STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

On Petition for Writ of Certiorari to
Greenville County
Benjamin H. Culbertson, Trial Judge
Debra R. McCaslin, PCR Judge

Appellate Case No. 2021-001061

EMMANUEL M. RODRIGUEZ,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE

Petitioner's Issue

Did the PCR judge err in refusing to find trial counsel ineffective for failing to request voir dire to ascertain potential juror bias against undocumented Mexican transsexuals?

Respondent's Counterstatement of Issue

The PCR court properly found Petitioner did not prove counsel was ineffective when (1) Petitioner did not submit any evidence of juror bias, thus failing to establish prejudice, and (2) counsel articulated a valid reason for not requesting voir dire questions related to juror bias.

STATEMENT OF THE CASE

Petitioner Emmanuel M. Rodriguez is currently confined in the South Carolina Department of Corrections serving a forty-year sentence. In April of 2014, the Greenville County Grand Jury indicted her for trafficking heroin, twenty-eight grams or more. On September 8, 2014, Petitioner proceeded to a jury trial before the Honorable Benjamin H. Culbertson. John Vernon Steensen Crangle represented Petitioner and Assistant Solicitor William Ryan Holloway prosecuted the case. The jury convicted Petitioner as indicted.

Petitioner filed a direct appeal, which was affirmed. See State v. Rodriguez, 2016-UP-320 (S.C. Ct. App. filed June 22, 2016). After Petitioner's Petition for Rehearing was denied, Petitioner filed a Petition for Writ of Certiorari. The Petition for Writ of Certiorari was denied, and the Remittitur was issued on October 9, 2017.

Petitioner filed an application for post-conviction relief (PCR) on November 17, 2016.[1] On June 2, 2021, the Honorable Debra R. McCaslin held an evidentiary hearing. Susannah Conyers Ross represented Petitioner and Assistant Attorney General Taylor Zane Smith represented the State.

On July 27, 2021, Judge McCaslin issued an order denying PCR. Petitioner filed a Rule 59(e) motion with a proposed order. On August 25, 2021, Judge McCaslin issued an order summarily denying Petitioner's motion.

Relevant Facts

Petitioner was arrested after law enforcement discovered more than 2,000 grams of heroin in a hidden compartment of a suitcase she was carrying on a passenger bus. (App. 117, 124, 128,

[1] Petitioner filed this PCR application while her Petition for Certiorari was pending; it was not summarily disposed of prior to the issuance of the Remittitur.

137, 140-44, 191). Notably, the heroin had a purity level of 85.3 percent, and an expert in drug transactions testified it would have a street value of $500,000 to $600,000 after being diluted. (App. 191, 204-05).

After her arrest, Petitioner told law enforcement she was paid $2,000 to transport the suitcase, and although she knew it had drugs, she did not know the quantity or type. (App. 177). At trial, however, she proceeded on a defense of duress. Petitioner testified she was deported from the United States to Mexico in 2012. (App. 221). While in Mexico, she read articles indicating the Mexican cartel was killing transsexuals. (App. 222-23). Petitioner testified she was afraid because she is transsexual.[2] (App. 222-23). She stated a woman named "Diana" contacted her, told Petitioner her life was in danger, and offered to help her return to the United States. (App. 223). However, after Diana helped Petitioner return to the United States, she kept increasing the amount of money Petitioner owed. (App. 224-25). Petitioner stated Diana's brothers were members of the Mexican cartel, and Diana's brother "Jonathan" approached Petitioner about transporting the suitcase. (App. 225-26). She averred Jonathan threatened her, and she agreed to transport it because she was afraid. (App. 226-27).

During deliberation, the jury asked questions about the duress charge. (App. 274-75). Ultimately, the jury convicted Petitioner of trafficking heroin.

[2] Petitioner identifies as a woman.

STANDARD OF REVIEW

The standard of review for PCR depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court properly found Petitioner did not prove counsel was ineffective when (1) Petitioner did not submit any evidence of juror bias, thus failing to establish prejudice, and (2) counsel articulated a valid reason for not requesting voir dire questions related to juror bias.

Petitioner contends trial counsel was ineffective for not requesting voir dire questions to ascertain potential juror bias against undocumented Mexican transsexuals. She first contends the PCR court erred in finding she failed to establish that prevailing professional norms require an attorney representing a transgendered person of Mexican origin to request such questions. Petitioner likewise avers the PCR court erred in finding trial counsel articulated a reasonable strategy. Regarding prejudice, Petitioner acknowledges she did not submit evidence showing any juror made an overtly racially biased statement against Hispanics or Mexicans but posits this should be one of the rare instances when prejudice is presumed. (Pet. 9-13). However, the PCR court properly determined Petitioner did not meet her burden. Specifically, counsel was not deficient because prevailing professional standards do not require such questions, and counsel articulated a valid reason for not requesting such questions. Further, Petitioner has not submitted *any* evidence of juror bias—thus precluding a finding of prejudice.

"There is a strong presumption trial counsel provided adequate assistance." Green v. State, 351 S.C. 184, 192, 569 S.E.2d 318, 322 (2002). To prove ineffective assistance of counsel, an applicant must show counsel was deficient, and that deficiency prejudiced the applicant. Strickland v. Washington, 466 U.S. 668 (1984). In other words, "the applicant must show trial counsel's performance fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different. Green, 351 S.C. at 192, 569 S.E.2d at 322. "A reasonable probability is one sufficient to undermine confidence in the trial's outcome." Id. A PCR applicant bears the burden of proving counsel was ineffective.

Glover v. State, 318 S.C. 496, 497, 458 S.E.2d 538, 539 (1995).

A court does not need to determine whether counsel's performance was deficient before examining prejudice. Strickland, 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." Id.

A. The PCR court properly found Petitioner failed to prove prejudice.

i. Petitioner has not presented any evidence of juror bias, thus precluding any finding of prejudice.

Petitioner has not submitted—or even attempted to submit—anything to support her allegations of juror bias. Specifically, Petitioner has not submitted anything showing any juror was biased against her due to her race, gender identity, or immigration status. Because Petitioner has the burden of proof, she must submit something to support an allegation of juror bias before she can show prejudice. Cf. Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence."); Magazine v. State, 361 S.C. 610, 606 S.E.2d 761 (finding "the PCR court erred in finding counsel ineffective for failing to use all available peremptory strikes" when "Respondent did not present any evidence to support a finding that counsel's error resulted in a violation of Respondent's right to a trial by a competent and impartial jury"). Without evidence, any finding of prejudice is speculative. Cf. Dempsey, 363 S.C. at 370, 610 S.E.2d at 815 (holding "any finding of prejudice is merely speculative" in claim that counsel was ineffective for not calling an expert when no expert testified at PCR hearing). Thus, the PCR court properly found Petitioner did not prove prejudice.[3]

[3] Petitioner criticizes the PCR court's reliance on Magazine, asserting such reliance is misplaced. (Pet. 7). Although Magazine addressed counsel's failure to exercise peremptory strikes rather than

In an effort to circumvent her failure to submit any evidence of prejudice, Petitioner posits Rule 606(b)[4] would have precluded such evidence. This assertion, however, ignores an important exception to this rule. Although Rule 606(b) excludes most juror testimony about deliberations, juror testimony is admissible when it "raises sufficient questions of fundamental fairness." Shumpert v. State, 378 S.C 62, 67, 661 S.E.2d 369, 372 (2009).

In State v. Hunter, 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995), our Supreme Court determined that "allegations of racial prejudice involve principles of fundamental fairness," and the trial court properly considered a juror's testimony about racial bias exhibited during jury deliberations. Thus, Petitioner's failure here to submit—or attempt to submit—any affidavit or other evidence showing juror bias is fatal to her claim of racial bias, as she has not met her burden of proving prejudice.

Although it is unclear whether an affidavit alleging juror bias based on gender identity or immigration status[5] would "raise[] sufficient questions of fundamental fairness so as to be

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the failure to request certain voir dire questions, it shows the importance of submitting *some* evidence showing that an alleged deficiency in jury selection actually caused prejudice. In other words, if our Supreme Court was unwilling to speculate as to the prejudicial impact of an attorney's failure to exercise peremptory strikes in Magazine, then this Court should likewise be unwilling to speculate as to the prejudicial impact of counsel's failure to request certain voir dire questions.

[4] Rule 606(b), SCRE, makes inadmissible a juror's testimony, affidavit, or evidence about a juror's statement "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."

[5] The State submits the issue of whether counsel was ineffective for not requesting questions related to *immigration status* is not preserved. In its ruling, the PCR court found counsel was not ineffective for not requesting questions related to bias against transgenders and/or Mexicans; it did not address questions related to immigration status. (App. 522-24). Petitioner likewise did not specifically request a ruling on this issue in her motion to reconsider. (App. 541-43). Admittedly, the proposed order granting relief attached to Petitioner's motion to reconsider includes a finding

admissible," it is speculative at this point to answer this question when Petitioner has not even attempted to enter any affidavit.

The duty to attempt to submit evidence—even if the court finds it inadmissible—is akin to a party's duty to proffer testimony when a trial court has decided it is inadmissible. See State v. Jackson, 384 S.C. 29, 34, 681 S.E.2d 17, 19 (Ct. App. 2009) ("Generally, the failure to make a proffer of excluded evidence will preclude review on appeal."); id. at 34 n.3, 381 S.E.2d at 20 n.3 (noting the rule requiring proffer is relaxed when a trial court refuses to allow a proffer but "[t]he threshold issue is whether [the defendant] attempted to proffer the evidence"). A proffer allows appellate courts the opportunity to evaluate the evidence so it is not speculating as to its admissibility or the prejudicial impact of its exclusion. See id. at 34, 681 S.E.2d at 19 (Ct. App. 2009) ("Where no proffer of excluded testimony is made, the court is unable to determine whether the appellant was prejudiced by the trial court's refusal to admit the testimony into evidence."). The same rationale applies here.

To prove prejudice, Petitioner has the burden to attempt to submit *something*, such as an affidavit, showing bias. In fact, when examining whether affidavits are properly excluded pursuant to Rule 606(b), appellate courts often examine the excluded affidavit itself. See Shumpert v. State, 378 S.C. 62, 67, 661 S.E.2d 369, 271 (examining excluded affidavit and finding "it was not necessary that the PCR court admit [it] in order to ensure fundamental fairness"); Lynch v. Carolina Self Storage Centers, Inc., 409 S.C. 146, 150-53, 760 S.E.2d 111, 114-15 (Ct. App. 2014)

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that counsel "failed to request voir dire to address potential juror bias against the Applicant who is a transsexual illegal immigrant from Mexico." (App. 541-42). However, the analysis of the proposed order focuses only on counsel's failure to request questions about bias against "a transgendered person of Mexican origin." (App. 542). The State submits the brief reference to the word "illegal" in the proposed order is not enough to preserve the issue of whether counsel was ineffective for not requesting questions related to immigration status.

(examining excluded affidavit to determine whether it was properly excluded under Rule 606(b)). Had Petitioner attempted to admit an affidavit or other evidence of juror bias, this Court could properly consider whether fundamental fairness required it to be admitted and then whether Petitioner was prejudiced by any bias. However, because Petitioner has not attempted to submit *anything*, this Court can only speculate about whether any juror was actually biased, and whether a reasonable probability exists that the outcome would have been different had counsel requested questions related to bias.

ii. Petitioner has not made the "extremely high showing" necessary for this Court to presume prejudice under Cronic.

Although Strickland generally requires an applicant to prove prejudice to prevail on a claim of ineffective assistance of counsel, there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." United States v. Cronic, 466 U.S. 648 (1984). However, **"[a] finding of per-se prejudice under [Cronic] is 'an extremely high showing for a criminal defendant to make.'"** Nance v. Ozmint, 367 S.C. 547, 552, 626 S.E.2d 878, 880 (2006) (emphasis added) (quoting Brown v. French, 147 F.3d 307, 313 (4th Cir. 1998)). Under Cronic, prejudice is presumed in three situations:

> First, . . . when the defendant is completely denied counsel at a critical stage of his trial. Second, . . . if there has been a constructive denial of counsel. This happens when lawyer entirely fails to subject the prosecution's case to a meaningful adversarial testing, thus making the adversary process itself presumptively unreliable. Third, . . . when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of trial.

Nance, 367 S.C. at 552, 626 S.E.2d at 880 (internal quotations and citations omitted). "Absent these narrow circumstances of presumed prejudice under Cronic, defendants must show actual

prejudice under Strickland." Id. at 552, 626 S.E.2d at 880.

Initially, the issue of whether prejudice should be presumed under Cronic is not preserved. Petitioner did not raise *any* issue with voir dire in her initial or amended application. (App. 367-76, 401). Prior to the evidentiary hearing, the State consented to proceeding on the issue of whether counsel was ineffective "for not asking questions in voir dire about whether the prospective jurors could be fair and impartial to a Mexican transvestite." (App. 406). At the conclusion of the hearing, with respect to voir dire, PCR counsel merely argued, "I would just argue, especially the voir dire, I think, is more prejudicial than people recognize, especially with the inherent prejudice caused by having an interpreter when the defendant clearly understands some English not only from his presence in court but the video as well." (App. 524). Although the broad issue of whether counsel was ineffective for not requesting questions related to bias was raised to and ruled upon by the PCR court, the specific argument that prejudice should be presumed was never presented to or ruled upon by the PCR court. Thus, the issue of whether prejudice should be presumed under Cronic is not preserved. See Pruitt v. State, 310 S.C. 254, 255, 423 S.E.2d 127, 128 (1992) (noting "the general rule that issues must be raised to, and ruled on by, the post-conviction judge to be preserved for appellate review").[6]

On the merits, Petitioner has not made the "extremely high showing" that prejudice should be presumed. Petitioner does not argue—and nothing suggests—that she was (1) completely denied counsel at a critical stage of trial or (2) constructively denied counsel due to counsel's

[6] This is not a situation akin to Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019), where then PCR court neglected to rule on an issue raised by the applicant, in contravention of section 17-27-80 of the South Carolina Code. Rather, Petitioner neglected to raise this argument *at all* to the PCR court.

complete failure to subject the State's case to a meaningful adversarial challenge.[7] Thus, the first two situations in Cronic do not apply.

Petitioner avers this situation fits the third scenario in Cronic. (Pet. 10). However, these facts do not show it was unlikely "that any lawyer, even a fully competent one, could provide effective assistance." Nance, 367 S.C. at 552, 626 S.E.2d at 880. Petitioner's trial was a straightforward trafficking-in-drugs trial. The State presented evidence showing law enforcement discovered heroin in Petitioner's bag after receiving a tip, and Petitioner subsequently admitted to she knew drugs were there. (App. 117, 124, 128, 137, 141, 177). Trial counsel began representing Petitioner on October 31, 2013—ten months before trial—and met with her seven times. (App. 431). He provided Petitioner copies of discovery, and nothing suggests there was anything unique about the State's evidence. (App. 431). Overall, nothing suggests this case is one "in which the surrounding circumstances make it unlikely that [Petitioner] could have received the effective assistance of counsel." Cronic, 466 U.S. at 666; contra Powell v. Alabama, 287 U.S. 45 (1932) (holding defendants in a capital case "were not accorded the right of counsel in any substantial sense" when the trial court "appointed all the members of the bar for the purpose of arraigning them," did not appoint specific counsel until the morning of trial, and did not give defendants a reasonable opportunity to procure their own counsel).[8] Thus, this case does not fit the third situation outlined in Cronic.

Further, in the context of direct appeals, our Supreme Court requires a criminal defendant to demonstrate prejudice before she is entitled to a new trial based on jury misconduct. See State

[7] In fact, a review of the transcript shows counsel subjected the State's case to a meaningful adversarial challenge.

[8] Cronic cited Powell as an example of the third situation when prejudiced could be presumed. 466 U.S. at 660.

v. Aldret, 333 S.C. 307, 509 S.E.2d 811 ("Given that we have not found automatic reversal warranted even in cases of external influences on a jury's verdict, we decline to do so in cases of internal misconduct consisting of premature deliberations."). Although Petitioner's claim involves allegations that a juror *may have been* biased rather than allegations of juror misconduct, both situations concern whether a criminal defendant had an impartial jury—and by extension, a fair trial. It is not logical to presume juror bias without requiring evidence of actual bias when our caselaw requires evidence of juror misconduct before a defendant is entitled to a new trial. Likewise, it is not logical to presume prejudice in the context of PCR when a similar issue on direct appeal requires an actual showing of prejudice. This situation does not fit any of three scenarios outlined in Cronic, and Petitioner has failed to make the "extremely high showing" required of Cronic. Thus, this Court should not presume prejudice.

B. The PCR court properly found trial counsel was not deficient.

Deficiency under Strickland turns on whether "counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Id. In evaluating the reasonableness of an attorney's performance, courts must evaluate decisions "from counsel's perspective at the time" and make every effort "to eliminate the distorting effects of hindsight." Id. at 689. Additionally, "court[s] must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. The burden is on a PCR applicant to overcome this presumption. Id.

Trial counsel's failure to request voir dire questions related to juror bias was reasonable under prevailing professional norms. Importantly, no standard requires criminal defense attorneys to request voir dire questions about bias. In fact, the United States Supreme Court "has noted the

dilemma faced by trial court judges and counsel in deciding whether to explore potential racial bias at voir dire." Pena-Rodriguez v. United States, 137 S. Ct. 855, 869 (2017). As the Court explained, "Generic questions about juror impartiality may not expose specific attitudes or biases that can poison jury deliberations. Yet more pointed questions 'could well exacerbate whatever prejudice might exist without substantially aiding in exposing it.'" Id. (quoting Rosales-Lopez v. U.S., 451 U.S. 182, (1981) (Rehnquist, J., concurring in result)). Thus, no standard exists requiring an attorney to request such questions.

Further, counsel articulated a valid reason for not requesting such questions. Trial counsel stated he would not normally request questions about bias against illegal immigrants or transgender individuals, averring such questions could draw attention to those issues and "antagonize a juror to think that [he thinks] that they're all prejudiced." (App. 445). He explained, "[I]n the same way I don't ask whether they can be fair to a black client or a white client[,] I don't ask about their gender or sexuality either." (App. 451). Viewed objectively, this was a valid reason for not requesting these questions. See Pena-Rodriguez, 137 S. Ct. at 869. (noting "[g]eneric questions about juror impartiality may not expose specific attitudes or biases," whereas more pointed questions could exacerbate whatever prejudice might already exist).

Additionally, although counsel believed the duress defense required discussing Petitioner's transgender status to explain why she illegally reentered the United States, he was unsure at the time of voir dire whether she would testify. (App. 433-35, 445). Trial counsel recalled Petitioner wore a gender-neutral outfit to trial: a button-down shirt with slacks and no tie. (App. 446). He addressed her as "Mr. Rodrigiez" because that was how she was charged, that was the way he had always addressed her, and he was never told to address her in any other way. (App. 446). Counsel explained he "didn't want to get into the whole situation with the jury at that time." (App. 446).

Due to counsel's uncertainty about whether Petitioner would testify—in which cases her gender identity and immigration status would not be proper issues before the jury—it was reasonable for counsel to not request voir dire about potential juror bias.[9]

Viewed as a whole and from counsel's perspective at the time of voir dire, counsel's decision was objectively reasonable. Petitioner has not overcome the strong presumption that counsel rendered effective assistance. Thus, the PCR court properly found Petitioner did not prove deficiency, and this Court should deny certiorari.

[9] As noted previously, Petitioner's failure to submit evidence about racial bias is fatal to that portion of his claim since such evidence would be admissible under Hunter.

CONCLUSION

Based on the foregoing, the PCR court properly found Petitioner failed to prove trial counsel was ineffective for not requesting voir dire questions related to potential bias. Thus, this Court should deny certiorari.

Respectfully Submitted,

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This 8th day of July, 2022