NO. 103334-6

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

MANUEL LORENZO MATIAS,
Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 58230-9-II
Kitsap County Superior Court No. 21-1-00776-18

ANSWER TO PETITION FOR REVIEW

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SERVICE		
	PETER B. TILLER 118 North Rock Street P.O. Box 58 Centralia, WA 98531 Email: ptiller@tillerlaw.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED August 5, 2024, Port Orchard, WA _____ **Original e-filed at the Supreme Court; Copy as at left.** **Office ID #91103** kcpa@kitsap.gov

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I. IDENTITY OF RESPONDENT

The respondent State of Washington files this answer through Kitsap County Deputy Prosecutor Jason Ruyf.

II. COURT OF APPEALS DECISION

The State respectfully requests this Court deny review of the Court of Appeals unpublished decision in *State v. Manuel Lorenzo Matias*, No. 58230-9-II (June 4, 2024), a copy of which is attached to the petition for review.

III. COUNTERSTATEMENT OF THE ISSUES

In conformity with well-established principles the Court of Appeals held Matias failed to prove his counsel was deficient for opening voir dire with discussion about immigration status to expose any biased venire members for challenges and that Matias failed to prove prejudice from counsel withholding a motion to strike a venire containing members committed to trials fairly decided without regard to immigration status.

The question presented is whether review should be

declined when none of RAP 13.4(b)'s criteria are met, because:

A. The Court of Appeals' decision Matias received effective assistance of counsel in voir dire aimed at eliminating biased jurors and seating favorable ones does not conflict with any decision of this Court or the Court of Appeals; and

B. There is no significant question of constitutional law in the application of precedent to a presumptively strategic choice to withhold a motion to strike a venire with members who emphatically rejected immigration related concerns shared by three members who were not seated as jurors; and

C. Matias raises an unsupported ineffective assistance of counsel claim which does not present an issue of substantial public interest as it was decided in accordance with precedent.

IV. STATEMENT OF THE CASE

Matias was convicted for a deadly weapon enhanced first degree assault committed against Santos Ramirez Pablo in a manner manifesting deliberate cruelty as well as fourth degree

assault committed against Noliber Luiz Ramirez Cruz. CP 221-23, 267. Matias and his four friends attacked Ramirez Cruz at a swap meet before they chased Ramirez Pablo into a nearby vacant lot where they stabbed him in the chest as well as his upper and lower abdomen while viciously beating him into submission. 2RP 744, 768, 770-71, 824; 3RP 1155-1159; 3RP 1365-72; Ex. 12. Ramirez Pablo was found bleeding out. 3RP 1259-62. He would have almost immediately died if the blade advanced a little farther into his heart. 2RP 749, 986.

Opinions about immigration conveyed by three stricken venire members were criticized by remaining venire members whose emphatic commitment to fairly deciding the case without regard to immigration status made them ideal for service. 2RP 564, 566-67, 579, 583. The victims, like Matias, were part of Bremerton's Guatemalan community. Foundation for Spanish translations critical to the case depended on the fluency of a testifying detective, who grew up in a Spanish-speaking family that immigrated from Venezuela and the fluency of a deputy

developed from being raised by a father who immigrated from Mexico. 2RP 830; 3RP 1017.

Voir dire began with instructions on the importance of a jury free of pre-existing bias. 2RP 522-24. The venire was directed to discharge its duties without regard to national origin. 2RP 521-22. Defense counsel opened voir dire with a discussion about bias. 2RP 564. Several venire members gave examples, like Juror 29, who concluded it is "not giving … an individual a fair shot" when "you're prejudging" based on "conscious or unconscious bias." 2RP 566. Juror 26 described teaching her children about Martin Luther King, the unfairness of segregation and mistreating people for skin color. 2RP 567.

Defense counsel described such racism as "hateful." 2RP 567. Nobody disagreed. *Id*. Defense counsel then described Matias:

> [Y]ou may have noticed Mr. Matias has a translator here. These guys are translators. And he doesn't speak English; he speaks a little bit of English obviously. And he's not from this country.

> He's from Guatemala. …. And some of you may have some biases. Some of you may have some prejudices about this. Now this is touchy, and I think some people would be reluctant to even say yes, I – I am – I think I do, or definitely I do in this environment. … But we want to get to the truth of this and make sure that a defendant … can get a fair trial. …

2RP 567-69. Counsel asked the venire to speak up if anyone had "an opinion about somebody that's not from this country or doesn't speak English." 2RP 569.

Jurors 39, 33, and 61 made remarks cited by Matias as panel-tainting. *Id*. Juror 39 shared bias against illegal immigrants, perceiving them to be less law abiding, adding "It's just how I feel." 2RP 570. 2RP 570-71. Those feelings were rejected by Juror 29, who explained "every human deserves a fair trial. Because it doesn't matter where you are living your life." 2RP 572. Juror 3 said immigration is not a jury question. *Id*. 572-73. Juror12 said, "Everybody deserves a fair trial. I don't care where they come from." 2RP 573. Counsel affirmed "[I]t's not relevant for the trial." 2RP 573.

Juror 33 revealed interest in Matias's immigration status. 2RP 574. Juror 61 attributed her concerns to her "basic pool of ignorance." 2RP 574-75. Juror 61 remained confused, acknowledged bias, and felt ill-suited for jury service in the case. 2RP 576.

Juror 58 asked to speak and contrary to No. 33, 39, and 61, No. 58 exclaimed:

> The immigration status is outside the relevance of this case. And so it's not something that is considered in the case.

2RP 577. Juror 15 gave an example of the American basketball star then held by Russia. 2RP 579. Juror 9 affirmed an absence of immigration-based bias. 2RP 579. Juror 39 explained misgivings associated with border-state life she refrained from explaining, and conceded the importance of suppressing bias to be fair. 2RP 581-82.

Juror 2 expressed frustration with these views:

> [W]hether he's – someone's here legally or not, it doesn't matter. If they're in this country, they're a … person and our laws extend to them.

2RP 583. Juror 11 agreed that national origin was "irrelevant." *Id*.

Juror 33 was excused for cause. 2RP 604. Juror 61 was stricken for cause. 2RP 664. Juror 39 was stricken by preemptory challenge. 2RP 646; 705. Juror 28 expressed concern he may nullify in Matias's favor based on a familial connection later denied. He was seated despite the State's peremptory challenge after Matias asserted GR 37. 2RP 613-14, 617-21, 625-29, 703-06.

V. ARGUMENT

THIS COURT SHOULD DENY REVIEW AS MATIAS FAILED TO PROVE THE COURT OF APPEALS ERRED IN HOLDING HE FAILED TO PROVE HIS COUNSEL WAS INEFFECTIVE FOR NOT MOVING TO STRIKE A VENIRE WITH MEMBERS WHO REJECTED IMMIGRATION CONCERNS SHARED BY THREE STRICKEN MEMBERS WHO REVEALED BIAS IN RESPONSE TO DEFENSE COUNSEL'S QUESTIONS.

None of the RAP 13.4(b) factors governing acceptance of review are present in this case. That rule provides a petition for

review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The Court of Appeals correctly applied the *Strickland* test in deciding Matias's counsel appropriately used voir dire to expose bias related to immigration status so he could strike biased members of the panel and retain others committed to unbiased verdicts.

1. The conclusion that Matias received effective assistance of counsel in voir dire aimed at eliminating biased jurors and seating favorable ones does not conflict with any decision of this Court or the Court of Appeals.

Legal principles governing the Sixth Amendment right to effective assistance of counsel were correctly recited by the Court of Appeals with citation to *Strickland* and the controlling cases of this Court. *Matias*, Op., at 23-24 (*citing Strickland v.*

Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); *State v. Estes*, 188 Wn.2d 450, 457-58, 395 P.3d 1045 (2017); *State v. Jones*, 183 Wn.2d 327, 338, 352 P.3d 776 (2015); *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); *State v. Crawford*, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006); *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001); *and State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)).

Included among those principles is the strong presumption counsel's representation was reasonable and conduct capable of being characterized as legitimate trial strategy is not deficient. *Id*. (*citing Kyllo*, 166 Wn.2d at 862). To overcome those tenets a defendant must affirmatively prove prejudice and show more than conceivable effect on a trial's outcome. *Id*. (*citing Crawford*, 159 Wn.2d at 99). Prejudice only exists if there is a reasonable probability that but for counsel's proven deficiency the outcome of the trial would have been different. *Id*. (*citing Kyllo*, 166 Wn.2d at 862). This

standard was not met here.

The lower court resolved each prong of *Strickland's* test in turn. It first held "Matias has failed to meet his burden to show that counsel's performance was deficient," reasoning:

> The record shows that defense counsel was concerned with eliminating any jurors with possible prejudice. Defense counsel opened up the voir dire discussion with questions about bias. Defense counsel then effected the purpose of voir dire by exposing possible biases on the part of potential jurors and challenging them for cause…. This is precisely the purpose of voir dire. Counsel did not perform deficiently.

Matias, Op., at 24 (*citing see State v. Lupastean*, 200 Wn.2d 26, 53, 513 P.3d 781 (2022) (importance of exposing actual or implied bias); *and State v. Davis*, 141 Wn.2d 798, 825, 10 P.3d 977 (2000)). The holding accords with *Davis* where this Court embraced the process of voir dire in selecting an impartial jury as stated in CrR 6.4(b), which provides:

> A voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges…. The judge and counsel may then ask

> the prospective jurors questions touching their qualifications to serve as jurors ….

Davis, 141 Wn.2d at 825. It was sound strategy for counsel to refrain from pursuing dismissal of a venire with members who empathically rejected consideration of immigration status in opposition to the potential bias expressed by three members who were not seated as jurors due to those beliefs. *See Kyllo*, 166 Wn.2d at 862-63.

The Court of Appeals als correctly determined that Matias also did not meet his burden to show he was prejudiced:

> Matias must affirmatively prove prejudice and show more than a "conceivable effect on the outcome" to prevail. *Crawford*, 159 Wn.2d at 99. He has not done so. Instead, he focuses on questionable comments made by prospective jurors and asks the court to infer the remainder of the panel was tainted based on those comments alone, plainly stating that "[t]hese comments cannot have been simply disregarded by those jurors that remained on the panel." Br. of Appellant at 64. We decline to make such an inference. No outside facts were introduced, and it cannot be assumed that the other jurors were tainted by these comments and that therefore Matias's right to a fair trial was prejudiced. Successfully uncovering bias is the purpose of voir dire; we will not

> announce a new rule that doing so requires voir dire to begin again with a new panel.

Matias, Op. at 24-25 (alterations the court's). The lower court's refusal to presume the venire was tainted by the biased remarks of a few stricken members rebuked by a greater number of their fellow members similarly accords with this Court's controlling precedent. As *Davis* recognized:

> [T]here is no constitutional presumption of juror bias for or against members of any particular racial or ethnic groups.

Davis, 141 Wn.2d at 827; *see also, Lupastean*, 200 Wn.2d at 53 ("moving party must show that the juror's nondisclosure was prejudicial to the party's right to a fair trial"). Matias wrongly urged the Court of Appeals to presume prejudice in derogation of precedent and despite considerable countervailing evidence, as that court's summary of voir dire demonstrates:

> Here, multiple jurors explicitly rejected the biased comments. Prospective juror 29 said "what I think is important here is ... that every human deserves a fair trial. Because it doesn't matter where you are living your life and the actions that you're doing, you should still be heard and people ... should be able to look at the laws and listen to a

> defense and receive a fair judgement." 2 RP at 572. When discussing bias and prejudice, the same prospective juror described those concepts as "not giving ... an individual a fair shot" when "you're prejudging" based on "conscious or unconscious" bias. 2 RP at 566.
>
> Some jurors even shared concerns about Matias getting a fair trial based on these comments. Prospective juror 3 said you "shouldn't judge him on his ... immigration [status]. That's not a question that's in front of the jury. The question is whether or not he committed a crime. So I think that if you are already questioning that—if that's going to be something in the back of your head, then—then I think you have a bias ... if you can't follow that." 3 RP at 572-73. In response to prospective juror 3, prospective juror 12 said, "I agree. Everybody deserves a fair trial. I don't care where they come from. ... [I]f I'm traveling in another country[,] ... I'd want people to hear me. And I don't think immigration really plays a part in it at all." 3 RP at 573. Furthermore, prospective juror 26 described teaching her children about Martin Luther King, Jr., the unfairness of segregation, and mistreating people for skin color.

Matias, Op., at 25-26 (alterations the court's). The Court of Appeals rejected Matias's meritless ineffective assistance claim through adherence to this Court's precedent. Review should be denied.

2. There is no significant question of constitutional

law in the straightforward application of precedent to a presumptively strategic choice to refrain from moving to strike a venire containing members who strongly rejected immigration related concerns shared by three members who were not seated as jurors.

This Court resolves open questions of constitutional law while ensuring it is rightly and harmoniously applied by lower courts. *See* RAP 13.4; *In re Arnold*, 190 Wn.2d 136, 150, 410 P.3d 1133 (2018); *State v. Cornwell*, 190 Wn.2d 296, 301, 412 P.3d 1265 (2018). Review should be withheld from fact-bound cases decided through accurate application of this Court's settled precedent. *See Id*.; *see also e.g., Mere Cash v. Maxwell*, 565 U.S. 1138, 132 S. Ct. 611, 612-13 (2012).

Matias incorrectly casts his case as an outlier requiring correction by comparing immigration-related remarks made by the stricken venire members to remarks deemed panel tainting in *Mach v. Stewart*, 137 F.3d 630, 633 (9th Cir. 1997). Yet Matias fails to account for the other members' clear refutation of those personal opinions and for how such opinions have been

correctly deemed insufficient to overwhelm the free will and independent minds of others in a panel. *See State v. Strange*, 188 Wn. App. 679, 687, 354 P.3d 917 (2015).

In that case, involving charges of child molestation, several members of the venire described experiences with that crime. Yet the venire was not tainted since those members neither claimed sexual-abuse expertise nor repeatedly asserted children always tell the truth about molestation as a venire-tainting member did in *Mach*. *Id*.

No remark in Matias's case was coupled with a claim of expertise-backed certainty. Juror 39 added: "It's just how I feel." 2RP 571. Juror 61 acknowledged "ignorance." 2RP 574. The negative reactions of others made Juror 39 feel judged. 2RP 631-32. The absence of prejudice here is far more apparent than in *Avila-Cardenas*, where in voir dire a former officer said charges are typically true. 200 Wn. App. 1025, 2017 WL

3588946, *4 (2017).[1] Retention of the venire was affirmed because the record did not show other members were influenced. *Id*.; *see also State v. Doerr*, 193 Ariz. 56, 969 P.2d 1168, 1173 (1998) (courts do not indulge in guesswork about contamination).

3. Matias raises an unsupported ineffective assistance of counsel claim that does not present an issue of substantial public interest because it was decided in accordance with precedent.

Matias wrongly characterizes his case as an important departure from *Zamora*, where the prosecutor, as representative of the State, undermined equal and impartial justice by injecting racial bias into voir dire. *State v. Zamora*, 199 Wn.2d 698, 710, 512 P.3d 512 (2022). There, the prosecutor posed irrelevant questions about border security, drug smuggling, and undocumented immigrants to highlight Zamora's perceived ethnicity and invoke stereotypes that Hispanic people are criminally and wrongly in the country, involved in criminal

[1] Unpublished; *see* GR 14.1(a).

activities, and pose a threat to the safety of Americans. *Id*., at 713, 719.

The two cases could not be more different. In stark contrast to *Zamora*, the prosecutor here properly conducted himself as defense counsel was joined by vocal venire members in a mutually beneficial effort to eliminate immigration-related bias from Matias's trial. The prevailing sentiment was perhaps best conveyed by Juror 2:

> [W]hether he's – someone's here legally or not, it doesn't matter. If they're in this country, they're a … person and our laws extend to them.

2RP 583.

Matias fails explain why this resounding majority position did not favorably influence the venire. Or why counsel would seek to disband a venire with so many members vocally committed to fair trials free of immigration bias. Such jurors were no less essential to the State, which needed unbiased jurors to credit the testimony of two victims from Matias's Guatemalan community, a detective who immigrated with his

family from Venezuela, and a deputy whose father immigrated from Mexico. The decision in this case no way conflicts with *Zamora*, for in *Zamora* venire members were asked to "make room" in their minds for immigration bias, while here they were implored to root it out. Review should be denied.

VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court deny Matias's petition for review.

V. CERTIFICATION

This document contains 3068 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED August 5, 2024.

Respectfully submitted,

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