Without Bias: How Attorneys Can Use The Right to Present a Defense to Allow For Jury Impeachment Regarding Juror Racial, Religious, or Other Bias

by Colin Miller

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I. THE APPLICATION OF RULE 606(b) TO ALLEGATIONS OF JUROR BIAS

A jury convicted African-American Roland William Steele of three counts of first-degree murder and related charges after he allegedly killed three Caucasian women. The Supreme Court of Pennsylvania later upheld Steele's conviction despite the declaration of a juror, "who stated that race was an issue from the inception of the trial. The juror stated in his declaration that 'early in the trial one of the other jurors commented on the race of the defendant.'" According to the declaration, the racist juror "'also noted the race of three victims and stated that, on that basis alone, the defendant was probably guilty….'" The juror additionally alleged that the racist juror's "'comments continued at other breaks and he made very racist remarks. First one juror, then two or three more gradually became drawn to his position as the first week wore on.'" Finally, the declaration asserted that the racist juror said during trial that Steele should "'fry, get the chair or be hung.'"[1]

Devastatingly, the racist juror's death wish will likely come true because the Supreme Court of Pennsylvania deemed the declaration inadmissible and sustained Steele's three death sentences by relying upon Pennsylvania Rule of Evidence 606(b), which states that:

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

The opinion was consistent with most precedent from across the country. Rules similar to Pennsylvania Rule of Evidence 606(b) have "repeatedly been held to preclude a juror from testifying, in support of a motion for a new trial, that juror conduct during deliberations suggests the verdict was tainted by racial bias."[2] Moreover, while such cases arise with less frequency, courts consistently have found that Rule 606(b) precludes jurors from testifying after trial about religious or ethnic slurs used by jurors.

While addressing a case with somewhat similar facts, the Ninth Circuit in *United States v. Henley* reached a very different result. In *Henley*, a jury convicted four men on drug charges, and three of the four men were African-American. After they were convicted, the men moved for a new trial, claiming, among

other things, that juror Sean O'Reilly made "several racist remarks" during trial, perhaps including statements such as, "All the n****** should hang" and "The n****** are guilty." These statements would have surprised anyone who read O'Reilly's responses to his *voir dire* questionnaire, in which he averred that "his overall view of interracial dating was 'neutral,' that he had never had a bad experience with a person of a different race, and that race would not influence his decision as a juror in any way." The Ninth Circuit was able to consider O'Reilly's alleged statements in *Henley* when addressing the motion, concluding that, "[w]here, as here, a juror has been asked direct questions about racial bias during *voir dire*, and has sworn that racial bias would play no part in his deliberations, evidence of that juror's alleged racial bias is indisputably admissible for the purpose of determining whether the juror's responses were truthful."[3]

The Ninth Circuit was not being hyperbolic. In reaching a similar conclusion in its 2008 opinion in *State v. Hidanovich*, (2008), the Supreme Court of North Dakota noted that "[c]ourts have universally held that provisions similar to N.D.R.Ev. 606(b)…do not preclude evidence to show that a juror lied on *voir dire*."[4] The reason for this distinction between *Henley* and *Steele*, where jurors were not asked about racial prejudice before trial, is that "rule 606(b) restricts inquiries into the validity of a jury's verdict but it does not bar inquiries into whether a juror lied or purposely withheld information during *voir dire*." While these courts are technically correct that such inquiries are directed toward the issue of whether a juror lied on *voir dire* and not the (in)validity of the verdict, the distinction is frequently ephemeral. Quoting the Supreme Court's opinion in *McDonough Power Equipment, Inc. v. Greenwood*, the Ninth Circuit aptly concluded in *Henley* that if "[i]f appellants can show that a juror 'failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause,' then they are entitled to a new trial." Because "[d]emonstrated bias in the responses to questions on *voir dire* may result in a juror being excused for cause," it is easy to see how quickly the distinction can collapse.[17]

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

The answer can be found in two parts. First, courts generally conclude that they are prohibited by the strict language of Rule 606(b) from considering such allegations, despite being uncomfortable with the results that the Rule produces. For instance, in its 2008 opinion in *People v. Brooks*, the Michigan Court of Appeals denied Keith Brooks' motion for a new trial after finding that it was precluded from considering the affidavit of the jury foreman, who, like Brooks, was African-American. According to that foreman, a juror claimed that the foreman's position that Brooks was not guilty was a "brotherhood thing," which immediately prompted another juror to "introduce[] race into the discussion." But while the foreman eventually relented in his "not guilty vote," the court stood firm in its application of Rule 606(b); despite characterizing this alleged misconduct as "disturbing," it found itself duty-bound to preclude the affidavit because it did not allege an "extraneous influence."[5]

Second, courts faced with constitutional challenges to such applications of Rule 606(b) generally have rejected them based upon *Tanner v. United States*[6], where the Supreme Court found that applying Rule 606 (b) to preclude jury impeachment concerning jurors drinking alcohol, using and selling drugs, and falling asleep during trial did not violate the petitioners' Sixth Amendment right to a *competent* jury. Most courts have extrapolated from *Tanner* that applying Rule 606(b) to preclude jury impeachment concerning jurors using racial, religious, or other slurs similarly does not violate the Sixth Amendment right to an *impartial* jury. As an example, in *Shillcutt v. Gagnon*, the Seventh Circuit denied an African-American appellant's petition for writ of *habeas corpus* from the Supreme Court of Wisconsin's opinion denying his motion for a new trial after he was convicted of soliciting prostitutes and keeping a place of prostitution. The state supreme court denied that motion after refusing under its version of Rule 606(b) to consider the affidavit of a juror who claimed that one of the jurors had commented, "Let's be logical, he's a black, and he sees a seventeen year old white girl-I know the type." The Seventh Circuit thereafter denied the appellants' petition, citing *Tanner* for the proposition that the exchange of ideas during jury deliberations, "however crude or learned, is important enough to preserve" to preclude peering behind the jury room curtain.[7]

This article sets forth an alternative method through which attorneys should be able to introduce evidence of juror racial, religious, or other bias.

II. HOW TO ARGUE THAT THE APPLICATION OF RULE 606(b) TO ALLEGATIONS OF JUROR BIAS VIOLATES THE RIGHT TO PRESENT A DEFENSE

While the Supreme Court in *Tanner* found that the application of Rule 606(b) to preclude jury impeachment did not violate the petitioners' Sixth Amendment right to a *competent* jury, attorneys representing convicted criminal defendants should be able to rely upon another Sixth Amendment right to allow them to present juror testimony regarding racial, religious, or other bias by jurors. In its 1967 opinion in *Washington v. Texas*, the Supreme Court addressed the constitutionality of two Texas statutes which provided "that persons charged or convicted as coparticipants in the same crime could not testify for one another." The Court found that these statutes contravened the Compulsory Process Clause of the Sixth Amendment, which states that "[i]n all criminal prosecutions, the accused shall enjoy the right…to have compulsory process for obtaining witnesses in his favor." According to the Court, this right is in plain terms, the right to present a defense, the right to present the defendant's version of facts as well as the prosecution's to the jury so it may decide where the truth lies."[8]

The Court found that the Texas statutes violated this right because they were arbitrary rules that prevented whole categories of witnesses from testifying on the basis of a categorization that presumed them untrustworthy of belief. Alternatively, the Court concluded that the Texas statutes could not even be defended on the ground that they "rationally set[] apart a group of persons who are particularly likely to commit perjury."[8] While these statutes precluded a charged or convicted coparticipant from providing exculpatory testimony in favor of his alleged partner in crime, they (1) removed this proscription if the coparticipant was exonerated and (2) never precluded such a coparticpant from providing incriminatory testimony as a witness for the prosecution.

According to many courts, a court violates a criminal defendant's right to present a defense when its application of an evidentiary rule: (1) deprived or would deprive him "of the opportunity to present evidence in his favor;" (2) the excluded evidence was or would be "material and favorable to his defense;" and (3) the deprivation was or would be "arbitrary or disproportionate to any legitimate evidentiary or procedural purpose."[9] This article lays out a strategy that attorneys can use to argue that the application of Rule 606(b) to allegations of juror bias violated this right.

A. **Rule 606(b) Deprives Appellants From Presenting Evidence of Juror Bias**

Plainly, when courts apply Rule 606(b) to preclude jurors from impeaching their verdicts based upon allegations of juror racial, religious, or other bias, they deprive appellants from presenting evidence of juror bias. Some courts hold that courts can only violate the right to present a defense by applying *per se* rules of evidence to exclude appellants from presenting evidence and not by excluding evidence under discretionary Rules, such as Rule 702. Because Rule 606(b) is a *per se* rule of exclusion, even the courts reading the right to present a defense in this manner would find that the Rule's application implicates the first factor of the analysis.

B. **The Excluded Evidence is Material, Favorable, and Critical**

In determining whether evidence was or would be "material and favorable," courts usually focus upon four factors, the extent to which the evidence at issue is or was: (1) corroborated, (2) the sole evidence on an issue or merely repetitive or cumulative, (3) probative of a central or critical issue, and (4) important to a weighty interest of the accused.

1. Allegations of Juror Bias Can Easily Be Corroborated

In a typical jury trial, as many as eleven jurors can corroborate a juror's claim that a juror made biased statements during trial. Indeed, there have been cases where all twelve jurors signed affidavits admitting to jury misconduct. Moreover, "because racist conduct occurs in front of the entire jury, its existence is easier to prove or disprove than outside influences or prejudicial information that affects only one juror."[10]

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

In the vast majority of cases, juror testimony would be the sole evidence that an appellant could present after trial to establish that jurors made biased statements during trial. Usually, only jurors are privy to jury deliberations, rendering juror testimony "the only available evidence to establish racist juror misconduct."[10]

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

It is well established that the presence of a biased juror is a "structural defect not subject to a harmless error analysis" necessitating "a new trial without a showing of actual prejudice."[11] Put another way, "even if only one member of a jury harbors a material prejudice, the right to a trial by an impartial jury is impaired."[12] And to put it even more simply, "[o]ne racist juror would be enough" to require the reversal of a verdict.[13] Because the presence of a bias can never constitute harmless error, evidence of juror bias during trial is *ipso facto* probative of a central issue. *See, e.g., State v. Santiago*, 715 A.2d 1, 20 (Conn 1998).

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

In *United States v. Scheffer*[14], the Supreme Court found that the application of Military Rule of Evidence 707, which *per se* precludes the admission of polygraph evidence, did not violate an airman's right

to present a defense. In part, it reached this conclusion by finding that the Rule did not implicate a weighty or significant interest of the accused because such evidence did not consist of the testimony of a person who personally observed or had firsthand knowledge of a relevant event. Under this reading, courts applying Rule 606(b) to preclude jurors from impeaching their verdicts through testimony regarding racial, religious, or other slurs that they personally heard implicates a weighty interest of the accused because "[t]he jurors are the persons who know what really happened."[15]

C. The Application of the Rule is Arbitrary or Disproportionate

The Supreme Court's opinion in *Washington* and its opinion in *Rock v. Arkansas*, both of which the Supreme Court recently reaffirmed in *Holmes v. South Carolina*[16], as addressing applications of rules of evidence that were arbitrary or disproportionate to the purposes that they were designed to serve, set forth three ways in which the application of Rule 606(b) to allegations of juror bias implicates the third right to present a defense factor.

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

In *Washington*, the Supreme Court found that the right to present a defense is violated "by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them untrustworthy of belief."[8] Federal Rules of Evidence 601 states that reliability-based competency rules have been cleared from the books in criminal cases. Rule 601 states in part that "[e]very person is competent to be a witness except as otherwise provided in these rules." The Advisory Committee Note to this Rule indicated that "[t]his general ground-clearing eliminates all grounds of incompetency not specifically recognized in the succeeding rules of this Article.... American jurisdictions generally have ceased to recognize these grounds."

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

2. Rules Not Rationally Setting Apart Persons Likely to Commit Perjury

In *Washington*, the Supreme Court concluded that even if the Texas statutes before it were something other than improper competency rules, they could not even be defended on the ground that they "rationally set[] apart a group of persons who are particularly likely to commit perjury."[8] As noted, while these statutes precluded a charged or convicted coparticipant from providing exculpatory testimony in favor of his alleged partner in crime, they (1) removed this proscription if the coparticipant was exonerated and (2) never precluded such a coparticpant from providing incriminatory testimony as a witness for the prosecution. In other words, the statutes precluded coparticipants from testifying for certain purposes and under certain circumstances but permitted them to testify for different purposes and under different circumstances.

The same can be said about Rule 606(b). Courts repeatedly have held that the Rule precludes jurors from impeaching their verdicts based upon allegations of racial, religious, or other bias. Conversely, as noted in the introduction, when "a juror has been asked direct questions about racial bias during *voir dire*, and has

sworn that racial bias would play no part in his deliberations, evidence of that juror's alleged racial bias is *indisputably admissible* for the purpose of determining whether the juror's responses were truthful." [3]

As with the Texas statutes in *Washington*, Rule 606(b) precludes jurors from testifying for certain purposes and under certain circumstances – to impeach a verdict when jurors have not been asked about bias on *voir dire* – but allows them to testify for different purposes and under different circumstances – to prove that jurors lied on *voir dire* when jurors have been asked about bias.

In reality, though, the purposes are not meaningfully different because inquiries into whether jurors lied on *voir dire* regarding bias necessarily become inquiries into the validity of a verdict. As the Supreme Court held in *McDonough Power Equipment, Inc. v. Greenwood*, if an appellant can "demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause," he is entitled to a new trial.[17] Because "[d]emonstrated bias in the responses to questions on *voir dire* may result in a juror being excused for cause," an inquiry into whether a juror lied during *voir dire* is an inquiry into the validity of the verdict for all relevant intents and purposes, especially because the presence of a biased juror is a structural defect. [17]

Consequently, when courts allow jurors to render post-trial testimony concerning juror bias during deliberations to prove that a juror lied during *voir dire*, the interests protected by Rule 606(b) are for the most part implicated to the same extent that they would be if courts allowed jurors to impeach their verdicts after trial through allegations of juror bias. If a court allowed either type of testimony, jurors could be harassed by the losing party, jurors could be embarrassed when their biased comments are exposed in court, and the verdict would lose its finality if the appellant could prove that a juror was biased.

Accordingly, Rule 606(b) serves no legitimate purpose by precluding jurors from testifying for certain purposes and under certain circumstances but allowing them to testify for technically different purposes and under different circumstances. Therefore, *Washington* provides a second reason that the application of Rule 606(b) to post-trial allegations of bias by jurors during trial violates the right to present a defense.

3. Rules *Per Se* Excluding Evidence that may be Reliable in an Individual Case

In *Rock v. Arkansas*, the Supreme Court found that Arkansas' categorical exclusion of hypnotically refreshed testimony violated a defendant's right to present a defense because "[a] State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case."[19] Instead, courts may not apply rules of evidence in a way that is "arbitrary or disproportionate to the purposes they are designed to serve." [18] Courts similarly could find that the application of Rule 606(b) to allegations racial, religious, or other bias violates the right to present a defense because such allegations may be reliable in individual cases and because such an application is arbitrary and disproportionate.

Initially, there is a strong argument that courts already have found that the scales of justice tip in the favor of appellants in such cases. As noted previously, courts universally have found that jurors may testify after trial regarding juror deliberations to prove that a juror lied during *voir dire*. In so doing, most courts simply note that Rule 606(b) is inapplicable in such situations, but a few courts have made clear what is implicit in these opinions: These courts are concluding that appellants' need for this evidence outweighs the interests protected by Rule 606(b). To wit, in *Levinger v. Mercy Medical Center, Nampa*, the Supreme Court of Idaho "ma[d]e clear that I.R.E. 606(b) does not bar the introduction of juror affidavits revealing dishonesty during *voir dire*."[19] In the accompanying footnote, the court indicated that it was reaching this conclusion "not unmindful of the policy goals underlying I.R.E. 606(b), namely, to promote finality, protect jurors from

post-trial inquiry or harassment, and to avoid the practical concern that an affidavit by a juror to impeach the verdict is potentially unreliable."[18] Because the appellant's need for evidence of juror bias is not altered by the presence or absence of questions concerning juror bias during *voir dire*, courts should be able to find that the scales of justice tip in favor of the appellant in jury impeachment cases based upon analogy to *voir dire* exception cases.

If, however, courts do not accept this analogy, an appellant would first have to demonstrate that a juror's allegations of juror bias are reliable in his individual case. As noted, an appellant could establish such reliability by having as many as eleven jurors corroborate those allegations. Also, opposing counsel would be able to cross-examine the juror regarding his allegations and test his reliability. Finally, many courts have found that statements of bigotry are reliable reflections of the declarant's bias because they "would tend to subject the declarant to hatred, ridicule, or disgrace such that a reasonable person would not make the statement unless the person believed it to be true."[20].

The question then becomes how an appellant can demonstrate that his evidentiary need for jury testimony concerning juror bias outweighs the interests protected by Rule 606(b) when the Supreme Court in *Tanner* held that the application of Rule 606(b) does not violate the right to a *competent* jury. The answer is that the American judicial system is much more concerned with the right to an *impartial* jury than the right to a *competent* jury. The inclusion of an incompetent juror, such as a juror who cannot read and write English, does not require reversal of a conviction unless there is a showing of actual prejudice.[21] Conversely, the inclusion of a biased juror is a "structural defect not subject to a harmless error analysis" necessitating "a new trial without a showing of actual prejudice."[22]

The reason for this difference is two-fold. First, the Supreme Court has concluded that one of "[t]he purpose[s] of the jury is to guard against the…biased response of a judge,"[23] and that "[p]roviding an accused with the right to be tried by a jury of his peers g[ives] him the inimitable safeguard against the biased or eccentric judge."[24] Second, the Court has found that "[t]he right to an impartial jury lies at the heart of due process." [25] In turn, "[a]llegations of racial bias on the part of jury members strike at the heart of that right."[25] These additional interests could tip the scales of justice in favor of the appellant when there are allegations of juror bias even though those scales tip against him when there are allegations of juror incompetence.

The more important point, however, is that because the presence of a biased juror is a structural defect not subject to a harmless error analysis, courts allowing jury impeachment on the issue of juror bias would not need to inquire into the juror's mental processes underlying the verdict. Courts have strongly avoided such inquiries, explaining the *Tanner* holding, because if jurors in that case had testified, the Court would have needed to inquire into the effect of their alcohol and drug use and drowsiness on their mental processes in reaching the verdict.

Conversely, when a juror claims after trial that another juror made biased comments during deliberations, the court does not need to inquire into the mental processes underlying the verdict. This point is made clear by an opinion from Connecticut, a state that allows jurors to impeach their verdicts through allegations of juror bias. In *State v. Phillips*, jurors were allowed to impeach their verdict convicting an African-American defendant of third degree robbery and related charges through allegations of a juror's racist comments. During the jurors' testimony, the trial court asked the jurors whether anything improper influenced their verdict. On appeal, however, the Appellate Court of Connecticut concluded that the trial court[25]

> should not[] have asked jurors whether anything improper had influenced their verdict. It should have instead restricted its inquiry to objective evidence of racially related statements

and behavior. The court should then have decided whether that evidence amounted to racial bias against the defendant on the part of one or more jurors, which would have automatically warranted a new trial.

In other words, if courts allowed jurors to render post-trial testimony concerning racial, religious, or other slurs used by a juror during trial, they would not need to inquire into the mental processes underlying the verdict. Indeed, they would not even need to inquire into the verdict itself. They would solely need to consider whether the juror made the alleged slurs and whether those slurs evinced bias because the inclusion of a biased juror is a "structural defect not subject to a harmless error analysis" necessitating "a new trial without a showing of actual prejudice." [25]

III. RECOMMENDATIONS FOR ATTORNEYS WHO BELIEVE JUROR BIAS MIGHT TAINT A VERDICT

- Screen prospective jurors for prejudice during pre-trial *voir dire* if the judge allows such questioning and if you do not think that it will not alienate jurors who might feel implicitly accused of harboring bias;

- If not automatically given, ask for a jury charge instructing jurors that they have an obligation to immediately come forward and (1) report jury misconduct, and (2) correct a misstatement or omission during *voir dire*;

- If you believe that a verdict was tainted by juror bias

    - request post-verdict jury *voir dire*;

    - move for leave to interview jurors;

    - request an evidentiary hearing into jury misconduct

- If you learn that a juror who claimed during *voir dire* that bias would play no part in his deliberations expressed bias during deliberations, move for a new trial based upon his deceit during *voir dire*;

- If there was no such *voir dire* but you learn that a juror expressed bias during deliberations, move for a new trial and argue that this bias was extraneous prejudicial information or an improper outside influence under Rule 606(b); and

    - Argue that if the court refuses to hear such evidence under Rule 606(b), it will violate your client's right to present a defense.

IV. CONCLUSION

When courts preclude jurors from impeaching their verdicts through allegations of juror bias, they violate one of the plainest principles of justice: the right to an impartial jury. Because the right to an impartial jury lies at the heart of due process, the presence of a biased juror is a structural defect not subject to a harmless error analysis. And yet, by applying Rule 606(b), an anomalous, reliability-based, competency rule, courts preclude appellants from proving such bias. Such an application of the Rule is thus arbitrary and disproportionate to the purposes it was designed to serve, and attorneys should be able to argue that this application of the rule is violative of the right to present a defense.

References

[1] *Commonwealth v. Steele*, 961 A.2d 786, 792, 807-08 (Pa. 2008).

[2] *Juror Competency to Testify that a Verdict Was the Product of Racial Bias*. (1993). Gold, Victor. 9 ST. JOHN'S J. LEGAL COMMENT. 125, 126

[3] *United States v. Henley*, 238 F.3d 1111, 1112-14, 1119-21 (9th Cir. 2001).

[4] *State v. Hidanovich*, 747 N.W.2d 463, 474 (N.D. 2008)

[5] *People v. Brooks*, 2008 WL 2855040, No. 281487 at *2 (Mich.App., July 24, 2008)

[6] *Tanner v. United States*, 483 U.S. 107, 113-15, 126-27 (1987)

[7] *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159-60 (7th Cir. 1987)

[8] *Washington v. Texas*, 388 U.S. 14 (1967)

[9] *Government of the Virgin Islands v. Mills*, 956 F.2d 443, 446 (3rd Cir. 1992)

[10] *Racist Juror Misconduct During Deliberations*, 101 HARV. L. REV. 1595, 1597 (1988).

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

[12] *After Hour Wedding, Inc. v. Laneil Management Co.*, 324 N.W.2d 686, 690 (Wis. 1982)

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

[14] *United States v. Scheffer*, 509 U.S. 579 (1993)

[15] 46 F.R.D. 161, 291 (1969)

[16] *Holmes v. South Carolina*, 547 U.S. 319, 321-22 (2006)

[17] *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984)

[18] *Rock v. Arkansas*, 483 U.S. 44 (1987)

[19] *Levinger v. Mercy Medical Center, Nampa*, 75 P.3d 1202, 1207 (Idaho 2003)

[20] See, e.g., *Chaddock v. State*, 203 S.W.3d 916, 927-28 (Tex.App.-Dallas 2006)

[21] *See, e.g., United States v. Silverman*, 449 F.2d 1341, 1343-44 (2nd Cir. 1971)

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

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

[24] *Duncan v. State of Lousiana*, 391 U.S. 145, 156 (1968)

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

We asked three experienced trial consultants to comment on Miller's article on 606(b). On the following pages, Edward Schwartz and then Julie Blackman and Ellen Brickman (collaborating on a response) offer their thoughts in reaction to Colin Miller's ideas.

Edward Schwartz responds to Colin Miller

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The Hollow Promise of Post-Verdict Juror Testimony:

Circumventing FRE 606(b) won't overcome racial prejudice

I have read with great interest Professor Miller's article, outlining an argument in favor of loosening the restriction on juror testimony to impeach criminal verdicts, where racial prejudice is alleged. I must say that I am not entirely persuaded that his approach can circumvent the logic of FRE 606(b). Of particular concern is a recognition that any effort at post-conviction relief begins a completely new phase of the judicial process, with new procedures, presumptions and burdens of proof. As such, one cannot easily analogize from forms of *trial* testimony to juror *post-verdict* testimony. That is, the jurors are most assuredly *not* testifying at the defendant's trial. Secondly, I seem to place a higher value on the interests being protected by 606(b) – namely the rights of jurors to deliberate free from state intervention or recrimination – than does Professor Miller.

Even were one able to loosen the bonds of 606(b), I am concerned that holding more post-verdict hearings, complete with juror testimony, wouldn't accomplish very much. This is a very blunt, unwieldy instrument for correcting the ills of racial animus. I outline below why I believe this to be so.

The 606(b) Exception Exception – The Massachusetts Rule

Reading the language of FRE 606(b) (and the state counterparts, which generally include the same language), there does not appear to be any room for impeaching a verdict based on racial animus infecting jury deliberations. Clearly, such animus falls squarely within the "mental processes" language and any jury discussion of racial issues falls under the "deliberations" prohibition.

Many impediments to impartial deliberations that would seem to be much more "extraneous" or "outside" have been interpreted to fall under the prohibitions of FRE 606(b). Verdicts have been allowed to stand despite the extreme depression, schizophrenia and mental retardation of jurors. The most famous case testing 606(b), *Tanner v. U.S.* (1978), involved a jury that got drunk and took cocaine together during deliberations. If cocaine and mental retardation don't qualify as "extraneous" influences, it is hard to think how racism might.

I was very surprised then to hear that a Massachusetts trial judge was conducting a hearing to investigate the verdict in the case of Christopher McCowen. McCowen, a black sanitation worker, had been convicted of murdering Christa Worthington, a white woman who lived on his route. A few days later, three jurors contacted the defense attorney to report racially charged irregularities in the deliberations.

I discovered that the Massachusetts Supreme Judicial Court has carved out a specific exception to 606(b) when racial animus is alleged. Although evidence that a juror made ethnically or racially prejudiced remarks during deliberations is not evidence of an "extraneous matter," the Supreme Judicial Court has held that a

judge has authority to inquire into such matters because the existence of such remarks may deprive a defendant of the right to be tried by an impartial jury. *Commonwealth v. Laguer* (1991).

So, Mr. McCowen got his hearing (*Commonwealth v. McCowen*, Barstable Superior Ct., April 4, 2008). All the jurors were interviewed. A few racially insensitive remarks were recalled, as were several apologies. In the end, Judge Gary Nickerson was not convinced that racial animus infected the deliberations, something the defendant had the burden of proving by a preponderance of the evidence. So, even in a state with the most liberal standard available for reinvestigating a verdict due to racial prejudice, admitted instances of racially insensitive remarks were insufficient to bring the defendant relief.

So, you secured a hearing – now what?

I would strongly advise against relying too heavily on 606(b) exceptions to overcome racial bias in the jury room. There are just too many things working against you. First of all, while some states like Massachusetts have carved out "racial animus" exceptions to the prohibition against juror testimony on matters relating to deliberations, not many of those exceptions were enthusiastically embraced by the state Supreme Courts. A state's official position on this topic could change tomorrow.

Second, all the exception gets you is a hearing (provided you've got solid affidavits from some jurors). Convincing a judge that the verdict was the result of racial prejudice is going to be a bear. The main reason for this, of course, is that the very same jurors complaining about the verdict *voted for the verdict themselves* (except in Oregon and Louisiana, where criminal verdicts need not be unanimous).

Imagine that you were an African American juror, sitting on a case with racial overtones. One or two of your fellow jurors start uttering remarks that are racially insensitive, maybe even inflammatory. Will that make you more likely to vote guilty? I don't think so. So, the first question any sensible judge will have for a juror who alleges that a verdict was tainted by racial animus is, "Then, why did you vote for it?"

The most likely scenario, leading to a juror contacting a defense attorney and complaining about the racial tension in the jury room, is that the juror experiences regret about the verdict for some reason. That is, after the fact, she comes to wish that she had voted differently. Most likely, she reads about the case in the newspaper, or hears about it on television, and learns some things that did not come out at trial.

The exceptions to 606(b) are not intended, however, to circumvent the other rules of evidence. Judges know this and no good judge will allow juror regret to impeach a verdict. As the judge in the McCowen appeal wrote, "The oft-expressed second thoughts of a conscientious juror do not necessitate a new trial."

Consider the final paragraph in the opinion denying McCowen's motion for a new trial:

"One final observation is in order. For over thirty years, this author has witnessed the delivery of verdicts in serious criminal cases. Watching jurors being polled has shown in many instances, a trembling hand, a tear trickling down, or the word "Guilty" getting caught in a juror's throat. The polling of the jury in this case was extraordinary. After eight days of deliberations, not one juror trembled, or shed a tear or choked on his or her words. Unfettered unanimity was obvious from the conduct of the jurors as well as from the words they spoke as they were individually polled."

Avoiding racial prejudice in the jury room

While Professor Miller spends the bulk of his article articulating his attack on FRE 606(b), he ends with a list of sensible suggestions for minimizing the likelihood that racial animus will contaminate a jury's deliberations.

Remember that 606(b) only applies after the verdict has been rendered. If you wait until then to try to rectify problems with your jury, the horse has already left the proverbial barn. The key is to be vigilant with respect to racial issues throughout the entire trial process.

By all means, follow Professor Miller's advice with respect to jury selection, but I would pay particular attention to his admonition to request a jury instruction regarding the reporting of juror misconduct. While it might not be prudent to mention racial prejudice explicitly, it is critical that the jurors are made aware that the judge is available to help with any issues that come up during the trial and deliberations. The judge should let each juror know that she should immediately come forward if she is at all concerned that she, or any other juror, has seen, heard or done anything that she believes might not be appropriate.

With any luck, you will have a judge who can couch such an instruction in a non-threatening way. In order to avoid reactance on the part of jurors, they must perceive this admonition as a genuine offer to help them work through any issues that might emerge.

Such an instruction can be critical because the prohibition against voir dire for the jurors does not apply until after a verdict is rendered. So, if jurors come forward during any point of the trial or deliberations, a proper investigation into possible racial prejudice can be conducted.

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Julie Blackman & Ellen Brickman Respond To Colin Miller

Julie Blackman, Ph.D. (jblackman@julieblackman.com) is the Principal of Julie Blackman & Associates, a trial strategy consulting firm. She has consulted to attorneys on jury selection in many cases, with special attention to strategies for identifying and challenging biased jurors.

Ellen Brickman, Ph.D. (ebrickman@julieblackman.com) is a social psychologist and the Director of Research at Julie Blackman & Associates.

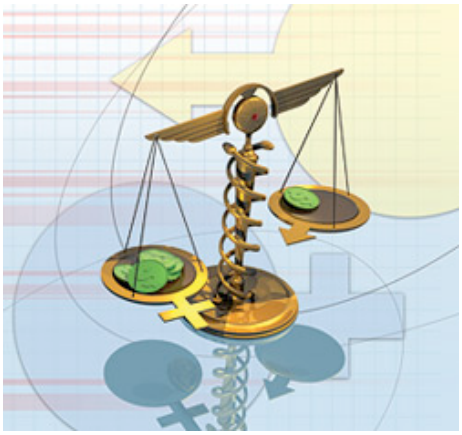
For us as psychologists, the most intriguing part of Miller's paper was the recommendation that jurors need to be screened for prejudice during voir dire. As trial consultants, we believe that effective voir dire is the key step to ensuring an impartial jury. Miller highlights the difficulty of dealing with the effects of a biased juror after the fact, once the juror has been impaneled and has deliberated. Whether through attorney-conducted voir dire, questions added to the judge's voir dire, or juror questionnaires one can often avoid relying on the legal remedies proposed by Miller by directing concerted attention to keeping prejudiced jurors off the panel in the first instance. Here, an ounce of prevention is surely worth a pound of cure.

Thus, in response to Miller's work, we offer these recommendations for detecting prejudiced jurors during voir dire:

(1) **Raise issues of gender and race (and any other characteristics that might engender bias) explicitly.** Acknowledge that jurors can sometimes feel uncomfortable with aspects of a case that have to do with gender or race or other characteristics, and let them know that you are not here to judge, you are simply interested in their honest reactions to the issues. Ask about bias in a non-threatening way, to increase the likelihood that jurors will be honest with you.

Avoid words like "prejudice" or "bias" or "stereotype," and focus instead on more neutral words like "discomfort."

Even if jurors do not acknowledge any discomfort or other negative emotions attached to gender or race, your questions about it will help to attune them to the broader issue of prejudice. Jurors want to do the right thing. If they are made aware of their own prejudices and instructed to set them aside, most will do their very best to do so.



(2) **Offer jurors a way to acknowledge their prejudices privately.** Jurors are aware that gender- or race-related prejudice is socially undesirable, and will probably be reluctant to admit to such prejudice in open court. It can be useful to nest your questions about prejudice in the context of a broader question that offers jurors an opportunity to share their concerns at sidebar. Thus, for example, you might raise the issue of the defendant's race, and say:

My client is an African-American man. Sometimes people have strong feelings about certain groups of people that can get in the way of rendering a fair and impartial verdict. Or, some people may feel uncomfortable about a case in which an African-American man is accused of attacking a white woman. Or, there may be other aspects of this case – having nothing to do with my client's race or gender – that make you uncomfortable and that we have not already discussed. If you have any such discomfort for any reason, please raise your hand now and we will discuss it with you privately.

(3) **Look to behavioral indicators of jurors' feelings about the target group(s), not just to their professed feelings**. Jurors who live and work in integrated settings and particularly, who report voluntary membership in integrated groups (e.g. churches, social organizations) are more likely to be free of prejudice than are those whose interactions are limited to people in their own demographic cohort. Ask the jurors about their neighborhoods, group memberships, where they send their children to school, and what newspapers and magazines they read. All of these can be useful indicators of an individual's social outlook, and can give you a good sense of how open-minded they are. This information is, of course, useful in ways that go far beyond detecting gender, race or other "demographic" biases.

(4) **Ultimately, aim for a heterogeneous jury.** In the event that a biased juror evades detection during the voir dire process, the best way to minimize that juror's impact is to have her/him deliberating with others from different demographic groups and social backgrounds. Then, individual beliefs are challenged and highly prejudiced views are unlikely to stand up to group consensus. Bringing a group of diverse individuals into a jury room inherently gives rise to a variety of perspectives, as each juror brings his or her life experience to bear on the case at hand. In this way, reasonable doubt comes to life in the jury room and jurors are prevented from coming to premature consensus – and particularly, from coming to consensus based on prejudice rather than on fact.

We recognize that attorneys sometimes have strong instincts, or even empirical findings from pre-trial research, about a preferred juror profile. Even if you are able to fill an entire jury with

that profile, we would encourage you not to do so. The ideal jury will have a strong cohort (e.g., 5 or 6 out of 12) of your preferred demographic, but the rest of the jury should be selected to maximize diversity, thereby promoting more elaborate deliberations and enlivening the burden of proof beyond a reasonable doubt.

Finally, though we recognize this goes beyond the scope of the original paper, we want to remind attorneys that prejudice is not limited to issues of sex and race. We have worked on cases involving Italian-Americans, ultra-Orthodox Jews, and other groups about whom jurors may hold beliefs based on stereotyped images. In all of these cases, we have recommended that attorneys inquire about these beliefs, and have been able to obtain cause challenges against jurors who expressed them. Even more frequently, we have worked on cases involving allegations of white-collar crime and have heard jurors express highly prejudiced views against wealthy corporate executives. For example, a potential juror in a recent case asked to be heard at sidebar and shared her belief that anyone who is rich and is trying to get richer is committing a crime. She was excused for cause.

In closing, we remind attorneys that prejudice comes in many forms and it is imperative that you delve into this issue during voir dire, and bear it in mind as you consider the overall makeup of your jury. It is far better to identify and de-select the prejudiced juror in advance than to have to rely on the complex and unpredictable legal remedies discussed by Miller.

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Editor's Note

Welcome to our March 2010 issue of *The Jury Expert*! Once again, we have diverse and provocative offerings for you. Whether you flip first to our article on apology, choose to travel to East Texas, or ponder the impact of emotional evidence, see just how informative and persuasive visual communication can be, think about the goals of witness preparation, sweat through the surprising heat of attitudes toward atheists, consider the use of 606(b) in jury impeachment, or travel back in time with our March 2010 Favorite Thing, you are bound to have an experience that teaches you a thing or two and that means you have more interesting conversations with colleagues.

We are continuing to try new topics and formats of articles as we press forward with *The Jury Expert*. Let us know what you think (what should we do more of, what should we do less of, and what should we keep the same?) by sending me an email (click on my name below).

> Tell us what you want to read. Tell us what you want to learn. Tell us what you are curious about (related to litigation advocacy). We will try to accommodate your questions, curiosities and desire for new topic areas.

You'll also see a bit of a new layout on our front webpage. We are looking for advertisers to help support costs of creating this publication and other activities of our publisher (the American Society of Trial Consultants). Read. Consider. Question. Comment on our website!

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