No. _____

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

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QUESTION PRESENTED FOR REVIEW

In *Peña-Rodriguez v. Colorado*, 580 U.S. 206 (2017), this Court again condemned the use of 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." Here, ineffective trial counsel allowed the Government to taint Shah's bribery corruption trial with racial *animus* opinion that people from India, like Petitioner, were culturally predisposed to corruption.

Therefore, the question presented is:

Given that the trial court found ineffective assistance of counsel when defense counsel failed to object to testimony that people from India were culturally predisposed to corruption, but that such evidence caused no prejudice, did the Ninth Circuit's refusal to issue a certificate of appealability categorically ignore Shah's multiple *habeas* issues and directly conflict with this Court's standard and racial *animus* precedent in *Buck v. Davis*[1], *Miller-El*[2], and *Peña-Rodriguez v. Colorado*?

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[1] *Buck v. Davis*, 580 U.S. 100, 120-21 (2017).

[2] *Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003).

PARTIES TO THE PROCEEDING

Petitioner Harshad Shah was the Petitioner-Defendant in the *habeas* proceedings and appellant in the court of appeal. Respondent United States of America was the Respondent-Plaintiff in the district court *habeas* proceedings and appellee in the court of appeal.

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.
- *USA v. Harshad Shah,* No. 19-330, Supreme Court of the United States, Cert. Denied January 21, 2020.
- *USA v. Harshad Shah,* No. 21-55443, U.S. Court of Appeals for the Ninth Circuit. Judgment entered November 30, 2022.

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PETITION FOR WRIT OF CERTIORARI

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 November 30, 2022.

OPINIONS BELOW

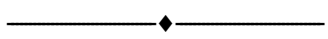
On September 16, 2022, the Court of Appeals for the Ninth Circuit issued its one-sentence Order (*Order*) refusing to issue a Certificate of Appealability (COA), thereby allowing the District Court's order to stand. The court's refusal to issue a COA reinforced the district court's erroneous finding that most of Petitioner's issues *had already* been rejected on direct appeal. In fact, the record palpably shows that Petitioner's new ineffective assistance of counsel (IAC) issues *had never been considered by the Ninth Circuit*.

In refusing to issue a COA, the Ninth Circuit approved IAC that allowed racially charged testimony by an official government witness in a bribery trial that people from Indian, like Petitioner, are culturally predisposed to offer bribes simply because of their cultural origin. And in doing so, the Ninth Circuit also eviscerated this Court's robust racial *animus* precedent when it found that stereotyping Indians as culturally prone to corruption was somehow not the same *type* or *category* of racial *animus* repeatedly condemned by this Court.

By not issuing a COA to address the IAC and racial *animus*, applying a more demanding standard than that required by this Court in *Buck v. Davis* and *Miller-El*, the Ninth Circuit also disregarded and distorted *Peña-Rodriguez* by erroneously splitting hairs as to what type of racism may be permitted in the criminal justice process. The Ninth Circuit essentially conflicted with this Court's national resolve that "It must become 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 221.

Notably, the Ninth Circuit's denial of a COA operated as an arbitrary, split-hair conflict with this Court's precedent in *Peña-Rodriguez* by proclaiming that the obvious stereotype "that all Indians are predisposed to commit bribery" is somehow a non-prejudicial, *different type* or *category* of racism, that did not at all deprive Petitioner of any fundamental constitutional right. In the Ninth Circuit now, it is all right to tell a jury in a corruption criminal trial that all people from India are predisposed to corruption because such racial slur is somehow not the same type of *animus* as that condemned in *Buck v. Davis* about "Black men", and in *Peña-Rodriguez* about "Mexicans."

It is because of the Ninth Circuit's splitting hairs about what is or is not odious racism that this Court's guidance is necessary.



JURISDICTION

On November 30, 2022, the Ninth Circuit entered its *Order* denying Rehearing *En Banc*, leaving in place the district court's erroneous and arbitrary judgment refusing to recuse itself, and refusing to issue a COA, denying Shah's admitted IAC and multiple constitutional challenges. App.15. Before that, September 16, 2022, the Ninth Circuit issued its *Order* denying a COA by erroneously conflicting with this Court's decisions in *Buck v. Davis* and *Miller-El*. App.1. 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, Sixth Amendment:

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

"In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

INTRODUCTION AND STATEMENT OF THE CASE

"People from India are culturally predisposed to corruption."

This is what the trial court allowed the government to tell the jury in the entrapment trial of Petitioner—a U.S. citizen originally born in Gujarat, India. A trial where predisposition to offer a bribe was the central issue for the jury. And where Petitioner's idle defense attorneys failed to object; indeed, allowed this racial *animus* to reach the jury.

Petitioner Harshad Shah brings to the Court a constitutionally important social dynamic, openly witnessed today at the heart of American's current social divide—the racial *animus* infecting the criminal justice process. The very type of racial *animus* allowed at Shah's jury trial and about which this Court warned in *Peña-Rodriguez* against permitting in the jury system:

> 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."

Id., at 868.

This Petition brings to the Court two interrelated constitutional issues implicating the most fundamental cornerstones of the criminal justice system in America—the Sixth Amendment's right to an impartial jury and the right to the effective assistance of counsel.

This Petition calls upon this Court to carry on Justice Kennedy's insightful clarion call when he spoke for the majority in *Peña-Rodriguez* 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." *Id.*, at 867. Here, the dignity of Indian-born Petitioner Harshad Shah and his absolute constitutional rights to trial by an impartial jury and effective assistance of counsel, were stripped away by the intentional, judicially endorsed, toxicity of racial *animus*. Racial *animus* no different than that consistently condemned by this Court.

And yet, the Ninth Circuit turned a blind eye to the obvious racial toxicity here. As if this Court's explicit ruling in *Buck* never existed:

> [The expert witness'] testimony appealed to a powerful racial stereotype—that of black men as "violence ***prone***." [citation omitted]. In combination with the substance of the jury's inquiry, this created something of a perfect storm. Dr. Quijano's opinion coincided precisely with ***a particularly noxious strain of racial prejudice***, which itself coincided precisely ***with the central question*** at sentencing. The effect of this unusual confluence of factors was to provide support for making a decision on life or death ***on the basis of race***.

Buck at 121, emphasis added. Similarly, the central question at issue for the jury in Petitioner's corruption trial was whether he was *predisposed* to offer a bribe.

In his Request for a COA, Petitioner first provided the Ninth Circuit detailed facts that *plainly* demonstrated that the district court never addressed several of his new *habeas* issues. App.17-19. One of those significant issues was his motion to recuse the trial court

from hearing his *habeas*. App.21-25. Petitioner specifically noted, among other facts:

> In his Reply to the court's denial of his recusal motion, Shah objected and asked that his recusal motion "be fairly reviewed." Shah noted that Judge Selna's denial was incomplete because it had failed to review the full facts. ***And because the denial of the recusal motion relied upon non-existent law*** when Judge Selna erroneously concluded "Opinions which the District Judge forms during a case, including an opinion concerning Shah's veracity, do not constitute an extrajudicial source." Judge Selna's reliance upon Liteky was misplaced ***because Liteky simply did not mandate an extra-judicial source for the appearance of bias at all***. Nevertheless, the district court never mentioned Shah's Reply and specific legal objection on the recusal issue.

App.23, emphasis added. Yet, despite Petitioner expressly outlining this Court's relatively lenient standard in *Buck v. Davis* and *Miller-El* in his Request for a COA, the Ninth Circuit never addressed the controlling lenient standard nor the recusal issue.

In his Request for a COA, Petitioner then raised the racial *animus* central to the new IAC issues in his *habeas*. First, Petitioner noted how one of the Circuit Court Judges (on direct appeal) expressed the presumed inadmissibility of the racial *animus* opinions at issue:

> Denying this core issue, the district court never stopped to meaningfully address Shah's citation ***to the comments during oral argument by a member of this Court's argument panel relative to the presumed inadmissibility of the racially charged opinion testimony***. Indeed, the district court failed to even mention ***the various evidentiary and procedural bases*** noted by this Court's Circuit judge, ***now within the new context of ineffective assistance of counsel (IAC)***. ***The district court simply concluded***: "Because [the government's witness'] testimony was not prohibited racist predisposition testimony, Dr. Shah's trial counsel was not unreasonable, much less grossly incompetent, for failing to object."

App.25-26, emphasis added.

Seeking a COA from the appellate court, Petitioner was underscoring the district court's distortion and confusion of the type of prohibited racial *animus* articulated by this Court in *Peña-Rodriguez* and *Buck v. Davis*. This was critical because it was the district court who had also implicitly found ineffective assistance in defense counsel's failure to object to the racial *animus* testimony. But it was also the district court, then ruling on Petitioner's new *habeas* issues, who had refused to recuse itself from Petitioner's IAC *habeas*. And it was the same court who also found "Petitioner failed to show ***he was prejudiced*** by ineffective assistance of counsel" by his counsel's failure to object to the racial *animus*. App.20.

In its finding that Petitioner "failed to show he was prejudiced" by the racial-*animus* related IAC, the district court found the first prong of *Strickland v. Washington*, 466 U.S. 668 (1986). But the district court palpably failed to understand this Court's guidance in *Peña-Rodriguez* and *Buck v. Davis* about what constitutes prohibited *animus* regarding racial or ethnic, or national origin. Thereby making compelling the need for this Court to provide additional guidance to lower courts when racial stereotypes are permitted in the jury system.

The Ninth Circuit's failure to recognize racial *animus* here brings to mind Justice Gorsuch's observations in his dissent in *Torres v. Madrid*, 141 S.Ct. 989, 1007 (2021), a Fourth Amendment seizure case but apt nevertheless, noting:

> And it *is* canonical that courts cannot give a single word different meanings depending on the happenstance of "which object it is modifying." [citation omitted] ("[W]e refuse to adopt a construction that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying"). To "[a]scrib[e] various meanings" to a single word, we have observed, is to "render meaning so malleable" that written laws risk "becom[ing] susceptible to individuated interpretation." [citation omitted]. The majority's conclusion that a single use of the word "seizures" bears two different meanings at the same time—indeed, in this very case—is truly novel. And when it comes to construing

> the Constitution, that kind of innovation is no virtue.

Here, the Ninth Circuit's malleable interpretation of "racial *animus"* is also "truly novel".

Petitioner also attempted, to no avail, to underscore for the Ninth Circuit how the district court in turn had perfunctorily denied his *habeas*:

> ***Despite the large volume of exhibits to review, within five business days after Shah filed his Reply, on March 12, 2021, the district court issued its Order Denying Shah's Motion to Vacate his conviction and sentence***. [Docket 16]. Exhibit A. In the Order, at footnote 3, the district court noted: "Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing." The Court cited Fed. R. Civ. P. 78 and Local Rule 7-15. ***However, the court did not cite 2255's mandate that a hearing is required "unless the motion and the files and record of the case conclusively show that the prisoner is entitled to no relief."*** 28 U.S.C. 2255, emphasis added.

App.18, emphasis added.

In his Request for a COA to the Ninth Circuit, Petitioner also expressly noticed and developed different issues other than IAC, recusal, and those he had *not* previously raised on direct appeal. He raised the variety and seriousness of the false representations by the Government. Of these, Petitioner noted:

> Shah's 2255 habeas had actually raised ***different issues*** than those presented to this Court on Shah's direct appeal. One of the different issues was a new one—a material misleading representation by the Government to the oral argument panel of this Court.

App.20, emphasis added. Petitioner then developed the multitude of misleading Government statements:

> The district court also did not mention the specific additional misrepresentations by the Government included in its Opposition to Shah's 2255. At pages 15-19 of Shah's Reply, he notes several new misrepresentations. One such example can be found at page 15 of Shah's Reply. There, Shah notes one of the Government's new explicit misrepresentations: "Further, the observations of trial counsel and [district court] belie the objectionable nature of [racial *animus*] testimony. Five of defendant's lawyers in two trials did not find the testimony objectionable." ***This additional misrepresentation was untrue as well and created a credibility issue and materially disputed fact that the district court had to resolve***. See, Exhibit D at 15-16. ***But the court never resolved this disputed issue***.

App.29, emphasis added. In denying the COA, the Ninth Circuit failed also to meaningfully give Petitioner a fair hearing and proper judicial review.

Finally, the Ninth Circuit's failure to issue a COA left yet one more constitutional issue without proper

judicial oversight—that an unsuccessful entrapment defense can nevertheless form a solid basis for sentencing. Petitioner again specified:

> The district court's Order regarding sentencing entrapment creates obvious circular reasoning when the court, begging the question and ignoring binding precedent, states:
>
> > Dr. Shah argues that the Court failed to consider a downward departure based on sentencing entrapment. (Mot. at 23.) This is false. The Court made an express finding that there was no sentencing entrapment based on the jury's conclusion that Dr. Shah was not entrapped. (MTS Order at 4.) The Ninth Circuit agreed, stating that "the district court did not ignore Dr. Shah's sentencing entrapment argument, nor did it abuse its discretion at sentencing. The district court denied a downward departure based on sentencing entrapment after it concluded there was sufficient evidence to find Dr. Shah was not induced to commit bribery." Shah, 768 F. App'x at 642.

App.31.

Viewed from the public's eye, the process denied to Shah by the district court, allowed to stand by the Ninth Circuit, recalls an observation in *United States v. Herrera*, 782 F.3d 571, 574 (10th Cir. 2015), by, now,

Justice Gorsuch: "Courts should err on the side of having a hearing." Where then District Judge Gorsuch noted that district courts err on the side of granting more process than strictly necessary "in order to ensure not only that justice is done ***but that justice is seen to be done***." Emphasis added.

The record in this case established that 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 years later, his first jury dead-locked because it could not convict him; one year after that, he was retried and convicted.

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—"I'm from India, there are [sic] a lot of corruption and bribery goes on, ***I assume*** he's [Petitioner] asking me to make it go away ***and offer me a bribe***. That's what I was thinking." Emphasis added. Government counsel then used this stereotype to argue in closing that Petitioner's national origin obviously made him predisposed to corruption.

The Ninth Circuit here endorsed predisposition testimony no different than testimony that being a "Black man" predisposed the accused in *Buck* to future violence *and* being "Mexican" predisposed the accused in *Peña-Rodriguez* to violence toward women. Here, Harshad Shah was *a priori* judged to be *culturally predisposed* to corruption and to have possessed the intent to offer a bribe.

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)". Emphasis added.

Unmasking the inconsistent, malleable interpretation of what constitutes racial *animus*, on direct appeal and 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 member 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.[3]

Plainly, the question presented here demonstrates 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.*

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[3] https://cdn.ca9.uscourts.gov/datastore/media/2019/02/04/17-50383.mp3 last accessed February 23, 2023.

B. The Court must allow this *writ* because the Ninth Circuit created a conflict with this Court's precedent applicable to the relatively low standard for issuing a COA.

Petitioner Shah's *writ* must be allowed to proceed so that this Court can provide guidance to lower courts on the procedure for issuing a COA to be implemented when there is evidence that racial *animus* has been injected in the criminal justice process.

Title 28 U.S.C. Section 2253(C)(2) provides that a certificate of appealability may issue when "(1) the applicant has made a substantial showing of the denial of a constitutional right." Appellant Harshad Shah submits that in his 2255 and request for a COA, he demonstrated that he has met the standard for a COA as interpreted in *Buck v. Davis*.

In *Buck*, the Court reaffirmed the *relatively low standard* required for issuance of a COA—"the ***only*** question is whether the applicant has shown that 'jurists of reason ***could disagree*** with the district court's resolution of his constitutional claims ***or*** that jurists could conclude ***the issues presented*** are ***adequate*** to deserve encouragement to proceed further." Quoting *Miller-El* at 336 (state case involving a *Batson* issue under a stricter 2254 AEDPA standard, but finding that a COA was required), emphasis added.

In *Buck*, this Court also noted how the Fifth Circuit misapplied this Court's standard for issuing a COA.

> But the question for the Fifth Circuit was not whether Buck had "shown extraordinary

> circumstances" or "shown why [Texas's broken promise] would justify relief from the judgment." [citation omitted] ***Those are ultimate merits determinations the panel should not have reached***. We reiterate what we have said before: [6] A "court of appeals ***should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims," and ask "only if the District Court's decision was debatable***." [quoting *Miller-El*]

Buck at 116, emphasis added. This Court's COA standard mandates that courts as "only if the District Court's decision was debatable." *Buck* is helpful here because in *Buck*, the defense attorney, as here, failed to ensure that the opinion (Dr. Quijano in *Buck*) offered to the jury that Blacks were predisposed to violence, is indistinguishable to the opinion used against Shah that those from Indian Nationality and culture, like him, were predisposed to bribery.

Finally, in *Miller-El*, this Court was clear that in determining to issue a COA, courts must only engage in a threshold inquiry explained as follows:

> This threshold inquiry ***does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it***. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in

> essence deciding an appeal without jurisdiction.

Id., at 336-37, emphasis added. Harshad Shah respectfully submits that the Ninth Circuit did exactly what this Court in *Miller-El* and *Buck* said should not be done—sidestep the threshold inquiry for the COA process. Instead, the lower court decided the merits of the *habeas* IAC issues underlying Shah's request for the COA when it held "appellant has not made a substantial showing of the denial of a constitutional right." App.1.

CONCLUSION

For the foregoing reasons, Harshad 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: February 28, 2023

Respectfully submitted,

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