No. _____

CAPITAL CASE

IN THE
SUPREME COURT OF THE UNITED STATES

EARL FORREST,
***Petitioner*,**

vs.

CINDY GRIFFITH,
***Respondent*.**

On Petition For A Writ Of Certiorari
To The Supreme Court of Missouri

PETITION FOR A WRIT OF CERTIORARI

KENT E. GIPSON, #34524
Law Office of Kent Gipson, LLC
121 East Gregory Boulevard
Kansas City, Missouri 64114
816-363-4400
816-363-4300 (Fax)
kent.gipson@kentgipsonlaw.com

LANCE D. SANDAGE, #46022
Sandage Law, LLC
1600 Genessee Street, Suite 314
Kansas City, Missouri 64102
816-753-0800
816-735-4602 (Fax)
lance@sandagelaw.com

COUNSEL FOR PETITIONER

CAPITAL CASE

QUESTION PRESENTED

Whether the death penalty, in all cases, constitutes cruel and unusual punishment and therefore violates the Eighth and Fourteenth Amendments.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Publications

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Earl Forrest respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Missouri, which denied his petition for a writ of habeas corpus pursuant to Mo. S. Ct. Rule 91, that raised the issue of whether the death penalty, in all circumstances, violates the Constitution.

OPINION BELOW

The January 21, 2016 order and judgment of the Missouri Supreme Court is unpublished and is published in the appendix at A-1.

JURISDICTIONAL STATEMENT

The Supreme Court of Missouri issued its order and judgment denying the petition for a writ of habeas corpus filed by petitioner on January 21, 2016. The Missouri Supreme Court has original jurisdiction to hear habeas corpus petitions brought by Missouri prisoners who have received a sentence of death pursuant to Mo. S. Ct. Rule 91.02(b). Under 28 U.S.C. § 2201(c) and Rule 13.1, the present petition for a writ of certiorari was required to be filed by petitioner within ninety days. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the United States Constitution that states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

This case also involves the Fourteenth Amendment to the United States Constitution that states, in pertinent part: "no state shall…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."

STATEMENT OF THE CASE

A. Procedural History

A Platte County, Missouri jury convicted Earl Forrest in 2004 of three counts of first degree murder that occurred in Dent County, Missouri in 2002. The trial court, upon the recommendation of this jury, sentenced petitioner to death on these three murder convictions. On direct appeal, the Missouri Supreme Court affirmed petitioner's convictions and sentences in *State v. Forrest*, 183 S.W.3d 218 (Mo. banc 2006), *cert denied*, *Forrest v. Missouri*, 549 U.S. 840 (2006).

Forrest subsequently sought post-conviction relief pursuant to Missouri Supreme Court Rule 29.15. The state trial court denied this motion on April 14, 2008. On appeal, the Missouri Supreme Court affirmed the denial of the post-conviction relief in *Forrest v. State*, 290 S.W.3d 704 (Mo. banc 2009) on June 16, 2009. Petitioner filed a timely motion for rehearing and a separate motion, after holding an evidentiary hearing, for remand to the trial court because of newly discovered evidence regarding an allegation of prosecutorial misconduct involving

a witness for the state. On September 1, 2009, the Missouri Supreme Court denied petitioner's motion for rehearing in his 29.15 appeal and issued its mandate.

The Missouri Supreme Court, however, issued a separate order on September 1, 2009 treating petitioner's motion for remand as a petition for a writ of habeas corpus pursuant to Missouri Supreme Court Rule 91. This order directed this case to be filed as a habeas petition as of September 1, 2009 entitled *State ex rel. Forrest v. Mo. Dept. of Corrections* and assigned it case number SC90368. The court further ordered that the trial judge be appointed as a special master to hear evidence regarding the allegations in this Rule 91 petition. After hearings were held in front of the trial court and evidence was submitted, the trial court issued a report on May 19, 2010 recommending that habeas relief be denied. On August 31, 2010, the Missouri Supreme Court issued an order denying petitioner's Rule 91 petition without explanation.

Forrest thereafter commenced a federal habeas corpus proceeding by filing a timely habeas petition in the United States District Court for the Western District of Missouri. *Forrest v. Roper*, No. 09-8002-CV-W-ODS. The case was assigned to District Judge Ortrie D. Smith. After the district court denied petitioner's requests for discovery and an evidentiary hearing, Judge Smith denied petitioner habeas relief on his claim of ineffective assistance of penalty phase counsel on May 11, 2012. The district court, *sua sponte*, issued a certificate of appealability

to petitioner on this ineffectiveness claim pursuant to 28 U.S.C. § 2253 on the same date. Forrest filed a timely notice of appeal. After briefing and argument, the Eighth Circuit Court of Appeals affirmed the district court's judgment. *Forrest v. Steele*, 764 F.3d 848 (8th Cir. 2014). Judge Kermit Bye dissented. (*Id*. at 862-863). The Court of Appeals, thereafter, denied rehearing and rehearing *en banc* on November 6, 2014. This Court denied certiorari on October 5, 2015.

On January 19, 2016, petitioner filed a petition for a writ of habeas corpus, pursuant to Mo. S. Ct. Rule 91, in the Supreme Court of Missouri. (A-6). This petition raised a single claim that the death penalty, in all cases, violates the Eighth Amendment to the United States Constitution. (A-6-38). Two days later, on January 21, 2016, the Missouri Supreme Court issued a one line order denying the petition for a writ of habeas corpus. (A-1). On the same date, the Missouri Supreme Court issued a warrant of execution. (A-3). This warrant ordered that petitioner be put to death by lethal injection during a twenty-four hour period beginning at 6:00 p.m. CDT on May 11, 2016. (A-5). Both this petition for a writ of certiorari and an accompanying motion for a stay of execution are now before this Court for discretionary review.

B. Facts Surrounding The Homicides And Trial

On direct appeal, the Missouri Supreme Court summarized the prosecution's case against petitioner as follows:

> On December 9, 2002, [petitioner], who had been drinking, and his girlfriend, Angelia Gamblin, drove to Harriett Smith's home. [Petitioner] and Smith apparently had a falling out over a dishonored agreement with Smith to purchase a lawn mower and a mobile home for petitioner in exchange for [petitioner] introducing Smith to a source for methamphetamine. [Petitioner] demanded that Smith fulfill her part of the bargain. During the ensuing melee, [petitioner] shot Michael Wells, a visitor at the Smith residence, in the face killing him. He also killed Smith, shooting her a total of six times.
>
> [Petitioner] removed a lockbox from Smith's home containing approximately $25,000 worth of methamphetamine and returned to his home with Gamblin, where a shootout with the police ensued. [Petitioner] shot Sheriff Bob Wofford in the abdomen wounding him. He killed Deputy Sharon Joann Barnes, shooting her once in her chest and a second time in the back of her head. [Petitioner] sustained a bullet wound to his face. Gamblin was shot twice, once in her shoulder and once in her back.

State v. Forrest, 183 S.W.3d 218, 223 (Mo. banc 2006).

Petitioner was represented at trial by public defenders David Kenyon and Sharon Turlington. Petitioner's jury trial began in October of 2004. Trial counsel did not contest the prosecution's evidence that he shot and killed three people. (Tr. 818). Trial counsel attempted to advance a theory of defense during the guilt phase that petitioner did not possess the requisite intent of deliberation to be found guilty of first degree murder. (*Id*.) Psychologist Robert Smith was the sole witness called by the defense during guilt phase to support this theory of defense. (*Id*. 1199). Dr. Smith testified that petitioner had damage to the frontal lobes of his brain and also had dysthymic disorder, cognitive disorder, and substance dependence. (*Id*. 1207-1208). The jury convicted petitioner as charged.

Defense counsel also called three mental health experts during penalty phase in an attempt to explain that petitioner suffered from various types of brain damage. Dr. Smith testified again in the penalty phase about petitioner's addictions to alcohol and methamphetamine and his impaired functioning due to substance abuse, brain damage, and other cognitive disorders. (*Id*. 1418-1429). Neuropsychologist Michael Gelbort testified that petitioner suffered from brain damage in the right frontal lobe portion of his brain that affected his judgment and impulse control. (*Id*. 1525-1568). Petitioner's brain damage and impairment was exacerbated by his drug and alcohol abuse. (*Id*. 1549-1550). Dr. Lee Evans, a clinical pharmacologist, testified that petitioner was suffering from an alcoholic blackout at the time of the crimes. (*Id*. 1568-1590). Defense counsel presented no medical records or neurological test results to corroborate this expert testimony.

As a result, the state aggressively questioned each defense expert why no neurological testing or medical records were presented to the jury to support their opinions. During the cross-examination of Dr. Gelbort, the state attacked his findings regarding brain damage and the severe head injury that petitioner suffered in California, suggesting that this evidence was unreliable because it was based solely upon petitioner's self-reporting during his evaluation and was not corroborated by any documents or records. (Tr.1545, 1557-1558).

The lead prosecutor at trial, Robert Ahsens, repeatedly argued to the jury that petitioner had not proven he was brain damaged because the defense did not retain an M.D. to scan petitioner's brain to demonstrate that brain damage existed with objective scientific evidence. During his guilt-phase cross-examination of Dr. Smith, Ahsens asked Dr. Smith whether he saw petitioner's brain damage on an x-ray, MRI, or on any other medical tests and Dr. Smith was compelled to admit that he did not. (*Id*. 1215). Ahsens also compelled Dr. Smith to admit that he could not point to any test that a layman could look at and see that there is evidence of brain damage. (*Id*. 1216).

After due deliberation, the jury recommended death sentences on all three murder convictions. (*Id*. 1744-1746). The jury found two statutory aggravating circumstances regarding the murder of Harriett Smith: the multiple murder aggravator and that the murder was committed for the purpose of receiving money or something of value from Smith. (L.F. 630). The jury found only one aggravating circumstance each to support its verdict and sentences for the murders of Michael Wells and of Joann Barnes. The jury found that the pecuniary gain circumstance involving Smith as the sole aggravator for the Wells' death sentence and that the murder of Joann Barnes involved a peace officer engaged in the performance of her official duties. (*Id*. 631-632).

Mr. Ahsens' cross-examination of the defense experts and his arguments undoubtedly swayed the jury. Jury foreman Lee Pitman later stated that the jury "did not buy the evidence that Forrest had brain damage."

C. Petitioner's Prior State And Federal Post-Conviction Appeals

The primary issue that petitioner advanced in his prior state post-conviction appeal and in his federal habeas corpus proceeding was the claim that his trial counsel was ineffective in failing to investigate and present available evidence to conclusively demonstrate, contrary to the jury foreman's belief, that petitioner suffered from severe brain damage. During post-conviction proceedings, both available medical records that trial counsel did not present and a 2006 PET scan conducted by Dr. David Preston conclusively established that petitioner suffered from severe brain damage.

Petitioner's medical records reveal that on March 2, 1990, petitioner sustained a serious head injury as a result of being struck with a baseball bat. Petitioner suffered from a closed head injury, sustained a subdural hematoma, and had frequent headaches.

The medical records also contained evidence of two separate suicide attempts by petitioner. These suicide attempts occurred after petitioner sustained his head injury and that he was referred by the emergency room doctors for inpatient psychiatric treatment at John George Pavilion. (*Id*. 209-210). During this

inpatient treatment, the doctors diagnosed petitioner as suffering from depression and alcohol and amphetamine dependence. (*Id*.). The evidence from the records would have provided the jury with objective evidence, from an independent source, that petitioner was brain damaged and had a history of mental illness.

Dr. Preston testified at the state post-conviction hearing and presented his findings and images of petitioner's damaged brain. (29.15 Tr. 78-133). Dr. Preston's 2006 PET scan, if conducted prior to trial, would have shown the jury actual pictures of petitioner's damaged brain.

Dr. Preston's quantitative database in his report, as set forth below, shows that eighteen regions of petitioner's brain were significantly underactive and damaged.

BRAIN REGION	AXIAL SLICE	STANDARD DEVIATION BELOW NORMAL	APPROXIMATE CHANCE OF COMING FROM A NORMAL POPULATION
Right superior frontal cortex	p9	-3.12	less than 9 in 10,000
Right medial frontal cortex	p9	-3.87	less than 1 in 10,000
Left superior frontal cortex	p9	-2.93	less than 17 in 10,000
Left medial frontal cortex	p9	-3.08	less than 11 in 10,000
Left sensory motor cortex	p9	-3.85	less than 1 in 10,000
Right sensory motor cortex	p9	-4.06	less than 5 in 1000,000
Left superior parietal cortex	p10	-3.50	less than 5 in 10,000
Right superior parietal cortex	p10	-3.41	less than 7 in 10,000
Left superior frontal cortex	p11	-2.02	less than 22 in 1,000
Right sensory motor cortex	p11	-3.03	less than 12 in 10,000

Left superior parietal cortex	p12	-2.22	less than 14 in 1,000
Right sensory motor cortex	p14	-2.69	less than 35 in 10,000
Left sensory motor cortex	p14	-2.35	less than 95 in 10,000
Left inferior parietal cortex	p16	-2.65	less than 40 in 10,000
Left inferior parietal cortex	p18	-3.07	less than 11 in 10,000
Left associative visual cortex	p20	-2.92	less than 19 in 10,000
Left thalamus	p42	-2.70	less than 36 in 10,000
Right thalamus	p42	-2.30	less than 14 in 1,000

The brain scan images and quantitative data above would have removed any doubt in the minds of the jury that petitioner was brain damaged. Based upon the brain scan and his quantitative data, Dr. Preston concluded that there is "no doubt that Mr. Forrest has a damaged brain."

Both the state courts during petitioner's Rule 29.15 action and the district court in petitioner's federal habeas proceeding found that this ineffectiveness claim did not entitle petitioner to penalty phase relief. The district court found that the Missouri Supreme Court's decision was reasonable under 28 U.S.C. § 2254(d)(1).

On August 22, 2014, a divided panel of the Eighth Circuit Court of Appeals affirmed the district court. *Forrest v. Steele*, 764 F.3d 848 (8th Cir. 2014). Chief Judge Riley authored the majority opinion and Judge Bye issued a dissenting opinion. The panel majority upheld the district court's finding that the Missouri Supreme Court's decision was reasonable under 2254(d) in concluding that trial

counsel's performance was not deficient because of trial strategy and because the PET scan and medical evidence was cumulative to the testimony of petitioner's trial experts. (*Id*. at 854-859). The majority opinion did not address *Strickland* prejudice.

In his dissent, Judge Bye found that trial counsel's failure to obtain a PET scan was not a reasonable strategic decision. (*Id.* at 862-863). Judge Bye concluded that his confidence of the outcome of the penalty phase of petitioner's trial was undermined by trial counsel's failure to conduct a PET scan and present the results to the jury. (*Id*.).

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE DEATH PENALTY, IN ALL CASES, VIOLATES THE EIGHTH AMENDMENT.

Recently, Justice Breyer suggested "rather than try to patch up the death penalty's legal wounds one at a time," this 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). The conclusion that the death penalty, in all cases, violates the Eighth Amendment is compelled for many reasons. First, standards of decency have evolved to the point that capital punishment is no longer constitutionally viable. A number of objective factors indicate that this consensus has now been reached. Public support for the

death penalty has significantly declined in the last twenty years. 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 unusual, and confined largely to just a handful of states.

Second, the procedural safeguards underlying this Court's reinstitution of the death penalty after *Furman*[1] have been an abject failure. Heightened protections have not achieved the reliability needed to eliminate wrongful executions and the *Gregg*[2] guided discretion formula has not significantly limited arbitrariness and racial discrimination in the capital sentencing process.

This case presents an important question as to 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 Constitution requires. The death penalty has outlived any conceivable purpose. It is imperfect in application, arbitrary in result, and serves no legitimate penological purpose. The arc of historical events and trends since *Gregg* leaves but one conclusion: America's

[1] *Furman v. Georgia*, 408 U.S. 238 (1972).
[2] *Gregg v. Georgia*, 428 U.S. 153 (1976).

sensibilities regarding capital punishment have evolved to the point where it is no longer constitutional. *See 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 this will never change. The imposition of the death penalty, in all cases, therefore, constitutes cruel and unusual punishment.

A. The Death Penalty is a Disproportionate Punishment even for Aggravated Offenses.

Recent trends and events have converged and resulted in 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 and unusual punishment, even for the most heinous of offenses. In 2014, according to the FBI, there were over 14,000 intentional homicides committed in the United States. However, only forty-nine murderers received death sentences in 2015. These numbers conclusively demonstrate how unusual a death sentence has become in this country.

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.[3] New Jersey repealed the death penalty in 2007, and New Mexico followed suit in 2009.[4] Illinois was next in 2011, a few years after concerns about fairness and wrongful convictions prompted the governor to commute all death sentences.[5] In 2012, Connecticut repealed the death penalty prospectively (and in 2015 declared the death penalty unconstitutional under its state constitution).[6] In 2013, Maryland also abolished the death penalty.[7] Most recently, in May, 2015, Nebraska became the first "red state" in the Midwest to repeal the death penalty.[8]

Currently, the federal government and thirty-one states legally authorized the death penalty, but its infrequency in practice tells the real story. The federal government has not carried out any executions since 2003,[9] and the military has not done so since 1961. Six death penalty states have not executed anyone during the

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

[4] Jeremy W. Peters, *Death Penalty Repealed in New Jersey*, The New York Times, Dec. 17, 2007; *Death Penalty Is Repealed in New Mexico*, The New York Times, Mar. 18, 2009.

[5] John Schwartz & Emma G. Fitzsimmons, *Illinois Governor Signs Capital Punishment Ban*, The New York Times, Mar. 9, 2011.

[6] Laura Bassett, *Connecticut Repeals Death Penalty*, Huffington Post, Apr. 15, 2012; *State v. Santiago*, 318 Conn. 1, 33 (2015).

[7] *Maryland: Governor Signs Repeal of the Death Penalty*, The New York Times, May 2, 2013.

[8] Julie Bosman, *Nebraska Bans Death Penalty, Defying a Veto*, The New York Times, May 27, 2015.

[9] DPIC, Searchable Execution Database.

last ten years: Colorado, Kansas, New Hampshire, Oregon, Pennsylvania, and Wyoming.[10] 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 men abandoned their appeals).[11]

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).[12]

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); 2015(28)).[13]

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

[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*

2014 to seventy-three (73), the lowest total since the death penalty was reintroduced.[14] 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)). In 2015, only forty-nine new death sentences were imposed. No new death sentences were imposed in Missouri in the last two years.[15]

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 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, Oregon, Pennsylvania, and Washington 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

[14] DPIC, Executions By Year.
[15] *Id*.

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*."); *Roper v. Simmons*, 542 U.S. 551, 564-565 (2005) (noting that although twenty states authorized death for juveniles, the practice was infrequent, with only three states, Oklahoma, 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, Justice Brennan 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 Furman*, 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*, 569 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, 489-490 (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 and twenty-eight in 2015.[16] Only China, Iran, Saudi Arabia, and Iraq had more.[17] The seventy-three death sentences imposed in 2014 ranked the United States behind only China, Nigeria, Egypt, Pakistan, Bangladesh, Tanzania and Iran.[18]

Ironically, this Court's condemnation of the death penalty, as practiced in the time of *Furman*, likely inspired the world's movement toward abolition. Since the 1970s, eighty-two 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. 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."

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. In 1982, the Council of Europe adopted

[16] Amnesty International, Death Sentences and Executions: 2014, 62 (2015).
[17] *Id*.
[18] *Id*. at 63.

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 Europe.

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.").

Also 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. Our European allies have gently reminded us of this responsibility, noting their "regret[] that the arbitrary and discriminatory 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*."

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 responsibility we should accept.

B. *Gregg's* Procedural Safeguards Have 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 the Supreme Court's forty-year experiment with the death penalty spawned by the *Gregg* decision has failed.

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. Researchers have estimated that nearly one in twenty (4.1%) of those sentenced to death are actually innocent, an unacceptably high error rate by any measure.

The conclusion is unavoidable that wrongful executions happen with alarming frequency and these statistics establish that innocent defendants have been executed. *See* J. Liebman, *The Wrong Carlos: Anatomy of a Wrongful Execution*, (Columbia Univ. Press 2014 ed.). This realization propels legislatures and courts into an uncomfortable and surreal cost/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, this choice is made easier. 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 interplay 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, 664-665 (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, 1144-1145 (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, 435-437 (2008).

There are other significant, and 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. 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. It is estimated that as many as 25% of the approximately 3,000 inmates on death row have a serious mental illness, and even this number may significantly underestimate its prevalence. 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.

History also tells us that a substantial number of the men and women that have been executed have severe cognitive impairments, traumatic brain injuries, or a history of childhood trauma that the judges and juries who sentenced them to death often did not hear or believe. *See* Smith, Cull, and Robinson, *The Failure of Mitigation?*, 65 Hastings L. J. 1221 (2014). This troubling aspect of the capital sentencing process is underscored by the facts of this case where the jury did not believe that petitioner suffered from severe brain damage due to trial counsel's ineffectiveness in failing to obtain a PET scan and present petitioner's medical records at trial. Forrest, 764 F.3d at 862-863 (Bye, J., dissenting).

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 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 Pennsylvania state courts have 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 nonviolent felonies (such as car theft, as occurred in *Commonwealth v. Walter*, 966 A.2d 560, 562-563 (Pa. 2009)) 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 trial counsel was deemed ineffective by Eighth Circuit judge Kermit Bye in his dissent. 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 instead of abating.

3. Discrimination

Scholarly research aptly demonstrates that racial discrimination exists 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. 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. He made a compelling statistical showing of racial disparity in Georgia's death penalty, and urged that the burden 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 or Eighth Amendments. *Id*. at 292, 306-307.

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."); 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, 147-148 (2013) ("The [*McCleskey*] standard is generally acknowledged to be impossible to meet…").

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. Former Governor Martin O'Malley of Maryland, a repeal state, flatly declared that the death penalty "*cannot be administered without racial bias*." 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." Former 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 the basis of race…" Similarly, former New Mexico Governor

Bill Richardson stated: "It bothers me greatly that *minorities are overrepresented in the prison population and on death row*."

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*." Former 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." 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*." 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."

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," have opted for the latter.

4. Delays And Conditions Of Confinement

On one hand there can be no question that delay and the attendant uncertainty as to when the "blade may drop" can be cruel, and otherwise diminishes the utility of the punishment; on the other hand, when a condemned man pursues avenues for relief the Constitution provides, he is hard pressed to complain of the wait if his appeals ultimately fail. But this analysis overlooks 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, 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 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.

Conditions of confinement on death row, which often involves isolation for most of each day, raise Eighth Amendment concerns as well. It has been known for decades that protracted isolation has a deleterious effect on mental well-being. 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, incompetence to be executed, *Ford v. Wainwright*, 477 U.S. 399 (1986), and even suicide. Death penalty litigation 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, 237-238 (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 individuals and institutions 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. It is an image that is shocking to the conscience. 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 execution process is flawed and cruel. 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 toward abolition. But even if this were not the case, the *Gregg* formula has proved unworkable, and with no constitutional substitute available, our experience over the last forty requires reassessment of *Gregg's* underpinnings. *Johnson v. United States*, 135 S. Ct. 2551, 2562-2563 (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, 2605-2606 (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 questions of the acceptability 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 v. Florida*, 458 U.S. 782, 797 (1982) ("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

The petition for a writ of certiorari should be granted.

Respectfully submitted,

_____

KENT E. GIPSON, #34524
Law Office of Kent Gipson, LLC
121 East Gregory Boulevard
Kansas City, Missouri 64114
816-363-4400 • Fax 816-363-4400
kent.gipson@kentgipsonlaw.com

LANCE D. SANDAGE, #46022
Sandage Law Firm, P.C.
1600 Genessee Street, Suite 314
Kansas City, MO 64102
816-753-0800 • Fax 816-531-3600
lance@sandagelaw.com

COUNSEL FOR PETITIONER