Decisions show increased attention to racism in criminal trials

Erwin Chemerinsky is dean and distinguished professor of law, Raymond Pryke professor of First Amendment law at UC Irvine School of Law.

Racism affects every aspect of the criminal justice system, ranging from who the police stop and arrest to who gets prosecuted to who gets convicted to what sentence is imposed. For all too long, the U.S. Supreme Court has refused to recognize the pervasiveness and insidiousness of racism in criminal justice. But two decisions in recent weeks expressly acknowledge the problem of racism and the need to eliminate its taint from criminal trials. My hope is that these rulings are the beginning of the court tackling the larger issue of the many ways in which racism manifests itself in the administration of criminal justice in the United States.

_Pena-Rodriguez v. Colorado_

Miguel Angel Pena-Rodriguez was convicted of sexually assaulting two teenage sisters. After the trial was over and the jury was dismissed, two of the jurors described a number of biased statements made by another juror. According to these jurors, the other juror said that he "believed the defendant was guilty because, in [his] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." The jurors reported that this juror stated, "I think he did it because he's Mexican and Mexican men take whatever they want." This juror said that, in his experience, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." Finally, the jurors recounted that the juror said that he did not find the defendant's alibi witness credible because, among other things, the witness was "an illegal," even though the witness testified that he was legally in the United States.

Armed with these affidavits, the defense counsel moved for a new trial. The court denied the motion because under Colorado law, like federal law, the actual deliberations that occur among the jurors are protected from inquiry. The Colorado Supreme Court affirmed.
The U.S. Supreme Court, in a 5-3 decision, reversed. Justice Anthony Kennedy wrote for the majority, joined by Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan. Kennedy began his analysis by declaring: "It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons. This imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments." The court powerfully stated: "A constitutional rule that racial bias in the justice system must be addressed - including, in some instances, after the verdict has been entered - is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right."

The court thus concluded that a hearing should be held when there is evidence of racial bias in jury deliberations. Kennedy declared: "the Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment 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."

**Buck v. Davis**

Duane Buck was convicted of killing two people. At the penalty phase, where the jury was to consider whether to impose the death penalty, the initial question was whether Buck posed a future danger. At the time of Buck's trial, a Texas jury could impose the death penalty only if it found - unanimously and beyond a reasonable doubt - "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

Buck's lawyer called several witnesses, including two expert witnesses, on the question of Buck's future dangerousness. One of these experts, Dr. Walter Quijano, had been appointed by the presiding judge to conduct a psychological evaluation. In determining whether Buck was likely to pose a danger in the future, Quijano considered seven "statistical factors." The fourth factor was "race." His report read: "4. Race. Black: Increased probability. There is an overrepresentation of Blacks among the violent offenders." Despite having this report that said that Buck was more likely to be dangerous because of his race, the defense counsel called Quijano as a witness.

On direct examination from Buck's lawyer, Quijano stated that certain factors were "know[n] to predict future dangerousness" and he identified race as one of them.

On cross-examination by the prosecutor, Quijano repeated this. The prosecutor asked: "You have determined that the sex factor, that a male is more violent than a female because that's just the way it is, and that the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?"
Quijano replied, "Yes."

Buck was sentenced to death. His conviction and sentence were affirmed on appeal and his state and federal habeas corpus petitions were denied. While these proceedings were pending, the state of Texas confessed error in six other cases where individuals had been sentenced to death in which Quijano had been a witness and said that a defendant was more likely to be dangerous because of his race. But it did not do so in Buck's case because it was his lawyer who had called Quijano as a witness.

Buck's third habeas corpus petition in federal court, which was accompanied by a motion to set aside the prior decision pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, claimed ineffective assistance of counsel based on his lawyer calling Quijano as a witness. The district court denied the petition, concluding that Buck could not show that he was prejudiced because the jury likely would have sentenced him to death even without Quijano's testimony. The 5th U.S. Circuit Court of Appeals refused to grant a certificate of appealability, which is necessary to appeal a denial of habeas corpus.

The Supreme Court in a 6-2 decision reversed the 5th Circuit. Chief Justice John Roberts wrote the opinion for the court; only Justices Clarence Thomas and Samuel Alito dissented. The court found that there was ineffective assistance of counsel. The test for ineffective assistance of counsel was articulated in Strickland v. Washington (1984), which requires that a defendant who claims to have been denied effective assistance must show both that counsel performed deficiently and that counsel's deficient performance caused him prejudice.

As for the former, the court said it was clearly ineffective assistance of counsel for the defense to call Quijano as a witness. The court wrote: "It would be patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race. No competent defense attorney would introduce such evidence about his own client."

As for the latter, the court concluded "it is reasonably probable - notwithstanding the nature of Buck's crime and his behavior in its aftermath - that the proceeding would have ended differently had counsel rendered competent representation." The court powerfully stated: "But when a jury hears expert testimony that expressly makes a defendant's race directly pertinent on the question of life or death, the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses."

Finally, and perhaps most importantly, the court was emphatic that "it is inappropriate to allow race to be considered as a factor in our criminal justice system."
Conclusion

Twice in the last two weeks the Supreme Court has forcefully declared the need to deal with racism in the criminal justice system. I am puzzled as to why Chief Justice Roberts, who wrote the opinion in *Buck v. Davis*, then joined the dissent in *Pena-Rodriguez*. But my hope is that these cases reflect a court that now is ready to deal with the countless other ways that racism taints the administration of criminal justice in the United States.