ORIGINAL

SUPREME COURT OF THE UNITED STATES

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CASE NO: 18-5118

SHANE K FLOYD, PETITTIONER

V

UNITED STATES OF AMERICA, RESPONDENT

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

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# PETITTIONER'S REPLY BRIEF TO BRIEF IN OPPOSITTION BY RESPONDENT

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PETITTIONER
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NOW RETURNS the petitioner, SHANE K FLOYD (hereinafter "petitioner" or "Floyd"), filing in propria persona, finding it prerequisite to "reply" to the Respondent's Brief for the United States in Opposition to his Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit .

**APPLICABLE RULES IN EFFECT**

The Respondent's Brief in Opposition was docketed and rendered into service on November 9, 2018 . Rule 15.3 (Rules of the Supreme Court) states, "Any Brief in opposition shall be filed within 30-days after the case is placed on the docket ." Allowance in the petitioner's filing is therefore extended to December 9, 2018 . This Brief is timely filed .

Rule 15.6 states, "Any petitioner may file a reply brief addressed to new points raised in the brief in opposition. "... In furtherance, by way of number of copies required, Rule 39 explains, " ... it suffices to file an original and 10 copies, unless the party is an inmate confined in an institution and is not represented by counsel, in which case the original, alone, suffices ." The latter instruction prevails herewith .

In preliminary summation, the petitioner, therefore, adheres to all applicable rules of this filing .

**BACKGROUND**

The extensive facts and procedural history of this case need not be restated here . Thus, being recounted only is that which is essential to comprehend the issues raised in this writ of certiorari .

The petition for this writ was filed on March 1, 2018 and docketed by this Court on July 5, 2018 as No. 18-5118 .

On July 12, 2018, the Government, by way of the Office of Solicitor General, hereby designated Counsel of Record, "waived its right to file a response to the petition on this case ."

Generally speaking, as history recounts, when an adversary "waives" argument, it indicates little if any discourse is designed to convince.

Notwithstanding, this court determined a delicate distinction and on August 10, 2018, advised the Office of the Solicitor General, "Although your office has waived the right to file a response to the petition for a writ of certiorari ... the Court nevertheless ... requests that a response be filed ... Ten typewritten or otherwise reproduced copies ... together with proof of service ... should be filed on or before September 10, 2018 ."

Counsel of Record requested not one but two continuances, both of which were granted by the Court The Brief in Opposition was ultimately filed and docketed in timely fashion on November 9, 2018

**ELIMINATION OF COMPLICATION**

Unless otherwise overcome by argument, it remains the petitioner's understanding that a "Brief in Opposition", as in presentment herein by the Solicitor General, is intended in purpose to be a "strong disagreement with or protest against a plan, law, system, etc." (Black's Dic, 10th Ed at 1267) .

With the highest respect intended, the legal abstract now



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in appearance to presumptively oppose the petitioner's writ of certiorari, candidly portrays an incorrect assessment.

In truth, when the Office of the Solicitor General instantly opted to waive "its right to file a response to the petition in this case", it was demonstrating to this court and the petitioner it could offer no replication in contradiction. This conclusion now becomes an obvious defect in the legal epitome before this Court.

In specificity, the learned Counsel of Record not only misinterprets the two questions in expression heretofore, its rhetoric clearly does not focus on the narrative unsolicited by the petitioner in the writ before this "court of the last resort in the federal system". (Black's, supra, at 1669). Instead, it merely echoes previous court decisions that have brought this petitioner before this "judicial power of the United States". This persists as significant in two regards.

First, the duplication of content is what has inclined this court to recognize the potential impact this judicial review holds in abeyance on freedom from bias at this moment in time.

Second, it cautions this court to the fact the learned Counsel of Record had purpose when it instantly waived its right to respond to the writ. It simply discerned no counterreply.

With the effort in placement made by Counsel of Record, the petitioner deferentially directs this Court to the relevant principal parts of its decretal compliance.

With accuracy and forthright, the petitioner's opposing

party simply had nothing to come in with, as its entire pilotage travels this Court to a mere copy of the entire case as it endured the lower courts.

Facts cannot be ignored. First, Counsel instantly waives a response (indicating it had no argument). Second, in further delay, it seeks 2 continuances. Next, when ordered to keep its response to 10 pages, it ignores the instruction and files 19 pages of an inordinate amount of oversupply from what transpired in the case. This already appears on the record, adding only sporadic insignificant new data, in its attempt to create a bonafide counterargument.

This Court must now be escorted to Counsel's "interpretation" of the two questions at issue herewith. Capsulized, it opines, "...(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...(2) whether petitioner received ineffective assistance of counsel at trial..." (Brf in Opp at I).

While Counsel foreseeably extracts these questions from the record, they unfortunately are not uncompromising in appearance before this Court in the submitted writ of certiorari. The true questions de facto tabled for scope of review are "...(1) whether can racial bias infect a jury's deliberation with discriminatory action tainting the outcome of any trial...(2) whether the form of expression from an appellate court in denial...prove legal counsel of record provided substandard assistance..." (Writ of Cert).

**QUESTION ONE**

The cornerstone of Question One is central to the bias and prejudice that was employed to literally coerce two black female jurors to "vote guilty" when their infirmity of purpose was overwhelming. This frailty obliterated the "beyond a reasonable doubt standard". While it never officially reached the "room where justice is administered", this matter for judgment featured was a deadlocked jury with certainty!

This highest court has been summoned to rectify in acknowledgement that this case is all about "jury tension and racial juror bias", as it breathes on the record with the presence of two black female jurors referred to as A R and M S.

Regrettably, the circumstances that actually took place in that jury deliberation room, prior to the jury reaching a verdict, has harmfully been lost to principle in repetitive restatement. This is evident when Counsel of Record, in its "Brief in Opposition", extends itself with, "The court (Sixth Circuit) explained that for 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. (Brief, supra at 16,17)

The Brief continues, "To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict." (id)

"Whether that threshold showing has been satisfed 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 . (id)

"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 attemptng to hang the jury and protect the defendants, despite the strength of the evidence, merely because the defendants also were African-American. (id, quoting Pet App 12).

"No matter how wrongheaded those views were, however, the foreperson's statements do not support 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 A R and M S, precisely because she (the foreperson) found the evidence to establish clearly petitioner's guilt ."

Herein lies the gravamen of the argument . Everything aforecited is pure conjecture . Is this highest Court to believe because the foreperson personally considers the evidence presented, adequate to "clearly establish the petitioner's guilt", both A R and M S are compelled to do the same? More importantly, it's because they don't concur, they are accused of attempting to create a "hung jury" for their "black brothers" . How can this not be viewed as "jury tension" and "racial juror bias"?

To better understand this shallow and narrow reduplicative conclusion, the Court is besieged to consider what follows .

With certitude, Counsel of Record conjoins both the District Court and U S Court of Appeals, Sixth Circuit, confirming means of proof appearing in the "Pena-Rodriquez" decision throughout the instant action. In specificity, one deduction from that judicial contest bears repeating, "...one or more jurors must make statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict." (supra)

"To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict." (id)

With force of law, the petitioner in the instant action, meets the "Pena-Rodriquez" criteria. From the transcripts of the juror interviews, it is apparent that the jury foreperson and at least one other juror believed that by virtue of being black, the two black female jurors could not render an honest verdict based on the evidence. (Motion R. 152-1, PageID ## 856,858,966-69). This belief revealed the jurors' bias, and the offending jurors expressed their racist views in a hostile manner during deliberations. Also, two jurors signed and submitted a note to the judge in which they accused other jurors of "intentionally trying to hang the jury" (Tr R. 220, PageID ## 3367,3370). The interview transcripts revealed who the "obstructionist" jurors were, the only two black persons serving on the jury. It appears then, that at least two jurors, including the foreperson, held views of black individuals as being self-serving, lacking integrity and incapable of dealing honestly in important matters.

This is significant because the defendants were charged with crimes involving fraud and dishonesty. Jurors harboring this type of prejudice against African-Americans should not have been sitting on the jury regardless. Distinctly,

this impacted their ability to render a fair and impartial verdict against three black defendants charged with crimes involving fraud and dishonesty.

Given these tangible conditions, the district and appellate courts erred in allowing injustice to prevail in the case at bar. Two conspicuous hypothesis never appeard as they should have in this legal proceeding, those being a "hung jury" and an Evidentiary Hearing. In both instances, this abuse of discretion by the district court, later affirmed by the U S Court of Appeals, Sixth Circuit, now mandate corrective action by this judicial power of the United States.

While the petitioner urged the District Court to schedule an Evidentiary Hearing, where oral argument could make an inquiry into his allegations of racial bias during jury deliberations, and with equal importance an ex parte contact between jurors and court personnel could be aired.

In the translation, it appears obvious court personnel (the bailiff) have been furtively removed as a contributory racial influence on both A R and M S.

The record discloses, during deliberations, the foreperson referred to the two black women, A R and M S, as "colored women" and accused them of refusing to convict the defendants because of their race. (Motion, R. 152-1, Page ID #858)

After enduring several days of bullying and harassment, M S became so enraged by the remark, she felt she was going to either black out or "smack the [redacted] out of the foreperson"(id, R 152-2, PageID #977-78, 983, 986, 1014-25).

It was then A R had the Bailiff summoned. She was advised both black female jurors were disrespected and delibera-



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tions were going nowhere (id at 859-61, 884-85).

The foreperson hastily retreated to the bathroom. Upon her return, the Bailiff ordered her to apologize, which she did halfheartedly, persisting in suggestion that A R and M S did not want to convict the defendants for racial reasons. (id at 966-969)

This further offended A R and M S (id at 886,968). In response, the Bailiff advised them to "calm down", and not to let things get "too crazy". (id)

As he should, the petitioner pursued a motion for a new trial agitated by Fed.R.Evid.606(b) and the interaction that took place between the Bailiff and jurors.

Surprisingly, the District Court denied both claims, reacting with inconclusive terms like, the issues were "incidental" and "innocuous" (Order, R.171, PageID #1158-65). Pointedly, the court erred on both counts.

Rule 606 prohibits, "during an inquiry into the validity of a verdict" juror testimony about any statement made or incident that occurred during jury deliberations. However, juror testimony is admissible to impeach a verdict when "an outside influence is improperly brought to bear on any juror." (Fed.R.Evid. 606(b)(2)

Moreover, courts have held that when racial bias influenced a jury verdict, Rule 606(b) is unconstitutional.

The "Villar" court held that because a criminal defendant has a right to due process and to an impartial jury, under the Fifth and Sixth Amendments to the Constitution, the District Court erred in ruling that Rule 606(b) prohibited it from taking juror-testimony about ethnically-biased

comments during the course of deliberations. (United States v Villar, 586 F 3d 76,87 1st Cir - 2009).

Contrary to the District Court's rationale, the petitioner is entitled to an impartial jury free from racial bias, which supersedes any rules of evidence or local rules. (See Villar, supra).

It must be emphasized, even though it has been ignored in the translation, the Bailiff's actions were not inconsequential. As disclosed on the record, the foreperson's insincere apology heightened the level of coercion placed on the minority jurors to return a verdict.

At the very least, the District Court was compelled to hold an Evidentiary Hearing or inquiry to determine the effect external influences and racial prejudices had on the outcome of the trial. It did none of the above in "plain error"

In "Smith", the petitioner presented juror affidavits describing two racially charged statements allegedly made during deliberations, including the remark, "You can't tell one black from another. They all look alike" (Tobias v Smith, 468 F Supp, 1287 - W.D.N.Y.- 1979).

Further, during the translation, the Government cited "United States v Hoffa, 382 F 2d 856 - 6th Cir - 1967" arguing the petitioner held the burden of showing that the relevant evidence of juror bias was discovered after the verdict and could not have been discovered before the verdict with due diligence.

It therefore argues the petitioner in the instant action could have discovered the evidence prior to the verdict had he acted with similar due diligence.

In no way could the petitioner have learned the racial bias going on at that time, without speaking to the jurors while they were deliberating, which clearly would not have been permitted.

Counsel of Record spends an inordinate time extracting "support" from "Pena-Rodriquez v Colorado, 2017 U S Lexis 1574 at * 30-31 - March 6, 2017", as it insists in underlying the absolute assertion of the Sixth Circuit affirmative action. Notwithstanding, this Court must be reminded that Counsel of Record has misconstrued the sum and substance of both questions this highest Court has favored to review, which have resulted from the case at bar. Both questions, having emerged from "juror bias" and "ineffective trial counsel" affect this low-profile African-American defendant. The questions have been elevated to the upper extremity of "jury tension" in the deliberation room leading to a unanimous verdict and decision in denial. This is supported by convincing remarks of an appellate court that certifies trial counsel did not satisfy the requirement of effective legal assistance as mandated by the Constitution (Sixth Amendment).

In toto, the Supreme Court ruling in "Pena-Rodriquez" holds that the "no impeachment" rule embodied in Colorado's counterpart to Federal Rule of Evidence 606(b), must give way where there is evidence of racial bias during jury deliberations.

Because this Court held that the Sixth Amendment supersedes rules of evidence, which could otherwise exclude evidence of racial bias during jury deliberations, it does not follow that a violation of a local rule (defense counsel's decision to interview jurors) could still result in excluding evidence of a racially-tainted verdict, as the Counsel of Record suggests in its Brief in Opposition.

Petitioner submits that Counsel's position that local rules supersede the Sixth Amendment is untenable, particularly in the legal landscape post "Pena-Rodriquez".

In this case, the Government posits that "local rules requiring leave of the court prior to contact with jurors serve to shield jurors from improper contact." However, District Courts have other tools at their disposal to prevent the harassment and intimidation of jurors. For example, the court can instruct jurors they are not obligated to speak to anyone, including counsel for the parties, and to report any harassment to the court. While the Court did not invalidate any local rule concerning juror contact in "Pena-Rodriquez", it did discuss the provisions of such instructions. (id, 2017 U.S. Lexis 1574 at *32-33).

To remind this Court, the Government did concede that while the District Court denounced the petitioner's attorney for the violatiuon of local rules, it did not "base its holding on this point". (Direct Appeal/Appellee's Brief, at 28).

Counsel of Record misses the mark in addressing the exparte contact between the Bailiff and the jury. It places emphasis on the fact that the jurors in their interviews did not state that the foreperson's racial bias determined their decision to finally vote guilty. Let us keep in focus the petitioner's point was that due to racial tensions, both A R and M S had physically exited the deliberations and declared they were done contemplating. (Motion, R.152.1, PageID ## 859-60, 884-85). This is significant because these jurors were coerced with purpose to resume deliberations only to return a verdict, not how they voted or what it was based on afterwards.

The intervention of a court officer (bailiff), while well-intended, resulted in coercing the two female black jurors to return a verdict in this racially-hostile environment. Without this improper coercion, it is likely there would have been a "hung jury" rather than a unanimous verdict.

Under "United States v Harris, 391 F 2d 348 - 6th Cir - 1968", the petitioner holds a constitutional right to a "hung jury". Only improper contact deprived him of that right.

For the isolated reason the petitioner herein has established, at a minimum, a likelihood that his verdict was affected by a bailiff's interaction with two female black jurors, he was entitled to an Evidentiary Hearing on Sixth Amendment claims of unauthorized contact.

**QUESTION TWO**

The petitioner finds it significato that in its 19-page Brief in Opposition, that the first 10-pages restate what has transpired to date at the district and appellate courts, the next eight pages attempt to reaffirm the appellate court's rulings as they pertain to Question One, and in its conclusion, less than one page confronts the question of ineffective counsel.

As was anticipated by Counsel's misconjecture of Question Two, dealing with ineffective counsel, it hastily "heads for the exit" in its Brief in Opposition with the profound statement, "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."

Contraire, this statement only coheres the petitioner's

assurance that Counsel of Record completely misconstrued the reality of Question Two .

The petitioner is not instantly taking the initiative to accost his trial counsel's ineffectiveness . He neglects with purpose any such collateral attack, resigning that mission to the U S Court of Appeals, Sixth Circuit .

To paraphrase for emphasis, Question Two conveys in relevant part, "Can statements of fact by an appellate court be employed to satisfy the two prong 'Strickland Standard' (performance and prejudice) to show substandard assistance by a trial counsel of record, thereby notorizing violation of the Sixth Amendment"?

It appears Counsel of Record presumably departed from this judicial contest, decisively offering no resistance to this factor of concern for all to follow . The petitioner rigidly advocates the commission and necessity of such occurrence since in the instant action the appellate court used that sound reasoning to deny specific arguments in appeal . Who better than a higher court can serve justice in this regard?

While the petitioner's writ of certiorari is laced with these relevant comments to emphasize their bearing, he extracts one for illustration purposes heretofore .

An FBI Special Agent gave opinion testimony at trial . He impermissibly drew conclusions . He repeatedly used terms like "significant, notable and suspicious" to describe certain transactions . It was further apparent by the record that a buyout of a contract by the petitioner was perfectly legal, yet it was presented as being illegal .

All these "facts" were emphasized in the petitioner's Direct

Appeal, all to be disallowed by the appellate court with sound reasoning targeted at counsel for the defense. The appellate court repeatedly clarified, "Defense counsel did not object at the time" (Direct Appeal, supra, at 18).

In evidence, trial counsel's failure to object at critical moments in the trial compelled the appelate court to procedurally reject several critical claims of the petitioner. In fact, however, because the court acknowledges it cannot allow a claim or allegation to proceed because of "counsel's failure to object at the time", this clarifying statement can only be construed as affirmance that said counsel was "ineffective" for that lack of legal performability.

As now established, this "ineffectiveness" comes to this Court from a different blueprint. It is the appellate court who validates the unavailing performance of defense counsel at trial. This far-reaching differential is what brings this question to this Court worthy of consideration.

Defendants in appeal should certainly hold entitlement to evidence forthcoming from an appellate court to substantiate the ineffectiveness of counsel to help satisfy the "Strickland Standard" for ineffectiveness.

When an appellate court is reviewing in appeal a decision in denial of ineffective assistance from a district court, the higher court is compelled to judge the reasonableness of counsel's challenged conduct on the facts of the particular case, and "viewed as of the time of counsel's conduct".

These indisputable events must prevail. A convicted defendant makes a claim of ineffective assistance, identifying a specific act or omission of counsel that visibly is not the result of reasonable, professional



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judgment . In turn, an appellate court cannot determine the stated identified acts or omissions were outside the wide range of professionally competent assistance because the attorney failed to object, when adverse comment was essential . This omission, however, precludes opportunity from the appellate court to favorably rule in light of all the circumstances before it.

In the spirit of this understanding, therefore, the appellate court cannot rule, and places on the record its rule of reason, that being, "...the defense did not object at the time...", substantiating the strong presumption that counsel has rendered inadequate assistance and has failed to make significant decisions in the exercise of reasonable professional judgment.

**CONCLUSION**

Deductible by the facts judicially noted heretofore, the petitioner prays this "Court of last resort in the federal system" will grant this writ of certiorari.

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Respectfully submitted by,

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Date: 11/28/18