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

REPLY BRIEF OF APPELLANT MARC MALLARD

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INTRODUCTION

This case represents another chapter in an unfortunately lengthy history of racial bias—even if innocently or unwittingly introduced—in jury trials. Fortunately, courts have routinely refused to tolerate it. For the reasons that follow, Mr. Mallard's claim warrants consideration and compels relief.

ARGUMENT

I. MR. MALLARD HAS PROVIDED A SUFFICIENT RECORD

The lower court issued an extensive Order documenting and summarizing the aspects of the transcripts upon which it relied. *See*, *e.g.*, Lower Court Order, at 7-8, 17. Mr. Mallard has also provided the transcript of the evidentiary hearing on his Petition. Mr. Mallard does not dispute, and the State asserts no basis to dispute, the lower court's characterizations of the contents of the two documents the State claims this Court must review. State's Brief, at 17. In fact, Mr. Mallard will accept as true the representations made by the State and the lower court in the postconviction proceedings with respect to the contents of those documents. Indeed, that would be the result had Mr. Mallard belatedly challenged the accuracy of the lower court's Order. *See*, *e.g.*, *Thompson v. Feniger*, No. 2017–0356, 2017 WL 6997009, at *1 (N.H. Dec. 21, 2007) ("Nor did the plaintiff, in her brief, summarize the complaint, challenge the trial court's characterizations of it or of the arguments in her objection . . . Accordingly, in reviewing the trial court's order granting the motion to dismiss, we will assume that its characterizations of the factual allegations and legal claims articulated in the complaint and the arguments raised in the plaintiff's

objection are accurate."). Although the State has ready access to the subject documents—and the ability to provide its own appendix if it thinks those documents are relevant or that the lower court mischaracterized them—it provides no basis to question the accuracy of the lower court's characterizations of those documents. Accordingly, the State's argument that Mr. Mallard has not provided an adequate record is without merit.[1]

Nevertheless, Mr. Mallard is providing with this Brief the two documents the State has identified. Reply Apx. at 3 and 67. Further, Mr. Mallard will not object to a request by the State to file a surreply addressing the contents of those documents.

II. A LONG LINE OF JURISPRUDENCE ESTABLISHES THAT MR. MALLARD HAS SHOWN PREJUDICE

The State appears to suggest that unless the number of abhorrent references to race or appeals to racial bias reaches some special threshold or a juror comes forward expressing explicit racial bias, overt injections of race into jury trials may be tolerated. *See* State's Brief, at 32-34. This is an extraordinary argument that is not only wrong as a matter of law, but would also sustain the type of injustice that courts have, for so long, sought to eradicate.

Since at least the dawn of the 20th Century, courts throughout the country have acknowledged that we cannot unring the bell with respect to statements expressly invoking racial bias during criminal jury trials. For instance, in *Derrick v. State*, the Texas Court of Criminal Appeals held that

[1] It should also be noted that, even if this Court found it necessary to fact-check the lower court on this issue, dismissing significant constitutional claims involving a racially biased jury trial outright, on a technicality, would only serve to produce greater injustice.

a single question by the prosecutor referencing race— "Did you not pay a fine for the defendant for vagrancy as being a common prostitute when the defendant was dragged out of bed with a negro in Dallas County, Texas?"—was reversible error. 272 S.W. 458, 459 (Tx. Ct. App. 1925). "[W]e do not hesitate to say that it was utterly impossible for the court to destroy the virus that was spread by the very asking of the question," which was "so repulsive to every idea of a fair trial as to cause us to have no hesitancy in holding it reversible error." *Id*. And more than a century ago, in reversing a conviction, the Louisiana Supreme Court recognized that a single, brief reference to race—referring to a witness as a "creole fellow in blood"—"having been once made, the effects thereof cannot be counteracted by any mere cautionary words of sober reason that may be uttered by the judge." *State v. Bessa*, 38 So. 985, 986-87 (La. 1905) (reasoning further, "Here was a jury all white, and two negroes being tried for striking a white man and nearly killing him. The court thinks it knows enough of the situation between the whites and negroes in Louisiana to know that the average white man is prone enough to be prejudiced in such a case").

Many courts have reached similar decisions. *See*, *e.g.*, *Cofield v. State*, 82 S.E. 355, 356 (Ga. Ct. App. 1914) (reversing a conviction because a single reference to race "was so foreign to the issue, so improper, and so prejudicial to the defendant's right to a fair trial as to have required the grant of a mistrial" and its "evil effect" was uncurable); *Reed v. State*, 99 So.2d 455, 456 (Miss. 1958) (reversing a robbery conviction based on a single remark invoking the defendant's race because "[t]he jury had the duty and right to evaluate that testimony and other evidence independently

of the emotional factor of racial prejudice being injected into the case by the State's attorney"); *United States v. Haynes*, 466 F.2d 1260, 1266 (5th Cir. 1972) (reversing weapons-related convictions under plain error review based on a prosecutor's use of a racially-charged phrase—"Burn, baby, burn"—while questioning the defendant, noting that "[t]he impropriety of government counsel's interjection of this racial shibboleth is too obvious to require comment"); *Johnson v. Rose*, 546 F.2d 678, 678-79 (6th Cir. 1976) (granting habeas relief because brief racially-charged questions regarding a Black defendant's relationship with a white woman "so tainted the entire trial that it denied . . . defendants that fundamental fairness which is the essence of due process"); *United States v. Vue*, 13 F.3d 1206, 1212-1213 (8th Cir. 1994) (reversing convictions where evidence was elicited relating the defendants' ethnicity to opium smuggling, which was "magnified" by defense counsel's attempt to "ameliorate the effect," because "the injection of ethnicity into the trial clearly invited the jury to put the [defendants'] racial and cultural background into the balance in determining their guilt"); *Bryant v. State*, 25 S.W.3d 924, 926 (Tx. Ct. App. 2000) (reversing a conviction and finding that a trial court abused its discretion in overruling a motion for mistrial based on a single question by a prosecutor, which included an unnecessary reference to race, that "would have served to aggravate any lingering prejudice against interracial couples among the jurors," refusing to "ignore the clear implication of his remark"); *see also Kornegay v. State*, 329 S.E.2d 601, 605 (Ga. Ct. App. 1985) (reversing convictions based on a finding of prejudice where defense counsel repeated a racial epithet, "even if counsel meant this line of argument as a trial tactic on defendants' behalf," because "[a]t the least, it was offered as an

ingredient for consideration, without any hint of prohibition by the court, and we cannot say the jury excised or rejected it. We cannot say that counsel's unlawful characterizations did not allow the jury to regard defendants as racially inferior persons whose conviction for that reason would therefore be more easily reached"); *United States v. Cruz*, 981 F.2d 659, 664 (2d Cir. 1992) (reversing conviction based on, *inter alia*, "highly improper and prejudicial" expert testimony concerning the ethnic composition of an area in which drug transactions occurred).

As most of the above-cited cases make clear, the injection of race by reference to a racial trope or racial prejudice does not need to be repeated a certain number of times.[2] There is no innocuous characteristic to even a "fleeting" reference to racial bias, as the lower court and the State suggest. "We reject outright the Government's claim that the prosecutor's remarks were 'fleeting' and 'insignifican[t]' . . . Just how much influence the prosecutor's summation exerted upon the jury is, of course, incapable of precise measurement, but its portent for harm is ominous." *United States v. Doe*, 903 F.2d 16, 26-28 (D.C. Cir. 1990). As the United States Supreme Court stated recently, in a case the State ignores but which involved "only two references to race" occasioned by defense counsel's deficient performance: "the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the

[2] And although the State only attempts to distinguish three of the many cases Mr. Mallard cited in which courts reversed convictions due to the injection of racial bias, Mr. Mallard has already provided multiple cases reinforcing the conclusion that even a single, or limited, invocation of racial bias warrants reversal. See Opening Brief, at 38-39 (citing, *e.g.*, *Wallace v. State*, *McFarland v. Smith*).

record. Some toxins can be deadly in small doses." *Buck v. Davis*, 137 S.Ct. 759, 777 (2017).

And, as the above-cited cases demonstrate, courts do not tolerate the injection of such references and they reverse convictions without, as the State appears to suggest, requiring a remarkably self-aware juror to come forward and confirm that their unconscious (or explicit) biases "actually" altered the outcome.[3] State's Brief, at 32 (arguing that Mr. Mallard has not "demonstrate[d] that it *actually did* result in prejudice, *i.e.*, that the result of the trial was affected"). In none of these cases did the courts require juror interviews or otherwise require some "proof" that jurors were "actually" affected by even a single reference to race. Indeed, the *Kornegay* court explicitly rejected that idea: "We cannot presume the absence of unlawful discrimination; the presumption instead, in the circumstances of this case, is that the injection of prejudice infected the verdict." 329 S.E.2d at 605; *see also Wallace v. State*, 768 So.2d 1247, 1250 (Fla. Ct. App. 2000) ("We are not suggesting that the jurors were affected by the prosecutor's appeal to racial prejudice merely because all of them are white. The point is that no jury should be exposed to an argument like the one made in this case.").

"The factor of racial prejudice has been formally and officially squelched in our society after long and arduous struggles. Where it remains informally, it cannot be condoned." *Id*. In short, numerous courts have recognized the extraordinary and substantial risk of juror bias inherent in

[3] In no other ineffectiveness or prosecutorial misconduct case does this Court require, for instance, a juror to come forward and say that certain inadmissible evidence affected the jury's determination. The State is attempting to create a more onerous burden for claims based on racial bias; the caselaw suggests precisely the opposite.

racially-charged statements and, in doing so, have reversed convictions accordingly.

Although the days of express references to racial bias in jury trials are likely largely over,[4] the proposition that such overt references have no place in our courtrooms must, of course, persist. "Formal equality before the law is the bedrock of our legal system, and we are determined that that principle will not be undermined." *Vue*, 13 F.3d at 1213. "It is much too late in the day to treat lightly the risk that racial bias may influence a jury's verdict in a criminal case." *Doe*, 903 F.2d at 21.

III. COURTS HAVE ROUTINELY INTERPRETED PROCEDURAL RULES AND BARS TO PERMIT REVIEW OF IMPERMISSIBLE USES OF RACE. MR. MALLARD'S CLAIM IS NOT PROCEDURALLY BARRED.

The merit to the arguments made in Mr. Mallard's Opening Brief with respect to the procedural issue are unaltered by the State's arguments, which largely assert a "one and done" policy for post-direct appeal claims. *See*, *e.g.*, State's Brief, at 19-20 (inaccurately relying, in part, on law relating to "repeated applications for a writ of habeas corpus," which is not at issue in this case).

Put simply, where jury trials have been infected with racial bias, procedural rules cannot shield such prejudice from review. Opening Brief, at 18-20 (citing cases in which courts bypassed procedural bars to address the merits of racial bias claims); *Buck*, 137 S.Ct. at 778; *Ex Parte Virginia*, 100 U.S. 339, 347 (1879) (considering a procedural barrier to reviewing

[4] *Rose v. Mitchell*, 443 U.S. 545, 559 (1979) ("Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious.").

merits of habeas petitions from district courts but holding that the claims should be reviewed "in favor of liberty"); *Ford v. Georgia*, 498 U.S. 411, 425 (1991) (rejecting application of a procedural bar to a claim involving race-based exclusion of jurors); *Bryant*, 25 S.E.3d at 926 (reversing a conviction based on racial prejudice even though "appellant did not comply with the established procedure for preserving error"); *see also Sanders v. United States*, 373 U.S. 1, 8 (1963) ("Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (barring federal review of habeas claims in light of a procedural default *except* where "failure to consider the claims will result in a fundamental miscarriage of justice").

What these and other cases establish is that procedure should bend toward fairness and justice. After all, "procedural rules . . . are designed to enhance the accuracy of a conviction or sentence," *Montgomery v. Louisiana*, 136 S.Ct. 718, 730 (2016), and address inequity, *Appeal of Laconia*, 150 N.H. 91, 93 (2003).

To the State, it appears principles of fairness, accuracy, and justice are beside the point. Mr. Mallard's trial transcript could be riddled with racial slurs and the State would still argue that some procedural barrier—yet undefined by New Hampshire law in the habeas context—requires this Court to turn a blind eye. That is not what longstanding jurisprudence holds, however. Courts must enhance "public confidence in the judicial process" and avoid "complicit[y] in racial discrimination." *Mitchell v. Genovese*, 974 F.3d 638, 652 (6th Cir. 2020) (*citing Buck*, 137 S.Ct. at 778).

It is necessary, of course, to preserve procedural rules in a way that limits frivolous and repetitive post-conviction motions. But procedural rules are not absolutes; the door must remain slightly ajar (as it has always been) for courts to address the rare cases, like this one, that involve significant issues of injustice. Procedure can bend without breaking. "Denial of the opportunity to seek relief" in Mr. Mallard's case, "undermines respect for the courts and the rule of law." *See id*. Instead of ensuring fairness, application of procedural rules that bar review of claims involving improper racial appeals secures injustice.

CONCLUSION

Mr. Mallard requests not that this Court establish new law, deviate from the *Strickland* standard, or offer novel relief. This case is extremely rare in nature, particularly in the 21st Century, for its inclusion of an overt racially prejudiced remark (along with racially-charged testimony and a concern about racial bias that "was there from the get go," Lower Court Order, at 32). Indeed, this Court may never see another case like it. Mr. Mallard simply seeks recognition that courts have always cared about this issue and have always done something about it; he is merely asking this Court to follow a long line of jurisprudence in refusing to tolerate racial bias in our courtrooms.

Dated: January 26, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that, on this date, copies of this Reply Brief 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: January 26, 2022 */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 Reply Brief complies with New Hampshire Supreme Court Rule 16(11), in that this Brief contains 2,552 words (including footnotes) from the "Introduction" to the "Conclusion" sections of the Reply Brief.

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