No. 18-8742

IN THE SUPREME COURT OF THE UNITED STATES

TRENTON R. BIRCHETTE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioner's post-trial ex parte motion for leave to interview two jurors based on an allegation that statements pertaining to race were made during jury deliberations.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (4th Cir.):

United States v. Birchette, No. 17-4450 (Nov. 7, 2018)

United States District Court (E.D. Va.):

United States v. Birchette, No. 4:16-cr-57 (June 27, 2017)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 908 F.3d 50. The order of the district court (Pet. App. 13a-23a) is unreported. A prior order of the district court (Pet. App. 9a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 2018. On January 2, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and

including April 5, 2019, and the petition was filed on that date. 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 Eastern District of Virginia, petitioner was convicted on one count of possession with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); one count of use of a communication facility in furtherance of a drug trafficking crime, in violation of 21 U.S.C. 843(b); one count of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. He was sentenced to 130 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-8a.

1. Petitioner was arrested on an outstanding warrant following a traffic stop of a car in which he was a passenger. See C.A. App. 151-157, 167, 466-473. Police found a handgun in the seat pocket in front of where petitioner had been sitting, along with a digital scale with cocaine residue. Id. at 159-162, 169, 173, 178-179. After a search triggered by petitioner's suggestion on recorded jailhouse calls that he had been carrying contraband at the time of his arrest, detectives eventually discovered a knotted plastic bag containing approximately 5.5 grams of cocaine base (in individually packaged quantities) in a

police car that had been used to transport petitioner. See Gov't C.A. Br. 19-23; C.A. App. 50-51, 626-631. The bag's condition was consistent with the type of body-cavity concealment that petitioner had described in the jailhouse calls. See Pet. App. 2a.

A federal grand jury in the Eastern District of Virginia returned a four-count indictment against petitioner for possession with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); use of a communication facility in furtherance of a drug trafficking crime, in violation of 21 U.S.C. 843(b); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). C.A. App. 14. Following a three-day trial and several hours of deliberation, the jury notified the district court that it had reached a verdict on the felon-in-possession count but had deadlocked on the other three. See Pet. App. 13a. In accordance with Allen v. United States, 164 U.S. 492, 501-502 (1896), the court instructed the jury to continue deliberating. See C.A. App. 784-787. Shortly thereafter, the lone African American woman on the jury made a written request to be "dismissed or excused from this case" without explaining why. Id. at 790; see id. at 787-790. The court denied that request because the juror's letter provided no sufficient basis for removal. Id. at 790-792, 794-796. The jury then returned a unanimous verdict convicting

petitioner on all counts. Id. at 7, 862. The court polled the jury at petitioner's request, and each juror individually supported the verdict. Id. at 797-798.

2. a. Following trial, petitioner filed an ex parte motion seeking permission to interview some of the jurors. C.A. App. 868-873. According to petitioner, the lone African American man on the jury had approached defense counsel after the verdict to say that he was "sorry they had to do that"; that "a white lady said, 'the two of you are only doing this because of race'"; and that "we worked it all out." Pet. App. 14a (citations omitted). Petitioner contended that the "white lady" was another juror, that "the two of you" referred to the two African American jurors, and that the woman's statement indicated potential racial bias during jury deliberations that might have affected the verdict. See C.A. App. 870-872.

The district court's local rules provide that "[n]o attorney or party litigant shall * * * interview, examine, or question any juror or alternate juror with respect to the verdict or deliberations of the jury in any criminal action except on leave of Court granted upon good cause shown and upon such conditions as the Court shall fix." E.D. Va. Local Crim. R. 24(C). In accordance with that rule, defense counsel had not asked the male juror for further details, and instead moved ex parte for leave to interview the two African American jurors. See C.A. App. 868-873.

b. The district court denied petitioner's ex parte motion. Pet. App. 9a-12a. The court explained that generally "a juror may not testify about any statement made or incident that occurred during the jury's deliberations" unless it involves "extraneous prejudicial information" or "an outside influence." Id. at 10a (quoting Fed. R. Evid. 606(b)(1) and (2)). The court also recognized that Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017), "held recently that when a juror makes a 'clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant . . . the trial court is permitted to consider the evidence of the juror's statement.'" Pet. App. 10a (brackets and citation omitted). The court explained that "'for [such an] 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,' and the statement or statements 'must tend to show that racial animus was a significant motivating factor in the juror's vote to convict.'" Id. at 11a (brackets and citation omitted).

The district court determined that petitioner had not satisfied that standard, finding "no indication that any juror relied on racial stereotypes or animus to convict [petitioner]." Pet. App. 11a. The court determined that "[t]he alleged reference to race concerned possible racial biases held by members of the jury regarding other jurors, not whether [petitioner] should be

convicted because of his race." Ibid. Accordingly, the court found the alleged juror statements to be "shielded from further inquiry" by Rule 606(b). Id. at 12a.

c. The district court denied petitioner's subsequent ex parte motion for reconsideration. Pet. App. 13a-23a. The court emphasized that, contrary to petitioner's assertion, it was not "h[o]ld[ing] that a 'definitive' showing [of racial bias] is required" before it would permit juror interviews. Id. at 15a. Instead, the court reiterated that petitioner had failed to satisfy the requirement in Peña-Rodriguez of alleging "a clear statement that indicates [the juror] relied on racial stereotypes or animus to convict a criminal defendant." Ibid. (quoting Peña-Rodriguez, 137 S. Ct. at 869).

The district court also observed that petitioner's "more carefully presented Motion for Reconsideration" sought leave to interview jurors under Local Criminal Rule 24(C), which requires "good cause shown." Pet. App. 18a, 20a. The court explained that although Peña-Rodriguez "only indirectly address[es] th[at] issue" because the "local rule[] applicable" there was "not as restrictive of communication with jurors as the local rule applicable here," the court would continue to "draw[] guidance" from Peña-Rodriguez. Id. at 20a. The court then reiterated that because the alleged juror statements here "are not indicative of racial bias against [petitioner]," it stood by its initial ruling to deny the request to interview the jurors. Id. at 21a.

3. The court of appeals affirmed. Pet. App. 1a-8a. As relevant here, the court determined that "the district court did not abuse its discretion in denying [petitioner's] request to interview jurors in search of evidence that could be used to impeach the jury's guilty verdict." Id. at 3a. The court of appeals explained that although "[t]he trial court was not required to take the view that it did of the evidence before it," it "was within its discretion to do so." Id. at 6a.

The court of appeals first explained that "the no-impeachment rule generally prohibit[s] courts from receiving evidence from jurors after the verdict that describe[s] what took place in the jury room," and that Peña-Rodriguez established only "a narrow exception" to that rule for "'clear and explicit statements'" of "'racial animus.'" Pet. App. 3a-4a (citation omitted). The court also noted Peña-Rodriguez's recognition that the "practical mechanics of acquiring . . . such evidence will no doubt be shaped and guided by * * * local court rules." Pet. App. 5a (citation omitted). Because the local rules here require "good cause shown," E.D. Va. Local Crim. R. 24(C), the court observed that "[t]he question thus boils down to whether the district court abused its discretion in finding that [petitioner] had not shown 'good cause' to interview jurors." Pet. App. 5a.

The court of appeals explained that to show "'good cause'" and to "avoid fishing expeditions, * * * a party should give a trial court sound reason to believe that interviews [with jurors]

would uncover the kind of evidence that moved the [Supreme] Court in Peña-Rodriguez." Pet. App. 5a (citation omitted). "In other words, a party must be likely to find evidence that 'racial animus was a significant motivating factor in the juror's vote to convict.'" Ibid. (citation omitted). The court of appeals observed that the trial court is "in the best position to assess th[at] question" because it "understands courtroom dynamics" and "interacts with the jury" in ways an appellate court does not. Ibid.

The court of appeals found that "none of the statements here required the district court to find that [petitioner] would likely uncover evidence that 'racial animus was a significant motivating factor in the jury's vote to convict.'" Pet. App. 6a (citation omitted). The court of appeals observed that the male African American juror's statement that he was "'sorry they had to do that' * * * is the sort of thing a well-meaning juror might tell defense counsel after a guilty verdict, or that anyone might say to salve someone's feelings after a tough loss." Ibid. (citation omitted). It also determined that "assuming that the 'white lady' was a juror," her statements that "'the two of you are only doing this because of race'" and "'it's a race thing for you' * * * need not suggest that the speaker's racial animus in any way impacted her vote to convict," but instead "can reasonably be interpreted * * * as the sort of 'offhand comments [indicating racial bias or hostility]' that [Peña-Rodriguez] held are insufficient to

overcome the no-impeachment rule." Ibid. (brackets and citation omitted). And the court observed that the statement "'we worked it all out' * * * reflects a jury's working in the way that juries should" in light of the Allen charge, which "encourages jurors to work out disagreements on their own." Ibid. (citation omitted).

The court of appeals additionally noted, with respect to the female African American juror's earlier request to be excused from the jury, that the district court was "hardly required * * * to believe that one juror's request to be excused provides compelling evidence that another made clear statements reflecting a vote based on racial animus." Pet. App. 6a. Accordingly, the court of appeals determined that none of the alleged statements or actions "justifies overturning the trial court's judgment that [petitioner] had failed to provide good cause for the requested interviews." Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 10-24) that the district court abused its discretion in denying his motion for leave to interview jurors. That contention lacks merit. The court of appeals correctly determined that the district court did not abuse its discretion, and its factbound determination does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. With three exceptions not pertinent here, Federal Rule of Evidence 606(b) prohibits post-trial efforts to impeach a verdict through evidence of the jury's internal deliberations. Like its common-law antecedent, the rule is "viewed as both promoting the finality of verdicts and insulating the jury from outside influences." Warger v. Shauers, 574 U.S. 40, 45 (2014). Without such a rule, "[j]urors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict." McDonald v. Pless, 238 U.S. 264, 267 (1915). And to ensure that such circumstances do not arise, lower courts have recognized 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), cert. denied, 540 U.S 1011 (2003). Such rules "are quite common" and "encourage freedom of discussion in the jury room." Cuevas v. United States, 317 F.3d 751, 753 (7th Cir.), cert. denied, 540 U.S. 909 (2003).

In Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017), this Court addressed the interplay between those principles and a defendant's Sixth Amendment right to trial by an impartial jury in a context where the defendant raised a claim of racial bias. The Court stated 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 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 emphasized, however, that "[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry." Peña-Rodriguez, 137 S. Ct. at 869. Rather, "[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. The Court explained that "[t]o 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," the Court continued, "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.

Peña-Rodriguez did not call into question the commonplace court rules limiting post-trial juror interviews. To the contrary, the Court 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." Peña-Rodriguez, 137 S. Ct. at 869. "These limits," the Court explained, "seek to provide jurors some protection when they return to their daily affairs after the verdict has been entered." Ibid.

2. The court of appeals correctly determined that the district court acted within its discretion in finding that petitioner had satisfied neither the constitutional standard in Peña-Rodriguez nor the "good cause" standard in the applicable local rule to justify interviewing jurors. Peña-Rodriguez applies only "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict." 137 S. Ct. at 869. As the court of appeals observed, the district court reasonably determined that none of the alleged statements by the male African American juror or the "white lady" (as relayed by him) was a "clear statement[]" that the jury found petitioner guilty because of racial animus. Pet. App. 6a. Instead, as the district court explained, those statements at most "concern[] possible racial biases held by members of the jury regarding other jurors," not petitioner. Id. at 11a. In reaching its decision, the district court correctly understood that Peña-Rodriguez supplied the applicable standard and reasonably determined that the facts here more closely resembled "offhand comment[s] indicating racial bias or hostility," which the court had distinguished from the facts of Peña-Rodriguez itself. Pet. App. 12a (citation omitted); see id. at 11a & n.2. Although petitioner

suggests in passing that the statements "may have met th[e] standard" articulated in Peña-Rodriguez, Pet. 12 (emphasis added), he does not explain how it was an abuse of discretion for the district court to determine otherwise.

The district court likewise did not abuse its discretion in making its factbound determination that, to the extent the local rule's "good cause" standard for interviewing jurors might be more permissive than Peña-Rodriguez's constitutional floor, petitioner had not shown "good cause" in the circumstances here. District courts generally have broad discretion to adopt, interpret, and enforce their own local rules, which "have 'the force of law.'" Hollingsworth v. Perry, 558 U.S. 183, 191 (2010) (per curiam) (citation omitted); see 28 U.S.C. 2071; 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). Peña-Rodriguez itself recognized that local rules play an important role in "provid[ing] jurors some protection when they return to their daily affairs after the verdict has been entered" and will thus necessarily "shape[] and guide[]" a defendant's ability to "acquir[e] and present[]" evidence of juror statements during deliberations. 137 S. Ct. at 869.

The district court acted within its discretion in interpreting and applying its own local rule to determine that petitioner had not demonstrated "good cause." As the court of appeals explained in affirming the district court's decision,

prior circuit precedent had interpreted the "good cause" standard to require a "'threshold showing'" that one of the three exceptions to Rule 606(b) applies before permitting a party to interview jurors. Pet. App. 5a (citation omitted). The court of appeals approved the district court's adaptation of that standard to "the relevant standard for waiving the no-impeachment rule from Peña-Rodriguez." Ibid. As adapted to "the present context," that standard requires a threshold showing under which a defendant "give[s] a trial court sound reason to believe that interviews would uncover the kind of evidence that moved the Court in Peña-Rodriguez" -- specifically, "evidence that 'racial animus was a significant motivating factor in the juror's vote to convict.'" Ibid. (citation omitted). The court of appeals explained that "[w]hether that standard is met is quintessentially a judgment call for district courts." Ibid.

The district court's analysis of the evidence here in making its "judgment call" was well supported by the record and was not an abuse of discretion. The court carefully reviewed each of the alleged statements and explained why they did not provide a sound reason to believe that any juror harbored racial bias against petitioner or voted to find petitioner guilty because of race. See Pet. App. 10a-12a, 20a-21a. And while recognizing that the district court "was not required to take the view that it did of the evidence before it," the court of appeals' analysis of the

evidence was similar to the district court's. Id. at 6a; see pp. 8-9, supra.

Petitioner errs in contending (Pet. 12) that "[t]he district court refused to allow [petitioner] to investigate a constitutional claim because he could not already prove that constitutional claim." To the contrary, the district court made clear that under the local rule, petitioner needed to make only a "threshold showing" of his claim to proceed. See Pet. App. 16a, 17a n.4, 19a. As the court of appeals explained, that threshold showing required petitioner to show that he would "be likely to find evidence that 'racial animus was a significant motivating factor in the juror's vote to convict'" -- not that he already needed to have such evidence in hand. Id. at 5a (citation omitted). And the district court properly applied that standard in determining that although the alleged statements "pertain[ed] to race," they "fail[ed] to illustrate any juror's racial bias against [petitioner]," and thus petitioner had not shown that he was likely to find evidence that a juror harbored racial animus against him. Id. at 20a. The court acknowledged "the possible equivalency between racial bias exhibited toward other jurors and racial bias against the defendant," but determined that petitioner had not demonstrated that equivalency under the applicable "good cause" standard. Id. at 21a.

3. Contrary to petitioner's argument (Pet. 17-22), the factbound decision below does not conflict with any decision of

other courts of appeals or state courts. In particular, he does not identify any conflict in the application of Peña-Rodriguez, and to the extent some jurisdictions might have more permissive local juror-inquiry rules or practices, any variance in such procedures was anticipated by Peña-Rodriguez, see 137 S. Ct. at 869, and presents no question that would warrant this Court's review. Cf. Hollingsworth, 558 U.S. at 191.

Like the court below, courts of appeals have uniformly recognized that Peña-Rodriguez created only a "narrow exception" to the general no-impeachment rule. United States v. Baker, 899 F.3d 123, 133-134 (2d Cir.), cert. denied, 139 S. Ct. 577 (2018) (No. 18-6351); see United States v. Robinson, 872 F.3d 760, 764 (6th Cir. 2017) (explaining that the exception applies "in very limited circumstances"), cert. denied, 139 S. Ct. 55 (2018) (No. 17-7970), 139 S. Ct. 56 (2018) (No. 17-7989), and 139 S. Ct. 786 (2019) (No. 18-5118); Young v. Davis, 860 F.3d 318, 333 (5th Cir. 2017) (explaining that the exception applies "narrowly"), cert. denied, 138 S. Ct. 656 (2018) (No. 17-6405).

The Sixth Circuit's decision in Robinson is illustrative. There, defense counsel obtained evidence that the foreperson of the jury had told two African American jurors during deliberations "that she believed they were reluctant to convict because they felt they 'owed something' to their 'black brothers.'" Robinson, 872 F.3d at 767. In affirming the denial of a motion for a new trial on the basis of that evidence, the Sixth Circuit explained

that 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." Id. at 770-771 (brackets and citation omitted). The Sixth Circuit observed that the foreperson "never suggested that she voted to convict [defendants] because they were African-American," and that although the foreperson "did impugn [the other jurors'] 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' analysis here is consistent with Robinson's. Like the court in Robinson, the court here evaluated the alleged juror statements and determined that although they exhibited some bias, they were not clear statements that any juror was biased against petitioner because of his race or that any juror voted to find petitioner guilty on that basis. See Pet. App. 6a. Indeed, petitioner does not identify any appellate decision in which juror statements that might suggest racial bias against other jurors, as opposed to the defendant, were deemed to satisfy Peña-Rodriguez or even to warrant further investigation -- much less to render a trial court's decision to the contrary an abuse of discretion.

Petitioner's suggestion (Pet. 17) that the decision below conflicts with the Ninth Circuit's decision in Dyer v. Calderon, 151 F.3d 970 (en banc), cert. denied, 525 U.S. 1033 (1998), is

incorrect. According to petitioner, Dyer "held that a 'colorable claim' of juror bias demands an investigation." Pet. 17. Petitioner does not explain how Dyer's "colorable claim" standard differs in substance from the "threshold showing" the district court required here. Moreover, Dyer did not involve the interpretation or application of a "good cause" standard under a local rule, and so cannot conflict with the district court's interpretation of that critical phrase in its own local rule here. Cf. Hollingsworth, 558 U.S. at 191. And at all events, Dyer is inapposite because it addressed a claim that a juror lied on her voir dire questionnaire about her potential bias, not a challenge to the verdict based on alleged statements during jury deliberations; indeed, the Ninth Circuit's en banc decision does not cite either Rule 606(b) or its common-law antecedent. See 151 F.3d at 979-981.

For similar reasons, the decision below does not conflict with the myriad state-court decisions petitioner cites (Pet. 19-22). Each of those cases predated Peña-Rodriguez and none involved an interpretation or application of the "good cause" standard in the local rule here. More important, that some courts have sometimes permitted investigation into juror bias based on the facts presented to them in those cases does not present a conflict with the factbound decision below, much less establish that the district court abused its discretion in determining that no such investigation was appropriate in light of the facts here. That is

particularly true given that States are free to make rules about post-trial juror questioning that sweep more broadly than the constitutional rule recognized in Peña-Rodriguez.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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