IN THE SUPREME COURT

OF THE STATE OF LOUISIANA

NO. 2016 – KP - 1742

STATE OF LOUISIANA

ex rel.

ALLEN ROBERTSON, Jr.

Petitioner

versus

DARREL VANNOY, Warden

Respondent

SUPPLEMENT TO APPLICATION FOR WRIT OF REVIEW

Supplemental Application for Writ of Review From the Nineteenth Judicial District Court Parish of East Baton Rouge, State of Louisiana Criminal Docket No. 01-91-611 Honorable Michael R. Erwin, Presiding Judge

THIS IS A CAPITAL CASE

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APPENDIX - EXHIBIT A

Table of Contents

I. THE SUPREME COURT OF THE UNITED STATES' RECENT DECISION IN *MOORE V. TEXAS* INFORMS APPLICANT'S *ATKINS* CLAIM 1

II. MR. ROBERTSON'S JUROR MISCONDUCT CLAIM SHOULD BE RECONSIDERED IN LIGHT OF THE SUPREME COURT OF THE UNITED STATES' RECENT DECISION IN PENA-RODRIGUEZ V. COLORADO 5

A. **Racial animus influenced a juror's decision to convict Applicant and sentence him to death, resulting in the violation of Applicant's right to a fair and impartial jury.** 6

III. IF REMANDED, APPLICANT'S CLAIM(S) SHOULD BE RANDOMLY REALLOTTED TO A NEW DISTRICT COURT JUDGE 8

IV. CONCLUSION 10

VERIFICATION OF COUNSEL 11

APPENDIX

EXHIBIT A: Supreme Court of the United States, *Moore v. Texas*, 581 U.S. ___ (2017)

EXHIBIT B: Supreme Court of the Unites States, *Pena-Rodriguez v. Colorado*, 580 U.S. ____ (2017)

EXHIBIT C: Dr. Donald G. Hoppe, Psy.D. – Consent Order on Disciplinary Action

EXHIBIT D: Declaration of Johnny Robin

EXHIBIT E: Affidavit of Alison McCrary

EXHIBIT F: The Advocate article, *Baton Rouge judge Mike Erwin banned from local eatery after allegation of racial slur*

EXHIBIT G: The Rouge Collection article, *White Baton Rouge Judge Calls Black Woman the N-word at Local Restaurant*

EXHIBIT H: The Rouge Collection article, *Local NAACP Calls For Investigation Into Judge Mike Erwin Use of the N-Word*

EXHIBIT I: WBRZ article, *Report – Judge banned from eatery over racial exchange with woman at bar*

EXHIBIT J: BET article, *Louisiana Judge Says, 'I'd Never Utter That Language,' Denies Hurling N-Word at Kaneitra Johnson*

EXHIBIT K: NY Post article, *Restaurant bans judge for allegedly using racial slur*

EXHIBIT L: Fox 10 TV article, *Restaurant that banned Baton Rouge judge releases statement about racial slur incident*

EXHIBIT M: News One article, *Louisiana Judge Barred From Restaurant After Hurling N-Word Slur*

EXHIBIT N: NY Daily News article, *La. Judge banned from eatery after woman claims he used N-word*

EXHIBIT O: Daily Mail article, *Louisiana judge allegedly calls black customer the N-word*

EXHIBIT P: Motion for Recusal

EXHIBIT Q: January 22, 2010 Hearing Transcript

MAY IT PLEASE THE COURT:

The procedural history of this case has been thoroughly outlined in Mr. Robertson's original Writ Application. For purposes of this supplemental pleading, Mr. Robertson confines his discussion to two recent decisions by the Supreme Court of the United States, *Moore v. Texas*, 581 U.S. ___ (2017) and *Pena-Rodriguez v. Colorado*, 580 U.S. ____ (2017)- attached as Exhibits A and B—and the effect these decisions have on his Writ Application.

I. THE SUPREME COURT OF THE UNITED STATES' RECENT DECISION IN *MOORE V. TEXAS* INFORMS APPLICANT'S *ATKINS* CLAIM

On March 28, 2017, the United States Supreme Court decided *Moore v. Texas*, 581 U.S. ___ (2017), and vacated the lower court's ruling affirming defendant Bobby Moore's death sentence, as "not aligned with the medical community's information." Exhibit A at 2. While the *Moore* opinion centers, in part, on Texas' use of the *Briseno* factors[1]—a practice peculiar to that state—the United States Supreme Court likewise affirmed its decision in *Hall* that "adjudications of intellectual disability should be 'informed by the views of medical experts'." Exhibit A at 2. In the instant case, the state district court engaged in the very behavior proscribed by the *Moore* Court in denying Applicant's *Atkins* claim: the state district court's ruling cites no medical experts and instead focuses on Applicant's perceived verbal skills as evidence that he is not intellectually disabled. Exhibit 1 at 3.[2] Further, during Applicant's evidentiary hearing, the state district court indicated confusion regarding the standard for competency versus the definition of intellectual disability. Exhibit 3 at 59-60. Additionally, the State and Dr. Curtis Vincent (court-appointed)—focused on Petitioner's relative strengths rather than his weaknesses in evaluating adaptive deficits, the second prong of intellectual disability.[3] Finally, during Applicant's evidentiary hearing both the state

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[1] The United States Supreme Court elaborated that the *Briseno* factors are "an invention of the CCA untied to any acknowledged source." Exhibit A at 2. At least one of the seven *Briseno* factors, while not called by that name, was emphasized by Dr. Donald Hoppe and Dr. Curtis Vincent in their evaluation that Applicant was not intellectual disabled. That factor is: "Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?" *See Ex parte Briseno*, 135 S. W. 3d 1, 8-9 (Tex. Crim. App. 2004). *See* Exhibit 4 at 46 & 47; Exhibit 4 at 82 ("But many times . . . the evidence from the crime, the descriptions from the crime are the most objective and most complete description of the defendant's behavior we have in the entire record."); Exhibit 4 at 94-96; Exhibit 6 at 147-148.

[2] Pursuant to Louisiana Supreme Court Rule X Section 3(9), the exhibits attached to the previous writ application are not duplicated and attached here. Such exhibits are referenced according to their numerical order in the original writ. New exhibits attached to this application are referenced alphabetically.

[3] The State routinely objected to questions regarding whether an evaluation of intellectual disability is focused on deficits rather than strengths. *See, e.g.*, Exhibit 4 at 14 ("Q. An intellectual disability evaluation for the court is focused on deficits? Ms. Burns: Judge, I'm going to object. That is not the case law. The Court: Sustained."); *id.* (Q: And intellectual disability is by definition a condition characterized by deficits? Ms. Burns: Objection, Your Honor…."); *id.* at 16 ("Q: So again, Dr. Vincent, intellectual disability is a condition characterized by deficits? Ms. Burns: Again, I'm going to make the same objection, Your Honor.").

district court and the State and its expert[4] cited Applicant's risk factors for intellectual disability as cutting against a diagnosis of intellectual disability.

As an initial matter, the state district court's denial cited no experts and relied, at least in part, on its own lay observations in finding that Mr. Robertson is not intellectually disabled.[5] *See* Exhibit 1. Like the Texas CCA's decision in *Briseno*—heavily criticized by the U.S. Supreme Court in *Moore*—Judge Erwin's oral denial of Applicant's *Atkins* claim "advanced lay perceptions of intellectual disability." Exhibit A at 15. In both Judge Erwin's 2008 and 2016 oral denials, he notes that Applicant was "very active in his two trials with his lawyers" and further bases his 2016 denial on 'the video tapes that I watched of his [Applicant's] confession and the video tape that was not admitted into evidence during the trial." Exhibit 1 at 3. Judge Erwin's 2008 denial further noted that having "heard his answers under questioning by both his attorney and the State . . . it doesn't appear that he [Applicant] falls into the mentally retarded category." *See* Exhibit 10 at 3. However, as the State's own expert conceded, persons with intellectual disability can appear normal to the lay observer and can develop relatively normal syntax and grammar. Exhibit 4 at 135 (Dr. Hoppe testifying that it is possible for persons with intellectual disability to have normal grammar, vocabulary, and syntax).

The state district court likewise expressed confusion regarding intellectual disability and competency and conflated the two standards. At the close of the testimony of the State's expert Dr. Donald Hoppe, the court handed Dr. Hoppe an affidavit submitted into the record by undersigned counsel, in which Applicant waived his presence at the evidentiary hearing. After asking Dr. Hoppe to read the affidavit aloud, the state district court asked: "What does that mean to you?" Exhibit 3 at 27. Dr. Hoppe answered "It means that he was judged competent to understand his rights and to make a waiver of his rights through that—he made an informative [sic] decision based upon what is written in the law, in a very sophisticated language I would add." Exhibit 3 at 27. At that point, the State marked and submitted the affidavit as State's Exhibit 22. Exhibit 3 at 29.

On rebuttal, undersigned counsel called expert Dr. Mark Cunningham back to the stand, who testified regarding the difference between intellectual disability and legal competence:

> **Q.** Is there a difference between legal competence and intellectual disability?
> **A.** Yes, sir, there is.
> **Q.** Can you describe briefly what that is?
> **A.** There are many – or with some regularity, persons with no [sic] retardation or intellectual disability come before the courts. They have committed crimes and [in] many, if not most instances, they are deemed to be competent to stand trial even though they're a person with mental retardation. . . .

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[4] In 2010, the State's expert Dr. Donald Hoppe entered into a Consent Order with the Louisiana State Board of Examiners of Psychologists related to an alleged violation of R.S. 37:2359(B)(2) and Ethical Standard 3.04 of the APA Ethical Principles and Code of Conduct (2002). Exhibit C.

[5] The district court, in denying Mr. Robertson *Atkins* relief, relied on Mr. Robertson's "school records where he was never found mentally retarded/intellectually disabled, his I.Q. scores, and his ability to adapt to life..." and that Mr. Robertson "was very active in his two trials with his lawyer,"[5] and additionally cited "the video tapes that I watched of his confession and the video tape that was not admitted into evidence during the trial." Exhibit 1.

Exhibit 3 at 59. The state district court interjected, stating:

> **The Court:** Let me interrupt you. From someone who has been doing this for twenty-six years, it's never happened in my court, so I don't believe that either.
> **Mr. Clements:** Excuse me your honor, I'm not—I didn't hear what you said.
> **The Court:** I said I've been doing this for twenty-six years. That situation has—or scenario has never come up in my court. I don't think it applies.

Exhibit 3 at 59-60. From his comments, it appears that the state district court incorrectly believes that incompetence to stand trial is a prerequisite for someone to be found mentally retarded or intellectually disabled—a proposition for which there is no support.

Further, the state district court as well as the State and Dr. Vincent all improperly emphasized Applicant's relative strengths in assessing Mr. Robertson's adaptive functioning. As the *Moore* Court asserted:

> [T]he medical community focuses the adaptive-functioning inquiry on adaptive *deficits*. *E.g.*, AAIDD-11, at 47 ("significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills"); DSM-5, at 33, 38 (inquiry should focus on "[d]eficits in adaptive functioning"; deficits in only one of the three adaptive-skills domains suffice to show adaptive deficits); see *Brumfield*, 576 U.S. at ___ (slip op., at 15) ("[I]ntellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.'" (quoting AAMR, Mental Retardation: Definition, Classification, and Systems of Supports 8 (10th ed. 2002)).

Exhibit A at 12-13 (emphasis in original). Nonetheless, the state district court's denial noted Mr. Robertson's "ability to adapt to life" and his verbal skills as demonstrated by the law enforcement videotapes of Applicant introduced by the State. Exhibit 1. On cross-examination, court-appointed expert Dr. Curtis Vincent, who found Applicant was *not* intellectually disabled, testified that, in evaluating adaptive functioning, strengths must be assessed as well as weaknesses:

> **Q:** And mental retardation or intellectual disability is defined by deficits?
> **A:** It's defined by both. Most commonly it's referred to what the – one measures the abilities of the individuals, and it's the typical abilities when you're looking at adaptive functioning, but both have to be assessed, both deficits and strengths.

See Exhibit 5 at 42. Dr. Vincent further testified, when asked whether intellectual disability was a condition characterized by deficits, that:

> **A:** I don't see it that way, no. If we're measuring deficits, deficits and all skills exist on a continuum. So we—the cutoff being approximately seventy for I.D. they're – that individual is not only going to have deficits that's—that was discussed considerably in the AAIDD manuals. The individual has strengths and has deficits as well. So it's not possible to simply look at deficits.

Exhibit 4 at 16. Dr. Vincent, while correct that an individual with intellectual disability will have both strengths and weaknesses, did not acknowledge controlling case law or Louisiana's own statute defining intellectual disability through the presence of deficits, *not* strengths. *See* La. C.Cr.P. art. 905.5.1 (2016).

Finally, both the state district court and the State framed risk factors as weighing against a diagnosis of intellectual disability rather than being supportive of such a diagnosis, as the medical community recognizes. In *Moore*, the U.S. Supreme Court criticized the state court's analysis, noting:

> **The [Texas] CCA furthermore concluded that Moore's record of academic failure, along with the childhood abuse and suffering he endured, detracted from a determination that his**

intellectual and adaptive deficits were related. Those traumatic experiences, however, count in the medical community as *"risk factors" for* intellectual disability. Clinicians rely on such factors as cause to explore the prospect of intellectual disability further, not to counter the case for a disability determination.

Exhibit A at 14 (internal citations omitted) (emphasis in original). The state district court's questioning of Applicant's expert Dr. Cunningham indicates that the court had determined that Applicant's alcohol abuse and failures in school—behavioral and educational risk factors for intellectual disability—detracted from rather than supported such a diagnosis:

The Court: Doctor, you eluded [sic] to Allen's early drinking.
The Witness: Yes, sir.
The Court: And possible—at least I got the impression, a possible link to his behavior in school.
The Witness: Yes, sir.
The Court: Now there's a lot of people who drink and do bad in school. Would you agree with that?
The Witness: Yes, sir.
The Court: Because, you see, the road goes on forever and the party never ends, except when I got a letter from L.S.U. that told me I was about to flunk out, and I'm certainly not intellectually disabled or mentally retarded.[6] I just didn't apply myself. Could that account for Allen Robertson's behavior in school?

Exhibit 2 at 63-64. However, unacknowledged by the court and the State is the expert testimony of Dr. Hayes and Dr. Cunningham that Applicant exhibited intellectual and adaptive impairments well *before* he began using alcohol and drugs. Court-appointed expert Dr. Jill Hayes testified regarding Applicant's academic performance and substance use that:

What I did was I looked to see if there was a pattern of deficits that dated back to, hopefully, when he wasn't necessarily using drugs, when he was younger. And his academic testing indicated that he did have this pattern of deficits in the functional academic area dating back to when he was a little kid.

Exhibit 7 at 68. Applicant's expert, Dr. Mark Cunningham, similarly testified:

My point was that the onset of – not just his academic difficulties, but his . . . social impairments, had an onset sustained presence long before he began a pattern of alcohol and drug abuse, and that those deficits are also evident after he's incarcerated and is no longer abusing alcohol and drugs.

Exhibit 3 at 51; *see also* Exhibit 3 at 56 ("We've already identified that drug and alcohol use is not a satisfactory explanation for that [Applicant's academic work performance and adaptive deficits in social skills], because these conditions are present before the drug and alcohol abuse starts.").

The State likewise elicited testimony from its expert Dr. Hoppe that the slow learner designation and substance use were more fitting explanations than an intellectual disability diagnosis:

Q. Okay, Dr. Hoppe, is it fair to say that in this case that there's more an issue of drugs and slow learning and not intellectual disability?
A. The data is more consistently pointing in that direction, yes. The only documented cognitive labeling throughout the record is slow learner. There are specific statements that he is not mentally

[6] Throughout the evidentiary hearing, the state district court consistently compared himself, and sometimes his wife, to Mr. Robertson, implying that because there were similarities between Applicant and persons who are not intellectually disabled, that Mr. Robertson was not intellectually disabled either. *See, e.g.*, Exhibit 4 at 137 ("My use of a typewriter is poor."); Exhibit 3 at 47 ("So far he sounds a lot like me as a kid." in response to Applicant's expert testifying that Applicant would steal one or two beers out of the ice box as an eleven or twelve-year-old.); Exhibit 7 at 102 ("I actually have on a semi-light blue t-shirt that used to be white. I don't think my wife is mentally retarded.").

retarded. There are no statements to suggest that he is. And certainly the drug use shows up over and over again. The reliable data seems to point in that direction.
Q. And of course, slow learner under our statute is one of the exemptions, like autism. That does not mean—
A. Correct.
Q . –Intellectual disability; is that correct?
A. Correct.

Exhibit 4 at 110-111. Dr. Hoppe likewise mischaracterized Louisiana's intellectual disability statute in his supplemental report, acknowledging that Mr. Robertson "experienced significant *emotional stress* at home and in school", was "[*e*]*nvironmentally, culturally,* and *economically*" "severely disadvantaged", had "limited" *educational opportunities*, and "very likely had a *learning disability*" but then asserts that such risk factors were "specifically exclude[d] . . . as diagnostic of mental retardation" by the Louisiana Criminal Code. Exhibit 15B at 9 (emphasis in original).

Rather than precluding a diagnosis of intellectual disability, La. C.Cr.P. art. 905.5.1 states that "[a] diagnosis of one or more of the following conditions"—including those listed by Dr. Hoppe in his supplemental report—"does not necessarily constitute mental retardation." *See* La. C.Cr.P. art. 905.5.1(H) (2) (2016). And in fact, Mr. Robertson does exhibit numerous risk factors for intellectual disability. *See, e.g.*, Exhibit 5 at 37-40 (Dr. Vincent testifying about risk factors for intellectual disability and further testifying that Mr. Robertson "certainly [has] a number of risk factors"); Exhibit 4 at 121 (Dr. Hoppe testifying that there are multiple risk factors for intellectual disability); Exhibit 4 at 123-128 & Exhibit 2 at 51 (Dr. Hoppe acknowledging that at least fourteen risk factors for intellectual disability identified by the AAIDD apply to Mr. Robertson). As the AAIDD notes, "at least one or more of the risk factors [described in the manual] will be found in every case" of intellectual disability. *See* The AAIDD Ad Hoc Committee on Terminology and Classification, *Intellectual Disability: Definition, Classification and Systems of Support* (11th ed. 2010) (hereinafter "AAIDD 11th ed.") at 60.

In light of the U.S. Supreme Court's decision in *Moore*, Applicant's *Atkins* claim warrants relief and his death sentence must be vacated. In the alternative, Applicant requests that his *Atkins* claim be remanded to the state district court for further proceedings not inconsistent with *Moore v. Texas*, 581 U.S. ___ (2017).

II. MR. ROBERTSON'S JUROR MISCONDUCT CLAIM SHOULD BE RECONSIDERED IN LIGHT OF THE SUPREME COURT OF THE UNITED STATES' RECENT DECISION IN PENA-RODRIGUEZ V. COLORADO

In *Pena-Rodriguez v. Colorado*, 580 U.S. ___ (2017), the United States Supreme 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 no-impeachment rule[7] give way in order to permit the trial court

[7] The no-impeachment rule, also called the "jury shield law", codified in Louisiana law as C.E. 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 testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether any outside influence was improperly brought to bear upon any juror, and, in criminal cases only, whether extraneous prejudicial information was

to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." Exhibit B at 17. "A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right." Exhibit B at 17. In the instant case, racial animus infected Mr. Robertson's conviction and death sentence in violation of his Sixth Amendment rights. Applicant respectfully requests that this Court reopen and remand his jury misconduct claim for consideration in light of *Pena-Rodriguez.*[8]

A. Racial animus influenced a juror's decision to convict Applicant and sentence him to death, resulting in the violation of Applicant's right to a fair and impartial jury.

Racial animus in jury deliberations causes an "impermissibly large risk of an inaccurate conviction." *Whorton v. Bockting,* 549 U.S. 406, 418 (2007) (quoting *Schriro v. Summerlin,* 542 U.S. 348, 352 (2004)). The United States Supreme Court repeatedly has held that "discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." Exhibit B at 15 (quoting *Rose v. Mitchell,* 443 U.S. 545, 555 (1979)); *see also Ham v. South Carolina,* 409 U.S. 524 (1973); *Castaneda v. Partida,* 430 U.S. 482 (1977); *Batson v. Kentucky,* 476 U.S. 79 (1986); *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614 (1991); *Georgia v. McCollum,* 505 U.S. 42 (1992). Considered a defendant's "fundamental 'protection of life and liberty against race or color prejudice'"—*see McClesky v. Kemp,* 481 U.S. 279, 310 (1987)—" racial prejudice in the jury system damages 'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.'" Exhibit B at 15 (internal citations omitted). Racial bias in the jury system—"a familiar and recurring evil"—"left unaddressed[] risk[s] systemic injury to the administration of justice." *Id.* at 15-16.

> improperly brought to the jury's attention. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

La. C.E. 606(B) (2017).

[8] The United States Supreme Court has held that a new constitutional rule will apply retroactively to cases on collateral review in two circumstances—where when a new constitutional rule is (1) a substantive rule or (2) a "watershed" rule of criminal procedure. *See Teague v. Lane,* 489 U.S. 288, 311 (1989); *State ex rel. Taylor v. Whitley,* 606 So.2d 1292, 1296 (1992) (this Court adopting *Teague* standard for all cases on collateral review in state court proceedings); *see also Saffle v. Parks,* 494 U.S. 484, 494-495 (1990). The *Pena-Rodriguez* decision announced a "watershed" rule, one which implicates the fundamental fairness and accuracy of a criminal proceeding and must meet two requirements: 1) it must be necessary to prevent an impermissibly large risk of an inaccurate conviction and 2) the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding. *See Saffle,* 494 U.S. at 495; *see also Whorton v. Bockting,* 549 U.S. 406, 418 (2007) (quoting *Schriro v. Summerlin,* 542 U.S. 348, 352 (2004)). *Pena-Rodriguez* satisfies both requirements.

First, unaddressed racial bias in the jury system, "would risk systemic injury to the administration of justice." *Id.* at 15-16. Second, *Pena-Rodriguez* changes the bedrock procedural elements necessary to the fairness of a proceeding by requiring a trial court to consider juror statements in cases where a juror relied on racial stereotypes or animus to convict a defendant. Before *Pena-Rodriguez,* racial bias was not recognized as a constitutionally-required exception to the jury shield law. Forty-two jurisdictions follow the Federal Rules for juror statements, and only eleven of those jurisdictions had previously carved out an exception for racial bias. *See* Exhibit B at 9-10. Specifically, Louisiana, which follows the current Federal Rules of Evidence Rule 606(b), did not allow for a racial bias exception. *See* La. C.E. art. 606(B). Consequently, *Pena-Rodriguez* has effected "a profound and sweeping change" by requiring trial courts to consider jurors' statements in cases where juror racial bias is alleged. *Whorton,* 549 U.S. at 421. *Pena-Rodriguez* constitutes a watershed rule that must be applied retroactively.

Mr. Robertson, an African-American male, was tried twice for first-degree murder and both times was sentenced to death. After Mr. Robertson's second trial, post-conviction counsel (who was not undersigned counsel) conducted juror interviews. During the interviews, counsel learned that one of the jurors, Johnny Robin, harbored racial animus towards African-Americans generally and towards Mr. Robertson specifically. In denying post-conviction relief, the district court did not specify on which ground it was denying the claim, stating "basically what I see is that they're either procedurally barred, they've been previously litigated by the Supreme Court on appeal, or that the allegations of ineffective assistance of counsel are not valid..." Exhibit 10 at 3. In its' *Procedural Objections and Answer to Amended Petition for Post-Conviction Relief* (hereinafter "State's Answer"), the State argued that the "jury shield law" prevented admission of the juror declaration demonstrating the racial animus.

In an interview with post-conviction counsel,[9] Juror Johnny Robin stated:

> My impression of Robertson was that he was trashy. He kept his head down throughout and never looked up. At sentencing his lawyer argued that he grew up in a bad environment and didn't have a father figure. I don't think that matters. Lots of black people don't have fathers – they don't know who their fathers are. That's just them.

Exhibit D at 4 (Declaration of Johnny Robin). During the interview, juror Robin made other statements indicating racial animus, including: "I paid for my children to go to Catholic schools so they wouldn't have to be around the violence and poor schools in Baton Rouge. Baton Rouge schools are becoming a lot like New Orleans public schools. They're becoming all black." Exhibit E at 2 (Affidavit of Alison McCrary). Mr. Robin further stated that:

> Robertson was just a low life like other black people. He [Robertson] was in trouble with the cops his whole life. He and his family were poor and lived in poverty. We [the jurors] knew Robertson was trashy because of the evidence we heard. That's all we could say about him.
>
> A lot of violence is coming to Baton Rouge now that so many people have moved here from New Orleans. A lot of people in Baton Rouge are moving to the suburbs like in Zachary to put their children in better schools and to get away from the poor neighborhoods. All this crime is committed by them.

Id. When asked what he meant when he referred to "them," Mr. Robin explained,

> You know. People like him [Robertson]. Yeah, you know, pardon my French, but they're all n*ggers. You see it on TV. They took over the neighborhood where the old Japanese woman and her husband lived [the victims]. Northern Baton Rouge is full of them now. I don't know why they commit crimes.

Id. Later in the conversation, Mr. Robin said, "[A]ll of this violence is caused by young black people. Murders and stuff, it's all done by them n*ggers." *Id.* at 3.

The state district court never considered the effect of juror Robin's racial animus on Applicant's conviction and sentence of death. In *Pena-Rodriguez*, the U.S. Supreme Court set forth the test for determining when racial animus has infected a jury's decision:

> 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. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all

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[9] At the time of Mr. Robin's interview, undersigned counsel was not yet post-conviction counsel.

the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

Exhibit B at 17. Juror Robin statements demonstrate "overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict." *Id.* Mr. Robin formed his opinions long before he sat on Mr. Robertson's jury and brought them into the jury box and deliberation room. As a result, the jury's guilty verdict and resulting death sentence is unreliable. The mere presence of one juror who is biased against the defendant is a structural defect. *Rogers v. McMullen*, 673 F.2d 1185, 1189 (11th Cir. 1982). *Pena-Rodriguez* requires that the state district court now consider the evidence in support of Mr. Robertson's juror misconduct claim and determine whether Mr. Robin's statements "tend to show that racial animus was a significant motivating factor in the juror's vote to convict." Ex. B at 17. Mr. Robertson respectfully requests that this Court reopen and remand Applicant's juror misconduct claim for reconsideration in light of *Pena-Rodriguez v. Colorado*, 580 U.S. ___ (2017).

III. IF REMANDED, APPLICANT'S CLAIM(S) SHOULD BE RANDOMLY REALLOTTED TO A NEW DISTRICT COURT JUDGE

The right to a fair and impartial judge is integral to the justice system. No matter what the evidence is against him, a defendant has a right to an impartial judge. *Tumey v. Ohio*, 273 U.S. 510, 535 (1927). The Louisiana Code of Criminal Procedure[10] requires that a judge be recused when he "[i]s biased, prejudiced, or personally interested in the cause to such an extent that he would be unable to conduct a fair and impartial trial...or [w]ould be unable, for any other reason, to conduct a fair and impartial trial." La. C.Cr.P. art. 671(A)(1) &(6). The commentary to this code article reinforces the importance of impartiality – "courts should not be only impartial but above the suspicion of partiality." *Id.* The Louisiana Code of Judicial Conduct reinforces the importance of the court's impartiality: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary..."[11] Canon 2(A). This Court has asserted that "even the appearance of impartiality, as well as impartiality itself, outweighs the inconvenience caused by the recusal of the trial judge." *State v. Le Blanc*, 367 So.2d 335, 341 (La. 1979). Thus, "a judge should disqualify himself if a reasonable person, knowing all the relevant circumstances, would harbor doubts about the judge's impartiality." *U.S. v. Landerman*, 109 F.3d 1053, 1066 (5th Cir. 1997). Statements and decisions by a judge may

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[10] The Code of Civil Procedure likewise requires recusal when a judge "is biased, prejudiced, or interested in the cause or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys or any witness to such an extent that he would be unable to conduct fair and impartial proceedings." La. C.C.P. art. 151.

[11] The Code of Judicial Conduct further states that: "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and shall personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved..."—Canon 1—and that "[a] judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned and shall disqualify himself or herself in a proceeding in which disqualification is required by law or applicable Supreme Court rule...." Canon 3(C).

also "support an actual bias claim if they reveal favoritism or antagonism such that fair judgement is impossible."[12] *Buntion v. Quarterman*, 524 F.3d 664, 673 (5th Cir. 2008).

Judge Erwin has abandoned the "appearance of impartiality." *See Le Blanc*, 367 So.2d at 341. On February 3, 2017, Judge Erwin was involved in a disagreement with a group of women in Sammy's Grill, a local Baton Rouge restaurant. During the course of the argument, one of the women, Ms. Johnson, accused Judge Erwin of calling her a n*gger. *See* Exhibit F (The Advocate article). The East Baton Rouge Parish Sheriff's deputies were called in response.[13] *Id.* at 1. Upon information and belief, Ms. Johnson has filed a complaint against Judge Erwin with the Louisiana Judiciary Committee, which is currently pending. Sammy's Grill, the restaurant where the argument took place, banned Judge Erwin as a result of the incident. Exhibit F at 2. Local papers, including The Advocate, reported on the incident on February 8, 2017 and in the days following. *See id*; Exhibits F - I (local articles). Quickly, the incident made national and international news. *See* Exhibits J – O (national and international articles).

Though no criminal or civil charges were brought by the East Baton Rouge Parish Sheriff's Office against Judge Erwin, the damage has been done. In the public's eye, Judge Erwin is a racist and cannot preside over cases African-Americans in an impartial manner.

This is not the first time that Judge Erwin's impartiality has been called into question. Applicant has filed at least three motions to recuse Judge Erwin, spanning over a decade, from 2001 to 2014. In 2014, Mr. Robertson filed a *Motion to Recuse* due to inappropriate comments made by Judge Erwin during the *Atkins* evidentiary hearing.[14] *See* Exhibit P (2014 Motion to Recuse). However, even before Applicant's *Atkins* hearing, Judge Erwin demonstrated that he could not remain impartial in Applicant's case. During a February 2008 hearing, Judge Erwin denied relief on all of Mr. Robertson's post-conviction claims, including *Atkins*. Exhibit 10 at 3 (February 14, 2008 transcript). Once this Court reversed the denial as to the *Atkins* claim and remanded the case to conduct an evidentiary hearing— *see State v. Robertson*, 2008-1116 (La. 09/04/09); 17 So. 3d 960—Judge Erwin expressed confusion regarding this Court's remand:

The Court:	As I understand it the supreme court has ordered a hearing to determine whether or not Mr. Robertson is mentally retarded to the extent that he couldn't be executed.
Ms. Burns:	That's correct, Your Honor.
The Court:	My question is ***didn't we go through this in the trial?***

[12] For example, in *Webbe v. McGhie Land Title Co.*, 549 F.2d 1358 (10th Cir. 1977), the trial judge told one party it was "stuck" before allowing it to make any arguments and shortly thereafter granted summary judgment against it. *Id.* at 1360. That judge made his decision after only hearing oral argument from the other side and without reading any of the depositions. *Id.* In remanding the case, the Tenth Circuit called for the judge's recusal since "there [was] not a reasonable likelihood that the trial judge in the instant case, having now been reversed for granting summary judgment, could later preside over the trial of this matter in a fair and impartial manner, or . . . with detachment and objectivity." *Id.* at 1361. The Fifth Circuit, when later discussing this case, agreed that "[i]t [was] not surprising that this conduct was found to indicate bias." *U.S. v. Harrelson*, 754 F.2d 1153, 1165 (5th Cir. 1985).

[13] After the incident, the NAACP held a press conference and called for Judge Erwin to be immediately suspended and investigated. Exhibit H.

[14] During the second setting of Applicant's *Atkins* hearing, (held on April 21, 22, and 23, 2014), Judge Erwin made the comment that was the focus of the recusal motion and subsequent writ: "I'm sure that pretty much everybody on death row is retarded now." Exhibit P at 1 (2014 Motion to Recuse); Exhibit 6.

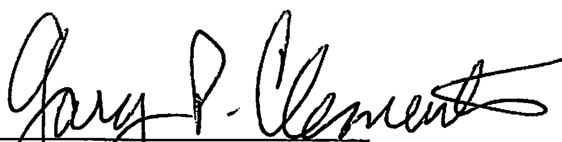
Ms. Burns:	Well, Judge, that was our position, and the court, upon review, have determined that we have to now, in postconviction, have that hearing and address that matter more fully.
	...
Mr. Trenticosta:	...This court ruled that Mr. Robertson is not mentally retarded.
The Court:	I understand that. Because we – ***I heard it twice; two different times, and two different cases that he wasn't mentally retarded. So, I didn't – I just kind of took them at their word.*** So, what did the supreme court decide?
Mr. Degravelles:	The supreme court decided that there should be an evidentiary hearing.
The Court:	Why, John? I mean, we're going to have it. I'm just curious. I haven't read the decision.

Exhibit Q (1/22/10 hearing transcript) at 2-3 (emphasis added). Given Judge Erwin's historical comments in Applicant's case as well as the public incident at Sammy's Grill, Applicant's case, if remanded, must be randomly allotted to a new district court judge to "preserve the appearance of impartiality." *Le Blanc*, 367 So.2d at 341.

IV. CONCLUSION

WHEREFORE, Applicant respectfully urges this Court to grant his Writ Application, vacate his death sentence and impose a mandatory sentence of life without parole. In the alternative, Applicant requests that this Court remand his *Atkins* claim to the state district court for reconsideration in light of *Moore v. Texas*, 581 U.S. ___ (2017). Applicant further requests that this Court remand his juror misconduct claim to the state district court for reconsideration in light of *Pena-Rodriguez v. Colorado*, 580 U.S. ___ (2017). Finally, Applicant respectfully requests that, if this Court is inclined to grant his request(s) for a remand, that his case be randomly assigned to new district court judge.

Respectfully submitted,



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ON BEHALF OF APPLICANT, ALLEN ROBERTSON, JR.

VERIFICATION OF COUNSEL

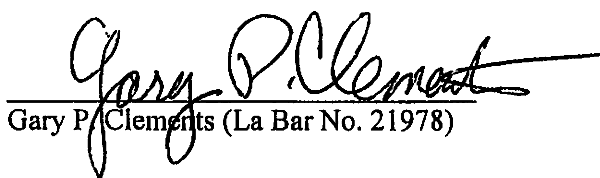
STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared:

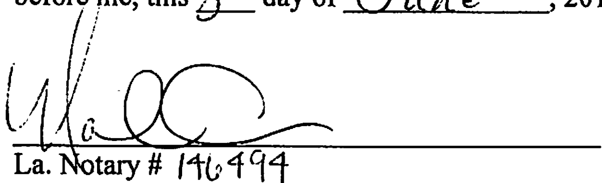
Gary P. Clements

Who, being duly sworn, deposed and stated that he is the attorney for Applicant Allen Robertson, Jr., that the allegations contained in the foregoing writ application are true and correct to best of his information, knowledge, and belief, that the exhibits attached hereto are true and correct copies of originals, and that a copy of the foregoing writ application has been delivered via U.S. Certified Mail to the District Attorney for the Parish of East Baton Rouge and the Honorable Michael R. Erwin by United States Postal Service on this date.



Gary P. Clements (La Bar No. 21978)

SWORN TO AND SUBSCRIBED
before me, this 8th day of June, 2017



La. Notary # 146494

My commission expires at death.