2010

Lethal Discrimination 2: Repairing the Remedies for Racial Discrimination in Capital Sentencing

J. Thomas Sullivan
University of Arkansas at Little Rock William H. Bowen School of Law, jtsullivan@ualr.edu

LETHAL DISCRIMINATION 2: REPAIRING THE REMEDIES FOR RACIAL DISCRIMINATION IN CAPITAL SENTENCING

*J. Thomas Sullivan**

> "It is important to recall what motivated Members of this Court at the genesis of our modern capital punishment case law. *Furman v. Georgia* was decided in an atmosphere suffused with concern about race bias in the administration of the death penalty—particularly in Southern States."[1]
>
> —*Graham v. Collins*, Thomas, J., concurring

INTRODUCTION

This article addresses the persistent and pernicious problem of racial discrimination in the administration of capital punishment, a fact that undermines the credibility of not only the death penalty, but the criminal justice system generally by compromising the Fourteenth Amendment's promises of due process and of equal protection under the law and the Eighth Amendment's guarantee against the infliction of cruel and unusual punishment.[2] The enforcement of these important constitutional values depends on aggressive and sensitive commitment to identifying and

* Judge George Howard, Jr. Distinguished Professor of Law, William H. Bowen School of Law, University of Arkansas at Little Rock; Founding Editor, The Journal of Appellate Practice and Process; I also want to acknowledge the excellent work and support provided by Molly K. Sullivan, Assistant Federal Defender, Eastern and Western Districts of Arkansas, in editing this article.

1. Graham v. Collins, 506 U.S. 461, 479 (1993) (Thomas, J., concurring).
2. This article builds on the analysis of the disposition of the claim of ineffective assistance by the state and federal courts in post-conviction process of the Texas capital prosecution involving the author's client, Gary L. Sterling, and the case of Georgia capital defendant Curtis Osborne discussed in *Lethal Discrimination*, which is also published in this issue of the Harvard Journal on Racial & Ethnic Justice. Both cases raise the specter of racial prejudice influencing the imposition of death sentences for these African-American defendants, ultimately resulting in their executions. The reader should note that this article, which focuses on judicial remedies designed to protect defendants from racial discrimination in capital cases, incorporates the critique and, often, passages of *Lethal Discrimination* in order that it can be read and understood independently. When appropriate, footnotes serve to direct the reader to corresponding material in the first installment. *See* J. Thomas Sullivan, *Lethal Discrimination*, 26 HARV. J. RACIAL & ETHNIC JUSTICE 69 (2010).

correcting the racially discriminatory imposition of capital sentences, requiring meaningful review of claims implicating racial discrimination. This article includes a series of proposals designed to address the shortcomings of current remedies available to address claims of constitutional violations, including claims of improper influences of racial and ethnic discrimination in the capital sentencing process. The proposed reforms require action by the United States Supreme Court to empower and demand state and federal habeas courts to provide the relief from discrimination that has so often been eloquently discussed in the Court's decisions.

I. THE PERSISTENT PROBLEM OF RACIAL DISCRIMINATION IN THE CRIMINAL JUSTICE SYSTEM

To effectively address the pernicious influence of racism in the administration of the death penalty, it is necessary to first recognize that this problem persists and undermines the credibility of capital punishment as a criminal sanction. Clearly, abolition of capital punishment represents the most effective means of removing the threat that death sentences will be imposed arbitrarily and capriciously on the basis of the accused's race or ethnic background, but abolition remains an infrequent response to the continuing problems associated with reliance on death as a punishment alternative.[3] Short of abolition, meaningful reform of the criminal justice system, generally, might offer tremendous gains in producing a fairer capital punishment system. Perhaps the best prospect for eliminating the impact of racism in the administration of the death penalty lies in more aggressive enforcement of procedural rights designed to protect the rights of capital defendants. This means ensuring high quality capital representation[4] and including provision of adequate

3. However, both New Jersey and New Mexico have ended reliance on capital punishment within the recent past. *See* Jeremy W. Peters, *Death Penalty Repealed in New Jersey*, N.Y. TIMES, Dec. 17, 2007, *available at* http://www.nytimes.com/2007/12/17/nyregion/17cnd-jersey.html; *see* Associated Press, *Death Penalty Is Repealed in New Mexico*, N.Y. TIMES, Mar. 18, 2009, at A16. In Connecticut, legislation to repeal the death penalty was vetoed by the governor in 2009. *See* Christopher Keating, *Rell Vetoes Bill to Abolish Capital Punishment*, HARTFORD COURANT, June 6, 2009, at A3. The Kansas legislature has also taken up the issue of repeal of the state's death penalty. *See* David Klepper, *Kansas Senate Takes Up Repeal of Death Penalty*, KAN. CITY STAR, Jan. 29, 2010, *available at* http://www.kansascity.com/115/story/1716864.html.

4. Regrettably, litigation focusing on the effectiveness of capital counsel remains one of the most common sources of review of state death sentences in the federal courts. *See e.g.*, Williams v. Taylor, 529 U.S. 362 (2000); Wiggins v. Smith, 539 U.S. 510 (2003); Rompilla v. Beard, 545 U.S. 374 (2005) (addressing issues relating to capital counsel's performance in the sentencing phase of capital trials). *See also* Florida v. Nixon, 543 U.S. 175 (2004) (considering question of trial counsel's strategic decision-making in conceding issues relating to guilt of defendant in support of sentencing approach focusing on mitigation); Smith v. Spisak, 130 S.Ct. 676, 685 (2010) (noting that counsel's strategy in closing argument of characterizing mentally impaired defendant as "sick," "twisted," and "demented" and discussing defendant's admiration for Hitler did not support finding that counsel rendered ineffective assistance where the record does not support conclusion that a more reasonable argument would have, within reasonable probability, led to a different result).

re-
sources for investigation and other support for capital trial and appellate counsel.[5]

Nevertheless, even reform designed to improve capital defense may well prove insufficient in the long run to address many endemic problems that result from political conflict, competition in the allocation of resources, and the general difficulties in ensuring support within the system. Increased resources for capital defense and enhanced procedural protections afforded capital defendants—such as proposed in this article—will not necessarily overcome the historical problems caused by racial discrimination in American life. Significant progress will also require changing our approach to dealing with claims of racial discrimination in the capital sentencing process. It means rethinking the degree of deference accorded explanations offered by trial counsel for defective strategic decisions and deficiencies in performance, as well as reversing the almost zealous deference afforded state court decision-making that serves to insulate constitutional infractions from federal habeas review.[6]

---

5. The predomination of capital cases in federal litigation may reflect, at least in part, federal law providing for appointment of counsel to represent state court defendants in federal habeas actions, 18 U.S.C. § 3599(a)(2), and further specifying that appointed counsel must be qualified for capital representation, 18 U.S.C. § 3599(b)–(d). The federal statute recognizes a right to counsel for state death-sentenced inmates independent of the Constitutional guarantee to effective assistance of counsel under the Sixth Amendment. Murray v. Giarratano, 492 U.S. 1 (1989). As part of a statutory package for expediting capital litigation, states are also required to provide similar access to counsel in state post-conviction proceedings in capital proceedings to qualify for expedited federal review of death sentences, pursuant to 28 U.S.C. § 2261 (2006).

   Yet, good representation, particularly in rural counties, is often lacking. The representation afforded in *Sterling v. State*, 830 S.W.2d 114 (Tex. Crim. App. 1992), critiqued elsewhere in this issue, suggests the difficult problems capital defendants encounter, particularly when the prosecution has cross-racial characteristics and the capital defendant claims that counsel rendered ineffective assistance at trial. *See* J. Thomas Sullivan, *Lethal Discrimination*, 26 HARV. J. RACIAL & ETHNIC JUSTICE, at 72 n. 10 (2010) (noting that Sterling raised thirty-one different claims of ineffective assistance in his federal habeas petition, but the United States District Court denied relief on all claims, Sterling v. Cockrell, 2003 WL 21488632, *35 (N.D. Tex. April 23, 2003)).

   In *Willingham v. State*, 897 S.W.2d 351, 354–55 (Tex. Crim. App. 1995), another capital case in which the death penalty was imposed in Navarro County, Texas—the county of Sterling's capital trial—trial counsel failed to properly impeach the evidence of the defendant's purported jailhouse confession to another inmate. The prosecution there relied heavily on this evidence, but evidence of this type is generally discounted in the law because of the self-serving interests of a witness admittedly interested in obtaining leniency for assisting the State. The Texas Court of Criminal Appeals upheld the conviction and sentence of death. *Id.* at 359. For a compelling perspective on the Willingham case, see David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER (Sept. 7, 2009) http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann.

6. For instance, consider the dissenting opinion of the late Judge Richard S. Arnold in *Brown v. Luebbers*, 371 F.3d 458, 471 (8th Cir. 2004) (en banc) (Arnold, J., dissenting). Judge Arnold, joined by Judges Bye and Melloy, criticized the circuit court's deference to state court decision-making based on his conclusion that the state court never actually considered the admissibility of evidence he found improperly ex-

The disposition of ineffective assistance allegations in *Osborne v. Terry*[7] illustrates the troubling power of the deference principle to frustrate consideration of a claim of racial discrimination in capital representation. Osborne argued that counsel failed to advise him of an offer made by the prosecutor of a life sentence in return for his plea of guilty. Trial counsel claimed that he advised his client that the state offered a life sentence in return for his plea of guilty, not an unreasonable response to this type of claim. Whose version is accepted depends on the relative credibility of the defendant and counsel, and state and federal courts accepted counsel's explanation as credible and reasonable in rejecting Osborne's initial claim of ineffectiveness.[8]

Osborne also produced evidence in his state court post-conviction proceeding that his attorney had referred to him as a "little nigger" in conversations with another client and argued that counsel's representation was compromised by animus toward his own client.[9] Neither the state courts nor the Eleventh Circuit ever determined whether the allegation of counsel's racial bias was credible.[10] Instead, the post-conviction courts refused to address the claim on the merits because Osborne had not asserted it in his first state post-conviction proceeding, as required by state law and thus, procedurally defaulted the claim that his lawyer's racial animus compromised the representation.

The "deference preference" that now characterizes federal habeas court determinations is apparent in the treatment of the allegations that defense counsel in *Osborne* exhibited racist attitudes toward Osborne. The circuit court was concerned that the evidence supporting Osborne's

---

cluded from the capital sentencing hearing. The evidence related to the accused's character was written by his younger brother who was on active duty in Iraq and not available to testify on his brother's behalf at trial. Judge Arnold found that the state court judge had never ruled on the letter's authenticity for purposes of admission and that the letter was particularly valuable as mitigation evidence in affording insight into the accused's character, a fact he noted had been repeatedly commented upon generally by the state trial judge. *Id.* at 473–75. Vernon Brown, an African American, was executed on May 18, 2005. *See* Death Penalty Information Center, http://www.deathpenaltyinfo.org/vernon-brown (last visited Feb. 18, 2010).

7. Osborne v. Terry, 466 F.3d 1298 (11th Cir. 2006), *reh'g denied*, 219 F. App'x 975 (11th Cir. 2006), *cert. denied*, 522 U.S. 841 (2007). The Death Penalty Information Center reports that Georgia inmate Curtis Osborne was executed on June 4, 2008. *See* Death Penalty Information Center, http://www.deathpenaltyinfo.org/curtis-osborne (last visited Feb. 18, 2010). Evidence supported allegations that his own attorney was racist, repeatedly referring to Osborne as "the little nigger." *Osborne*, 466 F.3d at 1316 (11th Cir. 2006) (citations omitted). The Eleventh Circuit did not follow the practice of disguising the offensive language used with asterisks or ellipses, as did the Fifth Circuit in Sterling v. Dretke, 100 F. App'x 239, 242 (5th Cir. 2004).

8. *Osborne*, 466 F.3d at 1316.

9. *Id.*

10. *Id.* at 1318. The Eleventh Circuit explained the district court's deference to the state court's fact-finding on this point:

> The district court also found that the affidavit is not sufficient to rebut the State court's factual finding based on Mostiler's clear testimony that he told Osborne about the plea offer, that Osborne rejected the offer, and that Osborne never wavered from that position. Accordingly, the district court denied Osborne relief on these claims.

Id.

claim, including the affidavit from trial counsel's other client, was not developed until after his first petitions in state and federal court had been denied, suggesting that the claim based on the affidavit had been procedurally defaulted.[11] The state court initially credited counsel's explanation that he had conveyed the plea offer to Osborne over Osborne's claims to the contrary. It then held that this determination was res judicata and binding on the revised, successor claim based on the witness's affidavit attesting to counsel's hostility toward Osborne.[12] Subsequently, in rejecting Osborne's claims in federal habeas, the district court deferred to the state court's disposition on the ground of procedural default,[13] meaning that neither the state, nor federal post-conviction courts ever considered Osborne's claim that counsel's representation was compromised by counsel's alleged racial animus.[14] While the circuit court acknowledged the claim of racism, it concluded that Osborne still failed to show that counsel's attitude actually affected his representation: "Even if the affidavit correctly recounts Mostiler's statements to Huey, it does not establish that Mostiler failed to convey the plea offer to Osborne. Moreover, Osborne presents no other evidence to support his claim that Mostiler's alleged racial animosity affected his representation."[15]

Conceding the usual policy of deference to the state court's procedural default finding, the unresolved question remains: was this deference reasonable without a determination of whether the defense attorney did, in fact, demonstrate the racial animosity toward his client, Osborne, which was supported by the testimony of another, arguably disinterested, witness? Further, if the credible evidence showed that counsel had used the racial slur attributed to him in referring to Osborne, wouldn't that fact suggest that counsel's claim that he explained the prosecution's plea offer of a life sentence might not be credible at all? The general answer is quite simply that deference to state disposition of federal claims has become a way of life in habeas corpus.[16] The Eleventh Circuit essentially ignored the significance of the claim of racial animus on the part of Osborne's counsel by deferring to the procedural default of this claim by the Georgia state courts.

Similarly, in 2005 the Fifth Circuit rejected the habeas claim brought by Texas death row inmate Gary Sterling that his trial counsel had rendered ineffective assistance in failing to question prospective jurors about their attitudes toward race,[17] a line of inquiry expressly authorized by the

11. *Id.* at 1317.
12. *Id.*
13. *Id.* at 1316–18.
14. *Id.* at 1318.
15. *Id.*
16. The Court requires deference to application of state procedural default rules based on counsel's failure to preserve error for federal review. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 752–53 (1991) (counsel failed to timely file capital defendant's appeal from denial of post-conviction relief in state courts, resulting in procedural bar to review).
17. Sterling v. Dretke, 100 F. App'x 239, 242–43 (5th Cir. 2004); Sterling v. State, 830 S.W.2d 114 (Tex. Crim. App. 1992) (affirming his direct appeal), *cert. denied*, 506 U.S. 1035 (1992); Sterling v. Scott, No. 3:93-CV-0147- G (N.D. Tex. Feb. 25, 1994) (dis-

Supreme Court's decision in *Turner v. Murray*.[18] There, the Court held that in a capital prosecution in which the defendant and victim were of different races, the defense is entitled to question prospective jurors about their racial attitudes to ensure that the death sentence imposed is not tainted by racial bias on the part of jurors.[19]

In *Sterling*, a post-trial juror interview, confirmed by testimony at the evidentiary hearing on Sterling's application for post-conviction relief in state court, established that one of the jurors who served on the all-white capital jury that sentenced him to death routinely referred to African Americans as "niggers." The juror stated in the affidavit:

> There are some *niggers* who live a couple of 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 get right back out. A couple of 'em shot each other last June Teenth over a card game. I heard about an old *nigger* they call XO shooting somebody playing cards, a long time ago. He went to TDC, but he was out by the time I moved here in 1975. People told me not to mess with him because he would shoot you.[20]

Despite the clear evidence that a member of his all-white capital jury admitted routine use of the most contemptible racial slur in referring to

---

missing his initial federal habeas filing for failure to exhaust state remedies), *certificate of probable cause denied*, 26 F.3d 29 (5th Cir. 1994), *cert. granted, judgment vacated and cause remanded*.

18. Turner v. Murray, 476 U.S. 28 (1986).

19. *Id.* at 35. The Turner Court observed that racial bias in a capital sentencing proceeding is particularly problematic:

> Because of 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. On the facts of this case, 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 the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. 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 35–36. *Turner* confirmed concerns of racial prejudice previously identified in *Ham v. South Carolina*, 409 U.S. 524 (1973). There, the Court also recognized that risk of racial bias infecting jury deliberations in criminal cases required opportunity for an African-American defendant's trial counsel to inquire into potential racial bias of prospective jurors as an essential demand of fairness required by the Due Process Clause. *Id.* at 526.

20. Sterling v. Cockrell, 2003 WL 21488632, *35 (N.D. Tex. April 23, 2003) (referencing affidavit of Juror W, subscribed and sworn to on July 12, 1993) (emphasis added). In this article, I refer to the juror whose admissions are the primary focus of my analysis, as Juror W, rather than using his name, as the lower courts did. This approach was used by the United States Supreme Court in *Uttecht, v. Brown*, 551 U.S. 1, 5 (2007) where the Court used the designations "X, Y and Z" in discussing the responses of three prospective jurors regarding their views on the death penalty. As in *Uttecht*, it is not necessary to further identify and possibly embarrass Juror W, who is entitled to his beliefs and use of language and was honest in his in-court testimony concerning his use of language in the post-trial affidavit submitted in support of Sterling's application for post-conviction relief in the Texas courts.

African Americans, not a single Justice dissented from the denial of Sterling's petition for certiorari.[21] Sterling's challenge directed at counsel's failure to use the remedy afforded by *Turner v. Murray* for assessing potential juror bias did not resonate with the Court, even though the Court has consistently addressed questions of ineffective representation in capital cases during the past decade.[22]

The executions of Curtis Osborne and Gary Sterling can offer little comfort for those who once believed the Court was moving toward a rejection of capital punishment or for those who continue to rely on the federal courts to correct constitutional abuses occurring in state capital trials. The refusal of the Court to review their cases demonstrates that while it may review cases implicating broad public policy concerns, such as the execution of juveniles[23] or the mentally disabled,[24] many defendants whose death sentences are tainted by constitutional violations will never obtain the scrutiny essential to ensuring that capital trials are free from impermissible influences.

A. Re-assessing the impact of racial discrimination on capital sentencing

As a starting point for improving the existing process for challenging capital sentences tainted by racial discrimination, the Court should simply recognize that the impact of discrimination on the administration of the death penalty stands apart from other problems that serve to undermine fairness in the capital sentencing process.[25] Generally, problems such as inadequate training or compensation of defense counsel; inadequate resources for investigation and expert witnesses; reliance on sus-

---

21. *Sterling*, 544 U.S. at 1053. When Sterling petitioned for a stay of execution following denial of his successor, or second, application for post-conviction relief, Justices Stevens, Ginsburg and Breyer dissented from the denial of the stay. Sterling v. Texas, 545 U.S. 1157 (2005). The stay was denied less than an hour before Sterling's execution. In the successor petition, Sterling claimed that the Texas courts had improperly refused to consider newly discovered evidence, including testimony at the state court's post-conviction hearing from the investigating officer that his testimony at Sterling's trial nine years earlier was incorrect with regard to the time of death. Sterling contended that the officer changed his testimony upon learning that the investigative files established an alibi for Sterling at the time originally claimed for the offense. At the hearing, Sterling called an un-impeached witness who provided an alibi for at least part of the time when the lead investigator, Navarro County Sheriff's Deputy "Bubba" Jones, testified he subsequently came to believe the crime had occurred. The state court refused to consider the claim of newly discovered evidence on the merits, holding that it had not been timely raised. *Sterling*, 100 F. App'x at 244–45.
22. Sullivan, *supra*, note 2.
23. Roper v. Simmons, 543 U.S. 551, 568 (2005) (abrogating Stanford v. Kentucky, 492 U.S. 361, 370–71 (1989) (holding that execution of defendant under the age of eighteen at the time of offense is prohibited by the Eighth and Fourteenth Amendments)).
24. Atkins v. Virginia, 536 U.S. 304, 314–15 (2002) (overruling Penry v. Lynaugh, 492 U.S. 302, 334 (1989) (holding that execution of mentally retarded capital defendants is prohibited by the Eighth Amendment)).
25. Graham v. Collins, Graham v. Collins, 506 U.S. 461, 479 (1993) (Thomas, J., concurring) (observing that the Court has had a long-standing concern that racial discrimination not infect the administration of the death penalty).

pect types of evidence that often undermine the integrity of fact-finding,[26] such as use of jailhouse informants[27] or prosecution witnesses whose testimony may be influenced by inducements offered by police or prosecutors;[28] or unreliable eyewitness identification[29] do not directly implicate the continuing damage done to the criminal justice system by racial discrimination.[30] Nonetheless, these problems should be viewed with a sharp eye toward ensuring reliability of the capital trial and sentencing processes.

However, public perception that the penalty is administered in a manner unfair to racial and ethnic minorities[31] or the poor undermines the

26. *See, e.g.*, Tibbs v. State, 337 So.2d 788 (Fla. 1976). The Tibbs court found such serious questions of credibility in the prosecution's case rested on: eyewitness testimony so "riddled with conflicts and so inherently incredible as to be unreliable," *id.* at 789–90; a jailhouse informant who testified that Tibbs had confessed, *id.* at 790; and the absence of any corroborating physical evidence, *id.* at 791. The majority concluded: "Rather than risk the very real possibility that Tibbs had nothing to do with these crimes, we reverse his conviction and remand for new trial." *Id.* at 791. Because the reversal was based on the state court's assessment of the weight, rather than legal sufficiency, of the evidence in this capital case, the United States Supreme Court held that the reversal did not amount to an acquittal precluding retrial as a matter of prior jeopardy. Tibbs v. Florida, 457 U.S. 31, 46–47 (1982).

27. *E.g.*, Dodd v. State, 993 P.2d 778 (Okla. Crim. App. 2000), *aff'd after new trial*, 100 P.2d 1078 (Okla. Crim. App. 2004). In *Dodd*, a death penalty case, the Oklahoma court adopted specific rules regarding admission of the testimony of a jailhouse informant relating a purported confession made by the accused. *Id.* at 784–85.

28. The potential for improper inducements made to witnesses resulting in improper convictions was explored by a panel of the Tenth Circuit in *United States v. Singleton*, which shocked the prosecution world in holding that 18 U.S.C. § 201(c)(2), prohibiting the promise or payment of anything of value to a witness with regard to their testimony, applies to bar federal prosecutors from offering inducements to prospective witnesses in order to gain the use of their testimony. Following the expected outrage, the circuit, en banc, restored the traditional order of things in holding that the statute did not apply to the United States Attorney. United States v. Singleton, 165 F.3d 1297, 1302 (10th Cir. 1999) (en banc). In its majority opinion, the circuit court characterized the Government's position: "[T]he United States argues to allow section 201(c)(2) to sweep so broadly [sic] would not only be a radical departure from the ingrained legal culture of our criminal justice system but would also result in criminalizing historic practice and established law." *Id.* at 1299. The *Singleton* litigation spawned considerable commentary. *See, e.g.*, George C. Harris, *Testimony for Sale: the Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 24–27 (2000) (discussing *Singleton* litigation and noting that panel opinion "[s]en[t] shock waves through the community of federal prosecutors.").

29. *See e.g.*, Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 78–80 (2008).

30. The exception to this general observation arises in the context of misidentification in cross-racial eyewitness identification cases. The flaws in witness recall may not be the product of conscious racial bias, but rather, environmental or possible genetic factors that impair accuracy in making identifications of individuals from different racial or ethnic groups. *See id.* at 79, n.86.

31. In examining disparity in support for the death penalty among white and black Americans, one suggested explanation focuses on seeming overrepresentation of black inmates on death row in the United States. For example, Gallup Poll Associate Editor Joseph Carroll, noting that white American support for the death penalty stands at 71%, while support among blacks surveyed in 2004 stood at 44%, suggests:

> This stark difference may be the result of the ongoing debate about the overrepresentation of blacks on death rows across the country. The Bureau of Justice Statistics reports that there were 3,374 prisoners on death row in 2003, of which

very credibility of capital punishment as a legitimate instrument of the criminal justice system. In fact, political scientists Mark Peffley and Jon Hurwitz conclude, based on their research: "[T]here is abundant evidence that African Americans regard the U.S. criminal justice system as inherently unfair—i.e., that it discriminates against them on the streets and in the courts. For this reason, blacks do not need any reminder of the racially-discriminatory nature of the death penalty . . . ."[32]

Probably the only factor more troubling for proponents of capital sentencing lies in the incidence of exonerations based on substantially-proven claims of actual innocence for defendants sentenced to death. The Death Penalty Information Center currently reports that "[a]s of November 3, 2009 there have been 139 exonerations in 26 different States,"[33] involving individuals released from death row with evidence of their innocence. Peffley and Hurwitz note that support for the death penalty fell generally in the late 1990s, attributed in part to the increasing disclosure of exonerations of death row inmates based on exculpating DNA evidence and declining crime rates.[34] In examining existing scholarship and interpreting their own survey data, Peffley and Hurwitz conclude that support for the death penalty among both whites and blacks tended to drop when survey respondents were presented with the additional consideration that flaws in the system may be resulting in the execution of too many innocent people.[35] But the drop in support was substantially smaller among white respondents than among black respondents.[36]

B. Re-assessing the remedies in place to combat racial discrimination in capital sentencing proceedings

The *Osborne* litigation points to one of the most troubling problems in ensuring administration of the death penalty in a racially- and ethnically-neutral fashion. The allegation that Osborne's own attorney referred to him in a racist vein, supported by evidence never tested by examination in the post-conviction process, is disheartening. What is perhaps of greater concern is the willingness of state and federal courts to ignore the claim—and the possible consequences for the fairness of the process by which Osborne's death sentence was imposed—based on the limitations

---

1,418 were black and 1,878 were white. Blacks represent 42% of the inmates on death row, but only 12% of the nation's population.

Joseph Carroll, *Who Supports the Death Penalty?*, Death Penalty Information Center (November 16, 2004), *available at* http://www.deathpenaltyinfo.org/article.php?did=1266&scid.

32. Mark Peffley & Jon Hurwitz, *Persuasion and Resistance: Race and the Death Penalty in America*, 51 AM. J. POLITICAL SCIENCE 996, 1001 (Oct. 2007) (citations omitted).
33. *See* Death Penalty Information Center, *Innocence and the Death Penalty*, http://www.deathpenaltyinfo.org/innocence-and-death-penalty#inn-st (last visited Feb. 18, 2010).
34. Peffley & Hurwitz, *supra* note 32, at 996–97, (examining historical support for capital punishment and citing Frank R. Baumgartner, Suzanna De Boef, & Amber E. Boydstun, An Evolutionary Factor Analysis Approach to the Study of Issue Definition (2004) (unpublished manuscript presented at the annual meeting of the Midwest Political Science Association)).
35. *Id.* at 1001, 1002, Table 1.
36. *Id.*

imposed by state and federal procedural rules precluding consideration of his claim that counsel's racial attitudes compromised the effectiveness of his representation.

The two principal remedies for addressing racial discrimination in the capital sentencing process are focused on the selection of the capital trial jury, which generally performs the function of fact-finder on the question of guilt or innocence of the capital defendant and then typically makes findings that determine whether a sentence of death should be imposed in the event of conviction on the capital charge.[37] First, the Court's decision in *Batson v. Kentucky*[38] addresses the problem of exclusion of minority jurors from the trial process through the prosecution's exercise of peremptory challenges. Because of the important role played by juries in capital sentencing determinations, *Batson* addresses the problem of racial influences in those proceedings by restricting prosecutors from excluding minority jurors from the process.

Second, the Court recognized a remedy for inclusion of potentially racially-biased jurors in capital trials involving minority defendants and white victims in *Turner v. Murray*.[39] There, the Court held that defense counsel is entitled to question prospective jurors on issues of racial attitudes in order to ascertain whether evidence of bias might warrant exclusion of a prospective juror, or alternatively, afford the defense a basis for the exercise of its peremptory challenges to remove a suspect juror.[40]

---

37. The Court's application of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in *Ring v. Arizona*, 536 U.S. 584 (2002) has arguably mandated jury sentencing in capital cases. However, the question remains open, as some state courts have rejected this conclusion. *See* Stephens v. State, 982 So.2d 1110, 1134–37 (Ala. Crim. App. 2005) (rejecting application of *Apprendi* to the jury advisory verdict rendered in an Alabama capital prosecution in which the trial court actually imposed punishment). The litigation in *Stephens* proceeds from the premise that *Ring v. Arizona* does not mandate jury sentencing in capital cases and that states retain the option of delegating discretion regarding imposition of capital sentences to trial judges. In *Ring*, the majority concluded: "Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589.

38. 476 U.S. 79 (1986).

39. 476 U.S. 28 (1986).

40. *Id.* at 36–37. Justice Brennan, concurring in part and dissenting in part, noted the need for defense counsel to have all necessary information to properly exercise peremptory challenges. *Id.* at 40–41. In disagreeing with the majority's limitation of the right to voir dire on racial prejudice to capital cases, he explained:

> My sense is that the Court has confused the *consequences* of an unfair trial with the *risk* that a jury is acting on the basis of prejudice. In other words, I suspect that what is really animating the Court's judgment is the sense of outrage it rightly experiences at the prospect of a man being sentenced to death on the basis of the color of his skin. Perhaps the Court is slightly less troubled by the prospect of a racially motivated conviction unaccompanied by the death penalty, and I suppose that if, for some unimaginable reason, I had to choose between the two cases, and could only rectify one, I would remedy the case where death had been imposed. But there is no need to choose between the two cases. To state what seems to me obvious, the constitutional right implicated is the right to be judged by an impartial jury, regardless of the sentence, and the constitutional focus thus belongs on whether there is a likelihood of bias, and not on what flows from that bias.

Neither remedy proves particularly effective in combating race-discrimination in the selection of capital juries. *Batson* has proved erratic in terms of effectiveness because the Court has simply failed to force rigorous enforcement of the remedy in practice. *Turner* has proved problematic because voir dire practice is often inadequate to ferret out racial animus in prospective jurors predisposed to deny bias.

1. *Flaws in enforcement of* Batson

Batson addresses the problem of discrimination by prosecutors using peremptory challenges to exclude minority jurors by authorizing the defense to challenge the basis for the State's strikes and by requiring the prosecution to offer a race-neutral explanation for the strike once the defendant makes the prima facie showing of discriminatory intent. However, the post-*Batson* litigation history has demonstrated precisely how difficult enforcement of the remedy for discriminatory use of peremptories has been in practice. The Court itself undermined *Batson* in *Purkett v. Elem*,[41] where, in a per curiam order, it watered down the remedy and expectations for constitutionally-sensitive exercise of discretion by trial judges. It did so by essentially accepting on faith the prosecutor's explanation that he struck jurors based on hair length and facial hair, *race-neutral* explanations for his decision to exclude the minority jurors.[42] The Court did not address the problem that hair length and facial hair might reflect cultural values that would prompt the exercise of the strike based upon a factor simply masking racial bias and discriminatory intent.[43] The Court's decision to permit trial courts to rely on any race-neutral explanation for strikes of minority jurors in *Purkett v. Elem*, regardless of how superficial, simply invites prosecutors to fabricate race-neutral grounds for their discriminatory exclusion of jurors so long as presiding trial judges are unwilling to question the integrity of the prosecutors or the proffered rationales.

Id. at 43–44. Justice Marshall, joined by Justice Brennan, also dissented in part from the majority's holding limiting the right to voir dire on racial attitudes to capital cases. *Id.* at 45 (citing his dissent from the denial of certiorari in *Ross v. Massachusetts*, 414 U.S. 1080 (1973)).

41. 514 U.S. 765 (1995).

42. *Id.* at 766. The Court related in its per curiam order:

> The prosecutor explained his strikes:
>
> "I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee type beard. And juror number twenty-four also has a mustache and goatee type beard. Those are the only two people on the jury . . . with the facial hair . . . . And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me."
>
> *Id.*

43. Justice Stevens, joined by Justice Breyer, dissented in *Purkett*, arguing: "Today, without argument, the Court replaces the *Batson* standard with the surprising announcement that any neutral explanation, no matter how 'implausible or fantastic,' even if it is 'silly or superstitious,' is sufficient to rebut a prima facie case of discrimination. *Id.* at 775 (Stevens, J., dissenting) (internal citations omitted).

Miller-El v. Dretke[44] provides an example of the difficulties involved in ensuring that trial courts make good on *Batson*'s guarantee of racially-neutral jury selection. In *Miller*, in order for the Court to grant the defendant habeas relief, it had to reject the findings of Texas courts on which lower federal courts had relied when they ruled that an apparent systematic use of peremptory challenges to exclude minority jurors from the capital trial of a minority defendant did not demonstrate racially discriminatory action by a Dallas County, Texas prosecutor.[45] The history of the *Miller-El* litigation—including the Court's initial remand to the Fifth Circuit[46]—demonstrates precisely how weak the *Batson* enforcement mechanism has often been in practice.[47]

Similarly, the extended litigation in *Snyder v. Louisiana*[48] demonstrates the same sort of unreasoned deference to trial court fact-finding or explanations offered by prosecutors in the jury-selection process during direct appeals in state courts. In *Snyder*, the Court eventually had to overrule the determination by Louisiana state courts that a prosecutor's use of a peremptory challenge to exclude a minority juror from service in a capital trial was constitutionally acceptable after its original remand for reconsideration had resulted in the state supreme court maintaining its deferential position. The state trial court had offered no subjective ground for accepting the prosecutor's purportedly race-neutral explanation for the strike, affording the *Snyder* majority the option to essentially render judgment in reversing the state court.[49]

The prosecutor's peremptory strike in *Snyder* excluded a minority juror who expressed concern that his participation as a capital juror would interfere with completion of the student teaching requirement to earn his education degree.[50] But subsequent information showed that the expected duration of the trial would not actually present the juror with any

44. 545 U.S. 231 (2005).

45. *Id.* at 234.

46. Miller-El v. Johnson, 261 F.3d 445 (5th Cir. 2000), *denying certificate of appealability*, Miller-El v. Cockrell, 534 U.S. 1122 (2002), *granting cert.*, 537 U.S. 322 (2003), *rev'g and remanding to Fifth Circuit for appeal on the merits*; Miller-El v. Cockrell, 361 F.3d 849 (5th Cir. 2004), *denying relief on the merits.*

47. But *Miller-El* does not represent the last instance of state and lower federal court hesitance in rejecting prosecutors' explanations for their peremptory strikes aimed at removing minority jurors from Dallas County capital juries. More recently, in *Reed v. Quarterman*, 555 F.3d 364 (5th Cir. 2009), the Fifth Circuit granted federal habeas relief, ordering a new trial for a Texas inmate who had spent thirty years on death row based on his claim that prosecutors had discriminatorily removed minority jurors through exercise of their peremptory challenges during the selection of his capital trial jury. *Id.* at 365 ("This case has spent three decades winding its way through the state and federal court systems. Today, we add to that lengthy history by concluding that Reed is entitled to habeas corpus relief for his *Batson* claim."). The Texas court affirmed Reed's conviction and death sentence in *Reed v. State*, No. 69,292 (Tex. Crim. App. Mar. 29, 1995).

48. 522 U.S. 472 (2008); Snyder v. Louisiana, 545 U.S. 1137 (2006), *granting cert*, State v. Snyder, 750 So.2d 832 (La. 1999), *and opinion after remand for additional fact-finding*, 874 So.2d 739 (La. 2004) (vacating the judgment and remanding for reconsideration in light of the Court's decision in Miller-El v. Dretke, 545 U.S. 231 (2005)).

49. 522 U.S. at 484–86.

50. *Id.* at 479–80.

problem in completing the required student teaching experience.[51] A white juror, who was not struck and was subject to considerable rehabilitation by the prosecutor, advised the court that he was a contractor with two houses under construction that required completion before buyers could move in and, additionally, disclosed a family problem: "[M]y wife just had a hysterectomy, so I'm running the kids back and forth to school, and we're not originally from here, so I have no family in the area, so between the two things, it's kind of bad timing for me."[52] The prosecutor accepted this juror. The Snyder Court looked to the disparity in examination of white and black jurors and the prosecutor's decision to retain a white juror whose situation was almost identical to that of the excluded black venireperson, rejecting the explanation that the black juror appeared "nervous" as a race-neutral explanation for the exercise of its peremptory challenge.[53]

Miller-El and *Snyder* demonstrate both the difficulty in enforcing the guarantee of *Batson* and the ultimate power resting with the Supreme Court to force state and federal courts to honor the promise of capital juries selected without racially-discriminatory prosecutorial tactics designed to frustrate *Batson*. *Batson* itself was a result of the failures of the Court's pronouncement in *Strauder v. West Virginia*[54] and the Court's remedy recognized in *Swain v. Alabama*.[55]

2. *The flawed remedy provided by* Turner v. Murray

The obvious inadequacies in the remedy afforded by *Turner v. Murray*, designed to permit counsel to discern racially discriminatory attitudes held by prospective capital jurors, are readily identified in the explanation given by Sterling's Texas trial counsel for not questioning prospective jurors regarding racial or ethnic bias.[56] Counsel explained in the post-conviction process that he did not inquire about racial attitudes because, in his experience, jurors seldom responded honestly to questions seeking to discern racially-discriminatory attitudes.[57] The Fifth Circuit accepted this rather straightforward explanation for counsel's failure to question jurors about racial prejudice during voir dire[58] as strategically reasona-

51. *Id.* at 480–82.
52. *Id.* at 484.
53. *Id.* at 479, 485–86.
54. In *Strauder*, 100 U.S. 303, 305 (1879), the Court held the statutory exclusion of African Americans from jury service unconstitutional. The discriminatory exclusion of minority jurors through exercise of peremptory challenges was similarly held unconstitutional in *Swain v. Alabama*, 380 U.S. 202, 222–24 (1965).
55. *Swain*, 380 U.S. at 223–24.
56. 117 F. App'x 328, 332 (5th Cir. 2004).
57. *Id.* at 332 ("While Dunn did not question any potential jurors about racial bias, he stated this decision rested on his belief that he very seldom receives truthful answers.").
58. Moreover, the court related the State's response argument to Sterling's ineffectiveness claim:

> W clearly indicated he could be fair to both sides. Dunn testified at the state habeas hearing that despite any potential prejudiced views, he considered W a "fair man" and "probably a middle-of-the-road juror for Navarro County."

ble.[59] Thus, trial counsel's failure to even attempt to use the remedy provided in *Turner* was found to be reasonable precisely because his reasoning for not doing so was facially quite credible.

The problem posed by trial counsel's explanation for not questioning Sterling's trial jurors about their attitudes on race lies in the simple fact that it demonstrates the naïveté of the Turner court in assuming that inquiry on this subject will ever ensure that jurors holding discriminatory attitudes will be identified and excluded from service on capital juries in cross-racial cases.[60]

Moreover, trial counsel's explanation for his decision not to inquire into racial attitudes of prospective jurors included two more disturbing points. First, he explained that he was content with accepting Juror W because he believed that the juror was, in fact, a middle-of-the-road juror in the county in which Sterling was tried.[61] If true, his disclosure raises the question of whether it would be possible to seat a racially-non-biased jury in a capital trial in Navarro County, Texas. Second, he also explained that he believed his prior relationship in representing Juror W would actually benefit Sterling.[62] His perception reflects a superficially reasonable, but likely naïve and potentially dangerous, assessment that his prior representation of the juror would essentially serve to counteract or overcome the juror's obviously long and deeply held views on African Americans.

Miller-El and *Snyder* reflect the Court's ongoing concern with the *possibility* of racial stereotyping by prosecutors in using peremptory challenges to exclude minority jurors from service on capital cases, while *Sterling* arises in the context of reliable evidence that a juror harboring racially-discriminatory attitudes *actually* sat in a case in which the death penalty was imposed. The common thread of concern for addressing racial discrimination in the imposition of the death penalty was unfortunately not sufficient to convince the Court that its subsequent decision in *Miller-El* necessarily warranted reconsideration[63] of its denial of certiorari in *Sterling*.[64] Miller-El obtained a new trial on the showing that prosecutors discriminated in their use of peremptory challenges to deny jury service to two African-American venirepersons without any showing of actual or likely actual prejudice in the conduct of jurors who did sit in the case. Sterling, on the other hand, suffered execution despite demonstrat-

---

Dunn also reasoned that because of his prior attorney-client relationship with W, W's presence on the jury would enure to Sterling's benefit.

Id. at 332.

59. *Id.*

60. Sterling's trial lawyers did rely on the remedy afforded under *Batson*, however, arguing unsuccessfully at trial and on direct appeal that the State exercised its peremptory challenges to exclude minority venirepersons from service on his jury. Sterling v. State, 830 S.W.2d 114, 118–19 (Tex. Crim. App. 1992).

61. *Sterling*, 117 F. App'x at 332.

62. *Id.* at 332–33.

63. The Court issued its opinion in *Miller-El* on June 13, 2005. 545 U.S. 231 (2005).

64. Sterling moved for rehearing on the basis of *Miller-El* after denial of certiorari on May 23, 2009. Sterling v. Dretke, 544 U.S. 1053 (2005), *denying petition for cert.* Rehearing was denied on August 1, 2005. Sterling v. Dretke, 545 U.S. 115 (2005), *petition for reh'g denied.*

ing a strong, prima facie case of actual racial bias on the part of a juror who did sit on his case.[65]

II. A PROPOSAL FOR REPAIRING THE REMEDIES FOR RACIAL DISCRIMINATION IN CAPITAL SENTENCING

The problem of race-based discrimination infecting the capital punishment system is not likely to be resolved through general repudiation of the death penalty. To the extent that existing remedies for dealing with colorable claims of racial bias tainting capital sentences can ever be effective in practice, serious thought should be directed toward repairing those remedies to enhance the authority of reviewing courts to afford relief for constitutionally-compromised death sentences.

A. Remedying the flaws in the available solutions for racial discrimination through application of the strict scrutiny standard for review of state action

The general standard for review of racial discrimination in state action—strict scrutiny—establishes a constitutional norm for considerations of racially-discriminatory treatment.[66] One approach to recognizing a more aggressive protection from discriminatory application of the death penalty would incorporate the use of strict scrutiny as a standard of review for claims of race-based discrimination arising in the context of individual criminal prosecutions. Existing tools for enforcement often fail to address claims of discrimination that rest on the circumstances of an individual capital case, frustrating the goal of a fair administration of the penalty.

Nor should the usual deferential standard for federal habeas review dilute the constitutional commitment to a fair and non-discriminatory use of the death penalty in the criminal process. In assessing the claim of racial prejudice in the context of Sterling's death sentence, trial counsel's decision not to question the racial attitudes of jurors was afforded deference in the disposition of Sterling's allegation of ineffective assistance. As his case demonstrates, deference to trial counsel's explanations or trial

---

65. A claim directly challenging the death sentence imposed as a result of racial animus would almost certainly have failed in light of evidence supporting the penalty in *Sterling*. Juror W denied being racist, as the Fifth Circuit noted. *Sterling*, 117 F. App'x at 332. The state trial court's conclusion that Juror W did not act out of racism would have been a factual finding binding on the federal habeas courts. *See, e.g.*,Wainwright v. Witt, 469 U.S. 412 (1985) (holding state court's finding regarding qualification of prospective juror to serve on capital jury presumed correct in federal habeas). For more on the predisposition of the state trial judge initially assigned to hear Sterling's application for state post-conviction relief, see Sullivan, *supra* note 2. Moreover, the then-recent amendments to the federal habeas statute, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 (1996), suggested that deference to state court law and fact-finding would complicate litigation of any federal habeas claim, while an error in the unreasonable application of existing federal constitutional law by a state trial court would afford a better chance for relief.

66. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications [imposed by government] must be analyzed by a reviewing court under strict scrutiny.").

court findings imposes a difficult and almost impossible burden upon capital, and non-capital, defendants seeking to prove that their convictions and sentences are tainted by racist attitudes of jurors.

In order to increase the effectiveness of procedural protections afforded by *Turner* and *Batson*, the Court should refine its approach to appellate and federal habeas review of constitutional claims where issues of race are inherent in the prosecution and imposition of a death sentence. Cases involving minority defendants, particularly involving cross-racial capital offenses, should be reviewed with the level of heightened scrutiny applied to state action adversely impacting cognizable ethnic groups. This level of scrutiny is applied in civil rights actions, as evident in the Court's decision in *Johnson v. California*[67] addressing racial segregation in correctional institution assignments.[68]

The Court has, of course, differentiated its analytical approach to claims asserted under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Traditionally, the former source of protection has focused on the fairness of the proceeding in which an individual's liberty or property has been compromised by the action of government, while the latter focuses on official action impacting the rights of recognized groups of persons.

Alternative approaches have been applied to the analysis of state action taken with respect to creation and enforcement of the criminal law, sometimes with more than one being considered within a single decision. For example, in *Skinner v. Oklahoma*,[69] members of the Court agreed that the state habitual criminal sterilization statute was unconstitutional, but considered separately arguments that it violated both the due process and equal protection guarantees of the Fourteenth Amendment. Justice Douglas, writing for the majority, concluded that the statute violated equal protection.[70] Chief Justice Stone concurred, arguing that the statute so invaded personal privacy as to violate due process, while rejecting the majority's equal protection analysis.[71] And, Justice Jackson concluded that the statute violated both due process and equal protection guarantees of the Fourteenth Amendment.[72] Similarly, in *Jackson v. Indiana*,[73] the Court struck down state law authorizing indefinite commitment of defendants

67. 543 U.S. 499 (2005).

68. *Id.* at 506.

69. 316 U.S. 535, 537–38 (1942).

70. *Id.* at 538. Although the case was decided on Fourteenth Amendment equal protection grounds, petitioner also asserted due process violations based on the procedure under which a sterilization order was obtained. The majority declined to consider other theories for relief urged by the petitioner in light of its disposition of the case on equal protection grounds. *Id.* at 538.

71. *Id.* at 543–45 (Stone, C.J., concurring).

72. *Id.* at 546 (Jackson, J., concurring). Justice Jackson would later lead the prosecution of Nazi leaders at the Nuremberg War Crimes Trials. Those proceedings included allegations of forced sterilization policy implemented by the Third Reich, a fact that makes his position in *Skinner* seem particularly revealing. *See* Jack W. Robbins, A Prosecutor's Remembrance of Nuremberg, http://www.roberthjackson.org/Man/Speeches_Nuremberg_Robbins/ (last visited Feb 10, 2010).

73. 406 U.S. 715 (1972).

incompetent to proceed to trial both in terms of equal protection[74] and due process[75] claims, noting the close relationship in the application of the two approaches.[76]

In considering issues relating to racial discrimination in the operation of the criminal law, including classifications implicit in statutes criminalizing behavior, the Court has appreciated the interplay between equal protection afforded by the Fourteenth Amendment and the use of the state police power: "It would violate the Equal Protection Clause for a State to base enforcement of its criminal laws on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'"[77]

What is also true is that when the issue of racial discrimination in the operation of the criminal law is in issue, the line between due process and equal protection is blurred as the Court has consistently held that the Fourteenth Amendment affords protection from race-tainted convictions and sentences. In *McCleskey v. Kemp*, the Court summarized this rather historically-consistent position, observing:

> Because of the risk that the factor of race may enter the criminal justice process, we have engaged in "unceasing efforts" to eradicate racial prejudice from our criminal justice system. . . . This Court has repeatedly stated that prosecutorial discretion cannot be exercised on the basis of race. Nor can a prosecutor exercise peremptory challenges on the basis of race. More generally, this Court has condemned state efforts to exclude blacks from grand and petit juries. Other protections apply to the trial and jury deliberation process. Widespread bias in the community can make a change of venue constitutionally required. The Constitution prohibits racially biased prosecutorial arguments. If the circumstances of a particular case indicate a significant likelihood that racial bias may influence a jury, the Constitution requires questioning as to such bias. Finally, in a capital sentencing hearing, a defendant convicted of an interracial murder is entitled to such questioning without regard to the circumstances of the particular case.[78]

Having declared the Court's commitment to eliminating the pernicious influence of race in the criminal process, however, Justice Powell and the *McCleskey* majority proceeded to reject McCleskey's claim that race influences capital punishment decisions and his supporting statistical evidence. Instead, the majority excused the possibility that capital sentencing decisions were influenced by factors such as the race of the

74. *Id.* at 723–30.

75. *Id.* at 731–39.

76. *Id.* at 731 (noting its due process analysis: "*For reasons closely related to those discussed in Part II above*, we also hold that Indiana's indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial does not square with the Fourteenth Amendment's guarantee of due process") (emphasis added).

77. McCleskey v. Kemp, 481 U.S. 279, 292 n.8 (1987) (citing Oyler v. Bowles, 368 U.S. 448, 456 (1962)) (rejecting attack on use of habitual punishment statute based on equal protection claim).

78. *Id.* at 309 n.30 (internal citations omitted).

accused or the victim, noting: "At most, the Baldus study indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. The discrepancy indicated by the Baldus study is 'a far cry from the major systemic defects identified in *Furman* . . . .'"[79]

Thus, when presented with evidence supporting the claimed infringement on the petitioner's rights, the majority rejected the constitutional significance of that evidence because it did not directly implicate racial prejudice in the imposition of McCleskey's own death sentence, while holding the same evidence failed to demonstrate "major systemic defects." The majority thus engaged in something of a constitutional "Catch 22"[80] in which an individual inmate cannot demonstrate prejudice implicating his own death sentence despite evidence of a general constitutional defect, without indicating what level of proof could ever be sufficient to show "major systemic defects."

It is difficult to explain why equal protection ensured by the Fourteenth Amendment should be subject to a more rigorous standard for constitutional review[81] than state action impacting the guarantee of fair application of the death penalty articulated by the Court as implicit in the Eighth and Fourteenth Amendments in numerous capital punishment decisions.[82] Of course, in the capital sentencing context, the Court has viewed the overlap in the two amendments to flow from the guarantee of due process in the Fourteenth, while the application of strict scrutiny as a standard for review has traditionally been invoked in considering state action arguably violating the Amendment's equal protection guarantee. But nothing actually would preclude the Court from applying its concern for formal classifications that may discriminate based on race or ethnicity to the imposition of capital punishment where the evidence or underlying facts raise the possibility of state action tainted by impermissible discrimination. Consider the rationale for applying strict scrutiny Justice O'Connor recounts in *Johnson v. California*:

> The reasons for strict scrutiny are familiar. Racial classifications raise special fears that they are motivated by an invidious pur-

79. *Id.* at 312–13 (quoting Pulley v. Harris, 455 U.S. 37, 54 (1984)).

80. Catch-22, a term coined by Joseph Heller in his novel *Catch-22*, "describe[s] a situation of deadlock, composed of two mutually exclusive sets of conditions." THE OXFORD COMPANION TO ENGLISH LITERATURE (Dinah Birch, ed.) *available at* http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t113.e1388 (last visited Feb. 10, 2010).

81. In *Johnson*, Justice O'Connor noted that the Court had consistently applied strict scrutiny in reviewing classifications urged to violate the Equal Protection Clause in a number of contexts: "We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications, such as race-conscious university admissions policies, race-based preferences in government contracts, and race-based districting intended to improve minority representation." Johnson v. California, 543 U.S. 499, 505 (2005) (internal citations omitted).

82. *E.g.*, Furman v. Georgia, 408 U.S. 238, 314, 359 n.141 (1972) (Marshall, J., concurring); McCleskey v. Kemp, 481 U.S. 279, 345–46 (1987) (Blackmun, J., dissenting); Lockett v. Ohio, 438 U.S. 586, 589 (1978); Roper v. Simmons, 543 U.S. 551, 555 (2005) (noting intersection of Eighth Amendment protections and Fourteenth Amendment due process considerations governing capital sentencing process).

> pose. Thus, we have admonished time and again that, "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining . . . what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." We therefore apply strict scrutiny to *all* racial classifications to "'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool."[83]

If the Court is truly interested in preventing the imposition of capital sentences based upon impermissible racially-discriminatory attitudes of various actors in the criminal justice system—including prosecutors, defense counsel, jurors, and perhaps even judges—then there is no reason not to view capital sentencing decisions with the same degree of scrutiny as classification systems used by state actors.

It makes little sense to act more vigorously to protect the rights of minority inmates classified for completion of prison sentences than the rights of capital inmates subject to execution for their offenses. Little sense, that is, unless one claims that the more heinous nature of the crimes committed by capital defendants justifies less protection from racial discrimination.[84] The history of the Court's capital punishment jurisprudence counters any suggestion that the quality of due process should vary based on the nature of the allegation, just as the Court is loath to suggest that due process can be constitutionally rationalized based on the race or ethnicity of the accused.[85]

Application of a strict scrutiny standard to address challenges to capital sentences in which evidence or factual contexts suggest legitimate concerns about racial prejudice influencing the capital prosecution and sentencing process would provide far greater protection against constitutionally-tainted death sentences than that afforded by the scheme of review now in place. The high degrees of deference afforded to trial counsel based on questionable representation of capital defendants[86] and

---

83. 543 U.S. at 505–06 (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)) (internal citations omitted).

84. For example, in *Florida v. Nixon*, 543 U.S. 170 (2003), the Supreme Court commented on the particularly difficult problems posed for defense counsel in capital cases:

> [T]he gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus. Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous.

Id. at 190–91.

85. In fact, the Court has ruled that even detainees at Guantanamo Naval Base designated as "enemy combatants" are afforded the right of habeas corpus to challenge their confinement. Boumediene v. Bush, 128 S.Ct 2229, 2247–73 (2008).

86. Consider the deference afforded to trial counsel's explanation in responding to an allegation of defective representation underlying an effective assistance of counsel claim as a matter of "strategy" in *McFarland v. State*, 928 S.W.2d 482, 505–06 n.20 (Tex. Crim. App. 1996). The claim was that lead counsel was asleep during the afternoon sessions of the defendant's capital trial. The court held that he could not demonstrate prejudice as a result of counsel's "naps." With regard to co-counsel's failure to awaken the older lawyer, the Court of Criminal Appeals opined: "We

to state courts in rejecting federal constitutional claims on procedural[87] or factual grounds[88] insulates the overwhelming majority of state court imposed capital sentences from meaningful federal habeas review.

Reliance on the strict scrutiny standard of review should not be limited to death sentences because distortion of the criminal justice process due to racial discrimination cannot be justified in any case. But, capital sentences represent a starting point for aggressive intervention that would likely lead to broader use of strict scrutiny when warranted by evidence developed in the course of any prosecution. Review of capital sentences is a logical starting point for a shift in constitutional policy, however, in light of the disparity in support for the death penalty among black and white Americans.

The Florida Supreme Court's aggressive approach in *Robinson v. State* suggests an appropriate response to interjection of racial animus in a capital prosecution[89] and should serve as a model for appellate and post-conviction courts dealing with racial taint in capital prosecutions.[90] There, the court held:

---

might also view Melamed's decision to allow Benn to sleep as a strategic move on his part. At the new trial hearing, Melamed stated that he believed that the jury might have sympathy for appellant because of Benn's 'naps.'" *Id.* at 505–06, n.20.

After the Fifth Circuit held that sleeping capital counsel constructively denied the accused the right to effective assistance in *Burdine v. Johnson*, 262 F.3d 336, 345 (5th Cir. 2001), the Court of Criminal Appeals reconsidered McFarland's claim. It rejected the claim on the ground that because co-counsel had actively participated in the trial while counsel slept, McFarland could not show prejudice necessary to support his ineffectiveness argument. Ex parte McFarland, 163 S.W.3d 743, 753 (Tex. Crim. App. 2005). It did so while noting that neither McFarland, nor lead counsel, wanted co-counsel's assistance in representing him in the case, *id.* at 750–51, and while noting the affidavit of one juror who sat in the case: "In an affidavit submitted in the habeas proceeding, one juror stated that Mr. Benn's sleeping 'was so blatant and disgusting that it was the subject of conversation within the jury panel a couple of times.'" *Id.* at 751 n.8. *See also*, Echols v. State, 127 S.W.3d 486, 560–61 (Ark. 2003). In that case, the state court rejected a claim of ineffective assistance at a capital trial based on trial counsel's failure to object to testimony by a psychologist regarding information contained in defendant's mental health records due to lack of prejudice from trial counsel's strategic decision not to object. The testimony showed that the defendant did not object when he was compared with Charles Manson and Ted Bundy during a hospital admission. Trial counsel claimed that he did not object to introduction of this testimony during the punishment phase of trial because he wanted jurors to understand the extent of his client's "mental health problems." *Id.* at 561. Echols was sentenced to death.

87. *E.g.*, Coleman v. Thompson, 501 U.S. 722, 752–53 (1991) (resulting in procedural bar to review on certiorari or in federal habeas corpus due to counsel's failure to timely file capital defendant's appeal from denial of post-conviction relief in state courts).

88. In *Osborne v. Terry*, for example, a state post-conviction court deferred to claims made by defendant's trial counsel that he had conveyed a life sentence plea bargain offer by the prosecutor to his client. 466 F.3d 1289, 1318 (11th Cir. 2006). Federal courts subsequently deferred to this state court determination. *Id.* at 1317.

89. 520 So.2d 1 (Fla. 1988).

90. *Id.* at 6. As the court explained, and as shown by the following transcript of testimony included in its published opinion, the prosecutor suggested during his examination of a defense medical expert that the defendant's crime may have been racially motivated:

> The situation presented here, involving a black man who is charged with kidnapping, raping, and murdering a white woman, is fertile soil for the seeds of racial prejudice. We find the risk that racial prejudice may have influenced the sentencing decision unacceptable in light of the trial court's failure to give a cautionary instruction. Our courts consistently have held that the trial judge should not only sustain an objection to such improper conduct but also should reprimand the offending prosecuting officer in order to impress upon the jury the gross impropriety of being influenced by improper argument or testimony.[91]

This type of aggressive approach to appellate review not only serves to counter the possibility that a capital sentence has been imposed with the cross-race nature of the crime interjected as a factor, but also directs trial courts to act affirmatively to address improper interjection of race in the capital trial, rather than relying on their discretion to deny mistrial motions. The *Robinson* court concluded: "We agree with appellant that the prosecutor's examination of this witness was a deliberate attempt to insinuate that appellant had a habit of preying on white women and thus constituted an impermissible appeal to bias and prejudice."[92]

Of course, aggressive action by state judges in capital cases not only reinforces their fidelity to enforcement of federal constitutional values by preventing or redressing improper appeals to racial animus, but also serves to avoid the need for federal courts to intervene in state capital cases.

B. A proposal for judicially-imposed reform

To ensure its commitment to the elimination of racial prejudice in the administration of the death penalty, the Supreme Court should carefully

---

> MR. ALEXANDER (prosecutor): Would you say, Doctor, that it's a fair statement that the Defendant, Mr. Robinson, is prejudiced toward white people, specifically, women?
> DOCTOR KROP: I don't know if he's prejudiced against them in the way we typically think of prejudice in terms of feeling like whites are worse than blacks or blacks are worse than whites. I think he has probably a lot of hostility built up. I don't know enough about his history in terms of whether there were racial prejudices which occurred substantially in his own background which would back that up, but I think he just has a lot of difficulty with women in general and I really can't say whether it's necessarily a racial hostility.
> MR. ALEXANDER: In regard to one of the answers you gave Mr. Pearl, you noted the Defendant had told you about several victims in the past in regard to sexual encounters. Are you familiar with the gender and the race of those particular victims?
> DOCTOR KROP: I believe that Mr. Pearl indicated that they were white.
> MR. ALEXANDER: Do you know if they were male or female?
> DOCTOR KROP: I probably don't know for sure. I presume they were white females.
> MR. ALEXANDER: And you know the victim in this case also was a white female, do you not?
> DOCTOR KROP: Yes, I do.

Id. at 15–16.

91. *Id.* at 7.
92. *Id.*

reformulate its approach to review of these claims in both the direct appeal and post-conviction processes. The Court should provide greater protection against the possibility that a death sentence will be imposed due, if only in part, to racial animus on the part of jurors, as well as prosecutors, state court judges, or, as in the case of Curtis Osborne, on the part of their own attorneys.

1. Identify racial influences in imposition of death penalty as matters of structural error

The Court's characterization of certain constitutional errors as "structural" is especially important in affording protection when subjective considerations of motive and effect are particularly difficult to assess. In this context, the Court's treatment of jury selection issues in *Batson*[93] and *Witherspoon v. Illinois*[94] is particularly instructive. The distinction between errors that are deemed "structural" and thus not subject to harmlessness analysis in determining whether the defendant suffered prejudice, and "trial error" was explained by the Court in *Arizona v. Fulminante*.[95]

"Trial error" is error occurring during the course of trial, typically in the admission or exclusion of evidence or in the presentation of the case to the jury.[96] These errors may be evaluated in terms of prejudice to the defendant by reference to the totality of evidence offered in support of the prosecution's case.[97] For instance, the *Fulminante* Court concluded that even the admission of a coerced confession, previously held presumptively prejudicial in *Payne v. Arkansas*,[98] could be subjected to harmlessness analysis.[99]

The most informative examples of structural constitutional error stem from the jury selection process. The discriminatory use of peremptory challenges to exclude prospective jurors from service on the basis of race,[100] ethnicity,[101] or gender[102] results in a structural error because a reviewing court has no basis from which to determine whether the exclusion of a juror for improper reasons might have affected the course of the trial, including the sentencing decision. Thus, error in the use of even a single peremptory challenge to exclude a prospective juror based upon

93. 476 U.S. 79 (1986).
94. 391 U.S. 510 (1968).
95. 499 U.S. 279 (1991).
96. *Id.* at 307–08.
97. *Id.* at 308 (noting that error may be assessed "quantitatively"). For example, in *Landreth v. State*, 960 S.W.2d 434, 436–37 (Ark. 1998), the court held that the capital defendant's Fifth Amendment right to remain silent was violated by the prosecutor's improper reference to his decision not to testify at trial, but nevertheless held that the error was harmless in light of the totality of the evidence adduced in support of the conviction at trial.
98. 356 U.S. 560, 568 (1958).
99. *Fulminante*, 499 U.S. at 310.
100. *E.g.*, Powers v. Ohio, 499 U.S. 400 (1991) (holding that claim of discriminatory use of peremptories to exclude black jurors may be made by white defendant in criminal trial).
101. Hernandez v. New York, 500 U.S. 352 (1991); United States v. Tucker, 90 F.3d 1135, 1142 (6th Cir. 1996) (upholding use of peremptory to exclude Latino juror).
102. J.E.B. v. Alabama ex rel T.B, 511 U.S. 127, 135 (1994).

race, ethnicity, or gender requires reversal of conviction, even when a criminal defendant otherwise could not demonstrate any prejudice resulting directly from the exclusion of the juror.[103]

The Court's other significant concern with exclusion of prospective jurors has focused on the problem of death qualification of jurors in capital cases. In *Witherspoon*, the Court ruled that prospective jurors expressing opposition or reservations concerning capital punishment could only be excluded as unqualified for service if they said they would vote contrary to the evidence in either the guilt or punishment phases of a capital trial in order to avoid imposing a death sentence.[104] The test for disqualification was further refined in *Adams v. Texas* to preclude exclusion where, as under Texas law, the prospective juror could not affirm under oath that his concerns about the death penalty would not affect his deliberations.[105]

Because it is impossible for a reviewing court to assess whether the improper exclusion of a *Witherspoon*-eligible juror would have affected the outcome of a capital trial, the error is treated as structural. Even though a reviewing court might well have been able to conclude that on the basis of overwhelming evidence, no rational juror could have acquitted, the history of death penalty litigation shows that the decision to impose life, rather than death, cannot be accurately predicted.[106]

---

103. For example, in *Turner v. Marshall*, 121 F.3d 1248, 1250, 1255 (9th Cir. 1997), the Ninth Circuit granted relief based on improper exclusion of one minority juror even though four other African Americans were empanelled.

104. 391 U.S. at 517–19.

105. 448 U.S. 38, 46–47 (1980) (holding that jurors opposed to capital punishment but capable of responding fairly and directly to punishment interrogatories used to determine punishment cannot be disqualified under *Witherspoon*).

106. The inability to rationally assess jury behavior with respect to capital sentencing has been noted by the Texas Court of Criminal Appeals in declining to consider appellate attacks on death sentences for evidentiary insufficiency with respect to implicit rejection of mitigation evidence. Eldridge v. State, 940 S.W.2d 646 (Tex. Crim. App. 1996). The Eldridge court explained:

> [T]he jury determines whether any evidence has mitigating effect and, if so, how much. We have said that these two decisions are normative and therefore are not reviewable by this Court. So long as the jury has all potentially relevant evidence before it, we continue to defer to the jury and believe its unfettered discretion under Article 37.071 § 2(e) is constitutionally valid. As we have consistently done in the past, we decline to review the jury's decision on the mitigation special issue.

Id. at 652 (citations omitted). The court then conceded: "Appellant is therefore correct to say that appellate review of a capital jury's Article 37.071 § 2(e) decision is impossible." *Id.*

Similarly, in rejecting a challenge to an affirmative finding regarding the capital defendant's propensity to commit acts of criminal violence in the future, the "future dangerousness" issue, the court reaffirmed in *Russeau v. State*, 171 S.W.3d 871, 896, n.1 (Tex. Crim. App. 2005): "Appellant also argues that the evidence of future dangerousness is factually insufficient. However, we do not conduct factual sufficiency reviews of the future dangerousness special issue." *Id.* In a similar vein, the inability to rationally assess capital sentencing decisions by juries has been criticized by Justice Scalia in his concurring opinion in *Walton v. Arizona*, 497 U.S. 639, 656 (1990) (Scalia, J., dissenting). In his view, as distilled here, the unlimited discretion imposed upon state capital sentencing process by the Court's decisions results in an arbitrary or capricious administration of the death penalty because the virtually unlimited options for consideration of mitigating circumstances permits juries to im-

Consequently, the Court has vacated death sentences imposed by juries from which even a single *Witherspoon*-qualified juror was[107] excluded. Further, in *Gray v. Mississippi*,[108] the Court rejected the State's harmless error argument based on the theory that prosecutors would have used otherwise unexhausted peremptories against *Witherspoon*-excluded jurors had they not been excused by the trial court. In rejecting this approach, the Court reconfirmed its original, but arguably flawed, commitment in *Witherspoon* to inclusion of diverse views on the death penalty on capital juries.[109]

The *Batson* and *Witherspoon* lines of cases not only illustrate the principle of structural constitutional error, but also apply directly to the issue raised in *Sterling*: the participation of a racially-biased juror in the capital sentencing process. Even assuming that the evidence would have supported the statutorily-required unanimous affirmative responses to the special issues necessary for imposition of a death sentence under Texas law,[110] the presence of a tainted juror would have compromised the jury's ability to reliably consider the special issues and, thus, the capital sentence imposed in Sterling's case.

In order to make existing remedies for discrimination in the capital sentencing process more effective, and to deter future discrimination, the structural error approach used for jury selection issues should be extended to other claims arising from racial or ethnic discrimination in the conduct of the proceedings or on the part of decision makers or advocates. Consistent with this notion, in *Smith v. Winters*[111] the Seventh Circuit observed: "We are mindful that a prosecutorial tactic that invokes or relies on racial prejudice, such as striking prospective jurors on racial grounds, is reversible error without regard to the effect on the outcome."[112] Once a violation is shown, the elimination of the requirement for proof of prejudice or even likely prejudice prevents race-based discriminatory decision-making from being excused by reliance on harmless error analysis to insulate the death sentence from attack.

2. *Assign the burden of proof on the State to disprove that racial prejudice had any role in imposition of the death penalty*

While evidence of racial discrimination on the part of key actors in the capital prosecution process, whether jurors, judges, prosecutors or de-

---

pose life sentences for wholly inconsistent and irrational reasons. Id. at 666–68. *Walton* was overruled in *Ring v. Arizona*, 536 U.S. 584 (2002).

107. Davis v. Georgia, 429 U.S. 122 (1976); Maxwell v. Bishop, 398 U.S. 262 (1970).

108. 481 U.S. 648 (1987).

109. In this view, the commitment was procedurally "flawed" precisely because it retained the prosecutor's option of removing prospective jurors perceived as reluctant to impose death through peremptory strikes. The commitment was substantively "flawed" as was made explicitly clear when the Court rejected a standard by which even conscientious opponents of capital sentencing would be eligible for service in order to have capital juries properly reflect divergent community sentiment. Lockhart v. McCree, 476 U.S. 162, 173–177 (1986).

110. *See* Sullivan, *supra* note 2, at 81-87, Sections IB1-3.

111. 337 F.3d 935 (7th Cir. 2003).

112. *Id.* at 938.

fense counsel, should trigger consideration of possible structural error requiring invalidation of a death sentence, the issue of whether race or ethnic bias has infected the process will necessarily require a factual determination.

Even when facts or circumstances suggest evidence of racial bias, testing allegations of bias may result in a good faith rejection of the claim. Moreover, racial bias or discriminatory attitudes do not necessarily warrant relief in all cases because the reality of continuing racism in American life is often a factor in criminal proceedings. For example, the motivation for the commission of a crime may itself be linked to racial animus, yet evidence of this factor does not itself suggest any constitutional infirmity.[113] Or, the capital defendant may deliberately inject racist attitudes into the proceedings or acquiesce in a strategy deliberately employed by defense counsel that will infuse the capital trial with elements of racial discrimination that might compromise the fairness of the proceedings.[114] In such cases, relief from a conviction or sentence, including a death sentence, imposed by jurors not shown to have been acting with any racial animus is not tainted under this approach.

What does implicate constitutional values is evidence of racial animus on the part of state actors or actors acting on behalf of the State, such as jurors or a single juror, as in Sterling's trial. And, while Juror W's conclusions might well have been precisely the same had he not harbored feel-

---

113. Interjection of race and racial prejudice would, of course, be particularly relevant in some capital prosecutions. For example, in *King v. State*, 29 S.W.3d 556 (Tex. Crim. App. 2000), the state court reviewed a capital conviction and death sentence in a case in which the victim, an African American named James Byrd, was seen late at night riding in the back of a pickup truck with three white men in the truck cab. His dismembered body was found the following day. The underlying felony supporting the capital offense was kidnapping. *Id.* at 558. In rejecting the insufficiency challenge to the evidence supporting the kidnapping, the court of criminal appeals noted:

> The State presented evidence of appellant's racial animosity, particularly towards African-Americans. Several witnesses testified about how appellant refused to go to the home of an African-American and would leave a party if an African-American arrived. In prison, appellant was known as the "exalted cyclops" of the Confederate Knights of America ("CKA"), a white supremacist gang. Among the tattoos covering appellant's body were a woodpecker in a Ku Klux Klansman's uniform making an obscene gesture; a "patch" incorporating "KKK," a swastika, and "Aryan Pride"; and a black man with a noose around his neck hanging from a tree. Appellant had on occasion displayed these tattoos to people and had been heard to remark, "See my little nigger hanging from a tree."

Id. at 559–60. In *King*, racial discrimination was, itself, a factor relevant to proof of the offense, not a collateral concern undermining the integrity of the prosecution or fact-finding.

114. For example, the Court rejected an ineffective assistance challenge in *Smith v. Spisak*, 130 S.Ct. 676, (2010), where counsel deliberately injected and emphasized the capital defendant's racist views, including admiration for Hitler, in an effort to demonstrate the significant extent of his mental impairment as a strategy in arguing that jurors should exercise greater humanity in not imposing the death penalty. *Id.* at 684–87. The Court reversed the circuit court's order granting relief, agreeing with the Ohio Supreme Court's conclusion that Spisak was not able to demonstrate that a more acceptable approach by counsel would have probably resulted in any more favorable outcome. *Id.* at 687–88.

ings of disdain for blacks, that fact undermines the integrity of the sentence imposed as a result of the findings of the capital jury on which he served.

In order to provide maximum protection against racial animus influencing a capital trial or sentencing proceeding, the burden of disproving existence of racial or ethnic discrimination compromising the integrity of a death sentence should be assigned to the State. When the *Chapman*[115] harmless error test applies to assess likely prejudice from constitutional trial error, the burden of proving that the error did not contribute to the conviction or sentence is placed upon the prosecution.[116] With respect to structural error, however, the question for the trial court would not be prejudice, but simply whether or not the claimed error is, in fact, supported by the evidence.

The framework created by the Batson Court provides a workable approach for resolving, initially, claims of racial discrimination compromising the integrity of the capital trial or sentencing hearing. It requires that the defendant make a prima facie showing that the prosecutor used peremptories in a discriminatory fashion,[117] usually by objecting to the strike of a minority juror, although in some cases, exclusion of a majority juror can trigger the process.[118] The prosecutor must then respond with a race-neutral explanation for the strike; a general denial of racially-discriminatory intent is insufficient to meet this requirement.[119] Then, the trial court is required to assess the strike in the context of the prosecutor's explana-

115. Chapman v. California, 386 U.S. 18 (1967).

116. *Id.* at 24.

117. The *Batson* challenge, however, is not limited to the prosecution's use of strikes since the Supreme Court has held that even the defense may violate the rights of prospective jurors to serve by exclusion through peremptories on the basis of race or ethnicity. Georgia v. McCollum, 505 U.S. 42, 55–56 (1992) (reasoning that because the protection afforded from the use of peremptories in a discriminatory fashion is designed to protect the rights of prospective jurors as citizens, neither the State nor defense may use peremptory strikes discriminatorily based on race or ethnicity).

118. For instance, in a capital trial of a black defendant accused of murdering a black victim, a prosecutor might attempt to influence the course of the eventual sentencing proceeding by using strikes against white jurors perceived as less likely to impose death for the murder of a black victim. Although the motivation might be to further a race-neutral goal of ensuring that the penalty is actually used equitably with respect to the race or ethnicity of the victim, the method would still violate the defendant's right to have a jury selected without reliance on racial or ethnic stereotypes. It would also implicate state action in denying the prospective juror the right to serve on a jury without regard to his or her race or ethnicity. Thus, in *Childs v. State*, 237 S.W.3d 116 (Ark. App. 2006), the Arkansas Court of Appeals affirmed the conviction where the State objected to the defendant's use of all eight peremptory challenges to exclude white jurors. *Id.* at 117. The trial court, rejecting defense counsel's explanations for each strike as failing to meet the "race-neutral" test for the strike, refused to strike several of the jurors and the defendant objected to violation of his right to exercise his peremptory challenges. *Id.* at 118–19. On appeal, the court found that the strikes were supported by acceptable explanations, but nevertheless, upheld the conviction, finding that the issue had been improperly framed on appeal. *Id.* at 120.

119. *See* Alexander v. Louisiana, 405 U.S. 625, 632 (1972) (reaffirming rule that a denial of discriminatory intent, even made in good faith, is insufficient to rebut a prima facie case of discriminatory exclusion).

tion and determine whether, in fact, the explanation simply constitutes a pretext for the impermissible use of the strike.[120]

Similarly, in considering a claim of racial discrimination tainting a capital sentence, the defendant—regardless of the stage of the proceedings—would simply be required to make the prima facie showing of discrimination on the part of a juror or jurors; the prosecutor[121] or law enforcement officers who are, by definition, members of the prosecution team;[122] the trial court; or the defense counsel.[123] Once that preliminary showing is made, the prosecution would then be required to rebut the claim of racial animus, or possibly demonstrate that the discriminatory act was wholly unrelated to the conduct of the criminal trial, such as a situation in which a stop and arrest was the product of racial profiling, but where the prosecution would not necessarily be barred despite that circumstance.

This approach of assigning the burden to the prosecution to disprove racial discrimination in the capital prosecution once the defense has presented evidence supporting its claim is not unprecedented, as the *Snyder* Court recognized. There, Justice Alito, writing for the majority, observed: "In other circumstances, we have held that, once it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by a state actor, the burden shifts to the party defending the action to show that this factor was not determinative."[124]

Justice Alito relied on *Hunter v. Underwood*[125] for this proposition, a case in which the Court, through Justice Rehnquist, held that where an Alabama statute disenfranchising individuals convicted of misdemeanors was prompted by the racially-discriminatory purpose of excluding black citizens from the voting rolls, the basis for exclusion violated constitutional protections.[126]

However, in addressing racial discrimination tainting a death sentence, the reliance on the *Batson* framework as a means of assessing the merits of the claim would only apply to state action. This approach could never reach the problem of a *life* sentence imposed by jurors who effectively nullified evidence supporting a capital sentence based on racial discrimination because once the life sentence has been imposed, there would be an intensely controversial problem in attempting to impose a remedy

120. Batson v. Kentucky, 476 U.S. 79, 96–98 (1986).

121. *E.g.*, United States v. Batchelder, 442 U.S. 114, 125 n.9 (1979) (noting Equal Protection Clause prohibits selective prosecution of defendant based on race).

122. Kyles v. Whitley, 514 U.S. 419, 437–38 (1995); Lewis v. State, 691 S.W.2d 864, 865 (Ark. 1985).

123. *See, e.g.*, text accompanying notes 7–15.

124. Snyder v. Louisiana, 128 S.Ct. 1203, 1212 (2008). The Court noted that the *Hunter v. Underwood* standard had not explicitly been applied in a *Batson* case and did not find it necessary to do so on the facts of the case. *Id.* In the *Batson* framework, the prosecution need only offer a race-neutral explanation in response to the objection, leaving the decision as to whether the plaintiff has sustained the challenge to the trial judge.

125. 471 U.S. 222 (1985).

126. *Id.* at 224–25, 233.

that disturbed the jury's sentence, a death sentence not subject to alteration in some cases due to double jeopardy protection.[127]

The Seventh Circuit's holding in *Smith v. Winters*[128] illustrates part of the problem in assessing claims that racial animus constitutes "error," even structural error, requiring that a death sentence be voided. There, the claimed structural error involved the prosecutor's alleged display of a swastika before the jury. The court rejected this action as amounting to structural error, even after affirming that "a prosecutorial tactic that invokes or relies on racial prejudice, such as striking prospective jurors on racial grounds, is reversible error without regard to the effect on the outcome."[129]

Instead, the Smith court declined to apply structural error analysis in considering the claim, while also expressing doubt as to its factual credibility. Judge Posner distinguished racial prejudice amounting to structural error from error still subject to harmlessness analysis:

> But if the alleged displaying of swastikas to jurors be deemed a racist tactic, on the ground that Nazis are notoriously racist, still the appeal to racial prejudice was too attenuated to preclude a determination of harmless error under the normal standard . . . applicable to state trial errors challenged by means of federal habeas corpus. It is not as if the prosecutor had been wearing a white hood and singing "The Old Rugged Cross." A prejudiced remark or its symbolic equivalent is not a per se ground for reversal. . . . Even if as we doubt the swastika incident actually occurred, still it was harmless so far as the outcome of the trial was concerned.[130]

The court's approach is consistent with the usual differentiation between structural and trial error standards of review. The claim arose from the purported actions of the prosecutor during the presentation of the case to the jury and thus, applying the usual approach to review of trial error claims, could be assessed in light of the totality of the record. But the court's conclusion also raises an important question regarding judicial review of claims of racial discrimination in prosecution of criminal actions particularly relevant to capital prosecutions.

---

127. In *Bullington v. Missouri*, 451 U.S. 430 (1981), the Court held that where a capital sentencing jury imposes a life sentence based on findings returned in a trial-like context, based on application of a burden of proof, the sentence serves to bar imposition of death in a subsequent trial. *Id.* at 444–45. The protection does not apply to a death sentence imposed in a proceeding not requiring the prosecution to carry a burden of proof in order to obtain a death sentence. Poland v. Arizona, 476 U.S. 147, 155–56 (1986). *But see* Arizona v. Rumsey, 467 U.S. 203, 211 (1984) (holding double jeopardy did bar death sentence where original life sentence imposed by judge based on finding of prosecution's failure to prove aggravating circumstance necessary for imposition of death penalty). Nor does a life sentence imposed as a result of a jury's failure to reach a unanimous verdict in the capital sentencing proceeding bar imposition of a death sentence at a subsequent trial. Sattazahn v. Pennsylvania, 537 U.S. 101, 109 (2003).

128. 337 F.3d 935.

129. *Id.* at 938.

130. *Id.* (citations omitted).

The decision in *Smith v. Winters* differentiates between those instances in which race-based discrimination constitutes structural errors and those in which the claimed violation is either deemed so remote, or perhaps, corrected, that no rational jurist would find the proceedings or the results tainted. If, in fact, the prosecution is able to carry its burden of either refuting the allegation that racial animus infected the proceedings at all or that the incident giving rise to the claim was, in fact, so minimal that it could not have tainted the proceedings, then the reviewing court—whether at trial, on appeal, or in the post-conviction process—could properly rule against the capital defendant. This would, of course, simply reflect the third step in the *Batson* determination process. Otherwise, any claim of racial discrimination would necessarily result in relief, penalizing prosecutors, judges and jurors acting in good faith in the capital trial and, ultimately, severely—perhaps, fatally—undermining the credibility of the penalty precisely because race could be used by minority defendants to defeat application of the death penalty regardless of the genuineness of the complaint. Thus, a mere allegation of racial taint could be discredited, preventing misuse of the strict liability test to afford relief in cases in which race played no impermissible part in the imposition of a death sentence.

3. Review claims of racial discrimination in capital sentencing de novo *at all stages of the post-trial process*

Finally, the Supreme Court should act to restore the authority of federal courts to review claims of racial discrimination in the capital sentencing process, which has been compromised over the past decades by the Court's general shift toward support for the values of comity and federalism. The Court has elevated concerns for the relationships between state and federal courts over the traditional focus of federal review of state court disposition of claims of federal constitutional violations by state courts. Both state court decision-making and state law now serve to block federal review of state judgments rejecting claimed constitutional violations. In order to address the persistent problem of racism that compromises the integrity of criminal court judgments and sentences—particularly involving the administration of capital punishment—the Court should re-define its posture on federal review when serious and factually-supported claims of racial animus tainting state court prosecutions have been rejected by state courts.

The Seventh Circuit observed in *Smith v. Winters*[131] that racial animus on the part of state actors constitutes "structural error" in all aspects of the criminal prosecution and is not simply limited to racial discrimination in the selection of the grand jury[132] where utilized to trigger criminal pro-

131. 337 F.3d at 938 (referring to discriminatory use of peremptories as an example of discriminatory action triggering application of structural error rule).

132. Vasquez v. Hillery, 474 U.S. 254, 261–64 (1986) (rejecting application of harmless error analysis to discriminatory composition of grand jury which returned an indictment resulting in defendant's prosecution and noting unbroken line of authority holding such events a error structural not corrected by subsequent conviction of the accused).

ceedings and the petit jury.[133] Application of structural error analysis effectively reduces both the load of state courts in the direct appeal and state post-conviction processes and the lower federal courts in the federal habeas process.

In order to afford necessary protection to both capital defendants and the credibility of capital punishment, the Court must act to restore authority to federal courts to review claims of racism tainting capital sentencing and demand state court vigilance in the enforcement of applicable federal constitutional guarantees of equal protection and due process in the capital process. In so doing, the Court will need to undo much of its judicial decision-making that has promoted expedited and deferential process at the expense of rigorous enforcement of the Constitution.

a. Implementing the "structural error" standard for characterization of racial discrimination claims

While the constitutional requirement that such error be treated as "structural" may *seem* clear, the Supreme Court should expressly hold that structural error analysis must be applied in review of all demonstrated claims of racial animus or discrimination on the part of state actors to assure that such claims are subject to review in state and lower federal courts. The Court's action in this regard is essential to ensuring that state courts properly apply this mode of analysis to claims based on racial or ethnic discrimination.

Relief in the federal habeas process, for instance, is only available upon a showing that the state court's determination of such a claim results in a decision *contrary to* existing Supreme Court precedent or a decision which is *unreasonable* in light of the Court's precedent. The federal habeas statute creating the avenue for federal relief for petitioners convicted in state court proceedings expressly limits the authority of federal habeas courts, providing, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States* . . . .[134]

Thus, where the state decision does not conflict with existing Supreme Court precedent, the federal habeas court lacks authority to grant relief. For instance, in *Brown v. Payton*, the Court held that the federal habeas statute precluded grant of relief based on alleged infirmity in California capital sentencing instructions where the state court decision did not re-

133. Batson v. Kentucky, 476 U.S. 79, 100 (1986) ("If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed.").

134. 28 U.S.C. § 2254(d)(1) (2010) (emphasis added).

flect incorrect or unreasonable application of United States Supreme Court precedent.[135]

Moreover, federal habeas courts are not permitted to engage in extension of precedent by analogy in resolving claims of federal constitutional error.[136] Consequently, the observation by the Seventh Circuit in *Smith v. Winters*, while theoretically correct, would not itself constitute the requisite precedent for federal habeas relief for claims based on racial discrimination in the administration of the death penalty other than those relating to discriminatory use of peremptory challenges or other procedures involved in selection of grand or petit jurors.

In order to ensure that claims of racial animus or discrimination tainting capital proceedings are assessed in terms of structural error, the Court must take the next available opportunity to expressly apply structural error analysis to such claims.

b. Limiting application of state procedural default rules as "adequate and independent" grounds for state court decisions that reject claims of racial discrimination in the administration of the death penalty

The Supreme Court has long held that where a state court determination rests on an alternative ground to federal law—an "adequate and independent" state law ground for decision—federal review of the state court disposition is barred in either the certiorari[137] or federal habeas process.[138] The application of this rule as a bar to federal review of state court decisions has proved extremely important in two contexts with particular relevance to disposition of federal constitutional claims raised in state criminal proceedings.

First, the application of a jurisdictional bar to the Court's own certiorari review of state court decisions resting on adequate and independent state law grounds[139] has facilitated the development of state constitutional

135. 544 U.S. 133, 147 (2005).

136. Under the "new rules" doctrine of *Teague v. Lane*, 489 U.S. 288, 301 (1989), new rules of constitutional criminal procedure cannot be announced by lower federal courts in the habeas corpus process. *See* Caspari v. Bohlen, 510 U.S. 383, 389–90 (1994); Goeke v. Branch, 514 U.S. 115, 120–21 (1995) (federal habeas courts cannot announce new rules of existing rules of constitutional criminal procedure, following *Teague*, 489 U.S. at 301).

137. *E.g.*, Michigan v. Long, 463 U.S. 1032, 1037–1041 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."); Herb v. Pitcairn, 324 U.S. 117, 125 (1945) (explaining that Court declines to take jurisdiction when state court determination rests on state law grounds); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935) ("[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment.").

138. *E.g.*, Lambrix v. Singletary, 520 U.S. 518, 522–23 (1997); Coleman v. Thompson, 501 U.S. 722, 729–30 (1991).

139. *See Michigan*, 462 U.S. at 1040 ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground.").

law that often provides greater protection for criminal defendants in state proceedings than that afforded by comparable federal constitutional protections.[140] For example, in *Arkansas v. Sullivan*,[141] the Court summarily reversed the Arkansas Supreme Court, which had held that a search incident to a pretext arrest violated the federal constitution, where the Court itself had expressly rejected this interpretation of the Fourth Amendment in *Whren v. United States*.[142] Because the state court's ruling was "flatly contrary" to the Court's interpretation of federal constitutional law, the Court summarily reversed,[143] explaining: "The Arkansas Supreme Court's alternative holding, that it may interpret the United States Constitution to provide greater protection than this Court's own federal constitutional precedents provide, is foreclosed by *Oregon v. Hass*."[144] On remand, however, the state supreme court again upheld the suppression of the evidence seized pursuant to the defective stop and search, this time relying on the state constitutional protection.[145]

The development of state constitutional law not only expands protection for state court criminal defendants, but also may serve to inform the Supreme Court in its own views of federal constitutional protections, as it did in *Arizona v. Gant*.[146] There, the Court rejected *New York v. Belton*[147] and the "bright-line" rule it had recognized[148] permitting police to search the interior of an automobile within the occupant's reach once they had lawfully stopped the vehicle and removed the occupant from the vehi-

140. The author, like many others, has written on the phenomenon of development of state constitutional law over the past quarter century or so. For a brief discussion of the development of state constitutional doctrine generally, see J. Thomas Sullivan, Danforth, *Retroactivity, and Federalism*, 61 OKLA. L. REV. 425, 434–37 (2008). For a comprehensive examination of the development of state constitutional law in a single jurisdiction that has demonstrated particularly aggressive application of state law protections as an alternative to comparable protections afforded under the federal constitution, see J. Thomas Sullivan, *Developing a State Constitutional Law Strategy in New Mexico Criminal Prosecutions*, 39 N.M. L. REV. 407 (2009).

141. 532 U.S. 769 (2001), *rev'g* State v. Sullivan, 11 S.W.3d 526 (Ark. 2000).

142. 517 U.S. 806 (1996).

143. *Sullivan*, 532 U.S. at 771.

144. *Id.* at 772 (citing Oregon v. Hass, 420 U.S. 714 (1975)).

145. State v. Sullivan, 74 S.W.3d 215, 221–22 (Ark. 2002) (relying on Article II, Section 15 of the Arkansas Constitution). Justice Brown, who wrote the majority opinion for the state court on remand in *Sullivan*, had also written the court's opinion in *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002), where the Arkansas court struck down the state's sodomy statute as violative of the state constitutional right to privacy even before the United States Supreme Court's similar ruling on federal constitutional grounds in *Lawrence v. Texas*, 539 U.S. 558 (2003). The development of Arkansas constitutional law as an alternative basis for decision on claims involving limitations on the authority of state officials led to scholarly comment, including Justice Brown's own view of the role of the state supreme court. *See* Robert L. Brown, *Expanded Rights through State Law: The United States Supreme Court Shows State Courts the Way*, 4 J. APP. PRAC. & PROCESS 499 (2002); Robert F. Williams, *The New Judicial Federalism Takes Root in Arkansas*, 58 ARK. L. REV. 883 (2006) (examining development of Arkansas constitutional law).

146. Arizona v. Gant, 129 S.Ct. 1710 (2009).

147. New York v. Belton, 453 U.S. 454 (1981).

148. *Gant*, 129 S.Ct. at 1714 ("[W]e hold that Belton does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle.").

cle.[149] The *Gant* majority noted that a number of state courts had rejected *Belton* in favor of more restrictive authority for police in searching automobile interiors.[150] Consequently, the insulation of state law rulings protected from federal review by the "adequate and independent" state law grounds principle not only results in creative state court decision-making, but adds to the constitutional debate over the scope of protections properly afforded by the federal constitution.

However, the application of the jurisdictional limiting principle predicated on state law determinations that are both "adequate" and "independent" of federal constitutional precedent also serves to insulate potentially meritorious federal constitutional claims from review in federal courts. The bar to federal review extends to state court procedural rulings as well as substantive holdings. Thus, where the defendant fails to present his federal constitutional claim to state courts for determination in accordance with state procedural rules,[151] a refusal to consider the claim based on the application of a procedural rule results in a default of the claim.[152]

In *Coleman v. Thompson*[153] for instance, counsel failed to file a timely notice of appeal—by three days—from a denial of post-conviction relief.[154] The state court dismissed the appeal based on the untimely filing. The petitioner argued that counsel's error in failing to timely file should excuse the default, but the Court held that because there is no constitutional right to post-conviction process, there is not corollary guarantee of effective assistance of counsel in state post-conviction proceedings.[155] Consequently, counsel's failure was neither excused, nor the subject of an independent ineffective assistance claim as a matter of Sixth Amendment protection.[156]

The critical problem posed by reliance on state procedural default to bar consideration of claims by state inmates that their capital convictions and sentences are tainted by racial discrimination is that these claims are

149. *Belton*, 453 U.S. at 460. The Court applied the same rule in *Thornton v. United States*, 541 U.S. 615, 617 (2004).

150. *Gant*, 129 S.Ct. at 1721 n.8. The majority noted that at least eight states had rejected the Belton court's "bright line" approach to vehicle searches and observed: "The chorus that has called for us to revisit *Belton* includes courts, scholars, and Members of this Court who have questioned that decision's clarity and its fidelity to Fourth Amendment principles." *Id.* at 1716.

151. *See, e.g.*, State v. Fudge, 206 S.W.3d 850, 861 (Ark. 2005) (alleging ineffective assistance in capital counsel's "failure to include federal grounds in his motion for directed verdict . . . foreclosed Fudge's opportunity to present the claim in a federal *habeas corpus* proceeding.").

152. *E.g.*, Stewart v. Smith, 536 U.S. 856, 857–58 (2002) (rejecting argument that counsel's failure to raise ineffective assistance claim with regard to conduct of capital sentencing proceeding in prior state post-conviction proceedings should not have been characterized as procedural default where failure to litigate claim was result of actual conflict of interest in public defender office).

153. 501 U.S. 722 (1991).

154. *Id.* at 727.

155. *Id.* at 752–53. *See* Pennsylvania v. Finley, 481 U.S. 551 (1987) (holding no federal constitutional right to state post-conviction process and, consequently, no Sixth Amendment right to effective assistance of counsel in state post-conviction process).

156. *See* Wainwright v. Torna, 455 U.S. 586 (1982).

often among the most difficult to discover and prove. Yet, failure to preserve and present these claims in the normal course of state direct appeal and post-conviction process forecloses federal review when state courts rest their decisions squarely on default rules, rather than proceeding to consider the federal claims on the merits.

The problem of discovering and then presenting claims of racial taint is compounded by the Court's determination that the Sixth Amendment right to effective assistance of counsel does not extend to representation in the state discretionary review process,[157] the certiorari process for review of state court judgments by the United States Supreme Court,[158] or state[159] or federal post-conviction process.[160] As a consequence, counsel's failure to investigate or properly present a federal constitutional claim based on racial discrimination in the administration of the death penalty does not afford the capital defendant a basis for avoiding application of a state procedural default rule to preclude federal rule under existing precedent.[161]

The problem posed for a defendant whose death sentence is tainted by racial discrimination or animus is illustrated by the disposition of Curtis Osborne's claim. There, the source of the racial discrimination was Osborne's own counsel who could hardly be expected to acknowledge and preserve such a claim on his client's behalf in state proceedings. Nevertheless, the state courts applied procedural default principles to the failure to allege the claim that counsel's racist attitudes compromised his duty to provide effective assistance. The state courts' reliance on procedural default was then taken to bind the federal habeas court, eventually resulting in the Eleventh Circuit's rejection of the claim,[162] which permitted Georgia's execution of Osborne to proceed.[163] On the facts of *Osborne*, the procedural bar imposed by Georgia did not reflect a reasonable ap-

157. Ross v. Moffitt, 417 U.S. 600, 615–17 (1974) (holding right to assistance of counsel does not extend to discretionary review in state appellate process); O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999) (emphasizing the importance of discretionary review within state appellate systems in holding that failure to seek such review in the state appellate process precludes a federal habeas court from later reviewing claims of federal constitutional error which were not presented to the state supreme court).

158. *See, e.g.*, Austin v. United States, 513 U.S. 5, 8 (1994) (citing *Ross v. Moffitt* for proposition that the Constitution does not afford right to counsel for discretionary proceedings, including certiorari, in challenge focusing on petitioner's right to representation by appointed counsel for purpose of petitioning Court for certiorari as a matter of statute, 18 U.S.C § 3006, or by circuit rule).

159. Pennsylvania v. Finley, 481 U.S. 551 (1987); Murray v. Giarratano, 492 U.S. 1 (1989) (holding no Sixth Amendment right to assistance of counsel in state post-conviction proceedings, including capital proceedings).

160. United States v. MacCollom, 426 U.S. 317, 323 (1976).

161. Murray v. Carrier, 477 U.S. 478, 492 (1986) (requiring showing of constitutionally ineffective counsel for excuse of procedural default based on counsel's performance). *But see*, Coleman v. Thompson, 501 U.S. 722, 752–53 (1991) (holding that defective performance by counsel in state post-conviction litigation could not excuse procedural default because there is no constitutional right to assistance of counsel in this stage of the post-trial process).

162. Osborne v. Terry, 466 F.3d 1298, 1316 (11th Cir. 2006).

163. *Supra* notes 9–16 and accompanying text.

preciation for the realities of litigation in which the petitioner often has little opportunity to realistically challenge counsel's representation, particularly with regard to matters of investigation and proof necessary to sustain a constitutional claim.

In order to ensure that capital sentences are not imposed as a result of racial animus or discriminatory intent, the Court should refuse to continue recognizing procedural default in state proceedings as *adequate* grounds for barring review of claims of racial discrimination in capital prosecutions. Clearly, this would be a significant departure from the Court's prior decisions, yet the determination of whether a state procedural default should serve to bar federal review is, itself, a question the Court answers. For instance, in *Henry v. Mississippi*,[164] the Court distinguished between independent state law grounds that rest on state substantive law and those that rest on procedural rules, noting that in the former, federal review would essentially constitute intrusion in the application and enforcement of state law, rather than exercise of federal jurisdiction to interpret or apply federal law.[165] In contrast, the Court explained with respect to review barred on state procedural grounds:

> These justifications have no application where the state ground is purely procedural. A procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional grounds, prevents implementation of the federal right. Accordingly, we have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question.[166]

Citing prior decisions rejecting absolute adherence to the principle of limitation on jurisdiction due to application of state procedural default rules,[167] the Henry Court concluded:

> These cases settle the proposition that *a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest.* In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights.[168]

The determination that procedural default in the state process will no longer bar federal review of claims of racial discrimination in the administration of the death penalty is one that the Court could make, consistent with *Henry*. Such a change in approach would enhance existing protec-

---

164. 379 U.S. 443 (1965).
165. *Id.* at 447.
166. *Id.*
167. Lovell v. City of Griffin, 303 U.S. 444, 450 (1938) ("Whether [the federal issue] was so presented and was decided is itself a federal question."); Love v. Griffith, 266 U.S. 32, 33 (1924) ("When as here there is a plain assertion of federal rights in the lower court, local rules as to how far it shall be reviewed on appeal do not necessarily prevail.").
168. Henry v. Mississippi, 379 U.S. 443, 447–48 (1965) (emphasis added).

tions against constitutionally-defective capital sentences, furthering the important public policy of eliminating the pernicious influence of racial prejudice from the criminal justice system.

There is one other point that bears on this proposed course of action. When a state court finds that a federal constitutional claim has been defaulted, it makes that determination as a matter of choice. A state court could always decide that enforcement of the federal constitutional protection implicated by the claim warrants review despite the default. Once the state court elects to review an otherwise defaulted federal constitutional claim on the merits, declining to hold it defaulted, the decision permits federal review if, in fact, the state court has rejected relief on the merits.[169] In fact, the recognition of doctrines of fundamental[170] and plain error[171] in most jurisdictions demonstrates that procedural default of significant claims is often excused so that a reviewing court may prevent injustice by resolving an unpreserved claim on the merits.[172]

This does not mean that procedural default rules should never apply to excuse failure to seek recourse in state court for the constitutional claim of racial discrimination in the imposition of a death sentence. A deliberate decision by a litigant—and not necessarily a deliberate decision on the part of counsel made without the capital defendant's intelligent agreement—to disregard state process in favor of presenting the claim in federal proceedings would warrant dismissal of the claim upon a proper showing of intent. Thus, the "deliberate bypass" doctrine of *Fay v. Noia*,[173] operating to bar federal review of a claim not presented to state

169. For instance, in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the Court reversed based on the prosecutor's final argument in a capital case which advised the jury that any error in its exercise of sentencing discretion would be corrected on appeal, an argument designed to diminish the jury's appreciation of its responsibility in setting punishment at death. The error had been preserved by objection at trial, but not urged on appeal. Although the state supreme court could have simply not addressed the issue, it found that the improper argument did not warrant relief. *Caldwell*, 472 U.S. at 326–27. The Court's decision on the merits of the federal constitutional claim afforded the United States Supreme Court the option of reviewing the claim on certiorari, leading to the reversal in the case. *See also* Harris v. Reed, 489 U.S. 255 (1989) (holding that state court ruling not resting on plain statement of state law grounds as basis for decision does not deprive federal habeas court of jurisdiction to review claim of federal constitutional error).

170. *E.g.*, Blue v. State, 41 S.W.3d 129, 132 (Tex. Crim. App. 2000) (noting that fundamental error of constitutional dimension requires no objection); State v. Ramirez, 648 P.2d 307–08 (N.M. 1982) (noting improper comment on accused's decision to remain silent constitutes fundamental error, reviewable even in the absence of a contemporaneous trial objection).

171. *E.g.*, United States v. Olano, 507 U.S. 725 (1993) (explicating federal plain error rule); FED. R. CRIM. P. 52(b) ("[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention.").

172. *E.g.*, State v. Barber, 92 P.3d 633, 636–40 (N.M. 2004). In describing the type of error deemed "fundamental" under New Mexico law, the court noted that the error:

> . . . must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive. Each case will of necessity, under such a rule, stand on its own merits. Out of the facts in each case will arise the law.

Id. at 635 (citing State v. Garcia, 128 P.2d 459, 462 (N.M. 1942)).

173. 372 U.S. 391 (1963).

courts only when the petitioner deliberately sought to avoid review in the state courts, would be resurrected to apply in the limited circumstance of requiring capital defendants to attempt to present their claims in state proceedings, even when futile because of procedural non-compliance.[174]

The Court severely limited *Fay* in *Wainwright v. Sykes*, where the Court held that procedural default of a federal constitutional claim in the state courts could only be excused if the federal petitioner could demonstrate both "cause" and "prejudice" warranting the exercise of federal jurisdiction.[175] The Court's decision in *Coleman v. Thompson*[176] finally repudiated the *Fay* "deliberate bypass" approach to excusing state procedural defaults. The resurrection of "deliberate bypass" in the instant context, however, does not affirmatively permit federal habeas petitioners to bypass state litigation in order to pursue their claims in federal courts. Rather, reliance on this standard would limit the expanded authority for federal review of claims based on racial discrimination in capital prosecutions. In this sense, the proposal does not implicitly overrule the Court's position that has evolved from *Fay v. Noia* to *Wainwright v. Sykes* to *Coleman v. Thompson*, but provides a stopgap where a claim of racial discrimination has not been subjected to resolution in state courts as a matter of deliberate strategy on the part of petitioner and counsel.

The federal habeas statute clearly contemplates that state inmates will present their federal constitutional claims to state courts[177] when state process affords them a potential remedy to redress constitutional violations.[178] Section 2254(b), however, also includes an alternative to the general requirement for exhaustion of state remedies, providing that the federal habeas court has jurisdiction when claims have previously been exhausted in state proceedings or when either "(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant."[179]

The possibility that a state court would not apply a recognized rule of procedural default to bar consideration of the claim on the merits suggests that the petitioner must attempt exhaustion even when it would appear futile based on any prior disposition on the merits in another state

174. *Id.* at 399.

175. Wainwright v. Sykes, 433 U.S. 72, 87–90 (1972) (noting: "[w]e leave open for resolution in future decisions the precise definition of the 'cause'-and-'prejudice' standard" while observing that the test is narrower than that recognized in *Fay*).

176. Coleman v. Thompson, 501 U.S. 722, 749–50 (1991).

177. *E.g.*, Rose v. Lundy, 455 U.S. 509, 520 (1982) (recognizing "simple and clear instruction to potential litigants" to take their claims first to state courts).

178. 28 U.S.C. § 2254(b)(1)(A) (2010) provides: "(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—(A) the applicant has exhausted the remedies available in the courts of the State . . . ." *Id.* Moreover, subsection (c) mandates that the petitioner first exhaust any available remedy before proceeding in the federal habeas process: "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State *to raise, by any available procedure*, the question presented." 28 U.S.C. § 2254(c) (2010) (emphasis added).

179. 28 U.S.C. § 2254(b)(1)(B) (2010).

proceeding.[180] Exhaustion may be excused where it would prove futile,[181] and the federal habeas court may agree with a petitioner's argument that dismissal or abatement of the pending federal litigation should not be required to permit further litigation in state courts. But the requirement for exhaustion, unless expressly waived by the State,[182] will typically require that a state defendant litigate his federal constitutional claims in available state court proceedings before proceeding in federal court.[183] The problem arises when late discovery of the claim may bar timely filing of a state post-conviction petition, even though the inmate may have time remaining to file his federal habeas claim.

A cautious petitioner faced with the alternative of pursuing a previously unlitigated claim in a state proceeding might proceed with federal litigation and address the exhaustion problem only if the State moves to dismiss to require exhaustion of any remaining state remedy. Because federal habeas claims for state inmates must be brought within a year following the conclusion of the state court direct appeal,[184] including the petition for certiorari to the United States Supreme Court,[185] state post-conviction litigation would ordinarily be expected not to conclude within the one year limitations period. The federal statutory limitations period is

180. 28 U.S.C. § 2254(c) (2010).

181. For instance, in *Eaton v. Wyrick*, 528 F.2d 477 (8th Cir. 1975), the circuit court recognized that exhaustion is not deemed futile absent a clear manifestation that a state court will reject a petitioner's constitutional claims. In that pre-AEDPA case, the court explained the "futility" exception to the exhaustion requirement:

> This exception derives from a recognition that 28 U.S.C. § 2254(b) and (c) are based on a principle of comity rather than a technical jurisdictional limitation. While due regard for that principle requires that the state be afforded the initial opportunity to consider alleged violations of the federal constitutional rights of its prisoners, a petitioner is not required to file repetitious or futile applications in the state courts.

Eaton, 528 F.2d at 482.

182. 28 U.S.C. § 2254(b)(3) (2010) provides: "A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." *Id.*

183. An example of the Court's commitment to exhaustion as a key prerequisite to the exercise of federal habeas jurisdiction is demonstrated in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), where the issue involved the petitioner's failure to seek review in the state supreme court of an adverse determination by the intermediate appellate court on a federal constitutional claim. The failure to seek review in the Illinois Supreme Court from an adverse ruling in the intermediate court resulted in a failure to exhaust the claim, even though the Illinois Supreme Court discouraged filings that would require affirmance based on the application of precedent. *Id.* at 839–40.

184. 28 U.S.C. § 2244 provides, in pertinent part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of— (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review. . . .

28 U.S.C. § 2244(d) (2010).

185. The direct appeal ends for this purpose with the disposition of the petition for certiorari by the United States Supreme Court seeking review after conclusion of the state appellate process following conviction. Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987).

tolled during the pendency of any properly-filed petition for state post-conviction relief.[186] This would seemingly suggest that any attempt to exhaust state remedies would toll the federal habeas limitations period, but that exception is subject to interpretation as to what constitutes a "properly filed" state application. In a series of decisions, the Court has considered what constitutes a "properly filed" application for state post-conviction relief,[187] and the danger for the unwary petitioner seeking to comply with the statutory exhaustion requirement is that a state court filing will be rejected on procedural grounds, potentially resulting in the tolling provision being deemed inapplicable by the federal habeas court.

Similarly, the federal limitations period is also tolled for newly-discovered constitutional claims, running from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."[188] To the extent that claims of racial discrimination may prove to be among the most difficult to discover, even when exercising exceptional diligence, because of the likelihood of concealment on the part of state actors, this exception in the federal statute would be of critical importance in such a case.

The best option for avoiding limitations problems likely lies in timely filing in federal court, when possible, and seeking abatement of the federal proceeding, rather than dismissal, for purposes of exhaustion. In *Rhines v. Weber*,[189] the Court recognized that dismissal of a pending federal habeas petition for purposes of exhaustion may necessarily result in a subsequent re-filing, after exhaustion of state remedies has been completed, requiring dismissal under the statute's one-petition rule.[190] *Rhines* does require that the petitioner show "good cause" for not previously exhausting state process;[191] of particular concern for the Court was that abeyance of federal habeas proceedings challenging state court dispositions in capital cases not be used to facilitate delay in execution of the sentence.[192]

Mindful of the Court's concerns in *Rhines*, capital petitioners asserting newly-discovered claims of racial discrimination tainting the proceedings

186. 28 U.S.C. § 2244(d)(2) (2010) ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.").

187. *See* Artuz v. Bennett, 531 U.S. 4, 5–8, (2000) (noting petition "properly filed" when delivered and accepted by "appropriate court officer for placement into the official record"); Carey v. Saffold, 536 U.S. 214, 226 (2002) (tolling of federal filing period dependent on state court finding that petition was timely filed); Pace v. DiGuglielmo, 544 U.S. 408 (2005) (stating that untimely filing in state court bars reliance on tolling provision of federal habeas statute). *But see* Jimenez v. Quarterman, 129 S.Ct. 681 (2009) (permitting defendant to file out-of-time appeal, federal statute tolled pending disposition of state court proceedings).

188. 28 U.S.C. § 2244(d)(1)(D) (2009).

189. 544 U.S. 269 (2005).

190. 28 U.S.C. § 2244(b)(1) provides: "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b) (2009).

191. 544 U.S. at 277.

192. *Id.* at 278.

in state court should present as fully a developed claim as possible in the federal proceeding. The Court's adoption of the structural error standard would serve to promote the goal of addressing such claims on the merits by virtually ensuring that capital litigants who have made appropriate effort to discover and present their racial prejudice claims will meet its standard for good cause in order to permit fair consideration of those claims. This may, of course, involve abeyance to afford the petitioner a reasonable opportunity to present his claim in available state process, or result in a finding that state process is not available for litigation of the claim, permitting the federal habeas court to proceed to consider the claim on the merits without exhaustion in the state courts.

This approach to the problems posed by the statutory exhaustion requirement and the Court's recognition of procedural default as a bar to litigation of many newly-discovered constitutional claims would further the Court's expressed goal of eliminating racism from the administration of the death penalty. But it is not designed to simply ignore conventional process, only to permit litigation of claims that without doubt undermine the integrity of death sentences and, consequently, the criminal justice system. Defendants should continue to be under a duty to exercise due diligence in attempting to raise claims of racial discrimination once disclosed or discovered, even though such claims might be subject to procedural default in state proceedings. State courts, however, would be able to avoid federal habeas review of *defaulted* claims by electing not to impose default rules and addressing the claims on the merits.

Finally, the Supreme Court should speak definitively with respect to procedural default of racial discrimination claims in the state courts in order to give federal habeas courts the unequivocal authority to address constitutional claims based on racial discrimination in state prosecutions. Because the authority of federal habeas courts to order relief for state inmates must be predicated on a showing that the state court disposition is contrary to or reflects an unreasonable application of existing Supreme Court precedent,[193] a state court's disposition resting on procedural default would typically not appear to trigger federal habeas jurisdiction.[194] However, if the Court were to hold that such claims could not be procedurally defaulted in capital cases unless deliberately withheld, the Court's pronouncement would open the door to litigation of such claims on their merits in the federal habeas process.

c. Supplanting deferential review with de novo review of claims of racial discrimination in the administration of the death penalty

Much as the requirement for deference to state court application of state procedural rules serves to frustrate litigation of meritorious claims, requiring deference to the process and results of state court decision-mak-

193. 28 U.S.C. § 2254(d)(1) (2010); Williams v. Taylor, 529 U.S. 362, 413 (2000).

194. The exception to the usual rule of deference to state court application of procedural default rules lies when the federal court finds that the state procedural default rule has not been consistently applied, or when the state court engages in an "exorbitant application" of a "generally sound rule," of procedural default. Lee v. Kemna, 542 U.S. 362, 376 (2002).

ing can also mask constitutional violations that should require relief under the federal habeas statute. The federal habeas statute has long required deference to state court fact-finding,[195] but the statute also afforded the habeas court discretion to order an evidentiary hearing in the event the petitioner could demonstrate that he had been deprived of a full and fair opportunity to develop his factual predicate for a federal claim in the state courts based on one or more of the statutory exceptions included in subsection (d) of then-Section 2254.[196] Otherwise, state court factual determinations were entitled to a presumption of correctness binding upon federal habeas courts.[197]

The Supreme Court's decision in *Keeney v. Tamayo-Reyes*[198] further restricted federal habeas court fact-finding by imposing on the petitioner a much higher duty to develop the factual predicate for his constitutional claims in state proceedings. Prior to the Court's restrictive decision in *Tamayo-Reyes*, federal courts had operated with greater discretion to afford federal habeas petitioners expanded opportunities to develop the ev-

195. Marshall v. Lonberger, 455 U.S. 422, 432 (1983). Prior to adoption of the 1996 amendments to the federal habeas statute, 28 U.S.C. § 2254(d) provided:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—(1) that the merits of the factual dispute were not resolved in the State court hearing; (2) that the fact[-]finding procedure employed by the State court was not adequate to afford a full and fair hearing; (3) that the material facts were not adequately developed at the State court hearing; (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding; (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding; (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or (7) that the applicant was otherwise denied due process of law in the State court proceeding; (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:
>
> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. § 2254(d) (2010).

196. *Id.*

197. *E.g.*, Sumner v. Mata, 449 U.S. 539, 551 (1981) (holding that facts found by state appellate courts, as well as state trial courts, are binding on federal habeas courts).

198. 504 U.S. 1 (1992).

identiary record if necessary to support a colorable claim for habeas relief.[199] This approach effectively prevented federal habeas petitioners from bypassing the state courts for purpose of litigation of factual matters essential to resolution of the federal claims.

In combination with the requirement for deference to state court fact determinations as controlling on federal habeas courts, the Court's decision in *Tamayo-Reyes* served to require state court defendants to fully present their federal constitutional claims to the state courts for initial resolution. The Court did recognize an exception in situations in which a habeas petitioner exercised due diligence in attempting to develop the factual basis for the federal constitutional claim, but was effectively prevented from doing so by state authorities or the operation of state procedural rules limiting his ability to do so.[200] Later, in reviewing the deference required by the AEDPA amendment to the federal habeas statute in *Williams v. Taylor*,[201] the Court essentially validated *Tamayo-Reyes* in finding that subsection 2254(e)(2)(A)(ii) and (B) reflected the approach taken there.[202] The combined effect of the Court's restriction on federal court fact-finding in *Tamayo-Reyes* and the approach taken by Congress in AEDPA is to limit fact-finding in the federal habeas courts to those situations in which the petitioner can demonstrate that additional fact-finding is warranted based on his actual innocence of the offense.

At least superficially, the operation of *Tamayo-Reyes* and subsection (e)(2) would appear to foreclose consideration of most discrimination-based claims because either they would not demonstrate actual innocence or the supporting evidentiary basis for the claims would not have been developed in state proceedings. The problem is that often discovery of the evidence of racial discrimination was simply not timely in terms of state court process, almost certainly due to the inherent difficulties in discerning an unconstitutional intent deliberately or habitually concealed by the actors involved. Sterling's trial counsel made this very point in responding to the ineffective assistance claim based on his failure to voir dire prospective jurors on attitudes on race when he explained that jurors are not candid with respect to these kinds of inquiries. This reflects the common problem of racism that once was acceptable in the community

199. Townsend v. Sain, 372 U.S. 293, 316–17 (1963), *overruled by* Keeney v. Tamayo-Reyes, 504 U.S. at 5.

200. *Id.* at 8, 12.

201. 529 U.S. 420 (2000).

202. *Id.* at 433–34. The applicable statutory section, 28 U.S.C. § 2254(e)(2), now provides:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
> (A) the claim relies on—
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2) (2010).

essentially going "underground"—being concealed, rather than being addressed through changed disposition.

The statute does provide an alternative theory for presentation of these newly discovered claims and development of supporting records, assuming that the courts vigorously interpret subsection (b) to afford relief where potentially meritorious challenges are made.[203] It permits consideration of a constitutional claim not previously litigated in the state courts such that state remedies have been fully exhausted where no state remedy exists for consideration of the claim,[204] or where "circumstances exist" rendering unexhausted state process "ineffective to protect the rights" of the habeas petitioner.[205]

Despite the generally draconian tone of the 1996 amendments to federal habeas process adopted in the AEDPA, Congress appears to have deliberately left the door open to litigation of newly-discovered claims of precisely the type envisioned in this article. Arguably, these provisions, particularly in recognizing in subsection (b) that state process for the presentation and development of the claim may be unavailable or inadequate in certain instances, will permit newly discovered claims of racial discrimination on the part of any actor[206] in the state capital litigation process to proceed on their merits in federal habeas proceedings.

The procedural limitations upon development of the factual predicate necessary to support a federal constitutional claim may not be the only or most burdensome obstacles to federal habeas relief. Instead, perhaps the most important obstacle in many cases is the tendency of federal judges to defer to state court decisions as a matter of comity or judicial courtesy,

---

203. 28 U.S.C. § 2254(b)(1)(B) (2010). This section provides:
(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—(B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
Id.

204. 28 U.S.C. § 2254(b)(1)(B)(i) (2010).

205. 28 U.S.C. § 2254(b)(1)(B)(ii) (2010).

206. In Sterling's situation, of course, the "state action" or "state actor" requirement would necessarily have to be satisfied by the conduct of jurors who might not otherwise be regarded as "state actors." *See* Edmonson v. Leesville Concrete Company, 500 U.S. 614, 624 (1991) (describing the jury as "an entity that is a quintessential governmental body, having no attributes of a private actor" in performing governmental function). Because the promise of a fair jury trial, implicit in the Sixth Amendment guarantee, and an unbiased jury, implicit in the Fourteenth Amendment guarantees of due process and equal protection, necessarily embraces fair disclosures by a prospective juror in voir dire and deliberations, jurors essentially function as state actors in the criminal prosecution process. *See, e.g.*, Williams v. Taylor, 529 U.S. 420, 440 (2000) (involving a jury foreperson who failed to disclose seventeen-year marriage to detective who was prosecution's lead detective at trial); Dennis v. United States, 339 U.S. 162, 171–72 (1950) (preserving right to prove actual bias on part of trial jury); Rushen v. Spain, 464 U.S. 114, 119–20 (1983) (admonishing trial judges to disclose instances of potential irregularity involving jurors during the course of trial to permit remedy); FED. R. EVID. 606(b) ("[A] juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.").

which compromises many claims that would otherwise merit federal habeas relief. This tendency has been reinforced by Supreme Court decisions in which the good faith of state judges has been accepted, apparently with little question,[207] and by cases in which federal judges appear reluctant to even evaluate state court decisions on the basis of reason, apparently fearing charges that in doing so they merely substitute their subjective assessments for those of state judges.

While the requirement for deference to state court findings of fact and law is mandated by the re-structured federal habeas statute,[208] two different factors serve to compromise the ability of federal habeas courts to protect capital defendants from racially-tainted death sentences. First, while federal courts are required to defer to findings of state courts in reviewing claims of violations of federal constitutional rights, state courts themselves are not bound to defer to unreasonable explanations for conduct by state actors or defense attorneys that mask racial discrimination or stereotyping. Realistically, however, decisions of state trial judges who preside over both trials and, typically, post-conviction proceedings are likely to be influenced by their very personal proximity to those actors in the system that they are obligated to supervise.[209] State trial judges, particularly elected judges, function in the community in which prosecutors, defense counsel, police, and jurors are most likely to live and work. Particularly in the case of capital defendants charged with commission of the most egregious offenses, state trial judges must be expected to share more in common with virtually everyone else in the prosecution process than with the criminal defendants themselves. If subject to popular rejection by election, the added pressure of the publicity of the heinous crimes prosecuted in their courts with its potential to shape public opinion requires even greater resolve on the part of judges to rule dispassionately and aggressively in protecting the constitutional rights of capital defendants.

Moreover, even assuming that state trial judges act most diligently, state post-conviction process routing constitutional claims through the state court of conviction may also create anxiety for a trial judge in whose court a death sentence has been imposed in retrospectively considering whether the sentence has been influenced by constitutional error. Where the sentence has been imposed by a jury, the state judge must consider invalidating the conviction or sentence based on claims that may well im-

---

207. *See e.g.*, Miller v. Fenton, 474 U.S. 104 (1985). In explaining that issues relating to the voluntariness of a confession are subject to de novo review, the Court noted: "We reiterate our confidence that state judges, no less than their federal counterparts, will properly discharge their duty to protect the constitutional rights of criminal defendants." *Id.*

208. 28 U.S.C. § 2254(d) (2010).

209. State post-conviction processes commonly require the petitioning convicted defendant to file the application in the trial court of conviction. *E.g.*, ARK. R. CRIM. PRO. 37.5 (authorizing post-conviction attack on capital convictions resulting in imposition of the death penalty); NMRA 5-802D(1) (authorizing filing petition for post-conviction relief in New Mexico district court of conviction); TEX. CODE CRIM. PROC. ANN. art. 37.071, sec. 4(a) (authorizing filing of application for post-conviction relief in case in which death sentence imposed in court of conviction).

pugn the integrity of the process, particularly where the claim rests on an allegation that racial prejudice has infected the process. Prosecutors, defense counsel and police necessarily understand and accept the legal requirements for due process, but lay jurors may not understand attacks on a verdict or sentence rendered that is perceived to fairly reflect the evidence. The suggestion that racial animus has influenced a jury verdict likely carries the greatest potential for adverse public reaction to a determination that the verdict must be set aside.

The second flaw in the process of reviewing constitutional challenges lies in the tension between the statutory requirement for deference, generally, and the appreciation for the role of reasonableness in assessing state court findings. The Court's decisions in *Miller-El* and *Snyder* both demonstrate the ongoing problem of undue deference afforded state trial judges in considering claims attacking the use of peremptory challenges by state prosecutors.[210] Because trial court decisions have been accorded deference based on the immediate opportunity for trial judges to assess credibility of prospective jurors and prosecutors, deference to their decisions has generally been accepted as reasonable.[211] Yet, in both *Miller-El* and *Snyder* the Court was forced to concede, at least by implication based on the fact that it reviewed the same record in each case on two different occasions, that lower courts simply had not considered trial court conclusions concerning the motivation of prosecutors in exercising peremptory challenges against black venirepersons with a reasoned skepticism. The lower courts had afforded deference more as an exercise of comity and in line with conventional wisdom about the superiority of trial court fact-finding than as a result of reasoned consideration of the record.

But perhaps an even better indicator of the Court's view of the role of state courts in terms of the enforcement of federal constitutional protections is evident in its treatment of the habeas process in *Brecht v. Abrahamson*[212] and *Fry v. Pliler*.[213] When a state court reviews a federal constitutional claim on direct appeal, it must apply the harmlessness standard of *Chapman v. California*.[214] Under *Chapman*, the burden is placed on the prosecution to demonstrate that constitutional trial error was harmless beyond a reasonable doubt in order to avoid reversal.[215] In *Brecht*, however, the Court held that when that same error is recognized by the federal habeas court, the petitioner is not entitled to relief unless he can also establish by a reasonable likelihood that the error affected the course of the proceedings.[216] When the federal habeas court is in "grave doubt" as to whether the prejudice standard has been met, the petitioner is entitled to relief.[217]

---

210. *See supra* notes 44–69, and accompanying text.
211. *E.g.*, Wainwright v. Witt, 469 U.S. 412 (1985) (holding state court's finding regarding qualification of prospective juror to serve on capital jury presumed correct in federal habeas court).
212. 507 U.S. 619 (1993).
213. 127 S.Ct. 2321 (2007).
214. 386 U.S. 18 (1967).
215. *Id.* at 324.
216. *Brecht*, 507 U.S. at 631.
217. O'Neal v. McAinich, 513 U.S. 432 (1995).

The *Brecht* Court rejected the argument that the more difficult burden of obtaining relief on federal constitutional claims in the habeas process might lead some state courts to simply fail to apply *Chapman* rigorously.[218] But in fact, the application of the *Brecht* standard in numerous cases demonstrates that whether intentional or not, state courts failed to vigorously enforce constitutional protections. The Eighth Circuit alone had taken the position that if state courts have failed to recognized federal constitutional claims and apply the *Chapman* standard in their review, the *Chapman* harmlessness test should be applied when the same claims are advanced in the federal habeas process.[219] However, the Court rejected this approach in a case arising from the Ninth Circuit, *Fry v. Pliler*,[220] holding that the *Brecht* prejudice standard applies in all federal habeas proceedings,[221] effectively insulating state court refusal or reluctance to enforce federal constitutional guarantees aggressively from correction through the federal habeas process.

The federal habeas statute's required deference to state fact-finding is not absolute, of course, but the significant limitation imposed on federal habeas courts based on the defendant's failure to develop an adequate record in state proceedings addressed by subsection (e)(2)(A)(ii) and (B) may compromise many otherwise meritorious claims. In many cases, of course, a state procedural default may bar development of the necessary record, such as where the habeas petitioner has failed to comply with a requirement that all claims be presented in the state court in a single proceeding. For the federal habeas petitioner, this is particularly troubling when the facts supporting the claim were not discovered until after the filing or litigation of the initial petition for relief.[222]

The key to the elimination of racial discrimination in the administration of the death penalty lies in the Supreme Court's recognition of the difficulties created by its own decisions dealing with the enforcement of federal constitutional rights. Deference to the decisions made by lower courts, whether state courts or lower federal courts, cannot further the goal of elimination of racial discrimination if the attitudes of judges

218. *Brecht*, 507 U.S. at 636. Chief Justice Rehnquist addressed this argument:

> Petitioner argues that application of the *Chapman* harmless-error standard on collateral review is necessary to deter state courts from relaxing their own guard in reviewing constitutional error and to discourage prosecutors from committing error in the first place. Absent affirmative evidence that state-court judges are ignoring their oath, we discount petitioner's argument that courts will respond to our ruling by violating their Article VI duty to uphold the Constitution.

Id. at 636. Of course, if Chief Justice Rehnquist was correct, there would have been little need for legislation creating the federal habeas remedy for state court defendants.

219. Orndorff v. Lockhart. 998 F.2d 1426, 1429–30 (8th Cir. 1993).

220. 127 S.Ct. 2321, 2338 (2007).

221. *Id.*

222. In *Osborne*, for instance, this subsection would not afford any option for relief because the claim of racism on counsel's part did not relate to a claim of actual innocence. Instead, it addressed a claim rejected on the merits of the initial petition by the state court that counsel failed to inform Osborne of the plea offer made by the prosecution that would have permitted Osborne to avoid the possibility of a death sentence following conviction at trial.

charged with the duty to enforce the Constitution are insensitive to the problem or too ready to deny the possibility of existence of racial discrimination in their courts. The Court's hesitance in addressing the realities of judicial decision-making over the years has led to the current situation in which superficial adherence to constitutional values is accompanied by indifference, perhaps even willful indifference.

The Court's only tools for reversing the drift toward accommodation of racial bias, most often latent and not patent, are its ability to reverse lower court decisions in the certiorari and federal habeas processes and in asserting its positions in the strongest possible language in decisions rendered on constitutional questions. The final decisions in *Snyder* and *Miller-El* demonstrate its use of the power of reversal when state and lower federal courts fail to respond to initial implied directives in vacating and remanding for reconsideration. Once lower courts fail to appreciate the Court's concern in ordering a second consideration, their intransigence must be dealt with by rendition on further review by a subsequent grant of certiorari.

Not all reconsiderations, of course, reflect intransigence on the part of lower courts. Indeed, no doubt in the majority of cases, the lower court performs a necessary part of the process of applying legal principle to the pertinent facts in the record properly. But where matters of racial discrimination are at issue, and particularly when they implicate a misuse of the death penalty based upon discriminatory intent or indifference to constitutional protections, the Court should act far more aggressively in forcing recognition of the problem posed and demand that lower courts themselves act aggressively in ordering relief. Formal recognition that factually-supported claims of racial discrimination in the administration of the death penalty constitute matters of fundamental, structural error would remove much of the uncertainty in enforcement of existing remedies.

The additional problem, however, is not a matter of precision in existing rules or principles, but instead rests in the subjective evaluations made by lower court judges when issues of racial discrimination are raised and supported by credible evidence, particularly when the evidence is controverted. To ensure that capital sentences are not influenced by racial animus or deliberate discrimination, the Court must also set a new tone for dealing with these issues. *Snyder* demonstrates the point: although the Court eventually corrected the constitutional error in the improper exclusion of a minority juror from the capital trial, it did so with an almost apologetic tone, continuing to emphasize the usual virtue of deference to trial court observation and evaluation in the process of considering the claim of discrimination.

Rather than adopting the cautious tone of *Snyder* in addressing cases in which racial discrimination claims provide the focus for the Court's review, it should address the issues far more aggressively in order to clearly indicate to lower courts its expectation that such claims will be viewed with the highest level of scrutiny. In order to prevent the use of capital punishment to further constitutionally impermissible values such as racial oppression—even when the effect is clearly collateral and not a

deliberate aspect of public policy—the Court has to give more substance to its traditional and consistent expressions of racial fairness in the administration of the death penalty. This also means that the Court must expand its docket, if necessary, and use the certiorari process affirmatively to address claims that are rooted in racial discrimination so that cases like *Sterling* and *Osborne* do not fall through the cracks in litigation and appellate review created by unreasonable deference and inflexible policies of procedural default.

C. *Consequences, intended and unintended, of adoption of the proposed reform*

The combination of reforms proposed here to deal with racially-tainted death sentences would undoubtedly prompt criticism based on a number of observations. With regard to each, the only justification for overruling or limiting the Court's precedent in order to facilitate federal review of capital sentences must lie in the constitutional promise that the criminal justice system will operate fairly and without the influence of racial animus or discrimination that compromises equality before the law.

Thus, critics might complain that this proposal will necessarily increase the amount of litigation designed to attack death sentences. The reality is that the capital sentencing and review systems are already designed to afford maximum litigation opportunities for state and federal death row inmates opting to challenge their convictions and sentences, particularly in habeas corpus actions brought in federal court.[223]

Second, critics might argue that recognition of claims of racial discrimination as matters of "structural error" and restricted reliance on deference to state dispositions resting on procedural default and state court fact and law finding are all too likely to result in a dramatic increase in grant of federal habeas relief. This could, of course, cause some practical difficulty for state courts and prosecutors forced to retry capital cases or proceed with re-sentencing proceedings, as well as resulting in dramatic increases in the cost of obtaining a death sentence. But the fact is, such a dramatic result would only occur if substantial numbers of capital sentences required relief because of the presence of racial animus or discrimination on the part of jurors or state actors in the capital prosecution or litigation processes.

---

223. Federal law provides for appointment of counsel to represent state court defendants in federal habeas actions, 18 U.S.C. § 3599(a)(2) (2010), and also provides for appointment of counsel qualified for capital representation. Subsection (e) provides for representation throughout the course of all proceedings. Section 3599(f) authorizes compensation for investigative expenses and expert witness fees and subsections (g)(1) and (2) authorize payment of reasonable compensation for counsel and supporting services. The federal statute recognizes a right to counsel for state death-sentenced inmates independent of the Sixth Amendment guarantee of effective assistance of counsel. Murray v. Giarratano, 492 U.S. 1 (1989). As part of a statutory package for expediting capital litigation, states are also required to provide similar access to counsel in state post-conviction proceedings in capital proceedings in order to qualify for expedited federal review of death sentences, pursuant to 28 U.S.C. § 2261 (2010).

Balanced against the obvious costs and problems associated with any argued increase in cases in which federal habeas relief would be appropriate is the reality that this result would demonstrate exactly how flawed capital sentencing now is in terms of protection against racial discrimination in the administration of the death penalty.

CONCLUSION

The proposal advanced here for reforming and enhancing remedies in place to address racial discrimination in the administration of capital punishment is ambitious and would certainly require the United States Supreme Court to retreat somewhat from its recent moves towards traditional notions of federalism. Nevertheless, the Court surely recognizes the difficulty created by its insistence on insulating capital punishment from attacks based on issues arising from persistent problems of racial and ethnic prejudice implicit in *McCleskey v. Kemp*. And the 7-2 split in *Snyder v. Louisiana* surely indicates that a majority of the Justices realize that intransigence on the part of state courts, coupled with the lengthy proceedings in *Miller-El* reflecting abdication of federal courts to state court decision-making, unequivocally demonstrate that the Court's commitment to enforcing the guarantee of discrimination-free capital sentencing is compromised by the general application of its precedents to ignore, avoid, or rationalize instances of racial discrimination in individual capital trials.

If the Court can simply unburden itself of an unrealistic expectation that state courts and lower federal courts will properly enforce constitutional values when confronted by serious and credible claims of discrimination raised in the context of prosecutions involving the most heinous crimes, then it can restructure the process for review of those claims. In that process, the message to state courts and lower federal courts will be one that makes clear that racial discrimination in the administration of the death penalty cannot be tolerated or excused. Otherwise, the credibility of the most potent deterrent in the punishment arsenal will be inherently compromised.

Of course, swift and complete reform could be achieved legislatively. However, the two main achievements of Congress in recent years have been the restriction of federal habeas relief through the passage of AEDPA[224] in 1996, which expanded the requirement for deference to state court determinations in the federal habeas process,[225] and the creation of an expedited review process to speed capital cases through post-trial review in state and federal courts to execution.[226]

The impact of racial prejudice on the integrity of the criminal justice system cannot be ignored. As the Court observed in *Rose v. Mitchell*: "Discrimination on the basis of race, odious in all aspects, is especially

224. Antiterrorism and Effective Death Penalty Act of 1996, 104 P.L. 132 (1996).
225. 28 U.S.C. § 2254(d), (e) (2010).
226. 28 U.S.C. § 2261, et seq. The statutory scheme provides for expedited review of federal habeas actions in which a sentence of death imposed by a state court is challenged on federal constitutional grounds where state process complies with Congressionally-dictated standards for procedural due process.

pernicious in the administration of justice."[227] Ultimately, the duty to enforce constitutional protections rests with the judicial branch. It is the Supreme Court that must confront the failure of its jurisprudence to prevent racial discrimination in the administration of the death penalty.

227. Rose v. Mitchell, 443 U.S. 545, 555 (1979).