

APL-2016-1783
On Appeal from Hamilton County Court of Common Pleas
Hamilton County, Ohio Case No. B 15 01811

In the Supreme Court of Ohio

STATE OF OHIO,

Plaintiff-Appellee,

—v.—

GLEN E. BATES,

Defendant—Appellant.

**BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL
FUND, INC. IN SUPPORT OF DEFENDANT-APPELLANT**

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February 13, 2018

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INTEREST OF AMICUS CURIAE

Amicus curiae NAACP Legal Defense & Educational Fund, Inc. (“LDF”) respectfully submits this brief in support of appellant Glen Bates. Founded in 1940 under the leadership of Thurgood Marshall, LDF is a non-profit law organization that focuses on advancing civil rights in education, economic justice, political participation, and criminal justice. LDF has a longstanding interest in ensuring that any death sentence meets constitutional requirements designed to ensure non-arbitrary and non-discriminatory sentencing. LDF has litigated or filed amicus briefs in numerous capital cases, including: *Furman v. Georgia*, 408 U.S. 238 (1972); *Coker v. Georgia*, 433 U.S. 584 (1977); *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Banks v. Dretke*, 540 U.S. 668 (2004); *Roper v. Simmons*, 543 U.S. 551 (2005); *Buck v. Davis*, 580 U.S. ___, 137 S. Ct. 759 (2017), and *Peña-Rodriguez v. Colorado*, 580 U.S. ___, 137 S. Ct. 855, 860 (2017). LDF has served as counsel of record in cases challenging racial bias in the jury system, *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972), and *Ham v. South Carolina*, 409 U.S. 524 (1973); pioneered the affirmative use of civil actions to end jury discrimination in *Carter v. Jury Commission*, 396 U.S. 320 (1970), and *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as amicus curiae in cases involving the use of race in peremptory challenges in *Johnson v. California*, 543 U.S. 499 (2005), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Georgia v. McCollum*, 505 U.S. 42 (1992), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), and *Batson v. Kentucky*, 476 U.S. 79 (1986) (overruling *Swain*).

The circumstances of Glen Bates’s capital trial directly implicate racial discrimination in the criminal justice system, effective assistance of counsel, and fair and impartial sentencing – issues that LDF has a longstanding commitment to protecting and upholding.

INTRODUCTION AND SUMMARY OF ARGUMENT

“The jury is a central foundation of our justice system and our democracy.” *Peña-Rodriguez v. Colorado*, 580 U.S. ___, 137 S. Ct. 855, 860 (2017). It is “especially pernicious” when racial bias infiltrates that sacred space. *See Rose v. Mitchell*, 443 U.S. 545, 555 (1979). And even more so, when a jury is charged with the awesome responsibility of deciding life or death, which requires “a heightened standard of reliability.” *See State v. Scott*, 91 Ohio St. 3d 1263, 1264, 746 N.E.2d 1124 (2001) (Pfeiffer, J., concurring).

In this case, one of the jurors who sat in judgment of Glen Bates, an African-American capital defendant, explained in a written response to a juror questionnaire that she strongly believed Black people were more violent than other races and that she felt uncomfortable around Blacks. Two other jurors agreed with the sentiment that members of some racial and ethnic groups tend to be more violent than others. Despite possessing these jurors’ written expressions of racial bias, Glen Bates’s defense attorneys inexplicably failed to explore these issues on voir dire, failed to strike jurors who expressed racial prejudice, and thus failed to protect Mr. Bates’s constitutional right to an impartial jury. Defense counsel’s deleterious conduct prejudiced Mr. Bates by permitting racial bias to infect the jury’s deliberations, thus depriving him of his rights to effective assistance of counsel and an impartial jury during his capital trial.

Racial bias “casts doubt on the integrity of the judicial process” and “impairs the confidence of the public in the administration of justice.” *Rose*, 443 U.S. at 556. The racially-biased views of members of Mr. Bates’s jury have no place in any judicial process, let alone a capital trial. Public confidence in the justice system cannot survive if Ohio executes an African-American man sentenced to death by a jury infected with the kind of blatant racial bias demonstrated in this case.

STATEMENT OF CASE AND FACTS

Glen Bates was tried in Hamilton County Criminal Court in September 2016, where racial divisions exist due to inequality in employment, housing, and educational opportunities.¹ Local journalist, Mark Curnutte notes that “Cincinnati remains one of the nation’s most racially segregated cities.”² Much of Hamilton County’s current issues regarding race are reflected in the historical legacy of racially-charged incidents that occurred through the twentieth and twenty-first centuries. These include large-scale unrest and demonstrations in the late 1960s, 2001, and the recent high-profile police killing of Samuel DuBose in 2015.³

Ten of the twelve jurors who served on Mr. Bates’s case were born in Ohio, most were raised in the Cincinnati area, and all spent significant portions of their adult lives in or near Cincinnati.⁴ Thus, the vast majority of Mr. Bates’s jury was exposed to Cincinnati’s legacy of racial discrimination and violence. And some of those jurors explicitly expressed prejudicial views of Black people as revealed in their questionnaire responses. Juror 31 stated that she believed Blacks were more prone to violence than non-Blacks and that she felt uncomfortable around Black

¹ “Today, the lack of affordable housing in certain neighborhoods continues to amplify our segregation in a city already too divided by race and income.” *Opinion: A change to foster inclusion, diversity*, CINCINNATI ENQUIRER, Jan. 5, 2015, at A6; “[M]any of the social and economic reasons for the 1960s Avondale riots parallel the three-day April [2001] riots . . . ‘The underlying issues – unemployment, housing and educational opportunities – all of those are still here today.’” John Kiesewetter, *Civil Unrest Woven into City’s History*, CINCINNATI ENQUIRER, July 15, 2001, at E6; and “There’s no question there are tensions. And one thing this community has been challenged by is various kinds of divisions – black white, city, suburb . . .” Michael Fisher, *Tensions Hurt Potential for Growth*, CINCINNATI ENQUIRER, Sept. 2, 2001, at A16.

² Mark Curnutte, *On MLK Day, 2nd Obama inaugural sign of progress*, CINCINNATI ENQUIRER, Jan. 19, 2013, at A12.

³ Oliver Laughland & Ryan Felton, *University police officer charged with murder for shooting of Samuel DuBose*, GUARDIAN (July 30, 2015).

⁴ Juror 1 questionnaire, p. 2; Juror 3 questionnaire, p. 2; Juror 10 questionnaire, p. 2; Juror 14 questionnaire, p. 2; Juror 17 questionnaire, p. 2; Juror 18 questionnaire, p. 2; Juror 26 questionnaire, p. 2; Juror 27 questionnaire, p. 2; Juror 28 questionnaire, p. 2; Juror 29 questionnaire, p. 2; Juror 31 questionnaire, p. 2; and Juror 33 questionnaire, p. 2.

people.⁵ Jurors 1 and 28 agreed with the statement that “[s]ome races and/or ethnic groups tend to be more violent than others.”⁶

These three jurors ranged in age from 47 to 53-years-old at the time of Mr. Bates’s trial, and all were born in the 1960s⁷ during the height of Cincinnati’s racial violence. Avondale, a historically African-American neighborhood in Cincinnati, experienced two violent events in the late 1960s. The first major event stemmed from “[t]he arrest of a black man for loitering near the Abraham Lincoln statue at Rockdale Avenue and Reading Road in June 1967,” which led to “widespread civil unrest. Seven hundred Ohio National Guard officers were called in to restore order. One person was killed, 63 injured and 404 people were arrested.”⁸ The second uprising occurred after the assassination of Rev. Martin Luther King in April 1968, when “Cincinnati was among more than 100 cities that experienced urban violence. Again, the Ohio National Guard was summoned to Avondale where two people were killed and at least 220 were injured. Police arrested 260 people during two nights of violence.”⁹

Moreover, the jurors who decided Glen Bates’s fate were likely exposed to three days of violence that rocked Cincinnati in early April 2001 after police officer Thomas Roach fatally shot Timothy Thomas, an unarmed African-American teenager, following Officer Roach’s attempt to arrest Mr. Thomas for outstanding traffic violations.¹⁰ Residents took to the streets to express their concerns over Mr. Thomas’s murder;¹¹ the fifteenth death of a Black male at the hands of law

⁵ Juror 31 questionnaire, p. 12-13.

⁶ Juror 1 questionnaire, p. 13 and Juror 28 questionnaire, p. 13.

⁷ Juror 1 questionnaire, p. 1; Juror 28 questionnaire, p. 1; and Juror 31 questionnaire, p. 1.

⁸ Kiesewetter, *supra* note 1, at E6.

⁹ *Id.*

¹⁰ Howard Wilkinson & Marie McCain, *Officer indicted in death; Feds launch police review*, CINCINNATI ENQUIRER, May 8, 2001, at A1, A5.

¹¹ *Id.* at A5.

enforcement in a six-year period.¹² The subsequent protests gained international attention.¹³ On the third day of protest, then Mayor Charles Luken declared a state of emergency – announcing a citywide curfew, sending police outfitted in riot gear and ordering “only people going to and from work be allowed on the streets. Others should stay in their homes and pray.”¹⁴ In the end, law enforcement arrested 837 people, dozens were injured, and the city experienced an estimated \$3.6 million in infrastructural damages.¹⁵

Between Mr. Bates’s indictment in April 2015 and his September 2016 trial, Cincinnati experienced another episode of racial unrest. On July 19, 2015, a University of Cincinnati police officer fatally shot Samuel DuBose, an unarmed Black motorist during a traffic stop.¹⁶ National news outlets covered the details of the shooting and subsequent community protest.¹⁷ Hamilton County residents could not ignore the local conversations and national groundswell of outrage about racial inequality and the devaluing of Black lives.¹⁸ It’s against this background that the court should consider juror bias and ineffective assistance of counsel in Mr. Bates’s trial.

¹² *15 who died: their stories*, CINCINNATI ENQUIRER, May 8, 2001, A5.

¹³ *Cincinnati rioting ‘under control,’* BBC News, April 13, 2001.

¹⁴ *Cincinnati Mayor Declares State of Emergency*, CNN, April 12, 2001.

¹⁵ *Suit Kicks Off Battle Over Racial Profiling*, CINCINNATI POST, March 14, 2001.

¹⁶ Patrick Brennan and Jason Williams, *The Death of Samuel Dubose: Key players in the case*, CINCINNATI ENQUIRER, July 30, 2015, A9.

¹⁷ Tina Susman, *Officer’s bond is set at \$1 million*, L.A. TIMES, July 31, 2015, A8; Lisa Cornwell & Andrew Welsh-Huggins, *Campus officer pleads not guilty*, CHICAGO TRIBUNE, July 31, 2015, 13; Michael Muskal, *Ohio officer indicted in man’s slaying*, BALTIMORE SUN, July 30, 2015, A2; Richard Pérez-Peña, *University of Cincinnati Officer Indicted in Shooting Death of Samuel Dubose*, N.Y. TIMES, July 29, 2015, A1; Kevin Williams, Wesley Lowery, and Mark Berman, *University of Cincinnati police officer who shot man during traffic stop charged with murder*, WASH. POST, July 29, 2015.

¹⁸ Cameron Knight & Cara Owsley, *Questions still loom about Northside shooting*, CINCINNATI ENQUIRER, June 19, 2015, A6; Matt Pearce, *A slogan? A movement? Black Lives Matter is those things and more. Here’s a breakdown*, L.A. TIMES, Oct. 22, 2015, A2; Black Lives Matter Cincinnati, *Arrests at protests not helpful to cause*, CINCINNATI ENQUIRER, Aug. 5, 2015, A7; Kate Murphy, *Marchers protest Tamir Rice decision*, CINCINNATI ENQUIRER, Dec. 30, 2015,

ARGUMENT

I. Jurors' Racial Prejudice Violated Glen Bates's Constitutional Right to an Impartial Jury

The jury is an “essential instrumentality – an appendage of the court, the body ordained to pass upon guilt or innocence.” *Sinclair v United States*, 279 U.S. 749, 765 (1929). It serves as the “prized shield against oppression.” *Glasser v. United States*, 315 U.S. 60, 84 (1942). As such, it is imperative that the jury be impartial. *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988). The Constitution expressly guarantees as much, assuring criminal defendants “the right to a . . . trial, by an impartial jury” U.S. Const. amend. VI; *see also Wainwright v. Witt*, 469 U.S. 412 (1985); *Turner v. Murray*, 476 U.S. 28 (1986). An impartial jury is one in which each juror is “capable and willing to decide the case solely on the evidence before [him or her].” *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982) (internal quotation marks omitted)). A single juror’s bias or prejudice strips a criminal defendant of this constitutional right. *Tillman v. United States*, 406 F.2d 930, 937 (5th Cir. 1969), *vacated on other grounds*, 395 U.S. 830 (1969); *see also United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir. 1977). In Ohio, a state that requires jury unanimity for a death sentence, a single juror’s unconstitutional bias can make the difference between life and death. *See Ohio Rev. Code Ann. § 2929.04(A)*.

A criminal defendant’s right to an impartial jury is afforded no less significance under Ohio state law. *See Ohio Const. art. I § 10*; *see also State v. Jackson*, 107 Ohio St. 3d 53, 2005-Ohio-5981, 836 N.E.2d 1173. “The purpose of our jury system is to impress upon the community as a whole that a verdict is given in accordance with the law by persons who are fair and impartial.”

A10; John McWhorter, *Black lives matter – whoever takes them*, CHICAGO TRIBUNE, Oct. 28, 2015, 30; *Editorial: The Truth of ‘Black Lives Matter’*, N.Y. TIMES, Sept. 3, 2015, A22.

Cordova v. Emergency Prof'l Servs., 2017 WL 3530922, at *2 (Ohio Ct. App. Aug. 17, 2017) (citing *Powers v. Ohio*, 499 U.S. 400, 413 (1991)); see also *State v. Coley*, 93 Ohio St. 3d 253, 258, 754 N.E.2d 1129 (2001) (the right to a jury trial encompasses the right to impartial jurors (citing *Irvin v. Dowd*, 366 U.S. 717, 722 (1961))). An infringement on a criminal defendant's right to a fair and impartial jury requires reversal of the conviction and sentence, and remand for a new trial. See *State v. Sweitzer*, 2000 Ohio App. LEXIS 3204 (Ohio Ct. App. July 14, 2000).

Racial bias is anathema to a criminal defendant's right to an impartial jury protected by state and federal law. Juries are designed to ensure the "protection of life and liberty against race or color prejudice." *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) (citing *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880) (internal quotation marks omitted)). When racial bias enters the jury room, that protection is turned on its head. Indeed, three times in the last two years, the United States Supreme Court has reversed and remanded capital sentences due to concerns about the reliability and legitimacy of jury verdicts infected by racial bias. See *Foster v. Chatman*, 578 U.S. ___, 136 S. Ct. 1737 (2016); *Peña-Rodriguez*, 137 S. Ct. 855; and *Buck*, 137 S. Ct. at 776. As the United States Supreme Court recognized in *Buck*, the possibility of race infecting a jury's decision "is a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle." *Id.* at 778. Shortly thereafter, in *Peña-Rodriguez*, the United States Supreme Court explained that racial bias in the jury room is "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." 137 S. Ct. at 868. These recent decisions and well-established case law make clear that a defendant's Sixth Amendment right to an impartial jury is essential to ensuring the public's trust that a criminal trial can produce a just result.

Yet, in violation of Glen Bates's rights under the United States and Ohio Constitutions, the jury that convicted and sentenced Glen Bates to death was not impartial. Juror 31 stated on her questionnaire that she believed Blacks were more violent than non-Blacks and that she felt uncomfortable around Black people. Similarly, Jurors 1 and 28 expressed the belief that some races tend to be more violent than others. Despite these unmistakable indications of racial prejudice, Mr. Bates's defense counsel failed to address juror bias during voir dire and failed to strike jurors who lacked the requisite impartiality. It is now in the hands of this Court to remedy a grievous injury to the justice system. "There is no right more sacred than the right to a fair trial. There is no wrong more grievous than its negation." *Stone v. United States*, 113 F.2d 70, 77 (6th Cir. 1940).

II. In Violation of Glen Bates's Sixth Amendment Right to Effective Assistance of Counsel, Defense Counsel Failed to Conduct an Appropriate Jury Selection

To prove a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient, and the deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). Here, for the reasons discussed in the previous section, the prejudice to Mr. Bates is clear: A racially biased jury convicted and sentenced him to death in violation of state and federal law. The remaining issue is deficient performance, i.e. did counsel's representation fall "below an objective standard of reasonableness," as measured "under prevailing norms." *Id.* at 686-87. In this case, three jurors expressed blatant racial bias in their questionnaires. Nonetheless, counsel for Mr. Bates failed to take any action during jury selection and allowed the court to empanel a jury that harbored racial prejudice based on race. Counsel for Mr. Bates was deficient in failing to protect his right to an impartial jury in at least two ways.

First, Jurors 1, 28 and 31's responses indicating racial bias should have led counsel to challenge them for cause. A defendant is entitled to a new trial where an empaneled juror's honest

responses to questions on voir dire would support challenge for cause. *McDonough Power Equip.*, 464 U.S. at 556. Yet, not only did Mr. Bates's attorneys not challenge these three jurors for cause or via peremptory strike, counsel also waived Mr. Bates's last peremptory challenge. *See* Tr. Vol. XIV, p. 496. "Jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice." *Gomez v. United States*, 490 U.S. 858, 873 (1989). Counsel's failure to perform a crucial function during a critical stage in the case resulted in the court empaneling at least three jurors known to have harbored racial bias. As a result, counsel deprived Mr. Bates, and the public, of a trial with a reliable outcome. *Strickland*, 466 U.S. at 687.

Second, given that counsel did not strike these jurors, these jurors' admissions of racial bias in their questionnaires required counsel to elicit further information during voir dire to determine whether the jurors could be impartial. *Ristaino v. Ross*, 424 U.S. 589, 596-97 (1976) (ruling that defendant has constitutional right to question prospective jurors on racial bias if case circumstances suggest "significant likelihood" of prejudice). "The purpose of the voir dire is to empanel a fair and impartial jury." *State v. Twyford*, 94 Ohio St. 3d 340, 346, 2002-Ohio-894, 763 N.E.2d 122. Indeed, a trial court's refusal to voir dire on racial bias is a reversible error in cases when there is a showing that racial or ethnic prejudice will likely affect the jurors. *Turner*, 476 U.S. at 36-37 (plurality opinion) (finding that defendants in capital cases involving interracial crime have constitutional right, upon request, to question prospective jurors about racial bias); *Rosales-Lopez v. United States*, 451 U.S. 182, 192 (1981) (plurality opinion) (holding that federal court overseeing case involving defendant charged with interracial crime of violence may not refuse defense counsel's request to question prospective jurors on racial bias).

This court has deferred to an attorney's tactical decision not to question jurors about racial bias during voir dire when racial issues do not create a special circumstance. *State v. Watson*, 61 Ohio St. 3d 1, 13, 572 N.E.2d 97 (1991). However, Glen Bates's trial was categorically different. A juror with known racial bias has the potential to infect the entire trial proceeding. *Id.* The jurors' questionnaire responses should have informed competent counsel that race could play an illicit and decisive role in Mr. Bates's trial during jury deliberations.

Racial bias in juries poses a particular danger in capital cases involving African-American defendants. "Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." *Turner*, 476 U.S. at 35. Here, Juror 31 stated a belief that Black people are violence prone – exactly the kind of belief that the Supreme Court has found to create a special risk in capital cases, where jurors must determine "whether petitioner's crime involved the aggravating factors specified under . . . law." *Id.* Last year, the Supreme Court again recognized how the stereotype of Black men as "violence prone" can have a powerful and pernicious influence on members of the jury in death penalty cases when they must assess the dangerousness of a Black capital defendant. *Buck*, 137 S. Ct. at 776 (quoting *Turner*, 476 U.S. at 35). Just as no competent counsel in a capital case would permit the introduction of evidence that his client was more liable to be dangerous because he is Black, *see id.* at 775, no competent capital counsel representing a Black client would permit a juror to serve who strongly agreed that Black people are more liable to be dangerous because of their race. Defense counsel's failure was in direct contradiction to counsel's duty to guard against violations of Mr. Bates's Sixth Amendment right to an impartial jury.

Incompetence or even discomfort with discussions about race cannot excuse defense counsel's failure to address jurors' expressed racial bias when required. *See* ABA GUIDELINES FOR

THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES at 103 (rev. ed. 2003) (stating that the defense in a capital case should “voir dire to discover those potential jurors poisoned by racial bias” when appropriate). Moreover, there are numerous resources to help counsel become proficient in exploring racial bias in the jury selection process. *See, e.g., Peña-Rodriguez*, 137 S. Ct. at 880 n.8 (Alito, J., dissenting) (identifying practice guides and resources on how to engage venire on issues related to racial bias).

A juror who believes that Black people tend to be violent cannot be an impartial decisionmaker in the capital trial of a Black man accused of a violent crime. Jurors in this case explicitly expressed racial bias prior to sitting in judgment of a Black defendant facing capital charges. Defense counsel’s failure to challenge or even question the jurors who expressed bias against other races was not – and cannot be – any legitimate strategy. It was, instead, a gross dereliction of duty that denied Mr. Bates his right to an impartial jury and fair trial.

CONCLUSION

It is axiomatic that capital proceedings require a “heightened standard of reliability.” *Scott*, 91 Ohio St. 3d at 1264, 746 N.E.2d 1124. *See also Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (“[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice.”). However, given the jury panel’s expressed racial bias, the outcome of Mr. Bates’s capital trial is far from reliable; it is instead contaminated with racial prejudice. *See Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018) (explaining that juror’s affidavit “presents a strong factual basis for the argument that [the defendant’s] race affected [the juror’s] vote for a death verdict. . . . The Eleventh Circuit erred when it concluded otherwise”). Counsel’s failure to protect Mr. Bates against known juror bias amounted to ineffective assistance of counsel. Due to counsel’s inexplicable error, racial prejudice tainted Glen Bates’s conviction and sentence. Allowing Mr.

Bates's conviction and death sentence to stand deprives not only Mr. Bates of his constitutional rights, but also robs Ohioans of confidence in the criminal justice system.

Dated: February 13, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2018, I had served true and correct copies of the following document:

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EDUCATIONAL FUND, INC. IN SUPPORT OF DEFENDANT-
APPELLANT**

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