An Ounce of Prevention: Educating Jurors to Avoid Investigating the Verdict

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"'I think he did it because he's Mexican and Mexican men take whatever they want.'"[1]

This language, attributed to a juror during deliberations in a sexual assault case involving a Hispanic defendant, helped to form the basis of a landmark Supreme Court decision that created a historic exception to a rule of evidence that dates back to the 18th century.[2] In *Peña-Rodriguez v. Colorado*, the Supreme Court examined what has been labeled the "no-impeachment rule" in light of evidence of overt juror racism influencing the verdict.[3] The no-impeachment rule, a common law principle derived from English law and codified in rule 606(b) of the Federal Rules of Evidence, is used in some form in every jurisdiction in the United States.[4] The rule prohibits jurors from providing admissible evidence of their deliberations after a verdict has been rendered or an indictment issued.[5] With only very narrow exceptions, the rule essentially prevents jurors from testifying or providing affidavits after a trial is over indicating that the deliberations were flawed in some way.[6]

Very good reasons have kept this rule in place for centuries, including the need to ensure finality of jury verdicts, to maintain the confidentiality of jury deliberations, and to prevent the harassment of jurors post-verdict by losing parties.[7] Yet despite the importance and longevity of the no-impeachment rule, it presents serious constitutional concerns.[8] The fairness of a trial–in both reality and

1 Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 862 (2017).
2 *Id.* at 863.
3 *Id.* at 866–69.
4 *Id.* at 863–65.
5 *Id.* at 864.
6 Charles Alan Wright et al., 27 Federal Practice and Procedure §§ 6074–6076 (2d ed. Apr. 2019 Update).
7 *See* Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 Harv. J. Racial & Ethnic Just. 165, 176–77 (2011). In recommending the adoption of the rule, the Senate Judiciary Committee stated:

> Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors.

S. Rep. No. 93-1277 (1974).
8 *See* Wright, *supra* note 6, § 6074.

perception–depends on the jury deciding the case based upon the evidence before it. However, as demonstrated by the quote above, not all jurors make their decisions based upon the evidence presented in the case.[9] What happens when a juror decides to convict a defendant because of his race? Or because the juror believes that all people of a certain ethnicity are prone to criminal conduct and must be guilty? Such a basis for a decision undermines the constitutional right to an impartial jury and consequently a fair trial.[10] Thus, when confronted with these facts, the Supreme Court decided to carve out a very narrow exception: when a juror's verdict is the result of an explicit racial bias against the defendant, the Sixth Amendment right to a fair trial is implicated and the trial judge must have the discretion to hear testimony from jurors to determine the constitutionality of the verdict.[11]

The *Peña-Rodriguez* decision was groundbreaking in recognizing this constitutionally-required exception to the no-impeachment rule. However, the narrowness of the decision, coupled with difficulty in application, has led to it making very little real impact.[12] The *Peña-Rodriguez* exception to the no-impeachment rule only applies to explicit animus toward a defendant, and only racial-animus.[13] Thus, a juror who expresses a bias against another juror's race, or against the sexual orientation of the defendant, will not fall within the exception nor will any implicit bias be considered if it is not explicitly evidenced through a juror's statement.[14] Further, the *Peña-Rodriguez* exception is limited by local rules that can bar attorneys from contacting jurors after a verdict is rendered. Attorneys who violate those rules to ascertain whether the jury expressed racial animus during deliberations may find themselves barred from arguing the exception, regardless of the evidence they find.[15] Finally,

9 Andrew J. Hull, *Unearthing Mansfield's Rule: Analyzing the Appropriateness of Federal Rule of Evidence 606(b) in Light of the Common Law Tradition*, 400 S. ILL. U. L.J. 403, 404 (2014) (noting that cases involving juror misconduct impacting the verdict "have existed throughout our common law history, and they continue to occur today").

10 Peña-Rodriguez, 137 S. Ct. at 868.

11 *Id.* at 869.

12 *See infra* Part III(a).

13 Peña-Rodriguez, 137 S. Ct. at 869.

14 *See id.*

15 *See id.*; United States v. Robinson, 872 F.3d 760, 770 (6th Cir. 2017) (holding that attorneys violating local rules regarding contacting jurors post-verdict were barred from arguing the application of *Peña-Rodriguez*).

the Supreme Court explicitly held that the exception only applies when the losing party can show that a juror's statements evidence an overt racial prejudice that actually motivated their vote to convict the defendant, a difficult burden to meet.[16]

The narrowness of the *Peña-Rodriguez* decision was intentional. The core policies behind the no-impeachment rule are crucial to maintaining a functioning jury system.[17] Yet there are significant constitutional concerns implicating a defendant's Sixth Amendment rights that are not addressed by the narrow exception to the no-impeachment rule created by this historic case. This Article recognizes the incredible challenge that the conflict between the competing policies behind the no-impeachment rule and the right to an impartial jury trial create, and argues that a different approach can better serve the interests of a defendant's right to a fair trial without implicating the no-impeachment rule.

While the no-impeachment rule applies to all juror testimony post-verdict, the rule has no application to jurors providing such testimony prior to a verdict being rendered.[18] Thus, jurors can present evidence of any improper bases used during deliberations at any time up to the point of verdict entry.[19] This Article argues that jurors can be encouraged to not only come forward with such evidence during deliberations, but also to examine their own implicit biases to minimize their impact on a verdict. A trial judge, through carefully worded jury instructions, can emphasize the importance of recognizing such biases in themselves and others, and can create a mechanism whereby jurors can feel more comfortable reporting evidence of improper influences in the jury room prior to the rendering a verdict. While these practices will not solve the problem of jurors using improper bases to render a verdict, it will help to minimize the impact of bias in deliberations and yet preserve the important policy considerations behind the no-impeachment rule.

Part I of this Article examines the history and policies be-

16 Peña-Rodriguez, 137 S. Ct. at 869. Some courts have also held the rule is not retroactively applicable, further narrowing its application. *See* Tharpe v. Warden, 898 F.3d 1342, 1346 (11th Cir. 2018).

17 Tanner v. United States, 483 U.S. 107, 119-20 (1987).

18 Wright, *supra* note 6, § 6074 (noting that because 606(b) does not apply before a verdict or indictment is reached, it "is inapplicable during pretrial voir dire and during the trial").

19 Tanner, 483 U.S. at 127 (noting that "jurors are observable by each other, and may report inappropriate juror behavior to the court before they render a verdict").

hind the no-impeachment rule. Part II of this Article examines the *Peña-Rodriguez* case and the narrowness of its holding. Part III of this Article reviews the limited way in which lower courts have applied the *Peña-Rodriguez* exception since the decision was issued and identifies problems associated with the narrowness of the Court's holding. Part IV of this Article discusses the use of implicit bias instructions in the courtroom and how the use of such instructions could be expanded upon to better address the improper reliance on bias in rendering verdicts.

I. HISTORY OF THE NO-IMPEACHMENT RULE

The origins of the no-impeachment rule are typically attributed to the British case, *Vaise v. Delaval*, decided in 1785.[20] Prior to that case, jurors in England were regularly permitted to testify to improper jury conduct during deliberations after a verdict was rendered in order to impeach the verdict.[21] In *Vaise*, Lord Mansfield broke with this common-law tradition, and prohibited jurors from testifying post-verdict to allegations that the case was decided by a coin-flip.[22] Mansfield did not prohibit the use of other evidence of jury misconduct to impeach the verdict, but found that jurors were not reliable witnesses against themselves, and thus held that post-verdict testimony or affidavits submitted by jurors could not be used to latter challenge the outcome of the case.[23] This rule preventing juror testimony to impeach a verdict became simply known as "Mansfield's Rule."[24]

Various versions of Mansfield's Rule were subsequently embraced by American courts.[25] While some courts imposed the complete ban on post-verdict juror testimony encompassed in the

20 Hull, *supra* note 9, at 406, 411.

21 *Id.*

22 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, 880–81 (Fall 2009)

23 West, *supra* note 7, at 171. Caroline Covington, Note, *Peña-Rodriguez v. Colorado: Elevating a Constitutional Exception Above the Tanner Framework*, 77 MD. L. REV. 547, 552 (2018). However, scholars have noted that the reasoning behind the rule is flawed, as it was based upon "a legal doctrine, quite popular at the time of the case and championed by Lord Mansfield, that a witness should not be able to testify to his own depravity or lack of character." This doctrine has been almost universally rejected in every other arena, barring the limited exception of juror testimony post-verdict. Hull, *supra* note 9, at 410.

24 West, *supra* note 7, at 171.

25 Hull, *supra* note 9, at 415.

British rule, others adopted modified versions of the rule, allowing for juror testimony on some topics but not others.[26] One such modified version, commonly referred to as the Iowa Rule, stems from the 1866 case of *Wright v. Illinois & Mississippi Telegraph Co.*, in which the Supreme Court of Iowa held that after a verdict is rendered, a juror is prohibited from testifying to or submitting an affidavit involving matters that "essentially inhere in the verdict itself."[27] Thus, the Iowa Rule prohibited jurors from testifying about their own subjective thoughts and intents when deliberating.[28] However, the Iowa Rule differed from Mansfield's Rule in that it allowed for jurors to testify about other matters that did not relate to the internal workings of a juror's mind during deliberations.[29] Under this rule, jurors could impeach a verdict with testimony that the case was decided by lot or by a game of chance.[30] The *Wright* court reasoned that such evidence was far more reliable than evidence of the subjective thought process of individual jurors, and that using such evidence to impeach a verdict would not undermine the stability of the jury system.[31]

The United States Supreme Court examined the no-impeachment rule in *McDonald v. Pless*, rejecting the Iowa Rule and other more lenient variations of Mansfield's Rule and opting for the more rigid bar of prohibiting all post-verdict juror testimony regarding deliberations, regardless of the matter on which they were to testify.[32] The Court noted the important policy considerations behind the rule, expressing the particular concern that in an adversarial system of justice, without such a bar on juror testimony, "[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."[33] The one limited exception to the rule the Supreme Court recognized was the same exception expressed in Mansfield's Rule–a juror could testify post-verdict to matters regard-

26 Pittsburgh Nat. Bank v. Mutual Life Ins., 425 A.2d 383, 384–85 (Pa. 1981).
27 20 Iowa 195, 210 (1866).
28 Peña-Rodriguez, 137 S. Ct. at 863.
29 *Id.* (noting that under the Iowa rule, jurors could "testify about objective facts and events occurring during deliberations, in part because other jurors could corroborate that testimony").
30 Wright, 20 Iowa at 211.
31 *Id.*
32 238 U.S. 264 (1915).
33 *Id.* at 267.

ing external influences on the jury during trial or deliberations.[34] The Supreme Court and lower courts have narrowly interpreted this exception to the no-impeachment rule, and have held that testimony regarding any internal abnormalities or misconduct that occurs during deliberations does not fall within the narrow parameters of the exception.[35]

In creating the Federal Rules of Evidence, Congress recognized the importance of the no-impeachment rule, but struggled with which version of the rule to adopt.[36] The Advisory Committee originally recommended adoption of a rule similar to that embodied by the Iowa Rule, however the Justice Department and an influential Senator from Arkansas, Senator McClellan, strongly criticized the recommendation, noting the important policy considerations behind the no-impeachment rule–including the need for the finality of verdict, the privacy of deliberations, and the concern over potential harassment of jurors.[37] The Advisory Committee's ultimate recommendation was much more in-line with Mansfield's strict bar of

34 *Id.* at 268. In the decades following *McDonald*, the Supreme Court addressed such cases of external influence, allowing jurors to testify about reading outside materials discussing a case during deliberations or a bailiff's comments on the defendant to a juror regarding matters not in evidence. Tanner v. United States, 483 U.S. 107, 117 (1987).

35 WRIGHT, *supra* note 6, § 6075.

> The courts have cited the exception for extraneous prejudicial information to permit jurors to testify as to the jury's consideration of extra-record information derived from books, newspapers and other public media, the internet, court documents, other objects not in evidence, experiments or investigations, views of the relevant scene or premises, the bailiff, the judge, the parties or witnesses, other persons not on the jury, or the jurors themselves. The courts have held that the exception for extraneous prejudicial information is inapplicable and have disqualified jurors from testifying as to the effect of security measures taken at trial that were reflected in the record, events that took place in open court even if not reflected in the record, intra-jury influences such as intimidation or harassment of one juror by another, the use by a juror of notes taken by that juror during the trial, and other matters not classifiable as either information or evidence outside the record. Even if the jury has been exposed to extraneous prejudicial information, some courts have held that Rule 606(b) prohibits jurors from testifying as to the effects such information had on the jury's decision."

Id. (internal citation omitted).

36 Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 864 (2017).

37 West, *supra* note 7, at 174-76.

post-verdict juror testimony.[38] Unsurprisingly, the Supreme Court endorsed this revised rule, which reflected the common-law principle the Court had applied for decades.[39]

Despite the Supreme Court's endorsement of the revised rule, the Judiciary Committees of each chamber of Congress backed different versions of the rule.[40] The House of Representatives Committee rejected the revised rule and recommended the adoption of the more lenient rule initially proposed by the Advisory Committee.[41] In so recommending, the House Committee expressed concerns over improper jury conduct that could lead to unjust verdicts.[42] The Senate Judiciary Committee supported the revised rule, and recommended the adoption of the more rigid bar of post-verdict juror testimony.[43] In supporting the more restrictive rule, the Senate Committee emphasized the need for "finality to litigation" and the importance of the confidentiality of juror deliberations.[44]

After considering the two proposed rules and the policies behind them, a conference committee adopted the revised rule, which was codified in Rule 606(b) of the Federal Rules of Evidence.[45] The language of 606(b) has been slightly modified over the years, but the substance has remained essentially the same, providing that:

> (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

38 *Id.*
39 Peña-Rodriguez, 137 S. Ct. at 864.
40 *Id.*
41 *Id.*
42 Lee Goldman, *Post-Verdict Challenges to Racial Comments Made During Juror Deliberations*, 61 Syracuse L. Rev. 1, 6 (2010) ("Believing that 'jurors are the persons who know what really happened,' and should be allowed to testify as to objective jury misconduct, the House Report recommended adoption of the Advisory Committee's original draft.").
43 Peña-Rodriguez, 137 S. Ct. at 864.
44 S. Rep. No. 93–1277 at 13–14, *as reprinted in* 1974 U.S.C.C.A.N. 7051, 7060 ("Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors.").
45 Peña-Rodriguez, 137 S. Ct. at 864.

> 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 ver dict on the verdict form.[46]

After its codification in the Federal Rules of Evidence, rules similar or identical to Rule 606(b) were universally adopted in state rules of evidence.[47]

In the years since its adoption, the Supreme Court has addressed the application of the no-impeachment rule several times. In *Tanner v. United States*, the Court was confronted with a case in which jurors were alleged to have engaged in egregious misconduct during trial and deliberations.[48] *Tanner* involved defendants who were convicted by a jury in a federal district court of conspiracy and mail fraud.[49] After the verdict was rendered two jurors reached out to defense counsel, alleging that jurors were "on one big party" during trial and deliberations, and stating that several jurors consumed copious amounts of alcohol during trial.[50] Other allegations of misconduct included jurors smoking and selling marijuana during the trial, one juror ingesting cocaine during the trial, and multiple jurors falling asleep during testimony.[51] The district court refused to hold an evidentiary hearing on these allegations, citing the prohibition of juror testimony under 606(b), and the Eleventh Circuit af-

46 Fed. R. Evid. 606(b). The one substantive change to the rule that has occurred since its adoption was the addition of the third exception, allowing for jurors to testify as to a clerical error on the verdict form. Wright, *supra* note 6, § 6075.1 (noting that in 2006 Congress added this exception to the existing rule in order for it to conform with existing case law).

47 Peña-Rodriguez, 137 S. Ct. at 865.

48 483 U.S. 107, 108 (1987).

49 *Id.* at 109.

50 *Id.* at 113-15.

51 *Id.* at 115-16.

firmed.[52] The defendants argued both that the misconduct alleged in the case fell within the "extraneous influence" exception to 606(b) and that even if the exception did not apply, the Sixth Amendment required a hearing nonetheless.[53]

Examining first the applicability of 606(b)'s exception for extraneous influences on the jury, the Court noted the narrowness of the exception, citing the limited circumstances in which courts had found an external influence on a jury's deliberations and explaining that such influence not only had to be external to the jury, but actually impact the outcome of the verdict.[54] The Court held that juror inebriation was not such an external matter, but rather an internal one and therefore did not fall within the exception.[55]

The Court also addressed the defendant's argument that the Sixth Amendment right to a competent jury compelled an evidentiary hearing on the allegations of juror misconduct in the case.[56] The Court emphasized the importance of the no-impeachment rule, and went on to describe mechanisms in place that protect a defendant's right to a competent jury.[57] The Court first noted that the voir dire process helped to ensure that individual jurors were fit to serve, and allowed unsuitable jurors to be identified and excluded from service.[58] Second, the Court noted that any juror misconduct could be identified and testified to *prior* to the rendering of a verdict.[59] Third, the Court further emphasized the narrow nature of 606(b)'s bar on

52 *Id.* at 113, 115-16.

53 *Id.* at 116-17.

54 Examples of cases given by the court where an external influence was found included: where a bailiff made comments about the defendant to a juror, where a bribe was offered to juror, and where a newspaper article relating to the case was read by a juror. *Id*. at 117-18.

55 The court likened the inebriated state of the jurors to jurors who are tired and inattentive during trial, and noted that such matters had been consistently held to be internal, rather than external under the rule. As the Court stated, "[h]owever severe their effect and improper their use, drugs or alcohol voluntarily ingested by a juror seems no more an 'outside influence' than a virus, poorly prepared food, or a lack of sleep," all of which are considered unreviewable internal matters under 606(b). *Id.* at 120.

56 *Id.* at 126-27.

57 *Id.* at 127.

58 *Id.*

59 *Id.* Indeed, the Court referred to its prior decision in *McIlwain v. United States*, 464 U.S. 972 (1983), where jurors sent a note to the judge during deliberations indicating that the jury foreperson was "incapacitated." Such a notification on the part of the jurors would not implicate 606(b) because it was presented prior to the rendering of the verdict.

juror testimony by noting that it only bars testimony of jurors themselves, and evidence of misconduct could be provided by numerous other sources aside from the jurors' own testimony.[60] Thus, the Court held these three mechanisms provided adequate protection to a defendant's right to a competent jury under the Sixth Amendment.[61]

In its decision, the Court observed, "[t]here is little doubt that post verdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper jury behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it."[62] In addressing the delicate balance between the policies behind the no-impeachment rule and Sixth Amendment rights, the Court determined that the very functioning of the jury system required the no-impeachment rule to prevail.[63] In so holding, the Court again emphasized that a functioning jury system requires finality of verdict, privacy of deliberations, and disincentives to harass jurors post-verdict.[64]

State and federal courts applying 606(b) since *Tanner* have repeatedly relied upon the protections described by the Court as preserving parties' Sixth Amendment rights despite concerns over juror misconduct or bias influencing deliberations.[65] Yet, over time, some state courts recognized that these protections do not always adequately protect a defendant's right to a fair trial when jurors engage in misconduct during trial and deliberations.[66] Thus, several states

60 The Court noted that in *United States v. Taliaferro*, 558 F.2d 724, 725–26 (4th Cir. 1977), the Fourth Circuit was able to consider "records of club where jurors dined, and testimony of marshal who accompanied jurors, to determine whether jurors were intoxicated during deliberations." Tanner, 483 U.S. at 127.

61 *Id.*

62 *Id.* at 120.

63 *Id.* at 120-21 (noting that "[a]llegations 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").

64 *Id.* at 119.

65 *See*, e.g. Warger v. Shauers, 574 U.S. 40 (2014); United States v. Leung, 796 F.3d 1032, 1036 (9th Cir. 2015); United States v. Johnson, 187 F.3d 632 (4th Cir. 1999); Golden Eagle Archery v. Jackson, 24 S.W.3d 362, 370-71 (Tex. 2000).

66 *See, e.g.,* Rhode Island v. Brown, 62 A.3d 1099 (R.I. 2013); Connecticut v. Santiago, 715 A.2d 1, 14–22 (1998); Kittle v. United States, 65 A.3d 1144, 1154–56 (D.C. 2013); Fisher v. State, 690 A.2d 917, 919–21, and n.4 (Del. 1996) (appendix to opinion); Powell v. Allstate Ins. Co., 652 So. 2d 354, 357–58 (Fla. 1995); Spencer v. State, 398 S.E.2d 179, 184–85 (Ga. 1990); State

began carving out exceptions to their no-impeachment rule for specific instances of juror misconduct.[67]

One of the more concerning allegations of juror misconduct involves jurors who base their verdict on racial bias. In these cases involving minority defendants, jurors alleged that others on the jury made explicit statements indicating their verdict was based on racial animus against or stereotypes of the accused. Courts struggled with how to address such allegations, recognizing the conflict between the no-impeachment rule and both the Sixth and Fourteenth Amendments, specifically in light of the corrosive and widespread impact racism has on the American judicial system.[68]

The split in jurisdictions on how to address allegations of racial bias on the part of individual jurors ultimately led the Supreme Court to address the issue in *Peña-Rodriguez*.

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v. Jackson, 912 P.2d 71, 80–81 (Haw. 1996); Commonwealth v. Laguer, 571 N.E.2d 371, 376 (Mass. 1991); State v. Callender, 297 N.W.2d 744, 746 (Minn. 1980); Fleshner v. Pepose Vision Institute, P.C., 304 S.W.3d 81, 87–90 (Mo. 2010); State v. Levitt, 176 A.2d 465, 467–68 (N.J. 1961); People v. Rukaj, 506 N.Y.S.2d 677, 679–80 (N.Y. App. Div. 1986); State v. Hidanovic, 747 N.W.2d 463, 472–474 (N.D. 2008); State v. Brown, 62 A.3d 1099, 1110 (R.I. 2013); State v. Hunter, 463 S.E.2d 314, 316 (S.C. 1995); After Hour Welding, Inc. v. Laneil Mgmt. Co., 324 N.W.2d 686, 690 (Wis. 1982).

67 Ariz. Rules Crim. Proc. 24.1(c)(3), (d) (exception for evidence of misconduct, including verdict by game of chance or intoxication); Idaho Rule Evid. 606(b) (game of chance); Ind. Rule Evid. 606(b)(2)(A) (drug or alcohol use); Minn. Rule Evid. 606(b) (threats of violence or violent acts); Mont. Rule Evid. 606(b) (game of chance); N.D. Rule Evid. 606(b)(2)(C) (same); Tenn. Rule Evid. 606(b) (quotient verdict or game of chance); Tex. Rule Evid. 606(b)(2)(B) (rebutting claim juror was unqualified); Vt. Rule Evid. 606(b) (juror communication with nonjuror); *See also* 27 Charles A. Wright et al., Federal Practice and Procedure: Evidence § 6071, at 447–48, 677 n. 66 (2d ed. 2007*); Id*. at 451, and n. 70; *Id.* at 452, and n. 72.

68 *See* United States v. Villar, 586 F.3d 76, 87 (1st Cir. 2009) (holding that the Sixth Amendment gave the trial judge discretion to hold evidentiary hearing to investigate allegations of juror's ethnic bias); United States v. Benally, 546 F.3d 1230, 1239 (10th Cir. 2008) (holding that the defendant's Sixth Amendment rights were not violated by application of the no-impeachment rule to allegations that jurors expressed racial bias toward the defendant during deliberations); Shillcutt v. Gagnon, 827 F.2d 1155, 1159 (7th Cir. 1987) (holding that juror post-verdict testimony was barred by 606(b), but noting that "[t]he rule of juror incompetency cannot be applied in such an unfair manner as to deny due process. Thus, further review may be necessary in the occasional case in order to discover the extremely rare abuse that could exist even after the court has applied the rule and determined the evidence incompetent.").

II. THE *PEÑA-RODRIGUEZ* DECISION

Peña-Rodriguez involved a Hispanic defendant accused of harassment and unlawful sexual contact for the alleged sexual assault of two teenage girls in a public bathroom.[69] After a three-day trial, the jury found the defendant guilty.[70] Immediately after the discharge of the jury, two jurors spoke privately with the defendant's attorney, expressing concern that during deliberations a third juror had articulated a bias against the Hispanic heritage of the defendant and his alibi witness.[71] Defense counsel reported the allegations to the trial court, and the court allowed the attorney to obtain affidavits from the two jurors describing the conduct and statements of the third juror during deliberations.[72]

The affidavits provided multiple examples of explicit bias against Hispanics on the part of the third juror, identified as Juror H.C. The affidavits described H.C. telling other jurors of his belief that "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."[73] Further, the jurors stated that H.C. expressed an opinion that "Mexican men are physically controlling of women because of their sense of entitlement."[74] The jurors also described H.C. as having stated, "'I think he did it because he's Mexican and Mexican men take whatever they want.'"[75] The affidavits further provided that H.C., citing to his own experience, believed that "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls."[76] In addition to the biases H.C. expressed toward the defendant, he also called into question the credibility of the defendant's alibi witness based upon his bias against Hispanics.[77] The jurors described H.C. as saying "that he did not find petitioner's alibi witness credible because, among other things, the witness was 'an illegal.'"[78] This statement was contrary to the evidence produced at

69 Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 861 (2017).
70 *Id.*
71 *Id.*
72 *Id.*
73 *Id.* at 862.
74 *Id.*
75 *Id.*
76 *Id.*
77 *Id.* at 861.
78 *Id.* at 862.

trial that the alibi witness was a legal resident of the United States.[79]

The trial court reviewed the juror affidavits and recognized H.C.'s bias, but denied the defendant's motion for a new trial based upon Rule 606(b) of the Colorado Rules of Evidence, a rule virtually identical to the federal no-impeachment rule.[80] In closely divided decisions, the state appellate court and state supreme court both affirmed the ruling of the trial court.[81] In so holding, the Colorado Supreme Court specifically relied on United States Supreme Court precedent that provided no exception to the no-impeachment rule for juror bias.[82]

Justice Kennedy, in announcing the opinion of the Supreme Court, noted the imperfect nature of the jury system, but emphasized that the function of the jury is to operate as "a necessary check on governmental power."[83] In order for the system to work, the Court explained that the finality of verdicts must be protected and jurors must be assured that they will not later be questioned about their decision.[84] The Court described the long history of the no-impeachment rule in England and the United States, ultimately noting that Rule 606(b) of the Federal Rules of Evidence expressed a broad-

79 *Id.*

80 The Colorado rule provides:

> 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.

Colo. R. Evid. 606(b).

81 Peña-Rodriguez, 137 S. Ct. at 862.

82 Peña-Rodriguez v. People, 350 P.3d 287, 291–92 (Colo. 2015), *rev'd*, 137 S. Ct. 855 (2017) (noting that "[c]ombined, *Tanner* and *Warger* stand for a simple but crucial principle: Protecting the secrecy of jury deliberations is of paramount importance in our justice system").

83 Peña-Rodriguez, 137 S. Ct. at 860. ("The jury is a tangible implementation of the principle that the law comes from the people.")

84 *Id.* at 861.

ly applicable rule, with limited exceptions.[85] The Court acknowledged the merits of this broad interpretation of the no-impeachment rule, explaining that "[i]t promotes full and vigorous discussion by providing jurors with considerable assurance that after being discharged they will not be summoned to recount their deliberations, and they will not otherwise be harassed or annoyed by litigants seeking to challenge the verdict. The rule gives stability and finality to verdicts."[86]

After acknowledging the importance and long history of the current broad interpretation of the no-impeachment rule, the Court recognized that a handful of state courts had recognized exceptions to the rule above and beyond what the federal rule allowed for.[87] The Court allowed that while every jurisdiction in the United States employed some version of the no-impeachment rule, and that the vast majority of jurisdictions followed a rule substantially similar to the federal rule, at the time of the decision at least 16 jurisdictions had adopted an exception to the bar on post-verdict juror testimony when racial bias played a role in deliberations.[88] Further, the Court noted that several federal courts of appeals had examined the issue and held or suggested that such an exception should exist.[89]

In addressing the criticism of the no-impeachment rule, the Court recognized the conflict between the important policy reasons behind the no-impeachment rule and the right to an impartial jury.[90] While acknowledging that its prior precedent had rejected broadening the exceptions to the bar on juror testimony, the Court also pointed out that its previous case law had left the door open to allow for evidence of "juror bias so extreme that, almost by definition, the jury trial right has been abridged."[91]

Addressing what type of bias might fall within this category, the Court focused on the fundamental threat that racism poses to the American judicial system, and in particular the guarantee of a fair and impartial jury under the Sixth Amendment viewed through

85 *Id.* at 863–65.
86 *Id.* at 865.
87 *Id.*
88 *Id.*
89 *Id.*
90 *Id.* at 868–69 (The Court described the case as lying "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.").
91 *Id.* at 866 (quoting Warger, 135 S. Ct. at 529, n. 3).

the lens of the Fourteenth Amendment.[92] The majority discussed the history of all-white juries punishing African-American defendants much more severely than their white counterparts and failing to punish white defendants for crimes against minorities.[93] The racism rampant in the American judicial system after the Civil War threatened to undermine the entire system of justice.[94] Thus, the legislature and the Supreme Court acted to prohibit the exclusion of jurors on the basis of their race.[95] Further, the Court has held that in certain situations, the Constitution requires that defendants have the ability to ask questions of prospective jurors about racial bias during voir dire in order to ensure an impartial jury and equal protection under the laws.[96] Thus, the United States has a history of attempting to address racial prejudice within the jury system through legal mechanisms. As the Court in *Peña-Rodriguez* noted, "[t]he unmistakable principle underlying these precedents is that discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.'"[97]

Given the history of racism in the United States, the Court recognized that among the different forms of juror misconduct or bias in deliberations, racial bias may be the most prevalent and pernicious.[98] As the Court explained, because of the unique "historical, constitutional, and institutional concerns" raised by racial bias in our jury system "[a]n effort to address the most grave and serious statements of racial bias . . . [is necessary] to ensure that our legal system[] remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy."[99] Further, the Court recognized that the protections described in *Tanner* would not necessarily be effective in rooting out the influence of racism in deliberations.[100] Racial bias on the part of a prospective juror is notoriously difficult to ascertain in voir dire, and the Court noted that jurors may be disinclined to call out the racism of their fellow jurors during deliberation.[101] Thus, because

92 *Id.* at 868-69.
93 *Id.* at 867.
94 *Id.*
95 *Id.*
96 *Id.* at 868.
97 *Id.* (quoting Rose v. Mitchell, 443 U.S. 545, 555 (1979)).
98 *Id.*
99 *Id.*
100 *Id.* at 868–69.
101 *Id.* at 869.

of the unique and pervasive effects of racial bias on the jury system, the Court recognized a need for a change in the application of the no-impeachment rule when racial bias is alleged to have influenced a jury verdict.[102]

Balancing the interests of a jury's ability to deliberate freely without fear of future harassment and the need for finality of verdicts against the interests of jury verdicts free from the influence of racial animus or stereotypes, the Court decided to carve out a narrow exception to the no-impeachment rule. The majority in *Peña-Rodriguez* held 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."[103] The Court emphasized that it is not enough for a defendant to demonstrate a juror made an "offhand comment" indicating racial bias, the burden is on the defendant to show that the juror (1) made an explicit statement; (2) exhibiting overt racial bias; and (3) that bias "was a significant motivating factor in the juror's vote to convict" thereby casting serious doubt on the fairness of the proceedings.[104] The Court further limited the application of this exception by leaving the process and standards by which a trial court would confront such allegations to the discretion of the judge, only to be overturned by an abuse of that discretion.[105] Finally, the Court addressed the concern of post-verdict juror harassment by noting that the ability of an attorney to discuss a case with jurors after the verdict would continue to be limited by state rules of professional ethics and local court rules.[106]

Justices Thomas, Alito, and Chief Justice Roberts dissented from the opinion, arguing that the *Tanner* safeguards present in every jury trial provided adequate protection of a defendant's rights to a fair and impartial jury.[107] In particular, the dissent noted that jurors can, and do, report on biased statements of other jurors prior to a verdict being rendered, a circumstance that does not conflict

102 *Id.* at 869.
103 *Id.* (emphasis added).
104 *Id.*
105 *Id.*
106 *Id.*
107 *Id.* at 878.

with the no-impeachment rule.[108] The dissent further stressed the importance of the confidentiality of jury deliberations and compared the rules barring post-verdict juror testimony with other rules of evidence that prevent relevant evidence from being admissible at trial.[109] The dissent concluded that "[u]ltimately, even though the no-impeachment rule 'may often exclude the only possible evidence of misconduct,' relaxing the rule 'would open the door to the most pernicious arts and tampering with jurors.'"[110]

The decision in *Peña-Rodriguez* was groundbreaking in that it carved out a significant exception to a rule to the longstanding federal no-impeachment rule, but the cases that have addressed the decision have demonstrated its limited application given the narrowness of the holding. Thus, the exception, designed to ensure constitutional compliance in the face of an evidentiary rule, has had very little real-world impact.

III. The Aftermath of *Peña-Rodriguez*

A. *Cases Applying the* Peña-Rodriguez *Exception*

In the two years since the *Peña-Rodriguez* decision, many defendants have cited the case in arguing their convictions were the result of racial bias on the part of the jury necessitating an evidentiary hearing and ultimately a new trial.[111] This is exactly the consequence that the dissent in *Peña-Rodriguez* feared–a groundswell of defendants protesting jury verdicts and a resultant surge in new trials for criminal defendants.[112] Yet, despite a number of cases clearly

108 The dissent noted that "[t]here is no question that jurors do report biased comments made by fellow jurors prior to the beginning of deliberations" and cited to a handful of cases in which this has occurred. *Id.* at 882 (citing United States v. McClinton, 135 F.3d 1178, 1184–85 (7th Cir. 1998)); United States v. Heller, 785 F.2d 1524, 1525–29 (11th Cir. 1986); Tavares v. Holbrook, 779 F.2d 1, 1–3 (1st Cir. 1985) (Breyer, J.).

109 *Id.* at 875 (noting that a defendant cannot compel an attorney, spouse, or member of the clergy to testify about a witness' confidential admissions that he lied on the stand, even when "the constitutional rights of the defendant hang in the balance").

110 *Id.* at 876 (quoting McDonald v. Pless, 238 U.S. 264, 268 (1915)).

111 David A. Barrett, et al., Opening the Door to Jury Room Secrets After Peña-Rodriguez, Litigation, Summer 2019, at 31, 36. ("Although there has been a surge in cases grappling with asserted bias in jury deliberations–in part because the rule applies to every state and federal jury verdict–many cases unsuccessfully sought to expand the decision beyond the strict holding.").

112 *Id. See also* Peña-Rodriguez, 137 S. Ct. at 884. The dissent expressed concern

demonstrating juror bias or misconduct during deliberations, the vast majority of courts that have addressed these cases have held the *Peña-Rodriguez* exception inapplicable to the facts presented. Courts have interpreted the narrowness of the *Peña-Rodriguez* exception literally, and have rejected its application for numerous reasons, among them, that the exception: is not retroactively applicable; is limited by local rules and state rules of professional conduct; only applies when bias is a motivating influence in the verdict and is directed at the defendant; only applies to an express statement of bias; and finally, does not extend beyond racial bias. Because of all of these limitations, courts have rarely found an instance in which the *Peña-Rodriguez* exception is, in fact, applicable and requires an evidentiary hearing let alone a new trial.

The first obstacle defendants have encountered in arguing the applicability of the *Peña-Rodriguez* exception is the refusal of courts to apply the exception retroactively. Thus, defendants arguing that the exception applies to evidence of racial bias motivating jurors in verdicts rendered prior to March 6, 2017 have had little luck in having their arguments succeed. Some courts have simply held that the defendant failed to prove the retroactive application of the exception, without expressly holding the rule does not apply retroactively.[113] Another court has explicitly held that the exception has no retroactive application, reasoning that the exception expresses a procedural rule but not the type of watershed rule that would require ex post facto application.[114] Thus, only defendants whose allegations of juror bias are based on verdicts rendered in the last two years have had a chance at succeeding in an argument that the exception applies.

Even those cases with timely allegations of jury bias have

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that the Court's holding would "prompt losing parties and their friends, supporters, and attorneys to contact and seek to question jurors, and this pestering may erode citizens' willingness to serve on juries. Many jurisdictions now have rules that prohibit or restrict post-verdict contact with jurors, but whether those rules will survive [the Court's] decision is an open question – as is the effect of this decision on privilege rules[.]"

113 *See* In re Robinson, 917 F.3d 856 (5th Cir. 2019) (holding that the defendant did not meet the burden of the *Peña-Rodriguez* exception and that there was no evidence that it applied retroactively); Commonwealth v. Smart, No. 1469 MDA 2017, 2018 WL 1280835 (Penn. Super. Ct. Mar. 13, 2018) (holding that the defendant could not prove the exception applies retroactively).

114 *See generally* McKnight v. Bobby, No. 2:09-CV-059, 2018 WL 2327668 (S.D. Ohio May 22, 2018).

been limited by the application of state rules of professionalism and local court rules governing the conduct of attorneys. In cases where defense counsel, upon learning of allegations of juror bias or suspecting as much, reached out to former jurors in violation of local rules, courts have held that such attorney misconduct bars the attorneys from raising the *Peña-Rodriguez* exception.[115] Courts have noted that the attorneys in *Peña-Rodriguez* did not violate any professional rules of conduct and sought the permission of the court to obtain the affidavits of jurors.[116] In contrast, in a case in which the attorneys were barred by local rules from contacting jurors and were admonished by the court not to do the same, the Sixth Circuit affirmed the trial judge's denial of a motion for an evidentiary hearing despite the fact that the attorneys learned of express statements of racial bias made by the jury foreperson.[117] Similarly, the Fourth Circuit found the trial court did not abuse its discretion in refusing to hold an evidentiary hearing after being presented with evidence that a juror approached the defendant's attorney after the verdict was rendered and indicated a white juror made express statements about race to the two African-American members of the jury during deliberations.[118] In its holding, the circuit court noted that local rules prohibited attorneys from interviewing jurors without leave of court.[119] Thus, courts applying the *Peña-Rodriguez* exception have interpreted the Supreme Court's dicta in the case narrowly, noting that local and state rules of professionalism designed to prevent juror harassment could prevent the application of the exception, regardless of whether there is evidence of racial bias influencing the verdict.

Another significant hurdle that defendants arguing the *Peña-Rodriguez* exception must overcome is to demonstrate that the alleged juror bias influenced the verdict in the case. As the Supreme Court stated in its opinion, it is not enough that a juror makes an "offhand comment" that reflects racial bias or stereotyping.[120] The defendant has the burden of showing that the statement actually influenced the verdict in the case.[121] Such a burden is difficult to meet, and courts have demonstrated a reluctance to give defendants the

115 United States v. Robinson, 872 F.3d 760 (6th Cir. 2017).
116 *Id.* at 770.
117 *Id.*
118 United States v. Birchette, 908 F.3d 50, 58 (4th Cir. 2018).
119 *Id.*
120 Peña-Rodriguez, 137 S. Ct. at 869.
121 *Id.*

benefit of the doubt.[122] Where a jury foreperson made statements to African-American female jurors suggesting that they were holding out on convicting African-American defendants because they were protecting them based on their race, the Sixth Circuit held that the defendant failed to meet his burden in establishing the statements motivated the verdict.[123] The circuit court explained that the juror in question "never suggested that she voted to convict [the defendants] because they were African-American. While she did impugn [the African-American jurors'] integrity based on their shared race with the defendants, she never said anything stereotyping about the defendants based on their race."[124] These comments demonstrate a major challenge to establishing racial bias as an influence on the verdict: where a juror's comments relate to the race of another juror, courts are reluctant to find that the statements influenced the verdict.[125] Unless the juror expresses a racial bias specifically against the defendant himself, a court may find that the defendant failed to demonstrate that the bias motivated the verdict.[126] In a case involving an African-American defendant out of the Western District of Pennsylvania, a juror submitted an affidavit alleging that three other jurors called him a racial epithet during deliberations.[127] The court held the *Peña-Rodriguez* exception did not apply because the statements were not directed at the defendant, and therefore the defendant did not meet his burden in demonstrating that the jurors making the statement were motivated to convict based on racial animus.[128] This extremely narrow interpretation of the Supreme

122 *See* People v. Hernandez-Delgado, No. H043755, 2018 WL 6503340, at *17–18 (Cal. Ct. App. Dec. 11, 2018) (holding that the El Salvadorian defendant was unable to show prejudice from a comment made by a juror that "so many murderers come from El Salvador" because the juror who made the statement was immediately reprimanded by other jurors and was followed by a lengthy discussion focused on the evidence).

123 *See, e.g.,* Robinson, 872 F.3d at 770–71.

124 *Id.* at 171.

125 *See, e.g., id.*

126 *See* Richardson v. Kornegay, No. 5:16-HC-2115-FL, 2017 WL 1133289, at *10 (E.D.N.C. Mar. 24, 2017) (holding that while juror statements made during deliberations did relate to race, they did not "warrant an evidentiary hearing because they [did] not pertain to any racial bias against the petitioner" but rather related to the race of another juror who was the same race as the defendant).

127 Williams v. Price, No. 2:98CV1320, 2017 WL 6729978, at *9 (W.D.P.A. Dec. 29, 2017).

128 *Id.*

Court's holding in *Peña-Rodriguez* has made it exceptionally difficult for defendants to demonstrate the applicability of the exception. Further, by limiting the exception in this way, courts fail to address the reality that even if a juror does not express a direct bias against the race of the defendant, such statements of racial bias and stereotyping may demonstrate implicit biases that could very well affect the verdict in the case.

Further limiting the application of the *Peña-Rodriguez* exception is the fact that the exception has been limited to express statements made by jurors, and therefore inapplicable to conduct that may demonstrate a racial bias influencing the verdict. As the Sixth Circuit has explained, "*Peña-Rodriguez* makes clear that it does not apply to a mere 'offhand comment indicating racial bias or hostility,' but only to a 'clear statement'" that demonstrates racial bias motivating the decision to convict.[129] Thus, courts have limited the *Peña-Rodriguez* exception to express/overt statements exhibiting an overt racial bias, not to statements or conduct that could imply such a bias.[130]

Further, even if the defendant can meet all of the above criteria and satisfy the limitations placed on the *Peña-Rodriguez* exception, if the bias alleged is not based on race, courts have refused to apply the exception. Courts have reasoned that the Supreme Court carved out this narrow exception to address the pervasive and pernicious impact of racism in our judicial system, and have therefore found it inapplicable to other forms of juror bias.[131] Thus, where a defendant provided evidence that the jury was biased against him as a police officer, the Southern District of Florida rejected his claim that *Peña-Rodriguez* applied, noting that "[t]o find otherwise would open the jury system to constant scrutiny."[132]

129 Robinson, 872 F.3d at 770.

130 United States v. Baker, 899 F.3d. 123, 131, 133 (2d Cir. 2018) (holding that a statement by a juror that "he knew the defendant was guilty the first time he saw him" could indicate a racial stereotype because of the race of the defendant, but that such an inference is not enough to establish the "clear statement. . . exhibiting racial bias" necessary for the exception to apply).

131 *See* Zamora-Smith v. Davies, No. CV 14-6032-GW (AGR), 2017 WL 3671859 (C.D. Cal. Aug. 23, 2017) (finding evidence that the jury foreperson pressured and rushed other jurors to decide the case, leading one juror to express he hoped the case would be reversed, did not fall within the *Peña-Rodriguez* exception).

132 United States v. Antico, No. 9:17-CR-80102, 2018 WL 659415, at *3 (S.D. Fla. Feb. 1, 2018).

Likewise, where defendants have alleged that jurors unconstitutionally considered certain facts in rendering their verdict, courts have refused to allow for testimony to that effect under the *Peña-Rodriguez* exception. Specifically, where defendants presented evidence that jurors expressed a bias against the defendant for his decision not to testify, courts rejected the claim that such evidence is admissible at an evidentiary hearing to impeach the verdict.[133] Similarly, the Fifth Circuit refused to extend the *Peña-Rodriguez* exception to an allegation that the jurors improperly believed they had to agree upon evidence before they could consider it in mitigation. In so holding, the Circuit Court noted the limited nature of *Peña-Rodriguez*, explaining:

> Prohibition of racial discrimination lies at the core of the Fourteenth Amendment. And in the erratic but relentless march toward a color-blind justice, its role in criminal proceedings has been salient. We decline the invitation to extend further the reach of *Pena-Rodriguez*, one antithetical to the privacy of jury deliberations—a principle whose loss would be attended by such high costs as to explain its veneration.[134]

Thus, even in cases where numerous allegations of juror misconduct were alleged[135] or where the consequences of the verdict resulted in a capital sentence,[136] the courts have rejected the argument that the

133 Deleon v. Director, No. 4:15CV726, 2018 WL 6332844 (E.D. Tex. Oct. 24, 2018); People v. Burke, 452 P.3d 124 (Col. Ct. App. 2018).

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

135 United States v. Ewing, 749 F. App'x 317, 321 (6th Cir. 2018). In this case, the allegations of juror misconduct included:

> (1) the presence of the victim's family members in the courtroom influenced the foreperson's decision; (2) another juror stated that he had been married to an addict for 12 years but failed to disclose this fact during voir dire; (3) a juror repeatedly stated that the lack of defense witnesses and the inadequate defense lawyering meant that the defendant must be guilty; (4) a juror stated that the Government's burden of proof was a preponderance of the evidence, and other jurors agreed; and (5) a juror stated that the fact that the Government prosecuted the case in federal court meant that the defendant was guilty."

Id. The court noted that all of the allegations fell within the 606(b) bar on juror testimony.

136 Austin v. Davis, 876 F.3d 757 (5th Cir. 2017). After sentencing the defendant

Peña-Rodriguez exception should apply when no allegations of explicit statements of racial bias against the defendant have been alleged.

Consequently, the narrowness of the *Peña-Rodriguez* exception excludes post-verdict juror testimony regarding allegations of juror bias influencing the outcome on the basis of gender, sexual orientation, or religion. Under this limited interpretation, anything that fails to explicitly allege juror bias based on race will not allow for juror testimony to impeach the verdict, even if the bias alleged clearly evidences a constitutional violation.

Yet despite the narrow interpretation of the *Peña-Rodriguez* exception, there have been rare instances where courts have found it applicable. In those cases, when courts have applied the exception and allowed jurors to testify or submit affidavits providing evidence of racial bias influencing the verdict in a case, the courts have found the verdict unconstitutional and ordered a new trial.

One such rare instance is reflected in *United States v. Smith*, a case in which an African-American defendant was charged with being a felon in possession of a firearm and illegally possessing a short-barreled shotgun.[137] The jury convicted him on both counts. Five years later, the jury foreperson, "D.B.," contacted the judge and asserted that another juror, "W.B.," stated during deliberations that the defendant was "just a banger from the hood, so he's got to be guilty."[138] A third juror, "A.J." submitted an affidavit alleging that "a middle-aged white male juror" made comments about the race of the defendant during deliberations.[139] The trial court found that the *Peña-Rodriguez* exception required an evidentiary hearing under these circumstances, and allowed both D.B. and A.J. to testify.[140] In his testimony, D.B. indicated that he believed his vote to convict the defendant was influenced by W.B.'s comments about the credibility

to death, a juror stated that he felt that any person convicted of capital murder should be executed, contradicting statements he made during voir dire. He further stated that as soon as he heard the defendant committed capital murder, he decided he should be executed regardless of the evidence presented at sentencing. The court held that the allegations were not subject to the *Peña-Rodriguez* exception because they did not demonstrate an explicit racial bias against the defendant.

137 United States v. Smith, No. CR 12-183 (SRN), 2018 WL 1924454 (D. Minn. Apr. 24, 2018).

138 *Id.* at *4.

139 *Id.* at *5.

140 *Id.* at *1.

of the defendant based upon his race.[141]

The court in *Smith* found that the defendant had demonstrated explicit statements made by a juror during deliberations evidencing racial bias against the defendant, and that those statements impacted the decision to convict.[142] Thus, the court held that the defendant's constitutional rights were violated and ordered a new trial.[143] This decision was made despite the fact that the deliberations took place well before the Supreme Court's decision in *Peña-Rodriguez*, and the statements did not demonstrate the type of explicit bias directed at the defendant that other courts have required. Further, the court applied the *Peña-Rodriguez* exception despite the fact that the juror who allegedly made the racist statements was not the same juror who claimed that racial bias influenced his decision to convict–a circumstance under which other courts have expressly rejected the application of the exception.[144]

In analyzing the facts presented at the hearing, the court addressed the language used by juror W.B., noting that while it did not explicitly invoke race it reflected a "racially biased stereotype" indicating that the defendant "a black man from a majority-black neighborhood of Minneapolis – was a gang member, should be disbelieved, and was guilty."[145] The court determined that because the evidence showed the verdict was influenced by racial prejudice, the defendant's Sixth Amendment right to a fair trial was violated.[146] Further, the court found that this was a structural defect, not "simply an error in the trial process itself," and that the error was not harmless beyond a reasonable doubt.[147]

Finally, the court rejected the government's argument that the Supreme Court intended the *Peña-Rodriguez* exception to only apply when the juror making the racially-charged statement is the same juror whose vote is alleged to have been influenced by racial prejudice.[148] The district court observed that the Supreme Court urged trial courts to use their discretion and consider "all the circumstances" in coming to a determination regarding whether racial

141 *Id.* at *12.
142 *Id.* at *10.
143 *Id.* at *15.
144 *Id.* at *10.
145 *Id.*
146 *Id.* at *15.
147 *Id.* at *14.
148 *Id.* at *10.

bias influenced the verdict.[149] The district court further reasoned that in *Peña-Rodriguez* itself, the Supreme Court remarked on the fact that "not only did the commenting juror use a dangerous racial stereotype to find the defendant guilty, he encouraged other jurors to do the same," indicating their concern over the influence of such statements on the jury as a whole.[150]

In coming to its decision, the trial court noted that the Supreme Court had not provided procedures by which a trial judge should determine whether racial bias had influenced the verdict in the case.[151] Thus, the court looked to the procedures used in cases involving the other narrow exceptions to the no-impeachment rule, and utilized that process in examining the applicability of the *Peña-Rodriguez* exception.[152] The court held that if a defendant presented evidence that demonstrated a "reasonable possibility of a prejudiced verdict" based upon racial bias, he is entitled to an evidentiary hearing.[153] The court went on to conclude that W.B.'s statement directly tied a racial stereotype to a conclusion of guilt, so therefore was a "significant motivating factor in the juror's vote to convict."[154]

The exhaustive analysis of the facts and law conducted by the district court in *Smith* in order to come to the conclusion that the Constitution required a new trial is necessitated by the narrowness of the *Peña-Rodriguez* exception and the extremely limited circumstances in which a defendant can succeed under the doctrine. In order for a court to determine that the exception applies, it must not only examine whether all of the rigid criteria have been met, but also come up with procedures and standards on how to apply the exception in the case. Thus, it is unsurprising that few courts have found the exception applicable given the narrowness of the holding and the difficulty in application.

B. Problems Posed by the Peña-Rodriguez *Holding*

The narrowness of the interpretation and limited applicability of this no-impeachment exception, evidenced by cases post-*Peña-Rodriguez*, present numerous challenges to ensuring that defendants'

149 *Id.*
150 *Id.* at *11.
151 *Id.* at *9.
152 *Id.*
153 *Id.*
154 *Id.* at *10.

right to an impartial and fair jury trial are not violated.

A significant obstacle to a defendant presenting evidence of unconstitutional bias influencing a jury verdict are rules limiting attorneys' ability to reach out to jurors after a verdict has been rendered.[155] As the courts have held, violation of such rules can lead to rejection of the application of the *Peña-Rodriguez* exception, and yet, often the only way for attorneys to gather any evidence to make a case that racial bias influenced the verdict is by contacting the jurors in the case.[156] Because local and state rules often bar attorneys from contacting jurors after the case to preserve the very real interest of preventing juror harassment, the instances in which the *Peña-Rodriguez* exception applies will almost certainly be relegated to the rare cases in which jurors independently decide after the case to contact the court or counsel.[157] This might prevent juror harassment, but it certainly is not the most effective way to root out racial bias in the deliberation process. As the Supreme Court itself pointed out in the *Peña-Rodriguez* case, jurors are reluctant to call other jurors racist or influenced by racial stereotypes.[158] Without some encouragement or instruction on the part of the court or attorneys, most jurors are unlikely to *sua sponte* reach out to the court after a verdict to report concerning statements made during deliberations.

A second hurdle that the *Peña-Rodriguez* exception presents to defendants seeking to ensure their right to a fair and impartial jury trial is that the exception only applies to racial animus or stereotypes, and not to other forms of bias that might render a verdict unconstitutional. As courts have accurately noted, racial animus has had a long, ugly, profound impact on our judicial system, and in particular on the jury function.[159] Because of this unique and outsized impact on a defendant's ability to receive a fair trial, the Supreme

155 Kathryn E. Miller, *The Attorneys are Bound and the Witnesses are Gagged: State Limits on Post-Conviction Investigation in Criminal Cases*, 106 CALIF. L. REV. 135, 168 (2018) ("While it is true that restrictions on post-conviction interviews with jurors will preserve the finality of verdicts by reducing misconduct claims, a danger remains that states will imprison or execute capital defendants after trials that violate the U.S. Constitution.").

156 *Id.* at 170 ("Restrictions that condition permission to interview on a showing of good cause result in an unfair catch-22: post-conviction counsel may not investigate whether juror misconduct occurred unless they already know juror misconduct occurred.").

157 *See, e.g.*, Robinson, 872 F.3d at 770; Birchette, 908 F.3d at 58.

158 Peña-Rodriguez, 137 S. Ct. at 869.

159 *Id.* at 867.

Court focused its decision in *Peña-Rodriguez* on racial bias alone.[160] Courts applying the exception have followed suit, and rejected all assertions that the exception to the no-impeachment rule should be extended to other forms of bias or stereotyping that impact the verdict.[161] While this application certainly preserves the finality of verdicts, it does not adequately protect the right to a fair and impartial jury trial where prejudice not based on race results in a conviction.

Imagine a case where the defendant, a gay man, is accused of child molestation. During deliberations, several jurors expressly state that they think that gay men are more prone to pedophilia, and therefore believe the defendant is guilty. The jury convicts the defendant, and after the verdict several jurors contact defense counsel indicating that they believe the defendant was convicted based upon his sexual orientation. The defense attorney brings this information to the judge seeking an evidentiary hearing. Under the limited holding of *Peña-Rodriguez*, the judge should deny the hearing because the alleged prejudice was not racial and therefore the jurors cannot provide evidence of the statements made during deliberations. Likewise, if jurors stated during deliberations that they believed all Muslims were prone to violence because of their faith, and therefore believed the Muslim defendant guilty of assault, other jurors would not be able to testify to those statements after the verdict because they demonstrate religious, not racial, prejudice.

Clearly both of these scenarios represent an improper result, and courts would agree that these are not constitutional bases for a jury verdict. Yet in these situations, the no-impeachment rule would trump the defendant's right to a fair and impartial jury trial and the trial judge would not be empowered to hold an evidentiary hearing allowing for post-verdict juror testimony.

A third challenge that the limited holding of *Peña-Rodriguez* presents is the difficulty in proving racial animus as a motivating factor in a juror's decision. In reality, this criteria provides three hurdles for a defendant to overcome. First, the defendant must somehow provide evidence that the racial statements made by a juror actually influenced the outcome in the case.[162] This burden is exceedingly difficult to meet, given that a juror may be affected by

160 *Id.* at 869.

161 *See supra*, Part III(a).

162 Peña-Rodriguez, 137 S. Ct. at 869 (holding that "[t]o qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict.").

any number of influences in coming to a decision–including the evidence in the case, the reasoning of other jurors, the desire to have the case be over, a dislike of the defense counsel, or some sort of bias–racial or otherwise–against the defendant.[163] Among all of the factors playing into a juror's decision to convict, it is hard to conceive of many situations in which a defendant could, through the evidence, establish that a motivating factor behind that decision was, in fact, racial animus and not simply another basis unless there was an explicit admission on the part of the juror that their vote was racially motivated.[164]

Second, most courts have limited the application of the *Peña-Rodriguez* exception to cases in which the juror who made the racist statement is also the juror whose decision to convict was based on the racial prejudice demonstrated in the statement. Thus, in cases where one juror made a racist statement that influenced another juror to convict the defendant, courts have held the exception inapplicable.[165] Unless the defendant can establish that the statement reflects the speaker's decision to convict based on racially-motivated reasons, the statement will be considered the type of "off-hand comment" that fails to fall within the exception.

Third, in order to show that the racially biased statement demonstrates a significant motivating influence on the outcome of the case, most courts have held that the defendant must establish that the racially biased statement specifically targeted the defendant.[166] Thus, if the juror made blatantly racist statements about other jurors, who were of the same race as the defendant, courts

163 Katherine Allen, *The Jury: Modern Day Investigation and Consultation*, 34 REV. LITIG. 529, 530 (2015) ("The reality is that twelve people hear the evidence in a courtroom, and return to the jury room to deliberate with different opinions on the correct verdict. People process information differently. All jurors have different sets of experiences, beliefs, and emotions that impact decisions in the jury box. Essentially, while the justice system requires impartial juries, impartial jurors do not exist. There is a gap between the evidence and the verdict that jurors color in with their individual experiences and prejudices.").

164 Even when evidence of overt racial animus exists, courts will look to other factors that might have mitigated the impact of such animus during deliberations. In *People v. Hernandez-Delgado*, a juror's statement that because the defendant was from El Salvador, she felt "he was more guilty" because "so many murderers come from El Salvador" was held not to have prejudiced the jury because of the brevity of the statement and the length of deliberations following the statement. Hernandez-Delgado, 2018 WL 6503340, at *16–18.

165 *See, e.g.*, Williams, 2017 WL 6729978.

166 *See id.*

have held that those statements do not fall within the exception, despite the fact that they clearly demonstrate racial stereotyping or prejudice.[167]

This last limitation on the application of the *Peña-Rodriguez* exception demonstrates perhaps its greatest limitation–its failure to address implicit bias. A juror's explicit statements demonstrating racial stereotyping against another juror may not be targeting the defendant, but certainly may demonstrate a bias against a defendant who is of the same race as the juror. Yet, the *Peña-Rodriguez* decision does nothing to address this situation. The Supreme Court made very clear that it was limiting its holding to those cases evidencing explicit statements of racial bias against the defendant.[168] Thus, regardless of the facts or circumstances demonstrating racial prejudice or bias during deliberations that influenced the verdict, unless the defendant can point to a specific explicit statement that evidences the racist beliefs, he will not succeed in obtaining an evidentiary hearing under *Peña-Rodriguez*, let alone a new trial.

Implicit biases are held by every individual, and are "driven by attitudes and stereotypes that we have about social categories, such as genders and races."[169] These types of unconscious attitudes are an inherent part of the human condition.[170] Social science research suggests that we have developed these biases over time in order to make quick decisions without having to weigh all of the details individually that comprise that decision.[171] Previously formed

167 *Id.*

168 Peña-Rodriguez, 137 S. Ct. at 869.

169 Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1128–29 (2012).

170 Sean D. O'Brien & Kathleen Wayland, *Implicit Bias and Capital Decision-Making: Using Narrative to Counter Prejudicial Psychiatric Labels*, 43 Hofstra L. Rev. 751, 760–61 (2015).

171 Implicit biases are a form of bias pertaining to the mental processes of perception, memory, judgment and reasoning, also known as cognitive bias. Cognitive biases arise because our human decision-making processes are not just factual or objective, but are influenced by a variety of factors including:

- information-processing short cuts – technically referred to as heuristics that could include instances where we might use our intuition, or common sense based on what we think we know (see also, Social categorisation theory on p18)
- motivational and emotional factors, for example from our own personal experiences
- social influences, such as the media and stereotypes.

attitudes or stereotypes allow us to make such instinctive decisions in a quick, almost automatic way.[172] An implicit bias is not necessarily a negative one. An individual could have an implicit bias that people of a social category have positive characteristics.[173] But implicit biases can also have extremely negative connotations.[174] Individuals employ these implicit biases, positive and negative, unconsciously throughout their daily life, and social scientists have been studying the effects of such biases on decision making for decades.[175]

In recent years, the judiciary, legal scholars, and attorneys have all expressed growing concerns over the influence of implicit bias in the courtroom.[176] These range from concerns over the implic-

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EQUALITY CHALLENGE UNIT, UNCONSCIOUS BIAS AND HIGHER EDUCATION (2013), available at https://www.ecu.ac.uk/wp-content/uploads/2014/07/unconscious-bias-and-higher-education.docx (citing Norbert Schwarz, *Emotion, Cognition, and Decision Making*, 14 COGNITION & EMOTION 433 (2000)).

172 Keith B. Maddox & Samuel R. Sommers, Implicit Bias in Daily Perceptions and Legal Judgments, 50 U. MICHIGAN J.L. REFORM 723 (2017).

> In the late 1970s, . . . as part of the 'cognitive revolution,' psychologists began to explore the notion that discrimination and other forms of biased intergroup judgment may result from ordinary, routine and completely normal cognitive mental processes. The results of this research suggest that a basic way in which people try to understand their world—categorization—can, of its own accord, lead to stereotyping and discrimination. These scientists determined that "[l]ife is just too short to have differentiated concepts about everything."

Antony Page, *Batson's Blind–Spot: Unconscious Stereotyping and The Peremptory Challenge*, 85 B.U. L. REV. 155, 181, 185 (2005) (quoting GORDON W. ALLPORT, THE NATURE OF PREJUDICE 20, 173 (1954)).

173 Gregory Mitchell, *An Implicit Bias Primer*, 25 VA. J. SOC. POL'Y & L. 27, 30 (2018). But note that even these "positive" stereotypes can have a damaging impact. "At times, biased thinking can be mistakenly construed as complimentary to a particular group, even though the so-called 'positive' stereotype itself brings with it harm." Melissa L. Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial*, 53 U. RICH. L. REV. 1039, 1045 (2019).

174 *Id.*

175 Anthony Kakoyannis, *Assessing the Viability of Implicit Bias Evidence in Discrimination Cases: An Analysis of the Most Significant Federal Cases*, 69 FLA. L. REV. 1181 (2017).

176 Breger, *supra* note 173, at 1051–56 (describing various studies and efforts made to address implicit bias in the judicial system); JENNIFER K. ELEKK & PAULA HANNAFORD-AGOR, CAN EXPLICIT INSTRUCTIONS REDUCE EXPRESSIONS OF IMPLICIT BIAS? NEW QUESTIONS FOLLOWING A TEST OF A SPECIALIZED JURY INSTRUCTION 1 (2014).

it bias of attorneys in representation to the implicit bias of judges in sentencing. But perhaps nowhere is this implicit bias more influential and concerning than behind the closed doors of the jury room.

At least one study has shown that there is a generally strong implicit bias associating guilt with African-American defendants and innocence with white defendants.[177] As one scholar noted "[w]ith otherwise identical scenarios, the darker the skin of the alleged perpetrator, the more likely jurors in mock situations are to find the alleged perpetrator guilty."[178] Further, implicit bias of a juror against a particular defendant because of his race may expressly contradict explicit statements made by that same juror about his attitudes or stereotypes.[179] Thus, implicit bias is difficult to identify and challenge, because the individual who holds the attitudes or stereotypes is unlikely aware of their existence or their impact on the individual's decision-making.[180]

177 Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 Ohio St. J. Crim. L. 187 (2010). The authors of this article conducted an Implicit Association Test where participants were confronted with images of the faces of African-American or white individuals after being given a narrative describing a crime. Participants were asked to quickly click on a button indicating "Guilty" or "Not Guilty" when they observed the image. The study demonstrated that "participants held implicit associations between Black and Guilty." The study further found that those associations "predicted judgments of the probative value of the evidence." Thus, the participants were more likely to find evidence more probative of guilt when the defendant was African-American than when the defendant was white. The study also found that "implicit attitudes of race and guilt are quite different from attitudes of race revealed by using explicit measures." *Id.* at 207.

178 Chris Chambers Goodman, *Shadowing the Bar: Attorneys' Own Implicit Bias*, 28 Berkeley La Raza L.J. 18, 34 (2018).

179 Levinson, *supra* note 177, at 207 (noting that "implicit attitudes of race and guilt are quite different from attitudes of race revealed by using explicit measures").

180 Washington v. Berhe, 444 P.3d 1172, 1181 (Wash. 2019).

> Implicit racial bias is neither experienced nor expressed in the same way as explicit racial bias. Explicit racial bias is consciously held, although the biased person may not be willing to admit to having such bias if asked. Implicit racial bias, however, primarily exists at an unconscious level, such that the biased person is unlikely to be aware that it even exists. This occurs because 'it is now socially unacceptable to be overtly racist. Yet we all live our lives with sterotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them.' Implicit racial bias can therefore influence our decisions without our being aware of it 'because we suppress it and because

Based upon the social science research demonstrating the deleterious impact of implicit bias on our system of justice, many actors in the legal system have attempted to address these concerns. The ABA has encouraged trainings of all courthouse staff and judges on the topic of implicit bias, and judges have begun to try and remedy the impact of implicit bias in the courtroom, focusing on the attitudes and stereotypes jurors bring with them into trial.[181] As the Chief Justice on the Iowa Supreme Court stated:

> It is as important to address implicit bias in jury deliberations as it is to address racial diversity in jury selection. The more this is done, the more these biases and differences will cease to exist. The more this is done, the more the goal of a fair and impartial trial will be understood. Any verdict, judgement or sentence motivated by any type of bias is unjust. Our system of justice must have confidence that the outcomes of trials were achieved with impartiality and fairness.[182]

Yet, despite the prevailing view that implicit bias can infect jury deliberations and impact verdicts without any expression of explicit animus, jurors who observed such bias during deliberations cannot provide evidence of those observations after a verdict has been rendered to demonstrate an unfair or biased result. The *Peña-Rodriguez* exception does not allow for a verdict to be impeached based upon

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> we create it anew through cognitive processes that have nothing to do with racial animus.

Id. (quoting Washington v. Saintcalle, 309 P.3d 326, 335–36 (Wash. 2013).

181 Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563, 1580 (2013).

> The Implicit Bias Working Group [of the American Bar Association] is building on the work of others in the association, such as the ABA Judicial Division, the Section of Litigation, and the Criminal Justice Section. These three entities make up the ABA's Joint Committee on Fighting Implicit Bias in the Justice System. A book is being drafted by this entity that focuses on fighting implicit bias in the justice system while advancing citizen understanding and support for the justice system.

Paulette Brown, *A Blueprint for Promoting Diversity in the Law*, JUDGES' J., Spring 2016, at 9, 10.

182 Iowa v. Plain, 898 N.W.2d, 801, 829 (Iowa 2017) (Cady, Chief J., concurring).

juror testimony regarding implicit bias during deliberations.[183] This limitation protects the privacy of deliberations and prevents defendants from conducting "fishing expeditions" delving into jury deliberations post-verdict by preventing speculation from providing a basis for opening up an inquiry. It also protects the finality of the verdict by limiting the application of the exception to the narrow instances where evidence demonstrates an explicit racial bias directed at the defendant in the case. However, the failure of the *Peña-Rodriguez* exception to address the impact of implicit bias on jury deliberations exposes a huge flaw in using the exception as a way to ensure protection of a defendant's Sixth Amendment right to a fair trial and impartial jury.

The narrow holding of *Peña-Rodriguez* and the limited application of its exception by lower courts has led to the case having very little impact on subsequent cases. And this result was likely intended by the Supreme Court. The important policy considerations behind the no-impeachment rule would be severely undermined if there were not strict limitations preventing the investigation into jury deliberations after a verdict has been rendered. And yet, as evidenced by cases in which lower courts have held the *Peña-Rodriguez* exception inapplicable, there are many instances of significant juror bias and misconduct that undermine fairness of the proceedings.[184] Under the current interpretation of the rule, those instances of bias and misconduct are unable to be addressed after a verdict has been rendered. Thus, in order to preserve a defendant's right to a fair and impartial trial, other steps must be taken to ensure that the influence of juror bias in rendering a verdict is minimized.

IV. Suggestions for Preserving a Defendant's Right to a Fair Trial in the Wake of *Peña-Rodriguez*

Peña-Rodriguez is not the first case to attempt to balance the Sixth Amendment rights of a defendant with the no-impeachment rule. State courts have been attempting to alleviate the impact of bias on verdicts long before the *Peña-Rodriguez* decision. In Washington State, courts have long held that jurors may testify regarding racial bias influencing deliberations, in order to impeach a verdict.[185]

183 Carrie Leonetti, *Smoking Guns: The Supreme Court's Willingness to Lower Procedural Barriers to Merits Review in Cases Involving Egregious Racial Bias in the Criminal Justice System*, 101 Marq. L. Rev. 205, 228 (2017).

184 *See* discussion *supra* Part III(A) and accompanying notes.

185 State v. Jackson, 879 P.2d 307 (Wash. 1994).

Thus, when a defendant makes a prima facie showing of racial bias in deliberations the trial court is required to hold an evidentiary hearing on a motion for a new trial "as a matter of due process."[186]

In an application of this rule, the Supreme Court of Washington recently vacated a trial judge's denial of the defendant's motion for a new trial based upon evidence of racial bias influencing the verdict. In *Washington v. Berhe*, the Washington high court held that the trial court abused its discretion in failing to conduct an evidentiary hearing and failing to adequately oversee the investigation regarding allegations of juror prejudice in a criminal trial.[187]

The Washington Supreme Court recognized the discretion trial courts have in determining whether to hold an evidentiary hearing after a verdict has been rendered and acknowledged the importance of the no-impeachment rule in promoting the secrecy of jury deliberations.[188] Nonetheless, the court held that in cases where the defendant has alleged juror bias, the right to a fair trial trumps the no-impeachment rule.[189] Thus, a defendant need not show purposeful discrimination in order to succeed.[190] Rather, a defendant need only establish a prima facie showing that, "an objective observer (one who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State) could view race as a factor in the verdict."[191] The court went on to note that if the evidence of racial bias is equivocal, the court must "conduct further inquiries" and not just reject the motion because there are "plausible, race-neutral explanations for the decision."[192]

Thus, Washington State's interpretation of its no-impeachment rule dramatically expands a criminal defendant's ability to

186 Berhe, 444 P.3d at 1179.

> [W]here a juror's statements during deliberations "create a clear inference of racial bias," there is "a valid issue of juror misconduct." In such a case, "as a matter of due process, the trial court should . . . conduct[] an evidentiary hearing before ruling on [a] motion for a new trial" to eliminate any "lingering doubt about" whether the defendant had received a fair trial.

Id. (internal citation omitted).

187 *Id.* at 1184.

188 *Id.* at 1178.

189 *Id.*

190 *Id.* at 1181.

191 *Id.*

192 *Id.* at 1182.

challenge a verdict based on allegations of racial bias influencing deliberations. This expansion strikes the balance between the Sixth Amendment and the no-impeachment rule by weighing more heavily a defendant's right to a fair and impartial trial. While this rule does better to protect a defendant's Sixth Amendment rights when racial discrimination is alleged, it does not reach other forms of bias nor does it address concerns regarding jury harassment post-verdict. The expansive reach of the rule is also unlikely to be adopted by federal courts, who have shown a reluctance to expand upon the exceptions to the no-impeachment rule and would likely view any expansion as opening up the floodgates for post-verdict impeachment proceedings.

Rather than focusing on post-verdict investigations and proceedings to address allegations of bias influencing jury deliberations, a more proactive approach that does not conflict with the no-impeachment rule could minimize the impact of such bias. The role of a judge in the courtroom is to ensure the fairness of the proceedings throughout. Judges do this in various ways–from ensuring the rules of evidence are followed to instructing the jury on the law.

Indeed, courts guide jurors in their decision-making through jury instructions.[193] In a typical federal case, judges instruct the jury on the law and their role after closing arguments and before jurors retire to deliberate. Judges have broad discretion to tailor the instructions so that jurors understand the law in the case and their role in the trial, and typically rely upon pattern instructions developed in their jurisdiction to address specific points of law.[194] As part of the typical instructions given to a jury, a judge will instruct the jury not to let bias or prejudice influence their decision-making. For

193 Elek, *supra* note 176, at 3.

194 "Judges typically rely on these pattern instructions as the heart of their legal guidance to the jury on the substantive law of the case." Kate E. Bloch & Jeffrey Gould, *Legal Indeterminacy in Insanity Cases: Clarifying Wrongfulness and Applying A Triadic Approach to Forensic Evaluations*, 67 HASTINGS L.J. 913, 944 (2016).

> Because the trial judge is in the best position to determine what instructions are necessary, the judge has broad discretion when instructing the jury, as long as the charge properly submits the issues that control the disposition of the case; this discretion extends to the decision of whether to give jury instructions. Decisions as to jury instructions will not be disturbed on appeal absent an abuse of discretion.
>
> 75A AM. JUR. 2D *Trial* § 871.

example, the standard California jury instruction on this point simply tells jurors to avoid letting "bias, sympathy, prejudice, or public opinion influence [their] decision."[195]

As members of the judiciary have become more aware of the dangers of implicit bias, judges have begun exploring how to better instruct juries in order to minimize the impact of bias on their evaluation of the evidence and application of the law to the facts of the case during deliberations. Various courts have begun to expand their instructions on implicit bias, and some courts have explored instructing the jury on the impact of unconscious bias prior to the presentation of evidence as well as after the conclusion of closing arguments.

Judge Mark Bennett, a federal district court judge in the Northern District of Iowa, spends a significant amount of time during jury selection educating jurors on the impact of implicit bias.[196] After jury selection is concluded, Judge Bennett has each juror sign a pledge that, among other things, they "will not decide this case based on biases. This includes gut feelings, prejudices, stereotypes, personal likes or dislikes, sympathies or generalizations."[197] In addition to the discussion that takes place during jury selection, Judge Bennett gives the following instruction to empaneled jurors prior to opening statements:

> Do not decide the case based on "implicit biases." As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, "implicit biases," that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual

195 CAL. PENAL CODE §1127h (West 2007).

196 Kang, *supra* note 169, at 1181-82. Judge Bennett spends approximately 25 minutes during jury selection discussing implicit bias.

197 *Id.* at 1182.

> evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.[198]

In a similar attempt to minimize the impact of bias on jury deliberations, the federal courts in the Western District of Washington play a 10-minute video for jurors before they are selected for jury service that discusses implicit bias and educates prospective jurors on the potential impact that implicit bias can have on decision-making.[199] In addition, the judiciary, scholars, and attorneys in the Western District of Washington formed a committee that developed jury instructions specifically to address implicit bias.[200] The instructions include a preliminary instruction, a witness credibility instruction, and a closing instruction. Each of these instructions define implicit bias and explain to jurors the potential impact this type of unconscious bias can have on any individual's decision-making.[201]

State courts have also begun to implement more extensive discussion of implicit bias through jury instructions. The Supreme Court of Iowa reversed the lower court's determination that it did not have authority to give a jury instruction on implicit bias.[202] In so holding the state high court noted that trial judges have broad discretion to address bias in their courtrooms, but declined to mandate

198 *Id.* at 1182–83.

199 *Unconscious Bias Juror Video,* United States District Court: Western District of Washington, https://www.wawd.uscourts.gov/jury/unconscious-bias.

200 *Criminal Jury Instructions - Unconscious Bias,* U.S. Dist. Ct. W.D. Wash. (last visited Mar. 31, 2020), https://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf.

201 *See id.* The preliminary instruction provides

> It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender identity, or gender of the [plaintiff,] defendant, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial. Accordingly, during this voir dire and jury selection process, I [the lawyers] *may* ask questions [or use demonstrative aids] related to the issues of bias and unconscious bias.

Id. Subsequent instructions explain what implicit bias means and the impact it can have on jury deliberations.

202 Plain, 898 N.W.2d at 829.

a particular method of addressing such bias.[203] Several concurrences in the case argued that an implicit bias instruction should be required in cases where a party requests such an instruction.[204]

In addition to the efforts made by individual courts, the American Bar Association funded an initiative focusing on implicit bias in the jury system. The Achieving an Impartial Jury project developed proposed jury instructions in an attempt to "de-bias" jury deliberations.[205] The instructions are based, in part, on Judge Bennett's instructions and provide:

> Our system of justice depends on judges like me and jurors like you being able and willing to make careful and fair decisions. Scientists studying the way our brains work have shown that, for all of us, our first responses are often like reflexes. Just like our knee reflexes, our mental responses are quick and automatic. Even though these quick responses may not be what we consciously think, they could influence how we judge people or even how we remember or evaluate the evidence.
>
> Scientists have taught us some ways to be more careful in our thinking that I ask you to use as you consider the evidence in this case:
>
> Take the time you need to test what might be reflexive unconscious responses and to reflect carefully and consciously about the evidence.
>
> Focus on individual facts, don't jump to conclusions that may have been influenced by unintended stereotypes or associations.
>
> Try taking another perspective. Ask yourself if your

203 *Id.* at 816.

204 *Id.* at 830 ((Wiggins, J. concurring) (noting that "[i]n the future when a defendant requests an implicit-bias instruction and implicit bias may have an effect on a jury, there is no reason for the court not to instruct the jury on implicit bias").

205 AM. BAR ASS'N, ACHIEVING AN IMPARTIAL JURY (AIJ) TOOLBOX 12, 15 (2015).

> opinion of the parties or witnesses or of the case would be different if the people participating looked different or if they belonged to a different group?
>
> You must each reach your own conclusions about this case individually, but you should do so only after listening to and considering the opinions of the other jurors, who may have different backgrounds and perspectives from yours.
>
> Working together will help achieve a fair result.[206]

These independent efforts to minimize the impact of juror bias on deliberations have been met with some criticism. Very little research has been done on the efficacy of these types of instructions, opening up the possibility that it is premature to use such instructions in jury trials.[207] Indeed, the one study that attempted to ascertain whether the use of implicit bias instructions minimized the effect of bias on verdicts was unable to replicate the baseline bias expected of participants, and therefore was unable to produce a complete test of the impact of such instructions.[208] Further, critics of the use of these instructions argue that instructing jurors on their unconscious biases could actually worsen the effects of those biases rather than alleviate them. Indeed, the Supreme Court has expressed the concern that directly addressing juror bias in voir dire questions "'could well exacerbate whatever prejudice might exist without substantially aiding in exposing it.'"[209]

Yet despite these concerns, social science research supports the premise that identifying biases and drawing awareness to them aids in minimizing their impact on decision-making. As scholars have noted, confronting individuals with the existence and impact of unconscious biases can lead to those individuals relying less on their attitudes and stereotypes to make decisions.[210] Recent studies have shown that this effect occurs both with "egalitarian-minded

206 *Id.*
207 *Id.* at 16.
208 Elekk, *supra* note 176.
209 Peña-Rodriguez, 137 S. Ct. at 869 (quoting Rosales-Lopez v. United States, 451 U.S. 182, 195 (1981) (Rehnquist, C.J., concurring)).
210 Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. Rev. 1555, 1608 (2013)

and highly prejudiced individuals."[211]

The suggestion of incorporating a more thorough discussion of bias into jury instructions is not a new or novel idea. Indeed, even in the *Peña-Rodriguez* case, the Supreme Court mentioned jury instructions as an effective way of combatting the impact of bias on deliberations.[212] However, much more could be done to ensure that judges educate jurors in an effective way that minimizes the impact of bias on the verdict. If protection of the secrecy of jury deliberations and the finality of verdicts is paramount, more effort needs to be made in ensuring that bias does not infect the deliberative process before the final verdict is rendered.

First and foremost, there needs to be a consistent, constant, and uniform effort of the judiciary to incorporate clear, thorough, and effective education on bias into jury instructions. It is not enough that some judges or some jurisdictions incorporate such instructions. In order to root out the impact of bias on deliberations, a uniform effort needs to take place across the federal and state judicial systems. The ABA initiative was a good starting point in commencing this effort, but courts have been slow to incorporate their suggestions. Critics of the use of such instructions have been successful in pointing out potential concerns regarding their use, despite evidence of the impact of bias on jury deliberations and the lack of significant support for harmful effects of educating jurors on the impact of bias.

Of course, any discussion of bias and implicit bias must be carefully worded in order to not attack the audience or put them on the defensive. When a judge instructs the jury on the dangers of implicit bias, such instructions need to clearly demonstrate that the judge is not accusing the jurors of being unfair or harboring unique prejudices.[213] Rather, the wording of such instructions needs

211 *Id.* at 1607-08 ("More recent social science research on race salience, however, suggests that making race salient helps to reduce racial bias in both egalitarian-minded and highly prejudiced individuals. This is probably due to the fact that race norms in today's society are more egalitarian than in days past.")

212 Peña-Rodriguez, 137 S. Ct. at 871 (noting that "[t]rial courts, often at the outset of the case and again in their final jury instructions, explain the jurors' duty to review the evidence and reach a verdict in a fair and impartial way, free from bias of any kind").

213 Kang, *supra* note 169, at 1183 ("Juror research suggests that jurors respond differently to instructions depending on the persuasiveness of each instruction's rationale. . . . Accordingly, the implicit bias instructions to jurors should be couched in accurate, evidence-based, and scientific terms. As with

to explain that all individuals harbor theses biases, including the judge herself. Indeed, poorly worded instructions can have the opposite effect of that intended by causing jurors to react defensively to the suggestion that they would allow bias to influence their deliberations in the case.[214] Because judges already rely on pattern jury instructions to address particular points of law, creating a standard pattern jury instruction to address bias that thoughtfully and thoroughly addresses juror bias should aid judges in addressing this topic during trial.

Equally important to carefully wording any instructions on bias, such instructions should be given early in the trial process, and not reserved until after closing arguments.[215] The earlier a jury is educated on the impact of bias, the more likely that education will help minimize the effects of juror's attitudes and stereotypes on their decision-making. A juror who is instructed on bias before the presentation of evidence in a case is more likely to evaluate the weight of that evidence on its merits, free from the biases the juror may have brought into the courtroom with him.[216] Likewise, instructions on bias early in the case may lessen the impact that stereotypes and attitudes have on juror's memory of the facts in the case during deliberations.

In addition to a uniform effort to create effective jury instructions that can be incorporated into every stage of trial, such instructions should be mandatory in every case which may implicate juror bias. When counsel requests that an implicit bias instruction be giv-

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the judges, the juror's education and instruction should not put them on the defensive, which might make them less receptive. Notice how Judge Bennett's instruction emphasizes the near universality of implicit biases, including in the judge himself, which decreases the likelihood of insult, resentment or backlash from the jurors.").

214 Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. Chi. L. Rev. 835, 872 (2016). Fears that implicit bias instructions can actually worsen the impact of bias in deliberations "receive some support from research finding that, if handled inappropriately, bias-reduction efforts can backfire."

215 Kang, *supra* note 169, at 1181; Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 Harv L. & Pol'y Rev. 149, 169 (2010).

216 Lee, *supra* note 210, at 1607–08 (Noting that "recent social science research on race salience . . . suggests that making race salient helps to reduce racial bias in both egalitarian-minded and highly prejudiced individuals").

en, it should be required that a judge give the instruction. Because of the dangers of bias on jury deliberations, and the limited ability to investigate the impact of such biases after a verdict has been rendered, it should not be left to the discretion of individual judges as to whether to include an instruction on bias when counsel has requested that one be given. Further, should the state and federal judiciary come up with standardized, carefully-worded instructions on implicit bias, it should be relatively commonplace and straightforward for a judge to include those instructions in the case.

Further, such instructions should not be limited to race. As the *Peña-Rodriguez* case highlighted, racial prejudice has historically affected our judicial system in a pervasive and pernicious way, and thus significant efforts need to be made to minimize the impact of racial biases on jury deliberations. But simply because one type of bias has had a more harmful impact to our system of justice does not mean that other types of bias should be ignored. Thus, where bias against an individual's gender, religion, gender-identity, nationality, or ethnicity could impact jury deliberations, educating jurors on the potential effect of those biases can help to lessen their impact.

Finally, in addition to more thoroughly, consistently, and effectively addressing bias in jury instructions, judges can also better encourage jurors to come forward with allegations of biased behavior on the part of their fellow jurors. As scholars and judges alike have pointed out, jurors are unlikely to accuse their fellow jurors of racist or bigoted attitudes during deliberations.[217] However, with increased education on the effect of bias on decision-making, jurors may be more receptive to the idea of coming forward with evidence that bias is impacting the deliberative process. Judges could aid in this effort by proactively incorporating opportunities for jurors to identify instances of juror bias prior to verdict.

This practice could take many different forms–from simply encouraging jurors in jury instructions to bring any evidence of juror bias affecting deliberations to the judge's attention to anonymously surveying jurors prior to the rendering of the verdict seeking indications of juror bias. Currently, courts will poll jurors after deliberations are over when one party requests it. The typical practice is for judges to simply ask each juror, in front of one another, whether they agree with the verdict.[218] While this measure can detect some

217 Peña-Rodriguez, 137 S. Ct. at 869.

218 Jackson v. State, 41 So. 178, 179 (Ala. 1906) ("Polling the jury is a practice

instances where a juror might have felt pressured into voting a certain way even though they did not agree with the outcome, jurors may be reluctant to raise such issues in front of their fellow jurors. A more extensive, anonymous survey of jurors seeking to determine not only whether the verdict was unanimous, but also whether there was any misconduct that was evidenced during deliberations that might undermine the constitutionality of the proceedings, would help to ensure that Sixth Amendment guarantees are protected.[219] By educating jurors on the dangers of bias in jury deliberations and providing a safe way in which jurors can expose evidence of such bias, courts may have a better opportunity to remedy the impact of bias and will avoid the need to investigate whether such bias impacted the verdict after proceedings are over.

V. Conclusion

The Supreme Court's holding in *Peña-Rodriguez* recognized that the impact of racial bias on jury deliberations could undermine a defendant's Sixth Amendment rights to a fair trial and impartial jury. Unlike prior precedent that held that the important policies underlying the no-impeachment rule must prevail even when significant juror misconduct is alleged, the *Peña-Rodriguez* Court struck a balance in favor of preserving a defendant's constitutional rights over concerns about jury harassment or the need to ensure the finality of verdicts. This holding was an important step in the right direction, allowing a small window into jury deliberations after the verdict in order to root out a specific type of bias that undermines the constitutionality of the proceedings.

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whereby the jurors are asked individually, whether they assented and still assent to the verdict.").

> The polling of the jury is the means for definitely determining, before it is too late, whether the jury's verdict reflects the conscience of each of the jurors or whether it was brought about through the coercion or domination of one of them by some of his fellow jurors or resulted from sheer mental or physical exhaustion of a juror.

Commonwealth v. Martin, 109 A.2d 325, 328 (Pa. 1954).

219 Some states prohibit anonymous jury polling, finding that it denies the defendant his right to confront jurors individually and ascertain their agreement with the verdict. Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 Vand. L. Rev. 123, 141, 147 (1996). The suggestion for anonymous surveys or polling would not need to replace the traditional jury poll, but could supplement it to provide further information for the trial judge.

The Court's holding narrowly defined the scope of this exception to the no-impeachment rule, and lower courts applying the *Peña-Rodriguez* exception have been reluctant to expand upon its rationale to address other forms of bias or misconduct that could impact the constitutionality of a verdict. The limited nature of the *Peña-Rodriguez* exception ensures that the underlying policies of the no-impeachment rule are preserved, but fails to adequately address the constitutional concerns that are raised in cases in which juror bias is alleged to have affected the outcome of the proceedings but the bias does not meet the narrow parameters of the exception.

Thus, as some state courts have found, *Peña-Rodriguez* does not go far enough in protecting a defendant's Sixth Amendment right to a fair trial and so the exception to the no-impeachment rule should be more broadly applicable. Yet it is unlikely that federal courts will follow suit and expand upon the rationale of the *Peña-Rodriguez* holding. As demonstrated by the federal court decisions applying the case, courts are reluctant to apply the exception beyond the narrow constraints of the holding. Concerns over opening the floodgates to post-verdict challenges, undermining verdict finality, and leading to the harassment of jurors are not without merit. Yet a defendant's right to a fair trial must be paramount.

Thus, as this Article suggests, courts employing other methods of addressing biases that may affect jury verdicts would not run afoul of the no-impeachment rule or its underlying policies. By creating uniform, clear, thorough instructions on the impact of bias on jury deliberations, the judiciary can help better educate jurors on what attitudes or stereotypes are improper to consider or rely upon in deliberations. Further, through these instructions, the judiciary can ensure that jurors are not just educated on racial bias, but on all forms of bias that would undermine the constitutionality of the proceedings. In addition, such instructions should be made mandatory in any case in which they are requested. Finally, the judiciary should encourage judges to create opportunities for jurors to anonymously report on any improper bias that appears to be influencing deliberations before the verdict is rendered. Such opportunities can take the form of anonymous surveys or questions that may encourage jurors to report instances of misconduct.

By incorporating these processes prior to the jury rendering a verdict, courts would be better able to investigate and identify unconstitutional bias influencing jury deliberations without undermining the important policy considerations of the no-impeachment rule.

When a rule of evidence, no matter how historic, comes into conflict with a constitutional right, every effort should be made to ensure that right is protected. By avoiding the application of the no-impeachment rule and focusing efforts on educating and interacting with jurors pre-verdict, judges will better protect a defendant's rights without undermining the finality of verdicts or encouraging the harassment of jurors post-trial.