No. 11-1484

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**

## REPLY BRIEF FOR PETITIONER


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## REPLY BRIEF FOR PETITIONER

The State's Opposition Brief acknowledges that the issue presented on certiorari is ripe for this Court's review. Moreover, the Opposition Brief makes no effort to address the principal argument raised in the petition for certiorari here: that the *Witherspoon-Witt* framework was developed without consideration of the Framers' understanding of the Sixth Amendment's impartial jury guarantee. There is a good reason for the State's failure to engage directly with the question presented. That reason is that this Court has never examined whether any support for death qualification can be found in the original understanding of the Sixth Amendment. This petition asks the Court to give the same consideration to the historical meaning of the term "impartial jury" in the death qualification context that it has given to other aspects of the Sixth

Amendment in recent years. The Opposition offers no principled reason for denying that examination.

1. The Opposition does not—and cannot—refute that this Court's recent jurisprudence has realigned the Sixth Amendment to its historical roots. *See* Pet. Br. 10-15. Nor does it refute that the Court has consistently indicated that historical understanding defines the protections the Sixth Amendment offers.

Instead, the State defends the Louisiana Supreme Court's opinion as based upon settled law[1] and attempts to invoke *stare decisis* to argue that the Court is prevented from conducting this same examination in the death qualification context.[2]

Indeed, this Court has not hesitated to reexamine—and overrule when it concluded doing so was appropriate—prior decisions based on an

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[1] The fact that the Louisiana Supreme Court followed this Court's precedent when denying relief is of no matter. As this Court has instructed, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Indeed, the State's Opposition Brief demonstrates that without intervention by this Court, further percolation of the underlying issue is unlikely to develop.

[2] Not only does the State's Opposition Brief fail to confront the series of instances cited in Petitioner's Brief where the Court overturned precedent to realign the Sixth Amendment jurisprudence with its historical meaning, but the case the State itself cites as support demonstrates that *stare decisis* is not some sort of categorical bar that hamstrings the Court from ever refining—or overruling—past decisions. *See Montejo* v. *Louisiana*, 556 U.S. 778 (2009) ("*Michigan* v. *Jackson* should be and now is overruled.") (cited at Opp. 12).

inconsistency between precedent and the Framers' understanding of the Sixth Amendment. As the Court has explained, such an inconsistency establishes the "necessity and propriety of doing so." *Ring* v. *Arizona*, 536 U.S. 584, 608 (2002) (citation omitted) (overruling *Walton* v. *Arizona*, 497 U.S. 639 (1990)). In particular, the Court has emphasized that Sixth Amendment precedents that "replac[e] categorical constitutional guarantees with open-ended balancing tests" warrant reexamination in order to avoid "do[ing] violence to [the Framers'] design." *Crawford* v. *Washington*, 541 U.S. 36, 67-68 (2004) (overruling *Ohio* v. *Roberts*, 448 U.S. 56 (1980)). Because the current death qualification "substantial impairment" standard was announced in an era when fidelity to historical significance was at its nadir, it too warrants reconsideration by this Court.

2. The State appears to agree with Petitioner that the Framers' intent is key to this Court's Sixth Amendment jurisprudence. Opp. 13-17. Where the State and Petitioner diverge, however, is in our views of what the Framers meant by "impartial jury" in this context. However, this dispute presents a merits question and is a reason to grant rather than deny certiorari.

In any event, the State's purported historical recitation of the meaning of an "impartial jury" cites no case addressing whether, when, or how the practice of death qualification conforms to the Framers' understanding of the Sixth Amendment jury guarantee—much less an "unbroken line of jurisprudence." Opp. 13.

In fact, the cases to which the State points did not even involve jurors who were asked about their views

of the death penalty. *See Connors* v. *United States*, 158 U.S. 408 (1895) (qualification of jurors based on political affiliation) (cited at Opp. 13); *United States* v. *Wood*, 299 U.S. 123 (1936) (qualification of government employees to serve on juries in criminal cases) (cited at Opp. 14); *Rosales-Lopez* v. *United States*, 451 U.S. 182 (1981) (qualification of jurors based on racial or ethnic bias) (cited at Opp. 14); *Reynolds* v. *United States*, 98 U.S. 145 (1878) (qualification of jurors practicing polygamy in a bigamy prosecution) (cited at Opp. 15); *Sparf* v. *United States*, 156 U.S. 51 (1895) (determination of whether judge or jury must find defendant guilty of lesser-included offense) (cited at Opp. 16).[3]

To the extent that *Connors* and *Wood* provide analysis of the impartial jury guarantee more generally, they establish that at common law a juror could only be struck for relational bias toward one of the parties—not because of the juror's opinion of the law or punishment. *See Connors*, 158 U.S. at 413 (explaining that "on general and public questions it is scarcely possible to avoid receiving some prepossessions" but jurors must be "perfectly indifferent between the parties") (quoting *Queen* v. *Hepburn*, 7 Cranch 290 (1813) (Marshall, C.J.)); *Wood*, 299 U.S. at 134 (while the Sixth Amendment does not require disqualification of government employees due to an "implied bias" toward the government in criminal cases, a court "would

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[3] As noted in the *Amicus Brief* filed by citizens excluded by service based upon their religious views, the citizens have no personal interest in the cause and yet are deemed ineligible to serve based upon their moral views. *See* Brief of *Amicus Curiae* I Want To Serve, filed July 9, 2012.

properly by solicitous to discover whether in view of the nature or circumstances of his employment, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise, he had actual bias"); *see also Wood*, 299 U.S. at 138 (quoting William Blackstone's explanation of relational bias in *Commentaries on the Laws of England* at 363). The *Witherspoon-Witt* framework, in contrast, focuses squarely on a juror's opinion of the law and possible punishment rather than the sort of relational bias the Court examined in *Connors* and *Wood*.

That framework, which was developed without any rooting in historical understandings or the Framer's intent, is fundamentally at odds with how this Court has approached the Sixth Amendment in the past decade. The State's failure to identify any on-point case law only serves to confirm that this Court has never attempted to align the death qualification framework with the historical record. The time to do so is now.

3. The Opposition's closing salvo is to suggest that re-tethering the death qualification framework to its historical roots would "harm a defendant's quest for an impartial jury." Opp. 18. While this assertion is belied by social science[4] and common sense,[5] it is

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[4] Data recently collected by the Capital Jury Project ("CJP") suggests that death-qualified juries are conviction-prone and more likely to vote for death. *See, e.g.*, William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 Crim. L. Bull. 51, 61 (2003); Brooke M. Butler & Gary Moran, *The Role of Death Qualification in Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 26 Law & Hum. Behav. 175, 182-83 (2002).

simply not relevant as to whether certiorari should issue or relief be granted. When the dissenters in *Blakely* v. *Washington* suggested that the regime created by *Apprendi* was "unfair to criminal defendants," the majority replied "[u]ltimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice." *Blakely* v. *Washington*, 542 U.S. 296, 312-13 (2004).

* * *

In this case, there is no dispute between the Petitioner and the Respondent that the Court has never considered the original understanding of the Sixth Amendment in the context of death-qualified juries. There is also no dispute that the *Witherspoon-Witt* framework was articulated decades ago, before the Court's more recent focus on tethering Sixth Amendment jurisprudence to original intent. And there is no dispute that this case properly presents the question at issue for consideration. Certiorari should therefore be granted to determine whether the *Witherspoon-Witt* framework is inconsistent with the Framers' understanding of the Sixth Amendment right to an impartial jury.

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[5] *See Baze* v. *Rees*, 553 U.S. 35, 84 (2008) (Stevens, J., *concurring*) ("Litigation involving both challenges for cause and peremptory challenges has persuaded me that the process of obtaining a "death qualified jury" is really a procedure that has the purpose and effect of obtaining a jury that is biased in favor of conviction. The prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive.").

## CONCLUSION

For the foregoing reasons, the petition should be granted.

SEPTEMBER 5, 2012 Respectfully submitted,

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