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IN THE SUPREME COURT OF THE STATE OF DELAWARE

BENJAMIN RAUF,	§	
	§	**No. 39, 2016**
Defendant-Appellant,	§	
	§	**Certified Questions of Law**
v.	§	**from the Superior Court**
	§	**Of the State of Delaware**
STATE OF DELAWARE,	§	
	§	
Plaintiff-Appellee.	§	**Cr. ID No. 1509009858**

***Amicus Brief* of**
The Charles Hamilton Houston Institute
for Race and Justice
In Support of Appellant

OF COUNSEL:

G. Ben Cohen
The Promise of Justice Initiative
636 Baronne Street
New Orleans, La. 70113
(504)-529-5955
bcohen@thejusticecenter.org

ROSENTHAL, MONHAIT & GODDESS, P.A.

Jeffrey S. Goddess (No. 630)
919 Market Street, Suite 1401
P. O. Box 1070
Wilmington, DE 19899-1070
(302) 656-4433

jgoddess@rmgglaw.com
Counsel for Amicus the Charles Hamilton Houston Institute for Race and Justice

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BRIEF OF *AMICUS CURIAE*

How we decide who should live and who should die – the mechanism for determining which offenders are the most culpable and which have diminished culpability based upon mitigating circumstances – is a critical constitutional question. Non-unanimous verdicts allow for the exclusion of minority votes from a jury, and historically are an anathema to the purpose of the Sixth, Eighth and Fourteenth Amendments, enacted to ensure that any verdict, including a death sentence, reflect the full conscience of the community.

STATEMENT OF INTEREST

This Court has certified *inter alia* two separate questions related to the function of the jury and the role of the unanimous jury:

> Question (2): If the finding of the existence of "any aggravating circumstance," statutory or non-statutory, that has been alleged by the State for weighing in the selection phase of a capital sentencing proceeding must be made by a jury, must the jury make the finding *unanimously* and beyond a reasonable doubt to comport with federal and state constitutional standards.
>
> Question (4): If the finding that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist must be made by a jury, must the jury make that *finding unanimously* and beyond a reasonable doubt to comport with federal and state constitutional standards?

(Emphasis added).

The *Charles Hamilton Houston Institute for Race and Justice* (CHHIRJ) at Harvard Law School was founded by Charles Ogletree in 2005. The Institute continues the work of Charles Hamilton Houston, one of the 20th Century's most

talented litigators and scholar. CHHIR convenes students, faculty, practitioners, civil rights and business leaders, litigators, and policymakers. Over the past ten years, CHHIRJ has held dozens of conferences, seminars, and working groups involving thousands of academics, advocates, and policy makers.

CHHIRJ focuses on reforming harsh criminal justice policies and redressing the influence of race on sentencing outcomes. CHHIRJ pursues criminal justice initiatives by conducting research and promoting best practices, developing policy on topics including racial bias, and excessive punishments. CHHIRJ serves as a bridge between scholarship, law, policy and practice, issuing reports, testimony in state legislatures and Congress, as well as – as offered in this instance – amicus briefs to state and federal courts.

Amicus has particular insight into the history of non-unanimous juries, and their function, particularly with regard to race. Amicus believes that this brief may assist the Court as it considers issues – particularly with regard to the racial impact of non-unanimous juries, disparate outcome in sentencings, the full service and participation of citizens on juries, regardless of their race, and the import of achieving the community's full confidence in the administration of justice.

Amicus files this brief pursuant to Supreme Court Rule 28, on motion, with consent of the appellant, and without objection of the appellee.

SUMMARY OF ARGUMENT

Unanimous juries play a central role in fulfilling the constitutional commitments of both the Sixth and Fourteenth Amendments. The history of the jury has been inexorably intertwined with unanimity. Nowhere was this more true than in capital cases. Only when suffrage was extended to African-Americans did states experiment with non-unanimous juries.

Non-unanimous juries originated in Louisiana's all-white Democratic Constitutional Convention of 1898 where its leader sought to enact practices that would satisfy the application of the Fourteenth Amendment by "Boston Judges" but ensure "white hegemony" in perpetuity.

Unanimous verdicts ensure complete deliberations and enhance the community's confidence in the justice system, while non-unanimous juries deny suffrage and voice to minority jurors. Social science teaches not only that unanimous verdicts provide more deliberation, interchange and more accurate verdicts, but also that non-unanimous verdicts allow majority voters to essentially disenfranchise the voices of African-Americans.

I. UNANIMOUS VERDICTS BASED UPON PROOF ESTABLISHED BEYOND A REASONABLE DOUBT HAVE BEEN ESSENTIAL COMPONENTS OF JURY VERDICTS SINCE BEFORE THE FOUNDING.

Unanimous verdicts, based upon proof beyond a reasonable doubt, have been essential components of juries since before the founding.

A. Unanimous Juries Have Been Required Since the Founding.

Unanimous verdicts have been an essential component of the Sixth Amendment guarantee since the founding. See *Apprendi v. New Jersey*, 530 U.S. 466 (2000) ("[T]he historical foundation for our recognition of these principles extends down centuries into the common law. '[T]o guard against a spirit of oppression and tyranny,' . . . trial by jury has been understood to require that 'the truth of every accusation, ... should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours ... .'").

Proponents of the non-unanimous jury verdict will unquestionably rely on Justice Powell's concurring opinion in *Apodaca v. Oregon*, 406 U.S. 404 (1972), and the concomitant opinion in *Johnson v. Louisiana*, 406 U.S. 356 (1972). But, as discussed in the Appellant's Opening Brief, this jurisprudence – even in non-capital circumstances – is of tenuous significance because of its 1) reliance upon functional approach to constitutional rights that has since been rejected, *see Apprendi v. New Jersey*, 530 U.S. 466 (2000); and 2) dependence upon Justice Powell's never adopted and since rejected theory of partial incorporation, *see McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 n.14 (2010).

The Founders' focus on the jury as a central feature of a system of ordered liberty was strongly rooted in English common law. As Sir William Blackstone emphasized, "the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law." 2 William Blackstone, Commentaries on the Laws of England 378-379 (1769). Blackstone emphasized that a criminal defendant be judged by "the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion." id. at 343 (emphasis added).

The Founders shared this idea that jury unanimity was implicit in the fundamental right to trial by jury in criminal cases. John Adams reflected that "it is the unanimity of the jury that preserves the rights of mankind." 1 John Adams, *A Defence of the Constitutions of Government of the United States* 376 (Philadelphia, William Cobbett 1797). Justice James Wilson, one of the framers of the Constitution and an original Supreme Court Justice, stressed the unanimity requirement in his 1790–91 lectures: "To the conviction of a crime, the undoubting and the unanimous sentiment of the twelve jurors is of indispensable necessity." 2 James Wilson, *Works of the Honourable James Wilson* 350 (Philadelphia, Lorenzo Press 1804). This recognition of unanimity has been at the core of Justice Scalia's jurisprudential commitment to the Sixth Amendment. See *Apprendi, supra.*

B. The Beyond A Reasonable Doubt Standard Was Consecrated To Address Concerns About Capital Punishment

At the Founding, proof a defendant deserved capital punishment was required "beyond a reasonable doubt." The historical origins of the *beyond a reasonable doubt standard* arose from concerns regarding imposition of the death penalty and was "related to the increasing resistance of the public – both American and British – to the application of the capital sanction." Erik Lillquist, Absolute Certainty and the Death Penalty, 42 Am. CRIM. L. REV. 45, 51 (Winter 2005).

John Adams – as lawyer for the accused in the Boston Massacre – recognized that the moral backbone of the nation was given meaning by the *unanimous* and *lesser* (i.e. non-capital) verdicts imposed on the British soldiers he defended. See also *id.* at 51 (noting the beyond a reasonable doubt standard used in the Boston Massacre trials of 1770, addressed concern of "that only the worst among the truly guilty were subject to that penalty."); *id.* ("[T]he rise of the reasonable doubt standard was related to the increasing resistance of the public – both American and British – to the application of the capital sanction."); see also John Langbein, *The Origins Of Adversary Criminal Trial* (Oxford University Press, 2003). What is particularly salient is that the Nation – confronted with the lesser, non-death verdicts of British nationals accused of killing natural born citizens – chose to consecrate the right to a jury, not diminish the standards of proof and permit non-unanimous verdicts.

II. NON-UNANIMOUS JURIES WERE INTRODUCED IN RESPONSE TO THE GUARANTEE OF SUFFRAGE TO AFRICAN-AMERICANS.

In *Strauder v. West Virginia*, 100 U.S. 303 (1880), the United States Supreme Court held that the exclusion from jury service based upon race violated the Fourteenth Amendment. Application of this rule was contentious. Where states refused to comply with the Fourteenth Amendment, defendants charged in state court could petition to remove their case to federal court where rights could be protected. See e.g. *Bush v. Kentucky*, 107 U.S. 110 (1883).

In *Neal v. Delaware*, involving an African-American defendant sentenced to death for rape, the defendant sought removal to federal court. The Court noted that since 1848, the Constitution and statutes restricted juries to "free white male citizens, of the age of twenty-two years and upwards." *Id.* While the Supreme Court in *Neal* ultimately rejected the petitioner's removal to federal court, it nevertheless reversed his conviction and death sentence based upon the exclusion of African-Americans from the grand and petit jury. Out of concern that overt violation of the Fourteenth Amendment would result in removal of cases from state to federal court or reversal of convictions, states took steps to limit the role of African-Americans on juries through means that did not overtly violate the Fourteenth Amendment. See e.g. *Murray v. Louisiana*, 163 U.S. 101 (1896) (noting no error where Louisiana jury commissioners merely "confin[ed] their summons to white citizens only, and in excluding from jury service citizens of the race and color of the petitioner"); *Smith v. Mississippi* 162 U.S. 592 (1896) (same).

Non-unanimous juries were an example of a measure adopted to undermine the influence of African-American suffrage. At Louisiana's all white 1898 Constitutional Convention, the participants gathered with the avowed "mission" "to establish the supremacy of the white race in [Louisiana]" by rolling back the advances made by the Civil War Amendments. See *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana* 374-75 (1898); see *id.* at 381 (Convention goal was "to perpetuate the supremacy of the Anglo-Saxon race in Louisiana"); *Louisiana v. United States*, 380 U.S. 145, 147-48 (1965) (discussing steps taken at 1898 convention to "disenfranchis[e] Negroes"). To this end, Louisiana adopted not only a non-unanimity rule at its convention but also its infamous literacy test and one of the South's first Grandfather Clauses, all of which sought to deprive African Americans of their fundamental rights and liberties. See e.g., *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana* 381 (1898) ("I don't believe that [federal courts or Congress] will take the responsibility of striking down the system which we have reared in order to ... perpetuate the supremacy of the Anglo-Saxon race in Louisiana."). This provision, founded in bigotry and designed to reduce the influence of minority voices in the deliberative process, achieved its pernicious goal.

III. NON-UNANIMOUS JURIES REDUCE PARTICIPATION OF AFRICAN-AMERICAN CITIZENS IN JURIES.

Unanimity rules bolster the deliberative process, promoting robust engagement and thorough evaluation of the evidence – rather than a swift vote conducting perfunctory discussion. See James H. Davis, Norbert L. Kerr, Robert S. Atkin, Robert Holt, and David Meek, *The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules*, 32 J. Personality & Soc. Psychol. 1 (1975); Devine et al. (2001); Robert D. Foss, *Group Decision Processes in the Simulated Trial Jury*, 39 Sociometry 305 (1976); Hastie Et Al. (1983); Charlan Nemeth, *Interactions Between Jurors as a Function of Majority vs. Unanimity Decision Rules*, 7 J. Applied Soc. Psych. 38 (1977).

When unanimity is not required, jurors can end their deliberations soon after the required quorum is reached. In *Johnson v. Louisiana*, Justice Brennan observed (in dissent) that "[w]hen verdicts must be unanimous, no member of the jury may be ignored by the others. When less than unanimity is sufficient, consideration of minority views may become nothing more than a matter of majority grace." *Johnson*, at 306. This is particularly true with regard to race.

A. Unanimity Ensures Meaningful Minority Participation

The unanimity requirement is critical to promoting meaningful jury participation by all segments of the community. See Jeffrey Abramson, *We, The Jury* (1994); Nancy S. Marder, *The Jury Process* (2004); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261 (2000).

As Professor Smith has explained, in an article cited by Justice Breyer dissenting in *Glossip v. Gross,* 135 S. Ct. 2726, 2761 (2015), "more than four decades of social science research indicates that unanimous juries deliberate longer, discuss and debate the evidence more thoroughly, and are more tolerant and respectful.... Non-unanimous decision rules also tend to promote perilous racial dynamics." Rob Smith, *The Geography Of The Death Penalty And Its Ramifications*, 92 B.U.L. Rev. 227, 244 (2012).

Similarly, Professor Kim Taylor-Thompson's research has documented how, where unanimity is required and racial diversity exists, "[a] juror of color can help to translate experiences for jurors who may otherwise miss the cultural meanings of acts and words..., can serve as a jury-room interpreter by introducing concepts to the discussion or offering explanations that simply may not occur to her white counterparts." Kim Taylor-Thompson, *Empty Votes In Jury Deliberations,* 113 Harv. L. Rev. 1261, 1285-1286 (2000). Professor Taylor-Thompson emphasized her finding – which has significant relevance to assessments of remorse or behavior in a courtroom that inform a jury's capital sentencing decision – that "[p]articularly, when a trial involves issues of race or a person of color's reactions are at issue in a trial, a juror of color's perceptions may be critical to a determination of truth." *Id.*

Minority views are less influential when unanimity is not required. Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 Del. L. Rev. 1 (2001); Valerie P. Hans And Neil Vidmar, *Judging The Jury,* 174-75 (1986). Minority jurors operating under a majority

decision rule are less likely to report full participation compared to minority jurors deliberating under a unanimity rule. Norbert L. Kerr, Robert S. Atkin, Garold Stasser, David Meek, Robert W. Holt, and James H. Davis, *Guilt Beyond a Reasonable Doubt: Effects of Conceptual Definition and Assigned Rule on the Judgment of Mock Juries*, 34 J. Personality & Soc. Psychol. 282 (1976).

The consequence of these dual features – the benefit of minority participation and the benefits of unanimity – is that where minority participation is needed the most, non-unanimous juries ensure it the least.

B. Influence of Race is Pernicious in Capital Cases.

Nowhere is the silencing of minority jurors more pernicious than in the life-death determination. While race may influence assessments of issues such as identity or criminal responsibility, there is a serious potential for racial prejudice to invade deliberative processes when a jury is called to make a judgment about moral culpability – such as whether an offense was heinous, atrocious and cruel, future dangerousness, or whether the defendant has remorse. There are a series of decision-points in a penalty phase that increase risk of implicit or explicit bias against African-American defendants or in favor of white victims. See Andrew Taslitz, *Racial Threat Versus Racial Empathy in Sentencing - Capital and Otherwise*, 41 Am. J. Crim. L. 1, 5 (2013) ("The mal-distribution of empathy may lead to racial stereotyping of the black offender as dangerous, fostering a sense of racial threat to whites."); *see also id* (noting "race-based empathy for the white victim individuates him while de-individuating the black offender, creating a jury

socially distant from the offender and unable to feel the compassion required for jurors to depart from psychological forces prodding them toward the decision to impose capital punishment."); see also Robert J. Smith & G. Ben Cohen, *Capital Punishment: Choosing Life or Death (Implicitly)*, in Implicit Racial Bias Across the Law 229, 236-37 (Justin D. Levinson & Robert J. Smith eds., 2012) ("White jurors are more likely to magnify the humanity of white victims and marginalize the humanity of black perpetrators. This dynamic ... negatively affects defendants who murder white victims, because the favorable implicit biases that flow toward white victims enhance the perceived harm of the crime when the victim is white.").

Significantly, in addition to conscious bias – which might be eliminated through careful voir dire and other measures – recent research has indicated that race bias held by whites may often be unconscious. See Justin D. Levinson, Robert J. Smith and Danielle M. Young, *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, 574 (2014) ("Our central findings are that jury-eligible citizens implicitly associate Whites with "worth" and Blacks with "worthless," that death-qualified jurors hold stronger implicit and self-reported biases than do jury-eligible citizens generally, that the exclusion of non-White jurors accounts for the differing levels of implicit racial bias between death-qualified and non-death-qualified jurors, and that implicit racial bias predicts race-of-defendant effects and explicit racial bias predicts race-of-victim effects. These findings strongly suggest that implicit racial bias does have an impact on the administration of the death penalty in America."). As a result of these implicit (and sometimes explicit) biases, there

is an unfortunate risk that race influences capital sentencing procedures; however, this risk is increased exponentially where the majority on the jury need not consider the views of minority jurors. See Taylor-Thompson, *supra*.

Juries "express the conscience of the community on the ultimate question of life or death." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). See also *Woodward v. Alabama*, 134 S. Ct. 405, 407 (2013) (Sotomayor J., *dissenting from denial of cert.*). Whether a defendant is a future danger, his potential for rehabilitation or redemption, whether the circumstances of his life deserve leniency or mercy, depends upon the full conscience of the entire community.

IV. NON-UNANIMOUS JURIES REDUCE THE FAITH OF THE COMMUNITY IN THE JUSTICE SYSTEM.

As Justice Stewart said in his *Johnson* dissent, "[C]ommunity confidence in the administration of criminal justice cannot but be corroded under a system in which a defendant who is conspicuously identified with a particular group can be acquitted or convicted by a jury split along group lines. The requirements of unanimity and impartial selection thus complement each other in ensuring the fair performance of the vital functions of a criminal court Jury." *Johnson*, 406 U.S. 398. Social science, similarly teaches unanimity rules enhance the perceived reliability and legitimacy of criminal verdicts. Shari Diamond, et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 Nw. U. L. Rev. 201, 222, 227 (2006) (citing research indicating that "community residents viewed unanimous procedures for arriving at jury verdicts in criminal cases as more accurate and fairer than majority procedures").

It is hard to imagine what other arena would deserve more faith in the deliberation process than the community's decision whether a citizen should live or die. When a system that allows for the exclusion of, or silence of, minority jurors results in a set of apparently racially-biased outcomes, confidence in the administration of justice is diminished. As Professor Kim Taylor-Thompson explained, confidence in the administration of justice is especially damaged when non-unanimous jury verdicts are divided on racial lines: "[A] nonunanimous verdict issued along racial lines is particularly corrosive because it highlights - and

perhaps exacerbates - racial divides on issues of justice." Taylor-Thompson, *op. cit.* at 1320.

Empirical research has indicated that "markedly higher death-sentencing rates in Delaware capital cases with black defendants and white victims, compared to the rates for cases with other race of defendant-race of victim combinations. . . . Delaware has the highest death-sentencing rate in the country in black defendant/white victim cases. . . . " Valerie P. Hans, John H. Blume, Theodore Eisenberg, Amelia Courtney Hritz, Sheri Lynn Johnson, Caisa Elizabeth Royer, and Martin T. Wells, *The Death Penalty: Should the Judge or the Jury Decide who Dies,* 12 J. Empirical Legal Stud. 70, 72 (2015). Jury recommendations based upon non-unanimous verdicts – where the voices of minority jurors need not be fully considered – undermine confidence in the administration of justice.

A penalty phase verdict reflects 'the community's moral sensibility,' and "express[e]s the conscience of the community on the ultimate question of life or death," and "translate[s] a community's sense of capital punishment." *Ring v. Arizona*, 536 U.S. 584, 615 (2002) (Breyer, J., concurring). Unanimous juries play an essential role in ensuring confidence in the expression of these principles.

CONCLUSION

For the reasons set forth herein, Amicus respectfully asks this Court to consider whether non-unanimous juries introduce an unconstitutional risk of race influencing the administration of capital punishment while simultaneously undermining faith in the administration of justice.

Respectfully Submitted,

Jeffrey S. Goddess (No. 630)
Rosenthal, Monhait & Goddess, P.A.
919 Market Street, Suite 1401
P. O. Box 1070
Wilmington, DE 19899-1070
(302) 656-4433
jgoddess@rmgglaw.com
Attorneys for Amicus the Charles Hamilton Houston Institute for Race and Justice

OF COUNSEL:

G. Ben Cohen
The Promise of Justice Initiative
636 Baronne Street
New Orleans, La. 70113
(504)-529-5955
bcohen@thejusticecenter.org

CERTIFICATE OF SERVICE

I, Jeffrey S. Goddess, hereby certify that on March 9, 2016, I caused to be served a true and correct copy of the *Amicus Brief Of The Charles Hamilton Houston Institute For Race And Justice In Support Of Appellant* upon the following counsel of record in the manner indicated below:

VIA FILE & SERVEXPRESS

Santino Ceccotti, Esquire
Ross A. Flockerzie, Esquire
David C. Skoranski, Esquire
Assistant Public Defenders
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

Elizabeth R. McFarlan, Esquire
Department of Justice
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

/s/ Jeffrey S. Goddess

Jeffrey S. Goddess (No. 630)
Rosenthal, Monhait & Goddess, P.A.
919 N. Market Street, Suite 1400
P. O. Box 1070
Wilmington, DE 19899-1070
(302) 656-4433
Attorneys for Amicus The Charles Hamilton Houston Institute For Race And Justice