No. 18-5118

IN THE SUPREME COURT OF THE UNITED STATES

SHANE K. FLOYD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

JOHN M. PELLETTIERI
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying a motion for a new trial that relied on information petitioner obtained from two jurors indicating that the foreperson accused them of initially withholding their votes to find petitioner guilty because they and petitioner were African American, when petitioner's counsel obtained this evidence in violation of a local rule and court directive prohibiting juror contact, the foreperson's statements did not address the considerations underlying her own vote, and the two jurors at whom the statements were directed themselves indicated that the statements did not influence their votes to convict.

2. Whether petitioner received ineffective assistance of counsel at trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-42) is reported at 872 F.3d 760. The order of the district court is not published in the Federal Supplement but is available at 2015 WL 5680390.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 2017 (Pet. App. 1). A petition for rehearing was denied on December 5, 2017. The petition for a writ of certiorari was filed on March 1, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of conspiracy to commit federal-funds bribery, in violation of 18 U.S.C. 371; receiving bribes, in violation of 18 U.S.C. 666(a)(1)(B); and making false statements, in violation of 18 U.S.C. 1001(a)(2). Judgment 1. He was sentenced to 84 months of imprisonment, to be followed by three years of supervised release. Id. at 2-3. The court of appeals affirmed. Pet. App. 3-29.

1. Petitioner was superintendent of Arise! Academy (Arise), a charter school in Dayton, Ohio. He became superintendent after the school had experienced declining enrollment, financial troubles, and an embezzlement scandal. Pet. App. 4-5. Hoping to turn the school around, the school's sponsor appointed petitioner superintendent, removed the existing board members, and replaced the board members with petitioner's chosen candidates. Ibid.

Shortly thereafter, petitioner hatched a kickback scheme with two former business partners, Carl Robinson and Mike Ward. Pet. App. 5. Specifically, petitioner caused the school to pay more than $400,000 to a company owned by Robinson, allegedly for consulting services; Robinson then distributed a portion of the money back to petitioner and other conspirators. Ibid. At one point, Arise was paying the company $29,000 per month even though it had stopped providing any services to Arise. Id. at 7. The

board was told these payments were required by the contract's "buyout clause," although the contract contained no such clause. Ibid. Meanwhile, the salaries of Arise teachers were cut by a fifth, staff members were not paid on a consistent basis, and Arise ran out of money and closed. Ibid. When the scheme came to the attention of federal investigators, petitioner then lied to them, claiming that the cash payments he had received under the kickback scheme were actually cash gifts he had received from parishioners at the church where he was a minister. Gov't C.A. Br. 12-13; see Pet. App. 10.

2. A federal grand jury indicted petitioner on charges of conspiracy to commit federal-funds bribery, in violation of 18 U.S.C. 371; receiving bribes, in violation of 18 U.S.C. 666(a)(1)(B); and making false statements, in violation of 18 U.S.C. 1001(a)(2). Pet. App. 7. He went to trial with Robinson and Christopher Martin. Ibid. The government's evidence at trial included testimony from Ward, who cooperated with the government and was not indicted. Ibid.

a. Jury deliberations began on a Friday. Pet. App. 7. The jury sent the district court several questions the following Monday, including one asking "how the jury should proceed 'if one or more juror members feel like the jury is intentionally being hung?'" Id. at 8. The court provided an "Allen charge," telling the jurors that they should continue their deliberations and

consider each other's views in good faith. Ibid.; cf. Allen v. United States, 164 U.S. 492, 501-502 (1896). The jurors sent the court another note the next day stating that they felt they would be unable to agree on the conspiracy count; the court then issued another Allen charge. Pet. App. 8. The jury returned a verdict several hours later, finding defendants guilty on all counts. Ibid.

The jury was polled, and the jurors individually confirmed that the verdict accurately reflected their votes. The district court then admonished counsel that "I did not inquire of the jurors whether they wanted to speak with counsel, and so I will ask you not to contact them since it was not preapproved." Pet. App. 8.

b. Three months later, petitioner filed a motion for a new trial, claiming that interactions between court personnel and the jury amounted to improper outside influence. Pet. App. 8-9. The motion contained transcriptions of recorded conversations between two jurors -- referred to as A.R. and M.S. -- and a private investigator that petitioner's counsel had hired. Gov't C.A. Br. 14; Pet. App. 8, 10. Petitioner is African American, and his counsel stated that he hired the investigator to speak with the jurors because he thought that A.R. and M.S., the only African-American jurors, looked uncomfortable during the verdict and polling. Pet. App. 8.

A.R. and M.S. told petitioner's investigator that, early in deliberations, the ten other jurors had been ready to find petitioner and his codefendants guilty, but that they (A.R. and M.S.) had doubts about the credibility of a central government witness (Mike Ward). Pet. App. 10. They also credited petitioner's explanation for the cash deposits into his bank account, namely, that they were gifts from parishioners. Ibid. A.R.'s and M.S.'s doubts initially prevented the jury from reaching consensus and prompted the jury notes that resulted in the two Allen charges. Ibid. The inability to reach consensus developed into a confrontation on the last day of deliberations:

> The jury foreperson -- a white woman -- reportedly told A.R. and M.S. that she "[found] it strange that the colored women are the only two that can't see" that the defendants were guilty, and accused A.R. and M.S. of deliberately trying to hang the jury. M.S. reported being so angered by this remark that her "eyes started watering" and she wanted to "smack the shit out of" the foreperson. A verbal confrontation ensued, which required the marshal to enter the jury room to broker peace. After things calmed down, the deputy clerk persuaded the foreperson to apologize to A.R. and M.S. The foreperson did apologize for her remarks, but then said that she still felt A.R. and M.S. were protecting the defendants because they felt they "owed something" to their "black brothers." Again, the foreperson's words prompted a confrontation, and, again, the deputy clerk intervened, ultimately persuading A.R. and M.S. to return to deliberations. A few hours later, the jury delivered its unanimous guilty verdict.

Id. at 10.

When interviewed by petitioner's investigator, A.R. and M.S. "expressed anger and frustration with the foreperson's behavior, but nevertheless stood by their ultimate decision to vote to

convict." Pet. App. 11. M.S. said that she felt the foreperson was "ignorant" but did not think the foreperson intended to sway her decision. Ibid. According to M.S., despite what the other jurors "were saying," she "was still going on how I felt and the information that was presented to me and how I perceived it anyway." Ibid. A.R. similarly said that she was initially unsure of the conspiracy charge because she was skeptical that sufficient evidence proved a conspiratorial agreement, but she and M.S. later examined the evidence together and identified specific evidence that assuaged her previous doubts. Ibid.

c. The district court denied the motion for a new trial. See Pet. App. 11-12. First, the court determined that the motion was untimely because it was filed "several months after the 14-day deadline" set forth in Federal Rule of Criminal Procedure 33(b). Pet. App. 11. Second, the court determined that petitioner's counsel violated the court's local rules regarding contact with jurors -- which provided that "[n]o attorney, party, or anyone acting as agent or in concert with them connected with the trial of an action shall personally, or acting through an investigator or other person, contact, interview, examine, or question any juror regarding the verdict of deliberations of the jury in the action except with leave of the Court," S.D. Ohio Local Civil and Criminal Rule 47.1 (2014) -- and also specifically violated the court's direct order instructing counsel not to

contact the jurors in this case. Pet. App. 11-12. Third, the court determined that the no-impeachment rule in Federal Rule of Evidence 606(b) precluded it from considering the statements from A.R. and M.S. Pet. App. 12.

3. The court of appeals affirmed. Pet. App. 3-29. As relevant here, the court rejected petitioner's argument that reversal was warranted under Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017), which this Court decided while petitioner's appeal was pending. In Peña-Rodriguez, this 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 general rule against post-trial impeachment of a jury verdict "give[s] 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 court of appeals provided independent grounds for its decision. First, the court determined that the district court did not abuse its discretion in denying the motion on the basis of counsel's violation of the local rules regarding contact with the jury and the district court's "specific admonishment from the bench not to contact jurors." Pet. App. 13. The court observed that "Peña-Rodriguez itself suggests that local rules and orders limiting jury contact can be enforced," because it contemplates that "'[t]he practical mechanics of acquiring and presenting such

evidence [of juror animus] will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors.'" Ibid. (quoting Peña-Rodriguez, 137 S. Ct. at 869) (brackets in original). "[E]ven though defense counsel should, in some circumstances, be able to interview jurors in order to impeach verdicts based on stereotyping and animus," the court of appeals explained, "jurors are still entitled to 'protection when they return to their daily affairs after the verdict has been entered,' and the district court must be able to oversee post-verdict juror contact." Ibid. (quoting Peña-Rodriguez, 137 S. Ct. at 869). The court also noted that "[i]n direct contrast to the instant case, the defense counsel in Peña-Rodriguez did follow all the rules" and obtained affidavits from two jurors with the trial court's supervision. Ibid.

Second, the court of appeals alternatively determined that "the stated holding of Peña-Rodriguez would not apply even if the defendants had not violated a local court rule and their evidence was properly before the district court." Pet. App. 14. The court explained that "Peña-Rodriguez makes clear that it does not apply to a mere 'offhand comment indicating racial bias or hostility,' but only to a 'clear statement' that 'tend[s] to show that racial animus was a significant motivating factor in the juror's vote to convict.'" Ibid. (quoting Peña-Rodriguez, 137 S. Ct. at 869).

The court found that in this case, although "the foreperson's reported comments clearly indicated racial bias or hostility," she "did not make comments -- much less a clear statement -- showing that animus was a significant motivating factor in her own vote to convict." Ibid. (citation, brackets, and quotation marks omitted). The foreperson "never suggested that she voted to convict [defendants] because they were African-American," and although the foreperson "did impugn A.R. and M.S.'s integrity based on their shared race with the defendants, she never said anything stereotyping the defendants based on their race." Ibid.

The court of appeals contrasted the facts of Peña-Rodriguez, where the juror said, among other things, "I think [the defendant] did it," i.e., sexually assaulted two girls "because he's Mexican and Mexican men take whatever they want." Pet. App. 14 (brackets in original). The court explained that the juror's remarks in Peña-Rodriguez "clearly demonstrated the juror's animus against Mexicans and, crucially, the juror's reliance on this bias in voting to convict." Ibid. The court found that here, in contrast, "none of the foreperson's remarks here come close to the Peña-Rodriguez juror's level of stereotyping or animus, and the foreperson's remarks were not directed against [defendants] in the same way that the Peña-Rodriguez juror's remarks were directed against the defendant in that case." Ibid.

The court of appeals also determined that "the facts of this case belie [petitioner's] theory" that the "foreperson's animus indirectly influenced A.R.'s and M.S.'s votes." Pet. App. 14. When interviewed after the trial, M.S. "stood by her vote to convict," stating that she "was still going on how [she] felt" and "how [she] perceived" the evidence. Ibid. "Similarly, A.R. reported that she decided to convict" after further examining the evidence and testimony. Ibid. "Therefore," the court found, "the foreperson's animus appeared not to have influenced A.R.'s or M.S.'s vote." Ibid.*

Judge Donald dissented in relevant part, stating that she would have "remand[ed] this case to the district court for, at a minimum, an evidentiary hearing on Defendants' claims." Pet. App. 40; see id. at 30-42. Judge Donald recognized that the facts of this case were different from Peña-Rodriguez, both because the evidence was obtained in violation of the local rules and the court order and because the foreperson's animus was aimed not "directly at the Defendants," but instead "at the two black jurors." Id. at 37; see id. at 38. Judge Donald believed, however, that "the evidence of racial animus and harassment presented by Defendants,

* The court of appeals also rejected petitioner's argument that the marshal and deputy clerk had improperly interfered with the deliberations. See Pet. App. 15-16. The court affirmed both convictions of petitioner's co-defendants, Martin and Robinson, and this Court later denied his co-defendants' petitions for writs of certiorari. Martin v. United States, No. 17-7989 (Oct. 1, 2018); Robinson v. United States, No. 17-7970 (Oct. 1, 2018).

notwithstanding the undeniable formal improprieties connected with its production, created reasonable grounds to doubt the validity of the jury verdict." Id. at 40.

ARGUMENT

Petitioner contends (Pet. 1-14) that the court of appeals erroneously affirmed the district court's denial of his motion for a new trial. The court of appeals' decision is correct, entirely factbound, and does not conflict with any decision of this Court or another court of appeals. Petitioner also contends (Pet. 14-24) that he received ineffective assistance of counsel at trial. But that contention was neither pressed nor passed upon below and petitioner can raise it in a post-conviction proceeding under 28 U.S.C. 2255. Further review is unwarranted.

1. The court of appeals correctly affirmed the district court's denial of petitioner's motion for a new trial.

a. First, the court of appeals correctly determined that the district court did not abuse its discretion in denying petitioner's motion on the ground that it "was based on evidence gathered in violation of both a local court rule and a specific admonishment from the bench not to contact jurors." Pet. App. 13. District courts have broad discretion to enforce and determine the requirements of their own local rules. See, e.g., Frakes v. Peoria Sch. Dist. No. 150, 872 F.3d 545, 548 (7th Cir. 2017); Texas v. United States, 798 F.3d 1108, 1114-1115 (D.C. Cir. 2015), cert.

denied, 136 S. Ct. 981 (2016); Simmons v. Navajo Cnty., 609 F.3d 1011, 1017 (9th Cir. 2010). And it has long been established that "district courts have the power to make rules and issue orders prohibiting attorneys and parties from contacting jurors, whether directly or indirectly, absent prior court approval." United States v. Venske, 296 F.3d 1284, 1291 (11th Cir. 2002) (citing cases), cert. denied, 540 U.S. 1011 (2003); see Cuevas v. United States, 317 F.3d 751, 753 (7th Cir.) ("Rules regulating parties' post-trial contact with jurors are quite common. Out of the 94 federal district courts, most have rules regarding post-trial juror contact."), cert. denied, 540 U.S. 909 (2003). Ethical rules in many jurisdictions reinforce these rules. See, e.g., Model Rules of Prof'l Conduct 3.5(c)(1) ("A lawyer shall not * * * communicate with a juror * * * after discharge of the jury if * * * the communication is prohibited by law or court order.").

Rules regulating contact with jurors and requiring prior court approval advance the "strong interest in protecting jurors from threats and needless harassment from unsuccessful parties." Venske, 296 F.3d at 1291-1292. They relatedly "encourage freedom of discussion in the jury room." Cuevas, 317 F.3d at 753; see also Rakes v. United States, 169 F.2d 739, 745 (4th Cir. 1948) ("If jurors are conscious that they will be subjected to interrogation or searching hostile inquiry as to what occurred in the jury room and why, they are almost inescapably influenced to

some extent by that anticipated annoyance."), cert. denied, 335 U.S. 826 (1948). And a court may enforce such rules "by excluding the evidence wrongfully obtained." Venske, 296 F.3d at 1291; accord Cuevas, 317 F.3d at 753 ("We have previously noted with approval a district court's decision to exclude evidence from post-trial juror interviews obtained without leave of the court."); United States v. Ridings, 569 Fed. Appx. 73, 75 (3d Cir. 2014) (per curiam) (unpublished) ("strictly enforc[ing] the rule" and "accord[ing] no weight to the report from [defendant's] private investigator" obtained in violation of it).

This Court's decision in Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017), recognized the existence and enforceability of rules limiting post-trial juror interviews. In that case, after the jury found the defendant guilty of unlawful sexual contact and harassment, the trial judge informed the jurors that "[t]he question may arise whether you may now discuss this case with the lawyers, defendant, or other persons" and told them that "whether you talk to anyone is entirely your own decision." Id. at 861. Two jurors then decided to speak with defense counsel and reported "that, during deliberations, another juror had expressed anti-Hispanic bias toward [the defendant] and [the defendant's] alibi witness." Ibid. Defense counsel then "reported this to the court and, with the court's supervision, obtained sworn affidavits from the two jurors." Ibid. Those affidavits in turn provided

"compelling evidence that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor" in his vote in favor of a guilty verdict. Ibid. Specifically, according to the affidavits, one of the jurors said that he thought the defendant was guilty of sexual assault because the defendant was Mexican and the juror believed that Mexican men feel "they could do whatever they wanted with women." Id. at 862.

In holding that evidence sufficient to support impeachment of the verdict, the Court in Peña-Rodriguez made clear that "[t]he practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors." 137 S. Ct. at 869. "These limits," the Court stated, "seek to provide jurors some protection when they return to their daily affairs after the verdict has been entered." Ibid. And the Court emphasized that defense counsel in that case had fully complied with all applicable rules. Id. at 869-870. In particular, "counsel did not seek out the two jurors' allegations of racial bias," and complied with court-imposed "limits on juror contact." Id. at 870. The jurors were aware "they were under no obligation to speak out" but approached counsel "to relay their concerns" and "[p]ursuant to local court rules, [defense] counsel then sought and received permission from the court to contact the two jurors and obtain affidavits limited

to recounting the exact statements made by [the other juror] that exhibited racial bias." Ibid.

The court of appeals here correctly recognized that counsel's improper juror contact in this case substantially differentiated it from Peña-Rodriguez. "[U]nlike in Peña-Rodriguez," the court of appeals explained, "the district court here denied the motion because it was based on evidence gathered in violation of both a local court rule and a specific admonishment from the bench not to contact jurors." Pet. App. 13. Counsel attempted to justify the violations by stating that he "found the Court's order to be questionable' because counsel believed 'that the Court had an ulterior motive' in prohibiting contact with the jurors." 2015 WL 5680390, at *3 (brackets omitted). Defense counsel also asserted that "the lack of a durational time limit in Local Rule 47.1 led him to believe that, if he just waited an unspecified amount of time after trial, the Rule might no longer apply, and he could contact jurors with impunity without seeking leave from the Court." Id. at *2. The district court, however, rejected those rationales as "groundless" and instead found that counsel's "disregard for this Court's local rules and his direct violation of the Court's trial order regarding contact with jurors" was "knowing" and "disturb[ing]." Ibid. As the court of appeals correctly recognized, consistent with Peña-Rodriguez, that finding amply supported the district court's exercise of discretion to refuse to

consider the information obtained through counsel's violations. See United States v. Cavallo, 790 F.3d 1202, 1226 (11th Cir. 2015) (upholding district court's decision not to consider information obtained from juror "only by brazenly violating a local court rule").

b. The court of appeals also correctly determined that, even if the district court had been required to consider the wrongfully-obtained information, Peña-Rodriguez still would not have supported a new trial. Federal Rule of Evidence 606(b) generally prohibits posttrial efforts to impeach a verdict through evidence of the jury's internal deliberations. In Peña-Rodriguez, this 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," which guarantees the right to trial by an impartial jury, requires that a general rule against post-trial impeachment of a jury verdict "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." 137 S. Ct. at 869. The Court emphasized that "[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry." Ibid. The Court explained that "[f]or the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast

serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict." Ibid. "To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict." Ibid. "Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence." Ibid.

The court of appeals correctly determined that the information provided by petitioner did not make the requisite showing under Peña-Rodriguez. The court recognized that the information showed that the jury foreperson adhered to racial stereotypes and appeared to harbor racial bias, as she apparently believed that two African-American jurors were attempting to hang the jury and protect the defendants -- despite the strength of the evidence -- merely because the defendants also were African American. See Pet. App. 12. No matter how wrongheaded those views were, however, the foreperson's statements do not suggest that racial stereotypes or animus motivated her, or any other juror, to vote in favor of a guilty verdict. To the contrary, the foreperson appears to have criticized the initial reluctance of M.S. and A.R. precisely because she (the foreperson) found the evidence to establish clearly petitioner's guilt. The foreperson's assumptions that fellow jurors were motivated by race in initially

taking a different view of the evidence does not show that animus motivated the foreperson's own vote, or that of any other juror, that petitioner and his co-defendants were guilty. Pet. App. 11.

The court of appeals expressly determined that "the facts of this case belie" petitioner's contention that the foreperson's statements indirectly influenced M.S. and A.R. to vote to convict. Pet. App. 15. Rather, both M.S. and A.R. made clear that, although they were initially holdouts because they harbored some skepticism about the government's case, they ultimately voted to convict not because of the foreperson's statements or any pressure, but instead because of their own close review and consideration of the evidence presented at trial. Ibid. The court of appeals accordingly correctly determined that "Peña-Rodriguez does not overcome the no-impeachment rule here." Ibid.

c. Petitioner does not contend that the court of appeals applied a rule of law that conflicts with any decision of this Court or another court of appeals. To the contrary, the court of appeals expressly applied the rule announced in Peña-Rodriguez to the facts of this case, ultimately determining that a new trial was not warranted on the facts of this case. See Pet. App. 37 (Donald, J., concurring in part and dissenting in part) ("readily not[ing]" that the facts of this case were different from Peña-Rodriguez). Petitioner's claim, therefore, is simply a request for correction of the court of appeals' application of law to the

facts of this case. This Court's review of that factbound issue is not warranted. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law.").

2. Petitioner also contends (Pet. 14-24) that he received ineffective assistance of counsel at trial with respect to the Allen charges. That contention was neither passed upon nor presented below, and does not warrant further review. See United States v. Williams, 504 U.S. 36, 41 (1992) (noting the "traditional rule" against a grant of certiorari "when 'the question presented was not pressed or passed upon below'") (citation omitted). Petitioner can raise his ineffective-assistance claim without this Court's intervention, by filing a motion for collateral relief under 28 U.S.C. 2255. See Massaro v. United States, 538 U.S. 500 (2003).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

JOHN M. PELLETTIERI
Attorney

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