

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA : Crim. No. 17-532-RBK
v. :
FRANK NUCERA, JR. :

**BRIEF OF DEFENDANT FRANK NUCERA, JR.
IN SUPPORT OF
MOTION TO VACATE CONVICTION ON COUNT THREE**

On the brief:

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PROCEDURAL HISTORY

Defendant Frank Nucera was charged in a three-count indictment, alleging the following:

- Count One: on or about September 1, 2016, Frank Nucera willfully caused bodily injury to Timothy Stroye by assaulting Stroye because of his actual and perceived race and color in violation of Title 18, United States Code, Section 249(a)(1).
- Count Two: On or about September 1, 2016, Frank Nucera, while acting under color of law, assaulted and caused bodily injury to Stroye during the course of an arrest of Stroye ,while Stroye was handcuffed, thereby willfully depriving Stroye of the right to be free from unreasonable search and seizure, in violation of Title 18, United States Code, Section 242.
- Count Three: On or about December 22, 2016, Frank Nucera made materially false, fictitious, and fraudulent statements and representations that he did not touch Stroye during Stroye's arrest and subsequent detention on September 1, 2016, in a matter within the jurisdiction of the executive branch of the Government of the United States, namely a criminal investigation conducted by the United States Department of Justice and

the Federal Bureau of Investigation, in violation of Title 18, United States Code, Section 1001(a)(2).

A jury trial ensued between September 17, 2019 and October 11, 2019 (on which date the jury was discharged). After five jury notes requesting either transcripts or other evidence, and for clarification of the definition of reasonable doubt (Notes 1-5, Dkt. Docs. 104, 106, 108, 110, 112), on October 7, 2019, the jury sent a note to advising that it was deadlocked (on all counts) [Note 6, Dkt. Doc. 114]. The Court instructed the jury:

It is important for you to reach unanimous agreement but only if you can do so honestly and in good conscience. Listen carefully to what the other jurors have to say and then decide for yourself if the Government has proved the defendant guilty beyond a reasonable doubt.

I'm going to ask you to take time and make another effort to come to unanimous agreement.

Trial Transcript 1895:3-9, DA079.

The jury continued deliberating, and sent various notes requesting other items to review. On October 8, 2019, after another note requesting to review another transcript of testimony [Note 7, Dkt. Doc. 116], the jury inquired whether if it was unanimous on one count but deadlocked on the other two counts, what would be its next step. [Note 8, Dkt. Doc. 118]. In response, the Court instructed the jury:

Members of the jury, you do not have to reach unanimous agreement on all the charges

before returning a verdict on some of them. If you have reached unanimous agreement on some of the charges, you may return a verdict on those charges and then continue deliberating on the others. You do not have to do this, but you can if you wish. You should understand that if you choose to return a verdict on some of the charges now, that verdict will be final. You will not be able to change your minds about it later on. Your other option is to wait until the end of your deliberations and return all your verdicts then. The choice is yours. So I'm going to ask you to return to your deliberations and resume your work.

Trial Transcript 1900:22-1901:8, DA085-DA085.

The jury then continued to deliberate and sent two more notes on October 8, 2019 requesting to review additional trial testimony. [Notes 9 and 10, Dkt. Docs. 102, 122]. The jury continued deliberating. It was not until the next day (October 9, 2019) that the jury then returned another note and advised that it had a unanimous verdict regarding Count 3. [Note 11, Dkt. Doc. 124]. The Jury returned the verdict and continued to deliberate regarding Counts 1 and 2.

Two days later, on October 11, 2019, the jury returned another note indicating that it was deadlocked on Counts 1 and 2. [Note 12, Dkt. Doc. 126]. In response, the Court advised:

I'm going to declare a mistrial in this case, which means that your service is done. Please don't be disappointed. You have not let anyone down. We all believe that you've done your best and we all very much appreciate it.

Trial Transcript 1924:24-1925:3, DA108-DA109, and the jury was discharged.

ADDITIONAL FACTS RELEVANT TO PRESENT MOTION

I. FOUR JURORS - FULL ONE-THIRD OF THE JURY - HAVE PROVIDED AFFIDAVITS THAT DEMONSTRATE SIGNIFICANT IMPROPRIETIES AND RACIAL ANIMUS IN THE DELIBERATIONS

Beginning immediately after the jury returned the above-described verdicts, some jurors contacted defense counsel regarding what each of them considered to be improper racial bias, statements and conduct during deliberations by other jurors, the effect such had on the jury's deliberations, and ultimately the guilty verdict which was returned on Count 3. In total four jurors contacted defense counsel. Those jurors have executed affidavits which are attached in the Appendix hereto and which are summarized below.¹

a. Affidavit of -REDACTED- (Juror 3)

The first juror to contact defense counsel, -REDACTED- (Juror 3) (referred to in a redacted copy of this brief only as Juror 3 due to concerns as expressed in her Affidavit), called the office of Mr. Nucera's counsel almost immediately after the jury was discharged. (DA001-DA014, Affidavit of K.C./Juror 3,

¹ Of course, these summaries are not all inclusive. The defendant of course will rely on the full content of the submitted Affidavits, not just the summaries herein.

¶2-4). Ms. -REDACTED- (Juror 3) requested to meet with, and did meet with, defense counsel to express her concerns.²

-REDACTED- (Juror 3) reported multiple concerns about the jury's deliberations, particularly the words and conduct of other jurors, and how such infected the decision to return a verdict of guilty on Count 3. (DA001-DA014, Affidavit of K.C./Juror 3, Affidavit of K.C./Juror 3, ¶ 5). Ms. -REDACTED- (Juror 3) also wrote a note to the Court as a result of the impact on her what occurred during jury deliberations. (DA001-DA014, Affidavit of K.C./Juror 3, Affidavit of K.C./Juror 3, ¶ 7).

In her Affidavit, -REDACTED- (Juror 3) states that "bullying, racial tension and unfounded accusations" influenced the jury deliberations. (DA001-DA014, Affidavit of K.C./Juror 3, ¶ 5). She stated plainly that the conduct and comments by certain other jurors made her to feel the if she did not vote to convict Frank Nucera, she would be labeled a racist. (DA001-DA014, Affidavit of K.C./Juror 3, ¶ 6). Unfortunately, as is evident from -REDACTED-'s (Juror 3's) Affidavit, and the others attached hereto, the jury deliberations often focused on more

² The Court had advised all counsel that although counsel could not contact jurors, if jurors contacted counsel, then counsel could speak with any jurors who did so.

than the only relevant issue: whether the government had met its burden of proof with regard to the offenses charged.

-REDACTED- (Juror 3) described comments and reactions by one particular juror, -REDACTED- (Juror 12), who improperly made references to historical racial inequities and improprieties, to racially discriminatory experiences her sons allegedly suffered, and to the race of other jurors. The -REDACTED- (Juror 3) Affidavit also establishes (1) that other jurors at times played upon the race of the jurors themselves, as well as historical racial discrimination and bad conduct toward black persons, as reasons to convict Frank Nucera, and (2) that as deliberations continued, other jurors also began to exert on -REDACTED- (Juror 3) and other jurors who were voting to acquit on all counts, improper pressure³ to convict Nucera. (DA001-DA014, Affidavit of K.C./Juror 3). A conviction reached by such improper means cannot be permitted to stand.

Comments such as those extrajudicial ones made by -REDACTED- (Juror 12) clearly had an improper impact and influence on other jurors, as -REDACTED- (Juror 3) and others recount. Juror -REDACTED- (Juror 6) in response to those

³ The Affidavits demonstrate that at times such pressure to convict because of historical racism, or sympathy for experiences suffered by juror -REDACTED- (Juror # 12) or other jurors, was overt, and at other times it was more subtle.

experiences which -REDACTED- (Juror 12) recounted, stated "I'm sorry, I'm so sorry, I remember those days", and embraced -REDACTED- (Juror 12). (DA001-DA014, Affidavit of K.C./Juror 3, ¶ 27). Juror -REDACTED- (Juror 5) similarly embraced -REDACTED- (Juror 12). (DA001-DA014, Affidavit of K.C./Juror 3, ¶ 28).

-REDACTED- (Juror 3) stated that she did not see -REDACTED- (Juror 12) review any evidence on the iPad that was provided for such purpose, despite other jurors asking her to do so to consider alternative points of view regarding the evidence. Per -REDACTED- (Juror 3), -REDACTED- (Juror 12) told the other jurors that the only thing she was writing in her juror notebook was a list of states to which she had traveled or planned to travel. (DA001-DA014, Affidavit of K.C./Juror 3, ¶ 11-12).

-REDACTED-'s (Juror 3's) Affidavit also recounts that -REDACTED- (Juror 12) not only expressed racial bias, but also bias against police officers, and particularly a presumption that police officers mistreat black people. Prior to the jury reaching a verdict on Count 3, -REDACTED- (Juror 12) told the rest of the jurors anecdotes about her sons being treated unfairly by police and stopped or approached without reason by the police other than that they were black men. -REDACTED- (Juror 12) specifically told the jurors that one son was stopped

by police three times in one night for nothing more than "driving while black." -REDACTED- (Juror 12) stated that black males need to be taught from a young age to submit to the demands of police officers. (DA001-DA014, Affidavit of K.C./Juror 3, ¶ 18-19).

-REDACTED- (Juror 12) not only expressed these opinions about police officers, and her own racially charged opinions, but she also accused other jurors of improper racial bias in favor of Frank Nucera. ((DA001-DA014, Affidavit of K.C./Juror 3, ¶ 14-15 and 21). -REDACTED-'s comments, opinions, anecdotes and accusations tainted the jury's deliberations. Such caused -REDACTED- (Juror 3) to feel that a "not guilty" vote for Frank Nucera was a vote to condone the racist remarks attributed to him, regardless of whether the evidence proved the essential elements of the crime(s) charged.

-REDACTED-'s (Juror 3's) Affidavit explains how other jurors in addition to -REDACTED- (Juror 12) began to express bias as the atmosphere in the deliberation room became increasingly racially charged. Juror -REDACTED- (Juror 1) stated to -REDACTED- (Juror 3) that -REDACTED- (Juror 3) "would not find Frank Nucera guilty even if he shot Stroye in the face." (DA001-DA014, Affidavit of K.C./Juror 3, ¶ 21). -REDACTED- (Juror 3) was so upset by the comments made by -

REDACTED- (Juror 1) that she went to the bathroom and cried. (DA001-DA014, Affidavit of K.C./Juror 3, ¶ 21). A third juror began to express improper bias further into the deliberations, - REDACTED- (Juror 5). (DA001-DA014, Affidavit of K.C./Juror 3, ¶ 22-23). -REDACTED- (Juror 3) expressed that she felt she would have to change her not guilty vote to avoid being aligned with the racist language used by Frank Nucera, not because she thought that the government proved its case. -REDACTED- (Juror 3) stated that she voted guilty "to dispel any impression that I am a racist[.]" (DA001-DA014, Affidavit of K.C./Juror 3, ¶ 23).

-REDACTED- (Juror 12) additionally improperly told the other jurors about how she had traveled through the South in her youth and had to relieve herself in jars because of segregation in restrooms/facilities, invoking emotional reactions from several jurors. (DA001-DA014, Affidavit of K.C./Juror 3, ¶ 26-28). -REDACTED- (Juror 12) also made a comment regarding shooting other jurors because they deny being racist. (DA001-DA014, Affidavit of K.C./Juror 3, ¶ 29).

Many of the same concerns, and testimony to racially biased comments, stories, improper statements, and conduct by certain jurors during the deliberations, that were reported by - REDACTED- (Juror 3) also are reported in Affidavits by other jurors who contacted Nucera's counsel, as well as admissions

made by -REDACTED- (Juror 12) herself. (DA112-DA116, Philadelphia Inquirer article featuring interviews with juror -REDACTED- (Juror 12) and juror Lipscomb (Juror 1), discussed in more detail below).

-REDACTED- (Juror 3) was not alone in her observations, and her experienced feelings of discomfort and pressure regarding the jury deliberations and her ultimate vote on Count 3. As -REDACTED- (Juror 3) states in her Affidavit, the next morning of continued deliberations, another juror, -REDACTED- (Juror 4), told -REDACTED- (Juror 3) that she had not been able to sleep, as she immediately had regretted changing her initial not-guilty vote to guilty, due to having felt pressure which she described similarly to the pressure -REDACTED- (Juror 3) expressed that she felt. (DA001-DA014, Affidavit of K.C./Juror 3, Par. 25). Ms. -REDACTED- (Juror 4) also contacted defense counsel.

b. Affidavit of -REDACTED- (Juror 4)

Juror -REDACTED- (Juror 4) also has provided an Affidavit. Ms. -REDACTED- (Juror 4) states in her Affidavit that she also felt pressured into a guilty vote on Count 3, and that it "was not a product of [her] true thoughts about the evidence." (DA015-DA023, Affidavit of J.N./Juror 4, ¶ 4). Juror -REDACTED- (Juror 4) further states that she

felt pressured into the guilty verdict even though I believed the government did not prove

the case. Even when I voted guilty I did not believe that Mr. Nucera was guilty.

(DA015-DA023, Affidavit of J.N./Juror 4, ¶ 4).

-REDACTED- (Juror 4) tried to focus the jury's attention on the evidence using the iPads they were provided, but she was "shut down" by juror -REDACTED- (Juror 12). She states that juror Addo (Juror 9), and other jurors were "nasty" to her when she tried to do so. (DA015-DA023, Affidavit of J.N./Juror 4, ¶ 4).

Combined with such, -REDACTED- (Juror 4)

also felt pressure from the jury instructions given to us (and other jurors stated so) that we could not have a hung jury, that we had to reach some verdict. I just voted that way [guilty for Count 3] because every time I tried to express my thoughts on the evidence and the proofs (or the failures) I was shut down by Juror -REDACTED- (Juror 12) or Juror -REDACTED- (Juror 9) even in the face of clear evidence to which I was referring and actually bringing up on the Ipad provided. I felt too alone and the responses to me from some other jurors were nasty each time.

(DA015-DA023, Affidavit of J.N./Juror 4, ¶ 4).

Ms. -REDACTED- (Juror 4) described juror -REDACTED- (Juror 12) telling stories about her sons being racially profiled by the police. (DA015-DA023, Affidavit of J.N./Juror 4, ¶ 7). She also recalled -REDACTED- (Juror 12) using the expression "driving while black" (DA015-DA023, Affidavit of J.N./Juror 4,

¶7) and explaining how as a mother of black sons she had to teach her sons how to interact with police. (DA015-DA023, Affidavit of J.N./Juror 4, ¶ 8). -REDACTED- (Juror 4) also recalled -REDACTED- (Juror 12) telling the same story that -REDACTED- (Juror 3) recounted in her Affidavit, about -REDACTED-'s (Juror 12's) childhood in the south when she had to urinate in a jar due to segregation restrictions. (DA015-DA023, Affidavit of J.N./Juror 4, ¶ 9). Ms. -REDACTED- (Juror 4) also recalled a comment by -REDACTED- (Juror 12) in the context of her disdain for people who claim understanding of the sensitivity of racial issues because they "have black friends", that -REDACTED- could "shoot you all". (DA015-DA023, Affidavit of J.N./Juror 4, ¶ 10). Ms. -REDACTED- (Juror 4) recounts in her Affidavit, like Ms. -REDACTED- (Juror 3) reported, that other jurors had emotional and sympathetic reactions to Ms. -REDACTED- (Juror 12) after she told stories of her personal experiences with racism and discrimination, including crying and hugging -REDACTED- (Juror 12). (DA015-DA023, Affidavit of J.N./Juror 4, ¶ 11).

-REDACTED- (Juror 4) in her Affidavit also reveals other improprieties in the comments of certain jurors during deliberations. For example, she overheard Juror -REDACTED- (Juror 5) make a comment about wanting to rip the sink off the bathroom wall [because he was so angry from the deliberations].

Juror -REDACTED- (Juror 4) also overheard a comment by Juror -REDACTED- (Juror 1) asking -REDACTED- (Juror 4) how she would feel if Nucera spoke to -REDACTED- (Juror 4) that way [meaning using racially derogatory terms]. (DA015-DA023, Affidavit of J.N./Juror 4, ¶ 12-13). -REDACTED- (Juror 4) stated that this comment made her "feel like [she] was being racist to vote not guilty, even though not guilty was [her] true belief from the evidence." (DA015-DA023, Affidavit of J.N./Juror 4, ¶ 13).

Unrelated to the issues regarding racial bias and anti-law enforcement bias, -REDACTED- (Juror 4) also notes the problematic issue that Juror -REDACTED- (Juror 6) looked up definitions of "unreasonable" and "unnecessary" on his own and supplied the definitions to jurors, which stands as another example of impermissible behavior by a juror during deliberations that tainted the deliberation process. (DA015-DA023, Affidavit of J.N./Juror 4, ¶ 16). This occurrence also was noted by Jurors -REDACTED- (Juror 2)⁴, Marc -REDACTED- (Juror 11)⁵, and -REDACTED- (Juror 3)⁶ in each of their affidavits.

⁴ DA024-DA036, Affidavit of D.V./Juror 2, ¶ 27.

⁵ DA037-DA046, Affidavit of M.C./Juror 11, ¶ 23.

⁶ DA001-DA014, Affidavit of K.C./Juror 3, ¶ 34.

c. Affidavit of -REDACTED- (Juror 2)

Juror -REDACTED- (Juror 2) also has submitted an Affidavit (DA024-DA036, Affidavit of D.V./Juror 2) regarding the jury's deliberations. Ms. -REDACTED- (Juror 2) explained that she "felt compelled to contact defense counsel after trial," and that her feeling was even stronger due to having read a newspaper article in the Philadelphia Inquirer (discussed in more detail below) in which -REDACTED- (Juror 12) was quoted extensively (see DA112-DA116). (DA024-DA036, Affidavit of D.V./Juror 2, ¶ 4). In that article, -REDACTED- (Juror 12) admitted to - indeed it seems bragged about - many of the very same actions and comments that had given pause to juror - REDACTED- (Juror 2) and the other affiant jurors.

-REDACTED- (Juror 2) recalled a statement by -REDACTED- (Juror 12) during the trial (even prior to deliberations) clearly intended to (only slightly subtly) communicate that she would hold out in favor of conviction until everyone else voted guilty. -REDACTED- (Juror 12) told her fellow Nucera trial jurors that she had sat on a prior jury and had told those jurors "Hope you are all thinking guilty, I can be here all day, I have f_ _ _ king no where to be." (DA024-DA036, Affidavit of D.V./Juror 2, ¶ 5). In addition to her thinly-veiled comment

regarding her prior jury service, -REDACTED- (Juror 12) later commented with regard to the Nucera deliberations that "I'm retired, this is \$50 more per day than I am making at home, I have all the time in the world." (DA024-DA036, Affidavit of D.V./Juror 2, ¶ 10). The other affiant jurors had similar recollections of -REDACTED- (Juror 12) making it clear she had plenty of time to wait for the guilty result she wanted, with -REDACTED- (Juror 12) specifically referencing her status as a retiree (thus exerting pressure on those jurors who had jobs and other obligations to which they needed to return). (See DA001-DA014, Affidavit of K.C./Juror 3, ¶ 22; DA015-DA023, Affidavit of J.N./Juror 4, ¶ 5). Ms. -REDACTED- (Juror 2) even recalled Juror -REDACTED- (Juror 5) jokingly stating essentially that they would all have to vote the way -REDACTED- (Juror 12) does [if they wanted to go home]. (DA024-DA036, Affidavit of D.V./Juror 2, ¶ 5).⁷ Indeed, the proverb "Many a true word is spoken in jest" here was borne out: the jury did not go home until there was at least one guilty verdict.

⁷ This pressure to convict if jury service ever was to end - at least in some jurors' minds - was perceived to be exacerbated by the instruction given to the jurors when they indicated deadlock, as indicated by juror -REDACTED- (Juror 4) in her Affidavit: She "felt pressure from the jury instructions given ... (and other jurors stated so) that we could not have a hung jury, that we had to reach some verdict." (DA015-DA023, Affidavit of J.N./Juror 4, ¶ 4).

Like the other affiant jurors, -REDACTED- (Juror 2) reported multiple examples of behavior by Ms. -REDACTED- (Juror 12) that exposed Ms. -REDACTED-'s (Juror 12) improper racial bias, among other things (discussed *infra*). For example, -REDACTED- (Juror 2) states that Ms. -REDACTED- (Juror 12) "yelled" at her that she did not know what it was like to be black. (DA024-DA036, Affidavit of D.V./Juror 2, ¶ 5). Similar to -REDACTED- (Juror 3) and -REDACTED- (Juror 4), -REDACTED- (Juror 2) reported that -REDACTED- (Juror 12) told the other jurors stories such as her son being stopped by police for "driv[ing] black" (DA024-DA036, Affidavit of D.V./Juror 2, ¶ 7) and one of her sons being approached by police in his own yard simply because he was black. (DA024-DA036, Affidavit of D.V./Juror 2, ¶ 9). -REDACTED- (Juror 2) also remembered, like the other affiant jurors, that -REDACTED- (Juror 12) described having to teach her sons, because they are black males, how to "answer a cop". (DA024-DA036, Affidavit of D.V./Juror 2, ¶ 8).

-REDACTED- (Juror 2) also recalled a comment by Juror -REDACTED- (Juror 1) which revealed improper bias. Ms. -REDACTED- (Juror 1) essentially accused other juror(s) of improper bias, stating "You would find him [Nucera] not guilty if he put a gun to Stroye's head and shot him". (DA024-DA036, Affidavit of D.V./Juror 2, ¶ 11). -REDACTED- (Juror 2) also remembered -REDACTED- (Juror 12) making a comment in response to juror -

REDACTED- (Juror 3) discussing her own view of the evidence, in which -REDACTED- (Juror 12) stated that -REDACTED- (Juror 3) wanted "12 white jurors." (DA024-DA036, Affidavit of D.V./Juror 2, ¶ 12). The repeated injection of the race and personal negative experiences that jurors (or their family members) suffered because of their race, had no place in the deliberations.

-REDACTED- (Juror 2) recalled, as -REDACTED- (Juror 3) also presented in her Affidavit, that -REDACTED- (Juror 3) was caused to retreat to the bathroom during deliberations because she was so upset by the comments by -REDACTED- (Juror 1) and -REDACTED- (Juror 12). (DA024-DA036, Affidavit of D.V./Juror 2, ¶ 14). -REDACTED- (Juror 2) revealed additionally that when -REDACTED- (Juror 3) was not in the room due to having exited upset, Juror -REDACTED- (Juror 5) told the rest of the jurors that -REDACTED- (Juror 3), has an adopted⁸ black daughter. (DA024-DA036, Affidavit of D.V./Juror 2, ¶ 15). That comment by juror -REDACTED- (Juror 5) makes clear that the comments being directed (in this instance) at -REDACTED- (Juror 3) were suggesting that she (-REDACTED-, Juror 3) was a racist.

⁸ While -REDACTED- (Juror 5) used the terms "adopted", -REDACTED- states in her Affidavit that she and her husband were granted Kinship Legal Guardianship when their "daughter" (as -REDACTED- refers to her) was 15 years old. (DA001-DA014, Affidavit of K.C./Juror 3, ¶ 3).

Becoming increasingly concerned about the improper personal attacks and extrajudicial information being addressed in the deliberations, -REDACTED- (Juror 2) advised the Deputy Clerk that some of the jurors were being called racists and that she was concerned with "disrespect and racial comments" in the jury room. The Deputy Clerk advised her to write a note to the Judge if she "had any further issues", but -REDACTED- (Juror 2) noted that there were no envelopes available and she did not want the foreperson to read her note to the judge. (DA024-DA036, Affidavit of D.V./Juror 2, ¶ 16). She was not provided any means to contact the judge anonymously or even privately, and no indication of this concern was presented to counsel.

-REDACTED- (Juror 2) stated that she felt that a deadlock would not be accepted by the Court and that she and the other jurors all believed "we had to reach at least one unanimous verdict." According to -REDACTED- (Juror 2), -REDACTED- (Juror 1) expressed this belief as well⁹, stating "I feel he's not going to just let us leave without a decision on one of these counts." (DA024-DA036, Affidavit of D.V./Juror 2, ¶ 17). Of course with the jurors understanding that at least one juror (-REDACTED-, Juror 12) vehemently would vote for nothing but guilty, essentially the jury had a shared understanding that their only

⁹ As discussed supra, -REDACTED- had the same reaction to the jury instruction. (DA015-DA023, Affidavit of J.N./Juror 4, ¶ 4).

way out of the jury room was a conviction on at least one count. Accordingly, -REDACTED- (Juror 2) changed her vote and felt regretful immediately after the jury returned a guilty verdict on Count 3. (DA024-DA036, Affidavit of D.V./Juror 2, ¶ 18).

When the jury returned for further deliberations the following day (being still deadlocked on the two remaining counts), -REDACTED- (Juror 2) learned that she was not the only regretful juror. Jurors -REDACTED- (Juror 3), -REDACTED- (Juror 4) and -REDACTED- (Juror 11) all expressed similar regret and discomfort at what they considered a "compromised verdict". (DA024-DA036, Affidavit of D.V./Juror 2 at ¶ 19).

Other inappropriate and obviously biased comments by -REDACTED- (Juror 12"), reported by -REDACTED- (Juror 3) and Ms. -REDACTED- (Juror 4), were described similarly by -REDACTED- (Juror 2). For example, -REDACTED-'s (Juror 12's) story about urinating in a jar due to segregation in the South, and her comment about shooting other jurors if she had a gun, also is presented by -REDACTED- (Juror 2) in her affidavit. (DA024-DA036, Affidavit of D.V./Juror 2, ¶ 23). At this point, -REDACTED- (Juror 2) expressed her concerns to the Deputy Clerk for a second time, resulting in the Judge coming to the jury room. (DA024-DA036, Affidavit of D.V./Juror 2, ¶ 24-25). -REDACTED- (Juror 2) started crying and "told the Judge that

there was serious disrespect going on in the jury room" and in her Affidavit states that she may have also said that there were threats being made. (DA024-DA036, Affidavit of D.V./Juror 2, ¶ 25). According to -REDACTED- (Juror 2), the Court advised the jurors to leave personal feelings out of deliberations, and directed the jurors to return to the jury room and decide whether they were going to continue. (DA024-DA036, Affidavit of D.V./Juror 2, ¶ 25).

d. Affidavit of -REDACTED- (Juror 11)

-REDACTED- (Juror 11) also was troubled by what occurred in the jury room, and contacted defense counsel the same day the jury was discharged. -REDACTED- (Juror 11) also has provided an Affidavit which described inappropriate words and conduct by other jurors which tainted the deliberation process. He recounted that he stated to -REDACTED- (Juror 12) that she and the other jurors voting for conviction may have been looking at things through a "different lens", and -REDACTED- (Juror 12) responded, "No sh--, Sherlock, we're black." (DA037-DA046, Affidavit of M.C./Juror 11, ¶ 3). -REDACTED- (Juror 12) herself recounted that comment, almost verbatim, in an interview she provided to the Philadelphia Inquirer promptly after the jury was discharged. (DA112-DA116, addressed in further detail below at Section II).

As addressed in more detail *infra* Section II, although -REDACTED- (Juror 12) provided responses to questions on the written juror questionnaire, and during individual *voir dire*, both of which were meant to weed out any improperly biased jurors, including bias against police officers¹⁰, she provided benign responses to those questions which were not in line with her actual beliefs and thoughts.¹¹ According to the sworn affidavit of -REDACTED- (Juror 11), -REDACTED- (Juror 12) stated during deliberations that she has a "problem with cops" and that she "told them out there" (referring to the Court and counsel during jury selection) that she had such a problem and did not know why she was chosen. However, in reality, during *voir dire* -REDACTED- (Juror 12) concealed her bias against police officers and presented an unbiased and neutral persona to the Court and counsel, depriving defendant Frank Nucera of the opportunity to potentially strike her from the jury pool based on her bias against police officers. (See Facts Section II below).

-REDACTED- (Juror 11) also recalled many of the examples given by the other jurors who have provided affidavits, of -

¹⁰ The issue of racial bias by jurors and bias against police officers were of course an important issues in jury selection for Defendant Nucera, who was a high-ranking police officer charged with committing racially motivated crimes in his capacity as a police officer.

¹¹ See DA047-DA074, Juror Questionnaire of -REDACTED- (Juror 12), and DA120-DA301, Transcript of Jury Selection, both addressed in more detail below at Section II.

REDACTED- (Juror 12) exposing her biases and making inappropriate comments. For example, -REDACTED- (Juror 11) reported the same incident that -REDACTED- (Juror 3) relayed in which Ms. -REDACTED- (Juror 12) yelled at -REDACTED- (Juror 3) that she did not know what it was like to be a black person. (DA037-DA046, Affidavit of M.C./Juror 11 at ¶ 5). -REDACTED- (Juror 11) also gave the same example of -REDACTED-'s (Juror 12's) statement to the effect that -REDACTED- (Juror 4) would prefer to have 12 white jurors. (DA037-DA046, Affidavit of M.C./Juror 11 at ¶ 6). -REDACTED- (Juror 11) stated that -REDACTED- (Juror 12) was "injecting into the deliberations her race and experiences related to race." (DA037-DA046, Affidavit of M.C./Juror 11 at ¶ 7).

Similar to the other jurors, -REDACTED- (Juror 11) recalled -REDACTED- (Juror 12) stating that she would shoot some of the other jurors if she had a gun (DA037-DA046, Affidavit of M.C./Juror 11, ¶ 12); explaining how black mothers have to worry about their sons' treatment by the police; (DA037-DA046, Affidavit of M.C./Juror 11, ¶ 10); describing her sons being approached or stopped by the police based on their race and using the term "driving while black" (DA037-DA046, Affidavit of M.C./Juror 11, ¶ 11-12); and telling the story of urinating in a jar due to segregation when she was growing up in the South (DA037-DA046, Affidavit of M.C./Juror 11, ¶ 13).

-REDACTED- (Juror 11) also presented other occurrences in his Affidavit which also tainted the jury's impartiality by injecting jurors' personal biases and past experiences into the deliberations. For example, he recalled that Juror -REDACTED- (Juror 6) stated that he felt the need to make "reparations" for the treatment of African Americans and for his own personal "bad behavior" in his youth. (DA037-DA046, Affidavit of M.C./Juror 11 at ¶ 17). At another point during deliberations, -REDACTED- (Juror 11) recounted, -REDACTED- (Juror 6) made a tearful "speech" about how if they did not convict Frank Nucera, "these things will continue to happen." (DA037-DA046, Affidavit of M.C./Juror 11 at ¶ 15).

-REDACTED- (Juror 11) also described being intimidated when he (-REDACTED-, Juror 11) was still expressing his opinion that Nucera was not guilty regarding all counts, and juror -REDACTED- (Juror 5) pounded the table while exclaiming "Motherf---er!" and exited the room. (DA037-DA046, Affidavit of M.C./Juror 11 at ¶ 19). This conduct and exclamation made -REDACTED- (Juror 11) feel "that the other jurors were perceiving [him] as a racist simply because [he] was voting not guilty". (DA037-DA046, Affidavit of M.C./Juror 11 at ¶ 19; see also DA024-DA036, Affidavit of D.V./Juror 2, ¶ 10). Juror -REDACTED- (Juror 5) continued in the vein as had -REDACTED- (Juror 12) that a hung jury was not an option, stating to -REDACTED- before the guilty

verdict on Count 3, that he was "not going to let you [-REDACTED-, Juror 11] hang this jury, I don't care if it takes three weeks". (DA037-DA046, Affidavit of M.C./Juror 11 at ¶ 20).

As did other affiant jurors¹², -REDACTED- (Juror 11) reports that -REDACTED- (Juror 12) repeatedly stated that she had an infinite amount of time to wait for a guilty verdict. (DA037-DA046, Affidavit of M.C./Juror 11 at ¶ 20). -REDACTED- (Juror 11) further reported inflammatory statements made by Juror -REDACTED- (Juror 1) and Juror Addo (Juror 9) which equated the Nucera verdict with the continued abuse of power by the police against black men. (DA037-DA046, Affidavit of M.C./Juror 11, ¶22).

II. JUROR -REDACTED- (JUROR 12) GAVE A NEWSPAPER INTERVIEW IN WHICH SHE CONFIRMED THE CONCERNS OF OTHER JURORS AND ADMITTED HER IMPROPER BIASES

The similar reports of improprieties in the deliberations reflected in the four juror affidavits (constituting a full 1/3 of the jurors) of course is enough to erode confidence in the verdict regarding Count 3 and to require vacation of the conviction. However, there is additional - and adequate in itself - proof of improper bias provided by -REDACTED- (Juror 12) *herself*. -REDACTED- (Juror 12) opted to give an interview

¹² See DA001-DA014, Affidavit of K.C./Juror 3, ¶ 22; DA015-DA023, Affidavit of J.N./Juror 4, ¶ 5; DA024-DA036, Affidavit of D.V./Juror 2, ¶ 10.

to a reporter from the Philadelphia Inquirer regarding the jury deliberations within a day of the jury being discharged. (DA112-DA116, Philadelphia Inquirer article).

-REDACTED- (Juror 12) indeed presented to the reporter several statements demonstrating that she never should have been on the jury which was to decide Frank Nucera's case, but for her stealth presentation in her written and verbal responses during jury selection. Even the very first line of the article corroborates the events described in the attached affidavits: "They yelled. They wept. They slammed doors. They took increasingly frequent smoking breaks. They struggled with issues of race." (DA112-DA116). In describing the jury deliberations based on information reported by -REDACTED- (Juror 12), the article states:

The jurors were not far into deliberations when the issue of their own races came up.

"There was one gentleman who said to us in the early days, **'The only reason you African American women are voting this way is because you're black,'** -REDACTED- said. "I went, **'No s-, Sherlock.'**"

The next morning, she said, one white juror who has black family members confronted that juror. On the last day of deliberations, -REDACTED- **spoke to the panel about her own experience as an African American woman, including her life in the South.**

(DA112-DA116, bold added). -REDACTED- (Juror 12) also confirmed that male jurors were crying ("All the men who thought that he

was guilty were crying.”, DA112-DA116) and even stated that she “assumed” defendant Frank Nucera was guilty of “something” based on recordings in which he used racially insensitive language: “‘When somebody used the racist commentary that he has used his whole life, and it’s on tape, the racist things he said, **you just automatically have to assume that he would do something to somebody,**’ -REDACTED- [Juror 12] said.” (DA112-DA116, bold added).

Juror -REDACTED- (Juror 1), who also agreed to an interview with the Inquirer, is quoted in the same article, though less extensively. Juror -REDACTED- (Juror 1) confirmed that the jurors were focused on the racial language of Defendant Nucera: “-REDACTED- [Juror 1] said the panel was clear about the racial animus that prosecutors alleged Nucera had expressed in the predominantly white township. ‘We all kind of agreed that the extensive racial piece of it was absolutely there, and that it was an atrocity,’ -REDACTED- [Juror 1] said.” (DA112-DA116).

III. JUROR -REDACTED- (JUROR 12) MADE MISREPRESENTATIONS DURING VOIR DIRE WHICH IMPROPERLY CONCEALED HER RACIAL BIAS AND BIAS AGAINST POLICE OFFICERS

Juror -REDACTED- (Juror 12) completed a well-vetted written juror questionnaire, and was thereafter engaged in oral individual *voir dire* by the Court, the Assistant U.S. Attorney(s), and Nucera’s defense counsel. Given the

allegations in this matter and Mr. Nucera's status as a 34 year police veteran and Police Chief, both the juror questionnaire and verbal *voir dire* included questions designed to uncover any biases held by, or past experiences of, each potential jurors that would affect his/her ability to be completely fair and impartial. This vetting of jurors was important to all parties, and particularly Mr. Nucera whose liberty was at stake, in light of the evidence and issues that would pervade the trial: alleged racial animus motivating alleged conduct; racially charged language that would be presented to the jury in recordings; and allegations of excessive force by a police officer. The *voir dire* process could be effective, of course, only if the potential jurors were candid with the Court and counsel. It is now evident that at least one juror, -REDACTED- (Juror 12), was not candid in her disclosures and concealed a bias of which she was well aware.

In her discussions with other jurors during her jury service -- and particularly during deliberations -- -REDACTED- (Juror 12) displayed racial bias and anti-police bias (or at least a pre-disposition against police officers especially in the context of conduct such as that alleged against defendant

Nucera).¹³ More specifically, -REDACTED- (Juror 12) admitted to a belief that the police regularly mistreat black men, even advising the jury that as a mother of black sons, she had to give special warnings to her own sons in that regard. Such statements have no place in the jury deliberation room and only serve improperly to erode the fairness of the deliberation process. -REDACTED- (Juror 12) also presented anecdotes wherein she viewed the police as having harassed her own sons based solely on their race, using the terminology "driving while black", and that one son was harassed by police merely because he was a black man working in a yard. (DA001-DA014, Affidavit of K.C./Juror 3, ¶ 18-19; DA015-DA023, Affidavit of J.N./Juror 4, ¶ 7; DA024-DA036, Affidavit of D.V./Juror 2, ¶ 7; DA037-DA046, Affidavit of M.C./Juror 11, ¶ 11-12).

-REDACTED- (Juror 12) expressed her anti-police bias to other jurors, stating during deliberations that she had "a problem with cops", and falsely claimed to the other jurors that she did not know why she was chosen for the jury because during *voir dire* she admitted to having a problem with police officers. **In fact, the opposite was true: -REDACTED- (Juror 12) actually told the Court that she did not have any such bias and that her**

¹³ This fact is not only clear from the attached four juror affidavits, but such biases are aptly described by Richardson (Juror 12) herself (DA112-DA116, Philadelphia Inquirer article).

sons' interactions with the police would not affect her as a juror.

Attached at DA047-DA074 is -REDACTED-'s (Juror 12's) completed written Juror Questionnaire. In it, -REDACTED- (Juror 12) gives several responses which, based on the information now known to defendant Nucera, were dishonest or at a minimum deceptively disingenuous, based on what -REDACTED- (Juror 12) knew about her own views and bias. Some examples are as follows:

1. -REDACTED- (Juror 12) replied "No" in response to Question 25, which asked

"Do you have any religious, philosophical, or other beliefs that would make you unable to render a verdict for reasons unrelated to the law or evidence?"

However, indeed Ms. -REDACTED-'s philosophical and political beliefs regarding relations between the police and the black community, and her later (*i.e.* in the jury room) expressed anti-police bias, would compel a positive response to that question. (DA047-DA074, Juror Questionnaire of P.R./Juror 12 at 5). In addition to her behavior during deliberations and her statements to the Inquirer, a public Facebook post which is dated September

17, 2014¹⁴ by -REDACTED- (Juror 12) also displays her bias against police officers. (DA117-DA119). In that post, -REDACTED- (Juror 12) asks in part, "Now that professional athletes are losing money and jobs due to their poor behavior against children and women, when are correctional officers and policemen going to be sanctioned?" (DA117-DA119). This publicly displayed singling out of police officers clearly provides additional evidence of -REDACTED-'s (Juror 12)'s bias and generalizations of police misconduct, especially when viewed in combination with the other evidence of bias described above. Her truthful response to Question 25 should have been "Yes".

2. -REDACTED- (Juror 12) stated that she was aware of other news stories regarding interactions between the police and persons of color. Based on her statements during deliberations, including that white jurors did not know what it is like to be a black person (to walk in their shoes), the experiences of her sons as she perceived them, and other statements, she obviously harbors a belief that police officers mistreat people of color

¹⁴ This post shows that her bias was not formed while -REDACTED- (Juror 12) was sitting as a juror on the Nucera trial, but indeed she harbored these biases for at least five years.

during such interactions, as a general proposition. Indeed, her concern of how she would return to her community and her sons and explain a not guilty verdict was important to her, as outlined *supra*. Yet, -REDACTED- (Juror 12) concealed that pre-conceived opinion in her response to Question 42:

Have you ever heard about any other cases or events in the media that you think are similar to this case? **Response: Yes**

If YES,

Where did you hear about those other matters? Response: TV

What were your opinions about those other matters? Response: Each case was decided the way the jurors decided.

Do you believe that what you heard/read/saw in those cases/matters may impact the way you view evidence in this case?

Response: No.

-REDACTED- (Juror 12) was not candid in her response to the above inquiry, based on what was later revealed about her bias and her view of police interactions with black men, specifically.

3. -REDACTED- (Juror 12), during deliberations, openly admitted that she felt her sons had been targeted by police because of their race, even using the terminology that the only thing her son was guilty of was "driving

while black," which term that presupposes racial profiling by the police. She also during deliberations told the jurors that a son was harassed/questioned by police merely because he was a black man working in a yard. Despite those experiences and her view thereof, -REDACTED- (Juror 12) provided the following responses in response to Question 61 (bold added):

61. Have you or any relative or close friend ever been charged with any crime or been the subject of any investigation?

Response: Yes.

If YES,

a. Would that experience affect your ability to be fair and impartial in this case?

Response: No.

b. Would it otherwise make it difficult for you to sit as a juror in this case?

Response: No.

(DA047-DA074, Juror Questionnaire of P.R./Juror 12 at 16).

Clearly, -REDACTED- (Juror 12) did not provide candid response to Question 61. It was evident during jury deliberations that the interactions that her sons had with police (which are investigations) had tainted her view of police officers, and that her sons' experiences indeed affected her "ability to be fair and impartial in this case" and made it "difficult for [her] to sit as a juror in this case." (DA047-DA074, Juror Questionnaire of P.R./Juror 12 at 16-17).

4. In additional written responses (bold or italics added),
-REDACTED- (Juror 12) continued to deny any bias or
strong opinions regarding race; regarding negative
experiences concerning race (despite the stories she
would tell of her own childhood, and her sons'
experiences); and regarding any hesitation to acquit if
the government did not prove its case:

70. Do you know of any reason why you may be
prejudiced for or against the government,
for or against any witness, or for or
against the defendant, because of the nature
of the charges or otherwise? **Response: No.**

71. Have you or anyone close to you ever had
a serious negative experience with a person
of another race or ethnicity? **Response: No.**

73. Have you or anyone close to you ever
accused anyone of racial or ethnic
discrimination? **Response: No.**

74. Have you or anyone close to you ever
been the victim of discrimination?
Response: No.

* * *

77. Would you have any difficulty serving as
a completely impartial juror on a case in
which a white police chief is accused of
using unnecessary force against a black man
during the arrest of the black man?
Response: No.

* * *

86. It is not a crime for police officers to use language that involves racial slurs/derogatory names or profanity. Do you believe that it should be a crime for police officers to use language that involves racial slurs/derogatory names or profanity?

Response: No.

87. Would you have difficulty being a completely impartial juror on a trial that involves rough language or profanity?

Response: No.

88. Would you have any difficulty being a completely impartial juror in a trial that involves words used by the person charged that are racially derogatory, such as the "N word," or other racially derogatory words?

Response: No.

89. Do you believe that if someone uses racially charged derogatory words verbally, that such person would be inclined to act with physical aggression as well?

Response: Yes.

Please explain your thoughts in that regard:

Response: when a person can't contain themselves from using derogatory words it can¹⁵ lead to physical aggression

90. Do you have any strong opinions about allegations against police officers accused

¹⁵ While -REDACTED- (Juror 12) did here say "can", in her statement to the Inquirer (DA112-DA116, Philadelphia Inquirer article) she stated that she "automatically have to assume" that the use of racist language meant "he would do something to somebody."

of engaging in racially motivated abuse of or violence against minorities?

Response: No.

* * *

101. If the government does not prove its case beyond a reasonable doubt, would you hesitate to return a verdict of not guilty because he was a police chief? **Response: No.**

102. Do you know of any reason why you may feel bias for or against the government, for or against any witness, or for or against Frank Nucera, Jr., because of the nature of the charges or otherwise? **Response: No.**

(DA047-DA074, Juror Questionnaire of P.R./Juror 12 at 19-25).

The above answers are disingenuous at best, and some are outright dishonest, based on what we now know to be true of - REDACTED-'s (Juror 12)'s opinions regarding police officers and their interactions with minorities, and her personal and family experiences regarding racism and discrimination.

As to a few of the written questions, -REDACTED- (Juror 12) did provide responses that caused the Court and/or counsel to conduct additional *voir dire* orally in order to determine if she could act as an unbiased juror. However, when she was probed about the subject matter, she again gave disingenuous responses which appear to be designed to conceal her actual bias. For example,

1. The Court inquired about Ms. -REDACTED-'s response to Question 89, as follows:

COURT: Okay. Question 89, I'm going to show it to you. And, as I said, there are no right or wrong answers, we're just interested in your response, we want to make sure we understand.

89: Do you believe that if someone uses racially charged derogatory words verbally, that such person would be inclined to act with physical aggression as well. Yes, when a person can't contain themselves from using derogatory words in a professional setting, it can, and you underline can, lead to physical aggression. Correct?

-REDACTED- (Juror 12): Correct.

Court: Okay. In this case the jurors are going to hear testimony that the defendant Mr. Nucera used racial epithets included the N-word. There's also allegations in the case, among the allegations, among the crimes alleged, and it's just allegations, he's entitled to the presumption of innocence, that Mr. Nucera during, he was a police chief, police officer, during the course of an arrest of a young African American male, he allegedly used excessive force and the reason was a racial motivation, he was racially motivated to use excessive force.

Now the reason for that question and the reason for my questions is I want to make sure you're able to separate these two concepts, the use of the language, the racial epithets, that in and of itself is not a crime.

-REDACTED- (Juror 12): Correct.

Court: Anyone as awful as it is, can say things. But there are allegations of crimes here, the excessive force, racial motivation. I want to make sure you understand that. Let's assume you're a juror

and let's assume he did in fact use those words, I want to make sure you understand that that does not make him guilty by itself of the physical force charged. Do you understand that?

-REDACTED- (Juror 12): Correct.

Court: Do you have any difficulty understanding that?

-REDACTED- (Juror 12): No.

Court: Do you have any difficulty separating those two concepts in your mind?

-REDACTED- (Juror 12): No.

Trial Transcript, 276:1 - 277:16, DA123-DA124.

Counsel for Defendant Nucera also questioned Ms. -REDACTED- (Juror 12) about her response to Question 89:

Mr. Cipparone: Good morning. With respect to question 89, that's where it asked if someone used racial profanities or slurs, would you believe they would be more inclined to act in a physical way. And your answer was, and I know the Judge asked you about this, you answered when a person can't contain themselves from using derogatory words in the professional setting, it can lead to physical aggression. **So my question really is Mr. Nucera, as with anyone charged with any crime, is presumed innocent, and we have to ensure that the jurors can really embrace that. If you heard evidence he used the N-word and he used it on different occasions at different times, would that lead you to at least, even ever so slightly, have some checkmark against him about whether he would act in a certain way, for example, in a manner aggressively toward an African American, which he is accused of?**

A JUROR: **No, I think now days hearing the N-word and other derogatory terms is very common.** You know, you hear it in the radio

station my son listens to, the music he listens to. Luckily he has a station designed for me when I get in his car. But I don't think -- and this was probably the most difficult question I had to answer to be truthful. **I don't think - I think some people might act on those derogatory terms and maybe get a little violent. But I think as you move up in a professional level and you've dealt with people from all different walks of life, you tend not to be as violent because you have more, what's the word, more, more that you could potentially lose. I think if you're just like cleaning the streets, you can use any words you want and you probably could potentially become violent. I think as you get up in profession, you look at where you are. Maybe you've been working 20 or 30 years, you think, oh, my pension, my kids, my house, am I willing to put that on the line to become violent, and most people don't.**

MR. CIPPARONE: Thank you. I appreciate that.

Trial Transcript, 281:4-282:13, DA128-DA129 (bold added).

Of course the above is the direct opposite of what -
REDACTED- (Juror 12) herself stated to the Philadelphia Inquirer: " 'When somebody used the racist commentary that he has used his whole life, and it's on tape, the racist things he said, **you just automatically have to assume that he would do something to somebody,**' -REDACTED- (Juror 12) said." (DA112-DA116, bold added).

2. Ms. -REDACTED- (Juror 12) also indicated in her written questionnaire that her sons had been stopped by the police. When asked about those incidents, Ms. -REDACTED- (Juror 12) provided responses that were the

direct opposite of what she revealed to other jurors during deliberations, with regard to her perception of those incidents. As detailed above, four affiant jurors recalled -REDACTED- (Juror 12) stating that her son(s) were stopped for "driving while black." (DA001-DA014, Affidavit of K.C./Juror 3, ¶ 18-19; DA015-DA023, Affidavit of J.N./Juror 4, ¶ 7; DA024-DA036, Affidavit of D.V./Juror 2, ¶ 7; DA037-DA046, Affidavit of M.C./Juror 11, ¶ 11-12). Yet, during *voir dire*, Ms. -REDACTED- (Juror 12) denied perceiving the situations that way:

THE COURT: Okay. 93, your sons --

A. Yes.

Q. -- how many times have they been pulled over?

A. My oldest on the way home from work got pulled over three times in a basically maybe five-mile period. And my youngest has gotten pulled over maybe two times.

Q. The oldest three times in five miles. Over what period of time?

A. The same night.

Q. Oh, the same night.

A. Yeah, the same night.

Q. Who pulled him over, do you know?

A. He used to work at the CVS pharmacy in Medford and he was on his way home like around 11:00 at night. And when he pulled out onto 70, he got pulled over immediately, they were wondering why he was out so late. When he arrived in Marlton, which is where we live, he got pulled over again. And then when he did the jug handle to enter our

development, he got pulled over a third time.

Q. This was different jurisdictions. It wasn't the same cop?

A. No, it wasn't the same cop.

Q. Two different jurisdictions, three different cops.

A. Three different.

Q. How about your youngest?

A. Same jurisdiction, Marlton.

Q. Same time or two different times?

A. Two different times.

Q. And you believe the reason they were pulled over is because of race?

A. Not with my oldest because it was dark and my oldest is

very light, so he wouldn't have been able to tell if he was

black or white. He probably would have thought he was white. I guess questioning why he was out so late.

Q. And your youngest? Maybe, maybe not?

A. Maybe, maybe not. Maybe because he's a young kid.

Q. Do you believe the police were wrong to do that?

A. I think with my oldest, I think -- who knows what was going on that night, it could have been there was some robberies or something going on and they were, you know, checking people out on the road that late at night.

With my youngest I think they profiled him because he is **a young kid with a flashy sort of car** and I'm not really sure about him.

Q. Okay.

A. He gets very emotional so I'm not sure I've gotten the real story.

Q. How old is he?

A. He's now 20.

Q. Do you hold a grudge against the police because of pulling your sons over like that?

A. I wouldn't say a grudge. I think I -- I have to stand back as a mom and say hopefully I raised my boys to do the right thing. **But we all know our children don't tell us the whole story so I have to sometimes wonder, you know, are they telling me a story that sounds good to mom or is there something else going on.** So I always stand back and just take a breath and, you know, after everything dies down I say, okay, now what part of the story haven't you told.

Q. I'm glad I'm not sitting where you are answering those questions about my kids.

A. I have good boys.

Q. Mine are good, too. But we have our moments, don't we?

A. Yes.

Q. **I just want to make sure that these incidents involving your sons don't somehow affect the way you look at the evidence in this case if you were a juror.** Here we have law enforcement officers are going to be testifying on behalf of the government presenting their case, of course the defendant is a police officer in this case. So I want you to be able to tell me, if you can, again, there's no right or wrong answer, **I just want to know how you feel about this, whether these incidents involving your sons is going to affect the way you look at the evidence in this case?**

A. I don't think it's going to affect me. I think, like I said with my sons, **I have to take the police officers at their word that**

that's what's going on. And I know that everybody fudges the answer a little bit, like in my sons' situation, as to what they were doing. So I think I can separate the two from what's happening with my boys to what happened in this case.

Q. Good.

Trial Transcript, 277:17-280:23, DA124-DA127. Obviously, the incidents involving her sons loomed large in -REDACTED-'s (Juror 12's) mind in actuality, and she equated those incidents with racial profiling, as she told the other jurors during deliberations.

-REDACTED- (Juror 12) also failed to reveal either on her written questionnaire or during oral *voir dire* the alleged incident regarding her son being approached by police and taken to the police station for inquiry merely (as she told it to the other jurors) because he was a black man working in their yard.

If -REDACTED- (Juror 12) had answered the written and verbal inquiries honestly and completely, defendant Nucera would have had an opportunity to request that she be stricken from the jury pool for cause, based on her bias against law enforcement, and if the Court denied such request, he would have had an opportunity to exercise a peremptory strike to exclude her from the jury pool. Instead, -REDACTED- (Juror 12) provided benign responses designed to conceal her bias, essentially turning her into a "stealth juror", because her bias was hidden even when she was probed on the potential areas of such.

-REDACTED-'s (Juror 12's) biases were not the only outside influences she improperly brought to the jury deliberations, including her own deliberations. She was worried about community reaction and her sons' reaction to a not guilty verdict: "Juror -REDACTED- (Juror 12) stated during the deliberations words to the effect that she would be hard-pressed to return to her sons and her community without a conviction or jail time for Frank Nucera." (DA001-DA014, Affidavit of K.C./Juror 3, ¶ 20). In light of the hidden bias of -REDACTED- (Juror 12), which she articulated inside the jury room as we are now aware, defendant Nucera was deprived of his right to a fair trial and his conviction on Count 3 must be vacated.

LEGAL ARGUMENT

I. BECAUSE THE JURY'S DELIBERATIONS WERE TAINTED BY ISSUES OF RACIAL BIAS, DEFENDANT FRANK NUCERA WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL

Because the jury's deliberations were tainted by issues of racial bias, extrajudicial considerations, and improper influence, defendant Nucera was deprived of his constitutional right to a fair trial. Such is evident even from just the statements made by juror -REDACTED- (Juror 12) to the media after the trial that her vote and that of other jurors for guilty was related to her and their race, that she had a

presumption of guilt based solely on the racially insensitive words spoken by defendant Nucera, and from her past Facebook post. "Even after the trial, evidence of misconduct other than juror testimony can be used to attempt to impeach the verdict." *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 866 (2017). Mr. Nucera's conviction on Count 3 must be vacated:

[D]iscrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979). The jury is to be "a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'" *McCleskey v. Kemp*, 481 U.S. 279, 310, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) (quoting *Strauder*, *supra*, at 309). Permitting racial prejudice in the jury system damages "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State."

Pena-Rodriguez, 137 S.Ct. at 860 (citations omitted). "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. . . In the ultimate analysis, only the jury can strip a man of his liberty or his life." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

While the Federal Rules of Evidence provide protection for the secrecy of jury deliberations, they also provide exceptions to insure that verdicts were not improperly tainted. The

instant case satisfies several of the exceptions allowing - indeed here compelling - inquiry into the nature and circumstances of the deliberations.

FED. R. EVID. 606(b)(1) provides that, generally, Courts may not accept evidence regarding the jury's deliberations:

Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

FED. R. EVID. 606(b)(1). The general rule is meant "to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations." *Pena-Rodriguez*, 137 S.Ct. at 861. However, FED. R. EVID. 606 provides explicitly for three exceptions: if the jury was made aware of "extraneous prejudicial information"; if an "outside influence was improperly brought to bear" on a juror; or if "a mistake was made in entering the verdict on the verdict form." FED. R. EVID. 606(b)(2).

In addition, recently the U.S. Supreme Court recognized a constitutional exception to the general no-impeachment rule regarding jury deliberations. In *Pena-Rodriguez*, the Supreme Court was confronted with the question of "whether there is an exception to the no-impeachment rule when, after the jury is discharged, a juror comes forward with compelling evidence that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict." *Pena-Rodriguez*, 137 S.Ct. at 861. The Court held that such circumstances warranted an exception to the no-impeachment rule.

The facts at issue in *Pena-Rodriguez* were very similar to those here. After a jury trial, the defendant in that case was convicted of two counts, and the jury failed to reach a verdict regarding a third count. *Pena-Rodriguez*, 137 S.Ct. at 861. After the verdicts (and no-verdict) had been returned, two jurors approached defense counsel and reported that one of the other jurors had openly expressed bias toward Hispanic individuals, particularly the defendant and an alibi witness for defendant. *Id.* Sworn affidavits were obtained and submitted to the trial court, describing a number of biased statements made by a juror identified only as H.C., including generalized statements about "Mexican men." *Pena-Rodriguez*, 137 S.Ct. at 862. The trial court denied the defendant's motion for a new

trial, relying on the Colorado's version of FED. R. EVID. 606, which is identical in substance to the federal rule. *Id.* The Colorado Court of Appeals and Colorado Supreme Court both affirmed defendant's conviction. *Id.* The U.S. Supreme Court granted certiorari.

The *Pena-Rodriguez* Court, considering much earlier cases, acknowledged that as early as 1852, the Court in *United States v. Reid*, 12 How. 361 (1852), noted that "'cases might arise in which it would be impossible to refuse' juror testimony 'without violating the plainest principles of justice.'" *Pena-Rodriguez*, 137 S.Ct. at 863. The Court held that *Pena-Rodriguez* was such a case, and recognized an exception to the no-impeachment rule:

where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Pena-Rodriguez v. Colorado, 137 S.Ct. at 869. The Court qualified its exception, stating that:

Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's

deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict.

Id. The Court took note that it was the jurors (as occurred here) who approached defense counsel regarding the improper statements made during deliberations, and that such was common with similar allegations:

With the understanding that they were under no obligation to speak out, the jurors approached petitioner's counsel, within a short time after the verdict, to relay their concerns about H.C.'s statements. App. 77. A similar pattern is common in cases involving juror allegations of racial bias. See, e.g., *Villar*, 586 F.3d, at 78 (juror e-mailed defense counsel within hours of the verdict); *Kittle v. United States*, 65 A.3d 1144, 1147 (D.C.2013) (juror wrote a letter to the judge the same day the court discharged the jury); *Benally*, 546 F.3d, at 1231 (juror approached defense counsel the day after the jury announced its verdict).

Pena-Rodriguez v. Colorado, 137 S.Ct. at 870.

Pena-Rodriguez and the instant case are very similar. In *Pena-Rodriguez*, a juror made statements showing bias against Hispanics, in a case where the defendant was Hispanic. In this case, a juror made statements revealing her bias against a police officer (and how police officers interact with black men in particular); interjected her racial animus as a result of her having experienced racial discrimination as a child; interjected perceived racial profiling of her sons and inequitable treatment

of her sons based on their race; and the potential community and family reaction to a not guilty verdict. Other jurors also injected race-relations, community impact, and the jurors' own races into the deliberation process.

Here, as in *Pena-Rodriguez* (and the other cases cited by the Court in its *Pena-Rodriguez* opinion) jurors approached defense counsel shortly after the jury was discharged, including several the same day. In *Pena-Rodriguez*, the motivations of the juror who made the biased statements had to be inferred from his statements, and the Court had to accept the word of the jurors who heard the individual make the statements. Here, there is even stronger evidence of racial bias: ***Juror -REDACTED- (Juror 12) admitted publicly that she (and the other black jurors) were voting for conviction because "we're black."*** DA112-DA116.

Just as a juror cannot be permitted to base his or her verdict on the race of a defendant, similarly a juror must not be permitted to base his or her verdict on *her own race*, the race of other jurors, or perceived racial tensions among the jurors. In the deliberations in this matter, -REDACTED- (Juror 12) and other jurors (perhaps influenced by the lead of -REDACTED- (Juror 12)) repeatedly made race an issue where it did not need to be, for example:

- Accusing at least one juror of wanting “twelve white jurors” (DA024-DA036, Affidavit of D.V./Juror 2, ¶ 12; DA037-DA046, Affidavit of M.C./Juror 11 at ¶ 6)
- Juror -REDACTED- (Juror 12) stating that she could “shoot” jurors who state that they are not racist because they have a black friend (there is no mention of anyone actually making such a claim). (DA001-DA014, Affidavit of K.C./Juror 3, ¶ 29; DA015-DA023, Affidavit of J.N./Juror 4, ¶ 10; DA024-DA036, Affidavit of D.V./Juror 2, ¶ 23; DA037-DA046, Affidavit of M.C./Juror 11, ¶ 12)
- Juror Mackluskie (Juror 6) stating that he felt he needed to make “reparations” for racial discrimination and for his own bad conduct in the past (DA037-DA046, Affidavit of M.C./Juror 11 at ¶ 17)
- Juror -REDACTED- (Juror 12) yelling at another juror that the juror did not know what it was like to be black (DA024-DA036, Affidavit of D.V./Juror 2, ¶ 5; DA037-DA046, Affidavit of M.C./Juror 11 at ¶ 5).

The affidavits submitted herewith, and especially - REDACTED-'s (Juror 12's) own statements to the media, confirm that “racial animus was a significant motivating factor in the juror's vote to convict” and such is sufficient to trigger the exception to FED. R. EVID. 606(b), and the racial animus exception

to the no-impeachment rule recognized by the Supreme Court in *Pena-Rodriguez*. Accordingly, the jury's verdict regarding Count 3 must be vacated, and defendant Nucera should be granted a new trial regarding that count.

II. BECAUSE JUROR -REDACTED- (JUROR 12) WAS DISHONEST DURING JURY SELECTION, FRANK NUCERA WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND HIS CONVICTION ON COUNT 3 MUST BE VACATED

Voir dire is intended to be an opportunity for a defendant to ensure that he receives his constitutional guarantee of a fair trial. See *Pena-Rodriguez*, 137 S.Ct. at 868 (“*Voir dire* at the outset of trial” is among “important mechanisms for discovering bias”); *Tanner v. United States*, 483 U.S. 107, 127, (1987) (“The suitability of an individual for the responsibility of jury service, of course, is examined during *voir dire*”); see also *Butler v. City of Camden, City Hall*, 352 F.3d 811, 814-15 (3d Cir. 2003) (“The trial court's duty to seat an impartial jury requires that it test prospective jurors for actual bias”).

However, the above-detailed¹⁶ misrepresentations by - REDACTED- (Juror 12) distorted the process and deprived defendant Nucera of that guarantee. Juror -REDACTED- (Juror 12), in her statements and conduct during deliberations, her earlier Facebook post (DA117-119), and her public admissions to

¹⁶ See Statement of Facts Section II, *supra*.

the Philadelphia Inquirer, displayed and admitted to -- even boasted about -- a clear bias, based on her race, against law enforcement.

The potential for bias against law enforcement has been acknowledged as acceptable fodder for *voir dire*. In *Butler v. City of Camden, City Hall*, 352 F.3d 811, 820 (3d Cir. 2003), the Third Circuit held that a civil trial court's failure to ask prospective jurors about law enforcement bias in a case where defendants were police officers deprived plaintiff arrestee of his right to a fair trial. In vacating the judgment in favor of the police officer defendants, the Third Circuit noted that the issue of law enforcement bias is more commonly raised in the criminal context, citing cases in other circuits that have found it erroneous for district courts to deny requests to conduct *voir dire* regarding potential law enforcement bias:

Challenges to the adequacy of the *voir dire* respecting juror attitudes toward police officials have primarily arisen in the context of criminal trials, with the issue also arising in some reported civil rights cases. See *Paine v. City of Lompoc*, 160 F.3d 562 (9th Cir.1998); *Darbin v. Nourse*, 664 F.2d 1109 (9th Cir.1981). The majority of federal courts of appeals to have passed on this question have held that the district court may, in certain circumstances, commit error when it fails to examine the jury pool for potential law enforcement bias when requested by counsel.⁵ See, e.g., *Brown v. United States*, 338 F.2d 543 (D.C.Cir.1964); *United States v. Victoria-Peguero*, 920 F.2d

77 (1st Cir.1990); *United States v. Gelb*, 881 F.2d 1155 (2d Cir.1989); *United States v. Baldwin*, 607 F.2d 1295 (9th Cir.1979); *United States v. Spaar*, 748 F.2d 1249, 1254 (8th Cir.1984); *United States v. Espinosa*, 771 F.2d 1382 (10th Cir.1985).

Butler v. City of Camden, City Hall, 352 F.3d 811, 816 (3d Cir. 2003).

Here, although the Court permitted *voir dire* on this topic, -REDACTED-'s (Juror 12's) concealment of her anti-law enforcement bias, and her racial animus, frustrated the intended transparency of the *voir dire* process. -REDACTED- (Juror 12) was not merely a deliberating biased juror, but her own admissions and the affidavits by fellow jurors confirm that she displayed her (concealed during *voir dire*) biases openly to the other jurors and influenced the other jurors' votes through improper comments, anecdotes, and opinions that revealed an admitted "problem with cops" and a guilty vote based on her race (and that of her children) rather than a view of the evidence. Accordingly, defendant Frank Nucera was deprived of his constitutional right to a fair trial and his conviction on Count 3 must be vacated.

III. BECAUSE THE COURT WAS MADE AWARE OF THE ISSUES WITHIN THE JURY ROOM AND DID NOT CONDUCT ANY INQUIRY OR ALERT COUNSEL TO THE ISSUES, DEFENDANT FRANK NUCERA WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND HIS CONVICTION ON COUNT 3 MUST BE VACATED

An additional intended protection of the right to a fair trial is the jurors' ability to bring any issues that arise during deliberations to the attention of the Court, so that the Court may, if appropriate, investigate the allegations, including by questioning jurors. See e.g. *U.S. v. Kemp*, 500 F.3d 257, 301 (3d Cir. 2007) ("where substantial evidence of jury misconduct—including credible allegations of jury nullification or of a refusal to deliberate—arises during deliberations, a district court may, within its sound discretion, investigate the allegations through juror questioning or other appropriate means"). As recognized in *Pena-Rodriguez*,

At the outset of the trial process, *voir dire* provides an opportunity for the court and counsel to examine members of the venire for impartiality. As a trial proceeds, the court, counsel, and court personnel have some opportunity to learn of any juror misconduct. And, before the verdict, jurors themselves can report misconduct to the court. These procedures do not undermine the stability of a verdict once rendered.

Pena-Rodriguez, 137 S.Ct. at 866.

Here, as set forth in her affidavit, -REDACTED- (Juror 2) on two separate occasions attempted to bring her concerns about potential bias to the Court's attention. The first time, -

REDACTED- (Juror 2) alerted the courtroom Deputy Clerk that there were "disrespect and racial comments" in the jury room, and was advised that she should write the Judge a note if she "had any further issues." (DA024-DA036, Affidavit of D.V./Juror 2 at ¶ 16). However, -REDACTED- (Juror 2) was attempting to bring the already existing issues to the Court's attention, and from her perspective she did so, but it is unclear if the Court was told about her complaint. -REDACTED- (Juror 2) noted that there were no envelopes available and she did not want the foreperson to read her note to the judge despite her continuing concerns. (DA024-DA036, Affidavit of D.V./Juror 2, ¶ 16). -REDACTED- (Juror 2) was not provided with any manner of follow up to contact the Court anonymously or at a minimum privately from the other jurors knowing.

-REDACTED- (Juror 2) expressed her concerns to the Deputy Clerk a second time, resulting in the trial judge coming to the jury room. (DA024-DA036, Affidavit of D.V./Juror 2, ¶ 24-25). -REDACTED- (Juror 2) started crying and "told the Judge that there was serious disrespect going on in the jury room" and states that she may have also said there were threats being made (but she was not certain that she stated the latter to the Court). (DA024-DA036, Affidavit of D.V./Juror 2, ¶ 25). The Court advised the jurors to leave personal feelings out of deliberations and ordered the jurors to return to the jury room

and decide whether they were going to continue. (DA024-DA036, Affidavit of D.V./Juror 2, ¶ 25). It appears the Court did not ask any questions to investigate the "disrespect" (or racist comments of which the Deputy Clerk was initially made aware). Instead, according to -REDACTED-'s (Juror 2's) Affidavit, the jurors were simply advised to keep their "personal feelings out" of the deliberations, without any inquiry by the Court into what personal feelings may have already tainted the deliberations.

The jurors' ability to bring issues of bias and juror misconduct to the trial court's attention is one of the intended safeguards of a defendant's Sixth Amendment right to a trial by an impartial jury. However, when that ability is hindered, such as it was here when, initially, -REDACTED-'s (Juror 2)'s complaint was not investigated or probed, and when the Court did get involved upon her second complaint but did not conduct any investigation into the alleged issues, this protection is watered down. See *Pena-Rodriguez*, 137 S.Ct. at 866. The occurrence here in that regard further bolsters the appropriateness of applying the exception to the "no-impeachment rule" to consider the jurors Affidavits.

Accordingly, Defendant Frank Nucera was deprived of his right to a fair trial and his conviction on Count 3 must be vacated.

IV. THERE IS A COMPELLING GOVERNMENT INTEREST WHICH JUSTIFIES SEALING THE JUROR AFFIDAVITS AND UNREDACTED BRIEF AND MAKING ONLY REDACTED VERSIONS PUBLIC

There has been a request by the affiant jurors that their identities be protected. Consequently, defendant Nucera has filed a redacted brief and Appendix (and simultaneously is supplying to the Court and government counsel unredacted versions). Counsel has moved to keep the public filing limited only to the redacted documents, in light of the affiants' requests.

When evaluating a request for juror anonymity, courts must be mindful of the opposing "right of the press and the public to have access to court proceedings". *U.S. v. Antar*, 38 F.3d 1348, 1350 (3d Cir. 1994). In *Antar*, the Third Circuit reversed an order of a district court, finding that it sealed the transcript "prematurely . . . without a hearing, and without factual findings being placed on the record." *Antar*, 38 F.3d at 1350. Finding that "the presumptive right of access applied to the *voir dire* proceedings as they were recorded in the trial transcript," the district court's failure to make "detailed findings of the need for restrictions . . . violated procedural and substantive aspects of the press's right of access to the *voir dire* transcript." *Antar*, 38 F.d at 1351.

However, this is not to say that sealing the record as to juror identities is not appropriate under certain circumstances (such as those presented in the case at bar). As the *Antar* court stated in guidance:

In order to restrict the right of access, however, a court must carefully articulate specific and tangible, rather than vague and indeterminate, threats to the values which the court finds override the right of access.

Antar, 38 F.3d at 1351. The *Antar* court was careful to emphasize that it was not minimizing “the importance of confidential jury deliberations or of the need to protect former jurors from harassment” and stating that “There are, of course, instances when the jurors’ identities should be concealed in order to protect against tampering or coercion or threats.” *Antar*, 38 F.3d at 1251.

The *Antar* court, citing earlier Third Circuit cases, set forth the precise analysis that a court must undertake in considering a request for closure as to *voir dire* proceedings¹⁷:

This right of access may not be abridged absent the satisfaction of substantive and procedural protections. On the substantive side, a court ordering closure must first establish that the competing interest

¹⁷ Here, the sealing request applies to transcripts and one questionnaire from the *voir dire* process, and also to the identities of the jurors who submitted affidavits in this matter. There does not appear to be case law directly on point with regard to the sealing of these type of juror affidavits.

asserted is not only "compelling," but also that it outweighs the First Amendment right of access. Second, it must determine that the limitations imposed are both necessary to and effective in protecting that interest. One part of establishing the necessity of a limitation is a consideration of alternative measures and a showing that the limitation adopted is the least restrictive means of accomplishing the goal. See *A.D.*, 28 F.3d 1353; *Criden II*, 675 F.2d 550. On the procedural side, these determinations must be covered by specific, individualized findings articulated on the record before closure is effected. See *Simone*, 14 F.3d at 840; *Raffoul*, 826 F.2d at 226; *Criden II*, 675 F.2d at 554, 560.

Antar, 38 F.3d at 1359. Here, the Court has an opportunity to make specific findings as to the "compelling interest", *i.e.*, juror safety and the public interest in ensuring the that where jury deliberations are tainted by racial animus, thereby eroding the constitutional right to a fair trial, jurors are willing to come forward and to reveal such. That interest sufficiently outweighs the First Amendment right of access, and the limitations requested are "necessary to and effective in protecting" the compelling public interest. *Antar*, 38 F.3d at 1359.

As the *Antar* court stated, alternative means must be considered, and it must be shown "that the limitation adopted is the least restrictive means of accomplishing the goal." *Antar*, 38 F.3d at 1359. Here, rather than request sealing of the

entire motion to vacate defendant's conviction on Count 3 (the notice of motion, brief, and appendix), defendant has already offered a less-restrictive option by filing a redacted copy of the supporting materials. Finally, the Court must make "specific, individualized findings" on the record prior to granting the request to seal, which can easily be accomplished as no sealing order has yet been entered.

Under the circumstances, it is appropriate to permit only the redacted versions of the brief and appendix to stand in the public filing in support of the present motion.

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