No. __-____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT BROWN II,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Government here alleged the Seven Mile Bloods operated as an enterprise in Detroit, Michigan, in an area known as the "Red Zone." The Government alleged the Seven Mile Bloods engaged in drug trafficking and violence. The Government further claimed Petitioner Robert Brown II was a member of SMB, and the charges at issue in this case stemmed from Brown's purported involvement with SMB.

Following a lengthy trial, a jury found Brown and his Co-Defendants guilty of various offenses including RICO Conspiracy. On appeal, Brown and his Co-Defendants raised approximately nineteen issues, all of which the United States Court of Appeals for the Sixth Circuit rejected in an Opinion issued July 5, 2022.

Brown now respectfully asks this Court to consider three of the issues raised on direct appeal: first, whether the District Court's denial of admission of evidence regarding a Government cooperating witness committing perjury was error and affected the outcome of the trial; second, whether the jury returned an inconsistent verdict by finding Brown not guilty of Murder in Aid of Racketeering, but guilty of RICO Conspiracy; and third, whether juror bias and extraneous influences resulted in a violation of Brown's right to a fair and impartial jury under the Sixth Amendment.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

There are no parties to the proceedings other than those listed in the caption. Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert Brown II, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, *United States v. Bailey*, Nos. 19-2280/2281/2354/20-1235, 2022 WL 2444930 (6th Cir. July 5, 2022), is reproduced as Appendix A. (Pet. App. 1a–46a)

JURISDICTIONAL STATEMENT

The Sixth Circuit issued its Opinion on July 5, 2022. Brown now timely files this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation . . . .

Fed. R. Evid. 606(b) provides:

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

Fed. R. Evid. 801(c)(2) provides that "'Hearsay' means a statement that: (2) a party offers in evidence to prove the truth of the matter asserted in the statement."

INTRODUCTION

The Government here alleged the Seven Mile Bloods (hereafter "SMB") operated as an enterprise in Detroit, Michigan, in an area known as the "Red Zone." The Government alleged SMB engaged in drug trafficking and violence. The Government further claimed Brown was a member of SMB, and the charges at issue in this case stemmed from Brown's purported involvement with SMB.

Following a lengthy trial, a jury found Brown and his Co-Defendants guilty of various offenses including RICO Conspiracy. On appeal, Brown and his Co-Defendants raised approximately nineteen issues, all of which the United States Court of Appeals for the Sixth Circuit rejected in an Opinion issued July 5, 2022.

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STATEMENT OF THE CASE

On January 3, 2018, a Sixth Superseding Indictment was filed in the United States District Court for the Eastern District of Michigan charging Brown with RICO Conspiracy contrary to 18 U.S.C. § 1962(d) (Count One); Murder in Aid of Racketeering contrary to 18 U.S.C. § 1959(a)(1) (Count Two); Use of a Firearm in Furtherance of a Crime of Violence

Causing Death contrary to 18 U.S.C. § 924(c) and (j) (Count Three); Attempted Murder in Aid of Racketeering contrary to 18 U.S.C § 1959 (a)(5) (Count Twenty-Five); Assault with a Dangerous Weapon in Aid of Racketeering contrary to 18 U.S.C. § 1959 (a)(3) (Count Twenty-Six); Use and Carry of a Firearm During, and in Relation to, a Crime of Violence contrary to 18 U.S.C. § 924(c) (Count Twenty-Seven); and Possession of a Firearm in Furtherance of a Crime of Violence contrary to 18 U.S.C. § 924(c) (Count Thirty-Two). (ECF No. 812, Sixth Superseding Indictment, PageID#4575-609, 4625-27, 4630-31) Regarding Count One, the Indictment accused Brown of participating in SMB, and of committing Overt Acts numbered 5-6, 20-21, 29-31, 42, 46, 79, 81, 84, 97-98, and 105.

On June 5, 2018, trial and voir dire commenced for Brown and Co-Defendants Eugene Fisher, Corey Bailey, Arlandis Shy, Keithon Porter, and Devon Patterson.[1] (ECF No. 1301, 06/05/2018-Trial, Sealed, PageID#16806) The jury began hearing evidence on June 20, 2018. (ECF No. 1118, 06/20/2018-Trial, PageID#10169-70)

On August 27, 2018, the jury returned its verdict finding Brown and his Co-Defendants. (ECF No. 1209, 08/27/2018-Trial, PageID#15664) As to Brown, the jury found him:

- Guilty of RICO conspiracy in Count One;
- As part of the RICO conspiracy, that he conspired with another conspirator to assault rival gang members with intent to commit murder between July 14, 2014 through September 26, 2015;
- As part of the RICO conspiracy, that he committed or caused to be committed, or aided and abetted in the commission of the first degree murder of Cleo McDougal on or about June 7, 2006;
- As part of the RICO conspiracy, that he committed or caused to be committed, or aided and abetted in the commission of the attempted murder, assault with intent

[1] Co-Defendant Patterson entered into a plea agreement before the start of evidence, and thereafter did not participate in the trial. (R.1118, 06/20/2018-Trial, PageID#10165, 10169-70)

to murder of Derrick Peterson, Darnell Canady or Jason Gaskin on or about May 10, 2015;

- Not Guilty of Count Two, murder of Cleo McDougal in aid of racketeering;
- Not Guilty of Count Three, use of a firearm during and in relation to a crime of violence causing death;
- Guilty of Count Twenty-Five, attempted murder of Derrick Peterson, Darnell Canady, or Jason Gaskin in aid of racketeering;
- Guilty of Count Twenty-Seven, use and carry of a firearm during and in relation to a crime of violence;
- Guilty of Count Thirty-Two, possession of a firearm in furtherance of a crime of violence in Count One RICO conspiracy.

(ECF No. 1209, 08/27/2018-Trial, PageID#15671-74)

On July 30, 2019, the Government moved to vacate the conviction and to dismiss Count Thirty-Two pursuant to *United States v. Davis*, 139 S. Ct. 2319 (2019), where the Court found unconstitutional the "residual clause" found in 18 U.S.C. § 924(c)(3)(B). (ECF No. 1465, Motion to Vacate, PageID#19667-68) The District Court granted the motion. (ECF No. 1465, Order, PageID#19669)

On November 18, 2019, the District Court sentenced Brown to an aggregate prison sentence of 480 months. (ECF No. 1531, Judgment, PageID#20279-85) Brown timely appeal on November 22, 2019. (ECF No. 1533, Notice of Appeal, PageID#20288-89)

On appeal, the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") jointly heard the cases of Bailey, Shy, Brown, and Porter. On July 5, 2022, the Sixth Circuit affirmed. *United States v. Bailey*, Nos. 19-2280/2281/2354/20-1235, 2022 WL 2444930 (6th Cir. July 5, 2022). (Pet. App. 1a–46a)

STATEMENT OF FACTS

According to the Sixth Superseding Indictment, the RICO conspiracy at issue began in 2003 and continued to the date of the indictment on January 3, 2018. (ECF No. 812, Sixth Superseding Indictment, PageID#4582)

Count One charged that an association-in-fact enterprise, SMB, allegedly operated in an area referred to as the "Red Zone" on the eastside of Detroit. (ECF No. 1127, 07/12/2018-Trial, PageID#11696) This area was bound by Seven Mile and Eight Mile, and Gratiot and Kelly, with a zip code of 48205. (ECF No. 1118, 06/20/2018-Trial, PageID#10194, 10199, 10201) Photographs of graffiti on buildings from the area were introduced to the jury. (*Id.*, PageID#10196-98) It was not certain how or who gave SMB its name. (ECF No. 1127, 07/12/2018-Trial, PageID#11696)

In 1995-1996, there had been a group known as "Ruthless Claim" that later became SMB in 2005. (ECF No. 1122, 06/26/2018-Trial, PageID# 10792-93, 10808-09) The evidence at trial showed that the 21 Co-Defendants named in the Sixth Superseding Indictment had varying degrees of association since their earlier childhoods growing up on Detroit's east side from the mid-1990's. (ECF No. 1122, 06/26/2020-Trial, PageID#10769-776)

By way of summary, the Government alleged SMB members made money through the sale and distribution of drugs, including cocaine, heroin, marijuana and prescription pills in the "Red Zone" and in West Virginia, Ohio, and Kentucky. These alleged SMB members would use various social media platforms to post photographs, videos, and rap videos depicting SMB activities. SMB would purportedly use certain hand signs, graffiti and clothing to identify themselves and engaged in rivalry with other street gangs. The Government alleged that various acts of violence, including multiple murders and shootings, were directly connected to these

rivalries. At trial, the Government produced several cooperating witnesses, Anthony Lovejoy, Derrick Kennedy, and Matleah Scott, along with specific instances of arrests, drug seizures by local law enforcement in Michigan and West Virginia, and cell phone and social media evidence.

The defense put forth by Brown and his Co-Defendants offered substantial and significant evidence that the Government failed to prove all of the charges because the SMB was not a racketeering enterprise, that Brown did not agree to participate in the racketeering activities, and that he and other purported members simply engaged in independent conduct.

Evidence showed there was no formal leader in SMB, no one directed others to commit crimes, and no rules or regulations existed for SMB. (ECF No. 1138, 07/24/2018-Trial, PageID#13341-43; ECF No. 1139, 07/25/2018-Trial, PageID#13521; ECF No. 1140, 07/26/2018-Trial, PageID#13623; ECF No. 1150, 07/27/2018-Trial, PageID#13961-62) Brown and some Co-Defendants may have sold drugs around their neighborhood, but they all worked independently. (*Id.*, PageID#10887; ECF No. 1123, 06/27/2018-Trial, PageID#10985-86; ECF No. 1139, 07/25/2018-Trial, PageID#13596-97) Nobody was forced to sell drugs for SMB, needed permission to sell drugs, or needed permission for where to sell drugs; they did not share profits; and no dues were paid to any kind of SMB pooled account. (ECF No. 1123, 06/27/2018-Trial, PageID#10978, 10982, 10984-85; ECF No. 1139, 07/25/2018-Trial, PageID#13532, 13596; ECF No. 1140, 07/26/2018-Trial, PageID#13624)

Lovejoy sold drugs beginning in 2003-2004 in Detroit; it was his own operation, not part of SMB or a larger organization, and he did not share the substantial profits that he made then or later with SMB. (ECF No. 1122, 06/26/2018-Trial, PageID#10912-13; ECF No. 1123, 06/27/2018-Trial, PageID#10982, 10988-89) Lovejoy admitted everyone sold separately, used different sources at times, and whatever money he made belonged to him, not SMB. (ECF No.

1122, 06/26/2018-Trial, PageID#10889; ECF No. 1123, 06/27/2018-Trial, PageID#10983-84, 10988-89) Kennedy also admitted his drug sales were not to advance SMB or any other organization, but for himself only; he had no boss telling him how to run his own personal business or what to do with his money. (ECF No. 1139, 07/25/2018-Trial, PageID#13600-01; ECF No. 1150, 07/27/2018-Trial, PageID#13946-47)

Lovejoy discussed the selling of pills in West Virginia being his own operation and people working "for me," not for SMB. (ECF No. 1122, 06/26/2018-Trial, PageID#10813-23, 10830-34) When Lovejoy sold his pills, he kept half of the proceeds and provided the other half to his partner at the time Jason Gill, not to SMB. (*Id.*, PageID#10824; ECF No. 1123, 06/27/2018-Trial, PageID#10994) When other people sold drugs on their own, Lovejoy did not know where the money went. (ECF No. 1122, 06/26/2018-Trial, PageID#10824) After Lovejoy left West Virginia, his operation continued by meeting with someone in Columbus; again, this was something he arranged independently and not through SMB. (ECF No. 1123, 06/27/2018-Trial, PageID#10995) Lovejoy later left the area entirely and went to Arizona to sell drugs, a decision he made by himself and not because of SMB. (*Id.*, PageID#10995-96)

Kennedy discussed selling drugs in Virginia on his own because he had family there. (ECF No. 1138, 07/24/2018-Trial, PageID#13354-55) Kennedy started selling in West Virginia after that, and brought his own drugs there to sell that he pieced together from different people. (*Id.*, PageID#13355-56) Kennedy arranged for someone to sell the pills for him and paid him directly for it; this turned into a partnership just with this person, not as part of SMB. (*Id.*, PageID#13357-62) Kennedy did see others in West Virginia, but they were there selling their own pills. (*Id.*, PageID#13362-63)

Lovejoy also mentioned setting up his own operation selling weed in Grand Rapids; this was not part of SMB. (ECF No. 1122, 06/26/2018-Trial, PageID#10813, 10846, 10888-89; ECF No. 1123, 06/27/2018-Trial, PageID#10992-93) Lovejoy said Brown came to Grand Rapids to make quick money for himself, not for SMB. (ECF No. 1122, 06/26/2018-Trial, PageID#10846) Lovejoy acknowledged Brown sold drugs separately from everyone else, and admitted Brown was involved with selling drugs less than anybody else. (*Id.*, PageID#10917-18) Indeed, Brown never had his own dope house. (ECF No. 1123, 06/27/2018 Trial, PageID#10941)

Kennedy did give money to help friends get back on their feet or to start their own drug business, not at the behest of SMB. (*Id.*, PageID#13541-43, 13601) Kennedy considered it part of a friendship with someone, and did not receive money in return. (ECF No. 1138, 07/24/2018-Trial, PageID#13369-70; ECF No. 1139, 07/25/2018-Trial, PageID#13541-43) When Lovejoy provided bail money for people, it was out of friendship, not for SMB. (ECF No. 1123, 06/27/2018-Trial, PageID#10997)

Kennedy acknowledged that the "enterprise" as alleged was merely a gathering of friends who hung out and talked about things happening in the street. (ECF No. 1139, 07/25/2018-Trial, PageID#13532) These friends grew up together, went to school together, and became like brothers such that if one of them needed help, they would receive help, not necessarily as gang-related. (*Id.*, PageID#13527-30) Being a "gang member" in this sense is not illegal as acknowledged by the Government's case agent, Vicente Ruiz. (ECF No. 1118, 06/20/2018-Trial, PageID#10170-71; ECF No. 1119, 06/21/2018-Trial, PageID#10300-02)

While others may have had SMB tattoos (ECF No. 1122, 06/26/2018-Trial, PageID#10811-12), Brown himself did not have any "gang" tattoos. (ECF No. 1119, 06/21/2018-Trial, PageID#10297-98; ECF No. 1122, 06/26/2018-Trial, 10924) Lovejoy did not

list Brown as among those he saw with firearms. (ECF No. 1122, 06/26/2018-Trial, PageID#10796-97)

Agent Ruiz acknowledged that while Brown had contact information in his phone for 3 purported SMB members (Arnold, Bailey, and Patterson), he had maybe hundreds of other contacts who were not SMB members. (ECF No. 1132, 07/18/2018-Trial, PageID#12392-94)

Lovejoy described how Brown often became involved in fights. (ECF No. 1122, 06/26/2018-Trial, PageID#10835) However, Brown fought "everybody," including SMB members and non-SMB members. (*Id.*, PageID#10835-36) Indeed, Brown had a reputation for violence in general, not necessarily for any role for SMB. (*Id.*, PageID#10840-41) Lovejoy acknowledged Brown did not engage in violence on behalf of SMB or their associates. (*Id.*, PageID#10841)

Kennedy's plea agreement called for a sentence of 48-60 months. (ECF No. 1139, 07/25/2018-Trial, PageID#13482-83) He acknowledged his history of lying. (*Id.*, PageID#13486-505) Lovejoy's plea agreement called for a sentence of 30 months. (ECF No. 1122, 06/26/2018-Trial, PageID#10875-76) Scott's plea agreement stipulated the Government would recommend a sentence of 10 years, and she could request a lower sentence. (ECF No. 1130, 07/16/2018-Trial, PageID#12006-08)

Overt Act 20 alleged: "On or about May 10, 2015, in Detroit, Michigan, BILLY ARNOLD, ROBERT BROWN, and others shot over sixty rounds of ammunition at a car containing D.P., D.C., and J.G." (ECF No. 812, Sixth Superseding Indictment, PageID#4588) These allegations also formed the basis for Counts Twenty-Five and Twenty-Seven.

On May 10, 2015, a shooting took place at Hoover and East State Fair in Detroit at approximately 1:00 pm. (ECF No. 1131, 07/17/2018-Trial, PageID#12178-79) When officers

arrived at the scene, no one was present; only a shot-up Impala remained surrounded by shell casings inside and outside, with blood also on the interior. (*Id.*, PageID#12179-81) One eyewitness described hearing a male say, "it's a red light. Go ahead and bust at them." (*Id.*, PageID#12192-94) The eyewitness heard gunshots and looked outside, and saw a black male in his early 20's lying on the ground by the bus stop pointing at the intersection of State Fair and Hoover. (*Id.*, PageID#12194-95) The witness saw another shooter behind the Impala. (*Id.*, PageID#12199-200) One shooter had a bigger gun, while the other had a smaller gun. (*Id.*, PageID#12200-01, 12206-07) The eyewitness saw a different vehicle reverse, and saw the guy laying on the ground get up and run toward a fire station. (*Id.*, PageID#12196-97) The eyewitness described how the individuals in the vehicle hopped out and took off. (*Id.*, PageID#12197-99)

Officers located one of the victims, Peterson, at the hospital with a gunshot wound to his right ankle. (*Id.*, PageID#12204) Peterson refused to cooperate with the investigation. (*Id.*, PageID#12204-05) Another person was also in the vehicle that was shot, but he was not identified by officers. (*Id.*, PageID#12205-06) At trial, however, Darnall Canady, claimed he drove the Impala and Gaskin and Peterson were in the car with him. (*Id.*, PageID#12280-86)

Evidence collected from the scene included 23 shell casings from Hoover, all .40 caliber, as well as 41 shell casings from State Fair most likely fired from an AK-47. (*Id.*, PageID#12211-29)

Cell phones belonging to Arnold, Brown, and Porter had contact at the time of the shooting near 11803 Lamont. (ECF No. 1136, 07/19/2018-Trial, PageID#12994-97, 13009-10) According to the Government's cell tower analyst, however, this did not prove who had these cell phones at the time. (*Id.*, PageID#13022)

Kennedy also alleged that Brown (R.O.) and Arnold (B-Man) discussed the shooting, with Brown saying, "I seen their body drop. They dead." (ECF No. 1139, 07/25/2018-Trial, PageID#13453-54)

Overt Act 97 alleged: "On or about June 7, 2006, C.M. was shot and killed by ROBERT BROWN." (ECF No. 812, Sixth Superseding Indictment, PageID#4600) "C.M." stood for Cleo McDougal. These allegations also formed the basis for Counts Two and Three.

On June 7, 2006, officers responded to 14299 Fordham on the east side of Detroit on reports of a homicide inside an apartment. (ECF No. 1121, 06/25/2018-Trial, PageID#10611-12) Officers processed a scene containing multiple gunshots and the deceased, Cleo McDougal. (*Id.*, PageID#10613-37) McDougal sustained four gunshot wounds. (ECF No. 1151, 07/30/2018-Trial, PageID#14046-52)

Elroy Jones was convicted twice in state court of murdering McDougal. (ECF No. 1154, 08/02/2018-Trial, PageID#14552)

In 2012, Jonathan Murphy, who became a Government snitch, provided information to Detroit Police Detective Aubrey Sargent about the McDougal homicide, which led Det. Sargent to conduct further investigation leading to the exoneration of Jones as the shooter. (ECF No. 1120, 06/22/2018-Trial, PageID#10581-89) Det. Sargent acknowledged how prosecutors twice relied upon the testimony of Martenis Carter, McDougal's brother, to convict Jones. (*Id.*, PageID#10589, 10600-01) Det. Sargent interviewed Carter in 2012, and he maintained his position that he saw who killed his brother. (*Id.*, PageID#10602-03) Indeed, Agent Ruiz acknowledged that McDougal's brother identified Jones as the killer. (ECF No. 1119, 06/21/2018-Trial, PageID#10306-07)

On the day in question at approximately 11:30 am, eyewitness, Martielle Barber, saw two African-American males fighting, one "bigger" and the other "skinny," near the area of Chalmers and Fordham. (ECF No. 1121, 06/25/2018-Trial, PageID#10651-53) Barber saw the bigger guy beat up the smaller guy, before the smaller guy ran off. (*Id.*, PageID#10655-56) The smaller guy was on his cell phone, and then ran back towards the bigger guy and fought him again. (*Id.*, PageID#10656) Barber observed the smaller guy get the best of the bigger guy the second time around, with the bigger guy falling down. (*Id.*, PageID#10656-57) Once the bigger guy got up, the smaller guy walked away while the bigger guy got into the passenger's side of a Chevy Lumina with someone else and pulled off. (*Id.*, PageID#10657-59) Barber identified the driver as "Man Man," who police later identified as Marcus Martin. (*Id.*, PageID#10658-59, 10727-28) Barber had seen the smaller guy before at a nearby gas station, but had never seen the bigger guy before that day. (*Id.*, PageID#10657-60) Barber did see the bigger guy bleeding from the mouth. (*Id.*, PageID#10659-60)

After witnessing the fight, Barber visited his cousin's collision shop nearby to tell him about the fight. (*Id.*, PageID#10660-61) Approximately 6-8 minutes later, Barber heard 8-10 gunshots coming from a nearby apartment building. (*Id.*, PageID#10661-62, 10668) As Barber walked toward the gas station, he saw someone in a Pontiac G6 car motioning for him to stop. (*Id.*, PageID#10662-63, 10683) Barber kept walking until he met up with "the big guy with the gun." (*Id.*) Barber claimed the gunman held an AK-47 and "put the gun up on me and asked, did I want some of this." (*Id.*, PageID#10663-64) He also alleged that the gunman was the same "bigger guy" he saw fighting. (*Id.*, PageID#10664, 10680) Barber told the gunman he was with him, and the gunman said "all right" before he hopped in the G6 and pulled off. (*Id.*,

PageID#10666) Barber claimed the driver of the G6 was a different person than who drove the Chevy Lumina. (*Id.*, PageID#10666-67)

While Barber purportedly picked out Brown from a photo array in 2012, he also admitted he could not identify the shooter because he "was really more focused on [his] life." (*Id.*, PageID#10678-83, 10708-09, 10721-27) He also admitted that prior to a live lineup, he had never seen Elroy Jones before, and claimed he did not know Carter before this incident. (*Id.*, PageID#10672-64)

Lovejoy testified that one morning in 2006 around 8:30 or 9:00, while waiting for a customer, he saw Brown with blood on his shirt and on his mouth. (ECF No. 1122, 06/26/2018-Trial, PageID#10836-37) He saw Brown with an AK in his hand, Jonathan Murphy drive up, and Brown get in the car before they pulled off. (*Id.*, PageID#10837-39)

REASONS FOR GRANTING THE PETITION

I. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING ADMISSION OF EVIDENCE REGARDING A GOVERNMENT COOPERATING WITNESS COMMITTING PERJURY, AND THE ERROR WAS NOT HARMLESS BECAUSE THE OUTCOME OF THE TRIAL WAS AFFECTED BY THAT EVIDENTIARY ERROR.

During a status conference before trial, counsel for Brown discussed how Jonathan Murphy, a Government cooperator, committed perjury over allegations involving Brown being the shooter in the McDougal murder, i.e., Counts Two and Three. (ECF No. 1410, 03/15/2018-Status Conference, PageID#18451-52) Counsel asked the District Court what could be introduced at trial regarding Murphy's perjury. (*Id.*, PageID#18452) The District Court suggested that counsel discuss the matter further with the Government, or file a motion in limine. (*Id.*)

In counsel for Brown's opening statement, counsel referenced Murphy previously lying when he claimed Brown killed McDougal. (ECF No. 1117, 06/19/2020-Trial, PageID#10137-40) Counsel went to so far as to state, "what the defense is going to show you, is that Mr. Murphy testified at a prior hearing about the murder of Mr. McDougal." (*Id.*, PageID#10138) The Government **did not object** to counsel's statement. (*Id.*, PageID#10137-40) Counsel for Brown's claims came **after** the Government's opening statement, where the prosecution said Murphy came forward and said what really happened, so the case against Elroy Jones was dismissed. (*Id.*, PageID#10105-06) The Government then alleged because Murphy came forward, Brown put out a rap video called "Betrayal" wherein he called Murphy a cop. (*Id.*)

The jury subsequently heard evidence of how Murphy provided information to Detroit Police Detective Aubrey Sargent about the McDougal homicide, which led Det. Sargent to conduct further investigation leading to the exoneration of Jones as the shooter. (ECF No. 1120, 06/22/2018-Trial, PageID#10582-89)

With the Government alleging that Brown, not Jones, committed the McDougal murder, it was imperative for Brown to challenge Murphy's credibility as it was his testimony that exonerated Jones and led to charges against Brown. During the cross-examination of Kennedy, he discussed the McDougal murder, Murphy (aka Bleek), Brown's statements, and Jones' release. (ECF No. 1140, 07/26/2018-Trial, PageID#13693-98) Counsel for Brown sought to introduce evidence of Murphy's perjury, but the Government objected and claimed the hearsay rules preclude introduction of the evidence. (*Id.*, PageID#13698-700) The District Court ultimately sustained the objection. (*Id.*, PageID#701)

During closing argument, counsel for Brown discussed how the Government did not call Murphy as a witness to testify about driving Brown to the McDougal shooting. (ECF No. 1157,

08/15/2018-Trial, PageID#14924-25) The District Court sustained the Government's objection as to defense counsel referencing any previous testimony from Murphy. (*Id.*, PageID#14926-28)

According to defense counsel's opening statement, Murphy testified at the first SMB trial that when Brown had an AK-47 and was going to kill McDougal, he told Murphy to go take care of his (Brown's) son. (ECF No. 1117, 06/19/2018-Trial, PageID#10138-39) The problem was that Brown's son was born 2 months after the shooting of McDougal, so Murphy was clearly lying. (*Id.*, PageID#10139) However, due to the District Court's decision, the jury never actually heard this evidence of Murphy's perjury from the first SMB trial. Since the jury heard that Murphy provided evidence to exonerate Elroy Jones, they should have also heard that Murphy perjured himself.

This evidence was critical. Although the jury acquitted Brown for Counts Two and Three regarding the McDougal murder, they still answered yes to the interrogatory regarding the McDougal murder for Count One. The jury needed to know that the key reason the McDougal murder investigation was reopened was based on Murphy, an admitted liar. Instead, the jury only heard one side of the story. The Government waived any ability to object by raising the issue in its opening and not objecting to Brown's opening.

Moreover, Murphy's testimony from the first trial did not constitute hearsay. Statements are only hearsay, and generally inadmissible unless an exception applies, if they are offered for the truth of the matter asserted. Fed. R. Evid. 801(c)(2). "The hearsay rule does not apply to statements offered merely to show that they were made or had some effect on the hearer." *United States v. Martin*, 897 F.2d 1368, 1371 (6th Cir. 1990).

Here, defense counsel intended to introduce Murphy's testimony for its falsity, the fundamental opposite of the truth of the matter asserted. It was also within defense counsel's

right to question Kennedy regarding his knowledge of Murphy's testimony, again another non-hearsay purpose. Brown had every right to use Kennedy as further proof that Murphy lied about the McDougal murder. Therefore, there was no evidentiary reason for the District Court denying defense counsel's questioning of Kennedy.

For these reasons, reversal in this case is warranted because there is lacking "a fair assurance that the outcome of a trial was not affected by evidentiary error." *McCombs v. Meijer, Inc*., 395 F.3d 346, 358 (6th Cir. 2005). The jury heard another person had his conviction vacated because of what Murphy initially told police, with the inference being that Brown instead must be the responsible party. The jury needed to hear about Murphy's perjury. The jury answering yes to a question in Count One about Brown's involvement with the McDougal murder (ECF No. 1209, 08/27/2018-Trial, PageID#15671), despite the jury finding Brown not guilty of this offense in both Counts Two and Three (ECF No. 1166, Verdict Form, PageID#15262), further demonstrates that the error was not harmless.

II. THE JURY RETURNED AN INCONSISTENT VERDICT BY FINDING PETITIONER NOT GUILTY OF COUNT TWO, MURDER IN AID OF RACKETEERING, BUT GUILTY OF RICO CONSPIRACY REQUIRING REVERSAL OF THE RICO CONSPIRACY CONVICTION.

Brown acknowledges the long-standing rule that with respect to the jury's verdict of guilt or innocence, "[c]onsistency in the verdict is not necessary." *Dunn v. United States*, 284 U.S. 390, 393 (1932). Juries may acquit out of compassion, compromise, or assumption of a power which they had no right to exercise, but to which they were disposed through lenity. *Standefer v. United States*, 447 U.S. 10, 22 (1980). While apparently irreconcilable verdicts of conviction and acquittal show the presence of error, "in the sense that the jury has not followed the court's instructions," judicial oversight cannot be meaningfully exercised because "it is unclear whose ox has been gored." *United States v. Powell*, 469 U.S. 57, 65 (1984). And "whose ox has been

gored" is unclear because a jury acquitting on one offense and convicting on another "is as likely to have erred in acquitting him of the one as in convicting him of the other." *United States v. Johnson*, 223 F.3d 665, 675 (7th Cir. 2000).

In this case, with regards to the RICO Conspiracy alleged in Count One, if the jury found Brown guilty, the District Court instructed the jury to consider an interrogatory: "Did [Brown] commit or cause to be committed, or aid and abet in the commission of, the first degree murder of Cleo McDougal on or about June 7, 2006." (ECF No. 1166, Verdict Form, PageID#15259-60) The jury answered "yes" to this question, beyond a reasonable doubt. (*Id.*; ECF No. 1209, 08/27/2018-Trial, PageID#15671) However, the jury also found Brown **not guilty** of Counts Two and Three, where the question was whether Brown killed McDougal, with a firearm, and committed this violent crime in aid of racketeering (VICAR). (ECF No. 1209, 08/27/2018-Trial, PageID#15672)

According to the jury instructions and the elements of RICO Conspiracy, by finding Brown guilty of RICO Conspiracy, the jury necessarily found that an enterprise existed that engaged in interstate commerce and in racketeering activity. (ECF No. 1208, 08/16/2018-Trial, PageID#15566-67) The jury then indicated Brown murdered McDougal as part of the RICO Conspiracy. (ECF No. 1209, 08/27/2018-Trial, PageID#15671) Importantly, and again according to the jury instructions for Count One, **these are the exact same elements** for Count Two—the existence of an enterprise engaged in interstate commerce and racketeering activity and Brown murdered McDougal in aid of racketeering. (ECF No. 1208, 08/16/2018-Trial, PageID#15600-02) Thus, the Government cannot credibly argue the acquittal in Counts Two and Three was the result of the jury not finding the murder was committed in aid of racketeering. If that was the case, then the Count One verdict as to the McDougal murder must also be not guilty. Based on

the District Court's instructions, the jury returned inconsistent responses to essentially the same count. It is illogical for the jury to find Brown guilty of a racketeering conspiracy with one of the overt acts being the murder of McDougal, but then not guilty of murdering McDougal in aid of racketeering.

What happened here differed from *Powell* where the inconsistent verdicts were for completely different federal offenses, i.e., cocaine possession and telephone facilitation. *Powell*, 469 U.S. at 60. Moreover, in *Dunn*, the inconsistency involved completely different offenses, namely maintaining a common nuisance (found guilty of), unlawful possession of intoxicating liquor (found not guilty of), and unlawful sale of such liquor (found not guilty of). *Dunn*, 284 U.S. at 391-92.

The problem identified in *Powell* of not knowing whose ox was gored is not present here. Because the jury acquitted Brown of Counts Two and Three, they should have also answered "no" to the question of whether Brown murdered McDougal as part of the RICO Conspiracy. If the murder was not a VICAR murder as the jury unanimously agreed, then the McDougal murder absolutely could not be part of the Count One RICO. Thus, it is clear Brown's ox was gored.

Under the unique facts of this case, the verdicts of the jury are inconsistent and cannot be reconciled. Accordingly, the rule set forth in *Dunn* and *Powell* does not apply, and Brown was deprived of due process of law under the United States Constitution.

III. JUROR BIAS AND EXTRANEOUS INFLUENCES RESULED IN A VIOLATION OF PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL JURY UNDER THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION.

In this case, one juror not only was biased against Brown and his Co-Defendants, but that same juror also injected an extraneous influence into the jury's deliberations. Additionally, two of the jurors may have exposed the jury to extraneous prejudicial information. Finally, one of the

District Court's marshals constituted an outside influence. These errors violated Brown's Sixth Amendment right to be tried by an impartial jury.

The Constitution guarantees criminal defendants the right to be tried by an "impartial jury." U.S. Const. amend. VI. The right to a jury trial presupposes "an absolute right to a fair and impartial jury." *Duncan v. Louisiana*, 391 U.S. 145, 153-54 (1968). In practice, that means a jury must base its verdict "upon the evidence developed at trial" and not other considerations. *Morgan v. Illinois*, 504 U.S. 719, 727 (1992). And if a trial court is presented with evidence of things like juror bias, it must hold a "hearing with all interested parties permitted to participate." *Remmer v. United States*, 347 U.S. 227, 230 (1954); *see Smith v. Phillips*, 455 U.S. 209, 215 (1982).

To warrant a *Remmer* hearing, a defendant must make a "colorable claim of extraneous influence" that has a "likelihood of affecting the verdict." *United States v. Lanier*, 870 F.3d 546, 549-50 (6th Cir. 2017); *see United States v. Britton*, 811 F. App'x 312, 316 (6th Cir. 2020). For example, it must involve "claims of intentional improper contacts or contacts that had the obvious potential for improperly influencing the jury." *Lanier*, 870 F.3d at 549-50 (cleaned up). A party's request for a *Remmer* hearing must be supported by credible evidence. *Lang v. Bobby*, 889 F.3d 803, 811 (6th Cir. 2018) ("[W]hen there is evidence of possible juror bias, a defendant is entitled to a hearing with all interested parties present.").

If a defendant makes the threshold showing, he is entitled under *Remmer* to (1) a rebuttable presumption that the external influence prejudiced the jury's ability to remain impartial; and to (2) an evidentiary hearing to determine "what actually transpired" and whether the challenged contact was harmless. *Remmer*, 347 U.S. at 229. At the hearing, the Government bears the burden of rebutting the presumption of prejudice by showing that the alleged "contact

with the juror was harmless to the defendant." *Id*. A district court "has an obligation to investigate a colorable claim of external influence on the jury to determine whether any external influence occurred and, if so, whether it was prejudicial." *Lanier*, 870 F.3d at 549.

For a juror's nondisclosure of bias during voir dire to warrant a new trial, a defendant must show that (1) the juror "failed to answer honestly a material question on voir dire," and (2) "a correct response would have provided a valid basis for a challenge for cause." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984). Where the juror's omission was unintentional, a defendant must show "actual bias," but where the omission was intentional, bias may be inferred. *Zerka v. Green*, 49 F.3d 1181, 1186 (6th Cir. 1995).

Under Fed. R. Evid. 606(b), a juror cannot "testify about any statement made or incident that occurred during the 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 rule, however, contains several exceptions, two of which are relevant here.

First, a juror may testify about whether "extraneous prejudicial information was improperly brought to the jury's attention." Fed. R. Evid. 606(b)(2)(A). "Extraneous prejudicial information" includes "publicity and information related specifically to the case the jurors are meant to decide." *Warger v. Shauers*, 574 U.S. 40, 51 (2014). Thus, news coverage may constitute extraneous prejudicial information. *See Thompson v. Parker*, 867 F.3d 641, 648 (6th Cir. 2017). So too may relevant information that is "physically brought to the jury room or disseminated to the jury." *Id.*

The second relevant exception concerns influences. A juror may testify about whether "an outside influence was improperly brought to bear on any juror." Fed. R. Evid. 606(b)(2)(B). The term "outside influence" refers to external influences on the jury rather than

internal ones, and an outside influence may occur when a juror's family member is threatened, *see Tanner v. United States*, 483 U.S. 107, 123 (1987), or a bailiff tells the jurors that the defendant is "wicked" and "guilty," *Parker v. Gladden*, 385 U.S. 363, 363 (1966).

Here, Juror V was biased against Brown and his Co-Defendants, and she deliberately answered voir dire questions in a way to hide and omit her bias and impartiality. (ECF No. 1-16, Case No. 18-mc-50780, PageID#3274) The juror's questionnaires put prospective jurors on notice to provide "true and complete answers" to the questions and that "honesty is necessary so that both the prosecution and the defense will have a meaningful opportunity to select an impartial jury." (ECF No. 1-16, Case No. 18-mc-50780, PageID#3261-62) The questionnaire further cautioned jurors "to listen to the evidence presented in court and make their decision based ONLY on the evidence they hear in court." (ECF No. 1-16, Case No. 18-mc-50780, PageID#3263)

In the questionnaire, Juror V stated that she did not know anyone who was a member of SMB or that she did not know anyone who had a dispute with any gang member; however, she failed to disclose that she knew of the SMB and gangs like them, and that she knew how gangs had ruined her neighborhood. (ECF No. 1-16, Case No. 18-mc-50780, PageID#3274)

Juror V further denied that she or anyone she knew had an experience with a gang, and she denied that she had "any views or opinions or any other reason why [she] could not be objective and impartial in this particular case" due to gangs and the charged distribution of drugs. (*Id*. at PageID#3274-75) Juror V denied that she had heard anything about this case or the people involved, and whether or not she had made up her mind about the Defendants' guilt. (*Id*. at PageID#3275-76) And Juror V stated that she would not do any research on the Internet concerning the case. (*Id*. at PageID#3278)

In court, the jury panel was immediately notified about the reasons for voir dire and their individual obligations to disclose material information about themselves:

> THE COURT. The questions asked during this process are meant to find out if you know anything about the case. Also, we need to find out if you have any opinions or personal experiences that might influence you for or against the prosecution, the defendant or any of the witnesses in the case.
>
> * * *
>
> The case that brings you here today is a criminal case which involves allegations of a racketeering enterprise, alleging that the Seven Mile Bloods and -- as a racketeering enterprise, has engaged in certain racketeering activity . . . . All six of the defendants who are here today are charged with being members or associates of the Seven Mile Bloods . . .

(ECF No. 1301, Voir Dire, PageID#16819, 16821-22)

Juror V also heard the defense attorneys question a number of jurors regarding their strong, negative opinions about gangs and rap music—that the jurors associated gangs with violence, drugs, and have an overall bad image keeping those jurors from being impartial. (ECF No. 1301, Voir Dire, PageID#16896-897; 16922, 16937-38, 16954-55) Those jurors who had a bias against gang members were excused for cause. (ECF No. 1301, Voir Dire, PageID#16956, 16960; R.1302, Voir Dire, PageID#17018)

One defense attorney told the panel the following:

> I looked at some of your questionnaires, and we all--a lot of you come from different areas around the state, and I have some real concerns as to whether you have biases that could spillover to you not being able to look at this evidence without being affected by your biases. Can you render a fair and impartial verdict?

(ECF No. 1301, Voir Dire, PageID#16915-16) Because of the defense's concern about impartiality toward gang members, one defense attorney repeated the request for revealing any biases: "After all of the questions that the government asked and we all asked, does anybody

now have a reason or opinion that they could not sit and be impartial in this case?" (ECF No. 1301, Voir Dire, PageID#16954)

Later, the trial court questioned jurors about being exposed to any news coverage of this case, noting that "[t]hat's, again, information outside the confines of the courtroom." (ECF No. 1302, Voir Dire, PageID#17027) Initially, the parties agreed to excuse for cause any juror who had been exposed to the media coverage. (ECF No. 1302, Voir Dire, PageID#17026-29) Three jurors were excused, but then brought back to the panel to assess their media exposure in case any of those jurors happened to be called to the jury box. (ECF No. 1302, Voir Dire, PageID#17029, 17032-033, 17038) One of those jurors initially excused, Juror 307, was later excused for cause because of her exposure to the media story. (ECF No. 1303, Voir Dire, PageID#17137-43)

A juror who had a family member murdered from gang activity was also excused for cause. (ECF No. 1302, Voir Dire, PageID#17055-56)

Juror V was called to the jury box at the end of the second day of voir dire, but she was not questioned until the following day. (ECF No. 1302, Voir Dire, PageID#17175) Before being questioned by the Court, Juror V again heard other jurors questioned about gang related bias. (ECF No. 1302, Voir Dire, PageID#17096, 17170) One juror saw gang related "scenes" while living in Chicago, and another had a nephew convicted for violent crimes who lived on the East side of Detroit and was familiar with the Seven Mile Bloods name. (ECF No. 1302, Voir Dire, PageID# 17170) The second juror who knew the name of the Seven Mile Bloods was excused for cause. (ECF No. 1302, Voir Dire, PageID#17171)

When Juror V was called to the box, the Court engaged in the following voir dire questioning:

> THE COURT: And you heard the other questions asked of the perspective jurors?
>
> JUROR NO. 16 [V]: Yes.
>
> THE COURT: And based on those questions, is there any information that you feel should be brought to our attention?
>
> JUROR NO. 16: No.
>
> * * *
> THE COURT: Okay. Anything about the nature of the case that raises concerns for you?
>
> JUROR NO. 16: No.

(ECF No. 1303, Voir Dire, PageID#17326-27)

As soon as the Court was finished with its questions, a defense attorney immediately questioned another juror about being exposed to any outside information about the case, giving Juror V a final notice that her bias and media exposure were material:

> MR. H. SCHARG: In reference to this case, you indicated that you had some reference to serious allegations in this case. Have you read anything about this case?
>
> JUROR NO. [***]: No, I haven't.
>
> MR. H. SCHARG: Have you heard anything other than what you heard in the court about this case?
>
> JUROR NO. [***]: No, I haven't.

(ECF No. 1303, Voir Dire, PageID#17239)

The foregoing demonstrates that Juror V knew that her biases, personal knowledge, and exposure to the media were material and she had an obligation to disclose them. Nevertheless, the defense presented the affidavits of two jurors, Juror F and Juror L, to show not only that Juror V was biased and intentionally omitted her unfair impartiality during voir dire, but that she injected her alleged personal knowledge of facts, facts not in evidence, and relied on a Detroit

News article about SMB during deliberations (which another juror, Juror "C," did as well). (ECF No. 1311-1, PageID# 17450-452; R.1313, PageID#17468-69) Co-Defendant Shy preserved this issue by filing two motions for a new trial based on newly discovered evidence and requesting an evidentiary hearing. (ECF No. 1181, Motion; ECF No. 1311, Motion)[2]

Juror V lived near the Red Zone and personally knew about its significance to the case a relation to gang violence. (ECF No. 1311-1, PageID#17450-52; ECF No. 1313, PageID#17468-69) She had witnessed what she considered to be the destructive effects of gang activity in her neighborhood, including SMB graffiti, and she believed that people like the Defendants in this case were ruining the neighborhood—they needed to burn and "had to go down." (*Id.*) Juror V also openly refused to decide the case based on the evidence presented, excusing herself from that obligation in front of the other jurors, because she had personal knowledge of the area, gangs, and Detroit neighborhoods, and the other suburbanite jurors did not. (*Id.*) Juror V claimed personal knowledge about the location of a strip club, openly relying on and referring to her personal knowledge during deliberations and not on evidence presented at trial. (*Id.*) Finally, Juror V and another juror, "Juror C," made statements in deliberations that lead Juror F to believe that they had read a Detroit News article about SMB, and both jurors referred to the facts in the article that were not presented at trial. (ECF No. 1311-1, PageID#17452)

Jurors F and L's affidavits demonstrate an external influence on the jury (Juror V's personal knowledge, and Juror V and Juror C's consideration of the Detroit News article). In addition, Deputy U.S. Marshal Mike Jordan gave the jurors his cell phone number "in case they

[2] Brown joined Shy's motion for a *Remmer* hearing. (ECF No. 1183, Notice of Joinder, PageID#15325-26) Brown also joined in the motion for a new trial based on newly discovered evidence regarding juror bias. (ECF No. 1311, Defendants' Motion for a New Trial, PageID#17424-65)

were late, had car troubles, received threats, etc." (ECF No. 1181-1, Marshal Rpt., PageID#15316)

On August 21, 2018, during the jury's deliberations, a juror sent the following two text messages to Dep. Jordan:

> If we think there maybe some conspiracy with in the group how do we voice that without being singled out? We don't know for sure but it's really bothering some of us.
>
> [W]e don't know for sure, but it is really bothering some of us.

(ECF No. 1307, PageID#17391) The defense attorneys were not made aware of this at the time. Special Deputy U.S. Marshal Jody Nidiffer interviewed that juror to investigate any potential outside interference, and the unnamed juror told Nidiffer that the jury believed "that two of the jurors were 'conspiring' to hold up the deliberations and it is causing frustration and arguments within the deliberations." (*Id.*)

The information about the juror's text to Dep. Jordan and later interview by Nidiffer were not disclosed to the parties until August 23, 2018, during deliberations. (ECF No. 1307, PageID#17391) The trial court stated that

> The U.S. Marshal asked for permission to inquire of the juror whether he or she was alleging wrongdoing or jury tampering of any kind, which would require further investigation.
>
> I approved the request on the condition that the marshal not elicit any information concerning the substance of jury communications, but to strictly limit the inquiry to whether the juror was alleging some kind of wrongdoing in the nature of jury tampering.
>
> I also directed my law clerk officer Jill Hart, who is seated here, to stand by during that interview to ensure that these restrictions were maintained.
>
> After a very brief inquiry of the juror, the marshal concluded that the juror was not alleging any wrongdoing or outside influence, but the complaints amounted to normal differences of opinion and alliances among the jurors in their deliberations.

> The juror sending the message then acknowledged having no tangible evidence of wrongdoing, and was content to continue the deliberations . . . .

(ECF No. 1307, PageID#17391-92) The defense requested a report about the incident that was later produced by the trial court. (ECF No. 1181-1, Report, PageID#15316)

As an influence on the jury deliberations, Juror V accused other "suburban" jurors as being naive and uninformed because they did not understand what really went on in Detroit neighborhoods like the Red Zone or her neighborhood. (ECF No. 1311-1, Affidavit, PageID#17450; ECF No. 1313, Affidavit, PageID#17468-69) When it was pointed out to Juror V that the jury was obligated to decide the case based on facts and evidence introduced at trial, she responded that these Defendants need to burn because of what gangs are doing to the city. (ECF No. 1311-1, Affidavit, PageID#17450-451) Juror V had strong opinions regarding gangs, and she was not interested in the facts and the jury instructions, such as whether the SMB was an enterprise. (ECF No. 1311-1, Affidavit, PageID#17451)

At one point in the deliberations, voices got loud, and Juror F pounded on the table. (ECF No. 1311-1, Affidavit, PageID#17451-52) A Marshal came into the jury room and told them they could be heard in the courtroom and to quiet down. (ECF No. 1311-1, Affidavit, PageID#17452) While Juror F felt it was somewhat embarrassing to be told to quiet down, the Marshal's intrusion did not affect Juror F, but she believed it may have had an impact on the other jurors. (*Id*.)

The jury also became deadlocked at one point during the deliberations, and Juror V and Juror C apparently relied on a Detroit News article to expose facts from the article to the rest of the jurors. Juror V also outspokenly maintained her personal knowledge about gangs, Detroit neighborhoods, the Red Zone, and the destructive effects occurring in those neighborhoods

should be relied on to support a guilty verdict--instead of the evidence presented at trial. Juror V's external personal knowledge was prejudicial because it was extrinsic evidence that had not been subject to the procedural safeguards of a fair trial, and threatened the rights of confrontation, cross-examination, and to counsel. In addition, since such evidence had not been subject to the rules of evidence, it confused the jurors, who thought that they had to vote either guilty or not guilty, and Juror V's personal knowledge evidence was a basis for their verdict.

Juror V also deliberately omitted to tell the trial court and defense attorneys about her bias and impartiality against SMB based on her personal knowledge from living near the red zone and seeing SMB graffiti, and the ruinous effects of gangs on Detroit neighborhoods. Juror V deliberately hid her bias because she had a strong motive to convict: the Defendants "had to go down" because "it was guys like them that were ruining the neighborhood." (ECF No. 1311-1, Affidavit, PageID#17450-452) If Juror V had been open and honest during voir dire, she would have been dismissed for cause.

Juror F and L's Affidavits show that Juror V injected an extraneous influence and bias in the deliberations, that is, Juror V's bias and personal knowledge of gangs in the Red Zone, the crimes and harm that they cause, and her personal knowledge obtained from media articles. The District Court erred not only in denying Brown and his Co-Defendants relief, but also in denying an evidentiary hearing. *Ewing v. Horton,* 914 F.3d 1027, 1028-30 (6th Cir. 2019).

Not only did Juror V introduce extraneous influence, Deputy Marshal Jordan gave his cell phone number to the jurors, in part, in case they "received threats." That was itself an outside act, extraneous to the jury, creating a bias and impartial atmosphere for the jury, that is, the jury was made aware that it could be the victim of the violence alleged in the indictments. Also, a

Marshal came into the jury room and told them they could be heard in the courtroom and to quiet down. (ECF No. 1311-1, Affidavit, PageID#17452)

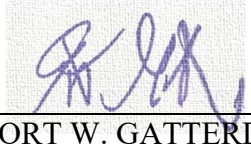
The fact that the incidents occurred during deliberations also meant they had a greater effect on the verdict, and the information reported by the unnamed juror to Deputy Marshal Nidiffer during the interview indicates that the "conspiracy" affected the whole jury because they were all aware of it.

Nidiffer's ex parte investigation was an additional extraneous influence. The trial court conducted an ex parte investigation through court staff. The trial court did not even determine the circumstances itself. That procedure deprived the Defendants an opportunity to uncover facts that could prove a Sixth Amendment violation, and it deprived the Defendants the presumption of prejudice to which they were entitled under *Remmer*.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,



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