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 United States Court Of Appeals, Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FILED ON BEHALF OF THE STATE OF LOUISIANA

HILLAR C. MOORE, III
District Attorney

DYLAN C. ALGE*
Assistant District Attorney

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
222 St. Louis Street, Fifth Floor
Baton Rouge, Louisiana 70802
Telephone: (225) 389-3453
E-Mail: dalge@ebrda.org
Counsel for Respondent the State of Louisiana
**Counsel of Record*

TABLE OF CONTENTS

Page

FACTS AND PROCEDURAL HISTORY 1

ARGUMENT 9

I. PROPORTIONALITY REVIEW IS NOT CONSTITUTIONALLY MANDATED. ADDITIONALLY, THE STATE OF LOUISIANA CONDUCTED MEANINGFUL APPELLATE REVIEW OF PETITIONER'S SENTENCE 9

II. THE EIGHTH AMENDMENT DOES NOT REQUIRE STATES TO EMPLOY A SENTENCING SYSTEM WHEREBY JURIES MUST FIND AN AGGRAVATING CIRCUMSTANCE OUTWEIGHS MITIGATION EVIDENCE BEYOND A REASONABLE DOUBT 22

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES:

Anderson v. Louisiana, 129 S.Ct. 1906, 173 L.Ed.2d 1057, cert. denied 4/6/09 27

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).....22, 23, 24, 25

Fields v. Kentucky, 130 S.Ct. 460, cert. denied 10/20/09 14

Georgia v. Walker, 129 S.Ct. 453, 172 L.Ed.2d 344 (2008).....13, 14, 15

Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).....14, 20

Holmes v. Louisiana, 130 S.Ct. 70, 175 L.Ed.2d 233, cert. denied 10/5/09 14

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).....11

Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).....13

Lowenfeld v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 9 L.Ed.2d 568 (1988).....24

Marsh v. Kansas, 548 U.S. 163, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006).....25, 27

McCleskey v. Kemp, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987).....14, 20

O'Kelley v. State, 670 S.E.2d 388 (Ga. 2008).....12

O'Kelly v. Hall, 130 S.Ct. 94, 175 L.Ed.2d 64, cert. denied 10/5/09, reh'g denied 11/30/09 14

TABLE OF AUTHORITIES – Continued

Page

Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984) 13, 16

Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) 22, 23, 24, 25, 27

State v. Broadway, 96-2659, 753 So.2d 801, La. 10/19/99 18

State v. Brumfield, 96-2667, 737 So.2d 660, La. 10/20/98 18

State v. Koon, 96-1208, 704 So.2d 756, La. 5/20/97 24

State v. Robertson, 92-2660, 630 So.2d 1278, La. 1/14/94 18

State v. Taylor, 93-2201, 669 So.2d 364, La. 2/28/96 18

State v. Wessinger, 98-1234, 736 So.2d 162, La. 5/28/99 18

State v. Williams, 07-1407, 22 So.3d 867, La. 10/20/09, rehearing denied 12/11/09 ..... *passim*

Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986) 15

Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) 14

TABLE OF AUTHORITIES – Continued

Page

OTHER:

U.S. Const. Amend. VIII.....*passim*

U.S. Const. Amend. XIV.....12

La. C.Cr.P. art. 905.4(A)(4).....15, 18, 23, 24

La. C.Cr.P. art. 905.5(h).....24

La. C.Cr.P. art. 905.6.....23

La. C.Cr.P. art. 905.3.....23, 24

Kan. Stat. Ann. §21-4624(e) (1995).....25

FACTS AND PROCEDURAL HISTORY

On May 22, 2004, petitioner Shedran Williams was employed as a manager of Mr. C's auto shop located in Baton Rouge, Louisiana. Thirty-three years old at the time, petitioner had begun the process of moving himself into a new apartment. Petitioner had to work at the auto shop on the 22nd, so he enlisted Deangelo Hammond and Jason Martin to help him with making his move. Hammond was petitioner's cousin and Martin was a friend. Petitioner worked at the auto shop while Hammond and Martin moved furniture into his new apartment.

Petitioner was car-less, having only been out of prison for about a month. As a result, Hammond and Martin picked petitioner up in Hammond's vehicle once he finished work. After picking up petitioner, the men stopped at a Rite Aid. Petitioner bought a twelve-pack of Michelob and some Absolut vodka to repay Hammond and Martin for their efforts in helping him with the move. Petitioner then directed Hammond to pick up two "party girls" he had previously met. After picking up the women, petitioner had Hammond stop at the Wal-Mart located on the corner of Perkins Road and Acadian Thruway in Baton Rouge. Planning on the possibility of group sex later in the evening, petitioner stopped at Wal-Mart to get some bed linens for his new furniture. Petitioner went into Wal-Mart while the rest of the people stayed in the car.

Once inside Wal-Mart, petitioner went around and put various items in his buggy. During this time, Martin came into Wal-Mart to use the restroom. At approximately 9:50 p.m., Martin saw petitioner by the electronics department. Martin watched defendant place a couple of disposable cameras underneath his shirt and into his back pocket. Martin did not want to be involved in a theft and quickly left the store. Martin returned to Hammond's vehicle and told Hammond that his cousin was stealing about twenty dollars' worth of merchandise.

Martin, however, was not the only person to witness petitioner put the cameras in his back pockets. Garrett Douget, the supervisor of Wal-Mart's loss prevention division, was also in the area and witnessed the shoplifting. Dressed in plain clothes, Douget followed petitioner to the front of the store. Petitioner proceeded to a register and began checkout for the items he had in his buggy, including pillows, sheets, and a rug.

Angela Ranson, a Wal-Mart cashier, checked out petitioner. During the process, petitioner engaged Ranson in flirtatious small talk, complimenting her hair and asking her if she was working the next day. Petitioner told her he would bring her breakfast.

As petitioner checked out, Douget summoned Lieutenant Vicki Wax. Lt. Wax, a twenty-seven-year veteran Baton Rouge police officer, was working security for Wal-Mart and was in full uniform. Douget advised Lt. Wax about the situation. Douget then got

in line immediately behind petitioner. Douget watched as petitioner made no attempt to pay for the cameras. He again witnessed the cameras sticking out of petitioner's back pockets when petitioner leaned over to talk to Ranson. Petitioner checked out, never paying for the cameras.

After checking out, petitioner did not immediately leave. Instead, he continued to flirt with Ranson while she checked out other people, including Douget. Petitioner persisted in trying to convince Ranson to give him her phone number after he had completed his purchase. Petitioner eventually asked Ranson where she lived. Somewhat scared, Ranson lied and told defendant she lived in Port Allen. During this time, Douget met with Lt. Wax.

Eventually, petitioner made his way toward the exit. Standing by the exit was Lester Barbier, Wal-Mart's door greeter. Barbier watched Lt. Wax and Douget follow petitioner. After petitioner had passed all possible points of sale without paying for the cameras, Douget confronted him in the store's vestibule. Douget identified himself as Wal-Mart security and asked petitioner about the items under his shirt. Petitioner said, "I can explain that."[1] Lt. Wax and Douget asked petitioner to step back inside. Petitioner started to turn around, but after taking only one step he instead brushed off Douget and made a run for the exit. Douget was able to grab petitioner's

[1] R. pp. 1961-1962.

arm, and a struggle ensued. Lt. Wax initially grabbed petitioner's other arm.

Lt. Wax yelled at Douget to handcuff petitioner, but he was unable to do so. During the struggle, Lt. Wax fell on her back, and petitioner fell on top of her. Petitioner then grabbed for Lt. Wax's gun. Lt. Wax screamed, "he's got his hand on my gun, get your hand off my gun."[2] Shortly thereafter, petitioner popped Lt. Wax's gun out of its holster and gained control of it.

Immediately prior to the struggle, Stanford Wilson, a frequent Wal-Mart customer, had been putting batteries into the radio on his bike near the Wal-Mart entrance/exit. Wilson watched the events developed, and he watched petitioner hitting Lt. Wax. When the gun popped out, Wilson heard Lt. Wax say, "please someone get the gun, don't let [petitioner] get the gun."[3] Wilson entered the fray and attempted to retrieve the gun, but petitioner got to it first.

Once petitioner gained the gun, Douget told him to "just get out of here."[4] Petitioner yelled for everyone to get back. Everyone obeyed his orders and backed off, leaving no impediment between himself and the front door.[5] Despite there being no impediment

---

[2] R. p. 1930.

[3] R. p. 1991.

[4] R. p. 1931.

[5] R. p. 2012.

between petitioner and the exit door, petitioner turned around inside the vestibule, pointed the gun at Lt. Wax and fired, striking her in the center of her forehead at her hairline. The bullet aimed at Lt. Wax fractured her skull and passed through her brain. Lt. Wax fell face down and petitioner shot her again, striking her in the center of her back. While Lt. Wax lay helpless, petitioner redirected his weapon and shot Douget in the back as he tried to get away.[6] The shots fired at both Lt. Wax and Douget came from point-blank range. Petitioner then turned and fired shots at Wilson. The shots hit Wilson in the neck and chest, splitting his armpit. Chaos ensued among the patrons as petitioner fled the store.

Lt. Wax died almost immediately from her wounds. Wilson was in critical condition from his injuries but survived. Douget's injury was painful, but not life threatening.

In the meantime, Hammond, Martin and the two women drove away when they noticed petitioner wrestling and heard the sound of gunshots. Once outside in the Wal-Mart parking lot, defendant attempted to steal a car containing twelve-year-old Bria Jenkins and her younger niece.[7] When he could not gain entry into the car, he ran to another car, a Chevy Corsica occupied by Karyn Garnett and Abraham Washington. Petitioner accessed the backseat of their

---

[6] R. p. 1939.

[7] Jenkins' mother was inside Wal-Mart at the time.

vehicle, pointed the gun he was still holding at them, and yelled, "Drive, drive or I'll kill you."[8] Rife with fear, both Garnett and Washington fled from the vehicle. Petitioner came around to the driver's side and recklessly sped off, hitting a nearby-parked car that contained two small children.[9] Petitioner eventually abandoned the vehicle, which the police located some two hours after the incident.

Late into the night and the following day, detectives processed the crime scene, retrieving evidence and interviewing eyewitnesses. Items known to have been touched by the shooter, including the disposable cameras, the cordless phone box, and the abandoned Chevy Corsica were dusted for fingerprints. A fingerprint lifted from one of the cameras matched petitioner's known prints in the police data bank. From that, the police developed a six-person photo lineup, which included petitioner's picture along with five fill-in photographs of men with similar features. On May 23, 2004, the police interviewed Garrett Douget in his hospital room and showed him the photo lineup. Douget positively identified petitioner as the person who shot him, Lt. Wax, and Wilson. A warrant for petitioner's arrest for the first-degree murder of Lt. Vickie Wax issued on May 23, 2004. On May 24, 2004, Baton Rouge Police Department Chief Pat Englade received a call from petitioner's stepfather

[8] R. p. 2035.

[9] R. pp. 2037-38.

that petitioner wanted to turn himself in. Petitioner was arrested without incident at the auto shop. The officers advised petitioner of his *Miranda* rights. Thereafter, Chief Englade asked petitioner what he did with the police officer's weapon, to which petitioner replied that he threw it in the river by a casino. Petitioner's post-arrest statement turned out to be false, because on July 10, 2006, members of the New Orleans Police Department found Lt. Wax's .357 caliber revolver in a stolen vehicle in New Orleans.

Additional identifications of petitioner were made on May 24, 2004. Deangelo Hammond and Jason Martin each gave a statement to the police about the events of May 22nd and viewed the photo lineup, positively identifying petitioner. Abraham Washington and Karyn Garnett also positively identified petitioner from the photo lineup as the person who stole their Chevy Corsica at gunpoint. Wal-Mart employees Angela Ranson (check-out clerk), James Minor, and Lester Barbier also made positive identifications of petitioner, as did Wal-Mart customers who witnessed the murder, Judge Kathleen Richey and Lee Gray. At trial, these witnesses again identified petitioner as the shooter.

Petitioner was indicted on June 17, 2004, with having committed the first-degree murder of Lt. Vickie Wax.[10] The state gave notice of its intent to

[10] La. R.S. 14:30; Indictment no. 6-04-486; R. p. 37.

:k the death penalty on June 28, 2004.[11] After ini-
lly entering a plea of not guilty, petitioner changed
; plea to not guilty and not guilty by reason of
;anity.[12] On March 13, 2006, jury selection began,
d a jury panel of twelve with one alternate was
orn on March 20, 2006.[13] Trial commenced, and
titioner was found guilty as charged on March 22,
06.[14] The penalty phase ensued the following day,
e jury recommending a sentence of death.[15] On May
, 2006, the trial court imposed the sentence of
ath by lethal injection.[16] Petitioner filed a motion
· new trial, which was denied.[17]

On direct appeal, the Louisiana Supreme Court
;animously affirmed petitioner's conviction and sen-
nce, and rehearing was denied.[18] Petitioner's appli-
tion for writs of certiorari to this Court followed.
ıe State submits the instant response.

---

[11] R. pp. 39-40.

[12] R. pp. 6, 817-818.

[13] R. pp. 8-18, 862-1885.

[14] R. pp. 29, 675.

[15] R. pp. 31, 676, 2469-2573.

[16] R. pp. 32, 2598.

[17] R. pp. 32, Supp. R. pp. 2-12.

[18] *State v. Williams*, 07-1407, 22 So.3d 867, La. 10/20/09, *hearing denied* 12/11/09.

ARGUMENT

I. PROPORTIONALITY REVIEW IS NOT CONSTITUTIONALLY MANDATED. ADDITIONALLY, THE STATE OF LOUISIANA CONDUCTED MEANINGFUL APPELLATE REVIEW OF PETITIONER'S SENTENCE.

In his initial allegation, petitioner contends that (1) the Federal Constitution requires proportionality review and that (2) the Louisiana Supreme Court conducted an insufficient proportionality review of his case. More specifically, petitioner argues that the Louisiana Supreme Court's comparison of his penalty to only those cases wherein the death penalty was imposed constituted insufficient proportionality review and failed the Eighth Amendment. Petitioner also argues that the Court failed to consider mitigating circumstances and that it failed to adequately consider fact that the majority of death row inmates from East Baton Rouge Parish have been African-Americans. Finally, he alleges that the Louisiana Supreme Court routinely conducts insufficient proportionality review. Petitioner's initial claim attacking the Eighth Amendment is meritless.

Before addressing petitioner's initial source of complaint, the State believes it necessary to address the two-paragraph "factual background"[19] contained within petitioner's writ application. Unfortunately, petitioner's factual background represents an intentional attempt to mislead this Court as to his level of

[19] Petition for Writ of Certiorari, pp. 14-15.

criminal culpability. For example, petitioner's factual background entirely omits the May 22nd events occurring prior to his entering Wal-Mart. Not coincidentally, the Louisiana Supreme Court found these pre-crime events quite valuable because they significantly undermined his claim of mental retardation.[20] Petitioner's factual background also attempts to discredit the aggravating circumstance that he killed a peace officer. Petitioner simply refers to Lt. Wax as an "off-duty police officer."[21] Lt. Wax, however, was a twenty-seven year police veteran who was in full uniform and on duty when petitioner committed his crime.

In what may accurately be described as a half-hearted attempt to negate specific intent and identity, petitioner mentions only that the store security cameras did not capture the crime and that, "during the attempted altercation Mr. Williams took Lt. Wax's gun and discharged it several times before he fled the scene. Lt. Wax was killed and two other civilians were injured in the encounter."[22] Petitioner conveniently omits the fact that no less than ten witnesses positively identified him as the perpetrator the crime.

---

[20] *State v. Williams*, 22 So.3d at 898. "The 35-year-old defendant testified at the guilt phase of his capital trial, and in so doing, undercut his defense of mental retardation. His testimony revealed a street-savvy drug abuser who was skilled at manipulation of others and possessed an outsized ego [. . .]."

[21] Petition for Writ of Certiorari, p. 14.

[22] Petition for Writ of Certiorari, p. 14.

Petitioner also fails to mention that he incited the altercation with his victim(s) by trying to steal merchandise and flee the store. He fails to note that it was he who wrested the gun away from Lt. Wax. He fails to mention that upon obtaining possession of the gun, everyone backed off and told him he could leave. He fails to mention that rather than leave, he shot Lt. Wax between the eyes from point blank range, then shot her again in the back once she had gone limp and fallen to the floor. He fails to mention that he then attempted to kill both Douget and Wilson, seriously injuring Wilson, before finally leaving Wal-Mart. He fails to mention that Wilson was an African-American male, a fact that completely undermines any contention that his actions were the product of racial motivation. Finally, petitioner fails to mention his post-crime actions, which included: (1) attempting to steal an occupied vehicle, (2) threatening to kill a couple before stealing a second vehicle, (3) committing damage to an occupied third vehicle while fleeing the scene, and (4) lying to the police about what he did with the murder weapon.

The State felt it necessary to confront petitioner's reconstruction of the facts of this case because of the nature of the claim he now presents to this Court. *Jackson v. Virginia*[23] is the governing standard of review at the appellate levels, and the *Jackson*

[23] 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

standard applies with equal force to the factual question of whether petitioner's death sentence is appropriate.[24] Petitioner's synopsis of the events would have one believe his crime was a collection of unfortunate happenstance, that he might have fired a gun and the bullets might have hit someone. Were one to simply read petitioner's factual background, it would not be apparent that petitioner committed the crimes of theft, resisting an officer, murder, two attempted murders, attempted carjacking, carjacking and/or armed robbery, and aggravated criminal damage to property in the course of five minutes.[25] Contrary to what his "factual background" might suggest, petitioner made a concerted effort to kill multiple people, one of whom was a police officer. What is truly disingenuous is that petitioner presented this factual background to this Court while simultaneously attempting to have this Court proclaim Louisiana's proportionality review is constitutionally insufficient. It stands to reason that if petitioner really sought to achieve "meaningful appellate review" and establish that his punishment was indeed disproportionate, he would not misrepresent the facts of his case in an attempt to skew such review.

Regardless, the Eighth Amendment, applicable to states through the Fourteenth Amendment, does not

---

[24] *State v. Williams*, 22 So.3d at 882-887; *O'Kelley v. State*, 670 S.E.2d 388 (Ga. 2008).

[25] La. R.S. 14:27, 14:30, 14:30.1, 14:55, 14:64, 14:64.2, 14:67, 14:108.

require a state appellate court, before affirming a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the defendant.[26] Petitioner has no Federal Constitutional right to proportionality review. Thus, he has no basis for complaint regarding the additional protective measures the State of Louisiana provides him with respect to his sentence.

In brief, petitioner relies heavily on a "statement" Justice Stevens issued in *Georgia v. Walker*[27] to argue that the Eighth Amendment requires proportionality review and that the Louisiana Supreme Court must consider cases wherein the death penalty was not imposed as part of its proportionality review. Justice Stevens' "statement" in *Walker*, however, does not stand for the proposition petitioner believes it does. More pertinently, this statement is not the law. As noted by Justice Thomas in his concurrence in *Walker*, "proportionality review is not constitutionally required in any form."[28] Louisiana, like Georgia "simply has elected, as a matter of state law, to provide an additional protection for capital defendants."[29] As there is no constitutional mandate, there is no

---

[26] U.S. Const. Amends. VIII, XIV. *Pulley v. Harris,* 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984); *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

[27] 129 S.Ct. 453, 172 L.Ed.2d 344 (2008).

[28] *Walker*, 129 S.Ct. at 482-483, *citing Pulley,* 465 U.S. 37 at 45, 104 S.Ct. 871 (1984).

[29] *Id.*

.sis for this Court to review the Louisiana Supreme ɔurt's proportionality review process. "*McCleskey,*[30] *ılley, Zant,*[31] and *Gregg*[32] remain the law."[33] Such as the scenario when this Court recently denied rtiorari in *Holmes v. Louisiana,*[34] a case wherein the ːtitioner similarly attacked Louisiana's propor-ɔnality review as violative of the Eighth Amend-ent. Post-*Walker*, a petitioner continues to have no nstitutional right to proportionality review.[35]

Further, it must be noted that the concerns ·ompting Justice Stevens' statement in *Walker* are ɔt present in this matter.[36] Justice Stevens' state-ent in *Walker* sprang from a deep-rooted concern of ɔssible discrimination in black-defendant, white-ctim crimes.[37] Worried that a "race-of-victim effect"

---

[30] *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 Ed.2d 262 (1987).

[31] *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 Ed.2d 235 (1983).

[32] *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 59 (1976).

[33] *Walker*, 129 S.Ct. 485 (J. Thomas, concurring).

[34] 130 S.Ct. 70, 175 L.Ed.2d 233, *cert. denied* 10/5/09.

[35] *See e.g. O'Kelly v. Hall*, 130 S.Ct. 94, 175 L.Ed.2d 64, *cert. ɜnied* 10/5/09, *rehearing denied* 11/30/09; *Fields v. Kentucky,* 30 S.Ct. 460, *cert. denied* 10/20/09.

[36] *See also McCleskey*, 481 S.Ct. 279 at 1805-1806 (J. tevens, dissenting).

[37] *Walker*, 129 S.Ct. at 455: "The opinions in another eorgia case, *McCleskey v. Kemp,* 481 U.S. 279, 107 S.Ct. 1756, 5 L.Ed.2d 262 (1987), make it abundantly clear that there is a ɔecial risk of arbitrariness in cases that involve black

(Continued on following page)

might still be present in Georgia capital cases, Justice Stevens cautioned that Georgia's proportionality review might be becoming perfunctory.[38] Unlike *Walker*, petitioner's case does not pose this "race-of-victim effect." Unlike *Walker*, the instant matter involves a black defendant whose attack was aimed at three victims: a white female, a white male, and a black male.[39] The record reflects that petitioner simply did not care about the race of his victims, and the result of his gross indifference to humanity was that the white woman lost her life and a black man nearly lost his. The Louisiana Supreme Court noted as much when it reviewed his death sentence.[40]

---

defendants and white victims. See also *Turner v. Murray,* 476 U.S. 28, 33-37, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986) (plurality and majority opinions) (discussing the heightened risks of prejudice that inhere in the prosecution of interracial capital offenses). Although there is some indication that those risks have diminished over time, at least the race-of-victim effect persists. See Baldus & Woodworth, Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception, 53 DePaul L.Rev. 1411, 1424-1426 (2004). It is against that backdrop that I find this case, which involves a black defendant and a white victim, particularly troubling."

[38] *Id.*

[39] La. C.Cr.P. art. 905.4(A)(4). *See also State v. Williams*, 22 So.2d at 899-900.

[40] *State v. Williams*, 22 So.2d at 899: "The victim, Lt. Wax, was a Caucasian female, who was 51 years old at the time of her death. Mr. Douget, the Wal-Mart loss prevention agent who was shot, was also Caucasian, while Mr. Wilson, the third victim shot, was an older African-American male. Race does not appear

(Continued on following page)

Moreover, petitioner's interpretation of Justice Stevens' statement is misplaced. Justice Stevens' statement does not, as petitioner suggests, mandate that a state conduct proportionality review by comparing cases where the death penalty was not imposed. In point of fact, Justice Stevens' statement is not a dissent. Rather, Justice Stevens' statement appears to be an extension of his concurrence in *Pulley* wherein he concluded that the Constitution, while not necessarily requiring a proportionality review, does require "meaningful appellate review."[41] As can be seen by the intricate, lengthy consideration the Louisiana Supreme Court gave to petitioner's sentence,[42] such "meaningful review" was provided in this case.

The Louisiana Supreme Court took painstaking measures to ensure petitioner's death sentence was not unconstitutionally excessive. The court began by considering all relevant background information, including reports from Department of Public Safety and

---

to be a motivating factor in the shooting of Lt. Wax. Defendant's jury was composed of two African-American females, eight Caucasian males, and two Caucasian females. The alternate juror was a Caucasian female. There has been no showing that defendant's capital trial was conducted with any racial taint."

[41] *Pulley*, 104 S.Ct. at 884 (J. Stevens, concurring in part and concurring in the judgment): "To summarize, in each of the statutory schemes approved in our prior cases, as in the scheme we review today, meaningful appellate review is an indispensable component of the Court's determination that the State's capital sentencing procedure is valid."

[42] *State v. Williams*, 22 So.3d at 897-901; Petition for Writ of Certiorari, pp. 66A-75A.

Corrections, the district court judge, the State, and petitioner's mental health expert.[43] It considered petitioner's family upbringing, his work history, his prior criminal history, his history with drugs and alcohol, and any relevant information regarding the possibility of retardation. The court considered the testimony of the witnesses who testified on his behalf at the sentencing phase, and it analyzed how defendant's taking the stand at trial negated any possibility of retardation.[44]

The court next considered the factors surrounding petitioner's trial. It concluded that race did not appear to be a motivating factor in the shooting of Lt. Wax and that no evidence suggested petitioner's trial was conducted with any racial taint.[45] The court determined that the jury's finding of two aggravating circumstances was fully supported by the evidence and that his "death sentence is firmly grounded on the finding of those two aggravating circumstances."[46]

Finally, the court considered whether petitioner's sentence was comparatively proportional. Noting that "several of the salient features of the instant case make it similar enough to other death sentences recommended by juries in the 19th JDC," the court found that petitioner's sentence was not disproportionate to

---

[43] *State v. Williams*, 22 So.3d at 897.

[44] *State v. Williams*, 22 So.3d at 898-899.

[45] *State v. Williams*, 22 So.3d at 899.

[46] *State v. Williams*, 22 So.3d at 900.

those cases.[47] Although unnecessary, the court looked beyond the 19th JDC and further analyzed petitioner's sentence:

> In the fairly rare instance that peace officers have been killed in the line of duty in Louisiana, besides *Broadway* and *Brumfield, supra,* this court has observed that juries have imposed capital punishment for that special circumstance under La. Code Crim. Proc. art. 905.4(A)(2). *See State v. LaCaze,* 99-0584 (1/25/02), 824 So.2d 1063 (brother and sister shot along with off-duty police officer working security detail at family-owned restaurant); *State v. Frank,* 99-0553 (La.1/17/01), 803 So.2d 1 (same).[48]

---

[47] *See, e.g., State v. Broadway,* 96-2659, 753 So.2d 801, La. 10/19/99 (defendant and co-defendant Kevan Brumfield shot and killed police officer escorting grocery store manager who was making a night deposit); *State v. Brumfield,* 96-2667, 737 So.2d 660, La. 10/20/98 (defendant and co-defendant Henri Broadway shot and killed police officer escorting grocery store manager who was making a night deposit); *State v. Wessinger*, 98-1234, 736 So.2d 162, La. 5/28/99 (defendant shot and killed two people, and injured two people during the course of an armed robbery at a restaurant); *State v. Taylor,* 93-2201, 669 So.2d 364, La. 2/28/96 (during armed robbery in a restaurant where defendant had previously been an employee, he shot and killed one employee and shot and permanently disabled and paralyzed another); *State v. Robertson,* 92-2660, 630 So.2d 1278, La. 1/14/94 (defendant broke into the victims' home, armed himself with a kitchen knife, and stabbed the two elderly victims to death).

[48] *State v. Williams*, 22 So.3d at 900.

Although constitutionally unnecessary, the Louisiana Supreme Court did much more than provide a purely perfunctory review of petitioner's sentence. That court considered all relevant aspects of his case, and it found that in the few cases that bore some factual resemblance to his, the death penalty had been properly imposed.

Petitioner contends that the state court should have compared similarly situated cases wherein the death penalty was not imposed. The Constitution imposes no such requirement. Moreover, petitioner did not provide this Court with a single first-degree, "life-sentence" case remotely approaching the factual circumstances of his case. Petitioner's death sentence was based on multiple aggravating circumstances. Petitioner tried to kill multiple people *and* he killed a police officer. Petitioner's writ application, however, skirts the fact that he killed a police officer in cold blood while also attempting to kill multiple people.[49]

Petitioner also takes issue with the fact that the Louisiana Supreme Court's proportionality review compared cases wherein the defendant was black and the victim was white. Petitioner, however, does not argue an Equal Protection violation occurred. Rather, petitioner asks this court to simply infer a racial bias

---

[49] Petition for Writ of Certiorari, pp. 25-26, n. 14. Petitioner simply string cites a list of inapposite caselaw, caselaw where the sole aggravating factor was risk of death or great bodily harm to more than one person.

exists in Louisiana's capital sentencing scheme based on the court's comparison of black-defendant, white-victim capital cases and the number of African-American males who have received the death penalty in East Baton Rouge. Such a proportionality argument was flatly rejected in *McCleskey v. Kemp*.[50] Moreover, petitioner once again fails to observe that he attempted to kill a black man during the course of his crime.

Each case turns on its own set of facts,[51] and upon a close inspection of the Louisiana Supreme Court's proportionality review, the cases cited by that court were relied upon because they bore a close factual resemblance to petitioner's case.[52] In fact, the comparisons made by the Louisiana Supreme Court were more relevant than those advanced by petitioner, as the cases that the court referenced incorporated

---

[50] The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment. As we have stated specifically in the context of capital punishment, the Constitution does not 'plac[e] totally unrealistic conditions on its use.'" *McCleskey*, 481 U.S. 319, 107 S.Ct. 1781, *citing Gregg v. Georgia,* 428 U.S., at 199, n. 50, 96 S.Ct. at 2937, n. 50.

[51] *McCleskey*, 481 U.S. 319, 107 S.Ct. 1782 (1987): It is the ultimate duty of courts to determine on a case-by-case basis whether these laws are applied consistently with the Constitution.

[52] *See* n. 48.

both parish and state-wide consideration of the rare instances where a police officer was killed.[53]

Petitioner also complains that the Louisiana Supreme Court did not consider mitigating circumstances in its proportionality review. There is no Eighth Amendment requirement that it do so. That task is reserved for the jury, and their determination was a reasonable one. Petitioner's complaint is also inaccurate. Further, the Louisiana Supreme Court did consider all possible mitigating circumstances when it determined whether petitioner's sentence was excessive.[54] That its consideration was placed under the heading of "capital sentence review" instead of the "proportionality" subheading does not negate the consideration.

There is no Eighth Amendment basis for federal review of a state's proportionality analysis. Moreover, the Louisiana Supreme Court conducted meaningful appellate review of petitioner's sentence, providing superfluous insurance that his sentence was not wantonly and freakishly imposed. Petitioner has no basis for complaint.

---

[53] *State v. Williams*, 22 So.3d at 900, 901.

[54] *State v. Williams*, 22 So.3d at 897-899.

II. THE EIGHTH AMENDMENT DOES NOT REQUIRE STATES TO EMPLOY A SENTENCING SYSTEM WHEREBY JURIES MUST FIND AN AGGRAVATING CIRCUMSTANCE OUTWEIGHS MITIGATION EVIDENCE BEYOND A REASONABLE DOUBT.

In his final allegation, petitioner contends that the Supreme Court cases of *Apprendi v. New Jersey*[55] and *Ring v. Arizona*[56] require that a jury, after considering the mitigation evidence presented at the sentencing phase, must find beyond a reasonable doubt that the death penalty is the appropriate sentence. Petitioner's claim is meritless.

In *Apprendi*, this Court held that the Fourteenth Amendment commands that any fact that increases the statutorily prescribed maximum penalty, other than a prior conviction, must be proven beyond reasonable doubt. Two years later, this Court found in *Ring* that capital defendants, no less than non-capital defendants, were entitled to a jury determination of any fact on which the legislature conditioned an increase in their maximum punishment. The Arizona statute analyzed in *Ring* provided that should a defendant be convicted of first-degree murder, the judge alone determined the existence of an aggravated circumstance. This Court held that because Arizona's enumerated aggravating factors operate as

---

[55] 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

[56] 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

"the functional equivalent of an element of a greater offense," the Sixth Amendment required that they be found by a jury.[57]

In Louisiana, first-degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm upon a peace officer *or* when the offender has a specific intent to kill or to inflict great bodily harm upon more than one person.[58] If the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury.[59] Any death verdict must be unanimous,[60] and "a sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed."[61] Under Louisiana law, the same aggravating circumstance may support both the guilt and death sentence

---

[57] *Ring*, 536 U.S. at 609, *citing Apprendi,* 530 U.S. at 494, n. 19, 120 S.Ct. 2348 (2000).

[58] La. R.S. 14:30 (A)(2), (A)(3).

[59] La. R.S. 14:30 (C)(1).

[60] La. C.Cr.P. art. 905.6.

[61] La. C.Cr.P. art. 905.3. In Louisiana, the fact that the victim was a peace officer engaged in her lawful duties and that petitioner knowingly created a risk of death or great bodily harm to more than one person are both aggravating factors. La. C.Cr.P. art. 905.4 (A)(2), (A)(4).

verdicts.[62] La. C.Cr.P. art. 905.5(h) imposes the requirement that a jury must consider any relevant mitigating circumstance.

Apprendi provides that when the state must prove a fact to increase the statutorily prescribed maximum penalty, that fact is tantamount to an element of the offense and must be established to a jury beyond a reasonable doubt. *Ring* simply noted that the *Apprendi* ruling applies to capital sentencing schemes, and that if at least one aggravating circumstance must be found before a death sentence can be imposed, the finding of that aggravating circumstance operates as the "functional equivalent" of an element of the offense and thus must also be determined by a jury under the reasonable doubt standard. In accordance with these decisions, Louisiana's statutory regime mandates that before a person may be *eligible* for a death sentence, the jury must find the existence of at least one statutorily enumerated aggravating circumstance beyond a reasonable doubt.[63] Louisiana does not require capital juries to weigh or balance mitigating against aggravating circumstances according to any particular standard.[64]

---

[62] *Compare* La. R.S. 14:30 and La. C.Cr.P. art. 905.4. *See also Lowenfeld v. Phelps,* 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988): A death sentence does not violate the Eighth Amendment simply because the statutory "aggravating circumstance" found by the jury duplicates an element of the underlying offense of first-degree murder.

[63] La. C.Cr.P. art. 905.3.

[64] *State v. Koon,* 96-1208, 704 So.2d 756, La. 5/20/97.

Neither *Apprendi* nor *Ring* imposes such an obligation.

Under Louisiana law, jurors must unanimously find at least one aggravating circumstance beyond a reasonable doubt before a defendant may be eligible for the death penalty. This obligation was satisfied in petitioner's case once the jury found two aggravating circumstances necessary to support his capital sentence. It is this initial finding beyond a reasonable doubt, and not the weighing of aggravating and mitigating circumstances, that authorized jurors to consider imposing a sentence of death.

Petitioner would like to see *Ring* extend from the Sixth Amendment to the Eighth Amendment. *Ring's* reach, however, is not that long. In *Marsh v. Kansas*,[65] this Court confronted the question of whether a state statute that *required* the imposition of the death penalty when the sentencing jury determined that aggravating evidence and mitigating evidence were in equipoise violated the Constitution. In *Marsh*, a petitioner contested that a state capital-sentencing statute violated the Eighth Amendment. The statute provided that a sentence of death was mandatory once the state had proven an aggravating circumstance beyond a reasonable doubt unless the petitioner could prove the mitigation evidence outweighed the aggravating circumstance.[66] The petitioner in *Marsh*

---

[65] 548 U.S. 163, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006).

[66] *Marsh*, 548 U.S. at 165; Kan. Stat. Ann. § 21-4624(e) (1995).

argued that the statute created an unfair presumption in favor of the death penalty. Rejecting this contention, this court noted:

> In aggregate, our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here. **"[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required."** *Franklin*, supra, at 179, 108 S.Ct. 2320 (*citing Zant*, supra, at 875-876, n. 13, 103 S.Ct. 2733). Rather, this Court has held that the States enjoy "'a constitutionally permissible range of discretion in imposing the death penalty.'" *Blystone*, 494 U.S., at 308, 110 S.Ct. 1078 (*quoting McCleskey v. Kemp*, 481 U.S. 279, 305-306, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). *See also* 494 U.S., at 307, 110 S.Ct. 1078 (stating that "[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence"); *Graham, supra*, at 490, 113 S.Ct. 892 (THOMAS, J., concurring) (stating that "[o]ur early mitigating cases may thus be read as doing little more than safeguarding the adversary process in sentencing proceedings by conferring on the defendant an

affirmative right to place his relevant evidence before the sentencer").[67]

Marsh determined that a state statute imposing a burden upon the defendant to negate a proven aggravating circumstance would not violate the Eighth Amendment. For obvious reasons, a state statute that provides a defendant greater protections by obviating this burden likewise cannot violate the Eighth Amendment.

Finally, it must be noted that petitioner's argument is not novel. This Court recently rejected an identical contention from a Louisiana capital petitioner in the case of *Anderson v. Louisiana*.[68] Petitioner's claim is a replication of the claim presented in *Anderson* and is similarly meritless.

The substantive element of petitioner's death sentence was the jury's finding of two aggravating circumstances beyond a reasonable doubt. Once these findings were made, the "element" necessary to impose petitioner's capital sentence was satisfied, authorizing the jury to consider imposing the death penalty. Louisiana's provision that a jury return the factual finding of an aggravating circumstance beyond a reasonable doubt fulfills *Ring*'s requirement. Petitioner's claim that Louisiana's capital sentencing

---

[67] *Marsh,* 348 U.S. at 175; 126 S.Ct. at 2525. Original emphasis.

[68] 129 S.Ct. 1906, 173 L.Ed.2d 1057, *cert. denied* 4/6/09.

scheme runs afoul of the Constitution is without merit.

CONCLUSION

WHEREFORE, the State of Louisiana prays that petitioner's application for writ of certiorari be denied.

Respectfully submitted,

HILLAR C. MOORE, III
District Attorney

DYLAN C. ALGE*
Assistant District Attorney

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
222 St. Louis Street, Fifth Floor
Baton Rouge, Louisiana 70802
Telephone: (225) 389-3453
E-Mail: dalge@ebrda.org
Counsel for Respondent
the State of Louisiana
**Counsel of Record*