

SUPREME COURT OF LOUISIANA

No. 2010-KA-0216

STATE OF LOUISIANA, *Plaintiff-Appellee*

v.

FELTON D. DORSEY, *Defendant-Appellant.*

Appeal from Conviction and Death Sentence Imposed in the First Judicial District Court,
Parish of Caddo, No. 251,406, Hon. John D. Moseley, Presiding.

**BRIEF OF *AMICI CURIAE* CARL STAPLES,
26 CADDO PARISH AND OTHER LOUISIANA CLERGY LEADERS,
28 LAW AND HISTORY PROFESSORS AND SCHOLARS,
THE AMERICAN CIVIL LIBERTIES UNION,
THE AMERICAN CIVIL LIBERTIES UNION OF LOUISIANA,
THE NAACP SHREVEPORT CHAPTER,
THE LOUIS A. MARTINET LEGAL SOCIETY GREATER BATON ROUGE CHAPTER,
THE EQUAL JUSTICE INITIATIVE,
THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE,
AND THE SOUTHERN CENTER FOR HUMAN RIGHTS
IN SUPPORT OF DEFENDANT-APPELLANT FELTON D. DORSEY**

John Holdridge, La. Bar Roll No. 23495
Counsel of Record
Anna Arceneaux, *seeking admission pro hac vice*
ACLU Capital Punishment Project
201 W. Main Street, Suite 402
Durham, NC 27701
(919) 682-5659
Fax: (919) 682-5961

Katie M. Schwartzmann, La. Bar No. 30295
ACLU Foundation of Louisiana
P.O. Box 56157
New Orleans, LA 70156
(504) 592-8056
Fax: (504) 522-0618

Dennis Parker
ACLU Racial Justice Program
125 Broad Street, 18th Floor
New York, NY 10004
(212) 519-7832
Fax: (212) 549-2651

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IDENTITY OF *AMICI CURIAE*

Excluded Juror in this Case

Carl Staples
Shreveport, LA

Caddo Parish Clergy:

Dr. Artis Cash, Sr.
Shreveport Christian Church

Imam Orsen El-Amin
Masjid Al-Taqwa Islamic Community Church

Chaplain Barbara Jarrell
All Souls Unitarian Universalist Church

Reverend Matthew Rawle
Broadmoor United Methodist Church

Reverend Curtis L. West, Jr.
Lane Chapel Christian Methodist Episcopal Church, CME President

Thirteenth District Baptist Association, including:

Dr. Leonard Rhone
Oakland Baptist Church

Reverend Robert L. Walton
St. Rest Baptist Church

Baptist Ministers Fellowship Conference of Shreveport (BMF), including:

Reverend C. E. McLain
Little Union Baptist Church, BMF President

Reverend Robert C. Canada
Mt. Sinai Missionary Baptist Church

Reverend Jimmy L. Carroll
Greater Mt. Nebo Baptist Church

Assoc. Pastor Aaron Franklin
Lake Bethlehem Baptist Church

Reverend Danny Thompson
St. John Baptist Church

Reverend Ernest James
Bethesda Missionary Baptist Church

Reverend Richard Hardy, Jr.
St. Mary Baptist Church

Dr. R. Timothy Jones
Peaceful Rest Baptist Church

Reverend Asriel McLain
Little Union Baptist Church

Reverend Arthur Douglas, Jr.
St. Peter Baptist Church

Reverend Alfred Cole, Jr.
Israelite Baptist Church

Reverend Gregory Jones
Greater Cornerstone Baptist Church

Reverend Roy L. Thomas, Sr.
Saint James Missionary Baptist Church

Reverend Webster C. West
Antioch Baptist Church

Reverend Robert Richmond
New Light Baptist Church

Reverend Alfred Cole, Jr.
Israelite Baptist Church

Other Louisiana Clergy Leaders

Sr. Helen Prejean, CJS
Roman Catholic nun and civil rights activist

The Right Reverend Joe Morris Doss
Bishop, Episcopal Church
President, At the Threshold

Rev. William Barnwell
Episcopal Clergyman
New Orleans, LA

Professors and Scholars:

Andrea Armstrong
Assistant Professor of Law
Loyola University College of Law
New Orleans, LA

Mitchell F. Crusto
Professor of Law
Loyola University College of Law
New Orleans, LA

Raymond Diamond
Jules F. and Frances L. Landry Distinguished Professor of Law
Paul M. Hebert Law Center, Louisiana State University
Baton Rouge, LA

Davida Finger
Assistant Clinical Professor
Loyola University College of Law
New Orleans, LA

Robert A. Garda
Professor of Law
Loyola University College of Law
New Orleans, LA

Lance Hill, Ph.D.
Executive Director
Southern Institute for Education and Research
Tulane University
New Orleans, LA

Janet C. Hoeffel
Vice Dean for Academic Affairs and Catherine D. Pierson Associate Professor of Law
Tulane University Law School
New Orleans, LA

Oliver A. Houck
Professor of Law
Tulane University Law School
New Orleans, LA

James M. Klebba
Victor H. Schiro Distinguished Professor of Law
Loyola University College of Law
New Orleans, LA

Hiroko Kusuda
Assistant Clinic Professor
Loyola University College of Law
New Orleans, LA

Katherine Maris Mattes
Professor of the Practice and Interim Director, Criminal Litigation Clinic
Tulane University Law School
New Orleans, LA

Isabel Medina
Ferris Family Distinguished Professor of Law
Loyola University College of Law
New Orleans, LA

Alex Mikulich, Ph.D.
Catholic Social Ethicist
Jesuit Social Research Institute, Loyola University
New Orleans, LA

Lawrence N. Powell, Ph.D.
James H. Clark Endowed Chair in American Civilization
and Director, New Orleans Gulf South Center
Tulane University
New Orleans, LA

Theodore A. Quant
Director, Twomey Center for Peace through Justice
Loyola University
New Orleans, LA

William P. Quigley
Janet Mary Riley Professor of Law
Loyola University College of Law
New Orleans, LA

Judith K. Shafer, Ph.D.
Visiting Professor of History and Adjunct Professor of Law
Tulane University
New Orleans, LA

Edward F. Sherman
W.R. Irby Chair in Law
Tulane University Law School
New Orleans, LA

Stephen Singer
Assistant Clinical Professor
Loyola University College of Law
New Orleans, LA

Karen Sokol
Assistant Professor of Law
Loyola University College of Law
New Orleans, LA

D. Majeeda Snead
Interim Clinical Director
Loyola University College of Law
New Orleans, LA

George Marion Strickler, Jr.
Professor of Law
Tulane University Law School
New Orleans, LA

Robert St. Martin Westley
LOCHEF Professor of Legal Ethics & Professional Responsibility
Tulane University Law School
New Orleans, LA

Pamela D. Bridgewater
Professor of Law
American University Washington College of Law
Washington, DC

Adam Fairclough
Raymond and Beverly Sackler Professor of American History
University of Leiden
Leiden, Netherlands

Anthony Paul Farley
James Campbell Matthews Distinguished Professor of Jurisprudence
Albany Law School
Albany, NY

Steven Hahn
Roy F. and Jeannette P. Nichols Professor of History
University of Pennsylvania
Philadelphia, PA

Rebecca J. Scott
Charles Gibson Distinguished University Professor of History and Professor of Law
University of Michigan
Ann Arbor, MI

Civil Rights Organizations:

American Civil Liberties Union
New York, NY

American Civil Liberties Union of Louisiana
New Orleans, LA

Charles Hamilton Houston Institute for Race & Justice
Cambridge, MA

Equal Justice Initiative
Montgomery, AL

Alejandro Perkins, Esq., on behalf of the
Louis A. Martinet Legal Society, Greater Baton Rouge Chapter
Baton Rouge, LA

Lloyd Thompson, President, and William Bradford, Member, on behalf of the
National Association for the Advancement of Colored People – Shreveport Branch
Shreveport, LA

Southern Center for Human Rights
Atlanta, GA

INTEREST OF *AMICI CURIAE*

Amici include the excluded juror in this case and concerned citizen Carl Staples, 26 ministers of Caddo Parish churches and other clergy leaders throughout Louisiana, and civil rights organizations working to redress the influence of race on the administration of capital punishment. They also include 20 historians and legal scholars whose area of study and expertise is relevant in part or whole to the issues that arise in this brief.

Excluded Juror and Concerned Citizen. Shreveport resident Carl Staples was a potential juror in Appellant’s trial. Mr. Staples was excluded for cause on the prosecution’s motion, after he expressed great concern serving as a juror in the case when the Confederate flag flew outside the Caddo Parish courthouse.

Clergy Leaders. The 23 Caddo Parish ministers and their congregants of many faiths not only worship in Caddo Parish; they live, work, vote, volunteer, recreate, and raise their families there. Within Caddo Parish’s courts, these ministers and their congregants have been complainants, witnesses, plaintiffs, civil and criminal defendants, and citizens reporting for jury service. These ministers, and the three clergy leaders from across the state, have a longstanding interest in both the well being of Caddo Parish’s community members and the legitimacy and fairness of the parish’s court system.

Historians and Legal Scholars. The 28 historians and legal scholars have areas of expertise relevant to the issues raised in this brief. Professor Raymond Diamond, of the Paul M. Hebert Law Center at Louisiana State University, has written widely in the area of constitutional law, race relations, and legal history, including *Brown v. Board of Education: Caste, Culture, and the Constitution*. He is a former member of the Board of Editors of the Journal of Southern Legal History and of the Board of Directors of the Louisiana Supreme Court Historical Society.

Lance Hill, Ph.D., is the Executive Director of the Southern Institute for Education and Research at Tulane University in New Orleans, a race and ethnic relations center. The Institute’s tolerance education program for teachers – the most comprehensive project of its kind in the South –uses case studies of the Holocaust and the Civil Rights Movement to teach the causes and consequences of prejudice.

Dr. Alexander Mikulich, Research Fellow at the Jesuit Social Research Institute at Loyola University in New Orleans, specializes in race, class, and gender inequalities and spirituality and social justice, among other areas. He recently co-authored *Interrupting White Privilege: Catholic Theologians Break the Silence*, (Maryknoll, New York: Orbis Books, 2007).

Lawrence Powell, James H. Clark Endowed Chair in American Civilization and Director of the New Orleans Gulf South Center at Tulane University, specializes in the history of the Civil War and Reconstruction, Southern history, and Louisiana history and politics. He has edited, among other publications, *Reconstructing Louisiana: Volume VI: Louisiana Purchase Bicentennial Series in Louisiana History* (USL Press 2002).

Theodore A. Quant, is Director of the Twomey Center for Peace through Justice, at Loyola University in New Orleans. The Center seeks to shape social justice consciousness through education, and to take action on critical social problems confronting society, such as poverty and racism.

Judith Schafer, Visiting Professor in the History Department at Tulane University, specializes in American legal history, U.S. Southern history, and the legal history of slavery. She has authored, among other publications, *Slavery, the Civil Law, and the Supreme Court of Louisiana* (Baton Rouge: LSU Press, 1997).

Professor Adam Fairclough, Professor of American History at the University of Leiden in the Netherlands, is an expert in the civil rights movement, Reconstruction, race and politics in Louisiana, and interracial relations in the United States. He has authored, among many other publications, *Race and Democracy: The Civil Rights Struggle in Louisiana, 1915-1972* (Univ. of Ga. Press 1995).

Steven Hahn, Professor of History at the University of Pennsylvania, is a specialist in history of 19th century America, African-American history, the history of the American South, and the international history of slavery and emancipation. Among other publications, he is the author of *A Nation Under our Feet: Black Political Struggles in the Rural South from Slavery to the Great Migration* (Harvard Univ. Press 2004).

Rebecca Scott, Charles Gibson Distinguished University Professor of History and Professor of Law, at the University of Michigan Law School, specializes in the law in slavery and freedom, civil rights, and the

boundaries of citizenship. Among other publications, she is the author of *Degrees of Freedom: Louisiana and Cuba after Slavery* (Harvard Univ. Press 2005).

Legal scholars joining this brief include Loyola University College of Law professors Andrea Armstrong, Mitchell F. Crusto, Davida Finger, Robert A. Garda, James M. Klebba, Hiroko Kusuda, Isabel Medina, William P. Quigley, D. Majeeda Snead; Tulane University Law School professors Janet C. Hoeffel, Oliver A. Houck, Katherine Maris Mattes, Robert St. Martin Westley, Edward F. Sherman, Stephen Singer, Karen Sokol, and George Marion Strickler, Jr.; American University Washington College of Law Professor Pamela Bridgewater; and Albany Law School Professor Anthony Paul Farley. Collectively, these legal scholars specialize in criminal law, constitutional law, legal history, civil rights, human rights, law and poverty, race and the law, civil procedure, and social justice, among many other fields.

Civil Rights Organizations. The ACLU is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty, due process, and equality embodied in the Constitution. The ACLU of Louisiana is one of its statewide affiliates. The Capital Punishment Project (CPP) is a national project of the ACLU that engages in public advocacy and litigation, including direct representation of capital defendants across the country. The Racial Justice Program (RJP) of the ACLU aims to preserve and extend constitutionally guaranteed rights to people who historically have been denied their rights on the basis of race.

The Equal Justice Initiative is a private, nonprofit organization that provides legal representation to indigent defendants and prisoners seeking relief for denial of fair and just treatment in the legal system, and also prepares reports, newsletters, and manuals to assist advocates and policymakers in the critically important work of reforming the administration of criminal justice.

Established in the fall of 2005 at Harvard Law School, the Charles Hamilton Houston Institute for Race and Justice (CHHIRJ) seeks to honor the extraordinary contributions of one of the great lawyers of the 20th century. Charles Hamilton Houston dedicated his life to using the law to address matters of racial discrimination. CHHIRJ is committed to continuing Mr. Houston's legacy through research, instruction, and advocacy directed to

the judicial, legislative and executive branches of government, with a consistent and particular emphasis on securing racial fairness and equality. CHHIRJ, through research and litigation, seeks to address various issues of disparity and racial justice.

The Shreveport Chapter of the NAACP, like its national parent organization, works to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination. The NAACP has 300 members in the Shreveport area.

The Greater Baton Rouge Chapter of the Louis A. Martinet Legal Society seeks to encourage the interchange of ideas, promote legal scholarship, advance the science of jurisprudence, promote the administration of justice, uphold the order and ethics of the courts and the profession of law and promote the welfare of the legal profession in Louisiana. The Society was founded in 1957, when African-American attorneys were barred from participating in the mainstream of the nation's legal profession. The Society sought to combat the racial injustices and inequalities that existed during that time, when Jim Crow laws dominated every aspect of African-American life.

The Southern Center for Human Rights, based in Atlanta, Georgia, is a non-profit, public interest law firm dedicated to enforcing the civil and human rights of people in the criminal justice system. SCHR provides legal representation to people facing the death penalty, challenges human rights violations in prisons and jails, seeks through litigation and advocacy to improve legal representation for poor people accused of crimes, and advocates for criminal justice system reforms on behalf of those affected by the system in the Southern United States.

Beyond the interest of the parties in this case, *amici* have a special interest in ensuring that race plays no role in the death penalty system. *Amici* are particularly concerned with the rights of prospective jurors to participate in their civic duties without reference to race, and to the rights of citizens at large to ensure the fair administration of the criminal justice system, particularly when capital punishment is at stake. Given *amici*'s collective longstanding interests in both the well-being of Caddo Parish's African-American community and the

legitimacy and fairness of the parish's court system, the proper resolution of this case presents a matter of substantial importance to *amici*, their congregants, their members, and their clients.

SUMMARY OF THE CASE

On June 18, 1903, when white citizens in Caddo Parish were still violently resisting implementation of the Thirteenth, Fourteenth, and Fifteenth Amendments passed during Reconstruction,¹ Caddo Parish commissioned a monument commemorating the parish as the last stand of Confederate Louisiana with a \$1,000 donation² to the Daughters of the Confederacy.³ The monument was constructed outside the entrance to the courthouse on Caddo Parish-owned land.⁴

In 1951, during the period often called the “Second Reconstruction,” the Confederate flag was raised at the courthouse.⁵ At that time, white citizens in Caddo were seeking through violence and other means to impede civic and civil rights advances of African-Americans in the parish. Standing on public ground, the Confederate flag today still flies in front of the Caddo Parish courthouse, beside the monument.

¹ The Thirteenth Amendment, ratified in 1865, abolished slavery. The Fourteenth Amendment, ratified in 1868, ensured due process and equal protection to all persons. The Fifteenth Amendment, ratified in 1870, provided that men could not be denied the right to vote “on account of race, color, or previous condition of servitude.”

² *Budget for 1903*, Caddo Parish Police Jury (on file with author); *Police Jury*, SHREVEPORT CAUCASIAN, June 21, 1903, at A1. Appellant’s Brief on Appeal mistakenly reported the donation amount at \$10,000. App. Br. at 53. \$10,000 was the total cost of the monument.

³ Historically, the United Daughters of the Confederacy (“UDC”) has written and endorsed textbooks and periodicals glorifying the Ku Klux Klan and revising civil war history. See, e.g., S.E.F. Rose, *The Ku-Klux Klan and the Birth of a Nation*, CONFEDERATE VETERAN (April 1916) (“The Ku-Klux Klan was organized to . . . resist lawlessness, to defend justice, to preserve the integrity of the white race, and to enforce civil and racial law. No braver men were ever banded together, no grander brotherhood ever existed, than the original Ku-Klux Klan.”). As Justice Thomas observed in *Virginia v. Black*, 538 U.S. 343 (2003), “The world’s oldest, most persistent terrorist organization is not European or even Middle Eastern in origin. Fifty years before the Irish Republican Army was organized, a century before Al Fatah declared its holy war on Israel, the Ku Klux Klan was actively harassing, torturing and murdering in the United States. Today . . . its members remain fanatically committed to a course of violent opposition to social progress and racial equality in the United States.” *Id.* at 388-89 (citing M. Newton & J. Newton, *THE KU KLUX KLAN: AN ENCYCLOPEDIA* vii (1991)).

⁴ *Budget for 1903*, *supra*. See also Report of United Title of Louisiana, Inc. to Caddo Parish Attorney Dannye Malone, Mar. 27, 2002 (on file with author) (records search revealed no conveyance of public land to UDC). Appellant’s Brief on Appeal incorrectly suggested that the land may have been donated to the UDC by the parish. App. Br. at 53.

⁵ *Minutes*, Caddo Parish Police Jury, October 17, 1951 (on file with author).



This is the courthouse where Appellant, an African-American convicted and sentenced to death for the murder of a white firefighter, faced trial. The white prosecutor in his case struck African-Americans at a rate over three times that of whites.⁶ Thus, Appellant’s jury – selected in a parish whose population is nearly half African-American⁷ – consisted of 11 whites and only one African-American. His jurors attended jury selection over a weeklong period, and the trial lasted for ten days. By the time they voted on sentence, each juror had seen the flag more than a dozen times and likely two or three dozen times.

Appellant has persuasively demonstrated in his Brief on Appeal that the existence of the Confederate flag in front of the Caddo Parish courthouse has a substantial adverse impact on the administration of justice in the courthouse, including implementation of the State’s death penalty system, in violation of the Thirteenth

⁶ R. 7264.

⁷ Caddo Parish QuickFacts from the U.S. Census Bureau, *available at* <http://quickfacts.census.gov/qfd/states/22/22017.html> (last visited Apr. 12, 2011).

Amendment's prohibition on slavery and badges and incidents of slavery, and the Fourteenth Amendment's guarantee of due process and equal protection. The State has responded that this issue is not preserved for appellate review. This Court should consider these important claims without resort to procedural bars.

The fair administration of justice, without reference or reliance upon race, is an essential concern of *amici*. In this case, the prosecution struck for cause African-American resident Carl Staples because he had serious reservations about serving as a juror under the specter of the flag of the Confederacy. As he told the court,

[The flag] is a symbol of one of the most . . . heinous crimes ever committed to another member of the human race, and I just don't see how you could say that, I mean, you're here for justice, and then again you overlook this great injustice by continuing to fly this flag which . . . put[s] salt in the wounds of . . . people of color. I don't buy it.

R. 6032. The presence of the Confederate flag denied Appellant a fair trial and equal treatment under the law. But its presence also denied African-Americans, like Mr. Staples, the opportunity to serve on the jury, and risked tainting with racial bias all of the other jurors and potential jurors, witnesses, and citizens who attended and participated in the court proceedings conducted underneath it.⁸

Rather than reiterating the legal arguments aptly presented by Appellant, *amici* begin this brief by setting forth the historical meaning and context of the raising of the flag at the courthouse. We then dig deeper into the parish's history of racial discrimination, explicating the historical meaning and context of the erection of the monument. Third, we show that flying the Confederate flag in front of the Caddo Courthouse creates an intolerable risk under the Eighth Amendment that criminal justice cannot be fairly administered within its walls, particularly in death penalty cases.

SUMMARY OF ARGUMENT

Courts across the country have recognized that, for many people and particularly for African-Americans,⁹ the Confederate flag is a provocative and "controversial racial and political symbol."¹⁰ A Louisiana federal

⁸ *Amici* the American Civil Liberties Union and its Louisiana affiliate have and will continue to support the right of private citizens to display the Confederate flag. This case, however, involves a display by the State of Louisiana outside a courthouse dedicated to the impartial administration of justice where a death penalty trial took place.

⁹ *Amici* do not mean to suggest that everyone in Caddo Parish or elsewhere views the Confederate flag as a symbol of America's history of racism. But they do aver that significant numbers of people do view it in this manner.

district court recognized years ago that a principal's display of the Confederate flag in his office at Covington High School represented "an affront to every Negro student in the school."¹¹ Eight years ago, the U.S. Court of Appeals for the Eleventh Circuit has similarly observed that the Confederate flag has multiple "emotionally charged" meanings, and is viewed by some as a symbol of white supremacy and racism, even if others view it as a symbol of heritage.¹² The court has also noted that "[i]t is ... clear that the primary effect of the [Confederate] flag ... is to remind citizens, albeit offensively to some, of a controversial era in American history."¹³ In 2001, the Fourth Circuit acknowledged,

It is the sincerely held view of many Americans, of all races, that the confederate flag is a symbol of racial separation and oppression. And, unfortunately, as uncomfortable as it is to admit, there are still those today who affirm allegiance to the confederate flag precisely because, for them, the flag is identified with racial separation. Because there are citizens who not only continue to hold separatist views, but who revere the confederate flag precisely for its symbolism of those views, it is not an irrational inference that one who displays the confederate flag *may* harbor racial bias against African-Americans.¹⁴

As the Eastern District federal court held decades ago, the continuing display of the Confederate flag at a public high school was "no way to eliminate racial discrimination 'root and branch' from the [school] system."¹⁵ Its display, the court found, could not be "constitutionally permissible in a unitary school system where both white and black students attend school together."¹⁶

Likewise, flying the Confederate flag in front of the Caddo Parish Courthouse creates an unacceptable risk under the Eighth Amendment to the U.S. Constitution that capital punishment cannot be fairly administered within its walls. For many people and particularly for African-Americans, the Confederate flag celebrates historical resistance by whites to equal treatment under the law for African-Americans. Moreover, the flag cannot be divorced from the parish's history of racism in which African-Americans were treated as chattel, denied basic

¹⁰ *Castorina v. Madison Cnty. Sch. Bd.*, 246 F.3d 536, 542 (6th Cir. 2001).

¹¹ *Smith v. St. Tammany Parish Sch. Bd.*, 316 F. Supp. 1174, 1176 (D.C. La. 1970).

¹² *Scott v. Sch. Bd. of Alachua Cnty.*, 324 F.3d 1246, 1249 (11th Cir. 2003). *See also A.M. ex rel. McAllum v. Cash*, 585 F.3d 214, 222 (5th Cir. 2009) (noting that even the plaintiffs agreed that some view "the Confederate flag in certain circumstances as a symbol of racism and intolerance, regardless of whatever other meanings may be associated with it").

¹³ *NAACP v. Hunt*, 891 F.2d 1555, 1564 (11th Cir. 1990).

¹⁴ *United States v. Blanding*, 250 F.3d 858, 861 (4th Cir. 2001) (per curiam) (emphasis in original).

¹⁵ *Smith*, 316 F. Supp. at 1176.

¹⁶ *Id.*

civil rights including the right to vote and the right to serve on juries, and suffered torture and intimidation at the hands of many white citizens of Caddo Parish. Because of its charged symbolism, the Confederate flag continues to influence the administration of capital punishment in Caddo Parish, interfering with the participation of African-American citizens in the criminal justice system and priming at least some of its white citizens consciously or subconsciously to view African-Americans defendants and victims as second-class citizens.

I. THE CONFEDERATE FLAG AND THE CONFEDERATE MONUMENT ARE SYMBOLS TO MANY OF THE SORDID HISTORY OF RACISM IN CADDO PARISH.

The courthouse's Confederate flag flies alongside a monument commemorating Caddo Parish as the last stand of Confederate Louisiana. The two – the flag and the monument – are inextricably linked, both literally and figuratively. Both were intended to celebrate white resistance to humane and equal treatment for African Americans. For many people, particularly African-Americans, their existence on public land right outside the courthouse is a profoundly unsettling symbol of the parish's racist past.

A. The Raising of the Confederate Flag in 1951 was a Specific Response to the Civil Rights Movement.

In the late 1940s and the 1950s, the Ku Klux Klan and other white supremacist groups took up the Confederate flag as part of their arsenal of symbols fiercely opposing the civil rights movement.¹⁷ The flag had come “to mean defiance of the national will and Southern white insistence upon political, economic, and social domination over the Negro.”¹⁸ The flag was “debased by many into a harsh summons to racial hate” in an effort of Southern whites to stand ground against the perceived “assaults of the judicial, legislative, and executive branches of the Federal Government.”¹⁹

¹⁷ Christopher Rose, *Confederate Banner Still a Call to Arms*, Times Picayune, Nov. 13, 1989 at A1. See also J. Michael Martinez, *Traditionalist Perspectives on Confederate Symbols*, in CONFEDERATE SYMBOLS IN THE CONTEMPORARY SOUTH 243, 255 (2000). Before World War II, display of the flag “was considered disrespectful unless it was displayed at a reunion or for another important purpose designed to honor memories of veterans who served in the Confederate forces during the war.” After the war, the Klan began displaying the flag “as part of a conscious effort to identify its message of intolerance and fear of other races with Confederate symbols.” *Id.* at 255-56.

¹⁸ Hodding Carter, *Furl That Banner?*, N.Y. TIMES MAGAZINE, July 25, 1965.

¹⁹ *Id.*

In 1949, just two years before the Confederate flag was raised at the courthouse, the Ku Klux Klan staged a “third re-activation” in the South,²⁰ and began to use the flag as its emblem of racial bias.²¹ The Klan targeted Shreveport and Northwest Louisiana to become a central hub of its activities, as its chapters quietly multiplied in the area throughout the 1950s and into the 1960s. Shreveport also became a favorite visiting place of the Klan’s “National Imperial Wizard,” R.E. Davis of Dallas. By 1961, there were at least four chapters of the Klan in the Shreveport area, totaling over 1,000 members, with three additional chapters about to be chartered.²²

As Shreveport historian Eric Brock has explained, the raising of the Confederate flag in 1951 was an official act of defiance against the burgeoning Civil Rights movement:

The present flagpole was erected ...during the wave of defiance that swept the establishment South during the period following World War II to the mid-1960s. During this time many southern cities and towns hoisted Confederate banners in reaction to federal legislation dealing especially with, though not exclusively with, civil rights, integration, and African-American voting rights. There appears to be no reason to have placed the flagpole and Confederate flag on this monument and, hence, on the Courthouse Square at this time except as part of Shreveport’s own role in resistance to the above-mentioned social changes then sweeping the region. This is quite consistent with the city’s and parish’s position, both officially and unofficially, at the time.²³

At this time, Shreveport was becoming “the most oppressive city in the South for critics of white supremacy.”²⁴

As demonstrated below, in reaction to civil rights achievements, white supremacists subjected Caddo Parish blacks to intimidation and coercion.

1. The Flag Was Raised Amidst Civil Rights Strides in Louisiana.

Despite the existence of oppressive Jim Crow laws, the period between 1940 and 1955 was characterized by considerable civil rights efforts and victories. The raising of the Confederate flag in front of the Caddo Parish Courthouse constituted an effort to ensure white supremacy and resist the ever-increasing involvement of African-Americans in the administration of justice and civic life.

²⁰ See Recruitment Material, from the Ku Klux Klan Archives, LSU-Shreveport (on file with author).

²¹ See, *supra*, n.18.

²² *Ku Klux Klan Active in Shreveport, Area*, SHREVEPORT TIMES, Feb. 10, 1961, at A1.

²³ Eric J. Brock, CONFEDERATE FLAG AND MONUMENT, CADDO COURTHOUSE SQUARE, SHREVEPORT (Jan. 16, 2002) (on file with author); see also Eric J. Brock, *Courthouse Monument First Public Sculpture*, FORUM NEWS, April 17, 2002, at p. 17.

²⁴ Adam Fairclough, RACE & DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA, 1915-1972 285 (2nd ed. 2008).

Between 1945 and 1960, African-American political enfranchisement in Louisiana increased substantially. In his second administration from 1948-1952, Governor Earl Long registered over 100,000 formerly disfranchised African-American citizens.²⁵ In 1948, African-Americans were only 2.4% of Louisiana's registered voters; by 1952, that figure had risen to 12.6%; and by the end of 1960, the figure was 15.6%.²⁶ During Long's three terms as governor, Louisiana witnessed the construction of 14 new trade schools for African-Americans, over 100 new public schools, the hiring of over 2,000 new African-American teachers, paid on equal scale with white teachers, a 50% reduction in African-American illiteracy, and a tenfold increase in spending for African-American colleges.²⁷

The same time period also witnessed efforts to end the systematic exclusion of African-Americans on juries. In a Louisiana capital case out of St. John the Baptist Parish, the U.S. Supreme Court found that court administrative officers were intentionally excluding otherwise qualified African-Americans from jury service, in violation of the Fourteenth Amendment's Equal Protection Clause.²⁸ The Court noted the disturbing history of racial discrimination in the parish: no African-American had served on a grand or petit jury in the parish for over 20 years, though the parish population of eligible jurors was over one-third African-American (and the population as a whole was 49.3% African-American).²⁹

Although African-Americans serving on Louisiana juries remained rare,³⁰ the Supreme Court's decision paved the way for small successes in challenges to discriminatory practices in jury selection that posed a threat to white supremacy. Louis Berry – one of the few African-American lawyers in the state at the time – succeeded in quashing the indictment against a client in Iberville Parish because no African-American had ever been called for

²⁵ Michael L. Kurtz and Morgan D. Peoples, *The Politics of Race, in THE AFRICAN AMERICAN EXPERIENCE IN LOUISIANA: FROM JIM CROW TO CIVIL RIGHTS* 238-51 (2002).

²⁶ Kurtz & Peoples, *supra*, at 241. To state legislators who worked to suppress African-American voter registration, Long shouted on the Senate chamber floor, "You got to recognize that niggers is human beings! There's no longer slavery!" Fairclough, *supra*, at 228.

²⁷ Kurtz & Peoples, *supra*, at 241.

²⁸ *Pierre v. Louisiana*, 306 U.S. 354, 362 (1935).

²⁹ At the time, the Louisiana Code of Criminal Procedure provided that a person was qualified for jury service if he was: 1) 21 years of age and a resident of the parish for at least 2 years; 2) able to read and write in English; 3) not charged with an offense or convicted of a felony; and 4) "[o]f well known good character and standing in the community." *Pierre*, 306 U.S. at 360 (quoting La. Code of Crim. Proc., *supra*, Title 18, c. 1, art. 172 (1932)).

³⁰ Fairclough, *supra*, at 127.

jury duty there.³¹ Berry also agreed to represent a high-profile defendant in St. Landry Parish, in order to “press...the constitutional issue of a Negro’s right to a fair trial, specifically, the right to be tried by a jury upon which blacks had an equal opportunity to serve.”³² Though his client was tried and convicted by an all-white jury,³³ because of Berry’s vigorous and courageous defense, the case became a “black cause célèbre.”³⁴

Other civil rights reforms were taking shape across Louisiana and the country. Following a United States Supreme Court decision holding segregation of interstate buses unconstitutional,³⁵ the Congress of Racial Equality (“CORE”)³⁶ began its freedom rides into the South in April of 1947 to test the decision.³⁷ The U.S. Court of Appeals for the Fifth Circuit had recently ruled that the decisions of Louisiana voting registrars denying black applicants were subject to judicial review.³⁸ In 1948, President Harry S. Truman ordered racial integration of the armed forces.³⁹ At that time, the Shreveport NAACP chapter boasted over 1,400 members.⁴⁰ Two years later, a federal court held that Louisiana State University Law School must integrate.⁴¹ On October 15, 1951, a federal judge ordered integration of the LSU nursing school.⁴² Just days after this decision, Caddo Parish authorized the raising of the Confederate flag at the courthouse.⁴³

2. The Confederate Flag Was Raised in 1951 as a Symbol of White Supremacy.

At the time of the raising of the flag, Caddo Parish was widely known to be one of the most conservative parishes in Louisiana, under the political leadership of the Shreveport Citizens’ Council. Citizens’ Councils, private membership advocacy organizations surfacing across the South to preserve “state’s rights and racial

³¹ *Id.* at 128.

³² *Id.* at 127.

³³ The petit jury venire had included 8 African-Americans, but “two were disqualified, one excused, and the remainder excluded by the peremptory challenges of the prosecution.” *Id.* at 128.

³⁴ *Id.* at 129.

³⁵ *Morgan v. Virginia*, 328 U.S. 373 (1946).

³⁶ CORE, a civil rights organization, “was founded in Chicago in 1942 for the specific purpose of fostering nonviolent direct action against Jim Crow.” Fairclough, *supra*, at 83.

³⁷ Raymond Arsenault, FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE 33, 42 (2006).

³⁸ *Hall v. Nagel*, 154 F.2d 931 (5th Cir. 1946).

³⁹ Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 28, 1948).

⁴⁰ Fairclough, *supra*, at 211.

⁴¹ *Wilson v. Bd. of Supervisors of LSU*, 92 F. Supp. 986 (E.D. La. 1950).

⁴² *Court Rules Negro Nurse May Enter LSU*, SHREVEPORT TIMES, Oct. 16, 1951.

⁴³ See *Minutes*, Caddo Parish Police Jury, October 17, 1951 (on file with author).

integrity,”” counted among its members “governors, congressmen, judges, physicians, lawyers, industrialists, bankers,” among other citizens.⁴⁴ The Councils were unified in their goal to deny socio-political equality to African-Americans, but even among the segregationist movement, Caddo’s chapter stood out as extreme: “Its raucous Negrophobia, excessive even by Deep South standards . . . marked it as an extremist organization akin to the Ku-Klux Klan.”⁴⁵

This extremism in the Northwest Louisiana region often translated into violence. As African-Americans returned from fighting in World War II, they found Southern leaders reluctant to extend them the equality they deserved.⁴⁶ One tragic case that echoed in Caddo Parish was the murder of 28-year old Army veteran John C. Jones in nearby Webster Parish. Home from the war, Jones had apparently raised questions at his job with an oil company about the predatory leasing of oil-bearing land from African-Americans.⁴⁷ In early August 1946, authorities picked up Jones’s cousin, 17-year-old Albert Harris, and accused him of planning to rape a white woman. Harris was released from jail to a crowd of white men, who tortured him and forced him into confessing that he had assisted Jones in a plan to rape the woman.⁴⁸ Jones was arrested, and on August 8, 1946, Webster Parish Sheriff’s deputies released the two men to a mob of at least ten white men. The mob took the men to the woods near Minden, where they were stripped naked and beat senselessly. Jones died, but Harris survived.⁴⁹

The Webster Parish grand jury refused to indict anyone for the crimes against Jones and Harris, but five of the men involved eventually faced a criminal trial in federal court in Shreveport.⁵⁰ After defense attorneys struck the sole African-American on the jury panel, the jury consisted of 12 white men. In closing argument, defense attorneys urged the jurors to follow their duty as Southern white men to teach the NAACP and the federal government a lesson. Defense lawyer A.S. Drew told jurors that “[t]his is the most important case you jurors ever

⁴⁴ Neil R. McMillen, *THE CITIZENS’ COUNCIL: ORGANIZED RESISTANCE TO THE SECOND RECONSTRUCTION, 1954-64* 11 (1971).

⁴⁵ McMillen, *supra*, at 71.

⁴⁶ Fairclough, *supra*, at 75-76.

⁴⁷ *Id.* at 113.

⁴⁸ *Id.* at 114-15.

⁴⁹ *Id.* at 115.

⁵⁰ *Id.* at 117. For the prosecution, Shreveport “was the least favorable [venue] in Louisiana.” *Id.*

sat on. It will decide whether we people in the South can run our own business.” He continued: “There will be no co-mingling of white and black.... No force in the world can bring us to co-mingling. I say that is being tried.” All five defendants were acquitted.⁵¹

During the 1950s, many Shreveport whites became fervent in their opposition to integration of any kind. In 1956, after voting against a proposed bill exempting the Sugar Bowl from a new law prohibiting interracial activities, State Representative Wellborn Jack of Shreveport promised that “the Shreveport Citizens’ Council can always depend on me to take a stand 100% for segregation and 100% against integration.”⁵² In response to a 1958 bill requiring labeling of blood with the race of the donor, Jack commented, “I don’t want any Negro blood in me. I guess it wouldn’t hurt me like they say, but I find it repulsive.”⁵³

The raising of the Confederate flag at the courthouse embodied the sentiments of these white supremacists during this time and represented a public endorsement of the idea that the justice of white men would reign there. As the defense attorneys urged the jurors in the case of the Jones murder, they must not let the federal government turn the court into “a negro’s court.”⁵⁴ But down the street from the federal courthouse, there would be no mistaking the allegiance of the state courthouse, as the Confederate flag signaled to those in Caddo Parish that the principles of the Confederacy would reign within its walls.

B. The Monument Commemorates Caddo’s Position as the Last Stand of Confederate Louisiana, when in the Wake of the Civil War, Whites in Caddo Parish Embarked on a Bloody Campaign to Disfranchise and Intimidate Black Citizens.

As explained above, the courthouse’s Confederate flag flies alongside a monument commissioned in 1903 commemorating Caddo Parish as the last stand of Confederate Louisiana,⁵⁵ and the two are inextricably linked. Caddo Parish was never controlled by, nor did it surrender to, federal troops. Because it was spared in the Civil War, its white citizens never experienced the famine, terror, and destruction of the War – nor the feeling of defeat

⁵¹ *Id.* at 118.

⁵² Letter from Senator Wellborn Jack to Robert C. Chandler, President of Shreveport Citizens’ Council, Sept. 10, 1956 (on file with author).

⁵³ *Blood Bill Approved in Committee*, SHREVEPORT TIMES, July 2, 1958, at D1.

⁵⁴ Fairclough, *supra*, at 118.

⁵⁵ Gilles Vandal, *Bloody Caddo: White Violence against Blacks in a Louisiana Parish, 1865-1876*, 25 J. of Soc. Hist. 373, 377 (1991) (hereinafter “*Bloody Caddo*”).

– suffered by other parts of the State and across the South.⁵⁶ Indeed, as Shreveport became the state’s capital after New Orleans fell, the war brought great prosperity to the region.⁵⁷ These circumstances created in Caddo a stronger, and often violent, resistance to the federal government and a firmer commitment to white supremacy than other regions in Louisiana.⁵⁸

When African-Americans were given the right to vote in Louisiana after the Civil War, they outnumbered whites in population and in eligible voters.⁵⁹ During the period from 1865 through 1874, white citizens in Caddo Parish refused to accept the Confederates’ loss of the Civil War, the displacement of their electoral control and other Reconstruction reforms,⁶⁰ and reacted with violence, intimidation, and mass murder. One of the Reconstruction reforms was a push for African-Americans to serve on Louisiana juries. Their presence threatened the well-entrenched immunities of the criminal justice system, as many all-white juries in Louisiana refused to punish crimes committed against African-Americans or Republicans.⁶¹

The ratification of the 1868 Constitution of Louisiana—which provided universal suffrage, a guarantee of equality, and a formal Bill of Rights—was also a major thorn in the eye of Caddo’s white citizens.⁶² This Republican triumph “gave impetus to a movement by former Confederates and other conservatives to insure a

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ “Louisiana was [] the only Southern state, with the exception of South Carolina, where blacks formed a clear majority of the eligible voters after the war. Blacks became, by their sheer numbers, the masters of the political situation. This was particularly true in rural areas where blacks comprised 60 percent of the population. Gilles Vandal, *RETHINKING SOUTHERN VIOLENCE* 4 (2000) (hereinafter “*Rethinking*”). See also Solomon K. Smith, *The Freedmen’s Bureau in Shreveport: The Struggle for Control of the Red River District*, 41 *LOUISIANA HISTORY* 435, 455 (2000).

⁶⁰ “By forming a solid bloc of voters for the Republican party, blacks left white conservatives with no hope of carrying the state elections without controlling black voters.” Vandal, *Rethinking*, *supra*, at 4. “A factor which was a major deterrent to the complete fastening of second-class citizenship on the Negro was his political influence in 1867 when some 83,000 Negroes, as compared to approximately 45,000 whites, qualified to vote under the provisions of the Reconstruction Acts. Republicans and Negroes dominated the state Constitutional Convention of 1868, which produced a constitution guaranteeing Negroes equal political and public rights, including the right to utilize all public places and conveyances on an equal basis with whites [T]he number of registered Negro voters increased until 1898.” Henry C. Dethloff & Robert R. Jones, *Race Relations in Louisiana, 1877-1898*, 9 *LOUISIANA HISTORY* 301, 306 (Autumn 1968).

⁶¹ James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 *YALE L.J.* 895, 934 (2004).

⁶² “In Caddo Parish, 1121 of 1730 blacks [had] voted for ratification, while 1025 out of 1050 whites [had] voted against it.” Smith, *Freedmen’s Bureau*, *supra*, at 455-56. “Black delegates played a major role in the constitutional convention for the adoption of this civil rights program.” Vandal, *Rethinking*, *supra*, at 175-76.

Democratic victory in the November [1868] presidential election *by any means*.⁶³ It is this movement—“by any means” necessary—that the monument in front of the Caddo Courthouse, for many, recalls.

At the outset of Reconstruction, Caddo Parish was at the heart of a statewide campaign to secure political dominance of the white race through violence, including murder.⁶⁴ “For years after the war, the parish had little or no law and witnessed within its borders some of the most atrocious murders ever recorded.”⁶⁵ The parish earned the infamous nickname “Bloody Caddo” for being “the most violent area in Louisiana.”⁶⁶ By the time the monument was commissioned in 1903, “[f]ew if any places held a sorrier record in race relations” than Caddo Parish.

‘White supremacy first, last, and all the time, has always been the motto of the white people . . . of Caddo,’ a city journal once proudly remarked; “and they prove their faith by their works.” There, during and after Reconstruction, the terroristic spirit displayed itself in ways both great and small.⁶⁷

1. Violence Following the Civil War Constituted an Explicit Rejection of Reconstruction.

In the decade following the Civil War, “Caddo, with 566 homicides, was the most violent parish in this violent state of Louisiana.”⁶⁸ The overwhelming majority of the victims of homicides in the area were African-American, and “whites were the presumed perpetrators” in at least 84% of the murders of African-Americans.⁶⁹ The violence against African-Americans in Caddo was well-organized and occurred *en masse*, in posses or paramilitary groups.⁷⁰ Indeed, “70% of white homicides against blacks in Caddo were committed by more than one person . . . , highlight[ing] the fact that whites killed blacks not simply from personal quarrels but in groups as

⁶³ *Id.* (emphasis added).

⁶⁴ As one historian observed, “Whites in Louisiana did not really accept postwar changes and particularly objected to the political implications of such changes, realizing that in the long run political equality meant social equality.” *Rethinking, supra*, at 34. These white citizens of Caddo took the law into their hands to “preserv[e] the state as ‘white man’s country.’” *Id.* In Caddo Parish, the local “Democratic leadership called for white solidarity and expressed its determination to resort to summary means, if necessary, to correct the wrongs brought about by radical policies.” *Id.*

⁶⁵ Vandal, *Bloody Caddo, supra*, at 373.

⁶⁶ *Id.* at 374.

⁶⁷ William Ivy Hair, *BOURBONISM AND AGRARIAN PROTEST: LOUISIANA POLITICS 1877-1900* 91 (LSU Press 1969) (hereinafter “BOURBONISM”) (quoting Shreveport *Evening Judge*, February 24, 1896).

⁶⁸ Vandal, *Bloody Caddo, supra*, at 375.

⁶⁹ *Id.* at 376.

⁷⁰ *Id.* at 378.

a means of social control.”⁷¹ The violence was so widespread that “[n]o less than 30% of whites in Caddo between the ages of 18 and 45 were involved in these homicides.”⁷² Approximately 10% of African-American males in the age group of 18 to 45 were killed by whites.⁷³

This campaign of violence surged significantly with the 1868 election, in which whites successfully terrorized African-Americans in Caddo Parish to prevent an otherwise assured Republican sweep at the polls.⁷⁴ In the months leading up to the election in Caddo, “almost two hundred blacks were killed in a ‘skirmish’ with a newly formed White League,⁷⁵ and hundreds more perished at white hands in scattered incidents between April and November of that year.”⁷⁶ This violence bore the stamp of the Confederacy. The anti-Republican perpetrators of the violence “were, for all intents and purposes, simply Confederate fighting units reconstituted, fifty to two hundred men riding together. . . . [T]here was no need for masks or disguises; these were small armies intimidating or killing anything that got in their way.”⁷⁷

The *Shreveport Times*, the area’s most widely-circulated newspaper, urged the white citizens of Caddo and surrounding parishes to participate in this violence against Republicans and African-Americans. After one such call, a significant number of white citizens from Caddo left the area to participate in the murder of six white Republican officials in Coushatta on August 30, 1874. After the slaughter, the *Times* “asserted that it was the duty of the white community to kill the Republican members of the returning board and proposed to dispose of all radical legislators by lynching them.”⁷⁸ The White League’s strategy, endorsed by the *Times*, secured the desired

⁷¹ *Id.* at 378.

⁷² *Id.*

⁷³ *Id.* at 380.

⁷⁴ Steven Hahn, *A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION* 286 (2003) (“Beginning with the fall elections of 1868, vigilante violence played havoc with republican voters and set back party mobilization. Louisiana experienced the most dramatic consequences, as the Knights of the White Camellia and the Klan had almost free rein outside of New Orleans and the adjacent parishes of the southeast.”) There were 185 homicides, 96.8% of which had African-American victims, in Caddo Parish in 1868. In 1867, there were 26, with 71.5%. In 1869, there were 19, with 80%. Vandal, *Bloody Caddo*, *supra*, at 374.

⁷⁵ The White League was a “loosely structured, paramilitary and antiradical organization, which [in 1874] took temporary control of the whole state.” *Id.* at 84. The League’s strategy included “not only [] intimidating blacks but also at expelling white Republicans from local parishes.” *Id.*

⁷⁶ Phillip Dray, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA* 48 (2003).

⁷⁷ *Id.*

⁷⁸ Vandal, *Rethinking*, *supra*, at 85.

political result, when all Republican officials in northern Louisiana felt compelled to resign in order to avoid the same fate as their Coushatta counterparts.⁷⁹

Major Merrill, a U.S. military officer assigned to the Red River area, offered reports from the ground describing the success of the League's campaign of violence and intimidation following the 1874 election:

The threats made before the election to drive from the community all that voted the Radical ticket are being carried out. Combinations among the whites are forming, and recruiting by every form of pressure, by which all negroes who voted the Radical ticket are to be refused work or leases. All the whites not belonging to the combination are to be ostracized. Already more than 500 families, including at least 2,000 people, of all ages and sexes, are wanderers without means to go elsewhere, powerless to find other homes where they are, and on the verge of starvation in midwinter.⁸⁰

The violence in the area spurred several federal investigations and three separate congressional hearings.⁸¹

The immunity for perpetrators of violence against African-Americans was so pervasive that, “[w]hen a black man was killed, civil authorities too often made no special record of it and made no effort to solve the crime.”⁸² The inclusion of African-Americans in jury service thus became a central objective of the Reconstruction movement for two primary reasons: “to ensure fair treatment of black people accused of crimes and enforcement of the law against white defendants accused of terror and violence against African-Americans.”⁸³ Proponents viewed the political and practical obstacles “that prevented blacks from serving on state juries as the central impediment to justice for blacks in the South.”⁸⁴ As a result of these efforts, Congress passed the Civil Rights Act of 1875, which outlawed racial discrimination in jury service. Several years later, the U.S. Supreme

⁷⁹ Vandal, *Rethinking*, *supra*, at 85; see also Gilles Vandal, *The Policy of Violence in Caddo Parish, 1865-1884*, LOUISIANA HISTORY, Vol. 32 (1991), at 178.

⁸⁰ See *The Louisiana Difficulty: An Organization to Expel Republican Voters*, N.Y. TIMES, Jan. 19, 1875 (describing Major Merrill's on the ground report from Caddo Parish). See also *Proceedings Before the Investigating Committee, Major Merrill Recalled -- the Intimidation in Caddo Parish -- Discharge of Five Hundred Negroes for Voting the Republican Ticket*, N.Y. TIMES, Jan. 29, 1875.

⁸¹ See *Proceedings of the Returning Board Last Night - a Republican Majority of Two In the House of Representatives*, N.Y. Times, Dec. 25, 1874; *Work of the Investigating Committee, Evidence of the Procedure of the Returning Board*, N.Y. Times, Jan. 3, 1875.

⁸² Vandal, *Rethinking*, *supra*, at 180.

⁸³ Equal Justice Initiative (“EJI”), *ILLEGAL DISCRIMINATION IN JURY SELECTION 9* (June 2010). See also Forman, *supra*, at 909-10.

⁸⁴ *Id.* at 926.

Court decided *Strauder v. West Virginia*, which found a state statute excluding African-Americans from juries on the basis of race to be unconstitutional under the Fourteenth Amendment.⁸⁵

However, despite the federal court victories and legislation, “juries remained largely all-white, violence against blacks in the South continued at an alarming rate, and punishment [of perpetrators of crimes against African-Americans] was the exception.”⁸⁶ Just as Louisiana would create a *de facto* exclusion of African-Americans from the franchise, states circumvented *Strauder* by “abandon[ing] statutes that expressly restricted jury service to whites, but local officials achieved the same result by excluding African-Americans from jury rolls and implementing ruses to exclude black citizens.”⁸⁷

2. Violence in Caddo Parish Around the Turn of the Century Ensured the White Supremacy that the Monument Commemorates.

Despite the rash of violence during Reconstruction, in the 1890s, African-Americans voters still outnumbered whites in Louisiana.⁸⁸ This continued threat to white political control led to another resurgence of violence against African-Americans, particularly in the run-up to the 1896 election, as white Democrats sought political hegemony through violence, intimidation, and fraud: any means necessary. The election was critical. As legal disfranchisement swept neighboring states, “Louisiana blacks realized that their future citizenship rights probably depended on the outcome of this election.”⁸⁹

On the campaign trail, Democrats brought out “the usual racial invective and racial slurs.” The *Shreveport Times* “referred to the opposing slate as ‘John N(igger) Pharr,’ and the ‘Populist-negro social equality ticket.’”⁹⁰ But because invective alone was insufficient to suppress votes, Democrats turned to tactics of violence and intimidation, including beating African-American women with barbed wire to intimidate families inclined to

⁸⁵ *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879).

⁸⁶ Forman, *supra*, at 934.

⁸⁷ EJI, *Illegal Discrimination, supra*, at 10. See also Vandal, *Rethinking, supra*, at 33.

⁸⁸ Dethloff & Jones, *supra*, at 308.

⁸⁹ William Ivy Hair, CARNIVAL OF FURY: ROBERT CHARLES AND THE NEW ORLEANS RACE RIOT OF 1900 104-05 (Feb. 2008).

⁹⁰ Rebecca Scott, DEGREES OF FREEDOM: LOUISIANA AND CUBA AFTER SLAVERY 159 (2005).

support the Republican-Populist ticket.⁹¹ Though the Republican-Populist ticket supported by African-Americans actually won by the numbers, Democrats doctored returns to ensure their own victory.⁹²

Just as African-Americans had feared, the new legislature following this stolen election passed suffrage laws restricting the right to vote based on education status. As a result, in 1898, 90% of African-Americans statewide were removed from the election rolls.⁹³ The legislature also sought to permanently disfranchise African-Americans by presenting a bill to the reduced electorate calling for a constitutional convention. Holding a convention required the approval of voters, but the bill as written did not require the electorate to ratify the new constitution, a maneuver that effectively ensured that the constitution from the convention would be final.⁹⁴

The plan worked. As the culmination of the “white ‘counter-revolution’” secured by intimidation and violence against African-Americans, the 1898 Constitutional Convention resulted in the complete and official disfranchisement of Louisiana African-Americans through crippling educational and property qualifications, achieving what whites in Caddo had been attempting since the end of the Civil War.⁹⁵ One historian described as follows this ultimate victory of Confederate principles, enshrined by law in the new state Constitution:

Governor Murphy Foster prided himself on the final text: “The white supremacy for which we have so long struggled at the cost of so much precious blood and treasure, is now crystallized into the Constitution as a fundamental part and parcel of that organic instrument.” . . . Kruttschnitt, the convention’s chair, . . . explained that the convention would have preferred to have inscribed “universal white manhood suffrage, and the exclusion from the suffrage of every man with a trace of African blood in his veins. We could not do that, on account of the fifteenth amendment to the Constitution of the United States.” . . . The result might be inelegant, he acknowledged, but ‘Doesn’t it let the white man vote, and doesn’t it stop the negro from voting, and isn’t that what we came here for?’ The official journal of the proceedings of the convention noted that this declaration was met with applause.⁹⁶

The monument in front of the Caddo Courthouse was erected during this period to commemorate the triumph of fear and violence over the hope offered by the civil rights achievements of Reconstruction. At the

⁹¹ *Id.*

⁹² Scott, *supra*, at 86.

⁹³ Hair, *BOURBONISM*, *supra*, at 268-69. The Baton Rouge “*Daily Advocate* gleefully noted that the new registration was ‘death on niggers and the kind of Pops who will be inclined to vote [with Negroes].’” See also *id.* at 271-72 (quoting Baton Rouge DAILY ADVOCATE, Dec. 12, 1897) (brackets in original text).

⁹⁴ *Id.* at 268.

⁹⁵ Dethloff & Jones, *supra*, at 316.

⁹⁶ Scott, *supra*, at 164-65.

time, the area was producing some of the most determined defenders of white supremacy. A local NAACP member observed in 1923, ““This place is one of the most intolerant in the whole southland.””⁹⁷ Indeed, in the years surrounding the monument’s erection in the front of the courthouse, “[b]etween 1900 and 1931 at least nineteen blacks were lynched in Caddo Parish, more than any other Louisiana parish.”⁹⁸

II. THERE IS AN INTOLERABLE RISK THAT FLYING THE CONFEDERATE FLAG IN FRONT OF THE CADDO PARISH COURTHOUSE WILL HAVE A PROFOUND LEGAL AND SUBSTANTIVE IMPACT ON THE ADMINISTRATION OF JUSTICE SYSTEM WITHIN ITS WALLS.

The Confederate flag flies outside the courthouse and is visible to all who walk through its doors. Its presence creates an intolerable risk under the Eighth Amendment that criminal justice cannot be fairly administered within the courthouse walls, particularly in death penalty cases.⁹⁹ “Public symbols such as state flags play a unique role in American society.... What [the symbol] signifies, and how it does so, defines its effect on the public.”¹⁰⁰ As noted above, and as courts from across the country have recognized, for many people but particularly for African-Americans, the Confederate flag continues to this day to be a “controversial racial and political symbol.”¹⁰¹ The flag has the potential to be seen by African-Americans “not only as a badge of inferiority, but as communicating messages of exclusion, of powerlessness, of lacking protection by the state, of

⁹⁷ Fairclough, *supra*, at 8.

⁹⁸ *Id.*

⁹⁹ The United States Supreme Court has analyzed the Eighth Amendment’s prerequisite for capital punishment procedures as whether they give rise to a “substantial,” “unacceptable,” “significant,” or “intolerable” risk of an unreliable outcome or infliction of harm. *See, e.g., Baze v. Rees*, 553 U.S. 35, 49-51 (2008) (holding that a procedure “subjecting individuals to a risk of future harm – not simply actually inflicting pain – can qualify as cruel and unusual punishment” if the procedure creates a “substantial risk of serious harm” or an “objectively intolerable risk of harm”) (citation and quotation omitted); *Booth v. Maryland*, 482 U.S. 496, 502-03 (1987) (“[f]or the reasons stated below, we find that [victim-impact] information is irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner”), *rev’d by Payne v. Tennessee*, 501 U.S. 808, 829-30 (1991) (finding victim-impact evidence is relevant to capital sentencing, without disturbing “constitutionally unacceptable” standard); *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987) (study finding disproportionate application of capital sentencing in Georgia based on race did “not demonstrate a constitutionally significant risk of racial bias”); *Turner v. Murray*, 476 U.S. 28, 37 (1986) (“[o]ur judgment in this case is that there was an unacceptable risk of racial prejudice infecting the capital sentencing proceeding”).

¹⁰⁰ Robert J. Bein, *Stained Flags: Public Symbols and Equal Protection*, 28 SETON HALL L. REV. 897, 911 (1998).

¹⁰¹ *See, supra*, notes 11-17 and accompanying text. *See also* Beth Reingold and Richard Wike, *Confederate Symbols, Southern Identity, and Racial Attitudes: The Case of the Georgia State Flag*, 79 SOC. SCI. Q. 568-80 (1998). The Confederate flag also remains an iconic emblem of the Ku Klux Klan and is displayed by hate groups like the Klan to “convey messages of rebelliousness, bigotry, and racial intolerance.” Martinez, *Traditionalist Perspectives*, at 253.

being second-class citizens.”¹⁰² Conversely, the flag has the potential, for white citizens, to “buttress feelings of superiority, privilege, and entitlement.”¹⁰³

The flag at the Caddo courthouse conveys these meanings both overtly and implicitly. Outwardly, it conveys the message that potential juror Staples heard loud and clear: that the system of justice in operation in Caddo Parish celebrates the legacy of lynching, terror, and oppression of the African-American race. As important, however, the waving of the flag conveys an implicit or subconscious message. The presence of the flag risks diminished trust among African-Americans in the justice system and threatens to impede their participation in the system. It also will operate upon some white jurors, impermissibly posing a serious risk that they will be primed consciously or subconsciously to view African-American defendants and victims as second-class citizens and less worthy than whites. The flag’s presence at the Caddo Parish courthouse is intolerable.

1. The Presence of the Confederate Flag Poses the Intolerable Risk that African-Americans’ Participation in the Criminal Justice System Will be Severely Affected and Impeded.

The presence of the flag poses a serious risk that African-Americans’ trust in the justice system will be diminished and that their participation in the system will be needlessly affected and impeded. Indeed, “[i]f a [public] symbol represents a message of exclusion, rather than inclusion, it will deny those excluded full participation in public life.”¹⁰⁴ In this very case, the court granted the prosecution’s motion to strike Mr. Staples for cause, when he expressed his great concern about his ability to participate in a justice system under the cloak of the Confederate flag.¹⁰⁵ Mr. Staples’s experience epitomizes the intolerable risk the presence of the Confederate flag outside the Caddo courthouse poses on the parish’s capital punishment system.

There is an intolerable risk that the presence of the flag hinders African-American participation in the parish’s capital punishment system in two significant ways. First, even if other African-American prospective jurors did not – or were unwilling – to express similar concerns as Mr. Staples, undoubtedly at least some were

¹⁰² Capers, *supra*, at 163.

¹⁰³ *Id.*

¹⁰⁴ Bein, *supra*, at 913. As such, a flag standing for disunity “will not ‘knit’ loyalty and identity – it will cause them to unravel.” *Id.* (citing *Texas v. Johnson*, 491 U.S. 397, 405 (1989)).

¹⁰⁵ R. 6038.

disturbed by the flag and sought other ways to remove themselves from the venire so as to avoid jury service. Second, African-American petit jurors may well be hesitant to return verdicts inconsistent with the principles the flag celebrates, including but not limited to cases such as the instant one involving an African-American defendant and a white victim.¹⁰⁶

2. The Presence of the Confederate Flag Poses the Intolerable Risk that Jurors Will Consider African-American Defendants and Victims as Second-Class Citizens.

Psychological research demonstrates that the flag creates an unacceptable risk that implicit racial bias could impact the trial process, particularly when the defendant is African-American. A recent study found that exposure to the Confederate flag increased the expression of negative attitudes toward African-Americans among whites.¹⁰⁷ After receiving either a controlled (no symbol) or the Confederate flag priming stimulus, participants were asked to read a story about a hypothetical African-American male engaged in negative behavior. The participants then evaluated his behavior by indicating their agreement to several positive and negative trait attributions. White participants primed with the Confederate flag agreed more strongly with negative characterizations of the hypothetical subject than white participants in the control group. The study's authors concluded that "prominent displays of the Confederate flag" may activate greater negativity toward African-Americans among those exposed to it.¹⁰⁸ These results track the findings of earlier studies, which have also demonstrated that exposure to symbolic images such as flags can affect political thought and behavior.¹⁰⁹

In the context of a capital trial, these results could mean that the Confederate flag primes white jurors to express negative views towards African-American defendants or victims. As former Supreme Court Justice

¹⁰⁶ See, e.g., Justin D. Levinson, *Suppressing the Expression of Community Values in Juries: How Legal Priming Systematically Alters the Way People Think*, 73 U. CIN. L. REV. 1059, 1060 ("[P]lacing people in a legal context primes a set of unconscious, implicit beliefs that alters their cultural context, changing the way they think and make decisions. *This legal priming at its worst ... could cause underrepresented community members to think more like majority societal members.*") (emphasis added).

¹⁰⁷ Joyce Ehrlinger, et al., *How Exposure to the Confederate Flag Affects Willingness to Vote for Barack Obama*, 32 POLITICAL PSYCHOLOGY 131 (Feb. 2011), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9221.2010.00797.x/full>.

¹⁰⁸ *Id.*

¹⁰⁹ See, e.g., Ran R. Hassin, et al., *Subliminal Exposure to National Flags Affects Political Thought and Behavior*, 104 Proc. Nat'l Acad. Sci. 19757 (2007).

Sandra Day O'Connor recognized, "[i]t is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials."¹¹⁰ Subconscious priming with racialized images has a deleterious impact on the criminal justice system.¹¹¹

CONCLUSION

Prominently displayed in front of the Caddo Parish courthouse, the Confederate flag represents for many people, and particularly for African-Americans, public entrenchment of racism in the parish's judicial system and an endorsement of historical efforts to deny African-Americans equality under the law. The flag, as a public symbol of racial bias, poses an intolerable risk that capital punishment cannot be fairly administered within the courthouse walls.

For the reasons foregoing, *amici* call upon this Court to hold that capital punishment cannot be administered fairly under the flag of the Confederacy, and that its presence at the Caddo Parish courthouse denied Appellant and African-American jurors the right to equal protection under the law and the Appellant his right to due process and his rights under the Eighth Amendment.

Respectfully submitted,

John H. Holdridge
Counsel of Record
Anna M. Arceneaux, *seeking pro hac vice admission*
ACLU Capital Punishment Project
201 W. Main Street, Suite 402
Durham, NC 27701
(919) 682-5659
(919) 682-5961 (fax)

¹¹⁰ *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting).

¹¹¹ See Levinson, *supra*, at 1060; Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008); Justin Levinson, *Forgotten Racial Equality: Implicit Bias, Decision Making, and Misremembering*, 57 DUKE L.J. 345 (2007); Jack Glaser et al., *Possibility of Death Sentence Has Divergent Effect on Verdicts for Black and White Defendants*, Goldman School of Public Policy Working Paper No. GSPP09-002 (June 24, 2009), available at <http://ssrn.com/abstract=1428943> (last visited Apr. 14, 2011); Jeremy Blumenthal, *Implicit Theories and Capital Sentencing*, 59 SYRACUSE L. REV. 1 (2008); Jennifer Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2006).