Memorandum

To: Colorado Evidence Rules Committee

From: CRE 606(b) Subcommittee (Harlan Bockman, Phil Cherner, David DeMuro, Dick Reeve, Chris Mueller [Chair])
Re: Possible Amendment to CRE 606(b) in light of *Pena-Rodriguez* case
Date: August 7, 2017

The CRE 606(b) subcommittee met on August 4th to consider the question whether to recommend to the full Evidence Committee an amendment in light of the Supreme Court's decision in *Peña-Rodriguez v. Colorado,* 137 S.Ct. 855 (2017), which holds that the defense has a due process right to be heard on a challenge to a verdict of guilty in a felony case on account of racial bias operating in the jury room. Due to last minute scheduling issues, Phil Cherner was not able to be with us, so we met without the benefit of the views of a criminal defense lawyer.

Recommendation. Briefly, our recommendation is to do nothing at this time, pending developments to see how *Peña–Rodriguez* plays out. The fact that the Federal Rules Committee also took the view that an amendment would be unwise at this time fortified views on this subcommittee in favor of the same conclusion. Because it may be of interest to the full Colorado Committee, we include with this report a copy of the Minutes of the Federal Committee on its April 2017 meeting (FederalCommitteeMinutes), which describes its thinking on the subject, and a list of Colorado cases construing our Rule 606(b), and a copy of Dan Capra's Memo to that Committee (CapraMemo). Dan is the Chair of the Federal Committee. We also include a a descriptive list of Colorado cases that construe Colorado Rule 606(b) (ReportedColorado606(b)Decisions).

Main underlying concerns. The main concern among subcommittee members was that codifying a fourth exception would encourage further challenges to jury verdicts. CRE 606(b) already allows challenges alleging extraneous information, outside influence, and mistakes in filling out the verdict form. It is understood that we're already there, in one sense: *Peña-Rodriguez* requires courts to entertain challenges based on racial bias or stereotypes. Still, at least three members of the subcommittee felt that adding an exception would invite unnecessary challenges.

There were also concerns over the framing of any possible Colorado amendment. Should the amendment broadly cover any "constitutional" challenge? If so, it might lead to challenges based on evidence that a jury held against a defendant the fact that he didn't testify in the case (which he has a constitutional right not to do). Should it cover only racial discrimination? Members of the subcommittee thought that one could not

foreclose, by drafting a narrow amendment, challenges to a verdict based on gender discrimination, or even discrimination based on sexual preference or identity or religion.

If an amendment were to cover only racial discrimination, should it apply only in criminal cases? There is no constitutional right to a jury trial in state court in civil cases (neither the Colorado Constitution nor the United States Constitution guarantees a right to a jury trial in civil cases in state court), and *Peña-Rodriguez* rests specifically on the Sixth Amendment entitlement to a jury trial in criminal cases: Hence including civil cases in an amendment to CRE 606(b) for racial challenges would go well beyond *Peña-Rodriguez* and would create a new ground for challenge that is not based on the constitutional right that is set forth as the basis for the Court's decision in that case. (Of course one could argue that racial discrimination in the decisionmaking of civil juries violates equal protection, which was the basis for the decision in *Edmonson v. Leesville Concrete Co.,* 500 U.S. 514 (1991), where Supreme Court addressed racial discrimination in civil jury selection mechanisms. Of course *Edmonson* did not address jury decisionmaking.)

Finally, there was some concern that the real question, when a post-verdict challenge is raised alleging jury misconduct, is whether the misconduct actually affected the verdict. CRE 606(b) doesn't contain a standard for awarding new trials: Rather, it states that certain things cannot be considered in such cases ("any matter or statement occurring" during deliberations or "the effect of anything upon [any] . . . juror's mind") and that certain thing can be considered ("extraneous prejudicial information" or "outside influence" or "a mistake in entering the verdict onto the verdict form"). So the problem for a court faced with a challenge that fits an exception is to figure out whether the misconduct likely affected the verdict, and this task the court must perform without asking other jurors what "effect" the misconduct might have had. CRE 606(b), like its federal counterpart, doesn't address the problem of assessing the effect of misconduct on the verdict, leaving trial courts to make a judgement call (maybe "an educated guess") on that question.

Other concerns. Finally, the subcommittee had before it a list describing Colorado cases applying CRE 606(b) (we are including this list in our submission to the full Committee). That list includes one situation where we already have what looks like an exception that allows consideration of challenges to jury verdicts that *also* is not stated as an express exception in CRE 606(b). That other situation is exemplified in the *Wharton* case, where the Colorado Supreme Court held in 1939 that a new trial had to be awarded in a capital case in which the sole holdout juror was browbeaten and threatened repeatedly with curses and vile language, and even physical intimidation, until he finally voted for the death penalty. Two recent Colorado Court of Appeals cases (*Ferrero* in 1993 and *Black* in 1986) imply that this ground of challenge remains available under CRE

606(b), which was of course adopted long after *Wharton* was decided. There are decisions in the federal system that struggle with this situation as well.

The Chair told the Committee that there is yet another unstated exception that federal courts seem to recognize, although the situation hasn't arise in Colorado. That exception covers the situation of jurors who are insane or *non compos mentis*.

Other states: The subcommittee was interested in the Court's Appendix A in the *Peña-Rodriguez* case, set out below, which lists various additional exceptions recognized in various state versions of Rule 606(b). Most create exceptions allowing impeachment by showing that a verdict was reached by chance or by adding amounts and dividing by the number of jurors ("quotient verdicts"): It is clear from legislative history that FRE 606(b) meant to disallow challenges to quotient verdicts, and arguably FRE 606(b) (and Colorado Rule 606(b) as well) disallows such challenges too.

Court's Appendix A: See Ariz. Rules Crim. Proc. 24.1(c)(3), (d) (2011) (exception for evidence of misconduct, including verdict by game of chance or intoxication); Idaho Rule Evid. 606(b) (2016) (game of chance); Ind. Rule Evid. 606(b)(2)(A) (Burns 2014) (drug or alcohol use); Minn. Rule Evid. 606(b) (2014) (threats of violence or violent acts); Mont. Rule Evid. 606(b) (2015) (game of chance); N.D. Rule Evid. 606(b)(2)(C) (2016–2017) (same); Tenn. Rule Evid. 606(b) (2016) (quotient verdict or game of chance); Tex. Rule Evid. 606(b)(2)(B) (West 2016) (rebutting claim juror was unqualified); Vt. Rule Evid. 606(b) (Cum. Supp. 2016) (juror communication with nonjuror).

Respectfully Submitted,
Chris Mueller (for CRE 606(b) Subcommittee)