LETHAL DISCRIMINATION

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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 is an article that explores racial discrimination in the administration of the death penalty through the prism of a single case. The purpose is to explain how courts ignore and excuse racial animus in the operation of the criminal justice system. The fundamental premise is that capital sentences cannot be fairly imposed consistent with our constitutional values as long as the death penalty is tainted by racism.

The State of Texas executed Gary Sterling by lethal injection on August 10, 2005, at the conclusion of a typically lengthy period of post-conviction litigation in state and federal courts challenging his capital murder conviction and sentence of death.2 In permitting the execution to proceed,

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the reviewing courts disregarded the constitutional significance of evidence that his death sentence was the likely product of racial discrimination, at least on the part of one member of his capital sentencing jury. That juror’s post-trial affidavit included references to African Americans as niggers, references that he confirmed in his testimony at the state court hearing on Sterling’s application for post-conviction relief:

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.

Sterling argued that trial counsel’s failure to inquire into the juror’s racial attitudes during voir dire at his capital trial constituted ineffective assistance of counsel.

3. The fact that only one of the jurors at Sterling’s capital trial evidenced racial bias against African-Americans would not appear to be a critical fact in light of the Court’s holdings in other contexts that the taint of a single seated or improperly-excluded juror requires relief from an adverse judgment rendered by the jury. See, e.g., Davis v. Georgia, 429 U.S. 122, 122 (1975) (per curiam) (relief required for improper exclusion of a single juror qualified for service in capital trial under Witherspoon v. Illinois, 391 U.S. 510, 522 (1968)) and Maxwell v. Bishop, 398 U.S. 262, 264-65 (1970) (identifying single venireperson as improperly excluded under Witherspoon). In Gray v. Mississippi, 481 U.S. 648, 651, 667 (1987), the Court held that error in the improper exclusion of a Witherspoon eligible juror could not be cured by the fact that the prosecution indicated it would have used an available peremptory challenge on the juror had the trial court not ordered exclusion, rejecting application of harmless error analysis to claims of improper exclusion of jurors.

4. Sterling v. Cockrell, 2003 WL 21488632, at *35 (referencing affidavit of Juror W, subscribed and sworn to on July 12, 1993) (emphasis added). The Fifth Circuit also referenced the statements made by the juror in his post-trial affidavit. Supra note 1. 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 Uttech, 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 Uttech, 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.

5. Sterling v. Dretke, 100 F. App’x 239, 242-43 (5th Cir. 2004).
Sterling’s case did not draw national attention except for an op-ed piece published in the Los Angeles Times. He was not a celebrity whose trial commanded extensive media coverage, nor was the victim a prominent member of the community. The cause of death, a single blow to the head, did not include the grotesque features that generate widespread outrage or curiosity.

In a term in which at least five of the six death penalty cases reviewed by the United States Supreme Court were decided favorably for the capital defendants, by contrast, not a single Justice dissented from the denial of Sterling’s petition for certiorari.


9. Sterling v. Dretke, 544 U.S. 1053 (2005). 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 (August 10, 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 v. Dretke, 100 F. App’x at 244-45.
I. STERLING’S “RACIST JUROR” CLAIM

Of Sterling’s many claims about the irregularity of his trial,10 only his ineffective assistance claim11 based on counsel’s failure to question Juror W about his attitudes toward African-Americans caught the attention of the federal appeals court reviewing his case,12 and that court found that it did not merit relief.13

Sterling’s lone allegation that trial counsel’s ineffectiveness warranted review was predicated on the Supreme Court’s decision in Turner v. Murray.14 There, the Court had held that in a death penalty case in which the defendant and victim were of different races, the defense was entitled to question prospective jurors about their racial attitudes to ensure that the penalty is not imposed based on racially-discriminatory views.15 The 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


11. The leading United States Supreme Court decision on the Sixth Amendment right to effective assistance of counsel is Strickland v. Washington, 466 U.S. 668 (1984). The accused suffers ineffective assistance when counsel’s deficient performance based on application of “objective standards of reasonableness,” id. at 688, “under prevailing professional norms,” Wiggins v. Smith, 539 U.S. 510, 521 (2003), results in prejudice to the accused. Prejudice is demonstrated when the accused can show that but for counsel’s errors, there exists a reasonable probability that the outcome of the proceedings would have been different. Strickland, 466 U.S at 692. The standard for effective assistance was initially applied in the context of a capital prosecution in Strickland, and capital counsel’s performance has been reviewed in subsequent cases particularly in the context of capital sentencing proceedings. E.g., Wiggins, Williams v. Taylor, 529 U.S. 362 (2000); Burger v. Kemp, 483 U.S. 776 (1987); Rompilla v. Beard, 545 U.S. 374 (2005).

12. The Fifth Circuit granted a certificate of appealability necessary to afford a federal habeas petitioner the option of appealing from the denial of a federal habeas corpus petition. Sterling, 100 F. App’x 239, 242-43 (5th Cir. 2004). A federal habeas petitioner has no right to appeal an adverse decision on the petition by the district court unless either that court or the court of appeals issues a certificate of appealability pursuant to 28 U.S.C. § 2253 (c) identifying those issues upon which a claimed violation of a constitutional right raises an issue upon which reasonable jurists could disagree. Barefoot v. Estelle, 463 U.S. 880, 893 n. 1 (1983); Hohn v. United States, 524 U.S. 236, 253 (1998) (holding Court has authority to review denial of certificate of appealability by circuit court of appeals on certiorari).


15. Id. at 35.
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.\(^\text{16}\) 

*Turner* confirmed concerns previously identified with regard to racial prejudice in the administration of the death penalty in *Ham v. South Carolina.*\(^\text{17}\) There, the Court recognized that risk of racial bias infecting jury deliberations in criminal cases required opportunity for the African-American defendant’s trial counsel to inquire into potential racial bias of prospective jurors as “essential demands of fairness required by Due Process Clause.”\(^\text{18}\) 

But *Turner* and *Ham,* relatively recent decisions in the Court’s death penalty jurisprudence, did not address a novel problem in capital sentencing following the rejection of then-existing capital punishment schemes in *Furman v. Georgia,*\(^\text{19}\) or approval of newly-enacted post-*Furman* state death penalty statutes in 1976 in *Gregg v. Georgia,*\(^\text{20}\) *Proffitt v. Florida,*\(^\text{21}\) and *Jurek v. Texas.*\(^\text{22}\) The Court recognized the *Turner* principle that afforded Sterling’s counsel the right to inquire about racial attitudes held by prospective jurors at least as early as *Aldridge v. United States*\(^\text{23}\) in 1931. The history of this line of thinking provides a starting point for understanding the problem posed by counsel’s decision not to make this inquiry of the prospective jurors in Sterling’s capital trial.

In *Aldridge,* the Court noted the potential for racial prejudice to improperly influence the capital sentencing decision in the prosecution of a “negro” defendant charged with the murder of a white police officer.\(^\text{24}\) Defense counsel related that in a prior trial, a “Southern” venireperson had indicated that she might be influenced by the fact that a black defendant was charged with the murder of a white person, and requested that the trial court inquire into possible racial prejudice on the part of prospective jurors. The trial court refused.\(^\text{25}\)

The *Aldridge* Court reversed,\(^\text{26}\) citing a series of decisions rendered by Southern courts authorizing inquiry into juror bias in cases involving minority defendants.\(^\text{27}\) It also noted that the inquiry into juror prejudice had

\(^{16}\) *Id.* at 35.

\(^{17}\) 409 U.S. 524 (1973).

\(^{18}\) *Id.* at 526.

\(^{19}\) 408 U.S. 238 (1972).


\(^{22}\) 428 U.S. 262 (1976).

\(^{23}\) 283 U.S. 308 (1931).

\(^{24}\) *Id.* at 309 (the Court did not capitalize negro in its opinion).

\(^{25}\) *Id.* at 310.

\(^{26}\) *Id.* at 315.

\(^{27}\) See Pinder v. State, 8 So. 837, 838-39, 841 (Fla. 1891); Hill v. State, 72 So. 1003, 1003 (Miss. 1916); State v. McAfee, 64 N. C. 339, 1870 WL 1747 (N.C. 1870); Fendrick v. State, 45 S.W. 589, 590-91 (Tex. Crim. App. 1898); and State v. Sanders, 88 S. E. 10, 12 (S.C. 1916) (juror expressed prejudice against defense counsel based on counsel’s race). The *Aldridge* Court also noted decisions in which prospective jurors admitting racial prejudice were sua sponte excused by trial courts. 283 U.S. at 312, n. 2.
been extended to permit examination “as to the existence of a disqualifying state of mind and such examination has been upheld with respect to other races than the black race, and in relation to religious and other prejudices of a serious character.”

Moreover, the Court recognized the significance of racial prejudice in capital cases, explaining: “Despite the privileges accorded to the negro, we do not think that it can be said that the possibility of such prejudice is so remote as to justify the risk in forbidding the inquiry. And this risk becomes most grave when the issue is of life or death.”

In *Sterling*, the death penalty was imposed by an all-white jury on a black defendant charged with killing a white man. Prospective jurors were never questioned about possible prejudice by defense counsel, even though courts have long recognized the potential for verdicts tainted by racial discrimination. *Sterling*’s death sentence was, moreover, the product of a sentencing verdict rendered by a jury that included at least one juror whose post-trial admissions demonstrated the existence of the kind of racial prejudice that the Court has long recognized as contaminating the criminal justice system. Nevertheless, no court intervened to prevent his execution.

### A. Assessing racial discrimination based on language

The undisputed evidence developed in the state post-conviction phase of the *Sterling* litigation was that Juror W referred to blacks as *niggers*. He affirmed this use of the word in his affidavit when testifying under oath at the evidentiary hearing conducted on *Sterling*’s application for relief under Article 11.071.

The use of the word *nigger* is so profoundly troubling precisely because of its historical significance as a term of derision and contempt directly related to the race or ethnicity of the individual so identified. It

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28. *Aldridge*, 283 U.S. at 313 (citing *Potter v. State*, 216 S.W. 886, 888 (Tex. Crim. App. 1919)) (approving examination of Jewish venirepersons about bias where accused charged with criminal libel in attack on individual presumed to be Jewish, having printed comments linking Jews to routine arson of their businesses); *People v. Reyes*, 5 Cal. 347, 349 (Cal. 1855) (inquiry into juror prejudice directed toward Mexican nationals); *Watson v. Whitney*, 23 Cal. 375, 379 (Cal. 1863) (reversing where trial court refused to permit voir dire based on possible prejudice against “squatters” in land title action); *People v. Car Soy*, 57 Cal. 102, 103 (Cal. 1880) (authorizing question of prospective juror regarding possible prejudice against witness based on witness’s Chinese ethnicity); *Horst v. Silverman*, 55 P. 52, 72 (Wash. 1898) (proper to inquire of prospective juror regarding bias against persons of Jewish faith in civil action).

29. *Id.* at 314 (emphasis added) (footnote omitted).


31. For example, a particularly complicated issue involves the political struggle over the inclusion of Mark Twain’s novel, *Huckleberry Finn*, in the required public school curriculum. Long considered a literary classic, it has been the focus of considerable social criticism because Twain’s use of the word *nigger* is neither considered ennobling in his characterization of Jim, nor accepted as a purely historically accurate
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remains so controversial that the mere reference to the word typically results in emotional responses ranging from rage to incredulity to extreme distress. In recent years, in fact, primarily well after Juror W sat during punishment deliberations at Sterling’s trial, references to nigger, or its derivative, “nigga,” have proven even more controversial in both the black and white communities. This has resulted from the rather com-

portrayal of American society. Instead, it is often viewed as perpetuating notions of racial inferiority that are especially intimidating or demeaning to African-American students and, undoubtedly, confusing to white students, particularly those trying to determine their own views of ethnicity and its place in society. Its mandatory inclusion in the curriculum may thus be explained by proponents of the work’s literary value as historically valid, while opponents may well sense that this judgment itself serves to perpetuate racial stereotyping leading to significant emotional distress. See Mark Twain, The Adventures of Huckleberry Finn (Random House 1996).

For a thoughtful critique, see Sharon E. Rush, Emotional Segregation: Huckleberry Finn in the Modern Classroom, 36 U. Mich. J.L. Reform 305 (2003). Professor Rush concludes with a rather persuasive point calling for educators to consider the impact of Twain’s literary expression on contemporary students struggling to come to grips with the continuing social pressures imposed on younger students by present and historical racial prejudice in American life: “A social harm model suggests that if educational teams better understood how racism functions in the debate over Huckleberry Finn, they would voluntarily choose to stop teaching the novel to emotionally and intellectually immature students.” Id. at 366.


The word “nigger” is a key term in American culture. It is a profoundly hurtful racial slur meant to stigmatize African Americans; on occasion, it also has been used against members of other racial or ethnic groups, including Chinese, other Asians, East Indians, Arabs and darker-skinned people. It has been an important feature of many of the worst episodes of bigotry in American history. It has accompanied innumerable lynchings, beatings, acts of arson, and other racially motivated attacks upon blacks. It has also been featured in countless jokes and cartoons that both reflect and encourage the disparagement of blacks. It is the signature phrase of racial prejudice.


33. One might suggest that the reference to “black and white communities” reflects a view that American society remains divided along the lines of race or ethnicity and thus serves to reinforce notions of racial separation. This article addresses the impact of racially-correlated attitudes on the conduct of the criminal justice system, particularly with regard to use of the death penalty, but it is important to recognize that there is no monolithic “black community,” just as there is no monolithic “white community.” There is incredible diversity of political and social viewpoints within the nation’s African American population. For an insightful overview of this diversity, see Ta-Nehisi Coates, ‘This is How We Lost to the White Man': The Audacity of Bill Cosby’s Black Conservatism, The Atlantic, May 2008, available at http://www.theatlantic.com/doc/200805/cosby.
mon usage of this language in music performed largely by black artists, which contributed to the NAACP’s symbolic “burial” of the word in 2007.

The spelling used by the Fifth Circuit in rejecting Sterling’s racist juror claim—“nig**r”—undoubtedly reflects sensitivity toward the likely response to the word as demonstrated in the contemporary conflict over its current use in public discourse. Yet, in deferring to the position that the use of nigger is inherently inappropriate in all circumstances—including a judicial opinion—the court displayed political sensitivity. In doing so, it also reinforced the inference that the juror’s use of the word represents something more than the Texas Attorney General’s attempt to minimize the impact of the word by characterizing the juror’s language as “uncouth.” Instead, the court’s decision not to spell the word demonstrates


For the NAACP, Oprah Winfrey and all the other right-thinking black grown-ups to suddenly start wagging their fingers at black hip-hop artists, a segment of the world they’d more or less previously ignored, for using offensive words and images neglects the minor consideration that hip-hop, and by extension black youth culture, has been having this discussion for years. If, at any random point in the last three decades, anyone who came of age in the civil rights era had been paying critical attention to hip-hop instead of belittling it out-of-hand, they would have heard numerous voices throughout the music’s history speaking up not only for black self-respect, but also for the uplift and respect of women, and peace and harmony among all people.

36. For instance, consider the public furor over comments made by Reverend Jesse Jackson regarding Democratic Presidential nominee Senator Barack Obama in which Jackson was recorded criticizing Obama for talking down to blacks, in advocating a more aggressive approach toward self-responsibility within the African-American community. See Clarence Page, Left Speechless, CHICAGO TRIBUNE, July 20, 2008, available at www.chicagotribune.com/news/columnists/chi-oped07200pagejul20,0,7494331.column. Page reported, “Besides whispering to another guest on the set that he would like to de-sex the Democratic presidential candidate, Jackson also accused Obama of “talking down to black people . . . telling niggers how to behave.”’’ Id.

37. Brief in Support of Respondent Cockrell’s Motion for Summary Judgment at 49 n. 36, Sterling v. Cockrell, No. Civ.A. 3:01-CV-2280, 2003 WL 21488632 (N.D.Tex. April 23, 2003). The Attorney General also argued that it was “somewhat unlikely that [Juror W] would have honestly answered” questions relating to racial bias during voir dire, as he did in his affidavit. Id.
the word's incredible power as evidence of racism directed against African-Americans.

Moreover, the Fifth Circuit's reference to Juror W's characterization of African-Americans as "nig**rs," does not appear to reflect any consensus among appellate courts forced to deal with this kind of reprehensible language. For instance, in an employment discrimination case Judge Lavinski Smith of the Eighth Circuit recounted the circuit's treatment of claims based on the use of discriminatory language in Singletary v. Missouri Department of Corrections:38  “Specifically, Singletary had information, although not first-hand, that some workers and managers had referred to him as a nigger when talking with others. We have held that racial slurs alone do not render a work environment hostile as a matter of law."39 There was no added emphasis in Judge Smith's opinion, and he went on to discuss prior Eighth Circuit precedent:

Under our case law, the racial slurs did not render the work environment . . . objectively hostile. For example, we held six instances of racially derogatory language from managers and coworkers over the course of a year and a half, together with burning cross graffiti, did not render the workplace objectively hostile. Although managers and coworkers said, "that damn nigger," "damn black," "nigger s**t, radio," "nigger-rigging," and "f***ing nigger," we pointed out two of the comments were not made to the plaintiff, two were not referring directly to him, and another was made in the heat of an altercation involving threats by the plaintiff.40

38. 423 F.3d 886 (8th Cir. 2005).
39. Id. at 893. But, the court also noted that use of racial epithets by a supervisor toward an employee had been deemed sufficient to state a hostile work environment claim in Ross v. Douglas County, Nebraska, 234 F.3d 391 (8th Cir. 2000).
40. Bainbridge v. Loffredo Gardens, Inc., 378 F.3d 756, 759-60 (8th Cir. 2004) (citing Jackson v. Flint Inc. No. Am. Corp., 370 F.3d 791, 792-93 (8th Cir. 2004)). The claim in Loffredo Gardens involved racial slurs directed at Asians and Asian-Americans, among others, as the court there recounted:

Bainbridge contends he heard the Loffredos make racially offensive remarks about Asians ("Jap," "nip," "gook") approximately once a month during his two years of employment. Nevertheless, despite taking contemporaneous notes, Bainbridge can recall only a few specific instances of racially derogatory comments about Asians made in his presence. Bainbridge asserts that on June 25, 1998, Jim Loffredo referred to a white employee as a "Jap," that on November 20, 1998, he overheard Mike Loffredo refer to an Asian customer as a "Jap," that on June 12, 1999 Mike Loffredo referred to an Asian customer as a "nip," and that on October 29, 1999, while showing his Nissan to Mike and Larry Loffredo, Larry said, "Yea, those Japs can do something right." Bainbridge also contends Mike Loffredo used the term "Jap" or "nip" in front of him at least once a month even after Bainbridge reminded him his wife was Japanese. Bainbridge also contends the Loffredos used racial slurs referring to other minorities, including "spic," "wetback," "monkey," and "nigger." Bainbridge contends he complained to Gene Loffredo, Jr. in 1998 about the derogatory remarks directed at Asians. Finally, on June 25, 2000, while Bainbridge was talking with Mike Loffredo, Mike stated another "Jap" produce company was going to try to run Loffredo Gardens out of business. Bainbridge then complained to his immediate supervisor, Dave Dennis, and left on his scheduled vacation.
In these employment cases, the racial slurs employed were no less reflective of prejudice or insensitivity than those admitted by Juror W, yet neither Judge Smith, an African American from Arkansas, nor other Eighth Circuit judges writing opinions in these cases shied away from using factually accurate, if blunt, references to the offensive language arguably supporting the claims of hostility in the working environment.4

Similarly, in Eddy v. Waffle House,42 a public accommodations case, the Fourth Circuit described the offensive language giving rise to the claim of racial discrimination: “The actual comment allegedly was ‘We don’t serve niggers here.’”43 The court’s opinion then relates counsel’s explanation of the racial slur: “According to Mr. Lander, defense counsel’s statement during his opening statement that ‘Mark Lander will tell you that . . . he heard the statement, they don’t serve niggers here,’ when Mr. Lander actually heard the phrase ‘we don’t serve niggers here,’ prejudiced and confused the jury.”44 Once again, when the precise offense language was critical in the plaintiffs’ action in demonstrating intent and effect of the use of racial slurs, the federal circuit court reported the language actually at issue without alteration.

Nevertheless, in their written opinions the courts relate the language actually used by parties and witnesses; offensive language related directly by counsel in their presentations of evidence and argument that could clearly be criticized as insensitive. The interest of the Fifth Circuit in Sterling to avoid a written, printed reference to the slur Sterling’s capital juror admitted using might be taken as a response to criticism or simply as indicating respect for African-American citizens. On the other hand, it may demonstrate the court’s rather cynical attempt to justify Sterling’s death sentence by emphasizing its own sensitivity to blacks. In adopting the euphemism, however, the court showed how very powerful the juror’s choice of language was in our social life, unambiguously raising the unanswered question of how a court so concerned with using the word nigger in its opinion could have permitted Sterling’s death sentence to remain intact.45

378 F.3d at 759. Ironically, an accepted convention for use of asterisks to mask the actual spelling of certain offensive words apparently applies to words that are considered offensive because they convey meanings that have sexual or excretive human functions. For instance, in F.C.C. v. Fox Television Systems, Inc., 129 S.Ct. 1800 (2009), the Court discussed the authority of the Federal Communications Commission to sanction broadcasts containing offensive language, referring to the performer Cher’s response to her critics—“So f*** ‘em”—and a comment made by performer Nicole Ritchie in The Simple Life, a Fox-produced television show: “Have you ever tried to get cow s*** out of a Prada purse? It’s not so f***ing simple.” 129 S.Ct. at 1808. This same convention does not generally appear to apply to ethnic slurs, however, as the circuit court cases suggest.

41. Chief Judge James Loken wrote the opinion in Bainbridge, supra note 40, while Judge Morris Sheppard Arnold wrote the opinion for the panel in Jackson, supra note 40.
42. 482 F.3d 674 (4th Cir. 2007).
43. Id. at 676, n. 1.
44. Id. at 680 (emphasis added).
45. There are two arguments that may be advanced for not substituting the euphemism “the N word” for the word nigger, particularly when it involves a discussion of the word in common language by a prospective juror, witness or defendant. First, the
The juror’s reference to African Americans as “niggers” can hardly be dismissed despite his own refusal to characterize himself as a racist. The use of such a racially-charged reference is routinely considered evidence of racism. In contrast to the Fifth Circuit’s rather dismissive approach to W’s language in the context of Sterling’s capital prosecution, federal courts have viewed this reference to demonstrate evidence of racism, particularly in the context of employment discrimination and harassment claims.

For instance, in Rodgers v. Western-South Life Ins., the Seventh Circuit observed that “nigger” is an “unambiguously racial epithet,” noting that “[p]erhaps no single act can more quickly alter the conditions of employment and create an abusive working environment,” and rejecting the claim that its use by a white supervisor was less explicitly racist merely because black employees used it among themselves. Similarly, in Kendall v. Block, the Fifth Circuit itself held that use of the word nigger by a white supervisor to refer to a black employee is “direct” evidence of discrimination. The Ninth Circuit, in Anderson v. Pacific Maritime Association, characterized the allegations of racial discrimination and hostile workplace, as “a horrific and pervasive picture of racial animosity and discrimination on the waterfront of the Pacific Northwest,” based on repetitive use of “nigger” and permutations of the word, as well as “direct, racially charged physical threats.” And, in Bailey v. Binyon, the district court held that “the use of the word ‘nigger’ automatically separates the person addressed from every non-black person; this is discrimination per se.”

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46. Sterling v. Dretke, 117 F. App’x 328, 332 (5th Cir. 2004). The court noted:

W testified at the state habeas hearing that “the color [of a defendant] doesn’t make no difference” and that he felt the same way at the time of Sterling’s trial and would have said so if asked. [W] also stated he has some very close friends who are African-American; using the term “nig**r” did not make him a racist; and he did not consider himself to be a racist.

47. 12 F.3d 668 (7th Cir. 1993).

48. Id. at 675.

49. 821 F.2d 1142 (5th Cir. 1987).

50. Id. at 1145-46. The court relied on an Eleventh Circuit decision, Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (11th Cir.1982), in describing what constitutes “direct evidence” of discrimination. Lee itself cited Crawford v. Western Elec. Co, Inc., 614 F.2d 1300, 1315 (5th Cir. 1980). The Crawford Court explained: “Statistical disparity between blacks and whites, especially when coupled with direct evidence of racially motivated conduct or language, might also, in a proper case, satisfy plaintiffs’ initial burden.”

51. 336 F.3d 924 (9th Cir. 2003).

52. Id. at 926.


54. Id. at 927 (relying on City of Minneapolis v. Richardson, 239 N.W.2d 197, 203 (Minn. 1976)).
Another Fifth Circuit decision is particularly enlightening with respect to its attempt to mask Juror W’s use of the word “nigger”. In Brown v. East Mississippi Electric Power Association,⁵⁵ the circuit court considered a racial discrimination claim based on the use of the word “nigger.” The court observed:

Unlike certain age-related comments which we have found too vague to constitute evidence of discrimination, the term “nigger” is a universally recognized opprobrium, stigmatizing African-Americans because of their race. That Pippen usually was circumspect in using the term in the presence of African-Americans underscores that he knew it was insulting. Nonetheless, he persisted in demeaning African-Americans by using it among whites. This is racism.⁵⁶

The irony lies in the different treatment given this offensive language in the Fifth Circuit’s decisions in this employment discrimination case and in Sterling. In Brown, the panel was willing to use the actual spelling of the word, while the Sterling panel seemingly sought to minimize the impact of Juror W’s racial animus by its use of asterisks in place of letters and its decision not to publish the opinion. More ironic, perhaps, is the fact that the Fifth Circuit’s spelling, when pronounced orally, results in the same spoken word as the fully spelled “nigger.”⁵⁷ By masking the language, the Sterling panel, whether deliberately or inadvertently, subordinated the issue of the juror’s racial attitudes and their possible contribution to the death sentence imposed to a superficial, politically correct avoidance of any suggestion of a lack of sensitivity on its own part to the juror’s choice of language.

Juror W’s characterization of blacks as “niggers” must certainly be viewed as sufficiently indicative of racial bias in his own experience and character. His participation in the capital sentencing decision can hardly be dismissed as unimportant, although he was only one of twelve members of the all-white jury that heard the case and imposed the death penalty. The circuit court credited defense counsel’s failure to question him for racial bias—whether as a matter of inadvertence or deliberate strategy—in part because counsel explained that while he had reason to know that W was biased, he was representative of typical juror mindset in Navarro County, where Sterling was tried.⁵⁸ If counsel was, in fact, correct in this assessment, one must conclude that other jurors were similarly prejudiced against African-Americans and that implications for the integrity of the jury’s fact-finding cannot be underestimated.

⁵⁵. 989 F.2d 858 (5th Cir. 1993).
⁵⁶. Id. at 861.
⁵⁷. Consider the action of the Arkansas Department of Motor Vehicles, which withdrew all license plates bearing “NGR” upon complaint of a white schoolteacher when she was issued a new plate that included this combination of letters. She found the plate offensive and the State agreed. See Noel E. Oman, State Scraps 981 License Plates Lest Letters’ Lineup Give Offense, Ark. Democrat-Gazette, July 24, 2008 at 1B, 10B.
⁵⁸. 117 F. App’x at 332 (counsel described W as a “middle-of-the-road juror for Navarro County.”).
B. Racial discrimination—the threat to accurate fact-finding by capital jurors

Racially-discriminatory attitudes toward a capital defendant, whether consciously or subconsciously held, threaten the accuracy of fact-finding critical to a fair administration of the death penalty, as the Court noted in Turner and Ham. Under Texas law, jury fact-finding in the guilt/innocence and punishment phases of trial are critical to the imposition of a death sentence. The likelihood that race affects juror attitudes toward capital punishment is certainly supported by survey research that not only confirms long-term disparity in support for the death penalty among white and black Americans, but also suggests that among whites, that support may correlate with general racially-discriminatory attitudes. Political scientists Mark Peffley and Jon Horwitz concluded in their study published in 2008: "There seems to be little doubt that, at least for whites, racial attitudes often affect their support for capital punishment."

In the context of the Texas capital murder and sentencing schemes, Sterling faced the possibility that racial bias might subconsciously influence a juror at three distinct points in the deliberation process.

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One of the most persistent findings of public opinion polls is that blacks are more likely than whites to oppose capital punishment . . . in each year studied between 1953 and 1974, blacks were more likely than whites to express opposition and . . . after the late 1950's, a majority of blacks opposed this form of punishment while a majority of whites supported it.

(citation omitted). See also Joseph Carroll, Who Supports the Death Penalty?, Death Penalty Information Center (November 16, 2004), available at http://www.deathpenaltyinfo.org/article.php?id=1266&scid. The Gallup results show that over the period 2001-04, support for the death penalty among whites averaged 71%, while support among blacks surveyed stood at 44%. Id.


63. Id. at 999; see also Chester L. Britt, Race, Religion, and Support for the Death Penalty: A Research Note, 15 Justice Quarterly 175, 175 (1998) (describing prior research on race and affiliation within Protestant congregations in assessing support or opposition to death penalty and reporting a finding that while black and white fundamentalist Christians reflect similar religious behavior and beliefs, “black fundamentalists show the least support for the death penalty, while white fundamentalists show the greatest support”).
1. The threat to accurate and fair fact-finding on guilt/innocence

In considering a capital defendant’s guilt under the applicable statute in Sterling’s case,\(^{64}\) a juror was required to decide whether the prosecution proved that the murder allegedly committed by the accused was “intentional.”\(^{65}\) Thus, a biased juror tending to believe that all African Americans are particularly violent might be predisposed to find that an African-American defendant charged with murder acted with the highest degree of criminal culpability in the commission of the crime, that is acting intentionally, rather than knowingly. Unwarranted assumptions about racially-determined tendencies toward violence, or underlying racist judgments about either the accused or the victim compromise the ability of jurors to render just verdicts.\(^{66}\) In Sterling, the question of degree of

\(^{64}\) Sterling was indicted for murder committed during the commission of a robbery. Tex. Penal Code Ann. §19.03(a)(2) (Vernon 2005) (“the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery . . . .,”) (emphasis added). Somewhat inexplicably, Texas capital murder law has traditionally not authorized the death penalty for a murder committed intentionally, if it was committed in the course of another felony. The range of punishment for such an intentional, but non-capital murder is five to 99 years or life imprisonment. Tex. Penal Code Ann. §12.32(a) (Vernon 2009). The punishment is in the discretion of the trial court or sentencing jury. Tex. Code Crim. Proc. Ann. Art. 37.07, Sec. 2(b) (Vernon 2007).

\(^{65}\) The offense of murder, a necessary element of capital murder, is defined under Texas law as when “a person intentionally or knowingly causes the death of an individual.” Tex. Penal Code Ann. §19.02(b)(1) (Vernon 2009). Thus, while murder itself may be committed with either an intentional or knowing mental state, a capital crime requires proof of the higher degree of criminal intent. Tex. Penal Code Ann. § 6.02(d) (Vernon 2005) provides:

(d) Culpable mental states are classified according to relative degrees, from highest to lowest, as follows:

1. intentional;
2. knowing;
3. reckless;
4. criminal negligence.

The Code further defines the culpable mental states of intentional and knowing states of mind:

(a) A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

(b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. Tex. Penal Code Ann. § 6.03(a) and (b) (Vernon 2009).

\(^{66}\) The level of the actor's intent in the commission of homicide has long been a factor in assessing the degree of offense committed. In Cain v. State, 549 S.W.2d 707 (Tex. Crim. App. 1977), for example, a police officer was prosecuted for the murder of a 12-year old Hispanic burglary suspect. The murder occurred while he interrogated the suspect at gunpoint in a simulated game of Russian roulette. Cain threatened to fire if the handcuffed suspect did not tell the truth, and then fired a single fatal shot at the child's head. The jury convicted the officer of murder with malice under the prior murder statute and sentenced him to serve a five-year prison sentence. Id. at 709-12. The subsequent investigation showed that prints recovered from the burglarized service station matched neither the deceased’s, Santos Rodriguez, nor his
2. Implications for the finding on required proof of a “deliberate” act

Second, Texas law applicable to Sterling’s trial required the State to prove that the intentional murder was also committed “deliberately” as the first element of its punishment case in a capital prosecution. The Texas Court of Criminal Appeals consistently held that proof that the defendant acted “deliberately,” an element of the sentencing case, differed from proof that he acted “intentionally” in committing the capital offense. A juror predisposed to believe that African Americans are prone to behave violently would tend toward bias in favor of evaluating the

67. Sterling signed a confession typed by the investigator in the case. Defendant’s Application for Post-Conviction Relief Pursuant to Article 11.071, Texas Code of Criminal Procedure Ex. A, Sterling v. Cockrell, No. Civ.A. 3:01-CV-2280, 2003 WL 21488632, at *40 (N.D. Tex. Apr. 23, 2003) (on file with Harvard Journal on Racial & Ethnic Justice). In the statement, he implicated himself and Clyde Cooks, Application for Post-Conviction Relief Ex. F, Cockrell, 2003 WL 21488632, another individual who had a lengthy criminal record, in the robbery of the victim. Application for Post-Conviction Relief Ex. A, at 13, Cockrell, 2003 WL 21488632 at *40. They drove the elderly victim and his girlfriend out into the country after he was found to have no money. Application for Post-Conviction Relief Ex. A, at 1-2, Cockrell, 2003 WL 21488632. Sterling admitted striking the victim on the head with a tire jack, but apparently only to knock him out. Application for Post-Conviction Relief Ex. A, at 2, Cockrell, 2003 WL 21488632. In his confession he explained that he “told Cooks that they should leave Carthey’s car so that Carthey could drive home on awakening, which indicates that he did not intend to cause Carthey’s death.” Cockrell, 2003 WL 21488632, at *17. Although the trial court ruled admissible the written confession, it curiously was not offered into evidence by the prosecution at trial. Id. at *41. The Texas Court of Criminal Appeals addressed admissibility of the “written confession” in its opinion on direct appeal, even though the confession was neither offered, nor admitted, at trial. See Sterling v. State, 830 S.W.2d 114, 116—17 (Tex. Crim. App. 1992). The federal habeas court rejected Sterling’s argument that counsel’s failure to offer his uncounseled, exculpatory “written” statement constituted ineffective assistance. Cockrell, 2003 WL 21488632, at *41-42. The exculpatory portion of the “written confession” would have supported a lesser-included offense charge and would have negated the intent necessary for a capital murder conviction and death sentence. Id. at *41. Clyde Cooks was prosecuted for the burglary of the victim’s residence, but never prosecuted for the murder. Application for Post-Conviction Relief Ex. H, State v. Clyde Excella Cooks, No. 23, 001 (13th Jud. Dist. Ct. Navarro County, Texas) (Feb. 27, 1989) (on file with Harvard Journal on Racial & Ethnic Justice).


69. See, e.g., Fearance v. State, 620 S.W.2d 577, 584 (Tex. Crim. App. 1980), opinion on rel’g, (explaining that proof of “deliberate” conduct relates to a thought process
punishment evidence as supporting a finding that the defendant acted "deliberately" in committing a capital murder.\textsuperscript{70}

3. The "future dangerousness" finding

The third, and critical issue for jury consideration in the punishment phase of a Texas capital trial involves a determination of whether there is a reasonable probability that the defendant would commit acts of criminal violence in the future.\textsuperscript{71} The bias reflected in a general expectation that African Americans were prone to violence—certainly evident in Juror W's affidavit—would have been particularly prejudicial in the juror's consideration of whether "there was a probability that Sterling would commit acts of criminal violence in the future."\textsuperscript{72} A juror predisposed to believe that African Americans tend to be violent would likely have less

\begin{quote}
"embracing more than a will to engage in conduct and activates the intentional conduct.").
\end{quote}

For instance, Juror W's affidavit, \textit{supra}, text accompanying note 4, demonstrates his characterization of African Americans as violent in terms of a number of specific incidents he relates, suggesting a more general view that African Americans tend to be violent. \textit{See also Peffley & Hurwitz, supra} note 62. Their research suggests that disparity in support for the death penalty among whites and blacks is the possible link to overall attitudes toward crime, crime suppression, and punishment demonstrated in responses from the two groups. Peffley and Hurwitz suggest that a difference in attitudes toward crime within the two communities impacts their views of punishment. Individuals who believe that crime is the product of deficiencies in character are generally more likely to be punitive and support capital punishment, while those who tend to view crime as the result of external conditions, such as poverty or poor economic conditions, are more likely to support a rehabilitation model of punishment. \textit{Id.} at 999. Peffley and Hurwitz conclude that while support for non-capital punishment is roughly equal between whites and blacks, the underlying attitudinal framework differs: whites tend to view crime as the product of internal factors, e.g., character deficiency, and thus, punishment is retributive; while blacks support punishment because of fear of victimization, e.g., that external factors will result in them becoming crime victims. \textit{Id.} at 997-98. \textit{See also} Steven F. Cohn, Steven E. Barkan, & William A. Halteman, \textit{Punitive Attitudes toward Criminals: Race Consensus or Racial Conflict?}, \textit{38 Soc. Problems} 287 (1991).

Moreover, Juror W also expressed a strong preference for mandatory imposition of the death penalty in his affidavit that could have disqualified him from service because of an inability to consider mitigation evidence warranting a life sentence. He stated:

I think they should hang people that murder instead of sending them down there and feeding them the rest of their life. I think the prisons would be better off if we just hang 'em right away instead of feeding them 15 or 20 years. I think all people who do a capital murder should die. They didn't give the people they killed a choice between life and death. I have believed this way for at least seven or eight years.


\textit{Tex. Code Crim. Proc. Ann.} art. 37.071 § (2)(b)(1) (Vernon 2009) (sentencing jury shall be required to answer the following special issue: whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society). This was the second issue propounded to jurors under the prior version of the statute, which was applicable at the time of Sterling's offense and trial, but has been subsequently re-numbered upon amendment of the statute. \textit{See Smith v. State}, 907 S.W.2d 522, 534 (Tex. Crim. App. 1995).

difficulty in concluding, regardless of the evidence, that the convicted capital defendant would commit acts of criminal violence in the future. The juror's attitudes would compromise accuracy in fact-finding because their view of the evidence would be tilted toward an affirmative finding simply based upon the defendant's ethnicity. 73

The critical third special issue in the Texas capital sentencing scheme, relating to the jury's finding that the defendant would probably commit acts of criminal violence in the future, 74 implicates the accuracy of jury fact-finding. Jurors harboring racially-discriminatory attitudes may be influenced by stereotypical characterization of African Americans as prone to violence, indirectly influencing voting in favor of the imposition of the death penalty and, thus, compromising the integrity of the capital sentencing process. 75

Under Texas law, the issue of the capital defendant's "future dangerousness" is critical in the jury's response to interrogatories that determine whether the death penalty is imposed and psychiatric expert opinion has been used extensively by Texas prosecutors on the issue of propensity to commit violent criminal acts in the future. 76 The amendment of the Texas capital sentencing process was a response to the admission of expert opinion in which the defendant's ethnicity was a factor in the expert's conclusion that the defendant was predisposed to commit acts of criminal violence. 77 The Texas legislature, concerned over testimony in a capital

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73. This is not to suggest that rational jurors could not have found Sterling likely to commit acts of criminal violence in the future. In fact, the evidence almost certainly would induce any rational juror to find that his admissions of two prior murders committed during robberies within the same short period of time while he was apparently engaged in a crime spree designed to finance his use of crack cocaine. With evidence so compelling, there could hardly be any "need" for racial bias or prejudice to enter into the fact-finding equation. Yet even in light of the evidence supporting the death sentence, the Constitutional protections of fair trial and due process should still not permit the intrusion of racial prejudice into the capital sentencing process.

74. Under the Texas statute, the death sentence could only be imposed upon unanimous jury findings on the special issues propounded during the punishment phase of trial. TEX. CODE CRIM. PROC. ANN. art. 37.071 § (2)(g). In Jurek v. Texas, 428 U.S. 262, 272-73 (1976), the Court noted the significance of the second issue, relating to the probability that the capital defendant would commit criminal acts of violence in the future, in the Texas capital sentencing scheme in upholding the statute as constitutional. See, supra, note 71, for the text of the special issue as propounded to the jury at Sterling's trial.

75. The Texas capital sentencing statute was amended after the disposition of Sterling's claims in the state and federal courts to preclude the affirmative use of ethnicity as a sentencing factor in capital sentencing proceedings: "[E]vidence may not be offered by the state to establish that the race or ethnicity of the defendant makes it likely that the defendant will engage in future criminal conduct." TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2.


trial from an expert who based his opinion on his conclusion that Hispan-ics are more likely to commit acts of criminal violence, responded by excluding race or ethnicity as appropriate factors in the consideration of the accused’s propensity to commit acts of criminal violence in the future.

In Sterling, the federal habeas court described the claim involving Juror W’s racial attitudes as follows:

Sterling developed evidence in the habeas process that is at least highly disturbing concerning this juror. W averred in an affidavit that “all people who do a capital murder should die,” P. Pet.App. Ex. P. ¶ 6, and he referred to African-Americans as “nig—rs,” id. at ¶ 8. During testimony in the habeas hearing, he admitted that he probably used that term at the time of Sterling’s trial. Hab. Tr. 2:152. Sterling is African-American, and Carthey Caucasian.78

Sterling was convicted of the capital murder of John Carthey and the cross-racial nature of the capital crime warranted inquiry into attitudes on matters of race of prospective jurors under Turner.79 The federal habeas court denied relief, perhaps reluctantly, based on its reliance on the state trial court’s finding that trial counsel had engaged in an objectively reasonable defense strategy in not questioning the juror about his racial attitudes, despite counsel’s admitted perception that the juror did, in fact, harbor discriminatory views toward African Americans.80

Despite the evidence developed after-the-fact concerning W, this court must remember that it is a federal habeas court operating under the confines of AEDPA. Because the state habeas court’s decision rejecting this ineffective assistance claim is not unreasonable, the court cannot grant relief.81

The Fifth Circuit similarly deferred to the state court finding that trial counsel’s decision to accept Juror W was defensible as a reasonable exercise of strategy. Instead, the circuit court credited trial counsel’s explanations that he thought W would prove more favorable as a potential juror because he had previously represented him in civil matters and that he

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79. Sterling v. Dretke, 100 F. App’x 239, 242 (5th Cir. 2004).
81. Id. at *36. The district court relied on 28 U.S.C. §2254(d)(1) (1996), precluding federal habeas relief unless the petitioner demonstrates that the state courts’ disposition of his federal claim was “contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States.” Williams v. Taylor, 529 U.S. 362, 413 (2000).
usually did not question jurors about their attitudes toward race because he found that they typically concealed their prejudices during voir dire.\(^8^2\)

It relied on the "deferential" scrutiny accorded to defense counsel's trial decisions under \textit{Strickland}\(^8^3\) in holding that the district court's finding that Sterling failed to demonstrate defective performance of trial counsel was not clearly erroneous.\(^8^4\)

\section*{C. The problem of proving racial discrimination in the administration of the death penalty}

Ultimately, Sterling was executed because he could not demonstrate that the Texas courts erred—unreasonably in light of existing Supreme Court precedent\(^8^5\)—by considering trial counsel's decision not to even question Juror W about his racial attitudes during voir dire an acceptable strategy in defending Sterling against the death penalty.\(^8^6\) It is this willingness to accept this proposition as \textit{acceptable} that is most troubling.\(^8^7\) The Texas courts were certainly not unreasonable in concluding that the evidence proved his guilt. Had Sterling been able to assert something more than technical challenges to his guilt,\(^8^8\) the claim that counsel's deci-

\footnotesize{82. Sterling v. Dretke, 117 F. App'x 328, 332 (5th Cir. 2004).
84. Dretke, 117 F. App'x at 333.
85. \textit{id.} at 333. 28 U.S.C. §2254(d)(1) authorizes the federal habeas court to reject state court conclusions of law only if the state court determination of the petitioner's federal claim "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 ..." \textit{id.} For discussion of the application of this section, see Williams v. Taylor, 529 U.S. 362, 376 (2000).
86. In \textit{Hollis v. Davis}, 941 F.2d 1471, 1477-79 (11th Cir. 1991), the Eleventh Circuit candidly considered the practice of defense attorneys in rural Alabama trials of not objecting to racially discriminatory jury selection tactics based on fear that objection would injure reputation or perception that such discrimination was acceptable as normal. The court held that counsel could not waive a client's right to a fairly constituted jury for such reasons.
87. Former Third Circuit Judge Timothy K. Lewis, writing in the Los Angeles Times while Sterling's certiorari petition was pending in the Supreme Court, characterized as "ludicrous" the reasoning of the state courts and Texas Attorney General, who argued that W's use of the term "nigger" did not demonstrate that he was a racist. Lewis, \textit{supra} note 7.
88. Sterling unsuccessfully argued that the evidence failed to demonstrate that he had committed a capital murder under Texas law or an act that would support the sentence of death. Sterling v. Cockrell, No. Civ.A. 3:01-CV-2280, 2003 WL 21488632, at *6-9 (N.D. Tex. Apr. 23, 2003). Under Texas law, the former requires proof of an intentional act, while the latter requires proof that the murder was committed deliberately. \textit{See supra} note 64. The only testimony of his intent offered at trial was from investigators who testified that he had orally admitted to them that he "killed" the victim. Cockrell, 2003 WL 21488632, at *40. No particular level of intent was provided and, under Texas law, Sterling's admission that he killed the victim during a robbery would have equally supported a conviction under a traditional felony-murder theory not supporting a capital murder conviction or the imposition of the death penalty. \textit{Tex. Penal Code Ann.} §19.02(b)(3) (Vernon 1994) (defining offense of felony murder as a first degree offense based on causing death as a result of a dangerous act during the course of commission of a felony). The federal district court concluded that the Texas courts correctly rejected the evidentiary sufficiency challenges. \textit{id.} at *6-9.
sion was neither objectively reasonable, nor defensible under any reading of Supreme Court interpretation of the Sixth Amendment, might have proven more persuasive.89

But the Court's continuing expressions of concern with the administration of the death penalty should have at least drawn something more than simplistic deference to the state court findings which were, after all, initially entered in the trial court of Sterling's conviction and sentence of death,90 albeit by a different judge.91 In fact, the Court considered another

89. Although deference to counsel's exercise of professional judgment is clearly recognized and, generally, required by the Court's decision in Strickland, that deference is subject to rebuttal. Strickland v. Washington, 466 U.S 668, 690 (1984). Not all strategic reasons advanced to explain counsel's actions are objectively reasonable and when they are unreasonable, they do not rebut a claim of defective performance. See Simmons v. Luebbers, 299 F.3d 929, 938 (8th Cir. 2002); United States v. Villalpando, 259 F.3d 934, 939 (8th Cir. 2001).

90. Under Texas law, a state post-conviction action must be filed and initially determined in the court in which the conviction was obtained. Tex. Code Crim. Proc. Ann. art. 11.07 (Vernon 2009) (challenges to felony convictions generally) and art. 11.071 (challenges to capital convictions in which a death sentence has been imposed). Texas procedure mirrors this approach commonly applied in other state court rules. See, e.g., Ark. R. Crim. Proc. 37.1, 37.5 (2007); NM R Dist. Ct. R. 5-802(d)(1) (2002), and in the federal post-conviction process, 28 U.S.C. § 2255 (1996).

91. The trial judge presiding at the time Sterling's application for postconviction relief was filed, Judge Jackson, recused on petitioner's motion based on the fact that he had given an affidavit opposing Sterling's motion for change of venue prior to trial in the case. See State v. Sterling, Motion for Recusal or Disqualification of Trial Judge (filed January 27, 1997) (on file with the Harvard Journal on Racial & Ethnic Justice). Judge Douglas, who sat at trial and had retired several years after Sterling's conviction, was then appointed to hear the postconviction matter. Sterling moved for his disqualification based upon his statement to co-counsel that he believed Sterling "deserved the needle in both arms." See State v. Gary Sterling, Motion for Recusal or Disqualification of Assigned Judge (filed May 27, 1997), esp. Exhibit B, Affidavit of Mark Breding, Attorney, and Exhibit A, Order appointing retired trial judge to hear case after recusal of presiding judge (on file with the Harvard Journal on Racial & Ethnic Justice and author). Judge Douglas recused and the case was assigned to Judge Campbell, who had retired from the Texas Court of Criminal Appeals. See Letter to counsel from Judge Jackson dated August 26, 1997 (on file with the Harvard Journal on Racial & Ethnic Justice and author). Following denial of postconviction relief, Judge Jackson then set Sterling's execution date, but was forced to vacate the date when Sterling again filed a motion to disqualify him based on his prior involvement in the case. See State v. Gary Sterling, Memorandum Order Relative to Vacation of Execution Date, No. 23,003, 13th Judicial District Court of Navarro County, Texas, (April 28, 2005) (on file with the Harvard Journal on Racial & Ethnic Justice and author). Sterling was executed on August 10, 2005. See Death Penalty Information Center, Executions in the United States in 2005, http://www.deathpenaltyinfo.org/executions-united-states-2005 (last visited February 19, 2010). The significance of the recusal of the retired judge who originally sat at Sterling's trial lies in the fact that the principle of deference incorporated in the federal habeas process is predicated on the notion that the trial court is in a better position than a reviewing court to consider the credibility of testimony or likely prejudice attributed to a particular event or action by witnesses, parties or counsel at trial. But in Sterling's case, the same judge sitting at the state post-conviction evidentiary hearing—while better positioned than the federal habeas court to assess the credibility of witnesses at that hearing—had no greater exposure to the trial itself than the federal habeas court. The rationale for deference is often undermined, as here, by the factual context of an individual case. Nevertheless, the Fifth Circuit noted the argument advanced by the State:
Texas death penalty case involving jury selection during the same term, reaching a dramatically different result.92

Sterling’s trial counsel offered a simple, but ironically, devastating explanation for his failure to question jurors about racial prejudice during voir dire. As the Fifth Circuit noted, counsel said that he did not inquire because he found that jurors seldom responded honestly to questions seeking to discern racially-discriminatory attitudes.93 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.” 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.94

The court then apparently adopted trial counsel’s explanation as strategically reasonable: “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.”95

Assuming, as the habeas court and Fifth Circuit must have also assumed, that trial counsel’s lack of questioning directed at prospective jurors was the result of a deliberate and reasonable strategy, then counsel’s explanation was credible. But, if that is correct, then the very efficacy of the only device for addressing potential racism in capital jurors—the use of voir dire to question venirepersons—provided in Turner v. Murray, is in question. If the only means available to counsel to detect racially-discriminatory attitudes on the part of prospective capital jurors is wholly dependent on candid responses of those jurors when questioned and they do not respond with candor, that remedy is simply not an effective means of protecting the rights of the capital defendant.

II. THE INADEQUATE REMEDIES FOR ADDRESSING RACIAL DISCRIMINATION IN THE CRIMINAL JURY TRIAL PROCESS

Nowhere is the Court’s long-standing concern for eliminating racial discrimination more apparent than in addressing the problem of racism in the criminal justice system, and particularly in the use of the death penalty.96 The potential for the impermissible influence of racial discrimini-
nation in the administration of the death penalty, or generally, in the criminal justice system, is not limited to the selection of the jurors. The need to address racial discrimination in the selection and seating of criminal juries and capital juries, particularly, has been a significant focus of the Court’s attention.

However, perhaps ironically, direct attacks on the operation of the death penalty as improperly influenced by racial bias have consistently failed, largely because they have been predicated on statistical evidence demonstrating greater use of the penalty against black defendants or in cases involving white victims. For instance, in *McCleskey v. Kemp*, the Court rejected an attack on Georgia’s capital punishment system based on statistical evidence showing a higher proportion of death sentences imposed on black defendants convicted of capital crimes and an even higher percentage in cases in which victims of capital crimes were white. The Court held that the apparent disparities reflected neither an arbitrary nor racially-discriminatory application of the penalty; the death sentences imposed being based upon evidence developed in support of aggravating circumstances in each case. *Kemp* discourages attempts to use statistical evidence to demonstrate systemic, constitutional flaws in the system of capital prosecution and sentencing.

*Kemp* frustrates challenges based on the general influence of racial discrimination on capital sentencing problems by requiring evidence that the death sentence imposed in the individual case was, itself, the product of or influenced by racial bias or animus. Yet, the remedies the Court has provided by case law to address individual situations are also unreasonably ineffective in practice. The *Sterling* litigation demonstrates the flawed reliance on voir dire of prospective capital jurors as a means to ensure that jurors holding racially-discriminatory attitudes are not ultimately seated to serve in capital trials. The Court’s reliance, in *Turner v. Murray*, on trial counsel to be able to discern constitutionally impermissible bias

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98. Id. at 286-91.
99. *See, e.g.*, *Andrews v. Shulsen*, 802 F.2d 1256, 1269 (10th Cir. 1986) (attacking Utah’s capital sentencing scheme based upon disproportionate number of African Americans on death row and the fact that all victims in the small number of cases in which death had been imposed were white. The petitioner pointed to the fact that at the time, all black defendants eligible for capital punishment had killed Caucasian victims and all had been sentenced to death. The circuit court found the population statistically insignificant, based on only seven individuals on Utah’s death row, four of whom were black, despite the disproportionally smaller percentage of the state’s total population who were black, and also concluded that the petitioner’s evidence failed to demonstrate that the individuals sentenced to death were, in fact, subjected to any systematic policy of racial discrimination).

100. This approach, requiring a showing that a particular state action was motivated by racial animus or discriminatory intent, as opposed to relying on proof of a racially disparate impact resulting from a particular policy or action, is consistent with the Court’s approach to claims of civil rights violations arising in the context of racial discrimination. *Washington v. Davis*, 426 U.S. 229, 238-39 (1976).
on the part of prospective jurors and protect the client against a tainted verdict and death sentence is rebutted by the facts in Sterling.

Trial counsel failed to even use the remedy provided in Turner, although his reason for not doing so was facially quite credible. He explained that jurors seldom respond with honest answers to questioning designed to disclose evidence of racial bias. Perhaps more telling was his assessment that Juror W was, in fact, a middle-of-the-road juror in the county in which Sterling is tried, suggesting that it might never have been possible to seat a racially unbiased jury in a capital trial in Navarro County, Texas. Finally, trial counsel's explanation that he believed his prior relationship with the juror would actually benefit Sterling, reflects a naïve and quite dangerous assessment that his prior representation of the juror would essentially serve to counteract or overcome Juror W's obviously long and deeply held views on African Americans.

Although the Sterling litigation focused primarily on trial counsel's failure to use the tool provided by Turner v. Murray to inquire into existence of racial bias on the part of prospective jurors during voir dire, bias held by jurors is only a single aspect of the potential for race-based discrimination to influence the proceedings in a capital prosecution. For instance, Sterling's trial lawyers unsuccessfully argued at trial and on direct appeal that the prosecutor had used the State's peremptory challenges to exclude all minority venirepersons from service on his jury. In fact, his death sentence was imposed by an all-white jury.101

An overarching concern of the Court has been to effectively address the pernicious effects of racial discrimination in the selection of jurors.102 The Court has consequently recognized different remedies to address this common problem, necessitated by the long-standing concern that the integrity of the justice system itself not be compromised by racial discrimination in decisionmaking: "[R]ace is a consideration whose influence is expressly constitutionally proscribed."103

A. Addressing racial discrimination in the jury selection process

Although the remedy recognized in Batson serves to protect the interests of citizens potentially subject to racial or gender-based discrimination resulting in their exclusion from jury service,104 it is clear that the remedy

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102. "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." McCleskey v. Kemp, 481 U.S. 279, 309 (1987) (citing Batson v. Kentucky, 476 U.S. 79, 85 (1986)).

103. McCleskey, 481 U.S. at 340 (Brennan, J., dissenting).

itself is designed to protect the fairness of the trial process for litigants.\textsuperscript{105} In \textit{Powers v. Ohio}, the Court affirmed: “Jury selection is the primary means by which a court may enforce a defendant’s right to be tried by a jury free from ethnic, racial, or political prejudice.”\textsuperscript{106} Thus, while \textit{Batson} and \textit{Miller-El} address the remedy for racial discrimination in one aspect of the criminal trial process, the remedy is grounded not only in the rights of prospective jurors, but in the right of criminal defendants to fair trials, as well.\textsuperscript{107}

The \textit{Batson} procedure required objection to the use of peremptory strikes as the initial step in the process for protecting the client. Once the prima facie case of discrimination through the use of peremptories to exclude minority jurors from service had been made, the burden shifted to the prosecutor to offer a race-neutral explanation for the strike. The third step in the process then required the trial court to decide whether the prosecutor had met its burden of proving a race-neutral basis for the strike.\textsuperscript{108} The Court described the standard of review on these claims as “clear error.”\textsuperscript{109}

The Court’s attempt to enforce non-discriminatory exercise of peremptories in \textit{Batson}, however, was subsequently undermined in \textit{Purkett v. Elem.}\textsuperscript{110} There, 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 holding that trial judges could accept a prosecutor’s explanation that he struck jurors based on hair length and facial hair as reflecting honest, race-neutral explanations for his decision to exclude the minority jurors.\textsuperscript{111} The Court did not address the not unlikely

\begin{enumerate}
\item \textit{Miller-El}, 545 U.S. at 237 (“Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by an impartial jury.”) (citing \textit{Strauder v. West Virginia}, 100 U.S. 303, 308-09 (1879)).
\item The Court has shown often reluctance, however, in considering the impact of racial or ethnic composition in the jury for the prospects of minority defendants receiving fair trials. For instance, in dissenting from the denial of certiorari in \textit{Mallett v. Missouri}, Justice Marshall condemned the change of venue ordered in the capital trial of an African-American defendant to a county without minority citizens:

[I] would grant the petition to consider whether a trial court’s decision to transfer a capital trial of an Afro-American defendant to a county with no residents of the defendant’s race violates the Equal Protection Clause or the Sixth Amendment’s fair cross section requirement, as applied to the States by the Fourteenth Amendment. Just as state prosecutors may not use peremptory challenges to exclude members of the defendant’s race from the jury, \textit{Batson v. Kentucky}, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), state trial courts may not transfer venue of the trial to accomplish the same result by another means.

\item 514 U.S. 765 (1995).
\item \textit{Id.} at 766-68. The Court observed:

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 num-
problem that hair length and facial hair might also reflect cultural values that would prompt the exercise of the strike based upon a factor simply masking racial bias and discriminatory intent.

Thus, the purported improved remedy provided by the Court in *Batson* for addressing racially-discriminatory use of peremptory challenges is suspect since the trial judge's ability to exercise discretion will almost necessarily be frustrated by a prosecutor offering a credible reason for the strike, even if the prosecutor is actually concealing a racially discriminatory motive. That is the message of the Court's holding in *Miller-El* because the state trial court sitting as the post-conviction court may be predisposed in any given case to accept any racially-neutral explanation in order to either insulate the conviction and sentence from post-conviction attack or protect the prosecutor from the implicit accusation of a constitutionally inappropriate exercise of her power in the jury selection process.

In *Miller-El*, and more recently, in *Snyder v. Louisiana*, the Court has had to address the danger implicit in according virtually absolute deference to the trial court and prosecutor in their explanations for exercising peremptory challenges against minority jurors. The *Snyder* Court reversed the Louisiana Supreme Court's decision to accept a trial court ruling finding that no discriminatory intent was evidenced in the exclusion of a minority juror from a capital jury. In so doing, the 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. Moreover, it did so in finding that there was no reason to defer to the subjective evaluation of the

ber 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.

112. The Court's policy of excessive deference apparently prompted Justice Breyer, dissenting in *Purkett v. Elem*, to write:

Today, without argument, the Court replaces the *Batson* standard with the surprising announcement that any neutral explanation, no matter how "implausible or fantastic," *ante*, at 1771, even if it is "silly or superstitious," ibid., is sufficient to rebut a prima facie case of discrimination. A trial court must accept that neutral explanation unless a separate "step three" inquiry leads to the conclusion that the peremptory challenge was racially motivated. The Court does not attempt to explain why a statement that "the juror had a beard," or "the juror's last name began with the letter 'S'" should satisfy step two, though a statement that "I had a hunch" should not.


114. The excused black juror was concerned about sitting on the capital jury because he was completing the required student teaching component of his education degree. 552 U.S. at 480. But subsequent information showed that the expected duration of the trial would not actually present the juror with any problem in completing the required student teaching experience. *Id.* at 481. The 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
juror’s demeanor and responses by the trial court in concluding that the prosecutor’s disparate treatment of prospective jurors rebutted his claim of race-neutral justification for exclusion of the black juror.115

What recent history demonstrates is that racial discrimination remains a significant threat to the integrity of the criminal justice system. The intransigence of lower courts in the Miller-El litigation suggests nothing less than that we are far from achieving a race neutral posture in the selection of capital juries. Miller-El is not an isolated instance as the Court’s continuing involvement in Snyder shows. In Snyder,116 for instance, the Court had to grant certiorari a second time117 to review a challenge to a capital sentence imposed by an all-white jury where the prosecutor alluded to the O.J. Simpson case in responding to defense counsel’s closing argument during the punishment phase of trial.118 The second petition was necessitated by the state supreme court’s rejection of the African-American capital defendant’s arguments that the prosecution had excluded jurors based upon ethnicity. The state court concluded that the Supreme Court’s initial grant of certiorari did not condemn its original factual or legal analysis,119 and the subsequent determination to review the state court’s application of Batson may well leave the conviction and capital sentence undisturbed. But the fact that all-white juries continue to be se-

115. Id. at 479.
118. State v. Snyder, 942 So.2d 484, 498-99 (La. 2007). The prosecutor’s reference to the racially-charged Simpson case was important in the context of evaluating the prosecutor’s intent in exercising peremptory challenges because, as the Louisiana court explained, the Supreme Court in Miller-El had dictated that the trial record be examined in terms of the context in which jury composition and exclusion issues should be assessed. Id. at 499 (citing Miller-El, 545 U.S. at 252). See, e.g., Snyder, 942 So.2d at 500 (Kimball, J., dissenting, joined by Calogero, J.). Justice Kimball argued that interjection of the racially-sensitive Simpson case was significant, noting:

As explained by the majority, voir dire began against a backdrop of the issues of race and prejudice when the State made reference to the O.J. Simpson case. Following defendant’s protests, the prosecutor assured the court that he would not refer to O.J. Simpson during the voir dire and evidentiary portion of trial. However, these representations appear disingenuous because the prosecutor clearly referenced the O.J. Simpson case during its rebuttal argument at the penalty phase of the trial.

Considering this injection of racial issues, and the fact that the prejudicial arguments were made to an all-white jury, I believe it is only reasonable to conclude that Mr. Brooks was peremptorily challenged by the State on the basis of his race when the entirety of the facts is considered. This is especially true in light of the fact that the trial court did not articulate its reasons for overruling the Batson challenge.

Id. at 501. See also, id. at 505 (Johnson, J., dissenting).

119. Id. at 495 ("Although the Supreme Court vacated the judgment and ordered reconsideration in light of Miller-El, we view the remand as a mere expansion of our review, not a rejection of the analysis made solely on a careful review of 'the entire record of the voir dire.'").
lected and then, perhaps not surprisingly, impose the death penalty in cases involving black defendants reflects the underlying problem that *Batson* simply fails to reach, as Justice Marshall originally argued: "The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely."120

The problems with enforcement of *Batson* demonstrate that the criminal justice system is much less capable of addressing the problem of individual racism that rarely surfaces in the jury selection process, but undoubtedly persists. In Sterling's case, the *Batson* claim had failed in the state courts121 long before the post-conviction focus shifted to Juror W's affidavit and the trial counsel's decision—whether strategic or objectively reasonable—not to inquire of prospective jurors about racial bias.

Referencing *Hernandez v. New York*,122 the Snyder Court applied the clear error standard of review123 in rejecting the state trial court's finding regarding discriminatory intent. Other courts have applied the "clear error" or "clearly erroneous" formulation to review trial court determinations with respect to race neutral explanations advanced by counsel using peremptories against minority jurors.124

The problem posed by the application of these traditional standards is that they fail to account for the possibility of bad faith, or lack of sensitivity, on the part of trial judges deciding *Batson* challenges in the first instance. If trial judges cynically accept unreasonable, but facially race-neutral, explanations for peremptory striking of minority venirepersons,125 the application of deferential standards of appellate review effectively insulates racially-discriminatory practices in jury selection from meaningful appellate review.

In 2005,126 *Dallas Morning News* reporters investigated the problem of compliance with *Batson* in Dallas County, Texas district courts—the courts in which felony cases are tried. In the last segment of the three-part se-

120. *Batson* v. Kentucky, 476 U.S. 79, 102-03(1986). This is now a view apparently shared by Justice Breyer, *Miller-El*, 545 U.S. at 269-74, but not one that has moved the Court away from continued reliance on the good faith of prosecutors and trial judges to enforce the guarantee against discriminatory use of peremptory challenges.
123. *Id.* at 474 ("We hold that the trial court committed clear error in its ruling on a *Batson* objection, and we therefore reverse.") (emphasis added).
124. E.g. *Vargas* v. State, 838 S.W.2d 552, 554 (Tex. Crim. App. 1992) ("We apply this 'clear error standard of review' as explained in *Hernandez*. We apply this standard by reviewing the record, including the voir dire and the racial makeup of the venire, the prosecutor's neutral explanations, and appellant's rebuttal and impeaching evidence.").
125. The use of such pretextual explanations for use of peremptory challenges was implicitly endorsed by the Court in its per curiam order in *Purkett v. Elem*, 514 U.S. 765, 769 (1995) ("The prosecutor's proffered explanation in this case—that he struck juror number 22 because he had long, unkempt hair, a mustache, and a beard—is race neutral and satisfies the prosecution's step two burden of articulating a nondiscriminatory reason for the strike.").
ries, the reporters concluded, based upon extensive interviews with de-
fense counsel and sitting judges:

Judges are the guardians of justice, yet in their courtrooms, laws
meant to stop racial discrimination against jurors are seldom
invoked.

Most Dallas County judges rarely object—or even notice—when
prosecutors reject disproportionate numbers of blacks from juries
and defense lawyers do the same with whites.127

The conclusion may in fact represent the proper application of Batson in
suggesting that issues regarding exclusion of jurors based on ethnicity
should be raised sua sponte by trial judges.128 Yet, the conclusion raises
interesting issues that the reporters did address, such as the failure of
counsel to make Batson objections; the differences among judges as to
what race-neutral explanations are acceptable—one judge permitted
strikes to be based on a prospective juror’s gold teeth or jewelry; that
experienced lawyers have learned to offer acceptable explanations for
strikes that satisfy the “race-neutral” standard for a strike; and that de-
fense counsel do not challenge peremptory challenges because trial
judges are too ready to accept any explanation offered by prosecutors,
such as the fact that a juror appeared bored or disinterested.129

The Dallas News investigation conclusion that Batson has not been en-
forced effectively in Dallas County, Texas courts was implicitly confirmed
in the Fifth Circuit’s 2009 holding in Reed v. Quarterman.130 There the cir-
cuit court granted relief in federal habeas, 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 exer-
cise of their peremptory challenges during the selection of his capital trial
jury.131 Reed was also convicted in a Dallas County capital re-trial in 1983
and his conviction was affirmed by the Texas Court of Criminal Appeals
in an unpublished opinion issued twelve years later, in 1995,132 nine years
after the decision in Batson. Interestingly, the Fifth Circuit noted that at
the retrospective Batson hearing conducted by the trial court on remand
from the Court of Criminal Appeals, the trial court never made a finding
regarding the prosecutors’ explanation for striking a black juror and, thus,
there was no finding requiring deference.133

127. Id.
128. In fact, the news story quoted the presiding Dallas County District Judge as explain-
ing that generally, trial judges do not intervene in the trial process, although they
have authority to do so. Id.
129. Id.
130. 555 F.3d 364 (5th Cir. 2009). The Texas court affirmed Reed’s conviction and death
131. Reed, 555 F.3d. 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 con-
cluding that Reed is entitled to habeas corpus relief for his Batson claim.”).
132. Id. at 366.
133. Id. at 368, n.1. The prosecutors testified that they had no independent recollection of
the reasons for the exercise of their peremptory challenges at the trial, conducted
some ten years earlier. Id. at 368-69.
In granting relief, the Fifth Circuit noted that the Texas court’s decision "appear[ed]" to be "contrary to its own law" in rejecting Reed’s reliance on a comparative analysis to examine the prosecution’s questioning of similarly situated white and black jurors in evaluating the use of strikes against black jurors. Instead, the circuit court relied on the comparative analysis presented by Reed in his direct appeal in finding that the strikes had been exercised discriminatorily, relying on both Miller-El and Snyder in using this approach.

Reed illustrates the extent to which the failure of reviewing courts to aggressively examine the use of peremptory challenges, deferring to prosecutor explanations and state trial court determinations, can not only frustrate justice, but also improperly delay it. The most obvious flaw in appellate review there involved not only the failure of the Texas trial court to use the technique of comparative analysis to consider the question of prosecutorial motivation in excluding minority jurors, but its willingness to disregard its own precedent apparently in order to avoid affording relief on a meritorious Batson claim.

Similarly, the extended litigation in Snyder also demonstrates the same sort of unreasoned deference to trial court fact-finding or explanations offered by prosecutors in the jury-selection process during direct appeal in state courts. These cases 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, which itself had resulted from the failures of the Court’s pronouncement in Strauder v. West Virginia and the remedy recognized in Swain v. Alabama to effectively address the problem posed by discriminatory exercise of peremptory challenges by prosecutors.

Both Miller-El and Sterling address the question of racial discrimination in jury composition and both arose in the context of Texas capital prosecutions in which the death penalty was imposed. This common thread was admittedly not sufficient to convince the Court that its subsequent decision in Miller-El necessarily warranted reconsideration of its denial of certiorari in Sterling, unfortunately. However, the irony presented by the two dispositions is that 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 exe-
cution despite demonstrating a strong prima facie case of actual racial bias on the part of a juror who did sit on his case.\textsuperscript{141}

Both cases reflect the failure of remedies the Court has put in place to prevent racial discrimination in the work of juries. In \textit{Sterling}, the declaration of Juror W that he was not a racist and did not consider his use of the word “niggers” as evidence of racism\textsuperscript{142} is certainly no more convincing than the prosecutors’ denial of discriminatory intent in \textit{Miller-El}.\textsuperscript{143} But the evidence of W’s racist attitudes appears insulated from attack in the state and lower federal courts based on their deference to trial counsel’s claimed strategy in accepting a juror whom he supposed to be racist—“probably a middle-of-the-road juror for Navarro County.”\textsuperscript{144} Assuming trial counsel Dunn was correct then one might well wonder how any capital verdict rendered in Navarro County might hold up if scrutinized under standards routinely used by the Court in the context of reviewing other forms of state action.

In \textit{Turner v. Murray}, the Supreme Court entrusted defense counsel to protect capital defendants from racially-prejudiced jurors. Yet, Sterling’s trial counsel’s failure to inquire into jurors’ racial attitudes compromised the only remedy the Supreme Court has thus far designed to protect the right of the capital defendant to a fair trial free from racial bias on the part of an individual juror. The lower courts concluded that the justification was an objectively reasonable strategic decision and that principles of def-

\textsuperscript{141} Arguably, the author, as counsel in the state post-conviction litigation, could have raised a claim directly challenging the death sentence imposed as the product of racial discrimination, based on the attitude reflected in Juror W’s characterization of African-Americans as “niggers.” However, assuming that the juror would deny any actual discrimination in his sentencing deliberations and the existence of evidence supporting affirmative answers to the special issues that determine the sentencing decision, counsel assumed that the trial court would find no evidence of actual discrimination and this finding of fact would almost certainly bind the federal habeas court in rejecting the claim on the merits, consequently rebutting any argument of prejudice under the second prong of a \textit{Strickland} ineffective assistance claim. \textit{E.g.}, \textit{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). Instead, the issue was raised in terms of trial counsel’s ineffectiveness because the record unequivocally showed that trial counsel did not question prospective jurors about racial attitudes during voir dire. Given the perceived predisposition of the judge presiding at trial, see note 87, \textit{supra}, the author assumed that the likelihood was greater that the state court would err in find trial counsel’s strategy reasonable, rather than finding that Juror W was biased against Sterling during his sentencing deliberations. Moreover, the then-recent amendments to the federal habeas statute (Antiterrorism and Effective Death Penalty Act of 1996, effective April 24, 1996, approximately eight months before the filing of Sterling’s application for state post-conviction relief), suggested that deference to state court law- and fact-finding would complicate litigation of any federal habeas claim, while an error in application of federal constitutional law by a state trial court would afford a better chance for relief. However, while courts repeatedly remind us that they do not assess counsel’s strategic decisions in hindsight, it is fair to argue that the author should have raised the claim of racial discrimination in the capital sentencing process directly, rather than through the vehicle of an ineffective assistance attack on Sterling’s trial lawyers.

\textsuperscript{142} \textit{Sterling v. Dretke}, 117 F. App’x 328, 332 (5th Cir. 2004).


\textsuperscript{144} \textit{Sterling}, 117 F. App’x at 332.
B. Deference to trial counsel’s “strategy” explanations in assessing effectiveness

Some claim trial strategies and tactics simply do not warrant deference in considering effectiveness of assistance rendered by counsel. For example, a strategy not to develop mitigation evidence in a capital case was not objectively reasonable if counsel failed to properly investigate the potential mitigating circumstances before making the decision not to present a mitigation-based defense.145

This general approach has also been applied to a failure by trial counsel to seek to exclude an unqualified or biased juror.146 Similarly, in Jackson v. Herring,147 the Eleventh Circuit found counsel’s performance deficient where he admitted knowing that the prosecutor was intentionally discriminating on the basis of race in exercising his peremptory challenges and thus defense counsel’s “failure to object to the prosecutor’s discriminatory use of peremptories was ‘inexplicable[,]’ and neither ‘a studied, tactical or strategic decision’ nor ‘a reasonable exercise of professional judgment.’”148 Ironically, counsel’s failure there was predicated on a failure to prevent discrimination aimed at prospective jurors, depriving them of the opportunity for jury service, while Dunn’s performance in failing to investigate Juror W’s apparent racial prejudice was upheld as an acceptable strategic decision.149

146. E.g., Johnson v. Armontrout, 961 F.2d 748, 756 (8th Cir. 1992) (“[F]ailure to attempt to bar the seating of obviously biased jurors constituted ineffectiveness of counsel of a fundamental degree.”); Hughes v. United States, 258 F.3d 453, 462 (6th Cir. 2001) (counsel’s failure to pursue further inquiry upon learning of potential juror’s bias cannot be justified because it is “simply a failure ‘to exercise the customary skill and diligence that a reasonably competent attorney would provide.’”) (quoting Johnson, 961 F.2d at 754); Miller v. Webb, 385 F.3d 666, 675-76 (6th Cir. 2004) (rejecting defense counsel’s proffered strategic justifications and holding that “the decision whether to seat a biased juror cannot be a discretionary or strategic decision . . . [because] there is no sound trial strategy that could support what is essentially a waiver of a defendant’s basic Sixth Amendment right to trial by an impartial jury.”) (citations omitted).
147. 42 F.3d 1350, 1360 (11th Cir. 1995).
148. Id. at 1360 (citing Jackson v. Thigpen, 752 F. Supp. 1551, 1562 (N.D. Ala. 1990)).
149. But courts have recognized that a strategy of avoiding discussion of racial prejudice during jury selection may, in some cases, be reasonable and acceptable. See, e.g., Lear v. Cowan, 220 F.3d 825, 829 (7th Cir. 2000) (“[A] lawyer’s failure to have the jurors informed of the victim’s race and questioned about their feelings about interracial crime is not unprofessional, subpar representation per se” because there may be “tactical reasons why a lawyer would not want to direct the jurors’ attention to the interracial character of the crime.”) (citing Turner v. Murray, 476 U.S. 28, 37 (1986)); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (approving decision not to question jurors on racial issues given trial counsel’s belief that, under the particular facts and circumstances of the case, doing so would only “irritate or polarize” the jury).
Deference to Sterling’s trial counsel’s claimed strategy was inappropriate precisely because the strategy itself was not objectively reasonable.\textsuperscript{150} In failing to address the question of racial bias with a prospective juror known or believed to harbor such prejudice, counsel deliberately gambled that his relationship with the juror would predominate over the juror’s prejudices, somehow resulting in a more favorable result for the client. Although an informed decision not to inquire of a prospective juror about racial bias may represent a reasonable strategy or tactic in certain situations, in Sterling’s case, the critical fact was that the existence of racial animus was not hypothetical, but actual.

Deferring to Sterling’s trial counsel’s judgment in this instance ultimately meant accepting the inclusion of a racially-discriminating juror on his capital jury. Once counsel and courts weigh the possible racially-discriminatory attitudes of prospective jurors in the balancing interests, there is fundamentally no protection against inclusion of jurors holding racially-discriminatory attitudes directed at members of the capital defendant’s racial or ethnic group on the capital jury, leaving them to the very real possibility that racial animus will influence the sentencing decision. The Fifth Circuit explained that decisions regarding conduct of voir dire and jury selection are committed to the discretion of trial counsel and are typically not to be disturbed in \textit{Teague v. Scott}:\textsuperscript{151}

The attorney’s actions during voir dire are considered to be a matter of trial strategy. A decision regarding trial tactics cannot be the basis for a claim of ineffective assistance of counsel unless counsel’s tactics are shown to be “so ill chosen that it permeates the entire trial with obvious unfairness.”\textsuperscript{152}

But in \textit{Teague v. Scott}, however, defense counsel’s claimed deficient performance involved his failure to “identify or challenge” several venirepersons who knew one of the prosecution witnesses in the case, some of whom admitted that they were likely to give more weight to the witness in terms of credibility because of their prior relationships. There, the court apparently did not find that counsel’s assumed strategic decision not to challenge those jurors met the stringent standard of tainting the entire trial.\textsuperscript{153}

The real source of the problem posed in \textit{Teague} appears to be that the petitioner did not actually demonstrate that any of the presumably biased jurors actually served on his trial jury, thus frustrating his burden of demonstrating any degree of actual prejudice resulting from counsel’s claimed

\textsuperscript{150} For example, the ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, §§10.10.2(A) & (B), specifically direct capital defense counsel to guard against jury selection practices presenting the possibility of seating of capital jurors evidencing “bias on the basis of race or gender.” American Bar Association, \textit{Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases}, 31 Hofstra L. Rev. 913, 1049 (2003). The Guidelines also warn counsel to attempt to identify and challenge “potential jurors poisoned by racial bias.” \textit{Id.} at 1053.

\textsuperscript{151} 60 F.3d 1167, 1172 (5th Cir. 1995).

\textsuperscript{152} \textit{Id.} (citing Garland v. Maggio, 717 F.2d 199, 206 (5th Cir. 1983)).

\textsuperscript{153} \textit{Id.}
failings in the jury selection process. Ironically, the Teague panel supported this conclusion by citing a prior Fifth Circuit decision, *Felder v. Estelle,* where the ineffective assistance claim—based on trial counsel's failure to challenge a juror who purportedly admitted that race might be a factor in his decision—failed because the petitioner did not identify the prospective juror who supposedly made the remark. In *Sterling,* by contrast, the evidence demonstrated that the racially-biased juror did actually serve on the capital jury.

The risk was simply too great that a racially-biased juror would be influenced by general social attitudes and personal acceptance of discrimination and that would lead to an unjust or improper verdict. Yet, Sterling's trial counsel's explanation that he believed the prospective juror, Juror W, would be more favorably disposed because of their prior attorney/client relationship, suggested nothing less than that he believed the juror would essentially disregard evidence, or engage in nullification, and vote favorably based on that relationship. The state habeas court apparently accepted this explanation in its conclusion: "Applicant's trial counsel's representation was not deficient by reason of his failure to question Juror W about racial bias."  

Trial counsel also explained that he did not typically inquire into racial attitudes of prospective jurors during voir dire because he had found them evasive or unresponsive. But that assessment was certainly incorrect with regard to Juror W, who admitted his reference to African Americans as "niggers" both in his affidavit offered by Sterling in support of his state petition for post-conviction relief and during his testimony at the evidentiary hearing conducted on the petition in the state trial court. Further, the explanation represents an admission that counsel ignored the remedy recognized by the Supreme Court designed to address the problem of juror racism in the capital sentencing process.

Even if one could speculate that trial counsel's risky gamble—despite its obvious potential for disaster—was theoretically acceptable, trial counsel's own history demonstrates the unreliability almost inherent in deferring to a strategy that carries the potential for imposition of a racially-motivated death sentence. Trial counsel Dunn had been found ineffective in a previous Texas capital prosecution, *Ex parte Guzman,* when

154. *Id.* at 1172-73.
155. *Id.* at 1173, n.24.
156. 588 F. Supp. 664, 671 (S.D. Tex. 1984), rev'd on other grounds, *Felder v. McCotter,* 765 F.2d 1245 (5th Cir. 1985) (finding that a defendant did not receive ineffective assistance of counsel when his counsel failed to identify a racially biased venireman because the defendant was unable to show that the biased venireman actually served on the jury).
157. *Id.* at 671 ("Petitioner does not identify the venireman who supposedly stated that Petitioner's race would be a factor of decision. This claim lacks the specificity and support needed for review, and is rejected.").
160. *See supra* text accompanying notes 144, 149 and 150.
he referred to his client before the jury as "wetback," claiming that he did not personally feel that the term had any "bad connotation." The state court found Dunn’s representation fell below the standard required for effectiveness and that his tactics had undermined the adversarial process to a "significant degree." Guzman was decided in 1987. Sterling was tried in 1989.

Significantly, the Guzman court was especially concerned that trial counsel's strategy contributed to the jury’s finding that the defendant would constitute a future danger, a finding necessary to the imposition of the death penalty under Texas law. Juror W, in his affidavit, offered his own insight into the character of African Americans as violent, a critical stereotypical conclusion for a juror obligated to render a judgment based upon a convicted offender’s propensity to commit acts of criminal violence in the future.

The state court’s conclusion that trial counsel rendered effective assistance in risking the seating of an admittedly racist juror without even an inquiry into the juror’s attitudes during voir dire cannot be squared with this Court’s concern that racism be eliminated from the justice system and, especially, the imposition of the death penalty. Similarly, in Osborne v. Terry, Osborne produced evidence in the state court post-conviction proceeding that his attorney had referred to him as a "little nigger" in conversations with another client. State and federal trial courts, how-

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162. Id. at 726.
163. Id. at 733, 736.
164. Dunn offered an explanation for his use of the term "wetback" during voir dire in the Guzman case, as the Texas Court of Criminal Appeals observed:

And I felt since we did have a minority race client, Mr. Smith and I felt that it was, indeed, necessary for us to root out any prejudice that existed and in my opinion the best way since we were interviewing these jurors on an individual basis where we had a one-on-one situation with complete eye contact I felt it was better to bring forward all the prejudicial matters that might or might not be brought just to see if their knuckles turned white or if they grimaced or if they were quick to answer either for or against the term and I used many terms . . . I even used the term "wetback," just to elicit reaction. I was in hopes on an overall basis to elicit the sympathy of this jury as an underlying main streme [sic] trial tactic.

Furthermore, counsel didn’t personally feel that the term wetback carried any "bad connotation." Id. at 726. The court apparently found this explanation unpersuasive. The Death Penalty Information Center reported that Georgia inmate Curtis Osborne was executed on June 4, 2008. Evidence supported allegations that his own attorney was racist, repeatedly referring to Osborne: "that little n____r deserves the chair." See Osborne v. Terry, 466 F.3d 1298 (11th Cir. 2006). In the Eleventh Circuit’s opinion, however, the word nigger is spelled in its entirety, with defense counsel telling another client, who testified in support of the ineffectiveness claim: "The little nigger deserves the death penalty." Id. at 1316. The Eleventh Circuit did not follow the Fifth Circuit’s practice of disguising the offensive language used with asterisks or ellipses.

165. Osborne, 466 F.3d 1298, petition for reh’g en banc denied, 219 F. App’x 975 (11th Cir. 2006), cert. denied, Osborne v. Hall, 552 U.S. 841 (2007).
166. 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
ever, deferred to trial counsel's explanation that he had explained the state's plea offer of a life sentence to the defendant, a fact contested by the capital defendant himself.\\(^{167}\) Neither the state courts nor the Eleventh Circuit ever determined whether the allegation of counsel's racial bias was credible, yet both ended up accepting counsel's explanation.\\(^{168}\)

The questions raised in Sterling most directly implicate the issue of fairness in the administration of the capital sentencing process, including the use of the death penalty in Navarro County, Texas, the State of Texas, and all death penalty states. If Sterling's trial counsel's decision not to question prospective jurors about racial attitudes is to be credited as an objective reasonable exercise of professional judgment, as the state and lower federal courts found, then his two most important observations about juror behavior are also arguably entitled to deference.

First, the lower courts accepted his explanation that he did not question jurors about racial prejudice because he found that jurors were seldom candid. Assuming that this is an adequate justification for deferring to his professional judgment, then it is apparent that the only remedy the Constitution provides to prevent the seating of racially-prejudiced jurors, questioning during voir dire of jurors in cross-racial, capital cases as approved in Turner v. Murray, is simply not an adequate remedy, at all. If counsel is correct that those jurors harboring racial animosity are unlikely to be candid in the voir dire process, then counsel could logically never expect to be able to assert a proper challenge for cause predicated on those attitudes. Moreover, counsel would not able to identify those prospective jurors actually prejudiced against the accused for the purpose of rationally deciding how to exercise peremptory challenges. In fact, exercising challenges against majority jurors based on supposition that they might be racist could arguably be viewed as an improper basis for strikes because the ground for excluding a prospective juror would, itself, be predicated on the race or ethnicity of the prospective juror.\\(^{170}\)

The lower courts also credited Sterling's trial counsel's explanation that he accepted Juror W because his prior relationship with him led him to believe that the juror would be predisposed to be favorable. This may or may not have been a reasonable perception, although it rested on the questionable proposition that the juror would have actually been influenced in his view of the evidence based on his prior relationship with

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\(^{167}\) Id. at 1316.

\(^{168}\) Id. at 1318.

\(^{169}\) The Court has not extended the right to question prospective jurors about racial bias to non-capital cases. Ristaino v. Ross, 424 U.S. 589 (1976). But see Smith v. State, 800 S.W.2d 440 (Ark. Ct. App. 1990), where the Arkansas court recognized a broad right to inquire into racial attitudes held by jurors, although not approving an unlimited right to question jurors.

\(^{170}\) Georgia v. McCollum, 505 U.S. 42 (1992), extends Batson to defense use of peremptories to strike members of recognized minority groups. Arguably, the same underlying principle of protecting jurors from exclusion based upon race or ethnicity would apply to strikes directed at majority jurors.
Sterling's counsel. The problem with this proposition is that it is difficult to determine how reasonable the inference would be that the juror's prior relationship with counsel would somehow offset his racially-discriminatory attitudes toward African Americans.

Second, and more troubling, was trial counsel's observation that Juror W was "probably a middle of the road juror for Navarro County."171 If counsel's professional judgment and experience can reasonably be credited, then his indictment of Navarro County jurors generally should also be credited, meaning that W's racist bias would not be the exception in Navarro County, but commonplace. Arguably, counsel's explanations for his own failure to inquire about prejudice among prospective jurors summoned for Sterling's capital trial suggests nothing less than that a racially unbiased jury could not have been seated in that county, in any event. If that is true, then capital punishment cannot be administered fairly in Navarro County, Texas, regardless of the many procedural protections imposed by decisions of the United States Supreme Court since its decision upholding the Texas death penalty statute in Jurek v. Texas.172 Yet, the history of capital punishment associated with Navarro County is not tainted only by Sterling, but arguably, by all capital prosecutions in that county.

C. Deference to state court findings in the federal habeas process

The state court's finding in Sterling does not, itself, warrant the conclusion that it engaged in any analysis about the soundness of trial counsel's claimed strategy for purposes of the Strickland test. The conclusory finding that Sterling's trial counsel did not render ineffective assistance contains no information concerning the basis for its decision. It does not demonstrate any appreciation of the significance of Turner v. Murray; any consideration of the specific admissions made by Juror W in his affidavit or state post-conviction hearing testimony; and does not even suggest that trial counsel actually made a strategic or tactical decision not to question W about his racial attitudes during voir dire. In fact, it characterizes Dunn's failure to do so as a failure.

The deference that now characterizes federal habeas court determinations is similarly apparent in the treatment of the allegations that defense counsel Mostiler in Osborne exhibited racist attitudes in his treatment of his client. The circuit court was concerned that the evidence supporting Osborne's claim, including the affidavit from trial counsel's other client, Huey, 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.173 The state court initially credited counsel's explanation that he had conveyed the plea offer to Osborne over Osborne's claim. It then held that this determination required rejection of the revised, successor claim supported by the witness's affidavit, based on the application of the principle of res judicata.

171. Sterling v. Dretke, 117 F. App' x 328, 332 (5th Cir. 2004).
173. Osborne, 466 F.3d at 1317.
The federal habeas court initially ruled that the claim had not been exhausted. Following the state proceeding in which Osborne offered the affidavit of his witness Huey and the state court applied the doctrine of res judicata in rejecting the claim on the merits, the parties agreed in the federal litigation that the issue was exhausted. The State argued, however, that the claim had been procedurally defaulted based on Osborne’s failure to develop the evidentiary record prior to the successor proceeding. The federal court denied relief on the claims, deferring to the state court’s judgment resting on procedural default, effectively rejecting Osborne’s ineffective assistance argument. In so doing, it avoided addressing Osborne’s claim that his attorney acted out of racial animosity on the merits.

The disposition of Osborne’s claims in his federal habeas petition never addressed the issue of trial counsel’s claimed racist attitudes or evaluated the credibility of his witness’s testimony concerning counsel’s references to Osborne’s race and his feelings about Osborne’s case. Instead, the Eleventh Circuit predicated its rejection of his petition on purely procedural grounds:

First, Osborne’s claim based on the Sixth Amendment is clearly barred from federal habeas review. The state trial court found the claim res judicata and even Osborne’s counsel conceded such. Second, our reading of the state trial court’s order on Osborne’s second state habeas petition convinces us that Osborne’s Eighth Amendment McCleskey claim is also procedurally barred from federal review. The state trial court relied upon Georgia procedural rules in denying Osborne relief on this claim. As such, the claim is barred from federal review.174

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.”175

Regardless of the apparent procedural default in the development of Osborne’s claim, the more important question for the administration of the federal habeas process relates to the degree of deference afforded defense counsel’s testimony in responding to the claim and the federal courts’ deference to the state court’s acceptance of that response. Why should any federal court accept the state court findings as sufficiently reliable to bar review in federal habeas without first ascertaining if the defense attorney did, in fact, demonstrate the racial animosity toward his client charged and supported by the testimony of another, arguably disinterested, witness?

174. Id. at 1318.
175. Id.
The answer is quite simply that deference to state disposition of federal claims has essentially become a way of life in habeas corpus. The Eleventh Circuit essentially ignored the significance of the claim of racial animus on the part of Osborne's counsel in deferring to the procedural default of this claim by the Georgia state courts.

Similarly, Miller-El and Sterling share a common thread of concern for racial discrimination in the jury selection process of a death penalty case. Miller-El's underlying principle is directly applicable to the disposition of Sterling's claim in the circuit court. In both Miller-El and Sterling, the Fifth Circuit deferred to the legal conclusions rendered by the Texas trial courts in the state post-conviction process. The Supreme Court's decision in Miller-El, however, demonstrates that even the revised statute's requirement for deference to state court legal conclusions does not compel deference even when faced with a contested evidentiary record. Despite the arguments advanced by Texas and trial court findings that the explanations given by prosecutors were "completely credible and sufficient" for a conclusion that "no purposeful discrimination" had occurred in the jury selection process, the Court nevertheless concluded that Miller-El had produced evidence "too powerful to conclude anything but discrimination." Clearly, the Court found the circuit court was simply too deferential in reviewing the state court's findings in light of the record and likely too

176. The Court requires deference to application of state procedural default rules based on counsel's failure to preserve error for federal review, as in Coleman v. Thompson, 501 U.S. 722, 752-53 (1991), where counsel failed to timely file capital defendant's appeal from denial of post-conviction relief in state courts, resulting in procedural bar to review or certiorari or in federal habeas corpus.

177. Miller-El v. Dretke, 361 F.3d 849, 862 (5th Cir. 2004); Sterling v. Dretke, 117 F. App'x 328, at 333 (5th Cir. 2004).


179. 28 U.S.C. § 2254 provides, 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; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Subsection (d)(1) essentially requires deference to state court decisions that are incorrect or wrong, but not "unreasonable" in terms of their understanding or application of controlling United States Supreme Court decisions.

180. In its first decision reversing the Fifth Circuit and remanding the case in Miller-El, the Court observed:

Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.


182. Id. at 265.
deferential in crediting the prosecutors' explanations as well. Although
the standard of proof of error in the state court's factual findings, clear
and convincing evidence, is high, Miller-El demonstrates that a reviewing
court in federal habeas is not foreclosed by facts arguably supporting the
state court's conclusions.

Critically, the circuit court noted the same standard in its review in
Sterling,183 but applied the same "dismissive and strained interpretation"
of the evidence condemned in Miller-El. In Sterling's case, the factual re-
cord clearly and convincingly demonstrates that Juror W held racially-
discriminatory views and that trial counsel made no attempt to probe his
attitudes toward race during voir dire. Dunn provided a facially-accept-
able explanation for his failure as a matter of strategy, just as the prosecu-
tors in Miller-El offered non-discriminatory explanations for their use of
peremptories.184 In contrast to the ultimate disposition of Miller-El's
claims, the Fifth Circuit's deference to trial counsel's explanation and the
state trial court's findings in Sterling ultimately served to deny him fed-
eral habeas relief. Unlike Miller-El, the Supreme Court did not overturn
the Fifth Circuit's exercise of deference to afford Sterling the relief denied
by the circuit court, despite the fact that he was actually able to show that
a juror holding racist attitudes had served on the jury whose findings
resulted in the imposition of his death sentence.

Miller-El demonstrates that the Fifth Circuit has simply been too defer-
ential, both in reviewing counsels' explanations for their decisions and the
state court's conclusions based upon those explanations in the federal
habeas process. The Supreme Court's long-held commitment to eliminat-
ing the effects of racial discrimination in the criminal trial process, partic-
ularly with respect to imposition of the death penalty, requires that
federal habeas courts approach their task of reviewing claims implicating
racial intent, or failure to protect against racial animus, with skepticism.

III. THE COURT'S INADEQUATE RESPONSE TO THE PROBLEM OF RACIAL
DISCRIMINATION IN THE ADMINISTRATION OF THE DEATH PENALTY

"Discrimination on the basis of race, odious in all aspects, is espe-
cially pernicious in the administration of justice."185

That state courts make mistakes in the enforcement of federal constitu-
tional rights and protections in state criminal proceedings is clear. Those
mistakes are evident in United States Supreme Court decisions reversing
state court decisions in which federal constitutional claims urged by crim-
inal litigants were rejected.186 And, this truth is implicit in the recognition

184. 545 U.S. at 236.
186. For example, the Supreme Court has granted relief in a number of capital cases
arising in Texas alone. It upheld the Texas death penalty and capital sentencing
process in Jurek v. Texas, 428 U.S. 262 (1976). Since Jurek, the Court has repeatedly
reviewed Texas death sentences, frequently granting relief. See, e.g., Panetti v. Quar-
terman, 551 U.S. 930 (2007); Brewer v. Quarterman, 550 U.S. 286 (2007); Abdul-Kabir
that on occasion, the mistaken judgments of state courts are, in fact, erroneous but reasonable, and thus are now entitled to deference in federal habeas actions.\textsuperscript{187} Section 2254(d)(1) limits availability of federal habeas relief for state court defendants to those cases in which state reviewing courts rendered a decision on the constitutional claim "that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."\textsuperscript{188}

Moreover, the Court's decisions in Miller-El and Snyder v. Louisiana both demonstrate the ongoing problem of undue deference being afforded state trial judges in considering claims attacking the use of peremptory challenges by state prosecutors. 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.\textsuperscript{189} Yet, in Miller-El and Snyder, the Court was forced to concede, at least by implication in 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, affording 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. The simple fact is that trial judges—often elected—are far closer to local prosecutors and prospective jurors—who will most likely be registered voters—than to the United States Supreme Court, or defendants charged with what are almost certainly notorious and heinous crimes, particularly as viewed in the communities in which the case is being tried.

\textsuperscript{187} Consider the opinion of Justice O'Connor in Williams v. Taylor, 529 U.S. 362, 99 (2000), where she announced Part II of the Court's opinion, joined by Justice Kennedy, the Chief Justice, Justice Thomas and Justice Scalia. In Part II, Justice O'Connor explained:

\textit{In § 2254(d)(1), Congress specifically used the word "unreasonable," and not a term like "erroneous" or "incorrect." Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.}

529 U.S. at 411 (O'Connor, J., concurring) (emphasis added).

\textsuperscript{188} Williams v. Taylor, 529 U.S. at 377-78. The Court reversed the Fourth Circuit, which had interpreted the provision too strictly in holding that federal habeas relief is granted only if a decision rendered by a state court was so contrary to existing Supreme Court precedent that all reasonable jurists would agree that the state court had reached an incorrect conclusion.

\textsuperscript{189} 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).
Procedural protections designed to eliminate racial discrimination can be totally frustrated if judges who conduct fact-finding on evidence intended to support federal constitutional claims are predisposed to reject claims of racial bias. Trial judges who are themselves insensitive to claims of racial discrimination or who refuse to face the potential political or social repercussions from ruling against local prosecutors, citizen/jurors or the police are empowered by unreasonably deferential review on the part of other judges to reject constitutional claims on the basis of factual determinations that do not offer support for the legal propositions advanced.

The extremely high level of deference generally applied to trial court determinations regarding credibility of those appearing in court, however, is evident even in the Court’s decision in Snyder, when the majority implicitly acknowledged that the trial court’s determination was clearly erroneous. But the Snyder Court, even faced with persistent rejection by the state courts of petitioner’s claim of constitutional error in the prosecutor’s discriminatory use of a peremptory challenge, a claim substantiated by the trial record, nevertheless observed: “On appeal, a trial court’s ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous.”

The Snyder majority then explained the reasoning behind this preference for deference in the review of trial court decision-making on credibility issues:

The trial court has a pivotal role in evaluating Batson claims. Step three of the Batson inquiry involves an evaluation of the prosecutor’s credibility and “the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge.” In addition, race-neutral reasons for peremptory challenges often invoke a juror’s demeanor (e.g., nervousness, inattention), making the trial court’s first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor’s demeanor belies a discriminatory intent, but also whether the juror’s demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie “peculiarly within a trial judge’s province” and we have stated that “in the absence of exceptional circumstances, we would defer to [the trial court].”

This level of deference, when applied to credibility issues relating to claims of racial discrimination in the administration of the death penalty particularly, virtually invites trial court defiance of constitutional precedent in the application of the law, even when lower courts give what may only be superficial deference to interpretation of the Constitution.

190. Id. at 477.
191. Id.
192. Id. (citations omitted).
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 in terms of 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 eliminating racial discrimination if the attitudes of judges charged with the duty to enforce the Constitution are insensitive to the problem or the very 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, often 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 its willingness to assert its positions in the strongest possible language in its decisions rendered on constitutional questions. The final decisions in Snyder and Miller-El, respectively, demonstrate its use of the power of reversal when state and lower federal courts fail to respond to its initial implied directive 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 and, 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 demanding 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 error will remove much of the uncertainty in enforcement characterizing application 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 objectives 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.

CONCLUSION

Sterling is the story of one capital trial and the subsequent post-conviction process and execution. The case raises troubling questions about the role of racial bias in the criminal justice process, particularly with regard to the prosecution of capital cases and imposition of the death penalty, and about the role of reviewing courts in protecting the rights of criminal defendants, regardless of race, to be free from the taint of racial prejudice in their trials, even when they are, in fact, guilty.

What is clear is that the promise made in the Constitution of a racially-fair capital sentencing process was simply not kept for Gary Sterling or Curtis Osborne. Whether they would have suffered the same penalty had their capital prosecutions not been tainted by substantial allegations of racial prejudice—whether they could actually demonstrate that they suffered prejudice attributable to unacceptable attitudes of racial animus on the part of decision-makers within the criminal justice system—the inescapable fact is that evidence of race-based discrimination was developed and dismissed within the system of deferential decision-making in which legitimate constitutional claims are often subordinated to concern for procedural regularity. In this sanitized process, it is process itself, rather than substance, that prevails. Ultimately, the duty to enforce constitutional protections rests with the judicial branch and it is the Supreme Court that must confront the failure of its jurisprudence to prevent racial discrimination in the administration of the death penalty.

In the end, of course, Sterling’s execution will remain largely unnoticed, a footnote in the history of this country’s capital punishment jurisprudence. But its importance should not be understated because the case reflects the most fundamental flaw in the premise that the death penalty can be administered without danger of racial prejudice at this point in our history. The residual racism that plagues American society cannot be assumed not to taint the death penalty in practice. Regrettably, despite the Supreme Court’s consistent expressions of concern that capital punishment not be imposed in a racially-discriminatory manner, its decisions have failed to adequately further its sentiment in this regard.
CAPITOL PUNISHMENT