No. _____

IN THE

Supreme Court of the United States

LEZMOND CHARLES MITCHELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Execution Scheduled: August 26, 2020

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CAPITAL CASE

QUESTIONS PRESENTED

In *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), this Court held, for the first time, that no-impeachment rules may not bar consideration of juror testimony showing a verdict was likely motivated by racial bias. In dissent, Justice Alito questioned whether there are "principled grounds for preventing the expansion" of *Peña-Rodriguez* and questioned whether local rules restricting post-verdict contact with jurors would survive this holding. The questions presented are:

1. Whether, after *Peña-Rodriguez*, district courts can validly bar death-sentenced inmates from interviewing trial jurors post-verdict concerning racial bias during deliberations?
2. Whether a change in decisional law such as *Peña-Rodriguez* is an "extraordinary circumstance" that justifies reopening under Federal Rule of Civil Procedure 60(b)(6)?

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

Mitchell petitions for a Writ of Certiorari to review the final order of the United States Court of Appeals for the Ninth Circuit denying his appeal and affirming the judgment of the United States district court denying him relief on his Rule 60(b)(6) motion. Case No. 18-17031.

OPINIONS BELOW

The Ninth Circuit denied Mitchell's appeal in a published decision. *Mitchell v. United States ("Mitchell III")*, 958 F.3d 775 (9th Cir. 2020). The decision of the District of Arizona denying Mitchell's Rule 60(b)(6) motion is not reported. Petitioner's Appendix ("App.") C.

JURISDICTION

The district court had jurisdiction over Mitchell's § 2255 motion under 28 U.S.C. §§ 2241 and 2255. The Ninth Circuit entered judgment on Mitchell's Rule 60(b)(6) motion on April 30, 2020, and denied a timely filed petition for rehearing/rehearing en banc on June 15, 2020. App. A and B. This petition is timely pursuant to Supreme Court Rules 13.1, 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See Miller-El v. Cockrell*, 537 U.S. 322, 329-31 (2003).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment

"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."

Federal Rule of Civil Procedure 60(b)(6)

"Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason that justifies relief."

INTRODUCTION

"[T]his Court has emphasized time and again the 'imperative to purge racial prejudice from the administration of justice' generally and from the jury system in particular." *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (quoting *Peña Rodriguez*, 137 S. Ct. at 197). "[I]t is the jury that is a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'" *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880)). That fundamental protection is eviscerated, however, when the jury is composed of one or more individuals who harbor racist views that impact their role as decisionmakers.

In this case, Lezmond Mitchell, a Navajo, was convicted and sentenced to death by a jury comprised of 11 white jurors and one Navajo juror for a carjacking resulting in the deaths of two Navajo victims on Navajo land. Mitchell's case marks the first time the United States Government has sought, and obtained, a federal death sentence against a Native American in modern history. Mitchell has, since the start of his post-conviction case, sought permission to interview the jurors who sentenced him to death. But despite concerning evidence of racial animus in the investigation, prosecution, and media coverage of his case, the district court denied his request to interview his jurors based on a local rule requiring a defendant establish "good cause" before contacting trial jurors. When *Peña-Rodriguez* changed the law on admissibility of juror statements, Mitchell moved the district court to re-open his case under Rule 60(b) but was again denied. As a result, Mitchell has never been able to interview his jurors about how racial bias affected their guilt and death verdicts.

This petition presents two closely related questions. The first question presented is whether lower courts, based on local rules, may deny death-sentenced defendants access to their trial jurors such that they are barred from investigating racial bias in deliberations. This question was explicitly left open in *Peña-Rodriguez* and should be decided now to prevent further unfairness in the application of the federal death penalty.

The second question is whether a change in decisional law, such as *Peña-Rodriguez*, can be an extraordinary circumstance that justifies re-opening. This case

would allow the Court to settle a circuit split regarding the correct application of Rule 60(b)(6) in the post-conviction context. First, the First, Second, Third, Seventh, Eighth, and Ninth Circuits have held that changes in decisional law may form a basis for Rule 60(b)(6) relief, while the Fourth, Fifth, Sixth, Tenth, Eleventh, and D.C. Circuits have held that Rule 60(b) relief is not available in this context. Here, the Ninth Circuit correctly held that a change in decisional law *can* be an extraordinary circumstance, but wrongly held that *Peña-Rodriguez* "left untouched the law governing investigating and interviewing jurors." In so holding, the Ninth Circuit failed to engage in a holistic view of the equities, including the risk of injustice to Mitchell, which is required by this Court's decisions in *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005) and *Buck v. Davis*, 137 S.Ct. 759 (2017).

Both issues presented are "important question[s] of federal law that ha[ve] not but been, but should be, settled by this Court." Supreme Court. R. 10(c). The latter question also justifies certiorari because the Ninth Circuit's decision conflicts with relevant decisions of this Court, and because circuit courts are split on an important matter. Supreme Court R. 10(c), 10(a).

STATEMENT OF THE CASE

I. Trial and Sentencing

In 2003, Mitchell was tried in the federal district court in Phoenix, Arizona, which is approximately 300 miles from the capital of the Navajo Nation. As a result of the distance, the failure of the court to provide translation services, and the traditional Navajo beliefs in opposition to the death penalty, Native Americans were almost entirely excluded from participating in Mitchell's trial. Ultimately, Mitchell

was tried before a jury of 11 white people and one Native American. At this penalty trial, the jury was informed that the Navajo Nation strongly opposed the death penalty and requested a life sentence in this case. Only seven jurors found this plea for Mitchell's life mitigating. In closing, the prosecutor referenced the Old West, an obvious reference to the cowboys and Indians culture, and made various comments that the Ninth Circuit later held "should not have been made." *United States v. Mitchell* ("*Mitchell I*"), 502 F.3d 931, 995 (9th Cir. 2007). These included telling the jury that "[p]erhaps years ago, Tombstone, he would have been taken out back, strung up." *Id.*

The jurors returned a recommendation that Mitchell be sentenced to death for his role in the carjacking. In 2007, Mitchell's conviction was upheld on direct appeal. *Mitchell I*, 502 F.3d 931.

II. Section 2255 Proceedings

The Office of the Federal Public Defender ("FPD") for the Central District of California was appointed to represent Mitchell for purposes of post-conviction proceedings and executive clemency.

Arizona District Court Local Civil Rule 39.2(b), made applicable to criminal matters via Local Criminal Rule 24.2, states that:

> Interviews with jurors after trial by or on behalf of parties involved in the trial are prohibited except on condition that the attorney or party involved desiring such an interview file with the Court written interrogatories proposed to be submitted to the juror(s), together with an affidavit setting forth the reasons for such proposed interrogatories, within

> the time granted for a motion for a new trial[1]. Approval for the interview of jurors in accordance with the interrogatories and affidavit so filed will be granted only upon the showing of good cause. *See* Federal Rules of Evidence, Rule 606(b). Following the interview, a second affidavit must be filed indicating the scope and results of the interviews with jurors and setting out the answers given to the interrogatories.

In accordance with these rules, on May 22, 2009, Mitchell moved the district court for authorization to interview his jurors in advance of filing his 28 U.S.C. section 2255 motion. App. H at 89-106. In that motion, Mitchell argued that in order to complete a thorough investigation in support of his section 2255 litigation, Mitchell needed access to the jurors to determine, *inter alia*, whether jurors "allowed bias or prejudice to cloud their judgment." *Id.* at 90. Additionally, Mitchell laid out several grounds to establish good cause. He explained that this Court, the Ninth Circuit, and the American Bar Association all place a high burden on post-conviction counsel in death-penalty cases to conduct a thorough investigation into all possible constitutional violations, and the failure to do so will result in forfeiture of potentially meritorious claims. *Id.* at 93-96. This high burden should suffice to establish good cause to carry out a reasonable investigation. *See id.* at 92-94 (citing, amongst others, *McCleskey v. Zant*, 499 U.S. 467, 498 (1991) (post-conviction applicant "must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition."); *Brown v. Vasquez*, 952 F.2d 1164, 1167 (9th Cir. 1992) (A federal post-conviction

[1] Per Federal Rule of Criminal Procedure 33(b)(2), a motion for new trial is timely if filed within 14 days of the verdict.

applicant "must assert all possible violations of his constitutional rights in his initial application or run the risk of losing what might be a viable claim."); ABA Guideline 10.15.1 ("Postconviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules."); Commentary to ABA Guideline 10.15.1 ("When a client will be killed if the case is lost, counsel should not let any possible ground for relief go unexplored or unexploited.")).

Additionally, Mitchell offered case-specific reasons satisfying the good cause standard and justifying juror interviews. App. H at 96-100. He noted the Ninth Circuit's condemnation of the government's closing argument. *Mitchell I*, 502 F.3d at 995; *see also id*. ("We disagree with the government that these were fair comments on the evidence and were not, even arguably, calculated to arouse the passions of the jury or to suggest that Mitchell bore a burden he did not bear."). Some of those inappropriate comments related to religious beliefs and Navajo culture. But the court of appeal placed the burden on Mitchell to establish that "the misconduct tainted the verdict." *Mitchell I*, 502 F.3d at 996. Therefore, as part of his motion to interview jurors, Mitchell explained that he sought to inquire into the jurors' racial or religious prejudice to meet the burden that this Court had highlighted for him. App. H at 103. Mitchell further argued that his case garnered significant media attention, including inaccurate reporting, which established good cause to interview the jurors. *Id*. at 98-99. Mitchell pointed to juror notes indicating

that the jurors may have misunderstood the Court's instructions, and questioned whether outside influences and extrajudicial material influenced the verdict. *Id.* at 99-100. Finally, Mitchell argued that in the absence of controlling Ninth Circuit caselaw on what would establish "good cause" under Local Rule 39.2, the district court should adopt the Eleventh Circuit standard that "good cause under the local rule may be shown only by satisfying the requirements of the exception stated in [Federal Rule of Evidence 606(b)]."[2] *Id.* at 100-01.

On June 8, 2009, Mitchell filed his initial motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. On September 4, 2009, the district court denied Mitchell's request to interview the trial jurors on two grounds. App. D at 45-54. First, it indicated that Mitchell had not followed the local rule's procedures which required the motion to be filed within the time granted for a motion for a new trial and to be submitted along with proposed interrogatories and an affidavit. Second, the district court concluded that Mitchell had not shown "good cause" for contacting the jurors. The district court held that good cause under Rule 39.2 is established by making a preliminary showing of juror misconduct. *Id.* at 47. And because Mitchell did not have evidence of actual misconduct on the part of the jurors, he could not meet the good cause standard. The district court ultimately

[2] Federal Rule of Evidence 606(b) provides that "[d]uring an inquiry into the validity of a verdict," evidence "about any statement made or incident that occurred during the jury's deliberations" is inadmissible, subject to three 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." Fed. R. Evid. 606(b)(2).

denied Mitchell's 2255 petition and the Ninth Circuit upheld the lower court's decision. *United States v. Mitchell* ("*Mitchell II*"), 790 F.3d 881 (9th Cir. 2015).

III. Rule 60(b)(6) Proceedings

On March 6, 2017, this Court issued its decision in *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), which created an exception to evidentiary rules barring post-trial verdict-impeaching statements of jurors concerning racial bias that may have affected the verdict. On March 5, 2018, Mitchell filed a motion to re-open his post-conviction proceedings pursuant to Federal Rule of Civil Procedure 60(b)(6). App. G at 77-88. In that motion, Mitchell argued that *Peña-Rodriguez* established that the district court had erroneously denied him the opportunity to interview the jurors in his case, which prevented Mitchell from presenting a fully investigated section 2255 motion, and thereby prevented the district court from conducting a full merits determination resulting in a "defect in the integrity of [Mitchell's] federal habeas proceeding." *Id*. at 80 (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005)).

After briefing, App. E and F, the district court denied Mitchell's Rule 60(b) motion on the merits. App. C at 37-44. According to the district court, Mitchell failed to establish extraordinary circumstances because *Peña-Rodriguez* does not give Mitchell the right to interview the jurors absent a reason to believe his jurors may have been biased against him. The court described *Peña-Rodriguez* as creating a "narrow exception to the no-impeachment rule," an exception that Mitchell did not satisfy. *Id*. at 42. The district court also denied Mitchell's request for a certificate of appealability. *Id*. at 43.

On April 25, 2019, the court of appeals granted Mitchell's motion for a certificate of appealability on the following issue: "[W]hether the district court properly denied appellant's motion to re-open his case pursuant to Fed. R. Civ. P. 60(b)(6) following the Supreme Court's opinion in *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017)." Although the Department of Justice scheduled Mitchell's execution for December 11, 2019, the Ninth Circuit stayed the execution pending the resolution of the appeal.

On April 30, 2020, the Ninth Circuit issued its opinion affirming the district court's denial of Mitchell's Rule 60(b) motion. *Mitchell III*, 958 F.3d 775 (9th Cir. 2020); App. A at 1-35. Mitchell sought rehearing en banc, which the Ninth Circuit denied on June 15, 2020. He also moved to stay the mandate so that he could seek review in this Court, and petitioned for rehearing when a stay was denied.

While those proceedings were still pending, on July 29, 2020, the BOP rescheduled Mitchell's execution for August 26, 2020.

REASONS FOR GRANTING THE WRIT

I. Certiorari should be granted to answer the "open question" of *Peña-Rodriguez* and establish that barring criminal defendants from interviewing their trial jurors about racial bias is untenable, particularly in death penalty cases.

A. *Peña-Rodriguez* is a landmark decision designed to root out racism's longstanding, systemic injuries to the administration of justice.

In *Peña-Rodriguez v. Colorado*, this Court created an exception to evidentiary rules barring post-trial verdict-impeaching statements of jurors where those statements documented that racial bias may have affected the verdict. This

exception, which drastically changed the age-old no-impeachment rule, was deemed necessary to address the "familiar and recurring evil" of racial bias. *Peña-Rodriguez*, 137 S. Ct. at 868. The Court reasoned that racial bias is such a stain on American history and notions of fair justice, and such a clear denial of the jury trial guarantee, that general evidentiary rules must be modified to root out racism in the criminal justice system. *Id.* at 871.

This Court's intent in *Peña-Rodriguez* was to provide lower courts with the tools to rid their courtrooms of racism. *Id*. *Peña-Rodriguez* acknowledged that courts have traditionally relied on certain safeguards, such as voir dire, to protect the right to an impartial jury, and that "[s]ome of those safeguards . . . can disclose racial bias." 137 S. Ct. at 868. However, the "distinct" and "unique" aspects of racism also mean that those safeguards may prove insufficient. *Id.* Thus, the Court held, it is necessary to create a "constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered" in order to "prevent a systemic loss of confidence in jury verdicts." *Id.*

B. The ability to interview trial jurors unimpeded by overly restrictive local rules is necessary for the holding of *Peña-Rodriguez* to have practical effect.

The *Peña-Rodriguez* Court deferred to lower courts and their rules governing juror access to resolve whether and when a criminal defendant may pursue evidence of a juror's racial bias. *Id.* at 869. However, as Mitchell's case unfortunately demonstrates, there are significant impediments to pursuing such evidence depending on the federal district where one's case is tried. There are 94 federal district courts in the United States, including in Guam, the Virgin Islands, the

Northern Mariana Islands, and Puerto Rico.[3] App. I. Of those, 36 districts place *no* restrictions on a party's access to jurors post-trial. In contrast, the other 58 districts, including the District of Arizona where Mitchell was tried, prohibit a party, or representative thereof, from speaking with a juror post-trial absent court approval. And in most of those districts, court approval is predicated on the defendant establishing "good cause," which means the defendant must already have evidence of juror bias or misconduct to meet the standard. Therefore, in the majority of cases, if a juror does not come forward of her own accord with evidence of racial bias (as happened in *Peña-Rodriguez*), a defendant's ability to investigate whether racial bias affected his trial is severely limited. As this Court acknowledged in *Peña-Rodriguez*, "The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations. It is one thing to accuse a fellow juror of having a personal experience that improperly influences her consideration of the case . . . . It is quite another to call her a bigot." 137 S. Ct. at 869 (citing *Warger v. Shauers*, 135 S. Ct. 521 (2014)). And as the dissenters in *Peña-Rodriguez* rightly recognized, jurors are more likely to admit to bias during deliberations "after the verdict is announced and the jurors have gone home," *id.* at 882 (Alito, J., dissenting), at a time when the traditional safeguards are certainly "insufficient." *Id.* at 868.

Here, Mitchell, a Navajo man, was tried before a nearly all-white jury. When Mitchell moved to interview the jurors in his case, the district court refused to grant

[3] https://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links

him access based on a Catch-22: the court required that he provide some evidence that racial bias infected his jury's deliberations in order to meet the good cause requirement; but the court would not allow Mitchell to interview the jurors who were the only witnesses to those deliberations. App. D. Therefore, Mitchell has been deprived of any ability to investigate racial prejudice amongst his jury, despite evidence that his trial was tainted by inaccurate media reporting, a dearth of Navajo members in the jury pool (and only one on the jury), and a prosecutorial closing argument "riddled" with inappropriate comments (some relating to religious beliefs and Navajo culture). *Mitchell II*, 502 F.3d at 995. Had Mitchell been tried a short distance away in the District of New Mexico, or if he been charged and tried in Arizona state court, he would not have been required to seek approval before speaking with his trial jurors.

Three justices of this Court noted that because of the sea change wrought by *Peña-Rodriguez*, it is "an open question" whether local rules that restrict access similarly to Mitchell's case "will survive," as "it is doubtful that there are principled grounds for preventing the expansion of [this] holding." *Peña-Rodriguez*, 137 S. Ct. at 884 (Alito, J., joined by Roberts, C.J., and Thomas, J., dissenting.). As Justice Alito correctly observed, "the majority approvingly refers to the widespread rules limiting attorney's contact with jurors. But under the reasoning of the majority opinion, it is not clear why such rules should be enforced when they come into conflict with a defendant's attempt to introduce evidence of racial bias." *Id.* at 884 n.15.

Mitchell respectfully petitions this Court to resolve the key issue recognized by Justice Alito, and left open by the majority opinion: In those jurisdictions where overly restrictive local rules forbid access to jurors, how can a defendant investigate his jury in order to protect his Sixth Amendment right to a jury trial untainted by racism?

Peña-Rodriguez countenances two possibilities. This Court held that "[t]he practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules," which "will inform the proper exercise of trial judge discretion in these and related matters." *Id.* at 859-60, 870. As the Court noted, those jurisdictions that already recognize a racial bias exception to Rule 606(b) exhibit "no signs of an increase in juror harassment or a loss of juror willingness to engage in searching and candid deliberations." *Id.* at 870. These districts demonstrate that "practical mechanics" exist which protect a defendant's constitutional rights by permitting reasonable access to jurors. But rules like Local Rule 39.2 fail to set forth "practical mechanics"; instead, by requiring clear evidence of racism before juror interviews can take place, they operate as an all-out ban on a defendant's ability to investigate juror misconduct. Thus, one approach is to eliminate the good cause standard in order for *Peña-Rodriguez* to have any practical effect.

A second approach would be to allow the good cause requirement, but find that the need to ferret out racism satisfies that standard. This is perhaps the most straightforward method, and also the most supportive of the concerns expressed by

the *Peña-Rodriguez* Court when it carved out a notable exception to the longstanding no-impeachment rule. *Id.* at 868 ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice" and must be eliminated) (internal quotations omitted); *see also Buck v. Davi*s, 137 S. Ct. 759, 778 (same).

Under either approach, any concerns about the sanctity of the deliberative process and potential harassment of jurors would be unlikely to come to pass. *See Peña-Rodriguez*, 137 S. Ct. at 870. First, any change would only allow a death-sentenced petitioner to *ask* the jurors if they would be interviewed; it does not oblige the jurors to agree. Second, the constitutional rights of death-sentenced individuals must take precedence over judicially-created rules designed to protect jurors from this limited intrusion into their post-verdict privacy. Constitutional rights implicitly protect those closely-related acts necessary to their exercise. *Luis v. United States*, 136 S. Ct. 1083, 1097 (2016) (Thomas, J. dissenting). Inevitably, "[t]here comes a point . . . at which the regulation of action intimately and unavoidably connected with [a right] is a regulation of [the right] itself." *Hill v. Colorado*, 530 U.S. 703, 745 (2000) (Scalia, J., dissenting).

This Court has applied this principle in a number of cases. For example, because criminal defendants have a right to an initial appeal, the Court has determined that defendants must also have the right to counsel for that appeal, or else the appellate right is diminished. *Douglas v. California*, 372 U.S. 353 (1963). And later, continuing this trend, this Court held that if defendants on appeal have a

right to counsel, then that right must encompass the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). The same logic applies here: If criminal defendants have the constitutional right to present evidence that racial animus affected the verdict, they must be given the tools to investigate that evidence. Otherwise, the key holding of *Peña-Rodriguez*—that the "familiar and recurring evil" of racial bias in jury deliberations requires "added precaution" to protect a defendant's Sixth Amendment rights, 137 S. Ct. at 868-69—is left without any force.

C. The local rules governing juror interviews differ dramatically across the country and require this Court's intervention to prevent geographic disparity.

The concerns motivating *Peña-Rodriguez* are more significant in capital cases, which require jurors to make a "moral judgment whether to impose the death penalty." *Shafer v. South Carolina*, 532 U.S. 36, 51 (2001). That decision is unlike any other a jury must make, and it requires the exercise of reasoned discretion. In exercising that discretion, jurors are constitutionally required to consider a defendant's humanity, and "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind" warranting a sentence less than death. As a result, it becomes even more crucial for a capital defendant to be able to investigate whether the jury that sentenced him to death was informed by racial animus.

Yet the ability of capital defendants, like Mitchell, to protect their Sixth Amendment right to a trial untainted by juror bias depends in large part on geography and the vagaries of judge-made local rules. This is an intolerable

disparity in the death-penalty context. *California v. Brown*, 479 U.S. 538, 541 (1987) ("death penalty statutes [must] be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion"). Such inequity flies in the face of core death penalty principles regarding "arbitrariness," in that a defendant's ability to investigate is based on where he happens to be tried, and "heightened reliability," in that Mitchell is precluded from investigating whether his convictions and death sentences were impacted by racial bias. *Furman v. Georgia*, 408 U.S. 238 (1972); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

As noted *supra*, about two-thirds of the federal districts restrict a defendant's post-trial access to jurors, while about one-third of federal districts permit such access. This statistic alone demonstrates unconstitutional arbitrariness as to which defendants will have the opportunity to develop evidence of racial bias. But the disparity within the Ninth Circuit is even more startling. There are 15 federal judicial districts in the Ninth Circuit. Of those, 10 do not pose any limitation on attorneys contacting jurors post trial. Two require leave of court without a "good cause" showing. E.D. WA LR CR 31(e); W.D. WA LR CR 31(e). Two require a good cause showing and have a strict time limitation that bars post-conviction counsel from conducting this investigation. D. AZ. LR Civ 39.2; D. MT LR CR 24.2(b). And one bars all post-verdict interviews unless the juror initiates contact. D. AK LR CV 39.5(b). Had Mitchell been tried in any one of the first 10 districts mentioned, he would have interviewed his jurors prior to filing his section 2255 motion and could have raised all appropriate claims at that time. Similarly, had Mitchell been tried

in either district in Washington, his motion to interview jurors may have been granted and, if so, he could have used the fruits of that investigation to support his section 2255 motion.

In more concrete terms, at present, there are four men under a federal death sentence from within the Ninth Circuit: Joseph Duncan was sentenced to death by the District Court for the District of Idaho[4], and Iouri Mikhel and Jurijus Kadamovas were sentenced to death by the District Court for the Central District of California.[5] There is no local rule barring Duncan, Mikhel, or Kadamovas from interviewing their jurors. But Mitchell, the only person of color amongst this group of four, shall go to his August 26, 2020 execution not knowing the extent to which racial bias influenced his jury. Such arbitrariness in the application of the death penalty cannot stand, and shall lead to the type of "systemic loss of confidence in jury verdicts" that the *Peña-Rodriguez* Court described as contrary to the Sixth Amendment trial right. 137 S. Ct. at 869. Juror investigations designed to disclose racial discrimination should be sufficient to overcome any judicial restrictions, including a showing of good cause, especially in death penalty cases. Otherwise, capital defendants tried in a district with a good cause requirement—where "good cause" means "clear proof of racism"—are arbitrarily barred from conducting a reasonable investigation to protect their Sixth Amendment right to a trial free from

[4] *United States v. Duncan*, 643 F.3d 1242 (9th Cir. 2011).

[5] *United States v. Mikhel and Kadamovas*, 889 F.3d 1003 (9th Cir. 2018).

racial bias. This Court should intervene now to correct this geographic arbitrariness in capital post-conviction proceedings.

II. Certiorari should be granted to decide whether a change in decision law such as *Peña-Rodriguez* justifies re-opening under Rule 60(b).

A. Circuit courts are divided on whether a change in decisional law is an "extraordinary circumstance" under Rule 60(b).

Federal Rule of Civil Procedure 60(b)(6) allows a district court to "relieve a party … from a final judgment, order, or proceeding" when "any other reason justifies relief." This Court has recognized that Rule 60(b) "has an unquestionably valid role to play in habeas cases." *Gonzalez*, 545 U.S. at 534 (2005). In the habeas context and elsewhere, "60(b)(6) relief is … neither categorically available nor categorically unavailable[.]" *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988); *see also Polites v. United States*, 364 U.S. 426, 433 (1960) (refusing to "inflexibly" withhold 60(b)(6) relief for "clear and authoritative change in governing law"). Instead, the Rule is an equitable catch-all provision that "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 614-615 (1949).

While relief is reserved for cases presenting "extraordinary circumstances," *Gonzalez*, 545 U.S. at 534 (2005), this Court has also made clear that Rule 60(b)(6) must be at least available in every case to "accomplish justice" where such extraordinary case-specific circumstances are present. *Klapprott*, 335 U.S. at 615. "In determining whether extraordinary circumstances are present, a court may

consider a wide range of factors," including "risk of injustice to the parties." *Buck*, 137 S. Ct. at 778 (2017); *cf. Gonzalez*, 545 U.S. at 536-38 (applying a multifactor analysis to determine that the petitioner's case did not present extraordinary circumstances). This approach serves Rule 60(b)(6)'s role as "a grand reservoir of equitable power" which "affords courts the discretion and power to vacate judgments whenever such action is appropriate to accomplish justice." *Phelps v. Alameida*, 569 F.3d 1120, 1124 (9th Cir. 2009) (citing *Gonzalez*, 545 U.S. at 542).

But circuit courts across the country are split on whether a change in decisional law may form the basis for Rule 60(b) relief.[6] The Ninth Circuit has held an intervening change in law may be a basis for re-opening. *See Phelps*, 569 U.S. at 1132-33 (relying on *Gonzalez* and applying a multifactor analysis to determine that an intervening change in law met the extraordinary circumstances requirement of Rule 60(b)(6)). The First, Second, Third, Seventh, and Eighth Circuits, have also interpreted *Gonzalez* to hold that important, intervening changes in decisional law (like *Peña-Rodriguez*) may form a basis for Rule 60(b)(6) relief in conjunction with critical, case-specific equities. *See Biggins v. Hazen Paper Co.*, 111 F.3d 205, 212 (1st Cir. 1997) (while reopening a final judgment based solely on later precedent is "dubious practice," it is possible in conjunction with other extraordinary circumstances); *In re Terrorist Attacks on Sept. 11, 2001*, 741 F.3d 353, 357 (2d Cir. 2013) (the rule that a change in decisional law cannot constitute an "extraordinary

[6] Even though Mitchell arguably received the benefit of this circuit split, it is still a "subsidiary question that is fairly included" in the larger question of whether *Pena-Rodriguez* is a change in law that justifies re-opening. Supreme Court. R. 14(a).

circumstance" is not absolute; courts must consider other case-specific, equitable factors); *Cox v. Horn*, 757 F.3d 113, 121 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 1548 (2015) (same); *Ramirez v. United States*, 799 F.3d 845, 850 (7th Cir. 2015) (same); *Kansas Pub. Emps. Ret. Sys. v. Reimer & Koger Assocs., Inc.*, 194 F.3d 922, 925-26 (8th Cir. 1999) (same). In contrast, the D.C., Fourth, Fifth, Sixth, Tenth, Eleventh, and Federal Circuits hold that 60(b)(6) relief is generally unavailable based on a change in decisional law. *See Abdur'Rahman v. Carpenter*, 805 F.3d 710, 716 (6th Cir. 2015); I, 679 F.3d 312, 320 (5th Cir. 2012); *Martin v. Howard Univ.*, 2011 WL 2262489, at *1 (D.C. Cir. May 9, 2011) (per curiam); *Concept Design Elecs. & Mfg., Inc. v. Duplitronics, Inc.,* 104 F.3d 376 (Fed. Cir. 1996) (unpublished table decision); *Dowell v. State Farm Fire & Cas. Auto. Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993); *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of Am.*, 962 F.2d 1528 (10th Cir. 1992).

Given Rule 60(b)'s importance as a vehicle to "accomplish justice," this Court should decide whether an intervening change in decisional law may be an "extraordinary circumstance" under Rule 60(b).

B. The Ninth Circuit erred in holding that *Peña-Rodriguez* does not justify re-opening Mitchell's case to allow for juror interviews.

Although the Ninth Circuit correctly held that a change in decisional law *can* be an extraordinary circumstance under Rule 60(b), it wrongly concluded that *Peña-Rodriguez* "left untouched the law governing investigating and interviewing jurors." *Mitchell III*, 958 F.3d at 790. It held that *Peña-Rodriguez* "did not make any change in the law regarding lawyer access to jurors, let alone one so significant that it

would constitute 'extraordinary circumstances' for purposes of Rule 60(b)." *Id.* In doing so, the Ninth Circuit failed to engage in a holistic view of the equities, including the risk of injustice to Mitchell, which is required by *Gonzalez* and *Buck*.

This failure was manifest error, because the risk of injustice to Mitchell is, in fact, extraordinary—as extraordinary as the confluence of unique factors that resulted in Mitchell being the only Native American on federal death row:

- All but one of the over 600 federally-recognized Native American and Alaska Native tribes, the Navajo Nation did not opt-in to the Federal Death Penalty Act, thereby denying the federal government the ability to sentence a tribal member to death for an intra-Indian crime occurring on tribal land. 18 U.S.C. § 3598; *United States v. Gallaher*, 624 F.3d 934, 936 (9th Cir. 2010).
- Nevertheless, in "an aggressive expansion of the federal death penalty," *Mitchell II*, 790 F.3d at 894-97 (Reinhardt, J., dissenting) resulting in "a betrayal of a promise made to the Navajo Nation," *Mitchell III*, 958 F.3d at 793, the government arbitrarily pursued a death sentence against Mitchell not for murder, but for the federal crime of carjacking, thereby avoiding the application of the tribal option. Mitchell's case is the only one where the federal government has broken its promise to Native Americans not to pursue the death penalty unless the tribe explicitly accepts that exercise of the federal government's jurisdiction.

- The Navajo Nation, members of the victims' family, and even the local United States Attorney's Office all vociferously objected to Mitchell's capital prosecution. *Mitchell II*, 790 F.3d at 894-897 (Reinhardt, J., dissenting). Those requests were 'ignored and dishonored." *Id.*
- On the government's motion, Mitchell's trial was moved from Prescott, AZ (the closest federal courthouse to the Navajo Nation) to Phoenix, AZ. *United States v. Mitchell*, 502 F.3d 931, 950 (9th Cir. 2007). Phoenix is over 300 miles away from the capital of the Navajo Nation.
- Mitchell was then tried before a jury that consisted of only one Native American. The jury was picked from a 207-person venire which included 30 Native Americans. Of those 30 people, 12 were excluded due to their Navajo language and/or beliefs. In fact, when the government attempted to exclude the lone surviving Native American juror, the court sustained Mitchell's *Batson* objection and denied the government's strike. The government was, however, successful in removing the only African American juror on the venire.
- The Government's closing argument to the jury was "riddled with comments that should not have been made." *United States v. Mitchell*, 502 F.3d 931, 995 (9th Cir. 2007) ("*Mitchell I*"). These comments included references to Navajo religion and culture, and also to the Old West wherein Mitchell "would have been taken out back, strung up." *Id.*

- Mitchell's jury was presented with a letter from the Navajo Nation stating that they opposed capital punishment generally and as applied to Mitchell. Only seven jurors found the Navajo Nation's plea for their member's life, and objections on sovereignty grounds, mitigating.

These events are all relevant to the extraordinary circumstances inquiry and whether justice and equity favor granting Mitchell's Rule 60(b)(6) motion. *Buck*, 137 S. Ct. at 778.

The Ninth Circuit's opinion improperly dismisses them from consideration because the claims "did not constitute errors at trial" without citing to any authority for such a proposition. *Mitchell III*, 958 F.3d at 791. Such reasoning is antithetical to Rule 60(b) analysis: it is often precisely because no error was found in previous proceedings that a petitioner seeks Rule 60(b) relief. For example, in *Buck v. Davis*, the petitioner raised claims alleging racial bias during his trial that were repeatedly denied by state and federal courts. *See, e.g.*, *Buck*, 137 S. Ct. at 770-72. Those claims, their denials, and subsequent developments in the law were all considered by the Supreme Court as part of the universe of extraordinary circumstances warranting Rule 60(b) relief in Buck's case. *Id.* at 777-80. It was simply wrong for the Ninth Circuit to rely on the previous denial of his racial bias-related claims on appeal in its assessment of his extraordinary circumstances argument. *Id.*; *see also Phelps*, 569 F.3d at 1124 (a court analyzing a Rule 60(b) claim has an obligation to heed the "incessant command of the court's conscience that justice be done in light of all the facts.").

While some of the extraordinary and disturbing elements of Mitchell's prosecution and conviction were separately addressed in the concurring opinions of Judges Christen, *Mitchell III,* 958 F.3d at 792-93, and Hurwitz, *id.* at 793-94, they rightly should have been considered by the court as part of the extraordinary circumstances calculus. As the Ninth Circuit's opinion now stands, it contravenes *Buck* because "the equitable factors offered in conjunction with the strength of the underlying constitutional error alleged enables [petitioner] to satisfy the high standard of Rule 60(b)(6)." *Buck*, 137 S. Ct. at 778. This Court's intervention is required to correct this conflict[7] with its relevant decisions and to settle the important question of whether *Peña-Rodriguez* justified re-opening of Mitchell's case.

CONCLUSION

Peña-Rodriguez stressed that "[t]he Nation must continue to make strides to overcome race-based discrimination." 137 S. Ct. at 871. In keeping with that essential goal, investigation into racial bias should be welcomed by the parties and encouraged by the courts, and local rules which impede the necessary changes wrought by *Peña-Rodriguez* must give way. "That the law confers no right without a remedy to secure it is a maxim of the law." *Globe Newspaper Co. v. Walker*, 210 U.S. 356 (1908) (citations omitted). If "[t]he work of "purg[ing] racial prejudice from the

[7] Although it is commonly said that this certiorari is not granted to engage in "error correction" in individual cases, this Court has recognized that "in death cases, the exercise of our discretionary review for just this purpose may be warranted." *Calderon v. Thompson*, 523 U.S. 538, 569 (1998) (Souter, Stevens, Ginsburg, Breyer, JJ., dissenting.).

administration of justice" is far from done, *Tharpe v. Ford*, 139 S. Ct. 911, 913 (2019) (quoting *Peña-Rodriguez*, 137 S. Ct. at 867) (Sotomayor J., respecting the denial of certiorari), then it is incumbent on this Court to establish that *Peña-Rodriguez* is not just an exception to the rules of evidence, but also to the rules barring post-conviction interviews with jurors.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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