IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

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102 EM 2018
103 EM 2018

JERMONT COX,
Appellant

V.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

_____

KEVIN MARINELLI,
Appellant

V.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

BRIEF OF SOCIAL SCIENTISTS AND RESEARCHERS CATHERINE M. GROSSO, JULES EPSTEIN, ET AL., AS AMICI CURIAE

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STATEMENT OF THE *AMICUS CURIAE*

The undersigned *amici*, identified by name and affiliation in Exhibit "A," are academics and researchers in statistics, social science, criminal justice, and criminal law including capital case representation. Their joint interest as scientists, academics, lawyers and otherwise is to ensure that criminal justice issues, and in particular issues pertaining to capital punishment, are informed by accurate, reliable empirical research.

Pursuant to Pa. R. App. P. 531(b)(2), *amici* state that no other person or entity has paid for the preparation of, or authored, this brief in whole or in part. *Amici* certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

STATEMENT OF THE CASE

Amici Curiae adopts and incorporates herein the Statement of the Case as presented by Appellant/Petitioner.

SUMMARY OF ARGUMENT

Social science research provides compelling evidence that race continues to play a significant role in the administration of capital punishment. In particular, as *amici* detail below, studies in Pennsylvania confirm a recurring problem in three areas critical to capital case litigation: the decision by prosecuting authorities to charge the case as capital; the decision by those same authorities as to which prospective jurors to peremptorily strike; and the choice of punishment made by the selected jurors. In addition to the Pennsylvania data, research conducted across the country has repeatedly found similar problems. In study after study, in jurisdiction after jurisdiction, and after controlling for the most important legally relevant factors, race remains a practically and statistically significant factor, an arbitrary "thumb on the scale."

Race discrimination compromises fairness and imposes arbitrariness. Race of the defendant or the victim constitutes an arbitrary basis for imposing a death sentence because it does not relate to the culpability of the defendant or the nature of the crime. The United States Supreme Court has said that an arbitrary system is cruel and unconstitutional. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). For these reasons, *amici* bring to the attention of this Court the findings of social science research, which demonstrate the powerful impact race has played and continues to

play in capital punishment in the Commonwealth of Pennsylvania and elsewhere. *Amici* urge the Court to assess the concerns raised in Appellants' King's Bench petition with this research in mind.

ARGUMENT

I. COMPELLING SOCIAL SCIENCE STUDIES CONFIRM THAT, WITHIN AND ACROSS THE CAPITAL CASE LITIGATION PROCESS, FROM CASE SELECTION THROUGH PENALTY DETERMINATION, RACE REMAINS A "THUMB ON THE SCALES."

Courts are often asked to grapple with issues of race and racism, and their potential deleterious impact on the capital punishment process. *See, e.g.*, *Foster v. Chatman*, 136 S. Ct. 1737, 1742 (2016); *McCleskey v. Kemp*, 481 U.S. 279, 292 (1978). The concern is not new; the impact of race has been an issue in the law of capital punishment since the United States Supreme Court began hearing state criminal case appeals. *See Powell v. Alabama*, 287 U.S. 45, 50 (1932) (noting that one of the claims raised was that "they were tried before juries from which qualified members of their own race were systematically excluded"); *Norris v. Alabama*, 294 U.S. 587 (1935) (reversing the second conviction and death sentence of one of the *Powell v. Alabama* defendants because blacks were systematically excluded from his jury venire).

In *McCleskey*, the U.S. Supreme Court confirmed that the Eighth Amendment is violated where "the death penalty [is] so irrationally imposed that any particular death sentence could be presumed excessive [and] . . . there was no basis for determining in any particular case whether the penalty was proportionate to the crime." *Id*. (citing *Furman v. Georgia*, 408 U.S. 238 (1972)). The Court went on to

affirm that where the "capital punishment system operates in an arbitrary and capricious manner," a constitutional violation has occurred. *McCleskey*, 481 U.S. at 306. While the Court concluded in *McCleskey* that the proof of arbitrariness arising from race was inadequate, forty years of continued study since then have demonstrated that the system is indeed arbitrary.

As this Court considers the current King's Bench petition, *amici* write to provide compelling data showing that in this Commonwealth race still plays a distorting role across the capital case process in at least three critical stages: the charging decision, the selection of jurors, and the determination of punishment. These results are consistent with research findings in similar studies nationally, heightening confidence in the validity of the overall findings. This continuing, pervasive, and substantial impact of race, as demonstrated in the Pennsylvania and nationwide research, raises concerns that the "capital punishment system operates in an arbitrary and capricious manner." *Id.*

A. Race and Capital Cases in Pennsylvania

An extensive body of academic literature has developed over the last forty years evaluating the influence of race in the administration of the death penalty. The research focuses on the degree to which the race of the defendant or the victim influences discretionary decisions of prosecutors or jurors. Research has also

analyzed the extent to which prosecutors rely on race during jury selection. Studies specific to Pennsylvania have found that race impacts multiple stages of the capital process in the Commonwealth.

1. Capital Charging and Sentencing Decisions

The first Pennsylvania study on the role of race in capital charging and sentencing found that African-Americans in Philadelphia receive the death penalty at a substantially higher rate than similarly situated defendants who committed death-eligible murders but were of other races. This well-controlled study of 600 death-eligible cases and 384 penalty trial cases in Philadelphia County during the period 1983-1993 documented significant black-defendant effects after controlling for the culpability of the defendant and the nature of the crimes. Specifically, the research found that the odds that a black defendant would receive a death sentence were 3.1 times that of a similarly situated non-black defendant ($p < .03$). David C. Baldus, et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 Cornell L. Rev. 1638 (1998).

Baldus and colleagues later updated this research to include cases through 2000 for litigation in 2003. Professor Baldus testified at a post-trial evidentiary hearing in Philadelphia that he had reviewed 338 capital cases in which

Philadelphia juries weighed aggravating factors against mitigating factors, and that a statistical analysis that controlled for the culpability of the defendants and the crime indicated that "there is substantial, consistent and statistically significant discrimination against African-American defendants." *Commonwealth v. Arrington*, 86 A.3d 831, 854-55 (Pa. 2014) *cert. denied sub nom. Arrington v. Pennsylvania*, 135 S. Ct. 479 (2014). Overall, Baldus determined that African-American defendants are sentenced to death at a much higher rate than other defendants, a disparity which persists after controls are introduced for legitimate case characteristics.

2. Exercise of Peremptory Challenges in Capital Jury Selection

Over thirty years ago, the U.S. Supreme Court made clear that racial discrimination in jury selection violates the guarantee of Equal Protection because "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Batson v. Kentucky*, 476 U.S. 79, 87 (1986); *Commonwealth v. Hardcastle*, 546 A.2d 1101 (1988). In the Eighth Amendment setting, purposeful exclusion is found in the recurring and systemic exclusion of African-American venire persons who are otherwise death-qualified and fit to serve as capital jurors. As a starting point, this exclusion "undermine[s] public confidence." *Id.* In addition, however, the pattern of

exclusion compounds the race-effect in jury weighing and penalty determination, increasing the arbitrary and capricious nature of the death penalty punishment system.

David Baldus and colleagues analyzed 317 capital murder cases tried by jury in Philadelphia between 1981 and 1997. The research evaluated each side's decision to strike or accept a qualified venire member. The research found that prosecutors struck on average 51% of the black jurors they had the opportunity to strike, compared to only 26% of comparable non-black jurors. This practice produces statistically significant racial disparities in 75% of all capital juries. While defense strikes exhibited a nearly identical pattern in reverse, even after researchers controlled for potentially relevant non-racial characteristics of the jurors, including age, occupation, education, and responses to certain questions asked in voir dire, prosecutorial strikes more efficiently limited the number of black jurors because there are fewer black potential jurors. David C. Baldus et. al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3, 121-23 (2001).

3. Pennsylvania and the Kramer Report

Amici have familiarized themselves with the October 2017 report[1] by Professor Kramer and colleagues, "Capital Punishment Decisions in Pennsylvania: 2000-2010, Implications for Racial, Ethnic and Other Disparate Impacts." The report did not replicate Baldus' findings with respect to race of defendant but confirmed, with respect to penalty trial decisions alone, that the race of the victim effected jurors' penalty decisions—a sentence of death was more likely if the victim was white

The data are compelling. For example, Kramer reports that death sentences were returned at penalty trials in 45% (31/69) of cases with white victims and 20% (15/74) of cases with Black victims. Table 21, at 79. These white victim disparities, detailed further in Table 25, are ones that Kramer found "highly statistically significant" and constituting "clear evidence of race-of-victim effects." Kramer report. Id. at 97-98.

This finding alone is strong confirmation that, as is posited throughout this Brief, race remains a significant unconstitutional factor in capital jury decision-

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[1] John Kramer et al., *Capital Punishment Decisions in Pennsylvania: 2000-2010: Implications for Racial, Ethnic and Other Disparate Impacts*, Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness, v (2017).

making in Pennsylvania. *Amici* have been advised that further review of the data by Kramer and his colleagues now show that white victim cases result in the imposition of a sentence of death at over twice the rate where the victim is black.[2]

B. Race and Capital Cases Nationally

Broadening the scope of the social science research to a national context, researchers have found similar racial effects in the capital process in other states, again at the charging, juror selection, and sentencing stages. This kind of evidence has been important to other state courts addressing these issues. *Washington v. Gregory*, 192 Wash. 2d 1, 5, 427 P.3d 621, 627 (2018) (invalidating the state death

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[2] *Amici* add that the inability to reproduce the Baldus findings regarding defendant-race and the imposition of death sentences may be a result of limitations in the study design. For example, the study included the universe of penalty trial cases, *i.e,.*, a single decision point which can be studied and measured accurately regarding the impact of victim race. However, that limited universe of cases did not allow the researcher to address the cumulative effects of omitting prosecutorial charging decisions or the ways in which the universe of candidate cases is compromised. *See also* David C. Baldus et al., *Empirical Studies of Race and Geographic Discrimination in the Administration of the Death Penalty: A Primer on the Key Methodological Issues*, in THE FUTURE OF AMERICA'S DEATH PENALTY 153, 161 (Charles S. Lanier et al., eds. 2009) ("If resource limitations require a sample of homicide cases rather than the entire universe, it is important to avoid the temptation of limiting the study to first-degree murder cases.").

penalty because empirical research demonstrated that is imposed in an arbitrary and racially biased manner").

1. Capital Charging and Sentencing Decisions

In 1990, the United States General Accounting Office undertook a systematic review of the empirical studies of capital charging and sentencing systems conducted in the 1970s and early 1980s. U.S. Gen. Acct. Off., GAO/GGD-90-57, *Death Penalty Sentencing: Research Indicates Pattern Of Racial Disparities* (1990). The review sought to evaluate the extent to which the existing literature supported claims that black defendants are treated more punitively than similarly situated non-black defendants, and claims that defendants whose victims are white are treated more punitively than similarly situated defendants whose victims are black. Neither the race of the defendant nor the race of the victim is relevant to the verdict or the penalty. The review reported that in "82% of the studies . . . [defendants] who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks." GAO reported this finding "remarkably consistent across data sets, states, data collection methods, and analytic techniques." *Id*. at 5-6.

Catherine Grosso (a co-author of this Brief) and colleagues identified and reviewed 36 empirical studies between the publication of the GAO Study and 2013, and concluded that the "post-1990 results are consistent with those summarized in

the GAO report." An overwhelming majority of the studies found that defendants whose victims are white are treated more punitively than similarly situated defendants whose victims are black. Catherine M. Grosso et al., *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, *in America's Experiment with Capital Punishment* 525 (James Acker, Charles S. Lanier, & Robert Bohm eds., 2014).

Studies with varying levels of detail and methodological sophistication have been conducted in numerous states.[3] While not universal, the overwhelming

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[3] In alphabetical order by state: Peg Bortner & Andy Hall, *Arizona First-Degree Murder Cases Summary of 1995-1999 Indictments: Data Set II Research Report to Arizona Capital Case Commission* (2002); Stephen P. Klein & John E. Rolph, *Relationship of Offender and Victim Race to Death Penalty Sentences in California*, 32 Jurimetrics J. 33 (1991); Glenn Pierce & Michael Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990–1999*, 46 Santa Clara L. Rev. 1 (2005–2006); Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 Cardozo L. Rev. 1227 (2012) (California); Scott Anderson, *As Flies to Wanton Boys: Death-Eligible Defendants in Georgia and Colorado*, 40 Trial Talk 9-16 (1991); Stephanie Hindson et al., *Race, Gender, Religion and Death Sentencing in Colorado, 1980–1999*, 77 U. Colo. L. Rev. 549 (2006); Meg Beardsley, et al. *Disquieting Discretion: Race, Geography & The Colorado Death Penalty in the First Decade of the Twenty-First Century*, 92 DEN. U. L. REV. 431 (2015) (Colorado); John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. Empiric. L. Stud. 637 (2014); David C. Baldus et al., *Equal Justice And The Death Penalty: A Legal and Empirical Analysis* (1990) (Georgia); Glenn L. Pierce & Michael L. Radelet, *Race, Region and Death Sentencing in Illinois, 1988-1997, Report of the Governor's Commission on Capital Punishment*, tech. app. I, Report A (April 14, 2002); Thomas J. Keil & Gennardo F. Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976-1991*, 20 Am. J. Crim. Just. 17 (1995); Raymond Paternoster & Robert Brame, *Reassessing Race Disparities in Maryland Capital*

majority of these studies indicate that the odds of receiving the death penalty are enhanced if the victim is white as opposed to black or another race. *See also* Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics:* Furman, McCleskey, *and A Single County Case Study*, 34 Cardozo L. Rev. 1227, 1246-1251

Cases, 46 Criminology 971 (2008); Glenn Pierce & Michael Radelet, *Death Sentencing in East Baton Rouge Parish, 1990–2008*, 71 La. L. Rev. 647 (2010–2011) (Louisiana); David Keys & Teresa Guess, *The Prevailing Injustices in the Application of the Death Penalty in Missouri (1978–1996)*, 32 Soc. Just. 151 (2005); Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 Ariz. L. Rev. 305 (2009) (Missouri); Michael Lenza et al., *The Prevailing Injustices in the Application of the Death Penalty in Missouri (1978-1996)*, 32 Soc. Just. 151 (2005); David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973–1999),* 81 Neb. L. Rev. 486 (2002); *State v. Marshall*, 613 A.2d 1059 (N.J. 1992); David S. Baime, *Report to the Supreme Court Systemic Proportionality Review Project 2000-2001 Term* (June 1, 2001) (New Jersey); Leigh Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 Rutg. L. Rev. 27 (1988); Barbara O'Brien, et al., *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990-2009*, 94 N.C. L. Rev. 1997 (2016); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 Cornell L. Rev. 1638 (1998) (Pennsylvania); Raymond Paternoster & Ann Marie Kazyaka, *The Administration of the Death Penalty in South Carolina: Experiences Over the First Few Years*, 39 S.C. L. Rev. 245 (1988); Michael Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina,* 58 S.C. L. Rev. 161 (2006); John M. Scheb II et al., *Race, Prosecutors, and Juries: The Death Penalty in Tennessee*, 29 Just. Sys. J. 338 (2008); Deon Brock et al., *Arbitrariness in the Imposition of Death Sentences in Texas: An Analysis of Four Counties by Offense Seriousness, Race of Victim, and Race of Offender*, 28 Am. J. of Crim. L. 43 (2000); Scott Phillips, *Continued Racial Disparities in the Capital of Capital Punishment: The Rosenthal Era*, 50 Hous. L. Rev. 131 (2012) (Texas); Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 Hous. L. Rev. 807 (2008) (Texas); and Joint Legislative Audit and Review Commission of the Virginia General Assembly, Review of Virginia's System of Capital Punishment (2002).

(2013) (reviewing the literature on race and capital punishment).

This is true across decades of study. The Baldus study of the administration of capital punishment in Georgia from 1973-1980 (litigated in *McCleskey v. Kemp*, 481 U.S. 279 (1987)) found that, after adjusting for the presence or absence of legitimate case characteristics, including the level of violence and the defendant's prior record, defendants whose victims were white faced odds of receiving a death sentence that were on average 4.3 times higher than similarly situated defendants whose victims were black. David C. Baldus et al., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* 319-320 (1990).

Studies in a limited number of jurisdictions have also found disparities based on the race of the defendant alone. The Baldus study in Philadelphia, described above, is one such example. Baldus, Grosso, Woodworth, and Newell also found this effect in a 2011 study of the administration of the death penalty in the United States Armed Forces. After analyzing all potentially death-eligible military prosecutions from 1984 to 2005, the authors found evidence of racial discrimination, defined as "the more punitive treatment of cases involving black and minority defendants compared to the treatment of similarly situated white-defendant cases, regardless of the race of the victim involved in the case." David C. Baldus et al., *Racial Discrimination in the Administration of the Death Penalty: The Experience*

of the United States Armed Forces (1984–2005), 101 J. Crim. L. & Criminology 1227 (2011).

Professor Eberhardt and colleagues used the data from the Baldus study of charging and sentencing in Philadelphia to show that among defendants convicted of murdering a white victim, defendants whose appearance was more stereotypically black (*e.g.*, darker skinned, with a broader nose and thicker lips) were sentenced more harshly and, in particular, were more likely to be sentenced to death than if their features were less stereotypically black. This finding held even after the researchers controlled for the many non-racial factors that might account for the results. Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 Psycholog. Sci. 383 (2006) (using data from David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia*, 83 Cornell L. Rev. 1638 (1998)).

Subsequent charging and sentencing studies find lower odds but consistent and statistically significant disparities. A recent study of capital charging and sentencing decisions in North Carolina between 1990 and 2009 used a very similar methodology to that in the Baldus study of Georgia discussed above and reported

similar findings. The primary model analyzing death sentencing among all death-eligible cases showed that—even after controlling for multiple measures of culpability—cases with at least one white victim face odds of receiving a death sentence that were 2.17 times the odds faced by all other cases. The evidence further suggested that this effect arises primarily in charging decisions, where prosecutors systematically disregard cases in which black defendants kill black victims. The odds of a black defendant/black victim case advancing to a capital trial are 2.6 times lower than the odds faced by all other cases. The study found that white victim cases and black defendant/black victim cases pulled strongly in opposite directions. In both instances, race—a factor unrelated to culpability and repugnant to the criminal justice system—plays a significant role. Barbara O'Brien et al., *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990-2009,* 94 N.C. L. REV. 1997 (2016).

Recent research has contributed to our understanding of possible ways that race infects capital decision-making. One field of research suggests that the human mind may unwittingly inject bias into the seemingly neutral concepts and processes of death penalty administration. This area of research is less well developed, but new research suggests that jury-eligible citizens harbor implicit racial stereotypes about blacks and whites generally, as well as implicit associations between race and the

value of life. This research also found that death-qualified jurors harbored stronger racial biases than excluded jurors. Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. Rev. 513 (2014).

Race may also infect capital decision-making prior to the selection of jurors, as early as the arrest of a suspect by police. A forthcoming study examines homicides reported in the FBI's Supplementary Homicide Reports between 1976 and 2009, finding that homicides with white victims were more likely to be cleared by the arrest of a suspect than homicides with minority victims. The study also finds that counties with large minority populations have lower clearance rates than predominantly white counties. The authors conclude that while race-of-victim disparities at this early stage "may potentially be mitigated by equalizing the distribution of police resources across regions . . . racial disparities that exceed those predicted by the unequal distribution of resources raise serious doubts as to whether the death penalty can be equitably applied." Jeffrey Fagan & Amanda Geller, *Police, Race, and the Production of Capital Homicides*, 24 Berkeley J. Crim. L. (forthcoming 2019).

2. Exercise of Peremptory Challenges in Capital Jury Selection

Like Baldus and his colleagues in Pennsylvania, researchers across the

country have consistently found racial disparities in strike decisions.[4] An early study by Billy Turner and colleagues examined strikes by both the prosecution and defense in 121 criminal trials in one Louisiana parish from 1976 to 1981. The authors compared the percentage of struck jurors who were black (44%) to the percent of the population in the Louisiana parish that was black at the time of the study (18%), and inferred from this 26-point disparity that jury selection was not race neutral. Billy M. Turner et al., *Race and Peremptory Challenges During Voir Dire: Do Prosecution and Defense Agree?*, 14 J. Crim. Just. 61 (1986).

The pattern has continued over time and to the present. In thirteen non-capital felony trials in North Carolina, prosecutors used 60% of their strikes against black jurors, who constituted only 32% of the venire. In comparison, defense attorneys used 87% of their strikes against white jurors, who made up 68% of the venire. Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 Law & Hum. Behav. 695 (1999).

John Clark and colleagues analyzed jury selection in 28 civil and criminal trials in two adjacent counties in a southeastern state. Across the eleven criminal

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[4] *See* Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials,* 97 Iowa L. Rev. 1531 (2012) (collecting studies discussed herein).

trials they examined, race was a statistically significant predictor of both prosecution and defense strikes. John Clark et al., *Five Factor Model Personality Traits, Jury Selection, and Case Outcomes in Criminal and Civil Cases*, 34 Crim. Just. & Behav. 641 (2007).

Similar results were reported in at least four other county-level studies: Richard Bourke & Joe Hingston, *Black Strikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Jefferson Parish District Attorney's Office* 5 (2003) (Louisiana) (noting that in both six- and twelve-person juries, prosecutors struck "black prospective jurors at more than three times the rate" they struck their white counterparts); Ursula Noye, *Black Strikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Caddo Parish District Attorney's Office* (2015) (Louisiana) (finding that prosecutors chose to strike black prospective jurors at three times the rate of non-blacks, a finding which is statistically significant); David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3, 10 (2001) (discussed above); Steve McGonigle et al., *A Process of Juror Elimination: Dallas Prosecutors Say They Don't Discriminate, but Analysis Shows They Are More Likely to Reject Black Jurors*, Dall. Morning News, Aug. 21, 2005, at 2005 WLNR 24658335 (finding that prosecutors "excluded eligible blacks from juries at more than twice the rate they

rejected eligible whites" even after the researchers controlled for non-racial characteristics of the jurors).[5]

Grosso and O'Brien examined the influence of race on the exercise of peremptory challenges in capital trials of all defendants on death row in North Carolina as of July 1, 2010. They found substantial disparities regarding which potential jurors prosecutors struck. Over the twenty-year period under review, prosecutors struck eligible black venire members at about 2.5 times the rate they struck eligible venire members who were not black. These disparities remained consistent over time and across the state, and did not diminish when researchers controlled for race-neutral factors. Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post*-Batson *North Carolina Capital Trials*, 97 Iowa L. Rev. 1531 (2012).

The finding of race as a factor in jury strikes is robust. In several of these

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[5] The *Dallas Morning News* published the results of this research in a set of feature stories between Sunday, August 21 and Tuesday, August 23. *See About the Series*, Dall. Morning News, Aug. 21, 2005, at 19A, 2005 WLNR 24658085 (describing the series); *How the Analysis Was Done*, Dall. Morning News, Aug. 21, 2005, at 9A, 2005 WLNR 2457224 (reporting study design and methodology). The Dallas Morning News published a similar study on jury selection in Dallas County in 1986. *See* Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection*, Dall. Morning News, Mar. 9, 1986, at 1986 WLNR 1683009. This study analyzed the impact of peremptory strikes on jury composition in 10 randomly selected felony jury trials in 1983 and 1984 and found blacks largely excluded from jury service. *Id.*

studies disparities persisted even where researchers included race-neutral factors about jurors that might bear on a party's decision to strike. Inclusion of race-neutral factors allows the researcher to rule out the possible explanation that racial disparities in strike rates arise because race is associated with other race-neutral factors that drive strike decisions. If members of one race are disproportionately less supportive of the death penalty, for example, prosecutors' disproportionately high strike rates against that group may be driven by group members' views rather than their race. Controlling for various race-neutral factors that may bear on the decision to strike allows the researcher to rule out at least some alternative explanations of racial disparities.

A recent 2018 study of trials held from 1992 to 2017 in Mississippi's Fifth Circuit Court District found racial disparities in strike decisions, even after controlling for race-neutral factors. A team of data experts and reporters at APM Reports analyzed juror responses in 13 capital trials for about 65 different variables, including the race of the juror, whether the juror was accused of a crime, and whether the juror was hesitant about the death penalty. These researchers then built a logistic regression model to determine how individual variables affected the likelihood that a juror was struck. The report determined that a black juror in a capital murder trial was 8.65 times more likely to be struck than a white juror. "Being black was the

greatest predictor of being struck in capital trials," the authors wrote, "even more than expressing hesitation about imposing the death penalty." Will Craft, *Peremptory Strikes in Mississippi's Fifth Circuit Court District*, APM Reports (2018), https://www.apmreports.org/files/peremptory_strike_methodology.pdf.

An additional body of research has examined the role of race in jury selection in an experimental setting. This type of research is limited by the artificial nature of the decision-making. Its strength, however, is that it allows researchers greater control over the variables in question in order to identify causal factors. These studies also offer substantial confirming evidence that race plays a significant role in jury selection, especially when evaluated in conjunction with the research from actual trials reviewed above.

An excellent example of this work was conducted by Michael Norton and Samuel Sommers. The researchers presented three groups of study participants—college students, law students, and trial attorneys—with the facts of a criminal case involving a black defendant. The researchers told participants to assume the role of the prosecutor, and that they had only one peremptory strike left to use in deciding which of two prospective jurors to strike. The prospective jurors each had qualities that pretesting suggested would be troubling to prosecutors: one was a journalist who had investigated police misconduct and the other had indicated skepticism about

statistics relevant to forensic evidence that the state would offer. Participants were randomly assigned to one of two conditions: one in which the first prospective juror was black and the second white, and another in which the race of the prospective jurors was reversed.

Participants challenged the black juror more often than the white juror, regardless of whether the juror was presented as the journalist or the statistics skeptic. Yet, when asked to explain why they struck the juror they did, the study participants almost never mentioned race; participants tended to offer the first juror's experience writing about police misconduct when striking him, and cited the second juror's skepticism about statistics when striking him. Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 Law & Hum. Behav. 261 (2007).

CONCLUSION

After several dozen studies and more than four decades of research, there is compelling proof that race influences decisionmakers responsible for administering the capital punishment system. Race influences charging and prosecuting decisions, jury selection, and sentencing, as demonstrated through both Pennsylvania and

national studies. This racial influence compromises fairness, creates arbitrariness, and undermines confidence in the criminal justice system. The consistency and power of these findings raise the fundamental question of whether the death penalty is imposed arbitrarily, *i.e.*, without the "reasonable consistency" required by the Constitution's commands. *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).[††]

[††] The authors of this Amicus Brief gratefully acknowledge the research and drafting assistance provided by law student Marissa McGarry, 3L Harvard Law School.

Respectfully submitted,

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IN THE SUPREME COURT OF PENNSYLVANIA

Jermont Cox, Petitioner	:	102 EM 2018
v.	:	
Commonwealth of Pennsylvania, Respondent	:	

PROOF OF SERVICE

I hereby certify that this 21st day of February, 2019, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

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IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

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