No. 18 - 9665

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

REPLY TO BRIEF IN OPPOSITION TO 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

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INTRODUCTION

A juror professed her belief to fellow jurors that petitioner was "more guilty because" he "was from El Salvador" and "so many murderers come from El Salvador[.]" App. D-52. She said that "people from El Salvador, that's where the gangs start and that's where—the kind of scarier people originate from." App. D-62.

Petitioner has now presented this evidence to three courts—the trial court, the court of appeal, and the California Supreme Court. He has asked each court for further factual development to determine whether the offending juror ultimately relied on her professed racial stereotypes in reaching her verdict and whether her statements affected other jurors. Each court has denied petitioner's request.

The trial court said no because it believed that it was "prohibited" under state law from considering "the mental processes of jurors to determine what they were thinking when they came to their verdict[.]" App. E-72 (relying on Cal. Evid. Code §1150). This Court has since clarified that state laws preventing such consideration must give way when credible allegations of racial bias are involved. *Peña-Rodriguez v. Colorado*, 580 U.S. ___, 137 S.Ct. 855, 869 (2017).

Notwithstanding *Peña-Rodriguez*, the court of appeal said no because it found that there was "no substantial likelihood that [petitioner] suffered actual harm" based on the offending juror's statements. App. A-36. The court necessarily held that the existing record was sufficiently developed for it to reach its conclusion that petitioner had not been prejudiced. And the California Supreme Court said no by silently affirming the court of appeal. App. C-44.

All told, petitioner has been thrice denied the opportunity to ascertain whether the offending juror relied on her professed belief that he was "more guilty" because "he was from El Salvador" in reaching her verdict. He has been denied the opportunity to ascertain whether her professed belief affected her fellow jurors.

This case directly presents the question of what fact-finding procedures are required when a defendant makes a threshold showing of racial bias by a juror. This Court's caselaw shows that more is required than petitioner received. This Court should grant the petition. Sup. Ct. R. 10(c).

ARGUMENT

I. THE QUESTION OF WHAT FACT-FINDING PROCEDURES ARE REQUIRED WHEN A DEFENDANT MAKES A THRESHOLD SHOWING THAT A JUROR RELIED ON RACIAL STEREOTYPES IN REACHING HER VERDICT IS PRESENTED BY THE OPINION BELOW.

The State asserts that the "issue framed in the petition is . . . not well presented in this case." BIO 12; *accord* BIO 5. The State is wrong.

The court of appeal framed the question as whether it should "remand the matter so the trial court can consider Juror No. 4's statements in light of *Pena-Rodriguez*." App. A-31.[1] This framing was consistent with the briefing, in which petitioner argued that "further probing" was required based on *Peña-Rodriguez* and asked the court to "remand the case to the trial court for a determination as to wether the [juror's] statement [that appellant was more guilty because of his Salvadoran heritage] warrants further consideration." AOB 75–76.

[1] Juror No. 4 **is not** the offending juror. Juror No. 4 is the juror who reported the offending juror's statements to defense counsel. App. D.

The court denied petitioner's arguments because it found—having "reviewed the entire record"—that "there is no substantial likelihood that [petitioner] suffered actual harm." App. A-36 (citation omitted). Inherent in this finding was an implicit finding that the existing record was sufficient to make such a determination. After all, a defendant suffers prejudice if even a single juror relies on racial stereotypes in reaching a verdict. *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998).

The court of appeal's conclusion that the record was sufficient to determine whether the offending juror relied on racial stereotypes in reaching her verdict is the subject of the instant petition. Whether explicit or implicit, the court of appeal's opinion addresses the question presented: "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?"[2]

II. THE QUESTION PRESENTED WOULD NOT BENEFIT FROM FURTHER PERCOLATION IN THE LOWER COURTS.

The State argues that "any consideration by this Court of the broader legal question presented in the petition would benefit from further percolation in the lower courts." BIO 13. Not so.

This Court has acknowledged that the "unhappy persistence of both the

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[2] The court's denial of rehearing addressed the question as well. Petitioner argued that it was "error under . . . federal . . . law" for the court to deny his appeal "using the traditional state test for juror misconduct claims." Petition for Rehearing at 22. He argued that the court's analysis was "flawed" because "it prevent[ed] the type of factual development that would have occurred below if not for the trial court's refusal to consider evidence regarding the mental processes of the jurors." Petition for Rehearing at 24. By denying rehearing, the court of appeal expressly rejected these arguments.

practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995). The reality is that defendants are, and will continue to be, convicted by jurors on the basis of racial stereotypes rather than the quality of the evidence against them. This Court has recognized that fighting against racial discrimination in the legal system requires "unceasing efforts." *Batson v. Kentucky*, 476 U.S. 79, 85 (1986). Those unceasing efforts must include the promulgation of guidelines describing what fact-finding procedures are required when a defendant makes a threshold showing that a juror relied on racial stereotypes in reaching her verdict.

The cases cited in the petition demonstrate that, right now, defendants across the country are being provided with varying levels of support in developing credible allegations of racial bias. Many, including petitioner, are being denied basic fact-finding procedures such as the ability to communicate with jurors and the right to an evidentiary hearing. *See, e.g.*, *United States v. Birchette*, 908 F.3d 50, 55 (4th Cir. 2018) (right to interview jurors); *and Kittle v. United States*, 65 A.3d 1144, 1157 (D.C. 2003) (right to evidentiary hearing). And lack of access to fact-finding procedures can, and has, prevented defendants from proving meritorious claims of juror bias. *See, e.g.*, *Fisher v. State*, 690 A.2d 917 (Del. 1996) (allegation of juror bias initially denied without hearing, but granted after hearing held on remand). This Court should settle the law now, before more defendants are harmed.

The State argues that "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.'" BIO 13 (quoting *Peña-Rodriguez*, 137 S. Ct. at 870). But the question presented here was not before this Court in *Peña-Rodriguez*: "This case does not ask, and the Court need not 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. This case asks that question. This Court should grant certiorari to settle it.

III. FURTHER FACTUAL DEVELOPMENT WAS NECESSARY TO DETERMINE WHETHER THE OFFENDING JUROR RELIED ON RACIAL STEREOTYPES IN REACHING HER VERDICT.

The State acknowledges that although "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[.]" BIO 7. The State ignores the unique danger presented by the infiltration of racial bias into jury deliberations.

That the offending juror was reprimanded by her fellow jurors does not show that she did not rely on her prejudice in reaching a verdict. It only shows that she learned she would receive a negative response if she continued to express her views. Juror No. 4 could not vouch for what went on inside the offending juror's mind after she made the statement. Only further fact-finding could reveal whether she relied on her professed bias. Only further fact-finding could reveal whether other jurors were influenced by her remarks and relied on them in reaching their own verdicts.

Indeed, Juror No. 4 likely underplayed the seriousness of the offending juror's conduct. There is a "stigma that attends racial bias [that] may make it difficult for a juror to report inappropriate statements during . . . deliberations. It is one thing to accuse a fellow juror of having a personal experience that improperly influences her consideration of the case . . . . It is quite another to call her a bigot." *Peña-Rodriguez*, 137 S.Ct. at 869. Without further fact-finding, it is impossible to know whether petitioner was convicted by an impartial jury.

IV. THIS COURT'S PRIOR DECISIONS REFLECT THE NEED FOR FURTHER FACTUAL DEVELOPMENT IN THIS CASE.

The State argues that "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)." BIO 8. Not so. The principles underlying *Remmer* apply here. *See Dyer*, 151 F.3d at 974 (citing *Remmer* for general principles regarding necessity of evidentiary hearing).

The State argues that "*Remmer* hearings are unique to the tampering context, where the potential effect on the jury is severe." BIO 8 n.3. The State's argument fails to distinguish *Remmer* in the context of racial bias: "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. Referring to racial bias, the 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). *Remmer* simply cannot be distinguished on the basis of the severity of the effect on the jury in the context of an allegation of racial bias.

The State argues that *Smith v. Phillips*, 455 U.S. 209 (1982) "held only that a *Remmer* hearing is sufficient to address an allegation of juror bias, not that it is always necessary." BIO 8 n.3. *Smith* is not so limited. *See Dyer*, 151 F.3d at 974–975 (citing *Smith* for general principles regarding necessity of evidentiary hearing).

"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*, 455 U.S. at 215. The Court provided *Remmer* as an "example" of this long-held practice. *Id.* The Court has cited *Smith* outside the context of jury tampering. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 420, 444 (2000) (citing *Smith* in case involving allegation that juror concealed bias at *voir dire*). *Smith* supports petitioner's argument that additional factual development was required here.

This Court's precedent shows that due process requires a defendant to be afforded sufficient fact-finding procedures to ensure that he received a fair trial by an impartial jury. *See also Ford v. Wainwright*, 477 U.S. 399, 424 (1986) ("If there is one fundamental requisite of due process, it is that an individual is entitled to an opportunity to be heard."). In light of these principles, the denial of fact-finding procedures below "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

V. THE SPLITS IN AUTHORITY DEMONSTRATE THE NEED FOR THIS COURT'S REVIEW.

The State argues that there is "no conflict in the lower courts" regarding what procedures a trial court must follow in adjudicating an allegation of racial bias. BIO 9. The State's argument runs counter to *Peña-Rodriguez*, in which the Court described "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)). The State is wrong in asserting that no split exists.

A. The Split in the State Courts Regarding the Necessity of Factual Development in the Face of Credible Allegations of Racial Bias in the Jury Is Based on Federal Law.

As support for the assertion that there is no split in authority, the State argues that "[e]ach of petitioner's cited state decisions mandating an evidentiary hearing provided such relief under the auspices of that state's own law." *Id.* (citing Pet. 8–9). The State is wrong, and its argument fails to show the absence of a split.

The cited state court opinions all relied on federal law in holding that allegations of racial bias require factual development. For example, federal law formed the backbone of the Connecticut Supreme Court's holding requiring "direct questioning of the juror alleged to have made the prejudicial comments." *State v. Santiago*, 715 A.2d 1, 21 (Conn. 1998). The court explained: "We so conclude because 'determinations made in . . . hearings [inquiring into allegations of juror bias] will frequently turn upon testimony of the juror in question . . . .'" *Id.* (quoting *Smith*, 455 U.S. at 217 n.7); *see also State v. Hunter*, 463 S.E.2d 314, 316 & n.3 (S.C. 1995) (quoting *McDonald v. Pless*, 238 U.S. 264, 269 (1915)); *and 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)).

The Missouri Supreme Court quoted federal law: "As stated in *United States v. Heller*, 'A racially or religiously biased individual harbors certain negative

stereotypes which, despite his protestations to the contrary, may well prevent him or her from making decisions based solely on the facts and law that our jury system requires.' Such stereotyping has no place in jury deliberations." *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 90 (Mo. 2010) (quoting *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986)). The Florida Supreme Court also relied on *Heller*, quoting the opinion at length before concluding: "We can hardly improve on this commentary." *Powell v. Allstate Ins. Co.*, 652 So.2d 354, 358 (Fla. 1995).

Each of these courts explicitly recognized that the federal Constitution controlled their opinions. *Santiago*, 715 A.2d at 19 ("[A]n allegation that a juror is racially biased strikes at the heart of the defendant's [federal] right to a trial by an impartial jury and the right to equal protection."); *Fleshner*, 304 S.W.3d at 87 ("It is axiomatic that a fair trial in a fair tribunal is a basic requirement of [federal] due process."); *Hunter*, 463 S.E.2d at 316 ("We find allegations of racial prejudice involve [federal] principles of fundamental fairness."); *After Hour Welding*, 324 N.W.2d at 690 ("For even if only one member of a jury harbors a material prejudice, the [federal] right to a trial by an impartial jury is impaired."); *Powell*, 652 So.2d at 358 ("The founding principle upon which this nation was established is that all persons were initially created equal and are entitled to have their individual human dignity respected.").

In *Berhe*, the Washington Supreme Court considered whether "the trial court abused its discretion by failing . . . to conduct a sufficient inquiry before denying Berhe's motion for a new trial without an evidentiary hearing." *State v. Berhe*, 444

P.3d 1172, 1177–1178 (Wash. 2019). The State asserts that "*Berhe* rooted its holding in state law." BIO 10 n.4. Again, the State is wrong.

The court in *Berhe* noted that this Court "has not yet addressed 'what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias' or 'the appropriate standard for determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted.'" *Id.* at 1179 (quoting *Peña-Rodriguez*, 137 S.Ct. at 870). "However," the court explained, "Washington courts have done so, and we do so again in this case." *Id.*[3] Given the *Berhe* court's explicit reference to *Peña-Rodriguez*, the court plainly believed its decision addressed an issue of federal law.

Even the courts that do not mandate further factual development recognize that the federal Constitution controls. *Kittle*, 65 A.3d at 1153 ("[T]he Constitution and federal and state laws unequivocally establish that state-sanctioned discrimination is unlawful and must be eradicated."); *Spencer v. State*, 398 S.E.2d 179, 184 (Ga. 1990) (citing *McCleskey v. Kemp*, 481 U.S. 279 (1987)).

Still, even assuming the state courts had only addressed state law, that fact would not demonstrate the absence of a split requiring this Court's attention. The federal Constitution protects a defendant's right to a fair trial by an impartial jury. U.S. Const. amends. VI, XIV.

Whatever the state courts' reasons for allowing disparate levels of factual

[3] The court held that "as soon as a court becomes aware of allegations that racial bias may have been a factor in the verdict, the court shall take affirmative steps to oversee further inquiry into the matter . . . ." *Berhe*, 444 P.3d at 1180.

investigation into claims of racial bias, the fact remains that the procedures are varied. Given the unique evil created by racial bias in jury deliberations, the level of discord in the state courts frustrates due process. And just as state rules that barred considering the mental processes of jurors could not stand in *Peña-Rodriguez*, state rules that deny further factual development in the face of credible allegations of juror bias should not be allowed to survive here.

B. The Federal Courts Are Split Regarding the Scope of Necessary Fact-Finding in the Face of Credible Allegations of Racial Bias in the Jury.

The State argues that petitioner "fails to cite any federal appellate decisions rejecting a constitutional entitlement to an evidentiary hearing on evidence of juror racial bias." BIO 11. The State's argument distorts the question presented.

Petitioner is not arguing that the courts are split regarding whether an evidentiary hearing is *ever* available to investigate an allegation of racial bias. He argues that the courts are split regarding the threshold level of evidence required to trigger further factual development. Pet. 10–11.

The State argues that 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*. BIO 11 (citing Pet. 10). The State argues that "the Ninth Circuit has on numerous occasions denied an evidentiary hearing while citing *Dyer* itself." *Id.* (citing *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); and *United States v. Smith*, 424 F.3d 992, 1011 (9th Cir. 2005)). The State's citations fail to show that the Ninth Circuit is in accord with the Fourth and Sixth Circuits.

Sims and *Tracey* are both habeas corpus cases subject to the highly deferential standard of 28 U.S.C. §2254(d) (AEDPA). They held only that *Dyer's* standard for granting a hearing did not constitute "clearly established [law] as required by AEDPA." *Sims*, 414 F.3d at 1156; *accord Tracey*, 341 F.3d at 1043 n.4.

Although the courts in *Sims* and *Tracey* read *Dyer* less broadly than petitioner, those interpretations were only *dicta* in light of their holdings under AEDPA.[4] In any event, application of *Sims*, *Tracey*, or *Smith* would still result in greater fact-finding procedures than were provided here or in the Fourth or Sixth Circuits. The court in *Tracey* held that courts must, "consider the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source" in determining whether to hold a hearing. *Tracey*, 341 F.3d at 1044; *accord Sims*, 414 F.3d at 1155; *and Smith*, 424 F.3d at 1011.

Here, the application of that test would have mandated an evidentiary hearing. The content of the allegation is straightforward. According to Juror No. 4, the offending juror stated that she believed petitioner was "more guilty" because "he was from El Salvador . . . ." App. D-52. The seriousness of the allegation—racial bias—could not be higher.[5] *See, e.g.*, *Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious

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[4] Even under AEDPA, Judge Cheryl Lay found that "the majority's refusal to require the trial judge to hold a hearing as to the expressed colorable bias of two jurors . . . . is directly contrary to United States Supreme Court precedent." *Tracey*, 341 F.3d at 1045 (Lay, J., dissenting).

[5] None of *Smith*, *Tracey*, or *Sims* involved an allegation of racial bias.

in the administration of justice."). No party has questioned Juror No. 4's credibility. In contrast, the Fourth and Sixth Circuits have provided far less in response to allegations of racial bias. *United States v. Birchette*, 908 F.3d 50, 55 (4th Cir. 2018); *United States v. Robinson*, 872 F.3d 760, 771 (6th Cir. 2017).

The State argues that the court in *Birchette* "did not reach the question of what procedures are required" when credible allegations of racial bias are raised. BIO 11–12. The State is wrong. The court in *Birchette* explicitly reviewed "the district court's denials of Birchette's request to interview jurors." *Birchette*, 908 F.3d at 55. This review is directly relevant to the question presented here. And under the Ninth Circuit test, a different result would have been reached.

The State acknowledges that "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." BIO 12 n.5. Yet the State urges this Court to disregard *Robinson* because the dissenting Judge "did not explain whether she would have ordered the evidentiary hearing as a constitutionally required remedy or instead as a supervisory rule of procedure." *Id.* The State is wrong.

The dissent in *Robinson* is based on federal Constitutional principles. Judge Donald opened by observing that the "highly deferential nature" of review for abuse of discretion "does not discharge [the court's] responsibility to rectify constitutional errors." *Robinson*, 827 F.3d at 786. "The answer [to a violation of procedural rules] cannot be to disregard Defendants' fundamental constitutional right." *Id.* at 788.

Immediately prior to holding that she would require an evidentiary hearing,

Judge Donald quoted Justice Kennedy for the proposition that a "'juror who allows racial . . . bias to influence assessment of the case breaches the compact [underlying the jury system] and renounces his or her oath.'" *Robinson*, 827 F.3d at 789 (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 153 (1994) (Kennedy, J., concurring)). Judge Donald plainly believed that federal constitutional principles required further factual development of Robinson's allegation of racial bias. Her dissenting opinion underscores the divide below with respect to the proper fact-finding procedures that must be applied in the face of a threshold allegation of racial bias.

C. This Court Should Settle the Important Federal Question of What Level of Fact-Finding Procedures Must Be Provided in Response to a Credible Allegation of Racial Bias.

Underlying much of the opposition brief is an assumption that the current procedures in place are sufficient to safeguard defendants from racial bias in the jury. For example, the State argues that "California law confers on trial courts the power to order an evidentiary hearing to explore the truth of juror misconduct allegations."[6] (citing *People v. Hedgecock*, 51 Cal. 3d 395, 415 (1990)). The State's

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[6] Elsewhere, the State argues that "[c]onsistent with [*Peña-Rodriguez*], California law permits trial courts to consider evidence of statements that constitute juror misconduct, including statements of the juror's racial or ethnic biases." BIO 6 (citing Cal. Evid. Code §1150(a)). Not so.

Petitioner is not arguing that the offending juror's statement constituted misconduct itself. He is arguing that the statement evinces an underlying bias, any reliance on which in reaching a verdict would constitute misconduct. As the State acknowledges, section 1150 expressly forbids a court from considering that question—whether a juror *actually relied* on a statement of racial bias in reaching a verdict. BIO 6. The State nevertheless argues that "trial courts may consider evidence of jurors' subjective mental processes when addressing claims that a juror's preexisting bias was concealed on voir dire." *Id.* The State misses the mark.

argument does not undermine the need for certiorari.

Petitioner does not argue that state and federal courts lack mechanisms that could allow for inquiry into allegations of racial bias in the jury. Petitioner argues that this Court needs to establish when the federal Constitution requires states to provide access to those mechanisms. As the law stands, state and federal courts are applying variable tests that result in vastly different levels of protection from racial bias. To ensure that all defendants are secure in their right to a fair trial by an impartial jury, this Court must settle what minimum fact-finding procedures are constitutionally required in the face of credible allegations of racial bias.

Here, the absence of guidance from the Court led to petitioner's conviction by a juror who professed that he was "more guilty" based on his county of birth. The absence of guidance has prevented petitioner from interviewing the offending juror, let alone obtaining her sworn testimony. "Relying on race to impose a criminal sanction 'poisons public confidence' in the judicial process." *Buck*, 137 S. Ct. at 778 (quoting *Davis v. Ayala*, 576 U.S. ___, 135 S.Ct. 2187, 2208 (2015)). What faith can the public have in a process that sits on its hands in the face of credible evidence that a juror voted for guilt based on the defendant's country of origin?

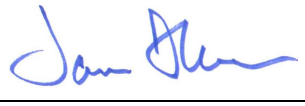
CONCLUSION

Petitioner respectfully requests that the Petition be granted.

Petitioner has not argued that the offending juror concealed her preexisting bias during voir dire. That question is irrelevant to this petition. The question presented asks only what fact-finding procedures are required when a defendant makes a threshold showing that a juror relied on racial stereotypes in reaching her verdict. And more is required than petitioner received.

DATED: October 31, 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 - 9665

I certify that the foregoing reply is proportionally spaced, has a typeface of 12 points, is in Century font, is double-spaced, and is 15 pages long.

JAMES S. THOMSON