Lightfoot

NEWS & INSIGHTS

WILL PENA-RODRIGUEZ V. COLORADO APPLY TO CIVIL CASES?

March 12, 2017

Law360

Authors: **M. Christian King** and **Wesley B. Gilchrist**

Last Monday, the United States Supreme Court opened the door to impeaching criminal jury verdicts on the basis of overt racial bias expressed by a juror during deliberations. Although it arose from a criminal conviction, much of the language of *Pena-Rodriguez v. Colorado*, 580 U.S. ___ (2017), arguably lends itself to civil juries as well as criminal. For instance, it begins by declaring that "[t]he jury is a central foundation" not only of "of our justice system" but of "our democracy." It concludes by confirming that "blatant racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases[.]" These well-accepted legal norms are as applicable to civil cases as they are to criminal prosecutions.

This raises the question: could the *Pena-Rodriguez* exception to the no-impeachment rule easily transfer to state court civil cases? Recall that it took just five years for the Court to extend *Batson v. Kentucky's* prohibition against race-motivated peremptory juror challenges from criminal cases to civil cases. While *Pena-Rodriguez* has much to recommend it to the civil side of the jury system, the analysis in the opinion may not be easily extended beyond the context of a criminal case.

***Pena-Rodriguez v. Colorado:* What Does it Do?**

Pena-Rodriguez, who is Hispanic, was convicted in Colorado state court on charges arising from an attack on two teenagers. In his defense, he offered an alibi witness who also was Hispanic. After being discharged, two jurors told Pena-Rodriguez's counsel that one of their fellow jurors, H.C., had made anti-Hispanic comments about Pena-Rodriguez and his alibi witness during deliberations. With the trial court's permission, Pena-Rodriguez's counsel obtained affidavits from the jurors detailing a number of H.C.'s overtly racist statements that conveyed the view that Pena-Rodriguez was guilty because he was Hispanic and that his alibi witness could not be believed because he also was Hispanic. The trial court acknowledged H.C.'s bias but denied the defendant's motion for a new trial because Colorado Rule of Evidence 606(b), like the Federal Rule, prohibits a juror from testifying about "the actual deliberations that occur among the jurors." The Colorado Court of Appeals and Colorado Supreme Court affirmed the trial court's ruling.

The U.S. Supreme Court reversed. The question was framed in terms of whether the no-impeachment rules, followed in some fashion by every state in the country, must yield to the Sixth Amendment's right to an impartial jury in a criminal prosecution. The answer was yes. The historical evils of overt racial discrimination in criminal trials of African-Americans were noted, as well as efforts by Congress and state legislatures to remedy them. The Court concluded: "where a juror makes a clear statement that indicates that 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."

The Court cautioned, however, that not every offhand comment suggesting racial bias or hostility will justify setting aside the no-impeachment rule. Rather, for the inquiry to proceed, a showing must be made that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. Moreover, to qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict.

Batson's Path from Criminal to Civil

The straight import of *Batson v. Kentucky* and its progeny is that any party, regardless of his or her race, may object to another party's race-based jury strikes. Such strikes violate the equal protection rights of the potential juror. Principles of third-party standing enable a party to enforce the equal protection rights of a wrongfully excluded juror.

In *Edmonson v. Leesville Concrete Co.*, the Court held that *Batson* applies with equal force in the context of a civil trial, even though the actor there is a private litigant, not a prosecutor acting on behalf of the government. The rationale for the extension to civil cases was that the peremptory strikes being exercised are rooted in state law, and a private litigant exercising those strikes is wielding the power of the state. Indeed, the entire conduct of a civil trial could not exist without the overt, significant participation of the government.

Looking Ahead: Could *Pena-Rodriguez* Be Extended To Civil Litigation Too?

The basis for *Pena-Rodriguez's* holding was the guarantee in the Sixth Amendment that a criminal defendant must be tried by "an impartial jury." By its terms, the Sixth Amendment applies to "criminal prosecutions" only and applies equally to the states. The Seventh Amendment preserves the right of trial by jury "[i]n Suits at common law," i.e., civil cases, but has not been held to apply to the states. Instead, the right to trial by jury in civil cases in state courts is governed by state constitutions or statutes – and as the Court noted in *Pena-Rodriguez*, several states already allow for impeachment of jury verdicts on the basis of racial bias.

Unlike *Pena-Rodriguez*, there are aspects of *Batson* that render it well suited for application in the civil context. As an initial matter, *Batson* is not about the parties to a lawsuit. Rather, it is an equal protection case that speaks to the equal protection rights of prospective *jurors*. If a prospective criminal juror has the right not to be excluded from a jury on the basis of race, then a prospective civil juror has it as well. Moreover, in either context, civil or criminal, *Batson* applies only on the front end: at the stage of striking the jury when a citizen's jury participation right is at stake. *Edmonson's* determination that a civil litigant's use of peremptory strikes was state action was based on the legal formality of the jury selection process and the fact that struck jurors are discharged by the judge, who thus becomes a party to discrimination if a strike was race-motivated. There is reason to be cautious that once a juror is selected, he or she becomes a state actor and the jury's private deliberations may be attributed to state action subject to the equal protection clause, although there is certainly language in *Batson* and *Edmonson*, in particular, that might support an argument to that effect.

Before Pena-Rodriguez could have a bearing on impeaching civil jury verdicts on the basis of racial bias in state courts that do not already allow it, the Court would have to be asked, among other things, (1) whether a civil litigant's right to an impartial jury is on par with that of a criminal defendant's right, (2) whether a juror is a state actor for purposes of the equal protection clause, and, ultimately, (3) whether the civil litigant's right to an impartial jury trumps a state's interests in the finality of its judgments. There is no clear indication in Pena-Rodriguez as to how the Court would answer those questions. So while civil practitioners are wise to familiarize themselves with Pena-Rodriguez and keep an eye on any expansion or extended application it gets, it is not a foregone conclusion that it will follow the path of *Batson* into the civil arena.

*Republished with permission. This article first appeared in **Law360** on March, 13, 2017.*