THE STATE OF NEW HAMPSHIRE
SUPREME COURT

2021 TERM

Docket No. 2021-0357

MARC MALLARD

v.

WARDEN, NEW HAMPSHIRE STATE PRISON

Discretionary Appeal Pursuant to Rule 7
From Merrimack County Superior Court

BRIEF OF APPELLANT MARC MALLARD

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QUESTIONS PRESENTED

I. Did the lower court err when it found that Mr. Mallard's ineffective assistance of counsel claim was procedurally barred? *See* Petition for Writ of Habeas Corpus, Apx. 3; Transcript of Lower Court Hearing, Apx. 180 (60:19-67:20); Motion to Reconsider, Apx. 263.[1]

II. Did the lower court err when it found that Mr. Mallard did not establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"? *See* Petition for Writ of Habeas Corpus; Transcript of Lower Court Hearing; Motion to Reconsider.

[1] This Brief is accompanied by an Appendix, referred to herein as "Apx."

STATEMENT OF THE CASE AND FACTS

The Appellant, Marc Mallard, filed this Petition for Writ of Habeas Corpus on July 13, 2020, challenging convictions resulting from a 2013 jury trial. Lower Court Order ("Order"), at 4.[2]

> Mallard was charged with committing extreme acts of domestic violence against a romantic partner with whom he had a child. Mallard is a large, African American man. The victim, Brandy . . . is a much smaller white woman.

Order, at 7.

Mr. Mallard argued that his trial counsel was ineffective for, in part, characterizing his client, in front of the all-white jury, as a "big, menacing black guy." *See* Order, at 1. He argued that this was prejudicial, particularly when considered with the following facts and circumstances: (1) "[t]he defendant was a large African American male accused of violently and impulsively assaulting a white girlfriend, who was much smaller than him, with whom he shared a child"; (2) counsel failed to "either personally voir dire the jury panel or request the court to voir dire the jury panel specifically with respect to race" and racial bias; (3) the State introduced evidence that Mr. Mallard was "sporadically involved in his daughter['s] life," which "triggered the racist stereotype of a black absentee father"; (4) counsel failed to object to the State's questioning, which "wittingly or unwittingly appealed to racial prejudice," and failed to seek a curative instruction; and (5) counsel failed to correct or otherwise explain

[2] Mr. Mallard was convicted in multiple trials for conduct occurring on different dates. *See* Order, at 3-4. He is currently serving the remaining term of his prison sentence, which will be followed by two consecutive jail sentences. *Id*. at 4, n.2.

his use of "big, menacing black guy," permitting the jury to decide the case based on Mr. Mallard's race. *See* Petition, Apx. 3; Order, at 7, 9, 18, 32.

I. Jury Selection and Trial

Jury selection occurred on July 22, 2013. Order, at 4. Neither party requested voir dire on issues of race or racial bias. *Id*. at 7. The trial court did not ask any such questions, but rather asked prospective jurors general, standard questions such as whether they had "any prejudice whatsoever that you might have in connection with this case." *Id*. The selected jury was composed of all white individuals. Affidavit of Marc Mallard, Apx. 5.

The jury trial began on July 25, 2013 and lasted one day. Order, at 4, 8. The central witness was the alleged victim, Brandy, who lived with her three young children in a second-floor apartment. *Id*. at 8. Mr. Mallard is the father of the youngest of her children, Tenasia. *Id*. Brandy testified that, after Tenasia was born, Mr. Mallard "was going back and forth to other women." *Id*. Brandy testified that Mr. Mallard would stay with her sporadically for a couple of days, then leave for a week or two. *Id*. The State questioned Brandy as follows:

> Q: What was parenting Tenasia like?
> A: I parented Tenasia. Alone.
> Q: How often . . .
> A: He'd come – when he'd come he'd do somethings but –
> Q: Okay. That's what I was going to ask is, how often did he see Tenasia?
> A: When he came to the house. You know, the sporadic – you know, whenever he showed up, he would spend time with her and see her.

Trial Transcript, Apx. 64-65 (84:22-85:8).

As the lower court noted, "Brandy viewed herself as the functional equivalent of a sole parent" and "she got used to dealing with [Mr. Mallard's] comings and goings to the point where it became normal for her." Order, at 9. Eventually, trial counsel objected, arguing that the State was trying to introduce evidence regarding "bad parenting" and was trying to "dirty up" Mr. Mallard. *Id*. The trial court instructed the State to go no further on these issues. *Id*.

Brandy next discussed the events leading up to the incident underlying the charges. *Id*. at 10. After Brandy learned that Mr. Mallard was seeing another woman, she felt "betrayed again," and contacted the other woman. *Id*. Mr. Mallard subsequently came to Brandy's home, and she let him in so they could talk. *Id*. Brandy testified that Mr. Mallard was upset that she had contacted the other woman, which led to the conduct underlying the charges. *Id*. at 11. Brandy testified that the incident "lasted approximately twenty minutes and that it included pushing, hitting, choking and talking." *Id*. at 13. Mr. Mallard suddenly stopped, began to cry, and left. *Id*. at 11.

Brandy did not call the police. *Id*. She saw her mother the next day and purportedly had a bruise on her eye, but she told her mother that she fell down in the bathroom after taking Tylenol PM and possibly drinking alcohol. *Id*. at 12. The State introduced a photograph taken the day after the accident which, according to Brandy, showed her wearing makeup over the bruise. *Id*. The photograph was described as dark, and Brandy acknowledged that the unbruised eye also appeared dark. *Id*.

Mr. Mallard's trial counsel questioned Brandy about the photograph:

> Q: And so this big guy, this **big menacing black guy**

> hit you with his fist and that's what shows in that picture, correct?
> A: Yes, I had makeup on too.

Id. at 16-17 (emphasis in Order).

In his closing argument, trial counsel discussed the photograph again:

> Now, this big guy, he's as big as me . . . If he hit her as she said he did . . . what kind of a mark you think there's going to be?
> That? Within 24 hours?
> My eyes look worse than that and nobody's hit me recently.

Id. at 15.

As the lower court summarized, trial counsel also emphasized the following:

- Despite the length and the intensity of the alleged assault, there was no evidence that Brandy's children woke up.
- Brandy did not know how many times she was punched, the exact words used, how long the incident lasted, "and other details."
- "More important, during Brandy's recorded interview with a police officer, approximately one month after the incident, she was unsure of which side of her face had been bruised."
- Brandy's testimony was inconsistent in other ways.
- Brandy continued a friendly relationship with Mr. Mallard after the alleged assault, sending him text messages saying that she loved him.

- There was no evidence of injuries from strangulation, one of the alleged methods of assault.
- The physical evidence was inconsistent with the allegations of assault, and Brandy's explanation to her mother was a more likely reason for the bruise.
- Brandy did not report the alleged assault until a month later.

Id. at 12-14.

After deliberation, the jury convicted Mr. Mallard on all charges.

II. Procedural History

Mr. Mallard's direct appeal was denied by this Court. He then brought a counselled motion for a new trial, raising ineffective assistance claims based on a failure to object to a curative instruction and a failure to cross-examine Brandy regarding the post-incident friendly text messages. Order, at 5. That motion was denied and an untimely pro se motion for reconsideration was denied on December 7, 2017. *Id*. at 6.

III. Evidentiary Hearing on Habeas Petition

Trial counsel testified that he did not plan to use the phrase "big, menacing black guy," but used it in response to the State's questioning on Mr. Mallard's purported sporadic involvement in his child's life, which he felt "triggered the racist [] stereotype of a black absentee father." Order, at 18. Trial counsel believed that referring to Mr. Mallard as a "big, menacing black guy" would "blow up the stereotype rather than let it fester." *Id*. He did not believe he needed to explain that to the jury. *Id*.

IV. Lower Court Order

The lower court denied Mr. Mallard's Petition on two bases: (1) the Petition is barred by procedural default and laches; and (2) Mr. Mallard did not prove the prejudice prong of the ineffectiveness test. Order, at 27, 35.

Before reaching its analysis, the lower court opined that, "while counsel may well have been thinking about how to deal with racial bias . . . he likely did not develop anything that could be called a strategy." *Id*. at 18.

The court first addressed the procedural issue. It stated that "Mallard cannot be faulted for his failure to brief his ineffective assistance claim on direct appeal." *Id*. at 22-23. The court did, however, find that "there is a second type of procedural default at play," because Mr. Mallard had already litigated a counselled motion for new trial involving ineffective assistance claims. *Id*. at 23. The court held that "a habeas petitioner cannot serially litigate a claim of ineffective assistance of counsel by filing a string of post-conviction motions." *Id*. It cited to the federal "successor writ" statute, 28 U.S.C. § 2244, but noted that "New Hampshire has not adopted anything close to such Draconian restrictions on successive post-conviction proceedings." *Id*. at 25. It also cited to RSA 534, which contains "no limits at all on successive habeas petitions," and noted this Court's express holding that dismissal of a habeas petition is not res judicata on a subsequent petition. *Id*. The court ultimately held that Mr. Mallard's Petition violates "sane and flexible" procedural restrictions. *Id*. at 27.

The court also held that laches bars Mr. Mallard's Petition where he "remained silent about his present [claim] for nine years." *Id*. at 26-27. The court "optimistically assume[d] that [this] Court will eschew the

rigidity of the analogous federal approach" to successive post-conviction claims. *Id*. at 27.

The court then analyzed the merits of Mr. Mallard's ineffectiveness claim. It unequivocally found that trial counsel rendered constitutionally deficient representation by using the phrase "big, menacing black guy" to describe his client, a statement the court characterized as "irrational at best." *Id*. at 2, 30-32. "This perpetuated, rather than 'blew up' the pernicious and false stereotype that black men are violent and dangerous." *Id*. at 31. "This appeal to the jurors' explicit or implicit racial biases was entirely improper. Period. If the prosecutor had done this, the remedy would have been a mistrial." *Id*. at 2. Despite trial counsel's claim to have ironically employed "a horrible racial trope, the jury heard only the trope." *Id*. at 31. The court further stated that failing to deal with racial bias "during juror voir dire, or by requesting a special jury instruction, or by intelligently discussing the issue during his opening statement or summation" were not deficient choices. *Id*. at 32.

Finally, the court found no prejudice because: (1) counsel made only a single reference to race; (2) counsel did not expressly argue the stereotype or revisit it, and no witness "picked up on it"; (3) jurors would not have understood counsel to be suggesting that Mr. Mallard has an innate propensity towards violence; and (4) Brandy was "clearly not influenced by racial prejudice." *Id*. at 33-35. The court did not weigh the evidence or analyze whether the use of the racial trope may have tipped the scales of justice.

SUMMARY OF ARGUMENT

This Brief raises two primary arguments. *First*, the lower court erred when it found that Mr. Mallard's claim was procedurally barred. Any procedural default is overcome by the principles of equitable tolling and the significance of a trial tainted by racial bias. Independently, this is Mr. Mallard's first habeas petition, not a successive one or one that poses the risk of serial habeas litigation. Additionally, the doctrine of laches, if it applies to habeas petitions, does not apply to Mr. Mallard's case. *Second*, while the lower court correctly found that trial counsel was ineffective, it erred in finding no prejudice resulting from trial counsel's characterization of his client as a "big, menacing black guy" and in failing to consider the cumulative prejudicial effect of the other errors and racialized circumstances arising at trial.

The constellation of facts in this case is particularly unique. Trial counsel uttered an overt reference to a racial stereotype, the State elicited testimony invoking another racial stereotype, and there were no efforts to correct or mitigate the effect of racial bias. Because these errors appealed to the jurors' biases and invited them to decide the case based on Mr. Mallard's race, there can be no confidence in the outcome.

ARGUMENT

I. MR. MALLARD'S FIRST PETITION FOR WRIT OF HABEAS CORPUS—CENTERED ON THE CONSTITUTIONALLY SIGNIFICANT ISSUE OF RACIAL BIAS—IS NOT BARRED BY PROCEDURAL DEFAULT OR LACHES

A. The Concept of Equitable Tolling and the Constitutional Significance of Racial Bias Warrant Consideration of Mr. Mallard's Claim

i. Mr. Mallard's Claim Represents an Extraordinary Circumstance, Risk of Injustice, and Risk of Undermining the Public's Confidence in the Judicial Process

Although the lower court referenced federal law and criticized its "miserly one-year period of limitations," Order, at 25-26, the court did not consider that it "may be tolled for equitable reasons." *Holland v. Florida*, 560 U.S. 631, 645 (2010). Federal courts have applied equitable tolling to cases very similar to Mr. Mallard's case. *See Mitchell v. Genovese*, 974 F.3d 638, 651 (6th Cir. 2020). In *Mitchell*, a Black man was convicted by an all-white jury in 1986 of raping two white women. *Id*. at 638, 640. The prosecutor had impermissibly excused a Black juror. Similar to Mr. Mallard's case, trial counsel in *Mitchell* did not raise a *Batson* claim at trial or in his initial post-conviction litigation. *Id*. at 641.

The court found, in 2020, that the *Batson* claim from the 1986 trial was not procedurally barred because of "[e]xtraordinary circumstances" that included "the risk of injustice to the parties" and "the risk of undermining the public's confidence in the judicial process." *Id*. at 651. Again, like Mr. Mallard, the *Mitchell* court cited to the holding in *Buck v.*

Davis in finding that a procedural bar "suggests the justice system is complicit in racial discrimination." *Id*. at 652. The court declared that "it is time–past time–that we rectify the 'judicial travesty' that is Mitchell's sentence." *Id*. Under these circumstances, the court found that "denial of the opportunity to seek relief in such situations undermines respect for the courts and the rule of law." *Id*.

ii. Courts Have Been Historically Intolerant of Racial Discrimination, Racial Bias in the Courtroom, and Juror Bias. Mr. Mallard's Claim Presents an Issue of Such Significance that it Overcomes any Procedural Bar

Mitchell is yet another case in a long line of precedent representing that the legal system, although imperfect, has always been intolerant of racial bias. *See*, *e.g.*, *Strauder v. West Virginia*, 100 U.S. 303, 310-12 (1879) (invalidating a state statute restricting jury service to white persons because it "amounts to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offence"); *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (prohibiting racial segregation in public schools); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (stating that racial classifications must be subjected to "the most rigid scrutiny"); *United States v. Mendenhall*, 446 U.S. 544, 558 (1980) (noting that the defendant's race was "not irrelevant"); *State v. Hight*, 146 N.H. 746, 750-51 (2001) (considering the races of a white police officer and a Black suspect in an unlawful detention case).

This longstanding effort to root out racial bias has been extended in recent years, including in cases in which courts have granted habeas relief even in the face of procedural defaults. *See*, *e.g.*, *Buck v. Davis*, 137 S.Ct.

759, 778 (2017) (overcoming a procedural default); *see also Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 870-71 (2017) (noting that numerous jurisdictions "have recognized a racial-bias exception to the no-impeachment rule" and emphasizing the need to "continue to make strides to overcome race-based discrimination"); *Foster v. Chapman*, 136 S.Ct. 1737, 1755 (2016) (granting habeas relief based on evidence of race-based peremptory strikes); *Ellis v. Harrison*, 947 F.3d 555, 557-564 (9th Cir. 2020) (granted habeas relief where the Black defendant learned of his trial counsel's racism long after trial and raised ineffectiveness claims based on conflict of interest, despite no overt references to the defendant's race in the record). This emphasis on granting relief when there is an indication of potential racial bias further supports equitable relief from strict procedural standards. *Cf. United States v. Brown*, 938 F.2d 1482, 1485 (1st Cir. 1991) ("The possibility of racial prejudice, however, raises special concerns."); *Tierco Maryland, Inc. v. Williams*, 849 A.2d 504, 527-28 (Md. Ct. App. 2004).

More broadly, the Supreme Court recently qualified its prior precedent regarding procedural default "[t]o protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel." *Martinez v. Ryan*, 566 U.S. 1, 9 (2012). The court was concerned with its previous suggestion that "an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." *Id*. It noted that a "prisoner's ability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel" and held that, "as an equitable matter," "a federal habeas court [can] hear a claim of ineffective assistance of trial counsel when an

attorney's errors (or the absence of an attorney) caused a procedural default in an initial-review collateral proceeding," resulting in the omission of "a substantial claim." *Id*. at 12-14.

As Justice Sotomayor stated in concurring with a denial of certiorari based on a preservation issue, in a case involving racial bias: "we should not look away from the magnitude of the potential injustice that procedural barriers are shielding from judicial review." *Tharpe v. Ford*, 139 S.Ct. 911, 913 (2019).

Put simply, racial bias—which, in this case, was brought about by an overt characterization of Mr. Mallard as a "big, menacing black guy"—presents an issue of such substantial injustice that it deserves a finding on the merits. It risks "injustice to the parties" and "undermining the public's confidence in the judicial process," either of which would justify equitable relief under strict federal law. *See Bennett v. Stirling*, 842 F.3d 319, 328 (4th Cir. 2016) ("The criminal justice system must win the trust of all Americans by delivering justice without regard to the race or ethnicity of those who come before it . . . A proceeding like this one threatens to tear that trust apart."). It certainly justifies consideration of the merits of Mr. Mallard's claim under the law of this State, which applies no statute of limitations to habeas petitions and, therefore, does not present the "procedural barriers [that] are shielding [such claims] from judicial review" in the federal context.

iii. Mr. Mallard's Claim is Not Barred by Laches

Further, the potential infection that racial bias introduced to Mr. Mallard's trial is of such significance that it undoubtedly overcomes any

concern regarding laches, if that doctrine applies here. *Milner v. A&C Tire Co., Inc.*, 146 N.H. 631, 633 (2001) ("Laches is not triggered by the mere passage of time," requires an "unreasonable" delay, and considers "the interests to be vindicated"); *Roy v. Perrin*, 122 N.H. 88, 100 (1982) (implying that there may be "circumstances justifying [a] delay"); *see also* Order, at 34-35 ("New Hampshire courts cannot permit any proceeding to be infected with racial bias."). This Court should continue its course—and the longstanding practice of federal and state courts alike—in building trust in the criminal justice system by addressing important issues involving race, even if it could be assumed that Mr. Mallard's claim was procedurally barred. *See State v. Jones*, 172 N.H. 774, 780 (2020) (stating that "race is an appropriate circumstance to consider in conducting the totality of the circumstances seizure analysis" even though it was not necessary to the holding).

iv. The Recognition of Implicit Bias and the Widespread Effort Throughout the Criminal Justice System to Combat It Further Support that Mr. Mallard's Claim Warrants a Decision on the Merits

Implicit racial bias has long been recognized, and its pervasive effect, including how it affects jurors and their decision-making, is well-established. *See infra*, Section II. In New Hampshire, all players in the criminal justice system have engaged in comprehensive efforts to mitigate the effect of implicit bias. *Id*. Courts in various jurisdictions have both recognized and taken decisive action in combatting implicit bias in jury trials. *Id*. These efforts are consistent with the longstanding practice among the judiciary to rigidly scrutinize issues concerning bias and work to

eliminate racial discrimination in the criminal justice system. It is not disputed that an overt reference to an antiquated racial stereotype was introduced at Mr. Mallard's trial. Order, at 1. And it is not disputed that the invocation of this "racist myth" "played to the jurors' implicit racial biases." *Id*. at 2, 17, 31. This serves as yet another reason why this Court should follow longstanding jurisprudence and address the merits of Mr. Mallard's substantial constitutional claim.

B. The Lower Court Erred by Conflating a Motion for New Trial with a Habeas Petition in Finding Procedural Default

In ruling that the Petition was procedurally barred, the lower court noted that Mr. Mallard has already filed a motion for new trial. Order, at 23. The court theorized that Mr. Mallard's counsel on that motion "chose to do nothing about [the "big, menacing black guy"] language and to instead focus on other issues he found more appealing." *Id*. The court stated that "a habeas petitioner cannot serially litigate a claim of ineffective assistance of counsel by filing a string of post-conviction motions." *Id*. Citing to the federal statute governing "successor writs," while noting that New Hampshire does not have a statute of limitations for habeas petitions, the court expressed concern about "serial, piecemeal litigation of ineffective assistance" and the filing of "petition after petition." *Id* at 25-27.

The court's concerns, however, are alleviated where this is Mr. Mallard's first habeas petition.[3] Motions for new trial and habeas petitions

[3] When filing the instant Petition, Mr. Mallard also filed a similar federal petition. *See Mallard v. Warden*, No. 1:20-cv-00794-PB (D.N.H.). That federal petition was immediately stayed pending outcome of the instant Petition, which remains his only state habeas petition.

involve two distinct statutory schemes and procedures. *See* Order, at 19, 21, 25; RSA 526 (new trials); RSA 534 (habeas corpus). Accordingly, as the lower court noted, habeas petitions are entirely distinct from motions for new trial, and each is governed differently by "specific procedures established by statute." *See* Order, at 21; *State v. Traudt*, No. 2019-0528, 2021 WL 252908, at *4 (N.H. Jan. 26, 2021) (nonprecedential order) ("[T]he defendant asserts that the trial court erred when it failed to treat his motion for a new trial as a petition for a writ of coram nobis . . . We disagree. The defendant filed the instant motion in the trial court with the benefit of counsel. That motion was titled "Motion For New Trial" . . . neither the defendant's motion, nor his motion to reconsider, mentioned coram nobis relief.").

Therefore, convicted defendants have two distinct statutory procedures by which they can raise constitutional claims, aside from their direct appeals. Neither statutory scheme purports to limit the application of the other. Although the filing of multiple habeas petitions may invoke the concerns raised by the lower court, the fact that Mr. Mallard simply took advantage of his three separate post-conviction procedures does not pose the risk of a successive "string" of habeas petitions. Indeed, the New Hampshire Constitution is clear that the benefit of habeas relief "shall be enjoyed in . . . [an] ample manner." N.H. Const., pt. II, art. 91. Procedurally barring Mr. Mallard from bringing his first habeas petition runs contrary to this guarantee.

Further, a motion for new trial carries with it a three-year statute of limitations, while habeas petitions are not temporally restricted. *See* RSA 526:4; Order, at 26. Accordingly, habeas corpus is, in part, designed to

deal with circumstances precisely as those presented here: claims that were not raised before the motion for new trial clock expired, but which involve constitutional issues. This is particularly true in the context of a claim of such magnitude as racial bias. This is not a case in which Mr. Mallard raised issues of racial bias five years ago and now seeks to raise those same issues again.

Before noting that "New Hampshire has not placed itself into a federal style straightjacket" and that it "optimistically assumes that our Supreme Court will eschew the rigidity of the analogous federal approach," the lower court cited to 28 U.S.C. § 2244(b). Order, at 25, 27. The court noted that a "so-called 'successor writ' must be dismissed unless it is grounded on either" new law or newly discovered facts. *Id*. at 25. The federal statute, however, clearly applies to "a second or successive habeas corpus application." *See*, *e.g.*, 28 U.S.C. § 2244(b)(1)-(2). The statute does not apply broadly to "successive post-conviction proceedings." *See* Order, at 25. Accordingly, Mr. Mallard's first habeas petition is clearly permissive, and the concerns presented by § 2244(b) and the lower court are not yet ripe.

In sum, the lower court erroneously conflated motions for new trial with habeas petitions. But that is not how the legislature, this Court, or federal statute has treated these two distinct post-conviction procedures. *State v. Santamaria*, 169 N.H. 722, 726 (2017) ("[W]e conclude that he could have brought his [ineffectiveness] claim in a motion for a new trial ***or*** a petition for a writ of habeas corpus." (emphasis added)). And there is no risk that the procedural acceptance of Mr. Mallard's Petition would open the door to defendants bringing an endless series of post-conviction

motions. Rather, after their direct appeals, defendants can bring a motion for new trial and a habeas petition. It is only once a defendant brings a *second* habeas petition (or repeatedly raises the same claims) that courts should take a closer look at a potential procedural bar. *But see Gobin v. Hancock*, 96 N.H. 450, 451 (1951) ("[A] refusal to grant a writ of habeas corpus or a dismissal of one is not res judicata on a subsequent application for such a writ."). Mr. Mallard's claim is not barred.

C. This Court Recently Found an Exception to a Potential Procedural Default of Ineffectiveness Claims in a Case Involving a Far Lengthier Delay

In *Hart v. Warden*, 171 N.H. 709 (2019), after filing "numerous" pleadings challenging his convictions, the defendant filed a habeas petition seventeen years after his convictions. This Court stated that "claims of ineffective assistance of counsel based upon alleged trial errors are not procedurally barred by the failure to raise those claims on direct appeal and, therefore, are eligible for review by way of a petition for writ of habeas corpus." *Id*. at 715. This Court found "no basis for procedurally barring [the defendant's] collateral attack in this case" and considered the merits of the defendant's petition. *Id*.; *see also Traudt*, No. 2011-0591, 2012 WL 12830664, at *2 (reaching the merits of an ineffectiveness claim, even though "the defendant had filed six previous motions for new trial, including two in which he asserted that his trial counsel was ineffective"). Indeed, a habeas petitioner "may collaterally attack a proceeding by filing a petition for writ of habeas corpus after the time for a direct appeal has expired, if he can establish a harmful constitutional error." *Humphrey v. Warden*, 133 N.H. 727, 732 (1990).

With respect to laches, "[i]n determining whether the doctrine should apply to bar a suit, the court should consider the knowledge of the plaintiffs, the conduct of the defendants, the interests to be vindicated, and the resulting prejudice." *Healey v. Town of New Durham*, 140 N.H. 232, 241 (1995). Here, for the reasons indicated *supra*, Sections I(A) and II, the interests to be vindicated are elephantine. Further, Mr. Mallard should not be faulted for not understanding the strength of a racial bias claim until just recently. As a Black man in a predominately white state, convicted by an all-white jury, it cannot be said that Mr. Mallard was "unjustified" in being jaded as to the availability of a remedy for yet another instance of racial bias. *Washington v. Lambert*, 98 F.3d 1181, 1188 (9th Cir. 1996) (noting "the reality that racism and intolerance are for many African–Americans a regular part of their daily lives"). For that reason, Mr. Mallard's delay was not "unreasonable." Finally, any prejudice to the State in retrying Mr. Mallard's case is so minimal that "the State has not alleged any specific threat of trial prejudice." Order, at 26-27. And, despite the lower court's assertion that it was prejudiced by trial counsel's waning memory, Order, at 26, it nonetheless found deficient performance. Even if there were any claims of notable prejudice, surely the prejudice arising from a racially biased jury trial outweighs any prejudice in retrying a one-day trial with minimal facts and witnesses. Laches does not apply to bar Mr. Mallard's claim.

Finally, it is worth briefly discussing the issue of finality and the effect a procedural ruling in Mr. Mallard's favor would have on other cases. *See Murray v. Carrier*, 477 U.S. 478, 495 (1986) (noting that "in appropriate cases, the principles of comity and finality . . . must yield to the

imperative of correcting a fundamentally unjust incarceration" (quotations omitted)). Notably, this Court was not concerned with the potential effect its ruling in *Jones* would have on other cases involving seizure of people of color. Continuing to recognize the significance of race in our criminal justice system, by way of allowing Mr. Mallard's claim to proceed to the merits, similarly should not give way to concerns of finality. More importantly, it is highly unlikely that there will be another case involving the unique facts present in Mr. Mallard's case.

D. If Mr. Mallard Can Show a Sufficient Level of Prejudice Resulting from Trial Counsel's Deficient Performance, "Any Procedural Default Could Be Forgiven"

As the lower court noted, where a "petitioner has shown that he would have likely been acquitted but for constitutional error at his trial . . . any procedural default could be forgiven." Order, at 24-25. For the reasons outlined *infra*, Section III, Mr. Mallard can show such a likelihood, though he is not obligated to do so. More broadly, the lower court's observation reinforces the conclusion that issues of significance, like a trial influenced by racial bias, deserve attention, despite any potential procedural bar.

II. IMPLICIT RACIAL BIAS AND ITS EFFECT ON JURORS

Mr. Mallard does not ask this Court to chart new territory. He is merely asking this Court to follow longstanding precedent in (1) addressing the merits of his claim as to harmful constitutional error rooted in racial bias; and (2) granting relief in the face of a trial infected with racial bias. Although the facts of this case are shocking, it does not involve a juror's explicit admission of bias. Accordingly, it is necessary to understand

implicit racial bias and the role it plays in our criminal justice system and, more specifically, in criminal jury trials.

It is well-known that everyone has implicit biases, which sometimes manifest themselves. Rapping, Jonathan A., *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16:999 LEG. & PUB. POL'Y 999, 1010 (2013) ("In the criminal justice context, it manifests itself as a subconscious association of race—particularly blackness—with criminality, and influences how actors in the criminal justice system behave when confronted with the application of race to decision-making").[4] This is true of defense attorneys. *Id*. at 1011. It is even true, and perhaps especially true, of those have progressive or egalitarian views about racial justice. *Id*. at 1119-20 ("[T]hose of us who [are immersed in a racially disparate criminal justice system] develop even deeper [implicit racial bias]."). As a result, defense attorneys must be conscious of them, seek to mitigate them, and overcome them. *Id*. at 1022. This includes, in part, being "vigilant about identifying opportunities during the course of litigation to educate others about" implicit racial bias through vehicles such as "motions practice, voir dire, use of experts, narrative, jury instructions, and sentencing advocacy." *Id*. at1023. Indeed, "[r]esearch shows that jurors do a better job of guarding against the influence of prejudice when race is treated as salient than when they do not see race as salient."

[4] This has been demonstrated by a substantial and growing body of scientific literature. *See* Judge Mark Bennett, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1126 (2012). Empirical evidence has shown that the impact of implicit biases does "not depend on [a] person's awareness of possessing these attitudes or stereotypes." *Id*. at 1129. Rather, they "function automatically, including in ways that the person would not endorse as appropriate if he or she did have conscious awareness." *Id*.

Bowman, Mary N., *Confronting Racist Prosecutorial Rhetoric at Trial*, 70 Case W. Rsrv. L. Rev. 39, 52 (2020).

"[R]esearchers have found that jurors tend to make decisions based on stereotypes where the defendant is accused of a crime that is 'stereotypically associated' with the defendant's racial group and that jurors will punish these defendants more severely." Thompson, Mikah K., *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 Mich. St. L. Rev. 1243, 1249 (2018). "And modern research has shown that stereotypes are particularly likely to affect decision-making when an individual is 'not motivated to seek individuating information about members of stereotyped groups' and when an individual is 'under stress or . . . pressed for time.'" Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 70 Case W. Rsrv. L. Rev. at 55.

> Additional research suggests that stereotypes affect information processing and memory. "[I]ndividuals who are impacted by stereotypes do a better job of processing stereotype consistent information as compared to stereotype-inconsistent information." Regarding memory, "stereotypes facilitate the way the brain stores and processes information"; when people attempt to recall "hazy" memories, they often fill in those memories with stereotypes. Consequently, "people often recall stereotype-consistent information more easily than stereotype inconsistent information."

Id. at 56 (footnotes omitted).

Implicit (or explicit) racial biases are triggered by allusions to stereotypes.[5] *See id*. at 57. "Much of the recent implicit bias research

[5] *See also* Vogelman, Lawrence, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 Fordham Urb. L.J. 571, 573 n.5 (1993).

focuses on how these negative attitudes are activated through 'priming,' which involves presenting information in ways that trigger associations with other ideas." *Id*. "[P]riming for race can affect interpretation of ambiguous facts" and "how jurors remember facts," resulting in the erroneous recall of memories in a manner harmful to African-Americans. *Id*. at 58-59. Certain language does not "have to directly refer to a stereotype to activate the juror's mental association," "even so-called positive stereotypes can have significant negative impacts on decision-making," and "stereotypes can even be activated through what sounds like a disavowal." *Id*. at 54, 61-62. Perhaps most importantly, because race-based character evidence or the invocation of a racial stereotype is "subliminal, playing upon the jury's most deep-seated prejudices, it escapes review from the trial court." *Id*. at 1254. "The impact of racial stereotypes is often automatic and subtle, and it may be quite difficult to correct the errors that will result." *Id*. at 1274.

Accordingly, any notion that implicit (or explicit) racial bias does not impact jury trials and is not triggered by racial cues, race-based character evidence, or even a brief mention of an overt stereotype is simply wrong.

Indeed, courts have issued implicit racial bias jury instructions, perhaps most recently, and prominently, in the trial of Derek Chauvin for the murder of George Floyd. *See State v. Chauvin*, No. 27-CR-20-12646 (Apr. 19, 2021), *available at* https://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-20-12646/JuryInstructions04192021.pdf.

The United States Supreme Court, too, has addressed the concept of implicit bias, overturning a conviction in a case involving the invocation of a racial stereotype by a witness but without any juror having expressed bias. *See Buck*, 137 S.Ct. 759. Similarly, this Court recently recognized the implicit role race can play in the criminal justice system. *Jones*, 172 N.H. at 780.

Other courts have addressed implicit racial bias extensively. For instance, in *State v. Berhe*, the Washington Supreme Court addressed it while evaluating the necessity of an evidentiary hearing regarding a claim of implicit juror bias. 444 P.3d 1172, 1176-78 (Wash. 2019). "[R]acial bias is uniquely difficult to identify. Due to social pressures, many who consciously hold racially biased views are unlikely to admit to doing so. Meanwhile, implicit racial bias exists at the unconscious level, where it can influence our decisions without our awareness." *Id*. at 1178. The court emphasized that "[i]t is essential to ensure that the jurors are not tainted by improper questioning" and that "[c]ourts must carefully oversee any inquiry into whether explicit or implicit racial bias influenced a jury verdict." *Id*. at 1178, 1180. The court analyzed how "implicit racial bias can affect the fairness of a trial as much as, if not more than, 'blatant' racial bias" but that "implicit racial bias can be particularly difficult to identify and address." *Id*. at 1180-81.

> Implicit racial bias can therefore influence our decisions without our being aware of it because we suppress it and because we create it anew through cognitive processes that have nothing to do with racial animus . . . The ultimate question for the court is whether an objective observer . . . [who is aware of

> implicit biases] could view race as a factor in the verdict.

Id. at 1181 (citations and punctuation omitted); *see also State v. Plain*, 898 N.W.2d 801, 817 (Iowa 2017) (noting the "general agreement that courts should address the problem of implicit bias in the courtroom").

The understanding of implicit racial bias and its impact has resulted in widespread trainings for prosecutors, defense attorneys, judges, and others. The New Hampshire Association of Criminal Defense Lawyers has organized trainings related to race and bias. *See* Training, *Race and Policing* (Sept. 1, 2020); Training, *Race and Representation* (Oct. 16, 2020), *available at* https://nhacdl.org/. The Attorney General's Office recently held a mandatory implicit bias training for State and county attorneys, prosecutors, investigators, staff, and advocates. *2020 Implicit Bias Training*, NH DOJ (Nov. 20, 2020), *available at* https://www.doj.nh.gov/implicit-bias-training/index.htm. Further, New Hampshire judges both receive and provide periodic training aimed at "reducing the impact that judges' implicit biases have on cases." *See* Stucker, Kyle, *Amid Case Backlogs and a Judge Shortage, N.H. Rethinks Criminal Trial Process*, SeacoastOnline (Sept. 9, 2021), *available at* https://www.seacoastonline.com/story/news/2021/09/09/covid-19-pandemic-court-case-backlog-nh-criminal-mediation-settlement-conference-restorative-justice/5700994001/; Merrill, Scott, *Stress and Resiliency in the N.H. Judiciary*, NH Bar News (May 17, 2021), *available at* https://www.nhbar.org/stress-and-resiliency-in-the-new-hampshire-judiciary/.

Moreover, the executive and legislative branches have acted swiftly in the last year to identify and rectify bias in the criminal justice system. *See*, *e.g.*, Final Report, LEACT (Aug. 31, 2020), *available at* https://www.governor.nh.gov/sites/g/files/ehbemt336/files/2020-09/accountability-final-report.pdf; NH Senate Bill 96 (2021 Session), *available at* http://gencourt.state.nh.us/bill_status/billText.aspx?id=992 (creating a committee to study the inclusion of race and ethnicity data on State-issued identification cards).

III. MR. MALLARD WAS PREJUDICED WHEN HIS TRIAL COUNSEL CHARACTERIZED HIM AS A "BIG, MENACING BLACK GUY," PARTICULARLY WHEN CONSIDERED WITH THE COMBINED PREJUDICIAL EFFECT OF OTHER ERRORS

Despite forcefully finding that trial counsel performed deficiently, the lower court, in a brief analysis, found no prejudice. The lower court erred. To meet the prejudice prong, Mr. Mallard need only show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Thompson*, 161 N.H. 507, 528 (2011) (quotation omitted). A "reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. Courts "must consider 'the cumulative effect of counsel's errors' rather than the effect of each error in isolation." Order, at 33 (citation omitted).

Before analyzing why Mr. Mallard was prejudiced by his trial counsel's errors, it is instructive to compare how the lower court described the effect of trial counsel's most notable error throughout its Order, prior to reaching the prejudice prong. Order, at 2 ("The phrase conveyed the notion that a 'big, menacing black guy' is somehow more scary than a 'big,

menacing, plain old guy.' This appeal to the jurors' explicit or implicit racial biases was entirely improper. Period. If the prosecutor had done this, the remedy would have been a mistrial."); *id*. at 17 ("This, of course, invoked the racist myth that black men are violent and dangerous."); *id*. at 31 ("This perpetuated, rather than 'blew up' the pernicious and false stereotype that black men are violent and dangerous. It played to the jurors' implicit racial biases. To conjure up this racist myth—which has been responsible for so much injustice for so long—was wrong, wrong, wrong . . . While a graduate student in literature might write an interesting essay on counsel's ironic invocation of a horrible racist trope, the jury only heard the trope.").

When it reached the prejudice prong, however, the lower court recharacterized the error as a "single reference," "misstep," and "fleeting allusion to a racial stereotype." Order, at 33-34. This Court should adopt the lower court's more forceful characterization of trial counsel's most significant error and find that, when considered with the other errors and circumstances in this case, it clearly rose to a sufficient level of prejudice.

"Big, Menacing Black Guy"

Trial counsel's overt reference to a racial stereotype infected Mr. Mallard's trial and effectively served as an invitation to the all-white jury to decide the case based on Mr. Mallard's race and not on the evidence of his guilt or innocence. The use of this "pernicious racist trope conflating male blackness with uncontrolled violence" alone undermines confidence in the verdict. *See* Order, at 1.

Initially, it must be noted that the lower court's Order itself suggests that there was prejudice. The lower court *twice* acknowledged that trial counsel's characterization of his own client appealed to the jurors' implicit (and explicit) biases. *Id*. at 2, 31. The court recognized that the jurors "only heard" the "horrible racist trope" and stated that the very racist stereotype at issue in this appeal "has been responsible for so much injustice for so long." *Id*. at 31. If this horrible racist trope directly appealed to juror's implicit and explicit racial biases in a way that, as the lower court suggested, produces injustice, how could Mr. Mallard have *not* been prejudiced? There is clearly a "reasonable probability" that at least one juror's implicit biases were triggered—or "primed"—by trial counsel's overt stereotypical reference, undermining confidence in the verdict. *See supra*, Section II (discussing how racial biases are cued by racial references and "unconsciously" affect jurors' decision-making, recall, and reframing of facts corresponding to the stereotype).

Indeed, as the lower court stated without reservation, "[i]f the prosecutor had done this, the remedy would have been a mistrial." Order, at 2. But as the United States Supreme Court made clear in rejecting an argument that a defense attorney eliciting racialized testimony is not prejudicial (*see also* Order, at 33): "We are not convinced. In fact, the distinction could well cut the other way. A prosecutor is seeking a conviction . . . When a defendant's own lawyer puts in the offending evidence, it is in the nature of an admission against interest, more likely to be taken at face value." *Buck*, 137 S.Ct. at 777; *see also State v. Larson*, No. A06-1036, 2007 WL 4234246, at *7 (Minn. Ct. App. Dec. 4, 2007) ("Although we are not presented with a prosecutorial-misconduct claim

here, in the context of an ineffective-assistance claim, the injection of race by defense counsel can be just as damaging to the defendant.").

The Supreme Court has issued recent opinions that place added emphasis on courts' constitutionally-based "duty to confront racial animus in the justice system," where discrimination based on race—especially when it impedes the jury's role in "protect[ing]" a criminal defendant against "race or color prejudice"—"is especially pernicious in the administration of justice." *Pena-Rodriguez*, 137 S.Ct. at 868. In *Pena-Rodriguez*, where a juror expressed racial bias after the verdict, the court stated: "A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right." *Id*. at 869. The court made an exception to the longstanding "no-impeachment" rule to address the "familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Id*. at 868-71.

This Court, too, has firmly addressed appeals to racial bias, reversing judgment in a civil case involving two indirect references to racial bias while stopping just short of adopting a "*per se* rule of reversal." *LeBlanc v. American Honda Motor Co., Inc.*, 141 N.H. 579, 580-84 (1997). Although the references were brief, this Court noted that "when an elephant has passed through the courtroom one does not need a forceful reminder" and that "it will be an unusual case in which the invocation of racial or ethnic bias should not result in a mistrial…." *Id*. (quotations omitted).

Similarly, and although the lower court criticized the use of *Buck* as too "extreme," Order, at 34, the message in that case could not be clearer: racial bias in criminal proceedings in unacceptable and must be addressed. *Buck*, 137 S.Ct. at 776-77. Despite that there were merely two references to race in the proceeding, the court noted that those references "appealed to a powerful racial stereotype" that Black men are violence-prone, providing support for making a decision on the basis of race. *Id*. Where the references "expressly ma[de] [the] defendant's race directly pertinent[,] . . . [the impact] cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record." *Id*. "***Some toxins can be deadly in small doses***." *Id*. (emphasis added). The consequence of racial bias may be more extreme in the capital context, but racial bias triggering the loss of one's liberty is of no less urgent concern.

Other courts have firmly dealt with references to race or stereotypes, granting post-conviction relief. *See*, *e.g.*, *Ellis*, 947 F.3d at 573-74; *United States v. Smith*, No. 12-183, 2018 WL 1924454, at *5, *13-15 (D. Minn. Apr. 24, 2018) (granting a new trial, in a close case hinging on credibility, where a juror came forward four years after the verdict to report a "racially-charged statement" of another juror); *People v. Sanders*, No. 3-18-0215, 2020 WL 7779040, at *4-5 (Ill. Ct. App. Dec. 31, 2020) (granting a new trial where defense counsel "inadvertently prejudiced the jury" by referring to his client as a "[b]ig black guy" and "a big scary black guy," finding that these statements "could only create prejudicial effects, even if [they were] used as well-intentioned trial strategy" because they were not based on the evidence and "created a prejudicial lens for the jury").

Ordering a new trial in the face of racialized references is not new. *See*, *e.g.*, *United States v. Cabrera*, 222 F.3d 590, 594 (9th Cir. 2000) ("[N]umerous authorities [have] recogniz[ed] that references to racial, ethnic, or religious groups are not only improper and prejudicial but also reversible error."); *Wallace v. State*, 768 So.2d 1247 (Fl. Ct. App. 2000) (granting a new trial where the prosecutor elicited testimony in front of an all-white jury that referenced the race of a white woman to whom the Black defendant made vulgar comments); *McFarland v. Smith*, 611 F.2d 414, 416, 419 (2d Cir. 1979) (finding that prosecutor's statement that African–American officer's testimony about African–American defendant should be believed because it is "someone she knows and that's a member of her own race" was "constitutionally impermissible" because it invoked race for an illogical purpose and created "a distinct risk of stirring racially prejudiced attitudes"); *cf. Tierco Maryland, Inc.*, 849 A.2d at 523 ("We conclude that there exists a significant probability that the jury's verdicts in the present case were influenced by Respondents' irrelevant and improper injection of racial considerations into the trial . . . [Where the purpose] is to inflame the passions of the jury, the reference is improper and prejudicial." (quotations and brackets omitted)).

Here, where the characterization of Mr. Mallard as a "big, menacing black guy" clearly invoked a racist stereotype, it "could only create prejudicial effects." This is true even though there was only one *overt* racial characterization. *See* Order, at 34 ("…Buck held that the poison of racial stereotypes is so strong that even a small dose can prove prejudicial."). It is especially true where, as the lower court's Order makes clear, this was a close case, hinging largely on the testimony of the alleged

victim. *See United States v. Cannon*, 88 F.3d 1495, 1503 (8th Cir. 1996) (finding that a prosecutor's reference to African–American defendants as "bad people," where evidence was not overwhelming, "gave [the] jury an improper and convenient hook on which to hang their conduct"); *Bain*, 489 P.2d at 569-70 (reasoning, in a case involving references to race: "In most sex offense cases the alleged perpetrator of the crime and the alleged victim are the sole or principal witnesses, and as in the instant case, there is a sharp conflict between their testimony. In these circumstances, there is grave danger that misconduct of counsel may tip the scales of justice").

It should be noted that the lower court did not weigh the evidence or reason that the evidence of guilt was too significant. The court merely suggested that, because no other witness mentioned race, the alleged victim was "clearly not influenced by racial prejudice," and trial counsel did not revisit the stereotype, that there was no prejudice. But these issues are beside the point. And trial counsel's failure to revisit and explain the issue was part of the problem. As the lower court acknowledged, the jury only heard the trope, shortly before it deliberated and rendered guilty verdicts.

In fact, and importantly, Mr. Mallard's jury trial—involving felony domestic violence charges—lasted just over three hours. *See* Trial Transcript, Apx. 47, 136-138, 178 (reflecting that the trial began at 9:22am, the jury took lunch from 11:38am until 1:05pm, and the jury began deliberations at 2:02pm). Although the lower court's reasoning that a brief reference to a pernicious racial stereotype (coupled with a brief and ultimately halted line of questioning invoking another racial stereotype) mitigates prejudice may be valid in the context of a weeklong trial, the jury was primed with these stereotypes mere hours before deliberation.

Trial counsel's use of a racist trope played upon the jurors' biases, and it undermines any confidence in the verdict.

> Bias often surfaces indirectly or inadvertently and can be difficult to detect. We emphasize, nonetheless, that the improper injection of race "can affect a juror's impartiality and must be removed from courtroom proceedings to the fullest extent possible" . . . Affirming this conviction would undermine our strong commitment to rooting out bias, no matter how subtle, indirect, or veiled. Accordingly, in the interests of justice and in the exercise of our supervisory powers, we reverse appellant's conviction and remand for a new trial.

State v. Cabrera, 700 N.W.2d 469, 475 (Minn. 2005).

Cumulative Effect of Other Errors

Although leaving the jury with the image of his client as a "big, menacing black guy" tipped the scales and resulted in prejudice, trial counsel made additional errors that, along with the State's seemingly unwitting invocation of another racial stereotype, compounded this prejudice. To be clear, Mr. Mallard is not asserting that each additional error would, alone, establish ineffective assistance. But courts must consider their cumulative effect. *See Dugas v. Coplan*, 428 F.3d 317, 335 (1st Cir. 2005). First, counsel failed to mitigate the "concern about racial bias [that] was present . . . from the get go" by requesting voir dire on racial bias. Order, at 32; *Pena-Rodriguez*, 137 S.Ct. at 860 ("Standard and existing safeguards may also help prevent racial bias in jury deliberations, including careful voir dire."). This is not *per se* ineffective, but it contributed to the prejudice.

Second, the State elicited testimony from the alleged victim that invoked the "racist [] stereotype of a black absentee father." Order, at 18; Trial Transcript, Apx. 64-65 (84:22-85:8); Kim, Jennifer Sumi, *A Father's Race to Custody: An Argument for Multidimensional Masculinities for Black Men*, 16 Berkeley J. Afr.-Am L. & Pol'y 32, 59 (2014) (discussing the "Bad Black Man/Absent Black Father image"). Trial counsel knew that this was racially charged testimony and, belatedly, objected to it. Order, at 9, 18. The judge put a stop to it. *Id*. Although arguably subtle, the State's questioning nonetheless "primed" the jury to view this case through a racial lens and triggered another bias. *See supra*, Section II. And it clearly contributed to trial counsel's subsequent error. This is yet another factor that makes Mr. Mallard's case particularly unique.

Third, trial counsel failed to request any curative instruction for the racialized testimony or his use of an overt racial stereotype, and failed to explain why he characterized his own client as a "big, menacing black guy." *See LeBlanc*, 141 N.H. at 581; *cf. United States v. Skilling*, 561 U.S. 358, 388, n.21 (2010) (noting various "measures" to mitigate "adverse effects"); *State v. Grayson*, 546 N.W.2d 731, 737, n.3 (Minn. 1996) (noting that "no cautionary instruction was given" in response to racialized questioning).

The cumulative prejudicial effect of these errors is clear: racial stereotypes were introduced to the jury by both trial counsel and the State, they preyed on the jurors' implicit (or explicit) biases, and, without any curative efforts, they undermine any confidence in the verdict.

Finally, although Mr. Mallard has satisfied his burden to demonstrate a "reasonable probability" of a different result, some courts

have suggested something closer to presumed prejudice in the context of claims involving racial bias. *See*, *e.g.*, *Cabrera*, 700 N.W.2d at 475 (noting that bias is difficult to detect and granting a new trial despite it being "difficult for us not to conclude" harmless error); *Berhe*, 444 P.3d at 1180-81 (same); *Ellis*, 947 F.3d 561 (presuming prejudice); *see also LeBlanc*, 141 N.H. at 583. The way in which racial bias infected Mr. Mallard's trial is akin to a structural error, requiring "reversal without regard to the evidence in a particular case." *See Rose v. Clark*, 478 U.S. 570, 577 (1986); *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991); *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) ("When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm.").

This is particularly appropriate in the context of this case. As outlined above, many jurors may not even know that they harbor implicit biases, much less recognize that those biases affected their judgment and then admit to it. Therefore, there is some degree of impossibility in *showing* prejudice, despite the consensus that implicit bias is real and affects jurors in cases such as Mr. Mallard's. *Cf. Commonwealth v. Long*, 152 N.E.3d 725, 723 (Mass. 2020) ("[T]hese holdings would set a nearly impossible bar for victims of discriminatory traffic stops to clear in order to establish their claims . . . the burden must not be so heavy that it makes any remedy illusory."); *Pena-Rodriguez*, 137 S.Ct. at 869 ("The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations."); *Smith*, No. 12-183, 2018 WL 1924454, at *6 (noting that the juror waited four years to come

forward, in part because he "wasn't proud" of how the defendant's race impacted his decision).

In sum, trial counsel, together with the State, invited the jury to decide the case on the basis of Mr. Mallard's race, and there is at least a "reasonable probability" that the jury accepted that invitation.

CONCLUSION

For the foregoing reasons, this Court should continue in the long judicial tradition of rooting out racial bias, reverse the lower court's procedural and prejudice prong findings, and order a new trial.

REQUEST FOR ORAL ARGUMENT

The Appellant requests oral argument before the full Court, to be presented by Attorney Michael G. Eaton.

RULE 16(3)(i) CERTIFICATION

The undersigned hereby certifies that the Orders being appealed are in writing and are appended to this Brief.

Dated: November 1, 2021

Respectfully submitted,

Marc Mallard

By his attorneys,
Wadleigh, Starr & Peters, P.L.L.C.

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CERTIFICATE OF SERVICE

The undersigned certifies that, on this date, copies of this Brief, Addendum, and the accompanying Appendix, as required by the Rules of this Court, are being electronically delivered through the Court's electronic filing system to Attorney Zachary L. Higham, Assistant Attorney General, counsel of record for the Warden.

Dated: November 1, 2021 */s/ Michael G. Eaton*
Michael G. Eaton, Esq.

STATEMENT OF COMPLIANCE

The undersigned hereby certifies that, pursuant to New Hampshire Supreme Court Rule 26(7), this Brief complies with New Hampshire Supreme Court Rule 26(2)-(4). Further, this Brief complies with New Hampshire Supreme Court Rule 16(11), in that this Brief contains 9,490 words (including footnotes) from the "Questions Presented" to the "Request for Oral Argument" sections of the Brief.

/s/ Michael G. Eaton
Michael G. Eaton, Esq.

ADDENDUM

Addendum Table of Contents

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Merrimack, ss

MARC MALLARD

v.

MICHELLE EDMARK, in her capacity as
WARDEN OF THE NEW HAMPSHIRE STATE PRISON

217-2020-CV-353

FINAL ORDER

The matter before the court is a petition for a writ of habeas corpus brought by a state prisoner. The plaintiff, Marc Mallard, claims he is unlawfully imprisoned because he did not receive effective assistance of counsel at the jury trial that resulted in his convictions and sentences.

More particularly, Mallard, who is African American man, claims that (a) his attorney inappropriately invoked the pernicious, false and racist trope conflating male blackness with uncontrolled violence, (b) this was not done in furtherance of a rational defense strategy, and (c) counsel's use of this racist myth at trial was prejudicial because he was accused of a violent crime.

That counsel referred to Mr. Mallard's race, and that he did so in a manner that suggested black men are violent, is beyond dispute. The trial transcript shows that counsel used the phrase "big, menacing black guy" when cross-examining the

complainant. (Transcript, p. 108 (emphasis added)). The "guy" was Mr. Mallard. He was the complainant's romantic partner and the father of one her children. So, the word "black" was not used for the purpose of testing the complainant's identification of Mr. Mallard as her assailant. Counsel's conscious, or perhaps not-so-conscious, purpose was to turbocharge the other two adjectives, i.e. "big" and "menacing." The phrase conveyed the notion that a "big, menacing black guy" is somehow more scary than a "big, menacing, plain old guy.

This appeal to the jurors' explicit or implicit racial biases was entirely improper. Period. If the prosecutor had done this, the remedy would have been a mistrial.

Counsel certainly did not have the conscious object to perpetuate the stereotype. He knew that it was false and pernicious and he wanted to convey this to the jury. But counsel's strategy, which was to use the phrase in isolation, without explanation, and in the context that he did, was irrational at best.

Accordingly, Mr. Mallard has proven that, with respect to this issue, trial counsel's representation was constitutionally deficient. Nonetheless, for the reasons set forth below, the petition for a writ of habeas corpus is DENIED and JUDGMENT IS ISSUED TO THE RESPONDENT WARDEN.

I. THE TRAVEL OF THE CASE

On April 29, 2012 Mallard was arrested and charged with a multitude of domestic violence related crimes. See State v. Marc Mallard, Merrimack County Superior Court, No. 217-2020-CR-00420. Although most of the charges arose from an incident that occurred immediately before his arrest, four charges were brought for conduct that occurred a month earlier, on March 29-30, 2012.[1]

At Mallard's request, the charges from the March 2012 incident were severed for a separate jury trial. Mallard's habeas petition relates to only the March 2012 charges. Therefore, the court need not describe the procedural history or underlying facts of the other charges.

Mallard was charged, in connection with the March 2012 incident, with:

-Second Degree Assault by strangulation (RSA 631:2,I(f));

-Attempted Second Degree Assault by ligature strangulation (RSA 629:1 and 631:2,I(f);

-Misdemeanor Criminal Threatening by threating to murder the victim during the attempted ligature strangulation; (RSA 631:4,I(d); and

-Misdemeanor Simple Assault for striking the victim in the face, (RSA 631:2-a,I(a)).

[1]There was also a single charge, that was later nol prossed, arising from an alleged incident in the fall of 2011.

All of these charges were subject to an enhanced penalty because Mallard was on bail at the time of the alleged offense. 597:14-b.

The March 2012 charges were tried to a jury in July 2013. Jury selection occurred on July 22, 2013 and the one day jury trial took place on July 25, 2013. Mallard was convicted of all four charges.

Mallard was then sentenced on September 13, 2013 to serve 7 to 14 years at the State Prison, stand committed, plus a consecutive committed sentence of 3 to 6 years, plus a consecutive house of corrections sentence.[2] Mallard has served more than nine years of these sentences.

Mallard appealed his convictions to the New Hampshire Supreme Court. See, N.H. Supreme Court No. 2013-0673. Mallard's trial counsel did not represent Mallard on direct appeal. Appellate counsel briefed two issues: (a) whether the trial court committed plain error by giving a certain curative instruction and (b) whether the evidence was legally sufficient to support the jury's verdict.

[2]Mallard was sentenced at the same time for charges relating to the April 2012 incident. Although those charges were tried separately, they were joined for sentencing purposes. Thus the specific sentences for the March 2012 incident are part of a larger overall sentence. Mallard's petition does not call the propriety of any of his sentences into question.

While these issues were pending on direct appeal, Mallard filed a pro se motion in the trial court to vacate his conviction and sentences on several constitutional grounds.[3] The trial judge denied his motion without prejudice on the grounds that (a) his appeal was pending and (b) he was represented by counsel. Mallard did not appeal this ruling.

On January 21, 2015, the New Hampshire Supreme Court issued a non-precedential order affirming Mallard's convictions. See, State v. Mallard, 2015 WL 11071107 (N.H. Jan 21, 2015).

Thereafter, on February 12, 2015, Mallard filed a counselled motion for a new trial. Neither Mallard's trial counsel nor his appellate counsel represented Mallard on the post-conviction motion. Mallard's post-conviction counsel argued that Mallard's convictions must be set aside because trial counsel was constitutionally deficient.

More particularly, post-conviction counsel argued that trial counsel was ineffective because (a) he failed to object to the curative instruction at issue on direct appeal and (b) he failed to cross-examine the victim regarding the specific content of certain friendly text messages she wrote to Mr. Mallard after the alleged assaults. Thus, like this petition,

[3] Mallard's motion was captioned as a "motion to dismiss indictment."

Mallard's earlier motion for new trial focused on the questions that counsel asked the victim.

On June 2, 2015, the trial judge denied Mallard's counselled motion for a new trial. Mallard did not appeal from this ruling. However, on October 9, 2015, Mallard filed an untimely, pro se, motion for reconsideration. He also moved to recuse the trial judge from ruling on his motion for reconsideration. These motions were denied on December 7, 2015.

The case then sat fallow for five years until Mallard filed the instant petition for a writ of habeas corpus. Mallard is represented by yet another attorney in this post-conviction case. Thus, he has received the assistance of four different criminal defense attorneys, i.e. trial counsel, appellate counsel, post-conviction counsel and now habeas counsel.

This court has reviewed the Complaint, Answer and Reply. This court has also reviewed the transcript of the criminal jury trial, including jury selection, as well as all docket documents in the criminal case. Additionally, this court has reviewed pertinent portions of trial counsel's discovery deposition in this case. Finally, this court *sua sponte* ordered an evidentiary hearing so that it could hear directly from trial counsel regarding his reasons for his use of the phrase "big, menacing black guy."

II. FACTS

A. Jury Selection

Mallard was charged with committing extreme acts of domestic violence against a romantic partner with whom he had a child. Mallard is a large, African American man. The victim, Brandy, who will be referred to by her first name to protect her privacy, is a much smaller white woman. Mallard and Brandy were never married.

Neither party requested counsel conducted voir dire. Mallard's attorney did not request, and the court did not ask, any voir dire questions specifically related to racial bias, inter-racial couples or unmarried partners having children.

That said, the court did ask the prospective jurors whether they had any type of prejudice against the defendant, the attorneys or the witnesses or "any prejudice whatsoever that you might have in connection with this case." The court also asked the prospective jurors whether they knew of any other reason why they could not sit and render a true and honest verdict.

Mallard does not claim that his lawyer was *per se* ineffective for failing to either personally voir dire the jury panel or request the court to voir dire the jury panel specifically with respect to race. However, Mallard argues, in essence, that the lack of such voir dire made counsel's later

use of the trope of a "big, menacing black guy" all the more dangerous and prejudicial.

B. The Jury Trial

The jury trial lasted one day. The central witness was the victim, Brandy. Brandy testified that she worked as a secretary at Concord Hospital and lived with her three children in a second floor apartment in Concord. Those children were 12, 10 and 4 years old at the time of trial.

Mallard was the father of Brandy's youngest child, Tenasia. Brandy had met Mallard in 2006, became friends with him, and then started dating him about six months after they met. The relationship was apparently a serious one because, according to Brandy, in 2008 they both decided to have a child. However, Mallard and Brandy always lived apart.

Brandy testified that her relationship with Mallard went downhill after Tenasia was born. According to Brandy, Mallard "was going back and forth to other women and . . . it was not good anymore. We weren't even getting along." Jury Trial Transcript, p. 84. Brandy told the jury that her contact with Mallard became sporadic, i.e. he would stay for a couple of days and then leave for a week or two.

Brandy testified that Mallard would spend time with Tenasia during his sporadic visits and he had a good relationship with

his daughter. Nonetheless, Brandy viewed herself as the functional equivalent of a sole parent.

Brandy told the jury that she remained in this difficult relationship because she thought she loved Mallard. She testified that she got used to dealing with his comings and goings to the point where it became normal for her.

After Brandy testified to these facts, the prosecutor started to segue towards the incident that occurred on the night of March 29-30, 2012. To do this, he asked Brandy when she last saw him before that night. When Brandy said that she could not be specific but it had been a little while, the prosecutor asked her whether it had been days or weeks.

Defense counsel objected and approached the bench. He claimed that the State was trying to introduce evidence relating to "bad parenting" and accused the State of trying to "dirty up" Mallard by showing he was a "bad partner." The prosecutor said he was just trying to provide the jury with some context. The court ruled that while Brandy's testimony had so far been admissible, the prosecutor should not delve further into these issues.

Defense counsel did not argue during this bench conference that that the prosecutor wittingly or unwittingly appealed to racial prejudice. Nothing having to do with race was discussed at the bench conference.

Following the bench conference, the prosecutor asked Brandy about the specific events leading up to the incident on March 29-30, 2012. Brandy testified she received information that Mallard was once again seeing another woman. She testified that she felt hurt and "betrayed again." In her mind, she was supposed to be in an exclusive relationship with Mallard.

Brandy contacted the other woman over Facebook. Shortly before the March 29-30 incident, Brandy had a phone conversation with Mallard during which she discussed her concerns about the matter. Brandy told the jury that she was not sure what she wanted to do about continuing her relationship with Mallard.

On the night of the incident, Mallard called her to say that he was coming to her home. She believed that he wanted to discuss the status and future of their relationship.

By the time Mallard arrived, Brandy was already in bed. However, she let him in so they could talk. At the time, only her two oldest children were home. Tenasia was with Brandy's mother (because Brandy's mother was scheduled to care for the child the next day, while Brandy was at work, and she found it easier to pick up the child in the evening than in the early hours of the morning).

Brandy testified that Mallard appeared agitated and tense from the moment she opened the door. She told the jury that

Mallard was extremely upset about the fact that she had communicated with the other woman.

According to Brandy, Mallard punched her in the face, causing a black eye and a split lip. She testified that after punching her, Mallard wrapped a belt around his hand and said that she was going to die. Brandy further testified that, as Mallard said this, he was trying to wrap the belt around Brandy's neck. Brandy put her arm in front of her neck so the belt went across her arm instead.

According to Brandy, Mallard then threw her down onto the bed and started to choke and strangle her with his hands. As he did this, he said "this is what happens when you want to investigate." Brandy it felt like Mallard was killing her. She told the jury she thought that he was going to kill her and she was scared of dying and having her kids find her.

Then, Brandy said, Mallard stopped the attack and "he just all of a sudden clicked" and said "he didn't want to do this," and "this is isn't going to make it better." According to Brandy, Mallard began to cry and then got up and left, saying that he had to get his friend's car back.

Brandy did not call the police. She testified that she did not want to get Mallard in trouble and that she was embarrassed. She had a bruise the next morning, decided not to go to work and called in sick. She was not scheduled to work again until the

next week, by which time the bruising had healed somewhat. According to Brandy, she had to cover up the bruise with makeup when she returned to work.

Brandy saw her mother the day after the incident. The mother testified that she observed the bruise on Brandy's face. Brandy told her mother that she fell down in the bathroom after taking Tylenol PM. Brandy may have also told her mother that she drank alcohol. According to the mother, Brandy did not make eye contact with her during this conversation and ended the conversation quickly.

The State introduced a cell phone photograph of Brandy that was taken on the day after the incident. According to the testimony, the photograph depicts Brandy wearing makeup over the bruise. However, the photograph was described as dark and Brandy testified that her other eye also appeared somewhat dark due to the lighting.

C. Mallard's Defense

Mallard's defense, as presented by trial counsel, was that Brandy's accusation of strangulation, attempted ligature strangulation and assault were all fabricated. Although the claim was one of factual innocence, what the defense aimed for was a reasonable doubt in the jurors' mind that Brandy's account was unworthy of belief.

In service of this goal, defense counsel focused on the following:

-There was no evidence that either of Brandy's older children (age 9 and 11 at the time) woke up during the incident. Brandy testified that the incident lasted approximately twenty minutes and that it included pushing, hitting, choking and talking. If this were the case, it would stand to reason that the children might have woken up. (However, in fairness to the State, the two older children slept in an attic bedroom and the assault took place in the middle of the night in Brandy's bedroom on the floor below. There was no evidence that Brandy's bedroom was immediately below the children's bedroom. There was no evidence of how noise travelled in the apartment and to the attic bedroom. Finally, neither of the older children testified, so there was no direct evidence in either direction about what they may have heard.)

-Brandy's testimony was hazy with respect to such things as the number of punches, the exact words used, how long the incident lasted and other details. More important, during Brandy's recorded interview with a police officer, approximately a month after the incident, she was unsure of which side of her face had been bruised. Brandy consulted the photograph to firm up her memory during the interview. There were other, less dramatic, inconsistencies between Brandy's police interview and

her in-court testimony. The defense argued that this was a hallmark of fabrication. The State argued otherwise.

-Brandy continued a seemingly friendly relationship with Mallard after the assault. She sent Mallard text messages saying that she loved him and they conversed by text back and forth. Counsel argued that a victim of such a violent and seemingly life threatening assault would not behave this way.

-There was no evidence of injuries from strangulation (i.e. red marks or bruising about the neck, etc.).

-There was no evidence of injuries relating to the attempted ligature strangulation.

-Counsel argued that the bruise, as it was depicted in the photograph, was inconsistent with Brandy's claim that she had been punched in the face by a large, strong man using great force. Counsel claimed that if that occurred, Brandy's injuries would have been worse. Counsel suggested that Brandy's account to her mother—i.e. that she fell in the bathroom after taking Tylenol PM (and maybe drinking) was a more likely reason for the bruise.

With respect to that last argument—i.e. that the bruising depicted in the photograph was inconsistent with the account of a vicious, full strength punch to face—counsel argued to the jury on summation as follows:

Okay. Let's talk about the picture a little bit.

Got State's Exhibit 1 here, you've all seen this. This is the eight by ten, eight—and—a—half by 11, whatever. See it's been real darkened up, real darkened up. You can't even make out Tenasia's hair. Even though the picture was darkened up, it doesn't look like much of a bruise there on the left eye; does it? And comparing it to the right eye? That's not much of a bruise.

Now, this big guy, he's as big as me; he's as big as Me. If he hit her as she said he did, if he hit her hard enough to knock her down, what kind of a mark you think there's going to be?

That? Within 24 hours?

My eyes look worse than that and nobody's hit me recently. It's about being tired and working too hard, which I'm sure she does —— is.

Well, gee, it's covered by makeup. I'm not a user of makeup but it seems to me that, if indeed, somebody had took that kind of a hit and she said she doesn't even know if she might have been hit more than once. Somebody could -- took that kind of a hit, it's going to show for a while.

She says, oh, yeah, it's still -- it's still lingered. It still showed a week later when I went back to work.

Well, it doesn't even show the next day. . . .

Jury Trial Transcript, pp. 165-166.

D. Trial Counsel's Reference To Mallard's Race And Skin Color During His Cross-Examination Of Brandy

There was only a single, one word reference made to Mallard's race during the trial. The prosecutor said absolutely nothing about race. However, when defense counsel was cross-examining Brandy regarding the incongruity between the

photograph of her injury and her account of the assault, he noted that his client was black:

Q. Ma'am, I'm showing you State's Exhibit Number l. A picture of you and Tenasia.

A. Right.

Q. You can't make out Tenasia's hair there; can you?

A. No.

Q. So that picture's been darkened up; has it not?

A. It's a printout from my cell phone, so it's probably, actually, about right.

Q. All right. And so even though it's been darkened up, you're saying that shows on your left eye, the bruise that happened the day before; is that correct?

A. Yes.

Q. And where's the split lip?

A. It's right there.

Q. Okay. The right eye looks kind of dark too. He didn't beat you there too; did he?

A. No.

Q. No? So why would your right eye look as dark as your left eye if he didn't hit you there too?

A. My head was turned there.

Q. So that was the day —— the next day, correct?

A. The following night.

Q. I'm sorry?

A. The following night.

Q. Twenty-four hours or less?

A. Yes.

Q. **And so this big guy, this big, menacing black guy hit you with his fist and that's what shows in that picture, correct?**

A. Yes, I had makeup on too.

Q. You had makeup on too?

A. Yes, cover up.

Jury Trial Transcript. pp. 107-109 (emphasis added).

Regardless of counsel's subjective state of mind, his question suggested that a punch from a "big, menacing black guy" would have caused great injury. This, of course, invoked the racist myth that black men are violent and dangerous.

Counsel did not utter anything else about Mr. Mallard's race at trial. As quoted at length above, counsel forcefully argued on summation, without any racial references, that the photograph disproved Brandy's testimony.

E. Trial Counsel's Testimony During The Habeas Proceeding

At his deposition, trial counsel testified that he intentionally used the phrase "big, menacing black guy" to "derisively" dispel the stereotype of a large, black man beating a small white woman.

At the evidentiary hearing, counsel testified that he did not go into the trial planning to use such language. However,

he felt the need to do something after the State introduced evidence that Mallard was only sporadically involved in his daughter Tenasia's life. Counsel testified that this triggered the racist the stereotype of a black absentee father. Counsel wanted to blow up the stereotype rather than let it fester. As the court understands counsel's testimony, he believed that a quick jab of referring to the defendant's race would bring the issue front of mind, and that nothing further needed to be done.

In fairness, counsel also testified that because the trial took place seven years earlier, he lacked a good memory of his moment-to-moment mental reasoning. As counsel told the court, a jury trial is dynamic and when it comes to cross-examining a witness, decisions are often made in the moment.

As explained below, counsel's stated reason for using the phrase "big, menacing black guy" is irrational. Further, the court suspects that while counsel may well have been thinking about how to deal with racial bias, as the case was playing out in real time before the jury, he likely did not develop anything that could be called a strategy. This judge has great personal respect for this attorney (who is an experienced, zealous, skilled, talented and caring advocate), but there was no rational strategy at work.

III. Legal Analysis

A. Habeas Corpus—In General

Habeas corpus has ancient origins. The "law of the land" (or due process) clause in Part 1, Article 15 of our Constitution was taken—almost verbatim—from Article 39 of the Magna Carta. Over time, habeas corpus became the means by which the right to the "law of the land" could be enforced by those who were imprisoned without its benefit. See e.g. Boumediene v. Bush, 553 U.S. 723, 740 (2008) ("[G]radually the writ of habeas corpus became the means by which the promise of Magna Carta was fulfilled.") (citing 9 W. Holdsworth, A History of English Law 112 (1926)). Our founders thought the Great Writ of sufficient importance to provide for it in the pre-Bill of Rights federal constitution. U.S. Constitution, Art. 1, Sec. 9, Cl. 2. Closer to home, since 1784 Article II, Section 91 of the New Hampshire Constitution has provided that:

> The privilege and benefit of the Habeas Corpus, shall be enjoyed in this State, in the most free, easy, cheap, expeditious, and ample manner, and shall not be suspended by the Legislature, except upon most urgent and pressing occasions, and for a time not exceeding three months.

However, habeas corpus is not a substitute for a direct appeal from a criminal conviction or for the statutory remedy of a motion for new trial. See, RSA 526:1. Under older, anachronistic caselaw, habeas corpus could not be used to

challenge a criminal sentence unless the court that issued the sentence lacked jurisdiction. See e.g., State ex rel. Welsh v. Towle, 42 N.H. 540, 541 (1861); Knewel v. Egan, 268 U.S. 442, 445 (1925). Yet, in this context the concept of jurisdiction was sufficiently plastic to include not only subject matter and personal jurisdiction but also the "jurisdictional prerequisite" of adherence to Constitutional mandates. See e.g., Johnson v. Zerbst, 304 U.S. 458, 467 (1938):

> Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. . . . If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus.

The modern cases have done away with the fig leaf of "jurisdictional" error and instead hold that habeas corpus is available to remedy "harmful constitutional error" resulting in a criminal conviction for which the petitioner is in custody. See e.g., State v. Pepin, 159 N.H. 310, 311 (2009); Sleeper v. Warden, New Hampshire State Prison, 155 N.H. 160 (2007); Humphrey v. Cunningham, 133 N.H. 727, 732 (1990); Bonser v. Courtney, 124 N.H. 796, 808 (1984). This is to say that the error in the judicial proceeding that led to the criminal

sentence must be of constitutional moment and the prejudice flowing from that error must be great.

Habeas corpus proceedings are controlled by RSA Chapter 534. The statute does not dictate much in the way of procedure. Pursuant to RSA 534:17 and 21, a hearing on the merits of a habeas petition should be held within three days after service on the defendant. The statute is silent with respect to the procedures to be followed if a claim of illegal confinement cannot be resolved at this threshold. However, it is clear from centuries of practice that habeas proceedings are protean; the court may continue a case for further hearings, evidentiary or otherwise, and may order such responsive pleadings, discovery and briefing as may be necessary.

The Superior Court rules do not apply in habeas cases. Superior Court Rule 1(a) provides that, "These rules govern the procedure in New Hampshire superior court in all suits of a civil nature whether considered cases at law or in equity *with the exception of those actions subject to specific procedures established by statute*." (emphasis added). See Superior Court Administrative Order 2013-08 (exempting habeas proceedings from the responsive pleadings and automatic disclosure requirements of the Superior Court Civil Rules); Brooks v. Zenk, 2017 WL 4464484, at *3, 217-2016-CV-591 (Merrimack County Superior

Court, Sept. 11, 2017) (noting that habeas cases are not controlled by the Superior Court Rules).

B. Mallard's Claim For Habeas Relief Is Barred By His Procedural Default And By Laches

An otherwise valid claim of harmful constitutional error may be defeated in the habeas context by a procedural default in the underlying criminal proceeding. See, e.g., Avery v. Perrin, 131 N.H. 138, 143(1988)("[P]rocedural defaults may preclude later collateral review."); Peppin, 159 N.H. at 311 (discussing procedural default); Sleeper, 155 N.H. 162–63.

The New Hampshire Supreme Court has seemingly adopted for state law purposes the federal "cause" and "prejudice" standard for obtaining collateral relief based on grounds that were not alleged at trial or on direct appeal. See Sleeper, 155 N.H. 163 (citing Bousley v. United States, 523 U.S. 614, 622 (1998) and 28 U.S.C. §2254); State v. Kinne, 161 N.H. 41, 48 (2010); See also Croft v. Coplan, 2001 WL 34013571, at *4 (N.H. Super. May 22, 2001) (Lynn, J); State v. Riendeau, 2001 WL 34013567, at *4 (N.H. Super. Nov. 14, 2001) (Lynn, J.); See generally, Wainwright v. Sykes, 433 U.S. 72 (1977)(establishing the federal "cause" and "prejudice" standard").

Mallard's habeas petition is not barred by this type of procedural default. Mallard cannot be faulted for his failure to brief his ineffective assistance claim on direct appeal. See

State v. Thompson, 161 N.H. 507, 527-528 (2011) ("Strongly disfavor[ing]" adjudication of ineffective assistance claims on direct appeal, even when the error at issue is seemingly apparent in the trial transcript); Peppin, 159 N.H. 313 ("[C]laims of ineffective assistance of counsel based upon alleged trial errors are not procedurally barred by the failure to raise those errors on direct appeal.").

But there is a second type of procedural default at play in this case. Mallard has already fully litigated a counselled motion for a new trial in which he argued that trial counsel was ineffective because of what he said, and failed to say, at page 167 of the transcript of the one day jury trial. In this petition, Mallard argues that trial counsel was ineffective because of what he said at page 108 of the very same transcript. To resolve the earlier motion it was necessary to review the entire transcript to argue the issue of prejudice. Thus, Mallard's post-conviction counsel (who is an experienced criminal defense attorney) necessarily reviewed the very language at issue today. Post-conviction counsel thus chose to do nothing about that language and to instead focus on other issues he found more appealing. Simply put, a habeas petitioner cannot serially litigate a claim of ineffective assistance of counsel by filing a string of post-conviction motions and

petitions, each one drawing on a different line from the same one-day transcript.

This is not a case in which an earlier motion for new trial was filed by trial counsel and, therefore, could not have included a claim relating to trial counsel's effectiveness. This is not a case in which an earlier motion for new trial related to other matters (such, as for example, newly discovered evidence, recantations, juror misconduct, etc.). If that were the case, then perhaps the failure to raise a separate ineffective assistance claim would be understandable. This is not a case in which the earlier motion alleged ineffective assistance, but was limited to matters not apparent from the trial transcript (such as, for example, trial counsel's advice to the accused, or trial counsel's failure to interview exculpatory witnesses, or trial counsel's failure to file a suppression motion, etc.). This is not a case in which the subsequent habeas petition is grounded on either newly discovered facts or newly established, retroactive law. This is not a case in which the petitioner was at a disadvantage in framing the earlier motion. The earlier motion was prepared and litigated by an experienced criminal defense attorney who had the full benefit of the trial court record.

Further, as explained below, this is not a case in which the petitioner has shown that he would have likely been

acquitted but for constitutional error at his trial. If ***that*** degree of prejudice were established, any procedural default could be forgiven.

In the federal system, a so-called "successor writ" must be dismissed unless it is grounded on either (a) a new rule of constitutional law, recognized by the U.S. Supreme Court, that the Court made retroactive to cases on collateral review, or (b) new facts that could not have been discovered earlier through the exercise of due diligence which, if proven, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would find the petitioner guilty. 28 U.S.C. §2244(b).

New Hampshire has not adopted anything close to such Draconian restrictions on successive post-conviction proceedings. RSA Chapter 534 contains no limits at all on successive habeas petitions and the New Hampshire Supreme Court has expressly held that, "a refusal to grant a writ of habeas corpus or a dismissal of one is not res judicata on a subsequent application for such a writ." Gobin v. Hancock, 96 N.H. 450, 451 (1951).

Yet the fact that New Hampshire has not placed itself into a federal style straightjacket, does not mean that the only limit on the serial, piecemeal litigation of ineffective assistance is the doctrine of collateral estoppel. If that were

the case, then only those precise facts and issues that were actually decided with finality would be off limits for future litigation. See, e.g., Stewart v. Bader, 154 N.H. 75, 80 (2006). With collateral estoppel as the only guardrail, the court could end up playing whack-a-mole for years or decades as it considers petition after petition in the same case.

It is also true that New Hampshire has no statute of limitations for habeas petitions. (In contrast, in the federal system there is a miserly one-year period of limitations that, subject to certain exceptions, begins after the conclusion of direct review in state court, and is tolled during the pendency of state post-conviction litigation. 28 U.S.C. 2244(d).) However, the New Hampshire Supreme Court has recognized that a habeas petition may be untimely under something akin to laches. In Roy v. Perrin, 122 N.H. 88, 100 (1982), the petitioner raised a habeas claim relating to his sentencing hearing. The Supreme Court held that his petition was barred with respect to that claim because he unjustifiably remained silent about it for four years.

In this case, Mallard remained silent about his present for nine years. The delay was prejudicial to the court's ability to adjudicate the claim because trial counsel testified to the difficulty in recalling precisely what was going through his mind at the time of trial. Beyond this, while the State has not

alleged any specific threat of trial prejudice, a nine year delay is almost certain to generate an inferior re-trial.

Frankly, this judge cannot predict what precise limits the New Hampshire Supreme Court will place on the ability of a criminal defendant to litigate successive post-conviction claims of ineffective assistance of counsel at trial. This judge optimistically assumes that our Supreme Court will eschew the rigidity of the analogous federal approach. But this judge also believes that New Hampshire has always had sane and flexible procedural restrictions on untimely, successive, post-conviction motions that plow the same ground.

Mallard's habeas petition violates those restrictions and, therefore, is DISMISSED due to Mallard's procedural default and for laches.

C. Ineffective Assistance

Introduction: The court will address the merits of Mallard's ineffective assistance of counsel claim notwithstanding its dismissal of the petition on procedural grounds. The court does this to avoid the need for further proceedings in this court if the New Hampshire Supreme Court reverses this court's procedural ruling.

In General: Under Part 1, Article 15 of the New Hampshire Constitution and the Sixth Amendment to the United States Constitution, "a criminal defendant is entitled to reasonably

competent assistance of counsel." State v. Henderson, 141 N.H. 615, 618 (1997). See also State v. Flynn, 151 N.H. 378, 389 (2004); Strickland v. Washington, 466 U.S. 668 (1984). To successfully assert a claim for ineffective assistance of counsel, a habeas petitioner must show that (a) "his counsel's representation was constitutionally deficient" and (b) "counsel's deficient performance actually prejudiced the outcome of the case." State v. Brown, 160 N.H. 408, 412 (2010). See also State v. McGurk, 157 N.H. 765, 769 (2008); Flynn, 151 N.H. at 389; Strickland, 466 U.S. at 687; Kimmelman v. Morrison, 477 U.S. 365, 382 (1986). A failure to establish either element requires a finding that counsel's performance was not constitutionally defective. See Brown, 160 N.H. at 412; State v. Kepple, 155 N.H. 267, 270 (2007); Sleeper v. Spencer, 510 F.3d 32, 39 (1st Cir. 2007).

Mallard Has Proven That He Received Deficient Representation: With respect to the element of deficient representation, habeas petitioner must prove that his attorney's representation "fell below an objective level of reasonableness." Brown, 160 N.H. at 412. See also State v. Whittaker, 158 N.H. 762, 768 (2009); Strickland, 466 U.S. at 688. This is a demanding standard: "[T]he defendant must show that counsel made such egregious errors that [he or] she failed to function as the counsel the State Constitution guarantees."

State v. Collins, 166 N.H. 210, 212 (2014). See also Thompson, 161 N.H. at 528; Harrington v. Richter, 562 U.S. 86 (2011) (same standard under the federal constitution); Strickland, 466 U.S. at 687.

The standard of reasonable competence does not require defense counsel to get out in front of the profession by advocating claims and positions that have not yet found support in the law. See, e.g., Baez-Gil v. United States, No. 12-CV-266-JL, 2013 WL 2422803, at *4 (D.N.H. June 4, 2013) (Laplante, J) ("The Strickland standard does not require counsel to be clever or inventive, or to advocate a claim not yet announced in the law."); Engle v. Isaac, 456 U.S. 107, 131-34 (1982) (the Constitution "does not insure that defense counsel will recognize and raise every conceivable . . . claim"); United States v. Fusaro, 708 F.2d 17, 26-27 (1st Cir. 1983) (reasonably competent defense counsel may not spot novel claims that have not yet been accepted as law).

Additionally, courts must defer to trial counsel's strategic and tactical decisions, so long as those decisions were rational, even if in hindsight counsel could have made different and better choices. See, Thompson, 161 N.H. at 429 ("We afford a high degree of deference to the strategic decisions of trial counsel, bearing in mind the limitless variety of strategic and tactical decisions that counsel must

make. [citation omitted]. The defendant must overcome the presumption that trial counsel reasonably adopted his trial strategy."); Strickland, 466 U.S. at 690-91 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."); United States v. Valerio, 676 F.3d 237, 246 (1st Cir. 2012) ("It is only where, given the facts known at the time, counsel's choice was so patently unreasonable that no competent attorney would have made it, that the ineffective assistance prong is satisfied."); Janosky v. St. Amand, 594 F.3d 39, 49 (1st Cir. 2010) ("The relevant inquiry is not what defense counsel might ideally have mounted but, rather, whether the choice that he made was within the universe of objectively reasonable choices.").

In this case, Mallard has proven that trial counsel rendered constitutionally deficient representation when he used the phrase "big, menacing black guy" during his cross-examination of Brandy. As noted above, the phrase was made in the context of suggesting that (a) Brandy accused Mallard of using great violence when he punched her in the face, yet (b) the photograph of her face taken the day after the incident was

inconsistent with the use of such violence. Thus, the only function the word "black" had was to amp up the violence of Brandy's account so that it could be better impeached by photograph.

This perpetuated, rather than "blew up" the pernicious and false stereotype that black men are violent and dangerous. It played to the jurors' implicit racial biases. To conjure up this racist myth—which has been responsible for so much injustice for so long—was wrong, wrong, wrong.

That said, the court accepts counsel's testimony that he wanted to "blow up" rather than perpetuate the stereotype. But saying what he said—at the time he said it—and without any further explanation at any point during the trial, was not a rational means of doing this. Cross-examination may be more art than science, but the goal must be something less than Joycean complexity. While a graduate student in literature might write an interesting essay on counsel's ironic invocation of a horrible racial trope, the jury heard only the trope.

Counsel was certainly not rationally responding to anything that had been previously introduced at trial. Brandy's testimony about her relationship with Mallard and his sporadic parenting of Tenasia did not in any way rely on a racial stereotype. Indeed, Brandy's testimony was the opposite of

racial stereotyping; she spoke about her daily experience with one specific individual and made no reference to his race.

To the extent that a concern about racial bias was present, it was there from the get go. The defendant was a large African American male accused of violently and impulsively assaulting a white girlfriend, who was much smaller than him, with whom he shared a child. That counsel opted not to deal with this concern during juror voir dire, or by requesting a special jury instruction, or by intelligently discussing the issue during his opening statement or summation, does not make his representation deficient. Those were strategic choices that—wise or foolish—were rational.

However, the way counsel ended up dealing with the issue of racial bias was irrational and, therefore, violative of the Sixth Amendment/Article 15 standard for effective assistance of counsel.

Mallard Has Failed To Prove The Prejudice Prong Of The Ineffective Assistance Test: In general, a criminal defendant is prejudiced by constitutionally deficient representation "if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Thompson, 161 N.H. at 528 (quoting Strickland, 466 U.S. at 694). In the context of a jury trial, a "reasonable probability is a probability sufficient to undermine confidence

in the outcome." Id. See also Argencourt v. United States, 78 F.3d 14, 16 (1st Cir. 1996). Therefore, a defendant need not prove that he would have been acquitted by his jury; he need only demonstrate that counsel's deficient performance undermines confidence in the jury's verdict. Strickland, 466 U.S. at 694. In making this determination, the court must consider "the cumulative effect of counsel's errors" rather than the effect of each error in isolation. See, e.g., Dugas v. Coplan, 428 F.3d 317, 335 (1st Cir. 2005).

In this case, the court cannot find that counsel's single reference to Mallard's race calls the jury verdict into question. Counsel's misstep—and it was a serious one, worthy of the briefing it received—was limited to a single word. Counsel never expressly argued the stereotype. He did not revisit the issue during his closing argument. Indeed he did not revisit it at all. No witness picked up on it.

Further, trial counsel's overall argument was that Mallard was not violent during the incident (if there even was an incident). No reasonable juror would have understood trial counsel to be suggesting that Mallard acted in conformity with an innate propensity towards violence.

The central witness in the case—Brandy—was clearly not influenced by racial prejudice. She made the choice to have a child with Mallard and she wanted to be together with him. The

only other witness who was even aware of Mallard's race was Brandy's mother and she said nothing to suggest that it was an issue for her.

The case that Mallard's habeas counsel primarily relies on is inapposite to the point of irrelevance. Buck v. Davis, 137 S.Ct. 759 (2017), involved expert testimony at the penalty phase of death penalty case. The governing law allowed the jury to impose death if it found the defendant was likely to commit acts of violence in the future. The defense introduced testimony from an expert who opined that, because the defendant was black, there was an increased statistical probability that he would commit violent acts in the future. Although the expert opined that the defendant was nonetheless not personally likely to do so, the jury sentenced the defendant to death. Not surprisingly, the U.S. Supreme Court found that the prejudice prong of the ineffective assistance test had been met.

The facts of Buck are so extreme, and the holding so limited, that it is difficult to see how Buck provides much guidance to this court in this matter. It is true that Buck held that the poison of racial stereotypes is so strong that even a small dose can prove prejudicial. But Buck did not create a rule of *per se* prejudice whenever a fleeting allusion to a racial stereotype is made at trial.

The constitutional and moral imperative of equal protection requires precisely that. New Hampshire courts cannot permit any proceeding to be infected with racial bias. Yet, at the same time, New Hampshire courts cannot vacate convictions to signal their virtue when the legal grounds to do so are absent.

Because Mallard has not proven the prejudice prong of the ineffective assistance test, his petition is DISMISSED.

IV. Conclusion

The petition for a writ of habeas corpus is DISMISSED and JUDGMENTIS GRANTED TO THE RESPONDENT WARDEN.

July 7, 2021

Andrew R. Schulman,
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 07/07/2021

SUPERIOR COURT

MERRIMACK, SS. JULY TERM, 2021

MARC MALLARD

V.

MICHELLE EDMARK, WARDEN

Docket No. 217-2020-cv-353

MOTION TO RECONSIDER

NOW COMES the Defendant, Marc Mallard, by and through counsel, Donna J. Brown, and, pursuant to N.H. Rules of Criminal Procedure 43(a), hereby requests this Court reconsider its holding that the Petitioner's claim is defaulted based on laches and that he was not prejudiced by his trial counsel's errors. A review of the Court's Order demonstrates that it did not fully consider certain issues raised by the Petitioner in the Writ of Habeas Corpus filed on July 13, 2020.

Introduction

1. In holding that Mr. Mallard's claim was an "untimely, successive, post-conviction motion," this Court did not consider several factors justifying the timing of the petitioner's 2020 habeas petition and the failure of prior post-conviction counsel to address this claim in the previous motion for a new trial. Order at 17. As explained in more detail below, neither Mr. Mallard—a Black man exposed to regular instances of racism in a predominately white state, who was convicted at a time during which many in this state ignored or dismissed racial bias in New Hampshire[1] —nor his trial or post-conviction counsel (or, for that matter, any one player in

[1] *See* Seelye, Katharine Q., *New Hampshire, 94 Percent White, Asks: How Do You Diversify a Whole State*, N.Y. Times, July 27, 2018, https://www.nytimes.com/2018/07/27/us/new-hampshire-white-diversity.html ("Part of the problem, Rogers J. Johnson, president of the Seacoast N.A.A.C.P., told [a conference] group, was 'a lack of recognition as to the seriousness of this problem.' He said that many people in New Hampshire view race as an issue in the South but not in the North.").

the criminal justice system [2]) understood the nature or extent to which implicit racial bias affects decision-making, or whether the effect of such bias could be successfully challenged

2. This Court failed to consider that a verdict obtained by racially biased evidence or considerations is particularly odious as a verdict based on racial bias "risk[s] systemic injury to the administration of justice" and "implicates unique historical, constitutional, and institutional concerns." Pena-Rodriguez v. Colorado. 137 S.Ct. 855, 868 (U.S. 2017). In balancing the prejudice to the State based on the delay in bringing this claim, this Court failed to consider the jurisprudence which holds that the need to address a verdict tainted by racial bias is so important to the administration of justice as to overcome any prejudice to the State in addressing this claim as this time. See Order at 26-27.

Procedural History

3. The Court issued a Final Order dismissing Mr. Mallard's petition for writ of habeas corpus on July 7, 2021. Under N.H. Rules of Criminal Procedure 43(a), a party may file a motion for reconsideration and the party "...shall state, with particular clarity, points of law or fact that the court has overlooked or misapprehended and shall contain such argument in support of the motion as the movant desires to present..." The Court's Order failed to consider certain facts in holding that laches required the dismissal of the Petitioner's Writ of Habeas Corpus. The Court's Order also failed to consider certain facts in holding that the Petitioner was not prejudiced by the constitutional deficiencies of his trial counsel.

A. The Court's order fails to consider the inapplicability of laches in the Petitioner's Writ of Habeas Corpus in light of our new understanding of implicit bias

4. This Court neglected to consider that the defendant's failure to raise this claim prior

[2] *See* Rapping, Jonathan A., *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16:999 LEG. & PUB. POL'Y 999, 1010-11 (2013).

to 2020 is likely due to ignorance as to how racial bias affects the decision making of all of those in the criminal justice system, including defense lawyers.[3] After the May 2020, murder of George Floyd, there was a "call to action for those in the criminal justice system."[4]

5. As part of that call to action, the NH Association of Criminal Defense Attorneys organized trainings related to race and the defense function as well as making multiple public statements concerning their stance on issues relating to race and representation. [5]

6. The Attorney General's office held a *mandatory* implicit bias training for attorneys, investigators, legal staff and victim/witness advocates in the Attorney General's Office, all County Attorney Offices, all state agency attorneys, and all prosecutors, including police prosecutors on November 20, 2020. [6]

7. Even more recently, in June 2021, the New Hampshire Legislature passed SB 96, which includes a provision for a committee to study the inclusion of race and ethnicity data on State-issued identification cards.[7] Courts are also being prompted by civil rights organizations to start tracking and analyzing racial data on decisions in the court system as a way to review potential disparities in sentencing.[8]

8. The court system in New Hampshire has also begun to realize the significance and

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[3] https://www.washingtonpost.com/posteverything/wp/2016/06/07/public-defenders-can-be-biased-too-and-it-hurts-their-non-white-clients/
[4] Time for Action, Criminal Justice, Spring 2021, Hamann, Kristine.
[5] Trainings: September 1, 2020 "Race and Policing," October 16, 2020"Race and Representation." Statements: "Statement from the NHACDL Board on Police Brutality and Systemic Racism in the Criminal Justice System," June 5, 2020; "Statement of NHACDL following State v. Chauvin verdict," April 20, 2021.
[6] https://www.doj.nh.gov/implicit-bias-training/index.htm
[7] http://gencourt.state.nh.us/bill_status/billText.aspx?sy=2021&id=992&txtFormat=pdf&v=current
[8] https://www.yahoo.com/news/civil-rights-racial-justice-organizations-235200132.html?guccounter=1

effects of racial bias; the New Hampshire Supreme Court recently made a historic holding that "race is an appropriate circumstance to consider in conducting the totality of the circumstances seizure analysis." State v. Jones, 172 N.H. 774, 780 (2020). [9]

9. Here, the Court's Final Order states that "this is not a case in which the subsequent habeas petition is grounded on either newly discovered facts or newly established, retroactive law." Order at 24. Petitioner argues that while implicit bias is not the latter, it is substantively akin to the former. As these facts demonstrate, our understanding of the effects of implicit bias *are* new in light of recent occurrences throughout the United States.[10] New Hampshire, like many states, has spent the last two years wrestling with the concept of racism and bias; the effects have been both positive (see Paragraph 8 above) and, to some, frustrating.[11] While the *facts* of Mr. Mallard's case are not new, when examined through the lens of implicit bias as we now understand it, they take on a new meaning. The facts of this case present a unique opportunity for this Court to issue an order consistent with the New Hampshire Supreme Court's recent jurisprudence that reflects the proposition that racial bias, when ferried into a trial via an overt reference to an antiquated racist trope, has no place in New Hampshire's criminal justice system.

10. The Court's Order further states that "New Hampshire courts cannot vacate convictions to signal their virtue when the legal grounds to do so are absent." Order at 35. Virtue signaling is defined as "the action or practice of publicly expressing opinions or

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[9] See Ariana Schechter, "N.H. Supreme Court Issues Historic Decision on Race and Police Encounters." Found at https://www.aclu-nh.org/en/press-releases/nh-supreme-court-issues-historic-decision-race-and-police-encounters

[10] Candice Norwood, "Racial Bias trainings surged after George Floyd's death. Nation, May 25, 2021. Found at https://www.pbs.org/newshour/nation/racial-bias-trainings-surged-after-george-floyds-death-a-year-later-experts-are-still-waiting-for-bold-change.

[11] Tracy Hahn-Burkett, "Denial Doesn't Change the Truth about Racism in New Hampshire." Found at https://newhampshirebulletin.com/2021/04/15/commentary-denial-doesnt-change-the-truth-about-racism-in-new-hampshire/

sentiments intended to demonstrate one's good character or the moral correctness of one's position on a particular issue."[12] In other words, virtue signaling can denote expression without action.

11. Granting the relief requested by Mr. Mallard is not virtue signaling as there is a legitimate and specific instance of racial prejudice within the case that cannot be ignored. Such blatant prejudice should not be denied relief because of a purely procedural matter. This issue has been addressed by the United States Supreme Court; in a recent opinion by Justice Sotomayor in a case involving juror bias, she passionately exhorted the Court that "we should not look away from the magnitude of the potential injustice that *procedural barriers are shielding from judicial review*." Tharpe v. Ford, 139 S. Ct. 911,913 (2019) (emphasis added). Justice Sotomayor's comment is evidence that racial bias demands more deference when overcoming procedural bars. Here, just as in Tharpe, the procedural barrier of laches is shielding the injustice within the case.

12. Because of these factors, and for the following reasons Petitioner argues that laches should not apply in this case where implicit bias is present: (a) Mr. Mallard, as a Black man, has so frequently experienced racism that he was not be aware of the impact of implicit bias on his trial until recently, and (b) he should not be punished for a nine-year "silence" when the recognition of racism within the justice system and the calls for reform have only occurred within the last two years. Reconsidering the dismissal of Mr. Mallard's writ of habeas corpus would present the Court with a chance to not simply castigate racial bias in written orders, but actively participate in its eradication within the justice system in a unique case involving an overt and specific racist trope employed by a Black defendant's own defense counsel.

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[12] *Virtue Signaling Definition,* Oxford English Dictionary (3rd Edition, 2021).

B. The Court's order fails to consider the prejudice imparted to the Petitioner's case by constitutionally defective counsel

13. The Court's Order noted that Petitioner's counsel invoked the "pernicious, false and racist trope conflating male blackness with uncontrolled violence." That this occurred is beyond dispute, and that this was an appeal to juror's biases was "entirely improper." Order at 2. The Court's Order also points out that had this comment been offered by the prosecution, "the remedy would have been a mistrial." Id. The Court therefore recognizes the seriousness of the effect this comment had on the jury. Indeed, the New Hampshire Supreme Court has recognized that "mistrial is the proper remedy only if the evidence or comment complained of is not merely improper, but is so prejudicial that it constitutes an irreparable injustice that cannot be cured by jury instructions." State v. Willey, 163 N.H. 532, 538 (2012). Here, Mr. Mallard's attorney made a racially biased statement that was distinctly prejudicial, the effects of which would be incurable by a jury instruction.

14. As this Court is well-aware, the comment made by Petitioner's attorney does not stand alone; counsel also neglected to request jury racial bias *voir dire*, even though the facts of the case clearly called for such a measure. Additionally, the prosecution presented a line of questioning that covertly pointed the juror's attention to the stereotype of the "bad, Black father" in the context of the case; this line of questioning was not mitigated by a curative instruction. These additional factors, though they may not amount to the requisite prejudice on their own, compounded the prejudice resulting from Mr. Mallard's counsel's use of a racist trope. These factors must be considered cumulatively.

15. Mr. Mallard's case is unique; counsel made a series of poor judgement calls,

compounded by a choice to "conjure up" a "racist myth" that was "wrong, wrong, wrong." Order at 31. These factors combined to create a toxic, biased environment in which the jury was asked to decide Mr. Mallard's fate.

16. Despite the evidence to the contrary, the Court's Order reflects that Petitioner has *not* shown that he was "prejudiced" by the deficiency of his counsel. Order at 35. However, this Court definitively found that Petitioner's representation *was* constitutionally defective because of the introduction of a "pernicious, false and racist trope" that appealed to the explicit or implicit bias of the jurors present. Order at 1. Notably, Strickland, on which the Court relies heavily, does not require that a defendant prove that he would have been *acquitted* by the jury but only "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S.668, 694 (1984). Here, the unprofessional error made by Mr. Mallard's counsel *did* cause a reasonable probability that the result would have been different; in other words, Mr. Mallard's counsel prejudiced the outcome of the case.

17. Recent tragedies like that involving George Floyd have brought new understanding of the power of implicit bias and how it affects the procedural fairness of the judicial process.[13] Reviewing the facts of this case coupled with the knowledge we now possess concerning implicit bias, there is little doubt that Mr. Mallard was prejudiced by the deficiency of his counsel. Here, the Court can rectify a great injustice by deciding that a trial tainted by racial bias causes material prejudice to a defendant's case.

18. Mr. Mallard urges the Court to consider the insidious nature of implicit bias; the

[13] See Kevin S. Burke and Steve Leven, *Procedural Fairness in a Pandemic: It's Still Critical to Public Trust*, 68 Drake L. Rev. 685, 691 (2020).

effects of which are now recognized as far-reaching and distinctly prejudicial. This theory has even been supported by the United States Supreme Court, which referred to racial bias as a "familiar and recurring evil." Tharpe, 139 S.Ct. at 913. In Tharpe, the defendant discovered after his trial that a particular juror had made racist remarks. Justice Sotomayor emphasized that "these racist sentiments, expressed by a juror entrusted with a vote over Tharpe's fate, suggest an appalling risk that racial bias swayed Tharpe's sentencing. *The danger of race determining any criminal punishment is intolerable and endangers public confidence in the law*." Id. (emphasis added). How much more so when the person making the racialized comment is the defendant's *own counsel.*

19. Similarly, in United States v. Smith, a juror stepped forward four years after a trial had taken place to report that the outcome of the trial had been prejudiced by another juror's racial bias. At the trial four years earlier, a juror had made the statement during deliberations "you know he's [the defendant] just a banger from the hood, so he's got to be guilty." 2018 U.S. Dist. LEXIS 69729 *11 (D. Minn. 2018). The reporting juror further attested that the racist statement "caused him to reconsider Smith's [the defendant's] credibility in light of his race and where he lived, rather than through the evidence." Id. at *12-13. When questioning the juror's delay in coming forward with this information, the court found that it was primarily due to embarrassment, as the juror explained that "he did not discuss it during the intervening four years because he "wasn't proud of it." He further stated that he regretted his vote [to convict the defendant] during that four-year period." Id. at *15. The court also noted that though four years had passed "a racially-charged statement would remain in one's mind," despite the fact that the comment was made at the end of jury deliberations and was unrelated to any evidence admitted

at trial. Id. at *39, 43. The court found that there had been a "miscarriage of justice" because of this racially biased remark and accordingly granted a new trial. Id. at *45.

20. Here, the jury was exposed to racially charged sentiments from both the defense counsel and the prosecution; a stereotypical narrative of Mr. Mallard's life was woven for him by his own attorney's reference to him as a "big, menacing Black guy" and the prosecution's invocation of the "bad Black father" trope. If a court has found it reasonable that a juror's single comment during deliberations was enough to "remain in one's mind" for four years, how much more so, when attorneys on both sides are drawing attention to the defendant's race – those comments and impressions would be likely to "remain in one's mind" for many years, and certainly would have been in the juror's minds while deciding Mr. Mallard's fate.

21. Relatedly, research has shown that "implicit bias causes judges and jurors to unknowingly misremember case facts in racially biased ways."[14] And further, that "systematic and implicit stereotyping-driven memory errors affect legal decision making and that the nature of group deliberations appears unlikely to alter this phenomenon." Id. It would follow this logic that Mr. Mallard's jury, exposed to the stereotypes raised during trial, perhaps operating under their own personal biases, would have "unknowingly misremembered" facts of the case. In other words, implicit bias was the driving factor behind Mr. Mallard's sentencing, not the plain facts, or unbiased logic. It is difficult to see how this effect could *not* be considered "prejudicial" under the Strickland test.

22. In the same vein, studies manipulating the race of a defendant accused of a violent

[14] Judge Mark W. Bennett, "Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions," 4 Harv. L. & Pol'y Rev. 149, 157 (Winter, 2010).

crime in hypothetical cases show that "white lay adults" are more likely to convict the Black defendant than the white defendant (90 percent versus 70 percent), *and* that judges, showed implicit bias in cases where the race of the defendant was "suggested" using "subliminal priming techniques and contextual clues."[15] The author's reasoning for this difference is that "judges were on guard when race was mentioned overtly," but when race was "subtly suggested" judges "implicit associations affected their judgment." Id.

23. Despite the span of years between the trial and our current understanding of it, this kind of bias cannot stand. As the Supreme Court has urged, "It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons." Pena-Rodriguez, 137 S.Ct. at 867.

WHEREFORE, for the above-stated reasons, the Petitioner respectfully requests this Honorable Court reconsider its Order dismissing the petition for writ of habeas corpus.

Date: July 15, 2021

Respectfully submitted,

/s/ Donna J. Brown

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[15] Bernice B. Donald, Jeffrey Rachlinski, and Andrew J. Wistrich, "Getting Explicit about Implicit Bias," Vol. 104, No. 3, Fall/Winter 2020-21. Found at: https://judicature.duke.edu/articles/getting-explicit-about-implicit-bias/

CERTIFICATION

I hereby certify that I have sent a copy of this motion to Attorney Wayne Coull of the Merrimack County Attorney's Office on this 15th day of July 2021.

/s/ Donna J. Brown
Donna J. Brown