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I. INTRODUCTION

In the Tenth Circuit's recent decision *United States v. Benally*,[1] the court held that post-verdict juror testimony of racist comments made by fellow jurors during deliberations is inadmissible under Federal Rule of Evidence 606(b) ("Rule 606(b)").[2] According to the court, Rule 606(b) stands as a nearly insurmountable obstacle to the admission of any post-verdict juror testimony on statements made during jury deliberations, regardless of how objectionable or offensive those statements may be.[3] In effect, the jury room is "a black box: the inputs (evidence and argument) are carefully regulated by law and the output (the verdict) is publicly announced, but the inner workings and deliberation of the jury are deliberately insulated from subsequent review."[4]

This Note will explore the Tenth Circuit's decision *United States v. Benally* and argue that the court misapplied Rule 606(b) by relying on precedent that only tangentially addressed these issues. Further, this Note will investigate whether the Tenth Circuit, by holding that juror testimony of racial bias during deliberations is inadmissible under Rule 606(b), has advanced an interpretation of Rule 606(b) that potentially conflicts with the criminal defendant's Sixth Amendment right to an impartial jury.

II. FACTS AND PROCEDURAL HISTORY

In 2007, Defendant Kerry Dean Benally was "charged with forcibly assaulting a Bureau of Indian Affairs officer with a dangerous weapon."[5] Prior to his trial, Mr. Benally, a member of the Ute Mountain Ute tribe, asked several voir dire questions focused on

1. 546 F.3d 1230 (10th Cir. 2008).
2. *Id.* at 1231.
3. *See id.* at 1241.
4. *Id.* at 1233.
5. *Id.* at 1231.

revealing any potential prejudice towards Native Americans.[6] Two of his submissions were used by the court: "'Would the fact that the defendant is a Native American affect your evaluation of the case?' and 'Have you ever had a negative experience with any individuals of Native American descent? And, if so, would that experience affect your evaluation of the facts of this case?'"[7] None of those eventually impaneled as jurors answered affirmatively to these questions.[8]

On October 10, 2007, Mr. Benally was found guilty of the charged offense.[9] The day after the announcement of the jury verdict, however, one juror contacted defense counsel and informed them that "the jury deliberation had been improperly influenced by racist claims about Native Americans."[10] According to the juror, the foreman stated that he had personally observed persons on an Indian Reservation and that "'[w]hen Indians get alcohol, they all get drunk,' and that when they get drunk, they get violent."[11] The juror further alleged that, although she argued with the foreman, other jurors appeared to have agreed with the foreman's racist assertions.[12] The juror further alleged that in the course of deliberations some jurors spoke of the need to "'send a message back to the reservation'" that you can't "'mess with police officers and get away with it.'"[13]

Defense counsel obtained a signed affidavit from the juror and located one other juror who corroborated some of the first juror's allegations.[14] Based on the testimony of these two jurors, Mr. Benally moved for a new trial under Rule 33 of the Federal Rules of Criminal Procedure.[15] The trial court granted the motion in light of the prospect that some jurors had allegedly failed to answer voir dire questions concerning racial bias truthfully and had considered

6. *Id*.

7. *Id*.

8. *Id*.

9. United States v. Benally, No. 2:07CR256 DAK, 2007 WL 4166135, at *1 (D. Utah Nov. 20, 2007).

10. *Benally*, 546 F.3d at 1231.

11. *Id*.

12. *Id*. at 1231–32.

13. *Id*. at 1232.

14. *Id*.

15. *Id*.

information not in evidence.[16] The trial court noted that although Rule 606(b) generally forbids a juror from testifying as to the content of a jury's deliberations, under the exceptions to the rule, a juror is allowed to testify "'whether extraneous prejudicial information was improperly brought to the jury's attention, [or] whether any outside influence was improperly brought to bear upon any juror.'"[17]

III. SIGNIFICANT LEGAL BACKGROUND

A. Rule 606(b)

The primary obstacle to the admission of juror testimony concerning evidence of racial bias that surfaces during jury deliberations is Federal Rule of Evidence 606(b). Rule 606(b) is grounded in the "near-universal and firmly established common-law rule in the United States [that] flatly prohibited the admission of juror testimony to impeach a jury verdict."[18] At common law, exceptions to this rule "were recognized only in situations in which an 'extraneous influence' was alleged to have affected the jury."[19] This common law rule, along with its exceptions for evidence of extraneous influences, was codified in Rule 606(b). This rule provides that when an inquiry is made into the validity of a verdict, a juror is incompetent to testify concerning (1) any statement made or matter occurring during the course of jury deliberations, (2) anything that had an effect on the juror's or any other juror's mind or emotions as influencing their decision, or (3) anything concerning "the juror's mental processes in connection therewith."[20]

Prior to the Tenth Circuit decision, there existed a circuit split between the Ninth and Third Circuits as to the applicability of Rule 606(b) in situations where evidence arises post-verdict that calls into question the impartiality of the jury. According to the Ninth Circuit, Supreme Court precedent allows for the introduction of evidence

16. United States v. Benally, No. 2:07CR256 DAK, 2007 WL 4166135, at *2 (D. Utah Nov. 20, 2007).

17. *Id.* at *1 (quoting FED. R. EVID. 606(b)).

18. Tanner v. United States, 483 U.S. 107, 117 (1987).

19. *Id.* (citation omitted).

20. FED. R. EVID. 606(b).

that shows a prospective juror lied during voir dire.[21] Consequently, if a juror was "asked direct questions about racial bias during voir dire, and . . . swor[e] that racial bias would play no part in his deliberations, evidence of that juror's alleged racial bias is indisputably admissible for the purpose of determining whether the juror's responses were truthful."[22] Under the Ninth Circuit view, such inquiries do not run afoul of Rule 606(b)'s prohibitions on jury testimony because such inquiries are not challenging the validity of the jury's verdict, but whether a juror misled the court by falsely answering a material question on voir dire.[23] If defendants can demonstrate that a juror "'failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause,' then they are entitled to a new trial."[24]

The Third Circuit, by contrast, has held that even though Supreme Court precedent allows for the introduction of evidence that may show a juror lied during voir dire, such evidence must first clear the Rule 606(b) hurdle.[25] To the Third Circuit, although the Ninth Circuit depicts its investigation as merely an inquiry into the truthfulness of a juror's voir dire responses, the practical effect of investigating a juror's voir dire response is actually an indirect challenge to the validity of the jury verdict.[26] Consequently, any evidence brought forth to support inquiries into the truthfulness of voir dire responses must first comply with Rule 606(b).[27]

B. The Sixth Amendment

The Sixth Amendment states that a criminal defendant "shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."[28] One of the basic requirements of an impartial jury is that the jurors will only consider the evidence before them and not take

21. *See* United States v. Henley, 238 F.3d 1111, 1121 (2001) (citing McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984)).

22. *Id.* (citing Hard v. Burlington N. R.R., 812 F.2d 482, 485 (9th Cir. 1987)).

23. *See id.*

24. *Id.* (quoting *McDonough Power Equip., Inc.*, 464 U.S. at 556).

25. *See* Williams v. Price, 343 F.3d 223, 235–36 (3d Cir. 2003).

26. *See id.*

27. *See id.*

28. U.S. CONST. amend. VI.

into account the defendant's race or color.[29] In situations where a juror comes forth with evidence of racism during jury deliberations, the policies and goals of Rule 606(b) and the Sixth Amendment squarely conflict. On the one hand, Rule 606(b) upholds the common law's long-held commitment to the secrecy and unassailability of juror deliberations.[30] On the other hand, the Sixth Amendment guarantees the accused criminal the right to an impartial tribunal that will decide the case only upon the evidence before it.[31] Lower courts have struggled to reconcile these competing values and "courts faced with the difficult issue of whether to consider evidence that a criminal defendant was prejudiced by racial bias in the jury room have hesitated to apply [Rule 606(b)] dogmatically."[32]

The Supreme Court has never squarely addressed whether Rule 606(b) wrongfully denies a criminal defendant's Sixth Amendment right to an impartial jury when evidence of racial prejudice in the jury room is denied admission. The Supreme Court precedent that best discusses the competing values of Rule 606(b) and the Sixth Amendment is *Tanner v. United States*.[33] In *Tanner*, the Court faced a challenge by the petitioner that the jury in the underlying case was incompetent because several members allegedly drank alcohol, smoked marijuana, and ingested cocaine during the course of the trial.[34] The only evidence to support this motion, however, was testimony by one of the jurors who came forth after the trial and attested that he had either participated in or witnessed the various acts of misconduct.[35]

In a narrow five to four decision, the Supreme Court held that Rule 606(b) applies in these types of instances and that none of the exceptions apply because "physical or mental incompetence of a juror [are treated] as 'internal' rather than 'external' matters."[36] The Court then turned its attention to the Sixth Amendment, which the Court has recognized as granting the defendant "a right to a tribunal

29. *See, e.g.*, Turner v. Murray, 476 U.S. 28 (1986).

30. *See, e.g.*, United States v. Benally, 546 F.3d 1230, 1233 (10th Cir. 2008) (discussing how Rule 606(b) incorporates the "firmly established common-law rule").

31. *See, e.g.*, Irvin v. Dowd, 366 U.S. 717, 722 (1961) (noting that the right to an impartial jury requires that a "verdict . . . be based upon the evidence developed at the trial").

32. Wright v. United States, 559 F. Supp. 1139, 1151 (E.D.N.Y. 1983).

33. 483 U.S. 107 (1987).

34. *Id.* at 115–16.

35. *Id.*

36. *Id.* at 118.

both impartial and mentally competent to afford a hearing."[37] The Court found that although application of Rule 606(b) in these circumstances forecloses any opportunity to further investigate the incompetency of the jury, this obstacle, in and of itself, did not create a constitutional violation.[38] To the Court, the defendant's Sixth Amendment right to a competent jury was substantially protected by processes already in place at the trial level: voir dire can test a candidate's suitability; the court, counsel, and court personnel can observe jury members; other jurors can observe their fellow jurors and can report any misconduct to the court "*before* they render a verdict;" and non-juror evidence can be admitted to challenge the competency of the jury after the verdict.[39] Because of these substantial protections already in place, coupled with the "long-recognized and very substantial concerns support[ing] the protection of jury deliberations from intrusive inquiry," the Court rejected the Sixth Amendment challenges to Rule 606(b) and found that the right to a competent jury was already substantially protected by the trial process and procedures.[40]

IV. THE COURT'S DECISION

At the Tenth Circuit, the court reversed the district court's grant of a new trial.[41] According to the Tenth Circuit, the trial court should have denied the motion because the only evidence offered in its support was juror testimony specifically proscribed by Rule 606(b).[42]

The Tenth Circuit stated that although Rule 606(b) is an evidentiary rule, "its role in the criminal justice process is substantive: it insulates the deliberations of the jury from subsequent second-guessing by the judiciary."[43] Although the trial judge can meticulously regulate the evidence admitted before the jury in open court, the jury room is a "black box," deliberately sealed against further judicial oversight.[44] In short, "[j]uries provide no reasons,

37. *Id*. at 126 (citations and internal quotations marks omitted).
38. *See id*. at 126–27.
39. *Id*. at 127.
40. *Id*.
41. United States v. Benally, 546 F.3d 1230, 1231 (10th Cir. 2008).
42. *Id*.
43. *Id*. at 1233.
44. *Id*.

only verdicts."[45]

A. Should Rule 606(b) Apply?

The first issue faced by the Tenth Circuit was whether Rule 606(b) should apply to the *Benally* circumstances. As mentioned previously, prior to the Tenth Circuit decision there existed a split between the Ninth and Third Circuits on whether Rule 606(b) proscribes admission of juror testimony that is used to challenge the truthfulness of another juror's voir dire responses. In reviewing the Ninth Circuit precedents described above, the Tenth Circuit found it difficult to accept the proposition that inquiries into the truthfulness of voir dire responses were not simply disguised inquiries into the validity of the jury's verdict.[46] As the court explained,

> [a]lthough the immediate purpose of introducing the testimony may have been to show that the two jurors failed to answer honestly during voir dire, the sole point of this showing was to support a motion to vacate the verdict, and for a new trial. That is a challenge to the validity of the verdict.[47]

Based on this reasoning, the Tenth Circuit rejected the Ninth Circuit's standard, echoing the claim by the Third Circuit that such a standard is "plainly too broad."[48] The court reasoned that "allowing juror testimony through the backdoor of a voir dire challenge risks swallowing the rule. A broad question during voir dire could then justify the admission of any number of jury statements . . . ."[49] Consequently the Tenth Circuit found that "[t]he Third Circuit's approach best comports with Rule 606(b), and we follow it here."[50]

B. Do the Exceptions to Rule 606(b) Apply?

Finding that Rule 606(b) applied, the Tenth Circuit turned its attention to the enumerated exceptions to the rule. Rule 606(b) contains three exceptions, two of which are relevant to this case: "'a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, [and]

45. *Id.*
46. *Id.* at 1235.
47. *Id.*
48. *Id.*
49. *Id.* at 1236.
50. *Id.*

(2) whether any outside influence was improperly brought to bear upon any juror . . . .'"[51]

The court rejected any assertion that a juror's internal racial biases fall within either of these two exceptions.[52] To the Tenth Circuit, these two exceptions only allow for the admission of statements concerning "extraneous influences."[53] Examples of such extraneous influences abound, such as "jurors reading news reports about the case, jurors communicating with third parties, bribes, and jury tampering."[54] According to the Tenth Circuit, however, internal biases do not qualify as extraneous influences contemplated by Rule 606(b)'s exceptions. The court feared that interpreting either exception to instances of racial bias "would unravel the internal/external distinction and make anything said in jury deliberations 'extraneous information' so long as it was inappropriate."[55]

C. Is Rule 606(b) Unconstitutional?

The last argument entertained by the Tenth Circuit was Mr. Benally's assertion that Rule 606(b) is unconstitutional because it violates his Sixth Amendment right to an impartial jury.[56] Although the court found this to be his "most powerful argument," the court ultimately rejected his assertion.[57] The Tenth Circuit found that "[t]his Court . . . has consistently 'upheld application of the Rule 606(b) standards of exclusion of jury testimony even in the face of Sixth Amendment fair jury arguments.'"[58] To strengthen this conclusion, the court turned its attention to the Supreme Court decision *Tanner v. United States*.[59] The Tenth Circuit noted that although the trial procedures in *Tanner* failed to disclose the alleged juror misconduct during the course of the trial, the Supreme Court still found that "the Sixth Amendment did not compel an exception to Rule 606(b) . . . ."[60] The Tenth Circuit reasoned that "*Tanner*

51. *Id*. (quoting FED. R. EVID. 606(b)).
52. *Id*. at 1236–38.
53. *Id*. at 1236–37.
54. *Id*. at 1236.
55. *Id*. at 1238.
56. *See id*. at 1239–41.
57. *Id*.
58. *Id*. at 1239 (quoting Braley v. Shillinger, 902 F.2d 20, 22 (10th Cir. 1990)).
59. 483 U.S. 107 (1987).
60. *Benally*, 546 F.3d at 1240 (citing *Tanner*, 483 U.S. at 127).

compel[led] a similar result in this case," arguing "that the Sixth Amendment embodies a right to 'a fair trial but not a perfect one, for there are no perfect trials.'"[61]

The Tenth Circuit feared that "once it is held that the rules of evidence must be subordinated to the need to admit evidence of Sixth Amendment violations, we do not see how the courts could stop at the 'most serious' such violations."[62] Leery of this result, the court rejected Mr. Benally's claims that Rule 606(b) is unconstitutional as applied and reversed the district court's motion granting a new trial.[63]

V. ANALYSIS

A. The Interplay Between Rule 606(b) and Untruthful Voir Dire Responses

Although the Tenth Circuit held that Rule 606(b) clearly applies to circumstances challenging the truthfulness of voir dire responses, further investigation of the precedent relied upon by the court calls this conclusion into question. As mentioned previously, a circuit split existed between the Ninth and Third Circuits on whether Rule 606(b) applies to juror testimony of racist jury deliberations when the juror was asked direct questions about racial bias during voir dire. This split actually stems from a 1984 Supreme Court case, *McDonough Power Equipment, Inc. v. Greenwood*,[64] in which a juror mistakenly failed to answer truthfully a question on voir dire about his background.[65] The underlying case involved a child who had been severely injured in an accident and was suing the manufacturer for damages.[66] During voir dire, the plaintiff's attorney asked questions aimed at discovering whether any of the prospective jurors, or any of their immediate family members, had ever been severely injured in an accident.[67] One of those eventually impaneled, who had a son who had been injured in an accident, failed to respond

61. *Id.* (quoting McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 553 (1984)).

62. *Id.* at 1241.

63. *Id.* at 1242.

64. 464 U.S. at 548.

65. *Id.* at 549.

66. *Id.*

67. *Id.* at 549–50.

affirmatively to these questions because he mistakenly believed they were inapplicable to him.[68] The jury later found for the manufacturer and the plaintiff moved for a new trial.[69]

At the Supreme Court, the Court held that "to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause."[70] To demonstrate that the juror failed to answer truthfully, the plaintiff brought forth a signed affidavit from a Navy Recruiter who could attest to the fact that the juror's son had disclosed on his Navy application that he had been "injured in the explosion of a truck tire."[71]

Because the juror's failure to answer the voir dire question was demonstrated through non-juror testimony, *McDonough* did not involve circumstances that trigger Rule 606(b). Consequently, although the standard announced in *McDonough* is relatively straightforward, the decision itself is silent as to the appropriate role of Rule 606(b) in post-verdict challenges of voir dire responses.

With this background in mind, the Third Circuit decision relied upon by the Tenth Circuit is not so determinative of the issue as the Tenth Circuit suggests. In *Williams*, the Third Circuit was asked to evaluate whether a petitioner was entitled to federal habeas relief from a state court adjudication.[72] Under such circumstances, the standard of review is whether the state court decision was "'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'"[73] Under this strict standard, the Third Circuit was not evaluating whether challenges to voir dire must comply with the requirements of Rule 606(b), but whether it was *clearly established* that voir dire challenges are beyond the scope of Rule 606(b). As mentioned previously, the circumstances involved in *McDonough* in no way implicated Rule 606(b), and, consequently, the *McDonough* decision says nothing about whether voir dire challenges must comply with Rule 606(b). In light of this context, the Third

68. *Id.*
69. *Id.* at 548–51.
70. *Id.* at 556.
71. *Id.* at 551.
72. Williams v. Price, 343 F.3d 223 (3d Cir. 2003).
73. *Id.* at 228–29 (quoting 28 U.S.C. § 2254(d) (2002) (emphasis removed)).

Circuit's decision seems appropriate under a "clearly established" standard, but ultimately unhelpful to the *Benally* controversy.

Once the Third Circuit decision is limited to its appropriate contours, the only circuit to squarely address the issue is the Ninth Circuit. Under the Ninth Circuit approach, because the jurors were asked two questions directly aimed at revealing racial prejudice during voir dire, Rule 606(b) would not be implicated and Benally could use juror testimony to challenge the truthfulness of the offending jurors' responses. Benally would then have an opportunity to demonstrate that the juror's failure to respond honestly stripped him of an opportunity to remove these jurors for cause.

The Tenth Circuit's most compelling challenge to the Ninth Circuit approach is its contention that, as the operative effect of a successful challenge to a voir dire response is to invalidate the jury's verdict, the process should be characterized as a challenge to the validity of the underlying verdict.[74] In looking at the operative effect of other evidence rules, however, the Tenth Circuit's fears appear to be overstated. The Rules of Evidence constantly permit evidence to be admitted for one purpose while forbidding it for others—even though the practical effect is the same. For example, a statement may be inadmissible hearsay if offered for the truth of the matter asserted but may be admissible for some other purpose.[75] The practical effect, however, is that the evidence is admitted to the jury with a limiting instruction from the judge that the evidence only be considered for the admissible purpose.

B. Constitutionality of Rule 606(b) as Applied

In finding that Rule 606(b) denies admission of evidence that challenges the impartiality of the jury, the Tenth Circuit has advanced an interpretation of Rule 606(b) that potentially conflicts with the Sixth Amendment. To be fair, the Tenth Circuit considered this potential constitutional complication and rejected it as being unsupported by Supreme Court precedent. That being said, the precedent relied upon by the Tenth Circuit is distinguishable from *Benally* in several important respects and fails to fully justify the Tenth Circuit's holding.

In rejecting Benally's assertion that Rule 606(b) is

74. United States v. Benally, 546 F.3d 1230, 1235 (10th Cir. 2008).

75. *See* FED. R. EVID. 801.

unconstitutional, the Tenth Circuit relied heavily upon *Tanner v. United States*. Although the Tenth Circuit is correct in finding *Tanner* as the closest analog to the *Bennally* controversy, important distinctions remain. Perhaps the most intriguing distinction between *Tanner* and *Benally* is that *Tanner* involved a challenge based on juror incompetence, while *Benally* involved a challenge of juror impartiality. Although it is true that both incompetence and impartiality are addressed by the Sixth Amendment, the United States' complicated history with racial biases and prejudices in the court room warns against treating the two identically.[76] In light of the fact that the *Tanner* outcome was so narrow, a challenge to Rule 606(b) under circumstances involving racial prejudice could merit a different outcome.

The suggestion that a situation involving racial prejudice may result in a different outcome than *Tanner* is bolstered by lower court decisions that have directly considered whether the Sixth Amendment requires the admission of jury testimony of racial prejudice. For example, one court stated that "if a criminal defendant could show that the jury was racially prejudiced, such evidence could not be ignored without trampling the sixth amendment's guarantee to a fair trial and an impartial jury."[77] Or as a court in the Seventh Circuit explained, "[w]here . . . an offer of proof showed that there was a substantial likelihood that a criminal defendant was prejudiced by the influence of racial bias in the jury room, to ignore the evidence might very well offend fundamental fairness."[78]

These suggestions by the lower courts that such situations run afoul of the Sixth Amendment are bolstered by the fact that the Sixth Amendment protections cited by the Supreme Court in *Tanner* fail to protect against instances of racial prejudice that arise during jury deliberations. Unlike juror misconduct such as that in *Tanner* where the juror's ingestion of drugs and alcohol could be quite apparent to a careful observer, a juror's racial prejudice might not surface until jury deliberations. "Indeed, that appears to be precisely what occurred here: despite the district court's best efforts at protecting Mr. Benally's Sixth Amendment right to an impartial jury, the jury foreman clearly lied during the voir dire proceedings about his ability

76. *See, e.g.*, Strauder v. W. Virginia, 100 U.S. 303 (1879).

77. Wright v. United States, 559 F. Supp. 1139, 1151 (E.D.N.Y. 1983).

78. Smith v. Brewer, 444 F. Supp. 482, 490 (S.D. Iowa 1978).

to be impartial."[79]

Perhaps the best way to assess whether the Sixth Amendment requires the allowance of juror testimony in this limited circumstance is to ask whether admitting this evidence is to "insist on something closer to perfection than our judicial system can be expected to give."[80] Certainly, there are no perfect trials and to insist on such would jeopardize the viability of the judicial system. But, in instances such as *Benally* where alleged juror misconduct rises to the level of racial prejudice, the Sixth Amendment requirement of an impartial jury appears to require further investigation. Under these circumstances, it is not insisting upon perfection to give the trial court discretion to hold a limited evidentiary hearing to investigate the matter and decide whether a new trial is warranted.[81]

VI. CONCLUSION

In *United States v. Benally*, the Tenth Circuit upheld the common-law tradition, codified in Rule 606(b), that jury deliberations should be kept secret except in the most exceptional circumstances. To the Tenth Circuit, keeping jury deliberations locked from further review protects the finality of judgments, encourages open discussion amongst jurors, and instills within jurors an "urgency that comes from knowing that their decision is the final word."[82]

While Rule 606(b) advances important policy goals, safeguarding jury decisions based on racial bias or prejudice should not be among them. In the limited circumstances where a juror comes forth, post-verdict, with testimonial evidence of racist jury deliberations, courts should be allowed to hold a limited evidentiary hearing to investigate the matter and to determine whether a new trial is warranted.

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79. United States v. Benally, 560 F.3d 1151, 1155 (10th Cir. 2009) (Briscoe, J., dissenting from denial of reh'g en banc).

80. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 555 (1984).

81. This is currently the approach taken in the Ninth Circuit. *See* United States v. Henley, 238 F.3d 1111 (9th Cir. 2001).

82. United States v. Benally, 546 F.3d 1230, 1234 (10th Cir. 2008).

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