No. 15-606

IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

On a Writ of Certiorari
to the Colorado Supreme Court

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Most states and the federal government have a rule of evidence generally prohibiting the introduction of juror testimony regarding statements made during deliberations when offered to challenge the jury's verdict. Known colloquially as "no impeachment" rules, they are typically codified as Rule 606(b); in some states, they are a matter of common law.

The question presented is whether a no-impeachment rule constitutionally may bar evidence of racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury.

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BRIEF FOR PETITIONER

Petitioner Miguel Angel Peña Rodriguez respectfully requests that this Court reverse the judgment of the Colorado Supreme Court.

OPINIONS BELOW

The opinion of the Colorado Supreme Court (Pet. App. 1a) is designated for publication at 350 P.3d 287. The opinion of the Colorado Court of Appeals (Pet. App. 28a) is published at 2012 COA 193. The relevant orders of the trial court (J.A. 125, 150) are unpublished.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on May 18, 2015. Pet. App. 1a. On September 10, 2015, Justice Sotomayor granted an extension of time within which to file a petition for a writ of certiorari to and including November 12, 2015. *See* No. 15A265. Petitioner filed a petition for a writ of certiorari on November 10, 2015, which this Court granted on April 4, 2016. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law."

INTRODUCTION

Our Constitution, as well as this Court's jurisprudence, reflects a steadfast commitment to expunging the "invocation of race stereotypes" from the administration of justice. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991). This commitment applies with special force to juries in criminal cases. A jury holds a person's liberty in its hands and must base its verdict solely upon "the evidence developed at trial." *Turner v. Louisiana*, 379 U.S. 466, 472 (1965) (internal quotation marks omitted). The interjection of "racial animus" into deliberations, therefore, destroys the "fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Id.*; *see also Georgia v. McCollum*, 505 U.S. 42, 58 (1992). As the State has put it: "[R]acial bias is reprehensible and should never be the basis for a verdict." BIO 17.

Meanwhile, the common law delivered to this Nation a tradition of protecting the secrecy of jury deliberations. In an oft-referenced 1785 English case where a jury allegedly reached its verdict by lot, Lord Mansfield refused to allow juror testimony to prove that malfeasance, pronouncing that jurors may not impeach their own verdicts. *Vaise v. Deleval*, 99 Eng. Rep. 944 (K.B. 1785). The common law's concern was that allowing juror testimony for that purpose would lead to juror harassment and "make what was intended to be a private deliberation, the constant subject of public investigation." *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915).

But it is critical to recognize that "[t]he familiar rubric that a juror may not impeach his own verdict, dating from Lord Mansfield's time, is a gross

oversimplification." Advisory Comm. Notes to Fed. R. Evid. 606. This Court's first opinion concerning whether jurors may impeach their verdict stressed that "[i]t would perhaps hardly be safe to lay down any general rule upon this subject. Unquestionably such evidence ought always to be received with great caution. But cases might arise in which it would be impossible to refuse [juror affidavits] without violating the plainest principles of justice." *United States v. Reid*, 53 U.S. (12 How.) 361, 366 (1851); *see also McDonald*, 238 U.S. at 268-69 (same).

In light of these considerations, American law has always recognized circumstances in which courts can receive juror testimony describing statements made during deliberations. Over one hundred years ago, for instance, this Court held that jurors can testify about statements recounting extraneous information that were made during deliberations. *Mattox v. United States*, 146 U.S. 140, 148-49 (1892). Similar state common-law decisions abound. *See id.* at 149 (surveying state cases). Some states today – as well as the Model Code and Uniform Rules of Evidence – go so far as to allow juror testimony regarding "any . . . statements made" in the jury room. Cal. Evid. Code § 1150; *see also* 27 Wright & Gold, Federal Practice and Procedure § 6074 n.58 (2d ed. 2007).

The federal rule on the subject – Fed. R. Evid. 606(b) – and many state rules are more restrictive. They generally allow consideration of juror testimony regarding statements made during deliberations only in specified circumstances. But even among jurisdictions that follow Rule 606(b), the vast majority of courts to have considered the issue hold

that the Sixth Amendment's guarantee of an impartial jury requires courts to consider juror testimony offered to prove that racial bias infected jury deliberations. *See infra* at 30-32.

In this case, a bare majority of the Colorado Supreme Court held otherwise. It thus condoned a trial court's invocation of Rule 606(b) as a basis for refusing to consider evidence that a juror urged others during deliberations to find petitioner guilty "because he's Mexican and Mexican men take whatever they want." Pet. App. 4a (internal quotation marks omitted).

The question presented is whether the Constitution tolerates such a bar against evidence offered to prove a defendant was convicted of a crime on the basis of racial bias. Racially biased decision-making is uniquely deplorable and constitutionally inexcusable. And the jury system has already demonstrated that narrow exceptions to general no-impeachment rules – including one for racial bias – do not undermine any valid state interest. This Court should therefore hold that the Sixth Amendment demands that a defendant in petitioner's position have an opportunity to introduce the offending juror's comments at an evidentiary hearing to prove a deprivation of the right to an impartial jury.

STATEMENT OF THE CASE

1. In May 2007, a man entered a bathroom at a horse-racing track in Colorado and asked the teenage sisters inside if they wanted to drink beer or "party." After they said no, the man turned off the lights, leaving the room dark. As the girls went to leave, the man grabbed one girl's shoulder and began moving his hand toward her breast before she swiped him

away. The man also grabbed the other girl's shoulder and buttocks.

The sisters exited the bathroom and reported the incident to their father, a worker at the racetrack. They told him they thought the assailant was a racetrack employee who worked in the nearby horse barn. From that description, their father surmised they were referring to petitioner Miguel Angel Peña Rodriguez. Their father then reported the incident to on-site security personnel, who contacted the police.

Late that night, the police pulled petitioner over near the race track. The officers conducted a show-up with petitioner standing on the side of the road and each girl about fifteen feet away, looking through the window of a police cruiser. Both girls identified petitioner as the man who had assaulted them.

2. a. The State charged petitioner with four offenses relating to the incident: one felony count of attempted sexual assault on a victim younger than fifteen; one misdemeanor count of unlawful sexual contact; and two misdemeanor counts of harassment. Pet. App. 3a.[1] Petitioner maintained he had been misidentified and demanded a trial.

At voir dire, the trial court and the parties repeatedly asked potential jurors whether they could be "a fair juror" in this case or would "have a feeling for or against" petitioner. Pet. App. 3a; *see also* J.A. 34. The judge also asked if "there is any reason why [any potential juror] would not be able and willing to

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[1] The State also initially charged petitioner with driving under the influence, J.A. 15, but it dismissed that charge before trial.

render a verdict solely on the evidence presented at trial and the law I give you." J.A. 22. None of the impaneled jurors indicated in response to any of these questions that he or she harbored any racial bias. Pet. App. 3a.

During the short trial, the prosecution presented no physical or forensic evidence, such as a fingerprint from the bathroom light switch. Instead, the prosecution focused on the victims' pretrial and in-court identifications of petitioner. Defense counsel highlighted the short amount of time during which the victims saw their attacker, the inherent stressfulness of that event, the suggestibility of the nighttime show-up, and the presence of other racetrack workers in the area to argue that the identification was mistaken. And the defense presented an alibi witness, a co-worker – like petitioner, Hispanic – who testified that he was with petitioner in one of the barns when the charged offenses occurred. Tr. 17 (Feb. 25, 2010). In response, the prosecution urged the jury to "[w]eigh the credibility of the girls against [the credibility of the alibi witness]." *Id.* 48.

Following a "somewhat lengthy" period of deliberations, J.A. 22, the jury reported that it was unable to reach a verdict on any of the charges. The court therefore gave the jury Colorado's version of an *Allen* charge – an admonition to keep deliberating to try to reach unanimity. "It is your duty," the court told the jurors, "to consult with one another and to deliberate with a view to reaching a verdict." J.A. 68. "In the course of your deliberations do not hesitate to reexamine your own views and change your opinion if convinced that it is erroneous." *Id.*

Late on Friday afternoon, after twelve total hours of deliberations, the jury told the court they had voted to find petitioner guilty on the three misdemeanor charges. Pet. App. 3a; J.A. 69-70. The jury reported it was still unable to reach a verdict on the felony charge. Pet. App. 3a. Noting that things had gotten "very loud" in the jury room just before the jury had emerged, and believing that the jury had "probably done as well as they could do," the court accepted the guilty verdicts and declared a mistrial on the felony charge. J.A. 68-71.

b. Upon dismissing the jurors, the trial court instructed them – following the State's model instructions – that it is "proper" for them to tell others "about your deliberations or the facts that influenced your decision." J.A. 85-86. The judge continued: "whether you talk to anyone is entirely your own decision"; "you may talk with [others] but you need not." *Id.*

Consistent with customary practice in Colorado and elsewhere, defense counsel remained in the courthouse after the jury's dismissal to speak with the jurors. Two jurors stayed longer to talk privately. They explained that, during deliberations, another juror (subsequently denominated Juror "H.C.")[2] had "expressed a bias toward [Petitioner] and the alibi witness because they were Hispanic." Pet. App. 4a (alteration in original).

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[2] In keeping with the Colorado Supreme Court's practice, petitioner refers to the juror at issue by his initials, and the parties have altered passages accordingly in the Joint Appendix where his name appears.

Shortly thereafter, petitioner asked the court for permission to contact the jurors regarding the alleged racially biased statements. Pet. App. 4a; *see also* J.A. 72. The court worked with petitioner's counsel to determine who the two jurors were, provided contact information, and allowed counsel to secure affidavits from the two jurors. *See* J.A. 96-100.

Both affidavits related a number of racially biased statements made by "Juror H.C." *See* J.A. 109-10 (reproducing affidavits). In particular, Juror H.C. allegedly said during deliberations:

- "[The defendant] did it because he's Mexican and Mexican men take whatever they want." Pet. App. 4a.
- "[The defendant] was guilty because in [Juror H.C.'s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." *Id.*
- "Mexican men [are] physically controlling of women because they have a sense of entitlement and think they can 'do whatever they want' with women." *Id.*
- "[W]here [Juror H.C.] used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." *Id.*
- "[T]he alibi witness [wasn't] credible because, among other things, he was 'an illegal.'" *Id.* 4a-5a. (The witness had testified during trial that he was a legal resident of the United States. Tr. 14 (Feb. 25, 2010).).

After receiving the affidavits, the trial court acknowledged that Juror H.C. "appear[ed] to be biased based on what he said in the jury room." J.A. 125. And the trial court expressed "regret" concerning this apparent "bias against Mexican men." J.A. 160. But the trial court determined that the juror's expressions of racial animus could "not form the basis of a new trial" because Colorado's no-impeachment rule, codified at Colorado Rule of Evidence (CRE) 606(b), prohibits inquiry into "what happens in the jury room." J.A. 125.[3]

c. Petitioner was sentenced to two years' probation and was required to register as a sex offender. Tr. 24-25 (Nov. 23, 2010). The State, meanwhile, dismissed the felony attempted sexual assault charge. J.A. 6.

3. A divided panel of the Colorado Court of Appeals affirmed. Pet. App. 64a. While the majority faulted petitioner for failing "to sufficiently question jurors about racial bias in voir dire," *see* Pet. App. 45a, the dissent would have held that when post-trial juror testimony suggests that "racial bias" infected

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[3] CRE 606(b), which is substantively identical to Federal Rule of Evidence 606(b), provides: "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify" – save exceptions not implicated here – "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. . . . A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying."

jury deliberations, "CRE 606(b) must yield to the Sixth Amendment right of [the] defendant." *Id.* 65a.[4] Accordingly, the dissent would have "reverse[d] [petitioner's] conviction and remand[ed] for further proceedings, because the trial court's error is not harmless beyond a reasonable doubt." *Id.*

4. The Colorado Supreme Court affirmed by a 4-3 vote. Pet. App. 1a-27a.

The majority sought guidance primarily in this Court's decisions in *Tanner v. United States*, 483 U.S. 107 (1987), and *Warger v. Shauers*, 135 S. Ct. 521 (2014), both of which dealt with whether applying no-impeachment rules violated the Sixth Amendment. In those two cases, this Court held that the Sixth Amendment posed no barrier to excluding juror affidavits alleging, respectively, that jurors were intoxicated during trial and that a juror was biased against a party because her daughter had caused a car accident similar to the one at issue. This Court explained that requiring courts to consider testimony on those topics was unnecessary because other safeguards allowed defendants in such situations to adequately protect their right to an impartial jury. *See Warger*, 135 S. Ct. at 529; *Tanner*, 483 U.S. at 127. These safeguards were: (1) the ability of trial courts and counsel to observe

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[4] The comments in this case, strictly speaking, were ethnically, not racially, biased. But given this Court's long recognition that the Constitution treats racial and ethnic bias in the same way, particularly in the context of anti-Hispanic bias, *see, e.g.*, *Hernandez v. Texas*, 347 U.S. 475, 477-80 (1954), the Colorado courts understandably treated the concepts as interchangeable. Petitioner does the same.

jurors for signs of misconduct during trial; (2) the ability of jurors to report misconduct before they reach a verdict; (3) the ability of judges and counsel to question jurors about potential bias during voir dire; and (4) the potential availability of nonjuror evidence of juror misconduct. *See id.*

The Colorado Supreme Court acknowledged that "neither *Tanner* nor *Warger* involved the exact issue of racial bias." Pet. App. 14a. And the majority recognized that this Court had stressed in *Warger* – in line with previous cases concerning no-impeachment rules – that "[t]here may be cases of juror bias so extreme" that applying a no-impeachment rule would abridge a defendant's right to an impartial jury. Pet. App. 16a n.6 (quoting *Warger*, 135 S. Ct. at 529 n.3) (alteration in original).

But the majority resisted holding that racial bias presented the kind of extreme situation *Warger* had in mind. The majority admitted that at least one of the *Tanner* safeguards (the ability of the court and defense counsel to observe jurors during trial) was unlikely to uncover racial bias. Pet. App. 15a. But the majority deemed the "remaining *Tanner* safeguards sufficient to protect a party's constitutional right[]" to a jury untainted by racial animus. *Id.* In addition, the Colorado Supreme Court expressed concern over the policy implications of recognizing a constitutional exception to CRE 606(b) for racial bias. It worried that creating such an exception would encourage lawyers to harass jurors after trial. *Id.* The majority was also unable to "discern a dividing line between different *types* of juror bias" and between biased comments of varying "severity." *Id.* 14a-15a (emphasis in original). Finally, it feared that "the

very potential" for investigation into claims of racial bias "would shatter public confidence in the fundamental notion of trial by jury." *Id.* 13a.

Justice Márquez dissented, joined by Justices Eid and Hood. Pet. App. 16a. Noting that most other courts have held that the Sixth Amendment precludes Rule 606(b) from barring the consideration of evidence of racial bias offered to prove a violation of the right to an impartial jury, *see id.* 23a n.4, Justice Márquez agreed with the view that the Rule "must yield to the defendant's constitutional right to an impartial jury." *Id.* 17a. She detailed the ways in which the *Tanner* safeguards are "not always adequate to uncover racial bias before the jury renders its verdict." *Id.* 22a-23a. In addition, Justice Márquez maintained that the majority's reasoning improperly "elevates general policy interests in the finality of verdicts and in avoiding the potential embarrassment of a juror over the defendant's fundamental constitutional right to a fair trial," thereby undermining "public confidence in our jury trial system." *Id.* 18a.

In light of their view that Rule 606(b) must yield to petitioner's constitutional right to an impartial jury, the dissenting Justices would have remanded to allow the trial court "to consider the allegations made in the post-verdict affidavits and to explore the validity of those allegations in an evidentiary hearing." Pet. App. 18a n.1.

5. The Colorado Supreme Court denied rehearing, with two justices noting that they would have granted it. Pet. App. 87a.

6. This Court granted certiorari. 136 S. Ct. ___ (2016).

SUMMARY OF ARGUMENT

An evidentiary rule must yield when it seriously infringes a constitutional right without sufficient justification. Here, applying Rule 606(b) to bar evidence that racial bias infected jury deliberations seriously infringes a defendant's Sixth Amendment right to an impartial jury, and no state interest justifies that infringement.

I. Barring defendants from introducing juror testimony recounting racially biased statements made during deliberations strikes at the heart of the Sixth Amendment's impartial-jury guarantee. Racial animus is constitutionally odious in all forms. It is particularly reprehensible when offered as a reason to convict someone of a crime – and thereby deprive him of his liberty.

Furthermore, when racial bias has tainted deliberations, post-trial testimony from jurors is essential to prove that misconduct. In contrast to the juror intoxication at issue in *Tanner v. United States*, 483 U.S. 107 (1987), racial bias cannot be readily observed by nonverbal cues or proven with physical evidence, such as barroom receipts. Nor, given the dynamics of group decision-making, are jurors likely to interrupt deliberations to notify the court that another juror is making racially biased remarks. Finally, in contrast to the juror partiality in *Warger v. Shauers*, 135 S. Ct. 521 (2014), which arose from the juror's daughter having caused a car crash similar to the one at issue, racial bias will seldom be exposed at voir dire. Defendants are often foreclosed from questioning prospective jurors about race, and even when defendants are allowed to raise the issue,

bigoted jurors will rarely admit they hold socially and legally repugnant views.

II. American law has always recognized various exceptions to no-impeachment rules. Indeed, over twenty jurisdictions already allow courts to consider juror testimony that racial bias infected deliberations when offered to prove a violation of the constitutional right to an impartial jury. This rule has existed in some jurisdictions for decades with no negative side-effects. And analysis confirms what experience suggests: The state interests animating no-impeachment rules do not justify precluding defendants from vindicating their right to jury deliberations untainted by racial bias.

First, allowing courts to consider juror testimony that racial bias infected jury deliberations does not undermine any legitimate discussion in the jury room. When a defendant's life or liberty is at stake, there is no valid interest in creating breathing space for jurors to argue that a defendant should be convicted because of his race.

Nor does permitting jurors to testify regarding claims of racial bias create a problem of attorneys harassing jurors. Attorneys have other, far stronger incentives to contact jurors, and courts already effectively regulate such contact. Allowing defendants to introduce post-trial evidence of racial bias does not appreciably change this situation.

Preserving the finality of convictions is not a significant concern here either. Racial bias is rarely expressed as a reason to convict someone of a crime. When defendants claim it was, courts have procedural tools readily at hand to efficiently determine whether to hold a hearing or grant relief.

The Colorado Supreme Court is also incorrect that precluding the application of Rule 606(b) in this situation would leave courts unable to draw lines between racially biased comments of varying "severity" or between different "types of juror bias," Pet. App. 14a-15a (emphasis omitted). Courts have shown they can distinguish racial bigotry that potentially affects verdicts from mere stray remarks that do not. And this Court has amply demonstrated in related settings that constitutional rules designed to police racial bias do not open the floodgates to claims respecting less pernicious forms of bias. Indeed, this Court has often limited such rules to the arena of race alone.

Finally, the Colorado Supreme Court is mistaken that allowing investigation into claims of racial bias "would shatter public confidence" in the concept of trial by jury, Pet. App. 13a. The populace does not expect jurors invariably to behave properly. But it *does* expect courts to guarantee the basic integrity of the trial process. That being so, permitting courts to turn a blind eye when a jury convicts someone "because he's Mexican," Pet. App. 4a, would be a far greater threat to the legitimacy of our criminal justice system than requiring Rule 606(b) to yield in the grave situation where evidence indicates that racial bias infected jury deliberations.

ARGUMENT

When faced, as in this case, with a claim that applying an evidentiary rule would infringe a constitutional guarantee, this Court determines whether the defendant's constitutional right "outweigh[s]" state interests purportedly advanced by the rule. *Davis v. Alaska*, 415 U.S. 308, 319 (1974).

Indeed, this Court has repeatedly made clear that even the most respected and longstanding evidence rules must yield when they unjustifiably infringe on constitutional rights.

In *Chambers v. Mississippi*, 410 U.S. 284 (1973), for example, the Court held that the Sixth Amendment and the Due Process Clause trump the hearsay rule and the common-law rule categorically prohibiting a party from impeaching his own witness when those rules bar reliable testimony vital to a full defense. *Id.* at 302. Even though "perhaps no rule of evidence has been more respected or more frequently applied" than the hearsay rule, this Court explained, the rule "may not be applied mechanistically to defeat" the constitutional right to present a defense. *Id.*; *see also Holmes v. South Carolina*, 547 U.S. 319, 324-26 (2006) (reaffirming *Chambers*).

Similarly, in *Rock v. Arkansas*, 483 U.S. 44 (1987), this Court held that the rule shared by many states "excluding a criminal defendant's hypnotically refreshed testimony" must yield to the constitutional right to testify in one's own defense when the rule would "disable a defendant from presenting her version of the events for which she is on trial." *Id.* at 49, 61. And in *Washington v. Texas*, 388 U.S. 14 (1967), this Court held that the common-law rule precluding defendants from calling alleged accomplices to testify on their behalf must sometimes yield to the Sixth Amendment. *Id.* at 20-23. Despite the rule's venerable origins predating the Founding era, this Court explained that it must give way when necessary to vindicate the right to secure testimony "relevant and material to the defense." *Id.* at 23; *see also Davis*, 415 U.S. at 319 (1974) (evidentiary rule

barring inquiry into juvenile convictions had to yield to constitutional right to confront and cross-examine adverse witnesses).

This same framework requires the State's no-impeachment rule to yield here. Applying Rule 606(b) to bar evidence that racial bias infected jury deliberations seriously infringes a defendant's Sixth Amendment right to an impartial jury. And no state interest justifies that infringement.

I. Barring Juror Testimony That Racial Bias Infected Deliberations Seriously Infringes The Right To An Impartial Jury.

Juror H.C. advocated for convicting petitioner "because he's Mexican and Mexican men take whatever they want." Pet. App. 4a. Infecting the deliberative process with such racial bias violates the right to an impartial jury. And applying Rule 606(b) to preclude courts from considering juror testimony recounting such statements would leave defendants without any meaningful way to remedy that injustice.

A. The Right To An Impartial Jury Forbids Injecting Racial Bias Into Deliberations.

The Sixth Amendment guarantees all defendants the right to a trial by "an impartial jury." U.S. Const. amend. VI. An impartial jury is one that "decide[s] the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217 (1982); *see also Turner v. Louisiana*, 379 U.S. 466, 472 (1965) (same); *United States v. Burr*, 25 F. Cas. 49, 50 (C.C.D. Va. 1807) (No. 14,692g) (Marshall, C.J.) (An impartial jury, "as required by the common law, and as secured by the constitution," is one that bases its verdict solely

according to "the testimony which may be offered" and "the law arising on it.").

A juror's injection of "racial animus" into deliberations concerning the defendant's guilt strikes at the heart of this right to impartial decision-making. *See Georgia v. McCollum*, 505 U.S. 42, 58 (1992). A jury in a criminal case is a "prized shield against oppression," *Glasser v. United States*, 315 U.S. 60, 84 (1942), and a "safeguard against arbitrary law enforcement," *Williams v. Florida*, 399 U.S. 78, 87 (1970). But racial bias "undermines the jury's ability to perform its function as a buffer against governmental oppression and, in fact, converts the jury itself into an instrument of oppression." 27 Wright & Gold, Federal Practice and Procedure § 6074 (2d ed. 2007); *see also McCollum*, 505 U.S. at 58 (a jury infected with racial bias "distort[s] our system of criminal justice").

The structure and history of the Constitution underscore that bringing governmental power to bear against individuals on the basis of racial stereotypes, while "odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555-56 (1979). "Discrimination on account of race," for example, was "the primary evil" at which the Fourteenth Amendment was directed. *Id.* at 554. Therefore, "[a]t the heart" of this Court's equal protection jurisprudence "lies the simple command that the Government must treat citizens as individuals," not as simply members of "racial" classes. *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (internal quotation marks and citation omitted). "Reduction of an individual to an assigned racial identity for differential treatment is among the most

pernicious actions our government can undertake." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 795 (2007) (Kennedy, J., concurring in part and concurring in the judgment); *see also id.* at 748, 772-82 (Thomas, J., concurring) (describing Constitution's special prohibition against "mak[ing] decisions on the basis of race").

It is hard to imagine something more antithetical to this constitutional commitment to colorblind decision-making than a jury focusing on a defendant's (or witness's) race as a determinative factor when deciding whether a person is guilty or innocent. The jury is "an essential instrumentality – and appendage – of the court." *Turner*, 379 U.S. at 472. It is the gatekeeper in deciding whether the government should exercise one of its most dramatic and solemn powers: "strip[ing] a man of his liberty or his life." *Id.*; *see also Ring v. Arizona*, 536 U.S. 584, 589 (2002). Our Constitution, therefore, cannot tolerate reliance on racial stereotypes during jury deliberations any more than it could tolerate a judge in a bench trial declaring the defendant guilty because of his racial identity, or a court imposing a longer sentence because of a racial stereotype.

B. Barring Juror Evidence That Racial Prejudice Infected Deliberations Leaves Defendants No Meaningful Opportunity To Vindicate The Right To An Impartial Jury.

1. This Court "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. 209, 215-16 (1982) (citing *Remmer v. United States*, 347 U.S. 227 (1954);

Dennis v. United States, 339 U.S. 162 (1950)). This is because a meaningful opportunity to present evidence of juror bias is part and parcel of the Sixth Amendment right to an impartial jury. That is, the "[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Dennis*, 339 U.S. at 171-72. And "determinations made in [post-trial] hearings [to assess allegations of juror partiality] will frequently turn upon testimony of the juror[s] in question." *Smith*, 455 U.S. at 217 n.7.

At the same time, this Court held in *Tanner v. United States*, 483 U.S. 107 (1987), and *Warger v. Shauers*, 135 S. Ct. 521 (2014), that the Sixth Amendment does not necessarily require that juror testimony be permitted in order to prove a violation of the right to a competent and impartial jury. In *Tanner*, the Court held that Rule 606(b) could constitutionally be applied to exclude jurors' testimony that other jurors had used drugs and alcohol throughout trial. 483 U.S. at 126-27. In balancing the defendants' Sixth Amendment impartial-jury right against the governmental interest in "the protection of jury deliberations from intrusive inquiry," the Court pointed to four safeguards that adequately protected the right in that case: (a) the ability of the court and counsel to observe jurors during trial; (b) the possibility of jurors coming forward and reporting misconduct before a verdict is rendered; (c) the opportunity to conduct voir dire of potential jurors before trial; and (d) the availability of external evidence to prove bias. *Id.* at 127.

In *Warger*, a juror disclosed during deliberations that her daughter had been at fault in a collision similar to the one at issue and added "that if her daughter had been sued, it would have ruined her life." 135 S. Ct. at 524 (internal quotation mark omitted). In holding that Rule 606(b) could constitutionally bar the introduction of this testimony, the Court observed that "in circumstances such as these," the *Tanner* safeguards will generally sufficiently protect the right to an impartial jury, "despite Rule 606(b)'s removal of one means of ensuring that jurors are unbiased." *Id.* at 529.

This Court, however, has always been careful to stress that the Constitution's tolerance for no-impeachment rules is limited. "[I]n the gravest and most important cases," this Court has explained, there may be instances in which juror testimony of juror misconduct "could not be excluded without 'violating the plainest principles of justice.'" *McDonald v. Pless*, 238 U.S. 264, 268-69 (1915) (quoting *United States v. Reid*, 53 U.S. (12 How.) 361, 366 (1851)). Therefore, this Court reaffirmed again in *Warger* that "[t]here may be cases of juror bias so extreme" that applying Rule 606(b) to bar juror testimony proving such bias would run afoul of the Sixth Amendment. 135 S. Ct. at 529 n.3.

2. This is such a case. None of the *Tanner* safeguards adequately protects defendants when a juror infects deliberations with racially biased assertions.

a. *Observation during trial.* The Colorado Supreme Court recognized that "the ability of the court to observe the jury's behavior during trial" does little to protect the defendant in the situation here.

Pet. App. 15a. In contrast to the drunkenness and drug use at issue in *Tanner*, which often manifest themselves in physically apparent ways, racial bias does not. Observable evidence that racial bias might be expressed during deliberations will virtually never arise in or around the courtroom.

b. *Jurors coming forward*. The possibility that jurors may report racially biased remarks before rendering a verdict is remote at best.

For starters, jurors may not realize that racially biased statements made during deliberations are legally impermissible. Jurors are typically instructed – as they were here – to consider the evidence in light of "common sense" and their "observations and experience in life." J.A. 55 (quoting instructions 1 and 3); *see also* Colorado Model Criminal Jury Instruction E:01). Consequently, where jurors couch racially biased assertions in the language of past experience – as Juror H.C. did here when he insisted that "where he used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls," Pet. App. 4a – other jurors may assume such statements, though offensive, are legally permissible. This is particularly likely to be a problem – again, as here – where the offending juror is someone of professional or social authority, such as a law enforcement officer.[5]

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[5] The jurors were also instructed here – again, as is typical – that "[y]ou may have to decide what testimony to believe" that "[y]ou should consider all facts and circumstances shown by the evidence which affects the credibility of witness' [sic] testimony." J.A. 56 (quoting instruction 4). So when Juror H.C. argued during deliberations that "the alibi witness [wasn't]

Even where jurors perceive the impropriety of another's conduct during deliberations, they are unlikely to report it. Jurors are encouraged (as they were here) to behave cooperatively and are charged to "consult with one another" to reach consensus. J.A. 68. They are instructed to value each other's perspectives and viewpoints and to strive to find common ground. *See id.* Against this backdrop, formally accusing another juror of being a racist is particularly fraught with the possibility of stirring unwanted conflict – not to mention incurring social anxiety and embarrassment. Jurors are therefore apt to be "unwilling[]" to interrupt deliberations, notify the court, and "confront their peers" from the witness stand concerning racially biased remarks. *Kittle v. United States*, 65 A.3d 1144, 1155 (D.C. 2013).[6]

Where a jury has begun to coalesce as a group around a verdict, these internal pressures only

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credible because, among other things, he was 'an illegal,'" Pet. App. 4a-5a, other jurors may not have thought it necessary to report this (factually inaccurate and morally offensive) remark to the judge.

[6] The traditional and primary means by which a jury communicates with the trial court – through written notes – heightens the social and practical barriers to reporting other jurors' expressions of racial bias. In this case, for instance, the jury was instructed that if questions arose "about the evidence in th[e] case or about the instructions or verdict forms," the "[f]oreperson should write the question on a piece of paper, sign it and give it to the bailiff." J.A. 62-63 (instruction number 20). Requiring that the foreperson be the conduit for all communications with the court makes the reporting of racial bias during deliberations all the more unlikely, especially when the offending juror is the foreperson.

intensify. Once a straw poll has been taken and a majority is leaning towards guilt, dissenters are incentivized to keep quiet and conform. *See* Saul M. Kassin & Lawrence S. Wrightsman, The American Jury on Trial: Psychological Perspectives 174-75, 180-84 (1988); Harry Kalven, Jr. & Hans Zeisel, The American Jury 463 & n.9 (1966). A juror in this circumstance who might contemplate reporting racial bias would have to overcome especially strong group pressures to break ranks and notify the trial court of another juror's malfeasance.

c. *Voir dire*. Questioning potential jurors during voir dire is ineffective at ferreting out jurors likely to interject racial bias into deliberations – particularly where, as here, there is no reason for defense counsel to think race should be an issue at trial at all.

For starters, criminal defendants are not always allowed during voir dire to inquire into whether potential jurors harbor racial bias. Trial courts possess "broad discretion" over the scope and length of voir dire, *Ham v. South Carolina*, 409 U.S. 524, 528 (1973), and they are "understandably hesitant" to allow questions concerning race for fear of "creat[ing] the impression 'that justice in a court of law may turn upon the pigmentation of skin [or] the accident of birth.'" *Rosales-Lopez v. United States*, 451 U.S. 182, 190 (1981) (plurality opinion) (quoting *Ristaino v. Ross*, 424 U.S. 589, 596 n.8 (1976)). Accordingly, courts are not constitutionally required to permit express inquiry into potential racial biases unless "special circumstances" exist. *See Turner v. Murray*, 476 U.S. 28, 37 (1986); *Ristaino*, 424 U.S. at 594. This Court has also declined to exercise its supervisory authority to require such inquiries in federal district

courts absent "a reasonable possibility that racial or ethnic prejudice will affect the jury." *Rosales-Lopez v. United States*, 451 U.S. 182, 191-94 (1981) (plurality opinion).

The facts and holding of *Rosales-Lopez* illustrate the extent of judicial control over any racial questioning during voir dire. There, a defendant of Mexican descent was charged with smuggling undocumented persons into this country. He sought permission to ask during voir dire whether prospective jurors would consider his race in evaluating the case. 424 U.S. at 185-86 (plurality opinion). But the federal district court denied such permission, and this Court held that neither the Constitution nor federal supervisory law dictated otherwise. *Id.* at 186-87, 190-94.

This Court has similarly held that the mere fact that a defendant is of one race and his alleged victims of another does not by itself qualify as a "special factor[]" demanding the defendant be allowed to ask about race during voir dire. *Ristaino*, 424 U.S. at 597-98; *see generally* 76 Am. Jur. Trials 127 § 38 (2000) (same). In run-of-the-mill criminal cases like this one, then, inquiry into potential racial bias may often be foreclosed entirely.

Even when defendants *are* permitted to inquire into racial bias, defense counsel is often well advised not to pose direct questions on the topic. As the Colorado Supreme Court itself recognized, these inquiries "might be viewed as insulting to jurors or as raising an issue defense counsel does not want to highlight." Pet. App. 11a n.5 (quoting *United States v. Villar*, 586 F.3d 76, 87 n.5 (1st Cir. 2009)); *see also* Ted A. Donner & Richard K. Gabriel, Jury Selection

Strategy and Science § 34:1 (3d ed. 2015) (The subject of race "should probably not be specifically addressed, in any voir dire, unless the facts of the case suggest that racism could be a dispositive factor.").

This risk is particularly pronounced where, as here, there is no reason race should be a focal point (or even a relevant consideration) at trial. Instead of suggesting at the outset that jurors' views concerning race are somehow important, defense counsel may reasonably elect to confine voir dire questioning to topics likely to be salient at trial.

Asking direct questions during voir dire about racial bias is usually ineffective anyway. In *Warger*, the partiality at issue sprang from the juror's daughter's involvement in a car accident similar to the one suffered by the plaintiff. 135 S. Ct. at 524. Because partiality along these lines is socially acceptable (and perfectly understandable), it is comfortable for a juror to admit and is thus easily accessible to counsel by direct questioning. By contrast, "it will rarely be productive to ask jurors directly if they will be prejudiced because of the party's race, as a negative answer will virtually always be forthcoming." James J. Gobert et al., Jury Selection: The Law, Art and Science of Selecting a Jury § 7:41 (3d ed. 2015). A "desire to fit in and be accepted by others" – not to mention knowledge of legal bans on race discrimination – often leads jurors to be "less than candid when asked directly about their beliefs and attitudes, particularly in front of strangers in a group setting" such as voir dire. Thomas A. Mauet, Trial Techniques 44 (8th ed. 2010); *see also* Steven Lubet, Modern Trial Advocacy: Analysis & Practice 485-86 (4th ed. 2009). More than

virtually any other form of bias, racial prejudice is generally met with social condemnation and is thus particularly embarrassing to publicly acknowledge.

Defense counsel is therefore frequently left at voir dire to pose only general, open-ended questions about potential bias. But such indirect questions seldom uncover racial animus. In this case, for example, Juror H.C. was asked whether there was "anything about you that you feel would make it difficult for you to be a fair juror" in this case and whether "this is simply not a good case for [you] to be a fair juror." Pet. App. 3a. Juror H.C. did not respond or otherwise disclose his bias. Indeed, few are prone, in the face of open-ended questions, to volunteer that they harbor socially repugnant views.

d. *External evidence*. The Colorado Supreme Court never identified any form of non-juror evidence that could enable defendants to prove that racial bias infected jury deliberations, Pet. App. 15a. Given the obstacles to obtaining and presenting such evidence, the court's silence is unsurprising.

In approving the application of Rule 606(b) to bar juror testimony regarding the misconduct in *Tanner*, this Court pointed to the possibility that trial counsel could use receipts from the lunchtime restaurant where jurors drank to prove intoxication. 483 U.S. at 127. Unlike alcohol consumption, however, racially biased remarks during deliberations cannot be established using barroom receipts or other forms of physical evidence.

Moreover, nonjuror testimony regarding racially prejudiced statements during deliberations rarely exists. Deliberations are, of course, private, and nonjurors cannot report what they cannot see or

hear. Even where such testimony *is* available to defense counsel – for instance, from an eavesdropping bailiff – it does not solve the problem that Rule 606(b) creates here. Rule 606(b) bars "all manner of juror statements" made during deliberations, even if they are conveyed "indirectly through a witness who overheard the statement." 27 Wright & Gold, Federal Practice & Procedure: Evidence § 6074 (2d ed. 2007); *see also* Colo. R. Evid. 606(b) ("[E]vidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying."). Indeed, courts in jurisdictions that follow Rule 606(b) bar non-jurors from testifying to statements uttered by jurors even when made outside of the courthouse. 27 Wright & Gold, *supra*, at § 6074.

II. No State Interest Animating Rule 606(b) Justifies Precluding Defendants From Proving That Racial Bias Infected Jury Deliberations.

The secrecy of the jury room is not – and has never been – inviolate. Not only have jurors always been permitted to discuss their deliberations outside of the jury room with whomever they please, *see, e.g.*, J.A. 85-86, but courts in this country have always allowed juror testimony in some circumstances to impeach verdicts. Nevertheless, the Colorado Supreme claimed that various state interests require applying Rule 606(b) even in the rare and grave case where jurors come forward with evidence that another advocated convicting the defendant because of his race. These arguments are unavailing.

A. Courts Have Long Admitted Juror Testimony About Misconduct During Deliberations – Including Injections Of Racial Bias – Without Any Appreciable Negative Effects.

At common law, federal and state courts could consider juror testimony about a variety of acts and statements to impeach verdicts. And today, more than twenty jurisdictions permit courts to consider juror evidence of racial bias, like the affidavits at issue here, when offered for this purpose. In none of these jurisdictions have the various exceptions resulted in any discernable negative effects.

1. *Common law*. Before the codification of evidentiary rules, many states allowed parties in at least some circumstances to introduce juror testimony about what occurred during deliberations to impeach verdicts (for example, when the testimony related to "overt acts" of jurors). *See, e.g.*, *City of Miami v. Bopp*, 158 So. 89 (Fla. 1934) (admitting juror testimony that one juror threatened another in deliberations); *Ruble v. McDonald*, 7 Iowa (7 Clarke) 90 (1858) (admitting juror testimony that jury arrived at its verdict by drawing lots); *Ritchie v. Holbrooke*, 7 Serg. & Rawle 458, 458-59 (Pa. 1821) (admitting juror testimony regarding extraneous information discussed during deliberations); *see also* 8 Wigmore on Evidence § 2354 (3d ed. 1940) (collecting other cases where courts admitted juror testimony to impeach verdicts).

In *Mattox v. United States*, 146 U.S. 140 (1892), this Court followed suit, ruling that federal common law required trial courts to consider juror testimony offered to prove that an "extraneous influence" –

there, a newspaper article – had been discussed during deliberations. *Id.* at 149; *see also Parker v. Gladden*, 385 U.S. 363, 364 (1966) (per curiam) (bailiff's comments as extraneous influence); *Remmer v. United States*, 347 U.S. 227, 228-30 (1954) (bribe offered to juror). Such juror testimony does not "induce tampering with individual jurors subsequent to the verdict," this Court explained, because it is "open to the knowledge of all the jury, and not alone within the personal consciousness of one." *Mattox*, 146 U.S. at 148-49 (quoting *Perry v. Bailey*, 12 Kan. 539, 545 (1874)) (internal quotation marks omitted). Nor does such post-trial testimony unduly threaten the finality of criminal judgments. *Id.* at 148.

2. *Modern approaches*. Today, every state, as well as federal law, continues to allow courts to consider juror testimony in various circumstances when offered to impeach jury verdicts. *See generally* McCormick on Evidence § 68 (7th ed. 2013). The Model Code and Uniform Rules of Evidence, in fact, recommend allowing juror testimony to report any improper statement during deliberations. *See* 27 Wright & Gold, Federal Practice and Procedure § 6074 n.58 (2d ed. 2007). And of particular relevance here, over twenty jurisdictions allow juror testimony about racially biased remarks in the jury room, while only three (including Colorado) have reported decisions expressly barring it.

Nine jurisdictions allow juror testimony regarding racial bias irrespective of any Sixth Amendment imperative. Six states – including large states like California – follow the "Iowa rule," under which juror testimony is permitted to prove any improper statement made during deliberations,

including that "appeals to racial bias [we]re made openly among the jurors," *Powell v. Allstate Ins. Co.*, 652 So. 2d 354, 357 (Fla. 1995).[7] Three other states that have more restrictive no-impeachment rules, including New York, likewise allow juror testimony as a matter of state law where racial bias may have infected deliberations.[8]

The Federal Rules of Evidence, of course, preclude consideration of such evidence. Adopted in 1975 after the Department of Justice lobbied federal lawmakers to reject the advisory committee's recommendation to codify the Iowa rule, Rule 606(b) allows the introduction of juror testimony only to prove that extraneous evidence or an improper outside influence affected deliberations, or that there is a mistake in the verdict. *See* Fed. R. Evid. 606(b); *see also* 27 Wright & Gold, Federal Practice and Procedure § 6071 & n.36 (2d ed. 2007) (recounting history of the rule). Many states have since adopted rules tracking Federal Rule 606(b), and thus

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[7] *See also Grobeson v. City of Los Angeles*, 118 Cal. Rptr. 3d 798, 806 (Ct. App. 2010); *State v. Jackson*, 912 P.2d 71, 80 (Haw. 1996); *Turner v. Stime*, 222 P.3d 1243, 1248 (Wash. Ct. App. 2009). Connecticut also follows the Iowa rule, and the Connecticut Supreme Court has invoked its supervisory power to mandate that lower courts investigate allegations of racial bias – including through the admission of juror testimony. *See State v. Santiago*, 715 A.2d 1, 20 (Conn. 1998). Kansas has adopted the Iowa Rule, *see* Kan. Stat. Ann. § 60-441, but has yet to address the specific issue of racial bias in deliberations.

[8] *See State v. Callender*, 297 N.W.2d 744, 746 (Minn. 1980); *People v. Rukaj*, 506 N.Y.S.2d 677, 680 (App. Div. 1986); *Fields v. Saunders*, 278 P.3d 577 (Okla. 2012).

generally preclude most juror testimony concerning statements made during deliberations.

But even among the jurisdictions that follow Rule 606(b), two federal circuits, six states, and the District of Columbia have deemed the rule unenforceable on constitutional grounds against evidence that racial bias infected deliberations.[9] And three other states that have judicially crafted no-impeachment rules similar to Rule 606(b) likewise deem such evidence admissible on constitutional grounds.[10] These jurisdictions deem these constitutional safety valves essential to "safeguard against the improper consideration of race in criminal trials." *State v. Santiago*, 715 A.2d 1, 19 (Conn. 1998) (citation omitted). At the same time, the jurisdictions believe these exceptions do not undermine "the policy considerations that justify the no-impeachment rule." *Kittle v. United States*, 65 A.3d 1144, 1156 (D.C. 2013).

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[9] *See United States v. Villar*, 586 F.3d 76 (1st Cir. 2009); *Shillcutt v. Gagnon*, 827 F.2d 1155 (7th Cir. 1987); *Fisher v. State*, 690 A.2d 917 (Del. 1996); *Kittle v. United States*, 65 A.3d 1144 (D.C. 2013); *Spencer v. State*, 398 S.E.2d 179 (Ga. 1990); *State v. Hidanovic*, 747 N.W.2d 463 (N.D. 2008); *State v. Brown*, 62 A.3d 1099 (R.I. 2013); *State v. Hunter*, 463 S.E.2d 314 (S.C. 1995); *State v. Shillcutt*, 350 N.W.2d 686 (Wisc. 1984). *But see United States v. Benally*, 560 F.3d 1151 (10th Cir. 2008) (holding that the impartial-jury right does not require Rule 606(b) to yield); *Commonwealth v. Steele*, 961 A.2d 786 (Pa. 2008) (same).

[10] *See Commonwealth v. McCowen*, 939 N.E.2d 735, 764 (Mass. 2010); *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 89 (Mo. 2010); *State v. Koedatich*, 548 A.2d 939, 971 (N.J. 1988).

B. The Reasons For Having No-Impeachment Rules Do Not Justify Ignoring Juror Testimony That Racial Bias Infected Jury Deliberations.

Notwithstanding the experiences of the many jurisdictions that have long allowed juror testimony like that at issue here, the Colorado Supreme Court advanced three reasons for barring such evidence: preventing juror harassment, avoiding slippery slope problems, and maintaining public confidence in the jury system. This Court has also noted that, at least in some circumstances, no-impeachment rules may promote finality and "full and frank discussion in the jury room." *Tanner v. United States*, 483 U.S. 107, 120 (1987).

But analysis confirms what other jurisdictions' experiences suggest: The policy rationales underlying Rule 606(b) are insufficient to outweigh a defendant's constitutional right to present evidence that a juror infected deliberations with racial bias. Indeed, even if the *Tanner* factors were effective at screening out many instances of such misconduct (as explained above, they are not), the state interests animating Rule 606(b) would still be insufficient to trump a defendant's right to an impartial jury where juror testimony becomes necessary to prove that racial bias infected deliberations. No-impeachment rules reflect the need to tolerate certain imperfections in the jury room, lest verdicts be subject to constant questioning from the outside. But racism is not just a glitch in deliberative reasoning; it is a constitutionally poisonous ground for depriving someone of his liberty. Consequently, the threat to the judiciary and the public's respect for the rule of law is so profound

when juror testimony indicates that a verdict rests on racial bias that such evidence can never be ignored merely in the name of deliberative secrecy.

1. *Free and frank discussion*. When a defendant's life or liberty is at stake, there is no valid interest in creating breathing space for jurors to argue that a defendant should be convicted because of her race. Thus, allowing courts to consider juror testimony that racial bias infected jury deliberations does not undermine any legally acceptable discussion in the jury room. As the State itself stresses, racial bias "should never be the basis for a verdict." BIO 17.

This Court's decision in *Clark v. United States*, 289 U.S. 1 (1933), reinforces this analysis. There, the federal government prosecuted a juror from a prior case for contempt, alleging she had manipulated her way onto the jury, interjected extraneous information into deliberations, and refused to consider countervailing evidence introduced at trial. *Id.* at 9. To prove its allegations, the prosecution introduced testimony from other jurors recounting the juror's statements and actions during deliberations. *Id.* at 12. Writing for the Court, Justice Cardozo acknowledged that "[f]reedom of debate might be stifled and independence of thought checked if" the content of deliberations were routinely publicized. *Id.* at 13. But while the interest in deliberative secrecy "will prevail in many situations," it "run[s] foul in others of a different social policy, competing for supremacy." *Id.* And in the Court's view, allowing chicanery in the jury room to go unchecked is "too high a price for the assurance to a juror of serenity of mind." *Id.* at 14.

Even more so here. Allowing racial animus in the jury room to go unchecked would be too steep a price to pay for ensuring unfettered conversation during deliberations. It is the *defendant's* liberty, after all, that is at stake in a criminal trial, not any juror's. In addition, the "integrity of the courts" is implicated when judges are confronted with evidence that "racial animus" played a role during jury deliberations. *See Georgia v. McCollum*, 505 U.S. 42, 48, 58 (1992) (quoting *Powers v. Ohio*, 499 U.S. 400, 402 (1991)). The defendant's fundamental right not to be convicted because of the color of his skin, and the judiciary's interest in superintending a system of criminal justice that lives up to our Nation's core principles, necessarily outweighs any interest in unbounded discussion the jury room.

This is particularly true because any effect that holding Rule 606(b) inapplicable here would have on the content of deliberations is negligible at best. In stark contrast to the strict secrecy requirements surrounding grand jury deliberations, *see, e.g.,* Fed. R. Crim. Proc. 6(e)(2), all American jurisdictions already allow petit jurors, after trial, to publicly disclose in any public forum (including on social media, in the newspapers, and throughout the community) any statement made during deliberations.[11] When jurors already know they may

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[11] *See, e.g.*, Peter Manso, *An Unjust Conclusion*, Boston Mag. (Mar. 2007), http://www.bostonmagazine.com/2007/03/an-unjust-conclusion1/ (interviewing jurors about racially biased statements made in deliberations). Indeed, in Colorado, the mandatory jury instruction upon discharge instructs jurors that it is "proper" for them to discuss deliberations with others.

be publicly excoriated for their remarks during deliberations, allowing jurors to also testify in a courtroom in those rare and grave situations where racial bias played a role in a conviction has virtually no marginal impact on the openness of deliberations.

2. *Juror harassment*. Permitting jurors to testify regarding claims of racial bias does not induce attorneys to harass jurors.

Prosecutors and defense lawyers have ample reason – wholly apart from the circumstances here – to talk to jurors after they render their verdicts. As a matter of professional development, not to mention sheer curiosity, attorneys typically stay after trial to discuss their arguments with jurors and ask what they found compelling or decisive. Nancy Hollander & Barbara E. Bergman, Everytrial Criminal Defense Resource Book § 7:1 (2015). Thus, regardless of the existence or content of no-impeachment rules, attorneys in every case have a strong incentive to interview jurors.

In addition, every jurisdiction already has multiple exceptions to no-impeachment rules. So defense lawyers have long had reason – independent of any suspicion of racial bias – to contact jurors to inquire whether any juror misconduct occurred during deliberations. Yet there is no evidence that this incentive to speak with jurors after trial has prompted any harassment by attorneys seeking to

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Model Criminal Jury Instructions Comm., Colo. Supreme Court, *Colorado Jury Instructions Criminal 2015* E:25, http://bit.ly/1YiMHXX; *see also* J.A. 85-86 (delivering this instruction).

overturn unfavorable verdicts. Indeed, even in states such as California that allow jurors to testify regarding *anything* said during deliberations, there is no evidence that juror harassment is a problem. And many states with narrow exceptions for cases of racial bias have recognized these exceptions for decades without any discernible harassment effect. *See, e.g.*, *People v. Whitmore*, 257 N.Y.S.2d 787 (Sup. Ct. 1965); *State v. Callender*, 297 N.W.2d 744 (Minn. 1980).

Attorneys do not harass jurors concerning the content of deliberations because state law, ethical rules, and the courts effectively regulate attorney-juror contact. Colorado's Rules of Professional Conduct, for example, prohibit communications with jurors that involve "misrepresentation, coercion, duress or harassment." Colo. R. Prof'l Conduct 3.5(c)(3).[12] And some federal courts have local rules requiring attorneys to seek the court's permission before initiating contact with jurors. *See, e.g.*, D. Md. Adm. R. 107(16) ("Unless permitted by the presiding judge, no attorney or party shall directly or through an agent interview or question any juror, alternate juror or prospective juror with respect to that juror's

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[12] Indeed, the same jury instruction that tells jurors that they may discuss the case with others after a verdict is reached also tells jurors to report to the court anybody who "persists in discussing the case over your objection." Model Criminal Jury Instructions Comm., Colo. Supreme Court, *Colorado Jury Instructions Criminal 2015* E:25, http://bit.ly/1YiMHXX. The Colorado courts have recognized that instructions and attorneys' professional obligations create a "safe zone" for jurors. *Stewart ex rel. Stewart v. Rice*, 47 P.3d 316, 325 (Colo. 2002).

jury service."); E.D. Mo. L.R. 47-7.01 ("Attorneys and parties to an action shall not initiate, directly or indirectly, communication with any petit juror, relative, friend or associate thereof at any time concerning the action, except with leave of Court.").

There is no evidence that these rules are ineffective in the context of racial bias. *See* Cert. Amicus Br. of Retired Judges at 3-5. And the trial court's careful management of defense counsel's contact with jurors here certainly precluded any harassment. *See* J.A. 96-100. If attorneys in the future were to harass any jurors while investigating any suspicions of bias, courts could address that problem by denying evidentiary hearings where "the defeated party's counsel obtains information from jurors in violation" of the professional code of conduct. *Id.* at 5 (citing *Baker v. Gile*, 257 N.W.2d 376, 377-78 (Minn. 1977)).

3. *Finality*. Given the existing exceptions to Rule 606(b) and other no-impeachment rules, a narrow exception for allegations of racial bias does not unduly disturb the finality of verdicts.

This Court has concluded in a variety of contexts that existing exceptions to a rule can "diminish" the strength of the government's rationale "in the first place." *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994); *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432-33 (2006). That principle applies here. Given that finality yields under Rule 606(b) when extraneous prejudicial information, an outside influence, or a mistake affects the verdict, the State could not credibly assert that allowing its no-impeachment rule also to give way in the exceptional case of racial

bias would meaningfully undercut any interest in the finality of verdicts.

In any case, the post-trial litigation that flows from allowing jurors to testify regarding racial bias is minimal. Defendants seldom have any basis to claim that racial bias infected jury deliberations. And even when they raise such claims, courts can dispose of many without holding a hearing. *See, e.g.*, *State v. Santiago*, 715 A.2d at 18 (A trial court may "rightfully be persuaded, solely on the basis of the allegations before it," that the defendant is not entitled to relief) (citation omitted). This comports with how courts in Colorado and elsewhere screen claims under other exceptions to no-impeachment rules. Courts recognize that "[n]ot every allegation of [juror misconduct] requires an evidentiary hearing." *See United States v. Moses*, 15 F.3d 774, 778 (8th Cir. 1994). Only when a juror affidavit credibly describes a prima facie case of juror misconduct do courts conduct further proceedings to assess the claim. *See id.*; *Wiser v. People*, 732 P.2d 1139, 1142 (Colo. 1987).

It is no surprise, then, that verdicts are rarely disturbed because of racially biased deliberations. Among the more than twenty jurisdictions that consider juror affidavits to substantiate allegations of racial bias, there appear to be only about two dozen appellate decisions (out of only a few dozen appeals) requiring new trials. *See* Cert. Amicus Br. of Ctr. for Admin. of Criminal Law 18-22. In short, defendants rarely seek new trials based on racial prejudice during deliberations – and when they do, those claims are usually meritorious.

4. *Administrability*. The Colorado Supreme Court maintained that if the Sixth Amendment required suspending Rule 606(b) with respect to evidence of racial bias, courts would be unable to discern a dividing line between racially biased comments of varying "severity" or between different "types of juror bias." Pet. App. 14a-15a (emphasis omitted). Not so.

a. Courts can – and regularly do – distinguish between racially biased comments that may be sufficiently serious to warrant relief and those that are not.

In jurisdictions where juror testimony of racial bias is already permitted, "not every stray or isolated off-base statement made during deliberations" requires post-trial proceedings. *United States v. Villar*, 586 F.3d 76, 87 (1st Cir. 2009). Instead, courts typically distinguish racial comments related to guilt – like the ones here – from disconnected remarks that do not demand court intervention.

Two decisions illustrate this dichotomy. In *Commonwealth v. Laguer*, 571 N.E.2d 371 (Mass. 1991), a Hispanic man was accused of raping a white woman. During deliberations, one juror leveled numerous "racist attack[s]" against the defendant and urged he was guilty because "spics screw all day and night." *Id.* at 375. The Massachusetts Supreme Judicial Court held that if these statements were really made, the defendant was entitled to a new trial. *Id.* at 377. By contrast, in *State v. Brown*, 62 A.3d 1099 (R.I. 2013), a juror allegedly referred to the Native American defendants as "those people" during deliberations but never said anything suggesting the defendant's race provided reason to convict. *Id.* at

1106. The Rhode Island Supreme Court held that such comments did not suggest "[the defendant's] racial or ethnic background" factored into the "jury's decision-making process." *Id.* at 1111.

Courts have long conducted similar inquiries in the context of employment discrimination claims, distinguishing comments indicating that race played a role in the employment action at issue from mere "stray remarks." Mark A. Rothstein et al., *Employment Law* § 2.7, at 289 (5th ed. 2014). *Compare, e.g.*, *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 184-85 (3d. Cir. 2009) (manager's statement when firing employee that "you ain't nothing but the N word" indicated that the employee's discharge was motivated by racial animus), *with Perry v. Woodward*, 199 F.3d 1126, 1134 (10th Cir. 1999) (finding "isolated, disparaging comments" about Hispanics insufficient to support a racial discrimination claim regarding an employee's discharge because the court found no "causal nexus" between the two).

Even under Rule 606(b)'s existing exceptions, courts likewise routinely determine whether misconduct during deliberations is sufficiently serious that it requires a new trial. For example, the Colorado Supreme Court has held that a juror's recitation of dictionary definitions to fellow jurors during deliberations "does not automatically require a new trial." *Wiser*, 732 P.2d at 1141. The question of prejudice in that circumstance turns on "the nature and circumstances" of the conduct. *Id.*; *compare id.* (looking up the definition of "burglary" did not warrant a new trial because there was no reasonable possibility that the conduct prejudiced

the defendant), *with Alvarez v. People*, 653 P.2d 1127, 1131 (Colo. 1982) (looking up "reasonable" warranted a new trial because the juror assessed the reasonableness of her doubts about the defendant's guilt according to the dictionary definition instead of the reasonable-doubt jury instruction). There is nothing preventing courts from conducting similar inquiries here.

Indeed, courts have procedural tools readily at hand to determine the severity of racially infused comments. Upon receiving juror affidavits alleging that expressions of racial prejudice infected deliberations, courts can hold evidentiary hearings to examine the "precise content and context of the statement[s]," *Commonwealth v. McCowen*, 939 N.E.2d 735, 765 (Mass. 2010), as well the statements' relationship to contested matters at trial, *State v. Johnson*, 951 A.2d 1257, 1279-80 (Conn. 2008). Trial courts are "most familiar with the strength of the evidence and best able to determine the probability of prejudice from an inappropriate racial or ethnic comment." *Villar*, 586 F.3d at 88. So entrusting them with the mechanics of these hearings – whether jurors are permitted to testify, the format of questioning, and the content – is fitting.

b. This Court has repeatedly recognized that addressing the particular toxin of racial bias in the criminal justice system does not compel the judiciary to police all potential forms of bias.

For instance, as noted above, this Court held over four decades ago that criminal defendants must sometimes be allowed to question potential jurors during voir dire regarding the subject of race. *See, e.g., Ristaino v. Ross*, 424 U.S. 589, 594, 598 (1976);

Ham v. South Carolina, 409 U.S. 524, 528 (1973). But, while judges must allow questioning of prospective jurors about racial prejudice when there is "a significant likelihood that racial prejudice might infect [a defendant's] trial," *see Ristaino v. Ross*, 424 U.S. 589, 598 (1976), the content of voir dire otherwise remains left to the "sound discretion" of trial courts, *id.* at 594 (quoting *Connors v. United States*, 158 U.S. 408, 413 (1895)). In fact, this Court has explicitly held that trial courts need not permit defendants to inquire into other forms of bias – such as "prejudice against beards" or "a host of other possible similar prejudices." *Ham*, 409 U.S. at 528.

In addition, even though the Constitution requires courts to ensure that "members of a racial group [have not been] purposefully . . . excluded" in setting grand jury rosters, *Rose v. Mitchell*, 443 U.S. 545, 556 (1979), states maintain "wide discretion" in the procedures for grand jury venire, *Norris v. Alabama*, 294 U.S. 587, 593 (1935). Indeed, in the several decades *Rose* has been on the books, this Court has not extended it beyond race.

Even when this Court has elected to extend a constitutional criminal procedure right beyond *racial* bias, it has encountered little difficulty limiting the protection to special categories of bias. Under *Batson v. Kentucky*, 476 U.S. 79 (1986), parties may not use peremptory challenges to strike potential jurors based on their race. This Court later extended this prohibition to gender. *See J.E.B. v. Alabama*, 511 U.S. 127 (1994). At the same time, the Court made clear that nothing in the Constitution prevents parties from exercising peremptory strikes with

respect to "any group or class of individuals normally subject to 'rational basis' review." *Id.* at 143.

So too here, there is no need for this Court to speak in this case beyond the issue of racial bias. And there is nothing about the impartial-jury right that would impede this Court in future cases from limiting the scope of its holding.

5. *Public confidence in the administration of criminal justice*. The Colorado Supreme Court asserted that allowing courts to determine whether racial bias infected jury deliberations would "shatter public confidence" in the concept of trial by jury. Pet. App. 13a. But concerns about public confidence push emphatically in the opposite direction here.

"Both the appearance and reality of impartial justice are necessary to the public legitimacy" of court proceedings "and thus to the rule of law itself." *Williams v. Pennsylvania*, 136 S. Ct. ____, ____ (slip op. at 13) (2016). In particular, "[t]he purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair." *Powers v. Ohio*, 499 U.S. 400, 413 (1991).

There would be no surer way, therefore, to bring the administration of justice into disrepute than to allow courts to turn a blind eye when evidence shows that jury deliberations were tainted by racial bias. If courts could ignore evidence showing defendants were convicted on the basis of racial stereotypes – even while jurors permissibly disclose it to the press or public at large – the populace may view the judiciary as a "willing participant" in the most odious sort of discrimination. *Georgia v. McCollum*,

505 U.S. 42, 49 (1992) (quotation marks and citation omitted). All the more so when courts in California, South Carolina, New York, and Florida, among others, have long considered such evidence (and, when appropriate, provided remedies for such misconduct) with no negative side effects.

What is more, the Colorado Supreme Court's suggestion that the jury system could not survive the presence of the safety valve proffered here offends the character of our citizenry. This Court has long recognized that jurors generally possess the "intelligence, experience, [and] moral integrity" to serve fairly. *See Batson*, 476 U.S. at 104-05 (Marshall, J., concurring); *see generally Duncan v. Louisiana*, 391 U.S. 145, 154-58 (1968). Surely then, jurors today are not so bigoted, and the system not so fragile, that courts must fear to respond when confronted with the rare allegation that racial bias infected the jury's decision-making process. It would hardly make sense to "prohibit racial . . . bias in jury selection only to encourage it in jury deliberations." *J.E.B.*, 511 U.S. at 153 (Kennedy, J., concurring in the judgment).

* * *

This case does not require this Court to undertake the task of "perfect[ing]" the jury system, Pet. App. 13a (citation omitted). This Court need only hold – as more than twenty jurisdictions already have – that juror testimony revealing express racial animus cannot be ignored. This is especially so where, as here, the offending juror interjected racial bias into a case with questionable evidence in which the jury was clearly struggling to reach a decision. *See supra* at 6-7. To deny petitioner

in this context any genuine opportunity to vindicate his Sixth Amendment right to an impartial jury is to say that the Constitution tolerates Juror H.C.'s argument for tipping the balance toward conviction – that "he did it because he's Mexican," and "nine times out of ten Mexican men [are] guilty," Pet. App. 4a. This cannot be right.

CONCLUSION

For the foregoing reasons, the judgment of the Colorado Supreme Court should be reversed.

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