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“Protect the Jury or Eliminate Racial Bias? How to Proceed After Peña-Rodriguez”

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In March 2017, the Supreme Court created a rare exception to a well-known evidence rule called the “no-impeachment” rule. The rule itself states that “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; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment.”^[2] The rule then contains three exceptions allowing a juror to testify: (1) regarding extraneous prejudicial information, (2) about the presence of an outside influence that improperly affected the jury, or (3) regarding a mistake made in entering the verdict.^[3]

Over the years, the Supreme Court has seemed reluctant to create further exceptions to this rule, doing so only for “the gravest and most important cases” where excluding juror testimony about the happenstance of the jury’s deliberations might violate “the plainest principles of justice.”^[4] It is logical, then, that a situation where a defendant’s constitutional right to an impartial jury might be hindered by a juror’s racial bias could be what the Court would consider a grave violation of “the plainest principles of justice.”^[5] This is exactly the kind of issue that was raised to the Supreme Court in *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

The petitioner in *Peña-Rodriguez* asked the Court to create a constitutional exception to no-impeachment for the purpose of preventing racial bias in juries from affecting verdicts. Writing for the majority, Justice Kennedy declared that no-impeachment laws (both on the federal and state levels) that totally bar testimony regarding jury deliberations are *invalidated* upon a finding that a juror made a “clear statement ... [indicating] he or she relied on racial stereotypes or animus to convict a criminal defendant.”^[6]

This new development in the law revolving around no-impeachment issues presents many big questions for courts, and legislatures, across the country to wrestle with. For example, in a recent Sixth Circuit case, *Peña-Rodriguez* was cited by the defendants seeking a new trial because of the racially insensitive remarks made by the jury foreman.^[7] *Peña-Rodriguez* established that evidence of a juror’s remarks that show racial stereotype or animus warrant a reversal of the verdict, however, the case did little more than this and leaves a lot up to lower court interpretation.^[8] The court in *United States v. Robinson*, for example, narrowly interprets *Peña-Rodriguez*, holding that the remarks at issue did not “overcome the no-impeachment rule.”^[9] If the remarks in *Robinson* were not enough for the Sixth Circuit to find warranted the exception created by *Peña-Rodriguez*, then what *would be* enough?^[10] This is one example that showcases some of the big questions accompanying the future of the no-impeachment rule around



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the country. How severe must the racism in jury deliberations be for courts to overturn the verdict? Is maintaining the “finality of the jury process” really *that* important when the risk of doing so might result in a defendant’s constitutional rights being infringed?^[11] Can attorneys actually approach jurors after a trial to ask if there was any racism going on in the jury room?

On first blush, the logical answer to that last question would be “no”, it would be improper for an attorney to do that. But *Peña-Rodriguez* did not explicitly bar that.^[12] In the case, jury members came forward after deliberations to reveal the racism that had occurred, with no prodding from attorneys at all. But some jurors may not feel so inclined to come forward.^[13] The ramifications of *Peña-Rodriguez*, combined with the Court’s previous decisions on the no-impeachment rule could lead to some tension between allowing the jury process to have the freedom it needs and eliminating racial bias from the justice system. In *Tanner v. United States*, for example, Justice O’Connor commented on the importance of preventing juror exposure to undue harassment from the defeated party, which could influence future proceedings.^[14] Yet, in *Peña-Rodriguez*, the Court makes clear that racial bias is a “serious, warping influence on a jury”.^[15] If and when this comes into conflict, how will that contention be addressed?

This and many other big and important questions are now on the table following *Peña-Rodriguez*. It will be interesting to follow the issue going forward, to watch how courts and legislatures across the country handle this new constitutional exception to the no-impeachment rule.

^[1] JD candidate, expected May 2019.

^[2] USCS Fed Rules Evid R 606(b)(1).

^[3] USCS Fed Rules Evid R 606(b)(2).

^[4] *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 863 (2017); *United States v. Reid*, 53 U.S. 361 (1852); *see also Tanner v. United States*, 483 U.S. 107 (1987) and *Warger v. Shauers*, 135 S. Ct. 521 (2014).

^[5] US Constitution, Sixth Amendment; *see also Reid*, 53 U.S. 361.

^[6] *See Peña-Rodriguez*, 137 S. Ct. at 855.

^[7] *See United States v. Robinson*, 872 F.3d 760, 764 (6th Cir. 2017).

^[8] *See Peña-Rodriguez*, 137 S. Ct. at 855; *see also Robinson*, 872 F.3d at 767.

^[9] *See Robinson*, 872 F.3d at 771.

^[10] The racially charged remarks at issue: “The jury foreperson—a white woman—reportedly told [two African American jurors] that she “[found] it strange that the colored women are the only two that can’t see” that the defendants were guilty, and accused [those jurors] of deliberately trying to hang the jury. [One juror] reported being so angered by this remark that her “eyes started watering” and she wanted to “smack the shit out of” the foreperson”. *See Robinson*, 872 F.3d at 768.

^[11] *See Peña*, 137 S. Ct. at 866; *see also Tanner*, 483 U.S. at 120-21; *see generally McDonald*, 238 U.S. at 267-68.

^[12] *See Peña-Rodriguez*, 137 S. Ct. 855.

^[13] *Id.*

^[14] *See Tanner*, 483 U.S. 107.

^[15] *See Garrett Epps, The Supreme Court Confronts Racism in the Jury Room*, THE ATLANTIC (Mar. 16, 2017), <https://www.theatlantic.com/politics/archive/2017/03/the-supreme-court-confronts-racism-in-the-jury-room/519747/>.

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