

THE CHOICE BETWEEN RIGHT AND EASY: *PENA-RODRIGUEZ V. COLORADO* AND THE NECESSITY OF A RACIAL BIAS EXCEPTION TO RULE 606(B)

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INTRODUCTION

In 1944, George Stinney Jr., a fourteen-year-old black boy, was tried for the murders of two young, white girls.¹ His trial lasted just one day, and the all-white jury deliberated for just ten minutes before finding him guilty and sentencing him to death.² Less than three months later, Stinney was executed by electrocution at the age of fourteen.³ Sixty years later, a judge posthumously vacated this conviction, citing constitutional flaws within the case, and noting that Stinney’s trial was a “truly unfortunate episode in our history.”⁴

It may be easy or convenient to believe that our justice system is perfect—that it truly delivers justice—and that each and every criminal defendant deprived of life or liberty is so deprived based on evidence of their guilt rather than the color of his or her skin. However, history has shown that this is not the case. In *Pena-Rodriguez v. Colorado*,⁵ the Supreme Court faces a stark choice: ensure that defendants are not convicted based on their race, or sweep evident racial bias under the rug of Rule 606(b).

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1. Julia Dahl, S.C. Boy Executed for 1944 Murder is Exonerated, C.B.S. News (Dec. 17, 2014, 2:51 PM), <http://www.cbsnews.com/news/south-carolina-boy-executed-for-1944-murder-is-exonerated>.

2. *Id.*

3. *Id.*

4. *Id.*

5. 136 S. Ct. 1513 (2016).

This Commentary argues that the Supreme Court should recognize a racial bias exception to Rule 606(b). First, racially based verdicts are constitutionally and historically distinct from other forms of juror misconduct. Second, alternative procedural safeguards, like *voir dire*, are inadequate to guard against racial bias. Finally, the exception Petitioner proposes would not only be workable, but would improve the legitimacy of the jury system. To rule otherwise would be to engage in willful blindness to preserve the fantasy of a perfect justice system.

I. FACTS

In 2007, two teenage girls were sexually assaulted in a horse-racing track bathroom.⁶ Petitioner, Miguel Angel Peña-Rodriguez, an employee of the race-track, was arrested and visually identified by the two victims.⁷ The State charged Petitioner with four crimes: a felony charge of attempted sexual assault on a victim younger than fifteen, a misdemeanor charge for unlawful sexual contact, and two misdemeanor charges for harassment.⁸

During *voir dire* for the trial, each potential juror received a questionnaire asking, “Is there anything about you that you feel would make it difficult for you to be a fair juror in this case?”⁹ None of the empaneled jurors expressed any indication of bias—racial or otherwise—at that time.¹⁰ The jury originally reported that it was unable to reach a verdict, and the judge gave an *Allen* charge to continue deliberations.¹¹ After twelve total hours of deliberation,¹² the jury found Petitioner guilty of the three misdemeanor charges, but was unable to reach a unanimous verdict on the felony charge.¹³ The trial judge declared a mistrial for the felony charge and accepted the jury’s guilty misdemeanor verdicts.¹⁴

After the trial, two jurors gave affidavits that another juror (“H.C.”) had made racially prejudicial comments about Petitioner

6. *Pena-Rodriguez v. People*, 350 P.3d 287, 288 (Colo. 2015).

7. *Id.*

8. Brief for Petitioner at 5, *Pena-Rodriguez v. Colorado*, NO. 15-606 (U.S. 2016) [hereinafter Brief for Petitioner].

9. *Pena-Rodriguez*, 350 P.3d at 288.

10. *Id.*

11. Brief for Petitioner, *supra* note 8, at 6.

12. *Id.* at 7.

13. *Pena-Rodriguez*, 350 P.3d at 288.

14. Brief for Petitioner, *supra* note 8, at 7.

during deliberations.¹⁵ According to one juror’s affidavit, H.C. said, “I think he did it because he’s Mexican and Mexican men take whatever they want.”¹⁶ According to another juror, H.C. stated that in his own experience as a former law enforcement officer, “nine times out of ten[,] Mexican men were guilty of being aggressive toward women and young girls.”¹⁷ Furthermore, H.C. reportedly voiced his opinion during deliberations that Petitioner’s alibi witness was not credible “because, among other things, he was ‘an illegal.’”¹⁸

Petitioner submitted these affidavits to the trial court and moved for a new trial.¹⁹ The trial judge ruled that under Rule 606(b) of the Colorado Rules of Evidence, H.C.’s comments during jury deliberation were inadmissible and thus, the court denied Petitioner’s motion for a new trial.²⁰ The Colorado Court of Appeals and the Colorado Supreme Court subsequently affirmed the lower court’s ruling.²¹ On April 4, 2016, the United States Supreme Court granted certiorari to hear Petitioner’s case.²²

II. LEGAL BACKGROUND

The American legal system has a long-standing tradition of avoiding inquiries into jury deliberations.²³ This principle comes from English common law²⁴ and is codified in its modern form as Rule 606(b) of the Federal Rules of Evidence.²⁵ Functionally, this rule prohibits jurors from impeaching their own verdicts by testifying on any matter

15. *Pena-Rodriguez*, 350 P.3d at 289.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 288.

22. *Pena-Rodriguez v. Colorado*, 136 S. Ct. 1513, 1513 (2016).

23. See 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, 510–11 (1988) (explaining the historical precedent for the modern rule).

24. The exclusionary principle comes from *Vaise v. Delaval*, in which jurors allegedly decided the outcome of a case through playing a game of chance. *Id.* at 513. (citing *Vaise v. Delaval*, 99 Eng. Rep. 944, 944 (K.B. 1785)). Lord Mansfield held that the affidavits of jurors toward juror misconduct were inadmissible in determining whether to grant a new trial. Crump, *supra* note 23, at 510–11.

25. *Id.* at 510. Colorado’s Rule 606(b) is functionally identical to its federal counterpart. Compare COLO. R. EVID. 606(b) (“Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations”) with FED. R. EVID. 606(b) (prohibiting the admission of juror testimony on statements or matters occurring during jury deliberations as evidence to impeach a jury’s verdict).

or statement made during jury deliberations.²⁶ In *McDonald v. Pless*,²⁷ the Supreme Court expressed the public policy rationales behind such a rule. Despite acknowledging that sometimes juries may come to verdicts based on “arbitrary and unjust method[s],”²⁸ the *McDonald* Court nonetheless upheld the no-impeachment rule as “the lesser of two evils.”²⁹

One policy consideration was to preserve the finality of verdicts.³⁰ The Court was worried that weakening the rule would incentivize the defeated party to try to uncover misconduct severe enough to overturn the jury’s verdict.³¹ The *McDonald* Court cautioned that such a practice would turn juror deliberations into a “constant subject of public investigation.”³² The anticipation of such intense scrutiny could also have a chilling effect on discussions within the jury room and destroy jurors’ abilities to engage in “freedom of discussion and conference.”³³

Later, in *Tanner v. United States*,³⁴ one juror (“Hardy”) came forward after the verdict to report misconduct among the jurors during the trial.³⁵ Hardy stated that several of his fellow jurors had drunk a significant amount of alcohol during several lunch recesses.³⁶ He also admitted to smoking marijuana with three other jurors “quite regularly during the trial,” and observed other jurors sell drugs to each other and bring drugs and drug paraphernalia into the courtroom.³⁷

Despite this evidence of shocking juror behavior, the *Tanner* Court explained that four safeguards exist within the court system to sufficiently protect a party’s Sixth Amendment right to an impartial jury, thereby negating the need for a post-verdict inquiry.³⁸ First, *voir dire* could screen out irresponsible or incompetent jurors.³⁹ Second, court personnel, counsel, and the judge all observe the jury during the

26. See FED. R. EVID. 606(b).

27. 238 U.S. 264 (1915).

28. *Id.* at 267.

29. *Id.*

30. *Id.* at 267–68.

31. *Id.* at 267.

32. *Id.* at 268.

33. *Id.*

34. 483 U.S. 107 (1987).

35. *Id.* at 115–16.

36. *Id.* at 115.

37. *Id.* at 115–16.

38. *Id.* at 127.

39. See *id.* (“The suitability of an individual for the responsibility of jury service, of course, is examined during *voir dire*.”).

trial and could report any irregularities or misconduct.⁴⁰ Third, jurors could report other jurors for misconduct before they render a verdict.⁴¹ Finally, after a trial, parties may use nonjuror evidence to overturn the verdict.⁴²

In 2014, the Court examined the applicability of Rule 606(b) when a juror was not truthful during *voir dire*. In *Warger v. Shauers*,⁴³ a negligence case concerning a car accident that caused severe injuries, one juror failed to disclose that her daughter had been at fault in a previous accident.⁴⁴ During jury deliberations, this juror made the comment that “if her daughter had been sued, it would have ruined her life.”⁴⁵ The Supreme Court ruled that even though one of the *Tanner* safeguards (*voir dire*) was faulty, the other safeguards were still in place to protect the parties’ Sixth Amendment interests.⁴⁶ Both *Tanner* and *Warger* reiterated the public policy rationales supporting Rule 606(b).⁴⁷

Despite this consistent support for Rule 606(b), the Supreme Court has thus far avoided foreclosing the possibility that there may be a type of juror bias extreme enough to outweigh the safeguards in place for a fair trial. As stated in *Warger*, “There may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged.”⁴⁸ Furthermore, during oral arguments, Justices Kagan and Alito specifically mention racial bias as a potential constitutional exception to Rule 606(b).⁴⁹

III. HOLDING

The Colorado Supreme Court upheld the trial court’s ruling that H.C.’s testimony was inadmissible.⁵⁰ In its opinion, the court equated racial bias with other forms of juror misconduct,⁵¹ and reiterated the

40. *See id.*

41. *Id.*

42. *Id.*

43. 135 S. Ct. 521, 525 (2014).

44. *Id.* at 524.

45. *Id.*

46. *Id.* at 529.

47. *See Tanner*, 483 U.S. at 120–21 (“[T]he community’s trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.”); *Warger*, 135 S. Ct. at 526 (“The rule . . . promot[es] the finality of verdicts and insulat[es] the jury from outside influences . . .”).

48. *Id.* at 529 n.3.

49. *See* Transcript of Oral Argument at 29–31, *Warger v. Shauers*, No. 13-517 (U.S. 2014).

50. *Pena-Rodriguez v. People*, 350 P.3d 287, 288 (Colo. 2015).

51. *See id.* at 293 (“[W]e cannot discern a dividing line between different types of juror bias or misconduct . . .”).

policy rationales of Rule 606(b).⁵² While acknowledging that racial bias was more difficult to detect visually than other forms of juror misconduct,⁵³ the court asserted that the other *Tanner* safeguards would still adequately protect a defendant’s Sixth Amendment right to an impartial jury.⁵⁴

IV. ARGUMENTS

The arguments in this case break down into several distinct issues or themes. First is the issue of whether racial discrimination should be characterized differently than other forms of juror misconduct. Second, the two sides argue whether the *Tanner* protections are sufficient to protect against racial bias. Finally, the parties argue over the effects of a racial bias exception on the public policy rationales of Rule 606(b) and its effect on the jury as an institution.

A. Does Racial Bias Represent a Unique Type of Juror Misconduct Which Warrants an Exception to Rule 606(b)?

Petitioner argues that criminal convictions based on racial animus are “uniquely deplorable and constitutionally inexcusable.”⁵⁵ Racism runs afoul of the Fourteenth Amendment,⁵⁶ and allowing the jury—an instrument of the court—to make a decision based on the race of a defendant would be tantamount to allowing a judge to convict someone directly based on his or her race.⁵⁷ Petitioner argues that racial bias must be made an exception to Rule 606(b) because of its insidious nature, ease of concealment, and lack of outward objective manifestations.⁵⁸ As such, it is a form of bias that, by definition, infringes upon a defendant’s right to an impartial jury trial.⁵⁹

While acknowledging that racial bias within jury deliberations is “reprehensible,” Respondent points to other examples of reprehensible juror conduct that are barred under the no impeachment

52. *Id.* at 292.

53. *See id.* at 293 (“Admittedly, [racial] bias is less readily visible than intoxication . . .”).

54. *See id.* (“That the safeguards did not benefit Petitioner in this case does not nullify their validity . . .”).

55. Brief for Petitioner, *supra* note 8, at 4.

56. *See id.* at 19 (asserting that the Fourteenth Amendment represents a “constitutional commitment to colorblind decision-making”).

57. *Id.*

58. *See id.* at 22 (“In contrast to the drunkenness and drug use at issue in *Tanner*, which often manifest themselves in physically apparent ways, racial bias does not.”).

59. *See id.* at 21 (citing *Warger v. Shauers*, 135 S. Ct. 521, 529 n.3 (2014)).

rule.⁶⁰ Essentially, Respondent argues that if evidence of jurors using drugs, sleeping through trial, or drinking alcohol is excluded for impeachment, then the court should not allow inquiry into racial bias.⁶¹ A rule requiring inquiry into racial bias would lead to arbitrary line-drawing within the scope of juror misconduct and create inconsistent outcomes.⁶²

B. Are Tanner Safeguards Sufficient to Protect Sixth Amendment Rights?

Petitioner argues that racial bias can often circumvent any safeguards laid forth in *Tanner*.⁶³ First, due to the hidden and subjective nature of racial bias, Petitioner argues that a court will not be able to detect racial bias simply by watching a jury during trial.⁶⁴ Second, Petitioner challenges the likelihood that jurors will report fellow juror misconduct in the case of racial bias.⁶⁵ Third, *voir dire* is insufficient to weed out racial bias because defense counsel is often hesitant to raise the issue of race explicitly⁶⁶ or because counsel is unaware that race could be a relevant factor at trial.⁶⁷ Petitioner further suggests that some district courts may actually use their discretion over *voir dire* to forbid counsel's inquiry into racial bias.⁶⁸ Even if counsel chooses and is allowed to explicitly question prospective jurors about potential bias, few jurors would readily reveal their racial bias during *voir dire*.⁶⁹ Finally, Petitioner argues that nonjuror evidence towards racial bigotry is usually not available,⁷⁰ and therefore a post-verdict inquiry provides the only real recourse to combat racial juror bias.⁷¹

60. Brief for Respondent at 3, *Pena-Rodriguez v. Colorado*, NO. 15-606 (U.S. 2016) [hereinafter Brief for Respondent].

61. *See id.* (discussing that while jurors drinking alcohol and doing drugs during trial “clearly violated the defendants’ Sixth Amendment rights,” the *Tanner* Court refused to make an exception to the no-impeachment rule).

62. *See id.* at 54–55 (suggesting that an alternative rule would allow inquiry into racial bias, but exclude evidence of other “profoundly disturbing” forms of juror misconduct).

63. Brief for Petitioner, *supra* note 8, at 21.

64. *Id.*

65. *See id.* at 22 (“The possibility that jurors may report racially biased remarks before rendering a verdict is remote at best.”).

66. *See id.* at 25 (“Even when defendants *are* permitted to inquire into racial bias, defense counsel is often well advised not to pose direct questions on the topic.”).

67. *Id.* at 24.

68. *Id.*

69. *See id.* at 26 (“Asking direct questions during *voir dire* about racial bias is usually ineffective anyway.”).

70. *Id.* at 27.

71. *See id.* at 19–21 (arguing that because the *Tanner* safeguards are so insufficient in the case of racial bias, defendants need this exception to the no-impeachment rule to have a

In contrast, Respondent argues that the *Tanner* safeguards “effectively detect and address racial bias among individual jurors.”⁷² *Voir dire* on the subject of racial bias is constitutionally required if requested by defendant’s counsel in interracial capital cases.⁷³ If *voir dire* were categorically incapable of detecting racial bias, then it would not be mandatory in certain cases.⁷⁴ Respondent then cites to a number of cases in which *voir dire* did reveal racial bias as evidence of its effectiveness.⁷⁵ Furthermore, questioning jurors regarding racial bias can take place in private conference with the judge, or on non-public juror questionnaires.⁷⁶ Coupled with the threat of perjury, jurors are incentivized to answer honestly, even when asked about sensitive topics.⁷⁷

Respondent argues that the other safeguards are also effective. There are a number of instances where jurors reported racial bias before the verdict.⁷⁸ As to nonjuror evidence, Respondent states that racial bias is often expressed outside of the jury room, citing several examples where a juror was successfully dismissed.⁷⁹ Because court personnel have numerous opportunities to interact with jurors during the course of a trial, they have many opportunities to detect racial bias.⁸⁰ In addition to the *Tanner* safeguards, Respondent contends that other safeguards in the system make post-verdict inquiry unnecessary.⁸¹ Racial limitations to peremptory strikes, the requirement of unanimity among a large jury, and the focus on ensuring that a panel of jurors represents a “fair cross-section of the community” all serve to protect defendants against racial bias.⁸²

“meaningful opportunity to present evidence of juror bias” and safeguard their Sixth Amendment right to an impartial jury).

72. Brief for Respondent, *supra* note 60, at 15.

73. *See id.* at 23 (citing *Turner v. Murray*, 476 U.S. 28, 36–37 (1986) (vacating a defendant’s death sentence in an interracial crime because defendant was not allowed to question the jury on racial bias)).

74. *See* Brief for Respondent, *supra* note 60, at 23 (“[V]oir dire on racial bias is constitutionally required precisely because it is effective.”).

75. *Id.* at 23 n.7.

76. *Id.* at 24–25.

77. Respondent makes the argument that jurors are commonly asked “sensitive and potentially embarrassing questions.” *See id.* at 24 (citation omitted).

78. *Id.* at 31.

79. *Id.* at 33–34.

80. *Id.* at 35.

81. *Id.* at 36.

82. *Id.* at 36–41.

C. *What Are the Effects on State Interests and the Jury System?*

Respondent contends that a rule allowing post-verdict inquiry into jurors' racial biases would have disastrous effects on the jury system.⁸³ A racial bias exception could disturb overall verdict finality by creating a torrent of post-verdict litigation.⁸⁴ Such a level of increased scrutiny would stifle free discussion during jury deliberations⁸⁵ and encourage increased harassment of jurors.⁸⁶ Furthermore, the different treatment between racial bias and other forms of jury misconduct would destroy public confidence in the jury system⁸⁷ and make the jury verdicts less independent.⁸⁸

Petitioner contends that allowing inquiry into racial bias would have a minimal or positive effect on state interests. The core of Petitioner's argument lies in his evidence that in jurisdictions that have allowed inquiry into juror racial bias, there has not been a subsequent floodgate of litigation over verdicts based on such juror testimony.⁸⁹ Because of this relatively small impact, verdict finality is not "unduly disturb[ed]."⁹⁰ Furthermore, there is a minimal state interest to preserving jurors' rights to free discussion on racial matters because the cost of racially biased discussion on a defendant's rights outweighs any benefits to a juror's peace of mind.⁹¹ Finally, allowing inquiry into racial bias would serve to strengthen jury legitimacy in the public eye, while a contrary rule would harm public confidence in a system that ignores racially motivated convictions.⁹²

V. ANALYSIS

One of the first lines of Respondent's brief states, "No one disputes that racial bias is reprehensible and has no place in the jury room."⁹³

83. *See id.* at 42 ("Petitioner's proposal . . . would undermine 'long-recognized and very substantial concerns' in favor of jury secrecy.").

84. *See id.* at 45–48 (challenging Petitioner's claim that such a rule would apply and be used in relatively few cases).

85. *Id.* at 44.

86. *Id.* at 48–49.

87. *Id.* at 49–50.

88. Respondent suggests that a racial bias exception would affect a person's right to trial by jury because verdicts would "be permitted to stand only by the court's leave." *Id.* at 50–52 (citation omitted).

89. *See* Brief for Petitioner, *supra* note 8, at 39 ("[T]he post-trial litigation that flows from allowing jurors to testify regarding racial bias is minimal.").

90. *Id.* at 38.

91. *Id.* at 35.

92. *Id.* at 44.

93. Brief for Respondent, *supra* note 60, at 3.

Respondent, however, then spends the next fifty pages arguing that racial bias within jury deliberations is an acceptable consequence of preserving secrecy within the jury system. That is, if racial bias slips by the safeguards in place, then the conviction must stand, and a defendant should lose his or her liberty based on their race. As the Petitioner aptly puts it, “[t]his cannot be right.”⁹⁴

A. Racism is Constitutionally and Historically Distinct From Other Juror Misconduct.

The United States has not had a societal history of drunk and drug-dealing jurors.⁹⁵ The United States has, however, been guilty of state-sanctioned racism and discrimination for the majority of its history.⁹⁶ Yet state-propagated racism is not just a bygone relic. Even in recent years, discriminatory enforcement policies have been used in the criminal justice system.⁹⁷

A rule that allows the court to ignore racial discrimination within jury deliberations is tantamount to state-sponsored racism. The jury is fundamentally an instrument of the court system⁹⁸ and stands between the government and its ability to deprive a person of his or her liberty.⁹⁹ Allowing a conviction to stand based on racial discrimination “undermines the jury’s ability to perform its function as a buffer against governmental oppression and, in fact, converts the jury itself into an instrument of oppression.”¹⁰⁰ Such oppression is as attributable to the government as allowing Jim Crow laws to stand or enforcing racial housing covenants between private parties.¹⁰¹

94. Brief for Petitioner, *supra* note 8, at 46.

95. This comment refers to the facts of *Tanner*. *Tanner v. United States*, 483 U.S. 107, 115–16 (1987); *see also supra* text accompanying notes 34–37.

96. *See, e.g.*, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (“[R]acial and ethnic distinctions [are] rooted in our Nation’s constitutional and demographic history.”).

97. *See Floyd v. City of New York*, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013) (finding that New York City’s stop-and-frisk policy “resulted in the disproportionate and discriminatory stopping of blacks and Hispanics in violation of the Equal Protection Clause”); *see generally* U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEP’T (2015) (finding that Ferguson, Missouri local government engaged in discriminatory enforcement, used disproportionate force, and levied fines against minorities to generate revenue for the city).

98. *See Sinclair v. United States*, 279 U.S. 749, 765 (1929) (“The jury is an essential instrumentality—an appendage—of the court . . .”).

99. *See Turner v. Louisiana*, 379 U.S. 466, 472 (1965) (“In the ultimate analysis, only the jury can strip a man of his liberty or his life.”).

100. 27 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6074, at 513 (2d ed. 2007).

101. *See, e.g.*, *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (“[I]t would appear beyond question that the power of the State to create and enforce [private] property interests must be exercised

Even after the passage of the Fourteenth Amendment, the Supreme Court has taken many steps to ensure that the court system does not act as a vehicle for racial discrimination. In 1879, the Supreme Court struck down a law that only allowed whites to serve as jurors, finding that such a law violated the Fourteenth Amendment.¹⁰² The Court later limited the practice of using peremptory challenges to prohibit parties from excluding jurors based on their race.¹⁰³ As stated in *Georgia v. McCollum*, “[w]e recognize, of course, that a defendant has the right to an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice.”¹⁰⁴ If, however, a defendant’s conviction can stand on statements like “Mexican men take whatever they want”¹⁰⁵ or “nine times out of ten Mexican men [are] guilty of being aggressive toward women and girls,”¹⁰⁶ then this right is meaningless. This fits the very definition of tolerating race-based decision making.¹⁰⁷

Considering the constitutional necessity of eliminating race-based decision making from the judicial system all together,¹⁰⁸ the existence of fallible safeguards should be irrelevant. After all, any preemptive safeguard—no matter how robust—can be circumvented. A system truly dedicated to eliminating racial bias needs a *post facto* mechanism to scrutinize and correct for racial bias. This is the only system that can support the proposition that “racial bias is reprehensible and has no place in the jury room.”¹⁰⁹

However, because the current framework of Rule 606(b) jurisprudence relies upon the *Tanner* safeguards, the Supreme Court will likely consider them and should find them insufficient to counter racial bias.¹¹⁰ It is also helpful to engage in the analysis of *Tanner*

within the boundaries defined by the Fourteenth Amendment.”).

102. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879).

103. *See Batson v. Kentucky*, 476 U.S. 79, 87 (1986) (“Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.”).

104. *Georgia v. McCollum*, 505 U.S. 42, 58 (1992).

105. *Pena-Rodriguez v. People*, 350 P.3d 287, 289 (Colo. 2015).

106. *Id.*

107. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 911 (1995) (“At the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.”) (internal quotation marks and citation omitted).

108. *See, e.g., McCollum*, 505 U.S. at 57 (“It is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race.”).

109. Brief for Respondent, *supra* note 60, at 3.

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

safeguards to further distinguish racial bias from other forms of juror misconduct.

B. Tanner Safeguards Are Insufficient.

Even if the Supreme Court analyzes this case using the *Tanner* framework, it should find that the *Tanner* safeguards are insufficient to counter racial bias. First, racial bias is hidden in a way that judges and counsel cannot easily observe or infer it from watching jurors at trial.¹¹¹ Second, *voir dire* also cannot readily detect racial bias. It is difficult to imagine a juror bold enough to declare their racial bias publicly when questioned in court. Furthermore, jurors may be unaware of or motivated to conceal their own racial prejudices when questioned.¹¹² Third, although there are some cases in which other jurors reported racial bias before a verdict,¹¹³ this often does not happen.¹¹⁴ Fourth, nonjuror testimony of juror racial bias is rarely available. While bar receipts can provide evidence of juror alcohol consumption, it is more difficult to find concrete evidence of racial prejudice.¹¹⁵ Oftentimes, juror testimony after the verdict is the *only* evidence that reliably proves racist jury misconduct.¹¹⁶ To deny a defendant access to this evidence is to deny a defendant any real recourse for racial misconduct.

protections relied on by the *Tanner* Court do not provide adequate safeguards in the context of racially and ethnically biased comments made during deliberations.”).

111. The Colorado Supreme Court conceded that court observation is unlikely to detect racial bias. *See Pena-Rodriguez v. People*, 350 P.3d 287, 293 (Colo. 2015) (“Admittedly, bias is less readily visible than intoxication . . . meaning the second *Tanner* protection . . . carries less force in such cases.”).

112. Jurors can often hide racial bias through *voir dire*, even if probing questions are asked. For example, in a case from Maine, a juror was found to have said, “[Defendants] are all guilty wetbacks anyway,” despite passing through a strenuous set of questions on racial bias during *voir dire*. *See United States v. Fuentes*, No. 2:12–CR–50–DBH, 2013 WL 4401803, at *2 (D. Me. Aug. 15, 2013); *see also* Barbara Allen Babcock, *Voir Dire: Preserving “Its Wonderful Power”*, 27 STAN. L. REV. 545, 554 (1975) (“Some jurors will intentionally deceive the courts, perhaps because they are ashamed to admit attitudes that are socially unfashionable or even because they might welcome the chance to seek retaliation against a litigant.”).

113. *See, e.g., United States v. Caporale*, 806 F.2d 1487, 1504 n.21 (11th Cir. 1986) (describing how jurors sent a note expressing concerns of racial bias during jury deliberations); *see also* Brief for Respondent, *supra* note 60, at 31–32.

114. Brief for *Amici Curiae* Professors of Law in Support of Petitioner at 12, *Pena-Rodriguez v. Colorado*, No. 15-606 (U.S. 2016); *see also Kittle v. United States*, 65 A.3d 1144, 1155 (D.C. 2013) (noting that jurors often wait until after a verdict to report racial bias out of “an unwillingness to confront their peers or mere unawareness that the court may not consider their post-verdict testimony”).

115. Brief for Petitioner, *supra* note 8, at 27.

116. *Racist Juror Misconduct During Deliberations*, 101 HARV. L. REV. 1595, 1596 (1988).

C. A Racial Bias Exception Would Not Unduly Affect State Interests.

In jurisdictions that have adopted such a racial bias exception, there is little evidence of the evils that *Tanner* forecasts.¹¹⁷ Without empirical evidence of the predicted “barrage of post-verdict scrutiny,”¹¹⁸ concerns about increased juror harassment and chilling effects on juror discussion as a justification for inaction become less tenable. The number of cases that involve inquiry into post-verdict racial bias remains relatively few,¹¹⁹ but in such cases, the verdicts are more often than not overturned.¹²⁰ The relatively few cases—and therefore limited impact on state interests—show that this is a narrow exception with low costs to the jury system.¹²¹ For those few defendants, however, the constitutional and liberty interests are of paramount importance.

Furthermore, there is no state interest in maintaining finality for verdicts tainted by racial prejudice. “Verdicts should not be final if they are the likely result of racism.”¹²² In fact, a contrary rule to hide such obvious racial defects in jury decision making could serve to delegitimize the criminal justice system further.¹²³ Such a system that condones deciding life or liberty based on race – or even appears to do so – undermines the public’s confidence and does not administer justice.

CONCLUSION

Racial bias has always been an issue in this nation’s history. As a deeply rooted societal problem with a constitutional basis, it is distinguishable from other forms of juror misconduct. Furthermore, the

117. See *Amicus Curiae* Brief of Center on the Administration of Criminal Law in Support of Petitioner at 22, *Pena-Rodriguez v. Colorado*, 15-606 (U.S. 2016) [hereinafter *Brief of Center on Admin. of Crim. Law*] (finding a minimal increase in post-verdict litigation).

118. *Tanner v. United States*, 483 U.S. 107, 121 (1987).

119. No jurisdiction, even the ones that adopted the exception over 30 years ago, has seen more than five of these cases. *Brief of Center on Admin. of Crim. Law*, *supra* note 117, at 24–25.

120. This signifies the importance of such a rule to address serious juror misconduct. *Id.* at 22.

121. Not every juror comment that could tentatively be connected to race becomes admissible. See *United States v. Villar*, 586 F.3d 76, 87 (1st Cir. 2009) (requiring a determination “whether there is a substantial probability that any such comments made a difference in the outcome of a trial”); see also *Kittle v. United States*, 65 A.3d 1144, 1156 (D.C. 2013) (limiting the exception to “rare and exceptional cases”). To make this exception narrow, courts must use juror testimony toward racial bias to evaluate the context and possible effects of the bias. Nonjuror testimony would not allow for such specific determinations.

122. *Racist Juror Misconduct During Deliberations*, *supra* note 116, at 1600.

123. See *Kittle*, 65 A.3d at 1155 (“[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.”).

interests and policy rationales of Rule 606(b) are not unduly harmed by a racial bias exception. Thus, the Supreme Court should adopt a racial bias exception to Rule 606(b) to eliminate race-based decision making at trial. After all, if the “smoking guns [of racism] are ignored, we have little hope of combatting the more subtle forms of racial discrimination.”¹²⁴

124. *Wilkerson v. Texas*, 493 U.S. 924, 928 (1989) (Marshall, J., dissenting) (internal quotation marks omitted).