No. 15-606

IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

BRIEF OF *AMICI CURIAE* RETIRED JUDGES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

NANCY GERTNER
51 Abbottsford Road
Brookline, Massachusetts 02446
(617) 851 3812
ngertner@law.harvard.edu

Counsel for Amici Curiae

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

RULES:

OTHER AUTHORITIES:

INTEREST OF *AMICI*

Amici are judges who served on either the Massachusetts state courts or the federal courts of Massachusetts. As judges they presided over jury trials and addressed issues similar to those raised in the case at bar.

Judge Rudolph Kass served as an Associate Justice of the Massachusetts Appeals Court from 1979 to 2003. Since retirement from the court, Judge Kass has served on the alternate dispute resolution panels of The Mediation Group, Org., in Brookline MA, and REBA Dispute Resolution, in Boston, MA. He is a member of the Board of Directors of Jewish Community Housing for the Elderly and Law Advocacy Resources, Inc., which delivers legal assistance to persons of low income and sometimes no income. Judge Hiller Zobel was an Associate Justice of the Massachusetts Superior Court from 1979 to 2002. Judge Zobel was also a tenured professor of law at Boston College Law School where he taught courses on civil procedure, evidence, copyright, admiralty, trial practice and judicial process. He presently serves as a neutral for Resolutions, LLC. Judge Margaret Hinkle was an Associate Justice of the Massachusetts Superior Court from 1993 to 2010 and on recall until February 2011. She presently serves as a neutral for JAMS and a Special Master for the Massachusetts Superior Court. Judge Nancy Gertner served on the United States District Court for the District of Massachusetts from 1994 to 2011. She retired to become Professor of Practice at the Harvard Law School, from 2011 to 2014 teaching criminal law, criminal procedure, and sentencing. She presently

teaches part time at Harvard and is a neutral with Resolutions, LLC.

SUMMARY OF THE ARGUMENT

Direct evidence of unequivocal racial bias expressed by a juror during deliberations raises serious constitutional questions about whether the defendant had the benefit of a fair and impartial jury. "No impeachment" rules that bar consideration of juror testimony of racial bias during deliberations when that testimony is offered to challenge a verdict go too far in undermining Sixth Amendment rights. While there are valid concerns about post-verdict inquiries into the jury's deliberation process, pragmatic issues must give way to constitutional requirements. *Amici*, retired state and federal judges from Massachusetts, a state without such a "no impeachment" rule since 1991, can attest that such pragmatic concerns can be addressed by court rules concerning lawyer-juror contact and decisional law.

In its opinion, the Colorado Supreme Court expressed three concerns regarding allowing investigations into jurors' racial bias: (1) that it would cause lawyers to harass jurors in an effort to uncover such information; (2) that courts would be unable to "discern a dividing line between different types of juror bias" or between racially biased comments of varying "severity"; and (3) that such inquiries would shatter public confidence in the judicial system.

Many other states, including the Commonwealth of Massachusetts permit such inquiries. These states have ethical rules allowing investigation into jurors'

racial bias while still preventing juror harassment. Trial courts in such states have the discretion to evaluate the significance of evidence of juror bias, and determine the appropriate remedy. The concerns expressed by the Colorado Supreme Court have not been reflected in the concrete experience of this Commonwealth or other states with a "no impeachment" rule. And rather than undermining public confidence in the judicial system, inquiries into racial bias during jury deliberations enhance it.

ARGUMENT

I. STATES THAT ALLOW INQUIRIES INTO JUROR BIAS STILL PROTECT JURORS FROM ATTORNEY HARASSMENT.

The Colorado Supreme Court expressed concern that allowing testimony regarding juror racial bias would cause lawyers to harass jurors. Pet. App. 13a-14a. Yet, many states allow inquiries into the jurors' deliberations process when allegations of racial bias surface, while still protecting jurors from attorney harassment.

For instance, Massachusetts has allowed post-verdict inquiries into the juror deliberations process since 1991. *See, e.g.*, *Commonwealth v. Laguer*, 571 N.E.2d 371, 375–77 (Mass. 1991) (concluding that a defendant is entitled to a hearing investigating the truth or falsity of a juror's affidavit attesting to "countless racial slurs . . . made in the presence of the jury" that may have deprived defendant of his fundamental right to a trial by an impartial jury); *Commonwealth v. McCowen*, 939 N.E.2d 735, 765–66 (Mass. 2010) (a post-verdict inquiry based on

affidavits from a discharged juror and two other deliberating jurors that the jury's deliberations had been infected by racial prejudice). At the same time, a juror is protected from lawyer harassment through an ethical rule forbidding the lawyer from engaging in post-verdict communications with jurors when the juror makes known his or her desire not to communicate with the lawyer. Mass. R. Prof'l Conduct 3.5(c)(2). Indeed, jurors are instructed, both before trial (in the Trial Juror's Handbook)[1] and after trial (in jury instructions), that they are under no obligation to disclose anything about their deliberations to either the media or to counsel.[2] In effect, they are encouraged to make clear whether or not they wish to speak to anyone post-verdict and counsel are obliged to respect their wishes.

Similarly, the Minnesota Supreme Court permits the trial court to hold a hearing whenever there is evidence of juror misconduct. *Schwartz v.*

---

[1] *See* COMMONWEALTH OF MASS., OFF. OF JURY COMM'R, TRIAL JUROR'S HANDBOOK (July 2012), http://www.mass.gov/courts/docs/jury/trial-juror-handbook-2012-07-03.pdf.

[2] Massachusetts only recently adopted this more permissive rule, replacing its prior rule which prohibited all lawyer-initiated juror contact unless specifically authorized by court order. *See* former Mass. R. Prof'l Conduct 3.5(d) (no longer effective as of July 1, 2015); *see also Commonwealth v. Solis*, 407 Mass. 398 (1990); *Commonwealth v. Fidler*, 377 Mass. 192 (1979). Significantly, when Massachusetts considered liberalizing this rule, none of the issues regarding juror harassment raised by the Colorado court were raised. *See, e.g.*, STANDING ADVISORY COMM., REP. OF THE STANDING ADVISORY COMM. ON THE R. OF PROF'L CONDUCT 27–28 (July 1, 2013), http://www.mass.gov/courts/docs/sjc/docs/rules-professional-conduct-report.pdf.

Minneapolis Suburban Bus Co., 104 N.W.2d 301 (Minn. 1960). And Minnesota allows such '*Schwartz*' hearings in response to allegations of racial bias on the part of a juror. *See, e.g.*, *State v. Evans*, 756 N.W.2d 854, 859 (Minn. 2008) (noting that, following a telephone caller's tip that a juror was racially biased, the trial court granted a *Schwartz* hearing to investigate the juror's misconduct). To prevent juror harassment Minnesota forbids a defeated litigant's attorney from contacting jurors for the purpose of obtaining evidence to request a *Schwartz* hearing. *Olberg v. Minneapolis Gas Co.*, 191 N.W.2d 418, 424–25 (Minn. 1971). To further discourage improper attorney behavior, the Minnesota Supreme Court strongly encourages trial courts to deny petitions for *Schwartz* hearings in instances where the defeated party's counsel obtains information from jurors in violation of *Olberg*. *Baker v. Gile*, 257 N.W.2d 376, 377–78 (Minn. 1977).

In short, the record in jurisdictions with a no-bar juror impeachment rule—as in Massachusetts and Minnesota—makes clear that the concerns of the Colorado Supreme Court can be addressed by ethical rules, juror handbooks, and court instructions.[3]

---

[3] Colorado's rule is almost identical to Massachusetts', prohibiting a lawyer from communicating with a juror after discharge of the jury if "the juror has made known to the lawyer a desire not to communicate." Colo. R. Prof'l Conduct 3.5(c)(2). Likewise, Colorado attorneys are forbidden from engaging in post-verdict juror communications if those communications involve "misrepresentation, coercion, duress or harassment." Colo. R. Prof'l Conduct 3.5(c)(3). Thus, even if Colorado allowed inquiries into juror racial bias, Colorado jurors are protected from attorney harassment.

II. A DISCERNABLE LINE CAN BE DRAWN.

The Colorado Supreme Court asserted a concern that they would be unable to "discern a dividing line between different types of juror bias" or between racially biased comments of varying "severity." Pet. App. 14a-15a. Yet, Massachusetts courts have drawn such lines without difficulty. The Court confronting allegations of racist statements is obliged to determine the "precise content and context of the statement to determine whether it reflects the juror's actual racial or ethnic bias, or whether it was said in jest or otherwise bore a meaning that would fail to establish racial bias." *Commonwealth v. McCowen*, 939 N.E.2d 735, 765 (Mass. 2010). If the court determines the statement reflects the juror's bias, the defendant is entitled to a new trial, without a further inquiry as to whether that bias affected the verdict. *Id.* Even if the court determines that juror is not actually biased, the court still conducts an inquiry into the deliberative process to determine whether the juror's statements "so infected the deliberative process" as to compromise the defendant's right to a fair trial. *Id.*

Other states have likewise identified meaningful standards for evaluating the impact of racist comments in the jury room without great difficulty. For example, in *Powell v. Allstate Insurance Co.*, 652 So.2d 354, 355 (Fla.1995), the Florida Supreme Court addressed claims of racial bias after a juror contacted the defendant's counsel and informed defense counsel of other jurors' numerous racial jokes throughout the trial. The Florida court drew a bright line. First, it noted that "it would be improper, after a verdict is rendered, to individually inquire

into the thought processes of a juror to seek to discover some bias in the juror's mind, like the racial bias involved here." *Id.* at 357. Then, however, the court explained that investigations into juror misconduct are acceptable "when appeals to racial bias are made openly among the jurors." *Id.* Though the court recognized this line might not prevent improper bias from existing as a *silent* factor in a particular juror's mind, it would, hopefully, act as a check on such bias and prevent the bias from being expressed so as to overtly influence others. *Id.* at 357–58.

III. INVESTIGATING JUROR BIAS PROMOTES PUBLIC CONFIDENCE IN THE NOTION OF A TRIAL BY AN IMPARTIAL JURY.

The Supreme Court of Colorado further wrote that allowing investigations of allegations of racial bias in the jury deliberations process would "shatter public confidence in the fundamental notion of trial by jury." Pet. App. 13a. Yet, when a juror injects racist statements into the deliberative process, the failure to conduct such an inquiry—to even consider the statement—has an even more deleterious impact. In fact, it is precisely because "juror bias affects the essential fairness of the trial" that Massachusetts grants a new trial to any defendant who establishes that the juror's statement reflects actual bias, without showing that the bias affected the jury's verdict. *Commonwealth v. McCowen*, 939 N.E.2d at 765 (internal citation omitted). Massachusetts recognizes that the public interest in holding a truly fair trial is more important than defending the idea that every trial must be fair.

Again, Massachusetts is not alone. *See, e.g.*, *State v. Jones*, 09-0751 (La. App. 1 Cir. 10/23/09), 29 So. 3d 533, 540 (La. Ct. App. 2009) (vacating the defendant's conviction and sentence after finding that the trial judge erred in failing to properly investigate a juror's racial slur); *People v. Rivera*, 759 N.Y.S.2d 136, 137 (N.Y. 2003) (ordering a new trial after three jurors admitted hearing a fourth juror make a racial slur regarding the defendant and his guilt); *Marshall v. State*, 854 So. 2d 1235, 1241 (Fla. 2003) (per curiam) (remanding the case for an evidentiary hearing on the claim of juror bias after a juror alerted defense counsel to other jurors' racist jokes); *Wright v. CTL Distribution, Inc.*, 650 So. 2d 641, 643 (Fla. Dist. Ct. App. 1995) (finding that the trial court erred in not investigating a juror's post-verdict statement regarding another juror's racial slurs); *After Hour Welding Inc. v. Laneil Management Co.*, 324 N.W.2d 686, 690 (Wis. 1982) (determining that a juror was competent to testify as to anti-Semitic statements made by other jurors concerning defendant's witness since those statements were "extraneous prejudicial information").

Colorado's concern that investigations into jury misconduct will undermine confidence in the judicial system is unfounded. Where even a single juror expresses racist sentiments, "[l]etting the verdict go unchallenged would be a serious affront to notions of equity." Victor Gold, *Juror Competency to Testify That A Verdict Was the Product of Racial Bias*, 9 ST. JOHN'S J. LEGAL COMMENTARY 125, 139 (1993).

CONCLUSION

There are important policy considerations underlying Fed.R.Evid. 606(b) as well as the Colorado Supreme Court's decision barring juror testimony on racist statements. *See e.g.*, *United States v. Villar*, 586 F.3d 76, 83 (1st Cir. 2009), Where, as here, there is direct evidence of bias, where the record shows that bias was expressed to the other jurors, pragmatic concerns must give way to concerns about a fair and impartial jury. An absolute exclusion in situations such as the one at bar is constitutionally unacceptable.

In any case, as the experience in Massachusetts and other states suggests, the concerns reflected in Rule 606(b) and in the decision of the Colorado Supreme Court are overstated.

We urge the Court to grant *certiorari*.

Respectfully submitted,

NANCY GERTNER
51 Abbottsford Road
Brookline, Massachusetts 02446
(617) 851 3812
ngertner@law.harvard.edu

Counsel for Amici Curiae

Dated: January 7, 2016