
No. 17-7155

IN THE
SUPREME COURT OF THE UNITED STATES

ULICES AGUILAR, PETITIONER,
vs.
NEIL MCDOWELL, RESPONDENT.

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

REPLY BRIEF

CARLTON F. GUNN
Attorney at Law
975 East Green Street
Pasadena, California 91106

Attorney for the Petitioner

TABLE OF CONTENTS

	<u>PAGE</u>
I. <u>INTRODUCTION</u>	1
II. <u>ARGUMENT</u>	2
A. PETITIONER CANNOT BE DENIED A HEARING BASED ON FAILURE TO PRESENT EVIDENCE IN STATE COURT BECAUSE THE STATE COURTS DENIED HIM THE OPPORTUNITY TO PRESENT EVIDENCE AND THAT DENIAL WAS BASED ON AN UNREASONABLE DETERMINATION OF FACTS.....	2
B. RESPONDENT’S ARGUMENT THAT PETITIONER IS NOT ENTITLED TO RELIEF BECAUSE THE STATE COURT CANNOT HAVE VIOLATED “CLEARLY ESTABLISHED FEDERAL LAW” LACKS MERIT.....	6
III. <u>CONCLUSION</u>	9

TABLE OF AUTHORITIES

CASES

	<u>PAGE</u>
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002).....	4
<i>Brumfield v. Cain</i> , 135 S. Ct. 2269 (2015).....	4, 5, 6
<i>Chapman v. California</i> , 386 U.S. 18 (1967).....	7
<i>Dyer v. Calderon</i> , 151 F.3d 970 (9th Cir. 1998) (en banc).	9
<i>Gomez v. United States</i> , 490 U.S. 858 (1989).....	7, 8
<i>Gray v. Mississippi</i> , 481 U.S. 648 (1987).....	7, 8
<i>Hughes v. United States</i> , 258 F.3d 453 (6th Cir. 2001).	8
<i>In re Harris</i> , 855 P.2d 391 (Cal. 1983).....	3
<i>Lockyer v. Andrade</i> , 538 U.S. 63 (2003).....	7, 9
<i>Miller v. Webb</i> , 385 F.3d 666 (6th Cir. 2004).	8
<i>Oklahoma City v. Tuttle</i> , 471 U.S. 808 (1985).....	6
<i>People v. Duvall</i> , 886 P.2d 1252 (Cal. 1995).....	2, 3
<i>People v. Romero</i> , 883 P.2d 388 (Cal. 1994).....	2, 3, 4, 5

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd)

	<u>PAGE</u>
<i>Rose v. Clark</i> , 478 U.S. 570 (1986).....	7
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	7, 8
<i>Taylor v. Freeland & Kranz</i> , 503 U.S. 638 (1992).....	6
<i>Tumey v. Ohio</i> , 273 U.S. 510 (1927).....	8, 9
<i>United States v. Gonzalez</i> , 214 F.3d 1109 (9th Cir. 2000).	9
<i>United States v. Martinez-Salazar</i> , 528 U.S. 304 (2000).....	9
<i>United States v. Mitchell</i> , 690 F.3d 137 (3d Cir. 2012).....	8
<i>Weaver v. Massachusetts</i> , 137 S. Ct. 1899 (2017).....	9
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000).....	8
<i>Youakim v. Miller</i> , 425 U.S. 231 (1976) (per curiam)..	6

STATUTES AND RULES

28 U.S.C. § 2254(d)(1).	6, 7, 9
28 U.S.C. § 2254(d)(2).	4, 5, 6, 7, 9

REPLY BRIEF

I.

INTRODUCTION

Respondent does not argue that the issue presented is not worthy of review. He simply argues this case is not the right vehicle to decide the issue. First, Respondent argues Petitioner would not be entitled to the evidentiary hearing Petitioner seeks because Petitioner failed to present evidence in state court habeas proceedings. Second, Respondent argues Petitioner would not be entitled to relief because Petitioner's claim depends on an extension of law beyond clearly established law necessary for federal habeas relief.

Respondent is wrong on both counts.

* * *

II. ARGUMENT

A. PETITIONER CANNOT BE DENIED A HEARING BASED ON FAILURE TO PRESENT EVIDENCE IN STATE COURT BECAUSE THE STATE COURTS DENIED HIM THE OPPORTUNITY TO PRESENT EVIDENCE AND THAT DENIAL WAS BASED ON AN UNREASONABLE DETERMINATION OF FACTS.

Respondent's assertion that Petitioner "had an opportunity to produce . . . evidence in the state habeas corpus proceedings, *see People v. Duvall*, 9 Cal. 4th 464, 474-475 (1994)," Brief in Opposition, at 11, ignores the steps of habeas procedure in California courts. There is a multi-step process which requires the presentation of evidence only at the later steps. The first step is the filing of the petition, which "serves primarily to launch the judicial inquiry." *People v. Romero*, 883 P.2d 388, 392 (Cal. 1994). *See also id.* at 391 ("A habeas corpus proceeding begins with the filing of a verified petition for a writ of habeas corpus."). The second step is for the court to "determine[] [whether] the petition states a prima facie case for relief – that is, whether it states facts that, if true, entitle the petitioner to relief – and also whether the stated claims are for any reason procedurally barred." *Id.* The court then either denies the petition or goes on to the third step, which is to issue a writ of habeas corpus or order to show cause. *See id.* There is then a fourth step, which is the respondent filing a return. *See id.* at 392. The process then moves on to a fifth step, which is the petitioner filing a response to the return

that is called a traverse. *See id.*¹ It is after the traverse is filed that the court determines whether to hold an evidentiary hearing. *See id.* at 392.

The petition may be denied at the earliest stage, without the filing of a return and a traverse and without an evidentiary hearing, only if it “does not state a prima facie case for relief,” which means, as noted above, “whether it states facts that, *if true*, entitle the petitioner to relief.” *Id.* at 391 (emphasis added). A petitioner can present documentary evidence such as transcripts and affidavits at this initial stage, but it is at most “reasonably available” documentary evidence that is required. *People v. Duvall*, 886 P.2d 1252, 1258 (Cal. 1995); *In re Harris*, 855 P.2d 391, 397 n.5 (Cal. 1983). It is at the later stages of the process that evidentiary disputes are framed. As explained in *Romero*:

[I]t is through the return and the traverse that the issues are

¹ The state court may, as the state court of appeals did here, request an “informal response,” to which the petitioner may file an informal reply, but that is not a substitute for the return and traverse. As the state supreme court explained in *Romero*:

We find no evidence that the authors of the 1984 amendment of rule 60 [which created the informal response procedure] intended that the informal response procedure could serve as a substitute for the formal return and traverse, nor is the language of the rule hospitable to such a construction. The term “informal” by itself implies that the rule 60 response is not a pleading, does not frame or join issues, and does not establish a “cause” in which a court may grant relief. Although the custodian or real party in interest may choose, after the order to show cause issues, to have the informal response serve as the formal return, the two documents (informal response and return) are formally distinct and are intended to serve different purposes.

Id. at 394.

joined in a habeas corpus proceeding.

Once the issues have been joined in this way, the court must determine whether an evidentiary hearing is needed. If the written return admits allegations in the petition that, if true, justify the relief sought, the court may grant relief without an evidentiary hearing. Conversely, consideration of the written return and matters of record may persuade the court that the contentions advanced in the petition lack merit, in which event the court may deny the petition without an evidentiary hearing. Finally, if the return and traverse reveal that petitioner's entitlement to relief hinges on the resolution of factual disputes, then the court should order an evidentiary hearing.

Id., 883 P.2d at 392-93 (citations omitted).

The determination of whether the petitioner has met the prima facie threshold for going on to the later steps of a return, a traverse, and, if needed, an evidentiary hearing is a factual determination which is subject to federal habeas review under 28 U.S.C. § 2854(d)(2) – for whether it was “based on an unreasonable determination of the facts.” *See Brumfield v. Cain*, 135 S. Ct. 2269 (2015) (holding state court determination that petitioner had not met state law threshold for evidentiary hearing on mental retardation claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), was “based on an unreasonable determination of the facts”).² Just as the petitioner in *Brumfield*, “in seeking an evidentiary hearing, . . . was not obligated to show that he was intellectually disabled” because he “had not yet had the opportunity to develop the record, *id.*, 135 S. Ct. at 2281, Petitioner here was not obligated to show juror bias and deficient attorney performance without an opportunity to develop the record. Applying the state law standard here – as the state law standard was applied in *Brumfield* – it was sufficient for Petitioner to “state[] facts that, *if true*,

² Petitioner made this point in his opening brief, *see* App. A143 n.14, and respondent did not argue the contrary.

entitle[d] [him] to relief,” *Romero*, 883 P.2d at 391 (emphasis added).

The state court’s implicit determination that Petitioner here did not do even this was an unreasonable determination of fact under § 2854(d)(2) just like the state court’s determination the petitioner in *Brumfield* did not meet the threshold there was an unreasonable determination of fact. Petitioner’s allegations established that the Sureno and Norteno gangs were rivals, that the killing here was allegedly a product of that rivalry, and that at least one witness saw the juror with the red star tattoo that signified Norteno gang membership. While the defense attorney asserted the witness who saw the red star said he would not testify, there were two reasons that could not be dispositive at the petition stage. First, under the California habeas procedure described above, such factual claims are subject to resolution not at the initial petition stage but in an evidentiary hearing, unless conceded by the petitioner.³ Second, even if the assertion were true, it ignored the power to compel testimony through a subpoena.

This made the state court determination that there was not even a prima facie case justifying further steps in the habeas process an unreasonable determination of fact under § 2854(d)(2) just like the state court finding in

³ The same would be true of the defense attorney’s claim he discussed the juror’s gang associations with petitioner during the general voir dire prior to the commencement of trial. In any event, what the witness observed about the juror outside the courtroom was far more disturbing. During voir dire in the courtroom – both before and during trial – the juror acknowledged family members with gang ties, but asserted, “I stay away,” “I don’t claim,” and “that doesn’t have nothing to do with me.” App. A290, A298. The witness who told the attorney about the juror’s conduct outside the jury room said the juror was both listening to Norteno gang music and had the red star gang symbol tattooed on her neck.

Brumfield was an unreasonable determination of fact under § 2854(d)(2).

Petitioner here is entitled to a hearing just like the petitioner in *Brumfield* was entitled to a hearing.

B. RESPONDENT’S ARGUMENT THAT PETITIONER IS NOT ENTITLED TO RELIEF BECAUSE THE STATE COURT CANNOT HAVE VIOLATED “CLEARLY ESTABLISHED FEDERAL LAW” LACKS MERIT.

Respondent also argues the petition should be denied because the state court’s ruling “cannot have violated ‘clearly established law’ in a way that could provide a basis for federal habeas corpus relief under § 2254(d)(1).” Brief in Opposition, at 12. Respondent did not make this argument in the lower court, *see* Appellee’s Answering Brief at 15-16, *Ulices Aguilar v. Warren Montgomery*, No. 15-16944 (9th Cir. Feb. 22, 2017), ECF No. 26, and “ordinarily, this Court does not decide questions not raised or resolved in the lower court[s],” *Taylor v. Freeland & Kranz*, 503 U.S. 638, 646 (1992) (quoting *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam)); *but cf.* *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985) (stating that non-jurisdictional defects “should be brought to our attention *no later* than in respondent’s brief in opposition to the petition for writ of certiorari” (emphasis in original)). Based on this practice, the Court could choose not to consider Respondent’s argument.

The argument fails even if the Court does choose to consider it, however – for two reasons. Initially, it is subsection (d)(2) of § 2254 which the state

court ruling violated, not subsection (d)(1), because, as discussed above, there was an unreasonable determination of the facts, specifically, an unreasonable determination that Petitioner did not establish the basic prima facie case the state habeas corpus process requires to merely “launch the judicial inquiry,” *supra* p. 2 (quoting *Romero*, 883 P.2d at 392). And the plain language of subsection (d)(2) of § 2254 does not include the “clearly established Federal law” requirement which the plain language of subsection (d)(1) includes.

Secondly, there was a violation of clearly established Federal law even if subsection (d)(2) is read to require it – or if subsection (d)(1) is applied to Petitioner’s claim, as Respondent seems to suggest. The clearly established Federal law on which a habeas claim may be based can be either a single legal principle or multiple legal principles. *See Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003) (stating that “‘clearly established Federal law’ under § 2254(d)(1) is the governing legal principle *or principles* set forth by the Supreme Court at the time the state court renders its decision” (emphasis added)). Here it is a combination of two clearly established legal principles. First, there is the clearly established law of ineffective assistance of counsel established by *Strickland v. Washington*, 466 U.S. 668 (1984). Second there is a clearly established line of cases recognizing that a biased juror is presumptively prejudicial. *See Gomez v. United States*, 490 U.S. 858, 876 (1989) (“Among those basic fair trial rights that “‘can never be treated as harmless’” is a defendant’s ‘right to an impartial adjudicator, be it judge or jury.’” (Quoting *Gray v. Mississippi*, 481 U.S. 648, 668 (1987), and *Chapman v. California*, 386 U.S. 18, 23 (1967).)); *Rose v. Clark*, 478 U.S. 570, 577 (1986) (“Harmless-error analysis thus presupposes a trial, at which the

defendant, represented by counsel, may present evidence and argument before an impartial judge and jury.”); *United States v. Mitchell*, 690 F.3d 137, 148 (3d Cir. 2012) (citing *Gomez* and *Gray* and also collecting court of appeals cases recognizing biased juror is structural error). *See also Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (biased judge). While the second line of cases addresses prejudice in the more direct harmless error context, the principle readily extends to the ineffective assistance of counsel context when the error goes to the heart of the trial process, as a biased juror does. *Cf. Williams v. Taylor*, 529 U.S. 362, 407 (2000) (holding that state court decision “also involves an unreasonable application of this Court’s precedent if the state court . . . unreasonably refuses to extend [a legal] principle to a new context where it should apply”).

One of the cases cited in the petition – *Miller v. Webb*, 385 F.3d 666 (6th Cir. 2004) – reached this very conclusion. It began by agreeing that clearly established Federal law was required. *See id.* at 671-72. It then pointed to two clearly established principles that required relief. First, it pointed to *Strickland*, which clearly establishes a right to relief when attorney representation falls below an objective standard of reasonableness and there is a reasonable probability the result of the proceeding would have been different but for the attorney’s errors. *See Miller*, 385 F.3d at 672. Second, it pointed to case law clearly establishing that a biased juror is presumptively prejudicial. *See id.* at 676.⁴ Taken together, these two principles clearly established the

⁴ The cases *Miller* cited were court of appeals cases, but those court of appeals cases ultimately lead to this Court’s cases. *See id.* at 676 (citing *Hughes v. United States*, 258 F.3d 453, 463 (6th Cir. 2001), and *United States*

error in the case before the court.⁵

To sum up, clearly established Federal law is not required here in the first place, because the claim is one under subsection (d)(2) of § 2254 rather than subsection (d)(1), and there is clearly established Federal law in any event.

III.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

DATED: April 19, 2018

s/ Carlton F. Gunn

CARLTON F. GUNN
Attorney at Law

v. Gonzalez, 214 F.3d 1109, 1111 (9th Cir. 2000)); *Gonzalez*, 214 F.3d at 1111 (citing *Dyer v. Calderon*, 151 F.3d 970, 973 n.2 (9th Cir. 1998) (en banc), and *United States v. Martinez-Salazar*, 528 U.S. 304 (2000)); *Dyer*, 151 F.3d at 973 n.2 (citing *Tumey v. Ohio*, 273 U.S. at 535).

⁵ To the extent *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017), might raise doubt about this by having left the issue presented here open, *see id.* at 1911-12, *quoted in* Petition, at 16-17, it cannot have affected what was clearly established Federal law at the time of the state court decisions in the present case. This is because *Weaver* was decided after the state court decisions, and it is the law set forth by the Supreme Court “at the time the state court renders its decision” which controls under § 2254(d)(1). *Lockyer v. Andrade*, 538 U.S. at 71-72 (emphasis added).

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ULICES AGUILAR, PETITIONER,

vs.

NEIL MCDOWELL, RESPONDENT.

CERTIFICATE OF SERVICE

I, Carlton F. Gunn, hereby certify that on this 19th day of April, 2018, copies of Petitioner's Reply Brief was mailed postage prepaid to counsel for the Respondent, Deputy Attorney General Justain Riley, at 1300 I Street, Suite 215, P.O. Box 944255, Sacramento, CA 94244-2550.

Respectfully submitted,

April 19, 2018

s/ Carlton F. Gunn

CARLTON F. GUNN
Attorney at Law