No. 18 - _____

IN THE SUPREME COURT OF THE UNITED STATES

ALEJANDRO HERNANDEZ-DELGADO

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

JAMES S. THOMSON
Counsel of Record
732 Addison Street, Suite A
Berkeley, California 94710
Telephone: (510) 525-9123

Attorney for Petitioner
ALEJANDRO HERNANDEZ-DELGADO

QUESTION PRESENTED

Petitioner is Salvadoran. During trial, petitioner argued to the jury that Omar Ruiz or Jason Avendano—neither whom are Salvadoran—had committed the crime.

Following the verdict, petitioner learned that one of his jurors had told the other jurors during deliberations that petitioner was "more guilty" because "he was from El Salvador [and] so many murderers come from El Salvador." The juror said that "people from El Salvador, that's where the gangs start and that's where—the kind of scarier people originate from."

Petitioner moved for a new trial. The trial court denied the motion because the California Evidence Code forbids consideration of evidence "concerning the mental processes" of a juror. Cal. Evid. Code §1150.

After petitioner's trial, this Court held that rules against considering the mental processes of jurors must be set aside with respect to "statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict." *Peña-Rodriguez v. Colordado*, 580 U.S. ___, 137 S.Ct. 855, 869 (2017).

On appeal, petitioner requested remand to the trial court for reconsideration of his motion for new trial and further factual development in light of *Peña-Rodriguez*. The court of appeal refused to remand the case.

This case presents the following question:

I. What fact-finding procedures are required by the Sixth and Fourteenth Amendments when a defendant makes a threshold showing that a juror relied on racial stereotypes in reaching her verdict?

LIST OF PARTIES

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Petitioner, Alejandro Hernandez-Delgado, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Sixth Appellate District.

OPINION BELOW

The opinion of the court of appeal, the highest state court to review the merits, appears as Appendix A. The relevant ruling of the trial court appears as Appendix E.

JURISDICTION

The court of appeal entered its opinion on December 11, 2018. Appendix A. The court of appeal denied rehearing on January 9, 2019. Appendix B. The California Supreme Court denied review on March 13, 2019. Appendix C. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution 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 Fourteenth Amendment to the United States Constitution provides (in relevant part):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law

> which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Trial

1. Charges

Petitioner was charged with the "willful, deliberate, and premeditated murder" of Antonio Garcia. Cal. Pen. Code §§187(a), 189; 1 CT 30–31.[1] He was alleged to have committed the crime for the "benefit of, at the direction of, or in association with a Sureno Criminal Street Gang." Cal. Pen. Code §§186.22(b)(1)(c)186.22(b)(5). 1 CT 31. He was alleged to have personally used a firearm. Cal. Pen. Code §12022.5(a); 1 CT 31.

Petitioner's defense was that either Jason Avendano or Omar Ruiz had been the shooter, not him. *See* 8 RT 2191–2214, 2219–2225 (defense closing argument); *id.* at 2201 ("[Petitioner] got stuck holding the bag, because he wasn't streetwise enough to go get a deal."); 10 RT 2715–2719 (further defense closing argument); *and id.* at 2716 ("It is the defense position that probably Jason [Avendano] committed this crime.").

Mr. Avendano and Mr. Ruiz testified against petitioner. 5 RT 1246–1288 (Avendano); 5 RT 1319–1364 (Ruiz). Mr. Ruiz testified as part of a plea bargain for which he received a nine-year sentence rather than face life in prison. 5 RT

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[1] The Clerk's Transcript on appeal is abbreviated as "CT" and the Reporter's Transcript as "RT" throughout this petition.

1319–1320. Mr. Avendano was granted use immunity with respect to his testimony.[2] 5 RT 1261–1262. Mr. Avendano had been assaulted by the victim in the past. 5 RT 1286.

2. Verdict

One day into deliberations, the jury requested clarification regarding the instructions on accomplice testimony. 2 CT 343; 10 RT 2705. The parties presented further argument regarding the instructions. 10 RT 2711–2719.

Later, the jury announced that it was unable to reach a verdict. 1 CT 190; 10 RT 2723. The jury was split nine to three. 10 RT 2723. The trial court stated that it was "not prepared to find the jury hopelessly deadlocked . . . ." *Id.* The court ordered the jury to continue deliberating. 10 RT 2724.

On the fourth day of deliberations, the jury found petitioner guilty of first degree murder. 1 CT 194. The jury found that petitioner committed the crime for the benefit of a criminal street gang and that he personally used a firearm. *Id.*

3. Motion for New Trial

Following the verdict, a defense investigator met with Juror No. 4. 1 CT 206–207. The juror had been crying as the jury returned its verdict. 1 CT 206. Juror No. 4 told the investigator that one of her fellow jurors "mention[ed] that the fact that [petitioner] was from El Salvador, um, it made her feel he was more guilty because that's—so many murderers come from El Salvador[.]" 1 CT 222, Appendix

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[2] The court later read the jury a stipulation stating that the grant of immunity was unnecessary because the statute of limitations had run. 6 RT 1693.

D at 52. Juror No. 4 said that the juror "made a comment about El Salvadorians [sic] and that, um, people from El Salvador, that's where the gangs start and that's where—the kind of scarier people originate from." 1 CT 231, Appendix D at 61.

Petitioner filed a motion for new trial. 1 CT 209–214. A transcript of the interview with Juror No. 4 was attached. 1 CT 216–232, Appendix D.

Petitioner argued that his constitutional rights to due process, a fair trial, and an impartial jury had been violated. 1 CT 211–214. He alleged that he "did not receive the legal benefit of twelve deliberating jurors[.]" 1 CT 212. He further alleged that a juror made "prejudicial statements regarding [his] country of origin." 1 CT 250. He argued that "[a] statement that a person from El Salvador is 'violent' and, therefore he is guilty, is an inadmissible piece of evidence that a juror may not consider in his deliberation." 1 CT 251. He requested a "formal hearing" to address his allegations. 1 CT 250.

The trial court denied the motion. 1 CT 268; 15 RT; Appendix E. The court found that it could not consider the allegation that one of petitioner's jurors based her verdict on racial stereotypes because of California's rule against considering the "mental processes and subjective reasoning of a juror." 15 RT 4210; *accord id.* at 4206, 4208, 4213, Appendix E at 70, 72, 74, 77 (citing Cal. Evid. Code §1150).

4. Sentence

The trial court sentenced petitioner to 50 years to life in prison. 1 CT 270.

B. Appeal

Petitioner timely filed a notice of appeal. 1 CT 271. He argued that "the trial

court erred in denying the motion for a new trial." Opening Brief at 73, *Hernandez-Delgado*, Case No. H043755. Petitioner argued that remand was required "for a determination as to whether the statement raised in [his] motion for new trial warrants further investigation" in light of this Court's opinion in *Peña-Rodriguez*. *Id.* at 75–76.

Respondent argued that petitioner could not show prejudice because—per Juror No. 4—the other jurors told the offending juror that she "can't use that" in response to her comments about Salvadorans. Respondent's Brief at 43, *Hernandez-Delgado*, Case No. H043755 (citing CT 222, Appendix D at 52).

Petitioner argued in reply that respondent's argument demonstrated the need for further factual development: "[A]ny argument that the juror who made the racially biased remark did not go on to rely on that bias in reaching her verdict is purely speculative due to the trial court's refusal to permit evidence regarding the jurors' mental processes." Reply Brief at 33, *Hernandez-Delgado*, Case No. H043755. Petitioner argued that "[h]ad such an investigation properly been permitted, the juror may well have admitted to relying on her expressed prejudice toward Salvadorans in reaching her verdict." *Id.* at 33–34.

The court of appeal denied the appeal. Appendix A. The court assumed that the juror's remark was admissible and "that it constituted misconduct[.]" Opinion at 34, Appendix A at 35. Rather than remand for a hearing or further factual development to determine whether petitioner was prejudiced by the juror's consideration of his Salvadoran heritage, the court found that there was "no

substantial likelihood that [petitioner] suffered actual harm . . . ." Opinion at 35, Appendix A at 36. The court found that "[w]hile improper, the El Salvador comment was brief, and the juror was immediately reprimanded by other jurors, who said, "'You can't use that.'"" *Id.* (quoting CT 222, Appendix D at 52). The court necessarily held that further factual proceedings were unnecessary to conclude that petitioner was not prejudiced by the juror's professed bias against Salvadorans.

Petitioner sought rehearing. He argued that the court of appeal "should grant rehearing regarding [his] claim under the Supreme Court's opinion in *Peña-Rodriguez v. Colorado*." Petition for Rehearing at 22, *Hernandez-Delgado*, Case No. H043755. Petitioner argued that the court "ignore[d] the emphasis that the Supreme Court placed on the trial court's discretion" by failing to remand for a hearing. *Id.* at 24. The court denied rehearing. Appendix B.

Petitioner raised his arguments before the California Supreme Court. Petition for Review at 9–17, *People v. Hernandez-Delgado*, California Supreme Court Case No. S253507; *see also id.* at 12 ("[T]here were material disputes that could only be resolved by a hearing. Most significantly, there was a dispute as to whether the juror who made the improper remark about petitioner's Salvadoran heritage was affected by her prejudice in reaching a verdict."), *and* 13 ("Remand for a hearing is necessary."). The court denied review. Appendix C.

REASONS FOR GRANTING THE WRIT

"The jury is a central foundation of our justice system and our democracy." *Peña-Rodriguez v. Colorado*, 580 U.S. ___, 137 S.Ct. 855, 860 (2017). "[R]acial

discrimination in the jury system pose[s] a particular threat both to the promise of the [Fourteenth] Amendment and to the integrity of the jury trial." *Id.* at 867. Accordingly, this Court has held that "[a] constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right." *Id.* at 869.

In *Peña-Rodriguez*, this Court articulated the "constitutional rule" in the following terms: "[W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Peña-Rodriguez*, 137 S.Ct. at 869. The Court "committed to the substantial discretion of the trial court" the determination whether this threshold had been reached. *Id.*

The Court in *Peña-Rodriguez* noted that there is a "divergence of authority over the necessity and scope of an evidentiary hearing on alleged juror misconduct." *Peña-Rodriguez*, 137 S.Ct. at 870 (citing 27 C. Wright & V. Gold, Federal Practice and Procedure: Evidence § 6076, pp. 575–578 (2d Ed. 2007)). However, the *Peña-Rodriguez* case "d[id] not ask, and the Court [did not] need [to] address, what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias." *Id.* Petitioner's case reveals the need for

the Court to address that very topic.

This Court should grant the petition for writ of certiorari because the lower courts are split, and many have interpreted *Peña-Rodriguez* in a manner that saps the opinion of its needed strength. The failure to remand for factual development below further contravenes this Court's precedents. This Court should grant the petition because "a state court . . . has decided an important question of federal law in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

A. The Lower Courts Are Split Regarding the Availability of Evidentiary Hearings and Other Fact-Finding Procedures to Adjudicate Allegations of Racial Bias.

The opinion below is the latest example in a growing split in authority regarding the need for investigation into allegations of racial bias in the jury. Many courts, including the court below, have placed significant limitations on the right of defendants to investigate and ultimately prove their allegations that racial bias impacted the verdicts in their cases. These limitations threaten to undermine this Court's holding that racial bias is a "familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Peña-Rodriguez*, 137 S.Ct. at 868.

The states that already had a racial-bias exception to the no-impeachment rule before *Peña-Rodriguez* was decided are split regarding the need for further fact-finding procedures. Many of these states require an evidentiary hearing whenever a credible allegation of racial bias is raised.

The Connecticut Supreme Court requires "direct questioning of the juror

alleged to have made the prejudicial comments" in cases involving "alleged ethnic references to a criminal defendant by a juror . . . ." *State v. Santiago*, 715 A.2d 1, 21 (Conn. 1998). Similarly, the Missouri Supreme Court has held that "if a party files a motion for a new trial alleging there were statements reflecting ethnic or religious bias or prejudice made by a juror during deliberations, the trial court should hold an evidentiary hearing to determine whether any such statements occurred." *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 89 (Mo. 2010).

The South Carolina Supreme Court has held that when "a juror claims prejudice played a role in determining the guilt or innocence of a defendant, investigation into the matter is necessary. To hold otherwise would violate 'the plainest principles of justice.'" *State v. Hunter*, 463 S.E.2d 314, 316 (S.C. 1995) (quoting *McDonald v. Pless*, 238 U.S. 264, 269 (1915)). The Wisconsin Supreme Court has held that "[w]henever it comes to a trial court's attention that a jury verdict may have been the result of any form of prejudice based on race, religion, gender or national origin, judges should be especially sensitive to such allegations and conduct an investigation to 'ferret out the truth.'" *After Hour Welding, Inc. v. Laneil Mgmt. Co.*, 324 N.W.2d 686, 690 (Wis. 1982) (quoting *Morgan v. United States*, 399 F.2d 93, 97 (5th Cir. 1968)). And the Florida Supreme Court has remanded for a more robust hearing where the trial court denied a motion for a new trial after only interviewing the juror who accused other jurors of bias. *Powell v. Allstate Ins. Co.*, 652 So. 2d 354 (Fla. 1995).

In contrast, the District of Columbia hews closer to the court of appeal below

and allows for credible, but otherwise unproven, allegations of racial bias to be dismissed summarily. *See Kittle v. United States*, 65 A. 3d 1144, 1157 (D.C. 2003) ("Nor do we conclude that the trial judge erred or abused her discretion by declining to hold a hearing and admit juror testimony."). So too does Georgia. *Spencer v. State*, 398 S.E.2d 179, 185 (Ga. 1990) ("[A]ssuming the truth of the affidavit, it shows only that two of the twelve jurors possessed some racial prejudice and does not establish that racial prejudice caused those two jurors to vote to convict Spencer and sentence him to die. The trial court did not err by refusing to consider the affidavit."). California has now joined those states in finding that factual investigation is unnecessary in cases involving credible allegations of racial bias. This Court should grant certiorari and hold otherwise.

The federal courts are also fractured. The Fourth Circuit has upheld the denial of a request to even contact the jurors regarding a credible claim of racial bias. *United States v. Birchette*, 908 F.3d 50, 55 (4th Cir. 2018), *petition for writ of certiorari docketed in Birchette v. United States*, U.S. Case No. 17-4450. In contrast, in the Ninth Circuit, an *evidentiary hearing* is required whenever a "colorable claim" of juror bias is raised. *Dyer v. Calderon,* 151 F.3d 970, 974 (9th Cir. 1998).

Moreover, a recent opinion in the Sixth Circuit interpreting *Peña-Rodriguez* generated a dissenting opinion over the propriety of further factual development. The majority found that certain remarks by the jury foreperson "clearly indicated racial bias or hostility," but found that they did not constitute a "clear statement"

that the bias was a "significant motivating factor in [the juror's] vote to convict." *United States v. Robinson*, 872 F.3d 760, 771 (6th Cir. 2017) (quotations omitted). In dissent, Circuit Judge Bernice B. Donald stated that "the evidence of racial animus and harassment presented by Defendants . . . created reasonable grounds to doubt the validity of the jury verdict. I would remand this case to the district court for, at a minimum, an evidentiary hearing on Defendants' claims." *Id.* at 789. This discord reveals the need for more clear standards from this Court describing when, and which, fact-finding procedures are proper.

The experience of Lewis Fisher reveals the need for factual development in cases involving credible allegations of racial bias by the jury. *Fisher v. State*, 690 A. 2d 917 (Del. 1996). Fisher's original motion for a new trial based on racial bias was "denied summarily" by the trial court. *Id.* at 918. On appeal, the Delaware Supreme Court "concluded that the absence of a hearing, on the allegation that the issue of race was improperly considered by one or more jurors, precluded it from effectively reviewing Fisher's 'fair trial' claim. Accordingly, th[e] matter was remanded to the Superior Court for a hearing." *Id.* Following a hearing, the trial court concluded "that Fisher was convicted by less than twelve impartial jurors" and granted a new trial. *Id.* Further factual development was necessary to ascertain effectively whether racial bias played a significant role in the jury's verdict once a credible allegation has been raised.

This Court's precedents further reveal the need for fact-finding procedures in cases of alleged racial bias. In referring to racial bias in the administration of

justice, this Court has held that "[s]ome toxins can be deadly in small doses." *Buck v. Davis*, 580 U.S. ___, 137 S.Ct. 759, 777 (2017). The Court was crystal clear: "it is inappropriate to allow race to be considered as a factor in our criminal justice system." *Id.* at 778. And the Court in *Peña-Rodriguez* held that "[i]t must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons." *Peña-Rodriguez*, 137 S.Ct. at 867. These principles are incompatible with the limitations on evidentiary development created by the decision below and the decisions in other courts.

B. This Case Is an Ideal Vehicle to Resolve the Question Unanswered by *Peña-Rodriguez*—What Minimum Fact-Finding Procedures Are Required to Address an Allegation of Racial Bias by a Juror.

This case is a perfect vehicle to address "what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias." *Peña-Rodriguez*, 137 S.Ct. at 870. Trial counsel requested further factual development in the motion for a new trial. 1 CT 250 ("Defendant is making a basic showing so that he can ask this court for a formal hearing."). Petitioner argued on appeal that further factual development was necessary. Reply Brief at 33–34 ("Had such an investigation properly been permitted, the juror may well have admitted to relying on her expressed prejudice toward Salvadorans in reaching her verdict."); Petition for Rehearing at 25 ("[T]he question is not whether the evidence contained in Juror No. 4's declaration was sufficient to sustain the motion for a new trial. Rather, the question is whether it was sufficient to warrant [an evidentiary] hearing. The plain answer is yes."). The issue of whether fact-finding procedures

are required is therefore "timely and properly raised . . . ." Sup. Ct. R. 10(g)(I).

The court of appeal's opinion cleanly presents the question of whether and when fact-finding procedures are required. The court assumed that the juror's statements regarding petitioner's Salvadoran heritage were admissible, that the statements were improper, and that prejudice would therefore be presumed. Opinion at 34, Appendix A at 35. Nevertheless, the court denied relief after finding that the presumption of prejudice was rebutted on the record below—a record generated without an evidentiary hearing or other fact-finding procedure. Opinion at 34–35, Appendix A at 35–36. This legal posture would allow the Court to address squarely the circumstances in which further factual development is required to adjudicate a credible allegation of racial bias.

Furthermore, the risk that racial bias affected the verdict was particularly strong here. The case was close, and the jury initially deadlocked 9-3. 10 RT 2721. The case turned on whether the jury believed Jason Avendano and Omar Ruiz that it was petitioner—and not one of them—who shot Antonio Garcia. The jury's request for further instruction regarding accomplice testimony shows that they had serious questions about the credibility of Mr. Avendano and Mr. Ruiz. 2 CT 343; 10 RT 2705. The jury heard Mr. Ruiz testify that he was Mexican. 5 RT 1339. The offending juror plainly knew that petitioner was Salvadoran. Thus, when deciding whether Mr. Ruiz or petitioner was more likely to have committed the crime, the juror's belief that "so many murderers come from El Salvador" and that "the kind of scarier people originate from [there]" would have inevitably affected her

determination that it was petitioner who shot Mr. Garcia. 1 CT 222, 231, Appendix D at 52, 61. The statement may have affected other jurors as well.

Because the issue is cleanly presented, and because petitioner has a strong case that he was prejudiced, this case presents an ideal opportunity to decide what kind, and under what circumstances, fact-finding procedures are required to address an allegation that a juror relied on racial stereotypes in reaching a verdict.

C. The Opinion Below is Contrary to this Court's Precedents Regarding the Need to Afford Litigants Adequate Fact-Finding Procedures in Cases Alleging Juror Bias.

"This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. 209, 215 (1982). Petitioner was denied such a hearing in this case because of the trial court's improper application of California's rule that "no evidence is admissible which relates solely to the mental processes and subjective reasoning of a juror." 15 RT 4210, Appendix E at 74; *accord* 15 RT 4206, Appendix E at 70 ("[T]he portions of the interview that has to do with the mental processes of [the jurors] would not be admissible . . . under Evidence Code Section 1150."); *and* 15 RT 4208, Appendix E at 72 ("[Defense counsel is] asking [the court] to go into the mental processes of jurors to determine what they were thinking when they came to their verdict, which the Court's really prohibited from doing.").

Had the trial court known that it could consider the jurors' mental processes as they pertained to racial bias, it would have considered whether to grant petitioner a *Hedgecock* hearing: "[W]hen a new trial motion in a criminal case is

based on allegations of juror misconduct, the trial court may conduct an evidentiary hearing to determine the truth of the allegations." *People v. Hedgecock*, 795 P.2d 1260, 1272 (Cal. 1990); *see also People v. Solorio*, 17 Cal. App. 5th 398, 403–404 (2017) (recounting trial court's decision to hold *Hedgecock* hearing at which court "subpoenaed all 12 jurors to testify and followed a script, asking jurors if they recalled whether the topic came up, if they participated and how many participated in those discussions, how long the discussions were, and whether jurors were admonished"). A *Hedgecock* hearing is held whenever "the trial court, in its discretion, concludes that an evidentiary hearing is necessary to resolve material, disputed issues of fact." *Hedgecock*, 795 P.2d at 1272.

Here, there were material disputes that could only be resolved at a *Hedgecock* hearing or through an analogous fact-finding procedure. Most significantly, there was a dispute as to whether the juror who made the improper remark about petitioner's Salvadoran heritage was affected by her prejudice in reaching the verdict. The prosecutor argued that "the juror says any statement that she deemed to be prejudicial was immediately corrected by the group. . . . Juror No. 4 states that 'No one used prejudice or the defendant's appearance in reaching their verdict.'" 15 RT 4207, Appendix E at 71. Trial counsel responded that "to say that something was said and then somehow [Juror No. 4] can vouch for [the other juror's] thinking that it was corrected, that is just completely illogical. We have no way of knowing." 15 RT 4208, Appendix E at 72; *accord* 1 CT 250 ("The idea that these statements were quickly dismissed without any impact on the verdict is

unrealistic."). But the trial court never attempted to resolve these material disputes because of its erroneous belief that it lacked discretion to consider the mental processes of the juror in question. 15 RT 4208, Appendix E at 72.

The court of appeal denied the trial court the opportunity to exercise its discretion to consider petitioner's allegation of juror bias anew in light of *Peña-Rodriguez*. The court assumed that the juror's statement was admissible and assumed that the juror committed misconduct. Opinion at 34, Appendix A at 35. Nevertheless, the court denied petitioner's request for further factual development in the trial court. Opinion at 35, Appendix A at 36. The court found that "[h]aving reviewed the entire record . . . there is no substantial likelihood that [petitioner] suffered actual harm." *Id.* The holding necessarily rejected petitioner's argument that it was impossible to know whether the offending juror relied on her professed bias against Salvadorans without further factual development.

This Court's precedents teach that some kind of fact-finding procedure was necessary to determine whether petitioner suffered harm from the juror's alleged racial bias. Petitioner's case is similar to *Remmer v. United States*, 347 U.S. 227 (1954). There, Remmer "learned for the first time [after the jury returned its verdict] that during the trial a person unnamed had communicated with a certain juror, who afterwards became the jury foreman, and remarked to him that he could profit by bringing in a verdict favorable to the petitioner." *Id.* at 228. Remmer raised these facts "in a motion for a new trial, together with an allegation that [he] was substantially prejudiced, thereby depriving him of a fair trial, and a request for

a hearing to determine the circumstances surrounding the incident and its effect on the jury." *Id.* As here, the trial court in *Remmer* "denied the motion for a new trial . . . without holding the requested hearing[.]" *Id.* at 229. And the appellate court in *Remmer* "held that the [trial court] had not abused its discretion, since the petitioner had shown no prejudice to him." *Id.*

This Court held that further factual development was necessary to determine whether Remmer was prejudiced by the alleged juror bias: "We do not know from this record, nor does the petitioner know, what actually transpired, or whether the incidents that may have occurred were harmful or harmless." *Remmer*, 347 U.S. at 229. The Court held that "[t]he trial court should not decide and take final action ex parte on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Id.* at 229–230. The Court remanded to the trial court with directions to hold such a hearing. *Id.* at 230.

The court of appeal here contravened *Remmer*, and numerous other principles, by denying petitioner relief without remanding for factual development in the trial court. "If there is one fundamental requisite of due process, it is that an individual is entitled to an opportunity to be heard." *Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (quotation and citation omitted). "Where juror misconduct or bias is credibly alleged, the trial judge cannot wait for defense counsel to spoon feed him every bit of information which would make out a case of juror bias; rather, the judge

has an independent responsibility to satisfy himself that the allegation of bias is unfounded." *Dyer v. Calderon,* 151 F.3d 970, 978 (9th Cir. 1998). "The trial judge['s] predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record." *Wainwright v. Witt*, 469 U.S. 412, 429 (1985).

Under these precedents, remand was required. The juror's statement regarding petitioner's Salvadoran heritage directly related to a propensity to join gangs. 1 CT 231 ("[P]eople from El Salvador, that's where the gangs start and that's where—the kind of scarier people originate from."). Given the significant role that gang violence played in this case, that fact alone is enough to warrant further probing. And contrary to the court of appeal's holding, the record was insufficient to conclude that petitioner had not been prejudiced. Juror No. 4, and by extension the court, had no way of knowing whether the other juror's expressed bias against Salvadorans affected the ultimate verdict. And trial counsel was improperly prevented from developing evidence related to that factual issue by the trial court's application of the non-impeachment rule. 15 RT 4206, 4208, 4210, 4213, Appendix E at 70, 72, 74, 77.

This Court should grant the petition for writ of certiorari because the court of appeal "has decided an important federal question"—whether and when further factual development is required to address a credible allegation of racial bias by a juror—"in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

CONCLUSION

Review of the decision below is necessary to resolve a longstanding conflict in the lower courts regarding when further factual development is required to address allegations that a juror relied on racial stereotypes in reaching her verdict. This case presents the ideal opportunity for this Court to settle that conflict, which it explicitly left unanswered in *Peña-Rodriguez*. *Peña-Rodriguez*, 137 S.Ct. at 870.

Accordingly, petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

DATED: June 8, 2019

Respectfully submitted,

JAMES S. THOMSON
Attorney for Petitioner
ALEJANDRO HERNANDEZ-DELGADO
Counsel of Record

CERTIFICATE OF COMPLIANCE

PURSUANT TO Sup. Ct. R. 33.2(b)

Case No. 18 - _____

I certify that the foregoing petition for writ of certiorari is proportionally spaced, has a typeface of 12 points, is in Century font, is double-spaced, and is 18 pages long.

JAMES S. THOMSON