No. 20-5398

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND OF APPLICATION FOR STAY OF EXECUTION

Execution Scheduled: August 26, 2020 (time to be determined)

CUAUHTEMOC ORTEGA
Interim Federal Public Defender
CELESTE BACCHI*
JONATHAN C. AMINOFF
Deputy Federal Public Defenders
321 East 2nd Street
Los Angeles, California 90012
Telephone: (213) 894-2854
Facsimile: (213) 894-0310
Celeste_Bacchi@fd.org

Attorneys for Petitioner
LEZMOND CHARLES MITCHELL
**Counsel of Record*

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ARGUMENT

I. Certiorari and a stay are warranted to address the scope and import of *Peña-Rodriguez*.

The Government recounts the supposedly "significant steps" the district court took to prevent racial bias during voir dire and trial in this case as illustrative of the "other safeguards" that may serve to protect a defendant's right to an impartial and competent jury. Brief for the United States in Opposition to Petition for a Writ of Certiorari and to Application for a Stay of Execution ("BIO") at 7-10, 27, 32; *see also Tanner v. United States*, 483 U.S. 107, 127 (1987) (traditional safeguards include voir dire, observation of jurors during trial, and pre-verdict opportunities for juror misconduct to be disclosed). The Government argues that *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), did not find those longstanding safeguards inadequate to root out racism in criminal trials, and the district court rightly found that they were not inadequate here. BIO at 27, 32. The Government's position is a mischaracterization of the *Peña-Rodriguez* holding and is belied by the record.

Peña-Rodriguez, 137 S. Ct. at 868, acknowledged that courts have traditionally relied on certain safeguards to protect the right to an impartial jury, and that "[s]ome of those safeguards . . . can disclose racial bias." However, the "distinct" and "unique" aspects of racism also mean that those safeguards "may be compromised, or they may prove insufficient." *Id.* As a result, "there is a sound basis to treat racial bias with added precaution." *Id.* at 869. This is because "the stigma that attends racial bias may make it difficult," in the context and formality of voir dire or a trial, for a juror to admit their own bias, or to report inappropriate

statements during the course of juror deliberations. *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.*

The Government highlights how the jurors in Mitchell's trial were specifically asked about race during voir dire and in juror questionnaires. BIO at 7, 19. But the jurors were asked just one question during voir dire about race: "The defendant in this case is Native American. Have you had any experience with members of any race, creed, or color, specifically Native Americans, that would prevent you from being fair and impartial in this case?" App. 7-8 (citation omitted); *United States v. Mitchell*, 502 F.3d 931, 946 (9th Cir. 2007). The juror questionnaire asked a similar question, in addition to questions about whether the venireperson was Native American or had relatives or close contacts with Native Americans. App. 6. Beyond the fact that the queries specifically mentioned "Native Americans," they were not much more than "[g]eneric questions about juror impartiality [which] may not expose specific attitudes or biases that can poison jury deliberations." *Peña-Rodriguez*, 137 S. Ct. at 869; *see also Morgan v. Illinois*, 504 U.S. 719, 735 (1992) (general questions about prospective jurors' fairness and impartiality are not sufficient to satisfy the Constitution). Those questions, and the jurors' post-trial attestations that race played no part in their verdict,[1] do not suffice to protect

[1] Post-trial, each juror stated that race played no role in their decision. Jurors were not asked whether race played a role in another juror's decision. As exemplified in *Peña-Rodriguez*, jurors are unlikely to identify or reveal their own personal racial bias or animus. In *Peña-Rodriguez*, 137 S. Ct.

Mitchell or guarantee his Sixth Amendment right to a fair trial. And pre-trial questioning of the venire does not expose racial bias that may have been prompted by events that occur during trial—including, for example, improper closing argument. *See infra* at 5-6.

If the safeguards pointed to by the Government and the district court were enough to expose racism before a jury verdict, then cases like *Peña-Rodriguez* would not exist. But during Peña-Rodriguez's trial,

> members of the venire were repeatedly asked whether they believed that they could be fair and impartial in the case. A written questionnaire asked if there was "anything about you that you feel would make it difficult for you to be a fair juror." The court repeated the question to the panel of prospective jurors and encouraged jurors to speak in private with the court if they had any concerns about their impartiality. Defense counsel likewise asked whether anyone felt that "this is simply not a good case" for them to be a fair juror. None of the empaneled jurors expressed any reservations based on racial or any other bias. And none asked to speak with the trial judge.

Peña-Rodriguez, 137 S. Ct. at 861.

Sadly, what happened in *Peña-Rodriguez* was not an isolated incident. In *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018), a white juror who served on Tharpe's capital jury was interviewed by defense counsel and attested, years after trial, that

> 'there are two types of black people: 1. Black folks and 2. [N------s]'; that [Petitioner], 'who wasn't in the "good" black folks category in my book, should get the electric chair for what he did'; that '[s]ome of the jurors voted for death because they felt [Petitioner] should be an example to other blacks who kill blacks, but that wasn't my reason'; and

at 870, the evidence of racial bias during deliberations came to light when two jurors reported on the actions of another juror—notably, the complained-of juror did not reveal their own personal bias.

> that, '[a]fter studying the Bible, I have wondered if black people even have souls.'

That juror made it through voir dire and a capital trial without the traditional "safeguards" exposing his extreme racism.

Similarly, in *Rhines v. Young,* 899 F.3d 482 (8th Cir. 2018), a case about anti-gay bias, 11 of 12 jurors were specifically asked whether they harbored any homophobic beliefs or concerns about homosexuality that would impact their ability to be impartial, and all of them said no. Yet juror interviews conducted approximately 15 years after the trial revealed that during jury deliberations at least two jurors made anti-gay statements, and one used an anti-gay slur.

Tharpe and *Rhines* illustrate *Peña-Rodriguez*'s central concern: that when it comes to certain kinds of deeply-rooted, deeply-damaging bias, traditional safeguards are often not enough to protect a defendant's Sixth Amendment right to an impartial jury. Indeed, these instances of prejudice only came to light because defense counsel was permitted to conduct post-verdict interviews. The district court abused its discretion in finding that those safeguards were sufficient to protect Mitchell at his capital trial.

The Government also asserts that Mitchell "cannot identify . . . [a] clear statement by a juror indicating racial animus, or any other non-speculative basis for concluding that -- notwithstanding their express written certification to the contrary -- any juror harbored such bias." BIO at 25-26 (internal citations and quotations omitted). But this argument highlights the problem with the *Peña-Rodriguez* majority opinion that the dissent acknowledged and that Mitchell asks

this Court now to solve: "[U]nder 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." *Peña-Rodriguez*, 137 S. Ct. at 884 n.15 (Alito, J., dissenting).

The record shows the defense was concerned about the potential for racism and bias to affect juror deliberations from the start of Mitchell's trial.[2] Those concerns were justified: Mitchell's 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, the Old West, and Navajo culture). *Mitchell*, 502 F.3d at 995. The Government notably fails to mention how the prosecutor reminded the jury that "[p]erhaps years ago, Tombstone," Mitchell, a Native American, "would have been taken out back, strung up," and how, despite finding no prejudice from the prosecutor's conduct, the Ninth Circuit found such comments designed to inflame the passions of the jury. *Id.* Similarly, by arguing that Mitchell "had turned his back on his religious and cultural heritage," the Government seeks to minimize

[2] Bias against Native Americans in the larger culture also made it more likely that jurors who sat in judgment of Mitchell harbored overt or latent racism. A 2014 study using data from the federal Centers for Disease Control showed that over a 12-year period from 2002 to 2014, Native Americans were statistically more likely to be killed by police than any other group, including African-Americans. *See* Males, Mike, "Who Are Police Killing?", Center on Juvenile and Criminal Justice, Aug. 26, 2014, found at http://www.cjcj.org/news/8113 (last visited August 21, 2020). And as recently as the 1970s, Native Americans, including thousands of Navajos, were forced by the United States Government to attend Christian boarding schools as part of an official policy to "assimilate" indigenous persons into white culture. Tapahonso, Lucy, "For More Than 100 Years, the U.S. Forced Navajo Students Into Western Schools. The Damage Is Still Felt Today," Smithsonian Magazine, July 2016, found at https://www.smithsonianmag.com/history/decades-us-government-forcibly-placed-native-students-western-schools-effects-felt-today-180959502/ (last visited August 21, 2020).

the fact that only seven jurors found the Navajo Nation's letter requesting a life sentence for Mitchell to be mitigating. BIO at 9 (internal quotations omitted). Intimating that Mitchell was no longer permitted to identify as a Navajo because he committed a crime is obviously problematic—it is hard to imagine a prosecutor saying something similar about a White defendant, for example. But it also ignores the fundamental point of the letter, which is that the Navajo Nation, both then and now, supports Mitchell and his right not to be put to death over the objections of the sovereign nation of which he is a member.[3] These events are all relevant to the extraordinary circumstances inquiry and whether justice and equity favored granting Mitchell's Rule 60(b)(6) motion. *See Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (stating that concerns about racial discrimination in the criminal justice system "are precisely among those we have identified as supporting relief under Rule 60(b)(6)"). However, the Government improperly dismisses them from consideration because the claims "did not constitute errors at trial" without citing to

[3] *See Mitchell I*, 502 F.3d at 997-1014 (Reinhardt, J., dissenting); *see also* Domonoske, Camila, *Navajo Nation Asks Trump to Commute Death Sentence of Native Man Facing Execution*, NPR (Aug. 11, 2020), available at https://www.npr.org/2020/08/11/901337273/navajo-nation-asks-trump-to-commute-death-sentence-of-native-man-facing-executio (last visited Aug. 21, 2020); Press Release, Office of the Speaker, 24th Navajo Nation Council, *Navajo Nation calls for end to Federal execution of tribal member, Lezmond Mitchell* (Aug. 13, 2020), available at http://www.navajonationcouncil.org/PressReleases/2020/AUG/Navajo_Nation_calls_for_end_to_Federal_execution_of_tribal_member_Lezmond_Mitchell_PR.pdf (last visited Aug. 21, 2020); Slater, Carl, *Lezmond Mitchell's Death Sentence is an Affront to Navajo Sovereignty*, The New York Times (Aug. 19, 2020), available at https://www.nytimes.com/2020/08/19/opinion/lezmond-mitchell-death-sentence-execution.html (last visited Aug. 21, 2020).

any authority for such a proposition. BIO at 32 (quoting *Mitchell III*, 958 F.3d at 791).[4]

The Government also faults Mitchell for not abiding by the timing requirement in Arizona's local rule, which requires a motion to interview jurors be filed "within the time granted for a motion for a new trial." BIO at 30 (quoting D. Ariz. L. R. Civ. P. 39.2(b).) However, the timing requirement further illustrates the problem with overly restrictive rules like Arizona's, which effectively prohibit *any* attempt by a defendant to investigate racial bias during his post-conviction litigation. *See* Fed. R. Crim. P. 33 (requiring that a motion for new trial be filed within 14 days after the verdict). This rule improperly limits a defendant from fully investigating and litigating his post-conviction claims. *See 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 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."). And as the dissenters in *Peña-Rodriguez* recognized, the majority opinion adopts the view that jurors are more likely to admit to bias during deliberations "after the verdict is announced and the jurors have gone home," 137 S.

[4] 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. *See, e.g.*, *Buck*, 137 S. Ct. at 770-72.

Ct. at 882 (Alito, J., dissenting), at a time when the traditional safeguards are certainly "insufficient." *Id.* at 868.

Finally, the Government claims that *Peña-Rodriguez* countenances the continued use of local rules to protect jurors, including in those states that have already recognized a limited racial-bias exception, and that Mitchell suffered no harm because he was given the same opportunity that *Peña-Rodriguez* was given. BIO at 27, 32-33. But the Government glosses over the significant differences between the cases and the actual restrictions under which Mitchell labored to gain access to his jurors. To exemplify the limits on juror access that the *Peña-Rodriguez* Court actually contemplated, the Court cited to jury instructions from Colorado, Florida, Massachusetts, and New Jersey, none of which impose any limitation on an attorney contacting a juror. *Peña-Rodriguez*, 137 S. Ct. at 870. Rather, each of these instructions merely informs the jurors that they may be approached by counsel after the trial, and that they are under no obligation to speak with counsel, but may do so if they wish. *Id*. The Government expresses concern that giving practical effect to the constitutional right recognized in *Peña-Rodriguez* would cause undue harassment to jurors and have a chilling effect on their deliberations. BIO at 24. But the Government fails to explain how simply asking jurors if they are willing to be interviewed constitutes harassment, *see Peña-Rodriguez*, 137 S. Ct. at 869 ("a juror can always tell counsel they do not wish to discuss the case"), and ignores the experience of jurisdictions that do not restrict access to jurors, which show "no signs of an increase in juror harassment or a loss of juror willingness to engage in

searching and candid deliberations," *id.* at 870. *See* Petition for a Writ of Certiorari at 14-15. Allowing defense counsel to interview jurors about whether racial animus played a role in deliberations does not hamper any legitimate discussion. Jurors should not discuss racial animus as a basis for a conviction or sentence during their deliberations, and surely the Government has no interest in ensuring that jurors feel free and protected to do so. *See Buck*, 137 S. Ct. at 778 ("'Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.'" (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979))). This Court should grant certiorari and a stay to address this important and unresolved issue.[5]

II. The balance of equities weighs strongly in favor of granting a stay.

The Government relies on *Hill v. McDonough*, 547 U.S. 573, 584 (2006), to argue this Court should deny Mitchell's stay request because his claims could have been brought weeks earlier. BIO at 34-36. Mitchell, however, has been litigating on an expedited schedule due to circumstances intentionally created by the Government. This Court's consideration of Mitchell's filings has not been curtailed by Mitchell sitting on his rights in a last-minute effort to halt his execution. Rather, the shortened timeframe was caused by the Government setting Mitchell's execution date while the Ninth Circuit's stay of execution was still in place. The Government should not be heard to complain about a situation it created. *Cf. Al*

[5] While Mitchell did not find anything warranting additional argument with regard to his second Question Presented ("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)?"), he does not waive that issue for either his petition for certiorari or his application for a motion to stay his execution.

Otro Lado v. Wolf, 952 F.3d 999, 1008 (9th Cir. 2020) ("That the government's asserted harm is largely self-inflicted 'severely undermines' its claim for equitable relief." (quoting *Hirschfeld v. Bd. of Elections in City of New York*, 984 F.2d 35, 39 (2d Cir. 1993)).

Mitchell's Rule 60(b)(6) motion was filed in district court in 2018, before the Government issued his first execution warrant in 2019. Following the first warrant setting Mitchell's execution for December 2019, Mitchell received a stay of his execution pending the Ninth Circuit's resolution of his appeal regarding the Rule 60(b)(6) motion. And that stay was still in effect when the Government issued Mitchell's second execution warrant, setting his execution 28-days later on August 26, 2020. The Government's decision to set a new execution date before completion of the very proceedings that caused it to vacate Mitchell's first execution date is baffling. But to then argue that Mitchell is at fault for not giving this Court adequate time to consider the merits of his claims absent a stay is disingenuous and reprehensible.

The Government also argues against a stay based on its interest in "the timely enforcement" of Mitchell's sentence (BIO at 36-37), but the Government's inaction for years to seek any execution, let alone Mitchell's, undermines the purported import of that interest. Prior to this year, the Government had not executed a federal prisoner since 2003, and the Government itself suspended executions from 2011 until 2019. The Government's years-long delay in generating any execution protocols dwarfs any expected delay in rescheduling Mitchell's

execution and undermines any purported claim of urgency. *Osorio-Martinez v. Attorney Gen. of the U.S.*, 893 F.3d 153, 179 (3d Cir. 2018) ("the fact that the Government has not—until now—sought to" act "undermines any urgency" to do so now). The Government offers no explanation for why, after years of delay in seeking Mitchell's execution, it must now act at breakneck speed.

Nor does the fact that "a scheduled federal execution date cannot readily be moved" constitute "severe prejudice" to the Government if the Court were to grant a stay. BIO at 38. Wasted preparation efforts are inadequate to demonstrate irreparable harm to the Government. *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (quoting *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) ("The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended . . . are not enough."")). Moreover, the Government could mitigate any potential financial harm by promptly stopping any preparations for Mitchell's execution.

Finally, without citing any supporting authority, the Government argues the Court cannot consider Mitchell's other pending litigation in considering the present stay request. BIO at 37-38.[6] But this Court has the authority to stay Mitchell's execution in order to preserve its ultimate jurisdiction in those other cases. The All Writs Act, 28 U.S.C. § 1651, empowers this Court to issue "all writs necessary or

[6] The Ninth Circuit denied Mitchell's lethal-injection protocol challenge on August 19, 2020. *See United States v. Mitchell*, 2020 U.S. App. LEXIS 26475. On August 20, 2020, Mitchell filed a petition for rehearing/rehearing en banc, which is to be briefed on an expedited schedule and shall be fully briefed by August 21, 2020.

appropriate in aid of [its] respective jurisdiction[] and agreeable to the usages and principles of law." This includes the power to "hold an order in abeyance," *Nken v. Holder*, 556 U.S. 418, 426 (2009), and the power to issue a stay of execution, S. Shapiro *et al.*, Supreme Court Practice 926 (10th ed. 2013).

The All Writs Act has been expansively interpreted to allow this Court to issue writs in aid of its *potential* jurisdiction, thus the fact that Mitchell has not yet filed petitions for a writ of certiorari in connection with his litigation pending in lower federal courts is immaterial. *See FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966) (explaining that a court's exercise of power under the All Writs Act "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected"); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943) (explaining that a court's authority to issue writs in aid of its jurisdiction "is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected"); *see also* S. Shapiro *et al.*, Supreme Court Practice 661 (10th ed. 2013) ("The Supreme Court can issue extraordinary writs not only in aid of its jurisdiction over a case pending before it, but also in aid of its potential jurisdiction over a case pending before a court over which it has direct appellate power, and even in aid of its potential jurisdiction over a case pending before a court over which it lacks direct appellate power but may ultimately be able to review after a decision by an intermediate court."). Stated otherwise, this Court can issue stays to prevent a case from becoming moot and thereby protect its

ultimate jurisdiction. *See, e.g.*, *Mikutaitis v. United States*, 478 U.S. 1306, 1309-10 (1986) (Stevens, Circuit Justice) (granting application to extend the stay of a district court contempt order because lack of a stay "may have the practical consequence of rendering the proceeding moot").

Because Mitchell's execution would render Mitchell's other cases moot and prevent this Court from having an opportunity to exercise its ultimate jurisdiction in those matters under 28 U.S.C. §§ 1254(1) and 1291, they are proper considerations before this Court and countenance in favor of a granting a stay of execution.

Given the irreparable harm to Mitchell absent a stay, which the Government rightfully does not dispute, and the considerations discussed, the balance of equities and relative harms weighs strongly in favor of granting a stay.

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CONCLUSION

For the foregoing reasons, and those included in Mitchell's application for stay and petition for writ of certiorari, the Court should grant Mitchell's petition for writ of certiorari and stay his execution pending consideration and disposition of the case.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Interim Federal Public Defender

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By: */s/ Celeste Bacchi*
CELESTE BACCHI*
Deputy Federal Public Defender
Attorneys for Petitioner

LEZMOND CHARLES MITCHELL
**Counsel of Record*