NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

KRISTOPHER LOVE

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

I. Whether Texas' Court of Criminal Appeals, the only court of last resort reviewing direct appeals in death penalty cases has decided an important federal question concerning a racially biased juror being allowed on a capital death penalty jury in violation of Petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution.

II. Whether Texas' Court of Criminal Appeals, the only court of last resort reviewing direct appeals in death penalty cases has decided an important federal question concerning a racially biased juror in a way that conflicts with relevant decisions of this Court in violation of Petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

LIST OF PARTIES

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

IDENTITIES OF PARTIES AND COUNSEL

HONORABLE TRACY F. HOLMES	JUDGE PRESIDING 363RD JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS
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ATTORNEY FOR THE
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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Kristopher Love, respectfully petitions for a writ of certiorari to review the judgement of the Texas Court of Criminal Appeals in this case.

OPINIONS BELOW

The opinion of the highest state court, the Texas Court of Criminal Appeals, to review the merits appears at Appendix A. The opinion petition in Cause No. AP-77,085 was delivered on April 14, 2021 and is unpublished.

JURISDICTION

The judgement/mandate of the Texas Court of Criminal Appeals was entered on May 10, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) and ninety days has not elapsed.

STATEMENT OF THE CASE
PROCEDURAL HISTORY

Petitioner was charged in the 363rd District Court of Dallas County, Texas, in trial court cause number F15-76400-W with the capital murder of shooting KENDRA HATCHER with a firearm in the course of committing and attempting to commit the offense of the robbery of the deceased. The jury found the Defendant guilty of capital murder. (RR: Vol. 40 p. 47)

On October 31, 2018 the jury answered Special Issue No. 1 "Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant Kristopher Love would commit criminal acts of violence that would constitute a continuing threat to society", as "Yes." The jury answered Special Issue No.2 "Do you find from the evidence, taking into consideration all the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, Kristopher Love, that there is a sufficient mitigating circumstance or circumstances to warrant a sentence of life imprisonment rather than a death sentence be imposed" as "No." (Reporter's Record

Vol. 43 p. 94) In accordance with the previous verdict of guilty and answers to the special issues, the trial court entered a judgment and assessed Appellant's punishment at death. (Reporter's Record Vol. 43 p. 94)

On November 1, 2018 Appellant timely filed a Motion for New Trial that was subsequently denied by the court. (Clerk's Record P. 352). Notice of appeal was filed even though appeal to the Texas Court of Criminal Appeals was automatic. *See* Tex. Code Crim.Proc.Ann. art. 37.071,§ 2(g)(Vernon Supp. 2001).

FACTS RELEVANT TO THE QUESTIONS RAISED IN THIS APPLICATION FOR WRIT OF CERTIORARI

SUMMARY OF VOIR DIRE OF VENIRE PERSON NO. 1136-B, ZACHARY NIESMAN

Defense Counsel challenged the juror for cause (Reporter's Record Volume 29 page 153) as follows:

MR. JOHNSON: .....First and foremost, we feel that a definite exclusion for this juror for cause is his stated beliefs that he recalls that - - his reading and being taught that non-whites commit more violent crimes than whites. I talked to him about that. It concerned me quite a bit, and I talked to him about the fact that I've seen studies that were the opposite.

And - - but as in our earlier discussions of his beliefs, that statistics show that the death penalty has been proven to be a deterrent. I said, What if you saw statistics

that showed the opposite and that that was wrong? And his response was, I'm still going to feel the way I feel. So it would certainly - - leaving this man on the jury would be an invitation to leaving someone on there that might make a decision on Special Issue No. 1 that would ultimately lead to a sentence of death on his preconceived notions and beliefs that have to do with the race of the defendant. And I think that is certainly inviting all kinds of danger and harm and prejudice to the defendant. We would challenge him for cause based upon that basis.

. . . .

A review the voir dire questioning the of the juror shows that:

. . . . Mr. Niesman answered the statement "The best argument for the death penalty is some crimes are so heinous and evil that the murderer does not deserve to still live." (Juror Questionnaire p. 3) When asked by the State to explain his answer, he said "I think is can deter people from committing similar offenses. I think some people are not able to be rehabilitated from their state and don't deserve to keep on living if they've taken a life that, by all accounts, is innocent." (RR: Vol. 29 p.p.76-77)

He stated that if he were governor he would keep the death penalty and use it on these types of crimes, "Premeditated, extremely heinous crimes, repeat offenders, serial killers. I guess crimes that target people that are innocent with no obvious

motive." (RR: Vol. 29 p. 77) He answered "Yes" to the statement concerning murder in the course of committing or attempting to commit the offense of robbery is a capital offense for which the death penalty can be imposed. (Juror Questionnaire p. 3) He explained his answer "Someone with no regard for human life that can kill another for the sake of greed might not be able to exist in civilized society.(Juror Questionnaire p. 3) He also agreed that some crimes call for the death penalty solely because of their severe facts and circumstances, regardless of whether or not the guilty person has committed prior violent cases. (Juror questionnaire p. 3) Mr. Neisman believed in "an eye for an eye", but did not explain his answer. (Juror Questionnaire p. 3)

Mr. Neisman answered "Somewhat agree" to the statement "A convicted capital murderer's accomplishments or good deeds during his life should not matter in deciding whether he should get the death penalty. (Juror Questionnaire p. 5) He also thought the testimony of police officers was more believable than most witnesses. (Juror Questionnaire p. 5) He further agreed with the statement "If the police charge someone with a crime, he/she is probably guilty."

Mr. Neisman answered "yes" to the question "Do you believe that some races and/or ethnic groups tend to be more violent than others?" (Juror Questionnaire p. 12) He wrote that "Statistics show more violent crimes are committed by certain

races. I believe in statistics." (Juror Questionnaire p. 12) When defense counsel asked him "What kind of statistics have you seen that would indicate that to you?", he replied "news reports and criminology classes I've taken." (RR: Vol. 29 p. 144) When asked which races were more violent, he replied "Non-white." (RR: Vol. 29 p. 145) The Defendant is a person of the black race. The juror wrote on the juror questionnaire that "Statistics show more violent crimes are committed by certain races. I believe in statistics."

The defense had exhausted all of its allowed peremptory challenges allowed by the State of Texas in death penalty cases. The trial court denied Defendant's request for an additional peremptory challenge and denied the defense challenge for cause. Mr. Niesman was seated as Juror No. 12. (RR: Vol. 29 p.154-155)

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to determine whether the Texas Court of Criminal Appeals, the only court of appeal in a death penalty case can allow a racially prejudiced juror to be placed on a jury over the defense's challenge for cause thereby denying Petitioner his Sixth amendment right to a fair trial by an unconstitutionally selected jury and due process of law in violation of the Fourteenth Amendment. Petitioner submits that this issue is sufficiently important in terms of its nationwide relevance or impact of having a racially biased white juror on a death

penalty jury, where the defendant is of the black race in today's racially charged environment.

Petitioner was tried before an unconstitutionally qualified jury composed of individuals at least one if not two of which were properly challenged for cause. In *Ramos v. Louisiana*, 140 S.Ct. 1300 (2020) it was stated that "The Constitution's text and structure clearly indicate that the Sixth Amendment term 'trial by an impartial jury' carries with it some meaning about the comment and requirements of a jury trial."

The imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments. "The central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." *McLaughlin v. Florida*, 379 U.S. 184, 192, 85 S.Ct. 283, 13 L.Ed. 222. Time and again, this Court has enforced the Constitution's guarantee against state-sponsored racial discrimination in the jury system.

The unmistakable principle of these precedents is that discrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice," *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S.Ct. 2993, 61 L.Ed.2d 739, damaging "both the fact and the perception" of the jury's role as "a vital check

against the wrongful exercise of power by the State," *Powers v. Ohio,* 499 U.S. 400, 411, 111 S.Ct. 1364, 113 L.Ed.2d 4311. Pp 867-868.

Racial bias, a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice. This Court's decisions demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns. An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming every closer to the promise of equal treatment under the law that is so central to a functioning democracy.

Racial bias is distinct in a pragmatic sense as well. In past cases this Court has relied on other safeguards to protect the right to an impartial jury. Some of those safeguards, to be sure, can disclose racial bias. *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 fo discovering bias. Yet their operation may be compromised, or they may prove insufficient. For instance, this Court has noted the dilemma faced by trial court judges and counsel in deciding whether to explore racial bias at *voir dire.* See *Rosales-Lopez, supra; Ristaino v. Ross,* 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976). Generic questions about juror impartiality may not expose specific attitudes or biases that can

poison jury deliberations. Yet more pointed questions "could well exacerbate whatever prejudice might exist without substantially aiding in exposing it." *Rosales-Lopez, supra,* at 195, 101 S.Ct. 1629 (Rehnquist J., concurring in result).

All forms of improper bias pose challenges to the trial process. But there is a sound basis to treat racial bias with added precaution. A constitutional rule that racial bias in the justice system must be addressed-including, in some instances, after the verdict has been entered is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right.

This Court wrote in *Turner v. Murray,* 106 S.Ct. 1683 (1986) :

Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.

The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence. "The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos,* 463 U.S. 992, 998-999, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983). We have struck down capital sentences when we found that the circumstances under which they were imposed "created an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' or through 'whim ... or mistake.' " *Caldwell, supra,* at 343, 105 S.Ct., at 2647 (O'CONNOR, J., concurring in part and concurring in judgment) (citation omitted). In the present case, we find the risk that racial prejudice may have infected petitioner's capital sentencing unacceptable in light of the ease with which that risk could have been minimized. By refusing to question prospective jurors on racial prejudice, the trial judge failed to adequately protect petitioner's constitutional right to an impartial jury.

In *Pena Rodriguez v. Colorado*, 137 S.Ct. 855 (2017) this Court wrote:

The imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments. "[T]he central purpose of the Fourteenth Amendment was to eliminate racial

discrimination emanating from official sources in the States." *McLaughlin v. Florida,* 379 U.S. 184, 192, 85 S.Ct. 283, 13 L.Ed.2d 222. Time and again, this Court has enforced the Constitution's guarantee against state-sponsored racial discrimination in the jury system. The Court has interpreted the Fourteenth Amendment to prohibit the exclusion of jurors based on race, *Strauder v. West Virginia,* 100 U.S. 303, 305–309, 25 L.Ed. 664; struck down laws and practices that systematically exclude racial minorities from juries, see, *e.g., Neal v. Delaware,* 103 U.S. 370, 26 L.Ed. 567; ruled that no litigant may exclude a prospective juror based on race, see, *e.g., Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69; and held that defendants may at times be entitled to ask about racial bias during *voir dire,* see, *e.g., Ham v. South Carolina,* 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46. The unmistakable principle of these precedents is that discrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice," *Rose v. Mitchell,* 443 U.S. 545, 555, 99 S.Ct. 2993, 61 L.Ed.2d 739, damaging "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State," *Powers v. Ohio,* 499 U.S. 400, 411, 111 S.Ct. 1364, 113 L.Ed.2d 411. Pp. 867 – 868.

Texas Article 35.16 Code of Criminal Procedure provides for the reasons for a challenge for cause by either the State or Defense. Art. 35.16(9) states: "That the

juror has a bias or prejudice in favor or against the defendant." The juror in this case by Texas law could not be rehabilitated.

In *Anderson v. State* 633 S.W.2d 851 (Tex,. Crim. App. 1982) it was held that when a prospective juror is shown to be biased as a matter of law, he or she must be excused when challenged even if she states he can set his or her bias aside and provide a fair trial. *See also Brandon v. State*, 599 S.W. 2d 567 (Tex. Crim. App. 1979) and *Williams v. State*, 565 S.W.2d 63 (Tex. Crim. App. 1978)

Petitioner submits first that venireperson Niesman disqualified himself as a matter of law when he testified in voir dire that "yes" he believed that some races and/or ethnic groups tend to be more violent than others and that "Statistics show more violent crimes are committed by certain races." "I believe in statistics." The statistical source he relied upon were news reports and criminology classes. He said "non-whites" were more violent.

Petitioner was denied the constitutional right to an impartial jury. In *United States v. Martinez-Salazar*, 528 U.S. 304 (2000) this Court reiterated that reversal would be required when a biased juror is seated after the trial court erroneously overruled an objection that the juror should be excused for cause as in the case at bar. *Faretta v. California*, 422 U.S. 806 95 S.Ct. 2525, 45 L.Ed.2d. 562 (1977) This Court has also said that the right to an impartial adjudicator be it judge or jury is

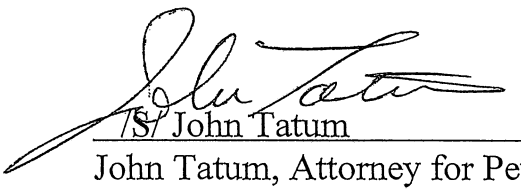
among the constitutional rights that can never be treated as harmless error. In an effort to ensure that individuals who sit on juries are free of racial bias, it has been held that the constitution at times demands that defendants be permitted to ask questions about racial bias during voir dire. See *Pena Rodriguez v. Colorado*, 137 S.Ct. 855 (2017). In this case Petitioner was not denied the opportunity to ask questions about racial bias, but once the defense established racial bias, the defense's challenge for cause based on racial bias was denied allowing a racially biased juror against 'non whites' to sit on the jury.

The juror's questionnaire shows that prospective juror is of the white race while the Defendant is of the black race. Petitioner's Sixth and Fourteenth amendment rights were violated by the trial court's ruling denying the defendant's challenge for cause as to this racially biased juror and by the Texas Court of Criminal Appeals that held that he was tried by a constitutionally qualified jury; contrary to decisions of this Honorable Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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