SETTING THE STANDARD: A CLOSER LOOK AT *PEÑA-RODRIGUEZ V. COLORADO*

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In criminal trials, individuals are summoned to serve on juries. Those who are selected to be on a jury are expected to be fair, impartial, and honest. But when jurors demonstrate characteristics that are not fair, impartial, or honest, a defendant's Sixth Amendment right may be impeded—even more so when there is a demonstration of racial bias in jury deliberations. In the past when there has been racial bias in jury deliberations, Federal Rule of Evidence 606(b) did not allow attorneys to do much to rectify the situation. Rule 606(b) states that a juror may not testify about any statement made or incident that occurred during jury deliberations, making it difficult for attorneys to remedy a verdict that has been tainted by racial bias.

Most recently, in Peña–Rodriguez v. Colorado, *the Supreme Court addressed this issue and attempted to remedy the situation by holding that when there is evidence of blatant racial bias that influences a jury's verdict, Rule 606(b) will give way to allow a juror to testify before a court in support of a motion to set aside the verdict. Although this ruling is a step in the right direction, the Supreme Court failed to establish what procedures lower courts should follow to decide whether an evidentiary hearing is warranted and, assuming the defendant is granted an evidentiary hearing, when a juror's behavior or bias is egregious enough for the defendant to be granted a new trial or reversal. This Note will bring to the forefront the narrow application of* Peña-Rodriguez *and discuss the issues defendants have had with its application. Moreover, this Note will shed more light on the racial bias impacting our justice system and open up an important discussion on a defendant's inability to address racial bias in jury deliberations, in spite of* Peña-Rodriguez.

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INTRODUCTION

A Native-American man is convicted of assault.[1] The day after the jury announces its verdict, a juror reveals that during deliberations the jury foreman told other jurors "when Indians get alcohol, they get drunk, and that when they get drunk, they get violent."[2] Other jurors chime in to agree with the jury foreman.[3] Despite these racially biased comments during jury deliberations, the court upholds the conviction.[4]

An African-American man is convicted of assault and two counts of threatening to injure a person.[5] The same day the jury is discharged, one juror writes a letter to the judge.[6] In the letter, the juror reveals that during deliberations some jurors expressed "all blacks are guilty regardless."[7] Despite this racially biased comment during jury deliberations, the court upholds the conviction.[8]

A Hispanic man is convicted of bank robbery.[9] Hours after the verdict is rendered, a juror sends an email that states that during deliberations one juror referred to the defendant and said, "I guess we're profiling but they cause all the trouble."[10] Despite this racially biased comment during jury deliberations, the court upholds the conviction.[11]

Racial bias is a substantial issue in our judicial system that affects, among other things, a defendant's ability to receive a fair trial.[12] The effectiveness of

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1. United States v. Benally, 546 F.3d 1230, 1231 (10th Cir. 2008).
2. *Id.*
3. *Id.* at 1232.
4. *Id.* at 1242.
5. Kittle v. United States, 65 A.3d 1144, 1147 (D.C. Cir. 2013).
6. *Id.*
7. *Id.* at 1148.
8. *Id.* at 1157 (the case was remanded on one of the convictions, but not because of juror racial bias).
9. United States v. Villar, 586 F.3d 76, 78 (1st Cir. 2009).
10. *Id.* at 81.
11. United States v. Villar, 411 F. App'x. 342 (1st Cir. 2011).
12. *See* cases cited *infra* note 33.

criminal jury trials depends on a jury's ability to remain honest, unbiased, and fair throughout a trial.[13] When jurors are unable to maintain these characteristics, true justice can never really be served. Unfortunately, as illustrated by the cases above, biased jurors appear in our justice system more often than we would like, and when this does happen, to a defendant's detriment, there is little attorneys can do to remedy the situation after a verdict has been rendered.[14]

However, before a jury has been selected, there are methods in place to filter out such jurors.[15] One of these methods is voir dire—also known as *jury selection*.[16] In a criminal trial, the court is entitled to examine prospective jurors and may permit attorneys to do the same.[17] This process helps to filter out potential jurors who appear to be biased, unfair, or dishonest.[18] Still, this process is not entirely flawless.[19] There are a number of ways the voir dire process can prove ineffective and allow biased jurors to remain on the jury, such as when prospective jurors are not honest during voir dire,[20] when the trial court conducts the voir dire in an ineffective manner,[21] or when an attorney fails to strike a biased juror during voir dire.[22]

Additionally, there are methods in place during trial—before a verdict is rendered—to help reveal biased jurors who may have fallen through the cracks of an ineffective voir dire, such as the court's and counsels' ability to observe jurors during trial and a defendant's ability to introduce nonjuror evidence of any juror misconduct.[23] Nonetheless, like the voir-dire process, these methods are not entirely flawless. First, neither the court nor counsel can see everything that is going on in the courtroom at all times, and either of them could miss an essential moment of juror misconduct. Second, although the collection of nonjuror evidence of juror misconduct in the courtroom could prove feasible—anyone who is not a juror, for example courtroom staff, individuals in the courtroom gallery, etc., could observe juror misconduct in the courtroom—that is not where juror misconduct is likely to take place. Jurors are more at liberty to speak their mind during juror deliberations where there is a lack of attorney, judge, and courtroom staff presence, and that is more likely where juror misconduct will take place. However, the collection of nonjuror evidence inside jury deliberations is more difficult because of the lack of access that attorneys, or any nonjurors, have to statements or anything that happens

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13. *See* Praatika Prasad, Note, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 FORDHAM L. REV. 3091, 3101 (2018).
14. *See* cases cited *supra* notes 1–11.
15. *See* Tanner v. United States, 483 U.S. 107, 108 (1987).
16. *Id.* at 127; FED. R. CRIM. P. 24.
17. FED. R. CRIM. P. 24(a)(1).
18. *See Tanner*, 483 U.S. at 107.
19. *See* United States v. Sampson, 820 F. Supp. 2d 151 (D. Mass. 2011); *see also* Wright v. State, 983 A.2d 519 (Md. 2009); Hughes v. United States, 258 F.3d 453 (6th Cir. 2001).
20. *Sampson*, 820 F. Supp. 2d at 151.
21. *Wright*, 983 A.2d at 522.
22. *See Hughes*, 258 F.3d at 456.
23. *Tanner*, 483 U.S. at 108.

inside the walls of a jury-deliberation room. This dilemma is made difficult, if not impossible, by the Federal Rule of Evidence 606(b).[24]

Rule 606(b), also known as the *no-impeachment rule*, bars a juror from testifying or producing any other evidence about the following: (1) any statement made or incident that occurred during the jury's deliberation; (2) the effect of anything on that juror's or another juror's vote; or (3) any juror's mental processes concerning the verdict.[25] Additionally, Rule 606(b) prevents a court from receiving a juror's affidavit.[26] This bar to a juror's testimony or any evidence of statements made during jury deliberations creates palpable tension between Rule 606(b) and a criminal defendant's Sixth Amendment right to a fair and impartial jury.

While the Supreme Court has not been previously willing to find an exception to Rule 606(b)'s bar on impeachment, it recently did so in the context of blatantly racially biased statements made during jury deliberations brought to light in *Peña-Rodriguez v. Colorado*.[27] In *Peña-Rodriguez*, the Supreme Court held that when there is a clear statement of racial bias in jury deliberations that significantly motivates a juror's vote, then the no-impeachment rule will be set aside to allow for the testimony of jurors to be used in an evidentiary hearing to attack the conviction.[28]

Although *Peña-Rodriguez* was a step forward, it left multiple legal questions open for resolution by lower courts.[29] First, it did not establish when a defendant will be granted an evidentiary hearing in light of juror racial bias: what procedures do lower courts follow when deciding whether an evidentiary hearing is warranted? And second, assuming the defendant is granted an evidentiary hearing, *Peña-Rodriguez* did not establish when a juror's behavior or bias is egregious enough for the defendant to be granted a new trial or reversal.

This Note will address each issue the Supreme Court left unresolved in *Peña-Rodriguez*. In Part I, this Note discusses the history of racial bias in our criminal-justice system. Part II discusses the history and policy behind Rule 606(b). Part III discusses the tension Rule 606(b) creates with the Sixth Amendment's guarantee that every criminal defendant has the right to be tried by a fair and impartial jury. Part IV examines the Court's previous rulings in *Tanner v. United States*[30] and *Warger v. Shauers*.[31] And, finally, Part V will consider the Court's analysis in *Peña-Rodriguez* and address the issues it left unresolved.

I. RACIAL BIAS IN OUR CRIMINAL-JUSTICE SYSTEM

Despite the Constitution's guarantees of fairness and impartiality, jury trials have never been fair or impartial, especially when it comes to race.[32] Racial

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24. FED. R. EVID. 606(b).
25. *Id.*
26. *Id.*
27. 137 S. Ct. 855, 858 (2017).
28. *Id.*
29. *See generally id.*
30. 483 U.S. 107 (1987).
31. 135 S. Ct. 521 (2014).
32. *See* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017).

bias in jury deliberations has been a longstanding issue in our criminal-justice system.[33] Following the Civil War, the Thirteenth, Fourteenth, and Fifteenth Amendments were added to the U.S. Constitution.[34] These Amendments prohibited slavery and involuntary servitude, provided equal protection under the laws, and protected voters of all races.[35] Despite the strides the United States took to ensure equality, it was not until 1879 that the Supreme Court ruled that excluding African Americans from jury service violated the Equal Protection Clause of the Fourteenth Amendment.[36]

Although African Americans could no longer be excluded from jury service, racial bias continued to appear in jury selection and jury deliberations. Fast forward 52 years from *Strauder v. State of West Virginia*, and by 1931 the issue of racial bias in jury deliberations became so apparent that in *Aldridge v. United States*, counsel for the defendant "requested [that] the court allow the record to show that the question relative to racial prejudice be propounded to each and every prospective juror" during voir dire to prohibit unfair and biased jurors on the final jury.[37] Although by this time questions relative to racial bias had been implemented into voir dire by some attorneys, racial bias in jury deliberations persisted.[38] This was shown in *Johns v. City of Los Angeles*, a 1978 case in which, during jury deliberations, a juror repeatedly stated "I wonder how long these lawyers shopped to get this Black Judge?"[39] Despite the apparent existence of racial bias in jury deliberations, courts were hesitant to remedy the situation by going within the walls of jury deliberations.[40] In 2011, the court in *Risko v. Thompson Muller Auto Group*

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33. *See* Aldridge v. United States, 283 U.S. 308, 310 (1931) (denying defense counsel the opportunity to ask jurors about racial bias); Ham v. South Carolina, 409 U.S. 524, 527 (1973) (holding that lower courts are required to interrogate jurors on the subject of racial bias upon request of defense counsel); Johns v. City of Los Angeles, 78 Cal. App. 3d 983, 144 Cal. Rptr. 629 (Ct. App. 1978) (jurors concealed racial bias during voir dire); Com. v. Tavares, 430 N.E.2d 1198, 1207 (Mass. 1982) (juror used racist term during deliberations); Wright v. United States, 559 F. Supp. 1139, 1150 (E.D.N.Y. 1983), aff'd, 732 F.2d 1048 (2d Cir. 1984) (defendant claimed racial bias may have motivated jurors to convict him); State v. Shillcutt, 350 N.W.2d 686, 688 (Wis. 1984) (defendant alleged that racial prejudice affected the jury's verdict); Barnes v. Toppin, 482 A.2d 749, 750 (Del. 1984) (trial judge suspected racial bias played an improper role in the jury verdict); United States v. Henley, 238 F.3d 1111, 1114 (9th Cir. 2001) (juror made several racist comments while driving to and from trial).

34. *Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments*, UNITED STATES SENATE, https://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm (last visited Mar. 5, 2018).

35. *Id.*

36. Strauder v. State of West Virginia, 100 U.S. 303, 304 (1879), *abrogated by* Taylor v. Louisiana, 419 U.S. 522, 95 S. Ct. 692 (1975).

37. *Aldridge*, 283 U.S. at 310.

38. *See generally Johns*, 78 Cal. App. 3d at 983.

39. *Id.* at 991.

40. Wright v. United States, 559 F. Supp. 1139, 1150 (E.D.N.Y. 1983), *aff'd*, 732 F.2d 1048 (2d Cir. 1984) ("Post-verdict inquiries into the internal deliberations of the jury or the mental processes of individual jurors are generally not permitted. This judicial reluctance is based on a number of well-founded fears."); State v. Shillcutt, 350 N.W.2d 686, 689 (1984)

recognized, "the jury room, during deliberations, must be a sanctuary for free and open discussion among jurors without a scenario of jurors overtly policing the conduct and comments of other jurors."[41] Courts were not only hesitant to violate the sanctity of jury deliberations but also barred by Rule 606(b) with only a few limited exceptions.[42]

II. FEDERAL RULE OF EVIDENCE 606(B)

Rule 606(b) bars attorneys from going within the walls of jury deliberations to discover jurors' thought processes before they reach a verdict.[43] During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberation, the effect of anything on that juror's or another juror's vote, or any juror's mental processes concerning the verdict or indictment.[44] The court may not receive a juror's affidavit or evidence of a juror's statements on these matters.[45]

Rule 606(b) was enacted to limit the testimony of a juror in the course of an inquiry into the validity of a verdict.[46] The only exceptions, before *Peña-Rodriguez*, included testimony "as to the influence of extraneous prejudicial information brought to the jury's attention (e.g., a radio newscast or a newspaper account) or an outside influence which improperly had been brought to bear upon a juror (e.g., a threat to the safety of a member of a juror's family)."[47] By enacting Rule 606(b), Congress intended to "ensure that jurors would not feel constrained in their deliberations for fear of later scrutiny by others."[48] Additionally, Congress sought to promote the values of freedom of deliberation, stability, and finality of verdicts, and protection of jurors against annoyance and embarrassment.[49]

At the time, Congress believed that, without Rule 606(b), jurors would base their final decision on fear rather than reason.[50] "The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment."[51] However, the Advisory Committee Notes did acknowledge

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("This general rule of juror secrecy fosters a number of valued public policies including: (1) discouraging harassment of jurors by losing parties eager to have the verdict set aside; (2) encouraging free and open discussion among jurors; (3) reducing incentives for jury tampering; (4) promoting verdict finality; and (5) maintaining the viability of the jury as a judicial decision-making body.").

41. 20 A.3d 1123, 1132 (N.J. 2011).
42. FED. R. EVID. 606.
43. *Id.*
44. *Id.*
45. *Id.*
46. FED. R. EVID. 606 advisory committee's notes to 1972 Proposed Rules.
47. *Id.*
48. Shoen v. Shoen, 933 F. Supp. 871, 876 (D. Ariz. 1996), *aff'd*, 113 F.3d 1242 (9th Cir. 1997).
49. FED. R. EVID. 606 advisory committee's notes to 1972 Proposed Rules.
50. *Id.*
51. *Id.*

potential drawbacks of Rule 606(b).[52] The Advisory Committee noted it would be difficult to prevent irregularity and injustice if verdicts were put beyond effective reach.[53] Unfortunately, the Advisory Committee Notes were correct.[54] Rule 606(b) creates injustice and, in doing so, conflicts with a criminal defendant's Sixth Amendment right to a fair trial by an impartial jury.[55]

III. THE CONFLICT BETWEEN FEDERAL RULE OF EVIDENCE 606(B) AND THE SIXTH AMENDMENT

The Sixth Amendment guarantees criminal defendants the right to "trial, by an impartial jury," but in some cases that right is not fulfilled because of Rule 606(b).[56] Rule 606(b) forecloses certain inquiries into the validity of jury verdicts by forbidding jurors from "testify[ing] about any statement made or incident that occurred during jury's deliberations," making it difficult for courts to look within the walls of the jury room and evaluate the impartiality of jury members.[57] While effective in promoting freedom of deliberation, stability, and the protection of jurors against annoyance and embarrassment, this Rule has made it difficult to address issues surrounding instances when a criminal defendant may have not received a fair trial.[58]

For instance, *Tanner v. United States* addressed a defendant's right to a competent jury.[59] There, a defendant attempted to introduce juror testimony to establish that the jury violated the defendant's Sixth Amendment right.[60] In *Tanner*, the defendants were convicted of conspiracy to defraud the United States and various acts of mail fraud.[61] After the verdict, jurors approached defense counsel and described drug and alcohol use by the jurors during the trial.[62] Defense counsel asked for permission to interview the jurors.[63] As a result, the lower court ordered the parties to file memoranda and heard arguments on the motion to interview the jurors.[64] The court held that the juror testimony was inadmissible under Rule 606(b).[65] But the court invited petitioners to call any nonjuror witnesses to testify about the juror misconduct.[66] The defendants' counsel took the stand and stated that "he had observed one of the jurors in a sort of giggly mood."[67] The court disregarded the testimony because the judge recalled that earlier in the trial he told defense

52. *Id.*
53. *Id.*
54. *See* Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017).
55. *Id.*
56. U.S. CONST. amend. VI.
57. FED. R. EVID. 606(b).
58. *See* cases cited *supra* notes 1–11.
59. *See* 483 U.S. 107 (1987).
60. *Id.*
61. *Id.* at 107.
62. *Id.* at 107–08.
63. *Id.* at 107.
64. *Id.* at 113.
65. *Id.*
66. *Id.*
67. *Id.*

counsel to alert him if defense counsel observed jurors being inattentive.[68] Defense counsel never did so.[69] Because neither defense counsel nor courtroom employees alerted the judge to any juror inattentiveness during trial, the court ruled that interviewing jurors was inappropriate.[70] However, later, the defendants filed for another new trial based on additional evidence of jury misconduct.[71] It turned out that the jurors consumed more than alcohol.[72] Defense counsel received an unsolicited visit at his residence from a second juror.[73] The juror expressed that he "felt like . . . the jury was one big party."[74] He indicated that seven of the jurors drank alcohol at noon recess; he and three other jurors smoked marijuana regularly during the trial; and one juror took marijuana, cocaine, and drug paraphernalia into the courthouse.[75] Despite the alcohol and drug use throughout trial, and the two separate jurors who came forward, the Supreme Court held that under Rule 606(b) the jurors would not be permitted to testify.[76]

Turning to the claim that exclusion of this testimony violated the defendant's Sixth Amendment right, the Court held that the obstacle to investigating the incompetency of the jury that Rule 606(b) creates for criminal defendants is not a constitutional violation.[77] The Court came to this conclusion by identifying four aspects of the trial process that serve to protect a defendant's Sixth Amendment right: voir dire, the ability of counsel and the court to observe the jury during trial, the ability of jurors to report the misconduct of other jurors before rendering a verdict, and the opportunity for a party to impeach a verdict based on nonjuror evidence of misconduct.[78] But, because *Tanner* involved jurors who were impaired, the ruling was limited to a defendant's right to a *competent* jury.[79] *Tanner* made no reference to an *impartial* jury.[80]

The next notable Supreme Court case to address the application of Rule 606(b) was *Warger v. Shauers*.[81] Rule 606(b) applied in *Warger* because the petitioner sought a new trial based on the allegation that a juror lied during the voir dire process.[82] The Court made short shrift of the petitioner's Rule 606(b) argument by citing to *Tanner*, stating that "this Court's *Tanner* decision forecloses any claim that Rule 606(b) is unconstitutional."[83] In *Warger*, a motorcyclist who suffered

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68. *Id.*
69. *Id.* at 115.
70. *Id.* at 112–15.
71. *Id.* at 115.
72. *Id.* at 115–16.
73. *Id.* at 115.
74. *Id.*
75. *Id.* at 115–16.
76. *Id.* at 108.
77. *Id.* at 127.
78. *Id.* at 141.
79. *Id.* at 127.
80. *Id.*
81. 135 S. Ct. 521 (2014).
82. *Id.* at 522.
83. *Id.* at 523.

serious injuries after a truck collided with his motorcycle brought an action against the truck's driver.[84] After the verdict was returned for the truck driver, one of the jurors contacted the motorcyclist's attorney and claimed that during the jury's deliberations the jury foreperson revealed that her daughter had been at fault in a fatal motor-vehicle accident, and that a lawsuit would have ruined her daughter's life.[85] The Court held the no-impeachment provisions of Rule 606(b) applied.[86] The Court stated, "[Rule 606(b)] made jury deliberations evidence inadmissible even if used to demonstrate dishonesty during voir dire."[87]

Warger, unlike *Tanner*, focused on jury impartiality.[88] However, despite this fact, and although this was a civil case, *Warger* concluded that the Court's earlier opinion in *Tanner* foreclosed any claim that Rule 606(b) is unconstitutional because of the safeguards *Tanner* had already discussed:

> A party's right to an impartial jury remains protected despite Rule 606(b)'s removal of one means of ensuring that jurors are unbiased. Even 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 after the verdict is rendered.[89]

As a result, courts still struggled with admitting juror testimony regarding an impartial jury.[90] The continued struggle stems from the question of whether juror testimony should be classified as inadmissible pursuant to Rule 606(b) or if Rule 606(b) violates a criminal defendant's right to an impartial jury.

This issue was addressed in *United States v. Benally*.[91] In *Benally*, the defendant was convicted of forcibly assaulting an officer with a dangerous weapon.[92] Before the defendant's trial, the defendant submitted several voir dire questions aimed at uncovering any bias against Native Americans.[93] The judge asked the questions "Would the fact that the defendant is a Native American affect your evaluation of the case?" and "Have you ever had a negative experience with any individuals of Native American descent?"[94] No juror answered the questions affirmatively.[95] Following the completion of the trial, a juror approached defense counsel and claimed that the jury deliberation had been influenced by racist claims

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84. *Id.* at 522.
85. *Id.* at 524.
86. *Id.* at 523.
87. *Id.*
88. *See id.*
89. *Id.* at 529.
90. *See* Warger v. Shauers, 135 S. Ct. 521 (2014); United States v. Benally, 546 F.3d 1230, 1231 (10th Cir. 2008); Tanner v. United States, 483 U.S. 107 (1987).
91. 546 F.3d 1230 (10th Cir. 2008).
92. *Id.* at 1231.
93. *Id.*
94. *Id.*
95. *Id.*

against Native Americans.[96] The juror explained that the foreman stated, "when Indians get alcohol, they get drunk and that when they get drunk, they get violent."[97] The juror then claimed that a second juror chimed in and agreed with the foreman's statement.[98] Armed with affidavits, the defendant moved to vacate the verdict, arguing that he should get a new trial on the grounds that the jurors lied about their racial bias during voir dire.[99] The defendant also argued that Rule 606(b) was inapplicable because he presented testimony to show that a juror lied during voir dire rather than to inquire "into the validity of the verdict."[100]

The *Benally* court rejected this argument and reasoned that although the defendant's evidence may have shown the two jurors were dishonest during voir dire, the point of the showing was to vacate the verdict, which was ultimately a challenge to the validity of the verdict.[101] The court concluded that "it does not follow that juror testimony that shows a failure to answer honestly during voir dire can be used to overturn the verdict."[102] The court stated that "allowing juror testimony through the back door of a voir dire challenge risks swallowing [Rule 606(b)]."[103]

The court then addressed whether the juror testimony fell within one of Rule 606(b)'s enumerated exceptions.[104] The court did not find that the statements were either "extraneous prejudicial information" or an "outside influence," concluding that while the statements were improper, "[i]mpropriety alone . . . does not make a statement extraneous."[105] Next, the court considered whether it should imply an exception to Rule 606(b) for evidence alleging racial bias.[106] The court concluded that Congress explicitly rejected a version of Rule 606(b) that had an exception broad enough to encompass racial bias, and therefore, the court could not imply an exception for such testimony.[107] Rather, the *Benally* court stated that it would be up to Congress to amend Rule 606(b) to include an exception for evidence alleging racial bias.[108]

Finally, the court considered whether the application of Rule 606(b) in *Benally* violated the defendant's Sixth Amendment right to an impartial jury.[109] The court relied on *Tanner* and the Supreme Court's enumerated procedural protections to conclude that Rule 606(b) was not unconstitutional as applied in *Benally*, stating

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96. *Id.*
97. *Id.* at 1231.
98. *Id.* at 1231–32.
99. *Id.*
100. *Id.* (quoting FED. R. EVID. 606(b)).
101. *Id.* at 1235.
102. *Id.*
103. *Id.* at 1236.
104. *Id.*
105. *Id.* at 1237–38.
106. *Id.* at 1238
107. *Id.* at 1238–39.
108. *See id.* at 1238.
109. *Id.* at 1239 (citing Tobias v. Smith, 468 F. Supp. 1287, 1290 (W.D.N.Y. 1979)).

that the "Sixth Amendment embodies a right to 'a fair trial but not a perfect one, for there are no perfect trials.'"[110] The Tenth Circuit expressed concern about the implications of creating a constitutional exception to Rule 606(b) for racial bias, noting that "once it is held that the rules of evidence must be subordinated to the need to admit evidence of Sixth Amendment violations, we do not see how the courts could stop at the 'most serious' such violations."[111] The court reasoned that "if every claim that, if factually supported, would be sufficient to demand a new trial warrants an exception to Rule 606(b), there would be nothing left of the Rule, and the great benefit of protecting jury decision-making from judicial review would be lost."[112]

As demonstrated in *Tanner*, *Warger*, and *Benally*, conflict between Rule 606(b) and a defendant's Sixth Amendment right arose only when other methods for detecting jury racial bias, such as voir dire, the ability of counsel and the court to observe the jury during trial, the ability of jurors to report the misconduct of other jurors before rendering a verdict, and the opportunity for a party to impeach a verdict based on nonjuror evidence of misconduct, failed.[113] This was the scenario in *Peña-Rodriguez v. Colorado*.[114]

IV. THE IMPACT OF *PEÑA-RODRIGUEZ*

On March 6, 2017, the Supreme Court decided *Peña-Rodriguez v. Colorado*.[115] In *Peña-Rodriguez*, a Colorado jury convicted Miguel Peña-Rodriguez, a Hispanic man, of harassment and unlawful sexual contact.[116] At trial, Peña-Rodriguez's friend testified that the two had been together when the assault occurred, and so Peña-Rodriguez could not have committed the crime.[117] But the jury convicted on two of the three counts nonetheless.[118]

After the jury was discharged, two jurors remained behind to speak to defense counsel.[119] They alleged that a third juror had made racially biased statements during deliberations.[120] One juror claimed that the third juror had said, "I think he did it because he is Mexican and Mexican men take whatever they want."[121] The third juror 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."[122] This third juror also believed that the defendant "was guilty because in his experience as an ex-law enforcement officer,

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110. *Id.* at 1240.
111. *Id.* at 1241.
112. *Id.*
113. *See* Warger v. Shauers, 135 S. Ct. 521 (2014); United States v. Benally, 546 F.3d 1230, 1240 (10th Cir. 2008); Tanner v. United States, 483 U.S. 107, 127 (1987).
114. Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017).
115. *Id.* at 855.
116. *See id.* at 857.
117. *Id.* at 861.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 862.
122. *Id.*

Mexican men had a bravado that caused them to believe they could do whatever they wanted with women."[123] Peña-Rodriguez moved for a new trial.[124]

The trial court denied Peña-Rodriguez's motion for a new trial and barred the admission of the jurors' affidavits under Rule 606(b).[125] The court sentenced Peña-Rodriguez to two years of probation and required him to register as a sex offender.[126] A divided panel of the Colorado Court of Appeals affirmed the conviction.[127] The court agreed that the juror's statements were inadmissible and rejected on procedural grounds Peña-Rodriguez's argument that the rule violated his right to an impartial jury.[128] The Colorado Supreme Court affirmed.[129] The majority denied the existence of any dividing line between different types of juror bias or misconduct, whereby one side of the line would implicate a party's Sixth Amendment right while another would not.[130]

In *Peña-Rodriguez*, the safeguards suggested in *Tanner* failed to expose a juror with racial bias.[131] First, voir dire did not bring to light any racial bias among the jurors who were ultimately selected for the trial.[132] During the voir dire process, the trial judge gave prospective jurors a written questionnaire that asked if there was "anything about [them] that [they felt] would make it difficult for [them] to be a fair juror."[133] The judge then orally asked the same question to the prospective jurors and encouraged them to speak with the court privately if they had any concerns about their impartiality.[134] None of the empaneled jurors expressed reservations about such bias or asked to speak privately with the judge.[135] Second, neither counsel nor the court observed any evidence of racial bias during the trial.[136] Third, jurors did not approach defense counsel about the racial bias until a verdict had already been rendered.[137] Finally, there was no mention of nonjuror evidence to prove the juror misconduct.[138] The only method left to ensure that Peña-Rodriguez's Sixth Amendment right was upheld was the possibility of going within the walls of jury deliberations, and that is the method the Court explored.[139]

Peña-Rodriguez posed the question of whether there is an exception to the no-impeachment rule when, after the jury is discharged, a juror comes forward with

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123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *See id.*
129. *Id.*
130. *See id.*
131. *See id.* at 866, 868.
132. *Id.* at 861.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 858.
137. *Id.* at 861.
138. *See id.* at 869.
139. *Id.*

compelling evidence that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor in the vote to convict.[140] Additionally, *Peña-Rodriguez* was the first case to recognize and attempt to remedy the conflict between Rule 606(b) and a defendant's Sixth Amendment right.[141] The Court held that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment right to a fair and impartial jury requires that the trial court consider that evidence.[142] This ruling trumped Rule 606(b)'s prohibition on inquiries into statements made during jury deliberations.[143]

However, the Court stated that there are limits on its decision: "Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry."[144] The threshold is 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."[145]

Peña-Rodriguez ultimately followed the imperative to purge racial prejudice from the administration of justice that began with the ratifications of the Civil War Amendments.[146] *Peña-Rodriguez* also found it less likely that the safeguards proposed by *Tanner* and solidified in *Warger* and *Benally* could protect against instances of racial discrimination in jury deliberations.[147] As a result, the Court sought to prevent future juror misconduct of this magnitude by setting aside the no-impeachment rule under the circumstances in this case.[148]

The Court also addressed the need to preserve confidence in jury verdicts and in the jury system itself, which the Sixth Amendment strives to protect.[149] The new exception created by *Peña-Rodriguez* did just that: it gave defendants the opportunity to go within the walls of jury deliberations to ensure that their verdicts were based on fair, unbiased reason and not on racial bias.[150] With the decision in *Peña-Rodriguez*, the Court sought to prevent injustice, and it also distinguished *Tanner*, *Warger*, and *Benally*.[151]

However, *Peña-Rodriguez* did not clearly pave the way for a defendant to get a new trial once racial animus has been discovered. The Court failed to explain

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140. *Id.* at 861.
141. *Id.*
142. *Id.* at 869.
143. *See id.*
144. *Id.* at 869.
145. *Id.*
146. McLaughlin v. Florida, 379 U.S. 184, 191–92 (1964) ("[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.").
147. *Peña-Rodriguez*, 137 S. Ct. at 869.
148. *See id.*
149. *Id.*
150. *See id.*
151. *See id.*

when a defendant will be granted an evidentiary hearing in light of juror racial bias, and assuming the defendant is granted an evidentiary hearing, it did not establish when a juror's behavior or bias is egregious enough for the defendant to be granted a new trial or reversal.[152] The Court's failure to address these issues in *Peña-Rodriguez* has made it difficult to apply the decision to other cases.[153]

The first two Supreme Court cases immediately following *Peña-Rodriguez* were *Cutro v. Stirling*[154] and *Anderson v. Kelley*.[155] Although neither case dealt with a juror's racial bias, both cases attempted to go within the walls of the jury deliberations.[156] As a result of the lack of juror racial bias, the court in each case held the allegations were unlike the "race-infected comments" in *Peña-Rodriguez* and thus did not meet the standard to set aside the no-impeachment rule.[157]

After *Cutro* and *Anderson*, more defendants began to cite *Peña-Rodriguez* in attempts to overcome the no-impeachment rule.[158] The court in *Young v. Davis* "declin[ed] the invitation to extend further the reach of *Peña-Rodriguez*, one antithetical to the privacy of jury deliberations—a principle whose loss would be attended by such high costs as to explain its veneration."[159] In that case, the defendant was convicted of capital murder.[160] He argued that the declarations from two of the jurors in his trial would show that the jurors thought they had to unanimously agree upon which evidence they believed was mitigating evidence before they could consider it in mitigation.[161] The court ruled against the defendant's

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152. *Id.* at 860–71.

153. *See infra* notes 157–58.

154. C/A No. 1:16-CV-2048-JFA, 2017 WL 1100869 (D.S.C. Mar. 23, 2017).

155. No. 5:12-CV-279-DPM, 2017 WL 1160583 (E.D. Ark. Mar. 28, 2017).

156. *Cutro*, 2017 WL 1100869, at *7 (defendant filed a petition for writ of habeas corpus arguing that, "[t]he judge erred by forcing the jury to continue deliberating after it clearly informed the court on more than one occasion it could not reach a verdict and that three jurors would not change their vote"); *see also Anderson*, 2017 WL 1160583, at *25 (defendant here was charged with murder and argued that a juror voted to convict him even though she did not believe he was guilty; further, in a separate claim, the defendant argued that a juror had a brief encounter with his brother which almost resulted in a physical altercation).

157. *Cutro*, 2017 WL 1100869 at *21 n.26 ("The Court did not consider the juror's affidavit regarding the internal deliberations of the jury as the United States Supreme court has not adopted an exception for this circumstance."); *Anderson*, 2017 WL 1160583 at *1 (citing Mattox v. United States, 146 U.S. 140, 148 (1892) ("The governing law prevents the secret thoughts of one juror from having the power to disturb the expressed conclusions of twelve. And the allegations here are unlike the race-infected comments that lifted the Rule 606(b) bar in *Peña-Rodriguez v. Colorado*.")).

158. Tharpe v. Sellers, 138 S. Ct. 545, 545, 551–52 (2018) (Thomas, J., dissenting) (petitioner moved to reopen his proceedings regarding a claim that the jury convicted him of murder included a white jury who was biased against petitioner because he was black); Young v. Davis, 860 F.3d 318, 333 (5th Cir. 2017); Malpica-Cue v. Fangmeier, 2017 COA 46, ¶ 20, 395 P.3d 1234, 1239 (Colo. Ct. App. 2017) (filed a motion to vacate jury award based on the jury foreman saying that the jury made a mistake when it had filled out the verdict form).

159. *Young*, 860 F.3d at 334.

160. *Id.* at 322.

161. *See id.* at 332.

arguments by reasoning, like the courts before it, that racial bias was not a factor in this case; therefore, the *Peña-Rodriguez* ruling did not apply.[162] Although this ruling was consistent with the rulings that immediately followed *Peña-Rodriguez*, what stood out in *Young* that was not present in the cases before it was the fact that the court was hesitant to open the door by using the new exception to Rule 606(b) to further look into jury deliberations.[163]

A case finally emerged, though, that involved a defendant's complaint of racial bias. That case was *Berardi v. Paramo*.[164] *Berardi* was decided by the Ninth Circuit and appeared to be the case that could finally and properly apply the *Peña-Rodriguez* ruling. Oddly enough, even though this case involved a defendant's complaint of racial bias, the court still ruled that *Peña-Rodriguez* did not apply.[165] In *Berardi*, the defendant, a Caucasian male, argued that a juror in his trial made a comment during jury deliberations showing the juror was racially biased.[166] The comment the juror made during deliberations was: "[I]f the races of the [defendant] and the victim were switched (Berardi is white and the victim was African American), they would have convicted the defendant immediately."[167] The court reasoned that the juror's comment did not reflect racial bias, but rather reflected the juror's frustration with the deliberations continuing for several days.[168] Thus, these comments did not reach the threshold set by *Peña-Rodriguez*.[169] But what threshold was that? Did the defendant need to be a minority for any court to consider setting aside the no-impeachment rule? Did the racial comments need to be exactly like those in *Peña-Rodriguez*? Is the mere mention of race inside a place where justice is supposed to be blind not enough? Without a standard from *Peña-Rodriguez*, there is no way this court, or any court for that matter, could measure how egregious racial comments need to be for the no-impeachment rule to be set aside, unless they were very similar to the statements made in *Peña-Rodriguez*. In *Berardi*, the court reasoned that the juror's comment was not egregious enough to set aside the no-impeachment rule.[170]

The ruling in *Berardi* was not the only instance where the courts held that a juror's racially biased comment was not grounds to set aside Rule 606(b). The second post-*Peña-Rodriguez* case to argue juror racial bias was *United States v. Robinson*. In *Robinson*, the defendants sought reversal of their convictions on the grounds that the jury foreperson made racist remarks that the defendant alleged affected the jury's verdict.[171] Specifically, during deliberations, the jury foreperson

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162. *Id.* at 334.

163. *Id.* ("We decline the invitation to extend further the reach of *Peña-Rodriguez*, one antithetical to the privacy of jury deliberations—a principle whose loss would be attended by such high costs as to explain its veneration.").

164. *See* 705 F. App'x 517 (9th Cir. 2017).

165. *Id.* at 518–19.

166. *Id.* at 518.

167. *Id.*

168. *Id.* at 518–19.

169. *Id.* at 519.

170. *Id.*

171. United States v. Robinson, 872 F.3d 760, 767 (6th Cir. 2017).

(a Caucasian woman) stated to two jurors (two African-American women) who refused to agree to a guilty verdict that they were reluctant to convict because they felt they "'owed something' to their 'black brothers,'"[172] and the jury foreperson stated she "found it strange that the colored women [were] the only two that [could not] see that the defendants were guilty."[173] The court held that the comments from the jury foreperson were not enough to warrant a new trial for the defendants.[174] The court reasoned that the way in which the defendants gathered the testimony from the jurors violated a local court rule, and the jury foreperson's comments were not *clear statements* showing that animus was a significant motivating factor in her vote to convict.[175] Given that the holding in *Peña-Rodriguez* left lower courts without a clear understanding of what a "clear statement of racial animus" might be, other than it is not a mere "offhand comment indicating racial bias or hostility and it is a statement exhibiting overt racial bias,"[176] or to whom the racial animus must be directed, it remains difficult for any lower court to apply the rule properly.

Since the ruling in *Peña-Rodriguez*, there has yet to be a case in which the court has set aside the no-impeachment rule in favor of a defendant's constitutional right to a fair and impartial jury.[177] However, there have been cases, such as those discussed above, that have displayed "overt racial bias that cast serious doubt on the fairness of the jury's deliberations."[178] Although what is said in Supreme Court decisions is often left to the discretion of the lower courts to interpret, in the instance of *Peña-Rodriguez*, this is not the case.[179] Lower courts decide cases with the mindset of avoiding appeals. For lower courts, the best way to avoid appeals is to rule with the standards set by the Supreme Court in mind. Later cases, such as *Tharpe v. Sellers*, make that goal difficult to reach. This was noted in the *Tharpe* dissent: "And Tharpe does not even attempt to argue that *Peña-Rodriguez* established a watershed rule of criminal procedure—a class of rules that is so 'narrow' that it is 'unlikely that any has yet to emerge.'"[180] *Peña-Rodriguez* ultimately established a rule that only applies to cases exactly like *Peña-Rodriguez*.[181] But even in that rare instance, the Supreme Court failed to lay out the standards a defendant must meet to establish that a juror's racial bias warrants an evidentiary hearing.[182]

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172. *Id.* at 788.
173. *Id.* at 768.
174. *Id.* at 772.
175. *Id.* at 770–71.
176. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017).
177. *See supra* note 161–73.
178. *Peña-Rodriguez*, 137 S. Ct. at 869.
179. *See id.* at 855.
180. Tharpe v. Sellers, 138 S. Ct. 545, 551–52 (2018).
181. *See Peña-Rodriguez*, 137 S. Ct. at 855 (2017).
182. *See id.*

V. PROCEDURES FOR AN EVIDENTIARY HEARING

In *Peña-Rodriguez*, the Supreme Court did not resolve the standard that lower courts should follow when granting an evidentiary hearing.[183] In the post-*Peña-Rodriguez* case of *Zamora-Smith v. Davies*, the court took note that "the Court also did not decide the appropriate standard for determining when evidence of racial bias is sufficient to require that the motion for a new trial be granted."[184] The Court in *Peña-Rodriguez* decided that it "need not address" the question of "what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias."[185] The Court went on to state, "[t]he practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by states' rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors."[186]

While the Court in *Peña-Rodriguez* hoped the process by which a defendant could get an evidentiary hearing or new trial would be shaped by the local rules of lower courts, it seems the lower courts have yet to make it this far in the process.[187] There has yet to be a case where any court has applied the decision in *Peña-Rodriguez* to set aside Rule 606(b) when it comes to juror bias. As such, there has yet to be a lower court that has shaped the process for a defendant to get a new trial based on *Peña-Rodriguez*. As a result, defendants are left with no answers about how they would proceed if their verdict was ever overturned as a result of *Peña-Rodriguez*. Would a new trial be granted? What steps would a defendant have to take to ensure a new trial? Would a reversal be granted? What steps would a defendant have to take to get a reversal once evidence is found that racial bias existed in jury deliberations? Would an evidentiary hearing be granted to explore the evidence of racial bias in jury deliberations? The Court left all of these questions unanswered. Defendants are left only to turn to what their state has done in the past when granting a new trial, evidentiary hearing, or reversal.[188]

VI. HOW EGREGIOUS DOES RACIAL BIAS HAVE TO BE BEFORE THE RULE AGAINST JURY IMPEACHMENT GIVES WAY?

Assuming an evidentiary hearing is granted, the Court still failed to set a standard explaining how egregious racial bias during jury deliberations has to be before Rule 606(b) will give way to allow for impeachment of the verdict. Instead, the Court stated that "not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry,"[189] and only "a showing of overt racial bias"[190] is sufficient.

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183. *See id.*

184. Zamora-Smith v. Davies, No. CV 14-6032-GW (AGR), 2017 WL 3671859, at *2 (C.D. Cal. Aug. 23, 2017).

185. *Peña-Rodriguez*, 137 S. Ct. at 870.

186. *Id.* at 869.

187. *Zamora-Smith*, 2017 WL 3671859, at *2.

188. *See Peña-Rodriguez*, 137 S. Ct. at 869.

189. *Id.* at 869.

190. *Id.*

The above cases demonstrate that a juror simply making a comment about race will not be enough to set aside the no-impeachment rule, but instead, the comments should mirror those made in *Peña-Rodriguez*.[191] In *Berardi*, the court rejected the defendant's argument that he was entitled to a new trial.[192] The comments made in *Berardi* did not mirror those made in *Peña-Rodriguez*. The comments in *Berardi* alleged that if the defendant were African American and the victim were white, the jury would have convicted immediately.[193] The two cases differed because the comments in *Peña-Rodriguez* alleged that the defendant did what he did because of his race.[194] The comments in *Berardi* touched on what the jury would have done had the defendant's race been different, rather than the fact that the juror presumed the defendant committed a crime because of his race like in *Peña-Rodriguez*. Thus, the comments in Berardi did not reach the *Peña-Rodriguez* threshold set by the Court.[195]

Additionally, the defendant in *Berardi* was not a minority but instead a Caucasian man.[196] The Supreme Court in *Peña-Rodriguez* gave no indication as to whether Rule 606(b) shall give way only in instances where the defendant is a minority, nor did it explain if the type of comment in *Berardi* would suffice for a new trial.[197]

Further, in *Young* and *Tharpe*, it was also noticeable that courts did not wish to apply Rule 606(b) any further than what was already set forth in *Peña-Rodriguez*. In *Young*, the court explained it did not wish to further "open the door" than what *Peña-Rodriguez* had already done.[198] Similarly, in *Tharpe*, the Court explained that the exception to Rule 606(b) is so narrow that the use of it is unlikely to have emerged yet.[199] From the cases that have come after *Peña-Rodriguez*, and their use of Rule 606(b), it can be concluded that although *Peña-Rodriguez* did not explicitly lay out how egregious a racial comment needs to be before Rule 606(b) can give way, it is more likely than not that a lower court will not successfully apply *Peña-Rodriguez* unless the circumstances exactly mirror those in *Peña-Rodriguez*.[200]

The issue of how egregious racial bias must be also begs the question of when finality will become an issue when racial bias persists in jury deliberations. Finality, especially in criminal proceedings, ensures that certain disputes must achieve a resolution.[201] Under the assumption that the racial bias is egregious enough each time and a court grants a retrial each time (which is rare) finality may

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191. *See supra* notes 157–58.
192. *See* Berardi v. Paramo, 705 F. App'x 517, 518 (9th Cir. 2017).
193. *Id.*
194. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 862 (2017).
195. *Berardi*, 705 F. App'x at 519.
196. *Id.* at 518.
197. *See Peña-Rodriguez*, 137 S. Ct. at 855.
198. Young v. Davis, 860 F.3d 318, 333 (5th Cir. 2017).
199. Tharpe v. Sellers, 138 S. Ct. 545, 551–52 (2018) (Thomas, J., dissenting).
200. *See Young*, 860 F.3d at 334; *see also Tharpe*, 138 S. Ct. at 551–52.
201. 43B Mass. Prac., Trial Practice § 19:3 (3d ed.) (2018).

become a concern. When the Court ruled in *Peña-Rodriguez*, it never explained the limits to the Rule 606(b) exception as applied to finality.[202] Potentially, with this new exception, a juror may alert an attorney to racial bias in jury deliberations every time a defendant is on trial, even if the defendant is already being retried. This could create a never-ending cycle of retrials. No finality means a strain on a court's resources, violation of a defendant's right to a speedy trial, and no end in sight for anyone involved in the proceeding, as long as a juror brings racial bias to the court's attention.

Finality is closely related to accessibility.[203] Without it, our judicial system would collapse under its own weight. Cases would go through and through the judicial system until one party received its desired ruling. The issue here is whether finality will exist once lower courts begin to implement the *Peña-Rodriguez* decision. When will a court decide that a new trial will not be set although there has been evidence of racial bias? Will a court allow a new trial to always be set when there is blatant evidence of racial bias?

Regarding the issue of finality, lower courts should adopt the standard that whenever there is evidence of egregious racial bias in jury deliberations, steps should be taken to ensure a defendant receives a new trial, or at least an evidentiary hearing. To take away defendants' right to a new trial based on evidence of racial discrimination is to take away their right to a trial by a fair and impartial jury. But, when a defendant makes a habit of asking for a new trial every time there is evidence of juror racial bias, a court should become more and more strict with what kind of evidence it considers sufficient for the defendant to be granted a new trial. However, with the lack of standard for lower courts to follow, and lower courts' hesitation to apply *Peña-Rodriguez*, there is doubt that finality would actually ever become an issue.

CONCLUSION

The *Peña-Rodriguez* majority has made a strong statement about the importance of eliminating racial discrimination from criminal cases to the greatest extent possible.[204] The majority was willing to break from a longstanding reluctance to disturb jury verdicts by examining the deliberations of the jury and left no doubt that it sees racial discrimination as a more serious threat to equal justice and public confidence in verdicts than any other threat it has confronted.[205] In rejecting the dissenters' argument against a uniform national rule, the majority established that there is only one acceptable rule when it comes to racial discrimination in criminal cases: it will not be tolerated.

However, this decision is only the starting point. The Supreme Court failed to establish when a defendant will be granted an evidentiary hearing in light of juror racial bias, and assuming the defendant is granted an evidentiary hearing, when a juror's behavior or bias is egregious enough for the defendant to be granted a new

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202. *See* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 861 (2017).
203. *See* 43B Mass. Prac., Trial Practice § 19:3 (3d ed.) (2018).
204. *See Peña-Rodriguez*, 137 S. Ct. at 867.
205. *See supra* Part I; *see also Peña-Rodriguez*, 137 S. Ct. at 867.

trial or reversal.[206] This ultimately makes it difficult for lower courts to apply *Peña-Rodriguez* and for defendants to use *Peña-Rodriguez* to receive a fair trial. This decision needs to be taken further to establish how lower courts can use this ruling to help eliminate, or at least address, racial bias in jury deliberations. As of now, this Note is a step forward in showing that for defendants to be granted a new trial, their circumstances need to be similar, if not the same, as the circumstances in *Peña-Rodriguez*. Lower courts should look to their state rules when searching for the procedures to grant an evidentiary hearing. And, the issue of finality can be remedied by applying a standard of evidence and following the procedures set forth in state rules for an evidentiary hearing or new trial. Additionally, this Note furthers the discussion on the important issue of racial bias in jury deliberations and sheds light on a defendant's inability, thus far, to successfully tackle the issue using *Peña-Rodriguez*. No matter what, a defendant deserves a fair trial that is free of racial bias; a trial that shows that justice truly is blind and does not take the race of an individual into account when deciding their guilt. *Peña-Rodriguez* has only laid the foundation to achieve this level of fair justice, it is by no means the stopping point.

206. *See id.* at 869.