No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

ROGER E. MAGANA,

Petitioner,

v.

RON CREDIO, Warden, ARIZONA
DEPT. OF CORRECTIONS,
MICHAEL F. GOWER,
Oregon Department of Corrections
Assistant Director for Operations,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Ninth Circuit's memorandum decision contravene this Court's rulings affirming the guarantees of effective counsel and an impartial jury for a person accused of serious crimes?

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The petitioner, Roger Magana, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on November 30, 2018.

Opinions Below

A United States Magistrate Judge for the District Court of Oregon issued Findings, and recommended that Mr. Magana's petition for writ of habeas corpus be denied. (Appendix C). The District Court adopted the Findings and Recommendation, but issued a Certificate of Appealability. (App. B). The United States Court of Appeals for the Ninth Circuit issued a memorandum opinion affirming the denial of relief. (App. A).

Jurisdictional Statement

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

The Sixth Amendment provides that: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury. . . .[and] to have the Assistance of Counsel" for his defence." The Fourteenth Amendment provides that "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

28 U.S.C. § 2254(d) provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

Statement of the Case

A. State criminal case

In two indictments returned in 2003, Roger Magana was charged in Oregon with committing fifty-two criminal offenses between September 1997 and January 2003. The charges included sex offenses, coercion and official misconduct. The alleged victims were women he met in the course of his duties as a police officer. Most often, the alleged encounters took place during the investigation of drug, alcohol or prostitution-related crimes. (App. C, p. 2). *State v. Magana*, 159 P.3d 1163 (Or. App. 2007). Mr. Magana retained Russell Barnett to represent him.

The case was the subject of widespread media coverage. At the outset of voir dire, the judge told the jury panel: "I assume that most if not all of you have heard about this case." When the first juror questioned was asked if he could put what he heard out of his mind, he responded: "I doubt it. It's hard to hear all that and put it away." Tr. p. 8. The second questioned juror said he had heard "Lots in the paper and lots on the news." Tr. p. 11. He added: "Up until now I've always assumed he is guilty." *Id.* at 11

The next day, voir dire resumed. A juror questioned early that day had heard about the case on the radio that morning. Another prospective juror said that she had opinions about the case before she came in. When asked the source of those opinions, she said: "The source of that opinion was from reading in the paper and when more than one accusation came up I'm pretty quick to judge on that."

During jury selection, two of the prospective jurors disclosed that they were victims of rape and a third had been a victim of domestic abuse and unspecified sexual abuse. Juror Carter said that she had been raped when she was in college. Tr., June 3, 2004, p. 144. She acknowledged that it would be hard for her to be impartial. She did not state that she could be fair or impartial, but said she would try. Tr. 144. Regarding her experience as a rape victim, she said she "would have to mentally overrule that." Tr. 145.

Mr. Magana denied each allegation, but the jury convicted him of 42 counts. The total term of imprisonment was 975 months. Mr. Magana appealed, but the appellate court affirmed in a written decision. *State v. Magana*, 159 P.3d 1163 (Or. App. 2007), *rev. denied*. 169 P.3d 1268 (Or. 2007).

B. State post-conviction proceedings

Mr. Magana initiated a post-conviction. In his petition, he raised ineffective assistance of trial counsel. Among other claims, he asserted that his counsel rendered ineffective assistance by failing to challenge certain jurors for cause. In one claim, he asserted that Mr. Barnett should have challenged Juror Carter for cause.

Defending against the claims, Respondent submitted the affidavit of Mr. Barnett in which he explained why he did not seek to remove Carter. Barnett said that he leaves sex crime victims on juries as a tactical choice because he believes victims of such crimes have a unique ability to see through the stories of false accusers. He stated:

> Petitioner faults me for not challenging Juror . . . Carter, for cause. I recall that there was a member of the jury pool who had been raped many, many years earlier, when she was a 20-year-old college student. If she had

> answered during voir dire that she would be unable to set aside what had happened to her, and unable to base her decisions in the case on the evidence presented in court, in accordance with the court's instructions, then I certainly would have challenged this juror for cause. However, I have left women on the jury, in other trials where sexual offenses are alleged, who have been raped or otherwise been victimized sexually. It is my belief that women who have experienced such sexual trauma are uniquely well-situated to evaluate whether other women have been victimized. In the present case, I thought [Juror] Carter's personal experience would give her insight into what compelled sexual activity actually entails. The defense theory was that the events alleged did not occur and Mr. Magana did not force sexual activity on any of the complainants. I thought this theory might resonate with [Juror] Carter, particularly if we could show that the State had failed to prove that Mr. Magana had engaged in any activity that was anything like the rape that [Juror] Carter had suffered, a few decades earlier.

(App. C, p. 12) (quoting a portion of the affidavit; the full version is in the record). After a hearing on Magana's petition, the court denied relief. It ruled: "The Court finds that petitioner has failed to prove by a preponderance of the evidence that any of his counsel's conduct and defense of him was ineffective and inadequate or that his defense was prejudiced by his counsel's performance. The court specifically rejects Petitioner's arguments involving jury selection . . . that counsel's representation fell below an objective standard of reasonableness guaranteed by the Sixth Amendment." (App. C, p. 9).

Magana appealed from the denial of relief. The Oregon appellate court affirmed without opinion and the Oregon Supreme Court denied review. (App. C, p. 21).

C. Federal habeas corpus case

Mr. Magana then initiated this federal habeas corpus case. In his petition, he again asserted that Mr. Barnett was ineffective in failing to challenge juror Carter for cause. (App. C, p. 3). The Magistrate Judge recommended denial of each claim. (*Id.*, p. 20).

The District Court stated: "I agree with Judge Acosta that the state post-conviction review court did not unreasonably apply *Strickland* by concluding that Mr. Magana failed to establish ineffective assistance of counsel...." (App. B, p. 5) (citation omitted). Judge Mosman granted a Certificate of Appealability regarding Magana's claim that he was denied his right to effective assistance of counsel because his counsel failed to challenge Juror Carter for cause. (App. B, pp. 6-7).

The Ninth Circuit affirmed. In pertinent part, the court ruled:

> Applying [the AEDPA] standards, we cannot say that the Oregon courts unreasonably determined that counsel was not ineffective when he decided that he would not challenge the juror in question for cause. Those courts could reasonably decide that the juror was impartial. Although the juror's answers at voir dire were somewhat equivocal, no clearly established Supreme Court law has declared that equivocal answers require a determination that there is bias. The juror said that she could serve as a juror, would really try to be fair and impartial, and would do her best. Plainly, her words and demeanor and tone satisfied counsel, and the Oregon courts were satisfied with this approach. Applying the deferential standard of review that we are required to apply, we cannot say that the Oregon courts' decision was so lacking in justification under clearly established Supreme Court law that no fairminded jurist could so decide.

(App. A, pages 3-4) (citations, including internal ones, omitted).

Reasons for Granting the Petition for Certiorari

The Ninth Circuit's decision contravenes this Court's command that effective defense counsel ensure an impartial jury.

A. Introduction

It is a constitutional imperative that the accused receive a fair trial before a panel of impartial jurors, jurors who are able to decide the case based exclusively on the law and the evidence as presented at trial. Roger Magana had no such trial.

As a police officer accused of committing rape and other coercive sexual crimes, and standing trial in the community he had served, Mr. Magana would face a difficult time attaining a fair and impartial jury panel.

During voir dire at his trial, one prospective juror, Ms. Carter, disclosed that she had been a victim of rape many years earlier. When asked if she could be fair and impartial, she stated she "would try." Tr. 144. However, she acknowledged that it would be hard to be impartial. Tr. 144. Regarding her victimization, she added that she would have to "mentally overrule that." Tr. 145. Defense counsel made no challenge for cause. Ms. Carter was then selected as a juror for the trial.

Given this juror's experience as a rape victim, her uncertainty as to whether she could be fair and impartial, and her equivocal answers to the corresponding voir dire questions, defense counsel rendered ineffective assistance in failing to challenge this juror for cause. The post-conviction court's ruling to the contrary was an unreasonable application of clearly established law on the guarantees of effective assistance of counsel and the right to an impartial jury.

B. The right to an impartial jury

The Sixth Amendment guarantees criminal defendants a trial and a verdict by an impartial jury. *Morgan v. Illinois*, 504 U.S. 719, 727 (1992) "The bias or prejudice of even a single juror" is enough to violate that guarantee. *See Parker v. Gladden*, 385 U.S. 363, 366 (1966) (a defendant is "entitled to be tried by 12, not 9 or even 10 impartial and

unprejudiced jurors"); *United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000) ("[T]he seating of any juror who should have been dismissed for cause … require[s] reversal.").

The right to an impartial jury is as fundamental as any that governs a criminal trial. In *Irvin v. Dowd*, 366 U.S. 717 (1961), this Court stated:

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U.S. 257 [(1948)]; *Tumey v. Ohio*, 273 U.S. 510 [(1927)]. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 [(1955)].

366 U.S. at 722 (footnote omitted; citation modified); *Morgan*, 504 U.S. at 727 ("due process alone has long demanded that, if a jury is to be provided the defendant, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment") (citing *Turner v. Louisiana*, 379 U.S. 446, 471 (1965))

"Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). "Challenges for cause are the means by which partial or biased jurors should be eliminated." *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000). "A prospective juror may be removed for cause if his [or her] views would prevent or substantially impair the performance of his duties as a juror. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). "Pursuant to the Sixth Amendment, for a finding of juror impartiality, when a juror is challenged for cause, the relevant question is 'did [the] juror

swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed.'" *Miller v. Webb*, 385 F.3d 666, 673 (6th Cir. 2004) (quoting *Patton v. Yount*, 467 U.S. 1025, 1036 (1984)).

C. The right to effective assistance of counsel is critical in jury selection.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This Court's "decisions have emphasized that the Sixth Amendment right to counsel exists 'in order to protect the defendant's fundamental right to a fair trial.'" *Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993) (quoting *Strickland v. Washington*, 466 U.S. 668, 684 (1984)). *Strickland* establishes the benchmark by which a claim of ineffective assistance of counsel must be evaluated. Ordinarily, counsel's strategic decisions are given wide latitude. But the strategy itself must be reasonable. *United States v. Span*, 75 F.3d 1383, 1389-90 (9th Cir. 1996).

Counsel's duty of competence applies with force in the selection of the jury. "Among the most essential responsibilities of defense counsel is to protect his client's constitutional right to a fair and impartial jury by using voir dire to identify and ferret out jurors who are biased against the defense." *Miller v. Francis*, 269 F.3d 609, 615 (6th Cir. 2001). Thus, if a prospective juror indicates that he or she may have genuine problems putting aside past victimization, and in confining his or her consideration to the evidence, that requires that counsel make a cause challenge.

In *Miller v. Webb*, for example, the Sixth Circuit found counsel ineffective in failing to challenge for cause a juror who stated that she "thinks she can be fair, but immediately

qualifie[d] it with a statement of partiality[.]" 385 F.3d at 675. The Court stated that the "decision whether to seat a biased juror cannot be a discretionary or strategic decision." *Id.* (citations omitted).

Similarly, in *Hughes v. United States*, 258 F.3d 453 (6th Cir. 2001), counsel failed to respond to a prospective juror's expression of doubt about her capacity to be fair by seeking removal for cause or by exercising a preemptory challenge. Counsel in Hughes also failed to ask follow-up questions. The Sixth Circuit emphasized that "no sound trial strategy could support counsel's effective waiver of Petitioner's basic Sixth Amendment right to trial by impartial jury." *Id.* at 463.

D. Defense counsel's failure to challenge Juror Carter for cause was objectively unreasonable.

The voir dire of Carter, who reported that she had been raped while in college, and that the experience could impact her ability to be fair, (Tr. 144) contained this exchange:

> [Court]: You weigh the evidence when it comes to you and decide who's telling the truth and who's not, based all that decision making on what you hear in the courtroom and then based on your deliberations with you fellow juror?
>
> [Juror Carter]: Yes, I would try my best to do that, yes.

Tr. 142. She stated that she "*would really try*" to be fair in her role as juror. Tr. 145 (emphasis added). Notwithstanding her best intentions, she never stated that she could be fair. In this context, given Carter's equivocation as to whether she could be serve impartially, it was ineffective for counsel to fail to seek her removal.

"The critical issue in deciding a challenge for cause is whether the juror "could be fair and impartial and decide the case on the facts and law presented." *United States v. Hager*, 721 F.3d 167, 190 (4th Cir. 2013). A biased juror who unsuccessfully tries her best to be fair is not an impartial juror. When examined carefully, the record reveals that all Carter's statements were seriously equivocal as to her ability to serve impartially. She stated that she thought it would be hard for her to be impartial, but she recognized that "that's not supposed to happen, I'm supposed to listen to the facts." Tr. 145. This equivocation, coupled with her experience as a victim of forcible rape, fails to satisfy the constitutional impartiality requirement.

E. Counsel's strategy to keep Ms. Carter as a juror was objectively unreasonable.

Trial counsel's reason for keeping Juror Carter on the panel was objectively unreasonable. What makes Mr. Barnett's reason so troubling is that it amounts to a near *per se* strategy to keep victims of rape on the jury unless, presumably, they state outright they cannot be fair. Notwithstanding Barnett's view, and contrary to the Ninth Circuit's conclusion, there was no discernment whether *this particular juror*, with her individual experience, and her expressed doubts and uncertainty, could actually be impartial.

No published research suggests that a rape victim will know whether another person is telling the truth or not. A person who has been victimized has no more powerful divining rod for judging credibility than anyone else. It is more likely that the person will feel a

natural affiliation with a person who testifies under oath that they suffered the same horrible experience.

Moreover, Mr. Barnett's reasoning calls upon the victimized juror to recall her own victimization, and a horrendous experience in her own life, at the precise moment she is evaluating the accusers' credibility and during her deliberations with other jurors. In fact, Juror Carter stated that she still thinks about her experience and said, in voir dire, "I would have to mentally overrule that." Tr. 146.

Barnett's reasoning essentially allows for an internal jury expert on the crime of rape, someone who will effectively give unsworn testimony about the experience of being raped, what it means, and how one assesses the credibility of a person who was raped and who then reports that they have been raped. For the effective defense of a criminal case such as this one, there are multiple problems with this. First, the juror is not an actual expert. He or she is acting solely from his or her own experienced trauma. The juror has no objective information about how to assess credibility in other victims of this crime. It is terribly unlikely that someone who is re-experiencing their trauma is going to be able to objectively assess credibility in the way that the attorney's strategy hypothesizes.

Next, the "expert" is completely out of defense counsel's control. Not only would counsel be unable to guide the juror's behind-closed-doors expressions and opinions, he would have no idea what their opinions actually are.

Thus, by utilizing such a "strategy," counsel damaged the objectivity of the jury as a whole. Given these flaws in Barnett's strategy," Magana's claim "overcome[s] the

presumption that, under the circumstances, the challenged 'action might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (citation omitted).

F. The Sixth Amendment violation satisfies the AEDPA standards for relief.

Under 28 U.S.C. § 2254(d), the federal court can grant relief where the state court's ruling was contrary to, or an unreasonable application of, clearly established Supreme Court precedent. *Williams v. Taylor*, 529 U.S. 362 (2000). In this case, the post-conviction court's decision unreasonably applied *Strickland* and its progeny in denying Magana's ineffective assistance claim. The state court also misapplied this Court's rulings on the impartiality requirement for jury service. The PCR court incorrectly concluded that Magana failed to prove that a challenge for cause would have prevailed.

This case is akin to *United States v. Sithithongtham*, 192 F.3d 1119 (8th Cir. 1999), in which a juror testified that he "would probably give [law enforcement witnesses] the benefit of the doubt if something was questionable," but that "I could probably be fair and impartial." *Id.* at 1121. The Eighth Circuit found the district court erred by not striking the juror for cause. "'Probably' is not good enough." *Id.* The court concluded it was not reversible error (because the defendant used one of his preemptory strikes to remove the biased juror). *Id.* at 1121-24. Here, through an express decision by trial counsel, no preemptory strike was used and Juror Carter sat on the case. *See also United States v. Nelson*, 277 F.3d 164, 201 (2d Cir. 2002) (district court erred by failing to strike a juror

who said "he 'would like to think' of himself as objective and able to give the defendants a fair trial," but "he '[h]onestly . . . [didn't] know' whether he could do so").

Next, the finding that Magana failed in his burden of proving prejudice must be rejected. Because the impaneling of a biased juror prejudiced Magana's case, the post-conviction court's determination to the contrary unreasonably applied both *Strickland* and established precedent on Sixth Amendment impartiality.

> Trying a defendant before a biased jury is akin to providing him no trial at all. It constitutes a fundamental defect in the trial mechanism itself. . . . We agree that, in the absence of a strategic motive, a defendant whose attorney fails to attempt to remove biased persons from a jury panel is prejudiced. Moreover, even without a showing of actual bias, prejudice may be implied in certain egregious situations. *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor J., concurring).

Johnson v. Armontrout, 961 F.2d 748, 755-56 (8th Cir. 1992). (citation modified). Here, had trial counsel raised a cause challenge to Juror Carter, it is reasonably probable that she would have been excused and Mr. Magana would have then enjoyed a trial by an impartial jury. Instead, he had a trial before at least one biased juror.

G. The Ninth Circuit employed an incorrect analysis.

The Ninth Circuit's decision incorrectly framed the constitutional issue. The Panel reached its conclusion because it found no Supreme Court precedent that declares that equivocal answers by a prospective juror require a finding of bias. (App. A, p. 4). That is not the correct analysis. Clearly established law requires an impartial jury. *Supra*. If a prospective juror has been seriously victimized, as this juror had, and the criminal case involves charges that include allegations of similar criminal acts, that same juror's doubts

and equivocal mental state about whether she could, in fact, decide the case fairly, requires that competent defense counsel seek to excuse that juror for cause. In this case, while disregarding that uncertainty, counsel unreasonably embraced the juror's past victimization – and resultant trauma – as a qualifying factor for seating her in this highly publicized criminal case. (App. C, p.12).

H. *Skilling* is distinguishable.

The Panel located its main support for its conclusion in *Skilling v. United States,* 561 U.S. 358, 395-99 (2010). (App. A, p. 4). The *Skilling* case is distinguishable for a number of reasons. First, the juror in *Skilling* had been forced to forfeit her own 401(k) to survive layoffs at the company she worked for. She was "angry" about Enron's collapse, but did not blame Skilling for the loss of her own retirement accounts. She had not paid much attention to Enron-related news and expressed that she "[thought] [she] could be" fair and impartial. *Id.* at 397.

There is a material difference between trying to be fair, when one has real doubts that they can actually attain that frame of mind (as in this case), and, as displayed by the *Skilling* juror, believing that one *could* be fair and impartial. In Magana's case, Juror Carter stated that her experience of being raped could make her less able to fairly evaluate the evidence but she would "really try" to be impartial despite her experience. Unlike the juror in *Skilling*, she did not state that she could be impartial or that she thought she could be fairly impartial. She said she "would really try" to be impartial despite her experience. Yet,

Barnett was not troubled by that sentiment. Rather, he erroneously saw the juror's traumatic experience as a qualifying attribute.

Next, the juror in the *Skilling* case was not a victim of the crime of fraud or the other offenses at issue in that case. Her financial loss was the result of a bad economy and, possibly, specific financial difficulties faced by the company she worked for. At least from what is quoted in the *Skilling* opinion, she never said she was the victim of any type of fraud, the charge she was asked to sit in judgment on. In contrast, the juror in Magana's case was a rape victim, the same type of charge that Magana was on trial for.

Lastly, there is a world of difference between the crime of fraud and the crime of rape. Being the victim of a financial fraud is certainly upsetting, but it is not a violent and traumatizing assault upon one's most intimate bodily integrity. The ability to detach emotionally from financial troubles is qualitatively different from detaching emotionally from having been raped. And, again, the *Skilling* juror was not the victim of any crime whatsoever.

Conclusion

For the foregoing reasons, the Court should issue a writ of certiorari.

DATED this 14th day of February, 2019.

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