No. 18-5246

In the Supreme Court of the United States

October Term, 2017

WARREN DARRELL RIVERS,

Petitioner,

versus

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

PETIONIONER'S REPLY TO STATE'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WARREN DARRELL RIVERS

Execution No. 00000928
Polunsky Unit Death Row
3872 FM 350
Livingston, Texas 77351

PETITIONER, *PRO SE*

CAPITAL CASE

QUESTIONS PRESENTED (Restated)

I. WHETHER PROSECUTION EVIDENCE THAT A CAPITAL DEFENDANT HAS BEEN SENTENCED TO DEATH ONCE BEFORE IN THE SAME CASE IMPERMISSIBLY UNDERMINES THE SENTENCING JURY'S SENSE OF RESPONSIBILITY FOR DETERMINING THE APPROPRIATENESS OF THE DEFENDANT'S DEATH, AND DEPRIVES THE DEFENDANT OF A REASONED, INDIVIDUALIZED SENTENCING DETERMINATION BASED ON HIS RECORD, PERSONAL CHARACTERISTICS, AND THE CIRCUMSTANCES OF THE CRIME IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS?

II. WHETHER DENYING A CAPITAL DEFENDANT THE OPTION OF ENLARGING HIS SENTENCE AND WAIVING HIS BACK-TIME CREDIT IN ORDER TO PROVIDE THE JURY WITH A CURRENTLY VALID SENTENCING OPTION OF LIFE WITHOUT PAROLE VIOLATES THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT AND DENIES DUE PROCESS OF LAW UNDER THE EIGHTH AND FOURTEENTH AMENDMENT.

LIST OF PARTIES

All parties to this proceeding appear in the caption of the case on the cover page.

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TO THE HONORABLE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

Pursuant to Rules 15(5) and (6) of the Rules of the Supreme Court of the United States, Petitioner Warren Darrell Rivers respectfully submits his Reply to Respondent, the State of Texas, opposition to the Petition for Writ of Certiorari for this Honorable Court's consideration.

ARGUMENT

The Respondent Misrepresents the "Big Picture" Presented to the Jury Concerning Petitioner's Previous Death Sentence

The Respondent picks-and-chooses the facts it presents to this Court concerning the evidence actually before the jury when it was informed of Petitioner's previous death sentence in this matter, and the 27 years he spent on death row. Respondent attempts to minimize the testimony presented to the jury, and wholly omits other evidence before the jury that, *when considered as a whole*, clearly informed the second sentencing jury that Petitioner had been previously found guilty and sentenced to death in the same matter. The Respondent's asks this Court to deny *certiorari* review through its erroneous depiction of the facts, which, in essence, presents a picture puzzle with many pieces of the puzzle missing.

At the outset of the proceedings, during the jury selection process, the venire panel was repeatedly informed that their role as a juror on this case would be only to access punishment since Petitioner had previously been found guilty of capital murder. (RR VII 27; RR IX 89, 90, 150; RR X 176, 177, 186, 203; RR XI 47; RR XII 9, 20; RR XIII 10, 14; RR XV 11; RR XVI 9, 14, 15; RR XVII 9, 14, 34; RR XVIII 20, 21, 23; RR XIX 22, 27; RR XX 133; RR XXI 34, 44). Later, at the close of the proceedings, in the Court's Charge, the jury was once again informed that Petitioner had "previously been found guilty of capital murder" occurring more than 27 years prior to the sentencing proceeding for which it was empaneled. Courts Charge to the Jury, *State v. Rivers*, No. 474122 (228th Dist. Ct., Harris Co., Tex., Nov. 14, 2014)). Thus,

the theme at the opening and closing of the new sentencing proceeding was that Petitioner had been convicted, presumably by another jury, of a capital murder occurring more than 27 years prior to the instant proceeding, and their sole duty was to determine the special punishment issues.

During the course of the sentencing proceeding, however, evidence was presented that Petitioner had been sentenced to death once before in this matter, and had resided on Texas' death row for the past 27 years.

For example, and as outlined in his petition, the jury was able to observe State's Exhibits 13 and 17, a scene diagram and a map, that when not in use, were turned over in plain view of the jury, and written on the back of these two exhibits in red ink were the words "capital murder" and "death". (RR XXIII 9, 10).

The jury was further presented with testimony from prison officials that, if sentenced to death, Petitioner would be "returned" to the Polunsky Unit where death sentenced convicts are housed, placed in a single cell, and housed away from general population convicts. (RR XXV 140, 141). A prison classification expert further testified that those in administrative segregation and death row would be housed separately. (RR XXVI 21). This testimony was further highlighted by the testimony of eight prison guards and employees that Petitioner was, without additional explanation, housed in a single cell in 1989, 1990, 1992, 2004, 2006, 2007 and 2009, (RR XXV 175, 186, 194, 198, 211, 218 and RR XXVI 92), all dates between the time Petitioner was "previously" found guilty of capital murder and the new sentencing proceeding, and coinciding with his 27 years on death row.

Since the only viable sentencing options available to the jury were a life or death sentence, it was a fairly simple deduction for the jury given the evidence presented to it that Petitioner was housed on death row because a previous jury had accessed his sentence at death, and that he was not housed in administrative segregation.

The fallacy of the Respondent's argument is that under our jury trial system, jurors are required to make factual determinations from the evidence presented to them. Thus, "jurors are allowed to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them." *Galloway v. United States*, 319 U.S. 372, 396 (1943). In fact, they are permitted to draw "multiple reasonable inferences from the evidence", whether the evidence is direct or circumstantial. *Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007). And that is what occurred here.

The Respondent makes much of the trial court's caution in attempting to keep the knowledge of Petitioner's previous death sentence from the jury. Nevertheless, the information was presented to the jury. As this Court and the lower courts recognize:

> "[O]ne cannot 'unring a bell'; 'after the thrust of the saber, it is difficult to say forget the wound'; and finally 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it.'."

Walker v. State, 610 S.W.2d 481, 484 n. 6 (Tex. Crim. App. 1980) (quoting *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962) (Gewin, J.)).

The evidence of Petitioner's previous death sentence in this matter could not be "unrung" with the jury that sentenced him to death a second time. Nor was there any attempt to do so. This is where the Respondent's argument fails. The issue takes on added significance when, in the absence of a life without parole alternative, a death sentence by default was a certainty.

Evolving Standards of Decency Require a Jury be Given the Option of Assessing Life Without Parole Even When the Option wasn't Previously Available.

Since the date of Petitioner's offense and conviction, 17 states adopted life without parole as a sentencing option in death penalty cases.[1] Texas, the lone hold-out, joined this consensus in 2005, but life without parole was not an option available to the jury in Petitioner's case because the offense occurred before the effective date of the statute, although it is now available for those committing capital offenses.

From 1973 to 2013, 8,466 sentences of death were handed down by federal and state courts, and 1,359 individuals were executed — only 16 percent. Even excluding those who remained on death row as of 2013, only about 24 percent of condemned inmates have been executed. *Those sentenced to death are almost three times as likely to see their death sentence overturned on appeal and to be resentenced to a lesser penalty than they are to be executed.* For example:

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[1] Arizona (1997), Colorado (2002), Delaware (2003), Florida (1994), Georgia (1993), Idaho (2004), Indiana (1994), Kansas (2004), Kentucky (1998), Louisiana (1994), Montana (1995), North Carolina (1994), Ohio (1995), South Carolina (1995), Tennessee (1995), Virginia (1994) and Washington (1993). https://deathpenaltyinfo.org/life-without-parole.

- 8,466 death sentences were imposed across the United States from 1973 through 2013.
- 3,194 were overturned on appeal, composed as follows. For 523, the underlying statute was declared unconstitutional. For 890, the conviction was overturned. *For 1,781, the death penalty was overturned, but guilt was sustained.*
- 2,979 remain on death row as of December 31, 2013.
- 1,359 were executed.
- 509 died on death row from suicide or natural causes.
- 392 had their sentence commuted by the governor to life in prison.
- 33 had some other outcome or a miscellaneous reason for being removed from death row.

U.S. DOJ, *Capital Punishment, 2013 – Statistical Tables* (rev. Dec. 19, 2014).

An actual execution is, in fact, the third most likely outcome following a death sentence. Much more likely is the inmate to have their sentence reversed, or to remain for decades on death row. By far the most likely outcome of a death sentence is that it will eventually be reversed and the inmate will remain in prison with a different form of death sentence: life without the possibility of parole. However, Petitioner has been denied this option.

The issue as to whether the Eighth Amendment permits the execution of a capital defendant when a jury is not given the option of a sentence of life without parole when the option was readily available at the time of the resentencing proceeding is a pressing question. This is especially so when the national consensus is that a jury should have the option of assessing life without parole as an alternative to a sentence of death. The issue take on added national significance given the data demonstrating that death sentenced convicts are likely to have their sentences

overturned after having served decades on death, and where society's standards of decency have evolved during the interim period to the point that imposition of a death sentence without providing the jury with the option of life without parole is no longer acceptable.

The crux of Respondent's opposition focuses on the premise that because (1) the punishment for crime is best left to the state legislatures, (2) the Texas Court of Criminal Appeals has repeatedly rejected claims that the applicable sentencing scheme is unconstitutional for failing to provide the jury with the sentencing option of life without parole, and (3) because this Court has declined to grant petitions for *certiorari* in similar cases, that Petitioner and all similarly situated death sentenced convicts sentences pass constitutional muster and this Court should deny *certiorari* review in this case as well.

The fallacy of Respondent's argument is that to determine whether a particular punishment is "cruel and unusual," the courts must consider "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958); *see also Roper v. Simmons*, 543 U.S. 551, 561 (2005).[2] The Eighth Amendment "acquire[s] meaning as public opinion becomes enlightened by a humane justice." *Hall v. Florida*, ___ U.S. ___,134 S.Ct. 1986, 1992 (2014). In

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[2] In his concurring opinion in *Roper*, Justice Stevens observed that the most important aspect of the Court's holding was its reaffirmation that its interpretation of the Eighth Amendment is based on the evolving standards of decency, that the Amendment's meaning was not frozen when it was originally drafted, that "the pace of that evolution is a matter for continuing debate," and that the Court's understanding of the Constitution "does change from time to time." *Roper*, 543 U.S. at 587 (Stevens, J., concurring).

short, standards of decency necessarily evolve, and what may have been constitutionally acceptable to the courts and society historically may not remain acceptable even a few years later.

For example, in *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held the execution of mentally retarded offenders is an excessive sanction, violating the Eighth Amendment ban on "cruel and unusual punishments." The Court reasoned that mental retardation diminishes personal culpability and renders the death penalty in the case of this category of offenders difficult to justify on deterrence and retribution grounds. *Atkins*, 536 U.S. at 320. The *Atkins* ruling overturned *Penry v. Lynaugh*, 492 U.S. 302 (1989) by finding that "standards of decency" had evolved in the intervening years to the point at which a "national consensus" had emerged against such executions – primarily reflected in state-level legislation banning the execution of the mentally retarded.[3] *Atkins*, 536 U.S. at 315-16.

In like manner, this Court's decision in *Roper v. Simmons* brought the United States into compliance with "the overwhelming weight of international opinion against the juvenile death penalty." 543 U.S. at 578. The Court "affirmed the necessity of referring to the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual." *Roper*, 543 U.S. at 560.

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[3] The Court also acknowledged that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." *Id.* at n. 21.

Evolving standards of decency dictate that life without parole sentencing option is constitutionally required. If a jury is forced to choose between the extremes of allowing a guilty defendant to be released or executed, it will be tempted to choose execution, even where it might otherwise consider such a penalty too harsh, simply to avoid the more unpalatable alternative. Because of this "forced choice," the jury settles for a death sentence as the less inappropriate of the limited alternatives, a scenario which has been termed "death by default." *See* William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605, 611 n.22, 627 (1999). The imposition of the death penalty simply because the state fails to provide the less severe punishment that jurors prefer is manifestly "excessive" punishment.

Thus, a death sentence that would have been permissible under the Constitution only a few years ago may now offend that very parchment. In this case, a death sentence that was lawful in 1987 is now contrary to the evolving standards of decency and the national consensus of a maturing society and violates the Eighth Amendment prohibition against cruel and unusual punishment.

CONCLUSION

The Court should grant *certiorari* and schedule this case for briefing and oral argument. Afterwards, this Court should grant Mr. Rivers' petition for writ of *certiorari*, vacate the judgment below, and remand the case to the TCCA for further proceedings.

Respectfully submitted,

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PETITIONER, *PRO SE*