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FAIRNESS OVER FINALITY: *PEÑA-RODRIGUEZ* V. *COLORADO* AND THE RIGHT TO AN IMPARTIAL JURY

*Katherine Brosamle**

“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.”¹

I. INTRODUCTION

The jury room has been described as a black box, shielding the deliberative process of juries from public scrutiny and courts’ examination. With its recent decision, *Peña-Rodriguez v. Colorado*,² the Supreme Court cracked open that box to remedy the influence of jurors’ racial bias on deliberations and, ultimately, verdicts.

Although the Court has decreed that “[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice,”³ the intersections between race and the criminal justice system have long been and still are deeply flawed and inequitable. African Americans account for thirteen percent of the United States general population but forty percent of the United States incarcerated population, and Hispanic Americans account for sixteen percent of the United States general population but nineteen percent of the United States incarcerated population.⁴ These disparities are the

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

2. 137 S. Ct. 855 (2017).

3. *Rose v. Mitchell*, 443 U.S. 545, 555 (1979).

4. Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POL’Y INITIATIVE (May 28, 2014), <https://www.prisonpolicy.org/reports/rates.html>.

result of deep, systemic issues, one facet of which the *Peña-Rodriguez* Court addressed: the jury.

The Sixth Amendment guarantees the right to an “impartial jury,”⁵ yet this right is not always afforded to defendants. Despite the procedures in place for careful jury selection, individuals with deep prejudices are often nonetheless empaneled on juries. When such individuals participate in jury deliberations, the risk that their biases may influence other jurors and the verdict is substantial.

In the initial criminal trial that gave way to the *Peña-Rodriguez* decision, one biased juror passed through the voir dire process undetected.⁶ The juror was empaneled and subsequently vocalized his strong anti-Hispanic biases during jury deliberations.⁷ Recognizing that *Peña-Rodriguez*, a Mexican American, had not been convicted by an impartial jury, two jurors attempted to reveal the other juror’s biased comments to the Court.⁸ Their testimony, however, was rejected, and the motion for a new trial was denied due to Colorado’s no-impeachment rule.⁹

Much like its federal counterpart, Federal Rule of Evidence 606(b), Colorado Rule of Evidence 606(b) prevents trial courts from accepting juror testimony regarding the jury’s deliberative processes in most cases, so as to protect the black box and finality of verdicts.¹⁰

This Comment argues that the Supreme Court properly found that an exception to the no-impeachment rule was necessary under the Sixth Amendment. Part II of this Comment discusses the history of the no-impeachment rule from its common law origins to its codification in the Federal Rules of Evidence. Part III outlines the factual and procedural history of the *Peña-Rodriguez* case, and Part IV breaks downs the Court’s reasoning. Part V argues that the *Peña-Rodriguez* decision is (1) consistent with both precedent and the judiciary’s role, (2) necessary in light of the insufficiency of the voir dire process, and (3) not a threat to the jury system or finality of verdicts. Part VI critiques the majority’s holding for allowing the lower courts too much discretion in implementation. Finally, Part VII concludes that the *Peña-Rodriguez* decision was both proper and necessary, but the

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

6. *Peña-Rodriguez*, 137 S. Ct. at 861–62.

7. *Id.*

8. *Id.*

9. *Id.* at 862.

10. *Id.*

Supreme Court must continue to enforce the principles set forth in the holding so that the goal of protecting Sixth Amendment rights can come to fruition.

II. HISTORICAL FRAMEWORK

Although Federal Rule of Evidence 606(b) was not codified until 1975, its origins trace back to an English civil trial that occurred nearly two hundred years earlier.¹¹

In 1785, the *Vaise v. Delaval*¹² jury found itself evenly split, unable to determine whether a defendant should be held liable, until an easy solution presented itself: a coin toss.¹³ This capricious method ultimately left two jurors wary, and after the verdict was announced, they came clean.¹⁴ Accordingly, the losing party's counsel attempted to petition the court for a re-trial.¹⁵ Lord Mansfield denied the motion, holding that "[t]he Court cannot . . . receive such an affidavit from any of the jurymen *themselves*," for the conduct described constituted a "very high misdemeanor."¹⁶ Through Mansfield's refusal to accept the jurors' affidavits that impeached themselves, the "no-impeachment" rule was born.

As a matter of common law, all American courts have adopted some variation of Mansfield's no-impeachment rule, albeit with "extraordinary variation."¹⁷ Two primary versions developed from this blanket rule in the early American courts: (1) the Iowa Rule and (2) the Federal Rule.¹⁸ The more flexible Iowa Rule has been adopted in approximately twelve jurisdictions and allows juror testimony regarding everything but one's own mental deliberative process.¹⁹ For example, the Iowa Rule would allow for juror testimony if a juror was approached by a party or attorney or if a verdict was rendered in an

11. Josh Camson, *History of the Federal Rules of Evidence*, A.B.A. (2010), https://apps.americanbar.org/litigation/litigationnews/trial_skills/061710-trial-evidence-federal-rules-of-evidence-history.html

12. 99 Eng. Rep. 944, 944 (K.B. 1785).

13. Andrew J. Hull, *Unearthing Mansfield's Rule: Analyzing the Appropriateness of Federal Rule of Evidence 606(b) in Light of the Common Law Tradition*, 38 S. ILL. U. L.J. 403, 409 (2014).

14. *Id.*

15. *Id.*

16. *Vaise*, 99 Eng. Rep. at 944 (emphasis added).

17. See Mark Cammack, *The Jurisprudence of Jury Trials: The No Impeachment Rule and the Conditions for Legitimate Legal Decisionmaking*, 64 U. COLO. L. REV. 57, 63 (1993).

18. *Id.* at 67–68.

19. *Id.*; see *Wright v. Ill. & Miss. Tel. Co.*, 20 Iowa 195, 210–11 (1866).

“improper manner,” such as by a game of chance.²⁰ It would not, however, allow for juror testimony regarding a juror’s personal misunderstanding of the court’s instructions, a juror’s miscalculation of damages, or “other matter resting alone in the juror’s breast.”²¹ Alternatively, the Federal Rule only allows for juror testimony regarding “facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon [a juror’s] mind.”²² In practice, whereas the Iowa Rule allows for testimony regarding the jury’s method of decision-making, the Federal Rule excludes such evidence.²³

In 1975, Congress adopted the Federal Rules of Evidence, which included Rule 606(b), a codification of the no-impeachment rule.²⁴ The Advisory Committee’s initial draft of Rule 606(b) read much like the Iowa Rule, prohibiting only testimony as to a juror’s mind, emotions, or mental processes.²⁵ However, the Justice Department and Senator John L. McClellan intervened before the draft was proposed.²⁶ After considering the policy concerns raised, the Committee re-drafted a more stringent version of the rule.²⁷ The Supreme Court accepted this version and referred it to Congress.²⁸ Initially, the House of Representatives favored the Iowa Rule, while the Senate preferred the Federal Rule.²⁹ However after much deliberation, Congress enacted, and the President subsequently signed, the second version of the rule.³⁰

Accordingly, Rule 606(b) prohibits juror testimony “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

20. *Wright*, 20 Iowa at 210.

21. *Id.*

22. *Mattox v. United States*, 146 U.S. 140, 149 (1892).

23. *Cammack*, *supra* note 17, at 68.

24. FED. R. EVID. 606(b); *Camson*, *supra* note 11.

25. *Cammack*, *supra* note 17, at 70; *see Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates*, 51 F.R.D. 315, 387 (Mar. 1971).

26. Deputy Attorney General Kliendienst from the Justice Department raised concerns of juror harassment, and Senator McClellan worried that the lenient rule would make it impossible to conduct trials, especially criminal trials. *See Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 877 n.3 (2017); *Cammack*, *supra* note 17, at 71.

27. *Cammack*, *supra* note 17, at 71.

28. *Id.* at 72.

29. *Id.* at 72–73.

30. *Id.* at 73.

vote; or any juror's mental processes concerning the verdict or indictment."³¹

The Court may only consider such juror testimony in limited cases. First, if "extraneous prejudicial information was improperly brought to the jury's attention,"³² juror testimony on any such "extra record sources" which were exposed to the jury, often through media sources, may be acceptable.³³ Second, if "an outside influence was improperly brought to bear on any juror,"³⁴ a juror may be able to testify to "threats or warnings, contacts with interested parties, lawyers, or witnesses, and even some kinds of contact with court personnel, including bailiff and judges."³⁵ Finally, if "a mistake was made in entering the verdict on the verdict form," a juror may testify to such human error.³⁶

III. STATEMENT OF THE CASE

A. Peña-Rodriguez's Original Criminal Trial

In May 2007, two teenage girls were cornered in a bathroom at a horse-racing facility by a man who made sexual advances toward them both.³⁷ Miguel Angel Peña-Rodriguez, an employee of the facility, was eventually identified by the girls in a one-on-one show-up and charged with sexual assault, unlawful sexual contact, and harassment.³⁸ Later that year, after a three-day trial, a jury found Peña-Rodriguez guilty of unlawful sexual contact and harassment.³⁹ One juror's reasoning?: "I think he did it because he's Mexican and Mexican men take whatever they want."⁴⁰ Citing his experience as a law enforcement officer, Juror H.C. explained his belief that Peña-Rodriguez was guilty because "Mexican men [have] a bravado that cause[s] them to believe they [can] do whatever they want[] with

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

32. *Id.*

33. 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 6:18 (4th ed. 2017).

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

35. 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 6:19 (4th ed. 2013).

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

37. Peña-Rodriguez v. People, 350 P.3d 287, 288 (Colo. 2015).

38. *Id.*

39. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 861 (2017).

40. *Id.* at 862.

women.”⁴¹ Moreover, Juror H.C. did not find Peña-Rodriguez’s alibi credible because he was “an illegal.”⁴²

Reminiscent of the original *Vaise* case, two jurors remained behind after the jury was discharged to speak with Peña-Rodriguez’s counsel privately.⁴³ They informed counsel of Juror H.C.’s comments indicating his anti-Hispanic bias towards Peña-Rodriguez and his alibi.⁴⁴

B. *The Appeals Process*

Peña-Rodriguez’s counsel obtained affidavits detailing the two jurors’ descriptions of Juror H.C.’s biased statements and presented them to the trial court as part of a motion for a new trial.⁴⁵ Despite acknowledging Juror H.C.’s bias, the trial court denied the motion because Colorado Rule of Evidence 606(b)⁴⁶ protects juror deliberations from inquiry.⁴⁷ Accordingly, the jury’s verdict was finalized, Peña-Rodriguez was sentenced to two years of probation, and he was required to register as a sex offender.⁴⁸

A divided Court of Appeals and a split Colorado Supreme Court affirmed the trial court’s decision, holding that racial bias does not fall into one of the categorical exceptions to Rule 606(b), thus making the jurors’ affidavits inadmissible.⁴⁹

VI. REASONING OF THE COURT

The U.S. Supreme Court granted certiorari to determine whether there is a constitutionally mandated exception to the no-impeachment rule for racial bias.⁵⁰ In a 5-3 decision, the Court concluded that the Sixth Amendment requires such an exception.⁵¹

41. *Id.*

42. It should be noted that Peña-Rodriguez’s alibi testified during trial that he is a legal resident of the United States. *Id.*

43. *Id.* at 861.

44. *Id.*

45. *Id.* at 862.

46. The language of Colorado Rule of Evidence 606(b) is identical to its federal counterpart, Federal Rule of Evidence 606(b). *Peña-Rodriguez*, 137 S. Ct. at 862.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 862–63.

51. *Id.* at 869.

After outlining the history of the no-impeachment rule and the variations different jurisdictions have adopted,⁵² Justice Kennedy went on to explain the majority's reasoning.

Kennedy distinguished two groupings of relevant precedent: decisions endorsing the no-impeachment rule and decisions dealing with racial bias in the jury system. The first category, which includes *United States v. Reid*,⁵³ *McDonald v. Pless*,⁵⁴ *Tanner v. United States*,⁵⁵ and *Warger v. Shauers*,⁵⁶ tracks the Supreme Court's decisions involving the no-impeachment rule, both prior to its codification and later interpreting Rule 606(b).⁵⁷ Kennedy then transitioned into the second category of precedent dealing with racial disparities in the criminal justice system, which the Civil War Amendments largely served as the impetus for.⁵⁸ To establish that the judiciary, and not just the legislature, has a duty to eliminate the role of race in the criminal justice system, Kennedy summarized past decisions whereby the Supreme Court sought to eradicate racial bias within the jury system.⁵⁹

Kennedy characterized the issue presented in this case as falling at the intersection of these two groupings of decisions, which need not conflict with each other for several reasons.⁶⁰

First, the traditional *Tanner* safeguards⁶¹ simply “may be less effective in rooting out racial bias” which is treated with “added precaution” in the justice system.⁶² Moreover, *Peña-Rodriguez* addresses an issue recognized in *Reid*, *McDonald*, and *Warger*: whether there is a constitutional requirement that the no-impeachment rule give way in cases of extreme juror bias.⁶³ Finally, systemic

52. *See id.* at 866–67.

53. 53 U.S. 361, 361 (1851).

54. 238 U.S. 264, 269 (1915) (rejecting the Iowa Rule).

55. 483 U.S. 107, 126 (1987) (identifying the concerns supporting the no-impeachment rule and outlining the existing safeguards to a defendant's Sixth Amendment rights).

56. 135 S. Ct. 521, 529 (2014) (declining to make an exception to the no-impeachment rule in a case involving pro-defendant bias, citing to the *Tanner* safeguards).

57. *Peña-Rodriguez*, 137 S. Ct. at 864–67.

58. *Id.* (noting the Civil War Amendments gave “new force and direction” to the “imperative to purge racial prejudice from the administration of justice”).

59. *Id.* at 867–68.

60. *Id.* at 868.

61. The *Tanner* safeguards are outlined in detail below, but include voir dire, the visibility of jurors throughout trial, and the admissibility of non-juror evidence detailing juror misconduct. *See infra* Part V.B.

62. *Peña-Rodriguez*, 137 S. Ct. at 869 (emphasis added).

63. *Id.* at 866–67.

confidence in jury verdicts, a “central premise of the Sixth Amendment trial right,” necessitates a “constitutional rule that [addresses] racial bias in the justice system.”⁶⁴

Accordingly, the Court determined that if “one or more jurors made statements exhibiting overt racial bias that casts serious doubt on the fairness and impartiality of the jury’s deliberations and resulting verdict,” and the statements indicated that “racial animus was a significant motivating factor in the juror’s vote,” then the no-impeachment bar can be set aside.⁶⁵ The determination of this threshold showing was left to the “substantial discretion of the trial court in light of all the circumstances.”⁶⁶

Both Justice Thomas and Justice Alito published dissenting opinions, with Chief Justice Roberts and Justice Thomas joining Alito’s dissent.⁶⁷ Thomas highlighted the fact that a race-based exception to the no-impeachment rule was not part of American common law history in 1791 (when the Sixth Amendment was ratified) or 1868 (when the Fourteenth Amendment was ratified).⁶⁸ Thus, Thomas found no constitutional basis for the majority’s holding.⁶⁹ On the other hand, the crux of Alito’s dissent was concern that this decision, while “well-intentioned,”⁷⁰ will undermine the foundational purposes of the no-impeachment rule.⁷¹ As a consequence of this exception, Alito fears there will be a chilling effect on juror deliberations, increased harassment of jurors after trial, and an undermining of the finality of verdicts.⁷²

V. ANALYSIS

The issue presented in *Peña-Rodriguez* lies precariously at the juncture between two fundamental tenets of the American criminal justice system: equal justice under the law and the stability and finality of verdicts. Balancing these two interests, the Supreme Court properly found that the Sixth Amendment necessitates an exception to Rule

64. *Id.* at 869.

65. *Id.*

66. *Id.*

67. *Id.* at 871 (Thomas, J., dissenting); *id.* at 874 (Alito, J., dissenting).

68. *Id.* at 874 (Thomas, J., dissenting).

69. *Id.*

70. *Id.* at 885 (Alito, J., dissenting).

71. *Id.* at 884.

72. *Id.* at 884–85.

606(b) when a juror utilizes racial bias to reach a verdict. As set forth below, the *Peña-Rodriguez* decision was both necessary and proper.

A. The Duty to Confront Racial Bias in the Justice System Is Not the Legislature's Alone

In his dissenting opinion, Alito gives great weight to the extensive legislative history of Rule 606(b) that resulted in the adoption of a variation of the Federal Rule, as opposed to the laxer Iowa Rule.⁷³ In doing so, Alito questions how the Court's "seat-of-the-pants judgment" is any more justified than the decisions made by the legislatures responsible for drafting and adopting federal and state evidentiary rules.⁷⁴

Alito's statement implies that *Peña-Rodriguez* deals with issues best left to the legislature, thus ignoring the judiciary's duty to dismantle the effects of racial animus in the administration of justice. Essential to the American scheme of justice, trial by an impartial jury is a fundamental right.⁷⁵ As Kennedy noted, the Supreme Court has a rich history of specifically addressing laws and practices involving race and juries.⁷⁶ As early as 1880, the Court prohibited the exclusion of jurors on the basis of race.⁷⁷ The Court has routinely overturned laws that overtly⁷⁸ or implicitly⁷⁹ exclude racial minorities, including African Americans⁸⁰ and Hispanic Americans,⁸¹ from being summoned for jury duty. In 1986, *Batson* held that the Sixth and Fourteenth Amendments guarantee defendants that the State will not

73. *Id.* at 877.

74. *Id.* at 882.

75. See U.S. CONST. amend. VI; *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

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

77. *Strauder v. West Virginia*, 100 U.S. 303, 305–09 (1880) (holding a West Virginia statute prohibiting people of color from serving as jurors violated the Fourteenth Amendment).

78. See *Neal v. Delaware*, 103 U.S. 370, 379–80 (1880) (invalidating a Delaware law that restricted the selection of jurors to voting, white male citizens under the Fourteenth Amendment); see also *Hollins v. Oklahoma*, 295 U.S. 394, 395 (1935) (per curiam).

79. *Avery v. Georgia*, 345 U.S. 559, 562 (1953) (overturning a county policy of placing the names of white prospective jurors on white cards and African American prospective jurors on yellow cards to be drawn for service under the Fourteenth Amendment).

80. *Alexander v. Louisiana*, 405 U.S. 625, 629–30 (1972) (finding a prima facie case of discrimination where only 5% percent of persons summoned for grand jury venire were African American in a county that was 21% African American).

81. *Castaneda v. Partida*, 430 U.S. 482, 495 (1977) (finding a prima facie case of discrimination where only 39% of persons summoned for grand jury service were Mexican American in a county that was 79.1% Mexican American); *Hernandez v. Texas*, 347 U.S. 475, 480–81 (1954) (rejecting a Texas law that systematically excluded persons of Mexican descent from juror selection).

exclude members of his or her race from the jury venire on account of race, or on the false assumption that members of his or her race as a group are not qualified to serve as jurors.⁸² The Court has also held that the Fourteenth Amendment requires trial judges to interrogate jurors about racial prejudice at the defendant's timely request.⁸³ Accordingly, the Court's decision in *Peña-Rodriguez* is not unprecedented. Rather, it is part of the Supreme Court's long-standing pattern of addressing issues of race discrimination in the criminal justice system.

B. Peña-Rodriguez Is Consistent with Precedent

Since its codification in 1975, the Supreme Court has heard three cases questioning the propriety of a potential exception to Rule 606(b): *Tanner v. United States* in 1987, *Warger v. Shauers* in 2014, and *Peña-Rodriguez v. Colorado* in 2017. In his *Peña-Rodriguez* dissent, Alito characterizes the majority's decision as an improper departure from the Court's prior holdings.⁸⁴ Not so. Although it is incontestable that the *Peña-Rodriguez* decision creates a new exception to Rule 606(b), it does so within the framework established by the Court's earlier precedent.

Even before Rule 606(b) was codified, the Supreme Court considered cases involving the common-law no-impeachment rule. As early as 1851, the Supreme Court acknowledged that while juror testimony "ought always to be received with great caution," there may be cases "in which it would be impossible to refuse [such testimony] without violating the plainest principles of justice."⁸⁵ The Court again echoed this concern in 1915, noting an exception may be needed "in

82. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986); *see also Snyder v. Louisiana*, 552 U.S. 472, 483 (2008) (holding a prosecutor's alleged reasons for striking an African American juror were implausible under the *Batson* framework); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991) (holding peremptory challenges may not be used to exclude jurors on account of their race in civil trials); *Hernandez v. New York*, 500 U.S. 352, 355 (1991) (prohibiting prosecutors from making peremptory challenges to exclude Hispanic Americans based on their ethnicity).

83. *Ham v. South Carolina*, 409 U.S. 524, 529 (1973); *see also Turner v. Murray*, 476 U.S. 28, 36–38 (1986) (holding a defendant accused of an interracial capital crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias); *Rosales-Lopez v. United States*, 451 U.S. 182, 190 (1981) (holding that unless a defendant is accused of a violent crime against an individual of another race or ethnicity, the trial court has discretion to determine if voir dire inquiry as to racial bias is necessary).

84. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 882 (2017).

85. *United States v. Reid*, 53 U.S. 361, 366 (1851).

the gravest and most important cases.”⁸⁶ Nearly a century later, the Court again acknowledged that “[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged.”⁸⁷ Justice Sotomayor, writing for the *Warger* Court, noted that “[i]f and when such a case arises, the Court can consider whether the usual safeguards are or are not sufficient to protect the integrity of the process.”⁸⁸ *Peña-Rodriguez* was that case. Accordingly, the Court’s decision in *Peña-Rodriguez* finally addressed the question left open by the *Reid*, *McDonald*, and *Warger* Courts.

In *Tanner*, the Supreme Court declined to make an exception to Rule 606(b) in order to allow for juror testimony regarding jurors’ drug and alcohol use during trial.⁸⁹ The *Tanner* Court justified this decision by highlighting the protective mechanisms already in place which protect defendants’ Sixth Amendment rights.⁹⁰ For example, “during the trial the jury is observable by the court, by counsel, and by court personnel,” as well as by each other, and such behaviors could have been reported prior to when the verdict was rendered.⁹¹ Additionally, the trial court may hold a post-trial evidentiary hearing to impeach the verdict by non-juror evidence of juror misconduct.⁹² Finally, there is the key protective mechanism of voir dire.⁹³

The Court’s decision in *Peña-Rodriguez* does not undermine the *Tanner* holding. In *Tanner*, the present safeguards should have been sufficient, and the Court’s holding was rational within the facts presented. There is, however, a significant difference between juror misconduct occurring throughout trial in the courtroom and juror misconduct occurring behind closed doors while shielded in the privacy of deliberations. The safeguards outlined in *Tanner* are still relevant in light of *Peña-Rodriguez*; *Peña-Rodriguez* merely adds an additional safeguard to defendants’ Sixth Amendment right to an impartial jury.

86. *McDonald v. Pless*, 238 U.S. 264, 269 (1915).

87. *Warger v. Shauers*, 135 S. Ct. 521, 529 n.3 (2014).

88. *Id.*

89. *Tanner v. United States*, 483 U.S. 107, 124–27 (1987).

90. *Id.* at 127.

91. *Id.*

92. *Id.*

93. *Id.*

C. *The Tanner Safeguards Are Insufficient for Rooting out Racial Bias Among Juries*

1. Issues with Relying on Voir Dire

In *Peña-Rodriguez* the only conduct at issue occurred during deliberations; there was no evidence of juror misconduct during trial.⁹⁴ Only a fellow juror could have reported Juror H.C.'s misconduct. Accordingly, the only potential *Tanner* safeguard at play in *Peña-Rodriguez* was the voir dire process.

Roughly translated, voir dire means “to speak the truth.”⁹⁵ It is the “preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury.”⁹⁶ The Supreme Court has consistently recognized the voir dire process as a means of rooting out juror bias so as to achieve the selection of an impartial jury.⁹⁷ Yet, the adequacy of this procedure is dubious.

In *Peña-Rodriguez*, Kennedy noted that the *Tanner* safeguards simply “may be less effective in rooting out racial bias.”⁹⁸ This is not the first time this concern has been raised.⁹⁹ There is a substantial body of scholarship which calls into question the effectiveness of the voir dire process in determining the impartiality of prospective jurors.¹⁰⁰ For example, one study conducted at the federal trial court level determined via post-trial interviews that the voir dire process “did not provide sufficient information for attorneys to identify prejudiced jurors.”¹⁰¹ Two commonly cited explanations for the insufficiency of

94. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 861 (2017).

95. *Voir Dire*, BLACK'S LAW DICTIONARY (10th ed. 2014).

96. *Id.*

97. *See* *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143–44 (1994) (“Voir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently.”); *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991) (“Voir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges.”).

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

99. *See, e.g.*, *United States v. Villar*, 586 F.3d 76, 87 (1st Cir. 2009) (“In our view, the 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.”).

100. *See* Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1186–90 (2003) (surveying various studies that demonstrate the ineffectiveness of voir dire in detecting juror biases).

101. Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 492, 528 (1978).

the voir dire process are (1) the role of trial judges and (2) the tendency of prospective jurors to conceal bias.¹⁰²

Voir dire is not self-executing. The suitability of a prospective juror cannot be revealed without proper questioning. In other words, “the power of voir dire depends on how the process is conducted and to what extent issues are probed.”¹⁰³ The determination of how voir dire will be conducted and what will ultimately be asked is largely a matter left up to the discretion of the trial judge, especially in federal court.¹⁰⁴ This is done to balance the interests of “effective[ly] . . . obtaining an impartial jury” and “reasonable expedition.”¹⁰⁵ With mounting concerns over the congestion of trial courts, judges are left to streamline the jury selection process to cut time and costs.¹⁰⁶

Federal District Court Judge Marvin A. Aspen described the “hybrid” voir dire practice used in many federal courts as follows: “the judge conducts voir dire and usually asks the attorneys to submit, in writing, questions the attorneys may wish the judge to ask.”¹⁰⁷ This streamlined process limits the ability of lawyers to inquire into biases that may impact their client’s interests because judges may not approve submitted questions or may fail to pursue further inquiry when a juror provides an ambiguous answer. Moreover, when judges act as the questioners in voir dire, “interviewer bias” may lead jurors to “quickly pick up on a judge’s expectations and mannerisms and then attempt to provide an answer that they think will meet with the judge’s approval.”¹⁰⁸ In sum, limited voir dire increases incidents of undetected juror bias.¹⁰⁹

102. Leah S.P. Rabin, *The Public Injury of an Imperfect Trial: Fulfilling the Promises of Tanner and the Sixth Amendment Through Post-Verdict Inquiry into Truthfulness at Voir Dire*, 14 U. PA. J. CONST. L. 537, 552–53 (2011).

103. *Id.*

104. FED. R. CRIM. P. 24(a); FED. R. CIV. P. 47(a).

105. *The Jury System in the Federal Courts*, 26 F.R.D. 409, 465–66 (1960).

106. Jeffrey M. Gaba, *Voir Dire of Jurors: Constitutional Limits to the Right of Inquiry into Prejudice*, 48 U. COLO. L. REV. 525, 531–32 (1977).

107. Mark A. Drummond, *Voir Dire: Don’t Let the Judge Cut You Out*, A.B.A., <https://apps.americanbar.org/litigation/litigationnews/articles-print/050412-practice-points-spring12.html>.

108. Rachael A. Ream, *Limited Voir Dire: Why It Fails to Detect Juror Bias*, CRIM. JUST., Winter 2009, at 22, 25.

109. *See id.* at 25–26; *Limited Voir Dire: An Inadequate Safeguard of the Constitutional Right to an Impartial Jury*, MICH. J. RACE & L. (Jan. 22, 2016), https://mjr.org/2016/01/22/comment-limited-voir-dire-an-inadequate-safeguard-of-the-constitutional-right-to-an-impartial-jury/#_ftnref30.

Inherent in the voir dire system is the risk that, “even assuming adequate trial and pre-trial tools for screening and excising juror bias,” jurors may misrepresent their biases, either intentionally or unintentionally.¹¹⁰ Voir dire often fails to reveal jurors’ biases because the “superficial questions” often asked of jurors regarding their biases are unlikely to prompt disclosure, as “[g]eneral questions do not reach hidden inconsistent attitudes, which research has shown are now prevalent about race.”¹¹¹ It can often take a more detailed and focused line of questioning to prompt a juror to admit to racial bias. Moreover, jurors may not answer honestly, especially to questions involving racial biases. Societal pressures may prevent a juror from honestly admitting their own prejudices publicly, but that does not mean the biases have been eliminated, just simply repressed.

2. Proof of Voir Dire Insufficiency

Concerns about the insufficiency of voir dire are not just theoretical. One need not look far to find concrete examples of juror bias escaping past the jury selection process. For example, during Keith Tharpe’s capital murder trial, one juror repeatedly referred to Tharpe by derogatory names and later told Tharpe’s attorneys that she “wondered if black people even have souls.”¹¹² On September 27, 2017, the Supreme Court stayed the execution of Keith Tharpe relying on the principles set forth in the *Peña-Rodriguez* decision.¹¹³

Many others have not been as fortunate as Tharpe, however. Before James Shillcutt was convicted of soliciting prostitutes, one juror in deliberations stated, “Let’s be logical; he’s a black, and he sees a seventeen year old white girl—I know the type.”¹¹⁴ During the deliberations for the trial against Walter Smith, Jr., one juror strutted around like a minstrel mimicking a black dialect to mock Smith and

110. Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. RACIAL & ETHNIC JUST. 165, 204 (2011).

111. Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1675 (1985) (“Asking a general question about impartiality and race is like asking whether one believes in equality for blacks; jurors may sincerely answer yes, they believe in equality and yes, they can be impartial, yet oppose interracial marriage and believe that blacks are more prone to violence.”).

112. David Beasley, *Supreme Court Halts Georgia Execution of Man Convicted of 1990 Murder*, THOMSON REUTERS (Sep. 26, 2017, 3:08 A.M.), <http://www.reuters.com/article/us-usa-georgia-execution/supreme-court-halts-georgia-execution-of-man-convicted-of-1990-murder-idUSKCN114R>.

113. *Id.*

114. *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987) (holding that evidence of racial comments could not be used to impeach jury verdicts under Rule 606(b)).

his attorney.¹¹⁵ Smith was subsequently convicted of first degree murder.¹¹⁶ Just before an all-white jury convicted nineteen-year-old Darrell Jones of first-degree murder, one juror attempted to persuade the remaining holdout by arguing that Jones was guilty because he was black.¹¹⁷ Kerry Dean Benally was convicted of assault with a dangerous weapon after the foreman stated “[w]hen Indians get alcohol, they all get drunk, and when they get drunk, they get violent.”¹¹⁸ The *Tanner* safeguards did nothing to preserve the Sixth Amendment rights of Shillcutt, Smith, Jones, or Benally.

Similarly, voir dire failed to protect Peña-Rodriguez. In his criminal trial, the trial court and counsel’s questions to the venire included whether any potential jurors: (1) “had ‘any feelings for or against’ either party,” (2) were “in law enforcement or had family or close friends in law enforcement,” (3) would be unable to “render a verdict solely on the evidence presented at trial and the law,” (4) “had taken ‘law classes of any kind,’ and (5) “thought this would not be a ‘good case’ for them to serve as a ‘fair juror.’”¹¹⁹ Jurors were also presented the opportunity to speak privately with the court.¹²⁰ Nonetheless, Juror H.C., a former law enforcement officer who believes Mexican men “have a sense of entitlement” and are “physically controlling” of women, was selected as a juror.¹²¹ The only answer of Juror H.C.’s which the Court questioned was his response that he had taken “classes in real estate and contract law.”¹²² Neither his apparent anti-Hispanic biases nor his law enforcement experience were revealed at any point during the voir dire process.¹²³ Juror H.C.’s selection reveals the insufficiencies of voir dire in exposing and rooting out racial bias.

115. *Smith v. Brewer*, 444 F. Supp. 482, 485 (S.D. Iowa 1978), *aff’d*, 577 F.2d 466 (8th Cir. 1978).

116. *Id.* at 484.

117. Jenifer McKim, *Three Decades Later, Juror Tries to Set Record Straight*, NEW ENGLAND CTR. FOR INVESTIGATIVE REPORTING (Sept. 2, 2017), <https://www.necir.org/2017/09/02/three-decades-later-juror-tries-set-record-straight>.

118. *United States v. Benally*, 546 F.3d 1230, 1231 (10th Cir. 2008) (alteration in original).

119. *People v. Peña-Rodriguez*, 412 P.3d 461, 465(Colo. App.2012).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

D. Race Based Exceptions Have Worked in Many States

The Center on the Administration of Criminal Law surveyed case law in all jurisdictions that allow courts to consider juror testimony of racial bias in deliberations.¹²⁴ The survey identified thirty cases from sixteen different states, the District of Columbia, and the First and Seventh Circuits where courts as early as 1967 have inquired into the impact of a juror's racial bias in deliberations.¹²⁵ Of those cases, sixteen resulted in a new trial or hearing, and fourteen did not.¹²⁶ The Court also found that although Oregon has a codified racial-bias exception, there was no published case law applying it.¹²⁷ Similarly, while the Ninth Circuit has expressed support of a race-based exception, it has not yet needed to apply such an exception.¹²⁸ In sum, the experiences of these twenty different jurisdictions over the past several decades indicate that allowing for a race-based exception to the no-impeachment rule has not resulted in substantial motions for retrial or overturn rates, increased harassment of jurors, or a weakening of the finality of verdicts. There is no reason to think that the experience of other jurisdictions in light of the *Peña-Rodriguez* holding will be any different than that of these nineteen jurisdictions prior to the holding.

VI. CRITIQUE

Although the use of the *Peña-Rodriguez* decision in the stay of Tharpe's execution appears promising, the stay was only granted by the Supreme Court after the Eleventh Circuit upheld the district court's denial of Tharpe's petition.¹²⁹ In their decisions, both the district court and the Eleventh Circuit focused on the "discretion" reserved to the lower courts in the *Peña-Rodriguez* holding.¹³⁰

In the majority's holding in *Peña-Rodriguez*, the Supreme Court twice makes explicit reference to leaving the mechanics of

124. Amici Curiae Brief of Center on the Administration of Criminal Law in Support of Petitioner, *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606).

125. *Id.* at 20–21.

126. *Id.*

127. *Id.* at 21 n.7; OR. REV. STAT. ANN. § 40.335 (1981).

128. See *United States v. Hayat*, 710 F.3d 875, 886 (9th Cir. 2013) (citing *United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001)).

129. *Tharpe v. Warden*, No. 17-14027-P, 2017 WL 4250413, at *3 n.5 (11th Cir. Sept. 21, 2017).

130. *Id.*

implementing this new exception up to the discretion of the state and lower courts.¹³¹ Unfortunately, this discretion left to the lower courts in the majority's holding may inhibit actual progress towards rooting out racial bias from jury deliberations.

In the months following the decision's announcement on March 6, 2017, four circuits addressed the implementation of *Peña-Rodriguez*. As mentioned, in ruling on Tharpe's petition, the Eleventh Circuit acknowledged but did not apply the *Peña-Rodriguez* holding.¹³² The Third and Sixth Circuits have similarly acknowledged but not applied the holding, distinguishing it from the cases at issue.¹³³ Most disconcertingly, the Fifth Circuit quickly "decline[d] the invitation" of *Peña-Rodriguez*, finding this step in the "relentless march toward a color-blind justice" to be "antithetical to the privacy of jury deliberations."¹³⁴ Playing into the same slippery slope argument that Alito endorsed in his dissent, other courts may likewise opt to maintain the status quo to the continued detriment of defendants' Sixth Amendment rights given the discretionary language used in the majority's holding.

VII. CONCLUSION

Miguel Angel Peña-Rodriguez, Keith Tharpe, Walter Smith Jr., Darrell Jones, and Kerry Dean Benally all deserved fair trials in front of an impartial jury. The Supreme Court correctly held the Sixth Amendment requires the no-impeachment rule to give way where there is evidence of a juror's overt racial bias. If the Supreme Court truly stands for the principles of equality and justice extolled in the opinion, it must defend this exception and continue to enforce the principles set forth in the *Peña-Rodriguez* holding so that the Sixth Amendment protection set forth by the Constitution and re-affirmed by the Court can come to fruition.

131. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017) ("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 The practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors.").

132. *Tharpe*, 2017 WL 4250413, at *3-4.

133. *United States v. Angel-Huerta*, 718 Fed. Appx. 105, 110 (3d Cir. 2017); *United States v. Robinson*, 872 F.3d 760, 771-72 (6th Cir. 2017).

134. *Young v. Davis*, 860 F.3d 318, 333-34 (5th Cir. 2017).

