NO._____

IN THE SUPREME COURT OF THE UNITED STATES

JAHVARIS LAMOUN SPRINGFIELD,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

The question presented is whether there is a constitutional exception to the no-impeachment rule codified in Federal Rule of Evidence 606(b) for instances where there is evidence that the jury considered evidence in violation of a criminal defendant's Fifth Amendment due process rights, including the right against self-incrimination, and Sixth Amendment fair trial rights?

PARTIES TO THE PROCEEDING

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

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Petitioner Jahvaris Lamoun Springfield respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's June 29, 2023 decision is unpublished and reproduced in the ppendix to this petition at A1-A6. The judgment and sentence of the United States District Court for the Southern District of California (Burns, L.) is not reported. It is reproduced in the appendix at B1-B5.

BASIS FOR THIS COURT'S JURISDICTION

The decision and judgment of the Ninth Circuit was entered on June 29, 2023. *See* Appendix A1-A6. This petition is timely filed, as it is being filed within

90 days after the Ninth Circuit panel's decision affirming the district court's judgment. Sup. Ct. Rule 13(1). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

The Sixth Amendment to the United States Constitution provides:

> 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 defence.

STATEMENT OF THE CASE

At issue in this case is the fundamental question concerning the protection and vindication of a criminal defendant's bedrock rights under the Fifth and Sixth Amendments, that is, the rights to due process of law, the right against self-incrimination, the presumption of innocence, and the right to hold the government to its burden of proof of every element of an offense beyond a reasonable doubt.

1. In February 2019, a San Diego man died after taking a combination of drugs including marijuana, cocaine, and oxycodone pills, which oxycodone pills contained fentanyl. Agents investigating the death discovered text messages on the

victim's cell phone in which he had sought to buy oxycodone pills (called "blues") from various sellers in a quantity of a few pills at a time. Through cell phone location data and other evidence, the government linked some of the drug-related text messages to petitioner and placed him under arrest.

During a lengthy interrogation, petitioner admitted that he previously had sold "blue" oxycodone pills to the victim, though he denied knowing that any pills he sold contained fentanyl and also denied selling pills to the victim in the days leading up to his death. Medical testimony at trial was conflicting as to whether fentanyl was the "but for" cause of the victim's death, or whether the victim's use of other drugs and the his preexisting heart condition caused his death.

2. The government charged petitioner with one count of distribution of fentanyl resulting in death, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). Appendix C1-2C.

3. The jury trial commenced on August 24, 2021, with the first morning spent on voir dire; the court conducted standard voir dire, and allowed each side 15 minutes to follow up. *See* D2-D29.

The defense asked, among other questions, "If I advise my client not to testify, is anyone going to hold that against Springfield…or is anyone going to say, well, he didn't get up there and testify. And so as a result of that, I'm voting guilty." D10. One prospective juror said he would "hold it against [petitioner] for not testifying, because [he would] want to hear [petitioner's] side of the story." D10. The potential juror elaborated that "it causes some doubt in my thinking, why he's

not testifying." D12. Quite candidly he admitted: "It casts additional doubt. Because usually the reason you don't testify is because you're guilty" and he followed that up, stating that "if you're not guilty, you have nothing to lose." D12.

The court reminded the potential juror that "a defendant in a criminal case has a constitutional right not to testify, and no presumption of guilt may be raised, no inference of any kind may be drawn from the fact the defendant doesn't testify." D13; *see* D14-D15. The potential witness again said that he wanted "to hear the whole story from either side." D16.

Upon defense counsel's challenge for cause, the potential juror was excused because "he can not deal with the burden of proof." D27-D28. No further challenges for cause were granted, and a jury was empaneled. Of those selected, none said anything like the excused juror when presented with the question whether anyone would hold it against petitioner, or convict, if he chose not to testify. *See* D10-D20.

4. The presentation of evidence lasted just over two days. *See* F18. The defense strongly contested the evidence connecting petitioner to the pill ingested by the victim, which was laced with fentanyl. *E.g.*, E4-5-E22. Additionally, there was conflicting medical evidence regarding the cause of the victim's death, with the deputy medical examiner testifying that he identified the cause of Gallagher's death as "[a]cute fentanyl and cocaine intoxication." E23; *see* E23-E44. He also listed cardiovascular disease as a "contributing condition," and testified that the victim's enlarged heart likely was attributable to chronic cocaine use. E43. The government offered an expert medical toxicologist who testified that "acute fentanyl toxicity"

was the "but for" cause of the victim's death. D31D33. The toxicologist, who reviewed only medical reports but did not conduct an autopsy, acknowledged that the victim had an enlarged heart, and that his blood contained marijuana, fentanyl, and metabolites from cocaine. D36-D40. The toxicologist also admitted that a heart arrythmia, or irregularity, could occur in a person with an enlarged heart without drug use, or it could be precipitated by cocaine use. D43-D44.

The petitioner did not testify at trial. F18.

The jury began deliberations the morning of August 26, 2021. F19. After just under two hours of deliberating, the jury submitted a note seeking to know the different types, compounds, and quantities of drugs found in various locations discussed in the government's case. F23-F27; I2-I3. After deliberating for nearly the remainder of the day – about five hours and 15 minutes in total – the jury returned a note stating: "Deliberations are at a standstill. Further deliberations aren't expected to reach a unanimous outcome. How do we proceed?" I4; F27-33.

The district judge told the jury he would send them home and advised them to return the next day for further instructions. F28-F33. The following day, the court provided the jury an additional instruction to continue deliberating, a modified instruction under *Allen v. United States*, 164 U.S. 492 (1896). G6-G16. The jury deliberated for 46 additional minutes and reached a unanimous verdict to convict. G10-G11.

5. Following the verdict and after the jury was released, G14, the district court discovered a cell phone exhibit was outside its plastic evidence bag, and the

court notified counsel. G16-G20. Defense counsel objected to juror misconduct and moved for a mistrial. G20. The court deferred ruling on the mistrial request and authorized the parties to contact jurors to investigate potential misconduct. G20-G23; I5-I7.

A defense investigator contacted the jury foreperson. I12-I15. The foreperson said that no one attempted to turn on the phone, I13, but the foreperson made statements indicating other potential juror misconduct. I13-I15.

Defense counsel brought a motion for new trial pursuant to Federal Rule of Criminal Procedure 33 based on newly discovered evidence and juror misconduct—*viz.*, misconduct in not truthfully answering questions in voir dire and failing to follow the court's instructions regarding the presumption of innocence and the defendant's constitutional right not to testify. I5-I15. The motion was supported by a declaration of the defense investigator recounting the discussion with the jury foreperson. I12-I15.

The government did not challenge what was stated in the declaration on hearsay grounds, I16-I22, and the district court it had no "question on" that. H5.

According to the declaration recounting the foreperson's comments, advised that when the jury sent the note indicating that it had reached a "standstill" and was unlikely to reach a unanimous verdict, they were split: *five not guilty* and *seven guilty*. I15. The foreperson explained that during the deliberations, the jury had a number of questions and points of confusion regarding the government's case and that he was one of the jurors who voted to acquit at the , and the. I13-

I15.Ultimately, after receiving the *Allen* instruction, the jurors reached a unanimous vote to convict at least in part *because* petitioner *did not testify at trial.* I14. The declaration states that:

- Some jurors voiced disappointment that [petitioner] chose not to testify. Some of the jurors wanted to hear [petitioner] defend himself." I14.
- While the jurors "knew it was his right not to testify, [] the fact that he didn't testify *swayed some jurors*." I14 (emphasis added).
- "Some jurors voiced that if it was their trial, they would testify. Others said they would let their attorney handle the decision." I14.
- "Some of the jurors expected a defense, some of the jurors wanted to hear from the defendant. We wanted to hear him say, 'I'm not guilty.'" I14.

6. Under Rule 33, to obtain a new trial based on newly-discovered evidence, a defendant must show (1) the evidence is newly discovered; (2) the defendant was diligent in seeking the evidence; (3) the evidence is material to issues at trial; (4) the evidence is not cumulative nor merely impeaching; and (5) the evidence indicates that the defendant would probably be acquitted in a new trial. Fed. R. Crim. Proc. 33; *United States v. Harrington*, 410 F.3d 598, 601 (9th Cir. 2005).

It was not disputed below that petitioner's evidence was newly discovered, that he was diligent in seeking it, and that the evidence was not merely

impeaching, since it was about juror misconduct and misrepresentations during voir dire. H10-H12; *compare* I9-I11, *with* I16-I22. Thus, the two factors at issue in the district court were (1) whether the newly-discovered evidence of juror misconduct *addressed a material issue at trial*, and (2) whether petitioner demonstrated that *he probably would be acquitted in a new trial*.

The district court never reached analysis on these two factors, because it concluded it was prohibited from considering the evidence of juror misconduct in the form of relayed statements by the jury foreperson. H7-H13. The court concluded that "the case law doesn't permit the Court to consider these statements about, you know, who said what during the deliberation process." H8.

In denying the motion, the district court noted that "when we get outside of the legal arena, [it] seems to me that it's human nature and human instinct, putting aside the legal protections that apply in Court, that when a person remains silent in the face of serious accusations, most people say, 'Yeah, he's got something to hide.' And that's the intuition." H7. Reviewing the post-trial statements given by the jury foreperson, the court stated that "[i]t could be true that it was deceitful or it could just be that…they said some things they shouldn't have said and maybe relied on considerations they shouldn't have relied on." H8. The court concluded that "this isn't the kind of deceit that would qualify for me to look at the declaration and act on the declaration. It's not racial animus, for example, which the Supreme Court has carved out as an exception" to the typical Rule 606(b) bar on juror evidence of deliberations, under. H9.

Nevertheless, the district court denied the government's motion to strike the declaration, stating that the declaration "should be part of the record here" and for appellate review. H10.

7. Petitioner was sentenced to 300 months (25 years) in federal custody, to be followed by a 10-year term of supervised release. Appendix B2-B3.

8. A panel of the Ninth Circuit affirmed the judgment of the district court. Appendix A1-A6. The court held that the district court properly denied petitioner's motion for a new trial "because the defendant investigator's declaration about the jury foreman's statements were inadmissible pursuant to Federal Rule of Evidence 606(b)." Appendix A4 (citing *United States v. Lopez*, 913 F.3d 807, 826 (9th Cir. 2019) and *United States v. Rutherford*, 371 F.3d 634, 639-40 (9th Cir. 2004)). The court reasoned that this Court "has rejected similarly proposed constitutional exceptions." (citing *Tanner v. United States,* 483 U.S. 107, 126-27, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987), and *Warger v. Shauers,* 574 U.S. 40, 50-51 (2014)). Appendix A5.

The Ninth Circuit did not address the merits of the argument to expand the racial animus exception recognized by this Court in *Pena-Rodriguez v. Colorado,* 580 U.S. 206, 222-27 (2017), and instead concluded— contrary to the district court's evidentiary ruling—that the declaration presented "hearsay-on-hearsay" evidence and "would not meet the high evidentiary burden required to overcome Rule 606(b)." Appendix A5 (citing *Pena-Rodriguez*, 580 U.S. at 225-26). The court also did not address petitioner's request for a remand to the district court so that court

could consider on the merits the evidence it believed was barred by Rule 606(b) in adjudicating petitioner's new trial motion. *See id.*

REASONS FOR GRANTING THE WRIT

I. Federal Rule of Evidence 606(b)'s Bar on Consideration of Evidence of a Jury's Deliberations Must Give Way to the Protection of a Criminal Defendant's Rights Under Fifth and Sixth Amendments

This Court has not yet settled the question of whether the bedrock Fifth and Sixth Amendment rights override the prohibition in Federal Rule of Evidence 606(b) on consideration of post-verdict evidence to impeach the verdict, where that evidence shows that the jury considered—and some jurors were swayed to vote to convict—by the fact that the defendant did not testify.

Just as this Court has held that a verdict infected by racial animus violates the Sixth Amendment right to a fair trial, *Pena-Rodriguez,* 580 U.S. at 222-27, a criminal defendant has a right to a trial and verdict free from the jury's evidence consideration of the defendant's decision not to testify at trial and allowing that fact to *sway* its decision to convict. Doing so violates not only a criminal defendant's Fifth Amendment rights to due process and against self-incrimination, but also violates the defendant's Sixth Amendment fair trial rights, including his right to be presumed innocent and to hold the government to its burden of proof beyond a reasonable doubt as to every element of the offense. Here, the evidence of juror deliberations shows that at least several members of the jury violated those sacrosanct Fifth and Sixth Amendment rights by expressly holding it against

petitioner that he did not testify at trial, and ultimately were *swayed* by that fact in voting to convict. I12-I15.

A. A Strict Application of Federal Rule of Evidence 606(b), Like the Ninth Circuit's Application Here, Violates a Criminal Defendant's Fifth and Sixth Amendment Rights

Federal Rule of Evidence 606(b) provides that "[d]uring 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." Fed. R. Evid. 606(b)(1).

The Rule contains three exceptions where evidence from a juror can establish "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." Fed. R. Evid. 606(b)(2). As is any Rule of Evidence, it also is subject to limitations required to preserve a criminal defendant's constitutional rights. *See McDonald v. Pless,* 238 U.S. 264, 269 (1915).

McDonald recognized the values sought to be promoted by excluding juror evidence include the stability and finality of verdicts, and the protection of jurors against annoyance and embarrassment. *McDonald,* 238 U.S. at 267-68. This Court also recognized "it would not be safe to lay down any inflexible rule" barring all juror testimony about deliberations "*because there might be instances in which such*

testimony of the juror could not be excluded without 'violating the plainest principles of justice." *Id.* at 269 (emphasis added). Thus, this Court contemplated that such testimony *must be allowed* "in the gravest and most important cases." *Id.*

1. Rule 606(b) Must Give Way to Protect Certain Core Constitutional Jury Trial Rights

Subsequent to Rule 606(b)'s adoption, this Court has continued to recognize what it forecast in *McDonald* as the need for flexibility when important constitutional rights are implicated. In *Warger*, this Court acknowledged that in some circumstances, it might be unconstitutional to prohibit the introduction of juror testimony that reveals "juror bias so extreme that, almost by definition, the jury trial right has been abridged." 574 U.S. at 51 n.3.

Such a case arose, for example, in this Court's 2017 decision in *Pena-Rodriguez v. Colorado*, where during jury deliberations in a criminal trial for sexual assault, a juror made several racist statements about Mexican men and sexual assault. 580 U.S. at 212-13. This Court held that such evidence that racial animus was a significant motivating factor in the juror's finding of guilt was an example of the situation preserved in *Warger* where "the Constitution requires an exception to the no-impeachment rule." *Id.* at 221. The Court discussed the Fourteenth Amendment's "guarantee against state-sponsored racial discrimination in the jury system" and it has included interpreting the Fourteenth Amendment to "prohibit the exclusion of jurors on the basis of race." *Id.* at 222 (discussing cases). In reconciling the protection of the values of the Fourteenth Amendment with Rule

606(b)'s no-impeachment rule, the Court held that the two lines of precedent "need not conflict." *Id.* at 223.

Further, the Court distinguished its prior "no-impeachment rule" authority and recognized that "[r]acial bias of the kind alleged in this case differs in critical ways from the compromise verdict in *McDonald,* the drug and alcohol abuse in *Tanner*, and the pro-defendant bias in *Warger*." *Id.* at 223-24. This Court explained that: "The behavior in those cases is troubling and unacceptable, but each involved anomalous behavior from a single jury—or juror—gone off course" and "neither history nor common experience shows that the jury system is rife with mischief of these or similar kinds." *Id*. at 224. Yet, the Court observed, "[t]he same cannot be said about racial bias, a familiar and recurring evil that, if left unaddressed, would risk system injury to the administration of justice." *Id.*

This Court also noted that the processes in place—"[v]oir dire at the outset of trial, observation of juror demeanor and conduct during trial, juror reports before the verdict, and nonjuror evidence after trial are important mechanisms for discovering bias." *Id.* at 224. But, the Court observed that the "operation" of those safeguards recognized in *Tanner* "may be compromised, or they may prove insufficient," as it sometimes can be particularly difficult to root out racial animus. *Id*. Thus, to "prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right," the Court adopted a "*constitutional rule* that racial bias in the justice system must be addressed—

including, in some instances—after the verdict has been entered." *Id.* at 225 (emphasis added).

The Court held that where a juror's statement "indicates that he or she relied on racial stereotypes or animus to convict a criminal defendant, *the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee*." *Id.* (emphasis added).

In setting some parameters for a trial court's inquiry about the racially motivated statement, the Court held that: (1) it must be a statement of one or more jurors "that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict," and (2) the statement tended to show that it was "a significant motivating factor in the juror's vote to convict." *Id.* at 225-26. The Court noted that the determination whether "that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence." *Id.* at 226.[1] Thus, citing the Sixth Amendment's guarantee of an impartial jury required the admission of evidence of juror racial bias. *Id.* at 226, 212-13.

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[1] The exception to the no-impeachment rule from *Pena-Rodriguez* has been applied and expanded. *Harden v. Hillman*, 993 F.3d 465, 481 (6th Cir. 2021) (applying exception in civil case).

2. The Fifth Amendment Right Not to Testify, and the Sixth Amendment Fair Trial Rights, Are Bedrock Rights That, If Violated, Undermine Our Constitutional System

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const., Amd. V. "The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990). It "permits a person to refuse to testify against himself at a criminal trial in which he is a defendant." *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984). The same protections are made applicable to the states through the Fourteenth Amendment due process clause. *Malloy v. Hogan,* 378 U.S. 1, 6 (1964).

This right against self-incrimination also is intertwined with the presumption of innocence and the government's burden of proof beyond a reasonable doubt. Each of those rights are fundamental components of the right to a fair trial. *Estelle v. Williams,* 425 U.S. 501, 502, 517 (1976); *In re Winship,* 397 U.S. 358, 363 (1970).

"The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure, and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective." *Brown v. Mississippi,* 297 U.S. 278, 287 (1936) (quoting *Fisher v. State,* 145 Miss. 116, 134 (1926) (holding that coerced confessions cannot be allowed to be admitted at trial under federal due process rights)).

Here, the district court allowed the parties to contact jurors to discuss the irregularity of how a physical exhibit—a cell phone—was returned to the court. G19. It was the jury's foreperson who volunteered the information to the defense investigator about the jury's deliberations, the jury's significant concerns and reservations about the lack of evidence in the government's case regarding the victim and the drugs he consumed leading to his death, the jury's vote count of 7-to-5 prior to the *Allen* charge, the reliance by some jurors on the fact that the defendant did not testify in their decision to convict even though they knew Springfield had the right not to testify, and multiple jurors' change of vote in particular after the district court's *Allen* charge. I14-I15.

As to the fundamental constitutional rights squarely at issue here—the presumption of innocence, the government's burden of proof, and the right of the accused not to testify—the key statement of the jury foreperson was: "We knew it was his right not to testify, but ***the fact that he didn't testify swayed some jurors***. Some of the jurors expected a defense, some of the jurors wanted to hear from the defendant. ***We wanted to hear him say, 'I'm not guilty***.'" I14. (emphases added). According to the foreperson, some jurors also stated that if it had been their trial, they would testify. I14.

3. This Court Should Recognize an Exception to Rule 606(b)'s Bar on Juror Testimony Where Evidence of Juror Misconduct Squarely Implicates a Defendant's Fifth and Sixth Amendment Rights

Petitioner contends that the constitutional rights impinged upon here warrant an exception to Rule 606(b)'s no-impeachment rule, where there is evidence of a constitutional deprivation of his rights not to testify, and to a fair and impartial jury trial, as guaranteed by the Fifth and Sixth Amendments.

Warger recognized that such "grave" constitutional cases could exist, and *Pena-Rodriguez* identified one such exception of a constitutional magnitude. Petitioner's case presents the next such case, in which this Court should recognize an exception to the no-impeachment rule because of the gravity of the deprivation it would work not only in Springfield's case but others, if such an exception is not allowed. Moreover, as in *Pena-Rodriguez,* the usual safeguards of voir dire, demeanor observations at trial, pre-verdict juror reports, and non-juror reports were not sufficient to protect the integrity of the process here.

And just as this Court in *Pena-Rodriguez* distinguished racial bias "from the compromise verdict in *McDonald,* the drug and alcohol abuse in *Tanner*, and the pro-defendant bias in *Warger*," because those latter situations evidenced "a single jury—or juror—gone off course," 580 U.S. at 224, the issue here is not a one-off, either.

The district court acknowledged that jurors may commonly hold it against a defendant who does not testify. H7. ("[W]he a person remains silent in the face of

serious accusations, most people say, 'Yeah, he's got something to hide.' And that's the intuition."); *id.* ("[I]t's a natural intuition that people say, Very serious accusation, and this person is standing silent, and I'm very suspicious about that. I think he's probably got something to hide."); *see also* H8, H11, H12.

Indeed, as the district court acknowledged, these risks are not a one-off, but can pervade a juror's intuitions. H7. This is not evidence of a juror's "inner thoughts" in weighing the evidence. It is evidence of a juror's (possibly several) misconduct in bringing external bias displaying a disregard of the constitutional protection for the defendant not to testify at trial, the presumption of innocence, and the government's burden of proof. I14-I15. Thus, it is evidence of ***juror misconduct and bias that goes at the very heart of the verdict.***

Additionally, although *Warger,* 574 U.S. 40 held that Rule 606(b) restricts the use of juror-deliberation evidence in attacking a verdict, this Court continued to recognize its prior holding that "[i]f a juror was dishonest during *voir dire* and an honest response would have provided a valid basis to challenge that juror for cause, the verdict must be invalidated." *Id.* at 45 (citing *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554-56 (1984)).

What post-verdict declaration here demonstrates is that some jurors, despite being instructed several times not to, held petitioner's decision not to testify against him. Additionally, they—just like dismissed prospective juror—could not follow the law as instructed and set aside their preconceived notions about a defendant's decision not to testify. Unlike the dismissed juror, they failed to honestly answer a

material question during voir dire. Had those jurors answered truthfully, they would have been challenged and excused for cause, just as was the juror who was dismissed.

Regardless of the classification as juror misconduct or *McDonough*-style bias, the jury foreperson's account of jurors evidences a disregard of the constitutional protections afforded to petitioner in choosing not to testify, the presumption of his innocence, and holding the government to its burden of proof. When this is coupled with the closeness of the jury's initial 7-to-5 vote prior to the *Allen* charge, petitioner has shown he is likely to be acquitted before an impartial jury when only admissible evidence is considered.

In sum, this case raises grave constitutional concerns, with deep historical roots and of the type of importance akin to that raised in *Pena-Rodriguez.* The no-impeachment rule must yield to the protections afforded a criminal defendant pursuant to the Fifth and Sixth Amendment and to fundamental notions of due process and a fair trial. The juror evidence should be admissible to consider misconduct and the new trial motion.

As for the appropriate remedy, in *Pena-Rodriguez*, this Court noted that the trial court is in the best position to consider the evidence on a motion for new trial. *See Pena-Rodriguez,* 580 U.S. at 227-28; Fed. R. Crim. Proc. 33(a). If the district court determines that more information is needed, the court should conduct an evidentiary hearing pursuant to *Remmer v. United States,* 347 U.S. 227, 229-30

(1954), to provide petitioner a meaningful opportunity to establish bias in the jury's verdict in support of his motion for a new trial.

CONCLUSION

This case presents an important question of federal law that has not been, but should be, settled by this Court. Sup. Ct. R. 10(c). It is therefore appropriate for this Court to grant this petition and hear the case on the merits.

Dated: September 27, 2023

Respectfully submitted,

/s/Johanna S. Schiavoni

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CERTIFICATE OF COMPLIANCE WITH RULE 33.2

I, Johanna Schiavoni, counsel for petitioner, certify that this document is prepared in accordance with the requirements of Supreme Court Rule 33.2, and contains 4,822 words, exclusive of the table of contents, table of authorities, signature lines, and certificates of service and compliance, as counted by the word count program of Microsoft Word**.**

I also certify that this brief complies with the typeface requirements because the brief is prepared in a proportionally spaced typeface using 14-point Century Schoolbook font.

I declare under penalty of perjury that the foregoing is true and correct. Executed September 27, 2023 at San Diego, California.

/s/ Johanna S. Schiavoni
By: Johanna S. Schiavoni

LAW OFFICE OF
JOHANNA S. SCHIAVONI