No. 14-30837

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant*,

v.

KURT MIX, also known as Kurt E. Mix, *Defendant-Appellee*.

On Appeal from the United States District Court for the
Eastern District of Louisiana, No. 2:12-CR-171-1 (Hon. Stanwood R. Duval, Jr.)

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN FAVOR OF APPELLEE AND IN SUPPORT OF AFFIRMANCE

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Parties in Related Litigation

In conformity with Rule 28.2.1, amicus National Association of Criminal Defense Lawyers specifies the following large group of persons by a "generic description."

All parties to Master Complaint 879, *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, MDL No. 2179, Docket Entry 879, and all attorneys for those parties.

Dated: January 23, 2015

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates. NACDL is dedicated to advancing the proper, efficient, and just administration of justice, including issues involving juvenile justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has an interest in this case because it implicates criminal defendants' Fifth and Sixth Amendment rights to due process, to be tried by an

[1] All parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus* certifies that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than *amicus*, its counsel, and its members contributed money intended to fund the brief's preparation or submission.

impartial jury, and to confront the witnesses against them. Reversal of the district court's well supported grant of a new trial based on the jury's exposure to prejudicial extraneous information could make it more difficult for criminal defendants to vindicate those rights. NACDL also has an interest in ensuring that Federal Rule of Evidence 606(b), Federal Rule of Criminal Procedure 33, and Supreme Court and Circuit precedent are interpreted and applied in a manner consistent with criminal defendants' Fifth and Sixth Amendment rights.

ARGUMENT

The district court appropriately granted a new trial to protect Defendant-Appellee Kurt Mix's Fifth and Sixth Amendment rights to due process, to be tried by an impartial jury, and to confront the witnesses against him. Those rights were compromised when the jury foreperson overheard a third party say in a courthouse elevator that other individuals in addition to Mix would be prosecuted in connection with the 2010 BP oil spill in the Gulf of Mexico. *See* ROA.7839. This prejudicial, extraneous information tended to reinforce the government's suggestions at trial that Mix was part of a company-wide effort to conceal the rate at which oil was flowing into the Gulf and that he conspired with his supervisor, Jonathan Sprague, to delete incriminating text messages. *See* Mix Br. 3, 17-18, 31-34, 53. Rather than informing the district court of her receipt of extraneous information, as the court had instructed, ROA.7832-33, the foreperson

compounded the prejudice to Mix by telling her fellow jurors at the critical moment when their deliberations had deadlocked that she had overheard information that "influenced her and gave her comfort in reaching a guilty verdict," ROA.7844.

Because the extraneous intrusions on the jury's proceedings here were more than innocuous, the government bore the heavy burden of establishing that there was no reasonable possibility that the intrusions affected the jury's verdict. The objective facts surrounding the intrusions, which the district court correctly considered in accordance with Federal Rule of Evidence 606(b) and Supreme Court and Circuit precedent, demonstrate that the government could not satisfy that burden.

On appeal, the government relies heavily on the contention that Mix did not suffer prejudice because the evidence against him "was substantial." Gov't Br. 37. The government's argument, however, is not only waived, but also improperly casts the evidence in the light most favorable to the government and ignores exculpatory facts. In reviewing the district court's decision, this Court must consider *all* the evidence presented at trial, including evidence favorable to Mix. It should also accord considerable deference to the district court's determination that a new trial was warranted, based on its firsthand experience with the trial proceedings and close familiarity with the record.

District courts are keenly aware of the costs and burdens of retrying a case, for they directly bear those costs and burdens. Where, as here, a district court nevertheless concludes that a new trial is required to avoid unfair prejudice to a defendant, a court of appeals should be hesitant to override the district court's decision. Because the government has come nowhere close to overcoming the deference this Court owes to the district court's decision to grant a new trial, that decision should be affirmed.

I. The District Court Correctly Presumed Prejudice from the Jury's Exposure to Extraneous, Non-Innocuous Information

A jury's exposure to extraneous information not presented as evidence at trial jeopardizes a criminal defendant's Fifth Amendment right to due process and Sixth Amendment rights to an impartial jury and to confront the witnesses against him. *See, e.g.*, *Parker v. Gladden*, 385 U.S. 363, 364 (1966) (per curiam); *Turner v. Louisiana*, 379 U.S. 466, 471-73 (1965). Accordingly, the Supreme Court held as early as 1892 that "[p]rivate communications, *possibly* prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, *at least unless their harmlessness is made to appear*." *Mattox v. United States*, 146 U.S. 140, 150 (1892) (emphasis added).

The Court reiterated this principle in *Remmer v. United States*, 347 U.S. 227 (1954). In *Remmer*, a third party suggested to the jury foreman that he could profit by securing a favorable verdict for a criminal defendant charged with tax evasion.

Id. at 228. This incident was disclosed to the trial judge and prosecutors and was investigated by the Federal Bureau of Investigation, but was not reported to the defendant or his counsel, who only learned of it after the jury returned a guilty verdict. *Id.* The Supreme Court vacated the district court's denial of the defendant's motion for new trial and remanded for the district court to hold a hearing to determine whether the incident "was harmful to the [defendant]." *Id.* at 230. Regarding the allocation of the burden of proof on the issue of prejudice, the Court stated:

> In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, *deemed presumptively prejudicial*, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but *the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant*.

Id. at 229 (emphasis added) (citing *Mattox*, 146 U.S. at 148-50). Although the district court on remand again denied the defendant's new-trial motion, the Supreme Court subsequently held that a new trial was warranted because the evidence presented at the post-remand hearing demonstrated that the bribery discussion and subsequent investigation "disturbed and troubled" the jury foreman, "affect[ing] . . . his freedom of action as a juror." *Remmer v. United States*, 350 U.S. 377, 381 (1956) ("*Remmer II*").

There is disagreement among the federal courts of appeals regarding whether *Remmer*'s presumption of prejudice remains good law in light of the Supreme Court's subsequent decisions in *Smith v. Phillips*, 455 U.S. 209 (1982), and *United States v. Olano*, 507 U.S. 725 (1993). *See infra* pp. 7-8. But both of those cases are readily distinguishable from *Remmer*. *Smith* reversed a grant of federal habeas relief in a case where a state-court juror during trial applied for a job at the District Attorney's Office that was prosecuting the case. *Id.* at 211-12. In doing so, *Smith* stated that "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Id.* at 215. Significantly, however, *Smith* involved only an allegation of "imputed bias," not, as here, that the jury improperly received extraneous information. *Id.* at 214. Furthermore, the decision emphasized the deference due in a federal habeas action to the state trial judge's finding that the defendant was not prejudiced by the juror's conduct—an issue not presented in this direct appeal from a federal criminal trial in which the trial judge *himself* found prejudice. *See id.* at 218.

Olano held that the criminal defendants in that case had not shown that the erroneous presence of alternate jurors during jury deliberations affected their "substantial rights," and thus the error could not provide grounds for appellate relief under Federal Rule of Criminal Procedure 52(b)'s plain error standard. 507 U.S. at 737-41. In rejecting the dissenters' contention that the alternate jurors'

presence was a structural error subject to reversal without any inquiry into prejudice, *see id.* at 743-44 (Stevens, J., dissenting), the *Olano* majority noted that the Court "generally ha[s] analyzed outside intrusions upon the jury for prejudicial impact," and cited *Remmer* as a "prime example" of this practice, *id.* at 738. The Court then noted, "There may be cases where an intrusion should be presumed prejudicial, but a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict?" *Id.* at 739 (citations omitted). According to the Court, it would not make sense to hold that "egregious comments by a bailiff to a juror (*Parker*) or an apparent bribe followed by an official investigation (*Remmer*) should be evaluated in terms of 'prejudice,' while the mere *presence* of alternate jurors during jury deliberations should not." *Id.* *Olano* thus merely recognized that an "outside intrusion[] upon the jury" is not necessarily a structural error reversible without regard for its "prejudicial impact." *Id.* at 738. It did not purport to overrule the presumption of prejudice recognized in *Remmer*; to the contrary, it *acknowledged* that "[t]here may be cases where an intrusion should be presumed prejudicial." *Id.* at 739.

The Sixth Circuit—alone out of all the federal courts of appeals—has held that *Remmer*'s presumption of prejudice has been overruled. *See United States v. Zelinka*, 862 F.2d 92, 95 (6th Cir. 1988); *United States v. Pennell*, 737 F.2d 521,

532 (6th Cir. 1984). The other courts of appeals, including this Court, continue to shift the burden to the government to show a lack of prejudice from intrusions on jury proceedings under certain circumstances, but they differ in their articulations of when this burden shifting is appropriate.[2]

In *United States v. Sylvester*, 143 F.3d 923 (1998), this Court stated that a stringent rule that "*any* outside influence on [a] jury [i]s presumptively prejudicial" "cannot survive *Phillips* and *Olano*." *Id.* at 933-34 (emphasis added). According to *Sylvester*, "the trial court must first assess the severity of the suspected intrusion; only when the court determines that prejudice is likely should the government be required to prove its absence." *Id.* at 934. "This rule," the Court stated, "comports with [this Circuit's] longstanding recognition of the trial court's considerable discretion in investigating and resolving charges of jury tampering." *Id.* Quoting *Olano*, the Court also noted that "regardless of whether the presumption arises, the court's 'ultimate inquiry' must be whether the intrusion will affect the jury's deliberations and verdict." *Id.* (quoting *Olano*, 507 U.S. at 739).

[2] *See United States v. Dehertogh*, 696 F.3d 162, 167 (1st Cir. 2012); *United States v. Greer*, 285 F.3d 158, 173 (2d Cir. 2000); *United States v. Lloyd*, 269 F.3d 228, 238 (3d Cir. 2001); *United States v. Lawson*, 677 F.3d 629, 642 (4th Cir. 2012); *United States v. Sylvester*, 143 F.3d 923, 934 (5th Cir. 1998); *Hall v. Zenk*, 692 F.3d 793, 801 (7th Cir. 2012); *United States v. Blumeyer*, 62 F.3d 1013, 1016-17 (8th Cir. 1995); *Caliendo v. Warden of Cal. Men's Colony*, 365 F.3d 691, 696 (9th Cir. 2004); *Mayhue v. St. Francis Hosp. of Wichita, Inc.*, 969 F.2d 919, 922 (10th Cir. 1992); *United States v. Ronda*, 455 F.3d 1273, 1299 & n.36 (11th Cir. 2006); *United States v. Williams-Davis*, 90 F.3d 490, 497 (D.C. Cir. 1996).

Although this Court's subsequent case law has continued to apply *Sylvester*, *see, e.g.*, *United States v. Smith*, 354 F.3d 390, 395 (5th Cir. 2003), the Court has not defined the precise showing required to establish that "prejudice is likely," thus shifting the burden to the government "to prove [the] absence" of prejudice, *Sylvester*, 143 F.3d at 934. The Court need not resolve this question here because under any reasonable interpretation of the *Sylvester* standard, the district court properly found that "outside irrelevant sources . . . likely affected the jury's deliberations and verdict," and as a result, "Mix was not tried by an impartial jury." ROA.7859; *see also* Mix Br. 29 n.7. Indeed, even the government makes only a halfhearted effort to contend that Mix has not satisfied the *Sylvester* standard. It devotes only one paragraph to the argument, Gov't Br. 31, focusing the remainder of its brief on arguing that it has proved the harmlessness of the jury intrusions at issue.

Nevertheless, if the Court chooses to reach the issue, it should hold that "prejudice is likely" within the meaning of *Sylvester* where, as here, "a defendant introduces evidence that there was an extrajudicial communication that was 'more than innocuous.'" *United States v. Lawson*, 677 F.3d 629, 642 (4th Cir. 2012) (quoting *United States v. Cheek*, 94 F.3d 136, 141 (4th Cir. 1996)). Adopting this standard, which the Fourth Circuit employs, would help harmonize the different formulations among the courts of appeals regarding the circumstances under which

Remmer's presumption of prejudice applies. Furthermore, adopting the standard would be consistent with *Sylvester*'s reliance on the D.C. Circuit's decision in *United States v. Williams-Davis*, 90 F.3d 490 (D.C. Cir. 1996), *see Sylvester*, 143 F.3d at 934 (quoting *Williams-Davis*, 90 F.3d at 497), which in turn expressed agreement with the Fourth Circuit's decision in *Stockton v. Virginia*, 852 F.2d 740 (4th Cir. 1988), *see Williams-Davis*, 90 F.3d at 497 (quoting *Stockton*, 852 F.2d at 745). *Stockton* was decided *after* the Fourth Circuit held in *Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1537 n.9 (4th Cir. 1986), that "more than innocuous interventions" on jury proceedings "justify a presumption of prejudicial effect." *Stockton* applied *Haley* in affirming the district court's determination that certain "not innocuous" extrajudicial communications warranted habeas relief, *Stockton*, 852 F.2d at 745 (internal quotation marks omitted), while other "innocuous" contacts did not, *id.* at 747 (citing *Haley*, 802 F.2d at 1537 & n.9).

This Court's post-*Sylvester* decisions support concluding that "prejudice is likely" under *Sylvester* (thereby shifting to the government the burden of proving harmlessness) where the jury is exposed to extrajudicial communications that are "more than innocuous." As this Court has explained, the *Sylvester* standard on direct appeal is (appropriately) less demanding than the *Brecht v. Abrahamson*, 507 U.S. 619 (1993), harmlessness standard applicable to habeas proceedings, which inquires whether constitutional error "'had [a] substantial and injurious effect or

influence in determining the jury's verdict.'" *Oliver v. Quarterman*, 541 F.3d 329, 341 (5th Cir. 2008) (quoting *Brecht*, 507 U.S. at 637). Under *Brecht*, habeas relief can be granted even if there is less than a "reasonable probability" that the jury would have returned a different verdict absent constitutional error. *Kyles v. Whitley*, 514 U.S. 419, 435-36 (1995) (explaining that "reasonable probability" standard of materiality set forth in *United States v. Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.), requires "greater . . . harm" to defendant than *Brecht*); *see also Woods v. Johnson*, 75 F.3d 1017, 1027 (5th Cir. 1996) ("[T]he *Brecht* standard does not require in order for the error to be held harmful that there be a 'reasonable probability' that absent the error the result would have been different." (quoting *Kyles*, 514 U.S. at 435-36)). Accordingly, as even the government recognizes, *Sylvester* only requires a defendant to "make[] a 'colorable showing of prejudice'" to shift the burden of establishing harmlessness to the government. Gov't Br. 30 (quoting *Smith*, 354 F.3d at 395). The defendant does not need to prove that the jury would have reached a different verdict absent the extrajudicial intrusion, or even that it is reasonably probable that the jury would have done so. *See Kyles*, 514 U.S. at 434 (explaining that *Bagley* "reasonable probability" standard is less demanding than preponderance-of-the-evidence standard).

The correct rule, supported by this Court's case law, is that when the defendant establishes a "more than innocuous" extraneous intrusion—*i.e.*, an extraneous intrusion that "reasonably draw[s] into question the integrity of the verdict," *Stockton*, 852 F.2d at 743—"the burden rests heavily upon the Government," *Remmer*, 347 U.S. at 229, to establish that "there is no reasonable possibility that the jury's verdict was influenced" by the intrusion, *United States v. Ruggiero*, 56 F.3d 647, 652 (5th Cir. 1995) (internal quotation marks omitted). Because the district court here correctly concluded that the highly prejudicial extraneous intrusions here were far from innocuous, *see* ROA.7856-59, the government bore the heavy burden of proving harmlessness—a burden that the government could not satisfy for the reasons explained in Mix's brief, *see* Mix Br. 30-61, and discussed below, *see infra* Section II.

II. In Accordance with Federal Rule of Evidence 606(b), the District Court Properly Considered Objective Evidence in Evaluating the Extrinsic Information's Subjective Effect on Jurors

The Sixth Amendment guarantees a criminal defendant the right to be tried by "an impartial jury." U.S. Const. amend. VI. Accordingly, in *Remmer II*, the Supreme Court evaluated the *actual* "impact . . . upon" the jury foreman of the third party's suggestion that he accept a bribe from the defendant. 350 U.S. at 379. Because the foreman's own testimony showed "that he was a disturbed and

troubled man from the date of the [third-party] contact until after the trial," the Court concluded that a new trial was required. *Id.* at 381.

Federal Rule of Evidence 606(b) limits the type of evidence a court may receive in determining the "impact . . . upon" a jury of extraneous information. *Id.* at 379. Under that rule, "[a] juror may testify about whether . . . extraneous prejudicial information was improperly brought to the jury's attention," but "[d]uring an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment." Fed. R. Evid. 606(b)(1), (b)(2)(A); *see also, e.g.*, 3 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 6:18 (4th ed. 2014) ("While juror testimony or statements are admissible to show that extraneous information came into the jury room, they are not admissible to show what effect such information had on any juror, or on the jury as a whole."). This rule accords with the Supreme Court's recognition in its 1892 *Mattox* opinion that "a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind." 146 U.S. at 149 (internal quotation marks omitted).

Although Rule 606(b) prohibits courts from receiving certain forms of juror testimony, it does not alter a defendant's constitutional right to be tried by a jury whose members are *actually* "impartial." U.S. Const. amend. VI; *see also* 3 Mueller & Kirkpatrick, *supra*, § 6:16 (explaining that Rule 606(b) "regulates the manner of proof, not the grounds on which verdicts may be impeached"). The government is thus wrong that the district court erred by "focusing . . . on the subjective impact of the [elevator] statement on Juror No. 1" and by considering that juror's "subjective motive" for attempting to relay that statement to her fellow jurors. Gov't Br. 28, 50. As this Court has held, a court evaluating a claim of jury taint such as the one at issue here "must reach a judgment concerning the *subjective* effects of objective facts." *United States v. Howard*, 506 F.2d 865, 869 (5th Cir. 1975) (emphasis added). In other words, despite Rule 606(b), the focus of a court's constitutional inquiry remains the extrinsic information's "subjective effect[]" on the particular jurors in the defendant's case. *Id.* Although Rule 606(b) precludes a court from receiving direct juror testimony "purporting to reveal the influence the alleged prejudicial extrinsic matter had upon the jurors," the court can—indeed, "must"—consider "objective facts" not precluded by Rule 606(b) as circumstantial evidence of the extrinsic matter's actual impact on the jury. *Id.*[3]

[3] Statements from this Court to the effect that "[i]nquiries that seek to probe the mental processes of jurors . . . are impermissible," *Llewellyn v. Stynchcombe*, 609 F.2d 194, 196 (5th Cir. 1980) (quoted at Gov't Br. 40); *see also United States v. Martinez*, 547 F. App'x 559, 562 (5th Cir.

To be sure, some courts take the position that a post-trial analysis of a jury's exposure to extraneous information should focus on the intrusion's "probable effect on 'a hypothetical average juror.'" *United States v. Calbas*, 821 F.2d 887, 896 n.9 (2d Cir. 1987); *see also* Gov't Br. 41-42. That, however, is not the law of this Circuit. *See Howard*, 506 F.2d at 869; *cf. United States v. McKinney*, 434 F.2d 831 (5th Cir. 1970) (vacating on rehearing *United States v. McKinney*, 429 F.2d 1019, 1030 (5th Cir. 1970), which used the "hypothetical jury" formulation (internal quotation marks omitted)). In any event, there is little practical difference between an inquiry that considers "objective facts" as circumstantial evidence of extraneous information's "subjective effects" on jurors, *Howard*, 506 F.2d at 869, and a "hypothetical" inquiry that nevertheless considers the actual "circumstances surrounding the introduction of [such] information," *Calbas*, 821 F.2d at 896 n.9 (internal quotation marks omitted).

Here, the district court's decision is supported by precisely the type of objective evidence permitted by Rule 606(b). The court properly considered the fact that three days after overhearing that Mix was not the only individual who would be prosecuted with respect to the BP oil spill, Juror No. 1 attempted to convey this information to her fellow jurors "at a critical juncture"—*i.e.*, "after the

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2013) (cited at Gov't Br. 41); *United States v. Vincent*, 648 F.2d 1046, 1049 (5th Cir. Unit A June 1981) (cited at Gov't Br. 41), merely restate the testimonial bar imposed by Rule 606(b) and *Mattox*. They do not call into question the subjective nature of the constitutional inquiry.

jury had deadlocked." ROA.7858; *see also* ROA.7833, ROA.7839 (explaining that Juror No. 1 overheard the statement "two days before deliberations" began on December 16, 2013, and tried to relate the information to other jurors on December 17); *Mayhue v. St. Francis Hosp. of Wichita, Inc.*, 969 F.2d 919, 926 (10th Cir. 1992) (affirming grant of new trial where jury that had previously reported being deadlocked returned verdict less than three hours after erroneously receiving definitions of key terms). As the district court indicated, Juror No. 1's effort to inject this information at such a pivotal moment in the jury's deliberations "demonstrate[s] objectively" that she considered the information important to the jury's verdict. ROA.7858 ("[I]t appears likely to the Court objectively that [Juror No. 1's] statements were made **specifically to influence the outcome of the decision**."); *see also* ROA.7857 (finding "an objectively reasonable possibility of prejudice" because the evidence indicated that Juror No. 1 "struggled with th[e] information" she overheard, was "bothered" by it, and "was unable to get it out of her mind"); *cf. Remmer II*, 350 U.S. at 381 (ordering new trial where juror's testimony indicated that juror "was a disturbed and troubled man from the date of the [extrinsic] contact until after the trial"); *United States v. Luffred*, 911 F.2d 1011, 1015 (5th Cir. 1990) (fact that "jury specifically called for" non-evidentiary demonstrative chart erroneously given to jury during deliberations "satisfie[d] the

requisite proof of prejudice" because request showed that "jury deemed [the chart] of value in its deliberations").

Juror testimony regarding Juror No. 1's effort to convey what she overheard to other jurors is admissible under Federal Rule of Evidence 606(b)(2)(A) because it is testimony about whether "extraneous prejudicial information was improperly brought to the jury's attention." Fed. R. Evid. 606(b)(2)(A). The government does not seriously contend otherwise. *See* Gov't Br. 44 ("assuming [Juror No. 1's comments] constituted extraneous information"). Here, unlike in *United States v. Brito*, 136 F.3d 397, 414 (5th Cir. 1998) (cited at Gov't Br. 44-45), Juror No. 1 referred to information from "an outside source," *id.*, that "influenced her and gave her comfort in reaching a guilty verdict," ROA.7844.[4]

That Juror No. 1 would consider the comment she overheard significant is hardly surprising. As Mix explains, the comment tended to reinforce the idea that Mix was part of a company-wide effort at BP to cover-up flow-rate information and had conspired with his supervisor, Jonathan Sprague, to delete incriminating text messages. Mix Br. 3, 17-18, 31-34, 53. Through its pretrial rulings, the district court had carefully circumscribed the government's ability to present

[4] The government cites no support for its suggestion that "ma[de] up" facts cannot constitute "extraneous information" under Rule 606(b), Gov't Br. 45 n.9 (emphasis removed), and such a rule would deny relief where it is most warranted—*i.e.*, where a jury has been exposed to prejudicial information not presented as evidence at trial that is in fact untrue. In any event, there is no dispute here that Juror No. 1 was speaking the truth when she told her fellow jurors that she had overheard information outside the courtroom that affected her decision to vote to convict. ROA.7844.

evidence in support of that theory. *See id.* at 19, 35-38. Juror No. 1's *extrajudicial* exposure to information that the district court had concluded was too prejudicial to be presented *at trial*, even with the safeguards of adversarial testing through cross-examination and judicial instructions regarding the evidence's proper use, strongly supports the court's conclusion that the risk of prejudice was sufficiently high to merit a new trial. *See Marshall v. United States*, 360 U.S. 310, 312-13 (1959) (per curiam) (ordering new trial where jurors were exposed to extraneous "information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence," and noting that the information's prejudicial effect may have been "greater" than if the information had been introduced at trial because it was "not tempered by protective procedures").

The district court's analysis of the effect of Juror No. 1's statements on her fellow jurors was similarly "objective[]." ROA.7858. The court emphasized that Juror No. 1 had told the other jurors "at [the] critical juncture . . . after the jury had deadlocked" that she had overheard statements that "rendered [her] comfortable with finding the defendant guilty." *Id.* This "vouchsafing" of the defendant's guilt, the district court properly found, was particularly prejudicial because Juror No. 1 was "entrusted with the important role of foreperson," a "leadership" position. *Id.*; *see also United States v. Snell*, 152 F.3d 345, 347 (5th Cir. 1998) ("[Juror's] position as jury foreman may have increased his ability to influence

jury deliberations."); *Mayhue*, 969 F.2d at 925 ("[T]he fact that the foreperson obtained and read the definitions might have caused those jurors who heard her to give the definitions undue emphasis . . . ."). Again, the government does not seriously contend that any of these facts are subject to Rule 606(b)'s evidentiary bar, *see supra* p. 17, and as Mix has argued, they together establish a sufficiently "reasonable possibility" of prejudice to warrant a new trial. *Ruggiero*, 56 F.3d at 652 (internal quotation marks omitted); *see also* Mix Br. 43-51.

III. In Reviewing the District Court's Decision, this Court Should Consider the Entire Record and Should Reject the Government's Effort to Evade Exculpatory Facts and to Cast the Evidence in the Light Most Favorable to It

In arguing that the jury's exposure to extraneous information did not prejudice Mix, the government relies heavily on its contention that "the evidence against Mix . . . was substantial." Gov't Br. 37. As Mix explains, the government waived this contention by failing to argue below that the evidence against Mix was sufficiently overwhelming to dispel any reasonable possibility of prejudice. *See* Mix Br. 55-57. Even if this argument were not waived, however, the Court should reject the government's effort to evade exculpatory facts and to cast the evidence in the light most favorable to it. *See id.* at 57-61. Rather than considering only the one-sided recitation of facts presented in the government's brief, this Court must base its decision on *all* the evidence presented at trial, including evidence that undermines the government's theory of the case. When reviewing the evidence,

the Court need not draw all factual inferences in the government's favor, as it would do in assessing a constitutional claim that the evidence was insufficient to support a conviction. *See United States v. Del Aguila-Reyes*, 722 F.2d 155, 157 (5th Cir. 1983) (in reviewing sufficiency-of-the-evidence claim, Court "must view the evidence, together with all reasonable inferences, in the light most favorable to the government"). To the contrary, this Court owes deference to the district court's determination, after presiding over Mix's trial and hearing all the evidence, that the risk of prejudice here was sufficiently high to warrant a new trial, despite the costs and burdens that such a proceeding would impose on the district court. *See, e.g.*, *United States v. Smith*, 354 F.3d 390, 394 (5th Cir. 2003) (noting that district court's ruling on new-trial motion based on juror exposure to extraneous information is reviewed for abuse of discretion).

This Court has squarely held that "in determining whether the government has successfully rebutted the presumption of prejudice" resulting from juror exposure to extraneous information, courts should consider, among other things, "the *weight of the evidence* against the defendant." *Ruggiero*, 56 F.3d at 652-53 (5th Cir. 1995) (emphasis added) (internal quotation marks omitted). To weigh evidence, a court must necessarily consider evidence both favorable and unfavorable to the defendant. *See United States v. Robertson*, 110 F.3d 1113, 1117-18 (5th Cir. 1997) (contrasting "weigh[ing] the evidence" in connection with

a motion for a new trial with "view[ing] the evidence in the light most favorable to the verdict"). Accordingly, courts have recognized that new-trial motions based on extraneous intrusions on jury proceedings require review of the "entire record," not merely those portions of the record that support the jury's verdict. *United States v. Weiss*, 752 F.2d 777, 795 (2d Cir. 1985); *accord, e.g.*, *Lacy v. Gardino*, 791 F.2d 980, 986 (1st Cir. 1986) ("record as a whole" (internal quotation marks omitted)); *United States v. Lloyd*, 269 F.3d 228, 239 (3d Cir. 2001) ("entire record" (internal quotation marks omitted)).

Considering the entire record accords with this Court's recognition that the standard for determining whether juror exposure to extrinsic information warrants a new trial—*i.e.*, whether there is a "reasonable possibility" that the jury's verdict was influenced by the information—"is in essence another way of stating the standard for harmless error review established in *Chapman v. California*, 386 U.S. 18 [(1967)]." *Pyles v. Johnson*, 136 F.3d 986, 994 (5th Cir. 1998). The Supreme Court has made clear that *Chapman* requires courts to consider "the whole record" in determining whether a constitutional error was harmless beyond a reasonable doubt. *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Similarly, the Court here must review the entire record in assessing the prejudicial effect of the jury's exposure to extraneous information.

The obligation to consider the entire record also stems from the standard of review applicable to new-trial motions under Federal Rule of Criminal Procedure 33—the procedural vehicle generally used to raise claims of jury misconduct (and the one used in this case). Unlike Rule 29 motions for judgment of acquittal based on insufficiency of the evidence, a court ruling on a new-trial motion is not required to "view[] the evidence in the light most favorable to the verdict." *Robertson*, 110 F.3d at 1117 n.6. Instead, the "trial judge may weigh the evidence and may assess the credibility of the witnesses," subject only to review for abuse of discretion on appeal. *Id.* at 1116-17.

Where, as here, a district court *grants* a defendant's motion for new trial based on jury taint, this Court's review should be especially deferential. District courts are acutely attuned to the judicial costs of a new trial—probably more so than any other court. They "have a strong incentive not to crowd their dockets and squander limited judicial resources by ordering unnecessarily that cases over which they presided, and which have already been taken to verdict, be retried." *People v. Ault*, 95 P.3d 523, 536 (Cal. 2004). Moreover, in contrast to appellate decisions affirming *denials* of new-trial motions, "appellate deference to [a trial] court's [grant of a new trial] produces no final victory for either party, but simply allows the matter to be retried before a new jury" free from "the error or misconduct that infected the original proceeding." *Id.* at 532-33; *see also United States v. Tarango*,

396 F.3d 666, 672 (5th Cir. 2005) ("If [a criminal defendant's new-trial motion were] granted, the Government would simply have a second opportunity to try the accused."). Therefore, this Court should be particularly hesitant to overturn a district court's determination, based on its firsthand experience with the trial proceedings, that the risk of prejudice from juror exposure to extraneous information warrants a new trial. *Cf. Reich v. Thompson*, 346 Mo. 577, 586-587 (1940) ("Appellate courts are . . . more liberal in upholding the trial court's action in sustaining a motion for a new trial than in denying it."). Given the deference to which the district court's decision here is appropriately entitled, no basis exists for reversing the court's grant of a new trial.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's order granting Defendant-Appellee Kurt Mix a new trial.

Dated: January 23, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This *amicus* brief complies with the requirements of Fed. R. App. P. 29(d) because it contains 5674 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font, except for the footnotes, which have been prepared in proportionally spaced Times New Roman 12-point font pursuant to 5th Cir. R. 32.1.

Dated: January 23, 2015

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of *Amicus Curiae* National Association of Criminal Defense Lawyers in Favor of Appellee and in Support of Affirmance with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on January 23, 2015.

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