STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Debra R. McCaslin, Circuit Court Judge

EMMANUEL M. RODRIGUEZ,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001061

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

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?

STATEMENT

In April of 2014,[1] the Greenville County Grand Jury indicted Petitioner, Emmanuel Marquez Rodriguez,[2] for trafficking heroin, indictment #2013-GS-23-007983. (App. pp. 281-282). On September 8, 2014, Petitioner proceeded to jury trial before the Honorable Benjamin H. Culbertson. John Crangle represented Petitioner at trial. Ryan Holloway prosecuted the case. The jury found Petitioner guilty. Judge Culbertson sentenced Petitioner to the maximum sentence of forty (40) years. A timely notice of intent to appeal was served and the direct appeal perfected. The South Carolina Court of Appeals affirmed the conviction in an unpublished opinion, State v. Rodriguez, 2016-UP-320 (S.C. Ct.App. filed June 22, 2016). (App. pp. 323-324). Petitioner filed for rehearing. (App. pp. 325-327). The Court of Appeals denied rehearing on August 18, 2016. Petitioner filed a petition for writ of certiorari with the South Carolina Supreme Court on September 16, 2016. (App. pp. 328-341). The State filed a return on September 19, 2016. (App. pp. 342-366). The South Carolina Supreme Court denied the petition on September 29, 2017.

On November 17, 2016, Petitioner filed an application for post-conviction relief. (App. pp.367-377). The State filed a return on November 15, 2019. (App. pp. 378-385). Petitioner filed an amended application on March 3, 2020. (App. pp. 401-402). On June 2, 2021, an evidentiary hearing was held before the Honorable Debra R. McCaslin. Susannah Ross represented Petitioner

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[1] The indictment number reflects the year 2013. The date below the witness's name is 2013. The indictment is stamped filed in the clerk's office on September 3, 2013. The year 2013 is scratched out and replaced with the year 2014 as the term and stamped 2014, on the other side of the indictment. (App. pp. 281-282).

[2] As noted in the first footnote of the order of dismissal, "At the start of the hearing Ross [PCR counsel] informed the Court that Applicant identifies as a female, who prefers to be referred to by the pronouns 'she' and 'her,' and that Applicant answers to the name of 'Monica.' The lawyers, witnesses, and this Court frequently referred to Applicant at the evidentiary hearing using in accordance with Applicant's wishes. This Court will continue that practice in this order, but is noting the fact here for the sake of clarity." (App. p. 495).

at the PCR hearing. Taylor Smith represented the State. In a written order filed July 27, 2021, Judge McCaslin denied relief and dismissed the application. (App. pp. 495-527). On August 6, 2021, Petitioner filed a motion to alter or amend. (App. pp. 528-545). The State filed a return on August 12, 2021. (App. pp. 546-549). Judge McCaslin denied the motion to alter or amend on August 20, 2021. (App. pp. 550-551). A timely notice of intent to appeal was served on September 20, 2021. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to find trial counsel ineffective for failing to request voir dire to ascertain potential juror bias against undocumented Mexican transsexuals.

The jury found Petitioner guilty of trafficking heroin. The defense at trial was that Petitioner was a mule and only transported the heroin under duress from members of a drug cartel to whom she owed money for bringing her back into the United States. (App. pp. 247-251). Petitioner testified that her parents first brought her to the United States from Mexico when she was seventeen. (App. p. 221, lines 1-9). Petitioner testified at trial that she had been deported to Mexico in 2012. (App. p. 221, lines 19-22). Petitioner testified that she was transsexual. (App. p. 222, lines 3-4). Petitioner believed her life was in danger in Mexico because she was transsexual. (App. p. 222, line 19 – p. 223, lines 1-3). Petitioner testified that a woman named Diane helped her return to the United States. (App. p. 223, line 4 – p. 224, 225, lines 1-18). Diane and her brothers were part of a cartel and involved with drug trafficking. (App. p. 224, line 10 – p. 225, lines 1-2). Petitioner owed Diane money for bringing her back to the United States and agreed to transport the heroin after being threatened by the brother. (App. p. 226, line 13 – p. 227, lines 1-1-23).

During jury deliberations the jury asked the judge to clarify the role of coercion and duress. (App. p. 274, lines 2-7). The judge re-charged the jury on the defense of duress. (App. p. 274, line 8 – p. 275, lines 1-8). The jury, who was not questioned about possible bias against undocumented Mexican transsexuals, did not accept the duress defense and found Petitioner guilty. The trial judge sentenced Petitioner to the maximum sentence of forty (40) years although Petitioner had no prior drug convictions, only a DUI arrest and immigration violation. (App. p. 229, lines 18-20; p. 279, lines 1-3; p. 427, lines 1-16).

Petitioner alleged that trial counsel was ineffective ". . . for not asking questions in voir dire about whether prospective jurors could be fair and impartial to a Mexican transvestite . . ." (App. p. 406, lines 9-12). During the PCR hearing Petitioner testified that she was from Mexico, was a transsexual and prefers to be referred to as Monica. (App. p. 411, lines 1-2). Petitioner testified that at the time of her arrest in 2013, she was in transition and had breasts. (App. p. 411, lines 3-10).

During the PCR hearing trial counsel was asked, "Did you consider asking for a question about whether members of the jury pool could be fair to a defendant who was an illegal immigrant and a transgender person?" (App. p. 445, lines 10-13). Trial counsel answered:

> I didn't - - I didn't plan to ask those questions. I wouldn't have normally asked it. I think it kind of draws attention, the jury's eye to those issues. And I didn't know at the time whether my client was going to testify or not. You never know. I mean, you plan on a client testifying, but I didn't ask any voir dire. I think it - - you know, you're either going to get – you're going to highlight the issue, which is not something I really wanted to do, or at worse you're going to antagonize a juror to think that I think they're all prejudiced.

(App. p. 445, lines 14-23). Upon cross-examination trial counsel agreed that the judge, rather than counsel, asks the jury questions during voir dire and the jury would not have known that questions about their ability to be fair to Mexican transsexuals in the country illegally were requested by defense counsel. (App. p. 451, lines 6-16).

In the order of dismissal the PCR judge first found that counsel was not deficient writing:

> Trial counsel did not submit voir dire to Judge Culbertson in order to question the prospective jurors about their ability to be fair and impartial to a transgendered person of Mexican origin. Applicant argues that trial counsel was constitutionally ineffective for not doing so.
>
> This Court finds that Applicant has failed to prove that trial counsel's performance was deficient due to his failure to submit proposed voir dire on the topic to Judge Culbertson. This Court is required to view trial counsel's performance according to the performance's "reasonableness under prevailing professional norms." *Cherry*, at 117, 386 S.E.2d at 625. Applicant has given this Court no reason to

> conclude that prevailing professional norms require a criminal defense attorney representing a defendant who is of Mexican origin, a transgendered person, or both, to attempt to voir dire prospective jurors on their biases with regard to someone falling into these three categories.

(App. p. 522). The PCR judge erred. The jury knew that Petitioner was a transsexual Mexican in the country illegally. (App. p. 221, lines 1-2; p. 222, lines 3-4; p. 249, line 9). PCR counsel argued that Petitioner's status as an undocumented Mexican transsexual was an integral part of the case and the jurors seated needed to be impartial with regard to that status. (App. p. 449, line 13 – p. 450, lines 1-17).

The PCR judge additionally found that trial counsel articulated a strategy for not requesting voir dire about bias toward undocumented Mexican transsexuals writing, "Trial counsel testified that he would not ask such questions of prospective jurors out of fear that they would infer from the question that he was assuming that they are intolerant. Trial counsel testified that he and Applicant had not yet decided at the start of the trial whether or not Applicant would testify during the defense's case-in-chief, and he did not want to tip the jury that Applicant was a Mexican transgendered person unless necessary, and that Applicant was not dressed as a female and presented as a male at trial." (App. p. 523). First, as trial counsel agreed, the judge asks questions on voir dire. Any purported negative inference would not have been attributed to defense counsel. Second, as discussed above, Petitioner's status as an undocumented Mexican transsexual was inextricably linked to the duress defense. As a result, this alleged trial strategy was not a valid, reasonable trial strategy. Petitioner established that trial counsel was ineffective in failing to request voir dire to ascertain bias.

The PCR judge also found no prejudice resulting from trial counsel's failure to question jurors about bias writing:

> This Court finds that Applicant has failed to prove that there is a reasonable likelihood that the outcome of trial would have been different had trial counsel submitted proposed voir dire about the prospective jurors' personal opinions as to Mexican and transgendered people. "[A] criminal defendant has no right to a trial by any particular jury, bout only a right to a trial by a competent and impartial jury." Magazine at 617, 606 S.E.2d at 765 (quotation omitted).

(App. p. 523). The PCR judge erred. There is a reasonable probability that trial counsel's failure to ascertain bias deprived Petitioner the right to an impartial jury.

The PCR judge's reliance on Magazine v. State, 361 S.C. 610, 606 S.E.2d 761 (2004), abrogated by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018), is misplaced. In Magazine trial counsel was alleged to have been ineffective for failing to use eight pf his ten peremptory strikes after the trial judge granted the State's Batson[3] motion. In Magazine the South Carolina Supreme Court found that:

> The PCR judge correctly found that counsel failed to properly evaluate and select jury members. Counsel admitted that he gave up his initial strategy and ended up selecting jurors that he had struck the first time—jurors whose names he had written "No" next to. In other words, counsel did not even show that he had a trial strategy for jury selection. Nevertheless, 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.

361 S.C. at 618, 606 S.E.2d at 765. In Magazine the Court found trial counsel ineffective for failing to properly use peremptory strikes but found no resulting prejudice. In the present case trial counsel used nine of his ten strikes. (App. pp. 30-31). The strikes used, however, could not have been based on bias against undocumented Mexican transsexuals because no questions were requested to determine those biases.

Petitioner does not challenge trial counsel's use of peremptory strikes, as in Magazine. Instead, Petitioner challenges trial counsel's failure to request voir dire to ascertain potential bias.

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[3] Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Trial counsel's failure to ascertain bias prevented counsel from intelligently exercising his right to peremptory challenges and challenges for cause. Petitioner had the right to question jurors about bias against Mexicans, bias against undocumented individuals, and bias against transsexuals. Prejudice resulted from the deficient performance.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was ineffective in failing to request voir dire to ascertain racial bias, immigration status bias, and sexuality bias. Petitioner's status as an undocumented Mexican transsexual was an important part of the duress defense. Absent a reasonable and valid trial strategy, not present in this case, prejudice should be presumed when there is a total lack of voir dire as to these types of bias. This is especially true in light of Rule 606(b), SCRE, with regard to immigration status bias, and sexuality bias.

In Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 869, 197 L. Ed. 2d 107 (2017), the United States Supreme Court wrote, "For the reasons explained above, the Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." The no impeachment rule referenced by the Court is found in Federal Rule 606(b). As the Pena-Rodriguez Court noted, "Some version of the no-impeachment rule is followed in every State and the District of Columbia." 137 S. Ct. at 865. The South Carolina "no-impeachment rule" provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify 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. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Rule 606(b), SCRE. If jurors came forward, as jurors did in Pena-Rodriguez, and reported a juror making statements exhibiting overt racial bias against Hispanics or Mexicans, the Sixth Amendment, pursuant to Pena-Rodriguez, would allow the judge to consider the evidence as an exception to Rule 606(b), SCRE. There was no evidence presented in this case of a juror making overtly racially biased statements against Hispanics or Mexicans. Importantly, however, it is unclear if the holding in Pena-Rodriguez would extend to overt statements of bias based on immigration status or sexuality. Prejudice should be presumed because, arguably, Rule 606(b), SCRE, prohibits a judge from considering biased juror statements about something other than race.

In Nance v. Ozmint, 367 S.C. 547, 551–52, 626 S.E.2d 878, 880 (2006), the South Carolina Supreme Court wrote:

> In Cronic, the Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." Cronic, 466 U.S. at 659, 104 S.Ct. 2039. Second, per-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing," thus making "the adversary process itself presumptively unreliable." Id. Third, the Court identified certain instances "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 the trial." *Id.* (citing Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)).

The third Cronic presumption of prejudice should apply in the present case. If jurors had come forward and reported a juror making overtly bias statements against undocumented individuals or transsexual individuals, Rule 606(b) would have arguably prevented the judge from considering those statements, making it impossible to demonstrate prejudice. Prejudice should be presumed.

In Ham v. South Carolina, 409 U.S. 524, 526–27, 93 S. Ct. 848, 850, 35 L. Ed. 2d 46 (1973), the United States Supreme Court wrote:

> The dissenting justices in the Supreme Court of South Carolina thought that this Court's decision in Aldridge v. United States, 283 U.S. 308, 51 S.Ct. 470, 75 L.Ed. 1054 (1931), was binding on the State. There a Negro who was being tried for the murder of a white policeman requested that prospective jurors be asked whether they entertained any racial prejudice. This Court reversed the judgment of conviction because of the trial judge's refusal to make such an inquiry. Mr. Chief Justice Hughes, writing for the Court, stated that the 'essential demands of fairness' required the trial judge under the circumstances of that case to interrogate the veniremen with respect to racial prejudice upon the request of counsel for a Negro criminal defendant. Id., at 310, 51 S.Ct., at 471.
>
> The Court's opinion relied upon a number of state court holdings throughout the country to the same effect, but it was not expressly grounded upon any constitutional requirement. Since one of the purposes of the Due Process Clause of the Fourteenth Amendment is to insure these 'essential demands of fairness,'

> e.g., Lisenba v. California, 314 U.S. 219, 236, 62 S.Ct. 280, 289, 86 L.Ed. 166 (1941), and since a principal purpose of the adoption of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race, Slaughter-House Cases, 16 Wall. 36, 81, 21 L.Ed. 394 (1873), we think that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice. South Carolina law permits challenges for cause, and authorizes the trial judge to conduct voir dire examination of potential jurors. The State having created this statutory framework for the selection of juries, the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that under the facts shown by this record the petitioner be permitted to have the jurors interrogated on the issue of racial bias. Cf. Groppi v. Wisconsin, 400 U.S. 505, 508, 91 S.Ct. 490, 492, 27 L.Ed.2d 571 (1971); Bell v. Burson, 402 U.S. 535, 541, 91 S.Ct. 1586, 1590, 29 L.Ed.2d 90 (1971).

Later in Rosales-Lopez v. United States, 451 U.S. 182, 189–90, 101 S. Ct. 1629, 1635, 68 L. Ed. 2d 22 (1981), the Court discussed Ham, writing:

> Ham involved a black defendant charged with a drug offense. His defense was that the law enforcement officers had "framed" him in retaliation for his active, and widely known, participation in civil rights activities. The critical factor present in Ham, but not present in Ristaino, was that racial issues were "inextricably bound up with the conduct of the trial," and the consequent need, under all the circumstances, specifically to inquire into possible racial prejudice in order to assure an impartial jury. Ristaino, supra, 424 U.S., at 596, 597, 96 S.Ct., at 1021. Although Ristaino involved an alleged criminal confrontation between a black assailant and a white victim, that fact pattern alone did not create a need of "constitutional dimensions" to question the jury concerning racial prejudice. 424 U.S., at 596, 597, 96 S.Ct., at 1021, 1022. There is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups. As Ristaino demonstrates, there is no *per se* constitutional rule in such circumstances requiring inquiry as to racial prejudice. Id., at 596, n. 8, 96 S.Ct., at 1021, n. 8. Only when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with this subject amount to an unconstitutional abuse of discretion.

While the Court in Rosales-Lopez found that the trial judge did not abuse his discretion in denying the defense request to ask the jury if they would consider the defendant's race or Mexican descent in their evaluation of the case, the Court noted, "Although he [the trial judge] did not ask any question directed specifically to possible racial or ethnic prejudice, he did ask a question directed to attitudes toward the substantive charges involved: 'Do any of you have any feelings

about the alien problem at all?' He subsequently rephrased this: 'Do any of you have any particular feelings one way or the other about aliens or could you sit as a fair and impartial juror if you are called upon to do so?'" 451 U.S. at 185–86, 101 S. Ct. at 1633. A similar question was not asked during the voir dire in the present case.

Noting the importance of voir dire, the Court in Rosales-Lopez wrote:

> *Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. See Connors v. United States, 158 U.S. 408, 413, 15 S.Ct. 951, 953, 39 L.Ed. 1033 (1895). Similarly, lack of adequate *voir dire* impairs the defendant's right to exercise peremptory challenges where provided by statute or rule, as it is in the federal courts.

451 U.S. at 188, 101 S. Ct. at 1634. Trial counsel in the present case was ineffective in failing to request voir dire to ascertain bias.

There were substantial indications of the likelihood of racial bias in the present case requiring inquiry on voir dire. In addition to racial bias, there were also substantial indications of the likelihood of immigration status bias and sexuality bias. Pursuant to Ham and Pena-Rodriguez, if trial counsel had requested voir dire with respect to racial bias, the trial judge would have erred in refusing that request. The racial bias exception to Rule 606(b) holding in Pena-Rodriguez should extend to immigration status bias and sexuality bias requiring inquiry on voir dire. Under the narrow and specific facts of this case, Due Process required that Petitioner be permitted to question jurors about these three forms of bias. Trial counsel was ineffective in failing to request voir dire to ascertain bias against undocumented Mexican transsexuals. Petitioner was prejudiced by the deficient performance. Given the current controversial nature of immigration and of sexual identity, there is a reasonable probability that trial counsel's failure to ascertain bias deprived Petitioner the right to an impartial jury. Alternatively, as discussed above, prejudice should be

presumed because, if the holding in Pena-Rodriguez does not extend to immigration status bias and sexuality bias, Petitioner is precluded from demonstrating prejudice.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

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ATTORNEY FOR PETITIONER

This 25th day of March, 2022.