No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CURTIS CLINTON,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

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PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Racism is America's original sin. It plagued this country's founding, wrenched it apart in civil war, and despite some progress, continues to produce unequal results in all avenues of society, including the criminal justice system. Curtis Clinton's death penalty case did not escape racism's destructive reach. The trial court, the State, and Clinton's counsel allowed a vicious racial stereotype to infect Clinton's trial. The trial court permitted an unrelated rape case to be joined and tried with the murder case for which Clinton received a death sentence, and it allowed the State to introduce evidence of a prior involuntary manslaughter. These rulings allowed the State to promote the highly prejudicial racial stereotype of the "black brute" who preys on vulnerable white women. Clinton's trial attorneys did nothing to stop this stereotype from taking root and infesting his trial.

Clinton's case thus raises a critical concern of national importance: whether and to what extent our system of justice tolerates the noxious use of deeply-rooted racial stereotypes. Accordingly, Clinton presents the following questions to this Court:

1. Whether a defendant's rights to the effective assistance of counsel, a fair and impartial jury, to be free from cruel and unusual punishment, and to the guarantee of equal protection under the laws, protected by the Sixth, Eighth, and Fourteenth Amendments of the Constitution, protect against the introduction of evidence and argument that calls forth and projects to the jury the poisonous racial stereotype of an African American defendant as a "black brute" who preys on vulnerable white women.

2. Whether lower courts need standards for detecting and remedying the more subtle but just as noxious forms of racism that plague the criminal justice system and violate a defendants' Sixth, Eighth, and Fourteenth Amendment rights.

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Curtis Clinton respectfully petitions for a writ of certiorari to review the judgement of the Ohio Supreme Court.

PARTIES TO THE PROCEEDINGS

Petitioner, Curtis Clinton, a death-sentenced Ohio prisoner, was the appellant in the Ohio Supreme Court.

Respondent, the State of Ohio, was the appellee in the Ohio Supreme Court.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported at *State v. Clinton*, 2017-Ohio-9423 and is reproduced in the Appendix at A-1. The sentencing entry of the trial court is reproduced in the Appendix at A-78.

JURISDICTION

The Supreme Court of Ohio rendered its opinion on December 19, 2017 and reported that opinion on February 8, 2018. Clinton timely-filed a Motion for Reconsideration in the Ohio Supreme Court on February 16, 2018. The Ohio Supreme Court denied that Motion on April 25, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

This case involves the following Amendments to the United States Constitution:

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury…and to have the Assistance of Counsel for his defense.

Eighth Amendment:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment:

No State shall make or enforce any law which shall… deny any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

> *When a knock is heard at the door [a White woman] shudders with nameless horror. The black brute is lurking in the dark, a monstrous beast, crazed with lust. His ferocity is almost demoniacal. A mad bull or tiger could scarcely be more brutal. A whole community is frenzied with horror, with the blind and furious rage for vengeance.*[1] *–George Winston, 1901.*

1. The Ohio Supreme Court upheld joinder of unrelated charges and admission of evidence at trial that ensured race would play an intolerable role in this case.

On September 8, 2012, Heather Jackson and her two children, C.J. and W.J, were strangled to death in their Sandusky, Ohio home. The State claimed that the killer raped C.J. prior to murdering her. Jackson was 23 years old at the time of her death, and C.J. and W.J. were 3 years and 1-year-old respectively. All three victims were white.

The police arrested, charged, and tried Curtis Clinton, an African American man, for these crimes. The State joined an unrelated rape charge involving E.S., which allegedly happened the week before the murders, to the Jackson murder trial. E.S. was 17, almost 18, at the time of the alleged rape. She too was white.

Before trial, Clinton filed a motion for change of venue, asked to sever the charges, and objected to the State introducing evidence under state Evidence Rule 404(b) of a 1997 manslaughter conviction involving the death of a white woman. *State*

[1] Winston, G.T. (1901). The relations of the whites to the Negroes, pp. 108–09. *Annals of the American Academy of Political and Social Science*, XVII; https://ferris.edu/jimcrow/brute/

v. Clinton, 2017-Ohio-9423, ¶ 42, 63, 95. All of these objections were overruled at trial and upheld on appeal.[2] *Id.* at ¶ 57, 69,109.

Clinton also raised on direct appeal other issues that showed racism's poisonous impact on his case. He argued that "[t]he trial court erred, and defense counsel was ineffective, by failing to adequately address the issue of race at any point during Clinton's capital trial…" Clinton Direct Appeal Merit Brief, p. 12 (hereinafter "Brief"). He argued that the trial court erred when it failed to voir dire on race given the nature of the case, *Clinton*, 2017 – Ohio – 9423, ¶162, that the State purposely challenged a prospective juror because of her race, *Id.* at ¶ 40, that Clinton's lawyers were ineffective for simply accepting the State's reasoning for its challenge, Brief at pp. 111–12, and that race was only mentioned once during voir dire when Clinton's trial counsel simply stated in passing that race should play no role in this case. Brief, p. 12. The Ohio Supreme Court rejected all of these arguments, claiming that these issues did not impact Clinton's right to a fair trial given what it considered the overwhelming evidence of guilt, *Clinton*, 2017 – Ohio – 9423 at ¶ 40, and that the trial court had no independent duty to inquire on issues of race in voir dire. ¶ 163.

Clinton once more argued against the racism in his case in his Motion for Reconsideration after the Ohio Supreme Court denied his direct appeal. *See* Clinton Motion for Reconsideration, pp. 12–15. He told the Court that its decision on the joinder and 404(b) issues allowed race to be a critical factor in his conviction and

[2] The Ohio Supreme Court found there were sufficient nexus between the rape of E.S., the murder of Jackson, and the 1997 manslaughter of Misty Keckler to allow the State to join the cases and introduce this evidence. The first similarity noted by the Court is that "[a]ll three victims were ***young Caucasian women***." *Clinton*, 2017-Ohio-9423, ¶108.

sentence in violation of the VI, VIII, and XIV amendments to the U.S. Constitution. *See* Mot. for Recon. pp. 2, 12–15. The Ohio Supreme Court denied this Motion without issuing an opinion. *State v. Clinton*, Ohio Supreme Court Case No. 2014-0273.

2. At trial, the State used coded language to call forth images of Clinton as the "black brute" – a long standing and enormously prejudicial stereotype.

The oversexualized "black brute" who preys on vulnerable white women is not a new stereotype. In fact, it dates back to the founding of our nation. Thomas Jefferson – Enlightenment thinker, president, and slave owner – claimed that African American men "are more ardent after their female; but love seems with them to be more an eager desire, than a tender delicate mixture of sentiment and sensation." Thomas Jefferson, *Notes On the State of Virginia*, *in* Race and the Enlightenment: A Reader 95, 98 (Emmanuel Eze, ed., 1997).

This stereotype of black men as violence prone is intimately tied to this country's politics. It finds its roots in Reconstruction, when white majorities in power depicted freed slaves as brutes and inflamed emotions by tying this brutality directly to the threat that these men would rape and murder white women. In the past, politicians used this stereotype to deny even basic physical safety for African Americans. Mississippi Congressman Sisson's 1921 comments during debates on an anti-lynching bill demonstrate the strength and depth of this prejudice:

> [A]s long as rape continues lynching will continue. For this crime, and this crime alone, the South has not hesitated to administer swift and certain punishment…We are going to protect our girls and womenfolk from these black brutes. When these black fiends keep their hands off the throats of the women of the South then lynching will stop...

62 Cong. Rec. 1721 (1921). This sentiment carried the day and the Dyer Bill died in the Senate.

It is no accident that this stereotype has long been perpetuated by dominant white American popular culture. In 1915, D.W. Griffith's film "Birth of a Nation" premiered and was immensely popular. The film's major theme was "the supposed dangers that hypersexualized black men pose to white women." It included "a lengthy sequence devoted to a former slave chasing his former white mistress after she turns down his proposal of marriage. She jumps off a cliff to her death rather than risk being caught — and her outraged brother founds the Klan to bring him to 'justice.'" Lou Lumenick, *Why 'Birth of a Nation' is Still the Most Racist Movie Ever*, NY POST, Feb. 7, 2015, *available at* https://nypost.com/2015/02/07/why-birth-of-a-nation-is-still-the-most-controversial-movie-ever/.

Given this history, it is hardly surprising that these prevailing stereotypes have found their way into the jury system. Men of color have routinely been convicted and sentenced based on the color of their skin. *See*, *Furman v. Georgia*, 408 U.S. 238 (1972); *Batson v. Kentucky,* 476 U.S. 79 (1986); *Turner v. Murray*, 476 U.S. 28 (1986); *McKlesky v. Kemp*, 481 U.S. 279 (1987); *Buck v. Davis*, 580 U.S. __ , 137 S. Ct. 759 (2017); *Peña-Rodriguez v. Colorado*, 580 U.S. __ , 137 S. Ct. 855 (2017); *Tharpe v. Sellers*, 583 U.S. ___ , 138 S. Ct. 545 (2018).

Curtis Clinton's case is proof that these stereotypes are alive and well today. The State accused Clinton of killing a young white mother, Heather Jackson, and her two young white children, C.J. and W.J. They further accused him of raping C.J., the

young girl. In addition, the State charged Clinton with the unrelated rape of a separate young white woman, E.S. The trial court allowed these cases to be tried together, over defense objection. This case – an African American adult male charged with raping and murdering young white women and children – presented a substantial and intolerable risk that race might play a decisive role in the jury's decision on guilt and sentence.

Rather than attempt to insulate the case from the potent impacts of racism, the State sought it out as a tool to use in convicting Clinton and winning a death sentencing against him. The State did this by drawing on one of the most prejudicial, pervasive, and easily recognizable stereotypes of the African American man: that of the "black brute."

The prosecutor struck a black juror in voir dire, and then at trial was allowed, over defense objection, to introduce evidence of an old, unrelated, and highly prejudicial involuntary manslaughter conviction that involved another young white woman, Misty Keckler. The State's witness told the jury that Clinton "advised" that he had "sexual contact" with this woman. Tr. 959. By introducing this evidence, the State aimed to paint Clinton as the embodiment of the "black brute" stereotype. This secured Clinton's convictions here.

The State's closing argument amplified this strategy. Without objection by defense counsel, the State told the jury that Clinton was a "vicious and brutal killer" who had "raped a number of people, ***including*** [E.S] and [C.J.]." Tr. 1164 (emphasis added). Despite using the word "including," the State had not charged Clinton with

other rapes and did not present evidence of other, prior rapes at trial. But the State's message was clear: Clinton was now and always had been a brutal and perpetual violator of vulnerable white women.

To this end, the prosecutor repeatedly described Clinton as emotionless, inhumane, and highlighted what he believed was the "cool, calculated, calm, cold-blooded nature of Curtis Clinton." Tr. 1196, 1198, 1213. The State repeatedly stereotyped Clinton this way. Without any supporting evidence, it told the jury that on the night of the murder, Clinton was "out drinking. Doesn't find anyone at the bar. He's out ***hunting*** for sex." Tr. 1210 (emphasis added). It told the jury that Clinton went to the house for devious reasons, "to purposely cause the death of those three individuals; to rape ***probably*** three of them. Now, there's no rape with Heather, but the evidence is pretty loud that he raped her." Tr. 1211 (emphasis added). The State continued: "He gets there. He's out for sex that night. He ***obviously isn't satisfied*** by [girlfriend] Mercedes Charleton. We know that from the weekend before [when the alleged rape of E.S. occurred]." Tr. 1211 (emphasis added). The State then again claimed that "when the Defendant arrives there, gets in the home he wants sex. Heather says no, but no's not in the cards that night. He sexually assaults Heather…" Tr. 1212–13. All of these comments play directly to the oversexed, violent "black brute" stereotype.

The State's repeated descriptions of the all-white victims as young, vulnerable, and in need of protecting also capitalized on this stereotype. The State referred to Jackson as "troubled" and a "beautiful girl" who had "maybe not made the best

choices." Tr. 1165. It told the jury that Jackson's friend "valued her as a person and a friend" – an attempt to contrast against Clinton, who the State projected had no such value. Tr. 1166. It also told the jury that even the State's special agent (a white man) who was an "experienced, trained, seasoned special agent…got somewhat emotional" as he removed the bodies of the children. Tr. 1181. And, in an effort to stoke the jury's passions towards vengeance, the State told the jury that Jackson's friends and family, who testified against Clinton, believed this to be a "dastardly event" and "a sick thing that occurred." Tr. 1192, 1193.

Regarding E.S., the State highlighted her age, and told the almost all-white jury that she was still young enough that children's services had to be involved before the police could interview her. Tr. 1186. The prosecutor called her as a "courageous young lady." Tr. 1205. He told the jury that E.S.'s biggest concern was "[w]hat's going to protect me in the future?" Tr. at 1187.

Finally, the State's presented the Keckler evidence in much the same way. Keckler was not a woman, but "an 18-year-old girl." Tr. 1204. The State claimed that the only purpose of the Keckler evidence was "to determine the identity of the killer of Heather Jackson and her children" and to show motive, because these crimes were "strikingly similar" with "sexual motivations." Tr. 1204. But the State never charged Clinton with raping Jackson and never convicted Clinton of anything sex related in the Keckler case. The similarities the State sought to highlight had everything to do with race: it told the jury that Keckler, E.S., and Jackson were all "young, blonde, pretty girls." Tr. 1204. "Young, blonde, pretty girls" – they were white.

Despite the obvious racist undertones of this commentary, Clinton's lawyers never once objected to State's descriptions or words. But these words were not chosen by accident. This is classic coded language, an attempt to convey without expressly saying that Clinton is black man with "uncontrollable desires [that] were illegal, criminal, and needed to be stopped…in the name of keeping white womanhood pure." *From "brute" to "thug:" the demonization and criminalization of unarmed Black male victims in America.* Calvin John Smiley and David Fakunle, J. Hum. Behav. Soc. Environ. 2016; 26 (3–4), 355. The coded nature of this language persists because many perceive it to be socially acceptable or refuse to confront it:

> While historically in America overt racist language was socially acceptable, there has been a cultural shift of social intolerance to this blatant racist behavior. This does not mean that racism or discriminatory actions have been eradicated but rather driven beneath the surface and reemerged as coded language, gestures, signs, symbols to indicate difference.

Smiley and Fakunle, p. 355. Although "racism in [] America is much more covert and implicit as opposed to earlier forms of overt and explicit forms of racial aggression," Smiley p. 359, racism still operates. Using this covert racism, the State cleverly packaged and successfully sold Clinton's jury an age-old racist stereotype of the "black brute." The jury convicted and sentenced Clinton to death with this stereotype looming in the background.

REASONS FOR GRANTING THE WRIT

1. A defendant's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution are violated when actions by the State and trial court make race a central factor, and defense counsel fails to protect the defendant.

For over a century, this Court has condemned as poisonous the persistent presence of racism in the criminal justice system. *See, e.g., Strauder,* 100 U.S. 303; *Furman*, 408 U.S. 238; *Batson,* 476 U.S. 79; *Turner*, 476 U.S. 28; *McKlesky*, 481 U.S. 279; *Buck*, 137 S. Ct. 759; *Peña-Rodriguez v. Colorado*, 580 U.S. __ , 137 S. Ct. 855 (2017); *Tharpe v. Sellers*, 583 U.S. ___ , 138 S. Ct. 545 (2018). That is because a defendant's race is "totally irrelevant" to conviction and sentencing and it remains "constitutionally impermissible" to consider it as such. *Zant v. Stephens*, 462 U.S. 862, 885 (1983). Racial discrimination, "odious in all aspects, is especially pernicious in the administration of criminal justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979).

This Court has long recognized that racial "[d]iscrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to black citizens that equal justice which the law aims to secure to all others.'" *Batson,* 476 U.S. at 87–88 (1986) (quoting *Strauder,* 100 U.S. at 308) (alterations omitted). The problem of racism is a particularly noxious poison in the context of capital cases. *See, e.g., Turner*, 476 U.S. at 34; *Buck*, 137 S. Ct. 759. Because capital juries are required to make decisions of extraordinary seriousness and sensitivity, this Court has repeatedly warned against using racial stereotypes in seeking convictions and death sentences.

Capital cases thus present "a unique opportunity for racial prejudice to operate but remain undetected." *Turner*, 476 U.S. at 35. The State's use of racial stereotypes to subtly call to jurors who may "fear…blacks" or "believe[] that blacks are violence prone or morally inferior" is particularly dangerous in the context of interracial violent crimes. *Id*. at 35–37 ("We hold that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias.").

Clinton's case epitomized this danger. Here, the State, the trial court, and Clinton's trial counsel ignored the decades of instruction from this Court on how to avoid injecting racism into a case. Instead, they all failed, allowing race to pay an impermissible role in Clinton's conviction and sentence.

a. Race played an impermissible role in Clinton's case in violation of the Sixth Amendment.

On direct appeal, Curtis Clinton told the Ohio Supreme Court that his conviction and sentence were the result of "a combination of ineffective assistance of counsel, misconduct by the prosecutor, a host of erroneous trial court rulings, as well as several violations of [his] rights to due process and to a fair trial…" Brief at p. 1. The Sixth Amendment guaranteed to Clinton the effective assistance of trial counsel. U.S. Const. amend. VI; *see also Strickland v. Washington*, 466 U.S. 688 (1984). Clinton's counsel was anything but effective. Among other failings, Clinton's counsel "fail[ed] to adequately address the issue of race at any point during Clinton's capital trial…" Brief at p. 12.

1. Prosecutorial misconduct infected Clinton's trial; trial counsel did nothing to correct this subtle racism.

The prosecutor cast forth a litany of subtly racist comments during closing argument. Clinton's lawyers failed to object to any of them. The prosecutor continually used language to portray the victims as vulnerable and that subtlety called attention to their whiteness. He described the women as "young," "girls," "beautiful," and "blonde." These remarks when examined superficially might seem to merely relay the physical similarities of the victims to the jury. But when put in the proper context, these comments were clearly designed to stereotype Clinton as a black man who routinely victimized white women. After all, a murder victim's beauty or blondeness – her whiteness – has no meaning in relation to a killer's choice of victim, unless the killer is an "other," unless he is black. Pretrial publicity and photographs revealed to the jurors that the victims were white, while Clinton, who was seated in front of them in a virtually all-white courtroom, is African American. And by continually providing the jurors with irrelevant details regarding the victims' looks, the prosecutor subtly, but effectively, told the jury that Clinton, a black man, stood accused of repeatedly violating white women.

The State also took every opportunity to racialize Mr. Clinton by appealing to the deeply entrenched stereotypes of black men as oversexualized predators of white women. *See* Brief for the Nat'l Black Law Students Ass'n as Amicus Curiae in Support of Petitioner, *Buck v. Davis*, 137 S. Ct. 759 (2017) (No. 15-8049), at 2 ("[P]resented with a criminal defendant, even well-meaning people fall prey to the stereotype that, whether for reason of biology or culture, Black people are inherently violent and

dangerous."). The prosecutor repeatedly referred to Clinton as "brutal," "vicious," "cool, calm, [and] calculated." He told the jury on more than one occasion that Clinton was a predator, essentially an animal who was out "***hunting***" for sex the night the State says he murdered a white woman and her children.

These intentional language choices called forth "the monstrous specter that is never far from the surface: the violent Black brute, the single most fearful, dehumanizing, and cruel stereotype that Black people have had to endure." Brief for the Nat'l Black Law Students Ass'n as Amicus Curiae in Support of Petitioner, *Buck v. Davis*, 137 S. Ct. 759 (2017) (No. 15-8049), at 4. It is no accident that the State made Clinton's race central to its argument for guilt and for death. And Clinton's lawyers did nothing to stop this enormously prejudicial stereotype from being placed in front of the jury.

2. Voir Dire was inadequate. Both the trial court and Clinton's counsel failed to effectively voir dire on race.

The Sixth Amendment also guarantees criminal defendants, like Clinton, the right to an impartial jury. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury…"); *see also, Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (holding that the Fourteenth Amendment to the United States Constitution also guarantees a fair and impartial jury as "a basic requirement of due process" (internal quotation marks omitted)). As noted above, racism infected Clinton's capital case from the outset and compromised the impartiality of the nearly all-white jury that sentenced him to death.

This Court has repeatedly recognized that jurors in capital cases must be free from racial bias. *Ham v. South* Carolina, 409 U.S. 524 (1973); *Rosales-Lopez v. United States*, 451 U.S. 182 (1981); *Turner*, 476 U.S. 28, *Peña-Rodriguez*, 17 S. Ct. 855. In *Turner*, this Court held "that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." 476 U.S. at 36–37. Simply put, "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." (*Id*. at 35) (plurality opinion of White, J., joined by Blackmun, Stevens, and O'Connor, JJ.). This is particularly true in this case, where Clinton's counsel failed to conduct any meaningful voir dire on the issue of race. During voir dire, counsel uselessly stated on one occasion that race was "not necessarily something that anyone really likes to talk about a lot maybe," but that "sometimes that's a big issue in this country with some people, and sometimes it's no issue at all. And a lot of people have strong feels one way or the other." Tr. 206, Brief at p. 12. He then asked the jurors generally if race was an "issue" for any of them. Brief at p. 12. Unsurprisingly, none of the jurors volunteered any racist sentiments. *Id*.

This Court has expressed hope that procedural protections like individual voir dire might help minimize or eliminate the risk that racist jurors might sit on juries and influence trial outcomes. *Peña-Rodriguez*, 137 S. Ct. at 868. Clearly, such protections were lacking here. And when Clinton raised this issue on appeal, asserting that the trial court should have raised the issue when trial counsel failed

to, the Ohio Supreme Court relied on this Court's decision in *Turner* to deny Clinton's claim. *Clinton*, 2017-Ohio-9423 at ¶ 163 ("If trial counsel declines to request voir dire on the subject of racial prejudice, the trial court need not broach the topic sua sponte.").

But the problem with the Ohio Supreme Court's reasoning in this case is twofold. First, though trial counsel did not expressly request voir dire by the trial court on race, Clinton's counsel superficially attempted to ask questions about race during jury selection, which put the trial court on notice that race was an issue in this case.

And second, courts are duty bound to guard against flagrant constitutional violations. "Time and again, this Court has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system." *Peña-Rodriguez*, 17 S. Ct. at 867. That is because "[t]he stark and unapologetic nature of race-motivated outcomes challenge[s] the American belief that 'the jury was a bulwark of liberty.'" *Id*. (internal citations omitted). The racism in Clinton's case exposed that "[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence." *Turner*, 476 U.S. at 37. Courts should not "simply [] presume impartiality," because "the risk of bias runs especially high when members of a community serving on a jury are to be confronted with disturbing evidence of criminal conduct that is often terrifying and abhorrent." *Id*. at 39 (Brennan, J., concurring in

part and dissenting in part). That is precisely what happened here and it was highly prejudicial to Clinton.

Actions by the State and the trial court ensured that race became a central factor in Clinton's conviction and sentence. Clinton's lawyers failed to protect Clinton from this invidious discrimination. And the combination of failures by the State, the trial court, and Clinton's ineffective attorneys allowed "racial prejudice in the jury system," which "damage[d] 'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.'" *Peña-Rodriguez*, 17 S. Ct. at 868 (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)). This violated Clinton's Sixth Amendment rights.

b. Clinton's conviction and sentence were unduly influenced by racial bias and were arbitrary and capricious in violation of the Eighth Amendment.

This Court has repeatedly recognized "that under the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'" C*aldwell v. Mississippi*, 472 U.S. 320, 329 (1985) (quoting *California v. Ramos*, 463 U.S. 992, 998-99 (1983)). The Eighth Amendment demands that capital sentencing determinations must not be "arbitrary and capricious." *Furman v. Georgia*, 408 U.S. 238 (1972). Even the substantial *risk* of such arbitrariness is constitutionally intolerable. *Id*.; *see also, Gregg v. Georgia*, 428 U.S. 153 (1976). A death sentence violates the constitution when "the circumstances under which it has been imposed 'creat[e] an unacceptable *risk* that 'the death penalty [may have been] meted out arbitrarily or

capriciously' or through 'whim or mistake'" *McKlesky v. Kemp*, 481 U.S. 279, 322–23 (1987) (Brennan, J., dissenting) (quoting *California* v. *Ramos*, 463 U.S. 992, 999 (1983)).

The use of race as a factor in capital sentencing makes that sentence "arbitrary and capricious." *See id.* at 306-07, 323 (Brennan, J., dissenting) ("[A] system that features a significant probability that sentencing decisions are influenced by impermissible considerations cannot be regarded as rational."); *see also Graham v. Collins*, 506 U.S. 461, 500 (1993) (Stevens, J., dissenting) ("Neither the race of the defendant nor the race of the victim should play a part in any decision to impose a death sentence.") That is because "it is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner* v. *Florida*, 430 U.S. 349, 358 (1977). When race becomes a factor in capital sentencing, it runs afoul of the constitutional promise that the sentence will "trea[t] each defendant in a capital case with that degree of respect due the uniqueness of the individual." *Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978); *see also Woodson* v. *North Carolina*, 428 U.S. 208 (1976). Using a defendant's race in the sentencing determination "treats all persons convicted of a designated offense not as unique individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Woodson*, 428 U.S. at 304.

Though the majority in *McKlesky* claimed that "disparities in sentencing are an inevitable part of our criminal justice system," 481 U.S. at 312, this Court has

since remained committed to the principle that race should play no role in capital sentencing. *Zant* v. *Stephens*, 462 U.S. 862, 885 (1983); s*ee also Section 2, infra.* Clinton's case was infected with racism that substantially impacted his conviction and sentence and rendered them arbitrary and capricious.

This Court must step in to prohibit the imposition of "the most awesome act that a State can perform"—that is, the deliberate taking of another human life. *McKlesky*, 481 U.S. at 342 (Brennan, J., dissenting). And to the extent *McKlesky* accepts as inevitable sentencing disparities based on race, it must be overruled as inconsistent with the protections provided by the Eighth Amendment. *Id*. at 339 ("The Constitution was framed fundamentally as a bulwark against governmental power and preventing the arbitrary administration of punishment is a basic ideal of any society that purports to be governed by the rule of law."); *Peña-Rodriguez*, 137 S. Ct. at 871.

c. Clinton's conviction and sentence were unduly influenced by racial bias and violate the equal protection clause of the Fourteenth Amendment.

The Fourteenth Amendment's equal protection clause guarantees criminal defendants like Clinton equal protection of the law. U.S. Const. amend XIV. The trial court violated this right when it ruled against Clinton and allowed the joinder of two unrelated cases and when it allowed the presentation of prejudicial evidence into Clinton's capital trial. Motion to Reconsider, p. 2. The Ohio Supreme Court perpetuated this error when it affirmed Clinton's conviction and sentence on appeal.

More than a century ago, this Court determined that equal protection guarantees cannot tolerate racism in the criminal justice system. *Strauder* v. *West Virginia*, 100 U.S. 303 (1880). After the Civil War – which was fought to determine whether this country could survive when one race was enslaved to another – "the Fourteenth Amendment was [ratified] to put an end to governmental discrimination on account of race." *Id*. at 306–07. That Amendment's equal protection clause "protects an accused throughout the proceedings bringing him to justice." *Batson*, 476 U.S. at 88 (quoting *Hill v. Texas*, 316 U.S. 400, 406 (1942)). It is settled law and guiding principle that African Americans are entitled to "the same right and opportunity to participate in the administration of justice enjoyed by the white population." *Id*. at 91 (internal quotations omitted).

If these principles are to mean anything, they must mean that defendants like Clinton are entitled to these same sacred protections. As a preliminary matter, Clinton raised a *Batson* challenge on direct appeal, but the Ohio Supreme Court denied this claim outright and in mass with multiple other claims. *Clinton*, 2017-Ohio-9423 at ¶40.

And, in considering the joinder and 404(b) issue, the lower court found that the Keckler evidence, the E.S. rape, and the Jackson murders shared significant similarities such that introduction of the Keckler evidence and joinder of the E.S. case was permissible. But the discussion of ***why*** the Ohio Supreme Court believed these instances were so similar puts race at the center of this case. Regarding the joinder issue, the Ohio Supreme Court found that E.S. and the Jacksons were victims of the

same types of crimes that occurred close in time and involved a white Cadillac. But, this ignores that Clinton's defense to the E.S. case was consent, not that it never happened. Identity was not at issue in that case.

As to the purported similarities between the Jackson murders, and E.S. rape, and Keckler evidence, the Ohio Supreme Court found that "[a]ll three [adult] victims were ***young Caucasian women***" and thus were part of Clinton's unique behavioral fingerprint in committing crimes. *Clinton*, Slip Opinion No. 2017-Ohio-9423 at ¶108 (emphasis added). The victims were all white, but this commonality is meaningful as a purported behavioral fingerprint unique to Clinton only because Clinton is not white.

These purported similarities did nothing to help the jury determine who committed the Jackson murders. After all, identity was not at issue in the E.S. case. Instead, these similarities only helped the State effectively rely on an old, prejudicial racial stereotype to convict Clinton: that of the "black brute" who rapes vulnerable white women. These similarities would have not have been relevant if Clinton were white. Both the trial court as well as the Ohio Supreme Court applied the other acts and joinder rules in a way that allowed Clinton's race to permeate the trial, which, in turn, violated the Fourteenth Amendment.

Moreover, the Ohio Supreme Court found that the trial court erred when it admitted the Keckler evidence as related to the charges against C.J. and W.J. But it cited to *Chapman v. California*, 386 US 18, 21 (1967) in finding that the error was

harmless because the evidence against Clinton was "overwhelming." But *Chapman* does not stand for this. What this Court said in *Chapman* was:

> California courts have neutralized this to some extent by emphasis, and perhaps overemphasis, upon the court's view of "overwhelming evidence." We prefer the approach of this Court in deciding what was harmless error in our recent case of *Fahy v. Connecticut*, 375 U.S. 85. There we said: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Although our prior cases have indicated there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error…

Chapman, 386 U.S. at 23.

There is more than a reasonable probability that the joinder of the E.S. case and the introduction of the Keckler evidence contributed to Clinton's conviction. It allowed the State to subtly, but powerfully, call forth and employ the racist stereotype of the "black brute" against Clinton. That there were also children victims in this case only made this stereotype more powerful, especially as the State alleged that Clinton raped C.J. – a three-year-old white girl – before he killed her. This is one such instance where Clinton's right to a trial free from racial bias and his right to equal protection are "so basic to a fair trial that their infraction can never be treated as harmless error." *Id.*

2. Lower courts need standards for detecting and remedying the more subtle but just as noxious forms of racism that plague the criminal justice system.

Racism has not been eradicated from American society or the criminal justice system. After the Civil War, this country attempted to eliminate government sanctioned racism by passing the Civil War Amendments. These Amendments and

the corresponding case law interpreting their protections have made progress. This progress has done much to drive overt racism from society. But racism has evolved into subtler forms in response.

Modern expressions of racism often hide in coded language, unconscious bias, and subtle nods to what once were explicitly racist slurs. The damage done by this subtler form of racism is perhaps more invidious than its more overt cousin. Because it claims to be hidden, many people refuse to acknowledge its existence.

But this state of ignorance cannot continue, especially in the criminal justice system, where the perniciousness of race is such that it harms the system of criminal justice when it plays any role:

> For we also cannot deny that years after the close of the War Between the States and [over] 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious.

Rose v. Mitchell, 443 U.S. 545, 558–59 (1979). And this Court has recently affirmed this statement once again, condemning racism as "a familiar and recurring evil," and one that "implicates unique historical, constitutional, and institutional concerns." *Peña-Rodriguez*, 137 S. Ct. at 868.

Over the past few terms, this Court has reaffirmed the "basic premise of our criminal justice system," which is that "[o]ur law punishes people for what they do, not who they are." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017). "Dispensing punishment on the basis of an immutable characteristic [like race] flatly contravenes this guiding principle." *Id.*; *see also Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015) (finding again

that racial discrimination "poisons public confidence in the evenhanded administration of justice"); *Peña-Rodriguez v. Colorado*, 580 U.S. __ , 137 S. Ct. 855 (2017); *Tharpe v. Sellers*, 583 U.S. ___ , 138 S. Ct. 545 (2018).

Critically, this Court rejected the idea that invidious uses of race could ever be "*de minimis*." *Buck*, 137 S. Ct. at 777 (rejecting the State's argument the two references that Buck's blackness made him violent were *de minimis*). This Court insisted that States are not free to argue that "the color of [a defendant's] skin made him more deserving of execution." *Id*. at 775. And, this Court prohibits the State from asking the jury to make "a decision on life and death on the basis of race" by appealing to "particularly noxious strain[s] of racial prejudice." *Id*. at 776.

The coded, racist language used in this case – language that plays to the exact same "noxious strain of racial prejudice" – must likewise be condemned as constitutionally repugnant. And this Court – as final arbiter of what the Constitution requires – must condemn the use of such tactics if the Constitution's guarantees of equality are to have any meaning. This Court long ago accepted its role in eradicating the racial inequality that persists in spite of the years that separate American from her original sin of racism. For example, this Court decided *Brown* at a time when the country – and her representative political branches – was bitterly divided over race. In striking down the doctrine of "separate but equal" as applied to education, this Court recognized the problem at issue – racism in public education – must be considered "in the light of its full development and its present place in American life throughout the Nation." *Brown v. Bd. Of Educ.*, 347 U.S. 483, 492–93 (1954).

Racism in the criminal justice system must be examined through the same lens: "in the light of its full development and its present place in American life throughout the Nation." *Brown*, 347 U.S. at 492–93. As Clinton's case shows, racism often creeps into criminal cases through subtle, coded language. This kind of language is so dangerous because it's incredibly easy to miss, as Clinton's lawyers did here. But it's impact is profound, widespread, and systemic. It allows States to win convictions against defendants of color by promoting powerfully racist stereotypes. It speaks directly to pervasive and longstanding biases, both conscious and unconscious. If our criminal justice system is to ever be truly free and equal, all racism, even the hard to discern and difficult to eradicate variant, must be meaningfully confronted.

This racism, "if left unaddressed, would risk systemic injury to the administration of justice." *Peña-Rodriguez*, 137 S. Ct. at 868 (internal quotation marks omitted). In the past, procedural safeguards have been heralded as the means to protect defendants from racism. For example, "*voir dire* at the outset of trial, observation of juror demeanor and conduct during trial, juror reports before the verdict, and nonjuror evidence after trial are important mechanisms for discovering bias." *Id*. at 868. But these safeguards will do nothing to protect against the kind of coded word racism at play in Clinton's case. That is because "[t]he stigma that attends racial bias" makes it exceedingly difficult to call out and condemn the use of such coded language as racist. *Id*. at 868–69.

Justice Kennedy made clear in *Peña-Rodriguez* that our work toward eradicating racism in our criminal justice system is far from finished:

> The Nation must continue to make strides to overcome race-based discrimination. The progress that has already been made underlies the Court's insistence that blatant racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases like this one…. It is the mark of a maturing legal system that it seeks to understand and to implement the lessons of history. The Court now seeks to strengthen the broader principle that society can and must move forward by achieving the thoughtful, rational dialogue at the foundation of both the jury system and the free society that sustains our Constitution.

Id. at 871.

Clinton's case presents this Court the perfect opportunity to engage in such a "thoughtful, rational dialogue" in a way recognizes the power racial stereotypes have to inject irrelevant and intolerable racism into the critical decisions a jury must make in a capital trial. It also presents the perfect vehicle for this Court to help lower courts identify and remedy the noxious, though subtler, forms of racism like that presented in this case. Otherwise, the State is rewarded for being clever enough to substitute code words for racial slurs, and our Constitutional protections against pernicious racism will exist in name only.

CONCLUSION

Racism infected Curtis Clinton's trial and sentencing. Prosecutorial misconduct, trial court error, and ineffective assistance by defense counsel combined to ensure that Clinton's race played an unconstitutional role in his conviction and sentence. The introduction of the "black brute" stereotype into this case violated Clinton's Sixth, Eighth, and Fourteenth Amendment rights. Moreover, lower courts need guidance from this Court on how to identify and remedy subtler, but just as

vicious, forms of racism when they infect criminal proceedings, as they did here. Clinton requests this Court grant a writ of certiorari to review the decision below.

Respectfully submitted,

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