No.

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA	)
	)
v.	)
	)
JATHIYAH AL-BAYYINAH,	)
	)
Defendant.	)

BRIEF OF SCHOLARS ON JURY DELIBERATIONS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT JATHIYAH AL-BAYYINAH

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I. SUMMARY OF THE ARGUMENT

The present litigation involving the North Carolina Racial Justice Act involves studies showing that death-qualified African Americans have been excluded from serving on trials involving capital punishment. Indeed, a substantial number of persons on death row were convicted by all white juries or juries containing only one racial minority member. There are multiple and significant reasons to indicate that this form of racial exclusion has serious negative consequences for the integrity of North Carolina's criminal justice system.

The core purpose of the jury is to combine the wisdom and life experiences of the community in order to evaluate the evidence presented at trial, to deliberate and to render a just verdict. African Americans are members of that community, but they have different life experiences and perspectives than white members of the community. Depriving the jury of these unique experiences deprives the jury of different insights and perspectives on the trial evidence that can affect their decisions. This is especially true in capital cases when the jury must make a decision between life versus death. Research has shown that juries with African American members deliberate more thoroughly and robustly than juries composed

exclusively of white persons. This finding holds true regardless of the race of the defendant.

Especially if the case involves racial-ethnic matters of any kind, the opportunity for African Americans to serve on the jury not only provides insights about differences in life experience, it also helps to prevent both conscious and "subconscious" racism from affecting the deliberations and verdict.

Another important purpose of the jury is to provide legitimacy to the criminal justice system. Seminal research conducted at the University of North Carolina in the early 1960s has generated hundreds of studies bearing on the willingness of people to respect and accept decisions of the legal system, even if it produces outcomes with which they disagree. Especially given North Carolina's large African American community and the historical background of discrimination in the state, excluding African Americans from juries deciding capital punishment cases reduces public respect for North Carolina's criminal justice system.

For these reasons we urge the court to consider both the actual fact of systematic exclusion of death-qualified African Americans and why that exclusion severely harms the state's criminal justice system.

II. INTEREST OF THE *AMICI*

Amici are social scientists and law professors who have spent many years conducting research on the American jury system.

Professor Neil Vidmar holds a Ph.D. in social psychology from the University of Illinois and is currently the Russell M. Robinson II Professor of Law at Duke University's School of Law. Professor Vidmar is also a Professor of Psychology at Duke University. Professor Vidmar has researched and written extensively about the American jury system. His publications include AMERICAN JURIES: THE VERDICT (Prometheus Books, 2007), WORLD JURY SYSTEMS (Oxford University Press, 2000), and JUDGING THE JURY (1986, 2d ed. 2001).

William J. Bowers holds a Ph.D. in Sociology from Columbia University, 1966. He is Director of the Center for Applied Social Research at Northeastern University and is presently Senior Research Associate at the Hindelang Center for Criminal Justice Research, University at Albany (SUNY), where he is conducting a continuing program of research on the capital jury with National Science Foundation support. He is the author of two books on the role of race in capital punishment, EXECUTIONS IN AMERICA (Lexington Books, 1974) and LEGAL HOMICIDE (Northeastern University Press, 1984) and he has conducted a detailed empirical study of

how race influences the decision-making of capital jurors, *Death Sentencing in Black and White* (Pennsylvania University Journal of Constitutional Law, 2001 171-274).

Professor Hiroshi Fukurai holds a Ph.D. in sociology from the University of California, Riverside and is currently a Professor of Legal Studies and Sociology at the University of California, Santa Cruz. Professor Fukurai has researched and written extensively about racial and social equities of the American jury selection system. Her publications include RACE IN THE JURY BOX: AFFIRMATIVE ACTION IN JURY SELECTION (SUNY Press, 2003), ANATOMY OF THE MCMARIN CHILD MOLESTATION CASE (University Press of America, 2001), and RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE (Plenum Press, 1993).

Professor Valerie P. Hans holds a Ph.D. in social psychology from the University of Toronto and is currently a Professor of Law at Cornell University. Professor Hans is a leading authority on the American jury system. Her publications include BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY (2000), THE JURY SYSTEM: CONTEMPORARY SCHOLARSHIP (2006), JUDGING THE JURY (1986, 2d ed. 2001), and AMERICAN JURIES: THE VERDICT (Prometheus Books, 2007).

Professor Margaret Bull Kovera holds a Ph.D. in social psychology from the University of Minnesota and is currently a Professor of Psychology at John Jay College of Criminal Justice at the City University of New York. Professor Kovera is a Past-President of the American Psychology-Law Society and a Fellow of the American Psychological Association and the Association for Psychological Science. Professor Kovera's research on juries has been funded by the National Science Foundation and has been published in journals such as *Law and Human Behavior*, the *Minnesota Law Review*, the *Journal of Applied Psychology*, and *Psychology, Public Policy, and Law*.

Daniel Krauss holds a J.D. and Ph.D. from the University of Arizona. He is Associate Professor of Psychology at Claremont McKenna College. He is a member of the Arizona State Bar as well as the United States Supreme Court Bar. His research focuses on the judicial system's use of expert psychological testimony and research, and he is a co-editor of PSYCHOLOGICAL EXPERTISE IN THE COURTROOM (Ashgate, 2009) and EXPERT TESTIMONY FOR THE COURTS (John Wiley & Sons, 2007).

Professor Nancy S. Marder holds a J.D. from Yale Law School and a M.Phil. from Cambridge University. She is a Professor of Law at Chicago-Kent College of Law and Director of the Jury Center there. She has written

extensively on the jury including a book entitled THE JURY PROCESS (2005). Currently, she is serving as a member of the ABA's committee on rewriting capital case instructions into plain English.

Professor Steven Penrod holds a J.D. and a Ph.D. in social psychology from Harvard University. He is currently Distinguished Professor of Psychology at John Jay College of Criminal Justice at the City University of New York and has previously been a professor at the Universities of Wisconsin (psychology), Minnesota (law), and Nebraska (law and psychology). Over the past three decades, Professor Penrod has produced an extensive body of research and writing about the influence of extra-legal factors on jury decision-making. He is co-editor of the forthcoming RESEARCH METHODS IN FORENSIC PSYCHOLOGY.

Professor James T. Richardson holds a Ph.D. in Sociology from Washington State University and a J.D. from Old College, Nevada School of Law. He is Professor of Sociology and Judicial Studies at the University of Nevada, Reno, where he directs and teaches in the Judicial Studies graduate degree program for trial judges, offered in conjunction with the National Judicial College and the National Council of Juvenile and Family Court Judges. He teaches Social and Behavioral Science and the Law in the

Judicial Studies program and has done extensive research on the use of expert and scientific evidence in court, including statistical evidence.

Professor Michael J. Saks hold a Ph.D. in experimental social psychology from the Ohio State University and an MSL from the Yale Law School. He is Regents Professor at the Sandra Day O'Connor College of Law at the Arizona State University. He previously taught at the University of Iowa, University of Virginia, Georgetown University Law Center, and Boston College. He is the author of many studies and other publications on the justice system, including the five-volume MODERN SCIENTIFIC EVIDENCE (West, 2010).

Professor Samuel R. Sommers holds a Ph.D. in psychology from the University of Michigan and is currently associate professor of psychology at Tufts University in Medford, MA. Professor Sommers received the Saleem Shah Award for Early Career Excellence from the American Psychology-Law Society in recognition of his published research concerning race and jury decision-making, race and jury selection, and the more general impact of racial diversity on human cognition and behavior. He has testified in court as an expert witness on matters including juror racial bias, racial disparities in capital punishment, and cross-racial eyewitness identification.

Andrew E. Taslitz is a Professor of Law at the Howard University School of Law, having also taught at Duke University's School of Law and at the University of Pittsburgh School of Law, where he was the Welsh S. White Distinguished Visiting Professor of Law. Professor Taslitz has authored over one hundred works, including numerous ones focusing on the psychology and history of racial bias in the criminal justice system, the nature of jury reasoning processes, and the problem of wrongful conviction, as well as several works on the death penalty. His publications include *The Jury and the Common Good: Fusing the Insights of Modernism and Postmodernism, in* FOR THE COMMON GOOD: A CRITICAL EXAMINATION OF LAW AND SOCIAL NORMS (Carolina Academic Press, Robin Miller ed. 2004) and RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868 (New York University Press paperback ed. 2009).

III. ARGUMENT

The study cited in Defendant's motion, by Michigan State University Law Professors Catherine Grosso and Barbara O'Brien, draws attention to the fact that prosecutorial practices in North Carolina have resulted in a large number of capital juries composed exclusively of white persons, or only one

racial minority member. What is more, many of those capital trials decided by all-white juries involved African American defendants.

The story of former North Carolina death row inmate Robert Bacon vividly illustrates the reasons why all-white juries are a blight on this state's capital justice system that cannot be tolerated. In a county that was approximately 18% African American, Bacon, a black man, was sentenced to death twice by all-white juries: in his original trial in 1987, and in a resentencing trial in 1991. The 1987 jury convicted Bacon for murdering the white husband of his white girlfriend in a plot that his girlfriend masterminded. In a separate trial, the white girlfriend also was convicted of first degree murder. However, the girlfriend was sentenced only to life in prison with the possibility of parole even though it was later found by Bacon's 1991 jury that he had no prior history of violent behavior and had acted under the domination of his girlfriend.

Even more alarming are comments made by one of the jurors who served on Bacon's resentencing jury.[1] The juror said in a sworn declaration that some jurors felt that it was wrong for a black man to date a white woman. Jurors also felt that black people commit more crime and that it is typical of blacks to be involved in crime. The juror said that some jurors

[1] *See* Declaration of Pamela Bloom Smith (May 10, 2010).

were adamant in their feeling that Bacon was a black man and he deserved what he got. According to this juror, the majority of jurors were impatient with those jurors who initially wanted to sentence Bacon to life without parole; the majority complained that it should have been an easy decision and that the jury was taking too long.[2]

This brief sets forth the reasons, backed by systematic bodies of social science research, why the pervasive presence of all-white and predominantly white capital juries in North Carolina should matter to everyone concerned with this state's criminal justice system. As seen in the case of Robert Bacon, all-white juries delegitimize North Carolina's death penalty system in three distinct and unacceptable ways:

- Deliberative Thoroughness and Accuracy: The systematic exclusion of death-qualified African American jurors negatively affects a jury's deliberative thoroughness and ultimately the accuracy and fairness of the jury's verdict bearing on life or death.
- Confronting Racial Issues: The systematic exclusion of death-qualified African American jurors from capital trials raises the very realistic specter that both explicit and subconscious racism could have been present in those trials.

[2] In 2001, Governor Michael F. Easley commuted Bacon's death sentence to life imprisonment without parole.

- Harm to Perceived Legitimacy of the Criminal Justice System: The systematic exclusion of African Americans from capital juries affects the perceived legitimacy of the North Carolina criminal justice system, especially in the eyes of the large African American community in North Carolina but also in eyes of white residents and other minority groups.

A. Deliberative Accuracy of the Jury

A crucial task of a jury is to have twelve members from different walks of life examine the evidence during trial, evaluate it, and then in deliberation bring together all of the perspectives of the members in order to reach a verdict. African Americans have unique social and cultural life experiences that can provide insight into the evidence: for example, the social and physical context in which a killing occurred; the reliability of witnesses; the potential motives of the accused; the background of the accused, and other factors, including the weight that should be given to each piece of evidence. In *Peters v. Kiff* (1972),[3] Justice Thurgood Marshall asserted that the group-based exclusion of jurors "deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."

[3] *Peters v. Kiff*, 407 U.S. 493, 503-504 (1972).

Professors Vidmar and Hans summarized the issue this way in their recent book, AMERICAN JURIES: THE VERDICT (2007) at 74:

> The idea of a representative jury is a compelling one. A jury of people with a wide range of backgrounds, life experiences, and world knowledge will promote accurate fact-finding for several reasons.... [A] diverse group is likely to hold varying perspectives on the evidence, encouraging more thorough debate over what the evidence proves.... [T]he inclusion of minorities and women in a representative jury adds their life experiences and insights to the collective pool of knowledge. Research on heterogeneous decision making groups supports the claim that diverse juries are better fact-finders. Minority jurors contribute their unique knowledge to the general discussion. Furthermore, when whites anticipate participating in a diverse jury, they tend to give more careful assessments of the evidence. (footnotes omitted)

Research conducted by legal anthropologist Daniel Swett demonstrated how non-diverse juries lack multi-cultural perspectives and often the ability to carefully consider the evidence was confirmed. Almost four decades ago, Professor Swett reported on a trial before an all white jury and a white judge that involved a charge of first degree murder against an African American man accused of shooting and killing another African American man in a pool room dispute.[4] The killer, the victim and the only witnesses to the event were from an inner city culture. The defendant admitted to the shooting, but claimed the dead man was actually the

[4] Daniel Swett, *Cultural Bias in the American Legal System*, 4 LAW & SOCIETY REV. 79, 79-110 (1969).

aggressor and that he had merely been defending himself. The witnesses to the shooting, all from the inner city, unanimously supported the defendant and testified that the deceased man had put the defendant "in the dozens." It was clear from the judge's attempt to clarify the testimony and the puzzlement on the jurors' faces that they were totally confused by the testimony. As Professor Swett documented, the white jurors' unfamiliarity with the witnesses' inner-city vocabulary and sub-culture, especially with respect to the continuously repeated phrase, "in the dozens," led the jury to return a verdict of murder in the second degree based solely on the ground that the defendant admitted that he shot the other man. If even a single African American had been on the jury it is likely that he or she could have explained to the other jurors that the defendant's and the witnesses' testimony about "in the dozens" was a reference to an extreme form of verbal aggression usually directed against the person's mother that frequently leads to violence. In the case before the jury, the aggression was initiated by the deceased man against the defendant. This knowledge could have been critical to the jury in assessing a claim of self defense.[5] At minimum, it meant the homicide was manslaughter and not murder.

[5] Swett also described a second trial of a young black man accused of assault. The defendant also used vocabulary and exhibited a demeanor on the witness stand that was foreign to the all-white jury.

The recent 2010 exoneration of Shawn Massey after twelve years in a North Carolina prison shows that Professor Swett's example is not a relic of history or an anomaly. Mr. Massey, a young black man was convicted of robbery and kidnapping after a white victim described her assailant as having hair "pulled back from the front with 4 or 5 braids hanging down the back" In fact she later clarified, he wore his hair in cornrows , a distinctive African American hairstyle. After Massey was arrested, although expressing some doubts, the victim said Massey "most" looked like her assailant even though Massey did not have braids. Massey and his family insisted he had never had braids. Police and prosecutors incorrectly assumed the victim's attacker had braids only on the back of his head because of the victim's description. They did not understand her trial testimony that the braids went through his head from front to back, the definition of cornrows. They assumed that seven pictures of Mr. Massey without cornrows, some as recent as eleven weeks before the assault, had little significance because the pictures did not show the back of Mr. Massey's head; and they assumed he could have cut off the braids following the assault and robbery. Only recently were investigators from Duke University's School of Law's Wrongful Conviction Clinic able to show that it would have been impossible

for Mr. Massey to have grown hair long enough to have it braided into cornrows, something the white police and prosecutors never considered.

The case of current North Carolina death row inmate Jathiyah al-Bayyinah further illustrates the cultural disconnect that can occur when capital juries are comprised only of white individuals. Mr. al-Bayyinah, a black man, was twice convicted and sentenced to death for the killing of a white storeowner in 1998. Each time, the jury that sentenced al-Bayyinah was all white.

Mr. al-Bayyinah's jury heard evidence that the victim gave a cross-racial identification to an emergency dispatcher over the phone: the victim stated that his attacker was a black male wearing dark clothing and said "I think I cashed his check yesterday... But, I'm not positive." Evidence presented at the trial showed that two black males had cashed checks at the store the day before the crime, and one of them was al-Bayyinah. Upon receiving word of the crime, local law enforcement officers drove toward the store. About four blocks from the store, an officer saw al-Bayyinah, a black male, walking unhurriedly down the side of the road wearing dark clothing. Al-Bayyinah saw the officer's patrol car and its flashing blue lights and ran into a nearby woody thicket. Other officers, who had been *en route* to the crime scene, instead joined the officer in the area of the woody thicket. No search was ever conducted of other areas around the crime scene; officers

did not canvass the neighborhood, question residents, or search for other suspects. Nonetheless, officers testified that al-Bayyinah was the only black male in dark clothing seen in the area. Law enforcement officers soon surrounded the thicket and eventually located al-Bayyinah within it.

Mr. al-Bayyinah's juries, which both convicted and sentenced him to death, were both all-white. There was no one on his juries who might have understood why a young African American male who did not commit any crime might have been distrustful of and run from approaching police officers. Nor was there any African American who might have had the shared experience of having been pulled over or pursued by the police simply because he or she was the first black person they saw. There is a significant risk that the absence of any African Americans on al-Bayyinah's juries caused these important perspectives to be overlooked during guilt and sentencing deliberations. The consequence is that the jury may have convicted him on less than proof beyond a reasonable doubt.

Empirical research has confirmed the wisdom of a truly representative jury. For example, in one of many studies, Professor Samuel Sommers created an experiment comparing six-person juries composed exclusively of

white persons with juries composed of four white and two black members.[6] The racially mixed juries engaged in longer deliberations, discussed a wider range of information, and were more accurate in their statements about the case. Interestingly, this was not simply the result of distinctive behavior on the part of black jurors in the mixed juries. White jurors acted quite differently depending on whether they were members of all-white or mixed juries. Compared to whites in the homogeneous juries, whites in mixed juries appeared to be more careful and systematic in their decision making: they made fewer factual mistakes and raised more pieces of evidence and issues in their deliberations. A substantial body of research on jury decision making is generally supportive of Sommers' findings.[7]

In an exhaustive review of research devoted to the study of racial effects on jury decision making, researchers Sommers and Ellsworth concluded that the research showed that

> "...the racial composition of the jury influenced the content and scope of the discussions. Compared to all-White juries, racially mixed juries tended to deliberate longer, discuss more case facts, and bring up more questions about what was missing from the trial...."[8]

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[6] Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006).

[7] *See, e.g.*, Phoebe Ellsworth, *Are Twelve Heads Better than One?*, 52 LAW & CONTEMP. PROBS. (Autumn 1989). In a compelling essay, Richard O. Lempert identified multiple ways that diversity could enhance fact finding. *See* Richard O. Lempert, *Uncovering "Nondiscernible" Differences: Jury Research and the Jury Size Cases*, 73 MICH. L. REV. 643, 670-671 (1974-1975).

[8] *See* Samuel Sommers & Phoebe Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 997-1031 (2003).

The superficial deliberations by all-white juries often engage in cannot be cured simply by placing a single black person on the jury. As far back as 1939 social psychologists began to document that in circumstances where a single member of a group holds opinions that are different from the majority opinions, that person is highly likely to not even express dissent and just go along with the majority. However, if that person has an ally, he is likely to express that opinion and defend it. Over the intervening decades hundreds, probably thousands, of studies have confirmed this finding, labeled the "Asch effect" after the psychologist who identified it.[9] Put in the context of the current litigation, the absence of a critical mass of black jurors often has the same detrimental effect on deliberations as the complete absence of black jurors. In other words, even when there is one black person on the jury, there is still a significant chance that cultural perspectives bearing on guilt or sentencing may not be heard.

In the context of such findings as summarized above, there is a very reasonable likelihood that some, if not all, of the North Carolina juries composed exclusively of white persons (or just one black person) who rendered death verdicts failed to engage in robust deliberations and

[9] For a review, see Michael Hogg, *Influence and Leadership, in* HANDBOOK OF SOCIAL PSYCHOLOGY 1166-1207 (Susan Fiske, Daniel Gilbert & Gardner Lindzey eds., 5th ed. 2010).

especially failed to understand and weigh pieces of evidence bearing on guilt and on factors bearing on mitigation. In those cases, the prosecutor's evidence would have been less than proof beyond a reasonable doubt, perhaps considerably so in some cases.

B. Confronting Racial Issues

United States Supreme Court case law commentary concludes and social science research demonstrates that all-white juries—even those comprised of citizens who honestly consider themselves race-neutral and fair-minded— may tend to exhibit racial biases in their decisions. In contrast, the presence of black citizens on juries has been shown to alleviate the risks that both conscious and subconscious racial bias may impact criminal justice decisions.

In *Powers v. Ohio* (1991), the Supreme Court asserted that

> the process of excluding racial minorities invites cynicism respecting the jury's neutrality and its obligation to adhere to the law. The cynicism may be aggravated if race is implicated in the trial, either in a direct way as with an alleged racial motivation of the defendant or a victim, or in some more subtle manner as by casting doubt upon the credibility or dignity of a witness, or even upon the standing or due regard of an attorney who appears in the cause.[10]

In *Georgia v. McCollum* (1992), Justice Sandra Day O'Connor observed that:

[10] *Powers v. Ohio*, 499 U.S. 400, 412 (1991).

> Conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence.[11]

In 1993 Professor Nancy King reviewed the then existing body of research on race and juries. Professor King concluded that overall the research indicated that "whenever a connection exists...white jurors are harsher with black defendants and more lenient with those charged with crimes against black victims than black jurors."[12]

Consistent with Justice O'Connor's observation, racial effects do not have to be the result of open racism. Although social psychologists use the term "implicit bias,"[13] a substantial body of research has shown that even persons who see themselves as liberals on race issues nevertheless make implicit assumptions about African Americans based on subtle stereotypes.[14] Thus, in a series of studies, Gaertner & Dovido (1986) found that whites who professed an egalitarian philosophy were nevertheless quick to

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[11] *Georgia v. McCollum,* 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting).

[12] Nancy King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions,* 92 MICH. L. REV. 63, 85 (1993).

[13] *See* John Dovido & Samuel Gaertner, *Intergroup Bias*, *in* HANDBOOK OF SOCIAL PSYCHOLOGY 1084-1121 (Susan Fiske et al. eds., 5th ed. 2010); Vincent Yzerbyt & Stephanie Demoulin, *Intergroup Relations*, *in* HANDBOOK OF SOCIAL PSYCHOLOGY, 1024-1093.

[14] *See, e.g.*, Jerry Kang & Mazahrin Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063, 1064 (2006). ("Evidence from hundreds of thousands of individuals across the globe shows that (1) the magnitude of implicit bias toward members of out-groups or disadvantaged groups is large, (2) implicit bias often conflicts with conscious attitudes, endorsed beliefs, and intentional behavior [and] (3) implicit bias influences evaluations of and behavior toward those who are the subject of the bias . . . .").

associate negative personality traits to African Americans and positive personality traits to whites. Many other studies unquestionably lead to a conclusion that people who sincerely believe themselves to be non-prejudiced often harbor anti-African American assumptions that influence their behavior and decision-making.

Professor James Johnson and his colleagues created an experiment that simulated a trial in which white persons serving as jurors learned about circumstantial evidence that incriminated the defendant. The defendant was described as either white or black and although the jurors had been exposed to it, the evidence was ruled inadmissible. The results showed that the jurors ignored the incriminating circumstantial evidence when the defendant was described as white, but used it in their decisions when he was described as black.

In another study 156 white persons were asked to give their opinions about a trial in which the defendant was accused of assaulting his girlfriend in a bar. In a "race salient" version of the event the defendant allegedly yelled: "You know better than to talk that way about a "Black man" (or "White man") in front of his friends." In another version the defendant was quoted merely as saying "to talk about a *man* in front of his friends." When race was made salient, as in the first scenarios, the ratings of guilt were

about equal for both Black and White defendants. However, when race was not made salient, as in the second versions, whites gave higher guilt ratings to the Black defendant than the white defendant and rated him as more aggressive and violent than the White defendant and more likely to commit a crime in the future. The results were replicated in a second study. The researchers concluded that when race was made salient the jurors were on guard against making racially based assumptions, but when the case was described without an explicit mention of race, those subtle stereotypes came into play.

While some research findings are from experiments, the findings are consistent with a large body of research demonstrating subtle, but often invidious, effects of perceptions of African Americans. For example research by Professor David Baldus and his colleagues found that killing a white person rather than a black person increased the likelihood of being sentenced to death, but also that black defendants who killed white victims were more likely than white persons to receive death sentences.[15]

Professor Jennifer Eberhardt and her colleagues used the Baldus database to ask an important question about more subtle effects of race of the defendant. Using photographs of the actual African American

[15] David 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, 1638-1770 (1998).

defendants Eberhardt and her co-authors had them independently rated according to the degree to which the defendants had features that were stereotypically African American. The researchers found that the more stereotypically African American the defendant's features, the more likely that defendant was to receive a death sentence.[16] The best explanation for this finding is subtle effects of race that influenced the juries' decisions.

Minority presence on the jury is likely to reduce the outright expression of racial bias. University of Michigan psychology and law professor Phoebe Ellsworth reported that when juries contained no minority members, they tended to be harsher toward minority defendants: "White people worry about being racist when they're reminded of it, but when it's all white people, it just doesn't occur to them to remember their egalitarian values."[17] Even if jury members have strong biases, diversity ensures a range of biases which can cause the jurors to examine the assumptions behind their individual perspectives during deliberations and thereby explore the testimony and other evidence more thoroughly.

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[16] Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*. 17 PSYCHOLOGICAL SCIENCE no. 5, 383-386 (2006).

[17] Steve McGonigle, Holly Becka, Jennifer LaFleur, & Tim Wyatt, *Jurors' Race a Focal Point for Defense: Rival Lawyers Reject Whites at Higher Rate*, THE DALLAS MORNING NEWS, Jan. 24, 2006, http://www.dallasnews.com/sharedcontent/dws/news/longterm/stories/082105dnproprosecutors.378d9eb.html.

In his award winning book, DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM (2005), Professor Craig Haney expanded upon those basic insights about conscious and unconscious racial bias. He concluded:

> Attributing deeper and more negative traits to minority group members in our society--traits and motives that are represented and perceived as natural, intrinsic and immutable--makes it even more difficult for whites to appreciate the role of social history and present circumstances in shaping the life course of African Americans.[18]

Professor Haney described experiments that confirmed the effects of race issues among white jurors. In a review of 14 different studies conducted by various researchers, he concluded that jurors sentenced differently as a result of the racial characteristics of the case.[19] Haney and a collaborator followed up this finding with their own research using samples of death-qualified jury-eligible adults.[20] The studies varied the race of the defendants and the race of the victims. Haney summarized the findings as follows:

> [W]e found that white participants interpreted aggravating and mitigating circumstances differently as a function of the racial characteristics of the case. In particular, they tended to weigh aggravating

[18] CRAIG HANEY, DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM 204 (Oxford University Press 2005).
[19] *Id.*
[20] Haney also use samples of students and obtained essentially the same results.

> circumstances more heavily when the defendant was African American. Similarly, they were reluctant to attach much significance to all mitigating circumstances when they were offered on behalf of an African American defendant. The participants also mentioned "stereotype-consistent" reasons for their sentencing verdicts (i.e., negative) qualities of the African American defendants, and they appeared less able or less willing to empathize with or enter the world of African American defendants. [21]

Haney also reported that his research showed that

> [W]hite jurors sentenced African American defendants to death more often than they did whites. There was about a 10-percentage point overall difference that was determined by race--white defendants were given death sentences a little more than 40% of the time, African American defendants a little more than 50%. The harshest sentencing occurred in the black defendant/white victim condition, where death sentences were rendered by 54% of the participants.[22]

In their extensive review of research bearing on the racial effects in jury decision making, Professors Sommers and Ellsworth concluded as follows:

> Racially mixed juries were ... more likely to discuss racial issues such as racial profiling during deliberations, and more often than not, Whites on these heterogeneous juries were the jurors who raised the issues.[23]

Sommers and Ellsworth further concluded that "...simply knowing that they would be discussing the case with a racially heterogeneous group

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[21] *Id.* at 205.
[22] *Id.*
[23] Sommers and Ellsworth, *Race and Juries*, *supra*, at 1028.

was sufficient to influence jurors' private judgments."[24] And as the findings showed, those private judgments were unfavorable to African Americans. In summary, juries that exclude African Americans are likely to exhibit racial biases even if they believe they are fair-minded and not racially biased. The presence of African Americans on juries helps to prevent such biases from tainting the deliberations.

C. Serious Harm to the Perceived Legitimacy of North Carolina's Criminal Justice System

The Supreme Court's opinion in *In re Winship*, 397 U.S. 358 (1970), held for the first time that the due process clause requires proof beyond a reasonable doubt. In describing the societal interests in the reliability of jury verdicts, the Court said:

> The requirement of proof beyond a reasonable doubt has [a] vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction....
>
> Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

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[24] *Id.*

In short, our nation's constitutionally-required procedures have two functions: one is fairness to the individual, and the second is ensuring the confidence of the community, which is critical to the moral force of the law, its acceptance, and compliance with it.

Almost four decades ago, social psychologist John Thibaut and law professor Laurens Walker of the University of North Carolina at Chapel Hill published their seminal study on what makes people evaluate the legal system as fair or unfair: PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975). Following their path-breaking research, literally hundreds of studies have investigated the factors that people use to evaluate whether legal procedures are fair, questions that have a direct bearing on whether they view a justice system as fair and should be accorded legitimacy. *See e.g.*, TOM TYLER, WHY PEOPLE OBEY THE LAW (2006).[25] One central implication of the findings is that the opportunity to participate in the legal system is critically important in evaluations of a system's legitimacy.

The United States Supreme Court has recognized the need for legitimacy of the legal system many times, especially in the context of race. Thus in a long line of cases that will be well known to North Carolina

[25] *See also* Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research*, SOCIAL ISSUES AND POLICY REVIEW 2, 65-102 (2008); Valerie P. Hans & Jonathan D. Casper, *Trial By Jury, the Legitimacy of the Courts, and Crime Control*, *in* THE CRIME CONUNDRUM: ESSAYS ON CRIMINAL JUSTICE 93 (Lawrence Meir Friedman & George Fisher eds., 1997).

courts, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991) asserted:

> Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality. In the many times we have addressed the problem of racial bias in our system of justice, we have not questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts....
>
> To permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin. (citations omitted)[26]

While excluding African Americans from serving on capital juries harms accurate fact finding and removes obstacles to the expression of conscious and subconscious racial bias, it also, as the *Edmonson* court observed, harms the legitimacy of verdicts. This is likely to be most true for North Carolina's African American community.

The article by scholars Seth Kotch and Robert Mosteller, which is referenced in the present litigation on the North Carolina Racial Justice Act, points to the long history of racial unfairness in administration of the death penalty in North Carolina.[27] For all North Carolinians, but especially for North Carolina's African American community, the uncovering of death-

[26] *Edmonson v. Leesville Concrete Co.*, 500 U.S. at 628.

[27] Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. (forthcoming 2010).

qualified minority citizens being excluded from capital juries has undoubtedly raised questions about the fairness of North Carolina's criminal justice system. This is especially true for cases involving African American defendants. In contrast, recent research shows that serving on juries increases general trust in government.[28] Therefore, the widespread exclusion of African American citizens from capital juries serves to delegitimize public confidence in fair and just decision-making in capital cases.

IV. CONCLUSION

For all of the reasons enunciated in the preceding paragraphs, the *amici* listed above urge this Court to consider both the actual fact of systematic exclusion of death-qualified African American jurors and the reasons why that exclusion severely harms the state's criminal justice system.

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[28] John Gastil et al., *Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberation and Political Participation*, 64 J. POL. 585 (2002); JOHN GASTIL, E. PIERRE DEESS, PHILIP J. WEISER AND CINDY SIMMONS, THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION (Oxford University Press 2010).

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing **Brief of Scholars on Jury Deliberations as *Amici Curiae* in Support of Defendant Jathiyah Al-Bayyinah** by first class mail upon:

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