

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FRANK NUCERA, JR., Petitioner

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ROCCO C. CIPPARONE, JR., ESQ.
Law Offices of Rocco C. Cipparone, Jr.
157 Bridgeton Pike, Suite 200-320
Mullica Hill, NJ 08062
courtnotices@cipparonelaw.com
(856) 547-2100
Counsel for Petitioner Frank Nucera, Jr.

QUESTION PRESENTED

1. Did the Third Circuit err by upholding the denial of Petitioner's motion for new trial or an evidentiary hearing based on juror affidavits which established several jurors expressed racial biases during deliberations, race-shamed other jurors into voting guilty, threatened other jurors during deliberations based on racial biases, and where at least one pivotal juror lied during *voir dire* about past racial discrimination experienced and about her anti-police bias?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

None.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit, filed May 5, 2023, appears in the Appendix at A.001 and is reported at *United States v. Nucera*, 67 F.4th 146 (3d Cir. 2023).

The July 10, 2023 Order of the United States Court of Appeals for the Third Circuit denying the petition for rehearing appears in the Appendix at A.027.

The Order and the transcript of the oral opinion of the United States District Court for the District of New Jersey denying Petitioner's new trial motion appears in the Appendix at A.031 and is not published.

JURISDICTION

The United States Court of Appeals for the Third Circuit panel decision was filed May 5, 2023. A timely petition for rehearing was denied by the United States Court of Appeals for the Third Circuit on July 10, 2023. A copy of the Order denying rehearing appears in the Appendix at A.027.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Title 28, United States Code, Section 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree

Federal Rule of Evidence 606(b)

(b) During an Inquiry into the Validity of a Verdict or Indictment.

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify about whether:

- (A) extraneous prejudicial information was improperly brought to the jury's attention;
- (B) an outside influence was improperly brought to bear on any juror; or
- (C) a mistake was made in entering the verdict on the verdict form.

STATEMENT OF THE CASE

Factual Background

The United States Court of Appeals for the Third Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The United States District Court had jurisdiction pursuant to 18 U.S.C. § 3231.

Petitioner was the Bordentown Township NJ Police (“BTPD”) Chief and Township Business Administrator. Well before the background incident and FBI interview based on which Petitioner was prosecuted, BTPD Officer Nathan Roohr surreptitiously for many hours, recorded Petitioner and other fellow police officers. Roohr was disgruntled by Petitioner’s management style and handling of personnel matters as Chief and Township Administrator.

On September 1, 2016, BTPD Police Officers (PO) Mount and Guido responded to a call from a local hotel manager who advised that a black male and a female secured a room without payment. The two suspects each physically attacked the responding officers. Mount - a police officer for 16 years - was so badly beaten by the male suspect that for the first time in his career he thought about using deadly force as even his physical actions and use of pepper spray did not dissuade the

male's continued attack. Mount suffered serious injuries and was taken by ambulance to the hospital. Mount was out of work for three weeks. Both perpetrators were eventually restrained, and the male was arrested.

Petitioner and other officers responded to the hotel while the assault on Mount and Guido was in progress. After being cuffed, the male arrestee was being walked by PO Guido through a doorway on the hotel's second floor to a stairway leading to the first floor. Guido linked arms with the male, who defiantly stopped walking, yelled angrily, and threatened to sue the officers. PO Roohr was behind PO Guido and the male. PO Guido gave the arrested male a hard push when the male stopped walking in the second floor doorway. Roohr contended that Petitioner also pushed the male simultaneously to Guido pushing, causing the male's head to strike the metal door jamb of the second-floor doorway. Roohr said the contact made a "loud thud". No other police officers – several of whom were proximate enough to hear - heard any loud thud. Of 40-50 witnesses the FBI interviewed, Roohr was the only one who allegedly heard it. None of the other 40-50 interviewed witnesses saw Petitioner touch the male. Only PO Guido, in wildly vacillating, often inconsistent testimony, said he saw some semblance of a push by Petitioner. Guido changed his story too many times to recount. Ultimately Guido testified he had no independent recollection of seeing Petitioner push the male. PO Roohr and PO Guido walked the arrested male down to the first-floor, out a door and then to the police car.

The Petitioner remained on the second floor of the hotel the whole time. The arrested male told FBI agents investigating the matter that he was pushed into the

lobby [1st floor] exit door at the hotel by police, and that a white police officer with a military style short haircut and no facial hair pushed him into the front passenger door (not to be seated, but physically not the actual door) of the police vehicle before placing him into the rear of the police vehicle. The arrested male's statements make clear it was not Petitioner who pushed him: Petitioner was on the second floor at the time, and Petitioner had a longer (not a "military-style" haircut) and had facial hair (a moustache).

On December 22, 2016, two FBI agents surreptitiously recorded an "impromptu" (from Petitioner's perspective) meeting with Petitioner. Petitioner voluntarily spoke with the FBI agents. Petitioner stated that he did not touch the arrested male.

Petitioner was charged in a three-count indictment. Count One charged that Petitioner assaulted the male because of the male's race and color, violating 18 U.S.C. § 249 (a)(1). Count Two charged that Petitioner acting under color of law assaulted the male, violating 18 U.S.C. § 242. Count Three charged that during his FBI interview Petitioner made false statements, violating 18 U.S.C. § 1001(a)(2). A.108-117. Petitioner's first jury trial occurred September 16, 2019 through October 11, 2019. After prior indications of deadlock on all counts, and several instructions from the Court to continue deliberating, on October 9, 2019 the jury returned a guilty verdict on Count 3 (18 U.S.C. § 1001). Mistrial was declared October 11, 2019 regarding Counts 1 and 2: the jury remained deadlocked.

After the jury was dismissed, four jurors contacted Petitioner's trial counsel and ultimately provided affidavits regarding racial biases and bad conduct of other jurors. They also revealed that a juror brought some of those issues to the attention of the District Court during deliberations, of which the parties were not advised.

The juror affidavits stated in summary as follows:

- Affiant juror Cunningham stated that "bullying, racial tension and unfounded accusations" influenced deliberations and the conduct and comments by other jurors pressured her to vote guilty so she would not be labeled racist, not because she thought the government proved its case.
- Affiant juror Cianfrani stated the same regarding his vote.
- Affiant juror Neiman stated her guilty vote "was not a product of [her] true thoughts about the evidence. [She] felt pressured into the guilty verdict even though ... [she] believed the government did not prove the case. Even when I voted guilty[,] I did not believe that Mr. Nucera was guilty." When Neiman tried to focus the jury's attention on the evidence, she was "shut down" by juror Pamela Richardson and juror Esther Addo (each of whom was black), and other jurors were "nasty" to her when she tried to do so. Neiman only voted guilty because she was infected by the improper biases, external information, and pressure put forth by Richardson and others. Neiman recounted juror Kia Lipscomb (also black) asking Neiman how she would feel if Nucera spoke to Neiman that way [meaning using racially derogatory terms]. That comment along with the others made Neiman "feel like [she]

was being racist to vote not guilty, even though not guilty was [her] true belief from the evidence.”

- Affiant juror Cianfrani noted statements made by jurors Lipscomb and Addo which equated not guilty verdicts with condoning and empowering continued abuse by police against black men.
- Multiple affiant jurors stated in substance that the comments of other jurors such as Richardson, Lipscomb and Addo was compounded by the District Court’s repeated push for a verdict despite pronouncements in notes from the jurors they were deadlocked.
- The affidavits also aver Richardson told the other jurors during deliberations about discrimination she suffered previously, such as when traveling in the South during her youth she had to relieve herself in jars roadside because of segregation, and to leave places because of her skin color. The affidavits reveal that those stories evoked emotional reaction by other jurors, including hugs and tears during deliberations.
- In a post-trial Philadelphia Inquirer (“newspaper”) interview, Richardson corroborated that she “spoke to the panel about her own experience as an African American woman, including her life in the South” and corroborated that “All the men [on the jury] who thought that he was guilty were crying.”
- During deliberations Richardson made a comment regarding shooting certain jurors (who were white) because they denied being racist, purported to

understand what she had gone through as a black person, or because they were voting not guilty.

- The affidavits recount how some jurors expressed the impact of Richardson's extraneous stories. One juror stated to Richardson "I'm sorry, I'm so sorry, I remember those days", and embraced Richardson. That juror also stated he needed to make reparations for the treatment of African Americans and for his own bad behavior in his youth, and made a tearful speech that if they did not convict Petitioner, "these things will continue to happen." Another similarly embraced Richardson.
- Juror Richardson demonstrated apathy to review the evidence despite other jurors asking her to do so to consider alternative points of view. Richardson told other jurors the only thing she wrote in her juror notebook was a list of states to which she traveled or planned to travel and also stated "all I am doing is making entries in my notebook about you SOB's".
- Richardson yelled at juror Viscome "you don't know what its [sic] like to be a black person".
- Richardson accused other jurors of improper racial bias in favor of Petitioner, alleging they would only be happy with an all-white jury.
- When affiant juror Cianfrani stated to Richardson that she and other jurors voting for conviction may be looking at things through a "different lens", Richardson responded, "No shit, Sherlock, we're black". Richardson

corroborated this attribution in her Philadelphia Inquirer interview, recounting her “No shit, Sherlock” comment.

- Richardson told the other jurors she “has a problem with cops”, despite that during *voir dire* she did not indicate any such bias when asked directly
- Richardson told other jurors her sons were discriminated against by police because of her sons’ race and that she had to warn her sons how to interact with police, contrary to her indication in *voir dire* that the incidents had nothing to do with race
- During the evidence phase of trial, constituting premature deliberations, Richardson expressed to other jurors “Hope you are all thinking guilty, I can be here all day, I have f_ __king nowhere to be.” Later, in deliberations, another juror even referenced Richardson’s premature comment, stating “It doesn’t matter anyway, we all have to vote the way Pam [Richardson...] votes”.
- Affiant juror Viscome twice during deliberations attempted to bring concerns about the improprieties to the District Court’s attention. She advised the Deputy Clerk that some jurors were calling other jurors racist, and that she was concerned with “disrespect and racial comments” in the jury room. The Clerk advised Viscome to write the Judge a note if she “had any further issues.” The second time juror Viscome expressed her concerns to the Clerk, the Judge addressed the jurors. Viscome started crying and “told the Judge that there was serious disrespect going on in the jury room”. She may have

also said there were threats being made, but she was not certain she stated the latter. The Judge advised the jurors to leave personal feelings aside and ordered the jurors to decide whether they were going to continue. It appears the District Court did not ask any questions to investigate the nature of the concerns of juror Viscome. There was no inquiry by the Court into what already tainted deliberations. The Court did not advise counsel for the parties of either interaction.

- Affiant juror Viscome stated that she and other jurors believed the Court would not accept deadlock: “There was a clear consensus that we had to reach at least one unanimous verdict based on the Court's instructions, including after we indicated previously that we were deadlocked on all counts.”

During *voir dire*, juror Richardson made several material misrepresentations and omissions, concealing her biases. Despite such, Richardson displayed her biases in her discussions with other jurors during the evidence phase of trial and during deliberations, as summarized above. She also advised the other jurors that as a mother of black sons she gave special warnings to her sons about police misconduct. Richardson presented specific anecdotes about police harassing her sons based on her sons' race. She told jurors police stopped her sons for “driving while black”, and that one son was harassed by police merely because he was a black man working in their yard. Egregiously, during *voir dire* Richardson hid what she later told other jurors during trial: that she had “a problem with cops”, and she falsely claimed to the others that during *voir dire* she admitted her “problem with cops”. The opposite

was true: Richardson told the Court and parties she did not have any such bias, and that her sons' interactions with police would not affect her impartiality.

Richardson's also recounted to jurors during deliberations specific instances of racial discrimination/segregation she experienced in her youth, despite her denial in the responses to express *voir dire* question that she never was a victim of discrimination.

Petitioner was charged in a three-count indictment. Jury trial occurred September 16, 2019 through October 11, 2019. On October 9, 2019 the jury returned a guilty verdict on Count 3 (18 U.S.C. § 1001). Mistrial was declared October 11, 2019 regarding Counts 1 and 2. Petitioner filed a motion for a new trial and evidentiary hearing based on the juror affidavits which demonstrated racial biases improperly asserted during deliberations, and juror misrepresentations during *voir dire*. That motion was denied by the District Court, which refused to consider the affidavits or grant an evidentiary hearing, relying upon the no-impeachment rule in Federal Rule of Evidence 606(b). Petitioner was sentenced based on an upward variance, to 28 months imprisonment on May 26, 2021, still then pending retrial on the remaining two counts.¹

A timely appeal from the conviction at trial #1, from which the instant petition ensues, followed. The Panel Opinion and Judgment of the United States Court of Appeals for the Third Circuit was entered on May 5, 2023. The Third

¹ Retrial on the remaining two counts again resulted in a mistrial (deadlocked jury), and the government determined not to pursue a third trial.

Circuit affirmed the District Court's denial of Petitioner's new trial motion based on juror misconduct and racial biases during deliberations and misrepresentations in the *voir dire* process again relying on Federal Rule of Evidence 606(b). The Third Circuit did remand for resentencing based on incorrect guideline application by the District Court). As to the aspects of the Panel Opinion concerning juror misconduct, Petitioner filed a motion for rehearing in the Third Circuit, which was denied on July 10, 2023.

On remand for resentencing, the District Court appointed counsel pursuant to the Criminal Justice Act based on its determination Petitioner qualified for such. On May 31, 2023, the District Court sentenced petitioner to time served (approximately 13 months), and petitioner was released from imprisonment.

REASONS FOR ALLOWANCE OF THE WRIT

This case presents an issue of legal importance that transcends the particular facts and parties involved, and compelling reasons exist for granting this petition. The Third Circuit panel opinion concluded that Petitioner's evidence of what occurred during jury deliberations could not be considered, concluding that the affidavits did not fall within any exception to Federal Rule of Evidence 606(b), particularly the constitutional exception for evidence of racial bias as recognized by this Court in *Peña-Rodriguez v. Colorado*, 580 U.S. 206 (2017). The Third Circuit panel further declined to expand the *Peña-Rodriguez* exception to encompass the disconcerting situation presented by Petitioner's case.

Deliberations and verdict based on racial bias – whether the race of the defendant or that of jurors – cannot be countenanced. That result infects the process (as it did here) in a manner that so seriously undermines the 6th Amendment right to a fair and an impartial jury, and the integrity of our justice system, that concern for the “sanctity” of deliberations and verdicts must give way. This issue is of substantial importance not only to Petitioner, but to the preservation of a fair and impartial justice system. The facts and issues presented in this case make it one of those “cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged... [such that] [i]f and when such a case arises, the Court can [and this Court should grant the instant petition to] consider whether the usual safeguards are or are not sufficient to protect the integrity of the process.” *Warger v. Shauers*, 574 U.S. 40, 51n.3 (2014). Although in *Warger* this Court concluded that there is no constitutional exception for statements showing dishonesty during *voir dire*, the Court did not consider such in the context of statements that show dishonesty during *voir dire* regarding racial biases and the subsequent use of those biases and past experiences to exert influence over other jurors during deliberations.

The occurrences in the jury room -- and the immediate post-verdict (same day) approach by several jurors to defense counsel expressing their concerns -- deprived Petitioner of his constitutional right to a fair and impartial jury. Even if they do not squarely fit within the *Peña-Rodriguez* exception, this Court should

grant the petition to address the issue whether the exception should be expanded to encompass when:

- jurors exhibited their own racial bias
- a juror accused other jurors of voting a certain way based on the jurors' race
- at least one juror intimidated and threatened other jurors during racially charged deliberations
- black jurors race shamed other jurors; and
- when there was no meaningful intervention by the District Court despite the opportunity to do so, and the concerns expressed by a juror to District Court staff and the Court while deliberations were occurring also was not brought to the attention of counsel.

Those occurrences “cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict.” *Pena-Rodriguez*, 137 S. Ct. at 869. As Judge Jordan wrote in his concurring panel opinion in this case,

[T]he circumstances that came to light after the verdict here are so disturbing it is hard to let the verdict stand. ... Guilty or not, Nucera, like all criminal defendants in our constitutional order, deserved an unbiased jury of his peers, people who would discuss the case, not each other's skin color. And he was likewise entitled to jurors who would be influenced solely by the evidence and persuasive force of proper argument, not by threats and vituperation. If what the other jurors have said about Richardson's remarks and about their own votes is true, he didn't get that.

United States v. Nucera, 67 F.4th 146, 177 (3d Cir. 2023) (Jordan, J. concurring)(bold added).

Safeguards that can nip in the bud brewing issues during deliberations, such as observations by the Court and court personnel, and real-time reporting by jurors of improprieties occurring during deliberations, were not respected in Petitioner's case despite real-time reporting by a juror, twice. Those other safeguards which formed part of the basis for this Court's decision in *Warger* to decline to hold Federal Rule of Evidence 606(b) unconstitutional were not respected by the District Court in the instant case. *See Warger*, 574 U.S. at 51 ("Even if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered"); *United States v. Fattah*, 914 F.3d 112, 147 (3d Cir. 2019) ("Consistent with the standard applied at other stages of criminal proceedings, ... 'where substantial evidence of jury misconduct—including credible allegations of jury nullification or of a refusal to deliberate—arises during deliberations, a district court may, within its sound discretion, investigate the allegations through juror questioning or other appropriate means.'").

Judge Jordon, in his concurring opinion in the instant case, expressed particular concern over the District Court's failure to probe Juror Viscome's expressed concerns:

Without vigilance on the part of trial participants and court personnel, however, these sources of protection can end up being ineffectual. Here, Juror 2's affidavit states that she twice attempted to alert

the District Court about "disrespect and racial comments that were being made in the jury room during deliberations." (App. at 194.) She says she told the Deputy Clerk "that some of [the] jurors were being called racists by other jurors[,]" to which the Deputy Clerk responded that, "if [she] had any further issues, [she] should write a note to the [j]udge." (App. at 194.) That response suggested the only avenue by which Juror 2 could communicate improper conduct to the District Court was by a written note delivered through the jury foreperson. After being rebuffed by the Deputy Clerk, Juror 2 understandably declined to write a note because she feared other jurors' reactions if the foreperson read the note aloud. The result was that a serious problem that should have been promptly addressed was not.

Nucera, 67 F.4th at 177.

CONCLUSION

This Court should grant this petition to consider the important issues presented and application/expansion of the *Pena-Rodriguez* exception to these disturbing occurrences which indisputably deprived Petitioner of his 6th Amendment right to a fair and impartial jury and to a verdict based solely on the evidence. Doing so "is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right."

Pena-Rodriguez, 137 S. Ct. at 869.

For the foregoing reasons, Petitioner submits that this Court should grant the Petition for a Writ of *Certiorari* to review the decision of the United States

Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

LAW OFFICES OF ROCCO C. CIPPARONE, JR.
ATTORNEY FOR PETITIONER FRANK NUCERA JR.

BY:


ROCCO C. CIPPARONE, JR., ESQ.
157 Bridgeton Pike, Suite 200-320
Mullica Hill, NJ 08062
(856) 547-2100

Dated: September 23, 2023