No.

In The

Supreme Court of the United States

RAYMOND BAKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

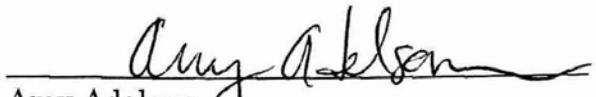
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW THE PETITIONER, RAYMOND BAKER, by and through his undersigned counsel, and herein moves for leave to proceed *in forma pauperis*. In support thereof, Petitioner would state:

1. Petition is an indigent inmate who has been incarcerated in the State of New Hampshire, but has been redesignated to the South Carolina.
2. On this date, Petitioner is filing a Petition for a Writ of Certiorari to the Second Circuit Court of Appeals.
3. Petitioner, who is without funds, seeks leave to proceed in this matter *in forma pauperis*.
4. The undersigned counsel was appointed by the United States Court of Appeals for the Second Circuit to represent Petitioner pursuant to the Criminal Justice Act.

WHEREFORE, Petitioner moves to proceed *in forma pauperis*.

Respectfully submitted,



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On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, as a means of protecting a defendant's rights to due process and a fair and impartial jury, the Court should clarify whether, when a defense lawyer receives unsolicited information from a juror, post-verdict, alleging serious juror misconduct, a district court must permit additional inquiry to determine whether the misconduct involves bias, extraneous information or outside influences which are properly the subject of examination.

2. Whether, to ensure that, consistent with due process, guilt is proven beyond a reasonable doubt, the Court should require corroboration when a conviction is based solely on accomplice testimony.

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The opinion of the United States Court of Appeals for the Second Circuit appears at *United States v. Baker*, 899 F.3d 123 (2d Cir. 2018) and is set forth at App. 1. The decision and order of the United States District Court for the Northern District of New York (Hon. Thomas J. McAvoy), dated April 12, 2016, is unpublished and is set forth at App. 10.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on August 8, 2018. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> 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…

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be … deprived of life, liberty, or property, without due process of law…

Rule 606(b) of the Federal Rules of Evidence provides, in pertinent part:

> (b) During an Inquiry into the Validity of a Verdict or Indictment.
>
> (1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations;

the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

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

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

STATEMENT OF THE FACTS

Petitioner Raymond Baker ("Baker") was indicted and convicted on one count of conspiring to knowingly and intentionally possess with intent to distribute a controlled substance in violation of 21 U.S.C. §§846 and 841(a)(1). (A-24)[1]

This case involved five "controlled" buys authorized by a joint task force of federal and state agents investigating drug trafficking in New York's Capitol region. Each transaction was a sale to a confidential informant by Kandi Kennedy, the cooperating witness whose testimony provided the only evidence implicating Baker in any wrongdoing. Kennedy was Baker's ex-girlfriend, and the mother of his then-seven-year-old daughter. Kennedy had prior convictions for selling drugs and for

[1] On August 10, 2016, Baker was sentenced to a term of imprisonment of 180 months; he has been incarcerated ever since.

stealing, but never served any jail time. When Kennedy was arrested on the sixth buy, she immediately "flipped" and named Baker as her supplier.

It was on that basis that Baker was charged with conspiracy. The state and federal investigators involved in this extensive task force (labelled "Operation Cutting Kandi") never found drugs on Baker's person, or in his car or home. They did not find that he had unexplained cash. They had no witness besides Kennedy to say that Baker was a drug dealer. They never traced calls to his supplier or traced on his monitored phone to discover where or from whom he was supposedly buying drugs.

The Evidence

The only evidence implicating Baker came from Kennedy, who lied freely and immediately to the task force (about the number of times she had sold heroin); to the grand jury (even about what her name was); to the confidential informants (about the sources of her drugs); to her probation officer (about whether she had stopped using drugs); and to the court (to obtain bail pending trial). Even the prosecutor acknowledged that Kennedy was a liar, in summation, cautioning the jury not "to believe everything she says. We're not asking you to believe anything she says that you yourselves cannot confirm with the exhibits and the other testimony that you have heard."

Kennedy's testimony about Baker being her supplier could not be confirmed "with the exhibits and other testimony." Kennedy and Baker had a child together, and they talked constantly, yet in the thousands of calls between them during the

period the government monitored Kennedy's phone, they never talked about drugs; accordingly, the government's argument rested on inferences drawn by linking the *timing* of calls between them. Those inferences did not corroborate Kennedy's claim that Baker was her supplier because there were often calls from or to other (unidentified) callers in between. In the five and a half months of monitoring, the number of calls Kennedy made and received covered 110 pages, single-spaced – more than 7,600 calls.

Baker challenged the sufficiency of the evidence on appeal. The Second Circuit did not address the substantial problems with Kennedy's reliability, upholding the conviction principally because, under federal law, no corroboration is required of accomplice testimony. (App. 5-6)

The Juror

Shortly after the trial, Baker's counsel advised the court that he received a telephone message, then an email, from Juror 10, who stated that another juror had stated that he "knew [Baker] was guilty the first time I saw him." Juror 10 also stated that the jurors began their deliberations prior to hearing all the evidence – that there was discussion "during virtually every break."

Complying with Second Circuit precedent, defense counsel advised the court and opposing counsel of what had transpired and sought the court's guidance on how to proceed.

The government argued that Juror 10 would be precluded from testifying about the other jurors' mental processes under Fed. R. Evid. 606(b)(1). The district court noted that, under Second Circuit precedent, a duty to investigate arises when the party alleging misconduct "makes an adequate showing of extrinsic influence to overcome the presumption of jury impartiality." Defense counsel pointed out that he could not possibly make this showing without further investigation.

At the court's direction, defense counsel filed a motion seeking permission to inquire further of Juror 10. Conceding that the juror's statement alone did not warrant a full-blown hearing, counsel instead sought a more preliminary, threshold inquiry and requested leave to obtain an affidavit from the juror to present for court review or, alternatively, for the court to determine what type of inquiry should be allowed. The government adhered to its argument that because inquiry into the "mental processes" of the juror who made the statement would be foreclosed, further inquiry was not necessary or permitted.

The district court denied counsel permission to inquire further about these representations and declined to even interview the juror itself. Though the court assumed that the juror made up his mind because of Baker's "appearance," (App. 17), it concluded that any testimony by the jury would be inadmissible. (App. 10-17)

On appeal, Baker argued that the district court conflated the separate questions of what evidence can be introduced to impeach a jury verdict and what counsel can do when advised about possible juror misconduct. Baker further argued

that the constitutional mandate of a fair and impartial jury trial requires a trial court to consider whether a juror relied on racial stereotypes or animus to convict a criminal defendant. Where a trial court acknowledges that a juror made up his mind because of a defendant's "appearance," Baker argued, barring all inquiry – even by the court alone – was improper.

The Second Circuit affirmed the conviction, holding that the district court did not abuse its discretion by denying Baker's request to conduct any post-trial interview of the juror. Upholding the "Catch-22" that defense counsel lamented, the Court rejected Baker's claim because he failed to sufficiently show that his case fell within the category permitting further inquiry. (App. 6-9)

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED TO CLARIFY WHETHER, IN ORDER TO PROTECT THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR AND IMPARTIAL JURY, WHEN A JUROR, POST-VERDICT, REPORTS ON JUROR MISCONDUCT, A DISTRICT COURT MUST PERMIT OR CONDUCT SOME INQUIRY TO DETERMINE THE NATURE OF THOSE ALLEGATIONS

"One touchstone of a fair trial is an impartial trier of fact –'a jury capable and willing to decide the cases solely on the evidence before it.'" *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 554 (1984), *quoting Smith v. Philips,* 455 U.S. 209, 217 (1982). Because the jury is a fundamental safeguard of individual liberty, *Federalist* No. 83, p. 451 (B. Warner ed. 1818) (A. Hamilton), a criminal defendant has a due process and Sixth Amendment right to an impartial and

competent jury. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017); *Tanner v. United States*, 483 U.S. 107 (1987).

This "touchstone of a fair trial" competes with another important principle: jurors must be protected from intrusive inquiry into their deliberative process, encouraging "honest, candid [and] robust" deliberations, while ensuring the finality of verdicts. *Pena-Rodriguez*. 137 S. Ct. at 861. While the first principle – the right to a fair and impartial jury – is enshrined in the Constitution itself, the other principle – the protection of jurors – is an institutional concern that has partially been codified in the Federal Rules of Evidence at Rule 606(b), the so-called "no impeachment" rule – an evidentiary rule that precludes juror testimony about the internal workings of the jury's deliberative process, while permitting testimony about "extraneous prejudicial information" and improper "outside influences." [2]

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[2] Rule 606(b) provides as follows:

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

The two rules frequently collide. This Court has addressed how these competing interests should be weighed in different scenarios, depending largely on whether the misconduct involves extraneous or internal matters. *See, e.g., Mattox v. United States*, 146 U.S. 140 (1892) (trial court must admit affidavits of jurors that newspapers had been brought into the jury room because it involved an extraneous influence); *Tanner v. United States* 483 U.S. 107 (1987) (prohibiting affidavits about the jurors smoking and drinking during the trial); *Warger v. Shauers*, 135 S.Ct. 521 (2014) (in civil case, a juror's affidavit revealing that another juror had lied during voir dire deemed "internal" and thus inadmissible). And recently, the Court made clear that the "no impeachment" rule is not absolute. In *Pena-Rodriguez*, the Court, balancing the interest in protecting the sanctity of jurors against the defendant's constitutional interest in a fair and impartial jury trial, held that:

> where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Id. at 869.[3]

In this case, a juror contacted defense counsel after the verdict and reported two potentially serious concerns: first, he represented that another juror had said that "he knew the defendant was guilty the first time he saw him" (and before he was

[3] In *Pena-Rodriguez*, the jurors volunteered the information about racial bias, and the Court noted, approvingly, that pursuant to local rules, counsel sought and, unlike here, received permission to approach the jurors and obtain affidavits. *Id*. at 870.

sworn in as a juror); second, he told counsel that the jurors had begun their deliberations prior to hearing all the evidence. Defense counsel, complying with Second Circuit precedent, *United States v. Moten*, 582 F.2d 654 (2d Cir. 1978), *reaffirmed in United States v. Schwarz*, 283 F.3d 76 (2d Cir. 2002), promptly notified the court and the government of what had transpired and sought the court's guidance on how to proceed. The government protested *any* inquiry of the juror, even by the court *in camera*. Defense counsel sought to interview the juror to more precisely determine the nature of his concerns. As he noted, he was ethically required to evaluate whether there were grounds to seek a new trial. Defense counsel agreed to any limitations the district court imposed on such an inquiry to ensure the juror did not feel threatened or intimidated.

The district court refused *any* inquiry. Not only could defense counsel not speak with the juror, the judge himself refused to speak with the juror *in camera* to flesh out the allegations. The court precluded any inquiry without knowing whether the juror had information that would *not* be barred under Rule 606(b). Defense counsel was placed in a classic Catch-22 situation: without knowing more, he could not determine whether he had grounds to seek a new trial, yet there was no way he could acquire any further information from the juror.

Though there was no factual basis for concluding that the juror would reveal information that *only* involved the jury's internal processes, the Second Circuit held that the district court did not abuse its discretion in refusing any inquiry. In effect,

the Second Circuit announced an extraordinarily broad principle: a district court is *never* required to investigate when a juror comes forward post-verdict with allegations of juror misconduct if the juror, in his initial contact, does not state that external influences were introduced into the jury room. Absent that degree of detail, the court can presume that the juror would not provide any information that would be admissible under Rule 606(b). (App. 6-9)

Cutting off any inquiry into a juror's voluntary reporting of concerns about juror misconduct deprives the defendant of a meaningful opportunity to establish whether his constitutional rights have been violated. This case presents a perfect opportunity for the Court to address whether so restrictive a rule is demanded by the institutional concerns underlying Rule 606(b).

Because the external/internal framework is imprecise, the case law is inconsistent and the district courts have no clear guidance on how to approach allegations of juror misconduct. There is a lack of consensus as to whether a district court may prohibit all efforts to ascertain whether the alleged juror misconduct involves "extraneous prejudicial information" or "outsides influences."

Some federal courts have suggested that in most instances a district court has an "duty" to investigate when there are colorable or plausible claims of misconduct. *See, e.g., United States v. Zimny*, 846 F.3d 458, 465 (1st Cir. 2017) ("court's primary obligation is to fashion a responsible procedure for ascertaining whether misconduct actually occurred and if so, whether it was prejudicial"), *quoting United States v.*

Boylan, 898 F.2d 230, 258 (1st Cir. 1990); *United States v. Lanier*, 870 F.3d 546 (6th Cir. 2017) (juror sought to contact a friend and prosecutor not involved in the case; inquiry required even though prosecutor refused to speak to juror because no way to determine what impact the juror's communications had on jury); *United States v. French*, 2018 WL 4403950 (1st Cir. 2018) (inquiry required when juror reported that another juror had deliberately lied in answering juror questionnaire; without inquiry, no way to determine if the juror was biased); *United States v. Herndon*, 156 F.3d 629 (6th Cir. 1998) (district court obliged to investigate when juror failed to reveal that she knew the defendant).

Other courts, like the Second Circuit here, have set a stricter standard. In the Second Circuit, no inquiry is required unless there are "reasonable grounds" for an investigation which must consist of "clear, strong, substantial and incontrovertible evidence" of "a specific, nonspeculative impropriety…which could have prejudiced" the jury. *United States v. Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984). Some courts uphold the district court's decision to bar any inquiry on the assumption that any questioning would involve an inquiry into the validity of the verdict, even when there is a report of an extraneous information provided to a juror. *E.g., United States v. Flemming*, 223 Fed. Appx. 117 (3d Cir. 2007). Courts have deemed reports on premature deliberations, as the juror reported here, to necessarily involve inadmissible evidence though, without any inquiry, it may be that those improper deliberations were prompted by the introduction of extraneous

material. *See, e.g., United States v. Morales*, 655 F.3d 608 (7th Cir. 2011), *cert. denied,* 565 U.S. 1169 (2012) (reports of premature deliberations would ultimately delve into juror's thought processes); *United States v. Leung*, 796 F.3d 1032 (9th Cir. 2015) (same). The interest in protecting the jury has even resulted in the preclusion of affidavits that report extrinsic communications obtained in violation of a local rule prohibiting contact with jurors without regard to whether the extraneous communications prejudiced the defendant's constitutional rights. *United States v. Venske*, 296 F.3d 1284 (11th Cir. 2002).

Jurors are unversed in the niceties of the law and often, like here, it is neither self-evident nor obvious whether the juror is speaking of the internal workings of the jury or of prejudicial extraneous influences. Requiring the court to at least speak to the juror to flesh out the allegations protects the defendant's constitutional rights without undermining the jury's deliberative process. In this case, the juror reported that, even before he was sworn in, another juror said that he knew the defendant was guilty the first time he saw him. Why? Was it because of his appearance? Was that based on racial or ethnic considerations? Did the juror know something about the defendant personally that he failed to reveal during voir dire? Similarly, the juror reported that the jurors engaged in premature deliberations. Did that involve discussion of media or internet reporting on the case? Were other external influences introduced during these improper premature deliberations? Without any inquiry, these questions cannot be answered.

This issue is recurring and the case law lacks cohesion. Because prejudice must be shown, which involves a determination of whether and how the misconduct impacted the verdict, virtually any juror misconduct can ultimately involve the jury's deliberative process. "The challenge … is to find the balance that honors the individual guarantees of our Constitution without undertaking 'efforts to perfect' the jury system that instead destroy it.'" *United States v. Ewing*, 2018 WL 4191102, *7 (6th Cir. 2018), *quoting Tanner*, 483 U.S. at 142 (Marshall, J., concurring in part and dissenting in part). This Court should take this opportunity to set standards for when a district court must conduct an inquiry of a juror's allegations of juror misconduct to establish the proper balance between a defendant's constitutional rights and the protection of the jury process.

I. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER ACCOMPLICE TESTIMONY MUST BE CORROBORATED TO PROTECT A DEFENDANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

The Federal Rules of Evidence do not require that the government corroborate the testimony of an accomplice. Thus, it is now the prevailing rule in the federal courts that such corroboration is unnecessary and that a conviction can be obtained, and upheld on appeal, based solely on the testimony of a single accomplice, no matter how unreliable or suspect the testimony.

In this case, Baker was convicted of a drug conspiracy based solely on the testimony of the person who actually sold drugs to an undercover agent and was caught and arrested with two ounces of heroin in her underwear – an accomplice who

the prosecution represented would say virtually anything if she "had a motive to lie" – if it would "help her" in any way. (A-305-07)

The prosecutor knew his witness. Kennedy *would* say anything to save her skin. When Kennedy was arrested she had a powerful motive to lie and she did, without hesitation. To avoid being labelled a career offender, she immediately lied to the police about the extent of her prior drug dealings and quickly made a deal, naming Baker as her supplier. It was easy to name Baker. He had a prior drug conviction. They had known each other since they were children. He drove her places and they spoke all the time. They had a tumultuous relationship: although he was the father of her daughter, one of her many prior convictions was for trying to hit Baker with a baseball bat and run him over with her car.

No witness other than Kennedy said that Baker possessed or sold drugs. The police found no drugs on Baker's person, car or home. The government did not show that Baker had unexplained cash or income unrelated to his employment. Though Baker, on supervised release, was wearing an electronic monitor so his whereabouts could be tracked (and a warrant was also obtained for a GPS on his cell phone), the government did not introduce any evidence that he met with anyone or went anywhere to buy the drugs he allegedly supplied to Kennedy. The government did not show that Baker sold drugs to anyone else during this period, although, as the government argued to the jury about Kennedy, he could not have "cultivated" the drugs himself – he had to have a supplier. And the police did not investigate who was

Baker's source, even though, as the prosecutor argued, the task force always searches for the supplier: "the idea is you go up the ladder."

About twenty federal and state police officers were working on this investigation. Yet the government failed to produce *any* of this typical evidence of drug-dealing that might tend to corroborate the dubious nature of Kennedy's self-serving testimony.

Instead of evidence, the government relied on Kennedy's word: a story that secured her a deal for time served. Kennedy received an extraordinarily cushy deal despite her extensive criminal history, her prior drug dealing, and her lying to the police and under oath.

If Baker had been tried in New York State court, where the conduct occurred, the prosecutor could not obtain a conviction based on Kennedy's word alone. That is because New York, like many other jurisdictions, requires corroboration of an accomplice's testimony.[4]

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[4] Currently, 16 states and territories have accomplice corroboration statutes. Ala. Code § 12-21-222 (1986) (applies to felonies only); Alaska Stat. § 12.45.020 (1984); Ark. Stat. Ann. § 16-89-111(e)(1) (1977) (applies to felonies only); Cal. Penal Code § 1111 (West 1985); Ga. Code Ann. § 24-14-8 (1982) (rule applies to treason, perjury, and felonies, but only when accomplice is sole witness); Idaho Code § 19-2117 (1979); Iowa Code Ann. Rule 2.21(3) (West 2002); Minn. Stat. Ann. § 634.04 (1983); Mont. Code Ann. §46-16-213 (West 1985); Nev. Rev. Stat. § 175.291 (1985); N.Y. Crim. Proc. Law § 60.22 (McKinney 1981); N.D. Cent. Code § 29-21-14 (1974); Okla. Stat. Ann. tit. 22, § 742 (West 1969); Or. Rev. Stat. § 136.440 (1984); P.R. Laws Ann. T. 34, App. II, R.156 (Supp. 1988); S.D. Codified Laws Ann. § 23A-22-8 (1979); Tex. Crim. Proc. Code Ann. art. 38.14 (Vernon 1979).

The federal courts do not. In *Holmgren v. United States*, 217 U.S. 509 (1910), and *Caminetti v. United States*, 242 U.S. 470 (1917), this Court approved of convictions based on accomplice testimony alone. In *Washington v. Texas*, 388 U.S. 14, 22 (1967), the Court held that a defendant's Sixth Amendment right to compulsory process included the right to obtain accomplice testimony, noting that accomplices may testify for the prosecution, even without corroboration, and "common sense would suggest that [the accomplice] often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing."

The federal courts sustain convictions solely on the basis of accomplice testimony if it is not "otherwise incredible or unsubstantial on its face." *Haakinson v. United States*, 238 F.2d 775, 779 (8th Cir. 1956) (seemingly the origin of this standard); *see also, e.g., United States v. Truman*, 688 F.3d 129, 139 (2d Cir. 2012); *United States v. Andrews*, 455 F.2d 632 (9th Cir. 1972); *United States v. Brown*, 49 F.3d 135 (5th Cir. 1995). Rarely, if ever, have the courts explained what is meant by

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Other states have established a corroboration rule by judicial decision. *See, e.g., State v. Copeland, 677 S.W.2d 471, 474 (Tenn. Crim. App. 1984)*, *citing McKinney v. State*, 552 S.W.2d 787 (Tenn. Crim. App. 1971); *In re Anthony W.*, 388 Md. 251, 264, 879 A.2d 717 (2005), *quoting Williams v. State*, 364 Md. 160, 179, 771 A.2d 1082 (2001); *Boggs v. State*, 228 Md. 168, 170, 179 A.2d 338 (1962); *Jones v. State*, No., 2018 WL 3770206, at *3 (Md. Ct. Spec. App. Aug. 8, 2018)

See, reporting on state laws, Christine J. Saverda, Note, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 Yale L.J. 785, 804 (Dec. 1990).

evidence "incredible on its face." In truth, if a jury credits an uncorroborated accomplice, no matter how unreliable the witness or how dubious his/her testimony, it will not be deemed "incredible on its face." *See,* citing cases, Christine J. Saverda, Note, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 Yale L.J. 785 (Dec. 1990); *Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to accomplice's testimony against defendant in federal criminal trial,* 17 A.L.R. Fed 249 (originally published in 1973).

The accomplice corroboration rule is designed to compensate for the "inherently untrustworthy" nature of accomplice testimony, which is "marked by obvious self-interest" and "carries the potential for falsification to avoid prosecution." *People v. Sage*, 23 N.Y.3d 16, 23 (2014). *See generally*, discussing the risk of convicting the innocent in relying solely on accomplice/ cooperating witness testimony especially when the defendant has a criminal history, Robert P. Mosteller*, The Special Threat of Informants to the Innocent who are not Innocents: Producing "First Drafts," Recording Incentives, and Taking a Fresh Look at the Evidence,* 6 Ohio St. J. Crim. L. 519 (Spring 2009); Graham Hughes*, Agreements for Cooperation in Criminal Cases,* 45 Vand. L. Rev. 1 (Jan. 1992); Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 Am. Crim. L. Rev. 737 (Summer 2016); Saverda*,* 100 Yale L.J. 785 (Dec. 1990).

Here, Kennedy's self-serving testimony exemplifies why corroboration of an accomplice's testimony should be required. Kennedy's testimony reeks of inherent

untrustworthiness. Kennedy lied to the police, unhesitatingly, the moment she was arrested. She lied to her probation officer. She lied to the grand jury. She lied to her buyer, the government's other cooperating witness. She admitted to lying on the stand. She had an "obvious self-interest" in fingering Baker to avoid jail time. Even the prosecutor agreed that Kennedy's testimony was so inherently unreliable it required corroboration.

This Court undoubtedly has the authority to establish a rule requiring some degree of corroboration of accomplice testimony. *See. e.g., Opper v. United States*, 348 U.S. 84 (1954) (requiring that admissions or confessions be corroborated). When the evidence against a defendant consists solely of accomplice testimony, corroboration is essential for the evidence to be sufficient to establish that the defendant committed the crime beyond a reasonable doubt. It is a fundamental requirement of due process. Moreover, a corroboration requirement would aid juries in their decision-making process when faced with a witness, like Kennedy, who freely, unabashedly lied from the moment she was arrested and throughout her testimony and would assist appellate courts in their evaluation of whether a conviction should be sustained on appeal.

Former Chief Judge Newman of the Court of Appeals for the Second Circuit has urged appellate courts to "at least take seriously [their] obligation" to review convictions to ensure that the prosecution has met the high standard of proof beyond a reasonable doubt, and has argued that this obligation is no less pressing when, as

here, a conviction rests principally on the testimony of an unreliable accomplice witness:

> But it is a romantic notion that the jury should be an infallible determiner of credibility. It is one thing to permit the jury unfettered discretion in choosing between the conflicting accounts of two upstanding members of the community. But it is quite another to defer blindly to their acceptance of testimony from a seriously impeached witness. For example, if a witness is indisputably shown to have lied on prior occasions, perhaps under oath, and is currently in a position to save himself years of jail time by accusing the defendant, does it make sense to say that his testimony alone is sufficient to prove guilt beyond a reasonable doubt, simply because twelve jurors have decided to believe him? Again, I do not mean to suggest that such testimony should be inadmissible. We should permit the jury to consider it along with other evidence. But if the other evidence is slender or nonexistent, then, at least in some cases, the substantial impeachment of an accusing witness, based on objective facts, should prompt a court to say that a reasonable jury (even any rational jury) could not find guilt beyond a reasonable doubt.

Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. Rev. 979, 993, 998 (1993).

Accomplice testimony is undoubtedly necessary to the functioning criminal justice system. A substantial percentage of wrongful convictions, however, are based on false accomplice testimony. *See* Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Harvard U. Press, 2011) (21% of wrongful convictions are based on false informant testimony), *cited in* Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 Am. Crim. L. Rev. 737, 738-39, 797 (Summer 2016). We respectfully request that this Court take this case, where the conviction rested solely on the testimony of a single

untrustworthy accomplice, to require that accomplice testimony be corroborated and thus ensure that criminal convictions comport with due process.

CONCLUSION

Petitioner respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

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Dated: October 10, 2018

APPENDIX

899 F.3d 123
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,
v.
Raymond BAKER, Defendant-Appellant.

No. 16-2895
|
August Term 2017
|
Argued: November 6, 2017
|
Decided: August 8, 2018

Synopsis

Background: Defendant was convicted in the United States District Court for the Northern District of New York, McAvoy, J., of conspiracy to distribute and possess with intent to distribute more than 100 grams of heroin. Defendant appealed.

Holdings: The Court of Appeals, Debra Ann Livingston, Circuit Judge, held that:

evidence was sufficient to support conviction, and

trial court did not abuse its discretion by denying defendant's request to conduct post-trial interviews of jurors.

Affirmed.

Attorneys and Law Firms

***125** For Appellee: Carina H. Schoenberger (Michael S. Barnett, on the brief), Assistant United States Attorneys, for Grant C. Jaquith, United States Attorney for the Northern District of New York, Syracuse, NY.

For Defendant–Appellant: Amy Adelson, Law Offices Of Amy Adelson LLC, New York, NY.

Steven David Clymer, Assistant U.S. Attorney, United States Attorney's Office for the Northern District of New York, Syracuse, Paul David Silver, Assistant U.S. Attorney, United States Attorney's Office for the Northern District of New York, Albany, for Appellee USA.

Before: Livingston, Chin, Circuit Judges, and Koeltl, District Judge.[*]

[*] Judge John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

Opinion

Debra Ann Livingston, Circuit Judge:

****1** Defendant-Appellant Raymond Baker appeals from an August 18, 2016 judgment of conviction in the United States District Court for the Northern District of New York (McAvoy, *J.*). Baker was convicted after a jury determined that he was guilty of participating in a conspiracy to distribute and possess with intent to distribute more than 100 grams of heroin in violation of the Controlled Substances Act, 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 846, and 851. Baker raises two issues in this appeal from his judgment of conviction: First, that there was insufficient evidence to support his conviction; and second, that the district court erred in denying his request to conduct post-trial interviews of jurors. For the reasons set forth below, we conclude that Baker's arguments lack merit. Accordingly, we affirm the judgment of the district court.

BACKGROUND[1]

[1] The factual background presented here is derived from the testimony and other evidence presented at trial, and we view the evidence in the light most favorable to the government. *See United States v. Brock*, 789 F.3d 60, 63 (2d Cir. 2015).

As relevant here, Baker was charged on November 5, 2015 in a single count superseding indictment with conspiring to distribute and possess with intent to distribute 100 grams or more of a mixture or substance containing heroin. The evidence presented at his trial established that between January and mid-June 2015, in Albany and Schenectady Counties, New York, Baker participated in this conspiracy with Kandi Kennedy, who

testified. Over the course of the conspiracy, Kennedy sold heroin and also fentanyl to two confidential informants ("CI1" and "CI2") working for the United States Drug Enforcement Administration ("DEA") on five separate occasions; she attempted to sell heroin in a sixth transaction that ended in the arrests of both Kennedy and Baker. Kennedy testified that Baker, the father of her only child, was her supplier; that Baker personally handed the drugs over to her at her house in Schenectady; and that after each drug sale, she split the money proceeds with him, so that she kept 10% and Baker took the remaining 90%. The jury also heard evidence that the CIs purchased drugs from Kennedy for $110 or $115 per gram.

Kennedy testified that Baker often accompanied her when she sold heroin or fentanyl to CI1 and CI2. Four of the five ***126** completed transactions occurred in the parking lot of a shopping plaza with retail stores including T.J. Maxx and Target in Latham, New York ("Shopping Plaza"). When Baker accompanied her on a transaction, Baker and Kennedy would drive together in the same car from Kennedy's house to the Shopping Plaza. The drive took approximately 20 minutes. Upon arrival, Baker would exit the car first and wait inside the T.J. Maxx store. Meanwhile, Kennedy would meet CI1 and CI2 in the parking lot to complete the drug sale. After the sale, which usually lasted only five to ten minutes, Kennedy would meet Baker inside the T.J. Maxx before driving with him back to Kennedy's home.

****2** In addition to Kennedy's testimony, the government presented other direct and circumstantial evidence of Baker's involvement in the conspiracy, including testimony from the two CIs and law enforcement agents, chemical forensic analyses of the controlled substances, recorded telephone calls and text messages between Kennedy and CI1 and also between Kennedy and Baker, and audio or video recordings of the drug transactions. Some of this corroborating evidence is described in more detail below.

I. The First Transaction

The first of the five completed drug transactions took place in January 2015. CI1 testified that on January 27, he called Kennedy and arranged to meet the next day so he could buy $500 worth of heroin from her. The next day, however, Kennedy told CI1 that she did not have the heroin ready because she fell asleep around 9:30 P.M. the night before, and missed a call from her supplier at approximately 10:30.[2] The only call that Kennedy received after 9:19 P.M. the night before was a call at 10:14 P.M. from Baker's number, which was forwarded to Kennedy's voicemail.

[2] In the recorded conversation, which was played for the jury, Kennedy said: "[T]hey were going drop them off last night and I fell asleep mad early I fell asleep around 9:30 and when they call at like 10:30 I was like dead ...." App. at 71–72, 353–54. Transcripts of this and the other recorded conversations were used as aids for the jury and are referenced herein, but jurors were properly instructed that the transcripts were not in evidence, and that the tape recordings themselves constituted the evidence.

Although Kennedy was unable to supply the heroin on January 28, the transaction took place the next day, January 29, when Kennedy met with CI1 at approximately 12:00 P.M. or 1:00 P.M. and sold him 3.8 grams of a substance containing heroin.

II. The Second, Third, and Fourth Transactions

The next transactions followed a similar pattern and took place in February and March 2015. In a video-recorded transaction, for instance, CI1 and CI2 met with Kennedy at the Shopping Plaza on February 16 and purchased 13.9 grams of a substance containing heroin from her. CI1 then contacted Kennedy again on February 24 at about 4:37 P.M. and asked her to call her supplier to check the price of heroin:

> CI1: [H]ave your people see what's the best number they can do, cause after the next one it's gonna be at least 100.
>
> ...
>
> Kennedy: I can check into it, but you know.
>
> CI1: Alright, just give 'em a call real quick if they can do a little better. Hit me right back.

App. 88–90, 363–64. Eight minutes later, at 4:45 P.M., Kennedy called CI1 back to tell him that she was unable to reach her supplier: "I didn't get an answer, but ... I'm sure that they're going to call me back ***127** as soon as possible." *Id.* at 90–91, 365–66. Kennedy's phone records, introduced at trial, reflect only one phone call during the eight-minute period in between her calls with CI1 at 4:37 P.M. and 4:45 P.M.—Kennedy called Baker's number at 4:39 P.M. About two weeks later, on March 6, Kennedy met with CI1 and CI2 at about 1:15 P.M. in the Shopping Plaza and sold them 26.2 grams of a substance

containing heroin.

The next transaction was on March 26. Kennedy arrived at the Shopping Plaza at approximately 1:30 P.M. in a car registered to Baker. There, she met with CI1 and CI2 again and sold them 27.4 grams of a substance containing fentanyl. Less than ten minutes after Kennedy completed the sale, a law enforcement agent observed Baker and Kennedy exiting the T.J. Maxx together.

III. The Fifth Transaction

****3** On May 11, 2015 at 11:06 A.M., CI1 called Kennedy again, this time seeking to purchase 64 grams of heroin.[3] They discussed meeting either later that day or the next day. Kennedy then texted Baker: "Call my [sic] ASAP ... Tia called ... Wants to see me ASAP."[4] App. 541. Baker called Kennedy back six minutes later at 11:12 A.M. The jury heard a recording of this conversation, which was intercepted pursuant to court-ordered wiretap surveillance of Kennedy's telephone communications. During the conversation, Baker queried Kennedy as to when "Tia" needed "it" and affirmed that he could "make it happen." *Id.* at 176–79, 525–26. At 11:19 A.M., within a few minutes of this conversation, Kennedy called CI1 again to confirm when CI1 would be available to meet to buy heroin from her. CI1 explained that he was not available to meet that day.

[3] In an earlier recorded conversation in April, Kennedy and CI1 had agreed to meet at the Shopping Plaza so that Kennedy could sell CI1 14 grams of heroin. CI1 cancelled this transaction, however, at the instruction of the DEA, when Kennedy informed CI1 that she would only be able to meet in the evening.

[4] Kennedy testified that "Tia" was the name she used for her buyer.

The following Monday, May 18, CI1 and Kennedy connected by phone again, and CI1 confirmed that he wanted to meet on Wednesday "in between like 12 and 1ish," and that "the jacket is a size 56," meaning that he now wished to purchase 56 grams of heroin.[5] *Id.* at 185, 530–31. Kennedy called CI1 the next day at 6:25 P.M. to tell him that instead of 56 grams, she would only be able to sell him 28 grams. The pair again used coded language, with Kennedy advising that "I'm only going to be able to get the pants, not the ... jacket too, not until Friday at least," to which CI1 responded, "The pants is just a 28?" App. 533. Approximately two hours later, Baker called Kennedy and they had the following conversation, which was again intercepted by wiretap:

> KENNEDY: Yes.
>
> BAKER: Yeah I'll be able to do that.
>
> KENNEDY: Oh, you will?
>
> BAKER: Yup.
>
> KENNEDY: Ok. Thank you that's a good look cause I, I really needed, I needed that to happen.
>
> BAKER: Alright.
>
> KENNEDY: I appreciate it. So I'll talk to you tomorrow about twelve, twelve thirty, ok?
>
> BAKER: Yeah.
>
> KENNEDY: Alright.

***128** *Id.* at 187–88, 534–35. Five minutes after her conversation with Baker, Kennedy texted CI1 saying, "I got the pants and jacket," thus confirming that she would be able to sell him the full amount of heroin requested—56 grams. Gov't App. 64; *see also* App. 113–14.

[5] CI1 testified that in his conversations with Kennedy, they used code words like "kids not dressed" and "clothes" to refer to the proposed heroin transaction.

On Wednesday, May 20, Kennedy and CI1 were scheduled to meet at the Shopping Plaza at approximately noon or 1 P.M. for the sale of 56 grams of heroin. Baker called Kennedy at 12:41 P.M. and said, "Yeah I'm almost to you, I'll be there in like two minutes." App. 536–37. Twenty minutes later, at 1:01 P.M., CI1 texted Kennedy to say, "I'm here r u by tj maxx" and Kennedy responded, "No. Be there in 10." Gov't App. 66. When Kennedy arrived at the Shopping Plaza, she was driving a car registered to Baker. Law enforcement agents observed Baker exit that vehicle, and walk into T.J. Maxx. Kennedy then drove approximately 25 or 30 yards away to a meeting place in the parking lot where she sold 49.8 grams of a substance containing fentanyl to CI1 and CI2. After completing the sale, Kennedy drove back towards T.J. Maxx, parked, and walked into the same T.J. Maxx store that Baker had entered moments before.

IV. The Arrests

On Monday, June 15, 2015, Kennedy and CI1 agreed to meet the next day at 1:00 P.M. in the Shopping Plaza. Kennedy agreed to sell CI1 two ounces of heroin on Tuesday and another two ounces on Thursday. On Tuesday, Kennedy and Baker arrived at the Shopping Plaza in a car registered to Baker. Upon arrival, Kennedy dropped Baker off at the T.J. Maxx. Kennedy then proceeded to her meeting with CI1 and CI2, but she was arrested in the parking lot before she was able to complete the sale.[6] Baker was arrested soon after that, as he was exiting the T.J. Maxx store.

[6] At the time of her arrest, Kennedy had in her possession 55.9 grams of a substance containing heroin.

V. The Trial and Jury Verdict

****4** Trial commenced on December 15, 2015. Baker did not put on a defense case. After deliberating for approximately three hours, the jury returned a guilty verdict on December 18, 2015. In addition to determining that Baker participated in a conspiracy to distribute drugs, the jury also made a finding that it was reasonably foreseeable to Baker that the conspiracy involved 100 grams or more of heroin. The district court polled the jury and each juror confirmed the verdict.

VI. Post-Trial Proceedings

By letter dated December 28, 2015, Baker moved *pro se* for a judgment of acquittal pursuant to Rule 29 and for a new trial pursuant to Rule 33. Fed. R. Crim. P. 29, 33. Then, about five weeks after the jury verdict, on January 25, 2016, Juror No. 10 left a voicemail for Baker's trial counsel, Arthur Frost. Juror No. 10 followed-up with an email to Frost a few days later expressing "several concerns" that "perhaps ... will be helpful to you and your client." *Id.* at 70–71. Among other things, Juror No. 10 advised as follows:

> The jury was instructed on several occasions to "keep an open mind" and not discuss the case among themselves until it received the case from the Court. This did not happen. There was discussion among many of the jurors during virtually every break. And after the verdict was rendered I overheard one juror say that he knew the defendant was guilty ***129** the first time he saw him (before he was sworn in as a juror).

Id. at 70. Frost scheduled a meeting with Juror No. 10. On the day of the scheduled meeting, however, Frost notified the district court that he planned to meet with Juror No. 10 later that evening, and sought "further guidance from the Court on how to proceed." App. 556. The district court asked the parties to brief the issue and Frost cancelled his meeting pending the district court's decision on his application for leave to obtain an affidavit from Juror No. 10 for presentation to the district court.

On April 12, 2016, the district court denied Baker's "application for permission to inquire further of the jurors about whether the jury engaged in premature deliberations, or if a juror lied during *voir dire*." Special App. 8–9. The district court stated "[t]he proffered resulting testimony would be inadmissible for purposes of challenging the validity of the verdict, see Fed. R. Evid. 606(b), and any further inquiry in the manner suggested by Defendant would be futile." *Id.* On May 5, 2016, the district court denied Baker's Rule 33 motion for a new trial and Rule 29 motion for a judgment of acquittal, concluding *inter alia* that "[v]iewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime of conviction proved beyond a reasonable doubt." *Id.* at 14. Sentencing was held on August 10, 2016. The district court imposed a term of imprisonment of 180 months, to be followed by eight years of supervised release.

DISCUSSION

On appeal, Baker first argues that the evidence was insufficient as a matter of law to support his conviction. Next, Baker argues that the district court erred in denying his application to conduct post-verdict juror interviews. We address each argument in turn.

I. Sufficiency of the Evidence

We agree with the district court that the evidence

presented at trial was sufficient to show that Baker conspired to distribute more than 100 grams of heroin. We review sufficiency of evidence challenges *de novo*, but defendants face "a heavy burden, as the standard of review is exceedingly deferential." *Brock*, 789 F.3d at 63 (citation omitted). "[W]e must view the evidence in the light most favorable to the [g]overnment, crediting every inference that could have been drawn in the [g]overnment's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence." *Id.* (internal quotation marks, brackets, and citation omitted). And "[w]e will sustain the jury's verdict if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Pierce*, 785 F.3d 832, 838 (2d Cir. 2015) (citation omitted) (emphasis in original).

****5** Baker's sufficiency of evidence challenge is meritless. Kennedy testified that she sold heroin several times in 2015; Baker was her supplier and he physically handed heroin over to her at her house; Baker sometimes accompanied her when she met CI1 and CI2 to sell them heroin; and Baker kept 90% of the proceeds from all of her sales. Because a federal conviction "may be supported by the uncorroborated testimony of even a single accomplice... if that testimony is not incredible on its face," Kennedy's testimony alone was sufficient to convict Baker. *United States v. Parker*, 903 F.2d 91, 97 (2d Cir. 1990). Baker argues that Kennedy's "self-serving testimony" was uncorroborated and should be rejected as "incredible on its face" because she "received an extraordinarily ***130** cushy deal despite her extensive criminal history, her prior drug dealing, and her lying to the police and under oath." Def.-Appellant Br. 23–24. But this argument amounts to challenging Kennedy's "credibility based on [her] plea agreement[ ] with the government and [her] long histor[y] of criminal and dishonest behavior," and "simply repeats facts and arguments already presented to the jury." *United States v. Florez*, 447 F.3d 145, 156 (2d Cir. 2006). During Kennedy's cross-examination, Baker's trial counsel focused almost exclusively on providing the jury with examples of Kennedy's dishonesty, noting inconsistencies in Kennedy's testimony, and explaining Kennedy's incentives to testify untruthfully. Baker's trial counsel also used a significant portion of his closing statement to expound upon how "Kennedy is a liar," referring to Kennedy as "Kandi the liar." *See* Dec. 18, 2015 Trial Tr. 547–54, 557–58, 560–61, *United States v. Baker*, No. 15-cr-258 (N.D.N.Y. Sept. 29, 2016), ECF No. 81. "We will not attempt to second-guess a jury's credibility determination on a sufficiency challenge," particularly when, as is the case here, trial counsel already presented these same credibility arguments to the jury. *Florez*, 447 F.3d at 156 (citations omitted).

Furthermore, even if corroborating evidence were necessary (and it is not), there was in fact ample corroborating evidence here to support the potential "inference[s] that the jury may have drawn in the government's favor" on the basis of Kennedy's testimony alone. *United States v. Hassan*, 578 F.3d 108, 126 (2d Cir. 2008) (internal quotation marks omitted); *see also Brock*, 789 F.3d at 63 ("[W]e must ... credit[ ] every inference that could have been drawn in the [g]overnment's favor, and defer[ ] to the jury's ... assessment of the weight of the evidence." (citation omitted)). Thus, the jury could have concluded that the following evidence supported Kennedy's account of her dealings with Baker: Baker's presence in the vicinity of at least three drug transactions; the use of a car registered to Baker in at least three transactions; the similar timing and location of the other transactions; the suspicious timing of calls between Baker and Kennedy; and the suggestive content of their communications. Such evidence, considered as a whole, provided the jury with ample additional reason, beyond its consideration of Kennedy's testimony, to conclude that this testimony was credible. *See Brock*, 789 F.3d at 63 ("[W]e must ... defer[ ] to the jury's assessment of witness credibility." (citation omitted)). Accordingly, we uphold the jury's verdict because a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Pierce*, 785 F.3d at 838.

II. Post-Trial Juror Interviews

We also uphold the district court's decision to deny Baker's request to interview jurors approximately five weeks after the jury verdict. We review a trial judge's handling of alleged jury misconduct for abuse of discretion. *United States v. Sabhnani*, 599 F.3d 215, 250 (2d Cir. 2010). As we have repeatedly said, a post-verdict inquiry into allegations of such misconduct is only required "when there is clear, strong, substantial and incontrovertible evidence ... that a specific, nonspeculative impropriety has occurred which could have prejudiced the trial of a defendant." *United States v. Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983) (citation omitted); *see also United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989). Allegations of impropriety must be "concrete allegations of inappropriate conduct that constitute competent and relevant evidence," though they need not be "irrebuttable [because] if the allegations were conclusive, there would be no need for a hearing." ***131** *Ianniello,* 866 F.2d at 543. "It is up to the trial judge to determine the effect of potentially prejudicial

occurrences," *United States v. Vitale*, 459 F.3d 190, 197 (2d Cir. 2006) (citation omitted), and the "trial judge has broad flexibility in responding to allegations of [juror] misconduct, particularly when the incidents relate to statements made by the jurors themselves, rather than to outside influences," *Sabhnani*, 599 F.3d at 250 (internal quotation marks omitted).

****6** Here, the district court properly proceeded with caution when determining whether to permit juror interviews. Baker argues that a post-trial inquiry was required based on two allegations in Juror No. 10's page-and-a-half long email:

> • Allegation No. 1: "The jury was instructed on several occasions to 'keep an open mind' and not discuss the case among themselves until it received the case from the Court. This did not happen. There was discussion among many of the jurors during virtually every break." Gov't App. 70; *see also* Def.-Appellant Br. 31.
>
> • Allegation No. 2: "[A]fter the verdict was rendered I overheard one juror say that he knew the defendant was guilty the first time he saw him (before he was sworn in as a juror)." Gov't App. 70; *see also* Def.-Appellant Br. 31.

Baker argues that the first allegation shows that the jurors impermissibly engaged in premature deliberations, perhaps "involv[ing] the introduction of truly extraneous materials into the juror process," Def.-Appellant Br. 37, and that the second demonstrates that a juror could have been "convinced from the outset of Baker's guilt based on racial stereotypes or animus," *id.* at 36. For the following reasons, we are not persuaded.

At the start, both of these allegations relate to "statements made by the jurors themselves, rather than to outside influences," and, as noted above, we have made clear that trial judges have particularly "broad flexibility in responding to allegations of such misconduct." *Sabhnani*, 599 F.3d at 250 (internal quotation marks omitted). Moreover, the brief email excerpts on which Baker relies are not even a prominent feature of Juror No. 10's lengthy email communication, which makes numerous observations about the trial, ranging over many topics, but at no point suggests that the jury reached the wrong verdict or that Juror No. 10 was in any way influenced by either premature deliberations or juror bias.[7] Because courts are wary of the "evil consequences" likely to result from post-verdict inquiries—"subjecting juries to harassment, inhibiting juryroom deliberation, burdening courts with meritless applications, increasing temptation for jury tampering and creating uncertainty in jury verdicts"—such inquiries are not undertaken in the absence of reasonable grounds. *Ianniello*, 866 F.2d at 543; *see also Moon,* 718 F.2d at 1234 (requiring "clear, strong, substantial and incontrovertible evidence that a *specific non-speculative* impropriety has occurred" (emphasis added)); *United States v. Moten*, 582 F.2d 654, 667 (2d Cir. 1978) (noting "unexceptional proposition" that convicted defendants "should not be allowed to ... inconvenience jurors merely to conduct ***132** a fishing expedition"). We cannot conclude that the district court abused its discretion in determining that Juror No. 10's email did not present sufficient reason for further inquiry and additional contact with jurors.

[7] In fact, Juror No. 10 references specific evidence in the form of an intercepted telephone call between Baker and Kennedy in explaining his vote to convict: "It came down to two sentences attributed to Mr. Baker in the last call we heard between he and Ms. Kennedy: 'I got the stuff. I can make it happen.' That didn't leave wiggle room." Gov't App. 71.

****7** Thus, regarding the first excerpt on which Baker relies, Juror No. 10 avers that the jurors failed to follow the district court's instruction to "keep an open mind and not discuss the case among themselves" because "[t]here was discussion among many of the jurors during virtually every break." Gov't App. 70. However, Juror No. 10 says nothing about the content of those discussions. Baker surmises that the conversations amounted to premature deliberations, but "[n]ot every comment a juror may make to another juror about the case is a discussion about a defendant's guilt or innocence that comes within a common sense definition of deliberation." *United States v. Peterson*, 385 F.3d 127, 135 (2d Cir. 2004); *see also United States v. Morales*, 655 F.3d 608, 629, 632 (7th Cir. 2011) (post-verdict juror note alleging some jurors violated the district court's instruction not to discuss the case among themselves prior to deliberations "only suggested the possibility of premature deliberations (as opposed to jokes, idle comments, or other generalized discussions)"); *Sabhnani*, 599 F.3d at 249 (affirming denial of post-verdict interview because a "potentially out-of-context, single word comment, does not demonstrate that the jurors prematurely deliberated and does not demonstrate that the juror would be unreceptive to opposing arguments or that any juror failed to participate in deliberations in good faith" (internal quotation marks and brackets omitted)).[8] Moreover, even assuming, *arguendo*, that premature deliberations occurred, we agree with the district court that Rule 606(b) of the Federal Rules of Evidence prohibited the jurors from impeaching their verdict by testifying about the effect of such deliberations on the verdict, rendering the

inquiry futile from the start.[9] *See* United States v. Leung, 796 F.3d 1032, 1036 (9th Cir. 2015) (concluding that Rule 606(b) prohibits post-trial inquiry of jurors into effect of premature deliberations because such an inquiry "intrudes upon jurors' mental processes concerning the verdict" and "how jurors considered the evidence or their mental states while hearing testimony" (internal quotation marks omitted)); *Morales*, 655 F.3d at 631 (concluding that "[a]ny [post-verdict] inquiry as to bias arising from the alleged premature deliberations would run afoul of [Rule 606(b)'s] clear proscription" and would thus be ***133** "fruitless" (internal quotation marks omitted)); *cf. United States v. Richards*, 241 F.3d 335, 343 (3rd Cir. 2001) (finding no abuse of discretion in denying motion for a new trial based on juror's post-trial affidavit attesting that he "overheard two jurors comment in the presence of other jurors and prior to the close of the evidence that they believed [the defendant] was guilty" because inquiry into "whether or not the premature statements affected their verdict" would be prohibited by Rule 606(b)).

[8] *See also United States v. Annabi*, 560 F. App'x 69, 73–74 (2d Cir. 2014) (summary order) (affirming denial of post-verdict interview where one juror wrote a letter disclosing that jurors spoke about the case during lunch).

[9] The no-impeachment rule and its exceptions are codified as Rule 606(b) of the Federal Rules of Evidence:

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

Fed. R. Evid. 606(b).

Baker attempts to avoid this conclusion by speculating that discussion among jurors during trial could have involved "the introduction of truly extraneous materials into the juror process." Def.-Appellant Br. 37 (referencing an exception to the general no-impeachment rule set out in Federal Rule of Evidence 606(b)(2)(A)). But he provides no basis for the conclusion that extraneous materials were introduced to the jury. And we have rejected speculative claims of this sort as insufficient on many past occasions. *See, e.g.*, *King v. United States*, 576 F.2d 432, 438 (2d Cir. 1978) (concluding that an evidentiary hearing was not required because "weakly authenticated, vague, and speculative material" constituted a "frail and ambiguous showing").[10]

[10] *See also United States v. Cartelli*, 272 F. App'x 66, 69–70 (2d Cir. 2008) (summary order) (affirming district court's decision not to inquire further because "the court was presented with mere speculation as to what sort of conversations the jurors may have had with their wives").

Along the same lines, Baker speculates that Juror No. 10's second allegation, that an unnamed juror stated after the verdict that he "knew the defendant was guilty the first time he saw him (before he was sworn in as a juror)," *could possibly indicate* that the juror determined Baker's guilt "based on racial stereotypes or animus," Def.-Appellant Br. 36, given that "[Baker] appeared non-white," Def.-Appellant Reply Br. 18. He seeks to invoke the Supreme Court's recent decision in *Peña-Rodriguez v. Colorado*, —— U.S. ——, 137 S.Ct. 855, 869, 197 L.Ed.2d 107 (2017), which recognized that when a juror "makes a clear statement that indicates that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." But Baker's invocation of *Peña-Rodriguez* is to no avail.[11]

[11] Baker did not argue below that Juror No. 10's email suggested that racial bias motivated the verdict and the government contends that we should review this claim only for plain error. We need not address the point, however, as we conclude that affirmance is appropriate under either potentially applicable standard of review.

****8** First, *Peña-Rodriguez*, by its terms, is inapposite. *Peña-Rodriguez* recognized a narrow exception to the no-impeachment rule: When a juror has made a "*clear statement* that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant"—that is, a statement "exhibiting *overt* racial bias that cast[s] serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict"—a trial court may consider evidence of that

juror's statement, even when proffered by other jurors. *Id.* (emphases added); *see also id.* (noting that "[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry"); *Young v. Davis*, 860 F.3d 318, 333 (5th Cir. 2017), *cert. denied*, —— U.S. ——, 138 S.Ct. 656, 199 L.Ed.2d 550 (2018) (describing ***134** *Peña-Rodriguez* exception as a "constrained relaxing" that only applies "narrowly"); *United States v. Robinson*, 872 F.3d 760, 764 (6th Cir. 2017) (describing *Peña-Rodriguez* exception as applicable only "in very limited circumstances"). *Peña-Rodriguez* thus sets forth a limited circumstance in which the Constitution requires an exception to the rule that jurors will not be heard to impeach their own verdicts. But *Peña-Rodriguez* does not address the separate question of what showing must be made before counsel is permitted to interview jurors post-verdict to inquire into potential misconduct. Indeed, as to this question, the decision simply reaffirms the importance of *limits* on counsel's post-trial contact with jurors "to provide [them] some protection when they return to their daily affairs after the verdict has been entered." *Peña-Rodriguez*, 137 S.Ct. at 869; *see also id.* at 865 ("[T]he no-impeachment rule has substantial merit [because i]t ... provid[es] jurors with considerable assurance that after being discharged they will not be summoned to recount their deliberations, and they will not otherwise be harassed or annoyed by litigants seeking to challenge the verdict").

Next, Juror No. 10's allegation that an unnamed juror said, "he knew the defendant was guilty the first time he saw him," without more, does not constitute clear, strong, and incontrovertible evidence that this juror was animated by racial bias or hostility, providing reasonable grounds for further inquiry. Crediting Baker's speculative conclusion to the contrary would run counter to our presumption that "jurors remain true to their oath and conscientiously observe the instructions and admonitions of the court." *United States v. Rosario*, 111 F.3d 293, 300 (2d Cir. 1997) (citation omitted). Here, after administering the oath to jurors, the district court specifically instructed the jury to "decide the case based on what you hear and see in the courtroom," to "keep an open mind until you have heard all the evidence in this case and the [c]ourt's charge on the law," and to remember that "[t]he defendant ... starts out the trial with a clean slate." Dec. 15, 2015 Trial Tr. at 13–17, *United States v. Baker*, No. 15-cr-258 (N.D.N.Y. Sept. 29, 2016), ECF No. 78. As *Peña-Rodriguez* itself made clear, such instructions help ensure that the exception to the no-impeachment rule that it recognized would be "limited to rare cases." 137 S.Ct. at 871. Baker has not come close to showing that his case falls within this category.

Finally, we observe that Baker's trial counsel properly notified the district court and the government prior to inquiring further of Juror No. 10. "[I]t always lies within the province of the district judge to take full control of the [post-verdict interviewing of jurors] when it is first brought to his attention." *Moten*, 582 F.2d at 666. The district court exercised "sound discretion" in determining that further inquiry was unnecessary. It thus did not err in denying Baker's request to interview jurors. Juror No. 10's email did not provide sufficient evidence to trigger mandatory post-trial juror interviews because Juror No. 10's email did not constitute "clear, strong, substantial and incontrovertible evidence that a specific, non-speculative impropriety ha[d] occurred." *Ianniello*, 866 F.2d at 543.

CONCLUSION

We have considered all of Baker's remaining arguments and find them to be meritless. For the foregoing reasons, Baker's judgment of conviction is AFFIRMED.

All Citations

899 F.3d 123, 2018 WL 3747345

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v. **1:15-CR-258**

RAYMOND BAKER,

Defendant.

THOMAS J. McAVOY,
Senior United States District Judge

DECISION & ORDER

I. INTRODUCTION

Following a jury trial, Defendant Raymond Baker was found guilty of Conspiracy to Distribute and Possess with the Intent to Distribute more than 100 grams of Heroin in violation of 21 U.S.C. §§ 846, 841(b)(1)(B) and 841(a)(1). Defendant contends that, after the verdict, his attorney received an email from a juror that raised two topics of concern: "first, that the jury began deliberations prior to hearing all evidence, receiving the law and hearing closing arguments; and second, that another juror said that 'he knew the defendant was guilty the first time he saw him (before he was sworn as a juror).'" Dkt. # 57 (interior quotation marks in original).

Defense counsel seeks permission to inquire further of the juror who sent the email to learn (1) more about the circumstances of the jury's premature deliberations, and (2) the identity of the other juror so he can be questioned about his purported statement that

he prejudged Defendant's guilt. *Id.* Defendant asserts that, presuming both jurors cooperate, he would present affidavits to the Court to allow it to determine whether a factual hearing should be held on Defendant's claim that he is entitled to a new trial due to juror misconduct. *Id.* The Government opposes the application, arguing that Defendant's request is futile because Federal Rule of Evidence 606(b) prevents impeachment of the verdict by the proffered juror testimony. The Court agrees with the Government.

II. DISCUSSION

"'Courts are, and should be, hesitant to haul jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences.'" *United States v. Rosario*, 111 F.3d 293, 298 (2d Cir. 1997) (quoting *U.S. v. Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983)). As the Second Circuit has repeatedly noted, "[t]here is no question that a federal court's review into jury deliberations, even a criminal jury's deliberations[,] is a decidedly limited enterprise." *Anderson v. Miller*, 346 F.3d 315, 327 (2d Cir. 2003).

The question of whether the testimony from either juror is admissible to challenge the validity of the verdict is governed by Federal Rule of Evidence 606(b). This provides:

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

jury's attention;

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

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

Fed. R. Evid. 606(b).

As Rule 606(b) makes clear, a party may not use a juror's testimony to challenge the validity of the verdict unless the juror testifies to a matter falling within the limited exceptions set forth in subsection (b)(2). While the Defendant, and the public, have vested interests in ensuring that all defendants receive fair trials by impartial juries that decide cases on the presented facts and the law as the Court instructs,

> [t]he prohibition on admitting juror testimony to challenge the validity of a verdict is longstanding. *Warger v. Shauers*, —— U.S. ——, 135 S. Ct. 521, 526, 190 L.Ed.2d 422 (2014). It has its roots in an eighteenth-century English case "in which Lord Mansfield held inadmissible an affidavit from two jurors claiming that the jury had decided the case through a game of chance." *Id.* In modern jurisprudence, this principle is found in Federal Rule of Evidence 606(b), which is a powerful shield against the efforts of litigants to overturn verdicts based on the real or perceived flaws of the juries that decided their cases.

United States v. Leung, 796 F.3d 1032, 1033 (9th Cir. 2015).

Both the common-law rule against the admission of jury testimony to impeach a verdict and Rule 606(b)'s enactment of this common-law rule arise from the public policy protecting the sanctity of the jury room and, *a fortiori*, the jury system.

> There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the

> community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.

Tanner v. United States, 483 U.S. 107, 120-21, 107 S. Ct. 2739, 2747-48, 97 L. Ed. 2d 90 (1987).

The Supreme Court has recognized the broad application of Rule 606(b) to verdict challenges supported only by juror testimony. In *Tanner*, "the Court addressed the admissibility of a juror affidavit asserting that jurors drank alcohol, smoked marijuana, ingested cocaine, conducted drug deals, and periodically slept throughout a complex criminal trial." *Leung*, 796 F.3d at 1035 (citing *Tanner,* 483 U.S. at 115–16). The *Tanner* Court noted that "the near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict," *Tanner*, at 117, and found that, despite Rule 606(b)'s exception permitting inquiry into whether "extraneous influences" tainted the verdict, "juror testimony regarding the jury's 'internal processes' is categorically barred." *Leung*, 796 F.3d at 1035 (quoting and citing *Tanner,* 483 U.S. at 120–21). "The [*Tanner*] Court emphasized that the internal/external distinction is 'not based on whether the juror was literally inside or outside the jury room when the alleged irregularity took place.' Rather, the salient inquiry is the 'nature of the allegation.'" *Id.* (quoting and citing *Tanner,* 483 U.S. at 117).

In *Warger v. Shauers*, —— U.S. ——, 135 S. Ct. 521, 190 L. Ed.2d 422 (2014), "[t]he Court . . . held that Rule 606(b)'s bar on jury deliberations evidence does not permit an exception for testimony about juror bias or dishonesty during *voir dire." Leung*, 796 F.3d at 1035 (citing *Warger*, 135 S.Ct. at 530). "The Court noted that while jurors can (and should) report such information to the court during trial, the plain text and history of

Rule 606(b) dictate that a party seeking to impeach a verdict cannot resort to juror testimony about any statement made or incident that occurred 'during deliberations.'" *Id.* at 1035-1036 (quoting *Warger*, 135 S. Ct. at 530).

Referring to Rule 606(b)'s language restricting its application to "an inquiry into the validity of a verdict," the Court explained:

> [T]he "inquiry" to which the Rule refers is one into the "*validity* of the verdict," not into the verdict itself. The Rule does not focus on the means by which deliberations evidence might be used to invalidate a verdict. It does not say "during an inquiry into jury deliberations," or prohibit the introduction of evidence of deliberations "for use in determining whether an asserted error affected the jury's verdict." It simply applies "[d]uring an inquiry into the validity of the verdict"—that is, during a *proceeding* in which the verdict may be rendered invalid. Whether or not a juror's alleged misconduct during *voir dire* had a direct effect on the jury's verdict, the motion for a new trial requires a court to determine whether the verdict can stand.

Warger, 135 S. Ct. at 528 (emphasis in original).

The Ninth Circuit found that the following "key principles" emerged from *Tanner* and *Warger*: "[Rule 606(b)] applies in any proceeding that involves an inquiry into 'the validity of the verdict,' however that inquiry is framed by the litigants. The Rule bars juror testimony about the jury's 'internal processes,' whether the claimed irregularity took place inside or outside the jury room. [And,] [t]he Rule imposes a nearly categorical bar on juror testimony about statements or events 'during the jury's deliberations.'" *Leung*, 796 F.3d at 1036. Application of these key principles renders Defendant's application futile.

While premature deliberations may constitute jury misconduct, *see United States v. Cox*, 324 F.3d 77, 86 (2d Cir. 2003),[1] exploring the allegation that this occurred requires

[1]("Where the district court instructs a jury to refrain from premature deliberation … and the jury nonetheless discusses the case before the close of trial, that premature deliberation may constitute juror (continued...)

inquiry into the jury's internal processes. Moreover, the inquiry invites examination of whether the premature deliberations influenced the verdict and, thus, constitutes exploration into the jury's deliberations.

Because the proffered proof of the alleged premature deliberations comes only from juror testimony about the jury's internal processes and deliberations, and does not involve evidence of: (1) extraneous prejudicial information improperly brought to the jury's attention; (2) an outside influence improperly brought to bear on any juror; or (3) a mistake made in entering the verdict on the verdict form, the testimony is inadmissible for purposes of challenging the validity of the verdict. *See* Fed. R. Evid. Rule 606(b).

The same analysis applies to *potential* testimony from a juror who seemingly indicated that he lied during *voir dire* regarding his willingness to accept Defendant's presumption of innocence. While trial by an impartial jury is a fundamental constitutional right protected through *voir dire*, *see Tanner*, 483 U.S. at 134;[2] *United States v. Colombo*, 869 F.2d 149, 151(2d Cir. 1989),[3] Rule 606(b)'s limitation on juror testimony attacking the validity of a verdict does not abridge a defendant's ability to enforce that right through

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[1](...continued)
misconduct.").

[2]("This Court has long recognized that due process implies a tribunal both impartial and mentally competent to afford a hearing, a jury capable and willing to decide the case solely on the evidence before it.")(Marshal, J.)(concurring in part and dissenting in part)(interior quotation marks and citations omitted).

[3]("*Voir dire* is an important method of protecting a defendant's right to trial by an impartial jury. We have held that the defense deserves a full and fair opportunity to expose bias or prejudice on the part of veniremen. "There must be sufficient information elicited on *voir dire* to permit a defendant to intelligently exercise not only his challenges for cause, but also his peremptory challenges, the right to which has been specifically acknowledged by the Supreme Court.")(interior quotation marks and citations omitted).

other evidence. *See Warger*, 135 S. Ct. at 529;[4] *Tanner*, 483 U.S. at 127;[5] *see also Colombo*, 869 F.2d at 152.[6]

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[4]The Supreme Court wrote in *Warger*:

> [A]ny claim that Rule 606(b) is unconstitutional in circumstances such as these is foreclosed by our decision in *Tanner*. In *Tanner*, we concluded that Rule 606(b) precluded a criminal defendant from introducing evidence that multiple jurors had been intoxicated during trial, rejecting the contention that this exclusion violated the defendant's Sixth Amendment right to "'a tribunal both impartial and mentally competent to afford a hearing.'" 483 U.S., at 126, 107 S.Ct. 2739 (quoting *Jordan v. Massachusetts*, 225 U.S. 167, 176, 32 S. Ct. 651, 56 L .Ed. 1038 (1912)). We reasoned that the defendant's right to an unimpaired jury was sufficiently protected by *voir dire*, the observations of court and counsel during trial, and the potential use of "nonjuror evidence" of misconduct. 483 U.S., at 127, 107 S. Ct. 2739. Similarly here, a party's right to an impartial jury remains protected despite Rule 606(b)'s removal of one means of ensuring that jurors are unbiased. Even if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered.

Warger, 135 S. Ct. at 529.

[5]The Supreme Court wrote in *Tanner*:

> [L]ong-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry. Petitioners' Sixth Amendment interests in an unimpaired jury, on the other hand, are protected by several aspects of the trial process. The suitability of an individual for the responsibility of jury service, of course, is examined during *voir dire*. Moreover, during the trial the jury is observable by the court, by counsel, and by court personnel. *See United States v. Provenzano*, 620 F.2d 985, 996–997 (CA3 1980) (marshal discovered sequestered juror smoking marijuana during early morning hours). Moreover, jurors are observable by each other, and may report inappropriate juror behavior to the court before they render a verdict. *See Lee v. United States*, 454 A.2d 770 (DC App.1982), *cert. denied sub nom. McIlwain v. United States*, 464 U.S. 972, 104 S. Ct. 409, 78 L. Ed.2d 349 (1983) (on second day of deliberations, jurors sent judge a note suggesting that foreperson was incapacitated). Finally, after the trial a party may seek to impeach the verdict by nonjuror evidence of misconduct. *See United States v. Taliaferro*, 558 F.2d 724, 725–726 (CA4 1977) (court considered records of club where jurors dined, and testimony of marshal who accompanied jurors, to determine whether jurors were intoxicated during deliberations). Indeed, in this case the District Court held an evidentiary hearing giving petitioners ample opportunity to produce nonjuror evidence supporting their allegations.

Tanner, 483 U.S. at 127.

[6]In *Colombo*, the defendant presented an affidavit that claimed a member of the jury deliberately violated her oath during the *voir dire* by failing to disclose that her brother-in-law was a government attorney, and that she did so in order to sit on this case. The Second Circuit remanded the case for further fact finding, instructing the district court:

> The appropriate inquiry on remand is a narrow one. If in fact the juror's brother-in-law was a

(continued...)

A pre-existing mind-set causing a juror to pre-judge a defendant's guilt based on the defendant's appearance is an internal matter, not an external or extraneous matter falling within Rule 606(b)(2)'s exceptions. *See Warger*, 135 S. Ct. at 529.[7] Moreover, a juror's testimony about such a mind-set invites inquiry into the jury's internal processes and its deliberations. Thus, even assuming that a juror stated that "he knew the defendant was guilty the first time he saw him," and would be willing to waive his Fifth Amendment right and testify to this fact, *see Colombo*, 869 F.2d at 151,[8] his testimony would be inadmissible for purposes of attacking the validity of the verdict. *Warger*, 135 S. Ct. at 528-530.

III. CONCLUSION

For the reasons set forth above, Defendant's application for permission to inquire further of the jurors about whether the jury engaged in premature deliberations, or if a juror lied during *voir dire*, is **denied.** The proffered resulting testimony would be inadmissible

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[6](...continued)
government attorney, that is sufficient corroboration of the . . . affidavit to call for [the defendant's] conviction to be vacated. That fact alone demonstrates a deliberately false answer to a *voir dire* question and calls into play the principles outlined above. Inquiry into the juror's state of mind by way of partial denial, explanation or protestations of impartiality would not reveal evidence that was under these circumstances either trustworthy or sufficient to offset the deliberate violation of the oath. If the district court should determine on remand that her brother-in-law was not a government attorney, this case will be referred back to this panel.

Colombo, 869 F.2d at 152.

[7]("Generally speaking, information is deemed "extraneous" if it derives from a source 'external' to the jury. 'External' matters include publicity and information related specifically to the case the jurors are meant to decide, while 'internal' matters include the general body of experiences that jurors are understood to bring with them to the jury room.")(citing *Tanner*, 483 U.S. at 117-119).

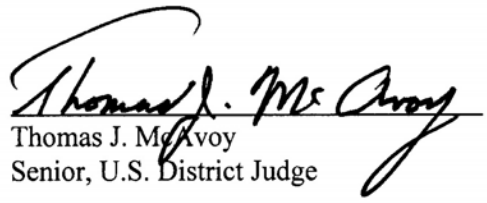
[8]("Knowingly lying during the *voir dire* violated, *inter alia*, 18 U.S.C. § 1621 (1982), and subjected the juror to possible criminal contempt pursuant to 18 U.S.C. § 401 (1982), as well as to possible substantial restitution claims by the government.") (citing *United States v. Hand*, 863 F.2d 1100 (3d Cir.1988)).

for purposes of challenging the validity of the verdict, *see* Fed. R. Evid. 606(b), and any further inquiry in the manner suggested by Defendant would be futile.

Defendant's counsel is to submit a memorandum of law in support of Defendant's Fed. R. Crim. P. 29 and 33 motions within ten (10) business days of the date of this Decision and Order. The Government is to submit its opposing memorandum of law within ten (10) business days after Defendant submits his memorandum of law.

IT IS SO ORDERED.

Dated: April 12, 2016



Thomas J. McAvoy
Senior, U.S. District Judge