No. 18-9665

In the Supreme Court of the United States

ALEJANDRO ERNESTO HERNANDEZ-DELGADO,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner moved for a new trial in light of a juror's statement reflecting bias based on national origin. The court of appeal assumed that the statement was admissible and constituted misconduct, giving rise to a presumption of prejudice. The court held that the presumption of prejudice was rebutted on the record before it because, among other things, the statement was made at the start of deliberations and the juror was admonished by other members of the jury. The question presented is:

Whether the court of appeal erred in rejecting petitioner's claim of juror misconduct without remanding for an evidentiary hearing.

DIRECTLY RELATED PROCEEDINGS

California Supreme Court:

People v. Hernandez-Delgado, No. S253507, review denied March 13, 2019 (this case below)

California Court of Appeal, Sixth Appellate District:

People v. Hernandez-Delgado, No. H043755, judgment affirmed December 11, 2018 (this case below)

People v. Hernandez-Delgado, No. H047257, filed September 3, 2019 (pending second direct appeal)

Monterey County Superior Court:

People v. Hernandez-Delgado, No. SS140200A, judgment entered July 12, 2016 (this case below)

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STATEMENT

1. a. In October 2012, petitioner Alejandro Ernesto Hernandez-Delgado, a member of the Sureño gang, and Sureño gang affiliates Jason Avendano and Omar Ruiz drove to a party attended by members of the rival Norteño gang. Pet. App. 3-5. Petitioner confronted Norteño gang member Antonio Garcia and fatally shot him. *Id.* At trial, both Avendano and Ruiz testified for the prosecution. *Id.* at 3-6. The jury convicted petitioner of first-degree murder; found that he had "committed the murder for the benefit of, at the direction of, or in association with a criminal street gang;" and further found that he had personally and intentionally discharged a firearm in the commission of the murder. *Id.* at 9-10.

b. Petitioner moved for a new trial and offered as evidence the transcript of his investigator's recorded interview of Juror No. 4, who had contacted defense counsel after the verdict. Pet. App. 10, 31-32, 60; *see also id.* at 46-63 (transcript). Juror No. 4 told the investigator that she was the last juror to be persuaded of petitioner's guilt, and she attributed her reluctance to convict to her difficulty understanding the concept of reasonable doubt. *Id.* at 47-49. The investigator asked Juror No. 4 whether there had been "any bias or prejudice[] expressed towards [petitioner] that prevented anyone from deliberating." *Id.* at 51. Juror No. 4 answered, "[n]ot that prevented people from deliberating .... [W]hen we first came into the deliberation room, ... everyone just went around to give their initial feelings and in my opinion, many prejud[ic]ial prejudiced things were said, but in every case, they were corrected." *Id.* As an example

of statements that were made in the jury room, Juror No. 4 related that, at the start of deliberations, one female Hispanic juror "mentioned that the fact that [petitioner] was from El Salvador ... it made her feel he was more guilty because ... so many murderers come from El Salvador, but other people right away said, 'You can't use that.' We were pretty good at correcting people." *Id.* at 31, 51-52.

When the investigator asked Juror No. 4 later in the interview about the incident, Juror No. 4 stated that the juror, "at the beginning, had made a comment about El Salvadorians [*sic*] and that ... people from El Salvador, that's where the gangs start and that's where—the kind of scarier people originate from." *Id.* at 60-61. Juror No. 4 added, "to be a hundred percent fair," the juror making the offending statement "did deliberate, did participate and I think ... really did ... do [her] civic dut[y]." *Id.* at 61.

At a hearing on the motion for a new trial, petitioner argued that several of Juror No. 4's observations to the investigator established various kinds of juror misconduct, including "statements made about [Hernandez-]Delgado being violent simply because he's from El Salvador." Pet. App. 68. The prosecutor urged that Juror No. 4's assurance that the jurors were "good at correcting people" constituted evidence that no improper comment during deliberations caused prejudice requiring a new trial. *Id.* at 70-71.

The trial court considered the transcript of Juror No. 4's interview to the extent it revealed statements made by jurors during deliberations, but it

declined to consider Juror No. 4's statements to the extent they concerned jurors' mental thought processes. Pet. App. 74-75 (citing Cal. Evid. Code § 1150(a)). The court noted that "when a statement was made that was improper, the jurors immediately said ... that people said, oh, no, we can't consider that, and they moved along and it wasn't discussed." *Id.* at 72; *see also* 2 Clerk's Transcript 276 (California pattern instruction CALCRIM No. 200, which instructed jurors "to decide what happened[] based only on the evidence that ha[d] been presented to [them] in th[e] trial" and to "not let bias, sympathy, prejudice, or public opinion influence [their] decision," where "[b]ias includes ... bias ... based on ... national origin"). Based on its review of the transcript of Juror No. 4's interview, the court denied petitioner's motion for a new trial. *Id.* at 72-77. The court sentenced petitioner to 50 years to life in prison. *Id.* at 10, 77.

2. On appeal, petitioner argued that *Peña-Rodriguez v. Colorado*, 580 U.S. ___, 137 S. Ct. 855 (2017), which was decided after the trial in this case, had allowed statements reflecting juror racial bias as evidence to impeach the jury's verdict. Pet. C.A. Br. 73-76. Petitioner asked the court of appeal to "remand the case to the trial court for a determination as to whether the statement raised in [his] motion for new trial warrant[ed] further consideration." *Id.* at 75-76.

The court of appeal affirmed. Pet. App. 2-39. The court first observed that section 1150 of the California Evidence Code "'expressly permits, in the

context of an inquiry into the validity of a verdict, the introduction of evidence of statements made within the jury room.'" *Id.* at 33 (quoting *People v. Cleveland*, 25 Cal. 4th 466, 484 (2001)). Although the statute does not permit the introduction of evidence concerning jurors' mental processes, "'statements made by jurors during deliberations are admissible ... when the very making of the statement sought to be admitted would itself constitute misconduct.'" *Id.* at 33-34 (quoting *Cleveland*, 25 Cal. 4th at 484). The court observed that, unlike the juror statements at issue in *Peña-Rodriguez*, "the challenged statement here was made at the outset of deliberations, and the juror was immediately admonished about the statement." *Id.* at 35. The court, however, declined to decide whether *Peña-Rodriguez* compelled the admission of the statement because the court assumed that the statement "was admissible under Evidence Code section 1150 and that it constituted misconduct." *Id.* (internal quotation marks omitted).

Having presumed as a matter of state law the statement's admissibility as evidence of misconduct in the jury room, the court of appeal applied California's rule that evidence of juror misconduct gives rise to a "presumption of prejudice," which is only rebutted by showing "'no substantial likelihood that the complaining party suffered actual harm.'" Pet. App. 35 (quoting *People v. Avila*, 46 Cal. 4th 680, 726 (2009)). Applying that standard and reviewing the entire record, the court of appeal held that the juror's misconduct in making the offending statement had not prejudiced petitioner because the statement,

"[w]hile improper," was "brief, ... the juror was immediately reprimanded by other jurors, ... [t]here was apparently no further discussion about the issue, and Juror No. 4 indicated that lengthy deliberations followed that focused on the legal concepts of reasonable doubt and circumstantial evidence." *Id.* at 35-36.

The court of appeal denied petitioner's request for rehearing. Pet. App. 42. The California Supreme Court denied his petition for review. *Id.* at 44.[1]

ARGUMENT

Petitioner asks this Court to consider the circumstances under which an evidentiary hearing is required under the Sixth Amendment when a defendant learns of a juror's statements reflecting racial or ethnic bias. The court of appeal did not address that federal constitutional question. It declined to remand for a further hearing in light of the record evidence, adduced by petitioner himself, that the juror's offending statement did not affect the outcome of the case. That decision does not conflict with this Court's precedents or with the other decisions petitioner cites. Further review is not warranted.

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[1] After petitioner filed the instant petition with this Court, he filed in the state trial court a petition to unseal identifying information for the members of his jury. The trial court denied that petition, and petitioner has filed a notice of appeal from that denial, which is still pending. *People v. Hernandez-Delgado*, No. H047257 (Cal. Ct. App. filed Sept. 3, 2019).

1. The decision below does not conflict with any decision of this Court. After the trial court proceedings in this case concluded, this Court considered in *Peña-Rodriguez* "whether there is an exception to the no-impeachment rule"—which "assure[s] jurors that ... their verdict ... will not later be called into question based on the comments or conclusions they expressed during deliberations"—when "compelling evidence" exists that a juror's "racial animus was a significant motivating factor in his or her vote to convict." 137 S. Ct. at 861. Answering that question in the affirmative, the Court held "that where 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." *Id.* at 869.

Consistent with that rule, California law permits trial courts to consider evidence of statements that constitute juror misconduct, including statements of the juror's racial or ethnic biases. Cal. Evid. Code § 1150(a); *Cleveland*, 25 Cal. 4th at 484; Pet. App. 35. And although California law generally precludes consideration of evidence showing the effect of such statements on a juror's decision or evidence concerning a juror's mental processes, Cal. Evid. Code § 1150(a), trial courts may consider evidence of jurors' subjective mental processes when addressing claims "that a juror's preexisting bias was concealed on voir dire." *In re Hamilton*, 20 Cal. 4th 273, 298 n.19 (1999) (citing

People v. Hutchinson, 71 Cal. 2d 342, 348 (1969) and *People v. Castaldia*, 51 Cal. 2d 569, 571-572 (1959)); *In re Manriquez*, 5 Cal. 5th 785, 800 (2018); *see also Tapia v. Barker*, 160 Cal. App. 3d 761, 766 (1984) (considering statements during deliberation as evidence of juror racial bias). Likewise, as petitioner acknowledges, California law confers on trial courts the power to order an evidentiary hearing to explore the truth of juror misconduct allegations. Pet. 14-15 (citing *People v. Hedgecock*, 51 Cal. 3d 395, 415 (1990)).

Here, the court of appeal expressly considered the juror's improper statements, and it assumed that those statements constituted juror misconduct, giving rise to a presumption of prejudice. Pet. App. 33-35. While further factual development may have given the trial court a fuller picture of statements made in the jury room, it was not unreasonable for the court of appeal to conclude that additional proceedings were unwarranted in light of the record before it: the juror's improper statement was made at the outset of deliberations, the juror was immediately reprimanded by other jurors, there was no evidence that the statement was referenced again, and the juror reporting the offending statement made clear that the jury's verdict was not based on any impermissible factor. *Id.* at 36; *supra* pp. 1-3.[2]

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[2] The Delaware Supreme Court's summary opinion in *Fisher v. State*, 690 A.2d 917 (Del. 1996), does not describe the evidence of bias in that case as similar to the evidence here, undermining petitioner's suggestion that *Fisher* provides guidance on the "need for factual development" in this case. Pet. 11.

Contrary to petitioner's contention, moreover, the court of appeal's decision to resolve petitioner's claim without a further hearing does not conflict with this Court's decision in *Remmer v. United States*, 347 U.S. 227 (1954). *See* Pet. 16. In *Remmer*, an FBI agent interviewed a juror "in the midst of a trial" to investigate a claim of jury tampering with only the trial judge's and prosecutor's knowledge; neither the defendant nor defense counsel knew of the contacts until after the trial. 347 U.S. at 228-229. This Court observed that "any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is ... deemed presumptively prejudicial." *Id.* at 229. The Court held that the trial judge "should not [have] decide[d] and take[n] final action ex parte on information such as was received in this case," but rather should have held "a hearing with all interested parties permitted to participate." *Id.* at 229-230. By its own terms, then, *Remmer* requires a hearing only on claims of juror tampering and that the hearing not be ex parte. Neither of those principles is implicated here.[3]

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[3] Petitioner has not cited any decision adopting his broad reading of *Remmer* as requiring an evidentiary hearing under circumstances similar to those presented here. Pet. 16-17. His citation to *Smith v. Phillips*, 455 U.S. 209 (1982), is unavailing because that decision held only that a *Remmer* hearing is sufficient to address an allegation of juror bias, not that it is always necessary. *Id.* at 215-218 (rejecting argument that potential juror bias required new trial regardless of outcome of *Remmer* hearing). Moreover, the courts of appeals have recognized that *Remmer* hearings are "unique to the tampering context, where the potential effect on the jury is severe." *Tracey v. Palmateer*, 341 F.3d

2. There is likewise no conflict in the lower courts on the question presented by the petition and reserved in *Peña-Rodriguez* concerning the "'procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias.'" Pet. 7-8 (quoting *Peña-Rodriguez*, 137 S. Ct. at 870). Each of petitioner's cited state decisions mandating an evidentiary hearing (*id.* at 8-9) provided such relief under the auspices of that state's own law. In *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81 (Mo. 2010), for example, the Missouri Supreme Court ordered an evidentiary hearing on allegations of juror anti-Semitism by analogizing to the existing state practice of requiring hearings "to determine whether [a juror's receipt of] extrinsic evidence prejudiced the verdict." *Id.* at 88-89 (citing *Travis v. Stone*, 66 S.W.3d 1, 4 (Mo. 2002)). The Florida Supreme Court similarly required an evidentiary hearing to resolve claims of juror racial bias based on a pre-existing state procedural scheme for resolving claims of juror misconduct. *Powell v. Allstate Ins. Co.*, 652 So. 2d 354, 356-358 (Fla. 1995) (citing *Baptist Hosp., Inc.*

1037, 1044 (9th Cir. 2003); *see also United States v. Garcia*, 182 F.3d 1165, 1170 (10th Cir. 1999); *United States v. Frost*, 125 F.3d 346, 377 (6th Cir. 1997); *United States v. Williams-Davis*, 90 F.3d 490, 501 (D.C. Cir. 1996); *United States v. Chiantese*, 582 F.2d 974, 978-979 (5th Cir. 1978). In addition, even within the small universe of cases to which *Remmer* applies, the courts of appeals have determined that "an allegation of an unauthorized communication with a juror requires a *Remmer* hearing only when the alleged contact presents a likelihood of affecting the verdict"—a likelihood that the trial court here found did not exist. *Frost*, 125 F.3d at 377; *see also United States v. Spano*, 421 F.3d 599, 605 (7th Cir. 2005); *United States v. Taylor*, 562 F.2d 1345, 1366 (2d Cir. 1977).

v. Maler, 579 So. 2d 97, 100-101 & n.1 (Fla. 1991)). The Connecticut Supreme Court invoked its "supervisory authority over the administration of justice" in that State to require evidentiary hearings in "cases in which a defendant alleges that a juror has made racial epithets." *Santiago v. State*, 715 A.2d 1, 18-22 (Conn. 1998). And while the Wisconsin Supreme Court did not identify the specific basis for requiring evidentiary hearings, its reasoning behind the requirement referenced only Wisconsin statutes and "common law." *After Hour Welding, Inc. v. Lanell Mgmt. Co.*, 324 N.W.2d 686, 689-692 (Wis. 1982). Petitioner's final cited case did not even require evidentiary hearings but rather only approved the trial court's use of such a hearing in denying a motion for new trial. *State v. Hunter*, 463 S.E.2d 314, 315-316 (S.C. 1995).[4]

Petitioner has provided little more support for his assertion that some state jurisdictions have explicitly denied a constitutional entitlement to evidentiary hearings on claims of juror racial bias. Pet. 9-10. In *Spencer v. State*, 398 S.E.2d 179, 184 (Ga. 1990), the Georgia Supreme Court refused to consider the proffered evidence of racial bias and therefore had no occasion to determine what evidentiary proceedings would have been required had the evidence been admissible. In *Kittle v. United States*, 65 A.3d 1144 (D.C. 2013),

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[4] After petitioner filed the instant petition, the Washington Supreme Court held that sufficient evidence of racial bias triggers an evidentiary hearing. *State v. Berhe*, 444 P.3d 1172, 1179 (Wash. 2019). Like petitioner's cited cases, *Berhe* rooted its holding in state law. *Id.* (citing *State v. Jackson*, 879 P.3d 307 (Wash. App. 1994)).

the District of Columbia Court of Appeals concluded that an evidentiary hearing was unnecessary after the admission of racial bias evidence, but it did not explicitly consider or reject a constitutional claim of entitlement to such a hearing. *Id.* at 1156-1157.

Equally illusory is petitioner's asserted conflict between the Ninth Circuit on the one hand and the Fourth and Sixth Circuits on the other. *See* Pet. 10-11. Petitioner's claim that the Ninth Circuit requires evidentiary hearings on any "'colorable claim' of juror bias" relies on broad language from *Dyer v. Calderon*, 151 F.3d 970, 974 (9th Cir. 1998). Pet. 10. But after *Dyer*, the Ninth Circuit has emphasized that "'[a]n evidentiary hearing is not mandated *every* time there is an allegation of jury misconduct or bias.'" *United States v. Hanley*, 190 F.3d 1017, 1031 (9th Cir. 1999) (quoting *United States v. Angulo*, 4 F.3d 843, 847 (9th Cir. 1993)). Indeed, the Ninth Circuit has on numerous occasions denied an evidentiary hearing while citing *Dyer* itself. *See, e.g.*, *Sims v. Rowland*, 414 F.3d 1148, 1155-1156 (9th Cir. 2005); *Tracey v. Palmateer*, 341 F.3d 1037, 1044 n.4 (9th Cir. 2003); *United States v. Smith*, 424 F.3d 992, 1011 (9th Cir. 2005).

Petitioner also fails to cite any federal appellate decisions rejecting a constitutional entitlement to an evidentiary hearing on evidence of juror racial bias. *United States v. Birchette*, 908 F.3d 50 (4th Cir. 2018), held that the evidence of juror racial bias in that case did not meet *Peña-Rodriguez*'s standard for admissibility; the Fourth Circuit therefore did not reach the

question of what procedures are required when evidence is admissible under that decision. *Id.* at 59. The same is true of the Sixth Circuit in *United States v. Robinson*, 872 F.3d 760 (6th Cir. 2017). *Id.* at 770-771 (concluding that *Peña-Rodriguez* did not apply because the jurors' biased statements did not motivate their guilty votes).[5]

3. The issue framed in the petition is also not well presented in this case. The decision below did not address whether and under what circumstances an evidentiary hearing is required to comply with federal constitutional guarantees. Indeed, the decision below declined to determine whether the juror's statements even met the standard for admissibility set forth in *Peña-Rodriguez*. Pet. App. 35; *see Peña-Rodriguez*, 137 S. Ct. at 869 (evidence admissible when statement "casts serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict," thus "tend[ing] to show that ... animus was a significant motivating factor in the juror's vote to convict"). Instead, the court of appeal assumed that the juror's improper comments were admissible and reflected misconduct under California law. Pet. App. 35. And because satisfaction of the "threshold showing" for

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[5] As petitioner observes, the dissenting judge in *Robinson* would have allowed the evidence of juror bias and remanded the case "'to the district court for, at a minimum, an evidentiary hearing.'" Pet. 11 (quoting *Robinson*, 872 F.3d at 789 (Donald, J., dissenting)). Judge Donald did not explain whether she would have ordered the evidentiary hearing as a constitutionally required remedy or instead as a supervisory rule of procedure.

admissibility under *Peña-Rodriguez* is "a matter committed to the substantial discretion of the trial court in light of all the circumstances," the trial court's finding of immediate corrective action by other jurors diminishes the likelihood that the offending statement here would meet *Peña-Rodriguez*'s constitutional standard for admissibility. 137 S. Ct. at 869.[6]

Finally, any consideration by this Court of the broader legal question presented in the petition would benefit from further percolation in the lower courts. As petitioner notes (Pet. 7-8), this Court in *Peña-Rodriguez* declined to address the "procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias." 137 S. Ct. at 870. And as explained above, in the two-and-one-half years since that decision was issued, the lower courts have not adopted diverging conclusions regarding that federal constitutional question.

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[6] For example, the evidence that the offending statement affected the verdict here is different from the evidence in *Peña-Rodriguez*, where a juror expressly drew the causal connection between his bias and his verdict, and no evidence existed that any other jurors dissuaded him from relying on his bias to reach his verdict. 137 S. Ct. at 862; *see also United States v. Birchette*, 908 F.3d 50, 59 (4th Cir. 2018) (evidence of juror racial bias "certainly f[e]ll short of the statements presented in *Peña-Rodriguez*, in which a juror allegedly argued for a guilty verdict because the defendant was Mexican").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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