

No. 04-9337

IN THE
Supreme Court of the United States

GARY STERLING,

Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit**

**BRIEF FOR THE NAACP LEGAL DEFENSE
AND EDUCATIONAL FUND, INC. AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

AUDREY J. ANDERSON
CATHERINE E. STETSON*
MARY L. JOHNSON
CHRISTOPHER R. ZAETTA
JAMES S. BLACK, II
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5491

* Counsel of Record

Counsel for Amicus Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	4
I. PETITIONER’S COUNSEL’S DECISION TO PLACE A “PROBABL[E]” RACIST ON A DEATH PENALTY JURY WAS NOT A DEFENSIBLE STRATEGIC CHOICE UNDER ANY STANDARD	4
II. JUROR WALTHER’S VIEWS OF BLACK CRIMINALITY NECESSARILY INFECTED THIS INTERRACIAL DEATH PENALTY CASE	8
A. “Nigger” Is Historically And Inextricably Linked To Racial Prejudice	9
B. Stereotyped Perceptions Of African- American Criminality Are Entrenched In Our Society	13
C. Racially Biased Perceptions Of Blacks’ Propensity Toward Violence Can Taint Jury Decisionmaking	15
D. A Known Risk Of Racial Bias By A Prospective Juror In A Capital Case Warrants Investigation By Defense Counsel	18
CONCLUSION	20

TABLE OF AUTHORITIES

	Page
<i>Cases:</i>	
<i>Alexander v. Louisiana</i> , 405 U.S. 625 (1972).....	1
<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986)	1, 2, 5
<i>Brown v. East Miss. Elec. Power</i> , 989 F.2d 858 (5th Cir. 1993)	12
<i>California v. Ramos</i> , 463 U.S. 992 (1983).....	6
<i>Carter v. Jury Comm.</i> , 396 U.S. 320 (1970)	1
<i>Duncan v. Louisiana</i> , 391 U.S. 145 (1968).....	5
<i>Edmonson v. Leesville Concrete Co.</i> , 500 U.S. 614 (1991).....	1
<i>Ex Parte Guzman</i> , 730 S.W.2d 724 (Tex. Crim. App. 1987)	11
<i>Georgia v. McCollum</i> , 505 U.S. 42 (1992)	1, 5
<i>Glasser v. United States</i> , 315 U.S. 60 (1942)	5
<i>Ham v. South Carolina</i> , 409 U.S. 524 (1973).....	1
<i>Hughes v. United States</i> , 258 F.3d 453 (6th Cir. 2001).....	7
<i>Hull v. Cuyahoga Valley Joint Vocational Sch.</i> <i>Dist. Bd. of Educ.</i> , 926 F.2d 505 (6th Cir.), <i>cert. denied sub nom. Hull v. Shuck</i> , 501 U.S. 1261 (1991).....	12
<i>Hunter v. Underwood</i> , 471 U.S. 222 (1985).....	14
<i>Johnson v. California</i> , 540 U.S. ____, 125 S. Ct. 1141 (2005).....	1
<i>Kendall v. Block</i> , 821 F.2d 1142 (5th Cir. 1987).....	13
<i>McCleskey v. Kemp</i> , 481 U.S. 279 (1987)	5
<i>McGinest v. GTE Serv. Corp.</i> , 360 F.3d 1103 (9th Cir. 2004)	12
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003).....	1

TABLE OF AUTHORITIES—Continued

	Page
<i>Mu’Min v. Virginia</i> , 500 U.S. 415 (1991).....	6, 7
<i>Powers v. Ohio</i> , 499 U.S. 400 (1991)	5
<i>Rodgers v. Western-Southern Life Ins. Co.</i> , 12 F.3d 668 (7th Cir. 1993)	12
<i>Rosales-Lopez v. United States</i> , 451 U.S. 182 (1981)	5, 6
<i>Strauder v. West Virginia</i> , 100 U.S. 303 (1879)	2, 5
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	2
<i>Swain v. Alabama</i> , 380 U.S. 202 (1965)	1
<i>Turner v. Fouche</i> , 396 U.S. 346 (1970)	1
<i>Turner v. Murray</i> , 476 U.S. 28 (1986).....	<i>passim</i>
<i>United States v. Brown</i> , 539 F.2d 467 (5th Cir. 1976).....	11
<i>United States ex rel. Goldsby v. Harpole</i> , 263 F.2d 71 (5th Cir.), <i>cert. denied</i> , 361 U.S. 838 (1959).....	6
<i>United States v. Heller</i> , 785 F.2d 1524 (11th Cir. 1986)	11
 <i>Constitutional Provisions:</i>	
U.S. Const. amend. 6.....	4, 5
U.S. Const. amend. 14.....	6
 <i>Rule:</i>	
Sup. Ct. R. 37.6	1
 <i>Other Authorities:</i>	
Steven E. Barkan & Steven F. Cohn, <i>Racial Prejudice and Support for the Death Penalty by Whites</i> , 31 J. Res. Crime & Delinquency 202 (1994)	15

TABLE OF AUTHORITIES—Continued

	Page
William J. Bowers, <i>The Capital Jury Project: Rationale, Design, and Preview of Early Findings</i> , 70 Ind. L.J. 1043 (1995).....	16, 17
William J. Bowers, et al., <i>Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant is Black and the Victim is White</i> , 53 DePaul L. Rev. 1497 (2004).....	17
William J. Bowers, et al., <i>Death Sentencing In Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition</i> , 3 U. Pa. J. Const. L. 171 (2001).....	14, 16
Capital Jury Project Website, at http://www.cjp.neu.edu (April 19, 2005)	16
Steven F. Cohn, et al., <i>Punitive Attitudes Toward Criminals: Racial Consensus or Racial Conflict?</i> , 38 J. Soc. Probs. 287 (1991)	15
Donna Coker, <i>Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System</i> , 93 J. Crim. L. & Criminology 827 (2003)	13
Patricia G. Devine, <i>Stereotypes and Prejudice: Their Automatic and Controlled Components</i> , 56 J. Personality & Soc. Psychol. 5 (1989).....	14
Patricia G. Devine & Andrew J. Elliot, <i>Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited</i> , 21 Personality & Soc. Psych. Bull. 1139 (1995).....	14
George M. Frederickson, <i>The Black Image in the White Mind: The Debate on Afro-American Character and Destiny, 1817–1914</i> (1971).....	10
Michele Goodwin, <i>Nigger and the Construction of Citizenship</i> , 76 Temp. L. Rev. 129 (2003).....	10

TABLE OF AUTHORITIES—Continued

	Page
A. Leon Higginbotham, Jr., <i>In the Matter of Color: Race and the American Legal Process, The Colonial Period</i> (1978)	10
Jon Hurwitz & Mark Peffley, <i>Public Perceptions of Race and Crime: The Role of Racial Stereotypes</i> , 41 Am. J. Pol. Sci. 375 (1997).....	15
Sherri Lynn Johnson, <i>Racial Imagery in Criminal Cases</i> , 67 Tul. L. Rev. 1739 (1993).....	8
Winthrop D. Jordan, <i>White Over Black: American Attitudes Toward the Negro, 1550–1812</i> (1968)	10
Randall L. Kennedy, <i>Race, Crime, and the Law</i> (1997).....	13, 14, 15
Randall L. Kennedy, <i>Nigger: The Strange Career of a Troublesome Word</i> (2003)	9
National Jury Project, <i>Jurywork</i> (2004)	18, 19
Mark Peffley & Jon Hurwitz, <i>The Racial Components of “Race-Neutral” Crime Policy Attitudes</i> , U. Ky., Department Pol. Sci, Lexington (reprint) (2002)	15
Lincoln Quillian & Devah Pager, <i>Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime</i> , 107 Am. J. Soc. 717 (2001)	14
Samuel R. Sommers & Phoebe C. Ellsworth, <i>How Much Do We Really Know About Race And Juries? A Review Of Social Science Theory And Research</i> , 78 Chi.-Kent L. Rev. 997 (2003).....	14, 16, 18
Samuel R. Sommers & Phoebe C. Ellsworth, <i>White Juror Bias, An Investigation of Prejudice Against Black Defendants in the American Courtroom</i> , 7 Psych., Pub. Pol’y, & L. 201 (2001).....	18

TABLE OF AUTHORITIES—Continued

	Page
Laura T. Sweeney & Craig Haney, <i>The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies</i> , 10 <i>Behav. Sci. & L.</i> 179 (1992).....	16
Mark Twain, <i>The Adventures of Huckleberry Finn</i> (1885).....	10
James M. Washington, ed., <i>A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.</i> 293 (1986).....	10
Forrest G. Wood, <i>Black Scare: The Racist Response to Emancipation and Reconstruction</i> (1970).....	9-10

STATEMENT OF INTEREST OF AMICUS CURIAE

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit corporation formed to assist African Americans in securing their rights by the prosecution of lawsuits. Its purposes include rendering legal aid without cost to African Americans suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own. For many years, its attorneys have represented parties and it has participated as amicus curiae in this Court, in the lower federal courts, and in state courts.¹

The LDF has a long-standing concern with the influence of racial discrimination on the criminal justice system in general, and on jury selection in particular. LDF represented the defendants in, *inter alia*, *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972), and *Ham v. South Carolina*, 409 U.S. 524 (1973); pioneered in the affirmative use of civil actions to end jury discrimination, *Carter v. Jury Commission*, 396 U.S. 320 (1970), *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as amicus curiae in *Johnson v. California*, 540 U.S. ___, 125 S. Ct. 1141 (2005), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Georgia v. McCollum*, 505 U.S. 42 (1992), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), and *Batson v. Kentucky*, 476 U.S. 79 (1986).

SUMMARY OF THE ARGUMENT

“Sometimes those niggers will start hollering and cursing. And pretty soon they’ll start shooting. One of them stays in

¹ Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus* or its counsel, made a monetary contribution to the preparation or submission of the brief. This brief is submitted with the consent of all parties, whose letters of consent have been lodged with the Clerk.

jail all the time.”² These are the words of Victor Walther, who sat in judgment of Petitioner—an African American—in his capital case in Navarro County, Texas, on an all-white jury that ultimately sentenced him to death. Petitioner’s trial counsel knew during jury voir dire that Walther was “probably * * * racially prejudiced,”³ but nevertheless allowed Walther to sit on the jury without inquiry as to whether Walther could fairly determine Petitioner’s sentence. The history of racial stereotypes in this country tracing back to the days of slavery, and the special vigilance afforded by the courts to issues of racial bias, dictate that Petitioner’s counsel’s failure to question Walther on his known racial prejudices could not have been “sound trial strategy” under *Strickland v. Washington*, 466 U.S. 668 (1984).

The Court has time and again recognized that juries are the primary means by which to protect our citizenry from the State’s misuse of its awesome powers to confine or execute its citizens. *Batson*, 476 U.S. at 86 (“The petit jury has occupied a central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge.”). The jury also serves as the defendant’s primary protection against the invidious influence of race in deciding whether a defendant lives or dies. *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879). In light of the critical function of the jury in capital cases and the “unique opportunity for racial prejudice to operate but remain undetected,” in the jury box, the Court has recognized the importance of ferreting out racial prejudice during the voir dire process in capital cases involving African-American defendants. *Turner v. Murray*, 476 U.S. 28, 35-36 (1986). The concerns that have led the Court to afford this special vigilance in capital cases involving African Americans are heightened in cases such as this one,

² Pet. App. 8 at 2.

³ Pet. App. 10 at 215.

where Petitioner's attorney *knew* that the prospective juror potentially harbored racial prejudice.

It is within this legal framework that Walther's use of the epithet "nigger" cannot—as the State has attempted to do in this case—be dismissed simply as an unpleasant but harmless slur. The word embodies a long history of racial oppression. Studies on the epithet have found that its use is closely associated with perceptions of lawlessness and hostility in African Americans, particularly African-American men. These perceptions can become reality in the minds of racially biased individuals like Victor Walther who link the epithet ("niggers") to violence ("pretty soon they'll start shooting").

Such stereotypes are rooted in our history and are perpetuated in modern culture, and neither the law nor any minimally adequate defense counsel can assume that the Victor Walthers of the world simply cast those stereotypes aside when they step into the jury box. Indeed, mock juror studies for example indicate that white jurors mete out harsher punishments to African-American defendants and suggest that stereotypes of black criminality and racial prejudice influence those judgments.

The Petition filed in this case demonstrates that the lower court's decision is inconsistent with this Court's rulings directed at minimizing the threat of racial bias in the courtroom in capital cases. As Amicus describes herein, the protections that flow from these rulings—and their relevance to this case—are best understood in the context of the history of racial prejudice underlying the malicious epithet "nigger" and the resultant stereotypes linking African-American men to crime. Amicus urges the Court to consider these factors and grant review of the lower court's ruling or, in the alternative, summarily reverse the judgment below.

ARGUMENT**I. PETITIONER’S COUNSEL’S DECISION TO PLACE A “PROBABL[E]” RACIST ON A DEATH PENALTY JURY WAS NOT A DEFENSIBLE STRATEGIC CHOICE UNDER ANY STANDARD.**

Juror Walther freely used the racial epithet “nigger”—a word freighted with more harsh racial animus than any other in our language. Walther equally freely offered observations about his “nigger” neighbors and their purportedly criminal bent. Petitioner’s trial counsel had known Walther for decades, and he knew Walther “probably” was a racist. Pet. App. 10 at 215. Yet he stood by while Walther was impaneled on an all-white jury that ultimately sentenced Petitioner to die. That was not a constitutionally defensible strategic choice.

As we discuss in this section, cases implicating race and racial animus carry a certain fundamental import; and cases implicating the death penalty are also subject to the most exacting scrutiny. These two features—race and death—are particularly relevant in determining the constitutionality of a court or counsel’s decisions in the context of voir dire, when the defendant’s Sixth Amendment rights are at risk. This Court’s precedents reveal three factors that generally determine the degree of duty charged (and deference given) to counsel in conducting voir dire: (1) the presence of a racial issue in the case; (2) the threatened punishment; and (3) the indicia of prejudice or potential bias present at the time of questioning. As these often-interrelated factors increase in magnitude, the power of court or counsel to unilaterally decide what to ask prospective jurors should—and does—diminish.

This case implicates all three factors at their zenith. It involves the murder of a white man by a black man; the attendant punishment of death; and his lawyer’s personal knowledge that Walther was “probably” racially prejudiced.

Petitioner's attorney was under a constitutional obligation to inquire more deeply into Walther's prejudices rather than brushing off the issue.

This Court has long recognized that "it is the jury that is a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'" *McCleskey v. Kemp*, 481 U.S. 279, 310 (1987) (quoting *Strauder*, 100 U.S. at 309). The Court has stated that "[o]ne of the goals of our jury system is 'to impress upon the criminal defendant and the community * * * that a verdict * * * is given in accordance with the law by persons who are fair.' * * * The need for public confidence is especially high in cases involving race-related crimes." *McCollum*, 505 U.S. at 49 (quoting *Powers v. Ohio*, 499 U.S. 400, 413 (1991)). Consequently, "a defendant has the right to an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice." *McCollum*, 505 U.S. at 58. If a jury is to fulfill its duty as a "prized shield against oppression," *Glasser v. United States*, 315 U.S. 60, 84 (1942), and the defendant is to reap the benefit of its "common-sense judgment," *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968), it must be untainted by bias. "We have, accordingly, held that there should be a mechanism for removing those on the venire whom the defendant has specific reason to believe would be incapable of confronting and suppressing their racism." *McCollum*, 505 U.S. at 58.

Peremptory challenges are one such mechanism. *See, e.g., Batson v. Kentucky*, 476 U.S. 79 (1986). Voir dire is another; it plays a critical function in ensuring that a defendant's Sixth Amendment right to an impartial jury will be honored. "Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (italics omitted). "[L]ack of adequate voir dire impairs the defendant's right to

exercise peremptory challenges where provided by statute or rule, as it is in the federal courts.” *Id.*

Traditionally, the Court has permitted both courts and counsel to exercise wide latitude over the questions asked during voir dire. *See Mu’Min v. Virginia*, 500 U.S. 415, 424 (1991). This latitude begins to narrow when a case is infused with racial issues. *Id.* (“[T]he possibility of racial prejudice against a black defendant charged with a violent crime against a white person is sufficiently real that the Fourteenth Amendment requires that inquiry be made into racial prejudice”). Where the defendant is charged with a capital crime against a person of a different race, the Court has explicitly recognized the need for questioning of potential jurors on the issue of racial prejudice. *See Turner v. Murray*, 476 U.S. at 33-35.

The death penalty demands a rigorous approach to jury selection as well. A criminal defendant’s constitutional rights take on greater significance as punishment increases in magnitude. *Cf. United States ex rel. Goldsby v. Harpole*, 263 F.2d 71, 83 (5th Cir. 1959) (“When not merely the client’s property but his life is at stake, it is all the more essential that an attorney should advise with his client before waiving objections to a trial jury unconstitutionally and discriminatorily constituted.”). And this Court has repeatedly observed that death penalty cases demand additional safeguards. *California v. Ramos*, 463 U.S. 992, 998-999 (1983) (“The Court * * * has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.”).

Perhaps the most important factor in determining the obligations incumbent upon the court and counsel during voir dire is the strength of any inference or evidence that a juror may harbor prejudice. This Court has recognized in a variety of contexts that more may be required of a court and counsel

where circumstances point to a greater possibility of bias. *See, e.g., Mu'Min*, 400 U.S. at 429 (noting that pretrial publicity may result in an inference that a prospective juror's comments that he could be impartial should not be believed); *see also Hughes v. United States*, 258 F.3d 453, 458-459 (6th Cir. 2001) (faulting court and counsel's failure to "conduct the most rudimentary inquiry" of a potential juror "to inquire further into her statement that she could not be fair"). Such case law suggests that when a lawyer is on notice of a juror's actual or potential bias—when direct or circumstantial evidence suggests that a juror's ability to judge impartially may be suspect—counsel *must* take the next step and inquire into that prejudice.

If bias is presumed where the prospective juror has been exposed merely to certain information about a crime prior to the trial—no matter how strongly that person insists he can be impartial—there should be little reason to doubt that similar circumstances warrant a presumption of bias in the context of known racial prejudice. This conclusion is particularly true given the virulence of racial prejudice and its pernicious history in this country.

This case accordingly represents a unique confluence of three circumstances that trigger enhanced duties on the part of court and counsel to ensure that the defendant's rights are preserved: A violent crime committed by a member of one race against another and for which a sentence of death was imposed, and the presence of direct knowledge by defense counsel of the probable racial prejudice of a prospective juror.

The *Turner* Court was concerned with the unacceptable risk of prejudice infecting the jury's deliberations based on the "conjunction" of similar factors: "the fact that the crime charged involved interracial violence, the broad discretion given the jury at the death-penalty hearing, and the special seriousness of the risk of improper sentencing in a capital

case.” 476 U.S. at 37. The Court concluded in *Turner* that the trial court had erred in not permitting questioning on the topic of racial prejudice. What sets this case apart from *Turner*—indeed, it makes *Turner* look mild—is the final factor present here: Petitioner’s attorney *knew* Walther “probably” was a racist. Where, as here, a known risk exists of bias, there is cause to engage in a close examination aimed at the source of this prejudice. And there is simply no strategic justification for impaneling a prejudiced juror in an interracial death penalty case without questioning him on the subject of race. Petitioner’s constitutional right to an impartial jury demands more than that.

II. JUROR WALTHER’S VIEWS OF BLACK CRIMINALITY NECESSARILY INFECTED THIS INTERRACIAL DEATH PENALTY CASE.

In an affidavit submitted during habeas proceedings, Walther stated:

There are some niggers who live [a] couple blocks over. They deal crack over there. Sometimes those niggers will start hollering and cursing. And pretty soon they’ll start shooting. One of them stays in jail all the time. He’ll be in jail a few days and then he’ll be right back out. A couple of ‘em shot each other last June Teenth over a card game. [Pet. App. 8 at 2.]

Walther’s statement connects in just a few words “some niggers” to drug dealing, violence, and general criminality. As discussed in greater detail below, such stereotypes have a long history in American race relations and criminal justice. *See* Sherri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 Tul. L. Rev. 1739, 1750-60 (1993) (discussing prosecutorial use of race-based stereotypes of blacks as more violent or involved in the drug trade). Thus, Juror Walther closely associated the venomous epithet he regularly used to describe individuals of Petitioner’s race with stereotypes of black criminality and propensity for violence having dark historical

roots in American life. Walther’s presence on the jury plainly begs the question whether he could possibly evaluate Gary Sterling’s guilt or innocence—and whether to spare his life or put him to death—apart from Sterling’s status as “some nigger.”

A. “Nigger” Is Historically and Inextricably Linked To Racial Prejudice.

The State of Texas contended below that the word “nigger” does not signal racial animus, and that Petitioner was operating under “the mistaken premise that mere use of the word ‘nigger’ makes one a racist.” State’s Appeal Br. 8. The State’s contention that Walther’s reference to blacks as “niggers” was perhaps “ugly,” *id.* at 16, but not racist, is fundamentally inconsistent with the history of that epithet and with the significance juror Walther attached to it.

“Nigger”’s history is inexorably connected with America’s own history of racial oppression and exclusion, because its use was and is so often connected to efforts to deny political and social equality to blacks in American life.⁴ “Nigger”

⁴ Whites and other non-blacks who have joined blacks’ struggle for equal rights have long been scorned in American history as “nigger lovers.” Randall L. Kennedy, *Nigger: The Strange Career of a Troublesome Word* 21 (2002). After President Theodore Roosevelt invited civil rights leader Booker T. Washington to the White House for dinner, Senator Benjamin Tillman of South Carolina is reported to have said, “The action of President Roosevelt in entertaining that nigger will necessitate our killing a thousand niggers in the South before they will learn their place again.” *Id.* at 8. And Abraham Lincoln’s political opponents crafted a “Black Republican Prayer” which ended with the following benediction:

May the blessings of Emancipation extend throughout our unhappy land, and the illustrious, sweet-scented Sambo nestle in the bosom of every Abolition woman * * * and the distinction of color be forever consigned to oblivion, and that we may live in bonds of fraternal love, union, and equality with the Al-

conjures up the exclusion of blacks from the family of mankind, as sharply rendered by Mark Twain, and the denial of full participation in American democratic, social, and economic life, as chronicled by Martin Luther King.⁵ See Michele Goodwin, *Nigger and the Construction of Citizenship*, 76 Temp. L. Rev. 129 (2003) (arguing that “nigger” affected America’s creation of citizenship). In short, “nigger” marks blacks as “other,” outside the American political and social community. It is powerful verbal shorthand for a history of exclusion and degradation, not long ago sanctioned by law, that has attended the black American experience. See A. Leon Higginbotham, Jr., *In the Matter of Color: Race and the American Legal Process, The Colonial Period* (1978); George M. Frederickson, *The Black Image in the White Mind: The Debate on Afro-American Character and Destiny, 1817–1914* (1971); Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550–1812* (1968). “Nigger”’s use as a signifier of the political, social, and

mighty Nigger, henceforth, now and forever. Amen. [Forrest G. Wood, *Black Scare: The Racist Response to Emancipation and Reconstruction* 84 (1970).]

⁵ *The Adventures of Huckleberry Finn* contains a scene in which Tom’s Aunt Sally learns of a steamboat explosion. She exclaims, “Good gracious! Anybody hurt?” Tom replies, “No’m. Killed a nigger.” Aunt Sally responds, “Well, it’s lucky, because sometimes people do get hurt.” In his damning critique of American race prejudice, the “Letter from Birmingham City Jail,” Martin Luther King, Jr. writes: “[W]hen you are humiliated day in and day out by nagging signs that read ‘white’ and ‘colored’; when your first name becomes ‘nigger,’ your middle name becomes ‘boy’ (however old you are) and your last name becomes ‘John’; * * * when you are forever fighting a degenerating sense of ‘nobodiness’; then you will understand why we feel it difficult to wait.” James M. Washington, ed., *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.* 293 (1986).

physical exclusion of blacks cannot be denied by those who use it or hear it.

In light of the foul history of the epithet “nigger,” courts have carefully protected the integrity of the judicial process against racial animus springing from that and similarly pejorative words. For example, in *United States v. Brown*, 539 F.2d 467, 468 (5th Cir. 1976), the Fifth Circuit vacated the conviction of H. Rap Brown after it surfaced that prior to trial, an attorney had overheard the trial judge say “that he was ‘going to get that nigger.’” *Id.* The court of appeals explained: “Impartiality finds no room for bias or prejudice. It countenances no unfairness and upholds no miscarriage of justice. Bias and prejudice can deflect the course of justice and affect the measure of its judgments.” *Id.* at 469.

Analogously, in *United States v. Heller*, 785 F.2d 1524 (11th Cir. 1986), the Eleventh Circuit reversed the conviction of a Jewish defendant after allegations of jury misconduct surfaced. Several jurors had made ethnic slurs and jokes during the defendant’s trial. In reversing, the court stated that “prejudice in a judicial context * * * prevents the impartial decision-making that both the Sixth Amendment and fundamental fair play require.” *Id.* at 1527-28.

State courts also have guarded the fairness of trial proceedings from the effects of racial and ethnic bias in the unusual circumstance where such bias has been introduced by the defendant’s counsel against the defendant *himself*. In *Ex parte Guzman*, 730 S.W.2d 724 (Tex. Crim. App. 1987), a death penalty appeal, the court considered an ineffective-assistance claim where the defense attorney had repeatedly referred to his client as a “wetback.” The court stated that the epithet “was no doubt particularly harmful when addressed to these jurors, some of whom had expressed doubts that such an illegal alien was entitled to all the protections United States citizens are afforded.” *Id.* at 733. The defense counsel found to have rendered ineffective assistance in that

case was none other than Robert Dunn—Petitioner’s trial counsel.

In addition to finding that the use of racial epithets by actors in the trial process undermines the fairness of the process, courts have pointed out more particularly the connection of the epithet “nigger” to racist practices, and have determined that its use is evidence of discriminatory animus. In *Brown v. East Mississippi Electric Power*, 989 F.2d 858 (5th Cir. 1993), for example, the Fifth Circuit addressed a black plaintiff’s claim that he had been fired from his job on the basis of race. Plaintiff had produced uncontradicted evidence that his supervisor had used the term “nigger” on several occasions to refer to him and to blacks in general. The court rejected the defendant’s argument that the use of the word “nigger” was an innocuous habit:

[T]he term ‘nigger’ is a universally recognized opprobrium, stigmatizing African Americans because of their race. That [the defendant] usually was circumspect in using the term in the presence of African Americans underscores that he knew it was insulting. Nonetheless, he persisted in demeaning African Americans by using it among whites. *This is racism.*” [*Id.* at 861 (emphasis added).]

See also McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1116 (9th Cir. 2004) (reversing summary judgment against a plaintiff who had alleged use of the epithet in the workplace, and noting that “[i]t is beyond question that the use of the word ‘nigger’ is highly offensive and demeaning, evoking a history of racial violence, brutality, and subordination. This word is perhaps the most offensive and inflammatory racial slur in English, a word expressive of racial hatred and bigotry”) (internal quotations and citation omitted).⁶

⁶ *See also Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) (“Perhaps no single act can more quickly

B. Stereotyped Perceptions of African-American Criminality are Entrenched In Our Society.

The stereotype of African Americans as violence-prone is prevalent in our culture. There is a widespread and stubborn belief that most crime in the United States is committed by African Americans. *See, e.g.*, Donna Coker, *Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. Crim. L. & Criminology 827, 864 (2003). This misperception of black criminality has extensive historical roots; and in modern American society, the stereotype is perpetuated and reinforced in more subtle ways.

The perception that African Americans have a propensity toward criminal behavior can be traced back to slavery: “Some defenders of slavery pointed to blacks’ alleged racial propensity to engage in crime as a justification for enslaving them.” Randall Kennedy, *Race, Crime, and the Law* 13 (1997). Criminal laws reinforced the perception by prohibiting slaves from engaging in certain activities and by imposing harsher criminal penalties on black slaves than on white persons. *Id.* at 76-77.⁷

alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as ‘nigger’ by a supervisor in the presence of his subordinates.”); *Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ.*, 926 F.2d 505, 513-514 (6th Cir. 1991) (the epithet, “even in jest, could be evidence of racial antipathy”) (citations omitted); *Kendall v. Block*, 821 F.2d 1142 (5th Cir. 1987) (evidence that supervisor called black employee “nigger” was, if credible, direct evidence of discriminatory motivation).

⁷ “Slaves * * * were subjected to capital punishment for a wider range of crimes than any other sector of the population. Virginia, for instance, defined seventy-three capital crimes applicable to slaves but only one—first-degree murder—applicable to whites.” Randall Kennedy, *Race, Crime, and the Law* at 77.

The view of African Americans as predisposed to crime continued through the post-Civil War period, borne out by discriminatory laws and enforcement geared toward disenfranchising blacks. For example, some Southern states enacted laws specifically intended to preclude blacks from the voting rolls; the provisions were facially neutral as to race, but made crimes of offenses that lawmakers believed blacks were more likely to commit. *Id.* at 87; *see also Hunter v. Underwood*, 471 U.S. 222 (1985). During segregation, criminal laws were used “to impose a stigmatizing code of conduct upon Negroes, one that demanded exhibitions of servility and the open disavowal of any desire for equality.” Kennedy, *Race, Crime, and the Law* at 88. One net effect of these discriminatory practices was the perpetuation of a link between blacks and criminal behavior.

Modern day stereotypes of black criminality persist. A number of studies evidence the stereotyped perception of African Americans as hostile, violent, and prone to criminality. *See, e.g.,* Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 *Am. J. Soc.* 717, 721-722 (2001) (citations omitted); Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 *Personality & Soc. Psychol. Bull.* 1139, 1146 (1995); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 *J. Personality & Soc. Psychol.* 5, 8, 15 (1989). Researchers also have found that white jurors stereotype white criminals as engaging in white collar crimes (*e.g.,* embezzlement) and stereotype black criminals as engaging in more violent crimes (*e.g.,* assault and robbery). Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race And Juries? A Review Of Social Science Theory And Research*, 78 *Chi.-Kent L. Rev.* 997, 1007-08 (2003) (discussing studies by other researchers); *see also* William J. Bowers, *et al., Death Sentencing in Black and White: An*

Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition, 3 U. Pa. J. Const. L. 171, 179 (2001) (citing research supporting the conclusion that “whites view certain violent offenses—muggings and assaults—as ‘black crimes.’”).

The link between race and crime likewise is reinforced in the media and in politics. See, e.g., Mark Peffley and Jon Hurwitz, *The Racial Components of ‘Race-Neutral’ Crime Policy Attitudes*, U. Ky. Department Pol. Sci, Lexington (REPRINT) (2002) at 4, 13 (citing the media’s overrepresentation of African Americans as perpetrators of violent crime and of racially “coded” political rhetoric); Randall Kennedy, *Race, Crime, and the Law* at 13. African Americans are “more likely than whites to be portrayed as criminal suspects in news stories about violent crime * * * [and] more likely to be depicted as physically threatening.” Jon Hurwitz and Mark Peffley, *Public Perceptions of Race and Crime: The Role of Racial Stereotypes*, 41 Am. J. Pol. Sci. 375, 376-377 (1997).

The perception of black criminality remains strong in our society, fueled by deeply rooted stereotypes and reinforced through societal stimuli. Such racial biases can infect the judgment of jurors in interracial capital cases.

C. Racially Biased Perceptions Of Blacks’ Propensity Toward Violence Can Taint Jury Decisionmaking.

Racially biased views of African-American criminality can infect juror decisionmaking and undermine a defendant’s right to an impartial jury. Research of punitive attitudes towards criminals, for example, indicates that white support for harsher punishments, including capital punishment, of African-American defendants is influenced by racial prejudice. See, e.g., Steven E. Barkan & Steven F. Cohn, *Racial Prejudice and Support for the Death Penalty by Whites*, 31 J. Res. Crime & Delinquency 202, 202-203 (1994); Steven F. Cohn, et al., *Punitive Attitudes Toward Criminals: Racial*

Consensus or Racial Conflict?, 38 J. Soc. Probs. 287, 294 (1991).

Several mock jury studies underscore the pervasive threat of racial bias. See, e.g., Hurwitz & Peffley, *Public Perceptions of Race and Crime*, 41 Am. J. Pol. Sci. at 379; Sommers & Ellsworth, *How Much Do We Really Know About Race And Juries? A Review of Social Science Theory and Research*, 78 Chi.-Kent L. Rev. at 1006-08 (discussing studies by other researchers). For example, one analysis of mock jury decisions revealed that racial bias “exerted an overall significant effect on the sentencing decisions of mock jurors. That is, Black defendants were punished significantly more harshly than their white counterparts.” Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 Behav. Sci. & L. 179, 190 (1992). The research “suggests that racially discriminatory sentencing is quite specific and focused; * * * [and] appears to result from a specific punitive reaction to crimes committed by members of another race against persons from one’s own.” *Id.* at 191-192. Moreover, mock jury studies of capital sentencing generally indicate that “white mock jurors have the strongest tendency to impose death as punishment in cases where the defendant is black and the victim is white.” Bowers, *et al.*, *Death Sentencing in Black and White*, 3 U. Pa. J. Const. L. at 184.

Mock jury trials likewise indicate that black defendants are seen as more likely to commit violent crimes in the future. Hurwitz & Peffley, *Public Perceptions of Race and Crime*, 41 Am. J. Pol. Sci. at 379. To this point, data from the Capital Jury Project’s⁸ interviews with former jurors in capital cases revealed:

⁸ The Capital Jury Project (CJP) is an ongoing research program examining capital juror decisionmaking, including the risk of arbitrariness in exercising capital sentencing discretion. The project is based on research by a consortium of university-based

[W]hite jurors were more likely than their black counterparts to see the defendant as dangerous in the interracial [capital] cases. * * * [W]hite jurors believed that, in the absence of a death sentence, such defendants will usually be back on the streets far sooner than do black jurors. This may, in part, explain why they were especially likely to stress the defendant's dangerousness as a reason for the death penalty.

William J. Bowers, *et al.*, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant is Black and the Victim is White*, 53 DePaul L. R. 1497, 1503 (2004).

Such findings are particularly relevant in Petitioner's case, given that Texas criminal procedure rules require capital jurors to consider a defendant's future dangerousness in their sentencing deliberations. One of the special issues put to the jury at the conclusion of Petitioner's trial was: "Do you find from the evidence, beyond a reasonable doubt that there is a reasonable probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society." State's Appeal Br. 30. As this result suggests, Juror Walther's biased perception of African Americans as violence-prone almost certainly influenced Walther's judgment that Petitioner presented a future danger—a factor directly bearing on Walther's sentencing recommendation.

investigators with support from the National Science Foundation. Findings derive from interviews with former capital jurors and involve questions about the former jurors' reasoning and influences in sentencing decisions. *See* Capital Jury Project website, at <http://www.cjp.neu.edu> (Apr. 19, 2005); *see also* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L. J. 1043, 1077-85 (1995) (describing objectives and design of the CJP).

Finally, even in the absence of overt prejudice, social science evidence supports the view that subtle forms of racial bias nevertheless may impact social behavior. “[E]ven Whites who sincerely believe themselves to be nonprejudiced often harbor anti-Black sentiment that influences their behavior.” Sommers & Ellsworth, *How Much Do We Really Know About Race And Juries?*, 78 Chi.-Kent L. Rev. at 1012 (discussing studies by other researchers); *see also* National Jury Project, Jurywork § 2.6, at 2-11 (2004) (some “white prospective jurors who honestly believe that they can be fair in a case involving a black defendant * * * still will be influenced by the racially prejudiced assumption that blacks are more violent than whites.”). Consequently, *even if* juror Walther sincerely thought himself “nonprejudiced,”⁹ his underlying perceptions of African Americans—as evidenced by his use of what he acknowledged to be a racial slur “highly resented” by African Americans and his remarks about the criminal behavior of African Americans in his neighborhood—undoubtedly influenced his judgment.

D. A Known Risk Of Racial Bias By A Prospective Juror In A Capital Case Warrants Investigation By Defense Counsel.

Investigating a potential juror’s racial attitudes in voir dire may mitigate white juror bias. *See, e.g.*, Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias, An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 Psychol., Pub. Pol’y, & L. 201, 222 (2001). At the same time, identifying a juror’s potential racial bias during voir dire requires careful questioning to the extent possible. A general question as to whether a juror has

⁹ During voir dire, “Walther stated that he could be fair to both sides” and “and denied that he was biased because of anything he knew about the case.” Pet. 3. In post-trial proceedings, Walther “denied that he was a racist, and stated that he thought skin color made no difference.” *Id.* at 5.

prejudices against African Americans that would affect the juror's ability to be impartial is unlikely to be sufficient to prompt disclosure of the bias. One reason is the propensity of people to adopt behavior that portrays them in a positive light. *See* National Jury Project, *Jurywork* § 2.3, at 2-7 (2004) (noting that prospective jurors generally “portray themselves as fair rather than unfair, honest rather than dishonest, and so on. In the context of the voir dire, fairness and impartiality are the most positive or socially desirable characteristics to be portrayed.”). This propensity is particularly true when people are “questioned about racial attitudes.” *Id.* (citations omitted). But where—as here—a defense attorney knows the juror “probably” is prejudiced, *Pet. App.* 10 at 215, careful voir dire is a necessity.

This Court in *Turner v. Murray* cautioned that due to “the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected.” 476 U.S. at 35. The *Turner* Court addressed the concern at the heart of this case—that of a juror harboring racial bias toward blacks and the likely influence of the juror's biased attitude on the sentencing determination:

[A] juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved [] aggravating factors. * * * More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty. [*Id.* at 35.]

The Court also emphasized that the potential for racial bias to taint death penalty proceedings is particularly troublesome “in light of the complete finality of the death sentence.” *Id.*

The critical question in *Turner* was whether there was an *unacceptable risk* of racial prejudice that may have infected

the sentencing determination. The Court found an unacceptable risk to exist, particularly “in light of the ease with which that risk could have been minimized.” *Id.* at 36. In Petitioner’s case, the risk could easily have been minimized by defense counsel’s questioning of a juror who counsel knew “probably” harbored racial prejudice against African Americans.

Defense counsel, of course, are not constitutionally required to engage in a fishing expedition to probe the unconscious minds of each prospective juror in hope of uncovering racial biases. But surely defense counsel violate their duties to their clients if they fail to bring to light *known* risks of racial bias by a juror that have the potential to infect the juror’s capital sentencing determination.

CONCLUSION

For the foregoing reasons, as well as those in the petition, the petition should be granted.

Respectfully submitted,

AUDREY J. ANDERSON
CATHERINE E. STETSON*
MARY L. JOHNSON
CHRISTOPHER R. ZAETTA
JAMES S. BLACK, II
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5491

Counsel for Amicus Curiae

