No. 16-____

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

PETITION FOR A WRIT OF CERTIORARI

G. Ben Cohen*
The Promise of Justice Initiative
636 Baronne Street
New Orleans, La. 70113
504-529-5955
benc@thejusticecenter.org

Blythe H. L. Taplin
The Capital Appeals Project
636 Baronne Street
New Orleans, La. 70113

**Counsel of Record*

QUESTION PRESENTED

Petitioner was convicted and sentenced to death in the same state, the same parish, by the same prosecutor considered by this court in *Tucker v. Louisiana*, 136 S. Ct. 1801 (2016) (Breyer J., Ginsburg J., dissenting from denial of certiorari). Petitioner asked the Louisiana Supreme Court to consider the constitutionality of capital punishment based upon the evolving standards of decency. The Louisiana Supreme Court rejected the claim holding "Louisiana's bifurcated capital sentencing scheme, modeled after the Georgia statute upheld in *Gregg*, … passes constitutional muster under the Eighth Amendment." As further percolation in the states is unlikely, and this Court's independent judgment is ultimately necessary, petitioner suggests now is an appropriate time to consider the following question:

> Whether imposition of the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, Marcus Reed, was the appellant below.

Respondent, the State of Louisiana, was the appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Marcus Reed respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Louisiana Supreme Court.

OPINION BELOW

The opinion of the Louisiana Supreme Court is reported at *State v. Reed*, 2014-1980 (La. 09/07/16); 2016 La. LEXIS 1676, and is reproduced in Appendix A at Pet. App. 1a. The unpublished appendix is in Appendix B., at Pet. App. 107a. The court's denial of rehearing is reported at *State v. Reed,* 2016 La. Lexis 2078 (La. 10/19/2016) and is reproduced in Appendix C., at Pet. App. 144a.

JURISDICTIONAL STATEMENT

The Louisiana Supreme Court issued an opinion on September 7, 2016, and denied a timely-filed motion for rehearing on October 19, 2016. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 14, Section 30 of the Louisiana Revised Statutes provides in pertinent part: "If the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation or suspension of sentence in accordance with the determination of the jury." La. R.S. 14:30 (C)(1).

Article 905.3 of the Louisiana Code of Criminal Procedure provides in pertinent part: "A sentence of death shall not be imposed unless the jury finds beyond reasonable doubt that at least one aggravating circumstance exists and, after consideration of any mitigation circumstances, determines that the sentence of death should be imposed." La. C. Cr. P. Art. 905.3.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

INTRODUCTION

Petitioner was convicted and sentenced to death in the same state, the same parish, by the same prosecutor considered by this Court in *Tucker v. Louisiana*, 136 S. Ct. 1801 (2016) (Breyer J., Ginsburg J., *dissenting from denial of certiorari*).

Recognizing that this Court expresses deep restraint before invalidating the constitutionality of any statute, still it remains her obligation to interpret and apply the Eighth Amendment, which protects 'nothing less than the dignity of man.'

Capital punishment is now constrained to a dwindling handful of locations, reserved not for the most culpable offenders, but for those unlucky few prosecuted under anachronistic circumstances. The declining numbers of death sentences and executions has not ensured that capital punishment is applied more carefully but rather enhanced the 'not altogether satisfactory' application of the punishment.

The time has come to assess whether the evolving standards of decency that mark the maturation of a civilized society now establish that a life sentence without parole is a sufficiently severe punishment.

STATEMENT OF THE CASE

Petitioner, Marcus Reed, resided, with his girlfriend, her two small children, and her brother, in a "rural, heavily wooded area of southwest Caddo Parish." Pet. App. at 4a. Mr. Reed had "applied for disability" because of an "injury to his arm he allegedly received as a child." Pet. App. at 97a.

On August 16, 2010, eighteen-year-old Jarquis Adams, along with another man, burglarized Reed's residence. After the burglary, Mr. Adams told his accomplice that he "wanted to go back to the house to get some stuff he should have got the first time [they were] there." Pet. App. at 15a. Later that evening, around 10:00 p.m., Jarquis Adams returned to Mr. Reed's home with his older brother Jeremiah Adams (20) and his younger brother Gene Adams (13). "There was little factual dispute at trial on this score. Every one of the fact witnesses the State offered who spoke to the defendant before the killings, or were present at the [] residence that evening testified the [defendant] learned prior to the homicides that someone had broken into the []residence that day." Pet app. at 14a.

The State introduced evidence that after the burglary, but before the shooting, Mr. Reed was heard on the phone saying ""You need to come home and get your package cause I'm fixing to go." Pet. App. at 15a. The prosecutor at trial attempted to argue that the unnamed person on the other end of the phone was

Jarquis Adams, and that this was an effort by Mr. Reed to entice Mr. Adams to his own home, in the dark of night.

The trial court excluded evidence that a State witness, Clarence Powell, overheard Mr. Reed arguing with an individual on the telephone about thirty minutes before the shooting, yelling

> I don't know what the hell y'all think y'all doing and I'm not the one to play with; don't—don't bring this stuff to my house, don't bring it down here; I don't mess around with nobody … He said I don't mess with nobody, I stick to my fucking self. …

Pet. App. at 64a. The Louisiana Supreme Court recognized that the trial court's exclusion of the evidence as hearsay was erroneous but found the exclusion of the evidence harmless because the defense was able to elicit evidence that Mr. Reed engaged in a similar altercation with the Adams brothers upon their arrival at his home. As Clarence Powell testified at trial, Reed yelled at Adams and his brothers:

> I told you don't come down here. Don't fuck with me. Don't fuck with me. And then somebody else, a voice I don't recognize, Motherfucker, I told you, I told you, you ain't shit. You ain't shit. And then I heard a man say, Get the fuck away from here; I'm telling y'all I'm telling y'all just leave me alone.

Pet. App. at 23a. Mr. Powell further testified that he heard someone yell "gun" and then he heard "gunshots from two different guns, first from a handgun and then from a rifle." Pet. App. at 23a.

Jeremiah Adams, Jarquis Adams, and Gene Adams were shot and killed with a semi-automatic rifle, found "hidden under the porch". The defense attempted to elicit evidence of fourth person in the Adams' brother's car, and the possibility that one of the occupants of the car was armed with another gun. "[C]oncerning the possibility of a fourth victim, [two state eye- witnesses] Shannon [Garland] and Daniel [Jackson] both admitted they initially informed police that more than three people were in the vehicle." Pet. App. at 37a. And indeed "a .45 caliber semiautomatic pistol was recovered in the tree line behind the residence." Pet. App. at 10a. Despite "discrepancies" "inconsistencies" and "conflicting testimony as to factual matters", the Louisiana Supreme Court found the evidence sufficient to support a first degree murder conviction. Pet. App. at 38a ("In this case, there were inconsistencies among the testimonies…").

As the Louisiana Supreme Court acknowledged, defense counsel "arguably made a professional error" by failing to request a "Stand Your Ground" defense instruction in the culpability phase, which allows a citizen to use lethal force to defend a dwelling against a person whom one reasonably believes is committing or about to commit a violent

felony or burglary. Instead, defense counsel requested an instruction that required the defense to prove that petitioner reasonably believed that he was "in imminent danger of losing his life" and that the "killing [was] necessary to save himself from that danger." Pet. App. at 44a.

The Louisiana Supreme Court also rejected Petitioner's claim that the district court erred in denying trial counsel's motion to withdraw based upon a potential conflict of interest arising from trial counsel's previous representation of one of the victims, Jarquis Adams. Defense counsel notified the trial court of this conflict before trial, and also asserted after trial that because of his duties to his former client, he was restricted in his investigation, and cross examination of the victim's relatives in support of Mr. Reed's defense that his actions were justified. The Louisiana Supreme Court rejected the possibility of a conflict of interest:

> It does not appear defense counsel's cross-examination of the State witnesses was hindered in any way by Mr. Florence's representation of victim, Jarquis Adams, and counsel did not take any action that was detrimental to defendant. Accordingly, this claim lacks merit.

Pet. App. at 112a. Uncontradicted, the evidence at trial lauded the three victims; the Louisiana Supreme Court opinion begins reciting the positive qualities of the victims and their hopes for the future,

unencumbered by any question concerning the complicated nature of their character. Pet. App. at 3a-4a.

Defense counsel, seeking to encourage the jury to express restraint, quoted Bishop Tutu's observation that "vengeance is not justice. And what we're looking for here is justice," (R. 5119), and asked for mercy on behalf of Mr. Reed, with a non-denominational reminder. *See* R. 5115 ("What they're talking about is vengeance and not justice. And I just want to point out there was a great man one time who says, what you do to the least of my brothers, you do to me."). The prosecution responded with a broad-side attack on defense counsel quoted almost in full in the Louisiana Supreme Court opinion, falsely claiming counsel had called the jurors vengeful killers, and then responding to the suggestion for mercy:

> But this is another insidious argument that [defense counsel] would make; well, unless you believe in his interpretation of the Bible, you're no good. You're a vengeful killer. You're not worthy of consideration. And remember what the man said. And [defense counsel] referred to Him as that man. I refer to Him as Jesus Christ, the son of the living God. But be that as it may. When you do to these the least of my brethren, you do to me. And he said that.
>
> Does that mean that doesn't apply to the Adams brothers? When you slaughter them, didn't then you slaughter Him?
>
> And it's so easy to get in to this and that's why the argument is so insidious, because Goorley says, This is my view of the Bible and unless

> you agree with my view of it, there's something wrong with you; you're not merciful; you're not Christian; you're not any good; you're a vengeful killer. Well, that's nonsense.
>
> Because I also remember the same Christ saying, Whoa [sic] to you who would harm one of these, referring to children. It would be better that you had never been born. A millstone around your neck and dropped into the sea.

Pet. App. at 48a. The Louisiana Supreme Court rejected Petitioner's argument that the prosecutor's closing argument was so far out of bounds that it undermined the integrity of the proceedings, opining that the argument did not vitiate the validity of the verdict. Pet. App. at 45a ("Even if the prosecutor exceeds these bounds, a reviewing court will not reverse a conviction due to an improper remark during closing argument unless the court is thoroughly convinced the argument influenced the jury and contributed to the verdict…"); Pet. App. at 52a ("Even assuming the prosecutor exceeded the bounds of proper rebuttal argument, the trial court clearly acted within its discretion when it denied the mistrial motion…").

On appeal, petitioner raised two separate assignments of error concerning the constitutionality of the death penalty, that its imposition in Louisiana was arbitrary and capricious (Assignment of Error 49) and that the evolving standards of decency rendered the penalty excessive (Assignment of Error 50. Pet. Brief, assignments of error at xii; *see also* Issue XX (A), XX (B), at pg 82-85. Petitioner also raised the

issue again in his Sentence Review Memorandum. See Petitioner's Sentence Review Memorandum, II, at pg 25-31.

Ultimately, the Louisiana Court held:

> Louisiana's bifurcated capital sentencing scheme, modeled after the Georgia statute upheld in *Gregg v. Georgia*, 428 U.S. 153, 187 (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).

Pet. App. at 143a. Petitioner's timely application for rehearing was denied. Pet. App. at 144a.

REASONS FOR GRANTING THE WRIT

This Court should consider whether the death penalty violates the Eighth Amendment. The standards of decency have evolved since this Court last considered the broad question of the constitutionality of capital punishment in 1976.

Use of capital punishment has dropped to such low levels that it would be hard to support a claim that the death penalty is an indispensable part of the criminal justice system. And yet, the death penalty has an out-sized effect on our confidence in the fair administration of punishment.

Experience has taught us that while many prisoners undergo significant transformation, the death penalty leaves no room for the possibility of redemption.[1] In so doing, capital punishment undermines the very dignity of human life that it was designed to enhance.[2]

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[1] *See* Wilbert Rideau, IN THE PLACE OF JUSTICE: A STORY OF PUNISHMENT AND DELIVERANCE, Knopf, New York, 2010.

[2] Cong. Rec H6192 (2015) (Statement of Pope Francis) ("[S]ince every life is sacred, every human person is endowed with inalienable dignity, and society can only benefit from the rehabilitation of those convicted of crimes. …[t]hat a just and

Further percolation in the lower courts is perhaps unlikely to provide additional answers. But delay in addressing the question serves to undermine confidence in the administration of the system it was designed to protect.[3]

This Court should grant certiorari and consider whether at this point in our national history the imposition of the death penalty for a homicide offense is excessive and unnecessary, and as such a cruel and unusual punishment imposed in violation of the Eighth and Fourteenth Amendments.[4]

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necessary punishment must never exclude the dimension of hope and the goal of rehabilitation.").

[3] See Martin Luther King Jr., *Letter from a Birmingham Jail*, 16 April, 1963 ("Now is the time to make real the promise of democracy and transform our pending national elegy into a creative psalm of brotherhood. Now is the time to lift our national policy from the quicksand of racial injustice to the solid rock of human dignity.").

[4] The question presented here "is limited to crimes against individual persons. [It does] not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State." *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008).

I. THE EVOLVING STANDARDS OF DECENCY REFLECT THAT THE DEATH PENALTY IS UNNECESSARY AND EXCESSIVE

When this Court upheld the constitutionality of capital punishment in *Gregg v. Georgia,* Justice Stewart's plurality opinion suggested that the death penalty promoted "stability" in the "administration of criminal justice" preventing the sewing "the seeds of anarchy, of self-help, vigilante justice and lynch law." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (Stewart, J., Stevens, J., Powell, J.,) (internal citations omitted). Today, in contrast, the opposite is true; confidence in the administration of criminal justice is undermined rather than enhanced by the application of capital punishment.

A. A Plurality of Jurisdictions (Twenty) No Longer Have The Death Penalty

In 2016, 19 states plus the District of Columbia now have no death penalty.[5] The movement away from capital punishment has increased; seven states abandoned the death penalty in the last nine years: New Jersey (2007), New York (2007), New Mexico

[5] Alaska, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin.

(2009), Illinois (2011), Connecticut (2012), Maryland (2013), Delaware (2016).[6]

The Court's jurisprudence is clear that the Eighth Amendment's evolving standards of decency analysis is not a nose-counting of states, but rather that the action of states is significant "[g]iven the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime[.]". *Atkins v. Virginia*, 536 U.S. 304, 315 (2002); *Roper v. Simmons*, 543 U.S. 551, 567 (2005) (noting trend "carries special force in light of the general popularity of anticrime legislation.").

When, in 1972, this Court decided *Furman v. Georgia*, forty-one states, the District of Columbia and the Federal Government provided for capital punishment. Nine states prohibited it. *See Furman v. Georgia*, 408 U.S. 238, 341 (1972). When the Court upheld the constitutionality of capital punishment in 1976, the Court noted that "35 states have enacted new statutes that provide for the death penalty."

[6] Legislative abolition in Nebraska was subjected to a repeal referendum on November 8, 2016. LB 268 was passed by the Nebraska State Senate on May 27, 2015, overriding a veto from Governor Pete Ricketts. While the plebiscite in Nebraska repealed the repeal, the legislative action broadly reflected a view that capital punishment was unnecessary and excessive.

Gregg v. Georgia, 428 U.S. 153, 179 (1976).[7] After *Gregg*, four additional states enacted death penalty statutes – resulting in 39 states with death penalty statutes.[8]

Much has changed. Now, twenty jurisdictions – the largest cohort of jurisdictions -- no longer have a death penalty statute on the books.

B. A Significant Number of Jurisdictions (Twelve) No Longer Use the Death Penalty.

In addition to the twenty jurisdictions that no longer have the death penalty on the books, twelve states that retain it on their books have ceased or all but ceased to employ it, reflecting the broad consensus against capital punishment. *See, e.g.*, *Hall v. Florida*, 134 S.Ct 1986, 1997 (2014) (counting Oregon on the abolitionist "side of the ledger," because the Governor

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[7] *See Gregg v. Georgia*, at n. 23 (citing statutes in Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.)

[8] Kansas, New Jersey, Oregon, South Dakota.

"suspended the death penalty" and the state had "executed only two individuals in the past 40 years").

Governors in Oregon,[9] Colorado,[10] Washington[11] and Pennsylvania[12] have indefinitely halted executions. Similar to Oregon, which "executed only two individuals in the past 40 years," Colorado has executed only one person in the past 47 years. Washington has executed only five people in a half-century. Pennsylvania has executed only three people—all volunteers—in the last fifty years. The dramatic infrequency of executions in these states demonstrates that the executive moratoria simply

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[9] *See Haugen v. Kitzhaber*, 306 P.3d 592 (Ore. 2013) (recognizing Governor's authority to impose moratorium).

[10] *See* Statement of Governor John W. Hickenlooper, Executive Order, Death Sentence Reprieve, 2013-006, May 22, 2013, at http://www.deathpenaltyinfo.org/documents/COexecutiveorder.pdf.

[11] *See* Statement of Governor Jay Inslee, *Remarks announcing a Capital Punishment Moratorium*, February 11, 2014, at http://www.deathpenaltyinfo.org/documents/InsleeMoratoriumRemarks.pdf.

[12] *See Commonwealth v. Williams*, 2015 Pa. LEXIS 2973 (Pa. Dec. 21, 2015) (upholding the Governor's authority to suspend the death penalty through a reprieve initiated as the "first step in establishing a temporary moratorium on the death penalty.").

made official what citizens of these jurisdictions had embraced for years: the end of capital punishment.

In addition to these four states, at least eight states, the federal government, and the U.S. Military[13] exhibit a degree of long-term disuse that rivals the disuse described in *Hall*. New Hampshire, which has only one occupant on its death row, has not performed an execution in 86 years. Wyoming has executed one person in fifty years and its death row is empty. Kansas, as the *Hall* Court noted, "has not had an execution in almost five decades." *Id.* at 1997.[14] Idaho, Kentucky, Montana, Nebraska, South Dakota, and the Federal Government have performed only three executions each over the past 50 years. Moreover, of the nineteen executions carried out by these eight states and the federal government, seven have involved inmates who volunteered for execution.

In sum, thirty-one states, the District of Columbia, the federal government, and the U.S. military, have either abolished the death penalty or have carried out one or fewer executions per decade over the past half-century.

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[13] The U.S. military has not executed anyone since 1961.

[14] In Kansas, where judicial elections over the state supreme court were received as a litmus test on capital punishment, the justices were retained.

C. A Number of States (Eight) Have What Appears to be Symbolic Death Sentences.

In eight other states that purport to endorse capital punishment, such as California, use of the death penalty appears more symbolic than actual. Although there are more than seven hundred and forty (740) people on California's death row, no execution has taken place in ten years.[15] It has been six years since Indiana or Utah executed a defendant, ten years since Montana did so. Even in parts of the South that used to execute people regularly, it has been five years since South Carolina has executed a person (a volunteer); seven years since Tennessee

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[15] *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1052 (C.D. Cal. 2014) *rev'd on procedural grounds*, *Jones v. Davis*, 2015 U.S. App. LEXIS 19698 (9th Cir. 2015) (noting "to carry out the sentences of the 748 inmates currently on Death Row, the State would have to conduct more than one execution a week for the next 14 years. . . .[and that] only 17 inmates currently on Death Row have even completed the post-conviction review process and are awaiting their execution."). The ballot initiatives on the death penalty reflect a majority of the population believe the system as it stands does not function. Proposition 62 which would have replaced capital punishment with life in prison without parole, garnered 46.1% of the vote. Proposition 66 which promised to fix the broken system in California, including expediting executions, received just above 50% of the vote. This is a far cry from the 71% that voted to pass California Proposition 7 in 1978. See University of California Hastings, Scholarship Repository, Propositions, available at http://repository.uchastings.edu/ca_ballot_props/840/ (last checked 11/10/2016).

executed a person; ten years since North Carolina executed a person, and eleven years since Arkansas has done the same.

D. Only a Handful of States Actually use Capital Punishment

Actual sentencing practices illustrate the true rarity of the punishment. *See Graham v. Florida*, 560 U.S. 48, 62 (2010) (finding a societal consensus against juvenile life without parole sentences for non-homicide offenses on the basis of extreme disuse even where the vast majority of jurisdictions formally authorized the practice); *Atkins*, 536 U.S. at 323 (Rehnquist, C.J., *dissenting*) (noting that jury verdicts are a "significant and reliable index of contemporary values" because of the jury's intimate involvement in the case and its function of "maintaining a link between contemporary community values and the penal system").

In the decade before this Court decided *Furman*, America averaged 106 death sentences annually. 408 U.S. at 291 (Brennan, J., concurring) ("When a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied. To dispel it would indeed require a clear showing of nonarbitrary

infliction.").[16] As both the population and homicide rate grew, death sentences ballooned to 315 in 1994 (and again in 1996). But death sentences have declined steeply and consistently over the past fifteen years. In 2015, in a nation of over 318 million people, the nation produced just 49 death sentences.[17]

In terms of executions, in 2015, six states were responsible for 28 executions, Florida (2), Georgia (5), Missouri (6), Oklahoma (1), Texas (13) and Virginia (1). In 2016, as of the filing of this petition, there were

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[16] *See also Furman*, *supra*, at 312-13 (White J., concurring) ("I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.").

[17] When juries impose death sentences in jurisdictions that do not perform executions, it is difficult to assess what those sentences reflect. In California, juries have sentenced 937 persons to death since 1976, but the State has performed only 13 executions in that same time span and none since 2006. While 745 inmates are on California's death row, none are scheduled for execution. *Jones v. Chappell*, *supra*. California juries (and prosecutors and defense lawyers considering their responsibilities) are protected by the near-certainty that a defendant purportedly condemned to death will likely never be executed. *See Caldwell v. Mississippi*, 472 U.S. 320, 331 (1985) ("even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts").

only 17 executions in five states – Alabama (1), Florida (1), Georgia (7), Missouri (1) and Texas (7) – have executed a defendant. To paraphrase *Coker*, given this infrequent use, it would be hard to support a claim that the death penalty was an indispensable part of Louisiana's criminal justice system.

E. Where Capital Punishment Is Utilized, It Is Characterized By Severe Geographic Isolation, And A Sordid Circumstance of Dysfunction.

Even in states that regularly impose the death penalty, examination reveals that its use is confined to a small number of counties. Only 15 of the United States' 3,143 county or county equivalents imposed five or more death sentences between 2010 and 2015.[18] These counties "share . . . a history of overzealous prosecutions, inadequate defense lawyering, and a pattern of racial bias and exclusion." These qualities frequently lead to "the wrongful

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[18] *See Glossip v. Gross*, 135 S. Ct. 2726, 2760 (2015) (Breyer, J., dissenting) (noting that "between 2010 and 2015 (as of June 22), only 15 counties imposed five or more death sentences."). *See also* FAIR PUNISHMENT PROJECT, TOO BROKEN TO FIX PART 1: AN IN-DEPTH LOOK AT AMERICA'S OUTLIER DEATH PENALTY COUNTIES 2 (2016) (hereinafter, *Too Broken*), *available at* http://fairpunishment.org/wp-content/uploads/2016/08/FPP-TooBroken.pdf.

conviction of innocent people, and the excessive punishment of persons who are young or suffer from severe mental illnesses, brain damage, trauma, and intellectual disabilities." Racial minorities bear the brunt of these failings.[19] As one commentator observed, the parish and prosecutor who secured Petitioner's death sentence are emblematic of the local irregularities that vitiate the validity of capital punishment. *See* Lee Kovarsky, *Muscle Memory and the Local Concentration of Capital Punishment*, Vol. 66 Duke Law Journal, No. 2, at 261 (2016).

Nor is it insignificant that in one third of the outlier counties identified by Justice Breyer and Ginsburg in the *Glossip* dissent, the elected prosecutors have either been voted out of office or declined to seek re-election.

F. Professional Organizations, Law Enforcement Agencies and Corrections Experts Reflect a Broad Consensus the Death Penalty is Unnecessary.

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[19] Of the fifteen men on death row in Caddo Parish, thirteen are African-American. Similarly, in Jefferson County, Alabama, all five of the 2010-2015 death sentences were for African-American men. *See* Emily Bazelon, *Where The Death Penalty Still Lives*, N.Y. TIMES MAGAZINE, Aug. 28, 2016.

Professional organizations, law enforcement agencies and the Corrections community reflect the emerging consensus that the death penalty is excessive. A poll of Chiefs of Police indicates that law enforcement officials ranked capital punishment last as a tool for crime reduction.[20] Like law enforcement officials, criminologists concur that there is no evidence that capital punishment deters murders.

The changing views of professional organizations once committed to capital punishment also reflect the abandonment of the death penalty. In 2009, the American Law Institute, the organization that drafted the model post-*Furman* capital punishment statute, removed the statute from its penal code. As noted by Professor Steiker:

> The decision of the American Law Institute (ALI) in October of 2009 to withdraw the death penalty . . . represents a similar recognition of the futility of further regulatory efforts. … Thus, it is clear that the ALI's decision to forgo further reform efforts was based not on its own resource constraints or other pragmatic concerns, but rather, like

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[20] *See* Richard C. Dieter, *Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis,* Death Penalty Information Center (released October 20, 2009) ("The nation's police chiefs rank the death penalty last in their priorities for effective crime reduction. The officers do not believe the death penalty acts as a deterrent to murder, and they rate it as one of most inefficient uses of taxpayer dollars in fighting crime.").

> Justice Blackmun's renunciation of constitutional regulation, on the impossible - "intractable" - nature of the task.

Carol Steiker and Jordan Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 Tex. L. Rev. 353, 354 (2010).

Corrections officials have similarly questioned both the necessity, and the appropriateness, of capital punishment. *See, e.g.*, Terry Collins, *Justice System Can Be Improved By Removing Ultimate Penalty*, COLUMBUS DISPATCH, Jan. 25, 2011 ("My experience tells me that our justice system can be even more effective and fair without Death Rows and the death penalty."); Frank Thompson, *Death Penalty Doesn't Make Guards Safer*, THE NEWS JOURNAL OF DELAWARE, Apr. 1, 2015 ("Many of us who have taken part in this process live with nightmares, especially those of us who have participated in executions that did not go smoothly. . . . Replacing the death penalty with a sentence of life without the possibility of parole does not excuse the horrific acts these individuals have committed. This is a severe punishment that allows Delaware to use its limited public safety dollars more wisely, and removes the monumental responsibility placed on correctional officers to take a human life in the name of a public policy that does not work."); E. Vail and D. Morgan, *It's Wrong For The State To Take A Life*, SEATTLE TIMES, Feb. 22, 2014 ("[B]etween the two of us, we have participated in all

five executions carried out [in Washington]…We have witnessed visibly shaken staff carry out a questionable law that condones killing inmates who have been captured, locked behind bars and long since ceased being a threat to the public.").

II. THE DEATH PENALTY NO LONGER FURTHERS ANY VALID PENOLOGICAL PURPOSE, VITIATING ITS LEGITIMACY AS A PUNISHMENT.

When the infliction of capital punishment no longer serves a penological purpose, its imposition represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." *Furman*, 408 U.S. at 312; *Kennedy*, 554 U.S. at 441 (citing *Gregg*, 428 U.S. at 173, 183, 187; *Atkins*, 536 U.S. at 319).

The only purposes that could be served by capital punishment are "retribution and deterrence." *Gregg v. Georgia,* 428 U.S. 153, 183 (1976). A punishment is unconstitutional and excessive

> if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground.

Coker v. Georgia, 433 U.S. 584, 592 (1977). While the Court in *Coker* held capital punishment was

disproportionate for rape, it noted that due to the lack of use "it would be difficult to support a claim that the death penalty for rape is an indispensable part of the State's criminal justice system." *Id.,* at n.4.

This Court should consider whether, given the thousands of homicides committed each year, and the handful of death sentences and executions, the death penalty fails to make a measurable contribution to acceptable goals of punishment and is out of proportion to the offense. *See Glossip.,* at 2755 (Breyer, J., Ginsburg, J., *dissenting*) ("I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution.").

A. The Available Evidence Does Not Establish That the Death Penalty Is a Meaningful Deterrent to Murder.

"[T]he theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct." *Atkins*, 536 U.S. at 320. Forty years ago, objective evidence that capital punishment had any deterrent effect whatsoever, when compared to lengthy imprisonment, was nonexistent. *See Furman*, 408 U.S. at 301, 307, 347-54, 395-96. The same is true today. In a 2012 analysis of several deterrence studies, the National Research Council concluded, "research to date on the effect of capital punishment on homicide is not informative about whether capital

punishment decreases, increases, or has no effect on homicide rates."[21] *See also Glossip,* 135 S.Ct. at 2768 (2015) (Breyer, J., Ginsburg, J., *dissenting*) (concerning deterrence); *Baze v. Rees*, 553 U.S. 35, 79 (2008) (Stevens, J., *concurring in judgment*) (same).

Even without parsing the statistics, a punishment as infrequently imposed as the death penalty is today can serve little, if any, purpose. *See Furman*, 408 U.S. at 311 (White, J., *concurring*) ("the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system."). Where, as here, there were approximately 14,000 murders in 2014 (the last year of available data) and just 49 death sentences and 28 executions, in 2015, the risk of facing the penalty of death is miniscule.

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[21] *Id*. *See also* D. Nagin and J. Pepper, "Deterrence and the Death Penalty," Committee on Law and Justice at the National Research Council, Apr. 2012; D. Vergano, *NRC: Death Penalty Effect Research "Fundamentally Flawed"*, USA TODAY, Apr. 18, 2012). *See also* Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Casual Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255 (2006).

B. The Death Penalty Does Not Contribute Any Significant Retributive Value Beyond That Afforded By A Life Sentence

Retribution is the principle that "most often can contradict the law's own ends," because, "[w]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing constitutional commitment to decency and restraint." *Kennedy*, 554 U.S. at 420. This Court exercises "particular concern" when it "interprets the meaning of the Eighth Amendment in capital cases." *Id*. Life in prison without the possibility of parole—knowing that one will die in prison—is an extremely severe punishment that adequately serves retributive goals.[22] The historical connection between capital punishment and lynching – that the penalty was justified to limit the sowing of "the seeds of anarchy-of self-help, vigilante justice and lynch law"[23] – should give pause.

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[22] Indeed, life without parole is a sufficiently harsh punishment that a significant number of condemned individuals choose death over a life sentence. *See* John H. Blume, *Killing the Willing 'Volunteers,' Suicide and Competency*, 103 MICH. L. REV. 939 (2005). Of the 1439 executions conducted since 1976, 144 (10%) have been volunteers. Death Penalty Information Center, *Execution Database*, Last Visited November 14, 2016.

[23] *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). *See also* G. Ben Cohen, *McCleskey's Omission: The Racial Geography of Retribution*, Oh. St. J. of Crim. Law, Vol. 10, No. 1 (2012).

C. Lengthy Delays, Coupled With the Conditions of Confinement, Undermine the Validity of the Punishment.

While exonerations and reversals of sentence underscore the heightened need for reliability and process in capital cases, the long delay between a death sentence's initial pronouncement and its eventual execution undermine whatever minimal deterrent or retributive benefit it might have. *Glossip*, 135 S.Ct. at 2765 (Breyer, J., Ginsburg J., *dissenting*). Death row inmates often spend decades in solitary confinement. Such lengthy terms in isolation can cause "numerous deleterious harms" to an inmate's physical and mental health. *Glossip*, 135 S.Ct. at 2765 (Breyer, J., dissenting); *see also* Haney, *Mental Health Issues in Long–Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQUENCY 124, 130 (2003) (solitary confinement can cause prisoners to experience "anxiety, panic, rage, loss of control, paranoia, hallucinations, and self-mutilations"); *Davis v. Ayala*, 135 S.Ct. 2187, 2210 (2015) (Kennedy, J., *concurring*) (acknowledging courts obligation to consider constitutionality of long-term solitary confinement).

Marcus Reed spends 23 hours per day, every day, in a cell that is 8 feet by 10 feet under conditions of confinement that are constitutionally questionable. A federal district court found that "inmates housed in each of the death row tiers are consistently, and for

long periods of time, subjected to high temperatures and heat indices in the [] 'caution,' 'extreme caution,' and 'danger' zones," with a heat index that would repeatedly exceed 100 degrees. *Ball v. LeBlanc*, 988 F. Supp. 2d 639, 659, 679-80 (M.D. La. 2013) (finding conditions of confinement for three prisoners on Louisiana's death row cruel and unusual punishment).[24]

D. The Death Penalty is Not Reserved for the Worst Offenders Culpable of the Most Aggravated Offenses

Despite the "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse," *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., *concurring*)), individuals with significant impairments remain overrepresented among defendants sentenced to death and executed.

The execution of a person with insufficient culpability serves no retributive purpose, "violat[ing] his or her inherent dignity as a human being." *Hall v. Florida*, 134 S.Ct. 1986, 1992 (2014). In part because

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[24] *See also Ball v. LeBlanc*, 792 F.3d 584 (5th Cir. 2015) (agreeing that conditions violated Eighth Amendment, but remanding for narrower remedy determination).

of their reduced moral culpability, the Court has categorically prohibited the execution of juveniles and those with intellectual disability. *See Roper v. Simmons,* 543 U.S. 551 (2005); *Atkins*, *supra*.

But the concern over retributive excess extends beyond juvenile status and intellectual disability to include offenders with severe mental illness, traumatic brain injuries and other functional deficits that have a tendency to degrade the quality of thought processes. *See*, *e.g.*, *Porter v. McCollum*, 558 U.S. 30, 43-44 (2009) (recognizing mitigating value of a defendant's "brain abnormality and cognitive deficits," as well as "the intense stress and mental and emotional toll" that army service can have on an individual); *Panetti v. Quarterman*, 551 U.S. 930, 958-59 (2007) (questioning "whether retribution is served" where "[t]he potential for a prisoner's recognition of the severity of the offense and the objective of community vindication are called in question" when the "prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole.").

Equally troubling are the many impairments or disadvantages affecting an offender's culpability of which a jury and court may not be entirely aware. The failure of defense counsel to discover and present

mitigation is but one obvious area of concern.[25] Significantly, an increasing percentage of death sentences involve defendants who don't just fail to "give meaningful assistance to their counsel" but due to direct conflicts with counsel decide to represent themselves; whether these conflicts arise as a result of the defendant's innocence, mental illness or personality deficits, the result in the aggregate is a "special risk of wrongful execution. *See Atkins*, at 320.

Courts grapple with the difficulty of determining what degree of disability, illness, or disadvantage renders death an impermissible or disproportionate punishment. The substantial functional impairments of those executed reveal the defects in this process. *See, e.g.* Smith, Cull, and Robinson, *The Failure of Mitigation*?, 65 HASTINGS L.J. 1221 (2014) (noting over 85% of one hundred individuals executed between the middle of 2011 and the middle of 2013 had traits reducing blameworthiness, including fifty-four diagnosed with or exhibiting symptoms of an acute mental illness, fifty with serious childhood trauma, like chronic homelessness or sexual molestation, and thirty-two with intellectual impairments, like a traumatic brain injury or a significant cognitive deficit).

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[25] *See e.g.*, Bright, *Counsel for the Poor: The Death Penalty Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

As significantly, there is no assurance that the death penalty is being reserved for the worst offenses. As this Court recognized in *Kennedy v. Louisiana*, "The rule of evolving standards of decency … means that resort to the penalty *must be reserved for the worst of crimes* and limited in its instances of application." 554 U.S. at 446-447.

Mr. Reed was exposed to capital punishment because he refused to plead guilty and accept a life sentence. *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."). The fact that a life sentence without parole was sufficient is strong evidence that that the death penalty is excessive; a scheme that reserves the death penalty for those who insist on their innocence is constitutionally infirm. *Cf United States v. Jackson*, 390 U.S. 570, 581 (1968) ("Our problem is to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury.").

E. There Remains an Intolerable Risk of Executing the Innocent.

Advances in forensic evidence, particularly DNA testing, have produced a startling number of exonerations in capital cases. *See Glossip*, 135 S.Ct. at

2756-58 (Breyer, J., and Ginsburg, J. *dissenting*); *Kansas v. Marsh*, 548 U.S. 163, 210 (2006) (Souter, J., dissenting) (quoting *Gregg*, 428 U.S. at 188) ("we are [] in a period of new empirical argument about how 'death is different.'"). When the Court decided *Marsh*, there had been 120 exonerations of death row inmates.[26] Today, there have been 156 exonerations of death row inmates. There were six such exonerations in 2015. [27] Even more troubling, there is growing concern that states have executed actually innocent defendants. *See Glossip*, 135 S.Ct. at 2758 (Breyer, J., dissenting); Maurice Possley, *Fresh Doubts Over a Texas Execution*, WASH. POST, Aug. 3, 2014 (discussing case of Cameron Todd Willingham); James Liebman, *The Wrong Carlos: Anatomy of a Wrongful Execution* (Colum. Univ. Press 2014 ed.) (discussing case of Carlos DeLuna). As Justice Stevens has noted, the risk of killing an innocent

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[26] *See* Death Penalty Information Center, *List of Those Freed from Death Row*, available at: http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (last visited November 14, 2016).

[27] *Id*. The exoneration of Henry McCollum is only unique in the attention the case received. *See* Jonathan Katz and Erik Eckholm, *DNA Evidence Clears Two Men in 1983 Murder*, N.Y. TIMES, Sept. 2, 2014. McCollum's case was described as one that justified the imposition of capital punishment. *See Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Scalia, J., *concurring*).

person, which cannot be entirely eliminated, is a "sufficient argument against the death penalty: society should not take the risk that that might happen again, because it's intolerable to think that our government, for really not very powerful reasons, runs the risk of executing innocent people." *See* Columbia Law School, *Professor James Liebman Proves Innocent Man Executed, Retired Supreme Court Justice Says*, Jan. 26, 2015. In Louisiana, since 1976, there has been one exoneration for every three executions.[28]

Accepting, for these purposes that the evidence in this case satisfied the Louisiana Supreme Court's sufficiency standards, the evidence was in no way dispositive. Mr. Reed was at his own residence, late in the evening, when two adults and a teenager proceeded to show up, in the dark, after previously burglarizing the residence. If not perjury, the State's evidence depended upon testimony the Louisiana Supreme Court referred to as "inconsistent" (Pet. App., 18a, 39a, 40a, 62a, 114a, 115a). Each witness gave multiple statements; a number were threatened with perjury or arrest by the prosecutor. Pet. App., at 56a, 66a (noting prosecutor's threat to charge witnesses with perjury and to arrest a witness that

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[28] Frank Baumgartner and Tim Lyman, *Louisiana Death-Sentenced Cases and Their Reversals, 1976-2015*, The Southern University Law Center Journal of Race, Gender and Poverty, Vol. 7, 2016, at pg. 68.

corroborated Reed's defense). But even accepting the state's witnesses, Mr. Reed had a valid *Stand Your Ground* defense; and even if he did not have an outright justification for his actions, this case is clearly not one of the most aggravated murders.

F. Race Continues to Play a Pernicious Role in the Administration of Capital Punishment.

Petitioner's case presents unwelcomed evidence that race continues to play a role in the administration of the death penalty.[29] Petitioner was sentenced to death, at a courthouse in front of which is a monument to *The Confederacy's Last Stand,* by a jury that was predominantly white even though the parish is almost 50% African-American.

Recent research indicates that race and gender pay a predominant role in the administration of capital punishment. *See* Frank Baumgartner and Tim Lyman, *Race of Victim Discrepancies in Homicides and Executions*, Louisiana 1976-2015, LOYOLA UNIV. OF NEW ORLEANS J. PUB. INTEREST L., Fall 2015.

After reviewing thousands of homicides in Louisiana over the forty-year period, the researchers

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[29] For some, it may be disquieting, that of the seventeen executions so far in 2016, each involved a white victim, and that seven of these white victims were white females. See Death Penalty Information Center, Execution Database, 2016.

found that African-American offenders had the highest chances of being sentenced to death. Noting the "stark disparities" in the application of the death penalty based upon race and gender, the authors observed that "we find no cases in the entire history of Louisiana where a white person was executed for killing a black male." *See id.* at 1, and at n.2. In Louisiana, it would be difficult to imagine a white person being prosecuted, let alone convicted and sentenced to death for the offense for which Mr. Reed is facing execution.

Parish-level data in Louisiana confirms the insidious role race plays in the application of capital punishment, suggesting that "the race of the defendant and victim are both pivotal in the imposition of capital punishment: death was more likely to be imposed against black defendants than white defendants."[30] *Id.*

III. FURTHER PERCOLATION IN THE LOWER COURTS IS UNNECESSARY AND UNLIKELY TO CLARIFY THE ISSUE

Further percolation in the lower courts is unnecessary. Acknowledging that when placed to a plebiscite, voters in Nebraska, Oklahoma and California rejected calls to abolish capital punishment. But nor can it be said that these votes mirrored the sentiment expressed in the years between *Furman* and *Gregg*. Regardless, in the end,

[30] *Id*. at 811–12.

limiting Eighth Amendment protections to those that pass referenda would turn the purpose of the constitutional protection on its head.

As the Court has held, complaints that "the Court's own institutional position and its holding will have the effect of blocking further or later consensus in favor of the penalty from developing" "overlook the meaning and full substance of the established proposition that the Eighth Amendment is defined by "the evolving standards of decency that mark the progress of a maturing society." *Kennedy v. Louisiana*, 554 U.S. at 446.

Further development is unlikely in the courts as Justice O'Connor observed, particularly in the context of the Eighth Amendment, which "draw[s] its meaning from . . . evolving standards of decency," "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*).

"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958). Ultimately, whether the death penalty is an excessive punishment is a question for this Court, whose independent must be brought to bear.

> Confirmed by repeated, consistent rulings of this Court, this principle requires that use of the death penalty be restrained. The rule of evolving standards of decency with specific marks on the way to full progress and mature

> judgment means that resort to the penalty must be reserved for the worst of crimes and limited in its instances of application. In most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense.

Kennedy v. Louisiana, at 445-447.

Further percolation in the courts is unnecessary. Death sentences are down to a dwindling number of counties, in a handful of states. Seven states have recently replaced the death penalty with life without parole. It may happen that one or two more states legislatively abolish capital punishment. It may happen that one or two states reinstate the death penalty on the books in response to outcries regarding crime. But actual use of capital punishment is constrained to a handful of jurisdictions. A candid assessment of the election returns in California, Nebraska and Oklahoma, where plebiscites on capital punishment did not eliminate use of the death penalty reflects – in a sense – only the unlikeliness of abolition by popular vote.

Justice Marshall hypothesized

> if the constitutionality of the death penalty turns, as I have urged, on the opinion of an informed citizenry, then even the enactment of new death statutes cannot be viewed as conclusive. In *Furman*, I observed that the American people are largely unaware of the information critical to a judgment on the

> morality of the death penalty, and concluded that if they were better informed they would consider it shocking, unjust, and unacceptable.

Gregg v. Georgia, 428 U.S. 153, 232 (Marshall, J., dissenting). Justice Marshall's thesis though apparent, in case after case, jurisdiction after jurisdiction, remains unrealized, in part, as a result of a percentage of people for whom, the fact that the death penalty operates in an unfair and racist manner increases rather than reduces support for capital punishment.[31] To the extent the existence of this percentage of individuals prevents further development in the states, it is exactly this Court's role and obligation to protect both the dignity of those broken and marginalized individuals facing punishment, and the dignity of, and confidence in, our justice system.

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[31] In a landmark study of attitudes towards the death penalty, Mark Peffley and Jon Hurwitz determined that as a matter of polling, that when exposed to the argument that the death penalty is unfair because of the risk of wrongful convictions, African-American support for capital punishment drops 16%; that when exposed to the argument that the death penalty is unfair because of race, African-American support for capital punishment drops 12%. In contrast, when whites are informed about the prospect of innocence, there is a less than 1% change in views on the death penalty; but when whites are informed that the death penalty has a racial component, there is a 12% increase in support for capital punishment. See Mark Peffley, Jon Hurwitz, *Race and the Death Penalty*, 51 American Journal of Political Science No. 4 (2007), at 1001.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

G. Ben Cohen*
The Promise of Justice Initiative
636 Baronne Street
New Orleans, La. 70113
504-529-5955
benc@thejusticecenter.org

Blythe H. L. Taplin
The Capital Appeals Project
636 Baronne Street
New Orleans, La. 70113

**Counsel of Record*