No. 14-1372

IN THE
SUPREME COURT OF THE UNITED STATES

RANDY WHITE, WARDEN

Petitioner

v.

ROGER L. WHEELER

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE
QUESTIONS PRESENTED

1. Should the Court grant certiorari to address a 28 U.S.C. §2254(d)(2) issue the lower court did not reach as well as a fact-specific matter the lower court did reach involving at most error correction in a case where, as Petitioner acknowledges, the lower court identified the correct standard under 28 U.S.C. §2254(d)(1), and then relied exclusively on long-standing Supreme Court precedent addressing the improper "for-cause" excusal of a juror when applying the §2254(d)(1) standard to the state appellate court's ruling and to the trial judge's statements and findings regarding "substantial impairment" of a juror?

2. Should the Court grant certiorari to determine whether a *Witherspoon/Witt* violation can be subject to harmless error analysis (a) when the Warden did not address in the lower courts the case law requiring reversal where a prospective juror was improperly excused for cause and (b) where the lower courts have faithfully applied that law on the matter for over twenty-five years, including here, without a split among the courts developing?

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Roger L. Wheeler requests the Court deny the Warden's Petition for a Writ of Certiorari to review the United States Court of Appeals for the Sixth Circuit's judgment granting habeas relief with regard to Wheeler's death sentence.

COUNTER-STATEMENT OF THE CASE

For purposes of the Petition for a Writ of Certiorari, the only facts relevant to the questions presented are the questions and answers posed to prospective juror #638[1] during voir dire, the trial judge's statements regarding that prospective juror, and the lower court's statements in ruling on the claim. In this regard, the Warden omits significant, relevant portions of the voir dire, including instances where prospective juror #638 stated: (a) there were arguments on both sides of the death penalty; (b) he had not reached a decision about whether he supported or opposed the death penalty generally; (c) he believed he could impose the death penalty; and, (d) he did not believe he had any beliefs that would prevent him from considering the death penalty in Wheeler's case.

A. The voir dire of prospective juror #638.

1. The voir dire questions and answers.

At the outset of his voir dire, prospective juror #638 expressed his belief that he could impose the death penalty – a view he maintained throughout his voir dire - while emphasizing the significant stakes at issue for both sides in a death penalty case. When informed at the outset of his voir dire that the death penalty was a potential sentence and asked if he could consider the entire range of sentences,

[1] The Sixth Circuit refers to prospective juror #638 by his name, Mr. Kovatch. The voir dire transcript and the Warden's Petition refer to him by his juror number. Wheeler does the same.

prospective juror #638 said "*I believe I could.* I've never been faced with that choice, *but I believe I could.*" *Petition Appx* at 125a (emphasis added). The trial judge followed up by asking the juror if he would be able to consider the entire range of penalties, including the death penalty. Prospective juror #638 responded, "*probably* with some deep reflection." *Id.* (emphasis added). The judge then asked him if he believes Kentucky "should have the authority to seek the death penalty in certain cases," to which he responded, "I don't know." *Id.* at 125a-126a. At that point, the judge asked him directly what are his "feelings and beliefs on the death penalty." *Id.* at 126a. Prospective juror #638 said, "I've read and seen a lot about it. *I'm not sure I have formed an opinion one way or the other. I believe there are arguments on both sides of the – of it.*" *Id.* (emphasis added). The judge then asked prospective juror #638 if he has "any moral, religious, spiritual or personal beliefs that would keep you from considering the death penalty." *Id.* He responded, "*I don't believe so. I – there is some, but I don't think strong enough to, at this point, to form a solid opinion one way or the other.*" *Id.*

As of this point, prospective juror #638 (1) acknowledged that there were arguments for and against the death penalty (2) stated he had not formed an opinion as to whether he supports or opposes the death penalty (3) recognized the severity of the sentence and the importance of not quickly jumping to a particular sentence if the case reaches the sentencing phase, and (4) said *three times* he believes nothing would impair his ability to impose the death penalty. Prospective juror #638 also noted he would reflect deeply on whether to impose the death

penalty in any case before actually doing so.

When the trial judge then turned to a different subject matter, juror #638 responded in a similarly thoughtful manner. For instance, when the judge asked if he had ever had a negative experience with a person of a different race, prospective juror # 638 said, "no different than everyone." *Petition Appx* at 127a. When asked if he believed the criminal justice system treats African-Americans unfairly, he stated, "I don't know. I really don't." *Id.* He did, though, state he believes an African-American is "just as likely" to receive the death penalty as a person of a different race. *Id.* at 128a. Then when asked if he had any racial prejudices, prospective juror #638 responded: "I'm sure that I do, but I try to, uh, be aware of them. I work in a very large, diverse organization," and "these are things we're mindful of and try to overcome." *Id.* at 129a. He then said he does not believe he has any racial prejudices that would affect him as a juror. *Id.* At this point, the trial judge allowed the prosecutor to question prospective juror #638.

The prosecutor asked prospective juror #638 if he "could realistically consider each penalty option before making a decision." *Id.* at 131a. Understanding this question to be asking him whether he would "vote" for the death penalty, prospective juror #638 responded, "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 . . . so *it's difficult for me to judge how I would I guess act*, uh." *Id.* The prosecutor responded with a muddled question that asked the juror "maybe you're, you're telling me that, at this point, you're not *absolutely certain* whether you could

realistically consider it [the death penalty] or not, because you –" *Id.* at 132a (emphasis added). Prospective juror #638 answered, "I think, I think that would be the most accurate way I could answer your question." *Id.* The prosecutor did not inquire further.

Defense counsel then questioned prospective juror #638, who said "on a very philosophical topic, I think [the death penalty is] 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." *Id.* at 133a. Prospective juror #638 was then asked again, "do you feel that you can consider all of the options presented?" *Id.* at 134a. He responded, "I believe I can, sir," *id*, making it at least the fourth time he said he could consider the death penalty and that nothing impairs his ability to do so. Despite prospective juror #638's last statement that he believes he can consider the death penalty, the prosecutor did not ask any further questions. Instead, the prosecutor immediately challenged prospective juror #638 for cause.

2. The prosecutor's challenge for cause and the trial judge's initial ruling.

The prosecutor did not argue to the trial court that prospective juror #638's ability to impose less than the death penalty was "substantially impaired." Instead, he argued a prospective juror should be excused when he "can't say if he can *give* the death penalty" and that prospective juror #638, in particular, should be excused because, according to the prosecutor, he "could not say whether he could

realistically consider the death penalty or not." *Id.* at 135a (emphasis added). The trial judge, who listened carefully to prospective juror #638's responses and who observed his demeanor, promptly expressed her disagreement. She stated,

> my overall sense was that he was, uh, someone who would take this job very seriously and who had serious reservations about the death penalty, but *his responses to my questions were not at all indicative of someone* – um, in fact, what I do mean when I finish my, my questioning is, is, first of all, put down 'could consider entire range': or 'exhibits reluctance on 20 years' or 'can't consider' – I do sort of a summary. Uh, and I put '*could consider entire range.*' I mean, *I didn't even see him as problematic when I got through with him.* Um, I think if you look at the totality of the questioning, what's he indicating, uh, that I understood was that he would *take it very seriously but that he could consider the entire range. . . . I didn't hear him say that he couldn't realistically consider the death penalty.*

Id. at 137a-138a (emphasis added).

The prosecutor persisted, ultimately resulting in the trial judge agreeing to review the video record because she had heard nothing that supported the prosecutor's position as to a reason to excuse prospective juror #638 for cause. *Id.*[2]

3. The trial judge's ruling after reviewing the video of voir dire.

The following day, the trial judge informed counsel she had reviewed the video of prospective juror #638's voir dire and would excuse him for cause for a *single reason.* She believed the prosecutor asked prospective juror #638 "would it be accurate to say that you couldn't, couldn't consider the entire range?" *Petition Appx* at 139a. She then characterized his response as "I think that would be pretty

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[2] In Kentucky, a video is the official record of the proceeding. A certified court reporter produced a transcript (the portion that was reprinted in the Warden's appendix contains numerous insignificant typographical errors that do not appear in the actual transcript) because the Sixth Circuit does not accept a video record. Wheeler requested the Sixth Circuit also review the video of voir dire that reflected exactly what the trial judge observed and said. The Sixth Circuit agreed to do so and thus, had before it exactly what the trial court had observed. For the Court's benefit, Wheeler attaches a copy of the video of potential juror #638's voir dire that is part of the lower court record.

accurate." *Id.* at 139a-40a. She said nothing else regarding the voir dire. Based *only* on this understanding (a mistaken one) of a *single question* the prosecutor asked and the answer prospective juror #638 gave to that question, the trial judge excused the prospective juror. Importantly, the trial court did not base her reversal on prospective juror #638's demeanor or other intangible observation of his behavior.

As the Warden admitted before the Sixth Circuit and before the Court, prospective juror #638 *never said* it would be pretty accurate to say he could not consider the entire range of sentences, which included the death penalty, but instead said it is "most accurate" to say he is "*not absolutely certain* whether [he] could realistically consider it [the death penalty] or not." *Compare*, *id.* at 132a; *with, id.* at 139a-140a, and *Petition* at ii, 6,10, 24 (noting and quoting what prospective juror #638 was asked and said while arguing, as he did in the Sixth Circuit, that the trial judge's different characterization of it was merely a matter of semantics).

B. The Kentucky Supreme Court's resolution of the claim.

The Kentucky Supreme Court ruled that the trial judge "appropriately struck for cause those jurors that could not impose the death penalty." *Petition Appx* at 91a. That was not a silent opinion within the meaning of *Harrington v. Richter*, 562 U.S. 86 (2011), or *Johnson v. Williams*, 133 S.Ct. 1088 (2013).

C. The Warden's arguments before the Sixth Circuit.

In his Sixth Circuit brief, the Warden relied on the same clearly established case law the Sixth Circuit relied upon to hold the state court decision was an unreasonable application of clearly established law. Namely, the Warden relied on

Witherspoon v. Illinois, 391 U.S. 510 (1968), *Wainwright v. Witt*, 469 U.S. 412 (1985), and *Lockhart v. McCree*, 476 U.S. 162 (1986). *Appendix* (hereinafter "App") at 13-21.[3]

Also, although the Warden argued generally in his Sixth Circuit brief that any errors were harmless, he did not specifically assert harmless error with regard to the for cause excusal of prospective juror #638. The Warden also never argued the prosecutor would have used a peremptory challenge on that prospective juror if he was not excused for cause, and never addressed the Court's case law holding that the improper for cause excusal of a juror under *Witt* requires reversal, even though Wheeler cited and argued that law within his Sixth Circuit briefing. App. at 10.

D. The Sixth Circuit's discussion and resolution of the claim.

The Sixth Circuit (1) denied relief on all guilt phase claims; (2) granted the writ of habeas corpus on the sentencing phase issue of the improper for cause excusal of prospective juror #638 after determining Wheeler had overcome 28 U.S.C. §2254(d)(1)'s limitation on relief that was applicable because the court concluded the state court adjudicated the claim on its federal merits; and, (3) did not reach Wheeler's other sentencing phase claims because they were rendered moot by the grant of habeas relief. In doing so, the court expressly stated that because it was granting relief under (d)(1), it would not determine if relief was warranted under (d)(2). *Petition Appx* at 13a n.3 ("We also observe that the trial judge's misapprehension of [prospective juror #638's] exchange with the prosecutor may

[3] The Sixth Circuit also relied upon *Uttecht v. Brown*, 551 U.S. 1 (2007), a federal habeas case where the Court ruled in favor of the Warden on the basis that the evidence in *Uttecht* demonstrated the juror's ability to impose the death penalty was substantially impaired.

itself warrant relief under 28 U.S.C. §2254(d)(2) because it led to a 'decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' We need not reach that question.").

In dealing with the juror excusal issue, the Sixth Circuit first noted "[t]he state trial court, after a full examination of [prospective juror #638] at voir dire, *found him not to be 'problematic' as a juror* but one who 'could consider the entire range' of penalties. Then the next day the trial court excused him *because the judge mistakenly remembered him saying he would not consider the death penalty.*" *Id.* at 2a (emphasis added). The Sixth Circuit then recited the portions of prospective juror #638's voir dire dealing with his views on the death penalty and his ability to impose the death penalty, *id.* at 6a-7a, all of which Wheeler laid out in the immediately preceding sections of the Statement of the Case. The Sixth Circuit then recited the trial judge's demeanor-based reasons for concluding that nothing prospective juror #638 said or did gave any reason to conclude his ability to impose the death penalty was substantially impaired. *Id.* at 7a. The court then recited the *sole reason* the trial court provided the next day for excusing prospective juror 638 - her belief after reviewing the video record of voir dire that prospective juror #638 said he *could not consider* the death penalty. *Id.* As the Warden conceded, and as the Sixth Circuit correctly recognized, prospective juror #638 never said that.

The Sixth Circuit noted the trial judge's ultimate statement that prospective juror #638 said he *could not consider the death penalty* "differed materially from the prosecutor's actual question, 'you're telling me that at this point *you're not*

absolutely certain whether you could realistically consider it [the death penalty] *or not*?" *Id.* at 8a. The court also noted the prospective juror had said he *could* consider the entire range of penalties but could not be "absolutely certain," which the trial judge believed made the prospective juror a "good juror" who could not be considered "problematic," only to change her mind when she mistakenly concluded he had said he could not consider the full range of penalties. *Id.* at 9a.

Based on facts the Warden acknowledges accurately reflect the questions prospective juror #638 was asked and the responses he gave,[4] the Sixth Circuit turned to the applicable law and the legal analysis that would determine if a constitutional violation occurred and if 28 U.S.C. §2254(d)(1) prohibited relief.

The Sixth Circuit concluded that the state supreme court's statement that the trial judge "appropriately struck for cause those jurors that could not impose the death penalty" constituted an adjudication on the merits and therefore meant §2254(d) applied to Wheeler's claim. *Id.* at 5a, 14a-15a, *quoting Wheeler v. Commonwealth*, 121 S.W.3d 173, 179 (Ky. 2003). Accordingly, the court focused its analysis entirely upon United States Supreme Court case law.[5]

The court first briefly discussed *Witherspoon*, *id.* at 9a, then noted *Witt* "clarified" *Witherspoon*, and quoted *Witt*'s holding. *Id.* at 10a. The court then discussed *McCree* and noted *McCree* "again clarified its position by holding that a

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[4] The Warden does not dispute that prospective juror #638 was neither asked nor said what the trial judge claimed and relied upon to excuse him for cause. Rather, the Warden disputes the significance of the difference between what the prospective juror was asked and said and what the judge believed had been asked and said that formed the basis for her excusing the prospective juror.

[5] The Sixth Circuit cited its own case for what is an unreasonable application of clearly established law. That citation says exactly what the Court has held constitutes an unreasonable application of clearly established law. *Compare id.* at 15a n.5; *with*, *Williams v. Taylor*, 529 U.S. 362, 407-09 (2000).

juror may not be excluded if, like [prospective juror #638], he can set aside his doubts and consider the death penalty." *Id.* The Sixth Circuit then discussed *Uttecht*, noting "*Uttecht* held that a trial judge's decision regarding for-cause removals should be afforded great deference" largely because of "the trial judge's ability to 'observe the demeanor of the juror during voir dire,' but "also made clear that 'the need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decisions where the record discloses no basis for a finding of substantial impairment.'" *Petition Appx* at 11a, *quoting Uttecht*, 551 U.S. at 17-22. The Sixth Circuit noted these cases provide "the constitutional rule we must apply in all for-cause juror-exclusion cases," and "[t]he specificity and clarity of this rule also satisfies the AEDPA statutory requirements that a writ of habeas corpus may not be issued against a state-court judgment unless the state decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Petition Appx* at 14a-15a.

Making this even clearer, in a footnote, the court wrote "AEDPA deference prevents federal habeas courts from upsetting many state court determinations," and then stated exactly what this Court has said constitutes an unreasonable application of clearly established Supreme Court law. *Id.* at 15a n.5 ("An unreasonable application of clearly established federal law occurs where a state court accurately identifies the governing legal rule but applies it in an unreasonable manner to the facts of the case before it."); *accord Williams*, 529 U.S. at 407-09.

Applying this clearly established law, the Sixth Circuit concluded that prospective juror #638 "did not display a misunderstanding of his role as a prospective juror or misstate the applicable law. He understood the decisions he would face and engaged with them in a thoughtful, honest, and conscientious manner. More important, in the context of *Uttecht*, the trial judge's initial assessment of [prospective juror #638's] answers and *demeanor* reveals that she judged him as someone who 'could consider the entire range' and didn't even see him as problematic when [she] got through with him." *Petition Appx* at 12a (emphasis added). The Sixth Circuit then concluded:

> [t]he trial judge reversed her initial assessment of [prospective juror #638's] qualification, which was *based on his demeanor and answers*, after misapprehending a single question and answer exchange with the prosecutor. Had the trial judge properly processed that exchange, her initial belief that [prospective juror #638] was not 'problematic' and 'could consider the entire range' would have been confirmed. Thus, the *deference owed to the trial judge's ability to assess* [prospective juror #638's] *demeanor supports that he is Witt-qualified* to serve on Wheeler's jury."

Id. at 12a-13a (emphasis).

Based on this, and noting its "aware[ness] of the great deference owed a trial judge's decision to remove a prospective juror for cause," the Sixth Circuit held "the Kentucky Supreme Court unreasonably applied clearly established Supreme Court law – *Witt* and its progeny – when it held that [prospective juror #638's] removal for cause was constitutional." *Id.* at 13a. The court then applied the Court's long-standing law on the appropriate remedy - *Gray v. Mississippi*, 481 U.S. 648 (1986) - to grant the writ of habeas corpus with regard to Wheeler's death sentence only. *Id.* at 14a-15a. The Warden never argued to the Sixth Circuit that *Gray* was

inapplicable or that there was any reason to differentiate *Gray*. App at 13-21.

The Warden did not seek rehearing or rehearing en banc.

REASONS FOR DENYING THE PETITION

This case is unremarkable and does not present an important question of federal law meriting the Court's review under S. Ct. R. 10. The Warden does not imply a split among the federal court of appeals or state high courts or that the lower courts could benefit from the Court's intervention. Rather, the Warden's questions presented (1) ask this Court to decide an issue the Sixth Circuit expressly did not decide; (2) raise an issue the Warden never presented to the lower court that, as a matter of law, would require a significant amount of speculation and would wreak havoc on the lower courts, while building additional delay into cases, as those courts attempt to determine what the prosecutor would have done if the prospective juror had not been excused for cause; (3) ask the Court to address one of the questions presented *only if* it grants plenary review on the other question presented; and, (4) are fact-bound issues concerning the application of properly stated and well-settled principles of law. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10. Because that is the routine business of the lower courts, the appropriate manner to seek the relief the Warden now requests was through Sixth Circuit rehearing, which the Warden did not seek. The Court should not now serve the role of those courts.

The Warden would like the Court to believe the lower court exceeded its authority to grant relief. Yet, the Warden concedes the Sixth Circuit identified and relied upon the same correct clearly established law the Warden now relies on. Further, the Warden concedes that the court neither misstated what was said during jury selection nor failed to consider a relevant statement made during jury selection. The Warden argues instead that the court erred by granting relief simply because not every judge to ever review the claim concluded relief should be granted and because the prospective juror at issue did not, in the Warden's opinion, "commit" to considering the death penalty. The correct legal standard is that a prospective juror may be excused for cause not when the juror fails to use the prosecutor's special language to heighten the juror's ability to "commit" with "absolute certainty" to considering the death penalty but only when the prospective juror's ability to impose the death penalty is "substantially impaired." *Witt*, 469 U.S. at 424. Nothing in the record, including the voir dire transcript and video, indicate prospective juror #638's ability to impose the death penalty was "substantially impaired."

As the Warden acknowledges, the trial judge originally believed the prospective juror was qualified and that voir dire gave no reason to suggest otherwise, only to then excuse the prospective juror after mistakenly concluding he said something indicating he could not consider the death penalty. The prospective juror never made that statement. The Sixth Circuit recognized this, and relied on it, to hold correctly that the state court's adjudication was an unreasonable application

of clearly established law. This fact-based ruling is what the Warden asks the Court to review, simply because the Warden disagrees with the result. Further review would have no impact on other cases and would not settle the already-settled law the Sixth Circuit applied or otherwise benefit courts in deciding future habeas cases. For these reasons, this case is not worthy of the Court's review.

I. The Petition asks the Court to resolve an issue the Sixth Circuit did not decide, raises issues that were not presented to the lower court, and is nothing more than a request for error correction as to a narrow factual disagreement on a matter that will have little to no impact on future cases.

A. The Warden asks the Court to decide an issue the lower court expressly declined to reach.

The Court does not review in the first instance legal issues the lower court expressly failed to address, particularly when the lower court declined to do so because the grant of relief on other grounds rendered the issue moot. *See Brumfield v. Cain*, 135 S.Ct. 2269, 2282 (2015) (refusing to address an issue the lower court had not decided); *Meyer v. Holley*, 537 U.S. 280, 291-92 (2003) (refusing to consider an issue not directly decided by the lower court); *Pennsylvania Dept. of Corrs. v. Yeskey*, 524 U.S. 206, 212-13 (1998) ("Where issues [were not] considered by the Court of Appeals, this Court will not ordinarily consider them."); *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (dismissing the writ as improvidently granted after concluding the lower court did not "expressly address the question on which we granted certiorari"). Yet, that is exactly what the Warden asks the Court to do.

In his first question presented, the Warden asks the Court to decide if habeas relief was improper under (d)(2)'s limitation on relief. The Sixth Circuit did not

address that issue, expressly stating, as the Warden acknowledges, it is unnecessary to do so because relief was warranted under (d)(1). *Petition* at 11, 17 n.6, 26; *Petition Appx* at 13a n.3 ("We also observe that the trial judge's misapprehension of [prospective juror #638's] exchange with the prosecutor may itself warrant relief under 28 U.S.C. § 2254(d)(2) because it led to 'a decision that was based on an unreasonable determination of the facts in light of the evidence in the State court proceeding.' We need not reach that question."). The Warden did not raise in his questions presented that the Sixth Circuit erred by addressing Wheeler's claim under (d)(1) instead of under (d)(2), and thereby waived this argument. *See, e.g., Wood v. Allen*, 558 U.S. 290, 304 (2010), *citing* S. Ct. R. 14a (refusing to address an issue that was not included within the questions presented, even though, unlike here, it was discussed in the Petition). Because the Warden did not raise and the Sixth Circuit did not decide the claim under (d)(2),[6] there is no (d)(2) issue properly before the Court.

B. The Warden asks the Court to address an issue he did not raise in the lower court and makes arguments, premised upon speculation, that it did not present to the lower courts.

In the second question presented, the Warden asks the Court to decide whether a *Witt* violation is subject to harmless error analysis, even though the Court has already conclusively held it is not and even though the Warden fails to

[6] For claims the state court adjudicated on the merits, 28 U.S.C. §2254(d) requires a habeas petitioner to establish the state court decision was "contrary to" or an "unreasonable application of" clearly established Supreme Court law, *or* based on an unreasonable determination of the facts. It does not require both. Nor must a court address (d)(1) or (d)(2) in any particular order. Thus, a court need not address (d)(2) if it has determined relief shall be granted under (d)(1). *See, e.g., Brumfield*, 135 S.Ct. 2269 (not reaching the (d)(1) issue after determining relief was warranted under (d)(2).

cite a single majority opinion from any court calling into question the already settled law in this area. The Warden also asks the Court to rely on pure speculation to find the error harmless based on facts the Warden elected not to develop in the courts below, and pitches an argument he never made to the lower courts.

The Warden acknowledges the Court has held that the improper for-cause excusal of a single juror because of death penalty views requires reversal, *Petition* at 27, and that the Court years ago rejected the argument that *Witt* error constitutes harmless error even in cases, unlike here, where the prosecutor did not use all his peremptory challenges. *Id.* at 28-29 (*"Gray* first disagreed that 'a *Witherspoon* violation constitutes harmless error when the prosecutor has an unexercised peremptory challenge'"; noting that *Gray* held that "the nature of the jury selection process defies any attempt to establish that an erroneous *Witherspoon-Witt* exclusion of a juror is harmless'"). Even though Wheeler relied on this law in his Sixth Circuit briefing, App at 10, the Warden failed to address those cases or in any way challenge their applicability at the Sixth Circuit. App at 13-21. The Warden now attempts, for the first time, to distinguish *Gray* for reasons never previously raised.

Specifically, the Warden argues *Gray* should not apply where peremptory challenges are exercised at the conclusion of voir dire, and that the Court should overrule long-standing precedent by adopting a rule that would, in that circumstance, require courts to determine if the prosecutor would have used a peremptory challenge on the prospective juror at issue. *Id.* at 29-30. To suggest this

rule would make a difference, the Warden asserts the trial prosecutor would have exercised a peremptory challenge on prospective juror #638 if he had not been excused for cause. *Id.* at 30-31.

The Warden's proposed rule would require the trial judge and all higher courts to speculate as to what the prosecutor would have done if the trial judge had ruled differently. To answer that in a non-speculative manner, the record would need to include something it virtually never does – a statement from the prosecutor that he would have used a peremptory challenge on the particular prospective juror if he had not been successful with his challenge for cause.[7] The Warden not only waived the opportunity to make these arguments when he failed to make them to the lowers courts, he failed to develop the factual record necessary to determine whether the prosecutor would have used a peremptory challenge on prospective juror #638 if he had not been excused for cause.

Moreover, unlike in *Gray*, the prosecutor used all his peremptory challenges to remove jurors he believed were impaired. The record does not suggest the prosecutor would have chosen to keep a juror he believed was impaired so he could exercise a peremptory challenge on prospective juror #638 if #638 had not been excused for cause. Rather, the record demonstrates why the prosecutor would *not* have done so.

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[7] The idea that a defendant has to show the empaneled jury was biased in order to prevail on a claim that a potential juror was improperly excused for cause because of his death penalty views, which the Warden suggests and the Sixth Circuit dissent argued, conflates the right to an impartial jury with the improper for-cause excusal of a juror and would essentially overrule part of *Witt*. It would mean there is no remedy for the improper excusal of a juror because relief can be granted only if the defendant makes the additional showing that the empaneled jury was biased. If the defendant can make that showing, there would be no reason to address whether a juror was improperly excluded for cause because the biased jury would itself be an independent constitutional violation.

At the conclusion of jury selection, Wheeler made a *Batson* challenge because the prosecutor exercised seven of his nine peremptory challenges to exclude African-Americans (seven were women). Providing his race-neutral reasons, the prosecutor noted he had unsuccessfully challenged for cause many of those prospective jurors, including the Caucasians he excused peremptorily for the same reasons he excused the seven African-Americans. *Video Record*, 2/21/01, 9:08:10-9:08:15, 9:12:43–9:12:50. Then, with regard to the seven African-Americans, he noted that, in addition to saying they could consider the death penalty, they also said one or more of the following: a) do not believe in the death penalty; b) the death penalty is wrong; c) could not give the death penalty; d) believed in redemption and salvation; e) felt it hard to be objective with the death penalty; and, f) had problems with law enforcement or the judicial process based on personal experiences. *Id.* at 9:04:30–9:18:08.[8] The statements the prosecutor attributed to each of these seven prospective jurors demonstrate his belief that they possessed much stronger

[8] The prosecutor said on the record he exercised a peremptory challenge against seven African-American jurors for the following reasons: 1) #643 – Deon Housel – because he said on voir dire that he does not believe in the death penalty, that killing someone is wrong, that his religion opposes the death penalty, and that he had problems with the police chief; 2) #629 – Florhanda Washington – because she said on voir dire she could not give the death penalty, does not believe the government should have the authority to seek the death penalty, and is against the death penalty; 3) #604 – Regina Brown – because she fell asleep during voir dire and because she volunteered that she does not believe in the death penalty and does not believe the government should be able to seek the death penalty; 4) #596 – Lolitta Scott – because her brother was in prison and because she said her husband had been treated unfairly by the judicial system and was eventually exonerated, which led the prosecution to believe she may harbor resentment towards the prosecution and towards the criminal justice system in general; 5) #536 – Yvonne Brown – because she believed in redemption, had the mindset of salvation and refused to state her opinion on the death penalty, after she stated on voir dire that her opinion on the death penalty is irrelevant; 6) #506 – Yvonne Woodard – because she had strong feelings against the death penalty and said it would be hard to be objective on the death penalty; and, 7) #546 – Shonzetta Griffin – because she said on voir dire that she believed the death penalty was too lenient a punishment and because she placed special emphasis on the word "consider" when she said she could consider the death penalty, which led the prosecution to believe she would not realistically consider the death penalty. *Id.* at 9:04:30 – 9:18:08.

opinions against the death penalty, or greater difficulty imposing the death penalty, or greater biases against the police or prosecution than may be attributed to prospective juror #638. It is therefore not just speculative but completely illogical to assert, *post hoc*, the prosecutor would have chosen to keep one of these jurors solely to eliminate prospective juror #638 if he had not been excused for cause.

This analysis reveals the impracticability of the rule the Warden urges the Court to adopt and the impossibility of reliably applying it in this case. It also demonstrates why the record in this case is insufficient for the Court to consider the issue and thus why this case is a poor vehicle to address the Warden's current, new arguments. Because the proposed rule is impracticable, and the Warden chose not to adequately develop the record to resolve the factual issues or even raise these arguments previously, it would be improper for the Court to grant certiorari to consider them, much less reverse the Sixth Circuit. *See Brumfield*, 135 S.Ct. at 2282 (refusing to address in the context of certiorari an argument that had not been presented to the court of appeals); *United States v. Jones*, 132 S.Ct. 945, 954 (2012) (refusing to consider an argument that was not raised in the court below and was therefore considered to have been forfeited); *Adams*, 520 U.S. at 86 (dismissing the writ as improvidently granted because, in part, the petitioner did not present his current argument to the lower court whose judgment the Court has been asked to review).

C. The Warden's second question presented requests review only under a contingent circumstance, and the first question presented raises a highly specific issue related to the facts and merely seeks error correction of a purported misapplication of a properly stated rule of no significance beyond Wheeler's case.

The Warden does not even want the Court to address by itself the only issue with potential to impact others cases - whether a *Witt* error is subject to harmless error analysis. The Warden asks the Court to address this issue only "*if*" the Court grants plenary review on the first question presented. *Petition* at 16. The second question presented is therefore not before the Court as an independent issue.

This leaves the Court with determining whether to grant certiorari on the first question presented. As noted above, that question presented asks the Court, in part, to review a (d)(2) issue the Sixth Circuit expressly decided to not resolve because it granted relief for a separate reason. The rest of the question focuses on the (d)(1) analysis the Sixth Circuit conducted. The Warden does not argue the Sixth Circuit addressed the claim under the wrong provision of §2254(d) or that the court otherwise applied the wrong law. He argues only that the court reached the wrong conclusion as to whether the state court decision was an unreasonable application of clearly established law when it upheld the excusal of a juror based on a question and answer exchange with the prospective juror that never took place, and where all else showed, both to the Sixth Circuit and to the trial judge, that prospective juror #638 was qualified.[9] This is nothing more than a request for error

[9] The Warden does not argue the Sixth Circuit (1) misunderstood or misconstrued the meaning of 'unreasonable application of'; (2) overlooked a state court finding or failed to consider a statement made by the prospective juror or by the judge; or (3) erred in its recitation of what occurred during the prospective juror's voir dire. The Warden does not dispute (1) the trial judge carefully observed

correction in a case with an unusual circumstance, and one that further shows why granting certiorari will have no impact beyond the facts of this case – the trial judge relied on a mistaken view of what prospective juror #638 was asked and said on voir dire, and there is an official video that proves it. It appears these circumstances will never re-occur and, thus, is unworthy of the Court's valuable resources and time.

II. The Sixth Circuit relied solely on the Court's clearly established applicable precedent, correctly applied §2254(d)(1), properly focused on the trial court's demeanor-based conclusions, and correctly applied the Court's precedents to reach a conclusion supported by the record.

The Warden does not suggest the Sixth Circuit misstated what §2254(d)(1) requires or how it applies. Nor does the Warden suggest the Sixth Circuit relied on its own precedent as clearly established law, extended clearly established law to an area where it does not apply, applied the wrong clearly established law, or failed to consider facts relevant to the resolution of the claim. At most, the Warden argues that the Sixth Circuit erroneously misapplied the law to the facts. Yet, the Warden would like the Court to think the Sixth Circuit reviewed Wheeler's claim de novo in a manner that disregards *Richter*, gave no deference to the trial judge's demeanor-based findings regarding prospective juror #638, and disregarded §2254(d)'s limitations on relief as the court did in *Parker v. Matthews*, 132 S.Ct. 2148 (2012) and *White v. Woodall*, 134 S.Ct. 1697 (2014). The Sixth Circuit ruling completely belies these conclusions.

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prospective juror #638's demeanor and voir dire statements and originally concluded there was no evidence of "substantial impairment;" and, (2) prospective juror #638 was never asked the question the judge relied upon to ultimately excuse the juror for cause.

In *Richter*, the Court overturned a decision by the United States Court of Appeals for the Ninth Circuit that "explicitly conducted de novo review." 562 U.S. at 101. After finding a constitutional violation, the Ninth Circuit simply "declared, without further explanation," that the 'state court's decision to the contrary constituted an unreasonable application of *Strickland*.'" *Id.* at 101-02. The Court then reversed, holding that the Ninth Circuit failed to apply AEDPA's limitations on relief. *Id.* at 102. This case is nothing like *Richter*.

The Sixth Circuit majority opinion never references the term "de novo." Rather than conduct de novo review, the Sixth Circuit carefully examined the state court's reason for excusing prospective juror #638 for cause and the state supreme court's affirmance of that decision, and then determined if that ruling was an unreasonable application of the Court's clearly established law regarding the excusal for cause of a juror based on death penalty views. Making clear that it was reviewing Wheeler's claim through the lens of §2254(d)(1) and applying deference to the trial judge's assessment of the prospective juror's demeanor and to her conclusions regarding that prospective juror, the Sixth Circuit identified the applicable governing rule from the Supreme Court law and laid out the holdings of the governing cases in great detail.

"[T]he Court has repeatedly held that a venireperson who has reservations about the death penalty cannot be excused for cause if he or she is able to follow the trial court's instructions and consider all penalties provided under the law." *Petition Appx* at 9a. The "standard 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," which "does not require that a juror's bias be proved with unmistakable clarity." *Id.* at 10a, *quoting Witt*, 469 U.S. at 424 (internal quotations omitted); *accord, id.* at 10a-11a, *quoting McCree*, 476 U.S. at 176, *Uttecht*, 551 U.S. at 22. In deciding the claim, habeas courts must recognize "that a trial judge's decision regarding for-cause removals should be afforded great deference." *Id.* at 11a, *citing Uttecht*, 551 U.S. at 17-22. But, "the need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decisions where the record discloses no basis for a finding of substantial impairment. *Id.*, *quoting Uttecht*, 551 U.S. at 20. Since the mid-1980's, "this has been the constitutional rule [courts] must apply in all for-cause juror-exclusion cases." *Id.* at 14a.

The Sixth Circuit then decided whether this law is clearly established in general and specific enough to be applicable to the issues before the court, which would not matter if the claim was reviewed de novo but is required when (d)(1)'s limitations on relief apply – further buttressing the conclusion that the court did not review this claim de novo. Concluding that *Witt* and its progeny are clearly established law that apply to Wheeler's claim, which the Warden does not dispute, the Sixth Circuit stated: "[t]he specificity and clarity of this rule also satisfies the AEDPA statutory requirement that a writ of habeas corpus may not be issued against a state-court judgment unless the state decision 'was contrary to, or involved an unreasonable application of clearly established Federal law, as

determined by the Supreme Court of the United States," which takes place under §2254(d)(1) as an "unreasonable application of" when "a state court accurately identifies the governing legal rule but applies it in an unreasonable manner to the facts of the case before it." *Id.* at 14a, 15a n.5; *accord*, *Williams (Terry) v. Taylor*, 529 U.S. 362, 407-09 (2000). This demonstrates (1) unlike the Ninth Circuit in *Richter,* the Sixth Circuit reviewed Wheeler's claim under (d)(1); (2) unlike in *Woodall* and *Matthews*, the Sixth Circuit correctly articulated both the governing legal standard and the applicable clearly established Supreme Court law; and, (3) also unlike in *Woodall* and *Matthews*, the Sixth Circuit then applied that law under the correct definition of what constitutes an unreasonable application of clearly established law under §2254(d)(1) to determine that habeas relief shall be granted.

In doing so, the Sixth Circuit made clear it recognized and would apply the deference to be paid to the trial judge's factual findings regarding the prospective juror and her conclusions regarding his demeanor. Although one could argue, as Wheeler did before the Sixth Circuit, that deference is not due here because Kentucky's unique use of a video record places the appellate and federal courts in the same position to observe a prospective jurors' demeanor - with the trial judge's better position to observe a prospective jurors' demeanor being the reason deference is paid to a trial judge's conclusions - the Sixth Circuit made clear its awareness of the deference owed to the trial judge and that it would apply that deference here.

Before reaching a conclusion as to whether the state court unreasonably applied the clearly established law of *Witt* [(d)(1) analysis], the Sixth Circuit noted

it is "[a]ware of the great deference owed a trial judge's decision to remove a prospective juror for cause." *Petition Appx* at 13a. The court also noted that the trial judge's initial decision that prospective juror #638 was qualified was based on the prospective juror's demeanor and his answers to voir dire questions. *Id.* at 12a-13a.

The Sixth Circuit then recognized the trial judge reversed her "initial assessment" of prospective juror #638's qualifications because she "misapprehended a single question and answer exchange with the prosecutor." *Id.* In other words, the trial judge did not excuse prospective juror #638 because of something she saw on the video record regarding his demeanor. Her opinion regarding his demeanor remained the same. She changed her mind solely because of what she mistakenly believed, after watching the video record, the prospective juror had said. The Warden does not dispute this or even dispute that what the trial judge said did not accurately reflect what the prospective juror was asked and answered. Nor could the Warden do so based on the express statements the trial judge made on the record. Therefore, paying deference to the trial judge's findings on demeanor means, as the Sixth Circuit recognized, giving deference to the conclusions that were based on statements the prospective juror made. This is exactly what the Sixth Circuit did and what the law mandates.

Contrary to the Warden's assertion, AEDPA does not require habeas courts to, in all cases, "determine what arguments or theories supported, or as here, could have supported, the state court's decision." *Petition* at 21, *quoting Richter*, 562 U.S. at 102. Post-*Richter*, it remains appropriate for a court to look back to, and then

analyze, the last reasoned state court decision to determine if §2254(d)'s limitations on relief have been overcome. *Brumfield*, 135 S.Ct. at 2277 (looking back through the Louisiana Supreme Court's decision to the trial court's "reasoned decision" to determine if §2254(d)'s limitations on relief had been overcome). Here, the Kentucky Supreme Court stated that the trial court appropriately struck for cause the jurors who could not impose the death penalty. Whether considered a reasoned opinion on the merits of the claim or not, that ruling requires the federal habeas court to turn to what prospective juror #638 was asked on voir dire and said in response, and to what the trial judge expressed as her reason for ultimately excluding that juror after previously expressing her view that the prospective juror's answers and demeanor gave no reason to excuse him for cause. The Sixth Circuit did just that, as §2254(d)(1) requires, and reached the correct result in doing so.

The Warden tries to convince the Court otherwise by arguing the core meaning of "not certain he could consider" and "could not consider" is the same because they both mean the prospective juror "would not commit to considering the death penalty." *Petition* at 24. But, a prospective juror does not have to commit to considering the death penalty. Rather, the Court's clearly established law permits a juror to be excused for cause based on death penalty views only when that juror's ability to impose the death penalty is "substantially impaired." Prospective juror #638's voir dire statements do not provide any basis for concluding he was "substantially impaired."

A juror can surely be unable to "commit" to considering the death penalty without any potential difficulty with imposing the death penalty rising to the level of "substantial impairment." Indeed, some of the prospective jurors the prosecutor excused peremptorily after the trial judge denied a motion to excuse for cause fall within this category, *see supra* fn.8, as does prospective juror #638.

Prospective juror #638 said at least four times he *could* consider imposing the death penalty and that nothing impaired his ability to do so. *See, e.g., Petition Appx.* At 125a ("I believe I could" consider the entire range of penalties, which included the death penalty); *id.* ("probably" could impose the death penalty); *id.* at 126a ("I believe there are arguments on both sides of the [death penalty]," but "I'm not sure that I have formed an opinion one way or the other."); *id.* ("I don't believe" I have any moral, religious, spiritual or personal belief that would keep [me] from considering the death penalty"); *id.* at 134a ("I believe I can" consider all of the sentencing options, including the death penalty). Also, prospective juror #638's last statement was "I believe I can" consider the death penalty. *id.* at 134a. None of his statements demonstrated substantial impairment. *See, e.g., Davis v. Ayala*, 135 S.Ct. 2187, 2201 (2015) (noting that a prospective juror who initially stated he did not believe in the death penalty and had once thought it was completely wrong is materially different from a prospective juror who stated she could vote for the death penalty after stating she "*probably* would not be able to vote for the death penalty"). At most, this demonstrated limited hesitancy about the death penalty that should be of no significance when determining whether a juror should be excused for cause.

As the Court noted only a few months ago, "[i]n a capital case, it is not surprising for prospective jurors to express varying degrees of hesitancy about voting for a death verdict. *Ayala*, 135 S.Ct. at 2201. That is, at most, all prospective juror #638 did. Thus, while Wheeler maintains that the voir dire demonstrates that prospective juror #638 clearly committed to being able to consider the death penalty, any failure by the prospective juror to have done so is of no significance. The Sixth Circuit recognized this, and unlike the Warden here, correctly applied the "substantial impairment" standard of *Witt*.

Under the correct legal standard, as the Sixth Circuit recognized, there is a significant difference between a prospective juror not being "*absolutely certain*" he can consider the death penalty and not being *able to* consider the death penalty. The latter is a categorical position that would require excusal even under the pre-*Witt* standard of *Witherspoon*. The former is not enough to constitute "substantial impairment," as the trial judge originally recognized when she expressed her findings based on observing prospective juror 638's demeanor. "Absolute certainty" is, by definition, an extremely high standard that would result in the excusal of the vast majority of jurors who could impose the death penalty. A person may not be absolutely certain he can impose the death penalty while at the same time not possessing a level of difficulty doing so that rises to the level of "substantial impairment." This is a crucial difference here.

When the correct standard is applied, not the "absolute certainty" standard the Warden argues, it is clear that, as laid out above, prospective juror #638's

ability to impose the death penalty was not impaired at all, much less substantially so. As such there was no basis to excuse him for cause, other than the trial judge's erroneous understanding of what the prospective juror had said. This is the reason the Sixth Circuit expressed for ruling the state court decision was an unreasonable application of clearly established law. One cannot dispute, and the Warden does not dispute, that prospective juror #638 was never asked what the trial judge ultimately believed he was asked and therefore never said he was unable to consider the death penalty (he did say at least four times, though, that he could consider the death penalty and had no scruples that would impair his ability to do so). Therefore, the Sixth Circuit did not commit the same error that occurred in *Richter*. Rather, it clearly applied (d)(1)'s limitations on relief in a reasoned opinion explaining why the state court's decision was an unreasonable application of the Court's applicable clearly established law.

Simply, the Sixth Circuit did not err in the law it applied or how it applied that law. Wheeler's case is not at all like *Woodall* or *Matthews*, and the errors the Sixth Circuit made in those cases did not occur here. Nor did the Sixth Circuit make the error that occurred in *Richter,* rely on its own precedent as if it was clearly established law, or fail to consider any relevant evidence. The Sixth Circuit simply articulated correctly the governing clearly established law, recognized (d)(1)'s applicability, correctly articulated the requirements of (d)(1), and then applied those requirements to the entirety of what transpired during prospective juror #638's voir dire and to what the judge said and ruled with regard to that prospective juror to

determine if the state court adjudication of the claim (including the Kentucky Supreme Court's ruling) resulted in a decision that was an unreasonable application of clearly established law. This means the Warden's Petition is merely for the purpose of error correction and is really about whether the Court should grant certiorari solely to address the Warden's disagreement with the lower court result. The Court should not do so.

CONCLUSION

The Court should deny the Warden's petition for a writ of certiorari.

Respectfully submitted,

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August 17, 2015

No. 14-1372

IN THE
SUPREME COURT OF THE UNITED STATES

RANDY WHITE, WARDEN

Petitioner

v.

ROGER L. WHEELER

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

APPENDIX TO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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No. 11-5707

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROGER WHEELER
Petitioner-Appellant,

v.

THOMAS L. SIMPSON, WARDEN
Respondent-Appellee

On appeal from the United States District Court
for the Western District of Kentucky at Louisville

CORRECTED BRIEF FOR APPELLANT ROGER WHEELER

DEATH PENALTY CASE

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ARGUMENT

I. Because Juror 638's voir dire answers indicated his ability to consider the death penalty was not substantially impaired, his excusal for cause violated Wheeler's Sixth, Eighth, and Fourteenth Amendment rights.

A juror whose beliefs about the death penalty "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" must be excused for cause. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). To assess whether a juror is unqualified, courts must consider the totality of the juror's voir dire statements to determine if the juror's ability to consider the death penalty is substantially impaired. *See, e.g., Uttecht v. Brown*, 551 U.S. 1, 18 (2006) (A juror's "assurances that he would consider imposing the death penalty and would follow the law do not overcome the reasonable inference from his other statements that in fact he would be substantially impaired in this case"). Although Juror 638 was a contemplative person, he clearly expressed he could consider imposing the death penalty in this case. Thus, he was not substantially impaired and should not have been excused for cause.

In response to whether he had "any moral, religious, spiritual or personal beliefs that would keep him from considering the death penalty, Juror 638 stated: "I don't believe so. I – there is some, but I don't think

strong enough to, at this point, to form a solid opinion one way or the other." (Transcript, RE 74, page ID #882). In response to the prosecutor's question whether he felt he could "realistically consider each penalty option before making a decision," Juror 638 responded: "I've never been confronted with that situation in a, in a real-life sense of having to make that kind of determination.... So, it's difficult for me to judge how I would I guess act, uh -." *Id.* at 886. The prosecutor then said, "you're not absolutely certain whether you could realistically consider it or not," to which Juror 638 interjected, stating "I think that would be the most accurate way I could answer your question." *Id.*

Although the prosecutor asked no other questions on this point, during defense questioning Juror 638 stated:

> [O]n a very philosophical topic, I think [sic] 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.

Id. at 888. Juror 638 then stated "I believe I can, sir" consider the death penalty, regardless of the evolution of his thinking. *Id.* at 888-89. Juror 638 was not questioned further about his ability to consider the death penalty.

Though none of Juror 638's statements evince substantial impairment to his ability to consider the death penalty, the prosecutor moved to exclude Juror 638, because he never directly stated he was *absolutely certain* he could consider the death penalty. *Id.* at 889. Contrary to the prosecutor's argument, *Witt* does not require jurors to express *absolutely certainty* of their ability to consider the death penalty. Instead, a juror is presumed qualified – a presumption that is overcome by showing the juror's ability to consider the death penalty is substantially impaired.

The trial judge initially denied the motion to excuse for cause, stating she interpreted Juror 638's statements to mean he would take his responsibilities seriously because the death penalty is a possible punishment and that he "could consider the entire range" of sentences, including the death penalty. *Id.* at 893. But, at the Commonwealth's urging she agreed to withhold a final ruling until she reviewed the video of the juror's voir dire and ultimately excused him for cause. The initial ruling that Juror 638's views on the death penalty did not render him unqualified to serve was correct.

According to the National Judicial College ("NJC"), jurors are not substantially impaired in their ability to consider the death penalty and thus should not be excused for cause if their voir dire responses indicate any of the following: 1) "the juror has general views against the death penalty but juror states that they can temporarily set aside the juror's own personal beliefs in deference to the rule of law"; 2) "the juror does not believe in the death penalty but could follow the law and consider the death penalty and vote for the death penalty if the facts and the evidence warrant the death penalty"; or 3) "the juror 'states [i]t would be difficult for me to vote for the death penalty'" or "I doubt very much whether I could vote for the death penalty." NJC, *Presiding over a Capital Case: A Benchbook for Judges, Chapter 5: Jury Selection* at section 5.44, pages 119-120, *available at*, http://www.judges.org/capitalcasesresources/bookpdf/Chapter%205%20Jury%20Selection.pdf. Juror 638 not only falls within these examples of non-impaired jurors whom the NJC indicates would be improper to excuse for cause, Juror 638 was not impaired at all.

Juror 638 never expressed opposition to the death penalty. Rather, he said his opinions are *not* strong enough to form a "solid opinion one way or the other." Moreover, Juror 638 never expressed difficulty with imposing the death penalty. Instead, he said he is "a bit more contemplative on the

issue of taking a life" and that the prosecutor was "accurate" in saying he did not know for certain if he could realistically consider the death penalty, which is something many jurors express since they have never been faced with the situation. This shows, as the trial judge accurately observed, Juror 638 would take the matter seriously and give substantial thought to whether or not to impose the death penalty in this case based on the evidence he would ultimately hear – a conclusion he made clear when the last thing he said regarding the death penalty was that he "believe[s]" he can consider it.

Far from showing substantial impairment in his ability to consider the death penalty, Juror 638's statements fall lower on the spectrum than views the NJC has concluded do not give rise to the level of impairment necessary to permit excusal for cause. Similarly, Juror 638 was less impaired than the juror in *Wolf v. Clarke*, 819 F.Supp.2d 538, 573-74 (E.D. Va. 2011), where the district court granted habeas relief because the trial judge improperly excluded a juror with far stronger views than Juror 638. As in Wheeler's case, no follow-up questions were asked after the juror said he believed he could consider imposing the death penalty. Finding the prosecution failed to establish substantial impairment under *Witt*, the court stated: "While [this juror] initially made statements indicating that he could not impose the death penalty in a particular situation, irrespective of the facts of the case, the

totality of [his] *voir dire* testimony indicated that he would obey the court's instructions and come to a determination after weighing the evidence presented in the case." *Id.*

In contrast to Juror 638's responses, the juror's statements in *Wolfe* were more definitive because that juror initially expressed an inability to impose the death penalty.[1] Yet, that initial inability did not establish

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[1] Because the juror's voir dire statements in *Wolfe* more definitively expressed an inability to impose the death penalty than occurred in Wheeler's case, Wheeler provides portions of the voir dire quoted in *Wolfe*:

"Mr. Ebert: ... Could you impose the death penalty on the person who hired the person to do the killing even though the person who did the killing may or may not receive the death penalty?

Mr. Mock: (shaking head.)

Mr. Ebert: You could or could not?

Mr. Mock: Could not.

...

Mr. Ebert: So you absolutely could not impose the death penalty in that certain case?

Mr. Mock: I don't think so

Mr. Ebert: You realize there may be different facts concerning each instance?

Mr. Mock: No, I couldn't.

...

substantial impairment. Juror 638's less definitive statements were therefore also insufficient to justify excusal for cause. Nonetheless, after reviewing the video record of Juror 638's voir dire, Wheeler's judge excused the potential juror for cause, over defense objection.

Without articulating whether she was doing so under *Witt* or the prosecutions' incorrect basis for requesting excusal, the judge removed Juror 638 for cause because she thought he said "I think that would be pretty accurate," in response to the following question the judge believed was posed to the juror: "would it be accurate to say you *couldn't, couldn't* consider the entire range?" (Transcript, RE 74, page ID #894-95). The most significant problem with the trial court's analysis is that the prosecutor never

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Mr. Partridge: Is there a set of facts that could be presented to you ... or would there be circumstances where you could impose it?

Mr. Mock: Yes, there could be circumstances where I could.

Mr. Partridge: Would you follow the law?

Mr. Mock: Sure, Yeah.

Mr. Partridge: And you would weigh the evidence that you hear over the next few days and come to your own determination then?

Mr. Mock: Yeah.

Wolfe, 819 F.Supp.2d at 572-73.

asked this question; thus, juror 638 never said it is "accurate" that he could not consider the entire range of potential sentences.

The difference between what Juror 638 was asked and what the judge mistakenly believed he was asked is critical because it changes the entire meaning of Juror 638's statement regarding what is "accurate" or "correct." In reality, Juror 638 said it was "accurate" that he lacked certainty whether he would consider the death penalty, just as many jurors do before hearing the evidence. The lack of certainty does not equate to an inability to consider the death penalty. More important, the lack of certainty does not, in itself, give rise to substantial impairment under *Witt*. Therefore, the sole basis for the trial judge's exclusion of juror 638 for cause was illusory.

Although a trial court's finding of juror impairment is a factual determination to which deference ordinarily applies because the trial judge observes demeanor, no deference applies here because a video record exists through which this Court has equal opportunity to observe demeanor and because the trial court was mistaken as to what juror 638 was asked on a material matter and then relied on that error to excuse the juror. Without this inaccuracy (and even considering the judge's incorrect understanding of what the juror actually said), there is still no legal basis to exclude the juror.

Thus, juror 638's ability to consider the death penalty was not substantially impaired, and his excusal for cause violated *Witt*.

The erroneous excusal for cause of a juror requires reversal. *Gray v. Mississippi*, 481 U.S. 648, 668 (1987); *Gall v. Parker*, 231 F.3d 265, 332 (6th Cir. 2000) (overruled on other grounds). Therefore, the writ of habeas corpus must be granted unless 28 U.S.C. §2254(d)'s limitations on relief prevent doing so. It does not.

Initially, it is unclear if the state courts adjudicated Wheeler's claim under the federal constitutional standard or under the different standard the prosecutor articulated. The Kentucky Supreme stated the trial judge "appropriately struck for cause those jurors that could not impose the death penalty." *Wheeler*, 121 S.W.3d at 179. The trial court never stated the legal standard she applied. The prosecutor argued juror 638 should be excused because he "could not say whether he could realistically consider the death penalty or not," which is not a basis to excuse a juror. (Transcript, RE 74, page ID #889). Because the only reason the prosecutor presented for excusing this juror was the juror did not expressly state he could consider the death penalty, it appears likely the judge applied that standard. Thus, the presumption that the claim was adjudicated on its federal constitutional merits has been overcome.

Even if §2254(d) is applied, Wheeler should prevail. The trial judge's articulation of the question juror 638 answered that led her to excuse him for cause was inaccurate and completely unfounded based on what was actually said during voir dire. The trial court's decision was therefore based on an unreasonable determination of the facts that the Kentucky Supreme Court neither addressed nor otherwise upset, thereby overcoming §2254(d)'s limitation on relief.

The failure to recognize a juror does not have to state with certitude he would consider the death penalty was contrary to *Witt*. The state court's conclusion juror 638 was properly excused for cause was unreasonable because it was based on an erroneous factual determination. Furthermore, nothing else Juror 638 said during voir dire demonstrates substantial impairment. Individually and collectively, this means Wheeler has overcome §2254(d)'s limitations on relief, and the writ should be granted.

II. Evidence of Warfield's pregnancy, when neither she nor Wheeler knew she was pregnant, violated Wheeler's federal due process right to a fair trial

Over defense objection, the trial judge allowed the jury to know something no one, including Nairobi Warfield, knew at the time of her murder - she was pregnant. Her pregnancy was irrelevant to all matters during trial and so prejudicial that it deprived Wheeler fundamental fairness

NO. 11-5707
IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROGER WHEELER — PETITIONER/APPELLANT

V.

THOMAS L. SIMPSON, WARDEN — RESPONDENT/APPELLEE

A DEATH PENALTY CASE

* * * * * * * * * *

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE
CIVIL ACTION NO. 3:09-CV-00336-JHM-DW

* * * * * * * * * *

BRIEF FOR RESPONDENT/APPELLEE

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ARGUMENT

I.

JUROR 638 WAS PROPERLY STRUCK FOR CAUSE. THE STATE COURT DECISION WAS NOT AN UNREASONABLE APPLICATION OF *WITHERSPOON V. ILLINOIS* AND *WAINWRIGHT V. WITT* OR ANY OTHER PRECEDENT.

Wheeler argues that the trial court erred in dismissing Juror 638 for cause. The District Court made the following findings of fact relative to the *voir dire* of Juror 638:

> Juror 638 stated that he did not know if the state should have the authority to impose the death penalty and was equivocal when asked whether he could consider the full range of penalties including the death penalty (VT 6, 2/19?01, 14:41:54 - 43:22). Juror 638 agreed that he was not absolutely certain if he could realistically consider imposing the death penalty (Id. 14:47:19 - 48:37). He explained that with age he had become more contemplative on the issue of whether or not we have the right to take life (Id. 14:49:20 - 50:03). Initially, the trial court found that the juror remained capable of considering the entire penalty range, but reserved ruling on whether to strike the juror for cause (Id. 14:55:39 - 56:57). The following day, over the objection of the defense, the court struck juror 638 due to the court's view that the juror could not consider the entire range of penalties (VT 7, 2/20/01, 10:13:21 - 14:47, 10:16:06 - 59). (Findings of Fact, Conclusions of Law & Recommendation, RE 52, Page ID # 54).

Juror 638 was informed of the nature of the crimes herein and the various sentencing possibilities. *(Voir Dire Transcript-Juror 638*, page 1). Juror 638 stated that he did not know if the state should have the authority to impose the death penalty. *Id.* When asked if he could consider the full range of penalties, including the death

penalty, Juror 638 was equivocal in his answer and stated that it would require "deep reflection." *Id.* After eliciting more equivocal responses, the Commonwealth asked, "You're telling me that, at this point, you're not absolutely certain whether you could realistically consider it [death penalty] or not?" Juror 638 replied, "I think that would be the most accurate way I could answer your question, sir." *Id* at page 7.

Upon questioning by the defense, Juror 638 stated that, "The older I get . . . I'm a bit more contemplative on the issue of taking a life and whether or not we have the right to take that life." *Id* at page 8. The trial court granted the Commonwealth's motion to strike for cause. The trial court found the juror was biased, i.e., unable to fully consider the full range of sentencing possibilities.

Before the Kentucky Supreme Court, Wheeler argued that the trial court's striking of Juror 638 violated his right to a fair trial by a fair and impartial jury per Wainwright v. Witt, 469 U.S. 412 (1985) and Witherspoon v. Illinois, 391 U.S. 510 (1968). In its Opinion of December 18, 2003, the Kentucky Supreme Court affirmed the trial court, holding:

> In this case, the trial judge allowed counsel for both parties great latitude in questioning the persons summoned for jury duty. The question of whether the potential jurors had any preconceived opinions that would interfere with their impartiality was carefully explored. The trial judge properly refused to strike for cause jurors who could consider the minimum penalty of twenty years. She appropriately struck for cause those jurors that could not impose the death penalty. She also correctly excused one juror who

> demonstrated a financial hardship. The voir dire process was entirely proper and thoroughly examined the question of whether any prospective jurors were predisposed. There was no error and the rights of the defendant to a fair trial by a fair and impartial jury, due process and freedom from cruel and unusual punishment under both the federal and state constitutions were not violated.

Wheeler v. Commonwealth, supra, 121 S.W.3d 173, 179 (Ky. 2003); (Rule 5 Answer, Appendix 1, Vol. X, RE 12, Page ID # 66-94).

The District Court held that the Kentucky Supreme Court's holding was a reasonable application of Wainwright, supra, and Witherspoon, supra. (Findings of Fact, Conclusions of Law & Recommendation, RE 52, Page ID # 48 - 51).

In Witherspoon, supra, the Court made clear that, in a death penalty case, jurors must be excluded for cause whenever they would automatically vote against the imposition of the death penalty, without regard to the evidence, or where their views about the death penalty would prevent them from making an impartial decision. Witherspoon, 391 U.S. at 522, n. 21. This standard was clarified in Wainwright, supra.

In Wainwright v. Witt, at p. 424 - 426, the United States Supreme Court held:

> We therefore take this opportunity to clarify our decision in *Witherspoon (v. Illinois*, 391 U.S. 510 (1968)) and to reaffirm the above-quoted standard from *Adams (v. Texas*, 448 U.S. 38 (1980)) as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard 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." [Footnote omitted.] We note that, in addition to dispensing with Witherspoon's reference to "automatic" decisionmaking, this standard likewise does not require that a juror's bias be proven with "unmistakable clarity." This is because determinations 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 this 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. For reasons that will be developed more fully infra, this is why deference must be paid to the trial judge who sees and hears the juror. (Emphasis added.)

The United States Supreme Court has consistently applied the "prevent or substantially impair" standard contained in Wainwright, supra. In Lockhart v. McCree, 476 U.S. 162 (1986), the United States Supreme Court reaffirmed the "prevent or substantially impair" standard, and the Court held that the United States Constitution is not violated by "death qualifying" juries. The Court also held that those who are opposed to the death penalty may still serve so long as they will set aside their personal beliefs and follow the rule of law. Id at p. 176.

The Supreme Court also made clear that "this standard . . . does not require that a juror's bias be proved with 'unmistakable clarity' as such an exacting standard does

not fit the realities fo voir dire questioning." Wainwright, supra, at p. 424-25; Beuke v. Houk, 537 F.3d 618, 638 (6th Cir. 2008), *cert. denied*, 129 S.Ct. 2792 (2009) (discussing Witt).

Regarding the deference that a federal habeas court must pay to the state court's findings of bias, Wainwright held that the state court's findings of bias on the part of a prospective juror is a finding of fact to be accorded the presumption of correctness contained in 28 U.S.C. § 2254(d). Id at p. 427 - 430. Thus, the state courts' findings of bias on the part of Juror 638 is presumed factually correct. Wheeler has not shown any clear and convincing evidence to the contrary. 28 U.S.C. §2254(e)(1).

Juror 638's was biased. Juror 638's views prevented or substantially impaired his ability to serve as an impartial juror and consider all possible sentencing options. The Respondent/Appellee cannot improve upon the reasoning of the District Court:

> [J]uror 638 expressed uncertainty whether the state should even have the authority to impose a death penalty at all. Further, when directly asked by the prosecution whether he was not absolutely certain if he could realistically consider the death penalty or not, juror 638 replied, "I think that would be most accurate way I could answer your question, sir." (Citation omitted.) Juror 638 added during questioning by defense counsel that as he got older he became more contemplative on the issue of "whether or not we have the right to take that life." (Citation omitted.) Such comments reveal juror 638 to be substantially impaired based on his views on capital punishment in the future performance of his duties as a juror contrary to the *Witt* standard. Accordingly, the trial court correctly found the juror to be biased. (Findings of Fact, Conclusions of Law & Recommendation, RE 52, Page ID #

49).

The totality of Juror 638's responses showed that his biased views on capital punishment would have prevented or substantially impaired the performance of his duties. Wheeler did not overcome the presumption of correctness attached to the state court's finding of bias. The state court's decision was not contrary to Wainwright or Witherspoon, nor did it involve an unreasonable application of Wainwright or Witherspoon. Further, the state court's decision was not based on an unreasonable determination of the facts, in light of the evidence. The District Court must be affirmed.

II.

THE STATE COURT'S DECISION, FINDING NO ERROR IN ADMITTING EVIDENCE THAT VICTIM WARFIELD WAS PREGNANT WHEN SHE WAS MURDERED, WAS NOT CONTRARY TO NOR INVOLVED AN UNREASONABLE APPLICATION OF ESTABLISHED SUPREME COURT PRECEDENT.

Nairobi Warfield was pregnant when Wheeler strangled her to death. The medical examiner testified that, during the course of the Ms. Warfield's autopsy, it was discovered that Ms. Warfield was pregnant with a small embryo. The prosecution also briefly mentioned the pregnancy during closing arguments. (Findings of Fact, Conclusions of Law & Recommendation, RE 52, Page ID # 57).

XIII.

ANY ERROR WAS HARMLESS.

Harmless error analysis applies in federal habeas corpus review. Brecht v. Abrahamson, 507 U.S. 619 (1993). This is true even if the state court did not engage in harmless error analysis. Fry v. Pliler, 551 U.S. 112 (2007), *citing* Penry v. Johnson, 532 U.S. 782, 794-796 (2001).

Respondent/Appellee argues that no error occurred. But, if any error occurred, it was harmless error. The evidence of Wheeler's guilt is overwhelming. At trial, Wheeler admitted being in the Malone/Warfield home at the time of the murders. This admission contradicted his earlier statements that he was not in the victims' home the night of the murders. Wheeler changed his story on the stand only because of the overwhelming, incriminating DNA and physical evidence.

Wheeler was not a stranger to the victims. Wheeler claimed that he had purchased drugs before from Mr. Malone. Wheeler claimed he had socialized with Ms. Warfield's mother and aunt on the night of the murders.

Nigel Malone was murdered by stabbing. He was stabbed nine (9) times, including two (2) wounds to the heart. Wheeler had a wound on his left forearm consistent with a knife wound. Wheeler's DNA was found on a bloody, black handled knife found at the murder scene. Wheeler's DNA and blood were found on a

newspaper located near Mr. Malone's corpse.

Nairobi Warfield was murdered by manual strangulation. She also suffered head trauma and had been punched in the mouth at least twice. Wheeler had wounds on his right hand consistent with punching somebody in the mouth. A small piece of latex was found in Ms. Warfield's mouth, suggesting Wheeler wore latex gloves. It is no surprise, then, that no fingerprints were found.

Wheeler's blood and DNA were found wiped on a bedsheet in the bedroom where Ms. Warfield was found. Wheeler's blood and DNA were also found dropped onto Ms. Warfield's left thigh. Wheeler's blood was found on a telephone in the bedroom. Wheeler denied being near Ms. Warfield's corpse, yet he never explained how his blood and DNA became located there. Wheeler focuses on the blood found on Ms. Warfield's thigh but conveniently ignores his blood and DNA found on the bedsheet and telephone near her corpse.

Shortly after the murders, Wheeler was seen in a nearby convenience store. Wheeler had blood about his head and body. Wheeler's blood and DNA were found in an automobile, owned by Donne Smith, which Wheeler admitted borrowing and driving the night of the murders.

Against this mountain of evidence, Wheeler could only offer a feeble alternate perpetrator defense. Like something out of a horror B-movie, Wheeler claimed that

he walked in the Malone/Warfield home and saw Mr. Malone's body. Wheeler then claimed that a man, dressed in a Halloween mask, Army fatigues and latex gloves came running up and stabbed him in the arm. Again, Wheeler's fanciful story does not explain how his blood and DNA got dropped onto Ms. Warfield's body and wiped on the sheet in her bedroom.

Of course, the jury saw past Wheeler's lies. Wheeler stabbed Mr. Malone to death and incurred a cut to his left forearm while so doing. Wheeler then murdered Ms. Warfield. As Wheeler punched Ms. Warfield in the mouth, slammed her head against the wall and/or dresser, and slowly choked the life out of her, a drop of his blood dropped onto Ms. Warfield's thigh. Once Wheeler was done with his murderous deeds, he wiped himself with a sheet in the same bedroom where Ms. Warfield lay dead. Apparently, Wheeler forgot to wipe his head because shortly after the murder he was seen in a local convenience store with blood on his head. And, his blood and DNA were found in his get-away car. The evidence of guilt is overwhelming. No error occurred in this case, but if any error occurred, it was harmless. The petition must be denied.