OCTOBER TERM 2017

No. _____

IN THE

Supreme Court of the United States

In re William Earl Rayford*, Petitioner*

Petition for Writ of Habeas Corpus

Capital Case

Execution Scheduled for January 30, 2018

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January 26, 2018

QUESTION PRESENTED

William Earl Rayford is on the brink of being executed, at least in part based on his race. Mr. Rayford, who is black, received a death sentence after his trial attorney elicited evidence that a person's race is a factor in their likelihood of committing assaults while in prison. This error deprived Mr. Rayford of his right to the effective assistance of counsel, in violation of the Sixth Amendment. Not only was the nature of this testimony disturbing, trial counsel's conduct was all the more egregious because the purported link between race and the number of assaults in prison does not exist. Mr. Rayford's habeas petition presents exceptional circumstances that justify this Court invoking its rarely used jurisdiction to entertain an original writ of habeas corpus, as all other legal avenues are closed to this claim.

The question presented is:

1. Whether granting an original writ of habeas corpus, or using this Court's powers to transfer to the district court this petition, is appropriate in the case of a death-sentenced man whose trial attorneys elicited false or misleading testimony linking race to the likelihood that the defendant would be a future danger.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner William Earl Rayford, a Texas death row prisoner, was the movant through previous state and federal habeas corpus proceedings below. Mr. Rayford is a prisoner in the custody of Lorie Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division.

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PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner William Earl Rayford respectfully requests that this Court grant his petition for writ of habeas corpus. In the alternative, he requests that this Court transfer this petition to the United States District Court for the Northern District of Texas in accordance with its authority under 28 U.S.C. § 2241(b).

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals dismissing Mr. Rayford's subsequent application for writ of habeas corpus is attached at Appendix A. Mr. Rayford has previously filed a petition for writ of habeas corpus in federal court, which was denied, and this Court denied certiorari on December 7, 2015. *Rayford v. Stephens*, 136 S. Ct. 585 (2015). Having no non-frivolous arguments as to why the claim raised in this petition would satisfy the requirements of 28 U.S.C. § 2244(b)(2) for successive petitions, Mr. Rayford has not sought authorization to file a successive application containing this claim in federal court.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 2241, 2254(a), 1651(a), and Article III of the U.S. Constitution.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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 of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

SUPREME COURT RULE 20 STATEMENT

Rule 20.1 of this Court requires a petitioner seeking an original writ of habeas corpus to establish that (1) "the writ will be in aid of the Court's appellate jurisdiction"; (2) "exceptional circumstances warrant the exercise of the Court's discretionary powers"; and (3) "adequate relief cannot be obtained in any other form or in any other court." This writ is in aid of this Court's appellate jurisdiction, as the claim has already been presented to the Texas Court of Criminal Appeals, and because Mr. Rayford is restrained in his liberty by the Director. In addition, Mr. Rayford meets the requirements of (2) and (3) as outlined below in Section III and Section IV, respectively.

Moreover, Rule 20.4 of this Court places additional responsibilities on the petitioner, requiring "a statement of the 'reasons for not making application to the district court of the district in which the applicant is held'" and "how and where the petition has exhausted available remedies in the state courts." Mr. Rayford is not filing this petition in the district court for the reasons set out in Section III. He has exhausted his state court remedies by pleading his current ineffective assistance of counsel claim in his First Subsequent Application for Writ of Habeas Corpus to the Texas Court of Criminal Appeals, which was dismissed on procedural grounds on January 26, 2018. *See Ex parte Rayford*, No.WR-63,201-02 (Tex. Crim. App. 2018). Two judges dissented. *Id*. (Alcala, J., and Walker, J., dissenting).

STATEMENT OF FACTS

I. Relevant Facts.

On December 5, 2000, William Rayford was sentenced to death for the capital murder of Carol Hall. *State v. Rayford*, 2000 WL 35629390 (Tex. Dist. 2000). The punishment phase of Mr. Rayford's trial was tainted when defense counsel made the egregious and prejudicial error of soliciting testimony—later determined to be false—linking race to future dangerousness. As this Court has recently explained, "[s]ome toxins can be deadly in small doses," especially one that "coincide[s] precisely with a particularly noxious strain of racial prejudice, which itself coincide[s] precisely with the central question at sentencing." *Buck v. Davis*, 137 S. Ct. 759, 776–77 (2017).

A. Mr. Rayford's trial counsel elicited testimony that directed the jury to consider race when determining whether Mr. Rayford was a future danger.

Before deciding which punishment to impose, Mr. Rayford's jury had to determine whether the State had established that Mr. Rayford was a future danger. More specifically, the State was required to show, beyond a reasonable doubt, there was a probability that Mr. Rayford would commit criminal acts of violence that would constitute a continuing threat to society. *Rayford v. State*, 125 S.W.3d 521, 534 (Tex. Crim. App. 2003). Only after finding that Mr. Rayford would constitute a future danger could the jury go on to consider his mitigating circumstances.

The punishment phase of Mr. Rayford's trial focused almost entirely on the first question—future dangerousness. The evidence showed that Mr. Rayford rior violent acts had occurred within similar, romantic relationships. The defense argued repeatedly that Mr. Rayford committed no other violent crimes but two crimes

involving women (one of them Ms. Hall) with whom he was in relationships and emphasized that Mr. Rayford would have no opportunities for such relationships in prison.[1] To support their contention that Mr. Rayford was not a future danger, defense counsel called Dr. Gilda Kessner, a psychologist who testified—based on several scientific studies—that Mr. Rayford would be a low risk for violence in prison and that prisons are generally very good at controlling violence. 47 RR 85; 47 RR 162.

In rebuttal, the State called Royce Smithey, the Chief Investigator for the Special Prison Prosecution Unit, a group that prosecutes felonies committed in Texas prisons statewide. The jury was told that Smithey had four subordinates working for him, that he assisted prosecutors in every county in the state, and that he had investigated numerous murders, assaults, and rapes in prison. *Id.* at 89–90. Though Smithey himself had not performed any statistical analysis of Texas prison violence, he recited for the jury numbers that he testified had been provided by the Texas Department of Criminal Justice (TDCJ) regarding prison incidents in 1999, the year before Mr. Rayford's trial. Smithey told the jury that there had been over 2,100 assaults on staff by inmates, over 1,700 assaults on inmates by other inmates, and over 112,000 "major disciplinary cases." *Id.* at 93–94. He also testified that there had been murders on, and escapes from, death row. *Id.* at 92.

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[1] *See, e.g.*, 47 RR 183 ("Are women going to be able to come and spend time with him in prison? No."); *id.* at 187 ("There's no correlation to what people do on the outside to what they do on the inside."); *id.* at 189 ("Is he capable of brutal violence under a limited, very small specific set of circumstances? Sure. There's something that's not clicking in there with this relationship with women thing. . . . This guy is good, in prison. He's good in jail."); *id.* at 194 ("If he gets out he has an opportunity to meet with another whom—start a relationship, which then starts to fail, and he can't handle it, sure, this could happen again. But it's not going to happen again. You know that. There's no probability that he's going to constitute a continuing threat to society in prison.").

On cross-examination, Mr. Rayford's trial counsel clarified that the numbers Smithey had cited were for the Texas prison system as a whole, and did not distinguish between the different TDCJ units. *Id.* at 128–129. Smithey agreed and testified that some units had very few assaults, while others comprised a disproportionate number of the assaults reported in the TDCJ statistics. *Id.* at 131. Trial counsel pointed out—and Smithey agreed—that this variation could be explained by factors such as gangs within the different units, before steering the testimony to race:

> [Trial Counsel]: The racial makeup of the unit is also something that goes to the number of assaults or what have you, is that correct?
>
> [Smithey]: It has a factor on it, even though under general Federal guidelines the racial breakdown of the units are predominantly the same or as close as they can get to it.

Id. Trial counsel specifically pointed out, and Smithey confirmed, that the race of the inmates in a unit can directly affect the number of assaults occurring within that unit. After the jurors were told of the seemingly high number of assaults that occur per year in Texas prisons, they were informed that race is a factor in that number. Smithey was the last witness to testify in Mr. Rayford's trial. Thus, the last witness the jurors heard before sentencing Mr. Rayford to death told them that race affects violence in prison.

The jurors were reminded of Smithey's testimony in closing argument, when the State emphasized his testimony about the "over 2000 assaults against staff last year" and "1700 [assaults] against inmates[.]"*Id.* at 200. The State hammered that even secure prisons are violent places because "people like [Mr. Rayford] . . . have the

opportunity to commit violence." *Id*. at 200–01. Thus, the jury was told that some prison units are much more violent than others, that the racial makeup of a unit impacts the level of violence in that unit, and, by obvious implication, that people like Mr. Rayford—a black man—are the cause of that violence.

B. The purported link between race and assaults in TDCJ prison units does not exist.

Not only was the jury encouraged to consider race in determining whether Mr. Rayford was a future danger, and thus whether he warranted a death sentence, the link touted for the jury between Mr. Rayford's race and his likelihood of committing assaults does not exist. Mr. Rayford has recently uncovered that TDCJ itself is unable to support Smithey's assertion, as they have no reports, statistics, or other information linking the racial makeup of units to the number of assaults.

Counsel for Mr. Rayford sent a records request to TDCJ on December 26, 2017, specifically requesting any records, documents, or other materials that would indicate whether the racial makeup of a unit in TDCJ is related, connected, or tied to the number of assaults that are committed in that unit, specifically for the time period of 1995-2001. App. C. TDCJ responded on January 12, 2018, in simple yet definitive form: "TDCJ has nothing responsive to your request." *Id.* Smithey, in his testimony, relied on statistics from TDCJ when testifying. 47 RR 89–92. Yet, Smithey's claim linking the racial makeup of the unit to the number of assaults was thus false; TDCJ has no documentation to support such a proposition.

II. Procedural History.

Mr. Rayford appealed his conviction and death sentence, the latter of which was rendered December 5, 2000, to the Texas Court of Criminal Appeals, and on November 19, 2003, the Court of Criminal Appeals affirmed his conviction and sentence. *Rayford v. State*, 125 S.W.3d 521 (Tex. Crim. App. 2003). On May 24, 2006, that court denied relief on Mr. Rayford's Initial Application for Writ of Habeas Corpus. *Ex parte Rayford*, WR-63,201-01, 2006 WL 1413533 (Tex. Crim. App. 2006).

Mr. Rayford's Petition for Writ of Habeas Corpus, after initially being denied by the United States District Court for the Northern District of Texas, was remanded by the United States Court of Appeals for the Fifth Circuit on February 18, 2014, in light of *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), and *Martinez v. Ryan*, 566 U.S. 1 (2012). *Rayford v. Stephens*, 552 Fed. App'x 367, 368 (5th Cir. 2014). On September 22, 2014, the district court again denied Mr. Rayford's Petition for Writ of Habeas Corpus. *Rayford v. Stephens*, 3:06-CV-0978-B, 2014 WL 4744632 (N.D. Tex. Sept. 22, 2014). Mr. Rayford again appealed the district court's denial of relief, and on May 21, 2015, the United States Court of Appeals for the Fifth Circuit affirmed the District Court's decision. *Rayford v. Stephens*, 622 Fed. App'x 315 (5th Cir. 2015). This Court denied certiorari on December 7, 2015. *Rayford v. Stephens*, 136 S. Ct. 585 (2015).

Mr. Rayford's current allegation—that his trial counsel provided ineffective assistance by eliciting testimony linking Mr. Rayford's race to the likelihood that he would be a future danger—has never been considered on the merits by any court. The claim was presented to the Texas Court of Criminal Appeals in a successive petition filed January 19, 2018, but the petition was dismissed on procedural grounds on

January 26, 2018. *Ex parte Rayford*, No. WR-63,201-02 (Tex. Crim. App. 2018). Two judges dissented. *Id*. (Alcala J., and Walker, J., dissenting).

REASONS FOR GRANTING THE WRIT

III. Statement of reasons for not filing in the district court.

Mr. Rayford has not filed this petition in United States District Court for the Northern District of Texas because the claim would be considered successive, as it was not raised in his previous petition for writ of habeas corpus. Thus, that court does not presently have the authority to reach the merits of this claim absent authorization from the circuit court. *See* 28 U.S.C. § 2244(b)(3)(A). Moreover, Mr. Rayford has not sought authorization to file a successive petition from the United States Court of Appeals for the Fifth Circuit because he has no non-frivolous argument that this claim meets the statutory requirements for a successive petition. *See id.* § 2244(b)(2). Indeed, Mr. Rayford has no available avenue to present this claim other than an original petition for writ of habeas corpus to this Court, and he cannot obtain adequate relief in any other form or from any other court.

IV. Mr. Rayford's case presents exceptional circumstances that warrant the exercise of this Court's original habeas jurisdiction.

This Court retains the power to entertain original petitions for writ of habeas corpus. *See Felker v. Turpin*, 518 U.S. 651, 660 (1996). The exceptional circumstances presented in this case warrant the exercise of this Court's discretionary powers, which are reserved for those cases, such as Mr. Rayford's, where "appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 260 (1947). Mr. Rayford's last

opportunity to avoid being executed at least in part because of his race lies with this Court.

A. Mr. Rayford was denied the effective assistance of counsel.

The right to effective assistance of counsel "plays a crucial role in the adversarial system embodied in the Sixth Amendment[.]" *Strickland v. Washington*, 466 U.S. 668, 685 (1984). Therefore, a fair trial is achieved only when the evidence is subjected to adversarial testing via counsel's "vital" assistance. *Id*. The Sixth Amendment is not satisfied when "a person who happens to be a lawyer is present at trial alongside the accused[.]" Rather, counsel must "bring to bear such skill and knowledge as will render a reliable adversarial testing process." *Id*. at 688.

When an applicant seeks to establish that his trial counsel failed to satisfy his duty to provide effective assistance, he must demonstrate both that counsel's performance was deficient and that the deficiency was prejudicial. *Id*. at 687. Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Id*. at 688. Prejudice is shown when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

i. Deficient Performance.

In this case, Mr. Rayford's Sixth Amendment right to effective assistance of counsel was violated during the punishment phase of his trial when trial counsel elicited testimony that the number of assaults in Texas prisons is tied to the race of the inmates. Mr. Rayford's counsel's behavior is strikingly similar to conduct this Court recently found patently unacceptable in *Buck v. Davis*, 137 S. Ct. at 775

(holding that "[n]o competent attorney would introduce such evidence about his own client"). Like trial counsel in *Buck*, Mr. Rayford's counsel intentionally introduced evidence—during the critical punishment phase of trial—that race affects future dangerousness; further, counsel did so through an expert witness whom the jury was likely to believe. This constitutes deficient representation.

After Smithey testified on direct examination, citing damaging statistics on prison violence, defense counsel asked Smithey—in a leading question—to agree that race affects the amount of violence in Texas prison units:

> [Trial Counsel]: The racial makeup of the unit is also something that goes to the number of assaults or what have you, is that correct?
>
> [Smithey]: It has a factor on it, even though under general Federal guidelines the racial breakdown of the units are predominantly the same or as close as they can get to it.

47 RR 131.[2] Trial counsel deliberately pointed out to the jury that race is a factor in determining whether someone will be violent in prison, while Mr. Rayford, a black man, was sitting at the defense table. *Cf. Buck*, 137 S. Ct. at 769 (eliciting testimony that minorities are over represented in the criminal justice system was deficient performance). As this Court held in *Buck*, given that the jury had to decide whether Mr. Rayford was a future danger, such behavior can only be described as incompetent. *See id.* at 775.

[2] The State also asked Dr. Gilda Kessner, outside of the presence of the jury, whether she had any type of racial statistics regarding the prison population or death row population and whether race would form any basis of her opinion. (46 RR 80). She did not. *Id.*

ii. Prejudice.

Even a small insertion of racial bias in a capital trial is prejudicial. In *Buck*, this Court found the statements linking race to violence were especially disturbing in light of the fact that they (1) were presented during testimony concerning future dangerousness, (2) came from an "expert" witness, and (3) were solicited by defense counsel. As detailed below, these circumstances mirror those of Mr. Rayford's trial.

First, Smithey's testimony spoke to the issue of Mr. Rayford's future dangerousness. The evidence in Mr. Rayford's trial showed that his prior violence occurred within a similar relationship with a romantic partner. The defense argued repeatedly that Mr. Rayford committed no other crimes but the two involving women he was married to or dating, and emphasized that Mr. Rayford could not engage in these relationships in prison. *See, e.g.*, 47 RR 183. In fact, the focus of Mr. Rayford's punishment trial was almost entirely on the question of future dangerousness. The State even pointed out that trial counsel "didn't spend much time on the mitigation question," contending that counsel did so "simply because there is not mitigation in this case." *Id*. at 201–02. Like in *Buck*, this makes Smithey's statements all the more damaging. *See Buck*, 137 S. Ct. at 776. Mr. Rayford's jury was faced with a question: would Mr. Rayford be dangerous in prison where he would not engage in romantic relationships with women? The jury got its answer from Smithey.

Smithey testified that numerous assaults occur in Texas prisons, that some units have considerably more assaults than others, and that the "racial makeup" of the unit affected the number of assaults. 47 RR 131. The State highlighted Smithey's testimony by reminding the jury of the number of assaults that occur in some Texas

prison units because "people like [Mr. Rayford] have the opportunity to commit violence." *Id.* at 200–01. Thus, the jury was told that some prison units are much more violent than others, that the racial makeup of a unit is linked to the amount of violence within that unit, and, by obvious implication, that people like Mr. Rayford—a black man—are the cause of the violence. When faced with the question of whether Mr. Rayford would be violent in prison, the jurors were still left with one immutable fact: Mr. Rayford is black. *See Buck*, 137 S. Ct. at 776. Within this context, Smithey's testimony and trial counsel's constitutionally deficient performance were undoubtedly prejudicial.

Second, the jury was likely inclined to credit Smithey's testimony because he was touted as a prison-violence expert. The jurors were told that Smithey was the Chief Investigator for the Special Prosecution Unit, and had been for 15 years. 47 RR 89. They were told that Smithey had four subordinates working for him, assisted prosecutors in every county in the state, and that he had investigated numerous murders, assaults, and rapes in prison. *Id.* at 89–90. As such, the jury was likely to place great weight on Smithey's ostensibly qualified opinion on the issue of Mr. Rayford's potential for violence in prison.

Third, and perhaps most troublingly, Smithey was asked for his race-based opinion by defense counsel. *Id.* at 131. Thus, the jury was more likely to find Smithey's racially tinged testimony credible because it was damaging to Mr. Rayford and came from his own counsel. *See Buck*, 137 S. Ct. at 777 (noting that the jury may evaluate evidence suggesting future dangerousness evidence put on by the

prosecution critically in light of the prosecution's motivations, but will more readily accept such offending evidence from the defense).

Smithey's testimony linking race to future dangerousness was brief, but the damage was significant. "[T]he 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." *Id*. Smithey testified during a critical stage of the proceedings, and on a critical issue. Smithey's "expert opinion" "coincided precisely with a particularly noxious strain of racial prejudice, which itself coincided precisely with the central question at sentencing." *See id*. at 776. That bell could not be unrung. Even a brief injection of an issue as dangerous as racial animosity is too much.

B. A death sentence tainted by racial prejudice cannot stand.

Racial animosity has no place in the criminal justice system, and a death sentence tainted by racial prejudice cannot stand. "The unmistakable principle . . . is that discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.'" *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)). Therefore, this Court has recognized that the "duty to confront racial animus in the justice system is not the legislature's alone. Time and again, this Court has been called upon to enforce the Constitution's guarantee against . . . racial discrimination[.]" *Id*. at 867.

It is unquestionable that the State would not be permitted to argue that Mr. Rayford constitutes a future danger because of his race. *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (identifying race as a factor that is "constitutionally impermissible or

totally irrelevant to the sentencing process") (emphasis added). Mr. Rayford should not be executed because his own attorney decided to inject the issue into the most crucial aspect of the punishment phase. Smithey's racially tinged testimony appealed to a potent "racial stereotype—that of black men as 'violence prone.'" *See Buck*, 137 S. Ct. at 776 (citing *Turner v. Murray*, 476 U.S. 28, 35 (1986)). No death verdict should stand when the evidence pushed the jury to make "a decision on life or death on the basis of race." *Id*.

This Court requires Mr. Rayford to show that "exceptional circumstances" warrant the exercise of this Court's discretionary powers to grant relief. SUP. CT. R. 20.1. That Mr. Rayford "may have been sentenced to death in part because of his race" is such an exceptional circumstance. *See Buck*, 137 S. Ct. at 778 (noting the "extraordinary nature" of Buck's case and remanding when lower courts failed to recognize the "extraordinary circumstances" of racial prejudice). A sentence based on race is a drastic departure from the premise that our laws punish people for what they do, not who they are. *Id*. at 778. Mr. Rayford's death sentence "flatly contravenes" the constitution and "'poisons public confidence'" in the judicial system. *Id*. (quoting *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015)). It cannot stand.

C. The error is all the more egregious because it is false.

Smithey not only told the jury that race affects the level of violence in prison, but his testimony was wrong. After citing seemingly impressive and factual statistics about the amount and types of violence in the Texas prison system, Smithey told the jury race played a part in those numbers. But, Mr. Rayford has recently uncovered that Smithey's claim is false. TDCJ itself has no documentation to support such a

proposition. App. B. Mr. Rayford cannot establish that the State had knowledge of Smithey's false testimony; however, false testimony influenced the jury's determination of future dangerousness and cannot be ignored. *See Johnson v. Mississippi*, 486 U.S. 578, 590 (1988) (finding that a death sentence based on "materially inaccurate" evidence violates the Eighth Amendment). This Court is Mr. Rayford's final venue to correct this egregious error.

CONCLUSION

William Rayford's trial was irreparably stained by false testimony informing the jury that the race of inmates affects the level of violence in prison. As the question of whether Mr. Rayford should live or die rested on whether he would be dangerous in prison, this error undoubtedly prejudiced the proceedings. Mr. Rayford has exhausted all other avenues for relief on the basis of this claim. He respectfully requests that this Court find that the execution of a man based in any way on racial animus is an exceptional circumstance and grant his petition. In the alternative, he requests that this Court transfer this petition to the United States District Court for the Northern District of Texas in accordance with its authority under 28 U.S.C. § 2241(b).

Respectfully submitted this 26th day of January, 2018.

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