No. _____

IN THE

Supreme Court of the United States

LEZMOND CHARLES MITCHELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

APPENDIX INDEX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEZMOND C. MITCHELL, AKA Lezmond Charles Mitchell, *Petitioner-Appellant*, v. UNITED STATES OF AMERICA, *Respondent-Appellee.*	No. 18-17031 D.C. Nos. 3:09-cv-08089-DGC 3:01-cr-01062-DGC-1 OPINION

Appeal from the United States District Court
for the District of Arizona
David G. Campbell, District Judge, Presiding

Argued and Submitted December 13, 2019
Phoenix, Arizona

Filed April 30, 2020

Before: Sandra S. Ikuta, Morgan Christen, and Andrew D. Hurwitz, Circuit Judges.

Opinion by Judge Ikuta;
Concurrence by Judge Christen;
Concurrence by Judge Hurwitz

SUMMARY*

Criminal / Fed. R. Civ. P. 60(b) / 28 U.S.C. § 2255

The panel affirmed the district court's denial of Lezmond Mitchell's motion pursuant to Fed. R. Civ. P. 60(b) for relief from the district court's denial of his 2009 motion for authorization to interview jurors at his 2003 criminal trial in order to investigate potential juror misconduct.

Mitchell argued that the Supreme Court's intervening decision in *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), which held that jury statements demonstrating racial animus could be admissible in a proceeding inquiring into the validity of the verdict, changed the law governing requests to interview jurors for evidence of racial bias, and that this change constituted an extraordinary circumstance justifying relief under Rule 60(b)(6).

The panel held that the district court had jurisdiction to decide the Rule 60(b) motion. The panel explained that the motion, which at best would give Mitchell the opportunity to attempt to develop a claim that the jurors were biased, does not present a substantive claim on the merits and thus is not a disguised second or successive 28 U.S.C. § 2255 motion.

The panel held that Mitchell presents no extraordinary circumstances or district court errors that would justify reopening his case, and that the district court therefore did not abuse its discretion by denying the Rule 60(b) motion. The

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

panel explained that although *Peña-Rodriguez* established a new exception to Fed. R. Evid. 606(b), which generally prohibits jurors from testifying regarding their deliberations, this change in law left untouched the law governing investigating and interviewing jurors and thus did not give rise to "extraordinary circumstances" for purposes of Rule 60(b).

Concurring, Judge Christen wrote that it is worth pausing to consider why Mitchell, who did not receive the death penalty for his murder convictions, faces the prospect of being the first person to be executed by the federal government for an intra-Indian crime, committed in Indian country, by virtue of a conviction for carjacking resulting in death.

Concurring, Judge Hurwitz wrote to suggest that the current Executive take a fresh look at the wisdom of imposing the death penalty in this case in which the crimes were committed by a Navajo against Navajos entirely within the territory of the sovereign Navajo Nation, and where the Navajo Nation, and members of the victims' family, have opposed imposition of the death penalty on the defendant.

COUNSEL

Jonathan C. Aminoff (argued) and Celeste Bacchi, Deputy Federal Public Defenders; Amy M. Karlin, Interim Federal Public Defender; Federal Public Defender's Office, Los Angeles, California; for Petitioner-Appellant.

William G. Voit (argued), Assistant United States Attorney; Krissa M. Lanham, Deputy Appellate Chief; Michael Bailey, United States Attorney; United States Attorney's Office, Phoenix, Arizona; for Respondent-Appellee.

OPINION

IKUTA, Circuit Judge:

In May 2009, Lezmond Mitchell asked the district court for authorization to interview the jurors at his criminal trial in order to investigate potential juror misconduct. The district court denied the motion because Mitchell identified no evidence of juror misconduct, and therefore failed to show good cause. In March 2018, Mitchell filed a motion under Rule 60(b)(6) of the Federal Rules of Civil Procedure for relief from the 2009 ruling. Mitchell argued that the Supreme Court's intervening decision in *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), changed the law governing requests to interview jurors for evidence of racial bias, and that this change constituted an extraordinary circumstance justifying relief under Rule 60(b)(6). The district court denied this motion as well. We affirm.

I

A

We have described the facts of this case in detail in two prior opinions, *see United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007) (direct appeal) ("*Mitchell I*"); *Mitchell v. United* States, 790 F.3d 881 (9th Cir. 2015) (appeal of denial of motion under 28 U.S.C. § 2255) ("*Mitchell II*"), so we

summarize them only briefly. In October 2001, Mitchell and three accomplices plotted to carjack a vehicle to use in an armed robbery of a trading post on the Navajo reservation. Mitchell and an accomplice, Johnny Orsinger, abducted 63-year-old Alyce Slim and her 9-year-old granddaughter in Slim's GMC pickup truck. Somewhere near Sawmill, Arizona, Mitchell and Orsinger killed Slim, stabbing her 33 times and moving her mutilated body to the back seat next to her granddaughter. After driving the truck into the mountains, Mitchell dragged Slim's body out of the car and ordered the granddaughter to get out of the truck and "lay down and die." Mitchell slit her throat twice, and then dropped rocks on her head to finish her off. Mitchell and Orsinger later returned to the scene to conceal evidence. They severed the heads and hands of both victims and pulled their torsos into the woods. Mitchell and Orsinger also burned the victims' clothing, jewelry, and glasses.

Three days after the murders, Mitchell and two accomplices drove the GMC pickup truck to the trading post. Once there, they struck the store manager with a shotgun, threatened another employee, and stole some $5,530 from the store. Mitchell and his accomplices drove the GMC pickup truck back to a location where one of the accomplices had parked his own vehicle. Mitchell set the truck on fire and left the scene in the other vehicle.

A Navajo police officer discovered the pickup truck a mile and a half south of a town within the Navajo Indian reservation. Criminal investigators discovered evidence in the truck connecting Mitchell to both the robbery and the murders. When the FBI arrested Mitchell at an accomplice's house, Mitchell (who was in bed) "asked for his pants, which he told an FBI agent were near a bunk bed on the floor."

Mitchell I, 502 F.3d at 944. When the agent picked them up, "a silver butterfly knife fell from a pocket." *Id.* After the accomplice and his mother consented to a search of the house, FBI agents retrieved the silver butterfly knife. "Trace amounts of blood from the silver knife were matched to Slim." *Id.*

After signing a waiver of his *Miranda* rights, Mitchell admitted that he had been involved in the robbery and had been present when "things happened" to Slim and her granddaughter. *Id.* He directed Navajo police officers to the site where he and Orsinger had buried the bodies, and he told the officers "that he had stabbed the 'old lady,' and that the evidence would show and/or witnesses would say that he had cut the young girl's throat twice." *Id.* at 944 45. He also admitted that "he and Orsinger [had] gathered rocks, and with Orsinger leading on, the two took turns dropping them on [the granddaughter's] head." *Id.* "Mitchell indicated that he and Orsinger retrieved an axe and shovel, severed the heads and hands, buried the parts in a foot-deep hole, burned the victims' clothing, and cleaned the knives in a stream." *Id.* Mitchell stated that it was Orsinger's idea to sever the victims' heads and hands "because [Mitchell] would also have severed the feet." *Id.*

Mitchell was indicted for eleven crimes, including premeditated first degree murder, armed carjacking resulting in death, felony murder, robbery, kidnapping, and use of a firearm in a crime of violence. The government filed a notice of intent to seek the death penalty as to Mitchell based on the charge of carjacking resulting in death.

Jury selection in Mitchell's trial began on April 1, 2003.[1] Potential jurors filled out prescreening questionnaires, and were subjected to a twelve-day voir dire in which they were asked questions about their qualifications, including their ability to be impartial towards Native Americans. A petit jury, including one member of the Navajo Nation, convicted Mitchell on all counts.

The penalty phase began on May 14, 2003. Consistent with the Federal Death Penalty Act, 18 U.S.C. §§ 3591 3598, the district court instructed the jury that "in your consideration of whether the death sentence is appropriate, you must not consider the race, color, religious beliefs, national origin, or sex of either the defendant or the victims," and that "[y]ou are not to return a sentence of death unless you would return a sentence of death for the crime in question without regard to race, color, religious beliefs, national origin, or sex of either the defendant or any victim." *See* 18 U.S.C. § 3593(f). In addition, the jury was required to "return to the court a certificate, signed by each juror, that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim may be." *Id.* Each juror signed the certificate. *Mitchell I*, 502 F.3d at 990.

In order to impose the death penalty under the Federal Death Penalty Act, the jury was required to "unanimously

[1] Then District Judge Mary Murguia presided over the trial and sentencing.

find beyond a reasonable doubt: (1) the defendant was 18 years of age or older at the time of the offense; (2) the defendant had at least one of four enumerated mentes reae (often referred to as 'gateway intent factors'); and (3) the existence of at least one of sixteen statutorily defined aggravating factors." *Id.* at 973 (internal citations omitted). Here, the jury found the four gateway intent factors, the necessary statutory aggravating factors, and one non-statutory aggravating factor. *Id.* at 946. "After weighing the aggravating and mitigating factors, the jury recommended imposition of a sentence of death." *Id.*

The court sentenced Mitchell to death on September 15, 2003. As the jurors were discharged, the district judge stated:

> You are free to talk about the case with anyone or not talk about it as you wish. If someone asks you about the case, and you don't want to talk about it, just advise them of the fact and they will honor your request.
>
> The lawyers will be standing in the hallway as you exit. If you choose to talk to them, if you have any questions for them, you may approach them and ask them questions. They've been instructed not to approach you. It's only if you want to talk or discuss the case with lawyers on either side as you wish, you may do. So if you decide to just exit the building, you may.

On direct appeal, Mitchell contended that the procedures used to empanel jurors caused an under-representation of Native Americans. *Id.* at 949 50. Mitchell also argued that

his constitutional rights "were violated when the government elicited testimony bearing on race, religion and cultural heritage, and made statements in closing argument impermissibly plying on the same factors." *Id.* at 989. We rejected these arguments. With respect to the government's statements in closing, we "accept[ed] the jurors' assurance [in their certifications] that no impermissible considerations of race or religion factored into the verdict." *Id.* at 990.

Mitchell alleged additional errors related to race and religion at the penalty phase. He argued that the government erred by suggesting, in closing, that "Mitchell turned his back on his religious and cultural heritage." *Id.* at 994 95. We rejected this argument as well. Because Mitchell had introduced a letter from the Attorney General of the Navajo Nation indicating opposition to capital punishment and relied on this evidence in mitigation, we held that "it was not plainly erroneous for the government to challenge the credibility of Mitchell's reliance." *Id.* at 995.

B

Nearly six years later, in May 2009, Mitchell filed a motion in the district court requesting to interview members of the jury in order to ascertain "whether any member of the jury panel engaged in *ex parte* contacts, considered extrajudicial evidence, allowed bias or prejudice to cloud their judgment, or intentionally concealed or failed to disclose material information relating to their qualifications to serve as jurors in [his] case."

Mitchell's request to interview jurors was governed by District of Arizona Local Rule Civil 39.2,[2] which requires a defendant seeking permission to interview jurors to file "written interrogatories proposed to be submitted to the juror(s), together with an affidavit setting forth the reasons for such proposed interrogatories, within the time granted for a motion for a new trial." The rule provides that permission to interview jurors "will be granted only upon the showing of good cause." Mitchell argued that good cause existed because an investigation into potential juror misconduct was a necessary part of any federal capital post-conviction investigation. Despite lacking evidence of juror impropriety, Mitchell speculated that jurors could have been affected by the prosecutor's comment regarding Mitchell's turning his back on the Navajo religion. In connection with this argument, Mitchell cited *United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001), to support his argument that Rule

[2] Local Rule Civil 39.2(b) states:

> Interviews with jurors after trial by or on behalf of parties involved in the trial are prohibited except on condition that the attorney or party involved desiring such an interview file with the Court written interrogatories proposed to be submitted to the juror(s), together with an affidavit setting forth the reasons for such proposed interrogatories, within the time granted for a motion for a new trial. Approval for the interview of jurors in accordance with the interrogatories and affidavit so filed will be granted only upon the showing of good cause. See Federal Rules of Evidence, Rule 606(b).

This rule is made applicable to criminal cases by Local Rule Criminal 24.2.

606(b) of the Federal Rules of Evidence,[3] which generally prohibits jurors from testifying regarding their deliberations, cannot preclude evidence regarding jurors' racial or religious bias. Mitchell also speculated that the jurors might have been affected by publicity about the trial, or might have been influenced by outside sources.

The district court denied Mitchell's request. The court ruled that Mitchell had not complied with the procedural requirements of Local Rule 39.2, because the motion was untimely and Mitchell had failed to file proposed interrogatories to the jurors or submit an affidavit setting

[3] Rule 606(b) of the Federal Rules of Evidence 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.

forth reasons for interrogatories. In any event, the court held that Mitchell had failed to establish "good cause," as required by Local Rule 39.2, because there was no preliminary showing of juror misconduct; rather Mitchell's allegations of juror misconduct were "based on wholesale speculation." According to the court, the prosecutor's statement that Mitchell "turned his back on his religious and cultural heritage" did not raise a potential for juror bias because the Ninth Circuit had determined on direct appeal that the statement was not improper. Moreover, the court reasoned that any testimony regarding the subjective effect of the prosecutor's statements on the jury's deliberation would be barred by Rule 606(b) of the Federal Rules of Evidence. Further, Mitchell had provided no evidence that prejudicial news articles about his case existed or that any juror saw such articles. The district court concluded that in the absence of any showing of juror misconduct or any other basis for good cause, Mitchell was not entitled to interview jurors.

C

After the denial of his request under Local Rule 39.2, Mitchell brought a federal habeas motion under 28 U.S.C. § 2255 to challenge his sentence on multiple grounds, primarily focusing on ineffective assistance of counsel. His eleventh claim (Claim K) alleged that the district court had violated the Fifth, Sixth, and Eighth Amendments by denying his request to interview the jurors. According to Mitchell, denying his interview request deprived him of the opportunity to ensure that his jury was impartial and that the verdict was reliable. The district court rejected Claim K because it alleged an "error in a postconviction proceeding, not at trial or sentencing," and therefore failed to state a cognizable claim for relief under § 2255. *See Franzen v. Brinkman*,

877 F.2d 26, 26 (9th Cir. 1989). The district court did not grant a certificate of appealability for this claim. On appeal, we denied a certificate of appealability with respect to all uncertified claims and affirmed the district court's denial of Mitchell's § 2255 motion. *Mitchell II*, 790 F.3d at 894 & n.7.

D

Two years after *Mitchell II*, the Supreme Court decided *Peña-Rodriguez*, which held that, notwithstanding Rule 606(b), juror statements demonstrating racial animus could be admissible as evidence. 137 S. Ct. at 869. Nearly a year later, in March 2018, Mitchell filed a motion under Rule 60(b)(6) of the Federal Rules of Civil Procedure, seeking relief from the district court's judgment in light of *Peña-Rodriguez*.[4] Although Mitchell's Rule 60(b)(6) motion ostensibly sought to reopen his § 2255 proceeding, it actually challenged the district court's denial of his May 2009 request to interview jurors. The district court[5] denied the motion, and Mitchell timely appealed.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review the denial of a Rule 60(b) motion for abuse of discretion, *Harvest v. Castro*, 531 F.3d 737, 741 (9th Cir.

[4] Rule 60(b)(6) provides:

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason that justifies relief.

[5] Judge David Campbell was assigned to the case after Judge Murguia was appointed to the Ninth Circuit.

2008), but we review questions of law underlying the district court's decision de novo, *Hall v. Haws*, 861 F.3d 977, 984 (9th Cir. 2017). We review de novo whether a § 2255 motion is an unauthorized second or successive motion. *See Jones v. Ryan*, 733 F.3d 825, 833 (9th Cir. 2013).

II

Before addressing the merits of Mitchell's Rule 60(b)(6) motion, we must first determine whether the district court had jurisdiction to hear it. *See* 28 U.S.C. § 2255(h); *Washington v. United States*, 653 F.3d 1057, 1062 (9th Cir. 2011). We conclude that it did.

Under Rule 60(b), a court may "relieve a party or its legal representative from a final judgment, order, or proceeding" for specified reasons, including the catchall "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). In *Gonzalez v. Crosby*, the Court held that, like other Federal Rules of Civil Procedure, Rule 60(b) applies in the habeas context "only to the extent that it is not inconsistent with applicable federal statutory provisions and rules." 545 U.S. 524, 529 (2005) (cleaned up). This means that Rule 60(b) does not apply to the extent it is inconsistent with the habeas rules' limitations on second or successive applications. *Id*. at 529 30; *see* 28 U.S.C. §§ 2244(b), 2255(h).[6]

[6] Although *Gonzalez* addressed only the extent to which Rule 60(b) is inconsistent with § 2244 (the provision providing the second-or-successive bar for habeas petitions filed by state prisoners under § 2254), 545 U.S. at 529 n.3, we held in *United States v. Buenrostro* that the reasoning in *Gonzalez* applies equally to § 2255 motions filed by federal prisoners. 638 F.3d 720, 722 (9th Cir. 2011). *But see Williams v. United States*, 927 F.3d 427, 434–36 (6th Cir. 2019) (holding that § 2244(b)(1)'s prohibition on claims in a second or successive petition that were not

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a district court has only limited authority to hear a claim presented in a second or successive habeas motion. The court must deny a second or successive motion unless the court of appeals first certifies that the motion relies on a new rule of constitutional law that is retroactively applicable or presents new evidence that meets the criteria set forth in § 2255(h). *See Burton v. Stewart*, 549 U.S. 147, 149 (2007); *Gonzalez*, 545 U.S. at 531 32.

According to the Supreme Court, these rules require courts to examine Rule 60(b) motions carefully in order to determine whether they raise "claims." *Gonzalez*, 545 U.S. at 530 31. If a Rule 60(b) motion raises a claim, it "is in substance a successive habeas petition and should be treated accordingly." *Id.* at 531. In other words, a Rule 60(b) motion presenting a claim cannot proceed without certification from the court of appeals; otherwise, "Rule 60(b) would impermissibly circumvent" the second or successive bar. *Id.* at 531 32.

A Rule 60(b) motion advances a "claim" for purposes of AEDPA when it contains an "asserted federal basis for relief from a state court's judgment of conviction." *Id.* at 530. As explained in *Gonzalez*, an argument is a "claim" if it "substantively addresses federal grounds" for setting aside a prisoner's conviction. *Id.* at 533. This includes an argument seeking to add a new ground for relief, or attacking the federal court's previous resolution of a claim on the merits. *Id.* at 532. It also includes a request to present "'newly discovered evidence' in support of a claim previously

raised in a prior habeas petition does not apply to motions made by federal prisoners under § 2255).

denied," or an argument "contend[ing] that a subsequent change in substantive law is a 'reason justifying relief.'" *Id.* at 531 (internal citation omitted); *accord Washington*, 653 F.3d at 1063. An "attack based on the movant's own conduct, or his habeas counsel's omission . . . in effect asks for a second chance to have the merits determined favorably" and amounts to a claim. *Gonzalez*, 545 U.S. at 532 n.5.

However, not all arguments in a Rule 60(b) motion constitute claims. *Gonzalez* gave examples of challenges that could be included in a Rule 60(b) motion without turning it into a second or successive habeas motion. For instance, an argument that a court's procedural error precluded a prisoner from obtaining a merits determination does not raise a habeas "claim." *Id.* at 532 n.4. Procedural errors include errors in determining whether the prisoner had exhausted state remedies, whether the prisoner had procedurally defaulted a claim, or whether a claim was time-barred. *See id.* Nor does a motion asserting some defect in the integrity of a habeas proceeding, such as a claim of fraud on the federal habeas court, advance a "claim." *Id.* at 532 n.5.

The government argues that even if a Rule 60(b) motion does not present a claim on its face, it should be treated as a disguised second or successive § 2255 motion if its end goal is to discover and assert a claim. The government relies on a Fifth Circuit case in which a federal prisoner brought a Rule 60(b)(6) motion claiming that the district court had erroneously denied his request to interview jurors regarding potential racial bias. *In re Robinson*, 917 F.3d 856, 861 66 (5th Cir. 2019), *cert. denied sub nom.*, *Robinson v. United States*, No. 19-5535, 2020 WL 872217 (U.S. Feb. 24, 2020). The prisoner argued that his motion was not a disguised second or successive § 2255 motion because he was

challenging a procedural "defect in the integrity of the habeas proceedings." *Id.* at 864. The Fifth Circuit rejected this characterization of the § 2255 motion because the district court had not made any procedural error in denying habeas discovery. *Id.* at 865. Because the § 2255 motion was not challenging a procedural defect, the Fifth Circuit concluded that the prisoner's request to interview jurors regarding racial bias had to be viewed as "attempting to advance a new habeas claim related to jury impartiality" and constituted a second or successive § 2255 motion. *Id.*

We decline to follow *In re Robinson*. The Fifth Circuit read *Gonzalez* as holding that a prisoner could use a Rule 60(b)(6) motion only for a single category of challenges (challenges to procedural errors); all other challenges were forbidden merits-based claims. But, rather than narrowing the use of Rule 60(b)(6) motions to a single type of challenge, *Gonzalez* did the opposite: it excised a single category of challenges from the arguments that could be raised under Rule 60(b)(6), holding that a prisoner could *not* bring a substantive merits-based claim as a Rule 60(b)(6) motion. *Gonzalez* did not preclude a prisoner from bringing any other sort of argument under Rule 60(b)(6).[7]

Because the Fifth Circuit bifurcated Rule 60(b)(6) motions into permitted challenges to procedural errors and merits-based claims, it failed to distinguish between a request

[7] Perhaps realizing the gap in its analysis, *In re Robinson* adds that "[e]ven if we were to find that Robinson's impartial-jury claim did not constitute a second or successive habeas petition, we would undoubtedly conclude that he fails to show that, as a result of the denial of his discovery request, extraordinary circumstances exist to justify the reopening of the final judgment under Rule 60(b)(6)." 917 F.3d at 866 n.18 (cleaned up) (quoting *Gonzalez*, 545 U.S. at 535).

for evidence to develop a possible new claim and an effort to bolster a prior claim, concluding that both fell within the category of disallowed substantive challenges. Again, we disagree. Consistent with *Gonzalez*, we have held that a request for "newly discovered evidence in support of a claim previously denied" qualifies as a "claim." *Wood v. Ryan*, 759 F.3d 1117, 1120 (9th Cir. 2014) (quoting *Gonzalez*, 545 U.S. at 531) (holding that a state prisoner's Rule 60(b)(6) motion seeking relief from the district court's denial of his motion for evidentiary development in support of a *previously denied* ineffective assistance of counsel claim was a second or successive petition); *see also Washington*, 653 F.3d at 1065 (holding that a motion seeking "a fresh opportunity to air the arguments *that failed at . . . trial*" was a second or successive § 2255 motion) (emphasis added).

But *Gonzalez* did not hold that a prisoner's request to develop evidence for a potential new claim also qualifies as a "claim." Such a request does not meet *Gonzalez*'s definition of a substantive merits-based claim because it does not assert a federal basis for relief from the prisoner's conviction or sentence. Here, for instance, Mitchell's Rule 60(b)(6) motion argues that the district court erred in denying Mitchell's request to interview the jurors who recommended the death penalty. Mitchell does not claim that the correction of this alleged error would entitle him to relief or affect the validity of his conviction or sentence. Nor does Mitchell seek to present newly discovered evidence to support a prior claim or argue that a change in law justifies relief from his conviction or sentence. *See Gonzalez*, 545 U.S. at 531. At most, a favorable ruling would give Mitchell the opportunity to attempt to develop a claim that the jurors were biased. Because Mitchell's motion does not present a substantive claim on the merits, "allowing the motion to proceed as

denominated creates no inconsistency with the habeas statute or rules." *Id.* at 533. Therefore, we conclude that Mitchell's motion is not a disguised second or successive § 2255 habeas motion, and the district court had jurisdiction to decide his Rule 60(b)(6) motion.

III

We therefore turn to whether Mitchell has established "'extraordinary circumstances' justifying the reopening of a final judgment." *Id.* at 535 (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)). In considering whether there is an "extraordinary" circumstance for purposes of a Rule 60(b)(6) motion, we consider a number of factors, including the "degree of connection between the extraordinary circumstance and the decision for which reconsideration is sought." *Hall*, 861 F.3d at 987 (citing *Phelps v. Alameida*, 569 F.3d 1120, 1135 40 (9th Cir. 2009)). Said otherwise, we consider whether the alleged extraordinary circumstance, such as a change in the law, was material to the prisoner's claim.

A

"[A] change in intervening law" can constitute an extraordinary circumstance. *Id.* at 987 88. *Gonzalez* made clear, however, that not every change in intervening law "provides cause for reopening cases long since final." 545 U.S. at 536; *see also Ritter v. Smith*, 811 F.2d 1398, 1401 (11th Cir. 1987) ("[S]omething more than a 'mere' change in the law is necessary to provide the grounds for Rule 60(b)(6) relief."). For instance, *Gonzalez* held that a Supreme Court decision that changed an interpretation of controlling law was not an "extraordinary circumstance" even though it would

have saved a prisoner's habeas petition from being time-barred. 545 U.S. at 537 38. According to the Court, development of the Supreme Court's jurisprudence in a particular area does not necessarily justify "reopening cases long since final"; indeed, it is "hardly extraordinary" that the Supreme Court arrives at a different interpretation of the law after a prisoner's case is no longer pending. *Id.* at 536. Moreover, where an argument is available and raised by other litigants (and even litigated all the way to the Supreme Court), but the prisoner did not diligently pursue the argument, the change in law is "all the less extraordinary." *Id.* at 537. Thus, a mere development in jurisprudence, as opposed to an unexpected change, does not constitute an extraordinary circumstance for purposes of Rule 60(b)(6).

B

Mitchell argues that *Peña-Rodriguez* was an intervening change in law that constituted an extraordinary circumstance requiring the district court to give Mitchell relief from the prior order denying his request to interview jurors. In addressing this argument, we consider the legal history leading up to the decision in *Peña-Rodriguez.*

We have long imposed restrictions on lawyers seeking access to jurors. These rules derive their authority from the common law, where "judges placed the veil of secrecy about jury deliberations." *N. Pac. Ry. Co. v. Mely*, 219 F.2d 199, 201 (9th Cir. 1954). Rules restricting lawyers' access to jurors "(1) encourage freedom of discussion in the jury room; (2) reduce the number of meritless post-trial motions; (3) increase the finality of verdicts; and (4) further Federal Rule of Evidence 606(b) by protecting jurors from harassment and the jury system from post-verdict scrutiny."

Cuevas v. United States, 317 F.3d 751, 753 (7th Cir. 2003). Indeed, "[i]t is incumbent upon the courts to protect jurors from the annoyance and harassment of such conduct," *Bryson v. United States*, 238 F.2d 657, 665 (9th Cir. 1956), and "it is improper and unethical for lawyers to interview jurors to discover what was the course of deliberation of a trial jury," *People of Territory of Guam v. Marquez*, 963 F.2d 1311, 1315 (9th Cir. 1992) (quoting *Smith v. Cupp*, 457 F.2d 1098, 1100 (9th Cir. 1972)). Therefore, in cases where there has been no showing of juror misconduct, we have held that a district court "d[oes] not abuse [its] discretion in refusing to allow postverdict interrogation of jurors." *United States v. Eldred*, 588 F.2d 746, 752 (9th Cir. 1978) (upholding an earlier version of the District of Arizona local rule restricting access to jurors in the absence of "some showing of sufficient reason"). We have also held that a district court's "denial of a motion to interrogate jurors" does not raise a constitutional problem where "there has been no specific claim of jury misconduct." *Smith*, 457 F.2d at 1100.

The judicial authority to exercise discretion regarding whether to grant lawyers permission to conduct jury interviews also undergirds Rule 606(b) of the Federal Rules of Evidence, which also stems from long-established common law rules. Rule 606(b) generally provides that a juror may not testify about statements and incidents that occurred during the jury's deliberations. Specifically, "[d]uring 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." Fed. R. Evid. 606(b)(1). Further, a court "may not receive a juror's affidavit or evidence of a juror's statement on these

matters." Fed. R. Evid. 606(b)(1).[8] This "no-impeachment rule" "promotes full and vigorous discussion by providing 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," and "gives stability and finality to verdicts." *Peña-Rodriguez*, 137 S. Ct. at 865.

Prior to *Peña-Rodriguez*, the Supreme Court had declined to recognize any exceptions (other than those in Rule 606(b)) to the no-impeachment rule. In *Tanner v. United States*, for instance, the Court "rejected a Sixth Amendment exception for evidence that some jurors were under the influence of drugs and alcohol during the trial," based on the "existing, significant safeguards for a defendant's right to an impartial and competent jury," such as voir dire, the opportunity to observe jurors during trial, and the opportunity for jurors to report misconduct before a verdict is rendered. *Peña-Rodriguez*, 137 S. Ct. at 866 (citing *Tanner v. United States*, 483 U.S. 107, 125 27 (1987)); *see also Warger v. Shauers*, 574 U.S. 40, 47 48 (2014).

Notwithstanding the Supreme Court's historical hesitance to interfere with the operation of Rule 606(b), we have long explained that the protections provided by this evidence rule are not absolute. *See Henley*, 238 F.3d at 1120. Noting the longstanding "conflict between protecting a defendant's right to a fair trial, free of racial bias, and protecting the secrecy

[8] Rule 606(b) contain several exceptions, allowing a juror to 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)(2).

and sanctity of jury deliberations," we suggested that there may be an exception to Rule 606(b) in cases where there was evidence of juror racial bias. *Id.* at 1119. Although we did not decide "whether or to what extent the rule prohibits juror testimony concerning racist statements made during deliberations," *id.* at 1121, we agreed that "a powerful case can be made that Rule 606(b) is wholly inapplicable to racial bias," *id.* at 1120.

Vindicating our views in *Henley*, *Peña-Rodriguez* subsequently recognized an exception to Rule 606(b) to allow jurors to testify about statements showing racial bias. In *Peña-Rodriguez*, a criminal defendant was convicted of unlawful sexual contact and harassment for sexually assaulting two teenage sisters. 137 S. Ct. at 861. After the jury was discharged, two jurors told the defendant's counsel that another juror had expressed anti-Hispanic bias against the defendant and the defendant's alibi witness during deliberations. *Id.* According to the jurors' affidavits, the biased juror stated he thought the defendant was guilty because "Mexican men ha[ve] a bravado that caused them to believe they could do whatever they wanted with women," and made similar statements evincing racial prejudice. *Id.* at 862. The trial court denied the prisoner's motion for a new trial, finding the affidavits would be inadmissible under Rule 606(b).[9] *Id.*

[9] Although the trial court decided the admissibility of the affidavits under Rule 606(b) of the Colorado Rules of Evidence, the Colorado rule is substantively identical to its federal counterpart, and the Supreme Court on appeal analyzed Rule 606(b) of the Federal Rules of Evidence. *Peña Rodriguez*, 137 S. Ct. at 864–65.

The Supreme Court reversed, holding that the Sixth Amendment guarantee of an impartial jury required the admission of evidence of juror racial bias. *Id.* at 870. The Court held that racial bias is a "familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Id.* at 868. According to the Court, "racial bias implicates unique historical, constitutional, and institutional concerns." *Id.* Further, "[a] constitutional rule that racial bias in the justice system must be addressed including, in some instances, after the verdict has been entered is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right." *Id.* at 869.

While acknowledging the safeguards that protect the right to an impartial jury (and urging trial courts to use such "standard and existing processes designed to prevent racial bias in jury deliberations," *id.* at 871), the Court noted that "their operation may be compromised, or they may prove insufficient" in addressing juror prejudice, *id.* at 868. For instance, "[t]he stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations." *Id.* at 869.

In light of these concerns, the Court 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," then "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.* The Court did not set down a rule for determining "[w]hether that threshold showing has been satisfied" but rather held that such a decision "is a matter committed to the substantial

discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence." *Id.* The Court noted that "[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry." Instead, "there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict" and "the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict." *Id.*

Despite establishing this exception to Rule 606(b), *Peña-Rodriguez* acknowledged and confirmed the longstanding rules giving trial courts discretion over lawyer efforts to investigate and interview jurors. The Court stated that "[t]he practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors." *Id.* Limits on contact with jurors "seek to provide jurors some protection when they return to their daily affairs after the verdict has been entered" and can be found even in jurisdictions "that recognize a racial-bias exception" to the no-impeachment rule. *Id.* at 869 70. The Court explained that jurors "may come forward of their own accord" to report racial bias notwithstanding rules prohibiting lawyers from initiating such contact, a practice that "is common in cases involving juror allegations of racial bias." *Id.* (collecting cases).

C

Mitchell's theory is that *Peña-Rodriguez*'s recognition of the threat posed by racial bias to the judicial system worked a sea change in the law applicable to his case. Although *Peña-Rodriguez*'s immediate effect was to make an exception to the rule precluding admissibility of evidence of racial bias in jury deliberations under Rule 606(b), Mitchell argues that this exception would have no practical effect if defendants could not acquire evidence of juror bias. As a result, Mitchell reasons, *Peña-Rodriguez* made an equally significant change to the precedents allowing district courts to deny lawyers leave to interrogate jurors and to rules such as Local Rule 39.2, which require lawyers to show good cause before they can interview jurors. These rules must now be set aside, according to Mitchell, because they impose an unreasonable burden on a criminal defendant's ability to ensure that no racial bias impacted the jury's verdict. Therefore, Mitchell claims, *Peña-Rodriguez* made a fundamental change in the law relevant to his request to interview jurors, and as such the district court was obliged to grant his Rule 60(b)(6) motion.

We disagree. Although *Peña-Rodriguez* established a new exception to Rule 606(b), this change in law left untouched the law governing investigating and interviewing jurors. *See Hall*, 861 F.3d at 987 (listing the "degree of connection between the extraordinary circumstance and the decision for which reconsideration is sought" as a factor for a court to consider when ruling on a Rule 60(b) motion). Indeed, *Peña-Rodriguez* acknowledged that juror-access rules would impose limitations on the use of the new racial-bias exception to Rule 606(b) because "[t]he practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and

local court rules, both of which often limit counsel's post-trial contact with jurors." 137 S. Ct. at 869; *see also id.* at 870 (referencing various rules setting limits on juror contacts). Rather than override the limitations on lawyers' access to jurors, *Peña-Rodriguez* emphasizes the important purpose of such limitations in providing "jurors some protection when they return to their daily affairs after the verdict has been entered." *Id.* at 869.

Because *Peña-Rodriguez* does not override local court rules or compel access to jurors, it is not "clearly irreconcilable" with our precedent, *Miller v. Gammie*, 335 F.3d 889, 893 (2003) (en banc), and therefore did not make any change in the law regarding lawyer access to jurors, let alone one so significant that it would constitute "extraordinary circumstances" for purposes of Rule 60(b). *Peña-Rodriguez* permits district courts to continue to exercise their discretion in granting motions to interview jurors, *see Smith*, 457 F.2d at 1100, and to implement and adhere to rules such as Local Rule 39.2 requiring a showing of good cause, *see Eldred*, 588 F.2d at 752.

All other circuits that have considered this issue have reached the same conclusion. The Second Circuit rejected the argument that *Peña-Rodriguez* required a district court to grant a request for juror interviews, and instead upheld a district court's denial of a request to interview jurors where there was no "clear, strong, substantial and incontrovertible evidence" that an impropriety occurred. *United States v. Baker*, 899 F.3d 123, 134 (2d Cir. 2018) (citation omitted). As the Second Circuit explained, *Peña-Rodriguez* established "a narrow exception to the no-impeachment rule," but "d[id] 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." *Id.* at 133 34. Rather "as to this question, the decision simply reaffirms the importance of *limits* on counsel's post-trial contact with jurors." *Id.* at 134; *see also United States v. Birchette*, 908 F.3d 50, 55 60 (4th Cir. 2018) (affirming the denial of a request to interview jurors, even when presented with some evidence of potential racial bias, because the evidence did not satisfy the local rule's "good cause" requirement); *cf. United States v. Robinson*, 872 F.3d 760, 770 (6th Cir. 2017) (affirming the denial of a motion for a new trial based on evidence of a juror's racial bias obtained in violation of local rules because of *Peña-Rodriguez*'s "reaffirmation of the validity of . . . local rules" regulating access to jurors).

Given this conclusion, Mitchell has failed to show an intervening change in law that constituted extraordinary circumstances.

D

We reject Mitchell's other arguments. First, Mitchell points to the district court's statement that procedural safeguards implemented during trial, such as voir dire and the in-court observation of jurors, helped protect Mitchell's conviction from the influence of racial bias, and weighed against finding "extraordinary circumstances." Mitchell argues that the district court erred in making this statement, because *Peña-Rodriguez* held that procedural safeguards, such as those presented in *Tanner* and its progeny, were insufficient to protect the right to a fair trial free from racial bias. This argument fails. Although *Peña-Rodriguez* indicated that procedural safeguards might be insufficient by themselves to protect against racial bias, 137 S. Ct. at 868 69, it also stated that they could effectively limit the impact of

racial bias, *id.* at 871. Here, the district court took significant steps to prevent racial bias. Jurors were asked in voir dire about their attitudes towards Native Americans, were instructed not to consider race, and were required to sign a certification attesting that they did not consider race. In addition, they were given the opportunity to speak with the lawyers as they left the courtroom. *Peña-Rodriguez* noted that these and similar procedural safeguards "deserve mention" for their role in helping to avoid racial bias in deliberations. *Id.*

Second, Mitchell argues that the district court should have revisited the question whether Mitchell lacked "good cause" for purposes of Local Rule 39.2 in light of *Peña-Rodriguez*. This argument also fails. *Peña-Rodriguez* did not change our controlling precedent on the issue of jury access. Moreover, the district court did not err in denying Mitchell's request for lack of good cause, given that Mitchell did not offer any "specific claim of jury misconduct." *Smith*, 457 F.2d at 1100; *see Eldred*, 588 F.2d at 752. We previously concluded in Mitchell's case that the racial composition of the jury pool and petit jury, the government's use of peremptory challenges, and comments made by the prosecutor in closing argument did not constitute errors at trial, *see Mitchell I*, 502 F.3d at 946 51, 957 58, 970 71, and thus they do not support Mitchell's claim that he had good cause to interview jurors. We also decline to adopt a per se rule that good cause is always satisfied in capital cases.

Because Mitchell presents no extraordinary circumstances or district court errors that would justify reopening his case, we conclude that the district court did not abuse its discretion by denying Mitchell's Rule 60(b) motion.

E

Our decision today does not mean that defendants will lack opportunities to learn of racial bias occurring in their cases. Although Mitchell asserts that local rules that require a preliminary showing of juror bias before allowing parties to interview jurors operate as an "all-out ban" on the ability of criminal defendants to learn of any racial bias that impacted the jury's deliberations, *Peña-Rodriguez* explained that the "pattern" of jurors approaching the lawyers in the case to report racial bias expressed during deliberation "is common in cases involving juror allegations of racial bias." 137 S. Ct. at 870 (collecting cases). It was pursuant to this pattern that the criminal defendants in *Peña-Rodriguez*, *id.* at 861, and *Henley*, 238 F.3d at 1113, obtained information of jurors' racial bias, *see also Baker*, 899 F.3d at 128 29; *Birchette*, 908 F.3d at 55. There were ample opportunities for jurors in Mitchell's case to report any racial bias, including the opportunity that the district judge gave the jurors to "discuss the case" with the lawyers as the jurors exited the courtroom.

Nor does our decision mean that local rules will never give way to the "unique historical, constitutional, and institutional concerns" of racism that motivated *Peña-Rodriguez*. 137 S. Ct. at 868. If a criminal defendant makes a preliminary showing of juror bias, a district court may set aside a procedural hurdle limiting access to jurors, just as the Supreme Court made an exception to Rule 606(b) of the Federal Rules of Evidence in the face of evidence of racial bias. Indeed, the district court did not rely on Mitchell's failure to comply with the procedural requirements of Local Rule 39.2 in denying Mitchell's request to interview jurors. We save questions regarding the extent to which procedural rules must give way to the right to an impartial trial for

another day, however, because Mitchell has presented no evidence of racial bias here.

AFFIRMED.

CHRISTEN, Circuit Judge, concurring:

I join the majority's considered opinion in full, but write separately because the lengthy history of this case may make it easy to lose track of the fact that Mitchell did not receive the death penalty for his murder convictions. Mitchell was sentenced to death because, in the course of committing their atrocious crimes, he and his accomplice also committed a carjacking. In my view, it is worth pausing to consider why Mitchell faces the prospect of being the first person to be executed by the federal government for an intra-Indian crime, committed in Indian country, by virtue of a conviction for carjacking resulting in death.

For intra-Indian offenses committed in Indian country, the Major Crimes Act allows federal prosecution of serious crimes such as murder and manslaughter. 18 U.S.C. § 1153(a). The Major Crimes Act was enacted in 1885, in direct response to the Supreme Court's decision in *Ex parte Crow Dog*, 109 U.S. 556 (1883), which held that the federal government lacked jurisdiction to try an Indian for the murder of another Indian in Indian country. *Keeble v. United States*, 412 U.S. 205, 209 10 (1973). More than one hundred years later, Congress eliminated the death penalty for federal prosecutions of Indian defendants under the Major Crimes Act, subject to being reinstated at the election of a tribe's governing body the so-called "tribal option." 18 U.S.C.

§ 3598; *United States v. Gallaher*, 624 F.3d 934, 936 (9th Cir. 2010).[1] The tribal option was an important recognition of tribal sovereignty. *See Gallaher*, 624 F.3d at 938 39. In short, the tribal option "place[d] Native American tribes on an equal footing with states: they may decide whether or not . . . first degree murder committed within their jurisdiction is punishable by death, even [when] first degree murders . . . are prosecuted in federal court." *Id.* at 939. The Navajo Nation, like many other tribes, declined to opt in to the federal death penalty.

Because of this history, when the United States prosecuted Mitchell for the murders of Alyce Slim and her nine-year-old granddaughter, it could not seek the death penalty for those charges. The United States circumvented the tribal option by also charging Mitchell with carjacking resulting in death and seeking the death penalty for that charge. The death penalty was not authorized for carjacking until 1994.[2] Because carjacking is a "crime of nationwide applicability,"[3] rather than a Major Crimes Act offense, the

[1] The tribal option also extends to crimes prosecuted under the Indian Country Crimes Act, 18 U.S.C. § 1152. But because the Indian Country Crimes Act does not extend to *intra Indian* offenses committed in Indian country, *United States v. Begay*, 42 F.3d 486, 498 (9th Cir. 1994), I limit my discussion to the Major Crimes Act.

[2] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 60003(a)(14), 108 Stat. 1796, 1968 (1994).

[3] Crimes of nationwide applicability are laws that "make actions criminal wherever committed." *Begay*, 42 F.3d at 498. By contrast, enclave laws—such as those prosecuted under the Major Crimes Act—"are laws in which the situs of the offense is an element of the crime—places such as military bases, national parks, federal buildings,

tribal option is inapplicable to it. *United States v. Mitchell*, 502 F.3d 931, 948 (9th Cir. 2007).

The decision to seek the death penalty in Mitchell's case was made against the express wishes of the Navajo Nation, several members of the victims' family, and the United States Attorney for the District of Arizona. As the Attorney General of the Navajo Nation Department of Justice explained, although "the details of [Mitchell's] case[] were shocking," the Navajo Nation did not support the death penalty for Mitchell because Navajo "culture and religion teaches us to value life and instruct against the taking of human life for vengeance." To be sure, the evidence of Mitchell's guilt was overwhelming, as the majority explains, but those who opposed the death penalty in his case did not doubt the horrific nature of Mitchell's crimes. The imposition of the death penalty in this case is a betrayal of a promise made to the Navajo Nation, and it demonstrates a deep disrespect for tribal sovereignty. People can disagree about whether the death penalty should ever be imposed, but our history shows that the United States gave tribes the option to decide for themselves.

Our court has already decided that the United States was legally permitted to seek death pursuant to the carjacking statute, *Mitchell*, 502 F.3d at 946 49, and I do not revisit that conclusion. I write to underscore only that the United States made an express commitment to tribal sovereignty when it enacted the tribal option, and by seeking the death penalty in this case, the United States walked away from that

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and the like." *United States v. Anderson*, 391 F.3d 1083, 1086 (9th Cir. 2004).

commitment. For all of these reasons, this case warrants careful consideration.

HURWITZ, Circuit Judge, concurring:

Judge Ikuta's opinion ably and comprehensively addresses the issue raised in this appeal, and I join it in full.

I write separately to stress a point aptly made earlier in the long history of this case by Judge Reinhardt. *See Mitchell v. United States*, 790 F.3d 881, 894 97 (9th Cir. 2015) (Reinhardt, J., dissenting in part). The heinous crimes that gave rise to this case occurred entirely within the territory of the sovereign Navajo Nation. The defendant is a Navajo, as were the victims. The Navajo Nation has, from the outset of this case, opposed imposition of the death penalty on the defendant, as have members of the victims' family.

The Attorney General nonetheless decided to override the decision of the United States Attorney for the District of Arizona not to seek the death penalty. Because this case involved a carjacking, I do not question the government's legal right to seek the death penalty; indeed, we have already held that it had the statutory right to do so. *See United States v. Mitchell*, 502 F.3d 931, 946 49 (9th Cir. 2007). But that the government had the right to make this decision does not necessarily make it right, and I respectfully suggest that the current Executive should take a fresh look at the wisdom of imposing the death penalty. When the sovereign nation upon whose territory the crime took place opposes capital punishment of a tribal member whose victims were also tribal members because it conflicts with that nation's "culture and

religion," a proper respect for tribal sovereignty requires that the federal government not only pause before seeking that sanction, but pause again before imposing it. That is particularly true when imposition of the death penalty would contravene the express wishes of several members of the victims' family.

The decision to pursue and to continue to pursue the death penalty in this case spans several administrations. The current Executive, however, has the unfettered ability to make the final decision. *See* U.S. Const. art. II, § 2, cl. 1. Although the judiciary today has done its job, I hope that the Executive will carefully consider whether the death penalty is appropriate in this unusual case.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEZMOND C. MITCHELL, AKA Lezmond Charles Mitchell,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 18-17031

D.C. Nos. 3:09-cv-08089-DGC
3:01-cr-01062-DGC-1
District of Arizona,
Prescott

ORDER

Before: IKUTA, CHRISTEN, and HURWITZ, Circuit Judges.

The panel has unanimously voted to deny appellant's petition for rehearing. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and the petition for rehearing en banc are DENIED.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Lezmond Charles Mitchell,

Defendant/Movant,

v.

United States of America,

Plaintiff/Respondent.

No. CV-09-08089-PCT-DGC

ORDER

Before the Court is Petitioner Lezmond Mitchell's motion for relief from judgment, filed pursuant to Federal Rule of Civil Procedure 60(b)(6). (Doc. 71.) The motion has been fully briefed. (Docs. 76, 79.) For the reasons set forth below, the motion is denied.

I. Background

In 2003, Petitioner was sentenced to death under the Federal Death Penalty Act; his conviction and sentences were affirmed on appeal. *United States v. Mitchell*, 502 F.3d 931, 942 (9th Cir. 2007), *cert. denied* 553 U.S. 1094 (2009). On May 22, 2009, Petitioner filed a motion for authorization to interview jurors in which he asserted that his counsels' responsibility to conduct a thorough post-conviction investigation required that they be allowed to contact and interview all jurors in his case. (Doc. 1.) Specifically, Petitioner asked "to interview the jurors about racial and religious prejudice . . . to see whether Mitchell's Navajo beliefs," which the prosecutor briefly invoked during closing

arguments, "played any part in his death sentence." (*Id.* at 10.) Respondent opposed the motion. (Doc. 18.)

Petitioner's request was governed by Local Rule of Civil Procedure 39.2(b), which requires that the requesting party "file with the Court written interrogatories proposed to be submitted to the juror(s), together with an affidavit setting forth the reasons for such proposed interrogatories, within the time granted for a motion for a new trial." *Id.*; *see also* LRCrim. 23.1. In addition to these procedural requirements, the requesting party must establish good cause for the request. LRCiv. 39.2(b). On September 4, 2009, the Court denied Petitioner's request to interview jurors because it was untimely and failed to establish good cause. (Doc. 21.)

Petitioner moved to vacate, set aside or correct his sentence under 28 U.S.C. § 2255. (Doc. 9.) The Court denied his motion on September 30, 2010 (Doc. 56), and the Ninth Circuit affirmed. *Mitchell v. United States*, 790 F.3d 881, 883 (9th Cir. 2015), *cert. denied* 137 S. Ct. 38 (2016).

The United States Supreme Court then decided *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), which Petitioner now cites as the basis for his request to reopen his § 2255 motion and revisit his motion to contact the jurors from his trial. (Doc. 71 at 3.)

II. Discussion

Citing *Peña-Rodriguez*, Petitioner alleges that this Court's prior denial of his request to interview jurors "prevented a full and fair merits determination, which warrants re-opening the proceedings under Rule 60(b)," at which point he intends to again "move the Court for an order granting . . . access to the jurors from his trial." (Doc. 71 at 9.) "Rule 60(b)(6) . . . permits reopening when the movant shows 'any . . . reason justifying relief from the operation of the judgment' other than the more specific circumstances set out in Rules 60(b)(1)–(5)." *Gonzalez v. Crosby*, 545 U.S. 524, 528–29 (2005). Relief under Rule 60(b)(6) requires a showing of "extraordinary circumstances." *Id.* at 536. "Such circumstances 'rarely occur in the habeas context.'" *Jones v. Ryan*, 733 F.3d 825, 833 (9th Cir. 2013).

Respondent urges that (1) the court lacks jurisdiction to decide Petitioner's Rule 60 motion because it is in reality an improper second or successive § 2255 petition, (2) Petitioner's motion is barred by this Court's prior rulings, and (3) the other safeguards against racial bias in this case were sufficient to ensure Petitioner's right to a fair trial was realized.[1] (Doc. 76.) Because *Peña-Rodriguez* does not grant Petitioner the right to investigate potential juror bias in the absence of a reason to believe his jurors may have been biased against him, there are no extraordinary circumstances warranting relief from the judgment.

A. The Court Has Jurisdiction to Consider Petitioner's Motion.

After a petitioner files an initial § 2255 petition, any subsequent § 2255 petition is barred unless the petitioner complies with the requirements of § 2255(h). *See United States v. Washington*, 653 F.3d 1057, 1059 (9th Cir. 2011) (noting that § 2255(h) requires that a petitioner seeking to file a second or successive petition must first have the circuit court certify that the petition relies on either substantial new evidence or a new, retroactive rule of constitutional law). To avoid these requirements, petitioners sometimes "characterize their pleading as being a motion under rule 60(b)." *Id.*

The Ninth Circuit has issued guidance for determining when a Rule 60(b) motion is an attempt to circumvent the requirements of § 2255(h). "[A] Rule 60(b) motion that attacks 'some defect in the integrity of the federal habeas proceedings' is not a disguised § 2255 motion . . . ." *Washington*, 653 F.3d at 1060 (quoting *Gonzalez*, 545 U.S. at 534). Motions that "seek vindication" of a claim, on the other hand, are "in substance [] successive habeas petition[s] and should be treated accordingly." *See Gonzalez*, 545 U.S.

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[1] Respondent also argues that to the extent *Peña-Rodriguez* has any substantive bearing on Petitioner's case, its holding is not retroactive and thus does not apply to Petitioner. (Doc. 76 at 8–9.) Because the Court agrees with Respondent that *Peña-Rodriguez* does not entitle Petitioner to relief under Rule 60(b)(6), the Court need not address whether *Peña-Rodriguez* applies retroactively. *See Greenawalt v. Ricketts*, 943 F.2d 1020, 1029 (9th Cir. 1991) (declining to opine on retroactivity of *Enmund v. Florida*, 458 U.S. 782, 801 (1982), where the holding in *Enmund* "would not change the outcome of this case").

at 531. Improperly disguised motions may include those that add new grounds for relief, attack the court's previous resolution of a claim on the merits, or supplement evidence in support of a previously litigated claim. *Id.* at 532.

In this motion, Petitioner does not seek to vindicate a substantive claim. He consistently argues that he is seeking only to investigate, as a preliminary matter, whether a substantive claim exists. (Doc. 1 at 4–8; Doc. 71 at 6–9.) Only if he discovered evidence of juror bias would he then file a substantive claim. (Doc. 79 at 3–4.) His motion does not raise substantive claims he previously litigated, and is validly before this Court.

B. Petitioner Is Not Entitled to Relief Under Rule 60(b)(6).

Petitioner alleges that the holding in *Peña-Rodriguez* establishes that this Court's order denying his request to contact jurors violated his Sixth Amendment rights, giving rise to an "extraordinary circumstance" entitling him to relief under Rule 60(b)(6). Respondent, relying primarily on the law-of-the-case doctrine, counters that Petitioner remains bound by this Court's prior rulings and may not re-litigate whether he is entitled to interview jurors.

The law-of-the-case doctrine generally precludes courts "from reconsidering an issue that has already been decided by the same court in the identical case." *Sechrest v. Ignacio*, 549 F.3d 789, 802 (9th Cir. 2008). Although the doctrine generally is discretionary, *United States v. Lewis*, 611 F.3d 1172, 1179 (9th Cir. 2010), it mandates that courts follow a prior decision "unless (1) the decision is clearly erroneous and its enforcement would work a manifest injustice; (2) intervening controlling authority makes reconsideration appropriate; or (3) substantially different evidence was adduced at a subsequent trial." *Alaimalo v. United States*, 645 F.3d 1042, 1049 (9th Cir. 2011).

Petitioner argues, first, that the law of the case doctrine does not apply when a party seeks relief under Rule 60(b). (Doc. 79 at 2.) Petitioner fails to cite authority supporting this proposition, and the Court has found none. *Cf., e.g., Agostini v. Felton*, 521 U.S. 203, 236 (1997) (analyzing the law of the case doctrine when presented with a

Rule 60(b)(5) request for relief and concluding that following the Court's prior judgment would meet the "manifest injustice" exception to the doctrine). In the alternative, Petitioner argues that *Peña-Rodriguez* is "an intervening change in the law' that justifies departing from the law-of-the-case doctrine." (*Id.*) As explained below, however, because Petitioner is no more entitled to interview jurors now than he was prior to *Peña-Rodriguez*, that case does not entitle him to relief.

Petitioner describes *Peña-Rodriguez* as a broad decision recognizing a right under the Sixth Amendment to conduct investigations into juror bias in criminal cases. (*See* Doc. 71 at 9.) He argues that *Peña-Rodriguez* supersedes this Court's Local Rule 39.2, which places specific limits on juror contacts. (*Id.* at 8.) But Petitioner's interpretation is overbroad. *Peña-Rodriguez* does not override Local Rule 39.2.

Local Rule 39.2 provides:

> Interviews with jurors after trial by or on behalf of parties involved in the trial are prohibited except on condition that the attorney or party involved desiring such an interview file with the Court written interrogatories proposed to be submitted to the juror(s), together with an affidavit setting forth the reasons for such proposed interrogatories, within the time granted for a motion for a new trial. ***Approval for the interview of jurors in accordance with the interrogatories and affidavit so filed will be granted only upon the showing of good cause***. See Federal Rules of Evidence, Rule 606(b). Following the interview, a second affidavit must be filed indicating the scope and results of the interviews with jurors and setting out the answers given to the interrogatories.

Id. (emphasis added); *see also* Fed. R. Evid. 606(b).

Local Rule 39.2 and Federal Rule of Evidence 606(b) implement what is known as the federal "no-impeachment" rule. That rule bars litigants from using jurors' statements to attack the validity of a verdict. *See Smith v. City & Cty. of Honolulu*, 887 F.3d 944, 954 (9th Cir. 2018) (citing Fed. R. Evid. 606(b)). The rule "evolved to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered,

it will not later be called into question based on the comments or conclusions they expressed during deliberations." *Peña-Rodriguez*, 137 S. Ct. at 860.

In *Peña-Rodriguez*, the Supreme Court created a narrow exception to the no-impeachment rule. The Court 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 . . . the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Id.* at 869. The Court's decision addresses only what a court must do when presented with evidence of racial bias; it does not address how or when a criminal defendant may seek to obtain evidence of racial bias. Indeed, the Court specifically noted that the methods of investigating potential racial animus remain governed by local rules. *See Peña-Rodriguez*, 137 S. Ct. at 869 ("The practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors.").

Petitioner acknowledges that *Peña-Rodriguez* allows courts to limit access to jurors through local rules, but argues that Local Rule 39.2 effectively *prohibits* access to jurors after trial. (Doc. 79 at 6.) Not so. Rule 32.9 imposes a "good cause" threshold, which requires only a "preliminary showing" of juror misconduct. *See Wilkerson v. Amco Corp.*, 703 F.2d 184, 185–86 (5th Cir. 1983) ("We continue to decline to 'denigrate jury trials by afterwards ransacking the jurors in search of some ground . . . for a new trial' unless a preliminary showing is made."); *Sullivan v. Fogg*, 613 F.2d 465, 467 (2d Cir. 1980) ("Once a preliminary showing of incompetence or juror misconduct has been made there is a corresponding right to an inquiry into the relevant surrounding circumstances."). The good cause threshold does not prohibit all inquiries into potential racial bias—it prohibits all baseless or speculative inquiries into potential racial bias.

Rule 39.2 reflects the fact that courts do not presume racial bias. *See United States v. Anekwu*, 695 F.3d 967, 978 (9th Cir. 2012) ("[T]here is no constitutional presumption of juror bias for or against members of any particular racial or ethnic

groups." (quoting *Rosales–Lopez v. United States*, 451 U.S. 182, 190 (1981))). Instead, courts evaluate the need to investigate juror bias on a case by case basis. Trial courts may determine whether a hearing on potential juror bias is necessary by first considering "the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source." *See Tracey v. Palmateer*, 341 F.3d 1037, 1044 (9th Cir.), *cert. denied*, 543 U.S. 864 (2003).

Petitioner has not alleged any reason to believe that any of the jurors in his case were biased against him due to his race. Absent a preliminary showing of bias, Rule 39.2 prohibits the fishing expedition Petitioner requests, and the Court's holding in *Peña-Rodriguez* does not alter that result. Petitioner is no more entitled to interview jurors now than he was when he made his initial request. (Doc. 1.) Thus, he was not deprived of an adequate investigation prior to filing his § 2255 motion in this Court, and he has not established that "extraordinary circumstances" warrant relief from this Court's judgment under Rule 60(b)(6).

Finally, to the extent the parties dispute whether other safeguards, such as voir dire and the in-court observation of jurors during trial, adequately protected Petitioner's conviction from the influence of racial bias (Docs. 76 at 12–14; 79 at 4–5), the Court agrees with Respondent that those safeguards weigh against finding the "extraordinary circumstances" that warrant reopening Petitioner's case.

Finally, Petitioner is not entitled to a certificate of appealability because he has not demonstrated that jurists of reason would find it debatable whether the Court abused its discretion in denying Petitioner's motion or that jurists of reason would find it debatable whether Petitioner's underlying § 2255 motion states a valid claim for denial of a constitutional right. *See United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015).

IT IS ORDERED denying Petitioner's Notice of Motion and Motion of Relief from Judgment Pursuant to Federal Rule of Civil Procedure Rule 60(b)(6) (Doc. 71).

IT IS FURTHER ORDERED that no certificate of appealability shall be issued.

Dated this 17th day of September, 2018.

David G. Campbell
Senior United States District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Lezmond Mitchell, Petitioner, vs. United States of America, Respondent.	No. CV-09-8089-PCT-MHM DEATH PENALTY CASE **ORDER**

Petitioner seeks authorization to interview jurors, moves for a protective order for privileged materials, and requests that a number of exhibits lodged in support of his § 2255 petition be filed under seal. (Dkts. 1, 13, 16.) He has also filed an *ex parte* motion to modify the scheduling order entered by the Court to provide for the filing of an amended petition. (Dkt. 20). The Court addresses these motions in turn.

Motion to Interview Jurors

Petitioner requests authorization to interview the jurors in his case to ascertain whether any member of the panel engaged in improper *ex parte* contacts, considered extrajudicial evidence, allowed bias or prejudice to cloud their judgment, or intentionally concealed or failed to disclose material information concerning his or her qualifications to serve as a juror. (Dkt. 1 at 2.)

"District courts have 'wide discretion' to restrict contact with jurors to protect jurors from 'fishing expeditions' by losing attorneys." *United States v. Wright*, 506 F.3d 1293,

1303 (10th Cir. 2007) (quoting *Journal Pub. Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986)). Rule 39.2 of the District of Arizona's Local Rules Civil, made applicable to criminal cases by Local Rule Criminal 24.2, provides as follows:

> Interviews with jurors after trial by or on behalf of parties involved in the trial are prohibited except on condition that the attorney or party involved desiring such an interview file with the Court written interrogatories proposed to be submitted to the juror(s), together with an affidavit setting forth the reasons for such proposed interrogatories, within the time granted for a motion for a new trial. Approval for the interview of jurors in accordance with the interrogatories and affidavit so filed will be granted only upon the showing of good cause. See Federal Rules of Evidence, Rule 606(b).

LRCiv 39.2(b). The rationale for this rule comes from Federal Rule of Evidence 606(b), which states that

> 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 assent to or dissent from the verdict or indictment concerning the juror's mental processes in connection therewith.

Strong policy considerations underlie this limitation on juror testimony. *See McDonald v. Pless*, 238 U.S. 264, 267-68 (1915) (noting that public investigation of juror deliberations would lead to "the destruction of all frankness and freedom of discussion and conference"); *Tanner v. United States*, 483 U.S. 107, 120-21 (1987) ("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."). Consequently, juror testimony is permissible only in limited circumstances to show that (1) extraneous prejudicial information was improperly brought to the jury's attention, (2) an outside influence was improperly brought to bear upon any juror, or (3) there was a mistake in the verdict form. Fed. R. Evid. 606(b).

In their opposition to Petitioner's motion, Respondents correctly note that Petitioner has not attempted to comply with this Court's local rule pertaining to juror interviews. (Dkt. 18 at 11.) He did not proffer proposed interrogatories or an affidavit and did not submit the instant request within the prescribed time limit. These failures are grounds for denial. Even if the Court overlooks the motion's procedural deficiencies, Petitioner has failed to establish

good cause.

Duty Under ABA Guidelines

Petitioner argues that good cause is established simply because counsel has an obligation under the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases to conduct a reasonable and diligent investigation, which includes interviewing jurors to uncover claims of possible jury misconduct. (Dkt. 1 at 4-7.) Petitioner cites no authority to support his contention that an exception to the strong policy against post-verdict juror investigation exists solely for capital cases, and the Court declines to so find. Petitioner must, at a minimum, make a preliminary showing of juror misconduct to establish good cause to conduct juror interviews. *See United States v. Stacey*, 475 F.2d 1119, 1121 & n.1 (9th Cir. 1973); *Smith v. Cupp*, 457 F.2d 1098, 1100 (9th Cir. 1972).

Alleged Prosecutorial Misconduct

Petitioner asserts as good cause a statement by the prosecution during closing arguments that suggested Petitioner had "turned his back on his religious and cultural heritage." *United States v. Mitchell*, 502 F.3d 931, 994-95 (9th Cir. 2007). Petitioner asserts that the Ninth Circuit found this comment to be inappropriate but nonetheless denied relief because Petitioner had failed to meet his burden of showing that the prosecutor's comments tainted the verdict. (Dkt. 1 at 9-10.) Petitioner therefore seeks the "opportunity" to meet this burden by interviewing the jurors "to see whether Mitchell's Navajo beliefs, or the allegation that the crime violated his Navajo beliefs, played any part in his death sentence." (*Id.* at 10.) The Court rejects this argument on several grounds.

First, the inquiry Petitioner proposes clearly concerns the subjective effect of the prosecutor's statements on the jury's sentencing deliberation and is thus plainly prohibited by Rule 606(b). Petitioner's reliance on *United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001), to argue otherwise is misplaced. In *Henley*, the court determined that Rule 606(b) did not prohibit examination of a juror's racial bias because such bias "is unrelated to any specific issue that a juror in a criminal case may legitimately be called upon to determine."

Id. However, in that case, a juror made racist statements "*before* deliberations began and *outside* the jury room." *Id.* (emphasis in original). Here, the statements at issue were made by the prosecutor during closing arguments. Such statements are clearly not "outside" or "extraneous" influences that can be used to impeach the jury's verdict under Rule 606(b). *See United States v. Bussell*, 414 F.3d 1048, 1055 (9th Cir. 2005) (finding court's jury instruction raising speculation among jurors not extraneous because "[i]t did not enter the room through an external, prohibited route, but rather was part of the trial") (internal quotation omitted); *United States v. Rodriquez*, 116 F.3d 1225, 1227 (8th Cir. 1997) (finding fact defendant did not testify as part of trial, "not a fact jurors learned through outside contact, communication, or publicity").

Moreover, contrary to Petitioner's assertion, the Ninth Circuit did not find the prosecutor's comments during closing argument concerning Petitioner's religious and cultural heritage to be improper. The court noted that while the prosecutor "at least indirectly" alluded to religion, it was in the same sense as a letter from the Navajo Nation proffered by the defense as mitigation that described Navajo values and the Nation's lack of support for capital punishment. *Mitchell*, 502 F.3d at 995. Because Petitioner had relied on this letter in mitigation, "it was not plainly erroneous for the government to challenge the credibility of Mitchell's reliance." *Id.*

Publicity

Petitioner asserts as good cause the bare fact that his case was publicized in the newspaper. He postulates that because some articles were "highly prejudicial," jurors must be questioned to determine whether any of the articles "were improperly brought to the jury's attention." (Dkt. 1 at 11.) Petitioner has not demonstrated any factual basis to support his claim that jurors may have been exposed to prejudicial newspaper articles in the jury room. Rather, he states summarily that there is a "strong likelihood" jurors sought out or were exposed to publicity despite acknowledging that during voir dire most of the jurors stated they had read nothing about the case. (Dkt. 19 at 4.) In addition, Petitioner states there were "many articles" but fails to provide citation to the articles to assist the Court in determining

where and when these articles were published. Nor has Petitioner provided any copies of the articles to support this request. It appears to the Court that this is nothing more than a fishing expedition and not an appropriate ground for post-verdict juror interviews.

Alleged Juror Misconduct

Petitioner contends that he has good cause based on "at least two acts of potential juror misconduct that occurred during the guilt phase portion of the case." (Dkt. 1 at 11.) The first involved an unsigned juror note during trial asking, "Are we allowed to consult detailed maps of this location to familiarize ourself [sic] with the aspects of this case?" (RT 4/30/03 at 2769.) With counsel's acquiescence, at the conclusion of evidence that day, the Court reiterated to the jury the "admonition not to do any research, to consult dictionaries, or other reference materials, including maps or to use the Internet to answer any questions you might have concerning this case." (*Id.* at 2907.) The Court further reminded the jury that the case had to be decided solely on the evidence admitted during trial. (*Id.* at 2908.) Based only on the juror's note, Petitioner speculates that one or more jurors may have improperly consulted outside sources. (Dkt. 1 at 11.)

The second alleged instance of misconduct involved a note from an alternate juror who relayed during trial that he had been in an elevator with three men who mentioned Petitioner's case. (RT 4/30/03 at 2770.) In response to questioning by the Court, the juror stated that none of the individuals were in the courtroom and that the only thing he heard was the name of the case. (*Id.* at 2909.) He then remarked, "Yeah, that's all that was said. I was kind of glad because I didn't want to say anything about it either." (*Id.*) From this remark, Petitioner hypothesizes that the juror was "inclined" to discuss the case had the men spoken further; therefore, he must be interviewed "to ensure that no such indiscretions took place." (Dkt. 1 at 12.)

Petitioner's arguments are based on wholesale speculation and fail to establish good cause. With regard to the alternate juror, the Court twice affirmed that the only thing he heard was the name of the case. The juror responded, "Yes, ma'am. I just wanted to report it because I thought I was supposed to." (*Id.*) The Court finds neither alleged instance of

"misconduct" sufficient to overcome the strong policy against post-verdict juror interviews.

Conclusion

Petitioner has failed to comply with the requirements of Local Rule Civil 39.2. Moreover, he has not established good cause to substantiate his request to interview jurors. Therefore, this motion is denied.

Motion for Protective Order and to Seal Exhibits

Petitioner has appended numerous exhibits to his § 2255 motion. Three are items from trial counsel's file offered in support of claims alleging ineffective assistance of counsel: Exhibit 92 is an internal memo to defense counsel from their mitigation specialist; Exhibit 93 is a comprehensive social history of Petitioner prepared by the mitigation specialist; and Exhibit 94 is a psychiatric report of Petitioner prepared prior to trial. Because these items constitute privileged attorney-work product, Petitioner requests that the Court enter a protective order limiting their use to the instant habeas proceeding, pursuant to *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir. 2003). (Dkt. 13.) Petitioner further requests that these documents, and any future privileged materials revealed through discovery, be maintained under seal "to ensure compliance" with the Court's protective order. (Dkt. 16 at 1.) Respondent concedes that issuance of a protective order is appropriate, but requests that the protective order be styled after that approved in *Bittaker* in lieu of Petitioner's proposed language. (Dkt. 18 at 12.) Respondent opposes the motion to seal, stating that it is not in possession of the relevant exhibits and that Petitioner has failed to demonstrate harm from public dissemination of the information contained therein. (*Id.* at 12-13.)

In *Bittaker*, the court held that the scope of a prisoner's waiver of the attorney-client privilege arising from a claim of ineffective assistance of counsel is limited to the extent necessary to litigate the claim in postconviction proceedings. 331 F.3d at 721-27. Here, Petitioner has raised numerous ineffectiveness claims and has proffered privileged attorney-client work product in support. (Dkt. 9.) Thus, he is entitled to an order of protection to ensure that his limited waiver is not extended to any future proceedings that may become necessary should he prevail on his § 2255 petition. *Bittaker*, 331 F.3d at 722-26. However,

Petitioner's proffered protective order goes further than the Court finds is necessary to carry out the mandate of *Bittaker*. Specifically, Petitioner seeks a blanket order mandating that all privileged attorney-client work product and communications proffered to the court or disclosed to opposing counsel during these proceedings be automatically maintained under seal. He argues that sealing privileged materials is "the only way to ensure compliance" with the limitations imposed by the Court through its protective order. (Dkt. 16 at 1.) The Court disagrees.

It is well settled that the public has a common law right of access to judicial documents. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978); *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1102 (9th Cir. 1999). However, this right is not absolute. A party seeking closure can overcome the presumption of access by showing "sufficiently compelling reasons for doing so." *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). This standard has been described as a "balancing test," *San Jose Mercury News, Inc.*, 187 F.3d at 1102, in which the court must weigh such factors as the "public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets." *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995) (citing *E.E.O.C. v. Erection Co.*, 900 F.2d 168, 170 (9th Cir. 1990)).

Although the Court agrees that a protective order limiting future use of attorney-client materials is necessary, it declines to allow blanket sealing of such materials without consideration of the public's right of access. In this case, Petitioner has proffered privileged materials as exhibits to his motion for relief from judgment. When discovery materials are attached to a motion seeking action by the court, they become subject to the presumption of access. *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252 (4th Cir. 1988) (holding that even documents specifically covered by a protective order during discovery must be unsealed, absent an overriding interest, when attached to a dispositive motion). Thus, the Court must balance competing interests to determine if the public right of access has been overcome before it will allow Petitioner's exhibits to be filed under seal. Because Petitioner

did not specifically address the public's right of access in his motion to seal, the Court will deny the motion without prejudice to refiling. In his renewed motion, Petitioner shall expressly address the prejudice he could suffer should the exhibits, in whole or in part, be filed in the public record. Furthermore, in light of the protective order issued this same date, Petitioner shall also provide unredacted copies of the exhibits to Respondent so that Respondent may file an informed response to Petitioner's renewed motion to seal.

Motion to File Amended Petition

Petitioner has filed an *ex parte* motion to vacate the impending due date for Respondent's answer to Petitioner's § 2255 motion and for leave to file an amended petition no later than November 18, 2009, or 90 days after this Court rules on his motion for authorization to interview jurors. (Dkt. 20 at 1.) The impetus behind Petitioner's motion is the one-year statute of limitations for seeking relief from judgment imposed on federal criminal defendants by 28 U.S.C. § 2255(f). In essence, he is asserting that one year was an insufficient period of time to complete his investigation and prepare his application. He also suggests that the filing of an amended petition is necessary because the Court has yet to rule on his motion to interview jurors. Therefore, he seeks to postpone the filing of the Government's response, presently due on September 28, 2009, and requests leave to file an amended petition. The Court is unpersuaded.

Counsel was appointed to represent Petitioner on April 25, 2008, more than thirteen months prior to expiration of Petitioner's limitations period. However, counsel did not move for permission to interview jurors until May 22, 2009, less than three weeks before the statute of limitations expired. On June 8, 2009, Petitioner filed a substantial 215-page petition to vacate judgment. (Dkt. 9.) On June 29, the Court directed Respondent to file an answer to the petition and to respond to the instant motions for juror interviews and a protective order (Dkt. 17). The Court finds no good cause for the delay in seeking permission to file an amended petition. Even were the request timely, the Court is disinclined to rule in an advisory fashion on a request to amend.

Pursuant to Local Rule Civil 15.1(a), "A party who moves for leave to amend a

pleading must attach a copy of the proposed amended pleading as an exhibit to the motion, which shall indicate in what respect it differs from the pleading which it amends, by bracketing or striking through the text to be deleted and underlining the text to be added." Petitioner has not proffered a proposed amendment and granting permission prospectively to file an amended petition past expiration of § 2255's limitations period is tantamount to an advisory ruling that such amendment is proper. The Court cannot make a determination as to whether amendment is appropriate unless and until Petitioner actually proffers an amended pleading. Consequently, Petitioner's motion to amend the Court's scheduling order and for time to file an amended petition is denied.

On a separate note, the Court observes that Petitioner titled the instant motion an "ex parte" request. It is unclear to the Court why Petitioner would proffer such a motion on an *ex parte* basis. In a declaration attached to the motion, Petitioner's counsel states that she emailed a copy of the motion to Respondent's counsel, who replied by email that he would oppose such a motion. (*Id.* at 6.) To the extent Petitioner seeks permission to proceed on this motion *ex parte*, that request is denied. The Court does not favor *ex parte* applications except when specifically authorized by law. *See, e.g.*, 18 U.S.C. § 3599(f) (providing for *ex parte* consideration of investigative and expert funding requests if need for confidentiality is demonstrated). Therefore, the Court will direct the Clerk of Court to docket Petitioner's motion as an ordinary filing. Because the Court has deemed it most expeditious to rule on Petitioner's motion forthwith, Respondent is relieved from Local Rule Civil 7.2(c) from filing a responsive memorandum.

Based on the foregoing,

IT IS HEREBY ORDERED that Petitioner's Motion for Authorization to Interview Jurors in Support of Motion to Vacate, Set Aside, or Correct the Sentence (Dkt. 1) is **DENIED**.

IT IS FURTHER ORDERED that Petitioner's Motion for Protective Order (Dkt. 13) is **GRANTED**. Pursuant to *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir. 2003), all information that is privileged under the attorney-work product doctrine and is attorney-client

communication produced or presented in this action may be used only by the parties, members of their legal teams (i.e., lawyers, paralegals, investigators, support staff), and all persons retained by the parties (i.e., outside investigators, consultants, expert witnesses) only for the purpose of litigating Petitioner's claims under 28 U.S.C. § 2255. Neither party shall disclose these materials or the content of these materials to any other persons or agencies without prior Court order. This order shall continue in effect after the conclusion of the proceedings in *Mitchell v. United States*, and specifically shall apply in the event of any retrial of all or any portion of Petitioner's criminal case or in any clemency proceeding. Any modification or vacation of this order shall only be made upon notice to, and an opportunity to be heard from, both parties.

IT IS FURTHER ORDERED that Petitioner's *Ex Parte* Application to File Under Seal Exhibits 92, 93, and 94 (Dkt. 16) is **DENIED WITHOUT PREJUDICE**. Pursuant to the discussion herein, Petitioner shall file a renewed motion to seal no later than **ten (10) days** after the filing of this Order.

IT IS FURTHER ORDERED that the Clerk of Court shall file Petitioner's Ex Parte Application for Schedule to File Amended § 2255 Motion (Dkt. 20) as an ordinary filing on the public docket.

IT IS FURTHER ORDERED that Petitioner's Ex Parte Application for Schedule to File Amended § 2255 Motion (Dkt. 20) is **DENIED**.

DATED this 1st day of September, 2009.

Mary H. Murguia
United States District Judge

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THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Lezmond Charles Mitchell, Defendant/Movant, v. United States of America, Plaintiff/Respondent.	Civil No. 3:09-CV-08089-DGC (Criminal No. 3:01-CR-01062-NVW-1) **DEATH PENALTY CASE** Honorable David G. Campbell United States District Judge **REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE RULE 60(b)(6)** **Oral Argument Requested**

MEMORANDUM OF POINTS AND AUTHORITIES

A. The Law of the Case Doctrine Does Not Bar Relief

The Government argues that law-of-the-case doctrine bars the Court from granting Mitchell's Rule 60 motion. Because Rule 60 allows for post-judgment relief from judgment or orders, however, the Government's logic would dictate that no Rule 60 motion could be granted absent a law-of-the-case analysis, which is belied by Supreme Court precedent. *Christeson v. Roper*, 135 S. Ct. 891, 895-96 (2015) (stating that a petitioner must establish only timeliness and extraordinary circumstances to avail himself of relief under Rule 60). Assuming arguendo that the Government is correct, however, Mitchell has already cited to *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), which constitutes "an intervening change in the law" that justifies departing from the law-of-the-case doctrine. *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 281 (9th Cir. 1996). Moreover, Mitchell established in his motion the injustice of depriving him of an opportunity to interview the jurors, Motion at 4-7, which also warrants a departure from the law-of-the-case doctrine. *Id*. at 281.

B. The Underlying Issues Are Not Procedurally Barred

The Government argues that because Mitchell raised the Court's denial of his request for juror interviews on "direct appeal," Mitchell is barred from raising the issue in a habeas proceeding. Opposition at 6:14-16. Separately, the Government asserts that Mitchell first sought authorization for juror interviews during his section 2255 proceedings, after his direct appeal was denied. Opposition at 3:7-11. The former is incorrect. The parties agree that Mitchell first sought approval for juror interviews in 2009, dkt. no. 1, his direct appeal proceedings ended when the Supreme Court denied his petition for writ of certiorari on June 9, 2008. *Mitchell v. United States*, 553 U.S. 1094 (2008). When he appealed the District Court's denial of his section 2255 motion, Mitchell included the District Court's denial of his request for juror interviews in his appeal. However, an appeal of his section 2255 motion and a "direct appeal" are two separate proceedings. *Wall v. Kholi*, 562 U.S. 545, 553 (2011) ("'collateral review' of

a judgment or claim means a judicial reexamination of a judgment or claim in a proceeding *outside of the direct review process*.") (emphasis added).

It appears this argument may simply be an oversight by the Government as the Government makes reference to Mitchell's "direct appeal" but then cites to the collateral proceedings. *See* Opposition at 6:4-7. Regardless, the procedural rule that the Government advances – namely, if an issue is raised on direct appeal, the defendant is barred from raising the same issue in a habeas proceeding – is obviously not applicable here because the juror interviews were not raised on direct review.

C. Mitchell's Motion Is Not a Second or Successive 2255 Motion

In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the Supreme Court held that Federal Rule of Civil Procedure, Rule 60 is applicable to habeas corpus proceedings, but cautioned that courts should be wary of second or successive habeas petitions disguised as Rule 60 motions. The Court explained that a Rule 60(b) motion "that seeks to revisit the federal court's denial *on the merits* of a claim for relief should be treated as a successive habeas petition." *Id*. at 534 (emphasis added). But where the motion "confines itself not only to the first federal habeas petition, but to a nonmerits aspect of the first federal habeas proceeding," that motion is not a second or successive petition; rather, it is a valid exercise of Rule 60(b). *Id.* Indeed, a motion that "challenges only the District Court's failure to reach the merits does not warrant such treatment, and can therefore be ruled upon by the District Court without precertification by the Court of Appeals pursuant to § 2244(b)(3)." *Id.* at 538.

Here, Mitchell's motion raises a single issue: the Court's rejection of his request to interview his trial jurors. The parties agree that this is a procedural ruling. Opposition at 8:2-4.

Although acknowledging that Mitchell is not currently presenting a new claim in his motion or seeking to revisit a claim already denied on its merits, the Government argues that Mitchell's motion is a second or successive motion. Opposition at 8. The Government's theory is that if Mitchell's discovery request is granted, and in discovery

he finds evidence that may form the basis for a claim not currently included in his section 2255 motion, then that new claim would constitute a second or successive motion. *Id*. at 8:12-19. The Government offers no authority for this theory, and its citations to *Gonzalez* do not support this principle. Moreover, whether granting Mitchell's Rule 60(b) motion ultimately leads to an opportunity for Mitchell to amend his petition with a new claim is not part of the analysis at this stage. In fact, in *Gonzalez*, 545 U.S. 524 (2005), the Supreme Court found that challenging a timeliness denial via a Rule 60(b) motion was a proper function of a Rule 60(b) motion. If Gonzalez's motion was granted, it would obviously have allowed him to litigate his underlying substantive claims for relief and if, in the ordinary course of proceedings, discovery was granted, Gonzalez may indeed have amended his petition with new claims. Thus, whether litigation on this procedural issue ultimately allows Mitchell to re-open his habeas proceedings is not a question to be considered by this court, nor does it provide justification to deny this motion. Additionally, Mitchell raised several claims related to his jury in his section 2255 motion, and claimed in his amended section 2255 motion that the jury was not impartial. *See* Dkt. No. 30 at Claim M. Depending on what evidence is ultimately discovered, Mitchell may not need to amend his petition to add new claims.

D. *Peña-Rodriguez* Establishes that the Existing Safeguards Against Racial Bias are Lacking

The Government argues that trial measures such as *voir dire* guard against racial prejudice. Opposition at 12-14. Of course, if those safeguards were effective, then cases like *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), where a juror espouses racist views during deliberations, would not exist. Moreover, and more specifically, Mitchell has raised several claims about the *voir dire* process in his case. Dkt. No. 30 at Claim H, I, J, L, M. It may be true, as a general matter, that *voir dire* helps to safeguard against racial prejudice. However, as cases like *Peña-Rodriguez*

demonstrate, the fact is that racist individuals exist and they end up on juries, and Mitchell should be permitted to investigate this issue.

E. Local Rule 39.2 is Inconsistent with *Peña-Rodriguez*

The District of Arizona's local rules have placed Mitchell in a catch-22: to establish racial bias, he must investigate; to be permitted to investigate, he must establish racial bias. Indeed, the Government endorses this catch-22, arguing that Mitchell "must make a preliminary showing of misconduct to establish good cause to conduct juror interviews." Opposition at 12:13-14.

In support of its position, the Government contends that the "Ninth Circuit disfavors post-verdict interrogation of jurors and has consistently disallowed such interrogation…." Opposition at 12:10-12. In support of this theory, the Government cites to *Smith v. Cupp*, 457 F.2d 1098, 1100 (9th Cir. 1972) which does not state a general proposition adverse to juror interviews, but simply holds, pre- *Peña-Rodriguez*, that there is no federal constitutional right to interview jurors. The Government also cites to *Northern Pacific Railway Co. v. Mely*, 219 F.2d 199, 202 (9th Cir. 1954), which also does not state a general proposition against juror interviews. Instead, it simply holds that it is inappropriate to inquire into the course of jury deliberations, as prohibited by Federal Rule of Evidence 606(b), but says nothing about inquiring into juror misconduct or evidence that is not barred by Rule 606(b). The additional cites offered by the Government do no more than to establish that evidence barred by 606(b) is not admissible. *United States v. Stacey*, 475 F.2d 1119, 1121 (9th Cir. 1973) ("After a verdict is returned a juror will not be heard to impeach the verdict when his testimony concerns his misunderstanding of the court's instructions. This rule does not violate a defendant's constitutional rights." (internal citation omitted)).

In actuality, the Ninth Circuit has considered the fruits of juror interviews when the subject matter is admissible under Rule 606(b). *See, e.g., Godoy v. Spearman*, 861 F.3d 956 (9th Cir. 2017) (en banc) (remanding for an evidentiary hearing in reliance on an alternate juror's declaration concerning juror's communication with outside source);

Estrada v. Scribner, 512 F.3d 1227 (9th Cir. 2008) (finding juror declarations admissible where they detailed improper discussions and extraneous evidence); *United States v. Maree*, 934 F.2d 196 (9th Cir. 1991) (juror's declaration was admissible where it detailed outside influence exerted on the jury) *overruled on other grounds by United States v. Adams*, 432 F.3d 1092 (9th Cir. 2006). Mitchell's request to interview jurors is consistent with Ninth Circuit precedent as Mitchell seeks to interview the jurors for evidence that is not rendered inadmissible by Rule 606(b).

Both Mitchell and the Government cite to the Supreme Court's language in *Peña-Rodriguez v. Colorado*, where the Court states "[t]he practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors." 137 S. Ct. at 859-60; Opposition at 11:16-18; Motion at 6:8-11. Yet the Government does not respond to the fact that Local Criminal Rule 39.2, requiring good cause as a prerequisite to juror interviews, is far more limiting than almost any rule on this topic in the entire Ninth Circuit. Indeed, Local Criminal Rule 39.2 does not set forth "practical mechanics" guiding counsel's post-trial contact with jurors; rather, it constitutes an all-out ban on counsel's ability to investigate the possibility of juror misconduct. The Government's only response is that because the jurors did not approach Mitchell's counsel of their own accord, and Mitchell could not otherwise find evidence of juror misconduct, Opposition at 11-12, Mitchell must live with the possibility of unrealized juror misconduct.

The Government's arguments do not comport with *Peña-Rodriguez*. Federal Rule of Evidence 606(b) prohibits jurors from testifying about the substance of their deliberations. In *Peña-Rodriguez*, however, the Supreme Court held that the Sixth Amendment required that Rule 606(b), and its state equivalent, cannot bar evidence of racial animus. 137 S. Ct. 855 (2017). Allowing a petitioner to advance evidence of a juror's racial bias is inconsistent with barring a petitioner from investigating racial bias amongst jurors. Indeed, the Supreme Court discusses at length rules that "limit"

attorneys contact with jurors and provide the jurors "some protection" when their juror obligations are complete. *Id*. at 869. Rules like Rule 39.2 that go beyond *limiting* contact and instead create total bans on juror interviews, render the rights articulated in *Peña-Rodriguez* meaningless.

Constitutional rights implicitly protect those closely related acts necessary to their exercise. *Luis v. United States*, 136 S. Ct. 1083, 1097 (2016) (Thomas, J. dissenting). Inevitably, "[t]here comes a point ... at which the regulation of action intimately and unavoidably connected with [a right] is a regulation of [the right] itself." *Hill v. Colorado*, 530 U.S. 703, 745 (2000) (Scalia, J., dissenting). The Supreme Court has applied this principle in a number of cases. For example, because criminal defendants have a right to an initial appeal, the Court has determined that defendants must also have the right to counsel for that appeal, or else the appellate right is diminished. *Douglas v. California*, 372 U.S. 353 (1963). And later, continuing this trend, the Court held that if defendants on appeal have a right to counsel, then that right must encompass the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). The same logic applies here: If criminal defendants have the constitutional right to present evidence of juror bias, then they must be given the tools to investigate that evidence, and Local Rule 24.1 bars the ability to do so.

This past term, the Supreme Court emphasized that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Buck*, 137 S. Ct. at 778 (quoting *Rose v. Mitchell,* 443 U.S. 545, 555 (1979)); *Peña-Rodriguez*, 137 S. Ct. at 868 (same). The *Buck* court continued that:

> Relying on race to impose a criminal sanction "poisons public confidence" in the judicial process. *Davis v. Ayala,* 135 S. Ct. 2187, 2208 (2015). It thus injures not just the defendant, but "the law as an institution, … the community at large, and ... the democratic ideal reflected in the processes of our courts." *Rose,* 443 U.S. at 556 (internal quotation marks omitted).

> Such concerns are precisely among those we have identified as supporting relief under Rule 60(b)(6).

137 S. Ct. at 778.

Those same concerns are at issue here. Mitchell has already highlighted the racial issues at play in his case and in death-penalty prosecutions at large. Motion at 5-6. These issues warrant relief under Rule 60(b).

CONCLUSION

For all of the foregoing reasons, Mitchell respectfully requests that the Court grant this motion, re-open this case, and allow Mitchell to move for access to the jurors.

Respectfully submitted,

Dated: June 18, 2018

/s/ Jonathan C. Aminoff
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, vs. Lezmond Mitchell, Defendant.	CV-09-08089-DGC **GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR RELIEF FROM JUDGEMENT PURSUANT TO RULE 60(b)(6) FED. R. CIV. P.**

The government respectfully requests the Court to deny the Defendant's Motion based on this Court's prior ruling that since the defendant's original Motion To Interview Jurors was raised in a post-trial setting there was "not a cognizable claim for relief under § 2255." *Mitchell v. United States*, No. CV-09-8089-PCT-MHM, 2010 WL 3895691, *42 (D. Ariz. Sept. 30, 2010). The Ninth Circuit affirmed the decision. *Mitchell v. United States* 790 F.3d 881, 894 (9th Cir. 2015).

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Alternatively, the Rule 60 (b)(6) Motion is a disguised § 2255 Petition which would require a COA. Finally, *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017) is not retroactive, nor does it permit a defendant to interview jurors to determine whether there was juror racial bias without any preliminary evidence. For all of these reasons the Motion should be denied. This request is based on the attached Memorandum.

Respectfully submitted this 21st day of May 2018.

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MEMORANDUM

I. Facts and Procedural History

The defendant was convicted of eleven criminal counts related to the brutal murders of a 63-year old grandmother and her 9-year old granddaughter. Among the counts of conviction was Count 2 - Carjacking Resulting in Death, for which the defendant received the death penalty at the recommendation of the trial jury. The defendant was sentenced on September 15, 2003. The Ninth Circuit later affirmed the conviction and sentenced on September 5, 2007. *United States v. Mitchell* 502 F.3d 931 (9th Cir. 2007). A petition for certiorari was denied June 9, 2008. *Mitchell v. United States*, 553 U.S. 1094 (2008).

Six years after conviction, on May 22, 2009, the defendant filed a Motion for Authorization to Interview Jurors. (CV 09-08089, CR-1.) The Court denied the Motion as untimely, failure to provide requisite affidavits, interrogatories and establish "good cause" to substantiate his request. (CV 09-08089, CR-21; *Mitchell v. United States*, No. CV-09-8089-PCT-MHM, 2010 WL 3895691, *2, *4 (D. Ariz. Sept. 30, 2010)

The defendant amended his original habeas petition in an attempt to again raise his request to interview the jurors. (CV 09-08089, CR- 42-1.) However, this Court ruled that the Motion for Authorization to Interview Jurors had been raised in a post-conviction setting, rather than in a trial/sentencing setting and therefore was not a "cognizable claim for relief under § 2255." *Mitchell v. United States*, No. CV 09-08089, CR-56; 2010 WL 3895691 at *42 (D. AZ. September 30, 2010)

The issue was raised as part of the defendant's appeal of the Court's denial of the habeas petition. The Ninth Circuit, while not specifically addressing this issue, implicitly rejected the argument by affirming the judgment of this Court. *Mitchell v. United States* 790 F.3d 881, 894 (9th Cir. 2015); *Certiorari Denied Mitchell v. United States* 137 S.Ct. 38, U.S., Oct. 3, 2016. The defense failed to raise it again either in his Motion for Rehearing or the Petition for Certiorari.

The defendant has now filed another Motion seeking permission to reopen his Section 2255 litigation in order to interview the jurors citing *Pena-Rodriguez v. Colorado*,

137 S.Ct. 855 (2017).

ARGUMENT

Court's Prior Orders Precludes the Reopening of the Habeas Proceedings.

The defendant seeks to reopen his "Section 2255 litigation to correct the defects in the integrity of the post-conviction proceedings that deprived him of a resolution of his claims on their merits" in order to again seek permission to interview the trial jurors. (CR-71 p. 2.) He is seeking relief pursuant to Fed. R. Civ. P. 60 60(b)(6) that allows a court, in very limited circumstances, to grant relief in habeas cases for "any other reason that justifies relief." However, before the Court can reach the Rule 60(b)(6) issue, there is the question of whether the defense can even request to reopen the habeas proceeding.

In 2009, the defendant sought authorization to interview the trial jurors pursuant to LRCiv 39.2(b) made applicable to criminal cases by Local Rule Criminal 24.2, which provides in part:

> Interviews with jurors after trial by or on behalf of parties involved in the trial are prohibited except on condition that the attorney or party involved desiring such an interview file with the Court written interrogatories proposed to be submitted to the juror(s), together with an affidavit setting forth the reasons for such proposed interrogatories, within the time granted for a motion for a new trial. Approval for the interview of jurors in accordance with the interrogatories and affidavit so filed will be granted only upon the showing of good cause. See Federal Rules of Evidence, Rule 606(b). Following the interview, a second affidavit must be filed indicating the scope and results of the interviews with jurors and setting out the answers given to the interrogatories.

The defendant did not file a motion in compliance with LRCiv 39.2(b) after the verdict was rendered in May 2003. It was not until approximately six years later, on May 22, 2009, that the defendant filed his Motion Seeking Authorization to Interview Jurors. (CV 09-08089, CR-1.)

The Court denied the Motion noting Rule 606(b)'s limitations on juror testimony. Further, it found that not only was the request untimely, but the defendant failed to proffer proposed interrogatories, or an affidavit as required by the Rule. Finally, even overlooking

the procedural failures the Court ruled that the defendant failed to show "good cause." *Mitchell v. United States,* CV-09-08089, 2009 WL 2905958 *2. The Court also rejected the defendant's argument that the good cause was established by the American Bar Association's Guidelines in Death Penalty cases directing habeas counsel to interview jurors post-verdict. It found no support in case law that death cases were entitled to exceptions of the strong policy against such interviews. *Mitchell v. United States,* CV-09-08089, 2009 WL 2905958 *2 (CR-21 p. 3.) The Supreme Court has agreed that the ABA Guidelines are only guidelines. *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009).

In response to that ruling, the defendant amended his original habeas petition to include the Court's denial of the request to interview jurors. (CV-09-08089, CR 42-1.) However, the Court ruled that the Motion for Authorization to Interview Jurors had been raised in a post-conviction setting rather than trial or sentencing and therefore was "not a cognizable claim for relief under § 2255." *Mitchell v. United States*, No. CV 09-08089, CR-56; 2010 WL 3895691 at *42 (D. AZ. September 30, 2010). Under the doctrine of the "law of the case," courts are "generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." *United States v. Alexander*, 106 F.3d 874, 876 ((9th Cir. 1997) (quoting *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993)).

A court may depart from the law of the case and grant reconsideration only where 1) the first decision was clearly erroneous, 2) an intervening change in the law has occurred, 3) the evidence on remand is substantially different, 4) other changed circumstances exist, or 5) a manifest injustice would otherwise result. Failure to apply the doctrine of the law of the case absent one of the requisite conditions constitutes an abuse of discretion. *Id*. at 876. The original decision was not clearly erroneous, there has been no intervening change in the law, as no case has authorized the interviews of jurors without some preliminary showing of an issue; nothing else has changed; and there is no manifest injustice when after 15 years no juror has come forward to allege racial bias. Therefore, the Court's decision that the original request to interview jurors was not timely, failed to demonstrate good cause as well

as its subsequent ruling that the Motion was "not a cognizable claim for relief under § 2255", are the law of case. Therefore, there is no Habeas Proceeding to reopen on the matter of juror interviews.

Furthermore, the defendant raised the denial on direct appeal, (CA-11-99003, CR-23). While the Ninth Circuit's opinion did not include a discussion of the juror interview issue, it implicitly rejected the claim in ruling: "[t]he judgment of the district court is AFFIRMED." *Mitchell v. United States* 790 F.3d 881, 894 (9th Cir. 2015). The defendant failed to raise it any further with the Ninth Circuit in its Motion for Rehearing. (CA-11-99003, CR-74-1) Nor did it bring the issue to the attention of the Supreme Court in its petition for certiorari. (No 15-8725). He also failed to seek a Certificate of Appealability from the Ninth Circuit. Had he been denied a certificate by the Court of Appeals he could have sought a review by the United States Supreme Court via petition for Writ of Certiorari. *Hohn v. United States*, 524 U.S. 236 (1998).

Since he raised this issue on direct appeal, he is also barred from raising it in a habeas proceeding. The Ninth Circuit has long held that "[i]ssues disposed of on a previous direct appeal are not reviewable in a subsequent petition under 2255." *Stein v. U.S.*, 390 F.2d 625, 626 (9th Cir. 1968). "Issues disposed of on a previous direct appeal are not reviewable in a subsequent § 2255 proceeding. The fact that the issue may be stated in different terms is of no significance." *United States v. Currie*, 589 F.2d 993, 995 (9th Cir. 1979); *Mitchell v. United States*, 2012 WL 1768088 *4 (D. Az. May 17, 2012).

Based on the Court's prior rulings and his direct appeal the defendant's request to reopen his § 2255 Habeas proceeding must be denied.

RULE 60(b)(6) and SECOND OR SUCCESSIVE MOTION.

To the extent that the Court disagrees with the argument that the Habeas Proceeding is not directly available based on its prior rulings, the Court must first determine whether this Motion is a legitimate Rule 60(b)(6) motion or a disguised second or successive habeas petition. If it is the latter, the Court lacks jurisdiction to consider the matter. *United States v. Washington*, 653 F.3d 1057, 1065 (9th Cir. 2011).

Federal criminal defendants are generally limited to a single motion under § 2255, and may not bring a "second or successive motion" unless it meets the exacting standards of 28 U.S.C. § 2255(h). Under that provision, a subsequent motion cannot be considered absent certification by the circuit court of appeals that it contains "(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense," or "(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* § 2255(h). To avoid this onerous standard, petitioners sometimes characterize their pleadings as motions under Rule 60(b) of the Federal Rules of Civil Procedure, which "allows a party to seek relief from a final judgment, and request reopening of a case, under a limited set of circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005)[1]; *United States v. Washington*, 653 F.3d 1057, 1059 (9th Cir. 2011). When a Rule 60(b) motion is actually a disguised second or successive § 2255 motion, it must meet the criteria set forth in § 2255(h). *Gonzalez*, 545 U.S. at 528.

The Supreme Court has not adopted a bright-line rule for distinguishing bona fide Rule 60(b) motions from disguised second or subsequent § 2255 motions, instead holding that a Rule 60(b) motion that attacks "some defect in the integrity of the federal habeas proceedings" is not a disguised § 2255 motion but rather "has an unquestionably valid role to play in habeas cases." *Id.* at 532, 534; see also *United States v. Buenrostro*, 638 F.3d 720, 722–23 (9th Cir. 2011) (per curiam). A legitimate Rule 60(b) motion may challenge a district court's procedural ruling, such as a "failure to exhaust, procedural default, or statute-of-limitations bar," that actually "precluded a merits determination." *Gonzalez*, 545 U.S. at 532 n. 4. On the other hand, if the motion presents a "claim," i.e., "an asserted federal basis for relief from a ... judgment of conviction," then it is, in substance, a new request for relief

[1] Although *Gonzalez* dealt with a § 2254 proceeding the Ninth Circuit has held it also applies to § 2255 motions as well. *United States v. Buenrostro*, 638 F.3d 720, 722 (9th Cir. 2011).

on the merits and should be treated as a disguised § 2255 motion. *Id.* at 530.

In this case, Mitchell purports to attack a procedural ruling – the denial of a request to interview jurors – but does so in the service of a claim he never made; that racial bias amongst the jurors prejudiced the verdict against him. (CR-30). Indeed, this Court has already held that Mitchell's complaints about the denial of juror interviews failed to state a claim upon which collateral relief might lie. *Mitchell v. United States*, No. CV-09-8089, CR-56 p. 60.) The Court did so despite Mitchell's complaints that "without any opportunity to communicate with the jurors, it would be impossible for him to identify, much less prove, that an individual juror was biased or that the deliberations were otherwise compromised." (CR-30 at 174.) Therefore, while Mitchell does attack a procedural ruling by this Court, the issue he identifies could not form the basis of relief absent permission by the Ninth Circuit for him to raise the substantive question of juror bias. As such, it appears that he has used Rule 60(b) in an improper attempt to smuggle a substantive issue before the Court, notwithstanding § 2255(h). Stated another way, Mitchell's arguments cannot satisfy Rule 60(b) because they allege a "defect in the integrity of the federal habeas proceedings" that did not impact this Court's adjudication of the merits as presented in the amended motion for relief. Cf. *Gonzalez*, 545 U.S. at 532, 534. Indeed, the defendant states that he is seeking to reopen the Section 2255 litigation to correct defects in those prior proceeding in order to pursue a "resolution of his claims on their merits." (CR 71, p. 2)

Even were the court to conclude that the defendant is entitled to reopen his habeas petition, the defendant is still not eligible for relief. He cannot sustain his burden of showing "'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez v. Crosby*, 545 U.S. at 535. The Court has explained that "[s]uch circumstances will rarely occur in the habeas context." Gonzalez, 545 U.S., at 535, 125 S.Ct. 2641. He fails to show that *Pena-Rodriguez* applies retroactively to his case. Even if the Court does determine that *Pena-Rodriguez* applies to the case, the defendant is unable to establish that the opinion supports his request to interview the jurors without a preliminary showing.

In *Tharpe v. Sellers*, 138 S. Ct. 545 (2018)(per curiam), a post *Pena-Rodriguez*

case, the Supreme Court remanded that case to the Eleventh Circuit for further consideration of whether a COA should issue on the issue of juror-bias. Although the opinion did not discuss *Pena-Rodriguez*, Justice Thomas, in dissent, provided an instructive analysis in concluding that *Pena-Rodriguez* did not apply retroactively:

> *Pena–Rodriguez* established a new rule: The opinion states that it is answering a question "left open" by this Court's earlier precedents. 580 U.S., at ——, 137 S.Ct., at 867. A new rule does not apply retroactively unless it is substantive or a "watershed rul[e] of criminal procedure." *Teague v. Lane*, 489 U.S. 288, 311, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion). Since *Pena–Rodriguez* permits a trial court "to consider [certain] evidence," 580 U.S., at ——, 137 S.Ct., at 869–70, and does not "alte[r] the range of conduct or the class of persons that the law punishes," *Schriro v. Summerlin*, 542 U.S. 348, 353, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), it cannot be a substantive rule. And Tharpe does not even attempt to argue that *Pena–Rodriguez* established a watershed rule of criminal procedure—a class of rules that is so "narrow" that it is " 'unlikely that any has yet to emerge.' " *Schriro*, supra, at 352, 124 S.Ct. 2519 (quoting *Tyler v. Cain*, 533 U.S. 656, 667, n. 7, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001); alterations omitted). Nor could he. Not even the right to have a jury decide a defendant's eligibility for death counts as a watershed rule of criminal procedure. *Schriro*, supra, at 355–358, 124 S.Ct. 2519. *Tharpe v. Sellers*, 138 S. Ct. 545, 551–52, 199 L. Ed. 2d 424 (2018) (Justice Thomas dissenting)

While Pena-Rodriguez carved out an exception to Rule 606(b) and allow for a review of racial bias of jurors, the Ninth Circuit had already raised the possibility. *United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001). Nevertheless, the defendant failed to avail himself of the opportunity to pursue this area of inquiry in his 2009 Motion. He now submits that *Pena-Rodriguez* supports his request to interview jurors without any preliminary showing of racial bias. There is no approval from the Supreme Court or any other court for fishing expeditions in the absence of some information of racial bias. Rather the case law is to the contrary.

In *Pena-Rodriguez*, the jury was discharged and advised by the court that they were free to discuss the case with anyone if they chose. *Pena-Rodriguez*, 137 S.Ct. at 861. The defense attorney entered the jury room and was approached by two jurors. They informed counsel that another juror had expressed anti-Hispanic bias toward the defendant. *Id*. 861.

Following the local court rules, defense counsel sought and obtained permission from the court to again contact the two jurors and obtain their affidavits limited solely to the issue of racial bias. *Id.* 870. However, the district denied the motion for a new trial because of Colorado's version of Rule 606(b) ruling that it was powerless to consider the affidavits and the Colorado Supreme Court agreed. *Id.* 862.

The Supreme Court set out to determine "whether there is an exception to the no-impeachment rule when, after the jury is discharged, *a juror comes forward* with compelling evidence that another juror made clear and explicit statements that racial animus was a significant motivating factor in his or her vote to convict." *Id*. 861(emphasis added).

The Court had previously addressed the issue of jury impeachment in *Tanner v. United States*, 483 U.S. 107 (1987). It expressed concerns that allegations of juror misconduct raised after a verdict would "seriously disrupt the finality of the process." "Moreover, full and frank discussion on 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 post-verdict scrutiny of juror conduct." *Id*. 120-121. "While persistent inquiry into internal jury processes could "in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior," our very system of trial by jury might not "survive such efforts to perfect it." *Id. 120*.

More recently, the Court rejected losing plaintiff's attempts to introduce a juror affidavit in an attempt to prove the foreperson lied during *voir dire*. *Warger v. Shauers* 135 S.Ct. 521 (2014). It stated, "Congress' enactment of Rule 606(b) was premised on the concern that the use of deliberation evidence to challenge verdict would represent a threat to both jurors and finality in those circumstances not covered by the Rule's express exceptions." *Id*. at 528.

In *Pena-Rodriguez*, the Court again reviewed *Tanner* and *Warger* in conjunction with the history behind the no-impeachment rule found in Rule 606 Fed. R. Evid. It reiterated that Rule 606 continued to have substantial merit. "It promotes full and vigorous discussion by 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. Additionally, it provides stability and finality to the verdict." *Pena-Rodriguez,* 137 S.Ct. at 865. "Once a jury has pronounced its judgment, Rule 606(b) helps ensure jurors' ability to 'separate and melt anonymously in to the community from which they came.'" *United States v. Leung,* 796 F.3d 1032, 1038 (9th Cir. 2015) (internal citation omitted).

The *Pena-Rodriguez* Court, after a review of the no-impeachment rule and the impact of racial prejudice in the administration justice carved out another exception to Rule 606(b). "[T]hat where a juror makes a clear statement 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 denial of the jury trial guarantee." *Pena-Rodriguez,* 137 S.Ct. at 869.

The defendant argues that the only way for him to determine whether racial bias played any role in the jury deliberations is to interview the members of the jury. However, the Court rejected the idea of open season on interviewing jurors. Rather, it left the mechanics of acquiring such evidence to the "state rules of professional ethics and local court rules both of which often limits counsel's post-trial contact with jurors." *Pena-Rodriguez,* 137 S.Ct. at 869. "These limits seek to provide jurors some protection when they return to their daily affairs after the verdict. But while a juror can always tell counsel they do not wish to discuss the case, jurors in some instances may come forward of their own accord." *Pena-Rodriguez,* 137 S.Ct. at 869. The Sixth Circuit concluded that this language allowed for the enforcement of local rules limiting juror contact. *United States v. Robinson*, 872 F.3d 760, 770 (6th Cir. 2017). It upheld a district court's dismissal of a motion for new trial, in part, based on juror racial bias where the defense contacted jurors in violation of its local rules. *Id*. 770.

The Court repeatedly emphasized in *Pena-Rodriguez* that it was the jurors who came forward and that defense counsel followed the local court rules and obtained

permission to seek the affidavit of the jurors. *Pena-Rodriguez,* 137 S.Ct. at 870. The argument offered here of the need to interview jurors to determine whether there was racial bias in the jury room was rejected in *United States v. Reyes,* 2018 WL 705302 (D. Vermont 2/01/2018 *3. The judge ruled that *Pena-Rodriguez* did not support mere speculation since it was premised on jurors coming forward, which had not happened in *Reyes*. * 3

In this District, Ariz. R. Sup. Ct. 42, E. R. 3.5 ("E.R. 3.5"). Arizona Rule of Professional Conduct Rule ER 3.5(a)(1) ""prohibits contact with jurors after they are discharged if the communication is prohibited by law or court order. LRCiv 39.2(b) prohibits such contact unless the court grants permission under a limited set of circumstances. The Ninth Circuit disfavors post-verdict interrogation of jurors and has consistently disallowed such interrogation for the purpose of discovering potential, but unspecified, jury misconduct. *Smith v. Cupp,* 457 F.2d 1098, 1100 (9th Cir. 1972); *N. Pac. Ry. Co. v. Mely,* 219 F.2d 199, 202 (9th Cir. 1954). At minimum, a party must make a preliminary showing of misconduct to establish good cause to conduct juror interviews. *See United States v. Stacey,* 475 F.2d 1119, 1121 & n. 1 (9th Cir. 1973); *Smith,* 457 F.2d at 1100. The defense cites to no authority in which a court allowed a fishing expedition without some type of preliminary showing of misconduct.

TRIAL SAFEGUARDS AGAINST RACIAL BIAS

The *Tanner* Court also outlined existing safeguards to protect an individual's right to an impartial and competent jury without the need to delve into juror testimony. It listed *voir dire* as a means of probing impartiality, the ability of the court and counsel to observe and learn of juror misconduct during the course of the trial, the opportunity of jurors to observe each other and to report issues prior to the verdict and finally the use of non-juror testimony after trial to impeach the verdict. *Tanner,* 483 U.S. at 127. The Supreme Court again acknowledged those safeguards in *Warger,* 135 S.Ct. *at* 529 and *Pena-Rodriguez,* 137 S.Ct. at 871.

In the instant case, there were many such safeguards. More so than a usual trial. First, each member of the venire panel answered a 22-page questionnaire with 77 questions,

which they answered under the penalty of perjury. Question 40 inquired whether the individual, close family members or friends were Native American. They were asked in Question 41 whether they, close family member or friends ever lived or worked on an Indian Reservation or had substantial work or personal contacts with a Reservation or its tribal members. Question 42 sought out whether any contacts or relationships with Native Americans would make it difficult for the potential juror to be fair and impartial in a case where the defendant was alleged to be a Native American. Finally, in question 43, they were asked whether there was any reason, such as personal experiences, or what they had heard or read or visits to a Reservation, that they believed would make it difficult for them to be a fair and impartial juror. Some potential jurors were struck based on their answers to the questionnaires prior to the actual selection process. (RT 3/26/03 pp. 88-153.)

Over the course of approximately 16 days, the venire was interviewed in small groups and then one by one by both the court and counsel. At the end of the penalty phase, the jurors were instructed:

> Finally – finally, in your consideration of whether the death sentence is appropriate, you must not consider the race, color, religious beliefs, national origin, or sex of either the defendant of the victims. You are not to return a sentence of death unless you would return a sentence of death for the crime in question without regard to race, color, religious beliefs, national origin or sex of either the defendant or any victim.
>
> To emphasize the importance of this consideration, Section VII of the Special Verdict Forms contains a certification statement. Each juror should carefully read the statement and sign your name in the appropriate place if the statement accurately reflects the manner in which you reach your individual decision.
>
> (RT 5/16/2003 pp. 4103-04.)

Each of the jurors signed this document at the conclusion of their deliberations. (RT 5/20/2003 pp. 4201, 4206.) (CR-01-01062, CR 325.)

Finally, as the court discharged the jury it advised them that they were free to talk with anyone about the case including the lawyers, but that they were under no obligation to

do so. (RT 5/23/2003 p. 4207.) No juror came forward at that time nor in the 15 years since the verdict was rendered in this case to report racial bias. The Supreme Court found that juror complaints about the racial bias of another juror are usually made quickly after the verdict. *Pena-Rodriguez*, 137 S.Ct. at 870.

CONCLUSION

The law of the case that the original request to interview jurors was untimely, failed to show good cause and that the Motion was not a cognizable claim under Section 2255 precludes reopening the Habeas Proceedings. Further, the Ninth Circuit's affirmance of the district court's decision also bars the reopening.

Alternatively, the defendant's Rule 60(b)(6) Motion is a disguised Section 2255 Petition which requires a Certificate Of Appealability to proceed. Further, *Pena-Rodriguez* is not retroactive to this case nor does it support the defense contention that he is entitled to interview the jurors without any showing of racial bias. Therefore, the defendant cannot sustain his burden of demonstrating "extraordinary circumstances" to support the reopening of a final judgement under Rule 60(b)(6). For these reasons, the Motion should be denied.

Respectfully submitted this 21st day of May, 2018.

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THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Lezmond Charles Mitchell, Defendant/Movant, v. United States of America, Plaintiff/Respondent.	Civil No. 3:09-CV-08089 (Criminal No. 3:01-CR-01062-NVW-1) **DEATH PENALTY CASE** Honorable Neil V. Wake United States District Judge **NOTICE OF MOTION AND MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE RULE 60(b)(6)** **Oral Argument Requested**

THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Lezmond Charles Mitchell Defendant/Movant, v. United States of America, Plaintiff/Respondent.	Civil No. 3:09-CV-08089 (Criminal No. 3:01-CR-01062-NVW-1) **DEATH PENALTY CASE** Honorable Neil V. Wake United States District Judge **NOTICE OF MOTION AND MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE RULE 60(b)(6)** **Oral Argument Requested**

Movant Lezmond Mitchell moves pursuant to Federal Rule of Civil Procedure, Rule 60(b)(6) for relief from the judgment of this Court due to the extraordinary circumstances of this case. This motion is based on the attached memorandum of points and authorities and all the files and records of this case.

Respectfully submitted,

Dated: March 5, 2018

/s/ Jonathan C. Aminoff
JONATHAN C. AMINOFF
CELESTE BACCHI
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In this death-penalty case, appointed post-conviction counsel for Lezmond Mitchell sought to conduct a reasonable investigation in support of Mitchell's post-judgment motion to vacate his conditions and sentences. Part of that investigation should have included interviewing the jurors from Mitchell's trial, but Mitchell's counsel was barred from speaking with the jurors. The Supreme Court subsequently issued *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), which casts doubt on this Court's prior ruling and warrants re-opening this case to allow Mitchell to brief his right to access the jurors from his trial.

II. BACKGROUND

This Court sentenced Lezmond Mitchell to death on September 15, 2003. *United States v. Mitchell*, CR-01-1062, Dkt. No. 425. The Ninth Circuit affirmed Mitchell's convictions and sentences, *United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007), and the Supreme Court denied certiorari. *Mitchell v. United States*, 553 U.S. 1094 (2008).

On June 8, 2009, Mitchell moved to vacate his convictions and sentences in this Court, pursuant to 28 U.S.C. Section 2255, *Mitchell v. United States*, CV-09-8089, Dkt. No. 9. Before filing his Section 2255 motion, however, Mitchell moved for authorization to interview the jurors from his capital trial. *Id*. at Dkt. No. 1. Leave of court was required pursuant to a District of Arizona rule that prohibits attorneys from contacting jurors after trial unless they submit written interrogatories to the district court "within the time granted for a motion for a new trial" and show "good cause" for the interview. D. Ariz. Loc. Civ. R. 39.2(b); D. Ariz. Loc. Crim. R. 24.2. The government opposed the motion. Dkt. No. 18.

This Court denied Mitchell's request to interview the trial jurors on two grounds. First, it indicated that Mitchell had not followed the local rule's procedures regarding

submitting proposed interrogatories and an affidavit,[1] and filing within the time granted for a motion for a new trial. Dkt. No. 31. Alternatively, the district court concluded that Mitchell had not shown "good cause" for contacting the jurors. *Id*. Mitchell then amended his Section 2255 motion to include a claim that this Court violated his constitutional rights by denying him access to the jurors. Dkt. No. 30 at 173.

This Court subsequently denied Mitchell's Section 2255 motion without holding an evidentiary hearing. Dkt. No. 56. Mitchell appealed on several grounds, including the denial of his motion to interview jurors. The Ninth Circuit's opinion affirming the denial of his Section 2255 motion does not address the juror interviews. *Mitchell v. United States*, 790 F.3d 881 (9th Cir. 2015). The Supreme Court denied certiorari. *Mitchell v. United States*, 137 S. Ct. 38 (2016).

In its recent decision in *Peña-Rodriguez v. Colorado*, 137 S. Ct 855 (2017), the Supreme Court established that Mitchell was erroneously denied the opportunity to interview the jurors in his case. This error prevented Mitchell from presenting a fully investigated Section 2255 motion to this Court, and prevented the Court from conducting a full merits determination resulting in a "defect in the integrity of [his] federal habeas proceeding." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). Mitchell moves to re-open the Section 2255 litigation to correct the defects in the integrity of the post-conviction proceedings that deprived him of a resolution of his claims on their merits.

III. ARGUMENT

The central concern of Federal Rule of Civil Procedure 60(b)(6) is that justice is done. *Klapprott v. United States*, 335 U.S. 601, 615 (1949). Accordingly, Rule

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[1] Mitchell submits that Local Rule 39.2 is unduly burdensome and should not impact Mitchell's ability to conduct a reasonable investigation including informal interviews with jurors. If, however, the Court grants this motion but insists on Mitchell's compliance with Local Rule 39.2, Mitchell will submit interrogatories as directed by the Court.

60(b)(6) "vests power in courts . . . to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Id*. at 615. Pursuant to Rule 60(b)(6), a party can seek relief "from a final judgment, order, or proceeding" and request reopening of his case, for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). Rule 60(b)(6) "reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work inequity." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 233-34 (1995) (quoting *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 244 (1944).

The Circuit Courts have long identified Rule 60(b)(6) as "a grand reservoir of equitable power," *Phelps v. Alameida*, 569 F.3d 1120, 1133 (9th Cir. 2009) (quoting *Harrell v. DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1458 (5th Cir. 1992)), that affords courts the discretion and power "to vacate judgments whenever such action is appropriate to accomplish justice." *Gonzalez*, 545 U.S. at 542, (quoting *Liljeberg v. Health Servs. Acquisition Corp*., 486 U.S. 847, 864 (1988)). A court's ability to grant relief under Rule 60(b), is constrained only by the requirements that a petitioner "demonstrate both the motion's timeliness and … that 'extraordinary circumstances justif[y] the reopening of a final judgment.'" *Christeson v. Roper*, 135 S. Ct. 891, 895-96 (2015) (quoting *Gonzalez*, 545 U.S. at 535).

Rule 60(b), "like the rest of the Rules of Civil Procedure, applies in habeas corpus proceedings" and "has an unquestionably valid role to play in habeas cases." *Gonzalez*, 545 U.S. at 534. District courts have jurisdiction to consider Rule 60(b) motions in habeas proceedings when such motions "attack[ ] not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceeding." *Gonzalez*, 545 U.S. at 532. Thus, a district court can consider a Rule 60(b) motion when a petitioner "asserts that a previous ruling which precluded a merits determination was in error — for example, a denial for such reasons as failure to exhaust, procedural default or statute-of-limitations bar." *Id*. at 532 n.4.

Rule 60(b) is particularly important where federal review of the merits of a petitioner's claims has been limited. *Phelps v. Alameida*, 569 F.3d 1120, 1140 (9th Cir. 2009) ("a central purpose of Rule 60(b) is to correct erroneous legal judgments that, if left uncorrected, would prevent the true merits of a petitioner's constitutional claims from ever being heard.").

A. The Lack of Due Process Afforded to Mitchell Constitutes an Extraordinary Circumstance Justifying Relief

Post-conviction counsel in a capital case is duty-bound to conduct "an aggressive investigation of all aspects of the case." American Bar Association ("ABA") 2003 Death Penalty Guidelines 10.15.1(E)(4). The commentary to the ABA Death Penalty Guidelines explains that post-conviction counsel must conduct a "thorough, independent investigation" of, *inter alia*, juror misconduct, because "the trial record is unlikely to provide either a complete or accurate picture of the facts and issues in the case." 31 Hofstra L. Rev. 913, 1085-86 (2003).

In the course of litigating his Section 2255 motion, Mitchell was denied the ability to conduct the type of investigation mandated by the ABA. Intervening Supreme Court caselaw reaffirms that this denial, which precluded a full and fair merits determination, was erroneous.

The Supreme Court's recent decision in *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), supports Mitchell's case for interviewing the jurors and demonstrates the error of this Court's decision. In that case, Peña-Rodriguez's counsel was permitted to speak with the jurors, and two jurors informed counsel that another juror had expressed anti-Hispanic bias toward the defendant and his alibi witnesses. *Id*. at 861. Defense counsel ultimately submitted signed affidavits from those jurors, which memorialized the racist comments made by another juror. *Id.* at 862. Despite this evidence of juror misconduct, the trial court denied the defense motion for a new trial, finding that the affidavits were not admissible to impeach the verdict under Colorado's equivalent to Federal Rule of Evidence 606(b), which renders inadmissible virtually any post-verdict

juror statement concerning the contents of the jury's deliberations. *Id.* at 862. The Colorado Supreme Court affirmed, and the Supreme Court granted certiorari to decide if racial bias should be an exception to the general, firmly rooted provisions behind Rule 606(b). *Id.* at 862-63. The Supreme Court reversed, finding that the Sixth Amendment requires that the no-impeachment rule give way in order to permit a trial court to consider evidence that a juror relied on racial stereotypes or animus to convict a criminal defendant. *Id*. at 869. The Court reasoned that racial bias is such a stain on American history and notions of fair justice, and such a clear denial of the jury trial guarantee, that general evidence rules must be modified to root out racism in the criminal justice system. *Id.* at 871.

It is uncontroverted that the death penalty has a long history of racial injustice. Indeed, just last term the Supreme Court reversed a Texas capital conviction in which a man's death sentence may have been based on his race. *Buck v. Davis*, 137 S. Ct. 759 (2017). The United States government has a particularly shameful history of oppressing the Native American people. *See, e.g., Mesclaero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) ("The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'") (quoting H.R.Rep.No.1804, 73d Cong., 2d Sess., 6 (1934)). Indeed, in this case, the government arbitrarily pursued a death sentence pursuant to "an aggressive expansion of the federal death penalty" despite strong opposition from the Navajo Nation, the victims' family, and the local United States Attorney's Office. *Mitchell*, 790 F.3d at 894-897 (Reinhardt, J., dissenting). Mitchell was then tried before a jury that consisted of only one Native American. The jury was picked from a 207-person venire which included 29 Native Americans. Of those 29 people, four were excluded based on their use of Navajo as their first language, RT 38, 119, 601-602, 1174, and eight more were excluded due to their Navajo beliefs in opposition to the death penalty. RT 198-99, 336, 988, 1262-63, 1424, 1684, 2256. In fact, when the government attempted to exclude the lone

surviving Native American juror, the Court sustained Mitchell's *Batson*[2] objection and denied the government's strike. RT 2506, 2509-13. The government was, however, successful in removing the only African American juror on the venire. RT 2514-16. Given the severity of Mitchell's sentence, and the racial undertones of this capital prosecution, Mitchell should be permitted to conduct an investigation no more intrusive than necessary to determine what role, if any, racial bias played in his convictions and sentences.

The Supreme Court noted in *Peña-Rodriguez* that the "practical mechanics of acquiring and presenting [evidence of juror bias] will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors." *Id*. at 869. In Arizona, however, Local Rule 39.2 goes far beyond *limiting* counsel's contacting with jurors. Rather, it *prevents* any contact between the parties and a juror absent permission of the Court on a showing of good cause. Indeed, of the fifteen district courts in the Ninth Circuit, only two — the District of Arizona and the District of Montana — require a "good cause" showing. D. Ariz. Loc. Civ. R. 39.2(b); D. Ariz. Loc. Crim. R. 24.2; D. Mont. Loc. Civ. R. 48.1(b); D. Mont. Loc. Crim. R. 24.2(b). Five other district courts require leave of court without a "good cause" showing. D. Alaska Loc. Civ. R. 83.1(h); D. Or. Loc. R. 48-2; E.D. Wash. Loc. R. 47.1(d); W.D. Wash. Loc. R. 47(d). Eight district courts in the Ninth Circuit impose no post-trial restrictions on juror contacts whatsoever.

Moreover, Local Rule 39.2 does not apply to habeas petitioners attacking state convictions and sentences in federal district courts in Arizona. *Ellison v. Ryan*, 2017 WL 1491608 (D. Ariz. April 26, 2017) at *2-3; *Cota v. Ryan*, 2017 WL 713640 (D. Ariz. February 23, 2017) at *2; *Harrod v. Ryan*, 2016 WL 6082109 (D. Ariz. October 18, 2016) at *3. As a practical matter, this means that all 116 inmates on death row in

[2] *Batson v. Kentucky*, 476 U.S. 79 (1986).

Arizona[3] are free to conduct a reasonable investigation by informally interviewing their jurors and presenting the fruits of that investigation in support of their federal habeas petitions to federal district courts in Arizona. But Mitchell, solely by virtue of the fact that he was prosecuted federally, is barred from conducting that same reasonable investigation. Thus Mitchell is left with no mechanism, practical or otherwise, for investigating the type of misconduct at issue in *Peña-Rodriguez*.

Ultimately, the *Peña-Rodriguez* case emphasizes that the specter of racial bias is an issue so repulsive that exceptions should be made to general rules to ensure that racism has not influenced criminal convictions or sentences. The Supreme Court has also emphasized the importance of investigation in the post-conviction context. *See, e.g.*, *Martinez v. Ryan*, 566 U.S. 1, 13 (2012) (explaining that post-conviction ineffective assistance of counsel claims can require extensive investigation such that an inmate's ability to file such a claim is significantly diminished absent the assistance of post-conviction counsel). On balance, *Peña-Rodriguez* establishes that criminal defendants must be allowed to pursue racial bias issues, and whether this Court sets aside Local Rule 39.2's good cause requirement, or finds that investigating racial bias satisfies the good cause requirement, Mitchell must be afforded the right to investigate. Mitchell's inability to adequately investigate his case prevented a full and fair merits determination, which warrants re-opening the proceedings under Rule 60(b) and permitting Mitchell to move the Court for an order granting Mitchell access to the jurors from his trial.

B. This Motion is Timely

Mitchell has diligently pursued his rights. He timely appealed his convictions and sentences in this Court and timely filed his Section 2255 motion and related appeals.

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[3] https://corrections.az.gov/public-resources/death-row

Mitchell has filed this motion under Federal Rule of Civil Procedure, Rule 60(b)(6). A motion brought pursuant to Rule 60(b)(6) must be filed within a reasonable time to be considered timely. Rule 60(c)(1). "What constitutes "reasonable time" depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." *Ashford v. Steuart*, 657 F.2d 1053, 1055 (9th Cir. 1981) (per curiam).

The interest in finality has been minimized by the Supreme Court in the context of a Rule 60(b) motion because the purpose of Rule 60(b) is to create an exception to finality. *Gonzalez*, 545 U.S. at 520 ("[Finality], standing alone, is unpersuasive in the interpretation of a provision whose whole purpose is to make an exception to finality."). Setting aside the first factor, Mitchell has good reason for any delay, as this motion is based on the Supreme Court's recent decision in *Peña-Rodriguez*, which was issued less than a year from the date of filing this motion. The third factor also weighs in Mitchell's favor because he obviously could not have known how this decision would impact his case before the Supreme Court issued its opinion. Indeed, the circuit courts have legitimized waiting for subsequent decisions to be issued before filing a Rule 60(b) motion. *Clarke v. Burke*, 570 F.2d 824, 831-32 (8th Cir. 1978) (where the "movants acted reasonably in waiting for the district court's decision in a later, but related, case before filing the Rule 60(b) motion because it was the unfavorable ruling in the later case that precipitated the need for the Rule 60(b) motion."). Finally, the government will not suffer prejudice if the Court grants this motion. While the Supreme Court opinion upon which this motion is based is new, the underlying issue has been previously argued in this case. As a result, the government should be familiar with these issues and not prejudiced by the timing of this motion.

The primary concern for timeliness is avoiding a scenario where the movant has allowed "the normal appeals channels [to] lapse" or "ignored normal legal recourses" and now seeks a "second bite at the apple." *In re Pacific Far East Lines, Inc.*, 889 F.2d

242 (9th Cir. 1989). That is not the situation here. Mitchell timely moved to interview the jurors in his case. When the Court denied his request, he raised the issue in his Amended 2255 Motion. *Mitchell v. United States*, Case No. 09-CV-8089, Dkt. No. 30, Claim K at 173. When his 2255 Motion was denied, Mitchell raised the issue on appeal. *Mitchell v. United States*, Ninth Circuit Case No. 11-99003, Dkt. Entry 23 at 78.

In *Buck v Davis,* the Supreme Court overturned the Fifth Circuit's denial of a COA and found that Buck had demonstrated entitlement to relief under Rule 60(b)(6). 137 S. Ct. 759 (2017). The Supreme Court reached this decision notwithstanding that Buck's motion primarily relied on the Supreme Court's decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), but was filed almost two years after *Martinez* was decided and 8 months after *Trevino* was decided. *Id*. at 767, 771. Mitchell's motion is being filed less than one year after *Peña-Rodriguez* was decided. *Buck* establishes that Mitchell has filed his motion within a reasonable time.

IV. CONCLUSION

For all of the foregoing reasons, Mitchell respectfully requests that the Court grant this motion, re-open this case, and allow Mitchell to move for access to the jurors.

Respectfully submitted,

Dated: March 5, 2018

/s/ Jonathan C. Aminoff
JONATHAN C. AMINOFF
CELESTE BACCHI
Deputy Federal Public Defenders

THE STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Lezmond Charles Mitchell, Defendant/Movant, v. United States of America, Plaintiff/Respondent.	Civil No. 3:09-CV-08089 (Criminal No. 3:01-CR-01062-NWVW-1) **DEATH PENALTY CASE** Honorable Neil V. Wake United States District Judge **[PROPOSED ORDER] GRANTING NOTICE OF MOTION AND MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE RULE 60(b)(6)**

Upon the motion of Movant Lezmond Charles Mitchell,

IT IS HEREBY ORDERED that Mitchell's motion for relief from judgment pursuant to Federal Rule of Civil Procedure, Rule 60(b) is granted.

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

LEZMOND CHARLES MITCHELL, Movant, v. UNITED STATES OF AMERICA, Respondent.	**CAPITAL CASE** 28 U.S.C. § 2255 Case No. _____ (Trial Case No. CR-01-1062-MHM) ORAL ARGUMENT REQUESTED

MOTION FOR AUTHORIZATION TO INTERVIEW JURORS IN SUPPORT OF MOTION TO VACATE, SET ASIDE, OR CORRECT THE SENTENCE

Petitioner, Lezmond Charles Mitchell, through undersigned counsel, respectfully moves the Court to permit his federal habeas counsel, or their representatives, to contact and interview the jurors in his case. Such an opportunity is essential to secure rights guaranteed to Mr. Mitchell by 28 U.S.C. § 2255, 18 U.S.C. § 3599, and the Fifth, Sixth, and Eighth Amendments to the United States Constitution.

A. Introduction

Petitioner Lezmond Mitchell hereby moves the Court for authorization to conduct a complete investigation that includes ascertaining whether any member of the jury panel engaged in *ex parte* contacts, considered extrajudicial evidence, allowed bias or prejudice to cloud their judgment, or intentionally concealed or failed to disclose material information relating to their qualifications to serve as jurors in Mr. Mitchell's case. In pursuing this investigation, federal postconviction counsel cannot be foreclosed from interviewing the witnesses who would be the most reliable source of evidence on these claims – the jurors themselves. *See McCleskey v. Zant*, 499 U.S. 467, 498 (1991) (imposes on all post-conviction applicants the obligation to "conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition.").

B. Procedural History

On September 15, 2003, following a jury trial and penalty phase proceeding, Hon. Mary H. Murguia, United States District Judge for the District of Arizona, sentenced Lezmond Mitchell to death. Mr. Mitchell's direct appeal to the United States Court of Appeals for the Ninth Circuit was not successful, *United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007), and the United States Supreme Court denied the petition for writ of *certiorari* on June 9, 2008, *Mitchell v. United States*, 128 S.Ct. 2902. Mr. Mitchell is in custody on federal death row in Terre Haute, Indiana.

Section 2255 of Title 28 of the United States Code sets forth a one-year period of limitations for filing a motion to vacate, set aside or correct the sentence. Thus, Mr. Mitchell must file his motion no later than June 9, 2009. In the course

of preparing the § 2255 motion, Mr. Mitchell's federal habeas counsel consider it necessary to interview the jurors who deliberated and decided Mr. Mitchell's capital case. Counsel for Mr. Mitchell hereby move this Court for leave to conduct a full and complete investigation in preparation for Mr. Mitchell's forthcoming motion to vacate, set aside or correct the sentence.

Rule 24.2 of the Local Rules of Criminal Procedure for the District of Arizona makes applicable Civil Rule 39.2 to criminal matters concerning communication with trial jurors. The rule requires the movant to request leave of the Court to interview the jurors post-trial. L.Civ.R. 39.2(b). Approval for the interview should be granted "upon the showing of good cause." *Id.*

C. Factual Background

An investigation into potential jury misconduct – no different than an investigation into possible instances of ineffective assistance of counsel or prosecutorial suppression of material evidence – is a standard and essential aspect of any minimally competent federal capital postconviction § 2255 investigation. In this case, no reasonably competent postconviction counsel would fail to question the jurors.

Petitioner's counsel does not seek discovery, but only permission to conduct his investigation. The identities of the jurors are not secret. Their names are publicly available in the district court record. Other identifying information and (dated) contact information are available to counsel in non-public parts of the record. Federal habeas counsel do not request disclosure of any information. This motion seeks only permission for federal habeas counsel to contact these jurors.

D. ARGUMENT

1. Petitioner's Counsel Must Conduct a Reasonable Investigation Including Allegations of Possible Jury Bias, Taint, or Misconduct

A federal postconviction applicant "must assert all possible violations of his constitutional rights in his initial application or run the risk of losing what might be a viable claim." *See, e.g., Brown v. Vasquez*, 952 F.2d 1164, 1167 (9th Cir. 1992). The Supreme Court has made clear that counsel for a postconviction applicant "must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition." *McCleskey v. Zant*, 499 U.S. 467, 498 (1991). The Ninth Circuit has characterized this as "a substantial burden." *Brown*, 952 F.2d at 1167. As the Supreme Court explained,

> If what petitioner knows or could discover upon reasonable investigation supports a claim for relief in a federal habeas petition, what he does not know is irrelevant. Omission of the claim will not be excused merely because evidence discovered later might also have supported or strengthened the claim.

McCleskey, 499 U.S. at 498.

The United States Constitution guarantees the defendant a trial by impartial jurors who are not exposed to extraneous information or influence or motivated by bias. *See Williams v. Taylor*, 529 U.S. 420 (2000); *Remmer v. United States*, 350 U.S. 377 (1956); *Remmer v. United States*, 347 U.S. 227 (1954). It has long been recognized that jurors' exposure to extrajudicial evidence or their participation in *ex parte* contacts regarding the substance of the trial can undermine the fairness of

the proceeding and entitle a defendant to a new trial.[1] The Supreme Court has affirmed that "an attempt to investigate [a] petitioner's jury" constitutes "diligent . . . efforts to develop the facts" supporting potential claims. *Williams v. Taylor*, 529 U.S. 420, 442-43 (2000).

The American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases reinforce the necessity of federal postconviction counsel's proposed investigation. *Wiggins v. Smith*, 539 U.S. 510, 524, 534 (2003) (Supreme Court has "long [. . .] referred" to the American Bar Association's standards as "guides to determining what is reasonable" in the representation of capital defendants), *citing Strickland v. Washington*, 466 U.S. 668, 688 (1984), and *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). Those Guidelines make clear that:

> Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense

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[1] *Mattox v. United States*, 146 U.S. 140 (1892) (jurors' exposure to media article in jury room recounting facts relating to prior trial and public anticipation of quick guilty verdicts is prejudicial error warranting relief); *Remmer v. United States*, 347 U.S. 227 (1954) (attempted bribery of juror warrants relief); *Parker v. Gladden*, 385 U.S. 363 (1966) (bailiff's comments to jurors regarding strength of evidence requires relief); *Gibson v. Clanon*, 633 F.2d 851 (9th Cir. 1980) (juror's library research held prejudicial); *United States v. Tebha*, 770 F.2d 1454 (9th Cir. 1985) (receipt of exhibit not introduced in evidence was prejudicial); *Marino v. Vasquez*, 812 F.2d 499 (9th Cir. 1987) (dictionary research and experiment required habeas relief); *Dickson v. Sullivan*, 849 F.2d 403 (9th Cir. 1988) (improper comments by bailiff to jurors compelled habeas relief); *United States v. Maree*, 934 F.2d 196 (9th Cir. 1991) (juror's *ex parte* conversation with friend regarding deliberations was prejudicial error); *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998) (concealment of material evidence during voir dire required habeas relief).

> representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review.

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.15.1 (Duties of Post-conviction Counsel) ¶ C, reprinted in *The Guiding Hand of Counsel*, 31 HOFSTRA L. REV. 913, 1079 (2003).[2]

The commentary explains:

> [C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation in accordance with Guideline 10.7. (Subsection E(4)). As demonstrated by the high percentage of reversals and disturbingly large number of innocent persons sentenced to death, the trial record is unlikely to provide either a complete or accurate picture of the facts and issues in the case.

Id., Guideline 10.15.1, ¶ C (31 HOFSTRA L. REV. at 1085-86).[3]

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[2] These obligations were not new to the 2003 Guidelines, but a restatement of principles contained in the earlier 1989 Guidelines:

> B. . . . Counsel should consider conducting a full investigation of the case, relating to both the guilt/innocence and sentencing phases. . . . Postconviction counsel should obtain and review a complete record of all court proceedings relevant to the case. With the consent of the client, postconviction counsel should obtain and review all prior counsel's file(s).
>
> C. Postconviction counsel should seek to present to the appropriate court or courts all arguably meritorious issues, including challenges to overly restrictive rules governing postconviction proceedings.

ABA Guidelines for the Appointment and Performance of Counsel In Death Penalty Cases, Guideline 11.9.3 (Duties of Postconviction Counsel) (1989).

The extent of the burden on federal habeas counsel has, of course, increased as a result of the Supreme Court's 1991 *McCleskey* decision.

[3] [I]t is of critical importance that counsel on direct appeal proceed, like all post-conviction counsel, in a manner that maximizes the client's ultimate chances of success. 'Winnowing' issues in a capital

"Collateral counsel should assume that any meritorious issue not contained in the initial application will be waived or procedurally defaulted in subsequent litigation, or barred by strict rules governing subsequent applications." *Id.* (31 HOFSTRA L. REV. at 1086).[4]

As the Supreme Court recognized in *Williams*, claims of possible jury misconduct are often capable of being discovered upon a reasonable and diligent investigation. *Williams*, 529 U.S. at 442-43. In fact, in *Worstzeck v. Stewart*, 118 F.3d 648, 653 (9th Cir. 1997), the inmate-petitioner was barred from filing a successive request for postconviction relief alleging juror impropriety because he had not previously interviewed jurors and could not show that he could not have uncovered this evidence through previous exercise of due diligence. The commentators to the ABA Guidelines recognize that juror misconduct is among the grounds that can give rise to relief and therefore must be thoroughly investigated. Guideline 10.15.1 (31 HOFSTRA L. REV. at 1086). But Petitioner's

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> appeal can have fatal consequences. Issues abandoned by counsel in one case, pursued by different counsel in another case and ultimately successful, cannot necessarily be reclaimed later. When a client will be killed if the case is lost, counsel should not let any possible ground for relief go unexplored or unexploited.

Commentary to Guideline 10.15.1 (31 Hofstra L. Rev. at 1083 (footnotes omitted)).

[4] It is premature to ask whether the investigation will uncover facts revealing meritorious, cognizable claims. "Until previously unpresented issues are fully explored, there is no way to determine whether or not any arguably applicable forfeiture doctrines may be overcome." Commentary to Guideline 10.15.1 (31 HOFSTRA L. REV. at 1086 n.350).

attorneys cannot conduct that investigation unless this court grants them the ability to contact the jurors.

The obligation placed on federal habeas counsel by the United States Supreme Court, the Ninth Circuit, and the American Bar Association to conduct a thorough investigation and to assert all possible constitutional violations in the habeas petition constitutes a showing of good cause sufficient to satisfy Rule 39.2.

2. This Court Should Allow Federal Postconviction Counsel to Conduct the Required Investigation

In his direct appeal to the Ninth Circuit, Lezmond Mitchell argued that prosecutorial misconduct in the form of improper statements made as a part of its closing argument deprived Mitchell of a fair trial. The Ninth Circuit agreed with Mr. Mitchell that the comments were indeed improper, however the Ninth Circuit denied relief stating that the burden is on Mitchell "to show that the misconduct tainted the verdict." *United States v. Mitchell*, 502 F.3d 931, 996 (9th Cir. 2007). The Ninth Circuit ruled that Mr. Mitchell had failed to meet his burden, and thus ruled that the government's misconduct did not affect Mitchell's substantial rights. *Id.*

Here, Mr. Mitchell seeks the opportunity to meet his burden. The only objective measure to determine whether Mitchell's rights were impacted is by actually interviewing the jurors on this issue. Frequently, however, when a petitioner requests post-verdict contact with jurors, courts hesitate to grant such contact based upon Federal Rule of Evidence 606(b). *See, e.g.*, *United States v. Rice*, 446 F.2d 1390 (9th Cir. 1971).

Federal Rule of Evidence 606(b) states:

> 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 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 on to the verdict form.

The Ninth Circuit has specifically stated that the "rule of juror incompetency [Rule 606(b)] cannot be applied in such an unfair manner as to deny due process." *United States v. Henley*, 238 F.3d 1111 (9th Cir. 2001). In the present case, Mr. Mitchell would indeed be denied due process if the Court insisted he meet a burden of proof, but denied him access to the only direct evidence to meet that burden.

In *Rushen v. Spain*, 464 U.S. 114 (1983), the United States Supreme Court clarified that a "juror may testify concerning any mental bias in matters unrelated to the specific issues that the juror was called upon to decide . . . ." *Rushen v. Spain*, 464 U.S. 114, 121 n.5 (1983) (citing Fed.R.Evid. 606(b)). The Ninth Circuit has specifically ruled that "racial prejudice is a mental bias that is unrelated to the specific issues that the juror was called upon to decide." *Henley*, 238 F.3d at 1120. And thus suggested that "racial bias is generally not subject to Rule 606(b)'s prohibitions against juror testimony." *Id.*

Regarding the prosecutor's many comments that the Ninth Circuit agreed were inappropriate, one comment dealt specifically with Lezmond Mitchell's apparent rejection of the Navajo religion. *See* RTT 4180[5]; *Mitchell*, 502 F.3d at 994-5. There is no debate that religious comments are inappropriate in penalty

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[5] "RTT" refers to the Reporter's Transcript at Trial.

phase proceedings (*see e.g.*, *Sandoval v. Calderon*, 241 F.3d 765, 777 (9th Cir. 2001)), but the Ninth Circuit found that Mitchell had failed to meet his burden of showing that the prosecutor's comments tainted the verdict. *Mitchell*, 502 F.3d at 996. Mitchell seeks to interview the jurors about racial and religious prejudice on this point to see whether Mitchell's Navajo beliefs, or the allegation that the crime violated his Navajo beliefs, played any part in his death sentence. Religious prejudice, like racial prejudice, is a mental bias "unrelated to the specific issues that the juror was called upon to decide" and thus should not be subject to Rule 606(b). *See Rushen*, 464 U.S. at 121 n.5, and *Henley*, 238 F.3d at 1120.

Furthermore, Mr. Mitchell's crimes and trial were highly publicized in both the local and state-wide media. The importance of close scrutiny for any inappropriate juror contact is heightened when a sensational case results in an emotionally charged, highly publicized trial. *See Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966) (quoting *Patterson v. State of Colorado*, 205 U.S. 454, 462 (1907)).

Mitchell's case is considered a "landmark" federal trial because it marked the first time that federal officials in the United States Department of Justice and, consequently, in Arizona, prosecuted a case under the 1994 Federal Death Penalty Act. The many articles published in connection with the case spoke of "crime sprees," "brutal killings," a remorseless Lezmond Mitchell, and increasing gang violence. Moreover, many reporters put the blame for these acts on two men: Lezmond Mitchell and another man who, they explained, was ineligible for the death penalty. Furthermore, some of the articles included information about a second multiple-murder and an erroneous report that Lezmond Mitchell was arrested in connection with that crime. Perhaps most damning, however, was an

article stating that Mitchell, along with the other five men with whom he had been arrested, had been bragging about their violent escapades to such an extent that the other inmates at the Window Rock jail had twice beaten them. The article explained that as a result of these beatings, Mitchell and his cohorts had to be separated from the general population. It is well settled that a juror's consideration of news articles is prejudicial and can warrant a new trial, *see e.g., United States v. Littlefield*, 752 F.2d 1429 (9th Cir. 1985), and extensive media coverage can deprive a defendant of a fair trial. *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966). Obviously the articles concerning Mr. Mitchell are highly prejudicial, and inquiry as to whether they were improperly brought to the jury's attention is legitimate and admissible under Federal Rule of Evidence 606(b)(1).

Finally, there were at least two acts of potential juror misconduct that occurred during the guilt phase portion of the case. On April 30, 2003, Judge Murguia received a note from an unnamed juror asking if the jury was permitted to consult "detailed maps" of the locations involved in the case. RT 2769. The Court's response was to give the jury an instruction at the end of the day informing them that they should not conduct any independent investigation or consult outside sources. (RTT 2769.) The jurors were never questioned as to who sent this note or for what purpose. Present counsel has never been provided a copy of this note.

The note itself is ambiguous, it is not clear if the author is asking if she can consult an outside source for her own knowledge or if she is writing in response to others in the jury room consulting outside sources and wondering if this is allowed. This is an important distinction as the latter would involve extraneous,

possibly prejudicial information and/or outside influence, evidence of which is admissible under Rule 606(b).

Also on April 30, 2003, Judge Murguia received a note from Alternate Juror Murphy stating that he had been in the company of three men who were discussing Mitchell's trial. (RTT 2770.) At the end of the day, the Court addressed this issue with Mr. Murphy who stated that the men only said the name of the case in his presence. (RT 2909.) He did, however, make a comment that Mitchell finds deeply disturbing, after telling the Court that the men said the name of the case he stated: "Yeah, that's all that was said. I was kind of glad because I didn't want to say anything about it either." (*Id.*) Mr. Murphy clearly indicates that had the men spoke further about the case, he would have been inclined to speak about the case as well.

Jurors are obviously banned from engaging in such conversations, and knowing Mr. Murphy's inclination to not abide by this rule, he must be interviewed to ensure that no such indiscretions took place. Such testimony would be admissible per Rule 606(b) as this would be evidence of an outside influence that may have improperly affected Mr. Murphy.

These notes indicate a strong possibility that outside influence and extraneous prejudicial information tainted the jury, and Mr. Mitchell's representatives must be permitted to investigate fully to ensure that this was not the case. Moreover, given that Mitchell was never provided with copies of these notes, it is all the more imperative that Mitchell confirm exactly what happened.

Neither this Court nor the Ninth Circuit has explicitly defined what constitutes "good cause" under Rule 39.2. This Court has, however, defined good cause under Rule 1.11, the predecessor to Rule 39.2, articulating a high burden of

proof for the individual seeking to interview jurors. The court cited Ninth Circuit precedent in support of this position, stating:

> Defendants bear the burden of showing that the verdict would have been different but for the presence of the external influence. 'Where a losing party in a civil case seeks to impeach a jury verdict, it must be shown by a preponderance of the evidence that the outcome would have been different.' *Hard*, 870 F.2d at 1461. Without such a showing, the Court need not order additional investigation, since, 'an evidentiary hearing is justified only when these materials are sufficient on their face to require setting aside a verdict.' *Id.*

TIG Ins. Co. v. Liberty Mut. Ins. Co., 250 F.Supp.2d 1197, 1199 (D. Ariz. 2003) (quoting *Hard v. Burlington Northern Railroad Co.*, 870 F.2d 1454, 1461 (9th Cir. 1989)).

In *TIG*, after losing a civil judgement, the defense sought to interview jurors based upon belief that extraneous evidence influenced the jury. This Court denied this request stating that the "Defendants' burden . . . is to show that the information they seek will show by a preponderance of the evidence that the outcome would have been different." *TIG Ins. Co.*, 250 F.Supp.2d at 1199. Because the defense stated that they were currently in the "investigation stage" of the case and could not yet meet this burden, the court denied them the opportunity to investigate. *Id.*

Mr. Mitchell's situation is distinguished from *TIG* for several reasons. First and most obvious, *TIG* involved an appeal stemming from a civil matter while Mitchell's case concerns a § 2255 proceeding following the appeal of a criminal conviction resulting in a death sentence. The Ninth Circuit was careful in noting that the burden of proof applied in a *civil* case. *Id.*; *Hard*, 870 F.2d at 1461. Neither the Ninth Circuit nor this Court has articulated the burden in a criminal

case, and certainly not in a postconviction proceeding challenging judgments of conviction and death sentence. This is noteworthy because, unlike an ordinary trial motion, the writ of habeas corpus is explicitly recognized in the Constitution.[6] U.S. Const. Art. I, § 9, cl. 2. Dubbed the "Great Writ," this procedural remedy "plays a vital role in protecting constitutional rights." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536, (2004); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). Due to the importance of the habeas corpus right, it is incumbent on counsel to "conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief." *McCleskey v. Zant,* 499 U.S. 467, 498 (1991). This necessarily entails conducting an appropriate inquiry of the jurors to determine whether a constitutional violation has occurred.

Secondly, and perhaps most importantly, this Court misapplied the standard the Ninth Circuit articulated. In *TIG,* the defense sought the court's permission to interview jurors. In *Hard*, the defense had *already* interviewed the jurors and was before the court seeking a new trial based upon affidavits from jurors. As a matter of fact, the standard that the court applied was taken entirely out of context. The Ninth Circuit reviewed the defense position in *Hard* and stated:

> Looking only at affidavits and testimony admissible under Rule 606(b), the court must decide whether an evidentiary hearing is required to determine whether a new trial is necessary. An evidentiary hearing is justified only when these materials are sufficient on their face to require setting aside the verdict. Where a losing party in a civil case seeks to impeach a jury verdict, it must be

[6] While federal habeas petitions are now brought under the statutory scheme adopted by Congress, the writ has been in no way diluted. *See* 28 U.S.C. § 2255 (2006); *Davis v. United States*, 417 U.S. 333, 343 (1974) (section 2255 is "intended to afford federal prisoners a remedy identical in scope to federal habeas corpus"); *Hill v. United States*, 368 U.S. 424, 427 (1962).

> shown by a preponderance of the evidence that the outcome would have been different. Unless the affidavits on their face support this conclusion, no evidentiary hearing is required. Unless such a showing is made at the evidentiary hearing, no new trial is required.

Hard, 870 F.2d at 1461.

The Ninth Circuit did not articulate a standard to determine if juror interviews should be allowed, but rather articulated the standard to be applied *after* the interviews had taken place to determine whether to grant a motion for a new trial based upon those interviews. The Ninth Circuit's standard, in context, is logical. Indeed it is prudent and efficient to require the moving party to show that the outcome would have been different once they have completed their investigation, provided all evidence to the court, and moved for a new trial. This Court, however, applied this standard *before* the moving party was given an opportunity to investigate, thus it is entirely illogical to require that they show they would win on a motion for a new trial before they have filed or been given the opportunity to investigate such.

In the present case, Mitchell does not seek to impeach the verdict and is not currently filing a motion for a new trial. Rather Mitchell simply seeks to address the burden the Ninth Circuit set for him in his direct appeal and to conduct a full and thorough investigation as required by law. Thus the burden set forth in *Hard* is inapplicable to Mitchell's motion to interview jurors.

Finally, as the Ninth Circuit has clearly articulated with regards to Rule 606(b), the rule must give away to the demands of due process. *See Henley*, 238 F.3d at 1120. If the Ninth Circuit has ruled that the Federal Rules of Evidence cannot bar due process then certainly Local Rule 39.2 must be likewise limited.

Given that the Ninth Circuit has not ruled on "good cause" as it relates to Rule 39.2 and the closest District of Arizona opinion is limited to civil cases, misapplies the laws, and, in this case, would violate due process, the appropriate standard is not clear. The Eleventh Circuit has clearly defined "good cause" as it relates to a Southern District of Florida local rule almost identical to Rule 39.2, explaining that "good cause under the local rule may be shown only by satisfying the requirements of the exception stated in [Federal Rule of Evidence 606(b)]." *United States v. Camacho*, 865 F.Supp. 1527, 1531 (S.D. Fl. 1994) (quoting *United States v. Griek*, 920 F.2d 840, 842 (11th Cir. 1991)).

The Ninth Circuit standard, as it relates to Rule 39.2, is in all likelihood the same as the Eleventh Circuit approach. Admissibility under rule 606(b) is often the deciding factor in issues related to requests for post-verdict contact with jurors, suggesting that this is the major impediment to receiving the court's approval for such interviews. *See, e.g., United States v. Rice*, 446 F.2d 1390 (9th Cir. 1971). Moreover the structure of Rule 39.2, where the "good cause" language is immediately followed by a citation to Federal Rule of Evidence 606(b), suggests that the key to attaining the court's permission to interview jurors is that the information sought is admissible under 606(b).

The burden placed on Mr. Mitchell by the Ninth Circuit and the fact that the information Mitchell seeks is admissible under 606(b) constitutes a showing of good cause sufficient to satisfy the requirements of Rule 39.2.

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E. CONCLUSION

For all the foregoing reasons, there is good cause to authorize counsel for Mr. Mitchell to conduct a thorough investigation, which includes interviewing the trial jurors, and therefore this motion should be granted.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: May 22, 2009

By: */s/ Statia Peakheart*
STATIA PEAKHEART
Deputy Federal Public Defender

Counsel for Petitioner
LEZMOND CHARLES MITCHELL

CERTIFICATE OF SERVICE

☐ I hereby certify that on _____, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

_____

_____

☒ I hereby certify that on 05/22/09, I served the attached document by mail

(insert service method: mail, courier service, in-person delivery, e-mail)
on the following, who are not registered participants of the CM/ECF System:

Kristine Fox, Senior Capital Case Staff Attorney
Evo A. DeConcini Courthouse, 405 W. Congress, Suite 1500
Tucson, AZ 85701-5010

s/

SUMMARY OF FEDERAL DISTRICT COURT LOCAL RULES REGULATING JUROR INTERVIEWS

Prepared by the Office of the Federal Defender for the Central District of California, June 8, 2020

COURT	NO RESTRICTION	RESTRICTED
Alabama - MD AL		LR 47.1(b) Attorneys, parties, anyone in their employ, or anyone acting for them or on their behalf shall not, without filing a formal motion therefor with the Court and securing the Court's permission, initiate any form of contact for the purpose of interrogating jurors or alternate jurors in civil or criminal cases, in any manner, in an attempt to determine what the jurors thought about any aspect of the case or evidence, the basis for any verdict rendered or to secure other information concerning the deliberations of the jury or any members thereof.
Alabama - ND AL		LR 47.1 Communications with a juror concerning a case on which such person has served as a juror or alternate juror shall not, without prior express approval of a judge of this court, be initiated by any attorney, party, or representative of either, prior to the day following such person's release from jury service for such term of court.
Alabama - SD AL		LR 47.1(e) (good cause) Parties, attorneys, and the agents or employees of parties or attorneys may not approach, interview, or communicate with a venire member or juror before, during, or after trial, except with leave of Court. Such leave may be granted only upon notice to opposing counsel (or pro se opponent) and a showing of good cause. A juror must be advised at the outset of any communication that his or her participation is voluntary. Any juror contact permitted by the Court under this Rule is subject to the Court's control.
Alaska - D. AK	*XX* (L CV R 39.5(b))	

COURT	NO RESTRICTION	RESTRICTED
Arizona - D. AZ		LR Crim 24.2 (LR Civ 39.2) Defers to rule 39.2 with regards to communications with jurors (LR Civ 39.2) (a) Before or During Trial. Absent an order of the Court and except in the course of in-court proceedings, no one shall directly or indirectly communicate with or cause another to communicate with a juror, prospective juror, or member of such juror's or prospective juror's family before or during a trial. (b) After Trial. Interviews with jurors after trial by or on behalf of parties involved in the trial are prohibited except on condition that the attorney or party involved desiring such an interview file with the Court written interrogatories proposed to be submitted to the juror(s), together with an affidavit setting forth the reasons for such proposed interrogatories, within the time granted for a motion for a new trial. Approval for the interview of jurors in accordance with the interrogatories and affidavit so filed will be granted only upon the showing of good cause. See Federal Rules of Evidence, Rule 606(b). Following the interview, a second affidavit must be filed indicating the scope and results of the interviews with jurors and setting out the answers given to the interrogatories. (c) Juror's Rights. Except in response to a Court order, no juror is compelled to communicate with anyone concerning any trial in which the juror has been a participant.
Arkansas - ED AR		LR 47.1 No juror shall be contacted without express permission of the Court and under such conditions as the Court may prescribe.
Arkansas - WD AR		LR 47.1 No juror shall be contacted without express permission of the Court and under such conditions as the Court may prescribe.
California - CD CA	*XX*	
California - ED CA	*XX*	
California - ND CA	*XX*	
California - SD CA	*XX*	

COURT	NO RESTRICTION	RESTRICTED
Colorado - D CO		L CR R 24.1 A party or attorney shall not communicate with, or cause another to communicate with, a juror or prospective juror before, during, or after a trial without order of the judicial officer to whom the case is assigned.
Connecticut - D CT		LR 83.5(c) Unless explicitly authorized by the Court, no party, and no attorney or person acting on behalf of a party or attorney, shall question a juror concerning the deliberations of the jury, votes of the jury or the actions or comments of any other juror.
Delaware - D DE	*XX* (only req. in civil 47.2) Unless otherwise permitted to do so by the Court, a lawyer shall not communicate with a prospective juror, or with a juror after discharge of the jury.	
D.C - D D.C.		LCrR 24.2(b) (good cause) After a verdict is rendered or a mistrial is declared but before the jury is discharged, an attorney or party may request leave of Court to speak with members of the jury after their discharge. Upon receiving such a request, the Court shall inform the jury that no juror is required to speak to anyone but that a juror may do so if the juror wishes. If no request to speak with jurors is made before discharge of the jury, no party or attorney shall speak with a juror concerning the case except when permitted by the Court for good cause shown in writing. The Court may grant permission to speak with a juror upon such conditions as it deems appropriate, including but not limited to a requirement that the juror be examined only in the presence of the Court. COMMENT TO LCvR 47.2: This Rule gives the Court greater flexibility by stating that where the request to converse with jurors is made after their discharge, the Court may impose such conditions as it deems appropriate.

COURT	NO RESTRICTION	RESTRICTED
Florida - MD FL		LR 5.01(d) LR 5.01(d) (good cause) No attorney or party shall undertake, directly or indirectly, to interview any juror after trial in any civil or criminal case except as permitted by this Rule. If a party believes that grounds for legal challenge to a verdict exist, he may move for an order permitting an interview of a juror or jurors to determine whether the verdict is subject to the challenge. The motion shall be served within 14 days after rendition of the verdict unless good cause is shown for the failure to make the motion within that time. The motion shall state the name and address of each juror to be interviewed and the grounds for the challenge that the moving party believes may exist. The presiding judge may conduct such hearings, if any, as necessary, and shall enter an order denying the motion or permitting the interview. If the interview is permitted, the Court may prescribe the place, manner, conditions, and scope of the interview.
Florida - ND FL	*XX*	
Florida - SD FL		LR. 11.1(e) (good cause) Before and during the trial, a lawyer shall avoid communicating with a juror in a case with which a lawyer is connected about any subject, whether pertaining to the case or not. After the jury has been discharged, a lawyer shall not communicate with a member of the jury about a case with which the lawyer and the juror have been connected without leave of Court granted for good cause shown. In such case, the Court may allow counsel to interview jurors to determine whether their verdict is subject to legal challenge, and may limit the time, place, and circumstances under which the interviews may be conducted. The Court also may authorize certain other post-trial lawyer/jury communications in specific cases as the Court may determine to be appropriate under the circumstances. During any Court-conducted or authorized inquiry, a lawyer shall not ask questions of or make comments to a juror that are calculated to harass or embarrass the juror or to influence the juror's actions in future jury service. Nothing in this rule shall prohibit a lawyer from communicating with a juror after the jury has been discharged where the communication is not related to the case and either the juror initiates the communication or the lawyer encounters the juror in a social or business setting unrelated to the case.

COURT	NO RESTRICTION	RESTRICTED
Georgia - MD GA		L CR R 31.1 Attorneys, parties, or anyone acting on their behalf shall not contact any juror without express permission of the Court and under such conditions the Court may prescribe.
Georgia - ND GA		L CR R 47.3 During trial or after the conclusion of a trial, no party, agent or attorney shall communicate with any members of the petit jury, including alternate or excused jurors, before which the case was tried without first receiving permission of the Court.
Georgia - SD GA		LR 83.8 All attempts to curry favor with juries by fawning, flattery, or pretending solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors and propositions to dispense with argument or peremptory challenges, should be made to the Court out of the presence of the jury or its hearing. Before and during the trial, a lawyer shall avoid conversing or otherwise communicating with a juror on any subject, whether pertaining to the case or not. No party, attorney, or other person shall, without Court approval, make or attempt any communication relating to any feature of the trial of any case with any regular or alternate juror who has served in such case, whether or not the case was concluded by verdict.
Guam - D. Guam	*XX*	
Hawaii - D. HI	*XX*	
Idaho - D. ID	*XX*	

COURT	NO RESTRICTION	RESTRICTED
Illinois - CD IL		LR 47.2 (1) Before and during trial, no attorney, party or representative of either, may contact, converse or otherwise communicate with a juror or potential juror on any subject, whether pertaining to the case or not. (2) No attorney, party, or representative of either may interrogate a juror after the verdict has been returned without prior approval of the presiding judge. Approval of the presiding judge may be sought only by application made by counsel orally in open court or upon written motion which states the grounds and the purpose of the interrogation. If a post-verdict interrogation of one or more of the members of the jury should be approved, the scope of the interrogation and other appropriate limitations upon the interrogation will be determined by the presiding judge prior to the interrogation.
Illinois - ND IL		LR 48.1 After the conclusion of a trial, no party, agent or attorney shall communicate or attempt to communicate with any members of the petit jury before which the case was tried without first receiving permission of the court.
Illinois - SD IL		LR 53.1 Before and during trial, no attorney, party, or representative of either shall contact, converse, or otherwise communicate with a juror or potential juror on any subject, whether pertaining to the case or not. No attorney, party, or representative of either may interrogate a juror after the verdict has been returned without prior approval of the presiding judge. Approval of the presiding judge shall be sought only by application made by counsel orally in open court or upon written motion which states the grounds and the purpose of the interrogation. If a post-verdict interrogation of one or more of the members of the jury is approved, the scope of the interrogation and other appropriate limitations upon the interrogation will be determined by the presiding judge prior to the interrogation.
Indiana - ND IN		LR 47-2 (a) Communication Forbidden. Ordinarily, no party or attorney (or any of their employees or agents) may communicate off the record with: (1) a member of the jury pool; or (2) a juror during trial, during deliberations, or after a verdict. (b) Exceptions. The court may allow a party or attorney to communicate with jurors if all other parties are given notice and if the court sets conditions on allowed communication.

COURT	NO RESTRICTION	RESTRICTED
Indiana - SD IN		LR 47-2 (good cause) (a) Communication Not Allowed. No party or attorney (or any of their employees or agents) may communicate or attempt to communicate off the record: (1) with a member of the venire from which the jury will be selected; or (2) with a juror. (b) Exceptions. The court may allow a party or attorney to communicate with jurors after the trial if all other parties are given notice. In criminal cases, a party or attorney must show good cause before the court will allow communication.
Iowa - ND IA		LR 47 Except by leave of court, no party or lawyer, and no other person acting on their behalf, may contact, interview, examine, or question any civil or criminal trial juror or potential trial juror before, during, or after a trial concerning the juror's actual or potential jury service.
Iowa - SD IA		LR 47 Except by leave of court, no party or lawyer, and no other person acting on their behalf, may contact, interview, examine, or question any civil or criminal trial juror or potential trial juror before, during, or after a trial concerning the juror's actual or potential jury service.
Kansas - D. KS		LR 47.1(a)(b) (a) Court Order Required. No one—including the parties, their attorneys, or the agents or employees of either—is permitted to examine or interview any juror, either orally or in writing, except: (1) by order of the court in its discretion; and (2) under such terms and conditions as the court establishes. (b) Restrictions on Interviews. If the court permits examination or interviews of jurors, the following restrictions apply, in addition to any other restrictions the court imposes: (1) Jurors may refuse all interviews or comments. (2) If a juror refuses to be interviewed or questioned, no person may repeatedly ask for interviews or comments. (3) If a juror agrees to an interview, he or she must not disclose any information with respect to: (A) the specific vote of any juror other than the juror being interviewed; or (B) the deliberations of the jury.

COURT	NO RESTRICTION	RESTRICTED
Kentucky - ED KY		L CR R. 24.1(a) Unless permitted by the Court, no person, party or attorney, nor any representative of a party or attorney, may contact, interview, or communicate with any juror before, during or after trial.
Kentucky - WD KY		L. CR R. 24.1(a) Unless permitted by the Court, no person, party or attorney, nor any representative of a party or attorney, may contact, interview, or communicate with any juror before, during or after trial.
Louisiana - ED LA		LCRR 23.2B (LR Civ. 47.5) (A) A juror has no obligation to speak to any person about any case and may refuse all interviews or requests for comments. (B) Attorneys and parties to an action, or anyone acting on their behalf, are prohibited from speaking with, examining or interviewing any juror regarding the proceedings, except with leave of court. If leave of court is granted, it shall be conducted only as specifically directed by the court. (C) No person may make repeated requests to interview or question a juror after the juror has expressed a desire not to be interviewed.
Louisiana - MD LA		LR CR 24(good cause) (LR Civ. 47(e)) (1) No party or their attorney shall, personally or through another person, contact, interview, examine, or question any juror or alternate, except on leave of court granted upon good cause shown. If a party believes in good faith that grounds for legal challenge to a verdict exist, he may move for an order permitting an interview of a juror or jurors to determine whether the verdict is subject to challenge. (2) No juror has any obligation to speak to any person about any case and may refuse all interviews or comments; (3) No person may make repeated requests for interviews or questions after a juror has expressed the desire not to be interviewed; (4) No juror or alternate who consents to be interviewed may disclose any information with respect to the following: (A) The specific vote of any juror other than the juror being interviewed; (B) The deliberations of the jury; or (C) Evidence of improprieties in the jury's deliberation.

COURT	NO RESTRICTION	RESTRICTED
Louisiana - WD LA		LR 47.5 - (good cause) A. No juror has any obligation to speak to any person about any case and may refuse all interviews or comments; B. No person may make repeated requests for interviews or questions after a juror has expressed his/her desire not to be interviewed; C. No juror or alternate who consents to be interviewed may disclose any information with respect to the following: 1. The specific vote of any juror other than the juror being interviewed; 25 2. The deliberations of the jury; or 3. For the purposes of obtaining evidence of improprieties in the jury's deliberation. D. No party or their attorney shall, personally or through another person, contact, interview, examine or question any juror or alternate or any relative, friend or associate thereof, except on leave of court granted upon good cause shown.
Maine - D ME	*XX*	
Maryland - D MD		LR 107-16 Unless permitted by the presiding judge, no attorney or party shall directly or through an agent interview or question any juror, alternate juror, or prospective juror with respect to that juror's jury service,
Mass - D MA	*XX*	
Michigan - ED MI	*XX* (LR 47.1)	
Michigan - WD MI	*XX*	
Minnesota - D MN	*XX* (LR 47.2)	

COURT	NO RESTRICTION	RESTRICTED
Mississippi - ND MS		Rule 48 - (good cause) Upon the return of a verdict by the jury in any civil or criminal action, neither the attorneys in the action nor the parties may, in the courtroom or elsewhere, express to the members of the jury their pleasure or displeasure with the verdict. After the jury has been discharged, neither the attorneys in the action nor the parties may at any time or in any manner communicate with any member of the jury regarding the verdict. Provided, however, that if an attorney believes in good faith that the verdict may be subject to legal challenge, the attorney may apply ex parte to the trial judge for permission to interview one or more members of the jury regarding the fact or circumstance claimed to support the legal challenge. If satisfied that good cause exists, the judge may grant permission for the attorney to make the requested communication and will prescribe the terms and conditions under which it may be conducted.
Mississippi - SD MS		Rule 48 - (good cause) Upon the return of a verdict by the jury in any civil or criminal action, neither the attorneys in the action nor the parties may, in the courtroom or elsewhere, express to the members of the jury their pleasure or displeasure with the verdict. After the jury has been discharged, neither the attorneys in the action nor the parties may at any time or in any manner communicate with any member of the jury regarding the verdict. Provided, however, that if an attorney believes in good faith that the verdict may be subject to legal challenge, the attorney may apply ex parte to the trial judge for permission to interview one or more members of the jury regarding the fact or circumstance claimed to support the legal challenge. If satisfied that good cause exists, the judge may grant permission for the attorney to make the requested communication and will prescribe the terms and conditions under which it may be conducted.
Missouri - ED MO		Rule 47-7.01(B)(1) Petit jurors shall not be required to provide any information concerning any action of the petit jury, unless ordered to do so by the Court. Attorneys and parties to an action shall not initiate, directly or indirectly, communication with any petit juror, relative, friend or associate thereof at any time concerning the action, except with leave of Court. If an attorney or party receives evidence of misconduct by a petit juror, the attorney or party shall inform the Court, and the Court may conduct an investigation to establish the accuracy of the misconduct allegations.

COURT	NO RESTRICTION	RESTRICTED
Missouri - WD MO	*XX*	
Montana - D MT		LR CR 24.2(b) (good cause + timing requirement) Unless a different time applies under Fed. R. Crim. P. 33(b): (1) or a judge's order, neither parties nor counsel may interview jurors unless, within 14 days after the jury returns its verdict, a party files: (A) proposed written questions to be asked of the jurors; (B) an affidavit showing good cause; and, (C) if granted leave, a second affidavit showing the results. (2) Unless otherwise ordered by the court, any juror or prospective juror may decline to communicate with anyone concerning a trial in which the juror was involved. LR Civ R 48.1(b) (1) Neither parties nor counsel may interview jurors unless, within 28 days after entry of judgment, a party files: (A) proposed written questions to be asked of the jurors; (B) an affidavit showing good cause; and, (C) if granted leave, a second affidavit showing the results. (2) Unless otherwise ordered by the court, a juror or prospective juror may decline to communicate with anyone concerning a trial in which the juror was involved.
Nebraska - D. NE	*XX*	
Nevada - D. NV	*XX* (LR 48-1 only prohibits jury contact during trial)	
New Hampshire - D. NH		LR 47.3 (good cause + extraordinary circs) No attorney, party, or witness, acting directly or through the use of an agent, shall attempt to communicate with any juror, prospective juror, or former juror concerning the person's service as a juror without obtaining prior approval from the court. The court will not approve a request to communicate with a juror except in extraordinary circumstances and for good cause shown.

COURT	NO RESTRICTION	RESTRICTED
New Jersey - D NJ		47.1(e) (good cause) (e) No attorney or party to an action shall personally or through any investigator or other person acting for such attorney or party, directly or indirectly interview, examine or question any juror, relative, friend or associate thereof during the pendency of the trial or with respect to the deliberations or verdict of the jury in any action, except on leave of Court granted upon good cause shown.
New Mexico - D NM	*XX*	
New York - ED NY	*XX*	
New York - ND NY	*XX* (LR 47.5 only prohibits jury contact during trial)	
New York - SD NY	*XX*	
New York - WD NY	*XX*	
North Carolina - ED NC	*XX* (LR 24.2(c))	
North Carolina - MD NC	*XX* (LCrR24.1(b)(4))	
North Carolina - WD NC	*XX (criminal cases)*	Barred in civil cases only LCvR47.1(d)) No attorney or party to an action, or persons acting on their behalf, shall personally or through their designees, directly or indirectly, interview, examine or question, or communicate in any way with, any juror, relative, friend, or associate thereof during the trial, or with respect to the deliberations or verdict of the jury in any action, except on leave of the presiding judge upon good cause shown.
North Dakota - D. ND	*XX*	
Northern Mariana Islands - D NMI	*XX*	
Ohio - ND OH	*XX*	

COURT	NO RESTRICTION	RESTRICTED
Ohio - SD OH		LR 47.1 No attorney, party, or anyone acting as agent or in concert with them connected with the trial of an action shall personally, or acting through an investigator or other person, contact, interview, examine, or question any juror regarding the verdict or deliberations of the jury in the action except with leave of the Court.
Oklahoma - ED OK	*XX*	
Oklahoma - ND OK		LR CR 24.2 (Criminal) At no time, including after a case has been completed, may attorneys approach or speak to jurors regarding the case unless authorized by the Court, upon written motion. LCvR 47.2 (Civil) At no time, including after a case has been completed, may attorneys approach or speak to jurors regarding the case unless authorized by the Court, upon written motion.
Oklahoma - WD OK		LCrR53.3 LCvR47.1 applies to criminal cases. LCvR47.1 At no time, including after a case has been completed, may attorneys approach or speak to jurors regarding the case unless authorized by the court, upon written motion.
Oregon - D. Or	*XX (criminal cases)*	Only prohibited in civil context - LR 48-2 Except as authorized by the Court, attorneys, parties, witnesses, or court employees must not initiate contact with any juror concerning any case which that juror was sworn to try.

COURT	NO RESTRICTION	RESTRICTED
Pennsylvania - ED PA		LR 24.1 (a) Before the trial of a case, no attorney, party or witness shall communicate or cause another to communicate with anyone the lawyer, party or witness knows to be a member of the venire from which the jury will be selected for the trial of the case. (b) During the trial of a case, no attorney, party or witness shall communicate with or cause another to communicate with any member of the jury. (c) After the conclusion of a trial no attorney, party or witness shall communicate with or cause another to communicate with any member of the jury without first receiving permission of the Court.
Pennsylvania - MD PA		LR 83.4 No attorney or party or anyone acting on behalf of such attorney or party shall, without express permission from the court, initiate any communication with any juror pertaining to any case in which that juror may be drawn, is participating, or has participated.
Pennsylvania - WD PA	*XX* (LcrR24.3(B))	
Puerto Rico - D. PR		LR 124(e) Counsel are strictly prohibited from any post-verdict communication with jurors, except under the supervision of the Court.
Rhode Island - D RI		LCrR 24(g) (Criminal) Unless otherwise permitted by the Court, no attorney, party, or agent of an attorney or party shall communicate directly or indirectly with a juror during or after the trial of a case. LR Cv 47(d) Unless otherwise permitted by the Court, no attorney, party, or agent of an attorney or party shall communicate directly or indirectly with a juror during or after the trial of a case.
South Carolina - D SC	*XX (criminal cases)*	Under no condition shall an attorney or party personally or through any person acting for such attorney or party ask questions of or make comments to a member of that jury or the members of the family of such a juror until after such juror has been permanently dismissed from jury service and has left the courthouse premises.

COURT	NO RESTRICTION	RESTRICTED
South Dakota - D SD		LR 24.2 No one may contact any juror before or during the jurors service on a case. The parties, their lawyers and anybody acting on their behalf must seek and obtain permission from the district judge who tried the case before contacting a juror after the juror served on the case.
Tennessee - ED TN		LR 48.1 Unless permitted by the Court, no attorney, representative of an attorney, party or representative of a party, may interview, communicate with, or otherwise contact any juror or prospective juror before, during, or after the trial. Permission of the Court must be sought by an application made orally in open court or upon written motion stating the grounds and the purpose of the contact. If permission is granted, the scope of the contact and any limitations upon the contact will be prescribed by the Court prior to the contact.
Tennessee - MD TN		LR 39.01(g)(2) No attorney, party, or representative of either may interview a juror after the verdict has been returned without prior approval of the Court. Approval of the Court may be sought only by counsel orally in open court, or upon written motion that states the grounds and the purpose of the interview. If a post- verdict interview of one or more members of the jury is approved, the scope of the interview and other appropriate limitations upon the interview will be determined by the Judge prior to the interview.
Tennessee - WD TN		LR 47.1(e) After a verdict, no attorney, party, or representative of either may interrogate a juror without prior approval of the Court. Approval of the Court shall be sought only by an application of counsel in open Court, or upon written motion, either of which must state the grounds for and the purpose of the interrogation. If a post-verdict interrogation is approved, the Court will determine the scope of the interrogation and any limitations upon the interrogation prior to the interrogation.
Texas - ND TX		LR24.1 A party, attorney, or representative of a party or attorney, shall not, before or after trial, contact any juror, prospective juror, or the relatives, friends, or associates of a juror or prospective juror, unless explicitly permitted to do so by the presiding judge.

COURT	NO RESTRICTION	RESTRICTED
Texas - SD TX		LR 47 Except with leave of Court, no attorney, party, nor agent of either of them may communicate with a former juror to obtain evidence of misconduct in the jury's deliberations.
Texas - ED TX		LR CR 24 (Criminal) (a) Communication with Jurors. (1) No party or attorney for a party shall converse with a member of the jury during the trial of an action. (2) After a verdict is rendered, an attorney must obtain leave of court to converse with members of the jury. (b) Signature of the Petit Jury Foreperson. The petit jury foreperson shall sign all documents or communications with the court using his or her initials. LR CV 47 (Civil) (a) No party or attorney for a party shall converse with a member of the jury during the trial of an action. (b) After a verdict is rendered, an attorney must obtain leave of court to converse with members of the jury.
Texas - WD TX	*XX*	
Utah - UT	*XX* DU CrimR 57-8; DUCivR 47-2(b)	
Vermont - D VT		LR 83.5 Parties, attorneys, their agents and representatives shall not contact jurors before, during, or after a trial without first obtaining the written permission of the trial judge.
Virgin Islands - D VI		LR 47.1(b) (b) After the conclusion of a trial, no attorney, party, or witness shall, directly or indirectly, communicate with or cause another to communicate with any member of the jury without first receiving permission from the Court.

COURT	NO RESTRICTION	RESTRICTED
Virginia - ED VA		LR Cr 24(c) (Criminal) (good cause) (c) No attorney or party litigant shall personally, or through any investigator or any other person acting for the attorney or party litigant, interview, examine, or question any juror or alternate juror with respect to the verdict or deliberations of the jury in any criminal action except on leave of Court granted upon good cause shown and upon such conditions as the Court shall fix. LRC 47(c) (Civil) (c) No attorney or party litigant shall personally, or through any investigator or any other person acting for the attorney or party litigant, interview, examine, or question any juror or alternate juror with respect to the verdict or deliberations of the jury in any civil action except on leave of Court granted upon good cause shown and upon such conditions as the Court shall fix.
Virginia - WD VA		LR 10 (good cause) No attorney or party litigant shall personally, or through any investigator or any other person acting for the attorney or party litigant, interview, examine or question any juror or alternate juror during the juror's term of service as a potential juror with respect to the verdict or deliberations of the jury in any action, civil or criminal, except by leave of Court upon good cause shown and upon such conditions as the Court in the particular case may fix.
Washington - ED WA		LCrR 31(e) (Criminal) Neither counsel nor the parties shall contact or interview jurors or cause jurors to be contacted or interviewed after trial without first having been granted leave to do so by the court. LCivR 48(d) (Civil) (d) Neither counsel nor the parties shall contact or interview jurors or cause jurors to be contacted or interviewed after trial without first having been granted leave to do so by the Court.

COURT	NO RESTRICTION	RESTRICTED
Washington - WD WA		CrR 31(e) (Criminal) (e) Counsel shall not contact or interview jurors, or cause jurors to be contacted or interviewed after trial without first having been granted leave to do so by the court. LCR 47(d) (d) Counsel shall not contact or interview jurors or cause jurors to be contacted or interviewed after trial without first having been granted leave to do so by the court.
West Virginia - ND WV		LR Gen P 47.01 No party, party's agent or attorney shall communicate or attempt to communicate with any member of the jury regarding the jury's deliberations or verdict without first obtaining an order from the Court allowing such communication.
West Virginia - SD WV		LR Cr P 31.1 (Criminal) (good cause) After conclusion of a trial, no party, nor his or her agent or attorney, shall communicate or attempt to communicate with any member of the jury, including alternate jurors who were dismissed prior to deliberations, about the jury's deliberations or verdict without first applying for (with notice to all other parties) and obtaining, for good cause, an order allowing such communication. LR Civ P 48.1 (Civil) After conclusion of a trial, no party, nor his or her agent or attorney, shall communicate or attempt to communicate with any member of the jury, including alternate jurors who were dismissed prior to deliberations, about the jury's deliberations or verdict without first applying for (with notice to all other parties) and obtaining for good cause an order allowing such communication.

COURT	NO RESTRICTION	RESTRICTED
Wisconsin - ED WI		LR 47(c) (good cause) Parties, attorneys, and the agents or employees of parties or attorneys may not approach, interview, or communicate with a venire member or juror, before, during or after trial, except on leave of Court granted upon notice to opposing counsel and upon good cause shown. Good cause may include a trial attorney's request for permission to contact one or more jurors after trial for the trial attorney's educational benefit. The juror(s) must be advised at the outset of any communication that the juror's participation is voluntary. Any juror contact permitted by the Court under this rule is subject to the Court's control.
Wisconsin - WD WI		Rule 4 (LR 47.2) No lawyer or party or person acting on their behalf shall contact any juror serving in this court, either before or after impanelment, without the prior permission of the trial judge or magistrate judge.
Wyoming - D WY	*XX* (LR 24.1)	
TOTAL 94	36 (38%)	58 (62%)