

Smoking Guns: The Supreme Court's Willingness to Lower Procedural Barriers to Merits Review in Cases Involving Egregious Racial Bias in the Criminal Justice System

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SMOKING GUNS: THE SUPREME COURT’S WILLINGNESS TO LOWER PROCEDURAL BARRIERS TO MERITS REVIEW IN CASES INVOLVING EGREGIOUS RACIAL BIAS IN THE CRIMINAL JUSTICE SYSTEM

CARRIE LEONETTI*

The systematic foreclosure of federal-court review of even the most meritorious federal constitutional challenges of state criminal convictions has made review on the merits of an inmate’s claim that a state court violated the U.S. Constitution in adjudicating a criminal case exceedingly rare. Nonetheless, over the past two terms, the Supreme Court appears to have started down a different road, overlooking potential procedural hurdles in several cases to uphold on the merits state inmates’ claims that their criminal trials were tainted by explicit race discrimination. While these cases taken together seem to suggest that the Court is willing to address egregious and somewhat isolated acts of racial bias in the criminal-justice system, it remains to be seen whether this willingness will extend to more systemic and implicit biases. The hope of this Article is that the Court will continue this line of cases to its logical conclusion with a new jurisprudence that addresses the significant disparate racial impacts in the criminal-justice system even when there is no “smoking gun.”

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I. INTRODUCTION

The last several decades have seen a largely coordinated lockstep march by Congress and the Supreme Court to foreclose federal-court review of even meritorious federal constitutional challenges to state criminal justice procedures.¹ For example, in *Camreta v. Greene*,² a case involving an allegedly unconstitutional seizure and interview of a nine-year-old child by child protective services workers, the United States Court of Appeals for the Ninth Circuit affirmed the district court’s grant of summary judgment for the officials, holding on the merits that the interview had been unconstitutional but found that qualified immunity barred any recovery of damages because, at the time of the interview, its illegality had not been clearly established.³ Despite having won below, the officials appealed to the Supreme Court wanting the Court to overturn the merits holding (which would establish clear precedent for the future) in light of the procedural bar, and the Court obliged—the result being that the constitutionality of such interviews will never be conclusively determined in the context of a tort suit because the procedural bar of qualified

1. *See, e.g.*, 28 U.S.C. § 2254(d) (1996); *Cullen v. Pinholster*, 563 U.S. 170, 174 (2011); *Harrington v. Richter*, 562 U.S. 86, 92 (2011); *Schiro v. Landrigan*, 550 U.S. 465, 481 (2007) (holding, pursuant to the deferential standard of review required by § 2254(d), that the Arizona state courts’ determination that Landrigan’s defense counsel’s failure to present mitigating evidence during his capital sentencing proceeding did not amount to ineffective assistance of counsel was not an unreasonable application of the Supreme Court’s earlier cases); *Lockyer v. Andrade*, 538 U.S. 63, 66, 77 (2003) (holding, pursuant to the deferential standard of review required by § 2254(d), that the California Court of Appeals’s decision affirming Andrade’s sentence of two consecutive terms of life imprisonment for a “third strike” conviction of petty theft was not an unreasonable application of the Eighth Amendment’s requirement of proportionality); *Woodford v. Visciotti*, 537 U.S. 19, 25, 27 (2002) (holding that the California Court of Appeals’s decision that Visciotti’s defense attorneys failure to present or argue readily available evidence of his severe brain damage in mitigation during his capital sentencing proceeding did not constitute ineffective assistance of counsel was not an unreasonable application of the Court’s Sixth Amendment jurisprudence); *Woodford v. Garceau*, 538 U.S. 202, 212–13 (2003).

2. 563 U.S. 692 (2011) (holding that, because it was not clearly established that the warrantless seizure of a young child by state investigators for an interview about allegations of sexual abuse violated the Fourth Amendment for the purpose of official immunity, the court of appeals should not have reached the merits issue of whether the conduct was unconstitutional in the first instance), *rev’g* 588 F.3d 1011 (9th Cir. 2009).

3. *Greene v. Camreta*, 588 F.3 at 1021–22, 1030, 1033. The Ninth Circuit opted to reach the merits issue, the immunity bar notwithstanding, to provide guidance for government officials in the future. *See Camreta*, 563 U.S. at 699–700.

immunity will always operate to frustrate the merits claim.⁴

In *Harrington v. Richter*,⁵ Joshua Richter and a companion, Christian Branscombe, entered the home of Joshua Johnson, a drug dealer with whom Branscombe was acquainted, at approximately 4:00 a.m.⁶ A gun battle ensued, during which Johnson was shot and injured and his houseguest, Patrick Klein, was shot and killed.⁷ Johnson later told the police that he had awoken to find Richter and Branscombe burglarizing his home, when they shot him and then Klein, who was asleep on the living-room sofa.⁸ Richter had a very different version of the night's events. He claimed that he had been waiting outside the residence in his truck when Branscombe went in to drop something off for Johnson's roommate, Tony, and then he heard shouting and gunshots.⁹ According to Richter, when he went inside, he found Klein lying in the doorway to Johnson's bedroom.¹⁰ Branscombe claimed that Johnson had shot Klein when he awoke suddenly in the middle of the night and tried to hit him (Branscombe) but missed.¹¹ Both versions of events (Johnson's and Richter and Branscombe's) had significant credibility issues, including that Johnson, Klein, and Richter had all smoked marijuana together a few hours before the shootings.¹²

The crime-scene investigation revealed two large pools of blood in the home: one in Johnson's bed and one in the doorway between Johnson's bedroom and the living room, where Klein had been sleeping.¹³ The State's theory was that both pools of blood were from Johnson, who had been shot in bed but later stood in the doorway waiting for the police to arrive.¹⁴ The defense theory was that at least some of the doorway blood was Klein's, which refuted Johnson's version of events and corroborated Richter's.¹⁵ Mid-trial, the State asked two forensic experts to perform additional tests from the crime scene: a

4. See *Camreta*, 563 U.S. at 694.

5. 562 U.S. 86 (2010).

6. See *Richter v. Hickman*, 578 F.3d 944, 947–48 (9th Cir. 2009) (en banc), *rev'd sub nom. Harrington v. Richter*, 562 U.S. 86 (2010).

7. *Id.*

8. See *Richter*, 562 U.S. at 93.

9. See *Richter*, 578 F.3d at 948

10. *Id.*

11. See *id.*

12. See *id.* at 947–50.

13. *Id.* at 948.

14. *Id.* at 953.

15. See *id.*

blood-spatter-pattern analysis and serological tests.¹⁶ The State's blood-spatter expert concluded (and then immediately testified, without prior notice to the defense), from photos of the crime scene, that the blood pattern in the doorway was inconsistent with Klein having been shot there and then later moved to the sofa (Richter's theory).¹⁷ The State's serologist concluded (and then immediately testified, also without prior defense notice) that the blood from the doorway was inconsistent with Klein's blood type.¹⁸ Richter's trial attorney did not consult any independent forensic experts, either prior to trial as part of his preparation or during trial to evaluate the State's last-minute expert testimony and offered no forensic evidence to rebut the State's expert's claims.¹⁹ Richter's murder conviction was affirmed on direct appeal by the California Court of Appeals.²⁰

Richter's postconviction attorneys conducted the forensic investigation that his trial counsel had failed to perform. In the process, they obtained declarations from four experts. One expert, a blood-spatter-pattern expert, reached the opposite conclusion as the State's experts—namely, that the blood patterns in the doorway were inconsistent with Johnson having bled while standing there.²¹ Two other experts, both serologists, reached the opposite conclusion of the State's serologist and found that blood type analysis of the blood taken from Johnson's bedroom doorway could not exclude Klein as a source.²² The final expert, a pathologist, opined that the amount of blood in the doorway was too great to be accounted for by Johnson's relatively minor gunshot wounds.²³ The California Supreme Court summarily denied Richter postconviction relief in a one-sentence order.²⁴ An en banc panel of the United States Court of Appeals found that Richter was entitled to federal habeas relief on the ground that his trial counsel had been constitutionally ineffective in failing to discover and present the exculpatory forensic evidence discovered by his postconviction counsel.²⁵ The Supreme Court reversed the Ninth Circuit, holding that federal habeas review of Richter's conviction was precluded by the California Supreme Court's prior adjudication of his ineffective-assistance-of-

16. *Harrington v. Richter*, 562 U.S. 86, 94–95 (2010).

17. *Id.*

18. *Id.*

19. *Richter*, 578 F.3d at 954.

20. *Richter*, 562 U.S. at 95.

21. *Id.* at 96.

22. *Id.*

23. *Id.*

24. *Id.*

25. *See id.* at 97.

counsel claim on its merits because the court's rejection of his claim was not unreasonable.²⁶ In reaching that conclusion, the Court noted: "If this standard is difficult to meet, that is because it was meant to be."²⁷

In *Cullen v. Pinholster*, decided during the same term as *Richter*, during the death-penalty phase of Scott Pinholster's murder trial, the State of California offered eight witnesses to testify about Pinholster's lengthy history of threatening and violent behavior.²⁸ In response, Pinholster's attorney called only his mother to offer evidence in mitigation of the sought-after death sentence.²⁹ After hearing this evidence, the jury unanimously recommended the death penalty, which the sentencing judge imposed.³⁰ During state postconviction proceedings, Pinholster's attorneys unearthed a substantial amount of evidence documenting his severe mental illness, including "school, medical, and legal records," and the diagnosis of a psychiatrist who opined that his behavior resulted, in part, from bipolar disorder, none of which his trial counsel had discovered (or therefore presented to his sentencing jury).³¹ Nonetheless, the California Supreme Court twice summarily denied his claim that his attorney provided constitutionally ineffective assistance during his capital sentencing proceedings.³² After an evidentiary hearing, the district court granted Pinholster federal habeas relief on the ground that the state courts' failure to recognize the ineffective assistance of his penalty-phase counsel constituted an unreasonable application of *Strickland v. Washington*.³³ The Supreme Court reversed the grant of relief, holding that Pinholster was not entitled to federal habeas corpus relief and that the district court should not have considered any evidence (i.e., that was adduced at the federal habeas hearing) that was not presented to the first state court that adjudicated Pinholster's ineffective-assistance-of-counsel claim.³⁴

26. *See id.* at 112–13.

27. *Id.* at 96.

28. *Cullen v. Pinholster*, 563 U.S. 170, 176–77 (2010).

29. *Id.* Pinholster's mother described his troubled childhood and what a lovely son he was (the two brutal murders for which he was on trial notwithstanding). *Id.* at 174, 177.

30. *See id.* at 177.

31. *See id.*

32. *See id.* at 177–78.

33. *See id.* at 180 (discussing the California Supreme Court's application of *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding that, in order to prevail on a claim that trial counsel provided constitutionally ineffective assistance, a postconviction petitioner must show that counsel's performance was deficient and that such deficiency prejudiced the proceedings below)).

34. *See id.* at 180–81.

The current iteration of the federal habeas corpus statute,³⁵ the vehicle by which most federal constitutional challenges to state criminal adjudication arrive in (or are kept from) federal court, precludes federal-court review of the constitutionality of the conduct of state trials for a host of reasons, including: a strict statute of limitations;³⁶ bars to review arising from the failure to exhaust state remedies³⁷ and the default of independent state procedural rules;³⁸ strict limits on when federal habeas courts may hold evidentiary hearings;³⁹ and a highly deferential standard of review for state court rulings.⁴⁰ The result is that a review on the merits of an inmate's claim that a state court violated the federal constitution in adjudicating a criminal case is the unicorn of federal jurisdiction: lots of people dream of seeing one, but almost no one ever does.

Of course, any observer of federal jurisdiction knows that the height of the procedural barrier to review tends to correlate with the willingness (or lack thereof) of the court being asked to review, to do so. Richard Fallon has argued that the Court erects high procedural barriers when it wishes to avoid a difficult underlying substantive issue.⁴¹ Pamela Karlan has analyzed the Court's use of "analytic and regulatory techniques" to segregate racial-bias challenges to criminal procedure from the rest of its equal protection jurisprudence.⁴²

35. 28 U.S.C. § 2254 (2012).

36. *See id.* § 2244(d).

37. *See id.* § 2254(b)(1)(A).

38. *See id.* § 2254(c).

39. *See id.* § 2254(e)(2).

40. *See id.* § 2254(d).

41. *See* Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 *passim* (1984) (discussing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–10 (1983) (holding that Lyons lacked standing to seek an injunction against the Los Angeles Police Department chokehold policy to which he had been illegally subject because he could not prove that he would be subjected to the chokehold procedure again in the future)); *cf.* Christopher E. Smith & John Burrow, *Race-ing into the Twenty-First Century: The Supreme Court and the (E)Quality of Justice*, 28 U. TOL. L. REV. 279, 288 (1997) (criticizing "the Supreme Court's tolerance for pretextual, race-based exclusion of African-American and other jurors").

42. *See* Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2002 (1998); *see, e.g.*, *Whren v. United States*, 517 U.S. 806, 810–13 (1996) (holding that the subjective motives of police officers, including intentional racial profiling, could not render a search or seizure unreasonable under the Fourth Amendment); *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987) (rejecting the sufficiency of the statistical evidence of racially disparate impact that McCleskey provided in support of his challenge of racial discrimination in the administration of the death penalty because it did not demonstrate intentional racial discrimination); *O'Shea v. Littleton*, 414 U.S. 488, 495–96, 502 (1974) (holding that Black citizens lacked standing to sue county officials for systematic racial discrimination in the local criminal-justice system because they could not prove that they would be arrested, charged, and discriminated against again in the future); *see also Atwater v. Lago Vista*, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting) (criticizing the majority opinion, which held that

During the 2015 term, the Supreme Court appeared to open the door a crack to addressing claims of racial bias in the criminal-justice system in the context of a claim of racially motivated jury selection that was arguably barred by procedural default.⁴³ Then, during the 2016 term, the Supreme Court reversed on the merits two more cases involving challenges to apparent racial bias in the criminal-justice system that lower courts had found, repeatedly, to be procedurally barred.⁴⁴

Are these isolated anomalies? If Fallon and Karlan are right, is the Court signaling a willingness to tackle head on issues of racial bias in the criminal-justice system, even when doing so requires it to elide serious concerns about the procedural posture of the state criminal cases that it is being asked to review? And, if so, will that willingness extend to the more subtle, hidden, and systemic implicit biases that plague the system?

Part II of this Article provides background on the Court's traditional "race is different" jurisprudence in criminal-procedure cases. Part III discusses *Foster v. Chapman*,⁴⁵ in which the Court, during the 2015 term, reversed Foster's conviction for capital murder after finding that the State of Georgia had engaged in racially discriminatory use of its peremptory strikes in composing his death-qualified jury. Part IV discusses *Buck v. Stephens*⁴⁶ and *Pena-Rodriguez v. Colorado*,⁴⁷ two cases involving criminal convictions that the Court reversed during the 2016 term on race-discrimination grounds. Part V notes that *Foster*, *Buck*, and *Pena-Rodriguez*, all involved explicit, intentional appeals to racial bias, rather than more subtle forms of racial bias, which courts have traditionally been loath to address on their merits. Part VI concludes that the larger question left open by these cases is whether the Court's willingness to bend the procedural rules and open itself to claims of racial bias will extend to the more nefarious, systemic, and common implicit biases, that pervade the criminal-justice system.

II. RACE IS DIFFERENT: AN ANCIENT PEDIGREE

There is, of course, a very old pedigree for the idea that racial discrimination, particularly against Black Americans, is different in a way that

the Fourth Amendment permitted full custodial arrests for any offense, no matter how minor, for ignoring the relationship between the arrest power and racial profiling).

43. See *infra* Part III.

44. See *infra* Part IV.

45. 136 S. Ct. 1737 (2016).

46. 137 S. Ct. 759 (2017).

47. 137 S. Ct. 855 (2017).

requires extraordinary remedies, most notably in the context of the right to trial by jury, going back to cases like *Strauder v. West Virginia*.⁴⁸ In *Strauder*, a Black defendant charged with murder in state court challenged the State's practice of trying him by a de jure all-white jury under the Equal Protection Clause of the new Fourteenth Amendment.⁴⁹ The Supreme Court held that equal protection included a prohibition against being tried by a jury from which people of color had been excluded.⁵⁰ In reaching its holding, the Court reasoned:

We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it.⁵¹

Having found that *Strauder's* all-white state jury was unconstitutional, the Court then went further, ordering, pursuant to a federal Reconstruction statute, that his case be removed from state court to federal court for trial, analogizing the federal jurisdiction at issue to federal-question jurisdiction.⁵²

Since *Strauder*, the Court has repeatedly demonstrated a belief that concerns involving racial animus outweigh the concerns like finality and efficiency that underlie most procedural barriers. For example, in *Aldridge v. United States*,⁵³ the Court reversed *Aldridge's* murder conviction for killing a white police officer after the trial court refused to engage in in-depth voir dire of one juror's potentially disqualifying racial biases against *Aldridge*, who was Black, reasoning: "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."⁵⁴ The Court reinforced the need for inquiry

48. See 100 U.S. 303 (1879).

49. See *id.* at 304.

50. See *id.* at 310.

51. *Id.*

52. See *id.* at 312.

53. 283 U.S. 308 (1931).

54. *Id.* at 309, 314–15.

into the potential for race-based bias in the attitudes of potential white jurors in the trials of Black defendants in *Ham v. South Carolina*—a drug prosecution against a prominent Black civil-rights activist involving charges that Ham asserted were racially motivated⁵⁵—where the Court held that the risk of racial bias in jury deliberations was so serious that due process required that Ham’s attorney be given the opportunity to engage in voir dire on the issue.⁵⁶

III. OCTOBER TERM 2015: RACIALLY MOTIVATED USE OF PEREMPTORY CHALLENGES

The State of Georgia charged Timothy Foster with capital murder, for which he was ultimately convicted and sentenced to death.⁵⁷ At the end of the first phase of jury selection during which prospective jurors were excused for cause, there remained a pool of forty-two “qualified” prospective jurors.⁵⁸ Five of those forty-two remaining jurors were Black.⁵⁹ The State had ten peremptory strikes available to it.⁶⁰ It used nine of them, four to strike the four Black jurors

55. 409 U.S. 524, 525–26 (1973).

56. *See id.* at 524, 526, 529.

57. *Foster v. Chatman*, 136 S. Ct. 1737, 1742 (2016).

58. *Id.* at 1743. Jury selection in criminal cases typically takes place in two phases. First, the parties make challenges to prospective jurors for “cause,” by alleging reasons why they cannot fairly and impartially decide the case. *See id.* In the context of the death penalty, many of these challenges for cause involve issues relating to prospective jurors’ personal beliefs about capital punishment. For example, a juror who expresses an inability to ever vote in favor of the death penalty will usually be stricken at this phase for cause, a process referred to as *Witherspooning*, because of the Supreme Court case recognizing that strong and inflexible beliefs about the death penalty could amount to juror bias warranting striking those jurors who held them for cause. *See Witherspoon v. Illinois*, 391 U.S. 510, 520–22 (1968) (authorizing the exclusion of prospective jurors in death-penalty cases if their personal opposition to the death penalty unequivocally compromised their ability to follow the law in determining the accused’s guilt or punishment). Once these cause strikes (which are not limited in number) have been litigated, the second phase of jury selection involves the parties’ exercise of their peremptory challenges, which are strikes that the parties can make against any remaining jurors without having to show a disqualifying bias. *See Foster*, 136 S. Ct. at 1743. The parties have a set number of these peremptory challenges, *id.*, which they can make for any or no reason other than impermissible discrimination. *Id.* at 1754–55; *see* Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the “Blind” Peremptory*, 29 U. MICH. J.L. REFORM 981, 981–82 (1996).

59. *Foster*, 136 S. Ct. at 1743, 1750.

60. *Id.* at 1743; *see also* GA. CODE ANN. § 15–12–165 (1985).

in the pool, until an all-white jury remained.⁶¹ Foster objected on *Batson* grounds.⁶²

In response, the State proffered a host of facially race-neutral explanations for striking each of the jurors.⁶³ Collectively, however, the State's explanations suffered from a host of credibility defects. Many of the explanations were subjective or vague. These explanations included the failure to make eye contact,⁶⁴ being "curt,"⁶⁵ seeming nervous,⁶⁶ responding to voir dire questions too slowly,⁶⁷ and equivocating in answering questions about views on the death penalty.⁶⁸ Other explanations, while facially neutral, seemed only to apply to Black prospective jurors. For example, the State claimed to have stricken Black jurors for being divorced,⁶⁹ for being relatively young (and therefore too close in age to Foster),⁷⁰ and for living too near the crime scene,⁷¹ while failing to strike white jurors who were also divorced,⁷² lived even closer to the crime scene,⁷³ or the juror who was the youngest in the venire at twenty-one years old and white.⁷⁴ Other explanations were flatly inconsistent with one another. For example, the State claimed to strike one Black juror for having unsuccessfully sought to be excused for cause during the first phase of jury selection⁷⁵ and another for not wanting to be excused.⁷⁶ While either reason might be plausible standing alone (a prospective juror trying to get out of jury service might hold conscription against one or both of the parties; a prospective juror who wants to serve on a jury might have an ulterior motive for service), they are inconsistent when used together to strike half of the Black jurors in the venire.⁷⁷

61. *Foster*, 136 S. Ct. at 1743.

62. *Id.* at 1742–43 (referencing *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (establishing the procedure by which a Black defendant alleging that members of his race had been impermissibly excluded from his venire could make out a prima facie case of purposeful discrimination)).

63. *Foster*, 136 S. Ct. at 1743–45, 1748, 1750, 1754.

64. *See id.* at 1748.

65. *Id.*

66. *Id.*

67. *Id.* at 1751.

68. *See id.* at 1754.

69. *See id.* at 1750.

70. *See id.*

71. *See id.* at 1751.

72. *Id.* at 1750.

73. *See id.* at 1751.

74. *See id.* at 1750–51.

75. *Id.* at 1751.

76. *Id.* at 1748.

77. *See id.* at 1754.

Despite the obvious credibility concerns with the State's putative race-neutral reasons for the disparate impact of its exercise of peremptory strikes on Black prospective jurors, the trial court rejected Foster's *Batson* challenge, and the Georgia Supreme Court affirmed that decision on appeal.⁷⁸ While Foster's petition for postconviction relief was pending in the state trial court, he acquired, through discovery, documents relating to prosecutors' conduct of jury selection, including the jury venire list, juror questionnaires,⁷⁹ and their personal notes from jury selection.⁸⁰ All of the documents were explicitly coded for race: the venire list had handwritten "B"s next to each Black prospective juror's name;⁸¹ the race of the prospective Black jurors was circled on each of their questionnaires;⁸² and the handwritten notes included comments like "No *Black Church*" next to Black jurors' names.⁸³

During the postconviction proceedings, the State offered an affidavit from a prosecution investigator who had participated in the prosecution team's jury selection process.⁸⁴ The affidavit entered in evidence, however, had been redacted to remove the following sentences from the original before its submission to the court: "If it comes down to having to pick one of the Black jurors, [this one] might be okay. . . . [I]f we had to pick a Black juror, I recommend that [this juror] be one of the jurors."⁸⁵

The state postconviction court denied relief to Foster on two alternative grounds: (1) that Foster's *Batson* claim was not reviewable on postconviction review, under the doctrine of *res judicata*, because it had already been fully and finally litigated to his detriment on direct appeal; and (2) that Foster had offered insufficient evidence of intentional racial discrimination.⁸⁶ The latter holding (the rejection of Foster's postconviction *Batson* claim on its merits) presented a federal question for the Supreme Court to review (whether Foster's conviction was obtained in violation of his Sixth and Fourteenth Amendment rights).⁸⁷ The former holding (that the state common law doctrine of *res judicata*

78. *See id.* at 1743.

79. Prospective jurors are asked to fill out questionnaires answering general questions about their life, employment, family, and community ties prior to the start of individualized jury voir dire. *See generally* ABA, PRINCIPLES FOR JURIES AND JURY TRIALS, Principle 11(A)(1) (2005).

80. *See Foster*, 136 S. Ct. at 1743–44.

81. *Id.* at 1744.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* (alterations in original).

86. *See id.* at 1745.

87. *Id.* at 1742–43.

precluded reversing Foster's conviction on *Batson* grounds), on the other hand, was arguably an independent and adequate state-law ground that would preclude the Court's federal question review of the merits holding.⁸⁸ Rather than punt by finding that it lacked jurisdiction, the Court found (after some stretching) that the Georgia court's first holding was essentially rendered dicta when it continued on to reach the second merits holding.⁸⁹ The Court then proceeded to reverse the Georgia court's *Batson* holding, finding that its "shifting explanations," "misrepresentations of the record," "persistent focus on race in the prosecution's file," and the fact that the State's proffered reasons for striking Black panelists applied equally to white panelists who were not stricken, combined to be powerful "circumstantial evidence that 'bear[s] upon the issue of racial animosity'" requiring the conclusion "that the strikes of [two Black jurors] were 'motivated in substantial part by discriminatory intent.'"⁹⁰

The Court's willingness to overlook a possible jurisdictional barrier to reaching the merits of Foster's racial discrimination claim is all the more noteworthy given that it has previously (and fairly recently) refused to equate even implausible purportedly race-neutral explanations for the use of peremptory strikes with impermissible discrimination. In 1994, the United States Court of Appeals for the Eighth Circuit ordered habeas corpus relief for Jimmy Elem after the State of Missouri, had stricken two Black prospective jurors from his jury because the prosecutor did not like the look of their haircuts

88. See *id.* at 1745–46; see also, e.g., *Walker v. Martin*, 562 U.S. 307, 310, 321 (2010) (holding that California's time limitation on applications for habeas corpus relief was an independent and adequate state-law ground sufficient to bar federal habeas review); *Beard v. Kindler*, 558 U.S. 53, 60 (2009) (holding that Pennsylvania's fugitive forfeiture rule could provide an adequate basis in state law to bar federal habeas review of Kindler's conviction); *Sochor v. Florida*, 504 U.S. 527, 533–34 (1992) (holding that the Supreme Court lacked jurisdiction to address Sochor's claim that his sentencing court instruction to his capital sentencing jury about "heinousness" as an aggravating factor violated the U.S. Constitution because the Florida Supreme Court's decision affirming his death sentence rested on the adequate and independent state-law ground that he had not preserved the claim for appellate review); *Coleman v. Thompson*, 501 U.S. 722, 757 (1991) (holding that the state procedural rule requiring dismissal of Coleman's state-court appeal, due to untimely notice of appeal, was based on an independent state-law ground that precluded federal habeas review of his conviction); *Michigan v. Long*, 463 U.S. 1032, 1037, 1043–44, 1053 (1983) (holding that the Supreme Court did not lack jurisdiction to decide whether the search of the passenger compartment of Long's vehicle during an investigatory stop of an occupant violated the Fourth Amendment, even though the Michigan Supreme Court had found that the search violated both the federal and state constitution, because the Michigan court's state constitutional decision was not an adequate and independent state-law ground on which to sustain its decision in the absence of the federal constitutional determination).

89. See *Foster*, 136 S. Ct. at 1745–47.

90. *Id.* at 1754 (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478, 485 (2008)).

and facial hair.⁹¹ The Eighth Circuit presumed that the State's proffered race-neutral reasons had to be pretextual, since there was no obvious relationship between hairstyles and qualifications and the State had not offered any additional information.⁹² The Supreme Court summarily reversed the grant of habeas relief, without argument and over a strenuous dissent, rejecting the Eighth Circuit's assumption that "silly" and "implausible or fantastic" explanations could not be facially race neutral, even when together they led to a racially disparate pattern of strikes.⁹³

Similarly, in *Wilkerson v. Texas*,⁹⁴ the Court denied certiorari of the question as to whether jurors could be examined and excluded on the basis of their negative, potentially racist perceptions of defense counsel.⁹⁵ In *Thaler v. Haynes*,⁹⁶ the Court, in a per curiam order, summarily rejected a *Batson* challenge to a trial court's failure to inquire further after a prosecutor offered, by way of a race-neutral reason, that he excluded a prospective Black juror because of the juror's "demeanor" rather than race.⁹⁷ In *Felker v. Jackson*,⁹⁸ the Court, in another per curiam order, summarily reversed the Ninth Circuit's grant of federal habeas relief on *Batson* grounds because the court failed adequately to defer to the factual findings of the state courts below.⁹⁹

IV. OCTOBER TERM 2016: CLAIMS OF RACIAL BIAS IN CRIMINAL ADJUDICATION

It was possible that *Foster* was simply an anomaly or was motivated by federal-jurisdiction principles rather than a desire to talk about race and the criminal-justice system, but the Court, during the 2016 term, unearthed two more analogous cases involving racial animus out from underneath what seemed to be high procedural hurdles and, in doing so, echoed themes from *Foster*.¹⁰⁰

91. *Purkett v. Elem*, 514 U.S. 765, 766–67 (1995).

92. *See id.* at 767.

93. *Id.* at 768, 770.

94. 493 U.S. 924 (1989) (Mem.)

95. *Id.* at 924 (Marshall, J., dissenting).

96. 559 U.S. 43 (2010) (per curiam).

97. *See id.* at 48–49.

98. 562 U.S. 594 (2011) (per curiam).

99. *See id.* at 597–98.

100. *See infra* Sections IV.A, IV.B.

A. *Racial Bias in the Administration of the Death Penalty*

The State of Texas convicted Duane Buck of the capital murder of his ex-girlfriend and her male friend.¹⁰¹ Buck's guilt was not at issue, but whether he should be executed for his crime was.¹⁰² During the penalty phase, the primary aggravating factor at issue was Buck's future dangerousness.¹⁰³ In determining future dangerousness, psychiatric experts utilize multi-factored statistical models to predict a defendant's risk based, primarily, on the aggregate impact of categorical, actuarial factors like age, race, marital status, criminal history, certain personality traits, etc.¹⁰⁴ During Buck's court-appointed defense attorney's direct examination of his psychiatric expert, Dr. Walter Quijano, the attorney elicited answers from him about the individual components of his risk model, including the race factor.¹⁰⁵ In response, Quijano opined: "It's a sad commentary that minorities, Hispanics and Black people, are over represented in the Criminal Justice System."¹⁰⁶ The prosecutor followed up on the defense attorney's line of inquiry on cross-examination, asking Quijano to make explicit the implicit import of his direct examination testimony—namely, that Buck was more likely to pose a danger, because he was Black, than a similarly situated white man, asking: "[T]he race factor, [B]lack, increases the future dangerousness for various complicated reasons; is that correct?"¹⁰⁷ Without objection from the defense attorney, Quijano responded, "Yes."¹⁰⁸ The court, on the jury's recommendation, ultimately sentenced Buck to death.¹⁰⁹

The postconviction procedural history in *Buck* is multilayered and complicated, but what follows is as brief a summary as possible of its relevant components. In 1997, Buck filed his first state petition seeking habeas relief from his death sentence.¹¹⁰ In it, his state habeas counsel failed to challenge the

101. *Buck v. Stephens*, 623 F. App'x 668, 669 (5th Cir. 2015).

102. *See id.* at 669–71.

103. *Id.* at 669–70. The State alleged that the likelihood of Buck's future commission of criminal acts was high enough that he would pose a continuing threat to society if he was not put to death, a special question requiring an affirmative answer for his death eligibility. *See id.* at 669. *See generally* TEX. CODE CRIM. PROC. ANN., Art. 37.071, § 2(b)(1) (2013) (establishing the future-dangerousness factor).

104. *See generally* Christopher Slobogin, *Dangerousness and Expertise Redux*, 56 EMORY L.J. 275, 283–85 (2006).

105. *See Buck*, 623 F. App'x at 669.

106. *Id.*

107. *Id.*

108. *See id.*

109. *Id.*

110. *Id.* at 670.

admission of the race-based dangerousness testimony at his sentencing proceeding on any ground.¹¹¹

In 2000, in an unrelated case, the Texas Attorney General confessed error, before the Texas Court of Criminal Appeals, in permitting sentencing-phase experts to testify in death-penalty cases that race increased certain defendants' likelihood of future dangerousness.¹¹² In doing so, the State identified several other cases in which it had elicited similar testimony, including *Buck*, and notified the respective defense attorneys in those cases.¹¹³

In 2002, Buck filed a second state habeas corpus petition alleging the constitutionally ineffective assistance of his sentencing counsel for his role in eliciting and failing to object to the race-based dangerousness testimony.¹¹⁴ At the request of the State (despite its apparent pledge not to do so), the Texas Court of Criminal Appeals dismissed Buck's successive petition as an abuse of the writ.¹¹⁵

In 2004, Buck filed a federal petition for habeas corpus relief on the ground that his sentencing counsel's ineffective assistance violated the Sixth Amendment to the United States Constitution.¹¹⁶ The district court denied relief on the ground that Buck had procedurally defaulted his ineffective-assistance claim by failing to raise it in his first state habeas petition, and the United States Court of Appeals for the Fifth Circuit affirmed the denial.¹¹⁷

In 2013, Buck filed a third state habeas petition.¹¹⁸ While that petition was pending in the Texas state courts, the United States Supreme Court decided *Trevino v. Thaler*,¹¹⁹ which found Texas's provision of state habeas counsel to be so inadequate that the failure of state habeas counsel to raise issues would

111. *See id.*

112. *See id.* Quijano was apparently a regular expert for the State in capital sentencing proceedings, and so the State frequently elicited testimony from him on direct examination that was similar to what was elicited on cross-examination in *Buck*. *See id.*

113. *See id.* The record below is inconclusive regarding the exact chronology of events surrounding the State's confession of error with regard to Buck's case because Buck never had a hearing on the merits of his ineffective-assistance-of-counsel claim, but there is some evidence to suggest that the State of Texas, at this period of time, also agreed not to raise procedural bars to relief for the affected defendants. *See id.* at 670 n.1.

114. *Id.* at 670.

115. *See id.*

116. *Id.*

117. *Id.*

118. *Id.* at 671.

119. 133 S. Ct. 1911 (2013).

not bar federal relief under *Martinez v. Ryan*.¹²⁰ Despite *Trevino*, the Texas Court of Criminal Appeals, in a narrowly decided 4–3 decision, again dismissed Buck’s third petition as an abuse of the writ.¹²¹

In 2014, Buck filed a motion for relief from judgment in federal district court, on the ground of ineffective assistance of counsel, under Rule 60(b).¹²² Rule 60(b) permits a plaintiff to challenge a previous ruling that precluded a determination of a federal question on the merits, but does not permit a plaintiff to challenge a prior merits-based ruling.¹²³ The district court denied Buck’s motion on the ground that there were no extraordinary circumstances justifying relief from judgment.¹²⁴ The court also denied Buck a certificate of appealability (COA) to the Fifth Circuit, and the Fifth Circuit affirmed that denial, concluding that the case was “not an extraordinary circumstance in the habeas context.”¹²⁵

Buck filed a petition for certiorari to the Supreme Court asking review of the Fifth Circuit’s denial of his COA.¹²⁶ After more than a decade of postconviction petitions and motions to both state and federal courts, Buck has never had a hearing on the merits of his ineffective-assistance-of-counsel claim.¹²⁷ The question on which the Court granted certiorari review was, therefore, rather tortured:

[D]id the United States Court of Appeals for the Fifth Circuit impose an improper and unduly burdensome Certificate of Appealability (COA) standard . . . when it denied Mr. Buck a COA on his motion to reopen the judgment and obtain merits review of his claim that his trial counsel was constitutionally ineffective for knowingly presenting an “expert” who testified that Mr. Buck was more likely to be dangerous in the future

120. See *id.* at 1921 (citing 566 U.S. 1, 17 (2012) (holding that ineffective assistance of postconviction counsel could establish cause to excuse the failure of a federal habeas petitioner to exhaust a claim of ineffective assistance of trial counsel in state postconviction proceedings)).

121. See *Buck*, 623 F. App’x at 671.

122. *Id.* See generally FED. R. CIV. P. 60(b) (authorizing relief from a final judgment that is void or otherwise unjust). The Federal Rules of Civil Procedure, rather than the Federal Rules of Criminal Procedure, govern federal habeas corpus proceedings because habeas corpus functions as a collateral challenge to a state criminal conviction by way of a civil suit against the custodian of the inmate challenging the constitutionality of the state adjudication as a basis for confinement. See 28 U.S.C. § 2254 note (2012) (Rules Governing Section 2254 Cases in the United States District Court, Rule 12, Advisory Committee Note).

123. See FED. R. CIV. P. 60(b).

124. See *Buck*, 623 F. App’x at 671.

125. *Id.* at 671, 673–74.

126. Brief for Petitioner at *i*, *Buck*, 623 F. App’x 668 (No. 15-8049).

127. *Id.* at 1.

because he is Black, where future dangerousness was both a prerequisite for a death sentence and the central issue at sentencing?¹²⁸

While the procedural posture of *Buck* meant that the Court was being asked to review the strictness of the standard under which the Fifth Circuit determines whether to grant COAs, the oral arguments focused primarily on the underlying merits of Buck's ineffective-assistance-of-counsel claim: the significant and pervasive effect that the impact of Buck's race being a dangerousness factor may have had on his sentencing jury.¹²⁹ Chief Justice Roberts questioned the Texas Solicitor General at length about the possibility that the jury may have condemned Buck to death because it "had this evidence that he was, by virtue of his race, likely to be dangerous."¹³⁰

The Court reversed the Fifth Circuit's denial of the COA.¹³¹ While the narrow question presented to the Court, again, involved the COA standard, the Court nonetheless decided to address "the underlying merits" to Buck's claim, reasoning, extraordinarily, that, because the parties had briefed the issues, it was "proper to meet the decision below and the arguments of the parties on their own terms."¹³² On the issue of Buck's ineffective-assistance claim, the Court found Buck's sentencing counsel to have engaged in deficient performance, explaining:

Given that the jury had to make a finding of future dangerousness before it could impose a death sentence, Dr. Quijano's report said, in effect, that the color of Buck's skin made him more deserving of execution. It would be patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race.¹³³

The Court also found that Buck's counsel's deficient performance—two fleeting references to the relationship between race and dangerousness—was so prejudicial that, without it, there was a reasonable probability that the jury would not have sentenced him to death, "notwithstanding the nature of Buck's crime and his behavior in its aftermath."¹³⁴ Rejecting the State's suggestion that the impact of these brief, cryptic references to race was *de minimis*, the Court concluded:

[A]ccording to Dr. Quijano, that immutable characteristic

128. *Id.* at *i*.

129. *See generally* Transcript of Oral Argument, *Buck*, 623 F. App'x 668 (No. 15-8049).

130. *Id.* at 30.

131. *See Buck v. Davis*, 137 S. Ct. 759, 767 (2017).

132. *Id.* at 775.

133. *Id.* (citation omitted).

134. *Id.* at 776.

carried with it an “[i]ncreased probability” of future violence. Here was hard statistical evidence—from an expert—to guide an otherwise speculative inquiry.

And it was potent evidence. Dr. Quijano’s testimony appealed to a powerful racial stereotype—that of [B]lack men as “violence prone.” In combination with the substance of the jury’s inquiry, this created something of a perfect storm. Dr. Quijano’s opinion coincided precisely with a particularly noxious strain of racial prejudice, which itself coincided precisely with the central question at sentencing. The effect of this unusual confluence of factors was to provide support for making a decision on life or death on the basis of race.

....

... [W]hen a jury hears expert testimony that expressly makes a defendant’s race directly pertinent on the question of life or death, the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses.¹³⁵

The Court then addressed the procedural hurdle to Buck’s success on these merits: whether Buck could use a Rule 60(b) motion to reopen a case so extensively and conclusively litigated.¹³⁶ The Court concluded that *Buck* presented “extraordinary circumstances” justifying extraordinary relief and that the district court had abused its discretion in deciding otherwise.¹³⁷ The Court explained:

Buck may have been sentenced to death in part because of his race. As an initial matter, this is a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle. . . .

This departure from basic principle was exacerbated because it concerned race. “Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.”¹³⁸

The Court dismissed the invited-error aspect of Buck’s case—namely, that it had been defense counsel, rather than the prosecutor, that had elicited the

135. *Id.* at 776–77 (citations omitted).

136. *Id.* at 777.

137. *Id.* at 778.

138. *Id.* at 778 (citation omitted).

racially discriminatory testimony: “Regardless of which party first broached the subject, race was . . . put to the jury ‘as a factor . . . to weigh in making its determination.’”¹³⁹

Finally, the Court refused to entertain the State’s argument that Buck was not entitled to retroactive application of *Martinez* and *Trevino* at such a late stage in the proceedings, not because the argument lacked merit, but because: “If we were to entertain the State’s eleventh-hour [retroactivity] argument and find it persuasive, Buck’s *Strickland* and Rule 60(b)(6) contentions—the issues we thought worthy of review—would be insulated from our consideration.”¹⁴⁰ The Court, therefore, declined to reach the retroactivity question and concluded that *Martinez* and *Trevino* applied retroactively only to Buck’s claim, while reserving the right to find them not to be retroactive as applied to any other habeas petitioners in the future.¹⁴¹

B. Racial Bias in Jury Deliberations

The State of Colorado charged Miguel Pena-Rodriguez, who is Chicano, with harassing and assaulting two teenage girls in a women’s room at the racetrack where he worked.¹⁴² In his defense, he offered alibi testimony from a friend and coworker, who is also Chicano, that they were working together at the time of the alleged attack.¹⁴³ After the jury found Pena-Rodriguez guilty of some of the charges, jurors came forward to report that, during deliberation, one juror, who self-identified as a former law-enforcement officer, had claimed, relying on previous investigative experience, that “I think he did it because he’s Mexican and Mexican men take whatever they want.”¹⁴⁴

Unfortunately for Pena-Rodriguez, however, Colorado, like most jurisdictions, has a jury verdict non-impeachment rule, which states:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon his or any other juror’s mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith.¹⁴⁵

139. *Id.* at 779 (second alteration in original).

140. *Id.* at 780.

141. *Id.*

142. Pena-Rodriguez v. People, 350 P.3d 287, 288 (Colo. 2015).

143. *Id.* at 288 & n.3.

144. *See id.* at 288–89.

145. COLO. R. EVID. 606(b).

The Colorado Supreme Court affirmed Pena-Rodriguez's conviction on the ground that the "plain language" of Rule 606(b) precluded it from considering the evidence of the juror's comments during deliberations, rejecting his claim that Rule 606(b) was unconstitutional as applied to the facts of his case in violation of his Sixth Amendment right to a fair and impartial jury.¹⁴⁶

The United States Supreme Court has had two fairly recent occasions to visit the constitutionality of Federal Rule of Evidence 606(b), which is substantially similar to Colorado's rule, and upheld it both times despite troubling facts. The first case was *Tanner v. United States*.¹⁴⁷ Tanner's jury apparently mistook his federal criminal trial for a booze cruise, drinking to excess, and even smoking marijuana and snorting cocaine while on breaks.¹⁴⁸ Some jurors were so inebriated that they passed out at one point during the trial.¹⁴⁹ When Tanner sought to overturn his guilty verdict on jury-misconduct grounds, the lower federal courts refused to consider affidavits from concerned jurors describing the drug and alcohol consumption of their peers, based on Rule 606(b).¹⁵⁰ The Supreme Court affirmed the denial on the basis of the importance of the "policy considerations" that underlay jury secrecy, namely the need for the "full and frank discussion in the jury room" of difficult and controversial issues.¹⁵¹ The Court also expressed concern about whether any jury deliberation would live up to searching scrutiny, commenting: "It is not at all clear . . . that the jury system could survive such efforts to perfect it."¹⁵²

The second case was *Warger v. Shauers*,¹⁵³ which upheld the constitutionality of Rule 606(b) to bar evidence that a juror had lied during voir dire, a scenario that a majority of federal circuits had previously held to constitute strong evidence of jury bias (theorizing that the only reason that a juror would lie about a disqualifying bias during voir dire was to get on a jury knowing that he or she could not decide the case impartially).¹⁵⁴ *Warger*, however, expressly reserved decision, in a footnote, about whether there could be "cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged."¹⁵⁵ The question presented in Pena-Rodriguez's petition for

146. *Pena-Rodriguez*, 350 P.3d at 289, 291–93.

147. 483 U.S. 107 (1987).

148. *Id.* at 115–16.

149. *See id.* at 116.

150. *See id.* at 113.

151. *Id.* at 119–21.

152. *Id.* at 120.

153. 135 S. Ct. 521 (2014).

154. *See id.* at 525, 529.

155. *See id.* at 529 n.3.

certiorari was precisely “whether a no-impeachment rule constitutionally may bar evidence of racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury.”¹⁵⁶

The Supreme Court also denied another petition for certiorari in the 2016 term in a case involving juror bias of a non-racial variety.¹⁵⁷ In that case, “[a] jury convicted Jose Felipe Velasco of committing a lewd and lascivious act against a child.”¹⁵⁸ Velasco argued that his right to a fair trial with an impartial jury was violated when the trial court failed to discharge for bias a juror who failed, until after opening statements, to disclose her knowledge of an analogous incident at her daughter’s school.¹⁵⁹ His challenge was rejected by the California Court of Appeals,¹⁶⁰ and that rejection was upheld by the United States District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit on federal habeas review on the ground that the state court’s decision was not contrary to, or an unreasonable application of, clearly established federal law and was not an unreasonable determination of the facts.¹⁶¹

The oral arguments before the Court in *Pena-Rodriguez* focused almost entirely over whether and to what extent race was “different” in a way that warranted an exception to the ordinary rules of verdict non-impeachment.¹⁶² Justice Sotomayor expressed her belief that “the most pernicious and odious discrimination in our law is based on race,” and advocated finding non-impeachment rules unconstitutional as applied only to issues of race.¹⁶³ Justice Breyer noted that “race is a special problem” when it comes to the issue of the systemic fairness of criminal justice.¹⁶⁴ Justice Kagan asserted the possibility that “the interests in preventing unfairness of this kind are much

156. Petition for a Writ of Certiorari at *i*, *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606).

157. See *Velasco v. Sherman*, 137 S. Ct. 379 (2016) (Mem.), *denying cert. sub nom. to Velasco v. Allison*, 645 Fed. App’x. 598 (9th Cir. 2016), *aff’g* 2014 WL 1266978 (C.D. Cal. Mar. 24, 2014), *denying petition to* 2013 WL 8150866 (C.D. Cal. Dec. 27, 2013), *denying petition sub nom. to People v. Velasco*, No. G042281, 2011 WL 264695 (Cal. Ct. App. Jan. 27, 2011).

158. *Velasco*, 2011 WL 264695, at *1.

159. *Id.*

160. *Id.* at *6.

161. See *Velasco v. Allison*, No. CV 12-1011-JSL (AGR), 2013 WL 8150866 *14 (C.D. Cal. Dec. 27, 2013); *Velasco*, 2014 WL 1266978; *Velasco*, 645 F. App’x at 598.

162. See Transcript of Oral Argument at 5, *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (No. 15-606). See generally *Rose v. Mitchell*, 443 U.S. 545, 555 (1979) (“Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.”).

163. Transcript of Oral Argument at 6, *Pena-Rodriguez*, 137 S. Ct. 855 (No. 15-606).

164. *Id.* at 20.

greater; . . . verdicts based on race discrimination pose a [fundamentally different] harm tha[n] verdicts based on other kinds of unfairnesses,” and further argued that “it seems artificial not to think about the Sixth Amendment [right to a fair and impartial jury] as [being] informed by the principles of the Equal Protection Clause.”¹⁶⁵ She also noted the special nature of race in the criminal-justice system, explaining: “[T]here’s a special kind of harm . . . in punishing people because of their race. And maybe especially because race is so associated with particular stereotypes respecting criminality, . . . it’s also the worst thing that you can suggest about the criminal justice system, that it allows that to happen.”¹⁶⁶

In its opinion in *Pena-Rodriguez*, the Court found that Rule 606(b) violated Pena-Rodriguez’s Sixth Amendment right to a fair and impartial jury as applied to the situation involving the juror’s explicitly racist comments, holding that the Sixth Amendment required a reviewing court to admit and consider the evidence of racial animus from deliberations.¹⁶⁷ In reaching its decision, the Court emphasized the “distinct” role of racism in the criminal trial process, requiring “added precaution,” noting what it termed the “imperative to purge racial prejudice from the administration of justice” because “racial discrimination in the jury system posed a particular threat both to the promise of the [Fourteenth] Amendment and to the integrity of the jury trial.”¹⁶⁸ The Court found that “the *Tanner* safeguards may be less effective in rooting out racial bias than other kinds of bias.”¹⁶⁹ The Court concluded: “The unmistakable principle underlying [the Court’s] precedents [prohibiting state-sponsored racial discrimination in the jury system] is that discrimination on the basis of race, ‘odious in all aspects, is especially pernicious in the administration of justice.’”¹⁷⁰ The Court described “racial bias” as “a familiar and recurring evil that, if left unaddressed, would risk systemic injury” and that it “implicates unique historical, constitutional, and institutional concerns.”¹⁷¹

165. *Id.* at 29–30.

166. *Id.* at 30–31.

167. *See Pena-Rodriguez*, 137 S. Ct. at 869.

168. *Id.* at 867–69.

169. *Id.* at 869.

170. *Id.* at 868 (citation omitted).

171. *Id.*

V. SMOKING GUNS & DOG WHISTLES

That the Court simply removed otherwise insurmountable procedural barriers in these cases is clear. Justice Breyer’s comments during the oral arguments in *Buck* are particularly illustrative:

We do know that the prosecutor asked the expert witness, is it correct that the race factor, [B]lack, increases the future dangerousness for various complicated reasons. And he says, yes.

....

... [T]he issue here is, is there some good reason why this person shouldn’t have been able to reopen his case? I mean, that’s the question. What’s the reason?¹⁷²

Chief Justice Roberts chimed in and asked the Texas Solicitor General, “[W]ouldn’t it seem pretty straightforward to say, okay, maybe he’s right, maybe he’s wrong, but at least he’s made a substantial showing. Let’s give him a Certificate of Appealability, and then we’ll go through the normal procedures on the merits?”¹⁷³

Dissenting in *Buck*, Justice Thomas complained: “Having settled on a desired outcome, the Court bulldoze[d] procedural obstacles and misapplie[d] settled law to justify it.”¹⁷⁴ He went on to note:

[A]fter chastising the Court of Appeals for making an end run around the COA standard in order to reach the merits of petitioner’s Rule 60(b) claim, the Court d[id] precisely that. Astonishingly, the Court also decide[d] the merits of petitioner’s Sixth Amendment claim—an issue that was not even ‘addressed by the Fifth Circuit.’

This unapologetic course reversal—made without so much as a hint of the irony—is striking.¹⁷⁵

He concluded that “[p]ermitting a defendant to file a Rule 60(b) motion years after the fact functionally eviscerates the statute of limitations [for federal

172. Transcript of Oral Argument at 31, *Buck v. Davis*, 137 S. Ct. 759 (2017) (No. 15-8049). Justice Breyer’s argument that the Court ought not to let procedural barriers interfere with *Buck* having one full hearing on the merits of his claim is particularly striking when compared with his comments at oral arguments during *Richter*. When Richter’s attorney argued that Richter had not had an adjudication of the merits of his ineffective-assistance-of-counsel claim at the California Supreme Court, Justice Breyer responded, rather blithely: “But if, in this case, [the California Supreme Court] did reject it on a procedural ground, and it was a reasonable ground that they applied consistently, then the Ninth Circuit or the Federal courts couldn’t consider the claim at all; is that right?” Transcript of Oral Argument at 14, *Harrington v. Richter*, 562 U.S. 86 (2010) (No. 09-587).

173. Transcript of Oral Argument at 35–36, *Buck*, 137 S. Ct. 759 (No. 15-8049).

174. *Buck*, 137 S. Ct. at 780–81 (2017) (Thomas, J., dissenting).

175. *Id.* at 782 (citations omitted).

habeas review of state convictions].”¹⁷⁶ Justice Alito similarly complained, dissenting in *Pena-Rodriguez*, that “the majority barely bother[ed] to engage with the policy issues implicated by no-impeachment rules.”¹⁷⁷

One thing that unites these three cases—*Foster*, *Buck*, and *Pena-Rodriguez*—is that they do not involve subtle or debatable issues of implicit bias or dog-whistle racism. They involve explicit, intentional appeals to racial bias—as close to a smoking gun as one is ever likely to see in a contested racial-equality challenge in the twenty-first century. Justice Alito described the race-based dangerousness testimony in *Buck* as “indefensible”¹⁷⁸ and the juror’s remarks in *Pena-Rodriguez* as “very blatant.”¹⁷⁹ Justice Thomas described the testimony in *Buck* as “expressly racial.”¹⁸⁰ Justice Kagan described the remarks in *Pena-Rodriguez* as “a screaming race bias in the jury room . . . the best smoking gun evidence you’re ever going to see about race bias in the jury room.”¹⁸¹ The majority in *Pena-Rodriguez* expressly limited its decision to “overt racial bias” and described the juror comments at issue as “egregious and unmistakable in their reliance on racial bias.”¹⁸²

Courts have generally refused to take on “subtler” forms of racial discrimination. For example, in *People v. Taylor*, Taylor was a Black man charged with capital murder for raping and murdering an elderly white woman.¹⁸³ Prior to jury selection, the trial court gave prospective jurors a questionnaire that included four questions meant to elicit information about their racial attitudes.¹⁸⁴ When the written responses of several jurors included ambiguous or inconsistent answers about their racial attitudes, the trial court refused Taylor’s request to ask follow-up questions to clarify the responses.¹⁸⁵ For example, two jurors answered both that they had no racial prejudices and that they could *not* be fair and impartial jurors in a case in which a Black defendant was accused of committing crimes against a white woman.¹⁸⁶

176. *Id.* at 785. Justice Thomas made a similar observation dissenting in *Pena-Rodriguez*, complaining that the majority had “impose[d] a uniform national rule” in an “attempt to stimulate a ‘thoughtful, rational dialogue’ on race relations.” *Pena-Rodriguez*, 137 S. Ct. at 874 (Thomas, J., dissenting) (citation omitted).

177. *Pena-Rodriguez*, 137 S. Ct. at 885 (Alito, J., dissenting).

178. Transcript of Oral Argument at 10, *Buck*, 137 S. Ct. 759 (No. 15-8049).

179. Transcript of Oral Argument at 26, *Pena-Rodriguez*, 137 S. Ct. 855 (No. 15-606).

180. *Buck*, 137 S. Ct. at 785 (Thomas, J., dissenting).

181. Transcript of Oral Argument at 44, *Pena-Rodriguez*, 137 S. Ct. 855 (No. 15-606).

182. *Pena-Rodriguez*, 137 S. Ct. at 869–70.

183. See 229 P.3d 12, 29 (Cal. 2010).

184. *Id.* at 43.

185. See *id.* at 44.

186. *Id.*

Another juror characterized her racial prejudices as “mild” because she was “fearful around large numbers of [B]lacks, Hispanics—or even [W]hites—if it [was] an unsafe area.”¹⁸⁷ Nonetheless, the trial court conducted no additional inquiry, and the jurors were ultimately seated for Taylor’s trial.¹⁸⁸ On appeal, the California Supreme Court rejected Taylor’s claim that the trial court’s questioning regarding potential racial bias was inadequate because “the juror questionnaire gave the prospective jurors a clear opportunity to disclose views about racial bias that would warrant their excusal from the jury” and the voir dire, “when viewed as a whole, was not so inadequate as to render his trial fundamentally unfair.”¹⁸⁹

In *State v. Tucker*, Tucker, a Black man, was convicted of the brutal beating and rape of a white woman.¹⁹⁰ On appeal, the Connecticut Supreme Court rejected Tucker’s claim that the trial court had inappropriately denied several of his challenges of prospective jurors for cause, including two jurors who admitted that they were philosophically opposed to interracial marriage, one of whom said that she “just wouldn’t want [her] daughter to marry one” and that she had been uncomfortable when she previously lived in what she described as a “[B]lack neighborhood.”¹⁹¹ After admonishing that “[t]here are some questions regarding racial attitudes the responses to which may raise red flags that should heighten the attention of the court,” the court nonetheless held that the trial court’s failure to strike the jurors had not constituted an abuse of discretion.¹⁹²

In *Commonwealth v. McCowen*, McCowen, who was Black, was convicted of a brutal rape and murder.¹⁹³ Approximately a month after his conviction, McCowen moved for a postverdict inquiry of the jurors based on information that the jury’s deliberations had been infected by three separate incidents involving racial prejudice.¹⁹⁴ In the first incident, a juror said that she was frightened of McCowen because he was “big” and “[B]lack” and had been trying to “intimidate” her by staring at her during the trial.¹⁹⁵ In the second incident, a different juror opined that bruises like those found on the victim’s

187. *Id.* (alterations in original).

188. *Id.* at 45.

189. *Id.* (citation omitted).

190. *See State v. Tucker*, 629 A.2d 1067, 1069–70 (Conn. 1993).

191. *Id.* at 1069, 1073, 1075–77.

192. *Id.* at 1078, 1080.

193. 939 N.E.2d 735, 742 (Mass. 2010)

194. *Id.* at 761.

195. *Id.*

body would result “when a big [B]lack guy beats up on a small woman.”¹⁹⁶ In the third incident, a third juror stated that he did not like Black people because of “what they are capable of.”¹⁹⁷ The trial court denied McCowen’s motion for a new trial, reasoning that none of the jurors’ actions constituted racial bias.¹⁹⁸ With regard to the first juror, the trial court found that there was no evidence that her fear of McCowen was “tied . . . to [his] race.”¹⁹⁹ With regard to the second juror, the court found that her comment constituted neither “overt prejudice” nor “veiled or subconscious bias or stereotyping,” but rather that it “was descriptive in nature and intent” and that any racial stereotype that it invoked was “inherent in the facts of the case.”²⁰⁰ With regard to the third juror, the trial court found that his comment was not an expression of “racial animus.”²⁰¹ On appeal, the Massachusetts Supreme Judicial Court found that the trial court had neither erred in its finding of facts nor in its legal conclusion that a new trial for McCowen was warranted, contrasting the jurors comments in McCowen with a juror comment in another case that “the goddamned spic is guilty just sitting there; look at him. Why bother having the trial.”²⁰²

VI. CONCLUSION

The deeper question that remains, therefore, is whether the Supreme Court’s recent willingness to bend the procedural rules and open itself to claims of racial bias, if that is what the Court is exhibiting, will extend to the more nefarious, systemic, and common implicit biases that pervade the system.²⁰³ As Justice Marshall pointed out, dissenting from the Court’s denial of certiorari in *Wilkerson*: “If such ‘smoking guns’ are ignored, we have little hope of combating the more subtle forms of racial discrimination.”²⁰⁴ What about

196. *Id.*

197. *Id.*

198. *See id.* at 763.

199. *Id.* at 762.

200. *Id.* at 762–63.

201. *Id.* at 762.

202. *Id.* at 765–66.

203. *See* Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149, 149 (2010) (“Implicit biases are the plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious, without our conscious permission or acknowledgement.”); *see also* Nancy Lewis Alvarez, *Racial Bias and the Right to an Impartial Jury: A Standard for Allowing Voir Dire Inquiry*, 33 HASTINGS L.J. 959, 961–62 (1982) (“[Implied bias] is based on the recognition that certain relationships between a litigant and a prospective juror are likely to result, consciously or unconsciously, in the bias of the juror.”).

204. *Wilkerson v. Texas*, 493 U.S. 924, 928 (1989) (Mem.) (Marshall, J., dissenting).

credibility determinations that are infused with stereotype-congruent responses to witnesses or parties of color—e.g., a jury’s determination of whether a defendant acted in self-defense, a judge’s determination of the legally permissible amount of force in apprehending a putatively “dangerous” suspect of color, or a lawyer’s use of subconscious stereotypes during the exercise of peremptory challenges?²⁰⁵ How should courts deal with well-documented implicit biases in the criminal-justice system like racially biased “misremembering” and the “shooter bias”?²⁰⁶

Justice Alito reformulated this Article’s question about whether the Court is prepared to take on these subtler, more implicit forms of racism into a slippery-slope argument in his dissenting opinion in *Pena-Rodriguez*:

Attempting to limit the damage worked by its decision, the Court says that only “clear” expressions of bias must be admitted, but judging whether a statement is sufficiently “clear” will often not be easy. Suppose that the allegedly biased juror in this case never made reference to Peña-Rodriguez’s race or national origin but said that he had a lot of experience with “this macho type” and knew that men of this kind felt that they could get their way with women. Suppose that other jurors testified that they were certain that “this macho type” was meant to refer to Mexican or Hispanic men.²⁰⁷

Of course, this author hopes that the Court will go down that slippery slope, but the extent of the Court’s willingness to address these bigger—and more prevalent—issues of implicit, dog-whistle biases, remains to be seen.

205. See Montoya, *supra* note 58, at 1024 (“*Batson* also fails to recognize that much discrimination in jury selection, like discrimination generally, is the product of unconscious racism and sexism.”).

206. See Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 357 (2007) (“The ‘shooter bias’ refers to participants’ propensity to shoot Black perpetrators more quickly and more frequently than White perpetrators and to decide not to shoot White bystanders more quickly and frequently than Black bystanders.”).

207. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 884 (Alito, J., dissenting) (citations omitted).