No. 19-_____

In The
Supreme Court of the United States

HARSHAD SHAH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

EZEKIEL E. CORTEZ
LAW OFFICES OF
EZEKIEL E. CORTEZ
550 West C Street, Suite 790
San Diego, California 92101
(619) 237-0309
lawforjustice@gmail.com

Attorney for Petitioner
Harshad Shah

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED FOR REVIEW

One hundred and thirty years ago, in *Ex Parte Virginia*, 100 U.S. 339, 345 (1880), this Court condemned the exploitation of racial *animus* used by a Virginia state judge to exclude African Americans from the jury selection process. Over a century later, in *Buck v. Davis*, 137 S.Ct. 759, 776-777 (2017) this Court again denounced the use of racial *animus*; this time to condemn stereotype testimony from a defense expert that "black men" are predisposed to violence simply because they are "black." The same year, in *Peña-Rodriguez v. Colorado*, 137 S.Ct. 855, 867-870 (2017), this Court again condemned racial *animus* in the sexual assault trial of a Mexican man, when, during deliberations, a juror said that "nine out of ten Mexican men were guilty of being aggressive toward women and young girls."

1. Is it structural error and a denial of the Sixth Amendment right to "trial by an impartial jury" when the government expressly uses racial *animus* in a bribery trial by having an official government witness testify that people from India, like Petitioner Harshad Shah, are predisposed to bribery simply because they are Indian?

2. Given the injection of racial *animus* at trial, did the Ninth Circuit create a conflict with this Court's precedent denying Petitioner due process and a fair trial when it misapplied plain error review to a predisposition jury instruction that "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings"?[1]

---

[1] [*United States v. Olano*, 507 U.S. 725, 732-736 (1993).]

PARTIES TO THE PROCEEDING

Petitioner Harshad Shah was the defendant in the district court proceedings and appellant in the court of appeal proceedings. Respondent United States of America was the plaintiff in the district court proceedings and appellee in the court of appeal proceedings.

RELATED CASES

- *USA v. Harshad Shah*, No. 8:10-cr-00070, U.S. District Court for the Central District of California. Judgment entered November 3, 2017.
- *Harshad Shah v. USA*, No. 17-50383, U.S. Court of Appeals for the Ninth Circuit. Judgment entered June 11, 2019.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Petitioner, Harshad Shah, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on June 9, 2019.

OPINION BELOW

On April 15, 2019, the Court of Appeals for the Ninth Circuit issued its Memorandum Opinion (*Memorandum Opinion*) affirming the District Court's judgment of conviction and order refusing to dismiss the Indictment. Principally, the Ninth Circuit decided that racially charged testimony by an official government witness in a bribery trial – that Indians like Petitioner Shah are predisposed to offer bribes simply because of their cultural origin as Indians – was not the same *sort* or *category* of racial *animus* repeatedly condemned by this Court.

In its *Memorandum Opinion*, the Ninth Circuit specifically held:

> Dr. Shah first argues that it was structural error for the Government to have elicited racist testimony from Revenue Agent ("RA") Raghaven that people of Indian descent are predisposed to commit bribery. Mr. Shah concedes that because [his trial lawyers] did not object to RA Raghaven's allegedly racist statements at trial, plain error review applies.

> Contrary to Dr. Shah's characterization, RA Raghaven's testimony was *not* ***the sort*** of racist predisposition testimony that the Supreme Court denounced in *Buck v. Davis*, 137 S.Ct. 759, 776-77 (2017). Testimony regarding RA Raghaven's interpretation of Dr. Shah's statements, using his numerous incongruous references to India as context, is *not* ***in the same category*** as testimony that a criminal defendant ***is predisposed to commit violence because of his race***. There was no structural error.

Memorandum Opinion, pg. 2, bold emphasis added. App. 1.

The Ninth Circuit here *did not* say that there was *no racist testimony*; but that the racist testimony injected in the trial about Indians was somehow not "the ***sort*** of racist predisposition testimony that the Supreme Court denounced in *Buck v. Davis*, 137 S.Ct. 759, 776-77 (2017)." Emphasis added. Plainly, the Ninth Circuit here made an arbitrary, split-hair distinction when it said that the claim "that all Indians are predisposed to commit bribery" is a *different type* or *category* of racism. That it is somehow not the same type of racial *animus* as that condemned in *Buck* about "Black men" and in *Peña-Rodriguez* about "Mexicans." A strained and clearly arbitrary judicial distinction without either a moral or a legal distinction.

JURISDICTION

On April 15, 2019, the Ninth Circuit Court of Appeals entered its *Memorandum Opinion* affirming the District Court's judgment and denying Shah's constitutional challenges. App. 1. Then, on June 11, 2019, the Ninth Circuit issued its Order denying a timely petition for rehearing *en banc*. App. 10. Jurisdiction of this Court is invoked under Title 28 U.S.C. §§ 1651(a) and 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Fifth Amendment:

> "No person shall . . . be deprived of life, liberty or . . . without due process of law. . . .";

United States Constitution, Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury. . . ."

INTRODUCTION AND STATEMENT OF THE CASE

This case presents two interrelated issues implicating the most fundamental cornerstones of the criminal justice system in America – the right to fair trial by an impartial jury and the right to due process of law, uncontaminated by racial prejudice.

Writing for the majority in *Peña-Rodriguez*, Justice Kennedy declared it the duty of this Court and "heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons." *Peña-Rodriguez*, 137 S.Ct. at 867. Here, the dignity of Petitioner Harshad Shah and his absolute constitutional rights to trial by an impartial jury and for due process, were deprived by the intentional, judicially permitted contamination of racial *animus*; racial *animus* no different than that consistently condemned by this Court since 1880.

Petitioner Harshad Shah was born and raised in the Gujarat region of western India. Many years ago, after he obtained his psychiatric medical degree, he emigrated to the United States, becoming a U.S. citizen. In 2010, he was Indicted for bribing a Revenue Agent of the Internal Revenue Service during an audit of his private practice. Five and six years later, he went to trial twice on this charge.

In his bribery trials, the trial court and the Ninth Circuit gave their judicial blessings to the express governmental use of racial *animus* opinion by an official government witness, allowing testimony that people from India, like Petitioner, are *predisposed* to commit bribery because of their national origin. Because Petitioner Shah raised an entrapment defense at both trials, predisposition for bribery was *the central* issue for the jury.

At the very outset of the trial, during opening statement, government counsel told the jury, *inter alia*, that their first witness, Indian-born IRS Revenue Agent Raghaven was "randomly" assigned to conduct the audit of then Dr. Shah's private medical practice. Government counsel told the jury how Raghaven telephoned Shah and, during their very first and only conversation, Raghaven "felt" that Dr. Shah had offered her a "bribe." The government explained to the jury:

> During the conversation . . . [Dr. Shah] determines that Revenue Agent Raghaven is of Indian descent, and he starts talking to her in Hindi. You're going to hear from her that's never happened to her before. And he says to her, "We are brother and sister from the same country. Make this audit go away."
>
> She's going to tell you that she, from her experience, ***felt that that was a bribe offering***. And it put her in a state of shock. And she said to him, "This doesn't happen in America," and told him, "We have to go through with the audit." She then hangs up the phone, and she's going to tell you she was in a state of shock, this has never happened to her before.

App. 15, emphasis added.

RA Raghaven then went on to testify, unhampered, to the jury that corruption is rampant in India and that people from India, like Shah, are therefore *predisposed* to bribery. The government intentionally

elicited this admittedly[2] inadmissible racist testimony to "prove" the centrally contested issue for the jury – that Petitioner Shah was "predisposed" to commit the corrupt crime of bribery *solely because* he was Indian.

The government's intentional elicitation of express racial *animus* against Indians permeated the trial and was also centrally used by the prosecutor in closing argument.

With the backdrop of an entrapment case, the government, on direct, proceeded to introduce testimony from Agent Raghaven that Dr. Shah boldly said to her, "We are brother and sister from the same country. Make this audit go away." Well aware of Raghaven's racial *animus* toward people from India, the government then asked her, "How did you take that?" App. 17.[3]

As anticipated, Raghaven obligingly testified, "Well, where I come from, I'm from India, there are [sic] a lot of corruption and bribery goes on, ***I assume*** he's asking me to make it go away ***and offer me a bribe***. That's what I was thinking." App. 17, emphasis added. Defense counsel, fully knowing that this racial *animus* was coming, failed to move pretrial for exclusion under Federal Rules of Evidence 103(d), 104(a), (b), and (c), 401, 403, and 701 and failed to object at the time the

---

[2] One member of the oral argument before the Ninth Circuit agreed that such testimony should have been challenged by trial counsel. And that, if such challenge had been made, it would have been excluded.

[3] Despite being on notice of the forthcoming answer, Dr. Shah's own defense team again made no objection.

racial *animus* was provided to the jury. [*See*, Note 3, *supra.*]

With the toxicity of racial *animus* in a jury trial, injected without objection from the defense and no *sua sponte* intervention by the trial court, the jury was left to logically think that such testimony was proper and must have carried some value. This presumptively undermined the entire structure of the proceeding, leaving the public – and Shah – believing that the government is allowed to have witnesses testify that certain people are more prone to commit crimes based solely on their race, ethnicity, or national origin.

Trying to un-ring that racial *animus* bell, on cross-examination, defense counsel elicited the admission from Raghaven that, despite what her subjective racial *animus* led her to believe about Dr. Shah then, he had not actually offered her anything: "Yeah, there was no mention of money." App. 18. Despite this admission, Agent Raghaven persisted on cross examination that people from India, presumably like her also, are corrupt and offer bribes. *Regardless of what Shah actually said to her. Regardless of the fact that Shah did not offer her anything at all*, she still "believed" that his nature as an Indian was to corruptly hint to "make the audit go away":

> In India that's what happens, so that's what I thought that he's offering. He is asking me to make the audit go away, so I assume that's what he's offering. He's asking me to make

> this offer go – audit go away, ***and that's the bribe he's offering***.

App. 19-20, emphasis added.

Defense counsel persisted in vain:

> Q So my question was, you made an assumption about Dr. Shah because he's Indian, and you had that kind of notion about how things work in India; right?
>
> A Yes.

App. 20.

How the jury may have interpreted this racism, coming from an official of the federal government, cloaked with the government's blessing and permitted by the Court, may be impossible to determine. *See, Weaver v. Massachusetts*, 137 S.Ct. 1859, 1908 (2017) ("an error has been deemed structural if the effects of the error are simply too hard to measure").

The government exploited this during closing argument by arguing: "So before TIGTA [the criminal branch of IRS] ever got involved, before any law enforcement, Dr. Shah has made overtures to a revenue agent to make it go away. Predisposition." App. 23. Contrary to the evidence, government counsel argued "We saw in June 2009 before [IRS criminal investigators] ever got involved, before any [undercover] monitored meeting, that ***Dr. Shah's corrupt efforts began with an attempt to bribe Revenue Agent Mytryee Raghaven***." App. 25, emphasis added.

On closing, the government elaborated, emphasizing the racial *animus* to the jury that Shah was guilty of bribery:

> The evidence showed that not only do both revenue agents share the fact that they spent some time on Dr. Shah's audit, ***they both were exploited by Dr. Shah***. Dr. Shah found a way in for both of them. The evidence showed that Ms. Raghaven, ***he used the fact that she was from the same place that he was***. And with Revenue Agent Ham, Dr. Shah zeroed in on his past psychological problems.

App. 22, emphasis added.

A. Jury Deliberations Focus on Predisposition

Long before Dr. Shah's second trial began, the trial court and defense counsel were on notice that the prosecutor was going to offer the testimony of Revenue Agent Raghaven. The court and the defense were on notice that RA Raghaven was going to offer the same opiniated racial *animus-laden* testimony that people from India are predisposed to corruption. This improper testimony was foreseeable because the government had *already* offered this very type of prejudicial testimony at Shah's first trial, which had ended in a hung jury more than one year earlier, on July 17, 2015. App. 11-13.

The trial record demonstrates indisputably that it took IRS agents *over five months* to get Petitioner Shah, during the audit, to finally offer an IRS agent

the bribe after inducements. It is undisputed that, at that time, Shah had been in private medical practice for years as a psychiatrist, in his fifties, devoid of any prior criminal record, and lacking any objective, demonstrated predisposition to bribery. This may be why the case had to undergo two separate trials because the first trial ended in a deadlocked jury.

Predictably, during deliberations, the jury sent out a note asking the court whether jurors could consider the undercover recordings, captured during the IRS sting operation months *after* the initial contact with Raghaven, for evidence that Shah was predisposed to bribery. Compounding the ongoing taint by the racial *animus* injected during the government's opening, direct and closing, the trial court answered the jury by simply telling them "yes. If you determine the evidence (tapes, recordings) indicates the defendant's predisposition ***before being contacted by government agents***." Emphasis added. This was misleading without explaining that they ***also*** had to consider the entire context preceding the undercover "tapes, recordings." App. 27-28.

The government's conduct boldly undermined the DOJ's Civil Rights Division proclamation that it "is concerned that national origin discrimination may go unreported in the United States because victims of discrimination do not know their legal rights, or may be afraid to complain to the government."[4] In Petitioner

[4] Available at: https://www.justice.gov/crt/federal-protections-against-national-origin-discrimination-1. Last accessed August 22, 2019.

Shah's case, the very government who is entrusted to protect people from such forms of discrimination, actually exacerbated this concern, and made a mockery of Justice Kennedy's proclamation that it is the "heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons." *Peña-Rodriguez*, 137 S.Ct. at 867.

Mr. Shah is currently serving his sentence at FCI Terminal Island in California.

REASONS FOR GRANTING THE PETITION

A. The Court must allow this *writ* because, as Justice Kennedy noted in *Peña-Rodriguez*, it is this Court's "imperative to purge racial prejudice from the administration of justice." *Peña-Rodriguez*, 137 S.Ct. at 867.

This Court's unambiguous mandates in *Buck* and *Peña-Rodriguez* for courts and the government to "purge racial prejudice" from criminal trials cannot be left vulnerable to the type of *ad hoc* erosion done here by the Ninth Circuit.

Here, the Ninth Circuit surprisingly and easily distinguished from the type of racial *animus* condemned by this Court, the racial stereotype testimony in Petitioner's trial that – "Well, where I come from, I'm from India, there are [sic] a lot of corruption and bribery goes on, ***I assume*** he's asking me to make it go away ***and offer me a bribe***. That's what I was

thinking." Government counsel then uses this stereotype to argue in closing that Shah's national origin obviously made him predisposed to bribery. Just as being a "Black man" made the accused in *Buck* and being "Mexican" made the "Mexican" in *Peña-Rodriguez* predisposed to the central issue at hand in each case – violence in the former; having his way with women in the latter.

This Court must grant this *writ* because it is not the case that racial *animus* testimony branding India-born Shah to be predisposed to the central issue here – bribery – "was *not* ***the sort*** of racist predisposition testimony that the Supreme Court denounced in *Buck v. Davis*, 137 S.Ct. 759, 776-77 (2017)."

There is simply no legal significance between the condemned types of testimony in a criminal trial, or at the sentencing phase, where a trial court allowed the phrase "Black men" are predisposed to violence because they are "Black men"; "Mexicans" are predisposed to have their way with women because they are "Mexican"; and "Indians" are predisposed to bribery because they are "Indian." Each is an indistinguishable type of pernicious racial *animus*.

Here, the presiding panel member of the Ninth Circuit panel at oral argument, without articulated disagreement from the other two, expressed the thought that such type of testimony is indeed inadmissible.

At oral argument, during colloquy regarding trial counsel's inexplicable failure to file *any* motions to exclude the race-based testimony at issue, the presiding

panel members firmly engaged in the following colloquy:

> **Counsel:** And I don't know why no one [of the trial counsel] objected to this type of testimony. It is the type of testimony that you don't have to be told 'We don't do that in America.' . . . We also in American do not opine to a jury that because someone is from Detroit, or Mexico or India, they happen to have a predisposition for something. . . ."
>
> **Presiding Panel Member:** ***I agree that***, had an objection been made, and it, and it . . . , ***and it could have been made on a variety of grounds, as to what happens in India***, if it had been made . . . possibly . . . ***the evidence would have been excluded***. But it wasn't made"

At point 7:16 – 9:47 in video/audio of oral argument, emphasis added.[5]

Plainly, the questions presented here demonstrate a need for guidance to lower courts to address the type of hair-splitting, erroneous interpretation, such as here by the Ninth Circuit, of *Peña-Rodriguez's* mandate to "rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons." *Peña-Rodriguez, id.*

---

[5] https://cdn.ca9.uscourts.gov/datastore/media/2019/02/04/17-50383.mp3. Last accessed August 22, 2019.

B. The Court must allow this *writ* because the Ninth Circuit created a conflict with this Court's precedent denying Petitioner due process and a fair trial when it misapplied plain error review to a predisposition jury instruction that "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings."

Petitioner Shah's *writ* must be allowed to proceed so that this Court can provide guidance to lower courts, in the plain error context, on the procedure to be implemented when there is evidence that racial *animus* has been injected in the criminal justice process. This is because structural error may be implicated.

Misapplying plain error standard of review, the Ninth Circuit here ruled:

> Dr. Shah next argues that the district court erred by offering a legally deficient answer to the jury's question about what evidence it could consider ***in evaluating Dr. Shah's predisposition to commit bribery***. The district court consulted with Dr. Shah's counsel before responding to that question during trial, and Dr. Shah's counsel agreed that the district court's proposed response was "correct as a matter of law." Dr. Shah therefore waived his right to challenge the district court's response to the jury note. Cf. United States v. Cain, 130 F.3d 381, 383-84 (9th Cir. 1997) (holding that a criminal defendant waived his right to appeal a jury instruction because his

> attorney agreed at trial that the instruction was legally correct).

Memorandum Opinion, page 4, App. 4, emphasis added. In this facile ruling, the Ninth Circuit failed again to consider this Court's controlling authority.

Petitioner Shah had fully briefed how the trial court's limited answer to the jury's mid-deliberation question about whether it could consider the undercover tape recordings *for predisposition*, implicated the fairness, integrity or public reputation of judicial proceedings. Shah noted how the trial court's response failed to also instruct the jury to consider *all the other evidence from the months before undercover recordings were generated by government agents*. This partial answer implicated structural error.

What the lower court ignored here was that the un-objected response by the trial court to the jury's question also implicated the highly prejudicial context that Shah, because of his Indian origin, was allegedly *predisposed* to corruption. In misapplying plain error, the trial court had an obligation to do more because the incomplete answer, with the background of the race-based prejudice, "Seriously affect[Ed] the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 736 (1993).

The lower court's error also typifies structural error that "strikes at the fundamental values of our judicial system and our society as a whole." *Vasquez v. Hillery*, 474 U.S. 254, 262 (1986), *quoting Rose v. Mitchell*, 442 U.S. 545, 556 (1979).

In *Peña-Rodriguez*, Justice Kennedy noted: "The jury is to be a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'" *Peña-Rodriguez* at 868 [Citations omitted]. The ninth circuit also failed to appreciate that, in the unique context of the racial *animus* and its synergistic effect to Shah's right to fair trial and due process, the incomplete response to the jury also necessarily implicated the pernicious toxin of "race or color prejudice."

CONCLUSION

For the foregoing reasons, Mr. Shah respectfully requests this Court grant a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Dated: September 9, 2019

Respectfully submitted,

EZEKIEL E. CORTEZ
LAW OFFICES OF
EZEKIEL E. CORTEZ
550 West C Street, Suite 790
San Diego, California 92101
(619) 237-0309
lawforjustice@gmail.com

Attorney for Petitioner
Harshad Shah