# THE NEW BATSON: OPENING THE DOOR OF THE JURY DELIBERATION ROOM AFTER PEÑA-RODRIGUEZ V. COLORADO

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## I. INTRODUCTION

Secrecy in jury deliberations is an important aspect of the American jury system. In both criminal and civil jury trials, what goes on in the jury deliberations room generally stays in the jury deliberations room.[1] It is very difficult to impeach a jury verdict and get a new trial based on internal deliberations—what jurors say to each other during the course of formal deliberations.[2] There are very good reasons for the no-impeachment rule: the need for finality in jury determinations and for jurors to have free and open discussions among themselves about the case, to name a few.[3] Yet, a strict application of the no-impeachment rule could be problematic. There is a valid countervailing concern that improper juror statements or behavior during jury deliberations could undermine the fairness of a trial when such statements influence the verdict, perhaps implicating due process, equal protection, and fundamental justice concerns.[4] Recognizing that the jury system as a human

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1. McDonald v. Pless, 238 U.S. 264, 267 (1915) (recognizing that the weight of authority in federal and state jurisdictions is that a juror cannot impeach his own verdict because of the public injury that would occur if jurors were allowed to testify concerning what happened in the jury room).

(3) reducing incentives for jury tampering; (4) promoting verdict finality; (5) maintaining the viability of the jury as a judicial decision-making body". Gov't of Virgin Islands v. Gereau, 523 F.2d 140, 148 (3d Cir. 1975).

4. McDonald, 238 U.S. at 269 (noting that the no-impeachment rule could recognize exceptions in the "gravest and most important cases" where exclusion of juror testimony might violate principles of justice); United States v. Reid, 53 U.S. 361, 366 (1852) ("[C]ases might arise in which it would be impossible to refuse [juror testimony] without violating the plainest principles of justice.").

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## II. HISTORY OF THE NO-IMPEACHMENT RULE

Every state and federal jurisdiction follows to a substantial degree the concept that jury verdicts cannot be impeached based on what occurs during formal jury deliberations.[9] This concept originated from the English common law rule that jurors could not impeach their verdict through affidavit or live testimony.[10] The original English common law "Mansfield" rule was a strict rule that prohibited jurors from testifying about their subjective mental processes or events that occurred during deliberations.[11] American jurisdictions have tended to follow the Mansfield rule in general but with three slightly different approaches. First, Texas applies the "outside influence" rule.[12] This approach generally protects all juror statements and events during deliberations from impeachment of the verdict but permits new trials based on outside influences—like the threatening of jurors—that affect the integrity of the jury's decision-making process.[13] In general, an outside influence has to come from a source outside the formal deliberation process such as a nonjuror third party.[14] Second, the federal rules approach permits exceptions to the no-impeachment rule for

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for post-verdict juror testimony that racial bias was a factor in jury deliberations.[21]

## III. THE NEW BATSON: EXTENDING PEÑA-RODRIGUEZ TO CIVIL CASES IN FEDERAL AND STATE COURTS

### A. The Peña-Rodriguez v. Colorado Decision

Prior to Peña-Rodriguez, each jurisdiction considered whether to make an exception to the no-impeachment rule for juror testimony about a juror's alleged racial bias expressed during deliberations. The Peña-Rodriguez Court held that where a juror clearly states or indicates that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment jury trial guarantee requires that a trial court consider the juror's statement and any resulting denial of such guarantee to the criminal defendant.[22] After Peña-Rodriguez, federal criminal defendants and state criminal defendants are now entitled to impeach a jury's verdict with juror testimony about a juror's alleged racial bias.[23] The exception applies to state criminal defendants because the Fourteenth Amendment makes the Sixth Amendment applicable to the states.[24]

While perhaps atypical, history is replete with instances where jurors have deliberated and then returned a verdict based on silly, improper, mischievous, and otherwise unfair reasons. Indeed, the origins of the Mansfield rule derived from a case where the jury came up with their verdict through a game of chance.[25] Deciding a verdict through a game of chance is silliness and presents a result that presumably nobody would try to defend as "fair" in a generic sense. But there is nothing to do about this under the no-impeachment rule.[26] In cases prior to Peña-Rodriguez, the Supreme Court had refused to recognize a Sixth Amendment right for criminal defendants to impeach a verdict based on clear flaws, irregularities, and misconduct in the jury decision-making process

21. Id. at 871 (appendix listing of the cases); Kittle v. United States, 65 A.3d 1144, 1154 (D.C. 2013); State v. Brown, 62 A.3d 1099, 1110 (R.I. 2013); Fleshner v. Pepose Vision Inst., P.C., 304 S.W.3d 81, 87–90 (Mo. 2010) (en banc); State v. Hidanovic, 747 N.W.2d 463, 472 (N.D. 2008); State v. Santiago, 715 A.2d 1, 22–24 (Conn. 1998); Fisher v. State, 690 A.2d 917, 919–21, 920 n.4 (Del. 1996); State v. Jackson, 912 P.2d 71, 81–83 (Haw. 1996); Powell v. Allstate Ins. Co., 652 So.2d 354, 357–58 (Fla. 1995); State v. Hunter, 463 S.E.2d 314, 316 (S.C. 1995); Commonwealth v. Laguer, 571 N.E.2d 371, 376 (Mass. 1991); Spencer v. State, 398 S.E.2d 179, 184–85 (Ga. 1990); People v. Rukaj, 506 N.Y.S.2d 677, 679 (N.Y. App. Div. 1986); After Hour Welding, Inc. v. Laneil Mgmt. Co., 324 N.W.2d 686, 691 (Wisc. 1982); State v. Callender, 297 N.W.2d 744, 746 (Minn. 1980); Seattle v. Jackson, 425 P.2d 385, 389 (Wash. 1967); State v. Hewitt, 176 A.2d 465, 467–68 (N.J. 1961).

22. Peña-Rodriguez, 137 S. Ct. at 869.

23. Id. at 871 (Thomas, J., dissenting).

24. Duncan v. Louisiana, 391 U.S. 145, 149–50 (1968).

25. Vaise v. Delaval, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785).

26. McDonald v. Pless, 238 U.S. 264, 268 (1915).

Court, "it is one thing to accuse a fellow juror of having a personal experience that improperly influences her consideration of the case, as would have been required in *Warger*. It is quite another to call her a bigot."[40] At the end of the day, the *Peña-Rodriguez* majority concluded that a constitutional exception for post-verdict impeachment of criminal jury verdicts due to alleged racial bias by juries is needed to "prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right."[41]

Justices Roberts, Alito, and Thomas, the dissenters in *Peña-Rodriguez*, disagreed with the Court's holding.[42] Justice Thomas looked to the common law history and found there was no common law right to impeach a verdict with juror testimony of juror misconduct at the time of the ratification of the Sixth Amendment in 1791 or the ratification of the Fourteenth Amendment in 1868.[43] Consequently, there was no constitutional basis for creating the racial bias exception.[44] Justice Alito argued that the political process is the appropriate place to decide whether to adopt such an exception and noted that the federal procedure and the overwhelming majority of state jurisdictions have a strong no-impeachment rule that does not provide a racial bias exception.[45] He pointed out the critical interests of finality and the promotion of freedom in juror discussions and decision-making advanced by a strong no-impeachment rule.[46] He criticized the majority's failure to adequately explain how the safeguards to protect against juror misconduct in deliberations are less effective with respect to racial bias than with respect to other forms of misconduct.[47] Moreover, he contended the majority's holding provides no way to make appropriate distinctions between different types of juror misconduct or bias, some of which would implicate a party's Sixth Amendment right and some of which would not.[48] According to Justice Alito, the majority's bottom line is the Constitution is less tolerant of racial bias than other forms of juror misconduct.[49] But he contended that neither the text or history of the Sixth Amendment, nor the nature of the right to an "impartial jury," indicate that the protection provided by the Sixth Amendment is dependent on the type of juror partiality or bias.[50]

instances, after the verdict has been entered, it is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right.[63]

From the *Peña-Rodriguez* dissent:

> The real thrust of the majority opinion is that the Constitution is less tolerant of racial bias than other forms of juror misconduct, but it is hard to square this argument with the nature of the Sixth Amendment right on which petitioner's argument and the Court's holding are based.[64]

### 1. The Civil Case Originating in Federal District Court

With all of this in mind, civil cases in federal district court will start to arise where, after a jury verdict is entered, the losing civil litigant will attempt to secure affidavits from one of the jurors stating that, during jury deliberations, another juror expressed racial bias. Under one of the applicable forms of the no-impeachment rule, the trial judge may be inclined to simply rule that the verdict cannot be impeached through testimony about what occurred during deliberations. But, after *Batson* and *Peña-Rodriguez*, attorneys now have an opportunity to argue that a constitutional exception for juror racial bias now applies in the context of civil cases that the judge must follow.

There are two ways to look at this argument. First, the argument in favor of

of action is based on a claim that existed at common law. However, there is no specific language in the Seventh Amendment that guarantees a racial bias exception to the no-impeachment rule.[67] Nor does the nature of the Seventh Amendment compel this conclusion. One could say as a general matter that a central premise of the Seventh Amendment is public confidence in civil jury verdicts that are free from the taint of racial bias by jury decision] Nesbjuree c (.)]TJ th-1

more about equal protection based on race.[72] Viewed in this way, the winning argument for extending *Peña-Rodriguez* to civil cases brought in federal district court is equal protection under the Fifth Amendment. This argument merely takes a page right out of the *Batson* and *Edmonson* playbook.

A court considering extending *Peña-Rodriguez* to civil cases could easily follow the extension of *Batson* to civil cases as illustrated by the *Edmonson* decision. In *Edmonson*, the civil plaintiff claimed racial discrimination in a peremptory challenge by the opposing party.[73] The civil case was brought in federal district court and so the Seventh Amendment jury trial right attached.[74] The *Edmonson* Court held that race-based peremptory challenges violate the equal protection rights of the challenged jurors in civil cases just like the *Batson* Court said they do in criminal cases.[75] Because the case was in federal court and concerned the federal government, the Court based its holding on the equal protection component of the Fifth Amendment's Due Process Clause[76] instead of the Fourteenth Amendment, as in *Batson*.[77] If *Peña-Rodriguez* is really more about equal protection based on race than the Sixth Amendment,[78] it would make sense when the juror racial bias issue in a civil case arises to simply follow the logic of *Edmonson* and create the constitutional exception to the no-impeachment rule for juror bias in civil cases under the Equal Protection Clause of the Fifth Amendment.

*Peña-Rodriguez* is perhaps even easier to extend to civil cases than *Batson* was because *Batson*'s peremptory challenge issue had the complicated question of whether peremptory challenges by private litigants concern state action. The *Edmonson* Court ruled that a private litigant's use of peremptory challenges constituted state action and was therefore subject to equal protection.[79] The juror racial bias situation is more straightforward from a state action perspective than peremptory challenges. The actor in the alleged jury racial bias is the jury and not a private litigant. The alleged equal protection deprivation flows from the jury. The jury is a quintessential government body.[80] The jury's authority derives from the power of the court and ultimately from the government that

72. Id. at 878–84 (Alito, J., dissenting).

73. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991).

74. Id. at 616.

75. Id. at 616–18.

76. Id.

77. Batson v. Kentucky, 476 U.S. 79, 879 (1986).

78. *Peña-Rodriguez* v. Colorado, 137 S. Ct. 855, 878–84 (2017) (Alito, J., dissenting).

79. State action occurred in *Edmonson* because the peremptory challenge right has its source in state authority, the peremptory challenge system could not exist absent governmental oversight and authority, and the selection of jurors is a governmental function even if in the peremptory challen

confers jurisdiction on the court.[81] In short, viewing juries as state actors seems even less of a stretch than viewing a private litigant as a state actor. Furthermore, Batson and Edmonson had to consider the standing issue of parties to the case raising the equal protection rights of jurors.[82] The standing issue is not implicated in a Peña-Rodriguez situation. If there is an equal protection violation in the racial bias by juror scenario, the violation is against the litigant and the litigant is raising the violation to protect his or her own rights and has standing.

The Supreme Court has gone to great lengths to focus on the unique nature of racial bias and the importance of constitutional requirements to try and root out racial bias in the criminal justice system through Batson and Peña-Rodriguez exceptions.[83] Is there any less of a policy reason for taking the same approach in civil juries than is now done in criminal cases? What would the principled argument be for making a distinction beyond a generalized idea that criminal trials and civil trials have some differences? Jury decisions free from racial bias are wanted in civil cases just like they are in criminal cases; this underlying interest applies in both systems.[84] The systemic and public confidence statements from both the Peña-Rodriguez and Batson Courts fit just as well with the administration of justice by civil juries as they do with the administration of justice by criminal juries.[85]

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affidavits from one of the jurors stating that during jury deliberations another juror expressed racial bias. Under the applicable state law version of the no-impeachment rule, the trial judge may be inclined to simply rule that the verdict cannot be impeached through testimony about what occurred during deliberations. Like civil cases in the federal district court, attorneys now have an opportunity to argue that a federal constitutional exception for racial bias by jurors applies in the context of civil cases that the judge must follow.

If a state civil court considers *Pena-Rodriguez* as limited to the Sixth Amendment, the state civil court will have no obligation to apply the exception as a matter of federal constitutional law because the Sixth Amendment applies only to criminal cases not to civil cases.[87] The Seventh Amendment jury trial right only applies to civil cases in federal courts and not civil cases in state courts.[88] So the Seventh Amendment is irrelevant to the juror racial bias exception in state civil court. State jurisdictions have their own constitutional provisions concerning the jury trial right.[89] Ultimately, a state supreme court would be able to analyze whether the juror racial bias exception to the no-impeachment rule should apply to civil cases in their state in the context of their own procedural rules, evidentiary rules, and constitutional provisions on the jury trial right. But if the federal courts (and ultimately the United States Supreme Court) hold that the exception is applicable in civil cases under equal protection, then a state supreme court would presumably be required to apply the exception to civil cases in their state courts. Such decisions would follow the pattern of state appellate courts a(,)nil cas

bias by fellow jurors during deliberations before the jury signs its verdict.[100] The instructions will also hopefully discourage jurors from making such statements during deliberations.

### B. Procedures and Standard for Granting a New Trial Due to Racial Bias During Jury Deliberations

The Peña-Rodriguez Court declined to decide what procedures a trial court must follow when a defendant files a post-verdict motion for new trial based on juror testimony of racial bias.[101] The Court also failed to decide the appropriate standard for determining when racial bias is enough to grant a new trial.[102] But these are certainly practical issues that all jurisdictions will have to deal with in the near future.

The motion for new trial procedure alleging racial bias in jury decision-making should be tailored to each jurisdiction. But one approach would be to initially require the motion for new trial to be supported by the affidavit of the juror describing the alleged racial bias. The trial court could then evaluate the affidavit to decide whether to hold an evidentiary hearing on the motion.[103] Live testimony from the juror(s) alleging racial bias and other jurors who could

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is over.[121] Before Peña-Rodriguez, procuring a new trial based on juror statements made during deliberations was generally not going to be a basis for a new trial under the no-impeachment rule.[122] But now with the Peña-Rodriguez exception, any limitations that prevent an attorney from initiating such a post-trial question to jurors in criminal cases are going to have to be evaluated and perhaps modified in light of the Peña-Rodriguez decision.[123] For example, stringent rules that prevent attorneys from speaking to jurors after the trial unless permitted by the court in exceptional circumstances and under considerable regulation may need to give way in the context of post-verdict contact that seeks to inquire with jurors about possible racial bias during the deliberations. After Peña-Rodriguez, criminal defense attorneys should presumably have some opportunity post-verdict to ask jurors about whether any racially biased statements were expressed during deliberations.[124]

## VI. CONCLUSION

The United States Supreme Court cracked open the door of the jury deliberation room as a matter of Constitutional law in Peña-Rodriguez. Now that the door is open a little bit, it is not going to be shut. The question is whether courts are going to keep the door where it is or bust it wide open. There will be pressures to keep the door where it is because of the practical problems associated with increasing post-trial reconsiderations of jury verdicts. But equal protection principles are going to push the other way because of the desire for

121. Cuevas v. United States, 317 F.3d 751, 753 (7th Cir. 2003) (explaining that rules regulating parties' post-trial contact with jurors are "quite common" and that most of the 94 federal district courts have rules regarding post-trial juror contact); Dall v. Coffin, 970 F.2d 964, 972 (1st Cir. 1992) ("[T]his Circuit prohibits the post-verdict interview of jurors by counsel, litigants, or their agents except under the supervision of the district court, and then only in such extraordinary situations as are deemed appropriate. Permitting the unbridled interviewing of jurors could easily lead to their harassment, to the exploitation of their thought processes, and to diminished confidence in jury verdicts, as well as to unbalanced trial results depending unduly on the relative resources of the parties." (quoting United States v. Kepreos, 759 F.2d 961, 967 (1st Cir. 1985))); Haeberle v. Tex. Int'l Airlines, 739 F.2d 1019, 1021 (5th Cir. 1984) ("Federal courts have generally disfavored post-verdict interviewing of jurors"); MISS. RULES OF PROF'L CONDUCT r. 3.5 (2011) ("A lawyer shall not. . ON44.2 (e r)-12.1 (es)-12.3 (our)-12 44.2 (e r)-12.1 (es)-12.30.01 Td (.)14 (1es)-12.30.01 3-10.7 (ed08 260.16914

fundamental fairness and justice in our jury system at a systemic level and the need for public confidence in the jury system. *Batson* and its progeny will likely play a significant role in making decisions about implementing and extending *Peña-Rodriguez*