

No. 18-5517

IN THE
SUPREME COURT OF THE UNITED STATES

MIKE PETER GALLARDO,
PETITIONER,

-vs-

STATE OF ARIZONA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA

BRIEF IN OPPOSITION

MARK BRNOVICH
ATTORNEY GENERAL

DOMINIC DRAYE
SOLICITOR GENERAL

LACEY STOVER GARD
CHIEF COUNSEL

VINEET MEHTA SHAW
ASSISTANT ATTORNEY GENERAL
CAPITAL LITIGATION SECTION
(COUNSEL OF RECORD)
1275 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2997
CADOCKET@AZAG.GOV
TELEPHONE: (602) 542-4686

ATTORNEYS FOR RESPONDENT

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Does the state court's failure to follow its own law regarding jury qualifications violate the Due Process Clause of the Fourteenth Amendment in the absence of any proof that the juror at issue was not fair and impartial?
2. Has Gallardo shown a compelling reason for this court to reconsider its longstanding jurisprudence holding that there is no right to a jury composed entirely of United States citizens? Was counsel ineffective for not objecting to the non-citizen juror that served on Gallardo's jury?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW.....	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
STATEMENT OF JURISDICTION.....	1
PROVISIONS INVOLVED	1
STATEMENT OF THE CASE.....	2
REASONS FOR DENYING THE WRIT.....	3
CONCLUSION.....	12

TABLE OF AUTHORITIES

CASES

Allison v. Snyder, 332 F.3d 1076 (7th Cir. 2003)	5
Bernal v. Fainter, 467 U.S. 216 (1984)	9
Bonin v. Calderon, 59 F.3d 815 (9th Cir. 1995)	5
Butler v. McKellar, 494 U.S. 207 (1990)	4
Cabell v. Chavez-Salido, 454 U.S. 432 (1982)	9, 10
Calderon v. Coleman, 525 U.S. 141 (1998)	6
Campbell v. Wood, 18 F.3d 662, (9th Cir. 1994)	11
Carter v. Jury Comm’n of Greene Cty., 396 U.S. 320 (1970)	9-10
Coleman v. Calderson, 150 F.3d 1105 (9th Cir. 1998)	6
Coleman v. Thompson, 501 U.S. 722 (1991)	3
Duren v. Missouri, 439 U.S. 357 (1979)	9
Foley v. Connelie, 435 U.S. 291 (1978)	9
Gallardo v. Arizona, ____ U.S. ____, 131 S. Ct. 1796 (2011)	3
In re Jury Selection Process in Maricopa Cty, 207 P.3d 779 (App. 2009)	8
Kohl v. Lehlback, 160 U.S. 293 (1895)	6, 8, 10
Lockhart v. McCree, 476 U.S. 162 (1986)	10
Lowenfield v. Phelps, 484 U.S. 231 (1988)	10
Olim v. Wakinekona, 461 U.S. 238 (1983)	6
Padilla v. Kentucky, 559 U.S. 356 (2010)	10
Rivera v. Illinois, 556 U.S. 148 (2009)	7
Shango v. Jurich, 681 F.2d 1091 (1982)	6
State v. Canez, 42 P.3d 564 (2002)	8
State v. Doerr, 969 P.2d 1168 (1998)	8
State v. Gallardo, 242 P.3d 159 (2010)	2
State v. Thomas, 652 P.2d 1380 (1982)	8
State v. Valenzuela, 371 P.3d 627 (2016)	9
Stewart v. Smith, 536 U.S. 856 (2002)	3
Strickland v. Washington, 466 U.S. 668 (1984)	10, 11, 12
Taylor v. Louisiana, 419 U.S. 522 (1975)	8, 9
United States v. Gonzales-Lopez, 548 U.S. 140 (2006)	11
United States v. Lawrence, 753 F. 3d 385 (6th Cir. 2013)	5, 6

STATUTES

A.R.S. § 13–751(F)(2)	2
A.R.S. § 13–751(F)(6)	2
A.R.S. § 21–201	4, 5
28 U.S.C. § 1257(a)	1

RULES

Ariz. R. Crim. P. 32.2(a)(3)	3
Ariz. R. Crim. P. 18.5	5
U.S. Sup. Ct. R. 10	3, 4
U.S. Sup. Ct. R. 10(c)	4

CONSTITUTIONAL PROVISIONS

U.S. Const., article III, Section 2	1
U.S. Const., amend. VI	1, 4, 5, 9
U.S. Const., amend. VIII	1
U.S. Const., amend. XIV	1

OPINION BELOW

On April 5, 2016, the Maricopa County Superior Court denied Gallardo's petition for post-conviction relief. (Pet. App. B.) On May 9, 2018, the Arizona Supreme Court summarily denied Gallardo's Petition for Review of Denial of Post-Conviction Relief. (Pet. App. C.)

STATEMENT OF JURISDICTION

Gallardo timely filed his petition for writ of certiorari on August 7, 2018. This Court thereafter granted Respondent's application for a 30-day extension of time to file a brief in opposition. This Court has jurisdiction over the ineffective assistance of counsel claim under Article III, Section 2 of the United States Constitution; 28 U.S.C. § 1257(a); and United States Supreme Court Rule 10. However, this Court is without jurisdiction over the non-citizen juror claim as set forth in the Reasons for Denying the Writ.

PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...

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.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law

STATEMENT OF THE CASE

On December 9, 2005, Rudy Padilla was murdered at his parents' home in Phoenix. *State v. Gallardo*, 242 P.3d 159, 162–63 (2010). Padilla's father returned from work and saw that a sliding glass door into the house had been broken. *Id.* He found his son's body in the master bedroom. *Id.* Padilla's wrists and ankles had been bound, a pillowcase had been tied over his head, and he had been shot once in the back of the head. *Id.* The bedroom was in disarray; jewelry and a revolver were missing. *Id.* Telephone records showed that Gallardo had called the Padilla home from his cell phone the day of the murder, and DNA profiles developed from evidence at the crime scene matched Gallardo's profile. *Id.* Neither Rudy nor his parents knew Gallardo. *Id.*

A mistrial was declared during Gallardo's first trial for reasons related to juror misconduct. *Gallardo*, 242 P.3d at 163. A second jury found Gallardo guilty of burglary, kidnapping, and first-degree murder. *Id.* The jurors also found that the A.R.S. § 13–751(F)(2) (prior conviction for a serious offense) and A.R.S. §13–751(F)(6) (especially cruel) aggravating factors had been proven beyond a reasonable doubt and that the mitigation was not sufficiently substantial to warrant leniency. *Id.* The jurors sentenced Gallardo to death. *Id.*

The Arizona Supreme Court upheld Gallardo's convictions and death sentence. *Id.* This Court denied Gallardo's petition for writ of certiorari, and his

conviction became final on March 28, 2011. *Gallardo v. Arizona*, ____ U.S. ____, 131 S. Ct. 1796 (2011) (mem.).

Gallardo sought state post-conviction relief based upon allegations of due process violations (non-citizen juror) and ineffective assistance of counsel. (Pet. App. B). The post-conviction court conducted an evidentiary hearing, after which it denied Gallardo's claim. The court specifically found that the non-citizen juror claim was precluded under state law, and alternatively meritless. The court denied the ineffective assistance of counsel claim on the merits. *Id.* The Arizona Supreme Court summarily denied Gallardo's petition for review. (Pet. App. C.) This petition followed.

REASONS FOR DENYING THE WRIT

First, this Court is without jurisdiction to review the state court's decision on the non-citizen juror claim because the decision "rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Specifically, the post-conviction court found the claim precluded under Arizona Rule of Criminal Procedure 32.2(a)(3). This Court has held that Rule 32.2(a)(3) is an independent and adequate state procedural bar that precludes federal-court review. *Stewart v. Smith*, 536 U.S. 856 (2002) (per curiam). For this reason alone, this Court should deny certiorari on the non-citizen juror claim.

Second, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion." U.S. Sup. Ct. R. 10. Accordingly, this Court grants certiorari "only for compelling reasons," including that a "state court of last resort has decided an

important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.” *Id.*; see *Butler v. McKellar*, 494 U.S. 407, 429 (1990) (Brennan, J., dissenting) (“[T]he Supreme Court’s burden and responsibility are too great to permit it to review and correct every misstep made by the lower courts in the application of accepted principles.”).

There is no “compelling reason” to grant certiorari here, because, contrary to Gallardo’s assertion, the state court has not “decided an important federal question in a way that conflicts with relevant decisions of this Court.” U.S. Sup. Ct. R. 10(c). Instead, at most, a non-citizen juror served during Gallardo’s capital murder trial, in violation of Arizona (but not federal) law, and Gallardo believes this error warranted reversal, despite the post-conviction court’s finding that the juror in question was fair and impartial. (Pet. at 5-7.) Essentially, Gallardo asks this Court to correct the state court’s perceived error in applying its own law. And even if a federal question is somehow presented, “[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.” U.S. Sup. Ct. R. 10. This Court should deny certiorari.

ARGUMENTS

I

THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW A STATE LAW CLAIM DISGUISED AS A FEDERAL CLAIM.

Gallardo argues that the trial court’s failure to comply with a state statutory requirement that the jurors be United States citizens, see A.R.S. § 21–201, somehow violated the due process clause and the Sixth Amendment, even though

Gallardo indisputably received a fair and impartial jury. However, a state's violation of its own statutory requirements does not automatically raise a federal constitutional issue, and the federal constitution does not compel states to follow their own laws. *Allison v. Snyder*, 332 F.3d 1076 (7th Cir. 2003). Therefore, this court should deny Gallardo's petition.

While the Sixth Amendment guarantees the right to a fair and impartial jury, it does not require jurors to be United States citizens. Accordingly, the post-conviction court correctly found that Arizona's "qualifications established for jury service are statutory rather than constitutional, imposed as they are by legislative action." (Pet. App. B (citing Ariz. Rev. Stat. Ann. § 21-201; *United States v. Lawrence*, 753 F. 3d 385 (6th Cir. 2013) *cert. denied*, 135 S. Ct. 753 (2014).))

Gallardo misunderstands how the Due Process Clause interacts with state law when he argues that A.R.S. § 21–201 creates a protected liberty interest in having a jury composed of United States citizens. (*See* Petition, at 9-11.) A state does not create new constitutional rights by enacting laws designed to protect existing constitutional rights. *See Bonin v. Calderon*, 59 F.3d 815, 842 (9th Cir. 1995). Rule 18.5 of the Arizona Rules of Criminal Procedure and A.R.S. § 21–201 merely provide procedures to implement the Constitution's existing guarantee of a fundamental, substantive right to a fair and impartial jury. The Arizona legislature and the Arizona Supreme Court did not create new federal constitutional rights by promulgating Rule 18.5 and A.R.S. § 21–201 and including therein a requirement that jurors be citizens.

Moreover, a jury comprised of United States citizens is not a substantive interest. *Kohl v. Lehlback*, 160 U.S. 293 (1895) (A juror disqualification “defect is not fundamental as affecting the substantial rights of the accused, and the verdict is not void for want of power to render it.”); see *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) (a liberty interest is “a substantive interest of an individual”) (quoting *Shango v. Jurich*, 681 F.2d 1091, 1100–01 (1982)). And state-created procedural rights are not substantive liberty interests protected by the Due Process Clause of the Constitution. *Olim*, 461 U.S. at 250 n.12; see also *Coleman v. Calderon*, 150 F.3d 1105, 1108, 1113, 1117 (9th Cir. 1998), rev’d on other grounds, *Calderon v. Coleman*, 525 U.S. 141 (1998) (rejecting argument that state law prohibiting felons from serving on juries created a constitutional due process liberty interest in a jury composed of non-felons, and that the state violated the habeas petitioner’s liberty interest by unknowingly seating a convicted felon on his jury).

As explained in *Lawrence*, failure to meet the statutory requirements for jury service neither implicates constitutional mandates nor constitutes structural error:

Moreover, the certification is a statutory, not a constitutional, requirement. Unlike the rights to counsel, an impartial judge, equal protection, self-representation, a public trial and an accurate reasonable-doubt instruction, the certification requirement is purely a creature of statute. Lawrence’s constitutional rights were not violated when the district court erroneously omitted part of the statutory language from the certification form...”

753 F.3d at 402.

The state court thus correctly concluded that “[f]ailure to meet one of the statutory requirements for jury service, such as “citizenship” in the instant case,

implicates neither structural nor fundamental error review, if the jury seated is determined to be fair, which this Court determined both at trial and subsequently in connection with its post-conviction review.” (Pet. App. B at 4.)

Gallardo relies heavily on *Rivera v. Illinois*, 556 U.S. 148 (2009), to argue otherwise, but that case is distinguishable. *Rivera* addressed whether a trial court’s erroneous denial of a peremptory challenge required automatic reversal, without a showing of prejudice. This Court held that, so long as a defendant receives a jury “composed of individuals who are 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.” *Id.* at 157. Here, Gallardo does not claim to have been erroneously deprived of a peremptory challenge and, even if he were so deprived, *Rivera* holds that such error does not rise to the level of a constitutional violation unless it results in a jury that is not fair and impartial. As the state court found, Gallardo received a fair and impartial jury. To the extent the non-citizen juror was subject to a motion to strike for cause, that motion would have only been based on a technical violation of Arizona law. Therefore, any error in seating the juror did not violate the federal constitution, under *Rivera* or otherwise.

This Court should therefore deny Gallardo’s petition.

II

GALLARDO HAS SHOWN NO COMPELLING REASON FOR THIS COURT TO RECONSIDER ITS LONGSTANDING JURISPRUDENCE HOLDING THAT THERE IS NO RIGHT TO A JURY COMPOSED ENTIRELY OF U.S. CITIZENS.

In *Kohl*, this Court held that a defendant's failure to object to the non-citizen status of a juror as a disqualification, whether done voluntarily, negligently, or unknowingly, was not grounds to upset the murder conviction against the defendant. *Kohl*, 160 U.S. at 302. *Kohl* has not been overruled, and Gallardo has offered no compelling reason (such as a conflict within the state or federal courts) to overrule it now. The law is instead consistent and well-established that, as long as the seated jury is fair and impartial, a defendant's right to due process has not been denied.

Gallardo's contention that he was prejudiced simply because a non-citizen, who was fair and impartial, was seated on the jury, finds no support in the law.

Fair and Impartial Jury

For the improper seating of a juror to create reversible error, it must result in a jury that is not fair and impartial. A defendant is entitled only to a jury that is fair and impartial, not to a jury of any particular composition. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); *State v. Doerr*, 969 P.2d 1168, 1177 (1998). To establish prejudice, the record must affirmatively demonstrate that the defendant was not tried by a fair and impartial jury. *State v. Thomas*, 652 P.2d 1380, 1384 (1982); *In re Jury Selection Process in Maricopa Cty*, 207 P.3d 779, 783 (App. 2009); *see also State v. Canez*, 42 P.3d 564, 577 (2002), abrogated on other grounds, *State v.*

Valenzuela, 371 P.3d 627 (2016) (“Juror prejudice will not be presumed but must be demonstrated by objective evidence.”).

Here, the state court found both at the trial and post-conviction relief stages — and ostensibly on direct appeal — that the seated jury was fair and impartial and that Gallardo was not denied a fair trial. (Pet. App. B at page 5.) For this reason alone, Gallardo has not demonstrated any prejudice or constitutional error and this Court should deny review.

Fair Cross-Section

The Sixth Amendment requires that jury panels “must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.” *Taylor*, 419 U.S. at 538. The defendant has the burden to make a prima facie showing of violation of the fair-cross-section requirement. *Duren v. Missouri*, 439 U.S. 357, 364 (1979). The fair cross-section requirement is intended to prevent exclusion of people on juries, not to require it. *Id.*; *Taylor*, 419 U.S. at 538. The cases upon which Gallardo relies do not hold otherwise. (*See* Petition, at 13, 14, 16 (citing *Bernal v. Fainter*, 467 U.S. 216 (1984) (Texas statute requiring that a notary public be a United States citizen violated equal protection under the Fourteenth Amendment); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (noncitizens may constitutionally be excluded from employment as probation officers); *Foley v. Connelie*, 435 U.S. 291 (1978) (noncitizens may constitutionally be excluded from employment as police officers).)

It is well-established that excluding noncitizens from juries does not violate the Constitution. *See Carter v. Jury Comm’n of Greene Cty.*, 396 U.S. 320, 332–33

(1970). Gallardo, however, points to several cases to support his argument that a non-citizen “cannot be a part of a fair cross section.” *Lockhart v. McCree*, 476 U.S. 162 (1986); *Lowenfield v. Phelps*, 484 U.S. 231 (1988); *Cabell v. Chavez-Salcido*, 454 U.S. 432 (1982); (Petition for Review at 14). He also claims that these cases demonstrate that *Kohl* should be overruled. However, these cases relate to employment and elected government positions, not to jury service. Moreover, this Court in those cases found important state interests in having only United States citizens in those positions. The same argument cannot be made for jurors.

The seating of the non-citizen juror accordingly did not violate the fair cross-section requirement. Thus, the post-conviction court did not abuse its discretion in dismissing Gallardo’s claim on the merits.

Ineffective assistance of counsel.

Finally, Gallardo presents a related ineffective assistance of counsel claim that is routine and not worthy of this Court’s review. The post-conviction court applied the appropriate test under *Strickland v. Washington*, 466 U.S. 668 (1984), in evaluating Gallardo’s claims of ineffective assistance. (Pet. App. B, at 6-10.) To prove ineffective assistance, a defendant must show that (1) counsel’s performance was deficient under prevailing professional standards; and (2) he suffered prejudice as a result. *Id.* at 687–88. Defendants bear a heavy burden meeting this standard, as “[s]urmounting *Strickland*’s high bar is never an easy task.” *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). Additionally, courts are not required to address both components of the *Strickland* test in deciding an ineffective-assistance claim “if the defendant makes an insufficient showing on one.” *Strickland*, 466 U.S. at 697.

To establish deficient performance, a defendant must show “that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 699. The allegations and supporting evidence must withstand the “highly deferential” scrutiny of counsel’s performance and overcome its “strong presumption” that counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* at 689–90. Moreover, courts should “neither second-guess counsel’s decisions, nor apply the fabled twenty-twenty vision of hindsight.” *Campbell v. Wood*, 18 F.3d 662, 673 (9th Cir. 1994). Rather, as *Strickland* holds, “[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689. To prove prejudice, a defendant must show a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. The prejudice requirement recognizes that a defendant is entitled to “effective (not mistake-free) representation.” *United States v. Gonzales-Lopez*, 548 U.S. 140, 147 (2006) (emphasis in original).

Gallardo has failed to show prejudice resulting from counsel’s strategic decision to affirmatively seek to keep the non-citizen juror on the jury panel. There is no suggestion that the non-citizen juror, or the jury as a whole, was not fair and impartial. Moreover, as the post-conviction court acknowledged, there was an obvious strategy behind counsel’s decision to not strike the juror, counsel felt that juror in question would be sympathetic to Gallardo and more likely to impose a life

sentence. (Pet. App. B at 9; Pet. App. F at 194). Accordingly, Gallardo has failed to show deficient performance. Under these circumstances, the state court reasonably concluded that Gallardo failed to meet his burden under *Strickland*, and this issue is therefore not worthy of this Court's review.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent respectfully requests this Court to deny Gallardo's petition for writ of certiorari.

Respectfully submitted,

Mark Brnovich
Attorney General

LACEY STOVER GARD
Chief Counsel

Vineet Mehta Shaw
Assistant Attorney General
(Counsel of Record)

Attorneys for Respondent

7282041

APPENDIX A

*