

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No. 2017-0938
Appellee, : On Appeal from the
-vs- : Warren County Court of
Common Pleas
TERRY LEE FROMAN, : Case No. 14CR30398
Appellant, : Death Penalty Case

**BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF CRIMINAL DEFENSE
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INTEREST OF AMICUS CURIAE

The Ohio Association of Criminal Defense Lawyers (OACDL) is an organization of over 600 dues-paying attorney members. Its mission is to defend the rights secured by law of persons accused or convicted of the commission of a criminal offense; to foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through presentation of accredited Continuing Legal Education programs; to educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the Bill of Rights and individual liberties; and to provide periodic meetings for the exchange of information and research regarding the administration of criminal justice. In support of its mission, OACDL is a frequent contributor of *amicus* briefs in the Supreme Court of Ohio and in the District Courts of Appeals.

OACDL has a particular interest in death penalty cases because of the unique importance of capital cases, because “death is different in kind from any other punishment imposed under our system of criminal justice,” *Gregg v. Georgia*, 428 U.S. 153, 188, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (Stewart, J., plurality opinion). Recognizing the singular nature of capital cases and capital punishment, OACDL is the major provider in the state of required training for lawyers accepting appointments to represent indigent defendants in capital cases. OACDL members have litigated death penalty cases in this state from pre-indictment stages through state and federal courts and clemency proceedings and through the moments of execution. The importance of OACDL’s role in the development and evaluation of Ohio’s death penalty law has been recognized by the appointment of two representatives from the organization to serve on the Supreme Court/Ohio State Bar Association’s Joint Task Force to Review the Administration of Ohio’s Death Penalty.

STATEMENT OF THE CASE AND OF THE FACTS

Amicus accepts and adopts the Statement of the Case and the Statement of Facts as set forth in the merit brief of appellant, Terry Lee Froman.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: A juror who is biased against African Americans may never properly sit on a jury, and that is especially true in a capital case where the accused is black and the victim is white.

Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. . . . “The injury is not limited to the defendant – there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.” *Ballard v. United States*, 329 U.S. 187, 195[, 67 S.Ct. 261, 91 L.Ed. 181] (1946).

Rose v. Mitchell, 443 U.S. 545, 555-556, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979).

Our system of criminal justice strives to recognize and correct for racial bias. The struggle has been long and hard. From the trials of the Scottsboro boys¹ to the jury nullification following the lynching of Emmett Till;² from the jury packing allowed in *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), condemned in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and dramatically revealed in *Foster v. Chatman*, 578 U.S. ___, 136 S.Ct. 1737, 195 L.Ed.2d 1 (2016); from the racial animus of the arrests and prosecutions of the factually innocent Central Park Five³ and Clarence Brandley, “the nigger [who] was elected,” *Ex parte Brandley*, 781 S.W.2d 886 (Tex.Crim.App. 1989), to the testimony at Duane Buck’s sentencing that

¹ E.g., Carter, *Scottsboro: A Tragedy of the American South* (1969); Goodman, *Stories of Scottsboro* (1994).

² E.g., Tyson, *The Blood of Emmett Till* (2017).

³ See Burns, *The Central Park Five: The Untold Story Behind One of New York City’s Most Infamous Crimes* (2011).

blacks were particularly dangerous, *Buck v. Davis*, 580 U.S. ___, 137 S.Ct. 759, 197 L.Ed.2d 1 (2017), to the overt racism expressed in the jury room leading to the conviction of Miguel Angel Peña-Rodriguez, *Peña-Rodriguez v. Colorado*, 580 U.S. ___, 137 S.Ct. 855, 197 L.Ed.2d 107 (2017), we have made progress. Still, the need for vigilance remains.

As the Supreme Court put it 78 years ago, racial discrimination in our jury system “not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.” *Smith v. Texas*, 311 U.S. 128, 130, 61 S.Ct. 164, 85 L.Ed. 84 (1940). Frederick Douglass understood it well. He wrote:

Justice is often painted with bandaged eyes, she is described in forensic eloquence as utterly blind to wealth or poverty, high or low, white or black, but a mask of iron however thick could never blind American justice when a black man happens to be on trial.

Symposium on The Black Lawyer in America Today, Harv.L.Sch.Bull. 6 (Feb. 1971).

We must be better than that. We can be. We are.

As detailed in the third Proposition of Law in Mr. Froman’s merit brief, Juror 49 expressed bias against African Americans both in her answers on the questionnaires and in open court during voir dire. Asked her view of the statement that "Some races and/or ethnic groups tend to be more violent than other," she indicated "Strong agreement]." And she *chose* to explain that "Statistics show there are more black people commit[ting] crimes." (Juror Questionnaire, question 54.) While we may commend Juror 49 for being forthcoming, her answers demonstrated that she should have been deemed ineligible to serve in this case. In fact, her answer to question 54 mirrors the words of Dr. Walter Quijano to the sentencing jury in Duane Buck's case - the words that led the

Supreme Court to hold that Buck's death sentence must be reversed. *Buck v. Davis*, *supra*.

Simply, a person who harbors racial bias has no business sitting on a jury in any case with a defendant who is African American. The impropriety is particularly glaring in a capital case such as this one where the defendant is African American and the victim is white. Yet that is exactly what happened in this case.

One hundred forty years ago, in *Reynolds v. United States*, Chief Justice Morrison Waite wrote that "[A juror who has formed an opinion cannot be impartial." *Reynolds v. United States*, 98 U.S. 145, 155, 25 L.Ed. 244 (1878). Sitting such a juror violates due process. *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961) (citing *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); and *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955)). Juror 49 should never have been allowed to sit, neither as one of the original 12 nor as an alternate. She ought to have been challenged for cause. A challenge for cause should have been granted. Yet she sat. She deliberated. And the jury with her on it voted for death.

We know from *Peña-Rodriguez v. Colorado*, *supra*, as of course we always knew, that racial bias can infect juror deliberations. We know, further, that racial bias is not always overt. See, e.g., Chandran, *Color in the Black Box: Addressing Racism in Juror Deliberations*, 5 Colum.J.Race & L. 28 (2014). And as U.S. District Judge Mark Bennett explained, we know that such bias is not always overt and is difficult to recognize and deal with. See Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and*

Proposed Solutions, 4 Harv.L. & Pol.Rev. 1206 (2010); *Turner v. Murray*, 476 U.S. 28, 35, 106 S.Ct. 1683, 90 L.Ed2d 27 (1986) (addressing "subtle, less consciously held racial attitudes"). Further, we know that the particular combination in this case - black defendant/white victim - is most subject to racial bias in decision-making. See, e.g., Blume, Eisenberg, & Wells, *Explaining Death Row's Population and Racial Composition*, 1J.Emprirical Legal Stud. 165 (2004).

While we do not know what transpired in the jury room in this case, we know that given Juror 49's attitudes, the possibility that racial bias infected the deliberations that led to the jury's death recommendation is intolerable. The integrity of our system of justice demands better.

CONCLUSION

There is no place in capital prosecutions for racial bias. A juror harboring such bias must not be allowed to taint any verdict, let alone a recommendation of death. Yet Juror 49, deliberating and rendering that verdict in this case, did taint the verdict.

The interests of justice and fairness require that the death sentence in this case be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of the foregoing Merit Brief of *Amicus Curiae* were sent by e-mail to David Fornshell and Kirsten Brandt, Counsel for Appellee State of Ohio, at david.fornshell@warrencountyprosecutor.com and kirsten.brandt@warrencountyprosecutor.com, and to Timothy J. McKenna and Roger W. Kirk, Counsel for Appellant Terry Lee Fromer, at mckennalaw@fuse.net and kirkeshire@aol.com this 30th day of April, 2018.

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