

NO. 08-5385

In The Supreme Court of the United States

ARTEMUS RICK WALKER,

Petitioner,

v.

STATE OF GEORGIA

Respondent.

On Petition For A Writ of Certiorari
To The Supreme Court of Georgia

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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QUESTIONS PRESENTED

- I. SHOULD THIS COURT GRANT CERTIORARI TO REVIEW CLAIMS NOT RAISED AND LITIGATED IN THE GEORGIA SUPREME COURT, AND WHICH ARE THEREFORE NOT PROPERLY PRESENTED TO THIS COURT FOR REVIEW?
- II. SHOULD THIS COURT GRANT CERTIORARI TO REVIEW A MERE DISAGREEMENT WITH A DECISION OF THE GEORGIA SUPREME COURT APPLYING THAT STATE'S OWN STATUTE TO THE FACTS OF PETITIONER'S CASE IN ACCORD WITH THE LONG-STANDING JURISPRUDENCE OF THIS COURT?

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PART ONE

STATEMENT OF THE CASE

On August 6, 1999, Petitioner was indicted by the grand jury of Macon County, Georgia, for malice murder, felony murder, armed robbery, aggravated assault, attempted burglary, and possession of firearm during the commission of a crime. The State filed its notice of intent to seek the death penalty on August 23, 1999.

On October 10, 2002, Petitioner was convicted as charged in the indictment. At the conclusion of the sentencing phase on

October 11, 2002, the jury found the existence of the following statutory aggravating circumstances beyond a reasonable doubt: that the murder of Ray Lyn Gresham was committed while Petitioner was engaged in the commission of another capital felony (armed robbery); that the murder of Ray Lyn Gresham involved an aggravated battery to the victim before death; that the murder of Ray Lyn Gresham was committed for the purpose of receiving money or other things of value; and that the murder of Ray Lyn Gresham was outrageously or wantonly vile horrible, or inhuman in that it involved depravity of mind. The jury then recommended a sentence of death. The trial court sentenced Petitioner to death, and further sentenced Petitioner to life for armed robbery, twenty years for aggravated assault, ten years for attempted burglary, and five years for possession of a firearm during the commission of a crime, all sentences to run consecutively.

Petitioner filed a motion for new trial on October 21, 2002, and an amended motion for new trial on August 25, 2005. This motion as amended was denied on February 28, 2006. The Supreme Court of Georgia affirmed Petitioner's convictions and sentences on October 9, 2007. Walker v. State, 282 Ga. 774, 653 S.E.2d 439 (2007). It is from this decision that Petitioner requests certiorari review.

PART TWO

STATEMENT OF THE FACTS

In its opinion on direct appeal from Petitioner's trial, the Georgia Supreme Court summarized the evidence as follows:

The evidence adduced at Walker's trial showed that he devised a plan to rob Lynwood Ray Gresham, who was the vice president of the bank that was next door to the service station Walker owned. Walker hired Gary Lee Griffin several days before the crimes to work at his service station and asked Griffin if he would help "rob and kill" a "rich" man. On May 12, 1999, Walker borrowed an automobile that belonged to another of his employees and drove with Griffin to the hotel where Griffin was staying. They picked up Griffin's bicycle at the hotel and then traveled in the automobile to Walker's apartment. Walker gave Griffin black pants to change into and gave him a knife and a stun gun. Walker also changed into black clothing. They also loaded Walker's bicycle into the automobile.

Walker drove the pair with their bicycles to a place near Gresham's house. Griffin waited at the side of the house as Walker went to the door and engaged Gresham in a conversation in the front yard. Walker and Gresham began struggling. Walker told Griffin to use the stun gun on Gresham, but Griffin refused. Griffin also refused when Walker told him to stab Gresham with the knife. Griffin gave Walker the knife, and Walker stabbed Gresham 12 times in the chest and back. Walker told Griffin to pick up things that had fallen during the struggle, which included Gresham's keys and wallet. Walker dragged Gresham, who was still alive, to the side of the house and hid him in some bushes, where he was later found dead. Walker then told Griffin that he had "one more to kill" and asked Griffin for Gresham's house keys. Walker tried to open the door to Gresham's house, but Gresham's wife, Roberta Gresham, locked a chain lock and a foot lock from inside. Roberta Gresham called the police, and she observed Walker, with whom she was familiar, through a window with "something on his hip that looked like

a gun." Roberta Gresham's daughter, Allison, yelled to Walker that she had a gun. Walker and Griffin then rode away on their bicycles. Griffin was arrested nearby after he crashed his bicycle. The victim's wallet was found in Griffin's pocket, and a broken stun gun was found on Griffin's belt. Walker was arrested a few hours later after he was discovered in the woods nearby. The victim's blood was on Walker's clothes, and he had the victim's keys. The knife used to kill Gresham and a pistol were discovered near the site of Walker's arrest.

Walker v. State, 282 Ga. at 774-775.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THE CLAIMS RAISED BY PETITIONER IN HIS PETITION FOR WRIT OF CERTIORARI WERE NOT RAISED AND LITIGATED IN THE GEORGIA SUPREME COURT AND ARE THEREFORE NOT PROPERLY PRESENTED TO THIS COURT FOR REVIEW.

Petitioner contends that Georgia's statutory system of sentence review violates the Eighth and Fourteenth Amendments and that, in Petitioner's case, the Georgia Supreme Court did not comply with the state statutory requirements. However, these challenges to Georgia's mandatory, statutory sentence review as allegedly violating this Court's decision in Gregg v. Georgia, 428 U.S. 153 (1976), were not raised and litigated in the Georgia Supreme Court and therefore, are not properly presented to this Court for review.

Although, on appeal, the Georgia Supreme Court conducted its state statutory proportionality review of Petitioner's

sentence, Petitioner did not challenge the manner in which the Georgia Supreme Court carried out its proportionality review. Accordingly, as Petitioner's claims were not raised to the Georgia Supreme Court on direct appeal, the issues Petitioner assert in his petition for writ present nothing warranting this Court's certiorari review. See Banks v. California, 395 U.S. 708 (1969) (finding that where Petitioner did not ask the Supreme Court of California to review the judgment entered by the Court of Appeals, the decision of the Court of Appeal is not a "final judgment ... rendered by the highest court of a State in which a decision could be had...." and this Court lacked jurisdiction to review it.); see also Cardinale v. Louisiana, 394 U.S. 437 (1969); Hammerstein v. California, 341 U.S. 491 (1951).

II. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW A MERE DISAGREEMENT WITH A DECISION OF THE GEORGIA SUPREME COURT APPLYING THAT STATE'S OWN STATUTE TO THE FACTS OF PETITIONER'S CASE IN ACCORD WITH THE LONG-STANDING JURISPRUDENCE OF THIS COURT.

Additionally, the instant grounds of this petition merely constitute Petitioner's disagreement with the decision of the Georgia Supreme Court applying its own statute, O.C.G.A. § 17-10-35, with the benefit of almost thirty years of thorough and pervasive litigation in both the Supreme Court of Georgia and this Court, and in accord with the long-standing jurisprudence of this Court, to the particular facts of Petitioner's case.

The Supreme Court of Georgia upheld the jury's finding of the statutory aggravating circumstances that the murder was committed while Walker was engaged in the commission of an aggravated battery under O.C.G.A. § 17-10-30(b) (2); that the murder was committed while Walker was engaged in the commission of armed robbery under O.C.G.A. § 17-10-30(b) (2); and that the murder was outrageously or wantonly vile, horrible, or inhuman because it involved torture, depravity of mind, and an aggravated battery to the victim under O.C.G.A. § 17-10-30(b) (7). Petitioner does not dispute the existence of those statutory aggravating circumstances, but rather asks this Court to grant review in order to second-guess the Georgia Supreme Court's application of the state statute.

In reviewing the proportionality of Petitioner's sentence and the "narrowing" statutory aggravating circumstances, the Georgia Supreme Court found:

This Court is required to review each statutory aggravating circumstance and to determine if it is supported by the evidence. See O.C.G.A. § 17-10-35 (c) (2). As part of this review, we find that the second and third statutory aggravating circumstances found by the jury in its sentencing verdict vary from the language of the Code so severely that we cannot conclude that they constitute valid statutory aggravating circumstances supported by the evidence. See *Jarrell v. State*, 261 Ga. 880 (2) (413 SE2d 710) (1992). It is possible that the two statutory aggravating circumstances in question, which concern aggravated battery before death and torture, were submitted to the jury in support of the fifth statutory aggravating circumstance involving

"depravity of mind." See O.C.G.A. § 17-10-30 (b) (7); *West v. State*, 252 Ga. 156 (2), 161 (Appendix) (313 SE2d 67) (1984) (prescribing a jury charge for the "depravity of mind" statutory aggravating circumstance). However, they cannot be regarded as proper statutory aggravating circumstances in their own right, because they omit critical portions of the language of the Code. Nevertheless, after setting aside these two statutory aggravating circumstances, we need not reverse Walker's death sentence, because it remains supported by at least one valid statutory aggravating circumstance. *Colwell v. State*, 273 Ga. 634 (11) (d) (544 SE2d 120) (2001).

Viewed in the light most favorable to the sentencing verdict, we find that the evidence adduced at trial was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt the existence of the remaining statutory aggravating circumstances in this case, which were as follows: that the murder was committed while Walker was engaged in an armed robbery, which is a capital felony; that the murder was committed for the purpose of receiving money or a thing of monetary value; and that the murder was outrageously or wantonly vile, horrible, or inhuman in that it involved depravity of mind. *Jackson v. Virginia*, *supra*; O.C.G.A. § 17-10-35(c) (2). See O.C.G.A. § 17-10-30 (b) (2), (4) (7).

This Court is required by statute to examine each death sentence and to determine if it "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." O.C.G.A. § 17-10-35(c) (3). This review concerns whether a death sentence is "excessive *per se*" or "substantially out of line" given the crime and the evidence regarding the defendant and whether the crime is in a category of crimes that "have so consistently ended with sentences less than death that the death penalty in any one case would be clearly disproportionate." (Citation and punctuation omitted.) *Gissendaner v. State*, *supra*, 272 Ga. at 716-717. Applying that standard, we conclude that the death sentence in this case is not disproportionate punishment. We have stated that our "proportionality review of death sentences includes

special consideration of the sentences received by co-defendants in the same crime." *Allen v. State*, 253 Ga. 390, 395 (8) (321 SE2d 710) (1984). In that regard, we note that Walker's co-defendant, Gary Lee Griffin, has been sentenced to imprisonment for life rather than to death. However, the evidence at Walker's trial showed Walker to be the more culpable party. Furthermore, Griffin has been adjudicated mentally retarded, making him ineligible for a death sentence. See O.C.G.A. § 17-7-31(a)(3), (j); *Atkins v. Virginia*, 536 U. S. 304 (122 S. Ct. 2242, 153 LE2d 335) (2002). The cases cited in the Appendix support our conclusion that Walker's punishment is not disproportionate in that each involved a deliberate plan to kill and killing for the purpose of receiving something of monetary value. See O.C.G.A. § 17-10-35 (e).

Walker v. State, 282 Ga. 774, 782 (2007). The Court's Appendix sets forth 21 cases in support of its conclusion that Petitioner's sentence was not disproportionate. Walker v. State, 282 Ga. at 783-784. Notably, and contrary to the assertions of Petitioner, (Petition, p. 29), none of the cases cited in the Court's Appendix have been overturned.

In approving Georgia's statutory death penalty scheme, this Court has noted that Georgia's statutory aggravating circumstances "perform[] the function of narrowing the category of persons convicted of murder who are eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 875 (1982), and "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Id. at 877. See also Lowenfeld v. Phelps, 484 U.S. 231 (1988).

This Court has also noted:

In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns which prompted our decision in Furman are not present to any significant degree in the Georgia procedure applied here.

Gregg v. Georgia, 428 U.S. 153, 206-207 (1976).

Furthermore, this Court has made clear that there is no federal constitutional right to have a proportionality review conducted by an appellate court. Pulley v. Harris, 465 U.S. 37 (1984) (comparative proportionality review by an appellate court not required in every case in which death penalty is imposed).¹

Therefore, as the death sentence in this case is authorized by the existence of the aggravating circumstances, and as the

¹ Although Petitioner appears to facially challenge the statute addressing the method by which certain defendants are determined to be death-eligible, this Court has held that all that is necessary is for the decision to impose capital punishment "to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant[,]" Gregg, 428 U.S. at 199, a requirement this Court found adequately met by Georgia's statute. Id. at 206-207. Additionally, Petitioner lacks standing to raise a challenge in the other cases in which he alleges the Georgia Supreme Court has not fulfilled its statutorily-imposed duty, a claim considered and rejected by the Georgia Supreme Court in Davis v. Turpin, 273 Ga. 244 (539 S.E.2d 129) (2000), cert. denied, 534 U.S. 842, 151 L. Ed. 2d 59, 122 S. Ct. 100 (2001). Finally, Petitioner has not shown, nor could he, that the penalty imposed was disproportionate to the crimes he was convicted of committing.

Georgia Supreme Court performed its statutory proportionality review of Petitioner's death sentence, Petitioner's mere disagreement with the decision of the Georgia Supreme Court presents no basis for the grant of certiorari.

CONCLUSION

WHEREFORE, because the claims raised by Petitioner are not properly preserved for this Court's review and as the claims are mere disagreements with the facts based on the State's application of its own statutory authority, Respondent prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Brief in Opposition on Behalf of Respondent, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

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This 20th day of August, 2008.

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