No. 09-5429

IN THE SUPREME COURT OF THE UNITED STATES

KERRY DEAN BENALLY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Federal Rule of Evidence 606(b) prohibits the consideration of juror testimony about statements made during deliberations for the purpose of demonstrating juror dishonesty during voir dire.

2. Whether the Sixth Amendment requires courts to make an exception to Rule 606(b) where a juror is alleged to harbor a racial bias.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 546 F.3d 1230. The order of the court of appeals denying rehearing (Pet. App. 32a-33a), and the opinions dissenting from the denial of rehearing en banc (Pet. App. 34a-44a) are reported at 560 F.3d 1151. The memorandum decision and order of the district court (Pet. App. 27a-31a) is not published.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 2008. A petition for rehearing was denied on March 23, 2009. On May 14, 2009, Justice Breyer extended the time within which to

file a petition for a writ of certiorari to and including July 20, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Utah, petitioner was convicted on one count of assaulting an employee of the United States with a dangerous weapon, in violation of 18 U.S.C. 111(b). The district court subsequently granted petitioner's motion for new trial based on affidavits from a juror and a defense investigator about racially biased statements allegedly made by other jurors during jury deliberations. Pet. App. 27a-31a. The court of appeals reversed and reinstated the jury verdict. Id. at 1a-26a.

1. In 2007, petitioner, a member of the Ute Mountain Ute Tribe, was charged with forcibly assaulting an officer of the Bureau of Indian Affairs with a dangerous weapon, resulting in bodily injury, in violation of 18 U.S.C. 111(b). Pet. App. 1a-2a. During pre-trial voir dire proceedings, petitioner submitted several questions aimed at uncovering bias against Native Americans in potential jurors. Id. at 2a. The district court posed two of those questions to the jury pool: (1) "Would the fact that the defendant is a Native American affect your evaluation of the case?" and (2) "Have you ever had a negative experience with any individuals of Native American descent? And, if so, would that

experience affect your evaluation of the facts of this case?" No potential juror answered either question affirmatively. Ibid.

The day after the jury found petitioner guilty, "Juror K.C." approached defense counsel and informed him that the jury foreman had made racist claims during the jury deliberations and that the jury had been improperly influenced by those claims. Pet. App. 2a-3a. Specifically, Juror K.C. alleged that the foreman had 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 Indians get drunk, they get violent. Id. at 3a. Juror K.C. claimed that she challenged the foreman, arguing that he was wrong. Ibid. At that point, another juror offered that she had also lived on or near a reservation; although Juror K.C. could not hear what the juror said after that, Juror K.C. felt that the juror agreed with the foreman. Ibid. Juror K.C. alleged that she continued to argue with the foreman, reiterating her view that he was wrong several times. Ibid. She also reported a separate discussion in which a juror stated that he had family members in law enforcement and had heard stories about "what happens when people mess with police officers and get away with it." Ibid. The jurors allegedly discussed needing to "send a message back to the reservation." Ibid.

Juror K.C. signed an affidavit confirming her accounts of the two conversations. Pet. App. 3a. A defense investigator then

contacted another juror, who may have corroborated some of Juror K.C.'s claims, but was not willing to sign an affidavit. Ibid. Instead, the defense investigator signed an affidavit purporting to describe what that juror said, including that "the jury foreman made a statement regarding Indians and drinking" and that he "said something like he had seen a lot of Indians that drink." Id. at 3a-4a.

2. Petitioner filed a motion for new trial supported by the affidavits of Juror K.C. and the defense investigator. Pet. App. 4a. The United States opposed petitioner's motion, arguing that the affidavit evidence was inadmissible under Federal Rule of Evidence 606(b). Ibid. Rule 606(b) provides:

> 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.

The district court admitted the juror testimony under the first and second exceptions listed in Rule 606(b), i.e., as revealing extraneous prejudicial information or outside influence. Pet. App. 4a-5a, 28a. Without holding an evidentiary hearing, the district

court credited the affidavits and concluded that two jurors had lied during voir dire when they failed to reveal that they "held any prejudice" toward Native Americans, "failed to disclose to the court that they had lived on or near a reservation, and did not bring to the court's attention that they had preconceptions about Native Americans due to their contact with that culture." Id. at 29a. Because the jurors were allowed to participate on the jury despite what the district court viewed as their prejudices, the court concluded that petitioner was denied his Sixth Amendment right to an impartial jury and ordered a new trial. Id. at 29a-30a.

The district court also found that the jury had improperly considered extrinsic evidence when the juror with relatives in law enforcement had relayed stories demonstrating the need to "send a message." Pet. App. 30a. Although the court could not determine whether any jurors actually relied on such stories, the court found the introduction of those stories to be a sufficient and independent basis for ordering a new trial. Ibid.

3. The United States appealed and the court of appeals reversed, reinstating petitioner's conviction. Pet. App. 1a-26a. The court examined the history and purpose of Rule 606(b), including the importance of its role of "insulat[ing] the deliberations of the jury from subsequent second-guessing by the judiciary." Id. at 6a. The court went on to reject the three

arguments petitioner asserted in defense of the district court's ruling.

First, the court of appeals considered petitioner's argument that Rule 606(b) does not apply at all to the juror testimony he offered in support of his new trial motion because the evidence was not offered to challenge the "validity of a verdict," Fed. R. Evid. 606(b), but "only to show that a juror failed to answer questions honestly during voir dire," Pet. App. 10a-11a. The court rejected that argument, reasoning that petitioner's only purpose in introducing the evidence was to vacate the verdict and receive a new trial. Id. at 11a. As the court of appeals concluded, "[t]hat is a challenge to the validity of a verdict." Ibid. The court of appeals noted that, if it permitted district courts to consider juror testimony about the content of jury deliberations "through the backdoor of a voir dire challenge," the exception would "risk[] swallowing the rule." Id. at 13a.

Second, the court of appeals rejected petitioner's argument that the juror testimony at issue in this case should be admitted as an exception to the general prohibition in Rule 606(b). The court concluded that the statement did not fall under either of the first two exceptions enumerated in Rule 606(b) for "extraneous prejudicial information" or "outside influence * * * improperly brought to bear upon any juror." Pet. App. 13a-17a. Although the court recognized that "the jurors' alleged statements were entirely

improper and inappropriate," it noted that "[i]mpropriety alone * * * does not make a statement extraneous." Id. at 17a. Because none of the statements allegedly made by jurors included "extra-record facts relating to the defendant," the court concluded that they did not fall within any exception to the general prohibition in Rule 606(b) and that the district court abused its discretion in finding otherwise. Id. at 16a-17a. The court also concluded that the statements could not be admitted under an "implicit exception" in Rule 606(b) for evidence of racial bias. Id. at 17a-20a. Although the court opined that "[p]erhaps it would be a good idea to amend Rule 606(b) to allow testimony revealing racial bias in jury deliberations," it noted that Congress had not done so and that the court's role was "to apply the Rules of Evidence as written." Id. at 18a.

Third, the court of appeals rejected petitioner's argument that "Rule 606(b) is unconstitutional as applied in this case, because it effectively precludes him from obtaining relief for what he regards as a violation of his Sixth Amendment right to an impartial jury." Pet. App. 20a. The court relied on this Court's decision in Tanner v. United States, 483 U.S. 107 (1987), which upheld Rule 606(b)'s preclusion of juror testimony about jurors' use of drugs and alcohol during the trial even though the Court acknowledged that defendants have a Sixth Amendment right to be tried by a "tribunal both impartial and mentally competent to

afford a hearing." Pet. App. 21a-24a (quoting Tanner, 483 U.S. at 115-116). Although the court of appeals recognized that "racial prejudice is an especially odious, and especially common, form of Sixth Amendment violation," the court feared that "once it is held that the rules of evidence must be subordinated to the need to admit evidence of Sixth Amendment violations," there would not be "a principled reason to limit the exception only to claims of bias, when other types of jury misconduct undermine a fair trial as well." Id. at 24a.

The court of appeals further noted that this case did not present a compelling argument for permitting exceptions to Rule 606(b). Pet. App. 25a-26a. According to Juror K.C.'s allegations, she countered the racially biased statements of the other jurors, and went on to vote for a verdict of guilty along with the rest of the unanimous jury. Id. at 25a. "This is not a case, therefore, where the verdict itself was shown to be based on the defendant's race rather than on the evidence and the law." Id. at 25a-26a.

Accordingly, the court of appeals reversed the district court's order granting a new trial and reinstated the jury's guilty verdict. Pet. App. 26a. Petitioner has not yet been sentenced.

4. On March 23, 2009, the court of appeals denied a petition for rehearing en banc. Pet. App. 32a-33a. Four judges dissented from the denial. Ibid. Judge Briscoe issued a written dissent, joined in part by Judge Lucero. Id. at 34a-43a. Judge Murphy

filed a separate dissent, which was also joined by Judge Lucero.[1] Id. at 44a. In the view of Judge Briscoe alone (expressed in the portion of her dissent that Judge Lucero did not join), Rule 606(b) does not apply to Juror K.C.'s affidavit because petitioner did not "inquir[e] into the validity of the verdict" within the meaning of the Rule, but instead challenged the validity of the pre-trial procedures and "the constitutionality of the overall proceedings." Id. at 37a. Judge Murphy separately expressed his "doubt about Judge Briscoe's confident assertion that the testimony at issue here falls outside the ambit of Rule 606." Id. at 44a.

Judges Briscoe, Lucero, and Murphy agreed that the juror statements at issue should have been admitted under the "extraneous prejudicial information" exception in Rule 606(b). Pet. App. 38a-40a, 44a. Judge Briscoe reasoned that the foreman's alleged statements "were obviously 'extraneous'" because they were neither made in open court nor subject to adversarial challenge. Id. at 39a. She would have held that "the 'erroneous prejudicial information' exception" encompasses "a juror's statements that denigrate the defendant's race." Id. at 40a.

Judges Briscoe, Lucero, and Murphy also agreed that the panel's application of Rule 606(b) in this case infringed petitioner's Sixth Amendment rights. Pet. App. 40a-43a; id. at 44a

[1] In addition, Chief Judge Henry dissented from the denial of rehearing en banc (Pet. App. 32a-33a), but did not join either dissenting opinion.

(Murphy, J., dissenting) ("I likewise agree [with Judge Briscoe] that the panel's contrary conclusion raises serious questions about the constitutionality of Rule 606.").

ARGUMENT

Petitioner urges this Court to review two aspects of the court of appeals' decision: (1) whether Rule 606(b) has any application to juror testimony about statements made during jury deliberations when such testimony is intended to establish that a juror lied during voir dire; and (2) whether the Sixth Amendment requires courts to make an exception to Rule 606(b) when the testimony could show that a juror harbored a racial bias. Neither aspect merits further review because the decision of the court of appeals is interlocutory; the decision correctly resolved the issue before the court; and the decision does not conflict with the holding of any other court of appeals.

1. As an initial matter, this Court's review is unwarranted at this time because the case is in an interlocutory posture. The court of appeals reinstated the jury verdict. Pet. App. 26a. Petitioner has not yet been sentenced or completed direct review of any additional claims he may have to challenge his conviction or sentence. Following the district court's final disposition of the case, petitioner will be able to raise his current claim, together with any other claims that may arise on remand, in a single petition for a writ of certiorari. The interlocutory posture of

the case "alone furnishe[s] sufficient ground for the denial" of this petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Virginia Military Inst. v. United States, 508 U.S. 946 (1993) (Scalia, J., concurring); see also Robert L. Stern et al., Supreme Court Practice, § 4.18, at 258 n.59 (8th ed. 2002) (noting that this Court routinely denies petitions for a writ of certiorari by criminal defendants challenging interlocutory determinations that may be reviewed at the ultimate conclusion of the criminal proceedings and explaining that this practice promotes judicial efficiency).

2. Petitioner contends that the courts of appeals are divided over whether Rule 606(b) prohibits consideration of juror testimony concerning jury deliberations for the purpose of determining whether a juror lied during voir dire. That is incorrect. Despite petitioner's reliance on language from certain cases, no court of appeals has held that Rule 606(b) permits juror testimony concerning statements made during jury deliberations for the purpose of establishing that a juror lied during voir dire when such testimony was not already admissible under the exceptions enumerated in Rule 606(b). Petitioner argues (Pet. 8) that the Ninth, Fifth, and District of Columbia Circuits have all 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." See also Pet. App. 11-13. But petitioner overstates the holdings of those circuits.

The strongest support for petitioner's view is found in the Ninth Circuit decisions stating that Rule 606(b) does not preclude juror testimony about deliberations when it is used for the purpose of determining whether a juror's responses during voir dire were truthful. 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."); Hard v. Burlington N. R.R., 812 F.2d 482, 485 (9th Cir. 1987) ("Statements which tend to show deceit during voir dire are not barred by that rule."). But neither of those cases concerned testimony that would have been barred by Rule 606(b) even outside the context of inquiring into the truthfulness of a juror's statements during voir dire.

In Henley, the allegedly racially biased statements at issue "were made before deliberations began and outside the jury room." 238 F.3d at 1120. The Ninth Circuit reasoned that the purpose of Rule 606(b) -- "the insulation of jurors' private deliberations from post-verdict scrutiny -- would not be implicated" by allowing the testimony at issue in that case. Ibid. While the court also

stated that it found "persuasive" the view that evidence of racial prejudice is excepted from Rule 606(b)'s restrictions, it explicitly did not decide "whether or to what extent the rule prohibits juror testimony concerning racist statements made during deliberations."[2] Id. at 1121.

In Hard, the evidence at issue consisted of a juror's statements during deliberations about the settlement practices of the railroad defendant on trial, for which the juror had previously worked. The Ninth Circuit held the statements admissible under the "extraneous influence" exception in Rule 606(b). 812 F.2d at 485-486. The court also stated that Rule 606(b) does not bar the introduction of "[s]tatements which tend to show deceit during voir dire," id. at 485, but that comment was unnecessary to the judgment in light of the court's simultaneous holding that Rule 606(b) did not bar introduction of the statement in any case. See id. at 486 ("Where [a juror's] * * * experiences are related to the

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[2] Statements made by jurors during the trial and outside of deliberations may nevertheless fall within Rule 606(b). See Williams v. Price, 343 F.3d 223, 236 (3d Cir. 2003) (noting that, in Tanner v. United States, 483 U.S. 107, 116-126 (1987), the Court applied the rule to testimony about drug and alcohol use during the trial and rejected the dissent's argument that the rule applied only to deliberations). But in Henley, the court reasoned that "Rule 606(b)'s primary purpose -- the insulation of jurors' private deliberations from post-verdict scrutiny -- would not be implicated by permitting juror testimony about what [one juror] said while carpooling with other jurors." 238 F.3d at 1120. This case, in contrast, deals with Rule 606(b)'s core purpose because the evidence at issue pertains directly to juror deliberations.

litigation, as they are here, they constitute extraneous evidence which may be used to impeach the jury's verdict.").

The other courts of appeals' decisions cited by petitioner are farther afield. Two of them do not involve alleged juror racism, and both permitted jurors to testify about jury deliberations in an inquiry into whether a juror lied during voir dire when Rule 606(b) would not have precluded the evidence. In United States v. Boney, 68 F.3d 497, 503 (1995), the D.C. Circuit permitted juror testimony about statements made during jury deliberations in order to determine whether a juror lied during voir dire because such statements fell under Rule 606(b)'s exception for "extraneous prejudicial information." In Vezina v. Theriot Marine Service, Inc., 554 F.2d 654, 655-656 (1977), the Fifth Circuit held that the district court should have considered testimony about a juror's statements that could have shown that the juror lied during voir dire; but those statements were made outside the context of jury deliberations before the jury had been charged. Indeed, the testimony in question came from an alternate juror who was not even part of the jury deliberations. Ibid.[3]

[3] Petitioner relies on the Fifth Circuit's decision in Maldanado v. Missouri Pacific Railway Co., 798 F.2d 764, 769-770 (1986), cert. denied, 480 U.S. 932 (1987), which also considered the admissibility of juror testimony about jury deliberations for the purpose of showing juror deceit during voir dire. But the court in that case declined to permit the introduction of such evidence.

Finally, in Williams v. Price, 343 F.3d 223 (3d Cir. 2003) (Alito, J.), the court considered a habeas corpus challenge to a state court conviction. The state defendant alleged that the state court of appeals, applying a rule of evidence essentially identical to Rule 606(b), should have considered testimony concerning allegedly racist juror statements in order to determine whether jurors had lied during voir dire when they denied racial prejudice. Id. at 225-228, 235-239. The Third Circuit expressly rejected the state defendant's view that the state version of Rule 606(b) "simply does not apply when a defendant seeks to introduce evidence to support a claim of juror misconduct committed during voir dire." Id. at 235 (internal quotation marks omitted). The court reasoned that both the state law at issue and Rule 606(b) "categorically bar juror testimony 'as to any matter or statement occurring during the course of the jury's deliberations' even if the testimony is not offered to explore the jury's decision-making process in reaching the verdict." Ibid. Although the court's ultimate holding was merely that the state court's exclusion of the statements did not violate clearly established federal law within the meaning of 28 U.S.C. 2254(d)(1), 343 F.3d at 235-236, its reasoning is in harmony with that of the decision below.

3. The court of appeals' conclusion that Rule 606(b) bars juror testimony about jury deliberations when that testimony is offered to establish that a juror lied during voir dire also does

not merit further review because it is correct. As the court of appeals noted, Pet. App. 5a, Rule 606(b) balances the sometimes-competing interests of ensuring that a jury verdict is free from inappropriate influence and protecting the sanctity of jury deliberations. See McDonald v. Pless, 238 U.S. 264, 267 (1915) ("[T]he weight of authority is that a juror cannot impeach his own verdict. The rule is based upon controlling considerations of a public policy which in these cases chooses between two evils."). As early as 1785, Lord Mansfield established a blanket ban on jurors' testifying against their own verdict in Vaise v. Delaval, 99 Eng. Rep. 944 (K.B. 1785). The so-called Mansfield's Rule was ultimately adopted by virtually every jurisdiction in the United States by the beginning of the twentieth century. See Tanner v. United States, 483 U.S. 107, 117 (1987). In 1974, Congress codified the common-law principle prohibiting jurors from impeaching their own verdict, along with certain exceptions that also developed in the common law, in the form of Rule 606(b).

This Court has recognized the wisdom of prohibiting jurors from impeaching their own verdicts as a means of protecting "the weighty government interest in insulating the jury's deliberative process." Tanner, 483 U.S. at 120. Although allowing "postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior," this Court has cautioned that "[i]t is

not at all clear * * * that the jury system could survive such efforts to perfect it." Ibid. Nearly a century ago, the Court expounded on the danger inherent in allowing jurors to testify about their deliberations:

> But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.

McDonald, 238 U.S. at 267-268; accord Tanner, 483 U.S. at 120-121 ("Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.").

The court of appeals in this case faithfully enforced the balance Congress struck in Rule 606(b) by refusing to read an unmanageable and unwritten exception into the Rule for new trial motions based on alleged juror dishonesty during voir dire. Petitioner argues (Pet. 11) that Rule 606(b) does not apply to his evidence because he is seeking a new trial based on alleged juror deceit during voir dire rather than based on improper influence

during jury deliberations. But by its terms the rule applies to all efforts to "inquir[e] into the validity of a verdict." Fed. R. Evid. 606(b). It is not limited to inquiries intended only to discover what influences came to bear during deliberations. As the court of appeals noted, Pet. App. 19a, Congress considered adopting a broader rule that would have allowed jurors to testify about what was said during jury deliberations as long as they did not testify about the mental processes of jurors. H.R. Rep. No. 650, 93d Cong., 1st Sess. 9-10 (1973); see also Fed. R. Evid. 606 advisory committee's notes (1974 Enactment, Notes to Subdivision (b)); Tanner, 483 U.S. at 122-125. Such a rule would have allowed the juror testimony at issue in this case, but that proposal was rejected by Congress in favor of the stricter provision codified in Rule 606(b). And, as the court of appeals reasoned, permitting a defendant to seek a new trial based on juror testimony about jury deliberations when the defendant alleges that a juror lied during voir dire would open such a large and unmanageable hole in the strong prohibition of Rule 606(b) as to "swallow[] the rule." Pet. App. 13a.

4. Petitioner argues (Pet. 13-17) that "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." But petitioner fails to identify any court of appeals that has held that the Constitution requires courts to read

an exception into Rule 606(b) to allow jurors to testify about racially biased statements made during jury deliberations.

Petitioner relies on the Ninth Circuit's decision in Henley, which held that Rule 606(b) does not preclude juror testimony about statements made by other jurors outside of jury deliberations when offered to establish whether a juror's voir dire responses were truthful. 238 F.3d at 1120-1121. Although the court considered whether evidence of racially biased statements made during deliberations should be admissible under the "outside influence" or "extraneous prejudicial information" exceptions in Rule 606(b), it did not rely on those exceptions or reach any constitutional issue. Id. at 1119-1121.[4] In any case, petitioner no longer argues that Juror K.C.'s affidavit should have been admitted under the "outside influence" or "extraneous prejudicial information" exceptions and the court of appeals correctly held that they should not. See Pet. App. 13a-17a.

Petitioner also broadly claims (Pet. 15) that "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." But he does not identify any case

[4] A later panel of the Ninth Circuit described the statement in Henley about whether Rule 606(b) permits jurors to testify about evidence of racial bias as dictum. United States v. Decoud, 456 F.3d 996, 1018-1019 (9th Cir. 2006), cert. denied, 551 U.S. 1116 (2007). Petitioner also cites (Pet. 14) the Ninth Circuit's decision in Hard. But that decision concerned a juror's failure to reveal that he had been employed by the defendant; it did not involve any allegations of racial bias. 812 F.2d at 483-486.

that has adopted the position he advocates -- that the Constitution requires courts to read an implicit exception in Rule 606(b) allowing juror testimony about racially biased statements made during jury deliberations. Neither of the courts of appeals cases petitioner cites -- Shillcutt v. Gagnon, 827 F.2d 1155 (7th Cir. 1987), and Carson v. Polley, 689 F.2d 562 (5th Cir. 1982) -- establishes the conflict he alleges. The Seventh Circuit in Shillcutt agreed with the court of appeals below that Rule 606(b) prevents a jury verdict from being impeached for the purpose of disclosing a racially biased statement. 827 F.2d at 1158-1159. And the Fifth Circuit in Carson was not confronted with an allegation of any sort of racial bias. 689 F.2d at 579-582. Thus, there is no disagreement among the courts of appeals that would warrant further review of this case by this Court.

In addition, contrary to petitioner's contention (Pet. 17-24), the court of appeals correctly concluded that the Sixth Amendment does not require courts to make an exception to Rule 606(b) for juror statements that display racial bias. This Court rejected a similar argument in Tanner in the face of allegations that jurors had used drugs and alcohol during the trial. 483 U.S. at 113. Although the Court recognized that "a defendant has a right to 'a tribunal both impartial and mentally competent to afford a hearing,'" the Court rejected the notion that the Sixth Amendment required the Court to infer an exception to Rule 606(b) in order to

determine whether a particular tribunal was in fact impartial and mentally competent. Id. at 126-127 (quoting Jordan v. Massachusetts, 225 U.S. 167, 176 (1912)). The court of appeals below correctly held that "Tanner compels a similar result in this case." Pet. App. 22a.

The Court reasoned in Tanner that the defendant's right to an unimpaired jury in that case was protected by four aspects of the trial process: (1) voir dire examination, (2) observation of the jury by the judge and other court personnel during the trial, (3) observation of jurors by each other with the opportunity to report inappropriate behavior to the court before a verdict is rendered, and (4) post-verdict impeachment of a verdict by non-juror evidence of misconduct. 483 U.S. at 127. Although, as the court of appeals noted, Pet. App. 23a, each of those protections will not be equally effective at discovering different types of juror misconduct, they still adequately protect a defendant's right to a fair trial. As this Court has held, a defendant "is entitled to a fair trial but not a perfect one, for there are no perfect trials." McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 553 (1984) (internal quotation marks omitted). Although racial bias is certainly an odious force in the legal system, courts are not helpless to uncover it without intruding on the jury's deliberative process. Voir dire, combined with the threat of contempt or perjury charges, is generally an effective means of

uncovering hidden biases. In addition, if Juror K.C. had brought her concerns to the attention of the judge before the jury rendered a verdict, the judge could have cured any alleged problem of bias without running afoul of Rule 606(b). Finally, even after the verdict was handed down, defense counsel could have employed investigative means other than interviewing jurors to determine whether any juror harbored an improper bias. For all of those reasons, applying Rule 606(b) according to its terms does not violate the Sixth Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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