



8-2019

Peña-Rodriguez v. Colorado: Carving Out a Racial-Bias Exception to the No-Impeachment Rule

John Austin Morales

St. Mary's University School of Law

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>

 Part of the [Civil Law Commons](#), [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Courts Commons](#), [Criminal Law Commons](#), [Criminal Procedure Commons](#), [Legal Remedies Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

John A. Morales, *Peña-Rodriguez v. Colorado: Carving Out a Racial-Bias Exception to the No-Impeachment Rule*, 50 ST. MARY'S L.J. 767 (2019).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol50/iss2/7>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact jllloyd@stmarytx.edu.

RECENT DEVELOPMENT

***PEÑA-RODRIGUEZ V. COLORADO:* CARVING OUT A RACIAL-BIAS EXCEPTION TO THE NO-IMPEACHMENT RULE**

JOHN AUSTIN MORALES*

I.	Introduction.....	768
II.	The Law Before <i>Peña-Rodriguez v. Colorado</i>	769
	A. Common Law.....	769
	B. Federal Rule of Evidence 606(b)—The No-Impeachment Rule.....	771
	C. <i>Tanner v. United States</i>	772
	D. <i>Warger v. Shauers</i>	775
	E. Circuit Splits: Creating a Racial-Bias Exception v. The <i>Tanner</i> Safeguards.....	776
III.	<i>Peña-Rodriguez v. Colorado</i> : The Journey from the Trial Court to the United States Supreme Court.....	778
IV.	<i>Peña-Rodriguez v. Colorado</i> : Arriving at the United States Supreme Court.....	780
	A. Justice Kennedy’s Majority Opinion.....	781
	B. Justice Thomas’s Dissenting Opinion.....	781
	C. Justice Alito’s Dissenting Opinion.....	782

* St. Mary’s University School of Law, J.D., 2018. The author sincerely thanks his wife, Brooke, for her unwavering love and support as he pursued his legal education. The author also wishes to thank his children, Benjamin, Madden, and Kendrick, for their endless encouragement and for always serving as his inspiration. Finally, the author wishes to express his appreciation to the Volume 50 Editorial Board of the *St. Mary’s Law Journal* for their hard work in editing this Recent Development.

V.	The Implications of the Racial-Bias Exception: Will the Exception Apply in Civil Cases?.....	784
VI.	Conclusion	786

I. INTRODUCTION

The Sixth Amendment safeguards an accused in criminal proceedings and affords them “the right to a speedy and public trial, by an impartial jury[.]”¹ In furtherance of this right, the no-impeachment rule prohibits a juror from testifying after a verdict has been handed down about the jurors’ deliberations.² While there are limited exceptions to the no-impeachment rule, juror expressed racial bias is not one of them.³ When presented with the dilemma of a juror using racial bias in deliberations, courts must weigh two competing doctrines that serve as the foundation to our judicial system: (1) affording a defendant his or her constitutional rights to an impartial jury in criminal proceedings, and (2) ensuring that we protect the secrecy of the jury’s deliberations.⁴

1. U.S. CONST. amend. VI; *see also* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 860 (2017) (“The right to a jury trial in criminal cases was part of the Constitution as first drawn, and it was restated in the Sixth Amendment.” (citing U.S. CONST. art. III, § 3, cl. 3; *id.* amend. VI)). Through the Fourteenth Amendment, the right to a jury trial in a criminal case applies to the states. *Duncan v. Louisiana*, 391 U.S. 145, 149–50 (1968); *see also* Ludwig v. Massachusetts, 427 U.S. 618, 624 (1976) (acknowledging that the Fourteenth Amendment affords an individual involved in a criminal case the right to jury trial, and when tried in a federal tribunal, this right falls within the guarantees of the Sixth Amendment). “The Court in *In re Oliver* made it clear that [the right to a speedy and public trial] extends to the [s]tates.” *Presley v. Georgia*, 558 U.S. 209, 212 (2010) (citation omitted) (citing *In re Oliver*, 333 U.S. 257, 273 (1948)). Further, the Sixth Amendment right is explicitly the accused’s right. *Id.*

2. FED. R. EVID. 606(b)(1). The no-impeachment rule rests on additional grounds, which include the need for finality, privacy for the deliberations, and juror protection from harassment and tampering. DAVID A. SCHLUETER & JONATHAN D. SCHLUETER, TEXAS RULES OF EVIDENCE MANUAL 541 (10th ed. 2015).

3. FED. R. EVID. 606(b)(2); *Fields v. Brown*, 503 F.3d 755, 767 (9th Cir. 2007) (defining bias as “bias in fact[.]” meaning that a “person will not act with entire impartiality” (quoting *United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir. 2000))); *United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir. 2000) (explaining that actual bias is found when a potential juror admits an inability to be impartial).

4. Lisa Soronen, *State ‘No-Impeachment’ Rules May Require a Rewrite*, NCLS BLOG (Apr. 18, 2017), <http://www.ncsl.org/blog/2016/04/18/state-no-impeachment-rules-may-require-a-rewrite.aspx> [<https://perma.cc/Q75N-2CJS>]; *see also* Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291, 381 (2014) (Sotomayor, J., dissenting) (“The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.”). Secrecy, however, is only one of the policy reasons for the no-impeachment rule. SCHLUETER & SCHLUETER, *supra* note 2, at 541.

In 2017, in *Peña-Rodriguez v. Colorado*,⁵ the United States Supreme Court addressed the issue of whether the no-impeachment rule overrules the Sixth Amendment right to an impartial jury in a criminal case.⁶ In a 5–3 decision, the Supreme Court held that the no-impeachment rule must give way, and courts are permitted to inquire into jury deliberations to determine whether a juror expressed racial bias during those deliberations.⁷ In doing so, the Supreme Court carved out a new exception to the long-standing rule that jury deliberations are to remain private. The majority opinion, written by Justice Anthony Kennedy, created a racial-bias exception to the no-impeachment rule.⁸ Justice Kennedy asserted that “blatant racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases[.]”⁹

With this introduction, Part II of this Recent Development will discuss the history of the no-impeachment rule and the challenge of grappling with the plain language of the rule in light of an individual’s Sixth Amendment right to a fair and impartial jury trial. Part III will evaluate the background to the *Peña-Rodriguez* case and the path it took from the trial court up to the United States Supreme Court. Part IV will evaluate the majority opinion and the dissenting opinions of the Supreme Court’s decision in *Peña-Rodriguez*. Part V will address whether the *Peña-Rodriguez* holding will apply in civil cases as well.

II. THE LAW BEFORE *PEÑA-RODRIGUEZ V. COLORADO*

A. *Common Law*

At common law, jurors were prohibited from impeaching a verdict by live testimony or affidavit.¹⁰ This rule became known as the no-impeachment rule. Later, courts adopted a more flexible version of this rule, which

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

6. *Id.* at 861.

7. *Id.* at 869 (creating the racial-bias exception to the no-impeachment rule, which requires the no-impeachment rule to give way for the trial court to hear evidence on whether a juror used racial bias in reaching a verdict).

8. *Id.* at 871.

9. *Id.*; *see also* *Gaines v. United States*, 994 A.2d 391, 401 (D.C. Cir. 2010) (holding a witness’s racial bias in the courtroom is within the scope of cross-examination when impeaching the witness’s credibility).

10. *Peña-Rodriguez*, 137 S. Ct. at 863.

became known as the “Iowa rule.”¹¹ The Iowa rule prohibited a juror from testifying about their subjective beliefs regarding a case.¹² Early court decisions did not show an allegiance to a particular version of the no-impeachment rule.¹³ Subsequently, an exception to the no-impeachment rule surfaced—termed the “federal approach”—which allowed jurors to testify regarding extraneous events that occurred outside of deliberations.¹⁴

In *United States v. Reid*,¹⁵ the Court left the door open to the possibility of creating an exception to the no-impeachment rule.¹⁶ Even still, the Court in *Reid* rejected impeachable evidence because it did not have the slightest influence on the outcome of the case.¹⁷ Similarly, the Court in *McDonald v. Pless*¹⁸ dismissed the opportunity to create an exception to the no-impeachment rule by holding that only in the “gravest and most important cases” will the Supreme Court create an exception to the common law no-impeachment rule.¹⁹ In 1975, Congress cleared the air by enacting Federal Rule of Evidence 606(b), which provided explicit exceptions to the no-impeachment rule.²⁰

11. *Id.* at 876 (Alito, J., dissenting) (“Under the Iowa rule, jurors were generally permitted to testify about any subject except their ‘subjective intentions and thought processes in reaching a verdict.’” (citing *Warger v. Shauers*, 135 S. Ct. 521, 526 (2014))).

12. *Id.*

13. *Id.* at 863 (majority opinion); see also *Mattox v. United States*, 146 U.S. 140, 149 (1892), (holding the denial of juror affidavits was reversible error), *superseded by statute*, Act of Jan. 2, 1975, Pub. L. No. 93–595, 88 Stat. 1926, *as recognized in Peña-Rodriguez*, 137 S. Ct. 855; *United States v. Reid*, 53 U.S. 361, 366–67 (1851) (denying a motion for a new trial based on jurors reading a prejudicial news article during the trial), *superseded by statute*, Act of Jan. 2, 1975, Pub. L. No. 93–595, 88 Stat. 1926, *as recognized in Peña-Rodriguez*, 137 S. Ct. 855.

14. *Peña-Rodriguez*, 137 S. Ct. at 863.

15. *United States v. Reid*, 53 U.S. 361 (1851), *superseded by statute*, Act of Jan. 2, 1975, Pub. L. No. 93–595, 88 Stat. 1926, *as recognized in Peña-Rodriguez*, 137 S. Ct. 855.

16. Compare *id.* at 366 (recognizing there may be cases where it would be prejudicial to reject certain impeachable evidence), with *Mattox*, 146 U.S. at 151 (requiring the jurors to sign affidavits admitting they consulted outside information during deliberations).

17. *Reid*, 53 U.S. at 366 (acknowledging that two jurors saw newspapers containing evidence from the trial but barring this admission into evidence after both jurors swore the “papers had not the slightest influence on their verdict”).

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

19. *Id.* at 269.

20. *Peña-Rodriguez*, 137 S. Ct. at 864. At the time the United States Supreme Court decided *Peña-Rodriguez*, Federal Rule 606(b) read as follows:

- (1) *Prohibited Testimony or Other Evidence.* During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment. The court may not receive a juror’s affidavit or evidence of a juror’s statement on these matters.

B. *Federal Rule of Evidence 606(b)—The No-Impeachment Rule*

Federal Rule of Evidence 606(b) generally prohibits jurors from discussing the events or statements that took place during deliberations.²¹ However, the Rule contains three exceptions, allowing a juror to testify about: (1) “extraneous prejudicial information [being] improperly brought to the jury’s attention;”²² (2) “an outside influence [being] improperly brought to bear on any juror;”²³ or (3) “a mistake [being] made in entering the verdict on the verdict form.”²⁴ The first two exceptions pertain to juror bias or prejudice.²⁵ The adoption of Rule 606(b) provided assurances to jurors that, even after being discharged from their duties, they would not be summoned back to testify about what was said during jury deliberations²⁶—which ultimately led to finality of their verdicts.²⁷

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

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

Id. at 864–65. As it stands, forty-two jurisdictions have adopted Federal Rule 606(b), while nine jurisdictions currently follow the Iowa rule. *Id.* at 865. Of those forty-two jurisdictions, Pennsylvania and Colorado are the only states to have been presented with the issue of racial bias as it pertains to Rule 606(b)—both have declined to establish a racial-bias exception. *Id.*; *Commonwealth v. Steele*, 961 A.2d 786, 807–08 (Pa. 2008).

21. Amanda R. Wolin, Comment, *What Happens in the Jury Room Stays in the Jury Room . . . but Should It?: A Conflict Between the Sixth Amendment and Federal Rule of Evidence 606(b)*, 60 UCLA L. REV. 262, 265 (2012); see also Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?*, 66 N.C. L. REV. 509, 511 (1988) (claiming the no-impeachment rule was enacted on public policy reasons grounded in protecting the jury system).

22. FED. R. EVID. 606(b)(2)(A).

23. *Id.* R. 606(b)(2)(B).

24. *Id.* R. 606(b)(2)(C).

25. Wolin, *supra* note 21, at 265; see also 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, 875–76 (2009) (explaining Rule 606(b) prohibits a juror from providing testimony, after a verdict has been handed down, regarding ethnic slurs made during trial).

26. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 861 (2017); see also Crump, *supra* note 21, at 511 (explaining there are rules that place restrictions on a lawyer’s ability to contact the jurors after trial).

27. *Peña-Rodriguez*, 137 S. Ct. at 865. The no-impeachment rule is considered the general rule with regard to finality of convictions. The rule ensures that, upon entering a verdict, the verdict will not be questioned based on conclusions or comments made during deliberations. See *Fullwood v. Lee*, 290 F.3d 663, 680 (4th Cir. 2002) (“[A] party seeking to invalidate a verdict may not rely upon evidence of ‘a juror’s mental process in connection with the verdict.’” (first quoting *United States v. Check*, 94 F.3d 136, 143 (4th Cir. 1996); then citing FED. R. EVID. 606(b); *Tanner v. United States*, 483 U.S. 107 (1987))); see also *Peña-Rodriguez*, 137 S. Ct. at 865 (finding Rule 606(b) provides for finality of verdicts).

In two hallmark cases, *Tanner v. United States*²⁸ and *Warger v. Shauers*,²⁹ the United States Supreme Court rejected exceptions to Rule 606(b).³⁰ The Supreme Court used those two cases as support—in *Peña-Rodriguez v. Colorado*—for its proposition that “[p]rotecting the secrecy of the jury deliberations is of paramount importance in our justice system.”³¹ In both *Tanner* and *Warger*, the Supreme Court stood by Rule 606(b) and rejected the opportunities to create an exception to the no-impeachment rule.³² While the facts of *Tanner* and *Warger* are not identical to those found in *Peña-Rodriguez*, the Colorado Supreme Court and the U.S. Supreme Court refused to create a “dividing line between different *types* of juror bias or misconduct[.]”³³

C. *Tanner v. United States*

In *Tanner v. United States*, petitioners were indicted and convicted of committing mail fraud and conspiring to defraud the United States pursuant to 18 U.S.C. § 371.³⁴ Prior to being sentenced, Tanner’s defense attorney received information that some of the jurors were consuming alcohol and illegal drugs during their lunch break throughout the trial.³⁵ As a result of consuming these substances, some of the jurors would sleep upon returning to court in the afternoon.³⁶

28. *Tanner v. United States*, 483 U.S. 107 (1987).

29. *Warger v. Shauers*, 135 S. Ct. 521 (2014).

30. *Tanner*, 483 U.S. at 126–27 (regarding the use of drugs and alcohol by jurors during the trial as not falling within the Rule 606(b) exceptions); *Warger*, 135 S. Ct. at 524, 529 (deciding the affidavit intended to impeach the verdict, which detailed a juror’s empathy for the defendant and hesitation to award pain and suffering damages based on a personal experience of the juror, was not extraneous prejudicial information but rather “internal” information). Extraneous information comes from a source outside of the jury. *Tanner*, 483 U.S. at 117. In *Warger*, the affidavit derived from “internal matters,” thus excluding the option of using the extraneous prejudicial information exception to the no-impeachment rule. *Warger*, 135 S. Ct. at 529; FED. R. EVID. 606(b)(2)(A).

31. Soronen, *supra* note 4.

32. *Peña-Rodriguez*, 137 S. Ct. at 878 (Alito, J., dissenting).

33. *Peña-Rodriguez v. People*, 350 P.3d 287, 293 (Colo. 2015), *rev’d*, 137 S. Ct. 855 (2017). In the U.S. Supreme Court’s dissenting opinion, Justice Alito agreed with the Colorado Supreme Court’s reluctance to create a dividing line between juror bias. *Peña-Rodriguez*, 137 S. Ct. at 882 (Alito, J., dissenting); *see also* Soronen, *supra* note 4 (summarizing the Colorado Supreme Court’s inability to decipher between various types of partiality to find a racial-bias exception to the no-impeachment rule).

34. *Tanner*, 483 U.S. at 109.

35. *See id.* at 113 (“Tanner’s attorney had received an unsolicited telephone call from one of the trial jurors . . . inform[ing him] that several of the jurors consumed alcohol during the lunch breaks[,] . . . causing them to sleep through the afternoons.”). One juror noted that several jurors used marijuana and cocaine on multiple occasions during the trial. *Id.* at 115–16.

36. *Id.* at 113.

After learning this information, petitioners filed a motion for a new trial and for permission to interview the jurors.³⁷ The district court denied their requests, citing Federal Rule of Evidence 606(b),³⁸ which prohibits the use of a juror's testimony to impeach a jury verdict except with regard to outside influences.³⁹ On appeal, the Eleventh Circuit affirmed the holding of the district court.⁴⁰ Petitioners filed a writ of certiorari to the United States Supreme Court.⁴¹

The Court affirmed the Eleventh Circuit in part and remanded the case for further proceedings.⁴² Justice Sandra Day O'Connor, writing for the majority, held that the district court did not err in denying petitioners' request to allow evidence of alleged juror intoxication during the trial because not allowing the evidence was the most reasonable reading of Rule 606(b).⁴³ Accordingly, a reasonable reading of Rule 606(b) would not permit a juror to testify about juror intoxication as an outside influence for which a juror is able to testify about to impeach a verdict.⁴⁴ The Court further held there were no potential Sixth Amendment violations as a result of this holding because there were other safeguards in the trial process to protect the petitioners from an unfair or biased trial.⁴⁵ Some of these

37. *See id.* (explaining that the day before sentencing, petitioners requested a "continuance of the sentencing date, permission to interview jurors, an evidentiary hearing, and a new trial").

38. FED. R. EVID. 606(b)(1) (prohibiting a court from receiving an affidavit from a juror regarding an incident or statement made during the jury's deliberations).

39. *See Tanner*, 483 U.S. at 113 (holding testimony from the jury regarding intoxication was inadmissible); *see also* H.R. REP. NO. 93-650, at 9-10 (1973) ("[A juror can] testify as to the influence of extraneous prejudicial information brought to the jury's attention . . . or an outside influence [that] improperly had been brought to bear upon a juror . . . but [the juror cannot] testify as to other irregularities [that] occurred in the jury room."). The purpose of House Report 650 was to provide uniformity to the Federal Rules of Evidence. *Id.* at 1. Some rules were deleted by the Committee on Judiciary, while others were retained but amended. *Id.* at 5-6. The Committee retained Rule 606(b) but significantly amended it. *Id.* at 9-10.

40. *Tanner*, 483 U.S. at 110; *United States v. Conover*, 772 F.2d 765, 767 (11th Cir. 1985).

41. *Tanner v. United States*, 479 U.S. 929 (1986).

42. *Tanner*, 483 U.S. at 134.

43. *Id.* at 127. *See* H.R. REP. NO. 93-650, at 10 (1973) (prohibiting "a juror [from] testify[ing] to the drunken condition of a fellow juror which so disabled him that he could not participate in the jury's deliberations"). At the time of *Tanner*, the House and Senate had a difference of opinion on the reading of Rule 606(b). *Tanner*, 483 U.S. at 125. The Senate's reading of the Rule prohibited a juror from testifying about any statement or matter that occurred during jury deliberations. H.R. REP. NO. 93-1597, at 8 (1974) (Conf. Rep.). Whereas the House's reading of the Rule allowed a juror to testify regarding any objective matter that occurred during the jury's deliberations. *Id.* *See Tanner*, 483 U.S. at 125 (asserting a result of this legislative history of differing interpretations is "strong support for [allowing] the most reasonable reading of the language of Rule 606(b)").

44. *Tanner*, 483 U.S. at 125.

45. *Id.* at 127.

safeguards⁴⁶—later termed the “*Tanner* safeguards”⁴⁷—are establishing the suitability of a juror during voir dire,⁴⁸ the ability of court personnel, or other jurors, to report any juror misconduct,⁴⁹ and a defendant’s ability to impeach a verdict through the use of non-juror evidence.⁵⁰

Justice Thurgood Marshall, concurring in part and dissenting in part in *Tanner*,⁵¹ stated that because the petitioners’ claims involved “objectively verifiable conduct [that] occur[ed] prior to [the jury’s] deliberations, juror testimony in support of the [petitioners’] claims is admissible under Rule 606(b).”⁵² Justice Marshall further contended that testimony regarding whether a juror was intoxicated falls within the “outside influence exception” of Rule 606(b) and to ignore this behavior is to denigrate the petitioners’ Sixth Amendment right to a trial by a competent jury.⁵³ Justice Marshall alluded to the fact that the safeguards mentioned in the majority opinion would do little to avoid a recurrence of this issue.⁵⁴ He also indicated that voir dire is an ineffective measure to determine whether an individual will use drugs or alcohol and that court personnel are not present during the lunch break to witness whether the jurors are using drugs or alcohol.⁵⁵ In closing, Justice Marshall stressed the importance of the

46. See Ashok Chandran, Note, *Color in the “Black Box”: Addressing Racism in Juror Deliberations*, 5 COLUM. J. RACE & L. 28, 40 (2014) (identifying voir dire, court personnel observations, jurors’ ability to report fellow jurors for misconduct, and non-juror evidence as procedural safeguards for preventing bias during jury deliberations); see also Leah S. P. Rabin, Comment, *The Public Injury of an Imperfect Trial: Fulfilling the Promise of Tanner and the Sixth Amendment Through Post-Verdict Inquiry into Truthfulness at Voir Dire*, 14 U. PA. J. CONST. L. 537, 540–41 (2011) (describing acts and comments during jury deliberations as unobservable by non-jurors because of the safeguards in place and their effectiveness).

47. Chandran, *supra* note 46, at 42.

48. See Prescott Loveland, *Acknowledging and Protecting Against Judicial Bias at Fact-Finding in Juvenile Court*, 45 FORDHAM URB. L.J. 283, 303 (2017) (explaining how jurors are susceptible to racially-based bias but safeguards are in place, such as “voir dire, to root out prospective jurors with discernible biases”); see also Christina Collins, Comment, *Stuck in the 1960s: Supreme Court Misses an Opportunity in Skilling v. United States to Bring Venue Jurisprudence into the Twenty-First Century*, 44 TEX. TECH L. REV. 391, 395 (2012) (“The process of voir dire is the primary means to discover prejudice or conflict of interest within the jury pool.”). But see *United States v. Nelson*, 277 F.3d 164, 202 (2d Cir. 2002) (explaining, with regard to bias, there are no guarantees the safeguards will be effective).

49. Chandran, *supra* note 46, at 40.

50. *Id.*

51. *Tanner v. United States*, 483 U.S. 107, 134 (1987).

52. *Id.* at 138 (Marshall, J., dissenting).

53. *Id.* at 134 (“If . . . members of petitioners’ jury were intoxicated as a result of their use of drugs and alcohol to the point of sleeping through material portions of the trial, the verdict in this case must be set aside.”).

54. See *id.* at 141–42 (“Reliance on these safeguards, to the exclusion of an evidentiary hearing, is misguided.”).

55. *Id.* at 142.

petitioners' Sixth Amendment rights by declaring "if we deny [petitioners] this opportunity, the jury system may survive, but the constitutional guarantee on which it is based will become meaningless."⁵⁶

D. *Warger v. Shauers*

In *Warger v. Shauers*,⁵⁷ petitioner Gregory Warger sued Randy Shauers for negligence due to injuries he sustained in a motor vehicle accident.⁵⁸ Ultimately, the jury found for Shauers.⁵⁹ Following the verdict, a juror contacted Warger's attorney and stated that the jury foreperson had a daughter who was responsible for causing a fatal motor vehicle accident and that a lawsuit would have devastated her daughter's life.⁶⁰ This information was in direct opposition to the information the foreperson had presented during voir dire and called into question the foreperson's ability to hear the present case impartially.⁶¹ With a signed affidavit from the disclosing juror, Warger filed a motion for a new trial.⁶²

The district court denied petitioner's motion because Federal Rule of Evidence 606(b) bars evidence of any statements made during jury deliberations.⁶³ The Eighth Circuit affirmed the district court's holding,⁶⁴ and the petitioner sought review by the United States Supreme Court. In 2014, Justice Sonia Sotomayor, writing for a unanimous Court, held that "Rule 606(b) applies to juror testimony during a proceeding in which a party seeks to secure a new trial on the ground that a juror lied during voir dire."⁶⁵ The Supreme Court also held that the juror affidavit did not fall within the Rule 606(b) exception for extraneous prejudicial information because the information within the affidavit was not received from an extraneous source—rather, the information stemmed from statements made during jury deliberations.⁶⁶ Even though the Court in *Warger* refused to create

56. *Id.*

57. *Warger v. Shauers*, 135 S. Ct. 521 (2014).

58. *Id.* at 524.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *See id.* at 525 (detailing the district court's denial of plaintiff's motion for new trial because "the only evidence that supported [the motion], the complaining juror's affidavit, was barred by Federal Rule of Evidence 606(b)"); FED. R. EVID. 606(b) (applying when an individual attempts to make "an inquiry into the validity of a verdict").

64. *Warger*, 135 S. Ct. at 525; *Warger v. Shauers*, 721 F.3d 606, 613 (8th Cir. 2013).

65. *Warger*, 135 S. Ct. at 525.

66. *See id.* at 529 (arguing that the juror's affidavit contained information that could be found internally in the deliberation process). The Court noted that the information from the juror's

another exception to Rule 606(b), the Court noted that an exception may be created for “juror bias so extreme that, almost by definition, the jury trial has been abridged.”⁶⁷ The Court thus left the door open for the possibility of a new “bias” exception to the no-impeachment rule.

E. *Circuit Splits: Creating a Racial-Bias Exception v. The Tanner Safeguards*

Federal appellate courts have found, or suggested, that there is a permissible exception to the no-impeachment rule when there is evidence that racial bias was used by jurors during deliberations.⁶⁸ For example, in *United States v. Flemming*,⁶⁹ the Third Circuit held that it was permissible to investigate into a juror’s bias.⁷⁰ The *Flemming* court further held that a defendant should be granted a new trial when the defendant is able to show that he or she “suffered ‘substantial prejudice’ as a result of the jury’s exposure to . . . extraneous information.”⁷¹

In contrast to the *Flemming* holding, other federal appellate courts have not been open to a racial-bias exception and have held that the *Tanner* safeguards are sufficient and effective. For example, the Seventh Circuit denied a defendant’s petition for habeas corpus in *Shillcutt v. Gagnon*⁷² after the court was notified that one of the jurors stated, “Let’s be logical. He’s

daughter’s accident may have provided insight on how that juror viewed motor vehicle accident liability, but it did not go so far as to provide the juror, or her fellow jurors, with enough specific information to influence Shauer’s case. *Id.* at 529; *see also* *Tanner v. United States*, 483 U.S. 107, 117–18 (1987) (defining extraneous information as information that is derived from a source external to the jury).

67. *Warger*, 135 S. Ct. at 529 n.3.

68. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 865 (2017); *United States v. Villar*, 586 F.3d 76, 87 (1st Cir. 2009) (finding the *Tanner* safeguards ineffective with regards to “racially and ethnically biased comments made during deliberations”); *United States v. Lloyd*, 269 F.3d 228, 237 (3d Cir. 2001) (“[A] criminal defendant is entitled to a determination of his or her guilt by an unbiased jury based solely upon evidence properly admitted against him or her in court.” (quoting *Virgin Islands v. Dowling*, 814 F.2d 134, 138 (3d Cir. 1987))); *United States v. Henley*, 238 F.3d 1111, 1119–20 (9th Cir. 2001) (characterizing racial bias as being inapplicable to Rule 606(b) because the Supreme Court has held “a juror may testify concerning any mental bias in matters unrelated to the specific issues that the juror was called upon to decide” and that racial bias is plainly unrelated to a “specific issue that a juror in a criminal case may legitimately be called upon to determine” (citing *Rushen v. Spain*, 464 U.S. 114, 121 n.5 (1983))).

69. *United States v. Flemming*, 223 F. App’x 117 (3d Cir. 2007).

70. The Third Circuit held that due to a defendant’s right to be tried by an unbiased jury, “a court may inquire into the verdict if extraneous prejudicial information was improperly brought to the jury’s attention[.]” *Id.* at 124 (citing *United States v. Lloyd*, 269 F.3d 228, 237 (3d Cir. 2001)).

71. *Id.* (quoting *Lloyd*, 269 F.3d at 238).

72. *Shillcutt v. Gagnon*, 827 F.2d 1155 (7th Cir. 1987).

black and he sees a seventeen[-]year[-]old white girl—I know the type.”⁷³ The Seventh Circuit cited *Tanner* as support for its decision to uphold Rule 606(b).⁷⁴ The Seventh Circuit further asserted that, although crude, the statements made by the juror were ideas exchanged during jury deliberations.⁷⁵ However, in *Shillcutt*, the Seventh Circuit acknowledged the importance of eliminating prejudicial communications in the jury room and the need to investigate into the racial bias to determine whether it had an effect on the outcome of the case.⁷⁶ Nonetheless, the Seventh Circuit maintained its position that the *Tanner* safeguards were sufficient and a racial-bias exception was not necessary.⁷⁷

The Tenth Circuit, in *United State v. Benally*,⁷⁸ denied a defendant’s request to create a racial-bias exception, stating that the *Tanner* safeguards were sufficient and effective.⁷⁹ In *Benally*, the court used a balancing test to determine whether a juror’s affidavit describing juror misconduct was admissible to impeach a verdict.⁸⁰ The court concluded that the *Tanner* safeguards are effective in exposing racial bias.⁸¹ The court further stated that the *Tanner* safeguards, while effective, will not eliminate every biased juror⁸²—but this is permissible because “jury perfection is an untenable goal.”⁸³

73. *Id.* at 1156; *see also* Miller, *supra* note 25, at 878–79 (discussing the facts of *Shillcutt*).

74. *Shillcutt*, 827 F.2d at 1159.

75. *Id.*

76. *See id.* (noting the court “consider[ed] whether prejudice pervaded the jury room,” meaning “whether there [was] a substantial probability that the alleged racial slur made a difference in the outcome of the trial” but nonetheless denied the defendant’s petition for habeas corpus).

77. *See id.* (concluding the racial slur likely had no impact on the outcome of the trial and applying the no-impeachment rule).

78. *United States v. Benally*, 546 F.3d 1230 (10th Cir. 2008), *overruled in part by* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 865 (2017).

79. *Compare id.* at 1240–41 (acknowledging the *Tanner* safeguards as sufficient to deter racial bias in deliberations), *with* *United States v. Villar*, 586 F.3d 76, 87–88 (1st Cir. 2009) (asserting the *Tanner* safeguards are not adequate with regard to ethnic and racially charged comments exerted in jury deliberations).

80. *Benally*, 546 F.3d at 1233; *see also* *McDonald v. Pless*, 238 U.S. 264, 267 (1915) (describing the balancing test as weighing “redressing the injury of the private litigant” against “inflicting the public injury [that] would result if jurors were permitted to testify as to what had happened in the jury room”).

81. *Benally*, 546 F.3d at 1240–41.

82. *Id.* at 1240.

83. *Id.*

III. PEÑA-RODRIGUEZ V. COLORADO:
THE JOURNEY FROM THE TRIAL COURT TO THE
UNITED STATES SUPREME COURT

In 2007, based on his contact with two teenage sisters, Miguel Angel Peña-Rodriguez was charged with (1) a felony for attempted unlawful sexual contact, (2) two misdemeanors for harassment, and (3) a misdemeanor for unlawful sexual contact.⁸⁴ The sisters, who reported the incident to their father,⁸⁵ separately identified the assailant as Peña-Rodriguez.⁸⁶ Consequently, Colorado state prosecutors filed criminal charges against Peña-Rodriguez.⁸⁷

During voir dire, a questionnaire was presented to the prospective jurors to evaluate their potential bias and establish their ability to hear the case.⁸⁸ The questionnaire assessed whether the jurors had any feelings toward the present case that would make it difficult for them to serve as a fair and impartial juror.⁸⁹ Additionally, the trial judge asked the panel whether any of the prospective jurors had any feeling for or against the prosecution of Peña-Rodriguez.⁹⁰ Then, defense counsel plainly asked the panel whether “this is simply not a good case for them to be a fair juror.”⁹¹ None of the potential jurors gave any indication that they held bias or any other inability to be a fair juror in the case.⁹²

Following a three-day jury trial, Peña-Rodriguez was found guilty of the three misdemeanor charges for harassment and unlawful sexual contact with the sisters.⁹³ However, the jury was hung⁹⁴ on the felony charge of

84. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 861 (2017); Peña-Rodriguez v. People, 350 P.3d 287, 288 (Colo. 2015), *rev'd*, 137 S. Ct. 855 (2017).

85. Peña-Rodriguez, 137 S. Ct. at 861.

86. *Id.*; Peña-Rodriguez, 350 P.3d at 288.

87. Peña-Rodriguez, 137 S. Ct. at 861.

88. Peña-Rodriguez, 350 P.3d at 288; *see also* United States v. Nelson, 277 F.3d 164, 202 (2d Cir. 2002) (describing voir dire as “the most common and direct ground on the basis of which actual bias is found to exist”).

89. *See* Peña-Rodriguez, 350 P.3d at 288 (“[T]he jury venire received a written questionnaire, which inquired, ‘Is there anything about you that you feel would make it difficult for you to be a fair juror in this case?’”). *But see* United States v. Greer, 968 F.2d 433, 435 (5th Cir. 1992) (explaining that without a showing of individual-based bias, a court’s decision not to exclude the prospective juror will not be deemed an abuse of the court’s discretion).

90. Peña-Rodriguez, 350 P.3d at 288.

91. *Id.*

92. *Id.*

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

94. *Cf.* Yeager v. United States, 557 U.S. 110, 125 (2009) (asserting a hung jury is not evidence of anything other than a failure of a jury to decide a case).

attempted sexual assault.⁹⁵ As a result, the trial judge accepted the jury's guilty verdicts for the misdemeanor charges and declared a mistrial for the felony charge.⁹⁶ Before the jury was released, the judge provided the jurors with instructions regarding their right to discuss the case upon discharge.⁹⁷

After the judge dismissed the jury panel, two jurors approached petitioner's counsel on their own accord.⁹⁸ The two jurors provided information to petitioner's counsel about a fellow juror ("H.C.") exhibiting racial bias toward Peña-Rodríguez.⁹⁹ According to the jurors' affidavits, H.C. stated the following: (1) "I think he did it because he's Mexican and Mexican men take whatever they want[;]"¹⁰⁰ (2) "[N]ine times out of ten[,] Mexican men were guilty of being aggressive toward women and young girls[;]"¹⁰¹ and (3) Peña-Rodríguez's alibi witness was not credible "because, among other things, he was 'an illegal.'"¹⁰²

Consequently, Peña-Rodríguez, armed with the affidavits from the jurors, filed a motion for a new trial.¹⁰³ The trial judge took notice of the bias but, nonetheless, denied Peña-Rodríguez's motion for a new trial because Colorado Rule of Evidence 606(b) explicitly prohibits inquiry into jury deliberations and the comments made by jury members amongst their fellow jurors.¹⁰⁴ On appeal, the Colorado Court of Appeals and the Colorado Supreme Court affirmed the trial court's ruling denying Peña-Rodríguez's motion for a new trial.¹⁰⁵ Peña-Rodríguez argued that, by disallowing consideration of the juror's racial statements via the no-impeachment rule, the Colorado Supreme Court violated his Sixth Amendment right to trial by an impartial jury.¹⁰⁶ Subsequently, Peña-Rodríguez filed a writ of certiorari

95. *Peña-Rodríguez*, 137 S. Ct. at 861.

96. *See id.* (reciting that the jury did not reach a verdict on the count of attempted sexual assault).

97. *Id.* Following the jurors' discharge from service, the judge advised the jury: "[T]he court instructs you that whether you talk to anyone is entirely your own decision. . . . If any person persists in discussing the case over your objection, or becomes critical of your service[,] . . . please report it to [the court]." *Id.*

98. *Id.* at 870.

99. *Id.* at 862.

100. *Peña-Rodríguez v. People*, 350 P.3d 287, 289 (Colo. 2015), *rev'd*, 137 S. Ct. 855 (2017).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Peña-Rodríguez*, 137 S. Ct. at 862; *Peña-Rodríguez*, 350 P.3d at 289 (concluding Rule 606(b) "barred any inquiry into H.C.'s alleged bias during deliberations").

105. *Peña-Rodríguez*, 350 P.3d at 289, 293.

106. Soronen, *supra* note 4.

to the United States Supreme Court.¹⁰⁷ On April 4, 2016, certiorari was granted.¹⁰⁸

IV. PEÑA-RODRIGUEZ V. COLORADO:
ARRIVING AT THE UNITED STATES SUPREME COURT

The Supreme Court stated the overarching question in *Peña-Rodriguez* was:

[W]hether there is an exception to the no-impeachment rule when, after the jury is discharged, a juror comes forward with compelling evidence that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict.¹⁰⁹

Ultimately, the Court answered this question in the affirmative.¹¹⁰ The holding of *Peña-Rodriguez* forced the Supreme Court to weigh the importance of an individual's Sixth Amendment right to a fair and impartial jury trial with enforcement of the no-impeachment rule.¹¹¹ The Court held that racial bias has no place in the judicial system and must be addressed with great caution.¹¹² Further, the Court held that racial bias is of grave importance; therefore, a rule must be provided to avoid a loss of confidence in jury verdicts—a confidence that is paramount to the Sixth Amendment.¹¹³

107. *Peña-Rodriguez*, 137 S. Ct. at 862–63.

108. *Peña-Rodriguez v. Colorado*, 136 S. Ct. 1513 (2016).

109. *Peña-Rodriguez*, 137 S. Ct. at 861. *But see* Mark Joseph Stern, *Read Anthony Kennedy's Stirring Denunciation of Racially Biased Juries*, SLATE (Mar. 6, 2017, 2:49 PM) http://www.slate.com/blogs/the_slatest/2017/03/06/read_anthony_kennedy_s_stirring_opinion_in_pe_a_rodriguez_v_colorado.html [<https://perma.cc/9TCB-Z6SA>] (asserting the only real question before the Court is “whether [racial] discrimination is so egregiously unlawful that, when it is present, the Constitution must override the no-impeachment rule”).

110. *Peña-Rodriguez*, 137 S. Ct. at 871 (Thomas, J., dissenting) (“The Court today holds that the Sixth Amendment requires the States to provide a criminal defendant the opportunity to impeach a jury’s guilty verdict with juror testimony about a juror’s alleged racial bias, notwithstanding a state procedural rule forbidding such testimony.”).

111. *See id.* at 868 (majority opinion) (“This case lies at the intersection of the Court’s decisions endorsing the no-impeachment rule and its decisions seeking to eliminate racial bias in the jury system.”).

112. *Id.*

113. *Id.* (“An effort to address . . . racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment . . .”). “Racial bias is ‘a familiar and recurring evil’ so harmful to the administration of justice that it cannot be ignored.” *Supreme Court Holds that Racial Bias in Justice System Must Be Addressed*, EQUAL JUSTICE INITIATIVE (Mar. 6, 2017) <https://eji.org/news/supreme-court-holds-courts-must-address-racial-bias> [<https://perma.cc/5QRN-WVR5>]; *see also* Brinson v. Walker, 547 F.3d 387, 393 (2d Cir. 2008) (branding racial bias the “prototypical form of bias”).

A. *Justice Kennedy's Majority Opinion*¹¹⁴

Writing for the majority, Justice Kennedy held:

[W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.¹¹⁵

However, the Court reasoned that not every comment “indicating racial bias or hostility” will trigger the no-impeachment racial-bias exception.¹¹⁶ Rather, the defendant must show that one or more jurors exhibited enough overt racial bias or animus toward the defendant to question the impartiality and fairness of the deliberations and the resulting verdict.¹¹⁷ Only when this overt racial bias is shown will the no-impeachment rule be set aside to allow for further inquiry into the racial comments made during jury deliberations.¹¹⁸

With this holding, the Court did not provide a standard for determining when a verdict should be set aside and a new trial granted.¹¹⁹ Instead, the Court is providing a remedy for overt racial bias in jury deliberations that allows a court to further investigate whether a verdict shall be set aside and a new trial afforded.¹²⁰

B. *Justice Thomas's Dissenting Opinion*¹²¹

Justice Thomas asserted that “[t]he Sixth Amendment's . . . right . . . is limited to the protections that existed at common law when the Amendment was ratified.”¹²² Thus, according to Justice Thomas, the Court must look to the common law to determine whether the Sixth Amendment supports a

114. *Peña-Rodriguez*, 137 S. Ct. at 860 (“Kennedy, J., delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined.”).

115. *Id.* at 869.

116. *Id.* “[T]he statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict.” *Id.*

117. *Id.*

118. *See id.* (clarifying this threshold inquiry is made at the discretion of the court considering all circumstances, such as the reliability of evidence and the timing and content of the statements alleged).

119. *Id.* at 870; *see also* *United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001) (providing that a showing of even one racist juror will suffice for inquiry into jury deliberations).

120. *Peña-Rodriguez*, 137 S. Ct. at 870–71.

121. *Id.* at 860 (“Thomas, J., filed a dissenting opinion.”).

122. *Id.* at 871–72 (Thomas, J., dissenting).

racial-bias exception.¹²³ At common law, the right to a jury trial did not include the option to impeach a verdict through juror testimony of misconduct during deliberations.¹²⁴ The common law rule—termed “Lord Mansfield’s no-impeachment rule”¹²⁵—prohibited the use of juror affidavits to impeach a verdict.¹²⁶ Historically, Lord Mansfield’s no-impeachment rule was widely accepted amongst American tribunals.¹²⁷ In furtherance of his position, Justice Thomas stated that the Constitution—specifically, the Sixth Amendment—does not impose a uniform rule nor lend support for a racial-bias exception.¹²⁸ Because the Constitution does not demand a national rule, Justice Thomas found that neither should the Supreme Court.¹²⁹

C. Justice Alito’s Dissenting Opinion¹³⁰

Justice Alito addressed the commonality of the American legal system, with different components of the system having similar rules that prohibit the admission of confidential information.¹³¹ According to Justice Alito,

123. *Id.*

124. *Id.* at 872 (“The common-law right to a jury trial did not . . . guarantee a defendant the right to impeach a jury verdict with juror testimony about juror misconduct . . .”).

125. *Vaise v. Delaval* (1785) 99 Eng. Rep. 944; 1 T.R. 11; *Peña-Rodríguez*, 137 S. Ct. at 873.

126. *See Vaise*, 99 Eng. Rep. 944 (indicating Lord Mansfield’s refusal to impeach a verdict by a juror’s affidavit). Prior to 1785, juror affidavits were willingly reviewed to impeach a verdict. *McDonald v. Pless*, 238 U.S. 264, 268 (1915); accord Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. RACIAL & ETHNIC JUST. 165, 171 (2011) (“Lord Mansfield held that neither affidavits nor testimony could be received as evidence as to impeach a verdict.”).

127. *Peña-Rodríguez*, 137 S. Ct. at 873 (Thomas, J., dissenting) (“The vast majority of [s]tates adopted the no-impeachment rule as a matter of common law.”); *see also Bull v. Commonwealth*, 55 Va. (14 Gratt.) 613, 627–28 (1857) (acknowledging Lord Mansfield’s no-impeachment rule as well-settled law).

128. *Peña-Rodríguez*, 137 S. Ct. at 874 (Thomas, J., dissenting).

129. *See id.* (finding that a racial-bias exception to the no-impeachment rule is not constitutionally required, and thus the Supreme Court should not be required to create one).

130. *Id.* at 860 (majority opinion) (“Alito, J., filed a dissenting opinion, in which Roberts, C. J., and Thomas, J. joined.”).

131. *Id.* at 874 (Alito, J., dissenting); *see also Mohawk Indus. v. Carpenter*, 558 U.S. 100, 108 (2009) (defining the attorney-client privilege as “one of the oldest recognized privileges for confidential communications” (quoting *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998))). The Court further held that “assuring confidentiality . . . encourages clients to make ‘full and frank’ disclosures[.]” *Mohawk Indus.*, 558 U.S. at 108 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2011) (asserting confidentiality between a physician and patient maintains the integrity of the relationship); *see also* 38 U.S.C.A. § 7332 (West 2017) (restricting a physician’s ability to disclose confidential patient information through medical records). Similarly, confidentiality is essential to the relationship between a pastor and members of their church. Christine P. Bartholomew, *Exorcising the Clergy Privilege*, 103 VA. L. REV. 1015, 1042 (2017).

the loss of probing evidence has long been a factor weighing against the release of confidential information.¹³² Even still, the Court has upheld the rules protecting such confidential information.¹³³ The same issue—the release of confidential information—is present in *Peña-Rodriguez v. Colorado*.¹³⁴ Allowing jurors to testify about comments made during deliberations would “undermine the system of trial by jury that is integral to our legal system.”¹³⁵

Providing great deference to the American people, Justice Alito explained that the jury room affords a right to citizens of different professional backgrounds to not be judged by their submissions in the deliberation process.¹³⁶ This right is paramount to trust in our judicial system. Therefore, the jury room door must remain locked and we must guard their deliberations.¹³⁷ With the majority’s holding, the Court is essentially prying this door open.¹³⁸ The majority’s holding is grounded in an attempt to combat racial bias. However, racial bias is not a new development in the judicial system, and the Court was not convinced before this case to create a racial-bias exception.¹³⁹

Justice Alito also addressed how the majority distinguished *Peña-Rodriguez* from *Tanner* and *Warger*.¹⁴⁰ But Justice Alito emphasized how they are similar.¹⁴¹ The three cases are similar in that they all state the no-impeachment rule promotes judicial interest and that an individual’s Sixth Amendment right is protected by the *Tanner* safeguards.¹⁴²

132. See *Peña-Rodriguez*, 137 S. Ct. at 874 (Alito, J., dissenting) (“The goal of avoiding interference with confidential communications of great value has long been thought to justify the loss of important evidence . . .”).

133. *Id.* Chief Justice Roberts, in a 2007 term decision, held that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

134. See *Peña-Rodriguez*, 137 S. Ct. at 874 (Alito, J., dissenting) (stating the issue of confidentiality is present in this case).

135. *Id.*

136. *Id.*

137. *Id.* at 875.

138. See *id.* (asserting that the Court’s inquiry into jury deliberations does little to respect the jury’s privacy and thus violates the jurors’ constitutional rights).

139. See *id.* (“[U]ntil today, the argument that the Court now finds convincing has not been thought to be sufficient to overcome confidentiality rules like the one at issue here.”).

140. *Id.* at 878.

141. See *id.* at 879 (explaining the Court’s failure to adequately distinguish *Tanner* and *Warger* from the present case).

142. *Id.* The *Tanner* safeguards are: (1) voir dire, (2) the ability of court personnel and fellow jurors to report juror misconduct, and (3) probative evidence found outside of the jury panel. *Tanner v. United States*, 483 U.S. 107, 142 (1987).

Lastly, Justice Alito stressed the danger of opening the flood gates for similar equal protection claims to impeach a verdict.¹⁴³ Creating a racial-bias exception turns this case into an equal protection case, which would not be limited to racial bias.¹⁴⁴ The racial-bias exception would require the judiciary to evaluate each statement made during jury deliberations to determine whether it falls within the purview of racial bias—a slippery slope of subjective evaluation making it difficult to “discern the dividing line between . . . racial or ethnic bias” and ambiguous statements.¹⁴⁵

V. THE IMPLICATIONS OF THE RACIAL-BIAS EXCEPTION:
WILL THE EXCEPTION APPLY IN CIVIL CASES?

The Supreme Court's holding in *Peña-Rodriguez v. Colorado* made an exception to the Sixth Amendment right to an impartial jury trial, which pertains exclusively to criminal proceedings.¹⁴⁶ However, there is a real question about whether the racial-bias exception to the no-impeachment rule extends to civil proceedings as well. The Seventh Amendment serves a similar purpose as the Sixth Amendment in that it provides the right to a jury trial but in civil proceedings.¹⁴⁷ The Seventh Amendment right to a jury trial in civil proceedings has not yet been extended to the states like the Sixth Amendment has.¹⁴⁸ Rather, the right to a jury trial in state courts is afforded through state statutes and constitutions.¹⁴⁹

In a similar holding to *Peña-Rodriguez*, the Court in *Batson v. Kentucky*¹⁵⁰ extended the prohibition against race-motivated peremptory jury challenges

143. *Peña-Rodriguez*, 137 S. Ct. at 883–84 (Alito, J., dissenting) (acknowledging that treating the case at bar as an equal protection case would not limit the exception to racial bias).

144. *Id.* at 884.

145. *Id.* at 884–85 (“The Court’s decision is well-intentioned. It seeks to remedy a flaw in the jury trial system, but as [the] Court said some years ago, it is questionable whether our system of trial by jury can endure this attempt to perfect it.” (citing *Tanner*, 483 U.S. at 120)).

146. *See generally Peña-Rodriguez*, 137 S. Ct. 855 (creating a racial-bias exception to the general rule excluding the use of juror testimony to impeach a verdict).

147. The Seventh Amendment provides a right to a jury trial regarding common law suits. U.S. CONST. amend. VII.

148. *See McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010) (explaining not all of the Bill of Rights have been applied to the states). In addition to the Seventh Amendment: the Third, Fifth, and Eighth Amendments have not been fully applied to the states pursuant to the Due Process Clause. *Id.* at 765 n.13.

149. *See, e.g., TEX. CONST.* art. I, § 15 (stating the right to trial by jury is “inviolable” and allows the legislature to pass laws to regulate or maintain the right).

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

to include civil cases as well as criminal cases.¹⁵¹ The Court in *Batson* held that the Equal Protection Clause—applicable to the states through the Fourteenth Amendment—would be violated if the Court allowed jurors to be removed on the basis of race.¹⁵² Similarly, in *Edmonson v. Leesville Concrete Co.*,¹⁵³ the Court held that prospective jurors could not be stricken from the venire based on race.¹⁵⁴ The Court in *Edmonson* held that the same analysis required to prove a prima facie case for racial discrimination in a criminal case applied in the civil context as well.¹⁵⁵

The holdings in *Batson* and *Edmonson* relied heavily on determining whether the individuals performing the racist acts were performing a state action.¹⁵⁶ If an individual is performing a state action, then the Equal Protection Clause comes into play and restricts the states' ability to make procedural decisions based on race.¹⁵⁷ In other words, once the jury is empaneled, the jurors become state actors and their actions and comments can be characterized as state actions that are subject to the restrictions of the Equal Protection Clause.

It is undisputed that the Fourteenth Amendment prohibits states from denying an individual equal protection of the laws.¹⁵⁸ In the context of *Peña-Rodríguez*, a juror is restricted from making racially driven comments during jury deliberations—regardless of whether the case is civil or criminal.¹⁵⁹ Therefore, the Court's holding in *Peña-Rodríguez* has the power to apply in both civil and criminal cases.

151. *Id.* at 84 (affirming the principle that the Equal Protection Clause prohibits a state from deliberately and purposefully making decisions based on race).

152. *Id.* at 90, 93–94.

153. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

154. *Id.* at 631. The holding in *Batson*, a criminal case, applies in *Edmonson*, a civil case. *Id.*

155. *Id.*

156. *See Batson*, 476 U.S. at 114–15 (discussing petitioner's contention that a peremptory challenge does not constitute state action); *Edmonson*, 500 U.S. at 619 (“Racial discrimination, though invidious in all contexts, violates the Constitution only when it may be attributed to state action.” (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972))).

157. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130–31 (1994) (“Intentional discrimination . . . by state actors violates the Equal Protection Clause”); *see also Johnson v. California*, 543 U.S. 499, 543 (2005) (announcing that when a state actor uses race as grounds for a decision, the state actor carries the burden of showing the race-based decision is justified).

158. U.S. CONST. amend. XIV.

159. *Cf. Edmonson*, 500 U.S. at 630 (“Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal.”).

VI. CONCLUSION

American courts have consistently followed the principle that what happens in the jury room, stays in the jury room—subject to limited exceptions outlined in Rule 606(b). Moreover, jury deliberations have long been a thing of mystery in that in only rare circumstances will a court be permitted to inquire into comments made while the jury was deliberating.¹⁶⁰ In drafting the majority opinion, it appears Justice Kennedy looked beyond the language of the Constitution, focusing primarily on the meaning of the constitutional provision—affording a defendant in criminal proceedings the right to an impartial jury trial.¹⁶¹ In contrast, Justices Thomas and Alito drafted their dissenting opinions with a formalistic approach by looking to whether common law and the text of the Sixth Amendment support a racial-bias exception.¹⁶² With these varying approaches, it raises the question of whether the Court will continue to look beyond the text when it comes to constitutional jurisprudence. Nevertheless, it is clear the Court's decision in *Peña-Rodriguez v. Colorado* is a large step in the direction of remedying our judicial system of racially charged motives. Admittedly, racial bias has historically been an issue in the United States. However, the Court's decision in *Peña-Rodriguez* shows that courts will not be reluctant to take action in an effort to combat racial bias and impart trust and confidence in the judicial system.

160. See generally *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017) (emphasizing the narrow scope of this exception); see also *United States v. Reid*, 53 U.S. 361, 365 (1851) (emphasizing the powerful role the jury plays in trial), *superseded by statute*, Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926, as recognized in *Peña-Rodriguez*, 137 S. Ct. 855; *McDonald v. Pless*, 238 U.S. 264, 267 (1915) (“The argument [in favor of admitting juror affidavits as to an overt act of juror misconduct] has not been sufficiently convincing to induce legislatures generally to repeal or to modify the rule.”).

161. See *Peña-Rodriguez*, 137 S. Ct. at 869 (relying on the Sixth Amendment in creating an exception to the no-impeachment rule).

162. See *id.* at 874 (Thomas, J., dissenting) (stating the decision to be made on the no-impeachment rule should be left to “the political process”); *Id.* (Alito, J., dissenting) (asserting the Court has not made their decision based on any test or basis).