No. 19-8271 ORIGINAL

In The
Supreme Court of the United States

LOREN J. LARSON, JR.,
Petitioner,

v.

ALASKA,
Respondent.

On Petition for a Writ of Certiorari
To the Alaska Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

All states and the federal government have one version or another of an evidence rule that generally prohibits the introduction of juror testimony regarding statements made during deliberations when such statements are offered to challenge the jury's verdict. These rules are known informally as the "no impeachment" rules.

The questions presented are: (1) whether a no-impeachment rule constitutionally may bar evidence of juror bias when offered to prove a violation of the Sixth Amendment to an impartial jury, that is, juror bias which is so extreme that almost by definition the jury trial right has been abridged; and (2) can constitutional exceptions to the "no-impeachment" rule be limited to evidence of racial bias only without violating the equal protection clause of the 14th Amendment.

Specifically, do the following statements amount to juror bias so extreme that almost by definition, the jury trial right has been abridged?

1. "I don't care what they say if a man won't testify for himself, he is guilty."
2. "Mr. Larson's attorney said Mr. Larson was not going to testify for himself. That showed Mr. Larson was guilty of the crime."
3. "If he won't testify for himself, he must be guilty."

4. "I remember Joe announcing that if Larson did not take the stand in his own defense, he was guilty and the other three jurors, the ballet dancer, the fireman from Ester and the tall light-haired man all agreeing."
5. "We're supposed to look at everything, his wife's not in the court room supporting him, shows he is guilty."
6. "She can't even support him in the courtroom, he must be guilty."
7. "She couldn't be in the courtroom because she could no look him in the eye, so he must be guilty."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Authorities

Rules

PETITION FOR A WRIT OF CERTIORARI

Petitioner Loren J. Larson, Jr., respectfully petitions for a writ of certiorari to review the judgment of the Alaska Supreme Court.

OPINIONS BELOW

Petitioner was placed in prison for life by a criminal judgment entered on March 11, 1998. The trial court denied Petitioner's motion for relief from judgment on August 21, 2017 (Appendix B). Petitioner then sought review by the Alaska Court of Appeals which denied relief on July 31, 2019 (Appendix A). Petitioner then sought a timely Petition for Rehearing with the Alaska Court of Appeals which was denied on August 19, 2019. Petitioner then sought review with the Alaska Supreme Court, but that court denied hearing his case on December 20, 2019 (Appendix C).

JURISDICTION

The order denying review by the Alaska Supreme Court was entered on December 20, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(A).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Sixth Amendment states:

> 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 defense.

The Fourteenth Amendment states 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.

Alaska Rules of Evidence, Rule 606(b) states:

> (b) *Inquiry Into Validity of Verdict or Indictment.* Upon an inquiry into the validity of a verdict or indictment, a juror may not be questioned as to any matter or statement occurring during the course of the jury's deliberations or to the effect of any matter or statement upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was

> improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes

STATEMENT OF THE CASE

Petitioner, Loren J. Larson, Jr., was tried for and convicted of two counts of first-degree murder and one count of first-degree burglary. Larson's trial commenced with *voir dire*. During *voir dire* the jurors were informed that they could not use a defendant's decision not to testify as proof that the defendant was guilty (Appendix M, 55a). Multiple jurors were questioned directly on this point, and two jurors, Naomi R. and Cameron W., told defense counsel that they understood the court instruction and would not use a defendant's decision not to testify as proof of a defendant's guilt (Appendix M, 56a-74a). However, unknown to the trial court or the parties at the time, these two jurors intentionally lied to conceal the bias *that they would use a defendant's silence as evidence of the defendant's guilt* (Appendix E, 28a-29a; Appendix F,30a-32a; Appendix G, 33a-34a; Appendix I, 37a-41a; Appendix J, 42a-45a).

Several years after Larson was convicted of the crimes, one juror as well as an alternate juror, came forward and told the defense attorney that almost immediately after the jury panel was sworn in to hear Larson's case, Jurors

Naomi R., Cameron W., John S. and Joe H., started proclaiming that any defendant that didn't testify for themselves was guilty (Appendix E, 28a-29a; Appendix F, 30a-32a; Appendix I, 37a-41a; Appendix J, 42a-45a). Specifically, juror Melodee S. stated in her Affidavit that:

> 1. I was a juror on the Mr. Larson homicide case in 1997 and deliberated the case with the other jurors at the end of the trial.
> 2. I feel that during the deliberations I was coerced into voting Mr. Larson guilty by jurors who had made up their mind of Mr. Larson's guilt well before the jury deliberations. I will explain what I mean.
> 3. During the first week of trial, Juror [Joe H.] and a male juror who always wore a black leather jacket[1], talked during most breaks that Mr. Larson was guilty. I have tried to remember everything I heard and will repeat them now
> 4. I heard them say that ***"we're supposed to look at everything, his wife not in the courtroom supporting him, shows he is guilty."***
> 5. I heard them say that ***"Mr. Larson's attorney said Mr. Larson was not going to testify for himself. That showed Mr. Larson was guilty of the crime.***
> 6. During the conversations there were other jurors listening and agreeing with them but I cannot say positively who they were. I know *the dancer*[2] and the *tall blonde male juror* were frequently involved in the conversation. They both acknowledge Mr. Larson's guilt and agreed with the statements. This was being done before the deliberations.
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> ...

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[1] The juror wearing the black jacket was determined to be juror Cameron W. (Appendix I, 39a).

[2] The ballet dancer has been determined to be juror Naomi R. (Appendix I, 38a).

(Appendix E, 28a). And, Juror Stella W. stated in her affidavit that:

1. I was an alternate juror sworn in to hear the case of the State of Alaska vs Loren Larson.
2. During the course of the trial and prior to being excused at the end of the trial as an alternate I made the following observations.

...

5. Mr. Madsen asked the jurors if they would hold it against his client if he chose not to testify. Later I heard [Joe H.] state, ***"anyone who won't testify for himself is guilty."*** This comment was made in the jury room. After it was made another juror commented that he agreed with [Joe H.], that Mr. Larson must be guilty. This other juror was known to me as the fireman from Ester[3]. A third juror who I describe as a young blonde haired man also stated **"if he won't testify for himself he must be guilty."**

...

8. I heard both the firefighter from Ester and [Joe H.] make the statement and talk about how Mr. Larson had to be guilty because his wife wasn't in the courtroom. Specifically, I remember [them] stating **"she can't even support him in the court room, he must be guilty."** I also heard [Joe] H. state that **"she couldn't be in the courtroom because she could not look him in the eye, so he must be guilty."** During this exchange of comments I also heard a juror who is a blonde female dancer state Mr. Larson must be guilty because the wife was not in the courtroom. She was agreeing with [Joe H.] and the fireman.

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[3] The Fireman from Ester has been determined to be juror Cameron W. (Appendix I, 39a).

18. I also heard several jurors comment that they wished Mr. Larson would get up to speak for himself and if not it proved his guilt.

(Appendix F, 30a-31a).

In addition to these four jurors, the trial court also intentionally sat a self-proclaimed biased juror. Juror Amy A., tried to inform the trial court before being sworn in to serve as a juror on Larson's jury that she could not be impartial because *it would be her goal to end the trial as quickly as possible so that she could return to work* , but the trial court dismissed her concerns as trivial (Appendix M, 79a). After being sworn in to serve on Larson's jury, Amy A. vehemently requested the trial court to hear her complaint that she could not follow the court's instructions and remain impartial as a result of her overwhelming desire to return to work at the earliest time (Appendix M, 80a-84a). An additional *voir dire* was held for Amy A. outside of the presence of the other jurors. Defense counsel inquired further into Amy A.'s concerns; however, before defense counsel could finish inquiring into the juror's concerns that she could not remain impartial as a result of her overwhelming desire to return to work at the earliest time, the trial judge interrupted the defense attorney and asked Amy A. leading questions that were designed to improperly rehabilitate her into an acceptable juror. (Appendix M, 83a-84a) The trial judge's improper rehabilitation of juror Amy A. and the trial judge's refusal to dismiss Amy A., even at the end of trial when picking the alternate jurors

(Appendix M, 86a-87a), caused the seating of a fifth biased juror. These five jurors have deprived Larson of his right to an unbiased jury panel.

The Sixth Amendment grants to the accused the right to a fair trial by an *impartial jury*. Fifty-eight years ago, this Court held in *Irvin v. Dowd,* 366 U.S. 717, 722 (1961), that "the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." *id.* (internal citations omitted). Together the Sixth and Fourteenth Amendments prescribe the minimum requirements of a criminal trial, and the failure of a tribunal to afford a defendant "the minimal standards of due process", *id.,* jurisdictionally bars that tribunal from depriving the defendant of their life, liberty, or property. Moreover, where a tribunal lacks jurisdiction to issue a criminal judgment, any such judgment is *void,* in this case for a failure to complete the court with an unbiased jury panel.

In the present case, the Alaska trial court in hearing Larson's post-conviction relief petition did not allow a hearing to be held to determine the credibility of the juror testimony. Instead, the trial court relied on Alaska Rule of Evidence 606(b) to preclude Larson from such a hearing. Therefore, Larson's claim that he has been deprived of his constitutional right to an impartial jury

has been solely made on the grounds of juror affidavits.[4] Instead, Alaska has only asserted that because Alaska Rule of Evidence, Rule 606(b), states that juror testimony is not allowed to impeach the jury's verdict except in situations not present in Larson's case, Larson cannot demonstrate that he was deprived of his constitutional right to an impartial jury through the use of juror affidavits which just happen to be the only available evidence to show the deprivation.

REASONS FOR GRANTING THE WRIT

I. The Question Presented is Profoundly Important

The question before this Court is whether the equal protection clause requires this Court to expand the *Pena-Rodriguez* holding to allow a constitutional exception to the "no-impeachment" rule for juror bias not based on racial bias, and allow juror testimony so that a defendant might have the opportunity to prove that they were denied their Sixth Amendment guarantee to a jury trial by an impartial jury. This issue is so profoundly important that this Court cannot simply pass on the opportunity to address whether the Equal Protection clause of the Fourteenth Amendment will require expanding this

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[4] It should be noted that the juror statements in their affidavits have never been challenged by Alaska as being false statements

Court's *Pena-Rodriguez* holding. If this Court were to pass on this issue, then this Court would simply be condoning the intentional violation by biased jurors of some of the most basic trial rights guaranteed to a criminal defendant. Such behavior by jurors is unacceptable. When jurors conceal a bias in order to be selected as a juror, bias that will ultimately deprive a defendant of their other jury trial guarantees, then our jury trial system can no longer be said to protect the innocent because bias, which has nothing to do with the defendant's guilt or innocence, will cause one or more jurors to find a defendant guilty.

In the case of *Pena-Rodriguez,* that bias was race. Here that bias is exacting a penalty of guilt to be applied to a defendant who does not testify at trial. Neither of these things has anything to do with whether a defendant committed the crime to which they are on trial, and as a result, these biases have the very real likelihood that they will imprison and maybe even put to death an innocent U.S. citizen. Our forefathers who framed our constitution fought to establish bedrock principles to protect the innocent so that they are not wrongfully imprisoned, and, in some cases, even put to death for crimes they did not commit. Thus, Larson implores this Court to take up his case and expand this Court's holding in *Pena-Rodriguez* so that rogue or wayward criminal juries are not left to destroy the bedrock principles that our forefathers enshrined in our constitution.

A. The right to an impartial jury is so fundamental that it is a prerequisite to jurisdiction

The right to an impartial jury is so fundamental that it is a prerequisite to the court's jurisdiction to enter a criminal judgment. This conclusion is garnered from this Court's decisions in *Irvin v. Dowd*, 366 U.S. at 722, *Duncan v. Louisiana*, 391 U.S. 145, 155-156 (1968), and *Johnson v. Zerbst*, 304 U.S. 458, 467-68 (1938). In *Irvin v. Dowd,* this Court held that "the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent", jurors." *id.* A failure to accord a defendant such a hearing "violates even the minimal requirement of due process." *id.* This Court observed that because "only the jury can strip a man of his liberty or his life," a juror who has formed an opinion "cannot be impartial." *id.*

The right to an impartial jury reflects a profound judgment about the way our criminal law should be enforced, and justice administered. This right is granted to criminal defendants in order to prevent oppression by the Government. *Duncan v. Louisiana*, 391 U.S. at 155-156. Our forefathers who framed the Constitution knew from their history and experience that such protections were necessary to protect those accused from "unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority." *id.* at 156. The framers strove to create an independent judiciary, but also insisted upon further protecting a criminal

defendant from arbitrary action by allowing a defendant the right to be tried by an unbiased jury of his peers. This gave the defendant an enormous safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. *id.* The jury trial provisions embodied in the Federal Constitution reflect a fundamental decision about the exercise of official power over a criminal defendant. The framers were reluctant to entrust plenary powers over the life and liberty of the defendant to just a single judge or a group of judges out of fear that unchecked power, so typical of the government in other respects, could deprive an innocent defendant of their liberty or life. The framers thus created in the criminal law the insistence upon community participation in the determination of guilt or innocence. *id.*

Because it is the government which is required to provide an impartial jury panel to a criminal defendant, when a jury panel is infected with a biased juror, the trial court is divested of its jurisdiction by that juror. Jurisdiction is lost because the trial judge cannot complete the court without an impartial jury panel, in compliance with the Sixth Amendment, for a defendant who has not waived his right to a jury trial by an impartial jury. *See, Johnson v. Zerbst,* 304 U.S. at 467-68 (1938); *In re Winship,* 397 U.S. 358, 364 (1970). The reason the juror has this effect on the jurisdiction of the trial court is because,

> [t]he jury is an essential instrumentality—an appendage—of the court, the body ordained to pass upon guilt or innocence. Exercise

> of calm and informed judgment by its members is essential to proper enforcement of law.

Turner v. Louisiana, 379 U.S. 466, 472 (1965). Thus, when a trial court unwittingly seats a biased juror, the court loses jurisdiction to enter a criminal judgment because that juror is "an appendage" of the court. Therefore, any judgment issued as a result of that proceeding is void.

B. A defendant's decision not to testify is immaterial to whether they committed the offense to which they are charged

A defendant's decision not to testify as a witness at his own trial has nothing to do with whether he committed the crime or not. It neither adds to nor subtracts from any evidence that the defendant may have committed the crime charged. In *Carter v. Kentucky,* 450 U.S. 288 (1981), this Court was faced with deciding whether a trial court was required to instruct a jury that a defendant's failure to testify at trial could not be used as an inference of the defendant's guilt. This Court held that pursuant to the Fifth Amendment "a criminal trial judge must give a "no-adverse-inference" jury instruction when requested by a defendant to do so." *id.* at 300. This Court observed "*that a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify.*" *id.* at 301 (emphasis added). This Court explained:

> The penalty was exacted in *Griffin* by adverse comment on the defendant's silence; the penalty may be just as severe when there is no adverse comment, but when the jury is left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt. Even without adverse comment, the members of a jury, unless instructed otherwise, may well draw adverse inferences from a defendant's silence.

id. (internal citations omitted). The significance of the "no-adverse-inference" instruction was "to remove from the jury's deliberations any influence of unspoken adverse inferences," and this Court even found that the importance of this outweighs a defendant's own preferred tactics against such an instruction. *id.* As this Court explained, the purpose of the instruction is grounded in the understanding that "[j]urors are not experts in legal principles" and "to function effectively, and justly, they must be accurately instructed in the law." *id.* at 302.

> Such instructions are perhaps nowhere more important than in the context of the Fifth Amendment privilege against compulsory self-incrimination, since "[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are . . . guilty of crime.

id.

A juror who assumes that a defendant is guilty simply because the defendant chooses not to testify has no basis in fact or law to make such an assumption. This is simply a bias which the juror possesses. There are many

reasons why a defendant may choose not to testify at trial and none of them are rooted in an admission of guilt. For example, the defendant may have prior crimes that may be introduced by the prosecutor if they take the stand in order to discredit the credibility of the defendant, or they simply have a hard time expressing themselves or controlling their emotions, and therefore would be of no help to the jury in deciding the case against the defendant. This is why the decision to testify or to not testify is the defendant's decision alone and cannot be held against them.

C. Juror bias does not belong in a jury trial, and the equal protection clause compels expanding the *Pena-Rodriguez* constitutional exception to other forms of juror bias

The equal protection clause requires the law and its protections to be applied equally to criminal defendants. When it comes to the Bill of Rights, this Court in *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963), observed that it is the "fundamental nature" of the right which dictates whether it is to be equally applied and "made immune from state invasion by the Fourteenth" Amendment. *id.* The guarantees of the Bill of Rights which are fundamental safeguards of liberty are immune from federal abridgment and are equally protected against state invasion by the due process clause of the Fourteenth Amendment. *id.* Thus, where a provision of the Bill of Rights is "'fundamental and essential to a fair trial'" and is made obligatory upon the States by the

Fourteenth Amendment, it must be equally applied to every criminal defendant. The Sixth Amendment right to an impartial jury trial is one of the rights which is "'fundamental and essential to a fair trial.'" Therefore, this right must be applied to each criminal defendant equally.

This Court in *Pena-Rodriguez* observed that "[t]he jury trial right is so central to the foundation of our criminal justice system that "[w]hatever its imperfections in a particular case, the jury trial is a necessary check on governmental power." *Pena-Rodriguez*, 137 S. Ct. at 860. However,

> [l]ike all human institutions, the jury system has its flaws, yet experience shows that fair and impartial verdicts can be reached if the jury follows the court's instructions and undertakes deliberations that are honest, candid, robust, and based on common sense.

id. at 861. This Court in *Turner v. Louisiana*, 379 U.S. at 472-73, found that the most important purposes of the right to an impartial jury, is that,

> [i]n the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the "evidence developed" against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.

id. [5] Thus, a juror who believes that they can use a defendant's decision not to

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[5] This Court has "recognized that "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless (cont.)

testify as evidence that they are guilty of the crime possesses a bias against the defendant because the defendant's decision not to testify is irrelevant to whether the defendant committed the crime or not.

In deciding *Pena-Rodriguez* this Court observed that "[a]t common law jurors were forbidden to impeach their verdict, either by affidavit or live testimony." 137 S. Ct. at 863. However, in 1975, Congress adopted the Federal Rule of Evidence which included FRE 606(b). Rule 606(b) now allowed the introduction of juror testimony or affidavits to show that: (1) "extraneous prejudicial information was improperly brought to the jury's attention;" (2) "an outside influence was improperly brought to bear on any juror;" or (3) "a mistake was made in entering the verdict on the verdict form." This Court explained that,

> This version of the no-impeachment rule has substantial merit. It promotes full and vigorous discussion by providing jurors with considerable assurance that after being discharged they will not be summoned to recount their deliberations, and they will not otherwise be harassed or annoyed by litigants seeking to challenge the verdict. The rule gives stability and finality to verdicts.

id. at 865. Yet, this Court in *Pena-Rodriguez* decided to establish a Sixth Amendment constitutional exception to the 'no-impeachment' rule.

(...)error." ... The right to an impartial adjudicator, be it judge or jury, is such a right." *Gray v. Mississippi*, 481 U.S. 648, 668 (1987).

Specifically, this Court explained 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.

The dissent in *Pena-Rodriguez* pointed out that while the majority attempted to limit the constitutional exception to claims of racial bias, it will be hard to limit it to just racial bias due to the fact that both Pena-Rodriguez's argument and this Court's holding are based on the Sixth Amendment jury trial right. *id.* at 882. The dissent properly observed that the Sixth Amendment protects the right to an "impartial jury." There is "[n]othing in the text or history of the Amendment or in the inherent nature of the jury trial right" that limits the extent of the protection based on the "nature of the jury's partiality or bias." *id.*

> If the Sixth Amendment requires the admission of juror testimony about statements or conduct during deliberations that show one type of juror partiality, then statements or conduct showing any type of partiality should be treated the same way.

id. at 883. As a result of this observation, the dissent also pointed out that "[r]ecasting this as an equal protection case would not provide a ground for

limiting the holding to cases involving racial bias. *id.*

The time has come to address the dissent's equal protection issue raised in *Pena-Rodriguez.* Can this Court limit the constitutional exception carved out in *Pena-Rodriguez* to just instances of racial bias, or does the equal protection clause require expanding the constitutional exception to other types of clear bias?

CONCLUSION

For the foregoing reasons, Larson respectfully requests this Court to grant Certiorari in this matter.

3-12-2020
Date

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