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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. KERRY DEAN BENALLY, Defendant.	**MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL** Case No: 2:07-CR-256-DAK

Defendant, Kerry D. Benally, by and through his attorney, A. Chelsea Koch, submits this Memorandum in Support of Motion for New Trial and respectfully requests that this Court grant a new trial, or in the alternative, schedule an evidentiary hearing at which time testimony may be taken. A new trial may be granted under Rule 33 of the Federal Rules of Criminal Procedure based on juror misconduct if there is a showing of actual bias or the circumstances require a finding of inherent bias as a matter of law. *United States v. Easter*, 981 F.2d 1549, 1553 (10th Cir. 1992). Here, there are several instances of juror misconduct which can both be reviewed by the Court, and which warrant a new trial, or at the very least, an evidentiary hearing.

A. The Court May Consider the Evidence Presented by Defendant in Determining Whether to Grant his Motion for New Trial.

The Government argues that the evidence offered by Defendant of juror misconduct is outside the court's realm of review, and cannot be considered in deciding the instant Motion for New Trial. *See* Memorandum in Opposition to Defendant's Motion for New Trial, at 2-3, 5. However, while Rule 606 of the Federal Rules of Evidence is generally narrowly construed, it explicitly allows for a juror to testify regarding "whether extraneous prejudicial information was improperly brought to the jury's attention, [or] whether any outside influence was improperly brought to bear upon any juror[.]" F.R.E. 606(b). Extraneous prejudicial information generally consists of that evidence not presented in court or at trial. *United States v. Saya*, 101 F.Supp.2d 1304 (D.Hawai'i 1999); *Guam v. Castro*, 2002 WL 31663293 (Guam Terr. 2002); *Bolton v. Tesoro Petroleum Corp*., 871 F.2d 1266 (5th Cir. 1989). When extraneous information has the "slightest possibility" of affecting the verdict, a new trial is warranted. *United States v. Wood*, 958 F.2d 963 (10th Cir. 1992); *Johnston v. Makowski*, 823 F.2d 387, 389-90 (10th Cir. 1987).

Several courts have held that a juror's racial bias is extraneous prejudicial information into which the Court may inquire. *United States v. Henley*, 238 F.3d 1111 (9th Cir. 2001); *Rushen v. Spain*, 464 U.S. 114, 121 n. 5 (1983); *Tobias v. Smith,* 468 F.Supp. 1287 (W.D.N.Y.1979); *Wright v. United States*, 559 F.Supp. 1139, 1151 (D.C.N.Y. 1983). Although the Tenth Circuit has not ruled directly on the issue, it has nevertheless allowed consideration of a juror affidavit alleging racial pressures in juror deliberations. *Brown v. Gibson,* 7 Fed. Appx. 894, 908-09 (10th Cir. 2001)(assuming, without deciding, that the court could consider a juror affidavit alleging racial pressures in juror deliberations).

In *Henley*, the Ninth Circuit found that "[r]acial prejudice is plainly a mental bias that is unrelated to any specific issue that a juror in a criminal case may legitimately be called upon to determine." 238 F.3d at 1120. In reviewing allegations that a juror was racially biased, the Court held that

> Where, 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. If 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.

Id. at 1121 (internal citations omitted).

Similarly, when a juror is fraudulently on the panel, the Court may conduct an inquiry into whether a new trial is warranted. *Clark v. United States*, 289 U.S. 1 (1932)(once juror's fraudulent presence on the panel is presented, court may breach sanctity of jury room); *Photostat Corp v. Ball*, 338 F.2d 783 (10th Cir. 1964)("False or misleading answers may result in the seating of a juror who might have been discharged by the Court, challenged for cause by counsel or stricken through the exercise of peremptory challenge. The seating of such a juror could and probably would result in a miscarriage of justice."); *Burton v. Johnson*, 948 F.2d 1150, 1158 (10th Cir. 1991)("Had the juror spoken up, she would have been dismissed for cause as two other jurors had been who had revealed substantial exposure to family abuse. Since the record does not fairly support a presumption of correctness of the trial court's finding that the juror was honest, that presumption is overcome. Thus *McDonough* applies and petitioner is entitled to a new trial."). A juror's false answers during voir dire are a widely-accepted basis for a new trial, and are routinely considered by a court upon a motion for new trial.

Thus, although Rule 606 is generally construed narrowly, the evidence of conduct and bias presented in Defendant's Motion for New Trial are exactly the types of evidence that a court may and should investigate under Rule 606, and indeed, such evidence requires further inquiry by the Court in this case.

B. The Evidence Presented by Defendant Warrants a New Trial, or at the Very Least, an Evidentiary Hearing to Allow the Court to Inquire Further.

This case presents several facts which require a new trial, or in the alternative, an evidentiary hearing to allow the court further inquiry. First, two jurors failed to answer voir dire questions honestly. Potential jurors were explicitly questioned about prior experiences with Native Americans, any negative experiences with Native Americans, whether they had any pre-conceived beliefs about the nature and character of Native Americans, and whether such beliefs would affect the juror's ability to make a fair and impartial decision. *See* Attachment C to Defendant's Motion for New Trial. All jurors empaneled answered these questions in the negative or failed to speak up to reveal any such experiences or beliefs. It has since been discovered that jurors David Mortensen and Judy Hansen failed to honestly answer that they had both lived on or near an Indian reservation, and had experience with Native Americans which made them believe all Native Americans who consume alcohol become wild and violent. *See* Attachments A & B to Defendant's Motion for New Trial. Given the nature and circumstances of this case, it is extremely likely those two jurors would have either been stricken for cause or excused by use of a peremptory challenge, had their answers been truthful during voir dire. Such dishonest answers - especially when material to the case at hand - demand a new trial. *McDonough Power Equipment v. Greenwood*, 464 U.S. 548, 556 (1984)(when shown that a juror

failed to honestly answer a material question during voir dire, to which a correct response would have supported a challenge for cause, a new trial is required); *Skaggs v. Otis Elevator Co.,* 164 F.3d 511, 515 (10th Cir. 1998)(same).

Closely tied to the false answers during voir dire was these same jurors' failure to disclose the racial prejudice against Native Americans they both held, which also constitutes extraneous prejudicial information affecting the verdict. When questioned during voir dire, both claimed to have no pre-conceived beliefs that would negatively affect their judgment. However, during deliberations, both expressed a strong belief that Native Americans all get drunk and wild and violent, repeating this opinion several times when challenged by other jurors. Their continued bias throughout the deliberations ultimately led to a guilty verdict of the Native American defendant. In addition to false answers to voir dire questions specifically regarding this topic, a racially-biased jury contravenes the Sixth Amendment's guarantee of a fair and impartial jury, and these jurors' racial prejudice - and moreover their failure to disclose it - mandates a new trial. *See Tobias*, 468 F.Supp. at 1291 ("[t]here should be no injection of race into jury deliberations and jurors who manifest racial prejudice have no place in the jury room. Certainly, where a probability of such prejudice can be demonstrated, it would constitute sufficient grounds for ordering a new trial.").

Finally, at least two additional jurors relied on further extraneous prejudicial information in returning their verdict, information which was not presented at trial and which the Court can review in ordering a new trial. One juror indicated to the panel that members of his family were in law enforcement, he had heard multiple stories about what happens when people mess with police officers and get away with it, and that he wanted to send a message back to the reservation

about messing with police officers. At least one other juror concurred, believing that the jury needed to send a message to the reservation. Such extraneous information - family members' experiences as law enforcement and the need to "send a message" to those living on the reservation - is clearly outside the jury's realm of evidence to be properly considered, and resulted in a faulty verdict. More importantly, use of such extraneous and prejudicial information is something the Court may question in determining whether a new trial is required. As the jury both used and relied upon extraneous information that was prejudicial and resulted in a guilty verdict, a new trial is required.

Accordingly, Defendant respectfully requests that this Court grant his Motion for New Trial, based on the misconduct of several jurors during voir dire and during deliberations. In the alternative, Defendant requests that this Court schedule an evidentiary hearing at which time the Court may hear testimony regarding the jury misconduct, in order to better determine whether a new trial is warranted.

DATED this 7th day of November, 2007.

/s/ A. Chelsea Koch
A. Chelsea Koch
Assistant Federal Defender

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2007, I did cause a true and correct copy of the foregoing to be mailed electronically to all parties named below:

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/s/ Kristine H. Harris
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