the state court's application of controlling precedent was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement. *Id.* at 102-103.

Recently reaffirming *Richter*, this Court in *White v. Woodall* reversed the Sixth Circuit and described §2254(d)(1) as "a provision of law that some federal judges find too confining, but that all federal judges must obey." 134 S.Ct. 1697, 1701 (2014).

The "difficult to meet" standard of *Richter* becomes doubly difficult when a trial court's factual finding of bias is challenged, for §2254(e)(1) attaches a presumption of correctness to this finding of fact.[7] *Witt*

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[7]The Court has not expressly applied the "fairminded jurist" and "fairminded disagreement standard" to §2254(e)(1). However, in the context of §2254(d)(2) review–"an unreasonable determination of the facts in light of the evidence presented in the State court proceeding"– the Court has implicitly applied the "fairminded disagreement" standard by holding that a state court's factual determination is not unreasonable merely because the federal court would have reached a different conclusion. *Burt v. Titlow*, 134 S.Ct. 10, 15 (2013) *(quoting Wood v. Allen*, 558 U.S. 290, 301 (2010)). Further, the Court's mandate in *Witt* that the

expressly held that a trial court's finding of bias is a finding of fact. *Id*. at 429. The Court has stated that, when applying *Witt*, "reviewing courts are to afford deference to the trial court['s]" findings of bias. *Uttecht*, at 7.

Here, the Sixth Circuit disregarded §§2254(d)(1), (d)(2) and (e)(1)'s strict limits and the "fairminded disagreement" standard in both its analysis and outcome. As to its analysis, the Sixth Circuit–four years after *Richter*–engaged in precisely the type of review *Richter* forbade. In *Richter*, the Court observed that:

> [I]t is not apparent how the Court of Appeals' analysis would have been any different without AEDPA. The court explicitly conducted a *de novo* review; and after finding a . . . violation, it declared, without further explanation, that the 'state court's decision to the contrary constituted an unreasonable application of [the relevant precedent]. AEDPA demands more.

Id. at 101. Specifically, AEDPA demands that "a habeas court determine what arguments or theories supported . . . the state court's decision; and then it must ask whether it is possible fairminded jurists could" agree with the state court's decision. *Id.*

The Sixth Circuit erred in finding that the Kentucky Supreme Court unreasonably applied

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federal habeas court defer to a state court factual finding of bias is consistent with §2254(e)(1).

Witherspoon and *Witt*. The Sixth Circuit reached its desired result by engaging in *de novo* review, by not giving due deference to state court's factual finding of juror bias, and by disregarding the presumption of correctness. After finding a purported *Witt* violation, the Sixth Circuit "declared, without further explanation," that "the Kentucky Supreme Court unreasonably applied *Witt*." App 13a.

The Sixth Circuit made no effort to "determine what arguments or theories . . . supported . . . the state court's decision" and did not ask "whether it is possible fairminded jurists could" agree with the state court's decision. Nor did the Sixth Circuit even purport to apply the §2254(e)(1) presumption of correctness to the trial court's factual finding of juror bias.

Habeas relief must be denied here. Fairminded jurists would have fairminded disagreement regarding bias on the part of Juror 638, given his ambiguous and equivocal answers. Because fairminded jurists could, and did, reasonably agree with the trial court's factual finding of bias and its resulting application of *Wainwright* and *Witt*, the state court's ruling should have been affirmed.

Contrary to the Sixth Circuit's characterization, Juror 638 did not "clearly" and "expressly" state that he could consider the full range of penalties. App 5a, 9a. His answers were equivocal and ambiguous, at best. In one instance, Juror 638 said that he could "probably" consider the full range of penalties. App 125a. In another instance, Juror 638 stated that he

"believe[d]" he could consider the full range of penalties. App 134a.

And, Juror 638's other responses subverted the Sixth Circuit's *de novo* finding. Juror 638 stated that, as he had aged and had children, he had become "a bit more contemplative on the issue of taking a life and, uh, whether or not we [society] have the right to take that life." And, when asked "you're telling me that ...you're not absolutely certain that you could realistically consider it [death penalty] or not[?], Juror 638 answered "I think that would be the most accurate way I could answer your question." App 132a.

Juror 638's ambiguous, equivocal and, indeed, conflicting answers show that he was precisely the type of juror described in *Witt*, where the Court explained that:

> 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.

Id. at 424-25.

A fairminded jurist could readily agree with the Kentucky Supreme Court's decision to defer to the trial court judge in these circumstances. As this Court noted in *Witt* at 434 and *Uttecht* at 7, any ambiguity in a juror's responses to *voir dire* questions must be

resolved in favor of the state. The Sixth Circuit erred by resolving this ambiguity in favor of Wheeler. Bolstering that conclusion still further is the presumption of correctness to the trial judge's finding of bias—a factual finding—required by §2254(e)(1).

Reversing the District Court, the Sixth Circuit relied upon considerations that fail to overcome the double deference applicable here. First, the Sixth Circuit emphasized what it called an "inaccurate paraphrase" of exchange between Juror 638 and the prosecutor. Juror 638 agreed that he was not "absolutely certain whether [he] could realistically consider [the death penalty]. App 8a. The trial court stated orally that Juror 638 agreed that he "couldn't consider the entire range." App 8a. The Sixth Circuit characterized the difference between these two statements as "material" and stated that this reflected a "misapprehen[sion]" by the trial court. App 8a.

The difference between "not certain he could consider" and "couldn't consider" is semantics that cannot bear the weight placed upon it by the Sixth Circuit. By definition, a paraphrase does not precisely track the original language. But contrary to the Sixth Circuit's conclusion, the core meaning was the same: Juror 638 would not commit to considering the death penalty.

Rather than treat the difference between "not certain he could consider" and "couldn't consider" as a perhaps slightly imprecise use of shorthand, the Sixth Circuit pounced on the difference as showing ignorance on the trial judge's part. The trial judge deserves more

deference and respect. The AEDPA mandates it.

The question per *Witt* was whether, reviewing the *voir dire* as a whole, Juror 638 could "realistically consider" the death penalty. It is clear that after reviewing the video recording of the *voir dire*, and giving due and deliberate contemplation, the trial court was "left with the definite impression that [Juror 638] would be unable to faithfully and impartially apply the law." *Witt* at 426. Fairminded jurists could, and did, conclude from Juror 638's answers that the trial court was correct. That is all that is required for the state to prevail under the §2254(d)(1) or (d)(2).

The Sixth Circuit also found proper deference to the state court unwarranted because the trial court initially "judged [Juror 638] as someone who 'could consider the entire range,'" but "reversed her initial assessment of" him. App 12a. The Sixth Circuit stressed that the trial court's initial assessment "was based on [Juror 638's] demeanor and answers," whereas the trail court's final ruling was based on its "misapprehension of" the colloquy listed above. App 12a - 13a. This is wrong on both the facts and the law.

The record is clear that the trial judge reviewed the video recording of the *voir dire* overnight before concluding that Juror 638 should be struck for cause. App 13a. The Sixth Circuit condemns the trial court for not rushing to judgment and for reviewing the record a second time before making a reasoned decision. This Court has never suggested that §§2254(d)(1) and (d)(2) deference does not apply to a state court decision that comes after the trial court

expressed a tentative view to the contrary. And for good reason.

Lastly, as noted earlier, Wheeler argued for *Witt* relief under both §§2254(d)(1) and (d)(2). In a footnote, the majority "observed" that Wheeler's *Witt* claim "may" warrant relief under §2254(d)(2) as an "unreasonable determination of the facts." App 13a.

The Court should make clear that Wheeler is no more entitled to relief under §2254(d)(2) as he is under §2254(d)(1). Federal habeas courts must be "doubly deferential" when applying §2254(d)(1), and they must also be "doubly deferential" when applying §2254(d)(2) to a legal rule. Section 2254(d)(2) only authorizes habeas relief where the state court's "determination of the facts" is "unreasonable." This Court has explained that "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first place." *Wood v. Allen*, 558 U.S. 290, 301 (2010). "[I]f '[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's . . . determination.'" *Id.* (*quoting Rice v. Collins*, 546 U.S. 333, 341-42 (2006)).

For the reasons stated, fairminded jurists could readily agree, and did agree, with the trial court that Juror 638 could not realistically consider the death penalty per *Witt*. This is true, particularly in light of the deference that *Witt* requires to be given to the trial court's factual finding of bias. And, the trial court's paraphrase of the exchange between the prosecutor

and Juror 638 does not remotely justify habeas relief. Habeas relief is foreclosed to Wheeler, regardless of whether his *Witt* claim is viewed through the lens of §§2254(d)(1) or (d)(2).

II. This Court should clarify whether the exclusion of a single juror in violation of *Witherspoon/Witt* is subject to harmless error review.

After finding *Witherspoon/Witt* error, the Sixth Circuit declared it structural error per *Gray v. Mississippi*, 481 U.S. 648 (1986). Wheeler was granted a new sentencing trial. The Sixth Circuit stated that harmless error analysis was inappropriate. App 14a.

While *Gray* did hold that *Witherspoon* violations are structural, *Gray* is premised on state procedural rules that do not apply in Kentucky. And, later decisions by this Court have undermined its reasoning and have suggested that its holding is limited to the unusual facts of the case.

"Only in rare cases has th[e] Court held that an error is structural[.]" *Washington v. Recuenco*, 548 U.S. 212, 218 (1999). Even assuming *arguendo* that the trial court committed error here, it does not merit falling within that class of "rare cases."

In *Gray*, the state used peremptory challenges to remove every juror who "expressed any degree of uncertainty in the ability to cast ...a vote" for the death penalty. *Id.* at 652. The state quickly exhausted its twelve peremptory challenges on these strikes. Then,

the state challenged a juror who did not express any opposition to the death penalty and who unequivocally said she could return a death sentence. The trial court denied the challenge. *Id*. at 654-655.

The state then argued to the trial court that it had erroneously denied certain earlier challenges for cause and thus forced the state to exhaust its peremptory challenges. The state moved to reopen the previous challenges, but the trial court refused to do so. Nonetheless, the trial court removed the juror over defense objection. *Id*. at 655. In short, the trial court in *Gray* expressly found that the juror was qualified to serve per *Witt* but nonetheless struck the juror per *Witt*.

Reaffirming its earlier summary ruling in *Davis v. Georgia*, 429 U.S. 122 (1976) (*per curiam*), the Court in *Gray* held that the *Witherspoon/Witt* error was structural. In reaching that conclusion, the Court rejected two distinct arguments for why the error should have been subject to harmless-error review.

Gray first disagreed that "a *Witherspoon* violation constitutes harmless error when the prosecutor has an unexercised peremptory challenge." *Id*. at 664. The *Gray* Court stated that "the relevant inquiry is whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's error." *Id*. at 665 (quotation marks omitted) (original emphasis). It then reasoned that when to use particular peremptory challenges is a difficult tactical issue for prosecutors. "Due to the nature of trial counsel's on-the-spot decisionmaking during jury

selection, the number of peremptory challenges remaining for counsel's use clearly affects his exercise of those challenges." *Id*. at 665. In short, "[t]he nature of the jury selection process defies any attempt to establish that an erroneous *Witherspoon-Witt* exclusion of a juror is harmless." *Id.*

Gray next rejected the argument that the error was harmless because it had no "prejudicial effect"—that is, "it cannot be said that the ultimate panel did not fairly represent the community." *Id.* at 661. The Court pointed to the prosecutor's use of his peremptory challenges to excuse other jurors who expressed reservations about the death penalty and stated that one "cannot say with confidence that an erroneous exclusion for cause of a scrupled, yet eligible, venire member is an isolated incident in a particular case." *Id.* at 668.

Unlike the prosecutors in *Gray,* Kentucky prosecutors (and defendants) do not exercise peremptory challenges during individual *voir dire.* In Kentucky, and in this case, peremptory challenges are used simultaneously after the conclusion of all *voir dire* and immediately prior to the blind draw for constituting the final jury. *See, Kentucky Rule of Criminal Procedure 9.36*(1) and (2). Thus, *Gray*'s first reason for not subjecting *Witherspoon/Witt* error to harmless-error review therefore does not apply here.

As noted, *Gray* found a prosecutor's possession of peremptory challenges irrelevant because one can never know how a prosecutor would have exercised those challenges during the course of individual *voir*

dire. *Id*. at 665. Here, however, the prosecutor retained all of his peremptory challenges at the close of *voir dire*. Had Juror 638 not been excused for cause, the prosecutor surely would have used one of those peremptory challenges on him. In the end, the jury that sentenced Wheeler to death was identical to the one that would have sentenced him to death had the trial court not excluded Juror 638 for cause. It is difficult for an error to be more harmless than that.

Just thirteen months after issuing *Gray*, this Court cast doubt upon *Gray's* sweeping rationale of structural error for *Witt* violations. "[T]he statement that **any** error which affects the composition of the jury **must** result in reversal defies literal application. (Added emphasis.)" *Ross* v. Oklahoma, 487 U.S. 81, 88 n. 2 (1988). Instead, "[a]ny claim that the jury was not impartial . . . must focus not on the [removed juror], but on the jurors who ultimately sat." *Id.* at 86. Although *Ross* did not purport to overrule *Gray*, its reasoning is in serious tension with *Gray*.

In *Uttecht v. Brown*, 551 U.S. 1 (2007), this Court noted *Gray's* factual limitations, and the Court further limited its application. The *Uttecht* Court noted that "*Gray* represents a rare case, however, because in the typical situation there will be a state-court finding of substantial impairment; in *Gray*, the state courts had found the opposite, which makes that precedent of limited significance to the instant case." *Uttecht* at 9.

Thus, in *Gray*, this Court held that structural error occurs in those atypical cases where the state court did **not** find substantial impairment on the part of the

juror, but nonetheless removed the juror per *Witt*. *Gray* has no application in the "typical situation"–the situation found here–where the juror was struck for cause for bias by the trial court, but ultimately found to be not biased and therefore improperly struck for cause.

Uttecht did not expressly provide that harmless error analysis applies in cases such as here, where the trial court found a juror to be biased, only to be reversed on appeal or federal habeas review. *Uttecht* did not engage in harmless error analysis because the Court reversed the Ninth Circuit's finding of *Witt* bias.

Nonetheless, the Warden argues that any error relative to Juror 638 was harmless. The Sixth Circuit should have affirmed the District Court's finding of harmless error. *Uttecht's* description of *Gray* as "the rare case" is further reason why *Gray's* holding regarding harmless-error review should either be confined to its facts or reconsidered.

Assuming *arguendo* that *Witt* error occurred herein, the error was undoubtedly harmless. The prosecutor had his full allotment of peremptory challenges and could have, and likely would have, used one to remove Juror 638. Given this fact, any error relative to Juror 638 was harmless.

A writ of certiorari should be issued so that the Court can address the important question whether a *Witt* error of the sort alleged here is immune from harmless-error analysis.

CONCLUSION

For the reasons stated above, the petition for writ of *certiorari* should be granted.

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