

William & Mary Law School

## William & Mary Law School Scholarship Repository

---

Supreme Court Preview

Conferences, Events, and Lectures

---

9-2016

### Section 1: Moot Court: Pena-Rodriguez v. Colorado

Institute of Bill of Rights Law, William & Mary Law School

Follow this and additional works at: <https://scholarship.law.wm.edu/preview>



Part of the [Constitutional Law Commons](#), [Law and Race Commons](#), and the [Supreme Court of the United States Commons](#)

---

#### Repository Citation

Institute of Bill of Rights Law, William & Mary Law School, "Section 1: Moot Court: Pena-Rodriguez v. Colorado" (2016). *Supreme Court Preview*. 266.

<https://scholarship.law.wm.edu/preview/266>

Copyright c 2016 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/preview>

## I. Moot Court: *Pena-Rodriguez v. Colorado*

*In This Section:*

<b>New Case:</b> 15-606 <i>Pena-Rodriguez v. Colorado</i>	p. 2
Synopsis and Questions Presented	p. 2
“SUPREME COURT TO HEAR CASE OF ALLEGED RACIAL BIAS BY JUROR” Robert Barnes	p. 12
“IS EVIDENCE OF JUROR BIAS IN DELIBERATIONS ADMISSIBLE? SUPREME COURT TO DECIDE” Shawn S. Ledingham, Jr.	p. 14
“COURT TO RULE ON CHALLENGE TO JUROR BIAS” Lyle Denniston	p. 16
“JURY ROOM RACISM IS PROTECTED. IT SHOULDN'T BE” Noah Feldman	p. 18

*Pena-Rodriguez v. Colorado*

15-606

**Ruling Below:** *Pena-Rodriguez v. People*, 2015 CO 31 (Colo. 2015)

Pena-Rodriguez was convicted of unlawful sexual conduct and harassment. He filed a motion for a new trial on the grounds that one of the jurors made racially charged statements. The motion was denied, and he appealed.

The Court of Appeals held that the evidence was insufficient to forego the rule excluding examination into validity of jury verdict, and that said rule did not violate the right to a fair and impartial jury.

**Question Presented:** Whether a no-impeachment rule constitutionally may bar evidence of racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury.

---

**Miguel Angel PENA–RODRIGUEZ, Petitioner**

**v.**

**The PEOPLE of the State of Colorado, Respondent.**

Supreme Court of Colorado

Decided on May 18, 2015

[Excerpt; some citations and footnotes omitted]

**CHIEF JUSTICE RICE** delivered the Opinion of the Court.

This case involves the interplay between two fundamental tenets of the justice system: protecting the secrecy of jury deliberations and ensuring a defendant's constitutional right to an impartial jury. After entry of a guilty verdict, defense counsel obtained juror affidavits suggesting that one of the jurors exhibited racial bias against the defendant during deliberations. The trial court refused to consider these affidavits, finding that Colorado Rule of Evidence (“CRE”) 606(b) barred their admission, and the court of appeals affirmed. We granted certiorari to consider whether CRE 606(b) applies to such affidavits and, if so, whether the Sixth

Amendment nevertheless requires their admission.

We hold that the affidavits regarding the juror's biased statements fall within the broad sweep of CRE 606(b) and that they do not satisfy the rule's “extraneous prejudicial information” exception. We further hold that the trial court's application of CRE 606(b) did not violate the defendant's Sixth Amendment right to an impartial jury. Accordingly, we affirm the judgment of the court of appeals.

**I. Facts and Procedural History**

In May 2007, a man made sexual advances toward two teenage girls in the bathroom of the horse-racing facility where Petitioner Miguel Angel Pena-Rodriguez worked. Shortly thereafter, the girls identified Petitioner as the assailant during a one-on-one showup. The People subsequently charged Petitioner with one count of sexual assault on a child—victim less than fifteen; one count of unlawful sexual contact—no consent; and two counts of harassment—strike, shove, or kick. After a preliminary hearing, the court bound over the first count as attempted sexual assault on a child—victim less than fifteen.

At the start of a three-day trial, the jury venire received a written questionnaire, which inquired, “Is there anything about you that you feel would make it difficult for you to be a fair juror in this case?” During voir dire, the judge asked the panel, “Do any of you have a feeling for or against [Petitioner] or the Prosecution?” Later, defense counsel asked the venire whether “this is simply not a good case for them to be a fair juror.” None of the jurors subsequently impaneled answered any of these questions so as to reflect racial bias. The jury ultimately found Petitioner guilty of the latter three counts but failed to reach a verdict on the attempted sexual assault charge.

Two weeks later, Petitioner filed a motion for juror contact information, alleging that “some members of the jury used ethnic slurs in the course of deliberations.” The trial court ordered Petitioner to submit affidavits regarding the “‘who, what, when, and where’ of the allegations of juror misconduct.” Petitioner’s counsel subsequently filed an affidavit averring that, shortly after entry of the verdict, two jurors informed her that “some of the other jurors expressed a bias toward [Petitioner] and the alibi witness because they were Hispanic.” The trial court

then authorized Petitioner’s counsel to contact these jurors, but only to secure affidavits regarding their “best recollection of exactly what each ‘biased’ juror stated about [Petitioner] and/or the alibi witness.”

Thereafter, Petitioner submitted affidavits from jurors M.M. and L.T., both of whom alleged that juror H.C. made racially biased statements during deliberations. According to M.M., H.C. said that “I think he did it because he’s Mexican and Mexican men take whatever they want.” She also stated that H.C. “made other statements concerning Mexican men being physically controlling of women because they have a sense of entitlement and think they can ‘do whatever they want’ with women.” L.T. stated that H.C. “believed that [Petitioner] 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.” L.T. further averred that H.C. “said that where he used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.” Finally, L.T. stated that H.C. “said that he did not think the alibi witness was credible because, among other things, he was ‘an illegal.’ ” Based on these affidavits, Petitioner moved for a new trial. The trial court denied the motion, finding that CRE 606(b) barred any inquiry into H.C.’s alleged bias during deliberations.

Petitioner appealed, and a split division of the court of appeals affirmed. The majority first held that CRE 606(b) controlled the admissibility of the jurors’ affidavits and that the affidavits did not satisfy the rule’s exceptions. The majority then rejected Petitioner’s constitutional challenge regarding his Sixth Amendment right to an impartial jury, holding that Petitioner “waived his ability to challenge the verdict on

this basis by failing to sufficiently question jurors about racial bias in voir dire. Writing in dissent, Judge Taubman did not disagree with the majority's general analysis of CRE 606(b). He concluded, however, that CRE 606(b) was unconstitutional as applied. We granted certiorari.

## **II. Standard of Review**

The general applicability of CRE 606(b) is a question of law that we review de novo. But whether the jury was influenced by extraneous prejudicial information is a mixed question of law and fact; we accept the trial court's findings of fact absent an abuse of discretion, but we review the court's legal conclusions de novo.

## **III. Analysis**

This case requires us to resolve whether CRE 606(b) bars admission of juror affidavits suggesting that a juror made racially biased statements during deliberations. To do so, we first examine the plain language of the rule and its overarching purpose. We then conclude that such affidavits indeed implicate CRE 606(b) and do not fall within the rule's "extraneous prejudicial information" exception. Finally, we consider whether the rule was unconstitutional as applied to Petitioner, and we determine that enforcing the rule did not violate his Sixth Amendment right to an impartial jury.

### **A. CRE 606(b): Language and Purpose**

CRE 606(b) is broad in scope: It precludes courts from peering beyond the veil that shrouds jury deliberations. Specifically, the rule provides as follows:

“Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or

statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith.”

CRE 606(b). The rule does, however, enumerate three narrow exceptions: “[A] juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form.” Colorado's rule is virtually identical to its federal counterpart.

CRE 606(b) effectuates three fundamental purposes: It “promote[s] finality of verdicts, shield[s] verdicts from impeachment, and protect[s] jurors from harassment and coercion.” Thus, the rule “strongly disfavors any juror testimony impeaching a verdict.” We have recognized that the federal rule is equally forbidding.

With the proscriptive language and purpose of CRE 606(b) in mind, we now consider whether the rule operates to bar admission of the juror affidavits in this case.

### **B. CRE 606(b) Bars Admission of the Jurors' Affidavits**

CRE 606(b)'s plain language clearly bars admission of the jurors' affidavits in this case. Absent narrow exceptions, the rule unambiguously prohibits juror testimony “as to any matter or statement occurring during the course of the jury's deliberations.” Here, Petitioner seeks to introduce juror testimony precisely to that effect, as the affidavits from

both M.M. and L.T. pertain to statements made during deliberations. Therefore, CRE 606(b) precludes their admission.

Petitioner argues that the affidavits do not involve “an inquiry into the validity of [the] verdict” as contemplated by CRE 606(b). In Petitioner's view, the rule only applies to statements regarding the jury's actual deliberative process—that is, how the jury reached its verdict—and not to evidence of a particular juror's racial bias. To the extent that we can even parse this semantic distinction, we deem it immaterial. Petitioner seeks to introduce evidence of comments made during deliberations in order to nullify the verdict and obtain a new trial. Such a request necessarily involves an inquiry into the verdict's validity, which is the very inquiry that CRE 606(b) prevents.

Indeed, the U.S. Supreme Court expressly rejected this exact argument in *Warger v. Shauers*, determining that the rule “does not focus on the means by which deliberations evidence might be used to invalidate a verdict.” Rather, the Court held that the rule “simply applies ‘[d]uring an inquiry into the validity of the verdict’—that is, during a proceeding in which the verdict may be rendered invalid.” Although the Court was interpreting Fed. R. Evid. 606(b), we have previously recognized that CRE 606(b) is “[s]ubstantially similar to its federal counterpart” and that we “look to the federal authority for guidance in construing our rule.” Thus, *Warger* forecloses Petitioner's argument.

Petitioner next contends that, even if CRE 606(b) applies, the affidavits satisfy the rule's exception for “extraneous prejudicial information.” He is mistaken. That exception pertains to “legal content and specific factual information learned from outside the record and relevant to the issues in a case.” But it is

“generally undisputed” that jurors “may apply their general knowledge and everyday experience when deciding cases.” Here, H.C. did not perform any improper investigation into Petitioner's case, nor did he introduce evidence from outside the record into the jury room. Rather, his alleged racial bias arose from his personal beliefs and everyday experience. Such bias, however ideologically loathsome, is not “extraneous” as contemplated by CRE 606(b).

And once again, *Warger* scuttles Petitioner's claim. In that car-crash case, following a verdict for the defendant, a juror reported that another juror stated during deliberations that her daughter had once caused a motor vehicle accident and that “if her daughter had been sued, it would have ruined her life.” The Court held that such information “falls on the ‘internal’ side of the line: [The juror's] daughter's accident may well have informed her general views about negligence liability for car crashes, but it did not provide either her or the rest of the jury with any specific knowledge regarding [the] collision.” The Court noted that even if the juror's comments would have warranted a challenge for cause, that did not render them “extraneous,” as otherwise “[t]he ‘extraneous’ information exception would swallow much of the rest of Rule 606(b).” The same analysis applies here.

Accordingly, we hold that the affidavits concerning H.C.'s biased statements fall within the broad sweep of CRE 606(b) and that they do not satisfy the rule's “extraneous prejudicial information” exception. We now address whether CRE 606(b) was unconstitutional as applied in this case.

### **C. CRE 606(b) Was Not Unconstitutional as Applied**

The Sixth Amendment to the U.S. Constitution provides that “the accused shall enjoy the right to ... an impartial jury.” The question here is whether the trial court’s application of CRE 606(b), which functioned to bar evidence of H.C.’s alleged racial bias against Petitioner, violated his Sixth Amendment right.

The U.S. Supreme Court addressed a similar—though not identical—issue in *Tanner v. United States*. In that case, following the verdict, a juror contacted defense counsel and informed him that several jurors had consumed alcohol on lunch breaks during the trial and had slept through afternoons, while another juror told counsel that the jury was “one big party” and that numerous jurors used alcohol and drugs. After holding that Fed. R. Evid. 606(b) barred this testimony, the Court considered whether the Sixth Amendment nevertheless required the trial court to examine such evidence. The Court first declared that “long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry.” Turning to the opposing scale, the Court reasoned that “several aspects of the trial process” protect a defendant’s Sixth Amendment right to an impartial jury. The Court identified four specific safeguards: (1) voir dire; (2) the court and counsel’s ability to observe the jury during trial; (3) jurors’ opportunity to “report inappropriate juror behavior to the court before they render a verdict”; and (4) the opportunity to use non-juror evidence of misconduct to impeach the verdict following trial. *Id.* The Court thus concluded that Rule 606(b) need not yield to Sixth Amendment considerations.

*Tanner*, then, held that Rule 606(b) was not unconstitutional as applied to cases of juror incompetence. Last year, the Court in *Warger* extended *Tanner* to cases of juror bias.

Relying on *Tanner*, the Court recognized that “[e]ven if jurors lie in voir dire in a way that conceals bias, juror impartiality is adequately assured by the parties’ ability to bring to the court’s attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered.” Therefore, the Court held that *Tanner* foreclosed “any claim that Rule 606(b) is unconstitutional in circumstances such as these.”

Combined, *Tanner* and *Warger* stand for a simple but crucial principle: Protecting the secrecy of jury deliberations is of paramount importance in our justice system. It was this principle that animated the Court’s refusals to deem Rule 606(b) unconstitutional, despite concerns regarding juror impropriety. Indeed, although the *Tanner* Court acknowledged that “postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior,” it warned that “[i]t is not at all clear ... that the jury system could survive such efforts to perfect it.” As the Court recognized, not only would authorizing post-verdict investigations of jurors “seriously disrupt the finality of the process,” but the very potential for such investigations would shatter public confidence in the fundamental notion of trial by jury. In fact, the Court perceived such a slippery slope as far back as 100 years ago:

“[L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and

beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.”

Turning to the instant case, this case law compels the conclusion that CRE 606(b) was not unconstitutional as applied to Petitioner. A contrary holding would ignore both the policy underlying CRE 606(b) and the unwavering Supreme Court precedent emphasizing the magnitude of that policy. To be sure, neither *Tanner* nor *Warger* involved the exact issue of racial bias. But in examining the Court's jurisprudence, we cannot discern a dividing line between different types of juror bias or misconduct, whereby one form of partiality would implicate a party's Sixth Amendment right while another would not. To draw such a line would not only violate the longstanding rule of shielding private jury deliberations from public view—not to mention incentivize post-verdict harassment of jurors—but it would also require trial courts to make arbitrary judgments that hinge on the severity of a particular juror's impropriety or the intensity of his bias. We decline to sanction such a haphazard process.

Admittedly, bias is less readily visible than intoxication, meaning the second *Tanner* protection—the ability of the court to observe the jury's behavior during trial—carries less force in such cases. But that did not prevent the *Warger* Court from deeming the remaining *Tanner* safeguards sufficient to

protect a party's constitutional rights, even when a biased juror lied during voir dire. The same is true here. Other jurors could have informed the court or counsel of H.C.'s statements prior to delivering the verdict, and any non-juror evidence of his bias remained admissible post-verdict. That these safeguards did not benefit Petitioner in this case does not nullify their validity, nor *Warger's* clear endorsement of their ability to protect a party's constitutional right to an impartial jury.

Accordingly, we conclude that the trial court's application of CRE 606(b) to bar admission of the jurors' affidavits did not violate Petitioner's Sixth Amendment right.

#### **IV. Conclusion**

CRE 606(b) operates to ensure that the privacy of jury deliberations remains sacrosanct. The rule, and the policy it buttresses, is squarely on point in this case. We thus hold that the jurors' affidavits regarding H.C.'s biased statements fall within the broad sweep of CRE 606(b) and that they do not satisfy the rule's “extraneous prejudicial information” exception. We further hold that the trial court's application of CRE 606(b) did not violate Petitioner's Sixth Amendment right to an impartial jury. Accordingly, we affirm the judgment of the court of appeals.

**JUSTICE MÁRQUEZ** dissents, and **JUSTICE EID** and **JUSTICE HOOD** join in the dissent.

#### **JUSTICE MÁRQUEZ, dissenting.**

I agree with the majority that CRE 606(b) bars admission of the post-verdict affidavits in this case. By its terms, that rule of evidence precludes any “inquiry into the validity of a verdict” based on juror testimony regarding



statements made during jury deliberations, and Pena–Rodriguez's motion for a new trial “plainly entail[ed] an inquiry into the validity of the verdict,” even if it questioned the jury's impartiality and not its thought processes. I also agree that evidence of a juror's personal bias does not qualify as “extraneous prejudicial information” for purposes of the exception in CRE 606(b)(1). Nevertheless, I respectfully dissent because, in my view, Rule 606(b) “cannot 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 due process and an impartial jury.” Racial bias is detestable in any context, but in our criminal justice system it is especially pernicious. I would hold that where, as here, evidence comes to light that a juror specifically relied on racial bias to find the defendant guilty, CRE 606(b) must yield to the defendant's constitutional right to an impartial jury.

By foreclosing consideration of the evidence of racial bias alleged in this case, the majority elevates general policy interests in the finality of verdicts and in avoiding the potential embarrassment of a juror over the defendant's fundamental constitutional right to a fair trial. Although the majority believes that this result is required to preserve public confidence in our jury trial system, in my view, it has precisely the opposite effect.

“The right to an impartial jury is guaranteed by both the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, and by principles of due process.” Our state constitution likewise guarantees this right. Indeed, this court has observed that “[a]n impartial jury is a fundamental element of the constitutional right to a fair trial.” Racial discrimination in our jury trial system “not only violates our Constitution and the laws enacted under it but

is at war with our basic concepts of a democratic society and a representative government.” Importantly, the harm caused by such discrimination is “‘not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.’”

In its recent discussion of Fed. R. Evid. 606(b) in *Warger*, the United States Supreme Court observed that certain features built into the jury system ordinarily suffice to expose juror bias before the jury renders a verdict. *Warger* involved a negligence action arising out of a motor vehicle accident. In that case, a juror allegedly stated during deliberations that her daughter had been at fault in a motor vehicle collision in which a man died and that if her daughter had been sued, it would have ruined her life. *Warger* argued in a motion for a new trial that this statement revealed that the juror had lied during voir dire about her impartiality and her ability to award damages. The Court concluded that Fed. R. Evid. 606(b) barred consideration of this evidence. It also concluded that its decision in *Tanner* foreclosed *Warger's* claim that Rule 606(b) was unconstitutional as applied to the circumstances of that case. In so doing, however, the Court expressly acknowledged that “[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged,” and declined to consider whether “the usual safeguards are or are not sufficient to protect the integrity of the [jury] process” under such circumstances. In my view, this is that exceptional case. According to the two juror affidavits obtained by Pena–Rodriguez's counsel, Juror H.C. made several statements during jury deliberations indicating that he relied on racial bias to determine Pena–Rodriguez's guilt:

- Pena–Rodriguez “did it because he's Mexican and Mexican men take whatever they want.”
- Mexican men are physically controlling of women because they have a sense of entitlement and think they can “do whatever they want” with women.
- Pena–Rodriguez “was guilty because, in [Juror H.C.'s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women.”
- Where Juror H.C. used to patrol, “nine times out of ten Mexican men were guilty of being aggressive toward women and young girls.”
- Pena–Rodriguez's alibi witness was not credible because, among other things, he was “an illegal.”

In my view, the circumstances of this case reveal that the safeguards identified in *Tanner* are not always adequate to protect a criminal defendant's constitutional right to an impartial jury. Unlike the comment in *Warger*, Juror H.C.'s multiple statements in this case evince racial bias toward a criminal defendant. And, importantly, these alleged statements reveal Juror H.C.'s inability to decide impartially the crucial issue in this case: whether Pena–Rodriguez committed the charged crimes, or whether he instead had a credible alibi.

The majority claims to adhere to “the unmistakable trend” in United States Supreme Court case law “refusing to deem Rule 606(b) unconstitutional.” Yet the Supreme Court has expressly acknowledged the possibility that juror bias may be so

“extreme” as to call into question the adequacy of the usual safeguards to protect the integrity of the process. In my view, where, as here, it appears that a juror specifically relied on racial bias to find the defendant guilty, Rule 606(b) must yield to a defendant's constitutional right to an impartial jury, in that a trial court must be afforded the discretion to explore the validity of such allegations in the context of a motion for a new trial.

The question whether evidence of a juror's racial bias should be admissible in some cases, notwithstanding Rule 606(b), is hardly uncharted territory. In *Villar*, the United States Court of Appeals for the First Circuit considered whether the usual *Tanner* safeguards suffice to protect a defendant's right to an impartial jury where racial or ethnic bias is alleged, as opposed to the type of juror misconduct at issue in *Tanner*. In *Villar*, a juror emailed defense counsel following the verdict to report that another juror said, “I guess we're profiling, but [Hispanics] cause all the trouble.” Similarly, in *Kittle v. United States*, a juror wrote to the judge post-verdict alleging that some jurors felt that “all ‘blacks’ are guilty.” Like the present case, both *Villar* and *Kittle* involved racially motivated statements directly tied to the defendant's guilt.

In *Villar*, the First Circuit concluded that “the four protections relied on by the *Tanner* Court do not provide adequate safeguards in the context of racially and ethnically biased comments made during deliberations.” Although the *Tanner* safeguards serve to protect a defendant's Sixth Amendment right to a jury trial, they focus on juror misconduct. In my view, they are not always adequate to uncover racial bias before the jury renders its verdict.

First, as the majority acknowledges, defense attorneys may, for legitimate tactical reasons, choose not to question jurors about racial bias during voir dire and instead attempt to root out prejudice through more generalized questioning. And even when defense attorneys are willing to probe this sensitive topic directly, jurors may be reluctant to admit racial bias during voir dire. Second, jurors might not report racial comments made during deliberations before the verdict because they are unwilling to confront their fellow jurors, or because they believe they cannot report such comments before rendering a verdict, or because they are unaware that post-verdict testimony is putatively inadmissible. Third, observations of the jury by counsel and the court during trial are generally unlikely to uncover racial bias. And fourth, non-jurors cannot report racially biased statements made during deliberations to which they obviously do not have access. For all these reasons, the *Tanner* protections do not always provide adequate safeguards of a defendant's right to an impartial jury.

In my view, the trial court should have discretion in some circumstances to admit evidence of racially biased statements made during juror deliberations. As the *Villar* court noted, the trial judge will often be in the best position to determine whether an inquiry is necessary to vindicate a defendant's Sixth Amendment right to an impartial jury. Thus, the *Villar* court remanded that case to the trial court to decide whether the juror's report warranted further inquiry.

Should the trial court conclude that further inquiry is appropriate, it must then determine whether a juror was actually biased. If such a juror sat on the case, the defendant is entitled to a new trial without having to establish that the juror's bias affected the verdict. Only if the defendant fails to establish that a juror

was actually biased must he show that the “statements so infected the deliberative process with racially or ethnically charged language or stereotypes that it prejudiced the defendant's right to have his guilt decided by an impartial jury on the evidence admitted at trial.” Therefore, contrary to the People's argument, Pena–Rodriguez may be entitled to a new trial regardless of the effect of Juror H.C.'s comments on the verdict.

The majority admits that Tanner did not implicate “the exact issue of racial bias” but summarily concludes: “[W]e cannot discern a dividing line between different types of juror bias or misconduct.” I disagree. I would limit our holding in this case to post-verdict evidence of racial or ethnic bias that goes directly to the issue of the defendant's guilt. Racial bias differs from other forms of bias in that it compromises institutional legitimacy. A holding limited to such circumstances would reflect and respond to a real-world threat to the integrity of the jury trial right.

Furthermore, the majority overstates its concerns about the potential demise of the jury system should the allegations in this case be admissible in a motion for a new trial. The majority reasons that “the secrecy of jury deliberations is of paramount importance in our justice system,” yet fails to acknowledge that jurors are free to discuss deliberations publicly. Concerns about “post-verdict harassment of jurors,” are similarly misplaced: Even commentators critical of allowing post-verdict evidence of juror bias have observed that the exception in Rule 606(b)(1) for extraneous information already creates an incentive for the losing party to contact jurors after a verdict has been rendered. The majority's broader fear that the jury system may not survive absent unbending application of Rule 606(b), has proven groundless; the jury system has not collapsed in jurisdictions where trial courts

have discretion, in rare circumstances, to allow post-verdict evidence of racial bias.

The policies of finality and juror privacy that underlie CRE 606(b) are well founded. Moreover, not every stray comment reflecting a racial stereotype warrants a hearing. However, this case presents the extreme exception contemplated in *Warger*. The multiple comments alleged to have been made in this case were heard by other jurors and were directly tied to the determination of the defendant's guilt. According to the two post-verdict affidavits, Juror H.C. expressed in various ways that Pena–Rodriguez “did it because he's Mexican.” I simply cannot agree

with the majority that “[p]rotecting the secrecy of jury deliberations” is of such “paramount importance in our justice system,” that it must trump a defendant's opportunity to vindicate his fundamental constitutional right to an impartial jury untainted by the influence of racial bias. In my view, to foreclose consideration of the allegations presented here is precisely what “shatter[s] public confidence in the fundamental notion of trial by jury.” Accordingly, I respectfully dissent.

I am authorized to state that **JUSTICE EID** and **JUSTICE HOOD** join in this dissent.

## “Supreme Court to hear case of alleged racial bias by juror”

*The Washington Post*

Robert Barnes

April 4, 2016

The Supreme Court on Monday said it will consider a case of alleged racial bias by a juror so severe that it may merit breaching the confidential nature of jury deliberations.

In most instances, state and federal laws prohibit defendants from challenging a jury’s verdict by introducing testimony about statements made during deliberations. But lawyers for a Colorado man persuaded the court to review whether comments made by a juror in his case were so discriminatory as to violate the defendant’s right to an impartial jury.

A juror in Miguel Angel Peña Rodriguez’s sexual assault trial told other jurors that the defendant was guilty “because he’s Mexican and Mexican men take whatever they want.” The juror, identified in court papers as H.C., said it was his experience in law enforcement that “nine times out of 10 Mexican men were guilty of being aggressive toward women and young girls.”

The Supreme Court in 2014 unanimously turned aside a lawsuit that sought to challenge “no impeachment” rules that bar using jury deliberations as evidence in seeking a new trial. But in a footnote, Justice Sonia Sotomayor noted that case did not involve charges of racial discrimination.

“There may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged,” Sotomayor wrote. “If 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.”

Peña Rodriguez, who is represented by Jeffrey L. Fisher of the Stanford Law School Supreme Court Litigation Clinic, said his case presented that opportunity.

“When racial prejudice infects a jury’s decision whether to convict, the integrity of the criminal justice system is brought into direct question,” Fisher wrote. Groups such as the NAACP Legal Defense and Educational Fund filed briefs urging the court to take the case.

Colorado responded that its no-impeachment rule had three goals: to promote finality of verdicts, shield verdicts from impeachment, and protect jurors from harassment and coercion. Proper questioning of potential jurors before the trial protects against bias, it said.

The case stems from an incident at Arapahoe Race Track in 2007. Peña Rodriguez was a horse keeper at the track, where three teenage sisters went into a restroom. A man entered

behind them and asked whether they wanted to drink beer and “party.”

One girl left before the man turned out the lights and groped the others. They escaped and went to their father, who also worked at the track. Eventually they identified Peña Rodriguez as the man in the bathroom.

The jury deliberated for 12 hours and could not reach a verdict on a felony count of attempted sexual assault. It convicted Peña Rodriguez of three misdemeanors: one count of unlawful sexual contact and two counts of harassment. He was sentenced to probation and required to register as a sex offender.

After the verdict, two jurors went to defense attorneys to tell them what juror H.C. had allegedly said. Peña Rodriguez tried to use the statements to overturn the verdicts, but lower courts turned him down. The Colorado Supreme Court ruled 4 to 3 that the state’s no-impeachment rule barred the statements.

Peña Rodriguez’s petition said that courts across the country are divided on the issue and that only the Supreme Court could decide whether such incidents violate the Sixth Amendment’s guarantee of an impartial jury.

The case, *Peña Rodriguez v. Colorado*, will be argued in the term that begins in October.

# “Is Evidence of Juror Bias in Deliberations Admissible? Supreme Court to Decide”

*Lexology*

Shawn S. Ledingham, Jr.

April 21, 2016

What happens in the jury room, stays in the jury room. Except when it doesn't. Earlier this month, the Supreme Court agreed to hear the appeal of a Colorado man whose counsel learned, after the guilty verdict was rendered, that one of the jurors had made statements in deliberation that the defendant must be guilty and his alibi witness could not be trusted, because both men were Hispanic. The case, *Peña-Rodriguez v. Colorado*, pits two fundamental aspects of jury trials against each other: the inadmissibility of evidence about what was said or done during jury deliberations versus the right to a fair trial by unbiased jurors. The Supreme Court's ruling could open up jury verdicts to possible challenge when those verdicts appear to be the result of racial or other bias.

## **Jury Deliberations – Not a Secret, but not Admissible**

Strictly speaking, jury deliberations are not always secret. In fact, a common feature of jury trials in many jurisdictions is the post-verdict interview, where lawyers seize the opportunity to discuss the case directly with the recently discharged jurors before they leave the courthouse. These interviews can be an incredibly valuable tool for trial lawyers. They can reveal which arguments resonate

and which don't, for appeal and potential retrial. They can serve as a gut check for even the most seasoned trial lawyer, and they can provide helpful critiques for younger lawyers developing their trial presentation skills. But, with very limited exceptions, statements made by a juror after she has been discharged cannot be used as evidence to try to upset the verdict.

Federal Rule of Evidence 606 says that courts considering whether to overturn a jury verdict may not hear live testimony from a juror, nor receive a juror's affidavit or any other evidence of a juror's statements, on anything that was said or done during jury deliberations. There are a few exceptions, such as when a juror testifies that information that was not in evidence was given to the jury (like Henry Fonda pulling out the second knife in *12 Angry Men*) or that there has been some sort of improper outside influence used against a juror (like the mob's threat to kill Demi Moore's son in *The Juror*). But other than in very narrow circumstances, it doesn't matter what a juror reports happened during deliberations; it can't be used to overturn the verdict.

## ***Peña-Rodriguez* – If Bias Comes out After Trial, Can You Do Anything About it?**

In granting certiorari in Peña-Rodriguez, the Supreme Court appears to be entertaining the possibility of opening up another exception to this evidentiary rule. Miguel Peña-Rodriguez was convicted of three misdemeanor counts for the alleged sexual harassment and groping of two teenage girls at a horse track where he worked. The defense maintained that the case was one of mistaken identity. Somebody had assaulted the girls, they argued, but it wasn't Peña-Rodriguez because he had been in a barn in a different part of the track facility during the attack. An alibi witness produced by the defense corroborated the defendant's story.

After the verdict, Peña-Rodriguez's lawyer was told by two of the jurors that another juror allegedly made racist statements during deliberations regarding the defendant's guilt and impugning the credibility of his alibi witness, including:

-“I think he did it because he's Mexican and Mexican men take whatever they want.”

-“Mexican men [have] a bravado that cause[] them to believe they could do whatever they wanted with women.”

-“[N]ine times out of ten Mexican men were guilty of being aggressive toward women and young girls.”

-“[T]he alibi witness [wasn't] credible because, among other things, he was an illegal.”

After defense counsel learned of these statements and others like them, the defense obtained sworn affidavits from both jurors and moved for a new trial. The trial court

denied the motion, under Colorado's analogue to FRE 606, because the jurors' testimony could not serve as a basis for overturning the verdict. This holding was affirmed on appeal, ultimately by the Colorado Supreme Court. Peña-Rodriguez's lawyers sought review from the U.S. Supreme Court, challenging the state evidentiary rule under the Sixth Amendment (applicable to state law under the Fourteenth Amendment). The Supreme Court accepted cert earlier this month.

### **What to Watch for – Balancing of Two Fundamental Tenets of Jury Trials**

The Supreme Court must decide whether the Constitutional right to an impartial jury trumps the exclusionary rule of evidence. At issue is the balance between the need for finality of jury verdicts, on the one hand, and the right to a fair trial, on the other. Overlaying this balancing is the additional concern — clearly on the minds of the Colorado Supreme Court justices when they denied Peña-Rodriguez's appeal — that the lawyers on the losing side of a jury trial might harass and coerce jurors in an attempt to drum up a basis for overturning the verdict. Of course, any ancillary proceeding involving evidence from the jury deliberations would also presumably require cross-examination of the jurors to probe the jurors' credibility and reliability.

While the Supreme Court's decision will likely focus on the narrow issue of racial prejudice in criminal trials, it has the potential of shifting this balance more broadly and opening up, just a tiny bit more, the shroud surrounding the jury room.



## “Court to rule on challenge to juror bias”

*SCOTUSblog*

Lyle Denniston

April 4, 2016

The Supreme Court on Monday took on a long-standing dispute over the privacy of jury deliberations, agreeing to decide whether jurors can be questioned after a trial is over about one of their colleagues’ support for a guilty verdict because of the defendant’s racial or ethnic identity. The case of *Pena-Rodriguez v. Colorado* will be argued and decided in the Court’s next Term, starting in October.

Most states, along with the federal courts, have rules that bar the questioning of jurors about claims that one of the members of their panel engaged in misconduct while the jurors were making up their minds. The idea behind such rules is that jurors should be able to ponder verdicts without worrying about being second-guessed later about the decisions they made, and how those were made. The specific question the Justices will decide is when the enforcement of that rule would interfere with the Sixth Amendment right to an impartial jury.

The case grows out of the prosecution of an Aurora, Colo., racetrack worker, Miguel Angel Pena-Rodriguez, for alleged sexual harassment of two teen-aged girls. He was found guilty of three misdemeanor charges, sentenced to two years on probation, and required to register as a sex offender. (A

native of Mexico, Pena-Rodriguez entered the United States as a child; his formal immigration status is not clarified in the case.)

After the trial was over, two jurors told defense lawyers that one of the jurors had made a number of racist comments about Mexicans during the jury deliberations. Among other points, that juror was said to have told colleagues that Pena-Rodriguez had committed the crime because he was a Mexican “and Mexican men take whatever they want,” that Mexican men had “a bravado that caused them to believe they could do whatever they wanted with women,” and that Mexican men were “physically controlling of women.” That juror, a former police officer, allegedly made similar comments based on his experience with Mexican men. The same juror allegedly described a witness, who also was Hispanic, as someone who could not be believed because he was “an illegal.”

Before the trial, the judge had told defense lawyers that, sometimes, jurors in the court in Colorado often had voiced their dislike of individuals who had entered the U.S. illegally. Defense lawyers, however, did not ask any of the potential jurors about that possibility.

In taking the case on to the Supreme Court, lawyers for *Pena-Rodriguez* argued that federal and state courts are split on when a rule against questioning jurors after a trial must be set aside to allow an inquiry into claims of alleged racial bias during deliberations.

In its orders on Monday, the Court accepted for review only the *Pena-Rodriguez* case. In other actions, it turned down several new cases seeking clarification of whether federal courts have the authority to approve a lawsuit in the form of a class action if some of those involved in the case had not suffered any of the harm claimed in the case.

These were attempts to get the Court to spell out further new limits on class-action lawsuits, in the wake of its recent ruling in the case of *Tyson Foods v. Bouaphakeo*.

## “Jury Room Racism Is Protected. It Shouldn't Be.”

*Bloomberg View*

Noah Feldman

April 5, 2016

Law and tradition say that a jury verdict shouldn't be overturned on the basis of something jurors say in their deliberations, no matter how ignorant or offensive.

But what if there's strong evidence that the jury deliberations were racially biased? Does the defendant's right to a fair trial supersede the tradition of letting the verdict stand? The Supreme Court has agreed to hear this fascinating question in a sexual assault case where one juror, a former cop, told the others that Mexican men "do whatever they want" with women.

Odds are that the court will decide that the sanctity of the jury room trumps racial fairness – but it's far from clear that would be the right result.

Most traditions are invented. What's fascinating about the tradition of refusing to consider post-trial stories by jurors of their own misconduct is that we know exactly when it was invented, and by whom. The year was 1785 and the inventor was Lord Mansfield, generally considered the greatest common law judge in English legal history, who loved to make up efficient new rules.

In the case of *Vaise v. Delaval*, the jurors, unable to reach a verdict, had "tossed up" –

probably a coin -- and agreed to decide the case based on the toss. Until then, courts had generally considered accounts of juror misbehavior.

Mansfield changed the rule. He argued that the jurors shouldn't be permitted to implicate themselves in the serious crime of breaking their oaths of conduct. If the jury's misconduct were to be considered, he concluded, "the Court must derive their knowledge from some other source: such as from some person having seen the transaction through a window, or by some such other means."

The rule probably relied on a then-prevalent doctrine that a witness would not be heard to allege his own wrongdoing. Today we allow testimony against one's own interests, so Mansfield's original rationale doesn't apply.

But within a few decades, Mansfield's rule had taken root for a different, more practical reason: It assures the finality of verdicts. If decisions could be overturned by jurors' testimony about what happened in the jury room, the incentive to reopen verdicts would be great, and it would be hard to know when, exactly, the result would stick.<sup>1</sup>

The Supreme Court relied on the finality rationale in a 1915 case. It repeated it in a 2014 decision, *Warger v. Shauers*, in which it refused to allow post-trial affidavits showing that a juror had lied during jury selection questioning and told other jurors that her daughter had been in a car accident and that if she'd been sued, "it would have ruined her life."

Federal evidence law, copied by most states, preserves the rule with exceptions for extraneous prejudicial information, improper outside influence or a mistake on the jury form. The extraneous information is usually held to include specific facts about the case, not jurors' general knowledge – or their personal biases.

The case that the court will hear now, *Pena-Rodriguez v. Colorado*, involved post-trial testimony that one juror's racial bias may have affected the verdict. The defendant in the case, Miguel Angel Pena-Rodriguez, was charged with sexual assault for accosting two girls, one under 15, in the bathroom of a horse-racing facility.

According to more than one juror affidavit, one of the jurors, a former law-enforcement officer, told the others that the defendant "did it because he's Mexican and Mexican men take whatever they want." He made more prejudicial statements in the same vein, adding that an alibi witness shouldn't be believed because he "was an illegal" -- a claim not supported in the trial record.

The justices of the Colorado Supreme Court all agreed that the juror affidavits were inadmissible. But while the majority considered that the end of the matter, Justice

Monica Márquez, joined by two others, did not.

Márquez, a respected judge (I went to law school with her), dissented to say that the Sixth Amendment<sup>2</sup> right to a fair trial, as well as the guarantee of due process, trumped the rule of evidence. She pointed out that in its 2014 opinion, the Supreme Court said in a footnote, "There may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged." This, said Márquez, was exactly such a case.

The fact that the court took the case suggests that it's at least possible that it thinks Márquez may be right. It seems more likely that the court will rely on finality once more, as it did in 2014. Jurors have all kinds of biases, and allowing testimony about them could indeed threaten the finality of trials.

But the court should consider that the federal rules already allow exceptions from finality for extraneous information. And it should keep in mind that the Mansfield rule doesn't rest on very strong internal logic. Given these, it makes some sense to treat the constitutional interest in a fair trial as paramount. Jurors may be biased, but if they express overt racism in the jury room, that should be admissible as evidence that their verdict was unconstitutional.