No. 24-70002

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMOS WELLS,

Petitioner-Appellant,

v.

BOBBY LUMPKIN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, CASE NO. 4:21-CV-1384

BRIEF FOR *AMICI CURIAE* LAW SCHOOL CENTERS ON RACIAL AND CRIMINAL JUSTICE IN SUPPORT OF PETITIONER-APPELLANT'S MOTION FOR A CERTIFICATE OF APPEALABILITY

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Case No. 24-70002, *Wells v. Lumpkin*

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Fifth Circuit Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici curiae—the Center on Race, Inequality, and the Law at New York University School of Law; the Fred T. Korematsu Center for Law and Equality at Seattle University School of Law; the Center on Race, Law, and Justice at Fordham Law School; the Nathaniel R. Jones Center for Race, Gender, and Social Justice at the University of Cincinnati College of Law; the Gibson-Banks Center for Race and the Law at the University of Maryland Francis King Carey School of Law; the Center on Law, Race & Policy at Duke University School of Law; the Center for Law, Equity and Race at Northeastern University School of Law; the Wilson Center for Science and Justice at Duke University School of Law; the Center for Criminal Justice at Brooklyn Law School; and the Community Equity Lab at New York University School of Law—are law school academic centers created to combat discrimination, provide public education on questions of race and racism, and engage with critical issues in the criminal legal system.[2]

Amici curiae submit this Brief in support of Petitioner-Appellant, Amos Wells, urging the Court to grant Mr. Wells's Motion for a Certificate of

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[1] No counsel for a named party authored this brief in whole or in part, and no counsel for a named party nor a named party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. *See* FED. R. APP. P. 29(a)(4)(E).

[2] *Amici curiae* do not, in this brief or otherwise, represent the official views of any of the educational institutions at which they are housed. For further information about individual *amici*, see the Appendix.

Appealability ("COA") and reverse the District Court's denial of his Petition for a Writ of Habeas Corpus. As set forth in the foregoing Unopposed Motion for Leave to File, *amici* are interested in this case because of the insidious ways in which racially charged junk science infected the jury's deliberations during the sentencing phase of Mr. Wells's capital trial. *Amici* have significant expertise in the roots and consequences of racial bias and a shared goal of preventing such bias from tainting criminal legal system decision-making and outcomes. *Amici* seek to draw on their experience to ensure that federal courts protect the constitutional rights of racial minorities when state courts fail to do so.

SUMMARY OF ARGUMENT

When Amos Wells's attorney argued at sentencing that Mr. Wells, a Black man, was biologically inclined toward violence, he was not just damning his own client with pseudoscience. He was damning his own client with a particularly nefarious brand of pseudoscience, one that reared its ugly head several years ago in *Buck v. Davis*, 580 U.S. 100 (2017). This brand of pseudoscience has manifested in different ways at different times throughout American history, its proponents seizing upon whatever nominally scientific trends were in vogue. But at its core lies a distinct stereotype that has been used to justify disparate punishments in the criminal legal system across the generations: that Black people, and in particular Black men, are innately predisposed to violent criminality.

This stereotype has been pervasive since the United States was founded. It was often invoked by enslavers to describe the parade of horribles that supposedly would ensue were slavery to be abolished. And it was not limited to parts of the country where slavery was most prevalent; Northerners also bemoaned the alleged propensity of free Black people for violence. The end of slavery did not bring an end to this stereotype. On the contrary, it continued to be widely invoked to justify the subjugation of Black Americans during the Jim Crow era. It was even disseminated by self-consciously "modern" scientific writers. As these writers framed the issue, it was a matter of scientific fact that Black people had a proclivity for violence—racial prejudice purportedly did not enter into the analysis.

Over a hundred years later, the stereotype of the Black violent criminal continues to exert a strong hold over the national consciousness. Ample research has shown that, consciously and unconsciously, Americans are influenced in their perceptions and actions by this stereotype, and actors in the criminal legal system are no exception. This includes jurors—such as those at Mr. Wells's sentencing—who, having been presented with racial stereotyping under the guise of objective science, condemned Mr. Wells to death.

As the U.S. Supreme Court has repeatedly made clear, racial prejudice has no legitimate role to play in the judicial process. For a man to die because his own attorney tainted the jury's deliberations with a notorious racial stereotype is

unconscionable. To preserve the integrity of the judicial system, it is of the utmost importance that this Court grant Mr. Wells's Motion for a COA and reverse the District Court's denial of his Petition for a Writ of Habeas Corpus.

ARGUMENT

I. THERE IS A DEEPLY ENTRENCHED STEREOTYPE IN THE UNITED STATES THAT BLACK PEOPLE ARE PREDISPOSED TO VIOLENT CRIMINALITY.

Amos Wells is a Black man who has been condemned to death. His trial counsel, at sentencing, argued that he was biologically predisposed to violence. *See, e.g.*, ROA.13077–78. As Mr. Wells explains in his Brief, this claim is junk science. But it is not merely junk science. Rather, it is sadly familiar junk science inextricably tied to this country's extensive history of categorizing Black people as congenitally violent and criminal and subjecting them to racially disparate sentences in capital and non-capital criminal cases.

Amos Wells is not alone in being harmed by this brand of racist "science." Indeed, his case bears chilling similarities to Duane Buck's, whose death sentence was invalidated by the U.S. Supreme Court in 2017. *See Buck*, 580 U.S. 100. In both of these Texas capital prosecutions, the jury's finding of future dangerousness was rooted, not in what each man did, but in who they are.

In Mr. Buck's case, defense counsel relied upon the purported expert testimony of Dr. Walter Quijano, who testified that the color of Mr. Buck's skin "carried with it an '[i]ncreased probability' of future violence." *Id.* at 121. The

testimony fixed Mr. Buck's actions in an immutable trait, undermining *any* consideration of his capacity for rehabilitation or the role of environmental factors in his behavior. The implication of Dr. Quijano's testimony was that Mr. Buck possessed a propensity for violence that would never wane—after all, he "would always be Black." *Id.*

Here, like in *Buck*, defense counsel introduced "scientific" evidence at sentencing that not only conceded future dangerousness, but compounded the harm by attributing it to a congenital trait—one which called to mind the same abhorrent, centuries-old racial stereotype at issue in *Buck*: "that of black men as 'violence prone.'" *Id.* (quoting *Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality opinion)); *see, e.g.*, ROA.13077–78.

A. This Stereotype Was Pervasive in the Early United States.

This "particularly noxious" stereotype has a history as old as the United States itself. *Buck*, 580 U.S. 121. In his seminal 1785 work, *Notes on the State of Virginia*, Thomas Jefferson opined that "the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowments both of body and mind."[3] Supporters of slavery described Africa as a land "of unmitigated

[3] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 150 (Lilly & Wait 1832) (1785). Although Jefferson acknowledged that "the blacks" were capable of some measure of improvement, he was staunchly committed to the idea that they were innately inferior: nature, not nurture. *Id.* at 148 ("The improvement of the blacks in body and mind, in the first instance of their

savagery, cannibalism, devil worship, and licentiousness."[4] Through enslavement, they argued, a Black person could be transformed from the condition of a "savage brute" to a "semi-civiliz[ed]" state in which—so long as their enslaver maintained firm control—they "would be happy, loyal, and affectionate."[5] Should that firm control weaken, however, disaster would strike, and the Black person "would revert to type as a bloodthirsty savage."[6] Public safety therefore demanded the preservation of slavery, lest white Americans fall victim to "the indiscriminate and unrelenting destruction of [Black people's] warfare, the infernal torments inflicted on their captives, and the horrible practice of cannibalism."[7]

Such characterizations clearly served the self-interests of enslavers, however, they also found expression outside the South. In 1798, for example, New Jersey abolitionists claimed that free Black people were "given to Idleness, Frolicking,

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mixture with the whites, has been observed by every one, and proves that their inferiority is not the effect merely of their condition of life.").

[4] GEORGE M. FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817–1914, at 49 (1971).

[5] *Id.* at 53–54.

[6] *Id.* at 54. This sort of regression, posited Professor Thomas Dew, an influential pro-slavery activist and president of the College of William and Mary, was the consequence of "an inherent and intrinsic cause at work, which will produce its effect under all circumstances." Thomas R. Dew, *Professor Dew on Slavery*, *in* THE PRO-SLAVERY ARGUMENT 289, 429 (1853).

[7] WILLIAM LAWRENCE, LECTURES ON PHYSIOLOGY, ZOOLOGY, AND THE NATURAL HISTORY OF MAN 479 (1819); *see, e.g.*, WILLIAM DRAYTON, THE SOUTH VINDICATED FROM THE TREASON AND FANATICISM OF THE NORTHERN ABOLITIONISTS 230 (1836) (arguing that slavery was necessary to control Black people who, when free, were "the most ignorant, voluptuous, idle, vicious, impoverished, and degraded population of this country").

Drunkenness, and in some few cases to Dishonesty."[8] Their voices were joined by those of other Northerners, with one "leading Pennsylvania abolitionist describ[ing Black Philadelphians] as 'degraded and vicious'" in 1806.[9] Even the anti-slavery New York Manumission Society decried the "depravity of conduct in many of the Persons of Colour in [its] city."[10] As "the gradual emancipation process in the North" progressed, this "image of the free Negro as a social danger came into sharp[] focus."[11]

B. This Stereotype Thrived During the Jim Crow Era and Was Propagated Through Junk Science.

The abolition of slavery did not bring an end to the stereotype of Black people as intrinsically violent and criminal. Instead, this stereotype remained entrenched in the national consciousness and was used to justify segregation, lynchings, racial pogroms, and other staples of the Jim Crow South—as well as racially discriminatory practices across the rest of the country. To defenders of these practices, subjugating Black people was simply a matter of protecting public safety. "[C]riminality . . . emerge[d] . . . as a fundamental measure of black inferiority,"

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[8] TALI MENDELBERG, THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY 32 (2001).

[9] FREDERICKSON, *supra* note 4, at 4.

[10] *Id.*

[11] *Id.* at 5.

ultimately "becom[ing] one of the most commonly cited and longest-lasting justifications for black inequality and mortality in the modern urban world."[12]

As the turn of the century approached, promulgators of the Black violent criminal stereotype increasingly began to cloak their racist ideas in "science." Emblematic of this move was American Statistical Association president Frederick Hoffman's 1896 treatise, *Race Traits and the Tendencies of the American Negro*. Hoffman assured his readers that he was approaching his subject matter free of any racial animus, for "[i]n the field of statistical research, sentiment, prejudice, or the influence of pre-conceived ideas have no place."[13] He then invoked statistical data to argue that "the criminality of [Black people] exceeds that of any other race of any numerical importance in this country," and that "education has utterly failed to raise the negro to a higher level of citizenship, the first duty of which is to obey the laws and respect the lives and property of others."[14]

Many influential scientists attributed the supposedly heightened criminal propensity of Black people to biology. Writing in *The Atlantic Monthly* in 1884, Harvard professor Nathaniel Shaler argued that the most "fundamental" difference between Black and white people lay "in the proportions of the hereditary motives

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[12] KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME AND THE MAKING OF MODERN URBAN AMERICA 20–21 (2010).

[13] Frederick L. Hoffman, *Race Traits and Tendencies of the American Negro*, PUBL'NS AM. ECON. ASS'N, Aug. 1896, at 1, 310.

[14] *Id.* at 228.

and . . . native impulses within their minds."[15] To Shaler, the fact that Black people were incapable of "ris[ing] above savagery" was not a matter of racial prejudice—he assured readers that his views were not "born of a dislike for the Black race"—but an issue of scientific fact.[16] While Shaler, like Jefferson, conceded that a person "of pure African blood" might occasionally have "a nobility denied to the greater part of the race,"[17] he maintained that strong measures were needed to "minimize the danger arising from the presence of this . . . blood" in American society.[18]

Works by Hoffman, Shaler, and similar "scientific" writers found a receptive audience, particularly in early twentieth century eugenicists,[19] "reveal[ing] just how quickly black criminality had captured the nation's imagination."[20] That these claims relied on pseudoscience and fallacious data analysis was no matter. The scientific veneer of this racist discourse appealed to those who liked to think of themselves as rational, unbiased thinkers, and "in the wake of new national crime statistics, . . .

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[15] Nathaniel S. Shaler, *The Negro Problem*, ATL. MONTHLY, Nov. 1884, at 696, 700.

[16] *Id.* at 702.

[17] *Id.* at 707.

[18] *Id.*

[19] *See* IBRAM X. KENDI, STAMPED FROM THE BEGINNING 301–02 (2016) (citing CHARLES BENEDICT DAVENPORT, HEREDITY IN RELATION TO EUGENICS 1 (1911)). This view ultimately found its fullest expression in Nazi Germany. *Id.* at 311, 332.

[20] MUHAMMAD, *supra* note 12, at 81.

southern claims of blacks' criminal nature [could] finally [be] exorcized of the ghost of their Confederate past."[21]

Indeed, in a society keen on categorizing people who committed crimes as either "occasional or habitual" criminals—the latter referring to people believed to be "biologically deficient and morally bankrupt"—couching Black predisposition to criminality in biology was an easy sell.[22] Black people as a whole could be slotted into this category to "justify a range of discriminatory laws, . . . targeting . . . [and] punishing them more harshly than whites," all under the guise of progressive-minded scientific objectivity and social improvement.[23]

C. The "Warrior Gene" Narrative Is an Extension of this Dangerous Stereotype and Mirrors the Racist Junk Science of the Past.

This scientific racism of the late-nineteenth and early-twentieth centuries finds its contemporary expression in the so-called "warrior gene." In the mid-

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[21] *Id.* at 81–82.

[22] KALI N. GROSS, COLORED AMAZONS: CRIME, VIOLENCE, AND BLACK WOMEN IN THE CITY OF BROTHERLY LOVE, 1880–1910, at 133 (2006).

[23] MUHAMMAD, *supra* note 12, at 34; *see also* Jonathan Simon, *"The Criminal Is to Go Free": The Legacy of Eugenic Thought in Contemporary Judicial Realism About American Criminal Justice*, 100 B.U. L. REV. 787, 790–91 (2020) (describing eugenicist "innovations" like "'preventative' policing"). Actuarial risk assessment tools directly linking Blackness with criminality exemplified this paradigm. One influential tool developed in the 1920s by University of Chicago Professor Ernest Burgess, for example, explicitly relied upon race and nationality to predict the likelihood that an incarcerated person would violate their parole. *See* Bernard Harcourt, *Risk as Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237, 238 (2015). Unironically, "being 'American (Colored) was a 'black mark' and being 'American (White)' was a 'white mark.'" *Id.* at 239. These "and other ethnic identifiers" continued to be expressly used in parole decision-making "at least into the 1970s." *Id.* at 238.

1990s—a time rife with racialized rhetoric about "superpredators" threatening civilized society[24]—the monoamine oxidase A ("MAOA") gene began to gain attention following the publication of a study revealing that several generations of violent, intellectually disabled men from a single Dutch family all shared a defective variant of the gene.[25] Several years later, another group of researchers observed a correlation between aggression and MAOA-L, a low-activity variant of the MAOA gene, among individuals who had been mistreated as children.[26] A 2004 article dubbed MAOA-L the "'warrior' gene," and the name stuck.[27]

In recent years, however, the research "linking MAOA to maladaptive or violent behavior [has] . . . been largely superseded by more robust and better-powered approaches to studying the genetic contributions to complex psychiatric

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[24] *See* Carroll Bogert & LynNell Hancock, *Analysis: How the Media Created a 'Superpredator' Myth that Harmed a Generation of Black Youth*, NBC NEWS (Nov. 20, 2020), https://www.nbcnews.com/news/us-news/analysis-how-media-created-superpredator-myth-harmed-generation-black-youth-n1248101.

[25] H.G. Brunner et al., *Abnormal Behavior Associated with a Point Mutation in the Structural Gene for Monoamine Oxidase A*, 262 SCIENCE 578 (1993).

[26] Avshalom Caspi et al., *Role of Genotype in the Cycle of Violence in Maltreated Children*, 297 SCIENCE 851 (2002); *see* John Horgan, *Code Rage: The "Warrior Gene" Makes Me Mad! (Whether I Have It or Not)*, SCI. AM.: CROSS CHECK (Apr. 26, 2011), https://blogs.scientificamerican.com/cross-check/code-rage-the-warrior-gene-makes-me-mad-whether-i-have-it-or-not/.

[27] Ann Gibbons, *Tracking the Evolutionary History of a "Warrior" Gene*, 304 SCIENCE 818 (2004); *see* Ed Yong, *Dangerous DNA: The Truth About the 'Warrior Gene'*, NEW SCIENTIST (Apr. 7, 2010), https://www.newscientist.com/article/mg20627557-300-dangerous-dna-the-truth-about-the-warrior-gene/.

traits."[28] Indeed, "[t]he current scientific consensus is that [the] candidate-gene association studies upon which the MAOA conclusion was made are obsolete."[29] Thus, properly contextualized, "the warrior gene resembles other pseudo-discoveries to emerge from behavioral genetics, like the gay gene, the God gene, the high-IQ gene, the alcoholism gene, the gambling gene and the liberal gene," all of which, including the warrior gene, have collapsed under proper scrutiny.[30]

Nevertheless, perhaps encouraged by a flawed and discredited 2007 article reporting that MAOA-L was nearly twice as prevalent in Black men as it was in white men,[31] white supremacists have seized upon the theory.[32] Consequently, despite its widespread rejection by the scientific community, the "warrior gene" has

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[28] Nita A. Farahany et al., *Genetic Evidence,* MAOA*, and* State v. Yepez, 50 N.M. L. REV. 469, 477 (2020) (emphasis omitted).

[29] *Id.* at 478.

[30] Horgan, *supra* note 26.

[31] Rod Lea & Geoffrey Chambers, *Monoamine Oxidase, Addiction, and the "Warrior" Gene Hypothesis*, 120 N.Z. MED. J., Mar. 2, 2007, at 5; *see* G. Raumati Hook, *"Warrior Genes" and the Disease of Being Māori*, MAI Rev., no. 2, 2009, at 2-3 (noting that the 2007 paper "was reviewed by outside experts in the field of population genetics," who "pointed out several serious flaws in the scientific reasoning" and raised ethical concerns about the authors' methods (citing Tony Merriman & Vicky Cameron, *Risk-Taking: Behind the Warrior Gene Story*, 120 N.Z. MED. J., Mar. 2, 2007, at 59; Peter Crampton & Chris Parkin, Warrior Genes and Risk-Taking Science, 120 N.Z. MED. J., Mar. 2, 2007, at 63)); *see also* Horgan, *supra* note 26 (describing the research as "racial profiling").

[32] Aaron Panofsky et al., *How White Nationalists Mobilize Genetics: From Genetic Ancestry and Human Biodiversity to Counterscience and Metapolitics*, 175 AM. J. PHYSICAL ANTHROPOLOGY 387, 393 (2021).

today become part of a "massive effort to . . . make the old arguments about racial hierarchy in new ways."[33]

Declaring that a Black person is innately criminal because of "monoamine oxidase A" may sound more credible and sophisticated than claiming they are innately criminal because of their "blood," but the claims are fundamentally the same.[34] Moreover, it is doubtful that MAOA-L would ever have gained so much attention were it not occupying a space already carved out in the public imagination by the archaic race "science" of the late-nineteenth and early-twentieth centuries.[35] In fact, scholars have warned that there is a "unique potential for behavioral genetics research, when placed in the context of criminal law, to stigmatize racial and ethnic minority groups."[36] That is exactly what happened to both Mr. Buck and Mr. Wells.

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[33] *Id.* Claims about the "warrior gene" have even made their way to the highest halls of political power. *See, e.g.*, Brandy Zadrozny & Ben Collins, *Activist Who Met with Congressmen About 'DNA' Posted about Black 'Violence Gene'*, NBC NEWS (Jan. 17, 2019), https://www.nbcnews.com/politics/congress/activist-who-met-congressmen-about-dna-posted-about-black-violence-n959931.

[34] *Compare, e.g.*, Constance Holden, *Specter at the Feast*, 269 SCIENCE 33, 35 (1995) (describing a speech in which the then-president of the Behavioral Genetics Association argued that "'some, perhaps much, of the race difference [in crime statistics] … is caused by genetic differences' in things like 'intelligence, lack of empathy, aggressive acting out, and impulsive lack of foresight'" (ellipsis in original)), *with, e.g.*, Shaler, *supra* note 15, at 706 (arguing that mixed-race people are "more inclined to vice and much shorter-lived . . . and are of a weaker mental power").

[35] *See* Karen Rothenberg & Alice Wang, *The Scarlet Gene: Behavioral Genetics, Criminal Law, and Racial and Ethnic Stigma*, 69 L. & CONTEMP. PROBS. 343, 363 (2006) ("A history of discrimination, especially genetic discrimination, lends additional resonance to racial and ethnic stigma because it echoes a message that is deeply ingrained in the social psyche.").

[36] *Id.* at 344. "[S]tudying the heritability of aggression in the African American community," for example "has greater potential for stigma than studying aggression in the Amish community." *Id.*

II. THE STEREOTYPE OF THE BLACK VIOLENT CRIMINAL SHAPES PERCEPTIONS.

In order to effectively operate in the world, human beings categorize everything around them.[37] This process is automatic and unavoidable. Indeed, as pioneering personality psychologist, Gordon Allport, famously noted, "[o]rderly living depends upon it."[38] Furthermore, because "[t]he mind is an automatic association-making machine," it will unconsciously pair the categories it creates with "certain prejudged attributes."[39] These associations—for example, "elderly people" and "forgetful"—are "shaped by the culture around us" and can, over time, become stereotypes.[40] Unfortunately, recognizing that a stereotype may be inaccurate does not automatically reduce its impact.[41] On the contrary, even concerted efforts to rewire implicit associations typically yield only temporary results, at best.[42]

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at 363 (citing R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 859 (2004)).

[37] GORDON W. ALLPORT, THE NATURE OF PREJUDICE 20 (1954).

[38] *Id.*

[39] MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE 78, 89 (2013). "When [the human mind] encounters any information—words, pictures, or even complex ideas—related information automatically comes to mind." *Id.* at 9.

[40] *Id.* at 13, 73, 88, 92, 98.

[41] *Id.* at 105, 109, 149–53.

[42] *Id.* at 152.

For hundreds of years, Americans have been inundated with the narrative that Black people, and in particular, Black men, are predisposed to violent criminality. It has for so long permeated popular culture, news media, and public discourse, and has so frequently borne the imprimatur of scientific rigor, that it is now part of our national consciousness.[43] "[B]ecause these stereotypes are so strong and well[-] rehearsed, they come to influence perception and behavior—even when people do not personally endorse them and are motivated to be racially egalitarian."[44] Thus, today, "there is a pervasive connection between Black men and threat in the minds (and brains) of most social perceivers."[45] It is so automatic and inescapable that "[t]he mere presence of a Black man," without anything more, "can trigger thoughts that he is violent and criminal."[46]

A. Racial Stereotypes Can Influence Decision-Making in the Criminal Legal System.

The criminal legal system offers endless opportunities for these automatic associations to cause harm. Police officers, for example, fatally shoot unarmed Black

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[43] Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. DAVIS L. REV. 745 (2018).

[44] Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 294 (2008).

[45] Sophie Trawalter et al., *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1322, 1322 (2008).

[46] Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004).

men at disproportionate rates, at least in part because "Black faces [simply] look[] more criminal to [them]; the more Black, the more criminal."[47] Indeed, the mere thought of a Black person "can lead people to evaluate ambiguous behavior as aggressive, to miscategorize harmless objects as weapons, or to shoot quickly, and" even, unnecessarily.[48] However, racial stereotyping is by no means limited to police officers. Prosecutors, for instance, are significantly less likely to request substantial assistance downward departures from mandatory minimum sentences for Black men than for comparably cooperative white men.[49] And "judges have been empirically shown to harbor implicit racial biases at substantially similar rates to the general American population"; these "biases predict[] their behavior in determining . . . appropriate sentences and recidivism potential for hypothetical defendants."[50]

Most relevant to this case, conscious and unconscious stereotyping influences jurors. "[J]urors drawn from the general population do not shed their implicit racial bias at the doors of the courtroom."[51] On the contrary, researchers have "demonstrate[d] that even the simplest of racial cues introduced into a trial [can]

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[47] *Id.* at 889; *see* Joshua Correll et al., *Event-Related Potentials and the Decision to Shoot: The Role of Threat Perception and Cognitive Control*, 42 J. EXP'L PSYCHOL. 120 (2006).

[48] Eberhardt et al., *supra* note 46, at 876.

[49] John Tyler Clemons, Note, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 AM. CRIM. L. REV. 689, 697 (2014).

[50] *Id.* at 698 (citing Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1214–15 (2009)).

[51] *Id.*

automatically and unintentionally evoke racial stereotypes, . . . affecting the way jurors evaluate evidence," as well as the extent to which they presume a defendant guilty.[52] Worse still, jurors presented with these cues are often unaware that their decision-making has been compromised.[53]

The argument that a Black man is genetically inclined towards aggression is precisely the kind of racial cue that gives rise to these stereotypical distortions. It is simply not possible to make such an argument without implicating the longstanding trope of the biologically violent and criminal Black man. Consequently, although it was clearly an "unreasonable determination of the facts," 28 U.S.C. § 2254(d)(2), for the State Habeas Court to conclude that the "warrior gene" evidence "was presented to the jury without any racial overtones or implications whatsoever," State's Proposed Mem., Findings of Fact, and Conclusions of Law at 73–74, *Ex parte Wells*, No. C-432-W011509-1405275-A (432nd Jud. Dist. Ct., Tarrant Cnty., Tex., June 30, 2021),[54] this Court need not make such a finding to grant Mr. Wells's

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[52] Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 309–10 (2010); *see, e.g.*, Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 207 (2010) ("First, we found that participants held implicit associations between Black and Guilty. Second, we found that these implicit associations were meaningful—they predicted judgments of the probative value of evidence.").

[53] Levinson & Young, *supra* note 52, at 339.

[54] This quote from the State's proposed findings of fact was adopted by the State Habeas Court. *See Ex parte Wells*, No. C-432-W011509-1405275-A, slip op. at 1 (432nd Jud. Dist. Ct., Tarrant Cnty., Tex., Aug. 10, 2021); *Ex parte Wells*, No. WR-86,184-01, 2021 WL 5917724, at *2 (Tex. Crim. App. Dec. 15, 2021).

Motion for a COA. At bottom, *no explicit mention nor implied reference to race was necessary for this stereotype to infiltrate the jurors' minds and influence their decision*.[55] Thus, the State Habeas Court's determination regarding the *manner* in which the "warrior gene" testimony was presented does not prevent this Court from concluding that the racial stereotype of the Black violent criminal was inevitably called to the jurors' minds by the of its presentation.

B. Expert Endorsement of a Racial Cue Has a Particularly Distorting Influence.

Mr. Wells's jury is especially likely to have been swayed by the "warrior gene" racial cue because it was evoked via expert testimony. Studies have shown that experts exert a distinctively strong cognitive influence on listeners when discussing their area of apparent expertise.[56] Because decision makers with little knowledge of a specialized topic "cannot apply an optimizing decision strategy in the usual sense (i.e., explore the set of possible options, and identify and choose the best one)," they instead tend to "base their decision[s] more on trust" in an expert.[57]

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[55] *See supra* note 52 and accompanying text.

[56] John R.P. French, Jr. & Bertram Raven, *The Bases of Social Power*, *in* STUDIES IN SOCIAL POWER 150, 163–65 (Dorwin Cartwright ed., 1959) (discussing the cognitive effects of "expert power").

[57] Helmut Jungermann & Katrin Fischer, *Using Expertise and Experience for Giving and Taking Advice*, *in* THE ROUTINES OF DECISION MAKING 157, 170 (Tilmann Betsch & Susanne Haberstroh eds., 2005).

This influence is even greater when the decision at issue is one that is especially complex and challenging.[58]

For these reasons, jurors tasked with making decisions involving complicated and technical issues, such as genetics, have a strong incentive to defer to an apparently trustworthy expert. Researchers have found that "juror decision[-]making may be unduly influenced by the *credentials* of an expert rather than by the *quality* of his or her testimony."[59] Jurors may overlook weaknesses in expert testimony because of the appearance of special credibility that an expert witness offers.[60] This dynamic is only strengthened in the context of a capital sentencing trial, where a juror must contend, not only with the technical issues at hand, but also the added burden of knowing that the defendant's life hinges upon their proper understanding of those issues.

In this case, just as in *Buck*, "hard statistical evidence—from an expert" was introduced "to guide an otherwise speculative inquiry." 580 U.S. at 121; *see, e.g.*, ROA.13077–78. This evidence, as discussed above, has been widely rejected by the

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[58] *See* Francesca Gino & Don A. Moore, *Effects of Task Difficulty on Use of Advice*, 20 J. BEHAV. DECISION MAKING 21, 27 (2007) (finding that "[p]eople weigh advice significantly more when the task is difficult than when the task is easy").

[59] Daniel A. Krauss & Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 PSYCHOL. PUB. POL'Y, & L. 267, 273 (2001) (emphasis added).

[60] *See id.* at 305 (finding that "[a]t least in the one capital sentencing case explored in this experiment, mock jurors failed to fully uncover the weaknesses of the less accurate clinical opinion expert testimony that was presented").

scientific community, and automatically called to jurors' minds the stereotype of Black violent criminality. Unfortunately, because the imprimatur of court-approved expertise weighs heavily on jurors tasked with answering the conjectural question of future dangerousness, *see Buck*, 580 U.S. at 121, both this evidence and the stereotype it evoked likely exerted undue influence on Mr. Wells's jury.[61] When jurors hear that a person on trial is "fundamentally different from other citizens or even other inmates" because of an innate characteristic, "the death penalty becomes more palatable, more appropriate, and more necessary."[62] In such cases, "the impact of [the] evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses." *Buck*, 580 U.S. at 122.

CONCLUSION

The ways in which racial bias infected Mr. Wells's capital sentencing proceeding are plain. Mr. Wells's trial counsel worked to persuade the jury that Mr. Wells, a Black man, was biologically predisposed to aggressive behavior. This argument necessarily called to jurors' minds the deep-seated racial stereotype of

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[61] Despite much academic criticism, "poorly grounded conclusions of violence risk at capital sentencing continue to be advanced by attorney argument and, more disturbingly, supported by mental health testimony." Mark D. Cunningham & Thomas J. Reidy, *Don't Confuse Me with the Facts: Common Errors in Violence Risk Assessment at Capital Sentencing*, 26 CRIM. JUST. & BEHAV. 20, 22 (1999).

[62] *Id.*

Black violent criminality, polluting their deliberations. Furthermore, Mr. Wells's counsel attempted to bolster his theory with scientific expert testimony that jurors were motivated to accept at face-value because of the ostensibly complex genetic science involved and the high-stakes nature of their decision. Having been fed a warmed-over meal of the same scientific racism long ago propagated by Frederick Hoffman, Nathaniel Shaler, and their brethren, the jury condemned Amos Wells to death.

In its decision invalidating Duane Buck's death sentence under the Sixth Amendment, the U.S. Supreme Court articulated precisely why Mr. Wells's sentencing was also so abhorrent: "Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle." *Id*. at 123. Like the death sentence initially imposed upon Mr. Buck, the death sentence currently facing Mr. Wells is impermissibly steeped in a centuries-old racial stereotype as a result of testimony supposedly offered on his behalf.

As the *Buck* Court stated unequivocally, racial bias of any kind is "especially pernicious in 'the administration of justice,'" and cannot be permitted to infect a decision of life-or-death significance. *Id.* at 124 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)); *see also Turner*, 476 U.S. at 35 ("The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the

complete finality of the death sentence."). Letting race influence the imposition of a particular "criminal sanction 'poisons public confidence' in the judicial process." *Id.* (quoting *Davis v. Ayala*, 576 U.S. 257, 285 (2015)). This injures "not just the defendant, but 'the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.'" *Id.* (quoting *Rose*, 443 U.S. at 556).

It is crucial that this Court heed the lesson of *Buck*. The legitimacy of our judicial system requires that Mr. Wells be afforded the opportunity to be judged on an individualized basis—for what he did, not for who he is. The Court can and must grant Mr. Wells's Motion for a COA and reverse the District Court's denial of his Petition for a Writ of Habeas Corpus.

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Respectfully Submitted,

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APPENDIX

The Center on Race, Inequality, and the Law ("CRIL") at New York University School of Law works to expose and dismantle structures and institutions that have been infected by racial bias and plagued by inequity. CRIL fulfills its mission through public education, research, advocacy, organizing, and litigation.

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center") at Seattle University School of Law works to advance justice through research, advocacy, and education. Inspired by the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the incarceration of 120,000 Japanese Americans, the Korematsu Center aims to promote social justice for all.

The Center on Race, Law, and Justice ("CRLJ") at Fordham Law School works to generate innovative responses to racial inequality and discrimination. CRLJ prioritizes law, data, and social science-informed interventions capable of creating concrete change in communities, institutions, and public policy in a number of areas in the domestic and global contexts. CRLJ maximizes real-world impact through cross-disciplinary collaborations, comparative analyses, and systemic interventions that push the boundaries of traditional approaches to race and inequality.

The Nathaniel R. Jones Center for Race, Gender, and Social Justice ("Jones Center") at the University of Cincinnati College of Law is an academic, educational, and legal advocacy institution that cultivates scholars, leaders, and activists committed to social change. Among other issues, the Jones Center's scholarship focuses on combatting racial injustice, state violence, and economic inequality, with a particular emphasis on the impacts of law and policy on people living at the intersections of multiple marginalized identities.

The Gibson-Banks Center for Race and the Law ("Gibson-Banks Center") at the University of Maryland Francis King Carey School of Law works collaboratively to reimagine and transform institutions and systems of racial and intersectional inequality, marginalization, and oppression. Named after Larry Gibson and Taunya Banks, the first Black man and Black woman, respectively, to be tenured at Maryland Carey Law, the Gibson-Banks Center works to address inequality and advance justice through education and engagement, advocacy, and research in a variety of focus areas, including the criminal legal system.

The Center on Law, Race & Policy ("CLRP") at Duke University School of Law is a nonpartisan, nonprofit university-based center that supports research, public engagement, teaching, and programs related to race, law, and policy. CLRP has an ongoing commitment to fostering racial equity by promoting material change in law and public policy, focusing on education, knowledge production, and

community engagement. Accordingly, the Center has a keen interest in challenging discriminatory practices affecting and having disparate impact on people of color.

The Center for Law, Equity and Race ("CLEAR") at Northeastern University School of Law was established in 2021 to address challenges from the role of the law and legal systems in creating and perpetuating racial inequalities and disparities. CLEAR addresses the challenge by providing interdisciplinary, hands-on advocacy, learning opportunities, research, legislative engagement, and community outreach.

The Wilson Center for Science and Justice ("Wilson Center") at Duke Law brings together faculty and students at Duke University in law, medicine, public policy, and arts and sciences to pursue research, policy, and education to improve criminal justice outcomes. Its work is non-partisan and evidence-informed. The Wilson Center is devoted to identifying better ways for law enforcement to collect eyewitness, confession, forensic, and other evidence, and to enhancing the ability of judges, lawyers, and jurors to understand evidence presented in court.

The Center for Criminal Justice ("CCJ") at Brooklyn Law School builds on the existing strengths of the school's nationally recognized criminal law faculty and places the Law School at the center of critical conversations, education, and sharing of expertise on the most vital issues and topics in criminal justice law and

policy today. CCJ serves as a forum for scholarship and discussion in areas of criminal justice that have real-world impact in New York City and across the nation.

The Community Equity Lab at New York University School of Law works to challenge entrenched racial inequality in the United States. It promotes models of community equity through policy advocacy, public education, and strategic litigation.

CERTIFICATE OF COMPLIANCE

The foregoing complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because it contains 6356 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f). This document also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because, with the exception of footnotes, it has been prepared in 14-point Times New Roman font, a proportionally spaced typeface, using Microsoft Word. Pursuant to 5th Cir. R. 32.1, the footnotes have been prepared in 12-point Times New Roman font.

Dated: May 23, 2024

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