No. 09-1092

In The
Supreme Court of the United States

SHEDRAN WILLIAMS
Petitioner,

v.

STATE OF LOUISIANA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

BRIEF IN REPLY TO OPPOSITION

CAPITAL CASE

G. Ben Cohen*
benc@thejusticecenter.org
Bidish J. Sarma
The Capital Appeals Project
636 Baronne Street
New Orleans, La. 70113

Robert John Smith
The Charles Hamilton
Houston Institute
125 Mount Auburn Street
Third Floor
Cambridge, MA 02138

* *Counsel of Record for Petitioner*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

BRIEF IN REPLY

A. Comparative Proportionality Review.

1. As the State's *Opposition Brief* highlights, the Court itself is divided over whether the federal Constitution *ever* requires a state court of last resort to conduct a comparative proportionality review of a death sentence. Justice Stevens's statement concerning the denial of *certiorari* in *Walker v. Georgia*, 129 S.Ct. 453 (2008), suggests that in states with capital punishment schemes structured like Georgia's (Louisiana is one) the arbitrary imposition of the death penalty is the "likely result" of an insufficient proportionality review. The *Opposition Brief* counters that Justice Thomas's concurrence in *Walker* suggests that the federal Constitution never compels a State court to conduct proportionality review regardless of the mechanics of a State's capital punishment scheme. Opp. Br. at 13.

The question of whether the U.S. Constitution compels comparative proportionality review of death sentences *in some instances* depending on the structure of the relevant capital sentencing scheme is not a debate over whether to reverse existing precedent. There is no controlling precedent. *Pulley v. Harris*, 465 U.S. 37, 51 (1984), simply examined the 1977 California capital sentencing statute and determined the system was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." Far from precluding future consideration of the propriety of proportionality

review of death sentences from other states under different sentencing schemes, the Court explicitly stated: "We take statutes as we find them." *Id.* at 45.

Louisiana's current capital sentencing scheme is not the equivalent of the 1977 California scheme that this Court reviewed in *Harris*. Louisiana law (unlike the statute in *Harris*) explicitly requires the Louisiana Supreme Court "to review every sentence of death to determine if it is excessive." Pet. Br. at 11. The excessiveness review requirement is an indispensible part of the state scheme. As explained in the Petition, the Louisiana statute does not provide jurors with any guidance for how to consider aggravation evidence vis-à-vis mitigation evidence. Nor does the jury's death-determination need to be made according to any set burden of proof. Moreover, in the 20 years since this Court reviewed the Louisiana capital statute in *Lowenfield v. Phelps*, 484 U.S. 231 (1988), Louisiana has drastically expanded the number an scope of statutory aggravating circumstances while reducing restrictions on the types of State evidence that the jury is permitted to consider when deciding whether to sentence someone to death. This Court should review Louisiana's current statute to determine whether its application results in an unacceptable risk that the death penalty is meted out in an arbitrary fashion.

2. The *Opposition Brief* cites *Jackson v. Virginia*, 443 U.S. 307 (1979), as the standard for challenging sufficiency of the evidence at the appellate level. This is the right standard, but the

wrong claim. Petitioner is not challenging in this forum the sufficiency of the evidence as to either the conviction or the existence of an aggravating factor. He simply asserts that among those defendants who are convicted of first-degree murder and against whom a jury has found the existence of an aggravating factor, the Louisiana sentencing scheme does not provide any mechanism sufficient to guarantee a rational relationship between the few individuals who receive death sentences and the many that do not. *Jackson* is irrelevant.

3. Though the *Opposition Brief's* evaluation of Petitioner's death-worthiness goes to the merits – and not whether this Court should grant review – the State's belief that juries always return death sentences for those who kill police officers is inaccurate. For example, in *State v. Ruffin*, 572 So.2d 232 (La. App. 1st Cir. 1990), police informants met with unsuspecting defendant for a prearranged buy/bust deal with defendant. Once there, Ruffin said he did not know why he did not just kill the two informers. Fearing for the safety of the two informants, a Sheriff's Deputy arrived on the scene. The defendant fired a single shot, fatally striking the Deputy in the face. A Jefferson Parish jury sentenced Ruffin to life imprisonment. *See also State v. Jones*, 769 So.2d 708 (La. App. 5th Cir. 2000) (defendant killed a Jefferson Parish Sherriff's Deputy in the course of an armed robbery, but did not receive a death sentence); *State v. Bell*, 477 So.2d 759 (La. App. 1st Cir. 1985); *State v. Bennett*, 454 So.2d 1165 (La. App. 1st Cir. 1984) (Bell and Bennett killed a store clerk during a robbery. A

sheriff's deputy was standing in line as a customer when defendants fired four shots into his head and neck, killing him). In *Bennett* and *Bell*, the defendants not only killed more than one person, but also killed a peace officer in each case.

The Louisiana Supreme Court cited four cases where a law enforcement officer was killed and the defendant received a death sentence. These four cases involved a total of two police officers. Brumfield and Broadway were co-defendants, as were Lacaze and Frank. Significantly, each of the four defendants armed themselves *before* the incident that led to the death of the police officer. *See, e.g.*, *State v. Brumfield*, 737 So.2d 660 (La. 1998) (noting "[d]efendant, along with co-defendant, planned an armed ambush and robbery at least two days prior to the police officer's death").

In this case, Williams entered the Wal-Mart to buy sheets – not to commit an armed robbery and certainly not to kill anyone. This is not to say that Mr. Williams is blameless, but rather that unlike Brumfield, Broadway, Lacaze, and Frank, all of whom killed police officers while conducting an armed robbery, Mr. Williams had no plan to use a dangerous weapon in the commission of a felony. Lt. Wax confronted Williams about a stolen disposable camera, the confrontation turned physical, Williams obtained control of the Lieutenant's weapon, and she was shot as he fled the store. This lack of deliberation also distinguishes this case from *Bell, Bennett,* and *Ruffin* (where the respective defendants received life sentences) in that

Petitioner's crime was *less* aggravated because in each of those cases a police officer was killed in the course of a pre-meditated felony conducted by a defendant who had been armed before committing the crime. In *Jones*, where the defendant also received a life sentence, Jones robbed a gas station (while intimating that he had a gun) and then killed a Sherriff's deputy after already having left the gas station. Moreover, as noted in the Petition, several hundred offers have been murdered in the line of duty in Louisiana since *Furman v. Georgia*, 408 U.S. 238 (1972). Pet. Br. at 20. Nothing meaningfully distinguishes this case from those that did not result in a death sentence.

4. The *Opposition Brief* suggests that there can be no race-of-the-victim effect in this case because "petitioner simply did not care about the race of his victims." Opp. Br. at 15 ("[T]he instant matter involves a black defendant whose attack was aimed at three victims: a white female, a white male, and a black male."); *id*. at 20 ("[P]etitioner once again fails to observe that he attempted to kill a black man during the course of his crime."). The Louisiana Supreme Court appears to have reached the same conclusion. *See* Pet. App. A at 72a (concluding that because "Mr. Wilson, the third victim shot, was an older African-American male[,] [r]ace does not appear to be a motivating factor in the shooting of Lt. Wax."). Both are incorrect. The well-documented race-of-the-victim effect that continues to plague the administration of capital punishment in Louisiana is not about whether a defendant had racial animus against the victim;

rather it describes the phenomenon of the higher rate of death sentences returned in cases that involve at least one white victim. Because Petitioner was convicted and sentenced to death for the killing of a white woman, the possibility for the arbitrary influence of race is present. This is especially true here because Lt. Wax was white woman and the Petitioner is a black man.[1] As the Petitioner explains more fully, the specter of race looms large over this case because the last 13 defendants to be sentenced to death in East Baton Rouge Parish are all black. Pet. Br. at 5-6. Every case the Louisiana Supreme Court cited in its proportionality review involved a black defendant. Pet. Br. at 27-28. Three of those cases involved a black defendant and a white victim. *Id*. Moreover, as this Court has acknowledged, race discrimination is not yet a relic of the past in

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[1] As this Court noted in *Turner v. Murray*:

> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate, but remain undetected. On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief . . . Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.

476 U.S. 28, 35 (1986).

Louisiana. *See generally Snyder v. Louisiana*, 552 U.S. 472 (2008).

B. *Apprendi v. New Jersey* and the Death-Determination.

1. The *Opposition Brief* emphasizes that the question of whether *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to the death-determination is not a novel one. Petitioner agrees. This important and undecided question not only affects every capital case in Louisiana, but also impacts and divides state courts of last resort across the country. *See* Pet. Br. at 33-34. (detailing a split of authority). This Court should resolve the issue here and now.

The State's assertion that Petitioner is urging this Court to "extend *Ring* [*v. Arizona*, 536 U.S. 584 (2002)] from the Sixth Amendment to the Eighth Amendment" is not correct. Opp. Br. at 25.[2] The penalty phase of a capital trial did not exist at the time of the founding. Rather, this Court's Eighth Amendment jurisprudence requiring amplified procedural protections in capital cases has altered the jury trial landscape.[3] A defendant's Sixth

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[2] *Ring v. Arizona*, 536 U.S. 584 (2002), explicitly left this issue undecided. *See id*. at 597 n.4 ("Ring's claim is tightly delineated . . . He makes no Sixth Amendment claim with respect to mitigating circumstances . . . Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty.") (internal citations omitted).

[3] *See Ring,* 536 U.S. at 611 (Scalia, J., concurring) ("[I]t is impossible to identify with certainty those aggravating factors

Amendment right to a jury trial cannot be diluted on the theory that these newly required sentencing proceedings did not exist at the time of the founding. If this Court chooses to compile additional requirements for the imposition of the death penalty, the Sixth Amendment right to a jury trial must be extended to correspond with all adversarial findings that function in the same manner as a finding during the guilt phase – including the death-worthiness determination at issue here. The Eighth Amendment requires jurors to consider mitigating evidence *before* a defendant can receive a possible death sentence. Implicit in the return of a death sentence then is the notion that the aggravating evidence overshadowed the mitigation evidence. This process should not be governed by alchemy or left to the caprices of each individual juror, but should be restrained by the Sixth Amendment and the beyond a reasonable doubt standard.

The State's reliance on *Kansas v. Marsh*, 548 U.S. 163 (2006), is misplaced. Though the *Marsh* Court found that the Eighth Amendment does not preclude a death sentence when mitigation and

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whose adoption has been wrongfully coerced by *Furman,* as opposed to those that the State would have adopted in any event."); *see also Apprendi,* 530 U.S. at 539 (O'Connor, J., dissenting) (the idea "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence.").

aggravation evidence are in equipoise, the Court clearly finds significant in the Kansas statute that which is absent in the Louisiana statute at issue here:

> Significantly, although the defendant appropriately bears the burden of proffering mitigating circumstances – a burden of production – he never bears the burden of demonstrating that mitigating circumstances outweigh aggravating circumstances. Instead, the State always has the burden of demonstrating that mitigating evidence does not outweigh aggravating evidence.

Marsh, 548 U.S. at 178-79. In Louisiana, the prosecution does not bear the burden of persuasion at the death-determination step (the only point of decision following consideration of any mitigation evidence). Thus, the statute – unlike the Kansas statute in *Marsh* – cannot be reconciled with the Sixth Amendment.

CONCLUSION

The State disagrees with Petitioner on the proper resolution of the two questions presented by this case, but the *Opposition Brief* does not disprove that the issues themselves are important, unsettled, and debatable. The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

G. Ben Cohen
Counsel of Record
benc@thejusticecenter.org
Bidish J. Sarma
The Capital Appeals Project
636 Baronne Street
New Orleans, LA 70113
504-529-5955

Robert J. Smith
The Charles Hamilton
Houston Institute
125 Mount Auburn Street
Third Floor
Cambridge, MA 02138
617-495-8285