No. 16-656

In The

Supreme Court of the United States

MARCUS REED,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Louisiana

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Petitioner seeks a ruling from this Honorable Court that the death penalty is a cruel and unusual punishment in contravention of the Eighth and Fourteenth Amendments without regard to the heinous nature of the offense, the depravity of the offender, or the penological purposes that may be served by its use. Contrary to Petitioner's main argument, there is no national consensus against the death penalty that would support its abandonment by this Court. Relying upon unproven assertions that society no longer views the death penalty as acceptable, Petitioner points to a reduction in imposed death sentences as evidence supporting his conclusion, yet at the same time, alleges that the death penalty is imposed in an overly wide swath of cases. In addition to its inherent contradictions, this position ignores the obvious effects of the capital punishment abolition movement on the prosecution of these cases – the burdens on a prosecutor's office that seeks a death sentence have never been greater. Excessive requests for funds by defense teams, extensive and baseless pre-trial motion practice by the same, increasingly complicated jurisprudential guidelines for conducting the trial, and post-conviction review processes that drag on for decades have made prosecutors more selective than ever about seeking a death sentence. Petitioner conflates prosecutorial discretion with societal squeamishness towards the death penalty, a position that is not borne out by any credible evidence. In this case, one of the worst offenders has received a just and well-deserved sentence. Marcus

Reed brutally murdered three young men – one, still a child at age thirteen – because he suspected one of them had stolen from him. The penological considerations in this case fully warrant a death sentence.

STATEMENT OF THE CASE

Petitioner Marcus Reed was a well-known drug dealer in the Keatchie-Marshall Road area of Caddo Parish, Louisiana. On August 16, 2010, someone burglarized his home and stole an Xbox gaming system, two amplifiers, and his marijuana inventory. Angry that he had paying customers at his house and no product to sell, Reed made a series of phone calls to ascertain the thief's identity. Petitioner ultimately identified the burglar, and he called him under the pretense of having a package of marijuana for sale (R. pp. 4296; 4298). When the telephone conversation ended, friend and customer Bridget Garland overhead Reed say that whenever Jarquis arrived, he was "going to kill them and whoever was with them" (R. pp. 4603-4604). Reed then put on a pair of latex gloves, armed himself with an assault rifle, and hid in some nearby woods (R. pp. 4298-4299; 4604).

Approximately 30 minutes later, Jarquis Adams, along with his brothers, 20-year-old Jeremiah Adams and 13-year-old Gene Adams, arrived at Reed's house (R. p. 4319). Daniel Jackson and Shannon Garland were present when the brothers arrived and witnessed the harrowing events that followed. According to these

eyewitnesses, Jarquis Adams exited the car and could barely ask, "where Marc at" before Reed emerged from the woods and fired his assault rifle (R. p. 4302). As the unarmed victim fell to the ground, Petitioner told him, "I got you" (R. pp. 4302-4303; 4384).

Reed then circled the car, all the while continuously firing his weapon into the vehicle "like a video game" (R. pp. 4303-4304). After peppering the car with gunfire, Petitioner returned to Jarquis Adams and fired another round into the lifeless victim (R. p. 4305).

When the gunfire ceased, Reed pointed his gun toward Shannon Garland and Daniel Jackson and told them to hide the bodies or they "were going to be next" (R. pp. 4306-4308). The men placed Jarquis' body in the trunk of the vehicle, but Jeremiah Adams was too heavy to move (R. pp. 4306-4307). Petitioner then walked inside his house, at which time Shannon and Daniel ran from the scene (R. p. 4308). Petitioner ultimately fled the area with the help of his cousin, Brian Wafer. Wafer recalled that Reed "acted like he was excited," and that he said, "the streets keep calling me back in" (R. pp. 4479-4480).

Officers arrived on scene to find a stream of blood and gasoline pouring down the driveway (R. p. 4251). They discovered the body of Jarquis Adams in the trunk of the bullet-riddled vehicle (R. p. 4255). Jarquis suffered two gunshot wounds – one at close range to his forehead and one to his chest (R. p. 4785). Jeremiah Adams was shot seven times, and his body was partially outside of the vehicle as if someone had tried to

pull him from the car (R. pp. 4255; 4813-4814). Thirteen-year-old Gene Adams was slumped over in the backseat of the car (R. p. 4255). He sustained as many as five gunshot wounds (R. p. 4973). Officers recovered one of Gene's fingers, which had been severed during the onslaught of gunfire, from the rear dash of the vehicle (R. pp. 4255; 4272). Officers located the murder weapon underneath the front porch of Petitioner's residence and subsequent firearm identification analysis matched it to the fired shell casings and bullet fragments recovered from the crime scene and victims' bodies (R. pp. 4691; 4741). DNA taken from blood stains on the underwear that Petitioner was wearing at the time of his arrest certainly came from Jeremiah Adams, with the determination that the probability that the DNA came from a randomly selected contributor other than Jeremiah Adams was one in 533 quadrillion (Pet. App. p. 13 A).

Petitioner was ultimately implicated in the murders and he was indicted for three counts of first degree murder in violation of Louisiana Revised Statute 14:30. As he awaited trial, he confessed committing the homicides to fellow inmate Terry Matthews. Reed explained that he hid in the woods and shot three people with an SK rifle (R. pp. 4659; 4661). Petitioner told Matthews that officers found blood on his shoe because he "went back and double-tapped them [the victims' and [he] got too close to the vehicle" (R. p. 4657). According to Matthews' understanding of the triple homicide, "the impression I got was over the – something to do with some weed and an Xbox. It was more of a got

disrespected type deal. And just said he laid and waited and ran out and ambushed them" (R. p. 4461).

During his trial, Reed's attorneys argued that the shootings were done in self defense. The jury rejected this claim and quickly found him guilty as charged of three counts of first degree murder. During the penalty phase of Petitioner's trial, the State proved that Reed was a convicted felon. Specifically, the defendant had previously been convicted of one count of Illegal Use of a Weapon. Testimony was taken from the detective that investigated that offense and the jury was informed that Reed used an assault rifle during that incident as well. The prosecution argued the statutory aggravating circumstances that the defendant knowingly created a risk of death or great bodily harm to more than one person. The jury found the same aggravating circumstance based upon the shooting deaths of all three Adams brothers. The jury rejected the defense's mitigation evidence and pleas for mercy.

Following denial of his post-trial motions, Petitioner's counsel took an appeal to the Supreme Court of Louisiana alleging fifty assignments of error. *State v. Marcus Reed*, 2014-1980 (La. 9/7/2016), 200 So.3d 291, rehearing granted in part. (La. 10/19/2016), ___ So.3d ___, 2016 WL 6123574. After consideration of the briefs and oral arguments, that court affirmed Petitioner's conviction and sentence. The issue of the constitutionality of Louisiana's death penalty statute was the last assignment of error addressed in the unpublished Appendix to the court's Opinion. On this

issue, the Supreme Court of Louisiana declined to provide relief, stating

> Defendant urges the state's death penalty statute is unconstitutional as it is arbitrarily and capriciously applied. As an initial matter, it is well-settled that a constitutional challenge may not be considered by an appellate court unless it was properly pleaded and raised in the trial court below. *Vallo v. Gayle Oil Co.*, 94-1238, p. 8 (La. 11/30/94), 646 So.2d 859, 864-65. Because defendant failed to raise this issue before the trial court, the issue is not properly before us. Nevertheless, we find this argument is meritless. Louisiana's bifurcated capital sentencing scheme, modeled after the Georgia statute upheld in *Gregg v. Georgia*, 428 U.S. 153, 187, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976), passes constitutional muster under the Eighth Amendment by narrowing the substantive definition of first-degree murder to restrict the class of death-eligible cases and by further providing for a sentencing hearing in which the jury may make a binding decision that the defendant receive a sentence of life imprisonment at hard labor. *State v. Welcome*, 458 So.2d 1235, 1251-52 (La. 1983).
>
> Petitioner's Appendix, p. 142 A-143 A.

The instant petition for writ of certiorari followed.

ARGUMENT

In Louisiana, a death sentence is only possible after two unanimous jury verdicts, the first for a conviction for the highest of five grades of homicide and the second for the sentence. Trying a criminal defendant for a capital murder is an undertaking that the State does not take lightly; many factors must be weighed in consideration. One factor is the balancing test that every prosecutor involved in capital work must utilize – weighing the circumstances of the offense, the culpability of the offender, the wishes of the victim's family, and the possibilities of both rehabilitation and recidivism. Another is the considerable expense and significantly increased burden on staff resources associated with a capital case. Capital trials also require an ever-increasing degree of caution and restraint on the part of the prosecutor due to jurisprudential restrictions, both present and anticipated. The deliberation required before seeking the death penalty is ironically also part of Petitioner's complaint, as he misrepresents prosecutorial discretion as a lack of support for the death penalty. Contrary to Petitioner's allegations, the people of the State of Louisiana have not retreated from the use of the death penalty when applied to the worst of offenders.

Petitioner's contention that the imposition of the death penalty is characterized by overwhelmed defense lawyers is a description of the Louisiana capital defense system that is unrecognizable to those who actually work with it on an everyday basis. In recent years the indigent defense system for capital cases has

been funded separately from, and much more lavishly than, the indigent defense system for non-capital defendants. The highly-organized capital defense industry provides numerous lawyers, investigators, and ample expert witness funding for each capital client. According to statements attributed to Jay Dixon, the Louisiana Public Defender, 28% of the Louisiana state public defender board's budget – $9.5 million – goes to providing death penalty defense in just 30 to 40 cases per year (Appendix A – Nola.com/The Times-Picayune). Despite the vast resources and expert counsel provided, there are times when the nature of the offender and the circumstances of the offense are such that a unanimous jury of twelve persons will vote to impose the death penalty.

A. THERE IS NO NATIONAL CONSENSUS AGAINST THE DEATH PENALTY

Petitioner first argues that there is a national consensus against the death penalty and thus it should be declared unconstitutional by this Honorable Court. This argument ignores both the jurisprudence of this Court and the Fifth Amendment of the federal Constitution that explicitly acknowledge capital punishment as an accepted component of the criminal justice system. While it is true this Court has restricted the application of the death penalty as to certain categories of offenders, Petitioner has made no showing that would warrant a sweeping pronouncement that the death penalty is entirely unconstitutional.

In *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) and *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), this Honorable Court based its decision, in part, on evidence of a national consensus against the death penalty for mentally disabled offenders and juvenile offenders, respectively. As discussed in *Roper*, 543 U.S. at 564, 125 S.Ct. at 1192, when it and *Atkins*, *supra*, were decided, thirty states already prohibited the death penalty for the mentally disabled and for juveniles, twelve of which had abandoned the death penalty all together. What the court found significant in both cases was the "consistency of direction of change," with the number of states prohibiting the death penalty for mentally disabled and juvenile offenders indicating that society considered both categories of offenders to be "less culpable than the average criminal." *Atkins*, 536 U.S. at 315-316, 122 S.Ct. at 2249; *Roper*, 543 U.S. at 566-567, 125 S.Ct. at 1193-1194.

Petitioner notes the fact that nineteen states, plus the District of Columbia, have no death penalty. More significant is that thirty-one states, plus the United States government and military, maintain the death penalty (Appendix B – Death Penalty Information Center, States with and without the Death Penalty as of July 1, 2015, at http://www.deathpenaltyinfo.org/states-and-without-death-penalty.) According to Gallup historical trends, as of October, 2015, 61% of Americans favor the death penalty for a person convicted of murder. The percentage of those favoring the death penalty has remained above the 60th percentile for

over a decade. Close review of the numbers shows that support for the death penalty was at its lowest in 1965 when only 45% of those polled favored it, but public support increased sharply over the years and has remained stable with a clear majority of Americans favoring the death penalty (Appendix C – Gallup Historical Trends, http://www.gallup.com/poll/1606/Death-Penalty). These numbers do not evidence a national consensus against the death penalty or a consistent direction of change away from the death penalty as a viable sentence for an adult murderer.

Disuse or infrequent use of the death penalty in those jurisdictions where it is available should not be considered indicative of a consensus against the death penalty or as evidence of a consistent direction of change away from the death penalty. Other factors more directly impact use or disuse of the death penalty in the majority states which maintain the death penalty. These factors include such things as the expense associated with capital prosecutions, the lengthy review process, issues concerning the appropriate method of execution, questions raised by the small number of those on death row who have been exonerated by DNA evidence[1], and unilateral decisions by governing authorities. Decisions by governors to grant reprieves or impose moratoriums on capital punishment are decisions made by those individuals based on their own beliefs. Such decisions are not necessarily reflective of the majority of their constituents' beliefs.

[1] Only 20 of 337 people exonerated since 1989 served time on death row. See www.innocenceproject.org.

They do not reflect a national consensus disfavoring the death penalty. In late 2015, the State of California lifted the moratorium on executions. Aside from the efforts of various special interest groups and outliers, there is no public cry against the death penalty. Considering that a majority of our citizens favor the death penalty, its disuse or infrequent use is in contravention of the general consensus favoring the death penalty as an appropriate sentence for adult murderers.

B. THE CONSTITUTIONALITY OF THE DEATH PENALTY IS SETTLED LAW, SERVES VALID PENOLOGICAL AND SOCIETAL PURPOSES, AND, AS PREVIOUSLY LIMITED BY DECISIONS OF THIS HONORABLE COURT, ITS APPLICATION COMPORTS WITH PREVAILING STANDARDS OF DECENCY.

In *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), this Honorable Court rejected the argument that the death penalty is per se unconstitutional. The *Gregg* court recognized that the death penalty serves the dual purposes of retribution and deterrence. It recognized that retribution "though unappealing to many, . . . is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs." *Id.*, at 184, 96 S.Ct. at 2930. The *Gregg* court also recognized the complexity of evaluating the deterrent effect of capital punishment, and it wisely noted that the responsibility for making such an evaluation "properly

rests with the legislatures." *Id.*, at 186-187, 96 S.Ct. at 2930. This Court has cited *Gregg* with approval in recent decisions, stating in one case "[o]ur decisions in this area [constitutionality of methods of execution] have been animated in part by the recognition that because it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a [constitutional] means of carrying it out.'" *Glossip v. Gross*, 135 S.Ct. 2726 (2015), citing *Gregg*, *supra*, at 47, 128 S.Ct. 1520. In his concurring opinion, Justice Scalia summarized the state of the law on this very question.

> "Mind you, not once in the history of the American Republic has this Court ever suggested the death penalty is categorically impermissible. The reason is obvious: it is impossible to hold unconstitutional that which the Constitution explicitly *contemplates*. The Fifth Amendment provides that '[n]o person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury,' and that no person shall be 'deprived of life . . . without due process of law.'" *Glossip*, *supra*, at 2747.

The relief Petitioner seeks – the complete abolition of the death penalty – would properly be achieved by an amendment to the federal Constitution. As it stands, the Petition for Writ of Certiorari ignores the Fifth Amendment, minimizes the retributive value of capital punishment, and, if granted, would usurp the legislative prerogative for determining the appropriate penalties available for the worst of offenses.

Even though infrequently imposed, the death penalty provides an appropriate avenue by which society may express its moral outrage against the depravity of murders, like the one committed by Petitioner. The death penalty also provides a means of justice for those families of the murdered who seek to have it imposed against the murderer. Certainly, some families of murder victims do not seek capital punishment. But for those who do, it would be indecent to deprive them of this long-recognized and constitutional means of obtaining justice, regardless of any delays in the ultimate execution of the sentence. These considerations should not be lightly overlooked. That lengthy delays exist and that some jurisdictions have halted executions are not support for considering again the constitutionality of the death penalty as it exists today. Rather, they evidence the care that society is taking to ensure that death penalties are meted out to the truly deserving, like Petitioner.

By its decisions in *Atkins*, *supra; Roper*, *supra; Kennedy v. Louisiana*, 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008), and *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), this Honorable Court limited the instances in which the death penalty could be imposed. Now, in line with the prevailing standards of decency in our ever evolving society, the death penalty is barred as to rapists of both adult women and children, murderers who are mentally retarded (intellectually disabled), and murderers who are under the age of 18. In holding that the death penalty is violative of the Eighth Amendment in *Coker* and

Kennedy, the opinion distinguished between the severity and irrevocability of an intentional first degree murder as compared to a non-homicide crime such as rape. *Kennedy*, 554 U.S. at 438, 128 S.Ct. at 2660; *Coker*, 433 U.S. at 598, 97 S.Ct. at 2861. In *Atkins* and *Roper*, the court found murderers who are "mentally retarded" and those who are under the age of 18 to be "categorically less culpable than the average criminal." *Atkins*, 536 U.S. at 316, 122 S.Ct. at 2242; *Roper*, 543 U.S. at 567, 125 S.Ct. at 1194. Here, the penalty imposed against petitioner, a fully culpable adult, is not barred by precedent confining the instances where the death penalty may be imposed and is not offensive to prevailing and evolving standards of decency in today's world.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Greater New Orleans

Lawmakers look to shift money to public defenders – from death penalty appeals

The Louisiana House will take up a bill to provide more funding to public defenders – at the expense of the death penalty defense budget.

By Julia O'Donoghue, NOLA.com | The Times-Picayune
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on April 07. 2016 at 2:40 PM, updated April 07, 2016 at 6:35 PM

The Louisiana House will take up legislation that seeks to get more money into the hands of local public defender offices – primarily by taking it from the defense teams representing people facing the death penalty.

The House Committee on the Administration of Criminal Justice passed House Bill 818 Thursday (April 7) to require the Louisiana Public Defender Board spend more of its budget on local public defender districts than it does now. It would also change the makeup of the board to make it more favorable to local public defender districts.

People on both sides of legislation agree that shifting more of the public defender board budget toward local districts would probably come at the expense of the capital crime defense budget. The board would have nowhere else to take the money.

The legislation would require 65 percent of the state public defenders board funding go to local districts. About 50 percent of the budget – which would be about $15 million in the current year – now goes to the local offices.

About 28 percent of the state public defender board's budget – $9.5 million – is currently devoted to providing death penalty defense, according to Jay Dixon, the state's public defender.

The public defenders board is paying for the defense in about 30 to 40 capital cases this year. The board contracts with private lawyers – many of whom work at nonprofit agencies – to provide the death penalty legal services. The legal work is notoriously time-consuming and expensive.

"I understand the bill does not take away money [from capital defense], but it practically does," said Sean Collins, a Baton Rouge lawyer who works on capital cases with a nonprofit entity.

Dixon and others warned that providing less money for death penalty defense would slow those legal proceedings. It would not necessarily mean the cases are wrapped up more cheaply.

Several of Louisiana's local public defender districts are struggling to provide basic services. In January, the New Orleans public defenders office announced it would refuse to accept new felony cases involving lengthy or life sentences, due to lack of money. And it's not the only Louisiana district taking such drastic action.

Public defenders from Monroe and the Florida parishes drove to Baton Rouge to speak in favor of the bill. They said a 65 percent allocation of the board's funding would provide more financial stability. They could plan for certain dollars to be available more than they can now.

"We usually don't know if we are getting our money until May or April," Reggie McIntyre, the public defender for Tangipahoa, Livingston and St. Helena parishes said. His budget cycle starts July 1.

But Dixon pointed out that about 75 percent of local public defenders' support is supposed to come from traffic tickets and court fees. And that is where the funding shortfall has mostly occurred.

Local court and ticket revenue has fallen dramatically in recent years. Dixon said shifting more of his $33 million budget from capital defense to local public defender offices won't change the primary problem. Indigent defense needs more money.

"It's not addressing the problem of funding," Dixon said of the legislation.

There are some who believe the state public defender board could spend less on death penalty cases and still provide adequate defense. Assistant District Attorney Hugo Holland, who works out of Lake Charles, said the board has an anti-death penalty bent right now, which means it is willing to fund every appeal effort.

Holland may not be alone in that belief. In addition to providing a floor for local public defender funding, the legislation also dramatically changes the makeup of the state public defender board.

If passed, the number of people on the board would change 15 to 11, and local public defenders would have much more say over who sat on it. Professors from local law schools would no longer have assigned slots on the board either. Holland believes those changes might mean that the amount of money allocated for death penalty defense could go down.

Still, some legislators are growing tired of the cost of the death penalty. It's not just that the public defenders board is spending $9.5 million on defense. Prosecutors spend a lot of time and money on their side of the cases. And it costs money to maintain death row at Angola.

Rep. Steve Pylant, a conservative Republican and retired sheriff from Winnsboro, has always been supportive of the death penalty. But he wondered aloud during the committee meeting Thursday if it was worth the expense anymore, especially when so many of the convictions get overturned.

. . . . . .

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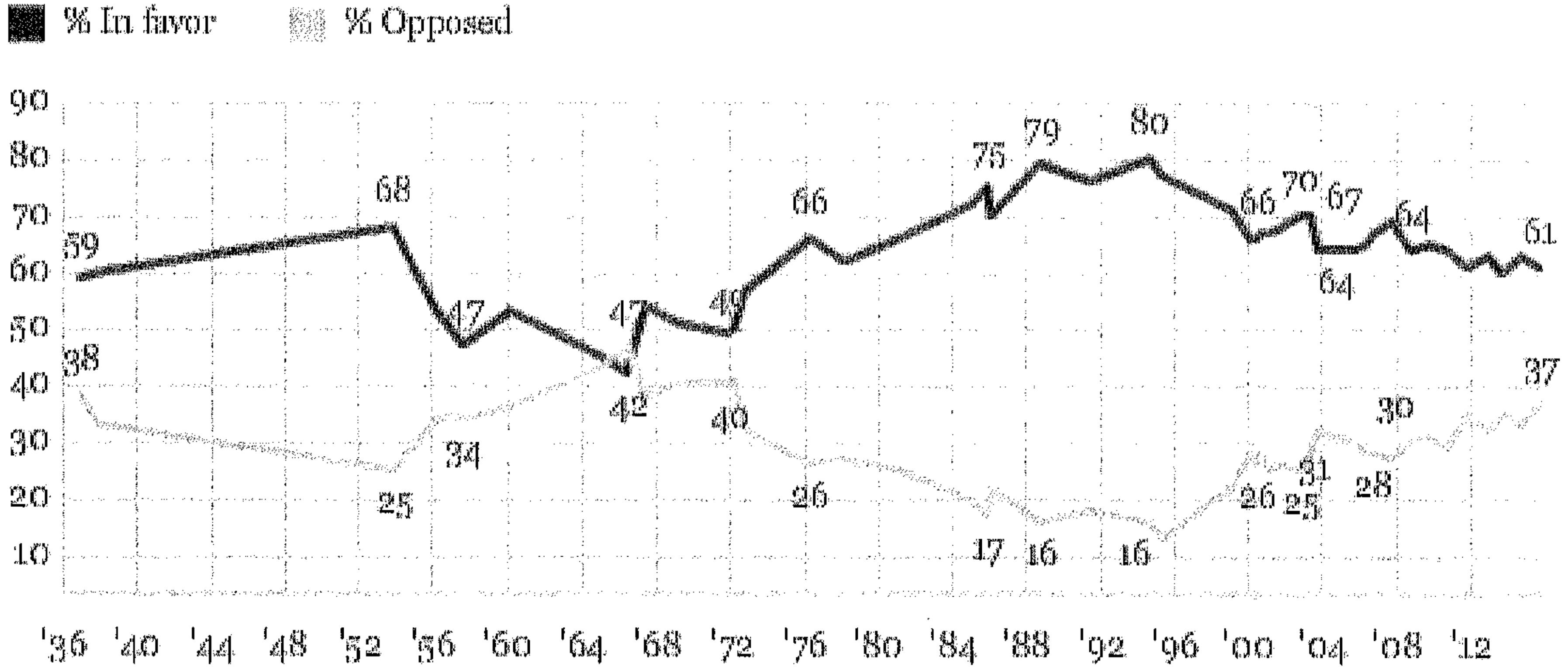
APPENDIX B

Death Penalty

Are you in favor of the death penalty for a person convicted of murder?



GALLUP

Are you in favor of the death penalty for a person convicted of murder?

	Favor	**Not in favor**	**No opinion**
	%	%	%
2015 Oct 7-11	61	37	2
2014 Oct 12-15	63	33	4
2013 Oct 3-6	60	35	5
2012 Dec 19-22	63	32	6
2011 Oct 6-9	61	35	4
2010 Oct 7-10	64	29	6
2009 Oct 1-4	65	31	5
2008 Oct 3-5	64	30	5
2007 Oct 4-7	69	27	4
2006 Oct 9-12	67	28	5
2006 May 5-7^	65	28	7
2005 Oct 13-16	64	30	6
2004 Oct 11-14	64	31	5
2003 Oct 6-8	64	32	4
2003 May 19-21	70	28	2
2002 Oct 14-17	70	25	5
2001 Oct 11-14	68	26	6
2001 Feb 19-21^	67	25	8
2000 Aug 29-Sep 5	67	28	5
2000 Jun 23-25	66	26	8
2000 Feb 14-15	66	28	6
1999 Feb 8-9	71	22	7
1995 May 11-14	77	13	10
1994 Sep 6-7	80	16	4
1991 Jun 13-16	76	18	6
1988 Sep 25-Oct 1	79	16	5

1988 Sep 9-11	79	16	5
1986 Jan 10-13	70	22	8
1985 Nov 11-18	75	17	8
1985 Jan 11-14	72	20	8
1981 Jan 30-Feb 2	66	25	9
1978 Mar 3-6	62	27	11
1976 Apr 9-12	66	26	8
1972 Nov 10-13	57	32	11
1972 Mar 3-5	50	41	9
1971 Oct 29-Nov 2	49	40	11
1969 Jan 23-28	51	40	9
1967 Jun 2-74	54	38	8
1966 May 19-24	42	47	11
1965 Jan 7-12	45	43	12
1960 Mar 2-7	53	36	11
1957 Aug 29-Sep 4	47	34	18
1956 Mar 29-Apr 3	53	34	13
1983 Nov 1-5	68	25	7
1937 Dec 1-6	60	33	7
1936 Dec 2-7	59	38	3

^ Asked of a half sample.

GALLUP

http://www.gallup.com/poll/1606/death-penalty.aspx?
version=print