No. 08-399

IN THE
Supreme Court of the United States

LADERRICK CAMPBELL,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF ON BEHALF OF ACADEMICS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

RORY K. LITTLE
HASTINGS COLLEGE OF LAW (U.C.)
200 McAllister Street
San Francisco, CA 94102
(415) 565-4669

DOUGLAS E. WHITNEY
Counsel of Record
JOSHUA G. HERMAN
ERICA GHOLSON
MCDERMOTT, WILL & EMERY
227 West Monroe Street
Chicago, IL 60606
(312) 372-2000

Attorneys for Amici Curiae

219093

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

MOTION FOR LEAVE TO FILE *AMICI* BRIEF

Amici Stanley Katz, Ronald Sullivan, Matthew Harrington, Charles Ogletree, Randolph Stone, Janet Hoeffel, Chuck McCurdy, Paul Baier and Joseph Thai ("amici") hereby move, pursuant to S. Ct. R. 37.2(b), for leave to file the accompanying *amicus curiae* brief in support of the petition for a writ of certiorari to the Louisiana Supreme Court. Petitioner, Laderrick Campbell, consented to the filing of this brief. Respondent, the State of Louisiana, did not consent.*

As set forth in the accompanying brief under "Statement of Interest," amici consist of nine law professors and historians who teach and write about Sixth Amendment jurisprudence, Constitutional law, English History, Early American History, and Criminal Procedure at eight different universities, and have an interest in the proper interpretation and application of the Sixth Amendment of the United States Constitution. Amici have varying views on whether the original understanding of the Sixth Amendment controls or informs current understanding and practice. Amici are concerned that the Court's current death qualification practice is inconsistent with the jury envisioned by the Framers and the original understanding of the Sixth Amendment. Accordingly, amici respectfully request that the Court grant leave to file the attached *amicus curiae* brief.

---

* In response to a request for consent to the filing of an *amicus curiae* brief, Respondents' counsel stated over the telephone on October 21, 2008 that she respectfully declined to consent to the filing of an amicus brief in support of petition.

Respectfully submitted,

Douglas E. Whitney
Counsel of Record
Joshua G. Herman
Erica Gholson
McDermott, Will & Emery
227 West Monroe Street
Chicago, IL 60606
(312) 372-2000

Rory K. Little
Hastings College of Law (U.C.)
200 McAllister Street
San Francisco, CA 94102
(415) 565-4669

Attorneys for Amici Curiae

October 27, 2008

QUESTION PRESENTED

Whether this Court should reevaluate the "death-qualification" framework established by *Witherspoon* and *Witt* in light of the original purpose of the Sixth Amendment guarantee to an impartial jury?

TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Constitutions

Page

Other Authorities

Cited Authorities

Cited Authorities

STATEMENT OF INTEREST

Amici curiae, academics representing fields including law and history, submit this brief in support of Petitioner and assert that the current practice of excluding potential jurors in capital cases based on their views toward the death penalty is inconsistent with the original understanding of the Sixth Amendment's "impartial jury" right and the historical role of the jury in criminal cases.[1] *Amici* do not take any position on questions presented 1A or 2 in Petitioner's petition for *certiorari*.

The *amici* are:

Paul R. Baier
George M. Armstrong, Jr.
Professor of Law
Louisiana State University

Matthew P. Harrington
Professor of Law
Université de Montréal

Janet C. Hoeffel
Associate Professor of Law
Tulane University

---

1. No counsel for any party to this case authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person or entity other than the *Amici Curiae* or their counsel made such monetary contribution. Counsel of record for Petitioner and Respondent were timely notified of the intent to file this brief and only counsel for Petitioner has consented to its filing; a letter of consent has been filed with the Clerk of the Court.

Stanley N. Katz
Woodrow Wilson School of Public
and International Affairs
Princeton University

Charles W. McCurdy
Professor of History and Law
University of Virginia

Charles J. Ogletree
Jesse Climenko Professor of Law
Harvard University

Ronald S. Sullivan
Clinical Professor of Law
Harvard University

Joseph Thai
Presidential Professor of Law
University of Oklahoma

Randolph N. Stone
Clinical Professor of Law
University of Chicago

SUMMARY OF ARGUMENT

State and federal courts across the country must strike jurors for cause and exclude them from capital juries if their views toward the death penalty are deemed to substantially impair those individuals from ultimately voting to impose a death sentence. The Court's decisions that forged this "death qualification" practice have neither sufficiently explored the origins of the Sixth Amendment's guarantee of an "impartial jury" nor afforded adequate attention to the jury's historical role in criminal cases. As a consequence, the current death qualification practice effectively undermines the intended role of the jury in criminal cases. The time is ripe for the Court to reconsider its jurisprudence governing the exclusion of jurors in capital cases, especially in light of the Court's recent decisions that have reevaluated Sixth Amendment issues through a historical lens. *See*, *e.g.*, *Ring v. Arizona*, 536 U.S. 584, 599 (2002) (overruling *Walton v. Arizona*, 497 U.S. 639 (1990) in part because when the Sixth Amendment was ratified it was the jury that determined which homicide defendants would be subject to capital punishment); *Crawford v. Washington*, 541 U.S. 36, 43 (2004) (rejecting Confrontation Clause analysis from *Roberts v. Ohio*, 448 U.S. 56 (1980)); and *Blakely v. Washington*, 542 U.S. 296, 313-14 (2004) (evaluating the jury's historical role in ruling that the jury must decide facts that elevate a sentence beyond its statutory maximum).

Historical evidence suggests that the drafters of the Sixth Amendment would not have viewed sitting jurors who are deemed to be "substantially impaired" as excludable for not being impartial. Specifically, historical

evidence contemporary with the ratification of the Sixth Amendment shows that a jury could determine both law and fact. The Framers would not have excluded jurors because they expressed conscientious scruples against a law. Moreover, the Framers would have understood a "partial" juror most clearly as one who was biased based on a personal relationship with one of the parties—not based on a certain view of a law. While it would be anachronistic and unwise to recreate in a wholesale manner juries as they existed at the time of the Sixth Amendment's enactment, the Court should, as its recent Sixth Amendment opinions have demonstrated, ensure that the core functions of today's capital jury are consistent with, or at least do not contradict, the functions envisioned by the Framers.

ARGUMENT

I. The Court Should Grant Certiorari To Review The Practice Of Death Qualification Of Juries In Capital Cases Because It Is Inconsistent With The Role The Framers Intended A Jury To Have When Enacting The Sixth Amendment.

The Sixth Amendment guarantees defendants the fundamental right to an "impartial jury." U.S. Const. amend. VI. In many respects the Framers viewed the jury as an essential bulwark against the authority of the State, and before that, the Crown. One way that jurors fulfilled this role was by reviewing both the law and facts in cases. In the colonies at the time of framing, and in the late 18th century generally, jurors could not be excluded from juries based on their beliefs about a law. Thus, the Framers would have found it alien to

exclude jurors on the grounds that their attitude toward a law could substantially impair their discretion. However, this concept—undeniably foreign to the Framers—is precisely what the death qualification process now requires. In terms of decision-making authority, the Framers would have seen little resemblance between the jury they envisioned and guaranteed through the "impartial jury" clause and the death-qualified jury that found Petitioner Laderrick Campbell guilty and sentenced him to death.

The Court should grant *certiorari* in order to determine whether the current death qualification practice is consistent with the jury envisioned by the Framers and the original understanding of the Sixth Amendment.

A. The Court's Cases Giving Rise to the Death Qualification Process Do Not Sufficiently Address the Jury's Historical Role.

Discussion of the historical role of the jury is curiously missing from the Court's seminal death qualification decisions, in stark contrast to the Court's recent Sixth Amendment rulings, which prominently rely on the original understanding of a jury's role in criminal cases. Omitting this discussion is significant, as the death qualification decisions inherently concern fundamental rights set forth in the Sixth Amendment. The result is a doctrine with limited historical fidelity.

Witherspoon v. Illinois, 391 U.S. 510, 519 (1968), set the early standard governing who may be excluded from a capital jury. *See Uttecht v. Brown*, 127 S. Ct. 2218,

2222 (2007) ("*Witherspoon* is not the final word, but it is a necessary starting point."). *Witherspoon* addressed the exclusion of venirepersons who expressed "'conscientious or religious scruples against the infliction of the death penalty' or against its infliction 'in a proper case.'" 391 U.S. at 515. The Court held that the imposition of the death penalty by a jury from which venirepersons were excluded based on their general objections against the death penalty violated the Sixth Amendment. *Id*. at 522. However, the Court observed that jurors could be excluded for cause if they "made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*." *Id.* at 522, n.21. The Court briefly mentioned impartiality in the opinion, but only to emphasize that the exclusion of conscientious objectors deprived the capital defendant of an impartial jury. *See id*. at 518 (with respect to sentencing, the jury "fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments.").

In *Adams v. Texas*, 448 U.S. 38 , 49 (1980), the Court held that a Texas law, which permitted exclusion on grounds broader than *Witherspoon*, was impermissible. In the course of the decision, the Court observed that its line of death qualification rulings "establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance

with his instructions and his oath." *Id.* at 45. In making that observation, the Court did not discuss the historical role of the jury nor did it discuss the likely original understanding of "impartiality."

In *Wainwright v. Witt*, 469 U.S. 412, 434 (1985), the Court adopted the "substantial impairment" test from *Adams* and it described the test as differing markedly from the "unmistakable clarity" standard from *Witherspoon*. The Court streamlined the *Witherspoon* standard and declared that the substantial impairment test was proper in light of the guided discretion regime that governed capital jurors' sentencing decisions. *Id.* at 421. With respect to impartiality, the Court observed that a panel was impartial and therefore did not violate the Sixth and Fourteenth Amendments if it was composed of "jurors who will conscientiously apply the law and find the facts." *Id.* at 423.

The Court echoed this definition of impartiality in *Lockhart v. McCree*, 476 U.S. 162, 177-78 (1986), when it specifically held that removing *Witherspoon*-excludables from the jury pool did not deprive a defendant of his right to an impartial jury. The following year, in *Buchanan v. Kentucky*, 483 U.S. 402, 416-17 (1987), the Court reinforced this decision by extending *Witt* to joint trials. Thus, the genesis of the Court's death qualification jurisprudence has transpired without any meaningful reference to or analysis of historical evidence contemporary with or pre-dating the ratification of the Sixth Amendment, specifically evidence that sheds light on the jury's historical role and the meaning of "impartiality."

B. Historical Evidence Concerning the Origins of the Sixth Amendment and the Role of the Jury in Criminal Cases.

The Sixth Amendment's guarantee that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed" (U.S. Const. amend. VI) enshrined rights that had already become a hallmark of the colonial courtroom. The role of the jury was so widely accepted by the Founders that the right to a jury trial in criminal cases was the only right that appeared in the original Constitution, the Bill of Rights, and every state constitution penned between 1776 and 1787. Arie M. Rubenstein, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 Colum. L. Rev. 959 (2006); Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 Hofstra L. Rev. 377, 424 (1996); Albert W. Alschuler and Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 870 (1994).

At the Constitutional Convention, for instance, the desirability of safeguarding the right to a jury trial was such a uniform point of agreement that Alexander Hamilton wrote:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the [Federalists] regard it as a valuable safeguard

> to liberty, the [Anti-Federalists] represent it as the very palladium of free government.

Federalist 83 (Hamilton), in Clinton Rossiter ed., The Federalist Papers 491, 499 (Penguin 1961). As the Founders created a federal government predicated on a system of checks and balances, they bestowed the power to restrict judicial overreach upon the citizenry in the form of the jury trial. Akhil Reed Amar, *America's Constitution: A Biography* 233 (Random House 2005). The Maryland Farmer defined the jury as the "democratic branch of the judiciary power—more necessary than representatives in the legislature." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 95 (1998). As a result, the early American jury "reflected the Founders' vision that the jury [] serve as a bulwark against government oppression and a check against an unresponsive central government." Chris Kemmitt, *Function over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 U. Mich. J.L. Reform 93, 95 (2006). This view still resonates. *See Blakely v. Washington*, 542 U.S. 296, 306 (2004) ("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.").

This concept of a robust and independent citizen jury can be found throughout the political literature at the time of the founding. According to the Federal Farmer:

> It is essential in every free country, that common people should have a part and a share of influence, in the judicial as well as in the

> legislative department. The trial by jury in the judicial department . . . [has] procured for them, in this country, their true proportion of influence, and the wisest and most fit means of protecting themselves in the community.

Amar, *The Bill of Rights*, at 94 (quoting *Letters from the Federal Farmer* (IV), *reprinted in* 2 *The Complete Anti-Federalist* 249-50 (Herbert Sorting ed. 1981)). *See also United States v. Kandirakis*, 441 F. Supp. 2d 282, 312-313 (D. Mass. 2006).

In the 18th Century, judges and juries often battled with each other over unjust, politically-motivated laws enacted by Parliament. John Hostettler, *Criminal Jury Old and New: Jury Power from Early Times to the Present Day* 82 (Waterside Press 2004). In England, the Waltham Black Act of 1723, passed to prevent the stealing or killing of deer in royal forests, added 50 new capital offenses to the legal code. *Id.* Jurors responded by committing so-called "pious perjury," where they would reduce capital penalties to non-capital sentences by partial verdicts in order to save the lives of the prisoners. *Id.* at 97. Juries in England and America also returned general verdicts of acquittal, rather than specific verdicts on the facts of the case, in order to save a defendant prosecuted under an unjust law. *Sparf v. United States*, 156 U.S. 51, 143 (Gray, J., dissenting) (1895).

Bold local juries that served as a check on authority were prevalent in colonial America. For example, in 1734, the Royal Governor of New York sought to punish John Peter Zenger for publishing criticism about the colonial

administration. Andrew Hamilton represented Zenger at trial. Hamilton argued that jurors "have the right beyond all dispute to determine both the law and the fact" and could conclude that the fact Zenger was telling the truth merited an acquittal, even though the laws at the time stated that truth was not a defense to libel. James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* 78-9 (Stanley N. Katz ed., Harvard Univ. Press 2d ed. 1972); *see also Sparf*, 156 U.S. at 146 (Gray, J., dissenting). The jurors returned a general verdict to acquit Zenger. The trial was famous throughout the century and likely would have provided an important background to the drafting and ratification of the Sixth Amendment.

C. Jurors Could Determine Both Fact and Law When the Sixth Amendment was Ratified.

At the time the Sixth Amendment was ratified, a jury could determine both law and fact in criminal cases. This authority was viewed as a central aspect of the jury's role as a protector against the State and a check on the judiciary. *See* Amar, *America's Constitution*, at 238; Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 Wis. L. Rev. 377, 378 (1999) ("American judges actually asserted an almost plenary power in the jury to decide the law as it saw fit."). Emphasizing these duties of the jury, in 1771 John Adams asserted:

> Whenever a general verdict is found, it assuredly determines both the fact and the law. It was never yet disputed or doubted that a general verdict, given under the direction

> of the court in point of law, was a legal determination of the issue. Therefore, the jury have the power of deciding an issue upon a general verdict. And, if they have, is it not an absurdity to suppose that the law would oblige them to find a verdict according to the direction of the court, against their own opinion, judgment and conscience?

1 Legal Papers of John Adams 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). In *Georgia v. Brailsford*, 3 U.S. 1 (1794), a famous jury trial held before the Court, Chief Justice Jay recognized the "good old rule" that questions of law were for the court and questions of fact were for the jury, but he then undercut that dichotomy by authorizing the jury to determine questions of law. Specifically, Chief Justice Jay instructed the jury that, under the same "good old rule" both law and fact were "within [the jury's] power of decision." *Id*. at 4. Alexander Hamilton emphasized the authority of the jury to determine law and fact when he defended Harry Croswell, who faced trial on charges that he libeled Thomas Jefferson and John Adams. In Croswell's defense, Hamilton recognized that it was the court's duty to direct the jury as to the law, but he forcefully argued that the jury had the authority, indeed the duty, to determine the law:

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

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

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

At the time of the founding, the analogous concept of the power of jury review was approved in America. Amar, *Bill of Rights*, at 98. Jury review—not to be mistaken with jury nullification, which occurs when a jury refuses to apply a law it deems to be unjust—is when a jury refuses to apply a law to a particular defendant because it believes the law to be unconstitutional, much like an appellate judge would employ judicial review. *Id.* In practice, this situation would arise when a defense lawyer would argue unconstitutionality to the jury itself as a basis to acquit. *Id.*

In a famous sedition case in 1800, lawyer William Wirt tried to argue the unconstitutionality of the law at issue to the jurors, but Circuit Justice Samuel Chase prevented him from doing so. *United States v. Callender*, 25 F. Cas. 239, 252-53 (C.C. Va. 1804). The exchange between Wirt and Chase during the trial brings into focus the power our original juries had in deciding the

unconstitutionality of laws. "If I understand you rightly," Chase said, "you offer an argument to the petit jury, to convince them that the . . . Sedition Law[] is contrary to the constitution of the United States and, therefore, void. Now I tell you that this is irregular and inadmissible; it is not competent to the jury to decide on this point . . . we all know that juries have the right to decide the law, as well as fact—and the constitution is the supreme law of the land, which controls all laws which are repugnant to it." *Id.* at 253. To which Wirt replied, "Since, then, the jury have a right to consider the law, and since the constitution is law, the conclusion is certainly syllogistic, that the jury have a right to consider the constitution." *Id.* Justice Chase was subsequently impeached by the House of Representatives, with one of the charges relating directly to his refusal to allow the jury to hear argument and determine questions of law and fact. Amar, *Bill of Rights*, at 98-99.

Over the course of the 19th Century, the jury's power to decide both law and fact and its ability to review laws for constitutionality slowly dwindled due to the rising legal profession and the growing trend of formalism in law. *See* Alschuler and Deiss, 61 U. Chi. L. Rev. at 904-06; Rubenstein, 106 Colum. L. Rev. at 965. After centuries of celebrated use, the jury's power to determine the law was dealt a blow in *Sparf v. United States*, 156 U.S. at 51, which upheld capital convictions and affirmed the lower court's refusal to instruct the jury on manslaughter. In so doing, the majority essentially adhered to the traditional civil jury principle, described by Sir Coke, where the judge determines the law and the jury serves as the fact finder. *See* Alschuler

and Deiss, 61 U. Chi. L. Rev. at 902 (citing 1 Sir Edward Coke, *The First Part of the Institutes of the Laws of England*, Lib 2, Cap 12 § 234 at 155(b) (Hargrave and Butler, 16th ed. 1809)). The decision, which was accompanied by a lengthy dissent from Justices Gray and Shiras, has been met with strong criticism for ignoring the jury's enshrined constitutional role. *See* Donald M. Middlebrooks, *Reviving Thomas Jefferson's Jury: Sparf and Hansen v. United States Reconsidered*, 46 Am. J. Legal Hist. 353, 355 (2004) ("*Sparf* was not only wrong on the facts and wrong on the law, it was and remains an assault on democracy.").

This Court also has expressed caution over the application of *Sparf* in criminal cases. In *United States v. Gaudin*, the Court held that a criminal defendant was denied his right to a jury when the trial court refused to allow the jury to decide whether his false statements were "material." 515 U.S. 506, 507 (1995). The government argued that under *Sparf*, such a question was a matter of law and not the province of the jury. *Id.* at 511-12. However, the Court disagreed, saying that "the jury's responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." *Id.* at 513. The Court also acknowledged that the specific jury power *Sparf* struck down, namely the power to decide issues of pure law, had a concrete basis in American legal history. *Id.* The legacy of *Sparf* is also questioned by a jury's ability to return a general verdict, which was viewed as an exercise of determining the law prior to *Sparf*. *See* Harrington, 1999 Wis. L. Rev. at 380 (quoting 1 Legal Papers of John Adams 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) ("Whenever a

general Verdict is found, it assuredly determines both the Fact and the Law."). Further, Georgia, Maryland, Indiana and Oregon still expressly establish the jury as the finder of find law and fact in criminal cases.[2]

D. The 18th Century Meaning of "Impartiality."

The Court's death qualification decisions rest on the notion that a juror who expresses conscientious scruples toward the death penalty cannot be impartial and should thus be excluded for cause. *Morgan v. Illinois*, 504 U.S. 719, 728 (1992) ("[I]t is clear . . . that a juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause"). However, these decisions fail to address and reconcile the historical meaning of "impartiality" in the jury context. The historical evidence shows that the right to an impartial jury was not originally understood to require that a jury blindly follow the law as it was interpreted and determined by the court. It was not until the end of the nineteenth century that judges began instructing juries that they were bound to follow the law as stated in the charge. *See* Harrington, 1999 Wis. L. Rev. at 380. Indeed, up

---

2. *See* Ga. Const., art. I, § I, para. X1(a) ("In criminal cases . . . the jury shall be the judges of the law and the facts."); Md. Const., Decl. of Rts., art. 23 ("In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."); Ind. Const., art. I, § 19 ("In all criminal cases whatever, the jury shall have the right to determine the law and the facts."); Or. Const., art. I, § 16 ("In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the Court as to the law").

until Justice Story's opinion in *United States v. Battiste*, 24 F. Cas. 1042 (C.C.D. Mass. 1835), federal judges instructed juries that they were *not* bound by the court's opinion. *See* Harrington, 1999 Wis. L. Rev. at 425. Moreover, the original understanding of the impartial jury clause certainly did not require the exclusion of jurors who may have expressed beliefs concerning the law at issue.[3]

By implication, the "impartial jury" guarantee establishes that a partial juror should be excluded from a jury. Historical evidence—not discussed in *Witherspoon* or *Witt*—shows that the Framers would have most clearly identified a "partial" juror as one who had a personal or relational bias toward one of the parties. This understanding would have derived from Blackstone, who noted that:

> Jurors may be challenged propter affectum, for suspicion of bias or partiality. This may either be a principal challenge, or to the favour. A principal challenge is such where the

3. During the debates on Virginia's ratification of the Constitution, George Mason, Patrick Henry and John Marshall engaged in a heated discussion of juror impartiality, yet nowhere did they mention jurors' personal beliefs about the laws before them. The debate centered on whether government employees or jurors selected from outside a defendant's community would be "partial" against the defendant because of their personal backgrounds and biases. Marshall described this concern as whether such partial jurors would be "tools and officers of the government." 3 Jonathan Elliot, *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, at 528, 542, 557-59 (Washington, 1836).

> cause assigned carries with it prima facie evident marks of suspicion, either of malice or favour: as, that a juror is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counselor, steward or attorney, or of the same society or corporation with him: all these are principal causes of challenge; which, if true, cannot be overruled for jurors must be omni exceptione majores.

See William Blackstone, 3 Commentaries *363.[4] Chief Justice Marshall emphasized the historical link between partiality and relational bias in the context of Aaron Burr's trial:

> Why is it that the most distant relative of a party cannot serve upon his jury? Certainly the single circumstance of relationship, taken in itself, unconnected with its consequences, would furnish no objection. The real reason of the rule is, that the law suspects the relative of partiality; suspects his mind to be under a

4. Blackstone specified three other grounds that justified the exclusion of a juror: *propter honoris respectum*, which allowed challenges on the basis of nobility; *propter delictum*, which allowed challenges based on prior convictions; *propter defectum*, which allowed challenges for defects, such as if the juror was an alien or slave. Blackstone, 3 Commentaries *361-364.

> bias, which will prevent his fairly hearing and fairly deciding on the testimony which may be offered to him. The end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose connexion with a party is such as to induce a suspicion of partiality. The relationship may be remote; the person may never have seen the party; he may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice.

United States v. Burr, 25 F. Cas. 49, 50 (C.C.D. Va. 1807). The Court relied on this connection between impartiality and relational bias when it opined that a juror who held a predetermined opinion of a defendant's guilt could be challenged for cause. *Id.* at 51.

However, by treating "impartiality" to mean "indifference" to the law, courts have embraced an interpretation that stands on weak historical footing. In one of the earliest cases to adopt this interpretation to justify the exclusion of a capital juror, *Commonwealth v. Lesher*, 17 Serg. & Rawle 155, 159 (Pa. 1828), the Pennsylvania Supreme Court affirmed the exclusion of a capital juror who volunteered to the court that he had conscientious scruples against the death penalty that would prevent him from finding the defendant guilty if that would result in a death sentence. The majority opinion viewed the exclusion of this juror as a valid exercise of the *propter affectum* challenge. In support the majority cited Sir Coke's statement that "[h]e that

is of a jury must be *liber homo*; that is, not only a free man and not bond, but also one that hath such freedom of mind, that he stands indifferent, as he stands unsworn." *Id.* at 159. But in dissent, Chief Judge Gibson stated that a proper understanding of Sir Coke's statement failed to support the juror's exclusion. *Id.* at 162. He argued that "indifferent," as used by Sir Coke and illustrated in his examples of malice toward persons, meant indifferent as to the parties, not indifferent as to an "abstract proposition." *Id.*

In another case affirming the exclusion of jurors, the court in *State v. Kennedy*, 8 Rob. 590 (La. 1845) adopted the *Lesher* majority's questionable interpretation of "indifferent." *Kennedy* affirmed the exclusion of jurors who voiced conscientious and religious scruples in finding a capital defendant guilty on the ground that they could not "stand indifferent between the State and the accused, upon a trial for a capital crime, when, from his religious belief and conscientious scruples he cannot convict, and is therefore previously determined to acquit." *Id.* at 594-95. As in *Lesher*, the Louisiana Supreme Court's rationale ignores Blackstone's explanation of *propter affectum* and expands the definition of "impartiality." *See* John Quigley, *Exclusion of Death-Scrupled Jurors and International Due Process*, 2 Ohio St. J. Crim. L. 261, 273 (2004) (discussing *Kennedy* and noting that the "court was taking the common law position that a juror who was 'not indifferent' based on some relationship to the parties and expanding it to say that a death-scrupled juror was 'not indifferent.'").

The misapplication of "indifference" is central to the Court's death qualification cases, from *Witherpsoon* to

Uttrecht, which all require jurors to be indifferent to an "abstract proposition" by requiring that they express no significant scruples against the death penalty (*i.e.*, not be "substantially impaired") in order to avoid disqualification. The exclusion of jurors on the grounds that they are not indifferent to the law is inconsistent with the original understanding of "impartial," and is certainly inconsistent with the powers of the jury at time of the founding. At the very least, this Court should examine the historical meaning of the Sixth Amendment's use of the term "impartial jury" because it has yet to conduct such an examination in the death qualification context.

E. The Practice of Death Qualification is Inconsistent with the Historical Role of Jurors and the Framers' Understanding of the Sixth Amendment.

The exclusion of jurors who express reservations about the applicability of the death penalty is an ahistorical doctrine. These jurors would not have been excluded by the Framers unless they fell under one of the four narrow cause challenges iterated by Blackstone. Moreover, the justification for excluding these jurors is based on an inaccurate assumption of the original meaning of "impartiality." Given that the term was incorporated into the Sixth Amendment at a time when jurors routinely had the ability to determine the law in cases strongly suggests that "impartiality" is not tantamount to having no view at all regarding the suitability of a law in a given case.

Witt embodies the incompleteness of the Court's analysis and the failure to account for the historical evidence. In *Witt* the Court relied on its understanding of "impartiality" to justify the shift from the *Witherspoon* "unmistakably clear" standard to the "substantial impairment" standard. The Court held that a state may exclude the venireperson if he "refuses to follow the statutory scheme and truthfully answer the questions put by the trial judge" because that venireperson "will be unable to view the case impartially." 469 U.S. at 422. The Court further justified the substantial impairment test because "it is in accord with traditional reasons for excluding jurors and with the circumstances under which such determinations are made." *Id.* at 423. However, the Court never specifically identified those "traditional reasons." Moreover, it defined impartiality as the ability of jurors to "conscientiously apply the law and find the facts," thus adopting the dichotomy offered by the *Sparf* majority. *Id*. at 852. Had the Court examined 18th and early 19th century sources, such as those discussed above, it would have been apparent that excluding a juror on impartiality grounds required a relational bias, not simply scruples toward a law—which the Framers in many instances embraced.

Notably, Court's recent Sixth Amendment decisions have emphasized the importance of the historical role of the jury and the Framer's deep appreciation of that role. For example, in *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) the Court acknowledged the "historical foundation" supporting its decisions that a defendant has the right to have a jury find him guilty of every element of the charged crime beyond a reasonable doubt. That individual right derived directly from the jury's historical role as a "guard

against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties." *Id.* (quoting 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873)); *accord Blakely*, 542 U.S. at 306-08 ("The jury . . . function[s] as circuitbreaker in the State's machinery of Justice"; "[T]he very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury."). Illustrating the significance of this revitalized emphasis into the Sixth Amendment's origins is the fact that the historical inquiry has led the Court to abandon decisions that failed to honor the historical role of the jury. *See Crawford* 541 U.S. at 53-54 (rejecting Confrontation Clause analysis from *Roberts* in part because "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial").

The return to the Sixth Amendment's historical foundations that underlies decisions including *Ring*, *Crawford* and *Blakely* calls for the Court to reevaluate its death qualification jurisprudence. Indeed, the issue of death qualification should trigger the heightened scrutiny attendant to capital cases. *See California v. Ramos*, 463 U.S. 992, 998-99 (1983) ("[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny"). Therefore, there is a paramount need to reevaluate the rationale and assumptions cited in support of death qualification, particularly the interpretation of "impartiality" and the reliance on that interpretation to exclude jurors who express views that would, when the Sixth Amendment was ratified, have been accepted and even embraced as central to the jury's role.

CONCLUSION

For the reasons stated above, *amici* respectfully submit that the Court should grant the petition for *certiorari*.

Respectfully submitted,

DOUGLAS E. WHITNEY
Counsel of Record
JOSHUA G. HERMAN
ERICA GHOLSON
MCDERMOTT, WILL & EMERY
227 West Monroe Street
Chicago, IL 60606
(312) 372-2000

RORY K. LITTLE
HASTINGS COLLEGE OF LAW (U.C.)
200 McAllister Street
San Francisco, CA 94102
(415) 565-4669

Attorneys for Amici Curiae

October 27, 2008