No. 15-946

IN THE

Supreme Court of the United States

LAMONDRE TUCKER,
Petitioner,

v.

THE STATE OF LOUISIANA,
Respondent.

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

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF AND BRIEF FOR THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE AT HARVARD LAW SCHOOL TO SERVE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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February 29, 2016

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MOTION FOR LEAVE TO FILE AMICUS BRIEF

Amicus curiae The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School ("*Amicus*") hereby moves, pursuant to Sup. 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. Counsel of record for Petitioner and Respondent were timely notified of the intent to file this brief. Counsel for Petitioner responded and consented to this filing. Counsel for Respondent withheld consent and thus this motion became necessary.

As set forth in the accompanying brief's "Statement of Interest," *amicus* continues the unfinished work of Charles Hamilton Houston, the litigator who engineered the multi-year legal strategy that led to the unanimous 1954 Supreme Court decision, *Brown vs. Board of Education*. By facilitating a continuous dialogue between practitioners and scholars, *amicus* works to ensure that legal scholarship resonates outside the academy, and that new legal strategies would be immediately incorporated into the training and practice of lawyers.

Amicus is a hub for scholarship, strategy, socially concerned legal education, and open, engaging and original public forums on matters central to civil rights in the 21st century. As such, *amicus* is well-positioned to offer an informed perspective on the impact that the Court's ruling in this case could have on the contemporary landscape of civil rights and the continuing development of social justice in the United States.

Accordingly, *amicus* respectfully requests that the Court grant leave to file the attached *amicus curiae* brief.

Respectfully submitted,

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INTEREST OF THE *AMICUS CURIAE*[1]

The Charles Hamilton Houston Institute for Race and Justice ("CHHIRJ") at Harvard Law School was founded in September 2005 by Charles Ogletree, Jr., Jesse Climenko Professor of Law at Harvard Law School. CHHIRJ continues the unfinished work of Charles Hamilton Houston, one of the twentieth century's most talented legal scholars and litigators. Houston helped to engineer the multi-year legal strategy that led to the unanimous decision by the United States Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954). Sadly, he died in 1950, at the age of 54, before he could witness his efforts coming to fruition.

Today, CHHIRJ marshals resources to advance Houston's dreams for a more equitable and just society. It brings together students, faculty, practitioners, civil rights and business leaders, community advocates, litigators, and policymakers in a variety of forums, conferences and meetings. CHHIRJ has been focused on, among other things, reforming criminal justice policies and redressing the influence of race on capital punishment. In the present case, CHHIRJ explains the profound historical and contemporary connections between race and the death penalty in the United States, both in Caddo Parish, Louisiana (the jurisdiction in which this case originated), and nationwide.

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[1] Counsel of record received timely notice of *amicus*' intent to file the present brief. Petitioner has consented to the filing of this brief, as reflected on the Court's docket; Respondent has withheld consent to the filing of this brief. No counsel for any party authored the present brief in whole or in part, nor has any party, or its counsel, provided a monetary contribution intended to fund preparation or submission of this brief.

SUMMARY OF ARGUMENT

When this Court ruled that the death penalty was not *per se* unconstitutional in 1976, it did so on the premise that states could implement procedural protections to ensure that the death penalty was administered in a fair, neutral, and reliable manner. Four decades later, that premise has been drawn seriously into question for a number of reasons, not the least of which is the continued influence of race on capital sentencing.

Lamondre Tucker was sentenced to death in Caddo Parish, Louisiana. Caddo Parish is one of a small number of counties that continue to impose new death sentences with any degree of frequency. This, coupled with Caddo Parish's nearly unparalleled history of racially motivated violence, deeply undermines any assertion that Caddo Parish's use of the death penalty is neither cruel nor unusual.

In this regard, Caddo Parish is not entirely alone—though it is increasingly so. Because the death penalty survives primarily in a handful of outlier jurisdictions (in many of which the effect of race in capital cases is demonstrable), and in light of the inseparable connection between race and capital punishment over the course of American history and to the present day, it is no longer possible to claim that the practice serves a valid and necessary penological purpose. Lamondre Tucker's case, and the jurisdiction in which it originated, are exemplary of this fact. *Amicus* respectfully urges this Court to grant Mr. Tucker's petition for certiorari, in order to determine whether the use of capital punishment, both in Caddo Parish and in the other few counties in which it thrives, violates the Eighth Amendment's prohibition of cruel and unusual punishments.

ARGUMENT

I. RACIAL DISPARITIES ARE EVIDENT IN THE ADMINISTRATION OF CAPITAL SENTENCING IN CADDO PARISH AND LOUISIANA.

On June 29, 2011, Lamondre Tucker was sentenced to death at Caddo Parish Courthouse. To scholars and observers of the American death penalty system, the geographic location of Mr. Tucker's capital sentence comes as little surprise. Mr. Tucker is one in a long line of defendants to be sent to death row from 501 Texas Street, Shreveport, Louisiana.

Caddo Parish has long served as one of the most active feeders of death row inmates into Louisiana's criminal justice system. Since 1976, Caddo Parish has sent the second most defendants to death row of any parish in Louisiana, and since 2005, it has accounted for nearly half of the death sentences in the state, despite accounting for only 5% of Louisiana's homicides and population. In the past six years alone, eight of the twelve death sentences in Louisiana have been handed down in Caddo Parish. *See 1 County, 2 Prosecutors Responsible for 3/4 of Recent Louisiana Death Sentences, Amid Charges of Prosecutorial Misconduct,* DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/node/6097 (last visited February 25, 2016). Indeed, with a modest population of about 250,000, Caddo Parish imposes more death sentences per capita than any other parish or county in the United States. Rachel Aviv, *Revenge Killing; Race and the death penalty in a Louisiana parish*, The New Yorker, July 6, 2015.

The disproportionately aggressive use of the death penalty in Caddo Parish may not alone give pause.

Members of this Court have recognized that capital sentencing is an inherently localized undertaking, reflective of local interests that vary from one community to the next. *See Glossip v. Gross*, 135 S. Ct. 2762, 2751-2752 (2015) (Thomas, J., concurring). What is striking, however, is the racial makeup of those that Caddo Parish has sent to death row, and the racial makeup of their victims. Of the twenty death sentences imposed in the modern era by Caddo Parish juries, fifteen were imposed on black defendants. *See* G. Ben Cohen, *McCleskey's Omission: The Racial Geography of Retribution*, 10 Ohio St. J. Crim. L. 65, 79 (2012). Of those fifteen, ten were charged with the murder of a white victim. *See id.* Conversely, no white defendant has ever been sentenced to death in Caddo Parish for killing a black victim. *See id.* Taken at face value, these numbers suggest that the badges of the Confederacy adorning the courthouse entrance in Caddo Parish signify more than stale remnants of a bygone era. The raw statistics invite analysis as to whether "Bloody Caddo," steeped in an unrivaled history of racially motivated lynchings, has failed to shake itself loose of the vestiges of a discriminatory past. *See id*; Part IV *infra*.

Given the outsized frequency with which Caddo Parish imposes death sentences relative to most other Louisiana parishes, it follows logically that Louisiana's death row is characterized by similar race-of-the-defendant and race-of-the-victim disparities. Louisiana is home to the highest percentage of African Americans on death row of any state with at least ten death row inmates. *See* Robert J. Smith & Bidish Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 La. L. Rev. 361, 367 (2012). The odds of a death sentence in Louisiana are 97% higher for defendants

charged with killing white victims. *See id.* Accordingly, black capital defendants in Louisiana are far more likely to be sentenced to death as a result of killing a white victim than killing a black victim. *See id.*

II. RACIAL DISPARITIES IN CAPITAL SENTENCING ARE NOT UNIQUE TO CADDO PARISH OR LOUISIANA.

Just as Caddo Parish disproportionately drives capital sentencing in Louisiana, only a handful of jurisdictions impose the death penalty with any frequency across the country, and therefore drive capital sentencing nationally.

Examining only state- or nation-wide data, however, masks the full impact of race upon the administration of capital sentencing in the United States. "A county focus is [more] appropriate because it is often the level at which charging decisions are made, venires are confected, publicity generated, and the interplay of race exits." *Id.* at 87. Of the 3,141 counties in the country, only 29 are responsible for roughly 44% of the death sentences imposed between 2004 and 2009. *Id.* During that period, 90% of the counties in the United States did not impose a single death sentence, 99% did not carry out a single execution, and only 1% imposed at least one new death sentence per year. *Id.* Even more recently, from 2012 to 2015, out of 274 death sentences imposed throughout the United States, 10 counties were responsible for 87 of them.[2]

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[2] These counties are: Los Angeles County, CA; Riverside County, CA; Maricopa County, AZ; Duval County, FL; Clark County, NV; Dallas County, TX; Harris County, TX; Mobile County, AL; Hillsborough, FL; and Orange County, CA. *See*

Just as in Caddo Parish, the use of capital punishment in the most active death penalty counties is infected by race. For example, in Harris County, Texas—which alone has carried out more executions since 1976 than any state other than Texas—race of the defendant and race of the victim have been found to be pivotal in the determination of which defendants live and which die. *See* Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 Hous. L. Rev. 807, 811 (2008). Professor Scott Phillips, when controlling for a number of factors—including defendant social characteristics, victim social characteristics, whether counsel was appointed or retained, and legal dimension of the case—concluded that in Harris County, "death was more likely to be imposed against black defendants than white defendants, and death was more likely to be imposed on behalf of white victims than black victims." *Id.* at 812. Indeed, since 2004, fifteen of eighteen defendants to be sentenced to death in Harris County were African American. *See* Lise Olsen, *Harris death penalties show racial pattern*, The Houston Chronicle, November 14, 2011; *see also* Death Penalty Sentencing Information, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/death-penalty-sentencing-information (last visited February 19, 2016).

Similarly, in East Baton Rouge Parish, the only parish in Louisiana to have imposed more death sentences than Caddo Parish in the modern era, the relationship of race to the administration of capital sentencing is apparent. As a preliminary matter, all sixteen individuals currently on death row that were sentenced in East Baton Rouge are black. Glenn L.

DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/race-and-death-penalty (last visited February 19, 2015).

Pierce & Michael L. Radelet, *Death Sentencing in East Baton Rouge Parish, 1990-2009*, 71 L.A. L. Rev. 647, 650, 657-58 (2011). Out of a total of 191 cases in the parish between 1990 and 2008 that ended with a homicide conviction, 23 resulted in death sentences. *Id.* at 657-58. After analyzing those convictions and death sentences, Glenn Pierce and Michael Radelet concluded that a statistically significant relationship exists between the imposition of a death sentence and the combination of the race of the defendant and race of the victim: "30% of the blacks convicted of killing whites were sentenced to death, followed by 12% of whites convicted of killing whites and 8.3% of the blacks convicted of killing blacks," while "[n]one of the three whites convicted of killing blacks was sentenced to death." *Id.* at 661. The import is clear: "[i]nter-racial homicides with white victims [are] far more likely to end with a death sentence than intra-racial homicides." *Id.* Similar findings have been made in connection with local communities in Arkansas and Missouri. *See* Cohen, *supra*, at 90.

III. THOSE WHO DECIDE WHETHER TO SEEK AND IMPOSE THE DEATH PENALTY HARBOR IMPLICIT AND EXPLICIT RACIAL BIAS THAT CAUSE THE DEATH PENALTY TO BE ADMINISTERED ARBITRARILY.

The common thread that runs through the outlier counties discussed above is the higher degree of both implicit and explicit racial bias exhibited in those who decide whether or not to seek and impose the death penalty.

A. The racial makeup of a capital jury has a direct effect on its ability to deliver an impartial verdict.

As shown in Part I, death sentencing rates in the United States are disproportionately higher for black offenders than white offenders, especially in outlier counties such as Caddo Parish. Even when controlling for factors such as a higher crime rate among black persons, evidence shows that the disproportional sentencing rates is due to the underrepresentation of black persons on capital juries. In Louisiana, even the small number of black persons who do succeed in sitting on a capital jury can be excluded easily from the decision-making process because Louisiana is one of only two jurisdictions in the country that allows less-than-unanimous verdicts in criminal cases. *See* La. Code Crim. Proc. art. 782 (2009); Or. Rev. Stat. Ann. § 136.450 (Westlaw 2011). Forty-eight states and the federal system require criminal juries to render unanimous jury verdicts.

The racial makeup of the jury is crucial to the administration of justice. Robert J. Smith and G. Ben Cohen have observed that "white jurors are more likely to magnify the humanity of white victims and marginalize the humanity of black perpetrators." ROBERT J. SMITH & G. BEN COHEN, IMPLICIT RACIAL BIAS ACROSS THE LAW 240 (Justin D. Levinson & Robert J. Smith eds., 2012). The ability of a juror to empathize with either the victim or the defendant plays a large role in whether a jury fairly weighs the evidence in a capital case. *See* Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 Mich. St. L. Rev. 573, 584 (2011).

The inability of white jurors to empathize with black defendants, coupled with the prevalence of implicit racial bias, discussed *infra*, do much to explain racial discrepancies in capital sentencing.

B. Black citizens are systematically excluded from jury service in capital cases due to the practice of "death qualification."

The practice of death qualification exacerbates the issues associated with racial discrepancies on capital juries. To be eligible to sit on a capital jury, a prospective juror must be willing to consider sentencing a defendant to both life without the possibility of parole and the death penalty. *See Uttecht v. Brown*, 551 U.S. 1, 9 (2007). A juror who meets this criterion is "death qualified." Death qualification—originally meant to make capital sentencing a neutral process—has had the opposite effect in practice. *See* Andrew E. Taslitz, *Racial Threat Versus Racial Empathy in Sentencing—Capital and Otherwise*, 41 Am. J. Crim. L. 1, 11 (2013).

Studies have shown that the practice of juror death qualification results in juries that are disproportionately white and male when compared to the general population. *See id.* at 10. Black citizens are more likely to be anti-death penalty regardless of the particular capital case, and therefore are excluded disproportionately through the death qualification process. That black citizens tend to disapprove of capital punishment more than white citizens "is not accidental or random: African Americans who remember slavery and lynching, or who live in areas where racial profiling and police intimidation are still the norms, are often reticent to impose a death sentence." Smith and Sarma, *supra*, at 399.

In 2014, an empirical study of 445 jury-eligible citizens in six leading death penalty states found that:

> (1) women and non-white jurors were less likely to be death-qualified;
>
> (2) white jurors were more racially biased than non-white jurors;
>
> (3) death-qualified jurors possess moderate to strong implicit racial biases;
>
> (4) death-qualified jurors held greater self-reported (explicit) and implicit racial bias than non-death-qualified jurors; and
>
> (5) racial bias, implicit and explicit, predicts death verdicts.

Justin D. Levinson, Robert J. Smith, & Danielle M. Young, *Devaluating Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death-Penalty States*, 89 N.Y.U. L. Rev. 513, 557-59 (May 2014). The results of the study show that death-qualification actually removes the least racially-biased jurors from juries. *Id.* at 519.

C. Use of peremptory strikes also serves to exclude black persons from serving on capital juries.

Even if a black potential juror is deemed "death-qualified," he or she is often nonetheless excluded from the jury pool by prosecutors' use of peremptory strikes. In Caddo Parish, this is especially true, and there is evidence that peremptory strikes are being used purposefully to exclude black citizens from juries. A study published in August 2015 of 332 trials in Caddo Parish found that "over the course of a ten year period,

Caddo parish prosecutors exercised peremptory challenges against black prospective jurors at more than three times the rate at which they exercised peremptory challenges against white prospective jurors." U. Noye, *Blackstrikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Caddo Parish District Attorney's office*, REPRIEVE AUSTRALIA, Aug. 2015. Caddo Parish has a 44.2% black adult population, thus one would expect an average of 5.3 black jurors per twelve person jury. However, in the 224 such juries included in the study, an average of only 3.86 jurors per jury were black. *Id.* at 10.

The rampant use of peremptory strikes to exclude black persons from juries exists in other outlier counties as well. In St. Louis county, the home of the now-infamous Ferguson, Missouri, prosecutors invented the "Postman Gambit" as a way to eliminate black jurors. "Postal workers in St. Louis County are disproportionately African-American, and the office used the "Postman Gambit" as a pretext to strike as many black jurors as possible."[3] Other counties that have used peremptory strikes as pretext for racial discrimination include *inter alia*: Dallas County,[4] Clark County, and Houston County, Alabama.[5]

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[3] Letter from current and former Missouri state and federal elected officials to The Honorable Jeremiah W. "Jay" Nixon, Governor of Missouri (April 2, 2015), *available at* http://www.aclu-mo.org/files/6414/2799/5003/April22015_Letter_to_Gov_Nixon.pdf.

[4] *See, e.g.*, *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005).

[5] From 2005 to 2009, in cases where the death penalty has been imposed, prosecutors in Houston County, Alabama, have used peremptory strikes to remove 80% of the African Americans qualified for jury service. Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* (Aug.

D. Community members of the outlier counties harbor implicit and explicit racial bias due to a long-standing culture of racial tension.

The outlier counties are fraught with historical racism that continues to this day. Relics of historical racism in these counties communicate to would-be jurors and other participants that due process guarantees such as the presumption of innocence and the right to an impartial trial are subject to a heritage of discrimination.

In Caddo Parish, for example, the Confederate flag flew in front of the county courthouse for decades and was only taken down a few years ago. The Confederate flag was raised before the Caddo Parish courthouse in 1951 when the flag had been appropriated by the Ku Klux Klan as a form of intimidation meant to remind black persons of the practice of lynching.

The Confederate flag was only removed when Carl Staples, a prospective juror, had the courage to stand up during voir dire and declare what so many others no doubt felt before him:

> [The flag is] a symbol of one of the most, to me, one of the most heinous crimes ever committed to another member of the human race and I just don't see how you could say . . . you're here for justice and then again you continue to overlook this great injustice by continuing to fly this flag which continues to

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2010), *available at* http://www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf.

> . . . put salt in the wounds . . . of people of color. I don't buy it. I don't buy it.

Cecelia Trenticosta & William C. Collins, *Death and Dixie: How the Courthouse Confederate Flag Influences Capital Cases in Louisiana*, 27 Harv. J. on Racial & Ethnic Just. 125, 156 (2011).

The Confederate flag was not the only symbol of reverence towards an era of government-sanctioned white supremacy that existed on the Caddo Parish courthouse grounds. Shreveport Confederate Monument, commissioned by the Caddo Parish Police Jury in 1903, still sits in front of the courthouse, looking down upon all who enter.[6]

Caddo Parish is far from alone. The culture of racial tension that influences the administration of criminal justice is the tie that binds the outlier counties. Racial strife can be seen in major death penalty counties

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[6] Photo credit: Henrietta Wildsmith, The Times, http://www.shreveporttimes.com/story/news/local/2015/07/05/fate-courthouses-confederate-monument-limbo/ 29728785/.

outside of the deep South. For example, California has had a long history of racial discrimination and violence. Police brutality towards minorities has been a grave problem in Los Angeles for decades, long before the beating of Rodney King in 1991. *See* REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT (1991), at 70.

As with slavery and Jim Crow laws, subsequent reforms may have decreased the amount of overt state-sanctioned racial discrimination, but their legacy continues to affect race relations today.

IV. CAPITAL PUNISHMENT HAS A DEEP AND INEXTRICABLE HISTORICAL CONNECTION WITH RACIALLY MOTIVATED VIOLENCE.

It is impossible to separate racially motivated violence from capital punishment in United States history. Reviewing the development of this relationship over time demonstrates that the influence of race on our nation's use of the death penalty can be seen not only in modern capital sentencing statistics, but also in the fundamental rationales that underpin the practice.

A. There is a longstanding and mutually reinforcing relationship between racial discrimination, retribution, and the death penalty.

There has been no time in our nation's history in which the use of capital punishment was not racially inflected.

Indeed, this was true even before our formal history as a nation began. In seventeenth-century colonial America (as in contemporary America) the per capita

execution rate of those of African descent significantly exceeded that of whites. *See* Carol S. Steiker & Jordan R. Steiker, *The American Death Penalty and the (In)visibility of Race*, 82 U. Chi. L. Rev. 243, 245 (2015). And while the rate of execution of whites generally declined over the course of the late seventeenth century, there was no such pattern in the black execution rate. *See id.*

The influence of race on capital punishment was even more apparent in the eighteenth and nineteenth centuries, and it manifested itself in various ways. For one, the disparities in the execution rates became even more pointed: while in the seventeenth century most executions took place in New England and most of those executed were white, in the eighteenth century the majority of executions occurred in the South and the majority of those executed were black. *See id.* Indeed, many of the condemned were slaves. North Carolina, to take one example, executed more slaves between 1748 and 1772—at least one hundred—than it executed whites in its entire history as a colony, which amounted to more than a century. *See* Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, *in From Lynch Mobs to the Killing State: Race and the Death Penalty in America* 168 (Charles J. Ogletree, Jr., ed., 2006).

The offenses for which a defendant could receive the death penalty varied dramatically based on race in the pre-Civil War period. In Virginia, free African Americans (but not whites) were eligible for the death penalty for rape, attempted rape, kidnapping of a woman, and aggravated assault; slaves were eligible for the death penalty for any offense for which a free person could receive a prison term of three years or more. *See id.* at 168.

There was a similar disparity when it came to the method of execution, with African Americans (free or enslaved) far more likely than whites to be subjected to extreme or torturous methods of execution. *See* Steiker & Steiker, *supra*, at 246. These often-public modes of execution, as well as other spectacular practices such as public display of the corpse of the condemned, "were often imposed on black defendants . . . as a means of reinforcing the racial hierarchy." Banner, *supra*, at 174.

This notion of racial subjugation through violent spectacle continued in the form of lynch-mob violence for nearly a century after the Civil War, predominantly (though not exclusively) in the South. Nearly 5,000 people were killed by lynch mobs in the United States between 1882 and 1968. Of these, roughly three quarters were African American. *See* Charles J. Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 Or. L. Rev. 15, 21 (2002). And although these lynch-mob murders were by definition extrajudicial killings, the line between the legal and the extralegal in this context was blurry in several respects.

First, lynchings themselves were often carried out with the support or even active participation of police officers and other community elites, and in many instances the mobs conducted "trials" in which the victim had no chance of being found innocent and after which the mob rendered a verdict and selected the method of execution. *See* Timothy V. Kaufman-Osborne, *Capital Punishment as Legal Lynching?*, *in From Lynch Mobs to the Killing State: Race and the Death Penalty in America* 58-59 (Charles J. Ogletree, Jr., ed., 2006).

Second, the frequency of lynch-mob murders in many states informed contemporary debates surrounding state use of capital punishment. Proponents of the death penalty in this era frequently justified its continued existence by arguing that whites would demand more lynching of African Americans without it. *See* Steiker & Steiker, *supra*, at 655.

The most significant blurring of the line, however, came as lynch-mob murders declined during the first half of the twentieth century and a practice now referred to as "legal lynching" took their place. "Legal lynching" was a judicial analogue of extrajudicial lynch-mob killings: a product of reforms that resulted in immediate trials and instant executions, where "whites deferred to the courts but remained ready to return to mob justice if the results were not favorable to them." Michael Brazao, *The Death Penalty in America: Riding the Trojan Horse of the Civil War*, 4 Mod. Am. 26, 30 (2008). (On some occasions, such proceedings were nearly identical to the lynchings that they purportedly replaced, as in one 1906 Kentucky case involving a black defendant accused of raping a white woman, in which the time that elapsed between the swearing in of the jury and the execution of the defendant was approximately fifty minutes.) *See* Banner, *supra*, at 180.

During this period, racial disparities in capital punishment were manifest on a broad scale. 54% of citizens executed between 1930 and 1967 were black, despite the fact that black persons never comprised more than 11% of the general population. *See* Brazao, *supra*, at 30. Three out of five executions in that period took place in southern states. Of those, 90% of those executed for rape, 100% of those executed for burglary,

and 83% of those executed for armed robbery were black.

Thus, even while spectacle lynching became increasingly unnecessary for proponents of white supremacy in the South (because they could look to judicial processes that bore the imprimatur of the state to serve the same purpose), the very real prospect of lynch-mob retribution continued to influence the administration of capital punishment in these states from the periphery.

B. The legacy of retributive racial violence continues to cast a shadow over the administration of capital punishment today.

Racial prejudice has influenced capital punishment from the days of public slave executions to the spectacular mob violence of the Reconstruction era to the more covert "legal lynchings" of the twentieth century. What connects these forms of racial violence to each other—and what connects all of them to the racial disparities present in today's administration of capital punishment—is the principle of retribution.

Retribution as a penological theory is what sustains the constitutionality of capital punishment today. See *Gregg v. Georgia*, 428 U.S. 153, 183, 185 (1976). But it is impossible to separate retribution from race when it comes to capital punishment. For centuries, capital punishment has existed in the shadow of mob violence. In fact, in the early twentieth century it was not uncommon for southern law enforcement officers to stave off lynchings by promising the public a quick conviction and execution, or for prosecutors to persuade juries to convict by arguing that doing so would discourage lynch mobs in the future. *See*

Michael J. Klarman, *Scottsboro*, 93 Marq. L. Rev. 379, 382 (2009).

In light of the longstanding connection between mob retribution and capital punishment, it is all the more significant that the jurisdictions with the most lynch-mob violence in their histories are also those that impose the death penalty most liberally today, with the link even stronger when only death sentences for black defendants are considered. *See* David Jacobs, Jason T. Carmichael and Stephanie L. Kent, Vigilantism, *Current Racial Threat, and Death Sentences*, 70 American Sociological Review, Vol. 70, No. 4 (Aug., 2005) at 656-677. Caddo Parish is a primary example of this phenomenon, having both the second-highest amount of historical lynch-mob violence of any county, and one of the highest death-sentence rates today. Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror—Supplement: Lynchings by County* (2015), *available at* http://www.eji.org/files/Lynching_in_America_Supplement_by_County_2nd_Edition.pdf. Nor is there any mistaking the retributive character of Caddo Parish's death penalty in the modern era: in 2014, then-Caddo Parish District Attorney Dale Cox commented in an interview that while he did not believe capital punishment works as a deterrent, its use as an instrument of revenge "brings to us a visceral satisfaction." Aviv, *supra*. Cox elaborated: "Over time, I have come to the position that revenge is important for society as a whole. We have certain rules that you are expected to abide by, and when you don't abide by them you have forfeited your right to live among us." *Id*.

V. IN LIGHT OF BOTH PAST AND PRESENT CONNECTIONS TO RACIAL DISCRIMINATION, CAPITAL PUNISHMENT CANNOT BE SAID TO SERVE A LEGITIMATE PENOLOGICAL PURPOSE.

When this Court held that the death penalty was not per se unconstitutional in *Gregg*, it assumed that states could impose procedural safeguards that would guarantee the reliable and nondiscriminatory imposition of death sentences. *See Gregg,* 428 U.S. at 206-07 (highlighting features of Georgia's capital punishment regime that could reduce the likelihood of a defendant's being sentenced to death "capriciously and arbitrarily").

As explained above, capital punishment in the United States has an inseparable connection to racial violence, and is still administered in a racially tainted fashion in the jurisdictions where it is most common. The fact that race continues to have such a pointed influence on capital punishment where it still exists—indeed, where it thrives—nearly forty years later demonstrates that the safeguarding of capital punishment's reliability contemplated in *Gregg* has not happened. Courts and legislatures can take and have taken measures ranging from removing a Confederate flag from a courthouse to establishing a judicial test for racially discriminatory striking of jurors, but they all amount to treating the symptoms rather than the disease.

A little more than a decade after *Gregg*, this Court held in *McCleskey v. Kemp* that evidence of racial disparity in the administration of a state's capital punishment regime would not be sufficient, by itself, to invalidate the imposition of the death penalty in an individual case. 481 U.S. 279, 312-13 (1987). The

factors that the *McCleskey* Court cited as justifying this conclusion—namely, "the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants"—have not, in light of an additional 25 years of data, proven to be as much of a guarantee against capriciousness and arbitrariness as the Court predicted they would be. *Id.* at 313.

Central to the issue of the constitutionality of capital punishment is the question of whether it is "necessary to accomplish the legitimate legislative purposes in punishment, or whether a less severe penalty—life imprisonment—would do as well." *Gregg*, 428 U.S. at 233 (Marshall, J., dissenting). In *Gregg*, this Court sustained the death penalty's constitutionality under the theories of retributive justice and (more reservedly) deterrence. *See id.* at 183-87. However justified it was in 1976, the notion that the death penalty is necessary for either of these purposes is dramatically weakened when one takes a hard look at how the death penalty is administered today: handed down in a shrinking number of jurisdictions; still subject to the racial disparities that have characterized it since the colonial era; and by and large imposed the most frequently in the jurisdictions that also participated the most enthusiastically in the racial violence that is inseparably linked to the use of the death penalty through centuries of American history. If capital punishment were in any way necessary to accomplish either of those objectives, the penological landscape would look far different from the balkanization that we see today.

In view of these considerations, the death penalty in the United States is irreparably unconstitutional. The "procedural safeguards" contemplated by the *McCleskey* Court have proven insufficient to ensure fairness and neutrality in the administration of capital punishment in the United States, but even the statistical approach that *McCleskey* rejected would have fallen short. *See* Cohen, *supra*, at 69-70 (arguing that the statistical approach rejected in *McCleskey* would have been counterproductive, since it would have allowed for "affirmative-action death sentences," increased arbitrariness, and failed to recognize that the problems of race and retribution in capital punishment tend to arise at a local rather than state level). The inextricable connection between racial violence and capital punishment that predates our nation's formal history renders the practice inherently suspect; that race continues to play a prominent role in capital sentencing today compels the conclusion that the constitutional error cannot be cured.

CONCLUSION

Even before the United States of America came into being as a sovereign nation, race played an invidious role in the administration of capital punishment. To this day, it still plays this role, despite over forty years of efforts to eliminate the influence of race from the minds of those who decide to seek and then impose the ultimate punishment. The explicit and implicit racial bias of jurors and prosecutors—especially in counties such as Caddo Parish—will continue to impose the death penalty in an arbitrary, and therefore cruel and unusual, manner. The Court should grant Mr. Lamondre Tucker's petition for writ of certiorari in order to review the constitutionality of the death penalty.

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