***** CAPITAL CASE *****

No. 21-7381

IN THE
SUPREME COURT OF THE UNITED STATES

JESSIE HOFFMAN, JR, *Petitioner,*

v.

LOUISIANA, *Respondent.*

ON WRIT OF CERTIORARI TO THE
LOUISIANA SUPREME COURT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO THE RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Court should intervene in this extraordinary case in which Louisiana seeks to execute Jessie Hoffman, a Black man convicted of killing a White woman, despite overwhelming evidence that the all-White jury relied on prejudicial racial stereotypes when sentencing him to death. This included the false belief that he had the criminal record of a gang member or drug dealer solely because he is a Black man, a racial stereotype so powerful that no amount of evidence to the contrary could combat it.

In seeking to defend this decision where a man's life is on the line, the State spends the majority of its Brief in Opposition (hereinafter "BIO") on the non-issue of *Pena-Rodriguez*'s retroactivity, BIO at 6-14. Aside from being a matter of state law, it is an issue that the Louisiana Supreme Court did not decide, is not presented in the petition, and can be considered on remand if necessary. It is also an illusory barrier given the clear practice of state courts to apply *Peña-Rodriguez* retroactively in post-conviction proceedings—where such claims are typically made—as Louisiana did in this case.

Far from being in an unsatisfactory posture for this Court's consideration and intervention, the Louisiana Supreme Court's clearly erroneous application of *Peña-Rodriguez* is squarely before the Court. It arises directly from a state high court's decision, in a case with no procedural issues, unimpeded by the complexities of federal habeas review, in respect to jury statements that the State has not contested.[1]

[1] The juror provided the signed statement in 2003, and reaffirmed the the truth of its contents in a 2012 sworn affidavit.

Cf., *e.g.*, *Tharpe v. Sellers*, 138 S.Ct. 545, 553 (2018) (Thomas, J., dissenting) (citing juror's second affidavit, procured by the state, in which he "denied having sworn to the first affidavit and explained that he had consumed a substantial amount of alcohol on the day he signed it" and discussing the "insurmountable [procedural] barriers" Tharpe would face on remand).

When the State finally does address the issue before the Court, it relies "admittedly" on out-dated pre-*Peña-Rodriguez* dicta from the Fifth Circuit in prior proceedings, BIO, at 14-15, and sweeps the evidence of racial bias under the rug. The State attempts to demonstrate that the juror's statements do not tend so show that racial bias played a role in the jury's verdict by citing only to the aggravating aspects of the case and the portions of the juror's affidavit which do *not* include the juror's statements of racial bias. Like the Louisiana Supreme Court's decision, the State's analysis is therefore entirely devoid of *any* discussion of the evidence of racial bias and stereotypes raised, or the direct significance they had to the issues before the jury at Mr. Hoffman's capital sentencing. Nor does the State even acknowledge the evidence in the record—the jury's only question regarding whether Mr. Hoffman had a juvenile record, after hearing uncontested testimony to his lack of prior criminal history—which confirms the significant role racial stereotypes actually played in the juror's verdict.

The singular and exceptional nature of this case requires the Court's review. No constitutional rule is more important than the dictate that race may play no role in a jury's verdict, much less a capital verdict. *See Peña-Rodriguez v. Colorado*, 137

S.Ct. 855, 868 (2017) ("Permitting racial prejudice in the jury system damages "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State.") (citations and quotations omitted); *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (imposition of a death sentence in part because of a defendant's race, "is a disturbing departure from a basic premise of our criminal justice system").

I. Retroactivity is a non-issue and this case presents an ideal vehicle for the Court's review

The vast majority of the State's BIO is spent arguing about the issue of *Pena-Rodriguez*'s retroactivy, BIO at 6-14, a state law question that was not decided by the Louisiana Supreme Court, is not before this Court, and can be considered by the state court on remand if necessary.

Contrary to the State's assertion, s*ee* BIO at 10 (claiming that Louisiana will "almost certainly" find that *Peña-Rodriguez* is not retroactive), it also presents an unlikely barrier to relief. In contrast to the federal courts, which have typically found that *Peña-Rodriguez* is not retroactive for the purpose of federal habeas review, not a single state has decided that *Peña-Rodriguez* is not retroactive for the purpose of state post-conviction proceedings, where jury misconduct claims are often raised for the first time. Several state courts have applied it in collateral review proceedings in cases that were final at the time of *Peña-Rodriguez*.[2]

[2] *Batiste v. State*, No. 2019-CA-00283-SCT, 2022 Miss. LEXIS 59 at *40 (Miss. Mar. 3, 2022) (applying *Peña-Rodriguez* to a case that was affirmed on direct review in 2013); *rehearing denied at Batiste v. State*, 2022 Miss. LEXIS 136 (Miss., May 19, 2022); *Dotson v. State*, No. W2019-01059-CCA-R3-PD, 2022 Tenn. Crim. App. LEXIS 132 (Tenn. Crim. App. Mar. 23, 2022) (applying *Pena-Rodriguez* in

This makes sense because unlike new rules of *trial* procedure, *Peña-Rodriguez* is a new rule governing *post-trial* procedures. When relied on in state post-conviction proceeedings, it is being applied *prospectively* at those proceedings to determine the admissibility of evidence to adjudicate constitutional claims that have been cognizable for decades. The same interests in finality associated with new constitutional rules of *trial* procedure, simply do not apply to this post-trial rule. The State is not being deprived of a death sentence that was constitutionally sound under the law when it was obtained, but merely the ability to execute more people sentenced to death based on racial bias without court intervention. *Buck*, 137 S. Ct. at 779 (acknowledging the "lack [of a finality] interest in enforcing a capital sentence obtained on so flawed a basis" because of "the infusion of race into [the] proceedings"). In this case the State has had notice of the constitutional infirmity of Mr. Hoffman's death sentence for years, as he has diligently and consistently presented his evidence, but the state has continually urged the courts to ignore it. That is no longer permissible. *See Peña-Rodriguez*, 137 S. Ct. at 869-870 (defining *Peña-Rodriguez's* mandate as a "constitutional rule that racial bias in the justice system *must* be addressed—including, in some instances, after the verdict has been entered" (emphasis added)).[3]

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capital post-conviction proceedings in a case affirmed on direct review in 2014); *People v. Thompson*, No. 5-19-0317, 2022 Ill. App. Unpub. LEXIS 118 (Ill. App. Ct. Jan. 31, 2022) (applying *Peña-Rodriguez* in post-conviction in a homicide case affirmed on direct review in 2014; *Larson v. State*, A-12945, 2019 Alas. App. LEXIS 272 (Alaska Ct. App. July 31, 2019) (applying *Peña-Rodriguez* in post-conviction proceedings in a homicide case affirmed on direct review in 2000).

[3] The rule in *Peña-Rodriguez* itself is premised on this Court's recognition that the usual finality justifications for no-impeachment rules are inapplicable to racial bias, which is a distinct, "familiar

The State's insistence that Louisiana will "almost certainly" follow the lead of the federal courts on retroactivity, BIO at 10, is also contradicted by the Louisiana Supreme Court's decision in the case. Consistent with the practice of all of the other state courts, it side-stepped retroactivity and applied *Peña-Rodriguez*, even thought the conviction and death sentence has long been final. It relied on *Peña-Rodriguez* twice. First, to reverse the lower court's procedural finding that Hoffman's racial bias claim was previously adjudicated in prior proceedings, and therefore procedurally barred under La. C.Cr.P. art. 930.4(D). It expressly recognized that "*Peña-Rodriguez* provides courts with the opportunity to consider evidence that was previously barred" and therefore found that Mr. Hoffman's old racial bias claim, raised afresh under *Peña-Rodriguez*, was a "new or different" claim entitled to review now that his evidence could potentially be considered. App. A7. Secondly, after noting that it is *not* bound by the federal retroactivity precedents cited by the State, App. A8 n.4, the Louisiana Supreme Court went on to address the merits of Mr. Hoffman's claim under *Peña-Rodriguez* that his evidence of racial bias met the threshold for consideration in the adjudication of his "new or different" claim.

This is in sharp contrast to that court's treatment of writs in capital post-conviction cases where other questions of retroactivity arise. For example, following *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), when first presented with a capital post-conviction writ raising a *McCoy* claim, the court did not address the merits of that

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and recurring evil" that "implicates unique historial, constitutional, and institutional concerns" and "if left unaddressed, would risk systemic injury to the administration of justice." *Peña-Rodriguez*, 137 S. Ct. at 868-69.

claim, but instead remanded the case to the the district court to determine the issue of retroactivity. *State v. Magee*, 2018-0310 (La. 12/17/18) 319 So. 3d 277, 277. After the district court in that case opined that *McCoy* was not retroactive, the Louisiana Supreme Court summarily denied writs, again without reaching the merits. *State v. Magee*, 2020-01778 (La. 11/24/20), 305 So. 3d 100. Since then, it has consistently denied applications for writs in successor capital post-conviction cases raising *McCoy*, with no discussion at all. *See, e.g., State v. Deal*, 2020-00524 (La. 3/23/21), 312 So. 3d 1093; *Tyler v. Vannoy*, 2020-00984 (La. 11/17/21), 327 So. 3d 507; *Hampton v. Vannoy*, 2020-00390 (La. 12/8/20), 306 So. 3d 430, *cert. denied*, 142 S. Ct. 96, 211 L. Ed. 2d 25 (2021). Conversely, in the instant case, the Louisiana Supreme Court—although applying the wrong standard—applied *Peña -Rodriguez* and considered Mr. Hoffman's claim on the merits at some length. *See* App. A8-9.[4]

II. The State relies on inapposite, out of date, pre- *Peña-Rodriguez* Fifth Circuit dicta

Even the State recognizes the "admittedly" outdated basis for the Fifth Circuit's dicta it cites, in a decision issued more than eight years before *Peña-Rodriguez* was decided. BIO at 14. The Fifth Circuit did not consider whether the juror's statements met *Peña-Rodriguez*'s threshold "tend to show racial animus was

[4] The State takes issue with Petitioner's footnoted reference to Louisiana's C.Cr.P. art. 930.8 timeliness provision. *See* BIO at 12. This is not, however, cited as authority that retroactivity rules do not apply at all in capital cases, but rather to point out Louisiana's less restrictive approach to capital petitioners in terms of finality, consistent with the Louisiana Supreme Court's decision to consider the merits of *Peña-Rodriguez* in this capital case. Certainly, retroactive reliance on *Peña-Rodriguez* in collateral review has not been limited to capital cases in Louisiana. *See, e.g., State v. Pontiff,* 18-273 (La. App. 3 Cir 10/02/19).

a significant motivivating factor" test. Rather, it was engaged in the highly deferential federal habeas review required by AEDPA, strictly limited to determining whether the state post-conviction court's decision denying relief on the merits of the racial bias claims was unreasonable or contrary to existing Supreme Court precedent at that time.[5] And it did so utilizing a stringent Equal Protection standard requiring proof of "intentional bias or discrimination," which is far different from *Pena-Rodriguez's* "tend to show that racial animus was a significant motivating factor" standard, which also expressly recognizes that "racial stereotypes" as well as "racial animus" implicate racial bias. *Peña-Rodriguez*, 137 S.Ct. at 869.[6] Even this was hypothetical; all courts and parties agree that the state court never actually made such a decision because the trial court never considered Mr. Hoffman's evidence. *See* BIO at 4; App. A7.

It is ironic that the State cites to this passage to defend the Louisiana Supreme Court's decision under *Peña-Rodriguez*, because this is the same passage that the trial court relied on when erroneously finding that Mr. Hoffman's *Peña-Rodriguez* claim had previously been adjudicated. App. B2. One thing the Louisiana Supreme

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[5] *Hoffman v. Cain*, 752 F.3d 430, 451 (5th Cir. 2014) (applying the "heightened deference under § 2254" in finding that "the state court cannot be said to have been unreasonable or contrary to federal law in deciding that no bias or discrimination was shown."). *See, e.g., Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) ("If this standard is difficult to meet, that is because it was meant to be. . . As amended by AEDPA, § 2254(d) [gives federal courts] authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no further. Section 2254(d) reflects the view that habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems," not a substitute for ordinary error correction through appeal.") (citations and quotation omitted).

[6] This Court has never endorsed "intentional bias or discrimination" as the standard applicable to the merits of jury racial bias claims. In *Pena-Rodriguez*, the Court noted it that it has not prescribed one, and pointed to a range of different standards applied across the country. *Peña-Rodriguez*, 137 S.Ct. at 870.

Court did get right was recognizing how "different" Mr. Hoffman's new claim under *Peña-Rodriguez* was, from the claim reviewed under AEDPA by the Fifth Circuit.

III. The State fails to address the evidence of racial animus and stereotypes

In its brief evaluation of the merits, the State repeats rather than addresses the Louisiana Supreme Court's constitutionally deficient application of *Peña-Rodriguez*. *Peña-Rodriguez* requires courts to review juror statements "in light of all the circumstances" "*including the content* . . . of the alleged statements") (emphasis added). *Peña-Rodriguez*, 137 S. Ct. 869. The State however, like the Louisiana Supreme Court before it, summarily concludes that Mr. Hoffman failed to meet *Peña-Rodriguez's* standards, without addressing any of the juror's racially biased and stereotyped statements, or their obvious significance to the issues before the jury at Mr. Hoffman's penalty phase, at all.

Instead, the State focuses on other things in an attempt to demonstrate that racial bias did not impact the juror's deliberations. First, it highlights the aggravated nature of the offense. *See*, *e.g.*, BIO at 17 ("Mr. Hoffman's crime is especially heinous"). However, if the heinous facts of a capital offense were sufficient to offset the harm of racial prejudice, "relief . . . would virtually never be available, so testing for it would amount to a hollow judicial act." *Gardner v. Johnson*, 247 F.3d 551, 563 (5th Cir. 2001). And indeed, prejudice has been found in a number of contexts in comparable or more aggravated cases that Mr. Hoffman's, including in *Buck,* 137 S. Ct. 759 (finding that injection of race at the penalty phase was prejudicial, in a case where the defendant shot and killed two people in a rampage against his ex-girlfriend

who he killed in front of her children, showed no remorse for the murders, laughed about them after his arrest, and had a history of violence against women, as well as prior drug and weapons convictions).[7] Unlike Mr. Buck, who raised a Sixth Amendment claim requiring an actual showing of prejudice, Mr. Hoffman need only show that the evidence *tends to show*, that racial bias or animus was a significant motivating factor in the jury's verdict. *Peña-Rodriguez*, 137 S. Ct. at 869.

Secondly, the State directs attention exclusively to those portions of the juror's affidavit that do *not* include the racial sterotypes and explicit references to Mr. Hoffman's race. The State highlights the juror's comments about the aggravated nature of Mr. Hoffman's offense, the juror's perception that Mr. Hoffman showed no remorse during trial, appeared "very cold-blooded," and the juror's belief that "if he were ever to get out of prison he would do it again." BIO at 16. It claims that it was these things, and not racial bias or stereotypes, that provided "the motivating factors behind the juror's actions." *Id.*

As an initial point, *Peña-Rodriguez* does not require a petitioner to produce evidence tending to show that racial animus or stereotypes was the "only" motivating factor in the jury's decision, just a "significant" one. *Peña-Rodriguez*, 137 S. Ct. at

[7] *See also*, *e.g.*, *Porter v. McCollum*, 558 U.S. 30 (2009) (in the Sixth Amendment context, finding penalty phase prejudice under *Strickland v. Washington* in a case where the defendant, based on plans he made well in advance, shot and killed his ex-girlfriend and her new boyfriend in the course of a home invasion in which he also assaulted his ex-girlfriend's daughter); *Rompilla v. Beard*, 545 U.S. 374, 378, 391-93 (2005) (finding *Strickland* prejudice even though the petitioner deliberately tortured the victim and had a significant history of convictions involving the use or threat of violence, including raping and slashing a woman during a burglary); *Williams v. Taylor*, 529 U.S. 362, 367-69, 398-99, 418 (2000) (finding *Strickland* prejudice even though the capital murder was "just one act in a crime spree that lasted most of Williams's life," and included two violent assaults on elderly victims in the months after the capital murder, one of which left the victim in a vegetative state).

869. More importantly, the juror's perceptions of these aspects of the case cannot be divorced from the prejudicial racial stereotypical beliefs that pervaded deliberations and surely influenced them.[8]

The nature of the offense, the defendant, his level of remorse and his potential to reoffend, are all legitimate considerations in a capital sentencing decision. But they are precisely those topics most likely to be influenced by the prejudicial stereotypes expressed by the juror. *See Buck*, 137 S. Ct. at 776 (describing the combination of a "particularly noxious" racial stereotype of black men being violence-prone with the substance of the jury's inquiry at sentencing as a "perfect storm" "for making a decision on life or death on the basis of race.").

A juror who assumes that Mr. Hoffman, in her eyes a "poor black man from the projects," was involved in drugs, gangs, and other criminal activities as a juvenile, is inherently more likely to accept the State's version of the offense and characterization of Mr. Hoffman's character and propsensities, than a juror who is not laboring under the weight of such prejudices.[9] A juror who believes that Mr. Hoffman "play[ed] the

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[8] It is for this reason that the *Peña-Rodriguez* determination is an objective rather than a subjective test, requiring courts to review juror statements "in light of all the circumstances" "including the content [and] timing. . of the alleged statements"). *Peña-Rodriguez*, 137 S. Ct. 869. *See, e.g., State v. Spates,* 953 N.W.2d 372, 2020 WL 6156739 (Iowa App. Oct. 21, 2020) (remanding for evidentiary hearing under *Peña-Rodriguez* and holding that both determinations—whether to receive juror testimony and whether to grant a new trial— "should be based on *objective* circumstances, e.g., what was said; how and when it was said; what was said and done before and after; whether and how the statements relate to evidence in the case; whether and how the statements related to the issues the jury will decide when reaching a verdct. Conversely, neither determination should depend on the jurors' *subjective* evaluations of their own motives—or the motives of other jurors—in voting to convict.") (emphasis in original).

[9] Although the State describes its theory of the offense–a pre-planned, cold-blooded, premeditated murder, involving a "death march" and "execution-style" shooting on the dock–as though it were uncontervertible fact, many aspects of the circumstances of the offense, including these, were disputed by the defense and open to interpretation by the jury.

race card" to "get off" and avoid the death penalty (even though race was not part of Hoffman's mitigating evidence at all, and even though he confessed), is more likely to believe Mr. Hoffman lacks remorse and deserves a death sentence. Indeed, the juror's comment that "it was clear to me as soon as I heard the evidence about what he did that he deserved the death penalty," followed immediately from her discussion about how Mr. Hoffman tried to use his race to make the jury "feel sorry him", how Black people often try and use their race to escape responsibility, and how "people like that should take responsibility for what they do." App. C3-4. This is the same juror who stated that she could tell Mr. Hoffman committed this crime just by "looking at him." App. C2. It is inconsistent with the nature of racial bias to parse the statements out and view them in isolation.

By focusing on the aggravating factors, the State also avoids addressing the devastating impact racial stereotypes had on the jury's receptiveness to Mr. Hoffman's mitigating evidence and case for life. The State simply ignores the clear statements in the juror's affidavit indicating that these same racial stereotypes beliefs led jurors to doubt the *uncontested* mitigating evidence of Mr. Hoffman's good charater and lack of prior criminal history presented through the testimony of multiple witnesses.

The juror's question to the court during deliberations confirms the significance of this sentencing factor to the jury. While the State insists that the heinous nature of the crime was the sole consideration of the jury, the only question the jury asked the judge during deliberations related to Mr. Hoffman's character and record prior to

the offense. As the juror's affidavit confirms, that question was prompted directly by jurors' open speculation that Mr. Hoffman was involved in drugs and gangs, a classic racial stereotype with zero basis in the record.

CONCLUSION

Louisiana's treatment of the evidence of racial bias in this capital case ignores the particular harm racial stereotypes pose in capital sentencing proceedings, *Buck,* 137 S. Ct. at 776*,* and undermines the force of *Peña-Rodriguez.*

To uphold the constitutional promise of equal justice and maintain public confidence in the administration of the death penalty, courts must apply the proper threshold standard under *Peña-Rodriguez*, and consider evidence of juror bias when it is presented. No court has ever done that here. The exceptional circumstances of this case warrant this Court's intervention.

For these reasons, Mr. Hoffman respectfully requests that this Court grant certiorari and evaluate the *Peña-Rodriguez* issue in this case, or remand for the Louisiana Supreme Court to consider Mr. Hoffman's evidence of racial bias in accordance with this Court's clear precedents.

Respectfully submitted,

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