No. 15-____

IN THE
Supreme Court of the United States

LAMONDRE TUCKER,
Petitioner,
v.

STATE OF LOUISIANA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether imposition of the death penalty upon a person convicted of murder constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?

Whether Louisiana's failure to require the jury to find beyond a reasonable doubt that death is the appropriate punishment violates the Sixth, Eighth and Fourteenth Amendments?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, Lamondre Tucker, was the appellant below.

Respondent is the State of Louisiana.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI 1

OPINION BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

INTRODUCTION 3

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 10

I. THERE IS A NATIONAL CONSENSUS AGAINST THE DEATH PENALTY 11

A. State Legislatures Increasingly Reject the Death Penalty 11

B. Many Other States No Longer Use the Death Penalty 12

C. Actual Sentencing Practices Further Illustrate That The Nation Has Evolved To The Point That Capital Punishment Is Unnecessary. 15

D. Where Capital Punishment Is Utilized, It Is Characterized By Severe Geographic Isolation 17

E. Professional Organizations, Law Enforcement Agencies and Corrections Experts Reflect a Broad Consensus Against the Death Penalty. 18

II. THE DEATH PENALTY DOES NOT FURTHER ANY VALID PENOLOGICAL PURPOSE, VITIATING ITS LEGITIMACY AS A PUNISHMENT. 21

A. The Available Evidence Does Not Establish That the Death Penalty Is a Meaningful Deterrent to Murder. 22

B. The Death Penalty Does Not Contribute Any Significant Retributive Value Beyond That Afforded By a Sentence of Life Without Parole. 23

C. Lengthy Delays, Coupled With the Conditions of Confinement, Undermine the Validity of the Punishment. 25

III. THE ADMINISTRATION OF CAPITAL PUNISHMENT IS WANTON AND ARBITRARY 27

A. Death is Often Imposed Upon Offenders With Crippling Impairments that Diminish Their Moral Culpability and Render Death an Excessive Punishment. 27

B. There Remains an Intolerable Risk of Executing the Innocent. 31

C. Race Continues to Play an Invidious Role in the Administration of Capital Punishment. ... 34

IV. LOUISIANA'S FAILURE TO REQUIRE THE JURY TO DETERMINE BEYOND A REASONABLE DOUBT THAT DEATH IS THE APPROPRIATE PUNISHMENT HAS RESULTED IN A SYSTEM THAT FAILS TO ENSURE THAT CAPITAL PUNISHMENT IS RESERVED FOR THE WORST OFFENDER GUILTY OF THE WORST OFFENSE 36

A. Louisiana's Death Penalty Scheme Fails to Identify the Worst of the Worst Offenders 38

B. In Order to Impose a Death Sentence, a Jury Should Make the Sentencing Determination Beyond a Reasonable Doubt... 41

CONCLUSION 45

APPENDICES

Appendix A: *State v. Tucker,* 2013-KA-1631 (La. 9/1/2015), Opinion 1a

Appendix B: *State v. Tucker,* 2013-KA-1631 (La. 9/1/2015), Unpublished Opinion 89a

Appendix C: *State v. Tucker,* 2013-KA-1631 (La. 10/30/2015), Louisiana Supreme Court Decision Denying Rehearing 95a

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La. C.Cr.P. Art. 905.3 42

La. R.S. 14:30 6

La. R.S. 14:44.1 7

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lamondre Tucker respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Louisiana Supreme Court.

OPINION BELOW

The opinion of the Louisiana Supreme Court is reported at *State v. Tucker*, 13-1631 (La. 09/01/15); 2015 La. LEXIS 1712, and is reproduced at Pet. App. A., at 1a. The unpublished appendix is at Pet. App. B., at 89a. The court's denial of rehearing is reported at *State v. Tucker,* 13-1631 (La. 10/30/2015); 2015 La. LEXIS 2334 and reproduced at Pet. App. C., at 95a.

JURISDICTIONAL STATEMENT

The Louisiana Supreme Court issued an opinion on September 1, 2015, and denied a timely-filed motion for rehearing on October 30, 2015. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

INTRODUCTION

There can be little doubt that Petitioner's death sentence is now unusual: in 2015, the entire country produced just 49 death sentences, down from a high of 315 twenty years ago. Forty years have passed since this Court last considered whether it is cruel to execute a person who commits a homicide offense. In the interim, our society has debated the moral and pragmatic questions in jury rooms, prosecutor's offices, churches, the pages of academic journals, and legislative chambers. The result is reflected in the steady march away from the death penalty. It is appropriate—and this is an emblematic case—to consider the question in our own time.

Petitioner's case reflects that -- where it has not been abandoned altogether -- the application of the death penalty is broken, and inconsistent with our country's commitment to restraint and decency. The Court has attempted, through procedural regulations, categorical restrictions, and case-by-case interventions, to ensure that the death penalty is reserved for the most culpable defendants responsible for the most aggravated offenses; yet, the death penalty does not reflect a careful winnowing of the most aggravated homicides and culpable offenders. Instead, it is most often administered in a handful of counties, plagued by overwhelmed defense lawyers, unrestrained prosecutors, and most often imposed on people with crippling mental or

intellectual disabilities—and even the innocent. The death penalty is thus not serving the retributive function for which it was designed—ensuring that the worst offenders receive the worst punishment.

Moreover, though experience teaches us that many prisoners undergo significant transformation while incarcerated,[1] the death penalty leaves no room for a person to establish that he is capable of redemption. Capital punishment thus undermines the very dignity of human life that it was designed to protect. In short, death is no longer a punishment that comports with the prevailing standards of decency.

There is a broad societal consensus that life without parole is a sufficient and severe punishment. The death penalty serves no penological purpose, and it carries with it an unavoidable risk of wrongful execution. Because the death penalty is excessive, unnecessary and not equitably administered, this Court should consider whether it is remains compatible with the Court's commitment to human dignity. This Court should grant certiorari and consider whether at this point in our national history the imposition of the death penalty for a homicide

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[1] *See* Wilbert Rideau, IN THE PLACE OF JUSTICE: A STORY OF PUNISHMENT AND DELIVERANCE (Knopf Doubleday Publishing Group 2010).

offense excessive and unnecessary, and as such a cruel and unusual punishment imposed in violation of the Eighth and Fourteenth Amendments.[2]

At a minimum, in the alternative, the Court should consider whether Louisiana's standard-less mechanism for deciding who should live and who should die is so unhinged from constitutional principles that it cannot sustain the death sentence in this case.

STATEMENT OF THE CASE

In September of 2008, Lamondre Tucker was 18 years old, repeating his senior year of high school. While he aspired to play college football and loved riding horses, he was a slow learner with an IQ of 74. On September 12, 2008, Tucker was arrested and charged with the murder of Tavia Sills, a pregnant 18-year-old with whom he had a brief relationship.

Jury selection began March 14, 2011. One-third of the venire – and half of the African-American venirepersons – were removed based upon their opposition to the death penalty. The defense

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[2] The question presented here "is limited to crimes against individual persons. [It does] not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State." *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008).

objected that death-qualification, coupled with the discouraging effect of the Confederate Flag atop a monument to the Confederacy's Last Stand outside the courthouse, distorted the racial makeup of the venire. The trial court noted that racial disparities were "troubling," but denied relief. Ultimately, in a parish where half the population is African-American, the fourteen jurors (twelve with two alternates) included twelve white jurors and two African Americans.

The State prosecuted Tucker for first-degree murder and sought the death penalty. The State alleged two aggravating factors: (1) that Tucker had the specific intent to kill more than one person, since Tavia Sills was four months pregnant at the time of her death,[3] and (2) that Tucker had committed a "second degree kidnapping"[4] because Tucker told

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[3] Aside from petitioner, no defendant has been sentenced to death under this theory in Louisiana. Ultimately, the Louisiana Supreme Court decided not to address petitioner's challenge to the validity of the aggravating factor noting "in this case, this Court need not resolve the question of whether La. R.S. 14:30(A)(3) applies to the murder of a pregnant woman given the presence of a second aggravating factor, i.e., that the killing took place in conjunction with a second degree kidnapping." Pet. App. A., at 27a.

[4] Second degree kidnapping was added as an aggravating factor after this Court's decision in *Lowenfield v. Phelps*, in 1990 by 1990 La. ALS 526; 1990 La. ACT 526; 1990 La. SB 727. In this instance, the State alleged that Tucker committed a second

police that he "cajoled" Sills to get her to go in his car with him. Pet. App. A., at 29a.

The State presented evidence that Tucker committed the killing with 21-year-old Marcus Taylor.[5] The prosecution relied primarily on the statement taken from 18-year-old Tucker during a lengthy interrogation that began when Shreveport Police Officers checked him out of class at his high school on September 9, 2008, and continued intermittently, only partially recorded, over the next four days.[6]

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degree kidnapping when he "physically injured" (killed) the victim, while "armed with a dangerous weapon" after "enticing or persuading" her "to go from one place to another." See La. R.S. 14:44.1.

[5] Taylor was initially indicted on first degree murder charges. The state ultimately prosecuted him for second degree murder, and the jury that was not death-qualified returned a manslaughter conviction. Taylor, three years Tucker's senior, received a 21-year sentence.

[6] The trial court and the Louisiana Supreme Court rejected Petitioner's challenge to the admissibility of the confession, finding the repeated exhortations to tell the truth, the detective's suggestion that the incident was an "accident" or a "manslaughter" rather than "a murder," and the detective's warnings about the seizure of Lamondre's mother's car, combined with his youth and low IQ, did not establish that the statements were involuntary. See Pet. App. A., at 7a-8a.

The defense called no witnesses and did not put on any evidence. The entirety of the defense closing argument offered:

> Good evening, ladies and gentlemen. I will not belabor the evidence in this case, ladies and gentlemen, simply because the facts are not in dispute. What is in dispute is the legal analysis. What we submit to you is that Lamondre is guilty of the second degree murder of Ms. Tavia Sills and the feticide of her unborn child; that is, the killing of the unborn child with specific intent to kill or inflict great bodily harm. Thank you.

Pet. App. A., at 12a citing R.18 at 3849-50.[7]

On March 22, 2011, the jury found petitioner guilty of first degree murder. On March 23, 2011, the penalty phase began. The State presented three victim impact witnesses. The defense presented six witnesses who described Lamondre's chaotic upbringing, and also his attempts to find structure in caring for horses and football. The trial court rejected the defense's requested instruction that the State

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[7] The Louisiana Supreme Court noted "Defendant alleges he did not acquiesce in the decision of defense counsel to admit guilt of second degree murder and feticide in closing." Pet App. A., at 61a.

prove--and the jury find--beyond a reasonable doubt that death was the appropriate punishment. The jury returned a death sentence.

On direct appeal, the Louisiana Supreme Court rejected Petitioner's claim that the death penalty violates the Eighth and Fourteenth Amendments. *State v. Tucker*, No. 13-1631, slip op. at 53-54 (La. Sept. 1, 2015); 2015 La. LEXIS 1712, 89. In an unpublished appendix, the court also rejected Petitioner's argument that the Eighth amendment and this Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), required the jury to find, beyond a reasonable doubt, that death was the appropriate punishment.

REASONS FOR GRANTING THE WRIT

Over the past dozen years, this country has abandoned the death penalty in all but a handful of jurisdictions, demonstrating a wide consensus against its imposition. Over the same period, it has become clear that the death penalty serves no penological purpose not equally well-served by life without parole. Nor can it be applied in a manner that reliably singles out the worst offenders. Instead, it is frequently imposed upon offenders lacking the kind of moral culpability that this Court has determined might warrant capital punishment, including those with crippling intellectual and mental disabilities. It has also been imposed on people who were factually innocent. In other words, the nation has abandoned the death penalty in law and practice for good reasons: it is an excessive, wasteful punishment, and its administration is irredeemably broken.

To the extent the death penalty is not unconstitutional *per se*, the capital punishment system in Louisiana does not ensure that the death penalty is reserved for the most culpable offenders responsible for the most serious offenses. The Louisiana courts decline to instruct juries that their determination that death is the appropriate punishment should be made beyond a reasonable doubt.

I. THERE IS A NATIONAL CONSENSUS AGAINST THE DEATH PENALTY.

A. State Legislatures Increasingly Reject the Death Penalty.

When, in 1972, this Court decided *Furman v. Georgia*, forty-one states, the District of Columbia and the Federal Government provided for capital punishment. Nine states prohibited it. *See Furman v. Georgia*, 408 U.S. 238, 341 (1972). In 2016, 19 states plus the District of Columbia have no death penalty.[8] The movement away from capital punishment has become increasingly rapid; seven of these states abandoned the death penalty in the last eight years[9]:

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[8] The highest courts of New York and Massachusetts ruled their respective death penalty statutes unconstitutional, and no legislation has been enacted to introduce the death penalty. Rhode Island's mandatory capital punishment scheme was deemed unconstitutional in 1984, and the legislature has not since endorsed capital punishment. The other 17 states and the District of Columbia have prohibited capital punishment through legislation or constitutional guarantee.

[9] The Court has noted the significance of the *trend* toward abolition. *Atkins v. Virginia*, 536 U.S. 304, 315 (2002) ("It is not so much the number of these States that is significant, but the consistency of the direction of change."); *Roper v. Simmons*, 543 U.S. 551, 567 (2005) (counting as "objective indicia of consensus" "the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice--provide sufficient evidence.").

New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), and Nebraska (2015).[10]

B. Many Other States No Longer Use the Death Penalty.

In addition to the twenty jurisdictions that have formally abolished the death penalty, other states that retain it on their books have ceased or all but ceased to employ it, reflecting the broad consensus against capital punishment. *See, e.g.*, *Hall v. Florida*, 134 S.Ct 1986, 1997 (2014) (counting Oregon on the abolitionist "side of the ledger," because the Governor "suspended the death penalty" and the state had "executed only two individuals in the past 40 years").

Governors in Oregon,[11] Colorado,[12] Washington[13] and Pennsylvania[14] have indefinitely

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[10] The legislative abolition in Nebraska has been subject to a referendum on November 8, 2016. LB 268 was passed by the Nebraska State Senate on May 27, 2015, overriding a veto from Governor Pete Ricketts. Whatever the ultimate outcome of the popular vote in Nebraska, the legislative action reflects a broad consensus that capital punishment is unnecessary and excessive.

[11] *See Haugen v. Kitzhaber*, 306 P.3d 592 (Ore. 2013) (recognizing Governor's authority to impose moratorium).

halted executions. Similar to Oregon, which "executed only two individuals in the past 40 years," Colorado has executed only one person in the past 47 years. Washington has executed only five people in a half-century. Pennsylvania has executed only three people—all volunteers—in the last fifty years. The dramatic infrequency of executions in these states demonstrates that the executive moratoria simply made official what citizens of these jurisdictions had embraced for years: the end of capital punishment.

At least seven other states, the federal government, and the U.S. military exhibit a degree of long-term disuse that rivals Oregon, Pennsylvania, Colorado and Washington. New Hampshire, which has only one occupant on its death row, has not

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[12] *See* Statement of Governor John W. Hickenlooper, Executive Order, Death Sentence Reprieve, 2013-006, May 22, 2013, at http://www.deathpenaltyinfo.org/documents/COexecutiveorder.pdf.

[13] *See* Statement of Governor Jay Inslee, *Remarks announcing a Capital Punishment Moratorium*, February 11, 2014, at http://www.deathpenaltyinfo.org/documents/InsleeMoratoriumRemarks.pdf.

[14] *See Commonwealth v. Williams*, 2015 Pa. LEXIS 2973 (Pa. Dec. 21, 2015) (upholding the Governor's authority to suspend the death penalty through a reprieve initiated as the "first step in establishing a temporary moratorium on the death penalty.").

performed an execution in 86 years. Wyoming has executed one person in fifty years and its death row is empty. Kansas, as the *Hall* Court noted, "has not had an execution in almost five decades." *Id.* at 1997.[15] The U.S. military has not executed anyone since 1961. Idaho, Kentucky, Montana, South Dakota, and the Federal Government have performed only three executions each over the past 50 years. Moreover, of the 16 death sentences carried out by these nine jurisdictions, 7 have involved inmates who volunteered for execution.

In sum, 33 jurisdictions, including the District of Columbia, the federal government, and the U.S. military, have either abolished the death penalty or have carried out one or fewer executions per decade over the past half-century.

In other states that purport to endorse capital punishment, such as California, use of the death penalty appears more symbolic than actual. Although there are more than seven hundred and forty (740) people on California's death row, no

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[15] *See also Atkins,* 536 U.S. at 316 (noting that where a state "authorize[s] executions, but none have been carried out in decades," "there is little need to pursue legislation barring the execution…"); *Roper v. Simmons*, 543 U.S. at 567 (noting as evidence of consensus "the infrequency of its use even where it remains on the books").

execution has taken place in ten years.[16] Even in parts of the South that used to execute people regularly, it has been nine years since North Carolina executed a person, and ten years since Arkansas has done the same.

C. Actual Sentencing Practices Further Illustrate That The Nation Has Evolved To The Point That Capital Punishment Is Unnecessary.

Even the accounting of states, *supra* at I (A)-(B) undervalues the degree of on-the-ground consensus against the death penalty. Actual sentencing practices illustrate the true rarity of the punishment. *See Graham v. Florida*, 560 U.S. 48, 62 (2010) (finding a societal consensus against juvenile life without parole sentences for non-homicide offenses on the basis of extreme disuse even where the vast majority of jurisdictions formally authorized the practice); *Atkins*, 536 U.S. at 323 (Rehnquist, C.J., dissenting) (noting that jury verdicts are a

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[16] *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1052 (C.D. Cal. 2014) *rev'd on procedural grounds*, *Jones v. Davis*, 2015 U.S. App. LEXIS 19698 (9th Cir. 2015) (noting "to carry out the sentences of the 748 inmates currently on Death Row, the State would have to conduct more than one execution a week for the next 14 years. . . .[and that] only 17 inmates currently on Death Row have even completed the post-conviction review process and are awaiting their execution.").

"significant and reliable index of contemporary values" because of the jury's intimate involvement in the case and its function of "maintaining a link between contemporary community values and the penal system").

In the decade before this Court decided *Furman*, America averaged 106 death sentences annually. 408 U.S. at 291 (Brennan, J., concurring) ("When a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied. To dispel it would indeed require a clear showing of nonarbitrary infliction.").[17] As both the population and homicide rate grew, death sentences ballooned to 315 in 1994 (and again in 1996). But death sentences have declined steeply and consistently over the past fifteen years. In 2015, in a nation of over 318 million people, the nation produced just 49 death sentences.[18]

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[17] *See also Furman*, *supra*, at 312-13 (White J., concurring) ("I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.").

[18] When juries impose death sentences in jurisdictions that do not perform executions, it is difficult to assess what those sentences reflect. In California, juries have sentenced 937

Moreover, because the death-qualification of jurors produces widespread removal of the millions of citizens who have moral opposition to capital punishment, the number of death sentences imposed nationally actually overstates the support for capital punishment. *Cf. Baze v. Rees*, 553 U.S. 35, 84 (2008) (Stevens J., concurring) ("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."). In this case, for instance, where one-third of the community was removed from the venire based upon their opposition to capital punishment, it is hard to assert that the death sentences in Caddo Parish reflect the sentiment of the whole community.

D. Where Capital Punishment Is Utilized, It Is Characterized By Severe Geographic Isolation.

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persons to death since 1976, but the State has performed only 13 executions in that same time span and none since 2006. While 745 inmates are on California's death row, none are scheduled for execution. *Jones v. Chappell*, *supra*. California juries (and prosecutors and defense lawyers considering their responsibilities) are protected by the near-certainty that a defendant purportedly condemned to death will likely never be executed. *See Caldwell v. Mississippi*, 472 U.S. 320, 331 (1985) ("even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts").

Even in states that regularly impose the death penalty, closer examination reveals that its use is confined to a small number of counties. *See Glossip v. Gross*, 135 S. Ct. 2726, 2760 (2015) (Breyer, J., dissenting) (noting that "between 2010 and 2015 (as of June 22), only 15 counties imposed five or more death sentences.").

Thus, even within active death penalty states, prosecutors and juries in most counties have abandoned the death penalty in practice, *See also Graham*, 560 U.S. at 64 (noting "only 11 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders—and most of those do so quite rarely—while 26 States, the District of Columbia, and the Federal Government do not impose them despite statutory authorization.").

This case demonstrates the extreme concentration of death sentences in a few outlier counties. Since 2005, Caddo Parish—which has only 5% of Louisiana's population and 5% of its homicides—has accounted for almost half of the death sentences in Louisiana. Caddo Parish imposes more death sentences per capita than any other parish or county in the nation.

E. Professional Organizations, Law Enforcement Agencies and Corrections Experts Reflect a Broad Consensus Against the Death Penalty.

Professional organizations, law enforcement agencies and the Corrections community reflect the emerging consensus that the death penalty is excessive. A poll of Chiefs of Police indicates that law enforcement officials ranked capital punishment last as a tool for crime reduction.[19] Like law enforcement officials, criminologists concur that there is no evidence that capital punishment deters murders.

The changing views of professional organizations once committed to capital punishment also reflect the abandonment of the death penalty. In 2009, the American Law Institute, the organization that drafted the model post-*Furman* capital punishment statute, removed the statute from its penal code, explaining that "underlying defects in the capital justice process, the inability of extensive constitutional regulation to redress those defects, and the immense structural barriers to meaningful improvement all counsel strongly against the Institute's undertaking a law reform project on capital punishment." In withdrawing the death

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[19] *See* Richard C. Dieter, *Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis,* Death Penalty Information Center (released October 20, 2009) ("The nation's police chiefs rank the death penalty last in their priorities for effective crime reduction. The officers do not believe the death penalty acts as a deterrent to murder, and they rate it as one of most inefficient uses of taxpayer dollars in fighting crime.").

penalty section from the Model Penal Code, the study concluded that "the preconditions for an adequately administered regime of capital punishment do not currently exist and cannot reasonably be expected to be achieved."

In 2015, the National Association of Evangelicals, a group whose members called from the pulpits for national reinstatement of the death penalty following *Furman*, released a statement recognizing that "all human systems are fallible," "[r]ealizing the limitations of our system and the morally disastrous nature of any error," and concluding that "despite differing views on capital punishment evangelicals are united in calling for reform to our criminal justice system."[20]

Corrections officials have similarly questioned both the necessity, and the appropriateness, of capital punishment. *See, e.g.*, Terry Collins, *Justice System Can Be Improved By Removing Ultimate Penalty*, COLUMBUS DISPATCH, Jan. 25, 2011 ("My experience tells me that our justice system can be even more effective and fair without Death Rows and the death penalty."); Frank Thompson, *Death Penalty Doesn't Make Guards Safer*, THE NEWS JOURNAL OF DELAWARE, Apr. 1, 2015 ("Many of us

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[20] *See* National Association of Evangelicals, Resolution Capital Punishment, 2015, at http://nae.net/capital-punishment-2/.

who have taken part in this process live with nightmares, especially those of us who have participated in executions that did not go smoothly. . . . Replacing the death penalty with a sentence of life without the possibility of parole does not excuse the horrific acts these individuals have committed. This is a severe punishment that allows Delaware to use its limited public safety dollars more wisely, and removes the monumental responsibility placed on correctional officers to take a human life in the name of a public policy that does not work."); E. Vail and D. Morgan, *It's Wrong For The State To Take A Life*, SEATTLE TIMES, Feb. 22, 2014 ("[B]etween the two of us, we have participated in all five executions carried out [in Washington]…We have witnessed visibly shaken staff carry out a questionable law that condones killing inmates who have been captured, locked behind bars and long since ceased being a threat to the public.").

II. THE DEATH PENALTY DOES NOT FURTHER ANY VALID PENOLOGICAL PURPOSE, VITIATING ITS LEGITIMACY AS A PUNISHMENT.

When the infliction of capital punishment no longer serves a penological purpose, its imposition represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." *Furman*, 408 U.S. at 312; *Kennedy*, 554 U.S. at 441 (citing *Gregg*, 428 U.S. at 173, 183, 187; *Atkins*, 536 U.S. at 319).

The only purposes that could be served by capital punishment are "retribution and deterrence." *Gregg v. Georgia,* 428 U.S. 153, 183 (1976). Capital punishment, as it is administered today, serves neither.

A. The Available Evidence Does Not Establish That the Death Penalty Is a Meaningful Deterrent to Murder.

"[T]he theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct." *Atkins*, 536 U.S. at 320. Forty years ago, objective evidence that capital punishment had any deterrent effect whatsoever, when compared to lengthy imprisonment, was nonexistent. *See Furman*, 408 U.S. at 301, 307, 347-54, 395-96. The same is true today. In a 2012 analysis of several deterrence studies, the National Research Council concluded, "research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates."[21] *See also Glossip,*

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[21] *Id.* *See also* D. Nagin and J. Pepper, "Deterrence and the Death Penalty," Committee on Law and Justice at the National Research Council, Apr. 2012; D. Vergano, *NRC: Death Penalty Effect Research "Fundamentally Flawed"*, USA TODAY, Apr. 18, 2012). *See also* Jeffrey Fagan, *Death and Deterrence Redux:*

135 S.Ct. at 2768 (2015) (Breyer, J., dissenting) (discussing why death penalty is unlikely to deter murder); *Baze v. Rees*, 553 U.S. 35, 79 (2008) (Stevens, J., concurring in judgment)(same).

Even without parsing the statistics, a punishment as infrequently imposed as the death penalty is today can serve little, if any, purpose. *See Furman*, 408 U.S. at 311 (White, J., concurring) ("the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system."). Where, as here, there were approximately 14,000 murders in 2014 (the last year of available data) and just 49 death sentences in 2015, the risk of facing the penalty of death is miniscule.

B. The Death Penalty Does Not Contribute Any Significant Retributive Value Beyond That Afforded By a Sentence of Life Without Parole.

Retribution is the principle that "most often can contradict the law's own ends," because, "[w]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing constitutional

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Science, Law and Casual Reasoning on Capital Punishment, 4 OHIO ST. J. CRIM. L. 255 (2006).

commitment to decency and restraint." *Kennedy*, 554 U.S. at 420. It is an uncomfortable history that capital punishment was justified to limit the sowing of "the seeds of anarchy-of self-help, vigilante justice and lynch law." [22]

This Court exercises "particular concern" when it "interprets the meaning of the Eighth Amendment in capital cases." *Id*. Life in prison without the possibility of parole—knowing that one will die in prison—is an extremely severe punishment that adequately serves retributive goals.[23]

Reliance on retribution also undervalues the constitutional interest in rehabilitation. See *Graham v. Florida*, 560 U.S. at 74 ("Finally there is rehabilitation, . . . The concept of rehabilitation is imprecise; and its utility and proper implementation are the subject of a substantial, dynamic field of inquiry and dialogue."). Nothing "forswears

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[22] *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). See also G. Ben Cohen, *McCleskey's Omission: The Racial Geography of Retribution*, Oh. St. J. of Crim. Law, Vol. 10, no. 1 (2012).

[23] Indeed, life without parole is a sufficiently harsh punishment that a significant number of condemned individuals choose death over a life sentence. *See* John H. Blume, *Killing the Willing 'Volunteers,' Suicide and Competency*, 103 MICH. L. REV. 939 (2005). Of the 1423 executions conducted since 1976, 143 (10%) have been volunteers.

altogether the rehabilitative ideal" as much as an execution imposed some thirty years after a death sentence imposed upon an 18-year-old.

C. Lengthy Delays, Coupled With the Conditions of Confinement, Undermine the Validity of the Punishment.

While exonerations and reversals of sentence underscore the heightened need for reliability and process in capital cases, the long delay between a death sentence's initial pronouncement and its eventual execution undermine whatever minimal deterrent or retributive benefit it might have. *Glossip*, 135 S.Ct. at 2765 (Breyer, J., dissenting). Death row inmates often spend decades in solitary confinement. Such lengthy terms in isolation can cause "numerous deleterious harms" to an inmate's physical and mental health. *Glossip*, 135 S.Ct. at 2765 (Breyer, J., dissenting); *see also* Haney, *Mental Health Issues in Long–Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQUENCY 124, 130 (2003) (solitary confinement can cause prisoners to experience "anxiety, panic, rage, loss of control, paranoia, hallucinations, and self-mutilations"); *Davis v. Ayala*, 135 S.Ct. 2187, 2210 (2015) (Kennedy, J., concurring) (acknowledging courts obligation to consider constitutionality of long-term solitary confinement).

Lamondre Tucker spends 23 hours per day, every day, in a cell that is 8 feet by 10 feet under

conditions of confinement that are constitutionally questionable. A federal district court found that "inmates housed in each of the death row tiers are consistently, and for long periods of time, subjected to high temperatures and heat indices in the [] 'caution,' 'extreme caution,' and 'danger' zones," with a heat index that would repeatedly exceed 100 degrees. *Ball v. LeBlanc*, 988 F. Supp. 2d 639, 659, 679-80 (M.D. La. 2013) (finding conditions of confinement for three prisoners on Louisiana's death row cruel and unusual punishment).[24]

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[24] *See also Ball v. LeBlanc*, 792 F.3d 584 (5th Cir. 2015) (agreeing that conditions violated Eighth Amendment, but remanding for narrower remedy determination); Amicus Brief of U.S. Dept. of Justice, *available at:* http://www.justice.gov/sites/default/files/crt/legacy/2014/10/01/ballleblancbrief.pdf (noting that, at least for inmates susceptible to heat-related illness, the conditions of confinement violate the Eighth Amendment).

III. THE ADMINISTRATION OF CAPITAL PUNISHMENT IS WANTON, EXCESSIVE AND ARBITRARY.

If the application of capital punishment produced meaningful deterrent or retributive advantages, the risks associated with it might be more tolerable. But despite this Court's fifty-year effort at imposing a rational and constitutionally tolerable framework on administration of the death penalty, the results remain "not altogether satisfactory." *Kennedy*, 554 U.S. at 436.

A. Death is Often Imposed Upon Offenders With Crippling Impairments that Diminish Their Moral Culpability and Render Death an Excessive Punishment.

Despite the "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse," *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)), individuals with significant impairments remain overrepresented among defendants sentenced to death and executed.

The Eighth Amendment mandates that a death sentence be limited to those offenders with "a

consciousness materially more depraved" than that of the typical person who commits a murder. *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980). The execution of a person with insufficient culpability serves no retributive purpose, "violat[ing] his or her inherent dignity as a human being." *Hall v. Florida*, 134 S.Ct. 1986, 1992 (2014).

In part because of their reduced moral culpability, the Court has categorically prohibited the execution of juveniles and those with intellectual disability. *See Roper v. Simmons,* 543 U.S. 551 (2005);[25] *Atkins*, *supra*.[26] But the concern over

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[25] The Court held that juveniles, who are more impetuous, reckless, influenced by negative peer pressure, and unable to control their actions as compared to adults, are also substantially less culpable. *Simmons*, 543 U.S. at 569-71. As a result, death is a constitutionally disproportionate punishment for all juveniles. *Id*. The Court held, "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." *Id*. at 572-73.

[26] Similar concerns motivated the Court's prohibition on executing offenders with intellectual disabilities. In *Atkins*, 536 U.S. at 320, the Court noted that the "cognitive and behavioral impairments" of the intellectually disabled – "the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses" – substantially reduced their moral culpability. Therefore, the execution of the intellectually disabled failed to advance any retributive goal. *Id*. at 319.

retributive excess extends beyond juvenile status and intellectual disability to include offenders with severe mental illness, traumatic brain injuries and other functional deficits that have a tendency to degrade the quality of thought processes. *See*, *e.g.*, *Porter v. McCollum*, 558 U.S. 30, 43-44 (2009) (recognizing mitigating value of a defendant's "brain abnormality and cognitive deficits," as well as "the intense stress and mental and emotional toll" that army service can have on an individual); *Panetti v. Quarterman*, 551 U.S. 930, 958-59 (2007) (questioning "whether retribution is served" where "[t]he potential for a prisoner's recognition of the severity of the offense and the objective of community vindication are called in question" when the "prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole.").

The categorical rules in *Simmons* and *Atkins* not only protect classes of individuals for whom death is a disproportionate punishment *per se*; they also reflect an understanding of the inherent difficulty—even unreliability—of jury determinations about moral culpability. The Court has recognized that juries do fail to make reliable and accurate assessments of the culpability of offenders facing a potential death sentence. *See Simmons*, 543 U.S. at 573 ("[a]n unacceptable likelihood exists that the

brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course"); *Penry*, 492 U.S. at 324 (noting that mitigation evidence can be "a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future").

Equally troubling are the many impairments or disadvantages affecting an offender's culpability of which a jury and court may not be entirely aware. The failure of defense counsel to discover and present mitigation is but one obvious area of concern.[27]

Courts grapple with the difficulty of determining what degree of disability, illness, or disadvantage renders death an impermissible or disproportionate punishment. The substantial functional impairments of those executed reveal the defects in this process. *See, e.g.* Smith, Cull, and Robinson, *The Failure of Mitigation*?, 65 HASTINGS L.J. 1221 (2014) (noting over 85% of one hundred individuals executed between the middle of 2011 and the middle of 2013 had traits reducing blameworthiness, including fifty-four diagnosed with

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[27] *See e.g.*, Bright, *Counsel for the Poor: The Death Penalty Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

or exhibiting symptoms of an acute mental illness, fifty with serious childhood trauma, like chronic homelessness or sexual molestation, and thirty-two with intellectual impairments, like a traumatic brain injury or a significant cognitive deficit).

B. There Remains an Intolerable Risk of Executing the Innocent.

Advances in forensic evidence, particularly DNA testing, have produced a startling number of exonerations in capital cases. *See Glossip*, 135 S.Ct. at 2756-58 (Breyer, J., dissenting); *Kansas v. Marsh*, 548 U.S. 163, 210 (2006) (Souter, J., dissenting) (quoting *Gregg*, 428 U.S. at 188) ("we are [] in a period of new empirical argument about how 'death is different.'"). When the Court decided *Marsh*, there had been 120 exonerations of death row inmates.[28] Today, there have been 156 exonerations of death row inmates.[29] There were five such exonerations in

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[28] *See* Death Penalty Information Center, *List of Those Freed from Death Row*, available at: http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (last visited December 21, 2015).

[29] *Id*. The exoneration of Henry McCollum is only unique in the attention the case received. *See* Jonathan Katz and Erik Eckholm, *DNA Evidence Clears Two Men in 1983 Murder*, N.Y. TIMES, Sept. 2, 2014, available at: http://www.nytimes.com/2014/09/03/us/2-convicted-in-1983-north-carolina-murder-freed-after-dna-tests.html?_r=0 (last visited June 3, 2015). McCollum's case was described as one that justified the

2015.[30] Even more troubling, there is growing concern that states have executed actually innocent defendants. *See Glossip*, 135 S.Ct. at 2758 (Breyer, J., dissenting); Maurice Possley, *Fresh Doubts Over a Texas Execution*, WASH. POST, Aug. 3, 2014[31] (discussing case of Cameron Todd Willingham); James Liebman, *The Wrong Carlos: Anatomy of a Wrongful Execution* (Colum. Univ. Press 2014 ed.) (discussing case of Carlos DeLuna). As Justice Stevens has recently noted, the risk of killing an innocent person, which cannot be entirely eliminated, is a "sufficient argument against the death penalty: society should not take the risk that that might happen again, because it's intolerable to think that our government, for really not very powerful reasons, runs the risk of executing innocent people." *See* Columbia Law School, *Professor James*

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imposition of capital punishment. *See Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Scalia, J., concurring).

[30] The National Registry of Exonerations, University of Michgian Law School, available at http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Exonerated&FilterValue1=8_2015&FilterField2=Sentence&FilterValue2=Death. (Last visited 1/25/2016).

[31] Available at: http://www.washingtonpost.com/sf/national/2014/08/03/fresh-doubts-over-a-texas-execution. (Last visited 1/25/2015).

Liebman Proves Innocent Man Executed, Retired Supreme Court Justice Says, Jan. 26, 2015.[32]

While the evidence in this case satisfied the sufficiency standards of *Jackson v. Virginia*, 443 U.S. 307 (1979), and despite defense counsel's concessions regarding culpability (apparently made without petitioner's consent), the evidence was in no way dispositive. The ballistics evidence failed to establish an exact match between the gun discovered by police and the murder weapon; the State relied upon a confession that did not match the physical evidence secured from an 18-year old with at best borderline intellectual disability after hours of interrogation. Given that over 221 individuals[33] have been exonerated after giving a false confession (21 from death row), and adolescents and individuals with low IQ have an increased risk of wrongful confession, this evidence cannot be characterized as particularly strong. The risk of wrongful execution presents a strong argument for replacing the death penalty with

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[32] Available at:https://www.law.columbia.edu/media_inquiries/news_events/2015/january2015/stevens-liebman.

[33] See National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=FC&FilterValue1=8_FC&FilterField2=Sentence&FilterValue2=Death (Last visited 1/25/2016).

life without parole. *Cf. Kennedy*, 554 U.S. at 443 (noting the chance of wrongful conviction a strong reason to prohibit the death penalty as it creates a "special risk of wrongful execution") (citing *Atkins*, *supra*, at 321 (noting the "enhanced" possibility of false confessions for intellectually-disabled defendants).

C. Race Continues to Play an Invidious Role in the Administration of Capital Punishment.

Petitioner's case presents unwelcomed evidence that race continues to play a role in the administration of the death penalty. Petitioner was sentenced to death under the Confederate flag, at a courthouse in front of which is a monument to *The Confederacy's Last Stand,* by a jury that was predominantly white even though the parish if almost 50% African-American. The Louisiana Supreme Court, while "conceding Caddo Parish placed the confederate memorial outside the district courthouse at the turn of the century, refurbishing and reaffirming it half a century later with the confederate battle flag," rejected Petitioner's assignment of error because he "made no showing the parish currently maintains the memorial because of the adverse effect it would have on the administration of the criminal justice system with respect to black defendants." See Pet App. A., at 71a-72a; see also id. at 82a ("There are very few potential

sources of passion, prejudice, or other arbitrary factors in the present case, aside from the allegation that racism pervades Caddo Parish…").

Regardless of the Louisiana Supreme Court's observation, seventeen of the twenty-two defendants sentenced to death in Caddo Parish are African-American men. Recent research indicates that race and gender pay a predominant role in the administration of capital punishment. *See* Frank Baumgartner and Tim Lyman, *Race of Victim Discrepancies in Homicides and Executions*, Louisiana 1976-2015, LOYOLA UNIV. OF NEW ORLEANS J. PUB. INTEREST L., Fall 2015.[34] After reviewing thousands of homicides in Louisiana over the forty year period, the researchers found that African-American offenders had the highest chances of being sentenced to death; but where African-American men were victims, the death penalty was least likely. Noting the "stark disparities" in the application of the death penalty based upon race and gender, the authors observed that "we find no cases in the entire history of Louisiana where a white person was executed for killing a black male." *See id.* at 1, and at n.2.

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[34] Available at: https://www.unc.edu/~fbaum/articles/Louisiana-RaceOfVictim-LJPIL-Fall2015.pdf. (Last visited 1/25/2016).

Data from the parish level in Louisiana confirms the invidious role the defendant's race plays in the application of capital punishment. Parish-level research suggests that "the race of the defendant and victim are both pivotal in the imposition of capital punishment: death was more likely to be imposed against black defendants than white defendants."[35] *Id.*

IV. LOUISIANA'S FAILURE TO REQUIRE THE JURY TO DETERMINE BEYOND A REASONABLE DOUBT THAT DEATH IS THE APPROPRIATE PUNISHMENT HAS RESULTED IN A SYSTEM THAT FAILS TO ENSURE THAT CAPITAL PUNISHMENT IS RESERVED FOR THE WORST OFFENDER GUILTY OF THE WORST OFFENSE.

Louisiana fails to ensure that capital punishment is reserved for the worst offender, culpable of the worst offense. This failure arises, at least in part, from the refusal of the Louisiana courts to instruct juries to determine beyond a reasonable doubt whether death is the appropriate punishment. The structural failure arises from the standard-less

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[35] *Id*. at 811–12.

death determination authorized under *Lowenfield v. Phelps,* 484 U.S. 231 (1988).[36]

At his trial, petitioner asked that the jury be instructed to impose a life sentence unless the jury determined beyond a reasonable doubt that death was the appropriate punishment. This requested instruction was rejected. The Louisiana Supreme Court rejected the complaint on appeal:

> Louisiana is not a weighing state. It does not require capital juries to weigh or balance mitigating against aggravating circumstances, one against the other, according to any particular standard." . . . *Apprendi* requires that "[o]ther than the fact of a prior conviction, any fact that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." . . . While defendant argues that *Apprendi/Ring* should be extended to require that jurors make their ultimate sentencing determination beyond a reasonable doubt as well, this

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[36] It is unlikely when this Court authorized Louisiana's death penalty scheme in *Lowenfield* that it contemplated the personality-driven – in the form of the prosecutor and the nature of defense counsel – role that appears to exist in a disproportionate number of death penalty cases in Louisiana.

> Court previously rejected the same argument in *State v. Anderson*, 06-2987, p. 61 (La. 9/9/08), 996 So.2d 973, 1015. Defendant offers no new reason for adopting such a substantial change to the law.

Pet. App. B at 91-92a.

A. Louisiana's Death Penalty Scheme Fails to Identify the Worst of the Worst Offenders.

Petitioner was eighteen at the time of the offense with a low IQ and significant deficits. Although not categorically exempt from capital punishment under this Court's precedents, Petitioner shared many of the characteristics of those exempted from the death penalty in *Simmons* and *Atkins*. As a result of Louisiana's standardless death determination, petitioner joins a line of individuals from Caddo Parish (and from Louisiana more broadly) who are sentenced to death despite having moral culpability similar to offenders who are exempt from capital punishment.

Sixteen of the eighty-two current death row inmates in Louisiana were below 21 years old at the time of the offense. Seven including petitioner were

18 at the time of the offense.[37] Evidence from Caddo Parish over the last ten years in particular confirms the system's failure: ten defendants were sentenced to death over the last decade; seven African-American men and one white woman remain on death row. Two of these defendants were eighteen years old at the time of the crime.[38] Four have IQs below 75, including Petitioner; Laderick Campbell[39]; Brandy Holmes, named after her mother's favorite drink;[40] and Robert Coleman.[41]

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[37] Six of these 18-year-olds are African-American. Indeed, the vast majority of teenagers sentenced to death in Louisiana have been black, although the state is only 32% African American.

[38] *See State v. Campbell*, 983 So. 2d 810 (La. 2008); and this case.

[39] *Campbell*, 983 So. 2d at827 (noting defendant had a "full-scale I.Q. of 67" with emotional and behavior problems); see also id at 874-875 (noting defendant's age (18) at the time of the offense, and indicating "the defendant's IQ is below 70, although that indication bears an asterisk with the further information that this is the result of preliminary testing and that the defendant refused further testing.").

[40] *See State v. Holmes*, 5 So. 3d 42, 53 (La. 2008) ("The defendant's mother testified that she drank whiskey during the first three months of her pregnancy and that afterwards she switched to beer. She told the jury she named the defendant Brandy because that was the drink she liked.") *see also id* at n 7, (noting 77 IQ); *see also id.* at 95 ("According to the defendant's mother, the defendant began school in special

Caddo Parish is emblematic of the wider problem in Louisiana in determining who should live and who should die. Indeed, a series of defendants have been sentenced to death in Louisiana despite strong evidence of intellectual disability of the type recognized in *Hall* and *Atkins*. *See State v. Williams*, 22 So. 3d 867, 887-88 (La. 2009) (rejecting defendant's claim of exemption where defendant had a 71 IQ based upon the state doctor's testimony that "There is a very clear standard for mental retardation. . . And it is that there be, first and foremost, an I.Q. of less than seventy,"); *State v. Anderson*, 996 So. 2d 973 (La. 2008) (rejecting defendant's *Atkins* claim because IQ was 73 and evidence indicated brain damage may have occurred after age 18 due to brain injury); *State v. Brown*, 907 So. 2d 1, 32 (La. 2005) (rejecting *Atkins* claim where "the evidence established that defendant was shot in the eye … at the age of 22."); *State v. Bell,* 53 So. 3d 437, 458 (La. 2010) (recognizing evidence of sub-70 IQ scores but rejecting *Atkins* claim as "nothing in the record from which it can be concluded that the

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education, and she only completed the sixth grade. Mrs. Bruce further claimed that defendant was raped at 12 years of age and was committed to a mental hospital for six months…").

[41] *State v. Coleman*, 2014-KA-0402 (appeal pending) (record includes claim of intellectual disability based upon an IQ score of 75).

jury erred in rejecting the defendant's claim of mental retardation").

B. In Order to Impose a Death Sentence, a Jury Should Make the Sentencing Determination Beyond a Reasonable Doubt.

While this Court has not previously imposed a standard for determining whether death is the appropriate punishment, the *beyond a reasonable doubt* burden is a necessary standard.[42]

The "beyond a reasonable doubt" standard applies to sentencing decisions. *See United States v. Booker*, 543 U.S. 220, 236 (2005) ; *Ring v. Arizona*, 536 U.S. 584, 602 (2002). However, neither the verdict form nor the statutory scheme in Louisiana reflects that the jury determination on penalty was made "beyond a reasonable doubt."[43] The trial court

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[42] As this Court has recognized, "Our response to this case law, which is still in search of a unifying principle, has been to insist upon confining the instances in which capital punishment may be imposed." *Kennedy*, 554 U.S. at 436-37

[43] The Fifth Amendment burden and the Sixth Amendment jury finding are inexorably intertwined. *See Sullivan v. Louisiana,* 508 U.S. 275, 278-80 (1993) ("It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship*

instructed the jury to consider the aggravating circumstances and mitigating circumstances but declined to articulate a standard for assessing whether the death penalty should be imposed.

Ring applied the *Apprendi*[44] rule to capital sentencing proceedings, and *Hurst v. Florida*, 577 U.S. __ (2016), applied the *Ring-Apprendi* rule to hold that a capital sentence must be imposed by a jury, and not a judge. In Louisiana, the statutory maximum a defendant convicted of first degree murder can be sentenced is life without the possibility of parole unless a jury determines unanimously that death is the appropriate punishment. *See* La. C.Cr.P. Art. 905.3 ("A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed."). In *Hurst*, the question concerned the constitutionality of a sentencing scheme that

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requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt. . . .").

[44] *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (holding that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt).

depended upon the trial court finding "'the facts… [t]hat sufficient aggravating circumstances exist' and 'that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" *Hurst*, slip op at 7. Relegation of these findings to a judge after a jury recommendation violated *Ring*. *Id.* Here, the question remains whether the due process clause and the Sixth Amendment are violated when the process is left to the jury, but the jury is not required to make that determination beyond a reasonable doubt.

At the founding of the country, the standard for determining whether a defendant deserved death was at least, "beyond a reasonable doubt." Indeed, the beyond a reasonable doubt standard originated in response to concern over the application of capital punishment and was "related to the increasing resistance of the public—both American and British—to the application of the capital sanction." Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 AM. CRIM. L. REV. 45, 51 (Winter 2005).[45] *See also id.* at 51 (identifying the origins of the beyond a reasonable doubt standard as

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[45] Lillquist cites, among other authorities, JOHN LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (Oxford University Press, 2003); Larry Laudan, *Is Reasonable Doubt Reasonable?*, 9 LEGAL THEORY 295, 297 (2003); Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 148-49, nn.206-07 (2002).

contemporaneous to the Boston Massacre trials of 1770, "as a way of ensuring that only the worst among the truly guilty were subject to that penalty."); *id*. ("It seems likely that the rise of the reasonable doubt standard was related to the increasing resistance of the public—both American and British—to the application of the capital sanction."). This Court in *Hurst* made the answer abundantly clear:

> The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt.

Hurst, supra at 4-5.

Review of Louisiana's capital punishment system is consistent with "[t]he rule of evolving standards of decency with specific marks on the way to full progress and mature judgment" which hold that the death "penalty must be reserved for the worst of crimes and limited in its instances of application. *Kennedy*, 554 U.S. at 446-47. The standard reflects the observation that "[i]n most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will

find ways to allow him to understand the enormity of his offense." *Id.* at 447.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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