

18-8643
No. _____

Supreme Court, U.S.
FILED

NOV 05 2018

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IN THE
SUPREME COURT OF THE UNITED STATES

Joseph Lee Flores _____ — PETITIONER
(Your Name)

vs.

Lorie Davis _____ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Joseph Lee Flores, # 1694314

(Your Name)

59 Darrington, Road

(Address)

Rosharon, Texas 77583

(City, State, Zip Code)

(Phone Number)

ORIGINAL

QUESTION PRESENTED

WHETHER VENIREMAN WHO STATED DURING VOIR DIRE THAT HIS ABILITY TO BE FAIR WOULD BE AFFECTED BY PRIOR EXPERIENCE WITH CRIME EXPRESS BIAS, RENDERING COUNSEL INEFFECTIVE FOR FAILING TO CHALLENGE OR STRIKE VENIREMAN.

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. Petitioner-Appellant,
Joseph lee Flores
2. Respondent-Appellee,
Lorie Davis, Director
TEXAS DEPARTMENT OF CRIMINAL JUSTICE-- CORRECTIONAL INSTITUTIONAL
DIVISION
3. Counsel for Respondent-Appellee
Jessica Manojlovich, Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL OF TEXAS

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at APPENDIX A to the petition and is unpublished.

The opinion of the United States District Court appears at APPENDIX B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided Petitioner's case was August 9, 2018. No petition for rehearing was filed.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

This case involves Amendments VI and XIV to the United States Constitution, which provides:

Amendment VI

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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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; nor deny to any person its jurisdiction the equal protection of law.

STATEMENT OF THE CASE

During voir dire proceedings, venire members were asked if they, close friends, or family members had ever been the victim of either robbery, murder, attempted robbery, or attempted murder. Venireman #38, Gary Taylor, stated that his ability to be fair would be affected because he had been the victim of an attempted auto theft and burglary of a motor vehicle. 2 R.R. 159, 162. Counsel did not ask Venireman #38 any follow-up questions to explore the depth of his biasness; nor did he challenge for cause or strike Venireman #38 from the jury. Venireman #38 ultimately sat in the jury, which convicted Petitioner of attempted capital murder and aggravated robbery and sentenced him to life and sixty years. The convictions were affirmed on appeal. *Flores v. State*, 2010 WL 5238580 (Tex. App. - Houston [14th Dist.] 2010, pet. ref'd). The Texas Court of Criminal Appeals denied Petitioner's application for writ of habeas corpus, raising, in part, the issue presented herein.

Petitioner timely filed application for writ of habeas corpus in the United States District Court for the Southern District of Texas, Civil Action H-15-1633. On September 1, 2016, the district court granted summary judgment and dismissal of Petitioner's 28 U.S.C. § 2254 application challenging his conviction.

On June 27th, 2017, the Fifth Circuit Court of Appeals granted Petitioner's motion for certificate of appealability in respect to his claim that counsel provided ineffective assistance by failing to challenge or strike Venireman #38 for alleged bias. Said court affirmed the judgment of the district court on August 9, 2018.

REASONS FOR GRANTING THE PETITION

The Petitioner moves the Court to grant this Petition for the following reasons:

A. Court of Appeals' Decision Conflicts with Decisions of Other Courts

The United States Court of Appeals for the Fifth Circuit determined that Venireman #38's declaration that he "thought his past experience as a crime victim would affect his ability to be fair" was an ambiguous statement that did not express actual bias, thus Flores's ineffective assistance of counsel claim was properly denied by the state court. Other Courts have determined otherwise.

The Sixth Circuit concluded in Hughes v. United States, 258 F.3d 598, 612-13 (6th Cir. 2001), that defense counsel who failed to request removal of juror who stated, "I don't think I could be fair" was ineffective assistance of counsel. The court went further in Miller v. Webb, 385 F.3d 666, 667 (6th Cir. 2004), stating, "When a venireperson expresses bias on voir dire, without a court response or follow-up, for counsel not to respond [to the statement of impartiality] in turn is simply a failure 'to exercise the customary skill and diligence that a reasonable, competent attorney would provide.'" The Eleventh Circuit also expressed in Smith v. Gearing, 88 F.3d 1334 (11th Cir. 2008), that counsel failure to object to empaneling a juror who stated he did not believe he could be fair was ineffective assistance of counsel.

Additionally, the Sixth, Eleventh, and Tenth Circuits have concluded that the seating of a bias juror who expresses an inability to be fair is per se prejudicial. See Hughes at 463-464 (6th Cir.), Miller at 667-668 (6th Cir.), Smith at 1334 (11th Cir.), and Hale v. Gibson, 227 F.3d 1298, 1319 (10th Cir. 2000).

B. The Court of Appeals' Decision Conflicts with Decisions of This Court

In Adams v. Texas, 448 U.S. 39, 45 (1980), this Court held that a juror is biased if his "views would prevent him or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." In this case, Venireman #38 clearly indicated his ability to be fair would be affected, thus, according to this Court and in line with Adams, he was biased. Additionally, this Court held that "the denial of the right to an impartial decision maker taints any resulting conviction with constitutional infirmity" and mandates reversal. See Neder v. United States, 527 U.S. 1, 8 (1995) (holding that the presence of a biased juror "is structural error subject to automatic reversal"); United States v. Martinez-Salazar, 526 U.S. 304, 316 (2000) (holding that the seating of a biased juror requires reversal).

C. Importance of Question Presented

This case presents a fundamental question that must be decided by this Court: Is a juror who states that his ability to be fair would be affected by his prior experience with crime bias? The Fifth Circuit says no while other circuit courts, such as the 6th, 10th, and 11th say yes. In light of the circuit courts' subjectivity of such statements made by jurors, the question presented is of great public importance in that it will essentially set the standard for all courts on questions of juror biasness. The common sense understanding of bias, as set forth in Adams v. Texas, has been left to the interpretation of the lower courts. Such should not be the case.

This Court should correct any misinterpretation of Adams and make it clear that any juror who states that their ability to be fair would be affected, in any way, is bias.

CONCLUSION

For the reasons herein, the circuits ruling was in error and the petition for a writ of certiorari should be granted.

Respectfully submitted,

Joseph Flax

November 11, 2018