

1-1-2018

## Constitutional Law - The Sixth Sense: Exorcising the Specter of Past Injustices - Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017)

Gina L. Fleury,

Follow this and additional works at: <https://dc.suffolk.edu/jtaa-suffolk>



Part of the [Litigation Commons](#)

---

### Recommended Citation

23 Suffolk J. Trial & App. Advoc. 202 (2017-2018)

This Comments is brought to you for free and open access by Digital Collections @ Suffolk. It has been accepted for inclusion in Suffolk Journal of Trial and Appellate Advocacy by an authorized editor of Digital Collections @ Suffolk. For more information, please contact [dct@suffolk.edu](mailto:dct@suffolk.edu).

**CONSTITUTIONAL LAW—*THE SIXTH SENSE:*  
EXORCISING THE SPECTER OF PAST  
INJUSTICES—*PENA-RODRIGUEZ V. COLORADO,*  
137 S. CT. 855 (2017).**

The right to a fair and impartial trial by jury – enumerated in the Sixth Amendment of the United States Constitution – is guaranteed to all persons accused of a crime regardless of one’s race, gender, sexual orientation, or religion.<sup>1</sup> Nevertheless, where a juror is accused of failing to remain impartial when rendering a verdict, Rule 606 of the Federal Rules of Evidence prohibits the introduction of juror testimony to impeach the validity of a verdict once it is adjudicated, which is known as the no-

---

<sup>1</sup> See U.S. CONST. amend VI (affording right to trial by impartial jury). The Sixth Amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

*Id.*; see also *Duncan v. Louisiana*, 391 U.S. 145, 149-50 (1968) (extending right to state prosecutions). The Court in *Duncan*, stated that the right to a trial by jury protects the people from oppression by their Government. *Id.* at 155; *Irvin v. Dowd*, 366 U.S. 717, 721 (1961) (deeming right to trial by jury as most important safeguard to protect liberty); Brief for Center on the Administration of Criminal Law as Amicus Curiae Supporting Petitioner at 6, *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606) (explaining significance of right to impartial jury). The Supreme Court’s past decisions ensure an impartial jury by attempting to rid the system of racial animus. See also *Batson v. Kentucky*, 476 U.S. 79, 97-99 (1986) (overturning previous decision that allowed use of peremptory strikes to excuse jurors based on race). The *Batson* Court reasoned, “[p]urposeful racial discrimination in selection of the venire violates a defendant’s right to equal protection because it denies him the protection that a trial by jury is intended to secure.” *Id.* at 86; *Georgia v. McCollum*, 505 U.S. 42, 58 (1992) (extending prohibition of peremptory challenges based on race to defendants). See, e.g., *Hollins v. Oklahoma*, 295 U.S. 394, 395 (1935) (per curiam) (granting new trial where African Americans were excluded from jury because of their race); *Neal v. Delaware*, 103 U.S. 370, 397 (1880) (overturning conviction where Delaware prohibited African Americans from serving on juries); *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (invalidating state law disqualifying black men from serving on juries);

impeachment rule.<sup>2</sup> In *Pena-Rodriguez v. Colorado*,<sup>3</sup> the United States Supreme Court addressed the question of whether the Sixth Amendment requires an exception to the no-impeachment rule where a juror relied on racial animus in their decision to convict; the Supreme Court answered in the affirmative without striking down Rule 606.<sup>4</sup> When a juror made a clear statement indicating that they relied on racial biases to convict a criminal defendant, the Sixth Amendment requires the no-impeachment rule must give way to allow testimony from other jurors of the alleged misconduct.<sup>5</sup>

In 2007, Miguel Angel Pena-Rodriguez was charged with harassment, unlawful sexual contact, and attempted sexual assault on a child, and he was convicted of unlawful sexual contact and harassment after a three-day trial.<sup>6</sup> After the jury was discharged, two of the jurors informed Pena-Rodriguez's attorney that one of the jurors, known as Juror H.C., expressed an anti-Hispanic belief against Pena-Rodriguez and his alibi witness.<sup>7</sup> The two jurors submitted sworn affidavits of H.C.'s statements,

---

<sup>2</sup> See FED. R. EVID. 606 (establishing "no-impeachment" rule). Rule 606(b) states:

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.

*Id.* Rule 606(b)(2) articulates exceptions to the no-impeachment rule such as allowing jurors to testify about extraneous prejudicial information that was brought to the jury's attention, an outside influence, or a mistake on the verdict slip. *Id.* A majority of states follow the no-impeachment rule. *Id.*; John L. Rosshirt, *Evidence – Assembly of Jurors' Affidavits to Impeach Jury Verdict*, 31 NOTRE DAME L. REV. 484, 484 (1956) (discussing states that follow no-impeachment rule); see also *Colorado v. Pena-Rodriguez*, 137 S. Ct. 855, 865 (2017) (stating forty-two jurisdictions follow federal no-impeachment rule).

<sup>3</sup> 137 S. Ct. 855 (2017).

<sup>4</sup> See *id.* at 868 ("This case lies at the intersection of the Court's decisions endorsing the no-impeachment rule and its decisions seeking to eliminate racial bias in the jury system. The two lines of precedent, however, need not conflict.").

<sup>5</sup> See *id.* at 871 (reversing conviction and ordering new trial).

<sup>6</sup> See *id.* at 861 (discussing alleged crime and trial). Two teenage sisters were sexually assaulted in a horseracing facility bathroom. *Id.* Both girls individually identified Pena-Rodriguez, an employee of the racetrack, as their attacker. *Id.* During jury selection, the potential jurors were given written questionnaires asking whether there would be any reason why they would be unable to remain impartial during the trial. *Id.* Moreover, the court repeated the questions relating to the potential jurors' ability to remain impartial. *Id.* None of the empaneled jurors expressed any reason that would render them unable to remain impartial during the trial. *Id.*

<sup>7</sup> See *id.* (describing Juror H.C.'s statements). Specifically, Juror H.C. stated 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." *Id.* at 862. He also stated, "I think he did it because he's Mexican and Mexican men take whatever they want," and "nine times out of ten Mexican men were guilty of being aggressive toward women

and while the court acknowledged H.C.'s racial biases, it denied the Motion for New Trial because Colorado Rules of Evidence Rule 606 prohibits jurors from testifying to statements made during deliberations when questioning the validity of the jury's verdict.<sup>8</sup>

The Colorado Court of Appeals affirmed the trial court's decision and concluded that the affidavits could not be used to question the validity of the verdicts pursuant to Colorado Rules of Evidence Rule 606(b).<sup>9</sup> Once more, Pena-Rodriguez appealed the decision to the Colorado Supreme Court, but again, the court affirmed his conviction on the basis that the affidavits were inadmissible to question the validity of the verdict.<sup>10</sup> The United States Supreme Court granted certiorari.<sup>11</sup>

The no-impeachment rule originated in the English common law and was later recognized by the United States Supreme Court before the

and young girls." *Id.* He also expressed that Pena-Rodriguez's alibi witness was not credible because she was "an illegal," although the witness testified that she was a legal resident of the United States. *Id.*

<sup>8</sup> See *Pena-Rodriguez*, 137 S. Ct. at 862 (discussing trial court's reasoning for denying motion for new trial). Colorado Rule of Evidence 606(b) mirrors Federal Rule of Evidence 606(b). *Id.*; see also COLO. R. EVID. 606(b) (establishing Colorado's non-impeachment rule). Rule 606(b) states:

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

*Id.* The court deemed the verdict as final, and Pena-Rodriguez was sentenced to two years of probation and was required to register as a sex offender. *Pena-Rodriguez*, 137 S. Ct. at 862.

<sup>9</sup> See *People v. Pena-Rodriguez*, No. 11CA0034, 2012 LEXIS 1836, at \*1-2 (Colo. App. Nov. 8, 2012) (affirming verdict). The Court of Appeals held H.C.'s statements did not fall under the three exceptions set out in Rule 606(b). *Id.* at \*20-22.

<sup>10</sup> See *Pena-Rodriguez v. People*, 350 P.3d 287, 288 (Colo. 2015) (reviewing denial of motion for new trial). Additionally, the Colorado Supreme Court questioned whether the Sixth Amendment of the United States Constitution requires the admission of the affidavits even if the Colorado Rules of Evidence Rule 606(b) bars their admission. *Id.* at 291-93. The Colorado Supreme Court used the United States Supreme Court's decisions in *Tanner v. United States*, 483 U.S. 107 (1987) and *Warger v. Shauers*, 135 S. Ct. 521 (2014) to determine if Colorado's Rule 606(b) was unconstitutional as applied. *Id.* at 291-94; see also *infra* note 16 and accompanying text (explaining decision in *Tanner*); *infra* note 17 and accompanying text (discussing decision in *Warger*). Just as the United States Supreme Court ruled that the Federal Rule of Evidence 606(b) was not unconstitutional as applied, the Colorado Supreme Court held that Rule 606(b) was not unconstitutional as applied. *Id.* at 293.

<sup>11</sup> See *Pena-Rodriguez v. Colorado*, 136 S. Ct. 1513, 1513 (2016) (granting certiorari).

enactment of Rule 606(b) of the Federal Rules of Evidence.<sup>12</sup> In two cases upholding the common law rule, the Court refused to allow juror testimony regarding a juror who read a newspaper article about the case and where the foreman improperly decided the amount of damages to award.<sup>13</sup> The Court's reasoning in applying the no-impeachment rule, as well as the later enactment of Rule 606(b), aids to: (1) ensure frankness and freedom of discussion in deliberation; (2) prevent harassment of jurors by the defeated parties who may attempt to make the juror come forward with manufactured misconduct to question the verdict; and (3) prevent private deliberations from becoming the subject of public investigations.<sup>14</sup> While the Court has upheld the no-impeachment rule, it refused to establish a strict rule that

---

<sup>12</sup> See Rosshirt, *supra* note 2, at 484 (highlighting origins of no-impeachment rule). The no-impeachment rule dates back to 1785 in the English case of *Vaise v. Delval*. *Id.* (referencing *Vaise v. Delval*, 99 Eng. Rep. 944 (K.B. 1785)). In *Vaise*, the jurors were split on a verdict and to resolve the case, the jurors flipped a coin. *Id.* The court rejected the testimony of the jurors regarding the coin-flip reasoning that a witness should not be used to allege his own wrongdoings. *Id.* Prior to *Vaise*, it was common practice for jurors to testify regarding deliberations. *Id.*

<sup>13</sup> See *McDonald v. Pless*, 238 U.S. 264, 267 (1915) (refusing to admit affidavits of jurors to impeach verdict); see also *United States v. Reid*, 53 U.S. 361, 366 (1852) (refusing to admit juror testimony that another juror read newspaper article relating to case); cf. *Mattox v. United States*, 146 U.S. 140, 150-51 (1892) (allowing testimony of newspaper introduced in jury room as extraneous influence). Rule 606(b)(2)(A) reflects the holding in *Mattox* by creating an exception that “[a] juror may testify about whether . . . extraneous prejudicial information was improperly brought to the jury’s attention . . .” FED. R. EVID. 606(d)(2)(A). The purpose of the no-impeachment rule is to ensure the confidence in jury deliberations. See FED. R. EVID. 606 advisory committee’s note to subdivision (b).

<sup>14</sup> See *McDonald*, 238 U.S. at 267 (elaborating reasoning behind rule). Specifically, the Court stated:

[L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors 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.

*Id.* at 267-68; see also *United States v. Eagle*, 539 F.2d 1166, 1170 (8th Cir. 1976) (citing *Mattox v. United States*, 146 U.S. 140, 148 (1892)) (explaining purpose of no-impeachment rule to avoid juror fraud and post-verdict tampering). While debating the language of the Federal Rules of Evidence, the House Judiciary Committee eliminated a clause in the proposed Rule 606(b) that would allow jurors to testify as to another juror being intoxicated, reasoning that the doors of the jury deliberations should not be opened for scrutiny. H.R. REP. NO. 93-650, at 10 (1973). Moreover, the Senate Judiciary Committee cited the Supreme Court’s reasoning in *McDonald* and reiterated that the purpose of proposed Rule 606(b) should not permit an individual to attack a verdict based on deliberations as it would be unwise. S. REP. NO. 93-1277, at 7060 (1974) (citing *McDonald v. Pless*, 238 U.S. 264 (1915)).

would exclude *all* juror testimony, as there will be cases that such an exclusion would “violat[e] the plainest principles of justice” and an exception is warranted “in the gravest and most important cases.”<sup>15</sup>

In considering what situations would warrant an exception to Rule 606, the Court has only been confronted with the issue twice, in *United States v. Tanner* and *Warger v. Shauers*.<sup>16</sup> In *Tanner*, the Court refused to allow juror testimony where the jurors were under the influence of drugs and intoxicated during the trial.<sup>17</sup> The *Tanner* Court reasoned sufficient protections exist to ensure juror impartiality including the ability to inquire into potential biases during *voir dire*, the ability for jurors to disclose misconduct before rendering a verdict, and the opportunity of the lawyers, the judge, and the defendant to observe any juror misconduct.<sup>18</sup> In *Warger*, the Court once more upheld the no-impeachment rule by finding no exception where a juror fails to disclose pro-defendant biases during *voir dire*.<sup>19</sup>

Lower federal courts have been split on the issue of when an exception exists, which is reflected by two circuit court of appeals allowing an exception to the rule where a juror alleged racial biases, one refusing to allow a racial bias exception, three acknowledging an exception may exist but not ruling on the issue.<sup>20</sup> Similarly, state courts have been split on the

---

<sup>15</sup> See *McDonald*, 238 U.S. at 269 (citing *United States v. Reid*, 53 U.S. 361, 366 (1852); *Mattox v. United States*, 146 U.S. 140, 148 (1892)) (stating exceptions to rule may exist in “the gravest and most important cases.”). These seminal cases in Rule 606(b) jurisprudence refused to establish a definite rule excluding all juror testimony because justice would require the admission of juror testimony to impeach an unjust verdict in certain cases. *Id.* Nevertheless, the Court did not express what such exception would be. *Id.*

<sup>16</sup> See *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 858 (2017) (outlining past cases addressing question of exception to Rule 606(b)).

<sup>17</sup> See *Tanner v. United States*, 483 U.S. 107, 126 (1987) (concluding juror intoxication does not fall within improper outside influence exception to rule). The Court reasoned, *inter alia*, Congress did not intend to allow juror testimony regarding juror intoxication because it rejected a version of Rule 606 that would allow such an exception to the rule. *Id.*

<sup>18</sup> See *id.* at 127 (emphasizing sufficient safeguards to impartiality). Moreover, the Court followed holdings in lower court cases that suggest physical or mental impairment is an internal matter of the jury, thus the exception that allows an inquiry into extraneous influences is not applicable to this case. *Id.* at 118 (citing *United States v. Thomas*, 463 F.2d 1061, 1063 (7th Cir. 1972)).

<sup>19</sup> See *Warger v. Shauers*, 135 S. Ct. 521, 524 (2014) (refusing to allow juror testimony regarding another juror’s dishonesty). In *Warger*, a case involving a vehicle accident, the juror did not disclose that her daughter was involved in a motor vehicle accident where she was at fault and a man died. *Id.* The Court refused to allow affidavits of jurors disclosing this dishonesty because it does not fall within any of the exceptions of Rule 606, and it refused to enact a new exception to the rule. *Id.*

<sup>20</sup> See, e.g., *United States v. Villar*, 586 F.3d 76, 87 (1st Cir. 2009) (reversing conviction and concluding *Tanner* protections are insufficient to root out racial biases); *United States v. Benally*,

issue as some states have allowed juror testimony challenging racial biases in deliberations, whereas other states have either recognized the need for an exception, but did not decide the issue, or have refused to allow juror testimony to challenge alleged racial biases.<sup>21</sup> The lower federal courts and state courts have recognized an exception to the no-impeachment rule, where the jurors have expressed biases based on religion.<sup>22</sup>

In *Pena-Rodriguez*, the Court held that the Sixth Amendment requires the no-impeachment rule give way to allow the inclusion of juror testimony where there is a clear statement that a juror relied on racial bias to convict a criminal defendant.<sup>23</sup> The Court recognized the need to rid the

546 F.3d 1230, 1240-41 (10th Cir. 2008) (refusing exception); *United States v. Henley*, 238 F.3d 1111, 1119-21 (9th Cir. 2001) (acknowledging arguments in favor of exception but not deciding issue); *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159-60 (7th Cir. 1987) (recognizing exception exists in certain cases); *Martinez v. Food City, Inc.*, 658 F.2d 369, 373-74 (5th Cir. 1981) (declining to decide whether Constitution requires exception); *Wright v. United States*, 559 F. Supp. 1139, 1151 (E.D.N.Y. 1983) (holding claims of juror racial biases to be analyzed on case-by-case basis); *Tobias v. Smith*, 468 F. Supp. 1287, 1289-90 (W.D.N.Y. 1979) (requiring evidentiary hearing on juror affidavit where another juror stated, “[y]ou can’t tell one black from another. They all look alike”); *Smith v. Brewer*, 444 F. Supp. 482, 490 (S.D. Iowa 1978) (denying habeas corpus petition while recognizing certain circumstances warrant exception), *aff’d*, 577 F.2d 466 (8th Cir. 1978).

<sup>21</sup> See, e.g., *Pena-Rodriguez v. People*, 350 P.3d 287, 290 (Colo. 2015) (refusing exception to no-impeachment rule); *Commonwealth v. Steele*, 961 A.2d 786, 807-08 (Pa. 2008) (upholding defendant’s death sentence where juror’s racial biases alleged); *State v. Santiago*, 715 A.2d 1, 14-22 (Conn. 1998) (reversing conviction where juror called defendant racial slur and trial court did not inquire into misconduct); *Commonwealth v. Laguer*, 571 N.E.2d 371, 376 (Mass. 1991) (stating if juror affidavit alleging racial bias is true defendant is entitled to new trial); *Spencer v. State*, 398 S.E.2d 179, 184 (Ga. 1990) (internal citations omitted) (upholding death sentence but stating, “[i]t has been held that the rule of juror incompetency cannot be applied in such an unfair manner as to deny due process”); Brief of Center on the Administration of Criminal Law as Amicus Curiae Supporting Petitioner at 1, *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606) (providing chart summarizing jurisdictions allowing exception to no-impeachment rule); Colin Miller, *Dismissed with Prejudice: Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to Present a Defense*, 61 BAYLOR L. REV. 872, 897 (2009) (discussing state applications of no-impeachment rule). Moreover, it is impossible to determine the extent of Tennessee and Missouri’s denial of an exception as both states have dogmatically denied an exception without outlining the details of the alleged misconduct. Miller, *supra* note 21, at 897.

<sup>22</sup> See *United States v. Heller*, 785 F.2d 1524, 1529 (11th Cir. 1986) (granting new trial where mistrial was not granted for anti-Semitic statements); see also *Fleshner v. Pepose Vision Inst.*, 304 S.W.3d 81, 87-90 (Mo. 2010) (opining when jurors make anti-Semitic statements during deliberations parties do not receive fair trial); *State v. Levitt*, 176 A.2d 465, 467-68 (N.J. 1961) (declaring trial judge should investigate jury’s verdict if “discolored by improper influences . . .”); *After Hour Welding, Inc. v. Laneil Mgmt. Co.*, 324 N.W.2d 686, 690 (Wis. 1982) (remanding for evidentiary hearing on claims of anti-Semitic statements by jurors).

<sup>23</sup> See *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017) (explaining holding). The Court distinguished that not every statement of racial bias would allow inquiry into the juror deliberations, but the statements must show that the juror’s racial bias “was a significant motivating factor in the juror’s vote to convict.” *Id.*

administration of justice of any racial biases, but this principle need not be inconsistent with Court's endorsement of Rule 606(b) of the Federal Rules of Evidence.<sup>24</sup> The Court distinguished this case from *Tanner* and *Shauers* because unlike in the previous cases where the misconduct was a result of the actions of lone jurors, here, racial animus in the jury system is a historic and recurring evil that must be addressed to ensure all criminal defendants are treated equally under the law.<sup>25</sup> Additionally, the Court reasoned that the safeguards listed in *Tanner* may not be sufficient to detect a juror's racial bias in some cases.<sup>26</sup> The Court also relied on several jurisdictions that have recognized an exception based on racial biases to the no-impeachment rule and have since not shown an increase in juror harassment, a decrease in the willingness for people to act as jurors, or an increasing strain on judicial resources.<sup>27</sup> Finally, the Court held not every allegation of racial bias in jury

---

<sup>24</sup> See *id.* at 867 ("It 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. This imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments."). The Court further stated that, "[t]he duty to confront racial animus in the justice system is not the legislature's alone. Time and again, this Court has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system." *Id.* The Court cited to cases that prohibit exclusion of jurors based on race and the cases that allow questions regarding racial bias in *voir dire*. *Id.* The Court noted that this principal does not invalidate Rule 606 of the Federal Rules of Evidence. *Id.* at 868.

<sup>25</sup> See *id.* (explaining differences in previous cases). According to the Court, this case differs from *Tanner*, where the jurors were intoxicated, and *Warger*, where the juror was untruthful during *voir dire*, because in these instances, the actions are typically those of lone jurors and are considered "anomalous behavior" of a single juror, whereas racial animus has historically occurred in the jury system. *Id.* The Court then analogized its previous holdings prohibiting exclusion of jurors on the basis of race, explaining that it was an attempt to rid racial biases from the administration of justice as well as implying that this trend must be continued into jury deliberations. *Id.* at 867.

<sup>26</sup> See *id.* at 868 (noting insufficiencies of *Tanner* safeguards). The Court stated that while there are safeguards to ensure that the jury will remain impartial, such as *voir dire* or the ability for a juror to bring another juror's racially bias statements to the court's attention *during* the trial, in cases of suspected racial animus, the reporting juror may be hesitant to call someone a bigot during the course of the trial. *Id.* at 868-69. It is likely easier for a juror to report that another juror has life experiences not disclosed in *voir dire* that causes them to have pro-defendant leanings, as was the case in *Warger*. *Id.* at 869.

<sup>27</sup> See *id.* at 870 (discussing reliance on lower courts). In addition to relying on the lower courts for guidance in this decision, the Court notes that the experience of these jurisdictions should be used to guide lower courts in the proper application and scope of the rule. *Id.* at 870-71; see also Brief for the Petitioner, *supra* note 1, at 22 (conducting empirical analysis on jurisdictions that allow racial bias exception). The *amicus curiae* states:

In those jurisdictions, allegations of racial bias among jurors are relatively rare, confirming the rule's practicality. When allegations of such bias do arise, however, courts have revered for a new trial or called for further inquiry in over half of the cases, confirming the rule's importance. Together, this experience demonstrates that consideration of racial bias does not unduly consume judicial resources or impair the



deliberations will result in a new trial, but the alleged racial bias must be a clear expression of racial animus and the juror must have relied on that bias to convict.<sup>28</sup>

The dissent argues that allowing juror testimony regarding alleged racially biased statements to impeach a verdict will open the doors of the jury deliberation rooms, which would essentially preclude open and honest deliberations.<sup>29</sup> Interestingly, the dissent further argues a case that involves

---

administration of trials, but that the rule serves an important function in rooting out racial bias.

Brief for the Petitioner, *supra* note 1, at 22.

<sup>28</sup> See *Pena-Rodriguez*, 137 S. Ct. at 869 (establishing threshold standard defendant must meet to trigger exception to rule). Notably, the Court stated:

Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

*Id.* Thus, the Court left the scope of the rule to the discretion of the lower court judges. *Id.*; see also *United States v. Villar*, 586 F.3d 76, 88 (1st Cir. 2009) (leaving scope of rule to discretion of motion judge). The Court in *Pena-Rodriguez* mirrors the court in *Villar*, where it states:

The determination of whether an inquiry is necessary to vindicate a criminally accused's constitutional due process and Sixth Amendment rights is best made by the trial judge, who is most familiar with the strength of the evidence and best able to determine the probability of prejudice from an inappropriate racial or ethnic comment. There is nothing about the evidence in this case that allows us to make this determination on appeal. We need not decide here what procedures the trial judge should follow if he decides to make such an inquiry on remand.

*Pena-Rodriguez*, 137 S. Ct. at 869; see also *Villar*, 586 F.3d at 88. Furthermore, the *Villar* court stipulates, "there are certain rare and exceptional cases involving racial or ethnic prejudice that require hearing jury testimony to determine whether a defendant received a fair trial under the Sixth Amendment. The determination of whether an inquiry is necessary . . . is best made by the trial judge, who is most familiar with the strength of the evidence and best able to determine the probability of prejudice from an inappropriate racial or ethnic comment." *Id.*

<sup>29</sup> See *Pena-Rodriguez*, 137 S. Ct. at 885 (Alito, J. dissenting) (arguing against exception). The dissent states that the need for confidential statements to remain confidential outweighs the defendant's need to obtain evidence before it is lost. *Id.* at 874. Justice Alito even goes so far as to say that communications between jurors in the jury room should be held at the same standard of confidentiality as attorney-client communications, spousal communications, and communications with the clergy. *Id.* at 875. The dissent relies on the Court's decision in *McDonald*, by stating that allowing jury testimony to impeach the validity of a verdict "would lead to 'harass[ment]' of jurors and 'the destruction of all frankness and freedom of discussion and conference.'" *Id.* at 876. The

a juror conviction based on *any* irrational bias would be considered unconstitutional if it is analyzed under the scope of the Equal Protection Clause.<sup>30</sup>

The Supreme Court appropriately continued to turn away from the endorsement of racial inequality in the criminal justice system by allowing an exception to the no-impeachment rule where a juror makes a statement that they convicted a defendant based on racial animus as ignoring the behavior places the administration of justice at risk.<sup>31</sup> In applying the language in *McDonald*, which states an exception to the no-impeachment rule can be warranted in the most grave and important of cases, it is hard to imagine a case that is more grave and deserving of an exception than when a person loses their liberty simply based on their race.<sup>32</sup> Moreover, both the majority and the dissent discuss the *Tanner* safeguards to ensure an impartial jury such as *voir dire*, the ability for jurors to report misconduct before rendering a verdict, and observations of the jury's conduct by the judge, attorneys, and the defense.<sup>33</sup> However, the majority properly conclude that while these safeguards are typically adequate to ensure impartiality, they are not sufficient to root out those with hidden racial biases because there is an unsettling number of cases where it was later discovered a juror relied on racial biases to convict even when subject to these safeguards.<sup>34</sup>

---

dissent further discusses that legislature's intent in enacting the more narrow language of Rule 606(b) of the Federal Rules of Evidence was to protect jurors from harassment, to ensure the jury is functioning efficiently, to avoid exploitation of the verdict by a juror, and to ensure the finality of the verdict. *Id.* at 877. The dissent also viewed the *Tanner* safeguards as sufficient to protect Pena-Rodriguez's right to an impartial trial. *Id.* at 880-82.

<sup>30</sup> See *Pena-Rodriguez*, 137 S. Ct. at 883-84 (stating Equal Protection would not limit cases to only requiring exception based on racial biases). The dissent concluded:

[r]ecasting this as an equal protection case would not provide a ground for limiting the holding to cases involving racial bias. At a minimum, cases involving bias based on any suspect classification—such as national origin or religion—would merit equal treatment. So, I think, would bias based on sex, or the exercise of the First Amendment right to freedom of expression or association. Indeed, convicting a defendant on the basis of any irrational classification would violate the Equal Protection Clause.

*Id.* at 884.

<sup>31</sup> See *id.* at 868 (stating racial animus cannot go unchecked); see also cases cited *supra* note 1 (discussing Court's emphasis on racial equality).

<sup>32</sup> See *McDonald v. Pless*, 238 U.S. 264, 269 (1915) (discussing situations that warrant exception); see also *supra* note 15 and accompanying text (outlining past Court decisions leaving open to exceptions).

<sup>33</sup> See *supra* notes 26 and 30 (discussing both majority and dissent view on safeguards).

<sup>34</sup> See *United States v. Villar*, 586 F.3d 76, 87 (1st Cir. 2009) (“[T]he four protections relied on by the *Tanner* Court do not provide adequate safeguards in the context of racially and ethnically biased comments made during deliberations. While individual pre-trial *voir dire* of the jurors can help to disclose prejudice, it has shortcomings because some jurors may be reluctant to admit racial

While the Court is commendable in attempting to remedy societal injustices, it leaves questions unanswered, which will likely result in conflicting applications of the exception in subsequent proceedings as demonstrated in the Circuit Courts' split decisions on this issue before the creation of the exception.<sup>35</sup> As the dissent understandably points out, the majority's attempt to limit the scope of the exception "clear expressions of racial bias" is insufficient as it will be difficult to determine what constitutes a clear expression.<sup>36</sup> However, as a claim of juror misconduct does not automatically trigger reversal, the risk of confusion as to the nature of the statements is mitigated through the discretion of the motion judge in determining whether the defendant's claim of juror misconduct contains any merit.<sup>37</sup> Furthermore, this holding protects defendants in instances where the statements of the jurors are more than obvious such as "I guess we're profiling but they [Hispanic men] cause all the trouble."<sup>38</sup>

Additionally, the decision leaves the question of whether there is an exception to the no-impeachment rule when a juror makes a statement that they convicted the defendant based on other biases, such as gender, religion, or sexual orientation, remain unanswered. Surprisingly, it is the dissent that inadvertently addresses this question by attempting to show how broadly this exception can be construed and concludes that, when viewed in light of the Equal Protection Clause, if a juror makes a statement that they convicted based on gender, religion, sexual orientation, or any unreasonable bias the

---

bias. In addition, visual observations of the jury by counsel and the court during trial are unlikely to identify jurors harboring racial or ethnic bias. Likewise, non-jurors are more likely to report inappropriate conduct – such as alcohol or drug use – among jurors than racial statements uttered during deliberations to which they are not privy.”); *see also* sources cited *supra* note 21 (outlining cases where death penalties and life sentences were upheld despite claim of racial bias); Miller, *supra* note 21, at 897-98 (discussing cases where jurors relied on racial biases to convict including in death penalty cases). Moreover, Miller highlights that the full extent of the injustice caused by juror misconduct cannot be known, as some courts have refused to hear claims of juror impartiality and have not reported the details of said alleged misconduct. Miller, *supra* note 21, at 897-98.

<sup>35</sup> See cases cited *supra* note 20 (outlining conflicting decisions in Circuit Courts).

<sup>36</sup> See *Pena-Rodriguez*, 137 S. Ct. at 884 (Alito, J., dissenting) (raising hypothetical to show difficulties in defining “clear expression” of racial animus). The dissent replaces the facts of the case with the following hypothetical: supposing Juror H.C. stated that he believed Pena-Rodriguez was guilty because a “macho type” person like him thinks they can get any woman they want. *Id.* The dissent cautions that the testifying juror could construe “macho type” as an anti-Hispanic epithet resulting in confusion as to whether the statement would fit into the exception and justify a new trial. *Id.*

<sup>37</sup> See *supra* note 28 and accompanying text (summarizing Court's decision to leave whether claim of misconduct has merit to trial judge).

<sup>38</sup> See *Villar*, 586 F.3d at 78 (elaborating on racial statement in question).

verdict would violate the Constitution.<sup>39</sup> Moreover, based upon the Court looking to jurisdictions that have already considered this issue for guidance on the scope of the exception to Rule 606(b), it will likely do the same when a question arises based on juror misconduct of biases other than racial biases, such as in the context of religion, which both federal circuit courts and state supreme courts have allowed exceptions where claims of religious biases arise in juror deliberations.<sup>40</sup> However, it would be a case of first impression in the context of gender biases in juries, therefore, just as in *Pena-Rodriguez*, where the Court relied heavily on past cases that attempted to rid racial biases from the jury system, the Court may similarly rely on cases in its past that allow women to sit on juries to show that gender biases cannot be tolerated in the jury system and therefore requiring an exception to the no-impeachment rule where a juror relies on gender biases to decide a case.<sup>41</sup>

In *Pena-Rodriguez*, the Court addressed whether the Constitution requires an exception to the no-impeachment rule where a juror's decision to convict the defendant was motivated by anti-Hispanic biases. The Court correctly held that the Sixth Amendment to the Constitution, ensuring the right to a trial by an impartial jury, requires such an exception to the no-impeachment rule. It is imperative for the Court to attempt to rid the system of racial biases where a person is at risk to lose their liberty and in some states, their lives. While this case does not acknowledge how to handle similar situations based on gender, sexual orientation, and religion unaddressed, it is a positive step to ensure the criminal justice system is fair for all.

Gina L. Fleury

---

<sup>39</sup> See *Pena-Rodriguez*, 137 S. Ct. at 883-84 (addressing Equal Protection ramifications of decision).

<sup>40</sup> See cases cited *supra* note 22 (citing cases allowing exception based on religious biases).

<sup>41</sup> See *Pena-Rodriguez*, 137 S. Ct. at 867 (outlining Court's discussion of past cases regarding racial discrimination in *voir dire* selection); see also *Duren v. Missouri*, 439 U.S. 357 (1979) (prohibiting sex discrimination in jury selection); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (holding Equal Protection prohibits peremptory challenges based solely on gender). Justice Kennedy stated, "[w]e do not prohibit racial and gender bias in jury selection only to encourage it in jury deliberations. Once seated, a juror should not give free rein to some racial or gender bias of his or her own." *Alabama ex. rel. T.B.*, 511 U.S. at 153 (Kennedy, J. concurring).