
In the Supreme Court of the United States

ULICES AGUILAR,

Petitioner,

v.

NEIL McDOWELL, WARDEN,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the federal habeas corpus court in this case correctly denied relief on petitioner's claim that trial counsel was ineffective in failing to challenge a juror on the ground of bias.

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STATUTES

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STATEMENT

1. Petitioner, a member of the Sureno gang, harbored animosity for Everado Marquez, a member of the rival Norteno gang, with whom he had fought previously. Pet. App. 8. Co-defendant Miguel Cisneros, a Norteno gang member, similarly felt aggrieved by Marquez for stealing Cisneros' car. *Id.* When the Nortenos refused to act on Cisneros' pleas for retribution, he began to associate with petitioner's Sureno gang. *Id.*

At a social gathering, petitioner drew attention to a handgun tucked into his waistband and stated that he was going to "cap it." Pet. App. 8. Petitioner and Cisneros announced that they were going to Marquez' house, with petitioner saying, "I got your back." *Id.* Cisneros, armed with a rifle, went to Marquez' house, entered, and fired multiple shots at Marquez, killing him. *Id.*

A week later, law enforcement officers found the rifle in petitioner's bedroom. Pet. App. 8. Petitioner admitted that he had accompanied the armed Cisneros to Marquez' house, but claimed that he did not know Cisneros would shoot the victim. *Id.* at 8-9. Petitioner said that he had stayed outside Marquez' house during the shooting. *Id.*

2. Petitioner and Cisneros were charged with murder. Pet. App. 44.¹ During jury voir dire, Juror No. 9 revealed that a family member was a

¹ Petitioner and Cisneros were tried separately. Pet. App. 44. Cisneros' jury found him guilty as charged. *Id.* at 45. Petitioner's first jury found him not guilty of first degree murder, found all special allegations to be not true, and

Norteno, but the juror denied personal involvement with the gang. *Id.* at 62. Juror No. 9 promised to decide the case based on the evidence. *Id.*

Later, during trial, Juror No. 9 sent a note alerting the judge that he/she might know an Alex Sanchez whose name had been mentioned during the proceedings. Pet. App. 63.² The judge reminded the parties that the state planned to use information about Alex Sanchez tangentially with regard to expert testimony on gang issues. Pet. App. 63. The judge questioned Juror No. 9 *in camera*. *Id.* at 63-64. The juror said that he/she previously had been quite close to Sanchez (deceased by the time of trial). *Id.* at 63. When the judge asked if that fact would affect the juror's ability to be fair, the juror said, "If it doesn't have anything to do with him, then no." *Id.* at 63-64. The judge said, "It doesn't"; and the juror reiterated, "If it doesn't, then no." *Id.* After further discussion with defense counsel, the judge again asked the juror, "The fact that he was Norteno-associated and defendant here may be Sureno-associated, is that going to affect your ability to be fair in this trial?" *Id.* The juror at first responded, "Maybe a little bit," but then continued, "I'm not saying that—I still have to see everything, so I can't say." *Id.* The judge said, "That's what we're asking"; and the juror said, "No." The judge asked, "You

hung on the lesser included second-degree murder charge. *Id.* On retrial, petitioner's second jury found him guilty of second-degree murder, and found the sentence-enhancing gang and firearm allegations true. *Id.*

² The state court of appeal referred to Juror No. 9 as "he/she," presumably to protect identity. Pet. App. 62. Respondent will do likewise.

could see the evidence and decide this based on the evidence?” *Id.* The juror answered, “Like, okay, put it this way. Right now I can’t say he’s guilty or not guilty. Just because he’s a Sureno, that doesn’t have nothing to do with me. I don’t claim. My family does, but that has nothing to do with me.” *Id.* The juror further denied he/she would be influenced by the defendant’s status as a Sureno, saying, “I don’t claim, so I don’t care about that,” and promised that he/she still would decide the case fairly. *Id.* at 63-64. Defense counsel did not ask for Juror No. 9 to be removed from the jury. *Id.* at 64.

On the next court day, defense counsel notified the judge that petitioner’s brother claimed to have observed, in the hallway outside the jury room, that Juror No. 9 had a red star with an “N” inside it tattooed on his/her neck and that Juror No. 9 was playing, on a phone, rap music that referred to Surenos in derogatory terms. Pet. App. 64-65, 69. Defense counsel claimed to have also seen the tattoo but not the “N”; similarly, he claimed that he had heard the music but said that he could not discern lyrics or subject matter. *Id.* Defense counsel referred the judge to testimony from a previous trial indicating that Juror No. 9’s tattoo might have been related to the Norteno gang. *Id.* at 65-66. The judge suggested checking the record of Juror No. 9’s statements, saying that he thought the juror had provided a “direct answer” to the question of whether the juror would be influenced by “north versus south.” *Id.* at 66.

Later that day, the judge and both the prosecutor and defense counsel reviewed Juror No. 9’s earlier *in camera* statements. Pet. App. 66-67. The

judge noted the exchange where the juror at first had stated that he/she might be affected “a little bit” but then “back[ed] off” and repeated that he/she would still decide the case fairly based on the evidence because he/she did not “claim.” *Id.* The judge stated, “So I think that’s covered.” *Id.* Defense counsel did not request any further action. *Id.* (Subsequently in petitioner’s trial, a gang expert testified for the prosecution that Norteno gang members identify with being Northerners and have adopted the North Star as a symbol. Pet. App. 65.)

The jury found petitioner guilty of second-degree murder, and further found to be true special allegations that the murder had been committed with a firearm and for the purpose of promoting a street gang. *Id.* at 44-45. After the verdict, petitioner moved for a new trial. Pet. App. 67. He submitted his personal declaration asserting that Juror No. 9 had lied to conceal a bias against petitioner because of the latter’s Sureno gang affiliation. *Id.* Defense counsel also submitted a declaration in which he recited the earlier allegations of petitioner’s brother regarding Juror No. 9’s tattoo and the rap music. *Id.* The judge ruled that no admissible evidence established that the rap music or tattoo were gang-related. *Id.* The judge also said that, even if there were an evidentiary foundation for the allegations, it would not establish misconduct. *Id.* The judge explained that Juror No. 9 had “very frankly” revealed a family member’s gang affiliation, had disclosed the connection with Alex Sanchez, and “was questioned about that and stated that [he/she] could be fair.” *Id.* at 67-

68. Further noting that the defense had earlier been aware of the allegations, and saying “You’re not allowed to gamble on the outcome while secretly preserving the error in the event of an unfavorable verdict,” the judge denied the new-trial motion. *Id.* Petitioner was sentenced to state prison for a term of 40 years to life. *Id.* at 45.

3. On direct appeal, petitioner argued both that the trial court should have dismissed Juror No. 9 *sua sponte* for bias, and that defense counsel had rendered ineffective assistance for failing to request Juror No. 9’s removal and to adequately develop evidence of bias. Pet. App. 68-72. The California Court of Appeal affirmed. *Id.* at 62-72.

On the juror-bias claim, the appellate court concluded that petitioner had not established that Juror No. 9 harbored a concealed bias or that the juror had failed to disclose relevant information. *Id.* at 68-69. The court explained that the allegation regarding the rap music and the tattoo was inadmissible hearsay. *Id.* The court observed, further, that Juror No. 9 had been forthright with information both during voir dire and during the later trial proceedings, and that the juror had affirmed he/she was not biased and could be fair. *Id.* at 69.

As to the ineffective-assistance claim, the appellate court concluded that petitioner could not overcome the presumption that counsel had acted reasonably in developing a record of bias and in declining to move to dismiss Juror No. 9. Pet. App. 69-72. The court explained that there was no indication

in the record why counsel had not sought to remove Juror No. 9 during the trial or why he had not presented evidence in support of the assertions in the new-trial motion. *Id.* at 70. The court noted several tactical reasons why trial counsel rationally might have chosen to litigate the bias issue as he did. *Id.* at 70-71. Because the appellate record shed no light on such questions, the court explained that habeas corpus was the appropriate avenue for litigating the claim and denied the claim on that basis. *Id.* at 71-72.

4. Petitioner filed a petition for a writ of habeas corpus in the California Supreme Court. Pet. App. 202-243. That petition again raised the ineffective-assistance claim regarding Juror No. 9. *Id.* at 224-225. It contained a post-trial declaration from trial counsel, stating that he and petitioner had agreed during the trial that Juror No. 9's relationships with gang members would make him/her "more apt to acquit." *Id.* at 234-235. Moreover, trial counsel averred, petitioner's brother was unwilling to testify regarding the alleged tattoo and rap music observations. *Id.* The state supreme court denied the petition without comment—a ruling on the merits of the claim. *Id.* at 82; *see Harrington v. Richter*, 562 U.S. 86, 99 (2011).

5. Petitioner next filed a petition for a writ of habeas corpus in the federal district court. Pet. App. 244-284. That petition challenged the state court's rejection of both the juror bias claim and the derivative ineffective-assistance claim. *Id.* at 259-260, 262-263, 265, 269. On the juror-bias claim, the court noted that a state-court finding on bias was entitled to a statutory

presumption of correctness. *Id.* at 24; *see* 28 U.S.C. § 2254(e)(1). Giving “the requisite ‘special deference’” to the trial judge’s factual determination as to Juror No. 9, the federal court agreed with the state court that there was no “competent admissible evidence” supporting petitioner’s claim and that petitioner was only speculating that Juror No. 9 was biased. *Id.* at 24-25. On the ineffective-assistance claim, the district court concluded that the lack of evidence of bias also fatally undermined petitioner’s ability to show that trial counsel’s performance was deficient or that prejudice had resulted from that performance. *Id.* at 40.

6. On appeal to the Ninth Circuit, petitioner re-asserted his ineffective-assistance claim regarding Juror No. 9. Pet. App. 141-149 (appellate brief). He argued that counsel’s deficient performance had resulted in a record lacking evidence of Juror No. 9’s bias. *Id.* at 142-143. Petitioner speculated that he could have proved Juror No. 9 was biased if counsel had done more to develop the record. *Id.* at 143-145, 148.

The court of appeals affirmed. Pet. App. 1-3. It held that the state court had reasonably applied *Strickland v. Washington*, 466 U.S. 668, 693 (1984), as petitioner could not meet his burden of showing prejudice under the applicable deferential standard of review. *Id.* at 3 (citing *Harrington v. Richter*, 562 U.S. at 102, 105). The court also concluded that no evidentiary hearing was needed, as the state court had not unreasonably determined the facts. *Id.* at 2-3.

ARGUMENT

In *Strickland v. Washington*, 466 U.S. 668, 693 (1984), this Court held that “actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice.” The claimant’s burden is to show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

Petitioner here seeks review on the question—never raised in the courts below—whether ineffectiveness of counsel leading to what he characterizes as structural error in the form of a biased juror should be treated as creating a “presumption of prejudice” that would require automatic relief under his proposed modification of the *Strickland* prejudice test. Pet. 15-22. He argues (*id.* at 11-12) that his case presents a question to that effect left open by this Court in *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1911-1912 (2017).

As both the state and federal courts below recognized, however—and as petitioner himself apparently recognized below, Pet. App. 138, 142-143—petitioner has never shown that Juror No. 9 in his case was biased. Nor has he shown—and none of the state or federal courts below concluded—that trial counsel acted incompetently. So the essential predicates for the question petitioner seeks to present are absent from his case. Further, the novel nature of the *Strickland* modification he proposes makes the *Weaver*-related question inappropriate for federal habeas review of a state conviction, where the basis

for federal relief excludes new rules of law but instead is limited, by 28 U.S.C. § 2254(d), to the law as already clearly established by this Court at the time of the state court ruling.

1. Before the proposed question modifying the *Strickland* prejudice test could arise in this case, petitioner would have to show the question's essential predicates: that trial counsel (a) unreasonably failed to object to (b) a biased juror. But petitioner has failed to make either showing.

a. Most obviously, the record does not show that Juror No. 9 was biased on account of the alleged affinity with the Norteno gang. To the contrary, the state trial judge necessarily credited the juror's affirmation that he/she did not have any personal commitment to the gang and would fairly consider the case based on the evidence, Pet. App. 66-69; and the district court correctly recognized that as a finding of fact entitled to the § 2254(e)(1) presumption of correctness in federal court, *id.* at 24-25. Nothing in this case, and certainly no "clear and convincing evidence," overcomes that presumption. *See* § 2254(e)(1). As the state courts and the federal district court explained, petitioner did not present admissible, non-hearsay evidence proving Juror No. 9 was biased. *Id.* at 24-25, 68-69. Instead, in attempting to show that Juror No. 9 was affiliated with the Nortenos and thus had lied during voir dire, petitioner relied on hearsay allegations about Juror No. 9's rap music tastes and third-party sightings of his/her star tattoo. *Id.* The state court of appeal found the tattoo and rap music evidence to be inadmissible. *Id.* at 68-69.

Moreover, contrary to petitioner's claim, Juror No. 9 at all times acknowledged that family and friends were affiliated with the Norteno gang, and the juror even took the initiative to notify the judge when the possibility arose that the juror might have been acquainted with a person named during the course of the proceedings. *Id.* at 63-64.

Indeed, although he blames trial counsel for the vacuum, petitioner explicitly argued in the court below that “[t]his absence of admissible evidence is the whole point—or at least a major part—of the ineffective assistance of counsel claim.” Pet. App. 142. Implicitly acknowledging the same point, petitioner sought a federal evidentiary hearing “to determine if the evidence the defense attorney could have presented establishes the facts alleged,” so as to provide the “evidence the federal court and state courts complained were missing.” *Id.* at 142-143 & n.14. But the time and place to produce any such evidence was in the prior state court habeas corpus proceedings, for 28 U.S.C. § 2254(d) prohibits relief unless the state court acted unreasonably on the basis of the evidence presented to it. *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). Regardless, the fact remains that the record in this case contains no proof establishing the essential juror-bias predicate of the *Weaver*-related question petitioner seeks to present.

b. Nor has petitioner shown that his trial counsel acted unreasonably under prevailing professional norms. *See Strickland v. Washington*, 466 U.S. at 668. Defense counsel submitted a declaration to the state habeas court

disclosing tactical reasons for declining to seek removal of Juror No. 9 and practical reasons for his inability to otherwise produce admissible evidence of the juror’s alleged bias. Pet. App. 234-235. He averred that he and petitioner had agreed during the trial that Juror No. 9’s relationships with gang members would make him/her “more apt to acquit,” and that petitioner’s brother was unwilling to testify regarding the alleged tattoo and rap music observations. *Id.* at 234-235. As this Court has explained, there is a presumption that counsel’s tactical decisions are reasonable. *Strickland*, 466 U.S. at 689-690. Here, reinforcing that presumption, the state appellate court noted potential reasons that might have dissuaded reasonable counsel from seeking Juror No. 9’s removal. Pet. App. 70-71. Similarly, the record discloses no evidence available to counsel that would have proved Juror No. 9’s alleged bias. *Id.* Instead, petitioner—who had an opportunity to produce any such evidence in the state habeas corpus proceedings, see *People v. Duvall*, 9 Cal. 4th 464, 474-475 (1994)—has only speculated that there might be more evidence to find. Pet. App. 142-148, 172-173, 189-191, 224-225. Especially in light of the “double deference” accorded to trial counsel’s decisions on federal habeas review, *Yarborough v. Alvarado*, 541 U.S. 652 (2004), speculation cannot overcome the presumption that counsel acted reasonably, see *Strickland*, 466 U.S. at 690.

2. Even if this case turned on the question presented in the petition—despite the paucity of evidence and the lack of judicial findings that counsel performed incompetently or that the juror lied or was biased—it would remain

an inappropriate vehicle for resolving that question. As his petition makes clear, petitioner seeks a new modification of the *Strickland v. Washington* prejudice standard, one that this Court’s prior holdings have not adopted. Pet. 10-12, 17. Under 28 U.S.C. § 2254(d), however, federal habeas relief from a state conviction is not available based on a claim that depends on an extension of the law beyond what this Court’s precedents had clearly established at the time of the underlying state court ruling.

Petitioner notes that some state and lower federal courts have applied a modified prejudice analysis to claims involving trial counsel’s failure to object to structural error. Pet. 8-9; *see also Weaver v. Massachusetts*, 137 S.Ct. at 1907. But this Court has never held that the Constitution requires a modified prejudice analysis for an ineffective-assistance claim premised on counsel’s failure to object to an alleged structural error. So the state court in this case cannot have violated “clearly established law” in a way that could provide a basis for federal habeas relief under § 2254(d)(1). *Carey v. Musladin*, 549 U.S. 70, 74 (2006); *accord, Harrington v. Richter*, 562 U.S. at 101; *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009).

Instead, at the time of the state court ruling in this case, this Court had squarely held that prejudice from ineffective assistance of trial counsel must be affirmatively proved on post-conviction review—i.e., that the record must demonstrate a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466

U.S. at 694; *see Greene v. Fisher*, 565 U.S. 34, 38 (2011) (“clearly established Federal law” refers to this Court’s holdings as of the time of the state court decision in issue). The Court had relaxed the standard only in some unusual circumstances—absent here—involving actual or constructive deprivation of counsel all together. *See id.* at 692; *Mickens v. Taylor*, 535 U.S. 162, 175 (2002); *United States v. Cronin*, 466 U.S. 648, 658-660 (1984). Each state and federal court that addressed petitioner’s claim therefore reasonably employed the unmodified *Strickland* standard. Under § 2254(d), petitioner cannot seek to have his state conviction set aside based on a new extension or modification of *Strickland*. *See also Teague v. Lane*, 489 U.S. 288 (1989) (plurality op.) (federal courts generally may not set aside state conviction based on retroactive application of new constitutional rule of criminal procedure); *accord, Caspari v. Bohlen*, 510 U.S. 383, 396-397 (1994).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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April 10, 2018

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NEIL McDOWELL, WARDEN, *Respondent*.

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Petition for Writ of Certiorari contains 3,242 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 10, 2018
Respectfully submitted,

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In the Supreme Court of the United States

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NEIL McDOWELL, WARDEN, *Respondent*.

CERTIFICATE OF SERVICE BY MAIL

I, Justain P. Riley, Deputy Attorney General, a member of the Bar of this Court hereby certify that on **April 10, 2018**, a copy of the **BRIEF IN OPPOSITION** in the above-entitled case were mailed, first class postage prepaid to:

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I further certify that all parties required to be served have been served.

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