DISMISSED WITH PREJUDICE: WHY APPLICATION OF THE ANTI-JURY IMPEACHMENT RULE TO ALLEGATIONS OF RACIAL, RELIGIOUS, OR OTHER BIAS VIOLATES THE RIGHT TO PRESENT A DEFENSE

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I. INTRODUCTION

After a jury trial in Pennsylvania in 1986, Roland William Steele, an African-American man, was convicted of three counts of first-degree murder and related charges based upon his alleged killings of three Caucasian women.[1] In 1996, he unsuccessfully filed a Post-Conviction Relief Act (PCRA) petition, in which he claimed, inter alia, "that his due process rights and right to a fair and impartial jury were violated by the racial prejudice of one of the jurors."[2] The basis for Steele's petition, which the PCRA court deemed inadmissible, was the declaration of a juror, "who stated that race was an issue from the inception of the trial. The juror stated in his declaration that 'early in the trial one of the other jurors commented on the race of the defendant.'"[3] According to the declaration, the racist juror "'also noted the race of three victims and stated that, on that basis alone, the defendant was probably guilty.'"[4] The juror additionally alleged that the racist juror's "'comments continued at other breaks and he made very racist remarks. First one juror, then two or three more gradually became drawn to his position as the first week wore on.'"[5] Finally, the declaration asserted that the racist juror said during trial that Steele should "'fry, get the chair or be hung.'"[6]

Devastatingly, the racist juror's death wish will likely come true because Steele was given three separate death sentences.[7] In 2008, Steele's appeal from the PCRA court's ruling finally reached the Supreme Court of Pennsylvania, which found in *Commonwealth v. Steele* that it could not consider the juror's declaration.[8] The court noted that under Pennsylvania Rule of Evidence 606(b):

> Upon an inquiry into the validity of a verdict, . . . a juror may not testify as to any matter or statement occurring

[1] Commonwealth v. Steele, 961 A.2d 786, 792–93 (Pa. 2008).

[2] *Id.* at 807.

[3] *Id.* at 792, 807.

[4] *Id.* at 807.

[5] *Id.*

[6] *Id.* at 807–08.

[7] *Id.* at 792.

[8] *Id.* at 808.

> during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions in reaching a decision upon the verdict or concerning the juror's mental processes in connection therewith, and a juror's affidavit or evidence of any statement by the juror about any of these subjects may not be received. However, a juror may testify concerning whether prejudicial facts not of record, and beyond common knowledge and experience, were improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.[9]

According to the Supreme Court of Pennsylvania, this Rule precluded the admission of the juror's declaration because its exceptions apply only to "*outside* influences, not statements made by the jurors themselves."[10] The court's opinion was consistent with prior Pennsylvania precedent. [11] Earlier in 2008, a lower Pennsylvania court denied the PCRA petition of an African-American man convicted of first-degree murder, applying Rule 606(b) to preclude the admission of a juror's post-trial allegation that multiple jurors used racial slurs "early and often" during trial.[12] The opinion was also consistent with the vast majority of state and federal precedent from across the country.[13] Rules similar to Pennsylvania Rule of Evidence 606(b) have "repeatedly been held to preclude a juror from testifying, in support of a motion for a new trial, that juror conduct during deliberations suggests the verdict was tainted by racial bias."[14] Moreover, while such cases arise with much less frequency, courts consistently have found that Rule 606(b) precludes jurors from testifying after trial about

[9] *Id.* (quoting PA. R. EVID. 606(b)).

[10] *Steele*, 961 A.2d at 808 (emphasis in original); *see also* Posting of Colin Miller to Evidence ProfBlog, http://lawprofessors.typepad.com/evidenceprof/2008/12/606b-com-v-stee.html (Dec. 19, 2008).

[11] *See Steele*, 961 A.2d at 808.

[12] *See* Posting of Colin Miller to Evidence ProfBlog, http://lawprofessors.typepad.com/evidenceprof/2008/03/racial-bias-pa.html (Mar. 22, 2008).

[13] *See* Victor Gold, *Juror Competency to Testify that a Verdict Was the Product of Racial Bias*, 9 ST. JOHN'S J. LEGAL COMMENT. 125, 126 (1993); *see also Developments in the Law – Racist Juror Misconduct During Deliberations*, 101 HARV. L. REV. 1595, 1597 (1988) [hereinafter *Racist Juror Misconduct*] ("[F]ew courts have admitted juror testimony of racist jury misconduct . . . .").

[14] *See* Gold, *supra* note 13, at 126 and accompanying text.

religious[15] or ethnic[16] slurs used by jurors during trial.

While addressing a case with somewhat similar facts, the Ninth Circuit in *United States v. Henley* was able to reach a very different result.[17] In *Henley*, a jury convicted four men on two charges of possession with intent to distribute cocaine, and three of the four men were African-American.[18] After they were convicted, the men moved for a new trial, claiming, inter alia, that juror Sean O'Reilly made "several racist remarks" during trial, perhaps including statements such as, "All the n[******] should hang" and "The n[******] are guilty."[19] These statements would have surprised anyone who read O'Reilly's responses to his voir dire questionnaire, in which he averred that "his overall view of interracial dating was 'neutral,' that he had never had a bad experience with a person of a different race, and that race would not influence his decision as a juror in any way."[20] The Ninth Circuit was able to consider O'Reilly's alleged statements in *Henley* when addressing the appellants' motion, concluding that, "[w]here, as here, a juror has been asked direct questions about racial bias during voir dire, and has sworn that racial bias would play no part in his deliberations, evidence of that juror's alleged racial bias is indisputably admissible for the purpose of determining whether the juror's responses were truthful."[21]

The Ninth Circuit was not being hyperbolic. In reaching a similar conclusion in its 2008 opinion in *State v. Hidanovic*, the Supreme Court of North Dakota noted that "[c]ourts have universally held that provisions

[15] *See, e.g.*, Marcavage v. Bd. of Trs. of Temple Univ., 400 F. Supp. 2d 801, 806 (E.D. Pa. 2005) ("Plaintiff's assertions that Juror No. 11 was 'verbally attacked' by other jurors because of his religious beliefs and was accused of bias in favor of Plaintiff because of those beliefs fall squarely within juror harassment and intimidation and are prohibited by Rule 606(b).").

[16] *See, e.g.*, Tabchi v. Duchodni, 56 Pa. D. & C.4th 238, 250 (C.P. 2002) ("Plaintiffs' contention that the jury was influenced by anti-Arab bias and bigotry in the course of its deliberations is based solely upon the allegations of other jurors.").

[17] 238 F.3d 1111, 1112 (9th Cir. 2001).

[18] *Id.* at 1111–12, 1119.

[19] *Id.* at 1113–14. Sean O'Reilly was not the only juror who allegedly committed misconduct, nor was the alleged misconduct limited to the jurors. Defendant Darryl Henley, a football player with the Rams, allegedly promised juror Michael Malachowski a job with the Rams in exchange for Malachowski "'do[ing] anything it takes' to secure a not guilty vote." *Id.* at 1111–12.

[20] *Id.* at 1121.

[21] *Id.* The Ninth Circuit flirted with the idea that Rule 606(b) might not prevent jurors from impeaching their verdicts through allegations of racial or other bias but found that it did not need to resolve this issue in light of the fact that it could admit the allegations to determine whether O'Reilly lied during voir dire. *See id.* at 1121.

similar to N.D.R.Ev. 606(b) . . . do not preclude evidence to show a juror lied during voir dire."[22] The reason for this distinction between *Henley* and *Steele*, where jurors were not asked about racial prejudice before trial, is that "rule 606(b) restricts inquiries into the validity of a jury's verdict but it does not bar inquiries into whether a juror lied or purposely withheld information during voir dire."[23] While these courts are technically correct that such inquiries are directed toward the issue of whether a juror lied on voir dire and not the (in)validity of the verdict, the distinction is frequently ephemeral. Quoting the Supreme Court's opinion in *McDonough Power Equipment, Inc. v. Greenwood*, the Ninth Circuit aptly concluded in *Henley* that "[i]f appellants can show that a juror 'failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause,' then they are entitled to a new trial."[24] Because "[d]emonstrated bias in the responses to questions on voir dire may result in a juror being excused for cause," it is easy to see how quickly the distinction can collapse.[25]

This being the case, how can judges continue to preclude appellants from presenting evidence of juror racial, religious, or other bias, based solely on the fact that their attorneys did not anticipate that their trials would be resolved with reference to factors such as skin color or choice of deity?[26] How can Rule 606(b) deem jurors per se incompetent to impeach their verdicts on the ground of bias based at least in part upon concerns about reliability when, as will be seen *infra*, courts have eliminated all other reliability-based competency rules in criminal cases? [27] And how can they do so when it is the appellant's freedom, and often his life, that is at stake, rather than simply a private injury?

The answer can be found in two parts. First, courts generally conclude that they are prohibited by the strict language of Rule 606(b) from considering such allegations, despite being uncomfortable with the results

[22] 747 N.W.2d 463, 474 (N.D. 2008).

[23] Manrique v. State, 177 P.3d 1188, 1191 (Alaska Ct. App. 2008).

[24] *Henley*, 238 F.3d at 1121 (quoting McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984)).

[25] *Greenwood*, 464 U.S. at 554.

[26] *See, e.g.*, *Hidanovich*, 747 N.W.2d at 474 (noting that allegations of juror bias are admissible to prove that a juror lied during voir dire but inadmissible as part of an inquiry into the validity of a verdict).

[27] *See infra* notes 432–46 and accompanying text.

that the Rule produces. [28] For instance, in its 2008 opinion in *People v. Brooks*, the Court of Appeals of Michigan denied Keith Brooks' motion for a new trial after finding that it was precluded from considering the affidavit of the jury foreman, who, like Brooks, was African-American.[29] According to that foreman, a juror claimed that the foreman's position that Brooks was not guilty was a "brotherhood thing," which immediately prompted another juror to "introduce[] race into the discussion."[30] But while the foreman eventually relented in his not guilty vote, the court stood firm in its application of Rule 606(b); despite characterizing this alleged misconduct as "disturbing," it found itself duty-bound to preclude the affidavit because it did not allege an "extraneous influence."[31]

Second, courts faced with constitutional challenges to such applications of Rule 606(b) generally have rejected them based upon *Tanner v. United States*, where the Supreme Court found that applying Rule 606(b) to preclude jury impeachment concerning jurors drinking alcohol, using and selling drugs, and falling asleep during trial did not violate the petitioners' Sixth Amendment right to a competent jury.[32] Most courts have extrapolated from *Tanner* that applying Rule 606(b) to preclude jury impeachment concerning jurors using racial, religious, or other slurs similarly does not violate the Sixth Amendment right to an impartial jury.[33] As an example, in *Shillcutt v. Gagnon*, the Seventh Circuit denied an African-American appellant's petition for writ of habeas corpus from the Supreme Court of Wisconsin's opinion denying his motion for a new trial after he was convicted of soliciting prostitutes and keeping a place of prostitution.[34] The state supreme court denied that motion after refusing under its version of Rule 606(b) to consider the affidavit of a juror who claimed that one of the jurors had commented, "Let's be logical, he's a black, and he sees a seventeen year old white girl—I know the type."[35] The

[28] *See, e.g.*, People v. Brooks, No. 281489, 2008 WL 2855040, at *2–3 (Mich. Ct. App. July 24, 2008).

[29] *Id.* at *1–2.

[30] *Id.* at *1.

[31] *Id.* at *3.

[32] 483 U.S. 107, 113–15, 126–27 (1987).

[33] *See Racist Juror Misconduct*, *supra* note 13, at 1596 ("The Supreme Court's recent decision in *Tanner v. United States* seems to insulate rule 606(b) from constitutional attack.").

[34] 827 F.2d 1155, 1159–60 (7th Cir. 1987).

[35] State v. Shillcutt, 350 N.W.2d 686, 688–90 (Wis. 1984). In finding that this statement did not constitute extraneous prejudicial information, the court concluded:

Seventh Circuit thereafter denied the appellant's petition, citing *Tanner* for the proposition that the exchange of ideas during jury deliberations, "however crude or learned, is important enough to preserve" to preclude peering behind the jury room curtain.[36]

Convicted criminal defendants, however, should be able to rely upon another Sixth Amendment right to allow them to present post-trial juror testimony regarding racial, religious, or other bias by jurors. [37] Since its 1967 opinion in *Washington v. Texas*, the Supreme Court has declared that the Compulsory Process Clause renders unto criminal defendants the "right to present a defense,"[38] and courts have broadly defined that right as the right to present evidence, whether at an initial trial, at a direct appeal, or in support of a motion for a new trial or petition for a writ of habeas corpus.[39] On six (out of seven) occasions, the Supreme Court found that courts violated this right by applying rules of evidence in a manner that was arbitrary or disproportionate to the purposes that they were designed to serve.[40]

This article argues that when courts preclude jurors from impeaching their verdicts through evidence of juror racial, religious, or other bias, they apply Rule 606(b) in a way that is arbitrary and disproportionate to the purposes that the Rule is designed to serve and thus violate criminal defendants' rights to present a defense. Section II traces the common law history of Rule 606(b) from the English Mansfield's Rule to the American Iowa Rule and the Supreme Court's futile attempts at clarification. This Section pays particular attention to the debate over the enactment of Federal Rule of Evidence 606(b), the Constitutional challenge to it in *Tanner v. United States*, and courts' application of the Rule to preclude post-trial jury

> '[E]xtraneous prejudicial information' is knowledge coming from the outside which is prejudicial. The juror in this case stated: 'Let's be logical, he's a black, and he sees a seventeen year old white girl—I know the type.' The juror did not explain what 'type' he had in mind. Whatever factual content the other jurors gave to this statement had to be supplied from their own catalogue of 'types' rather than from the statement itself. The juror's statement here does not fall under the category of extraneous prejudicial information.

Id. at 690.

[36] *Gagnon*, 827 F.2d at 1159.

[37] *See, e.g.*, Washington v. Texas, 388 U.S. 14, 19 (1967).

[38] *Id.*

[39] *See infra* notes 375–77 and accompanying text.

[40] *See infra* Part III.A.2–8.

testimony regarding jurors' use of racial, religious, or other slurs during trial.

Section III tracks the Supreme Court's development of the right to present a defense—from its creation of the right in *Washington v. Texas,* to its last word on the right in *Holmes v. South Carolina*, a unanimous opinion delivered by Justice Alito in 2006. This Section notes that despite courts reading the right broadly as the right to present evidence, no defendant has yet attempted to claim that the exclusion of evidence of juror misconduct violates the right, and only one court, the Third Circuit, in an opinion written by then Judge Alito, has addressed the issue.

Section IV argues that the application of Rule 606(b) to exclude allegations of racial, religious or other bias by jurors violates the right to present a defense in three ways. First, Rule 606(b) is a rule of (in)competency based in part on the presumed unreliability of jurors seeking to impeach their verdicts, and the Court in *Washington v. Texas* found that such rules violate the right to present a defense. Second, the Court in *Washington v. Texas* found that rules that do not rationally set apart a group of persons particularly likely to commit perjury violate the right, and courts irrationally preclude some jurors from impeaching their verdicts based upon allegations of juror bias under Rule 606(b) while permitting other jurors to testify regarding similar allegations to prove that they or other jurors lied during voir dire. Third, the Court in *Rock v. Arkansas* found that rules that per se exclude "unreliable" evidence violate the right when that evidence may be reliable in an individual case, and allegations of juror bias can be proven to be reliable in individual cases.

II. THE PROSCRIPTION ON POST-TRIAL JURY IMPEACHMENT OF VERDICTS

A. The Common Law History of the Anti-Jury Impeachment Rule

1. Mansfield's Rule

Prior to 1785, English courts "sometimes received" post-trial juror testimony and affidavits concerning juror misconduct, "though always with great caution."[41] In that year, English Chief Justice Lord Mansfield decided *Vaise v. Delaval*, where he was confronted with post-trial affidavits by

[41] McDonald v. Pless, 238 U.S. 264, 268 (1915).

jurors indicating that "the jury being divided in their opinion, had tossed up,"[42] i.e., resolved the case by "flipping a coin or some other method of chance determination."[43] Mansfield deemed the affidavits inadmissible by applying the then-popular Latin maxim, *nemo turpitudinem suam allegans audietur* (a "witness shall not be heard to allege his own turpitude").[44] According to Mansfield, jurors were not competent to impeach their own verdicts, and thus themselves, because "a person testifying to his own wrongdoing was, by definition, an unreliable witness."[45] *Vaise* thus became the basis for "Mansfield's Rule," "a blanket ban on jurors testifying against their own verdict,"[46] although, according to Mansfield, post-trial testimony concerning jury misconduct could be admissible if it came from another source, "such as from some person having seen the [deliberations] through a window, or by some such other means."[47]

2. The Iowa Rule

Based upon "the prestige of the great Chief Justice, [Mansfield's Rule] soon prevailed in England, and its authority came to receive in this country an adherence almost unquestioned"[48] until the latter half of the nineteenth century.[49] The first major crack in the dam appeared in the 1851 opinion in *United States v. Reid*, where the United States Supreme Court refused to permit jurors to impeach their verdict convicting the defendants of murder based upon evidence that an ostensibly non-influential newspaper account of the case found its way into the deliberation room.[50] In dicta, however, the Court mused that "cases might arise in which it would be impossible to refuse [juror affidavits] without violating the plainest principles of justice."[51] The floodgates then opened fifteen years later in *Wright v. Illinois & Mississippi Telegraph Co.*, when the Supreme Court of Iowa

[42] 99 Eng. Rep. 944, 944 (K.B. 1785).

[43] David A. Christman, *Federal Rule of Evidence 606(b) and the Problem of 'Differential' Jury Error*, 67 N.Y.U. L. REV. 802, 815 n.76 (1992).

[44] *Id.* at 815 & n.78.

[45] *Id.* at 815 n.78.

[46] United States v. Benally, 546 F.3d 1230, 1233 (10th Cir. 2008).

[47] *Vaise*, 99 Eng. Rep. at 944.

[48] 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIAL AT COMMON LAW § 2352 (2d ed. 1923).

[49] Christman, *supra* note 43, at 816.

[50] 53 U.S. (12 How.) 361, 361–62, 366 (1851).

[51] *Id.* at 366.

reviewed an Iowa trial court's refusal to consider four juror affidavits alleging an illegal quotient verdict, i.e., that their "verdict was determined by each juror marking down such sum as he thought fit, and dividing the aggregate by twelve and taking the quotient as their verdict."[52] The Supreme Court of Iowa deemed the trial court's refusal reversible error, concluding that courts could receive juror affidavits for purposes such as proving "that the verdict was determined by aggregation and average, or by lot, or game of chance, or other artifice or improper manner."[53]

This was exactly the direct repost to Mansfield's Rule that it appeared to be, with the court deeming the Rule "not more than satisfactory."[54] The Supreme Court of Iowa acknowledged that jurors reaching a verdict by "resort to lot or the like" was "illegal and reprehensible," but it found that "such resort might not evince more turpitude tending to the discredit of [a juror's] statement than would be evinced by a person not of the jury, in the espionage indicated by Lord Mansfield."[55] Indeed, the court noted that jurors would be in a superior position to impeach their own verdicts than Mansfield's eavesdroppers based upon their "superior opportunities of knowledge and less liability to mistake."[56] Finally, the court concluded that if the proposed jury impeachment concerned merely "the *fact* of improper practice, . . . there [wa]s no reason why a court should close its ears to the evidence of it from one class of persons, while it will hear it from another class, which stands in no more enviable light and is certainly no more entitled to credit."[57]

3. Post-Iowa Rule Variations

After *Wright*'s creation of the "'Iowa Rule,' as it came to be known, new formulations of and variations on the Mansfield rule were created by state courts."[58] For instance, in its 1871 opinion in *Woodward v. Leavitt*, the Supreme Judicial Court of Massachusetts addressed the question of whether a court properly admitted two types of post-trial juror testimony during consideration of the plaintiff's motion for a new trial: (1) testimony

[52] 20 Iowa 195, 212 (1866).

[53] *Id.* at 195.

[54] *Id.* at 211.

[55] *Id.*

[56] *Id.* at 211–12.

[57] *Id.* at 212.

[58] Christman, *supra* note 43, at 817.

by juror Solomon Brown that he may have formed and expressed an opinion on the merits of the case before being seated; and (2) testimony by other jurors that Brown did not take part in deliberations and by Brown himself that he "did not vote against the plaintiff till after all the other jurors had."[59] The court found that the first type of testimony was admissible because it did "not concern[] anything that passed in the jury room;" however, it found that the second type of testimony was improperly admitted because "it related to the private deliberations of the jury . . . ."[60]

Meanwhile, in its 1874 opinion in *Perry v. Bailey*, the Supreme Court of Kansas permitted the admission of juror affidavits indicating, inter alia, that another juror drank alcohol during a recess and was abusive during deliberations.[61] In so doing, the court drew a dichotomy between unacceptable jury impeachment regarding matters resting in the personal consciousness of one juror and acceptable jury impeachment regarding overt acts, "open to the knowledge of all the jury."[62] According to the court, jury impeachment on the former subject would give "the secret thought of one the power to disturb the expressed conclusions of twelve," while overt acts are "accessible to the knowledge of all the jurors. If one affirms misconduct, the remaining eleven can deny; one cannot disturb the action of the twelve; it is useless to tamper with one, for the eleven may be heard."[63]

4. The Supreme Court's Attempts at Clarification

Possibly mindful of the post-*Wright* variations on Mansfield's Rule, the Supreme Court granted certiorari in *Mattox v. United States*, a murder appeal in which Clyde Mattox alleged that the trial court erred by failing to consider juror affidavits indicating that: (1) a newspaper article injurious to Mattox was read to the jury, and (2) the bailiff informed the jury that "this was the third person Clyde Mattox had killed."[64] In its 1892 opinion written by Chief Justice Fuller, the Court began by citing the aforementioned dicta from *Reid* and setting forth the holdings in *Bailey* and

[59] 107 Mass. 453, 459 (1871).

[60] *Id.* at 471.

[61] 12 Kan. 539, 542–43 (1874).

[62] *Id.* at 545.

[63] *Id.*

[64] 146 U.S. 140, 150–51 (1892).

Leavitt.[65] Justice Fuller found that these opinions laid down a rule "conformable to right reason and sustained by the weight of authority": "[p]rivate communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear."[66] The Court found that the affidavits before it were within this rule, meaning that "their exclusion constitute[d] reversible error."[67]

But what exactly was the rule? *Mattox* stands for the proposition that jurors could impeach their verdicts after trial through testimony concerning "external causes," i.e., extraneous prejudicial information, such as the newspaper article, and improper outside influences, such as the bailiff's comments.[68] Justice Fuller, however, failed to answer clearly the question of whether jurors could also testify regarding overt acts, such as the juror's drunk and abusive behavior in *Bailey*, which were likely internal to the jury deliberation process.[69]

The Supreme Court's next attempt at answering this question did not help matters. Twenty years later, in *Hyde v. United States*, the Court was presented with allegations that jurors in a four-defendant trial for conspiracy to defraud the United States had improperly reached a compromise verdict.[70] In other words, jurors claimed that after some jurors wanted to acquit all of the defendants and other jurors wanted to convict all of the defendants, the entire jury compromised by deciding to convict two of the defendants and acquit two others.[71] Without much explication, the Court found that the rule in *Wright*, which had allowed impeachment of a quotient verdict, "should apply," but found that application of that rule precluded impeachment of the compromise verdict.[72]

The last significant word that the Supreme Court had on jury impeachment before the drafting of the Federal Rules of Evidence came two years later in *McDonald v. Pless*.[73] In *McDonald*, attorneys brought a civil lawsuit against a former client to recover $4,000 he allegedly owed

[65] *Id.* at 147–49.

[66] *Id.* at 149–50.

[67] *Id.* at 149.

[68] *Id.* at 149–50.

[69] *See* Mattox v. United States, 146 U.S. 140 (1892).

[70] 225 U.S. 347, 382–83 (1912).

[71] *Id.*

[72] *Id.* at 383–84.

[73] 238 U.S. 264 (1915).

them in legal fees and were awarded $2,916 by the jury.[74] The client subsequently moved to set aside the verdict on the basis of a juror's affidavit, which averred that the jury reached a quotient verdict.[75] In deciding whether the jurors should be able to impeach their verdict under these circumstances, the Court found that it had to "choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room."[76] The Court found that the possibility of private redress was insufficient to outweigh the danger of jury room scrutiny, and chose what it deemed "the lesser of two evils," famously concluding:

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.[77]

The Court then acknowledged that some courts and legislatures had permitted jury impeachment through evidence of overt acts of misconduct and concluded that "the argument in favor of receiving such evidence is not only very strong, but unanswerable—when looked at solely from the standpoint of the private party who has been wronged by such misconduct."[78] But the Court nonetheless found that this argument was insufficient because, while precluding such overt act, impeachment "may often exclude the only possible evidence of misconduct, a change in the rule

[74] *Id.* at 265.

[75] *Id.*

[76] *Id.* at 267.

[77] *Id.* at 267–68.

[78] *Id.* at 268.

'would open the door to the most pernicious arts and tampering with jurors.'"[79]

This is not to say, though, that the Supreme Court was reinstating the Iron Curtain that was Mansfield's Rule.[80] Instead, the Court read *Reid* and *Mattox* as "recogniz[ing] that it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.'"[81] The Court simply found that "there [wa]s nothing in the nature of the present case warranting a departure from what is unquestionably the general rule, that the losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach their verdict."[82]

Significantly, the Court ended by clarifying that this general rule was only applicable in civil cases.[83] According to the Court, "[t]he suggestion that, if this be the true rule, then jurors could not be witnesses in criminal cases, or in contempt proceedings brought to punish wrongdoers, is without foundation."[84] The Court forcefully responded that the general rule it announced was "limited to those instances in which a private party seeks to use a juror as a witness to impeach the verdict."[85]

B. The Legislative History Behind Federal Rule of Evidence 606(b)

1.The Initial 1969 Draft of Rule 606(b)

When the Supreme Court initially proposed the Federal Rules of Evidence, Federal Rule of Evidence 606(b) read as follows:

> Rule 6-06. Competency of Juror as Witness . . .
>
> (b) Inquiry into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or

[79] *Id.*
[80] *Id.*
[81] *Id.* at 268–69 (quoting Mattox v. United States, 146 U.S. 140, 148 (1892)).
[82] *Id.* at 269.
[83] *Id.*
[84] *Id.*
[85] *Id.*

> concerning his mental processes in connection therewith. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.[86]

In proposing a rule similar to the Iowa Rule, the Committee explicitly referenced the Supreme Court of Iowa's opinion in *Wright* in its Advisory Committee Note, asserting that it was part of a trend of precedent precluding jury impeachment concerning jurors' mental processes but permitting impeachment concerning the existence of conditions or occurrences, "without regard to whether the happening [wa]s within or without the jury room."[87] In so doing, the Committee rejected "[t]he familiar rubric that a juror may [never] impeach his own verdict, dating from Lord Mansfield's time, [a]s a gross oversimplification," and cited *Mattox* for the proposition that "the door of the jury room is not a satisfactory dividing point" for a jury impeachment rule.[88]

Relying on *McDonald*, the Committee found that preventing jurors from being able to impeach their verdicts after trial promotes several values, including "freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment."[89] At the same time, the Committee cautioned that "simply putting verdicts beyond effective reach can only promote irregularity and injustice."[90] The Committee thus saw its proposed rule as "an accommodation between these competing considerations" because "[t]he jurors are the persons who know what really happened.[91] Allowing them to testify as to matters other than their own inner reactions involves no particular hazard to the values sought to be protected."[92]

2.1971's Hasty Rewrite

The Committee thereafter included the exact same text of Proposed

[86] Preliminary Draft of Proposed Rules of Evidence, 46 F.R.D. 161, 289-90 (1969).

[87] Preliminary Draft of Proposed Rules of Evidence, Advisory Committee's Note, 46 F.R.D. 161, 291 (1969).

[88] *Id.* at 290, 291.

[89] *Id.* at 290.

[90] *Id.*

[91] *Id.* at 290–91.

[92] *Id.* at 291.

Rule 606(b) in its second draft in 1971,[93] but in September or October of 1971, the rule was "hastily rewritten . . . . and w[as] approved by the Supreme Court and presented to Congress."[94] This rewrite was ostensibly the result of "the extensive lobbying efforts of Senator McClellan and the Justice Department."[95] In a letter from the Senator to the Chairman of the Standing Committee, McClellan wrote:

> Were it possible to overturn a decision because, in fact, it was not based upon precedent, but bias, and this was an issue that could be litigated, it would indeed be brought before the courts. Present law, as I read it, wisely prohibits this sort of inquiry . . . .[96]

The hastily rewritten rule reflected McClellan's concern as it precluded jurors from impeaching their verdicts by testifying concerning matters or statements occurring during the jury deliberation process.[97] This version of the Rule read:

> Rule 606. Competency of Juror as Witness . . .
>
> (b) Inquiry into validity of verdict or indictment.—Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about what he would be precluded from testifying be received for these purposes.[98]

[93] Preliminary Draft of Proposed Rules of Evidence, 46 F.R.D. 161, 289-90 (1969).

[94] Christman, *supra* note 43, at 824 n.141.

[95] *Id.*

[96] 117 CONG. REC. 33,641, 33,645 (1971) (letter from Sen. McClellan).

[97] *See id.*

[98] FED. R. EVID. 606(b) (1974) (repealed 1987).

According to the 1972 Advisory Committee's Note to this version of the proposed rule, the rule protected "each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process."[99] Thus, under this version of Rule 606(b), jurors would not be competent to impeach their verdicts after trial through testimony concerning "a compromise verdict; a quotient verdict; speculation as to insurance coverage; misinterpretation of instructions; mistake in returning verdict; [or] interpretation of guilty plea by one defendant as implicating others."[100] Conversely, jurors would be competent to impeach their verdicts after trial through testimony concerning: (1) "prejudicial extraneous information" such as "a prejudicial newspaper account," or (2) "influences injected or brought to bear upon the deliberative process" such as "statements by the bailiff."[101]

The note made clear that Rule 606(b) "does not purport to specify the substantive grounds for setting aside verdicts for irregularity; it deals only with the competency of jurors to testify concerning those grounds."[102] According to the Committee, "[t]he present rules does not relate to secrecy and disclosure but to the competency of certain witnesses and evidence."[103]

3. The House-Senate Debate

The House, however, rejected this new draft and was "[p]ersuaded that the better practice [wa]s that provided in the earlier drafts."[104] Specifically, the House took issue with this new draft because, under it, "a quotient verdict could not be attacked through the testimony of a juror, nor could a juror testify to the drunken condition of a fellow juror which so disabled him that he could not participate in the jury's deliberations."[105] Conversely, after vigorous debate, the Senate opted for the Supreme Court's version, concluding that the House's "extension of the ability to impeach a verdict [wa]s . . . unwarranted and ill-advised."[106] As support for this position, the

[99] FED. R. EVID. 606 advisory committee's note.

[100] *Id.* (citations omitted).

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] H.R. REP. NO. 93-650 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 7075, 7083.

[105] *Id.*

[106] S. REP. NO. 93-1277 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7051, 7060.

Senate cited to the aforementioned famous conclusion[107] of the Supreme Court in *McDonald* and cautioned that the House version of the rule "would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors."[108] Finding that "[p]ublic policy requires a finality to litigation" and that "common fairness requires that absolute privacy be preserved for jurors," the Senate thus found that "rule 606 should not permit any inquiry into the internal deliberations of the jurors."[109]

Eventually, the Senate and House Committee resolved the dispute in the Senate's favor.[110] The Advisory Committee's Note to the enacted rule explains the import of this decision.[111] According to that note, the rejected House version of the rule permitted "a juror to testify about objective matters occurring during the jury's deliberation, such as the misconduct of another juror or the reaching of a quotient verdict."[112] Meanwhile, the approved Senate version of the rule precluded "juror testimony about any matter or statement occurring during the course of the jury's deliberations."[113] But, the Senate version did allow jurors to testify as to "whether extraneous prejudicial information was improperly brought to the jury's attention and on the question whether any outside influence was improperly brought to bear on any jurors."[114] Most states have counterparts to Federal Rule of Evidence 606(b) that generally preclude jury impeachment, subject to the above two exceptions.[115]

C. Post-Enactment Rule 606(b) Developments

1. The Sixth Amendment Challenge to Rule 606(b)

In *Tanner v. United States*, William Conover and Anthony Tanner were

[107] *See supra* note 77 and accompanying text.

[108] S. REP. NO. 93-1277 (1974).

[109] *Id.*

[110] H.R. REP. NO. 93-1597 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 7098, 7102.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] Barry Tarlow, *True Purpose of Local Federal Rules Prohibiting Lawyers from Contacting Jurors After a Verdict*, THE CHAMPION, Dec. 1997, at 46, 46.

convicted of mail fraud and conspiring to defraud the United States.[116] The day before the two men were scheduled to be sentenced, Tanner filed a motion, subsequently joined by Conover, which sought "continuance of the sentencing date, permission to interview jurors, an evidentiary hearing, and a new trial."[117] Tanner attached to the motion an affidavit which indicated that a juror made an unsolicited call to his attorney and stated "that several of the jurors consumed alcohol during lunch breaks at various times throughout the trial, causing them to sleep through the afternoons."[118]

The district court found that juror affidavits or testimony relating to juror intoxication were inadmissible pursuant to Federal Rule of Evidence 606(b) and denied the motion in all respects.[119] While their appeal was pending, Tanner and Conover filed another new trial motion based upon an "unsolicited visit" by juror Daniel Hardy to the residence of Tanner's attorney.[120] Hardy indicated in a sworn interview that he "'felt like . . . the jury was on one big party.'"[121] He claimed that seven jurors drank alcohol during noon recess, with four jurors (including Hardy), imbibing between them "'a pitcher to three pitchers'" of beer during various recesses and the foreperson having a liter of wine on three occasions.[122] He also alleged that during trial, two jurors ingested cocaine, three jurors regularly smoked marijuana, and one juror even sold another juror a quarter pound of marijuana.[123] Perhaps, then, it is unsurprising that Hardy contended that a juror described himself to Hardy as "flying" and that other jurors fell asleep during the trial.[124] Finding that these allegations differed quantitatively but not qualitatively from the earlier allegations, the district court again denied the motion for a new trial, and the Eleventh Circuit thereafter affirmed.[125]

The Supreme Court subsequently granted certiorari and began its analysis by noting the "external/internal distinction" of Federal Rule of Evidence 606(b).[126] Importantly, however, in her majority opinion, Justice

[116] 483 U.S. 107, 109–10 (1987).
[117] *Id.* at 113.
[118] *Id.*
[119] *Id.*
[120] *Id.* at 115.
[121] *Id.*
[122] *Id.*
[123] *Id.* at 115–16.
[124] *Id.* at 116.
[125] *Id.*
[126] *Id.* at 116–17.

O'Connor noted that the common law rule leading to the Rule's dichotomy "was not based on whether the juror was literally inside or outside the jury room when the alleged irregularity took place; rather, the distinction was based on the nature of the allegation."[127] As an example, the Court noted that a juror could impeach his verdict by testifying concerning a newspaper read in the jury room but could not impeach his verdict by claiming that he misheard or miscomprehended the judge's instructions, despite the jury charge occurring outside of the jury room.[128] Applying this calculus to the allegations at hand, and liberally citing to the *McDonald* opinion, Justice O'Connor concluded that there could be no jury impeachment because, "[h]owever . . . improper their use, drugs or alcohol voluntarily ingested by a juror seem[ed] no more an 'outside influence' than a virus, poorly prepared food, or lack of sleep."[129]

The petitioners' appeal, however, was not limited to arguing that the lower courts improperly applied Rule 606(b).[130] Instead, they also alleged "that the refusal to hold an evidentiary hearing at which jurors would testify as to their conduct 'violat[ed] the sixth amendment's guarantee to a fair trial before an impartial and competent jury.'"[131] Justice O'Connor parried this claim, noting that "long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry" and that the petitioners' Sixth Amendment interests in a competent jury were at least partially protected by certain aspects of the trial process.[132] For instance, O'Connor noted that jurors could come forward during trial with allegations of juror misconduct and that the attorneys, the trial judge, and court personnel could observe jurors' demeanors during trial.[133] She also cited with approval *United States v. Taliaferro*, an opinion in which the Fourth Circuit found that a marshal could render post-trial testimony regarding jurors' consumption of alcohol after the judge sent the jury and the marshal to a private club for dinner when the jurors were deadlocked for hours.[134] According to O'Connor, because the marshal's testimony did not consist of the jurors impeaching their verdict, its admission did not violate Rule

[127] *Id.* at 117.

[128] *Id.* at 118.

[129] *Id.* at 122.

[130] *Id.* at 126.

[131] *Id.*

[132] *Id.* at 127.

[133] *Id.*

[134] *Id.* (citing 558 F.2d 724, 725–26 (4th Cir. 1977)).

606(b).[135] The Court thus concluded that the district court's failure to hold an evidentiary hearing did not violate the petitioners' Sixth Amendment right to a competent jury.[136]

2. The 2006 Amendment to Rule 606(b)

In 2006, to resolve a circuit split that had developed over whether post-trial jury testimony was permitted to establish "proof of clerical errors," Congress made one final change to Rule 606(b):[137] the addition of a clause allowing jurors to testify after trial about "whether there was a mistake in entering the verdict onto the verdict form."[138] In making this addition, Congress "specifically reject[ed] the broader exception, adopted by some courts, permitting the use of juror testimony to prove that the jurors were operating under a misunderstanding about the consequences of the result that they agreed upon."[139]

The Advisory Committee's Note to the 2006 amendment indicated that this "broader exception [wa]s rejected because an inquiry into whether the jury misunderstood or misapplied an instruction goes to the juror's mental processes underlying the verdict, rather than the verdict's accuracy in capturing what the jurors had agreed upon."[140] Rather, Congress decided that the new clause was "limited to cases such as 'where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty.'"[141]

After this 2006 amendment, Rule 606(b) currently reads as follows:

> Rule 606. Competency of Juror as Witness . . .
>
> (b) Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to

[135] *Id.* at 127.

[136] *Id.*

[137] FED. R. EVID. 606(b) advisory committee's note.

[138] *Id.* 606(b)(3).

[139] *Id.* 606(b) advisory committee's note.

[140] *Id.*

[141] *Id.*

> assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.[142]

Under this new, third exception to Rule 606(b), jurors can impeach their verdicts through testimony regarding clerical errors such as the foreperson mistakenly deducting twenty percent from the jury's verdict for the plaintiff.[143] Conversely, even with the new exception, jurors still cannot testify that their verdict was based upon a misunderstanding of the jury instructions or the consequences of their verdict.[144] As an example, in *United States v. Jackson*, several jurors sought to testify that they gave the defendant the death penalty because they incorrectly thought that if they sentenced him to life imprisonment without the possibility of parole, he could still be released before the end of his life.[145] In its 2008 opinion, the Fifth Circuit precluded this proposed jury impeachment, finding that jurors could not impeach their verdicts through allegations of misunderstood jury instructions.[146]

3. Applying Rule 606(b) in the Wake of *Tanner*

Since *Tanner*, courts have applied Rule 606(b) by using *Tanner's* characterization of the rule's internal/external dichotomy. Courts have precluded jurors from impeaching their verdicts on the basis of allegations relating to anything internal to the jury deliberation process, such as claims that jurors took the defendant's refusal to testify as evidence of his guilt,[147]

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[142] FED. R. EVID. 606(b).

[143] Eastridge Dev. Co. v. Halpert Assocs., Inc., 853 F.2d 772, 783 (10th Cir. 1988).

[144] *See, e.g.*, United States v. Jackson, 549 F.3d 963, 983–84 (5th Cir. 2008).

[145] *Id.*

[146] *Id.*; *see also* Posting of Colin Miller to Evidence ProfBlog, http://lawprofessors.typepad.com/evidenceprof/2008/11/essential-eleme.html (Nov. 30, 2008).

[147] *See* United States v. Kelley, 461 F.3d 817, 831–32 (6th Cir. 2006).

misunderstood jury instructions,[148] reached a majority verdict,[149] and threatened each other.[150] Conversely, courts have permitted jurors to impeach their verdicts based upon anything external to the process, whether it be external evidence or an external influence. Accordingly, courts have allowed jurors to testify regarding improperly received extraneous prejudicial information such as jurors learning that the defendant was already incarcerated for another offense.[151] Courts have also allowed jurors to testify regarding improper outside influences, whether the alleged influencer was the judge,[152] bailiff,[153] detective,[154] or a family member of a party.[155]

4. The Application of Rule 606(b) to Allegations of Racial or Other Bias

Rule 606(b) "has repeatedly been held to preclude a juror from testifying, in support of a motion for a new trial, that juror conduct during deliberations suggests the verdict was tainted by racial bias."[156] A few courts, such as the Supreme Court of Minnesota in *State v. Bowles*, have found that "[r]ace-based pressure constitutes 'extraneous prejudicial information' about which a juror may testify."[157] And while the Sixth Circuit in *Mason v. Mitchell* found that a juror's use of racial slurs is an

[148] *See* United States v. Wickersham, 29 F.3d 191, 194 (5th Cir. 1994).

[149] *See* Edwards v. State, 997 So. 2d 241, 246–47 (Miss. Ct. App. 2008); Posting of Colin Miller to EvidenceProf Blog, http://lawprofessors.typepad.com/evidenceprof/2008/12/606(b)-edwards=v.html (Dec. 26, 2008).

[150] *See* United States v. McGhee, 532 F.3d 733, 740–41 (8th Cir. 2008); Posting of Colin Miller to EvidenceProf Blog, http://lawprofessors.typepad.com/evidenceprof/2008/07/606b-juror-inti.html (July 13, 2008).

[151] *See* State v. Allen, No. 06-1495, 2008 WL 5234319, at *2–3 (Iowa Ct. App. Dec. 17, 2008); Posting of Colin Miller to EvidenceProf Blog, http://lawprofessors.typepad.com/evidenceprof/2008/12/606b-state-v-al.html (Dec. 22, 2008).

[152] *See* United States v. Scisum, 32 F.3d 1479, 1481–83 (10th Cir. 1994).

[153] *See* Henri v. Curto, 891 N.E.2d 135, 141–42 (Ind. Ct. App. 2008); Posting of Colin Miller to EvidenceProf Blog, http://lawprofessors.typepad.com/evidenceprof/2008/08/606b-henri-v-cu.html (Aug. 2, 2008).

[154] *See* State v. Lewis, 654 S.E.2d 808, 809–11 (N.C. Ct. App. 2008); Posting of Colin Miller to EvidenceProf Blog, http://lawprofessors.typepad.com/evidenceprof/2008/01/do-the-right-th.html (Jan. 22, 2008).

[155] *See, e.g.*, Davis v. State, 770 N.E.2d 319, 325 n.4 (Ind. 2002).

[156] Gold, *supra* note 13, at 126, 128.

[157] 530 N.W.2d 521, 536 (Minn. 1995).

internal influence rather than an improper outside influence, [158] the United States District Court for the Eastern District of Tennessee recently deemed that opinion "unsupported by any discussion."[159] Finally, other courts, such as the Supreme Court of South Carolina in *State v. Hunter*, have found that juror testimony concerning juror racial bias is admissible, not under Rule 606(b)'s exceptions, but because its exclusion would deprive defendants of due process.[160]

Overall, however, there is "little dissent from the proposition" that Rule 606(b) precludes jurors from impeaching their verdicts based upon allegations of racial, religious, or other bias by jurors.[161] For the most part, courts have found that biased remarks by jurors are neither "extraneous" nor "information."[162] Also, courts have largely concluded that juror bias is an internal or intra-jury influence rather than the type of improper outside influence that can form the proper predicate for jury impeachment.[163] Finally, most courts have extrapolated *Tanner*'s conclusion that application of Rule 606(b) does not violate defendants' Sixth Amendment right to a competent jury to reach the broader conclusion that applying Rule 606(b) to preclude jury impeachment concerning jurors using racial, religious, or other slurs similarly does not violate the Sixth Amendment right to an impartial jury.[164]

Sometimes, court opinions such as those in the introduction lay out in graphic detail the exact nature of the injustice that Rule 606(b) wreaks in such cases. For instance, in *Smith v. Brewer*, the United States District Court for the Southern District of Iowa denied the habeas petition of an

[158] 320 F.3d 604, 636–37 (6th Cir. 2003).

[159] United States v. Taylor, No. 1:04-CR-160, 2009 WL 311138, at *8 (E.D. Tenn. Feb. 6, 2009). The rest of the Eastern District of Tennessee's opinion, however, made clear that the court would never allow jurors to impeach their verdicts after trial through allegations of juror bias. *See* Posting of Colin Miller to EvidenceProf Blog, http://lawprofessors.typepad.com/evidenceprof/2009/02/i-am-currently.html (Feb. 14, 2009).

[160] 463 S.E.2d 314, 316 (S.C. 1995).

[161] Gold, *supra* note 13, at 128.

[162] Shillcutt v. Gagnon, 602 F. Supp. 1280, 1283 (E.D. Wis. 1985).

[163] *See, e.g.*, State v. Finney, 337 N.W.2d 167, 169 (S.D. 1983) (finding that racist comments by jurors are an intra-jury influence).

[164] *See, e.g.*, United States v. Benally, 546 F.3d 1230, 1240 (10th Cir. 2008) ("The safeguards that the Court relied upon for exposing the drug and alcohol use amongst jurors in *Tanner* are also available to expose racial biases of the sort alleged in Mr. Benally's case."); *see also* Posting of Colin Miller to EvidenceProf Blog, http://lawprofessors.typepad.com/evidenceprof/2008/11/ive-written-two.html (Nov. 14, 2008).

African-American convicted of first-degree murder,[165] a decision which the Eighth Circuit later affirmed.[166] In so doing, it found that the Iowa state courts had committed no error in using Rule 606(b) to preclude a juror from testifying after trial that during deliberations another juror "'got up and walked about the room in kind of a . . . strutting away such as a minstrel used to do and . . . used the black dialect to repeat some of the things . . . (Mr. McKnight petitioner's black trial attorney) said.'"[167] Meanwhile, in its 2008 opinion in *United States v. Benally*, the Tenth Circuit found that a Native American man convicted of assaulting a Bureau of Indian Affairs officer with a dangerous weapon was precluded under Rule 606(b) from invalidating the verdict through allegations that during deliberations, inter alia, (1) the jury foreman said, "'[w]hen Indians get alcohol, they all get drunk,' and that when they get drunk, they get violent," and (2) other "jurors discussed the need to 'send a message back to the reservation.'"[168]

Other times, it is difficult to measure the level of injustice because some courts such as the Supreme Court of Tennessee[169] and the Court of Appeals of Missouri[170] reject proposed juror testimony regarding "racial prejudice" out of hand, without presenting any detail regarding the nature of the allegations. Furthermore, sometimes a court is so vague in precluding allegations of juror prejudice during trial that even the type of prejudice alleged is unclear as in the Fifth Circuit's opinion in *United States v. Duzac*.[171]

Courts have even applied Rule 606(b) to prevent jurors from impeaching their verdicts through allegations of racial bias when an

[165] Smith v. Brewer, 444 F. Supp. 482, 488, 491 (S.D. Iowa 1978).

[166] *See generally* Smith v. Brewer, 577 F.2d 466 (8th Cir. 1978).

[167] *Brewer*, 444 F. Supp. at 488.

[168] *Benally*, 546 F.3d at 1231–32, 1240.

[169] *See* State v. Blackwell, 664 S.W.2d 686, 689–90 (Tenn. 1984) ("Evidence was offered of remarks made during the jury's deliberation that had racial overtones, the effect of which was said to amount to pressure to vote to convict defendant, a black man. That evidence was inadmissible under the exclusionary language of Rule 606(b) . . . .").

[170] *See* State v. Smith, 735 S.W.2d 65, 69–70 (Mo. Ct. App. 1987) (finding that a juror's post-trial claim that claimed that the verdict was motivated by racial prejudice was "an improper attempt to impeach the verdict").

[171] 622 F.2d 911, 913–14 (5th Cir. 1980) (finding that allegations of juror prejudice were inadmissible without specifying the type of prejudice alleged). The Fifth Circuit more clearly excluded allegations of juror racial bias under Rule 606(b) the following year in *Martinez v. Food City, Inc.*, 658 F.2d 369, 373–74 (5th Cir. 1981).

appellant has been given a death sentence.[172] The Supreme Court of Georgia reached this conclusion in *Spencer v. State*, when it found that a Georgia trial court properly precluded a death-sentenced African-American appellant from presenting a juror's affidavit in which she indicated that "she overheard two white jurors making racially derogatory comments about the defendant during the jury's deliberations."[173] Similarly, in *Bacon v. Lee*, the Fourth Circuit denied the habeas petition of a death-sentenced African-American man, finding that the North Carolina state courts properly precluded him from introducing the affidavit of an alternate juror, who claimed that "she recalled jurors making racial jokes during the course of the trial."[174]

III. THE RIGHT TO PRESENT A DEFENSE

A. The Supreme Court's Development of the Right to Present a Defense

1. Introduction

The Sixth Amendment to the Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[175]

Of the six rights contained in the Sixth Amendment, the late bloomer of the bunch was clearly the accused's right "to have compulsory process for obtaining witnesses in his favor."[176] For almost two centuries, courts

[172] *See* Spencer v. State, 398 S.E.2d 179, 184 (Ga. 1990); Bacon v. Lee, 225 F.3d 470, 485 (4th Cir. 2000).

[173] 398 S.E.2d 179, 184 (Ga. 1990).

[174] 225 F.3d 470, 485 (4th Cir. 2000).

[175] U.S. CONST. amend. VI.

[176] *Id.*

interpreted this Compulsory Process Clause as merely conferring on criminal defendants the procedural right of being able to subpoena or otherwise secure the presence of witnesses at trial.[177] Indeed, the Compulsory Process Clause had become "almost a dead letter after 170 years of desuetude, before it was given new life in *Washington v. Texas*."[178] In *Washington v. Texas*, the Supreme Court read the right to present a defense into the Clause.[179] Including *Washington v. Texas*, the Court has applied this right to evidentiary rulings seven times,[180] and while this Supreme Court septet has given lower courts a "lack of guidance" on how to apply the right, these opinions provided enough detail to allow lower courts to fill in the blanks.[181]

2. *Washington v. Texas*

Before the Supreme Court's 1967 opinion in *Washington v. Texas*, the Court had mentioned the Compulsory Process Clause "only five times—twice in dictum, and three times in the course of finding it unnecessary to construe the clause,"[182] making *Washington v. Texas* the Court's "first and seminal opinion" on the Clause.[183] *Washington v. Texas* seemingly involved the classic tale of boy meets girl, boy loses girl, boy kills girl's new boyfriend. But did it? Eighteen year-old Jackie Washington dated Jean Carter until her mother forbade the relationship.[184] Carter then took up with another young man, and Washington responded by searching, not for another young lady, but for a gun, which he found in the possession of one

[177] *See* Louis S. Quinn, Note, *Defense Witness Immunity—A "Fresh" Look at the Compulsory Process Clause*, 43 LA. L. REV. 239, 240 (1982) ("Traditionally, courts viewed the compulsory process clause as granting the defendant the right to subpoena witnesses in his favor to appear in court."); Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 74 (1974) ("In a series of cases since 1967, the Supreme Court has rejected the narrow construction, and has recognized that compulsory process constitutionalizes the entire presentation of the defendant's case.").

[178] United States v. Vietor, 10 M.J. 69, 75 (C.M.A. 1980).

[179] *See* 388 U.S. 14, 19 (1967).

[180] *See* Janet C. Hoeffel, *The Sixth Amendment's Lost Clause: Unearthing Compulsory Process*, 2002 WIS. L. REV. 1275, 1289 & n.58 (2002). Hoeffel mentions five opinions in her pre-*Holmes* article, omitting *Green*. *See id.*

[181] *Id.* at 1353.

[182] Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 586 n.47 (1978).

[183] *Id.*

[184] Washington v. State, 400 S.W.2d 756, 757 (Tex. Crim. App. 1966).

Charles Fuller.[185] Fuller's shotgun fired the fatal shot that felled Carter's new suitor on the porch of Carter's house, with the question being whose finger pulled the trigger.[186] The Dallas District Attorney first charged Fuller with the murder and secured his conviction along with a fifty year sentence after the jury rejected his defense that he pulled the shotgun's trigger without ever seeing the man who would be struck with its shell.[187] The district attorney then turned around and charged Washington with murder with malice, and the jury again came back with a conviction and a half-century sentence.[188]

The jury's second verdict might seem indefensible in light of Fuller's testimony at his trial, but Washington's jury never heard Fuller's version of events.[189] Instead, the trial court precluded Washington from putting Fuller on the witness stand, despite indications that Fuller also would have testified that Washington tried to persuade him to leave and actually left before Fuller fired the fatal shot.[190] And it did so pursuant to two Texas statutes which provided "that persons charged or convicted as coparticipants in the same crime could not testify for one another."[191]

Washington's appeal eventually reached the Supreme Court, which initially determined as a matter of first impression that the Compulsory Process Clause was incorporated in the Fourteenth Amendment's Due Process Clause and thus applied to state criminal trials.[192] According to the Court, "[t]he right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States."[193] Instead, Chief Justice Warren concluded that "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of facts as well as the prosecution's to the jury so it may decide where the truth lies."[194]

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[185] *Id.* at 757–58.

[186] Washington v. Texas, 388 U.S. 14, 16 (1967).

[187] *Id.*

[188] Washington v. State, 400 S.W.2d at 757.

[189] Washington v. Texas, 388 U.S. at 17.

[190] *Id.* at 16–17.

[191] *Id.* at 16.

[192] *Id.* at 18–19.

[193] *Id.* at 18.

[194] *Id.* at 19.

The Court then applied this new right to the circumstances of the case before it and found it to be an especially good fit given the history of the Compulsory Process Clause.[195] According to the Chief Justice, "the right to compulsory process was included in the Bill of Rights in reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all."[196] The Clause, though, was not a direct response to this absolute prohibition, which had been abolished in England before the drafting of the United States Constitution; it was, however, adopted against a common law backdrop of rules rendering certain categories of individuals incompetent to testify at trial despite the fact that they were "physically and mentally capable of testifying."[197]

Such "incompetent" witnesses included spouses under the doctrine of coverture, atheists on the ground of irreligion, and individuals convicted of felonies or crimes of *crimen falsi* under the doctrine of disqualification for infamy.[198] In spite of the Compulsory Process Clause, "[t]he federal courts followed the[se] common law restrictions for a time" because they were on the books at the time of the Judiciary Act of 1789.[199] These rules, however, eventually fell out of favor, with the Supreme Court greasing the wheels on the process by striking down the doctrine of disqualification for infamy in 1918 in *Rosen v. United States*¸ concluding "that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here . . . ."[200]

In *Washington v. Texas*, Chief Justice Warren noted that *Rosen* was decided on non-constitutional grounds but nonetheless found that its reasoning was required by the Compulsory Process Clause.[201] Warren adduced from *Rosen* that a state would violate the Clause "if it made all defense testimony inadmissible as a matter of procedural law."[202] The Chief Justice then analogized this finding to the case before him and concluded that "[i]t is difficult to see how the Constitution is any less

[195] *Id.* at 19–23.

[196] *Id.* at 19.

[197] *Id.* at 19–20.

[198] *See* Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1369 n.35 (1985).

[199] Washington v. Texas, 388 U.S. at 21.

[200] 245 U.S. 467, 471 (1918).

[201] Washington v. Texas, 388 U.S. at 22.

[202] *Id.*

violated by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them untrustworthy of belief."[203]

Alternatively, the Court concluded that the Texas statutes could not even be defended on the ground that they "rationally set[] apart a group of persons who are particularly likely to commit perjury."[204] While these statutes precluded a charged or convicted co-participant from providing exculpatory testimony in favor of his alleged partner in crime, they: (1) removed this proscription if the co-participant was exonerated, and (2) never precluded such a co-participant from providing incriminatory testimony as a witness for the prosecution. [205]

According to the Chief Justice, Texas thus denied Washington his right to present a defense because it "arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events he had personally observed, and whose testimony would have been relevant and material to the defense."[206] What seemed to support this finding of materiality was the Court's earlier conclusion that Fuller's testimony was "vital" because he "was the only person other than [Washington] who knew exactly who had fired the shotgun," rendering his proposed testimony the "only testimony available on a crucial issue."[207]

In a terminal footnote, however, the Court cautioned:

> Nothing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination or the lawyer-client or husband-wife privileges, which are based on entirely different considerations from those underlying the common-law disqualifications for interest. Nor do we deal in this case with nonarbitrary state rules that disqualify as witnesses persons who, because of mental infirmity of infancy, are incapable of observing events or testifying about them.[208]

[203] *Id.*

[204] *Id.*

[205] *Id.* at 17 n.4.

[206] *Id.* at 23.

[207] *Id.* at 16, 21.

[208] *Id.* at 23 n.21.

3. *Chambers v. Mississippi*

While the Supreme Court waited nearly two centuries before creating the right to present a defense, it took only another four years before it found that another evidentiary ruling violated that right, although it did not explicitly reference the Compulsory Process Clause. In *Chambers v. Mississippi*, Leon Chambers was tried in Mississippi for the murder of a policeman and advanced the defense that another man, Gable McDonald, committed the crime.[209] There was significant evidence to support this defense.[210] Before trial, McDonald gave a sworn confession to Chambers' attorney in which he admitted to killing the policeman, but he later repudiated that confession to police and was never charged.[211] McDonald's sworn confession, however, was apparently not the first time that he had admitted to the murder; instead, Chambers had three friends of McDonald ready to testify that he confessed to them before giving his sworn confession.[212]

But while the jurors heard about McDonald's sworn confession and subsequent repudiation, they never heard about these other three confessions.[213] Rather, the trial judge precluded the friends from testifying about McDonald's other confessions because they constituted inadmissible hearsay.[214] Moreover, the prosecution had no reason to call McDonald, making him a defense witness, and the judge found that under Mississippi's voucher rule, Chambers was precluded from impeaching his own witness through questions regarding his three other confessions.[215]

After Chambers was convicted and unsuccessfully challenged his conviction in the Mississippi state court system,[216] he appealed to the United States Supreme Court, which eventually granted certiorari.[217] Addressing the second evidentiary ruling first, Justice Powell found that the trial judge's application of the voucher rule meant that Chambers was "effectively prevented from exploring the circumstances of McDonald's

[209] 410 U.S. 284, 287–89 (1973).

[210] *Id.* at 289.

[211] Chambers v. State, 252 So. 2d 217, 218 (Miss. 1971).

[212] Chambers v. Mississippi, 410 U.S. at 292.

[213] *Id.*

[214] *Id.*

[215] *Id.* at 292–95.

[216] Chambers v. State, 252 So. 2d at 220.

[217] Chambers v. Mississippi, 410 U.S. at 284.

three prior oral confessions and from challenging the renunciation of the written confession."[218] Accordingly, the Court concluded that "[t]he 'voucher' rule, as applied in this case, plainly interfered with Chambers' right defend against the State's charges."[219]

The Court then viewed this ruling in conjunction with the trial judge's hearsay ruling and determined that the friends' testimony was inadmissible because Mississippi had a hearsay exception for statements against pecuniary interests but no exception for statements against penal interest.[220] Justice Powell noted that states such as Mississippi justified the distinction between these two types of statements against interest on the ground that "confessions of criminal activity are often motivated by extraneous considerations and, therefore, are not as inherently reliable as statements against pecuniary or propriety interest."[221]

The Court then noted that there had been significant scholarly criticism of this dichotomy.[222] However, the Court concluded that it did not need to resolve this dispute because McDonald's confessions "were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability."[223] Namely, inter alia, "[t]he sheer number of independent confessions provided . . . corroboration," each of the confessions was "unquestionably against interest," and McDonald was available to be "cross-examined by the State."[224] Therefore, Justice Powell found additional error by the trial court,[225] concluding that, "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."[226]

Justice Powell's opinion explicitly referenced neither *Washington v. Texas* nor the Compulsory Process Clause in finding a violation of Chambers' right to present a defense because Chambers raised no constitutional objection at trial.[227] The Court thus apparently "assumed that

[218] *Id.* at 296–97.

[219] *Id.* at 298.

[220] *Id.* at 299.

[221] *Id.* at 299–300.

[222] *Id.* at 300.

[223] *Id.*

[224] *Id.* at 300–01.

[225] *Id.* at 302.

[226] *Id.*

[227] Westen, *supra* note 181, at 607 n.108.

the only constitutional question properly before it rested on due process, rather than on *Chambers'* newly advanced . . . compulsory process argument[] . . . ."[228] The Court, however, would eventually mesh *Chambers v. Mississippi* and *Washington v. Texas* under the same right to present a defense umbrella fifteen years later, but not before the Court expanded upon its holding in *Chambers v. Mississippi*.

4. *Green v. Georgia*

The Supreme Court's 1979 opinion in *Green v. Georgia* was similar to its opinion in *Chambers v. Mississippi*, except that it involved the mechanistic application of only one rule of evidence, and that ruling occurred during sentencing.[229] In *Green*, Roosevelt Green, Jr. and Carzell Moore were both convicted of the rape and murder of Teresa Carol Allen in separate trials.[230] Green was actually convicted at a first trial,[231] and then, during his second trial for sentencing, he sought to introduce the testimony of Thomas Pasby, who testified at Moore's trial that "Moore had confided to him that he had killed Allen, shooting her twice after ordering [Green] to run an errand."[232] The trial court, however, rebuffed this attempt because, like Mississippi, Georgia had a hearsay exception for statements against pecuniary interest but no exception for statements against penal interest.[233]

Green's appeal eventually reached the United States Supreme Court,[234] which found that that "[t]he excluded testimony was highly relevant to a critical issue in the punishment phase of trial and substantial reasons existed to assume its reliability." The court found "[t]he evidence corroborating the confession was ample," "[t]he statement was against interest" and, "[p]erhaps most important, the State considered the testimony sufficiently reliable to use it against Moore, and to base a sentence of death upon it."[235] Citing to *Chambers v. Mississippi*, the Court concluded that the Georgia state courts acted unconstitutionally because "[i]n these unique circumstances, 'the hearsay rule may not be applied mechanistically to

[228] *Id.*

[229] *See* 442 U.S. 95, 97 (1979).

[230] *Id.* at 95.

[231] *Id.* at 96.

[232] *Id.*

[233] *Id.* at 96 n.1.

[234] *Id.* at 96.

[235] *Id.* at 97 (internal citations omitted).

defeat the ends of justice.'"[236]

5. *Crane v. Kentucky*

In *Crane v. Kentucky*, somebody shot and killed a clerk at the Keg Liquor Store in Louisville, Kentucky during the course of a robbery.[237] The police, however, were hampered in their investigation by "[a] complete absence of identifying physical evidence" to connect anyone to the crime.[238] But a week after the shooting, the fog lifted, and manna fell into the police's laps.[239] At that time, police arrested and questioned sixteen-year-old Major Crane in connection with an unrelated service station holdup.[240] According to the police, "'just out of the clear blue sky,' [Crane] began to confess to a host of local crimes, including shooting a police officer, robbing a hardware store, and robbing several individuals at a bowling alley."[241] Their curiosities piqued, the officers transferred Crane to a juvenile detention center and continued to interrogate him, whereupon he initially denied being involved with the Keg Liquors shooting before eventually confessing to that crime.[242]

The State subsequently indicted Crane for murder, and he moved to suppress his confession, claiming that the police impermissibly coerced the statement from him.[243] According to Crane, he falsely confessed to the crime only after he was detained in a windowless room for a protracted period of time, repeatedly denied contact with his mother, and surrounded by as many as six officers, who constantly badgered him.[244] Despite Crane's claims, the court credited the police version of events and denied Crane's motion to suppress his confession as involuntary, finding that there was "no sweating or coercion of the defendant."[245]

The case then proceeded to trial, where defense counsel asserted in his opening statement that Crane's confession was "rife with inconsistencies"

[236] *Id.* (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973)).

[237] 476 U.S. 683, 684 (1986).

[238] *Id.*

[239] *See id.*

[240] *Id.*

[241] *Id.*

[242] *Id.*

[243] *Id.* at 684–85.

[244] *Id.* at 685.

[245] *See id.* at 684–85.

and that "the very circumstances surrounding the giving of the [confession] [we]re enough to cast doubt on its credibility."[246] The prosecutor responded by bringing a motion *in limine*, arguing that any testimony in support of these claims would be solely related to the involuntariness of Crane's confession, which was "a 'legal matter' that had already been resolved by the court in its earlier ruling."[247] The trial court agreed, the jury found Crane guilty of murder, and Crane's evidentiary appeal was rejected by the Kentucky Supreme Court,[248] which found that "under established Kentucky procedure a trial court's pretrial voluntariness determination is conclusive and may not be relitigated at trial."[249]

After granting certiorari, the United States Supreme Court disagreed in a 1986 opinion on the ground that this Kentucky law "finds no support in our cases."[250] Instead, the Court found that testimony concerning the circumstances surrounding confessions bears on their credibility as well as their voluntariness.[251] Accordingly, the Court concluded that even if a confession is deemed voluntary and admissible, "as with any other part of the prosecutor's case, [it] may be shown to be 'insufficiently corroborated or otherwise . . . unworthy of belief.'"[252]

The Court then noted that as a result of the application of this Kentucky procedure to the proffered testimony concerning Crane's confession, Crane was "effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?"[253] At the same time, the Court acknowledged that it was reticent to "impose constitutional constraints on ordinary evidentiary rulings"[254] because of the "wide latitude" extended to judges to exclude evidence that is merely "repetitive" or "marginally relevant."[255] But notwithstanding this reluctance, the Court found that it had "little trouble concluding on the facts of this case that the blanket exclusion of the proffered testimony about the circumstances of [Crane's] confession

[246] *Id.* at 685.

[247] *Id.* at 685–86.

[248] *Id.* at 686.

[249] *Id.* at 686–87.

[250] *Id.* at 687.

[251] *Id.* at 688.

[252] *Id.* at 689 (quoting Lego v. Twomey, 404 U.S. 477, 485–86 (1972)).

[253] *Id.*

[254] *Id.*

[255] *Id.* at 689–90 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)).

deprived him of a fair trial."[256]

And it found such a deprivation by weaving strands from *Washington v. Texas*,[257] *Chambers v. Mississippi*,[258] the Compulsory Process Clause, the Due Process Clause, and the Confrontation Clause into the modern right to present a defense patchwork.[259] According to the Court, "whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"[260]

The Court then fleshed out this conclusion, pointing out that this right "would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence."[261] Instead, because Crane's defense was, in large part, that his earlier admission was not credible,[262] reversal was required on the ground that "introducing evidence of the physical circumstances that yielded the confession was all but indispensable to any chance of its succeeding."[263]

6. *Rock v. Arkansas*

This emboldened right to present a defense produced a Supreme Court opinion the following year which was seemingly compelled by the above language but shocking nonetheless. In *Rock v. Arkansas*, the State charged Vicki Lorene Rock with manslaughter in connection with the death of her husband after a scuffle between the two culminated with a fatal bullet wound to his chest.[264] When Rock was unable to remember the exact details of the shooting, her attorney had licensed neuropsychologist Bettye Back hypnotize her twice to refresh her memory.[265] After being

[256] *Id.* at 690.

[257] *See generally* Washington v. Texas, 388 U.S. 14 (1967).

[258] *See generally* Chambers v. Mississippi, 410 U.S. 284 (1973).

[259] Crane v. Kentucky, 476 U.S. 683, 690 (1986).

[260] *Id.* at 690 (internal citations omitted) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)).

[261] *Id.*

[262] *Id.* at 691.

[263] *Id.*

[264] 483 U.S. 44, 45 (1987).

[265] *Id.* at 46.

hypnotized, Rock recalled that at the time of the shooting, she did not have her finger on the gun's trigger;[266] instead, it "discharged when her husband grabbed her arm during the scuffle."[267] This revelation led her attorney to have a gun expert examine the manslaughter weapon, and the expert concluded that "the gun was defective and prone to fire[] when hit or dropped, without the trigger's being pulled."[268]

While the gun expert later testified regarding this conclusion at trial, the judge precluded Rock from testifying regarding any matters that she recalled due to the hypnosis "because of inherent unreliability and the effect of hypnosis in eliminating any meaningful cross-examination on those matters."[269] After Rock was subsequently convicted, she appealed, with the Supreme Court of Arkansas eventually affirming after deciding "to follow the approach of States that ha[d] held hypnotically refreshed testimony of witnesses inadmissible per se."[270]

In its reversal, the United States Supreme Court began, as it had in *Washington v. Texas*, by tracing the common law patchwork of rules rendering certain categories of individuals incompetent to testify at trial to their near death to *United States v. Rosen*.[271] Of course, *Rosen* merely struck down the doctrine of disqualification for infamy on nonconstitutional grounds,[272] but the Court in *Washington v. Texas* significantly expanded that decision and struck the fatal blow to the common law rule precluding certain categories of witnesses from testifying to their near death, concluding that "arbitrary rules that prevent whole categories of defense witnesses from testifying" violate the right to present a defense.[273] The Court now concluded that "[j]ust as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony."[274]

The Court then attempted to define exactly what it meant by an arbitrary

[266] *Id.* at 47.

[267] *Id.*

[268] *Id.*

[269] *Id.* at 47–48 n.3.

[270] *Id.* at 48–49.

[271] *Id.* at 54 (quoting Rosen v. United States, 245 U.S. 467, 471–72 (1918)); *see generally* Washington v. Texas, 388 U.S. 14, 20–33 (1967).

[272] *Rock*, 483 U.S. at 54.

[273] Washington v. Texas, 388 U.S. 14, 22 (1967).

[274] *Rock*, 483 U.S. at 55.

application of a rule of evidence.[275] It found that "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve."[276] In other words, "[i]n applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify."[277] Under these principles, Arkansas' per se anti-hypnosis rule could not withstand scrutiny because it "operate[d] to the detriment of any defendant who undergoes hypnosis, without regard to the reasons for it, the circumstances under which it took place, or any independent verification of the information it produced."[278] Put another way, "[a] State's legitimate interest in barring unreliable evidence does not extend to per se exclusions that may be reliable in an individual case."[279]

The problem with Arkansas' rule on the one hand was that "[i]t virtually prevented [Rock] from describing any of the events that occurred on the day of the shooting, despite corroboration of many of those events by other witnesses."[280] Moreover, while the Court conceded that hypnosis can introduce the possibility of unreliable recollections,[281] it found that "the inaccuracies the [hypnosis] process introduces can be reduced, although perhaps not eliminated, by the use of procedural safeguards,"[282] which Doctor Back apparently followed.[283]

7. *United States v. Scheffer*

In the wake of the Supreme Court's landmark ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[284] in 1993, several federal circuit courts began suggesting that existing automatic bans on the admission of polygraph evidence might no longer be constitutionally defensible.[285] In the

[275] *See id.* at 55–56.

[276] *Id.*

[277] *Id.* at 56.

[278] *Id.*

[279] *Id.* at 61.

[280] *Id.* at 57.

[281] *Id.* at 59 (noting that hypnosis appears to increase both correct and incorrect recollections).

[282] *Id.* at 60.

[283] *Id.* at 62.

[284] 509 U.S. 579 (1993).

[285] Faust F. Rossi, *Evidence*, 49 SYRACUSE L. REV. 507, 526 (1999) (stating that in light of *Daubert* several federal circuit courts have suggested that the automatic bans on polygraph evidence should be re-examined).

United Stated Supreme Court's 1998 opinion, *United States v. Scheffer*, however, it forestalled this line of analysis by rejecting the argument that *Rock* compelled a finding that the per se exclusion of polygraph evidence violated a criminal defendant's right to present a defense.[286]

In *Scheffer*, Air Force airman Edward Scheffer volunteered in March 1992 to work as an informant on drug investigations, which rendered him subject to drug testing and polygraph examinations.[287] Soon after taking a drug test that April, but before the results were known, Scheffer agreed to take a polygraph test, which "indicated no deception" when he denied using drugs since enlisting.[288] If Scheffer was lying, the drug test was not, as it revealed the presence of methamphetamine.[289]

During his ensuing court-martial on charges of methamphetamine use, Scheffer raised an "innocent ingestion" theory,[290] but the military judge precluded him from introducing the polygraph evidence in support of this claim pursuant to Military Rule of Evidence 707, which stated in relevant part: "(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination shall not be admitted into evidence."[291]

After Scheffer was convicted, he appealed to the Air Force Court of Criminal Appeals, which affirmed, explaining that Rule 707 "does not arbitrarily limit the accused's ability to present reliable evidence."[292] But the Court of Appeals for the Armed Forces reversed, concluding that "'[a] per se exclusion of polygraph evidence offered by an accused to rebut an attack on his credibility . . . violates his Sixth Amendment right to present a defense.'"[293]

In reversing the Court of Appeals, the Supreme Court, in an opinion written by Justice Thomas, began by couching the new *Rock* test in the negative: "Such rules [of evidence] do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to

[286] 523 U.S. 303, 307–08 (1998).

[287] *Id.* at 305.

[288] *Id.* at 306.

[289] *Id.*

[290] *Id.*

[291] *Id.* at 306–07 (quoting MILITARY R. EVID. 707).

[292] United States v. Scheffer, 41 M.J. 683, 691 (A.F. Ct. Crim. App. 1995).

[293] United States v. Scheffer, 44 M.J. 442, 445 (C.A.A.F. 1996).

the purposes they are designed to serve.'"[294] Justice Thomas then added a clarification to this test, deducing from *Rock*, *Chambers v. Mississippi*, and *Washington v. Texas* that "the exclusion of evidence [can] be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused."[295]

The Court then flagged three legitimate governmental interests that Rule 707 rationally and proportionally advanced,[296] but a majority of the Justices only signed the part of the opinion dealing with the first interest.[297] That interest was the government's "legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial."[298] According to a majority of the Court, the problem with Scheffer's argument was that there was "simply no consensus that polygraph evidence is reliable."[299] Moreover, according to Justice Thomas, unlike in *Rock*, "there is simply no way to know in a particular case whether a polygraph examiner's conclusion is accurate, because certain doubts and uncertainties plague even the best polygraph exams."[300] This impossibility of reliability thus rendered Rule 707's per se exclusion of all polygraph evidence "a rational and proportional means of advancing the legitimate interest in barring unreliable evidence."[301]

Justice Thomas also proffered the preservation of the jury's role as lie detector and the avoidance of litigation collateral to the primary purpose of the trial as legitimate interests rationally and proportionally advanced by Rule 707's categorical exclusion,[302] but he could only coax the signatures of Rehnquist, Scalia, and Souter on these parts of the opinion.[303] But Thomas did corral an eight Justice majority in support of his conclusion that the military judge did not violate Scheffer's right to present a defense because Rule 707 does not implicate a sufficiently weighty interest of the

[294] United States v. Scheffer, 523 U.S. 303, 308 (1998) (quoting Rock v. Arkansas, 483 U.S. 44, 56 (1987)).

[295] *Id.*

[296] *Id.* at 309.

[297] *Id.* at 318.

[298] *Id.* at 309.

[299] *Id.*

[300] *Id.* at 312.

[301] *Id.*

[302] *See id.* at 312–15.

[303] *Id.* at 305.

accused.[304] The Court briefly recounted the facts of *Rock*, *Washington v. Texas*, and *Chambers v. Mississippi*, but concluded that "unlike the evidentiary rules at issue in those cases, Rule 707 does not implicate any significant interest of the accused."[305] In *Rock*, the court precluded the testimony of the only witness with "firsthand knowledge of the facts."[306] In *Washington v. Texas*, the Texas statutes prevented a witness from testifying regarding "events that he had personally observed."[307] In *Chambers v. Mississippi*, the trial court "excluded the testimony of three persons to whom that witness had confessed."[308] Conversely, despite the court-martial's exclusion of the polygraph evidence under Rule 707, the court members during Scheffer's trial "heard all the relevant details of the charged offense from the perspective of the accused, and the Rule did not preclude him from introducing any factual evidence."[309] Rule 707 merely barred Scheffer "from introducing expert opinion testimony to bolster his own credibility."[310]

8. *Holmes v. South Carolina*

The Supreme Court's 2006 opinion in *Holmes v. South Carolina*, contains its most recent assessment of a defendant's right to present a defense.[311] In *Holmes*, Bobby Lee Holmes was sentenced to die after being convicted of first-degree criminal sexual conduct, first-degree burglary, and robbery in connection with the death of eighty-six-year-old Mary Stewart.[312] In securing Holmes' conviction, the prosecution relied heavily on forensic evidence, such as evidence that Holmes' underwear contained a mixture of DNA from two individuals, with ninety-nine point nine percent of the population other than Stewart and Holmes having been excluded as contributors to that mixture.[313]

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[304] *See id.* at 304, 308, 316–17.

[305] *Id.* at 316–17.

[306] *Id.* at 315.

[307] *Id.* at 316.

[308] *Id.*

[309] *Id.* at 317.

[310] *Id.*

[311] *See generally* 547 U.S. 319, 321–22 (2006); *see also* Stull v. Campbell, No. CIV S-05-1762 JAM KJM P, 2009 WL 172983, at *5 (E.D. Cal. Jan. 23, 2009).

[312] *Holmes*, 547 U.S. at 321–22.

[313] *Id.* at 322.

In response, Holmes "sought to introduce proof that another man, Jimmy McCaw White, had attacked Stewart" on the day of her death.[314] The trial court, however, precluded Holmes from presenting evidence concerning this alternate suspect theory, and the Supreme Court of South Carolina subsequently affirmed this evidentiary ruling and Holmes' conviction.[315] The court concluded that "where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence."[316]

In a unanimous opinion written by Justice Alito, the United States Supreme Court reversed, finding that the rule applied by the Supreme Court of South Carolina violated Holmes' right to present a defense.[317] Incorporating the last refinement of that right by Justice Thomas in *Scheffer*,[318] Justice Alito indicated that "[t]his right is abridged by evidence rules that infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve."[319] Alito then noted how each of the aforementioned opinions (sans *Scheffer*) addressed arbitrary rules, such as the Texas statutes in *Washington v. Texas*, which "could not even be defended on the ground that [they] rationally set[] apart a group of persons particularly likely to commit perjury since the rule[s] allowed an alleged participant to testify if he or she had been acquitted or was called by the prosecution."[320]

The Court noted that notwithstanding this right, judges can exclude evidence that is "repetitive" or "only marginally relevant," such as alternate suspect evidence that merely casts "bare suspicion" on another or merely raises "a conjectural inference" of his guilt.[321] But it found that the Supreme Court of South Carolina "radically changed and extended" this principle in Holmes' case by focusing its critical inquiry on the strength of the prosecution's case while remaining insouciant to the probative value of

[314] *Id.* at 323.

[315] *Id.* at 324.

[316] *Id.* (construing State v. Gay, 541 S.E.2d 541 (S.C. 2001)).

[317] *Id.* at 331.

[318] *See supra* note 295 and accompanying text.

[319] *Holmes*, 547 U.S. at 324–25 (quoting United States v. Scheffer, 523 U.S. 303, 308 (1998) (internal quotations omitted)).

[320] *Id.* at 325 (quoting Washington v. Texas, 388 U.S. 14, 22–23 (1967) (internal quotations omitted)).

[321] *Id.* at 326, 328.

the defendant's alternate suspect evidence or the "potential adverse effects of [not] admitting the defense evidence of third-party guilt."[322] According to Alito, the rule applied by the court was arbitrary and did not serve the end that it was designed to promote because, "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt."[323]

B. Tests Used by Lower Courts in Applying the Right to Present a Defense

These Supreme Court opinions gave the lower courts a "lack of guidance" by failing to articulate any clear test for determining whether the application of a rule of evidence violates criminal defendant's right to present a defense.[324] That said, in its 1982 opinion in *United States v. Valenzuela-Bernal*, a Compulsory Process Clause appeal which did not involve the application of a rule of evidence, the Court noted that in *Washington*, it had found a violation of the Sixth Amendment "when the defendant was arbitrarily deprived of 'testimony [that] would have been *relevant* and *material*, and . . . *vital* to the defense.'"[325] From this language, the Court concluded that *Washington* intimated that a criminal defendant must "at least make some plausible showing" that the evidence he sought or was seeking to introduce was or would have been "material and favorable to his defense" to establish a Compulsory Process Clause violation.[326] The Court then found this intimation borne out by the line of cases stemming from *Brady v. Maryland*, which it found indicated "that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial."[327]

From *Valenzuela-Bernal* and the aforementioned "right to present a defense" line of opinions, lower courts have employed a remarkable variety of tests, whether implicitly or explicitly, when applying the right to rules of

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[322] *See id.* at 328–29.

[323] *Id.* at 331.

[324] Hoeffel, *supra* note 180, at 1353.

[325] 458 U.S. 858, 867 (1982) (quoting Washington v. Texas, 388 U.S. 14, 16 (1967)) (emphasis in original).

[326] *Id.*

[327] *Id.* at 868 (quoting United States v. Agurs, 427 U.S. 97, 104 (1976) (internal citations omitted)).

evidence.[328] While numerous, most of the tests are quite similar.[329] According to the Third Circuit, a court violates a criminal defendant's right to present a defense when its application of an evidentiary rule does three things.[330] First, that the defendant was or would be deprived "of the opportunity to present evidence in his favor;" second, the excluded evidence was or would be "material and favorable to his defense;" and third, the deprivation was or would be "arbitrary or disproportionate to any legitimate evidentiary or procedural purpose."[331]

Other courts have analyzed right to present a defense claims under a due process analysis, with there being "little, if any, difference in th[is] analysis" and the Third Circuit's test mentioned above.[332] In essence, these courts apply the same analysis under factors one and three and decide under factor two whether the evidence at issue "creates a reasonable doubt that did not otherwise exist."[333] Additionally, other courts have utilized a test that also applies the same analysis under factors one and three; however, these courts decide under factor two whether the evidence was or is "reliable," which they determine by considering basically the same factors that other courts consider under factor two.[334] These factors mainly include the extent to which the evidence at issue is or was: (1) corroborated[335] (based upon *Chambers v. Mississippi*, *Green*, and *Rock*);[336] (2) the sole evidence on an issue or merely repetitive or cumulative[337] (based on *Washington v. Texas*, *Crane*, and *Holmes*);[338] (3) probative of a central or critical issue[339] (based

[328] Hoeffel, *supra* note 180, at 1353.

[329] *See id.* (noting that only the second elements of the tests vary).

[330] Gov't of the Virgin Islands v. Mills, 956 F.2d 443, 446 (3d Cir. 1992).

[331] *Id.*

[332] *Id.* at 445 n.4.

[333] Hoeffel, *supra* note 180, at 1353–54 (quoting United States v. Agurs, 427 U.S. 97, 112 (1976)).

[334] Chia v. Cambra, 281 F.3d 1032, 1037 (9th Cir. 2002).

[335] *See* Alley v. Bell, 307 F.3d 380, 395 (6th Cir. 2002) (noting that the Supreme Court has made clear that the exclusion of critical, corroborative defense evidence may violate the right to present a defense).

[336] *See supra* Part III.A.3–4, 6 and accompanying text.

[337] *See e.g.*, Jensen v. Romanowski, 564 F. Supp. 2d 740, 750 (E.D. Mich. 2008) (noting that courts do not violate the right to present a defense by excluding evidence that is repetitive or marginally relevant).

[338] *See supra* Part III.A.2, 5, 8 and accompanying text.

[339] *See, e.g.*, Gov't of the Virgin Islands v. Mills, 956 F.2d 443, 447 (3d Cir. 1992).

on *Washington v. Texas*, *Chambers v. Mississippi*, *Green*, and *Crane*);[340] and (4) important to a weighty interest of the accused[341] (based on *Scheffer* and *Holmes*).[342]

C. Application of the Right to Present a Defense to Evidentiary Privileges

In the terminal footnote of its opinion in *Washington v. Texas*, the Supreme Court left open the question of how the right to present a defense interacts with evidentiary privileges.[343] The aforementioned Supreme Court right to present a defense cases dealt with courts applying rules to exclude evidence based upon perceived unreliability, and the appellants thus merely had to establish that the excluded evidence was reliable to prove that the rule as applied was arbitrary or disproportionate to the purpose that it was designed to serve.[344] The problem with extending this analysis to the application of evidentiary privileges is that they "often exclude perfectly reliable evidence to serve other societal goals."[345] Therefore, an appellant cannot prove that the exclusion of evidence under a privilege violated his right to present a defense simply by establishing that the excluded evidence was reliable.[346] Consequently, courts have generally required appellants to prove not only that evidence excluded under a privilege is reliable, but also that their need for the evidence outweighs the interests protected by the privilege.[347] This analysis appears consistent with the Court's claim in *Rock* that "[i]n applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed . . . ."[348]

The opinion of the United States District Court for the Southern District of New York in *Morales v. Portuondo* provides a nice illustration of this

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[340] *See supra* Part III.A.3–5 and accompanying text.

[341] *See, e.g.*, United States v. Hoffecker, 530 F.3d 137, 184 (3d Cir. 2008) (noting that the application of a rule of evidence is only arbitrary or disproportionate when it infringes upon a weighty interest of the accused).

[342] *See supra* Part III.A.7–8 and accompanying text.

[343] Washington v. Texas, 388 U.S. 14, 23 n.21 (1967); *see also* GEORGE FISHER, EVIDENCE 882 (Robert C. Clark ed., 2d ed., Thomson Reuters/Foundation Press 2008) (2002).

[344] *See* FISHER, *supra* note 343, at 882 (recognizing that the "hearsay rule aims to exclude *unreliable* evidence").

[345] *Id.*

[346] *Id.*

[347] *See id.*

[348] *See supra* notes 275–76 and accompanying text.

type of analysis. [349] In *Morales*, Jose Morales filed a petition for writ of habeas corpus that the Southern District of New York considered nearly thirteen years after Ruben Montalvo and he were convicted of the murder of Jose Antonio Rivera in 1988.[350] Part of the basis for Morales' petition was the testimony of attorney Stanley Cohen.[351] Morales called Cohen as a witness at the 2001 evidentiary hearing on his petition, and Cohen testified that Jesus Fornes, who was killed in 1997, told him soon after Morales and Rivera were convicted "that he and two other individuals had killed someone and that the two individuals who had been convicted of the murder had not been involved."[352]

Cohen was actually the fourth person to whom Fornes had confessed back in 1988; he had made prior confessions to Morales' lawyer, Montalvo's mother, and a priest.[353] Despite Fornes' protestations to the contrary, Cohen convinced him to invoke his Fifth Amendment right against self-incrimination in the inevitable event that he was interrogated.[354] Thereafter, as part of Morales' motion to set aside his murder conviction in 1989, Fornes was indeed questioned, and he followed Cohen's advice by invoking his Fifth Amendment privilege.[355] After determining that Fornes' confession to the priest was covered by the priest-penitent privilege, the Appellate Division denied Morales' motion.[356]

In considering Morales' subsequent petition for writ of habeas corpus in 2001, the district court actually found that Fornes' "confession" to the priest was not privileged because, inter alia, it was a "heart-to-heart" talk rather than a "formal confession."[357] But Fornes was no longer around to invoke his Fifth Amendment privilege, and while Cohen was now willing to testify concerning Fornes' confession to him, the court found that the confession was covered by attorney-client privilege. [358] Notwithstanding its privilege conclusion, the court found that "under the authority of *Chambers v.*

[349] 154 F. Supp. 2d 706 (S.D.N.Y. 2001).

[350] *Id.* at 709–10.

[351] *Id.* at 719.

[352] *Id.* at 713.

[353] *Id.* at 711–12.

[354] *Id.* at 714.

[355] *Id.*

[356] *Id.* at 717, 719.

[357] *Id.* at 729.

[358] *Id.* at 730.

Mississippi . . . Fornes's statements to Cohen [we]re admissible"[359] because:

> Fornes spoke to Cohen to obtain legal advice, but he was merely repeating what he had already told three other people, including Morales's lawyer and Montalvo's mother. Fornes wanted to continue to help Morales and Montalvo, but Cohen advised him that he would probably only hurt himself without helping Morales and Montalvo at all. Fornes was undoubtedly speaking the truth when he told Cohen that he had committed the murder and that Morales and Montalvo were not present. Fornes has been deceased for some four years now, while two apparently innocent men have spent nearly thirteen years in prison for a crime that he committed.[360]

The court thus found that "Morales was denied a trial in accord with traditional and fundamental standards of due process" it thus granted his habeas petition.[361]

D. Application of the Right to Present a Defense to Juror Misconduct

As *Green v. Georgia* and *Morales v. Portuondo* make clear, courts have not narrowly construed the "right to present a defense" as merely the right to present a defense at the guilt phase of trial or even at any phase of the initial trial.[362] Instead, the right to present a defense is the right to present evidence, whether at an initial trial, a direct appeal, or in support of a motion for a new trial or petition for a writ of habeas corpus. Despite these broad readings of the right, only one court has addressed the issue of whether the exclusion of evidence regarding alleged jury misconduct can violate the right to present a defense, and that court did so sua sponte, without the petitioner even raising the argument.[363] Significantly, the court's opinion in that case was written by then Third Circuit Judge Alito, the Supreme Court Justice with the current last word on the right to present a defense, and it involved allegations of juror racism.[364]

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[359] *Id.*

[360] *Id.* at 731.

[361] *Id.* at 732.

[362] *See generally* 442 U.S. 95 (1979); 154 F. Supp. 2d 706 (S.D.N.Y. 2001).

[363] Williams v. Price, 343 F.3d 223, 236 (3d Cir. 2003).

[364] *Id.* at 225.

In *Williams v. Price*, Ronald A. Williams, an African-American, was convicted of first-degree murder and sentenced to life imprisonment in connection with a fatal shooting outside a truck depot in Pennsylvania.[365] Before the jurors that convicted Williams were seated, the trial court asked them two questions: (1) "Do you personally believe that blacks as a group are more likely to commit crimes of a violent nature involving firearms?" and (2) "Can you listen to and judge the testimony of a black person in the same fashion as the testimony of a white person, giving each its deserved credibility?"[366] Each juror selected to serve answered "no" to the first question and "yes" to the second question.[367]

After Williams was convicted, he unsuccessfully filed a Post-Conviction Relief Act ("PRCA") Petition, which contained two affidavits.[368] According to the affidavit of Judith Montgomery, inter alia, "when I was Juror No. 9 . . . I was called 'a n[*****] lover' and other derogatory names by other members of the jury. Remarks were made to me such as 'I hope your daughter marries one of them.'"[369] Williams also included the affidavit of his "intimate acquaintance," Jewel Hayes.[370] In her affidavit, Hayes stated:

> Subsequent to the proceedings in this case . . . I ran into Juror Number Two (2) in the lobby of the Courthouse. . . . Upon seeing me he stated "All n[*******] do is cause trouble[.]" I am not sure whether this was stated directly to me but it was stated for my benefit and loudly enough for me to hear and to get a rise out of me. During our confrontation he also stated "I should go back where I came from."[371]

The PRCA court denied Williams' petition, not mentioning Hayes' affidavit, and finding with regard to Montgomery's affidavit that "it is firmly established that after a verdict is recorded and the jury discharged, a juror may not impeach the verdict by his or her own testimony."[372]

[365] *Id.*
[366] *Id.* at 226.
[367] *Id.*
[368] *Id.* at 227.
[369] *Id.*
[370] *Id.* at 225.
[371] *Id.* at 227.
[372] *Id.*

Subsequently, after Williams' state superior court appeal was unsuccessful and the Pennsylvania Supreme Court denied review, he filed a petition for writ of habeas corpus in the United States District Court for the Western District of Pennsylvania.[373] That court denied the petition, finding that the state courts' actions in precluding the admission of Montgomery's affidavit were not contrary to *Tanner* and other Supreme Court opinions.[374] And while that court briefly mentioned Hayes' affidavit, it made no further reference to Hayes in denying Williams' petition.[375]

Williams thereafter appealed to the Third Circuit, claiming, inter alia, that he was denied his Sixth Amendment right to an impartial jury.[376] Alito began by noting that the court's standard of review was governed by 28 U.S.C § 2254(d)(1), meaning that he could not award federal habeas relief unless the PCRA court's decision was "*contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States*."[377] In this regard, Williams' chance of success seemed dim.

But while Williams did not raise the right to present a defense himself, Alito rounded up the usual suspects—*Washington v. Texas*, *Chambers v. Mississippi*, *Crane*, *Rock*, and *Scheffer*—and concluded that "[n]one of these cases clearly establishes just how far a jurisdiction may go in excluding evidence of juror misconduct."[378] Alito, however, was able to construe these opinions "as 'clearly establish[ing] . . . that a state evidence rule may not severely restrict a defendant's right to put on a defense if the rule is entirely without any reasonable justification."[379]

Understandably, Alito concluded that the state courts' exclusion of Montgomery's affidavit during the inquiry into the validity of the verdict neither contravened nor unreasonably applied clearly established Federal law because, as noted, the vast majority of courts have held that Rule 606(b) precludes jurors from impeaching their verdicts through allegations of racial, religious, or other bias.[380] According to Alito, this was the only

[373] *Id.* at 228.

[374] *Id.*

[375] *Id.*

[376] *Id.*

[377] *Id.* (quoting 28 U.S.C § 2254(d)(1)) (emphasis in original).

[378] *Id.* at 231–32.

[379] *Id.* at 232.

[380] *See* Gold, *supra* note 13 at 127–28.

basis of his conclusion.[381] He noted that the Third Circuit's role in *Price* was "not to interpret Rule 606(b) or any other version of the 'no impeachment' rule but merely to determine whether the state courts contravened or unreasonably applied clearly established Federal law, as determined by the Supreme Court."[382]

Alito also noted that Williams claimed in his petition that the Pennsylvania state courts improperly precluded him from introducing Montgomery's affidavit to prove that jurors lied during voir dire.[383] As noted *supra*, "[c]ourts have universally held that provisions similar to [Rule 606(b)] . . . do not preclude evidence to show that a juror lied during voir dire."[384] Unfortunately, the Supreme Court is not yet one of those courts, and Alito thus found that the state courts neither contravened nor unreasonably applied Federal law, especially in light of *Tanner*.[385] Again, Alito was quick to point out that the Third Circuit's opinion was solely based upon this ground because the issue before it was "not whether Montgomery's testimony was prohibited by Federal Rule 606(b) (since Rule 606(b) did not govern the state proceedings) or by the Pennsylvania version of the 'no impeachment' rule (since the enforcement of a state rule is a matter for the state courts)."[386]

Conversely, Alito found that "[n]o rational justification for the exclusion of [Hayes' affidavit] was provided by the state courts or the District Court, and none has been offered in this appeal."[387] Alito noted that Mansfield's Rule, Federal Rule of Evidence 606(b), and the similar Pennsylvania Rule of Evidence 606(b) all precluded jurors from impeaching their verdicts after trial but that none of the three precluded other sources from testifying regarding alleged juror misconduct.[388] He thus concluded that none of these three rules precluded the admission of Hayes' affidavit because "[t]he incident that Hayes recounted occurred after the trial ended and in a public place; no other jurors were alleged to have been present at the time; and the offensive remarks did not concern discussions among the jurors or anything that any other juror had

[381] *See generally* Williams v. Price, 343 F.3d 223 (3d Cir. 2003).

[382] *Id.* at 239.

[383] *See id.* at 235.

[384] *See supra* note 22 and accompanying text.

[385] *Price*, 343 F.3d at 235.

[386] *Id.*

[387] *Id.* at 233.

[388] *See id.* at 232–33.

purportedly said or done."[389]

Therefore, according to the Supreme Court Justice with the current last word on the right to present a defense, the exclusion of evidence concerning racial bias by jurors can violate the right. The question then becomes whether courts not bound by the limitations of a habeas review can similarly find that the application of Rule 606(b) to preclude the admission of post-trial juror testimony alleging racial, religious, or other bias during trial violates that right.

IV. APPLYING THE RIGHT TO PRESENT A DEFENSE TO JUROR BIAS

A. Introduction

While the Supreme Court in *Tanner* found that the application of Rule 606(b) to preclude jury impeachment did not violate the petitioners' Sixth Amendment right to a competent jury,[390] the above analysis suggests that convicted criminal defendants should be able to rely upon another Sixth Amendment right to allow them to present juror testimony regarding racial, religious, or other bias by jurors. Since *Washington v. Texas*, the Supreme Court has declared that the Compulsory Process Clause renders unto criminal defendants the right to present a defense, and courts have drawn from *Washington v. Texas* and its progeny a three-factor analysis to determine when that right is violated. When courts apply Rule 606(b) to exclude juror testimony concerning juror racial, religious or other bias, they implicate all three factors of this analysis.

B. Rule 606(b) Deprives Appellants of the Right to Present Evidence of Juror Bias

Plainly, when courts apply Rule 606(b) to preclude jurors from impeaching their verdicts based upon allegations of juror racial, religious, or other bias, they deprive appellants from presenting evidence of juror bias.[391] Some courts hold that courts can only violate the right to present a defense by applying per se rules of evidence to exclude appellants from presenting evidence and not by excluding evidence under discretionary

[389] *Id.* at 233.

[390] Tanner v. United States, 483 U.S. 107, 113–15, 126–27 (1987).

[391] *See, e.g.*, *supra* note 160 and accompanying text.

Rules, such as Rule 702.[392] Because Rule 606(b) is a per se rule of exclusion,[393] even the courts reading the right to present a defense in this manner would find that the Rule's application implicates the first factor of the analysis.

C. The Excluded Evidence Is Material, Favorable, and Critical

As noted previously, in deciding whether the subject evidence implicates the second factor, courts alternatively have considered whether the evidence is material and favorable,[394] critical,[395] or "creates a reasonable doubt that did not otherwise exist."[396] In essence, however, these courts all consider basically the same factors,[397] and all of these factors could or necessarily would support a finding that evidence of juror racial, religious, or other bias implicates the second factor of the analysis.

1. Allegations of Juror Bias Can Easily Be Corroborated

In *Chambers v. Mississippi*, the Court placed great emphasis on the fact that three witnesses were ready to testify, and thus corroborate, McDonald's sworn confession to the crime with which Chambers was charged.[398] According to the Court, "[t]he sheer number of independent confessions provided . . . corroboration . . . ."[399] In a typical jury trial, as many as eleven jurors can corroborate a juror's claim that a juror made biased statements during trial.[400] Indeed, there have been cases where all twelve jurors signed affidavits admitting to jury misconduct or

[392] *See* Moses v. Payne, 543 F.3d 1090, 1103 (9th Cir. 2008).

[393] *See, e.g.*, Robles v. Exxon Corp., 862 F.2d 1201, 1207 n.6 (5th Cir. 1989) ("[W]hether the categorical rule created by rule 606(b) applies to a given case simply does not turn on whether one, two, or all of the jurors indicate that they may have been confused or on when or how, after they have rendered their verdict, the jurors evidence their confusion. Rather the application of rule 606(b) is determined solely by the nature of the testimony sought to be introduced[]. . . .").

[394] Gov't of the Virgin Islands v. Mills, 956 F.2d 443, 446 (3d Cir. 1992).

[395] Chia v. Cambra, 281 F.3d 1032, 1037 (9th Cir. 2002).

[396] United States v. Agurs, 427 U.S. 97, 112 (1976).

[397] *See supra* Part III.B. and accompanying text.

[398] Chambers v. Mississippi, 410 U.S. 284, 284 (1973).

[399] *Id.*

[400] *See* Robles v. Exxon Corp., 862 F.2d 1201, 1207 (5th Cir. 1989) (noting that other courts had looked at grounds that considered that "not all of the jurors . . . indicated that they had misunderstood their instructions. . . .").

misunderstanding.[401] Moreover, "[b]ias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence . . . ."[402] As the Supreme Court of Kansas correctly noted in 1874: "overt acts . . . are accessible to the knowledge of all the jurors; if one affirms misconduct, the remaining eleven can deny; one cannot disturb the action of the twelve; it is useless to tamper with one, for the eleven may be heard."[403]

2. Juror Testimony Is Almost Always the Sole Evidence of Juror Bias

In the vast majority of cases, juror testimony would be the sole evidence that an appellant could present after trial to establish that jurors made biased statements during trial.[404] Usually, only jurors are privy to jury deliberations, rendering juror testimony "the only available evidence . . . to establish racist juror misconduct."[405] In rare cases, jurors conduct part of the jury deliberation process while in the public eye, allowing bystanders to observe or overhear juror misconduct.[406] But, as Justice O'Connor noted in *Tanner*, in those cases, Rule 606(b) does not apply to the bystander; therefore, the bystander can impeach the jury's verdict after trial, and there would be no need to apply the right to present a defense.[407] In every other case, juror testimony is the sole evidence of juror bias during trial.

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[401] *See* Tanno v. S.S. President Madison Vessel, 830 F.2d 991, 993 (9th Cir. 1987); Mauch v. Mfrs. Sales & Serv., Inc., 345 N.W.2d 338, 342–43 (N.D. 1984); Grenz v. Werre, 129 N.W.2d 681, 691 (N.D. 1964); *see also* Robles v. Exxon Corp., 862 F.2d at 1207 n.6 ("[W]hether the categorical rule created by rule 606(b) applies to a given case simply does not turn on whether one, two, or all of the jurors indicate that they may have been confused or on when or how, after they have rendered their verdict, the jurors evidence their confusion.").

[402] Smith v. Phillips, 455 U.S. 209, 231 (1982) (quoting Crawford v. United States, 212 U.S. 183, 196 (1909)).

[403] Perry v. Bailey, 12 Kan. 539, 542–43 (1874) (referencing the acceptance of juror affidavits that stated that one of the jurors was drunk during deliberations).

[404] *Racist Juror Misconduct*, *supra* note 13, at 1596.

[405] *Id.*

[406] *See* United States v. Taliaferro, 558 F.2d 724, 725–26 (4th Cir. 1977) (noting that the jurors were sent to dine at a private club during deliberations, and were instructed that though they could discuss the case during dinner, they were not permitted to discuss the case when any other person was in the room).

[407] *See* Tanner v. United States, 483 U.S. 107, 127 (1987).

3. Evidence of Juror Bias Is Probative of a Central Issue

It is well established that the presence of a biased juror is a structural defect not subject to a harmless error analysis and necessitates "a new trial without a showing of actual prejudice."[408] Put another way, "even if only one member of a jury harbors a material prejudice, the right to a trial by an impartial jury is impaired."[409] And to put it even more simply, "[o]ne racist juror would be enough" to require the reversal of a verdict.[410] Because the presence of a bias juror can never constitute harmless error, evidence of juror bias during trial is ipso facto probative of a central issue.[411]

4. Evidence of Juror Bias Is Important to a Weighty Interest of the Accused

Justice Thomas found that the exclusion of the polygraph evidence in *Scheffer* did not implicate a weighty or significant interest of the accused because such evidence did not consist of the testimony of a person who personally observed or had firsthand knowledge of a relevant event as was the case in *Rock v. Arkansas*, *Washington v. Texas*, and *Chambers v. Mississippi*.[412] Based upon this language, some authorities have claimed that courts implicate the weighty interest of an accused only by applying rules of evidence to "bar[] the introduction of testimony based upon personal or firsthand knowledge."[413] Under this reading, courts applying Rule 606(b) to preclude jurors from impeaching their verdicts through testimony regarding racial, religious, or other slurs that they personally heard implicates a weighty interest of the accused because "[t]he jurors are the persons who know what really happened."[414] Other courts apparently read Justice Thomas' language from *Scheffer* as merely rephrasing the third

[408] Dyer v. Calderon, 151 F.3d 970, 973 n.2 (9th Cir. 1998).

[409] After Hour Welding, Inc. v. Laneil Mgmt. Co., 324 N.W.2d 686, 690 (Wis. 1982).

[410] United States v. Henley, 238 F.3d 1111, 1120 (9th Cir. 2001).

[411] *See, e.g.*, State v. Santiago, 715 A.2d 1, 20 (Conn. 1998) ("Allegations of racial bias on the part of a juror are fundamentally different from other types of juror misconduct because such conduct is, ipso facto, prejudicial.").

[412] *See supra* notes 294–308 and accompanying text.

[413] Edward J. Imwinkelried, *A Defense of the Right to Present Defense Expert Testimony: The Flaws in the Plurality Opinion in* United States v. Scheffer, 69 TENN. L. REV. 539, 546 (2002).

[414] *See* Preliminary Draft of Proposed Rules of Evidence, Advisory Committee's Note, 46 F.R.D. 161, 290–91 (1969).

factor discussed previously in the article[415] and based upon the same reasoning applied in that subsection, this application of Rule 606(b) also implicates a weighty interest of the accused.[416]

5. Conclusion

All four of the factors lower courts have applied thus far point in favor of post-trial juror testimony concerning juror bias during trial being material and favorable or critical. Moreover, even if a court were to find that one of these factors did not support such a finding, it is important to note that not all of these factors were implicated in each of the aforementioned Supreme Court right to present a defense opinions.[417] For instance, in *Chambers v. Mississippi*, McDonald's confessions to his three friends were not the sole evidence of those confessions because Chambers was able to admit McDonald's sworn confession.[418] Therefore, there is compelling argument that post-trial juror testimony concerning juror bias during trial is material and favorable or critical even if a court does not find that one or more of these factors is present in a particular case.

D. The Application of the Rule Is Arbitrary or Disproportionate to the Purposes It Is Designed to Serve

The aforementioned opinions in *Washington v. Texas* and *Rock v. Arkansas*, both of which the Supreme Court recently reaffirmed in *Holmes v. South Carolina* as addressing applications of rules of evidence that were arbitrary or disproportionate to the purposes that they were designed to serve,[419] set forth three ways in which the application of Rule 606(b) to allegations of juror bias implicates the third factor of the right to present a defense analysis.

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[415] *See* Ferensic v. Birkett, 501 F.3d 469, 478 (6th Cir. 2007) (finding that the district court's exclusion of expert testimony concerning the unreliability of eyewitness identifications implicated a weighty interest of the accused).

[416] *E.g.*, Gov't of the Virgin Islands v. Mills, 956 F.2d 443, 446 (3d Cir. 1992).

[417] *See supra* notes 317–20 and accompanying text.

[418] 410 U.S. 291, 292 (1973).

[419] *See supra* notes 319–21 and accompanying text.

1. Arbitrary Rules that Prevent Whole Categories of Witnesses from Testifying

In *Washington v. Texas*, the Supreme Court found that the right to present a defense is violated "by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief."[420] As previously noted, there used to be a patchwork of rules rendering certain categories of individuals incompetent to testify based upon presumed unreliability despite the fact that they were "physically and mentally capable of testifying."[421] These rules, however, eventually fell out of favor, and the Supreme Court struck the fatal blow by finding in *Washington v. Texas* that they violate a criminal defendant's right to present a defense.[422]

As Federal Rules of Evidence 601 now makes clear, these reliability-based competency rules have been cleared from the books in criminal cases. Rule 601 states in relevant part that "[e]very person is competent to be a witness except as otherwise provided in these rules."[423] The Advisory Committee Note to this Rule indicated that:

> This general ground-clearing eliminates all grounds of incompetency not specifically recognized in the succeeding rules of this Article. Included among the grounds thus abolished are religious belief, conviction of crime, and connection with the litigation as a party or interested person or spouse of a party or interested person. With the exception of the so-called Dead Man's Acts, American jurisdictions generally have ceased to recognize these grounds.[424]

The only other Federal Rules of Evidence dealing with witness competency are Rules 602 through 606 and 701 through 702, and of those, only Rule 606(b) has anything to do with presumed unreliability. Federal Rule of Evidence 602 states that lay witnesses must have personal knowledge about a matter to testify about it at trial.[425] Federal Rule of

[420] *See supra* note 203 and accompanying text.

[421] *See supra* note 201 and accompanying text.

[422] *See supra* notes 271–73 and accompanying text.

[423] FED. R. EVID. 601.

[424] *Id.* 601 advisory committee's note.

[425] *See id.* 602.

Evidence 603 requires witnesses to take an oath or affirmation indicating that they will testify truthfully.[426] Federal Rule of Evidence 604 requires an interpreter to take an oath or affirmation in addition to being qualified as an expert witness.[427] Federal Rule of Evidence 701 and 702 set forth the conditions that lay and expert witnesses must respectively satisfy to render opinion testimony.[428] Finally, Federal Rule of Evidence 605 precludes judges from testifying at trials over which they preside, and Federal Rule of Evidence 606(a) precludes jurors from testifying during trials in which they are seated.[429]

The first five Rules do not prevent whole categories of witnesses from testifying; they merely set forth the conditions that lay and expert witnesses must satisfy in order to testify. The latter two Rules do prevent whole categories of witnesses from testifying, but they do not do so on the basis of *a priori* categories that presume them unworthy of belief.[430] Instead, they do so to prevent judges and jurors from having an "involvement destructive of [actual or perceived] impartiality."[431] In other words, the concern of these Rules is that the testimony of these witnesses is trustworthy rather than untrustworthy, or at least that it will be perceived as such by the party against whom it is rendered.

As the Advisory Committee noted, for the most part, the only remaining rules of evidence that preclude a category of witnesses from testifying on the basis of an *a priori* categorization that presumes them untrustworthy of belief are state Dead Man's Statutes. These statutes generally preclude interested parties from testifying about any communication, transaction, or promise made to them by a now deceased (or incapacitated) person when the testimony would damage the interests of the decedent's estate.[432] The theory behind Dead Man's Statutes "is that the interested person has reason to fabricate his testimony and the deceased/incapacitated person does not have the ability to dispute the testimony and protect his estate from false claims."[433] These statutes, however, are a dying breed. Most states have

[426] *See id.* 603.

[427] *See id.* 604.

[428] *See id.* 701–02.

[429] *See id.* 605, 606(a).

[430] *See id.*

[431] *See id.* 605 advisory committee's note.

[432] *See* Posting of Colin Miller to EvidenceProf Blog, http://lawprofessors.typepad.com/evidenceprof/2007/10/dead-mans-statu.html (Oct. 26, 2007).

[433] *Id.*

repealed them which leaves them on the books in only a handful of states.[434] More importantly, these Dead Man's Statutes are only applicable in civil trials.[435]

The one anomaly left standing after the purging of reliability-based competency rules in criminal cases is Rule 606(b), a vestige of Lord Mansfield's centuries-old conclusion that jurors could not impeach their own verdicts, and thus themselves, because "a person testifying to his own wrongdoing was, by definition, an unreliable witness."[436] On this ground alone, courts could find that application of Rule 606(b) to allegations of racial, religious, or other bias by jurors violates the right to present a defense because it is an arbitrary rule that prevents a whole category of witnesses—jurors—from impeaching their verdicts after trial on the basis of an *a priori* categorization that presumes them unworthy of belief.

One potential problem with this argument is that Rule 606(b) prevents jurors from impeaching their verdicts after trial based not only upon their presumed unreliability, but also based upon the desire to promote the values identified in *McDonald*: "freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment."[437] Perhaps, then, courts should treat Rule 606(b) more like a rule of privilege than a rule of (in)competence, meaning that it is not governed by the *Washington v. Texas* opinion, which excepted privileges from its analysis.[438] Instead, courts would engage in a *Morales* analysis and, as will be noted *infra*, determine whether a criminal defendant's need for juror testimony concerning allegations of bias outweighs the values promoted by Rule 606(b).[439]

Treating Rule 606(b) in this manner makes a certain amount of sense because, despite the fact that the Advisory Committee made clear that Rule 606(b) is a witness competency rule,[440] some courts have either specifically referred to the Rule as a rule of privilege[441] or evaluated it under a

[434] Wesley P. Page, *Dead Man Talking: A Historical Analysis of West Virginia's Dead Man's Statute and a Recommendation for Reform*, 109 W. VA. L. REV. 897, 898 (2007).

[435] Fullerton Lumber Co. v. Korth, 127 N.W.2d 1, 4 (Wis. 1964).

[436] *See generally* Christman *supra* note 43.

[437] FED. R. EVID. 606(b) advisory committee's note.

[438] Washington v. Texas, 388 U.S. 14, 23 n.21 (1967).

[439] *See infra* note 466 and accompanying text.

[440] *See* FED. R. EVID. 606(b) advisory committee's note.

[441] Gold, *supra* note 13, at 135 & n.43 (construing Bays v. Petan Co., 94 F.R.D. 587, 591 (D. Nev. 1982)).

"typical . . . privilege analysis."[442] But under further review, "[t]his privilege analysis is an unconvincing explanation for the law of juror incompetency"[443] for two essential reasons. First, the holder of any evidentiary privilege "may customarily waive it."[444] Conversely, jurors can never waive Rule 606(b) and testify concerning anything internal to the jury deliberation process; even in cases where all twelve jurors have signed affidavits proclaiming juror misconduct, courts have deemed the jury impeachment impermissible.[445] Second, if Rule 606(b) were indeed a rule of privilege, it would preclude jurors from testifying regarding alleged juror misconduct at any proceeding.[446] But, the Rule does not preclude jurors from testifying regarding such misconduct at a proceeding concerning the issue of whether jurors lied during voir dire.[447]

Moreover, the fact that the Supreme Court expanded Mansfield's Rule from a rule focused solely on juror (un)reliability to one also concerned with other goals does not distinguish it from the competency rules the Court deemed unconstitutional in *Washington v. Texas*.[448] As noted, one of these rules precluded spouses from testifying against or in favor each other under the doctrine of coverture.[449] Like Mansfield's Rule, this doctrine was originally rooted in presumed unreliability, with a wife being unable to testify in favor of "her husband because her interests were thought to be identical to his, and no witnesses could testify on his or her behalf due to the disqualification of interest."[450] And, as with Mansfield's Rule, courts eventually expanded the list of goals promoted by the spousal incompetency doctrine to include protection of "the sanctity of marital relations" and "hid[ing] from public gaze the sacred confidences which

[442] *Id.* at 135 & n.44 (construing *In re* Beverly Hills Fire, 695 F.2d 207, 213 (6th Cir. 1982)).

[443] *Id.* at 135.

[444] *Id.*

[445] *See* Tanno v. S.S. President Madison Vessel, 830 F.2d 991, 993 (9th Cir. 1987); Mauch v. Mfrs. Sales & Serv., Inc., 345 N.W.2d 338, 342–43 (N.D. 1984); Grenz v. Werre, 129 N.W.2d 681, 691 (N.D. 1964); *see also* Robles v. Exxon Corp., 862 F.2d 1201, 1207 n.6 (5th Cir. 1989).

[446] *See* Gold, *supra* note 13, at 135.

[447] United States v. Henley, 238 F.3d 111, 1121 (9th Cir. 2001); Tobias v. Smith, 468 F. Supp. 1287, 1289 (W.D.N.Y. 1979).

[448] *See* Washington v. Texas, 388 U.S. 14, 23 (1967).

[449] *See* Nesson *supra* note 198 and accompanying text.

[450] Jonathan L. Hafetz, *"A Man's Home is His Castle?": Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries*, 8 WM. & MARY J. WOMEN & L. 175, 193 (2002).

subsist between husband and wife."[451] Viewed from this perspective, it appears that Rule 606(b) comfortably fits within the patchwork of witness competency rules that the Supreme Court deemed violative of a criminal defendant's right to present a defense in *Washington v. Texas*.[452]

Under this reasoning, one could argue that, just as courts and legislatures transformed the spousal incompetency rule into two waiveable spousal evidentiary privileges,[453] they should change Rule 606(b) into a waiveable evidentiary privilege, which would allow jurors to choose to impeach their verdicts through allegations of juror bias. Indeed, some scholars have suggested such a transformation, arguing that Rule 606(b)'s "attempt to effectuate significant policy considerations affecting vital substantive rights by rules of competency is like trying to eat soup with a fork. Although by proper manipulation some nourishment can be supplied, the process is hit or miss with substantial and unacceptable side effects."[454] While this argument has some appeal, it seems unlikely that courts or legislatures would make such a radical change to a rule that has, for the most part, been treated as a competency rule since 1785.

A similar inertia could prove fatal to the argument that application of Rule 606(b) to allegations of juror bias violates the right to present a defense. Critics could claim that this argument would create a slippery slope. If courts treat Rule 606(b) as a reliability-based competency rule, it might necessitate a finding that application of Rule 606(b) in any criminal case would violate the right to present a defense, a conclusion that courts would likely not be willing to accept. One response to this claim is that criminal defendants asserting that courts applying Rule 606(b) to preclude jury impeachment on grounds other than juror bias would have to prove that the misconduct at issue was not merely harmless error and thus might have difficulty establishing materiality under factor two.[455] A second response is that a conclusion that application of Rule 606(b) violates the right to present a defense in all criminal cases is not as outlandish as it may first appear. In fact, it is the exact conclusion that the Supreme Court drew in *McDonald*,

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[451] *Id.*

[452] *See* Washington v. Texas, 388 U.S. at 23.

[453] *See* G. Michael Fenner, *Privileges, Hearsay, and Other Matters*, 30 CREIGHTON L. REV. 791, 800 (1997) (noting that there are two waiveable spousal privileges).

[454] Peter N. Thompson, *Challenges to the Decisionmaking Process—Federal Rule of Evidence 606(b) and the Constitutional Right to a Fair Trial*, 38 SW. L.J. 1187, 1221–22 (1985).

[455] *Cf.* United States v. Klein, 93 F.3d 698, 702–03 (10th Cir. 1996) (finding that the improper submission of an unredacted indictment to the jury was harmless error).

when it proclaimed that the anti-jury impeachment rule it adopted was inapplicable in criminal cases and "limited to those instances in which a private party seeks to use a juror as a witness to impeach the verdict."[456]

2. Rules that Do Not Rationally Set Apart a Group of Persons Particularly Likely to Commit Perjury

In *Washington v. Texas*, the Supreme Court concluded that even if the Texas statutes before it were something other than improper competency rules, they could not even be defended on the ground that they "rationally set[] apart a group of persons who are particularly likely to commit perjury."[457] As noted, while these statutes precluded a charged or convicted coparticipant from providing exculpatory testimony in favor of his alleged partner in crime, they (1) removed this proscription if the coparticipant was exonerated and (2) never precluded such a coparticpant from providing incriminatory testimony as a witness for the prosecution.[458] In other words, the statutes precluded coparticipants from testifying for certain purposes and under certain circumstances but permitted them to testify for different purposes and under different circumstances.

The same can be said about Rule 606(b). Courts repeatedly have held that the Rule precludes jurors from impeaching their verdicts based upon allegations of racial, religious, or other bias.[459] Conversely, as noted in the introduction, when "a juror has been asked direct questions about racial bias during voir dire, and has sworn that racial bias would play no part in his deliberations, evidence of that juror's alleged racial bias is indisputably admissible for the purpose of determining whether the juror's responses were truthful."[460]

For instance, in *Tobias v. Smith*, Archie Tobias, an African-American man, filed a petition for writ of habeas corpus with the United States District Court for the Western District of New York after he was convicted of second degree burglary and related charges.[461] The basis for Tobias' petition was that the New York state courts improperly precluded him from presenting a juror's affidavit alleging racist comments by jurors during trial

[456] McDonald v. Pless, 238 U.S. 264, 269 (1915).

[457] Washington v. Texas, 388 U.S. at 22.

[458] *Id.* at 17 n.4.

[459] *See* Gold, *supra* note 13, at 128.

[460] *See supra* notes 17–21 and accompanying text.

[461] 468 F. Supp. 1287, 1287–88 (W.D.N.Y. 1979).

to prove that jurors lied on voir dire.[462] During voir dire in Tobias's trial, all seated jurors indicated that they "had no prejudice toward black people or toward the petitioner."[463] But according to the juror's affidavit, a "juror said that we should take the word of two white victims as opposed to this black defendant," and "[a]lthough the issue of identification was argued vigorously, particularly the fact that the witnesses could not identify a photo of the defendant, the jury foreman told everybody that it didn't matter because '[y]ou can't tell one black from another. They all look alike.'"[464]

The court agreed with Tobias and ordered a hearing on the question of jury prejudice, finding that "where comments indicate prejudice or preconceived notions of guilt, statements may be admissible not under F.R.E. 606(b) but because they may prove that a juror lied during voir dire."[465]

Indeed, the Supreme Court of North Dakota ostensibly spoke accurately when it issued its 2008 opinion in *State v. Hidanovic*, in which it found that "[c]ourts have universally held that provisions similar to N.D.R.Ev. 606(b) . . . do not preclude evidence to show a juror lied during voir dire."[466] Rule 606(b) does not preclude jurors from testifying regarding juror misconduct under these circumstances because it "restricts inquiries into the validity of a jury's verdict but it does not bar inquiries into whether a juror lied or purposely withheld information during voir dire."[467] As with the Texas statutes in *Washington v. Texas*, Rule 606(b) precludes jurors from testifying for certain purposes and under certain circumstances—to impeach a verdict when jurors have not been asked about bias on voir dire. However, it allows them to testify for different purposes and under different circumstances—to prove that jurors lied on voir dire when jurors have been asked about bias on voir dire.[468]

In reality, though, the purposes are not meaningfully different because inquiries into whether jurors lied on voir dire regarding racial, religious, or

[462] *Id.* at 1289.

[463] *Id.*

[464] *Id.*

[465] *Id.* at 1290–91.

[466] 747 N.W.2d 463, 474 (N.D. 2008) (Seven months later, the Tenth Circuit found that allegations of juror bias were admissible to prove that a juror lied during voir dire at a contempt proceeding but not "to overturn the verdict."); United States v. Benally, 546 F.3d 1230, 1235 (10th Cir. 2008).

[467] Manrique v. State, 177 P.3d 1188, 1191 (Alaska. Ct. App. 2008).

[468] *See* FED. R. EVID. 606(b).

other bias necessarily become inquiries into the validity of a verdict. As the Supreme Court held in *McDonough Power Equipment, Inc. v. Greenwood*, if an appellant can "demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause," he is entitled to a new trial.[469] Because "[d]emonstrated bias in the responses to questions on voir dire may result in a juror being excused for cause," an inquiry into whether a juror lied during voir dire is an inquiry into the validity of the verdict for all relevant intents and purposes, especially because the presence of a biased juror is a structural defect.[470]

Consequently, when courts allow jurors to render post-trial testimony concerning juror bias during deliberations to prove that a juror lied during voir dire, the interests protected by Rule 606(b) are, for the most part, implicated to the same extent that they would be if courts allowed jurors to impeach their verdicts after trial through allegations of juror bias. If a court allowed either type of testimony, jurors could be harassed by the losing party, jurors could be embarrassed when their biased comments are exposed in court, and the verdict would lose its finality if the appellant could prove that a juror was biased.[471] Furthermore, allowing jurors to impeach their verdicts after trial through allegations of juror bias potentially causes less violence to Rule 606(b)'s goal of precluding unreliable evidence than does the current voir dire exception. In this former scenario, jurors might admit to their biased statements after trial, and there would be no reason to distrust their testimony because they never proclaimed impartiality during voir dire. Meanwhile, under the status quo, a juror who claimed that bias would not influence his decision is allowed to testify that bias did influence his decision, rendering him, in Lord Mansfield's terms, "by definition, an unreliable witness."[472]

Application of Rule 606(b) to preclude appellants from presenting post-trial juror allegations of juror bias thus does not serve any legitimate evidentiary purpose and violates appellants' right to present a defense unless it serves some legitimate procedural purpose.[473] Advocates of the status quo might argue that the current dichotomy serves a procedural

[469] 464 U.S. 548, 556 (1984).

[470] *See id.* at 554.

[471] *See* McDonald v. Pless, 238 U.S. 264, 268 (1915).

[472] *See* Christman, *supra* note 43, at 815 n.78.

[473] Gov't of the Virgin Islands v. Mills, 956 F.2d 443, 446 (3d Cir. 1992).

purpose by, in effect, forcing criminal defendants to preserve their ability to present post-trial juror allegations of juror bias by asking prospective jurors about bias before trial. Under this analysis, such advocates could argue that a criminal defendant must do everything to ensure that a biased juror is not seated before he can challenge that juror's bias after trial.

The first response to this argument is that there is no reason that courts should take it seriously until they take the idea of questioning prospective jurors regarding racial, religious, and other bias before trial more seriously. In its 1986 opinion *Turner v. Murray*, the Supreme Court did finally announce that capital defendants accused of an interracial crime are "entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias."[474] But in every non-capital case, and even in capital cases involving a defendant and victim of the same race, defendants have no such automatic entitlement, meaning that "voir dire on racial prejudice, generally is not available to the defendant."[475]

Furthermore, it seems unlikely that courts would want to defend the present dichotomy on procedural grounds when the necessary message such an analysis would send is that all criminal defendants should operate under the assumption that every prospective juror likely harbors a racial, religious, or other bias. And indeed, because courts often "restrict the number . . . of questions that counsel may ask during voir dire," that is exactly the assumption that most attorneys would have to make to place such bias questions above other questions in the voir dire pecking order.[476] Moreover, requiring criminal defendants to inquire into the biases of prospective jurors would be fundamentally unfair because such questions could easily inject race into trial as a primary issue and alienate jurors who might feel implicitly accused of harboring said bias.[477]

Accordingly, Rule 606(b) serves no legitimate evidentiary or procedural purpose by precluding jurors from testifying for certain purposes and under

[474] 476 U.S. 28, 36–37 (1986).

[475] Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 46 (1993).

[476] *The Supreme Court, 1991 Term—Leading Cases*, 106 HARV. L. REV. 163, 247 (1992) [hereinafter *Leading Cases*].

[477] *See* Butler v. Hosking, No. 93–5976, 1995 WL 73132, at *9 (6th Cir. 1995) ("[C]ounsel may have wished to avoid implicitly accusing potential jurors of racism or expressly injecting race into the trial as a primary issue."); *Leading Cases*, *supra* note 476, at 247 ("A lawyer cannot easily inquire into a potential juror's biases without insulting or alienating that person, onlooking jurors or prospective jurors.").

certain circumstances but allowing them to testify for technically different purposes and under different circumstances. Therefore, *Washington v. Texas* provides a second reason that the application of Rule 606(b) to post-trial allegations of bias by jurors during trial violates the right to present a defense.[478]

Critics might again claim that this reasoning would necessitate the conclusion that the application of Rule 606(b) in any criminal case violates the right to present a defense. The responses to this argument are similar to the responses in the previous section. First, whereas the inclusion of a biased juror is a structural defect necessitating a new trial,[479] the inclusion of an incompetent juror, such as a juror who cannot read and write English, does not require reversal of a conviction unless there is a showing of actual prejudice.[480] Thus, a criminal defendant would have to prove that the seating of a drunk or sleepy juror was not merely harmless error and might have difficulty establishing materiality under factor two.[481] Second, as previously noted, a conclusion that application of Rule 606(b) violates the right to present a defense in all criminal cases is consistent with the Supreme Court's conclusion in *McDonald* and thus not necessarily something that courts should reject out of hand.[482]

3. Rules that Per Se Exclude Unreliable Evidence that May Be Reliable in an Individual Case

In *Rock v. Arkansas*, the Supreme Court found that Arkansas' categorical exclusion of hypnotically refreshed testimony violated Rock's right to present a defense because "[a] State's legitimate interest in barring unreliable evidence does not extend to per se exclusions that may be reliable in an individual case."[483] Assuming that courts treat Rule 606(b) more like a rule of privilege than a rule of competence, they could find that application of the rule to allegations racial, religious, or other bias violates the right to present a defense because such allegations may be reliable in individual cases. Of course, if courts treat Rule 606(b) like a rule of privilege, appellants would also need to establish that their need for such

[478] *See generally* 388 U.S. 14 (1967).

[479] Dyer v. Calderon, 151 F.3d 970, 973 n.2 (9th Cir. 1998).

[480] *See, e.g.*, United States v. Silverman, 449 F.2d 1341, 1344 (2d Cir. 1971).

[481] *See id.*

[482] *See* McDonald v. Pless, 238 U.S. 264, 269 (1915).

[483] 483 U.S. 44, 61 (1987).

evidence outweighs the interests protected by the Rule.[484]

Initially, there is a strong argument that courts already have found that the scales of justice tip in the favor of appellants in such cases without realizing it. As noted previously, courts universally have found that jurors may testify after trial regarding juror deliberations to prove that a juror lied during voir dire. In so doing, most courts simply note that Rule 606(b) is inapplicable in such situations, but a few courts have made clear what is implicit in these opinions: these courts are concluding that appellants' need for this evidence outweighs the interests protected by Rule 606(b). To wit, in *Levinger v. Mercy Medical Center, Nampa*, the Supreme Court of Idaho "ma[d]e clear that I.R.E. 606(b) does not bar the introduction of juror affidavits revealing dishonesty during voir dire."[485] In the accompanying footnote, the court indicated that it was reaching this conclusion "not unmindful of the policy goals underlying I.R.E. 606(b), namely, to promote finality, protect jurors from post-trial inquiry or harassment, and to avoid the practical concern that an affidavit by a juror to impeach the verdict is potentially unreliable."[486] Because the appellant's need for evidence of juror bias is not altered by the presence or absence of questions concerning juror bias duding voir dire, courts should be able to find that the scales of justice tip in favor of the appellant in jury impeachment cases based upon analogy to voir dire exception cases.

If, however, courts do not accept this analogy, an appellant would first have to demonstrate that a juror's allegations of juror bias are reliable in his individual case. As previously noted, in accordance with *Chambers v. Mississippi*, an appellant could establish such reliability by having as many as eleven other jurors corroborate those allegations.[487] Also, as in *Chambers v. Mississippi*, opposing counsel would be able to cross-examine the juror regarding his allegations and thus test his reliability.[488] Finally, just as the Court in *Chambers v. Mississippi* found that McDonald's

[484] *See supra* note 325 and accompanying text.

[485] 75 P.3d 1202, 1207 (Idaho 2003).

[486] *Id.* at 1207 n.3.

[487] *See* Tanno v. S.S. President Madison Vessel, 830 F.2d 991, 993 (9th Cir. 1987); Mauch v. Mfrs. Sales & Serv., Inc., 345 N.W.2d 338, 342–43 (N.D. 1984); Grenz v. Werre, 129 N.W.2d 681, 692 (N.D. 1964); *see also* Robles v. Exxon Corp., 862 F.2d 1201, 1207 n.6 (5th Cir. 1989) ("[W]hether the categorical rule created by rule 606(b) applies to a given case simply does not turn on whether one, two, or all of the jurors indicate that they may have been confused or on when or how, after they have rendered their verdict, the jurors evidence their confusion.").

[488] Chambers v. Mississippi, 410 U.S. 284, 301 (1973).

confessions were reliable as statements against penal interest, many courts have found that statements of bigotry are reliable reflections of the declarant's bias because they "would tend to subject the declarant to hatred, ridicule, or disgrace such that a reasonable person would not make the statement unless the person believed it to be true."[489]

The question then becomes how an appellant can demonstrate that his evidentiary need for post-trial jury testimony concerning juror bias outweighs the interests protected by Rule 606(b) when the Supreme Court in *Tanner* held that the application of Rule 606(b) does not violate the right to a competent jury.[490] The answer is that the American judicial system is much more concerned with the right to an impartial jury than it is with the right to a competent jury. As noted, the inclusion of an incompetent juror, such as a juror who cannot read and write English, does not require reversal of a conviction unless there is a showing of actual prejudice.[491] Conversely, the inclusion of a biased juror is a "structural defect not subject to harmless error analysis" necessitating "a new trial without a showing of actual prejudice."[492]

The reason for this difference is two-fold. First, the Supreme Court has concluded that one of "[t]he purpose[s] of the jury is to guard against the . . . biased response of a judge"[493] and that "[p]roviding an accused with the right to be tried by a jury of his peers g[ives] him an inestimable safeguard against the . . . biased, or eccentric judge."[494] Second, the Court has found that "[t]he right to an impartial jury lies at the heart of due process."[495] In turn, "[a]llegations of racial bias on the part of jury members strike at the heart of that right."[496] These additional interests could tip the scales of justice in favor of the appellant when there are allegations of juror bias even though those scales tip against him when there are allegations of juror incompetence.

The more important point, however, is that the fact that the presence of a biased juror is a structural defect not subject to a harmless error analysis means that allegations of juror bias can be treated the same as allegations of

[489] Chaddock v. State, 203 S.W.3d 916, 927–28 (Tex. App.—Dallas 2006, no pet.).

[490] *See* Tanner v. United States, 483 U.S. 107, 127 (1987).

[491] United States v. Silverman, 449 F.2d 1341, 1344 (2d Cir. 1971).

[492] Dyer v. Calderon, 151 F.3d 970, 973 n.2 (9th Cir. 1998).

[493] Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

[494] Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

[495] Porter v. Illinois, 479 U.S. 898, 900 (1986).

[496] State v. Phillips, 927 A.2d 931, 933 (Conn. App. Ct. 2007).

a clerical error by a jury. As previously noted, in 2006 Congress added a third exception to Rule 606(b), allowing jurors to impeach their verdicts after trial through testimony regarding "whether there was a mistake in entering the verdict onto the verdict form,"[497] but still precluding them from alleging that "the jury misunderstood or misapplied an instruction" because such testimony "goes to the juror's mental processes underlying the verdict."[498] This dichotomy explains the holding in *Tanner* because if the jurors in that case had testified, the court thereafter would have needed to inquire into the effect of their alcohol use, drug use, and drowsiness on their mental processes in reaching the verdict.

Conversely, when a juror claims after trial that another juror made biased comments during deliberations, the court does not need to inquire into the mental processes underlying the verdict. This point is made clear by an opinion from Connecticut, a state that allows jurors to impeach their verdicts through allegations of juror bias. In *State v. Phillips*, jurors were allowed to impeach their verdict convicting an African-American defendant of third degree robbery and related charges through allegations of a juror's racist comments.[499] During the jurors' testimony, the trial court asked the jurors whether anything improper influenced their verdict.[500] On appeal, however, the Appellate Court of Connecticut concluded that the trial court:

> should not[] have asked jurors whether anything improper had influenced their verdict. It should have instead restricted its inquiry to objective evidence of racially related statements and behavior. The court should then have decided whether that evidence amounted to racial bias against the defendant on the part of one or more jurors, which would have automatically warranted a new trial.[501]

In other words, if courts allowed jurors to render post-trial testimony concerning racial, religious, or other slurs used by a juror during trial, they would not need to inquire into the mental processes underlying the verdict. Indeed, they would not even need to inquire into the verdict itself. They would solely need to consider whether the juror made the alleged slurs and whether those slurs evinced bias because the inclusion of a biased juror is a

[497] FED. R. EVID. 606(b)(3).

[498] *Id.* 606(b) advisory committee's note.

[499] 927 A.2d at 937–38, 940.

[500] *Id.* at 937–38.

[501] *Id.*

"structural defect not subject to harmless error analysis" necessitating "a new trial without a showing of actual prejudice."[502]

Clearly, by adopting the third exception to Rule 606(b) in 2006, Congress concluded that appellants' need for evidence of juror clerical errors outweighs the interests protected by the Rule because the introduction of such evidence does not require courts to inquire into the mental processes underlying the verdict. Using the same logic, courts should find that the application of Rule 606(b) to allegations of juror bias during trial violates the right to present a defense because the admission of juror testimony regarding juror bias would not require courts to inquire into the mental processes underlying the verdict.

If courts refuse to make such a finding, it begs the question of what type of application of Rule 606(b) would violate the right to present a defense. While most courts have found that Rule 606(b) precludes jurors from impeaching their verdicts through allegations of bias, many courts still agree that "allegations of racial bias on the part of a juror are fundamentally different from other types of juror misconduct because such conduct is, ipso facto, prejudicial."[503]

Perhaps the answer is that courts would never find that an application of Rule 606(b) violates the right to present a defense. But to do so, they would have to make a compelling argument that Rule 606(b) is not only essentially a rule of privilege, but also more sacrosanct than any other evidentiary privilege. Rule 606(b) has exceptions, just as "all privileges . . . are subject to multiple exceptions."[504] As noted previously, however, Rule 606(b) is not waiveable whereas the holder of every evidentiary privilege can waive it.[505] Moreover, courts have found that every evidentiary privilege violates the right to present a defense when applied in certain situations.[506] Given these facts, it is difficult to see how courts could hold that no application of Rule 606(b) violates the right to present a defense unless they not only treat Rule 606(b) as an evidentiary privilege but also find it significantly stronger than any other privilege. To this point, no court has made such an argument.

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[502] Dyer v. Calderon, 151 F.3d 970, 973 n.2 (9th Cir. 1998).

[503] State v. Santiago, 715 A.2d 1, 20 (Conn. 1998).

[504] Eileen A. Scallen, *Relational and Informational Privileges and the Case of the Mysterious Mediation Privilege*, 38 LOY. L.A. L. REV. 537, 541 (2004).

[505] *See* Gold, *supra* note 13, at 135.

[506] FISHER, *supra* note 343, at 883–84.

IV. CONCLUSION

In *McDonald*, the Supreme Court "recognize[d] that it would not be safe to lay down any inflexible [anti-jury impeachment] rule because there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.'"[507] But by strictly adhering to the language of Rule 606(b) and concluding that any constitutional challenge to the Rule is foreclosed by the Supreme Court's opinion in *Tanner*, courts have thrown the Supreme Court's caution to the wind. When courts preclude jurors from impeaching their verdicts through allegations of juror racial, religious, or other bias, they violate one of the plainest principles of justice: the right to an impartial jury. Because the right to an impartial jury lies at the heart of due process, the presence of a biased juror is a structural defect not subject to a harmless error analysis. And yet, by applying Rule 606(b), an anomalous, reliability-based, competency rule, courts preclude appellants from proving such bias, based solely on the fact that their attorneys did not anticipate that their trials would be resolved with reference to factors such as skin color or choice of deity. Such an application of the Rule is thus arbitrary and disproportionate to the purposes it was designed to serve and violative of the right to present a defense.

[507] McDonald v. Pless, 238 U.S. 264, 268–69 (1915) (quoting Mattox v. United States, 146 U.S. 140, 148 (1892)).