RACIAL EPITHETS IN THE CRIMINAL PROCESS

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INTRODUCTION

In a sense, this Article is a throwback to an earlier era. Most of the articles in this Issue use sophisticated techniques for uncovering the influence of covert—and sometimes even unconscious—racial bias in capital cases. The evidence of modern bias is often difficult to document and, even when documented, still capable of racially neutral interpretations. In contrast, the use of racial epithets is neither subtle nor ambiguous. In another sense, however, this Article is not a throwback at all, for it reflects the *continuing* legacy of the more hostile forms of bias that have not yet been eradicated and that, as it turns out, our judicial system is not very enthusiastic about eradicating.

The case of Curtis Osborne is emblematic both of the problem and of the passive response of the criminal justice system. Osborne, an African American, was convicted of capital murder in Georgia[4] after being represented by attorney Johnny Mostiler, a long-time contract public defender. Mostiler also represented Gerald Huey, a white man, on an unrelated charge.[5] Although the only connection that the two clients shared was a short and somewhat unfriendly stint in nearby isolation cells, Mostiler nonetheless discussed with Huey, in revolting terms, his representation of Osborne.[6] Huey kept those discussions to himself until Osborne's case entered federal court, and Huey began to believe that Osborne might be executed without anyone knowing what he knew.[7] At that point, Huey signed an affi-

4. Osborne v. Terry, 466 F.3d 1298, 1303-04 (11th Cir. 2006).
5. *Id.* at 1316.
6. *Id.*
7. *Id.*

davit recalling Mostiler's use of racial slurs toward Osborne and complete lack of interest in Osborne's welfare:

> The first time I recall [Mostiler] saying anything about Curtis Osborne's case was when he said, "*The little nigger*[8] *deserves the death penalty.*" I was shocked because I knew that Mr. Osborne had not gone to trial yet[.] . . . That wasn't the only time [Mostiler] said something like that though. I recall [Mostiler] telling me that I wouldn't believe the amount of money he was going to spend on my case. He said he was going to hire a private investigator and get expert witnesses. He said the money he would spend on m[e] was going to be a lot more than he would spend on Mr. Osborne because "*that little nigger deserves the chair.*" [Mostiler] made similar comments to me both before and after Mr. Osborne's trial.[9]

And indeed, just as he said, Mostiler did not expend available funding on experts for Osborne, instead leaving the jury ignorant of the mitigating mental illness that drove Osborne's crimes.[10] Despite the fact that the state never disputed that Osborne's lawyer made these statements, two state courts and two federal courts denied relief, and the Supreme Court of the United States denied review.[11] The last substantive decision on the issue came from the Eleventh Circuit Court of Appeals, which first found that the claims relating to Mostiler's racial bias were procedurally defaulted because they were raised in a *second* state post-conviction petition—because Osborne's Post-Conviction Relief (PCR) counsel did not know of the underlying facts at the time of the first petition.[12] But the Eleventh Circuit went on to reject the claim on the merits as well, for reasons that are noteworthy:

> Assuming *arguendo* that the *McCleskey* claim is not procedurally barred from federal habeas review, we conclude that the claim lacks merit. Even if the affidavit correctly recounts Mostiler's statements to Huey, it does not establish that Mostiler failed to convey the plea offer to Osborne. Moreover, Osborne presents no other evidence to support his claim that Mostiler's alleged racial animosity affected his representation. Furthermore, *McCleskey* discusses the racial animus of the decisionmakers, not defense counsel; therefore, Osborne's claim does not fit within the *McCleskey* rubric.[13]

Thus, it appears that in the Eleventh Circuit: (1) using a racial slur to describe his client and declare that the client deserves to be executed does

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8. We debated whether or not to print out the epithets, realizing that every repetition causes some injury, but also believing that evasion of the ugliness of racial epithets is part of what has allowed courts to affirm convictions. When one of us argued Curtis Osborne's case in the Eleventh Circuit, none of the three judges on the panel were willing to repeat the slur in their questions—but all of them were willing to vote to affirm the conviction. This is hypocrisy, to say the least. So we have opted in this Article to report the slur the first time we describe the case, and then to avoid its repetition, acknowledging that this is not a perfect solution.

9. *Osborne*, 466 F.3d 1298 (emphasis added).

10. *Id.*

11. *Id.* at 1317-18.

12. *Id.* at 1318.

13. *Id.*

not affect the credibility of a lawyer's denial that he failed to convey a plea offer of life imprisonment to his client (an offer that would have led to the client escaping the "chair" that his lawyer thought he deserved); (2) stating that he will not hire any experts for a client because the client deserves to die—and then in fact not hiring any experts—does not constitute "evidence . . . that [a lawyer's] racial animosity affected his representation;" and, most surprising of all, (3) there is no constitutional prohibition against race-based animus toward a client, even if that animus affected decisions made during the course of representation.[14]

Clemency proceedings were equally unavailing. Former President Jimmy Carter made a plea for clemency, as did former U.S. Attorney General Griffin Bell.[15] After a hearing that left no doubt that Mostiler in fact used racial slurs to describe not only Osborne but other African-American clients, the Georgia Board of Pardons and Parole denied clemency, and Osborne was executed in June of 2008.[16]

We encountered the case of Curtis Osborne as part of our work in the Cornell Death Penalty Project; one of us represented him in the Eleventh Circuit, on certiorari, and then in clemency proceedings. Then, in 2010, one of us consulted with local post-conviction counsel for Johnny Bennett, whose case also involves a racial epithet.[17] We postpone discussion of the Bennett case, which is now pending before the South Carolina Supreme Court, for Part I.[18] But we note it here because prior to seeing this second case, all three of us would have assumed that the use of a racial epithet at a criminal trial would be rare. When we later examined that assumption, we realized that such a broad phrasing overstated what we really expected. Testimony in which a witness *repeats* a racial epithet used in some other setting might or might not be terribly rare; the frequency of the use of racial epithets during the course of a crime or its aftermath cannot be deterred by the judicial process and generally would not reflect bias in that process. So to be more precise, we would have thought that the use of an epithet *by a decisionmaker*—a judge, lawyer, or juror—would be extremely rare. Because the Project was involved in two such cases in less than five years, we wondered whether even that assumption was unduly optimistic. We all agreed that we would also have assumed that the use of an epithet by any of the decisionmakers would lead to reversal—but it did not in *Osborne*,[19] and

14. *Id.*

15. *Georgia Murderer Executed*, UPI.COM, June 4, 2008, http://www.upi.com/Top_News/2008/06/04/Georgia-murderer-executed/UPI-47271212636675/.

16. *Id.*

17. *See* discussion *infra* Subsection I.B.1.a.

18. *See infra* Subsection I.B.1.a.

19. Osborne v. Terry, 476 F. 3d 1299, 1318 (11th Cir. 2006).

so far, has not in *Bennett*.[20] We all found preposterous every one of the reasons cited by the reviewing courts as the basis for denying relief. This led us to undertake to find all of the racial epithet cases of the last twenty years to see how common they are and whether they typically result in relief.

Part I reports the results of our collecting the cases. Part II describes the general standards for assessing juror, judge, prosecutor, and defense attorney misconduct that are applied to a variety of kinds of misconduct and considers whether those standards are adequate when the misconduct involves use of a racial epithet. Finally, Part III proposes how a judicial system committed to racial equality would respond to racial epithets in criminal cases.

I. MODERN RACIAL EPITHET CASES

The cases we found involving the use of racial epithets were surprisingly numerous and, in general, unsuccessful. We initially searched for cases from the past twenty years and, after discovering the numbers remained fairly constant over the period, decided to concentrate on examples from the past ten years. We summarize below seventeen cases: five in which the criminal defendant nominally "won"[21] and twelve where the defendant lost. We spend the time to describe the facts and the courts' reasoning because they vary and because, to our minds, they are a surprise to anyone who thinks that old-fashioned racism has disappeared, or to anyone who thinks that the courts are committed to eradicating it when it does appear. The first subpart presents those cases in which a lower court's denial of relief was reversed or vacated on appeal—the "wins"—although as will be explained, only two of those "wins" were really victories, either for the defendant or for racial equality. The second subpart discusses those cases in which the defendant was denied relief. The third explains our strong suspicion that these readily discoverable cases substantially underrepresent the universe of recent cases in which a party to trial used racial epithets against a defendant.

A. "Winning" Cases: Epithets by Jurors

Perhaps the most surprising discovery—apart from how unreceptive the courts have been in awarding relief for racial bias—about these cases is that those in which a defendant succeeds on appeal have all involved juror misconduct. In only two cases—neither of which were capital—was an epithet the basis for remanding for a new trial; the other three cases granted some form of relief to the defendant in the form of an ability to explore fur-

20. *See* discussion *infra* Subsection I.B.1.a.

21. Even though we denote these cases as wins, most are actually quite limited and may not necessarily result in relief.

ther facts about the claim, but under a legal standard likely to ultimately defeat the claim.

1. *State v. Jones*

Jeffrey Jones was convicted under Louisiana law for possession of a knife while also in possession of cocaine.[22] After the jury was impaneled but before opening statements, a juror informed the court through a note—which the juror wished to remain confidential—that, in the jury room, he overheard another juror "[use] the term 'nigger,'" though not in specific reference to Jones.[23] A long colloquy followed in which defense counsel noted the all-white makeup of the jury panel and requested further voir dire of the juror who used the racial epithet.[24] In response, the prosecutor asserted that the use of an "offensive term [did] not mean in any way whatsoever that [the jury] cannot give [Jones] a fair trial."[25] The judge refused to permit voir dire of the juror,[26] and after the defendant was convicted, he asserted on appeal that the trial court denied his right to trial by a fair and impartial jury.[27]

The Court of Appeal of Louisiana reversed.[28] It first noted two earlier cases from other jurisdictions in which the use of similar epithets was the basis of reversal: *United States v. Heller*,[29] and *Wright v. CTL Distribution Inc*,[30] a civil case. Even though both of those cases presented situations in which jurors used epithets in direct reference to the party, the *Jones* court found that distinction unpersuasive, stating that it had "considerable difficulty accepting the government's assumption that, at this time in our histo-

22. State v. Jones, 2009-0751, p. 2 (La. App. 1 Cir. 10/23/09); 29 So. 3d 533, 534.

23. *Id.* at p. 4; 29 So. 3d at 535.

24. *Id.* at p. 4; 29 So. 3d at 536.

25. *Id.* at p. 5; 29 So. 3d at 536.

26. To justify his decision, the judge first noted the difference between the present case and "a capital case where you even have to go more in depth as to jury qualifications." *Id.* p. 5; 29 So. 3d at 537. He also explained that, because the juror who wrote the note wanted to remain anonymous, raising the issue "would lose [that juror's] confidence and possibly the confidence of all the jurors." *Id.* at p. 5; 29 So. 3d at 537. The judge did, however, agree to include in his jury instruction a caution against being "influenced by sympathy, passion, prejudice or public opinion." *Id.* p. 6; 29 So. 3d at 537.

27. *Id.* at p. 3; 29 So. 3d at 535.

28. *Id.* at p. 10-11; 29 So. 3d at 540.

29. 785 F.2d 1524 (11th Cir. 1986). In *Heller*, the Eleventh Circuit reversed a conviction where jurors used racial and ethnic slurs, at least some of which were directed at the defendant. *Id.* at 1525.

30. 650 So. 2d 641 (Fla. Dist. Ct. App. 1995). In *Wright*, a civil action for negligence stemming from a car accident, a juror informed the judge that she heard several members of the jury say they would not "award anything to Wright because she was a fat black woman on welfare who would simply blow the money on liquor, cigarettes, jai alai, bingo or the dog track." *Id.* at 642.

ry, people who use the word 'nigger' are not racially biased."[31] The court then held that a juror's use of the term, even when not directed at a party to the proceeding, combined with limited effort on the part of the trial judge to investigate or remedy the situation, shows such a high probability of prejudice that the trial is "inherently lacking in due process."[32] As a result, Jones's conviction and sentence were vacated, and the court remanded for a new trial.[33]

2. *People v. Rivera*

Orlando Rivera was convicted by jury on two counts of burglary, grand and petit larceny, and two counts of criminal mischief in Kings County, New York in 2000.[34] In a posttrial motion to set aside his convictions because of juror misconduct, Rivera presented the account of three jurors that a fourth juror stated, "I know that nigger is guilty."[35] Although Rivera argued that this statement showed that he was denied his right to an impartial jury, the trial court disagreed, denying his motion,[36] but the Appellate Division reversed.[37] The court acknowledged that although typically juror misconduct warrants a new trial only when a defendant shows "prejudice to a substantial right," the case is different "where a juror had an undisclosed preexisting prejudice that would have resulted in his or her disqualification if it had been revealed during voir dire, such as an undisclosed, pretrial opinion of guilt against the defendant."[38] Because of the juror's racist attitude, the court reversed and ordered a new trial.[39]

3. *Marshall v. State*

Matthew Marshall was convicted and sentenced to death for murder of a fellow inmate while imprisoned in Florida.[40] Evidence of jurors' use of racially charged language in Marshall's trial emerged when a juror in the

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31. *Jones*, 2009-0751, at p. 8; 29 So. 3d at 539 (quoting United States v. Henley, 238 F.3d 1111, 1121 (9th Cir. 2001)).

32. *Id.* p. 10; 29 So. 3d at 540.

33. *Id.*

34. People v. Rivera, 759 N.Y.S.2d 136, 137 (N.Y. App. Div. 2003).

35. *Id.* There was some disagreement about the precise timing of the juror's use of the slur, two jurors asserting that they overheard it during trial deliberations and another stating that he overheard it during juror selection. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. Marshall v. State, 854 So. 2d 1235, 1237 (Fla. 2003) (per curiam).

case called Marshall's attorney[41] and told him that: (1) jurors told racial jokes about Marshall and (2) some jurors announced during the guilt phase that they would vote for guilt and a "life sentence because they wanted Marshall to return to prison to kill more black inmates."[42] The trial court barred introduction of this evidence during post-conviction proceedings on the grounds that it inhered in the verdict and was therefore barred by state statute.[43]

The Florida Supreme Court reversed the trial court's ruling that the evidence of bias inhered in the verdict, finding that racial bias constitutes an overt act of conduct that does not "inhere[] in the verdict."[44] Consequently, the court remanded for an evidentiary hearing on the claim of juror bias, giving the trial court explicit instruction on how to proceed.[45] First, the trial court was to determine the identity of the female juror who spoke to Marshall's attorney on the phone,[46] and from there, if the court determined there existed a reasonable probability of juror misconduct, it was to conduct further interviews.[47] Although *Marshall* does not order a new trial, the terms of its remand put it in line with *Jones* and *Rivera*, for it states clearly that relief would be warranted were the allegations proven, because "when appeals to racial bias are made openly among the jurors, they constitute overt acts of misconduct" and therefore are outside the rule against inquiry into conduct that "inhered in the verdict."[48]

Jones, *Rivera,* and *Marshall* are, however, the only reported cases in this century that vindicate the premise with which we started: that the use of a racial epithet by a trial participant, such as a judge, juror, or lawyer, should be—and would be—reversed.[49] The other two "wins" are far more limited victories, if they are victories at all. They are focused on vindicating the interest in prohibiting lying on voir dire, rather than on redressing racial bias.

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41. Although counsel remembered that the caller was a female, he could not remember the caller's name. *Id.* at 1239.

42. *Id.*

43. *Id.* at 1240; *see* Fla. Stat. § 90.607(2)(b) (1999).

44. *Marshall*, 854 So. 2d at 1241-42.

45. *Id.* at 1253.

46. *Id.*

47. *Id.*

48. *Id.* at 1241 (quoting Powell v. Allstate Ins. Co., 652 So. 2d 354, 357 (Fla. 1995)) (emphasis omitted).

49. State v. Jones, 2009-0751 (La. App. 1 Cir. 10/23/09); 29 So. 3d 533; People v. Rivera, 759 N.Y.S.2d 136, 137-38 (N.Y. App. Div. 2003); *Marshall*, 854 So. 2d at 1237-44.

4. *United States v. Henley*

Rex Henley stood trial with six codefendants for conspiracy to distribute cocaine and possession with intent to distribute cocaine.[50] While the trial was in progress in federal district court, a former juror in the case, Michael Malachowski—who was excused for reasons unrelated to any misconduct—approached Henley at his home and informed him that he had information that could entitle Henley to a new trial, if Henley was convicted.[51] Eight days later, five of the charged individuals were convicted, including Henley.[52] Malachowski then provided Henley's counsel with a statement detailing the extent of racist remarks made by juror Sean O'Reilly.[53]

Malachowski swore that while carpooling with juror O'Reilly to the trial, he heard O'Reilly say, "All the niggers should hang."[54] According to Malachowski, although O'Reilly had used the racial epithet, he did not appear to be directing it toward any of the defendants.[55] Upon further investigation, a fellow juror who carpooled with Malachowski and O'Reilly stated that he also had heard O'Reilly say either "'The niggers are guilty' or 'Niggers are guilty.'"[56] Nonetheless, the trial court denied the defense motion for a new trial.[57] The court partially based its denial on Federal Rule of Evidence 606(b), which generally bars the use of a juror's testimony to impeach the jury verdict.[58]

On appeal, the Ninth Circuit did not reach the question of whether Rule 606(b) applies to proof that racial bias infected jury deliberations. Instead, it held that "[w]here . . . a juror has been asked direct questions about racial bias during voir dire, and has sworn that racial bias would play no part in his deliberations, evidence of that juror's alleged racial bias is indisputably admissible for the purpose of determining whether the juror's responses were truthful."[59] Whether the defendant was entitled to relief, according to the Ninth Circuit, would turn on whether O'Reilly made statements during voir dire which were untruthful—an inquiry not explored by the trial court. The Ninth Circuit therefore remanded the case to the trial

50. United States v. Henley, 238 F.3d 1111, 1112 (9th Cir. 2001).

51. *Id.* Relevantly, the juror had information that juror Sean "O'Reilly had made racist remarks," though he did not elaborate as to the precise statements until later. *See id.* at 1112-13.

52. *Id.* at 1112.

53. *Id.* at 1113.

54. *Id.*

55. *Id.*

56. *Id.* at 1114.

57. *Id.*

58. *Id.* at 1114 & n.4.

59. *Id.* at 1121 (citing Hard v. Burlington N. R.R., 812 F.2d 482, 485 (9th Cir. 1987)).

court to "enter detailed findings and make a specific determination regarding O'Reilly's alleged statements and racial bias."[60]

Although the last reported opinion in Henley is a "win," it foreshadows the grounds on which other cases lose. It is possible, of course, that when remanded, the trial judge would find that O'Reilly was lying, either because he would admit to lying or because the judge would determine that his demeanor betrayed his mendacity. However, the first possibility seems little more than abstract, since a juror would likely be afraid to admit to lying on voir dire, even if he were conscious of doing so. And the second possibility, that the judge would find him to be lying, seems unlikely given his initial hostility to this claim.

5. *Williams v. Price*

Ronald Williams was convicted of murder and sentenced to life imprisonment in Pennsylvania.[61] His race-related claim in post-conviction stemmed from the affidavits of two jurors who claimed to have observed, or been targets of, the use of racial epithets. Juror Judith Montgomery swore in an affidavit that she "was called 'a nigger lover' and other derogatory names by other members of the jury" and heard other jurors say that the defendant's "'black ass was cooked.'"[62] Additionally, Jewel Hayes, an acquaintance of Williams who attended the trial, supplied another affidavit swearing that after the trial she heard a juror on the case state, "'All niggers do is cause trouble.'"[63] The post-conviction court denied relief on the grounds that the affidavits served to impeach the verdict and were thus barred from admission, an analysis that was affirmed through the state appeals process.[64]

On appeal to the Third Circuit, that court explained the history and justification of the "no impeachment" rule,[65] then held that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) precluded relief because the state court's refusal to consider Montgomery's affidavit was not contrary to or an unreasonable application of clearly established Supreme Court precedent.[66] However, the "no impeachment" rule has never extended to nonjurors, and because Hayes was not a juror, her affidavit should have been considered.[67] The court therefore ordered a remand, but the remand,

60. *Id.* at 1122.
61. Williams v. Price, 343 F.3d 223, 225 (3d Cir. 2003).
62. *Id.* at 227.
63. *Id.*
64. *Id.* at 228.
65. *See id.* at 232-33.
66. *See id.* at 237 (citing Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1) (2000)).
67. *Id.* at 233-34.

like that in *Henley*, was limited to consideration of (1) whether the juror failed to honestly answer a material question on voir dire and (2) whether a truthful response would have provided a valid basis for a challenge for cause.[68]

B. Losing Cases

Far more abundant are those cases in which racial epithets are used to characterize and degrade a defendant—but no relief is granted. We group them below by speaker: juror, defense lawyer, witness, and prosecutor.

1. *Epithets by Jurors*

a. State v. Bennett

In a post-conviction interview, one of Johnny Bennett's jurors, when asked why he thought Bennett had committed murder, casually responded that it was "'because he was just a dumb nigger.'"[69] Somewhat surprisingly, at the evidentiary hearing a year later, this juror did not deny making the remark and admitted that he used the epithet "nigger" and the phrase "dumb nigger" to describe other African Americans.[70] He did acknowledge that he was sorry he had uttered the word, but only because it caused him inconvenience seven years after the trial and he feared that he had "throw[n] another wrench" in the case.[71]

These admissions did not prompt the order of a new trial, at least not from the PCR court. The PCR judge asked the state to draft an order denying relief, which he signed without modification.[72] That order first found that there was no evidence that the juror had lied on voir dire,[73] then justified the denial of relief on three theories: (1) that the juror's bias came into existence sometime after the trial,[74] (2) that the use of the slur did not establish that the juror believed that "African Americans were inferior to Whites,"[75] and (3) that the juror's racial prejudice was not relevant because

68. *See id.* at 229 (citing McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984)), 239.

69. Transcript of Record at 9, Bennett v. State, No. 06-CP-40-5751 (S.C. Ct. Com. Pl. 2008).

70. *See id.* at 20.

71. *Id.* at 13.

72. Conversation with Robert Lominack, counsel for Johnny Bennett (Jan. 2011).

73. Amended Order at 36-37, Bennett v. State, No. 06-CP-32-3221 (S.C. Ct. Com. Pl. 2009).

74. *Id.* at 40 ("[I]t is unclear from [the juror's] testimony when he came to the conclusion that the Applicant was a racial epithet.").

75. *Id.* at 42 (finding that the racist epithet "was a poor choice of words").

the victim was also black.[76] The case is currently pending review in the South Carolina Supreme Court.

b. Pace v. State

Levi Pace was convicted of felony murder in Alabama in 2002 and sentenced to life imprisonment.[77] On his first appeal from a denial of his motion for a new trial, Pace presented one juror's statement that another juror used a racial slur to disparage the testimony of two African-American defense witnesses, saying, "'I don't believe a word those niggers said.'"[78] The appellate court remanded to conduct an evidentiary hearing on this claim of juror bias,[79] and on remand, the trial court found the juror who denied making the statement more credible than his accuser.[80] The reviewing court deferred to the trial court's credibility determination,[81] which of course may have been correct. What makes this case interesting is the court's explanation of why the claim would have been denied on the merits even if the allegation had been credible.[82] According to the court,

> The testimony of [the two African-American defense witnesses], to the extent it was elicited to discredit [the state's witness], likely had little impact on the jury, because . . . [the state's witness's] testimony was far more damaging to her own credibility than the testimony of [the two African-American defense witnesses'] was, so [the jurors'] refusal to consider [the two African-American defense witnesses'] testimony would have been harmless.[83]

This explanation, of course, ignores the possibility that a juror who used the epithet about a witness might have biased views concerning the defendant.

c. Rouse v. Lee

Kenneth Rouse was convicted of capital murder and sentenced to death in North Carolina.[84] Rouse asserted on his initial state post-conviction petition that a member of his jury had admitted he had intentionally concealed the circumstances of his own mother's violent death at the hands of a

76. *Id.* at 44 (finding that even if the juror "possessed some racial prejudice," there is no evidence that this bias would influence him in a case that involved a black victim).

77. Pace v. State, 904 So. 2d 331, 336-37 (Ala. Crim. App. 2004).

78. *Id.* at 342.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 343 (explaining that "[e]ven had Pace been able to establish that [the juror] was prejudiced against blacks, Pace would not have been denied a fair trial" because the testimony of those African-American witnesses "likely had little impact on the jury").

83. *Id.*

84. Rouse v. Lee, 339 F.3d 238, 241 (4th Cir. 2003) (en banc).

criminal who was later executed for the crimes.[85] That juror also allegedly "expressed intense racial prejudice against African Americans, calling them 'niggers' and opining that [they] care less about life than white people do and that African-American men rape white women in order to brag to their friends."[86] Nonetheless, the state court denied a hearing on his claim.[87]

Rouse's federal habeas petition was filed *one day* late.[88] A Fourth Circuit panel had granted equitable tolling, relying on the short delay, the fact that the mistake was made by attorneys over which Rouse himself had no control, and the strength of Rouse's claim.[89] The Fourth Circuit, sitting en banc, reversed, declaring without even mentioning the juror's use of a racial epithet, that the merits of Rouse's claim were irrelevant to the question of tolling.[90] Indeed, it is only by reading the dissent that one learns of the substance of Rouse's claim.[91]

d. State v. Bowens

Tyreese Bowens was convicted of murder committed at a Connecticut convenience store.[92] Bowens claimed that he was denied his right to a fair trial due to the removal of an alternate juror, who had informed the court of racially biased remarks said by a fellow juror. The alternate swore that: (1) at lunch, the juror "said that she had been very uncomfortable because of all the niggers that were there [at Burger King]"; (2) while discussing families, the juror stated that she would not let her son shop where he wanted because "all the people from the jungles were there"; and (3) the juror stated, "[T]hank God I don't have to deal with the gangs" because "[I] liv[e] on the good side" of town.[93]

The juror vehemently denied ever using racial epithets, referring to the jungle, or referencing gangs,[94] but several other jurors recalled hearing some variation of those comments from the juror in question, though they stated they did not interpret them as racist in nature.[95] Defense counsel moved for

85. *Id.* at 257 (Motz, J., dissenting).
86. *Id.*
87. *Id.* at 257-58.
88. *Id.* at 257 (majority opinion). On February 5, 1999, his state post-conviction proceedings ended when the Supreme Court of North Carolina denied review of his claim thus starting the one-year limitations period for filing for habeas relief in federal court. *Id.* at 244. Because February 5, 2000, was on a Saturday, Rouse had until the following Monday, February 7, to file, but his lawyers miscalculated, and filed on February 8. *Id.*
89. *Id.* at 243.
90. *Id.* at 251.
91. *See id.* at 257 (Motz, J., dissenting).
92. State v. Bowens, 773 A.2d 977, 979, 980 (Conn. App. Ct. 2001).
93. *Id.* at 980 n.3.
94. *Id.* at 980 n.4.
95. *Id.* at 981.

a mistrial, but instead, the court excused both the juror and the alternate.[96] On appeal, the court did not find an abuse of discretion, noting that a trial court has "wide discretion in determining the competency to serve."[97] This resolution, of course, ignored possible effects on the jurors who heard the comments—and saw both the speaker and the whistleblower removed.

2. *Epithets by Defense Counsel*

There are five cases in the last ten years in which a claim for relief based upon the defense attorney's use of a racial slur failed, and none in which such a claim succeeded. Interestingly, in the previous decade, there was only one such case reported, and relief was granted in that case.[98] One case, that of Curtis Osborne, is described at some length in the introduction. The other four are no less discouraging.

a. Mayfield v. Woodford

Demetrie Mayfield was convicted of a 1983 murder and sentenced to death in California, represented at trial by Donald Ames.[99] He sought habeas relief on the ground that he was denied the effective assistance of counsel due to his attorney's conflict of interest—namely, that counsel was racially prejudiced and, as a result, did not request the funding necessary for a successful defense.[100] Mayfield presented evidence that Ames was racially prejudiced, including two specific declarations identifying "racial epithets that Ames used in reference to minority clients."[101] The declarations conveyed the following information:

> Ames' former secretary states that he "consistently" referred to his African-American clients as "niggers"; called another secretary "a dumb nigger"; and called a fellow lawyer "a big black nigger trying to be a white man." Another former employee avers that Ames "said because his client [not Mayfield] was black he, Ames, did not trust him and did not care what happened to him." An employee of the superior court says in her affidavit, that Ames described a former secretary as a "dumb little nigger" and that he said of a minority death penalty client (not Mayfield) that "he deserves to fry." An investigator states that Ames referred to yet another African-American client as a "dumb nigger."[102]

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96. *Id.* at 981-82.

97. *Id.* at 982 (quoting State v. Mills, 748 A.2d 891 (2000)).

98. Frazer v. United States, 18 F.3d 778, 783 (9th Cir. 1994) (finding that where trial counsel in a bank robbery case called his client "a stupid nigger son of a bitch," prejudice is presumed).

99. Mayfield v. Woodford, 270 F.3d 915, 918-19 (9th Cir. 2001) (en banc).

100. *See id.* at 924-25.

101. *Id.*

102. *Id.* at 940 (Graber, J., dissenting in part).

Despite, or perhaps because of, the repetitive use of this slur by defense counsel, as confirmed by multiple sources, the court took pains to minimize those repetitions by noting that none of the declarations related to epithets used against Mayfield.[103] The court did not consider the possibility—indeed, the likelihood—that a person who so "consistently" referred to his African-American clients in this way also used it to refer to Mayfield.

Because Mayfield asserted that his counsel labored under a conflict of interest, the court identified the controlling standard as *Cuyler v. Sullivan*,[104] requiring "an actual conflict of interest [that] adversely affected his lawyer's performance."[105] However, it also explained that the claim of racial bias is not necessarily cognizable under the then-existing conflict-of-interest law.[106] Perhaps more importantly, the court found fatal the fact that Mayfield did not demonstrate that his attorney performed deficiently because of his racial bias.[107] Accordingly, it declined to even grant a Certificate of Appealability on this claim.[108]

b. Ellis v. Harrison

Ezzard Ellis was convicted of murder in 1991 in California and sentenced to life imprisonment without the possibility of parole;[109] like Demetrie Mayfield, whose case is described above, Ellis was represented at trial by attorney Donald Ames.[110] In early 1996, the California Supreme Court denied Ellis final review,[111] but in 2005, after Ellis became aware of Ames's prior representation of Mayfield[112] and the related allegations of racial bias, he then submitted a habeas petition in federal court asserting that Ames provided ineffective assistance, based on a conflict of interest.[113]

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103. *Id.* at 925 (majority opinion).

104. 446 U.S. 335 (1980).

105. *Mayfield*, 270 F.3d at 925 (quoting *Cuyler*, 446 U.S. at 348).

106. *See id.* at 935 (Gould, J., concurring) & n.9.

107. *Id.* at 933 (majority opinion).

108. *See id.* (declining to grant a Certificate of Appealability for the claim). Mayfield was, however, granted relief on his claim that he received ineffective assistance of counsel during the sentencing phase of his trial and awarded a new sentencing. *See id.* This may be another instance of a court refusing to grant relief based upon a claim of racial bias, but becoming more inclined to grant relief on another ground due to disturbing evidence that racism was a contributing factor in a death sentence. *See* Sheri Lynn Johnson, *Litigating for Racial Fairness After* McCleskey v. Kemp, 39 COLUM. HUM. RTS. L. REV. 178 (2007).

109. Ellis v. Harrison, No. EDCV 05-00520-SJO (MAN), 2010 U.S. Dist LEXIS 87560, at *5 (C.D. Cal. July 12, 2010) (magistrate findings), *adopted*, 2010 U.S. Dist LEXIS 87516 (C.D. Cal. Aug. 25, 2010).

110. *Id.* at *8-9.

111. *Id.* at *7.

112. *See supra* Subsection I.B.2.a.

113. As possible adverse effects of this conflict, Ellis cited Ames's failure to (1) "challenge the jury panel in which African-American jurors were underrepresented," (2)

The main obstacle facing Ellis was the length of time he had waited in presenting his claim.[114] Ellis asserted that his petition was timely because he had only discovered that his attorney was a racist in 2003 after hearing about the allegations in Mayfield's case.[115] The court assented to the contention that a delayed commencement date for purposes of the limitations period was possible,[116] beginning when Ellis "first learned of Ames's possible racism."[117] That determination was of no avail, however, because Ellis's petition was filed on May 31, 2005—almost two years after Ellis learned of the information underlying the accusations of Ames's racism.[118] As a result, the court dismissed Ellis's petition as untimely.[119]

c. Jones v. Campbell

Aaron Lee Jones was found guilty of capital murder and sentenced to death in Alabama in 1982.[120] In federal habeas litigation, Jones made a new assertion that he was deprived of the effective assistance of trial counsel because of attorney George Boles's racial animus.[121] Jones presented evidence from his post-conviction counsel's legal secretary that Boles told her on the phone "something to the effect of 'that nigger is going to fry.'"[122] The Eleventh Circuit, however, was not receptive to Jones's claim for relief.

First, the court explained that Jones's assertion was not a "claim" of ineffective assistance because of how little discussion—if any—it received in his federal petition and in the state courts. Regarding the petition, Jones mentioned the claim only in the introduction and conclusions of his state and federal petitions, never stating it as an explicit claim for relief.[123] Furthermore, the Eleventh Circuit found that the state courts' failure to discuss the racial bias allegation indicated that it was not a properly presented claim

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object to racial discrimination in jury selection, (3) "challenge biased jurors, and" (4) "present critical testimony." *Ellis*, 2010 U.S. Dist LEXIS 87560, at *10.

114. The typical limitations period for filing a federal habeas petition is one year, which is tolled statutorily by the proper filing of post-conviction collateral review. 28 U.S.C. § 2244(d)(1) (2006). Relevant here, the one-year limitations period for a claim with a newly discovered factual predicate begins upon discovery of that fact, provided there is delayed discovery of those facts and that delay is excusable. *Id.* § 2244(d)(1)(D).

115. *Ellis*, 2010 U.S. Dist LEXIS 87560, at *8-9.

116. *Id.* at *36.

117. *Id.* at *29.

118. *Id.* at *12.

119. *Id.*

120. Jones v. Campbell, 436 F.3d 1285, 1291 (11th Cir. 2006).

121. *Id.* at 1292.

122. *Id.* at 1304.

123. *Id.* The court also found unavailing the discussion of that bias during Jones's evidentiary hearing as well as its inclusion in Jones's proposed findings of fact and conclusions of law after the evidentiary hearing was held. *Id.*

for relief.[124] Because the claim was never presented to state courts for adjudication, it was procedurally defaulted, and Jones was denied relief because he did not attempt to overcome the default.[125]

The *Jones* court went on to explain that even if the allegation of racial bias were cognizable on federal habeas, it would deny relief on the merits, in a paragraph that cites three seemingly irrelevant facts:

> Assuming the issue was properly before us for consideration, we would conclude that the claim is without merit. Boles's alleged racial remarks occurred almost 13 years after Jones's trial. Jones did not present any evidence that Boles made any racist statements to Jones during his representation. There is no evidence that Boles ever made a derogatory racial remark to Jones. The alleged racial remark was made to a legal secretary, not to Jones, and the alleged comment was made after Boles's representation of Jones. There is no evidence to support Jones's allegation that Boles's alleged racist attitude toward him affected Boles's representation to the extent that Jones was denied the right to counsel guaranteed by the Sixth Amendment. Accordingly, Jones is not entitled to relief on this claim.[126]

Thus, the panel would have one assume that Boles somehow became racially prejudiced *against Jones* after Jones's trial was over; it would have one assume that the problem is in using the word to a client, who might—unreasonably?—be offended, rather than the problem being that the lawyer harbors racial animosity toward his client; and finally, it would have one assume saying about one's client that "that nigger is going to fry" is not, itself, evidence that his representation of the client would be affected.

d. State v. Yarborough

Kevin Yarbrough was convicted of murder in Ohio in 1997 and sentenced to death.[127] He sought relief on grounds that his trial counsel had rendered ineffective assistance because he breached the duty of loyalty to his client. At the outset of trial, counsel engaged the help of a mitigation expert to help prepare for trial and sentencing. In post-conviction proceedings, the mitigation expert signed an affidavit stating that counsel had told her, after the conclusion of trial, "that he [counsel] knew black people he liked, but that Kevin was a nigger."[128] The mitigation expert pointed out "that trial counsel did not follow her suggestions or advice during the penalty phase of the trial."[129]

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124. *Id.*
125. *Id.*
126. *Id.* at 1304-05.
127. State v. Yarbrough, No. 17-2000-10, 2001 Ohio App. LEXIS 1930, at *3 (Ohio Ct. App. Apr. 30, 2001).
128. *Id.* at *15-16.
129. *Id.* at *16.

The court's discussion of Yarbrough's claim was extremely limited. It conceded that such a statement, if made, was "grossly inappropriate, offensive, and distasteful."[130] However, the court explained that after a review of the record, they could not find that trial counsel rendered ineffective assistance in his performance.[131] According to the court, the remark, if made, did not prejudice the outcome of trial, and therefore no relief was warranted.[132]

3. *Epithets by Witnesses*

a. Robinson v. State

Terik Robinson's capital murder trial was still at the jury-selection stage when he was confronted with a bizarre situation. The trial witnesses were entering the courtroom when Avery Savage, a prosecution witness, audibly blurted out an insult at Robinson that he was "a ho ass nigger."[133] Defense counsel moved for a mistrial.[134] Rather than ruling on the motion, the judge took Savage into custody, admonished him for the behavior, and asked the jurors if the use of that offensive epithet would alter any of their abilities to judge the case fairly and impartially.[135] All prospective jurors responded that it would not, and voir dire resumed, with the judge never having ruled on the defense's motion for a mistrial.[136]

On appeal, the Supreme Court of Arkansas found that it was procedurally barred from considering the merits of Robinson's claim that the trial judge should have granted a mistrial.[137] Specifically, the court explained that the objection was not properly preserved on appeal because the trial judge never ruled on it and defense counsel never followed up with questions seeking an explicit ruling.[138] The court went on, however, to imply that even if the issue had been preserved, the admonishment to the jury would have sufficed to cure any prejudice resulting from the slur directed at Robinson.[139] Consequently, the court denied Robinson all relief.

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130. *Id.*
131. *Id.*
132. *Id.*
133. Robinson v. State, 214 S.W.3d 840, 842 (Ark. 2005).
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 842-43.
139. *See id.* at 843 ("An admonishment is an acknowledged means of curing error.").

4. *Epithets by Prosecutors*

Because we found only one case involving the use of racial epithets by prosecutors in the last decade, we report it and two cases from the late 1990s.

a. Bennett v. South Carolina

During the sentencing phase of his trial, the prosecution emphasized Johnny Bennett's race, pointing out his prior relationship with a white woman and referring to him with what we consider two racial epithets: "King Kong" and "Caveman."[140] The state supreme court was not troubled, admitting that though these characterizations might have "racial connotations," they were not an appeal to the passions and prejudice of the jury:

> In this regard, the Solicitor's use of the term "King Kong" was not suggestive of a giant black gorilla who abducts a white woman, but rather, descriptive of Appellant's size and strength as they related to his past crimes.[141]

To us, this decision seemed remarkably blind; we do not live in a country where ape imagery is devoid of racial meaning,[142] and indeed "ape" is itself a recognized racial slur.[143] But the South Carolina Supreme Court's complacency is easily trumped by that of the post-conviction court, as discussed above, for Johnny Bennett's capital jury included a juror who described him as "just a dumb nigger." Perhaps twelve racially neutral South Carolina jurors could have ignored these racially inflammatory comments, but Johnny Bennett's jury clearly was not composed of twelve such people.

b. Nevius v. Sumner

After being convicted of capital murder in Nevada, Thomas Nevius took a long trip through the state and federal courts, asserting many bases for relief along the way. He first raised a claim concerning the prosecutor's racial bias in federal habeas, claiming that he was entitled to discovery as to whether "the prosecutor had made [a] statement [to defense counsel] about not wanting 'all those niggers on [his] jury.'"[144] Even after one of Nevius's

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140. Bennett v. State, 632 S.E.2d 281, 285 (S.C. 2006).

141. *Id.* at 288.

142. *See, e.g.*, Jennifer Eberhardt, *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY AND SOC. PSYCHOL. 292 (2008).

143. *List of Ethnic Slurs*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_ethnic_slurs (last visited Oct. 20, 2011).

144. Nevius v. Sumner, 105 F.3d 453, 456 (9th Cir. 1996). Unsurprising in light of this comment, the jury was entirely white. *Id.* at 455.

habeas attorneys informed the prosecutor that the comment would be included as a ground for habeas relief, the prosecutor replied, "I did a good job of that, didn't I?"[145] The Ninth Circuit found that the statements, if true, were serious and would have bolstered Nevius's earlier claim of racial discrimination in jury selection.[146] However, the court ruled that because the statements were outside the record and never presented to a state court for adjudication, they could not be considered.[147]

c. Thompson v. State

Gregory Thompson was convicted of first-degree murder and sentenced to death in Tennessee. He alleged that his attorney was ineffective for failing to question the prosecutor about racist remarks during the motion for a new trial, which Thompson asserted would have bolstered his claim of jury selection discrimination.[148] At the state post-conviction hearing, one of Thompson's attorneys testified that during a conversation with the prosecutor occurring between voir dire and a motion for new trial,[149] the prosecutor stated, "'I hope they fry that nigger.'"[150] His co-counsel testified that, although he did not hear the comment, he recalled seeing his colleague upset after the conversation at issue.[151] The prosecutor denied making the racist remark, and the trial judge ruled in favor of the prosecution, finding "that the racist comment had not, in fact, been made."[152] Because of the deference given to the state court's determinations of credibility, the Court of Criminal Appeals of Tennessee denied relief.[153]

5. *Epithets by Judges*

We did not find any *criminal* cases in the last twenty years in which judges were alleged to have used racial slurs, though we did stumble upon three disciplinary actions involving such a slur, and had we set out to find such actions, we expect we would have found more. In 2008, the South Carolina Supreme Court upheld the conclusions of a panel of the Commis-

145. *Id.* at 456 n.4.
146. *Id.* at 456.
147. *Id.*
148. Thompson v. State, 958 S.W.2d 156, 168 (Tenn. Crim. App. 1997).
149. The motion for new trial was based on the trial court's "refus[al] to enjoin the state from using peremptory challenges to exclude any African Americans." *Id.* Defense counsel sought the injunction after the prosecutor moved to strike the only African-American prospective juror; the court allowed the challenge, based on the proffered reason that the juror "was not strongly in favor of the death penalty." *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*

sion on Judicial Conduct, which found that a magistrate judge violated multiple Canons under Rule 7(a) of the Rules of Judicial Disciplinary Enforcement when he, in a conversation with his clerk's supervisor, complained that the clerk was dating "'niggers' and that there was 'no telling what we might catch using the same bathroom as her.'"[154] In 1998 the Michigan Supreme Court ordered removal of trial court judge based upon his repeated use of "nigger" in surreptitiously recorded conversations off the bench, which did *not* concern legal matters before the judge.[155] And in 1994, the Arizona Supreme Court suspended a judge without pay for using the phrase "'fucking niggers'" in reference to post-conviction relief proceedings.[156]

C. Earlier Cases

Although the focus of this Article is recent cases involving racial epithets, we also wanted to check whether the numbers of such cases is declining, and whether there is any increase in the tendency to grant relief. The short answer is, with one exception, things are not getting better. If one compares the first decade of this century and the last decade of the twentieth century, the frequency of reported racial slurs cases has slightly increased. Moreover, the rate of reversal is slightly higher in the earlier decade.[157]

D. The Likelihood of Substantial Underestimation

For numerous reasons, we are convinced that the reported cases substantially underestimate the frequency with which trial participants use racial epithets. First, because of our involvement in the community of capital

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154. *In re* Hutchings, 661 S.E.2d 343, 345 (S.C. 2008).

155. *In re* Ferrara, 582 N.W.2d 817, 819, 827 (Mich. 1998).

156. *See In re* Goodfarb, 880 P.2d 620, 621 (Ariz. 1994).

157. Thus, as previously mentioned, in the only case involving defense counsel epithets, a habeas petitioner was granted an evidentiary hearing on his ineffective assistance claim based on counsel's use of a racial slur, for which prejudice was presumed. *See* Frazer v. United States, 18 F.3d 778, 780 (9th Cir. 1994) (reversing for appointment of new counsel where trial counsel called his client "a stupid nigger son of a bitch" and promised to be ineffective if Frazer did not take a plea deal). We found three earlier cases involving use of racial epithets by jurors. In one case, evidence of a juror's use of an ethnic slur was the basis for a new trial. *See* State v. Santiago, 715 A.2d 1, 14, 22 (Conn. 1998) (remanding for a hearing on juror misconduct where a juror called defendant "spic"). Of the two losing cases, one was dismissed on procedural grounds, *State v. Saleem*, 977 P.2d 921, 928-29 (Kan. 1999) (affirming defendant's conviction where jurors used the term "nigger" because objection was not made prior to the jury's verdict), and one was an unusual set of facts where the juror misquoted testimony, replacing "black boys" with the obvious racial epithet, but immediately recognized her "mistake" and covering her mouth. *See* State v. Hunter, 463 S.E.2d 314, 315-17 (S.C. 1995) (denying relief where juror used the term "nigger" in reference to testimony during trial). Moreover, the reference was not to the defendant. *Id.* Both of these facts were relied upon by the state court in affirming the conviction. *Id.*

appeals attorneys, we know of cases involving racial epithets that were challenged in a criminal case—but where the use of those epithets never finds its way into a reported opinion. For example, one of us was counsel for Louis Truesdale, where no published opinion reveals that the only black juror told an investigator that fellow jurors intimidated her into voting for the death penalty, and that two "young white male jurors . . . made remarks such as this nigger has to fry."[158] Similarly, the clemency investigation in Curtis Osborne's case revealed two other cases—also unreported—in which Osborne's lawyer had been accused in open court of calling his client a "nigger"—and did not deny that he had done so, but claimed he did not remember if he had or had not.[159]

Moreover, even in cases where the issue results in a reported opinion, the phrasing of the opinion may neither report the language that was used, nor use the words *epithet* or *slur* to describe that language, making them very difficult to locate.[160] *Mayfield* and *Rouse* suggest that this may be a large source of underinclusiveness, particularly of cases that deny relief. In *Mayfield v. Woodford*, only dissenting Judge Graber identified the language at issue;[161] the majority opinion, although identifying the slurs as "racial epithets," did not even allude to what was actually said.[162] Likewise, in *Rouse v. Lee*, had it not been for the vehement dissent of Judge Motz, the juror's use of a racial epithet could not have been discerned from the opinion.[163] Where there is no dissent, there may be no report of the language actually at stake.

The vast overrepresentation of capital cases in our pool also suggests that there may be many more unreported noncapital epithet cases. That the use of epithets would be more frequently litigated—though not necessarily more frequently occurring—is likely both because capital cases tend to be

158. *Information About Persons Executed 1998*, FIGHT THE DEATH PENALTY USA, http://www.fdp.dk/uk/exec/exe-9804.htm (last visited Oct. 21, 2011).

159. DeathPenaltyInfoCntr, *Georgia Execution Involves Racially Biased and Unprepared Defense Lawyer*, YOUTUBE (Mar. 13, 2009), http://www.youtube.com/watch?v=d1Kk7dwEcAQ.

160. A related difficulty is one of winnowing the cases that in fact contain a racial epithet, since many of those cases do not actually involve the independent use of the epithet by a juror, lawyer, judge, or witness, but merely the recounting of someone else's extrajudicial use of that epithet.

161. Mayfield v. Woodford, 270 F.3d 915, 939-40 (9th Cir. 2001) (en banc) (Graber, J., dissenting). The dissent also elaborated about the statement of the bigoted attorney's own daughter—which the majority does not mention—that her father "especially ridiculed black people, referring to them . . . [by] terms and phrases [such] as 'nigger,' 'schwartze,' 'jig,' 'jungle bunnies,' 'trigger the nigger,' and 'shoot the coon to the moon.'" *Id.*

162. *See id.* at 924-25 (majority opinion).

163. *See* 339 F.3d 238, 257-58 (4th Cir. 2003).

better funded, and hence better investigated and better litigated,[164] and because the use of epithets in such cases is more likely to garner public attention.

Finally, while we might not be surprised that the use of racial epithets to describe African Americans is more common than the use of racial epithets to describe other groups, we note that our pool of twenty-first century cases contains no epithets at all for other races or ethnicities. This too suggests that we are missing cases, or put differently, that some cases are reported in ways that are not easily locatable.[165]

II. THE GOVERNING LEGAL STANDARDS

Even a cursory examination of the governing legal standards makes it apparent why so many cases lose, although it also makes clear that there are doctrinal choices to be made, and that these losses are not foreordained.

A. Juror Misconduct

We begin with juror misconduct, both because the largest number of epithet cases involve jurors and because there is such a sharp division in approaches to epithets in this context. The Sixth Amendment guarantees a criminal defendant "a fair trial by a panel of impartial, 'indifferent' jurors."[166] This guarantee, however, is often in tension with the long-standing rule that prevents the court from considering evidence that impeaches the jury's verdict.[167] Federal Rule of Evidence 606(b), and its state counterparts, codify that longstanding rule:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.[168]

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164. *See generally* John H. Blume, Sheri Lynn Johnson & Keir M. Weyble, *In Defense of Noncapital Habeas: A Response to Hoffman and King*, 96 CORNELL L. REV. 435 (2011).

165. An earlier case, Ex parte *Guzmon*, 730 S.W.2d 724 (Tex. Crim. App. 1987) was reversed due to defense counsel's reference to his client during voir dire as a "'wet-back.'"

166. Irvin v. Dowd, 366 U.S. 717, 722 (1961).

167. *See, e.g.*, McDonald v. Pless, 238 U.S. 264, 267-68 (1915).

168. FED. R. EVID. 606(b).

If a court adheres to a rigid version of the no-impeachment rule, it is theoretically possible to grant relief based upon a juror's utterance of racial epithets, but only because the use of an epithet raises the question of whether the juror lied on voir dire. Then the issue becomes whether the defendant can show "that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause."[169] This standard probably could have been met in *Rouse*, had the Fourth Circuit been willing to hear Rouse's claim on the merits because the juror in question not only used a racial epithet, but told other jurors that he lied to get on the jury. But such situations are rare, in part because such boasting is risky, but mostly because the racial epithet does not come from a juror who lied to get on the jury. Actually, in many noncapital cases, there would have been no opportunity to lie, because no question about racial bias was asked. The Supreme Court has refused to find a due process right to such a question in noncapital cases, even when the crime is an interracial one.[170] Moreover, if a juror is asked a question, and then lies about his or her racial bias, it would far more likely be due to shame or the awareness of social disapproval of such bias—and such lies would hardly be the subject of boasting. And finally, "lying" in the sense of deliberately deceiving is just not the point; a juror may in good faith think that he is not racially biased but still use racial epithets. The question should not be whether he thinks he is biased, but whether the epithet reveals that he *is* biased. Resolving that question, as did the lower court in *Bennett*, by relying upon the epithet-employing juror's assertions that he is not racially biased is leaving the fox to guard the henhouse, or, more aptly, the slave master to determine the aptitude of the slave.

Because of the tension between the Sixth Amendment guarantee of a "fair trial by a panel of impartial, 'indifferent' jurors"[171] and the no-impeachment rule, and the unsatisfactoriness of resolving this tension by cabining relief for juror lies about bias, some lower courts have questioned whether the no-impeachment rule should apply to evidence that racial bias has tainted jury deliberations. One means of doing so is to interpret racial bias as an "external influence" that therefore lies within the exception to Rule 606(b) "that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any

169. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984).

170. *See* Turner v. Murray, 476 U.S. 28 (1986) (holding that a capital defendant accused of an interracial crime is entitled to question potential jurors about racial bias, but adhering to prior precedent that noncapital defendants are not).

171. Irwin v. Dowd, 366 U.S. 717, 722 (1961).

juror."[172] Several cases from the 1970s adopted this position,[173] but it does run the risk of swallowing the rule.

Florida case law has crafted a line that attempts to preserve the rule while permitting inquiry into racist statements:

> [I]t would be improper, after a verdict is rendered, to individually inquire into the thought processes of a juror to seek to discover some bias in the juror's mind, like the racial bias involved here, as a possible motivation for that particular juror to . . . act as she did. Those innermost thoughts, good and bad, truly inhere in the verdict. *But when appeals to racial bias are made openly among the jurors, they constitute overt acts of misconduct.* This is one way that we attempt to draw a bright line. This line may not keep improper bias from being a silent factor with a particular juror, but, hopefully, it will act as a check on such bias and prevent the bias from being expressed so as to overtly influence others.[174]

B. Ineffective Assistance of Counsel

The typical means for assessing a defendant's Sixth Amendment claim of ineffective assistance of counsel is set forth in *Strickland v. Washington*.[175] Under *Strickland*, a defendant's right is violated when counsel provides deficient representation that results in prejudice. The first *Strickland* inquiry—the performance prong—requires "that counsel's representation fell below an objective standard of reasonableness" under the prevailing professional norms.[176] On review, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"[177] The second[178] requirement—the prejudice prong—requires a defendant to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[179]

As the Court noted in *Strickland*, the standard for ineffectiveness is highly deferential, and the prejudice prong is especially difficult to prove in

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172. Smith v. Brewer, 444 F. Supp. 482, 490 (S.D. Iowa 1978).

173. *See, e.g.*, *Smith*, 444 F. Supp. at 490; Tobias v. Smith, 468 F. Supp. 1287, 1289 (W.D.N.Y. 1979); *see also* United States v. Henley, 238 F.3d 1111, 1121 (9th Cir. 2001) (remanding for an evidentiary hearing on claims of juror bias while explicitly holding open the question of whether racist statements fit within any exception to the rule).

174. Marshall v. State, 854 So. 2d 1235, 1241 (Fla. 2003) (emphasis in original).

175. 466 U.S. 668 (1994).

176. *Id.* at 688.

177. *Id.* at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

178. Although this prong is designated as the second, a court may review an ineffective-assistance claim in either order it wants and may dispose of the claim on either prong without discussing the other. *See id.* at 697.

179. *Id.* at 694. The Court further defined a reasonable probability as "a probability sufficient to undermine confidence in the outcome." *Id.*

practice.[180] A defendant must show that the "[l]ikelihood of a different result [is] *substantial*, not just conceivable."[181] Notably, every court that has applied *Strickland* to a case involving a racial epithet by counsel has denied relief; the one grant of relief came in *Frazer*, where the court presumed prejudice from counsel's use of an epithet.

A second approach to the use of racial epithets by defense counsel is through the Equal Protection Clause of the Fourteenth Amendment. According to the Eleventh Circuit, racially biased decision making by defense counsel would not constitute an Equal Protection violation because "*McCleskey* discusses the racial animus of the decisionmakers, not defense counsel."[182] This reasoning is simply wrong. While it may be true that the statistical evidence considered in *McCleskey* focused on discrimination by prosecutors and juries, *McCleskey* itself purports to apply broader basic Equal Protection principles. Those principles include a prohibition against race-based discrimination by any state actor, absent a compelling state interest and the necessity of using the classification to further that interest.[183] At least when acting in a criminal trial, defense counsel is a state actor subject to the constraints of the Equal Protection Clause.[184] Moreover, it takes only a small thought experiment to conclude that the Eleventh Circuit's categorical rejection of an Equal Protection claim based on defense counsel's racial bias must be erroneous: Is it plausible that an attorney appointed by the state (as almost all defense attorneys are) who declared that he would spend twice as much time on the cases of white defendants as on the cases of similarly charged black defendants would not be violating the Equal Protection Clause?

C. Prosecutorial Misconduct

At least three different legal claims might be created or impacted by a prosecutor's use of a racial epithet. The most obvious claim generated by the use of a racial slur is one of selective prosecution: that the prosecutor used his discretion in a racially biased way, either in choosing to prosecute, or in choosing to seek death. This claim arises from the Equal Protection Clause of the Fourteenth Amendment and is governed by the standards identified in *United States v. Armstrong*[185] and *McCleskey v. Kemp*. In *Arm-*

180. When a federal court considers a claim for ineffective assistance of counsel in conjunction with the deference due to state court decisions under AEDPA, the result is a doubly deferential standard that is even less likely to warrant relief. *See* Harrington v. Richter, 131 S. Ct. 770, 788 (2011).

181. *See id.* at 792 (emphasis added).

182. Osborne v. Terry, 476 F. 3d 1299, 1318 (11th Cir. 2006).

183. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 212-31, 235-39 (1995).

184. Georgia v. McCollum, 505 U.S. 42 (1992).

185. 517 U.S. 456 (1996).

strong, the Court required a defendant claiming selective prosecution to show "that the administration of a criminal law is 'directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive' that the system of prosecution amounts to 'a practical denial' of equal protection of the law."[186] In *McCleskey*, as has been discussed throughout this Symposium, the Court required that a defendant show that racial discrimination affected the outcome in his own case, and deemed even strong statistical evidence to be insufficient evidence to establish the required causal link.[187] Given that only one post-*McCleskey* capital sentencing race discrimination case has succeeded in the twenty-five years since *McCleskey*, it is obvious that this is a difficult standard to meet.[188]

In *Darden v. Wainwright*,[189] the Supreme Court set forth another standard relevant to a prosecutor's use of a racial epithet: when prejudicial prosecutorial arguments violate a defendant's Due Process right to a fair trial. The Court held that "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'"[190] Although this standard seems vague, the Court provided some elaboration about the relevant factors to consider, albeit not with any suggestion for the appropriate weighting of those factors. First, a reviewing court must look to what the prosecutor actually said. A comment that manipulates or misstates evidence, or that implicates "other specific rights of the accused," for example, will likely be seen as more deserving of reversal than truthful commentary that is inappropriately stated.[191] In addition, a court should look to the relevant, related conduct by defense counsel. If it appears that defense counsel "'invited'" the prosecutors comment through his own inflammatory conduct, a court will be less likely to award relief.[192] Furthermore, the court must look to the trial court's instructions that may have mitigated the inappropriate prosecutorial comment.[193] The last consideration is the weight of the evidence against defendant to determine the effect of the comment on the trial as a whole.[194] The facts of *Darden* suggest the difficulty of prevailing under its standard. The improper arguments made during the penalty phase of Darden's trial were neither isolated nor brief, and they were extremely inflammatory, yet the Supreme

186. *Id.* at 464-65 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886)).
187. McCleskey v. Kemp, 481 U.S. 279 (1987).
188. *See Johnson*, *supra* note 108, at 179-80 (discussing single winning case).
189. 477 U.S. 168 (1986).
190. *Id.* at 181 (quoting Donnelly v. DeChristoforo, 416 U.S. 637 (1974)).
191. *See id.* at 181-82.
192. *See id.* at 182.
193. *See id.*
194. *See id.*

Court declined to reverse, relying in large part on the overwhelming evidence against Darden.[195]

Finally, *Batson v. Kentucky*[196] holds that the Equal Protection Clause precludes a prosecutor from exercising his or her peremptory challenge on the basis of race, and a prosecutor's use of a racial epithet could be probative of his racial motivation in striking a minority race juror.[197] *Batson* claims, like selective prosecution claims, require a showing of purposeful discrimination in which the ultimate burden of proof of that motivation falls on the defendant and consequently are difficult to win.[198] The smoking gun of a racial epithet eases that burden considerably, and the pressure of *Batson* claims may be part of the reason that reported cases involving the use of racial epithets by prosecutors have become rarer than such cases involving defense attorneys.

III. TOWARD ERADICATION OF EPITHETS

Having read our summaries of the epithet cases, we hope the reader will agree that current law, while it provides vehicles with the potential for remedying and deterring the use of racial epithets, generally has failed to do so. Below, we propose a per se approach and then defend it against likely objections.

A. Our Proposal

When a (1) *decisionmaker* in a (2) *criminal case* uses a (3) *racial epithet* to address, describe, or refer to (4) the *defendant, or in the case of a lawyer, other defendants he or she contemporaneously represented or prosecuted,* and the defendant raises the resulting claim at (5) *the first opportunity after he discovers the use of the epithet,* the defendant's (6) *conviction should be reversed.*

1. *Decisionmakers*

By "decisionmaker," we include jurors, defense lawyers, prosecutors, and judges. The power and discretion inherent in the roles of juror, defense lawyer, and prosecutor is obvious. It is true that a judge's decision making, except in bench trials, is more limited, but it is important enough that "the floor established by the Due Process Clause clearly requires a 'fair trial in a

195. *See id.* at 185-87.
196. 476 U.S. 79 (1986).
197. *Id.* at 79-80.
198. *Id.*

fair tribunal,' before a judge with no actual bias against the defendant or interest in the outcome of his particular case."[199]

We do not, however, include use of racial epithets by witnesses, even when those epithets are heard by the jury and are contemporary characterizations rather than quotations of out-of-court statements. This is not to say that courts should not be concerned when jurors are exposed to racial epithets, from whatever source. Thus, should a witness (or courtroom observer, for that matter) use a racial epithet in the jury's presence before trial begins, as occurred in *Robinson v. State*,[200] it would seem appropriate to dismiss the jury pool and start anew. But where a witness uses an epithet later in the case, admonishment of the jurors may be sufficient. Indeed, some admonition would be appropriate even if the witness were repeating an out-of-court statement relevant to the issues at trial.[201] These precautions are appropriate because use of a racial epithet may trigger stereotyping and animosity in decisionmakers, but because use of an epithet by some participant who makes no decisions does not demonstrate bias that infects the trial process, it should not result in automatic reversal.[202]

2. *Criminal Cases*

The progressive Florida rule, which permits inquiry into the racial bias of jurors when that bias was expressed during deliberations, actually had its origins in a civil case.[203] We certainly do not dispute that reversal would be appropriate in similar circumstances in a civil case, but none of us feel we have the expertise to evaluate the somewhat different trade-offs that arise on the civil side. However, we do mean to encompass the use of epithets in the appellate, post-conviction, and federal habeas stages of a criminal case, despite the fact that some of those stages are technically civil. Post-conviction judges, post-conviction counsel, and assistant attorneys general have the same kind of decision-making power and discretion that their counterparts have at trial, and therefore, a parallel response is required. A parallel response, however, would not normally entail a new trial but would entail a

199. Bracy v. Gramley, 520 U.S. 899, 904 (1997) (internal citations omitted).

200. 214 S.W.3d 840, 842 (Ark. 2005).

201. In many instances, where the use of the epithet is probative of any issue the jury needs to determine, it would be appropriate to instruct the witness to avoid repeating the epithet.

202. Use of an epithet by a bailiff, or other court personnel, is a closer question. In most situations, these individuals have no particular influence over a decisionmaker. However, if such influence were present in a particular case—for example, if a bailiff spoke of the defendant in that manner to jurors during deliberations—then we are inclined to think automatic reversal is appropriate. This is also more practical than a rule that would encompass witnesses and observers, who generally cannot be trained or deterred as can court personnel.

203. Powell v. Allstate Ins. Co., 652 So. 2d 354 (Fla. 1995).

repeat of the proceeding in which the person who spoke the epithet participated—with that person being recused from participation in the new proceeding, of course.

We also want to explicitly disavow the strange compromise made by the Supreme Court in the related area of voir dire. *Turner v. Murray*[204] holds that a capital defendant—but only a capital defendant—accused of an interracial crime is entitled to question potential jurors about racial bias. This distinction between capital and noncapital cases is warranted, according to the *Turner* majority, because a capital sentencing proceeding has both higher stakes and a greater opportunity for discretion than does the determination of guilt. We think that such a distinction is unwarranted there—and here—for exactly the reasons the dissent articulates:

> A trial to determine guilt or innocence is, at bottom, nothing more than the sum total of a countless number of small discretionary decisions made by each individual who sits in the jury box. The difference between conviction and acquittal turns on whether key testimony is believed or rejected; on whether an alibi sounds plausible or dubious; on whether a character witness appears trustworthy or unsavory; and on whether the jury concludes that the defendant had a motive, the inclination, or the means available to commit the crime charged. A racially biased juror sits with blurred vision and impaired sensibilities and is incapable of fairly making the myriad decisions that each juror is called upon to make in the course of a trial. To put it simply, he cannot judge because he has prejudged. This is equally true at the trial on guilt as at the hearing on sentencing.[205]

Moreover, the distinction proposed by the majority has even less validity in the context of a decisionmaker who has used a racial epithet, for clearly, if he or she has used that language, bias has been triggered by the proceedings in which he or she is involved, whether capital or noncapital.

3. *Racial Epithets/Ethnic Slurs*

There is both a definitional issue raised by "racial epithets" and a line-drawing issue. We postpone for the following section, in which we answer objections, why racial epithets should be treated differently than other indications of bias. With respect to the definitional question, we use "racial epithets" interchangeably with "ethnic slurs"—or, more technically, "ethnophaulisms"—both because the Constitution treats discrimination on the basis of ethnic origin the same way it treats race[206] and because ethnic slurs function to degrade in the same way that racial slurs do. By that category we mean to include all terms or words used to insult, derogate, or pejo-

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204. 476 U.S. 28 (1986).

205. *Id.* at 42-43 (Brennan, J., concurring in part and dissenting in part).

206. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (applying strict scrutiny to the "racial classification" of Japanese ancestry).

ratively describe a person on the basis of his or her race, ethnicity, or nationality. Moreover, religious slurs usually, though not always, reflect similar animosity and degradation, and when they do, should be treated the same as are racial slurs.

Perusing a list of such slurs is demoralizing, for there are so many, and such varied, entries in those lists. For example, Wikipedia lists four slurs against African Americans *that begin with the letter A*: "alligator bait," which refers to an African-American child; "Ann," a black woman who thinks she should be treated like a white woman; "ape," and "Aunt Jemima," a black woman who ingratiates herself with white people.[207]

Even though long, lists of slurs cannot be viewed as exhaustive. In part, this is because there are idiosyncratic variations on slurs that are not captured in lists but function exactly as does the more prevalent form; thus, for example, calling a black defendant "King Kong," as did the prosecutor in Johnny Bennett's case, is really no different than calling him "ape." Moreover, there are combinations of an ethnic descriptor, not a slur in itself, with another derogatory term that by itself does not reference ethnicity, and these combinations will not appear on ethnic slur lists simply because there are so many possibilities. Thus, for example, the Wikipedia list does not include "dirty Jew" or "stinking Arab," but any sensible approach would incorporate these into the category of racial epithets/ethnic slurs.

4. *The Subject of the Epithet*

In almost all of the cases we have surveyed, the subject of the epithet is a criminal defendant. One can imagine a rule that would encompass any use of a racial epithet concerning any person at any time—a rule that would be extraordinarily broad. But such a rule would encompass a minority juror who had used an epithet toward a person of his or her own group in a social setting, as well as an elderly juror who had used an epithet at a time when it was not nearly as clearly indicative of bias as it is today, or a juror who had used the epithet to describe a person of a group to which the defendant does not belong—and all of those applications reach beyond the focus of our concern. In general, unless the epithet is used to describe a criminal defendant, it should not trigger per se reversal. Of course, there are *some* situations in which the use of a racial slur toward someone other than a defendant triggers virtually the same concerns as does its use toward a defendant. If, as in *Pace v. State*, a juror used a racial slur to disparage the testimony of an African-American defense witness, and the defendant was also African-

207. *List of Ethnic Slurs*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_ethnic_slurs (last visited Oct. 21, 2011).

American,[208] then a reviewing court should treat the epithet in the same way that it would had it been directed against the defendant—because it is likely that the juror in question will be as biased in his evaluation of the defendant as in his evaluation of the witness.

We think any distinction as to the addressee of the racial epithet, such as that made by the Eleventh Circuit in *Jones v. Campbell*,[209] is irrelevant. Whether or not the defendant heard the slur and was wounded or angered—or even indifferent due to having heard it so often—is not the point; the point is whether or not the decisionmaker has exhibited an intensity of bias that cannot be squared with race-neutral decision making.

We also reject a qualification that, as suggested to be important by the *Bennett* court, an epithet describing or denigrating the defendant have been uttered during the course of the trial itself. It is simply implausible—at least, absent extraordinary circumstances—to assume that racial bias against a particular defendant was generated after the trial concluded. It is implausible both because racial bias, at least in the general population, is *decreasing* over time, and it is implausible because the bias against the defendant in particular is more likely to have been stirred by testimony concerning his alleged crimes than by the passage of time. Perhaps it should be open to a court to consider an unusual case where some traumatic, posttrial, racially charged incident has in fact created a new racial bias in the juror, lawyer, or judge who later uses the epithet—if such a case ever occurs.

We have incorporated into our proposal that when a defense lawyer or a prosecutor directs a racial or ethnic slur at or about "*other defendants he or she contemporaneously represented or prosecuted*" such a slur is treated the same way as is a slur against the defendant. This is primarily because of the great likelihood that a lawyer who has so denigrated one criminal defendant is likely to have done so with respect to other criminal defendants of the same race that he or she is contemporaneously representing—as was the case with respect to the defense attorney whose epithets were challenged in *Ellis* and *Mayfield*. Moreover, even if the lawyer has not made such a remark about a particular defendant, referring to any client or accused by a racial slur is such a gross deviation from professional standards that it demonstrates strength of bias that should be presumed to affect actions taken with respect to other clients of the same race.[210]

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208. Pace v. State, 904 So. 2d 331, 342 (Ala. Crim. App. 2004) ("I don't believe a word those niggers said.").

209. 436 F.3d 1285, 1304-05 (11th Cir. 2006).

210. The North Carolina Supreme Court ordered the removal of a district attorney from office because the attorney, while at a bar, "loudly and repeatedly" called a fellow patron a "nigger." *In re* Spivey, 480 S.E.2d 693 (N.C. 1997). While we agree with the discipline, we would not reverse convictions of African-American defendants obtained by such a prosecutor because the circumstances—including the influence of alcohol—are so different

5. The First Opportunity

Doctrines of procedural default, for better or worse, are a substantial barrier to redress of many serious constitutional violations.[211] We pause here only to note that in racial epithet cases, some lower courts have imposed roadblocks beyond what such doctrines require. If a defendant raises a claim involving the use of a racial epithet by a decisionmaker in his trial promptly upon learning of the underlying facts, no procedural default has occurred. The Supreme Court's approach in *Williams v. Taylor*,[212] is controlling here.

In *Williams*, a juror failed to reveal her relationship to a key state witness, as well as her prior representation by the state's attorney, despite the fact that she was asked about such relationships during voir dire.[213] After both the trial and state post-conviction proceedings were over, attorneys for Williams discovered these relationships.[214] The Supreme Court found that given the nature of the facts withheld by the juror, Williams had not "failed to develop" his claim in state court, and the surrounding circumstances "suffice to establish cause for any procedural default petitioner may have committed in not presenting these claims to the [state] courts in the first instance."[215] Just as the Supreme Court determined that it would have been unreasonable to expect post-conviction counsel to check the public records to determine whether the juror had previously been married to a witness or previously represented by the state's attorney,[216] it would be unreasonable to expect that post-conviction counsel in every case would investigate whether jurors, defense counsel, or the prosecutor had used racial slurs against clients. Such events are rare enough that "diligent counsel" cannot be expected to expend time and resources investigating them, and consequently, when they come to light later, procedural default must be deemed to have a "cause" that excuses it.[217] That said, there may be some instances, such as that described in *Ellis*, where a defendant learns of the use of an epithet and then delays acting on that information for a substantial period of time; here, unlike *Osborne*, the case with which we began this Article, a finding of default is appropriate.

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that we think an inference of likely discrimination against criminal defendants is not strong enough to warrant blanket reversals.

211. Although we think that the modern, very harsh forms of such doctrines are undesirable, see Blume, Johnson & Weyble, *supra* note 164, at 472-73, we incorporate current procedural default principals in our proposal here.

212. 529 U.S. 420 (2000).

213. *Id.*

214. *Id.*

215. *Id.* at 444.

216. *Id.* at 443.

217. *Id.*

B. Answering Objections

Obviously we have delayed addressing the central question of just how concerned courts should be when a decisionmaker in a criminal case uses a racial epithet to describe or denigrate a criminal defendant. We have hoped that the reader's knowledge of history, understanding of psychology, and commitment to racial justice provides most of the answer to this question, but we sketch below the reasons we think epithets deserve a special rule, then explain why we think no inquiry into the "effects" of an epithet on the decisionmaker is appropriate.

1. *Why a Special Rule for Epithets?*

The Sixth Amendment, of course, "requires that a defendant have 'a panel of impartial, "indifferent" jurors.'"[218] Given the history of the discriminatory treatment against black defendants in the criminal justice system, it cannot be seriously disputed that "racial prejudice can violently affect a juror's impartiality [in a criminal case] . . ."[219] Despite this history and the magnitude of the risk, we do not here urge automatic reversal upon any evidence of any form or racial stereotyping or imagery. Why not?[220]

We start with the worst epithet, which at least in the reported cases, is overwhelmingly the most common. "No word in the English language is as odious or loaded with as terrible a history [as nigger].[221] Not only is the use of the term 'highly offensive and demeaning,' . . . it evok[es] a history of racial violence, brutality, and subordination."[222] That history, in many states, includes slavery, post-reconstruction lynchings, and extraordinarily violent resistance to integration.[223]

It is true that current literature shows that many—indeed most—whites harbor automatic, often unconscious, racial associations and stereotypes.[224] The past has trained most Americans to make those associations,

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218. Murphy v. Florida, 421 U.S. 794, 799 (1975) (quoting Irvin v. Dowd, 366 U.S. 717, 722 (1961)).

219. United States *ex rel.* Haynes v. McKendrick, 481 F.2d 152, 157 (2d Cir. 1973).

220. One of us has urged that elsewhere, see Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739 (1993), but is constrained in this Article by her co-authors, as well as by the hope of influencing the law.

221. Daso v. Grafton Sch., Inc., 181 F. Supp. 2d 485, 493 (D. Md. 2002).

222. McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1116 (9th Cir. 2004).

223. *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 315-37 (1966).

224. On tests of implicit attitudes, the vast majority of white Americans express a strong preference for whites. *See, e.g.*, Brian Nosek, et al., *Harvesting Implicit Group Attitudes from a Demonstration Web Site*, 6 GROUP DYNAMICS 101, 105 (2002) (reporting data). Most white adults are also more likely to shoot a black target than a white target in a video simulation—regardless of whether the object the target pulls out of his pocket is a tool or a gun. Results on this task correlate with measures of implicit attitudes. Jack Glaser & Eric D.

and consequently, they may bear no moral responsibility for them. But persons with those automatic associations sometimes can, if motivated, suppress those biases, and make unbiased decisions.[225] Where a decisionmaker has used a racial epithet—whether the most offensive epithet or a slightly less horrible slur—to describe or demean a criminal defendant, the problem of a well-meaning but subconsciously biased juror is not at stake. The use of the words at issue here—particularly the use of the most disparaging word in the English language, but more generally, the use of words the degrade and dehumanize based on ancestry—do not reflect a person with mild or subconscious associations, but an extremist: someone who actively accepts stereotypes and racial animosity.[226] The law can, and must, repudiate decisions made by such decisionmakers, both for the sake of the defendant, and for the sake of the community that rests its trust in the judicial system.

2. *Why No Inquiry into the Meaning or Effect of the Epithet?*

This question repeats, in a different form, doubt about the significance of a racial epithet. The South Carolina Supreme Court will soon face precisely that question in the petition for certiorari of Johnny Bennett. The reader will recall that a juror from Bennett's capital trial opined that the reason behind Bennett's crime was that Bennett was "just a dumb nigger."[227] According to the post-conviction relief court, that statement was not a reason to reverse Bennett's conviction or sentence, in part because the court credited the juror's assurances "that his decision was based solely on the evidence presented at trial"; "that race had nothing to do with his decision"; and "that he did not believe that Blacks are inferior to Whites."[228]

But this is not really a credibility determination, or if it is one, it is misguided. The Supreme Court of the United States, when confronted with a similar finding of fact in a case of another species of juror bias, made clear that some juror protestations of impartiality must be taken with more than a grain of salt: "No doubt each juror was sincere when he said that he would

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Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164 (2008).

225. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1202-04, 1221 (2009) (reviewing the literature and reporting new data).

226. Since at least the 1970s, the number of "dominative racists"—those who embrace white superiority racial stereotypes and animosity—has been steadily falling. *See, e.g.*, HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA (1985); Howard Schuman, *Changing Racial Norms in America*, 30 MICH. Q. REV. 460 (1991).

227. Transcript of Record at 9, Bennett v. State, No. 06-CP-40-5751 (S.C. Ct. Com. Pl. 2008).

228. Amended Order at 41, Bennett v. State, No. 06-CP-32-3221 (S.C. Ct. Com. Pl. 2009).

be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father."[229]

The Eleventh Circuit in *Osborne* raised parallel objections to Osborne's claim concerning his trial counsel's statement that "that little nigger deserves the chair," questioning whether the epithet established racial animosity, and holding that it did not constitute evidence of discrimination.[230] But in *Bennett*, as in *Osborne*, as in all epithet cases, it is simply inconceivable that the speaker in fact did not believe that African Americans were inferior to whites, or harbored no racial animosity towards them, or was uninfluenced by race.[231] "Bias or prejudice is . . . an elusive condition of the mind . . . and it might exist in the mind of one . . . who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence."[232] Or, as the Ninth Circuit put it, "We have considerable difficulty accepting the government's assumption that, at this time in our history, people who use the word 'nigger' are not racially biased."[233]

Florida has adopted a per se rule of reversal for cases in which a juror's use of an epithet has been established.[234] A Louisiana appellate court, in the absence of controlling Louisiana precedent, has adopted Florida's approach, also abjuring additional inquiry into whether the use of an epithet had an effect, quoting the reasoning of the Florida Supreme Court: "Any attempt by the jurors to characterize their racially charged comments would have no effect of erasing prejudice and bigotry so evident."[235]

3. *What About* Rouse?

An objection to our proposal from the other side of the ideological spectrum is possible: Nothing we have said would alter the travesty of *Rouse v. Lee*. This is true, but we think not really a criticism of our proposal. Rouse lost a claim that, on the merits, would seem to win in virtually every jurisdiction: One of his jurors not only used a racial epithet to describe Rouse, but admitted to other jurors that he had lied during voir dire in order to be seated on Rouse's jury. Rouse lost not because of the substantive

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229. Irvin v. Dowd, 366 U.S. 717, 728 (1961).

230. Osborne v. Terry, 476 F.3d 1297, 1318 (11th Cir. 2006) ("Osborne presents no other evidence to support his claim that Mostiler's alleged racial animosity affected his representation.").

231. *See generally* Johnson, *supra* note 108 (reviewing the literature on racial bias and its influence on decision making).

232. Crawford v. United States, 212 U.S. 183, 196 (1909).

233. United States v. Henley, 238 F.3d 1111, 1121 (9th Cir. 2001).

234. Powell v. Allstate Ins. Co., 652 So.2d 354, 358 (Fla. 1995).

235. State v. Jones, 2009-0751, p. 8 (La. App. 1 Cir. 2009); 29 So.3d 533, 539 (quoting Wright v. CTL Distribution, Inc., 650 So. 2d 641, 643 (Fla. Dist. Ct. App. 1995)).

law governing his claim, but because a majority of the Fourth Circuit refused to consider the merits of his claim at all—due to his attorney's error in filing Rouse's petition one day after the statute of limitations period had expired. Elsewhere we have deplored *Rouse*, and its rigid application of a counterproductive statute of limitations.[236] But that problem is different than the one on which this Article focuses, and we note with some optimism that as this Article is going to press, the Supreme Court is considering whether attorney error may excuse procedural default,[237] and should it decide that it may, one can imagine a similar approach to statute of limitations barriers when caused by attorney error, as was the case in *Rouse*.

CONCLUSION

Examination of modern racial epithet cases is not pleasant. Those cases reveal the continued presence of race-based animosity and the absence, in most jurisdictions, of any significant efforts to ameliorate its influence on criminal cases. Indeed, we are reminded of Justice Scalia's memo on *McCleskey*,[238] in which he stated that even if he were persuaded that the data proved purposeful discrimination, he would not strike down Warren McCleskey's death sentence. That view, which seemed quite shocking when first revealed, has real parallels here, for there can be—or at least, *should* be—little doubt that when a trial participant uses a racial epithet, he or she has engaged in purposeful discrimination. Yet most jurisdictions have found reasons to do nothing, or at least to do nothing unless some value in addition to racial equality—such as protecting the process from lying jurors—is at stake.

Surprisingly, the greatest commitment to the eradication of overt bias in jurors appears in the Florida and Louisiana cases, a commitment other jurisdictions would do well to emulate. South Carolina has the opportunity to do so imminently, and we hope that it will follow the implications of its

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236. *See* Blume, Johnson & Weyble, *supra* note 164, at 479.

237. Maples v. Thomas, 131 S. Ct. 1718 (2011) (granting certiorari only with respect to the second question of the petition, which reads: "Whether the Eleventh Circuit properly held—in conflict with the decisions of this Court and other courts—that there was no 'cause' to excuse any procedural default where petitioner was blameless for the default, the State's own conduct contributed to the default, and petitioner's attorneys of record were no longer functioning as his agents at the time of any default.").

238. *See* John H. Blume, Theodore Eisenberg & Sheri Lynn Johnson, *Post-McKleskey Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771, 1779 (1998); Dennis D. Dorin, *Far Right of the Mainstream: Racism, Rights, and Remedies from the Perspective of Justice Antonin Scalia's* McCleskey *Memorandum*, 45 MERCER L. REV. 1035 (1994).

earlier cases[239] and embrace Louisiana's per se rule when jurors refer to the defendant with a racial epithet. In this Article we have modestly proposed to extend that per se approach to the use of racial epithets by other trial decisionmakers, noting that Equal Protection principles long espoused by the Supreme Court would seem to command that extension.

Finally, we note that the racial progress of the last half-century makes it reasonable for post-conviction lawyers and their clients to presume—absent information to the contrary—that trial participants do not have the kind of bias that leads them to direct racial epithets at defendants, much like they presume—again, absent information to the contrary—that jurors will not lie during voir dire. Thus, when the use of a racial epithet is credibly alleged to have been discovered late in the litigation game, procedural default should be excused, and inquiry into the merits of the claim permitted. A nation that *has* made some progress toward the goal of racial justice should both acknowledge that progress and admit that the goal has not yet been achieved. Rooting out the influence of racial epithets, whenever discovered, is a necessary, albeit modest, step toward that goal.

239. *See* State v. Hunter, 463 S.E.2d 314, 316 (1995) (finding that "[t]he use of the word 'nigger' by a juror was highly improper," but declining to reverse because "[the juror] was not referring to [the black juror] or [to the defendant] when she made the statement").