

No. 08-5385

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2008

ARTEMUS RICK WALKER,
Petitioner,

-v.-

STATE OF GEORGIA,
Respondent.

REPLY TO BRIEF IN OPPOSITION

THOMAS H. DUNN
Georgia Resource Center
303 Elizabeth Street, N.E.
Atlanta GA 30307
(404) 222-9202

URSULA BENTELE
Brooklyn Law School
250 Joralemon Street
Brooklyn, NY 11201
(718) 780-7990
ATTORNEYS FOR PETITIONER

I. THIS COURT CAN AND SHOULD EXERCISE JURISDICTION IN THE PRESENT CASE BECAUSE THE SUPREME COURT OF GEORGIA VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS WHEN IT FAILED TO CONDUCT A MEANINGFUL PROPORTIONALITY REVIEW OF HIS DEATH SENTENCE (addressing the Reasons for Not Granting the Writ, Part I of Brief in Opposition).

This Court has jurisdiction to review constitutional issues arising from decisions of the highest courts of the states pursuant to 28 USC § 1257. The affirmance of Petitioner's death sentence by the Supreme Court of Georgia, without the meaningful proportionality review required under the Eighth Amendment, resulted in a violation of his constitutional rights. Exercising jurisdiction is appropriate in this case because Petitioner was not deprived of his rights until the Supreme Court of Georgia issued its decision relying on an inadequate review.

Moreover, this Court has a long history of reviewing state court decisions when the relevant constitutional issue was not raised below. As Justice Powell has noted, "the Court has jurisdiction to review plain error unchallenged in the state court when necessary to prevent fundamental unfairness." *Webb v. Webb*, 451 U.S. 493, 502 (1981) (Powell, J., concurring). In *Boykin v. Alabama*, 395 U.S. 238, 242 (1969), this Court held that the Alabama Supreme Court's affirmance of a death sentence during the course of mandatory review, without any showing that the guilty plea was intelligent and voluntary, was adequate to confer jurisdiction on this Court to review the sentence, even though petitioner never asserted that his plea was improper in state proceedings. *See also Vachon v. New Hampshire*, 414 U.S. 478, 479–80 (1974) (finding a constitutional violation in the trial record that was not raised in state court, resulting in a reversal of defendant's conviction);

Wood v. Georgia, 450 U.S. 261, 271 (1981) (remanding case to state court to settle a due process issue that was raised for the first time in this Court).

The cases cited by Respondent in support of its assertion that this Court does not have jurisdiction here are simply inapposite. In both *Banks v. California*, 395 U.S. 708 (1969), and *Hammerstein v. Superior Court*, 341 U.S. 491, 492–93 (1951), this Court lacked jurisdiction because, in contrast with the present case, there were further avenues for appeal at the state level. In *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969), this Court declined to hear an appeal on the improper introduction of trial evidence because the claimant could have introduced the evidence in earlier proceedings. In contrast, the Petitioner in the present case challenges a practice that occurred in the state’s highest court. Accordingly, this Court has jurisdiction to review Petitioner’s claim, and it should exercise its discretion to consider whether the Georgia Supreme Court has abandoned its obligation to conduct meaningful review of the death sentences imposed in the state.

II. THE SUPREME COURT OF GEORGIA’S FAILURE TO CONDUCT MEANINGFUL PROPORTIONALITY REVIEW RISKS ARBITRARY AND RACIALLY DISCRIMINATORY DEATH SENTENCES IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND THEREFORE WARRANTS REVIEW BY THIS COURT (addressing the Reasons for Not Granting the Writ, Part II of Brief in Opposition).

Respondent’s Brief in Opposition fails to address Petitioner’s central claim that the Supreme Court of Georgia no longer conducts adequate proportionality review of death sentences. By neglecting to consider capital cases in which life sentences were imposed along with cases in which death sentences are imposed, the Supreme Court of Georgia violates the procedural safeguards upon which this Court

relied in upholding the Georgia statute. This deficient review risks arbitrary and racially discriminatory death sentences in violation of the Eighth and Fourteenth Amendments.

The Supreme Court of Georgia has a statutory mandate to review every death sentence and to determine whether each sentence “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). While the statutes of other states may contain alternative procedural safeguards, the Georgia capital sentencing scheme depends on proportionality review to adequately “protect against the wanton and freakish imposition of the death penalty.” *Zant v. Stephens*, 462 U. S. 862, 876 (1983). (See Petition for Writ of Certiorari, at 15-16 n. 1.) The fact that proportionality review by an appellate court is not required by the federal Constitution in every case in which the death penalty is imposed is therefore beside the point. (See Brief in Opposition, at 9.) As this Court has noted “each distinct [capital punishment] system must be examined on an individual basis.” *Gregg v. Georgia*, 428 U.S. 153, 195 (1976). This Court has emphasized that the constitutionality of Georgia’s death penalty, in particular, derives from the existence of mandatory, meaningful review by the state Supreme Court. *Zant v. Stephens*, 462 U.S. at 890. Therefore, the Supreme Court of Georgia is required to engage in meaningful proportionality review of each death sentence.

When this Court approved Georgia’s current capital sentencing scheme, it understood effective proportionality review to require a comparison of cases in

which both death and life sentences were imposed. *See Gregg*, 429 U.S. at 205 n. 56 (noting that the Supreme Court of Georgia “does consider appealed murder cases where a life sentence has been imposed” in conducting its proportionality review); *Zant v. Stephens*, 462 U.S. at 879 n. 19. The Supreme Court of Georgia has itself recognized that its “review of all death sentences includes a special vigilance for categories of cases that have so consistently ended with sentences less than death that the death penalty in any one case would be clearly disproportionate.” *Gissendaner v. State*, 532 S.E.2d 677, 690 (Ga. 2000). Yet, in reviewing Mr. Walker’s sentence, the Supreme Court of Georgia failed to consider similar capital cases which ended in sentences less than death. (*See* Petition for Writ of Certiorari, at 24-25.) Excluding life sentence cases from its proportionality review makes it impossible for the state Supreme Court to determine whether the imposition of any particular capital sentence is an anomaly.

When the Supreme Court of Georgia fails to conduct meaningful appellate review, considering both death and life sentences, it inadequately protects against arbitrary and racially discriminatory death sentences. Specifically, because Georgia’s numerous statutory aggravating factors make nearly all murderers eligible for the death penalty, and its sentencing statute grants unlimited discretion to juries and fails to give any weighing instructions, the likelihood of arbitrary and capricious death sentences, as well as racially discriminatory sentences, is great. Meaningful proportionality review is, therefore, a critical check against the effects of sentencing discretion that has previously troubled this Court. *See Furman v.*

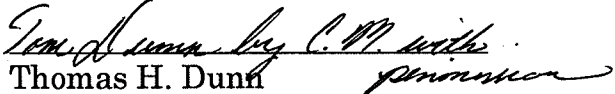
Georgia, 408 U.S. 238 (1972). Among the potential dangers of unguided jury discretion is the sentencing to death of an individual for racially motivated reasons. The Baldus Study discussed in *McCleskey v. Kemp*, 481 U.S. 279, 286-87 (1981), revealed that Georgia prosecutors are more likely to seek and juries are more likely to impose a death sentence in a case, like Petitioner's, involving a black defendant and a white victim. Recent studies suggest that these trends persist today. (See Petition for Writ of Certiorari, at 27.) A meaningful proportionality review, in which the Supreme Court of Georgia considers both life and death cases, is therefore necessary to ensure that racially discriminatory death sentences are detected and corrected.

CONCLUSION

For the reasons stated above, as well as those stated in the main petition, Petitioner respectfully prays that a writ of certiorari be granted to review the judgment of the Supreme Court of Georgia.

Dated: September 16, 2008

Respectfully Submitted,


Thomas H. Dunn
Ga. Bar No. 234624
Georgia Resource Center
303 Elizabeth Street, N.E.
Atlanta, GA 30307
(404) 222-9202
Attorney for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF GEORGIA

Vs.

ARTEMIS RICK WALKER

CASE NO. S07P0687

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition for Writ of Certiorari upon the District Attorney and the Attorney General by United States mail, first class postage, affixed as follows:

Cecilia M. Cooper
District Attorney
P.O. Box 1328
Americus, GA 31709

Susan V. Boleyn
Senior Assistant Attorney General, State of Georgia
40 Capitol Square, S.W.
Atlanta, GA 30334

Beth A. Burton
Senior Assistant Attorney General, State of Georgia
40 Capitol Square, S.W.
Atlanta, GA 30334

This 16 day of September, 2008.

Tom Dunn by C.M. with permission
Thomas H. Dunn
Georgia Resource Center
303 Elizabeth Street, N.E.
Atlanta GA 30307
(404) 222-9202