NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2009

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

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Petitioner, Kerry Dean Benally, by and through his court-appointed counsel, Scott Keith Wilson, respectfully requests this Honorable Court for leave to proceed *in forma pauperis* in filing the attached Petition for Writ of Certiorari. In support of this request, Petitioner states that undersigned counsel was appointed pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, by the United States Court of Appeals for the Tenth Circuit, and he is unable to retain counsel and pay for the costs attendant to the proceedings before the Honorable Court.

WHEREFORE, the Petitioner, Kerry Dean Benally, respectfully requests that he be granted leave to proceed *in forma pauperis*.

Respectfully submitted,

_____

SCOTT KEITH WILSON
Utah Federal Defender's Office
46 West 300 South, Suite 110
Salt Lake City, UT 84101
(801) 524-4010

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SCOTT KEITH WILSON
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QUESTIONS PRESENTED

1. Does Federal Rule of Evidence 606(b) permit the court to consider statements made by jurors during deliberations to prove that jurors gave false responses during voir dire?
2. If so, does the Constitution limit application of Rule 606(b) with regard to consideration of racist statements made during deliberations?

LIST OF PARTIES

1. United States of America

2. Kerry Dean Benally

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2009

KERRY DEAN BENALLY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PRAYER

Petitioner Kerry Dean Benally respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is published at 546 F.3d 1230. The court's denial of Mr. Benally's Petition for Rehearing En Banc is published at 560 F.3d 1151.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 2008. The court denied Petitioner's timely petition for rehearing on March 23, 2009. An extension of time for filing this Petition was granted by the Court up to July 20, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

1. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense

2. Rule 606(b) of the Federal Rules of Evidence provides:

> **Inquiry into validity of verdict or indictment.** 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 that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. 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.

STATEMENT

Rule 606(b) of the Federal Rules of Evidence precludes jurors from testifying as to anything that occurs during jury deliberations when a court is considering "the validity of a verdict." In this case, the district court considered testimony from jurors in ordering a new trial based on its finding that racially biased jurors had lied during voir dire and convicted a minority defendant. The court of appeals reversed the trial court and reinstated the verdict, however, holding that Rule 606(b) precludes any remedy for this undisputed violation of Petitioner's Sixth Amendment rights. As both the court below and the government have explicitly acknowledged in this case, the circuit courts are in fundamental disagreement as to the proper scope of this rule when a juror in a criminal case seeks to testify that racist statements were made by fellow jurors during deliberations.

Petitioner Kerry Dean Benally, a member of the Ute Mountain Ute tribe, was charged with assaulting a Bureau of Indian Affairs officer with a dangerous weapon. Pet. App. 2a. During voir dire, the district court judge asked the prospective jurors questions specifically targeted at determining whether anyone had any prejudice toward Native Americans or held any preconceived notions about Native Americans that might impact their ability to be impartial in the case. None of the prospective jurors indicated that they had any such issues with Native Americans. A jury was chosen from the panel and found Petitioner guilty. *Id*.

The day after the jury announced its verdict, one juror, "Juror K.C.," approached defense counsel and reported that the jury's deliberations had been improperly influenced by racist claims about Native Americans. Pet. App. 3a. Juror K.C. stated that the jury foreman told the other jurors that he used to live on or near an Indian Reservation, that "[w]hen Indians get alcohol, they

all get drunk," and that when they get drunk, they get violent. Juror K.C. said that when she then argued with the foreman that not all Native Americans get drunk, the foreman insisted, "Yes, they do." Juror K.C. reported that a second juror then chimed in to say that she had also lived on or near a reservation. While Juror K.C. could not hear the rest of this juror's statement, it was "clear she was agreeing with the foreman's statement about Indians." Juror K.C. continued to argue with the foreman, going back and forth several times. *Id.*

Juror K.C. also described another exchange in which some jurors discussed the need to "send a message back to the reservation." During this exchange, one juror related that he had two family members in law enforcement and had "heard stories from them about what happens when people mess with police officers and get away with it." *Id.*

Juror K.C. signed an affidavit describing these discussions. A defense investigator then contacted another juror who generally corroborated Juror K.C.'s claims, but was unwilling to sign an affidavit. The defense investigator did, however, submit an affidavit saying that the second juror "indicated that the jury foreman made a statement regarding Indians and drinking" and "said something like he had seen a lot of Indians that drink." The investigator also testified that the juror recalled a statement about "sending a message back to the reservation." Pet. App. 4a.

Based on these affidavits, defense counsel moved for a new trial. In response, the government opposed the district court's consideration of the affidavits under Rule 606(b), but did not seek to present any contrary evidence and did not request a hearing to dispute the facts described in the affidavits. Pet. App. 27a.

The district court vacated the conviction and ordered a new trial. Pet. App. 31a. The court granted the motion on two independent grounds: first, the court found that two of the

jurors had made misrepresentations during voir dire by not responding forthrightly to direct questions regarding their experience with Native Americans, and that if they had answered the questions truthfully, they would have been removed from the jury panel for cause. Pet. App. 29a. The court also held that the presence of these jurors resulted in a denial of Petitioner's Sixth Amendment right to an impartial jury. Pet. App. 30a. Second, the court held that the juror comments regarding the need for a conviction in order to send a message back to the reservation constituted "extrinsic evidence" not in the record of the case, which likely impacted the verdict and required a new trial. *Id.*

On appeal by the government, the Court of Appeals for the Tenth Circuit reinstated the verdict. The court held that Rule 606(b) precluded consideration of juror affidavits in ruling on an allegation that jurors lied during voir dire. Acknowledging a split of authority in federal cases, the court rejected the distinction between "an inquiry into the validity of a verdict," for which the Rule precludes the use of juror testimony, and a district court's inquiry into misconduct during voir dire as part of a defensnt's motion for a new trial under Fed. R. Crim. P. 33. Pet. App. 13a. In the court of appeals' view, a motion for a new trial on any ground is the equivalent of a challenge to the validity of the verdict, and use of the evidence of statements made during deliberations was therefore precluded under Rule 606(b). *Id.*

The court of appeals also held that the jurors' factual assertions regarding Native Americans' tendencies toward drunkenness and violence, and the need to send a message supporting law enforcement, did not constitute "extraneous prejudicial information" so as to qualify under the exceptions to the general prohibitions of Rule 606(b). The court held that these

statements were not an "external" influence, but were merely internal views improperly brought to bear on the issues by the jurors themselves. Pet. App. 17a.

Finally, the court rejected any implied limitation on the scope of the rule for cases alleging racial bias, or a constitutional limit on the on the application of Rule 606(b). Pet. App. 26a. Acknowledging a circuit split on this issue as well, the court held that the Sixth Amendment interest in a jury free from racial bias did not limit strict application of Rule 606(b). *Id.*

Petitioner sought rehearing en banc, which the court denied. Pet. App. 32a. In two separate opinions dissenting from the denial of rehearing en banc, a number of judges emphasized a substantive disagreement with the result in the panel decision, the importance of the issues raised for defendants in criminal cases, and the existence of a deepening circuit split. Pet. App. 34a-44a.

REASONS FOR GRANTING THE WRIT

Since the adoption of Fed. R. Evid. 606(b) in 1974, this Court has considered the scope of the rule in only one case, *United States v. Tanner*, 483 U.S. 107 (1987). In *Tanner*, the Court held that rule 606(b) precluded consideration of juror evidence in support of a challenge to juror competence during trial and deliberations. Since *Tanner*, both federal and state courts have continued to divide on two remaining issues regarding application of Rule 606(b) and similarly-worded state rules. First, although it is generally recognized that evidence of statements made during jury deliberations may be admitted to show that jurors lied during voir dire when that inquiry is made for purposes other than granting a new trial, the courts are divided on the question of whether Rule 606(b) precludes consideration of such evidence in the context of a

defendant's motion for a new trial. Second, courts are divided as to whether a trial court is precluded by Rule 606(b) from considering and remedying a serious allegation of racial bias during deliberations. Both of these issues are squarely presented in this case. This case is a particularly good vehicle for the Court's consideration, in that the district court's factual findings of juror misstatements in voir dire and actual racial bias in the jury room allow the court to fully consider the policy choices and implications which will arise in setting the proper scope of the rule's prohibition.

I. This Court Should Grant Review to Clarify Whether Rule 606(b) Applies to Preclude Consideration of Juror Evidence in the Context of a Challenge to False Statements Made in Voir Dire.

Rule 606(b) limits the use of juror testimony in one particular context: "upon an inquiry into the validity of a verdict." In granting Petitioner' Motion for a New Trial under Fed. R. Crim. P. 33, the trial court in this case did not decide whether particular statements reflecting racial bias significantly affected the jury's deliberations or played any role at all in its verdict. Instead, the court simply found that statements made by jurors indicated that they had not been honest during voir dire.

In finding that the trial court's consideration of juror testimony was not allowed even in this context, the Tenth Circuit broadly read Rule 606(b) to apply in any proceeding where the eventual result could be to vacate a judgment of conviction, regardless of the nature of the inquiry that prompts such result. In doing so, the court of appeals deepens a dispute among the lower courts as to the scope of Rule 606(b).

A. Federal Courts Are Divided over Whether Rule 606(b) Applies to Hearings Regarding Voir Dire.

The Tenth Circuit emphasized in its analysis of this issue that "[t]here is a split in the Circuits on this point." Pet. App. 11a. The court then cited to and explicitly rejected the holdings of the Ninth Circuit in *Hard v. Burlington Northern R.R.*, 812 F.2d 482, 485 (9th Cir. 1987) ("[s]tatements which tend to show deceit during voir dire are not barred by [Rule 606(b).]") and *United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001) ("Where, as here, a juror has been asked direct questions about racial bias during voir dire, and has sworn that racial bias would play no part in his deliberations, evidence of that juror's alleged racial bias is indisputably admissible for the purpose of determining whether the juror's responses were truthful."). Pet. App. 11a-12a. It also cited to and rejected the holding of a district court case; *Tobias v. Smith*, 468 F.Supp 1287, 1290(W.D.N.Y. 1979) ("Moreover, where comments indicate prejudice or preconceived notions of guilt, statements may be admissible not under F.R.E. 606(b) but because they may prove that a juror lied during the voir dire. Such evidence can be used to show that a juror should be disqualified by his prejudice and that the verdict in which he participated was a nullity.") (citations omitted). Pet. App. 12a. Similarly, the Fifth and District of Columbia Circuits have held that Rule 606(b) does not preclude a district court from considering juror evidence in context of an inquiry into juror honesty during voir dire. *United States v. Boney*, 68 F.3d 497, 502-03 (D.C.Cir 1995) (juror may testify as to deliberations in order to determine prejudice from juror's failure to disclose felony conviction during voir dire); *Maldonado v. Missouri Pacific Railway Company*, 798 F.2d 764, 770 (5th Cir. 1986) (refusing to

remand for hearing because alleged juror statements did not imply possible misrepresentations in voir dire).

In rejecting the conclusions of the Ninth, Fifth, and District of Columbia Circuits, the Tenth Circuit sided with the Third Circuit's decision in *Williams v. Price*, 343 F.3d 223, 235 (3d Cir. 2003). "The Third Circuit's approach best comports with Rule 606(b), and we follow it here." Pet. App. 12a. In *Williams*, the Third Circuit explicitly disagreed with the Ninth Circuit's analysis in *Hard*, holding that the restrictions of Rule 606(b) are "categorical" and apply even when the testimony is not offered to explore the jury's decision-making process. *Williams*, 343 F.3d at 236 n. 5 ("Since the affidavits in *Hard* recounted statements made during jury deliberations, it appears that the decision is inconsistent with Federal Rule of Evidence 606(b)"). *See also Brofford v. Marshall*, 751 F.2d 845, 853 (6th Cir. 1985) ("The Magistrate apparently assumed that this rule was inapplicable to the Ramsey "affidavit" because it pertained to whether she had lied during voir dire. . . . It is less than clear, however, that this assumption is correct.").

In opposing Petitioner's request for en banc review, the government acknowledged the circuit split, arguing that the Tenth Circuit merely took sides in an existing split of authority, and opposing rehearing on the grounds that rehearing could not resolve that split. Response of the United States to Petition for Rehearing En Banc, at. 8-9. Four judges dissented from the Tenth Circuit's denial of rehearing en banc, issuing two written opinions emphasizing the significance of the issue and the ongoing circuit split. Pet. App. 37a-38a. (Briscoe, J., dissenting from denial of rehearing en banc) ("the panel's interpretation of Rule 606(b) in this regard conflicts with that of the Ninth and District of Columbia Circuits."), *citing Henley*, 238 F.3d at 1121 *and Boney*, 68 F.3d at 503; Pet. App. 44a (Murphy, J., dissenting from denial of rehearing en banc) ("the issue is

undoubtedly worthy of en banc review as the only other two circuits to directly address this issue have reached a conclusion contrary to that adopted by the panel").

Commentators have likewise noted the dispute over application of Rule 606(b) to proceedings other than a direct attack on the deliberations themselves. "When the comments indicate that the juror had preconceived notions of liability or guilt or personal knowledge about the facts in issue, the statements may be admissible to prove that the juror lied on the voir dire, a separate question from that of impeachment of verdicts. However, other circuits do not admit statements that tend only to show deceit during voir dire." *Weinstein's Federal Evidence 2d*, § 606.04[5][a], 606.42 (2009). *See also* 27 Charles Alan Wright & Victor James Gold, *Federal Practice And Procedure, Evidence 2d* § 6074, 516 (2007) ("the courts usually have held Rule 606(b) inapplicable in this context, reasoning that the focus of the motion is the legitimacy of pre-trial procedures, not the validity of the verdict.").

B. Rule 606(b) Does Not Preclude Consideration of Juror Testimony Regarding Statements Made During Deliberations in the Context of Challenges to Juror Misstatements in Voir Dire.

The court of appeals' decision in this case flows from its view that a trial court's consideration of whether its pretrial procedures were compromised constitutes "an inquiry into the validity of the verdict" for purposes of Rule 606(b). The dispute among the courts about the scope of the rule arises out of directly opposing views of the language of the rule. While the Ninth Circuit felt that it was obvious that a hearing regarding voir dire was not an inquiry into the verdict, the Tenth Circuit believed it to be equally obvious that such a hearing must be covered by the rule simply because the result of granting the motion would be to invalidate the conviction and thereby avoid the effect of the jury's verdict. *Compare Henley*, 238 F.3d at 1121 ("evidence

of that juror's alleged racial bias is indisputably admissible for the purpose of determining whether the juror's responses were truthful") with *Benally*, Pet. App. 11a ("Although the immediate purpose of introducing the testimony may have been to show that the two jurors failed to answer honestly during voir dire, the sole point of this showing was to support a motion to vacate the verdict, and for a new trial. That is a challenge to the validity of the verdict.").

Although the court of appeals in *Williams* expressly relied on this Court's decision in *Tanner* to support its broad reading of 606(b), *Tanner* does not resolve the issues. *Tanner* held that evidence of juror conduct during deliberations was not admissible to show that jurors misbehaved during deliberations in such a way as to render them incompetent. *Tanner*, 483 U.S. at 127. In contrast, in this case the trial court did not make any findings regarding the propriety of jurors' conduct during deliberations, and its ruling did not require the court to consider the effect of the jurors' statements on the verdict rendered. The only question taken up by the court was whether jurors had acted improperly during voir dire. Such a determination does not involve the court in evaluating deliberations or second-guessing the work of the jury.

The court of appeals' decision in this case focuses on the ultimate relief being sought in the defendant's motion rather than the nature of the court's inquiry, which is what Rule 606(b) controls. Rule 606(b) precludes consideration of such evidence in inquiring into the "validity of the verdict." It does not preclude consideration of such evidence whenever a defendant seeks a new trial. In this case, Petitioner did not seek to have the court examine whether the jury's verdict was the result of racial prejudice. He only sought to have the court review whether his right to unbiased jurors was undermined by misconduct during voir dire.

In its discussion of the legislative history of the rule, *Tanner* is largely focused on the legislative goal of protecting the deliberative process from scrutiny. The legislative history it relies on evidences congressional concern to craft a rule that would prevent jurors from testifying as to conduct in order to review the jury's deliberative process, and the examples given in the advisory committee notes quoted by this Court in *Tanner* set clear limits on the species of juror misconduct regarding which juror evidence would be barred. The more permissive House version of the rule, which was ultimately rejected, would have permitted evidence of quotient verdicts, of jurors so intoxicated as to be incapable of participation in deliberations, a refusal to follow jury instructions, and of a juror's refusal to participate in deliberations. Nothing in the examples of the testimony sought to be prevented by the more restrictive Senate version of the rule that was ultimately adopted suggests any concern to exclude juror evidence used for any other purpose than to prevent litigation over the internal deliberations of juries. *See Tanner*, 483 U.S. at 123–125.

In a related context, this Court has weighted courts' ability to protect trial procedures outside of deliberations more heavily than generalized appeals to the value of secrecy. The court of appeals in this case noted that this Court has held that statements made by jurors during deliberations are unquestionably admissible in a proceeding to censure or prosecute a juror for making misstatements during voir dire. Pet. App. 11a, *citing Clark v. United States*, 289 U.S. 1, 13 (1933). It is notable that the distinction between a contempt hearing and a hearing on a motion for a new trial is not in any way based upon the nature of the intrusion upon the jury's work. It is based solely upon the nature of the remedy sought for the juror's misconduct. Thus,

the rule applied by the court of appeals will operate absurdly to allow use of the evidence in a proceeding to punish a juror, but not in a proceeding to correct the juror's wrongdoing.

This Court has recognized in *Tanner* the desirability of shielding jury deliberations from scrutiny as a general matter, 483 U.S. at 119-120, but this interest must be weighed against the opposing interests of insuring fairness in trial procedures outside of the jury room. Neither the language of the Rule nor the decision in *Tanner* settles the question of how the balance between these competing interests should be drawn. *Tanner* itself held only that evidence of misconduct during deliberations could not be considered. In this case, however, the rule has been extended to preclude a court's consideration of evidence of misconduct taking place entirely outside of deliberations. Thus, unlike *Tanner*, the court is not considering juror testimony to determine whether the jury's deliberations were compromised. The trial court in this case was not asked to consider whether the jury's deliberations were unfairly biased. What the court was asked to consider was whether its own pre-trial procedures were compromised, in turn compromising Petitioner's ability to challenge racially biased jurors for cause. *McDonough Power Equipment, Inc., v. Greenwood*, 464 U.S. 548, 556 (1984) (new trial required when juror misrepresentation prevented challenge for cause).

II. This Court Should Grant Review to Determine Whether Rule 606(b) May, Consistent with the Constitution, Preclude Consideration of Evidence of Racially Biased Jurors and Overtly Racist Statements in Jury Deliberations.

A. Courts Are Divided on the Issue of Whether Rule 606(b) Violates the Constitution If Applied to Prevent a Criminal Defendant from Presenting Evidence of Racial Bias.

Even if the Court holds that Rule 606(b) precludes the use of juror testimony as proof of false statements in voir dire, the district court's finding that two jurors had actual racial bias

against Petitioner provides the Court with grounds to consider the second issue regarding the scope of Rule 606(b) remaining after *Tanner*: whether the Rule prevents a district court from considering evidence of racially biased statements, and, if so, whether a categorical exclusion of such evidence is consistent with the Sixth Amendment rights of a criminal defendant. In reversing the district court in this case, the Tenth Circuit deepened a split in authority on both of these issues.

First, federal courts are divided as to whether a juror statement asserting specific facts about the defendant based on a racial stereotype are admissible as "extraneous prejudicial information" or "outside influence." When a juror asserts that the defendant has a particular characteristic based on his membership in a racial minority group, such information has been viewed by some courts as being so far outside of the facts in evidence as to be beyond the scope of Rule 606(b)'s prohibition. *United States v. Henley*, 238 F.3d 1111, 1119-20 (9th Cir. 2001) ("Racial prejudice is plainly a mental bias that is unrelated to any specific issue that a juror in a criminal case may legitimately be called upon to determine. It would seem, therefore, to be consistent with the broad goal of eliminating racial prejudice from the judicial system, to hold that evidence of racial bias is generally not subject to Rule 606(b)'s prohibitions against juror testimony."); *Hard v. Burlington Northern R.R.*, 812 F.2d 482, 486 (9th Cir. 1987) ("Jurors must rely on their past personal experiences when hearing a trial and deliberating on a verdict. Where, however, those experiences are related to the litigation, as they are here, they constitute extraneous evidence which may be used to impeach the jury's verdict."); *Tobias v. Smith*, 468 F.Supp. 1287, 1290 (D.C.N.Y. 1979). *See also Benally*, Pet. App. 40a (Briscoe, J., dissenting from denial of rehearing en banc) ("it is a vastly more reasonable interpretation of the

"extraneous prejudicial information" exception to acknowledge that a juror's statements that denigrate the defendant's race concern supposed facts about this specific defendant.").

The court of appeals in this case took a contrary position. "None of the statements that Mr. Benally alleges his jurors made are 'specific extra-record facts relating to the defendant.' They are generalized statements, ostensibly based upon the jurors' personal experience." Pet. App. 16a. The Fifth Circuit likewise has rejected the view that factual assertions grounded in prejudice constitute extraneous influences. *Martinez v. Food City, Inc.*, 658 F.2d 369, 373 (5th Cir. 1981). Commentators have noted the courts' divided reasoning on this issue:

> Such [racial] bias might not qualify as an "outside influence" since it is imposed as a factor in decision-making by the jury itself, not some source extrinsic to the jury. On the other hand, racial bias may be considered an outside influence if what is meant by that is an influence on the verdict "outside" of the record and the parameters of constitutionally acceptable grounds for jury verdicts. Racial bias might not qualify as extraneous prejudicial information" since, while bias is arguably "extraneous" and certainly "prejudicial," it is hard to think of it as "information." On the other hand, if bias manifests itself in the form of comments made by jurors during deliberations to sway the vote of other jurors, the comments may be thought of as the functional equivalent of "information" even if not in the form of hard data.

Wright & Gold, *supra*, at § 6074, 507-08 (citing cases).

Second, regardless of whether racist juror statements are considered to be within the explicit exceptions to Rule 606(b), federal courts are divided as to whether there are constitutional limits to the application of the Rule in cases of racial discrimination, and where a line should be drawn. *Shillcutt v. Gagnon*, 827 F.2d 1155 (7th Cir. 1987) ("The rule of juror incompetency cannot be applied in such an unfair manner as to deny due process"); *Carson v. Polley,* 689 F.2d 562, 582 (5th Cir. 1982) ("In an appropriate case, a letter from a juror to the court may reveal such a magnitude of prejudice as to move the court to grant a new trial rather

than suffer an obvious default of justice."); *Tobias v. Smith*, 468 F.Supp. 1287, 1290 (W.D.N.Y. 1979) ("Whatever the scope of a jurisdiction's non-impeachment rule, a court determination of whether particular jury events are open or closed to inquiry must consider a defendant's sixth amendment rights"); *Smith v. Brewer,* 444 F.Supp. 482 (D.C. Iowa 1978) ("Where, for example, an offer of proof showed that there was a substantial likelihood that a criminal defendant was prejudiced by the influence of racial bias in the jury room, to ignore the evidence might very well offend fundamental fairness."); *Wright v. United States*, 559 F.Supp. 1139 (D.C.N.Y.,1983) ("Certainly, if a criminal defendant could show that the jury was racially prejudiced, such evidence could not be ignored without trampling the sixth amendment's guarantee to a fair trial and an impartial jury.") *See also* Wright & Gold, *supra*, at § 6074, 512 -13 ("A balance must be struck, protecting parties from the most egregious cases of jury bias while leaving the jury free to decide most cases without fear of judicial intrusion. While lines may be difficult to draw in many cases, it should be clear that among the most serious cases of jury bias are those involving racial prejudice.") (citing diverging opinions).

The court of appeals in this case disagreed with these courts, and strongly expressed skepticism that a court should *ever* find a Constitutional violation in restricting the use of juror evidence, no matter how extreme the circumstances. Pet. App. 25a ("We are skeptical of this approach. If confidentiality can be breached whenever a court, after the fact, thinks the advantages of doing so are important enough, much of the damage has already been done."); *see also Shillcut*, 827 F.2d at 1159 (allowing for review in only rare extreme cases). The court of appeals in this case held that even if some room exists for considering evidence of racial bias as a Constitutional requirement, the facts of this case were insufficient. Pet. App. 25a. Thus, while

most courts have acknowledged Constitutional limits on the application of Rule 606(b) in cases of racial bias, the court of appeals in this case has effectively rejected any such limits by applying Rule 606(b) in a case where a district court has found that jurors were actually racially biased, and the evidence indicates that arguments were made during deliberations based upon invidious racial stereotyping that went directly to the issues raised at trial.

B. The Court of Appeals' Broad Application of Rule 606(b) Is Unconstitutional and Must Be Corrected to Avoid Harm to the Credibility of the Criminal Justice System.

This Court has long held that elimination of racial bias from the jury system is of vital importance. "One of the goals of our 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.'" *Georgia v. McCollum*, 505 U.S. 42, 49 (1992), *quoting Powers*, 499 U.S. at 413. This Court has recently reiterated that competing interests between fairness and efficiency must be balanced, and that the basic right to a fair tribunal must be protected even at the cost of intrusive inquiry. *Caperton v. A.T. Massey Coal Co., Inc.* ___ U.S. ___, 129 S.Ct. 2252 (2009). Specifically with regard to possible racial bias, "a defendant has the right to an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice." *McCollum*, 505 U.S. at 58.

In this case, a criminal defendant has come forward with evidence that some of the jurors which decided his guilt believed that he was more likely to be guilty of a crime because of his race. The district court found that these jurors were, in fact, racially biased against him. Pet. App. 30a. Then, a rule of evidence is applied to prevent the court from remedying this "distort[ion]" of the system. This Court should itself review any application of a rule of evidence

which has the effect of insulating overt racial discrimination from any remedy, especially in a criminal case.

The law as it now stands creates the worst of all possible worlds: the uncertainty and inconsistency among federal and state courts with regard to the admissibility of evidence of racial bias in jury deliberations requires that counsel fully investigate and document such evidence whenever an allegation of racial bias is brought to light, resulting in public airing of such issues in any case where they arise. However, the extremely broad application of Rule 606(b) ordered by the Tenth Circuit in this case seriously undermines the credibility of the jury system as such issues are fully aired and then the problems ignored due to a procedural rule. The confidence of both litigants and the public in the fairness of the jury system is thereby significantly undermined, especially for minority communities who might already be suspicious of the fairness of the process.

As the Tenth Circuit noted in its decision below, Rule 606(b) is intended to "preserve[] the 'community's trust in a system that relies on the decisions of laypeople [that] would all be undermined by a barrage of postverdict scrutiny." 546 F.3d at 1234, *quoting Tanner*, 483 U.S. at 121. The Tenth Circuit's ruling thus represents an attempt to prevent disclosure of conduct occurring during deliberations in order to preserve the credibility of the system. But even if it is true that such disclosure is a serious problem, the lack of consistent application of this rule in cases of racial bias means that public airing of such allegations will not be avoided or even discouraged by even the Tenth Circuit's strict reading. The rule thus undermines its own purpose: since most courts allow consideration of juror racial bias under some theory that avoids the restrictions of the rule, the rule does nothing to discourage the investigation and public

pursuit of inflammatory allegations of racial bias in jury deliberations. At the same time, the rule as applied in this case operates to prevent the courts from reassuring the public as to the fairness of the system by addressing and remedying what has long been noted as a significant problem for the administration of equal justice for all, both in perception and in actuality. *See Batson v. Kentucky*, 476 U.S. 79, 87 ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."). The current status of the law regarding Rule 606(b) thus fails to afford any advantage in avoiding scrutiny of jury deliberations at the same time as it precludes the court from remedying even outrageous abuses it discovers. A more effective method for undermining the public trust in the jury system would be difficult to devise.

In rejecting any implied exception to the limitations of Rule 606(b) based upon statements that show racial bias, the Tenth Circuit in this case acknowledged that it was balancing the defendant's interests in a trial free from overt racial bias against the institutional interests underlying Rule 606(b). Pet. App. 24a. In doing so, however, the court almost entirely discounted the strong interests, both for a defendant and for society, in eliminating racial bias from the jury system. While the court seemed to acknowledge that racial bias is a more fundamental, "odious, and especially common" problem than, say, intoxicated jurors, it refused to alter the balance in its analysis and held that this Court's ruling in *Tanner* governs this issue. *Id.*.

Tanner's analysis of Rule 606(b) in the context of litigation over issues of juror competence does not in any way resolve the issues raised here. In *Tanner*, this Court held that

the civil litigant's constitutional right to a competent jury was not violated by applying Rule 606(b) to limit the types of evidence available for challenging juror competence. *Tanner*, 483 U.S. at 127. In doing so, the Court explicitly balanced the competing interests at stake, between avoidance of intrusion on jury deliberations and the litigants' need to prove a violation of his Constitutional right to a competent jury. *Id*.

The balancing that must be done in this case is readily distinguishable from the interests evaluated in *Tanner*. As noted, the danger of incompetent jurors at issue in *Tanner* is fundamentally different from the overt racial bias at issue in this case, especially in the significance to the public's overall view of the fairness of the system. It seems clear that the problem of racial bias in jury deliberation is such a serious attack on the fairness of the entire process that a remedy must be afforded.

> Eradication of the evil of state supported prejudice is at the heart of the Fourteenth Amendment. This suggests that the constitutional interests of the affected party are at their strongest when a jury employs racial bias in reaching its verdict. Racial prejudice 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. This also suggests that the policy interests behind the enforcement of Rule 606(b) are at their weakest in such a case.

Wright and Gold, *supra*, at § 6074, 513. Further, these issues are very different with regard to the specifics of how a litigants are to protect themselves from such abuses. Indeed, the government explicitly argued this point in *Tanner*:

> **Unlike juror partiality, which tends to express itself only during jury deliberations and, hence, outside the presence of the trial judge,** juror incompetence or inattentiveness is often reflected in juror behavior that is observable during the trial, either by the judge, by counsel, or by court personnel.

Brief of Respondent United States of America at 49, *Tanner v. United States*, 483 U.S. 107 (1987) (No. 86-177) (emphasis added). Thus, in arguing *Tanner*, the government itself took the position that juror racial bias must be treated differently from issues of competence, and that the defendant's inability to prove racial bias in other ways should tip the balance in favor of allowing the evidence of juror statements to be used.

The difference between incompetence and racism is likewise evident from the standards imposed on these different issues: when a court finds that a juror was incompetent due to intoxication during a trial, the harmless error standard would require the court to find that the juror's actions altered the verdict. In contrast, when a court finds that a juror was racially biased, the mere presence of that juror constitutes structural error that requires a new trial without the need for any inquiry into whether that juror's bias actually had an effect on the verdict. *See* Pet. App. 37a*, quoting Gray v. Mississippi*, 481 U.S. 648, 668 (1987) ("because the impartiality of the adjudicator goes to the very integrity of the legal system, the *Chapman* harmless-error standard cannot apply").

In fact, the differing nature of these standards also alters the balance because of the decreased risk of disruption to jury deliberations in cases such as this one. A challenge to competency requires a showing of actual harm, which would require inquiry into the effect of the jurors' intoxication on the actual course of deliberations, a much greater intrusion into the jury's deliberations than is at issue here, adding weight to the balance on the side of applying Rule 606(b). In this case, no inquiry into the effect of racial bias on deliberations is necessary, so the harm to the interests protected by exclusion of the evidence is far less. In addition, the Court in *Tanner* discounted the need for juror testimony with regard to incompetency by intoxication, as

such a problem would ordinarily be apparent outside of the jury room and thus generally be subject to proof other than by testimony from fellow jurors. *Tanner*, 483 U.S. at 127. In contrast, it is unlikely that evidence of racial bias would be observable by others during the course of the trial, as such bias would only be revealed when jurors begin their deliberations.

The rules of evidence generally embody policy choices; a balancing of interests between fairness and efficiency. *See* Fed. R. Evid. 102 ("These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."). However, this Court has always independently evaluated that balance to make certain that an individual's constitutional rights are not undermined by the broad dictates of the rules. It is therefore not sufficient to say that the rule of evidence itself draws the appropriate balance between a criminal defendant's constitutional right to a jury free from racial bias on the one hand and the court's institutional interests in insulating jury deliberation from scrutiny on the other. This Court has repeatedly limited application of rules of evidence when the interests underlying a rule are insufficient to justify the limitations imposed on the defendant's ability to present his case. *Green v. Georgia*, 442 U.S. 95 (1979) ("[i]n these unique circumstances, 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.'"); *Crane v. Kentucky*, 476 U.S. 683 (1986) (state court's "blanket exclusion of the proffered testimony . . . deprived him of a fair trial"); *Rock v. Arkansas*, 483 U.S. 44, 61 (1987) ("State's legitimate interest in barring unreliable evidence does not extend to per se exclusions that may be reliable in an individual case."); *Holmes v. South Carolina*, 547 U.S. 319 (2006) (categorical rule precluding alternate suspect evidence is unconstitutional).

In holding that the actual racial bias which the trial court found to exist in this case was insufficient to avoid strict application of Rule 606(b), the court of appeals asserted that Petitioner had failed to prove that the racial bias of the jurors actually caused the guilty verdict. *Benally*, 546 F.3d at 1241.[1] The court of appeals thus created a new test for determining whether evidence of racial bias may avoid the restrictions of Rule 606(b), a test that requires a far greater intrusion by the court into the workings of the jury's deliberations than would be otherwise be necessary to rule on the defendant's motion.

Under the court of appeals' ruling, a defendant with evidence of racially biased juror statements will bring those statements to the attention of the court, which will have to investigate the nature of jury deliberations before it can make the far less intrusive determination whether a juror was actually biased. This is a procedure that embraces all of the disadvantages of the rule even as it fails to protect any of the interests sought to be promoted by application of the rule. Under the court of appeals' rule in this case, provocative evidence of racist statements made by jurors will always be brought to the court for consideration, but the court is placed in a supremely difficult position: it must make a preliminary decision as to how much of an effect such statements have actually had on the process of jury deliberations before it can make the threshold determination of admissibility under Rule 606(b). Of course, it is this sort of investigation into

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[1] The record on appeal does not disclose any basis for this unprecedented fact finding by the court of appeals; certainly the district court made no such finding, The district court found only that two jurors, including the jury foreman, had exhibited actual racial bias against Petitioner. Pet. App. 29a-30a. While it is true, as the court of appeals noted, that Juror K.C. ultimately voted to convict, she also stated that when she argued against making a decision based upon a racial prejudice, she was effectively silenced. In any event, no evidence was presented as to the basis for her vote, or the basis for the votes of any of the other jurors, because such an intrusive inquiry into deliberations was not relevant (until the court of appeals ruling) to resolution of the motion for a new trial based on the presence of racially biased jurors.

the deliberative process of the jury that the rule is intended to avoid in the first place. Only if the court finds that the racial bias had an actual effect on deliberations can the court proceed to consider whether jurors were racially biased. This requires the court, in every case alleging juror bias, to undertake a more extensive and intrusive inquiry into the deliberative process of the jury than would have been required to simply rule on the issue presented by the motion; i.e., whether a juror was racially biased.

CONCLUSION

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

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2009

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

AFFIDAVIT OF SERVICE

Scott Keith Wilson, Assistant Federal Public Defender for the District of Utah, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and the accompanying Motion for Leave to Proceed *In Forma Pauperis* were served on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class postage prepaid or by delivery to a third party commercial carrier for delivery within 3 calendar days, and addressed to:

Elena Kagan
Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave, N.W.
Washington, D.C. 20530-001

It is further attested that the envelope was deposited with the United States Postal Service on July 20, 2009 and all parties required to be served have been served.

_____

SCOTT KEITH WILSON
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STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

Subscribed and sworn to before me this ____ day of July, 2009.

_____

Notary Public

My Commission Expires:

NO. _____

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Clerk of Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

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STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

Subscribed and sworn to before me this ____ day of July, 2009.

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