No. 15-606

IN THE
Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,
Petitioner,
v.
STATE OF COLORADO,
Respondent.

On Writ of Certiorari to the Colorado Supreme Court

BRIEF OF NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST[1]

The National Association of Federal Defenders ("NAFD") was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. One of the guiding principles of NAFD is to promote the fair administration of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. NAFD has appeared as *amicus curiae* in litigation before the Supreme Court and the federal courts of appeals.

NAFD is particularly interested in this case because the holding that jurors cannot testify about racial bias in jury deliberations runs afoul of criminal defendants' constitutional rights, and also prevents criminal defense attorneys from ensuring that their clients receive a fair trial in front of an impartial jury.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* made such a monetary contribution. Both parties have filed blanket letters of consent to the filing of *amicus* briefs with the Clerk's office.

SUMMARY OF ARGUMENT

1. A core premise of Respondent's argument is that judicial inquiry into juror misconduct is foreign to our legal system. The reality, however, is far more nuanced. Courts in the United States have long permitted jurors to testify to impeach their verdicts in certain circumstances, with the aim of ensuring fairness and justice in jury trials. Before 1785, common law allowed jurors to impeach their verdicts through testimony and affidavits regarding deliberations. While Lord Mansfield advanced a rule prohibiting juror testimony to impeach verdicts in *Vaise v. Delaval*, 99 Eng. Rep. 944 (K.B. 1785), American courts adopted the rule with significant exceptions, recognizing the injustices and evidentiary anomalies created by a strict application of the rule.

To be sure, American courts have disagreed about the precise circumstances in which juror testimony should be permitted to impeach a verdict. Many of them adopted one of two competing approaches at the common law: (1) the "Iowa" approach, which permitted all juror testimony about deliberations unless it went to the juror's subjective intentions and internal thought processes; or (2) the "federal" approach, which permitted courts to consider juror testimony that an "extraneous matter" had influenced the jury while prohibiting other juror testimony about deliberations. But, while courts disagreed on the precise contours of permissible jury testimony, they overwhelmingly agreed that such testimony was necessary in some cases to ensure a fair trial.

The federal government and states subsequently codified rules about juror testimony. As originally enacted as part of the codification of the Federal Rules of Evidence in 1975, Rule 606(b) permitted jurors to testify about whether the jury was subject to improper outside influence or extraneous prejudicial information. Several states, including Colorado, have adopted rules similar to Rule 606(b), although a number of other states have continued to follow the "Iowa" approach.

Even after Rule 606(b)'s enactment, however, federal courts and state courts subject to Rule 606(b) analogs have allowed juror testimony to impeach verdicts in circumstances beyond those listed in the rule. One such circumstance – testimony regarding whether the verdict was accurately rendered – was formally incorporated into Rule 606(b) in 2006. Still, courts permit jurors to provide information about verdicts or deliberations in other circumstances that go beyond the current Rule. Most notably for this case, numerous courts have permitted juror testimony about racial bias in jury deliberations, recognizing due process and Sixth Amendment concerns with barring such testimony.

2. With more than two hundred years of practice under their belts, courts are adept at dealing with allegations (whether by jurors or others) of juror misconduct, and have developed methodical, multi-step processes for assessing whether a verdict should be impeached based on allegations of juror misconduct.

First, courts require the party alleging juror

misconduct to make a threshold showing that the allegation is colorable. Second, if the party advances a colorable allegation, the judge conducts an evidentiary hearing to gather more evidence and assess its credibility. This inquiry often requires the court to determine whether juror testimony is admissible under Rule 606(b) or on another basis. Third, the court conducts a prejudice inquiry, for courts allow juror testimony to impeach a verdict only when a party actually is prejudiced. The prejudice inquiry is searching and comprehensive, accounting for factors such as the extent to which the improper communication or extraneous information was discussed by the jury, the strength of the government's case, and whether extraneous information was cumulative of evidence properly before the jury.

Courts regularly and carefully execute this multi-step process, advancing the party's interest in a fair trial while also giving heed to the systemic interests in conserving judicial resources and respecting the finality of verdicts.

3. Allowing jurors to testify about racial bias in jury deliberations fits well within both tradition and existing practice. As a constitutional matter, a hallmark of the right to a fair trial is the right to an impartial jury that decides the case based solely on the evidence before it. Racial prejudice in jury deliberations strikes at the core of this right, and preventing racial bias in jury deliberations thus is at least as important to a defendant's fair trial rights as shielding these deliberations from outside influences and extraneous

information.

Moreover, as a practical matter, courts are well-equipped to apply the same methodical approach they routinely apply under Rule 606(b) to address allegations of racial bias. Courts thus have ample tools to assess the credibility of allegations of racial bias, consider evidentiary issues, and determine whether there has been prejudice. Courts that have already made a practice of admitting juror testimony regarding racial bias have demonstrated that they are adept at making these determinations in this context, even in difficult cases. If more courts were to consider juror testimony of racial bias, they undoubtedly would be amply prepared to take up the task.

ARGUMENT

I. THERE IS A LONG AND SIGNIFICANT HISTORY OF ALLOWING JURORS TO PROVIDE INFORMATION ABOUT THEIR DELIBERATIONS TO ENSURE A FAIR TRIAL.

A key premise of the decision below and of Respondent's argument to this Court is that courts have long been "preclude[d] … from peering beyond the veil that shrouds jury deliberations." BIO at 1 (quoting Pet. App. 6a). But the reality of both historical and current practice is far more complex. For centuries, to ensure a fair trial, courts have recognized substantial exceptions to the general presumption that juror deliberations are confidential.

While Rule 606(b) now codifies certain instances in which juror testimony is permitted in federal courts (and Colorado and certain other states have adopted similar rules), these courts have continued to allow juror testimony in circumstances that go beyond those expressly authorized by the Rule when they conclude that the Constitution or justice so requires. Most relevant to this case, courts have recognized that Rule 606(b) and its state law analogs cannot foreclose a defendant's ability to show through juror testimony that the jury's deliberations were infected by racial bias, as this would violate the defendant's constitutional right to a fair trial.

A. At Common Law, Courts Permitted Juror Testimony To Impeach Verdicts.

Prior to 1785, the common law permitted jurors to impeach their verdicts through testimony and affidavits. *See McDonald v. Pless*, 238 U.S. 264, 267-68 (1915); *State v. Kociolek*, 118 A.2d 812, 815 (N.J. 1955) (Brennan, J.); *see also* 8 *Wigmore on Evidence* § 2352, at 696-97 (John T. McNaughton ed. 1961) (compiling cases). Commentators trace the origin of Rule 606(b) to *Vaise v. Delaval*, 99 Eng. Rep. 944 (K.B. 1785), in which Lord Mansfield declined to receive the affidavit of two jurors to prove their verdict had been made by lot. *See Warger v. Shauers*, 135 S. Ct. 521, 526 (2014). Lord Mansfield ruled that "[t]he Court cannot . . . receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor . . . but in every such case the Court must derive their

knowledge from some other source[,] such as from some person having seen the transaction through a window, or by some such other means." *Vaise*, 99 Eng. Rep. 944. Lord Mansfield's rule soon took root in the United States. *Warger*, 135 S. Ct. at 526.

Today, however, "[t]he familiar rubric that a juror may not impeach his own verdict, dating from Lord Mansfield's time, is a gross oversimplification." Fed. R. Evid. 606(b) Advisory Committee's Note to 1972 Proposed Rules. By the beginning of the nineteenth century, courts in the United States had started to recognize exceptions to Lord Mansfield's rule. *See, e.g.*, *Grinnell v. Phillips*, 1 Mass. 530, 542 (1805) (Sewall, J., concurring) ("[T]he testimony of a juror may be admitted as to overt acts, which may be the subject of legal inquiry, and in that each member of the jury may be a competent witness."); *Smith v. Cheetham*, 3 Cai. R. 57, 60 (N.Y. Sup. Ct. 1805) (holding that it was proper to admit juror affidavits showing jurors issued quotient verdict and criticizing "Lord Mansfield's rule of shutting the mouths of the jurors"); *State v. Hascall*, 6 N.H. 352, 361 (1833) ("To exclude the testimony of jurors . . . in all questions affecting their verdict, would neither be just to the parties, or the jury."); *Murdock v. Sumner*, 39 Mass. (22 Pick.) 156, 157 (1839) ("The Court are not prepared to say that [the Mansfield Rule] is a rule without exception; there may be cases of manifest mistake in computation, or other obvious error, where there are full means of detecting and correcting it, where it would be proper to interfere."). Courts also criticized Lord Mansfield's rule for creating injustices and evidentiary issues, noting, for example, that it "permitted a bailiff or other court officer who had been

spying on the jury to testify as to misconduct, but disallowed the testimony of those who really knew what happened." *Kociolek*, 118 A.2d at 815 (Brennan, J.) (discussing history of Lord Mansfield's rule); *see also Crawford v. State*, 10 Tenn. 60, 67 (1821) ("Lord Mansfield says, the court must derive their knowledge from other sources. What source? The law contemplates their seclusion; the only alternative is the ignominious eavesdropper."); *Smith*, 3 Cai. R. at 59 ("If a man will voluntarily charge himself with a misdemeanor, why should he not be indulged?").

Accordingly, most courts in the United States applied Lord Mansfield's rule in a modified form that allowed juror testimony in some circumstances. *See* 3 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 6:16, Westlaw (4th ed. database updated May 2016) (noting that American courts applied a "somewhat compromised version of the more encompassing English rule" announced by Lord Mansfield). Two competing approaches developed in the courts. The first was derived from the Iowa Supreme Court's decision in *Wright v. Illinois & Mississippi Telegraph Co.*, 20 Iowa 195 (1866), which held that courts could receive post-verdict juror affidavits unless they related to matters that "inhere[d] in the verdict" – the juror's subjective intentions and thought processes in reaching the verdict. *Wright*, 20 Iowa at 210-11. About a dozen jurisdictions adopted this "Iowa" approach. 8 *Wigmore on Evidence* § 2354, at 702 & n.1. Other courts adopted what is referred to as the "federal" approach, which allowed jurors to present testimony that an "extraneous matter" had influenced the jury, but prohibited other juror testimony. *See*

Warger, 135 S. Ct. at 526. Unlike the Iowa approach, the federal approach focused on an "external/internal distinction to identify those instances in which juror testimony impeaching a verdict would be admissible." *Tanner v. United States*, 483 U.S. 107, 117-18 (1987).

This Court first held post-verdict juror testimony admissible in *Mattox v. United States*, 146 U.S. 140 (1892), allowing jurors' testimony that they had heard and read prejudicial information not admitted into evidence from a bailiff and an outside newspaper. *Id.* at 149. As this Court recently noted, its early cases could be read to suggest a preference for the Iowa approach. *See Warger*, 135 S. Ct. at 526; *see also Hayes v. United States*, 225 U.S. 347, 383-84 (1912) (stating that "we think the rule expressed in *Wright v. Illinois & M. Tel. Co.*, 20 Iowa 195 [1866] . . . should apply"); *Mattox*, 146 U.S. at 148-49 (quoting at length from Kansas Supreme Court case applying the Iowa approach). This Court ultimately retreated from that approach in *McDonald v. Pless*, 238 U.S. 264 (1915), however, holding that juror affidavits were not admissible to show that jurors had issued a "quotient" verdict (*i.e.*, a monetary award calculated by dividing the sum of the individual jurors' suggested amounts by twelve). *Id.* at 265. But many states continued to follow the Iowa approach, *see* Timothy C. Rank, *Federal Rule of Evidence 606(b) and the Post-Trial Reformation of Civil Jury Verdicts*, 76 Minn. L. Rev. 1421, 1428 & n.39 (1992) – and several still do so today. *See, e.g.*, Cal. Evid. Code § 1150(a); Fla. Stat. § 90.607(2)(b); Conn. Super. Ct. R. § 16-34; Haw. R. Evid. 606(b).

B. Congress Codified In Rule 606(b) The Well-Established Practice of Allowing Juror Testimony To Impeach A Verdict In Some Circumstances.

In enacting Rule 606(b) as part of the broader codification of the Federal Rules of Evidence in 1975, Congress sought to codify the well-established practice of allowing juror testimony to impeach a verdict in some circumstances. *See* Fed. R. Evid. 606(b) Advisory Committee's Note to 1972 Proposed Rules. Indeed, the Federal Rules Advisory Committee observed that "simply putting verdicts beyond reach can only promote irregularity and injustice." *See id.* At the same time, the Advisory Committee acknowledged that courts had "substantial differences of opinion" regarding the circumstances in which testimony, affidavits, or statements of jurors should be received for the purpose of invalidating a verdict or indictment. *Id.* The debate surrounding Rule 606(b) thus centered upon the particular circumstances in which jurors would be permitted to offer such testimony. *See Tanner*, 483 U.S. at 139.

The Advisory Committee initially proposed a version of Rule 606(b) resembling the Iowa approach, which would have admitted juror testimony to impeach a verdict, except when it pertained to a juror's "emotions" and "mental processes." Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 387 (1971). Senator John McClellan and the Department of Justice

criticized the Advisory Committee's proposed rule on the grounds that it would too broadly authorize the use of juror testimony to impeach verdicts. *See Tanner*, 483 U.S. at 122 (discussing legislative history). Congress ultimately adopted a more restrictive version of the rule reflecting the federal approach. *See Warger*, 135 S. Ct. at 527.

As originally enacted in 1975, Rule 606(b) stated:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify 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, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror . . . .

Fed. R. Evid. 606(b) (1975). Thus, the rule as enacted permitted jurors to testify about improper outside influences or extraneous prejudicial information. *Id.*

These are not the only circumstances in which courts subject to Rule 606(b) have permitted jurors to testify, however. Rather, even after Rule 606(b) was codified, courts continued to create new exceptions to further the administration of justice. One such exception allowed juror testimony to determine whether the verdict had been accurately rendered.

Following the enactment of Rule 606(b), a number of federal circuit courts held that jurors may testify about the accuracy of the verdict because such testimony is necessary to ensure a fair outcome for litigants, even though this was not listed as a circumstance in which jurors could testify under Rule 606(b). *See, e.g.*, *Plummer v. Springfield Terminal Ry. Co.*, 5 F.3d 1, 3 (1st Cir. 1993); *Robles v. Exxon Corp.*, 862 F.2d 1201, 1208 (5th Cir. 1989); *Karl v. Burlington N. R.R.*, 880 F.2d 68, 74 (8th Cir. 1989); *Eastridge Dev. Co. v. Halpert Assoc., Inc.*, 853 F.2d 772, 783 (10th Cir. 1988); *Attridge v. Cencorp Div. of Dover Techs. Int'l, Inc.*, 836 F.2d 113, 116 (2d Cir. 1987). Following these cases, this Court submitted to Congress an amendment to Rule 606(b) adding an additional exception for post-verdict juror testimony about whether "a mistake was made in entering the verdict on the verdict form." *See* Amendments To Federal Rules of Evidence, 547 U.S. 1281 (Apr. 12, 2006); *see also* Fed. R. Evid. 606(b) Advisory Committee's Notes to 2006 Amendments (noting that exception responded to "case law that has established an exception for proof of clerical errors"). The amendment took effect in 2006. Its history illustrates the ongoing role of the courts in determining the circumstances in which juror testimony will be permitted, as well as this Court's important role in guiding the development and scope of Rule 606(b) to balance the competing priorities of fairness and finality of verdicts.

C. Courts Have Recognized Additional Circumstances, Beyond Those Set Forth in Rule 606(b), In Which Information Can Be Obtained From Jurors About Their Verdicts And Deliberations.

Federal courts have continued to recognize a number of other circumstances in which jurors may provide information about their verdicts and deliberations. For example, Federal Rule of Criminal Procedure 31(d) states: "After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually." *See also United States v. Singer*, 345 F. Supp. 2d 230, 234 (D. Conn. 2004) (holding that Rule 606(b) does not apply to post-verdict juror polling under Fed. R. Crim. P. 31(d), and thus does not limit what information from jurors a judge may consider when polling the jury), *aff'd*, 241 F. App'x 727 (2d Cir. 2007); Fed. R. Evid. 606(b) Advisory Committee's Notes to 2006 Amendments (noting that Rule 606(b) does not prevent polling the jury). Moreover, even after the verdict is entered and the jury is discharged, it is "not uncommon" for attorneys or court staff to talk to jurors to seek their feedback on the trial. *Dietz v. Bouldin*, 136 S. Ct. 1885, 1894 (2016), citing 1 K. O'Malley *et al.*, Federal Jury Practice and Instructions § 9:8 (6th ed. 2006).

Especially relevant to this case, a number of federal and state courts allow jurors to testify about racial bias in deliberations. As this Court recognized more than a century ago, "it would not be safe to lay down any

inflexible rule [regarding the exclusion of juror testimony,] because there might be instances in which such testimony of the juror could not be excluded without violating the plainest principles of justice." *McDonald*, 238 U.S. at 268-69 (internal quotation marks omitted); *see also Warger*, 135 S. Ct. at 529 n.3 ("There may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged."). Following this principle, a number of courts have held that precluding such testimony under Rule 606(b) would violate the constitutional guarantee of a fair trial.

In *United States v. Villar*, 586 F.3d 76 (1st Cir. 2009), for example, the First Circuit reversed the trial court's ruling that Rule 606(b) foreclosed it from considering a juror's testimony about racially biased remarks by another juror during deliberations. *Id.* at 87. As the First Circuit explained, "[w]hile the issue is difficult and close, we believe that the rule against juror impeachment cannot be applied so inflexibly as to bar juror testimony in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant's right to due process and an impartial jury." *Id.* The Seventh Circuit similarly considered a juror's post-verdict affidavit alleging a racial slur by another juror, explaining that "[t]he rule of juror incompetency cannot be applied in such an unfair manner as to deny due process." *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987) (denying defendant's petition for writ of habeas corpus because there was insufficient evidence that racial slur, if it occurred, prejudiced defendant). A number of other federal and state courts similarly have

held that Rule 606(b) cannot be applied rigidly in cases where doing so would violate a defendant's Sixth Amendment rights. *See, e.g.*, *Villar*, 586 F.3d at 85-86 (compiling cases); *Developments in the Law – Race and the Criminal Process: Racist Juror Misconduct During Deliberations*, 101 Harv. L. Rev. 1595 (1988) (same).

II. COURTS HAVE AMPLE TOOLS AND METHODS TO ASSESS ALLEGATIONS OF JUROR BIAS FAIRLY AND EFFICIENTLY.

While the precise methods vary from jurisdiction to jurisdiction, courts have developed tools and practices to evaluate post-verdict allegations of juror misconduct.

1. Once an allegation of juror misconduct arises, the first step is for the judge to consider whether he or she should further investigate the allegation. Courts accordingly require a preliminary showing that the allegation is colorable. *See Economou v. Little*, 850 F. Supp. 849, 852-53 (N.D. Cal. 1994) ("Most federal courts deny requests to conduct post-verdict interviews of jurors unless there is a proper preliminary showing of likely jury misconduct or witness incompetency."); *United States v. Alexander*, 782 F.3d 1251, 1258 (11th Cir. 2015) (no hearing or further investigation of juror misconduct necessary absent "colorable showing of extrinsic influence" (quotation marks omitted)); *United States v. Gravely*, 840 F.2d 1156, 1159 (4th Cir. 1988) (request for leave to conduct post-verdict juror interviews properly denied because there was "no threshold showing of improper outside influence"). If

the claim is not colorable, the inquiry is at an end. *See, e.g.*, *Traver v. Meshriy*, 627 F.2d 934, 941 (9th Cir. 1980) (denying defendant's request for hearing regarding allegation that jury verdict was not unanimous, where jurors had assented to verdict in poll in open court); *Economou*, 850 F. Supp. at 852-53 (denying leave to interview jurors where "defendants have not made any preliminary showing" of either "extraneous prejudicial information . . . improperly brought to the jury's attention" or "any outside influence improperly brought to bear upon any juror"); *Gravely*, 840 F.2d at 1159 (denying defendant's request to interview jurors based on juror's comment to press that jurors were under "extreme pressure at the end of a two week trial" because there was no "threshold showing of improper outside influence" and "[t]he alleged pressure could have been brought by one juror on another" (internal quotation marks omitted)); *cf. United States v. Basham*, 561 F.3d 302, 317 (4th Cir. 2009) (conducting evidentiary hearing after learning that juror contacted news producer at television station during trial to discuss trial); *United States v. Blumeyer*, 62 F.3d 1013, 1015 (8th Cir. 1995) (granting request for leave to interview jurors when faced with credible allegation that juror consulted outside lawyer).

In assessing whether a party has made this preliminary showing, courts are mindful of the balance between the party's interest in a fair trial, a juror's interest in avoiding harassment, and the systemic interest in the finality of verdicts. *See Munafo v. Metro. Transp. Auth.*, 277 F. Supp. 2d 163, 170 (E.D.N.Y. 2003), *aff'd*, 381 F.3d 99 (2d Cir. 2004). In keeping this balance, courts are wary of giving weight

to *ex parte* juror affidavits, *see, e.g.*, *Munafo*, 277 F. Supp. 2d at 174; *Continental Casualty Co. v. Howard*, 775 F.2d 876, 886 (7th Cir. 1985), and reluctant to allow parties to interview jurors for the purpose of uncovering juror impropriety when the court has no basis to believe there has been misconduct. *See, e.g.*, *United States v. Cornelius*, 696 F.3d 1307, 1324 (10th Cir. 2012); *United States v. Davila*, 704 F.2d 749, 754-55 (5th Cir. 1983); *Economou*, 850 F. Supp. at 853.

2. When a party advances a colorable claim of juror misconduct, the judge conducts an evidentiary hearing to assess the credibility of the evidence, permitting juror testimony to the extent appropriate, provided the evidence is admissible. *See, e.g.*, *Blumeyer*, 62 F.3d at 1015; *Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914, 917 (7th Cir. 1991). When the allegation of misconduct involves an unauthorized communication between a juror and a third party, judges initially "limit the questions asked [to] jurors to whether the [alleged] communication was made . . . and what exactly it said." *Haugh*, 949 F.2d at 917.

3. Juror misconduct only serves to impeach the verdict if it is prejudicial. Accordingly, if the judge finds there has been juror misconduct, the judge next assesses whether the misconduct was prejudicial. Courts conduct this inquiry with rigor and care. Cases involving a juror's unauthorized communication with a third party are illustrative. In 1954, this Court held that "any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is . . . deemed presumptively prejudicial." *Remmer v. United States*,

347 U.S. 227, 229 (1954). But the modern practice is not to treat the *Remmer* presumption as "particularly forceful" in light of Rule 606(b) and this Court's later jurisprudence. *United States v. Williams-Davis*, 90 F.3d 490, 496-97 (D.C. Cir. 1996). Instead courts "focus[] on specific facts of the alleged contact" recognizing that trial courts have "broad discretion . . . to assess the effect of the alleged intrusions." *Id.* at 496-97; *United States v. Lloyd*, 269 F.3d 228, 238-39 (3d Cir. 2001) (applying *Remmer* presumption only "when the extraneous information is of a considerably serious nature"); *Stockton v. Virginia*, 852 F.2d 740, 745 (4th Cir. 1988) ("[W]hile a presumption of prejudice attaches to an impermissible communication, the presumption is not one to be casually invoked"); *United States v. Hall*, 85 F.3d 367, 371 (8th Cir. 1996) (only presuming prejudice if extrinsic evidence related to factual evidence – as opposed to legal issues – not developed at trial).

To determine whether particular juror misconduct was prejudicial – that is, whether there was a "reasonable possibility that the jury's verdict was influenced by an improper communication," *Basham*, 561 F.3d at 319 (quotation marks omitted) – courts assess numerous factors, including the duration of the improper communication or contact, the extent to which the communication was discussed and considered by the jury, the strength of the government's case, whether extraneous information was cumulative of evidence admitted at trial, and at what point in deliberations any extraneous evidence was introduced. *See id.* at 319-20 (deeming the prejudice inquiry a "heavy obligation" that "requires the court to examine

the entire picture, including the factual circumstances and the impact on the juror") (internal quotation marks omitted); *Stockton*, 852 F.2d at 747 (considering extent of exposure); *Lloyd*, 269 F.3d at 240-41 (considering timing of exposure, length of jury deliberations, and strength of government's case); *Williams-Davis*, 90 F.3d at 497 (considering nature of communication, length of contact, impact of the communication on other jurors, strength of government's case, and whether extraneous information was cumulative of evidence admitted at trial); *Hall*, 85 F.3d at 371 (noting that courts should consider manner in which extrinsic evidence was received by jury, whether it was discussed and considered extensively, and at what point during deliberations evidence was introduced, among other factors).

These cases, and others, illustrate the care courts take in conducting prejudice inquiries. In *Lloyd*, for example, a defendant was convicted of computer sabotage by planting a "time bomb" on his employer's computer, set to "detonate" after he was fired. 269 F.3d at 231. After the verdict, a juror reported to the court that, during the deliberation period, she heard a news report about a computer virus propagated by someone (not the defendant) with remote access to the infected computer. *Id.* The Third Circuit concluded that the juror's exposure to the story was not prejudicial because the jury did not discuss the story during deliberations, the juror was exposed to the story only after the jury had deliberated for two days, the government had advanced "strong uncontradicted evidence to support the verdict," and the news story

was not sufficiently related to the facts and theories of the case. *Id.* at 239-43.

In contrast, the court in *Williams-Davis* faced a more direct incident of outside influence: an allegation that the forewoman's husband advised her to "nail" the defendants. The court concluded there was no actual prejudice in light of the fact that the remark was isolated, the forewoman leaned heavily toward conviction during deliberations, and the evidence against the defendant was overwhelming. *Williams-Davis*, 90 F.3d at 497-98.

Lastly, *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001), reflects how courts are appropriately thorough when the situation calls for it. In *Elias*, the district court faced a factual dispute about whether the defendant asked a juror in the parking lot "what it would take" to win her vote. *Id.* at 1019-20. The district court conducted two "extensive" evidentiary hearings, taking testimony from all of the jurors, and ultimately credited the juror in the parking lot's testimony that the defendant briefly greeted the juror but did not make the concerning statement. *Id.* The district court also found – based on the testimony of two other jurors – that even if the concerning statement was made, it was made in a "joking manner" and was not prejudicial. *Id.* at 1020. The Ninth Circuit affirmed these factual findings as well as the district court's denial of the defendant's request for a new trial. *Id.* at 1020-21.

As these cases illustrate, courts capably employ a multi-step process to determine whether juror testimony or other evidence should be admitted and, if

so, whether a verdict should be impeached based on it. The process is structured such that courts need not expend significant time or resources on claims that are not colorable, but have the discretion to conduct a more searching inquiry when appropriate. The process also is structured to minimize juror harassment and respect the finality of verdicts by only affording relief – only impeaching the verdict – in the face of actual prejudice.

III. ALLOWING JURORS TO PROVIDE INFORMATION ABOUT RACIAL BIAS IN DELIBERATIONS FITS COMFORTABLY WITHIN TRADITION AND EXISTING PRACTICE.

The need to ensure that juries are not tainted by racial bias is at least as important, constitutionally speaking, as the need to ensure that juries are not tainted by the sorts of external influences covered by Rule 606(b). The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI. Thus, "[o]ne touchstone of a fair trial" is the guarantee of an impartial jury that is "capable and willing to decide the case solely on the evidence before it." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (internal quotation marks omitted). "The obvious difficulty with prejudice in the judicial context is that it prevents the impartial decision-making that both the Sixth Amendment and fundamental fair play require." *Villar*, 586 F.3d at 84-85 (quoting *United States v. Heller*, 785 F.2d 1524, 1527

(11th Cir. 1986)). Accordingly, as this Court has emphasized, "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). It therefore would be anomalous to admit juror testimony of less pernicious extraneous information and outside influence, while barring juror testimony regarding the "especially pernicious" factor of racial bias.

Allowing juror testimony regarding racial bias in deliberations also fits comfortably within courts' existing practices and procedures. Broadly speaking, when courts are faced with any allegation of juror misconduct, they must determine whether the allegations are colorable, supported by sufficient evidence, and sufficiently prejudicial to justify impeaching the verdict. The same tools and practices courts use to assess other allegations of juror misconduct – including evidentiary and other hearings – work equally well for assessing allegations of racial bias in deliberations.

First, the court's threshold determination about whether an allegation is sufficiently colorable to warrant further evidentiary proceedings will – regardless of the subject matter at issue – take account of factors such as "the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source." *Cornelius*, 696 F.3d at 1324 (quoting *United States v. Smith*, 424 F.3d 992, 1012 (9th Cir. 2005)).

Second, a court's determination about whether an allegation is supported by sufficient evidence will involve the same evidentiary analyses and tools, regardless of whether the allegation involves racial bias or another type of juror misconduct. When the evidence includes juror testimony, the court must of course make the key determination as to whether that testimony is admissible under Rule 606(b) or another source. And to make this determination in the Rule 606(b) context, courts successfully and routinely engage in line drawing. For example, courts engage in the sometimes thorny exercise of assessing whether alleged improper influences on jurors are external – making juror testimony permissible under Rule 606(b) – or internal – making juror testimony impermissible under Rule 606(b). *See, e.g.*, *Crawford v. Head*, 311 F.3d 1288, 1333-34 (11th Cir. 2002) (nursing student "bringing [her nursing] experiences to bear" on assessment of physical evidence properly before the jury constitutes permissible internal influence); *United States v. Vasquez-Ruiz*, 502 F.3d 700, 704-05 (7th Cir. 2007) (holding that "GUILTY" written in a juror's notebook mid-trial by an unknown source constitutes external influence); *United States v. Paneras*, 222 F.3d 406, 411 (7th Cir. 2000) (cartoon drawn by professional artist juror, and shared with other jurors, depicting defendant and his actions is internal influence); *Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1462 (9th Cir. 1989) (observing that juror's personal knowledge of "facts specific to the litigation" constitutes improper external influence but general knowledge such as "a basic understanding of x-ray interpretation" does not). This Court has praised lower courts for "wisely"

applying this internal/external distinction. *Tanner*, 483 U.S. at 118.

Courts use similar line-drawing exercises in assessing whether a juror's testimony pertains to racial bias in deliberations. For example, they distinguish stray comments from material ones, recognizing in the racial-bias context "that not every stray or isolated off-base statement made during deliberations requires a hearing at which juror testimony is taken." *Villar*, 586 F.3d at 87. Courts also recognize that when statements or expressions allegedly evidencing such bias are ambiguous, impeachment of the verdict should not necessarily follow. *See, e.g.*, *State v. Brown*, 62 A.3d 1099, 1110-11 (R.I. 2013) (agreeing with trial court that, in case involving Native American defendant, juror's act of "banging water bottles like tom-tom drums" during deliberations is "ambiguous" and "capable of different interpretations" (internal quotation marks omitted)). For example, courts will examine "the precise content and context" of the racial statement at issue to determine "whether it reflects the juror's actual racial or ethnic bias, or whether it was said in jest." *Commonwealth v. McCowen*, 939 N.E.2d 735, 765 (Mass. 2010). And, of course, courts have substantial experience analyzing the "precise context and content," *id.*, of statements outside the racial-bias context in other 606(b) cases. *See*, *e.g.*, *Elias*, 269 F.3d at 1020.

Finally, courts have substantial experience assessing whether juror misconduct was sufficiently prejudicial to warrant a new trial. *See supra*. In fact, many of the factors that courts already consider in

assessing whether particular juror misconduct is prejudicial would also apply to allegations of racial bias, including the extent to which the improper consideration was discussed and considered by the jury, at what point in deliberations the racial consideration was raised, and the strength of the government's case. *See Shillcutt*, 827 F.2d at 1159-60 (holding that alleged racial slur, even if made, would not have created sufficient prejudice to warrant habeas relief, where evidence suggested it was stray remark that did not affect deliberations or verdict); *State v. Watkins*, 526 N.W.2d 638, 640-41 (Minn. Ct. App. 1995) (finding prejudice where multiple jurors referred to defendant as "darky," evidence did not weigh heavily against defendant, and there were no curative measures or instructions on racial or ethnic bias); *see also Dietz*, 136 S. Ct. at 1894 (discussing multiple different factors that court may consider to determine whether prejudice was created by district court's recall of jury it had already discharged).

In sum, judicial treatment of jurors' allegations of racial bias mirrors courts' vigilant and resourceful approach to applying the existing Rule 606(b) exceptions. In the event more courts were to consider juror testimony of racial bias, there is little doubt they are well-equipped to assess such allegations and would continue to use the tools and practices already in place to do so efficiently and accurately.

CONCLUSION

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

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