

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE]	
]	
Appellee,]	
v.]	No. M2020-01241-CCA-R3-CD
]	
TIM GILBERT]	GILES COUNTY
]	No. CR-14803
Appellant.]	

**BRIEF OF AMICUS CURIAE
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ON BEHALF OF APPELLANT**

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STATEMENT OF ISSUES ADDRESSED BY AMICUS

I. The appellant, Tim Gilbert, did not receive a fair trial as his jurors were exposed to a prejudicial display of Confederate icons – including the “Blood Stained Banner.”

II. The Tennessee public is entitled to a judiciary that it trusts to be free from racial bias; this trust cannot be attained when our courts permit the display of Confederate icons in our public courthouses.

ARGUMENT OF AMICUS CURIAE

I. INTRODUCTION

The State claims that substantial justice can be done in a criminal trial of a Black citizen, when the jury deliberates in the United Daughters of the Confederacy Room, which displays the original flag of the Confederate States of America on the door, the Confederacy’s “Blood Stained Banner”¹ immediately upon entry, and portraits of the Confederate President Jefferson Davis and Confederate General John C. Brown on the walls. (See Appellee Brief, pp. 45-49; VII 7-16). Amicus respectfully disagrees.

Amicus accepts that some Tennesseans associate the Confederate battle flag with racially benign issues of heritage.² Similar racially neutral associations might be held, by some, regarding Jefferson Davis or Confederate Generals. Amicus is not concerned with the (rare) jurors who are blessed with the clarity of conscience, so that they could impartially judge a Black man’s guilt in a jury room adorned with

¹ The flag displayed inside the UDC Jury Room is the “Blood Stained Banner,” which was the final flag of the Confederacy. [Confederate battle flag: What it is and what it isn't | CNN](#) last visited July 2, 2021. The upper left quadrant of this flag contains the battle flag flown by General Lee’s Army of Northern Virginia. *Id.* General Lee’s battle flag is the more commonly flown flag signifying either respect for Confederate heritage, or white supremacy. Throughout this brief, for simplicity’s sake, counsel will refer to the various versions of Confederate flags that contain the battle flag as “the Confederate Flag” and/or “the battle flag.” The flag on the jury room door is the Confederacy’s original flag and it does not include the battle flag.

² See [Poll: Majority sees Confederate flag as Southern pride | CNN Politics](#) (2015), last visited May 11, 2021.

Confederate memorabilia.³ Rather, amicus is concerned with the jurors who could be negatively affected, such that they are either biased against the defendant, or chilled in exercising their obligation to speak their minds. *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 867 (2017) (recognizing the “imperative to purge racial prejudice from the administration of justice”); *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (a single biased juror requires new capital sentencing). Amicus is also deeply concerned with maintaining “the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.” *Turner v. State of La.*, 379 U.S. 466, 472 (1965). Our public – all of our public – must have confidence that our judiciary is free from racial bias. *Pena-Rodriguez*, 137 S.Ct. at 869.

The following sections will explore how the Confederate flag is seen by many Americans, especially people of color, to whom the flag is not a benign symbol of heritage. Amicus will explore the racist message that is intended by some who display Confederate icons. The many courts that have found the Confederate flag to be a symbol of hatred and discord will be discussed. Then empirical scientific evidence regarding the psychologically negative impacts of the Confederate flag will be explored: as the flag, acting subconsciously, brings out racist tendencies in whites, and serves to chill Black participation in our democracy and jury system.

³ Though, as will be addressed in § V, below, people who are unaffected by the psychological impact of Confederate icons may be quite rare: even ostensibly prejudice-free persons may subconsciously exhibit anti-Black bias in the presence of the Confederate battle flag.

Following this examination of the reality of Confederate icons generally, and the Confederate flag particularly, amicus will discuss the controlling law that compels this Court to grant Tim Gilbert a new trial. This Court’s “duty to confront racial animus in the justice system” requires that the Giles County jury deliberation room and courthouse be purged of a state-sponsored displays of racial animus. *Pena-Rodriguez*, 137 S.Ct. at 867. Amicus will demonstrate that this duty is not only owed to Mr. Gilbert, but to all of the citizens of Tennessee.

NOTE AND WARNING: This brief contains photographs where the Confederate battle flag is displayed in a hostile and hate-filled manner, alongside signs that express messages of extreme racial animus. The “N-word” is depicted on some signs and is used by some speakers who will be quoted.

II. Acknowledgement: to some decent Americans the Confederate flag is a symbol of heritage not hatred.

Much of this brief will present the hateful aspect of the Confederate flag and Confederate icons. Before doing so, amicus wishes to respectfully acknowledge that to some decent people these are honored historical symbols. As the Chief of Heritage Operations for the Sons of Confederate Veterans wrote: “To those 70 million of us whose ancestors fought for the South, it is a symbol of family members who fought for what they thought was right in their time⁴, and whose valor became legendary in military history. This is not nostalgia. It is our legacy.”⁵

Such people see the flag in this honored context:



⁴ That the most successful Southern General to fight in Tennessee, who “fought for what he thought was right at the time,” is not similarly honored has always perplexed one of the writers of this amicus brief. See [Chronology – George H. Thomas \(generalthomas.com\)](http://generalthomas.com) last visited June 23, 2021.

⁵ [The Confederate Flag Is a Matter of Pride and Heritage, Not Hatred - NYTimes.com](https://www.nytimes.com) last visited June 23, 2021.

⁶ [Confederate flags draw differing responses \(arkansasonline.com\)](http://arkansasonline.com) last visited June 23, 2021.

III. What the Confederate Flag means to those who do not view it as a benign part of their heritage.

*Southern trees bear a strange fruit
Blood on the leaves and blood at the root
Black bodies swingin' in the Southern breeze
Strange fruit hangin' from the poplar trees*

*Pastoral scene of the gallant South
The bulgin' eyes and the twisted mouth
Scent of magnolias sweet and fresh
Then the sudden smell of burnin' flesh*

Abel Meeropol (1937), recorded by Billie Holiday (1939)



Dylan Roof shortly before murdering nine Black parishioners at Emanuel A.M.E. Church in Charleston, S.C.⁷

⁷ [Dylann Roof Photos and a Manifesto Are Posted on Website - The New York Times \(nytimes.com\)](#) last visited June 23, 2021.

No doubt more Americans can trace lineage to soldiers who fought for the Union than for the Confederacy.⁸ Many more Americans, either through inadequate genealogical research, or more recent immigration to the United States, do not have any known connection to soldiers for either side. A significant proportion of Americans and Tennesseans⁹ could not have ancestors who fought for the Confederacy as the ancestors were slaves who only gained their (limited) freedom with the defeat of the rebellion in 1865. For many of those Americans who do not pridefully identify as Confederate descendants¹⁰, Confederate icons have a meaning that is far from benign.

⁸ [Facts - The Civil War \(U.S. National Park Service\) \(nps.gov\)](#), last visited, May 10, 2021. 2.6 million soldiers, including 178,975 Black soldiers, fought for the United States; between 750,000 and 1.25 million fought for the Confederacy. The SOCV Chief of Heritage states that 70 million of our country's 330 million citizens trace ancestry to men who fought for the Confederacy. See [The Confederate Flag Is a Matter of Pride and Heritage, Not Hatred - NYTimes.com](#) last visited June 23, 2021.

⁹ 31,000 (white) Tennesseans served in the U.S. Army; 6,776 lost their lives. [Southern Unionists: A Socio-Economic Examination of the Third East Tennessee Volunteer Infantry Regiment, U.S.A., 1862-1865 on JSTOR](#) last visited June 30, 2021. 20,133 freed slaves fought for the Union. [Blacks in the Union Army of Tennessee \(tnstate.edu\)](#) last visited June 30, 2021.

¹⁰ Amicus recognizes that people can honor their family's history, hideous warts and all. One of the writers of this brief has a long-deceased relative who was a Klansman and showed his Klan artifacts to counsel (who was but a little boy). These objects are now housed in some box in some attic somewhere. Should that writer find these artifacts (of hate) he will not destroy them but will privately preserve them as a truthful (if unfortunate) portion of the family history.

A. The rise of the Confederate flag as a symbol of white supremacist resistance to the civil rights movement.

In the decades after the Civil War, the Confederate flag was rarely displayed in public.¹¹ It was not flown at Robert E. Lee's funeral,¹² nor was it regularly flown by the Klan in their war against Reconstruction.¹³ The United Daughters of the Confederacy waited until the 1930's to display the flag in the Giles County Courthouse. (VII, 16).

As a political symbol, the Confederate Flag re-emerged in opposition to President Truman's desegregation of the United States military during the "Dixiecrat Revolt of 1948."¹⁴ Then during the 1950's and 1960's the flag was adopted by white supremacists and segregationists, who displayed it in opposition to Black civil rights.¹⁵

The following pages show how the Confederate flag was displayed, and seen, in that far from benign context¹⁶:

¹¹ [What the Confederate flag means. - The Washington Post](#) last visited July 1, 2021.

¹² [Confederate battle flag: What it is and what it isn't | CNN](#) last visited July 2, 2021

¹³ [The Confederate flag largely disappeared after the Civil War. The fight against civil rights brought it back. - The Washington Post](#), last visited May 10, 2021

¹⁴ [President Harry S. Truman desegregated the military after overcoming his own racism - The Washington Post](#) last visited May 10, 2021; [The Confederate flag: A 150 year battle - The Washington Post](#) last visited June 23, 2021. (The Dixiecrat platform was "We stand for the segregation of the races.").

¹⁵ [The History of the Confederate Battle Flag - The Atlantic](#) last visited May 10, 2021.

¹⁶ All black and white images were originally displayed by the Equal Justice Initiative, as part of their comprehensive report: "Segregation in America," see [Segregation in America | Equal Justice Initiative \(eji.org\)](#)



Segregationists taunt peaceful civil rights protestors as they march from Selma to Montgomery in March 1965. (Spider Martin)



Mississippi Highway Patrolmen watch marchers as they arrive in Montgomery on March 25, 1965. (Alabama Department of Archives and History. Donated by Alabama Media Group / Photo by Spider Martin, Birmingham News)

last visited May 10, 2021. The captions below the pictures come from EJI, but have been enlarged for easier reading.



Young white men with Confederate flag and racist sign jeer at civil rights marchers in the southwest side of Chicago, August 5, 1966. (AP Photo)



Bogalusa, Louisiana, July 1, 1965. (© 1976, Matt Herron/The Image Works)



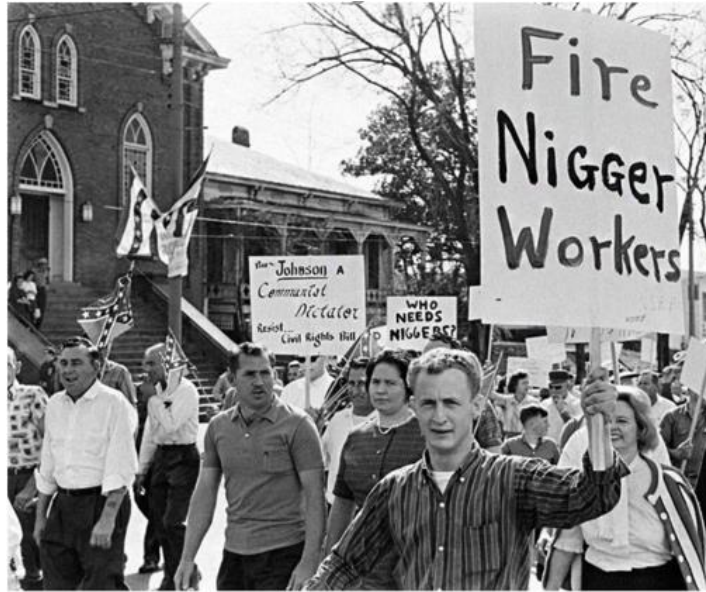
Hundreds of white students protest at the University of Mississippi in Oxford, Mississippi, on September 20, 1962, in response to James Meredith's enrollment as the school's first Black student. (AP)



Teenage boys wave Confederate flags during a protest against school integration in Montgomery, Alabama, 1963. (© Flip Schulke/CORBIS/Getty Images)



Young children wave Confederate flags at a White Citizen's Council meeting in New Orleans, Louisiana, on November 16, 1960. The meeting was called to organize opposition to the integration of two local elementary schools. (Bettman/Getty Images)



Pro-segregation march in Montgomery, Alabama, on March 17, 1965. (Glen Pearcy Collection, American Folklife Center, Library of Congress)



Students at the University of Alabama burn desegregation literature in Tuscaloosa, Alabama, on February 6, 1965, in response to the enrollment of Autherine Lucy. (Library of Congress/AP)

This Court does not need to be reminded that the Confederate flag was not merely used at “peaceful” protests; the reality of the fight against civil rights involved bombings, murders, and savage beatings.¹⁷ However, to make this truth most clear (and for other readers less versed in American history), here are some of the images that are burned into the minds of many Black Americans.



On February 17, 1960, young white men attack a sit-in demonstrator at Woolworth's lunch counter in **Nashville, Tennessee**. (Jimmy Ellis/Nashville Public Library)

¹⁷ For a comprehensive history of racist terror, amicus would suggest the Equal Justice Initiative's detailed report: "Lynching in America." [Lynching in America: Confronting the Legacy of Racial Terror \(eji.org\)](https://www.eji.org/), last visited May 11, 2021. Tennessee racial terrorists lynched 233 victims between 1877 and 1950, with six of those murders taking place in Giles County.



In Anniston, Alabama, segregationists hurled a fire bomb into a Freedom Rider bus on May 14, 1961. (AP Photo)



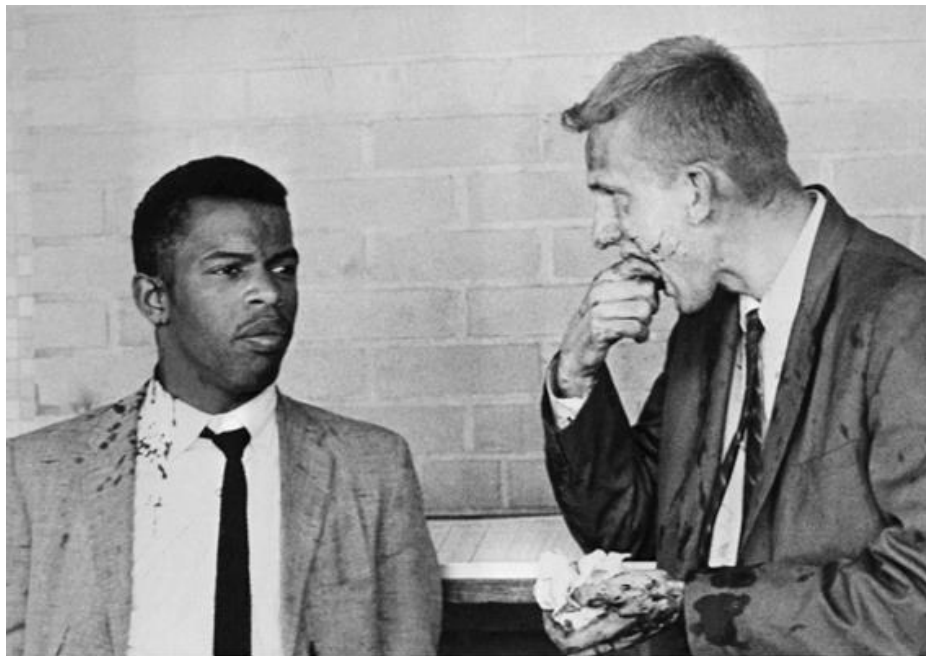
Police beat a Black man in Harlem, New York, in 1964. (AP Photo)



Sixteenth Street Baptist Church bombing in Birmingham, Alabama, in which four children were murdered, 1963. (Anthony Falletta/© The Birmingham News)



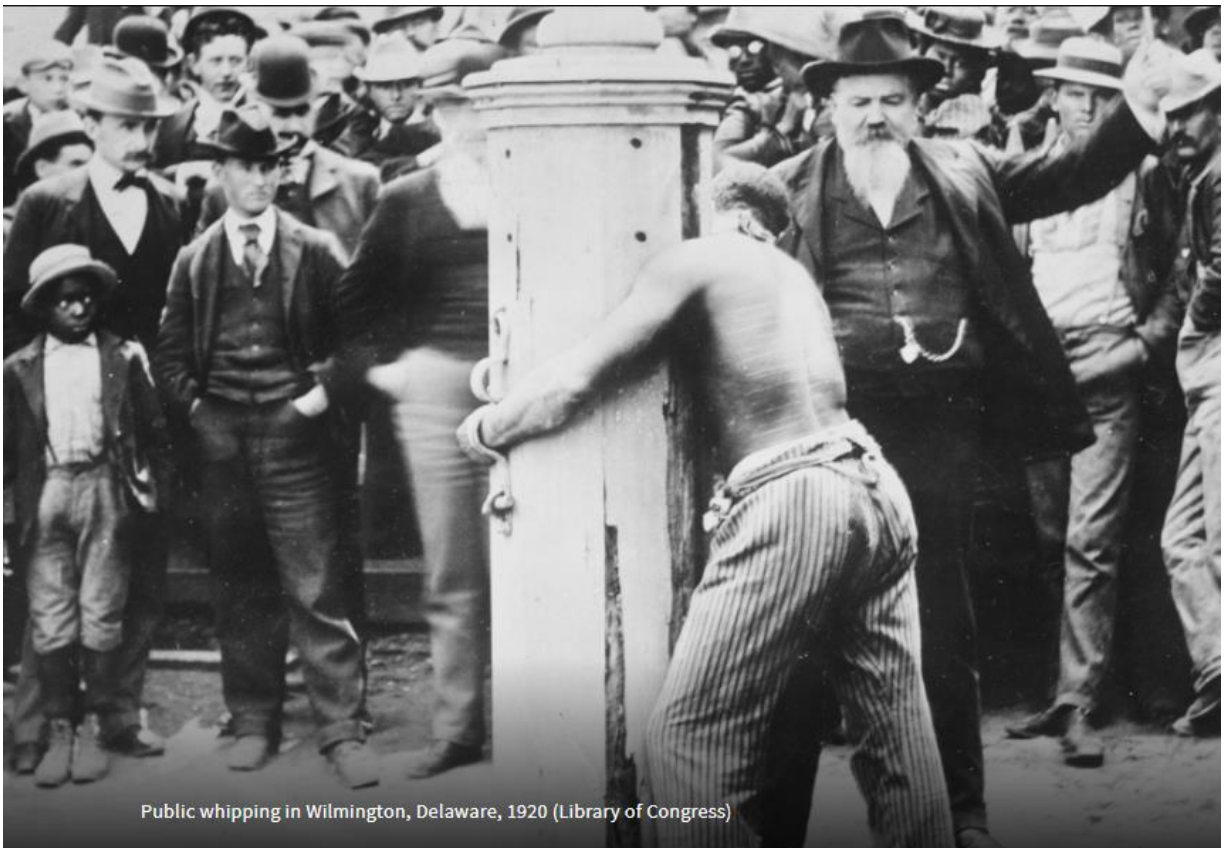
In the summer of 1964, the Southern Christian Leadership Conference organized weeks of anti-segregation demonstrations and marches in St. Augustine, Florida, during which more than 200 white residents chased and beat protestors, injuring 50 and sending 15 to the hospital. Many of the Black demonstrators, including Dr. King, were arrested. Dr. King inspects a bullet hole in the glass door of his rented cottage in St. Augustine, Florida, on June 5, 1964. (AP)



On May 20, 1961, to Freedom Riders, John Lewis (left) and James Swerg (right), were brutally beaten by segregationists in Montgomery, Alabama. (Bettman/Getty Images)



A civil rights advocate is struck by water from the hoses wielded by police officers during a protest in Birmingham, Alabama. (Charles Moore/Getty Images)



Public whipping in Wilmington, Delaware, 1920 (Library of Congress)

The images displayed, so far, are somewhat dated. Many older jurors lived through the civil rights movement and witnessed many of the scenes depicted. But, to a younger generation, the images of white terrorism and the Confederate flag are different. Now, when used as a symbol of hatred the flag is often joined with Nazi and Ku Klux Klan symbols of white supremacy.



“Unite the Right” rally, Charlottesville, Virginia, August 11-12, 2017.¹⁸

¹⁸ [The Resurgence Of Violent White Supremacy In America | TPR](#) last visited June 18, 2021.



Ku Klux Klan Rally on steps of South Carolina State House, Columbia, South Carolina, July 18, 2015.¹⁹



Klan March in Texas, undated.²⁰

¹⁹ [KKK met with skirmishes at rally to protest Confederate flag removal - The Washington Post](#) last visited Jun 18, 2018, 2021.

²⁰ [Gonzalez: Confederate flag is finally seen by many people as symbol of white supremacy and racism - New York Daily News \(nydailynews.com\)](#) last visited June 22, 2021.

During the recent attack on the United States Capitol, the Confederate Flag was conspicuously displayed. To many loyal and patriotic Americans this display of the Confederate flag was highly offensive. At the least it was divisive.



January 6, 2021 attack on United States Capitol.²¹

²¹ [Man Seen Carrying Confederate Flag in US Capitol During Siege Arrested | Voice of America - English \(voanews.com\)](#) last visited June 22, 2021, and [Special Coverage Of Violent Riots At U.S Capitol | WBFO](#) last visited June 22, 2021.

B. What the United Daughters of the Confederacy claim in their own words: Africans were barbaric cannibals who were civilized through slavery.

Since the 1920's, the United Daughters of the Confederacy (UDC) have distributed the "Catechism on the History of the Confederate States of America."²² Today, this document is promoted on the UDC's main website where the UDC encourages members to recite these "basic beliefs and elements of Confederate history;" and the "Children of the Confederacy" are enticed to learn these "truths" with awards of prizes and scholarships.²³

A copy of the 1920 version of the Catechism is provided as Attachment One to this amicus brief.²⁴ Amicus respectfully submits that this core UDC document evinces racial animus, and a hostility to American history. Amicus recognizes that others might, respectfully,

²² [Old South monument backers embrace "Confederate Catechism" \(apnews.com\)](https://www.apnews.com/story/US-Confederate-Catechism/2021/05/10/old-south-monument-backers-embrace-confederate-catechism/2021-05-10) last visited May 10, 2021.

²³ [Catechisms | United Daughters of the Confederacy \(hqudc.org\)](https://www.hqudc.org/catechisms) last visited May 10, 2021.

²⁴ It does not appear that copyright protection was ever sought or given to the Catechism. Amicus has searched the public copyright catalog of the United States Copyright Office, *see* [WebVoyage \(loc.gov\)](https://www.loc.gov/webvoyage/), and does not find any copyrights under the author, Lyon Gardiner Tyler, nor any copyright ever being issued to the Catechism under its various titles. Tyler died February 12, 1935. The Sons of Confederate Veterans publicly provides a 1929 version of the Catechism on their website, which appears identical to Attachment One, except that the "answer" to question 19 is longer, adding in the claim that President Lincoln "had little of the backbone of his successor, Andrew Johnson;" and adding a 20th "answer." *See* [Confederate Catechism – Sons of Confederate Veterans \(scv.org\)](https://www.scv.org/Confederate-Catechism) last visited, May 11, 2021.

disagree. Regardless, the Catechism says what it says, including, but not limited to the following:

“The Southerners took the negro as a barbarian and cannibal, civilized him, supported him, clothed him, and turned him out a devout Christian.” Att. 1, p. 8, Cat. 18.

The Catechism claims that “it was not slavery, but the vindictive, intemperate anti-slavery movement that was at the bottom of all the troubles.” Att. 1, p. 2, Cat. 2.²⁵ The Catechism and the UDC ignore the explicit reasons for the rebellion cited at the time:

Our position is thoroughly identified with the institution of slavery --- the greatest material interest of the world. Its labor supplies the product which constitutes by far the largest and most important portions of commerce of the earth. These products are peculiar to the climate verging on the tropical regions, and by an imperious law of nature, none but the black race can bear exposure to the tropical sun.

*A Declaration of the Immediate Causes which Induce and Justify the Secession of the State of Mississippi from the Federal Union.*²⁶ Texas, in joining the war, declared that its people intended for slavery to “exist in all future time.” *A Declaration of the Causes which Impel the State of Texas to Secede from the Federal Union.*²⁷ Georgia’s declaration

²⁵ This would be an early example of the modern rhetorical technique of “gaslighting”: lie flagrantly, blame the victims, and condemn the oppressed for complaining about their oppression.

²⁶ See [Declaration of Causes of Secession \(civilwarcauses.org\)](http://civilwarcauses.org) last visited July 13, 2021. The Mississippi declaration objected to the doctrine of “negro equality.”

²⁷ *Id.* Texas also claimed that “the servitude of the African race [...] is mutually beneficial to both bond and free, and is abundantly authorized

recognized the “right” to preserve slavery and the “political and social inequality of the black race.”²⁸ South Carolina went to war to maintain the “right of property in slaves.”²⁹ A revisionist history which places the blame for the war on those decent Americans who objected to human bondage, and which denies the rebellion’s intent to keep Blacks in permanent subjugation, is offensive to many students of history, and, of course, to Black Americans.

Amicus recognizes that possibly many members of the UDC do not hold these beliefs and consider the UDC a benign social organization. The opening page of the UDC website contains a statement from President General Linda Edwards that “denounces any individual or group that promotes racial divisiveness or white supremacy.”³⁰ But this denunciation is followed with a reaffirmation of the UDC’s “objectives,” which include “collecting and preserving the material for a truthful history of the War Between the States.”³¹ The First Amendment permits the UDC to disseminate the Catechism, and its “truth” about African cannibals who needed civilizing via slavery; however, amicus believes that this creed should not be endorsed in any way inside our public courthouses.

and justified by the experience of mankind, and the revealed will of the Almighty Creator.”

²⁸ *Id.*

²⁹ *Id.*

³⁰ [United Daughters of the Confederacy | Historical – Educational – Benevolent – Memorial – Patriotic \(hqudc.org\)](https://www.hqudc.org/) last visited May 10, 2021.

³¹ *Id.*

IV. Multiple courts have recognized the racially hostile and disruptive nature of the Confederate flag.

In 2010, Texas refused to issue a specialty license plate on behalf of the Sons of Confederate Veterans that contained the Confederate flag, finding that “many members of the general public find the design offensive,” and “a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups.” *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 206 (2015). The United States Supreme Court upheld this refusal against First Amendment challenge. *Id.* at 219-220.

The Sixth Circuit Court of Appeals found that the Confederate flag “communicates a message of hatred towards members of the student body population and, therefore, presents a situation ‘involving substantial disorder or invasion of the rights of others,’” which justified its removal from public schools. *Defoe ex rl. Defoe v. Spiva*, 625 F.3d 324, 334 (6th Cir. 2010) (cleaned up) (quoting *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969)). In *Defoe*, the Sixth Circuit described the racial animus present in Anderson County, Tennessee, which led to the banning of the Confederate flag:

The record contains uncontested evidence of racial violence, threats, and tensions at both ACHS and ACCTC. At ACHS, several incidents have occurred: two days after two black male students enrolled at ACHS, a large Confederate flag appeared draped in a school hallway; racial slurs such as “dirty niggers, sand niggers and dirty mexicans” were directed at Hispanic students; racially-charged graffiti including a Swastika and the words “niggers” and “white power,” and the comments “White 4 Life” and “I Hate Niggas, J/K AVM”; graffiti including the

name of a racially mixed couple along with “something about nigger-lover, white girl, black boy, in my school” and a picture of a hangman's noose; a black Clinton High School student involved in a leadership program at ACHS being called a “nigger” by a group of white ACHS students; Oreo cookies thrown onto the basketball court when a biracial Clinton High School basketball player attempted to warm-up before a basketball game; and a physical altercation between a Hispanic student and a white male student stemming from the white student's reference to the Hispanic student's brother as a “sand nigger, dirty mexican.”

Defoe, 625 F.3d at 334 (this litany of racism goes on for an additional two paragraphs). While Anderson County is some distance from Giles County, the virulent racism that accompanied the Confederate flag in that county demonstrates how the flag is used as a tool of intimidation, and how it is perceived by minority citizens.

Similar results recognizing the divisive nature of the Confederate flag, and approving of its removal from public schools include: *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 439-40 (4th Cir. 2013) (Confederate flag was “racially divisive” and “likely to cause a substantial disruption.”); *A.M. ex rel. McAllum v. Cash*, 585 F.3d 214, 223 (5th Cir. 2009) (the “racially inflammatory meaning associated with the Confederate flag and the evidence of racial tension” established that displays of the flag could substantially disrupt school activities); *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 741 (8th Cir. 2009) (ban on clothing depicting the Confederate flag upheld due to “likely racially-motivated violence, racial tension, and other altercations directly related to adverse race relations in the community and the school”); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1366–67 (10th Cir.) (ban

based on past racial incidents and history of racial tension in the school district); *Melton v. Young*, 465 F.2d 1332 (6th Cir. 1972) (racial tension and physical altercations tied to displays of the Confederate flag).

Yet more courts have found that displays of the Confederate flag can contribute to a hostile work environment. In *Adams v. Austal, U.S.A., L.L.C.*, the Eleventh Circuit Court of Appeals held that a reasonable jury could find a hostile environment based on regular displays of the Confederate flag, coupled with racist graffiti, displays of a noose, and derogatory comments (i.e. the “N-word,” “monkey” and “boy”). 754 F.3d 1240, 1251-54 (11th Cir. 2014). Similar rulings include: *Renfro v. IAC Greencastle, LLC*, 385 F. Supp. 3d 692, 706 (S.D. Ind. 2019) (“almost daily” display of Confederate flag, plus racially offensive comments); *Kemp v. CSX Transp., Inc.*, 993 F. Supp. 2d 197, 212 (N.D.N.Y. 2014) (hostile environment claim based on vulgar racial language, racial slurs and Confederate flags displayed prominently on walls of office); *E.E.O.C. v. Rock-Tenn Servs. Co.*, 901 F. Supp. 2d 810, 821 (N.D. Tex. 2012) (claim based on racist graffiti including “the racial slur ‘[n-word],’ the letters ‘KKK,’ and images of nooses, Confederate flags, and swastikas”); *Golden v. World Sec. Agency, Inc.*, 884 F. Supp. 2d 675, 687 (N.D. Ill. 2012) (Confederate flag along with n-word, and KKK-like hoods was offensive).

Thus, while the State in their briefing suggests that the Confederate flag and other icons are of no real significance, just minor trifles that the jurors probably never noticed and certainly would not be

disturbed by (Appellee Brief, pp. 45-49), multiple courts have concluded otherwise.

V. The objectively measured impact of exposure to the Confederate flag.

It may seem obvious that the Confederate flag and icons would negatively influence white jurors towards Black defendants, and would chill the willingness of a Black juror from speaking his or her mind to the white majority. Any Black citizen who has lived through the attack on the Freedom Marchers at the Edmund Pettus Bridge, the bombing of the 16th Street Baptist Church, or Dylan Roof's massacre at Emanuel A.M.E. Church can be expected to feel personally threatened by the display of the battle flag in the deliberation room. But these self-evident truths are also supported by empirical science.

Dr. Joyce Ehrlinger then of Florida State University completed two studies on the impact of exposure to the Confederate flag on human behavior. Ehrlinger et al., *How Exposure to the Confederate Flag Affects Willingness to Vote for Barack Obama*, *Political Psychology* 32(1) (2011). In the first study a politically diverse group of students at Florida State University were exposed either to the Confederate flag, or a neutral control, and then asked about their willingness to vote for four then candidates for President: Hillary Clinton, Mike Huckabee, John McCain, and Barack Obama. *Id.* at pp. 135-37. White students exposed to the Confederate flag were significantly less willing to vote for Barack Obama than white students who were not exposed to the flag (while their support

for McCain and Huckabee was unchanged, and their support for Clinton marginally increased after exposure to the flag). *Id.* at 137-139.

In Ehrlinger's second study, the all-white participants were asked their opinions of a fictional Black man, "Robert"; half of the participants were primed with the Confederate flag, half were not. *Id.* at 141-42. In the story, Robert refused to pay his rent until his landlord repainted his apartment, and demanded money back from a clerk; after reading the story the participants were asked to evaluate Robert. *Id.* at 142. Those participants who read the story while being primed with the Confederate flag rated Robert significantly more negatively than did those participants who were not exposed to the flag. *Id.* at 142-43. Importantly, the participants' negativity was independent of pre-existing levels of prejudice—people expressing non-discriminatory views still viewed Robert more negatively if exposed to the Confederate flag. *Id.* at 143.

In both studies the students' exposure to the Confederate flag was brief. In the first study it was displayed on a screen for 15 ms (15/1,000 of second), *id.* at 135; in the second study a folder with a Confederate flag sticker was "accidentally left" on a corner of the desk where the students took the examination. *Id.* at 142.

Ehrlinger concluded that "Our studies show that, whether or not the Confederate flag includes other nonracist meanings, exposure to this flag evokes responses that are prejudicial. Thus, displays of the Confederate flag may do more than inspire heated debate, they may actually provoke discrimination." *Id.* at 144.

The chilling effect of racist symbols that carry with them the threat of lynching is borne out by the reality of life in the Jim Crow South. Following the freeing of the slaves in Louisiana, fully 130,344 Blacks voted in the election of 1868; with the resumption of racial terror and lynchings, only 5,320 voted in 1869, and by 1940 (when America was on the eve of WWII as the defender of democracy) only 886 Blacks voted in the entire state. [Trenticosta, C. & Collins, W, *Death and Dixie: How the Courthouse Confederate Flag Influences Capital Cases in Louisiana*, 27 Harv. J. Racial & Ethnic Just. 125, 130 \(2011\).](#) The threat of violence has long worked to chill Black participation in our democracy. Possibly this truth is evident in Mr. Gilbert's jury – despite Giles County having a population that is 10.3% Black, not a single Black citizen decided his fate. (I, 96). Trenticosta quotes modern Black citizen responses to seeing the Confederate flag displayed at a courthouse: “when we see the Confederate Flag flying over the courthouse, we are reminded of our slave masters fighting to keep us slaves.” *Id.* at 136. “Any Black person knows what that flag means...It is the symbol of white supremacy. It is to Black people what a swastika is to Jews.” *Id.*³²

³² Trenticosta also quotes a white defender of the flag: “I just don't see what the issue is. Is it the coloreds again?” said Charles Moore, past commander of the Sons of the Confederacy. “Anybody who says that flag stands for racism is a hypocrite. If that was the case, then those Ole Miss rebels would run all of those Negroes off of the football team.” *Id.* at 137.

VI. A jury's exposure to Confederate Icons denies the defendant a fair trial free of extraneous prejudicial information and improper outside influence.

[D]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. The jury is to be a criminal defendant's fundamental protection of life and liberty against race or color prejudice. Permitting racial prejudice in the jury system damages both the fact and the perception of the jury's role as a vital check against the wrongful exercise of power by the State.

Pena-Rodriguez v. Colorado, 137 S.Ct. 855, 868 (2017) (cleaned up) (quoting and citing *Powers v. Ohio*, 499 U.S. 400, 411 (1991); *McCleskey v. Kemp*, 481 U.S. 279, 310 (1987); *Rose v. Mitchell*, 443 U.S. 545, 555 (1979).

Every criminal defendant has a constitutional right to a trial “by an impartial jury.” U.S. Const. amend. VI; Tenn. Const. art. I, § 9; *State v. Sexton*, 368 S.W.3d 371, 390 (Tenn. 2012); *Remmer v. United States*, 347 U.S. 227, 229 (1954). Jurors must render their verdict based only upon the evidence introduced at trial, weighing the evidence in light of their own experience and knowledge. *Caldararo ex rel. Caldararo v. Vanderbilt Univ.*, 794 S.W.2d 738, 743 (Tenn. Crim. App. 1990). When a jury has been exposed to either extraneous prejudicial information or an improper outside influence, the validity of the verdict is placed in doubt. *State v. Blackwell*, 664 S.W.2d 686, 688 (Tenn.1984). Our Supreme Court holds: “An unbiased and impartial jury is one that begins the trial with an impartial frame of mind, that is influenced only by the competent evidence admitted during the trial, and that bases its verdict on that evidence.” *State v. Smith*, 418 S.W.3d 38, 45 (Tenn. 2013).

“The presence of even a single biased juror deprives a defendant of his right to an impartial jury.” *Williams v. Bagley*, 380 F.3d 932, 943–44 (6th Cir. 2004) (citing *Morgan v. Illinois*, 504 U.S. 719, 729 (1992); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)). This year, applying this principle, the Sixth Circuit granted a new trial to three defendants based on evidence that a single juror had been communicating with a friend who was employed as a prosecutor during jury deliberations. *United States v. Lanier*, 988 F.3d 284 (6th Cir. 2021). Amicus highlights this to make clear the issue isn’t whether some morally strong, psychologically well-balanced juror(s) would be immune to the negative influence of the Confederate icons; the issue is whether even a single juror could be impermissibly encouraged to judge Mr. Gilbert’s case based on exposure to prejudicial extraneous racist material.

A party challenging the validity of a verdict must produce admissible evidence to make an initial showing that the jury was exposed to extraneous prejudicial information or subjected to an improper outside influence. *Caldararo*, 794 S.W.2d at 740–41. Once the challenging party shows that the jury was exposed a rebuttable presumption of prejudice arises and the burden shifts to the State to introduce admissible evidence to explain the conduct or demonstrate that it was harmless. *Walsh v. State*, 166 S.W.3d 641, 647 (Tenn.2005); *State v. Parchman*, 973 S.W.2d 607, 612 (Tenn. Crim. App. 1997). These Tennessee opinions are in accord with United States Supreme Court precedent. *Remmer v. United States*, 347 U.S. 227, 229 (1954) (“In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror

during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial”); *Mattox v. United States*, 146 U.S. 140, 150 (1892) (“Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.”).

No doubt, the photographs of the UDC Jury Room, with the brazen display of the Confederate flag and president Davis, conclusively demonstrate that the jury was “exposed to extraneous prejudicial information” and “subjected to an improper outside influence.” (VII, 7-16). As counsel for Mr. Gilbert has already ably argued (Reply Brief, pp. 6-8), the State has chosen not to attempt to rebut the presumption of prejudice, or to argue harmlessness,³³ and instead has tried to hide behind a manufactured defense of “plain error.”³⁴ Having chosen not to address the unaddressable, the State has effectively conceded the truth – the jury was prejudiced by exposure to extraneous prejudicial information, and a new trial is required. *Remmer*, 347 U.S. at 229; *Walsh*, 166 S.W.3d at 647; *Parchman*, 973 S.W.2d at 612; *Caldararo*, 794 S.W.2d at 740–41.

³³ The State’s brief conspicuously does not use the word “harmless” until addressing cumulative error. (Appellee Brief, p. 50).

³⁴ No doubt, this is the best they can do with these terrible facts. WHY the State chooses this course, as opposed to honorably standing up against the clear racist wrong of the UDC Jury Room and confessing error is what compelled TACDL to submit this amicus brief.

VII. This Honorable Court has a duty to confront racial animus.

“The duty to confront racial animus in the justice system is not the legislature’s alone.” *Pena-Rodriguez*, 137 S.Ct. at 867. The United States Supreme Court makes clear that the judiciary has a crucial role to play: “it must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons.” *Id.* The Supreme Court has endeavored to “ensure that individuals who sit on juries are free of racial bias.” *Id.* at 868 (citing *Ham v. South Carolina*, 409 U.S. 524 (1973); *Rosales-Lopez*, 451 U.S. 182 (1981); *Turner v. Murray*, 476 U.S. 28 (1986)).

This Honorable Court should follow the lead of our nation’s highest court and directly confront the racial animus that infects the Giles County Courthouse. The State of Tennessee’s suggestion that “substantial justice” does not require judicial intervention is terribly wrong.

VIII. While no courthouse in Tennessee should display Confederate icons, Giles County, as the birthplace of the Ku Klux Klan, is a particularly inappropriate location.

In 1917, shortly before the Giles County UDC created their shrine to the Confederacy in the courthouse, they erected a plaque honoring the founding the Ku Klux Klan in Pulaski, Tennessee.³⁵ As this Court is well

³⁵ <https://thereconstructionera.com/kommemorating-the-klans-birthplace-with-a-backwards-plaque-in-pulaski-tn/> last visited July 14,

aware, Pulaski is infamous as the birthplace of our nation's original racist terrorist organization.³⁶ Indeed, the KKK plaque (now turned backwards, so its message speaks only to the brick wall) can be seen from the Giles County Courthouse and from the UDC jury room. (Reply Brief, p. 3).

Of all places in America, Pulaski, Tennessee should not still be honoring racism, white supremacy, and the KKK's terrible history of lynching, night rides, and racist terror. According to data compiled by the Equal Justice Initiative, Giles County has suffered no less than six lynchings, while the other three counties in the 22nd Judicial District have experienced an additional nine such murders.³⁷ The UDC's twin shrines in Pulaski make clear the cruel connection between their Confederate icons in the jury room, and their honoring of the terrorist Klan a mere block away. This court does not have jurisdiction to remove the UDC's public (if reversed) memorial to the Klan, but it can, effectively, order the removal of the UDC's Confederate icons from the courthouse.

2021 and [KKK Photo Postcards \(genealogyvillage.com\)](http://genealogyvillage.com) last visited June 23, 2021.

³⁶ [Ku Klux Klan \(tennesseeencyclopedia.net\)](http://tennesseeencyclopedia.net) last visited June 23, 2021 and <https://thereconstructionera.com/kommemorating-the-klans-birthplace-with-a-backwards-plaque-in-pulaski-tn/> last visited July 14, 2021.

³⁷ [Explore The Map | Lynching In America \(eji.org\)](http://eji.org) last visited June 23, 2021.

IX. It is crucial to maintain public respect for our courts and our judiciary; such respect will not be given (nor deserved) if we display racist symbols of hatred in our courthouses.

“The preservation of the public’s confidence in judicial neutrality requires not only that the judge be impartial in fact, but also that the judge be perceived to be impartial.” *Cook v. State*, 606 S.W.3d 247, 254 (Tenn. 2020) (quoting *State v. Reid*, 213 S.W.3d 792, 815 (Tenn. 2006) and *Kinard v. Kinard*, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998)).

Mr. Gilbert is entitled to a new trial, because he was tried by a jury that was exposed to extraneous prejudicial influences. *Caldararo*, 794 S.W.2d at 740–41; *Walsh*, 166 S.W.3d at 647 (Tenn. 2005). However, the Tennessee public is entitled to yet more: they are entitled to a judiciary that they trust and have confidence in, and they are entitled to have faith that our court system is not corrupted by racial animus *Pena-Rodriguez*, 137 S.Ct. at 867-68. The display of Confederate icons in the Giles County jury deliberation room violates the rights of all Tennesseans, and sullies the dignity of our courts.

In the following two sub-sections, amicus will explore first the public’s interest in a judiciary that is free of the appearance of bias and racism, and then explore the explicit canons set forth in our Judicial Code of Conduct, which require the Giles County court to immediately cleanse the jury deliberation room of all Confederate and UDC icons.

A. The Tennessee public has an interest in maintaining a judiciary that is free from the appearance of bias.

The United States Supreme Court in *Pena-Rodriguez* recognized that “racial bias in the justice system must be addressed” to avoid

“systemic loss of confidence in jury verdicts.” 137 S.Ct. at 869. It is a “vital state interest” [to] safeguard “public confidence in the fairness and integrity of the nation's elected judges.” *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 445–46 (2015) (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)).

The importance of public confidence in the integrity of judges stems from the place of the judiciary in the government. Unlike the executive or the legislature, the judiciary “has no influence over either the sword or the purse; ... neither force nor will but merely judgment.” The Federalist No. 78, p. 465 (A. Hamilton) The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions.

Williams-Yulee, 575 U.S. at 445 (cleaned up).

The “public perception of judicial integrity is ‘a state interest of the highest order.’” *Williams-Yulee*, 575 U.S. at 446 (quoting *Caperton*, 556 U.S., at 889). Justice Kennedy expressed this interest as follows:

Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.

Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring).

Our Tennessee Supreme Court has made clear that our public is entitled to a judiciary that avoids the “appearance” of bias: “justice must satisfy the appearance of justice.” *Cook*, 606 S.W.3d at 255 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955) and *Offutt v. U.S.*, 348 U.S. 11, 14 (1954)). “[T]he appearance of bias is as injurious to the integrity of the

judicial system as actual bias.” *Id.* (quoting *Liberty Mut. Ins. Co.*, 38 S.W.3d 560 (Tenn. 2001)).

For all the reasons set-forth in §§ III, IV, V and VIII, above, it is impossible for all members of our public to have confidence in the Giles County judiciary, when Confederate icons are displayed in the jury deliberation room. The Giles County court appears, to many, to be endorsing the creed of Klan and modern white supremacists. Whether, in fact, the Giles County judiciary is the most learned, honorable, dignified, and unbiased in the State (which could certainly be true) they appear to be racially biased. And that appearance, irrespective of any underlying truth, sullies the dignity of the Giles County courts – and all Tennessee courts – and degrades public confidence in the legitimacy of their rulings. *Williams-Yulee*, 575 U.S. at 445; *Cook*, 606 S.W.3d at 255.

B. The Tennessee Rules of Judicial Conduct require the removal of Confederate icons from our courthouses.

A judge must “act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.” Tenn.R.S.Ct. 10, RJC 1.2. As has been set-forth in § V, above, it is very hard for Black citizens to view a court as impartial when it displays a flag that reminds them “of our slave masters fighting to keep us slaves.” Trenticosta, at 136. Similarly, it would be very hard for members of a minority and often persecuted religion to have confidence in a judiciary that displays a battle flag that is commonly displayed alongside the Nazi swastika by anti-Semites.

The Tennessee Supreme Court made the above point explicit in Rule of Judicial Conduct 2.3:

A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon [race, religion or ethnicity] and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

Tenn.R.S.Ct. 10, RJC 2.3. As discussed in § IV, above, multiple courts have already found that the Confederate battle flag is a divisive symbol of racial animus. The display of such a flag in a courthouse is conduct that manifests bias or prejudice and rises to the level of harassment based upon race, religion, and ethnicity. *Id.* A judge should not permit court staff, such as those responsible for maintaining the jury room, to engage in such conduct. *Id.*

Moreover, “A judge shall not use the benefits or facilities of an organization if the judge knows or should know that the organization practices invidious discrimination on the basis of [race, or ethnicity].” Tenn.R.S.Ct. 10, RJC 3.6(B). The Giles County court’s use of the UDC jury room, is the use of a facility maintained by an organization that promotes invidious racial discrimination. *See* §§ III.B and VII, above.³⁸

³⁸ Again, amicus accepts that the UDC may promote some prosocial and historically legitimate activities, but it also distributes “A Confederate Catechism” (Att. A) and is responsible for the 1917 plaque celebrating the founding of the KKK in Giles County, Tennessee. [KKK Photo Postcards \(genealogyvillage.com\)](http://www.kkkphoto.com) last visited June 23, 2021.

X. Courtrooms should be purged of, and protected from, displays of partisan and incendiary political icons.

Amicus has focused, thus far, on the evils perpetrated by the display of Confederate icons in a jury deliberation room. But, it bears note that other political displays could be equally harmful to a defendant's right to a fair trial. This summer, a former police officer was scheduled to stand trial in Nashville, Tennessee charged with the murder of a young Black man³⁹ – would his trial have been fair if the jury deliberated in the “Black Lives Matter Jury Deliberation Room,” with images of Tamir Rice, George Floyd, and other victims of police violence displayed on the walls? Should individuals charged with driving under the influence have their fates decided by jurors who deliberate in the “Mothers Against Drunk Driving Jury Room”? Amicus wants ALL defendants in Tennessee to be afforded fair jury trials, free of exposure to extraneous prejudicial outside influences.

³⁹ He entered a guilty plea on the eve of trial. [Daniel Hambrick shooting: Andrew Delke pleads guilty to manslaughter \(tennessean.com\)](#) last visited July 5, 2021.

XI. CONCLUSION

Tim Gilbert deserves a new trial, as the jury that heard his case was exposed to extraneous prejudicial information, in the form of racially hostile Confederate icons. This Honorable Court should make clear that in Tennessee such prejudicial displays have no place in our courthouses and must be removed.

Respectfully submitted,

A handwritten signature in black ink that reads "Jonathan Harwell". The signature is written in a cursive, flowing style.

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