No. 15-606

IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

On Petition for a Writ of Certiorari
to the Colorado Supreme Court

REPLY BRIEF FOR PETITIONER

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The State acknowledges that "racial bias is reprehensible and should never be the basis for a verdict." BIO 17. Yet all indications are that is exactly what happened in this case. A bare majority of the Colorado Supreme Court allowed the tainted verdict to stand. And this holding deepens the longstanding conflict over whether no-impeachment rules may bar evidence necessary to expose verdicts infected by racial prejudice.

Despite all of this, the State opposes certiorari. But contrary to the State's arguments, the question presented is ripe for review; this case is an excellent vehicle to resolve the issue; and the Colorado Supreme Court's opinion fails to heed the mandates of the Sixth Amendment. This Court should grant the petition.

I. The Conflict Here Is Unaffected By *Warger v. Shauers*.

The State does not dispute that the federal courts of appeals and state courts of last resort are divided nine-to-three over whether a no-impeachment rule may constitutionally bar evidence of racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury. *See* Pet. 9-16 (detailing this conflict). The State maintains, however, that more percolation is necessary because "[t]he lower courts have not yet had a sufficient opportunity to apply this Court's guidance" in *Warger v. Shauers*, 135 S. Ct. 521 (2014). BIO 10.

The problem with the State's argument is that *Warger* offers no guidance concerning the question presented. In *Warger*, the petitioner and Justice

Kagan expressed concern that enforcing Rule 606(b) across the board to *all* claims of juror bias would unconstitutionally prevent criminal defendants from obtaining relief when racial bias infected jury deliberations. *See* Petr. Br. in *Warger* 39-40; Tr. of Oral Arg. in *Warger* 20, 31-32. But this Court refused to address the question of racial bias, expressly reserving the question whether "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged." 135 S. Ct. at 529 n.3. The *Warger* Court explained that it "need not consider th[at] question" because "those facts [we]re not presented." *Id.*

When this Court reserves a legal question, it leaves lower court case law on the issue undisturbed. The State nevertheless insists that *Warger* "arguably rejected" the view that defendants have a constitutional right to offer evidence that racial bias infected jury deliberations because the Court "declined to . . . qualify its holding that claims of juror bias do not override the no-impeachment rule." BIO 3, 9-10. But the whole point of the footnote just quoted above was to qualify this holding, refusing to offer a view as to whether it applied to evidence of the most odious form of bias – *racial* bias. Lest there be any doubt, this Court explained in the paragraph to which the footnote is attached that it was holding Rule 606(b) constitutional only "in circumstances such as th[o]se" in *Warger* – that is, when a juror potentially had sympathy for persons who negligently cause car crashes. 135 S. Ct. at 527.

In light of the clear limits the *Warger* Court placed upon its holding, it would be fanciful to suggest that any of the nine lower courts (much less

all nine) that have held the Sixth Amendment demands consideration of evidence offered to prove that racial bias infected jury deliberations would reconsider that view. This is why commentators continue to report that "[t]he Supreme Court has yet to definitively rule on the issue, and a split exists among the federal circuit courts." Jacob J. Key, *Walking the Fine Line of Admissibility: Should Statements of Racial Bias Fall Under an Exception to Federal Rule of Evidence 606(b)?*, 39 Am. J. Trial Advoc. 131, 132 (2015); *see also* 27 Charles Alan Wright & Victor James Gold, Federal Practice & Procedure § 6074, at 513 (2007 & 2015 Supp.) (noting continuing split of authority). "[A] definitive ruling needs to be made by the Supreme Court to ensure all defendants are afforded the same rights and constitutional protections." Key, *supra*, at 161.

II. This Case Is An Excellent Vehicle For Resolving The Split.

Neither of the State's vehicle arguments undercuts the suitability of this case for resolving the conflict over the question presented.

1. The State suggests that "[g]iven the evidence at trial and the defense's presentation of its case, one juror's alleged racial bias could not have altered the outcome." BIO 11. This argument is quite mistaken. The victims never claimed the perpetrator was Hispanic, Tr. 518, and there was no physical evidence linking petitioner or any other Hispanic man to the crime. Tr. 518. At the police-orchestrated show-up and later at trial, the victims identified petitioner as the perpetrator. But petitioner maintained that the stress of the events, the brevity of the encounter, and

suggestions by the police and their father had caused the victims to misidentify him. Pet. 3.

Indeed, as the State notes, petitioner argued *only* that he had been misidentified; "defense counsel did not challenge the evidence" concerning what happened in the bathroom of the racetrack – or that this evidence established *all four* of the offenses the State charged. BIO 5; *see also* Pet. 3-4. Thus, one would have expected the jury to convict on all four counts or none at all. Yet the jury initially hung and ultimately declined to convict petitioner of the State's most serious charge, indicating its verdict was the product of some sort of uncertainty or compromise. Pet. 18; BIO 5-6.

Against this backdrop, there is strong reason to suspect – as all four Colorado judges to consider the question have concluded – that Juror H.C.'s statements in the jury room influenced the outcome. *See* Pet. App. 26a-27a (Márquez, J., joined by Eid & Hood, JJ., dissenting); 65a, 84a-85a (Taubman, J., dissenting). Juror H.C. urged the other jurors to convict petitioner "because he's Mexican" and "Mexican men ha[ve] a bravado that cause[s] them to believe they c[an] do whatever they want[] with women." *Id.* 4a. Juror H.C. also suggested petitioner's alibi witness should be discredited because he was Hispanic and thus necessarily "an illegal." *Id.* 5a. Worse yet, Juror H.C. did not just exhort the other jurors to cast their votes based on these ethnic stereotypes; he purported to ground his racially bigoted contentions in "his experience as an ex-law enforcement officer." *Id.* 4a. Under these circumstances, the notion that Juror H.C.'s urgings

could not have affected the outcome is dubious in the extreme.

At any rate, this Court need not resolve the question of prejudice. The issue here is simply whether a trial court must consider evidence offered to show that racial bias infected jury deliberations. *See* Pet. App. 17a n.1 (Márquez, J., dissenting). If so, then this case should be remanded for that process to go forward. Once the trial court assesses the affidavits petitioner has offered and any other evidence that emerges, it can determine whether petitioner is entitled to a new trial.

2. The State also argues petitioner waived his racial bias claim "by failing to adequately question prospective jurors during voir dire." BIO 15. The Colorado Supreme Court unanimously rejected this contention, Pet. App. 11a n.5, and for good reason: It rests on a misapprehension of petitioner's claim and lacks any support in precedent.

Petitioner's claim is that his Sixth Amendment right to an impartial jury was violated when a juror urged others during deliberations to convict him because he is Hispanic. This claim did not arise until deliberations and does not turn on any alleged error in allowing Juror H.C. to sit on the jury. It thus makes no sense to suggest that petitioner somehow waived his claim by failing to ask any particular questions at voir dire – long before his claim even existed. Failing to object to a person's presence on the jury, in other words, cannot waive a defendant's ability to press a later-arising Sixth Amendment claim based on bias expressed during deliberations.

On-point precedent supports this reasoning, and none lends any support to the State's contrary view.

In *United States v. Villar*, 586 F.3d 76 (1st Cir. 2009), for example, "neither party requested the court to ask the potential jurors voir dire questions regarding bias based upon race or ethnicity." *Id.* at 79. Yet the First Circuit held the defendant had a right to press the same constitutional claim petitioner presses here, explaining that "many defense attorneys have sound tactical reasons for not proposing specific voir dire questions regarding racial or ethnic bias." *Id.* at 87 n.5; *accord Kittle v. United States*, 65 A.3d 1144, 1155 (D.C. 2013).

By contrast, none of the cases the State cites at BIO 14 & n.5 involve the claim petitioner makes. In those cases, defendants argued that trial courts had erred in allowing particular venire members to sit on the jury. Such claims can be waived by failing to register contemporaneous objections or to ask certain questions during voir dire. But neither law nor logic supports extending those unremarkable holdings to the situation here, where the defendant's claim does not argue that the trial court should have struck any venire members from the jury pool.

Finally, even if defendants were required to preserve their right during voir dire to make later-arising claims regarding bias during jury deliberations, petitioner would have adequately discharged that duty. During voir dire, petitioner repeatedly asked the prospective jurors whether they could be "fair" and "render a verdict solely on the evidence presented," and whether they had any inherent feelings against him. Pet. App. 3a; Tr. 319. No court has ever held that such questions are insufficient to require a prospective juror to disclose racial bias.

III. The Colorado Supreme Court's Decision Is Incorrect.

In light of the vital need to establish uniformity in the lower courts regarding the question presented, the State's arguments on the merits do not supply a valid reason to deny certiorari. But the State's arguments are unconvincing even on their own terms.

1. The State cites a few cases supposedly showing the factors laid out in *Tanner v. United States*, 483 U.S. 107 (1987), "can appropriately be applied in cases of alleged racial bias." BIO 16-17. None of the State's cases, however, even involved racial bias. That the State, when challenged, could not come up with any case in which the *Tanner* factors might have adequately safeguarded the Sixth Amendment right to a jury uninfected by racial bias confirms petitioner's and amici's point: Those factors are not up to the task. *See* Pet. 21-24; Br. of Law Professors 10-13; Br. of NACDL 16-17.

2. The State next asserts that racial bias is not qualitatively different from other forms of bias to which no-impeachment rules unquestionably apply. BIO 17. But, as petitioner has explained, the text of the Constitution, as well as this Court's cases, establish the opposite: Racial bias is an exceptionally pernicious form of bias and thus often demands constitutional inquiries that other forms of bias do not. Pet. 24-25, 27-28; Br. of NAACP Legal Defense & Educ. Fund 6-10; *see also Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*,. 551 U.S. 701, 795 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("Reduction of an individual to an assigned racial identity for

differential treatment is among the most pernicious actions our government can undertake."); *id.* at 748, 772-82 (2007) (Thomas, J., concurring) (describing Constitution's special prohibition against "mak[ing] decisions on the basis of race"). The State offers no answer.

3. The State lastly contends that implementing a rule requiring courts to evaluate whether racial bias infected jury deliberations would be so difficult that courts must forgo such inquiries entirely. BIO 18-19. But jurisdictions that already follow the majority rule have not experienced significant problems. Pet. 26-27. Groups of law professors, former judges, and other experts stress this reality, explaining at length how various jurisdictions sensibly and ably administer the rule petitioner seeks. *See* Br. of Law Professors 13-20; Br. of Retired Judges 6-7; Br. of Ctr. on Admin. of Crim. Law 10-12, 23-29. Once again, the State offers no response.

The State's silence should not be surprising. Every quandary the State imagines, if legitimately problematic, would apply not only to claims of racial bias, but also to claims that improper factors already exempted from no-impeachment rules – such "extraneous prejudicial information" or an "outside influence," Fed. R. Evid. 606(b) – influenced jury deliberations.

The State, for instance, professes uncertainty over how courts should take jurors' testimony concerning racial bias; what the appropriate standard of proof should be; and whether an allegedly biased juror's subjective beliefs should be relevant. BIO 18-19. Yet "[t]his Court has long held that the remedy for allegations of juror partiality" in contexts

exempted from impeachment rules is a "post-trial hearing" "in which the defendant has the opportunity to prove actual bias" and the court "determine[s] the effect of such [prejudicial] occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 215-17 & n.7 (1982). And a healthy body of case law fills in the procedural details. *See* Br. of Law Professors 16-17; Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 6:23, at 121 (4th ed. 2013) ("Procedural issues – Interviewing jurors; motions; hearings; burden of proof"). So administering the majority rule concerning the influence of racial bias on deliberations would not require the Colorado courts or any other jurisdiction currently resisting that rule to develop any new procedural protocols. It would just require them to deliver simple justice.

CONCLUSION

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

Respectfully submitted,

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