No. 09-5429

IN THE

Supreme Court of the United States

KERRY DEAN BENALLY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR EVIDENCE AND CRIMINAL PROCEDURE SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici curiae are law professors at various law schools across the country who specialize in Evidence and Criminal Procedure.[1] As professors of law, *amici* have a particular interest in ensuring that the Federal Rules of Evidence are applied in a consistent manner that comports with the goals that the rules were designed to achieve. The Tenth Circuit's decision, like those of other courts that have reached similar conclusions, creates inconsistency in the lower courts and reaches a result that does not comport with the purpose of the rules considered in light of the constitutional right to present a defense.

SUMMARY OF ARGUMENT

The Petition presents important questions concerning the application of the Rules of Evidence when they intersect with fundamental rights and interests of justice. Specifically, the Petition raises two questions: (1) whether Rule 606(b) bars juror testimony that demonstrates that some jurors gave dishonest answers during voir dire; and (2) whether a rule that bars juror testimony demonstrating both dishonest juror answers during voir dire and racial bias is unconstitutional.

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1. *Amici*'s names and law school affiliations are listed in the Appendix to this brief. No person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have received timely notice of the intent to file this brief and have consented to its filing. The letters of consent have been filed with the Clerk.

As the Petition demonstrates, the Circuits are split on the admissibility of juror testimony of racial bias that demonstrates dishonest answers during voir dire. In this brief, *amici* expound upon an additional reason for granting certiorari: the decisions of the Tenth Circuit and other courts that have held such testimony inadmissible are inconsistent with this Court's constitutional precedents. The Petition discusses the Sixth Amendment right to an impartial jury, free from racial bias. *Amici* here emphasize the importance of a line of caselaw directly relevant to this argument: that delineating the right to present a defense. The Tenth Circuit did not discuss this right, and, consequently, reached a result clearly inconsistent with it.[2]

Based on the Compulsory Process Clause and the Due Process Clause, this Court has repeatedly held that a criminal defendant has a right to present a defense. It has therefore consistently deemed unconstitutional an application of evidentiary rules to exclude material evidence when exclusion of the evidence would conflict with the purposes the rules were designed to achieve.

Lower courts have applied somewhat different tests in determining when the right to present a

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2. *Amici* agree with Petitioner that Rule 606(b), properly interpreted, permits use of juror testimony to demonstrate dishonest juror answers during voir dire. *Amici* submit this brief, however, to explain that juror testimony showing either (a) dishonest answers during voir dire or (b) racial bias must be admissible under this Court's precedents concerning the right to present a defense.

defense is applicable, and this Court should take this opportunity to clarify the exact contours of the proper test. But this Court's discussion of the right makes clear that the Tenth Circuit's decision violates it. The Tenth Circuit's approach denied Petitioner his right to present the sole evidence relevant to a defense that would entitle him to a new trial: evidence of juror racial bias as well as evidence of deceit in the voir dire process. And presentation of this evidence would not undermine the purposes of Rule 606(b). This rule is rooted in caselaw that itself makes clear that "there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.'" *McDonald v. Pless*, 238 U.S. 264, 268-69 (1915) (quoting *Mattox v. United States*, 146 U.S. 140, 148 (1892)). That is the case where the evidence shows racial bias and dishonesty during voir dire. Moreover, because the evidence excluded by the Tenth Circuit is admissible in contempt proceedings, exclusion of this evidence when a defendant seeks a new trial does little, if anything, to protect jury deliberation.

As law professors with a focus on evidence and criminal procedure, *amici* wish to underscore the critical need for this Court to resolve the Circuit split to ensure uniform application of Rule 606(b). Currently, as a result of the split among the Circuits, a defendant's ability to present a defense that jurors were racially biased and dishonest during voir dire depends on the jurisdiction in which his case arises. Such an arbitrary result not only "violat[es] the plainest principles of justice," *Pless*, 238 U.S. at 268-69, but also undermines public confidence in the fairness of the jury system. This Court should grant

certiorari to make clear that its precedent requires that criminal defendants be permitted to introduce juror testimony demonstrating racial bias or dishonest answers during voir dire.

ARGUMENT

I. THE RIGHT TO PRESENT A DEFENSE IS IMPLICATED HERE.

The right to present a defense is rooted in the Compulsory Process and Due Process Clauses of the Constitution, *see Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *Washington v. Texas*, 388 U.S. 14, 18 (1967), each of which has broad application to all phases of a criminal proceeding. As this Court has recognized, the right to present a defense extends beyond the guilt or innocence phase of a trial. *See, e.g.*, *Green v. Georgia*, 442 U.S. 95, 97 (1979) (holding unconstitutional the application of a rule of evidence during the sentencing phase of a trial and noting "[t]he excluded testimony was highly relevant to a critical issue in the punishment phase of the trial").

Here, in Petitioner's motion for a new trial, he tried to present evidence that jurors in his criminal trial made racially biased statements during court proceedings, and that they answered dishonestly voir dire questions directed at ascertaining the existence of any such racial bias. *See* Pet. at 4. The exclusion of that evidence through application of Rule 606(b) implicates Petitioner's right to present a defense for two reasons.

First, as the Petition explains, it is well established that the presence of a biased juror is a "structural defect not subject to harmless error analysis," necessitating "a new trial without a

showing of actual prejudice." *Dyer v. Calderon*, 151 F.3d 970, 973 n.2 (9th Cir. 1998); *see also Gray v. Mississippi,* 481 U.S. 648, 668 (1987) (right to impartial jury is "so basic to a fair trial that [its] infraction can never be treated as harmless error") (internal quotation marks omitted); Pet. at 21. Thus, "[o]ne racist juror would be enough" to require the reversal of a verdict. *United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001); *see also Gray*, 481 U.S. at 668. Because the presence of a biased juror can never constitute *harmless* error, the evidence excluded by the Tenth Circuit was probative of a critical defense raised by Petitioner -- one that would have overturned the verdict against him if he prevailed on the issue. *See, e.g.*, *State v. Santiago*, 715 A.2d 1, 20 (Conn. 1998) ("Allegations of racial bias on the part of a juror are fundamentally different from other types of juror misconduct because such conduct is, ipso facto, prejudicial.").

Second, it is equally well established that if an appellant can "demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause," he is entitled to a new trial. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984). Because "[d]emonstrated bias in the responses to questions on voir dire may result in a juror being excused for cause," *id.* at 554, the evidence excluded by the Tenth Circuit here also was critical to Petitioner's ability to establish a right to a new trial based on dishonest voir dire responses.

II. THE RIGHT TO PRESENT A DEFENSE REQUIRES ADMISSION OF CERTAIN EVIDENCE OTHERWISE BARRED BY THE FEDERAL RULES OF EVIDENCE.

This Court has held that the right to present a defense may trump rules of evidence. *See, e.g.*, *Chambers*, 410 U.S. at 301-02 ("where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice"); *see also Green*, 442 U.S. at 97 (same for punishment phase). In *Washington v. Texas*, 388 U.S. 14 (1967), for example, the Court held that rules deeming whole categories of witnesses untrustworthy and thus unfit to testify were unconstitutional under the Compulsory Process Clause. *Id*. at 22. Likewise, the Court has held that the right to present a defense requires that a criminal defendant be permitted to present impeachment evidence otherwise barred under a hearsay rule. *See Chambers*, 410 U.S. at 301-02.[3] As noted above, the right extends to phases of a trial beyond the guilt or innocence phase. *See Green*, 442 U.S. at 97.

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3. In *Chambers*, the right to present a defense was rooted in the Due Process Clause, and in *Washington* it was rooted in the Compulsory Process Clause. As the Court has explained, however, "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment, . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, . . . the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

To determine whether the ends of justice require that a defendant be permitted to present certain evidence as part of his defense, this Court has looked to and weighed factors such as the importance of the evidence, the weightiness of the issue, and the purpose of the evidentiary rule impeding admission of the evidence. *See, e.g.*, *id.* (concluding that right to present a defense was violated by application of a hearsay rule to bar a defendant from presenting testimony implicating an alternate suspect because the testimony was "highly relevant to a critical issue in the punishment phase of the trial"); *see also United States v. Scheffer*, 523 U.S. 303, 308 (1998) (holding that "the exclusion of evidence [can] be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused"); *Rock v. Arkansas*, 483 U.S. 44, 56-60 (1987) (holding that a per se rule excluding hypnotically refreshed testimony was "arbitrary or disproportionate to the purposes" the rule was "designed to serve"). In balancing these factors, courts "must evaluate whether the interests served by a rule justify the limitation imposed" on a defendant's fundamental rights. *Rock*, 483 U.S. at 56.

This Court's most recent examination of the right to present a defense reaffirmed the relevance of these factors, holding that a rule preventing a defendant from presenting alternate suspect evidence violated that important right. *See Holmes v. South Carolina*, 547 U.S. 319, 324-25 (2006). The Court based this determination on its conclusion that such a rule "'infring[ed] upon a weighty interest of the accused' and [was] arbitrary or 'disproportionate to the purposes [it was] designed to serve,'" and that

the rule as applied did not serve the end it was designed to promote. *Id.* at 324-25, 331 (quoting *Scheffer*, 523 U.S. at 308).

III. THE LOWER COURTS ARE IN DISARRAY AS TO HOW TO APPLY THIS COURT'S JURISPRUDENCE ON THE RIGHT TO PRESENT A DEFENSE.

That line of decisions by this Court clearly establishes that the right to present a defense may require admission of evidence that might otherwise be excluded under rules of evidence.[4] Nevertheless, lower courts have inconsistently applied the principles established by this Court, assessing whether the right to present a defense trumps a rule of evidence using a "variety of tests" that is "remarkable." Janet C. Hoeffel, *The Sixth Amendment's Lost Clause: Unearthing Compulsory Process*, 2002 Wis. L. Rev. 1275, 1353.

For example, the Third Circuit has held that a court violates a criminal defendant's right to present a defense when (1) its application of an evidentiary rule deprives or would deprive the defendant "of the

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4. Notably, many states have anti-jury impeachment evidentiary rules that are similar to Federal Rule of Evidence 606(b). *See, e.g.*, Ala. R. Evid 606(b); Alaska R. Evid. 606(b); Ariz. R. Evid 606(b); Ark. R. Evid 606(b); Colo. R. Evid. 606(b); Del. R. Evid. 606(b); Idaho R. Evid. 606(b); Iowa R. Evid. 606(b); Me. R. Evid. 606(b); Md. R. 5-606(b); Minn. Evid. R. 606(b); Miss. R. Evid. 606(b); Neb. Rev. Stat. § 27-606; N.M. R. Evid 11-606(b); N.D. R. Evid. 606(b); Ohio R. Evid. 606(B); 12 Okla. Stat. § 2606(b); Pa. R. Evid. 606; Tex. R. Evid. 606(b); Vt. R. Evid. 606(b); W. Va. R. Evid. 606(b); Wis. Stat. § 906.06(2); Wyo. R. Evid. 606(b).

opportunity to present evidence in his favor"; (2) the excluded evidence was or would be "material and favorable to his defense"; and (3) the deprivation was or would be "arbitrary or disproportionate to any legitimate evidentiary or procedural purpose." *Gov't of Virgin Islands v. Mills*, 956 F.2d 443, 446 (3d Cir. 1992). But cases from the Second, Sixth, Seventh, and Ninth Circuits have applied different tests to analyze right-to-present-a-defense claims, ranging from harm-based tests rooted in *Brady v. Maryland*, 373 U.S. 83 (1963), to tests examining whether the evidence at issue is "critical." Hoeffel, 2002 Wis. L. Rev. at 1353.[5]

By granting *certiorari* and evaluating whether the Tenth Circuit's decision violated Petitioner's right to present a defense, this Court can clear up

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5. For example, the Second Circuit has applied a harm-based tests rooted in *Brady*. *See, e.g.*, *Washington v. Schriver*, 255 F.3d 45, 56 (2d Cir. 2001). In contrast, the Sixth, Seventh, and Ninth Circuits look at a variety of factors, with an emphasis on how critical or central the evidence in question is, to determine whether the right to present a defense requires admission of evidence otherwise barred by the Federal Rules of Evidence. *See, e.g.*, *Turpin v. Kassulke*, 26 F.3d 1392, 1396 (6th Cir. 1994) (applying a three-part test that examines (1) whether "the proffered evidence is 'critical' in the context of the case"; (2) "the extent to which [it] 'tend[s] to exculpate' the accused"; and (3) "whether the proffered evidence bears 'persuasive assurances of trustworthiness'" (quoting *Chambers*, 410 U.S. at 297, 302 & n.21)); *United States v. Brown*, 785 F.2d 587, 590 (7th Cir. 1986) (analyzing whether the exclusion of evidence would lead to defendant's "total inability to present a theory of defense"); *Chia v. Cambra*, 281 F.3d 1032, 1037 (9th Cir. 2002) (applying a five-factor analysis that examines, *inter alia*, whether the evidence relates to a "central issue," is the "sole evidence" on the issue, and was "a major part" of the defense").

the confusion in the lower courts and specify exactly which factors courts should consider.

IV. THE TENTH CIRCUIT'S APPLICATION OF RULE 606(B) IS INCONSISTENT WITH THIS COURT'S DECISIONS ON THE RIGHT TO PRESENT A DEFENSE.

In precluding Petitioner from presenting juror testimony of racial bias and dishonesty during voir dire, the Tenth Circuit considered Petitioner's Sixth Amendment right to an impartial jury and this Court's caselaw applying that right. It did not, however, discuss this Court's caselaw on the right to present a defense. The factors this Court has articulated as relevant in evaluating whether the right to present a defense has been violated make clear that the Tenth Circuit's decision conflicts with this Court's precedent. The key factors this Court has articulated as relevant -- corroboration, materiality, weightiness of the defendant's interests, and the purpose of the rule, *see, e.g.*, *Chambers*, 410 U.S. at 302; *Green*, 442 U.S. at 97; *Rock*, 483 U.S. at 57 -- all weigh in favor of admitting evidence of juror bias and juror dishonesty during voir dire to show a structural error that would have rendered the verdict constitutionally invalid.

A. The evidence at issue is corroborated and central to Petitioner's important interests.

The evidence that the Tenth Circuit deemed inadmissible was both corroborated and central to Petitioner's interests. As a general matter, because it occurs in front of the entire jury, racist conduct of jurors during deliberations is easier to prove or

disprove than outside influence or prejudicial information that affects only one juror. *See Racist Juror Misconduct During Deliberations*, 101 Harv. L. Rev. 1595, 1597 (1988). And in this particular case, another juror corroborated the testimony proving juror racial bias and establishing the dishonesty of juror answers to questions about such bias posed during voir dire.

Moreover, the excluded juror testimony was the sole evidence of juror bias available to Petitioner. Because only jurors are privy to their deliberations, juror testimony is "the only available evidence to establish racist juror misconduct." *Id.* at 1596. Given that racist sentiment is easily observable in the jury room, juror testimony can establish whether jurors were truthful during voir dire or are racially biased against a defendant. Establishing that jurors did harbor such biases implicates a defendant's core right to an unbiased jury. Excluding testimony establishing such bias therefore completely barred Petitioner from presenting the evidence central to a critical defense that automatically would have entitled him to a new trial.

B. The Tenth Circuit's mechanistic interpretation of Rule 606(b) is arbitrary and inconsistent with the Rule's purposes.

This Court has made clear that, in addition to considering the interests of the defendant, courts "must evaluate whether the interests served by a rule justify the limitation imposed" on a defendant's fundamental rights. *Rock*, 483 U.S. at 56; *see also Chambers*, 410 U.S. at 301-02 (explaining that under certain circumstances an evidentiary rule "may not

be applied mechanistically to defeat the ends of justice").

The origins of Rule 606(b) make clear that the Rule was not intended to bar testimony when such an exclusion would violate fundamental rights and the interests of justice. In *McDonald v. Pless*, 238 U.S. 264 (1915), the last significant word from this Court on jury impeachment before the enactment of the Federal Rules of Evidence, the Court "recognize[d] that it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.'" *Id.* at 268-69 (quoting *Mattox v. United States*, 146 U.S. 140, 148 (1892)).[6] Rule 606(b) relies heavily upon *Pless*. *See* Fed. R. Evid. 606(b) advisory committee's note. Thus, in assessing whether exclusion of juror testimony in this case was constitutional under this Court's precedents, the Tenth Circuit should have taken into account that Rule 606(b) was not intended to bar critical testimony implicating the plainest principles of justice.

More specifically, the particular purposes of the Rule are not served by exclusion of the evidence that Petitioner sought to introduce in this case. An examination of the historical origins of Rule 606(b) reveals that its primary purpose is to ensure reliable evidence. That purpose can be traced all the way

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6. Notably, in *Pless*, the Court prohibited jury impeachment only in civil cases, leaving open the possibility that the balance of interests might be different in criminal cases or contempt proceedings.

back to an old English doctrine called Mansfield's Rule, which states that "a person testifying to his own wrongdoing [is] by definition, an unreliable witness." David A. Christman, *Note: Federal Rule of Evidence 606(b) and the Problem of "Differential" Juror Error*, 67 N.Y.U. L. Rev. 802, 815 n.78 (1992). Another goal of the Rule -- and the one the Tenth Circuit relied upon below -- is to protect jury deliberations "from subsequent second-guessing by the judiciary." *United States v. Benally*, 546 F.3d 1230, 1233 (10th Cir. 2008) (Rule 606(b) "insulates the deliberations of the jury"). As demonstrated below, the Tenth Circuit's categorical exclusion of juror testimony on the jury's racial bias is disproportionate to both purposes.

1. A mechanistic application of Rule 606(b) is disproportionate to the Rule's stated purpose of excluding unreliable testimony.

A mechanistic application of Rule 606(b) prevents a whole category of witnesses -- jurors -- from impeaching their verdict after trial on the basis of a prior assumption that such testimony is unreliable. But this Court has long made clear that such a categorical presumption of unreliability is not constitutionally supportable. *See, e.g.*, *Washington*, 388 U.S. at 22; *Rock*, 483 U.S. at 61. Blanket exclusion of juror testimony of racial bias is thus inconsistent with this Court's rejection of rules that "prevent[] whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief." *Washington*, 388 U.S. at 22.

Notably, the Rules of Evidence themselves generally eliminated reliability-based competency rules in criminal cases. Under Rule 601, "[e]very person is competent to be a witness except as otherwise provided in these rules." Fed. R. Evid. 601. The accompanying Advisory Committee note states that:

> [t]his general ground-clearing eliminates all grounds of incompetency not specifically recognized in the succeeding rules of this Article. Included among the grounds thus abolished are religious belief, conviction of crime, and connection with the litigation as a party or interested person or spouse of a party or interested person.

Fed. R. Evid. 601 advisory committee note.[7]

Rule 606(b) stands as an anomaly following the purging of reliability-based competency rules in criminal cases. As this Court has explained, the "truthfulness" of witnesses -- and thus the concern

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7. As the Advisory Committee noted, for the most part, the only remaining rules of evidence that preclude a category of witnesses from testifying on the basis of an a priori categorization that presumes them untrustworthy of belief are state Dead Man's Statutes -- which, critically, are applicable only in civil trials. *See, e.g.*, *Fullerton Lumber Co. v. Korth*, 127 N.W.2d 1, 4 (Wis. 1964). Most states have now repealed their Dead Man's Statutes. *See* Wesley P. Page, *Dead Man Talking: A Historical Analysis of West Virginia's Dead Man's Statute and a Recommendation for Reform*, 109 W. Va. L. Rev. 897, 898 (2007).

underlying the Rule's categorical exclusion -- "can be tested adequately by cross-examination." *Rock*, 483 U.S. at 52. Because the Tenth Circuit applied the Rule in a way that excludes a category of evidence based on a prior determination of its reliability -- without consideration of whether such an application "violat[es] the plainest principles of justice," *Pless*, 238 U.S. at 268-69 -- the Tenth Circuit's decision is inconsistent with this Court's precedent. *See, e.g.*, *Washington*, 388 U.S. at 22; *Rock*, 483 U.S. at 61.

2. A mechanistic application of Rule 606(b) is disproportionate to the Rule's stated purpose of protecting juror deliberations.

In denying admission of testimony of juror racial bias, the Tenth Circuit relied primarily on the notion that Rule 606(b) serves to protect jury deliberations from judicial "second-guessing." *Benally*, 546 F.3d at 1240. However, in the criminal context in particular, a defendant's need to present juror testimony on racial bias during deliberations -- testimony revealing a structural defect sufficient to render the verdict invalid, *see, e.g.*, *Henley*, 238 F.3d at 1120 -- outweighs any interest in protecting deliberations from any later inquiry.

That is so in part because that interest is significantly weakened where the same testimony sought to be excluded to protect deliberations is deemed admissible in other contexts. *See Washington*, 388 U.S. at 22 (noting that Texas statutes "disqualifying an alleged accomplice from testifying on behalf of the defendant" could not be defended against a Compulsory Process Clause challenge because they allowed such alleged

accomplices to testify under slightly different circumstances and for slightly different purposes). Here, as the Tenth Circuit recognized, juror testimony "can be used to show dishonesty during voir dire, for purposes of contempt proceedings against the dishonest juror." *Benally*, 546 F.3d at 1235 (citing *Clark v. United States*, 289 U.S. 1, 12-14 (1933)). Admitting such testimony in contempt proceedings implicates the same interests as admission of juror testimony in support of a motion for a new trial: concerns about juror unreliability, juror harassment, and juror embarrassment when biased or untruthful comments are exposed in open court. Precluding jurors from testifying for certain purposes and under certain circumstances while allowing them to testify for technically different purposes and under different circumstances serves no legitimate purpose.

Thus, permitting this same testimony in additional contexts -- namely, those where fundamental rights are at stake -- would do little, if anything, to undermine an interest in free juror deliberation. At the same time, Petitioner's fundamental rights weigh heavily in the balance, and in this case they tip the scales in favor of admission of the disputed evidence. *See, e.g.*, *Levinger v. Mercy Med. Ctr.*, *Nampa*, 75 P.3d 1202, 1207 & n.3 (Idaho 2003) (holding that Idaho equivalent of Rule 606(b) does not bar the introduction of juror affidavits revealing dishonesty during voir dire even though the court was "not unmindful of the policy goals underlying I.R.E. 606(b), namely, to promote finality, protect jurors from post-trial inquiry or harassment, and to avoid

the practical concern that an affidavit by a juror to impeach the verdict is potentially unreliable").

The Tenth Circuit failed to undertake this sensible balancing in light of the admissibility of the evidence in other contexts. There is no principled basis for such an approach.

C. This Court's decision in *Tanner v. United States* does not compel the Tenth Circuit's application of Rule 606(b).

In applying Rule 606(b) mechanistically and without consideration of Petitioner's right to present his defense, the Tenth Circuit relied on this Court's decision in *Tanner v. United States*, 483 U.S. 107 (1987), a case in which this Court concluded that Rule 606(b) precluded jury impeachment regarding substance abuse by jurors. *See id.* at 109-10, 113-15. But *Tanner* is fundamentally different from this case, and does not control here, or excuse the Tenth Circuit's failure to apply this Court's precedents establishing the right to present a defense. That is because evidence of juror *incompetence* necessarily requires a judge to inquire into a jury decision-making process, while evidence of juror *bias* does not.

In *Tanner*, the Court held that admitting evidence of juror substance abuse would require a judge to examine the effect of the substances on jurors' mental processes in reaching the verdict. Such an inquiry, the Court reasoned, would invade the province of the jury and potentially subject jurors to harassment. *See id.* at 127. The Court relied on the fact that "several aspects of the trial process," such as voir dire, observations of jurors by court

personnel and counsel, and the availability of non-juror evidence of any misconduct, provide protection to a defendant's interest in an unimpaired jury. *Id.* The Court therefore concluded that the balance of interests weighed in favor of protecting the integrity of jury deliberations.

In contrast, in a case alleging deceit in the voir dire process and juror racial bias, those particular aspects of the trial process do nothing to ensure protection of a defendant's fundamental rights. For example, a sleeping or otherwise incompetent juror can readily be detected by the judge based on mere observation. But nothing prevents jurors from lying about the existence of bias, or from exhibiting that bias in a context in which the judge and the lawyers are not watching.

Moreover, unlike testimony about juror incompetence, testimony about juror racial bias does not require a judge to inquire into the mental processes underlying the verdict in order to establish that the bias entitles the defendant to a new trial. This point is made clear by an opinion from the Appellate Court of Connecticut, a state that allows jurors to impeach their verdicts through allegations of juror bias. That court allowed jurors to impeach their verdict convicting an African-American defendant of robbery through allegations of a juror's racist comments. *See State v. Phillips*, 927 A.2d 931, 934-36 (Conn. App. 2007). During the jurors' testimony, the trial court asked the jurors whether anything improper influenced their verdict. *See id.* at 937. On appeal, however, the Appellate Court of Connecticut concluded that the trial court:

> should not[] have asked jurors whether anything improper had influenced their verdict. It should have instead restricted its inquiry to objective evidence of racially related statements and behavior.[] The court should then have decided whether that evidence amounted to racial bias against the defendant on the part of one or more jurors, which would have automatically warranted a new trial.

Id. at 937-38.

In other words, once racial bias has been established, there is no need for the court to determine whether bias affected the verdict. That is because juror racial bias constitutes a "structural defect not subject to a harmless error analysis"; instead, it necessitates "a new trial without a showing of actual prejudice." *Dyer*, 151 F.3d at 973 n.2; *see also Gray*, 481 U.S. at 668 (right to impartial jury "so basic to a fair trial that [its] infraction can never be treated as harmless error"). Accordingly, courts hearing evidence of bias would not need to consider whether the same verdict would have been reached if the bias had not come into play. Rather, courts would need to consider only whether the juror made the alleged remarks and whether those remarks evinced bias. *See Dyer*, 151 F.3d at 973 n.2.

In the end, Petitioner's interest in an impartial jury outweighs any countervailing interests here. "The right to trial by an impartial jury lies at the heart of due process." *Porter v. Illinois*, 107 S. Ct. 298, 299 (1986). And "[a]llegations of racial bias on the part of jury members strike at the heart of that

right." *Phillips*, 927 A.2d at 933. Petitioner's interests thus tip the scales of justice in favor of admission of the evidence, especially where there are no "other sources of protection of [a defendant's] right" to an impartial jury. *See Tanner*, 483 U.S. at 127. This Court should therefore address the conflict between its precedents and the Tenth Circuit's decision, and make clear that juror testimony of racial bias or dishonest statements during voir dire is admissible.

CONCLUSION

For these reasons and those set forth in the Petition, the Petition for Certiorari should be granted.

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