No. 15-606

IN THE

Supreme Court of the United States

MIGUEL ANGEL PEÑA RODRIGUEZ,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

ON WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

AMICUS CURIAE BRIEF OF CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Federal and state courts often inquire into the validity of jury verdicts—including inquiries into the possibility of juror misconduct—to ensure compliance with the Sixth Amendment right to trial by an impartial jury. However, most states and the federal system have a rule of evidence that generally prohibits the introduction of juror testimony regarding statements made during deliberations. These principles are known as "no-impeachment rules." No-impeachment rules are codified as Federal Rule of Evidence 606(b) and its state analogues; in some states, such rules exist as common-law principles.

In Amicus's view, the question presented is whether an exception to no-impeachment rules should exist for those narrow circumstances where a defendant offers evidence of racial bias to prove a violation of the Sixth Amendment right to an impartial jury.

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The Center on the Administration of Criminal Law (the "Center") respectfully submits this amicus curiae brief in support of Petitioner in this case.[1]

INTEREST OF AMICUS CURIAE

The Center, based at New York University School of Law,[2] is dedicated to defining and promoting good government practices in the criminal-justice system through academic research, litigation, and formulating public policy. One of the Center's guiding principles in selecting cases to litigate is identifying cases that raise substantial legal issues regarding interpreting the Constitution, statutes, regulations, or policies. The Center supports challenges to practices that raise fundamental questions of defendants' rights or that the Center believes constitute a misuse of government resources in view of law-enforcement priorities. The Center also defends criminal-justice practices where discretionary decisions align with applicable law and standard practic-

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[1] Counsel for all parties have consented to the filing of this amicus curiae brief. No counsel to any party authored this brief in whole or in part, and no person or entity other than Amicus and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] No part of this brief purports to represent the views of New York University School of Law, or of New York University, if any.

es and are consistent with law-enforcement priorities.

The Center's appearance as amicus curiae in this case is prompted by its belief that the Sixth Amendment right to trial by an impartial jury requires that an exception be made to no-impeachment rules for cases in which defendants offer evidence of racial bias during jury deliberations. The Center believes that protecting defendants' Sixth Amendment rights is necessary for the fair and effective administration of criminal justice. This case, therefore, is important to the Center's mission.

SUMMARY OF ARGUMENT

A rule permitting the impeachment of jury verdicts where racial bias is expressed during deliberations would substantially enhance the administration of criminal justice. This amicus brief demonstrates that rooting out racial bias in jury deliberations would not impose significant practical burdens on the courts. To the extent that such a burden may exist, it is greatly outweighed by the importance both of eradicating racial bias from the justice system and of enhancing the appearance of justice in this critical respect.

In order to ensure compliance with the Sixth Amendment's requirement of trial by an impartial jury, federal and state courts already inquire into the

validity of jury verdicts and deliberations on multiple grounds. There is no practical reason why consideration of racial bias should not be included among the issues affecting impartiality that courts already address—issues that are less pernicious than racial bias.

Indeed, some 20 jurisdictions throughout the country expressly provide for an exception[3] to the no-impeachment rules codified in Federal Rule of Evidence 606(b) and in state analogues.[4] This fact alone

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[3] Some jurisdictions base the exception on the Sixth Amendment. *See, e.g.*, *United States v. Villar*, 586 F.3d 76 (1st Cir. 2009) ("While we agree with the trial court that Rule 606(b) precludes inquiry into juror prejudice, we hold that the court has the discretion to conduct such an inquiry under the Sixth Amendment and the Due Process Clause . . . ."). Others apply principles of state law. *See, e.g.*, *State v. Santiago*, 715 A.2d 1, 22 (Conn. 1998) (mandating consideration of racial bias "in the exercise of our inherent supervisory authority over the administration of justice").

[4] Rule 606(b) of the Federal Rules of Evidence provides:

> During an Inquiry Into the Validity of a Verdict or Indictment.
>
> (1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
>
> (2) Exceptions. A juror may testify about whether:
>
> (A) extraneous prejudicial information was improperly brought to the jury's attention;

demonstrates the practicality of an exception. In those 20 jurisdictions, furthermore, courts have developed protocols to ensure the sound administration of trials and to limit slippery-slope problems that might ensue from inquiry into jury deliberations. Experience in other areas of the law further confirms that courts are well-equipped to address and decide issues of alleged racial bias.

Not only does an exception for racial bias fit easily into the already-routine regime of post-verdict inquiries into pernicious or improper juror influences, but a review of the case law in jurisdictions where the inquiry is permitted shows that racial bias arises infrequently—some 42 times over several decades. *See infra* Point II.C and Appendix A. At the same time, however, courts that have addressed allegations of racial bias have called the jury verdict into question over half the time—a fact that demonstrates the importance of recognizing an exception in order to expunge racial bias that would have gone unremedied were it not for the exception.

The practicality of an exception for racial bias should be dispositive. It is axiomatic that racial bias has no place within the criminal-justice system. For

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(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.

FED. R. EVID. 606(b). Most states have analogous rules, either codified or common-law.

that reason, the courts, including this Court, have crafted rules and doctrines to protect defendants from racial bias. Here, where a no-impeachment exception does not pose significant practical difficulties to the justice system, the pernicious influence of racial bias compels the adoption of such an exception.

ARGUMENT

I. THE SIXTH AMENDMENT REQUIRES AN EXCEPTION TO NO-IMPEACHMENT RULES FOR RACIAL BIAS TO ENSURE THE FAIR, CONSISTENT AND EFFECTIVE ADMINISTRATION OF CRIMINAL JUSTICE

The Sixth Amendment compels adoption of an exception to no-impeachment rules in order to ensure that racial discrimination plays no role in the jury process from beginning to end in criminal cases. As the Court has long recognized, racial bias affecting the impartiality of a jury is especially harmful to the integrity of the justice system. As a consequence, the Court has crafted mechanisms to extirpate racial considerations from almost every stage of the criminal process. The exception is jury deliberations, where, in many jurisdictions, no-impeachment rules preclude even considering whether racial bias affected the impartiality of jury deliberations.

Yet courts regularly inquire into jury deliberations for other reasons. Indeed, the Court has permitted post-trial inquiry and reversed jury verdicts to ensure that the jury was not influenced by evils far less pernicious than racial bias. Given the Sixth Amendment's command of impartiality, this fact highlights the incongruity of courts rooting out racial bias from every stage of the criminal process, yet doing nothing when racial bias may have infected the jury deliberations—arguably the most crucial stage.

A. The Right to an Impartial Jury, Free of Racial Bias, Is Fundamental to the Fair Administration of Criminal Justice

The Sixth Amendment right to trial by jury is "the most priceless" of safeguards for the preservation of individual liberty and dignity in the American criminal-justice system. *Irvin v. Dowd*, 366 U.S. 717, 721 (1961). In 1765, the First Congress of the American Colonies described trial by jury as an "inherent and invaluable right," *Duncan v. Louisiana*, 391 U.S. 145, 152 (1968); in 1774, the First Continental Congress called it a "great and inestimable privilege," *id.*; and in 1776, the Declaration of Independence bemoaned that King George III had "depriv[ed] us in many cases, of the benefits of Trial by Jury," THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

The right guaranteed by the Sixth Amendment is the right to "a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin*, 366 U.S. at 722. The failure to accord this right to a defendant "violates even the minimal standards of due process." *Id.* As Chief Justice Marshall recognized in 1807, "'those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection'" to a juror. *Reynolds v. United States*, 98 U.S. 145, 155 (1878) (quoting 1 Burr's Trial, 416 (1807)).

Biased jurors undermine a central purpose of the jury system: "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." *Powers v. Ohio*, 499 U.S. 400, 413 (1991) (all criminal defendants may object to race-based peremptory challenges, regardless of the race of the defendant or excluded juror).

B. Because Racial Bias Uniquely Harms the Integrity of Jury Verdicts, It Must Be Eradicated at Every Stage of Criminal Trials

Racial bias impairs both the integrity and reliability of the jury system, in violation of the Sixth

Amendment. Accordingly, the Court has implemented mechanisms designed to expunge racial bias from virtually every aspect of the criminal-justice system.

For example, racially discriminatory selection of grand jurors violates the Constitution. *See Castaneda v. Partida*, 430 U.S. 482, 501 (1977); *Reece v. Georgia*, 350 U.S. 85, 87 (1955); *Smith v. Texas*, 311 U.S. 128, 130 (1940); *Neal v. Delaware*, 103 U.S. 370, 394 (1880). Selection of a grand-jury foreperson based on race is unconstitutional. *Rose v. Mitchell*, 443 U.S. 545, 564-65 (1979). Similarly, during *voir dire*, a trial court may properly inquire into possible racial bias of prospective jurors before seating them. *See Turner v. Murray*, 476 U.S. 28, 33 (1986); *Ham v. South Carolina*, 409 U.S. 524, 529 (1973).

In selecting a petit jury, the Constitution prohibits the racially discriminatory use of peremptory challenges by prosecutors. *Powers v. Ohio*, 499 U.S. 400, 416 (1991); *Batson v. Kentucky*, 476 U.S. 79, 96 (1986). The same rule applies to peremptory challenges in civil trials, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991), and to peremptory challenges exercised by criminal defendants, *Georgia v. McCollum*, 505 U.S. 42, 59 (1992).

In recent years, the Court has repeatedly reaffirmed the importance of eliminating racial bias from the criminal-justice system, especially through the *Batson* framework. *See, e.g.*, *Snyder v. Louisiana*, 552 U.S. 472, 482-83 (2008) (prosecutor's proffered

reasons for striking an African-American juror were implausible); *accord Miller-El v. Dretke*, 545 U.S. 231, 266 (2005). Just last term, the Court reversed a decades-old conviction on a finding that "prosecutors were motivated in substantial part by race when they struck [two jurors] from the jury 30 years ago. Two peremptory strikes on the basis of race are two more than the Constitution allows." *Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016).

In light of the Court's consistent reprobation of bias in the criminal process, some lower courts have implemented additional prophylactic rules to excise racial and ethnic bias. For example, the Eleventh Circuit has held that jury misconduct in the form of racial and anti-Semitic slurs, brought to the attention of the court before the jury renders a verdict, may warrant the declaration of a mistrial. *United States v. Heller*, 785 F.2d 1524, 1528-29 (11th Cir. 1986); *see United States v. McClinton*, 135 F.3d 1178, 1187 (7th Cir. 1998).

Using rules such as these, courts strive to eliminate racial and other forms of discrimination from the arrest, indictment and juror-selection stages of criminal trials—and even, in some cases, from jury deliberations before the jury renders a verdict. Anomalously, however, no-impeachment rules preclude post-verdict inquiry into racial bias during jury deliberations, which are arguably the most important stage of trial by jury. An exception to no-

impeachment rules is necessary to ensure the uniform eradication of racial bias from the entire criminal-justice process.

"Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose*, 443 U.S. at 555. In fact, "[n]o surer way could be devised to bring the processes of justice into disrepute" than to "permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors." *Aldridge v. United States*, 283 U.S. 308, 315 (1931).

Racial discrimination undermines the institution of the jury by undercutting the democratic ideals that the jury represents:

> "[S]uch discrimination 'not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.' The harm is not only to the accused . . . . It is to society as a whole. 'The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.'"

Rose, 443 U.S. at 556 (citations omitted).

Racial discrimination also impairs the accuracy of jury verdicts. "It is by now clear that conscious

and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence." *McCollum*, 505 U.S. at 68 (O'Connor, J., dissenting).

The "pernicious" effect of racial bias among jurors, *Rose*, 443 U.S. at 555, in conjunction with the Sixth Amendment, requires that courts root out such bias no matter when or where they discover it, whether at the stage of jury selection—*see, e.g.*, *Turner*, 476 U.S. at 33; *Rose*, 443 U.S. at 555-56; *Aldridge*, 283 U.S. at 314-15—or at the stage of jury deliberations. An exception to no-impeachment rules will ensure that racial and ethnic bias is extirpated from the entire criminal-justice process, from arrest through jury decision-making.

II. AN EXCEPTION TO NO-IMPEACHMENT RULES FOR RACIAL BIAS WILL NOT IMPAIR THE ADMINISTRATION OF CRIMINAL JUSTICE

The majority of federal appellate courts and state courts of last resort that have considered the interplay between no-impeachment rules and the right to an impartial jury have held that courts may inquire into alleged racial bias in jury deliberations. The experience of these jurisdictions, especially when considered in light of the inquiries into jury delibera-

tions that regularly occur already, shows that inquiry as to racial bias is entirely feasible.

A. Federal and State Courts Already Routinely Inquire into Jury Deliberations, Including for Juror Misconduct

The Colorado Supreme Court expressed concern that "authorizing post-verdict investigations of jurors" would "'seriously disrupt the finality of the process,'" and that "the very potential for such investigations would shatter public confidence in the fundamental notion of trial by jury." Pet. App. 13a (quoting *Tanner v. United States*, 483 U.S. 107, 120 (1987)). Such fears are unfounded.

Federal and state courts already inquire into the possibility of juror misconduct in order to ensure compliance with the Sixth Amendment. As a consequence, a Sixth Amendment exception to no-impeachment rules that is targeted at racial bias would not open up broad new avenues for inquiry. Rather, all that is necessary is a limited extension of existing grounds for inquiries—albeit an extension critical to ensuring the fundamental fairness of all jury trials.

Rule 33(a) of the Federal Rules of Criminal Procedure broadly provides: "Upon the defendant's motion, the court may vacate any judgment and

grant a new trial if the interest of justice so requires." FED. R. CRIM. P. 33(a). State rules are similarly flexible. *See, e.g.*, COLO. R. CRIM. P. 33(a) (Colorado equivalent of federal rule).

As to juror misconduct, "[t]his Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. 209, 215 (1982). This is a fundamental Constitutional right: "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Id.* at 217. Thus, in all jurisdictions, upon a proper initial showing by the defendant, courts must hold proceedings to determine if the jury "decide[d] the case solely on the evidence before it," to ensure that there were no "prejudicial occurrences," and to "determine the effect of such occurrences when they happen." *Id.*

Courts maintain the flexibility and discretion to fashion these inquiries according to the needs of the situation: "[I]n light of the infinite variety of situations in which juror misconduct might be discerned and the need to protect jurors and the jury process from undue imposition, the trial judge is vested with the discretion to fashion an appropriate and responsible procedure to determine whether misconduct actually occurred and whether it was

prejudicial." *United States v. Ortiz-Arrigoitia*, 996 F.2d 436, 443 (1st Cir. 1993). Similarly, in Connecticut, for example, "a trial court must conduct a preliminary inquiry, on the record, whenever it is presented with any allegations of jury misconduct in a criminal case." *State v. Brown*, 668 A.2d 1288, 1303 (Conn. 1995).

Federal and state no-impeachment rules are an evidentiary limitation on this broad, Constitutionally-mandated requirement of inquiry into juror misconduct. Rule 606(b) of the Federal Rules of Evidence and its state equivalents prohibit jurors from testifying on certain topics, such as "any statement made or incident that occurred during the jury's deliberations." As demonstrated in Point II.B below, however, this evidentiary limitation is subject to multiple exceptions.

The prevalence of post-verdict inquiries demonstrates that by recognizing a racial-bias exception to Rule 606(b), the Court would not be creating a new kind of hearing or procedure. Rather, a racial-bias exception would modify the scope of the inquiries that are already required in all jurisdictions. The courts are well-equipped to handle such a change in the scope of post-verdict hearings.

Additionally, although the secrecy of jury deliberations promotes "full and frank discussion in the jury room," *Tanner*, 483 U.S. at 120, the sanctity of the jury process always has been subject to practical

limitations. For example, jurors are allowed to speak to the media regarding jury deliberations, including their mental processes, their motivations for voting for conviction or acquittal, and comments made by other jurors. While courts may discourage such disclosures, they cannot prevent jurors from making them. *See* LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS ¶ 9.09 (2015) ("As a matter of law you will have the right after you are dismissed from this courtroom to talk, if you want to talk, I have no power to order you otherwise. . . We do see in the newspapers and on television sometimes a case is decided and the minute they reach the courthouse steps jurors are being interviewed by various people, and they are making statements and saying who said what to whom in the jury room. And how many jurors thought this and how many jurors thought that."); Jane Kirtley, *Keeping Jurors' Lips Sealed*, AM. JOURNALISM REV., Jan.-Feb. 1998, *available at* http://ajrarchive.org/Article.asp?id=1767 ("Although judges often instruct jurors at the conclusion of a trial that they are not obliged to talk to anyone about their service, they do have a constitutional right to speak, which doesn't vanish simply because they have served on a jury.").

More recently, the Internet and social media have provided further outlets for jurors to freely discuss their deliberations. As with traditional media interviews, jurors are not prohibited from revealing

what occurred in the jury room through posts on social media. *See* N.Y. STATE BAR ASS'N, SOCIAL MEDIA JURY INSTRUCTIONS REPORT (2015), https://www.nysba.org/Sections/Commercial_Federal_Litigation/Com_Fed_PDFs/Social_Media_Jury_Instructions_Report.html (anticipating the use of social media after trial); Marcy Zora, *The Real Social Network: How Jurors' Use of Social Media and Smart Phones Affects A Defendant's Sixth Amendment Rights*, 2012 U. ILL. L. REV. 577, 588 (2012) (a juror posted on Twitter after a verdict, "I just gave away TWELVE MILLION DOLLARS of somebody else's money").

Thus, practically speaking, modifying the scope of no-impeachment rules to enable jurors to testify regarding racial bias during jury deliberations would neither "disrupt the finality" of jury verdicts nor "shatter public confidence" in the process, given the limited nature of such a modification and the imperfect secrecy of the jury room.

B. Rule 606(b) Has Exceptions for Less Odious Juror Influences than Express Racial Bias

Although, as discussed in Point I above, racial bias has a particularly destructive effect on the fairness and reliability of the jury system, Rule 606(b)'s evidentiary limitation has exceptions for juror influ-

ences that do not have the same "pernicious" effect on jury impartiality. *See Rose*, 443 U.S. at 555.

Under Rule 606(b) and similar common-law principles, notwithstanding the general prohibition on post-verdict testimony concerning jury deliberations and mental processes, a juror may testify about whether "extraneous prejudicial information was improperly brought to the jury's attention," or about whether "an outside influence was improperly brought to bear on any juror." FED. R. EVID. 606(b)(2); *see Tanner*, 483 U.S. at 117 (providing examples of evidence, in categories described below, which may be admitted notwithstanding Rule 606(b)'s broadly prohibitory language).

Courts have reversed convictions based on prejudicial inferences that arose from information other than the evidence presented at trial. For example, notwithstanding Rule 606(b), juror testimony is permitted concerning whether deliberations were affected by personal knowledge concerning a defendant, which may require reversal of a conviction or a hearing into whether reversal is required. *See, e.g.*, *United States v. Howard*, 506 F.2d 865, 866 (5th Cir. 1975) ("during the jury's deliberations one juror 'stated that the defendant had been in trouble two or three times'"; "this fact was used to pressure the affiant and another juror into aligning with the rest of the panel"); *United States ex rel. Owen v. McMann*, 435 F.2d 813, 815 (2d Cir. 1970) (ju-

rors "informed the other jurors that they 'knew all about' [the defendant] and referred to unfavorable incidents in [the defendant's] life which were entirely unrelated to the charge").

Although less "pernicious" than racial bias, *Rose*, 443 U.S. at 555, the concern in these cases is similar to the concern in this case. In the personal-knowledge cases, a juror attributed criminal acts to the defendant based on purported facts not admissible at trial. The same is true here. *See* Pet. App. 4a (juror stated that "in his experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women"). The only difference is that the bias in *Howard* and *Owen* was the result of a juror's outside personal knowledge concerning the defendant, whereas the bias in this case was the result of racial prejudice. Even if this distinction were material, it cuts in favor of permitting inquiry into racial bias, both because personal knowledge at least may be accurate and because racial prejudice more greatly affects societal perceptions of fairness in the criminal-justice system.

Additionally, courts admit evidence of (and reverse jury verdicts because of) unauthorized communication by or to jurors. Courts inquire into such situations even where the juror himself or herself has not made any statements or taken any overt action; the possible prejudicial effect of such statements on a

juror is enough to require an inquiry. *See, e.g.*, *Parker v. Gladden*, 385 U.S. 363, 363-64 (1966) (a court bailiff commented to a juror, "Oh that wicked fellow [the defendant], he is guilty," and said that if the jury erred "the Supreme Court will correct it"); *Mattox v. United States*, 146 U.S. 140, 142 (1892) (a court bailiff said to jurors, "This is the third fellow [the defendant] has killed").

Along the same lines, evidence of attempts to bribe jurors is admissible and may require reversal, even where attempts were clearly unsuccessful (*i.e.*, conviction occurred), because of possible prejudice arising from the bribe attempt itself. Thus, in *Remmer v. United States*, the Court directed a hearing into allegations of juror bribery, even though an FBI investigation had concluded that there was no wrongdoing and the attempt had been made "in jest." 347 U.S. 227, 228-29 (1954) (explaining that the FBI investigation itself could have prejudiced the jury); *see Stimack v. Texas*, 548 F.2d 588, 588 (5th Cir. 1977) (jurors testified that they viewed defendants "more severely" after they received phone calls threatening retribution by the Mafia if the jury did not acquit).

Furthermore, courts reverse convictions in situations involving communications that appear less harmful than threats or bribery. In the case of government actors, "even seemingly innocuous juror conversations and contact between such individuals

and a juror can trigger a presumption of prejudice." *United States v. Rutherford*, 371 F.3d 634, 643 (9th Cir. 2004); *see Turner v. Louisiana*, 379 U.S. 466, 468-70 (1965) (deputy sheriffs who testified for prosecution also drove jurors and spent social time with them); *United States v. Caldwell*, 83 F.3d 954, 956 (8th Cir. 1996) (where jurors witnessed another juror's husband enter the jury room during breaks, "third-party communications regarding the substance of the trial are presumptively prejudicial and can constitute grounds for a new trial unless the government establishes that the contact was harmless to the defendant"); *Little v. United States*, 73 F.2d 861, 867 (10th Cir. 1934) (stenographer who reread jury instructions in the jury room may have influenced deliberations through misinterpretation or use of emphasis).

If courts may permissibly inquire into whether a stenographer's inadvertent use of emphasis could bias a jury's deliberations so severely as to warrant overturning a conviction, there can be no doubt that they must inquire into the far more troubling circumstances of racial bias. These examples show that courts are fully capable of investigating potential juror bias following a verdict without disrupting the system of jury deliberations.

Courts also have admitted evidence of (and reversed convictions due to) jurors' entirely accidental access to outside information, including in circum-

stances that suggest no inherent bias on the jurors' part. *See, e.g.*, *Gov't of Virgin Islands v. Joseph*, 685 F.2d 857, 862-65 (3d Cir. 1982) (two documents not in evidence were inadvertently sent to the jury); *United States v. Vasquez*, 597 F.2d 192, 193 (9th Cir. 1979) (jurors examined case file accidentally left in jury room); *Farese v. United States*, 428 F.2d 178, 179-81 (5th Cir. 1970) (jurors found $750 in cash, about which the court and parties were unaware, in an attaché case during jury's examination of evidence). Again, given the unique evil of racial bias, it is anomalous to allow post-conviction inquiries into innocent mistakes, but to preclude probing into racial bias.

It makes no sense to prohibit the introduction of evidence showing overt racial bias by jurors. Racial prejudice is uniquely "pernicious" to the justice system, *Rose*, 443 U.S. at 555, and demonstrates an obvious and overt lack of the Constitutionally guaranteed impartiality. In the situations discussed above, courts have proven their facility at entertaining evidence concerning jury deliberations without disrupting the criminal-justice system, and even the mere possibility of bias arising from an external influence on the jury is enough to reverse a conviction.

C. In Jurisdictions that Consider Racial Bias, Such Inquiries Are Infrequent, But Often Lead to Reversal

The experience of the 20 jurisdictions that expressly allow consideration of jury-room racial bias confirms that such inquiries are both practical and crucial to protecting Sixth Amendment rights. In those jurisdictions, allegations of racial bias among jurors are relatively rare, confirming the rule's practicality. When allegations of such bias do arise, however, courts have reversed for a new trial or called for further inquiry in over half of the cases, confirming the rule's importance. Together, this experience demonstrates that consideration of racial bias does not unduly consume judicial resources or impair the administration of trials, but that the rule serves an important function in rooting out racial bias.

To reach these conclusions, Amicus analyzed the case law in jurisdictions that approve of courts' consideration of racial bias in jury deliberations as exceptions to no-impeachment rules. Amicus (*i*) identified in each such jurisdiction the leading case or cases that established the principle that courts may inquire into racial bias in deliberations; (*ii*) analyzed the cases that were indicated on Westlaw as "citing" the leading case, and (*iii*) identified whether such judicial review resulted in affirmance or rever-

sal of the challenged verdict due to alleged racial bias.[5]

For purposes of this survey, Amicus did not include jurisdictions where courts have expressed support for a racial-bias exception but have not explicitly adopted such a rule. *See, e.g.*, *United States v. Hayat*, 710 F.3d 875, 886 (9th Cir. 2013) (citing *United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001)). Notably, even after expressing support for such an exception in dicta, the courts in these jurisdictions have not needed to resolve the question in the several years since the issue has arisen, thus confirming that such challenges are sufficiently rare as to be administratively feasible.

The following chart summarizes the results:

[5] An explanation of the methodology used by Amicus and its case-by-case results are shown in Appendix A. This analysis may have missed some cases that are unreported or unavailable on Westlaw or otherwise were not identified by Amicus's methodology. Thus, the chart is suggestive rather than definitive. Nonetheless, the research provides a general basis for understanding the frequency with which racial or ethnic bias in deliberations arises and leads to reversal.

	Date of First Case Allowing Racial Bias Challenge	Number of Cases Addressing Inquiry into Racial/Ethnic Bias in Jury Deliberations	Number of Cases Granting New Trial or Hearing	Number of Cases Denying a New Trial or Hearing
First Circuit[6]	2009	2	2	0
Seventh Circuit[6]	1987	1	0	1
Connecticut	1998	5	3	2
Delaware	1996	1	1	0
District of Columbia	2013	1	0	1
Florida	1995	5	5	0
Georgia	1990	1	0	1
Hawaii	1996	1	0	1
Massachusetts	1991	2	1	1
Minnesota	1980	5	3	2
Missouri	2010	1 (ethnic or religious bias)	1 (ethnic or religious bias)	0
New Jersey	1961	1 (religious bias)	1 (religious bias)	0
New York	1986	4	3	1

[6] Including federal district courts within the Circuit.

	Date of First Case Allowing Racial Bias Challenge	Number of Cases Addressing Inquiry into Racial/Ethnic Bias in Jury Deliberations	Number of Cases Granting New Trial or Hearing	Number of Cases Denying a New Trial or Hearing
North Dakota	2008	1	0	1
Oklahoma	2012	1	1	0
Oregon	1981	N/A[7]	N/A	N/A
Rhode Island	2013	1	0	1
South Carolina	1995	2	1	1
Washington	1967	3	1	2
Wisconsin	1982	4 (including religious bias)	1 (religious bias)	3 (including religious bias)
Total		**42**	**24**	**18**

The rarity of allegations of bias confirms the practicality of Petitioner's proposed rule. Amicus's review of these 20 jurisdictions over several decades showed 42 instances in which courts addressed inquiries into allegations of racial bias (including, in some jurisdictions, ethnic or religious bias) during jury deliberations. This shows that the availability

[7] Although an Oregon statute establishes a racial-bias exception, no cases were identified which applied it.

of a remedy for bias during deliberations has not opened the floodgates or overwhelmed the courts. There is no reason to believe that the experience of these 20 jurisdictions would not be reflected nationwide.

At the same time, the frequency with which a new trial or hearing was ordered demonstrates the importance of recognizing a Sixth Amendment exception to no-impeachment rules. In over half of the cases in which courts considered allegations of racial bias in jury deliberations—24 of 42 cases reviewed by Amicus—courts have required new trials or inquiries into the allegations.

With a low systemic cost to the courts as a whole and a high individual value in the specific cases in which it arises, consideration of racial bias in jury deliberations is a paradigmatic example of a beneficial rule. In the jurisdictions that already permit it, the inquiry not only serves to root out racial bias in individual cases, but it carries enormous symbolic importance as a normative statement that the courts will not countenance the type of horrific racial bias that may be revealed. *See, e.g.*, *Kittle v. United States*, 65 A.3d 1144, 1147-48, 1155 (D.C. 2013) (where certain jurors reportedly suggested "that all 'blacks' are guilty," the trial judge had discretion to consider juror testimony to ensure "the public's confidence in the fair administration of justice" and because of the "insidiousness of racial or

ethnic bias"). And even if the trial court concludes that reversal is not warranted, the thoughtful and deliberate consideration of potential racial bias strongly validates the judicial process. The small burden on the courts is thus outweighed both in individual cases and systemically.

D. Courts Are Well-Equipped to Make Judgments Concerning Alleged Racial Bias in Jury Deliberations

The experience of the 20 jurisdictions that allow inquiry into racial bias in jury deliberations demonstrates the error of the Colorado Supreme Court's view that it 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. The Colorado Supreme Court was wrong for at least four reasons.

First, courts frequently draw precisely that dividing line regarding racial bias in multiple contexts other than jury deliberations.

For example, when faced with *Batson* challenges to prosecutors' use of peremptory challenges, courts are required to conduct "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available" in determining whether prosecutors' use of challenges was proper or whether prosecutors acted with "discriminatory purpose." *Batson*,

476 U.S. at 93-94. As part of this inquiry, courts must look carefully at "all relevant circumstances," including prosecutors' questions and statements during *voir dire* and any pattern of strikes against jurors of a particular race. *Id.* at 96-97; *see Foster*, 136 S. Ct. at 1748 ("We have 'made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted.'" (quoting *Snyder*, 552 U.S. at 478)). Indeed, determining a prosecutor's true motive may well be a more difficult judgment than discerning unlawful bias in actual spoken comments made by deliberating jurors.

Similarly, during *voir dire*, courts are entitled to ask questions about racial bias, and must decide whether to excuse jurors for cause based on their responses, as well as any other comments they may make about race. Under the circumstances of a particular case, it may even be an abuse of discretion to fail to ask questions regarding such bias. *See, e.g.*, *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981) ("federal trial courts must make such an inquiry when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups"); *Ham*, 409 U.S. at 527 ("we think that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of ra-

cial prejudice"). These decisions recognize that trial courts are well-equipped to determine whether jurors' responses to such questions require their removal for cause. *See Rosales-Lopez*, 451 U.S. at 189 ("Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the *voir dire*.").

In an analogous context, when courts evaluate the motives underlying employment decisions, they often distinguish between evidence of true racial animus and "stray" racial comments. "Whereas direct evidence of animus relates to the actor's state of mind at the time of making an adverse decision, a stray remark is simply a prejudicial comment that does not bear upon the challenged employment decision." MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 2.7 (5th ed. 2014). A "stray remark" may be identified, among other means, through its "remoteness in person from the individual plaintiff and in time from the adverse decision." *Id.*

Assessing whether a municipality's refusal to rezone was racially motivated—a situation that the Court recently described as a "related context" to the analysis of racial discrimination in jury selection, *Foster*, 136 S. Ct. at 1748—requires a similar fact-specific inquiry. "Determining whether invidious

discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977), *cited by Foster*, 136 S. Ct. at 1748.

The experience of jurisdictions permitting inquiry into racial bias during jury deliberations confirms that courts are capable of identifying the appropriate "dividing line" in that context as well. In *State v. Johnson*, 951 A.2d 1257 (Conn. 2008), for example, the defendant claimed that jurors' comments identifying the race of certain spectators at the trial showed that those jurors were racially biased. The Connecticut Supreme Court engaged in a careful, fact-specific review of the record—noting, for example, that "five of these seven jurors first mentioned the gender or height of the individuals rather than their race"—before concluding that the jurors' descriptions of the spectators fell on the permissible side of the line. *See id.* at 1279-80 (an alternative holding would "demand an overly cynical and unjustified assessment of the jurors"). The Connecticut courts have further ensured the administrability of this exception by limiting judicial inquiry to "objective evidence of racially related statements and behavior" rather than jurors' subjective beliefs. *State v. Phillips*, 927 A.2d 931, 937-38 (Conn. App. Ct. 2007) (the court "need not, and should not, have asked ju-

rors whether anything improper had influenced their verdict").

Second, courts have already shown that they are able to distinguish between allegations that trigger further inquiry and implausible allegations that require no further investigation when administering the existing exceptions to Rule 606(b) for "extraneous prejudicial information" and for "outside influence[s]."

Courts must sometimes decide whether allegations of juror influence or prejudice are credible, typically based on the source and nature of the allegations. *Compare, e.g.*, *United States v. Moses*, 15 F.3d 774, 778 (8th Cir. 1994) (a juror's claim that someone tampered with his food or drink did not warrant a hearing); *United States v. Caldwell*, 776 F.2d 989, 998 (11th Cir. 1985) (an anonymous telephone call was "speculative and unreliable" and created "no burden to investigate"); *King v. United States*, 576 F.2d 432, 438 (2d Cir. 1978) ("weakly authenticated, vague, and speculative" affidavits required no further inquiry), *with United States v. Angulo*, 4 F.3d 843, 847 (9th Cir. 1993) (a hearing was necessary where a juror "informed the judge that she had received a threatening phone call and that she had told the other jurors about it").

In other cases, even assuming the truth of the allegations at hand, courts must decide whether the statements that occurred could plausibly have influ-

enced the jury. *Compare, e.g.*, *United States v. Lakhani*, 480 F.3d 171, 185 (3d Cir. 2007) ("Here, the jury foreman's 'threat' to keep juror number nine from her new home for months is obvious hyperbole."), *with Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914, 917 (7th Cir. 1991) (Posner, J.) (a new trial was required where a marshal told a jury that it would "be locked up till it renders its verdict, however long that may take," because a marshal's "official position makes him likely to be believed").

Similarly, courts implementing racial-bias exceptions to no-impeachment rules carefully examine allegations to determine whether they are credible, could plausibly have affected the jury, and deserve further review.

For example, in *United States v. Villar*, 586 F.3d 76 (1st Cir. 2009), the First Circuit held that, where "defense counsel received an e-mail message from one of the jurors disclosing that during deliberations another juror said, 'I guess we're profiling but they cause all the trouble,'" the district court had the discretion to hear juror testimony "to determine whether ethnically biased statements were made during jury deliberations." *Id.* at 78, 87. In doing so, the court "emphasize[d] that not every stray or isolated off-base statement made during deliberations requires a hearing at which jury testimony is taken." *Id.* at 87; *see Commonwealth v. McCowen*, 939 N.E.2d 735, 765 (Mass. 2010) ("[T]he judge must de-

termine 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.").

By contrast, in *State v. Brown*, 62 A.3d 1099 (R.I. 2013), the Rhode Island Supreme Court held that allegations that a juror had said that a Native American defendant was "nothing," that a juror had described Native American defendants as "those people," and that a juror's banging water bottles like tom-tom drums did not require further inquiry, because that behavior, even if it had occurred, was "'ambiguous,' 'innocuous,' and 'capable of different interpretations.'" *Id.* at 1110-11.

Third, in jurisdictions where evidence of racial bias in jury deliberations is considered, courts often employ harmless-error review, *i.e.*, determining whether comments made a difference in the outcome of the trial. *See, e.g.*, *Villar*, 586 F.3d at 87 (after first determining that "ethnically biased statements were made during jury deliberations," the trial court should examine "whether there is a substantial probability that any such comments made a difference in the outcome of the trial"); *Shillcutt v. Gagnon*, 827 F.2d 1155 (7th Cir. 1987).

Through harmless-error review, courts are able to draw a "dividing line" between comments that require reversal and those do not, which the Colora-

do Supreme Court claimed was impossible. For example, in *Shillcutt*, where the defendant was accused of soliciting prostitutes, a juror said, "Let's be logical. He's black and he sees a seventeen year old white girl—I know the type." *Id.* at 1156. Applying harmless-error review, the court concluded that there was no "substantial probability that the alleged racial slur made a difference in the outcome of the trial." *Id.* at 1159; *see State v. Hidanovic*, 747 N.W.2d 463, 467, 474 (N.D. 2008) (juror's statements that Bosnians "stole from my business" and "lied to me regarding the theft and their conduct" "would not have affected the verdict of a hypothetical average jury"); *State v. Hunter*, 463 S.E.2d 314, 316 (S.C. 1995) (juror's use of racial slur, in context, did not deny defendant a fair trial); *Spencer v. State*, 398 S.E.2d 179, 185 (Ga. 1990) (juror's affidavit showed "only that two of the twelve jurors possessed some racial prejudice and does not establish that racial prejudice caused those two jurors to vote to convict Spencer and sentence him to die").

The Colorado Supreme Court gave no reason why harmless-error review is infeasible in this context, given its frequent use to evaluate a host of different challenges to a verdict, ranging from mistaken admission of harmful evidence to prosecutorial misconduct to errors in jury instructions. All of these situations may require judgment calls equally or

more difficult than assessing the impact of openly expressed racial bias.

Fourth, courts have adopted familiar doctrines, presumptions, and rules—the very same judicial doctrines already used in numerous legal contexts—to help them decide which types of comments may have impermissibly infected the jury's decision-making with racial or ethnic bias.

In some jurisdictions, there are relatively strict, bright-line rules requiring courts to hold hearings on all allegations of racial bias. For example, in *Powell v. Allstate Insurance Co.*, 652 So. 2d 354 (Fla. 1995), the Florida Supreme Court found that when "appeals to racial bias are made openly among the jurors," those statements "constitute overt acts of misconduct" requiring a hearing. *Id.* at 357. The court explained, "This is one way that we attempt to draw a bright line." *Id.* Indeed, the court's direction that "[i]f the trial court determines that such statements were made, it shall order a new trial" apparently gave no discretion to excuse such statements as non-prejudicial if they were in fact made. *See id.* at 358.

Similarly, in *State v. Santiago*, 715 A.2d 1 (Conn. 1998), the Connecticut Supreme Court instructed that in "all future cases in which a defendant alleges that a juror has made racial epithets," the trial court should conduct "an extensive inquiry of the person reporting the conduct, to include the

context of the remarks, an interview with any persons likely to have been a witness to the alleged conduct, and the juror alleged to have made the remarks." *Id.* at 22.

Other states leave greater discretion to trial judges to dismiss allegations of racial bias without holding a hearing. For example, Wisconsin uses the same three-step procedure for assessing alleged racial bias that it uses for allegations of extraneous prejudicial information or inappropriate outside influences. The Wisconsin Supreme Court has explained, "The first two steps involve evidentiary questions: (1) Is the proffered evidence competent under [Wisconsin law]; and (2) does the evidence show error, that is, substantial grounds sufficient to overturn the verdict. (3) The third question is whether the party seeking to impeach the verdict was prejudiced requiring that the verdict be upset." *State v. Shillcutt*, 350 N.W.2d 686, 689 (Wis. 1984).

Massachusetts has adopted a burden-shifting framework:

> The defendant therefore bears the initial burden of proving, by a preponderance of the evidence, that the jury were exposed to statements that infected the deliberative process with racially or ethnically charged language or stereotypes. If the defendant meets this burden, the burden then shifts to the

> Commonwealth to show beyond a reasonable doubt that the defendant was not prejudiced by the jury's exposure to these statements.

McCowen, 939 N.E.2d at 766 (citations omitted).

Indeed, *McCowen* stands as an example of a court drawing the dividing line between different circumstances and expressions of racial bias that the Colorado Supreme Court thought impossible. There, juror affidavits alleged "that another juror (Juror Y) said that bruises like those found on the victim's body would result 'when a big black guy beats up on a small woman.'" *Id.* at 761. After a hearing, the trial judge concluded that in the jury room, "Juror Y's words provoked an immediate reaction from the black female juror, who asked Juror Y what being black had to do with it and called her a racist"; a verbal "confrontation" then ensued. *Id.* at 762. Based on that evidence, the court upheld the trial court's conclusion that the juror's response to Juror Y "served the beneficial purpose of exposing and 'blunting the effect' of the racial stereotype, and of warning the jury of the risk of racial stereotypes infecting their deliberations." *Id.* at 766.

Moreover, as is common practice, appellate courts have given deference to factual determinations on the basis that the trial judge is best situated to determine what affected jury deliberations. *See Hidanovic*, 747 N.W.2d at 474 (applying abuse-of-

discretion review); *State v. Levitt*, 176 A.2d 465, 468-69 (N.J. 1961) ("We cannot overlook the factor that the judge who presided at the trial and the hearing was in a better position than this court, which sees only the cold record, to appraise the entire situation and determine whether the defendant's basic rights were violated."). This doctrine helps alleviate concern that appellate judges will need to draw lines between factual circumstances based on "cold records."

In sum, courts can effectively evaluate and judge evidence of racial bias in jury deliberations using standard doctrines and procedures. The Colorado Supreme Court's suggestion that such inquiries would be unmanageable fails to pass Constitutional muster.

CONCLUSION

For the foregoing reasons, the judgment of the Colorado Supreme Court should be reversed.

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Respectfully submitted,

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APPENDICES

In preparing this brief, Amicus reviewed case law in the 20 jurisdictions that Amicus identified as allowing impeachment of jury verdicts on grounds of racial or ethnic bias expressed during deliberations. In each of the relevant jurisdictions, Amicus identified the leading case or cases that established the principle that courts may consider racial bias in jury deliberations. For each leading case, Amicus then analyzed the cases that were indicated by Westlaw as "citing" the leading case and that contained keywords relating to racial bias. For each such case, Amicus ascertained whether the criminal defendant or petitioner had alleged that racial bias infected the verdict. Amicus then recorded the outcome of each case—whether racial bias was grounds for reversal for a new trial or for a hearing into whether a new trial was necessary, or whether the conviction was affirmed. The 42 cases shown in the chart below met these criteria.[8]

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[8] As noted above, Amicus did not include jurisdictions where courts have expressed support for a racial-bias exception but have not explicitly adopted such a rule. *See, e.g.*, *United States v. Hayat*, 710 F.3d 875, 886 (9th Cir. 2013) (citing *United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001)).

Amicus also did not include federal district courts in jurisdictions where courts of appeals have not adopted a circuit-wide exception. *See, e.g.*, *Wright v. United States*, 559 F. Supp. 1139, 1151 (E.D.N.Y. 1983), *aff'd on other grounds*, 732 F.2d 1048 (2d Cir. 1984); *Tobias v. Smith*, 468 F. Supp. 1287, 1290

Appendix A
Jurisdictions with Sixth Amendment Exceptions to No-Impeachment Rules for Racial or Ethnic Bias

	Cases Addressing Inquiry into Racial/Ethnic Bias in Jury Deliberations	New Trial or Hearing Granted	No New Trial or Hearing
First Circuit	*United States v. Villar*, 586 F.3d 76 (1st Cir. 2009)	X	
First Circuit	*United States v. Fuentes*, No. 2:12-CR-50-DBH, 2013 WL 4483062 (D. Me. Aug. 19, 2013)	X	
Seventh Circuit	*Shillcutt v. Gagnon*, 827 F.2d 1155 (7th Cir. 1987)		X

(W.D.N.Y. 1979); *Smith v. Brewer*, 444 F. Supp. 482, 490 (S.D. Iowa), *aff'd on other grounds*, 577 F.2d 466 (8th Cir. 1978).

Finally, Amicus did not include cases that were decided before the adoption of no-impeachment rules in their respective jurisdictions. *See, e.g.*, *Evans v. Galbraith-Foxworth Lumber Co.*, 31 S.W.2d 496, 500 (Tex. Civ. App. 1929).

Although the foregoing categories of cases are not included in the analysis, they provide additional practical support for recognizing a racial bias exception to no-impeachment rules.

	Cases Addressing Inquiry into Racial/Ethnic Bias in Jury Deliberations	New Trial or Hearing Granted	No New Trial or Hearing
Delaware	*Fisher v. State*, 690 A.2d 917 (Del. 1996)	X	
District of Columbia	*Kittle v. United States*, 65 A.3d 1144 (D.C. 2013)		X
Georgia	*Spencer v. State*, 398 S.E.2d 179 (Ga. 1990)		X
Massachusetts	*Commonwealth v. McCowen*, 939 N.E.2d 735 (Mass. 2010)		X
Massachusetts	*Commonwealth v. Laguer*, 571 N.E.2d 371 (Mass. 1991)	X	
Missouri	*Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81 (Mo. 2010) (ethnic or religious bias)[9]	X	
New Jersey	*State v. Levitt*, 176 A.2d 465 (N.J. 1961) (religious bias)	X	
North Dakota	*State v. Hidanovic*, 747 N.W.2d 463 (N.D. 2008)		X

[9] Six states (Missouri, Wisconsin, Connecticut, Florida, Oklahoma and Washington) have applied a bias exception to no-impeachment rules in certain civil cases. The civil cases further demonstrate feasibility and usefulness, as they show that expanding the racial-bias exception to include civil cases does not impair the administration of justice.

	Cases Addressing Inquiry into Racial/Ethnic Bias in Jury Deliberations	New Trial or Hearing Granted	No New Trial or Hearing
Rhode Island	*State v. Brown*, 62 A.3d 1099 (R.I. 2013)		X
South Carolina	*State v. Hunter*, 463 S.E.2d 314 (S.C. 1995)		X
South Carolina	*Bennett v. Stirling*, No. CV 2:13-3191-RMG, 2016 WL 1070812 (D.S.C. Mar. 16, 2016)	X	
Wisconsin	*State v. Shillcutt*, 350 N.W.2d 686 (Wis. 1984)		X
Wisconsin	*After Hour Welding, Inc. v. Laneil Mgmt. Co.*, 324 N.W.2d 686 (Wis. 1982) (religious bias)	X	
Wisconsin	*Anderson v. Burnett Cty.*, 558 N.W.2d 636 (Wis. Ct. App. 1996) (religious bias)		X
Wisconsin	*Jacobs v. Buchanan*, 364 N.W.2d 181 (Wis. Ct. App. 1985)		X

Appendix B
Jurisdictions with Exceptions to No-Impeachment Rules for Racial or Ethnic Bias Based on State Statute or Common Law

	Case Addressing Inquiry into Racial/Ethnic Bias in Jury Deliberations	New Trial or Hearing Granted	No New Trial or Hearing
Connecticut	*State v. Johnson*, 951 A.2d 1257 (Conn. 2008)		X
Connecticut	*State v. Anderson*, 773 A.2d 287 (Conn. 2001)		X
Connecticut	*State v. Santiago*, 715 A.2d 1 (Conn. 1998)	X	
Connecticut	*State v. Phillips*, 927 A.2d 931 (Conn. App. Ct. 2007)	X	
Connecticut	*Horan v. Murgio,* No. 538130, 1998 WL 695282 (Conn. Super. Ct. Sept. 23, 1998)	X	
Florida	*Marshall v. State*, 854 So. 2d 1235 (Fla. 2003)	X	
Florida	*Powell v. Allstate Ins. Co.*, 652 So. 2d 354 (Fla. 1995)	X	

	Case Addressing Inquiry into Racial/Ethnic Bias in Jury Deliberations	New Trial or Hearing Granted	No New Trial or Hearing
Florida	*Wright v. CTL Distribution, Inc.*, 679 So. 2d 1233 (Fla. Dist. Ct. App. 1996)	X	
Florida	*Singletary ex rel. Barnett Banks Trust Co. v. Lewis*, 584 So. 2d 634 (Fla. Dist. Ct. App. 1991)	X	
Florida	*Sanchez v. Int'l Park Condo. Ass'n, Inc.*, 563 So. 2d 197 (Fla. Dist. Ct. App. 1990)	X	
Hawaii	*State v. Jackson*, 912 P.2d 71 (Haw. 1996)		X
Minnesota	*State v. Bowles*, 530 N.W.2d 521 (Minn. 1995)	X	
Minnesota	*State v. Callender*, 297 N.W.2d 744 (Minn. 1980)		X
Minnesota	*State v. Vu*, No. A04-235, 2005 WL 623236 (Minn. Ct. App. Mar. 15, 2005)	X	
Minnesota	*State v. Hinton*, No. C1-98-379, 1998 WL 887495 (Minn. Ct. App. Dec. 22, 1998)		X

	Case Addressing Inquiry into Racial/Ethnic Bias in Jury Deliberations	New Trial or Hearing Granted	No New Trial or Hearing
Minnesota	*State v. Watkins*, 526 N.W.2d 638 (Minn. Ct. App. 1995)	X	
New York	*People v. Estella*, 889 N.Y.S.2d 759 (N.Y. App. Div. 2009)	X	
New York	*Shung Lam v. Cheng*, 773 N.Y.S.2d 303 (N.Y. App. Div. 2004)		X
New York	*People v. Rukaj*, 506 N.Y.S.2d 677 (N.Y. App. Div. 1986)	X	
New York	*People v. Whitmore*, 257 N.Y.S.2d 787 (N.Y. Sup. Ct. 1965)	X	
Oklahoma	*Fields v. Saunders*, 278 P.3d 577 (Okla. 2012)	X	
Oregon	OR. REV. STAT. ANN. § 40.335 (West 1981) (Conference Committee Commentary)	N/A[10]	N/A
Washington	*Seattle v. Jackson*, 425 P.2d 385 (Wash. 1967)		X

[10] According to the legislative history of Oregon's analogue to Rule 606(b), the legislature understood the rule to allow a juror to testify about a fellow juror who "manifested extreme racial prejudice towards one of the parties." However, Amicus found no cases that applied the statute in that manner.

	Case Addressing Inquiry into Racial/Ethnic Bias in Jury Deliberations	New Trial or Hearing Granted	No New Trial or Hearing
Washington	*Turner v. Stime*, 222 P.3d 1243 (Wash. Ct. App. 2009)	X	
Washington	*State v. Hall*, 697 P.2d 597 (Wash. Ct. App. 1985)		X