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WHAT COUNTS AS 'RACIST ENOUGH?': A CLEARER STANDARD FOR NEW TRIALS WHEN JURORS DEMONSTRATE RACIAL BIAS

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> [A] constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after a 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.[1]

The no-impeachment rule, Federal Rule of Evidence 606(b), necessitates that jurors keep their deliberations secret. However, in the 2017 Supreme Court case Peña-Rodriguez v. Colorado*, the Court created a racial bias exception to the no-impeachment rule. This exception allows jurors to notify the court when "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." This Note argues that this standard is too narrow because it fails to consider several situations of racial bias, like implicit bias. The ineffectiveness of this exception is demonstrated by the fact that there are only two instances where a defendant met this standard and was granted a new trial. This Note proposes that all courts follow a different standard. First, whenever there is an instance of racial bias during jury deliberations, courts must hold*

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[*] J.D. Candidate, Brooklyn Law School, 2023. M.S., Johns Hopkins University, 2019. B.A., New York University, 2016. I would like to thank my partner Alan Malamud for supporting me through every high and low I had while writing this Note. Thanks to Professor Alexis Hoag-Fordjour for inspiring this Note's topic, taking the time to give comments, and providing emotional support. Finally, I am incredibly grateful to the Journal of Law and Policy staff for all their assistance in the writing process.

[1] Peña-Rodriguez v. Colorado, 580 U.S. 206, 225 (2017).

an evidentiary hearing to interview the jurors. Second, courts must evaluate the evidence by using a totality of factors test to determine whether a new trial should be granted. The factors proposed by this Note have been pulled from courts across the country who have faced juror racial bias. By using this standardized approach, courts will have a clearer methodology to evaluate whether a juror's racial bias compromised a person's right to an impartial trial.

INTRODUCTION

Racial bias permeates every level of the criminal legal system.[2] When it comes to the initial stage of policing, Black people are more likely to be stopped and searched by police.[3] A study looking at the NYC Stop and Frisk program has also uncovered that police are 50% more likely to use non-lethal force[4] when stopping and searching Black and Hispanic individuals.[5] Even as police increase the intensity of force they use,[6] the racial disparities persist relative to white individuals.[7] In 2019, the National Academy of Sciences published a study based on police shooting databases that revealed that Black men were 2.5 times more likely than white men to be

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[2] *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (1st ed. 2010); *see e.g., Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System,* THE SENTENCING PROJECT (Apr. 19, 2018), https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system/ [https://perma.cc/8EPT-K8Y2] (citing several studies that highlight racial bias throughout the criminal justice system).

[3] *See e.g.,* Floyd v. City of New York, 959 F. Supp. 2d 540, 573–74 (S.D.N.Y. 2013) (citing the statistics of stops; in 52% of 4.4 million stops, the individual was Black).

[4] Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, NAT'L BUREAU OF ECON. RSCH. (Jan. 2018), https://www.nber.org/papers/w22399 [https://perma.cc/V4G5-2FJG]. Non-lethal force includes slapping, grabbing, and pushing individuals into a wall or onto the ground. *Id.* at 3–4.

[5] *Id.*

[6] Increase of force includes "handcuffing civilians without arrest, drawing or pointing a weapon, or using pepper spray or a baton." *Id.* at 4.

[7] *Id.*

killed by police.[8] Next, at the charging stage of the criminal legal process, a 2017 report by Professor Carlos Berdejó showed that Wisconsin prosecutors were 25% more likely to drop or reduce charges for a white defendant than for Black defendants.[9]

These racial disparities continue to the plea-bargaining stage. Low-level felonies and misdemeanors typically reveal little about an individual's propensity for dangerousness, which is a key factor in deciding whether jail time is warranted.[10] Since "prosecutors may be relying on the presumption of dangerousness that has long burdened African Americans," race may determine how favorable a defendant's plea deal is.[11] For instance, a report exposed that prosecutors in New York City were 19% more likely to offer Black defendants a plea deal with jail time than their white counterparts.[12]

If a case proceeds to a jury trial, then the next stage of the criminal legal process is jury selection. Attorneys are more likely to use their peremptory challenges to strike people of color from the jury than to strike white people.[13] This is likely because a report by the Equal Justice Initiative has shown all-white juries are more likely to convict Black, Indigenous, People of Color ("BIPOC") defendants than juries with at least one Black person, regardless of

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[8] Frank Edwards, et al., *Risk of Being Killed by Police Use-of-Force in the U.S. by Age, Race/Ethnicity, and Sex,* NAT'L ACAD. OF SCIS. (Aug. 2, 2019), https://www.prisonpolicy.org/scans/police_mort_open.pdf [https://perma.cc/8HDT-G9AZ].

[9] Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea Bargaining*, 59 BOSTON COLLEGE L. REV. 1187, 1190 (2018). This disparity was even higher when looking at felonies versus misdemeanor charges, with white people being 75% more likely than Black people to have "all charges carrying potential imprisonment dropped, dismissed, or reduced to lesser charges." *America's Massive Misdemeanor System Deepens Inequality,* EQUAL JUST. INITIATIVE (Jan. 9, 2019), https://eji.org/news/americas-massive-misdemeanor-system-deepens-inequality/ [https://perma.cc/62GM-WGGX].

[10] *Id.*

[11] *Id.*

[12] Besiki Luka Kutateladze & Nancy R. Andiloro, *Prosecution and Racial Justice in New York County – Technical Report,* VERA INST. OF JUST., https://www.ojp.gov/pdffiles1/nij/grants/247227.pdf [https://perma.cc/Q3QP-BK4S].

[13] *Illegal Discrimination in Jury Selection,* EQUAL JUST. INITIATIVE (Aug. 2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf [https://perma.cc/Y9GY-Z6G7].

culpability.[14] Research has exposed that jurors rely on implicit racial bias when it comes to deliberations.[15] In 2010, a group of social scientists and economists administered a study, in which mock jurors reviewed security camera footage of a fake robbery showing either a light-skinned or dark-skinned suspect.[16] The study results revealed that jurors were more likely to find the dark-skinned suspect guilty, despite the evidence being the race-neutral.[17]

Additionally, jurors have also voiced explicit racial bias during deliberations.[18] In *United States v. Shalhout,* a juror argued that the defendants were guilty because "all Arabs are liars, are thieves."[19] The Third Circuit found this comment to be barred under Federal Rule of Evidence 606 and affirmed the district court's denial of the defendants' motion for a new trial based on racially biased jurors.[20] Fed. R. Evid. 606(b) prevented jurors in federal court from informing anyone of such racist statements. Rule 606(b) states that "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."[21] This rule is commonly referred to as the no-impeachment rule.[22] Until recently, there were only three, narrow instances in which 606(b) allowed juror testimony regarding deliberations: improper extraneous prejudicial information, improper outside influence, or a mistake in the verdict.[23]

In 2017, the Supreme Court finally addressed the racial bias plaguing jury deliberations in *Peña-Rodriguez v. Colorado,* by

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[14] *Id.*

[15] Shamena Anwar, et al., *The Impact of Jury Race in Criminal Trials*, 127 Q. J. OF ECON. 1017 (2012) (finding that all white juries convict black defendants 16% more often than white defendants).

[16] *Id.*

[17] *Id.*

[18] *See generally*, Peña-Rodriguez v. Colorado, 580 U.S. 206, 212 (2017).

[19] United States v. Shalhout, 507 F. App'x 201, 203 (3d Cir. 2012).

[20] *Id.* at 207–08.

[21] FED. R. EVID. 606(b)(1).

[22] *See Peña-Rodriguez*, 580 U.S. at 217.

[23] FED. R. EVID. 606(b)(2).

creating a fourth exception.[24] The new exception allows jurors to testify about racial bias against criminal defendants during jury deliberations, giving defendants the opportunity to seek justice when jurors found a guilty verdict based on racial bias.[25] This ruling was monumental because juror testimony about misconduct during deliberations is the best evidence to support a request for an evidentiary hearing. The purpose of the evidentiary hearing is to determine the extent of juror misconduct. Without the evidentiary hearing, the defendants often do not have enough evidence to move for a new trial.

Peña-Rodriguez involved a Hispanic defendant charged with sexually assaulting two girls.[26] There, the Court granted a new trial when one juror told the other jurors that he thought "[the defendant] did it because he's 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 "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls."[27] The Court emphasized the need to address the pervasiveness of racial bias present in jury deliberations,[28] holding

> 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 requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.[29]

Today, almost half a decade later, the question is whether the *Peña-Rodriguez* exception has helped defendants, whose verdicts were tainted by a juror's racial bias, get a new trial. This Note argues that the answer is a resounding no. The *Peña-Rodriguez* standard is an excessively high barrier for defendants to overcome for several

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[24] *Peña-Rodriguez,* 580 U.S. at 206.

[25] *Id.* at 224.

[26] *Id.* at 210.

[27] *Id.* at 212–13.

[28] *Id.* at 223.

[29] *Id.* at 224.

reasons. First, the juror's statement must indicate *explicit* racial bias, thus failing to acknowledge the harm of implicit racial bias.[30] The Court made clear that this exception was a narrow one.[31] Second, the Court failed to consider the racism and pressure white jurors inflict on jurors of color to convict.[32] Third, the Court failed to provide guidance on "what showing must be made before counsel is permitted to interview jurors post-verdict to inquire into potential misconduct."[33] This lack of a standard approach has forced lower courts to create their own approaches, resulting in unequal outcomes across the country.[34]

This Note examines why courts refuse to grant defendants new trials, despite severe instances of juror racial bias, following the creation of the racial bias exception. [35] Part I of this Note analyzes the origins of secret jury deliberations and interrogates the Supreme Court's reasoning in creating a new exception in *Peña-Rodriguez*. Part II identifies four significant obstacles with the *Peña-Rodriguez* standard. Part III analyzes existing solutions to solving the problem of racial bias in jury deliberations. Part IV proposes that courts should follow a two-step approach to determine when racial bias evidence is sufficient to warrant a new trial. Though the *Peña-Rodriguez* exception should be extended to all forms of bias, this Note provides a solution only to the racial bias problem of jury deliberations.[36]

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[30] "Implicit racial bias, however, primarily exists at an unconscious level, such that the biased person is unlikely to be aware that it even exists. This occurs because '[i]t is now socially unacceptable to be overtly racist. Yet we all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them.'" State v. Berhe, 444 P.3d 1172, 1181 (Wash. 2019) (quoting State v. Saintcalle, 309 P.3d 326, 335 (Wash. 2013)).

[31] *Peña-Rodriguez*, 580 U.S. at 229.

[32] *See infra* Part II.C.

[33] United States v. Baker, 899 F.3d 123, 133 (2d Cir. 2018).

[34] *See infra* Part II.D.

[35] *See infra* Part II.D.

[36] Additionally, this Note does not explore the possibility of doing away with Rule 606(b) altogether because, though it is a solution this Author agrees with, it does not seem attainable in the current climate. *See* Daniel Harawa, *Sacrificing Secrecy,* 55 GA. L. REV. 593 (2021) (arguing that jury deliberations should be recorded and transcribed to ensure impartial verdicts).

I. BACKGROUND OF THE NO-IMPEACHMENT RULE AND *PEÑA-RODRIGUEZ'S* NEW EXCEPTION

The idea that jurors in federal court could outwardly be racist during deliberations up until 2017 may, rightfully, be shocking. However, Rule 606(b) is meant to prohibit anyone from inquiring about the validity of the verdict.[37] To understand why jury deliberations are kept so secret, one must go back hundreds of years.

A. Rationale of the No-Impeachment Rule and its Three Exceptions

The no-impeachment rule was established in 1785 in the English case *Vaise v. Delaval*.[38] The judge, Lord Mansfield, held that because individuals cannot be reliable witnesses against themselves, juror affidavits could not be used as evidence for a new trial.[39] Known as the Mansfield Rule, it effectively banned jurors testifying about their own wrongdoings and was adopted by the United States with little critical thought.[40] In 1915, the Supreme Court affirmed the Mansfield Rule in *McDonald v. Pless*, citing several public policy reasons.[41] The majority explained that when a juror comes forward with allegations of misconduct, "the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room."[42]

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[37] FED. R. EVID. 606(b)(1).

[38] Peña-Rodriguez v. Colorado, 580 U.S. 206, 215 (2017) (citing Vaise v. Delaval (1785) 99 Eng. Rep. 944 (KB)).

[39] *Id.*; *see also* Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principal of Rule 606(b) Justified?*, 66 N.C. L. REV. 509, 513 (1988).

[40] *See Peña-Rodriguez*, 580 U.S. at 215 (noting that "[t]he Mansfield rule, as it came to be known, prohibited jurors . . . from testifying either about their subjective mental processes or about objective events that occurred during deliberations," and that courts throughout the U.S. adopted the rule as a matter of common law).

[41] McDonald v. Pless, 238 U.S. 264, 267–68 (1915) (stating that jurors would be "harassed and beset by the defeated party," and that a private deliberation would be turned into "the constant subject of public investigation").

[42] *Id.* at 267.

In 1987, the Court reaffirmed the Mansfield Rule in *Tanner v. United States*, laying out examples of the public injuries that juror testimony about deliberations would invite.[43] For example, the Court feared that jurors would not have "full and frank discussion[s]," that losing parties would harass jurors, and that the "community's trust in a system that relies on the decisions of laypeople" would be broken.[44] In support of its holding, the majority emphasized several procedural safeguards that would ensure juror misconduct was rectified before a verdict was issued, and therefore allowed the continued existence of the no-impeachment rule.[45] One safeguard the Court highlighted, voir dire, allows attorneys to ask questions to ensure the court selects unbiased jurors, thus preventing juror misconduct during deliberations.[46] Another safeguard was the fact that "preverdict conduct of jurors is observable" by non-jurors, such as court personnel or counsel, and that "the trial court may allow a post-trial evidentiary hearing to impeach the verdict by non-juror evidence of juror misconduct."[47]

The Federal Rules of Evidence ("FRE") 606(b)(1) later codified the no-impeachment rule in 1975, along with three exceptions the Supreme Court previously upheld.[48] The first exception is that a juror may testify about whether "extraneous prejudicial information was improperly brought to the jury's attention."[49] The Supreme Court discussed the first exception in *United States v. Reid*.[50] There, two convicted defendants moved for a new trial based on the testimony of two jurors stating that they received and read a

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[43] Tanner v. United States, 483 U.S. 107 (1987) (noting, for example, that since 1915, the Court has explained the necessity of keeping jury deliberations private, and that not doing so would risk the ability of a jury to function effectively).

[44] *Id.* at 108.

[45] *See id.*

[46] *Id.*

[47] *Id.*

[48] Jason Koffler, *Laboratories of Equal Justice: What State Experience Portends for Expansion of the Peña-Rodriguez Exception Beyond Race,* 118 COLUM. L. REV. 1801, 1807 (2018).

[49] FED. R. EVID. 606; *see generally* U.S. v. Reid, 53 U.S. 361, 362 (1851), *overruled in part by* Rosen v. U.S., 245 U.S. 467 (1918).

[50] *Reid*, 53 U.S. at 362.

newspaper which contained a report about the evidence shown in the case.[51] The majority did not grant the motion for the new trial because it found that the newspaper did not influence the jurors' verdict.[52] The Court in *Reid* noted that "cases might arise in which it would be impossible to refuse [juror testimony] without violating the plainest principles of justice."[53]

In *Mattox v. United States*, [54] the Court analyzed the second exception, which allows jurors to testify about deliberations when there is an improper "outside influence." [55] The bailiff remarked to the jury that this was "the third fellow [the defendant] has killed."[56] Additionally, a juror brought a newspaper to the jury room containing an article about the defendant's trial for the murder.[57] The Court granted the motion for a new trial and adopted the outside influence exception, finding it "vital in capital [death penalty] cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiassed [sic] judgment."[58]

The third exception is when there is a "mistake" in "entering the verdict on the verdict form."[59] Federal courts have explained that "[a] clerical error would be one where the foreperson wrote down, in response to an interrogatory, a damage amount different from that agreed upon by the jury . . . [or] mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty."[60] Additionally, the entire jury must agree to the

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[51] *Id.* at 361–62.

[52] *Id.* at 366.

[53] *Id.*

[54] Mattox v. United States, 146 U.S. 140 (1892).

[55] FED. R. EVID. 606.

[56] *Mattox*, 146 U.S. at 142.

[57] *Id.* at 141–44.

[58] *Id* at 149, 151.

[59] FED. R. EVID. 606(b)(2).

[60] Karl v. Burlington N. R. Co., 880 F.2d 68,74 (8th Cir. 1989); *see* United States v. Dotson, 817 F.2d 1127, 1129 (5th Cir. 1987) (overturning a guilty verdict on one count because multiple jurors came forward stating the jury had unanimously voted to acquit defendant).

error made.[61] Confusion or disagreement amongst one or a few jurors is not enough to constitute a mistaken verdict.[62] This issue arises when jurors are confused with special verdict forms[63] or when jurors have disagreed on damage awards.[64]

Warger v. Shauers, decided in 2014, is a final key case in the historical development of the no-impeachment rule.[65] There, the plaintiff tried to proffer evidence that the jury foreperson was pro-defendant and that she concealed that bias during voir dire.[66] The Court chose to follow the no-impeachment rule and relied on the procedural safeguards that assume that any bias would come to the court's attention before the verdict, and each party could use non-juror evidence of bias after the verdict to move for a new trial.[67] This case further demonstrates how hesitant courts are to stray from existing protections. However, the Court in *Warger* reiterated that there could be situations of "juror bias so extreme that, almost by definition, the jury trial right has been abridged" and the Court could decide "whether the usual safeguards" were not sufficient.[68] This precedent was vital in setting the stage for the Court in *Peña-Rodriguez* to create the racial bias exception.[69]

Since its codification, forty-two jurisdictions have adopted versions of Rule 606(b).[70] Nine jurisdictions, however, followed the "Iowa Rule." [71] The Iowa Rule allows jurors to testify about jury deliberations after the verdict under certain circumstances.[72] This rule originated in the 1866 case of *Wright v. Illinois & Mississippi*

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[61] *See* Imperial Trading Co. v. Travelers Prop. Cas. Co. of Am., No. 06-4262, 2009 WL 2922307, *6 (E.D. La. Sept. 10, 2009).

[62] *Id.*

[63] *See e.g.,* Munafo v. Metro. Transp. Auth., 381 F.3d 99 (2d Cir. 2004).

[64] *See e.g.,* Malpica-Cue v. Fangmeier, 395 P.3d 1234 (Colo. App. 2017).

[65] Peña-Rodriguez v. Colorado, 580 U.S. 206, 220–21 (2017) (citing Warger v. Shauers, 574 U.S. 40 (2014)).

[66] *Id.* (citing *Warger*, 574 U.S. at 43, 51).

[67] *Id.* (citing *Warger*, 574 U.S. at 51).

[68] *Id.* at 221 (quoting *Warger*, 574 U.S. at 51).

[69] *Id.* at 221, 225.

[70] *Id.* at 218.

[71] *Id.* at 215.

[72] Wright v. Ill. & Miss. Tel. Co., 20 Iowa 195, 212 (Iowa 1866); *see also* FED. R. EVID. 606(b).

Telegraph Co., in which the Iowa Supreme Court specifically rejected the Mansfield Rule under the belief that jurors could easily credit or discredit each other's testimony.[73] The key limitation to the Iowa Rule is that jurors cannot testify about their subjective beliefs of how statements may have impacted a juror's thought process.[74] Thus, the Iowa Rule allows juror testimony where the Mansfield Rule does not.[75] Nevertheless, the United States Supreme Court rejected the Iowa Rule, finding that it does not sufficiently address the public policy goal of maintaining the finality of verdicts.[76] The Court did not prohibit states from using the Iowa Rule, but rather noted in *Peña-Rodriguez* that "there is a diversity of approaches" to this issue.[77] Therefore, states are allowed to add more exceptions to the no-impeachment rule than those required by the federal system.[78]

B. Peña-Rodriguez Decision

In 2017, *Peña-Rodriguez* made another rightful attack to create another exception to the no-impeachment rule. The Supreme Court weighed two goals: the need to eliminate racial bias in the jury system and the need to preserve the sanctity of jury deliberations as emphasized by *McDonald*, *Tanner*, and *Warger*.[79] Distinguishing *Peña-Rodriguez* from that precedent, the Court noted that all three cases involved "anomalous behavior from a single jury or juror," while *Peña-Rodriguez* involved racial bias, which the court described as "a familiar and recurring evil, that if left unaddressed, would risk systemic injury to the administration of justice."[80]

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[73] *Wright*, 20 Iowa at 211–12.

[74] *Impeachment of Verdicts by Jurors–Rule of Evidence 606(b)*, 4 WM. MITCHELL L. REV. 417, 420 (1978).

[75] *Peña-Rodriguez*, 580 U.S. at 215.

[76] *Id.* at 216.

[77] *Id.* at 218.

[78] Prior to *Peña-Rodriguez*, "at least [sixteen] jurisdictions, [eleven] of which followed the Federal Rule, have recognized an exception to the no-impeachment bar . . . [when] juror testimony that racial bias played a part in deliberations." *Id.*

[79] *Id.* at 219–23.

[80] *Id.* at 223–24.

The majority also found that some of the usual safeguards would not protect against racial bias.[81] Specifically, they acknowledged the stigma that comes with racial bias, which "may make it difficult for a juror to report inappropriate statements."[82] Furthermore, evaluating the seventeen jurisdictions that already had a racial bias exception, the Court noted that in those jurisdictions, "juror harassment or a loss of juror willingness to engage in searching and candid deliberations" had not increased as a result of the exception.[83] Ultimately, the pervasiveness of racial bias and the need to maintain confidence in jury verdicts outweighed the other policy goals of the no-impeachment rule, leading to the creation of the fourth exception.[84]

For guidance, the majority created a two-prong standard for the racial bias exception.[85] First, the juror must have made a clear and overt statement of racial bias during jury deliberations.[86] Second, the juror who made the statement or other jurors, must have relied on the statement to convict or sentence a criminal defendant.[87] The Court let each jurisdiction's local court rules and professional ethics rules shape the methods for when and how parties could gather the evidence of juror misconduct.[88] Unfortunately, the majority made clear that the exception is narrow, claiming that "[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar."[89] This standard presents grave obstacles: it can rarely be utilized, it does not include implicit racial bias, it fails to account for the racism jurors of color face, and it fails to provide a uniform approach for courts.

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[81] *Id.* at 224.
[82] *Id*. at 225.
[83] *Id*. at 227.
[84] *Id*. at 225.
[85] *Id*. at 225–26.
[86] *Id.* at 225.
[87] *Id.*
[88] *Id*. at 226.
[89] *Id*. at 225.

II. *PEÑA-RODRIGUEZ* EXCEPTION'S FAILURES

A. Exception to be Used Only in "Limited Cases"

Although the majority in *Peña-Rodriguez* claimed that rooting out racial bias was a key concern,[90] the statement that the exception is to be "limited to rare cases" directly contradicts the goal of rooting out racial bias.[91] Courts cannot achieve the goal of eliminating the racism deeply rooted in jury deliberations if they use the *Peña-Rodriguez* exception sparingly.[92] Lower courts' decisions underscore the exception's ineffectiveness at rooting out racial bias.[93] The *Peña-Rodriguez* exception is so difficult for defendants to meet, that in almost five years, only two have been successful.[94]

In the District of Minnesota case *United States v. Smith,* the court granted the defendant a new trial because a juror remarked that the Black defendant was "a banger from the hood and was guilty."[95] The court emphasized that though "banger" did not explicitly mention race, the first prong of the exception was still met because the juror also said "the hood," which trial testimony clearly showed that meant the majority Black neighborhood of North

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[90] *Id.*

[91] *Id.* at 229.

[92] *See* Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 ANN. REV. L. SOC. SCI. 269, 270 (2015) (examining the effect of "race, ethnicity, and culture [on] jury decision-making, and addressing how the race and ethnicity of defendants and victims influence trial outcomes as well as how the demographic characteristics of individual jurors and [how] the racial composition of juries may affect their judgments and behaviors"); Garrett Epps, *The Supreme Court Confronts Racism in the Jury Room*, THE ATL. (Mar. 16, 2017), https://www.theatlantic.com/politics/archive/2017/03/the-supreme-court-confronts-racism-in-the-jury-room/519747/ [https://perma.cc/2GQ6-CB6Z] (noting the pervasiveness of racial bias in jury deliberations).

[93] *See* United States v. Baker, 899 F.3d 123, 133–34 (2d Cir. 2018) (stating that *Peña-Rodriguez* creates a "narrow exception"); United States v. Robinson, 872 F.3d 760, 764 (6th Cir. 2017) (stating that the exception applies "in very limited circumstances"); Young v. Davis, 860 F.3d 318, 333 (5th Cir. 2017) (stating that the exception applies "narrowly").

[94] Daniel S. Harawa, *The False Promise of Peña-Rodriguez*, 109 CAL. L. REV. 2121 (2021); *see also*, United States v. Smith, 2018 WL 1924454, *9 (D. Minn. 2018); Harden v. Hillman, 2022 WL 3160735, *1 (W.D.Ky., 2022).

[95] *Smith*, 2018 WL 1924454, at *9.

Minneapolis.[96] The court found that "[t]he juror used a racially biased stereotype to find that Smith—a black man from a majority-black neighborhood of Minneapolis—was a gang member, should be disbelieved, and was guilty."[97] One juror also admitted to "reaching his guilty verdict based on race" after the other juror made that comment.[98] Thus, the second prong of the exception was met.[99]

The second successful defendant was in the Western District of Kentucky case *Harden v. Hillman.*[100] There, the sole Black juror notified the court that other jurors alleged: "(1) that Harden was a 'crack addict' and was using drugs or alcohol to stay calm during trial, (2) speculated that Harden's partner fell asleep during trial because she was on heroin, and (3) referred to Harden's African American legal team as The Cosby Show."[101] The court relied on *Smith*, when finding the jurors' statements "clearly invoked racial stereotypes."[102] The court also used *Smith's* multi-factor test to find that the jurors' relied on racial bias to convict the defendant.[103] Some of the court's findings were that the statements were: made during deliberations, unrelated to the facts of the case, not rejected vocally by other jurors, and tied the outcome of the case to racial bias.[104] The Supreme Court's history of racial bias requires a stronger remedy than the scarce application of the *Peña-Rodriguez* exception.[105]

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[96] *Id.*

[97] *Id.*

[98] *Id.* at *13.

[99] *Id.*

[100] *Hillman*, 2022 WL 3160735, at *1.

[101] *Id.* at *9.

[102] *Id.* at *12.

[103] The statements "(1) were made during deliberations and before a verdict was reached; (2) were unrelated to evidence presented at trial; (3) were 'received by the jury, with no evidence showing that any juror challenged it;' (4) tied the outcome in the case to racial stereotypes; (5) were made in close proximity to the verdict; (6) were made in a case that involved little physical evidence and largely turned on the credibility of the witnesses; and (7) impacted another juror, who testified that he rendered his decision based on racial bias." *Id.* at 16.

[104] *Id.* at *16–19.

[105] *See* Kathryn Stanchi, *The Rhetoric of Racism in the United States Supreme Court*, 62 B.C. L. REV. 1251, 1252 (2021) (noting that "for the Supreme Court, racism is either something that just *happens* without any acknowledged

Courts have a longstanding reluctance in revealing jury deliberations because of some consequences that may result from post-verdict inquiries.[106] Specifically, courts have worried about "subjecting juries to harassment, inhibiting jury room deliberation, burdening courts with meritless applications, increasing temptation for jury tampering and creating uncertainty in jury verdicts."[107] These concerns have little merit. The Sixth Amendment requires jurors to return an impartial verdict.[108] Therefore, investigating credible claims should not be framed as "harassment;" it should instead be viewed as a way to enforce an accused person's Sixth Amendment right. Next, jury deliberations would not be inhibited if jurors were aware a party could investigate their conversations. Jurors should not be allowed to say and do whatever they want while determining the course of someone's life. The argument that parties would overwhelm the courts with meritless applications and increase jury tampering is also weak. There are state courts that allow for a much more expansive bias exception to the no-impeachment rule.[109] Finally, holding jurors accountable to their duty to uphold a defendant's Sixth Amendment rights would maintain certainty in jury verdicts. Jurors would be on notice that if they were to rely on bias, the law would reveal them, encouraging jurors to act without bias.

Ultimately, none of these public policy concerns come close to outweighing the damage of convicting, imprisoning, or sentencing an individual to death based on racial bias. In America, the consequences of a conviction can be long and life altering.[110] A

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racist actor or something that is perpetrated by a narrow subset of usual suspects, such as the Ku Klux Klan or Southern racists. In the Supreme Court's usage, the law and the Court are largely innocent in perpetuating racism.").

[106] *Baker*, 899 F.3d at 131.

[107] *Id.*

[108] U.S. CONST. amend. VI, § 2.

[109] Koffler, *supra* note 48, at 1815–16.

[110] Rebecca Vallas & Sharon Dietrich, *One Strike and You're Out,* CTR. FOR AM. PROGRESS (Dec. 2, 2014), https://americanprogress.org/article/one-strike-and-youre-out/ [https://perma.cc/Z5WQ-66ZH] ("Today, a criminal record serves as both a direct cause and consequence of poverty . . . It is a consequence due to the growing criminalization of poverty and homelessness. One recent study finds that our nation's poverty rate would have dropped by 20[%] between 1980 and

conviction "can present obstacles to employment, housing, public assistance, education, family reunification, and more."[111] Imprisonment itself is a traumatizing experience for many.[112] Post Incarceration Syndrome ("PICS"), is a set of symptoms that includes Post Traumatic Stress Disorder and Substance Use Disorder affecting some individuals after their release.[113] The constant violence and total disregard for human life people witness and experience while incarcerated causes this disorder.[114] This trauma impedes a person's ability to return to society as a productive member.[115] Thus, when it comes to extinguishing racial bias in jury deliberations, the scale is clearly weighed in favor of defendants' lives and not the public policy rationales for the no-impeachment rule.

B. Exception Only Includes "Overt Racial Bias"

Even if courts applied the *Peña-Rodriguez* exception frequently, the standard to succeed on a claim is intolerably high, resulting in unreasonable outcomes. Requiring "overt racial bias"[116] blatantly ignores the reality that racism today is more dangerously displayed

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2004 if not for mass incarceration and the subsequent criminal records that haunt people for years after they have paid their debt to society.").

[111] *Id.*

[112] *Post Incarceration Syndrome (PICS),* IDAHO NONPROFIT CTR., https://barnoneidaho.org/resources/post-incarceration-syndrome/ [https://perma.cc/3675-GLJK] (last visited Oct. 11, 2022).

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *See* Peña-Rodriguez v. Colorado, 580 U.S. 206, 225 (2017).

through implicit bias[117] than overt bias.[118] Implicit bias is arguably more treacherous because people are unaware that these unconscious biases are affecting their decision-making.[119] Everyone has implicit biases, with racial bias being one of the most common types, because race is one of the first characteristics a person notices.[120] The *Peña-Rodriguez* exception in its current form only protects people from the most extreme and obvious forms of racism, hindering the Supreme Court's goal of eradicating racial bias from the court system.

The Washington state supreme court, in *State v. Berhe*, explained that even if overt racism is generally no longer socially acceptable,[121] "we all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them."[122] These implicit racial biases

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[117] "Implicit biases are associations made by individuals in the unconscious state of mind. This means that the individual is likely not aware of the biased association. Implicit racial bias can cause individuals to unknowingly act in discriminatory ways. This does not mean that the individual is overtly racist, but rather that their perceptions have been shaped by experiences and these perceptions potentially result in biased thoughts or actions. No one is immune from having unconscious thoughts and associations, but becoming aware of implicit racial bias creates an avenue for addressing the issue." Bailey Maryfield, *Implicit Racial Bias*, JUST. RSCH. & STATS. ASS'N (Dec. 2018), https://www.jrsa.org/pubs/factsheets/jrsa-factsheet-implicit-racial-bias.pdf [https://perma.cc/XWK7-5ML5].

[118] *See* William Y. Chin, *The Age of Covert Racism in the Era of the Roberts Court During the Waning of Affirmative Action*, 16 RUTGERS RACE & L. REV. 1, 3 (2015) ("In this age of covert racism, the conception of racism must change to capture its clandestine nature.").

[119] *See id.*

[120] Tibi Puiu, *When Interacting With Other People, We First Notice Race and Gender,* ZME SCIENCE (Mar. 18, 2015), https://www.zmescience.com/science/when-interacting-with-other-people-we-first-notice-race-and-gender/ [https://perma.cc/AVS5-FNU5].

[121] *See e.g., White Nationalists*, S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/ideology/white-nationalist [https://perma.cc/WWP9-5EVK] (last visited, Oct. 11, 2022). This article provides a list of White Nationalist hate groups. *Id.*

[122] State v. Berhe, 444 P.3d 1172, 1180 (Wash. 2019) (quoting State v. Saintcalle, 309 P.3d 326, (Wash. 2013) (en banc)).

can play a large role in jury decision-making.[123] Professor Levinson and Professor Young conducted a mock jury experiment in which half the jurors were shown a slightly different video of a masked gunman whose hand was visible.[124] In one video, the skin tone of the hand was light; in the other it was dark.[125] More jurors found the darker-skinned gunman guiltier, signifying how race can affect an individual's unconscious thoughts on culpability.[126]

Additionally, certain stereotypes appear to be disconnected to race but are in fact, rooted in racism. For example, in the aforementioned case, *Harden v. Hillman*, jurors claimed the Black defendant "just wants money; he's a crack head; he's an alcoholic."[127] Upon review, the Sixth Circuit found that the juror had raised a worthy claim that other jurors based their verdict on racial stereotypes.[128] Additionally, the Sixth Circuit required the district court to hold an evidentiary hearing, to ascertain evidence of juror influence, and to allow Harden a meaningful 'opportunity to establish actual bias.'"[129] The court opined that

> [l]ittle needs to be said about the pervasive and harmful racial stereotypes regarding African Americans and drugs, and specifically, crack cocaine . . . In the mid-1980s, there was a strategic effort to build public and legislative support for the War on Drugs. As a result, 'the media was saturated with images of black "crack whores," "crack dealers," and "crack babies,"—images that seemed to confirm the worst negative racial stereotypes about impoverished inner-city residents.'[130]

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[123] Jennifer K. Elek, *First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making,* CT. REV.: THE J. OF THE AM. JUDGES ASS'N 190, 191 (2013), https://core.ac.uk/download/pdf/215161343.pdf.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] Harden v. Hillman, 993 F.3d 465, 467 (6th Cir. 2021).

[128] *Id.* at 485.

[129] *Id.*

[130] *Id.* at 482. This opinion also references Michelle Alexander's book, The New Jim Crow. ALEXANDER, *supra* note 2. For example, although African Americans constitute only 15% of drug users, in a study that asked participants to

The court in *Harden* found cause for an evidentiary hearing based on the "crackhead" statements, given the long-standing studies and extensive documentation of Black racial stereotypes associated with crack.[131] Without such widespread awareness of the racism fueling certain statements, courts may be less likely to find cause for an evidentiary hearing or a new trial for those less-understood stereotypes. This reluctance would frustrate the goal of exterminating racial bias if courts are unwilling to recognize the pervasiveness of implicit bias.

United States v. Baker provides another example in which a juror made implicitly racist statements, but unlike *Harden,* the court did not allow defense counsel to investigate the jurors.[132] There, a juror stated he "knew the defendant [a person of color] was guilty the first time he saw him."[133] Despite the fact that race is one of the first characteristics people notice about others,[134] the Second Circuit

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close their eyes and "envision a drug user . . . [95%] of respondents pictured a black drug user." *Id.* at 103. "The media bonanza inspired by the . . . [War on Drugs] campaign solidified in the public imagination the image of the black drug criminal." *Id.* at 105. *See also* David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1293 (1995) (explaining that "[w]hites strongly associated crack with the same minority group they linked with heroin—inner city blacks."); Jelani Jefferson Exum, *From Warfare to Welfare: Reconceptualizing Drug Sentencing During the Opioid Crisis*, 67 U. KAN. L. REV. 941, 947 (2019).

[131] *Harden*, 993 F.3d at 483.

[132] United States v. Baker, 899 F.3d 123, 133–34 (2d Cir. 2018).

[133] *Id.* at 133.

[134] *See* Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2263–64 (2017); *see also* Reply Brief for Defendant Appellant at 17–18, United States v. Baker, No. 16-2895-cr, 2017 WL 3948132 (2d Cir. 2017) ("O[f] course, there is a possibility that the juror who 'knew [Baker] was guilty the first time I *saw* him' meant he thought Baker looked sloppy or ungroomed. But given the Supreme Court's declaration that racial discrimination is 'odious in all aspects' but 'especially pernicious in the administration of justice,' it is ignoring the elephant in the room to brush aside the possibility—likelihood—that the juror meant Baker's race. The government's suggestion that there could be anything constitutionally permissible about a juror determining guilt by *glancing* at defendant, and that such a troubling occurrence should not even warrant inquiry, makes a mockery of the most elemental concepts of due process. If the jury is indeed to function as 'a necessary check on governmental power,' the system cannot tolerate a court's recognition that the juror assessed guilt 'based on the defendant's appearance' . . . but then foreclose

held that this did not meet the *Peña-Rodriguez* standard.[135] In a criminal trial, a juror's remark about a defendant "looking guilty" is likely a guise for racial bias. At the very least, the court could have allowed an inquiry into the juror's comment before dismissing the allegation of racial bias. Unfortunately, the majority in *Peña-Rodriguez* explicitly stated what types of statements would not meet the standard for the racial bias exception to apply.[136] The Court noted that "[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry."[137] In saying this, the highest Court in the country blatantly ignored the reality that "humor" is often an offhand comment used to disguise harassment and disparaging views.[138]

The Eleventh Circuit, in *United States v. Heller*, correctly explained that casual comments can still indicate bias when evaluating anti-Semitic humor.[139] There, a juror commented "let's hang him" about the Jewish defendant and the government argued that the juror's comment was merely a joke.[140] The court admonished this characterization, explaining that "anti-Semitic 'humor' is by its very nature an expression of prejudice on the part of the maker."[141] The court further stated that "[t]hose who made the anti-Semitic 'jokes' at trial and those who reacted to them with 'gales of laughter' displayed the sort of bigotry that clearly denied

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inquiry about what that means. Race is a critical component of a person's appearance. The district court should have inquired whether what convinced this juror about Baker's guilt was that he appeared non-white.") (citation omitted).

[135] *Baker*, 899 F.3d at 133.

[136] Peña-Rodriguez v. Colorado, 580 U.S. 206, 225–26 (2017).

[137] *Id.* at 225.

[138] Thomas E. Ford, *Psychology Behind the Unfunny Consequences of Jokes that Denigrate,* CONVERSATION, (Sept. 6, 2016), https://theconversation.com/psychology-behind-the-unfunny-consequences-of-jokes-that-denigrate-63855 [https://perma.cc/84AX-LDCA] ("By disguising expressions of prejudice in a cloak of fun and frivolity, disparagement humor, like the jokes above, appears harmless and trivial. However, a large and growing body of psychology research suggests just the opposite – that disparagement humor can foster discrimination against targeted groups.").

[139] United States v. Heller, 785 F.2d 1524 (11th Cir. 1986).

[140] *Id.* at 1526–27.

[141] *Id.* at 1527.

the defendant Heller the fair and impartial jury that the Constitution mandates."[142] By allowing "offhand comments" or jokes, courts normalize discriminatory behavior,[143] Instead, courts ought to label those comments and jokes as juror misconduct.

C. Lack of Clarity Regarding Whether the Peña-Rodriguez Exception Includes Racial Bias Aimed at BIPOC Jurors

Additionally, courts have found that the *Peña-Rodriguez* exception only includes juror statements of racial bias directed towards the defendant.[144] This limitation fails to consider that explicit or implicit racism white jurors show towards jurors of color can also result in unjust verdicts.[145] The white jurors' biases can pressure BIPOC jurors to vote guilty, even if they had doubts of the defendant's guilt.[146] This pressure likely increases when there is only one person of color on the jury.[147]

The Sixth Circuit case, *United States v. Brooks,* illustrates why implicit bias and bias towards jurors of color should be included in the *Peña-Rodriguez* standard.[148] There, the court failed to acknowledge a BIPOC juror faced racial bias because she did not mention race explicitly.[149] An African American juror, the only one on the jury, informed the court that she felt pressure to return a guilty verdict from the other non-Black jurors, but did not explicitly

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[142] *Id.*

[143] Ford, *supra* note 138 ("Disparagement humor appears to do just that by affecting people's understanding of the social norms – implicit rules of acceptable conduct – in the immediate context. And in a variety of experiments, my colleagues and I have found support for this idea, which we call prejudiced norm theory.").

[144] Williams v. Price, No. 2:98CV1320, 2017 U.S. Dist. LEXIS 213087, *23 (W.D. Pa. Dec. 29, 2017) (holding that one juror's comment to another juror calling her a "n***er lover" did not fall under the *Peña-Rodriguez* exception).

[145] *See* United States v. Robinson, 872 F.3d 760 (6th Cir. 2017) (Douglas, J., concurring in part and dissenting in part).

[146] *Id.* at 788–89.

[147] *See* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition in Jury Deliberation*, 90 J. PERSONALITY AND SOC. PSYCH. 597, 600 (2006).

[148] United States v. Brooks, 987 F.3d 593 (6th Cir. 2021).

[149] *Id.* at 604.

mention the pressure stemmed from racial bias.[150] The Sixth Circuit found her explanation insufficient to meet the *Peña-Rodriguez* standard; emphasizing the email in which she informed the Court of the likely race-fueled pressure did not directly reference race nor did the other jurors make overtly racist statements about the defendant.[151] Brooks argued that the "race-neutral comments might nevertheless show evidence of implicit bias."[152] Rejecting her argument, the Sixth Circuit emphasized that the *Peña-Rodriguez* standard is a narrow one and only applies to explicit racial bias.[153] The court further explained that if the exception were extended to include race-neutral statements like the ones in *Brooks*, "this purportedly 'rare' exception would eventually swallow the rule. After all, it has not been uncommon for jurors to assert after the fact that other jurors pressured them into their verdict."[154]

On the contrary, including race neutral statements in the *Peña-Rodriguez* exception would not overwhelm the no-impeachment rule because the court can request proof of the statements containing implicit bias. This proof can come from social science research to confirm certain actions or phrases are the result of implicit racial

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[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id. See also,* McCleskey v. Kemp, 481 U.S. 279, 322 (1987) (Brennan, J., dissenting). Justice Brennan addressed a similar concern in his dissent in *McCleskey v. Kemp,* where the majority was afraid of "encouraging widespread challenges to other sentencing decisions." *Id.* The Black defendant was sentenced to death by an all-white jury, and he appealed the sentence. He supported his claim with a study that showed "defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks." *Id.* at 321. Justice Brennan rejected the majority's fear saying: "Taken on its face, such a statement seems to suggest a fear of too much justice. Yet surely the majority would acknowledge that if striking evidence indicated that other minority groups, or women, or even persons with blond hair, were disproportionately sentenced to death, such a state of affairs would be repugnant to deeply rooted conceptions of fairness. The prospect that there may be more widespread abuse than McCleskey documents may be dismaying, but it does not justify complete abdication of our judicial role. The Constitution was framed fundamentally as a bulwark against governmental power, and preventing the arbitrary administration of punishment is a basic ideal of any society that purports to be governed by the rule of law." *Id.* at 339.

bias.[155] Courts must root out all bias, but particularly implicit bias, and include it in the exception to ensure a defendant's right to an impartial trial.[156] The Supreme Court of Washington in *State v. Berhe*, correctly emphasized that the implicit bias problem is challenging because "a person may honestly believe and credibly testify that his or her actions were not influenced by racial bias, even where implicit racial bias did in fact play a significant role."[157] Rather than abandoning the issue, the court stressed "we should recognize the challenge presented by unconscious stereotyping . . . and rise to meet it."[158]

Similar to the Sixth Circuit's approach, a federal district court in Virginia did not consider accent discrimination and intimidation as forms of racial bias that in *United States v. Brown*.[159] There, a Hispanic juror faced explicit and implicit racial bias. He claimed that other jurors had "mocked and intimidated him . . . that jurors used [his] accent, and Mexican heritage to suggest that [he] was trying to apply Mexican law to the case."[160] These statements plainly mention race and ethnicity, yet the trial court held that the first prong of the *Peña-Rodriguez* exception was not met because they did not "clearly implicate racial stereotypes or animus."[161] This court ignored the transparent accent discrimination, which is concerning considering "[a]ccent and grammaticality are salient features by which people are racially categorized."[162] Professor Jasmine Gonzales Rose, a professor of law, appropriately argues how accents are a way for people to identify race, as demonstrated by studies in which people "can identify a speaker's socially

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[155] Sklansky, *supra* note 130.

[156] *See* Rose v. Mitchell, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice").

[157] State v. Berhe, 444 P.3d 1172, 1181 (Wash. 2019).

[158] *Id.* (quoting State v. Saintcalle, 309 P.3d 326 (2013)).

[159] United States v. Brown, No. 1:20CR00014, 2021 WL 2981207, *4 (W.D. Va. 2021).

[160] *Id.* at *2.

[161] *Id.* at *4.

[162] Jasmine Gonzales Rose, *Color-Blind But Not Color-Deaf,* 44. N.Y.U. R. OF L. & SOC. CHANGE 309, 320 (2020).

assigned race within seconds by merely hearing them speak." [163] She highlights how courts ignore accent discrimination as racial bias by pointing to the fact they allow parties to use a potential juror's accent as a race neutral reason to strike them from the jury.[164] Accent discrimination is racism, and these statements should have met the explicit racial bias requirement of the *Peña-Rodriguez* standard.

Additionally, other jurors threatening and showing more aggression to the Hispanic juror is implicit racial bias. One juror "told [him] that he knew where [he] lived" and mentioned his guns.[165] Later in deliberations, that same individual approached him, "puffed out his chest" and "took an aggressive stand while [they] discussed [their] opinions."[166] A different juror "told [him he] had to say yes and agree with the other jurors."[167] Despite these allegations, the trial court found that the statements did not satisfy the first prong of the *Peña-Rodriguez* exception, claiming that there had been no "clear" racial bias.[168] It is well documented that white people are prone to showing more hostility towards people of color, than to other white people, in a variety of situations.[169] The court was wrong to disregard the intimidating and bullying behavior as implicit racial bias.

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[163] *Id.*

[164] *Id.* at 335.

[165] *Brown*, No. 1:20CR00014, 2021 WL 2981207, at *2.

[166] *Id.*

[167] *Id.*

[168] *Id.* at *4.

[169] *See* Dan Battey et al., *Racial (Mis)Match in Middle School Mathematics Classrooms: Relational Interactions as a Racialized Mechanism,* 88 HARVARD EDUC. R. 455 (Dec. 1, 2018) (finding that white teachers are more prone to having more tense exchanges with Black students than with white students); Mark Hoekstra & Carly Will Sloan, *Does Race Matter for Police Use of Force? Evidence From 911 Calls*, NAT'L BUREAU OF ECON. RSCH., (Feb., 2020), https://www.nber.org/papers/w26774 [https://perma.cc/JTH8-PT8K] (finding that white officers are more likely than minority officers to increase their use of force in minority neighborhoods); Rob Voigt et al., *Language From Police Body Camera Footage Shows Racial Disparities in Officer Respect,* 114 PNAS 6521, 6524 (2017) (finding that officers speak with more disrespect towards Black community members than white ones).

Furthermore, the trial court held that the defendant failed to meet the second prong of the *Peña-Rodriguez* exception.[170] Brown, who is Black, did not establish "how the jurors' alleged use of a racial stereotype against another juror, of a different race than his own, caused them to conclude [he] was guilty."[171] However, the jurors' misconduct against the Hispanic juror obviously caused him to vote guilty. He told the court in a letter, a few days after the verdict, that he was not convinced by the evidence and then went on to discuss how the other jurors treated him.[172] The just holding in this case was for the court to find the jurors' intimidation and accent discrimination constituted racial bias, and to find that their conduct was why the Hispanic juror voted guilty.

In *United States v. Robinson,* the Sixth Circuit ignored the verbal and emotional reactions jurors of color had to the white jury foreperson's race-based comments.[173] The court did not consider this to impact any of the jurors' votes for guilt.[174] There, the jury foreperson told two Black jurors that she "[found] it strange that the colored women are the only two that can't see [guilt]" and claimed that they were protecting the defendants because they felt they "owed something" to their "black brothers."[175] Robinson argued that these statements showed the jury foreperson's racial bias had indirectly influenced the two Black jurors' to find that he was guilty.[176] Though the court found that the jury foreperson's comments "clearly indicated racial bias,"[177] the court concluded that the racial bias was not a significant factor in her verdict.[178] Additionally, the court held that the foreperson's racist remarks were not a significant factor in the Black jurors' verdicts because they still thought Robinson was guilty.[179] Therefore, the court

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[170] *Brown*, No. 1:20CR00014, 2021 WL 2981207, at *4.

[171] *Id.*

[172] *Id.* at *2.

[173] United States v. Robinson, 872 F.3d 760, 771 (6th Cir. 2017).

[174] *Id.*

[175] *Id.* at 768 (alteration in original).

[176] *Id.* at 771.

[177] *Id.* at 770–71 (alteration in original) (quoting Peña-Rodriguez v. Colorado, 580 U.S. 206, 225 (2017)).

[178] *Id.* at 771.

[179] *Id.*

determined that the *Peña-Rodriguez* exception did not apply because the second prong of the standard was not met.[180]

This outcome is problematic because there was strong evidence that the jury foreperson pressured the Black jurors into the guilty verdict. The defendant-appellant's brief noted that after the foreperson's comments, one of the Black jurors was "so mad, to the point [her] eyes started watering" and that she was "getting ready to smack the shit out of the foreperson."[181] Both Black jurors were so overwhelmed, they had to rush to the bathroom to calm down.[182] This level of frustration could point to the Black jurors choosing to go with a guilty verdict and lying about other evidence swaying them, to understandably get out of a mentally and emotionally draining situation. Further, the brief highlighted that the jury foreperson's racist remarks upset the other jurors.[183] One juror cried, apologizing to the two Black jurors and "pledging her disagreement with the foreperson."[184] In the end, all jurors voted guilty, perhaps because of the turbulent deliberations. Yet, the Sixth Circuit failed to address the other jurors' reactions and the potential of their vote being influenced by the foreperson's remarks.

These cases demonstrate how jurors of color also face racial bias and that can cause them to vote guilty, despite believing otherwise. For the *Peña-Rodriguez* exception to serve as a proper remedy for defendants, it must be applied to jurors' racial bias toward jurors of color too.

D. Lack of Guidance to Lower Courts Leads to Unjust Outcomes

The *Peña-Rodriguez* exception is failing to remedy, let alone adequately address racial bias in jury deliberations, partly because of the lack of guidance to lower courts.[185] The Supreme Court did not outline "what procedures a trial court must follow when

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[180] *Robinson*, 872 F.3d at 771.

[181] Brief for Appellant at 9–10, United States v. Robinson, No. 15-4098, 2016 WL 6834780 (6th Cir. 2016).

[182] *Id.* at 11.

[183] *Id.* at 10–11.

[184] *Id.* at 10.

[185] *See generally*, Peña-Rodriguez v. Colorado, 580 U.S. 206, 228 (2017).

confronted with a motion for a new trial based on juror testimony of racial bias."[186] Subsequently, circuit courts facing this issue have all interpreted the *Peña-Rodriguez* holding to not compel courts to change their local rules and grant parties post-verdict access to jurors.[187] This conclusion is based on the Supreme Court holding that the method for obtaining evidence on juror deliberations will be "guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors."[188] Furthermore, the Court did not lay out an "appropriate standard for determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted." [189] This gap in the exception has led courts to have differing answers on what constitutes "racist enough" for a new trial; which leads to disparate outcomes for defendants.

Courts across the country have differing rules regarding post-verdict contact between jurors and counsel. The Supreme Court has explained that jurors may approach counsel to report racial bias, excluding the circumstances where local rules prohibit attorneys initiating contact.[190] Some courts do not allow counsel any post-verdict contact with jurors, while others require that parties obtain the court's permission first.[191] Moreover, jurisdictions differ in

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[186] *Id.*

[187] Mitchell v. United States, 958 F.3d 775, 790–91 (9th Cir. 2020) ("All other circuits that have considered this issue have reached the same conclusion. The Second Circuit rejected the argument that *Peña-Rodriguez* required a district court to grant a request for juror interviews, and instead upheld a district court's denial of a request to interview jurors where there was no 'clear, strong, substantial and incontrovertible evidence' that an impropriety occurred. As the Second Circuit explained, *Peña-Rodriguez* established 'a narrow exception to the no-impeachment rule,' but 'd[id] not address the separate question of what showing must be made before counsel is permitted to interview jurors post-verdict to inquire into potential misconduct.' Rather 'as to this question, the decision simply reaffirms the importance of *limits* on counsel's post-trial contact with jurors.'.") (citations omitted).

[188] *Id.* at 789.

[189] *Peña-Rodriguez*, 580 U.S. at 228.

[190] *Id.* at 231. (Thomas, J., dissenting).

[191] *Communication with Jurors,* LAW SHELF, https://lawshelf.com/coursewarecontentview/communication-with-jurors [https://perma.cc/K9QY-NS24] (last visited Oct. 11, 2022).

whether local rules can be set aside for juror racial bias. For example, the Sixth Circuit requires that parties follow the procedural local rules regarding juror contact or else a new trial may not be granted.[192] In *United States v. Robinson*, the court affirmed the district court's denial of the motion for a new trial on several grounds, one of which was that the moving party violated the local rules.[193] Robinson's counsel hired a private investigator to interview two of the jurors, in which he was able to ascertain the testimony of racial bias during jury deliberations.[194] The Southern District Court of Ohio pointed to their local rule, which specifically states no one " . . . connected with the trial of an action shall personally, or acting through an investigator or other person, contact, interview, examine, or question any juror regarding the verdict or deliberations of the jury in the action except with leave of the Court."[195]

On the other hand, the Ninth Circuit held that courts could disregard the local procedural rules altogether when it comes to juror racial bias.[196] In *Mitchell v. United States*, the court held that "[if] a criminal defendant makes a preliminary showing of juror bias, a district court may set aside a procedural hurdle limiting access to jurors."[197] This rule can have positive effects because it does not let procedural matters impede a person's right to an impartial trial. However, this is unfair to defendants who are tried in a jurisdiction where the local rules cannot be set aside.

Courts also have differing thresholds for when a party can investigate jurors and whether an evidentiary hearing should be conducted. For example, in *United States v. Birchette,* the Fourth Circuit articulated a high threshold for granting the right to interview jurors after trial.[198] There, a white juror told the only two Black jurors that they were leaning towards a not guilty verdict for the Black defendant because it was "a race thing."[199] The Fourth Circuit

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[192] United States v. Robinson, 872 F.3d 760, 770 (6th Cir. 2017).

[193] *Id.*

[194] *Id.* at 768.

[195] *Id.* at 769.

[196] Mitchell v. United States, 958 F.3d 775, 792 (9th Cir. 2020).

[197] *Id.*

[198] United States v. Birchette, 908 F.3d 50 (4th Cir. 2018).

[199] Brief for the Appellant at 20–21, United States v. Birchette, 908 F.3d 50 (4th Cir. 2018) (No. 17-4450).

quickly characterized this comment as "offhand," finding it inadequate to overcome the no-impeachment rule because there was no indication that the comment affected her vote.[200] However, the defendant-appellant's motion was to investigate whether the Black jurors felt pressured in their verdicts, and the trial court denied him the chance to figure that out.[201] The single comment, which was clearly based on race, should have been enough for the court to allow further exploration of juror misconduct before deciding a new trial was not warranted.

The Massachusetts Appellate Court demonstrated a much lower threshold for investigating jurors.[202] In *Commonwealth v. Ralph R.,* the jury struggled to come to a decision.[203] When the judge asked the jury foreperson what the problem was, he said members of the jury made "a lot of discriminating comments."[204] The judge then instructed the jury foreperson not to divulge any statements made during deliberations.[205] When the defendant applied for a new trial based on the jury foreperson's testimony, the same judge denied the motion based on the lack of specificity of the racial statements.[206] The appellate court vacated the judgement, holding that the statement of "discriminating comments" likely meant "discriminatory comments" and that was enough to put the judge on notice of the possibility of bias during deliberations, thus the jury foreperson's testimony was sufficient to conduct an evidentiary hearing.[207] Unlike *Birchette,* where race was explicitly mentioned, here, the mere possibility of bias was enough for the court to require an evidentiary hearing.

Everyone deserves the same opportunity for a new trial when there is evidence of racial bias. This is not possible if jurisdictions have differing rules on if and how a party can contact jurors after the trial. This issue is exacerbated when one jurisdiction requires parties

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[200] *Birchette*, 908 F.3d at 59.

[201] Brief for the Appellant at 20–21, *Birchette*, 908 F.3d 50 (4th Cir. 2018) (No. 17-4450).

[202] Commonwealth v. Ralph R., 176 N.E.3d 637 (Mass. App. Ct. 2021).

[203] *Id.* at 645.

[204] *Id.*

[205] *Id.* at 646.

[206] *Id.*

[207] *Id.* at 647.

to follow local rules always, and another jurisdiction allow parties to ignore local rules at a seemingly ad hoc basis.[208] It is also unjust for one jurisdiction to require a higher evidence requirement to investigate jurors, while another jurisdiction has a low requirement. A uniform approach to the *Peña-Rodriguez* exception is imperative if justice is to prevail.

III. COMPARING AND CONTRASTING SOLUTIONS TO THE PROBLEM OF RACIAL BIAS

The Supreme Court has argued that voir dire, the process of selecting *impartial* jurors, is one of several sufficient tools in the trial process that protects the right to trial by a fair jury.[209] However, there are several cases in which jurors were untruthful during voir dire, assuming they would not be caught.[210] Though some jurors were caught, that in no way means every juror that has lied during voir dire has been discovered. Commentators have offered several other solutions to eradicating juror bias.

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[208] Several jurisdictions require a showing of "good cause" to believe juror misconduct occurred before allowing parties to investigate jurors. *See United States v. Wright*, 506 F.3d 1293, 1303 (10th Cir. 2007); *United States v. Kepreos*, 759 F.2d 961, 967 (1st Cir. 1985); *United States v. Riley*, 544 F.2d 237, 242 (5th Cir. 1976). However, even judges within the same district differ in whether "good cause" is required. "*Compare Ellison v. Ryan*, No. CV-16-08303-PCT-DLR, 2017 WL 1491608, at *2–3 (D. Ariz. Apr. 26, 2017) (finding no authority that requires a showing of "good cause" to contact jurors) and *Gomez v. Shinn*, 587 F. Supp. 3d 939, 942 (D. Ariz. 2022), *with Reeves v. Shinn*, No. CV-21-1183-PHX-DWL, 2021 WL 5771151, at *3 (D. Ariz. Dec. 6, 2021) (finding ample case law confirming that district courts may grant such requests and that there are "powerful reasons why district courts should exercise their discretion in favor of such requests")."

[209] Tanner v. United States, 483 U.S. 107, 108 (1987).

[210] *See* United States v. Sampson, 820 F.Supp.2d 151, 158–59 (D. Mass. 2011) (holding that because juror lied on voir dire that defendant was entitled to a new trial); *see also* Jackson v. State of Ala. Tenure Comm'n, 405 F.3d 1276, 1288-89 (11th Cir. 2005) (finding that a jurors "failure to speak up [during voir dire] was an intentional and dishonest response to an indisputably material question."); Burton v. Johnson, 948 F.2d 1150, 1158 (10th Cir. 1991) (holding that "it is hard to believe that the juror honestly answered the abuse voir dire questions," therefore the petitioner is entitled to a new trial.").

A. Exposure to Implicit Bias

Implicit biases can affect a juror's ability to evaluate: the credibility of witnesses, the believability of the attorneys, and the culpability of the defendant.[211] Commentators have argued that one way to solve the implicit bias problem is through more education on implicit bias.[212] For example, the Western District of Washington requires jurors to watch a training video in which a judge and attorney explain what implicit bias is and how to fight it during deliberations.[213] This is a step in the right direction, however, one video is insufficient for an individual to unlearn the years of implicit biases one acquires throughout life.

Another approach, used by Judge Bennet of the Northern District of Iowa, is discussing his experience with the Harvard Implicit Association Test ("IAT") to educate jurors about their own implicit biases.[214] The IAT measures "the strength of associations between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy)."[215] This test helps individuals identify who or what they have implicit biases against. However, being aware of implicit bias is just the first step. Fighting implicit biases requires lengthy introspections on where the bias comes from and continuous mindfulness of words and actions.[216] Many jurors may be learning about implicit bias for the first time or just have never had to face those biases before. There needs to be time and motivation for jurors to learn how to actively fight the bias. Therefore, the IAT alone is not enough.[217]

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[211] Anona Su, *A Proposal to Properly Address Implicit Bias in the Jury*, 31 HASTINGS WOMEN'S L. J. 79, 83–84 (2020).

[212] *See e.g., id.* at 81.

[213] *Id.* at 92.

[214] *Id.* at 95–96.

[215] *About the IAT,* PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/iatdetails.html [https://perma.cc/UV4A-M68P] (last visited Oct. 11, 2022).

[216] *See* Elek, *supra* note 123, at 190.

[217] *See generally*, Jennifer Edgoose, et. al., *How to Identify Understand and Unlearn Implicit Bias in Patient Care,* AM. ACAD. OF FAM. PHYSICIANS (July/Aug., 2019), https://www.aafp.org/fpm/2019/0700/p29.html [https://perma.cc/JSY3-XK5Y] ("Resisting implicit bias is lifelong work. The

B. Expert Witnesses on Bias

Lawyers proposed another solution, which involves an expert witness explaining to the jury what implicit bias is and how it impacts their decision making.[218] This solution has been mostly ineffective, largely because the court finds issues with relevance of the expert testimony.[219] The testimony that is usually offered "does not speak to an element of the crime," nor does it connect to the particular facts of the case.[220] Further, even if all courts allowed this testimony, jurors still often cannot apply their newfound knowledge of implicit bias to the immediate case because no additional instruction is given.[221] Finally, since jurors decide how to weigh the evidence presented, they could entirely dismiss expert testimony or decide that they have no implicit biases.[222] Thus, expert testimony on implicit biases is another feeble solution to the problem of racial bias in jury deliberations.[223]

C. Jury Instructions Stating That Racial Bias Cannot be a Factor in the Verdict

Courts have also attempted to fight implicit bias by explicitly noting in the jury instructions that racial bias cannot be part of the verdict.[224] In California, one model jury instruction orders jurors not to "let bias, sympathy, prejudice, or public opinion influence [their] assessment of the evidence or [their] decision . . . [They] must not

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strategies introduced here require constant revision and reflection as you work toward cultural humility. Examining your own assumptions is just a starting point. Talking about implicit bias can trigger conflict, doubt, fear, and defensiveness. It can feel threatening to acknowledge that you participate in and benefit from systems that work better for some than others. This kind of work can mean taking a close look at the relationships you have and the institutions of which you are a part").

[218] Su, *supra* note 210, at 87.

[219] *Id.*; *see generally*, FED. R. EVID. 401 (providing the test for relevant evidence).

[220] Su, *supra* note 210, at 87.

[221] *Id.* at 89.

[222] *Id.*

[223] *Id.*

[224] *Id.*

be biased in favor of or against any party . . . because of his or her disability, gender, nationality, national origin, *race or ethnicity*, religion, gender identity, sexual orientation, age [or socioeconomic status]."[225] Similarly, Washington, D.C.'s Pattern Criminal Jury Instructions warn jurors about reaching a verdict based on racial bias.[226] Those instructions state that jurors "should determine the facts without prejudice, fear, sympathy, or favoritism [and] should not be improperly influenced by anyone's *race, ethnic origin*, or gender."[227]

Although jury instructions are important ways to counteract the strong influence of implicit and explicit bias, they are ultimately insufficient. Relying on jury instructions to counteract implicit bias is as effective as a parent who leaves a teenager at home for the night and orders them to go to bed on time. The teenager is aware that their parent will likely not know whether they went to bed on time because the parent is not present. Similarly, jurors are aware that the court will likely never know if they obeyed the court's instructions because the no-impeachment rule keeps jury deliberations secret from everyone. There is little to no accountability in either situation. Ultimately, none of the aforementioned solutions target the problem of what standard lower courts should follow when trying to determine if racial bias requires a new trial.

IV. A CLEARER STANDARD FOR WHEN NEW TRIALS SHOULD BE GRANTED

A better way to tackle racial bias in jury deliberations is the two-step approach some states have implemented post-*Peña-Rodriguez*.[228] To make the two-step approach more effective, all

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[225] JUD. COUNCIL OF CAL. ADVISORY COMM. ON CRIM. JURY INSTRUCTIONS (2020 ed.), CALCRIM No. 101 (emphasis added).

[226] Natalie A. Spiess, *Peña-Rodriguez v. Colorado: A Critical, but Incomplete, Step in the Never-Ending War on Racial Bias*, 95 DENV. L. REV. 809, 839 (2018).

[227] *Id.*

[228] This approach is modeled after the one laid out in *State v. Jackson,* requiring "courts to hold an evidentiary hearing before ruling on a motion for a new trial when "the moving party has made a prima facie showing of [racial] bias." State v. Jackson, 879 P.2d 307, 311–12 (Wash. Ct. App. 1994). This

courts should first change their local rules to allow attorneys to initiate post-verdict contact with jurors. The Supreme Court acknowledged that "[t]he stigma that attends racial bias may make it difficult for a juror to report inappropriate statements,"[229] and that concern still applies post-verdict. The first step of the approach is that courts should require an evidentiary hearing to collect all the evidence regarding any racial bias that affected the jury deliberations.[230] At the second step, courts should decide whether a new trial should be granted by evaluating the evidence using a multi-factor test.[231]

A. Step 1: Mandate an Evidentiary Hearing When There is Credible Report of Racial Bias

In *State v. Spates,* the Iowa Court of Appeals affirmed the lower court's decision to grant the defendant's post-verdict request to subpoena the jurors for an evidentiary hearing based solely on the attorney's second-hand summary of the juror misconduct.[232] There, a Black defendant was convicted of murder in a drive-by shooting.[233] After the trial, one juror told defense counsel that while the jury tried to establish a motive for why the defendants left the

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holding was reaffirmed in *Berhe*. State v. Berhe, 444 P.3d 1172, 1179 (Wash. 2019). *See* State v. Spates, 953 N.W.2d 372, 2020 WL 6156739, *6 (Iowa Ct. App. 2020).

[229] Peña-Rodriguez v. Colorado, 580 U.S. 206, 225 (2017).

[230] *Jackson*, 879 P.2d at 311–12.

[231] The court in *Smith* also utilized a multi-factor test to apply the second prong of the racial bias exception. The factors were: "1) whether the extrinsic evidence was received by the jury and the manner in which it was received; (2) whether it was available to the jury for a lengthy period of time; (3) whether it was discussed and considered extensively by the jury; (4) whether it was introduced before a jury verdict was reached and, if so, at what point during the deliberations; and (5) whether it was reasonably likely to affect the verdict, considering the strength of the government's case and whether the government's case outweighed any possible prejudice caused by the extrinsic evidence." United States v. Smith, CR 12-183 (SRN), 2018 WL 1924454, at *14 (D. Minn. Apr. 24, 2018).

[232] State v. Spates, 953 N.W.2d 372, 2020 WL 6156739, **7–8. (Iowa Ct. App. 2020).

[233] *Id.* at *1.

shell casings in the car, "[one] juror stated that they're 'all' in gangs and if you do drive by shootings 'all the time' you're just used to it, and that was why the defendants overlooked disposing of the casing."[234] Another juror said that Black people are raised to think that "'it's o.k. to kill people'."[235] The court found that these statements clearly involved race based assumptions and material facts of the case, so if jurors made these statements, they "could very well show that racial animus played a substantial role in one or more jurors' decisions to convict."[236] The appellate court also noted that the lower court could have required the defendant to provide more evidence, like a signed affidavit from the juror who told defense counsel of the biased statements, instead of the "second-hand recollections of an attorney."[237] However, the appellate court emphasized the district court had the discretion to deem the testimony from the attorney credible enough for an evidentiary hearing.[238]

In *State v. Berhe,* the Supreme Court of Washington utilized an objective observer test when determining whether the court should hold an evidentiary hearing.[239] The test was "whether an objective observer (one who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State) could view race as a factor in the verdict." [240] If an objective observer can see race as a factor in the verdict, then the court must hold an evidentiary hearing.[241] There, the only Black juror was "'personally ridiculed in a way the other dissenting jurors were not' . . . her ideas [were] 'mocked as "stupid" and "illogical"'."[242] The court found that while implicit racial bias was not the only plausible explanation for the different treatment, it was a reasonable inference.[243]

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[234] *Id.* at *8.

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] State v. Berhe, 444 P.3d 1172, 1181 (Wash. 2019).

[240] *Id.*

[241] *Id.*

[242] *Id.* at 1183.

[243] *Id.*

The comments from other jurors about the sole Black juror further supported this inference.[244] One juror mentioned that the Black juror was accused of being "'bias[ed] based on her history with the law' also rais[ing racial bias] concerns."[245] The court stated that this evidence was not conclusive of racial bias, however, and that the trial court could seek more clarification about the above statements and the Black juror's statement that she was "repeatedly accused of being 'partial' because [she] was the only African American juror on the panel . . . with an African-American defendant."[246]

The appellate court also emphasized that the lower court failed to properly oversee the investigation. [247] When a juror alerted defense counsel that there was racial misconduct, they filed a motion for a new trial based on the juror's statements.[248] Around one month later, other jurors signed declarations denying that there was any racial bias during deliberations.[249] The court stated that it was reasonable to believe that the prosecution improperly influenced the other jurors after seeing defense counsel's motion.[250] The appellate court went on to state that this was improper, and that the lower court should have banned all contact with jurors once the misconduct allegations were brought forward.[251]

All jurisdictions must conduct an evidentiary hearing as soon as evidence of juror racial bias appears, before deciding to overturn a verdict, when there is credible evidence of racial bias.[252] Since the

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[244] *Id.*

[245] *Id.*

[246] *Id.*

[247] *Id.* at 1182.

[248] *Id.* at 1175.

[249] *Id.*

[250] *Id.* at 1183. The prosecution asked "(1) 'Did you personally do anything to Juror #6 which was motivated by racial bias during deliberations? and (2) Did you observe any other juror do anything to Juror #6 which appeared to be motivated by racial bias during deliberations?' This created a natural tendency to craft written submissions in a way that best supports counsel's argument and impedes the fact-finding process, an example of the requisite importance for verbal testimony on the record overseen by the court." *Id.*

[251] *Id.* at 1182–83.

[252] *See e.g.*, People v. Hernandez-Delgado, No. H047257, 2020 WL 2092477, *3–4 (Cal. Ct. App. 2020) (reversing the trial court's denial of

only way to determine the gravity of racial bias in jury deliberations is to ask the jurors what happened, the threshold to grant this access should be very low. The appropriate standard is for courts to grant an evidentiary hearing if they receive a reasonably sufficient and credible report of a juror's racial animus during deliberations, even if it is just one comment made by one juror.[253] This Note defines credible as information that comes from a trustworthy source, such as another juror, party's attorney, or court personnel. Finally, courts must restrict all communications with jurors to the evidentiary hearing once the initial misconduct is brought to the court's attention.[254] This alleviates the public policy concern of juror harassment because the court is there to safeguard how counsel treats the jurors. Ultimately, requiring evidentiary hearings will ensure defendants have a proper chance at discovering whether racial bias was a part of their guilty verdict.

B. Step 2: Utilizing a Multi-Factor Test to Determine if a New Trial Should be Granted

Once all the facts are collected from the evidentiary hearing, courts must decide whether the juror misconduct was "racist enough" to set aside the verdict. Courts should grant a new trial if the defendant has proven by "compelling evidence" that (1) one or more jurors has made explicit or implicit comments of racial bias

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defendant's petition for disclosure of identifying juror information and directing a hearing because the record supported an inference of juror misconduct due to racial bias).

[253] *See* United States v. Henley, 238 F.3d 1111, 1120 (9th Cir. 2001) (following the standard that a trial court may investigate a jury verdict if there is any evidence of one racist juror, as "the Sixth Amendment is violated by 'the bias or prejudice of even a single juror'") (quoting Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir. 1998)).

[254] In *Harden v. Hillman,* the court did not notify jurors of why they were being called back to court after the trial, prohibited them from researching the case, and prohibited them from deleting any information from the beginning of the trial to three days after the verdict. Harden v. Hillman, No. 3:15-CV-594-CHB, 2022 WL 3160735, at *3 (W.D. Ky. Aug. 5, 2022). This Note argues the same procedures should apply to all evidentiary hearings to ensure transparency.

towards the defendant or another juror, and (2) that racial bias was a significant motivating factor of his or her vote.[255]

First, courts must consider whether racial bias is explicitly or implicitly mentioned. If explicit, then the "race" part of the standard has been met. If implicit, then courts should observe social science research explaining that the seemingly race-neutral term has racial implications, just like the court used various studies to show how "crackhead" was a racist term in *Harden.*[256] For example, the phrase "thug" may not immediately seem racist.[257] However, people often use this term to stereotype Black people, furthering the false narrative that they are violent or prone to criminal behavior.[258]

Second, courts must examine the severity and pervasiveness of the comments made, which involves a few considerations. One consideration would be the number of comments made, though the court should not preclude overturning a verdict if it was one comment. Additionally, statements characterized as "jokes" are not to be discounted. A second consideration is how many jurors heard the comment, and then subsequently voted according to the comment. The court should also examine whether the other jurors responded in agreement or disagreement to the racially biased

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[255] This standard is closely modelled on the one held in *Spates*, where a "juror made clear and explicit [and implicit] statements indicating that racial animus was a significant motivating factor in his or her vote to convict." *See e.g.*, State v. Spates, 953 N.W.2d 372, 2020 WL 6156739, *8 (Iowa Ct. App. 2020). Washington state also follows this standard emphasizing both explicit and implicit bias counts. State v. Berhe, 444 P.3d 1172, 1178 (Wash. 2019).

[256] *See* Harden v. Hillman, 993 F.3d 465, 482–83 (6th Cir. 2021) (describing the racial stereotypes regarding African Americans and crack cocaine and referencing several articles that support that connection.); s*ee also* Sklansky, *supra* note 130, at 1284.

[257] *Thug*, Merriam-Webster (2022), https://www.merriam-webster.com/dictionary/thug [https://perma.cc/NEQ3-2A79] (last visited Oct. 11, 2022) (defining "thug" as a "violent or brutish criminal or bully" without implicating race or the color of a person's skin).

[258] Charles F. Coleman Jr, *Thug is the New N-Word,* EBONY (May 27, 2015), https://www.ebony.com/news/thug-is-the-new-n-word-504/ [https://perma.cc/3X3E-BA6H]; Bronwyn Isacc, *10 Common Phrases That are Actually Racist AF,* UPWORTHY, https://www.upworthy.com/10-common-phrases-that-are-actually-racist-af [perma.cc/NX78-CGFG] (last updated Oct. 6, 2022).

statements made.[259] Even if other jurors show clear disagreement with the biased statements, the court should not conclude on that evidence alone that there is no merit in a juror bias claim, and should investigate further.[260] The Northern District of California utilized this approach in a case where a Hispanic juror declared the defendant was "more guilty because . . . so many murderers come from El Salvador"[261] and other jurors responded, "you can't use that."[262] The District Court correctly rejected the California Superior Court's and the California Court of Appeals' conclusions that because the comment was "brief" and the juror was "immediately reprimanded" the defendant's petition for review should be denied.[263]

Third, courts ought to examine the relationship between the statement and the facts of the case to determine whether the statement was a significant factor in the verdict. The more related the statements were to the material issues of the case, the stronger the inference that the verdict was racially biased. In *Hernandez-Delgado v. Atchley*, the defendant was from El Salvador and was tried for murder.[264] There, the juror's comments clearly met the *Peña-Rodriguez* standard for overt racial statements because she explicitly stated that "more murderers come from El Salvador."[265] Had she made irrelevant claims about people from El Salvador usually being adulterers, there would not have been as much of an issue, given the charges at hand were about murder. However, this is still a negative stereotype that could sway someone slightly towards guilty, so the corresponding amount of weight should be given to such a statement. Courts must keep in mind that "the biased

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[259] Hernandez-Delgado v. Atchley, No. 20-CV-08108-LHK, 2021 WL 3602319, *4 (N.D. Cal. 2021).

[260] *See e.g., id.* at *6.

[261] *Id.* at *1.

[262] *Id.*

[263] *Id.* at *2, 4.

[264] *Id.* at *1.

[265] *Id.*

attitude of one juror . . . can end up infecting the other members of the jury."[266]

Finally, an objective approach should be utilized when evaluating juror statements for racial animus. Courts should investigate "what was said; how and when it was said; what was said and done before and after; whether and how the statements relate to evidence in the case; whether and how the statements relate to the issues the jury will decide when reaching a verdict."[267] Rather than relying on a juror's affirmation that race did not influence their verdict, courts should follow the standard laid out in *Berhe*: "whether an objective observer (one who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination)" would believe there was juror bias in his or her vote.[268]

This approach is superior to the *Peña-Rodriguez* exception because defendants have a better chance of unearthing racial bias when courts' local rules are standardized, and evidentiary hearings are granted as soon any amount of racial bias is discovered. Additionally, this approach provides a remedy for when a defendant encounters implicit bias and when jurors face bias. The totality of factors test ensures "offhand" comments and jokes are not ignored, and offers a structured approach to determining whether the racial bias requires a new trial.

CONCLUSION

The *Peña-Rodriguez* exception attempts to resolve racial bias after it has already occurred. Many commentators have rightly

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[266] Robert I. Correales, *Is Peña-Rodriguez v. Colorado Just a Drop in the Bucket or a Catalyst for Improving a Jury System Still plagued by Racial Bias, and Still Badly in Need of Repairs*, 21 HARV. LATINX L. REV. 1, 29 (2018).

[267] State v. Spates, 953 N.W.2d 372, 2020 WL 6156739, *6 (Iowa Ct. App. 2020).

[268] State v. Berhe, 444 P.3d 1172, 1181 (Wash. 2019) ("The ultimate question for the court is whether an objective observer (one who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State) could view race as a factor in the verdict. If there is a prima facie showing that the answer is yes, then the court must hold an evidentiary hearing.").

argued that the implicit bias problem cannot be solved by a retroactive approach. Racial bias cannot be eradicated from the outset until everyone is educated on both what it is and how to fight it. However, that proactive approach will take years. Until we have reached the societal goal of understanding bias, it is imperative that tools on the back end are utilized with ferocity to prevent lives from being irreparably ruined by imprisonment and convictions resulting from racial bias.

Therefore, courts should always require an evidentiary hearing when there is credible evidence of racial bias during jury deliberations. This should be a very low threshold, as to allow a party to gain the required evidence to adequately argue a motion for a new trial if necessary. The threshold should be when there is a credible showing to support an objectively reasonable belief that jury misconduct may have occurred. Next, courts should examine the totality of factors when determining whether to grant a new trial. These factors are: (1) explicit or implicit bias and if implicit, considering social science research supporting race-neutral statements as racial bias; (2) severity and pervasiveness of statements; (3) relationship of statements to the facts of the case; and (4) to utilize an objective approach to evaluate all factors. By using this non-exhaustive list of factors, courts will have a clearer approach when evaluating juror conduct for racial bias that compromised a person's right to an impartial trial.