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Winning the Waiting Game: How Oklahoma Can Rectify the Discrepancy Between Its No-Impeachment Rule and *Peña-Rodriguez v. Colorado*

*Juror 8: "It's always difficult to keep personal prejudice out of a thing like this. And whenever you run into it, prejudice always obscures the truth."*¹

I. Introduction

For most people, the jury room remains a mystery. What is known: twelve semi-randomly chosen jurors enter the jury room, discuss the merits and arguments of a case, decide the fate of each party, and leave the room to have their decision announced publicly.² What is generally not known, however, is the deliberation leading to that decision. What happens within the physical walls of the jury room varies in each case because the inputs—such as the jurors and the facts—are different in each case.³

Even more arcane are the inner workings within the mind of each juror. While each juror must decide the case according to the evidence established in the record, it is nearly impossible to keep personal feelings or proclivities from creeping in. For that reason, society and the law do not require jurors to be robotic arbiters⁴—devoid of emotions or predilections. But, according to the Sixth Amendment, criminal defendants have the right to a fair and impartial trial.⁵ Consequently, at what point does a juror's reasoning, or basis of reasoning, infringe upon a criminal defendant's constitutional right?

Imagine the following scenario: A Native American defendant, in Oklahoma, is charged with criminal assault stemming from a barroom brawl. The prosecution has admitted credible evidence that the defendant consumed alcohol on the night in question, but the amount or extent of alcohol consumed is unclear. Moreover, the issue in the case turns on

1. 12 ANGRY MEN (MGM Studios 1957).

2. See HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 3 (1966).

3. See *id.* at 464 (recognizing "that no two juries, and for that matter no two judges, are alike" while trying to determine whether one can "connect the background characteristics of juries and judges with their decisions").

4. See *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984) (explaining that the Sixth Amendment requires "a fair trial but not a perfect one, for there are no perfect trials").

5. U.S. CONST. amend. VI.

whether the defendant instigated the fight or merely responded in self-defense. After a two-day trial, the defendant is found guilty.

Several days after the trial, a juror approaches the public defender tasked with representing the defendant and explains that she is having second thoughts about the verdict. She also mentions that Juror No. 3 dominated the deliberations and expressed racially charged statements about the defendant. More specifically, Juror No. 3 said he lived in a community with a large population of Native Americans and insisted that “when Indians get alcohol, they all get drunk, and when they get drunk, they get violent”; therefore, the defendant must have started the fight. Despite initial reservations from some jurors, Juror No. 3 managed to persuade the few remaining holdouts to convict the defendant.

The public defender, aghast by this revelation, does not believe his client received a fair and impartial trial and thereafter begins drafting a motion for a new trial. Unfortunately, after the public defender consults Oklahoma’s evidence code, he realizes that Oklahoma law prohibits jurors from testifying about what transpires in the jury room in order to impeach the verdict, except in a few, unrelated circumstances involving extraneous influences.

A public defender in that hypothetical,⁶ burdened with a seemingly endless caseload, might stop there and decide against filing a motion for a new trial because the evidence rules provide no remedy. And until 2017, an attorney in such a case was right: there was no remedy. But, in *Peña-Rodriguez v. Colorado*, the United States Supreme Court held that the Sixth Amendment requires that a juror be able to testify as to another juror’s overt statements of racial bias or animus if those statements were a significant factor in reaching the verdict.⁷ Because *Peña-Rodriguez* was based on the Sixth Amendment, Oklahoma’s evidence rule, Rule 2606(B),⁸ which mirrors the language of the federal rule barring juror testimony, was also deemed unconstitutional when applied to cases involving displays of

6. The preceding hypothetical was largely, but loosely, based on *United States v. Benally*, 546 F.3d 1230 (10th Cir. 2008), *abrogated by* *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). In *Benally*, the facts were different—e.g., the case was in federal court because the defendant had allegedly assaulted a Bureau of Indian Affairs officer—but the juror’s statements are mostly recited verbatim. *See id.* at 1231–32. In that case, the Tenth Circuit held that a criminal defendant’s Sixth Amendment right was not violated when jurors expressed racial bias during deliberations and that evidence of the racial bias was precluded by Federal Rule of Evidence 606(b). *See id.* at 1241. *Contra Peña-Rodriguez*, 137 S. Ct. at 869.

7. *Peña-Rodriguez*, 137 S. Ct. at 869.

8. 12 OKLA. STAT. § 2606(B) (2011).

overt racism in the jury room. Unfortunately, however, neither Rule 2606(B) nor Federal Rule of Evidence (FRE) 606(b) has been updated to reflect this significant change in the law—perpetuating a waiting game.

This Comment highlights the conflict between the newly created racial-bias exception and Rule 2606(B), as well as FRE 606(b), and provides Oklahoma’s lawmakers with recommendations for rectifying that discrepancy. By adopting these recommendations, Oklahoma can set an example for other jurisdictions to follow and, in the process, win the waiting game. Part II explores the historical treatment of the no-impeachment rule, beginning with the English common law and culminating in its codification into the Federal Rules of Evidence, which Oklahoma adopted. Part III reviews the two prominent U.S. Supreme Court cases interpreting FRE 606(b)—prior to *Peña-Rodriguez v. Colorado*—that rejected constitutional challenges to the rule. Part IV examines the groundbreaking *Peña-Rodriguez* decision and the newly created exception to the no-impeachment rule. Part V discusses the immediate and long-term effects of *Peña-Rodriguez* and explains the reasons for the reluctance of the Advisory Committee on Rules of Evidence (Advisory Committee) to amend FRE 606(b). Finally, Part VI provides Oklahoma lawmakers with alternative amendments to rectify the unconstitutionality of Rule 2606(b).

II. *The Law Before Peña-Rodriguez v. Colorado*

A. *The Common Law Development of the No-Impeachment Rule*

Traditionally, the jury deliberation room has been considered a black box⁹ because, in theory, “no one should be a witness to his own misconduct.”¹⁰ The treatment of jury deliberations and the protection of verdicts from juror impeachment in America traces its lineage back to the English common law. Before the case of *Vaise v. Delaval*,¹¹ English courts admitted juror testimony to invalidate verdicts if the testimony contained evidence of juror misconduct.¹² In 1785, however, Lord Mansfield upheld

9. See Amanda R. Wolin, *What Happens in the Jury Room Stays in the Jury Room . . . but Should It?: A Conflict Between the Sixth Amendment and Federal Rule of Evidence 606(b)*, 60 UCLA L. REV. 262, 289 (2012) (“The jury room is meant to be a black box, and what happens in the jury room is meant to stay there.”).

10. Comment, *Impeachment of Jury Verdicts*, 25 U. CHI. L. REV. 360, 360 (1958); see Note, *Evidence: Impeachment of Verdict When Jurors Obtain Independent Information*, 10 DUKE L.J. 149, 149–50 (1961).

11. 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785); see *Peña-Rodriguez*, 137 S. Ct. at 863.

12. See Benjamin T. Huebner, Note, *Beyond Tanner: An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. REV. 1469, 1472 (2006).

the *Vaise* verdict notwithstanding the evidence that the jurors reached their verdict by chance.¹³ Lord Mansfield's opinion—in its entirety—held that:

The Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor: but in every such case *the Court must derive their knowledge from some other source*: such as from some person having seen the transaction through a window, or by some such other means.¹⁴

Thus, the Mansfield rule, as it became known, broadly prohibited juror testimony.¹⁵ More colloquially, the Mansfield rule provided that “a juror cannot impeach his own verdict,”¹⁶ and the policy behind this rule highlighted the inherent untrustworthiness in a juror testifying about his own misconduct.¹⁷ Because of Lord Mansfield's influence on early jurisprudence, the Mansfield rule gained notoriety and broad implementation throughout both England and the American colonies.¹⁸

Despite the Mansfield rule's broad acceptance, it never received universal adherence, especially in America.¹⁹ For example, in the 1852 case of *United States v. Reid*, the U.S. Supreme Court cautioned that “cases might arise in which it would be impossible to refuse [juror testimony] without violating the plainest principles of justice.”²⁰ The Court, however, ultimately applied the no-impeachment rule and excluded juror affidavits testifying that a juror received and read an outside newspaper.²¹ But the primary divergence from the Mansfield rule came from Iowa in 1866.²²

13. In other words, “the jury broke their deadlock by ‘toss[ing] up’ (i.e., by casting lots).” *Id.* (alterations in original); see Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?*, 66 N.C. L. REV. 509, 513 (1988).

14. John L. Rosshirt, Note, *Evidence—Admissibility of Jurors' Affidavits to Impeach Jury Verdict*, 31 NOTRE DAME LAW. 484, 484 (1956) (quoting *Vaise*, 1 T.R. 11, 99 Eng. Rep. 944) (emphasis added).

15. See Huebner, *supra* note 12, at 1472–73; see also Jack Pope, *The Mental Operations of Jurors*, 40 TEX. L. REV. 849, 849 (1962) (noting that Lord Mansfield created the rule in the eighteenth century that prohibited jurors for testifying about their own misconduct).

16. See, e.g., Rosshirt, *supra* note 14, at 484; Comment, *supra* note 10, at 361.

17. See Crump, *supra* note 13, at 513.

18. See B.M.K., Note, *Jurors—Impeachment of Verdict*, 64 U. PA. L. REV. 86, 86 (1915).

19. See Huebner, *supra* note 12, at 1473; Crump, *supra* note 13, at 514–15.

20. 53 U.S. (12 How.) 361, 366 (1851).

21. *Id.* at 367.

22. See Huebner, *supra* note 12, at 1473.

In *Wright v. Illinois & Mississippi Telegraph Co.*, the Iowa Supreme Court explicitly rejected the Mansfield rule²³ and adopted what became known as the “Iowa rule.”²⁴ This new rule permitted courts to receive juror affidavits “to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself[.]”²⁵ In effect, the Iowa rule allowed jurors to testify about objective facts that occurred in the jury room because, the Iowa Supreme Court reasoned, other jurors could easily dispute or corroborate the juror’s testimony.²⁶ Inversely, the Iowa rule prohibited jurors from testifying about “subjective facts such as the effect of overt acts upon a juror’s thinking.”²⁷ As a result, a minority of states followed suit, adopting the Iowa rule.²⁸

Thereafter, the Mansfield rule and the Iowa rule competed in American common law.²⁹ The U.S. Supreme Court applied the Iowa rule twice³⁰ but ultimately decided against adopting the Iowa rule at the federal level in *McDonald v. Pless*.³¹ In doing so, however, the Court again expressed its foreshadowing refrain from *Reid*—this time, that a juror’s own testimony may be necessary “in the gravest and most important cases.”³² Despite this ambiguous forewarning, the Court recognized the no-impeachment rule as the law of the land, and the *McDonald* holding, known over time as “the federal rule,” prevailed throughout the twentieth century.³³

23. See 20 Iowa 195, 211–13 (1866).

24. See Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 863 (2017).

25. *Wright*, 20 Iowa at 210.

26. Peña-Rodriguez, 137 S. Ct. at 863.

27. Note, *Impeachment of Verdicts by Jurors—Rule of Evidence 606(b)*, 4 WM. MITCHELL L. REV. 417, 420 (1978).

28. See Peña-Rodriguez, 137 S. Ct. at 865 (noting, as of 2017, nine states have adopted the Iowa rule); see also Huebner, *supra* note 12, at 1474 (commenting that the Iowa rule “gained broad acceptance” but only supporting this claim by stating that “[a]t least twelve states adopted the rule”).

29. See Crump, *supra* note 13, at 517–20.

30. See, e.g., Hyde v. United States, 225 U.S. 347, 382–84 (1912); *Mattox v. United States*, 146 U.S. 140, 151 (1892).

31. 238 U.S. 264, 269 (1915); see *Warger v. Shauers*, 574 U.S. 40, 46–47 (2014) (“This Court occasionally employed language that might have suggested a preference for the Iowa rule. But to the extent that these decisions created any question as to which approach this Court followed, *McDonald v. Pless* largely settled matters. There, we held that juror affidavits were not admissible to show that jurors had entered a ‘quotient’ verdict, precisely the opposite of the result reached by the Iowa Supreme Court in its decision establishing the Iowa approach.”) (internal citations omitted).

32. *McDonald*, 238 U.S. at 269; see *supra* text accompanying note 20.

33. See Peña-Rodriguez, 137 S. Ct. at 876 (Alito, J., dissenting).

B. FRE 606(b)—The Codification of the No-Impeachment Rule

During the first half of the twentieth century, several organizations attempted to codify common-law evidence rules, but no effort was successful³⁴ until the Advisory Committee was appointed.³⁵ After the Advisory Committee was formed to develop what ultimately became the Federal Rules of Evidence, the Committee had to decide whether to codify the federal no-impeachment rule or the Iowa rule. The Advisory Committee's first draft favored a more liberal rule, comparable to the Iowa rule,³⁶ however, the Committee ultimately scrapped that approach. The proposed rule, which the Advisory Committee sent to Congress for confirmation, reflected the *McDonald* approach.³⁷ The debate over the proper standard did not end there. The U.S. House of Representatives passed a bill incorporating the Iowa rule into the federal evidence code,³⁸ but the U.S. Senate declined to adopt that version³⁹ and instead instituted FRE 606(b), mirroring the federal rule.⁴⁰

Currently, FRE 606(b) prohibits the use of juror testimony to impeach a verdict, specifically foreclosing testimony about the inner workings and deliberations inside the jury room, except in three narrow instances. Under the rule, jurors may testify when:

34. See Michael S. Ariens, *The Law of Evidence and the Idea of Progress*, 25 LOY. L.A. L. REV. 853, 858–63 (1992) (discussing early codification efforts by, namely, the American Law Institute and the National Conference of Commissioners on Uniform State Laws).

35. *Id.* at 863–64.

36. See Crump, *supra* note 13, at 520; see also *Peña-Rodriguez*, 137 S. Ct. at 864.

37. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 265 (1972); see *Peña-Rodriguez*, 137 S. Ct. at 864; see also Crump, *supra* note 13, at 520–21 (“The Advisory Committee’s final proposal, which eventually was adopted by the Supreme Court, added the restriction, taken from *Mattox* and *Woodward*, that jurors were not competent to testify about any occurrences or statements made during deliberations”) (internal citations omitted).

38. HOUSE COMM. ON THE JUDICIARY, FEDERAL RULES OF EVIDENCE, H.R. REP. NO. 93-650, at 9–10 (1973), reprinted in 28 U.S.C.S. FED. R. EVID. App. 1, at 167–68 (Law. Co-op. 1975); see Crump, *supra* note 13, at 521; see also FED. R. EVID. 606 advisory committee’s note to subdivision (b).

39. SENATE COMM. ON THE JUDICIARY, FEDERAL RULES OF EVIDENCE, S. REP. NO. 93-1277, at 56 (1974), reprinted in 28 U.S.C.S. FED. R. EVID. App. 2, at 203–04 (Law. Co-op. 1975); see Crump, *supra* note 13, at 521; see also FED. R. EVID. 606 advisory committee’s note to subdivision (b).

40. See Wolin, *supra* note 9, at 271–72; see also *id.* at 271 n.37 (discussing the 2006 amendment, which created an exception in cases where a mistake was made on the verdict form, as well the 2011 amendment to the Federal Rules of Evidence, which restyled the rule to make them more legible and accessible).

- (A) extraneous prejudicial information was improperly brought to the jury's attention;
- (B) an outside influence was improperly brought to bear on any juror; or
- (C) a mistake was made in entering the verdict on the verdict form.⁴¹

Like many states, Oklahoma's comparable Rule 2606(B)⁴² is a near word-for-word copy of FRE 606(b), and its adoption of the rule in 2002 did not significantly change the state's common-law treatment of juror testimony.⁴³

41. FED. R. EVID. 606(b). In its entirety, FRE 606(b) reads as follows:

(b) During an Inquiry into the Validity of a Verdict or Indictment.

(1) *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.

(2) *Exceptions.* A juror may testify about whether:

- (A) extraneous prejudicial information was improperly brought to the jury's attention;
- (B) an outside influence was improperly brought to bear on any juror; or
- (C) a mistake was made in entering the verdict on the verdict form.

Id.

42. 12 OKLA. STAT. § 2606(B) (2011). In its entirety, section 2606(B) reads as follows:

B. Upon an inquiry into the validity of a verdict or indictment, a juror shall not testify as to any matter or statement occurring during the course of the jury's deliberations or as to the effect of anything upon the juror's mind or another juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes during deliberations. A juror may testify on the question 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. An affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying shall not be received for these purposes.

Id. In 2006, FRE 606(b) added a third exception for mistakes on verdict forms, which Oklahoma has not adopted. See FED. R. EVID. 606 advisory committee's note on the 2006 amendment to amended rule 606(b); *cf.* 12 OKLA. STAT. § 2606(B).

43. See 12 OKLA. STAT. § 2606(B) Evidence Subcommittee's Note ("As to § 606(B) relating to inquiry into the validity of a verdict or indictment, does not change Oklahoma law significantly.").

Therefore, in Oklahoma, trial courts exclude juror testimony if it does not fit one of the narrow exceptions.⁴⁴

III. Supreme Court Interpretation of FRE 606(b)

Since the codification of the no-impeachment rule, the Supreme Court has rarely had to interpret FRE 606(b). The two cases in which the Court interpreted and applied FRE 606(b), prior to *Peña-Rodriguez*, are *Tanner v. United States* and *Warger v. Shauers*.⁴⁵ In each case, the U.S. Supreme Court upheld a broad application of the no-impeachment rule and failed to find additional exceptions to the rule.

A. Tanner v. United States

1. Background

In *Tanner*,⁴⁶ defendants Anthony Tanner and William Conover were each found guilty on one count of defrauding the United States and various counts of mail fraud.⁴⁷ The defendants' charges arose out of shady contractual dealings involving the construction of a coal-fired power plant and an accompanying patrol road by Seminole Electric Cooperative, Inc.⁴⁸ Because both projects were backed by a federal loan, criminal charges were brought in federal court.⁴⁹ After a hung jury in an initial trial, a subsequent trial with a different jury found both defendants guilty.⁵⁰

2. Post-Trial Motions

After the trial but before the defendants were sentenced, one of the jurors, on her own, called Tanner's attorney to inform him that multiple jurors had consumed alcohol during recesses and had slept through portions

44. Given Rule 2606(B)'s broad prohibition, Oklahoma courts have rarely addressed the effect of a juror's racial bias in relation to post-verdict inquiries. But in 2012, the Oklahoma Supreme Court held that a juror's racial bias was unconstitutional; however, the court qualified its holding under the extremely narrow facts of that case. *See Fields v. Saunders*, 2012 OK 17, ¶¶ 12–15, 278 P.3d 577, 581–82. Despite the holding, the court “stress[ed] that this is a fact specific case of juror bias and not a case of a juror impeaching a verdict”—thus distinguishing the case from one involving Rule 2606(B). *Id.* ¶ 13, 278 P.3d at 581.

45. *See Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 866 (2017) (“[S]ince the enactment of Rule 606(b), the Court has addressed the precise question whether the Constitution mandates [a racial bias] exception to it in just two instances.”).

46. 483 U.S. 107 (1987).

47. *Id.* at 112–13.

48. *See id.* at 110–13.

49. *Id.* at 112.

50. *Id.* at 112–13.

of the trial.⁵¹ Tanner’s attorney filed several motions, including one for a new trial, but the district court judge found the juror testimony “inadmissible under Federal Rule of Evidence 606(b) to impeach the jury’s verdict.”⁵² Instead, the judge invited additional evidence—not in the form of juror testimony—to determine whether a new trial should be granted.⁵³ Upon review, the judge again ruled that the testimony was inadmissible, so the defendants appealed.⁵⁴

While on appeal, Tanner’s attorney received another unsolicited statement by a juror, attesting a similar story as the first juror’s statement.⁵⁵ This time, however, the juror gave more details into what he described as “one big party.”⁵⁶ The juror alleged that

- (1) at least seven jurors, including himself, had consumed alcohol, including pitchers of beers, liters of wine, and multiple mixed drinks;
- (2) four jurors, including himself, “smoked marijuana quite regularly” throughout the trial;
- (3) two jurors ingested cocaine several times each;
- (4) one juror sold another juror “a quarter pound of marijuana”; and
- (5) one juror “took marijuana, cocaine, and drug paraphernalia into the courthouse.”⁵⁷

According to the juror, he came forward “to clear [his] conscience” because he believed “Mr. Tanner should have a better opportunity to get somebody that would review the facts right.”⁵⁸

Despite the shocking allegations, the district court denied a new trial, and the Eleventh Circuit affirmed.⁵⁹

3. Supreme Court Affirms

The Supreme Court affirmed the lower courts’ decisions holding that juror intoxication is not considered an extraneous influence and that

51. *Id.* at 113.

52. *Id.*

53. *Id.*

54. *Id.* at 115.

55. *Id.*

56. *Id.* (quoting and citing the juror’s affidavit).

57. *Id.* at 115–16 (quoting and citing the juror’s affidavit).

58. *Id.* at 116 (quoting and citing the juror’s affidavit).

59. *Id.*; see *United States v. Conover*, 772 F.2d 765, 767 (11th Cir. 1985).

multiple trial safeguards already protect defendants from juror misconduct.⁶⁰ In rejecting Tanner's demand for juror testimony, the Court also relied upon the significant public policy concerns supporting the no-impeachment rule.⁶¹

Writing for the majority, Justice O'Connor first looked to whether the alleged juror misconduct fit one of the exceptions of FRE 606(b)⁶²—namely, whether juror intoxication is an “external influence.”⁶³ In *Mattox v. United States*, the Supreme Court first recognized an exception for “extraneous influence[s]” on juries.⁶⁴ Since then, federal courts have “used this external/internal distinction to identify those instances in which juror testimony impeaching a verdict would be admissible.”⁶⁵ Courts applying this framework have held that “allegations of the physical or mental incompetence of a juror [are] ‘internal’ rather than ‘external’ matters.”⁶⁶

In particular, the Court highlighted the case of *United States v. Dioguardi*.⁶⁷ In *Dioguardi*, a juror wrote a letter to the defendant, post-trial, telling him she had clairvoyant abilities and knew he was a good man, despite his being guilty.⁶⁸ The defense sought to impeach the verdict, alleging the juror's incompetence as evidenced by her self-professed supernatural powers in her letter,⁶⁹ but the court denied relief.⁷⁰ The Second Circuit affirmed and concluded that generally “courts have refused to set aside a verdict, or even to make further inquiry, unless there be proof of an adjudication of insanity or mental incompetence closely in advance”⁷¹ Therefore, juror intoxication does not rise to the level of misconduct or incompetence such that it may be deemed an outside influence.⁷²

Next, the Court discussed the substantial policy concerns in favor of limiting juror testimony except in cases of outside influence. Primarily, the Supreme Court focused on the concerns it first noted in *McDonald* in 1915:

60. *See Tanner*, 483 U.S. at 121–27.

61. *See id.* at 119–21, 127.

62. *See id.* at 117–19.

63. *See id.* at 117–18.

64. *Id.* at 117 (quoting *Mattox v. United States*, 146 U.S. 140, 149 (1892)); *see also* cases cited *supra* note 30.

65. *Tanner*, 483 U.S. at 117.

66. *Id.* at 118.

67. *Id.* at 118–19.

68. *See United States v. Dioguardi*, 492 F.2d 70, 75–78 (2d Cir. 1974).

69. *See id.* at 75 n.7 (reciting the juror's letter in full).

70. *See Tanner*, 483 U.S. at 118.

71. *Id.* at 119 (quoting *Dioguardi*, 492 F.2d at 80).

72. *See id.* at 122.

[j]urors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.⁷³

The Court confirmed that those policy considerations still existed⁷⁴ and expressed concerns that post-verdict “[a]llegations of juror misconduct” would substantially disrupt the finality of verdicts.⁷⁵ Despite conceding that post-verdict investigations into jury deliberations would prove helpful in some cases, the Court concluded that “[i]t is not at all clear, however, that the jury system could survive such efforts to perfect it.”⁷⁶ Therefore, public policy weighed in favor of prohibiting juror testimony of juror misconduct in order to prevent juror harassment, encourage full and frank jury deliberations, and promote the finality of verdicts.

Finally, the Court considered the constitutional challenge to the criminal defendant’s Sixth Amendment right to a fair and impartial trial.⁷⁷ The Court determined that four trial safeguards protect a criminal defendant’s Sixth Amendment right—apart from juror testimony. The first line of defense against juror misconduct is voir dire, during which counsel for both parties can assess a prospective juror’s competence and can accept or reject jurors accordingly.⁷⁸ Second, during trial, jurors are “observable by the court, by counsel, and by court personnel.”⁷⁹ Consequently, finality issues are negated if the court learns of the misconduct and remedies it before the verdict is decided.⁸⁰ Third, jurors observe each other and are made aware of

73. *Id.* at 120 (quoting *McDonald v. Pless*, 238 U.S. 264, 267–68 (1915)); *see supra* notes 30–32 and accompanying text.

74. *See Tanner*, 483 U.S. at 120.

75. *Id.* (“Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process.”) (citing *Virgin Islands v. Nicholas*, 759 F.2d 1073, 1081 (3d Cir. 1985)).

76. *Id.*

77. *Id.* at 127.

78. *Id.* Though, it is worth noting that jurors shall not be excluded because of their race. *See Batson v. Kentucky*, 476 U.S. 79, 89 (1986); *see also* discussion *infra* notes 190–201 (explaining how *Batson* may play a role in the development of *Peña-Rodriguez* jurisprudence).

79. *Tanner*, 483 U.S. at 127 (citing *United States v. Provenzano*, 620 F.2d 985, 996–97 (3d Cir. 1980)).

80. *See id.*

procedures for reporting any misconduct prior to deliberations.⁸¹ Lastly, parties may still seek to impeach a verdict using “nonjuror evidence,”⁸² which the trial judge invited Tanner’s attorney to provide after rejecting the initial juror’s testimony.⁸³ Because these safeguards were in place, the Court reasoned Tanner’s Sixth Amendment right was not violated. After establishing that the aforementioned trial safeguards insulated Tanner’s Sixth Amendment right and that juror intoxication is not an extraneous influence, the Supreme Court held that the juror testimony was correctly excluded.⁸⁴

B. *Warger v. Shauers*

The Supreme Court’s holding in *Tanner* unified lower courts’ approaches to post-verdict inquiries,⁸⁵ and the Court did not interpret FRE 606(b) or comparable state rules until *Warger v. Shauers*⁸⁶ in 2014.

1. *Trial Level and on Appeal*

While riding his motorcycle in South Dakota, Gregory Warger was struck from behind by a truck driven by Randy Shauers.⁸⁷ Warger suffered devastating injuries as a result of the accident, including the loss of his leg.⁸⁸ Both parties claimed the other was at fault, and “Warger sued Shauers for negligence” in a civil trial.⁸⁹

The jury found in favor of Shauers, who was driving the truck.⁹⁰ Shortly after the trial, however, one juror informed the plaintiff’s counsel that the foreperson, Regina Whipple, expressed pro-defendant views in the deliberation room.⁹¹ According to the juror’s affidavit, Whipple admitted that her daughter had been at fault in a similar vehicle accident.⁹²

81. *Id.*

82. *Id.*

83. *Id.*; see also *supra* notes 52–53 and accompanying text.

84. See *Tanner*, 483 U.S. at 127.

85. See Huebner, *supra* note 12, at 1487–90 (discussing how Tanner’s “framework has gained widespread acceptance in the states” and how “once there was a diversity of approaches to the admissibility of juror testimony, with each state balancing fairness to the litigants with the important goal of protecting the jury system, there is now staid uniformity and little experimentation”).

86. 574 U.S. 40 (2014).

87. *Id.* at 42.

88. *Id.*

89. *Id.*

90. *Id.* at 43.

91. *Id.*

92. *Id.*

Specifically, the juror alleged Whipple even said that “if her daughter had been sued, it would have ruined her life.”⁹³

Before the jury was empaneled, during voir dire, counsel extensively questioned prospective jurors about whether they would be able to be fair and impartial in a civil negligence case.⁹⁴ For each question, Whipple answered affirmatively that she could be an impartial juror.⁹⁵ Thus, upon hearing of Whipple’s pro-defendant bias, Warger’s counsel sought a new trial because Whipple likely would have not been empaneled had she told the truth during voir dire.⁹⁶ The district court denied Warger’s motion for a new trial because the juror’s testimony did not fit one of FRE 606(b)’s exceptions.⁹⁷

The Eighth Circuit affirmed, holding that the juror’s testimony of Whipple’s bias did not fit the definition of “extraneous prejudicial information,” as found in FRE 606(b)(2)(A).⁹⁸ The Eighth Circuit reasoned that prejudices and biases are personal and, therefore, internal rather than external evidence.⁹⁹ Furthermore, despite a circuit split on this issue, the Eighth Circuit sided with the majority of circuit courts in holding that FRE 606(b) applies to juror evidence “that a juror lied during *voir dire*.”¹⁰⁰

2. Supreme Court Affirms

The Supreme Court applied a straight-forward analysis to this case. First, FRE 606(b) applies to “inquir[ies] into the validity of a verdict.”¹⁰¹ Second, moving for a new trial because a juror lied during voir dire is “plainly” an inquiry into the jury’s verdict.¹⁰² Third, FRE 606(b) applies, so the evidence

93. *Id.* (quoting the juror’s affidavit).

94. *Id.*

95. *Id.*

96. *Id.* The basis of the plaintiff’s motion for new trial was that the juror’s affidavit satisfied the requirements of *McDonough Power Equipment, Inc. v. Greenwood*, which requires a party to “demonstrate that a juror failed to answer honestly a material question on *voir dire*, and . . . that a correct response would have provided a valid basis for a challenge for cause.” *Id.* (quoting *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984)). But, before the plaintiff could even prove that the juror’s affidavit fulfilled the *McDonough* requirements, the juror’s testimony had to be admitted under FRE 606(b). *See id.*

97. *Id.*

98. *Id.* at 44.

99. *Id.*

100. *Id.*

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

102. *Id.* at 44–45.

must fit one of FRE 606(b)'s three exceptions.¹⁰³ In this case, the Supreme Court held that the juror's testimony of Whipple's alleged pro-defendant bias did not fit any of the exceptions.¹⁰⁴

Despite couching its opinion in simplistic terms at times,¹⁰⁵ the Court supplied a robust discussion of why FRE 606(b) applied in this situation and why the juror's testimony should be excluded. The Court began its analysis by reciting the history of the no-impeachment rule leading up to the codification of FRE 606(b).¹⁰⁶ By adopting the narrower federal rule, the Court reasoned, Congress purposely chose to exclude all juror testimony that did not meet one of FRE 606(b)'s exceptions, when offered during an inquiry into the validity of a verdict.¹⁰⁷ Therefore, the Court's analysis of "simply accord[ing] Rule 606(b)'s terms their plain meaning"¹⁰⁸ aligned with courts' traditional treatment juror testimonies.¹⁰⁹

Next, the Court rejected two of Warger's theories. First, Warger argued that the focus of his motion for a new trial was on voir dire because Whipple allegedly lied during voir dire.¹¹⁰ Thus, vacating the verdict is the only remedy to rectify the wrong that transpired during voir dire.¹¹¹ But the Court disagreed with Warger because the language of FRE 606(b)— "[d]uring an inquiry into the validity of a verdict"¹¹²—simply means "during a *proceeding* in which the verdict may be rendered invalid."¹¹³

Second, Warger argued that civil litigants, like criminal defendants, have a right to an impartial trial.¹¹⁴ Accordingly, Warger's constitutional right, which is largely protected by voir dire,¹¹⁵ compels admittance of juror testimony in this case.¹¹⁶ To refute this argument, the Court again pointed to

103. *See id.*

104. *Id.* at 51.

105. *See, e.g., id.* at 44 (stating that, in announcing the holding of the case, the Court "simply accord[s] Rule 606(b)'s terms their plain meaning") (emphasis added); *id.* at 48 (stating that the plaintiff "seek[s] to rebut this straightforward understanding of Rule 606(b)") (emphasis added).

106. *See id.* at 45–48; *see also* discussion *supra* Part II.

107. *Warger*, 574 U.S. at 48.

108. *Id.* at 44.

109. *See id.* at 45–48.

110. *Id.* at 48–49.

111. *Id.*

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

113. *Warger*, 574 U.S. at 49.

114. *Id.* at 50.

115. *See id.* (citing *Turner v. Murray*, 476 U.S. 28, 36 (1986) (plurality opinion); *Ham v. South Carolina*, 409 U.S. 524, 527 (1973)).

116. *Id.*

the common-law history and language of FRE 606(b), which lacks any ambiguity.¹¹⁷ But more importantly, the Court's decision in *Tanner* supplied the answer:¹¹⁸ the safeguards detailed in *Tanner*,¹¹⁹ including voir dire, protect a criminal defendant's Sixth Amendment right.¹²⁰ Therefore, even if one safeguard is allegedly compromised, the remaining safeguards still protect a criminal defendant's constitutional rights.¹²¹

Ultimately, the Court held that the juror's testimony did not fit the FRE 606(b)(2)(A) exception.¹²² Moreover, by applying the *Tanner* analysis to this civil case and by precluding the juror's testimony, the Supreme Court affirmed that the no-impeachment rule does not violate the Sixth Amendment.¹²³

IV. Peña-Rodriguez v. Colorado

Tanner and *Warger* appeared to foreclose arguments that the Constitution compels post-verdict juror testimony about juror misconduct in the deliberation room. But the Supreme Court reversed course in *Peña-Rodriguez v. Colorado*.¹²⁴ The issue presented in *Peña-Rodriguez* was whether one juror may testify about another juror's statements demonstrating overt racial bias or animus to impeach a verdict, when those statements played a significant role in reaching the verdict.¹²⁵ The Supreme Court ruled affirmatively, holding FRE 606(b) and comparable state statutes unconstitutional when applied to cases involving racist statements made by jurors during deliberation.¹²⁶ *Peña-Rodriguez* marked a significant

117. *Id.*

118. *Id.* (“[A]ny claim that Rule 606(b) is unconstitutional in circumstances such as these is foreclosed by our decision in *Tanner*.”).

119. *See supra* notes 77–83 and accompanying text.

120. *Warger*, 574 U.S. at 51.

121. *Id.*

122. *Id.*

123. *See id.* (“In *Tanner*, we concluded that Rule 606(b) precluded a criminal defendant from introducing evidence that multiple jurors had been intoxicated during trial, rejecting the contention that this exclusion violated the defendant's Sixth Amendment right[.] . . . Similarly here, a party's right to an impartial jury remains protected despite Rule 606(b)'s removal of one means of ensuring that jurors are unbiased. Even if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered.”).

124. 137 S. Ct. 855 (2017).

125. *See id.* at 861.

126. *Id.* at 869.

shift in the no-impeachment rule and may have profound constitutional effects moving forward.

A. The State Trial

In 2007, Miguel Angel Peña-Rodriguez, a Hispanic man, was charged with harassment, unlawful sexual contact, and attempted sexual assault of two teenage sisters.¹²⁷ Both sisters identified the defendant as their assailant.¹²⁸ Before the jury was empaneled, prospective jurors were given a written questionnaire asking them, *inter alia*, if “there [is] anything about you that you feel would make it difficult for you to be a fair juror in this case?”¹²⁹ Moreover, at *voir dire*, prospective jurors were asked whether they had any reason why they could not be impartial in this trial, and “[n]one of the empaneled jurors expressed any reservations based on racial or any other bias.”¹³⁰ After the trial and subsequent jury deliberation, the jury found the defendant guilty.¹³¹

B. Jurors Come Forward—Motion for New Trial

After the jury rendered the verdict, however, two jurors approached the defense counsel and said privately that another juror, Juror H.C., had made racially biased statements about the defendant and his alibi witness.¹³² With approval by the court, the defense counsel obtained sworn affidavits from the two jurors testifying to the following:

H.C. told the other jurors that he “believed the defendant was guilty because, in [H.C.’s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women.” The jurors reported that H.C. stated his belief that Mexican men are physically controlling of women because of their sense of entitlement, and further stated, “I think he did it because he’s Mexican and Mexican men take whatever they want.” According to the jurors, H.C. further explained that, in his

127. *Id.* at 861.

128. *Id.*

129. Peña-Rodriguez v. People, 350 P.3d 287, 288 (Colo. 2015); *see Peña-Rodriguez*, 137 S. Ct. at 861.

130. *Peña-Rodriguez*, 137 S. Ct. at 861.

131. *Id.*

132. *Id.*

experience, “nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.”¹³³

Finally, the jurors testified that Juror H.C. disputed the credibility of the defendant’s Hispanic alibi witness because he was in the country illegally, which was later proven false.¹³⁴

At the hearing on the motion for a new trial, the trial court recognized the juror’s evident bias but denied the motion because Colorado Rule of Evidence 606(b)—which is modeled after FRE 606(b)—does not permit juror testimony concerning such evidence.¹³⁵ Thereafter, the Colorado Court of Appeals and the Colorado Supreme Court both affirmed the trial court’s denial.¹³⁶

C. Justice Kennedy’s Opinion

The U.S. Supreme Court reversed the decision of the Colorado Supreme Court and created a new exception to FRE 606(b) in cases “where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant[.]”¹³⁷ Specifically, the Court held that “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.”¹³⁸

Justice Kennedy commenced the Court’s analysis by reciting the history of the no-impeachment rule leading up to the modern-day codification of FRE 606(b),¹³⁹ as well as precedent cases involving juror testimony.¹⁴⁰ The Court emphasized the history of the no-impeachment rule by charting the courses of two historical approaches to juror testimony.¹⁴¹ Moreover, though the Federal Rules of Evidence codified the common law and a majority of states had adopted that rule, the Court noted that at least sixteen states¹⁴² and three federal circuit courts¹⁴³ had recognized an exception

133. *Id.* at 862 (quoting jurors’ affidavits) (internal citations omitted).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 869.

138. *Id.*

139. *See supra* Part II.

140. *Peña-Rodriguez*, 137 S. Ct. at 863–67; *see supra* Part III.

141. *Peña-Rodriguez*, 137 S. Ct. at 863–65.

142. *See id.* at 886 (providing an appendix listing cases in which the respective states have judicially recognized a racial-bias exception).

when racial bias is used to reach a verdict.¹⁴⁴ Finally, the Court addressed the concerns expressed in *Tanner v. United States* and *Warger v. Shauers*.¹⁴⁵

Having recited the evolution of the no-impeachment rule, Justice Kennedy proceeded to the heart of the Court's reasoning: given our nation's struggle with extinguishing racism from the justice system, "[t]ime and again, this Court has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system."¹⁴⁶ The Court cited many cases wherein it sought to expunge racial discrimination from the justice system and noted that allowing racial bias in the jury rooms is "especially pernicious."¹⁴⁷ Moreover, Justice Kennedy distinguished racial bias from the juror misconduct in other cases involving the no-impeachment rule.¹⁴⁸ Thus, because "racial bias implicates unique historical, constitutional, and institutional concerns," it is "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice."¹⁴⁹

In articulating this new rule, the Court explained that purging juries of racial bias is more "necessary to prevent a systemic loss of confidence in jury verdicts" than any damage to the jury and verdict safeguards laid out in *Tanner*.¹⁵⁰ But fleeting or inconsequential remarks on race do not fit this new exception because the Court narrowed its holding to evidence of overt racial bias or discrimination.¹⁵¹ Consequently, "[t]o qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict."¹⁵² Beyond that directive, however, the Court did not provide a framework or test to help lower courts determine when a

143. *See id.* at 865 (citing *United States v. Villar*, 586 F.3d 76, 87–88 (1st Cir. 2009); *United States v. Henley*, 238 F.3d 1111, 1119–21 (9th Cir. 2001); *Shillcutt v. Gagnon*, 827 F.2d 1155, 1158–60 (7th Cir. 1987)).

144. *Id.* Later in the opinion, however, Justice Kennedy stated that 17 jurisdictions had a racial-bias exception prior to *Peña-Rodriguez*. *Id.* at 870.

145. *See supra* Part III.

146. *Peña-Rodriguez*, 137 S. Ct. at 867.

147. *Id.* at 868 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)).

148. *Id.* ("Racial bias of the kind alleged in this case differs in critical ways from the compromise verdict in *McDonald*, the drug and alcohol abuse in *Tanner*, or the pro-defendant bias in *Warger*.").

149. *Id.*

150. *Id.* at 869.

151. *Id.*

152. *Id.*

juror's racially charged statements require admission of juror testimony about those statements.¹⁵³

Finally, the Supreme Court recognized that Juror H.C.'s statements, which "were egregious and unmistakable in their reliance on racial bias," fit this new exception.¹⁵⁴ Therefore, the Court reversed and remanded the case.¹⁵⁵

D. Justice Alito's Dissent

Joined by Chief Justice Roberts and Justice Thomas,¹⁵⁶ Justice Alito attacked the majority's holding on four grounds: (1) the extensive history of no-impeachment rule; (2) the safeguards elucidated in *Tanner* that are in place throughout a trial; (3) the lack of a hierarchy of fairness or impartiality under the Sixth Amendment; and (4) the majority's willingness to undermine the underlying public policy concerns the no-impeachment rule was designed to protect.¹⁵⁷

Justice Alito began his dissent by recounting the exhaustive history of the no-impeachment rule¹⁵⁸ before reiterating the holdings of *Tanner* and *Warger*.¹⁵⁹ In particular, Justice Alito focused on the "crucial interests" advanced by the no-impeachment rule and the trial safeguards that the *Tanner* Court identified as protecting criminal defendants' Sixth Amendment right against juror misconduct.¹⁶⁰ In its opinion, the majority addressed two of these safeguards—voir dire and pre-verdict juror reports—and found them ineffective against the type of racial bias the holding attempts to eliminate.¹⁶¹ Justice Alito disagreed and argued that the

153. *See id.*

154. *Id.* at 870.

155. *Id.* at 871.

156. In addition, Justice Thomas wrote a separate dissenting opinion. *See id.* at 871–74 (Thomas, J., dissenting).

157. *Id.* at 875–85 (Alito, J., dissenting).

158. *See id.* at 875–78 (Alito, J., dissenting); *see also discussion supra* Part II.

159. *See Peña-Rodriguez*, 137 S. Ct. at 878–82 (Alito, J., dissenting).

160. *Id.* at 879–80 (Alito, J., dissenting); *see Tanner v. United States*, 483 U.S. 107, 127 (1987) ("Petitioners' Sixth Amendment interests in an unimpaired jury, on the other hand, are protected by several aspects of the trial process. The suitability of an individual for the responsibility of jury service, of course, is examined during *voir dire*. Moreover, during the trial the jury is observable by the court, by counsel, and by court personnel. Moreover, jurors are observable by each other, and may report inappropriate juror behavior to the court *before* they render a verdict. Finally, after the trial a party may seek to impeach the verdict by nonjuror evidence of misconduct.") (internal citations omitted).

161. *Peña-Rodriguez*, 137 S. Ct. at 880 (Alito, J., dissenting).

majority “provide[d] no good reason to depart from the calculus made in *Tanner and Warger*.”¹⁶²

Next, Justice Alito contested the majority’s argument that racial bias presents a unique challenge to the justice system and is thus worthy of its own exception to FRE 606(b).¹⁶³ While Justice Alito agreed with the majority on the pernicious nature of racial discrimination, he emphasized the language of the Sixth Amendment and its corresponding jurisprudence.¹⁶⁴ Specifically, the Sixth Amendment guarantees the right to an impartial jury but does not indicate a hierarchy of impartiality.¹⁶⁵ Moreover, Justice Alito warned that the majority’s rationale would likely open the door to other types of discriminations being recognized. But how future courts will categorize such impartialities and whether the Sixth Amendment offers protection in such cases remains unclear.¹⁶⁶

Finally, the dissent pointed out that the majority’s holding would exacerbate public policy concerns surrounding juror testimony—namely, juror harassment and the finality of verdicts.¹⁶⁷ By allowing post-verdict scrutiny into jury deliberations, Justice Alito warned of “an increase in harassment, arm-twisting, and outright coercion” of jurors,¹⁶⁸ which may “undermine the finality of verdicts.”¹⁶⁹ These public policy concerns played a major role in the development of the no-impeachment rule, and Justice Alito argued that the majority’s holding in *Peña-Rodriguez v. Colorado* would bring those harms to the forefront.¹⁷⁰

V. *The Effect of Peña-Rodriguez v. Colorado*

Given the long, seemingly settled history of the no-impeachment rule, the Supreme Court’s holding in *Peña-Rodriguez v. Colorado* has profound ramifications both now and in the course of time. Accordingly, Part V first examines the immediate impact of *Peña-Rodriguez*, including its effect on

162. *Id.* at 882 (Alito, J., dissenting).

163. *Id.* at 882–84 (Alito, J., dissenting).

164. *See id.* at 882 (Alito, J., dissenting).

165. *See id.* (Alito, J., dissenting) (“Nothing in the text or history of the Amendment or in the inherent nature of the jury trial right suggests that the extent of the protection provided by the Amendment depends on the nature of a jury’s partiality or bias.”).

166. *Id.* at 883–84 (Alito, J., dissenting).

167. *Id.* at 884–85 (Alito, J., dissenting).

168. *Id.* at 885 (Alito, J., dissenting) (citing *McDonald v. Pless*, 238 U.S. 264, 267 (1915)).

169. *Id.* (Alito, J., dissenting).

170. *Id.* (Alito, J., dissenting).

the no-impeachment rule, and addresses some unanswered issues that courts must navigate moving forward. Next, Part V explains the reason for an early consensus that *Peña-Rodriguez* will be expanded—potentially to civil cases and eventually to other forms of bias and discrimination.

A. Immediate Impact: FRE 606(b) Is Now Facially Incomplete

Peña-Rodriguez holds that the no-impeachment rule must yield to a criminal defendant's Sixth Amendment rights when jurors use explicit racial bias to reach a verdict.¹⁷¹ In effect, the Supreme Court created an additional exception to the no-impeachment rule that renders FRE 606(b) incomplete and unconstitutional for such cases. Moreover, because the Court's holding in *Peña-Rodriguez* is based on the Sixth Amendment—which is applied to the states through the Fourteenth Amendment¹⁷²—this newly created exception affects state trials in addition to federal trials, implicating each state's no-impeachment rule. As a result, Oklahoma's Rule 2606(B) is similarly incomplete.

In addition to the partial invalidation of FRE 606(b) and comparable state rules, the *Peña-Rodriguez* holding creates uncertainty about when racial bias or animus crosses the threshold and becomes subject to testimony by other jurors.¹⁷³ Justice Kennedy's majority opinion did not provide a clear-cut rule or framework to address future challenges¹⁷⁴—much like Justice Scalia's decision not to define “testimonial” in the

171. *See id.* at 869–70.

172. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (“The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.”).

173. This uncertainty exists because “[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry.” *Peña-Rodriguez*, 137 S. Ct. at 869. Therefore, “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.” *Id.* But “[w]hether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court.” *Id.*

174. *See id.* at 869–70; *see also* Jason Koffler, Note, *Laboratories of Equal Justice: What State Experience Portends for Expansion of the Peña-Rodriguez Exception Beyond Race*, 118 COLUM. L. REV. 1801, 1823 (2018) (“*Peña-Rodriguez*, groundbreaking as it may have been, was a relatively barebones decision that avoided meaningful engagement with the many procedural and doctrinal issues created by subjecting the no-impeachment rule to a constitutional racial-bias exception in criminal cases.”).

seminal Sixth Amendment case *Crawford v. Washington*.¹⁷⁵ Nevertheless, Justice Kennedy did provide a starting point by requiring “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.”¹⁷⁶ But determining whether a juror’s racial bias or animus crosses this threshold or is a significant enough factor in reaching the verdict will be left to the trial court’s discretion.¹⁷⁷

Rather than elucidating a bright-line rule, the Supreme Court will rely on the seventeen jurisdictions that already have judicially created racial-bias exceptions to their FRE 606(b) counterparts.¹⁷⁸ But, as Justice Kennedy briefly noted, “there is a diversity of approaches” among those jurisdictions.¹⁷⁹ For example, not every state with a judicially recognized racial-bias exception based its exception on constitutional principles.¹⁸⁰ Of those states that did, some states relied upon the Fourteenth Amendment’s Due Process or Equal Protection Clauses to establish their exceptions.¹⁸¹ Meanwhile, *Peña-Rodriguez* was based on the Sixth Amendment and accordingly applies to all states. Therefore, states with racial-bias exceptions that were based on other constitutional principles may not provide much help to other states because *Peña-Rodriguez* has now subsumed and superseded that case law. Because Justice Kennedy entrusted states to develop their own procedures and standards when applying *Peña-Rodriguez*¹⁸² and because the federal rule has not been amended, it is

175. Compare *Crawford v. Washington*, 541 U.S. 36, 51–53, 68 (2004) (“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”), with *Peña-Rodriguez*, 137 S. Ct. at 870 (“The Court also does not decide the appropriate standard for determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted.”).

176. *Peña-Rodriguez*, 137 S. Ct. at 869.

177. See *id.* In fact, the trial court will have “substantial discretion . . . in light of all circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.” *Id.* (emphasis added).

178. See *id.* at 870 (“[T]he Court relies on the experiences of the 17 jurisdictions that have recognized a racial-bias exception to the no-impeachment rule—some for over half a century—with no signs of an increase in juror harassment or a loss of juror willingness to engage in searching and candid deliberations. The experience of these jurisdictions, and the experience of the courts going forward, will inform the proper exercise of trial judge discretion in these and related matters.”); see also *id.* at 886 (providing an appended list of jurisdictions that have a judicially recognized racial bias exception).

179. *Id.* at 865.

180. See Koffler, *supra* note 174, at 1828–30.

181. *Id.* at 1829.

182. See *supra* notes 174–78 and accompanying text.

unclear how each state will approach such a precedent-setting decision, leaving lawyers in the dark.¹⁸³

Oklahoma, in particular, faces a potentially steep learning curve. Like FRE 606(b), Oklahoma's Rule 2606(B) is silent concerning a juror's use of racial bias or animus in the jury room,¹⁸⁴ and Oklahoma has no prior jurisprudence to consult.¹⁸⁵ As a result, the absence of a racial-bias exception in the evidence rules has set a trap for unwary attorneys. As the introductory hypothetical illustrates, perpetuating an incomplete and unconstitutional evidence rule threatens the administration of justice by unnecessarily and indirectly obscuring a prominent addition to evidence law. Apart from criminal defendants, public defenders are most affected by this change. They are also typically in the best position to learn of alleged juror misconduct. For example, in two of the three Supreme Court cases interpreting the no-impeachment rule, jurors approached the defense counsel with testimony of another juror's misconduct.¹⁸⁶ In the third case—a civil suit—the juror approached the plaintiff's counsel shortly after his client lost.¹⁸⁷ Unfortunately, however, public defenders are notoriously overworked and underpaid¹⁸⁸ and, as a result, may be susceptible to errors

183. See Lauren Crump, Comment, *Removing Race from the Jury Deliberation Room: The Shortcomings of Peña-Rodriguez v. Colorado and How to Address Them*, 52 U. RICH. L. REV. 475, 492–93 (2018) (“Allowing trial courts to make case-by-case determinations as to whether racial bias occurred will lead to wide-spread disparities in the application of the no-impeachment rule exception, and instances of racial bias will inevitably creep into jury verdicts.”).

184. See 12 OKLA. STAT. § 2606(B) (2011).

185. *Contra* Washington v. Berhe, 444 P.3d 1172, 1179 (Wash. 2019) (“By the time *Peña-Rodriguez* was decided, Washington had already begun to develop procedures for addressing motions for a new trial based on allegations of racial bias of a juror.”) (citing Washington v. Jackson, 879 P.2d 307 (Wash. 1994)).

186. See *supra* Section III.A and Part IV.

187. See *supra* Section III.B.

188. See, e.g., Heather Perry Baxter, *At a Crossroads: Where the Indigent Defense Crisis and the Legal Education Crisis Intersect*, 18 BERKELEY J. AFR.-AM. L. & POL'Y 25, 29 (2016) (discussing a then-recent study that found public defenders in Missouri spent an “alarmingly small amount of time . . . on each case”); Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. 15, 19 (2016) (“[S]ome states appear worse than others, but public defenders nationwide are underfunded and overworked.”); see also Richard A. Oppel, Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html>; Alexa Van Brunt, *Poor People Rely on Public Defenders Who Are Too Overworked to Defend Them*, GUARDIAN (June 17, 2015, 7:30 EDT), <https://www.theguardian.com/commentisfree/2015/jun/17/poor-rely-public-defenders-too-overworked>.

and oversights. Therefore, until evidence codes are revised to reflect this recent change in law, the administration of justice may be unnecessarily hindered by incomplete no-impeachment rules in Oklahoma and nationwide.

B. Future Impact: Peña-Rodriguez May Have Opened Pandora's Box

Evaluating the longer-term effects of the *Peña-Rodriguez* decision also presents a formidable challenge. Because the Supreme Court issued a significant ruling without offering much guidance concerning its application,¹⁸⁹ early scholarship has sought to fill in the gaps. The prevailing consensus maintains that the holding in *Peña-Rodriguez* will likely be expanded in two ways: the racial-bias exception will apply to civil cases and will eventually incorporate additional forms of discrimination.¹⁹⁰ Even the Advisory Committee has recognized that attorneys will argue to expand the *Peña-Rodriguez* holding because “[t]he scope of the constitutional right remains to be developed.”¹⁹¹ Whether courts ultimately expand *Peña-Rodriguez* remains to be seen, but attorneys have already sought Supreme Court review to advocate for *Peña-Rodriguez*'s application to other forms of discrimination—specifically, juror bias based on the defendant's sexual orientation.¹⁹² Though threats of expansion may seem distant, they are looming.

Here in Oklahoma, public defenders also face similar issues with understaffed, underfunded, and overworked public defenders' offices. *See, e.g.,* Josh Dulaney, *Biding Time: “Do the Most with the Least”*, OKLAHOMAN (June 28, 2017), <https://newsok.com/special/article/5553775>.

189. *See supra* notes 172–76 and accompanying text.

190. *See generally, e.g.,* Jarod S. Gonzalez, *The New Batson: Opening the Door of the Jury Deliberation Room After Peña-Rodriguez v. Colorado*, 62 ST. LOUIS U. L.J. 397, 409 (2018) (“The Supreme Court opened the door and created the exception” in criminal cases, but the policy reasons the Court provided “fit just as well with the administration of justice by civil juries as they do with the administration of justice by criminal juries.”); Koffler, *supra* note 174; *see also* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 884 (2017) (Alito, J., dissenting) (“Today's decision—*especially if it is expanded in the ways that seem likely*—will invite the harms that no-impeachment rules were designed to prevent.”) (emphasis added).

191. Adv. Comm. on Rules of Evidence, Report to Standing Committee (May 7, 2017) [hereinafter Report to Standing Committee], in Comm. on Rules of Practice & Procedure, June 2017 Meeting Materials 735, 742 (June 12, 2017), https://www.uscourts.gov/sites/default/files/2017-06-standing-agenda_book_0.pdf.

192. *See* Petition for Writ of Certiorari, Rhines v. South Dakota, 138 S. Ct. 2660 (2018) (No. 17-8791) (arguing defendant was subject to discrimination, within the jury room, based on his homosexuality); *see also* Jordan S. Rubin, *Gay Death Row Inmate Wants SCOTUS*

The first step toward expanding the *Peña-Rodriguez* holding will likely result from the application of its analysis to civil cases. Because the Supreme Court based its holding on the Sixth Amendment and a criminal defendant's right to a fair and impartial trial,¹⁹³ *Peña-Rodriguez* is currently inapplicable in civil cases where jurors express racial bias in reaching their verdict.¹⁹⁴ Anticipating the expansion to civil cases is quite reasonable, however, given its striking resemblance to *Batson v. Kentucky* and its progeny of cases.¹⁹⁵

In *Batson*, the Supreme Court held that race-based discrimination in the form of peremptory challenges during voir dire of a criminal case is unconstitutional.¹⁹⁶ Like *Peña-Rodriguez*, *Batson* carved out a narrow exception to a broad right—the right to exclude a potential juror using a peremptory challenge—and only applied to criminal cases and racial discrimination.¹⁹⁷ But five years later, the Court expanded *Batson* to apply in civil cases as well.¹⁹⁸ The main difference between *Batson* and *Peña-Rodriguez*, however, is that the former was grounded in the Equal Protection Clause, while the latter relied on the Sixth Amendment.¹⁹⁹ Some scholars posit that the underlying theme in both cases is an equal protection issue,²⁰⁰ but the Court chose a more measured approach by basing *Peña-*

Review of Jury Bias Claim, BLOOMBERG LAW (June 12, 2018, 2:08 PM), <https://news.bloomberglaw.com/white-collar-and-criminal-law/gay-death-row-inmate-wants-scotus-review-of-jury-bias-claim> (via subscription).

193. *Peña-Rodriguez*, 137 S. Ct. at 869 (“[T]he Court now holds that 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.”).

194. *See id.*

195. *See generally* Gonzalez, *supra* note 190.

196. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

197. Gonzalez, *supra* note 190, at 404.

198. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616–17 (1991); *see* Gonzalez, *supra* note 190, at 404, 408.

199. *Compare Batson*, 476 U.S. at 89 (“Accordingly, the component of the jury selection process at issue here, the State’s privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause.”), *with Peña-Rodriguez*, 137 S. Ct. at 869 (“[W]here 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.”); *see* Gonzalez, *supra* note 190, at 404.

200. *See* Gonzalez, *supra* note 190, at 405 (“The heart of both the *Peña-Rodriguez* and *Batson* decisions is really an equal protection concern, although *Peña-Rodriguez* is framed

Rodriguez on the Sixth Amendment because of the susceptibility for expansion if framed using the Equal Protection Clause.²⁰¹ In fact, in Justice Alito's dissent, he postulates that *Peña-Rodriguez* is actually an equal protection case instead of a Sixth Amendment case,²⁰² making the majority's holding more susceptible to expansion.²⁰³ Therefore, in order to convince courts that *Peña-Rodriguez* should apply to civil cases, attorneys must argue that *Peña-Rodriguez* is actually an Equal Protection Clause case cloaked in Sixth Amendment robes.²⁰⁴ If subsequent courts agree, then the trajectory of *Peña-Rodriguez* will likely resemble that of *Batson*.

The second step in *Peña-Rodriguez*'s evolutionary trajectory may require the no-impeachment rule to yield to the Sixth Amendment in order to allow jurors to testify about other forms of bias or discrimination made in the jury room. In other words, the racial-bias exception will become a broader "bias exception." Most notably, Justice Alito warned of this possibility in his dissent.²⁰⁵ Justice Alito worried that *Peña-Rodriguez* might be an equal protection case masquerading as a Sixth Amendment case,²⁰⁶ and, if courts

in the context of the Sixth Amendment . . ."); Richard Lorren Jolly, *The New Impartial Jury Mandate*, 117 MICH. L. REV. 713, 751 (2019) ("Nevertheless, as Justice Alito's dissent highlights, the holding seems to sound more in concepts drawn from the Fourteenth Amendment than it does in the Sixth Amendment."); see also *Peña-Rodriguez*, 137 S. Ct. at 868 (stating that the holding is not an attempt to create a perfect jury but is rather an attempt at "coming ever closer to the promise of *equal treatment under the law* that is so central to a functioning democracy") (emphasis added).

201. See *Peña-Rodriguez*, 137 S. Ct. at 883 (Alito, J., dissenting) ("Recasting this [decision] as an equal protection case would not provide a ground for limiting the holding to cases involving racial bias."); Robert I. Correales, *Is Peña-Rodriguez v. Colorado Just a Drop in the Bucket or a Catalyst for Improving a Jury System Still Plagued by Racial Bias, and Still Badly in Need of Repairs?*, 21 HARV. LATINX L. REV. 1, 11 (2018) ("Time will tell whether the Court's reluctance to fully deploy Equal Protection was an oversight or perhaps an intentional and strategic move to lay the first stone in the foundation of a more expansive doctrine.").

202. See *Peña-Rodriguez*, 137 S. Ct. at 883–84 (Alito, J., dissenting).

203. See *id.* at 883–84 (Alito, J., dissenting) ("Today's decision—*especially if it is expanded in the ways that seem likely*—will invite the harms that no-impeachment rules were designed to prevent.") (emphasis added).

204. Gonzalez, *supra* note 190, at 408 ("[T]he winning argument for extending *Peña-Rodriguez* to civil cases brought in federal district court is equal protection under the Fifth Amendment. This argument merely takes a page right out of the *Batson* and *Edmonson* playbook."). Moreover, if *Peña-Rodriguez* were recast as an equal protection issue, it would also be based on the Equal Protection Clause of the Fourteenth Amendment in order to apply to the states.

205. See *Peña-Rodriguez*, 137 S. Ct. at 883–84 (Alito, J., dissenting).

206. See *supra* text accompanying notes 196–201.

agree with him, then “[a]t a minimum, cases involving bias based on any suspect classification—such as national origin or religion—would merit equal treatment.”²⁰⁷ Justice Alito also agreed that bias based on gender or the exercise of First Amendment-protected activity would also garner similar protections.²⁰⁸ If the racial-bias exception is expanded, courts will likely look to equal protection jurisprudence to determine which suspect classifications should be protected. But, at this point, it is unclear where courts will draw the line among different forms of bias. According to Justice Alito, if *Peña-Rodriguez* is eventually framed as an equal protection concern, “convicting a defendant on the basis of any irrational classification would violate the Equal Protection Clause.”²⁰⁹

Academic scholarship on this issue also tends to support Justice Alito’s contention that *Peña-Rodriguez* is primed to expand and incorporate other forms of bias or discrimination.²¹⁰ Maybe more importantly, the Advisory Committee also believes that *Peña-Rodriguez* will be expanded or that, at the very least, defense attorneys will vigorously advocate for its expansion.²¹¹ This uncertainty—if, when, and to what extent *Peña-Rodriguez* will be expanded—has complicated the remedial responses by

207. *Peña-Rodriguez*, 137 S. Ct. at 883 (Alito, J., dissenting).

208. *Id.* at 883–84 (Alito, J., dissenting).

209. *Id.* at 884 (Alito, J., dissenting).

210. *See supra* note 203 and accompanying text; Jolly, *supra* note 200, at 750 (“While the majority in *Peña-Rodriguez* is adamant that the decision is limited to racial biases in criminal cases, it is unlikely that the Court can identify a limiting principle to exclude testimony of bias against additional suspected classes”); Correales, *supra* note 201, at 11 (“Time will tell whether the Court’s reluctance to fully deploy Equal Protection was an oversight or perhaps an intentional and strategic move to lay the first stone in the foundation of a more expansive doctrine.”); Gonzalez, *supra* note 190, at 405 (“The United States Supreme Court cracked open the door of the jury deliberation room as a matter of Constitutional law in *Peña-Rodriguez*. Now that the door is open a little bit, it is not going to be shut.”); Koffler, *supra* note 174, at 1855–56 (“Both state experience with bias exceptions to the no-impeachment rule and the Court’s own experience with *Batson* and related cases suggest expansion is coming. Significant pragmatic and normative reasons support such expansion.”).

211. *See* Adv. Comm. on Rules of Evidence, Spring 2017 Meeting Materials 279 (Apr. 21, 2017), https://www.uscourts.gov/sites/default/files/advisory_committee_on_rules_of_evidence_-_spring_2017_meeting_materials.pdf [hereinafter Adv. Comm. Spring 2017 Meeting] (“[T]here is a possibility that the constitutional right found in *Peña-Rodriguez* could be extended[—]for example, to statements that indicate a sexual bias, or a religious bias, or a bias against old people, or a failure to respect the defendant’s right not to testify,” and “[t]here is also a pretty fair possibility that the holding in *Peña-Rodriguez* could be extended to civil cases.”).

the Advisory Committee and state legislatures.²¹² As a result, only Virginia has updated their respective evidence rule,²¹³ while the remaining jurisdictions are taking a wait-and-see approach.

Another interesting wrinkle that compounds the uncertainty of the *Peña-Rodriguez* decision is the recently changed makeup of the Supreme Court. *Peña-Rodriguez* was decided by a vote of 5-3 while Justice Scalia's seat remained vacant following his death.²¹⁴ Since then, Justice Gorsuch has been confirmed to the Supreme Court,²¹⁵ and Justice Kennedy—the author of *Peña-Rodriguez*—has been replaced by Justice Kavanaugh.²¹⁶ As a result, the Supreme Court has shifted, in theory, toward a conservative majority for the foreseeable future.²¹⁷ How the new Supreme Court will approach juror misconduct cases is speculative, for now, but could play a major role in deciding whether *Peña-Rodriguez* will or should be expanded.

VI. How Lawmakers Can Rectify This Discrepancy

Despite the rule-altering holding in *Peña-Rodriguez*, FRE 606(b) is unchanged. The Advisory Committee has discussed amending FRE 606(b) but has yet to act,²¹⁸ and only one state has updated its evidence code in

212. See discussion *infra* Sections V.B, VI.A–C.

213. VA. R. EVID. 2:606(b)(ii)(d). Of course, as Justice Kennedy points out in the majority opinion, seventeen jurisdictions already have judicially recognized racial-bias exceptions, though none has explicated an exception in its evidence codes. See *Peña-Rodriguez*, 137 S. Ct. at 870; see also *id.* at 886 (providing an appendix listing the jurisdictions with a judicially recognized exception for evidence of racial bias).

214. See *Peña-Rodriguez*, 137 S. Ct. at 860. Justice Kennedy was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan in the majority, while Justices Alito, Roberts, and Thomas dissented. *Id.*

215. See Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html>.

216. See Sheryl Gay Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html>.

217. See Adam Liptak & Alicia Parlapiano, *Conservatives Now in Charge, the Supreme Court Moved Right*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/interactive/2018/06/28/us/politics/supreme-court-2017-term-moved-right.html>.

218. See Adv. Comm. Spring 2017 Meeting, *supra* note 211, at 276–83; Adv. Comm. on Rules of Evidence, Fall 2017 Meeting Materials 27–28 (Oct. 26–27, 2017), https://www.uscourts.gov/sites/default/files/a3_0.pdf; Adv. Comm. on Rules of Evidence, Spring 2018 Meeting Materials 17–18 (Apr. 26–27, 2018), https://www.uscourts.gov/sites/default/files/agenda_book_advisory_committee_on_rules_of_evidence_-_final.pdf; Adv. Comm. on Rules of Evidence, Fall 2018 Meeting Materials 3–5 (Oct. 19, 2018),

response to *Peña-Rodriguez*.²¹⁹ But why? As Part V illustrated, the expansion of the racial-bias exception is peering over the crest of the horizon, awaiting its inevitability. Meanwhile, the Advisory Committee and state legislators are playing a waiting game to see how the jurisdictional case law will develop.²²⁰

At the first Advisory Committee meeting following the *Peña-Rodriguez* decision, the Committee acknowledged that “Rule 606(b) is unconstitutional as applied at least to racist statements made by jurors while deliberating in criminal cases.”²²¹ In response, the Advisory Committee considered three proposed amendments, in addition to standing pat. The first proposal recommended a straight-forward exception, mirroring the holding in *Peña-Rodriguez*.²²² The second proposal expanded the exception to include other forms of discrimination, in anticipation of the expansion of *Peña-Rodriguez*.²²³ The third proposal included a generic constitutional safeguard designed to capture any new exceptions recognized by the U.S. Supreme Court.²²⁴ Ultimately, however, the Advisory Committee took a wait-and-see approach, leaving FRE 606(b) incomplete and failing to provide states with any guidance on updating their respective rules.²²⁵

Each proposed amendment has its benefits and downsides. The following sections introduce similar alternatives to update Oklahoma’s Rule 2606(B) and explain why playing the waiting game is a losing effort. The first alternative narrowly adopts the holding of *Peña-Rodriguez*, and the second alternative incorporates a more generous exception that has room to grow with subsequent case law. Though Oklahoma has mostly been lethargic

https://www.uscourts.gov/sites/default/files/2018-10-evidence-agenda-book_0.pdf [hereinafter Adv. Comm. Fall 2018 Meeting]. Discussion of *Peña-Rodriguez* and possible amendments to FRE 606(b) was not on the agenda for the Advisory Committee’s most recent meeting.

219. See VA. R. EVID. 2:606(b)(ii)(d).

220. In fairness, Justice Kennedy also took this approach in *Peña-Rodriguez*. See 137 S. Ct. 855, 870 (2017) (“The experiences of these jurisdictions [that recognize a racial-bias exception], and the experience of the courts going forward, will inform the proper exercise of trial judge discretion in these and related matters.”).

221. Report to Standing Committee, *supra* note 191, at 742.

222. See Adv. Comm. Spring 2017 Meeting, *supra* note 211, at 278–80.

223. *Id.* at 280–81.

224. *Id.* at 281–83.

225. See Adv. Comm. Fall 2018 Meeting, *supra* note 218, at 47 (“The Chair wrapped up the discussion by noting that the issue would be tabled for one to two years to allow more time for case law to develop before the Committee reconsidered action on Rule 606(b).”).

toward amending its evidence code following federal rule changes,²²⁶ the Sooner State can provide clarity and completeness to its no-impeachment rule—all while encouraging other jurisdictions to amend their own no-impeachment rules.

A. Why Action Is Needed

Each attorney is obligated to render effective counsel for his client through diligent and competent representation.²²⁷ Accordingly, any attorney faced with a situation similar to the one in *Peña-Rodriguez* should be aware of the Supreme Court's holding and should, thus, be able to render effective counsel. Moreover, it is worth noting that in the age of Westlaw, even cursory legal research should uncover an on-point U.S. Supreme Court case

226. Within the last thirty years, two federal rules—FRE 803(10) and 412—were affected by Supreme Court holdings and were subsequently amended by the Advisory Committee to ensure compliance with constitutional rights. In each case, the Advisory Committee took a different approach.

In *Melendez-Diaz v. Massachusetts*, the Supreme Court stated that FRE 803(10) searches can be testimonial and, thus, subject to the Sixth Amendment's Confrontation Clause. *See* 557 U.S. 305, 323 (2009). But the Supreme Court endorsed notice-and-demand statutes as a method of satisfying a criminal defendant's confrontation rights. *See id.* at 325–28. Accordingly, the Advisory Committee included a narrow exception to FRE 803(10) that encapsulates the notice-and-demand statutes contemplated by the Supreme Court in *Melendez-Diaz*. FED. R. EVID. 803(10)(B); *see id.* 803(10)(B) advisory committee's note to 2013 amendment (“Rule 803(10) has been amended in response to *Melendez-Diaz v. Massachusetts*.”).

In *Olden v. Kentucky*, the Supreme Court identified a situation in which a criminal defendant's confrontation rights were violated when he was prohibited from discussing a key fact in a rape case because FRE 412 prevented inquiries into a victim's sexual predisposition and prior sexual behavior. 488 U.S. 227, 231–32 (1988) (per curiam). As a result, the Advisory Committee instituted a broad constitutional safeguard in FRE 412 to ameliorate *Olden*-like situations in the future. FED. R. EVID. 412; *see id.* 412 advisory committee's note to 1994 amendment.

These two rule modifications are indicative of the probable future amendment to FRE 606(b) and knowing how Oklahoma has responded to previous federal evidence rule changes can help assist lawmakers in amending Rule 2606(B). Unfortunately, however, Oklahoma has not amended either evidence rule, further justifying the need to update the state's evidence code in addition to Rule 2606(B). Though, it should be noted that Oklahoma accounts for a notice-and-demand requirement, similar to the one in FRE 803(10)(B), elsewhere in its statutes. *See* 22 OKLA. STAT. § 751 (Supp. 2013); *see also* Randolph v. State, 2010 OK CR 2, ¶ 3, 231 P.3d 672, 684 (Lumpkin, J., specially concurring) (“[A]t least implicitly, the U.S. Supreme Court confirmed that the type of notice/demand procedure set out in 22 O.S. Supp. 2004, § 751(A)(3) meets constitutional muster, even in a trial setting.”).

227. MODEL RULES OF PROF'L CONDUCT rr. 1.1, 1.3 (AM. BAR ASS'N 1983).

such as *Peña-Rodriguez*. So, practically speaking, judges and litigators have the tools necessary to navigate a *Peña-Rodriguez*-like situation.

Nevertheless, the main reason for codifying the Federal Rules of Evidence was to promote accessibility.²²⁸ In theory, “[t]he Rules can be printed in a small book easily carried to court, quickly perused and readily understandable.”²²⁹ But Rule 2606(B) and its federal counterpart are now incomplete, and maintaining an incomplete rule perpetuates an unconstitutional trap for the unwary—especially for Oklahoma’s overworked and underpaid public defenders.²³⁰ This risk alone should warrant correction.²³¹

Prior to the codification of the Federal Rules of Evidence, judges and practitioners also had the necessary tools at their disposal—albeit, sprinkled among thousands of cases over a century of jurisprudence. However, the Supreme Court and lawmakers recognized the need for a uniform and universal set of evidence rules and, accordingly, codified and published the federal evidence code. Those same policy concerns that motivated the codification of the Federal Rules of Evidence—namely, fairness and accuracy—still exist today, beckoning for resolution.

B. First Alternative: Codifying Peña-Rodriguez

One simple way to produce constitutionally fair verdicts is to amend Rule 2606(B), according to the holding in *Peña-Rodriguez*. In effect, the racial-bias exception would update the rule to conform to the current no-impeachment rule jurisprudence and provide clarity to parties. Because Oklahoma did not follow the Advisory Committee in restyling the evidence rules into a bullet-point format, the racial-bias exception should be added as

228. CHRISTOPHER B. MUELLER, LAIRD C. KIRKPATRICK & LIESA L. RICHTER, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS 2 (9th ed. 2019).

229. *Id.*

230. See sources cited *supra* notes 184–85 and accompanying text.

231. Though, it should be noted that an amendment may not be required since *Peña-Rodriguez* invoked the Sixth Amendment and now applies to all criminal trials. See Adv. Comm. Spring 2017 Meeting, *supra* note 211, at 277 (“It surely can be argued that no amendment to Rule 606(b) is necessary in response to *Peña-Rodriguez*. No amendment is needed to remove the Rule 606(b) bar on testimony about racist statements during deliberation. The Sixth Amendment has already removed that bar.”). That being said, the perpetuation of an incomplete evidence rule, which may produce potentially unconstitutional results, impedes the administration of justice. See *supra* text accompanying notes 181–84.

Section C to Rule 2606.²³² Under this alternative, the exception should read as follows:

C. Upon an inquiry into the validity of a verdict or indictment, a juror may testify about whether one or more jurors made a clear statement indicating that the juror or jurors relied on racial stereotypes or animus to convict a defendant in a criminal case.²³³

The benefit of this proposal is clear: Rule 2606 would render a complete picture of the no-impeachment rule and would resolve any unconstitutional misapplications of the rule as currently written.²³⁴ This alternative may be an attractive option, especially for more conservative states like Oklahoma, because the amended verbiage aligns the rule with current law without expanding the exception or anticipating what the law might become. On the other hand, the drawback to this proposal is that the holding of *Peña-Rodriguez* is prone to expansion and may soon encapsulate other forms of discrimination.²³⁵ Therefore, amending the rule now may prove futile if the law changes in a few years. But, because that rationale perpetuates a state of uncertainty and deficiency, change remains necessary.

For Oklahoma, the advantages of this alternative outweigh its disadvantages. Rule 2606 could develop alongside Supreme Court precedent while diligently maintaining Oklahoma's evidence code. Furthermore, Rule 2606 would preserve the interpretation advanced by the Supreme Court without unintentionally incorporating future developments. In essence, by adopting this alternative, Oklahoma would accomplish only what is needed and nothing more.

232. Whereas, an amendment to FRE 606(b) would likely be added as a fourth exception—subsection (D)—to FRE 606(b)(2). See Adv. Comm. Spring 2017 Meeting, *supra* note 211, at 278; *cf. id.* at 283 (creating a slightly different composition of the FRE 606(b) exceptions when creating a general constitutional protection exception).

233. This proposed amendment aligns with the current, non-bullet-point format of Rule 2606 by adding a section (C) that mirrors the holding in *Peña-Rodriguez*. See *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017); *cf. Adv. Comm. Spring 2017 Meeting, supra* note 211, at 278 (adding the new racial-bias exception according to FRE 606(b)'s format).

234. The ambiguity in applying the racial-bias exception, however, still remains due to the lack of guidance from the Supreme Court and the significant discretion imposed on trial courts. See *supra* text accompanying notes 171–80.

235. See sources cited *supra* notes 206–07.

C. *Second Alternative: Expanding Beyond Peña-Rodriguez*

When contemplating how to modify FRE 606(b) and comparable state statutes, the prevailing refrain among prognosticators is that *Peña-Rodriguez* is primed for expansion.²³⁶ In other words, *Peña-Rodriguez* is really an equal protection case,²³⁷ and, given time, courts will expand the rule to civil cases and other forms of discrimination or bias. In recognition of this potential for expansion, states may favor adopting exceptions with room to grow—thereby eliminating the need to amend their no-impeachment rules should the Supreme Court later expand *Peña-Rodriguez*. However, lawmakers who choose this path must confront a crucial question in the to-expand-or-not-to-expand debate: where should the line be drawn?

At one end of the exception spectrum exists a simple racial-bias exception, similar to the one discussed in the preceding section. At the other end of that spectrum is the Iowa rule. At its initial, post-*Peña-Rodriguez* meeting, the Advisory Committee considered two proposals aimed at creating a broad exception to FRE 606(b); however, despite several suggested amendments, the Committee only produced one fully formed amendment—a generic constitutional safeguard.²³⁸ Modified to conform with Oklahoma’s current Rule 2606 format, Section (C) would read:

C. Upon an inquiry into the validity of a verdict or indictment, a juror may testify if excluding that juror’s testimony would violate a party’s constitutional rights.²³⁹

This alternative would ensure compliance with constitutional rights and obviate the need for further amendments.²⁴⁰ Additionally, this new

236. See sources cited *supra* notes 206–07.

237. See *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 883 (2017) (Alito, J., dissenting) (“Recasting this as an equal protection case would not provide a ground for limiting the holding to cases involving racial bias.”); Gonzalez, *supra* note 190, at 405 (“The heart of both *Peña-Rodriguez* and *Batson* decisions is really an equal protection concern, although *Peña-Rodriguez* is framed in the context of the Sixth Amendment”); Leading Cases, *Sixth Amendment—No-Impeachment Rule—Racially Biased Statements in Jury Deliberations—Peña-Rodriguez v. Colorado*, 131 HARV. L. REV. 273, 279 (2017) (“Rather than limiting himself to the discrete body of Sixth Amendment jurisprudence, Justice Kennedy viewed *Peña-Rodriguez*’s Sixth Amendment claim as opening up the full panoply of constitutional values, engendering an analysis replete with equal protection references.”).

238. See Adv. Comm. Spring 2017 Meeting, *supra* note 211, at 278–83 (providing four possible amendments but not providing explicit examples of how the third proposal would be codified).

239. See *id.* at 283.

240. See *id.*

exception would function as a “heads up” of additional constitutional protections for unwary practitioners. On the other hand, some may interpret such an exception as greatly expanding the rule created in *Peña-Rodriguez*, leaving the rule at the mercy of the ever-developing area of constitutional law. Because some areas of constitutional law, especially those involving individual rights, remain nebulous until the Supreme Court weighs in, circuit courts split and develop their own case law.²⁴¹ The Advisory Committee worried about such ramifications and discussed adding a qualifier to “a party’s constitutional rights.”²⁴² Under this derivative version, a juror may testify when “excluding the testimony would violate *clearly established* constitutional law as determined by the Supreme Court of the United States.”²⁴³ After some discussion, the Advisory Committee ultimately rejected this idea because it would handicap lower courts in their legitimate, independent efforts to discern constitutional imperatives.²⁴⁴ Though the Committee decided that the generic constitutional exception is the better alternative, it has yet to modify FRE 606(b)—thus prolonging the waiting game.²⁴⁵

For Oklahoma, this option may go a step too far; a more measured amendment is likely more palatable given the state’s generally conservative approach to rulemaking. That being said, at the heart of *Peña-Rodriguez* lies the primary aim of ensuring that criminal defendants receive their constitutionally mandated right to a fair trial. Though the Supreme Court couched its holding in narrow terms to address the unique and pernicious nature of racism in the justice system, reason suggests that other forms of bias and animus also might infringe upon one’s Sixth Amendment right.

241. Recently, for example, the Supreme Court was expected to provide a resolution on the intersectional conflict of religious freedoms and LGBT rights in the case *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. See, e.g., Klint W. Alexander, *The Masterpiece Cakeshop Decision and the Clash Between Nondiscrimination and Religious Freedom*, 71 OKLA. L. REV. 1069, 1069–70 (2019) (“The expectation among legal scholars was that this case would provide important guidance concerning the uneven recognition of LGBT rights under federal and state antidiscrimination laws and the role of religious liberty and free expression in this calculus.”). Somewhat unexpectedly, however, the Court decided the case on very narrow procedural grounds. See *id.* at 1101–02; see also Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 133 (2018) (“Rather than sorting out the principles for determining whether religious liberty authorizes discrimination against gays and lesbians in the marketplace, the Court focused on whether state officials treated religious objections with the proper respect and consideration.”).

242. See Adv. Comm. Fall 2018 Meeting, *supra* note 218, at 45–46.

243. *Id.*

244. See *id.* at 46.

245. *Id.* at 47.

Recognizing this reality and aspiring to rectify such injustice is a worthy objective. But is a state like Oklahoma ready to take a leap when it normally takes a step?²⁴⁶

D. Oklahoma Should Lead the Way by Creating a Constitutional Exception to Its Evidence Rule 2606

Along with a majority of states without racial-bias exceptions, Oklahoma finds itself in a precarious position. The first question Oklahoma lawmakers must answer is whether to amend its evidence rule now or wait for case law to develop—or, even, whether to wait for the Advisory Committee to create the exemplar for states to adopt? The answer to that question should, instinctively, be a “yes” to updating Rule 2606 to align with the Supreme Court’s holding in *Peña-Rodriguez*. As Section V.A addressed, perpetuating an outdated evidence rule obscures the truth and hinders the administration of justice in cases involving overt racial bias in the jury room. A simple amendment to Oklahoma’s Rule 2606 that incorporates the *Peña-Rodriguez* holding would fix the current discrepancy and put criminal defense lawyers on notice of additional constitutional protections.

But, as Section V.B emphasized, *Peña-Rodriguez* is primed for expansion. How, when, and to what extent will its holding be expanded are questions best left for another day, but most scholars forecast that *Peña-Rodriguez* will be expanded to include other suspect classifications of discrimination and will eventually be applied in civil cases. Therefore, the second question Oklahoma lawmakers must answer is whether to create a narrow racial-bias exception or to amend the rule, with room to grow, by including a broad constitutional safeguard.

Answering the second question is undoubtedly the harder task. Proponents of the *Peña-Rodriguez* decision applaud the Court’s willingness to protect criminal defendants’ right to a fair trial and eliminate racial bias and animus from the justice system.²⁴⁷ On the other hand, opponents fear

246. See *supra* note 226 and accompanying text.

247. See, e.g., Natalie A. Spiess, Comment, *Peña-Rodriguez v. Colorado: A Critical, but Incomplete, Step in the Never-Ending War on Racial Bias*, 95 DENV. L. REV. 809, 836 (2018) (noting “the Court took an important step forward in the fight against racism when it ruled that the Constitution mandates an exception to the no-impeachment rule in cases of juror racial bias” but arguing the Court should have done more); Samuel R. Thomas, Comment, *Peña-Rodriguez v. Colorado: A Constitutional Battle of Public Policy*, 53 GONZ. L. REV. 355, 372 (2017) (“The traditional policies and safeguards that have long balanced the protection of the jury with that of the defendant are not necessarily outdated, but it must be recognized that there is a certain class of defendants that [is] still subject to significant harm. . . . Thankfully, the Court has moved in favor of justice and equality under the law.”);

that *Peña-Rodriguez* has opened Pandora's box and will, consequently, act as a conduit for further investigation into the deliberations of jurors.²⁴⁸ But if the critics are correct—that Pandora's box has been opened—all is not lost.

In the Greek mythological tale, Zeus created Pandora, the first woman, as a punishment to Prometheus for stealing fire and giving it to mortal men.²⁴⁹ The gods then bestowed upon Pandora a box that contained many evils, and they forbade her from ever opening the box.²⁵⁰ But Pandora was a curious being, and one day she opened the lid of the box, and numerous evils began spewing out into the world.²⁵¹ Terrified, Pandora shut the lid quickly, but everything had already escaped except one thing: hope.²⁵² “It was the only good the casket had held among the many evils, and it remains to this day mankind's sole comfort in misfortune.”²⁵³

The idiom “opened Pandora's box” has come to denote an action taken that then creates “unexpected and unwanted problems and consequences.”²⁵⁴ If *Peña-Rodriguez* has indeed opened Pandora's box, its

Amanda L. B. Wineman, Comment, *The Invasion of Racial Bias into Jury Deliberations: Examining Peña-Rodriguez v. Colorado*, 41 AM. J. TRIAL ADVOC. 211, 237 (2017) (“*Peña-Rodriguez* demonstrates the Court moving forward, making strides to overcome race-based discrimination.”).

248. See *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 875 (2017) (Alito, J., dissenting) (“Today, with the admirable intention of providing justice for one criminal defendant, the Court not only *pries open the door*; it rules that respecting the privacy of the jury room, as our legal system has done for centuries, violates the Constitution.”) (emphasis added); see also Alisa Micu, Note, *Addressing Racial Bias in the Jury System: Another Failed Attempt?*, 35 GA. ST. U. L. REV. 843, 865 (2019) (arguing that the Supreme Court has provided an “unworkable ruling that compromises the system more than it protects it”); Taurus Myhand, Note, *Will the Jury System Survive the Peña-Rodriguez Exception to Rule 606(b)?: The Court's Response to Racial Discrimination by a Juror Leaves the Future of the American Jury Trial System in Jeopardy*, 23 TEX. J. ON C.L. & C.R. 103, 123 (2018) (“Another troubling, but likely outcome that may follow the Court's decision in *Peña-Rodriguez* is seemingly endless litigation by unsatisfied litigants seeking to undermine the jury's verdict.”).

249. See EDITH HAMILTON, MYTHOLOGY: TIMELESS TALES OF GODS AND HEROES 70 (1942). This version of Pandora's story is recited according to Hesiod, who is considered the “principal authority for the myths about the beginning of everything.” *Id.* at 63.

250. See *id.* at 70.

251. See *id.* at 70, 72.

252. See *id.* at 72.

253. *Id.*

254. OFF. OF ENG. LANGUAGE PROGRAMS, U.S. DEP'T OF STATE, IN THE LOOP: A REFERENCE GUIDE TO AMERICAN ENGLISH IDIOMS 68 (1st ed. 2010), https://permanent.access.gpo.gov/gpo46375/PDF%20version/in_the_loop_pages.pdf, adapted from SHELLEY

goal is a hopeful one: to uphold criminal defendants' right to a fair trial by eradicating prejudicial bias. As Justice Kennedy pronounced in his majority opinion, "[i]t must become the heritage of our Nation to *rise above* racial classifications that are so inconsistent with our commitment to the *equal dignity of all persons*."²⁵⁵ But if the aim of *Peña-Rodriguez* is to promote the equal dignity of all persons, why should jurisdictions implicitly permit other forms of bias and discrimination that may be as prejudicial as racial bias? Over one hundred years ago, the *McDonald* Court admonished that "in the gravest and most important cases," the exclusion of juror testimony may violate "the plainest principles of justice."²⁵⁶ Yet, in theory, a defendant in Oklahoma may still be convicted because his or her religion, sexuality, or gender played a significant role in the jury's decision to convict. This outcome amounts to a denial of justice and should be rectified.

Therefore, to answer the second question posed, Oklahoma should aim high and add a constitutional exception to Rule 2606. This resolution incorporates the *Peña-Rodriguez* holding while recognizing the existence of other pernicious forms of discrimination worthy of comparable treatment. In adopting this approach, the state of Oklahoma would derive three primary benefits. First, Oklahoma citizens would receive equal dignity in trials because jurors would be able to testify about overt displays of bias or discrimination of a suspect classification in the jury room. Second, this amendment would warn public defenders that their clients may have some redress and could, ultimately, provide better representation. Finally, this amendment would encourage the fair administration of justice by requiring jurors to decide cases based on the objective facts in the record rather than on deep-seated biases.

The United States is a government by the people, and juries are the epitome of that principle.²⁵⁷ But, because people are not perfect, juries are not perfect. Though the law permits some imperfections in the jury system since perfection is not possible,²⁵⁸ it should not condone avoidable,

VANCE LAFLIN, SOMETHING TO CROW ABOUT: A CONCISE COLLECTION OF AMERICAN ENGLISH IDIOMS FOR EVERYDAY USE (Anna Maria Malkoç & Frank Smolinski eds., U.S. Info. Agency 1993).

255. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017) (emphasis added).

256. *Id.* at 864 (quoting *McDonald v. Pless*, 238 U.S. 264, 269 (1915)).

257. *Id.* at 860 ("The jury is a tangible implementation of the principle that the law comes from the people.").

258. *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984).

prejudicial imperfections. Accordingly, Oklahoma lawmakers should rectify the discrepancy in the evidence code created by *Peña-Rodriguez*.

VII. Conclusion

In early 2017, the United States Supreme Court's decision in *Peña-Rodriguez v. Colorado* effected a significant shift in the application of the no-impeachment rule. As a result, Oklahoma's Rule 2606(B) and its federal counterpart have been rendered incomplete and have set a trap for the unwary. Oklahoma lawmakers have a great opportunity to rectify this discrepancy by providing a replicable model for other states to follow. At the very least, lawmakers should add a racial-bias exception that mirrors the holding language in *Peña-Rodriguez*. Based on the majority's reasoning, however, the rule may eventually be expanded to civil cases, as well as to other forms of discrimination. Thus, Oklahoma should amend Rule 2606 by adding a constitutional exception—thereby promoting equal dignity, transparency, and fairness.

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