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

REPLY BRIEF

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REPLY BRIEF

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

INTRODUCTION

Now is the time; and this is an appropriate case for this Court to consider whether the evolving standards of decency render imposition of capital punishment in a non-terrorism, non-treason case unconstitutional.

Louisiana's *Brief in Opposition* (BIO) does not dispute that the issue before the Court is pressing and ripe. Nor does the BIO argue for deferring or delaying consideration of the issue. Indeed, the BIO candidly acknowledges the "considerable expense and significantly increased burden on staff resources and associated with a capital case." BIO at 7.

Nor does the BIO argue that this is an inappropriate vehicle for addressing the question posed by Justices Breyer and Ginsburg in *Glossip v. Gross*, 135 S.Ct. 2726 (2015) (dissenting) and *Tucker v. Louisiana*, 136 S. Ct. 1801 (2016) (dissenting from denial of certiorari). Instead, it merely offers a substantive argument defending the "retributive value of capital punishment." BIO at 11.

This Court should grant certiorari, and determine whether the standards of decency have evolved, rendering the death penalty excessive and unnecessary.

I. The BIO Frames the Merits Question for the Court.

The BIO makes clear that there are substantive disputes ripe for this Court's review.

A. Whether Disuse Demonstrates a Consensus Is a Merits Question, Ripe for this Court's Review.

The BIO does not dispute that death sentences are at a 40-year low. Seventy-two percent of the states have no death penalty or have not executed anyone in the last five years. Nor does the BIO contest that in 2015, there were only twenty-eight executions (85% in three states); in 2016, there were only twenty executions (90% in three states).[1] Rather, the BIO defends capital punishment by reference to the number of jurisdictions that have death penalty statutes, and polling data it argues supports capital punishment.[2]

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[1] See The Death Penalty Information Center, The Death Penalty in 2016: Year End Report, at 2. Available at http://deathpenaltyinfo.org/documents/2016YrEnd.pdf

[2] The BIO attempts to bolster its argument with October 2015 Gallup poll results showing 61% of Americans favor the death penalty for people convicted of murder. BIO at 9. But see Baxter Oliphant, *Support for the Death Penalty Lowest in More than Four Decades*, PEW RESEARCH CENTER, Sept. 29, 2016, *available at* http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/ (Last visited January 18, 2017) (Poll conducted from August to September 2016 showing a mere 49% of Americans support capital punishment for people convicted of murder).

Petitioner believes that steep decline in use demonstrates that capital punishment is excessive and unnecessary, and that this metric provides the most salient measure of our standards of decency. *See Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (noting little need to pursue legislation barring execution in states that do not execute); *Kennedy v. Louisiana,* 554 U.S. 407, 443 (2008) ("There are measures of consensus other than legislation."); *Graham v. Florida*, 560 U.S. 48, 62 (2010) ("A]ctual sentencing practices are an important part of the Court's inquiry into consensus.").[3]

In contrast, the BIO suggests that lack of use arises not from a consensus that the death penalty is excessive, but from "other factors" that "directly impact use or disuse." BIO at 10. These factors include "expense," "the lengthy review process," issues concerning the "appropriate method of execution," questions raised by the "small number" of exonerations, and "unilateral decisions by governing authorities." *Id.*

Respondent suggests that life sentences are not due to the evolving standards of decency but the result of the "lavishly" funded "capital defense industry." BIO at 7-8.[4] Mr. Reed was represented at trial by two

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

[4] In contrast to the claim of 'lavishly funded' indigent defense services, the Chief Justice of the Louisiana Supreme Court recently certified that there was a "state of emergency" for Louisiana indigent defendants. See Della Dhasselle, *Why A Recent Law to Shield Cash-Strapped Public Defenders from Budget Cuts May Not Wor*k, The Advocate, January 14, 2017. See also Eli Hager, *Louisiana Public Defenders: A Lawyer with a*

attorneys who were responsible for more than one quarter of the death sentences in Louisiana between 2009 and 2014. In this case, where Mr. Reed's only defense was that the killings were justified, the Louisiana Supreme Court acknowledged that "defense counsel arguably made a professional error by failing to request instructions under [Louisiana's Stand Your Ground Statute]."[5] Pet. App. 44A. If this is lavishly resourced, highly competent counsel, one shudders to consider the alternative.

In the end, however, the restraint of prosecutors or the quality of counsel informs but does not resolve the question presented: whether or not the number of death sentences can be attributed to these factors, the number is so low as to establish a consensus that capital punishment is excessive.

Similarly, the BIO suggests that the problem of wrongful convictions is exaggerated as "only 20 of 377 people exonerated since 1989 served time on death row."[6] BIO at 10. Even accepting Respondent's

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Pulse will Do, The Marshall Project, September 8, 2016; Campbell Robertson, *In Louisiana, the Poor Lack Legal Defense*, New York Times, March 19, 2016; *Louisiana's Public Defender System is in Crisis*, Fair Punishment Project, April 26, 2016 available at http://fairpunishment.org/louisianas-public-defender-system-is-in-crisis/.

[5] Defense counsel requested an instruction that the homicides were justified under La. R.S. 14:20 (A), as "one who reasonably believes that he is imminent danger of losing his life or receiving great bodily harm, and that the killing is necessary to save himself from that danger." Counsel did not request an instruction based upon the law enacted in 2006 which allowed petitioner to Stand His Ground without belief in necessity or his own personal danger.

[6] An accurate account reflects 156 individuals exonerated from death row since 1976. *See* Death Penalty Information

characterization, the question remains whether the death penalty functions in a way that is constitutional.

The BIO suggests that the assessment of national consensus is confined to counting the states. BIO at 9.[7] Ultimately, it is for this Court to determine whether the data reflects, as the BIO contends, a functioning system of constitutional restraint, or

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Center, List of those Freed from Death Row, available at http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row. In Louisiana, there have been 45 exonerations; 15 by DNA evidence; 10 exonerations have been from death row. *See* Samuel Gross, *National Registry of Exonerations*, University of Michigan Law School, available at www.law.umich.edu/special/exoneration /Pages/detaillist.aspx.

Moreover, the tally of exonerations fail to take into account cases where a defendant was sentenced to death despite significant concerns over innocence, such as the recent case of Rodricus Crawford. See *State v. Crawford*, 2014-2153 (La. 11/16/16), 2016 La. Lexis 2376 (reversing conviction and death sentence based upon Batson violation); but see id., at 60-61 (Knoll J., Johnson, J., concurring and dissenting) ("I heartily disagree with the majority's conclusion that there was sufficient evidence under *Jackson v. Virginia*, [] to sustain defendant's conviction for the first-degree murder of his infant son."). Notably, Mr. Reed was prosecuted by the same county, and the same prosecutor, as Mr. Crawford.

[7] Even under this metric, there has been a consistent trend towards abolition. The number of states abolishing capital punishment has more than doubled since *Gregg,* going from nine to nineteen. Given the "general popularity of anticrime legislation," the fact that seven jurisdictions have abolished capital punishment and four additional states have adopted moratoria, in the last decade, whereas no state has passed legislation to reinstate it, "carries special force." *Roper v. Simmons*, 543 U.S. 551, 566 (2005).

whether it reflects an ever-increasing national consensus against the death penalty.

B. Whether Retribution Justifies Capital Punishment is a Merits Question Ripe for this Court's Review.

The BIO also asserts that capital punishment is justified by a single penological purpose: as "a means of justice for those families of the murdered who seek to have it imposed against the murderer." BIO at 13. It argues that Petitioner "minimizes the retributive value of capital punishment." BIO at 12.

Significantly, it is no longer seriously contested by Respondent that capital punishment is actually justified under a theory of deterrence or incapacitation. Whether capital punishment can be sustained solely under a theory of retribution, along with unfettered deference to legislative intent, is a question for this Court on merits review. "[E]xercise of independent judgment is the Court's judicial duty." *Hall*, 134 S. Ct. at 2000. "[J]udgment is not merely a rubber stamp on the tally of legislative and jury actions. Rather, it is an integral part of the Eighth Amendment inquiry--and one that is entitled to independent weight in reaching our ultimate decision." *Simmons*, 543 U.S. at 597.

C. This Case Is an Appropriate Vehicle to Address the Issue.

The BIO does not argue that the question presented is unimportant, unpreserved, or that this case is an inappropriate vehicle for addressing it.[8]

Further percolation in the lower courts is unlikely to answer the question. Recent judicial developments in Delaware and Florida reveal the shortcomings and inefficiencies still plaguing the regulation of capital punishment. Delaware death row inmate Derrick Powell's motion for post-conviction relief was denied in May 2016, *State v. Powell,* 2016 WL 3023740 (Fla. May 24, 2016), before he and the other 12 men on Delaware's death row had their sentences commuted to life without parole 7 months later by the Supreme Court. *Powell v. State*, 2016 WL 7243546 (Fla. Dec. 15, 2016) (holding that the ruling declaring Delaware's death penalty law unconstitutional applied retroactively). *See also* Delaware Department of Corrections, *Death Row* (Last visited January 16, 2017).

Indeed, development in the lower courts in this context is particularly unlikely. As Justice O'Connor

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[8] The State quotes part of the lower court opinion that observed Mr. Reed's trial counsel had not filed a motion challenging whether "Louisiana's bifurcated capital sentencing scheme, modeled after the Georgia statute upheld in *Gregg v. Georgia*, [] passes constitutional muster under the Eighth Amendment." Respondent does not raise a procedural bar here. Regardless, the issue is not whether Louisiana's death penalty scheme complies with *Gregg* in narrowing the class of offenders eligible for the death penalty but rather whether under the evolving standards of decency the death penalty is excessive today. Ultimately, it is for this Court to use "its own independent judgment" to decide whether evolving standards of decency reflect that the death penalty is unnecessary and

observed, in the context of the Eighth Amendment, "it remains 'this Court's prerogative alone to overrule one of its precedents.' . . . That is so even where subsequent decisions or factual developments may appear to have 'significantly undermined' the rationale for our earlier holding." *Roper v. Simmons*, 543 U.S. 551, 594 (2005) (O'Connor J., *dissenting*). *See also United States v. Fell*, No. 5:01-CR-00012 GWC, 2016 WL 7238930 at *56 (D. Vt. Dec. 13, 2016) (finding that "the reforms introduced by *Gregg* and subsequent decisions have largely failed to remedy the problems identified in *Furman*," but concluding that "[i]nstitutional authority to change this body of law is reserved to the Supreme Court.").

Ultimately, whether the death penalty is an excessive punishment is a question for this Court, whose independent judgment must be brought to bear. Indeed, it is exactly this Court's role and obligation to protect both the dignity of those individuals facing punishment, and the dignity of, and confidence in, our justice system.

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excessive. *Roper v. Simmons*, 543 U.S. 551, 564 (2005). To the extent that this Court determines the death penalty excessive and unnecessary punishment, state procedural bars must unquestionably yield. *See Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) ("a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced.").

II. The Issue Is Worthy of This Court's Review.

The BIO argues that while this Court has restricted the application of the death penalty, it has never held capital punishment "entirely unconstitutional." BIO at 8. The fact that this Court has not addressed this question is a reason to grant certiorari rather than to deny it.[9] Indeed, the BIO does not dispute that this is an important issue, worthy of this Court's consideration.

In 2008, after 32 years of attempting to reconcile "the tension between general rules and case-specific circumstances," this Court concluded that it had produced "results not altogether satisfactory." *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008). Nearly another 10 years have passed since this determination, and still the regulation of the death penalty is marked by arbitrariness and "in search of a unifying principle." *Id.* at 437. *Compare*, *e.g.*, *Arthur v. Dunn*, 137 S.Ct. 15 (2016) (granting stay of execution with courtesy fifth vote), *with Smith v. Alabama*, 137 S.Ct. 462 (2016) (denying certiorari and stay of execution despite a jury recommendation of life), *and Broom v. Ohio*, 2016 WL 4381115 (U.S. Ohio, Dec. 12, 2016) (allowing a second execution attempt).

The Court could spend conceivably another 40 years "in search of a unifying principle" to regulate capital punishment. *Kennedy*, 554 U.S. at 437. In the meantime, however, whether people will be sentenced

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

to death or to life without parole will continue to be determined by such arbitrary factors as race,[10] geography,[11] or date of sentence.[12]

The Death Penalty Information Center census indicates that there were some two thousand nine hundred and five (2905) individuals under death sentence in America in 2016.[13] Over a thousand were

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[10] The Louisiana Supreme Court rejected petitioner's complaint that the trial was conducted in a courthouse that "commemorated the Confederacy's Last Stand." See Pet. App. 141a. Similarly, the Court declined to address the concern raised in his Sentencing Review Memorandum "that 12 of the 16 defendants currently sentenced to death are African-American." Sentence Review Memorandum at 2. The Louisiana Supreme Court determined that because both defendant and victim were African-American, that race played no role in the case. See Pet. App. at 97a.

[11] *See, e.g., Robert J.* Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B. U. L. Rev. 227, 233–235, 278, 281 (2012); Campbell Robertson, *The Man Who Says Louisiana Should "Kill More,"* N.Y. Times, July 8, 2015, p. A1 ("From 2010 to 2014, more people were sentenced to death per capita [in Caddo Parish] than in any other county in the United States, among counties with four or more death sentences in that time period"); see also *Glossip v. Gross*, 135 S.Ct. 2726, 2761 (2015), (Breyer, J., *dissenting*) ("[I]n 2012, just 59 counties (fewer than 2% of counties in the country) accounted for *all* death sentences imposed nationwide");

[12] *See, e.g.*, *Asay v. State*, 2016 WL 7406538 (Fla. Dec. 22, 2016) (holding that *Hurst v. Florida*, 136 S.Ct. 616 (2016) did not apply retroactively to defendant's case because his conviction was final at the time of *Ring v. Arizona,* 536 U.S. 584 (2002)).

[13] See Death Penalty Information Center, Size of Death Row By Year, 1968-Present, available at: www.deathpenaltyinfo.org/

sentenced more than twenty years ago. Executing these individuals in an ordered fashion at a rate of 100 per year (five times more than the current rate, and a rate higher than ever employed in the modern era), it would still take more than twenty-five years to reach Petitioner while he waits on death row. Or it might occur more quickly, in an arbitrary manner. Perhaps as a result of geography or race, an especially vigorous prosecutor, a defense lawyer asleep at the wheel, he will be advanced to the front of the line. Or perhaps Respondent suggests that the machinery will proceed more quickly as some number of these individuals will have their convictions reversed, their sentences set aside, or die of old age (or madness)[14] awaiting execution. But this hardly defends the status quo.

Petitioner does not discount Respondent's reference to the important roles of restraint and discretion. But, in a country with more than fifteen thousand homicides each year, there is nothing about this case that reflects the exercise of either; or that this case was worse than 99.97 percent of the homicides. Respondent acknowledged as much in when it informed the defense prior to trial that a life sentence without parole was sufficient.[15]

Respondents suggest that petitioner ignores the plain language of the Fifth Amendment,

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death-row-inmates-state-and-size-death-row=year?scid=9&did=188#year.

[14] In Louisiana, since 2002, five individuals on death row have died of natural causes or suicide; while one defendant has been executed involuntarily and one volunteered for execution.

[15] *See* R. 1881 (*State's Motion to Set Plea Deadline*) ("The State has informed defense counsel that should the above-named defendant want to plead guilty to all three counts on the Bill of Information, then that needs to be put on the record on August 28, 2013 which is our next court setting.").

minimizes the retributive value of capital punishment, and threatens to usurp legislative prerogative. This Court should address these contentions.

Petitioner believes that times have changed since adoption of the Fifth Amendment which constrains the government's excision of "life or limb" as punishment; that the Fifth Amendment was a limitation on the government's power not a laundry list of permissible punishments. Petitioner suggests the standards of decency have evolved, and that the Eighth Amendment must protect against more than extra-legislative punishments. Of retribution, the least one can say is: one hopes we are a better nation than we were.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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