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Recommended Citation

77 Md. L. Rev. 547 (2018)

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Note

PENA-RODRIGUEZ V. COLORADO: ELEVATING A CONSTITUTIONAL EXCEPTION ABOVE THE TANNER FRAMEWORK

CAROLINE COVINGTON*

In *Pena-Rodriguez v. Colorado*,¹ the Supreme Court of the United States addressed whether post-verdict juror testimony about racial bias during jury deliberations is a constitutionally mandated exception to Federal Rule of Evidence 606(b) (“Rule 606(b)”) ² and its state analogues.³ Although jurors are generally barred by the “no-impeachment rule” from testifying about the deliberation process to question the validity of the verdict, the Court ruled that the Sixth Amendment⁴ requires that Rule 606(b) give way to allow

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1. 137 S. Ct. 855 (2017).

2. FED. R. EVID. 606(b). The Rule states, in part, that 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.” *Id.* For the full text of the Rule, see text accompanying *infra* note 107. Rule 606(b) is commonly referred to as the “no-impeachment rule” because the losing party is generally prohibited from impeaching the verdict through juror testimony about the deliberation process with three exceptions. *Kittle v. United States*, 65 A.3d 1144, 1147 (D.C. 2013).

3. *Pena-Rodriguez*, 137 S. Ct. at 859. Forty-two states, including Colorado, have adopted a rule or statute modeled after Rule 606(b), which generally prohibits jurors from testifying as to any statement made during deliberations if that testimony is offered to challenge the validity of a verdict. Benjamin T. Huebner, *Beyond Tanner: An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. REV. 1469, 1487 & n.96 (2006). Colorado’s Rule 606(b) is practically identical to the Federal Rule. Compare FED. R. EVID. 606(b)(1) (“During an inquiry into the validity of a verdict . . . a juror may not testify about any statement made or incident that occurred during the jury’s deliberations . . .”), with COLO. R. EVID. 606(b) (“Upon an inquiry into the validity of a verdict . . . a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations . . .”).

4. U.S. CONST. amend. VI. The Sixth Amendment states that “the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.” *Id.*

the trial court to consider evidence of a juror's reliance on racial animus to convict a criminal defendant.⁵

The Court correctly held that the Sixth Amendment right to an impartial jury should take priority over a rigid application of Rule 606(b) when a jury member produces evidence of racially biased statements during deliberations.⁶ As jurisdictions that allow racial bias exceptions demonstrate, the Court's exception will not impede the policy goals advanced in support of Rule 606(b).⁷ First, an exception for juror testimony on racial bias will not disrupt the finality of verdicts nor increase post-verdict litigation because the Court narrowly tailored the exception to apply only in instances where the racial bias cast substantial doubt on the fairness and impartiality of the verdict.⁸ Additionally, courts are already well-equipped to implement procedures to receive juror testimony under the Court's exception that will not compromise the privacy of jury deliberations.⁹ Rule 606(b) already permits disclosure under its enumerated exceptions about what happened in the jury room if the testimony concerned prejudicial extraneous information and outside influence.¹⁰ Courts can use these same procedures to receive testimony under one of the Rule's exceptions to receive testimony on racial bias within deliberations without significant intrusion into the inner workings of the deliberative process.¹¹ The Court's exception will also not increase post-verdict harassment of jurors because of existing professional and local rules that restrictively govern contact with jurors.¹² Lastly, the Court's decision was correctly decided because it promotes public confidence in the fairness of the jury system by allowing consideration of whether racial bias affected a defendant's Sixth Amendment right to an impartial jury.¹³

The Court, however, erred when it failed to adequately base its decision on the insufficiency of current procedural safeguards enumerated in *United States v. Tanner*.¹⁴ In *Tanner*, the Court declined to mandate a constitutional exception to Rule 606(b), precluding the defendant from introducing juror testimony about other jurors' alleged intoxication and drug use.¹⁵ The Court reasoned that any Sixth Amendment concerns to Rule 606(b) were addressed by four procedural safeguards: voir dire, court and counsel observation of

5. *Pena-Rodriguez*, 137 S. Ct. at 869.

6. *See infra* Part IV.A.

7. *See infra* Part IV.A.

8. *See infra* Part IV.A.1.

9. *See infra* Part IV.A.1.

10. *See infra* Part IV.A.1.

11. *See infra* Part IV.A.1.

12. *See infra* Part IV.A.2.

13. *See infra* Part IV.A.3.

14. 483 U.S. 107 (1987); *see infra* Part IV.B.

15. *See infra* Part II.C.1

jurors, non-juror evidence, and pre-verdict juror testimony.¹⁶ Following *Tanner*, the Supreme Court as well as lower courts relied on the *Tanner* procedural safeguards to foreclose any constitutional challenges to Rule 606(b)'s exclusionary practice of evidence of juror bias during deliberations.¹⁷ Rather than work within this established *Tanner* framework, the *Pena-Rodriguez* Court incorrectly reasoned that a constitutional exception to Rule 606(b) was necessary to combat systematic racism within the criminal justice system.¹⁸ As a result of its flawed reasoning, the majority's opinion inadvertently gives rise to a preferential system of bias that disregards other types of equally damaging juror bias.¹⁹ The Court should have decided the case based on the insufficiencies of the *Tanner* safeguards in the context of racial bias to protect a defendant's Sixth Amendment right to an impartial jury.²⁰

I. THE CASE

In May 2007, a man was accused of sexually assaulting two teenage sisters in the bathroom of a Colorado horse-racing track.²¹ The girls separately identified an employee of the racetrack, Petitioner Miguel Angel Peña-Rodriguez, as the perpetrator.²² Peña-Rodriguez was charged with one count of attempted sexual assault on a child younger than fifteen, one count of unlawful sexual contact, and two counts of harassment.²³ Prior to trial, potential jurors were questioned during voir dire²⁴ about whether they could be fair and impartial in the case.²⁵ None of the subsequently empaneled jury members expressed racial or other bias.²⁶ The jury found Peña-Rodriguez

16. *See infra* Part II.C.1.

17. *See infra* Part II.C.1.

18. *See infra* Part IV.B.

19. *See infra* Part IV.B.

20. *See infra* Part IV.B.

21. *Pena-Rodriguez v. People*, 350 P.3d 287, 288 (Colo. 2015), *rev'd*, 137 S. Ct. 855 (2017).

22. *Id.*

23. *Id.*

24. Voir dire is the process by which the court evaluates prospective jurors to ensure impartiality and suitability for jury service. *Tanner v. United States*, 483 U.S. 107, 127 (1987); *see Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1982) (“*Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored”).

25. *Pena-Rodriguez*, 350 P.3d at 288. Potential jurors received written questionnaires asking, “Is there anything about you that you feel would make it difficult for you to be a fair juror in this case?” *Id.* Additionally, defense counsel asked during voir dire whether “this is simply not a good case for [you] to be a fair juror.” *Id.*

26. *Id.*

guilty of harassment and unlawful sexual contact but failed to reach a verdict on attempted sexual assault of a child.²⁷

After the trial concluded, Petitioner filed a motion for juror contact information, alleging that some jury members had made racially biased remarks during deliberations.²⁸ After the court ordered Petitioner to allege the particular facts of juror bias, Petitioner's counsel submitted an affidavit stating that two jurors told her "some of the other jurors expressed a bias toward [Peña-Rodriguez] and [his] alibi witness because they were Hispanic."²⁹ Petitioner's counsel received the court's permission to contact the jurors and request affidavits recalling the specific instances of bias within deliberations.³⁰ Subsequently, Petitioner's counsel submitted affidavits from jurors M.M. and L.T. alleging that another juror, Juror H.C., made racially biased comments about Peña-Rodriguez and his alibi witness during jury deliberations.³¹ According to the two jurors, Juror H.C. allegedly said, "I think he did it because he's Mexican and Mexican men take whatever they want."³² Additionally, Juror H.C. made statements about Mexican men being "physically controlling of women because they have a sense of entitlement and think they can 'do whatever they want' with women."³³ The affidavits also alleged that Juror H.C. believed Peña-Rodriguez was guilty because "in his 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" and that "where he used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls."³⁴ Lastly, Juror H.C. was alleged to have said that he did not think Peña-Rodriguez's alibi witness was credible because "among other things, he was 'an illegal.'"³⁵

Peña-Rodriguez's counsel moved for a new trial, but the trial court found that H.C.'s comments during jury deliberations were inadmissible under Rule 606(b) of the Colorado Rules of Evidence ("CRE 606(b)").³⁶ The court subsequently denied the motion for a new trial, and Peña-Rodriguez was sentenced to probation for two years and required to register as a sex

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 289.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*; COLO. R. EVID. 606(b); *see supra* note 3.

offender.³⁷ Peña-Rodriguez appealed.³⁸ A divided Colorado Court of Appeals affirmed the district court's decision,³⁹ and the Colorado Supreme Court affirmed by a 4-3 vote, holding that CRE 606(b) prohibited admission of Juror H.C.'s testimony.⁴⁰ The majority expressed concern that creating an exception to CRE 606(b) for racial bias would undermine policy objectives that the rule purported to achieve.⁴¹ Justice Márquez, joined by Justices Eid and Hood, dissented, noting that the majority should have elevated a defendant's fundamental constitutional right to a fair trial over general policy interests.⁴² The United States Supreme Court granted certiorari to address whether the constitution requires an exception to the no-impeachment rule when a juror makes a statement indicating that "racial animus was a significant motivating factor in his or her vote to convict."⁴³

II. LEGAL BACKGROUND

The United States Constitution guarantees a defendant the right to a trial by jury in all criminal proceedings.⁴⁴ The Sixth Amendment further guarantees the criminal defendant the right to an *impartial* jury, free of prejudice and bias.⁴⁵ An impartial juror has been understood to be one who can "lay aside his impression or opinion and render a verdict based on the evidence presented in court."⁴⁶ Although the right to a fair and impartial jury

37. Petition for Writ of Certiorari at 6, *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606).

38. *People v. Pena-Rodriguez*, No. 11CA0034, at *2 (Colo. App. Nov. 8, 2012), *reh'g denied*, 350 P.3d 287 (Colo. 2015).

39. *Id.* at *16 (referring to Juror H.C. as "Juror 11").

40. *Pena-Rodriguez v. People*, 350 P.3d 287, 287–88 (Colo. 2015), *rev'd sub nom.* *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

41. *Id.* at 292–93.

42. *Id.* at 293–94 (Márquez, J., dissenting).

43. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 861 (2017). The Court addressed whether the Constitution required an exception to both state and federal codifications of the no-impeachment rule, as applied in the case at bar in Colorado Rule of Evidence 606(b). *Id.*

44. U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . ."). The Supreme Court, however, has held that the Constitution only requires juries for criminal trials where the prospective punishment is more than six months in prison. *Baldwin v. New York*, 399 U.S. 66, 73–74 (1970).

45. See *supra* note 4 for the relevant text of the Sixth Amendment. See, e.g., *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) ("One touchstone of a fair trial is an impartial trier of fact— 'a jury capable and willing to decide the case solely on the evidence before it.'" (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982))).

46. *Irvin v. Dowd*, 366 U.S. 717, 723 (1961) (first citing *Ex Parte Spies*, 123 U.S. 131 (1887); then citing *Holt v. United States*, 218 U.S. 245 (1910); and then citing *Reynolds v. United States*, 98 U.S. 145 (1878)); see, e.g., *Buchanan v. Kentucky*, 483 U.S. 402, 417 (1987) ("[T]he Court's understanding [is] that jury impartiality requires only 'jurors who will conscientiously apply the law and find the facts.'" (quoting *Wainwright v. Witt*, 469 U.S. 412, 423 (1985))).

is a cornerstone of the American legal system,⁴⁷ the common law and evidentiary rules designed to preserve the integrity of the process have shielded the secrecy of jury deliberations.⁴⁸ When facing allegations of juror misconduct, courts will often prohibit jurors from offering testimony that would impeach their verdict.⁴⁹ Section II.A traces the common law development of prohibiting post-verdict juror impeachment in American jurisprudence as well as the Supreme Court's early efforts to clarify its position on the issue. Section II.B reviews the codification and legislative history of the no-impeachment rule from its early development to adoption into the Federal Rules of Evidence. Lastly, Section II.C examines the Supreme Court's subsequent ruling in *Tanner v. United States*⁵⁰ and its pervasive influence on lower courts' interpretations of Rule 606(b).

A. The Early Era: Development of the Common Law No-Impeachment Rule

The general rule that prohibited post-verdict juror testimony originated from the eighteenth-century English case, *Vaise v. Delaval*.⁵¹ In *Vaise*, English Chief Justice Lord Mansfield heard a case in which a defendant attempted to set aside a jury verdict by presenting two juror affidavits explaining that the jury had improperly reached a verdict through a game of chance.⁵² Although English courts had consistently allowed jurors' testimony to impeach the verdict without question,⁵³ Lord Mansfield broke with tradition and held that the juror affidavits were inadmissible to impeach their own verdicts.⁵⁴ Lord Mansfield, however, held that the court may receive evidence about deliberations from an outside source, such as someone who observes the misconduct from a window.⁵⁵ American courts subsequently adopted Lord Mansfield's decision in *Vaise* as the Mansfield

47. See U.S. CONST. amend. VI; U.S. CONST. art. III, § 2, cl. 3.

48. See *infra* Part II.A.; see also *United States v. Thomas*, 116 F.3d 606, 618 (2d Cir. 1997) (“[C]ourts and commentators alike recognize that the secrecy of deliberations is essential to the proper functioning of juries.”).

49. See *infra* Part II.C.

50. 483 U.S. 107 (1987).

51. (1785) 99 Eng. Rep. 944; 1 T.R. 11; see also *State v. Kociolek*, 118 A.2d 812, 815 (N.J. 1955) (“The barrier, apparently insurmountable in its original form however heinous or reprehensible the misconduct of the jury, originated with Lord Mansfield’s decision in *Vaise v. Delaval* . . .”).

52. 99 Eng. Rep. at 944.

53. See, e.g., *Dent v. Hertford* (1696) 91 Eng. Rep. 546; 2 Salkeld 645 (holding that the verdict must be set aside and new trial ordered because the jury foreman said the plaintiff should never get a verdict in his favor); *Philips v. Fowler* (1735) 94 Eng. Rep. 994; *Barnes* 441 (allowing juror testimony that the verdict was decided by casting lots to impeach the verdict).

54. *Vaise*, 99 Eng. Rep. at 944.

55. *Id.*

Rule, which embodied the proposition that all juror testimony is inadmissible for purposes of impeaching a verdict.⁵⁶

1. *Breaking Mansfield Tradition*

While some early American courts adopted the Mansfield Rule's complete ban on jurors testifying to impeach their own verdict,⁵⁷ other courts embraced modified versions of the ban. The first variation to gain traction, known as the Iowa Rule, arose from a mid-nineteenth century Iowa Supreme Court case, *Wright v. Illinois & Mississippi Telegraph Co.*⁵⁸ In *Wright*, four jurors offered affidavits alleging that the jury had returned a quotient verdict, i.e., a verdict determined by the average of each individual juror's estimate of damages.⁵⁹ Noting that prior precedent was not based on any standard principle, "but upon its own supposed merits," the Iowa Supreme Court created its own rule.⁶⁰ The court held that affidavits from jurors are admissible for purposes of impeaching a verdict if they involve a matter which did not "essentially inhere in the verdict itself."⁶¹ Rather than focus on the trustworthiness of juror testimony,⁶² the Iowa court focused on whether the testimony was both disruptive to the stability and finality of verdicts, as well as irrefutable.⁶³ Affidavits alleging that the jury returned a quotient verdict, that a jury determined a verdict by a game of chance, or that a juror was improperly approached by a third party were admissible because the allegations involved "fact[s] independent of the verdict itself."⁶⁴ The court reasoned that these allegations could be "readily and certainly disproved by his fellow jurors."⁶⁵

56. See *Dorr v. Fenno*, 29 Mass. (12 Pick.) 521, 525 (1832) ("The [Mansfield] rule is now perfectly well settled in both countries and may be laid down to be, that the [t]estimony of jurors is inadmissible to show their own misbehaviour . . .").

57. See, e.g., *Pleasants v. Heard*, 15 Ark. 403, 407–08, 411 (1855) (finding inadmissible juror testimony that damages were determined by average); *Murdock v. Sumner*, 39 Mass. (22 Pick.) 156, 157 (1839) (finding juror affidavits stating that they had made a mistake in assessing damages inadmissible on motion for a new trial); *Clum v. Smith*, 5 Hill 560, 560–61 (N.Y. 1843) (holding juror testimony inadmissible because it was intended to impeach the verdict on the grounds that the jury foreman had left deliberations to consult with outside sources on damages).

58. 20 Iowa 195 (1866).

59. *Id.* at 212 ("[T]he verdict was determined by each juror marking down such sum as he thought fit, and dividing the aggregate by twelve and taking the quotient as their verdict . . .").

60. *Id.* at 209.

61. *Id.* at 210.

62. *Id.* at 210–13. The Iowa court dismissed Lord Mansfield's reasoning about the inability of a jury to reliably report its own misconduct and instead offered that "[a]t all events the superior opportunities of knowledge and less liability to mistake . . . would entitle his statement to the most credit." *Id.* at 211–12.

63. *Id.* at 211.

64. *Id.* at 210.

65. *Id.* at 211.

The court distinguished these types of allegations from those allegations solely within the juror's own mind.⁶⁶ Under the court's newly created rule, misunderstandings of jury instructions or witness testimony during trial, mistakes in calculating the verdict, or allegations of influential statements by other jurors were held to be inadmissible.⁶⁷ The Court also noted that while public policy does protect those verdicts in which a juror correctly discharges his duty, there is no legitimate public policy that can prevent a court from considering the best available evidence to remedy unlawful juror misconduct.⁶⁸

In the years following the *Wright* decision, several states departed from the Mansfield Rule's broad prohibition on juror impeachment of the verdict. While some states adhered to the Iowa Rule,⁶⁹ others adopted narrower interpretations that were less lenient than the Iowa Rule yet more flexible than the Mansfield Rule's blanket prohibition on any juror testimony.⁷⁰ Rather than focus on the credibility of juror testimony, the critical factor was whether or not the allegations took place outside of jury deliberations or within the protected sphere of the jury room.⁷¹ Despite these variations, the majority of jurisdictions still followed the Mansfield approach by the beginning of the twentieth century.⁷²

2. *The Supreme Court's Role in the Common Law Development of the No-Impeachment Rule*

The United States Supreme Court refrained from directly addressing the admissibility of juror testimony under the common law to impeach verdicts in *United States v. Reid*.⁷³ In *Reid*, the Court confronted two juror affidavits that indicated the jurors had read a newspaper article during deliberations on the evidence presented at a murder trial.⁷⁴ Rather than deem these affidavits

66. *Id.* at 210.

67. *Id.*

68. *Id.* at 212.

69. The Supreme Court of Kansas determined that a juror's affidavit alleging drunken behavior from another juror during deliberations was admissible under the Iowa Rule because it did not exist within the juror's own mind and was easily verifiable by the court. *Perry v. Bailey*, 12 Kan. 539, 544-45, 546-47 (1874).

70. The Massachusetts Supreme Judicial Court in *Woodward v. Leavitt* considered three jurors' testimonies alleging that juror Brown had told them he had already decided in favor of the defendant prior to the trial. 107 Mass. 453, 459 (1871). Conversely, Brown testified that he had actually voted for the plaintiff rather than the defendant. *Id.* at 459. The court found that the pretrial testimony was admissible because it did not concern the internal deliberation process but that the second testimony was inadmissible because "it related to the private deliberations of the jury." *Id.* at 471.

71. *Id.* at 471.

72. *Tanner v. United States*, 483 U.S. 107, 117 (1987).

73. 12 How. 361 (1851).

74. *Id.* at 361-62.

inadmissible, the Court held that the defendants were not entitled to a new trial because the newspaper article did not influence the jury's verdict.⁷⁵ The *Reid* Court neither endorsed the Mansfield rule nor stated a preference for a more flexible variation; instead, the Court focused on the benign effect of reading the newspaper article prior to issuing a verdict.⁷⁶ However, the Court did caution that "cases might arise in which it would be impossible to refuse [juror affidavits] without violating the plainest principles of justice."⁷⁷

In *McDonald v. Pless*,⁷⁸ the Supreme Court firmly rejected more lenient variations of the Mansfield Rule that had developed in the United States in favor of a more restrictive standard.⁷⁹ The Court held that evidence of a jury's quotient verdict could not be used in this case because the accepted rule prohibited losing parties from using juror testimony to impeach the verdict.⁸⁰ Although the Court acknowledged that litigants possessed countervailing interests when juries arrived at verdicts based on "arbitrary and unjust method[s],"⁸¹ the Court defended its adherence to excluding post-verdict juror testimony by noting it was "the lesser of two evils."⁸² In support of its conclusion, the Court articulated three overriding policy considerations behind upholding the no-impeachment rule.⁸³ First, if jurors were permitted to impeach their verdicts, the Court reasoned that all verdicts would be challenged by losing parties who would harass the jurors to obtain testimony to invalidate the jury's findings.⁸⁴ Second, the Court reasoned that admitting juror testimony would destroy all frankness and freedom of discussion and transform once private deliberations into the subject of constant public scrutiny.⁸⁵ Lastly, the Court reasoned that allowing such testimony would undermine the finality of verdicts because it would encourage losing parties to launch inquiries after the conclusion of trial.⁸⁶ The Court reaffirmed that it would be imprudent to provide an inflexible rule as there might be cases in which juror misconduct is so egregious that it would merit a departure from

75. *Id.* at 366.

76. *Id.* The Court did note, "[i]t would perhaps hardly be safe to lay down any general rule upon this subject." *Id.*

77. *Id.*

78. 238 U.S. 264 (1915).

79. *Id.* at 269.

80. *Id.*

81. *Id.* at 267.

82. *Id.*

83. *Id.* at 267–68.

84. *Id.* at 267.

85. *Id.* at 267–68.

86. *Id.* at 268.

the no-impeachment rule as to avoid “violating the plainest principles of justice.”⁸⁷

A. *The Legislative History of Rule 606(b)*

The Advisory Committee’s original rule in its 1971 Preliminary Draft conformed to the Iowa Rule’s division between testimony on the mental processes of jurors and testimony about conditions or occurrences that improperly influenced the verdict.⁸⁸ Rather than focus on the location of the misconduct, the proposed rule drew a distinction between testimony on subjective mental processes and testimony concerning objective occurrences.⁸⁹ This proposed rule would have prohibited jurors from testifying about conduct occurring during deliberations but only with respect to its effects on the jurors’ thought processes.⁹⁰ The Advisory Committee noted that “the door of the jury room is not necessarily a satisfactory dividing point” and that allowing jurors to testify about matters outside of their own internal reactions does not jeopardize the values that the Committee sought to protect.⁹¹

After reviewing comments and suggestions on the original preliminary draft, the Advisory Committee submitted a revised draft to the Supreme Court for promulgation in October of 1970.⁹² The draft was heavily criticized by both the Justice Department⁹³ and Senator McClellan⁹⁴ as dangerously subjecting jury deliberations to review after the verdict had been rendered.

87. *Id.* at 268–69 (quoting *Mattox v. United States*, 146 U.S. 140, 147 (1892)). The Court noted that it would not attempt to enumerate or describe those types of circumstances in which a departure from the no-impeachment rule would be applied. *Id.* at 269.

88. FED. R. EVID. 606(b) advisory committee’s note to 1974 enactment (quoting FED. R. EVID. 606(b) advisory committee’s note to 1971 draft); *see supra* notes 58–67 and accompanying text (detailing the formation of the Iowa Rule in *Wright v. Ill. & Miss. Tel. Co.*)

89. *See* S. REP. NO. 93-1277, at 13 (1974).

90. *Id.* The rule provided:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify concerning 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. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

46 F.R.D. 161, 289–90 (1969).

91. FED. R. EVID. 606(b) advisory committee’s note to 1972 proposed rules. The Committee noted, “[t]he values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment.” *Id.* (citing *McDonald v. Pless*, 238 U.S. 264 (1915)).

92. H.R. REP. NO. 93-650, at 3 (1973).

93. 117 CONG. REC. 33,648, 33,655 (1971) (“Recent experience has shown that the danger of harassment of jurors by unsuccessful litigants warrants a rule which imposes strict limitations on the instances in which jurors may be questioned about their verdict.”)

94. 117 CONG. REC. 33,642–48 (Letter from John L. McClellan, Senator, Ark., to Albert B. Maris, Judge, Comm. on Rules of Practice and Procedure (Aug. 12, 1971)).

In response, the Advisory Committee submitted a revised draft of the “long-accepted Federal law”⁹⁵ and prohibited jurors from testifying about any matter or statement that occurred during jury deliberations.⁹⁶ The new version of the rule was sent to the Supreme Court, which subsequently adopted the rule and referred it to Congress for approval.⁹⁷

The Judiciary Committee of the House of Representatives rejected this broader rule, finding that the Advisory Committee’s earlier draft was the better practice.⁹⁸ The House noted the newly revised rule could not adequately address unjust jury verdicts nor other irregularities that occurred during deliberations.⁹⁹ The House version subsequently omitted the language that prohibited testimony concerning any matter or statement occurring during the jury’s deliberations.¹⁰⁰

The Senate Judiciary Committee favored the narrower, more restrictive interpretation adopted by the Supreme Court.¹⁰¹ The Senate expressed concern that the “unwarranted and ill-advised” changes made by the House would expose verdicts to constant scrutiny based on occurrences during the jury’s deliberations.¹⁰² The Senate’s report reflected the policy concerns articulated in *McDonald v. Pless*,¹⁰³ namely that “[p]ublic policy requires a finality to litigation” as well as promotion of free and frank discussion among jurors during deliberations.¹⁰⁴ After a conference was convened, the committee adopted the more restrictive rule as passed by the Senate,¹⁰⁵ which Congress enacted in 1974 as part of the Federal Rules of Evidence.¹⁰⁶

As adopted by Congress, Federal Rule of Evidence 606(b) reads as follows:

Rule 606. Juror’s Competency as a Witness

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

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify

95. S. REP. 93-1277, at 13 (1974).

96. 56 F.R.D. 183, 265 (1972).

97. *Id.* at 184.

98. H.R. REP. NO. 93-650, at 10 (1973).

99. *Id.* Specifically, the House was concerned about quotient verdicts and the “drunken condition of a fellow juror which so disabled him that he could not participate in the jury’s deliberations.” *Id.*

100. S. REP. NO. 93-1277, at 13 (1974).

101. *Id.* at 13–14.

102. *Id.* The Senate Report noted that allowing a losing party to challenge a jury verdict based on testimony of the deliberation process has “long been recognized as unwise by the Supreme Court.” *Id.* at 13.

103. *See supra* text accompanying notes 83–86.

104. S. REP. NO. 93-1277, at 14 (1974).

105. H.R. REP. NO. 93-1597, at 8 (1974) (Conf. Rep.).

106. Act of Jan. 2, 1975, Pub. L. No. 93-595, § 1, 88 Stat. 1926.

about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

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

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.¹⁰⁷

Almost every state, including Colorado, adopted its own version of the no-impeachment rule following the federal codification.¹⁰⁸

C. Interpreting Rule 606(b): From Tanner to Warger

1. Tanner Takes the Stage

Following Rule 606(b)'s enactment, the Supreme Court first addressed the contours of the rule and its limitations on juror impeachment in *Tanner v. United States*.¹⁰⁹ Prior to sentencing for mail fraud and conspiracy convictions, defendant Anthony Tanner moved for permission to interview jurors, an evidentiary hearing, and a new trial on the grounds of juror misconduct.¹¹⁰ In support of this motion, Tanner submitted affidavits of two jurors alleging that at least seven jurors were drinking substantial amounts of alcohol throughout the trial.¹¹¹ The affidavits also alleged that during the trial four jurors had regularly smoked marijuana and two jurors ingested cocaine on several occasions.¹¹² The United States District Court for the Middle District of Florida denied both the motion for an evidentiary hearing and new trial, and the United States Court of Appeals for the Eleventh Circuit affirmed.¹¹³ The Supreme Court granted certiorari to consider whether the District Court was required to hold an evidentiary hearing regarding the juror testimony.¹¹⁴ The Court considered two arguments advanced by Petitioner:

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

108. See *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 865 (2017) (noting that "[s]ome version of the no-impeachment rule is followed in every State").

109. 483 U.S. 107 (1987).

110. *Id.* at 112–13.

111. *Id.* at 113–16.

112. *Id.* at 115–16.

113. *Id.* at 116.

114. *Id.*

(1) juror testimony regarding drug and alcohol use during deliberations is not prohibited under Rule 606(b); and (2) the Sixth Amendment right to trial by a competent jury compels an evidentiary hearing on the juror testimony.¹¹⁵

Justice O'Connor, writing for the majority, held that drug and alcohol use during deliberations was not an outside or extraneous influence under Rule 606(b)(2), as argued by the petitioner.¹¹⁶ Although the Court acknowledged that the severe and improper effects of drugs and alcohol were troublesome, the Court concluded that any ambiguity about the plain language of Rule 606(b) was clarified by the legislative history of the rule.¹¹⁷ The Court reasoned that the legislative history demonstrated that Congress did not intend to allow jurors to testify about juror conduct during deliberations, including juror intoxication.¹¹⁸ Rather than explicitly define what constituted an external or internal influence, the Court explained that a rigid distinction based on the juror's physical location was not conducive to determining admissibility.¹¹⁹ Instead, the Court noted that the lower courts' distinction based on the nature of the allegations was a more pragmatic approach to the testimony distinction.¹²⁰

The *Tanner* Court also rejected an argument that prohibiting testimony of juror misconduct violated the Sixth Amendment's guarantee to a fair trial before an impartial jury.¹²¹ The Court reasoned that preexisting procedural safeguards within the justice system adequately protected a party's Sixth Amendment right to an impartial jury, which invalidated any request for a post-verdict inquiry.¹²² First, the Court identified voir dire as a suitable means of detecting incompetent jurors.¹²³ The Court also explained that court personnel, counsel, and the judge could observe the jury during trial and that jurors may report inappropriate juror behavior to the court *before* the jury renders a verdict.¹²⁴ Lastly, a party may also request to impeach a verdict through the admission of nonjuror evidence.¹²⁵ Although the Court acknowledged that some instances of jury misconduct could lead to the invalidation of a verdict regardless of the pre-existing procedural safeguards, the Court noted that it was unclear whether "the jury system could survive

115. *Id.* at 116–17.

116. *Id.* at 126.

117. *Id.* at 122.

118. *Id.* at 125; *see supra* Part II.B (providing a brief summary of the legislative history of Rule 606(b)).

119. *Tanner*, 483 U.S. at 117–18.

120. *Id.* The Court did clarify that "allegations of physical or mental incompetence of a juror [are treated] as 'internal' rather than 'external' matters." *Id.* at 118.

121. *Id.* at 127. See *supra* note 4 for the relevant text of the Sixth Amendment.

122. *Tanner*, 483 U.S. at 127.

123. *Id.*

124. *Id.*

125. *Id.*

such efforts to perfect it.”¹²⁶ Additionally, the Court noted that the allegations of juror misconduct in the present case were not so egregious as to fall under a common law exception allowing post-verdict inquiry.¹²⁷ In light of these circumstances, the Court determined that an additional post-verdict exception was not necessary to protect the defendant’s Sixth Amendment right.¹²⁸

2. Circuit and District Courts Apply Rule 606(b) to Juror Bias

Federal courts have differed in approaches when determining the admissibility of post-verdict juror testimony alleging juror bias.¹²⁹ Prior to *Tanner*, some courts have acknowledged that juror bias within deliberations may be so severe that it implicates the defendant’s constitutional right to an impartial jury.¹³⁰ In *Shillcutt v. Gagnon*, the United States Court of Appeals for the Seventh Circuit noted that the no-impeachment rule cannot be applied so inflexibly as to deny due process, and that further review may be necessary to determine the impact of racial bias within deliberations.¹³¹ The court, however, ultimately declined to find that the no-impeachment rule’s prohibition on juror testimony offended “fundamental fairness.”¹³² Similarly in *Smith v. Brewer*,¹³³ the United States District Court for the Southern District of Iowa struggled to reconcile a defendant’s Sixth Amendment right to an impartial jury with Rule 606(b)’s prohibition on juror testimony alleging bias within deliberations.¹³⁴ Although the court concluded that Rule 606(b) rendered juror testimony inadmissible to impeach a verdict based on alleged bias, the court did state that Rule 606(b) should not be blindly applied where there was a substantial likelihood that a defendant was prejudiced by racial bias during deliberations.¹³⁵

In the wake of *Tanner*, the circuit courts split over whether the *Tanner* safeguards were procedurally sufficient to counter any Sixth Amendment challenges to Rule 606(b) in the context of racial bias during deliberations.¹³⁶

126. *Id.* at 120.

127. *Id.* at 125–26.

128. *Id.* at 127.

129. *See infra* Part II.C.2.

130. *See Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987) (noting that “[t]he rule of juror incompetency cannot be applied in such an unfair manner as to deny due process”).

131. *Id.* at 1159–60.

132. *Id.* at 1160 (holding that defendant was barred under Rule 606(b) from introducing evidence of racial bias during jury deliberations).

133. 444 F. Supp. 482 (S.D. Iowa 1978), *aff’d*, 577 F.2d 466 (8th Cir. 1978).

134. *Id.* at 490 (concluding that testimony on racist juror conduct during deliberations was inadmissible under Rule 606(b), but that evidence of racial bias “might very well offend fundamental fairness” in certain cases).

135. *Id.*

136. *See United States v. Benally*, 546 F.3d 1230, 1240 (10th Cir. 2008) (holding that Rule 606(b) was not unconstitutional as applied to racial bias within the case). *But see United States v.*

In *United States v. Benally*,¹³⁷ the United States Court of Appeals for the Tenth Circuit considered whether excluding testimony of racial bias during deliberations violated the defendant's constitutional right to an impartial jury.¹³⁸ The court noted that important policy considerations animated Rule 606(b)'s exclusion on testimony alleging juror bias within deliberations.¹³⁹ The *Benally* court also considered whether testimony regarding racial or ethnic juror comments made by a juror during deliberations fell under one of Rule 606(b)'s enumerated exceptions.¹⁴⁰ Though it noted that the alleged racially biased statements were inappropriate, the court held that the juror testimony did not constitute either "extraneous prejudicial information" or an "outside influence."¹⁴¹ Additionally, the court determined that the *Tanner* safeguards were appropriate procedural mechanisms to offset racial bias during jury deliberations which curtailed any constitutional concerns regarding the impartiality of the jury.¹⁴²

In *United States v. Villar*,¹⁴³ the First Circuit agreed with the *Benally* court that the plain language of Rule 606(b) excluded juror testimony alleging instances of racial bias within deliberations.¹⁴⁴ The *Villar* court, however, found the *Tanner* protections insufficient in the context of racial bias during deliberations.¹⁴⁵ The Court reasoned that the *Tanner* protections

Villar, 586 F.3d 76, 87 (1st Cir. 2009) (holding that Rule 606(b) does allow inquiry into allegations of racial bias within deliberations).

137. *Benally*, 546 F.3d 1230 (10th Cir. 2008).

138. *Id.* at 1239. The defendant in *Benally* was a Native American man accused of assaulting a federal officer with a dangerous weapon. *Id.* A juror came forward after the trial and alleged that jurors made racially biased statements concerning a Native American propensity to consume alcohol and act violently. *Id.* at 1239–40.

139. *Id.* at 1236 ("Given the importance that Rule 606(b) places on protecting jury deliberations from judicial review, we cannot read it to justify . . . [what] Mr. Benally requests."); *see also* *Williams v. Price*, 343 F.3d 223, 232–33 (3d Cir. 2003) (noting the importance of the public policy concern that "all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding" (quoting *McDonald v. Pless*, 238 U.S. 264, 267–68 (1915))).

140. *Benally*, 546 F.3d at 1236.

141. *Id.* at 1237 (finding that a juror making racially discriminatory comments about the Native American defendant is best understood as internal reflections of a juror's personal experience and not extraneous information)

142. *Id.* at 1240 ("The safeguards that the Court relied upon for exposing the drug and alcohol use amongst jurors in *Tanner* are also available to expose racial biases . . ."); *see* *Robinson v. Polk*, 438 F.3d 350, 364 (4th Cir. 2006) (finding that *Tanner* factors provided an adequate safeguard of the defendant's right to be sentenced by an impartial jury even though a juror read Bible passages during deliberations).

143. 586 F.3d 76 (1st Cir. 2009).

144. *Id.* at 84 (noting that the plain language of Rule 606(b) precludes an investigation into a verdict based on juror testimony on racial bias during deliberations). *Contra* *United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001) (noting that racial bias is exempt from Rule 606(b)'s restrictions on juror testimony).

145. *Villar*, 586 F.3d at 87.

were particularly ineffective at detecting racial bias prior to deliberations, implicating constitutional concerns.¹⁴⁶ Rather than rely on a rigid interpretation of Rule 606(b), the *Villar* court concluded that the Rule must not be applied so inflexibly as to bar juror testimony “in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant’s right to . . . an impartial jury.”¹⁴⁷

In *Kittle v. United States*,¹⁴⁸ the District of Columbia Court of Appeals upheld a trial judge’s denial of a motion for an evidentiary hearing in response to allegations of racial bias within jury deliberations.¹⁴⁹ The court reasoned that evidence of racial bias within deliberations was inadmissible to impeach the verdict because the evidence was not an “extraneous influence” under the plain meaning of Rule 606(b).¹⁵⁰ The court, however, determined that there was a countervailing interest in protecting the Sixth Amendment right to an impartial jury.¹⁵¹ The court rejected the *Tanner* procedural mechanisms as adequately protecting a defendant’s right to an impartial jury in the context of racial bias.¹⁵² To remedy disparity between the Rule’s restrictions and the substantial constitutional interests of the defendant, the court held that judges have the discretionary power in those “rare and exceptional circumstances where claims of racial or ethnic bias amongst jurors implicate the defendant’s right to an impartial jury.”¹⁵³ Despite the court’s constitutional exception, it found that the trial judge acted within her discretion under the circumstances to refuse the defendant an evidentiary hearing on the allegations.¹⁵⁴

3. *Tanner Revisited: FRE 606(b) and Juror Bias in Warger v. Shauers*

In 2014, the Court again considered whether it should permit an exception to the no-impeachment rule in *Warger v. Shauers*.¹⁵⁵ The

146. *Id.* at 88. *Cf.* *United States v. Heller*, 785 F.2d 1524, 1527–28 (11th Cir. 1986) (finding that where jurors had been openly anti-Semitic during deliberations, a new trial was necessary to prevent prejudice from entering the justice system). Although *Heller* was decided prior to *Tanner*, its holding reflects the view that in cases of extreme prejudice, procedural protections failed to protect the defendant from a biased jury. *Id.*

147. *Villar*, 586 F.3d at 87.

148. 65 A.3d 1144 (D.C. 2013).

149. *Id.* at 1148. The defendant, an African American, requested that the trial judge declare a mistrial, or alternatively, an investigation and evidentiary hearing about the impact of racially biased remarks towards African Americans made during deliberations. *Id.* at 1147–48.

150. *Id.* at 1151–52.

151. *Id.* at 1152.

152. *Id.* at 1154.

153. *Id.* at 1155–56 (quoting *United States v. Villar*, 586 F.3d 76, 88 (1st Cir. 2009)).

154. *Id.* at 1156.

155. 135 S. Ct. 521 (2014).

negligence case involved a car accident between a motorcycle and a truck, which severely injured the motorcycle driver, petitioner Gregory Warger.¹⁵⁶ During voir dire, a juror failed to disclose that she was partial towards the defendant because her daughter had been at fault in a car accident as well.¹⁵⁷ The Court unanimously determined that even if the plaintiff sought juror testimony to prove that the pro-defendant juror had lied during voir dire, the plaintiff was still seeking to circumvent the plain meaning of Rule 606(b) to question the validity of the verdict.¹⁵⁸ The Court noted that Congress had expressly rejected a version of Rule 606(b) that would have most likely allowed the introduction of Warger's evidence, but nonetheless chose a rule that reflected the more restrictive federal approach to protect the finality of verdicts.¹⁵⁹

The *Warger* Court reiterated that the *Tanner* safeguards sufficiently alleviated any constitutional concerns.¹⁶⁰ The Court reasoned that even though voir dire failed to prevent a biased jury member, the remaining, available safeguards were adequate to protect the integrity of deliberations from biased jurors.¹⁶¹ Though the Court declined to create a constitutional exception to Rule 606(b), the Court did not foreclose the possibility of an exception for bias if confronted with a case involving "juror bias so extreme that, almost by definition, the jury trial right has been abridged."¹⁶²

III. THE COURT'S REASONING

The Court recognized the opportunity to address such a case in *Pena-Rodriguez v. Colorado*.¹⁶³ Writing for the majority, Justice Kennedy held that where a juror makes a clear statement that indicated they relied on racial stereotypes or animus to convict a criminal defendant, the Constitution requires that the trial court be permitted to consider any evidence of the juror's statement.¹⁶⁴ The Court first discussed the pressing need to "purge racial prejudice from the administration of justice" and that such

156. *Id.* at 524.

157. *Id.* The juror stated during deliberations that "if her daughter had been sued, it would have ruined her life." *Id.* After jury members informed Warger's counsel, Warger moved for a new trial on the grounds that the juror member's dishonesty violated his Sixth Amendment right to a fair and impartial jury. *Id.*

158. *Id.* at 528.

159. *Id.* at 527.

160. *Id.* at 529. The Court also noted "any claim that Rule 606(b) is unconstitutional in circumstances such as these is foreclosed by our decision in *Tanner*." *Id.*

161. *Id.*

162. *Id.* at 529 n.3. The Court also noted "[i]f and when such a case arises, the Court can consider whether the usual safeguards are or are not sufficient to protect the integrity of the process." *Id.*

163. 137 S. Ct. 855 (2017).

164. *Id.* at 869.

discrimination is inconsistent with the American commitment to “equal dignity of all persons.”¹⁶⁵ Acknowledging that confronting racial animus in the justice system was not the sole responsibility of the legislature, the Court traced its historical interpretation of the Fourteenth Amendment as prohibiting racial discrimination within the jury system.¹⁶⁶ In order to eradicate state-sponsored racial discrimination, the Court has prohibited exclusion of prospective jurors on the basis of race,¹⁶⁷ as well as held that the Constitution sometimes demands a right to ask questions about racial bias during voir dire.¹⁶⁸ The Court concluded by noting that discrimination on the basis of race, “odious in all aspects, is especially pernicious in the administration of justice.”¹⁶⁹

The Court subsequently distinguished the present case from the drug and alcohol abuse in *Tanner*¹⁷⁰ and the pro-defendant juror in *Warger*.¹⁷¹ because those circumstances were deviations from normal jury behavior.¹⁷² While the Court acknowledged that those behaviors were troublesome and inappropriate, the Court noted that they were unique to a single jury or juror.¹⁷³ Unlike juror incompetence, the Court found that racial bias “implicates unique historical, constitutional, and institutional concerns.”¹⁷⁴ The Court reasoned that racial bias is a unique challenge to the justice system in that it has systematically undermined constitutional guarantees of equal treatment under the law.¹⁷⁵ The Court also noted that racial bias is functionally distinct because it is less perceptible to observation than other types of bias.¹⁷⁶ The Court observed that voir dire can be insufficient by both failing to expose racial bias through generic questions or by exacerbating any existing racial bias through more focused questions.¹⁷⁷ Additionally, the Court noted that the attending stigma of racial bias would make it difficult for one juror to accuse another of making racist statements during deliberations.¹⁷⁸ As a result of these differences, the Court reasoned that the

165. *Id.* at 867.

166. *Id.*

167. *Id.* at 867 (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)).

168. *Id.* at 868 (citing *Ham v. South Carolina*, 409 U.S. 524 (1973)).

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

170. *See supra* text accompanying notes 111–112.

171. *See supra* text accompanying note 157.

172. *Pena-Rodriguez*, 137 S. Ct. at 868.

173. *Id.* (finding that “neither history nor common experience show that the jury system is rife with mischief of these or similar kinds”).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 869 (citing *Rosales-Lopez v. United States*, 451 U.S. 182, 195 (1981) (Rehnquist, J., concurring in result)).

178. *Id.*

procedural safeguards relied upon in past cases to protect the Sixth Amendment are not sufficient to protect against racial bias.¹⁷⁹ Although the Court noted that *Tanner*'s safeguards are potentially less effective in detecting racial bias than other kinds of bias, that issue alone was not "dispositive" in deciding the present case.¹⁸⁰ Rather, the Court reasoned that a constitutional exception addressing racial bias was essential to preventing a "systemic loss of confidence" in jury verdicts rendered by a fair and impartial jury.¹⁸¹

The Court also narrowed the circumstances in which post-verdict inquiries into jury deliberations are permitted.¹⁸² To inquire into racially motivated juror misconduct post-verdict, there must be a demonstration that one or more jurors made overtly racially biased statements that "cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict."¹⁸³ The juror's statements must show that racial bias was an important motivating factor in the juror's vote to convict.¹⁸⁴ The Court noted that whether this initial showing has been satisfied is a discretionary decision of the trial court that must be made considering the totality of the circumstances.¹⁸⁵ State rules of professional ethics, as well as local court rules, would guide which evidence of racial bias during deliberations will be acquired and presented to the court.¹⁸⁶ The Court emphasized that these state and local rules often limit post-trial contact with jurors to provide protection to the jurors after they render a verdict but also allow jurors to contact counsel as in the present case.¹⁸⁷ Lastly, the Court noted that state adoptions of the Federal Rule of Evidence 606(b) were no longer bars to post-verdict investigations of racism during deliberations.¹⁸⁸

Justice Thomas dissented, asserting that the right to an impartial jury did not ensure the defendant had an equal right to overturn a jury verdict using juror testimony about misconduct or bias during deliberations.¹⁸⁹ Justice Thomas supported his assertion by tracing the common law development of the no-impeachment rule and detailing the states' various approaches to the

179. *Id.* at 868–69 (noting that jurors are reluctant to report inappropriate statements during deliberations for fear of accusing another juror of bigotry and that generic questions about juror impartiality might not expose racism).

180. *Id.* at 869.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* The Court noted that the trial court should consider the content and timing of the alleged racially biased statements as well as the reliability of the juror testimony. *Id.*

186. *Id.*

187. *Id.* at 869–70.

188. *Id.* at 870.

189. *Id.* at 872 (Thomas, J., dissenting).

admissibility of juror testimony on juror misconduct.¹⁹⁰ Although there were state deviations, Justice Thomas noted that by the latter half of the nineteenth century, “Lord Mansfield’s no-impeachment rule had become firmly entrenched in American law.”¹⁹¹ Justice Thomas argued that the majority failed to ascribe this common law history as dispositive in its opinion.¹⁹² Although Justice Thomas recognized that there are potentially valid reasons to depart from the no-impeachment rule, he asserted that the majority erred by circumventing the political process that codified Rule 606(b) and ignoring common law tradition.¹⁹³

In a separate dissent, joined by Chief Justice Roberts and Justice Thomas, Justice Alito acknowledged that there are valid policy and injustice concerns animating the majority opinion, but that ultimately the Court reached the incorrect decision.¹⁹⁴ Justice Alito’s primary concern was that the majority’s opinion would undermine the system of trial by jury that is functionally crucial to the legal system.¹⁹⁵ Although the Court distinguished the present case from *Tanner* and *Warger*, Justice Alito found this argument unpersuasive.¹⁹⁶ Justice Alito reasoned that the constitutionality of Rule 606(b) was well-settled in both *Tanner* and *Warger*, and the *Tanner* safeguards were not less effective for protecting a defendant’s Sixth Amendment interests “in cases involving racially biased jurors.”¹⁹⁷

Additionally, Justice Alito found no basis for the majority’s reasoning that the Constitution was less tolerant of racial bias than other forms of bias.¹⁹⁸ In particular, Justice Alito found that the plain language of the Sixth Amendment did not support the notion that the extent of constitutional protection depended on the nature of the jury’s partiality or bias.¹⁹⁹ Justice Alito acknowledged that the majority had pointed to prior holdings that endorsed constitutional protection against racial bias within the jury system but found this ultimately unpersuasive in supporting a preferential treatment of racial bias under the Constitution.²⁰⁰ Justice Alito also found that even though racial bias is especially troublesome, it was difficult to understand what role the “hierarchy of partiality or bias” has in a defendant’s right to be

190. *Id.* at 872–73.

191. *Id.* at 873.

192. *Id.* at 874.

193. *Id.*

194. *Id.* at 875 (Alito, J., dissenting).

195. *Id.*

196. *Id.* at 879.

197. *Id.* Justice Alito also noted that the effectiveness of these safeguards, especially in the case of voir dire, would be more appropriately assessed in the development of state and federal evidence rules. *Id.* at 881.

198. *Id.* at 882.

199. *Id.*

200. *Id.* at 883.

judged impartially.²⁰¹ If the Sixth Amendment required admission of juror testimony about racial bias within deliberations, Justice Alito reasoned that juror testimony alleging any other type of bias should be given equal treatment.²⁰²

IV. ANALYSIS

In *Pena-Rodriguez v. Colorado*, the Supreme Court held that the Constitution requires an exception to Federal Rule of Evidence 606(b) when a juror made a clear statement of reliance on racial bias to convict a criminal defendant.²⁰³ The Court's decision was correct because the holding furthered both the public policy goals of Rule 606(b) as well as the constitutional commitment to ensuring a defendant's Sixth Amendment rights.²⁰⁴ The Court's reasoning, however, was flawed because its holding should have been structured around the inadequacy of *Tanner*'s procedural protections to ensure a defendant's Sixth Amendment right to an impartial jury in cases of racial bias.²⁰⁵ The Court incorrectly focused on the unique historical and constitutional implications of racial bias in our criminal justice system as justification for the constitutional exception to Rule 606(b) and its state analogues. As a result of its inexplicable departure from the *Tanner* framework, it elevated racial bias above all other types of bias that can be equally destructive to a defendant's Sixth Amendment right to an impartial jury.²⁰⁶

A. *The Court's Holding Is Correct Because It Is Consistent with Rule 606(b) and Protects the Constitutional Right to a Fair and Impartial Jury*

The Court's constitutional exception to permit juror testimony on racial bias is consistent with the policy considerations animating the no-impeachment rule, as codified in Rule 606(b).²⁰⁷ The Court's holding is also

201. *Id.* at 883.

202. *Id.* at 883.

203. *Id.* at 869 (majority opinion).

204. *See infra* Part IV.A.

205. *See infra* Part IV.C. The Court listed four procedural protections for a defendant's Sixth Amendment right to an impartial jury in *Tanner v. United States*: (1) voir dire; (2) court and counsel observations of jurors; (3) non-juror evidence of misconduct; and (4) juror reports of misconduct before a verdict is rendered. 483 U.S. 107, 127 (1987). *See supra* Part II.C.1 for a discussion of *Tanner v. United States*.

206. *See infra* Part IV.C.

207. *See* FED. R. EVID. 606(b) advisory committee's note to 1972 proposed rules ("The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment." (citing *McDonald v. Pless*, 238 U.S. 264 (1915))).

consistent with prior Supreme Court case law, which allows the possibility of a constitutional exception to the no-impeachment rule when juror misconduct egregiously threatens the defendant's right to an impartial jury.²⁰⁸ First enumerated in *McDonald v. Pless*, and reflected in the legislative history of Rule 606(b), there are substantial policy considerations that support the rule against admission of jury testimony to impeach the verdict: preserving the finality of verdicts, preventing juror harassment by losing parties, and promoting free and frank jury discussion during deliberations.²⁰⁹ Rather than defy legislative intent, the Court's exception to Rule 606(b) strikes the proper balance between preserving these policy objectives and upholding a defendant's Sixth Amendment rights in the face of juror misconduct.²¹⁰ Additionally, the Court's holding is consistent with the broader goal of bolstering public confidence in the ability of the justice system to fulfill Sixth Amendment guarantees.

1. Preserving the Finality of Verdicts and Promoting Free and Frank Jury Discussion

Experiences from the nineteen federal and state jurisdictions that have allowed juror testimony in instances of bias during deliberations strongly suggest that the Court's exception will not undermine the finality of verdicts nor substantially increase the amount of post-trial litigation.²¹¹ Jurisdictions that have permitted exceptions to the no-impeachment rule in instances of racial bias continue to function without experiencing a "barrage of postverdict scrutiny of juror conduct."²¹² Among the nineteen state and federal jurisdictions that have allowed racial bias exceptions, only fourteen

208. See *Warger v. Shauers*, 135 S. Ct. 521, 529 n.3 (2014) (noting that in some instances of juror bias, the Court may determine whether the *Tanner* safeguards are constitutionally sufficient); *McDonald*, 238 U.S. at 268 (noting that there may be cases of egregious juror conduct that deserve an exception to the no-impeachment rule); *United States v. Reid*, 12 How. 361, 366 (1915) (noting that certain cases may arise where it would be unjust to refuse testimony on juror misconduct).

209. *McDonald*, 238 U.S. at 267–268; see S. REP. NO. 93-1277, at 14 (1974) ("Public policy requires a finality to litigation."). See *supra* Part II.B for the legislative history of the Rule.

210. Amanda R. Wolin, *What Happens in the Jury Room Stays in the Jury Room . . . but Should It?: A Conflict Between the Sixth Amendment and Federal Rule of Evidence 606(b)*, 60 U.C.L.A. L. REV. 262, 293–94 (2012).

211. See *Amicus Curiae* Brief of Ctr. of the Admin. of Crim. Law in Support of Petitioner at 21–22, *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606) [hereinafter *Amicus Brief of Ctr. of Admin. Crim. Law*] (finding that racial bias exceptions have minimally increased inquiry into verdicts); see also *id.* at app. A (identifying the nineteen jurisdictions which have allowed exceptions for the no-impeachment rule as well as the outcomes of thirty cases in these jurisdictions).

212. *Tanner v. United States*, 483 U.S. 107, 121 (1987); see *Brief of Amici Curiae Retired Judges in Support of Petition for a Writ of Certiorari* at 3, *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606) (asserting that policy concerns have not been reflected in the concrete experience of Massachusetts or other states with no-impeachment exceptions).

out of thirty cases in which these courts considered allegations of racial bias have resulted in new trials or further inquiries.²¹³ Additionally, no jurisdiction has seen more than five cases that involve inquiry into post-verdict racial bias, even among those jurisdictions that have adopted the exception.²¹⁴ These jurisdictions show that the Court's narrow exception to the no-impeachment rule will not open the floodgates for losing litigants who wish to impeach their verdicts, but simply allow testimony in those limited circumstances where racial bias was a motivating factor in conviction.²¹⁵

The Court's exception to Rule 606(b) only renders testimony about racial bias admissible if that testimony can be definitely proven.²¹⁶ Under the Court's holding, a post-verdict inquiry into juror testimony may proceed only upon a showing that "one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict."²¹⁷ Although the Court did not give specific guidance to the trial courts regarding what merits a threshold showing of racial animus as a significant motivating factor in the juror's vote to convict,²¹⁸ trial courts can implement the Court's constitutional exception in the same manner as courts that have received testimony under one of Rule 606(b)'s enumerated exceptions without inquiring into the mental processes of the jurors.²¹⁹ Racist behavior is often easier to corroborate or refute than extraneous or outside influence because the racist misconduct occurs in the presence of all other jurors during deliberations.²²⁰ As a result, Courts may implement a hearing process to merely confirm the veracity of allegations, thereby preserving the sanctity of jury deliberations and preventing any increased disruption to verdicts in compliance with legislative intent.²²¹

213. Amicus Brief of Ctr. of Admin. Crim. Law, *supra* note 211, at 22.

214. Kevin Zhao, Note, *The Choice Between Right and Easy: Pena-Rodriguez v. Colorado and the Necessity of a Racial Bias Exception to Rule 606(b)*, 12 DUKE J. CONST. L. & PUB. POL'Y 33, 45 n.119 (2016).

215. Amicus Brief of Ctr. on Admin. Crim. Law, *supra* note 211, at 21; *see* United States v. Villar, 586 F.3d 76, 87–88 (1st Cir. 2009) (emphasizing that "not every stray or isolated off-base statement made during deliberations requires a hearing").

216. *See Pena-Rodriguez*, 137 S. Ct. at 869 (holding that testimony is admissible only if there is a showing of overtly racist comments during deliberations).

217. *Id.*

218. *Id.*

219. *See* Wolin, *supra* note 210, at 296 (explaining that a juror can testify about the objective presence of biased conduct or comments without revealing the effect or internal mental processes as related to the verdict reached).

220. *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1599 (1988).

221. S. REP. NO. 93-1277, at 14 (1974) ("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."); *see* Wolin, *supra* note 210, at 296 ("[T]he policies would not be risked by permitting juror testimony concerning juror bias or prejudice to prove its presence and not its effect on the jury.").

Congress passed a version of Rule 606(b) which does permit jurors to testify on what occurred during deliberations on matters involving “extraneous prejudicial information” and “outside influence[s].”²²² Courts have allowed juror testimony about occurrences within deliberations under Rule 606(b)(2)(A) for accounts of a juror’s unsanctioned outside research on evidence in a case²²³ as well as relating personal knowledge of the defendant to the jury.²²⁴ The trial judge has broad discretion to create a sufficient process to determine whether the misconduct occurred and whether it was actually prejudicial.²²⁵ When a litigant asserts that there was juror misconduct that improperly influenced the jury during deliberations, the trial judge can choose whether and how to receive affidavits alleging the misconduct and determine whether a hearing is necessary to evaluate such claims.²²⁶ Inquiry at the hearing is limited to establishing the objective verification of the alleged occurrence but may not extend into the realm of the occurrence’s effects on the jury.²²⁷ The trial judge must then attempt to “reach a subjective conclusion based on objective facts” for whether a new trial is merited under all the circumstances.²²⁸ Using these same techniques, trial courts are already equipped to investigate objectively verifiable instances of juror bias under the Court’s constitutional exception without undermining the finality of verdicts or the privacy of jury deliberations.²²⁹

222. FED. R. EVID. 606(b); see *Virgin Islands v. Gereau*, 523 F.2d 140, 148–49 (3d Cir. 1975) (noting that Rule’s exceptions for extraneous information incorporated the courts’ early awareness that any rule that flatly prohibited receiving juror testimony concerning deliberations “contravened another public policy: that of ‘redressing the injury of the private litigant’ where a verdict was reached by a jury not impartial” (quoting *McDonald v. Pless*, 238 U.S. 264, 267 (1915))).

223. *Kiser v. Bryant Elec.*, 695 F.2d 207, 214–15 (6th Cir. 1982) (admitting testimony for purposes of new trial that a juror conducted an experiment regarding aluminum wires at issue in the case and reported his findings back to the jury during deliberations).

224. *United States v. Howard*, 506 F.2d 865, 866 (5th Cir. 1975) (finding that an affidavit alleging a juror had told members of the jury during deliberations that the defendant had been “in trouble” several times required further inquiry to determine whether or not prejudice had influenced the verdict).

225. *United States v. Ortiz-Arrigoitia*, 996 F.2d 436, 443 (1st Cir. 1993) (“The trial judge is not, however, shackled to a rigid and unyielding set [of] rules and procedures that compel any particular form or scope of inquiry.”).

226. *United States v. Davis*, 60 F.3d 1479, 1483–84 (10th Cir. 1995). In *Davis*, the court found that the district court did not abuse its discretion by denying an evidentiary hearing on extraneous information introduced to the jurors but detailed the procedures for admitting such testimony for purposes of obtaining a new trial. *Id.*

227. 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, 532 (1988) (“Courts have correctly reasoned that because losing litigants are prohibited from presenting evidence of the mental or emotional processes of jurors, the trial judge should likewise be barred from making such inquiries and may only determine prejudice by drawing reasonable inferences.”).

228. *Id.*

229. Amicus Brief of Ctr. of Admin. Crim. Law, *supra* note 211, at 17.

Similarly, jurisdictions that have allowed post-verdict testimony on racial bias during deliberations have taken narrow approaches to identifying and inquiring into juror testimony.²³⁰ These jurisdictions also demonstrate that the court is capable of “discern[ing] the dividing line between [statements] that are ‘clear[ly]’ based on racial or ethnic bias and those that are . . . ambiguous.”²³¹ Courts can distinguish between comments that merit a new trial and those that do not by utilizing harmless-error review, which “determin[es] whether comments made a difference in the outcome of the trial.”²³² Courts that have applied this exception prior to *Pena-Rodriguez* decision have clarified that impeaching a verdict through juror testimony of racial bias will not be granted liberally.²³³ Collectively, these different approaches provide a structured inquiry into juror testimony without compromising the privacy of jury deliberations or disrupting the finality of verdicts.²³⁴ As a result, the Court’s exception is still consistent with finality of verdicts and protection of free and frank discussion, while addressing valid concerns about racial prejudice as an impediment to the Sixth Amendment.²³⁵

2. Juror Harassment

The Court’s broader application of Rule 606(b) will also not increase post-trial juror harassment by those seeking to invalidate verdicts through

230. Brief for Amici Curiae Professors of Law in Support of Petitioner at 15–16, *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606).

231. *Pena-Rodriguez*, 137 S. Ct. 885, 884 (2017) (Alito, J., dissenting) (third alteration in original) (observing that courts may be unable to distinguish between prejudicial statements and those that are merely ambiguous).

232. Amicus Brief of Ctr. of Admin. Crim. Law, *supra* note 211, at 25–26; *see* *United States v. Shalhout*, 507 F. App’x 201, 206–07 (3d Cir. 2012) (finding that racially biased remarks by juror were stray isolated comments that did not implicate the defendant’s Sixth Amendment rights nor warrant a constitutional exception under Rule 606(b)); *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987) (determining that there was not a “substantial probability that the alleged racial slur made a difference in the outcome of the trial”); *State v. Hunter*, 463 S.E.2d 314, 316 (S.C. 1995) (holding that the court was “unconvinced what occurred in the jury room demonstrated racial prejudice toward [the defendant], or that [the juror] felt threatened or coerced into voting guilty”).

233. *See* *State v. Santiago*, 715 A.2d 1, 20 n.21 (Conn. 1998) (citing *State v. Newsome*, 682 A.2d 972, 992 (1996)) (recognizing that a new trial is only merited in instances where juror misconduct has prejudiced the defendant to the extent that he has not received a fair trial).

234. *See supra* notes 211–215 and accompanying text (detailing the minimal increase in post-verdict litigation in jurisdictions that allow exceptions to the no-impeachment rule).

235. *See* Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 165, 203 (2011) (“Adoption of the . . . exception would preserve the finality of the vast majority of verdicts as well as . . . address[ing] valid concerns about . . . the injection of bias and misrepresentation into juror deliberations.”).

juror testimony.²³⁶ In addition to the ABA rules,²³⁷ state and federal rules regarding ethics and post-trial jury contact continue to police the interactions between counsel and jurors post-trial.²³⁸ Many local rules prohibit parties and counsel from contacting a juror absent a court order while other rules prohibit parties and their counsel from contacting jurors in a manner that amounts to harassment.²³⁹ The Court's exception is also unlikely to increase harassment because the existing exceptions to Rule 606(b) have already given defeated parties an avenue to harass juries.²⁴⁰ Racially biased comments during deliberations are easily verifiable through juror corroboration without inquiring into the effect or the mental processes of the jurors.²⁴¹ As a result, parties will not receive a relaxed standard of inquiry and are not more likely to seek to impeach the verdict through the Court's constitutional exception than those under the existing exceptions to Rule 606(b).

In courts that have allowed exceptions for racial bias, jurors had proactively contacted defense counsel of their own volition and volunteered to provide affidavits or testimony on juror misconduct.²⁴² In some jurisdictions, if a party fails to follow the sanctioned procedures for obtaining evidence of jury misconduct, the court has expressed that it will not consider

236. *Developments in the Law—Race and the Criminal Process*, *supra* note 220, at 1599. *Contra Pena-Rodriguez*, 137 S. Ct. at 885 (Alito, J., dissenting) (finding that the exception will prompt losing parties to contact and question jurors post-verdict).

237. MODEL RULES OF PROF'L CONDUCT r.3.5 (2002) (providing general rules for contact with jurors); *Developments in the Law—Race and the Criminal Process*, *supra* note 220, at 1599 (noting that the ABA Model Code of Professional Responsibility prohibits a lawyer from harassing jurors).

238. *Pena-Rodriguez*, 137 S. Ct. at 869 (majority opinion) (commenting that many jurisdictions have rules that prohibit or restrict post-verdict contact with jurors).

239. *See Crump*, *supra* note 227, at 526–28 (providing overview of federal local rules and restrictions on contacting jurors); *see, e.g.*, JOINT KY. CIV. PRAC. R. 47.1(a) (“Unless permitted by the Court, no person, party or attorney, nor representative of a party or attorney, may contact, interview, or communicate with any juror before, during, or after trial.”); E.D.N.C. CIV. R. 47.1(c) (“Following the discharge of a jury from further consideration of a case, no attorney or party litigant shall . . . ask questions of or make comments to a member of that jury . . . that are calculated merely to harass or embarrass such a juror”); S.D. TEX. CRIM. R. 24.1 (“Except with leave of Court, no attorney, party, nor agent of either of them may communicate with a former juror to obtain evidence of misconduct in the jury’s deliberations.”).

240. *Developments in the Law—Race and the Criminal Process*, *supra* note 220, at 1599.

241. *Supra* note 220 and accompanying text.

242. Ashok Chandran, Note, *Color in the “Black Box”: Addressing Racism in Juror Deliberations*, 5 COLUM. J. RACE & L. 28, 50 (2014) (“In every case that has addressed the issue so far, petitioners have only raised their claims once a member of the jury actively reached out and alerted them of racist comments or behaviors that took place.”); *see, e.g.*, *Warger v. Shauers*, 135 S. Ct. 521, 524 (2014) (noting that the juror contacted defense counsel post-verdict to express concern over another juror’s pro-defendant comments during deliberations); *United States v. Villar*, 586 F.3d 76, 81 (1st Cir. 2009) (noting that a juror e-mailed the convicted defendant’s counsel post-verdict to inform counsel of anti-Hispanic commentary during deliberations).

a claim of jury misconduct based on the improper methods of obtaining testimony.²⁴³

3. *Public Confidence in the Jury System*

There are sound public policy goals that legitimize current jurisprudence prohibiting juror testimony as a means to impeach the verdict, as codified in Rule 606(b).²⁴⁴ Allowing verdicts to go unquestioned without further investigation after parties have made legitimate allegations of racial bias, however, violates even minimum Sixth Amendment requirements.²⁴⁵ Recent studies have identified procedural justice, that is, perceived fairness of the manner in which the government exercises authority, as one of the “most important factors in shaping individuals’ views on a legal system’s legitimacy.”²⁴⁶ When courts have denied defendants the ability to inquire into allegations of racial bias during jury deliberations, it undermines the justice system’s perceived legitimacy by potentially denying the defendant a *fair* jury trial.²⁴⁷ The no-impeachment rule as applied in cases of racial bias is perceived as the court’s refusal to protect defendants of color against racial bias in jury deliberations, leading to continued distrust and lack of confidence in the criminal justice system.²⁴⁸ As applied prior to the Court’s holding in *Pena-Rodriguez*, Rule 606(b) “actually had the converse effect [of] delegitimizing courts in minority communities.”²⁴⁹

Conversely, the Court’s constitutional exception to examine potential racial bias in jury deliberations is a step toward remedying public confidence that the justice system can assure a fair and impartial trial by jury for

243. See *Impeachment of Verdicts by Jurors—Rule of Evidence 606(b)*, 4 WM. MITCHELL L. REV. 417, 437–38 (1978) (detailing Minnesota state court approach to receiving post-verdict juror testimony in which a party must “wait until they are approached by a juror or other person with knowledge of possible jury misconduct” or petition the Court for a *Schwartz* hearing in which jurors can be summoned and questioned).

244. See *supra* note 209 and accompanying text.

245. Leah S.P. Rabin, Comment, *The Public Injury of an Imperfect Trial: Fulfilling the Promises of Tanner and the Sixth Amendment Through Post-Verdict Inquiry into Truthfulness at Voir Dire*, 14 U. PA. J. CONST. L. 537, 555 (2011) (“[A]llowing verdicts to stand without inquiry after legitimate allegations of juror racism have been presented is an affront to the very foundation of our judicial system.”).

246. Chandran, *supra* note 242, at 48 (citing Tom R. Tyler & Jonathan Jackson, *Future Challenges in the Study of Legitimacy and Criminal Justice*, in LEGITIMACY AND CRIMINAL JUSTICE: AN INTERNATIONAL EXPLORATION 83, 83 (Justice Tankebe & Allison Liebling eds., 2013)).

247. Chandran, *supra* note 242, at 50; see *Developments in the Law—Race and the Criminal Process*, *supra* note 220, at 1600 (noting that refusing to admit evidence of overt racism within jury deliberations to overturn verdicts has a “demoralizing effect on public confidence.”).

248. Chandran, *supra* note 242, at 50 (noting that “[d]ecisions like *Bennally* can be seen as further microaggressions; they send clear messages that the institution of ‘law’ does not care about the concerns” of minorities).

249. Chandran, *supra* note 242, at 50.

defendants of all races.²⁵⁰ The Supreme Court is already applying its *Pena-Rodriguez* constitutional exception by allowing defendants to expose instances of racial bias within jury deliberations.²⁵¹ On September 26, 2017, the Court issued a stay of execution for an African American death row inmate Keith Tharpe while it considered Tharpe's appeal.²⁵² Tharpe's attorneys, relying on the holding in *Pena-Rodriguez*, assert that juror Barney Gattie's racial bias towards African Americans was a violation of Tharpe's right to an impartial jury under the Sixth Amendment.²⁵³ Although Gattie represented during jury selection that he could be fair and impartial during the trial, Gattie signed an affidavit seven years after the trial in which he used the n-word with reference to Tharpe and other African Americans, and questioned whether "black people even have souls."²⁵⁴ On January 8, 2018, the Court issued an unsigned opinion remanding the case to the lower courts to determine whether Tharpe should be permitted to appeal the district court's denial of his motion to reopen his case.²⁵⁵ The Court noted that there was a "strong factual basis" that racial bias affected Gattie's decision to vote for the death penalty in Tharpe's case.²⁵⁶ Prior to *Pena-Rodriguez*, Tharpe's attorneys were unable to present evidence of Gattie's racial bias under Georgia's no-impeachment rule.²⁵⁷ The Court's exception offers protections to defendants who were unable to present evidence of Sixth Amendment violations before *Pena-Rodriguez*, as well as continued protections for a defendant's fundamental constitutional rights against future racial bias within

250. See *Kittle v. United States*, 65 A.3d 1144, 1155 (D.C. 2013) (citing *State v. Santiago*, 715 A.2d 1, 19–20 (Conn. 1998)) ("[I]f we required trial courts to ignore all allegations that jurors expressed racial or ethnic bias during deliberations, we would jeopardize the public's confidence in the fair administration of justice."); *Developments in the Law—Race and the Criminal Process*, supra note 103, at 1600 ("Permitting defendants to expose racially tainted deliberations gives the public—particularly minority citizens—more reason, not less, to trust the final results of the criminal justice system.").

251. Dakin Andone & Emanuella Grinberg, *SCOTUS Stays Execution of Georgia Death Row Inmate amid Claims of Racial Bias*, CNN (Sept. 27, 2017, 12:57 AM), <http://www.cnn.com/2017/09/26/us/keith-tharpe-georgia-execution/index.html>.

252. *Id.* Although Chief Justice Roberts previously joined Justice Alito's dissent in *Pena-Rodriguez*, the Chief Justice did not join Justices Thomas, Alito, or Gorsuch in their dissent of the stay of execution. *Id.*

253. *Id.* Tharpe's attorneys also assert that Tharpe's low IQ makes him ineligible for the death penalty under federal law. *Id.*

254. *Id.*

255. *Tharpe v. Sellers*, No. 17–6075, slip op. at 2–3 (U.S. Jan. 8, 2018) (per curiam).

256. *Id.* at 2.

257. *Id.*

jury deliberations.²⁵⁸ The Court correctly recognized that a rigid application of Rule 606(b) is contrary to the goals the Rule purports to achieve.²⁵⁹

B. The Court Failed to Base Its Holding on the Inadequacy of Tanner Sixth Amendment Protections

The Court's reasoning ultimately fails to persuasively support its holding in *Pena-Rodriguez* because it ignores the insufficiency of *Tanner* safeguards to protect a defendant's Sixth Amendment rights as controlling in Rule 606(b) jurisprudence.²⁶⁰ In both *Tanner* and *Warger*, the Court stated that refusing post-verdict juror testimony about juror misconduct was not a Sixth Amendment violation because there were safety valves in place to ensure an impartial jury.²⁶¹ If the Court had based its holding on the insufficiency of *Tanner* safeguards to protect a defendant's Sixth Amendment rights, it would have "fit neatly into [the] Court's broader jurisprudence concerning the constitutionality of evidence rules."²⁶² The Court incorrectly reasoned that because of the unique historical and constitutional implications of racial bias in the jury system, racial bias should necessarily be placed within the highest tier of the "hierarchy of partiality or bias" that the Court has inadvertently constructed.²⁶³

The Supreme Court's decisions in both *Tanner* and *Warger* affirmed that a defendant's right to an unimpaired jury was sufficiently protected by four aspects of trial: voir dire, court and counsel observation during trial, potential use of nonjuror evidence of misconduct, and the ability of jurors to report misconduct before a verdict is rendered.²⁶⁴ After *Tanner*, courts refused to acknowledge constitutional challenges to Rule 606(b) on the grounds that the *Tanner* protections adequately assured an individual a fair and impartial jury.²⁶⁵ Despite the subsequent reliance on the *Tanner* framework as applied to Rule 606(b), the Court incorrectly chose to decide the case solely on societal concerns rather than address the inadequacy of the

258. See *Pena-Rodriguez v. People*, 350 P.3d 287, 294 (Colo. 2015), *rev'd*, 137 S. Ct. 855 (2017) (noting that a defendant's constitutional right to an impartial jury is of paramount importance); *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986) (finding that prejudice in a judicial context prevents the impartial decision-making that the Sixth Amendment requires).

259. See *supra* text accompanying notes 93–94.

260. See *supra* text accompanying notes 90–92.

261. *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014); *Tanner v. United States*, 483 U.S. 107, 127 (1987).

262. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 879 (2017) (Alito, J., dissenting).

263. *Id.* at 883; see also *supra* notes 147–48 and accompanying text (noting that there is no constitutional or legislative basis for the Court's reasoning to elevate racism above other forms of bias).

264. *Warger*, 135 S. Ct. at 529 (asserting that the enumerated protections in *Tanner* were a similarly adequate means of assuring juror impartiality).

265. See *supra* note 209.

Tanner protections.²⁶⁶ The Court's holding solely recognizes racial bias as deserving a constitutional exception to the no-impeachment rule on the grounds that racism has been and continues to be a systematic and recurring evil throughout the history of our criminal justice system.²⁶⁷ As a result, the holding suggests that the Sixth Amendment prioritizes racially or ethnically biased juror misconduct above all other types of bias that could equally taint jury deliberations.²⁶⁸ Additionally, the Court's reliance on the unique role of racial bias as determinative gives rise to the dissent's main point of contention: If the Sixth Amendment requires admission of juror testimony about juror bias, all statements or conduct showing bias should be given equal weight.²⁶⁹

The Supreme Court should have grounded its opinion instead on the insufficiency of the *Tanner* Court protections in the context of racially or ethnically biased comments made during deliberations.²⁷⁰ If the Court had based its holding on the inadequacy of *Tanner* protections in the context of racial bias, it would not have construed the Sixth Amendment as giving preference to a single type of bias. A holding based on the ultimate failure of the *Tanner* safeguards to protect a defendant's Sixth Amendment right to an impartial jury would not give constitutional preference to racial bias, but would grant an exception based on the Court's accepted framework of analyzing the constitutionality of Rule 606(b) as applied in *Tanner*. Though the Court did discuss the *Tanner* safeguards as inadequate to protect against racial bias, the Court's discussion was incidental to the case rather than determinative of the outcome.²⁷¹

First, the Court should have more thoroughly addressed voir dire as a faulty mechanism for detecting overt racism in potential jury members.²⁷² Voir dire is often performed by the judge rather than defense counsel in both

266. See *Pena-Rodriguez*, 137 S. Ct. at 882 (Alito, J., dissenting) ("In short, the Court provides no good reason to depart from the calculus made in *Tanner* and *Warger*.").

267. *Pena-Rodriguez*, 137 S. Ct. at 868 (majority opinion) ("[R]acial bias, a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice.").

268. See *id.* at 882–883 (Alito, J., dissenting) (noting that the majority's reasoning is unsupported by the Sixth Amendment, which does not recognize a hierarchy of partiality or bias).

269. See *id.* at 883 (finding that the Court's preferential treatment to racial bias subjects other types of juror partiality to a lesser constitutional ranking).

270. See *supra* note 63 and accompanying text. But see *Tanner v. United States*, 483 U.S. 107, 127 (1987) (finding that Sixth Amendment interests are protected by voir dire, jury observations by court and counsel, and admissibility of nonjuror evidence of misconduct).

271. See *Pena-Rodriguez*, 137 S. Ct. at 869 (majority opinion) ("The recognition that certain types of *Tanner* safeguards may be less effective in rooting out racial bias than other kinds of bias is not dispositive.").

272. See *United States v. Villar*, 586 F.3d 76, 87 (1st Cir. 2009) ("While . . . voir dire of the jurors can help to disclose prejudice, it has shortcomings because some jurors may be reluctant to admit racial bias.").

state and federal courts.²⁷³ Though unintentional, judges may inadvertently subject potential jurors to social pressure to conform to the notion of a fair and impartial juror because the judge is perceived as an authority figure even if the potential juror may be neither “fair” nor “impartial.”²⁷⁴ Once the jurors retire to the deliberation room, they might be more likely to reveal biases in the natural course of deliberations rather than when asked if they are “fair and impartial” in open court.²⁷⁵ Additionally, racist attitudes are often not overtly expressed but are a result of implicit bias that a juror may not be cognizant of during voir dire.²⁷⁶ As a result, direct questions on voir dire inquiring specifically into racial bias are unlikely to identify racist jurors through the voir dire process or observation of court and counsel.²⁷⁷ However, research suggests that implicit bias may be combatted by “making race salient or calling attention to the possibility of racial bias” to “encourage prospective jurors to reflect on their own possible biases and consciously counter what would otherwise be automatic stereotype-congruent responses.”²⁷⁸

Even if courts were able to more accurately identify racist jurors through focused questioning during voir dire,²⁷⁹ defendants are not guaranteed the ability to utilize these specific voir dire techniques.²⁸⁰ Although a defendant has a constitutional right to conduct voir dire into racial bias in all capital cases where the defendant is charged with a violent interracial crime,²⁸¹ the defendant does not have that same right in all other instances. In *Ristaino v. Ross*,²⁸² the Court held that voir dire directed at racial prejudice was not constitutionally required absent special circumstances of the case that suggest a significant likelihood of prejudice by the jurors.²⁸³ The Court clarified that

273. Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843, 848 (2015).

274. Wolin, *supra* note 210, at 287 (noting that “if the judge asks potential jurors to be fair and impartial, it is likely that many jurors will declare they are both” because potential jurors perceive the judge as an authority figure).

275. *Id.* at 287–88.

276. Lee, *supra* note 273, at 860 (“[S]ocial scientists have convincingly demonstrated that bias is largely unconscious and often at odds with conscious beliefs.”); see West, *supra* note 235, at 201 (“Because jurors may have difficulty recognizing or admitting their biases, the potential for misrepresentations of bias may be even greater than it is for other types of juror representations.”).

277. Lee, *supra* note 273, at 846. *But see id.* at 846–47 (asserting that a series of open-ended questions during voir dire might mitigate effects of implicit bias).

278. *Id.* at 867.

279. *See id.* at 866–69 (finding that courts can combat implicit bias during voir dire by raising awareness of implicit bias through open ended questions and avoiding negative stereotyping).

280. *See Turner v. Murray*, 476 U.S. 28, 36–37 (1986) (holding that a capital defendant charged with an interracial crime is entitled to have potential jurors asked about racial bias during voir dire).

281. *Id.*

282. 424 U.S. 589 (1976).

283. *Id.* at 597.

the mere fact that the defendant was a person of color and the victim of the alleged crimes was white was not sufficient to constitute a significant likelihood of biased jurors.²⁸⁴ Though the *Ristaino* Court noted that it was a wiser course of action to conduct specific questioning on racial bias if requested by the defendant,²⁸⁵ the Court in *Rosales-Lopez v. United States*²⁸⁶ upheld a federal court's decision to deny a defendant's request for race-specific questioning toward people of Mexican descent in an illegal immigration case.²⁸⁷ As a result, the Court has unequivocally stated that there is no constitutional requirement for voir dire on racial prejudice absent special circumstances or a capital offense.²⁸⁸

Additionally, juror testimony in most cases is the only form of evidence that an individual can submit after trial to confirm that jurors made biased statements during deliberations.²⁸⁹ In order to insulate the jury from public or judicial scrutiny and promote free and frank jury discussions, no outside observers may monitor the deliberations for prejudice.²⁹⁰ Subsequently, the only way to obtain objective evidence of bias during deliberations is through a juror's own testimony rather than observations of court or counsel.²⁹¹ As a result, visual observations of the jury by the court and counsel are unlikely to detect jurors harboring racial bias either.²⁹² While court observations or non-juror evidence of misconduct might be adequate to detect juror *incompetence*, such as drug and alcohol use, they are minimally effective in detecting racial bias in the jury.²⁹³

The last *Tanner* safeguard—jurors reporting misconduct before the verdict is reached—is also unlikely to protect a defendant from racial bias during deliberations.²⁹⁴ Unless specifically instructed by the court, jurors may not realize that they have the ability to report juror misconduct or that

284. *Id.*

285. *Id.* at 597 n. 9.

286. 451 U.S. 182 (1981).

287. *Id.* at 193–94.

288. *See id.* at 194 (finding that it was not a reversible error to refuse the defendant criminal racial questioning during voir dire because there were no allegations of racial or ethnic bias during trial and no violent crimes committed).

289. *Developments in the Law—Race and the Criminal Process*, *supra* note 220, at 1596.

290. *See United States v. Benally*, 546 F.3d 1230, 1233–34 (10th Cir. 2008) (“[T]he inner workings and deliberation of the jury are deliberately insulated . . .”).

291. *Developments in the Law—Race and the Criminal Process*, *supra* note 220, at 1599 (noting that juror testimony about biased misconduct is easily verified).

292. *United States v. Villar*, 586 F.3d 76, 87 (1st Cir. 2009).

293. *See id.* (“[N]on-jurors are more likely to report inappropriate conduct—such as alcohol or drug use—among jurors than racial statements uttered during deliberations to which they are not privy.”); Lee, *supra* note 273, at 869–70 (noting that directly asking a juror about potential bias would have a “patronizing” effect on the juror).

294. *See Kittle v. United States*, 65 A.3d 1144, 1155 (D.C. 2013) (observing that the *Tanner* shortcomings include a juror's reluctance to report racial bias before the verdict is reached).

they will be barred from providing testimony after the verdict is reached under Rule 606(b).²⁹⁵ Providing improved jury instructions to jurors may still not cure a defendant's failure to report juror misconduct prior to the verdict. First, jurors may rationalize racism during deliberations and not report it to the court because the juror ultimately agrees with the verdict.²⁹⁶ Jurors may also be unwilling to confront fellow jurors or report juror misbehavior when they may still have to interact with the offending juror for the duration of the trial.²⁹⁷ Collectively, the four *Tanner* safeguards are insufficient in the context of racial bias to ensure a defendant's Sixth Amendment right to an impartial jury in criminal proceedings.

V. CONCLUSION

In *Pena-Rodriguez v. Colorado*, the Supreme Court held that post-verdict juror testimony on racial bias made by a juror during the deliberations process is a constitutionally mandated exception under Federal Rule of Evidence 606(b) when the juror made a clear statement that shows they relied on racial prejudice or animus to convict a defendant.²⁹⁸ The Court correctly decided the case because precluding jurors from impeaching their verdicts through evidence of racial bias violates an individual's Sixth Amendment right to a fair and impartial jury.²⁹⁹ The Court, however, incorrectly based its constitutional exception on the need to address institutional evils of racism in the criminal justice system. Rather, the Court should have created the constitutional exception to Rule 606(b) solely because of the *Tanner* safeguards' inability to protect a defendant's Sixth Amendment right in the context of racial bias during deliberations.³⁰⁰

295. Wolin, *supra* note 210, at 282.

296. See Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1033 (2008) (recounting a juror's experience in deliberations when other members of the jury were using derogatory gestures and language towards three African American plaintiffs).

297. See *Kittle*, 65 A.3d at 1155 (noting that jurors may be unwilling to come forward out of an unwillingness to confront their peers about racist conduct).

298. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017) (majority opinion).

299. See *supra* Part IV.A.

300. See *supra* Part IV.B.