

19-8213
No. _____

IN THE
Supreme Court of the United States

JESUS RODRIGUEZ,

Petitioner,

v.

ADMINISTRATOR NEW JERSEY STATE
PRISON, ET AL.,

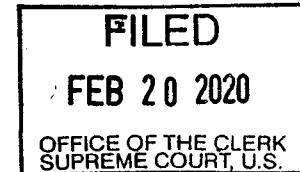
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

ORIGINAL

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QUESTIONS PRESENTED

1. Whether receiving inadequate representation at a first collateral review proceeding that causes the material facts of an ineffective assistance claim not to be fully developed triggers the exception of Martinez v. Ryan, 132 S.Ct. 1309 (2012), despite this Honorable Court's ruling in Cullen v. Pinholster, 563 U.S. 170 (2011) requiring that federal review be confined to the record that was before the state court?
2. Whether allowing a juror who had been intimidated by outsiders to remain on the jury is a denial of a fair trial and a violation of the Sixth Amendment?
3. Whether an attorney's failure to be present for three days during jury selection procedures constitutes ineffective assistance of counsel during a crucial stage?
4. Whether the exclusion of all Hispanics jurors but one, by a State attorney, is a Batson violation?
5. Whether an attorney's failure to advise his client of the right to testify which prevents the client from testifying and present his defense still constitutes ineffective assistance of counsel under precedents of this Honorable Court?
6. Whether Petitioner is entitled to a certificate of appealability ("COA") pursuant to the ruling of this Honorable Court in Buck v. Davis, 137 S. Ct. 759 (2017)?

LIST OF PARTIES

Bruce Davis, Administrator of New Jersey State Prison

Gurbir S. Grewal, Attorney General of New Jersey

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STATUTES

28 U.S.C. § 1254(1).

28 U.S.C. § 2253

OTHER

United States Constitution, Amendment VI

United States Constitution, Amendment XIV

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The Orders of the United States Court of Appeals appear at Appendices A and B to the petition and are unpublished.

The Opinion of the United States District Court appears at Appendix C to the petition and is unpublished.

JURISDICTION

The original date on which the United States Court of Appeals decided my case was October 16, 2019. A motion for rehearing en banc was filed that was denied on January 21, 2020. (APPENDICES A & B).

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Six Amendment rights to a fair trial and impartial jury and to the effective assistance of counsel.

The standard for a certificate of appealability, 28 U.S.C. § 2253.

STATEMENT OF THE CASE

Neither trial counsel nor the trial court advised Petitioner of his right to testify, and never asked him whether or not Petitioner would testify. As a result, Petitioner did not testify even though he wanted to. Twice the State invited the jury to consider against Petitioner the fact that he did not testify. Trial counsel permitted the jury to hear that Petitioner has been in prison before. And the jury was allowed to consider Petitioner's prior criminal record as evidence of his guilt.

Petitioner was assigned a Post-Conviction-Relief ("PCR") attorney with a history of possessing drugs and providing ineffective representation. PCR counsel did not investigate, raise, nor argue this claim even though Petitioner asked him to. Petitioner requested the Office of the Public Defender to remove and replace PCR counsel to no avail. Thus the material facts of the claim were not fully developed due to PCR counsel's inadequate representation.

A similar claim was raised by the codefendants' PCR attorneys and a collective evidentiary hearing was held. Trial counsel for Petitioner testified that he had no recollection of ever advising Petitioner of his right to testify. Petitioner requested to testify at the PCR evidentiary hearing but was deprived from testifying for no reason whatsoever. Petitioner filed a pro se certification and an affidavit to preserve this claim.

The PCR court relied on a sua sponte instruction given

by the trial court to find that Petitioner was advised of his right to testify. The State Appellate Court noted that this claim was not raised by PCR counsel but declined to deeming it procedurally barred. The State Appellate Court rejected the conclusion of the PCR court that the *sua sponte* instruction meant that trial counsel advised Petitioner of his right to testify.

The State Appellate Court did not consider Petitioner's prejudice argument that the State twice told the jury that Petitioner did not testify to rebut the evidence presented against him. Nor Petitioner's prejudice argument that trial counsel permitted the jury to hear that Petitioner has been in prison before. Nor Petitioner's prejudice argument that the jury was permitted to consider Petitioner's prior criminal record as evidence of his guilt since the jury instruction that a prior criminal record should not be used to determine guilt was given specifically in reference to those who did testify.

The State Appellate Court denied relief claiming that Petitioner failed to certify to the error. Despite the fact that Petitioner did certify to the error in his sworn certification and affidavit that he filed in both State courts. Petitioner filed his certification and affidavit in the District Court. Yet the District Court mistakenly concluded that the first time that Petitioner made this claim in sworn form was in his habeas matter and that nothing equivalent was before the state courts.

Petitioner filed a motion for an evidentiary hearing in

the District Court pursuant to this Honorable Court's ruling in Martinez v. Ryan, 132 S.Ct. 1309 (2012) and Trevino v. Thaler, 2013 U.S. LEXIS 3980. But the District Court denied the motion applying Cullen v. Pinholster, 563 U.S. 170, 181-82 (2011) despite the record showing that the material facts of this claim were not fully developed in state court due to PCR counsel's ineffectiveness.

The trial court refused to dismiss a juror who was followed and intimidated by four people from the audience. The State inferred to the jury that the Defense was responsible for what occurred to the juror in an attempt to get Petitioner off, and urged the jury to have the courage to convict. Petitioner's motion for a mistrial was denied.

Trial counsel was absent during the first three days of jury selection. As a result, trial counsel failed to notice the under-representation of Hispanics on the jury panel and could not make a timely objection nor study the jurors' demeanor.

The State dismissed all Hispanic jurors but one in a discriminatory manner. Both the District Court and the Third Circuit Court of Appeals declined to issue a certificate of appealability.

REASONS FOR GRANTING THE PETITION

I. Petitioner Was Deprived Of The Constitutional Right To Testify On His Own Behalf And Present A Defense

Trial counsel did not afford Petitioner his constitutional right to testify on his own behalf in violation of Rock v. Arkansas, 483 U.S. 44 (1987).

i. The Error

Trial counsel never advised Petitioner of his right to testify nor that the choice whether to testify was ultimately his to make. Trial counsel failed to ask the trial court to conduct a voir dire, thus the court never questioned trial counsel nor Petitioner as to whether or not Petitioner would testify. Never informed Petitioner of the jury instruction it could give if in fact he elected not to testify, and gave the jury instruction sua sponte. (PCR Op. at 29 to 36).

PCR counsel did not raise this claim in the PCR court. The PCR attorneys for the codefendants did raise a similar claim and a collective evidentiary hearing was held. Trial counsel for Petitioner testified that he had no recollection of ever advising Petitioner of his right to testify. Petitioner told the PCR court that he wanted to testify at the PCR evidentiary hearing. But the PCR court removed him from the proceeding and deprived him from testifying for no reason whatsoever. Petitioner filed a pro se certification as a closing argument and an affidavit in support of this claim. (Tr. 11/22/11 P.87 L.19 to P.88 L.10, P.125 L.21 to P.126 L.1, P.126 L.19 to 25); (APPENDICES D & E).

The PCR court concluded that the sua sponte jury instruction

given by the trial court meant that Petitioner was advised of his right to offer testimony. The State Appellate Court rejected said conclusion. The State Appellate Court noted that this claim was not raised in the PCR court by PCR counsel, but decided not to deeming it procedurally barred. (PCR Op. at 37; App. Div. PCR Op. at 21 & 23 (footnote)).

The State Appellate Court acknowledged that trial counsel has no recollection of having advised Petitioner of his right to testify, but affirmed alleging that Petitioner failed to certify to the error. But Petitioner did certify to the error in his sworn pro se closing argument and affidavit that he filed in the PCR court. Which was filed to the State Appellate Court as well marked as Da284 to Da293. (App. Div. PCR Op. at 22-23).

Petitioner filed his certification and affidavit in the District Court marked as Pa1 to Pa10. Still, the District Court mistakenly concluded that "the first time that Petitioner made this claim in sworn form was in his habeas matter, in his February 15, 2017 Declaration, and that nothing equivalent was before the state courts." (ECF No. 33 at 13 & n.3). The District Court's fact finding misstates the record because Petitioner made this claim in sworn form in the PCR court by filing a written certified closing argument and an affidavit. (APPENDICES D & E).

ii. Prejudice

The PCR court refused to find prejudice claiming that Petitioner failed to specify what he would have said. But the PCR court did not consider Petitioner's certification and

affidavit in which he stated his exculpating testimony that he wanted to present in his defense. (PCR Op. at 38; APPENDICES D & E). The PCR court also overlooked the fact that it deprived Petitioner from testifying at the PCR evidentiary hearing, that two comments were made by the State against Petitioner not testifying, and that the jury was made aware of Petitioner having a prior criminal record. (Tr. 2/23/00 P.111 L.17 to 22; Tr. 3/10/00 P.41 L.1 to 4, P.45 L.23 to 24; Tr. 11/22/11 P.87 L.19 to P.88 L.10, P.125 L.21 to P.126 L.1, P.126 L.19 to 25).

The State Appellate Court declined to find prejudice alleging that Petitioner did not assert the error, his desire to testify, nor the nature of his proposed testimony either by testifying at the PCR hearing or in a certification. And that said assertions were made only "unsworn." (App. Div. PCR Op. at 22). But the State Appellate Court is in error because Petitioner's pro se closing argument is sworn and made under oath citing Rule 1:4-4(b). Indeed, the last page states that "Pursuant to Rule 1:4-4(b) I certify that the foregoing statements made by me are true, I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment." (See APPENDIX D at last page). The State Appellate Court also overlooked Petitioner's affidavit and the fact that he requested to testify at the PCR evidentiary hearing but was prevented from doing so. (APPENDIX E); (Tr. 11/22/11 P.87 L.19 to P.88 L.10, P.125 L.21 to P.126 L.1, P.126 L.19 to L.25).

The State Appellate Court did not consider Petitioner's

prejudice argument that the State twice invited the jury to consider the fact that Petitioner did not testify to rebuttal the testimony presented against him, despite said comments being a violation of this Honorable Court's ruling in Griffin v. California, 380 U.S. 609 (1965). (Tr. 3/10/00 P.41 L.1 to 4, P.45 L.23 to L.24).

The State Appellate Court did not consider Petitioner's prejudice argument that trial counsel permitted the jury to hear that Petitioner has been in prison before. Nor the fact that the jury was allowed to consider Petitioner's prior criminal record as evidence of his guilt, since the court's instruction that a prior criminal record should not be used to determine guilt was given specifically in reference to those who did testify. (Tr. 2/23/00 P.111 L.17 to 22); (APPENDICES D & E).

II. Petitioner Was denied An Evidentiary Hearing In Violation Of Multiple Precedents From This Honorable Court

This Honorable Court's rulings in Schriro v. Landrigan, 550 U.S. 465 (2007), Martinez v. Ryan, 132 S.Ct. 1309 (2012), and Trevino v. Thaler, 2013 U.S. LEXIS 3980 govern in cases like this one where the facts of a claim of ineffective assistance were not fully developed in state court due to the inadequate representation of a PCR attorney. Which make the District Court's application of Cullen v. Pinholster, 563 U.S. 170, 181-82 (2011) in this case contrary to the law of this Honorable Court.

Here, the PCR counsel assigned to represent Petitioner

in the State PCR proceedings has a past of rendering ineffective representation and has been sanctioned for possessing drugs and professional misconduct. Petitioner told PCR counsel to investigate, raise, and argue this claim but PCR counsel failed to do so. Petitioner requested the Office of the Public Defender to remove and replace PCR counsel, but the request was unsuccessful. (Da199 to Da273).

Due to the PCR attorneys for some of the codefendants raising a similar claim, a collective evidentiary hearing was held. Trial counsel for Petitioner testified that he has no recollection of ever advising Petitioner of his right to testify. Petitioner tried to testify at the PCR evidentiary hearing but the PCR court did not allow him to. Petitioner filed a written pro-se sworn closing argument and an affidavit in an effort to preserve the claim. But in reality the material facts of this claim were not fully developed at the State PCR hearing due to PCR counsel's ineffectiveness, and because the PCR court prevented Petitioner from testifying. (Tr. 11/22/11 P.89 L.3 to P.91 L.4); (APPENDICES D & E).

Petitioner filed a motion for an evidentiary hearing in the District Court invoking the Martinez v. Ryan, 132 S.Ct. 1309 (2012) exception. The District Court relied on the fact that the State Appellate Court did not deem this claim procedurally barred and applied Cullen v. Pinholster, 563 U.S. 170, 181-82 (2011) which requires that federal review be confined to the record that was before the state court. Even though here the record shows that the facts of this claim were not

fully developed due to PCR counsel's ineffectiveness. (ECF No. 31 at 1).

The record also shows that the State Appellate Court did not consider Petitioner's prejudice argument that the State made two comments to the jury about Petitioner's failure to testify and rebut the evidence presented against him. Nor Petitioner's prejudice argument that trial counsel permitted the jury to hear that Petitioner has been previously convicted. Nor Petitioner's prejudice argument that the jury was permitted to consider Petitioner's prior criminal record as evidence of his guilt since the trial court's instruction that a prior criminal record should not be used to determine guilt was given specifically in reference to those who did testify. (App. Div. PCR Op.).

Furthermore, Petitioner received inadequate representation at his first collateral review proceeding which prevented him to fully develop the material facts of this claim. And that triggers the exception of Martinez v. Ryan, 132 S.Ct. 1309 (2012), and makes the Pinhoster's standard of review inapplicable to this case. In fact, this Honorable Court made it clear that the purpose for the ruling in Martinez is to give an opportunity to criminal defendants who were unable to present - or fully develop - a claim of ineffective assistance of trial counsel as a result of having received ineffective representation during the first collateral review proceeding where such claim should have been properly raised. And it would be contrary to that purpose to allow the courts below to apply Pinhoster to cases

like this one.

Petitioner renewed his motion for an evidentiary hearing, and once again the District Court denied the motion. (ECF 33 at 37-38).

In sum, in cases like this one applying Pinhoster is contrary to the rulings of this Honorable Court in Martinez and Trevino.

**III. Violating Multiple Precedents From This Honorable Court
The State Courts Denied Petitioner Of A Fair Trial By An
Impartial Jury**

This Honorable Court has made it clear that a defendant cannot be deprived of a fair trial by an impartial jury, and that outside contacts with a jury raise a presumption of prejudice. Duncan v. Louisiana, 391 U.S. 145, 149 (1968); Sheppard v. Maxwell, 384 U.S. 333, 362 (1966). Mattox v. United States, 146 U.S. 140 (1892); Remmer v. United States, 347 U.S. 227 (1954).

In the present case a juror was followed and intimidated by four people from the audience but the juror kept quiet about it. Two other jurors exposed him, so the juror confessed that he was afraid and thought it was a scare tactic to let him know that he was in danger and needed to watch his back. The juror asked for security. (Tr. 2/18/00 P.156 L.24 to P.160 L.17).

Trial counsel asked the trial court to excuse the juror whom counsel described as paranoid. But the trial court refused to excuse the juror. The State capitalized from the juror's fear and made unfair comments inferring that the Defense was

responsible for what occurred to the juror as an attempt to get Petitioner and the codefendants off, and urged the jury to have the courage to convict. The Defense made a joined motion for a mistrial but the trial court denied it. (Tr. 2/18/00 P.162 L.2 to P.165 L.6); (Tr. 3/10/00 P.102 L.11 to P.103 L.17, P.108 L.4 to P.109 L.14).

IV. Trial Counsel For Petitioner Was Absent During The First Three Days Of Jury Selection In Violation Of Petitioner's Constitutional Right To Counsel

In Gomez v. United States, 490 U.S. 858, 873 (1989) (citing Lewis v. United States, 146 U.S. 370 (1872)), this Honorable Court emphasized that "where the indictment is for a felony, the trial commences at least from time when work of empaneling jury begins."

Here, trial counsel for Petitioner was absent during the first three days of jury selection due to suffering a heart attack. As a result trial counsel failed to notice the under-representation of Hispanics on the jury panel and could not make a timely objection, nor study the jurors' demeanor during the hardship process. Upon his return, trial counsel made a belated objection to the grossly under-representation of Hispanics which the court rejected as untimely. (Tr. 2/10/00 P.51 L.17 to P.59 L.25).

The PCR court denied relief holding that there was no transgression of Petitioner's right to counsel. The Appellate Division concurred. But the State courts decisions, evaluated objectively and on the merit, resulted in an outcome that cannot reasonably be justified under the rulings of this Honorable

Court in Gomez and Lewis. (PCR Op. at 63); (App. Div. PCR Op. at 19).

V. The State Excluded All Hispanic Jurors But One In Violation Of This Honorable Court's Ruling In Batson

The discriminatory exclusion of all Hispanic jurors but one - by the State - is a violation of Petitioner's Sixth and Fourteenth Amendment rights and Batson v. Kentucky, 476 U.S. 79, 90 (1986).

Petitioner went to trial with three Hispanic codefendants and one African-American. The State used 17 peremptory challenges to dismiss Hispanics and Blacks. Hispanics were under-represented in the jury panel to begin with. Out of the three Hispanic jurors, the State dismissed two. Trial counsel motioned for a mistrial concerning the dismissal of Hispanics jurors. The trial court conceded that Petitioner met step one of a Batson claim, but that he could not met the second prong because a Hispanic juror was still seated. Trial counsel reminded the court that Hispanic were under-represented in the jury panel to begin with. Still the court ruled that trial counsel have not met the second Batson prong given the composition of the jury. (Tr. 2/10/00 P.86 L.5 to L.17, P.87 L.20 to P.89 L.11, P.92 L.9 to P.93 L.3).

Batson, however, does not require the State to dismiss all the Hispanic jurors from the jury in order for a *prima facie* claim to exist. Therefore the state court's decision and the District Court ruling are an unreasonable application of Batson.

**VI. This Case Meets The Requirements Under 28 U.S.C. § 2253
For A Certificate of Appealability**

The Orders of the Court of Appeals declining to grant a certificate for appealability are contrary to 28 U.S.C. § 2253. Because this case meets the burden set by this Honorable Court to obtain a certificate of appealability.

In this case Petitioner was denied his constitutional right to testify and present a defense. Petitioner received ineffective assistance of counsel at trial and at the PCR appeal. Petitioner was denied of a fair trial by an impartial jury. Defense counsel was absent for three days during the jury selection process. And the State committed Batson violations. This being so jurists of reason could disagree with the district court's resolution of these constitutional claims and could also conclude that these issues are adequate to deserve encouragement to proceed further. Buck v. Davis, 137 S. Ct. 759 (2017)(slip op., at 13), holding that the COA threshold inquiry is more limited and forgiving than the adjudication of the actual merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jesus Rodriguez

Date: 2-18-20

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