CASE NO._____

IN THE
Supreme Court of the United States

SHONDA WALTER,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

Petition for Writ of Certiorari to
the Supreme Court of Pennsylvania

THIS IS A CAPITAL CASE

DANIEL SILVERMAN
SILVERMAN & ASSOCIATES
123 S. BROAD ST., SUITE 2500
PHILADELPHIA, PA 19109-1023
(215) 735-1771
daniel.silverman@temple.edu

CAPITAL CASE

QUESTION PRESENTED

Recently, Justice Stephen Breyer suggested that "rather than try to patch up the death penalty's legal wounds one at a time," the Court should entertain "full briefing on a more basic question: whether the death penalty violates the Constitution." *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting). This case, which seeks a writ of certiorari following the affirmance on direct appeal of Petitioner's death sentence, provides this Court that opportunity. The question presented is:

Whether, in all cases, the imposition of a sentence of death violates the Eighth Amendment's prohibition against cruel and unusual punishments.

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Petitioner, Shonda Walter, respectfully asks that this Court issue a writ of certiorari and review the decision of the Supreme Court of Pennsylvania in this capital case.[1]

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania affirmed Petitioner's conviction and sentence of death. *Id.* App. 1a-101a. The opinion of the trial court, *Commonwealth v. Walter*, CP-18-CR-0000179-2003 (September 24, 2013) is unpublished. App 102a-122a.

JURISDICTION

In pretrial motions, counsel raised the claim presented herein, that the death penalty violates the Eighth Amendment. *See* Defendant's Challenge to Capital Proceeding, November 1, 2004, Appendix to Initial Brief of Appellant, Commonwealth v. Walter, 645 CAP at App. 36; Defendant's Amended Challenge to Capital Proceedings, November 3, 2004 (*id.* at App. 44). The claim was pursued on direct appeal and addressed on its merits. *Walter*, App. 97a. ("[W]e do not view Appellant's argument . . . as sufficient to warrant our reassessment, at this juncture, of the constitutionality of the death penalty *per se*.").

The Supreme Court of Pennsylvania issued its opinion affirming Ms. Walter's conviction and death

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[1] All emphasis herein is supplied unless otherwise indicated. The notes of testimony from the trial proceedings are cited as "NT" followed by the page number.

sentence on July 20, 2015. Petitioner has received a thirty-day extension for the filing of the petition, which is now due November 17, 2015. This petition is timely filed. This Court's jurisdiction is invoked under 28 U.S.C.A § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

INTRODUCTION

The conclusion that the death penalty, in all cases, violates the Eighth Amendment is compelled for two reasons. First, our standards of decency have evolved to the point where the institution is no longer constitutionally sustainable. A number of objective indices show that this consensus has now been reached. Since 2004, seven states have legislatively or judicially rejected the death penalty, four are currently under a moratorium, and in several more its use has been negligible over the last ten years. New death sentences have consistently trended downward, as have executions. The result is that the death penalty is now truly infrequent in practice, and confined largely to just a handful of states.

Second, the assumptions underlying this Court's reinstitution of the death penalty after *Furman*[2] have proved wrong, flawed, or illusory. Heightened protections have not achieved the reliability needed

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[2] *Furman v. Georgia*, 408 U.S. 238 (1972).

to eliminate wrongful executions, the *Gregg*[3] guided discretion formula has not significantly limited arbitrariness, and racial discrimination remains pervasive.

STATEMENT

Shonda Walter is an African American female, and the last woman on Pennsylvania's death row. Her case exemplifies what is wrong with the death penalty. She was ill-served by counsel, leaving serious questions about her guilt and eligibility for the death penalty; she has already spent ten years in isolation, and her case has barely progressed; she emerged from an arbitrary process which fails to limit the death penalty to the worst offenders; and joined a mostly black death row, the country's fifth largest, as a product of a system that even a state supreme court committee has acknowledged is plagued by racial discrimination.[4]

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[3] *Gregg v. Georgia*, 428 U.S. 153 (1976).

[4] A Pennsylvania Supreme Court committee concluded:

> Empirical studies conducted in Pennsylvania to date demonstrate that, at least in some counties, race plays a major, if not overwhelming, role in the imposition of the death penalty . . . [Moreover], [t]here is a significant failure in the delivery of capital counsel services to indigent capital defendants in Pennsylvania, one that disproportionately impacts minority communities.

FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM, 218 (2003), available at http://www.pa-interbranchcommission.com/_pdfs/FinalReport.pdf.

On March 30, 2003, Aaron Jones was caught driving a car stolen from 83–year–old Lock Haven resident James Sementelli. *Commonwealth v. Walter*, 966 A.2d 560, 562 (Pa. 2009) The next day the police went to Mr. Sementelli's home and discovered his body; he had been struck several times with a hatchet. *Walter*, 966 A.2d at 561. The medical examiner found evidence of defensive wounds, indicating he may have struggled with his attacker. *Id.* Based on ungathered newspapers, police determined Mr. Sementelli had died a week earlier, on March 23, 2003. *Id.* at 561.

Two associates of Jones, Shanee Gaines, who would become the principal witness against Ms. Walter, and her friend, Michelle Mathis, a member of the Bloods gang of Williamsport, were implicated along with Petitioner. They participated in trying to sell Mr. Sementelli's car and were seen on video cashing coins stolen from Mr. Sementelli's home. *Id.* at 562. Gaines also admitted to having been at Mr. Sementelli's home the night of the murder, along with Mathis, but claimed it was only in its aftermath. Mathis was treated that same evening at a hospital for injuries (which she claimed were incurred in a street fight), consistent with the medical examiner's conclusion about a possible struggle. *Id.* at 561; NT 4/11/2005 at 152.

Based largely on Gaines's account, Ms. Walter was arrested for Mr. Sementelli's murder. Jones and Gaines were permitted to plead guilty to lesser charges, and testified against her at trial. Mathis was never charged.

Stephen C. Smith and James N. Bryant were appointed to represent Ms. Walter, and differences

immediately emerged. Ms. Walter made multiple requests for appointment of new counsel alleging that her interests were not being adequately protected. The trial court denied her requests.

At trial, Ms. Walter's worst fears were realized. Counsel boasted to the jury, "When I was appointed I told Shonda there is no way I am going to argue that [she] should be found not guilty." NT 4/18/05 at 8. No defense was presented and, unsurprisingly, on April 18, 2005, Ms. Walter was convicted of first-degree murder. Chief Justice Thomas G. Saylor summarized counsel's performance:

> Ten years have passed since Appellant's trial, and glaring post-conviction issues remain concerning the adequacy of her attorneys' stewardship at her capital trial. In this regard, Appellant's guilt-phase counsel made no opening statement to the jurors, presented no evidence, and delivered a rambling series of closing remarks in which he repeatedly conceded [Ms. Walter's] guilt, while focusing more upon his own circumstances and idiosyncrasies than upon her representation.

App 99a-100a (Saylor, C.J., dissenting).[5]

Among counsels' many alleged deficiencies was their failure to put before the jury that Michelle Mathis had confessed to an associate that she was

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[5] Under Pennsylvania law, claims of ineffectiveness of trial counsel are deferred until post-conviction proceedings. *Commonwealth v. Grant*, 813 A.2d 726, 735 (Pa. 2002).

the actual killer, App. 83a,[6] and that the police recovered prescription drugs taken from Mr. Sementelli in Mathis's home.[7]

Counsel performed no better at the penalty phase. A one-day hearing was conducted on April 19, 2005. The Commonwealth sought a single aggravating circumstance, car theft, a felony under Pennsylvania law, and thus sufficient to qualify the case as capital.[8] The jury found the sole aggravating circumstance, but due to counsels' meager penalty phase presentation,[9] it found no mitigating circumstances.[10] This meant the jury was precluded from deliberating as to whether the aggravating circumstance, car theft, warranted death; a death verdict was mandatory under Pennsylvania law.[11]

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[6] Even if culpable for the murder, doubt that Petitioner was not the actual killer would have made her ineligible for death. *Commonwealth v. Lassiter*, 722 A.2d 657 (1998) (Section 9711(d)(6) does not apply to accomplices).

[7] LockHaven Police Department Property Receipt dated 4/10/03, inventory #1281-37, Initial Brief of Appellant, App. 117.

[8] 42 Pa.C.S.A. § 9711(d)(6) ("the murder was committed in the perpetration of a felony").

[9] The trial court found, "We believe the mitigating evidence to have been woefully inadequate." App. 122a.

[10] The mitigation presentation included that Ms. Walter was twenty-three years old at the time of the offense; she was a high school graduate, earning mostly As and Bs; was active in sports, playing basketball and softball; and performed with a percussion ensemble. She was raised in a single-parent household. She was a good child growing up, but endured racial taunts from schoolmates. She was the mother of a young girl, six years old at the time of trial. NT 4/19/2005, 15-45.

[11] *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990) (upholding Pennsylvania's death penalty statute, which makes death

Post-sentence motions were denied but the trial court would later express reservations about this decision:

> In retrospect, the Trial Court erred in failing to appoint new counsel when it became clear that irreconcilable differences were eroding the attorney-client relationship . . . . Were it in our power, we would award a new penalty hearing.

App. 125a.

Trial counsel continued to represent Petitioner on appeal and the ineffectiveness continued there as well. On March 20, 2009, the Supreme Court of Pennsylvania issued its opinion in *Walter*, 966 A.2d 560, where it pointedly expressed displeasure with the quality of counsel's appellate advocacy. The court noted, "Appellant raises four issues on appeal, none of which are completely clear in their rationale and some of which are unintelligible." *Id.* at 563. Nevertheless, it affirmed the conviction and death sentence.

In post-conviction proceedings, the Attorney General's Office agreed that appellate counsel's performance was constitutionally deficient, and that summary judgment on that claim was warranted. Consequently, the court awarded a new direct appeal and did not reach the balance of Petitioner's post-conviction claims.

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mandatory if the jury finds at least one aggravating circumstance and no mitigating circumstances).

In her new direct appeal of right[12] before the Supreme Court of Pennsylvania, Petitioner alleged her death sentence no longer comported with the Eighth Amendment, citing in support the recent state legislative trend toward abolition, the judicial trend toward limiting the punishment to only the most culpable (including the categorical exclusion of juveniles and the intellectually disabled), issues arising from constitutionally required protections (including the right to present mitigation and to effective capital counsel), and the views of the international community. Initial Brief of Appellant, Commonwealth v. Walter, 645 CAP at 62-67. The court rejected Ms. Walter's claims and again affirmed her conviction and death sentence. App. 97a. This Petition followed.

REASONS FOR GRANTING THE WRIT

This case presents the questions of whether our standards of decency have evolved to the point where the death penalty no longer comports with the Eighth Amendment, and whether, nearly forty years after *Gregg*, it can now be concluded that the goals of reliability, consistency, and equal justice in its application have fallen well short of what the Amendment requires.

THE DEATH PENALTY, IN ALL CASES, VIOLATES THE EIGHTH AMENDMENT

The death penalty has outlived any conceivable use. It is imperfect in application, haphazard in result, and of negligible utility. The arc of historical

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[12] 42 Pa.C.S.A. § 722(4).

events and trends since *Gregg* leaves but one conclusion: Our sensibilities regarding this severe punishment have evolved to the point where it is no longer constitutionally sustainable. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Likewise, it is time to recognize that the procedural safeguards implemented after *Furman* have proved inadequate to reduce arbitrariness and discrimination to constitutionally acceptable levels, and are unlikely to ever fulfill that role. The imposition of the death penalty, in all cases, constitutes cruel and unusual punishment.

A. The Death Penalty is a Disproportionate Punishment Even For the Gravest of Offenses

Recent trends and events have coalesced, marking the steady and progressive abandonment of capital punishment throughout the country such that it can now be fairly concluded that the death penalty is a disproportionate punishment, even for the gravest and most heinous of offenses.

1. National Trend Toward Abolition

Across the country, each passing year has seen an increasing rejection of the death penalty. The starkest attribute of this trend is its unwavering progression—in speed, direction, and magnitude—toward disuse, thus forming a reliable metric of our evolving sensibilities. In 2004, a time when thirty-eight states still authorized the punishment, New York's death penalty statute was declared unconstitutional, with no subsequent legislative attempt to reinstate it.[13] New Jersey repealed in

[13] *People v. LaValle*, 3 N.Y.3d 88 (2004).

2007, and New Mexico followed suit in 2009.[14] Illinois was next in 2011, a few years after concerns about fairness and wrongful convictions prompted the governor to commute all death sentences.[15] In 2012, Connecticut repealed the death penalty prospectively (and this year declared the death penalty unconstitutional under its state constitution).[16] In 2013, Maryland abolished.[17] Most recently, in May, 2015, Nebraska abolished as well.[18]

Currently, the federal government and thirty-one states legally authorize the death penalty, but its infrequency in practice tells a larger story. The federal government has not carried out any executions since 2003,[19] and the military authorities

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[14] Jeremy W. Peters, *Death Penalty Repealed in New Jersey*, THE NEW YORK TIMES, Dec. 17, 2007, http://www.nytimes.com/2007/12/17/nyregion/17cnd-jersey.html?_r=0;*Death Penalty Is Repealed in New Mexico*, THE NEW YORK TIMES, Mar. 18, 2009, http://www.nytimes.com/2009/03/19/us/19execute.html.

[15] John Schwartz & Emma G. Fitzsimmons, *Illinois Governor Signs Capital Punishment Ban*, THE NEW YORK TIMES, Mar. 9, 2011, http://www.nytimes.com/2011/03/10/us/10illinois.html.

[16] Laura Bassett, *Connecticut Repeals Death Penalty*, HUFFINGTON POST, Apr. 25, 2012, http://www.huffingtonpost.com/2012/04/25/connecticut-repeals-death-penalty_n_1453331.html; *State v. Santiago*, 318 Conn. 1, 33 (2015).

[17] *Maryland: Governor Signs Repeal of the Death Penalty*, THE NEW YORK TIMES, May 2, 2013, http://www.nytimes.com/2013/05/03/us/maryland-governor-signs-repeal-of-the-death-penalty.html.

[18] Julie Bosman, *Nebraska Bans Death Penalty, Defying a Veto*, The New York Times, May 27, 2015, http://www.nytimes.com/2015/05/28/us/nebraska-abolishes-death-penalty.html.

[19] DPIC, Searchable Execution Database, http://www.deathpenaltyinfo.org/views-executions (last visited Nov. 2, 2015).

since 1961.[20] Six death penalty states have not executed anyone during the last ten years: Colorado, Kansas, New Hampshire, Oregon, Pennsylvania, and Wyoming.[21] Seven more have carried out only one execution in the last ten years: Arkansas, Kentucky, Louisiana, Nevada, Utah, Montana, and Washington (and of these, in Kentucky, Louisiana, Montana, and Nevada, the executed abandoned their appeals).[22]

In only eleven states have executions averaged more than one per year over the last ten years: Alabama, Arizona, Florida, Georgia, Mississippi, Missouri, Ohio, Oklahoma, South Carolina, Texas, and Virginia. These eleven states accounted for 87% of all executions (383/450) over this time period, with a single state, Texas, responsible for over 40% (182/450).[23]

Even those states which still routinely employ the death penalty have seen a marked drop in executions, as reflected in a steady decline nationally. The high came in 1999 when ninety-eight offenders were executed. The last ten years have shown a consistent decrease in executions (2005(60); 2006(53); 2007(42); 2008(37); 2009(56); 2010(46); 2011(43); 2012(43); 2013(39); 2014(35)).[24]

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[20] DPIC, The U.S. Military Death Penalty, http://www.deathpenaltyinfo.org/us-military-death-penalty (last visited Nov. 2, 2015).

[21] DPIC, Searchable Execution Database, http://www.deathpenaltyinfo.org/views-executions (last visited Nov. 2, 2015).

[22] *Id.*

[23] *Id.*

[24] DPIC, Executions By Year, http://www.deathpenaltyinfo.org/

The decline in new death sentences is just as stark. 1995 saw 311 new death sentences, which was more than halved by 2004 (138) and nearly halved again by 2014 to seventy-three (73), the lowest total since the death penalty was reintroduced.[25] The geographic clustering is apparent here as well, with just three states accounting for half of the new death sentences in 2014 (Florida (11), Texas (11), and California (14)).[26]

Several states that still authorize the death penalty have expressed reservations about its continued use. The legislatures in California, New Hampshire, Pennsylvania, and Tennessee have commissioned reports on their state's death penalty, and Louisiana has established a Capital Punishment Fiscal Commission to investigate the cost of the death penalty. Significantly, four states that have recently joined the abolitionist ranks, New Jersey, Illinois, Connecticut, and Maryland, all

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executions-year (last visited November 2, 2015). App. 123a. The spike in 2009 reflects the end of the stays of execution issued pending *Baze v. Rees*, 553 U.S. 35 (2008).

[25] The ten year trend is as follows: 2005 (140); 2006 (123); 2007 (126); 2008 (120); 2009 (118); 2010 (114); 2011 (85); 2012 (82); 2013 (83); 2014 (73). DPIC, Death Sentences in the United States From 1977 By State and By Year, http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008 (last visited Nov. 2, 2015); App.123a.

[26] Death sentences are also heavily dependent on the county in which a defendant is tried. Robert J. Smith, *The Geography of the Death Penalty and its Ramifications*, 92 B.U. L. Rev. 227, 231–32 (2012); Richard C. Dieter, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All*, DEATH PENALTY INFORMATION CENTER, 6 (2013) ("Just 2% of the counties in the U.S. are responsible for 56% of the population of death row.").

commissioned reports before approving bills abolishing the death penalty.

The executive branches of multiple states have signaled their concerns over the fairness of the death penalty as well. Governors of Colorado,[27] Oregon,[28] Pennsylvania,[29] and Washington[30] have declared official moratoriums on executions.

This Court has consistently looked to *actual* practices of the states, rather than simply whether the punishment was legislatively *authorized*, when assessing constitutionality. *See Atkins v. Virginia*, 536 U.S. 304, 316 (2002) ("[E]ven among those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since we decided *Penry* [*v. Lynaugh*, 492 U.S. 302 (1989)]."); *Roper v. Simmons*, 543 U.S. 551, 564-65 (2005) (noting that although twenty states authorized death for juveniles, the practice was infrequent, with only three states, Oklahoma,

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[27] Exec. Order No. D 2013-006, at 2 (Colo. May 22, 2013), *available at* http://www.cofpd.org/docs-dun/governor-executive-order.pdf.

[28] William Yardley, *Oregon Governor Says He Will Block Executions*, THE NEW YORK TIMES, Nov. 22, 2011, http://www.nytimes.com/2011/11/23/us/oregon-executions-to-be-blocked-by-gov-kitzhaber.html.

[29] Gov. Tom Wolf, Death Penalty Moratorium Declaration (Feb. 13, 2015), *available at* https://www.scribd.com/doc/255668788/Death-Penalty-Moratorium-Declaration.

[30] Gov. Jay Inslee, Remarks Announcing a Capital Punishment Moratorium (Feb. 11, 2014), *available at* http://www.americanbar.org/content/dam/aba/publications/criminaljustice/scj2016_ch19_capital_punishment.authcheckdam.pdf.

Texas, and Virginia, actually executing juveniles in the prior ten years); *Graham v. Florida*, 560 U.S. 48, 62 (2010) ("Here, an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use. Although these statutory schemes contain no explicit prohibition on sentences of life without parole for juvenile nonhomicide offenders, those sentences are most infrequent."); *Miller v. Alabama*, 132 S. Ct. 2455, 2459 (2012) ("[S]imply counting legislative enactments can present a distorted view. . . .").

Over forty years ago, when the death penalty was in far greater favor than today, one Justice of this Court commented: "The progressive decline in, and the current rarity of, the infliction of death demonstrate that our society seriously questions the appropriateness of this punishment today." *Furman*, 408 U.S. at 299 (Brennan, J., concurring). The evidence now is far more compelling; capital punishment is infrequently practiced, save for in a handful of states, and new death sentences are rapidly, and consistently, declining. Its infrequent use relative to the number of death eligible offenders renders it "truly unusual" and thus it can now be concluded that a "national consensus has developed against it." *Atkins,* 536 U.S. at 316.

2. The Death Penalty is Excessive

The Eighth Amendment proscribes "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive." *Atkins*, 536 U.S. at 311, n.7 (2002). *Gregg* made clear that to be constitutional "punishment must not involve the *unnecessary* and wanton infliction of

pain." *Gregg*, 428 U.S. at 173. *See also Furma*n, 408 U.S. at 325 (Marshall, J., concurring) ("The Court [in *Weems*] made it plain beyond any reasonable doubt that excessive punishments were as objectionable as those that were inherently cruel."). It must now be concluded that the death penalty is an excessive punishment, even for the gravest of offenses.

The traditional goals of punishment—deterrence, retribution, incapacitation, and rehabilitation—form the baseline for analyzing excessiveness. *Graham*, 560 U.S. at 71 (discussing "penological justifications" relevant to the Eighth Amendment analysis). The death penalty fails to significantly further these goals in any measurable degree over life imprisonment. *See, e.g.*, Justin F. Marceau & Hollis A. Whitson, *The Cost of Colorado's Death Penalty*, 3 U. DENV. CRIM. L. REV. 145, 162 (2013) ("[S]ocial scientists increasingly agree that the deterrence benefits of the death penalty are entirely speculative"); Michael L. Radelet & Traci L. Lacock, *Do Executions Lower Homicide Rates?: The Views Of Leading Criminologists*, 99 J. CRIM. LAW & CRIMINOLOGY 489, 489-90 (2013); *Ring v. Arizona*, 536 U.S. 584, 615 (2002) (Breyer, J., concurring) (concluding that "[s]tudies of deterrence are, at most, inconclusive.") (citation omitted); *Glossip*, 135 S. Ct. at 2767 (Breyer, J., dissenting) ("Capital punishment by definition does not rehabilitate. It does, of course, incapacitate the offender. But the major alternative to capital punishment—namely, life in prison without possibility of parole—also incapacitates."); *id.* at 2269 ("[W]hatever interest in retribution might be served by the death penalty as currently administered, that interest can be served almost as well by a sentence of life in prison without parole

. . . .").

Because the death penalty fails to measurably promote any of the principal penological goals over life imprisonment, it is excessive. *Furman*, 408 U.S. at 279 (Brennan, J, concurring) ("If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive.") (internal citation omitted.).

3. The United States is Out of Step With the International Community's Consensus Against the Death Penalty

The United States has long been the world's principal champion of human rights, yet it stubbornly retains the use of capital punishment for its own citizens. This country had thirty-five executions in 2014.[31] Only China, Iran, Saudi Arabia, and Iraq had more.[32] The seventy-three death sentences imposed in 2014 ranked the United States behind only China, Nigeria, Egypt, Pakistan, Bangladesh, Tanzania and Iran.[33]

Ironically, this Court's condemnation of the death penalty, as practiced in the time of *Furman*, likely inspired the world's movement toward abolition. Echoing the adage, "poor is the pupil who does not surpass his master,"[34] since the 1970s, eighty-two

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[31] Amnesty International, Death Sentences and Executions: 2014, 62 (2015), *available at* http://www.amnestyusa.org/pdfs/DeathSentencesAndExecutions2014_EN.pdf.

[32] *Id.*

[33] *Id. at 63.*

[34] Attributed to Leonardo da Vinci.

countries have abolished it for all crimes, bringing the total number of abolitionist countries to ninety-eight. And thirty-five countries can be considered abolitionist in practice as they have not executed anyone during the last ten years and are understood to have an established policy or practice of not carrying out executions.[35] The General Assembly of the United Nations, comprising all 193 members of the UN, has repeatedly adopted resolutions calling for countries that still maintain the death penalty "to establish a moratorium on executions with a view to abolishing it."[36]

But the death penalty finds its greatest opposition among European states, whose social and political interests most closely align with those of the United States. Article 2(2) of the *Charter of Fundamental Rights of the European Union* prohibits the use of capital punishment.[37] In 1982, the Council of Europe adopted *Protocol No. 6 to the European Convention on Human Rights*, the first legally binding instrument calling for the abolition of the death penalty in peace time, and ratification is a prerequisite to membership in the Council of

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[35] DPIC, Abolitionist and Retentionist Countries, http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=30&did=140#9 (last visited Nov. 2, 2015); Amnesty International, Death Sentences and Executions: 2014, 64 (2015), *available at* http://www.amnestyusa.org/pdfs/DeathSentencesAndExecutions2014_EN.pdf.

[36] G.A. Res. 69/186 ¶ 4, U.N. Doc. A/RES/69/186 (Dec. 18, 2014), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/186.

[37] Charter of Fundamental Rights of the European Union, Art. 2 (2) (2000 OJ C364/1) ("No one shall be condemned to the death penalty, or executed.").

Europe.[38]

Although not dispositive, the views of the rest of the world inform the issue. This Court has routinely taken into account the climate of international opinion in its Eighth Amendment jurisprudence. *See, e.g.*, *Graham*, 560 U.S. at 80 (the Court may look "beyond our nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual"); *Roper*, 543 U.S. at 575 ("[F]rom the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'").

And gaining currency is the notion that with the protections we enjoy come a collective duty to be the international standard-bearer of fundamental rights inherent in all human beings.[39] Our European allies have gently reminded us of this responsibility, noting their "regret[] that the arbitrary and discriminatory

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[38] Council of Europe—Human Rights Law and Policy: Abolition of the Death Penalty, http://www.coe.int/t/dghl/standardsetting/hrpolicy/Others_issues/Death_Penalty/ (last visited Nov. 2, 2015). *See also* Protocol No. 13 to the European Convention on Human Rights (providing for the total abolition of the death penalty in *all* circumstances). Amnesty International, Death Sentences and Executions: 2014, 67 (2015), *available at* http://www.amnestyusa.org/pdfs/DeathSentencesAndExecutions2014_EN.pdf.

[39] *See*, *e.g.*, STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES ___ (2015) ("By engaging the world and the borderless challenges it presents, we can promote adherence to and the adoption of those basic constitutional and legal values for which the Court and Constitution stand, and which we have bequeathed to others.").

application of the death penalty in the United States . . . have stained the reputation of this country, which its friends expect to be a *beacon for human rights.*"[40]

This country enjoys a level of judicial oversight shared by few other nations, yet we have struggled and failed to bring an acceptable level of rationality to our executions. History has shown tremendous potential for abuse carried out beneath the banner of lawful executions, and we have no reason to assume countries with lesser protections can avoid these abuses in the future. Whether it is a role we chose or not, most of the world looks to us as its "beacon for human rights." It is a responsibility we should accept.

B. *Gregg* Has Failed To Significantly Further the Goals of Reliability, Consistency, and Equal Justice

The plethora of procedural protections imposed post-*Furman* has not eliminated wrongful executions, and the process remains plagued by arbitrariness, discrimination, and excessive delay. It is time to recognize that this Court's forty-year experiment with the death penalty has failed.[41]

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[40] Council of Europe, P.A. Res. 1807 ¶ 4.2 (Apr. 14, 2011), *available at* http://www.europeanrights.eu/public/atti/ris1807_ing_copy_1.mht (reiterating its opposition to the death penalty).

[41] Many of the global issues identified find analogues in this case. There are serious questions about the effectiveness of Ms. Walter's trial attorneys: the factor that rendered her case death eligible was not the violence attendant the killing, but the theft of the victim's car in its aftermath, clearly on the low end of the

1. Reliability

Perhaps the single greatest cause of concern in capital cases is the risk of wrongful execution. The difficulty in gauging this risk is inherent in the choice of punishment. After execution, there is little incentive, and no legal forum, for corrective action. Nevertheless, the prevalence of death row exonerations, typically through relatively rare DNA evidence, points to a more widespread problem.

Today, there is evidence of at least 156 exonerations in capital cases.[42] Researchers have estimated that nearly one in twenty (4.1%) of those sentenced to death are actually innocent,[43] an unacceptably high error rate by any measure.

The conclusion is unavoidable. Wrongful executions happen, and with some frequency. This realization propels legislatures and courts into the thicket of an unpalatable risk/benefit analysis: How many wrongful executions will society tolerate in order to preserve the death penalty for the truly guilty? But as the death penalty rapidly sheds its venire of legitimacy, the choice is made easier.

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aggravation scale; Ms. Walter is African American, Mr. Sementelli was white; and although she has already spent ten years on death row, due to appellate counsel's ineffectiveness, her case just emerged from direct appeal.

[42] DPIC, Innocence: List of Those Freed from Death Row, http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (last visited Nov. 2, 2015).

[43] *See* Gross, O'Brien, Hu, & Kennedy, *Rate of False Conviction of Criminal Defendants Who are Sentenced to Death* (2014), https://www.law.umich.edu/newsandinfo/Documents/Gross_ProceedingsNationalAcademyofSciences_Exonerations.pdf.

Although as a constitutional matter, this Court has yet to speak definitively, *Herrera v. Collins*, 506 U.S. 390 (1993), it is generally accepted that due process protects the innocent, and as long as there remains the possibility of exoneration, this right should not be foreclosed.

2. Arbitrariness

The Eighth Amendment mandate to eliminate arbitrariness in capital sentencing is undermined by the conflicting demands of consistency in application, *California v. Brown*, 479 U.S. 538, 541 (1987) ("[D]eath penalty statutes [must] be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion") and a capital defendant's right to individualized sentencing. *Lockett v. Ohio,* 438 U.S. 586, 605 (1978) (plurality opinion) ("The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.").

The result is an uneasy détente between these competing goals, each indispensable to a constitutional system, and the recognition that they may ultimately be irreconcilable. *Walton v. Arizona*, 497 U.S. 639, 664-65 (1990) (Scalia, J., concurring in part and concurring in judgment) ("The latter requirement quite obviously destroys whatever rationality and predictability the former requirement was designed to achieve."); *Callins v. Collins*, 510 U.S. 1141, 1144-45 (1994) (Blackmun, J., dissenting) ("Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be

achieved without compromising an equally essential component of fundamental fairness—individualized sentencing.") (internal citation omitted). Today, these conflicting goals are still "in search of a unifying principle." *Kennedy v. Louisiana*, 554 U.S. 407, 435-37 (2008).

And there are significant, as yet unaddressed, concerns. For example, *Roper* and *Atkins* recognized that certain classes of offenders are on average sufficiently lacking in culpability so as to render their execution unconstitutional. Yet, the severely mentally ill, whose illness may defy ready categorization but who nevertheless occupy the less-culpable end of the spectrum, remain subject to the death penalty.[44] Indeed, there is growing evidence that the categorical approach to death penalty exclusions exemplified in *Roper* and *Atkins* may have missed the larger picture, and even introduced unintended arbitrariness.[45] It is estimated that as

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[44] *See, e.g.*, *Corcoran v. State*, 774 N.E.2d 495, 502 (Ind. 2002) (Rucker, J., dissenting) ("[T]he underlying rationale for prohibiting executions of the mentally retarded is just as compelling for prohibiting executions of the seriously mentally ill . . . ."); American Bar Association, Recommendation 122A (recommending "prohibit[ing] execution of persons with severe mental disabilities whose demonstrated impairments of mental and emotional functioning at the time of the offense would render a death sentence disproportionate to their culpability"), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/2006_am_122a.authcheckdam.pdf.

[45] *Graham*, 560 U.S. at 75 (acknowledging that "[c]ategorical rules tend to be imperfect . . . ."); Stephen B. Bright, *The Role of Race, Poverty, Intellectual Disability, and Mental Illness in the Decline of the Death Penalty*, 49 U. RICH. L. REV. 671, 687-88 (2015) ("Another reason for arbitrariness is the impossibility of

many as 25% of the approximately 3,000 inmates on death row have a serious mental illness,[46] and even this number may significantly underestimate its prevalence.[47] There is a troubling randomness in excluding some groups of less-culpable defendants from execution while allowing the execution of others whose culpability is equally reduced.

Another concern is the states' tendency, post-*Gregg*, to periodically add aggravating circumstances to their death penalty statutes, or broadly construe existing circumstances, thus effectively nullifying their limiting function. Pennsylvania provides an example. As enacted, 42 Pa.C.S.A § 9711(d) had ten aggravating factors; it now numbers eighteen. Among the additions were two addressed to common

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measuring the mental state or level of intellectual functioning of a person accused of a capital crime.").

[46] Rebecca Covarrubias, *Lives in Defense Counsel's Hands: The Problems and Responsibilities of Defense Counsel Representing Mentally Ill or Mentally Retarded Capital Defendants*, 11 SCHOLAR: ST MARY'S LAW REVIEW ON MINORITY ISSUES 413, 416 (2009); DPIC, Death Row Inmates by State and Size of Death Row by Year, http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year?scid=9&did=188#year (last visited Nov. 2, 2015).

[47] *Id.* at 440 (noting that mentally ill defendants often mask their symptoms because of the enduring stigma associated with mental illness; counsel often fail to recognize their clients' mental health problems; and lack of funding, before and after conviction, often precludes thorough mental health examinations). *See also* Robert J. Smith, *Forgetting Furman*, 100 IOWA L. REV. 1149, 1153 (2015) ("Juvenile offenders and the intellectually disabled are categorically exempt from capital punishment due to their insufficient culpability; yet, most of the last hundred people executed in America possessed functional impairments that rivaled or outpaced those endured by the typical adolescent or intellectually disabled person.").

occurring drug-related killings ((d)(13-14)). The felony aggravating circumstance, 42 Pa.C.S.A § 9711(d)(6) ("defendant committed a killing while in the perpetration of a felony"), has been interpreted to encompass killings committed with illegally possessed firearms, also very common. *Commonwealth v. Johnson*, 107 A.3d 52, 85 (Pa. 2014). And the state court has declined to impose any limitation on the "felony" requirement, *Commonwealth v. Robinson*, 877 A.2d 433 (Pa. 2005), the result being even commission of common non-violent felonies, such as here (car theft), are deemed sufficiently aggravating to elevate the crime to capital status.

With so many, and so broadly defined, aggravating factors, they no longer perform their constitutionally mandated role of narrowing the class of eligible offenders. *See Zant v. Stephens*, 462 U.S. 862, 877 (1983). And these concerns are not limited to Pennsylvania. *See People v. Ballard*, 794 N.E.2d 788, 818 (Ill. 2002) ("Even assuming that a death penalty statute could have 'too many' aggravating factors rendering a first degree murder defendant eligible for the death penalty, how many aggravating factors are 'too many'?"); *State v. Steckel*, 708 A.2d 994, 1000 (Del. Super. Ct. 1996) ("Can the Court arbitrarily declare that fifty aggravating circumstances is too many but forty-nine is permissible? Even assuming one could ever create a tool that would measure the percentage of defendants eligible for capital punishment, where is the dividing line of constitutionality and who makes that decision?").

There are also wide disparities in the quality of

capital counsel and the resources states are willing to provide, also introducing arbitrariness. As noted above, Petitioner's counsel have already been found ineffective on direct appeal, and questions about their performance at trial remain unaddressed. This is far from rare. *See* Cory Isaacson, *How Resource Disparity Makes the Death Penalty Unconstitutional: An Eighth Amendment Argument Against Structurally Imbalanced Capital Trials*, 17 Berkeley J. Crim. L. 297, 300 (2012) ("An inadequately resourced defense, when pitted against a much better resourced prosecution, yields distorted capital trials and a consequential risk of arbitrary sentencing outcomes."); *Commonwealth v. McGarrell*, 87 A.3d 809, 810 (Pa. 2014) (Saylor, J., dissenting, with Todd, J., and McCaffery, J., joining) ("During my tenure on the Court I have been dismayed by the deficient performance of defense counsel in numerous Pennsylvania death-penalty cases."). Lack of resources and lack of quality counsel are still endemic in capital proceedings.

Notwithstanding this Court's efforts, the fact remains we have achieved nothing close to the consistency the Constitution requires. *Glossip v. Gross*, 135 S. Ct. at 2760 (Breyer, J., dissenting) ("Despite the *Gregg* Court's hope for fair administration of the death penalty, 40 years of further experience make it increasingly clear that the death penalty is imposed arbitrarily, *i.e.*, without the 'reasonable consistency' legally necessary to reconcile its use with the Constitution's commands."). Unacceptable levels of arbitrariness persist, and the problem appears to be growing, not abating.

3. Discrimination

There is no dearth of scholarship on race effects in the administration of the death penalty. Some of the most rigorous social science research of the last few decades has been devoted to examining how well the system respects our notions of equal justice.[48] Virtually all tell the same story: White lives matter most. These studies consistently reveal, even after accounting for legitimate, non-racial, case characteristics, that offenders who kill whites have a significantly higher chance of receiving a death sentence—and the highest probability of all is reserved for blacks who kill whites.

Yet, this body of scholarship has received little attention in our courts since *McCleskey v. Kemp*, 481 U.S. 279 (1987) was decided nearly three decades ago. McCleskey's proof looked much like the proof routinely accepted in other discrimination litigation, such as in housing and employment.[49] He made a compelling statistical showing of racial disparity in Georgia's death penalty, and urged that the burden

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[48] *See, e.g.*, U.S. General Accounting Office, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities (GAO/GGD-90-57, Feb. 1990); David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194, 196, 207-08 (2003) (the post-1990 studies generally "document race-of-victim disparities reflecting more punitive treatment of white-victim cases among similarly aggravated cases" and also suggest that "cases involving black defendants and white victims are treated more punitively than cases of all other defendant/victim racial combinations.").

[49] *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *Washington v. Davis*, 426 U.S. 229, 240 (1976).

should shift to the prosecution to demonstrate legitimate factors were responsible. Yet, Justice Powell, writing for a five-justice majority, held that statistical evidence of systemic racial discrimination in the application of the death penalty was an insufficient basis for relief under either the Fourteenth, *id.* at 292, or Eighth Amendments. *Id.* at 306-07.[50]

McCleskey brought an end to any opportunity to attain redress in the courts for racial discrimination in the implementation of the death penalty. *See*, *e.g.*, *Coleman v. Mitchell*, 268 F.3d 417, 441-442 (6th Cir. 2001) ("*McCleskey* remains controlling law on the ability of statistically-based arguments concerning racial disparity to establish an unconstitutional application of the death penalty. Although the racial imbalance in the State of Ohio's capital sentencing system is glaringly extreme, it is no more so than the statistical disparities considered and rejected by the Supreme Court in *McCleskey* . . . ."); *Davis v. Greer*, 13 F.3d 1134, 1143 (7th Cir. 1994) (assuming "as true the statistical conclusions that Davis describes . . . [o]ur analysis begins and ends with McCleskey"); David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1437 (2004) (commenting on the effect of *McCleskey*: "Because this burden of proof is impossible to meet, *McCleskey* effectively removed the issue from the jurisdiction of the federal courts.");

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[50] Notably, Justice Powell came to later regret his decision in *McCleskey*. JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL JR. (1994).

John M. Powers, *State v. Robinson and the Racial Justice Act: Statistical Evidence of Racial Discrimination in Capital Proceedings*, 29 HARV. J. RACIAL & ETHNIC JUST. 117, 147-48 (2013) ("The [*McCleskey*] standard is generally acknowledged to be impossible to meet . . . .").

Yet, despite the difficulty of attaining redress in the courts, race remains an important factor in the evolving consensus against the death penalty. Some states have invoked the persistence of discrimination as a basis for eliminating or curtailing the death penalty. Governor Martin O'Malley of Maryland, a repeal state, flatly declared that the death penalty "*cannot be administered without racial bias*."[51] Connecticut Governor Dannel P. Malloy, in signing repeal legislation, reflected on his time as a prosecutor: "I saw people who were poorly served by their counsel. I saw people wrongly accused or mistakenly identified. *I saw discrimination*. In bearing witness to those things, I came to believe that doing away with the death penalty was the only way to ensure it would not be unfairly imposed."[52] Illinois Governor Pat Quinn, upon signing repeal legislation, declared: "The evidence presented to me by former prosecutors and judges with decades of experience in the criminal justice system has convinced me that it is *impossible to devise a system that is consistent, that is free of discrimination* on

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[51]Ian Simpson, *Maryland Becomes Latest U.S. State to Abolish Death Penalty*, Reuters, May 2, 2013, available at http://mobile.reuters.com/article/idUSBRE9410TQ20130502.

[52] Governor Dannel P. Malloy, on Signing Bill to Repeal Capital Punishment (Apr. 25, 2012), *available at* http://portal.ct.gov/Gov-Malloy-on-Signing-Bill-to-Repeal-Capital-Punishment/.

the basis of race . . . ."[53] Similarly, New Mexico Governor Bill Richardson stated: "It bothers me greatly that *minorities are overrepresented in the prison population and on death row*."[54]

Currently, the governors of Colorado, Oregon, Washington, and Pennsylvania have declared moratoriums on executions, each of whom cited questions about equal justice. Colorado Governor John Hickenlooper expressed concern that a death sentence could "perhaps [be due to] the *race or economic circumstance of the defendant*."[55] Oregon Governor John Kitzhaber stated, "I refuse to be a part of this compromised and *inequitable* system any longer; and I will not allow further executions while I am Governor."[56] Washington Governor Jay Inslee explained, "Equal justice under the law is the state's primary responsibility. And in death penalty cases, *I'm not convinced equal justice is being served.*"[57]

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[53] Press Release, Statement from Governor Pat Quinn on Senate Bill 3539 (Mar. 9, 2011), *available at* http://www3.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=2&RecNum=9265.

[54] Press Release, Governor Bill Richardson Signs Repeal of the Death Penalty (Mar. 18, 2009), *available at* http://www.eji.org/files/03.19.09%20NM%20Press%20Release.pdf.

[55] http://www.deathpenaltyinfo.org/documents/COexecutiveorder.pdf.

[56] William Yardley, *Oregon Governor Says He Will Block Executions*, THE NEW YORK TIMES, Nov. 22, 2011, http://www.nytimes.com/2011/11/23/us/oregon-executions-to-be-blocked-by-gov-kitzhaber.html.

[57] Governor Jay Inslee, Remarks Announcing a Capital Punishment Moratorium (Feb. 11, 2014),*available at* http://www.americanbar.org/content/dam/aba/publications/criminaljustice/scj2016_ch19_capital_punishment.authcheckdam.pdf.

Governor Tom Wolf of Pennsylvania stated, "While data is incomplete, there are strong indications that a person is more likely to be charged with a capital offense and sentenced to death if he is poor or of a minority racial group, and particularly where the victim of the crime was Caucasian."[58]

In the absence of a practical judicial remedy for racial discrimination, the repeal and moratorium states, no doubt cognizant of this Court's admonition "that capital punishment be imposed fairly, and with reasonable consistency, or not at all,"[59] have opted for the latter.

4. Delays and Conditions of Confinement

The debate is easily framed: On one hand there can be no question that delay and the attendant uncertainty as to when the blade may drop can be cruel,[60] and otherwise diminishes the utility of the punishment;[61] on the other hand, when the

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[58] Memorandum, found at http://triblive.com/csp/mediapool/sites/dt.common.streams.StreamServer.cls?STREAMOID=Nq5E$GnlbbnsqmK8mPX21JM5tm0Zxrvol3sywaAHBAlfBS9wpOQ2XAZVRlx$MYI3YFvYJtLALTVU4xRnIdl0TQd75FFq0wwMGY0lFLj3Tq2CntTQg573rVzOhfe3dIuoe$SE7JovEZhFAnhYfMRaAg--&CONTENTTYPE=application/pdf&CONTENTDISPOSITION=ptr-deathpenalty-021415.pdf.

[59] *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

[60] *In re Medley*, 134 U.S. 160, 172 (1890) ("Nor can we withhold our conviction of the proposition that when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it . . . as to the precise time when his execution shall take place.").

[61] *Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J., respecting denial of certiorari) ("The deterrent value of any

condemned pursues avenues for relief the Constitution provides, he is hard pressed to complain of the wait when his supplications ultimately fail.[62] But this misses a key factor. Litigation during the wait has resulted in an extraordinarily high rate of reversal in capital cases. When over half of capital convictions suffer from a constitutional infirmity,[63] delay seems to be not only unavoidable, but indispensable. It is a system that forces a defendant to sacrifice one right in order to secure another, a conflict this Court has found to be unacceptable. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) ("[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another.").

By any measure, the delay between imposition

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punishment is, of course, related to the promptness with which it is inflicted.")

[62] *Glossip*, 135 S. Ct. at 2749 (Scalia, J., concurring) (the "invocation of . . . delay as grounds for abolishing the death penalty calls to mind the man sentenced to death for killing his parents, who pleads for mercy on the ground that he is an orphan.").

[63] James S. Liebman, Jeffrey Fagan, & Valerie West, *A Broken System: Error Rates in Capital Cases 1973-1995*, COLUM. L. SCH., PUBLIC LAW RESEARCH PAPER NO. 15, 8-9 (2000), *available at* www2.law.columbia.edu/instructional services/liebman/ (fixing the overall error rate in capital cases between 1973 and 1995 at 68%); *Capital Punishment 1998*, U.S. Department of Justice Bureau of Justice Statistics, Dec. 1999, NCJ 179012, 12-13 (confirming results of Liebman study, finding that of all death sentences imposed in 1989, state and federal courts overturned 76% of the cases); *Whitmore v. Arkansas*, 495 U.S. 149, 170 (1990) (Marshall, J., dissenting) ("The high percentage of capital cases reversed on appeal vividly demonstrates that appellate review is an indispensable safeguard.").

and execution tests the bounds of reasonableness. The average elapsed time from sentence to execution has more than doubled since 1984 and now averages more than fifteen years.[64]

Conditions of confinement on death row, which typically involves isolation for most of each day,[65] raise Eighth Amendment concerns as well. It has been known for decades that protracted isolation has a deleterious effect on mental well-being.[66] In addition to the anguish that can ensue, the resulting mental disturbances can affect the inmate's ability to cooperate with counsel, and in extreme cases lead to premature abandonment of appeals,[67] incompetence to be executed, *Ford v. Wainwright*, 477 U.S. 399 (1986), and even suicide.[68] Death penalty litigation

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[64] DPIC, Time on Death Row, http://www.deathpenaltyinfo.org/time-death-row (last visited Nov. 2, 2015).

[65] American Civil Liberties Union, A Death Before Dying: Solitary Confinement on Death Row, 5 (2013), *available at* https://www.aclu.org/files/assets/deathbeforedying-report.pdf.

[66] Keramet Reiter, *Supermax Administration and the Eighth Amendment: Deference, Discretion, And Double Bunking, 1986-2010*, 5 UC IRVINE L. REV. 89, 91-93 (2015); Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell : An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, 90 Denv. U. L. Rev. 1, 35 (2012); Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 Crime & Just. 441, 502 (2006); Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124, 126 (2003).

[67] G. Richard Strafer, *Symposium on Current Death Penalty Issues: Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. Crim. L. & Criminology 860, 869 (1983).

[68] J. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939 (2005).

by its very nature is protracted, and the longer the delay, the greater the risk this isolation crosses Eighth Amendment boundaries.*Hutto v. Finney*, 437 U.S. 678, 686 (1978) ("It is perfectly obvious that every decision to remove a particular inmate from the general prison population for an indeterminate period could not be characterized as cruel and unusual . . . It is equally plain, however, that the length of [solitary] confinement cannot be ignored in deciding whether the confinement meets constitutional standards.")Farmer v. Brennan, 511 U.S. 825, 832 (1994) (Eighth Amendment guarantees "humane conditions of confinement"); *Chambers v. Florida*, 309 U.S. 227, 237-38 (1940) (referring to "solitary confinement" as one of the techniques of "physical and mental torture" governments have used to coerce confessions); *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (noting "[t]he human toll wrought by extended terms of isolation long has been understood, and questioned, by writers and commentators," and recognizing that the years of solitary confinement that await a death-sentenced prisoner may bring the condemned "to the edge of madness, perhaps to madness itself").

5. Lethal Injection

It is an inexplicable paradox that, even with years of preparation and deliberation, time and time again those burdened with the task of extinguishing human life do so clumsily, resulting in an unnecessarily painful death. This Court has devoted much care to ensure that this does not happen, *Baze v. Rees*, 553 U.S. 35 (2008), yet the problem persists, and periodically we awaken to an account of an inadequately-drugged condemned writhing on the

gurney.[69] It is an image anathema to our sensibilities. And as a constitutional concern, although still on the tolerable side of the equation, *Glossip*, 135 S. Ct. at 2747, there can be no doubt that too often the process courts cruelty. It is one more factor in its disfavor.

C. It Is Principally the Responsibility of the Judiciary to Ensure Our Punishments Remain Within Constitutional Limits

The death penalty is being squeezed out of existence from two sides. First, our evolving standards of decency compel us to revisit our notions of what is a proportional punishment, even for the gravest of crimes. There can be little question about both the magnitude and direction of this evolution; it is quickly and unwaveringly trending to abolition. But even if this were not the case, the *Gregg* formula has proved unworkable, and with no constitutional substitute in sight, our experience over the last forty

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[69] Erik Eckholm, *Arizona Takes Nearly 2 Hours to Execute Inmate*, THE NEW YORK TIMES, July 23, 2015 (describing execution of Joseph Wood); Erik Eckholm, *One Execution Botched, Oklahoma Delays the Next,* THE NEW YORK TIMES, Apr. 29, 2014, http://www.nytimes.com/2014/07/24/us/arizona-takes-nearly-2-hours-to-execute-inmate.html?_r=0 (describing execution of Clayton D. Lockett); Erica Goode, *After a Prolonged Execution in Ohio, Questions Over 'Cruel and Unusual,'* THE NEW YORK TIMES, Jan. 17, 2014, http://www.nytimes.com/2014/01/18/us/prolonged-execution-prompts-debate-over-death-penalty-methods.html (describing execution of Dennis B. McGuire); Bob Driehaus, *Ohio Plans to Try Again as Execution Goes Wrong*, THE NEW YORK TIMES, Sept. 16, 2009, http://www.nytimes.com/2009/09/17/us/17ohio.html (describing the attempted execution of Romell Broom).

years requires reassessment of *Gregg*'s underpinnings. *Johnson v. United States*, 135 S. Ct. 2551, 2562-63 (2015) ("The doctrine of stare decisis allows us to revisit an earlier decision where experience with its application reveals that it is unworkable.").

Although areas of this country still embrace the death penalty, this is not dispositive. This Court has many times exercised its own independent judgment when determining whether a punishment challenged under the Eighth Amendment is disproportionate to an offender's culpability. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2605-06 (2015) ("The idea of the Constitution 'was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'") (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943))); *Kennedy*, 554 U.S. at 421 ("[C]onsensus is not dispositive. Whether the death penalty is disproportionate to the crime committed depends as well upon . . . the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning and purpose); *Roper*, 543 U.S. at 563 ("[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment") (*quoting Coker v. Georgia*, 433 U.S. 584, 597 (1977))); *Enmund*, 458 U.S. at 797 ("Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty . . . .").

Over forty years ago, Justice William O. Douglas recalled the words of Warden Lewis E. Lawes of Sing Sing, who observed, "Not only does capital punishment fail in its justification, but no punishment could be invented with so many inherent defects." *Furman*, 408 U.S. at 251, n.16 (Douglas, J., concurring). Today, this observation carries the weight of years of empirical confirmation. It is time to revisit the constitutionality of this punishment.

CONCLUSION

There is a palpable inevitability to the demise of the death penalty in this country. Whether it be now or in the future, the cast of its last libretto will be a familiar one: an innocent victim senselessly murdered, a psychologically damaged defendant, a lawyer with at least one foot on the disfavored side of *Strickland*'s[70] Maginot line. And, as here, the case will have progressed through a system overshadowed by interminable delays, arbitrary and discriminatory application, and the now inescapable conclusion that too often we err in a way no court can mitigate. This Court should grant certiorari to review the important issues presented herein.

Respectfully submitted,

Daniel Silverman
Counsel of Record
SILVERMAN & ASSOCIATES
123 S. BROAD ST., SUITE 2500
PHILADELPHIA, PA 19109-1023
(215) 735-1771
daniel.silverman@temple.edu

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[70] *Strickland v. Washington*, 466 U.S. 668 (1984).