IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Nos. 102 EM 2018 & 103 EM 2018

JERMONT COX and KEVIN MARINELLI,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.

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INTERESTS OF THE AMICUS CURIAE[1]

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights law organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights.

LDF has long been concerned about the persistent and pernicious influence of race in the criminal justice system, including the administration of capital punishment. For example, LDF served as lead counsel in two important cases before the United States Supreme Court that dealt squarely with racial discrimination in capital punishment: *McCleskey v. Kemp*, 481 U.S. 279 (1987), which held that the compelling and uncontroverted statistical evidence of racial discrimination in the administration of Georgia's capital punishment was beyond federal constitutional remedy unless a specific person acted with racially discriminatory purpose in Mr. McCleskey's case; and *Buck v. Davis*, 137 S. Ct. 759 (2017), which invalidated Mr. Buck's death sentence based on defense counsel's ineffectiveness in introducing racially discriminatory testimony at trial, causing the jury to have possibly sentenced Mr. Buck to death "in part because of his race." *Id.* at 778.

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[1] Pursuant to 210 Pa. Code R. 531, amicus curiae states that no one other than amicus curiae, its members, or counsel (i) paid in whole or in part for the preparation of the amicus curiae brief or (ii) authored in whole or in part the amicus curiae brief.

LDF has also challenged racial bias in jury selection, in *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972), and *Ham v. South Carolina*, 409 U.S. 524 (1973); pioneered the affirmative use of civil actions to end jury discrimination in *Carter v. Jury Commission of Greene County*, 396 U.S. 320 (1970), and *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as amicus curiae in cases involving the improper reliance on race in sentencing in *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), and the racially discriminatory use of peremptory challenges in *Johnson v. California*, 543 U.S. 499 (2005), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Georgia v. McCollum*, 505 U.S. 42 (1992), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), *Batson v. Kentucky*, 476 U.S. 79 (1986), and *Flowers v. Mississippi*, No. 17-9572 (Dec. 27, 2018) (pending before the Supreme Court of the United States).

The circumstances of Jermont Cox and Kevin Marinelli's capital cases directly implicate grave concerns about the pervasive racial discrimination in Pennsylvania's capital punishment system. Given LDF's longstanding advocacy on issues pertaining to race and the death penalty, it believes that its experience and expertise will aid the Court in the adjudication of these cases.

INTRODUCTION

Over thirty years ago, LDF represented Warren McCleskey before the United States Supreme Court, presenting an exhaustive statistical analysis by Professor David Baldus that demonstrated how race impermissibly influenced capital charging decisions and the imposition of death sentences in the State of Georgia. *McCleskey,* 481 U.S. 279. The strength of Professor Baldus's analysis was undisputed. Nevertheless, in a 5-4 decision, the *McCleskey* Court infamously permitted these known racial disparities to persist in the administration of Georgia's death penalty, leaving behind a pernicious stain on the integrity of the criminal justice system.

By no means was—or is—Georgia unique in operating a capital punishment scheme riddled with systemic racial discrimination. Throughout the country, the death penalty has been associated with a legacy of devaluing and dehumanizing Black people. The Commonwealth of Pennsylvania is not immune to this persistent anti-Black discrimination in the administration of capital punishment. Indeed, study after study has demonstrated the taint of racial bias in the selection of capital juries, capital charging decisions, and death sentencing throughout the Commonwealth.

This Court is not bound to *McCleskey* under Commonwealth law and now has the opportunity to hold, once and for all, that racial discrimination can play no role in Pennsylvania's capital punishment system under the Pennsylvania Constitution. This Court should not hesitate to do so. We therefore urge this Court to rule that the

death penalty is unconstitutional, as a "cruel punishment" under Article I, Section 13 of the Pennsylvania Constitution, because stark racial disparities evince pervasive racial bias in the administration of capital punishment in Pennsylvania.

ARGUMENT

I. Racial Inequities Pervade the Administration of Pennsylvania's Capital Punishment.

The death penalty in Pennsylvania is riddled with serious concerns of racial bias. Despite comprising only 12 percent of the statewide population,[2] Black people account for 54 percent of Pennsylvania's death row.[3] "Pennsylvania is second only to Louisiana in the percentage of African Americans on death row."[4]

This stark racial disparity in Pennsylvania's death row is not a product of mere chance. Capital juries, which are tasked with the heavy responsibility of choosing life or death for the defendant, do not sufficiently represent Pennsylvania's population, as prospective Black jurors are routinely and systematically excluded from jury service. The predominantly white prosecutors across the Commonwealth impermissibly allow race to infect their capital charging decisions. And juries—which are insufficiently diverse due to discriminatory peremptory challenges and

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[2] U.S. Census Bureau, *Quick Facts: Pennsylvania* (July 1, 2018), https://www.census.gov/quickfacts/pa.

[3] NAACP Legal Def. & Educ. Fund, Inc., *Death Row U.S.A.*, at 58-59 (2018), https://www.naacpldf.org/wp-content/uploads/DRUSASummer2018.pdf.

[4] *Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System*, at 200 (2003) ("Race and Gender Final Report"), http://www.pa-interbranchcommission.com/_pdfs/FinalReport.pdf.

thus less able to make accurate assessments of the evidence at trial—are influenced by the entrenched racial stereotypes that pervade our society. Multiple studies establish that racial discrimination leaves an indelible stain on death sentences throughout Pennsylvania, thereby undermining the legitimacy of the entire criminal justice system and judicial process within the Commonwealth.

A. Prosecutors Persistently Exercise Their Peremptory Challenges Against Black Prospective Jurors in a Discriminatory Manner in Capital Cases.

Jury service is a "cornerstone of the American justice system" and a marker of citizenship dating back to the Magna Carta.[5] It is a jury's "commonsense judgment" that "hedge[s] against the overzealous or mistaken prosecutor" or "perhaps overconditioned or biased response of a judge." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (citation omitted). Racial discrimination in jury selection, therefore, has no place in the criminal justice system. It not only "denies . . . the prospective juror . . . the equal protection of the law guaranteed by the fourteenth amendment," *Commonwealth v. Jackson*, 562 A.2d 338, 342-43 (Pa. Super. 1989), but also "calls into question the reliability of the sentencing determination," *Commonwealth v. Basemore*, 744 A.2d 717, 734 (Pa. 2000). *See also Batson*, 476 U.S. at 87 ("The harm from discriminatory jury selection extends beyond that

[5] Unified Judicial System of Pa., *Jury Duty*, http://www.pacourts.us/learn/jury-duty (last visited Feb. 19, 2019).

inflicted on the defendant and the excluded juror to touch the entire community.").

Indeed, due to the critical importance of juries to the legitimacy and integrity of the judicial process, the "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Id.* at 79, 85. The United States Supreme Court, therefore, has made "unceasing efforts to eradicate racial discrimination" from the jury selection process. *Id.* at 85; *see also Miller-El v. Dretke*, 545 U.S. 231, 240 (2005); *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008). This Court has recognized the Supreme Court's insistence on this issue. *See Basemore*, 744 A.2d at 733-34 (recognizing that *Batson* violations can never be harmless and thus necessitate new trial).

Racial discrimination in jury selection is particularly egregious in capital cases given the finality and gravity of a death sentence, and the corresponding need for heightened reliability in the imposition of such sentences. *See Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion) ("[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice."); *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985) ("Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an 'awesome responsibility' has allowed this Court to view sentencer discretion as consistent with—and indeed as indispensable to—the Eighth Amendment's 'need for reliability in the determination that death is the appropriate

punishment in a specific case.'") (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion)).

Nevertheless, the discriminatory use of peremptory challenges persists in Pennsylvania.[6] Professor David Baldus, who conducted the widely respected and uncontroverted statistical analysis in *McCleskey*, led an exhaustive examination of 317 capital murder cases tried by jury in Philadelphia between 1981 and 1997 ("2001 Baldus Study"), which the United States Supreme Court cited in a 2005 concurring opinion as evidence of the persistence of widespread discrimination in peremptory challenges.[7] The 2001 Baldus Study found that "venire member race was a major determinant in the use of peremptories by both prosecutors and defense counsel, with the prosecution disproportionately striking black venire members and defense

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[6] *See, e.g., Johnson v. Love*, 40 F.3d 658, 667-69 (3d Cir. 1994) (finding that York County prosecutor failed to provide race neutral reason for striking Black juror); *Holloway v. Horn*, 355 F.3d 707 (3d Cir. 2004) (granting writ of habeas corpus where Philadelphia County prosecutor exercised eleven of twelve peremptory strikes against Black potential jurors); *Lark v. Beard*, No. 01 Civ. 1252, 2012 WL 3089356, at *1 (E.D. Pa. July 30, 2012) ("the prosecutor engaged in purposeful discrimination in striking African-American veniremen [at a rate of 87%] from [petitioner's] jury."), *aff'd sub. nom. Lark v. Sec'y Pa. Dep't of Corrs.*, 566 F. App'x. 161 (3d Cir. 2014); *Commonwealth v. Edwards*, 177 A.3d 963, 975 (Pa. Super. Ct. 2018) (granting new trial where Philadelphia prosecutor used seven of eight peremptory strikes to remove Black people from venire); *see also* David C. Baldus et al., *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges: The Impact and Promise of the* Miller-El *Line of Cases as Reflected in the Experience of One Philadelphia Capital Case*, 97 Iowa L. Rev. 1425 (2012) ("2012 Baldus Study").

[7] 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 (2001), cited in *Miller-El*, 545 U.S. at 268-69 (Breyer, J., concurring); *see also* Race and Gender Final Report, *supra* note 4, at 78-80, 205-07.

counsel disproportionately striking non-blacks."[8] Defense counsels' strikes, however, do not offset prosecutors' strikes because the prosecutors' targeted group is disproportionately smaller, making it easier to effectively exclude African-Americans from the jury.[9] This study also concluded that United States Supreme Court precedent prohibiting the discriminatory use of peremptory challenges "have had, at best, only a marginal impact on the peremptory strike strategies of each side," possibly due to a fear that a *Batson* challenge would lead to a reciprocal challenge from opposing counsel or a lack of faith that a *Batson* challenge will be sustained by the courts despite solid evidence in support.[10] The resulting racial makeup of the jury has a profound effect on capital sentencing: "predominantly black juries (ones with five or more blacks) were less likely to impose death sentences than were juries with four or fewer black jurors."[11]

Philadelphia, which produces a disproportionately high number of death sentences relative to other Pennsylvania counties,[12] has a well-documented history

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[8] 2001 Baldus Study, *supra* note 7, at 121-22 (footnote omitted). "As a result of th[e] disparity in the sizes of their respective target groups, the Commonwealth was more effective than defense counsel in depleting target group members from the pools of death eligible cases that each side considered." *Id.* at 125 (footnote omitted).

[9] *Id.* at 125-26.

[10] *Id.* at 123 (footnote omitted).

[11] *Id.* at 124 (footnote omitted).

[12] *See* Joint State Gov't Comm'n, *Capital Punishment in Pennsylvania: The Report of the Task Force and Advisory Committee*, at 67 (June 2018), (noting that "Philadelphia County accounted for 106 of the 223 inmates on death row") ("JSGC Report"), https://bit.ly/2KkkqDa.

of racial discrimination in jury selection.[13] Shortly after the United States Supreme Court's decision in *Batson*, Jack McMahon, a Philadelphia County Assistant District Attorney, led an officewide training on how to discriminate against jurors based on race, in which he stated: "The blacks from the low-income areas are less likely to convict . . . . There's a resentment for law enforcement. There's a resentment for authority. And as a result, you don't want those people on your jury."[14] During the training, ADA McMahon implied that prosecutors could be fired if they did not employ the instructed discriminatory practices.[15] Further, ADA McMahon offered instructions on how to thwart a *Batson* challenge, explaining that "the best way to avoid any problems . . . is to protect yourself."[16] Specifically, he recommended questioning "black jurors 'at length' and record[ing] contemporaneous documentation of 'legitimate' reasons as each black is struck," to enable the "prosecutor who is challenged later in trial" to "present nonracial reasons for the

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[13] *See* 2001 Baldus Study, *supra* note 7, at 41-42 ("In the Philadelphia system, prosecutors appear to have been guided for many years by a jury selection model . . . outlined in a 1986 video training tape for Philadelphia prosecutors" which identifies "[t]he worst jurors" as "blacks from the low-income areas.").

[14] *Former Philadelphia prosecutor Accused of Racial Bias*, N.Y. Times (Apr. 3, 1997), https://www.nytimes.com/1997/04/03/us/former-philadelphia-prosecutor-accused-of-racial-bias.html; *see also* L. Stuart Ditzen, Lina Loyd, & Mark Fazlollah, *Avoid Poor Black Jurors, McMahon Said*, Phila. Inquirer, Apr. 1, 1997, at A1 ("[McMahon] told the rookie prosecutors that their mission was not to 'get a competent, fair and impartial jury,' but to win.").

[15] *Commonwealth v. Rivera*, No. 730 CAP, 2018 WL 6817080, at *14 (Pa. Dec. 28, 2018).

[16] 2012 Baldus Study, *supra* note 6, at 1449.

strikes against blacks.'"[17] Many courts expressly found *Batson* violations by ADA McMahon and the Philadelphia District Attorney's Office following the release of a video of this training.[18]

State-commissioned studies have recognized the persistent and unconstitutional exclusion of Black venire panelists from jury service in Pennsylvania capital cases, but the problem continues.[19] Given the inability to eradicate racial discrimination in the selection of capital juries, this Court must take immediate action to prevent capital defendants from being convicted and sentenced to death under the shadow of racial bias.

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[17] *Id.*

[18] *See* Robert Brett Dunham, *Pennsylvania Capital Case Summary of Grounds for Reversal (Philadelphia)* at 25-26, 35, Death Penalty Info. Ctr. (July 30, 2015) (citing *Commonwealth v. Basemore*, Nos. 1762-1765 (Phila. Ct. Com. Pl. Dec. 19, 2001); *Commonwealth v. Hackett*, Nos. 3396-3400 (Phila. Ct. Com. Pl. Oct. 5, 2005); *Commonwealth v. Spence*, Nos. 3391-3395 (Phila. Ct. Com. Pl. Mar. 22, 2004)), https://deathpenaltyinfo.org/files/pdf/PhiladelphiaCapitalCaseReversals2015.pdf; *see also* Robert Moran, *New trial ordered in 1986 slaying*, Phila. Inquirer, Dec. 20, 2001, at B1 ("McMahon used 19 peremptory challenges to eliminate potential jurors [from Mr. Basemore's trial], and all were black."); David B. Caruso, *Court overturns death sentence*, Morning Call, Jan. 24, 2004, at A17 (describing federal court's decision in *Holloway*, 355 F.3d at 722, which overturned death sentence where pattern of peremptory strikes "was certainly strong enough to suggest an intention of keeping blacks off the jury"); *Commonwealth v. Wilson*, Nos. 3267, 3270, 3271 (Phila. Ct. Com. Pl. Jan. 17, 2003); *see also* 2012 Baldus Study, *supra* note 6, at 1454 (identifying 15 capital cases and 39 homicide cases that ADA McMahon prosecuted).

[19] *See* JSGC Report, *supra* note 12; Race and Gender Final Report, *supra* note 4. *See also* Pa. Gov. Tom Wolf, Death Penalty Moratorium Declaration at 3 (Feb. 13, 2015) (noting that "racial bias in juror selection" is a contributing factor to Pennsylvania's broken death penalty system) ("Wolf Declaration"), https://www.scribd.com/doc/255668788/Death-Penalty-Moratorium-Declaration (last visited Feb. 19, 2019).

B. Race Impermissibly Influences Prosecutors' Decisions to Seek the Death Penalty.

As dictated by this Court, the prosecutor's "duty is to seek justice, not just convictions." *Commonwealth v. Gilman*, 368 A.2d 253, 257 (Pa. 1977). Thus, despite the adversarial nature of criminal proceedings, "it is fundamental that [the prosecutor's] obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public." *Id.* (citations and internal quotations omitted). It is only with that grave responsibility that a "prosecutor is vested with considerable discretion in deciding who will or will not be charged and what they will be charged with." *Commonwealth v. McNeal*, 120 A.3d 313, 326 (Pa. Super. Ct. 2015) (quoting *Commonwealth v. Amundsen*, 611 A.2d 309, 311 (Pa. Super. Ct. 1992)).

Yet, this "broad power[] of discretion" has given prosecutors "the power to treat similarly situated 'death-eligible' defendants differently because of . . . their race."[20] Professor Baldus' exhaustive 1998 study of all death-eligible cases from

[20] 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, 1643 & n.4 (1998); *but see* JSGC Report, *supra* note 12, at 88 (discussing alternative research that did "not find an overall pattern of disparity to the disadvantage of Black or Hispanic defendants in the decision to seek the death penalty, the decision to retract the death penalty once filed, or the decision to impose the death penalty") (citing John Kramer et al., *Capital Punishment Decisions in Pennsylvania: 2000-2010*, at 117 (2017), http://justicecenter.psu.edu/research/projects/files/the-administration-of-the-death-penalty-in-pennsylvania-pdf). Unlike the Baldus study, however, the Kramer study did not include all death-eligible cases in its analysis, but instead

1983 to 1993 Philadelphia ("1998 Baldus Study")[21]—which controlled for defendant culpability to isolate race effects—found that the race of the defendant is "a substantial influence in the Philadelphia capital charging [] system, particularly in jury penalty trials."[22] The study also found that "prosecutors were less likely to waive the death penalty unilaterally in black-defendant cases."[23] Likewise, when announcing a moratorium on Pennsylvania's death penalty in 2015, Governor Tom Wolf noted that, "[w]hile [the] data is incomplete, there are strong indications that a person is more likely to be charged with a capital offense and sentenced to death if he is . . . of a minority racial group, and particularly where the victim of the crime was Caucasian."[24] The fact that "almost all district attorneys are white" in Pennsylvania may explain at least some of these disparities because "the racial disparity between the prosecutors and the death row population" relative to "the similarity between the prosecutor and the victim populations" invites what some characterize as "unconscious bias" to "enter the system."[25]

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was limited to cases resulting in a first-degree murder conviction. JSGC Report, *supra* note 12, at 4.

[21] This study of Philadelphia death-eligible cases is relevant to considerations of the constitutionality of the death penalty in Pennsylvania given that nearly one-half of Pennsylvania's death row was convicted and sentenced in Philadelphia. *See* JSGC Report, *supra* note 12, at 67.

[22] 1998 Baldus Study, *supra* note 20, at 1714.

[23] *Id.* at 1716 n. 147.

[24] Wolf Declaration, *supra* note 19.

[25] JSGC Report, *supra* note 12, at 74 (footnote omitted). "A statistical analysis of the respective populations shows that the racial and ethnic composition of the prosecutorial staff is much closer to the victim population." *Id.*

"Society wins not only when the guilty are convicted but when criminal trials are fair; our system of administration of justice suffers when an accused is treated unfairly." *Brady v. Maryland,* 373 U.S. 83, 87 (1963). And the "character, quality and efficiency of the [entire criminal justice] system is shaped in great measure by the manner in which the prosecutor exercises his [or] her broad discretionary powers, especially in capital cases, where the prosecutor has enormous discretion in deciding whether or not to seek the death penalty."[26] In Pennsylvania, however, race has impermissibly influenced the discretion of prosecutors—who are overwhelmingly white—in deciding whether to seek the death penalty against Black defendants, thus providing additional grounds for this Court to find capital punishment, as applied in Pennsylvania, unconstitutional under Commonwealth law.

C. Juries Disproportionately Impose Death Sentences on Black Defendants and for Crimes Against White Victims.

The pernicious influence of race extends to capital jury deliberations in cases involving Black defendants, especially due to the widespread and systematic exclusion of Black prospective jurors, as discussed above. *See supra* Section I.A. Several studies have shown that white jurors are likely to treat Black defendants

[26] ABA, *Evaluating Fairness and Accuracy in State Death Penalty Systems, The Pennsylvania Death Penalty Assessment Report,* at xii (Oct. 2007), https://eeas.europa.eu/sites/eeas/files/the_pennsylvania_death_penalty_assessment_report.pdf.

more harshly than white defendants, especially in cases involving white victims.[27] Often, white jurors are unable to recognize commonalities between themselves and Black defendants, which can create an "empathetic divide," rendering them unable to consider mitigating evidence and more likely to impose a death sentence.[28] Furthermore, "the range of discretion entrusted to a jury in a capital sentencing hearing, [creates] a unique opportunity for racial prejudice to operate but remain undetected." *See Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality opinion).

Statistical evidence specific to Pennsylvania confirms these disparities. When

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[27] *See* Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 Mich. St. L. Rev. 573, 583 (2011) (describing study where white participants were significantly more likely to sentence Black defendants to death than similarly situated white defendants, especially with a Black defendant and white victim); Jelani J. Exum, *Should Death Be So Different?: Sentencing Purposes and Capital Jury Decisions in an Era of Smart on Crime Sentencing Reform*, 70 Ark. L. Rev. 227, 243-44 (2017) (explaining that implicit racial biases cause predominately white juries to insufficiently consider mitigating evidence involving Black defendants and to inappropriately add weight to aggravating factors when the victim is white); Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DePaul L. Rev. 1557, 1560 (2004) (noting that Black capital defendants are over-punished when charged with killing white victims); William J. Bowers, Benjamin D. Steiner, & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171, 191-96 (2001) (indicating that the dominance of white male jurors on a capital case is strongly associated with the imposition of a death sentence when the defendant is Black and the victim is white).

[28] *See* Haney, *Condemning the Other*, *supra* note 27, at 1582-84 (suggesting that empathic divide between Black defendants and white jurors interferes with the jurors' ability to take structural mitigation into account as they assess culpability); Mark A. Jacobson, *Reducing the Impact of Juror Discrimination in Interracial Crimes: An Analysis of* Turner v. Murray, 5 Law & Ineq. 135, 147-48 (1987) (explaining that a predominately white jury's inability to empathize with a Black defendant and ease in empathizing with a white defendant may cause them to impose a death sentence without giving full and fair consideration to the defendant).

controlling for race neutral variables related to culpability, the 1998 Baldus Study found that the defendant's race was "a substantial influence" in Philadelphia's capital system, "particularly in jury penalty trials."[29] "[O]n average, black defendants in Philadelphia face odds of receiving a death sentence in a penalty trial that are 9.3 times higher than the odds faced by nonblack defendants with comparable levels of culpability"[30] Testifying later before a Pennsylvania Supreme Court Committee, Professor Baldus explained that this meant being Black was akin to being "saddled with an extra aggravating factor."[31] In other words, "on average, being African American increased the chance of a defendant receiving a death sentence to the same degree that the presence of the aggravating circumstance of 'torture' or 'grave risk of death' increased the chance of a non-African American getting a death sentence."[32] One-third of the Black persons on death row in Philadelphia, Professor Baldus concluded, would have received life sentences but for their race.[33]

The victim's race also has an impact on Pennsylvania juries in capital cases.

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[29] 1998 Baldus Study, *supra* note 20, at 1667, 1669, 1682 tbl. 4, 1684, 1714. *But see* Kramer et al., *supra* note 20, at iv (finding no effect of a defendant's race in capital sentencing). Philadelphia County produces a strong plurality of the capital cases and death row inmates in this state. *See, e.g.*, JSGC Report, *supra* note 12, at 67.

[30] 1998 Baldus Study, *supra* note 20, at 1726.

[31] Race and Gender Final Report, *supra* note 4, at 206.

[32] *Id.*

[33] *See id*.

The Joint State Government Commission recognized that, across Pennsylvania, "[r]egardless of the defendant's race or ethnicity, cases with White victims were 8% more likely to receive the death penalty; conversely, cases with Black victims were 6% less likely to receive the death penalty."[34] Similarly, the 1998 Baldus Study of Philadelphia death-eligible cases found "substantial and statistically significant" "race-of-victim results" which were "particularly prominent" at the stage at which juries examined mitigation and aggravation.[35] For example, juries were more willing to find statutory aggravation and less likely to find statutory mitigation when a Black defendant was convicted of killing a non-Black victim.[36] "[T]he presence of a nonblack victim . . . enhance[d] the average juror's perception of the deathworthiness of the offense."[37] And the highest death-sentencing rate involved Black defendants accused of killing non-Black victims.[38]

The racial disparities in capital jury sentencing are a product of how Black defendants are perceived by jurors. For example, a study found that, controlling for nonracial variables, a defendant who appeared more "stereotypically Black"—"e.g.,

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[34] *See* JSGC Report, *supra* note 12, at 89 n.680 (citing Kramer et al., *supra* note 20, at 121).
[35] 1998 Baldus Study, *supra* note 20, at 1714; *see also id.* at 1694 n.132.
[36] *See id.* at 1719.
[37] *Id.* at 1722.
[38] *Id.* at 1763-64 figs. F1 & F2; *see also* Meg Beardsley et al., *Disquieting Discretion: Race, Geography & The Colorado Death Penalty in the First Decade of the Twenty-First Century*, 92 Denv. U. L. Rev. 431, 436 n.24 (2015).

a broad nose, thick lips, or dark skin"—was more likely to receive a death sentence in cases with white victims.[39] Similarly, researchers interviewing Pennsylvania death penalty jurors found them significantly "more likely to prematurely decide the defendant deserves death, before the sentencing phase even begins, when the defendant was Black or NonWhite."[40] The same study found jurors "much more likely to think [a non-white] defendant will be dangerous in the future and consider this in sentencing[.]"[41] It is clear, therefore, that the vestiges of past racist ideology—as well as entrenched racial stereotypes that persist to this day—continue to influence Americans' perceptions of race, with pernicious effects.[42] This is confirmed by an analysis of the *Philadelphia Inquirer*'s media coverage of 153 Philadelphia-area murders between 1979 and 1999, which coded news articles for

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[39] Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 Psychol. Sci. 383, 383-85 (2006).

[40] Wanda D. Foglia, *Report on Capital Juror Decision-Making in Pennsylvania*, at 19 (2003), https://bit.ly/2NfOCOO; *see also* Race and Gender Final Report, *supra* note 4, at 208 (reporting these results).

[41] Foglia, *supra* note 40, at 20. These Pennsylvania-specific findings reflect national trends. For example, a study of 1155 capital jurors from 340 trials in fourteen states found that jurors discussed future dangerousness more often in cases where a Black defendant was accused of killing a white victim. *See* Bowers et al., *supra* note 27, at 224.

[42] *See, e.g.*, Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. Personality & Soc. Psychol. 292, 294, 296, 300-01, 305 (2008) (discussing "cultural memory" of racist ideology); Bowers et al., *supra* note 27, at 179 & n.32 (recounting an analysis of over 600 popular-media articles that found Black prisoners more often "depicted as 'irrational, incorrigible, predatory, and dangerous criminals with warped personalities'"); *id.* at 179 & nn.32-34; *see also* Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 Cal. L. Rev. 1, 16 & nn.61-63 (2007) (collecting sources and examples).

words "associated with apes" and found that Black defendants were more likely to be described with these words, especially the Black defendants who were sentenced to death.[43]

The lack of racial diversity in capital juries, resulting from the discriminatory exercise of peremptory strikes against Black venire panelists as discussed above, *see supra* Section I.A, magnifies the taint of racial bias in capital jury deliberations.[44] Diverse juries are more deliberative, make fewer factual mistakes, and are more likely to consider all the evidence presented at trial.[45] In the capital context, therefore, diversity can make the difference between life and death. Studies of penalty phase trials in Pennsylvania find that the rate of death-sentencing rises as Black juror representation falls.[46] And this effect can be more pronounced in Black defendant/white victim cases.[47] One possible explanation is the research finding that Black jurors are more likely to view a capital defendant as remorseful—a belief correlated with a jury's likelihood of choosing life over a death sentence.[48]

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[43] Goff et al., *supra* note 42, at 292, 303-04.

[44] *See* Race and Gender Final Report, *supra* note 4, at 54 (observing that Pennsylvania's policies "fail at each step of the [jury composition] process to include a representative number of minorities"); *see also* Nina W. Chernoff, *No Records, No Right: Discovery & the Fair Cross-Section Guarantee*, 101 Iowa L. Rev. 1719, 1748 & n.178 (2016).

[45] *See* Neil Vidmar, *The North Carolina Racial Justice Act: An Essay on Substantive and Procedural Fairness in Death Penalty Litigation*, 97 Iowa L. Rev. 1969, 1972-75 (2012) (collecting evidence).

[46] 2001 Baldus Study, *supra* note 7, at 84; Race and Gender Final Report, *supra* note 4, at 208 (*citing* Foglia, *supra* note 40, at 19).

[47] 2001 Baldus Study, *supra* note 7, at 89 & fig. 8.

[48] Foglia, *supra* note 40, at 19-20; Bowers et al., *supra* note 27, at 211 & n.142.

In sum, study after study has proven how race infects capital jury deliberations, resulting in the disproportionate death sentencing of Black defendants. If committed to the universal principle that each life—whether the defendant or victim—is of equal value, this Court cannot let stand the continuing influence of race in capital sentencing decisions.

II. Pervasive Racial Inequities Render Pennsylvania's Death Penalty System Cruel and Unlawful Under the Pennsylvania Constitution.

In a sharply-divided, 5-4 decision the United States Supreme Court ruled in *McCleskey v. Kemp* that Georgia's capital punishment system violated neither the Eighth nor Fourteenth Amendments despite overwhelming statistical evidence that Black defendants and defendants accused of murdering white victims had a greater likelihood of being capitally charged and sentenced to death than white defendants or defendants accused of murdering Black victims. 481 U.S. at 291-92, 306, 309. The United States Supreme Court did not question the strength of the statistical evidence presented by Mr. McCleskey. In fact, the Court "assume[d] the study is valid statistically" and, at the very least, recognized the existence of a "*risk* that the factor of race entered into some capital sentencing decisions." *Id.* at 291 n.7. Nevertheless, the *McCleskey* Court refused to allow its assumption of the study's validity to also "include the assumption that the study shows that racial considerations actually enter into any sentencing decisions in Georgia," *id.*, but instead shockingly concluded the "discrepancy that appears to correlate with race"

was "an inevitable part of our criminal justice system," *id*. at 312.[49]

LDF was the legal organization that represented Warren McCleskey before the United States Supreme Court and maintains, to this day, that *McCleskey* was wrongly decided, leaving behind an intolerable level of known and pervasive racial discrimination in capital punishment systems throughout the country, including Pennsylvania. Indeed, Justice Powell, who authored the *McCleskey* opinion and cast the deciding vote, publicly stated in retirement that, in retrospect, he would have decided *McCleskey* differently.[50] The statistical evidence of widespread discrimination at issue here in the exercise of peremptory challenges, capital charging decisions, and the imposition of death sentences in Pennsylvania, *see supra* Sections I.A-C, may be the type of discrimination that the *McCleskey* Court considered to be beyond judicial remedy under federal law. It is imperative, however, that this Court remedy this taint of racial bias in Pennsylvania's capital

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[49] Justice Antonin Scalia, who joined the *McCleskey* majority, wrote in an unpublished memorandum to his fellow members of the Court that he did not need "more proof" of discrimination in the *McCleskey* case, but rather accepted as true that "the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable." John Charles Boger, *"A Fear of Too Much Justice"?: Equal Protection and the Social Sciences Thirty Years after* McCleskey v. Kemp *Symposium*, 112 Nw. U. L. Rev. 1637, 1680 (2018) (quoting Memorandum from Antonin Scalia, Assoc. Justice, U.S., to the Conference (Jan. 6, 1987) (located in Justice Powell's *McCleskey v. Kemp* Case File on file with the Washington & Lee University School of Law Library at 147), http://law.wlu.edu/deptimages/powell%20archives/McCleskeyKempBasic.pdf)).

[50] Opinion, *Justice Powell's New Wisdom*, N.Y. Times (June 11, 1994), https://www.nytimes.com/1994/06/11/opinion/justice-powell-s-new-wisdom.html.

punishment under Commonwealth law.

Article I, Section 13 of the Pennsylvania Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." In *Commonwealth v. Zettlemoyer*, this Court held "that the rights secured by the Pennsylvania prohibition against 'cruel punishments' are co-extensive with those secured by the Eighth and Fourteenth Amendments." 454 A.2d 937, 967 (Pa. 1982). However, *Zettlemoyer* concerned a claim that capital punishment was *per se* unconstitutional under the Pennsylvania Constitution, as opposed to a claim that it is unconstitutional as applied given the likelihood of racial bias. *Id.* at 968-69. As noted by former Chief Justice Castille in the concurring opinion of a subsequent case, "the wording of Article I, Section 13, prohibiting 'cruel punishments,' is not identical to that of the Eighth Amendment which prohibits 'cruel and unusual punishments,'" thus leaving "an open question whether Pennsylvania should follow a different approach to constitutional sentencing proportionality claims" because "the existing Eighth Amendment approach does not sufficiently vindicate the state constitutional value at issue." *Commonwealth v. Baker*, 78 A.3d 1044, 1054, 1055 (Pa. 2013) (Castille, J., concurring).

Last year, the Washington Supreme Court struck down the death penalty in that state because it is "administered in an arbitrary and racially biased manner" in violation of a Washington state constitutional provision that is almost identical to

Article I, Section 13 of the Pennsylvania Constitution.[51] *Washington v. Gregory*, 427 P.3d 621, 633 (Wash. 2018). In its ruling, the Washington Supreme Court made clear—as this Court should do now—that it was "adher[ing] to [its] duty to resolve constitutional questions under [its] own constitution." *Id.* at 632. Thus, evidence that "black defendants were four and a half times more likely to be sentenced to death than similarly situated white defendants"—coupled with "judicial notice of implicit and overt racial bias against black defendants in [Washington] state"—gave the Washington Supreme Court "confiden[ce] that the association between race and the death penalty is *not* attributed to random chance." *Id.* at 630, 635.

Similarly, the Connecticut Supreme Court ruled that the death penalty "constitutes cruel and unusual punishment, in violation of the state constitution" in the aftermath of state legislation prospectively barring death sentences. *Connecticut v. Santiago*, 122 A.3d 1 (Conn. 2015). In striking the death penalty, the Connecticut Supreme Court was concerned, in part, about how "the selection of which offenders live and which offenders die appears to be inescapably tainted by caprice and bias." *Id.* at 66. Moreover, a concurring opinion found it "hard-pressed to dismiss or explain away the abundant evidence that suggests the death penalty in Connecticut, as elsewhere, has been and continues to be imposed disproportionately on racial and

[51] Article 1, Section 14 of the Washington Constitution provides: "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted."

ethnic minorities, and particularly on those whose victims are members of the white majority." *Id.* at 96 (Norcott and McDonald, Js., concurring). The concurrence further "express[ed] to [its] sister courts . . . [the] suggestion that they consider closely whether the legal standard articulated in *McCleskey v. Kemp* . . . affords adequate protection to members of minority populations who may face the ultimate punishment." *Id.* at 102 (internal citation omitted). And even before the *McCleskey* decision, the Massachusetts Supreme Court ruled that the "arbitrariness and discrimination" of the death penalty violated the Massachusetts Declaration of Rights. *Dist. Attorney for Suffolk v. Watson*, 411 N.E.2d 1274, 1286 (Mass. 1980).

This Court should follow the example of its sister courts and unequivocally rule that it will no longer tolerate the racial bias pervading Pennsylvania's capital punishment system. The *McCleskey* decision has permitted known and demonstrated racial disparities to persist throughout the criminal justice system, but most importantly in the administration of the death penalty. A capital punishment system in which juries, capital charging decisions, and death sentences are determined, even in some part, by race is necessarily so arbitrary and capricious as to be a "cruel punishment" under Article 1, Section 13. This Court must not allow such a discriminatory and unconstitutional punishment to continue in the Commonwealth of Pennsylvania.

CONCLUSION

For the foregoing reasons, amicus curiae NAACP Legal Defense and Educational Fund, Inc. respectfully urges this Court to hold that the administration of capital punishment in Pennsylvania violates the Pennsylvania Constitution and to vacate Mr. Cox and Mr. Marinelli's death sentences.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing filing, BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF UNDER KING'S BENCH JURISDICTION, complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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CERTIFICATE OF WORD COUNT

Per Pa.R.A.P. 531(b)(3), I hereby certify that the foregoing filing, BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF UNDER KING'S BENCH JURISDICTION, contains 6,227 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

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CERTIFICATE OF SERVICE

I, David Richman, hereby certify that on this 22nd day of February, 2019, I caused a true and correct copy of the foregoing filing, BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF UNDER KING'S BENCH JURISDICTION, to be served upon the following persons by first class United States mail:

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