No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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MIKE PETER GALLARDO,
*Petitioner,*
v.

STATE OF ARIZONA,
*Respondent.*

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On Petition for a Writ of Certiorari
To the Supreme Court of Arizona

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**PETITION FOR A WRIT OF CERTIORARI**

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## CAPITAL CASE

## QUESTIONS PRESENTED

Almost a decade ago, this Court unanimously held that, "If a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern." *Rivera v. Illinois*, 556 U.S. 148, 157 (2009). This case presents a question not addressed in *Rivera.* Here, an patently *unqualified* juror who *was* challengeable for cause — the juror was not a citizen and entered the juror pool after illegally registering to vote — sat on petitioner's jury and voted to sentence him to death.

This petition presents these questions:

> I. Whether seating an alien capital juror—a juror the court and counsel should have known was unqualified to sit and was challengeable for cause—violated Petitioner's Sixth and Eighth Amendment rights to a panel of jurors who *were* qualified and *not* challengeable, and further violated the petitioner's Fourteenth Amendment procedural due process right to have Arizona follow its own laws on jury composition.

> II. Whether the constitutional "fair cross-section of the community" and "conscience of the community" jury requirements were violated by seating a foreigner as a juror, since aliens are categorically "outside of this community" under this Court's precedent, in violation of petitioner's Sixth, Eighth, and Fourteenth Amendment rights, thus requiring recognition of a Sixth Amendment right to citizen-jurors.

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**PETITION FOR A WRIT OF CERTIORARI**

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Petitioner Mike Peter Gallardo petitions for a writ of certiorari to review the judgments of the Supreme Court of Arizona and its lower court, the Superior Court of Maricopa County, Arizona (the "trial court").

## OPINIONS BELOW

The Supreme Court of Arizona's direct appeal opinion is reported at 225 Ariz. 560, 242 P.3d 159 (2010) and a copy is attached hereto as Appendix A. After denial of his initial petition for a writ of certiorari, post-conviction relief ("PCR") proceedings commenced in the trial court in February 2011. The trial court granted a hearing on several of the issues raised but denied all relief after an evidentiary hearing. The trial court's PCR orders are unreported but are attached hereto as Appendix B. Petitioner then brought a timely petition for review to the Supreme Court of Arizona.

## JURISDICTION

The Supreme Court of Arizona entered an order denying review May 9, 2018, attached hereto as Appendix C. This petition is due on August 7, 2017. S.Ct.R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed…and to have the Assistance of Counsel for his defence." U.S. Const. amend VIII.

The Eighth Amendment to the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

## STATUTES AND RULES INVOLVED

The relevant provisions of the Arizona Revised Statutes and Rules of Criminal Procedure are attached hereto as Appendix D.

## INTRODUCTION

This is a once in a generation case—a legally unqualified foreign national whose belief in Islamic law required her to impose the death penalty was unwittingly

seated as Juror 4 on an American's capital jury. This happened due to, respectfully, an admitted, inexplicable lapse of judicial diligence by the trial court and the woefully ineffective assistance of petitioner's counsel, as shown by their mutual failure to fully read the Juror 4's questionnaire, which plainly disclosed her alienage on its first page of answers, attached hereto as Appendix E.[1] The juror elaborated on her religious feelings about the death penalty in her voir dire testimony, attached hereto Appendix F.

But at voir dire, neither trial court nor counsel grasped that Juror 4 had openly revealed in her questionnaire that she was a Somali national and not a U.S. citizen. As a foreigner, the court should have immediately excused Juror 4 under Arizona's juror qualification law and Rules of Criminal Procedure. Pet. App. D. As it happened, Juror 4's Somali origins were briefly mentioned during voir dire, but not a word was uttered about citizenship. Pet. App. F.

This failure wasn't uncovered until the PCR investigation, but the trial court denied all relief, Pet. App. B, even after petitioner proved that Juror 4 had entered the jury pool in 2007 after having falsely claimed under oath to be a United States citizen when she unlawfully registered to vote in Arizona, complete with her choice of a political party affiliation, attached hereto Appendix G. The United States Department of Homeland Security confirmed that Juror 4 had not been naturalized until 2010, a year *after* petitioner's trial. *Id.*

[1] In the Appendix, Juror 4's personal information has been redacted. As a prospective juror she was "Juror 110," prior to her selection to sit as Juror 4.

Almost a decade ago, this Court unanimously held that, "If a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern." *Rivera v. Illinois,* 556 U.S. 148, 157 (2009). Accordingly, an *unqualified* juror who *was* perforce challengeable for cause would plainly violate petitioner's Sixth, Eighth, and Fourteenth Amendment rights to be tried by jurors who *were* qualified and *not* challengeable for cause, i.e. a jury of American citizens.

Because Juror 4 was patently removable for cause, petitioner's Sixth Amendment right to 12 jurors not challengeable for cause and his Fourteenth Amendment right to due process were violated. *Rivera,* 556 U.S., at 159, citing *Ross v. Oklahoma,* 487 U.S. 81, 86-91 (1987). In addition, at the very least the State of Arizona created a constitutional due process right to a jury made up of citizens when it enacted that legal requirement and imposed on judges the duty to strike challengeable jurors at any time cause appeared. Pet. App. D.

Unfortunately, when presented at PCR with this evidence and given the opportunity to correct its error, the trial court refused. It found that while defense counsel were deficient and should have—but failed to realize, like the trial court—that Juror 4 was not a citizen, it did not amount to constitutional error because the failure to strike was also the product of trial strategy, i.e. the desire for a minority juror, and because the issue was waived by counsel at trial and on appeal, Pet. App. B. The court characterized as "reasonable" the idea that trial counsel "having grown

up in the South," wanted to keep the non-citizen juror—regardless of her status or views—based on her race alone, and that Juror 4 had been satisfactorily rehabilitated from her religious feelings about the death penalty. *Id.* The trial court erred in its analysis and should have never reached those questions because (1) all involved always had in hand clear proof Juror 4 was unqualified and challengeable for cause, (2) the court had its own affirmative duty under law to excuse Juror 4, even as defense counsel slept, but (3) the court failed to discharge its own duty to petitioner. The trial court ruled on the merits that there was no due process violation in allowing a challengeable juror to sit, no ineffective assistance of counsel for allowing that juror to sit, and no right to a jury of U.S. citizens. Pet. App. B.

Instead, the trial court relied chiefly on *Kohl v. Lehlback,* 160 U.S. 293 (1895), a case holding there is no stand-alone Sixth Amendment right to a jury of U.S. citizens. *Id.* However, *Kohl* has been overtaken by more than a century of jurisprudence that puts it in conflict with other lines of precedent from this Court. That precedent upholds the capital jury as the "conscience of the community," and assures defendants that their juries will be chosen from "a fair cross section of the community," yet this Court also categorically *excludes* aliens like Juror 4 *from* the community. This indicates *Kohl* has been effectively superseded, most especially in capital cases.

This Court should grant certiorari and remand for a new trial with a jury that is not challengeable for cause, a jury that is qualified and unbiased—an all-American jury.

## STATEMENT OF THE CASE

In summary form, the 20-year-old male victim was shot once in the head and killed during the unwitnessed burglary of his parents' Phoenix home in December 2005. Petitioner Gallardo has always maintained his innocence. None of the victims' property was ever recovered. The petitioner lived in the same neighborhood and his DNA was found on cigarette butts outside the victims' home. A very small amount of Petitioner's blood was found on a lawn chair outside the home but no evidence ever placed him inside. Petitioner went to trial in May 2009 and was convicted and sentenced to death by the jury—which included Juror 4. Pet. App. A.

In Arizona, all jurors *must* be United States citizens. Ariz. Rev. Stat. § 21-201 and one *must* be a citizen to register to vote. Ariz. Rev. Stat. § 16-101; in turn, jurors are drawn from voter registration lists. Ariz. Rev. Stat. § 21-301; and, Arizona trial courts are under an affirmative duty *sua sponte* to excuse any juror when cause to do so appears. Rule 18.5(f), Ariz. R. Crim. P. Pet. App. D.

The mandatory nature of the statutes and the rule deprived the trial court of any discretion. The most scrupulously fair and impartial capital juror imaginable must be struck where it is shown that juror is challengeable for cause, *inter alia,* as a non-citizen. *Id.* Here, the trial court admitted it failed to discharge its own duty to petitioner to excuse the alien Juror 4. "The Court is mindful of its obligation to ensure that it has primary responsibility for conducting examination of the jury…

The Court finds that all who participated in jury selection bear responsibility for the seating of a noncitizen juror." Pet. App. B.

The trial court's duty under Rule 18.5(f) to excuse challengeable jurors such as Juror 4 creates a cognizable Fourteenth Amendment issue because removing unqualified and challengeable jurors is a federal question. *Rivera,* 556 U.S., at 159. The failure to strike Juror 4 also violated petitioner's Sixth Amendment right to an impartial jury and the effective assistance of counsel.

Among the witnesses who testified at the evidentiary hearing were trial and appellate counsel who, consistent with their declarations, testified that they were unaware Juror 4 was a foreigner, despite having her questionnaire, but that they would have challenged her for cause had they realized it. For her part, appointed appellate counsel admitted she never even met with petitioner and failed to collect or review the jury questionnaires, using in the appeal only what the clerk had sent her. She never saw Juror 4's questionnaire but stated she would have raised the alienage issue on appeal had she read it. The declarations are attached hereto as Appendix H.

The trial court found that trial counsels' failure to strike Juror 4, and appellate counsel's failure to raise the issue in on appeal amounted to deficient performance but was not error because it was redeemed by trial counsels' supposed strategic desire to have a minority juror, based on race alone, regardless of her views, or the matter had been waived, or both, and in all events wasn't a constitutional question. citing *Kohl.* Pet. App. B.

## REASONS FOR GRANTING THE PETITION

I. This Court should grant certiorari to

A. Clarify that Fourteenth Amendment procedural due process requires Arizona to enforce its own mandatory laws that capital jurors must be qualified and not challengeable for cause. The mandatory juror qualification law and the court's express duty to excuse unqualified jurors required the court to *sua sponte* excuse Juror 4, parallel to petitioner's rights to effective assistance and to an impartial and qualified jury.

B. Establish that racial preference in jury selection is not a trial strategy that will defeat a meritorious claim of ineffectiveness for failing to investigate an obvious, decisive challenge for cause. And,

II. Clarify that the Constitution requires that jurors be United States citizens under this Court's modern jurisprudence holding that defendants are entitled to jurors drawn from a "fair cross section of the community," and that since capital jurors are the "conscience of the community," they must be U.S. citizens because aliens are "by definition" outside the community, respectfully overruling to that extent *Kohl v. Lehlback.*

## I. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE REQUIRES SITTING CAPITAL JURORS TO BE "QUALIFIED AND NOT CHALLENGEABLE FOR CAUSE."

### A. The Decision Below Rejects the Due Process Duty Owed By The Trial Court To Strike Patently Unqualified Jurors.

The decision below is based chiefly on a finding that there is no constitutional violation, and hence no relief, because *Kohl* states there is no stand-alone Sixth Amendment right to a jury of American citizens. Pet. App. B.

Capital defendants are accorded heightened procedural safeguards. *Monge v. California*, 524 U.S. 721, 732–33 (1998) and due process presumes that defendants will be tried by "a qualified jury composed of individuals not challengeable for cause," *Rivera,* 556 U.S. at 157. Deprivation of that right necessarily creates a federal due process issue, as opposed to deprivation of mere peremptory challenges, dismissed as a federal concern in *Rivera. Id.* Instead, the issue here is that

> … constitutional rights to due process and an impartial jury … are satisfied as long as a defendant is tried before a "qualified jury composed of individuals not challengeable for cause." *United States v. Cardena*, 852 F.3d 959, 973 (7th Cir. 2016) (quoting) *United States v. Russell* , 463 Fed.Appx. 585, 586–87 (7th Cir. 2012) (quoting *Rivera,* 556 U.S. 148, 157).

Juror 4 was patently unqualified and removable for cause and her presence on the jury violated petitioner's Sixth Amendment right to jurors not challengeable for cause and his Fourteenth Amendment right to due process. *Rivera,* 556 U.S., at 159, citing *Ross,* 487 U.S., at 86-91.

The decisive reason Gallardo's due process rights were violated—and should have netted him a new trial—was the trial court's failure to excuse Juror 4 *sua sponte* when it plainly appeared Juror 4 was unqualified and challengeable. The court later refused to remedy its mis-step on post-conviction since it found, citing *Kohl,* that petitioner had no constitutional right to a jury of Americans, which was, respectfully, beside the point.

The order below finds that the trial court itself failed to notice Juror 4 was a foreigner, and that trial and appellate counsel were indeed deficient in failing to investigate Juror 4's alienage, which would have prompted the court to strike for cause had they been aware but, it reasoned, the missing ingredient for relief was the lack of a Sixth Amendment right to a jury of American citizens, again citing to *Kohl*. Respectfully, the due process flaw was in Juror 4's conceded susceptibility to challenge for cause for *whatever* reason.

The Arizona juror statute has several categorical exclusions. It forbids foreign jurors. It also forbids minors, convicted felons, or those with proven serious mental disabilities. Pet. App. D. Petitioner's constitutional challenge here would be just as potent if it had been based on conceded proof of a child juror, or one who was a convicted felon, legally mentally incompetent, or "insane." *Id.*

Under Ariz. Rule Crim. P. 18.5(f),

> At any time that cause for disqualifying a juror appears, the court shall excuse the juror… Pet. App. D.

This Court should grant certiorari because the trial court refused to accept that the right to qualified jurors not challengeable for cause is a question of Fourteenth Amendment due process and not a mere issue of local custom and practice. The court also failed to effectually recognize it had its own *sua sponte* duty to excuse Juror 4. And again, at the very least, Arizona has created with its juror law and rule a constitutional due process right. The court ruled petitioner presented only a statutory claim, excluding him from PCR remedies because the error wasn't constitutional. But at a minimum, procedural due process means the state will obey its own laws and rules, and its failure to do so violates the Fourteenth Amendment.

### B. The Decision Below Excuses Ineffective Assistance By Relying On Trial Counsels' Racial Preference For A Minority Juror As A Supposed Strategic Choice.

This Court should grant certiorari to clarify that counsels' conclusively deficient performance, based on the failure to investigate a juror who was challengeable for cause, is inexcusable under the Sixth Amendment. All defense counsel admitted they failed to investigate but would have objected to Juror 4 had they read her questionnaire. Pet. App. 184a-192a. But the trial court indicated there was no error in failing to object to Juror 4 since counsel made a strategic decision to keep Juror 4 because she was a Black.[2] Pet App. B.

Although citing to it, the order below in effect ignores *Strickland v. Washington,* 466 U.S. 668, 690-691 (1984), which teaches that "strategic choices made after less than complete investigation are reasonable precisely to the extent

[2] The petitioner and victim were both Hispanic.

that reasonable professional judgments support the limitations on investigation." *Accord*, W*iggins v. Smith,* 539 U.S. 510 (2003); *Rompilla v. Beard,* 545 U.S. 374 (2005); *Cullen v. Pinholster,* 563 U.S. 170 (2011); *Hinton v. Alabama,* 571 U.S. ___ (2014). No reasonable professional judgment would support making a decision about a juror based on race alone, or support ignoring Juror 4's questionnaire or her foreign status, both of which should have subjected her to *immediate* removal from the panel. Both trial and appellate counsel testified they failed to read Juror 4's questionnaire thoroughly and were thus unaware of her alienage and admitted that they would have moved to challenge her at voir dire or raised the failure to challenge as fundamental error on appeal, had they been aware. Pet. App. H. The failure to investigate what was immediately in front of them renders unreasonable any "strategy" on racial grounds to not object to Juror 4. The trial court erred at post-conviction by finding otherwise. Respectfully, this Court should reaffirm that the investigation must direct the strategy, not the other way around. *Strickland; Rompilla.*

This Court has presumed the prejudice of legal error in jury selection. For instance, irregularity in jury selection that excluded African-Americans was presumptively prejudicial in *Batson v. Kentucky,* 476 U.S. 79, 86 (1986), even though there was no suggestion that the seated white jurors were biased. *Batson* itself is based on the premise that "the rule of law will be strengthened if we ensure that *no citizen* is disqualified from jury service because of his race." *Id.* at 91 (emphasis *added*), and a defendant has "the right to be tried by a jury whose

members are selected pursuant to non-discriminatory criteria." *Id.* at 85-86. The prejudice should be presumed where deficient performance in jury composition seats jurors challengeable for cause. *Quintero v. Bell,* 256 F. 3d 409, 415 (6th Cir. 2001)(citing *Strickland* and *Fulminante v. Arizona,* 499 U.S. 309 (1991).

Respectfully, certiorari should be granted.

## II. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT UNDER ITS MODERN JURISPRUDENCE THE SIXTH AMENDMENT REQUIRES THAT CAPITAL JURORS BE UNITED STATES CITIZENS.

Under this Court's modern jurisprudence, a right under the Sixth and Fourteenth Amendments to trial in capital cases by a jury of United States citizens should be recognized, overruling *Kohl* to that extent.

Under the Sixth and Fourteenth Amendments, defendants are entitled to trial by jury. *Duncan v. Louisiana,* 391 U.S. 145 (1968); *Ring v. Arizona,* 536 U.S. 584, 609 (2002). This Court also holds that those who sit as jurors must be drawn from a "fair cross section of the community." *Lockhart v. McCree,* 476 U.S. 162, 184 (1986); *Duren v. Missouri,* 439 U.S. 357 (1979); *Taylor v. Louisiana,* 419 U.S. 522, 527-528 (1975). Once seated in a capital case like this one, that jury is held to act as the "conscience of the community" when it comes to deciding life or death. *Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988). Due process therefore requires that such juries be *of* the community. But crucially, this Court also holds that foreigners like Juror 4 are *not* part of the community, which it defined by the bright line of citizenship. *Cabell v. Chavez-Salcido*, 454 U.S. 432, 440 (1982).

The community itself has an interest in limiting "the exercise of the sovereign's coercive police powers over the community to citizens…A citizenship requirement is an appropriate limitation on those who exercise and, therefore, symbolize this power of the political community over those who fall within its jurisdiction." *Id.* at 444. This Court has also long recognized "…a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within the basic conception of a political community." *Sugarman v. Dougall,* 413 U.S. 634, 642 (1973).

As for what comprises that political community, this Court reasoned in *Cabell*,

> The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: *Aliens are by definition those outside of this community*. *Cabell*, 454 U.S., at 439-440 (emphasis *added*).

It is hard to imagine a more profound participation in self-government than capital jury service. Under this Court's modern jurisprudence Juror 4, and all foreigners, are categorically excluded from the political community until they might become citizens. This means aliens like Juror 4 cannot not be part of a fair cross section, nor act as the community's conscience. The progression of cases about *community* as the touchstone for juries—especially capital juries, as in *Lowenfield*—puts the modern Court squarely at odds with, and effectively

contradicts, *Kohl's* 1895 holding that the Sixth Amendment does not assure a capital jury of American citizens. "Time and subsequent cases have washed away the logic" of a case at issue that "appears to rest on reasons rejected in some other line of decisions," *Hurst v. Florida*, 577 U.S. ___, 136 U.S. 616, 624 (2016). Respectfully, that is what has become of *Kohl.* Its logic has been overtaken and eroded, leaving petitioner to ask, if *Kohl* stands and the American political community can be made to tolerate one alien capital juror, why not two foreigners? Why not twelve?

The effective repudiation of *Kohl* across multiple lines of this Court's cases shows that the time has come to overrule its holding that the Sixth Amendment does not assure a capital jury of U.S. citizens. *Kohl* not only violates the newer "fair cross section" and "conscience of the community" cases, Henry Kohl went to trial at a time when juries were all-male, cf. *Duren.* As a state court defendant, Kohl had no meaningful access to appeal, cf. *Griffin v. Illinois,* 351 U.S. 12 (1956). Kohl's lawyer was ineffective, but defendants would not have a recognized, enforceable right to effective assistance until *Powell v. Alabama*, 287 U.S. 45, 57 (1932). See also, *Avery v. Alabama*, 308 U.S. 444, 446 (1940); *Glasser v. United States,* 315 U.S. 60, 69-70 (1942); *Reece v. Georgia,* 350 U.S. 85, 90 (1955). None of *Kohl's* holdings in those regards would pass constitutional muster today. It is time, respectfully, to also retire the notion that citizen-jurors are optional.

More recently, this Court has held aliens may be properly excluded from holding certain public offices, specifically, offices that exercise political or

governmental functions—including judicial positions—that participate directly in the execution of public policy and perform functions that go to the heart of representative government. These include *Cabell* (the job of probation officer may be restricted to citizens); *Ambach v. Norwick,* 441 U.S. 68 (1979)(a state may refuse to employ as teachers aliens who are eligible for United States citizenship but fail to seek naturalization because of the state's interest in promoting "civic virtues");*Bernal v. Fainter,* 467 U.S. 216, 221-224 (1984)(the state may limit the right to govern to those who are full-fledged members of the political community)*;* and *Foley v. Connelie,* 435 U.S. 291 (1978)(service as a sworn police officer may be limited to citizens as they are, unlike aliens, members of the community).

This clearly established federal law puts aliens such as Juror 4 *categorically outside* the community in the context of governmental policy functions, including service as judicial officials who exercise broad discretionary power. *Bernal*, 467 U.S., at 219-222*.* Again and again, this Court places citizenship and community hand-in-hand.

A capital juror is a public officer who takes a public oath, is paid with public money, and executes directly the most grim and serious of all discretionary public functions: the *election* whether to put a person to death. *Kohl* has been plainly overtaken and effectively superseded by modern jurisprudence because Juror 4 was, like all aliens, a person "who (has) not become part of the process of democratic self-determination." *Bernal,* 467 U.S., at 221. These newer lines of Supreme Court authority directly conflict with *Kohl.* The trial court erred not only by denying Mr.

Gallardo his right to a jury comprised of U.S. citizens, but also his concomitant right to a jury drawn from a fair-cross section of the citizen-community, as required by the Sixth Amendment. His *ultra vires* jury could not act as the conscience of the community, *Lowenfield,* because it was not of the community.

In *Batson,* this Court wrote that in *Duncan v. Louisiana,* "The Court emphasized that a defendant's right to be tried by a jury of his peers is designed "to prevent oppression by the Government. … For a jury to perform its intended function as a check on official power, it must be a body drawn from the community." *Batson* at fn. 8, citing *Duncan,* 391 U.S. 156-157 (internal quotes omitted). And what is a "peer," if not at least a fellow citizen "drawn from the community"?

This point is critical because "[T]he Constitution presupposes that a jury selected from a fair cross section of the community is impartial..." *Lockhart,* 476 U.S., at 184. Since Gallardo's jury was *not* chosen from a fair cross section of the community, it was an abuse of discretion for the trial court to presuppose that his jury was impartial, especially in light of Juror 4's truly alarming voir dire responses Pet. App. E. and F.

Juror 4 testified she had a "strongly held belief" that the innocent must prove their innocence (a belief she never retracted). Pet. App. F. Her burden shifting beliefs were confirmed in her questionnaire. Pet. App. E. Juror 4 also testified on voir dire that in her home country of Somalia, the death penalty is often used, "especially in my religion." Pet. App. F.

> PROSPECTIVE JUROR (Juror 4): When somebody kills someone—and we have proof, clear proof, we kill that person in my religion.
> …
> PROSECUTOR: So in the Muslim religion if the theory of the belief is that if somebody kills somebody, then they should die?
> PROSPECTIVE JUROR (Juror 4): Yeah, they should die.
> …
> PROSECUTOR: ---you believe the same thing?
> PROSPECTIVE JUROR (Juror 4): Yes, I believe that.

And what if there was clear proof the defendant "did it"? Then, in that event,

Juror 4's answer was clear:

> PROSPECTIVE JUROR (Juror 4): Yeah, we have to kill--
> PROSECUTOR: Have to kill?
> PROSPECTIVE JUROR (Juror 4): -- because if we don't kill, other person start then killing another body and we don't kill him, that continues the cycle so that all the society can be killers, most of them. That's what I feel. Pet. App. F.

The trial court gamely tried to clarify Juror 4's feelings about the death penalty:

> THE COURT: …If somebody purposefully kills someone else…this is a premeditated murder, that in your religion, that person gets the death penalty?
> PROSPECTIVE JUROR (Juror 4): In my religion?
> THE COURT: Is that what you were saying to (the prosecutor)?
> PROSPECTIVE JUROR: Yes. Some people -- some person come in my home or in my store and he start come here and killing me with no reason --
> THE COURT: Correct.
> PROSPECTIVE JUROR: That person has to get death penalty.
> THE COURT: Is that your religion?
> PROSPECTIVE JUROR: That's my religion.
> Pet. App. F.

Trial counsel actually endeavored to rehabilitate Juror 4 because she was Black and because had given, in his turn, contrary, positive-sounding answers about her willingness to consider a life sentence, *id.,* which led the trial court to conclude Juror 4 was unbiased. Pet. App. B. By any standard, Juror 4 should have been excused for cause under *Morgan v. Illinois,* 504 U.S. 719 (1992) as mitigation impaired.[3] Again, Juror 4 didn't qualify for *Morgan* analysis because she was challengeable for cause. However, no one realized she was a Somali national whose sometimes pliant answers reflected nothing so much as her lack of American acculturation. To no avail, Petitioner offered expert testimony in PCR from Dr. Shaul Gabbay, an academic expert on Somalia and Islam, who opined that it was unreasonable for the trial court to have accepted Juror 4's answers, attached hereto Appendix I.

Be it in response to a Somali warlord, Muslim imam, or an American trial judge, Juror 4 was keen on giving what she thought were the "correct" answers. *Id.* This lack of acculturation typifies the danger of allowing those outside the community to intrude onto a capital jury and shows how prejudicially wrongheaded and objectively unreasonable counsel were by keeping a challengeable juror based on race alone. It was manifest error to find that Juror 4 was unbiased. See *Patton*

[3] Even the prosecutor believed Juror 4 was mitigation impaired. At the settling of the penalty phase instructions, the prosecutor pointed out that Juror 4 could not be asked to make a "moral judgment" about the death penalty because she had revealed she was a Muslim whose faith required her to kill. Instead, the state asked that the jury be told to make "legal reasoned judgments" about death. After a contentious exchange with the trial court the state withdrew its objection to the instruction, "a thousand times over, because I know I'm wrong." Trial counsel had no response. That on-the-record exchange is attached as Appendix J.

*v. Yount*, 467 U.S. at 1031 (a court's determination of juror impartiality is to be overturned for "manifest error"); *accord*, *Mu Min v. Virginia*, 500 U.S. 415 (1991).

Arizona has thus decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court, or both.

In the end, all involved wrongly assumed that in Juror 4 they were dealing with an American, but instead of 12 qualified and unchallengeable jurors drawn from a fair cross-section forming the conscience of the community, petitioner had something rather less, an *ultra vires* panel that sat contradictory to *Rivera, Ross,* and *Batson* itself*,* whose due process protections extend to all "citizens" in the "community." Those protections may be best secured by assuring that capital defendants have the constitutional right to a jury of United States citizens.

## CONCLUSION

The petition for a writ of certiorari should be granted, the judgment below vacated and the matter remanded for a new trial.

Respectfully submitted,

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