No. 18-8742

IN THE

SUPREME COURT OF THE UNITED STATES

TRENTON R. BIRCHETTE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION TO CERTIORARI

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ARGUMENT

Just as Rule 606 of the Rules of Evidence gave way to Miguel Pena-Rodriguez's Sixth Amendment jury trial right, E.D.Va. Local Rule 24(c) must give way to Petitioner Trenton Birchette's Sixth Amendment jury trial right, and more specifically, to his right to investigate a colorable allegation raised by Juror Martin that that right may have been violated.[1]

[1] *Pena-Rodriguez v. Colorado*, 137 S. Ct 855 (2017), arose from the state court system of Colorado, but the Court discussed Rule 606 of the Federal Rules of Evidence as an example of the no-impeachment rule. *Id.* at 865.

The United States starts its brief in opposition by framing the question presented incorrectly. The issue for this Court is not "[w]hether the district court abused its discretion in denying" Mr. Birchette the ability to ask any jurors any questions about the allegations of racial bias in jury deliberations raised by Juror Martin. Brief in Opp. at I. Rather, the question presented is about the Fourth Circuit's legal standard, imposed in a published opinion after a rare federal criminal trial, about the requirements a federal criminal defendant must meet in order to be permitted even to *investigate* a colorable claim of racial bias in jury deliberations in violation of the Sixth Amendment. This is a binding legal standard, and it is one that is inconsistent with other federal circuits and state courts of last resort. *See* Pet'n at 19-22.

The United States argues in opposition to a grant of certiorari for two principal reasons: first, that the court of appeals was correct; and second, that there is no split among the lower courts. Neither argument is persuasive.

1. The United States first claims that the court of appeals was correct that Mr. Birchette "satisfied neither the constitutional standard in *Pena-Rodriguez* nor the 'good cause' standard in the applicable local rule to justify interviewing jurors." Brief in Opp. at 12.

First, the courts must not require that Mr. Birchette prove a substantive *Pena-Rodriguez* claim in order to merely investigate the alleged *Pena-Rodriguez* violation raised by Juror Martin. The government's first argument – that he did not satisfy "the constitutional standard in *Pena-Rodriguez*" – is the exact Catch-22 Mr. Birchette has been asking courts

to remedy throughout this appeal; how can a defendant ever prove a claim of racial bias in jury deliberations in a jurisdiction where his counsel is prohibited from speaking to any jurors, even a juror who approaches counsel voluntarily?

Second, the court of appeals did not correctly rule that Mr. Birchette lacked "good cause" to interview jurors under the local rule. The rule and its caselaw – in line with other courts, *see* infra – require a mere "threshold showing" to interview jurors. *E.g.*, *United States v. Gravely*, 840 F.2d 1156, 1159 (4th Cir. 1988) (requiring "threshold showing of improper outside influence" to allow juror interviews); *cf. United States v. Sandalis*, 14 F. App'x 287, 291 (4th Cir. 2001) (reversing district court for not holding evidentiary hearing regarding extraneous factors that allegedly bore on juror's decision-making process). Juror Martin's allegations, raised voluntarily by the lone black male juror on the case just minutes after the verdict – included allegations that a white juror accused the two black jurors of "only doing this because of race" and telling them "it's a race thing for you," in a case that required an *Allen* charge.[2] This more than meets the low bar of a "threshold showing." These statements by the white juror(s) were not "offhand comments," and moreover, even if they were such "offhand comments" that did not impact the verdict, a quick interview of Jurors Martin and Williams could have confirmed that. This was no "fishing expedition" by the defense.

The court of appeals opinion itself demonstrates that it held Mr. Birchette to a standard far higher than "good cause" or a "threshold showing," when it imported the "compelling evidence" language from the substantive *Pena-Rodriguez* standard into its

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[2] *Allen v. United States*, 164 U.S. 492 (1896).

analysis of a request to interview jurors under Local Rule 24(c). Pet. App. 6a (holding that facts in this case "hardly required the trial court 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") (emphasis provided). A "threshold showing" is not "compelling evidence." And if jurisdictions require "compelling evidence" to interview jurors even after jurors have voluntarily approached counsel to discuss racial bias in jury deliberations, *Pena-Rodriguez* violations in those jurisdictions will be impossible to prove. How can a defendant possibly gain "compelling evidence" without speaking to jurors?

The United States describes at some length the standard for a violation of the Sixth Amendment jury trial right as explicated in *Pena-Rodriguez*, noting that the no-impeachment rule gives way in those circumstances. Brief in Opp. at 10-11. The United States notes that for a violation "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 in Opp. at 11 (quoting *Pena-Rodriguez*, 137 S. Ct. at 869).

Mr. Birchette agrees that the Court said that in *Pena-Rodriguez*. In order to satisfy his burden to make such a showing, his counsel or the district court has to be able to interview at least some jurors. That is, the government obfuscates the line between the substantive *Pena-Rodriguez* standard – for a violation of his Sixth Amendment right to a jury trial due to racial bias in jury deliberations such that his conviction must be vacated – and the issue in this case. The issue here is what preliminary showing must be made before a

criminal defendant in federal court must be allowed to interview jurors about colorable claims of racial bias.

This case is about is the standard to *investigate*, not the substantive standard to prove that his conviction must be overturned and to gain a new trial. The government ignores that critical distinction when it complains that Mr. Birchette "does not explain how it was an abuse of discretion for the district court to determine" that he had not met the substantive *Pena-Rodriguez* standard. Brief in Opp. at 13. Mr. Birchette did not explain that because he has not yet had a chance to ask a single question of a single juror to investigate his *Pena-Rodriguez* claim. That explanation must be a for later step in the litigation. The Fourth Circuit recognized this critical distinction, and the government should not be allowed to obfuscate it. The Fourth Circuit observed that Mr. Birchette "does not yet attempt to impeach the jury's guilty verdict, but to gather evidence of racial bias through juror interviews." Pet. App. 5a. But the court of appeals did not apply the standard it articulated.

This is not a difficult paradigm to implement or to administer. It has similarities to the standard for obtaining a certificate of appealability under 28 U.S.C. § 2253. A prisoner seeking to appeal the denial of habeas relief need only make a showing that the issues he raises are "adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quotation omitted). The reviewing court makes only a "threshold inquiry," and that court errs if it requires a showing that the claim will succeed. *Id.* at 336-37. Courts engage in this analysis every day, and could just as easily determine whether a defendant has made a threshold showing of juror bias that is worthy of further

investigation. But like the Fifth Circuit in *Miller-El* – which had required petitioners to prove their cases on the merits before it would issue a COA – the Fourth Circuit here paid lip service to the "threshold showing" or "good cause" standard while, in fact, requiring Mr. Birchette to prove a *Pena-Rodriguez* claim he had no opportunity to investigate. And like the Court in *Miller-El*, the Court should grant certiorari here to ensure that an outlier circuit does not impose an impossibly high bar to presenting a claim on the merits.

The government leads with an emphasis on the need to protect jurors from contact or harassment, *see* Brief in Opp. at 10, 12, but here Juror Martin voluntarily came forward and approached the defense team; the need to avoid harassing him is minimal at best. The *Pena-Rodriguez* Court discussed this concern too: "These limits," the Court explained, "seek to provide jurors some protection when they return to their daily affairs after the verdict has been entered." *Pena-Rodriguez*, 137 S. Ct. at 869 (cited in Brief in Opp. at 12). But again, this concern is not an issue here, where Juror Martin sought out the defense team; he need not be protected from contact that he chose to initiate.

The United States also asserts that "the facts here more closely resembled 'offhand comment[s] indicating racial bias or hostility,' which the court had distinguished from the facts of *Pena-Rodriguez* itself." Brief in Opp. at 12. This too ignores the problem in this case, which is the courts' refusal to allow Mr. Birchette to investigate. The "facts here" cannot be assumed without allowing any follow-up or investigation, and the white juror's statements should not be given a presumption of offhand-ness. A white juror said – at a minimum – "it's a race thing for you" and "the two of you are only doing this because of

race." Pet. App. 2a-3a. One black juror asked to be excused from service mid-deliberation. Pet. App. 2a. The other black juror raised the racial comments of the while juror to defense counsel, and was asked no clarifying or follow-up questions because of the local rule. The jury required an *Allen* charge to convict on three of the four counts. Pet. App. 2a. There is no basis to assume that all the "facts here" are known, that all the statements are known, and that all statements were such "offhand comments," without allowing any investigation of Juror Martin's allegations. That is the point.

The United States emphasizes repeatedly the Court's statement 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." *Pena-Rodriguez*, 137 S. Ct. at 869. That mechanics of the gathering of evidence may be "shaped and guided" by local court rules, however, does not mean that investigation of a colorable claim of a constitutional violation can be entirely prohibited by a local court rule, or by a court of appeals treating "good cause" to investigate as the equivalent of having "compelling evidence" to prove one's substantive claim. The *Pena-Rodriguez* Court suggested that a juror's conscience and his or her ability to voluntarily initiate a report of racial bias serve as a sort of backstop, stating that "jurors in some instances may come forward of their own accord." *Id.* at 869. When a juror comes forward, as Juror Martin did here, local rules should not stymie that report from being heard. Defense counsel did not ask any follow up questions, fully complying with the local rule. Pet. App. 3a. To then hold that against Mr. Birchette is untenable. Just as the rules of evidence

gave way in *Pena-Rodriguez*, so must the fact of a juror raising a colorable *Pena-Rodriguez* claim trump a local rule prohibiting juror contact.

2. The government is also incorrect when it denies the existence of a split among either the circuits or the states. Brief in Opp. at 15-16. There is a split about the standard required to investigate the existence of a *Pena-Rodriguez* racial bias violation. That the *Pena-Rodriguez* exception to the no-impeachment rule of Rule 606 of the Federal Rules of Evidence is narrow, Brief in Opp. at 16, does not mean that defendants may be prevented from investigating at all when colorable claims of violations are presented. The *Pena-Rodriguez* Court recognized that jurors approaching counsel was the principal way the existence of such claims might become known, in the very same paragraph the government emphasizes about local court rules. "But while a juror can always tell counsel they do not wish to discuss the case, jurors in some instances may come forward of their own accord." *Pena-Rodriguez*, 137 S. Ct. at 869. That is what happened here, but counsel was not allowed to ask even clarifying questions. The local rules prevented it. Those local rules must give way.

When a juror voluntarily comes forward with evidence of a colorable claim that racial bias affected deliberations, "good cause" has been shown. The Constitution demands some further investigation. Both the Court and the dissent in *Pena-Rodriguez* recognized that if juror testimony of racial bias in deliberations must be admissible to impeach a verdict, defendants must be allowed to investigate such claims. *Pena-Rodriguez*, 137 S. Ct. at 870 (citing cases in which jurors volunteered information and stating: "When jurors disclose an

instance of racial bias as serious as the one involved in this case, the law must not wholly disregard its occurrence"); *see id.* at 884 ("Many jurisdictions now have rules that prohibit or restrict post-verdict contact with jurors, but whether those rules will survive today's decision is an open question – as is the effect of this decision on privilege rules such as those noted at the outset of this opinion.") (Alito, J., dissenting).

The United States claims there is no distinction between the Ninth Circuit's decision in *Dyer v. Calderon,* 151 F.3d 970 (9th Cir. 1998), and the decision of the Fourth Circuit here. "Petitioner does not explain how *Dyer*'s 'colorable claim' standard differs in substance from the 'threshold showing' the district court required here." Brief in Opp. at 18. Mr. Birchette does explain, Pet'n at 17-18, and is happy to do so again. The Ninth Circuit in *Dyer* held that a "court confronted with a colorable claim of juror bias must undertake an investigation of the relevant facts and circumstances." 151 F.3d at 974. The Fourth Circuit here prevented Mr. Birchette from interviewing a single juror about a claim of racial bias raised by a juror himself. The Fourth Circuit assumed the claim – raised by Juror Martin to defense counsel – had no merit, and was not colorable, without allowing any investigation at all. The Ninth Circuit, in contrast, ruled that courts "must undertake an investigation." The split between preventing an investigation and requiring one is clear.

The government suggests that perhaps *Dyer*'s "colorable claim" standard does not "differ in substance" from the "good cause" standard "the district court required here." Brief in Opp. at 18. That is, the government suggests that *Dyer* cannot conflict with this case because of variations in local rules. Brief in Opp. at 18. If that is true, there may never be

any split on the standard to be allowed to investigate a *Pena-Rodriguez* claim. That cannot be right. *Pena-Rodriguez* is a constitutional exception to a rule of evidence. If Rule 606 gives way to the Sixth Amendment right to a jury trial, so must an overly restrictive interpretation of a "good cause" standard of a local rule in which a "threshold showing" is deemed not to have been met because of a lack of "compelling evidence," Pet. App. 6a – when the relief sought is to question a juror for that very evidence, after the juror came forward voluntarily.

The statements offered by Juror Martin, a layperson, more than meet the standard of a "colorable claim" and also were a "threshold showing" and "good cause" under Local Rule 24(c) for Mr. Birchette's lawyers, or the court, to interview Juror Martin and/or Juror Williams. The Fourth Circuit upheld the denial of Mr. Birchette's request to investigate his colorable claim of racial bias in the jury deliberations because he did not produce "compelling evidence." Pet. App. 6a. How though could any defendant produce compelling evidence when the local rules literally forbid him and his counsel or other agents from seeking such evidence? This paradox leads to geographic areas where Sixth Amendment racial bias claims will never be remedied, even when jurors come forward of their own accord. The Fourth Circuit's standard is far too stringent. And it is notably different from that of the Ninth Circuit.

The United States's discussion of the Sixth Circuit's decision in *United States v. Robinson*, 872 F.3d 760 (6th Cir. 2017), is irrelevant. Brief in Opp. at 16-17. That case is about whether the comments in the jury room rose to the level of a substantive

Pena-Rodriguez violation, such that the conviction must be overturned. The case at bar is about the standard to allow either counsel or the court to question any jurors about statements made in the jury room; it is about the preliminary showing required to investigate. *Robinson* does not speak to that. If anything, *Robinson* highlights the geographical differences at play, in that one petitioner's counsel was able to "hire[] a private investigator to interview the two African-Americans on the jury, A. R. and M. S. [Those jurors] A. R. and M. S. reportedly told the investigator that jury deliberations had become openly hostile along racial lines." 872 F.3d at 768. Mr. Birchette's counsel was barred from that exact course of action by Local Rule 24(c). Mr. Birchette seeks the right to investigate that Mr. Robinson and his co-defendants had. *Robinson* therefore makes the geographical split on investigation of *Pena-Rodriguez* racial bias claims even more clear.

Mr. Birchette noted in his petition that the state courts of last resort also have varying standards on investigations of claims of racial bias in jury deliberations in violation of the Sixth Amendment. Pet'n at 19-22. Cases that have been published after the petition was filed make it clear that this split requires the intervention of the Court. *See State v. Berhe*, 444 P.3d 1172 (Wash. 2019). The question presented to the Supreme Court of Washington in *Berhe* was similar to the question here, in that it focused on the investigation of racial bias in jury deliberation claims: "This case addresses the standards and procedures that apply when trial courts must determine whether an evidentiary hearing is necessary on a motion for a new trial based on allegations that jury deliberations were tainted by racial bias." *Id.* at 1174. Contrary to the United States's suggestion, Brief in Opp. at 18-19, Washington's

rule is not more protective than the decision in *Pena-Rodriguez*; the Washington Supreme Court declared the substantive rule of *Pena-Rodriguez* to be "the same conclusion" it had reached regarding a racial bias exception to the no-impeachment rule. *Berhe*, 444 P.3d at 1179.

The rule on investigating a *Pena-Rodriguez* claim in Washington state, however, is very different than that crafted by the Fourth Circuit below. This is more evidence of the split the petition for certiorari in this case recognizes. In contrast to prohibiting inquiry in the absence of "compelling evidence," Pet. App. 6a, the trial court in Washington must itself undertake inquiry. "Rather than permitting the parties alone to investigate allegations of racial bias, once a claim of racial bias is raised, inquiries into the influence of that racial bias on a jury's verdict must be conducted under the court's supervision and on the record." *Berhe*, 444 P.3d at 1180.

The *Pena-Rodriguez* 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." 137 C. St. at 869 (emphasis provided). Where local rules prevent juror contact even when a juror comes forward with allegations about racial bias in deliberations, it will be impossible for defendants to gain "the evidence" the Court referred to *even in cases where it exists*. A colorable allegation demands an investigation, or that evidence will never be brought to light.

Mr. Robinson got to investigate his claim. So did Mr. Pena-Rodriguez. Mr. Birchette did not. The question presented in this case therefore is one on which the lower state and federal courts are divided: what showing must a criminal defendant make in order to be permitted to investigate a colorable claim of racial bias in jury deliberations in violation of the Sixth Amendment and *Pena-Rodriguez*. The question is not whether the district court abused its discretion, as the government proclaims. Rather, it is whether a defendant who is precluded from speaking to jurors must, as a matter of law, present "compelling evidence" of racial bias in jury deliberations before even being permitted to interview jurors about his colorable claim of racial bias in jury deliberations. It is not Mr. Birchette's fault that his counsel were not allowed to ask any clarifying or follow-up questions of the juror who voluntarily approached them. Mr. Birchette lacked what the Fourth Circuit deemed sufficient "compelling evidence" and therefore, the Fourth Circuit ruled, had not made a "threshold showing" of "good cause" under the local rule requiring court permission before juror contact. This is a legal error, and it is an error that renders the investigation of a colorable claim of a Sixth Amendment racial juror bias violation impossible, and the violation itself therefore unable to be remedied. This cannot stand.

CONCLUSION

For the reasons given above, as well as those presented in the petition, the Court should grant a writ of certiorari and review the judgment of the Fourth Circuit.

Respectfully submitted,

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