NO. **09-5429**

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

REPLY TO BRIEF IN OPPOSITION

Respectfully submitted,

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In its response to the petition in this case, the United States argues that this Court should deny the petition because (i) the case is interlocutory, (ii) there is no split of authority on the issues presented, and (iii) the Tenth Circuit ruled correctly. In fact, however, the Tenth Circuit has finally decided the central legal issues presented in this case which are ripe for this Court's disposition. Critically, moreover, the United States' assertion that no conflict exists is directly contradicted by the numerous courts and commentators which have noted the disagreement among authorities. Indeed, the lower court in this case explicitly acknowledged that it was taking sides in an ongoing circuit split in making its ruling. Further, in arguing that the lower court ruled correctly in this case, the United States the ignores the ongoing dispute over the scope of

the language of Rule 606(b), and simply recites the general policy of protecting juror deliberations. It fails to acknowledge the important constitutionally-based competing judicial interests in preventing jury selection from being undermined by dishonesty and in protecting the jury system from the evils of racism.

1. The United States initially asserts that certiorari is inappropriate because this case is before the Court on an interlocutory appeal. Br. in Opp. 10. However, as the United States acknowledges, nothing remains to be done in this case except sentencing, a proceeding which will in no way alter the nature of the issues presented in this petition. The United States does not identify any possible issues to be raised on remand which would provide any basis for appeal, let alone for certiorari review. To deny review at this stage would only serve to delay any possible relief to petitioner, who has been held in custody since indictment in April, 2007.

Even in cases where an actual trial would be held on remand and thus where the issue presented could be mooted by acquittal, this Court has granted certiorari to review the admissibility of evidence or availability of a defense. *See Dickerson v. United States*, 530 U.S. 428 (2000) (certiorari granted to review court of appeals' reversal of district court's interlocutory order suppressing evidence); *Mills v. Alabama*, 384 U.S. 214, 217-218 (1966) (certiorari granted to review availability of first amendment defense to state crime). In *Mills*, this Court acknowledged the pointlessness of requiring a final judgment where proceedings on remand would not affect the presentation of the issues before the court:

> [T]he trial . . . would be no more than a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it to formally to repeat its rejection of Mills' constitutional contentions whereupon the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable. Such a roundabout process would not only

> be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets.

Id.

In this case, there is not even a trial to be conducted on remand which could conceivably moot the issue. *Compare Michael v. United States*, 454 U.S. 950 (1981) (White, J., dissenting from denial of certiorari) (possibility of acquittal on remand should not delay consideration of properly presented evidentiary issue). Here, the outcome of the sentencing proceeding to be conducted on remand is irrelevant to the issues presented in this petition. Petitioner is seeking to reinstate the district court's ruling granting him a retrial, and a chance at acquittal and release from custody. Denial of the petition based on the nominally interlocutory nature of the case would serve only to unreasonably and pointlessly delay the relief which Petitioner is seeking from this Court.

2. The United States contends that there is no actual division among the courts of appeals on the precise issue raised in Petitioner's case. This assertion is directly contrary to the United States' argument in the circuit below, where it opposed the rehearing petition by arguing that the Tenth Circuit in this case had "merely sided with the Third Circuit on an existing circuit split." Response of the United States to Rehearing En Banc, at 8-9.

The United States' current characterization of the status of the circuit split is inaccurate, most particularly with regard to the holdings in *Hard v. Burlington Northern R.R.*, 812 F.2d 482 (9th Cir. 1987), and *United States v. Henley*, 238 F.3d 1111 (9th Cir. 2001). The United States argues that because *Hard* found the challenged statements admissible both as an "extraneous

influence" exception to Rule 606(b) and because Rule 606(b) does not bar the introduction of juror statements showing dishonesty during voir dire, the latter holding is "unnecessary to the judgment." Br. in Opp. 13. The United States cites no authority for this proposition, nor for the implied corollary that if a holding is unnecessary to a judgment it cannot evidence a split of authority on that point. The law is both well-established and precisely to the contrary:

> It does not make a reason given for a conclusion in a case obiter dictum, that it is only one of two reasons for the same conclusion. It is true that in this case the other reason was more dwelt upon and perhaps it was more fully argued and considered than section 3477, but we can not hold that the use of the section in the opinion is not to be regarded as authority, except by directly reversing the decision in that case on that point.

Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 340 (1928). *See also Sanchez-Llamas v. Oregon*, 548 U.S. 331, 352 (2006) (characterizing as "easily dismissed" the argument that a holding was "unnecessary" in a case in which the petitioner "had several ways to lose," and citing *Richmond Screw Anchor*.).

Moreover, other courts analyzing *Hard* and *Henley* have consistently adopted the construction of those cases Petitioner advocates. The Tenth Circuit opinion in this case makes explicit the assumption that its ruling in this case deepened the split in authority on this issue between the Third Circuit in *Williams v. Price*, 343 F.3d 223 (3d Cir. 2003), and the Ninth Circuit in *Hard* and *Henley*: "[t]here is a split in the Circuits on this point." Pet. App. 11a. The opinion below does not characterize that split as created by its work, but by that of the Third Circuit in *Williams*: "[t]hen-Judge Alito acknowledged that the Ninth Circuit had held otherwise in *Hard* but that 'it appears that [*Hard*] is inconsistent with Federal Rule of Evidence 606(b).'" *Id*. (quoting *Williams,* 343 F.3d at 236, n.5)).

Numerous Ninth Circuit panels have cited *Hard* and *Henley* for the same principle. *See United States v. Chern*, 141 F.3d 1180, *2 (9th Cir. 1998) (unpubl.) (juror's statements that during deliberations two other jurors made statements in tension with voir dire responses considered but found under *Hard* to be inadequate to require a hearing); *United States v. Godines*, 124 F.3d 213, *1 (9th Cir. 1997) (unpubl.) (evidence that during deliberations a juror revealed information that reflected on honesty of answers during voir dire considered and determined to be inadequate to merit an evidentiary hearing under the standard set out in *Hard*); *Westmont Tractor Co. v. Touche Ross & Co.*, 862 F.2d 875, *3 (9th Cir. 1988) (unpubl.) (characterizing *Hard* as recognizing an exception to Rule 606(b) for "juror statements 'which tend to show deceit during voir dire' or demonstrate the introduction of extraneous information into jury deliberations.").

State and federal district courts have employed *Hard* and *Henley* as authority for a similar purpose. *See State v. Hidanovic*, 747 N.W.2d 463, 473 (N.D. 2008) (citing *Henley* for the proposition that Rule 606(b) does not preclude juror testimony to establish juror lied during voir dire); *United States v. Hayat*, 2007 WL 1454280 *2 (E.D.Cal.2007) (quoting the exceptions set out in Rule 606(b) and citing *Hard* and *Henley* for the proposition that "[a]dditionally, '[s]tatements which tend to show deceit during voir dire are not barred by [Rule 606(b)].'");[1]

[1]The United States' brief in opposition to the defendant's motion for a new trial in *Hayat* concedes that this is the correct reading of *Hard* and *Henley*. "It is true, of course, that '[s]tatements which tend to show deceit during voir dire are not barred by [Rule 606(b)].' *Hard v. Burlington Northern R.R.*, 812 F.2d 482, 485 (9th Cir. 1987). In particular, evidence of a juror's alleged racial bias is admissible for the purpose of determining whether the juror's responses on voir dire related to bias were truthful. *United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001)." *United States v. Hayat*, Government's Opposition to Defendant's Motion for a New Trial, District Court Docket #449, February 3, 2007 at 130. (District Court Case 2:05-CR-00240-GEB).

Levinger v. Mercy Medical Center, Nampa, 75 P.3d 1202, 1207 (Idaho 2003) (citing *Henley* for the proposition that "[a]n affidavit alleging information which calls into question a juror's responses to questions during voir dire does not fall within the limitations of [Idaho Rule of Evidence] 606(b)."); *State v. Messelt*, 518 N.W.2d 232, 237 (Wis.1994) (citing *Hard* and *Maldonado v. Missouri Pacific Ry.*, 798 F.2d 764 (5th Cir.1986)) ("it is well established that . . . Rule 606(b), do[es] not prevent jurors from testifying for purposes of determining whether a juror failed to reveal potentially prejudicial information during voir dire."); *State v. Thomas*, 777 P.2d 445,450 (Utah,1989) (defendant attempted to introduce juror affidavits regarding statements during deliberations in support of claim that jurors had been dishonest during voir dire; Utah Supreme Court cited *Henley* and *Maldonado v. Missouri Pacific Ry.*, 798 F.2d 764 (5th Cir.1986) for proposition that 606(b) does not bar "evidence which tends to show deceit during voir dire.").

The United States also maintains that other cases in support of Petitioner's argument are "farther afield" than the Ninth Circuit cases in part because they "do not involve alleged juror racism." Br. in Opp. 14. This distinction is irrelevant to Petitioner's argument that there is authority supporting the position that juror evidence, whether it concerns allegations of racism or not, does not fall afoul of Rule 606(b) when admitted to show a juror lied during voir dire. Moreover, both *United States v. Boney*, 68 F.3d 497 (D.C.Cir. 1995) and *Maldonado v. Missouri Pacific Ry. Co.*, 798 F.2d 764 (5th Cir. 1986), have been cited by other authorities in support of the same argument made by Petitioner. *See Thomas*, 777 P.2d at 450; *United States v. Benally*, 560 F.3d 1151,1154 (10th Cir. 2009) (Briscoe, J., dissenting).

Petitioner's argument that there is a split of authority on whether Rule 606(b) bars introduction of juror evidence of juror statements made during deliberation that tend to show dishonesty on voir dire is one that has been accepted by the lower court in his own case and by the Ninth Circuit itself as well as a considerable number of other courts faced with this issue.

3. In asserting that this petition should be denied because the Tenth Circuit's decision is correct, the United States describes the values underlying its restrictive view of the requirements of Rule 606(b), but fails to address or even acknowledge the competing values and textual ambiguities which have created the circuit split now facing the Court. Br. in Opp. 15-18.

As pointed out in the petition, the text of Rule 606(b) does not, of itself, resolve the issue which is presented in this case. Some courts have held that the language "upon an inquiry into the validity of a verdict" encompasses any attack on a conviction, while others restrict its application to attacks on the jury's deliberations as such. Thus, while it can be argued that the restrictions of the Rule should be extended to preclude use of juror evidence to support a claim of juror dishonesty in voir dire, a mere recitation of the values underlying Rule 606(b) does not constitute such an argument. The United States baldly claims that Rule 606(b) was intended to preclude use of juror statements to attack voir dire, but provides no relevant legislative history or case law to support this assertion: the legislative history the United States quotes merely affirms that the Rule was intended to preclude inquiry into more than merely the jurors' thought processes, and was also intended to preclude attacks on the jury's deliberations by considering allegations of juror misconduct during deliberations. Br. in Opp.18. That history does not in any way evidence an assumption that the rule was to apply to any judicial inquiry which may ultimately result in the grant of a new trial. The juror evidence in this case was considered by the

court as evidence of misconduct occurring during voir dire, not deliberations, and the grant of a new trial based upon voir dire misconduct was not an evaluation of deliberations, but only of the propriety of pretrial procedures.

4. The United States also argues that there is no split of authority regarding whether an interpretation of Rule 606(b) that prevents consideration of evidence of juror racial bias would violate the Constitution. Br. in Opp. 18. But the United States' contention rests on an overly narrow characterization of the cases it considers. The United States thus limits its discussion of *Shillcutt v. Gagnon*, 827 F.2d 1155 (7th Cir. 1987), to a constricted description of the outcome, ignoring altogether the limits the court placed on its holding:

> The rule of juror incompetency cannot be applied in such an unfair manner as to deny due process. Thus, further review may be necessary in the occasional case in order to discover the extremely rare abuse that could exist even after the court has applied the rule and determined the evidence incompetent. In short, although our scope of review is narrow at this stage, we must consider whether prejudice pervaded the jury room, whether there is a substantial probability that the alleged racial slur made a difference in the outcome of the trial.

Shillcutt, 827 F.2d at 1159. Thus, while the court found that the facts of the case before it did not implicate due process guarantees, the court acknowledged that there would be facts that would do so. The United States' interpretation of *Carson v. Polley*, 689 F.2d 562 (5th Cir. 1982) is similarly selective. While it is true that the court in *Carson* was not concerned with allegations of racial bias, its holding bears clear implications for cases that do, acknowledging that some juror evidence concerning deliberations could "reveal such a magnitude of prejudice as to move the court to grant a new trial rather than suffer an obvious default of justice." *Carson*, 689 F.2d at 581–2. That the evidence in the case before the court "f[ell] short of such an extremity" in no way alters the conclusion that some cases might require a different result. *Id*. at 582. *Henley*,

too, acknowledges the "powerful case [that] can be made that Rule 606(b) is wholly inapplicable to racial bias," 238 F.3d at 1120, and identified several of the cases relied upon by Petitioner as support for that position.

In its insistence that there is no split of authority, the United States ignores altogether those cases demonstrating that even lower courts acknowledge the existence of such a division. In considering allegations of juror racial bias, for example, the court in *Tobias v. Smith*, 468 F.Supp. 1287, 1289 (D.C.N.Y. 1979), held that "[i]n addition to consideration of Rule 606(b), the sixth amendment guarantee of a fair trial to a criminal defendant injects a constitutional element into the evidentiary question." *Wright v. United States*, 559 F.Supp. 1139 (D.C.N.Y. 1983), identifies cases in which, "[d]espite the broad language of Rule 606(b), courts faced with the difficult issue of whether to consider evidence that a criminal defendant was prejudiced by racial bias in the jury room have hesitated to apply the rule dogmatically." 559 F.Supp. at 1151. The court in *Wright* joins those who have declined to apply the prohibition in Rule 606(b) dogmatically on constitutional grounds: "[c]ertainly, 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." *Id*. *Smith v. Brewer*, 444 F.Supp. 482, 490 (D. Iowa 1978), arrives at the same conclusion: "[w]here, 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."

These cases acknowledge limits on the reach of Rule 606(b), limits recognized neither in the United States' brief nor in the opinion in Petitioner's case below. Indeed, the opinion below

expresses doubt as to whether there could ever be a case in which the character of the juror prejudice alleged could warrant an intrusion into juror deliberations. *See* Pet. App. 25a. As noted, other courts have acknowledged that when an issue of racial bias is raised, it is at least questionable as to whether a rule of evidence could properly preclude consideration of the issue. This petition seeks to resolve this question by presenting the court with a case in which the district court has expressly found that racially biased jurors sat in judgment of a criminal defendant.

Finally, the United States asserts that this Court, in *Tanner v. United States*, 483 U.S. 107 (1987), has already settled the question of applying Rule 606(b) over a Sixth Amendment based objection. Br. in Opp. 20. However, as discussed in the Petition, at 19-24, *Tanner* does not in any way dictate the result in this case, as allegations of juror incompetence and juror racism are very different in several significant respects: in the way such issues may be discovered, in the scope of their effects upon the proceeding, and in their effect on the credibility of the legal system itself. In response, the United States does not address these differences in any way, simply relying upon its citation to *Tanner*, as if the balancing of interests undertaken in the context of an allegation of juror intoxication is exactly the same as in a case where juror racism against a criminal defendant has been alleged. Both the practical difficulties of proving racism and the extreme significance of such allegations in the context of our judicial system indicate that this issue poses special considerations which are not addressed by *Tanner* and which must be explicitly addressed by this Court.

CONCLUSION

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

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PROOF OF SERVICE

I, Scott Keith Wilson, do declare that on this date, November 2, 2009, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached RESPONSE TO BRIEF IN OPPOSITION on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid. The names and addresses of those served are as follows:

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 Nobember 2, 2009 and all parties required to be served have been served.

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