No.

In the Supreme Court of the United States

GREGORY P. WARGER, PETITIONER

v.

RANDY D. SHAUERS

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Federal Rule of Evidence 606(b) permits a party moving for a new trial based on juror dishonesty during voir dire to introduce juror testimony about statements made during deliberations that tend to show the alleged dishonesty.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Rule involved 2

Statement 2

Reasons for granting the petition 8

A. The decision below deepens a circuit conflict on the admissibility of juror testimony about statements made during deliberations that tend to show juror dishonesty during voir dire 9

B. The question presented is an important one that warrants the Court's review in this case 17

Conclusion 20

Appendix A 1a

Appendix B 12a

Appendix C 40a

TABLE OF AUTHORITIES

Page

Cases:

Hard v. *Burlington Northern Railroad*, 812 F.2d 482 (9th Cir. 1987) ..... *passim*

Maldonado v. *Missouri Pacific Railway Co.*, 798 F.2d 764 (5th Cir. 1986), cert. denied, 480 U.S. 932 (1987) 13

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

United States v. *Benally*, 546 F.3d 1230 (10th Cir. 2008), reh'g denied, 560 F.3d 1151 (10th Cir. 2009), cert. denied, 558 U.S. 1051 (2009), and 132 S. Ct. 401 (2011) ..... *passim*

United States v. *Boney*, 68 F.3d 497 (D.C. Cir. 1995) 12, 15, 17, 18

Page

Cases—continued:

United States v. *Henley*,
238 F.3d 1111 (9th Cir. 2001)................................11, 14, 15
United States v. *Villar*, 586 F.3d 76 (1st Cir. 2009) 19
Williams v. *Price*, 343 F.3d 223 (3d Cir. 2003) 9, 15, 16

Statute and rules:

28 U.S.C. 1254(1) 1
Fed. R. Evid. 606..10
Fed. R. Evid. 606(b)...*passim*
Fed. R. Evid. 606(b)(1) ....*passim*
Fed. R. Evid. 606(b)(2) ....*passim*
Fed. R. Evid. 606(b)(2)(A)...6, 7
Fed. R. Evid. 606(b)(2)(B)..6
Fed. R. Evid. 606 advisory committee's note (2011).........10

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Gregory P. Warger respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 721 F.3d 606. The order of the district court denying petitioner's motion for judgment as a matter of law or a new trial (App., *infra*, 12a-39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Federal Rule of Evidence 606(b) provides:

(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.

STATEMENT

This case presents an expressly recognized circuit conflict on a recurring question of interpretation involving Federal Rule of Evidence 606(b). Petitioner brought suit against respondent in the United States District Court for the District of South Dakota after respondent's truck collided with petitioner's motorcycle, resulting in the amputation of petitioner's leg. In response to questioning during voir dire, the woman who later became the jury foreperson stated that she could remain impartial and that she could award damages to petitioner if the evidence supported it. During deliberations, however, the foreperson told the other jurors that her own daughter had been at fault in a fatal automobile accident—and

that, if her daughter had been sued, it would have "ruined her life." The jury returned a verdict in favor of respondent. After obtaining an affidavit from another juror in which the juror reported the foreperson's statements during deliberations, petitioner moved for a new trial based on the foreperson's dishonesty during voir dire.

The district court denied petitioner's motion for a new trial, App., *infra*, 12a-39a, and the Eighth Circuit affirmed, *id.* at 1a-11a. Like other courts before it, the Eighth Circuit recognized that "[t]here is a split among the circuits as to whether [juror] testimony may be used" to seek a new trial based on juror dishonesty during voir dire. *Id.* at 8a. In the decision below, the Eighth Circuit joined the Tenth Circuit, and departed from the Ninth and District of Columbia Circuits, in holding that such testimony is not admissible under Federal Rule of Evidence 606(b). *Id.* at 8a-9a. In dicta, moreover, other circuits have lined up on each side of the conflict. The resulting conflict, on an important question of interpretation involving a federal rule, warrants this Court's review.

1. On August 4, 2006, petitioner, a computer systems engineer and former Navy officer, was involved in a traffic accident with respondent at the intersection of U.S. Highway 385 and Sheridan Lake Road in Pennington County, South Dakota, not far from Mount Rushmore. Respondent's truck, which was pulling a 28-foot camper trailer, clipped petitioner's motorcycle as respondent was attempting to pass petitioner at a high rate of speed. An off-duty officer saw the accident and raced to the scene. When the officer came upon petitioner, he was missing part of his left leg. Petitioner's lower leg was amputated, and he suffered numerous other serious injuries. App., *infra*, 2a, 12a-13a; Pet. C.A. Br. 3, 6-11.

2. On December 12, 2008, petitioner brought suit against respondent in the United States District Court for the District of South Dakota, invoking the court's diversity jurisdiction and asserting a claim of negligence. App., *infra*, 2a, 13a.

The case twice went to trial before a jury. The first trial ended in a mistrial after respondent's attorney violated an order prohibiting experts from offering legal opinions as to whether the parties' conduct violated South Dakota law. App., *infra*, 2a, 13a-14a.

During voir dire for the second trial, petitioner's counsel asked the prospective jurors whether there was any reason why they could not remain fair and impartial in a case of this type. Petitioner's counsel also inquired as to whether there was any reason that each juror could not vote in petitioner's favor. Petitioner's counsel specifically inquired as to whether each juror could vote to award damages for future medical expenses or pain and suffering if the evidence supported such an award. All of the jurors who were empaneled—including Regina Whipple, the juror who was later selected as the foreperson—indicated that they could remain fair and impartial and that they could award damages against respondent if the evidence supported it. Tr. 52-61, 77, D. Ct. Dkt. 197 (Sept. 20, 2010).

The case proceeded to trial. At the conclusion of the trial, the jury returned a verdict in favor of respondent. App., *infra*, 3a, 14a.

3. Less than a week after the jury returned its verdict, one of the jurors, Stacey Titus, stopped by the office of petitioner's counsel in Rapid City. After the district court permitted jurors and counsel to have contact, Mr. Titus met with petitioner's counsel. He expressed concern about the jury's deliberations—and, in particular, expressed concern that the jury foreperson, Ms. Whip-

ple, had not decided the case based on the evidence presented. App., *infra*, 3a, 28a; C.A. App. 121.

Specifically, Mr. Titus alleged that, during deliberations, Ms. Whipple had told the other jurors that her own daughter had been at fault in a fatal automobile accident—and that, if her daughter had been sued, it would have "ruined her life." According to Mr. Titus, Ms. Whipple explained that her daughter had visited with the family of the dead motorist and had given them flowers on the fifth anniversary of the accident. In Mr. Titus's view, Ms. Whipple's statements had influenced other jurors, because those jurors "also expressed their concern about ruining the * * * li[ves] [of respondent and his wife] as they were a young couple." Mr. Titus executed an affidavit in which he made all of the foregoing allegations. App., *infra*, 40a-41a (affidavit).

4. As is relevant here, relying on Mr. Titus's affidavit, petitioner moved for a new trial based on the foreperson's dishonesty during voir dire. The district court denied the motion, based on its conclusion that Federal Rule of Evidence 606(b) barred the admission of Mr. Titus's affidavit. App., *infra*, 12a-39a.[1]

The district court held that the affidavit was inadmissible under Rule 606(b)(1), which prohibits the introduction of juror testimony about statements made during jury deliberations "[d]uring an inquiry into the validity of [the] verdict." App., *infra*, 35a-38a. In so doing, the court rejected petitioner's contention that he was seeking admission of the affidavit not to "inquire into the va-

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[1] Petitioner also moved for judgment as a matter of law or a new trial on other grounds. The district court rejected those arguments, see App., *infra*, 14a-27a, as did the court of appeals, see *id.* at 3a-5a, 6a. Petitioner does not renew those arguments before this Court.

lidity of the verdict," but rather to "demonstrate the foreperson lied during voir dire." *Id.* at 35a-36a. The district court noted that the Tenth Circuit had "recently addressed this precise issue" and held that such testimony "fell within the ambit of Rule 606(b) because the jurors made the statements during the course of jury deliberations, regardless of the purpose for which [the moving party] sought to use the information." *Ibid.* (citing *United States* v. *Benally*, 546 F.3d 1230 (10th Cir. 2008), cert. denied, 558 U.S. 1051 (2009), and 132 S. Ct. 401 (2011)). While acknowledging that the Ninth Circuit had expressed a contrary view, *id.* at 37a-38a (citing *Hard* v. *Burlington Northern R.R.*, 812 F.2d 482, 485 (9th Cir. 1987)), the district court found the Tenth Circuit's reasoning to be "persuasive." *Id.* at 38a. The district court explained that "[t]o allow statements made during jury deliberations to be used to challenge a juror's conduct during voir dire would undermine the purpose of Rule 606(b) and runs counter to its directive." *Ibid.*

The district court also held that, to the extent the affidavit was inadmissible under Rule 606(b)(1), it did not qualify for admission under any of the exceptions in Rule 606(b)(2): specifically, the exceptions for evidence that "extraneous prejudicial information was improperly brought to the jury's attention," Fed. R. Evid. 606(b)(2)(A), and evidence that "an outside influence was improperly brought to bear on any juror," Fed. R. Evid. 606(b)(2)(B). App., *infra*, 31a-35a. The court determined that "[t]he type of biases the foreperson allegedly expressed in this case, while unfortunate, do not fall within any exception to Rule 606(b)." *Id.* at 34a (citing *Benally*, 546 F.3d at 1236-1238).

5. The court of appeals affirmed. App., *infra*, 1a-11a. Like the district court, the court of appeals rejected

the contention that Rule 606(b)(1) "should not exclude the affidavit because it is not being used to challenge the verdict, but rather to show a juror was dishonest during voir dire." *Id.* at 8a. At the outset, the court of appeals acknowledged that "there is a split among the circuits as to whether [juror] testimony may be used" to seek a new trial based on juror dishonesty during voir dire. *Ibid.* In particular, the court noted that the Ninth Circuit had held that "statements by jurors regarding dishonesty during voir dire may be admitted into evidence for the purpose of challenging a verdict," *ibid.* (citing *Hard*, 812 F.2d at 485), while other courts (including the Tenth Circuit) had held that "trial courts may exclude such evidence," *id.* at 8a-9a (citing *Benally*, 546 F.3d at 1235-1236). The court of appeals found the reasoning of the latter courts to be "persuasive." *Id.* at 9a. The court explained that "allowing juror testimony through the backdoor of a voir dire challenge risks swallowing the rule." *Ibid.* (quoting *Benally*, 546 F.3d at 1236).

Also like the district court, the court of appeals held that, to the extent the affidavit was inadmissible under Rule 606(b)(1), it did not qualify for admission under the exception in Rule 606(b)(2)(A) for evidence that "extraneous prejudicial information was improperly brought to the jury's attention." App., *infra*, 6a-7a. "Upon first blush," the court conceded, "it would seem the foreperson's comments fall into this category." *Id.* at 7a. The court ultimately determined, however, that "[j]urors' personal experiences do not constitute extraneous information." *Ibid.* Instead, "extraneous information includes objective events such as publicity and extra-record evidence reaching the jury room, and communication or contact between jurors and litigants, the court, or other third parties." *Ibid.* (internal quotation marks and citation omitted). Because the affidavit "concerns an al-

leged bias held by a jury member" and "does not concern extraneous information improperly brought before the jury," the court concluded that "the exception to the rule does not apply." *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents a mature conflict on an important and recurring question concerning the interpretation of Federal Rule of Evidence 606(b), the rule governing the admissibility of juror testimony about statements made during jury deliberations. In the decision below, the Eighth Circuit expressly recognized that it was deepening a preexisting conflict on the question whether a party moving for a new trial based on juror dishonesty during voir dire may introduce juror testimony about statements made during deliberations that tend to show the alleged dishonesty. While consistent with an earlier decision of the Tenth Circuit, the Eighth Circuit's decision conflicts with decisions from the Ninth and District of Columbia Circuits. And two other circuits have addressed the issue in dicta, with those circuits lining up on either side of the conflict.

That conflict, moreover, warrants the Court's review in this case. The question presented is of substantial practical importance. And this case is an optimal vehicle for consideration and resolution of that question, because it cleanly presents the full range of potential arguments as to why Rule 606(b) permits the introduction of juror testimony of the type at issue here. The petition for certiorari should therefore be granted.

A. The Decision Below Deepens A Circuit Conflict On The Admissibility Of Juror Testimony About Statements Made During Deliberations That Tend To Show Juror Dishonesty During Voir Dire

The Eighth Circuit's decision deepens a conflict among numerous courts of appeals on the admissibility of juror testimony about statements made during deliberations that tend to show juror dishonesty during voir dire. That conflict has been expressly recognized not only by the Eighth Circuit, but by many of the other courts and judges to have considered the issue. See, *e.g.*, *United States* v. *Benally*, 546 F.3d 1230, 1235 (10th Cir. 2008), reh'g denied, 560 F.3d 1151 (10th Cir. 2009), cert. denied, 558 U.S. 1051 (2009), and 132 S. Ct. 401 (2011); *Benally*, 560 F.3d at 1153-1154 (Briscoe, J., dissenting from denial of rehearing en banc); *id.* at 1156 (Murphy, J., dissenting from denial of rehearing en banc); *Williams* v. *Price*, 343 F.3d 223, 235 n.5 (3d Cir. 2003) (Alito, then-J.). Further review is warranted to resolve that conflict.

1. a. As the Eighth Circuit noted (App., *infra*, 8a), the Ninth Circuit has squarely held that Rule 606(b) permits a juror to testify about statements made during deliberations that tend to show juror dishonesty during voir dire.

Most notably, in *Hard* v. *Burlington Northern Railroad*, 812 F.2d 482 (1987), the Ninth Circuit rejected precisely the sort of argument that the Eighth Circuit accepted here. In the underlying suit, a railroad employee brought an action against his employer under the Federal Employers' Liability Act for injuries he suffered on the job. *Id.* at 483. The jury returned a verdict in the employee's favor, but found the employee 50% negligent and accordingly reduced its damages award. *Ibid.* After the trial, the employee's attorney learned that, during deliberations, one of the jurors had announced that he

used to work for the railroad and had made comments about the railroad's business practices. *Id.* at 485.

The employee moved for a new trial on two grounds: first, that the juror had concealed his past employment during voir dire, and second, that the juror had introduced to the jury potentially prejudicial evidence about the railroad's business practices. 812 F.2d at 483. In support of his motion on both grounds, the employee sought to introduce the affidavits of three jurors testifying about the statements that the juror had made. *Ibid.*

The district court determined that the affidavits were excluded by Rule 606(b) and denied the employee's motion for a new trial, see 812 F.2d at 483, but the Ninth Circuit reversed, see *id.* at 484-486. As is most relevant here, the Ninth Circuit held that, insofar as the employee was seeking to use the affidavits to show that the challenged juror had been dishonest during voir dire, the affidavits were admissible under what is now Rule 606(b)(1)[2] because "[s]tatements which tend to show deceit during voir dire are not barred by that rule." *Id.* at 485.

In addition, the Ninth Circuit went on to hold that, insofar as the employee was seeking to use the affidavits to show that the juror had introduced to the jury potentially prejudicial evidence about the railroad's business practices, the affidavits were admissible under the exception, now contained in Rule 606(b)(2), for evidence that "extraneous prejudicial information was improperly

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[2] At the time of *Hard* and the other cases discussed in this section, both the general rule and the exceptions to that rule were codified in Rule 606(b). Rule 606(b) was broken up into paragraphs (1) and (2) as part of the recent restyling of the Federal Rules of Evidence. See Fed. R. Evid. 606 advisory committee's note (2011).

brought to the jury's attention." 812 F.2d at 486. The court reasoned that, where a juror's past personal experiences "are related to the litigation," they "constitute extraneous evidence which may be used to impeach the jury's verdict." *Ibid.* The court remanded for an evidentiary hearing to determine whether the employee was entitled to a new trial. *Ibid.*

More recently, the Ninth Circuit has confirmed that it adheres to *Hard*'s interpretation of what is now Rule 606(b)(1). In *United States* v. *Henley*, 238 F.3d 1111 (2001), the Ninth Circuit considered the admissibility, in connection with a motion for a new trial, of juror testimony regarding allegedly racist statements made by one of the jurors. See *id.* at 1113. The court reasoned 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." *Id.* at 1121. In so reasoning, the Ninth Circuit cited *Hard* for the proposition that "[s]tatements which tend to show deceit during voir dire are not barred by" what is now Rule 606(b)(1). *Ibid.* (quoting *Hard*, 812 F.2d at 485).[3] Because petitioner seeks to introduce Mr. Titus's affidavit for the purpose of showing the foreperson's dishonesty during voir dire, that affidavit would plainly have been admissible under the Ninth Circuit's interpretation of Rule 606(b).

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[3] The Ninth Circuit remanded for a factual determination as to whether the juror had in fact made the racist statements attributed to him—and, if so, whether that fact was sufficient to establish that he had been dishonest during voir dire. See *Henley*, 238 F.3d at 1122.

b. The District of Columbia Circuit has also held that Rule 606(b) permits a juror to testify about statements made during deliberations that tend to show juror dishonesty during voir dire, though it relied exclusively on the "extraneous prejudicial information" exception now contained in Rule 606(b)(2). In *United States* v. *Boney*, 68 F.3d 497 (D.C. Cir. 1995), defense counsel learned after a criminal trial that the jury foreperson had previously been convicted of a felony—a fact that, if disclosed, would have disqualified him from serving on the jury. *Id.* at 499. The defendant moved for a new trial. *Ibid.* At the hearing on the motion, the trial judge examined the foreperson, but refused to ask him any questions about his statements to the other jurors during deliberations, on the ground that such questions were barred by Rule 606(b). *Id.* at 500.

The D.C. Circuit agreed with the defendant that the questioning was permissible under the "extraneous prejudicial information" exception now contained in Rule 606(b)(2). 68 F.3d at 503. The court reasoned that, because the foreperson would not have been on the jury if he had disclosed his status as a convicted felon, "any discussion of [the foreperson's] felon status during deliberations would surely seem to be 'extraneous,' and possibly 'prejudicial' as well." *Ibid.* On that basis, the court "h[e]ld that Rule 606(b) does not prohibit further questioning of the [foreperson]." *Ibid.* Even assuming that Mr. Titus's affidavit would otherwise have been excluded under Rule 606(b)(1), therefore, the affidavit would have been admissible under the D.C. Circuit's interpretation of the "extraneous prejudicial information" exception in Rule 606(b)(2).

c. Beyond the holdings of the Ninth and D.C. Circuits, one other court of appeals has concluded in dicta that Rule 606(b) permits a juror to testify about state-

ments made during deliberations that tend to show juror dishonesty during voir dire. In *Maldonado* v. *Missouri Pacific Railway Co.*, 798 F.2d 764 (1986), cert. denied, 480 U.S. 932 (1987), the Fifth Circuit held that a district court had properly denied a defendant's post-verdict motion to obtain juror testimony concerning discussions the jury had allegedly had about the defendant's wealth. *Id.* at 769-770. In so holding, the Fifth Circuit noted that "the district court can receive testimony or grant a new trial only if the voluntary disclosure relates to 'extraneous prejudicial information' or 'outside influence' on the jury, *or false information (or withholding) given on voir[] dire*." *Id.* at 770 (emphasis added). Because the defendant's motion "did not indicate that any juror believed he or she would be unable to treat [the defendant] fairly but concealed that fact during voir dire," the court concluded that the motion was seeking testimony that "clearly concerned matters shielded from inquiry by Rule 606(b)." *Ibid.* Notably, in *Hard*, the Ninth Circuit cited the foregoing language in support of the proposition that "[s]tatements which tend to show deceit during voir dire are not barred by [Rule 606(b)]," 812 F.2d at 485. And the Eighth Circuit cited the same language, but refused to follow it, in the opinion below. See App., *infra*, 8a.

2. a. By contrast, as the Eighth Circuit expressly recognized in joining it (App., *infra*, 9a), the Tenth Circuit has held, in the context of a motion for a new trial, that Rule 606(b) does not permit a juror to testify about statements made during deliberations that tend to show juror dishonesty during voir dire. In *Benally*, *supra*, the defendant, a Native American, was convicted of assaulting an officer with a dangerous weapon. 546 F.3d at 1231. After the trial, defense counsel learned that two of the jurors had made racist statements about Native

Americans during deliberations. *Ibid.* The defendant moved for a new trial on the ground that the jurors had lied about their impartiality during voir dire; the government argued that the supporting affidavits the defendant sought to introduce were inadmissible under Rule 606(b). *Id.* at 1232.

The district court determined that the affidavits were admissible and granted the motion for a new trial, see 546 F.3d at 1232, but the Tenth Circuit reversed, see *id.* at 1241-1242. At the outset, citing the Ninth Circuit's decisions, the Tenth Circuit noted that "[t]here is a split in the Circuits" on whether Rule 606(b) permits a party moving for a new trial to introduce juror testimony to prove juror dishonesty during voir dire. *Id.* at 1235 (citing *Hard*, 812 F.2d at 485, and *Henley*, 238 F.3d at 1121).

The Tenth Circuit ultimately rejected the Ninth Circuit's approach, however, and held that the affidavits were inadmissible under what is now Rule 606(b)(1). See 546 F.3d at 1236. The Tenth Circuit reasoned that, "[a]lthough the immediate purpose of introducing the testimony may have been to show that the two jurors failed to answer honestly during voir dire, the sole point of this showing was to support a motion to vacate the verdict, and for a new trial." *Id.* at 1235. According to the court, "[t]hat is a challenge to the validity of the verdict." *Ibid.* The court added that "allowing juror testimony through the backdoor of a voir dire challenge risks swallowing the rule." *Id.* at 1236. After determining that the affidavits did not qualify for admission under any of the enumerated exceptions now contained in Rule 606(b)(2), see *id.* at 1238, the Tenth Circuit rejected the defendant's arguments that it should create an implied exception for evidence of racial bias, see *id.* at 1238-1239, and that Rule 606(b) would be unconstitutional if applied to bar evidence of racial prejudice, see *id.* at 1239-1241.

The Tenth Circuit subsequently denied rehearing en banc, with three judges dissenting. Judge Briscoe, joined in part by Judge Lucero, challenged the panel's holding that the affidavits were inadmissible under what is now Rule 606(b)(1). See 560 F.3d at 1153-1154. She reasoned that, "contrary to being an inquiry into the validity of the verdict rendered by the jury in his case, [the defendant's] claim is more properly viewed as an inquiry into the legitimacy of [the] pre-trial procedures, and, in turn, the constitutionality of the overall proceedings." *Id.* at 1153 (second alteration in original; internal quotation marks and citation omitted). And she noted that the panel's interpretation of Rule 606(b) "conflicts with that of the Ninth and District of Columbia Circuits." *Ibid.* (citing *Henley*, 238 F.3d at 1121, and *Boney*, 68 F.3d at 503). Judge Briscoe also concluded that affidavits would have been admissible under the "extraneous prejudicial information" exception now contained in Rule 606(b)(2). See *id.* at 1154-1155.

Judge Murphy, joined by Judge Lucero, also dissented. See 560 F.3d at 1156. He agreed with Judge Briscoe that the affidavits would at a minimum have been admissible under the "extraneous prejudicial information" exception. See *ibid.* Although he "harbor[ed] some doubt" about whether the affidavits were admissible under what is now Rule 606(b)(1), he reasoned that "the issue is undoubtedly worthy of en banc review as the only other two circuits to directly address th[e] issue have reached a conclusion contrary to that adopted by the panel." *Ibid.*

b. In addition, as the Eighth Circuit noted (App., *infra*, 9a), one other court of appeals has concluded in dicta that Rule 606(b) does not permit a juror to testify about statements made during deliberations that tend to show juror dishonesty during voir dire. In *Williams*, *supra*, the Third Circuit considered a habeas petition in which a

prisoner contended that his right to an impartial trial was abridged because the state court refused to admit affidavits showing racial bias on the part of some jurors. See 343 F.3d at 225.

The Third Circuit ultimately vacated the district court's order denying the habeas petition and remanded for an evidentiary hearing. See 343 F.3d at 239. In the course of doing so, however, the Third Circuit considered and rejected the habeas petitioner's argument that the state court should have considered one of those affidavits because state law did not exclude evidence presented to support a claim of juror dishonesty during voir dire. See *id.* at 235-236. While noting that Rule 606(b) was inapplicable because the underlying proceeding had occurred in state court, the court concluded that Rule 606(b) "categorically bar[s] juror testimony 'as to any matter or statement occurring during the course of the jury's deliberations' even if the testimony is not offered to explore the jury's decision-making process in reaching the verdict." *Id.* at 235. Notably, the Third Circuit specifically rejected the Ninth Circuit's holding in *Hard* that Rule 606(b) does not bar "[s]tatements which tend to show deceit during voir dire." *Id.* at 235 n.5 (alteration in original). The Third Circuit asserted, without elaboration, that "it appears that the decision [in *Hard*] is inconsistent with [Rule] 606(b)." *Ibid.*

As matters stand, therefore, in the context of a motion for a new trial, juror testimony about statements made during deliberations that tend to show juror dishonesty during voir dire would be admissible in the Ninth and D.C. Circuits; inadmissible in the Eighth and Tenth Circuits; likely admissible in the Fifth Circuit; and likely inadmissible in the Third Circuit. That entrenched conflict warrants the Court's review.

B. The Question Presented Is An Important One That Warrants The Court's Review In This Case

1. The question presented in this case is a recurring one of substantial practical importance. As this Court has explained, a party is entitled to a new trial if it 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." *McDonough Power Equipment Inc.* v. *Greenwood*, 464 U.S. 548, 556 (1984). As a practical matter, juror dishonesty during voir dire will often come to light in much the same way that it did here: one juror will come forward with statements that another juror made during deliberations that tend to show that the challenged juror dishonestly answered questions in voir dire. Absent the unusual case in which the challenged juror admits to the deceit, the testimony of other jurors will often be the most probative evidence, if not the only evidence, of juror dishonesty.

If a party is unable to introduce the testimony of other jurors concerning the statements of the challenged juror—or even to examine the challenged juror about his own statements, see *Boney*, 68 F.3d at 500—the party will in many cases be disabled from bringing juror dishonesty to light and vindicating its right to a new trial. That is precisely what took place here, where Mr. Titus's affidavit was the sole evidence of the foreperson's dishonesty that petitioner was able to adduce. In cases like this one, resolution of the question whether Rule 606(b) permits such juror testimony will be dispositive of the underlying claim that juror dishonesty entitles the moving party to a new trial.

2. This case, moreover, is an ideal vehicle for consideration and resolution of the interpretive question concerning Rule 606(b). The Court has had only one recent

opportunity to consider that question, denying a petition for certiorari in *Benally*. This case, however, presents a vastly superior vehicle to *Benally*, for several reasons.

As an initial matter, to state the obvious, the Eighth Circuit's decision in this case deepens the conflict that already existed at the time of *Benally*. The Eighth Circuit expressly acknowledged that conflict, see App., *infra*, 8a-9a, before concluding that the Tenth Circuit's reasoning in *Benally* was "persuasive," see *id.* at 9a. To the extent, therefore, that there was any doubt at the time of *Benally* about the existence of a circuit conflict, but see *Benally*, 546 F.3d at 1235 (acknowledging that "[t]here is a split in the Circuits"), the Eighth Circuit's decision dispels it.

Perhaps more significantly, the petitioner in *Benally*, who was proceeding *in forma pauperis*, appears to have abandoned any argument before this Court that the affidavits at issue qualified for admission under the enumerated exceptions now contained in Rule 606(b)(2). See Br. in Opp. at 20, *Benally*, *supra* (No. 11-5090). Instead, the petitioner argued only that the Court should create an "implied exception to the limitations of Rule 606(b) based upon statements that show racial bias." Pet. at 19. That enabled the respondent in *Benally* to distinguish those circuit decisions that rest either in whole or in part on the enumerated exceptions in holding that juror testimony of the type at issue is admissible. See, *e.g.*, Br. in Opp. at 13-14 (citing *Hard*, 812 F.2d at 486); *id.* at 14 (citing *Boney*, 68 F.3d at 503). Here, by contrast, not only did the Eighth Circuit pass on both the admissibility of the affidavit under Rule 606(b)(1) and the applicability of the exceptions in Rule 606(b)(2) in the decision below, see App., *infra*, 6a-10a, but petitioner is relying on both provisions before this Court. Unlike *Benally*, therefore, this case fully implicates the circuit conflict, and it pre-

sents the Court with the full range of options as to how to resolve that conflict.

Finally, this case provides the Court with a cleaner vehicle in which to resolve the conflict over the correct interpretation of Rule 606(b), because it is free of the additional (and substantial) complication presented on the facts of *Benally*: namely, whether it would violate the Constitution to limit a criminal defendant's ability to present evidence that jurors were racially biased. The petitioner in *Benally* relied on that constitutional argument in support of his contention that the Court should create an implied exception in Rule 606(b) for evidence of racial bias, see Pet. at 17-24, *Benally*, *supra* (No. 11-5090), and lower courts have reached conflicting conclusions based on the constitutional implications of excluding such evidence. Compare *United States* v. *Villar*, 586 F.3d 76, 87 (1st Cir. 2009) (holding that the Constitution requires an exception "in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant's right to due process and an impartial jury"), with *Benally*, 546 F.3d at 1241 (holding that the Constitution does not require "an implicit exception for racially biased statements made during jury deliberations").

This case, by contrast, involves a claim of juror dishonesty during voir dire that does not involve racial bias—and therefore cleanly and squarely presents the interpretive question whether Rule 606(b) permits a party moving for a new trial based on juror dishonesty during voir dire to introduce juror testimony about statements made during deliberations that tend to show the alleged dishonesty. Because there is undeniably a circuit conflict on the admissibility of such juror testimony, the Court should take this opportunity to resolve the conflict and grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

TABLE OF CONTENTS

Appendix A:	Court of appeals opinion, July 24, 2013 .... 1a
Appendix B:	District court order, Mar. 28, 2012 .... 12a
Appendix C:	Affidavit of Stacey Titus, Oct. 25, 2010 .... 40a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 12-1846

Gregory P. Warger, Plaintiff-Appellant

v.

Randy D. Shauers, Defendant-Appellee

Submitted: March 12, 2013
Filed: July 24, 2013

Before: WOLLMAN, BYE, and COLLOTON, Circuit Judges.

OPINION

BYE, Circuit Judge.

Gregory Warger sued Randy Shauers to recover for injuries he sustained during a traffic accident. After a mistrial, the jury returned a verdict for Shauers. Warger subsequently moved for judgment as a matter of law, or, in the alternative, for a new trial. The district court[1] denied his motion. On appeal, Warger contends the district court (1) erred by not granting a second mistrial after

[1] The Honorable Jeffrey L. Viken, United States District Judge for the District of South Dakota.

Shauers's counsel violated an in limine order, (2) should have granted him judgment as a matter of law because there was insufficient evidence to support the jury's verdict, and (3) improperly barred expert witnesses from opining on statutes governing the rules of the road. We affirm.

I

On August 4, 2006, Randy Shauers and Gregory Warger were involved in a traffic accident in Pennington County, South Dakota. Shauers's truck, which was pulling a camper trailer, clipped Warger's motorcycle. Warger suffered serious injuries, including the amputation of his left leg. He filed suit against Shauers, asserting a claim of negligence and seeking to recover for property damage, loss of enjoyment of life, permanent disability, present and future medical expenses, and prejudgment interest.

A jury trial commenced on July 20, 2010, resulting in a mistrial after Shauers's attorney violated the district court's in limine order instructing "that experts may offer opinion testimony as to a driver's conduct but may not offer legal opinions as to whether such conduct violates South Dakota law." Appellant's Add. 35. During a second trial, on cross-examination of an expert witness, Shauers's attorney again violated the order by asking whether "Mr. Warger ha[d] to yield to the right-of-way and not enter . . . until he [was] certain that the highway [was] free of oncoming traffic . . . ." *Id.* at 38. Warger's counsel objected and asked for a recess. The court excused the jury and held a brief hearing, during which Warger moved for a mistrial. The court acknowledged the violation, but denied the motion for mistrial because it found the violation had not been prejudicial. After the recess, the court instructed the jury to disregard the

question. The trial continued without any further violations of the in limine order, and the jury returned a verdict in favor of defendant Shauers.

After the jury was released from further jury duty, one of the jurors contacted Warger's lawyer and expressed his concern as to the jury foreperson having behaved inappropriately during deliberations. Specifically, the juror alleged the foreperson had focused on her own daughter's past experience with a serious traffic accident, rather than the evidence presented at trial. In an affidavit, the juror contended that during deliberations the foreperson stated her daughter's life would have been ruined had her daughter been held liable for damages caused by the accident. The affidavit further alleged the foreperson expressed she was unwilling to return a verdict for Warger because the Shauers were a young couple and their lives would also be ruined should they be found liable. Further, it stated other jurors had been persuaded by her expressions of sympathy and thus decided to return a verdict for Shauers. Warger subsequently filed a motion for judgment as a matter of law, or, in the alternative, for a new trial. The district court refused to consider the juror's affidavit and denied the motion. Warger filed a timely appeal.

II

A. Violation of the In Limine Order

On appeal, Warger argues the district court should have declared a mistrial because the second violation of the in limine order was prejudicial. This Court will not disturb a trial court's denial of a motion for mistrial "absent a clear showing of abuse of discretion." *Pullman v. Land O'Lakes, Inc.*, 262 F.3d 759, 762 (8th Cir. 2001). "A violation of an order granting a motion in limine may on-

ly serve as a basis for a new trial when the order is specific in its prohibition and the violation is clear." *Black v. Shultz,* 530 F.3d 702, 706 (8th Cir. 2008). Such violation must constitute prejudicial error or result in an unfair trial. *Id.* "Prejudicial error is error which in all probability produced some effect on the jury's verdict and is harmful to the substantial rights of the party assigning it." *Id.* (quoting *Pullman,* 262 F.3d at 762).

It is undisputed the district court's in limine order was specific in its prohibition and the violation was clear. The issue raised on appeal is whether the violation was prejudicial. We agree with the district court, it was not. The court gave a curative instruction after the recess and, during final jury instructions, reminded the jury that if an objection is sustained they "must ignore the question and must not try to guess what the answer might have been." Appellant's App. 79. We have previously upheld district courts' refusals to grant mistrials for violations of in limine orders when, *inter alia,* the court gives "a prompt and clear curative instruction." *Russell v. Whirlpool Corp.,* 702 F.3d 450, 460 (8th Cir. 2012).

Warger argues the curative instruction was insufficient because it was not given until the jury had returned from the recess. Although it is true the instruction was not given until after the recess, Warger provides no persuasive explanation as to how Shauers's question affected the jury's verdict. He claims the question was prejudicial because it was an attempt to introduce inadmissible evidence which was key to Shauers's defense. However, the jury heard no inadmissible testimony because the district court sustained the objection and Shauers's counsel did not ask any similar questions during the re-

mainder of the trial. Accordingly, we cannot say the district court abused its discretion in denying a new trial.

B. Sufficiency of the Evidence

Warger next argues the district court erred when it denied his motion for judgment as a matter of law or for a new trial. First, he contends there was insufficient evidence to support the jury's verdict. Second, he argues the verdict was against the weight of the evidence because it was tainted by juror misconduct. "We review de novo the district court's denial of a motion for judgment as a matter of law, using the same standards as the district court." *Howard v. Mo. Bone & Joint Ctr., Inc.,* 615 F.3d 991, 995 (8th Cir. 2010). We will not grant such a motion unless no reasonable jury could have returned a verdict in favor of the non-moving party. Fed. R. Civ. P. 50(a). We will "grant judgment as a matter of law only when all of the evidence points one way and is susceptible of no reasonable inference sustaining the position of the nonmoving party." *Littleton v. McNeely,* 562 F.3d 880, 885 (8th Cir. 2009) (internal quotation marks and citation omitted). The standard for granting a new trial is even higher. *Howard,* 615 F.3d at 995. Such decision to grant a new trial lies within the discretion of the district court, Fed. R. Civ. P. 59, and we review the district court's decision for abuse of discretion. *Howard,* 615 F.3d at 995. "We will not reverse the district court's decision unless there is a clear showing that the outcome is against the great weight of the evidence so as to constitute a miscarriage of justice." *Bair v. Callahan,* 664 F.3d 1225, 1230 (8th Cir. 2012) (internal quotation marks omitted) (citing *Weitz Co. v. MH Washington,* 631 F.3d 510, 520 (8th Cir. 2011)).

First, we address Warger's contention as to the evidence presented at trial being insufficient to sustain the

verdict. Supporting such argument, Warger points to inconsistencies in Shauers's testimony and an expert witness's model recreating the accident. The district court devoted eight pages to addressing Warger's insufficiency argument. We find such detailed reasoning as being correct. The collision occurred in a matter of seconds, it was observed by few witnesses, and both parties presented conflicting expert testimony. Although Warger's verison of the accident may have been plausible, the jury also heard significant evidence in favor of Shauers. Reasonable jurors could have disagreed on which version was correct. Ultimately, in the face of conflicting evidence, the jury sided with Shauers; our court is not permitted to second-guess such collective judgment. The district court properly allowed the jury's verdict to stand.

We turn next to Warger's argument that the verdict was tainted by juror misconduct. Federal Rule of Evidence 606(b)(1) provides the general rule regarding inquiries into the validity of a verdict:

> 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.

Rule 606 also provides three exceptions to the general rule prohibiting the admissibility of such evidence. Warger argues the affidavit falls within the exception which allows a juror to testify about whether "extrane-

ous prejudicial information was improperly brought to the jury's attention." Fed. R. Evid. 606(b)(2)(A). We agree with the district court, it does not.

We have defined "extraneous information" to include "matters considered by the jury but not admitted into evidence." *United States v. Bassler,* 651 F.2d 600, 602 (8th Cir. 1981). Upon first blush, it would seem the foreperson's comments fall into this category. However, we have distinguished juror testimony regarding "objective events or incidents . . . from juror testimony regarding possible subjective prejudices or improper motives of individual jurors, which numerous courts and commentators have held to be within the rule rather than the exception of 606(b)." *United States v. Krall,* 835 F.2d 711, 716 (8th Cir. 1987). Jurors' personal experiences do not constitute extraneous information; it is unavoidable they will bring such innate experiences into the jury room. Rather, extraneous information includes objective events such as "publicity and extra-record evidence reaching the jury room, and communication or contact between jurors and litigants, the court, or other third parties." *Id.* (citing *Gov't of the Virgin Islands v. Gereau,* 523 F.2d 140, 149 (3d Cir. 1975)). As we have previously instructed, "Rule 606(b) establishes very strict requirements for accepting testimony from jurors about their deliberations, and trial courts should be hesitant to accept such testimony without strict compliance with the rule." *Banghart v. Origoverken, A.B.,* 49 F.3d 1302, 1306 n.6 (8th Cir. 1995). In this case, the evidence excluded by the district court concerns an alleged bias held by a jury member. It does not concern extraneous information improperly brought before the jury. Thus, the exception to the rule does not apply, and we cannot say the district court abused its discretion.

In the alternative, Warger argues Rule 606(b) should not exclude the affidavit because it is not being used to challenge the verdict, but rather to show a juror was dishonest during voir dire. The Supreme Court has held, "to obtain a new trial in such a situation, a party must first 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." *McDonough Power Equip., Inc. v. Greenwood,* 464 U.S. 548, 554 (1984). Although juror testimony can be used to show dishonesty during voir dire for the purpose of contempt proceedings against the juror, *Clark v. United States,* 289 U.S. 1, 12–14 (1933), there is a split among the circuits as to whether such testimony may be used to challenge a verdict. *See United States v. Benally,* 546 F.3d 1230, 1235 (10th Cir. 2008).

The Ninth Circuit has held that statements by jurors regarding dishonesty during voir dire may be admitted into evidence for the purpose of challenging a verdict. *See United States v. Henley,* 238 F.3d 1111, 1121 (9th Cir. 2001) (holding "evidence of . . . juror's alleged racial bias is indisputably admissible for the purposes of determining whether the juror's responses were truthful"); *Hard v. Burlington N. R.R.*, 812 F.2d 482, 485 (9th Cir. 1987) ("Statements which tend to show deceit during voir dire are not barred by [Rule 606(b)]."); *see also Maldonado v. Mo. Pac. R.R. Co.,* 798 F.2d 764, 770 (5th Cir. 1986) (stating in *dicta* that "the district court can receive testimony or grant a new trial . . . if the [juror's] voluntary disclosure relates to . . . false information (or withholding) given on voire [sic] dire").

The Third and Tenth Circuits have reasoned differently. Then-Judge Alito, writing for the Third Circuit, held trial courts may exclude such evidence:

> [T]he Federal . . . Rules of Evidence categorically bar juror testimony 'as to any matter or statement occurring during the course of jury's deliberations' even if the testimony is not offered to explore the jury's decision-making process in reaching the verdict . . . We hold . . . that the exclusion of such testimony is not irrational and does not contravene or represent an unreasonable application of clearly established federal law.

Williams v. Price, 343 F.3d 223, 235–37 (3d Cir. 2003) (quoting Fed. R. Evid. 606(b)). More recently, the Tenth Circuit has sided with the Third Circuit's reasoning:

> [I]f the purpose of the post-verdict proceeding were to charge the jury foreman or the other juror with contempt of court, Rule 606(b) would not apply. However, it does not follow that juror testimony that shows a failure to answer honestly during voir dire can be used to overturn the verdict . . . The Third Circuit's approach best comports with Rule 606(b), and we follow it here.

Benally, 546 F.3d at 1235–36 (citations omitted). We also find the Third Circuit's reasoning persuasive. "[A]llowing juror testimony through the backdoor of a voir dire challenge risks swallowing the rule. A broad question during voir dire could then justify the admission of any number of jury statements that would now be recharacterized as challenges to voir dire rather than challenges to the verdict." *Id.* at 1236.

Congress, when drafting Rule 606(b), made no exception for the admittance of such evidence. "[T]he legislative history demonstrates with uncommon clarity that Congress specifically understood, considered, and rejected a version of Rule 606(b) that would have allowed jurors to testify on juror conduct during deliberations . . . ." *Tanner v. United States,* 483 U.S. 107 (1987). We decline to create an exception to the rule here. In order to achieve finality in the litigation process and avoid relentless post-verdict scrutiny and second guessing, occasional inappropriate jury deliberations must be allowed to go unremedied. As the Supreme Court has warned, "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct." *Id.* at 120–21. Because we find Rule 606(b) precludes jurors from testifying in regards to jury deliberations for the purpose of challenging a verdict, we conclude the district court did not abuse its discretion.

C. Validity of the In Limine Order

Finally, Warger argues the district court erred by not allowing his accident reconstruction expert to testify whether either of the drivers' conduct violated South Dakota law. "We review a district court's decision concerning the admission of expert testimony for an abuse of discretion." *Miller v. Baker Implement Co.,* 439 F.3d 407, 412 (8th Cir. 2006) (citing *Peitzmeier v. Hennessy Indus., Inc.,* 97 F.3d 293, 296 (8th Cir. 1996)). The district court excluded such testimony because it would have been based on a traffic officer's report it had found inadmissible. Of course, expert testimony need not always be based on admissible facts or data. Fed. R. Evid.

703. However, expert testimony must be "the product of reliable principles and methods." Fed. R. Evid. 702(c). Because the district court found the officer's report not only inadmissible, but also unreliable, allowing such testimony would have contravened Rule 702(c). Although the court did not allow experts to testify regarding South Dakota law, it provided such information to the jury during final instructions. Thus, the jurors were informed on the rules of the road and were allowed to make their own decisions based on facts and testimony the court found reliable. The court's in limine order did not amount to an abuse of discretion.

III

For the foregoing reasons, the judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

No. 08-5092-JLV

Gregory P. Warger, Plaintiff

v.

Randy D. Shauers, Defendant

Decided March 28, 2012

VIKEN, District Judge.

ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR NEW TRIAL

INTRODUCTION

Pending before the court is plaintiff's motion for judgment as a matter of law or, in the alternative, for a new trial. (Docket 170). Defendant resists the motion in its entirety. (Docket 180). For the reasons set forth below, the court denies plaintiff's motion.

FACTS AND PROCEDURAL HISTORY

The court limits its recitation to those facts necessary to resolve the pending motion. If needed, the court shall

provide additional facts in its discussion of the merits of the motion.

On August 4, 2006, plaintiff Gregory P. Warger and defendant Randy D. Shauers were involved in a motor vehicle collision on U.S. Highway 385 in Pennington County, South Dakota. (Docket 1 at ¶¶ 5–7). At the time of the collision, Mr. Warger was operating a motorcycle and Mr. Shauers was operating a three-quarter ton pickup pulling a 28–foot long camper trailer. *Id.* at ¶¶ 5–6. The collision resulted in serious injury to Mr. Warger, including but not limited to the loss of his lower left leg. *Id.* at ¶ 9. On December 12, 2008, Mr. Warger filed suit against Mr. Shauers, asserting a claim of negligence and seeking to recover for property damage, present and future lost wages, present and future pain and suffering, loss of enjoyment of life, permanent disability, present and future medical expenses, and prejudgment interest. *Id.* at pp. 2–3. Mr. Shauers denied the allegations and asserted various affirmative defenses, most prominent of which was contributory negligence.[1] Both parties asserted their right to a jury trial. (Dockets 1 at p. 4 & 6 at p. 3).

A jury trial commenced on July 20, 2010.[2] On July 22, 2010, the court declared a mistrial as a result of a violation of the court's *in limine* order by counsel for Mr.

[1] Mr. Shauers also asserted a counterclaim for property damage, which he voluntarily dismissed before the first trial. (Docket 98 at p. 1). Mr. Shauers also voluntarily abandoned the affirmative defenses of failure to mitigate and assumption of the risk. *Id.*

[2] During both trials, Mr. Warger appeared in person and by his counsel, Steven C. Beardsley and Travis B. Jones. Mr. Shauers appeared in person and by his counsel, Ronald Ray Kappelman and Gregory G. Strommen.

Shauers. (Docket 104). A second trial commenced on September 20, 2010. On September 29, 2010, the jury returned a verdict in favor of Mr. Shauers. (Docket 159). The same day, the Clerk of Court entered judgment in favor of Mr. Shauers and against Mr. Warger. (Docket 162). On October 25, 2010, Mr. Warger filed a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 or, in the alternative, for a new trial pursuant to Fed. R. Civ. P. 59. (Docket 170; *see also* Dockets 171 & 182). Mr. Shauers resisted the motion. (Docket 180).

DISCUSSION

Mr. Warger raised three grounds in support of his motion: (1) the verdict was against the weight of the evidence; (2) the verdict was the product of the misconduct of Mr. Shauer's counsel; and (3) the verdict was the product of juror misconduct. (Docket 171). The court shall address each argument in turn.

A. Whether the Verdict was Against the Weight of the Evidence

When resolving a motion for judgment as a matter of law under Fed. R. Civ. P. 50, the court must determine whether there is sufficient evidence to support the jury's verdict.[3] *Anderson Marketing, Inc. v. Maple Chase Co.,* 241 F.3d 1063, 1065 (8th Cir. 2001). The court must view the evidence in a light most favorable to the prevailing

[3] The United States Court of Appeals for the Eighth Circuit reviews *de novo* the district court's decision to grant or deny a motion for judgment as a matter of law. *Howard v. Missouri Bone & Joint Center, Inc.,* 615 F.3d 991, 995 (8th Cir. 2010). In reviewing this type of motion, the Eighth Circuit uses the same standards as the district court. *Id.*

party and must give great deference to the jury's verdict. *Id.; Howard,* 615 F.3d at 995. Further, the court "must not engage in a weighing or evaluation of the evidence or consider questions of credibility." *Howard,* 615 F.3d at 995 (citation and internal quotation marks omitted); *see also White v. Pence,* 961 F.2d 776 (8th Cir. 1992) (same) (discussing in detail the difference between motions for judgment notwithstanding the verdict[4] and motions for new trial). The court will not reverse a jury's verdict unless it finds "no reasonable juror could have returned a verdict for the non-moving party." *Anderson Marketing, Inc.,* 241 F.3d at 1065 (citation and internal quotation marks omitted); *see also Structural Polymer Group, Ltd. v. Zoltek Corp.,* 543 F.3d 987, 991 (8th Cir. 2008) ("In reviewing the sufficiency of the evidence to support the jury's verdict, [the court] interpret[s] the record in a light most favorable to the prevailing party, affirming unless no reasonable juror could have reached the same conclusion."). "Judgment as a matter of law is appropriate only when all of the evidence points one way and is susceptible of no reasonable inference sustaining the position of the nonmoving party." *Howard,* 615 F.3d at 995 (citation and internal quotation marks omitted).

The standard for granting a new trial under Fed. R. Civ. P. 59 is even higher. *Id.* The "decision to grant a new trial lies within the sound discretion of the trial court."[5]

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[4] A motion for judgment as a matter of law encompasses a motion for directed verdict and a motion for judgment notwithstanding the verdict. *Keenan v. Computer Associates International, Inc.,* 13 F.3d 1266, 1268, n. 2 (8th Cir. 1994). The court uses the same standards when reviewing such motions, regardless of their nomenclature. *Id.*

[5] The Eighth Circuit reviews the district court's decision to grant or deny a motion for a new trial under an abuse of discretion stand-

Id. The court should grant a new trial only to avoid a miscarriage of justice. *Id.; see also Structural Polymer Group, Ltd.*, 543 F.3d at 991 ("A new trial motion premised on a dispute about the strength of the supporting proof should be granted only if the verdict is against the weight of the evidence and allowing it to stand would result in a miscarriage of justice.") (citation and internal quotation marks omitted). Unlike a motion for judgment as a matter of law, in evaluating a motion for a new trial, the court "can rely on its own reading of the evidence—it can weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict." *White,* 961 F.2d at 780 (citation and internal quotation marks omitted).

Armed with an understanding of the standards governing motions for judgment as a matter of law and motions for a new trial, the court now turns to the merits of Mr. Warger's claim.

The jury returned a verdict in favor of Mr. Shauers. (Docket 159). In order to do so, as instructed by the court in its final jury instructions, the jury had to have found Mr. Shauers was not negligent, or his negligence was not a legal cause of Mr. Warger's injuries, or both parties were negligent, but Mr. Warger's negligence was more than slight in comparison to Mr. Shauers. *See* Docket 160 at pp. 30–31 (pp. 29–30 of the instructions). The court also instructed the jury (1) Mr. Warger had

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ard. *Howard*, 615 F.3d at 995; *Structural Polymer Group*, Ltd., 543 F.3d at 991. "Where the basis of the motion for a new trial is that the jury's verdict is against the weight of the evidence, the district court's denial of the motion is virtually unassailable on appeal." *Howard*, 615 F.3d at 995 (citations and internal quotation marks omitted).

the burden to prove by the greater convincing force of the evidence Mr. Shauers was negligent, his negligence was the legal cause of Mr. Warger's injuries, and the amount of damages, if any, legally caused by Mr. Shauers' negligence and (2) Mr. Shauers had the burden to prove by the greater convincing force of the evidence Mr. Warger was contributorily negligent. (Docket 160 at p. 10; p. 9 of the instructions). In light of these governing principles, the court finds there was sufficient evidence for a reasonable jury to return a verdict in favor of Mr. Shauers and to find by the greater convincing force of the evidence Mr. Shauers was not negligent or, if he was negligent, Mr. Warger was contributorily negligent more than slight. *See Anderson Marketing, Inc.,* 241 F.3d at 1065 (The court will not reverse a jury's verdict unless it finds "no reasonable juror could have returned a verdict for the non-moving party.") (citation and internal quotation marks omitted).

In support of its finding, the court looks to the evidence admitted at trial. The evidence on the issue of liability consisted of exhibits and the testimony of lay witnesses Clint Elmore, Lieutenant David Berkley, Mr. Shauers, and Michelle (Misty) Shauers and expert witnesses Brad Booth and Dr. Jubal Hamernik.[6] (Docket 163). The court shall provide a brief summary of each witness's testimony.

Mr. Elmore testified he was traveling northbound on Highway 385 on his motorcycle when he saw Mr. Warger

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[6] Mr. Warger testified only with respect to damages. Given the impact of the collision and the injuries he sustained, Mr. Warger could not remember any of the events immediately preceding or following the collision.

stop at the stop sign on the north fork of the Y intersection between Sheridan Lake Road and Highway 385, enter Highway 385 and travel south for a short distance, turn his left blinker on, and set up to stop in order to return to Sheridan Lake Road by virtue of a left turn onto the south fork of the Y intersection. Mr. Elmore testified he observed Mr. Warger's vehicle travel southbound on Highway 385 at a fast rate of speed. Mr. Elmore testified he noticed Mr. Shauer's was looking to the right and was concerned Mr. Shauers would not be able to stop in time. Mr. Elmore observed the collision in his rear-view mirror and returned to assist. Mr. Elmore provided a statement to Lieutenant Berkley at the scene of the collision. Mr. Elmore believed Mr. Warger had sufficient time to safely enter Highway 385.

Mr. Kappelman vigorously cross-examined Mr. Elmore. On cross-examination, Mr. Kappelman impeached Mr. Elmore's ability to see the events surrounding the collision and his memory of the events. Mr. Elmore testified the events surrounding the collision occurred during a matter of seconds, at a 90 mile per hour closing speed from his perspective, during busy traffic, and while he was paying attention to his own driving. Mr. Kappleman questioned Mr. Elmore regarding the written statement he provided to Lieutenant Berkley at the scene of the accident. Mr. Elmore admitted he did not include in his written statement most of the details about which he testified. He did not indicate in his written report that Mr. Warger stopped at the north fork of the Y intersection before turning onto Highway 385, that Mr. Warger put his blinker on as soon as he turned onto Highway 385, that Mr. Shauers was traveling too fast, would not be able to stop in time, and was looking to the right. Mr. Elmore provided statements a week after the collision and then three months after the collision and

did not indicate Mr. Shauers was looking to the right. Mr. Elmore first stated Mr. Shauers was looking to the right during Mr. Elmore's deposition approximately three years after the collision.

Lieutenant Berkley of the South Dakota Highway Patrol testified regarding his observations at the scene of the collision and the steps he took to collect evidence. Lieutenant Berkley arrived at the scene approximately twenty minutes after the collision. He observed a motorcycle lying in the ditch along the southbound lane of Highway 385 and observed skid marks from Mr. Shauers' vehicle starting from the southbound lane through the northbound lane toward the area where the motorcycle rested. He also observed the skid marks caused by the path of travel of Mr. Warger's motorcycle. The skid marks began near the center line of the highway. Lieutenant Berkley photographed all the skid marks. He was aware Mr. Shauers' trailer sustained damages to its right corner.

Mrs. Shauers testified in both parties' cases-in-chief. Mrs. Shauers testified regarding the checklist she and Mr. Shauers perform on their truck and camper before taking any trip, including the trip to South Dakota. Mr. Shauers drove approximately 15,000 miles before the collision. Mrs. Shauers testified Mr. Shauers was a very safe driver who pays attention to the roadway and is always aware of other vehicles. When Mrs. Shauers asked Mr. Shauers to look at a feature along the road, Mr. Shauers refused because he needed to pay attention to the roadway. Mrs. Shauers has rules for her children to follow when in the vehicle. She does not allow raised voices, sudden movements, or screams and does not allow the children to move around inside the vehicle. Mrs. Shauers testified Mr. Shauers was driving between 45 to

50 miles per hour before braking to avoid Mr. Warger. Mrs. Shauers testified regarding the other traffic on the roadway, including a truck with a slide-in camper traveling in front of them.

Mrs. Shauers testified she noticed traffic increased as they approached the intersection of Sheridan Lake Road and Highway 385. She turned around to check on her children for a few minutes and felt Mr. Shauers apply the brakes and subtly steer toward the center line of the highway. Mrs. Shauers looked forward and saw a motorcycle go from the right side of their lane to the center of the lane, then stop, and the motorcycle rider turned around and looked at her and raised his arm as if recognizing he made a traffic error. She did not see Mr. Warger at the Y intersection or enter the highway. She testified Mr. Shauers swerved to the center line and straddled the center line when he struck Mr. Warger. Mrs. Shauers did not know from which fork of Sheridan Lake Road Mr. Warger entered Highway 385. Right after the collision, Mr. Shauers told her Mr. Warger pulled out in front of them. In Mrs. Shauers' opinion, Mr. Shauers did not have adequate time and distance to avoid hitting Mr. Warger.

Mr. Jones cross-examined Mrs. Shauers and impeached her with prior inconsistent statements provided during her deposition. Mr. Jones pointed out inconsistencies in her testimony regarding other traffic, Mr. Shauers' speed at the time of impact, and the location of Mr. Warger when she first observed him.

Mr. Shauers testified in both parties' cases-in-chief. Mr. Shauers testified in great detail regarding his driving experience and training and his experience teaching his co-workers safe driving techniques. He testified regarding the safety inspection he made of his vehicle eve-

ry time before traveling on the road. He testified regarding his memory of the events surrounding the collision. He testified traffic was heavy in both lanes, with a high amount of motorcycle travel. He testified he was traveling southbound on Highway 385. When Mr. Shauers crested the hill approaching the Y intersection, he was traveling around 50 miles per hour. The speed limit in that area was 55 miles per hour. Approximately halfway down the hill, the road was at about a 5 percent grade. Given the configuration of the roadway, he could not see the intersection until he was about halfway down the hill. Mr. Shauers testified there was a vehicle with a slide-in camper traveling directly in front of him—slightly more than four to six seconds ahead of Mr. Shauers. Mr. Shauers testified he was not distracted in any way and was paying attention to and focused on his driving and the roadway.

Mr. Shauers did not begin to apply his brakes until he saw Mr. Warger. He was approximately 100 feet away or three to five seconds away from Mr. Warger when he first saw him. Mr. Shauers testified he did not see Mr. Warger until he entered the highway, that is, until Mr. Warger was in the northbound lane of the highway. He did not see Mr. Warger stopped at the intersection, but he assumed Mr. Warger ran the stop sign. Mr. Shauers testified he saw Mr. Warger travel onto Highway 385 perpendicular from the south fork of Sheridan Lake Road oriented toward the southbound lane of Highway 385. Mr. Shauers testified Mr. Warger pulled out in front of him, then turned to the left, almost reaching the right shoulder, and curved back to the right oriented south. Mr. Shauers testified Mr. Warger applied his brakes. As Mr. Warger crossed the center line and entered the southbound lane of the highway, Mr. Shauers testified he braked hard and moved to the left toward the oncoming

lane. Mr. Shauers did not press his horn to warn Mr. Warger of his approach. Mr. Shauers straddled the center line because there was another vehicle coming from the opposite direction. Mr. Shauers collided with Mr. Warger. Mr. Shauers came to a stop, exited the vehicle, asked Mrs. Shauers to move the truck and trailer out of the road, and ran to Mr. Warger to assist.

Mr. Beardsley vigorously questioned Mr. Shauers on direct examination as an adverse witness and on cross-examination. Mr. Bearsley impeached Mr. Warger with his prior inconsistent statements regarding, but not limited to, the location of Mr. Warger when Mr. Shauers first saw him, the path of travel of Mr. Warger, Mr. Shauers' attentiveness to the road, the presence of other vehicles on the roadway, and Mr. Shauers' statements Mr. Warger ran the stop sign and/or failed to yield.

Mr. Booth, an accident reconstructionist, gave extensive testimony in this case, subject to lengthy cross-examination. Mr. Booth testified as to his qualifications, education, and training. He explained how he conducted his analysis and interpreted the evidence, the measurements he took and calculations he reached, and how he created various diagrams. To summarize, in Mr. Booth's opinion, the evidence did not support Mr. Shauers' version of events, but rather was consistent with Mr. Elmore's version of events. Mr. Booth testified Mr. Shauers had sufficient time and distance to break, come to a stop, and stay in his lane without colliding with Mr. Warger.

Dr. Hamernik, an engineer who specializes in forensic engineering and accident reconsutruction, also provided extensive testimony in this case, again subject to lengthy cross-examination. Dr. Hamernik testified as to his qualifications, education, and training. He testified as

to the materials he reviewed to form his opinions and his methodology, which was different from the methodology used by Mr. Booth. Dr. Hamernik testified, regardless from which fork Mr. Warger entered the highway, by the time any driver in Mr. Shauers' position could have seen Mr. Warger and recognized the hazard, he would not have had sufficient time and distance to stop before impact. Dr. Hamernik opined the only course open to Mr. Shauers was to attempt to swerve and Mr. Warger created an emergency situation for Mr. Shauers. Dr. Hamernik opined, even if Mr. Elmore's version of events was correct, Mr. Warger did not have sufficient time and distance to safely enter the highway, travel a short distance south, stop, and then attempt to turn back onto Sheridan Lake Road.

Like many civil trials, the evidence included conflicting lay witness testimony and the battle of the experts. The court is cognizant of the standards governing a motion for judgment as a matter of law. The court must not reweigh the evidence or assess the credibility of the witnesses. *Howard,* 615 F.3d at 995. Significantly, the court must view the evidence in a light most favorable to Mr. Shauers as the prevailing party and must give great deference to the jury's verdict. *Anderson Marketing, Inc,* 241 F.3d at 1065. In light of these standards, the court rejects Mr. Warger's challenge to the sufficiency of the evidence and finds the evidence presented at trial was sufficient to sustain a finding Mr. Shauers was not negligent or, if he was negligent, Mr. Warger was contributorily negligent more than slight. The jury's verdict must stand.

Similarly, the court finds Mr. Warger cannot meet the even higher standard to justify a new trial. In reaching this decision, the court weighed the evidence and as-

sessed the credibility of the witnesses. *See White,* 961 F.2d at 780. The court finds the conflicting testimony was not the result of intentional falsehoods on the part of any witness. The collision occurred in a matter of seconds in an area of high traffic. Witnesses' perceptions of the incident naturally may differ and may change through time. The court finds the jury's verdict accurately reflects the weight of the evidence and the burdens of proof. The court does not find a miscarriage of justice occurred in this case. *See Howard,* 615 F.3d at 995.

B. Whether the Verdict was the Product of Counsel's Conduct

During the July 16, 2010, pretrial conference before the first trial, the court ruled expert witnesses could offer opinion testimony as to a driver's conduct, but could not offer legal opinions as to whether such conduct violated the laws and rules of the road of South Dakota. (Docket 98 at p. 1). During the second trial, in a hearing outside the presence of the jury toward the end of the direct examination of Mr. Booth on September 22, 2010, the court reiterated Mr. Booth could not offer an opinion as to whether any driver violated the rules of the road by failing to yield or failing to pay attention to his driving. Counsel for both parties indicated they understood the court's ruling. However, during cross-examination of Mr. Booth later that same day, Mr. Kappelman asked Mr. Booth the following question: "Mr. Warger has to yield the right-of-way and not enter Highway 385 until he's certain that the highway is free of oncoming traffic, isn't that correct?" (Exhibit A at p. 2, lines 4–6).

Before Mr. Booth answered the question, Mr. Jones objected. The court held a hearing outside the presence of the jury. During the hearing, Mr. Jones argued Mr.

Kappelman's question was in direct violation of the court's *in limine* order and moved for a mistrial on behalf of Mr. Warger. The court found Mr. Kappelman's question to be improper. The court warned Mr. Kappelman it was "not going to mistry this case again if [the court] can help it, but [the court] will mistry [the case] if [counsel] either intentionally or recklessly ask questions and put matters before this jury that I have excluded." *Id.* at p. 6, lines 1–4. In response to the court's directive, plaintiff's counsel did not renew the motion for mistrial, but rather stated he would ask for a directed verdict if another violation occurred. When the jury returned to the courtroom and the trial resumed, the court sustained Mr. Jones' objection and directed the jury to disregard the question.

Mr. Warger argues Mr. Kappelman's question prejudiced his case to such a degree as to require a new trial. (Docket 171 at pp. 8–10). Mr. Warger argues such prejudice "is obvious" from the jury's verdict. *Id.* at p. 9. Mr. Warger also alleges Mr. Kappelman compounded the prejudice by suggesting in his closing argument Mr. Warger had a duty to yield to traffic on Highway 385. *Id.* The court finds Mr. Warger's position unpersuasive.

When addressing a motion for new trial premised on an alleged violation of a district court's *in limine* order, the Eighth Circuit established the following guiding principles:

> In order for a violation of an order granting an in limine motion to serve as a basis for a new trial, the order must be specific in its prohibition and the violation must be clear. Further, a new trial may follow only where the violation has prejudiced the parties or denied them a fair trial. Prejudicial

> error is error which in all probability produced some effect on the jury's verdict and is harmful to the substantial rights of the party assigning it.

Pullman v. Land O'Lakes, Inc., 262 F.3d 759, 762 (8th Cir. 2001) (internal citations omitted).

The court finds its *in limine* order was specific in its prohibition. The court further finds Mr. Kappelman clearly violated the court's directive by asking Mr. Booth to provide a legal opinion as to the rules of the road. However, the court does not find Mr. Kappelman's question prejudiced Mr. Warger in any meaningful way or denied him a fair trial. First, Mr. Booth never answered Mr. Kappelman's question. If he had, the prejudicial impact of an answer given by an expert witness may well be high. Second, the court sustained Mr. Jones' objection and immediately instructed the jury to disregard the question. *See Black v. Shultz,* 530 F.3d 702, 707 (8th Cir. 2008) (finding district court did not abuse its discretion in denying defendants' motion for a new trial due to a violation of an *in limine* order when the district court, in part, instructed the jury the testimony was irrelevant and should be disregarded and the defendants did not suffer prejudice as a result of the violation); *Couch v. ConAgra Foods, Inc.,* 64 Fed. Appx. 595, 596 (8th Cir. 2003) (affirming district court's decision to deny defendant's motion for a new trial in large part because "the court's curative instructions to the jury removed any potential prejudice or error from violation of the oral order in limine"). Importantly, in both its preliminary and final jury instructions, the court instructed the jury that statements, arguments, questions, and comments by counsel were not evidence; the jury must ignore a question to which the court sustained an objection and must

not "try to guess what the answer might have been;" and testimony the court told the jury to disregard must not be considered. (Dockets 149 & 160). The court repeatedly instructed the jury they must decide the case based solely on evidence admitted during trial. *See id.*

Finally, the court reviewed Mr. Kappelman's closing argument. Although he argued Mr. Warger failed to yield to Mr. Shauers, he did not claim Mr. Booth or any expert witness gave such a legal opinion. Mr. Kappelman certainly had the right to argue Mr. Warger was contributorily negligent by failing to yield. The court's *in limine* order did not preclude defense counsel from arguing their theory of defense in closing argument. *Cf. Vanskike v. ACF Industries, Inc.*, 665 F.2d 188, 209–10 (8th Cir. 1981) (finding district court abused its discretion in denying defendant's motion for a mistrial and remanding for a new trial when the evidence did not warrant the submission of punitive damages to the jury, but, in closing argument, plaintiff's counsel made an improper and inflammatory punitive damages argument, referenced a recent high-profile case where a jury awarded punitive damages, and invited the jury to punish defendant and deter others from like conduct, all of which prejudiced defendant by resulting in an excessive award). The court also notes it advised the jury closing arguments were not evidence.

The court finds Mr. Warger is not entitled to a new trial because the violation of the *in limine* order did not prejudice Mr. Warger or deny him a fair trial. The court's repeated instructions to the jury cured any prejudice caused by Mr. Kappelman's single, unanswered question.

C. Whether the Verdict was the Product of Juror Misconduct

Mr. Warger's final argument centers around the conduct of the jury. Mr. Warger alleges juror misconduct occurred in the following two ways: (1) the jury foreperson deliberately lied during voir dire about her impartiality and ability to award damages if Mr. Warger satisfied his burden of proof on the issue of liability; and (2) the jury foreperson tainted jury deliberations by expressing untoward sympathy for Mr. Shauers and by swaying other jurors to do the same in violation of the court's jury instructions. (Docket 171 at pp. 10–13). In support of his allegations, Mr. Warger relies on an affidavit signed by Stacey Titus, a juror in this case, and dated October 25, 2010. (Docket 171–1). After the trial concluded, Mr. Titus contacted counsel for Mr. Warger and expressed his concerns regarding during jury deliberations. (Docket 170 at p. 10). Memorialized in his affidavit, Mr. Titus' concerns are as follows:

> The biggest concern I had during jury deliberations was the attitude and comments by some of the jurors to not consider the facts and evidence of the case. It was evident to me [Mr. Titus] that one juror, who ended up being the foreman, was influenced by her own daughter's experience, and not the facts, evidence, and law that was presented to us.
>
> The juror, who ended up being the foreperson, during deliberations spoke about her daughter's experience, which included a motor vehicle collision in which her daughter was at fault for the collision and a man died. She related that if her daughter

> had been sued, it would have ruined her life. She further indicated that her daughter sat down and visited with the family of the deceased person and gave them flowers at the 5 year anniversary of the collision.
>
> It is obvious that this juror was more concerned about the issues involving her daughter than she was the facts, evidence, and law presented by this Court and counsel. It was apparent that this comment may have been made to and influenced other jurors because other jurors also expressed their concern about ruining the Shauers' life as they were a young couple.
>
> . . . .
>
> I am still concerned regarding the bias expressed by this juror. I am concerned that the juror influenced other jurors by stating that her daughter's life would have been ruined if a lawsuit had been filed against her in her collision.

(Docket 171–1, ¶¶ 4–6, 8).

A court may grant a new trial if a party presents *admissible* evidence of juror bias. *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 554 (1984) (emphasis added). Fed. R. Evid. 606 limits the court's inquiry, however. Rule 606(a) establishes the general rule that a juror is not competent to testify as a witness on matters pertaining to the trial in which the juror sat. *See* Fed. R. Evid. 606(a). Rule 606(b) extends the general rule to inquiries into the validity of a verdict. *See* Fed. R. Evid. 606(b). This rule provides in pertinent part:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.

Fed. R. Evid. 606(b) (2011). The United States Supreme Court explained the rationale of Rule 606(b) as follows:

> There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.

Tanner v. United States, 483 U.S. 107, 120–21 (1987) (internal citations omitted).

There are three exceptions to the rule expressed in Rule 606(b), only two of which are relevant to this discussion. During an inquiry into the validity of a verdict, a juror may testify as to "whether extraneous prejudicial information was improperly brought to the jury's attention" or "whether any outside influence was improperly brought to bear on any juror." Fed. R. Evid. 609(b)(2) (2011). The court must determine whether Mr. Titus' statements are admissible as evidence of juror bias. The court finds the information provided by Mr. Titus does not fall in either exception to Rule 606(b) and, thus, cannot be considered.

The court finds instructive and persuasive the opinion of the district court in *Lopez v. Aramark Uniform & Career Apparel, Inc.*, an employment discrimination and sexual harassment case where the jury found in favor of plaintiffs. 417 F. Supp. 2d 1062 (N.D. Iowa 2006). After trial, defense counsel contacted the jurors. *Id.* at 1065. One of the jurors, Juror French, stated she felt there was undue pressure during jury deliberations because two other female jurors revealed during deliberations they were victims of sexual abuse. *Id.* Juror French stated 99 percent of why the verdict was so high was because of the two jurors' past sexual abuse. *Id.* The court examined whether this information was admissible so as to allow inquiry into "the subjective deliberative processes of a jury." *Id.* at 1072. The court found the information was not extraneous prejudicial information and, thus, did not fall within the exception to Rule 606(b). *Id.* The court reasoned as follows:

> Although the breadth of the exception is imprecise, it is clear that a juror may testify as to extra-record facts introduced into the jury room or the presence of an im-

> proper influence on the deliberations of the jury such as in the case of communications or contacts between jurors and litigants, the court, or other third parties. In contrast, juror testimony regarding the subjective prejudices or improper motives of individual jurors has been held to be encompassed by the rule, as opposed to, as the defendant contends, within the exception.
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> . . . .
>
> It is a fact that jurors will bring with them to deliberations their life experiences. Indeed, how jurors perceive the evidence and judge the credibility thereof will be indubitably shaded by such experiences. When such information becomes part of the deliberative process, it becomes sacrosanct under Rule 606(b). The situation complained of by the defendant in this case is not a situation in which a juror conducted outside research or was contacted by a third party and then relayed the information to fellow jurors. This was simply a matter of two jurors drawing upon their prior life experiences and utilizing those experiences in the course of deliberations. Further inquiry, under Rule 606(b), is therefore, inappropriate.

Id. at 1072–73 (internal citations and quotation marks omitted).

The *Lopez* court cited with approval the decision of the United States Court of Appeals for the Fifth Circuit in *United States v. Duzac.* In *Duzac,* defendants learned

one or more jurors had certain prejudices because of prior personal experiences and moved for a new trial. 622 F.2d 911, 913 (5th Cir. 1980). The Fifth Circuit found Rule 606(b) prohibited inquiry into the verdict and no exception applied, reasoning as follows:

> Here, there is no evidence that any external influence was brought to bear on members of the jury. The prejudice complained of is alleged to be the product of personal experiences unrelated to this litigation. The proper time to discover such prejudices is when the jury is being selected and peremptory challenges are available to the attorneys. Although the jury is obligated to decide the case solely on the evidence, its verdict may not be disturbed if it is later learned that personal prejudices were not put aside during deliberations. We therefore hold that the trial court acted properly in denying appellant's motion for a new trial.

Id.

The district court in *Marcavage v. Bd. of Trustees of Temple Univ.* reached a similar conclusion. Following a verdict in favor of defendant, a juror contacted plaintiff's counsel and informed him of possible misconduct during jury deliberations. 400 F. Supp. 2d 801, 804 (E.D. Pa. 2005). The juror indicated several jurors expressed bias toward Christians. *Id.* The court found this information was not admissible because it did not fall within any exception to Rule 606(b). *Id.* at 805–06. The court found the information was not extraneous. "Extraneous influence has been found to include publicity received and discussed inside the jury room, consideration by the jury of

evidence not admitted in court, and communications or other contact between jurors and third persons, including contacts with the trial judge outside the presence of the [parties] and counsel." *Id.* at 805 (citing *Gov't of Virgin Islands v. Gereau,* 523 F.2d 140, 149 (3d Cir. 1975)). The court found the religious bias expressed by some jurors consisted of personal experiences with individuals of various religious faiths. "[L]ife experiences do not constitute extraneous prejudicial information and may be brought into the jury room." *Id.* (citing *Wilson v. Vermont Castings, Inc.,* 170 F.3d 391, 395 n. 4 (3d Cir. 1999)).

The court also found plaintiff failed to present any evidence an outside influence was improperly brought to bear on the jury. *Id.* at 806. "[T]he scope of 'outside influences' is limited and applies only to those influences outside the evidence presented at trial, such as prejudicial publicity, pressure placed on jurors from outside sources, [and] use of extrajudicial information." *Id.* (citing *Tanner,* 483 U.S. 107). "Additionally, evidence of discussions among the jury, intimidation or harassment of a juror by another, along with other intrajury influences fall within the prohibition of the rule not the exception and cannot be considered to impeach a verdict." *Id.* (citing *Gereau,* 523 F.3d at 149).

The court finds the opinions of the *Lopez, Duzac,* and *Marcavage* courts to be persuasive and representative of the majority view. The type of biases the foreperson allegedly expressed in this case, while unfortunate, do not fall within any exception to Rule 606(b). *See United States v. Benally,* 546 F.3d 1230, 1236–38 (10th Cir. 2008), *cert. denied,* 130 S. Ct. 738 (2009) (describing the type of information that falls within the enumerated exceptions to Rule 606(b) and collecting cases). Mr. Warger

cannot impeach the jury's verdict on the basis of this information.

Mr. Warger also seeks to use the affidavit of Mr. Titus to demonstrate the foreperson lied during voir dire. Concealed juror bias may justify a new trial in limited circumstances. See *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 556 (1984); *United States v. Tucker,* 137 F.3d 1016, 1026 (8th Cir. 1998). The issue is whether Mr. Warger may use information obtained during jury deliberations to challenge a juror's responses in voir dire.

The United States Court of Appeals for the Tenth Circuit recently addressed this precise issue in *Benally,* a criminal case involving a Native American defendant convicted of assaulting an officer with a dangerous weapon. 546 F.3d at 1231. After the jury announced its verdict, a juror approached defense counsel claiming the foreperson made racist claims against Native Americans and another juror agreed. *Id.* at 1231. The foreperson allegedly told the other jurors he used to live on or near an Indian reservation and "'[w]hen Indians get alcohol, they all get drunk,' and that when they get drunk, they get violent." *Id.* Other jurors allegedly discussed the need to "'send a message back to the reservation.'" *Id.* at 1232. One of the jurors allegedly stated two of his family members were in law enforcement and he "'heard stories from them about what happens when people mess with police officers and get away with it.'" *Id.* A defense investigator received corroborating information from another juror. *Id.* Armed with all of this information, defendant moved for a new trial on the basis certain jurors lied during voir dire and, during deliberations, improperly considered information not in evidence. *Id.* The district court admitted the juror testimony under the exceptions

to Rule 606(b) and found two jurors lied on voir dire and the jury improperly considered extrinsic evidence of stories by one of the juror's law enforcement family members. *Id.* The district court granted a new trial, and the government appealed. *Id.*

The Tenth Circuit found the district court erred in admitting the juror testimony about racial bias and about sending a message. *Id.* at 1241. The Tenth Circuit reversed the decision of the district court to grant a new trial and reinstated the jury verdict. *Id.* at 1241–42. In reaching its decision, the Tenth Circuit found the information fell within the ambit of Rule 606(b) because the jurors made the statements during the course of jury deliberations, regardless of the purpose for which defendant sought to use the information. *Id.* at 1235. Defendant argued he did not offer the testimony to inquire into the validity of the verdict, but rather to show certain jurors lied during voir dire. *Id.* The Tenth Circuit rejected this argument:

> Although the immediate purpose of introducing the testimony may have been to show that the two jurors failed to answer honestly during voir dire, the sole point of this showing was to support a motion to vacate the verdict, and for a new trial. That is a challenge to the validity of the verdict.
>
> It is true that juror testimony can be used to show dishonesty during voir dire, for purposes of contempt proceedings against the dishonest juror. Thus, if the purpose of the post-verdict proceeding were to charge the jury foreman or the other juror with contempt of court, Rule 606(b) would not apply. However, it does not follow that ju-

> ror testimony that shows a failure to answer honestly during voir dire can be used to overturn the verdict.
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> . . . .
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> [Defendant] seeks to use Juror K.C.'s testimony to question the validity of the verdict. The fact that he does so by challenging the voir dire does not change that fact. We agree with the government that allowing juror testimony through the backdoor of a voir dire challenge risks swallowing the rule. A broad question during voir dire could then justify the admission of any number of jury statements that would now be re-characterized as challenges to voir dire rather than challenges to the verdict. Given the importance that Rule 606(b) places on protecting jury deliberations from judicial review, we cannot read it to justify as large a loophole as [defendant] requests.

Id. at 1235–36 (internal citations omitted); *see also Marcavage,* 400 F. Supp. 2d at 807 ("Although Plaintiff asks this Court to consider statements made during jury deliberations only as to whether a juror lied during *voir dire,* Plaintiff offers no Rule of evidence, nor court decision in support of his request that this Court make an exception as to the categorical prohibition against testimony on matters and statements occurring during jury deliberations. No case in any circuit has required a court to consider inadmissible evidence when inquiring as to whether a juror lied under *voir dire* . . . ."); *but see Hard v. Burlington Northern R.R.,* 812 F.2d 482, 485 (9th Cir. 1987) ("Statements which tend to show deceit during voir

dire are not barred by [Rule 606(b)," even if such statements were made during jury deliberations.]; *see also Williams v. Price,* 343 F.3d 223, 235 & 236 n. 6 (3d Cir. 2003) (Alito, J.) (finding *Hard* was inconsistent with Rule 606(b) and finding Rule 606(b)) "categorically bar[s] juror testimony 'as to any matter or statement occurring during the course of the jury's deliberations' even if the testimony is not offered to explore the jury's decision-making process in reaching a verdict," but rather is offered to support a claim of juror misconduct during voir dire). The Tenth Circuit in *Benally* went on to hold the juror statements did not fall within one of the enumerated exceptions to Rule 606(b), that is, the statements were not about extraneous prejudicial information or an outside influence, although they were "entirely improper and inappropriate." 546 F.3d at 1236–38.

The court finds the reasoning of the *Benally* and *Williams* courts persuasive. To allow statements made during jury deliberations to be used to challenge a juror's conduct during voir dire would undermine the purpose of Rule 606(b) and runs counter to its directive. Regardless of how Mr. Warger hopes to use the juror statements at issue, Rule 606(b) bars their admission unless the statements fall within one of the enumerated exceptions to Rule 606(b), which the court finds they do not. Accordingly, the court denies Mr. Warger's request for a new trial on the basis of alleged juror misconduct.

CONCLUSION

As discussed in this opinion, the court finds no legal cause to set aside the verdict and enter judgment as a matter of law for plaintiff or grant a new trial. Accordingly, it is hereby

ORDERED that Mr. Warger's motion for judgment as a matter of law or for a new trial (Docket 170) is denied.

APPENDIX C

STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

AFFIDAVIT OF STACEY TITUS

Stacey Titus, being first duly sworn, deposes and states as follows:

1. My name is Stacey Titus. I am a Civil Engineer, employed by the City of Rapid City.

2. I served as a juror on the Greg Warger v. Randy Shauers trial.

3. Following the jury trial, which lasted approximately eight days, I was concerned about what had transpired in deliberations and stopped at the offices of Beardsley, Jensen & Von Wald, to visit with Steve Beardsley or Travis Jones.

4. The biggest concern I had during jury deliberations was the attitude and comments by some of the jurors to not consider the facts and evidence of the case. It was evident to me that one juror, who ended up being the foreman, was influenced by her own daughter's experience, and not the facts, evidence, and law that was presented to us.

5. The juror, who ended up being the foreperson, during deliberations spoke about her daughter's experience, which included a motor vehicle collision in which her daughter was at fault for the collision and a man died. She related that if her daughter had been sued, it would have ruined her life. She further indicated that her

daughter sat down and visited with the family of the deceased person and gave them flowers at the 5 year anniversary of the collision.

6. It is obvious that this juror was more concerned about the issues involving her daughter than she was the facts, evidence, and law presented by this Court and counsel. It was apparent that this comment may have been made to and influenced other jurors because the other jurors also expressed their concern about ruining the Shauers' life as they were a young couple.

7. Following the verdict I was concerned about the dilemma of the juror ignoring the dictates of the Court and the law. I sought advice from one of the City Attorneys regarding this matter and regarding whether I had an obligation to report to the Court the impropriety I observed.

8. I am still concerned regarding the bias expressed by this juror. I am concerned that the juror influenced other jurors by stating that her daughter's life would have been ruined if a lawsuit had been filed against her in her collision.

Further your affiant sayeth not.

Dated this 25 day of October, 2010.

/s/ Stacey P. Titus
Stacey Titus

Subscribed and sworn to before me this 25th day of October, 2010.

(SEAL) /s/ Travis B. Jones
Notary Public
My Commission expires: March 24, 2011