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

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

DEBORAH L. GRAMICCIONI
Executive Director
CENTER ON THE ADMINISTRATION OF CRIMINAL LAW
139 MacDougal Street
New York, NY 10011
(212) 998-6612
debgram@nyu.edu

DAVID A. BARRETT
Counsel of Record
JOSHUA J. LIBLING
YOTAM BARKAI
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue
New York, NY 10022
(212) 446-2300
dbarrett@bsfllp.com

Attorneys for Amicus Curiae

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262883

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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 received notice of Amicus's intent to file this brief and have consented to its filing. 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 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 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 address—issues that are less pernicious than racial bias.

Indeed, some 19 jurisdictions in regions 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 demonstrates the practicali-

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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;

ty of an exception. In those 19 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 also confirms that courts are well-equipped to address and decide issues of 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 30 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 unexposed were it not for this 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 that reason, the courts, including this Court, have

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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.

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 is excluded consistently from the entire jury process in criminal cases. As this 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, this Court has crafted mechanisms to exclude racial considerations from almost every stage of the criminal process. The exception is juror deliberations where, in many jurisdictions, no-impeachment rules preclude even considering whether racial bias affected the impartiality of jury deliberations.

This 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 highlights the incongruence of rooting out racial bias from every stage of the criminal process except what is arguably the most crucial one.

A. The Right to an Impartial Jury 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) (any criminal defendant may object to race-based peremptory challenges, regardless of the defendant's or excluded juror's race).

B. Because Racial Bias Uniquely Harms the Integrity of Jury Verdicts, It Must Be Excluded from Every Stage of the Criminal Trial

Racial bias impairs both the integrity and reliability of the jury system, in violation of the Sixth Amendment. This Court has implemented mechanisms designed to eliminate racial bias in almost every aspect of the criminal justice system, including where required under the Sixth Amendment. For

example, this Court has permitted objections to the use of peremptory challenges based on race, allowed questions at voir dire to probe racial bias, and held that discrimination in grand jury selection may require setting aside a conviction. *See* Pet. 16-17.

As a consequence of rules such as these, courts strive to expunge racial discrimination from the arrest, indictment, and juror selection stages of criminal trials. Anomalously, however, no-impeachment rules preclude inquiry into racial bias during juror deliberations, which are arguably the most important stage of trial by jury. An exception to no-impeachment rules is necessary to ensure the uniform exclusion 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 v. Mitchell*, 443 U.S. 545, 555 (1979). 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." *Albridge 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." *Georgia v. McCollum*, 505 U.S. 42, 68 (1992).

The "pernicious" effect of racial bias among jurors, 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 v. Murray*, 476 U.S. 28, 33 (1986) (defendant was entitled to questioning of potential jurors concerning racial prejudice); *Rose*, 443 U.S. at 555-56; *Albridge*, 283 U.S. at 314-15—or at the stage of jury deliberations. An exception to no-impeachment rules will ensure consistent treat-

ment of racial bias across the entire criminal process, from arrest through jury decision-making.

II. AN EXCEPTION TO NO-IMPEACHMENT RULES FOR RACIAL BIAS WILL NOT IMPAIR 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 juror deliberations already permitted, shows that such an exception for racial bias is entirely feasible.

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

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 for racial bias would not open up broad new avenues for inquiry. Rather, all that is

required 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), Fed. R. Crim. P. 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." 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). 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.* at 217. 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 general requirement of inquiry into juror misconduct. Federal Rule of Evidence 606(b) 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 discussed below, however, this evidentiary limitation itself has several exceptions.

By recognizing a racial bias exception to Rule 606(b), therefore, 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 already exist in all jurisdictions. The courts are well-equipped to handle such an evidentiary change in the scope of post-verdict hearings.

B. Rule 606(b) Has Exceptions For Less Odious Juror Influences than Racial Discrimination

Although, as discussed in Point I above, racial bias has a particularly destructive effect on the fair-

ness and reliability of the jury system, Rule 606(b)'s evidentiary limitation has exceptions for juror influences that do not have the same "pernicious" effect on jury impartiality.

Under Rule 606(b) and similar common-law principles, notwithstanding the general prohibition on post-verdict testimony concerning juror 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 v. United States*, 483 U.S. 107, 117 (1987) (providing examples of evidence, in categories described below, which may be admitted notwithstanding Rule 606(b)'s broadly prohibitory language).

Of particular interest here, courts have reversed convictions based on biases or prejudices formed through external information other than the evidence presented at trial. For example, a juror's use in deliberations of personal knowledge concerning a defendant 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) (jurors "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, the concern in these cases is starkly 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 (i) personal knowledge at least may be accurate, and (ii) racial prejudice more greatly affects societal perceptions of fairness in the criminal-justice system.

Additionally, courts recognize the prejudicial effect that can arise from unauthorized communication by or to jurors, and reverse jury verdicts accordingly. 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 who has heard them 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").

By contrast, in three jurisdictions that have considered the issue, including the Colorado Supreme Court in the decision below, no comparable inquiry into racial bias is permissible. *See, e.g.*, Pet. App. 5a ("The trial court denied the motion, finding that CRE 606(b) barred any inquiry into H.C.'s alleged bias during deliberations.").

Along the same lines, evidence of attempts to bribe jurors may require reversal, even where attempts were clearly unsuccessful (*i.e.*, conviction occurred), because of possible prejudice arising from the bribe attempt itself. For example, in *Remmer v. United States*, this Court directed the district court to hold a hearing into allegations of juror bribery, although an FBI investigation concluded that there had been 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 influenced and 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 retributive action by the Mafia if the jury did not acquit the defendant).

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) (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 so severely as to warrant overturn-

ing 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 juror deliberations.

Courts also have reversed convictions where jurors have had entirely accidental access to outside information, in circumstances 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 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 not to allow an inquiry into racial bias in jury deliberations.

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, 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 ju-

ry 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 Allegations Are Infrequent, But Often Lead to Reversal

The experience of 19 jurisdictions that expressly allow consideration of jury-room racial bias confirms both that consideration of racial bias in jury deliberations is practical and that it is crucial to protecting Sixth Amendment rights. In those jurisdictions, allegations of racial bias among jurors arise relatively rarely, confirming the rule's practicality. When they 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 notwithstanding no-impeachment rules. Amicus (*i*) identified in each such jurisdiction the leading case 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 reversal of the challenged verdict due to alleged racial bias.[5]

The following chart summarizes the results:

[5] An explanation of the methodology used by Amicus and its case-by-case results are shown in the chart annexed as 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 bias in deliberations arises and leads to reversal.

	Date of First Case Allowing Racial Bias Challenge	Number of Cases Addressing Inquiry into Racial Bias in Jury Deliberations	New Trial or Hearing Granted	No New Trial
First Circuit[6]	2009	2	2	0
Seventh Circuit[6]	1987	1	0	1
Connecticut	1998	6	3	3
Delaware	1996	1	1	0
District of Columbia	2013	1	0	1
Florida	1995	3	3	0
Georgia	1990	1	0	1
Hawaii	1996	1	0	1
Massachusetts	2010	2	1	1
Minnesota	1980	2	1	1
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	3	2	1
North Dakota	2008	1	0	1
Oklahoma	2012	1	1	0

[6] Including federal district courts within the Circuit.

	Date of First Case Allowing Racial Bias Challenge	Number of Cases Addressing Inquiry into Racial Bias in Jury Deliberations	New Trial or Hearing Granted	No New Trial
Oregon	1981	N/A[7]	N/A	N/A
Rhode Island	2013	1	0	1
South Carolina	1995	1	0	1
Washington	1967	1	0	1
Total		**30**	**16**	**14**

The rarity of allegations of bias confirms the practicality of Petitioner's proposed rule. Amicus's review of these 19 jurisdictions over several decades showed 30 instances in which courts addressed inquiries into allegations of racial bias (in two jurisdictions, ethnic or religious bias) during jury deliberations. This shows that the availability 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 19 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 excep-

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

tion to no-impeachment rules. In over half of the cases in which courts considered allegations of racial bias in jury deliberations—16 of 30 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 have already adopted it, the exception 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 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 19 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 (emphasis in original). The Colorado Supreme Court was wrong for at least three 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 v. Kentucky*, 476 U.S. 79, 93-94 (1986). 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. 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 v. South Carolina*, 409 U.S. 524, 527 (1973) ("we think that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice"). These principles 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, in determining the motives underlying employment decisions, courts 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.*

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, 1279-80 (Conn. 2008), for example, the defendant claimed that racial bias was shown by jurors' comments about certain spectators at the trial. The appellate court engaged in a careful, fact-specific review of the record before concluding that the jurors' descriptions of the spectators fell on the permissible side of the line. *See id.*

Second, 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. Through harmless error review, courts

are able to draw a "dividing line" between comments that require reversal and those do not, which the Colorado Supreme Court claimed was impossible. For example, in *Shillcutt v. Gagnon*, 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." 827 F.2d 1155, 1156 (7th Cir. 1987). 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) (negative discussion of the defendant's ethnicity, including a juror's statement 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) ("Moreover, assuming the truth of the affidavit, it shows 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 that it is frequently used 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 which may require judgment calls equally or more difficult than assessing the impact of openly expressed racial bias.

Third, 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.

Massachusetts, for example, 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.

Commonwealth v. McCowen, 939 N.E.2d 735, 766 (Mass. 2010) (citations omitted).

Indeed, *McCowen* stands as an example of a court drawing the dividing line between different cir-

cumstances 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," and which was followed by a verbal "confrontation." *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 petition for a writ of certiorari should be granted.

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Respectfully submitted,

Deborah L. Gramiccioni
Executive Director
CENTER ON THE ADMINISTRATION OF CRIMINAL LAW
139 MacDougal Street
New York, NY 10011
212-998-6612
debgram@nyu.edu

David A. Barrett
Counsel of Record
Joshua J. Libling
Yotam Barkai
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue
New York, NY 10022
212-446-2300
dbarrett@bsfllp.com

Attorneys for Amicus Curiae

APPENDIX

APPENDIX A

In preparing this brief, Amicus reviewed case law in jurisdictions that allow impeachment of jury verdicts on grounds of racial bias expressed during deliberations. In each of the relevant jurisdictions, Amicus identified the leading case 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 as "citing" the leading case on Westlaw 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 30 cases shown in the chart below met these criteria.[1]

[1] For purposes of this survey, Amicus did not include three additional jurisdictions that have expressed support for a racial bias exception to the no-impeachment rule without explicitly adopting it. *See* Pet. App. 15 (citing *United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001); *State v. Shillcutt*, 350 N.W.2d 686 (Wis. 1984)); *see also People v. Allen*, 264 P.3d 336, 348 n.13 (Cal. 2011).

Jurisdictions with Sixth Amendment Exceptions to No-Impeachment Rule

	Case Addressing Inquiry into Racial Bias in Jury Deliberations	New Trial or Hearing Granted	No New Trial
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
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	

	Case Addressing Inquiry into Racial Bias in Jury Deliberations	New Trial or Hearing Granted	No New Trial
Missouri	*Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81 (Mo. 2010) (ethnic or religious bias)[2]	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
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

[2] Missouri, Connecticut, Florida, and Oklahoma have applied a bias exception to no-impeachment rules in certain civil cases, as well as in criminal cases. The civil cases are relevant here to show the feasibility and usefulness of the exception.

Jurisdictions with Exceptions to No-Impeachment Rule Based on State Statute or Common Law

	Case Addressing Inquiry into Racial Bias in Jury Deliberations	New Trial or Hearing Granted	No New Trial
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	*State v. Bowens*, 773 A.2d 977, 983 (Conn. App. Ct. 2001)		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	
Florida	*Wright v. CTL Distribution, Inc.*, 679 So.2d 1233 (Fla. Dist. Ct. App. 1996)	X	

	Case Addressing Inquiry into Racial Bias in Jury Deliberations	New Trial or Hearing Granted	No New Trial
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
New York	*Shung Lam v. Cheng*, 773 N.Y.S.2d 303 (App. Div. 2004)		X
New York	*People v. Rukaj*, 506 N.Y.S.2d 677 (App. Div. 1986)	X	
New York	*People v. Whitmore*, 257 N.Y.S.2d 787 (Sup. Ct. 1965)	X	
Oklahoma	*Fields v. Saunders*, 278 P.3d 577 (Okla. 2012)	X	
Oregon	Or. Rev. Stat. Ann. § 40.335 (1981) (Conference Committee Commentary)	N/A[3]	N/A
Washington	*State v. Hall*, 697 P.2d 597 (Wash. Ct. App. 1985)		X

[3] Although the Oregon statute creates a racial bias exception to the no-impeachment rule, Amicus was able to find no cases applying the statute in this regard.