

No. _____

In the
Supreme Court of the United States

GEORGE BERARDI, Petitioner

v.

DANIEL PARAMO, Respondent Warden

On Petition for Writ of Certiorari to the United States Court of
Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Charles R. Khoury Jr.
P.O. Box 791
Del Mar, California, 92014
State Bar Nr. 42625
Telephone: (858) 764-0644
Fax: (858) 876-1977
charliekhouryjr@yahoo.com
Attorney for Petitioner

QUESTIONS PRESENTED

- 1) DID THE CCA UNREASONABLY DETERMINE THE FACTS CONCERNING THE RACIAL PREJUDICE OF JUROR 9 AND ITS INFLUENCE ON THE JURY?**
- 2) UNDER THESE FACTS OF A LONE BLACK JUROR ACCUSING THE REMAINING WHITE JURORS OF RACISM, RESULTING IN SOME JURORS MOVING FROM REASONABLE DOUBT TO CONVICTION, CAN IT BE OBJECTIVELY REASONABLE FOR THE CALIFORNIA COURT OF APPEAL (CCA) TO CONCLUDE THAT RACE WAS NOT A FACTOR IN THE DECISION TO CONVICT PETITIONER?**

PARTIES TO THE PROCEEDINGS

Petitioner is **GEORGE BERARDI**

Respondent is **DANIEL PARAMO**, Warden

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
PARTIES TO THE PROCEEDINGS.....	I
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	vi
PETITION FOR WRIT OF CERTIORARI.....	1
OPINIONS BELOW	2
JURISDICTION	3
STATUTORY AND CONSTITUTIONAL PROVISIONS.....	3
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE WRIT.....	7
 I CERTIORARI SHOULD BE GRANTED SINCE THE FACT FINDING OF THE CCA WAS DEFECTIVE. NOT ONLY THAT, BUT THE DECISION OF BOTH THE CCA AND THE NINTH CIRCUIT VIOLATES THE RULE SET FORTH BY THIS COURT IN <i>PENA - RODRIGUEZ v. COLORADO</i>	 8

A.	Under These Facts of a Lone Black Juror Accusing the Remaining White Jurors of Racism, Resulting in Some Jurors Moving from Reasonable Doubt to Conviction Can it Be Objectively Reasonable for the Cca to Conclude That Race Was Not a Factor in the Decision to Convict Petitioner ?	8
----	--	---

II	THE CCA UNREASONABLY DETERMINED THE FACTS.	20
----	--	----

	CONCLUSION.	33
--	---------------------	----

CERTIFICATE OF SERVICE

APPENDICES ATTACHED

- A. Ninth Circuit Memorandum Opinion
- B. Denial of Petition for Rehearing and Rehearing En Banc
- C. Judgment of the District Court
- D. Report and Recommendation
- E. Opinion of the California Court of Appeal
- F. CSC Denial of Petition for Review

Page

TABLE OF AUTHORITIES

PAGE(S)

CASES

<i>Irvin v. Dowd</i> , 366 U.S. 717 (1961).....	8
<i>Miguel Angel Pena Rodriguez v. Colorado</i> , 137 S.Ct. 855, (2017).....	1
<i>Taylor v. Maddox</i> , 366 F.3d 992, 1001(2004).	6
<i>Warger v. Schauers</i> , 135 S. Ct. 521 (2014).....	4

STATUTES

28 U.S.C

Section 2254 (d)(1).....	2,5
Section 2254 (d)(2).	2,5

Rules

Evidence 606(b).....	3,4,6
----------------------	-------

No. _____

In the
Supreme Court of the United States

GEORGE BERARDI, Petitioner

v.

DANIEL PARAMO, Respondent Warden

On Petition for Writ of Certiorari to the United States Court of
Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner George Berardi respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the district court's denial of the petition for a writ of habeas corpus.

OPINIONS BELOW

Cases from Federal Courts:

On July 27, 2017, the Ninth Circuit Court of Appeals, in a memorandum decision, affirmed the judgment of the district court dismissing the petition for writ of habeas corpus by a state prisoner filed by petitioner Berardi. (Appendix A, 9th Ckt. Memorandum opinion.)

The unpublished order of the Ninth Circuit dated November 27, 2017, denying the petition for rehearing is Appendix B.

The judgment of the United States District Court for the Central District of California denying the petition for a writ of habeas corpus with prejudice was issued on May 13, 2015 and is Appendix C.

The report and recommendation of the magistrate filed on July 17, 2014 is Appendix D.

Cases from State Courts:

The California Supreme Court summarily denied a petition for

review, raising the same constitutional claims asserted in this petition for certiorari, on April 12, 2012, Appendix F.

The unpublished opinion of the California Court of Appeal's denial of petitioner's direct appeal, raising the same constitutional claims asserted in this petition for certiorari was filed January 12, 2012, and is Appendix E.

JURISDICTION

The Ninth Circuit denied the petition for rehearing on November 27, 2017. The jurisdiction of this Court is, thus timely invoked under 28 USC section 1254(1). *Hohn v. United States*, 524 U.S. 236 (1998).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

A defendant in a criminal case must be tried by a fair and impartial jury. The Sixth and Fourteenth Amendments to the U. S. Constitution. 28 U.S.C. section 2254(d) provides:

- (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings

- unless the adjudication of the claim-
- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States; or
 - (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

The facts relevant to this petition are that a white defendant, Berardi, was charged with a co-defendant with the murder of a Black young man, Keglal, in a marijuana deal gone wrong. Berardi never testified, despite the fact he asked his attorney to testify and did not have any prior record whatsoever. But his attorney did not call him and then when questioned by Berardi, told him it was too late.

A Black juror, during deliberations, expressed, what other jurors called bias as to the white defendants during the deliberations and several jurors testified at a hearing that some jurors were moved from reasonable doubt to conviction because of the racially tinged outbursts of juror 9.

That California state jury convicted petitioner Berardi, and a co-defendant, of one counts each of conspiracy to commit murder, Cal. Penal Code section 182(a)(1), and one count each of first degree murder, Cal. Penal Code section 187(a) for the death of Marcus Keglär.¹ The jury also found true the special allegation attached to the murder charge against petitioner Berardi that he was armed with a firearm during the commission of the charged offenses within the meaning of California Penal Code section 12022(a)(1). (1ER 51-52.)

The trial court, after an extensive hearing on juror misconduct where jurors testified, denied a new trial motion and on December 23, 2009, sentenced Berardi to 26 years to life in state prison. (2ER376; 20RT 2214-2215.)

On January 12, 2012, the California Court of Appeal (CCA) affirmed the convictions in an unpublished opinion. (1ER8-46.)

¹ER refers to Excerpt of Record, the number preceding ER is the volume number followed by the page number, RT is the reporter's transcript with the same designations as to volume and page nr. ECF refers to the civil docket nr. for the case. The CCA misspelled Keglär's name throughout.

On April 11, 2012, the California Supreme Court summarily denied appellant's petition for review. (ECF19-1 at 1.)

B. Federal Court Proceedings

On July 9, 2013, , appellant filed a petition pursuant to 28 U.S.C. § 2254. (ECF1.)

On July 12, 2013, appellant filed a motion to stay and abey while exhausting an unexhausted issue.(ECF4.)

On February 14, 2014, the motion to stay and abey was declared moot as the issue had been exhausted. (ECF20.)

On July 17, 2014, the Magistrate Judge filed a Report and Recommendation that the petition be denied with prejudice. (1ER49-50.)

On September 4, 2014, objections were filed with an alternate request for a COA. (ECF33.)

On May 13, 2015, that recommendation and its findings were accepted with modification by the district court judge who ruled that none of the juror testimony could be considered because of Rule 606(b) of the

Federal Rules of Evidence, and *Warger v. Shauers*, 574 U.S. _____, 135 S.Ct. 521 (2014). The District Court granted a COA as to claim 1, the racial prejudice of Juror 9. (1ER4-13; ECF35.)

On that same date a judgment was filed to that same effect and dismissing the petition with prejudice. (1ER3.)

A notice of appeal was filed on June 8, 2015.(1ER1-2.)

After briefing and oral argument, a memorandum decision affirming the District Court was filed on July 27, 2017. (Exhibit A.)

A petition for rehearing and rehearing en banc was denied on November 27, 2017. (Exhibit B.)

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because, the CCA unreasonably applied clearly established federal law established by the Supreme Court and unreasonably determined the facts in this case in light of the evidence presented in the state court. Juror 9 was racially biased against petitioner

Berardi. And the uncertified issue was that petitioner Berardi was unconstitutionally prevented from testifying in his own behalf by his attorney.

I

CERTIORARI SHOULD BE GRANTED SINCE THE FACT FINDING OF THE CCA WAS DEFECTIVE, NOT ONLY THAT, BUT THE DECISION OF BOTH THE CCA AND THE NINTH CIRCUIT VIOLATES THE RULE SET FORTH BY THIS COURT IN *PENA-RODRIGUEZ v. COLORADO*

Under These Facts of a Lone Black Juror Accusing the Remaining White Jurors of Racism, Resulting in Some Jurors Moving from Reasonable Doubt to Conviction Can it Be Objectively Reasonable for the CCA to Conclude That Race Was Not a Factor in the Decision to Convict Petitioner ?

The Memorandum Opinion states at page 2 that:

Berardi focuses on Juror Nine's statement to other jurors that, if the races of Berardi and the victim were switched (Berardi is white and the victim was African-American), they would have convicted Berardi immediately. However, the California Court of Appeal reasonably interpreted that comment as reflecting not racial bias but rather Juror Nine's frustration that

deliberations continued for several days despite what he believed was strong evidence in favor of conviction. Indeed, Juror Nine's comment was unlike those in other cases that strongly indicated racial bias. *See, e.g., Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 862, 869–70 (2017).

But there was much more on which Berardi depended than just this statement of juror 9 to show the writ had to be granted. This writer cannot do it justice by paraphrasing the letter to the trial judge written by juror no. 5 after the verdict. It was quoted in the adoption of the Report and Recommendation by the District Court Judge and is set forth below verbatim:

At the beginning of deliberations on January 22, 2009, the same day the verdict was finally reached after several days of deliberation, there were still three hold-outs for a murder conviction, and conspiracy had not even been discussed yet.

At some point there was only one hold-out for murder. Then, one of the jurors, the only African-American juror, "launched into a heated racist tirade, directed at all of us, accusing us of 'doing what you're gonna do' and saying 'you know god damn good and well if this was a white boy shot by a black man there wouldn't even be a trial.' He had risen from his seat and was gesturing wildly." After he caught his breath he continued his accusations of racism. He dared the other jurors to try to have him removed from the jury

and stated that he did not want to be there. After the tirade the remaining hold-out for murder was no longer a hold-out, and apparently conspiracy was quickly deliberated on and a unanimous decision reached. Also, the juror who engaged in the racial tirade against all the other jurors spent most of his time in deliberations with his back turned to the rest of the jurors, “occasionally loudly snorting or scoffing, sometimes turning to us and making simplistic and defiant statements like ‘he had a gun, they did a deal, a man got shot!’ then turning his back on us again.” The final hold-out sobbed before raising her hand for a unanimous decision of guilt. Juror #5 regrets that no one had the courage to call the bailiff regarding what was happening in the jury deliberation room.

ECF35 at 1ER5 citing 2ER412 Lodgment No. 3, Clerk’s Tr. [“ Vol.6CT”] at 1322.05.

The District Court ruled that the Supreme Court case of *Warger v. Schauer* 135 S. Ct. 521 (2014) , involving a civil suit filed in federal court, governed this section 2254 proceeding and prevented the state court judge, under Rule 606(b) of the federal rules of evidence, from considering the juror testimony concerning juror nine’s racial bias. This restriction of evidence therefor prevented petitioner from carrying his burden under section 2254 (d)(1) and (d)(2) thereby requiring denial of the petition. See fn. 2 of the District Court adoption of the Magistrate’s R and R and page 9

of ECF 35, 1ER10.

A. Comparing the Actual Evidence Before the CCA to the Ruling of That State Court Illustrates the Exception of 2254 (d)(2) Has Been Met. The CCA Unreasonably Determined the Facts in Light of the Evidence

Six jurors testified at the hearing; three said juror 9's outburst occurred *before* the jurors were unanimous for guilt and two jurors said *after* the last vote had been taken and one juror said it could have occurred before or after. Yet the CCA held that the outburst from Juror 9, about how quickly this case would have moved had the races been reversed, only came when it was 11-1 and the last holdout was tearfully agonizing.

1ER72.

But what is important is that the CCA left out what Juror 9 said to that holdout at that point who then changed her vote to guilt.

Juror 2 said they were 11 to 1 for conviction and the holdout said "she wished there was some other way and she started to cry" and that is when the Black juror got annoyed and said "we were bigots and prejudiced and if the shoe fits, wear it. He kept saying that." 2ER171.

That statement was left out of the CCA opinion. It explains two things. It shows the level of bias of Juror 9 and secondly shows how it caused the hold-out to change her vote to guilty in the face of that accusation from Juror 9. This is exactly what this Court explains in *Taylor v. Maddox*² is a “defect in the state-court fact-finding process -- failure to consider and weigh relevant evidence that was properly presented to the state courts and made part of the state-court record.”

Is it any wonder that the hold-out juror wilted under this attack from Juror 9?

Is it any wonder that Juror 5 was “tormented” by his failure to speak out against Juror 9's bias that he wrote a letter to the judge which exposed this whole episode in the jury room? 2ER143.

All of this evidence was before the CCA and it was unreasonable under 2254(d)(2) to leave out those important facts showing both bias of juror 9 and the effect of that bias on at least one, if not more, jurors who

²*Taylor v. Maddox*, 366 F.3d 992, 1001(2004)

were holding out for not guilty.

B. The CCA Decision Was An Unreasonable Application of Clearly Established Law of the Supreme Court of the United States

As far as 2254 (d)(1) is concerned, the CCA unaccountably concludes that there was no showing that juror 9 was biased on the basis of race against Mr. Berardi. This statement totally ignores the *fact* that juror 9 was discriminating against Berardi on the basis of his race. And the fact that he was discriminating against the jurors because of their race was also supported by the juror testimony: e.g. “That was the impression I got, we were white and he wasn’t.” 2ER157.

In assessing whether a juror is ‘impartial’ for federal constitutional purposes, the United States Supreme Court has stated: “Impartiality is not a technical conception. *It is a state of mind.* (Emphasis added by this writer.) For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula’ (*United States v. Wood* (1936)

299 U.S. 123, 145-146....)”

“The theory of the law is that a juror who has formed an opinion cannot be impartial.’ [Citation.] [P] It is not required, however, that the jurors be totally ignorant of the facts and issues involved. . . . It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.” *Irvin v. Dowd*, 366 U.S. 717, 722-723 (1961).

C. Applying the Above Supreme Court Standards to the Juror’s Testimony at the Hearing Illustrates Juror 9 Was a Biased Juror Who in Addition Affected the Vote for Guilt of At Least One Juror Who Had a Reasonable Doubt

To aid this Court to decide the petition for rehearing, the entire questioning of the jurors, 6 of them, who responded to the trial court’s request to testify at a hearing, is set forth below in pertinent part.

Conspicuously absent is Juror 9 who did not respond to that request.

Juror No. 1

The first juror to be interviewed was no. 1:

That juror referred to “the juror in question” but not by number although

it was obvious who nr. 1 was talking about. For clarity, nr. 9 will be used instead of “that juror”:

Juror 9 did not participate in deliberations; turning his chair around and turning his back on the rest of us; refusing to review security tapes the jury thought were important. 2ER121,2ER122 line 11-12.

Juror 9 was hostile, he intimidated no.1 briefly but juror 1 said “I asserted myself and my jobs have always been dealing with people not in the best of circumstances and I went into that mode. 2ER122-123

He was inattentive, hostile and resistant and in the end *made it a racist situation* .2ER123 emphasis added.

When juror 1 would say something, juror 9 would belittle it. 2ER124

Juror 1 said race “became an issue” and it could have been before or after their final vote “it was pretty overt” “that if it had been a white boy on the ground and a black boy who had done the shooting—and those are his words—that it wouldn’t have taken us five minutes to reach the verdict.” 2ER125.

Juror 1 said “How dare you consider me a racist. You don’t know anything about my background, my family, or what I hold in my heart”. “And he just kept saying, ‘If the shoe fits, wear it. If the shoe fits, wear it.’ It must have been about a dozen times he said that–” 2ER125

When asked if there were emotional outbursts during deliberations, juror 1 said yes. Juror 9, in response to something that might be said by one of the other jurors... would make loud belittling statements. 2ER128.

Emotional exchanges between juror 9 and other members of the panel were a daily occurrence. 2ER128-129.

Juror no. 3

When asked if any juror was intimidated by any other jurors during the deliberations, juror 3 said “Yes”. 2ER133.

“I hesitate to say this , but there was race card played which turned some of the jurors off.”

Juror 3 said “one of our jurors who was a Black man indicated that if

the defendant—if there was a white man shot by a Black man, he said this would be all over very early and that turned a lot of people into an anger mode, but it died. 2ER133

Juror 3 said the outburst he described above occurred the “day before..we reached a common verdict as I recall, yeah.” 2ER135

Juror 5

“There was a juror who spent a lot of time with his back to us and scoffing and it didn’t seem like an issue at the time but with the incident that happened later, it kind of made it an issue.” 2ER137

Juror 5 said Juror 9 participated but marginally. When asked “How so?” Juror 5 answered “He spent some time with his back to us and just kind of making noises that—you know, just disrespectful or--

...Anybody who disagreed with him, he would bully or say things to the effect of, “You just don’t get it. You don’t understand,” or something.

2ER138

The Court: Did any juror appear to you to be intimidated by that particular conduct or the conduct of any other juror

during deliberations?

Juror no. 5: You know, I couldn't be sure, but I know we had three people who were of the opinion that the defendants were not guilty or not guilty as charged, that we wound up changing, but two of them had converted to the verdict that we arrived at and one of them was still half and half, and that evaporated. We became unanimous after the tirade.

The Court asked if the "conversion" of that particular juror was the result of the outburst? 2ER139

Juror 5 said that within ten or fifteen minutes after the "tirade" the jury became unanimous. 2ER140.

Juror 5 related a statement Nr. 9 made that "if it had been a white boy shot by a Black man, there wouldn't have been a trial. That's what he said." (2ER141.)

Juror 5 said "The people that he may have been referring to by saying 'you all' even though he was looking at me, I think they were intimidated. I was somewhat intimidated because 'You all,' and he was looking at me and it was very uncomfortable." Juror 5 said he was tormented by the fact he did not respond to Juror 9's charge of racism. Three were for not guilty

“But we haven’t discussed conspiracy yet, but their remarks, their comments, were such that, you know, there was not going to be a conspiracy.” 2ER143.

Juror 5 said the “outburst” may have “sped us along. I think it may have bumped a couple of the people who were on the fence. I think it might have bumped the in the direction we wound up.” 2ER144.

Juror 11

Juror 11 said juror 9 appeared to be looking at the picture on the wall with his back to the jurors on a daily basis. 2ER147

He confirmed that a racial comment was made by juror 9 but it was after the verdict forms had been signed. 2ER149.

Juror 12

She said all the jurors were attentive and none were intimidated by any conduct of any other juror. 2ER155. The Black juror expressed “nonverbal behavior that indicated he didn’t want to be there ..” He was resentful because the jurors were white and didn’t have the experiences that he had as an African-American person.” 2ER156.

"That was the impression I got, we were white and he wasn't." 2ER157.

She said this type of conduct took place during the entire deliberations, "off and on." She said no one appeared to have changed their position based upon what the Black juror had said. 2ER158. She said that the holdout juror continued to deliberate and did not appear to change her hold out due to anything said or done by any juror, including the African-American male. ER159-160.

She said that after "all of us had decided" the Black juror said "Well if Markus would have been white, it wouldn't have taken you so long" 2ER164.

Juror 2

Juror 2 said that the comment by the Black juror was if a white boy had been killed by two black boys "he would have been tried and hung by now". And that statement was made "before we took our last vote." 2ER170.

They were 11 to 1 for conviction and the holdout said "she wished there was some other way and she started to cry" and that is when the

Black juror got annoyed and said “we were bigots and prejudiced and if the shoe fits, wear it. He kept saying that.” 2ER171. The holdout who had been crying had five adopted children of all different ethnicities and she took offense at him calling her prejudiced. Juror 2 said she never felt the Black juror’s actions served to intimidate anybody. 2ER172.

She said that the jurors were going to go out to lunch after the verdict but after they got “the letter” some three weeks after the verdict “we decided to call it off because we didn’t want to compromise the job we had done there.” 2ER174-175.

After reading the testimony of the jurors set forth above, can there be any doubt in the mind of any reasonable judge that juror 9 did not qualify as an unbiased juror?

Does an open minded juror turn his back to the other jurors and couch his objections to their deliberations solely on the basis of skin color?

Does an unbiased juror call a holdout juror a bigot? The questions answer themselves.

AEDPA is no bar to the granting of relief because it was

unreasonable for the CCA to conclude Juror 9 was not biased and because the CCA left out critical facts which were in the record and that assisted it in coming to their unreasonable conclusion.

CONCLUSION

Appellant Berardi had a juror who was not the impartial juror required by the constitution and an attorney who was determined to deprive Berardi of his constitutional right to testify. That was simply too much to overcome for Berardi to have a fair trial. The AEDPA is no barrier to the granting of this writ. Certiorari should be granted.

Respectfully submitted,

/s/Charles R. Khoury Jr.

Attorney for Berardi

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

BERARDI v. PARAMO

PROOF OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States and not a party to this action and that on this 25TH Day of FEBRUARY 2018 a petition for In Forma Pauperis Status and petition for Certiorari with volume of exhibits, were mailed postage prepaid, to the Attorney General of the State of California ANGELA M.

BORZACHILLO

Deputy Attorney General

State Bar No. 170717

600 West Broadway, Suite 1800

San Diego, CA 92101

P.O. Box 85266

San Diego, CA 92186-5266 counsel for the Respondent.

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,
/s/CHARLES R. KHOURY JR.

Executed on FEBRUARY 25, 2018

By: _____
/S/CHARLES R. KHOURY JR.
Attorney for PETITIONER