No.

IN THE

Supreme Court of the United States

MICHAEL RICHARDS,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

Should this Court's decision in Pena-Rodriquez v. Colorado, 137 S. Ct. 855 (2017) be applied retroactively to Petitioner's collateral attack?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Richards respectfully petitions for a writ of certiorari to review the judgments of the Supreme Court of Pennsylvania and the Superior Court of Pennsylvania.

OPINIONS BELOW

The Opinions of Common Pleas Court (9a-20a) and the Superior Court of Pennsylvania denying the Petitioner's Petition for relief under the Pennsylvania Post-Conviction Relief Act are attached hereto in the Appendix (2a-8a) as well as the Order of the Supreme Court of Pennsylvania denying the Petitioner's Petition for Allowance of Appeal. (1a)

JURISDICTION

This Court has jurisdiction, pursuant to 28 U.S.C. §1257(a), to review the final judgment of the Supreme Court of Pennsylvania.

RELEVANT PROVISIONS INVOLVED

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT

The Petitioner Michael Richards was found guilty on May 30, 2001 following a trial by jury in the Court of Common Pleas of Philadelphia as per CP-51-CR-1200841-1999, of Murder in the First Degree, Robbery, Intimidating a Witness and Possessing an Instrument of Crime. On August 6, 2001, the Petitioner was sentenced to a term of life without parole on the homicide along with an 18 to 36 month consecutive term for Intimidation and a 60 to 120 months concurrent term for Robbery.

The Pennsylvania Superior Court affirmed the judgment of sentence on April 7, 2003. The Supreme Court of Pennsylvania denied the Petitioner's Petition for Allowance of Appeal on December 22, 2003. Commonwealth v. Richards, 828 A. 2d 402 (Pa. Super. 2003), appeal denied, 841 A. 2d 530 (Pa. Super. 2003).

On April 12, 2005, the Petitioner filed a collateral Petition in the Court of Common Pleas of Philadelphia under the Pennsylvania Post Conviction Relief Act regarding a claim of newly discovered evidence. That Petition was denied on September 2, 2005. The Petitioner appealed to the Superior Court as per Docket No. 2780 EDA 2005. On September 22, 2006, a Panel of that Court issued a Memorandum affirming the Order of the Court of Common Pleas on the ground that the PCRA Petition was not timely. A subsequent Petition for Allowance of Appeal was denied by the Pennsylvania Supreme Court on June 6, 2007.

The Petitioner filed a Petition for a Writ of Habeas Corpus under 28 U.S. Code §2254 before the United States District Court for the Eastern District of Pennsylvania. That Petition was denied. Richards v. Tennis, 2005 WL 991264 (2005). In that Petition, the Petitioner claimed that trial counsel provided ineffective assistance in failing to request a limiting instruction concerning repeated references at trial by the prosecutor to the Petitioner having been "a Jamaican drug dealer". Although the United States Court of Appeals for the Third Circuit granted a Certificate of Appealability as to this issue, the Court of Appeals eventually affirmed the District Court. Richards v. Tennis, 2006 WL 2726496 (2006).

On May 4, 2017, the Petitioner filed the instant PCRA Petition with the Court of Common Pleas of Philadelphia, which was supported by Affidavits from witnesses Westmore Richards, Timothy Zigler and Sandra Findley (21a-35a).

On October 6, 2017, the Honorable Gary Glazer entered an Order dismissing the PCRA Petition without a hearing on the ground that the Petition was untimely. A copy of the Opinion of the lower court is annexed hereto (9a).

On October 25, 2017, the Petitioner filed a Notice of Appeal to the Superior Court of Pennsylvania. On November 6, 2018, a Panel of the Superior Court issued a Memorandum Opinion affirming the denial of PCRA relief in this case (2a).

The Petitioner filed a timely Petition for Allowance of Appeal with the Supreme Court of Pennsylvania on December 4, 2018 but the same was denied by Order of the Supreme Court dated May 1, 2019, a copy of which is attached (1a).

The Petitioner remains incarcerated at the Pennsylvania Correctional Institution at Rockview, serving the aforementioned judgment of sentence.

REASONS FOR GRANTING THE PETITION

On May 31, 2001, following the jury's guilty verdict, the forelady told the Petitioner's parents that she "hates Jamaicans" as they only "sell drugs and kill people" and that "they should all go back to where they came from". The present collateral attack seeks to raise a claim that the Petitioner was denied his right to a fair trial by jury.

In denying review, the Pennsylvania courts have stated that this Court's decision in Pena-Rodriquez v. Colorado, 137 S. Ct. 855 (2017), cannot be applied to the benefit of the Petitioner because that ruling is not a newly recognized and retroactively applied constitutional right as set forth in 42 Pa.C.S. §9545(b)(1)(iii) (Superior Court Opinion, 7a).

The Petitioner respectfully submits that Pena-Rodriquez v. Colorado represents a watershed rule of criminal procedure which should be applied retroactively to the Petitioner's case. Therefore, the case should be remanded to the Pennsylvania courts with an instruction that the Petitioner's claim that the jury was infected with racial prejudice against Jamaicans be considered on its merits.

In Pena-Rodriquez v. Colorado, supra, this Court held that where a juror makes a clear statement that indicates that he or she has relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee. Id. at 869.

In the instant case, your Petitioner filed a Post Conviction Relief Act petition within sixty days of this Court's decision in Pena-Rodriquez v. Colorado, pursuant to 42 Pa.C.S. §9545(b). The claim in the attached PCRA petition was supported by the three attached Affidavits (30a-35a). Nevertheless, the Pennsylvania courts have rejected this claim because this Court has never ruled that Pena-Rodriquez v. Colorado is retroactive to collateral cases such as this.

The Petitioner was not in a position to raise this claim prior to March 6, 2017 because the Pennsylvania Rules of Evidence, Rule 606(b), did not permit impeachment of a juror based upon a juror's mental processes. See Commonwealth v. Steele, 961 A. 2d 786, 807 (Pa. 2008). Furthermore, this Court held in Tanner v. United States, 483 U.S. 107 (1987), that such an inquiry was not permitted. In accord is Williams v. Price, 343 F. 3d 223, 237 (3rd Cir. 2003).

Accordingly, this Petitioner was not in a legal position to use this information to support a claim for relief prior to March 6, 2017.

Under Reed v. Ross, 468 U.S. 1 (1984), where a constitutional claim is so novel at that point in time that its legal basis would not be reasonably available, a criminal defendant can be excused for the failure to raise the claim at the time of the event in view of the law that controlled the issue. In accord is United States v. LaPrade, 673 Fed. Appx. 198 (3rd Cir 2016).

The question that is now before this Court is whether this Court's decision in Pena-Rodriquez v. Colorado should be applied retroactively under Teague v. Lane, 489 U.S. 288 (1989) because Pena-Rodriquez v. Colorado constitutes a new rule of law that is a "watershed" rule of criminal procedure. See Montgomery v. Louisiana, 136 S. Ct. 718, 732 (Pa.

2016).1

As this Court stated in Schirro v. Summerlin, 542 U.S. 348, 352 (2004), a watershed rule is one in which the likelihood of an accurate conviction has been seriously diminished, leaving an impermissibly large risk that the verdict may have been less than accurate or the result of fundamental unfairness.

While it is true that this Court has qualified a watershed exception in only Gideon v. Wainwright, 83 S. Ct. 792 (1963), this Court has stated that the danger of racial animus determining any criminal punishment is intolerable and endangers public confidence in the law. Buck v. Davis. 137 S. Ct. 759, 778 (2017). This Court has often held that the Constitution protects an accused from the fundamental deprivation of life and liberty by reason of race or prejudice of color. McCleskey v. Kemp, 107 S. Ct. 1756 (1987).

As Justice Sotomayor noted in her Statement respecting the denial of certiorari in Tharpe v. Ford, Warden, 139 S. Ct. 911 (2019), racial bias is an evil that can and does seep into the jury system and often evades review on the merits. Therefore, the Petitioner respectfully submits that this Court's decision in Pena-

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1 In Tharpe v. Sellers, 138 S. Ct. 545 (2018), this Court granted a Certificate of Appealability that had been denied by the Eleventh Circuit. A state inmate had submitted a motion to reopen his federal habeas corpus proceedings based upon a claim that his jury in Georgia had convicted him of murder while including a white man who was racially biased. Mr. Tharpe had produced a sworn Affidavit from the juror which indicated racial animus. This Court remanded the case for further consideration of that claim. In a Dissenting Opinion by Justice Thomas and joined by Justices Alito and Gorsuch, it was contended that this Court's decision in Pena-Rodriquez v. Colorado should not apply retroactively on collateral review. The significance of this dissent is that the majority of this Court did not adopt that view in its ruling.

Rodriquez v. Colorado constitutes a watershed rule that should be applied retroactively to his case.

The Petitioner concedes that Pena-Rodriquez v. Colorado established a new rule that was neither dictated nor apparent to any reasonable jurist at the time of the conviction of the Petitioner. The Petitioner submits, however, that this rule fits within the second **Teague** retroactivity exception as a watershed rule of criminal procedure since Pena-Rodriquez v. Colorado was the first time that this Court created a constitutional exception to the no impeachment rule. 157 S. Ct. at 875, 879 (Justice Alito, dissenting).

In Wharton v. Bocking, 127 S. Ct. 1173 (2007), this Court stated that, in order to qualify as watershed, a new rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction and must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding. The Petitioner respectfully submits that the Pena-Rodriquez v. Colorado issue, as presented in this case, meets both of these requirements. Racial bias in a jury's deliberation would certainly create "an impermissibly large risk of an inaccurate conviction". This would be a different situation from Wharton, which involved whether the rule created by this Court in Crawford v. Washington, 124 S. Ct. 1354 (2004), would be retroactive to cases already final.

Other cases in which this Court has rejected watershed applicabililty include claims such as the retroactivity of Mills v. Maryland, 108 S. Ct. 1860 (1998), Simmons v. South Carolina, 114 S. Ct. 2187 (1994) and Caldwell v. Mississippi, 105 S. Ct. 2633 (1985). Those cases do not involve the danger of a misdirected deliberation process due to racial animus, as might exist in a Pena-Rodriquez v. Colorado case.

Here, the likelihood of an accurate conviction must be deemed to be "seriously diminished" if the Petitioner's underlying contention of racial animus proves to be correct. Schriro v. Summerlin, 124 S. Ct. 2519,

Furthermore the Petitioner contends that there is no more "bedrock" constitutional right than the right to a fair and impartial trial before a jury of unbiased peers. The Pena-Rodriquez v. Colorado rule constitutes a previously unrecognized (and in fact rejected) bedrock procedural element that is essential to the fairness of a trial. Warden, supra at 1183. In view of the prior precedent to the contrary, the rule in Pena-Rodriquez v. Colorado qualifies as a rule that has altered our understanding of a bedrock procedural element essential to the fairness of a proceeding.

The record here is sufficient to establish that one or more jurors made statements exhibiting overt racial bias that would cast serious doubt on the fairness and impartiality of the deliberations of the jury and its resulting verdict. 137 S. Ct. at 869. A court that hears the merits of this claim may well conclude that racial animus was a significant motivating factor in a juror's vote to convict the Petitioner. A hearing needs to be held before the lower court which will then exercise its discretion in light of all the circumstances to resolve this claim, including the content and timing of the alleged statements and reliability of the proffered evidence. Id. at 869. If, at that hearing, the trial court determines that a juror was biased and unwilling or unable to decide the case solely on the evidence before him, then the Petitioner might well be entitled to relief. Porter v. Zook, Warden, 898 F. 3d 408, (4th Cir. 2018). A remand for such a hearing is all that the Petitioner is asking of this Court. An opportunity for justice for the Petitioner should not be turned away.

CONCLUSION

The Petitioner respectfully submits that this Court should grant his Petition and remand this case for further proceedings.

Respectfully submitted,

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