No. _____

IN THE

Supreme Court of the United States

STEVE ROMERO,

Petitioner,

v.

MIKE D. MCDONALD, Warden,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This non-capital habeas case arises out of Steve Romero's 2006 conviction in the state court of California for attempted murder and the Ninth Circuit's 2019 unpublished order affirming the district court's denial of habeas relief.

Romero presented to the district court and the Ninth Circuit a claim under *Strickland v. Washington*, 466 U.S. 668 (1984), that his trial counsel was ineffective for failing to challenge for cause a juror who made it clear on voir dire that he was explicitly biased against the defendant. After the juror was seated, the trial judge challenged Romero's counsel on sidebar for allowing the juror on the panel. In response trial counsel stated he had a reason for failing to challenge the biased juror. The record does not reveal any basis for a tactical decision, and counsel no longer remembers.

The Ninth Circuit held, under de novo review, that there was no deficient performance.

The question presented is: Does the Ninth Circuit's decision contravene *Strickland* and this Court's Sixth Amendment jurisprudence?

LIST OF RELATED PROCEEDINGS

Trial: Superior Court of California, Riverside County; *People v. Steve Cruz Romero*, case no. RIF 12158; judgment entered April 3, 2006.

Direct appeal: California Court of Appeal, Fourth Appellate District; *People v. Steve Cruz Romero*, case no. E040434; judgment entered Nov. 28, 2007.

Petition for writ of mandate: California Court of Appeal, Fourth Appellate District; *Steve Romero v. Sup. Ct.*, case no. E040023, judgment entered March 14, 2006.

Petition for review: California Supreme Court; *People v. Steve Cruz Romero*, case no. S159514; judgment entered Feb. 13, 2008.

Petition for writ of habeas corpus: Superior Court of California, Riverside County; *In re Steve Romero*, case no. RIC575219; judgment entered April 21, 2009.

Petition for writ of habeas corpus: California Court of Appeal, Fourth Appellate District; *In re Steve Romero*, case no. E048309; judgment entered May 15, 2009.

Petition for writ of habeas corpus: California Supreme Court; *In re Steve Romero*, case no. S175192; judgment entered Feb. 18, 2010.

Federal petition for writ of habeas corpus: USDC, Central District of California; *Steve Romero v. Mike D. McDonald*, case no. 10-cv-00462-SVW-SP; first judgment entered July 18, 2013.

First federal appeal: Ninth Circuit Court of Appeals; *Steve Romero v. Mike D. McDonald*, case no. 13-56436; judgment entered June 1, 2016.

Petition for rehearing (by the state): Ninth Circuit Court of Appeals; *Steve Romero v. A.M. Gonzales*, case no. 13-56436; judgment entered July 25, 2016.

On remand: USDC, Central District of California; *Steve Romero v. Mike D. McDonald*, case no. 10-cv-00462-SVW-SP; second judgment entered June 28, 2018.

Second federal appeal: Ninth Circuit Court of Appeals; *Steve Romero v. Mike D. McDonald*, case no. 18-55929; judgment entered Aug. 15, 2019.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Steve Romero respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals

ORDERS AND OPINIONS BELOW

The unpublished order denying Romero's appeal in Ninth Circuit case number 18-55929 was entered on August 15, 2019. (App. 1-2.) The remaining orders entered in the case are also unreported, but are reproduced in the attached appendix.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction under 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely under Supreme Court Rule 13 because Romero is filing his petition within 90 days of the Ninth Circuit's August 15, 2019 final order.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides:

> 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.

The portions relevant herein include the right to a trial by an impartial jury, and the right to have the assistance of counsel in the defense.

STATEMENT OF THE CASE

A. Facts material to consideration of the question presented

On January 1, 2005, at a gathering to celebrate the New Year, a man was shot and seriously injured. (*See* App. 35-36.) Steve Romero was arrested and charged with attempted murder, with an enhancement for discharging a firearm and causing great bodily injury. (App. 35.) He also faced charges of burglary and of being an ex-felon in possession of a firearm. (*Id.*)

Voir dire took place in Romero's trial between March 20 and March 22, 2006. (App. 46.) After the venire person who would be empaneled as Juror No. 7[1] was called to the juror box, the judge asked the seated prospective jurors the following question: "Do you have any reason to believe that based upon the fact that you yourself have been the victim of a crime that you could not be fair and impartial to both sides in a case of this nature?" (App. 53.)

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[1] California Code of Civil Procedure 237 provides that the names and other identifying information of trial jurors and alternate jurors are to be redacted from the reporter's transcript upon the entry of a verdict in criminal cases.

Another prospective juror answered that it would not be a problem. The judge then turned to Juror No. 7 for an answer to the question of whether he had reason to believe that he could not be fair and impartial, and the following colloquy took place:

> JUROR NO. 7: Yes. I've had my cars stolen, a couple of cars. They've been broken into a few times. When I was younger, we lived in a gang-infested area, and I was stabbed, been in knife fights. I didn't have a knife. I mean, they came after me with a knife. A lot of gang-related things. They broke into – they've stolen our car and things like that.
>
> THE COURT: Where did these events occur?
>
> JUROR NO. 7: Whittier.
>
> THE COURT: Sir, would you be able to set aside those personal experiences in which you were a victim and listen to the evidence in a case of this nature and make your decision based solely upon what you hear in this courtroom?
>
> JUROR NO. 7: Most likely not.
>
> THE COURT: And is that because of the fact that you were victimized and those circumstances and would identify with one side or the other?
>
> JUROR NO. 7: Yes.
>
> THE COURT: Do you believe that if you were on trial with a crime of this nature, would you want somebody with your mind-set judging your case?
>
> JUROR NO. 7: No.

THE COURT: Thank you, (Juror No. 7)[2], for bringing that to my attention.

(App. 53-54.) The court then continued the voir dire with the next prospective juror.

Juror No. 7 also responded to other questions posed by the court. The venire persons were asked, "Do you know or have any family members that are in law enforcement?" (App. 55.) Juror No. 7 answered "Yes. Two of my best friends, one is ATF and one is an officer down in Costa Mesa." (App. 56.) Asked about firearm ownership, he responded, "I have a .22 rifle, a 12-gauge shotgun, and a derringer." (App. 57.) He also informed the court about former membership in the NRA. (App. 58.)

Then the group of prospective jurors that included Juror No. 7 was asked to provide answers to a questionnaire handed out by the court. (App. 47-48; 49-50.) The questionnaires sought information from the prospective jurors about address, marital status, other adult residents in the household, and prior jury service. (*Id.*) Question number 8 was about relationships with people in law enforcement. Question number 9 was, "Do you think that you can be a fair judge of the facts in this case?" (App. 72, 80.)

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[2] The juror's name was redacted by the Court Reporter. (*See supra*, n.1.)

Juror No. 7 provided the following information:

> My name is (Juror No. 7). I live in Lake Elsinore. I'm married. I'm a construction superintendent. My wife does not work. She stays home with four children. One of those children does work. She's a full-time college student and works at TGI Friday's. I have not served on a jury. I've already answered 8, and 9 is no.

(App. 59.) Though the prospective juror answered 'no' to the question about whether he could be fair, there were no objections or further questions; the court replied "Thank you, sir," and moved on to the next prospective juror. (*Id.*)

Juror No. 7 was seated in the juror box, questioned, and asked all the above questions on the afternoon of March 21, 2006. (App. 52.) When voir dire resumed the next morning, the court began by asking, "I think last night we concluded the questionnaire with the 19 new jurors. Mr. Mallen, do you wish to inquire?" (App. 60.) Defense counsel answered, "No, Your Honor." (*Id.*) The prosecutor did accept the invitation to question certain other prospective jurors further. (*Id.*) Over the entire course of the voir dire, defense counsel exercised peremptory challenges, but did not challenge any prospective juror for cause.

Juror No. 7 was sworn in to the jury. (App. 61.)

Another prospective juror answered that she could not be fair due to language issues, but was seated on the jury as Juror No. 3. (App. 51.) During

deliberations, the jury sent out a note informing the court that Juror No. 3 was having a hard time understanding and making a decision on the basis of her lack of understanding of the English language. Court and counsel conferred and met with Juror No. 3 in chambers, after which she was dismissed and replaced on the jury with an alternate. (App. 64-67.) Defense counsel moved for a mistrial. (App. 68.) In denying the motion, the court pointed out that three prospective jurors had answered that they could not be fair, but that neither side had moved to exclude for cause.[3] (App. 71.) The court then stated,

> We have one juror, (Juror No. 7), who is Juror No. 7, who emphatically stated that he could not be a fair and impartial juror, and he's been with us through this entire trial. I questioned both counsel on the record regarding those decisions as well, and I was informed that it was a tactical decision to leave him on. At least that's the information both counsel gave me.[4]

(App. 72.)

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[3] In addition to Jurors No. 3 and No. 7, prospective juror Fred Blaskovich informed the court on voir dire that he could not be fair, as he did not trust law enforcement. (App. 55.) The prosecutor exercised a peremptory challenge to excuse him from the jury.

[4] The record shows that, after the jury was sworn in, defense counsel asked to approach, and an unrecorded conference was held at sidebar. (App. 62.) The discussion described by the court is not included in the record. The State has acknowledged that any transcript of said conversation is unavailable. (App. 17.)

On April 23, 2006, after the trial was completed and the verdict had been reached, trial counsel filed a motion for a new trial. One of the grounds was the court's dismissal of Juror No. 3. (App. 78-79.) In the course of denying that motion, the court made the following statements:

> During the course of jury selection when we went through the panel, the last group of jurors that we inquired of, and they went through the questionnaire, we had three jurors in that panel who when asked to respond to question No. 9, "Do you think that you can be a fair judge of the facts in this case," three prospective jurors in the panel said, "No," they could not be fair and impartial jurors in this case.
>
> Neither the defense nor the prosecution challenged any of those three jurors for cause, and I went out of my way to make a specific record, "Do you understand we have three jurors, including Juror No. 7, a gentleman who was selected to sit on this jury, who had told us that he could not be fair and impartial," and you both told me it was for tactical reasons that we had left this juror on as well as passing for cause as to the other jurors. So I assumed that that was a tactical decision that you both made at one time or another during the course of jury selection.
>
> So we have a situation where you have selected jurors. You have allowed jurors to sit that you know we already have problems with. We knew from Juror No. 7 he wasn't going to be a fair and impartial juror, and we knew from Juror No. 3, she had difficulties with the English language. I fully expected both of them to be challenged for cause. They weren't, so they remained on the jury.

(App. 80-81.) Though Juror No. 3 was dismissed during deliberations, Juror No. 7 sat on the panel that rendered a guilty verdict for Romero.

B. Procedural history

This petition for a writ of certiorari is based on Romero's second appeal on the sole issue of whether Romero's trial counsel was ineffective, in violation of Romero's right to counsel and to a fair trial, when he failed to object for cause to a juror who was overtly biased.

On April 3, 2006, a Riverside County jury convicted Romero of attempted murder, with an enhancement for discharging a firearm and causing great bodily injury. (App. 35.) The jury also found him guilty of being an ex-felon in possession of a firearm. (*Id.*) Romero's sentence, after adjustment on direct appeal, is life plus twenty-five years to life. (*Id.*)

Counsel on Romero's direct appeal failed to raise a claim that Romero had been convicted and sentenced by a partial jury that was tainted by a biased juror. (See App. 34-45.) Romero filed pro se habeas petitions in the state courts raising, among other claims, the one at issue herein. The California Supreme Court denied the entire petition with a citation to *In re Swain*, 34 Cal. 2d 300, 304 (1949), and *People v. Duvall*, 9 Cal. 4th 464, 474 (1995). (App. 85.)

Romero then brought his claims to federal court, filing a timely habeas petition on March 29, 2010. (App. 87.) The magistrate judge filed a report

recommending that the district court deny the claims and dismiss the action with prejudice. (App. 88.) Romero filed objections, requested a certificate of appealability ("COA"), and then requested appointment of counsel. (App. 88-89.) The magistrate judge denied the motion for appointment of counsel. (App. 89.) The district court adopted the report and recommendation of the magistrate judge, entered judgment dismissing the petition with prejudice, and denied a COA on all issues. (*Id.*)

On Romero's first appeal, the Ninth Circuit appointed counsel and granted a COA on the three following issues: 1) whether the trial court violated appellant's right to a fair trial by failing to remove a biased juror sua sponte; 2) whether trial counsel rendered prejudicial deficient performance by failing to challenge a biased juror for cause; and 3) whether appellate counsel rendered prejudicial deficient performance by failing to raise the first issue on direct appeal. (App. 95.)

After full briefing and oral argument, the Ninth Circuit issued a memorandum on June 1, 2016, ruling that the state court did not adjudicate the claims on the merits, and thus the claims are reviewed de novo. (App. 30-33.) It affirmed the district court's judgment with regard to Claims 1 and 3. The court, however, remanded "the district court's denial of Romero's ineffective assistance of counsel claim against his trial counsel as the record is incomplete on this issue." (App. 31-32.) The Ninth Circuit directed the

district court to "determine whether evidentiary proceedings are warranted to address Romero's claim of ineffective assistance of trial counsel," as "[a] trial counsel's failure to strike a prospective juror who repeatedly expresses his inability to serve as an impartial juror during voir dire could represent deficient performance and prejudice under *Strickland*." (App. 32.)

On September 7, 2016, the magistrate judge requested a first round of briefing addressing the limited issues of the standard of review the court should apply in considering the habeas claim remanded from the Ninth Circuit, and the extent to which the parties could augment the record. (*See* App. 12, 90.) After briefing the court issued an order finding that the California Supreme Court did not deny the instant claim on the merits, that no procedural default applied, and that the applicable standard of review for the claim is de novo. (*See* App. 12.) The court then ordered augmentation of the record, if warranted, and briefing on the merits of the claim.

On July 17, 2017, Romero submitted a declaration from trial counsel Patrick Mallen attesting that he had no memory of Romero, the case, the trial, the voir dire process, or any jurors, and that his memory could not be refreshed by the record. (App. 13.) Respondent also averred that the record could not be augmented, as missing transcripts were unavailable and the district attorney who prosecuted Romero had no independent recollection that could assist in a court's determination of the claim. (*Id.*) Romero then

filed a motion for summary judgment, asserting that the claim may be decided on the current record. (*Id.*)

After briefing and a hearing on the motion, the magistrate judge issued a report finding that trial counsel's failure to object to the seating of a juror who was explicitly biased against his client did not fall below an objective standard of reasonableness and recommending that the district court deny Romero's petition with prejudice. (App.28-29.) Romero filed objections on May 2, 2018. (App. 92.) The district court adopted the report and recommendation on June 28, 2018 (App. 4) and entered judgment dismissing Romero's petition with prejudice (App. 3). The district court found, however, that Romero had made the requisite showing in support of his claim, and granted a certificate of appealability. (App. 92.) Romero then filed a timely notice of appeal on July 11, 2018. (*Id.*)

Romero submitted his opening brief on November 19, 2018 (App. 99), and the parties had completed briefing by April 15, 2019 (App. 100). Four months later, the assigned panel affirmed, without oral argument, in an unpublished memorandum disposition. (App. 1-2.) The court stated that, "Because the record has not changed on remand, Romero has not met his burden to establish that counsel's decision to retain the juror was professionally incompetent." (App. 2.)

This petition follows.

REASONS FOR GRANTING THE WRIT

Rule 10(c) provides that certiorari is appropriate when "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." (Rule 10(c), Rules of the Supreme Court.) In addition, Rule 10(a) provides that certiorari is appropriate on questions that "call for an exercise of this Court's supervisory power."

A. Romero did not receive a fair trial from an impartial jury

The relevant decisions of this Court are clear that the Sixth Amendment to the United States Constitution guarantees a defendant's right to a fair trial before a panel of impartial, "indifferent" jurors. U.S. Const. amend. VI; *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *Tinsley v. Borg*, 895 F.2d 520, 523 (9th Cir. 1990). This guaranteed right to a fair trial "means, in a case tried to a jury, 'a jury capable and willing to decide the case solely on the evidence before it.'" *Fields v. Brown*, 431 F.3d 1186, 1192 (9th Cir. 2005) (quoting *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 554 (1984) (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982))).

Juror No. 7 was very clear about his inability to serve as an unbiased juror and to grant Romero a fair trial. When asked if past experience as a crime victim would render him unfair and not impartial, he answered with a straightforward "yes," before describing his experiences as a victim. (App. 53-

54.) The court asked if he would be able to set those experiences aside to listen to the evidence in this case and decide solely on that evidence. (App. 54.) Juror No. 7 answered, "Most likely not." (*Id.*) He told the court that, as a past victim, he would identify with one side over the other (clearly the prosecution over the defense). (*Id.*) When asked if he would want somebody like himself to serve on his jury if he were on trial, he again answered with a clear "No." (*Id.*) Finally, when asked directly if he could be a fair judge of the facts in this case, he responded with an unambiguous "no." (App. 59.)

The trial court explicitly found that Juror No. 7 was biased. The court described the juror as having "emphatically stated that he could not be a fair and impartial juror." (App. 72.) Because the juror had not been challenged for cause, the judge stated he "went out my way to make a specific record, 'Do you understand we have here … Juror No. 7, a gentleman who was selected to sit on this jury, who had told us that he could not be fair and impartial'." (App. 81.) He stated that "You have allowed jurors to sit that you know we already have problems with. We knew from Juror No. 7 he wasn't going to be a fair and impartial juror." ((*Id.*) Thus the trial judge, who conducted the voir dire, heard the prospective juror's answers, and observed his demeanor at all times, concluded that he knew from the juror that he was not going to be fair and impartial. This Court has clearly established that the determination of a juror's partiality or bias is a factual determination to which section 2254(d)'s

presumption of correctness applies. 28 U.S.C. § 2254(e)(1)); *see also Austad v. Risley*, 761 F.2d 1348, 1350 (9th Cir. 1985).

Even if only one juror is unduly biased or prejudiced, the defendant is denied his constitutional right to an impartial jury. *See United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000) (holding that the seating of a biased juror who should have been dismissed for cause requires reversal of the conviction).

Here, Juror No. 7 demonstrated actual bias through his explicit admissions on voir dire. Juror No. 7 presents the rare situation in which a prospective juror expressly admits his bias, repeatedly and unambiguously. Juror No. 7 was, by his own admissions during voir dire, incapable and unwilling to decide the case solely on the evidence before him; yet he sat on the jury.

B. The Ninth Circuit's finding that Romero's counsel did not perform deficiently conflicts with this Court's seminal *Strickland* opinion because there can be no reasonable strategy for leaving on a jury an automatic vote to convict

Romero established in his Ninth Circuit appeal that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). "To establish deficient performance, [Romero] must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'" *Id.* (quoting *Strickland*, 466

U.S. at 688). The Ninth Circuit panel, however, failed to apply *Strickland* properly in affirming the district court's judgment. Because the Ninth Circuit found only that Romero's claim failed under the deficient performance prong of *Strickland*, and did not reach the issue of prejudice, Romero focuses only on counsel's deficient performance.

Minimally competent counsel would challenge an explicitly biased prospective juror during voir dire. The primary purpose of voir dire is to safeguard the right to trial by a fair and impartial jury. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) ("part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors"); *United States v. Powell*, 469 U.S. 57, 66-67 (1984) (purpose of voir dire is "to identify those jurors who for whatever reason may be unwilling or unable to follow the law and render an impartial verdict on the facts and the evidence").

Trial counsel failed to challenge for cause a juror who emphatically admitted to bias, and who stated expressly that he would not be capable and willing to decide the case solely on the basis of the evidence presented at trial. At no time did he provide on the record any possible basis for a belief that he could be fair toward the defendant, or even that he would be anything but unfair to the defendant. As a past victim of crime, he was biased toward the prosecution, and would not be open to judging the case based on the evidence presented at trial. Yet counsel for the defense never asked him a

single question, and did not challenge Juror No. 7 in any way. Juror No. 7 sat on the jury without objection from counsel. Even the trial court found this failure stunning. (App. 72, 81-81.)

Trial counsel's failure thus resulted in the selection of a juror whose bias and/or prejudices concerning relevant factual issues were clearly established on the record. As the Sixth and Eighth Circuits have found, this failure constitutes deficient performance. *See Hughes v. United States*, 258 F.3d 453 (6th Cir. 2001) (counsel failed to respond to venire person's expression of doubt about capacity for fairness by seeking removal for cause or exercising peremptory strike or even by asking follow-up questions); *Johnson v. Armontrout*, 961 F.2d 748, 756 (8th Cir. 1992) ("Counsel's failure to attempt to bar the seating of obviously biased jurors constituted ineffectiveness of counsel of a fundamental degree").

Deficient performance may be excused where a trial choice is based on a strategy that is "sound" or derives from "reasonable professional judgment." *Strickland*, 466 U.S. at 689, 690. Here there is a question of whether trial counsel based his failure to challenge the biased juror on a strategy. The court stated on the record that it had inquired of trial counsel why he failed to challenge for cause, but that counsel had responded that he had tactical reasons for leaving Juror No. 7 on the jury. (App. 72, 80-81.)

The trial court stated that trial counsel had said that he had a strategic basis for leaving a person overtly biased against the defense on the jury; but the court did not aver that trial counsel had explained what such a strategic basis might be. There is no hint in the record as to what such a strategy might comprise. The record of the relevant discussion apparently does not exist; the State has submitted that any such record is unavailable. (App. 13.) Trial counsel himself now has no memory of the client or the case, much less of any strategies he may have relied on. (*Id.*) The prosecutor in the case likewise has no memory of any such discussion, nor does he have any notes from the case. (*Id.*) The court, in admittedly making a record to explain how an explicitly biased juror was allowed to determine Romero's fate, stated that counsel had said he had a reason – without taking the next step of summarizing, on the record, what such a strategy might be.

Nonetheless, the magistrate judge, in recommending denial of Romero's petition, tried to find support for "a plausible objective basis … for the trial counsel's jury selection decision." (App. 25.) Trial counsel's bare, self-serving statement, proffered after jury was sworn in, that he had a reason for failing to object, was sufficient to establish for the magistrate judge that "trial counsel believed this was a juror who, after actually hearing the case, would in fact be able to set aside any preconceived notions, follow the court's instructions, and decide the case on the evidence, without bias against his

client." (*Id.*) In other words, the court below denied Romero's claim on the basis of a theory that trial counsel believed the exact opposite of everything the prospective juror said, and that the trial court heard, observed, and accepted as true. Even if trial counsel had in fact formulated such a belief, he would have done so unreasonably.

Here we have no memory from trial counsel of what he may have been thinking, and no realistic possibility of reconstructing such a memory. Nor do we have any relevant information on the record. Here the district court erred in the attempt to impart a sound strategy on trial counsel without a basis in the evidence, and the Ninth Circuit was unreasonable in affirming its denial of relief. It has been established that "courts may not indulge '*post hoc* rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions." *Harrington v. Richter*, 562 U.S. 86, 109 (2011) (quoting *Wiggins*, 539 U.S. at 526-27). Courts, including this Court, have repeatedly recognized that *Strickland*'s focus means that, "[j]ust as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer." *Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986)). The district court engaged in just the sort of *post hoc* rationalization that is disfavored in the law, and the Ninth Circuit affirmed its improper analysis.

The Ninth Circuit accepted the district court's speculative rationalization of trial counsel's actions because trial counsel had referred to a strategy for his failure to object to a biased juror and presently has no memory of the case, so that the record has not been expanded beyond the transcript. (App. 2.) Courts, however, have found deficient performance solely on the basis of the record at trial. In *Zapata v. Vasquez*, 788 F.3d 1106, 1116 (9th Cir. 2015), the Ninth Circuit found deficient performance, even under the double deference required with AEDPA review, on the basis that the record suggested no strategic basis for counsel's failure to object to the prosecutor's inflammatory statements. Here, counsel's much more serious failure resulted in a structural violation of Romero's rights, and only half the deference was owed to his actions under de novo review. In *Gabaree v. Steele*, 792 F.3d 991, 995 (8th Cir. 2014), as here, trial counsel averred in an evidentiary hearing that she had no memory of the case or the trial, but that she must have had a strategic reason for her failures. The Eighth Circuit, again under doubly-deferential AEDPA review, affirmed the district court's finding of deficient performance because any strategy, in the context of the record at trial, was "invalid." *Id.* at 996. Here, as in *Gabaree*, there is no plausible support in the record for a reasonable strategy that trial counsel has not even offered. The court's attempt to construct a sound strategy, in acknowledged contradiction of the actual record, fails. And the Ninth

Circuit's affirmance of that attempt is in conflict with *Strickland* and serves to violate Romero's rights under the Sixth Amendment.

More importantly, however – as other circuits including the Fifth, Sixth, and Eighth Circuits have found – even if trial counsel did have some sort of a reason, there could be no reasonable tactical basis for trial counsel to fail to challenge a prospective juror who was actually biased against his client's case. *See*, *e.g.*, *Miller v. Webb*, 385 F.3d 666, 675-76 (6th Cir. 2004) ("the decision whether to seat a biased juror cannot be a discretionary or strategic decision. . . . [T]here is no sound trial strategy that could support what is essentially a waiver of a defendant's basic Sixth Amendment right to trial by an impartial jury.") An attorney performs incompetently when his conduct "was unreasonable under prevailing professional norms and . . . the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 3815 (1986); *see also Virgil v. Dretke*, 446 F.3d 598, 609-10 (5th Cir. 2006) (after two venire persons stated they could not be impartial, defendant's counsel was "obligated . . . to use a peremptory or for-cause challenge on these jurors. Not doing so was deficient performance under *Strickland*."). "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." *Armontrout*, 961 F.2d at 755. Trial counsel thus essentially threw the trial at the voir dire stage; even were there any reasonable-seeming strategy

to impute to trial counsel, no strategy could have been reasonable enough to justify a clear violation of Romero's right to a fair trial. Here the Ninth Circuit decision conflicts with decisions of other circuits.

CONCLUSION

Romero was denied the right to an impartial jury and a fair trial by counsel's deficient performance. This Court should grant the petition and order merits briefing, or grant the petition, vacate the Ninth Circuit's order, and remand with instructions to assign a new panel to consider his claim afresh.

Respectfully submitted,

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Interim Federal Public Defender

DATED: November 8, 2019

By: _____
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