PURGING RACIAL PREJUDICE FROM THE ADMINISTRATION OF JUSTICE

By Nina Marino and Jennifer Lieser

It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons.[1] Justice Kennedy

INTRODUCTION

In the words of Justice Kennedy, there is an "imperative to purge racial prejudice from the administration of justice," which the courts have given strength and creed since ratification of the Civil War Amendments. This "racial prejudice purge" has historically infiltrated the courts and has influenced their decisions since the passage of these amendments. The impetus of the Fourteenth Amendment, in particular, was to "eliminate racial discrimination emanating from official sources in the States."[2]

Time and again, the Supreme Court has enforced the Constitution's guarantee against state-sponsored racial discrimination in the jury system. The Court has interpreted the Fourteenth Amendment to prohibit the exclusion of jurors based on race, *Strauder v. West Virginia*[3]; struck down laws and practices that systematically exclude racial minorities from juries, *see, e.g., Neal v. Delaware*[4]; ruled that no litigant may exclude a prospective juror based on race, *see, e.g., Batson v. Kentucky*[5]; and held that defendants may, at times, be entitled to inquire about racial bias during voir dire, *see, e.g., Ham v. South Carolina*[6].

The unmistakable principle of these precedents is that discrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice," *Rose v. Mitchell*[7], damaging "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State," *Powers v. Ohio*.[8]

WHEELER/BATSON

The holdings of *Wheeler*[9] and *Batson*[10] are two significant examples of the courts' efforts to root out prejudice from the judicial process.

In 1978, the California Supreme Court in *Wheeler* found that the exercise of a peremptory challenge based on a lawyer's belief that certain jurors were biased because of their membership in a particular racial, ethnic, or religious group was a violation of Cal. Const., art. 1, § 16.[11] In 1986, the U.S. Supreme Court in *Batson* drew the same conclusion, finding that juror challenges based on group bias violate the Equal

Protection Clause of the Fourteenth Amendment.[12]

The progency of these holdings is now known as "*Wheeler/Batson* Rule" and prohibits the dismissal of potential jurors based solely on their membership in a cognizable group, namely race, religion, and ethnicity. "*Wheeler/Batson*" is an available objection which may be triggered during the jury selection process.

PENA-RODRIGUEZ

In *Pena-Rodriguez v. Colorado*, the U.S. Supreme Court recently extended this imperative even further.

The secrecy of jury deliberations is a historical tradition of our justice system. This tradition extends even after a verdict has been reached and the trial concludes. The **"no-impeachment rule"** (Fed. R. of Evid. § 606(b)) generally prohibits the litigants or their counsel from inquiring into the validity of the verdict by requesting that a juror testify about - or even discuss - statements made during jury deliberations.

However, in *Pena-Rodriguez*, the U.S. Supreme Court cracked open this rule by holding that the Sixth Amendment requires an exception to the no-impeachment rule when "a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant."[13]

A "constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—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."[14]

Rule 606(b) of the Federal Rules of Evidence ("Rule 606(b)"), often referred to as the "no-impeachment rule," was enacted in 1975 to statutorily protect the public policy interest of jury verdict finality. Some version of the no-impeachment rule is followed in every state. Cal. Evid. Code section 1150 is the California equivalent of Rule 606(b). Rule 606(b) states that:

> 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 deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

The purpose of the rule is to allow jurors the ability to have a frank and free discussion – and to empower them to return the verdict they believe is correct even if it is unpopular or controversial. The rule promotes verdict safety and stability and protects the jurors from harassment after the verdict is read.

The Court in *Pena-Rodriguez* found that the Constitution requires an exception to the no-impeachment rule when a juror's statements indicate that racial animus was a significant factor in his or her finding of guilt.[15]

In 2007, Miguel Angel Pena-Rodriguez was charged with harassment, unlawful sexual contact, and attempted sexual assault on a child.[16] The jury found Pena-Rodriguez guilty of unlawful sexual contact and harassment, but hung on the attempted sexual assault charge.[17]

Following the discharge of the jury, two jurors asked to speak with the defense counsel.[18] Through their discussion, counsel learned that one of the jurors, Juror H.C., had exercised an anti-Hispanic bias towards the defendant and his alibi witness.[19] Juror H.C. made statements such as "[he] believed the defendant 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" and "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls."[20]

The trial court reviewed the affidavits and acknowledged the bias, however, it denied the defendant's motion for a new trial because the no-impeachment rule provided no leeway.[21] The Supreme Court granted certiorari to determine if there should be a constitutional exception to the no-impeachment rule in limited cases where a juror(s) made explicit statements or otherwise indicated that racial animus was a significant motivating factor in his or her decision to convict.[22]

In addressing this question, the Court looked at the unique distinction between the racial bias demonstrated in this case and the other types of demonstrated biases (drug and alcohol abuse and pro-defendant bias) in prior Supreme Court decisions where the Court chose *not* to break the seal of the jury room.[23] Racial bias is "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice . . . [and] implicates unique historical, constitutional, and institutional concerns."[24]

Additionally, while there are safeguards built into the jury system to assist in the detection of bias, **racial bias** can be exceptionally difficult to root out. During voir dire, generic questions regarding impartiality are unlikely to expose specific biases, and more pointed questions might only exacerbate the problem without actually exposing it.[25] And while observation of jurors during trial certainly sheds light on possible juror biases, juror reports pre-verdict and non-juror post-verdict evidence may assist in further identifying racial bias.[26] Nonetheless, the stigma associated with racial bias may still inhibit jurors from self-identifying or reporting that other jurors were or are biased.[27]

The Court, therefore, laid out a basic framework for this new exception to the no-impeachment rule. For a judicial inquiry to proceed, a court needs to find a threshold showing that statements made by one or more juror exhibited "overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict."[28] The statement must tend to show that racial animus was a significant motivating factor for the juror(s).[29] The Court gave lower court judges broad discretion in determining whether this threshold is satisfied[30] by directing them only that in

doing so, the judges should look at the totality of the circumstances, including content, timing, and reliability of proffered evidence.[31] **The procedure for determining the appropriate level of prejudice shown was intentionally left open-ended for the lower courts to figure out.**

OUTSTANDING UNCERTAINTIES

The framework given by the Court unmistakably left vague and outstanding questions. The Court focused on the need to "purge racial prejudice" given the unique historical concerns within the context of the Fourteenth Amendment. However, it is unclear if this exception will apply to other cognizable groups clearly in need of similar judicial protection. In *People v. Garcia*, California Supreme Court Justice Bedsworth wrote that "[gays and lesbians] share a history of persecution comparable to that of blacks and women."[32]

Further, while the Court in *Pena-Rodriguez* focused on the reasons for ratifying the Civil War Amendments and noted that "the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States,"[33] the Court was silent as to a broader Fourteenth Amendment application to the Equal Protection Clause. It would seem to follow that this holding should be expanded to other cognizable groups. Yet the Court left the holding very narrow, focusing solely on race as a uniquely suspect class.

Earlier this month, the Supreme Court of California even expanded the list of cognizable groups in need of constitutional protection during the jury process. The court in *People v. Douglas* found that "excluding prospective jurors solely on the basis of sexual orientation principles runs afoul of the constitutional principles espoused in *Wheeler/Batson*."[34]

This holding also poses a unique ethical issue for attorneys regarding post-trial conduct with jurors. Cal. Rules of Prof. Conduct section 5-320(d) states that after discharge of the jury from further consideration of a case, a member shall not ask questions of or make comments to a member of that jury that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service. Attorneys are allowed to speak with jurors after trials - if the jurors are willing to speak with them. However, this new exception has the potential to lead to juror harassment. As Justice Alito noted in his dissenting opinion in *Pena-Rodriguez*, now that it is established that verdicts can be attacked and set aside based on what took place during jury deliberations, unsuccessful litigants have an incentive to harass jurors in an attempt to discover something which will invalidate the findings.[35] He warned that relaxing the no-impeachment rule would "open the door to the most pernicious arts and tampering with jurors."[36] State ethics rules will need to be modified to adapt to this ruling.

There is also the question of whether this new exception to the no-impeachment rule will actually aid in rooting out racial bias in the everyday administration of justice, or if it will only be employed in the most egregious of cases where jurors are willing to put

themselves on the line and speak out against their fellow jurors.

CONCLUSION

In breaking open the no-impeachment rule, the Court in *Pena-Rodriguez* went a far way to establish that there is only one acceptable rule when it comes to racial discrimination in criminal cases – **that it will not be tolerated**. It remains to be seen if other suspect groups will be afforded the same protection.

Racism is man's gravest threat to man - the maximum of hatred for a minimum of reason. Abraham Joshua Heschel

Nina Marino is a partner at the criminal defense law firm of Kaplan Marino; Jennifer Lieser is an attorney at Kaplan Marino. **A special thanks to Casey Clark who is a law clerk at Kaplan Marino.**

[1] *Id.* at 25.
[2] *McLaughlin v. Florida*, 379 U. S. 184, 192 (1964).
[3] 100 U.S. 303 (1879).
[4] 103 U.S. 370 (1880).
[5] 476 U.S. 79 (1986).
[6] 409 U.S. 524 (1973).
[7] 443 U.S. 545, 555 (1979).
[8] 499 U.S. 400, 411 (1991).
[9] 22 Cal.3d 258 (Cal. 1978).
[10] 476 U.S. 79 (1986).
[11] 22 Cal.3d 258 (Cal. 1978).
[12] 476 U.S. 79 (1986).
[13] *Pena-Rodriguez*, at 30.
[14] *Id.*
[15] *Id.* at 30-31.
[16] *Id.* at 10.
[17] *Id.* at 11.
[18] *Id.*
[19] *Id.* at 11-13.
[20] *Id.* at 12.
[21] *Id.* at 12-13.
[22] *Id.* at 14.
[23] *Id.* at 28-29.
[24] *Id.* at 28.
[25] *Id.* at 29.
[26] *Id.* at 29-30.
[27] *Id.*
[28] *Id.* at 31.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] 77 Cal.App.4th 1269, 1276 (2000).
[33] *Pena-Rodriguez*, at 25.
[34] No. C072881, 2017 Cal. App. LEXIS 330, at *13 (Ct. App. Apr. 11, 2017).
[35] *Pena-Rodriguez*, at 48-50 (Alito, J., dissenting).
[36] *Id.* at 49 (Alito, J., dissenting).