IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC16-547

LARRY DARNELL PERRY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

AMICUS CURIAE BRIEF OF THE CONSTITUTION PROJECT IN SUPPORT OF PETITIONER

ON DISCRETIONARY REVIEW FROM A DECISION OF THE
FIFTH DISTRICT COURT OF APPEAL

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STATEMENT OF INTEREST

The Constitution Project ("TCP") is a national nonpartisan organization that seeks solutions to contemporary constitutional issues through scholarship and public education. TCP's essential mission is to promote and defend constitutional safeguards. TCP's work is driven by bipartisan, blue-ribbon committees whose members are former government officials, judges, law enforcement officials, scholars, and other prominent citizens. These committees reach across ideological and partisan lines to craft consensus recommendations for policy reforms, which include accuracy, fairness, and due process in our justice system. TCP is deeply concerned with the preservation of our fundamental constitutional guarantees and ensuring that those guarantees are respected and enforced by all three branches of government. TCP regularly files amicus briefs in cases, like this one, that implicate its bipartisan positions on constitutional issues, in order to better apprise courts of the importance and broad consequences of those issues.

In 2000, TCP convened a Death Penalty Committee ("Committee") including supporters and opponents of the death penalty, Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others with extensive and varied experience in the criminal justice system. Although the Committee does not take a position on the death penalty itself, its members have grave concerns that, as currently administered, the death penalty lacks adequate procedural safeguards and other assurances of fundamental fairness. In 2014, the Committee issued a report making recommendations seeking to improve reliability in capital convictions and sentencing. *See* The Constitution

Project, *Irreversible Error: Recommended Reforms for Preventing and Correcting Errors in the Administration of Capital Punishment* (2014) (www.constitutionproject. org/wp-content/uploads/2014/06/Irreversible-3 Error_ FINAL.pdf) ("*Irreversible Error*").[1] In this report, the Committee specifically called for the use of a unanimous verdict as to the death sentence and for each aggravating circumstance. *Irreversible Error* at 98. TCP has filed this brief out of concern regarding the negative impact non-unanimous jury sentencing has on the reliable, fair, and constitutional administration of capital punishment.

SUMMARY OF ARGUMENT

Because unanimous sentencing verdicts are critical to the reliability and credibility of the death penalty, TCP opposes any statute that permits imposition of a death sentence on the less-than-unanimous consent of the jury. A unanimity requirement promotes careful and thorough evidence-based deliberations, prevents the exclusion or silencing of minority and opposing views in the deliberation process, and increases public confidence in the jury's sentencing decision. Unanimity is also essential to ensuring the jury's penalty determination accurately reflects the conscience of the community. Perhaps for all of these reasons, the overwhelming majority of death penalty jurisdictions require a unanimous sentencing verdict to authorize a sentence of death. The near-uniform judgment of

[1] The membership of The Constitution Project's Death Penalty Committee is included as Appendix A to this brief.

the nation's legislatures confirms that non-unanimity in death sentencing violates current standards of decency.

ARGUMENT

In the complicated aftermath of *Hurst v. Florida*, 136 S. Ct. 616 (2016), this Court is squarely faced with the constitutional permissibility of utilizing a less-than-unanimous sentencing verdict to condemn a man to death. TCP opposes this practice for reasons that also reveal its Eighth Amendment infirmities. Lack of unanimity undermines the jury decision making process, and, as a result, the credibility and reliability of death penalty verdicts. Perhaps in light of these deficiencies, non-unanimity in capital sentencing is a widely rejected practice among this nation's legislatures – a stark refutation that reflects a national consensus against it.

I. NON-UNANIMOUS JURY DECISION-MAKING PRODUCES UNRELIABLE VERDICTS.

Since the Supreme Court approved the constitutionality of capital punishment in 1976, it has consistently recognized that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *see, e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death

is the appropriate punishment in a specific case."); *Gardner v. Florida*, 430 U.S. 349, 358 (1977) ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) ("Thus, the rule in *Lockett* followed from the earlier decisions of the Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all.").

Unanimity is critical to reliability in capital sentencing. Over ten years ago, this Court recognized as much:

> [W]e perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict. The "heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate" (*Sumner v. Shuman*, 483 U.S. 66 (1987)) convinces us that jury unanimity is an especially important safeguard at a capital sentencing hearing. In its death penalty decisions since the mid-1970s, the United States Supreme Court has emphasized the importance of ensuring reliable and informed judgments. These cases stand for the general proposition that the "reliability" of death sentences depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact. The requirement of a unanimous verdict can only assist the capital sentencing jury in reaching such a reasoned decision.

State v. Steele, 921 So.2d 538, 549 (Fla. 2005) (quoting *State v. Daniels*, 542 A.2d 306, 315 (Conn. 1988)) (citations omitted).

Empirical evidence supports this Court's conclusion. Studies suggest that "where unanimity is required, jurors evaluate evidence more thoroughly, spend

more time deliberating and take more ballots." American Bar Association, American Jury Project, *Principles for Juries and Jury Trials,* 24 (2005).[2] Unanimous jury decisions for death produce more accurate outcomes by forcing jurors to engage with the evidence:

> Majority-verdict deliberations tend to be more verdict-driven, meaning that the jurors are more likely to take the first ballot during the first ten minutes of deliberation and vote until they reach a verdict. Unanimous-verdict juries, on the other hand, tend to be more evidence-driven, generally delaying their first votes until the evidence has been discussed.

Riordan, *Ten Angry Men: Unanimous Jury Verdicts in Criminal Trials and Incorporation After McDonald*, 101 J. Crim. L. & Criminology 1403, 1429 (2012).

According to a 2001 study, "several consistent findings have emerged" in research conducted over the last four decades: Juries not subject to a unanimity requirement "tend to take less time to reach a verdict, take fewer polls, … hang less often," and, most importantly, "cease deliberating when [the minimum necessary vote] is reached." Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 669 (2001) (citations omitted); *see also* Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1272-1273 (2000) (reporting similar findings). Such careful deliberations substantially reduce the chance of error in the verdict – a consequence even the members of the jury itself realize. As compared

[2] Available at: http://www.abanet.org/jury/pdf/final%20commentary_july_1205.Pdf.

to unanimous juries, "non-unanimous juries express less confidence in the justness of their decisions." Riordan*, supra* at 1429.

II. NON-UNANIMOUS JURY VERDICTS EXCLUDE MINORITY VIEWS AND CREATE A PUBLIC PERCEPTION OF UNFAIRNESS REGARDING THE DEATH PENALTY.

Allowing a non-unanimous vote has a deleterious effect on the decision-making process itself. When the members of a jury know that unanimity is not required, they do not feel compelled to give serious consideration to disagreements among the jurors. A non-unanimous decision rule "allows juries to reach a quorum without seriously considering minority voices, thereby effectively silencing those voices and negating their participation." American Bar Association, American Jury Project, *Principles for Juries and Jury Trials,* 24. A non-unanimous jury may also suppress the voice of racial minorities in the process. When a jury contains no members of the defendant's race, there is an increased likelihood of conscious and unconscious biases influencing the vote. Riordan, *supra* at 1431. Under a non-unanimous verdict system, members of racial and ethnic minority groups lose their power to bring to the attention of their fellow jurors information or evidence others may have missed, or to encourage their fellow jurors to consider a viewpoint that challenges stereotypes and assumptions. *Id.* As Justice Brennan correctly observed over forty years ago, "When 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 v. Louisiana*, 406 U.S. 395, 396 (1972) (Brennan J., dissenting).

Unanimous verdicts also lend credibility to the administration of the death penalty. A non-unanimous verdict "fosters a public perception of unfairness and undermines acceptance of verdicts and the legitimacy of the jury system." American Bar Association, American Jury Project, *Principles for Juries and Jury Trials*, 24-25. Such a verdict can invite rather than resolve racial divisiveness, especially in light of well-known statistical studies demonstrating that, all else being equal, black defendants who kill white victims are substantially more likely than other defendants to be sentenced to death. *See*, *e.g.*, Baldus et al., *Equal Justice and the Death Penalty,* 150 (1990).

In addition, because "a jury that must choose between life imprisonment and capital punishment can do little more – and must do nothing less – than express the conscience of the community on the ultimate question of life or death," *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968), it is appropriate and necessary that even a single vote against a death sentence must prevent its infliction. The jury can only continue to serve its critical function as "a significant and reliable objective index of contemporary values," *Gregg v. Georgia*, 428 U.S. 153, 181 (1976), if the judgment of each member is respected.

This restraint on the death penalty is particularly necessary given that capital juries are entirely composed of death-qualified members, *i.e.*, those who will commit to considering and imposing the death penalty in an appropriate case. *See Lockhart v. McCree*, 476 U.S. 165 (1986); *Wainwright v. Witt*, 469 U.S. 412

(1985). The significant segment of the population that is entirely opposed to capital punishment is excluded from jury service and therefore, the jury's sentencing determination will often be more punitive than society as a whole deems appropriate. Therefore, to maintain the credibility and reliability of the death penalty's administration, it is critical that, if even one member of a death-qualified jury finds the penalty excessive or disproportionate in a particular case, it must not be imposed.

III. THERE IS A NATIONAL CONSENSUS REJECTING THE USE OF NON-UNANIMOUS CAPITAL SENTENCING VERDICTS.

Perhaps for all of these reasons, there is a nationwide consensus against non-unanimous jury verdicts in capital cases. Only two other states – Alabama and Delaware – permit a jury's sentencing determination to be less than unanimous. *See* Ala. Code § 13A-5-46 (f) (requiring a minimum jury recommendation of 10-2 in favor of death); 11 Del. C. § 4209 (permitting a sentencing recommendation supported by a majority vote). In recent months, however, substantial constitutional questions have been raised regarding both of these statutes.[3]

[3] The Delaware Supreme Court has stayed all pending death prosecutions while it considers the constitutionality of the state's death penalty statute under *Hurst v. Florida*. Tom McParland, "All Del. Capital Cases Stayed Pending High Court Ruling," Delaware Law Weekly (Feb. 1, 2016), *available at* http://www.delawarelawweekly.com/id=1202748516955/All-Del-Capital-Cases-Stayed-Pending-High-Court-Ruling?slreturn=20160207124245. In Alabama, a trial court judge recently ruled that the state death penalty was unconstitutional in a pending murder case. Kent Faulk, "JeffCo judge: Alabama death penalty sentence scheme unconstitutional," Al.com (March 3, 2016), *available at* http://www.al.com/news/birmingham/index.ssf/2016/03/jeffco_judge_rules_alaba

(continued . . .)

Even assuming the validity of these laws, however, the scarcity of states that permit non-unanimous capital sentencing is "strong evidence of consensus that our society does not regard this [procedure] as proper or humane." *Hall v. Florida,* 134 S. Ct. 1986, 1998 (2014); *see also Coker v. Georgia*, 433 U.S. 584, 596 (1977) (death penalty for rape of an adult woman held unconstitutional, in part, because Georgia was the only state in the country that authorized such a punishment and therefore the nation's collective judgment on the penalty "obviously weigh[ed] very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman"). The existence of a unanimity requirement across all capital jurisdictions is "the clearest and most reliable objective evidence of contemporary values," *Atkins v. Virginia,* 536 U.S. 304, 312 (2002) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)), and demonstrates that non-unanimous sentencing violates the contemporary standards of decency embodied in the Eighth Amendment. *See id.; Roper v. Simmons*, 543 U.S. 551, 567 (2005); *Kennedy v. Louisiana*, 554 U.S. 407, 426 (2008).

(. . . continued)
ma_dea.html. On May 2, 2016, the U.S. Supreme Court granted certiorari in a case challenging the constitutionality of Alabama's death penalty, vacated the petitioner's death sentence, and remanded to the Alabama court for further consideration in light of *Hurst*. *Johnson v. Alabama*, No. 15-7091 (U.S. May 2, 2016). In addition, Justices Sotomayor, Ginsburg, and Breyer have each noted the likely unconstitutionality of the Alabama death penalty statute. *See Woodward v. Alabama*, 134 S. Ct. 405 (2013) (Sotomayor, J., dissenting from denial of certiorari); *Brooks v. Alabama*, 136 S. Ct. 708 (2016) (Sotomayor, J., and Ginsburg, J., concurring in denial of certiorari) and (Breyer, J., dissenting from denial of certiorari).

CONCLUSION

For all of the reasons set forth above, this Court should find that Section 921.141, Florida Statutes, which permits a non-unanimous jury to recommend a death sentence, violates the Eighth Amendment to the United States Constitution.

Respectfully submitted,

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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APPENDIX A

THE CONSTITUTION PROJECT'S DEATH PENALTY COMMITTEE

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