No. 18-5517

IN THE SUPREME COURT OF THE UNITED STATES

MIKE PETER GALLARDO,
Petitioner,
v.

STATE OF ARIZONA,
Respondent.

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Table of Contents

Table of Authorities

Federal Cases

United States Code

State Cases

State Constitution, Statutes and Rules

Law Review

I. THE CLAIMS IN THE PETITION ARE NEITHER WAIVED NOR PRECLUDED AND ARE PROPERLY RAISED HERE.[1]

The state does not deny that Juror 4 was plainly challengeable for cause. But the state errs when it claims the failure to challenge was not a constitutional violation or is somehow precluded. This claim was presented to the state court on post-conviction relief raising, *inter alia,* ineffective assistance of counsel as the cause of trial counsel's failure to challenge the undeniably unqualified Juror 4. The court below ruled on the claims' merits. It found that even though the juror should have been struck for cause, the claim was waived because, 1) under *Kohl v. Lehlback*, 160 U.S. 293 (1895) there is no right to an all-American jury, and 2) trial counsel ostensibly had a strategic reason for keeping Juror 4, namely a racial preference. Trial counsel was so set on getting a black juror that he even sought to rehabilitate Juror 4 from her extraordinary claims in voir dire about defendants needing to prove their innocence and that her Islamic faith required the death penalty in cases like this. Respectfully, this Court teaches otherwise. In *Strickland v. Washington*, 466 U.S. 668, 690-691 (1984), this Court held that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." There was nothing reasonable about trial counsels' failure to read even the first

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[1] In the APPENDIX TO PETITION FOR WRIT OF CERTIORARI, TABLE OF CONTENTS, Counsel for Gallardo mis-identifies Appendix J. It should read that Appendix J is the Settlement Conference of Penalty Phase Instructions of June 10, 2009. Counsel regrets the error.

page of Juror 4's answers (Pet. App. E). Trial counsel both admitted in their testimony and affidavits (Pet. App. H) that they hadn't noticed (that is, they failed to investigate) that Juror 4 was disqualified as an alien, but would have moved to strike her had they read her questionnaire with comprehension. This was not invited error, this was an unreasonable professional judgment: that any black woman, even one professing Islam's teaching on the necessity of the death penalty in a case like Petitioner's, and holding a wrongheaded view of the presumption of innocence, would necessarily be a favorable juror.

The claim is not precluded because ineffective assistance in Arizona can only be raised in post-conviction relief proceedings. Ariz. Crim.P.Rule 32. See, e.g. *State v. Spreitz,* 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). These claims were timely raised at the first opportunity and ruled upon below on their merits, preserving review for this Court's consideration. And, Sixth Amendment ineffectiveness claims may be premised in post-conviction on counsels' failure to raise state-law issues; see, *Estelle v. McGuire,* 502 U.S. 62, 67–68 (1991); *Shaw v. Wilson,* 721 F.3d 908 (7th Cir. 2013). Respectfully, this puts the failure to strike Juror 4 squarely in this Court's constitutional realm.

The ineffectiveness violated Gallardo's Sixth, Eighth and Fourteenth Amendment rights to "a *qualified* jury composed of individuals *not challengeable* for cause." *Rivera v. Illinois,* 556 U.S. 148, 157 (2009) (emphasis *added*). In *Rivera,* this Court held "because no member of the jury as finally composed was removable for cause, there was no violation of his Sixth Amendment right to an impartial jury or

his Fourteenth Amendment right to due process." But Juror 4 *was* undeniably removeable for cause; still, she sat and returned guilt and death verdicts, as neither the lawyers nor the trial judge meaningfully read her juror questionnaire (Pet. App. E). In that lapse of diligence, the Sixth, Eighth, and Fourteenth Amendments were violated.

The state cannot hide behind a state procedural rule of preclusion where the rule is not independent of the federal question which was raised and ruled upon below, cf. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991), *abrogated on different grounds by Martinez v. Ryan*, 566 U.S. 1 (2012). This trial court *did* rule on the merits, but found the claim was precluded because it wasn't constitutionally based (Pet. App. B). Gallardo urges that was profound error.

Gallardo urges these preserved issues are more than quibbles about state law. For example, in *Batson v. Kentucky,* 476 U.S. 79 (1986) the fact that Batson unsuccessfully argued below that his conviction violated state law did not preclude his famous counterpart Sixth Amendment claim that his jury was not drawn from a fair cross section of the community.

Petitioner agrees with the state that violation of a state law is not "automatically" a violation of due process (Brief in Opposition at p. 5), but violation of state law that seats a juror who should have been struck for cause violates due process as well. A correct understanding of due process in this case reveals that the Arizona law of jury composition directs mandatory outcomes based on objective predicates that assure fundamental fairness, thus creating a due process liberty

interest. Arizona's jury selection process contains an objective criterium, e.g. juror U.S. citizenship, that requires mandatory action in its absence, i.e. juror excusal. Under Ariz. R. Crim. P. 18.5(f) there is no discretion, the rule more than merely "plac(es) substantive limitations on official discretion." *Olim* v. *Wakinekona,* 461 U.S. 238, 249 (1983). The court below failed to act as required by law.

Arizona Const. Article 2 §§ 23 and 24 have "inviolate" requirements for an impartial jury of 12 in a capital case. The state statute here, A.R.S. § 21-201, requires that only United States citizens "shall" be jurors, and that the court "shall" excuse a juror whenever cause appears. Ariz.R.Crim.P. 18.5(f). These provisions are "explicitly mandatory," as in *Hewitt* v. *Helms,* 459 U.S. 460, 472 (1983) ("the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest"). In other words, "the ... law must direct that a given action will be taken or avoided only on the existence or nonexistence of specified substantive predicates." See also, *Toussaint* v. *McCarthy,* 801 F .2d 1080, 1094 (9th Cir. 1983). "[T]he liberty interest is created when the word 'shall' is used to mandate certain procedures ... " *Id.* at 1098 (citing *Hewitt,* 459 U.S. at 472). "Shall" is the operative, compulsory verb in each Arizona provision.

A state statute or procedural rule creates a Fourteenth Amendment liberty interest if the court's discretion is limited by substantive predicates and if the statute uses mandatory language in specifying the outcome. *See, e.g., Bonin v. Calderon,* 59 F.3d 815, 842 (9th Cir.1995). That was the case here, since the Arizona

Constitution, statutes and rules all *mandate* 12 qualified jurors. *See Bonin,* 59 F.3d at 842 ("In order to create a liberty interest protected by due process, the state law must contain: (1) substantive predicates governing official decision making, and (2) explicitly mandatory language specifying the outcome that must be reached if the substantive predicates have been met.") (internal quotations and citations omitted). Since the language is mandatory, it created a liberty interest. The trial court abused its discretion and violated due process by in effect excusing its own lapse. Due process requires the state to follow its own mandatory rules; its failure to do so here resulted in constitutional error.

The original moment to challenge Juror 4 for cause was lost, but these constitutional questions were appropriately retrieved on post-conviction, adversely ruled upon, and now presented here.

II. UNDER THIS COURT'S MODERN JURISPRUDENCE, A CONSTITUTIONAL CAPITAL JURY CONTEMPLATES AN ALL-AMERICAN CAPITAL JURY.

Respectfully, the right to an all-American jury is implicit in this Court's frequent resort to "the community" as the source of jurors themselves, the wellspring of the jury's political legitimacy, and the necessity of the community's participation in the administration of justice. See, e.g. *Taylor v. Louisiana,* 419 U.S. 522, 530 (1975) ("the requirement of a jury's being chosen from a fair cross section of the community is fundamental to the American system of justice."); *Lowenfield v. Phelps,* 484 U.S. 231, 238 (1988) (the capital jury is the "conscience of the community"). That body of law parallels this Court's jurisprudence that defines

"community" as categorially excluding non-citizens like Juror 4. See, e.g. *Cabell v. Chavez-Salcido*, 454 U.S. 432, 440 (1982); *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973). That is why *Kohl v. Lehlback* has been overtaken by this Court's subsequent jurisprudence on community and its relation to the capital jury in particular; see e.g. *Lowenfield. Kohl v. Lehlback* should be overruled to the extent it fails to recognize the Sixth and Fourteenth Amendment right to a jury of citizens. Respectfully, foreigners on American juries cannot co-exist in the same universe with this Court's modern precedent on what comprises "the community" and its "conscience."

There is a broad national consensus that jurors shall be United States citizens. "In the United States, all jurors must be U.S. citizens." Amy R. Motomura, *The American Jury: Can Noncitizens Still Be Excluded?* 64 Stan. L. Rev. 1503 (2012). "In federal courts, citizenship is required by 28 U.S.C. *§* 1865(b): '[A]ny person [shall be deemed] qualified to serve on grand and petit juries in the district court unless he–1) is not a citizen of the United States . . . .' 28 U.S.C. § 1865(b) (2006). Forty states also specifically dictate that jurors must be U.S. citizens." *Id.* at fn. 1. "Four states require that jurors be qualified to be electors, and electors are in turn required to be citizens... In five states, the statute requires only state citizenship or requires simply "citizenship" without specifying whether that is U.S. or state citizenship. In these states, other statutes or case law make clear that jurors must be U.S. citizens." *Id.* (internal citations omitted).

The court below relied on the now-outmoded lack of an explicit Sixth Amendment right to an all-American jury found in *Kohl v. Lehlback* to reach its result. But Gallardo urges there is a need for constitutional protection of our uniform national consensus that jurors must be citizens.

Such an emergent consensus on policy has in the past led this Court to recognize constitutional change. For instance, in *Roper v. Simmons*, 543 U.S. 551, 559-560 (2005), the fact that just thirty states either forbade execution of minors or had done away with the death penalty altogether proved that the time had come to abolish the juvenile death penalty under the protections of the Eighth and Fourteenth Amendments. *Id.*

Respectfully, in this case the Court should recognize under the Sixth, Eighth and Fourteenth Amendments the right to an all-American jury, a qualified, impartial American jury chosen from a "fair cross-section" of the community, *Lockhart v. McCree*, 476 U.S. 162, 184 (1986), a jury that can act as the "conscience of the community" when it comes to deciding life or death. *Lowenfield v. Phelps.*

The state does not rebut this Court's established precedent that the American "community," excludes non-citizens, *Cabell v. Chavez-Salcido*, 454 U.S. 432, 440 (1982); *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973). The state concedes that in *Carter v. Jury Comm'n of Greene Cty.* 396 U.S. 320 (1970) this Court held "excluding non-citizens from juries does not violate the Constitution." (Brief in Opposition, p. 9). Just so. And *Carter* used the terms "citizen" and "community" near-interchangeably. Respectfully, it is time to close this circle.

CONCLUSION

The record shows that the Somali national Juror 4 falsely swore under oath to being a U.S. citizen when she illegally registered to vote in Arizona in 2007, complete with a party preference (Pet. App. G). She then sat in 2009 in Gallardo's capital venire as the product of her apparent perjury and voter registration fraud. And with the proof of her disqualification in hand, neither court nor counsel noticed. Juror 4 went on to wrongfully vote in that most grim and serious of elections, the capital juror's ballot. Juror 4's only defense to these charges would likely be she was so unassimilated that she did not know what she was doing, which only amplifies the need for a Sixth Amendment right to juries of only acculturated members of the political community, namely U.S. citizens. The state court demurred chiefly because of *Kohl,* even though the capital process requires the "community," which this Court equates with citizenship, a status from which this Court categorically excludes aliens like Juror 4.

Respectfully, the time has come to recognize a right under Sixth, Eighth, and Fourteenth Amendments to an all-American jury, comprised solely of United States citizens, and to reverse the decision below.

Respectfully submitted,

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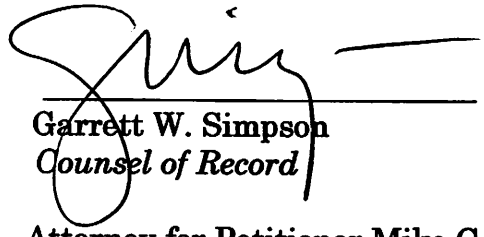

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