No. 15-946

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

REPLY BRIEF

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REPLY BRIEF

Pursuant to Rule 15.6, Petitioner files this *Reply Brief*.

INTRODUCTION

Louisiana's *Brief in Opposition* (BIO) does not argue that the question presented is unimportant, unpreserved or that this case is inappropriate for addressing it. The BIO essentially acknowledges a merits review is warranted but argues for the constitutionality of capital punishment.

Now is the time; and this is an appropriate case in which to consider whether the evolving standards of decency render imposition of the death penalty on a person convicted of murder unconstitutional. Vast reduction in use of the death penalty provides strong evidence that the punishment is excessive, unnecessary, and devoid of penological purpose. In the majority of states, counties, and cases, a life sentence is deemed sufficiently severe.

Although the BIO suggests that this case provides "evidence of the care that society is taking to ensure that death penalties are meted out to the truly deserving, like Petitioner," (BIO at 13), in fact this case, and the county from which it arises, provide strong evidence of the problems with capital punishment.

While the BIO argues that *Gregg v. Georgia,* 428 U.S. 153 (1976) is controlling, it does not dispute that circumstances have changed over the last forty years. As the *Amicus Brief of Appellate Court Justices* notes, seven Supreme Court Justices have

come to question whether the promise of *Gregg* can be fulfilled.[1]

Nor does the BIO suggest that additional time is necessary to settle the issue. The Court should grant certiorari to address the continued constitutionality of capital punishment.

I. Disuse Demonstrates the Evolution of the Standards of Decency

Abandonment of capital punishment by the majority of the country provides significant evidence of the evolving standards of decency. Steep decline in use demonstrates that capital punishment is both excessive and unnecessary. Disuse also informs this Court's independent judgment concerning the role of capital punishment, particularly whether a life sentence is sufficiently severe.

A. Decisions of Legislatures, Prosecutors, and Juries Across the Country Demonstrate A Consensus that Capital Punishment is Excessive and Unnecessary.

The BIO suggests that the assessment of national consensus is confined to counting the states. BIO at Appendix B. Even under this metric, there has been a consistent trend towards abolition. The number of states abolishing capital punishment has more than doubled since *Gregg,* going from nine to nineteen. Given the "general popularity of anticrime legislation," the fact that seven jurisdictions have abolished capital punishment and four additional states have adopted moratoria, in the last decade,

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[1] *See Tucker v. Louisiana*, 15-496, *Amicus Brief of Former Appellate Court Justices*, at n. 2.

whereas no state has passed legislation to reinstate it, "carries special force." *Roper v. Simmons*, 543 U.S. 551, 566 (2005).

Lack of use provides a significant measure of consensus. *See Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (noting little need to pursue legislation barring execution in states that do not execute); *Kennedy v. Louisiana,* 554 U.S. 407, 443 (2008) ("There are measures of consensus other than legislation."). "[A]ctual sentencing practices are an important part of the Court's inquiry into consensus." *Graham v. Florida*, 560 U.S. 48, 62 (2010) ("Thirty-seven states as well as the District of Columbia permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances. … Federal law also allows for the possibility of life without parole for offenders as young as 13.").

As detailed in the *Brief of Scholars of Law and Science*, death sentences are at a 40-year low. Seventy-two percent of the states have no death penalty or have not executed anyone in the last five years. *See Tucker v. Louisiana*, *Brief of Scholars of Law and Political Science*, at 4, 12.

In Louisiana, there has been approximately one exoneration for every three executions carried out since 1976, death sentences have dropped from a high of twelve a year to only one per year, and the state has had only two executions in the last fifteen years.[2]

The BIO suggests that lack of use arises, not from a consensus that the death penalty is excessive

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[2] Frank Baumgartner and Tim Lyman, *Louisiana Death-Sentenced Cases and Their Reversals*, *1976-2015*, 7 S.U. J. Race, Gender & Poverty 68 (2016).

but from "other factors" that "directly impact use or disuse" such as "expense," "the lengthy review process," issues concerning the "appropriate method of execution," questions raised by the "small number"[3] of exonerations, and "unilateral decisions by governing authorities." BIO at 10. While the BIO argues that these factors are irrelevant, they are the type of indicia that reveal a consensus.[4]

Respondent also suggests that these life sentences are not due to the evolving standards of decency but the result of "lavishly" funded "capital defense industry" with "ample expert witness funding for each capital client."[5] BIO at 6. Mr. Tucker, however, never received any such

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[3] Contrary to the BIO's representation, there have been 1,777 exonerations, 421 by DNA; 115 exonerations have been from death row; 25 of these by DNA. In Louisiana, there have been 45 exonerations; 15 by DNA evidence; 10 exonerations have been from death row. *See* Samuel Gross, *National Registry of Exonerations*, University of Michigan Law School, available atwww.law.umich.edu/special/exoneration/Pages/detaillist.aspx.

[4] *See Hall v. Florida*, 134 S. Ct. 1986, 1998 (2014) ("On the other side of the ledger stand the 18 States that have abolished the death penalty, either in full or for new offenses, and Oregon, which has suspended the death penalty and executed only two individuals in the past 40 years.").

[5] The State's description of the current funding situation is not entirely accurate. *See*, *e.g.*, Joe Gyan Jr., *District Attorneys Take Aim at Louisiana Public Defender Board Spending On Death Penalty Cases*, THE ADVOCATE, April 26, 2016, *available at*:http://theadvocate.com/news/15535963-175/district-attorneys-take-aim-at-louisiana-public-defender-board-spending-on death- penalty-cases (noting efforts of prosecutors to reduce expenditures on capital defense). Indigent defense representation in Louisiana, whether capital or otherwise, cannot be described as luxurious.

representation. His uncertified trial counsel represented one-third of those sentenced to death in Louisiana between 2005 and 2011.

Moreover, this is the point: where properly trained and funded counsel presents mitigation, juries prefer life. Here, the opposite occurred: overworked defense lawyers, with full public defender case-loads, filed essentially no motions, presented no witnesses, made an 82-word closing argument and put on no mental health evidence for an 18 year old with clear intellectual deficits. The death sentence that ensued is a reflection of a broken system, not the community's standard of decency.

B. Lack of Use Undermines Rationale for Punishment

In a country with 15,000 homicides per year[6] but less than 50 death sentences, the risk is that capital punishment is imposed on the few whose political positions are weak, whose personal situation is unpopular, where the unrestrained excess of individual prosecutors[7] combined with the

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[6] *See* Center for Disease Control, *Deaths: Final Data for 2013, National Vital Statistics Report* Vol. 64, No. 2, Table 10, February 16, 2016, located at www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_02.pdf (noting in 2013, 16,121 individuals died as a result of homicide); Erica L. Smith and Alexia Cooper, *Homicide in the U.S. Known to Law Enforcement, 2011*, United States Department of Justice, BJS, December 2013 NCJ 243035, www.bjs.gov/content/pub/pdf/hus11.pdf (identifying 14,610 victims of homicide in 2011).

[7] *See* Campbell Robertson, *The Prosecutor who says Louisiana Should 'Kill More People*, N.Y. TIMES, July 7, 2015, A1 *available at* www.nytimes.com/2015/07/08/ us/ louisiana-prosecutor-becomes-blunt-spokesman-for-death-penalty.html?_r=0

indifference of individual defense lawyers[8] determines the sentence.

Lack of use vitiates the penologocial purpose of the punishment.[9] As Justice White has explained, it would be a "near truism" that capital punishment could so seldom used "that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system." *Furman v. Georgia,* 408 U.S. 238, 311-12 (1972) (White, J. *concurring*). "Most important", he emphasized, "a major goal of the criminal law" –

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[8] Louisiana adopted more stringent standards for representation of capital defendants in 2007. The majority of individuals sentenced to death since then, including petitioner, were represented by lawyers who did not meet those standards. *See* Robert J. Smith, *The Worst Lawyers, Death Sentences Are Down Across The Country Except For Where One Of These Guys Is The Defense Attorney*, SLATE, Nov. 4, 2015, *available at*: www.slate.com/articles/news_and_politics/jurisprudence/2015/11/the_worst_defense_lawyers_for_death_penalty_cases_in_arizona_florida_louisiana.html (noting one defense lawyer responsible for 20% of the death sentences between 2005 and 2014).

[9] "*Gregg* instructs that capital punishment is excessive when . . . it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes." *Kennedy v. Louisiana*, 554 U.S. at 441. Judge Alex Kozinski, *Death: The Ultimate Run-On Sentence*, 46 CAS. W. RES. L. REV. 1, 1-2 (Fall 1995) ("Whatever purposes the death penalty is said to serve -- deterrence, retribution, assuaging the pain suffered by the victims' families -- these purposes are not served by the system as it now operates."); Justice Lewis Powell, *Commentary: Capital Punishment*, 102 HARV. L. REV. 1035, 1035 (1989) ("Years of delay between sentencing and execution . . . undermines the deterrent effect of capital punishment and reduces public confidence in our criminal justice system.").

deterrence – "would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others. *Id.* at 312; *see also id.* at 293 (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.").

The BIO asserts that capital punishment is justified by a single penologial purpose: as "a means of justice for those families of the murdered who seek to have it imposed against the murderer. BIO at 12. *But see Kennedy* at 420 ("It is the last of these, retribution, that most often can contradict the law's own ends. . . . When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.").

C. This Court's Independent Judgment Is Important

"[E]xercise of independent judgment is the Court's judicial duty." *Hall*, 134 S. Ct. at 2000. "[J]udgment is not merely a rubber stamp on the tally of legislative and jury actions. Rather, it is an integral part of the Eighth Amendment inquiry--and one that is entitled to independent weight in reaching our ultimate decision." *Simmons*, 543 U.S. at 597.

II. The Constitutionality of the Death Penalty is Not Permanently Resolved

As Justices Breyer and Ginsburg noted, dissenting in *Glossip v. Gross*:

> Nearly 40 years ago, this Court upheld the death penalty under statutes that, in the Court's view, contained safeguards sufficient to ensure that the penalty would be applied reliably and not arbitrarily. . . . The circumstances and the evidence of the death penalty's application have changed radically since then. Given those changes, I believe that it is now time to reopen the question.

135 S. Ct. 2726, 2755 (2015) (Breyer J., Ginsburg, J., *dissenting*). The BIO offers no basis for rejecting this invitation.

A. Gregg *Did Not Permanently Resolve The Constitutionality Of Capital Punishment*

While the BIO identifies *Gregg v. Georgia* as controlling, it does not dispute that the landscape has shifted dramatically. *Gregg* itself cabined the significance of its ruling. *See Gregg* at 187 ("in the absence of more convincing evidence"); *id* at 206 ("If a time comes when juries generally do not impose the death sentence in a certain kind of murder case…."). *See also Kennedy*, 554 U.S. at 436 ("[W]e have spent more than 32 years articulating limiting factors that channel the jury's discretion to avoid the death penalty's arbitrary imposition in the case of capital murder" and "that the produced results not alltogether satisfactory.").

The BIO argues that while this Court has restricted the application of the death penalty, it has never held capital punishment "entirely unconstitutional."[10] The fact that this Court has not addressed this question is a reason to grant certiorari rather than to deny it.[11]

B. The Fifth Amendment's Reference To Capital Punishment Does Not Resolve the Issue

The BIO argues that the Fifth Amendment's reference to capital punishment precludes the relief petitioner seeks. *State's BIO* at 8, 12. The Fifth Amendment also prohibits the loss of limb, the cutting off of which would presumably violate the Eighth Amendment. Moreover, as a lexicological issue, the Fifth Amendment's prohibitions against government conduct do not consecrate the conduct. See Joseph Blocher, *The Death Penalty and the Fifth Amendment*, Duke Law Journal, Dec. 16, 2015. While the framers' views on capital punishment may inform this Court's assessment, in the context of the evolving standards of decency, they are not dispositive.

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[10] Whether capital punishment is "entirely unconstitutional" is also beyond the scope of this petition. The question presented here, and footnote 2 of the *Petition for Certiorari,* specifically excluded crimes against the state, terrorism, treason and espionage, as well as killings of a corrections officer by a prisoner serving a life term.

[11] *Cf. Baze v. Rees*, 553 U.S. 35, 70-71 (2008) (Alito J., c*oncurring*) ("The issue presented in this case--the constitutionality of a method of execution--should be kept separate from the controversial issue of the death penalty itself. If the Court wishes to reexamine the latter issue, it should do so directly, as Justice Stevens now suggests.").

III. Louisiana's Statutory Scheme Does Not Ensure That the Death Penalty Is Reserved for The Worst Offenders Convicted of the Worst Offenses.

The BIO claims that the "lengthy delays" have effectively "ensure[d] that death [is] meted out to the truly deserving, like Petitioner."[12]

A. The Death Penalty Is Repeatedly Imposed On Individuals With Crippling Disabilities

Louisiana's statutory scheme has failed to ensure that the death penalty is reserved for the most culpable offenders.[13] *See Amicus Brief of*

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[12] The State's BIO spends considerable time referring to Mr. Tucker's conviction for jury tampering. The facts giving rise to the conviction – though not presented at his trial – are referenced in the appellate record of jury selection, when many African-Americans were excluded based upon their views on the death penalty. The record indicates that petitioner engaged in a three-way recorded jail call with his mother and a prospective juror regarding this issue. While the matter reflects a lack of judgment consistent with his immaturity, that he was ultimately sentenced to thirty years in prison for the phone call, and his mother sentenced to fifteen years for assisting, reflects more of the individual prosecutor's lack of restraint than Mr. Tucker's moral culpability.

[13] Petitioner's *Sentence Review Memorandum* noted that eleven of the condemned defendants on death row are 19 years or younger. Both before and after *Atkins*, individuals with low IQ have been sentenced to death in Louisiana. *See Brumfield v. Cain*, 13-1433, *Brief of Amici Curiae of Chief Justice Pascal F. Calogero* (identifying eighteen defendants with low IQ or intellectual disability). At least seven additional cases since *Atkins* involve death sentences imposed on defendants with low IQ. *State v. Bell,* 53 So. 3d 437 (La. 11/30/10) (pro se defendant

Former State Court Appellate Judges and Justices (noting death penalty regularly imposed on people with crippling disabilities).

B. The State's Reliance on Kansas v. Carr *is Misplaced*

The State's BIO suggests that the lack of a reasonable doubt instruction is authorized by *Kansas v. Carr*. BIO at 16. But the Carr brothers – and all defendants in Kansas – specifically received the instruction that Petitioner did not. *Kansas v. Carr*, 136 S. Ct. 633, 643 (2016) ("The instruction makes clear that both the existence of aggravating circumstances *and* the conclusion that they outweigh mitigating circumstances must be proved beyond a reasonable doubt.").

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with IQ in the 50's and 60's sentenced to death); *State v. Dressner*, 45 So. 3d 127 (La. 07/06/10) (18 year-old defendant with a 79 I.Q.); *State v. Williams*, 22 So. 3d 867 (La. 10/20/09) (73 I.Q. and a pre-offense diagnosis of intellectual disability); *State v. Holmes*, 5 So. 3d 42 (La. 12/02/08) (full scale IQ of 77); *State v. Lee*, 976 So. 2d 109 (La. 1/16/08) (IQ of 75.5); *State v. Campbell*, 983 So. 2d 810 (La. 05/21/08) (IQ of 67 for eighteen year old); *State v. Anderson*, 996 So. 2d 973 (La. 09/09/08) (70 I.Q. but testimony regarding post-18 brain injury). Robert Coleman's death sentence was set aside on other grounds, though he had a reported IQ in the range of intellectual disability. *State v. Coleman*, 2016 La. LEXIS 370 (La. Feb. 26, 2016) ("evidence of intellectual disability, without more, is insufficient to show involuntariness.").

Instead of being reserved for the worst offenders,[14] culpable of the most serious offenses,[15] petitioner, who only narrowly missed two separate categorical exemptions from capital punishment, was convicted of an offense that only arguably met the state's eligibility standards. Louisiana's scheme fails to ensure that the death penalty is reserved for the worst offenders.

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[14] Louisiana juries have returned life verdicts in cases involving more culpable offenders. *State v. Gillis* (42-year-old white murderer convicted of killing and dismembering of multiple bodies); *State v. Mickelson* (retrial) (38-year-old white murderer convicted of killing and dismembering elderly victim); *State v. Carley* (31-year-old white murderer, serving life sentence without parole, convicted of killing prison guard during an escape, sentenced to life without parole). Petitioner's Sentence Review Memorandum submissions identified many cases involving comparable defendants who received lesser sentences.

[15] Nationally, in *State v. Holmes*, a Colorado jury sentenced the defendant to life for the movie theater massacre that left twelve dead and injured dozens. Mark Berman, *Aurora Movie Theater Gunman Sentenced to Life In Prison Without Parole for Killing 12 People During Shooting Spree*, Washington Post, 8/7/2015 available at www.washingtonpost.com/news/post-nation/wp/2015/08/07/jury-reaches-decision-on-sentence-in-aurora-movie-theater-shooting-trial/. In *State v. Nichols*, a Georgia defendant received a life sentence for shooting of a judge, and three other victims during an escape attempt. AP, *Multiple Life Terms for Courthouse Killings in Atlanta*, N.Y. TIMES, 12/13/2008, *available at*: www.nytimes.com/2008/12/14/us/14atlanta.html

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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