No. 11-____

IN THE

Supreme Court of the United States

TERRANCE CARTER,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Louisiana

PETITION FOR A WRIT OF CERTIORARI

BLYTHE TAPLIN
CAPITAL APPEALS PROJECT
636 Barrone Street
New Orleans, LA 70113
BlytheT@thejusticecenter.org
(504) 529-5955

M. MICHELE FOURNET
P.O. Box 78015
Baton Rouge, LA 70837
mfournet@bellsouth.net
(225) 383-5107

JESSICA L. ELLSWORTH *
NATHANIEL S. BOYER
JULIET MAZER-SCHMIDT
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
jessica.ellsworth@hoganlovells.com
(202) 637-5600

* Counsel of Record — *Counsel for Petitioner*

QUESTION PRESENTED

In recent years, the Court has carefully hewed its Sixth Amendment jurisprudence to the prevailing understanding of the right to a jury trial at the time the Framers adopted the Sixth Amendment, including revising and reexamining prior Sixth Amendment precedents that were developed without that historical foundation. The question presented is:

Whether the Court should reexamine its "death qualification" framework articulated in *Witherspoon* v. *Illinois* (1968) and *Wainwright* v. *Witt* (1985) because the Court announced that framework decades ago without any consideration of, or foundation in, the Framer's intent in protecting a defendant's right to an "impartial jury" in the Sixth Amendment.

PARTIES TO THE PROCEEDINGS

The petitioner is Terrance Carter, the Defendant and Defendant-Appellant in the courts below. The respondent is the State of Louisiana, the Prosecution and Appellee in the courts below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATUTORY PROVISION INVOLVED 2

INTRODUCTION 2

STATEMENT OF THE CASE 4

A. Legal Background of Death-Qualified Juries 4

B. Proceedings Below 6

REASON FOR GRANTING THE WRIT 10

THE "SUBSTANTIAL IMPAIRMENT" STANDARD FOR EXCLUDING JURORS IS INCONGRUOUS WITH MODERN SIXTH AMENDMENT JURISPRUDENCE, LACKS ANY HISTORICAL BASIS, AND SHOULD BE REVISITED 10

A. This Court's Modern Sixth Amendment Precedent Focuses Squarely on Remaining Faithful to the Historical Understanding of an Impartial Jury 10

TABLE OF CONTENTS—Continued

Page

B. The Existing Framework for Death-Qualified Juries Predates the Court's Adherence to the Framers' Intent in Adopting the Sixth Amendment's Right to an Impartial Jury 16

C. The Framers Intended the "Impartial Jury" Guarantee to Prohibit Jurors from Being Struck Based on Their Views of the Death Penalty 21

CONCLUSION 28

APPENDICES

Appendix A: Published Portion of the Opinion of the Louisiana Supreme Court (Jan. 24, 2012) 1a

Appendix B: Unpublished Portion of the Opinion of the Louisiana Supreme Court (Jan. 24, 2012) 50a

Appendix C: Denial of Application for Rehearing by the Louisiana Supreme Court (Mar. 9, 2012) ... 105a

TABLE OF AUTHORITIES

Page

CASES:

Adams v. *Texas*,
448 U.S. 38 (1980) 5,, 17, 18, 19

Apprendi v. *New Jersey*,
530 U.S. 466 (2000) .....*passim*

Atkins v. *Virginia*,
536 U.S. 304 (2002) 27

Baze v. *Rees*,
553 U.S. 35 (2008) 20

Blakeley v. *Washington*,
542 U.S. 296 (2004) 14, 15

California v. *Ramos*,
463 U.S. 992 (1983) 20

Crawford v. *Washington*,
541 U.S. 36 (2004) 3, 14, 15

Georgia v. *Brailsford*,
3 U.S. 1 (1794) 26

Gregg v. *Georgia*,
428 U.S. 153 (1976) 27

Jones v. *United States*,
526 U.S. 227 (1999) .....*passim*

Lockett v. *Ohio*,
438 U.S. 586 (1978) 17, 18

Lockhart v. *McCree*,
476 U.S. 162 (1986) 16, 19

Morgan v. *Illinois*,
504 U.S. 719 (1992) 19

Ohio v. *Roberts*,
448 U.S. 56 (1980) 3, 14

TABLE OF AUTHORITIES—Continued

Page

Patterson v. *McLean Credit Union*,
491 U.S. 164 (1989) 13

People v. *Croswell*,
3 Johns. Cas. 337 (N.Y. Sup. Ct. 1804) 25

Reynolds v. *United States*,
98 U.S. 145 (1878) 17, 19

Ring v. *Arizona*,
536 U.S. 584 (2002) ..... *passim*

Roper v. *Simmons*,
543 U.S. 551 (2004) 27

Rothgery v. *Gillespie Cnty., Texas*,
554 U.S. 191 (2008) 23

Sparf v. *United States*,
156 U.S. 51 (1895) 23

United States v. *Burr*,
25 F. Cas. 49 (C.C.Va. 1807) 23

Uttecht v. *Brown*,
551 U.S. 1 (2007) 19, 20

Wainwright v. *Witt*,
469 U.S. 412 (1985) ..... *passim*

Walton v. *Arizona*,
497 U.S. 639 (1990) 3, 13

Witherspoon v. *Illinois*,
391 U.S. 510 (1968) ..... *passim*

STATUTES:

28 U.S.C. § 1257(a) 1

La. Cr. P. art. 798 ..... 2, 5

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES:

John Adams, *Diary Entry* (Feb. 12, 1771), *reprinted in* 2 Works of John Adams 252 (C. Adams ed., 1850) 15

James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* (Stanley N. Katz ed., 2d ed. 1972) 24

Akhil Reed Amar, *America's Constitution* 238 (2005) 25

Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33 (2003) 9

3 William Blackstone, *Commentaries on the Laws of England* 23

4 William Blackstone, *Commentaries on the Laws of England* 11, 12, 14

Federalist 83 (Hamilton), *reprinted in* The Federalist Papers 491 (Clinton Rossiter ed., 1961) 26

John Hostettler, *Criminal Jury Old and New: Jury Power from Early Times to the Present Day* 82 (2004) 23

1 Legal Papers of John Adams 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) 25

TABLE OF AUTHORITIES—Continued

Page

Letter XV by the Federal Framer (Jan. 18, 1788), reprinted in 2 The Complete Anti-Federalist 315 (H. Storing ed. 1981) 15

Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), *reprinted in* 15 Papers of Thomas Jefferson (J. Boyd ed., 1958) 15

Frank Newport, *Americans, Including Catholics, Say Birth Control Is Morally OK*, Gallup (May 22, 2012), *available at* http://www.gallup.com/poll/154799/americans-including-catholics-say-birth-control-morally.aspx 20

Frank Newport, *In U.S., Support for Death Penalty Falls to 39-Year Low*, Gallup, (Oct. 13, 2011), *available at* http://www.gallup.com/poll/150089/support-death-penalty-falls-year-low.aspx 20

[New Hampshire] Farmer, No. 3, June 6, 1788, quoted in The Complete Bill of Rights 477 (N. Cogan ed. 1997) 11

2 Joseph Story, *Commentaries on the Constitution of the United States* 540-41 (4th ed. 1873) 12

Welsh S. White, *Fact Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 Notre Dame L. Rev. 1 (1989) 13

IN THE
Supreme Court of the United States

No. 11-_____

TERRANCE CARTER,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Terrance Carter ("Carter") respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Louisiana in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana is bifurcated. The published portion is reported at __ So.3d __, 2012 WL 206430 (La. Jan. 24, 2012) and reproduced at page 1a of the appendix to this petition ("Pet. App."). An unpublished portion of the opinion is reproduced at Pet. App. 50a. The denial of rehearing is reproduced at Pet. App. 105a.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered on January 24, 2012. That court denied Petitioner's timely application for rehearing on March 9, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to * * * an impartial jury[.]"

The Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]"

STATUTORY PROVISION INVOLVED

Article 798 of the Louisiana Code of Criminal Procedure provides, in relevant part:

> It is good cause for challenge on the part of the state, but not on the part of the defendant, that: * * * (2) The juror tendered in a capital case who has conscientious scruples against the infliction of capital punishment and makes it known: (a) That he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him; (b) That his attitude toward the death penalty would prevent or substantially impair him from making an impartial decision as a juror in accordance with his instructions and his oath; or (c) That his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt[.]

INTRODUCTION

In a series of decisions issued over the prior thirteen Terms, this Court has reexamined and reanalyzed much of its Sixth Amendment jurisprudence in a consistent effort to tether the Court's decisions to a historical understanding of

what is encompassed by the Sixth Amendment's protection of the right to a jury trial. In those decisions, the Court has repeatedly explained that the contours of the Sixth Amendment's protections flow from—and are to be determined by—the Framers' intent in enshrining the right to an "impartial jury" in the Constitution.

Predating these decisions and the Court's focus on the understanding of the term "impartial jury" when it was written into the Sixth Amendment, the Court articulated a framework for permitting juries to be "death qualified." That framework—referred to as the "*Witherspoon-Witt* framework" based on the 1968 and 1985 decisions in which it was articulated—is out of step with the Court's modern Sixth Amendment jurisprudence. As the Court's decisions over the last decade make plain, the Court has not hesitated to reexamine its precedents to incorporate into its Sixth Amendment jurisprudence a fidelity to the Framers' intent in protecting the right to a jury trial. *See Ring* v. *Arizona*, 536 U.S. 584 (2002), *overruling Walton* v. *Arizona*, 497 U.S. 639 (1990); *Crawford* v. *Washington*, 541 U.S. 36 (2004) (confrontation clause), *abrogating Ohio* v. *Roberts*, 448 U.S. 56 (1980). This petition presents the Court with an opportunity to do the same in connection with its jurisprudence on the death-qualification of juries.

Terrance Carter was indicted for first-degree murder and prosecuted in a capital case in Red River Parish, Louisiana. During the process of choosing the "impartial jury" who would decide his case, the State of Louisiana challenged sixteen separate jurors for cause because they expressed significant reluctance to recommend a sentence of death for Mr.

Carter. The trial court dismissed each of these jurors, thereby empaneling a jury that included only individuals far more willing to impose a death sentence. The Louisiana Supreme Court upheld the trial court's dismissal of these sixteen jurors as permissible under this Court's decisions in *Witherspoon* and *Witt*. Those decisions, however, lack any inquiry into, or examination of, whether such wholesale exclusion of jurors is consistent with what an "impartial jury" meant at the time the Sixth Amendment was adopted. Instead, they were crafted to accommodate certain States' desires to seek capital punishment without interference from the substantial portions of their citizenry who have religious, moral, or otherwise strongly held beliefs against sentencing individuals to death.

As the Court's more recent cases show, the right to a jury trial has a storied history—and it is precisely that historical perspective that the Court has focused on incorporating into today's understanding of the protections accorded to defendants to ensure their right to an impartial jury. The *Witherspoon-Witt* framework takes no account of that perspective and should be revisited.

STATEMENT OF THE CASE

A. Legal Background of Death-Qualified Juries.

In its first encounter with the issue of a death-qualified jury in 1968, the Court held that a prospective juror could not be excluded for cause based on personal beliefs against capital punishment. *Witherspoon* v. *Illinois*, 391 U.S. 510, 519 (1968) (finding that "[a] man who opposes the death penalty, no less than one who favors it, can

make the discretionary judgment entrusted to him by the State"). *Witherspoon* explained that a State could only exclude jurors who

> made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

Id. at n.21.

Twelve years later, in *Adams* v. *Texas*, this Court referred to the "general proposition" established by *Witherspoon* as the notion that "a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." 448 U.S. 38, 45 (1980).

Because there was no question that "the standard applied in *Adams* differ[ed] markedly from the language of footnote 21 [of *Witherspoon*]," this Court sought to resolve that disconnect in its 1985 *Witt* decision. *Wainwright* v. *Witt*, 469 U.S. 412, 421 (1985). In that decision, the Court repeated the *Adams* formulation: A juror may be excluded if his views on capital punishment "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Witt*, 469 U.S. at 424 (quoting *Adams*, 447 U.S. at 45). This test, known as the "substantial impairment" standard, remains the test for determining juror excludability today. Article 798 of

the Louisiana Code of Criminal Procedure was drafted to conform to this test. Pet. App. 65a-66a.

B. Proceedings Below.

Carter was indicted on July 19, 2006 by a Red River Parish Grand Jury for the first-degree murder of Corinthian Houston. Pet. App. 1a. Houston was the five-year-old son of Carter's ex-girlfriend. He was murdered in an abandoned house next door to where Carter was living with his mother. Pet. App. 3a-5a. The district court denied Carter's motion to suppress statements that he gave to the police after the crime, but granted his motion for a change of venue given the extensive pretrial publicity. Pet. App. 1a-2a. The trial was moved to Lincoln Parish, and jury selection began on September 8, 2008.

The single issue presented in this petition relates to the propriety of the jury selection procedures in Petitioner's trial. Pet. App. 2a. The State indiscriminately sought to exclude from the "impartial jury" to which Petitioner was constitutionally entitled every potential juror who expressed serious reluctance or hesitation to impose a sentence of death. On *sixteen* separate occasions, the State argued that a potential juror should be struck because of the individual's view on the death penalty. Defense counsel repeatedly objected to these challenges on constitutional grounds. R.1844, 1846, 2072, 2076, 2108, 2114, 2342, 2354, 2359-60, 2547, 2594, 2654, 2869, 3169, 3184, 3230. One by one, the court granted the State's for-cause challenges and dismissed each of the sixteen jurors.

While some of these excluded jurors had expressed a steadfast opposition to capital punishment based on religious belief or other unequivocal views, *e.g.*,

R.2072, 2547, 3184, many of the attitudes toward the death penalty expressed by the excluded jurors were far less clear. For example, one potential juror (Elanda Dunn) initially stated that "morally, [she] just [didn't] believe in the death penalty," R.2282, but then went on to clarify:

> I've never been in a situation of being on a trial. But, if you just ask me as a person right now do I believe in the death penalty, no. But, if I get in a situation I have to think about it, what I'm doing, [then] *my mind might change, because I never been in that situation before.*

R.2283-84 (emphasis added). She further stated both that a crime committed against her family member "could change [her] mind about the death penalty," R.2339, and that she could set aside her general opposition and follow the law "if [she] would have to." R.2341. Ultimately, she felt that she "probably" would vote against the death penalty. R.2342. The Court granted the State's for-cause challenge and dismissed Ms. Dunn from the jury.

Another one of the potential jurors (Amy Marcus) was excluded after discussing her moral and ethical views on capital punishment as well as her religious beliefs as a member of the Roman Catholic Church. She explained:

> Maybe this will help you all understand where I'm coming from. If I did [vote for the death penalty] I believe I would pay a price for it, because I don't believe I actually have the God given right to take another person's life. If you're not Catholic you're not going to understand this, but in my mind I believe I would probably spend time in purgatory for

> that. But, I would have to do it if I felt strongly that the offense would be repeated. Does that help?

R.2353. Ms. Marcus reiterated that her view of imposing the death penalty would require her to consider "whether I felt that it was absolutely certain that the offense would be repeated." R.2354. The State challenged Ms. Marcus, arguing that even if she could vote to impose the death penalty in a "limited circumstance," she "would be substantially impaired" from performing her role as a juror. R.2354. The court agreed and dismissed her from the jury.

Yet a third juror (Alicia Givens) was dismissed despite the fact that she made clear that she did not have religious, moral, or conscientious scruples against capital punishment. R.2529. The State objected to her serving on the jury because, during a second interview, she stated that her ability to impose the death penalty "depends on the circumstances" and because she indicated that while she could vote to impose a death sentence, she took that responsibility seriously and it would be "very difficult" for her. R.2650. Ms. Givens ultimately stated that she did not think she could sentence someone to death, but that "I'd consider it." R.2653-54. The State argued that Ms. Givens should be dismissed "based on her inability to follow the law in relationship to capital punishment." R.2654. The court dismissed her.

Carter's trial lasted from September 20-25, 2008. On September 25, the jury returned a guilty verdict for first-degree murder. The penalty phase was conducted on September 26, and the jury

immediately returned a unanimous recommendation that Carter be sentenced to death. Pet. App. 2a.

Carter appealed his conviction and sentence to the Supreme Court of Louisiana. One of the assignments of error that he asserted was that the death qualification of the jurors in his case—and the court's exclusion of sixteen jurors for expressing opinions against the death penalty or hesitation to impose a sentence of death—violated the Sixth Amendment's guarantee of an impartial jury. The Louisiana Supreme Court reached and rejected this argument in the unpublished portion of its decision. Pet. App. 65a (concluding "[t]he instant appeal adds nothing new to warrant revisiting this longstanding principle of law"). In the Louisiana court's view, the line of "watershed" Sixth Amendment decisions from this Court, including *Jones* v. *United States*, 526 U.S. 227, 245 (1999) and *Apprendi* v. *New Jersey*, 530 U.S. 466, 477 (2000), was irrelevant to the continuing viability of the *Witherspoon-Witt* framework for empaneling death-qualified juries.[1]

This petition followed.

---

[1] Many commentators have referred to *Apprendi* as a watershed opinion, not simply for its impact on sentencing but because it restored the notion that "jurors have the kind of ameliorative power Aristotle deemed critical for producing equitable results." Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 36 & n.18 (2003).

REASON FOR GRANTING THE WRIT

THE "SUBSTANTIAL IMPAIRMENT" STANDARD FOR EXCLUDING JURORS IS INCONGRUOUS WITH MODERN SIXTH AMENDMENT JURISPRUDENCE, LACKS ANY HISTORICAL BASIS, AND SHOULD BE REVISITED.

A. This Court's Modern Sixth Amendment Precedent Focuses Squarely on Remaining Faithful to the Historical Understanding of an Impartial Jury.

The Court's Sixth Amendment decisions throughout the past thirteen Terms reflect a consistent refrain: The standards and analysis for applying the Sixth Amendment's right to a jury trial should be focused on the Framers' intent and understanding in adopting the Sixth Amendment. Using this lens, the Court has twice reexamined—and twice overruled—prior Sixth Amendment precedents as it has endeavored to re-tether the jurisprudence to its historical roots.

***Jones* v. *United States* (1999).** Thirteen years ago, in *Jones* v. *United States*, 526 U.S. 227, 245 (1999), the Court highlighted that juries historically played two critical roles: they both carried out the state's commands, and they also provided a necessary check on the executive's power. Therefore, in distinguishing whether a particular fact was an element of an offense that must be submitted to a jury and proven by the prosecution beyond a reasonable doubt or was a sentencing consideration, the Court emphasized the Sixth Amendment implications based on the historical role of juries.

The Court explained that historically, there had been "competition" between judge and jury over their respective roles. *Id.* That was because "[t]he potential or inevitable severity of sentences was indirectly checked by juries' assertions of a mitigating power when the circumstances of a prosecution pointed to political abuse of the criminal process or endowed a criminal conviction with particularly sanguinary consequences." *Id.* In other words, juries had the power "to thwart Parliament and Crown" both in the form of "flat-out acquittals in the face of guilt" and also "what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as 'pious perjury' on the jurors' part." *Id.* (quoting 4 William Blackstone, *Commentaries on the Laws of England* *238-39.

There is no more "sanguinary consequence" than capital punishment. Although *Jones* was not a capital case, the Court's concern with the "genuine Sixth Amendment issue" that would flow from diminishing the jury's significance applies to death-qualified juries as well. *Id.* at 248. The Court echoed a crucial warning from Blackstone that was "well understood" by Americans of the time: There is a need "'to guard with the most jealous circumspection'" against erosions of the jury trial right flowing from a variety of plausible pretenses for limiting the right. *Id.* (quoting a [New Hampshire] Farmer, No. 3, June 6, 1788, quoted in The Complete Bill of Rights 477 (N. Cogan ed. 1997)). As the Court reiterated, "however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient) * * * let it be remembered, that delays, and little inconveniences

in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters." *Id.* at 246 (quoting 4 Blackstone, *supra*, at *342-44).

In capital cases, limiting juries to death-qualified juries is *precisely* the sort of convenience that Blackstone warned a free nation must guard against. That it may be more convenient for the government to only try a capital case to a jury that has excluded from its ranks all of the individuals who might interfere with the government's effort to impose a death sentence is no answer. The historical basis for the Sixth Amendment, as *Jones* emphasizes, is to interpose citizens between the government and an accused.

***Apprendi* v. *New Jersey* (2000).** A year after its *Jones'* decision, this Court again invoked the Sixth Amendment's "historical foundation" as support for its conclusion in *Apprendi* v. *New Jersey* that a jury must find a defendant guilty of every element of any charged crime beyond a reasonable doubt. 530 U.S. 466, 477 (2000). Like *Jones*, *Apprendi* was not a capital case. It involved firearms charges and the potential for a sentencing enhancement under a New Jersey hate crime statute. But in analyzing the question presented, the Court again focused on the jury's historical role as a "guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties * * * ." *Id.* (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* 540-41 (4th ed. 1873)). These principles, important in a case where the consequence at stake for a defendant is imprisonment, are indispensable in the context of a capital case.

***Ring* v. *Arizona* (2002).** The Court applied the jury-right principles discussed in *Apprendi* and *Jones* to a capital prosecution in *Ring* v. *Arizona*, 536 U.S. 584, 589 (2002). *Ring* involved the question whether it violated the Sixth Amendment for a trial judge to alone determine the presence or absence of aggravating factors required for imposition of the death penalty after a jury's guilty verdict on a first-degree murder charge.

In answering that question "yes," the Court reversed its earlier holding in *Walton* v. *Arizona*, 497 U.S. 639 (1990). Finding *Apprendi* in particular to be irreconcilable with *Walton*, this Court recognized that "[a]lthough 'the doctrine of stare decisis is of fundamental importance to the rule of law[,]' * * * [o]ur precedents are not sacrosanct." *Ring*, 536 U.S. at 608 (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989)). *Ring* continued the Court's focus on the historical right to a jury trial. It discussed the juries of 1791, when the Sixth Amendment became law—just as Justice Stevens had in his *Walton* dissent, *see* 497 U.S. at 710-11—and unequivocally stressed that at the time the Bill of Rights was adopted, the jury's right to determine "which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind" was "unquestioned." *Ring*, 536 U.S. at 608 (quoting Welsh S. White, *Fact Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 Notre Dame L. Rev. 1, 10-11 (1989)).

In addition, the Court repeated that the Sixth Amendment jury trial right

> does not turn on the relative rationality, fairness, or efficiency of potential factfinders * * *. "The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions in the Bill of Rights. It has never been efficient; but it has always been free."

Ring, 536 U.S. at 607 (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring)).

***Crawford* v. *Washington* (2004).** Two years later, the Court again overturned one of its earlier decisions which had not considered the historical understanding of the Sixth Amendment. In *Crawford* v. *Washington*, 541 U.S. 36 (2004), the Court focused on the historical interpretation of the Sixth Amendment's Confrontation Clause and reversed its holding in *Ohio* v. *Roberts*, 448 U.S. 56 (1980). Looking to the "historical record," the Court concluded that, under the common law in 1791, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial * * * ." *Id.* at 53-54. The Court acknowledged that its contrary holding in *Roberts* had failed to honor the historical role of the jury and thereby created a framework that did not "provide meaningful protection from even core confrontation violations." *Id.* at 63.

***Blakely* v. *Washington* (2004).** Just three months later, in *Blakeley* v. *Washington*, 542 U.S. 296 (2004), the Court held that it violated the Sixth Amendment for a judge to impose a sentence based on fact-finding that was not presented to the jury. As the Court reiterated, again citing Blackstone, every accusation against a defendant should "be

confirmed by the unanimous suffrage of twelve of his equals and neighbours." *Id.* at 301 (quoting 4 Blackstone, *supra*, at *343).

Echoing its reasoning in *Apprendi*, the Court held that the imposition of a sentence based on additional judicial fact-finding violated the defendant's Sixth Amendment right to trial by jury. *Id.* Once again focusing on the Framers' intent, the Court stressed that "the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury." *Id.* at 306-08 (citing Letter XV by the Federal Farmer (Jan. 18, 1788), *reprinted in* 2 The Complete Anti-Federalist 315, 320 (H. Storing ed., 1981) (describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department"); John Adams, *Diary Entry* (Feb. 12, 1771), *reprinted in* 2 Works of John Adams 252, 253 (C. Adams ed., 1850) ("[T]he common people, should have as complete a control * * * in every judgment of a court of judicature" as in the legislature); Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), *reprinted in* 15 Papers of Thomas Jefferson, 282, 283 (J. Boyd ed., 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislature or Judiciary department, I would say it is better to leave them out of the Legislative."); *Jones*, 526 U.S. at 244-48.

* * *

The clear and consistent line of cases from *Jones* to *Apprendi* to *Ring*, *Crawford*, and *Blakeley* leaves no doubt that the Court has sought to tether Sixth Amendment jurisprudence to the historical role of juries and the Framers' intent in adopting the Sixth Amendment. That emphasis is particularly apparent

with respect to the Court's consideration of the role of juries in sentencing defendants. As explained below, however, the current death-qualification framework for juries was established in *Witherspoon, Wainwright,* and *Lockhart*—all cases decided prior to *Jones* and none of which involve any discussion of the considerations repeatedly reflected in the more recent pronouncements from this Court on the Sixth Amendment.

B. The Existing Framework for Death-Qualified Juries Predates the Court's Adherence to the Framers' Intent in Adopting the Sixth Amendment's Right to an Impartial Jury.

The Court's approach to the death qualification of juries is incongruous with its approach to the Sixth Amendment generally, as demonstrated by the cases discussed. Unlike those cases—which specifically consider the Framers' intent when interpreting the Sixth Amendment's protections—none of this Court's death-qualification decisions have considered the Framers' intent in assessing whether the practice of death qualification violates a defendant's Sixth Amendment right to impartial jury.

Instead, the Court's decisions on death qualification of jurors attempt to craft a balancing test that accommodates a State's interest in implementing its death penalty system while trying to avoid unduly stacking the deck against a defendant. This balancing approach is incongruous with the Court's more recent pronouncements interpreting the Sixth Amendment by tethering its protections to a historical understanding of what it meant to guarantee a defendant an impartial jury.

The Court's first foray into the death qualification of jurors was *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), which involved an Illinois statute requiring that a juror be struck for cause if he "state[d] that he has conscientious scruples against capital punishment, or that he is opposed to the same." *Id.* at 512. The Illinois statute's "conscientious scruples" standard had been derived from *Reynolds* v. *United States*, 98 U.S. 145 (1878), a case that upheld the striking of polygamist jurors in a bigamy prosecution. The Court held that application of the statute at issue in *Witherspoon* "produced a jury uncommonly willing to condemn a man to die"—and such a jury "fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments." 391 U.S. at 518. The Court reversed Witherspoon's death sentence, holding that a State could only strike jurors for cause if the jurors

> made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

Id. at 523 n.21. Although this test suggests a sense of Solomonic justice and bright lines at some level, it had no roots in—and made no reference to—the Framers' understanding of an impartial jury. Indeed, *Witherspoon* does not cite anything as support for the standard it announced. *Id.*

Twelve years later, in *Adams* v. *Texas*, 448 U.S. 38 (1980), the Court retreated from the suggestion of a

bright line test. After discussing *Witherspoon* and *Lockett* v. *Ohio*, 438 U.S. 586, 595-97 (1978) (upholding exclusion of jurors who claimed they could not take an oath to serve where a possibility of the death penalty existed), the Court observed that "[t]his line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would *prevent or substantially impair* the performance of his duties as a juror in accordance with his instructions and his oath." *Adams*, 448 U.S. at 45 (emphasis added).

Like *Witherspoon* and *Lockett*, *Adams* made no reference to any historical foundation for its pronouncement of a "substantial impairment" standard and certainly did not endeavor to tether it to any understanding of the Framer's view. Instead, *Adams* just viewed the death qualification of jurors as an effort "to accommodate the State's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths." 448 U.S. at 43-44.

The "substantial[] impair[ment]" standard from *Adams* sewed uncertainty into how death qualification applied in capital cases. Five years later, the Court tried to address that uncertainty in *Wainwright* v. *Witt*, 469 U.S. 412 (1985). There, the Court sought to "clarify [its] decision in *Witherspoon*" and "reaffirm" that a juror can be struck where his views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* at 424. Despite striving to "clarify" the standard, the decision did not attempt to locate its holding in any particular view of the term "impartial jury"—and

certainly not in the prevailing view of that term at the time of the Sixth Amendment's adoption.

Although passingly referencing "traditional" notions of and procedures for obtaining "unbias[ed]" jurors, *id.* at 423-26, 444, *Witt* never discusses what those traditional notions were or what potential "bias" was a concern. In fact, the concern about "bias" that appears to be reflected in *Witt* bears no connection to the Court's earlier understanding of "bias" which was reflected in its *Reynolds* decision. In *Reynolds*, the Court upheld the striking of jurors for a bigamy prosecution who "were or had been living in polygamy" because such jurors had a personal interest in the case's outcome—not because of their opinion of the validity of the statute. 98 U.S. at 157. In the end, *Witt*—like *Witherspoon* and *Adams* before it—reflects a straightforward effort to accommodate the interests of the State in pursuing a death sentence without offering any foundation for its analysis in the meaning of the relevant Constitutional provision.

In the twenty-seven years since *Witt* was decided—and while the Court has refined much of its Sixth Amendment jurisprudence to ensure that it aligns with the Framers' understandings, *see supra* at 10-15—the Court has never examined whether there is any historical support for its death-qualification standard. S*ee Lockhart* v. *McCree*, 476 U.S. 162 (1986) (extending the *Witherspoon-Witt* standard to the guilt phase of a trial); *Uttecht* v. *Brown*, 551 U.S. 1 (2007) (granting trial court deference in applying the *Witherspoon-Witt* standard); *see also Morgan* v. *Illinois*, 504 U.S. 719 (1992) (holding that defense counsel must be permitted to inquire into, and strike for cause, any

capital jurors who state that they will "automatically" vote for the death penalty). In fact, in *Uttecht*, the Court explicitly noted that the relevant "principles" established in the case law create a standard that seeks to "balance" the interests of the defendant against the interest of the state—without even contemplating whether the "impartial jury" guarantee permits such "balancing." 551 U.S. at 9.[2]

Given that the stakes involved in a capital case warrant especially careful consideration, the Court's lack of inquiry to date into whether a historical basis exists for the *Witherspoon-Witt* substantial-impairment standard is a gaping question that

---

[2] This is not to say that this "balancing" approach results in juries that are, in fact, "balanced" in terms of their attitudes toward the death penalty. Far from it. The "substantial impairment" test excludes "citizens who firmly believe the death penalty is unjust but who nevertheless are qualified to serve as jurors in capital cases." *Uttecht*, 551 U.S at 35 (Stevens, J., dissenting); *see also Baze* v. *Rees*, 553 U.S. 35, 84 (2008) (Stevens, J., concurring) (expressing concern that a death-qualified jury "deprive[s] the defendant of a trial by jurors representing a fair cross section of the community" and "is really a procedure that has the purpose and effect of obtaining a jury that is biased in favor of conviction"). More than one-third of Americans disapprove of the death penalty, leaving capital punishment with "the lowest level of support since 1972." Frank Newport, *In U.S., Support for Death Penalty Falls to 39-Year Low*, Gallup (Oct. 13, 2011). And support for the death penalty tends to fall along partisan, age, gender, and racial lines. *Id.* Indeed, only 58% of respondents in a 2012 Gallup study said the death penalty was morally acceptable, down from 65% last year, and support for the death penalty fell below 50% when offered alternative punishments. *See* Frank Newport, *Americans, Including Catholics, Say Birth Control Is Morally OK*, Gallup (May 22, 2012). Thus, large categories of citizens are excluded as a consequence of the substantial-impairment framework, resulting in a skewed jury.

should be addressed. *See California* v. *Ramos*, 463 U.S. 992, 998-99 (1983) ("[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."). The Court should grant certiorari to harmonize its death-qualification standard with the rest of the Sixth Amendment jurisprudence by examining whether a death-qualified jury violates the defendant's right to an "impartial jury" as understood by the Framers. For the reasons described below, the answer to that question is yes.

C. The Framers Intended the "Impartial Jury" Guarantee to Prohibit Jurors from Being Struck Based on Their Views of the Death Penalty.

Permitting jurors to be struck for cause because of their views toward the death penalty is antithetical to the Framers' understanding of an "impartial jury." When the Sixth Amendment was adopted, neither prosecutors nor defense counsel was permitted to exclude a juror based on that individual's attitude toward the death penalty. Jurors were permitted to consult their conscience and, in this limited way, "find the law" in addition to "finding the facts." Indeed, this was—and should continue to be—a critical component of the Sixth Amendment's "impartial jury" protection.

Steeped in the experience of overreaching criminal laws (such as libel laws that were used to punish political dissidents), the Framers considered a jury to be the conscience of the community, serving as an important bulwark against the machinery of the judiciary. In this regard, a jury was free to use its verdict to reject the application of a law that it

deemed unjust—indeed, it was its duty to do so—and this was (and should again be) at the heart of the "impartial jury" guaranteed to all criminal defendants under the Sixth Amendment.[3]

At common law, striking a juror on the basis of bias, or "*propter affectum*," was limited to circumstances in which the jury had a bias *toward a party* (relational bias); it did not include striking a juror on the basis of her opinion of the law or the range of punishment for breaking the law. As Blackstone cogently articulated:

> Jurors may be challenged *propter affectum*, for suspicion of bias or partiality. This may either be a principal challenge, or to the favour. A principal challenge is such where the cause assigned carries with it prima facie evident marks of suspicion, either of malice or favour: as, that a juror is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counselor, steward or attorney, or of the same society or corporation with him: all these are principal causes of challenge; which, if

[3] A juror could of course still be struck for cause if the juror refused to deliberate *at all*. Consistent with the Framers' understanding, however, the Sixth Amendment's "impartial jury" guarantee ensures that a criminal defendant's case is tried before a jury that, *upon deliberating*, can consult their consciences and consider the fairness and justice of the law and punishment the jury is asked to apply.

> true, cannot be overruled for jurors must be omni exceptione majores.

3 William Blackstone, *Commentaries on the Laws of England* *363;[4] *see also Rothgery* v. *Gillespie Cnty., Texas*, 554 U.S. 191, 219 (2008) (Thomas, J., dissenting) ("There is no better place to begin than with Blackstone."). This understanding of the *propter affectum* challenge, and its connection to the Sixth Amendment, was acknowledged by Chief Justice Marshall in *United States* v. *Burr*, 25 F. Cas. 49, 50 (C.C.Va. 1807) ("The end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose *connection with a party* is such as to induce a suspicion of partiality." (emphasis added)).

The limited understanding of "bias" or "partiality" is not some historical footnote: At the time of the Framers, bias toward the *law* was both welcomed and expected from jurors. The colonial and early American experience teaches that the right to reject the law as instructed was crucial to the role the jury played in its check against the judiciary and executive. For example, when England made the stealing or killing of deer in the Royal forests an offense punishable by death, English juries responded by committing "pious perjury," *i.e.*, rejecting these politically motivated laws by acquitting the defendant of the charged offense. John Hostettler, *Criminal Jury Old and New: Jury*

---

[4] Blackstone specified three other grounds that justified the exclusion of a juror: *propter honoris respectum*, which allowed challenges on the basis of nobility; *propter delictum*, which allowed challenges based on prior convictions; and *propter defectum*, which allowed challenges for defects, such as if the juror was an alien or slave. *Id.* at *361-64.

Power from Early Times to the Present Day 82 (2004); *see also Sparf* v. *United States*, 156 U.S. 51, 143 (1895) (Gray, J., and Shiras, J., dissenting) (observing that juries in England and America returned general verdicts of acquittal in order to save a defendant prosecuted under an unjust law).

One well known example of such "pious perjury" is the 1734 trial of John Peter Zenger. The Royal Governor of New York, in an effort to punish Zenger for his criticism of the colonial administration, prosecuted Zenger for criminal libel. Andrew Hamilton, representing Zenger at trial, argued that jurors "have the right beyond all dispute to determine both the law and the fact" and thus could acquit Zenger on the basis he was telling the truth, even though the libel laws at the time did not provide that truth was a defense. James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* 78-79 (Stanley N. Katz ed., 2d ed. 1972). Zenger was acquitted on a general verdict. This trial, and others like it, provides necessary context for understanding what animated the Framers' intent in guaranteeing a defendant the constitutional right to an impartial jury.

Reinforcing how the Framers themselves viewed the issue, a different (and even more famous) Hamilton successfully made a similar argument seventy years later on behalf of a man accused of libeling John Adams and Thomas Jefferson. In that case Founding Father Alexander Hamilton argued:

> It is admitted to be the duty of the court to direct the jury as to the law, and it is advisable for the jury, in most cases, to receive the law from the court; and in all cases, they ought to pay respectful attention to the opinion of the

> court. *But, it is also their duty to exercise their judgments upon the law, as well as the fact; and if they have a clear conviction that the law is different from what it is stated to be by the court, the jury are bound, in such cases, by the superior obligations of conscience, to follow their own convictions.* It is essential to the security of personal rights and public liberty, that the jury should have and exercise the power to judge both of the law and of the criminal intent.

People v. *Croswell*, 3 Johns. Cas. 337, at *15-16 (N.Y. Sup. Ct. 1804) (emphasis added).

At base, the notion of striking a juror because of his opinion on the propriety of the law was entirely foreign to the nation's founders. In fact, it was expected that the jurors would follow their conscience and render a verdict that was against a law they deemed unjust—this was at the heart of the impartial jury as understood by the Framers. As John Adams wrote in 1771:

> And whenever a general Verdict is found, it assuredly determines both the Fact and the Law. It was never yet disputed, or doubted, that a general Verdict, given *under the Direction of the Court* in Point of Law, was a legal Determination of the Issue. Therefore the Jury have a Power of deciding an Issue upon a general Verdict. And, if they have, is it not an Absurdity to suppose that the Law would oblige them to find a Verdict according to the Direction of the Court, against their own Opinion, Judgment, and Conscience[?]

1 Legal Papers of John Adams 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (emphasis in original);

see also Akhil Reed Amar, *America's Constitution* 238 (2005) ("Alongside their right and power to acquit against the evidence, eighteenth century jurors also claimed the right and power to determining legal as well as factual issues—to judge both law and fact 'complicately'—when rendering any general verdict.").

This principle was echoed in the instructions given by Chief Judge Jay who, at the end of a trial before the Supreme Court, charged the jurors with the "good old rule" that:

> on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. *But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy*. On this, and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of the law. *But still both objects are lawfully, within your power of decision*.

Georgia v. *Brailsford*, 3 U.S. 1, 4 (1794) (emphases added). Indeed, the importance of this right was widely shared by those attending the Constitutional Convention. *See* Federalist 83 (Hamilton), *reprinted in* The Federalist Papers 491, 499 (Clinton Rossiter ed., 1961) ("The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by

jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.").

The current death-qualification "substantial impairment" standard reflects none of this—and conflicts with all of it. To the Founding Fathers, it was the solemn duty of a jury to issue a verdict reflecting the jury's conscience. There was no exception to this rule carved out for cases where the State sought a sentence of death. The substantial-impairment announced in this Court's death-qualification precedents contradicts the Court's more recent Sixth Amendment decisions and erodes the Sixth Amendment's guarantee of an impartial jury where it is needed most. That erosion of the right to a trial not only diminishes the check that a jury provides on governmental authority, but also distorts the Court's Eighth Amendment assessment of the evolving standards of decency.[5] Death qualification of a jury under the substantial-impairment standard

---

[5] *See, e.g.*, *Roper* v. *Simmons*, 543 U.S. 551, 590 (2004) (O'Connor, J., dissenting) ("[D]ata reflecting the actions of sentencing juries, where available, can also afford 'a significant and reliable objective index' of societal mores.") (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 181 (1976)); *Atkins* v. *Virginia*, 536 U.S. 304, 328 (2002) (Rehnquist, C.J., dissenting) (noting the importance of the role of "the practices of sentencing juries in America" in assessing what "constitutes an evolving standard of decency under the Eighth Amendment"); *id.* at 354 (Scalia, J., dissenting) (observing that the strongest protection against cruel and unusual punishments was captured in "Matthew Hale's endorsement of the common law's traditional method for taking account of guilt-reducing factors" including the decision to "excuse persons in capital offenses" "namely, by a jury of twelve men all concurring in the same judgment").

is squarely in tension with the Court's other Sixth Amendment jurisprudence and should be revisited.

CONCLUSION

For the foregoing reasons, the petition should be granted.

JUNE 7, 2012

Respectfully submitted,

JESSICA L. ELLSWORTH *
NATHANIEL S. BOYER
JULIET MAZER-SCHMIDT
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
jessica.ellsworth@hoganlovells.com
(202) 637-5600

BLYTHE TAPLIN
CAPITAL APPEALS PROJECT
636 Barrone Street
New Orleans, LA 70113
BlytheT@thejusticecenter.org
(504) 529-5955

M. MICHELE FOURNET
P.O. Box 78015
Baton Rouge, LA 70837
mfournet@bellsouth.net
(225) 383-5107

* Counsel of Record

Counsel for Petitioner

APPENDICES