No.

IN THE

SUPREME COURT OF THE UNITED STATES

TREVIS S. THOMPSON, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Appellate Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In a post-conviction proceeding challenging a criminal conviction, two jurors testified that one or more jurors had made statements, during deliberations, that the defendant (petitioner herein) had previously committed or been charged with murder but had managed to escape legal consequences. No evidence of such prior acts was presented at trial, and the allegations were false. Although the trial court found that one or more of these statements had been made and heard by jurors, it denied relief on the ground that the error was harmless because discussion on the subject had been "shut down," and because six jurors testified that they had not heard the extraneous information. The appellate court affirmed, holding that the defendant had not been prejudiced by the statements.

Thus, the principal question presented is: Where deliberating jurors receive external information that a criminal defendant had committed prior bad acts, does the dissemination of such information to jurors necessarily violate his Sixth Amendment right to trial by an unbiased jury, or may the receipt of such information be excused as "harmless error"?

A secondary question presented is: Where courts violate Federal Rule of Evidence 606(b)'s provision barring evidence relating to the effect of external influences on the mental processes of jury members, can such evidence still be considered by the court in making its determination as to whether the defendant was prejudiced?

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The petitioner, Trevis S. Thompson, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The decision of the Illinois Appellate Court (Appendix A) is reported at 2022 IL App (5th) 190317-U and is not published.[1] The order denying rehearing (Appendix B) is not reported. The order of the Illinois Supreme Court denying leave to appeal (Appendix C) is reported at 197 N.E.3d 1063 (Ill. 2022).

JURISDICTION

On January 31, 2022, the Illinois Appellate Court of Illinois issued its initial decision. A petition for rehearing was denied on April 7, 2022, but with the appellate court entering a modified order on that date. The Illinois Supreme Court denied a timely filed petition for leave to appeal on September 28, 2022. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

[1] Both the initial order, entered January 31, 2022 and a modified order, entered April 7, 2022, are reported at 2022 IL App (5th) 190317-U. The latter, the subject of the instant petition, is at Westlaw cite 2022 WL 17582357.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution states:

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

U.S. Const. amend. VI.

Federal Rule of Evidence 606(b) states:

Rule 606. Juror's Competency as a Witness . . . .

(b) During an Inquiry Into the Validity of a Verdict or Indictment.

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

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

(A) extraneous prejudicial information was improperly brought to the jury's attention;
(B) an outside influence was improperly brought to bear on any juror; or
(C) a mistake was made in entering the verdict on the verdict form.

Fed. R. Evid. 606 (2018).

STATEMENT OF THE CASE

On March 23, 2011, the petitioner herein (defendant and appellant in the courts below) Trevis S. Thompson was found guilty of one count of first-degree murder, one count of aggravated battery and one count of mob action. (R.2009; C.163-65) The convictions were based on allegations that, on November 20, 2010, along with co-defendant Patrick A. Greene, he had stabbed and struck Orlando Lamont Clark, causing his death. (C.24-25) The court sentenced him to a term of imprisonment of 50 years. (R.2134; C.317)

The trial record shows that a juror named Peter Pederson was the foreperson. (R.128,233-34,2008)

Mr. Thompson filed two post-trial motions seeking a new trial or a dismissal of the charges. (C.274-308) At a hearing on the latter motion, defense counsel Thomas Mansfield reported that a juror had contacted him and "made some statements to me regarding events which happened prior to and during jury deliberation which caused him great concern," prompting Mansfield to request more time on his other post-trial motion. (R.2017) At a subsequent hearing on that motion (R.2052-73), Mansfield made no further mention of the juror who had contacted him, except to say that he was still researching the issue. (R.2974) The court denied the motion. (R.2073)

Although a pre-sentence investigation on Mr. Thompson was ordered (R.2012) and filed (C.14), the circuit clerk was unable to locate and include the pre-sentence investigation report in the record on appeal. However, at the sentencing hearing on June 24, 2011, the report was discussed, and Mansfield

objected to inclusion of references to "the history of a case that ended up getting reversed on appeal and then got dismissed," referring to an incident that occurred in December 2003. (R.2082) The objection was overruled and police officer Don Priddy testified about a December 2003 incident in which Mr. Thompson allegedly shot someone in the leg outside of a high-school basketball game. (R.2085-92)

Mr. Thompson appealed his conviction and sentence, raising issues unrelated to the subject matter of the instant petition. *People v. Thompson*, 2014 IL App (5th) 110290-U, ¶ 2; *leave to appeal denied*, 20 N.E.3d 1261 (Ill. 2014). The Illinois Appellate Court affirmed his conviction and sentence, *Thompson*, 2014 IL App (5th) 110290-U, ¶ 26 (C.374-90), and the Illinois Supreme Court denied his petition for further review. *People v. Thompson*, 20 N.E. 3d 1261 (Ill. 2014).

On August 10, 2015, Mr. Thompson, through attorney Christian Baril, filed a petition for post-conviction relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1, *et seq.* (2015)), raising a number of issues. (C.398) For purposes of the present petition, the pertinent claim was that he was denied his due process right to a fair trial when the jury's deliberations were tainted by consideration of information outside the scope of the trial, such as his prior criminal history and racially biased statements. (C.399)

The petition was advanced to the second stage by docket entry. (SUP

C.10)[2] During second-stage proceedings, the parties took the evidence deposition of former juror James Williams. (Sup 2, C.4-31) Williams testified that jury members had discussed allegations that Mr. Thompson had committed murder twice but that he had "intimidated a high school coach into not confessing [sic]," and that the state [sic] had "overturned the judge's behavior [sic]," so that "twice this guy has gotten off," on "[t]echnicalities," but that "[t]his time they are going to get him." (Sup 2, C.11, 25-26) He stated that these claims had come especially from an older man who "spent most of the time before the trial trying to position himself" to become the foreman, and who succeeded in becoming foreman. (Sup 2, C.11) He said that no such information had been presented at trial, but that it "sure had some weight in the pre-deliberations and deliberations." (Sup 2, C.11-12, 26)

Williams added that one of the prior incidents discussed by the foreman had taken place at a high school. (Sup 2, C.14) The foreman alleged that Mr. Thompson had shot someone, and that a coach was supposed to testify against him, but the coach refused because Mr. Thompson had "got to him." (Sup 2, C.14-15) Williams testified that jurors stated that Mr. Thompson had been convicted two times but that in both cases the convictions were overturned on appeal. (Sup 2, C.15) He testified that a young woman on the jury asked him, "how could you not know this?," stating that "[e]verybody knows this," referring to the prior alleged incidents. (Sup 2, C.15)

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[2] For a brief overview of the three-stage post-conviction process utilized in Illinois, see generally *People v. Pingelton*, 2022 IL 127680, ¶¶ 32-34, and 725 ILCS 5/122-2.1, 122-5, and 122-6.

Williams said that after the trial was over, he contacted attorney Mansfield, telling him that the rest of the jury was "pretty much unanimous" in wanting to "convict both guys of everything," because "somebody got killed" and "somebody has got to get punished." (Sup 2, C.16) He voted "not guilty on the second guy," apparently referring to Greene, but guilty on Mr. Thompson, with the intention of informing the judge that, despite his vote, "there were some bad things going on there," including "racial comments made during the jurors' deliberation."[3] (Sup 2, C.16) He testified that he "had a feeling we weren't even supposed to know about" the alleged prior offenses, and that this may have made him more defensive of Mr. Thompson. (Sup 2, C.17)

Williams said that he "could see from some points around the room" that Mr. Thompson was not getting a fair trial, and expressed his belief that he "was convicted because he had prior convictions." (Sup 2, C.18) Williams was unable to recall the foreman's name. (Sup 2, C.19-21) He elaborated on the deliberations, stating that in the initial discussion, another juror, a "very educated young man," pointed out some problems with the evidence, but was yelled at and called stupid by other jurors who strongly supported conviction. (Sup 2, C.22) Williams said that he also questioned the sufficiency of the

[3] Mr. Thompson's claim that jury deliberations were tainted by improper consideration of his race (in addition to the false allegations about his prior criminal history) was raised in the Appellate Court, based largely on this Court's opinion in *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 137 S. Ct. 855, 869 (2017). However, the instant petition is not based on this claim. The factual basis for that claim is briefly described herein should this Court wish to consider it along with the other claim of tainted jury deliberations.

evidence and received "the same treatment," and that maybe as many as four jurors questioned the sufficiency of the evidence at first. (Sup 2, C.22-23)

Williams described his vote to convict Mr. Thompson as a "negotiated signature," and that he signed the verdict form with the intention of "telling the judge what had gone on in the jury room," but that he "chickened out" when the jury was polled, after he "realized how angry everybody was." (Sup 2, C.24, 28) He said that there had been a lot of hostility generated "in town between the different groups of black people" over the trial, and that he was worried about his four children. (Sup 2, C.25)

Williams stated that he "gave a verdict" that he "didn't believe in," based on his intention to talk to the judge afterwards. (Sup 2, C.27) He said that he asked the foreman to relay his concerns about comments on race and the information about the prior cases to the judge, but that the foreman said that he would decide who would communicate with the judge. (Sup 2, C.27)

Mr. Thompson's claim on the tainted jury deliberations was advanced to the third stage, and an evidentiary hearing on the claim was conducted on June 21, 2017. (R.2158) Mansfield testified that about two weeks after the trial, juror Williams had contacted him, expressing concern that "cases which had involved Mr. Thompson as a defendant prior to the case which was being tried" had been brought up both during and prior to jury deliberations. (R.2163) However, Williams ceased cooperating when he decided that he did not want his identity disclosed. (R.2163) He was fearful, since, after the verdict, Mr. Thompson's mother's house was set ablaze and there were other incidents of harmful conduct

directed toward Mr. Thompson's family. (R.2164)

Juror Christopher Vaughn testified that a juror had made a remark, during deliberations, "along the lines of this is now his [Mr. Thompson's] second or third incident in the exact same situation," and/or "[t]his is not the first murder trial that this guy is on." (R.2168-69) However, the foreman said: "We are here for this case and only this case, and we can't talk about any other cases." (R.2169) Vaughn affirmed that the juror making the comment was someone other than the foreman, but added: "And myself." (R.2170) Neither attorney, nor the court, asked him to clarify or explain what he meant by the latter remark. Vaughn said that the comment did not affect his decision. (R.2170)

When the State asked Vaughn whether he had already made up his mind about the verdict when deliberations began, Baril objected on the grounds that the question "[g]oes to his deliberations." (R.2172) The court sustained that objection, but when the State asked Vaughn what the "differentiating factor" was in voting to convict Mr. Thompson, and Baril objected again, the court, with no explanation, overruled the objection. (R.2173) Vaughn testified that he based his vote to convict Mr. Thompson on the evidence at trial. (R.2174)

Four other jurors testified that they did not "remember" or "recall" any statements regarding prior criminal charges against Mr. Thompson or statements indicating racial prejudice by other jurors. (R.2175-77,2180-81,2183-87) Two jurors asserted more affirmatively that no statements regarding prior murder charges or racially prejudiced statements had been brought up during

jury deliberations. (R.2177-79,2182-83)

Juror Williams testified again at the hearing. In response to a question about racially biased statements during deliberations, he stated that one juror, backed by another, said: "He [Mr. Thompson] was one of them. Why am I arguing for the evidence? He wouldn't do the same for you." (R.2188-89,2193) Williams asked what was meant by "them," and the juror said, "you know exactly what we're talking about," to which Williams replied, "we're not allowed to go there." (R.2189)

Williams testified about the statements made by the foreman, and the reasons why he did not share his concerns with the court when the verdict was read, consistently with his evidence deposition testimony. (R.2190-99) He said that the foreman's comments were made "[b]efore we heard a moment of testimony," but that the same information "was discussed during deliberations as well." (R.2190,2193) He testified that he told Mansfield about the comments after the trial but ceased cooperating after being told that his name and address would have to be published in the paper. (R.2201) Williams was aware of acts of violence directed against Mr. Thompson and his mother after the verdict. (R.2201-02) He feared retribution against his children and told Mansfield that he was not willing to testify until he moved out of the area, which had not yet occurred. (R.2202)

Former jury foreman Peter Pederson testified by telephone. (R.2209-13) He denied knowing anything about the prior criminal history of Mr. Thompson, an incident involving a coach, or saying anything to the jury about any prior

incidents. (R.2213) He did not recall any other juror making any comments about Mr. Thompson's prior criminal activities or racial epithets. (R.2214) He denied that the verdict had anything to do with Mr. Thompson's prior criminal history. (R.2216)

On November 29, 2018, the trial court entered an order denying the petition. (C.657-64) The court summarized the testimony of Williams and the other jurors with respect to the claim that the jury had considered extrinsic information and that racially prejudiced statements had been made during deliberations. (C.660-62) It cited to *People v. Hobley*, 182 Ill. 2d 404 (1998), as providing guiding authority. (C.662-64) The court found that the inquiry and testimony of the jurors was proper, as it fell into the exception for impeaching a jury verdict, but that the evidence did not support the conclusion that Mr. Thompson was prejudiced by the information. (C.664) It stated:

> Although there was some collaboration of the allegations of James Williams by Charles Vaughn, none of the other jurors confirmed the allegations. Furthermore, inconsistencies in the statements of James Williams create doubt as to the specifics of the allegations. Reviewing the testimony of the jurors, it appears as if someone said something that was shut down during the deliberation process and neither prejudiced nor influenced the jury. (C.664)

The court ruled that, accordingly, the verdict must stand, and it denied the petition for post-conviction relief. (C.664)

Mr. Thompson filed a motion to reconsider. (C.665) At a hearing on the motion, the State conceded that if the statements alleged by Williams and Vaughn were true, then Mr. Thompson would have been prejudiced by the extrinsic information. (R.2240)

The court (by a different judge) denied the motion. (C.693) It read the prior judge's decision as "making a finding that extraneous information was received by the jury, but that the incident was harmless." (C.695) It agreed that "the type of extraneous information alleged here would have been prejudicial to Defendant," but determined that, since six of the eight [sic] jurors testified that they "never heard" the extraneous information, the court had not misapplied the law. (C.695-96)

The appellate court affirmed. After its initial order was filed, Mr. Thompson filed a petition for rehearing, raising a number of issues of both fact and law that he contended were misapprehended by the court. The court denied the petition (see Appendix B) but filed a modified order (Appendix A), that again affirmed the judgment of the trial court. *People v. Thompson*, 2022 IL App (5th) 190317-U ¶ 85. It found that "[b]oth Pederson and Vaughn contradicted Williams's testimony that the foreman had made statements about the defendant's criminal history," that the trial court did not make any "findings of any specific statements made that would have prejudiced the defendant," and that its "finding that the jury was not prejudiced by extraneous information after considering the credibility of the jurors' testimony during an evidentiary hearing was not against the manifest weight of the evidence." *Thompson*, 2022 IL App (5th) 190317-U, ¶¶ 80-83.

Mr. Thompson filed a petition for leave to appeal to the Illinois Supreme Court, but it was denied without comment. (Appendix C) *People v. Thompson*, 197 N.E.3d 1063 (Ill. 2022).

REASONS FOR GRANTING CERTIORARI

This Court should grant certiorari because the Illinois Appellate Court has made a decision on two related important federal questions that should be settled by this Court. Granting certiorari would allow this Court to bring greater certainty and uniformity to highly unsettled rules of law governing how courts should respond to evidence of external information being received by juries.

I. Introduction

Although the questions presented have already been stated in summary fashion above, it may be helpful to restate the issues raised by this petition more fully, incorporating the salient facts. This is a case in which:

- One juror testified that, both during *voir dire* and in deliberations, the jury foreman made allegations that Mr. Thompson had twice before committed murder but had escaped legal consequences, based on "technicalities," and that another juror had remarked that "[e]verybody knows this."
- No evidence of such alleged prior offenses was introduced at trial.
- A second juror testified that someone other than the foreman had made similar statements during deliberations, but that the foreman shut down any discussion of the allegations.
- The second juror briefly remarked that he had also made a similar statement during deliberations, thereby indicating his own receipt of this external information.

- Evidence presented at the sentencing hearing showed that Mr. Thompson had been involved in one shooting incident, thus lending credence to the two jurors' accounts that the allegations had been made, but it also showed that the allegations were a wildly distorted and false account of what had actually transpired.

- The trial court recognized the legal prohibition against admitting testimony regarding the mental processes used by jurors in arriving at the verdict, yet it admitted testimony from the second juror, as well as the foreman, that the allegations did not affect their decision.

- The trial court found that the false allegations regarding Mr. Thompson's alleged prior bad acts had been received, but that it did not cause prejudice to him, in part because discussion of the allegations had been "shut down," and in part because the remaining jurors did not recall, or denied, hearing the allegations.

Thus, the first issue raised is whether the receipt of external information, by at least some jurors, alleging prior bad acts by a defendant in a criminal case, can ever be excused as "harmless error."

The second issue raised concerns Federal Rule of Evidence 606(b), which, as this Court has noted, is followed by the vast majority of jurisdictions in the U.S. *Pena-Rodriguez,* 137 S. Ct. at 865. Illinois is one of them. *People v. Holmes*, 69 Ill. 2d 507, 516 (1978); *Hobley*, 182 Ill. 2d at 457-58. That rule states, in pertinent part, that while jurors may testify about whether "extraneous prejudicial information was improperly brought to the jury's attention," they

may not testify about "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 second issue raised herein is, where a court violates the latter provisions barring testimony relating to the *effect* of external influences on jury deliberations, can such evidence nonetheless be given its "full probative effect," *Thompson*, 2022 IL App (5th) 190317-U, ¶ 78, and considered by the court in making its determination as to whether the defendant was prejudiced?

II. The applicable Constitutional framework

The Sixth Amendment to the U.S. Constitution guarantees all criminal defendants "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. "[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). These and other vital protections of the Sixth Amendment are applicable to the States by operation of the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 149-150 (1968).

This petition concerns the parameters of certain exceptions to the general rule that jury verdicts may not impeached by evidence of alleged improprieties that occurred during deliberations. As this Court observed in *Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017): "At common law jurors were forbidden to impeach their verdict, either by affidavit or live testimony. This rule originated in *Vaise v. Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785). There, Lord Mansfield excluded juror testimony that the jury had decided the case through a game of chance. The Mansfield rule, as it came to be known, prohibited jurors, after the verdict was entered, from testifying either about their subjective mental processes or about objective events that occurred during deliberations." *Pena-Rodriguez*, 580 U.S. 206, 137 S. Ct. 855, 863 (2017).

This became the default rule in American jurisprudence, such that, at the outset of the 20th Century, "the near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror

testimony to impeach a jury verdict." *Tanner v. United States*, 483 U.S. 107, 117 (1987). Substantial policy considerations supported this rule, including the judicial interest in the finality of verdicts and in protecting jurors from the inevitable harassment and invasion of their privacy that would ensue if verdicts could be attacked and set aside on the basis of allegations of misconduct during deliberations. *Id.* at 119-120, *citing McDonald v. Pless*, 238 U.S. 264, 267-68 (1915).

However, there has been a longstanding – and necessary – tension between such considerations and the equally weighty right to an impartial jury as promised by our Sixth Amendment. Thus, this Court recognized a vital exception to the Mansfield rule in *Mattox v. United States*, 146 U.S. 140 (1892), holding that a "'juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind. So a juryman may testify in denial or explanation of acts or declarations outside of the jury room, where evidence of such acts has been given as ground for a new trial.' " *Mattox*, 146 U.S. at 149, *quoting Woodward v. Leavitt*, 107 Mass. 453 (1871).

Decades later, this Court established the principle that: "In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not

conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Remmer v. United States*, 347 U.S. 227, 229 (1954).

The rule as set forth in *Remmer* seems clear and straightforward enough, and yet application of the rule has been anything but consistent. See generally *State v. Christensen*, 929 N.W.2d 646, 666-674 (Iowa 2019) (reviewing both federal and state case law on how *Remmer* has been applied); 27 Fed. Prac. & Proc. Evid. (Wright & Miller) § 6075 (2d ed.) (On scope of Federal Rule of Evidence 606(b), which permits a juror to testify as to "whether extraneous prejudicial information was improperly brought to the jury's attention," and "whether any outside influence was improperly brought to bear upon any juror.").

III. Granting certiorari would allow this Court to more firmly enforce the sound juridical policies underlying Rule 606(b)'s prohibition against inquiring into the mental processes of jurors during deliberations.

Much of the conflict in this area of the law centers on whether, and to what extent, courts may consider narrow exceptions to the rule that inquiry into the actual deliberations themselves is forbidden – as was debated by this Court in *Pena-Rodriguez*, 137 S. Ct. at 863-871 (majority opinion), 874-885 (Alito, J., dissenting); see also Wright & Miller, § 6075, especially at notes 80-91.

U.S. courts have generally upheld Rule 606(b)'s prohibition against any juror testimony on "the effect of anything" on a juror's vote, and on any juror's "mental processes concerning the verdict or indictment." *See, e.g.*, *U.S. v. Lawson*, 677 F.3d 629, 646-647 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 393 (2012); *Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914, 917-18 (7th Cir. 1991); *United States v. Bassler*, 651 F.2d 600, 603 (8th Cir. 1981).

However, as discussed in Wright & Miller, § 6075, a number of courts have "bent" the rule on occasion or have created various partial exceptions to the rule, in response to the difficulty of determining the prejudicial impact of external information without any inquiry into jurors' deliberations. See, *e.g.*, *United States v. Boylan*, 898 F.2d 230, 259-260 (1st Cir. 1990) (opining that it is difficult to distinguish between "subjective" and "objective" matters when examining the effect of external information on jurors, and that "appellate courts must grant the trier a margin of error in separating wheat from chaff");

United States v. Calbas, 821 F.2d 887, 896 n.9 (2d Cir. 1987) (finding no fault with district court considering testimony that the "vast majority of jurors" refused to consider one juror's consultation of a telephone directory in an attempt to discredit a government witness). Generally, the case law reveals courts striving to honor the rule yet frequently splitting hairs as they struggle to determine whether a defendant was prejudiced by the information. See Wright & Miller, § 6075, notes 84.50-91.

The question of whether, and how much, courts may "bend" or permit minor encroachments on Rule 606(b)'s prohibition against inquiring into the mental processes of jurors is at play here. As noted, Illinois follows Rule 606(b), its Supreme Court holding that "actual evidence of the nature of outside influences exerted on the jury during deliberations will be considered, but evidence relating to the effect of such influences on the mental processes of jury members is inadmissible." *Holmes*, 69 Ill.2d at 514. The trial court was aware of that rule (C.664), yet it inexplicably allowed one juror (Vaughn) to give testimony on why he voted to convict Mr. Thompson, over a defense objection, moments after sustaining a defense objection that a similar question was an improper inquiry into the deliberations. (R.2172-74) It later allowed foreman Peterson to give similar testimony. (R.2216)

The Illinois Appellate Court in the instant case overlooked that transgression, based on another appellate opinion holding that if a trial court violates this rule from *Holmes*/Rule 606(b), and improperly admits evidence regarding how the external information impacted deliberations, it "is to be given

its natural probative effect." *Thompson*, 2022 IL App (5th) 190317-U, ¶ 78, citing *People v. Collins*, 351 Ill. App. 3d 175, 180 (2d Dist. 2004).[4] That rule conflicts with the approach taken by other jurisdictions. See, *e.g. Meyer v. State*, 119 Nev. 554, 567, 80 P.3d 447, 457 (2003) (information contained in juror affidavits that involved the jury's thought processes were properly stricken and not considered).

Therefore, if this Court grants *certiorari*, it will have an opportunity to draw a sharper line, firmly forbidding inquiries into the decision-making process of juries, in keeping with Rule 606(b) and the sound juridical policies underlying that rule that hark back to the Mansfield Rule.

[4] Further confusing matters, the appellate court held that, "[s]ince no objections were raised when the jurors testified that they made their decision based on the evidence presented and were not influenced by extraneous information, their testimony was given its full probative effect." *Thompson,* 2022 IL App (5th) 190317-U, ¶ 78. The record shows that an objection *was* made, and only two jurors, Vaughn and Pederson, testified to that effect. (R.2172-74, 2216)

IV. Granting certiorari will allow this Court to clarify a vital constitutional question: Whether prejudicial information regarding alleged prior bad acts of a defendant, imparted to and received by jurors at trial, can ever be disregarded as "harmless error." This Court is urged to adopt a rule holding that the receipt of such information by jurors is a *per se* violation of an accused's Sixth Amendment right to a trial by a fair and impartial jury.

The equally vital issue raised in this petition concerns the reach of the presumption of error that arises when external information is received by a jury, and, conversely, the reach of what may, and may not, be considered "harmless error."

As Wright and Miller observe, this is a highly unsettled area of the law, with some jurisdictions not even following *Remmer*'s rule that a jury's receipt of external information creates a rebuttable presumption of prejudice. See, *e.g.*, *Boylan*, 898 F.2d at 261-63 (holding that presumption did not apply where jurors were exposed to magazine article contending that defense counsel was a mob-connected lawyer, based in part on its interpretation of *Smith v. Phillips*, 455 U.S. 209, 217, 102 S. Ct. 940, 946 (1982)); see generally Wright and Miller, § 6075, notes 87-88; *Hall v. Zenk*, 692 F.3d 793, 798-805 (7th Cir. 2012) (discussing the "*Remmer* presumption" at length, determining that the presumption still exists but that there is wide disagreement as to the circumstances where it should be applied); *State v. Mann*, 2002-NMSC-001, ¶ 36, 131 N.M. 459, 470, 39 P.3d 124, 135 (citing cases holding that the *Remmer*

presumption no longer exists or only exists in cases involving bribery or threats).

Wright and Miller suggest that the disparate approaches used by various jurisdictions has arisen as a consequence of Rule 606(b)'s provision precluding testimony concerning the mental processes of jurors. They contend that this makes it "difficult to prove prejudice since the best if not only witnesses are precluded from testifying that prejudice occurred. Without a way to effectively prove prejudice, the policy and constitutional problems raised by jury consideration of extraneous information or outside influences are left unresolved." Wright and Miller, § 6075, note 84. See also, *e.g.*, *Barnes v. Thomas*, 938 F.3d 526, 534 (4th Cir. 2019) (discussing the "unique difficulties in the context of juror misconduct claims" created by this provision).

Regardless of whether their assessment of the cause of the problem is correct, Wright and Miller well document the widely disparate approaches to the *Remmer* presumption that have evolved in various jurisdictions. With apologies for the large block quote:

> The courts have developed several approaches to the problem. Some decisions draw a distinction between juror testimony regarding the specific effect on a verdict of alleged jury tampering, which is inadmissible, and juror testimony concerning the general fear and anxiety following a tampering incident, which is admissible and permits an inference that the tampering affected the verdict. Other decisions would distinguish between juror testimony regarding the specific effect of extraneous prejudicial information or outside influence, which is inadmissible, and general testimony as to whether jurors exposed to such matters could still be impartial. Other courts have responded to this problem by concluding that, once a party has demonstrated the jury was exposed to extraneous information or outside influence, a rebuttable presumption of prejudice arises. Some courts have refused to recognize such a presumption while others have suggested it should be recognized selectively, depending on the

> type of extraneous information or outside influence in question. For example, one court has held that prejudice may be presumed where the jury is exposed to extraneous information that bears on the facts of a case, but may not be presumed where such information bears only on the legal issues. Another court suggests that, at least under certain circumstances, an irrebuttable presumption of prejudice arises. Yet another decision suggests that, as a matter of comity, an approach deferential to the verdict is appropriate where the issue is presented by a defendant in a *habeas corpus* petition seeking relief from a state court conviction. In effect, this approach rejects a presumption of prejudice in favor of conventional harmless error analysis.

Wright and Miller, § 6075 (footnotes omitted, but encompassing notes 84.50-91).

The case *sub judice* provides this Court with a prime opportunity to begin to restore some order out of the chaos. It can do so by returning to the logic of *Remmer* and reminding lower courts that the presumption of prejudice standard remains binding law, beginning with a bright line rule that external information regarding prior bad acts of a criminal defendant is prejudicial *per se*.

The trial court's rationale in the case at bar, that Mr. Thompson was not prejudiced by the jury's receipt of external allegations, in part because discussion of same was "shut down" (C.666), does find some support in the case law – which, he contends, is additional cause for this Court to accept certiorari. One of the factors frequently relied upon by some courts in deciding whether a defendant was prejudiced by external information is "the extent to which the jury discussed and considered it." See, *e.g.*, *United States v. Navarro-Garcia*, 926 F.2d 818, 822 (9th Cir. 1991); see also Wright and Miller, § 6075, note 104.

However, it is incongruous to apply that criterion to external information regarding a defendant's prior bad acts. If any jurors believed the information to

be accurate (and those who imparted it or claimed to already know of it clearly did), it would obviously have a major prejudicial impact, irrespective of the length of time it was discussed – or even if it was not "discussed" at all. It is difficult to imagine something more prejudicial in a murder case than an allegation that a defendant had previously murdered two people but had escaped consequences. This raises the "substantial risk that all exculpatory evidence will be overwhelmed by a jury's fixation on the human tendency to draw a conclusion which is impermissible in law: because he did it before, he must have done it again." *United States v. Bagley*, 772 F.2d 482, 488 (9th Cir. 1985).

The trial court's rationale also conflicts with the case law of several other jurisdictions. To begin with, it is difficult to reconcile with this Court's holding in *Marshall v. United States*, 360 U.S. 310, 311-13, 79 S.Ct. 1171, 1172-73 (1959), where the Court determined that the defendant was entitled to a new trial because several jurors had read newspaper accounts reporting on the defendant's prior criminal activity. This Court reached that conclusion even though the jurors uniformly assured the trial court that they would not be swayed by the newspaper stories. *Id.* Although the external information in *Marshall* was received by jurors prior to deliberations, and the question concerned whether the trial court should have declared a mistrial, *id.*, the circumstances are sufficiently comparable to warrant a similar outcome here.

Thus, *Marshall* alone provides additional cause for this Court to grant certiorari, insofar as the Illinois Appellate Court "has decided an important

federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c).

In *Dickson v. Sullivan*, 849 F.2d 403 (9th Cir. 1988), a deputy sheriff responsible for escorting jurors to and from the courtroom made a statement to two jurors, prior to deliberations, to the effect that defendant Dickson had "done something like this before." *Dickson,* 849 F.2d at 405. However, the trial court found that the two jurors had followed its jury instructions limiting the use of prior convictions and directing them to make their decision exclusively on the trial evidence, concluded that the remark had not influenced the jury's deliberations, and denied Dickson's motion for a new trial. *Id.*

The Ninth Circuit reversed, holding that, even though the remarks were only heard by two jurors, information of this nature was not subject to harmless error analysis and that it was "impossible to conclude that this information was harmless beyond a reasonable doubt." *Id.* at 407-09.

Similarly, in *Taite v. State*, 48 So. 3d 1 (Ala. Crim. App. 2009), three jurors testified that one juror had asserted, during deliberations, that another juror had averred that the defendant had previously been imprisoned or had a prior felony conviction. *Taite*, 48 So. 3d at 3-4. Much like the case at bar, the juror accused of having made the statement denied making it. *Id.* at 5. The court concluded that, even though several jurors testified at the post-trial hearing that the extraneous information did not affect their votes, the "prejudicial impact of information about a prior conviction would have been virtually impossible to ignore," and it reversed the trial court's denial of the defendant's motion for a

new trial. *Id.* at 10-12.

See also *Benjamin v. Fischer*, 87 F. App'x 761, 763 (2d Cir. 2004) (affirming grant of writ of habeas corpus based on jurors' improper consideration of document showing the defendant's prior arrest record); *State ex rel. Trump v. Hott*, 187 W. Va. 749, 752-53, 421 S.E.2d 500, 503-04 (1992) (collecting cases holding that statements by a juror disclosing a defendant's prior wrongdoing, evidence of which was not admitted at trial, is an extrinsic matter and may be used to impeach the jury verdict in a criminal proceeding).

However, the case law on this point does not universally favor Mr. Thompson. In *Dorsey v. Quarterman*, 494 F.3d 527 (5th Cir. 2007), even though one juror was improperly exposed to a transcript revealing the defendant's prior bad acts, and another knew that the transcript in question contained such information, the Fifth Circuit held that the external information was harmless in light of overwhelming evidence of the defendant's guilt. *Dorsey*, 494 F.3d at 531-32. Thus our nation's courts would benefit from this Court granting certiorari and bringing clarity and uniformity to this area of the law.

Mr. Thompson has focused on the trial court's rationale here, because, in all candor, the appellate court's rationale for affirming the trial court was utterly specious. It honed in on the trial court's lack of specificity in its factual findings, asserting that the trial court could only conclude that "someone said something," and that there "were no findings of any specific statements made that would have prejudiced the defendant." *Thompson*, 2022 IL App (5th) 190317-U, ¶ 82. This is refuted by the record. What the trial court actually

stated, after reviewing the relevant testimony of Williams and Vaughn, is that "someone said something *that was shut down during the deliberation process*" (Emphasis added; C.664) – an obvious reference to the testimony of juror Vaughn, the only juror who described the discussion being shut down. (R.2169) This means that the "something" that was heard by the jury were the allegations that "this is now his [Mr. Thompson's] second or third incident in the exact same situation," and "not the first murder trial that this guy is on." (R.2168) Those were specific statements that prejudiced Mr. Thompson.

Moreover, the appellate court disregarded the trial court's subsequent finding "that extraneous information *was received by the jury*, but that the incident was harmless." (Emphasis added; C.695) The trial court agreed that "the type of extraneous information alleged here would have been prejudicial to Defendant," but determined that, since six of the eight jurors testified that they "never heard" the extraneous information, the court had not misapplied the law. (C.695-96)[5]

This presents additional cause for this Court to grant certiorari, since one of the areas of conflict in this area of the law concerns whether, and to what degree, "the number of jurors exposed to the information or influence" merits consideration when courts determine whether a defendant was prejudiced. See Wright and Miller, § 6075, note 102. As noted therein, some courts emphasize that the receipt of potentially prejudicial external information by even *one* juror

[5] The record shows that it was actually seven of nine jurors who either did not "recall" the information or denied hearing it.

is sufficient to warrant reversal. See, *e.g.*, *Dickson*, 849 F.2d at 408; *United States v. Hall*, 116 F.3d 1253, 1255 (8th Cir. 1997) ("[i]f a single juror is improperly influenced, the verdict is as unfair as if all were," *quoting Stone v. United States*, 113 F.2d 70, 77 (6th Cir.1940)). Others have found an absence of prejudice where only one or two jurors received the information, as in *Dorsey*, 494 F.3d at 532 (finding it significant that "[n]one of the other jurors knew about the extrinsic material"), and *United States v. Blumeyer*, 62 F.3d 1013, 1018 (8th Cir. 1995) (holding that district court erred in finding that jury foreman's contact with an attorney on a point of law was prejudicial, in part because "the extrinsic information was received by less than half of the jurors and was not discussed or considered by the jury at all").

In this petition, Mr. Thompson has appropriately focused on how the Illinois Appellate Court has "has decided an important question of federal law that has not been, but should be, settled by this Court," in adherence to Rule 10(c). However, he beseeches this Court to grant certiorari not *only* to bring greater clarity and stability to this area of the law, but to correct a manifest injustice. The introduction, into jury deliberations, of utterly false allegations about him having committed prior murders, when he was on trial for murder, was a Sixth Amendment transgression of monstrous proportions. That error was made all the more monstrous by a trial court that acknowledged that the impropriety occurred – yet ruled that it was "harmless." This mockery of justice was then affirmed by an appellate court that failed to even perform its elementary duty of basing its decision on the facts of record. In restoring order

to an area of the law in which both federal and state courts are applying increasingly divergent rules and reaching increasingly disparate results, this Court can, at the same time, correct a horrible injustice done to a man who is now serving a 50-year sentence as a consequence of a verdict rendered by a tainted jury.

CONCLUSION

For the foregoing reasons, petitioner Trevis S. Thompson respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Appellate Court.

Respectfully submitted,

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