No. 21-7381

In The Supreme Court of the United States

JESSIE D. HOFFMAN, JR.,

Petitioner,

v.

LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Louisiana

AMICUS BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity—work that continues to be vital today. Much of the Lawyers' Committee's work involves combatting racial inequities in the criminal justice system through litigation, public policy advocacy, and serving as amicus curiae.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an all-too-familiar story. A prosecutor sought out a friendly venue, struck the only Black jurors, and secured a death sentence from an all-White jury that relied on unsupported and untruthful racial tropes about the defendant. But this is not early 20th century Jim Crow. This happened in 1990s Louisiana, and now the State is prepared to execute petitioner Jessie Hoffman despite undisputed evidence from a juror that Mr. Hoffman's race played a role in

[1] No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief. The parties were timely notified and have consented to the filing of this brief.

his sentence. Both the Constitution and this Court's precedent demand a different result.

Certiorari is warranted because the Louisiana Supreme Court decided an important federal question in a way that conflicts with relevant decisions of this Court. Years after the verdict, a juror voluntarily admitted that the jury had convicted and sentenced Mr. Hoffman based on classic racial tropes that had zero basis in the record. Under *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), that should have been sufficient to pierce the no-impeachment rule and entitle Hoffman to a hearing where he could present evidence and prove that his sentence was impermissibly based on his race. Yet the Louisiana Supreme Court refused to grant Mr. Hoffman a hearing even in the face of credible evidence that a jury was tainted with racial bias during deliberations.

As the petition ably demonstrates, the decision below erred in two key respects. First, although the Louisiana Supreme Court recognized that the jury's decision relied on racial stereotypes, it nonetheless wrongly concluded that the statements were not "egregious and unmistakable" enough to trigger *Peña-Rodriguez*. App. for Pet. for Writ of Cert. ("App."), *Hoffman v. Hooper*, A 7-8. Second, the court erroneously heightened the burden that this Court requires of a defendant in Mr. Hoffman's position. Rather than following *Peña-Rodriguez*'s standard that a defendant must produce evidence that "tend[s] to show" his sentence resulted from racial bias at this threshold stage, the Louisiana Supreme Court held that he must

"prove" this bias resulted in the sentence, App. A 9. But that is the question for the next stage, to be addressed *after* the *Peña-Rodriguez* threshold is met, when Mr. Hoffman can present evidence to offer that proof.

The Lawyers' Committee, as amicus, offers additional context that bolsters both of Mr. Hoffman's arguments. First, the juror's statements in this case unquestionably exhibited overt racial bias toward Mr. Hoffman, particularly in light of the larger historical, cultural, and geographic context in which they were made. Second, the statements of overt racial bias at issue here easily satisfy the Court's "tend to show" evidentiary threshold. Both the social science literature, as well as caselaw applying the no-impeachment rule and relied upon in *Peña-Rodriguez*, demonstrate that such overt statements of racial animus are likely to affect juror decision-making, particularly in death sentence deliberations, involving a Black defendant, White victim, and an all-White jury, as was the case here. Thus, the statements at issue satisfy the "tend to show" standard, and it was reversible error for the Louisiana Supreme Court to require, at this stage, "proof" that a juror's sentencing decision was motivated by racial animus.

Because the juror statements exhibited overt racial bias, and tend to show that this bias motivated the jury's death sentence, this Court should grant Mr. Hoffman's petition to ensure that lower courts faithfully follow the *Peña-Rodriguez* standard in these matters of utmost importance. Granting the petition would allow this Court to address and correct the Louisiana

Supreme Court's ruling, which directly conflicts with the "tend to show" standard that this Court has held should apply in cases that involve this important federal question.

ARGUMENT

I. THE JUROR'S STATEMENTS WERE OVERTLY RACIST

A. The Juror's Statements Exhibit Overt Racial Bias on Their Face.

It has long been recognized—with *Peña-Rodriguez* being only one of the latest decisions from this and other Courts—that insidious racist ideas have no place in the American justice system. *See*, *e.g.*, *Strauder v. West Virginia*, 100 U.S. 303, 305–309, (1880) (prohibiting the exclusion of jurors on the basis of race); *After Hour Welding, Inc. v. Laneil Mgmt. Co.*, 324 N.W.2d 686, 690 (Wis. 1982) ("The form of stereotyping as evidenced by the juror Stokes' affidavit has no place in our system of justice."). Here, the juror M.L.'s Affidavit ("Affidavit") (*see* App. at C1-C5) is infused with racial stereotyping and animus that has no place in our system of justice. The Affidavit facially exhibits an overt racial bias that casts substantial doubt on the fairness and impartiality of the jury's sentencing deliberations.

To take just one example, the jury held the stereotypical view that a Black person with no prior criminal record must, nonetheless, have engaged in some type of nefarious behavior. The Affidavit says:

> During the penalty phase deliberations we wanted to know whether the defendant had a juvenile record. We thought that given his background he may have a history of drugs and things like that. We wondered if he was in a gang. The judge told us we were not allowed to have that information.

App. at C4. This statement is littered with thinly veiled nods to Mr. Hoffman's race—the non-existent juvenile record, the fabricated history of drugs and gang membership, and a "background" that evinced nothing of the sort.

The stereotypes that Black men are presumed to be criminals and violent is a pervasive racial bias in this country. *See*, *e.g.*, Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. Contemp. Crim. Just. 276, 278 (2007) (noting the pervasive stereotyping of young Black men as criminals, and surveying studies which offer empirical evidence that Black people are improperly stereotyped as having a propensity for criminality and violence); Dorothy E. Roberts, *Crime, Race, and Reprod.*, 67 Tul. L. Rev. 1945, 1953-54 (1993) ("The unconscious association between blacks and crime is so powerful that it supersedes reality: it predisposes whites to literally *see* black people as criminals."); *see also* Ann C. McGinley, *Policing and the Clash of Masculinities*, 59 How. L.J. 221, 253 (2015) ("Seeing all black men as presumptive criminals is reinforced by widespread stereotypes about black men and black masculinity."); James D. Unnever and Francis T. Cullen, *White Perceptions of Whether African*

Americans and Hispanics are Prone to Violence and Support for the Death Penalty, 49 J. Rsch. Crime and Delinquency 519, 519-22 (2012) (examining White Americans' perception of Black Americans as "crime prone" and that "pejorative depictions" of Black Americans significantly predicts support for capital punishment). It is clear from the Affidavit that the jury considered, discussed, and presumed these racial stereotypes and biases—all contrary to evidence at the trial—while deliberating on Mr. Hoffman's sentence.

Despite hearing testimony at trial that Mr. Hoffman had no legal history and no prior experience with criminal behavior (*see*, *e.g.*, Pet. for Writ of Cert., *Hoffman v. Hooper*, ("Pet.") at 8-9, n.8, n.10), the Affidavit shows that during deliberations, the all-White jury presumed that Mr. Hoffman, a Black man from "the projects," may have had a juvenile record that was being kept from them. App. at C3-C4. Instead of accepting the actual testimony at trial that Mr. Hoffman had no prior criminal record, the jury introduced their own unfounded racial stereotypes about Black men's criminality and propensity for violence in their deliberations.

Similarly, the Affidavit's baseless speculation that Mr. Hoffman must be involved with drugs and gangs exhibits overt racial biases. There is a persistent, false belief in our country that Black men are involved with drugs and gangs, reflecting pervasive racial stereotypes and bias. Our judicial system is well aware of the racial bias that associates Black men with drugs and has taken several measures, such as piercing the jury

shield, to guard against such bias. "Little needs to be said about the pervasive and harmful racial stereotypes regarding African Americans and drugs." *Harden v. Hillman*, 993 F.3d 465, 482 (6th Cir. 2021) (piercing jury shield based on juror statement that Black defendant was a "crack addict"); *see also* Travis A. Taniguchi, Joshua A. Hendrix, Alison Levin-Rector, Brian P. Aagaard, Kevin J. Strom & Stephanie A. Zimmer, *Extending the Veil of Darkness Approach: An Examination of Racial Disproportionality in Traffic Stops in Durham, NC*, 20 POLICE Q. 426 (2017) (citing studies which show that "African Americans . . . are more likely than any other group to be described as violent, drug abusers, and criminals"). The same is true of the stereotypes about Blackness and gangs. *See* D. Marvin Jones, "*He's A Black Male . . . Something Is Wrong with Him!" the Role of Race in the Stand Your Ground Debate*, 68 U. Miami L. Rev. 1025, 1034-35 (2014) (discussing the false but popular association between Blackness and drugs, gangs, and thugs).

Tragically, the Affidavit shows that the jury presumed these racial stereotypes during its deliberations, despite a complete lack of any evidence or testimony that supported their views. In so doing, the jury ignored their role to decide on the facts before them, and, instead, relied on classic racial tropes about Black men. At trial, multiple mitigation witnesses testified to Mr. Hoffman's good character, history, temperament, and habits. *See*, *e.g.*, Pet. at 8-9, n.8. Indeed, the prosecution called two managers from Mr. Hoffman's place of employment, who testified that Mr. Hoffman

had no criminal record and that his drug screens were clean. *Id*. at n.10. Yet, despite all evidence and testimony to the contrary, the jury presumed Mr. Hoffman likely had a juvenile record, a history of drugs, and possible gang affiliations—simply because he is Black.

Social science shows that racial bias is likely to prejudice Black people in this way. Studies show that mock jurors misremember case facts in racially biased ways and even subconsciously manufacture evidence against Black defendants that did not exist. *See* Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L.J. 345, 381 (2007). Troublingly, the prejudice created by one juror's false recollection or fabrication of evidence is not mitigated by jury deliberation and, in some cases, prejudice may actually be exacerbated by deliberation. *See* Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. Rev. 962, 993 (2005) ("[G]roups generally can be expected to amplify rather than correct individual bias.").

The racial animus is reinforced by the Affidavit's indication that the jury made the presumptions about criminal history, drug usage, and gang affiliations "*given his background*." App. at C4 (emphasis added). As the Affidavit clarifies, the jury thought the defense used Mr. Hoffman's background—growing up in a Black New Orleans neighborhood—to make them "feel sorry for [Mr. Hoffman] being a poor black man from the projects." *Id*. at C3. Given that the trial was held in the predominantly White suburb of St. Tammany

Parish before an all-White jury, it is hardly surprising that the jury would assume that growing up in a Black New Orleans neighborhood would mean Mr. Hoffman had been involved in prior criminal activity. *See* Pet. at 4-5.

The Affidavit is replete with other language showing overt racial bias. For instance, the jury could allegedly tell just by "[l]ooking at him," that Hoffman—who had no criminal background and had just reached the age of majority—was "cold-blooded." App. C2. That baseless observation reflects the known phenomenon that White jurors are likelier to associate Black people with guilt. *See*, *e.g.*, William J. Bowers, et al., *Death Sentencing in Black and White: An Empirical Study of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171, 215-216 (2001); Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. Va. L. Rev. 307, 337 (2010). Elsewhere, the Affidavit speculates about a defense strategy to "play the race card and get [Hoffman] off. . . . Like O.J. Simpson using it to get off." App. at C3. These are unmistakably statements of racial bias in the jury's deliberations. *See*, *e.g.*, Robert J. Cottrol, *Through A Glass Diversely: The O.J. Simpson Trial as Racial Rorschach Test*, 67 U. Colo. L. Rev. 909, 916 (1996) (noting significant majorities of White people believed O.J. Simpson was guilty, and significant majorities of Black people believed he was innocent). These references in the Affidavit show that an overt

and impermissible racial bias was present during jury deliberations.

The Affidavit's speculation and stereotypes about Mr. Hoffman as a Black man from the inner city is the type of showing that has been found to demonstrate a bias that unconstitutionally permeates the deliberation. "When a juror makes statements evincing ethnic or religious bias or prejudice during deliberations, the juror exposes [her] mental processes and innermost thoughts. . . . The juror has revealed that [she] is not fair and impartial." *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 89 (Mo. 2010) (cited in *Peña-Rodriguez* as one of the "Judicially Recognized Exceptions for Evidence of Racial Bias"). The Affidavit specifies that these speculations were raised "*[d]uring the penalty phase deliberations*," and shows that Hoffman's sentencing was infected with racial bias. App. at C4 (emphasis added). The jury was instructed by the trial judge to consider mitigating factors in Mr. Hoffman's sentencing, including his character and his lack of criminal history. Pet. at 9. Rather than consider the evidence and testimony presented at trial—which weighed strongly in favor of mitigation as Mr. Hoffman was a first-time offender—the Affidavit makes clear that racial stereotypes and speculation led the jury to impose the ultimate and most final punishment.

B. The Context in which the Juror's Statements Were Made Compounds the Presence of Racial Bias.

Not only did the juror's statements exhibit racial bias on their face, but they also occurred in circumstances that significantly compounded the risk of racial bias. First, the trial took place in a majority-White parish rife with racial tension and with an all-White jury, which research has shown increases the risk of racial bias. Second, the facts of the case, involving the rape and murder of a White woman by a Black man, tap into deep and longstanding cultural stereotypes about Black men and sexual violence. Both factors bring race and racial bias to the forefront.

1. An All-White Jury in a Majority-White Parish Heightens the Risk of Racial Bias.

The racial makeup of both the jury and the parish contributed to the likelihood that racial bias would infect the trial. While there were two qualified potential Black jurors in the jury pool, they were peremptorily excused by the prosecution, and the jury that sentenced Mr. Hoffman was entirely White. Pet. at 6. The trial could have occurred in the majority-Black parish of Orleans, where the crime occurred, but the prosecutors chose to bring the case in the majority-White parish of St. Tammany and connected their decision to seek the death penalty to "issu[ing] a strong statement to the criminal element of New Orleans . . . we will not

tolerate this kind of victimization of our citizens in St. Tammany Parish." *Id.* at 4-5, n.4.

Social science research has demonstrated that all-White juries and White jurors are often susceptible to racial stereotypes. *See*, *e.g.*, Justin D. Levinson, Robert J. Smith, & Danielle M. Young, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury–Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. Rev. 513, 553, 557-58 (2014) (study of jury-eligible citizens in six states found White citizens more likely to exhibit racial bias). The geographical context of the case—in a majority-White parish adjacent to a majority-Black parish—also increased the potential for racial bias in sentencing. A 2014 study of jurisdictions that impose death sentences found that areas that have majority-White counties surrounding a majority-Black county are more likely to impose the death penalty. Levinson, et al., *Devaluing Death*, *supra*, at 513; *see also* James S. Liebman & Peter Clarke, David H. Bodiker, *Lecture on Criminal Justice: Minority Practice, Majority's Burden: The Death Penalty Today*, 9 Ohio St. J. Crim. L. 255, 272 (2012) (discussing the death penalty in Baltimore); G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 Wash. L. Rev. 425, 437 (2010) (documenting an increase in death sentences where there is a majority Black county surrounded by majority White federal districts).

Orleans and St. Tammany parishes were among the worst environments for this dynamic during Mr. Hoffman's trial. Newspapers described White residents

of the area harboring "terror of Black crime and a distrust of young African-American men" and a "perception that African-Americans are predators." J.C. Hill, *Misperceptions, Fear Increase Racial Hostility*, Times Picayune, nola.com (Nov. 18, 1993). A sociologist observed that this perception exacerbated tensions "between urban, Black New Orleans and the suburban White metro area," such as St. Tammany Parish. *Id*.[2] No case occurs in a vacuum. Mr. Hoffman's case occurred in a context literally surrounded by racial tension, which research shows almost inevitably prejudiced him at trial.

2. The Rape of a White Woman by a Black Man Taps into Deeply Rooted Cultural Fears and Racial Bias in White Juries.

The facts of this case, involving the rape and murder of a White woman by a Black man, also significantly raise the risk that racial stereotypes and bias infected jury deliberations. The crime of rape has been particularly fraught with racist implications when it involves a White victim and a Black defendant because fears about Black men and sexual violence have long been used to inflame racial bias, as evidenced by multiple famous and foundational stories about race in the United States. *See*, *e.g.*, Lisa Cardyn, *Sexualized*

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[2] One sociologist described the area as "fertile ground in white America's historic dread of African-American violence," associated with "old rape stories" about Black men and White women. *Id.*

Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South, 100 Mich. L. Rev. 675, 807 (2002) (discussing the *Birth of A Nation* and the Ku Klux Klan's weaponization of widespread fear of miscegenation to spread in the Reconstruction South); Harper Lee, *To Kill a Mockingbird* (1960).

The underlying racial bias engendered by these circumstances is found not only in American literature, but also in, for example, horrific violence by White people against Black communities, as well as opposition to past anti-lynching legislation. *See*, *e.g.*, Jamelle Bouie, *The Deadly History of "They're Raping Our Women,"* Slate, June 18, 2015 2:22 P.M., https://slate.com/news-and-politics/2015/06/the-deadly-history-of-theyre-raping-our-women-racists-have-long-defended-their-worst-crimes-in-the-name-of-defending-white-womens-honor.html (reporting that when Dylann Storm Roof murdered nine black church goers, he said that he wanted to kill them because "you rape our women"); Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 Yale J. of L. & Feminism 31, 55 (1996) (quoting Senator James Buchanan's statement that removing the threat of lynching would excite the "criminal sensualities of the criminal element of the Negro race and directly incite[] the diabolical crime of rape upon the white women.").

Sadly, those same deeply rooted cultural fears are reflected in the tendency of juries to exhibit racial bias in sentencing decisions. Simulated jury studies from the 1970s and 1980s found disparate and harsher penalties for Black men who were accused of raping White

women. Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 Nat'l Black L.J. 238, 271 (1994). A study of defendants sentenced to death in the 1980s and 1990s found harsher punishments for Black men raping White women than any other combination of defendant and victim. Phyllis L. Crocker, *Crossing the Line: Rape-Murder and the Death Penalty*, 26 Ohio N.U. L. Rev. 689, 703 (2000).

Studies of crimes other than rape have similarly found higher rates of death sentences when the defendant is Black and the victim is White. Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 Stan. L. Rev. 27, 105-06 (1984) (studying death penalties in eight states); Matthew A. Gasperetti, *Crime and Punishment: An Empirical Study of the Effects of Racial Bias on Capital Sentencing Decisions*, 76 U. Miami L. Rev. 525, 549 (2022) (finding that Black defendants are eleven times more likely to be executed for killing a White victim than a Black victim).

The social science research of juries and race demonstrates that the circumstances of this case were rife with the potential for racial bias, and in this instance, there is evidence in the Affidavit that racial bias infected Hoffman's sentencing. *Peña-Rodriguez* makes clear that courts should address exactly these types of situations so that insidious racial ideas do not remain part of the American justice system.

II. THE JUROR'S STATEMENTS, CONSIDERED IN CONTEXT, "TEND TO SHOW" THAT RACIAL ANIMUS WAS A SIGNIFICANT MOTIVATING FACTOR IN THE JUROR'S DEATH SENTENCE.

The Affidavit, particularly when taken in historical, cultural, and geographic context, demonstrates the jury's overt racial bias toward Mr. Hoffman. This Court should grant certiorari review to clarify that, at the threshold stage, proof of a direct causal link between racial animus and the juror's decision-making, as the Louisiana Supreme Court erroneously ruled, is not the proper standard. Rather, courts must evaluate whether racist statements "tend to show" that racial animus was a significant motivating factor in the juror's decision to impose a death sentence, consistent with *Peña-Rodriguez*, 137 S. Ct. at 869. For several reasons, the Court should grant certiorari to clarify the appropriate standard to be used in these important cases.

A. Racial Stereotypes Affect Jury Decision-Making, Particularly in Cases Involving the Death Penalty.

Historical and empirical evidence demonstrates that juror decision-making is affected by racial stereotypes, such that racist statements of the sort explicitly exhibited here tend to show racial animus is a significant motivating factor in that juror's decision.

Shortly after the Civil War, it became clear that racial biases were infecting jury deliberations with "[a]ll-white juries punish[ing] black defendants particularly harshly, while simultaneously refusing to punish violence by whites . . . against blacks and Republicans." James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 Yale L.J. 895, 909-10 (2004). This was the context that necessitated the Fourteenth Amendment. Yet the impermissible effect of racism on jury decision-making persists into modern times. As discussed above, studies have long shown the presence of racial bias in jury decision-making. *See* Tara Mitchell, et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 Law & Hum. Behav. 621, 628-29 (2005) (discussing studies).

This racial disparity is even more pronounced when it comes to the death penalty. For example, the use of abstract mitigating evidence during the sentencing phase creates opportunities for racial bias to influence decision-making, since "jurors can have difficulty giving adequate mitigating value to evidence introduced by Black defendants." Levinson, et al., *Devaluing Death*, *supra*, at 539 ("The racial disparities that we found in sentencing outcomes were likely the result of the jurors' inability or unwillingness to empathize with a defendant of a different race—that is White jurors who simply could not or would not cross the 'empathic divide' to fully appreciate the life struggles of a Black capital defendant and take those struggles into account in deciding on his sentence.") (quoting Mona

Lynch, et al., *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 Mich. L. Rev. 573, 584 (2011)); *see also* Mitchell, et al., *supra*, at 629 (noting that racial bias in juror verdicts is more pronounced when non-dichotomous evidence, such as evidence unrelated to guilt versus non-guilt, is at issue).

Juror decision-making in capital cases is thus subject to higher incidents of racial stereotypes, even in the *absence* of overt racist statements. It follows that where such statements have been made, discussed, and repeated—as was the case here—they tend to show the presence of racial bias as a significant motivating factor in that juror's decision-making.

Indeed, empirical studies show racial bias increases the likelihood of both guilt and a death sentence. *See* Gasperetti, *supra, at* 554. "Respondents who failed the voir dire questions screening for racial bias were 18.3% to 18.4% more likely to sentence a Black defendant to death than a White defendant ceteris paribus." *Id.* In other words, where a juror voices his or her racial animus, the likelihood that race plays a significant role in that juror's decision-making is substantial. Thus,

> [e]ven though the days of rampant and overt racism are mostly gone, our study shows that it is still valuable to monitor explicit racial bias, at least in capital cases. If higher self-reported bias indeed leads, as we found, to more death sentences for the killers of White victims, then courts should devote energy to

> rooting out those jurors who will acknowledge their own biases.

Levinson, et al., *Devaluing Death*, *supra*, at 564-65.

To be sure, subtle or implicit appeals to racism—so called "dog whistles"—have been shown to be even more effective than overtly racist statements, in terms of harnessing prejudice among others. Rachel Wetts, et al., *Who Is Called by the Dog Whistle? Experimental Evidence That Racial Resentment and Political Ideology Condition Responses to Racially Encoded Messages*, 5 Socius 1, 2 (2019). According to these studies, statements that are overtly racist risk being recognized and rejected as such by others, whereas subtle or implicit cues can more effectively harness "underlying racial dispositions" when "the racial content of the message remains outside conscious awareness." *Id.*

While *Peña-Rodriguez* establishes that one overtly racist juror statement alone is enough to violate a defendant's constitutional rights, veiled racist remarks among jury members can be more insidious than overt racist statements. *See generally*, *id.* This reality informs the application of the Court's "tend to show" standard, confirming that *Peña-Rodriguez* sets a lower evidentiary threshold than actual "proof," as the Louisiana Supreme Court required. Louisiana's version of the no-impeachment exception would capture only the most obvious racist remarks, and miss the more insidious forms of racism that traffic in stereotypes and constitute a significant motivating factor during deliberations.

In short, empirical data as reported in the social science literature demonstrates that the salient fact in determining the impact of racial bias, is that an explicit or implicit racially charged remark is *made* during jury deliberations. Racist statements give voice to an undercurrent of racial animus in juror decision-making, particularly in the context of capital cases involving a Black defendant. Such statements "tend to show" that racial animus is a significant motivating factor in the decision to impose death, even if the statements do not causally link a finding of guilt or a death sentence to racial motivation.

B. State Court Decisions Cited in *Peña-Rodriguez* Found Analogous Statements Sufficient to Satisfy the Exception to the No-Impeachment Rule.

State court decisions confirm that the "tend to show" standard sets a lower evidentiary threshold for piercing the no-impeachment rule than the proof required by the Louisiana Supreme Court, and that the threshold is satisfied when racist statements are made. The Court in *Peña-Rodriguez* noted that "at least 16 jurisdictions, 11 of which follow the Federal Rule [606(b)], have recognized an exception to the no-impeachment bar under the circumstances the Court faces here: juror testimony that racial bias played a part in deliberations." 137 S. Ct. at 865 & Appx. (collecting state court decisions).

A review of those state court decisions confirms that statements exhibiting racial bias, such as those at issue in this case, are sufficient to show that racial bias was a "significant motivating factor" in that juror's decision, satisfying the "tend to show" threshold standard of *Peña-Rodriguez* without the need to demonstrate a causal link to the juror's verdict. 137 S. Ct. at 869. Rather, the question of a causal link is ultimately a fact-bound issue for the trial court at a later hearing, once the exception to the no-impeachment rule has been established through the threshold showing.

For example, in *Fisher v. State*, the following statement was sufficient to warrant an evidentiary hearing on whether juror bias improperly affected the verdict (*i.e.*, would be sufficient to satisfy the *Peña-Rodriguez* "tend to show" standard): "this defendant does not have a chance with this jury look there are no Blacks on it." 690 A.2d 917, 919 (Del. 1996). This statement was sufficient to trigger a remand hearing (and, thus, satisfy the "tend to show" standard under *Peña-Rodriguez*). The remand hearing ultimately resulted in a finding that racial bias actually *played a role* in the jury's deliberations after jurors testified *in camera* to additional racially biased details and statements. *Id.* at 920. The Louisiana Supreme Court erred in jumping to this second "proof" step as the required threshold showing, rather than following *Peña-Rodriguez*'s requirement that a statement tending to show bias is sufficient to pierce the no-impeachment rule.

In *Fleshner v. Pepose Vision Institute, P.C.*, the Missouri Supreme Court addressed juror statements

made during deliberations, including "She is a Jewish bitch," "She is a penny-pinching Jew," and "She is such a cheap Jew that she did not want to pay Plaintiff unemployment compensation." 304 S.W.3d 81, 88 (Mo. 2010). Reversing the trial court, the Missouri Supreme Court held that these statements were sufficient to pierce the no-impeachment rule and require an evidentiary hearing. *Id.* at 89-90. The Court reached its holding even though the statements at issue did not themselves show that the juror reached his verdict *because of* religious animus. *See id.* Indeed, examining such statements and their relationship to the verdict was the very purpose of the subsequent evidentiary hearing after the no-impeachment rule has been pierced. *See id.* ("The trial court abused its discretion in failing to hold an evidentiary hearing to determine whether the alleged juror misconduct occurred.").

And in *After Hour Welding, Inc. v. Laneil Management Co.*, 324 N.W.2d 686, 689-90 (Wis. 1982), an affidavit showed that a juror had referred to an officer of the corporate defendant as "a cheap jew." The trial court refused to hold an evidentiary hearing, on grounds that "there is *no proof* that it affected their judgment." *Id.* (emphasis added). The Wisconsin Supreme Court held that the juror's statement itself was sufficient to trigger an evidentiary hearing in the trial court. *Id.* at 691. The mere fact that an overt racist statement was made was sufficient to pierce the no-impeachment rule and satisfy the "tend to show" standard under *Peña-Rodriguez*, with the ultimate

question of whether the verdict was motivated by racial animus to be later determined by the trial court.

Other state court decisions cited in *Peña-Rodriguez* have similarly held that juror statements that specifically reference race or religion are sufficient to trigger the no-impeachment rule and require a subsequent evidentiary hearing, even if such statements do not themselves draw a direct line between the juror's bias or animus and the verdict. *See*, *e.g.*, *State v. Levitt*, 176 A.2d 465 (N.J. 1961) (juror statement "[d]id you notice most of them were Jews and even one of them was from the Synagogue," was sufficient to pierce no-impeachment rule and trigger evidentiary hearing); *Powell v. Allstate Ins. Co.*, 652 So. 2d 354, 356 n.2 (Fla. 1995) (finding in a civil case that juror statement that defendants' children were "probably drug dealers" constituted overt act of racial bias and granting a new trial); *People v. Rukaj*, 123 A.D. 2d 277, 279-80 (N.Y. Sup. Ct. 1986) (jury's note sent to trial judge during proceedings that it could not reach a verdict "because of speculations and biased feelings," was sufficient to require an evidentiary hearing). As the New York court stated in *Rukaj*, "when *the spectre* of an outside influence of the jury affecting the defendant's fundamental right to a fair trial is raised, it is vital that a hearing or other appropriate inquiry be held to ascertain what actually transpired." *Rukaj*, 123 A.D.2d at 280 (emphasis added).

These state court decisions were relied upon by *Peña-Rodriguez* in its formulation of this exception to the no-impeachment rule. 137 S. Ct. at 870. They

further demonstrate that the Louisiana Supreme Court's requirement that Mr. Hoffman produce "proof" that the juror's verdict was motivated by racial animus erected an impermissibly high evidentiary bar at the threshold stage. *See After Hour Welding, Inc.*, 324 N.W.2d at 738 (trial court erred by requiring "*proof* that it [juror's racist remark] affected their judgment") (emphasis added).

Courts applying *Peña-Rodriguez* have also found that impermissible racial bias required the jury shield to be pierced in similar contexts. The Sixth Circuit found that a jury's unsupported belief that a Black male petitioner was a "hard drug user" "demonstrate[d] overt racial bias" and sustained a *Peña-Rodriguez* claim. *Harden*, 993 F.3d at 482-85. Similarly, in *United States v. Smith*, a court applying *Peña-Rodriguez* found that, even though it did "not explicitly invoke race," a juror's statement that a Black man was a "banger from the hood" indicated racial bias and tended to show that racial animus was a motivating factor in the juror's vote to convict. *United States v. Smith*, No. CR 12-183 (SRN), 2018 WL 1924454, at *4, 9-11 (D. Minn. Apr. 24, 2018). Here, Mr. Hoffman's jurors assumed he was involved with drugs and gangs, with no basis other than racial bias to generate their assumption and sentence him to death.

These decisions also demonstrate that an inquiry into juror motivation, and whether racial bias or animus was a significant part of those motivations, is a fact intensive question that the trial court must answer once the exception to the no-impeachment rule

has been established by a threshold "tend to show" finding. To require "proof" that racial animus was a significant motivating factor in a juror's decision, at the threshold level under *Peña-Rodriguez*, would turn the post-conviction discovery process on its head, requiring ultimate proof of a claim before determining whether a litigant can even bring it.

That, in turn, would deprive defendants of their constitutional right to a fair trial, which is unacceptable. As the Court has stated, "racial bias [is] a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Peña-Rodriguez*, 137 S. Ct. at 868. Mr. Hoffman's case presents exactly the kind of racial bias this Court has determined cannot be left unaddressed. By enforcing the proper *Peña-Rodriguez* standards at the threshold stage, the Court has the opportunity to prevent both systemic injury to the administration of justice and the execution of Mr. Hoffman without a required evidentiary hearing.

CONCLUSION

For all of these reasons, the Lawyers Committee respectfully requests that the Court grant the petition, reverse the Louisiana Supreme Court's application of *Peña-Rodriguez*, and order that court to remand for a hearing on Mr. Hoffman's claim of racial bias.

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