

No. _____

19-6252

IN THE

SUPREME COURT OF THE UNITED STATES

EDINSON HERRERA RAMIREZ — PETITIONER

(Your Name)

vs.

STATE OF MARYLAND

FILED
SEP 25 2019
OFFICE OF THE CLERK
SUPREME COURT U.S.
RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE MARYLAND COURT OF APPEALS

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

PETITION FOR WRIT OF CERTIORARI

EDINSON HERRERA RAMIREZ

(Your Name)

30420 REVILLS NECK ROAD

(Address)

WESTOVER, MARYLAND 21890

(City, State, Zip Code)

N / A

(Phone Number)

QUESTION(S) PRESENTED

WHETHER THE MARYLAND COURT OF APPEALS ERRED AND ABUSED ITS DISCRETION IN HOLDING THAT PETITIONER HAD RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO USE A PEREMPTORY STRIKE TO REMOVE A BIASED JURY, BUT THAT PETITIONER HAD FAILED TO PROVE PREJUDICE?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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:

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir. 1998)	7
Hughes v. United States, 258 F.3d 453 (6th Cir. 2001)	7
Irvin v. Dowd, 366 U.S. 717, 722 (1961)	6
Newton v. State, 455 Md. 341 (2017), cert. denied, 138 S.Ct. 665, 199 L.Ed. 554 (2018)	8
Smith v. Phillips, 455 U.S. 209, 217 (1982)	5
Williams v. State, 398 Md. 98, 106 (2006)	5,6
Williams, 394 Md. at 109-17	6
Wolfe v. Brigano, 232 F.3d, 499, 503 (6th Cir. 2000)	7

STATUTES AND RULES

OTHER

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	i
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	5
STATEMENT OF THE CASE	2-3
REASONS FOR GRANTING THE WRIT	4-8
CONCLUSION.....	8

INDEX TO APPENDICES

APPENDIX A UNREPORTED OPINION, MD COURT OF APPEALS

APPENDIX B

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

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

[] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

[x] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

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

For cases from **state courts**:

The date on which the highest state court decided my case was JULY 12, 2019. A copy of that decision appears at Appendix ___ A _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI. Jury trials for crimes, and procedural rights

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 accusation; 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 defence.

Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection;

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 within its jurisdiction the equal protection of the law.

Md. Decl. of Rights, art. 21. Right of accused; indictment; counsel; witnesses; speedy trial; jury.

That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

STATEMENT OF THE CASE

After a four-day jury trial, on July 12, 2005, petitioner was found guilty of all eleven counts: 1. Two counts of robbery with a dangerous weapon; 2. Two counts of robbery; 3. Two counts of first degree assault; 4. Burglary; 5. Conspiracy to rob with a dangerous weapon; 6. Use of a handgun in the commission of a crime of violence; 7. Possession of an unregistered firearm; and, 8. Theft of property with a value of at least \$500. On November 17, 2005, he was sentenced to a total of ninety-five years by the circuit court of Carroll County, MD. The State dismissed the unregistered firearm charge. Being unsuccessful on direct appeal and a petition for writ of certiorari in the MD Appellate Courts, petitioner filed a petition for post conviction relief on May 14, 2014 raising allegations of ineffective assistance of trial counsel for failing to strike a stated biased juror from the jury panel. A hearing for postconviction relief was held February 3, 2015. On October 29, 2015 the postconviction judge issued the Opinion denying postconviction relief.

Petitioner filed an application for leave to appeal and on March 13, 2018 the Court of Special Appeals issued an Order remanding the case to the lower court with instructions to determine whether the trial transcript was accurate in indicating that

petitioner Ramirez's trial counsel had moved to strike juror 25, as opposed to juror 27 for cause. The postconviction judge later affirmed the remanded instruction. Subsequently, the Court of Special Appeals affirmed the circuit court's judgement, ruling that the judge did not err in denying postconviction relief.

On December 7, 2018 petitioner filed a petition for writ of certiorari in the MD Court of Appeals raising questions that:

1. did the intermediate appellate court err when it ruled that a structural error did not occur when a biased juror was not stricken from the jury by trial counsel; 2. Whether the appellate court erred in ruling that even if a structural error occurred, Ramirez was not prejudiced; 3. Did Ramirez receive ineffective assistance of counsel; and, 4. Did the Court of Special Appeals err when it used the number of prospective jurors in St. Mary's County when trial in this case was held in Carroll County? On February 22, 2019, the MD Court of Appeals granted the petition and affirmed the judgement of the Court of Special Appeals, from which forms the basis of this instant petition to the Honorable Court.

The MD Court of Appeals Ruling is in conflict with the federal and state constitutions guaranteeing a fair and impartial trial.

REASONS FOR GRANTING THE PETITION

In its Majority Opinion, Unreported, dated July 12, 2019, the Maryland Court of Appeals, in granting certiorari, denied relief and affirmed the intermediate appellate court's affirmal of denial of postconviction relief. The reasons stated by the Maryland Court of Appeals is contradictory in several respects. In its Analysis, p.31, the Court ruled that petitioner did prove that trial defense counsel provided deficient performance, but then goes on to state that petitioner did not prove prejudice. In a nutshell, this issue involves a voir dire process where a prospective juror, No. 27, answered a court question because his apartment had been broken into and that would affect his ability to render a fair and impartial verdict. Counsel did not request the juror be stricken for cause, nor did not ask the juror any other questions. During the empaneling of the jury phase, defense counsel, although having 1 remaining peremptory strike, did not strike the juror, No. 27. As such, Juror No. 27 was a member of the jury that convicted petitioner on all counts stemming from burglary charges.

As the Court of Appeals majority panel, in its opinion, in part, p.34, stated, "We are satisfied that Ramirez has met the burden to prove that his trial counsel's performance was deficient. No reasonable lawyer in Ramirez's trial counsel's position would have, as she did, refrained from asking or requesting

any follow-up questions of Juror 27, refrained from moving to strike him for cause based on his response to the 'crime victim' question, and refrained from exercising a peremptory challenge as to Juror 27 . . ." On Page 39 the panel concluded that counsel's deficient performance caused structural error, "i.e., error that rendered Ramirez's trial fundamentally unfair," but that Ramirez failed to prove prejudice from a structural error; see p. 43.

The Court of Appeals panel itself stated the prejudice: that counsel's deficient performance rendered Ramirez's trial fundamentally unfair. Petitioner asks this Court to recognize that the MD Court of Appeals panel, majority, erred and abused its discretion in its holding that Ramirez did not prove the prejudice prong. As Judge McDonald in the Dissenting Opinion, filed July 12, 2019, pgs. 2-3, opined:

"An indispensable element of a fair trial is an impartial arbiter. This Court has opined that the right to a fair trial guaranteed by the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Constitution is a "promise that a defendant's fate will be determined by an impartial fact finder who depends solely on the evidence and argument introduced in open court." **Williams v. State**, 394 Md. 98, 106 (2006); see also **Smith v. Phillips**, 455 U.S. 209, 217 (1982) ("Due pro-

cess means a jury capable and willing to decide the case solely on the evidence before it"). It has long been held, and perhaps goes without saying, that a biased jury "violates even the minimal standards of due process." Irvin v. Dowd, 366 U.S. 717, 722 (1961). One could fill pages with quotations from every court in the country expressing the principle that an impartial jury is one of the most basic and essential elements of our criminal justice system and that the presence of a biased individual on a jury deprives a defendant of that right."

"Had defense counsel moved to exclude this biased juror for cause and the trial court seated the juror in the face of that objection, any ensuing conviction would clearly have been reversed on direct appeal on the basis that the defendant had been denied the right to an impartial jury. Williams, 394 Md. at 109-17 (reversing conviction and remanding for a new trial for violation of right to impartial jury because juror failed to disclose that she was related to employee of prosecutor's office). But when defense counsel fails to raise ~~such an issue~~ during voir dire, the claim would likely be defeated on direct appeal due to waiver or non-preservation. A postconviction claim based on counsel's defective performance is the only way to vindicate this fundamental constitutional right..."

"Court's have not hesitated to grant postconviction relief when it is established that the jury that returned the conviction included a biased member. See, e.g., Wolfe v. Brigano, 232 F.3d 499, 503 (6th Cir. 2000) (granting postconviction relief and reversing murder conviction due to presence of biased jurors because "[f]ailure to remove biased juror taints the entire trial"); Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir. 1998) (en banc) (granting postconviction relief and reversing murder conviction due to presence of biased juror because "[t]he bias or prejudice of even a single juror would violate [the defendant]'s right to a fair trial")."

"In my view, an error by counsel that deprives a defendant of the right to an impartial jury results in a fundamentally unfair trial and is necessarily prejudicial. In a federal postconviction case with facts very similar to this one, the Sixth Circuit reversed a conviction on the basis of ineffective assistance of counsel. Hughes v. United States, 258 F.3d 453 (6th Cir. 2001). In Hughes, a prospective juror in a federal theft and firearms prosecution admitted that she did not think she could be fair to the defendant based on her personal relationship with local police officers. Defense counsel did not move to strike for cause or exercise a peremptory strike and, as a result, the admittedly biased prospective juror was selected as a juror. The Sixth Circuit held that there was prejudice because the defense coun-

sel's inaction had effectively waived the defendant's "basic Sixth Amendment right to a trial by an impartial jury." 258 F.3d at 463."

As the dissenting opinion points out and, petitioner asserts, there is a conflict between the MD Court of Appeals Majority Opinion, federal courts, as well as this Court, with respect to the United States Constitution's law as to the right to a fair and impartial jury. If a defendant is convicted by a jury that contains a biased juror, how can this not be prejudicial on its face? Being deprived of a most basic fundamental right is prejudicial. If a constitutional error is structural because it is fundamentally unfair, then it will satisfy the prejudice prong of the test for ineffective assistance. *Newton v. State*, 455 Md. 341 (2017), cert. denied, 138 S.Ct. 665, 199 L.Ed. 554 (2018).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: Sept. 26/2019