THIRTIETH ANNUAL

DEAN JEROME PRINCE MEMORIAL EVIDENCE COMPETITION

No. 14-1746

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN HABIB,
Petitioner,

--against--

UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE

COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

RECORD ON APPEAL

UNITED STATES DISTRICT COURT
DISTRICT OF JORALEMON

— X

NO. 825-13

UNITED STATES OF AMERICA

I N D I C T M E N T

— against —

18 U.S.C. § 1111
JOHN HABIB, **15 U.S.C. § 2064-A**

Defendant.

— X

THE GRAND JURY CHARGES:

COMMON ALLEGATIONS

1. The Defendant JOHN HABIB was the president of Zodiac Electronics, Incorporated ("Zodiac") from 1995 to 2013. Zodiac is a personal electronics manufacturer headquartered in the city of Boerum, in the district of Joralemon.

2. In June of 2008, Zodiac began developing a smart watch device, which it called the "Genius Watch." In April of 2010, Defendant JOHN HABIB directed Zodiac to power the Genius Watch using a thin lithium battery. Lithium batteries have a risk of exploding that increases as they are made thinner. Defendant JOHN HABIB knew of this danger.

3. In June of 2012 and September of 2012, in reports signed by the Defendant JOHN HABIB, Zodiac represented to the Consumer Electronic Products Safety Commission that the Genius Watch was safe as required by 18 U.S.C. § 2064-A.

4. On October 1, 2012, Defendant JOHN HABIB authorized the sale of the Genius Watch to the general public.

5. In October 2012, Genius Watches began to explode, causing injuries. Olivia Mope and Jonathan Snow died from injuries suffered when their Genius Watches exploded.

6. On January 15, 2013, the Consumer Electronic Products Safety Commission directed Zodiac to recall all Genius Watches.

7. On February 1, 2013, William Roberts ("Roberts"), a member of Zodiac's creative team and an engineer with the company, entered into a transactional immunity proffer agreement with the United States Attorney's Office in the District of Joralemon.

8. On that date, Roberts informed the Government that as early as November of 2011, Defendant JOHN HABIB knew of the design defect in the Genius Watch that resulted in explosions.

9. On that date, Roberts also told the Government that most, if not all, of the information given by Defendant JOHN HABIB to the Consumer Electronic Products Safety Commission was false.

COUNTS ONE AND TWO
(Murder in the Second Degree)
(In violation of 18 U.S.C. § 1111)

10. The allegations contained in paragraphs one through nine of this indictment are realleged and incorporated as if fully set forth in this paragraph.

11. COUNT ONE: On October 4, 2012, Olivia Mope was wearing a Genius Watch at Fire Island National Seashore, a United States National Seashore in the state of Joralemon.

12. At around 1:30 PM, the Genius Watch exploded, causing life-threatening injuries.

13. Olivia Mope was pronounced dead three days after the explosion as a direct result of the explosion.

14. On the above dates, within the District of Joralemon, the Defendant JOHN HABIB murdered Olivia Mope, that is, under circumstances evincing a grave indifference to human life, he recklessly engaged in conduct, which created a grave risk of death to Olivia Mope, and thereby caused her death, in violation of Title 18, Section 1111 of the United States Code.

15. COUNT TWO: On October 7, 2012, Jonathan Snow was wearing a Genius Watch at Joralemon Army Base in the state of Joralemon.

16. At around 3:00 PM, the Genius Watch exploded, causing life-threatening injuries.

17. Jonathan Snow was pronounced dead seven hours later as a direct result of the explosion.

18. On the above date, within the District of Joralemon, the Defendant JOHN HABIB murdered Jonathan Snow, that is, under circumstances evincing a grave indifference to human life, he recklessly engaged in conduct which created a grave risk of death to Jonathan Snow, and thereby caused his death, in violation of Title 18, Section 1111 of the United States Code.

COUNTS THREE THROUGH FIVE
(Consumer Electronics Safety Act)
(In violation of 15 U.S.C. § 2064-A

19. The allegations contained in paragraphs one through nine of this indictment are realleged and incorporated as if fully set forth in this paragraph.

20. COUNT THREE: On or about October 1, 2011, the Defendant JOHN HABIB reasonably knew that the Genius Watch contained a defect capable of creating substantial bodily harm and did not report such information to the Consumer Electronic Products Safety Commission in violation of 15 U.S.C. § 2064-A.

21. COUNT FOUR: On or about June 1, 2012, the Defendant JOHN HABIB did not notify the resellers of the Genius Watch of any performance and technical data related to safety, in violation of 15 U.S.C. § 2064-A, as required by the Consumer Electronic Products Safety Commission policy in an order published on February 6, 2010.

22. COUNT FIVE: On or about June 1, 2012, and September 1, 2012, within the District of Joralemon, the Defendant JOHN HABIB knowingly and willfully falsified records sent to the Consumer Electronic Products Safety Commission alleging the safety of the Genius Watch, in violation of 15 U.S.C. § 2064-A.

A TRUE BILL

Alice Stryker

Alice Stryker
Foreperson

Matthew T. Niehaus
United States Attorney
District Of Joralemon

BY: Elizabeth Johnson

Elizabeth Johnson
Assistant United States Attorney

DATE: MARCH 11, 2013

Public Law 110–385[1]
110th Congress

An Act

To establish a commission dedicated to consumer product safety standards and other safety requirements for cellular phones, handheld devices, electronic watches, and other wearable devices or those carried close to the body.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

(a) SHORT TITLE.—This Act may be cited as the "Consumer Electronics Safety Act of 2009."

SECTION 2. AUTHORITY TO ISSUE IMPLEMENTING REGULATIONS.

The Consumer Electronic Products Safety Commission ("the Commission") may issue regulations, as necessary, to implement this Act and the amendments made by this Act.

SECTION 3. EFFECTIVE DATE OF ACT.

The Act's effective date is December 1, 2009.

TITLE I—WEARABLE TECHNOLOGY [CODIFIED AT 15 U.S.C. § 2064-A]

SEC. 101. ELECTRONICS

(a) The Consumer Electronic Products Safety Commission is directed to enforce all sections and amendments against manufacturers of cellular phones, handheld devices, electronic watches, and all other wearable devices, with the Commission to determine any other electronic devices to be included.

(b) Every manufacturer of a consumer product who obtains information that reasonably supports the conclusion that such product contains a defect which could create a substantial product hazard and which because of the pattern of defect, the number of defective products

[1] This statute was created for the Prince Competition.

distributed in commerce, the severity of the risk, or otherwise creates a substantial risk of injury to the public must inform the Commission of such defect.

(c) Any manufacturer of consumer products must provide to the Commission such performance and technical data related to performance and safety as may be required to carry out the purposes of this chapter, and to give such notification of such performance and technical data at the time of original purchase to prospective purchasers and to the first purchaser of such product for purposes other than resale, as the Commission determines necessary to carry out the purposes of this chapter.

(d) Violation of Sec. 101(b)-(c) of this Act is punishable by:

(1) imprisonment for not more than 5 years for a knowing and willful violation;
(2) a fine determined under § 3571 of Title 18; or
(3) both.

(e) Any individual director, officer, or agent of a corporation who knowingly and willfully authorizes, orders, or performs any of the acts or practices constituting in whole or in part any violation of Sec. 101(b)-(c) shall be subject to penalties under subsection (d)(1) of this section.

(f) Any individual director, officer, or agent of a corporation who knowingly and willfully falsifies a report required by Sec. 101(b)-(c), or fails to issue a report required by Sec. 101(b)-(c), shall be subject to penalties under subsection (d)(1) of this section.

UNITED STATES DISTRICT COURT
DISTRICT OF JORALEMON

— X

NO. 825-13

UNITED STATES OF AMERICA

— against —

JOHN HABIB,

Defendant.

— X

AUGUST 15, 2013

TRANSCRIPT OF ORAL ARGUMENTS ON MOTIONS IN LIMINE

Before: Honorable Daniel Joseph III, Chief Judge, United States District Court

APPEARANCES:

For the United States of America	Elizabeth Johnson Assistant United States Attorney 250 Church Street Boerum, Joralemon 11201
For Defendant	Stewart P. Schultz Schultz and Sponza, LLP 500 Montague Street Boerum, Joralemon, 11201
Court Reporter	Richard Pratts 250 Church Street Boerum, Joralemon 11201

CLERK: United States against John Habib. Please state your appearances for the record.

MS. JOHNSON: Elizabeth Johnson for the United States. Good morning, your honor.

MR. SCHULTZ: Stewart Schultz of Schultz and Sponza, for Mr. Habib. Good morning, your honor.

THE COURT: Good morning, counselors. I see Mr. Habib is also present. Ms. Johnson, could you please briefly summarize where we are in this case?

MS. JOHNSON: Yes, your honor. This case stems from the exploding Genius Watch tragedy, of which the Government alleges Mr. Habib was the architect. Mr. Habib, the former president of Zodiac Electronics, Incorporated, is indicted on two counts of second degree murder pursuant to Title 18 U.S.C. Section 1111, for the tragic deaths of Ms. Olivia Mope and Mr. Jonathan Snow, both of whom died from injuries sustained when their respective Genius Watches exploded. Mr. Habib is also facing three counts of violating Title 15 U.S.C. 2064-A, the Consumer Electronics Safety Act. Trial is set for September third.

THE COURT: Thank you, Ms. Johnson. We are here this morning to discuss two motions in limine. Is that correct?

MR. SCHULTZ: Yes, your honor. Mr. Habib moves to admit Dr. Jacob White as an expert witness to testify about his diagnosis of the Government's key witness, Mr. William Roberts, with

Reed's disorder[2] as well as a description of that disorder and how it affects Mr. Roberts's credibility. Additionally, Mr. Habib moves to quash the subpoena --

THE COURT: Hold on, Mr. Schultz. Let's take things one at a time. I have read both parties' submissions regarding Dr. White's testimony, as well as Dr. White's affidavit, which I ask the court reporter to make part of the transcript of this hearing. Please continue, Mr. Schultz.

MR. SCHULTZ: Your honor, as you are aware, this Court was concerned about the mental competence of the Government's key witness, Mr. William Roberts, and ordered Mr. Roberts to submit to a psychological evaluation by Dr. White. Dr. White completed the evaluation and rendered a written report opining that Mr. Roberts is competent to testify, and this Court found the same. Mr. Roberts's competence is no longer an issue in this case. However, in addition to this finding, Dr. White also determined that Mr. Roberts suffers from Reed's disorder and, in his professional opinion, it is doubtful that Mr. Roberts would be able to testify truthfully on a consistent basis, even under oath. Dr. White's expert opinion regarding Roberts's credibility is crucial to Mr. Habib's defense, because the Government will rely heavily on Mr. Roberts's testimony at trial to show that Mr. Habib knew there was a defect in the Watch

[2] This disorder has been created for the Prince Competition and is a legitimate diagnosis for Competition purposes.

design — a claim Mr. Habib vehemently denies. This Court should admit the evidence in question.

First, as an initial matter, no rule of evidence commands the exclusion of Dr. White's testimony simply because he will give an opinion as to Mr. Roberts's capacity for truth-telling. For instance, Federal Rule of Evidence 608 permits opinion testimony about a witness's character for truthfulness. Nothing in the text of Rule 608 suggests that only lay witnesses are permitted to give opinion testimony on a witness's character for truthfulness. So the rules certainly permit Dr. White's testimony. Second, your honor, Rule 702(a) makes clear that expert testimony is appropriate when "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence" — as it will here. In this case, the Government will introduce Mr. Roberts's testimony into evidence as a key part of its case. The jury will have to assess the credibility of Mr. Roberts. Dr. White's expertise will help the jury understand and evaluate this critical testimony.

THE COURT: Will it actually help the jury, or would Dr. White simply be determining the credibility of Mr. Roberts's testimony for them?

MR. SCHULTZ: The former, your honor. Dr. White will testify consistent with his affidavit, in particular, that in Dr.

White's expert opinion, based on a careful psychiatric evaluation, Mr. Roberts suffers from Reed's disorder and would be unlikely to testify consistently truthfully in court.

THE COURT: So this is not a case, then, where you would simply like Dr. White to provide his diagnosis of Mr. Roberts, as well as some of the symptoms generally associated with that condition.

MR. SCHULTZ: That's correct, your honor.

THE COURT: And this is because under existing law, Dr. White can testify about his diagnosis of Mr. Roberts, the procedures he used to evaluate him, and symptoms displayed by an ordinary person afflicted with the disease. Do I have that correct, counselors?

MR. SCHULTZ: That's correct, your honor.

MS. JOHNSON: The Government concedes that point, your honor.

THE COURT: Good. So, Mr. Schultz, the issue is that you would like Dr. White to draw additional conclusions for the jury?

MR. SCHULTZ: Your honor, Mr. Roberts's credibility is at the heart of the Government's case. We are asking the Court to permit Dr. White, a highly trained and well-credentialed psychiatrist, to testify that, in his expert opinion, Mr. Roberts is not a credible witness, and that the way Mr. Roberts's disorder manifests itself is particular to him — he is very likely to be untruthful in high-pressure situations and

when confronted by authority figures. Both of these triggering situations will be present in the criminal trial when Mr. Roberts testifies. This expert testimony is crucial, your honor, because the Government has relied on Mr. Roberts's cooperation from the start, and Mr. Roberts may provide the most important Government evidence in this case. Mr. Habib will testify that he never read the false reports he allegedly signed and instead relied on Mr. Roberts's representations of their accuracy. These are the very reports upon which the Government's case hinges under Title 15 Section 2064-A of the U.S. Code. Mr. Habib will testify that he thought the battery defect had been successfully resolved. The Government will rely on Mr. Roberts's testimony to show that Mr. Habib knew it had not been cured when Mr. Habib signed these reports. The Government has relied on Mr. Roberts from the beginning to demonstrate Mr. Habib's knowledge and complicity. Dr. White would shed light on the veracity of Mr. Roberts's statements to the Government and testimony in court.

THE COURT: Thank you Mr. Schultz, I have your argument. Ms. Johnson?

MS. JOHNSON: Your honor, first, I imagine that Mr. Schultz will cross-examine Mr. Roberts about his cooperation with the Government in this case and whether Mr. Roberts will receive, or is expecting to receive, favorable treatment as a result of his

cooperation. This is sufficient to alert the jury that they will have to be careful in their credibility assessment of Mr. Roberts. Allowing Dr. White to testify about Mr. Roberts's credibility as a witness impermissibly encroaches on the jury's domain. Although, admittedly, this Circuit has never ruled directly on this issue, the vast majority of courts confronted with it have ruled that expert witnesses may not provide testimony bearing on the credibility of other witnesses. The Government's brief contains a list of cases, so I will not recite any here. But, in short, the view that experts should not be permitted to testify about a witness's truth-telling tendency is both the traditional rule and the rule followed in most courts. Dr. White's proposed testimony falls squarely in this category. It will not be helpful to the jury as required by Rule 702. The jury is fully capable of assessing Mr. Roberts's credibility. Moreover, the jury will have information about Mr. Roberts's mental history, Dr. White's evaluation of Mr. Roberts, and Dr. White's testimony about the behavior of people with Reed's disorder. This gives jurors more than enough psychological data to assess the credibility of Mr. Roberts.

THE COURT: Thank you, Ms. Johnson. Anything further on this motion?

MR. SCHULTZ: No, your honor.

MS. JOHNSON: No, your honor.

THE COURT: Thank you, counselors. I have heard your arguments and have your memoranda. Let's turn to the second motion. Mr. Schultz, I have reviewed both parties' submissions and I understand that Mr. Habib has moved to quash the Government's subpoena seeking documents in his possession relating to the development of the Genius Watch.

MR. SCHULTZ: Yes, your honor. Mr. Habib is entitled to assert his Fifth Amendment privilege against compelled self-incrimination. The act of responding to a subpoena of this nature would be a testimonial act, which would likely be incriminating given the context --

THE COURT: Let's back up a bit. As I understand it, the situation here is highly unusual. Perhaps, Ms. Johnson, you could explain why, and why at this late date, the Government is seeking to obtain corporate records from a criminal Defendant by way of subpoena.

MS. JOHNSON: The Government has been informed that Mr. Habib is in possession of the only copies in existence of various documents relating to the Genius Watch. Zodiac had stored all of the originals of the documents on a hard drive in its labs. Because of concerns for security, that hard drive was not backed up or connected to the Internet. In other words, it was like a digital safe. Unfortunately, the hard drive was destroyed in a lab fire. However, we were informed just last month by Mr.

Roberts that Mr. Habib had taken home a copy of nearly every important document that concerns the Genius Watch. Based on this information, we obtained a search warrant for Mr. Habib's home. The agents executing the warrant were unable to find the documents, however, and we are now seeking them through a subpoena.

THE COURT: Right, well. Let's proceed with Mr. Habib's motion. Mr. Schultz, you may proceed.

MR. SCHULTZ: Thank you, your honor. My client is entitled to assert his Fifth Amendment right against compelled self-incrimination in this context because the act of turning over these documents is incriminating and it is being compelled by the Government --

THE COURT: Yes, yes. I understand the Supreme Court in *Braswell* to have mandated that the court make a threshold inquiry to determine whether an act of production pursuant to the Government's subpoena is testimonial.

MR. SCHULTZ: Yes, exactly your honor. And, because the production of these documents would at a minimum confirm their existence, their authenticity, and that they are in my client's possession, the act of production is undeniably testimonial.

THE COURT: That is not what I mean counselor. An act of production cannot be testimonial if it is the corporation producing the documents. That is, if the person subpoenaed is a

custodian of corporate records or holds corporate records in a representative capacity, then the act of production cannot be testimonial because there is no Fifth Amendment protection for artificial entities such as corporations and those who hold documents in the name of the corporation.

MR. SCHULTZ: Your honor, if that person is not acting in a representative capacity to the corporation, then their possession of the documents alone does not render them so. In this case, the person is an individual and entitled to assert his Fifth Amendment privilege.

THE COURT: Exactly, so the only question here is whether Defendant, as a former employee of a corporation who has corporate documents in his possession, falls under what has been called by the Supreme Court the collective entity doctrine. That is, I must determine whether he holds the documents in a representative capacity based on his status as a former employee. If he does, he is not entitled to assert a Fifth Amendment right against self-incrimination. Or, stated another way, the act of production is not testimonial for corporate documents so that analysis would not even apply. From what I can tell from the parties' submissions and my own research, the Fourteenth Circuit has yet to address this issue.

MR. SCHULTZ: Yes, your honor. And, as we argue in our brief, the Second and Ninth Circuits have —-

THE COURT: Yes, have held under what appears to be an agency theory that the collective entity doctrine cannot extend to former employees of a corporation. But that doesn't seem to me a very compelling position.

MR. SCHULTZ: Well, your honor, the Supreme Court based its *Braswell* decision on a theory of agency. That is, the Court held that a custodian of records or other employee of a corporation who is in possession of corporate documents is part of the corporation. Accordingly, that individual may not resist a subpoena duces tecum on the grounds that the documents would be incriminating. That employee or custodian acts on behalf of the corporation. And, of course, because corporations cannot assert a Fifth Amendment right against self-incrimination, that employee cannot do so either. Indeed, the Court held that it must be that the "corporation produce the documents subpoenaed." And, as such, it must be that the individual producing the documents has a relationship to the corporation other than through the documents themselves. But Mr. Habib has not worked for Zodiac since January 2013. Additionally, there is nothing outside of his previous employment relationship with Zodiac that the Government can point to that ties him to Zodiac. For example, he does not have a severance agreement that would obligate him to cooperate with investigations. Zodiac did not think it necessary to secure a non-competition agreement or any

other post-employment covenants in which to protect its interests. He does not receive any payment in any form. He does not have any formal relationship whatsoever with Zodiac. In fact, he does not even work in the technology industry any longer. He is currently devoting his time and resources to improving educational opportunities in developing countries. In short, he is a private person. He is not a representative of Zodiac.

THE COURT: Except, as I understand, he has a trove of indisputably corporate documents.

MR. SCHULTZ: So the Government contends. The documents are indeed corporate. We do not argue that they are personal. However, the act of producing them is personal and would personally incriminate Mr. Habib. Mr. Habib does not act on behalf of the corporation in any facet of his life at the moment, and therefore the act of producing documents pursuant to the Government's subpoena cannot rationally be viewed as an act of Zodiac. Additionally, from a public policy --

THE COURT: Yes, I was just going to ask you how your theory squares with the purpose of the collective entity doctrine. That is, how is it that former employees are not representatives of the corporation when they are in the possession, rightly or wrongly, of corporate property? In other words, should the

Government be able to access these documents for law enforcement purposes?

MR. SCHULTZ: Your honor, the fact that the documents requested by the Government are allegedly only available through Mr. Habib is no reason to extend the doctrine to all former employees.

THE COURT: Thank you. Ms. Johnson?

MS. JOHNSON: Thank you. Your honor, a dangerous loophole would be created for corporations if former employees could resist producing corporate documents merely by virtue of a termination of the formal relationship with their employer. We would also like to highlight that in 1974, in *Bellis*, the Supreme Court refused to hold that termination of an employment relationship terminates the obligation to produce corporate records. Additionally, the Supreme Court in *Braswell* did hold, yes, that it must be the corporation that produces the documents under the collective entity doctrine. So, if an agent of the corporation produces the documents, then it is the corporation and not the agent that is producing them. That much is clear. However, *Braswell* also holds that "corporate records are necessarily held in a representative capacity." And, as the Eleventh Circuit interpreted that holding, it is the "immutable character of the records as corporate which requires their production and which dictates that they are held in a representative capacity." So, while the law of agency is important to understanding this

doctrine, Mr. Schultz has it backwards. It is the documents that create the relationship to the corporation, not the individual vis-a-vis the corporation.

THE COURT: Thank you, Ms. Johnson. Anything else?

MS. JOHNSON: Not unless your honor has any further questions.

THE COURT: No, thank you. Any rebuttal, Mr. Schultz?

MR. SCHULTZ: Thank you, your honor. One point. Mr. Habib is unable to act on the corporation's behalf. And, as the Second Circuit held in *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, cited in our brief, if a person is not authorized to produce documents on a corporation's behalf, then certainly that person should not be viewed as a representative of the corporation only for the purpose of the Government's subpoena. It is flat out inconsistent. It deprives Mr. Habib of his Fifth Amendment right not to be compelled to incriminate himself.

THE COURT: Thank you, Mr. Schultz. My clerk will inform you when I have reached a decision on your motions.

MR. SCHULTZ: Thank you, your honor.

MS. JOHNSON: Yes, thank you, your honor.

UNITED STATES DISTRICT COURT
DISTRICT OF JORALEMON

— X

UNITED STATES OF AMERICA **NO. 825-13**

— against —

JOHN HABIB,

Defendant.

— X

AFFIDAVIT OF DR. JACOB WHITE

I, Jacob White, do hereby declare as follows under penalty of perjury.

1. I am a forensic and board-certified general psychiatrist with over 30 years of experience. I am licensed in the State of Joralemon to practice psychiatry. I am a member of the American Board of Psychiatry and a Distinguished Fellow of the American Psychiatric Association. I earned both my Bachelor of Science and medical degrees from the University of Joralemon. I completed my residency in psychiatry at Bellevue Hospital in New York City.

2. My practice consists of treating individuals with mental illnesses, performing evaluations at individual requests, performing forensic examinations related to actual or potential litigation, teaching at the University of Joralemon Medical School, and various activities with the American Psychiatric Association.

3. I have never been disqualified from rendering any expert opinion in any court of law.

4. On July 10, 2013, the District Court of Joralemon appointed me to perform a formal psychological evaluation of Mr. William Roberts to determine his competency to testify at trial.

5. I have conducted over 50 formal psychological evaluations for this Court. My forensic evaluations are routinely performed over a two-day period in order to allow sufficient time for a thorough evaluation of the patients and to administer any necessary tests. On day one, I meet with the patient for an initial interview. This includes a mental status exam, history-taking, and clinical exam. I then administer a battery of tests. The specific tests and the nature of the battery can vary somewhat depending on the individual case. The tests are then scored and analyzed, and preliminary results are written up and available. The second day of evaluation normally consists of a second clinical exam and, when appropriate, a discussion of the tests and/or further testing is done to clarify any questions that may arise. A comprehensive report is then written which incorporates all of the above. This report was prepared and submitted to the Court for Mr. William Roberts.

6. I performed a formal psychological evaluation of Mr. Roberts using my routine process, as described above, on July 24 and July 26, 2013.

7. On the first day of my evaluation, I spoke with Mr. Roberts about any history of mental illness or psychiatric treatment he previously received. He was aware of his surroundings, knew why he was being examined by me, and was able to answer my questions thoroughly and thoughtfully.

8. Mr. Roberts disclosed that he was under the care of a psychiatrist when he was twelve years old following an incident with another student at school. He has occasionally sought psychiatric treatment since then. Mr. Roberts is currently forty-five years of age. I reviewed his medical records and discussed the contents of them with Mr. Roberts.

9. Based on the information I obtained from Mr. Roberts, I conducted further tests and examinations to determine his mental state as of the date of the assessment.

10. Mr. Roberts' medical records and interviews indicate a pattern of deceitful, manipulative interactions and relationships with others starting in pre-adolescence and consistent to this point in time. This opinion is based on (1) medical records dated back to June 1982; (2) psychological battery of tests performed on July 24 and 26, 2013; and (3) clinical interviews performed on those same dates.

11. It is my expert opinion, based on my knowledge and experience with Mr. Roberts, that he is unquestionably competent to testify as a witness at the trial in question.

12. It is my expert opinion, based on my knowledge and experience with Mr. Roberts, that he has Reed's disorder. Reed's disorder is characterized by a pervasive pattern of disregard and violation of the rights of others, as indicated by a combination of the following: deceitfulness, as indicated by repeated lying or conning of others for personal profit or pleasure; impulsivity; irritability and aggressiveness; consistent irresponsibility; and lack of remorse, as indicated by being indifferent to telling frequent lies.

13. It is my expert opinion that because of his Reed's disorder, Mr. Roberts will be unlikely to testify completely truthfully in court. He has an impulse to lie and thus, it is doubtful that even under oath, he would be able to testify truthfully on a consistent basis. I believe that given the way Reed's disorder has manifested itself in him, particularly under stress and in the presence of authority figures, there is a high likelihood that he would lie.

Jacob White, M.D.

Dated: July 30, 2013

Jacob White, M.D.
200 Main Street
Danville, Joralemon, 11201

Sworn to before me this 30th day
of July, 2013

William H. Herbert

Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF JORALEMON

— X

NO. 825-13

UNITED STATES OF AMERICA

ORDER

— against —

JOHN HABIB,

Defendant.

— X

Honorable Daniel Joseph III, Chief Judge, United States District Court for the District of Joralemon.

Defendant is charged with two counts of second degree murder, under 18 U.S.C. § 1111, and with three counts of violating 15 U.S.C. § 2064-A, the Consumer Electronics Safety Act. The Government alleges that Defendant, while employed by Zodiac Electronics ("Zodiac") as the company's president until January 2013, was responsible for the creation, development and ultimate release and sale of the Genius Watch, a device that malfunctioned with tragic consequences. The Defendant made two in limine motions—one to introduce the expert testimony of Dr. Jacob White and the other to quash the Government's subpoena duces tecum seeking corporate records in his possession.

Motion to Admit Expert Testimony

The Defendant made an in limine motion to introduce the expert testimony of Dr. Jacob White. Both Defendant and the Government presented their arguments at a hearing held on August 15, 2013. For the reasons discussed herein, the Defendant's motion is GRANTED in part and DENIED in part.

Dr. White is a qualified expert as a general and forensic psychiatrist. This Court appointed Dr. White to perform a formal evaluation of William Roberts in order to determine Mr. Roberts's competency to testify as a witness at trial. Neither party contends that the evaluation was improper, and neither party made any argument relating to privilege; therefore, those issues are not before the Court. At an earlier hearing, this Court found Mr. Roberts competent to testify. The Defendant does not contest that finding. However, Defendant seeks to introduce Dr. White's testimony about Mr. Roberts's credibility. Specifically, Defendant seeks 1) the introduction of Mr. Roberts's diagnosis of Reed's disorder, 2) a description of Reed's disorder, and 3) the effect that Reed's disorder has on Mr. Roberts's credibility. The Government does not contest the first two requests. Thus, only the expert opinion as to credibility is in issue.

Federal Rule of Evidence 702 allows the introduction of expert testimony when the specialized information will help the trier of fact. However, expert testimony about a particular witness's credibility has always been excluded in this Court as a matter of law, and the authority from other circuits weighs in favor of its exclusion. This Court sees no reason to create an exception to that rule. It is within the jury's sole discretion to make determinations about credibility, and Dr. White's testimony about Mr. Roberts's credibility would infringe on that right. The proposed testimony would not be helpful to the jury.

While Dr. White will not be permitted to testify about Mr. Roberts's credibility, he will be permitted to testify about the procedures that he used to evaluate Mr. Roberts. Dr. White may speak about the diagnosis that he made and the characteristics of an ordinary person afflicted with the disease, as that may aid the trier of fact. Dr. White may not, however, testify about how the disease specifically affects Mr. Roberts's credibility.

For the foregoing reasons, Defendant's motion is GRANTED in part and DENIED in part.

Motion to Quash Subpoena of Corporate Records

Defendant also made a motion to quash the Government's subpoena duces tecum seeking corporate records in his possession. For the reasons discussed herein, Defendant's motion is DENIED.

In January 2013, the Consumer Electronic Product Safety Commission directed Zodiac to recall the Genius Watch following two instances in October 2012 in which the Watches exploded and killed their wearers. Those deaths are the basis for Defendant's second-degree murder charges. The alleged misrepresentations made to the Commission by Defendant on behalf of Zodiac regarding the Watch's safety are the basis of the Consumer Electronic Safety Act charges.

On July 22, 2013, the Government issued a subpoena duces tecum to Defendant seeking "[a]ny and all records, documents, instructions, memoranda, notes and papers (whether in computerized or other form) relating to the Genius Watch in your care, custody, possession or control, that were created during the course of, or in connection with, your employment at Zodiac Electronics."

On August 15, 2013, this Court held oral argument on the motion to quash. According to the Government, a cooperating witness, Mr. Roberts, informed the Government of the documents in Defendant's possession at a proffer session on July 19, 2013, only a few days before it issued the subpoena. The Government also represents that it does not know of any other copy of these documents in existence.

Additionally, both parties agree that Defendant obtained the documents while employed by Zodiac. Of course, both parties make this assertion towards opposing ends. Defendant represents that because he is no longer employed by Zodiac, he currently holds the documents in his personal capacity. And the Government asserts that because Defendant obtained these

documents while he served in a representative capacity at Zodiac, he necessarily continues to hold those documents in that capacity.

This is an important point to both parties' arguments, as Defendant's motion to quash the Government's subpoena relies on whether or not he falls within this Court's application of the collective entity doctrine. It is well established that a corporation and its representatives are not entitled to assert a Fifth Amendment privilege against compelled self-incrimination. Here, the Court must decide whether the collective entity doctrine reaches former employees of a corporation. If it does, Defendant must produce the documents or risk being held in contempt of court. If it does not, Defendant may assert his Fifth Amendment privilege, and this Court must then quash the subpoena.

For the reasons set forth herein, the Court finds the Defendant's arguments unavailing. The issue is one of first impression in the Fourteenth Circuit. Nevertheless, we join the majority of courts that have addressed this issue in holding that the collective entity doctrine extends to former employees of a corporation when those former employees are in possession of corporate documents.

The Supreme Court has never held that the "termination of the employment relationship somehow terminates the obligation to produce corporate records on proper demand." *Bellis v. United States*, 417 U.S. 85, 88-10 (1974). Indeed, it is "the immutable character of the records as corporate which requires their production and which dictates that they are held in a representative capacity." *In re Grand Jury Subpoena Dated Nov.12, 1991, FGJ 91-5 (MIA)*, 957 F.2d 807, 809-810 (11th Cir. 1992). While Defendant's employment relationship may have ended, the records in his possession remained immutably corporate. No amount of time, distance, or significance can change that fact.

For these reasons, Defendant's motion to quash the Government's subpoena duces tecum is DENIED. Defendant is ordered to produce all responsive documents within 48 hours of the submission of this order to the docket.

SO ORDERED.

Dated: August 30, 2013

Hon. Daniel Joseph III

UNITED STATES DISTRICT COURT
DISTRICT OF JORALEMON

— X

UNITED STATES OF AMERICA **NO. 825-13**

— against —

JOHN HABIB,

Defendant.

— X

MOTION FOR A NEW TRIAL

The Defendant, John Habib**,** through undersigned counsel, moves this Court, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, to grant a new trial to the Defendant herein.

In support of this motion, the Defendant asserts that a new trial in this matter is required in the interest of justice because extraneous prejudicial information was improperly brought to the jury's attention, and the effect this information had on the jury's deliberative process violated the Defendant's Sixth Amendment right to an impartial jury.

Wherefore, the Defendant respectfully requests that the Court set aside the judgment of conviction of September 27, 2013, and order a new trial, or in the alternative, order a full evidentiary hearing to determine the extent to which such prejudicial information was improperly brought to the jury's attention.

Dated October 3, 2013

Stewart Schultz
Schultz & Sponza, LLP
500 Montague Street
Boerum, Joralemon, 11201

Sworn to before me this 3rd day
of October, 2013.

Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF JORALEMON

— X

NO. 825-13

UNITED STATES OF AMERICA

— against —

AFFIDAVIT IN SUPPORT OF MOTION FOR A NEW TRIAL

JOHN HABIB,

Defendant.

— X

Stewart Schultz, Esq., in support of Defendant John Habib's Motion for a New Trial under Federal Rule of Criminal Procedure 33, hereby swears to the truth of the following.

1. I am a member of the law firm of Schultz & Sponza and represent the Defendant, John Habib, in the above-captioned matter.

2. Following a jury trial before this court, a verdict of guilty on all counts was entered against Mr. Habib on September 27, 2013.

3. On September 30, 2013, I received a phone call from an individual identifying herself as "Juror #3", stating that she felt obliged to contact me concerning what occurred during the jury deliberations in Mr. Habib's trial. Prior to receiving this phone call I had no contact with any of the jurors concerning their deliberations.

4. Juror #3 informed me that a pervasive anti-Muslim perspective had a significant effect on the jury's verdict.

5. Juror #3 stated that after the jury had deliberated for nearly six hours, a vote was cast with eleven jurors voting guilty and one juror voting not guilty.

6. According to Juror #3, immediately after this vote took place, Jurors #2, #8, and #9 began to aggressively harass the one dissenting juror, Juror #5.

7. According to Juror #3, after this vote, Juror #2 threw his hands up in the air and declared to Juror #5, "How can you possibly believe this towel-head? He's clearly out there killing Americans with these watches as some sort of terrorist plot!"

8. According to Juror #3, in response to this statement, Juror #5 said, "Look, I don't mean to drag things out, but I don't feel comfortable voting guilty. I honestly don't believe the prosecution has proved their case beyond a reasonable doubt."

9. According to Juror #3, this statement prompted both Jurors #8 and #9 to suggest that Juror #5 was somehow involved in the Genius Watch explosions and that they should speak with the judge after they "locked up Habib" and tell him that Juror #5 should be locked up as well. Juror #9 then stated, "My brother died fighting those bastards overseas and now you want to let one go when we have him in our grasp? You disgust me."

10. According to Juror #3, Juror #5 did not respond, but Juror #2 began to calmly state that "these types of people don't deserve to be in this country, and it's our duty to keep them off of our streets, away from our families, so they can't hurt anyone."

11. According to Juror #3, after this discussion took place, Juror #5 began to suggest a discussion of William Roberts's testimony, to which Juror # 2 responded, "Why are we even listening to you? We know 'towlie' here is guilty. His people do this thing all over the world, and I for one am not letting him get away with it here."

12. According to Juror #3, after about five minutes of silence, Juror #2 suggested another vote, the results of which came back unanimously in favor of a guilty verdict.

13. According to Juror #3, after the jury returned to the courtroom, and the Court accepted the verdict, Juror #3 quickly left the courtroom without speaking with any of the other jurors or attorneys.

14. Juror #3 then informed me that she too had felt some trepidation about voting guilty, but that she was simply too caught up in the moment and now feels terrible about how things concluded.

15. Juror #3 was not offered anything in return for this conversation, but stated that she would be willing to testify as to what occurred during deliberations.

Dated: October 3, 2013

Stewart Schultz
Schultz & Sponza, LLP
500 Montague Street
Boerum, Joralemon, 11201

Sworn to before me this 3rd day
of October, 2013.

Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF JORALEMON

— X

NO. 825-13

UNITED STATES OF AMERICA

— against —

JOHN HABIB,

Defendant.

— X

OCTOBER 7, 2013

TRANSCRIPT OF ORAL ARGUMENTS ON MOTION FOR A NEW TRIAL

Before: Honorable Daniel Joseph III, Chief Judge, United States District Court.

APPEARANCES:

For the United States of America	Elizabeth Johnson Assistant United States Attorney 250 Church Street Boerum, Joralemon, 11201
For Defendant	Stewart P. Schultz Schultz and Sponza, LLP 500 Montague Street Boerum, Joralemon, 11201
Court Reporter	Richard Pratts 250 Church Street Boerum, Joralemon, 11201

THE COURT: We are here this afternoon on the Defendant's motion for a new trial or in the alternative for an evidentiary hearing pursuant to Federal Rule of Criminal Procedure 33. I have the memorandum in support of his motion as well as the Government's response. According to the Defendant's submissions, the Defendant's attorney, Mr. Stewart Schultz, received an unsolicited phone call from an individual identifying herself as "Juror #3," in which she described portions of the deliberations and alleged that some of the other jurors held a significant degree of prejudice against the Defendant due to his name and supposed Muslim faith. Furthermore, based on the statements of Juror #3, Defendant alleges that the ultimate verdict was directly affected by the prejudicial religious comments and harassment that occurred within the jury's deliberation. Mr. Schultz, have you had contact with any of the other jurors regarding this matter?

MR. SCHULTZ: No, your honor, after I received the phone call from Juror #3, I immediately spoke with my client, alerted Ms. Johnson, and filed the present motion, with copies to Ms. Johnson.

THE COURT: Well, let's get started. Mr. Schultz, please proceed.

MR. SCHULTZ: Thank you, your honor. What we have before us is simply a fundamental violation of Mr. Habib's constitutional rights. Mr. Habib has been convicted of murder, not based on the

facts of this case, but rather because of bias against his perceived Muslim faith. Mr. Habib's religion was entirely irrelevant and never mentioned at trial. Any yet the jury's bias against his supposed religion was a determinative factor for this jury. We therefore ask that Mr. Habib's conviction be vacated and a new trial ordered, or alternatively, that this court order an evidentiary hearing to determine the extent to which this prejudicial bias was brought to the jury's attention.

THE COURT: Counselor, I understand your client's disappointment with the verdict, but these alleged anti-Muslim comments seem to be purely internal to the deliberations and inadmissible in any inquiry into the validity of the verdict.

MR. SCHULTZ: Yes, your honor is correct that the content of a jury's deliberative process is generally inadmissible under 606(b). However, the religious bias that Jurors #2, #8, and #9 inserted into these deliberations constitutes the introduction of extraneous prejudicial information that instead falls squarely within the 606(b)(2)(A) exception to the general prohibition of such testimony. The exception was created to provide redress in situations where jurors improperly introduce statements into the deliberation room regarding matters beyond the trial record. In this case, the bias against Muslims clearly was not a relevant factor for the jury to consider during

deliberations and therefore constitutes extraneous prejudicial information. Furthermore --

THE COURT: Mr. Schultz, before we go any further into the constitutional component of the present motion, I'd like to first hear the Government's response, specifically to this 606(b)(2)(A) argument. Ms. Johnson?

MS. JOHNSON: Thank you, your honor. Federal Rule of Evidence 606(b) flatly prohibits the use of juror testimony in an attempt to impeach a jury verdict. Although the rule provides an exception for extraneous prejudicial information and significant outside influences that are improperly brought to the jury's attention, the personal values and beliefs of jurors are well within the bounds of the rule and not external to the deliberation process. Despite the ugliness and inappropriate nature of the alleged comments made by a minority of the jurors in this matter, this does not constitute extraneous information under Federal Rule of Evidence 606(b). As the Tenth Circuit held in *United States v. Benally*, "impropriety alone ... does not make a statement extraneous."

THE COURT: Thank you, Ms. Johnson. Mr. Schultz you may continue.

MR. SCHULTZ: Yes, your honor. Notwithstanding the admissibility of these statements under the Federal Rules of Evidence, to let Mr. Habib's conviction stand would endorse a violation of his

Sixth Amendment right to an impartial jury. As seen by the persistent use of derogatory terms to refer to Mr. Habib, the suggestion that he was involved with an imaginary terrorist plot, and the complete disregard of Juror #5's suggestion to review actual evidence, it is clear that the jury's deliberation was corrupted by this religious bias, which therefore violated Mr. Habib's Sixth Amendment rights. In fact, the determinative effect of this bias is clearly established by Juror #5's change in vote immediately following the prejudiced and harassing statements of Jurors #2, #8, and #9, despite Juror #5's belief that the prosecution had not proved its case beyond a reasonable doubt. As stated by the First Circuit in *United States v. Villar*, there exist 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." The pervasive animus toward Muslims that at three of the jurors not only expressed during deliberations, but pressed upon other jurors, clearly falls within this category. Accordingly, this Court should vacate the September 27th conviction and order a new trial for Mr. Habib.

THE COURT: Ms. Johnson?

MS. JOHNSON: Your honor, contrary to the Defendant's allegations, Mr. Habib has suffered no violation of his Sixth Amendment rights. As explained directly by the Supreme Court in

Tanner v. United States, a Defendant's Sixth Amendment rights to a fair trial and an impartial jury are sufficiently protected through the proper use of voir dire, direct observation of jurors during courtroom procedures, the reception of reports made by jurors should they identify inappropriate behavior prior to reaching a verdict, and direct evidence other than juror testimony. These safeguards sufficiently protect the Defendant's Sixth Amendment rights, and we must simply accept, as the Tenth Circuit did in *Benally*, that any attempt "to cure defects in the jury process"--like the possibility here that anti-Muslim sentiments "played a role in the jury's deliberations—entails the sacrifice of structural features in the justice system that have important systemic benefits." To permit intrusive investigations of jury deliberations upon any allegation of impropriety or harassment would encourage persecution of jurors, discourage candor during deliberations, eliminate any hope of juror privacy, and create an unending cycle of trials within trials. Accordingly, an evidentiary hearing that allows for the introduction of juror testimony would improperly allow inquiry into the internal processes of the jury and ignore both congressional intent and Supreme Court precedent.

THE COURT: Very well, I have your respective memoranda and will have a decision for you within the next few weeks.

UNITED STATES DISTRICT COURT
DISTRICT OF JORALEMON

— X

NO. 825-13

UNITED STATES OF AMERICA

— against —

JOHN HABIB,

Defendant.

— X

OCTOBER 15, 2013

DECISION ON MOTION FOR A NEW TRIAL

Before: Honorable Daniel Joseph III, Chief Judge, United States District Court

APPEARANCES:

For the United States of America	Elizabeth Johnson Assistant United States Attorney 250 Church Street Boerum, Joralemon, 11201
For Defendant	Stewart P. Schultz Schultz and Sponza, LLP 500 Montague Street Boerum, Joralemon, 11201
Court Reporter	Richard Pratts 250 Church Street Boerum, Joralemon, 11201

CLERK: United States versus John Habib. Counsel, please note your appearances for the record.

Ms. JOHNSON: Assistant United States Attorney Elizabeth Johnson, for the Government.

Mr. SCHULTZ: Stewart Schultz, for Defendant John Habib. Mr. Habib is also present.

THE COURT: Good morning counselors. I have reached a decision on the Defendant's motion for a new trial. So long as there are no objections, I will be ruling from the bench.

Ms. JOHNSON: No objection.

Mr. SCHULTZ: No objection.

THE COURT: For the sake of the record, I'll briefly review the procedural history leading up to this present motion. On March 11, 2013, Mr. Habib was indicted for murder in the second degree and violations of the Consumer Electronics Safety Act, after two of the Genius Watches he had developed while president of Zodiac Electronics exploded. In two pre-trial motions, Defendant moved, first, to admit psychiatrist Dr. Jacob White as an expert witness to testify concerning his diagnosis of and the likely credibility of the Government's witness, William Roberts, and second, to quash the Government's subpoena seeking documents in Defendant's possession relating to the development of the Genius Watch. After a hearing, I ruled that Dr. White would be permitted to testify as an expert at trial concerning his

diagnosis of the witness as well as how Mr. Roberts's affliction generally manifests itself in an individual, but prohibited from testifying as to Mr. Roberts's personal credibility. I also denied the Defendant's motion to quash the Government's subpoena for corporate records in Defendant's possession.

Trial began for the Defendant on September 3, 2013. At trial, Mr. Roberts was the Government's key witness, testifying that the Defendant was fully aware of the defect in the Genius Watch, intentionally hid this defect, and knowingly provided false reports to the Consumer Electronics Safety Commission. The Defendant testified and vehemently denied the claims made by Mr. Roberts, stating that it was Mr. Roberts, not himself, who was fully aware of the defects and that Mr. Roberts had misled Defendant into believing the Watches were safe. On September 27th, the jury returned a verdict finding Mr. Habib guilty on all counts. Three days later, on September 30th, 2013, Defendant's counsel, Mr. Schultz, received a phone call from an individual identifying herself as Juror #3, who alleged the jury deliberations in Mr. Habib's trial had been tainted by religious bias. On October 3rd, 2013, Mr. Schultz filed the present Rule 33 motion seeking a new trial for Mr. Habib, or alternatively, for an evidentiary hearing to further investigate the contents of the jury's deliberation.

Before delivering my decision, I would like to note that the Fourteenth Circuit has not yet addressed whether statements expressing religious bias, made within the jury room, constitute extraneous material within the meaning of Evidence Rule 606(b), nor the effect that such statements may or may not have on a Defendant's Sixth Amendment rights. Upon reviewing the memoranda submitted by each side and after hearing oral arguments, the Defendant's motion is in all respects denied.

Federal Rule of Evidence 606(b) codifies the longstanding common law principle prohibiting the introduction of juror testimony to impeach a jury verdict. There are, of course, exceptions to this rule, where the deliberations have been tainted by extraneous prejudicial information or an improper outside influence. However, these exceptions must be read narrowly, so as to protect the vital role Rule 606(b) plays in ensuring the finality of judgments and allowing justice to be dealt by peers, not judges. The comments suggesting religious animus, allegedly made by some of the jurors during deliberations, although highly inappropriate, are nevertheless part of the internal processes of the jury and cannot be used to challenge the validity of the verdict.

Furthermore, I find that the Defendant's Sixth Amendment right to an impartial jury was not violated, as the protections articulated by the Supreme Court in *Tanner* sufficiently vetted

the jury for improper bias. Although during voir dire, neither party inquired as to a potential religious bias of the venire members, defense counsel utilized three peremptory challenges and successfully challenged a fourth potential juror for cause. Furthermore, no reports of religious prejudice were brought to the Court's attention throughout the entirety of the twenty-five day trial. Religious prejudice is an ugly and unfortunate reality in our society. However, we must rely on the procedures set forth in our system of justice to sufficiently screen such bias and prejudice from the jury room. As the Tenth Circuit determined in *Benally*, with these protections in place we can provide what the Sixth Amendment requires, "a fair trial but not a perfect one, for there are no perfect trials." Accordingly the Defendant is not entitled to an evidentiary hearing upon the issue and the motion is in all respects denied. Thank you.

UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

— X

UNITED STATES OF AMERICA,
Appellee,

ORDER
2014-CR-001

— against —

JOHN HABIB,
Defendant-Appellant.

— X

Before: Velazquez, Wyeth, Kandinsky, Circuit Judges:

OPINION OF THE COURT

Wyeth, Circuit Judge.

BACKGROUND

On March 11, 2013, John Habib, the Defendant-Appellant and former president of Zodiac Electronics, Incorporated, was indicted on two charges of murder in the second degree in violation of 18 U.S.C. § 1111 and three counts of violating 15 U.S.C. § 2064-A, the Consumer Electronics Safety Act.[3] All charges stemmed from Zodiac's "Genius Watch," the alleged cause of the two deaths in this case. On September 27, 2013, Appellant was convicted on all counts after a jury trial.

Prior to trial, Appellant moved to introduce an expert witness, Dr. Jacob White, to testify that the Government's main witness, Mr. William Roberts, had been diagnosed with a disorder that affects his ability to tell the truth. The district court granted Appellant's motion in part and denied it in part. Dr. White was permitted to testify as to the disorder generally and how he came to diagnose Mr. Roberts. However, Dr. White was not permitted to testify as to how the disorder might affect Mr. Roberts's ability to tell the truth at trial.

Appellant also moved prior to trial to quash the Government's subpoena duces tecum seeking all documents in Appellant's possession pertaining to the Genius Watch, documents obtained while he was president of Zodiac. Appellant argued that answering the subpoena would violate his Fifth Amendment privilege against compelled self-incrimination. The district court denied Appellant's motion to quash, holding that a former employee of a corporation who holds corporate documents obtained in the course of that employment remains a representative of the corporation for purposes of a subpoena ordering production of those documents.

The jury trial commenced on September 3, 2013. On September 27, 2013, Appellant was

[3] As stated earlier, this statute was created for the Prince Competition.

found guilty on all counts. Appellant then moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure on two grounds: that extraneous prejudicial information was improperly brought to the jury's attention and that the effect it had on the jury's deliberative process violated Appellant's Sixth Amendment right to an impartial jury. Appellant's counsel at trial represented to the district court that he had received a phone call from a juror in which that juror conveyed to him various religiously intolerant and coercive statements allegedly made by other jurors during jury deliberations. Specifically, Appellant argued in his motion for a new trial that Rule 606(b) of the Federal Rules of Evidence permitted the district court to inquire into the juror's allegations regarding biased and coercive remarks made during deliberations. The district court denied Appellant's Rule 33 motion in all respects.

This Court has consolidated Appellant's direct appeal and Appellant's appeal from the denial of his Federal Rule of Criminal Procedure 33 motion. For the purposes of this consolidated appeal, the following is a summary of the evidence presented at trial.

Government's Case

The Government and Appellant stipulated that Appellant was the president of Zodiac from 1995 until he was dismissed in January 2013. The Government's chief witness was Mr. William Roberts. Mr. Roberts was an electrical engineer for Zodiac, head of the wearable smart-device department, and "second in command" under Appellant in the development of the Genius Watch. Mr. Roberts testified that the Genius Watch was solely Appellant's creation and that Appellant had told him that it was his "baby." Mr. Roberts also testified that he had entered into a cooperation agreement with the Government and that in exchange for his truthful testimony at trial he would be given immunity.

Mr. Roberts testified that Appellant began to lead him and their team in development of the Genius Watch in 2008. Mr. Roberts further testified that both he and Appellant were well aware from 2011 until the Watch was released that when the battery was flattened and stretched to the degree required for it to fit into the sleek Genius Watch casing, it would begin to heat and expand rapidly.

Mr. Roberts further testified that during a test that he and Appellant conducted in October of 2011 involving the efficacy of the Watch's internal digital gyroscope under heavy movement, the likelihood of the Watch exploding increased exponentially to a "near certitude." Mr. Roberts testified that he and Appellant had placed the Watch in a glass chamber in which a robotic arm moved it in circles and back and forth to simulate the movements of a very active human arm. Mr. Roberts testified "the Genius became so angry with so much movement that it blew my robot arm up." Mr. Roberts stated that he and Appellant were the sole witnesses to this event, spoke at length about their findings, and concluded that the battery and the Watch were very unsafe.

Mr. Roberts also testified that around May 2012, five months before the release of the Genius Watch, he and Appellant were again in the process of testing that same type of battery, which Mr. Roberts testified that Appellant instructed him to use in the Genius Watch despite its

dangers. Mr. Roberts testified that during this test, at which again only he and Appellant were present, the battery exploded in their laboratory and caused a fire that resulted in the total destruction of a hard drive containing all of the Genius Watch development files. Appellant has stipulated that the hard drive containing all of the Genius Watch development files was destroyed in a fire, but Appellant did not stipulate to the cause of the fire.

The Government introduced copies of documents relating to the Genius Watch, which were obtained by subpoena from Appellant prior to trial over his vehement objection. The documents included, among others, a research report outlining the failures of the Genius Watch, specifically its battery; the raw data results of Government-mandated tests; and a draft of a report to the Commission that accurately matched the data reflected in the test results and earlier research report but conflicted with the reports actually submitted by Zodiac to the Consumer Electronic Products Safety Commission. The versions received by the Commission did not include information about the negative research report or battery test results. Rather, the reports submitted to the Commission indicated that the Genius Watches were safe. These reports and other documents relevant to this case were submitted by Zodiac and signed by Appellant and in some instances by Mr. Roberts, as well.

According Mr. Roberts, Zodiac sold 750,000 Genius Watches within the first month of its release. The two victims of the Genius Watch explosions at issue in this case both spent a large portion of their day vigorously moving their arms up and down. According to Mr. Roberts's trial testimony, expert testimony by a forensic scientist, and other evidence presented at trial by the Government, the movements of the two victims closely resembled the types of movements that Appellant and Mr. Roberts had tested in May, 2012, and found to cause the Genius Watch to explode. Olivia Mope, who died of injuries caused by an exploding watch on October 4, 2012, was an employee of the National Parks Service, spending most of her time cutting and clearing trails for the enjoyment of visitors to Fire Island National Seashore. And Jonathan Snow, who died of injuries caused by an exploding Genius Watch on October 7, 2012, was a drill sergeant in the Army who was developing a new training routine on the Joralemon Army Base for his incoming trainees.

Mr. Roberts also testified that internal pressure at Zodiac began to build against Appellant. The board terminated Appellant's employment with Zodiac on January 1, 2013, for unspecified reasons. On January 15, 2013, the Commission ordered Zodiac to recall the Genius Watches, a fact to which the parties stipulated. In its recall order, the Commission cited the two October 2012 deaths and its suspicion that regulatory filings had been falsified or fabricated.

Defense Case

Appellant testified at trial that he was in charge of the Genius Watch's creation and that it was his idea. However, according to Appellant, it was Mr. Roberts who was in charge of the technical aspects of the Watch's development. In particular, Appellant stated that once he completed the design for the Watch's appearance and its general features, he put Mr. Roberts in charge of designing and implementing its internal components. Appellant also indicated that he

turned his attentions to developing the software for the Watch, his specialty, and to promoting the Watch to investors and the press.

Specifically, Appellant testified that he remembered a conversation with Mr. Roberts in or around February 2012, in which Mr. Roberts told him that he and their creative team had finally figured out the "battery situation." Appellant asked Mr. Roberts what he meant by "battery situation," telling Mr. Roberts that he had not known that there was "any issue, let alone a situation" with the battery. Mr. Roberts told him only that "the battery situation had something to do with its cost per unit and the availability of a manufacturing facility in China."

Appellant also said that he had no knowledge of the battery's likelihood to expand and heat under pressure. He testified that he was not present during any testing of the battery. Additionally, he stated that had he been present and found out about the battery problems, he would have used it "as an opportunity to yank the product from the development pipeline." Appellant further testified that by the time of the alleged battery testing, he had lost interest in the Watch project, considering it an already out-of-date idea.

Appellant further stated that not only did he not know about the battery problems but that he did not know about the test involving the robotic arm. Again, he testified that had he known about this problem even separately from the underlying issues involving the battery's likelihood to heat and expand, he would have ordered the end of the Watch's development.

Appellant also testified that he was the only employee of Zodiac who was authorized to copy documents pertaining to the Genius Watch. Appellant stated that he periodically took "many, if not most" of those documents home. Appellant added that given the nature of his job and the corporate structure at Zodiac, his signature was required on most documents relating to the development of the Genius Watch; however, he routinely signed documents without reading them, such was his trust in his subordinates and the large number of documents involved. Appellant added that the documents included supply order forms, test results, internal memoranda outlining the status of the Watch, and all draft and final submissions to outside regulatory agencies—including those to the Commission. Appellant conceded that it was his signature on all the documents introduced at trial.

Appellant further testified that before he was indicted on these charges, he had not read any of the documents introduced at trial. Specifically, he answered in the negative when asked whether he had read the test results pertaining to the battery and the gyroscope. Additionally, Appellant stated that he had not read Zodiac's draft and final reports to the Commission pertaining to the Watch. Appellant expressed remorse at trial that his failure to review documents before signing them may have led to the victims' deaths.

Finally, Appellant testified that he believed he was terminated from Zodiac for reasons unrelated to the Genius Watch. Rather, Appellant testified that he was most likely fired because his focus no longer was solely on generating profits for the corporation but on increasing accessibility to Zodiac products in impoverished countries, a project that entailed travelling abroad many times during the development of the Genius Watch. Since leaving Zodiac, he has severed all ties with the technology industry and has been working with educational projects in

developing nations.

The defense presented psychiatrist Dr. Jacob White as an expert witness. He testified that Mr. Roberts had been diagnosed with Reed's disorder and explained the general symptoms of the disorder. Dr. White's testimony was identical in all relevant respects to paragraphs 1-12 of his affidavit submitted in support of Appellant's in limine motion. The district court did not allow Dr. White to opine as to Mr. Roberts's credibility as a witness.

ANALYSIS

Dr. White's Credibility Testimony

Appellant first urges us to hold that the district court erred when it denied his motion to admit expert witness testimony attacking the credibility of the key Government witness, William Roberts. The district court did allow Appellant's expert, psychiatrist Dr. Jacob White, to testify that he evaluated Mr. Roberts and that he diagnosed Mr. Roberts with Reed's disorder. The district court also allowed Dr. White to describe the symptoms generally exhibited by a typical person diagnosed with Reed's disorder, but it did not allow Dr. White to testify about Mr. Roberts's personal credibility. We find no error in the district court's ruling.

The Fourteenth Circuit has yet to address this issue. We join the majority of circuits that have considered this issue in holding as a matter of law that expert opinion testimony evaluating the credibility of a witness is inadmissible under Rule 702. *See, e.g.*, *United States v. Hill*, 749 F.3d 1250, 1260 (10th Cir. 2014) (collecting cases). "Expert medical testimony concerning the truthfulness or credibility of a witness is generally inadmissible because it invades the jury's province to make credibility determinations." *United States v. Beasley*, 72 F.3d 1518, 1528 (11th Cir. 1996).

Even if Rule 702 did not categorically bar Dr. White's expert opinion testimony, the district court properly excluded it in this case because it would not have been helpful to the jury. *See* Fed. R. Evid. 702(a); *United States v. Adams*, 271 F.3d 1236, 1245 (10th Cir. 2001). Here, the district court allowed Dr. White to testify that he diagnosed Mr. Roberts with Reed's disorder, as well as some symptoms displayed by a typical person suffering from that disorder. This was sufficient to allow the jury to assess what effect Reed's disorder may have had on Mr. Roberts's credibility. The jury had ample time to observe Mr. Roberts during the course of the trial, on both direct- and cross-examination, andto evaluate his demeanor. *See United States v. Sessa*, 806 F. Supp. 1063, 1070 (E.D.N.Y. 1992). At trial, the jury learned that Mr. Roberts had entered into a cooperation agreement with the Government, establishing that he had a motive to lie. Any additional testimony by Dr. White regarding Mr. Roberts's credibility would have simply instructed the jury what conclusion to reach and would not have been helpful as required by Rule 702.

The district court's decision denying Appellant's motion to admit Dr. White's expert opinion testimony regarding Mr. Roberts's credibility is affirmed.

The Collective Entity Doctrine

Also on appeal is the issue of whether a former employee of a corporation who is in possession of corporate documents may claim an act of production privilege against compelled self-incrimination. The district court's denial of Appellant's motion to quash the Government's subpoena duces tecum of corporate documents in Appellant's possession was proper. Appellant transferred the trove of documents in question from the corporate offices to his home while he was president of Zodiac. The question of whether the documents are corporate is not before us. Rather, Appellant invites this Court to adopt the position of the Second and Ninth Circuits and thus to create an overly obvious and tempting safe haven for corporations and their agents to avoid the production of documents. Supreme Court precedent dictates that we decline that invitation.[4]

We therefore join the majority of circuits that have addressed this issue in holding that a former employee of a collective entity, such as a corporation, may not resist document production by asserting the Fifth Amendment privilege against self-incrimination. The former employee in possession of corporate documents falls within the collective entity doctrine, and therefore the act of production is not personal, but rather that of the corporation, which is not entitled to the Fifth Amendment privilege against self-incrimination.

It is well-established that a corporation has no Fifth Amendment privilege. *See Braswell v. United States*, 487 U.S. 99, 105 (1988). This is because "collective entities are treated differently from individuals." *Id.* The Supreme Court has also unambiguously held that an act of production by an agent or custodian of a corporation is not a personal act, but rather an act of the corporation. *See id.* at 110. Indeed, "[a]ny claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation—which of course possesses no such privilege." *Id.* Unsettled by the Supreme Court and an issue of first impression in the Fourteenth Circuit, however, is whether a former employee of a corporation falls within the collective entity doctrine and is therefore unable to assert the privilege.

It is also well-established that "an individual may not invoke his personal Fifth Amendment privilege to avoid producing the documents of a collective entity in his custody, even if his production of those documents would prove personally incriminating." *See In re Grand Jury Subpoena Dated Nov. 12, 1991, FGJ 91-5 (MIA)*, 957 F.2d 807, 809-810 (11th Cir. 1992). We find support for this holding in the Supreme Court's earlier refusal to hold that "termination of the employment relationship somehow terminates the obligation to produce corporate records on proper demand." *See id.* (citing *Bellis v. United States*, 417 U.S.85, 88-90 (1974)). Many other courts outside our Circuit have also followed that reasoning. *See, e.g., In re Grand Jury Subpoena, (85–W–71–5)*, 784 F.2d 857, 861 (8th Cir. 1986).

For these reasons we find the position taken by the dissent untenable. It is not the employment relationship that dictates the boundaries of the collective entity doctrine, but the

[4] Any argument that even if it were error to preclude the evidence in question, such error was harmless, is beyond the scope of the Prince Competition problem and should not be made by competitors.

nature of the documents at issue. Were it merely the employment relationship, a corporate or other collective entity could escape compliance with proper subpoenas by merely passing potentially incriminating documents to a former employee. There are compelling reasons to infer that that is exactly what occurred in the case before us.

The decision of the district court denying Appellant's motion to quash the Government's subpoena duces tecum is affirmed.[5]

Evidence of Juror Religious Bias

Finally, we consider whether the district court erred when it denied Appellant's Rule 33 motion for a new trial on the basis that extraneous prejudicial information, in the form of comments suggesting religious animus, was improperly introduced into the jury room and that the introduction of such information violated Appellant's Sixth Amendment rights to a fair trial and impartial jury. Although our Court has not yet directly addressed either of these issues, we find no error in the district court's denial of Appellant's motion for a new trial.

Religious Bias and the "Extraneous Information" Exception to Rule 606(b)

Federal Rule of Evidence 606(b) embodies the "near-universal and firmly established common law rule in the United States [which] flatly prohibit[s] the admission of juror testimony to impeach a jury verdict." *Tanner v. United States*, 483 U.S. 107, 117 (1987). The rule serves the necessary function of protecting jury deliberations from intrusive inquiry and providing finality and stability to our jury verdicts. Nevertheless, Rule 606(b)(2) contains three narrow exceptions to this blanket rule in order to balance the sanctity of the deliberative process with the need to ensure justice is properly served. The exceptions permit a juror to testify concerning 1) extraneous prejudicial information; 2) an outside influence improperly brought to bear on any juror; or 3) a mistake that was made in entering the verdict on the verdict form. These exceptions have been applied with great caution in order to avoid "the destruction of all frankness and freedom of discussion" within the deliberative process. *Kittle v. United States*, 65 A.3d 1144, 1149 (D.C. 2013). Accordingly, these exceptions have been held inapplicable to "discussions among jurors, intimidation or harassment of one juror by another," *United States v. Benally*, 546 F.3d 1230, 1237 (10th Cir. 2008), or even "evidence of drug and alcohol use during the deliberations." *Tanner*, 483 U.S. at 122.

Appellant maintains that the comments concerning his supposed religious faith made by Jurors #2, #8, and #9 constitute extraneous prejudicial information under the 606(b)(2)(A) exception, information about which jurors should be permitted to testify at an evidentiary hearing. In rejecting Appellant's argument and affirming the district court's dismissal of Appellant's motion, we join the majority of circuits that have addressed this issue and hold that statements of religious bias, made during deliberations, are the personal beliefs and philosophies

[5] As with the previous issue, argument that, in the alternative, the error was harmless, is beyond the scope of the Competition.

of jurors and are therefore necessarily internal aspects of the deliberative process that do not constitute extraneous information.

In determining whether an influence is external or internal, the court is required to examine the "nature of the allegation." *Tanner*, 483 U.S. at 117. Although it would be impossible to draw a rigid line to distinguish internal and external influences, juror testimony concerning comments suggesting religious or racial bias have been almost universally precluded under 606(b)'s general prohibition. *See, e.g.*, *Benally*, 546 F.3d 1237-38; *United States v. Villar*, 586 F.3d 76 (1st Cir. 2009). Courts must not confuse "outside evidence with a juror who brings his personal experiences to bear on the matter at hand." *Benally*, 546 F.3d at 1237. Personal beliefs and subjective opinions that jurors hold when they enter the deliberation room are simply not the type of extraneous information envisioned by the rule itself. *See* Fed. R. Evid. 606(b) Advisory Committee's note (suggesting that newspaper account would qualify).While the statements of Jurors #2, #8, and #9 were unquestionably improper and reflect a shameful disposition present throughout our country, "impropriety alone … does not make a statement extraneous." *Benally*, 546 F.3d at 1238.

Sixth Amendment Right to an Impartial Jury

Despite our holding that statements of religious bias are not within the 606(b)(2)(A) exception, we must also examine the extent to which Appellant's Sixth Amendment rights are implicated. The Sixth Amendment guarantees a criminal defendant "a tribunal both impartial and mentally competent to afford a hearing." *Tanner*, 483 U.S. at 126. As noted above, however, this ideal must be tempered with the "long recognized and very substantial concerns [which] support the protection of jury deliberations from intrusive inquiry." *Tanner*, 483 U.S. at 117. A defendant's Sixth Amendment interests in an unimpaired jury "are protected by several aspects of the trial process." *Id.* As enumerated by the Supreme Court in *Tanner*, these protections include the voir dire process; personal observations by counselors, the court, and fellow jurors; and the availability of an evidentiary hearing concerning non-juror evidence of misconduct. *Id.* at 127. These features have been deemed to sufficiently protect a defendant's Sixth Amendment rights, even where they "failed to expose [a] problem, which therefore went uncorrected." *Benally*, 546 F.3d at 1240.

Accordingly, we conclude that the fact that one juror changed his vote from innocent to guilty is not dispositive of the present matter. Jurors change their minds often, especially after hearing the arguments of their fellow jurors. Notwithstanding Appellant's contention that this change of opinion evinces a problem within deliberations, the *Tanner* factors adequately protected Appellant's Sixth Amendment rights. Although there is no question that some of the hateful and abhorrent comments made by jurors in the present case remain completely inappropriate for the deliberative process, the procedural safeguards already set in place sufficiently preserved Appellant's Sixth Amendment rights to an impartial jury and a fair trial.

We therefore affirm the decision of the district court denying Appellant's Motion for a New Trial.

SO ORDERED.

Velazquez, Circuit Judge, dissenting.

Dr. White's Credibility Testimony

The majority expresses concern that Dr. White's testimony, if allowed, would have been an impermissible intrusion into "the jury's province to make credibility determinations." *United States v. Beasley*, 72 F.3d 1518, 1528 (11th Cir. 1996). This is "empty rhetoric." *United States v. Sessa*, 806 F. Supp. 1063, 1066-67; *see generally,* Margaret A. Berger, *United States v. Scop: The Common-law Approach to an Expert's Opinion About Witness Credibility Still Does Not Work*, 55 Brook. L. Rev. 559 (1989). Put simply, Dr. White would not have "invade[d] the jury's province" because jury would have remained free to determine the appropriate weight to attach to Dr. White's opinion testimony. *See id*. at 1067.

First, as a matter of law, Rule 702 permits expert testimony when "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). Nothing in the rule itself forbids expert testimony about a witness's credibility, so long as it is based on "sufficient facts or data" and "is the product of reliable principles and methods." Fed. R. Evid. 702(b)-(c). Because neither Dr. White's expert credentials nor the basis of his proffered testimony are at issue, the text of Rule 702 does not bar his testimony.

Second, Rule 702 requires an expert's testimony to "help the trier of fact." Fed. R. Evid. 702(a). In *United States v. Shay*, the First Circuit held that it was error for a district court to deny the admission of expert testimony where a Defendant sought to attack the credibility of his own incriminating statements—which the Government introduced against him—with expert psychiatric testimony about his mental disorder that would have caused him to make statements against penal interest. 57 F.3d 126, 133 (1st Cir. 1995). The testimony in *Shay* would have been helpful to the jury because "[c]ommon understanding conforms to the notion that a person ordinarily does not make untruthful inculpatory statements." *Id.* (citing Fed. R. Evid. 804(b)(3) advisory committee's note).

Here, Mr. Roberts made statements during trial that were against his penal interest. It is precisely Mr. Roberts's complicity that allegedly gave him insight into Mr. Habib's knowledge of the battery defect and false reporting. Although at trial, the jury did learn about Mr. Roberts's cooperation with the Government, Dr. White would have helped the jury dismiss altogether the assumption about statements against penal interest in Mr. Roberts's case. Indeed, Dr. White would have helped the jury by giving them good reason to doubt Mr. Roberts's statements, whether against penal interest or not. Similarly, testimony about Mr. Roberts's diagnosis and medical history was not sufficient to help the jury understand the probability that Mr. Roberts was lying under oath at trial and throughout the investigation. Moreover, it is plain that the

Government's case rested on establishing Mr. Roberts's credibility, not just at trial, but also throughout the course of the investigation. Dr. White's testimony would not only have helped the jury assess Mr. Roberts's in-court testimony, but it would also have helped them assess his out-of-court statements during which time the jury had no opportunity "to evaluate his demeanor," as well as his overall credibility throughout the case. *See United States v. Gonzalez-Maldonado*, 115 F.3d 9, 16 (1st Cir. 1997). I conclude that the district court erred by excluding Dr. White's expert opinion testimony,[6] and I therefore dissent.

The Collective Entity Doctrine

The majority's opinion defies simple logic. The collective entity doctrine cannot apply to a former employee of a collective entity who is no longer acting on behalf of the collective entity. A substantial number of our sister circuits have held this as well. *See, e.g.*, *In re Three Grand Jury Subpoenas Duces Tecum Dated Jan. 29, 1999*, 191 F.3d 173 (2d Cir. 1999); *In re Grand Jury Proceedings*, 71 F.3d 723 (9th Cir. 1995).

The majority categorically misapplies *Braswell*. The Supreme Court's holding in that case relied on the agency relationship between the individual holding the corporate documents and the corporation. Braswell held that for the collective entity doctrine to apply it must be that the "corporation produce[s] the documents subpoenaed." *Braswell*, 487 U.S. at 118. Accordingly, "once the agency relationship terminates, the former employee is no longer an agent of the corporation and is not a custodian of the corporate records." *In re: Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d at 181.

While the issue as to whether the documents themselves are corporate is not before this Court, the documents are unquestionably held in Appellant's *personal* capacity. That determination alone is sufficient to overcome the Government's subpoena. Appellant's motion to quash the subpoena should have been granted.

At the time the Government served the subpoena, Appellant no longer had any formal relationship with Zodiac. In fact, Appellant had decided to retire completely from the technology industry and focus his energies full time on promoting access to and education in science and technology in developing countries. While the latter fact may seem an irrelevant factor, it is indicative of a single reality that I feel is indisputably clear: Appellant is an individual person. And, as such, he is unquestionably entitled to his Fifth Amendment privilege against compelled self-incrimination.

Additionally, the majority's statement that it is inferable from the facts before us that Zodiac Electronics fired Appellant for the sole reason of shielding itself and Appellant from the production of documents is wholly unsupported by the record. And, furthermore, had there been evidence to this effect, the Government would likely have chosen to indict Zodiac itself or current corporate officers who would clearly be prohibited from asserting Fifth Amendment privilege with respect to corporate documents.

[6] As noted above, harmless error analysis is beyond the scope of the Competition.

If the Government wishes to seek the production of corporate documents, it must serve a subpoena upon either the corporation itself or an employee or other individual who falls within the logical confines of the collective entity doctrine. The facts that the documents sought by the Government are not in the corporation's possession and that as far as the Government is aware there is no other employee who has possession of these documents do not justify distorting the collective entity doctrine and eviscerating the protections of the Fifth Amendment.[7]

Religious Bias and the "Extraneous Prejudicial Information Exception" to Rule 606(b)

Although Federal Rule of Evidence 606(b) provides for a general prohibition on the use of juror testimony in an inquiry into the jury's verdict, it allows an exception if "extraneous prejudicial information was improperly brought to the jury's attention." Fed R. Evid. 606(b)(2)(A).

Thus, although the Rule serves an important function in maintaining full and unreserved communication during jury deliberations, there exist situations in which the protective bubble over deliberations must be burst to ensure a Defendant's constitutional rights are not violated and that justice is properly served. Here, the biased views of Appellant's supposed Muslim faith that Jurors #2, #8, and #9 imposed on the jury as a whole constitute the introduction of extraneous prejudicial information falling directly within the 606(b)(2)(A) exception. Through their comments during deliberations, Jurors #2, #8, and #9 proposed and obstinately defended the idea that Mr. Habib's supposed Muslim faith made him more likely to have committed the charged crimes. The extraneous nature of the comments is clear, in that they concern matters "not part of the trial record," *United States v. Benally*, 560 F.3d 1151, 1154 (10th Cir. 2009) (Briscoe, J., dissenting), and yet present the jury with an unfavorable and preconceived opinion of the Defendant. In the same manner that presenting information about a Defendant, learned from watching a television program or reading a newspaper, would introduce inappropriate information for the jury's consideration, allowing religious prejudice to assist in the factual determinations of the jury constitutes the use of extraneous prejudicial information.

Sixth Amendment Right to an Impartial Jury

I find the majority's dismissal of the Appellant's Sixth Amendment argument even more troubling than its erroneous reading of the exceptions within Federal Rule of Evidence 606(b). Appellant has argued that the determinative effect that the prejudicial comments made during deliberations by Jurors #2, #8, and #9 violated his Sixth Amendment right to a trial by an impartial jury. Although state and federal evidence rules hold the deliberative process almost sacrosanct, the Supreme Court has long accepted that, "it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.'" *McDonald v. Pless*, 238 U.S. 264,

[7] Although it would appear that erroneous admission of the subpoenaed documents would not be deemed harmless here, this issue is beyond the scope of the Competition and should not be argued by competitors.

268-69 (1915). Here, we are presented with such an instance where the procedural safeguards used to protect juror privacy directly collide with Appellant Habib's constitutional rights.

As an initial matter, the majority improperly relies on the protections identified by the Supreme Court in *Tanner* as sufficient to protect the Appellant's Sixth Amendment right to an impartial jury. In *Tanner*, the Court did not examine the issue of religious bias during deliberations, but rather overall juror competence and the physical ability to observe and deliberate fairly. The protections of *Tanner* − voir dire, direct observation of jurors during courtroom procedures, reports made by jurors that have identified inappropriate behavior prior to reaching a verdict, and direct evidence other than juror testimony − were identified to address the problem of juror drunkenness and inability to deliberate fairly due to substance abuse. Even the Tenth Circuit in *Benally* conceded that "each protection might not be equally efficacious in every instance of jury misconduct [and that a] judge will probably not be able to identify racist jurors based on trial conduct as easily as he could identify drunken jurors … and voir dire might be a feeble protection if a juror is determined to lie." *United States v. Benally*, 546 F.3d 1230, 1240 (10th Cir. 2008). In the present case, the only indication of bias or overarching prejudice was the dramatic and telling statement by Juror #3 as reported in counsel's affidavit, making the *Tanner* protections simply insufficient to ensure Mr. Habib's Sixth Amendment rights were properly enforced.

Accepting that we have been presented with this direct conflict between 606(b) and the Sixth Amendment, we must now consider to what extent the policies in favor of juror privacy and the finality of judgments must yield, if at all, to a Defendant's Sixth Amendment right to an impartial jury. Although the majority finds solace in the uncompromising approach of the Tenth Circuit in *Benally*, I find the First Circuit's permitted intrusion into the deliberation room, under rare and exceptional situations, more persuasive. Implicitly adopting the rationale of *McDonald v. Pless*, the First Circuit noted that "the rule against juror impeachment cannot be applied so inflexibly as to bar juror testimony in those rare and grave cases where claims of racial or ethnic bias during deliberations implicate a Defendant's right to due process and an impartial jury." *United States v. Villar*, 586 F.3d 76, 87 (1st Cir. 2009).

In my opinion, the majority has adopted the type of dogmatic approach to 606(b) that courts have warned would directly implicate constitutional concerns. Mr. Habib has been convicted of murder by a jury more concerned with his presumed Muslim faith than with the facts surrounding his trial. The jury's obsession with Mr. Habib's presumed faith as well as the criminal propensity some jurors attributed to that faith were clearly inappropriate considerations. Nevertheless, the effect that these improper matters had on the ultimate verdict is clear, in that Juror #5's deciding vote changed from innocent to guilty as a direct result of the pressure and prejudicial comments made by his fellow jurors. Jurors #2, #8, and #9 entered the deliberation room with more than an obstinate prejudice against Mr. Habib; they also made it a priority to convict him, notwithstanding the evidence, so as not to "let one go when we have him in our grasp." To prioritize juror privacy and the general goal of verdict finality over such a blatant disregard of Mr. Habib's constitutional rights is to make a mockery of the guarantee of

fundamental fairness. Accordingly, I would reverse the order denying Appellant's motion for a new trial.

For these reasons, I respectfully dissent.

No. 14-1746

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN HABIB,
Petitioner,
−against−

THE UNITED STATES OF AMERICA,
Respondent.

Date: October 30, 2014

The petition for a writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit is granted, limited to the following questions.

I. Whether as a matter of law, Federal Rule of Evidence 702 precludes expert psychiatric testimony on the credibility of a specific witness.

II. Whether a former employee of a corporation may assert the Fifth Amendment privilege against compelled self-incrimination to the act of producing corporate documents in his possession.

III. Whether statements evincing religious bias made by jurors during deliberations qualify as extraneous prejudicial information within the Federal Rule of Evidence 606(b)(2)(A) exception to the Rule's general prohibition on the use of juror testimony as evidence during an inquiry into the validity of a verdict.

IV. Whether statements evincing religious bias made by jurors during deliberations deprived Petitioner of his Sixth Amendment rights to a fair trial and an impartial jury, where the issues of religion and religious bias were never reached on voir dire and no other evidence suggesting the jury's religious prejudice was shown to the court.