

No. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW NICHOLSON,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition of Certiorari to The Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

No execution date is presently scheduled

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Capital Case

QUESTION PRESENTED

Is Ohio's death penalty being arbitrarily applied in violation of *Gregg v. Georgia*, when geography dictates whether a defendant will be subject to the death penalty?

PARTIES TO THE PROCEEDING

Petitioner, Matthew Nicholson, an Ohio death row inmate, was the appellant in the Ohio Supreme Court. Respondent, the State of Ohio, was the appellee in the Ohio Supreme Court.

STATEMENT OF RELATED PROCEEDINGS

All proceedings directly related to this petition include:

- *State v. Matthew Nicholson*, Slip Opinion No. 2024-Ohio-604, Ohio Supreme Court. Judgment entered February 22, 2024.
- *State v. Matthew Nicholson*, No. CR-18-634069-A, Cuyahoga County Common Pleas Court. Judgment entered November 19, 2019.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Matthew Nicholson respectfully petitions for a writ of certiorari to review the judgment of the Ohio Supreme Court in this case.

OPINIONS BELOW

The opinion of the Ohio Supreme Court affirming Nicholson's convictions and death sentence on direct review is published as *State of Ohio v. Matthew Nicholson*, 2024-Ohio-604, and is reproduced as Appendix A, at A-1. The Ohio Supreme Court's Reconsideration Entry, filed April 30, 2024, denying motion for reconsideration is reproduced as Appendix B, at A-152. The Cuyahoga County Court of Common Pleas Journal Entry, *State of Ohio v. Matthew Nicholson*, Case No. CR-18-634069-A, Sentencing Opinion, filed November 19, 2019, is reproduced as Appendix C, at A-153.

JURISDICTION

In this petition, Matthew Nicholson seeks review of the decision in which the Ohio Supreme Court affirmed his convictions and death sentence on February 22, 2024. Nicholson thereafter sought reconsideration, which was denied by the Supreme Court on April 30, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). Nicholson's petition is timely filed by July 29, 2024.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law; not deny to any person within its jurisdiction the equal protection of the laws.

Ohio Rev. Code Ann. § 2929.05(A) provides, in relevant part:

[T]he supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. . . . the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.

STATEMENT OF THE CASE

In September 2018, Matthew Nicholson was living with his girlfriend, America Polanco, and two of her children, M.L. and Giselle Lopez, in Cuyahoga County, Ohio. A-2. On the evening of September 5, 2018, Nicholson discovered a text message from Polanco's ex-boyfriend. *Id.* When he confronted her about it, an altercation ensued. *Id.* Upon hearing the commotion, M.L. attempted to intervene, which turned into a physical altercation between M.L. and Nicholson. *Id.* At one point, M.L. called 911. *Id.* During the fight, Giselle was returning home, and M.L. called her to tell her not to come into the house. *Id.* As M.L. exited the house through the side door, Nicholson pushed past Polanco and fired shots at M.L. and Giselle. *Id.* Both were struck multiple times. A-6. M.L. died on the scene, and Giselle was taken to the hospital where she succumbed to her injuries. A-3. After barricading himself in the residence for several hours, Nicholson surrendered to police without incident. *Id.*

Nicholson was indicted on two counts of aggravated murder and each count included one capital specification. A-12. Nicholson's capital specification was charged under Ohio Rev. Ann. § 2929.04(5), which provides that "the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons[.]"

During the penalty phase, Nicholson presented significant mitigating evidence of his chaotic upbringing and mental health issues. Nicholson grew up in an abusive household and endured a "childhood [that] was filled with violence and stress." A-111. There was significant domestic violence between Nicholson's parents, Robert Sr., and Angel. A-112. Nicholson witnessed his father choke his mother almost to the point of unconsciousness when Nicholson was only four years old. *Id.* Both Nicholson's parents struggled with alcoholism and heavy drinking. A-113. Nicholson's brother testified that their parents were in strong denial about the impact their conduct had on Nicholson, and they were "taught not to ever say anything about what was going on in that house. You were told to keep quiet, and if you didn't, other things happened." A-113-14.

Nicholson's maternal aunt, Donna, confirmed the physical violence, Robert Sr.'s heavy drinking, and reported that Angel would not let Donna take her to the hospital for her injuries. A-114. Donna testified that the family hid the abuse and hid inside their house, alienating themselves from family and friends. A-114-15.

Angel did not disclose her entire family background to Dr. Fabian, the psychologist who evaluated Nicholson, because she was "not proud of it," and "it [was]

painful.” A-115. She did testify, however, and admitted that Robert Sr. was physically abusive to her. *Id.* She also admitted that Robert Sr. verbally abused Nicholson when he was a child, berating him for his challenges in school and calling him “halfwits and things like that.” A-116. Angel testified that Nicholson struggled in elementary school, and his teacher suggested he be tested for ADHD, which Robert Sr. was against, so Angel did not seek treatment for Nicholson. *Id.*

Dr. Fabian evaluated Nicholson and found he was cooperative, but protective of his family and lacked insight into the dysfunction. A-116. Dr. Fabian determined that Nicholson struggled with attachment, which “paved the way” for Nicholson’s “problems in relationships down the road.” A-117. Dr. Fabian outlined the multigenerational family dysfunction which affected both Robert Sr. and Angel. A-118. Both suffered from developmental trauma in their upbringings, which impacted their ability to not fall victim to the same vicious cycles of abuse. A-118-19.

Dr. Fabian administered a battery of psychological and neuropsychological tests in his evaluation of Nicholson. A-119. Dr. Fabian opined that Nicholson had a mild neurocognitive disorder due to TBI, ADHD, PTSD related to childhood trauma and the offenses for which he was charged, major depressive disorder, and borderline personality disorder with paranoid traits. A-119-20. There was disagreement among the experts for the defense and state whether Nicholson showed frontal-lobe deficits on his MRI. A-121-27.

In the Ohio Supreme Court’s statutory independent sentence evaluation, both the majority and the dissent found Nicholson’s mitigation significant. The majority,

which consisted of four Justices, determined that “the strength of the aggravating circumstances cannot be overstated. Nicholson murdered two unarmed teenagers in front of their mother and mounted a defense that the physical evidence flatly contradicts.” A-130. Accordingly, they affirmed his death sentence.

But three Justices would have overturned Nicholson’s death sentence. A-135-151. Those Justices were deeply concerned with the geographic disparity of death sentences sought by Cuyahoga County compared to the rest of the state during the time which Nicholson was indicted and sentenced to death. A-135-37. Specifically, “this court should not uphold death sentences in close-call cases in which the only apparent deciding factor was something as arbitrary as where the offenses occurred.” A-137.

REASONS FOR GRANTING THE WRIT

When geography is the most salient predictor of whether someone will be sentenced to death, the death penalty is rendered arbitrary in violation of Eighth Amendment.

In *Furman v. Georgia*, this Court temporarily ended the death penalty in the United States because it was being arbitrarily imposed. 408 U.S. 238, 293-94 (1972). As states enacted procedures to reinstate the death penalty, this Court, again, required that the death penalty not be arbitrarily or freakishly imposed. *Gregg v. Georgia*, 428 U.S. 153 (1976). In the intervening decades, there have been numerous decisions tempering the use of the death penalty to prevent the arbitrary imposition of death sentences.

States are required to take steps to prevent the arbitrary, capricious, and disproportionate imposition of the death penalty, but geographical disparities plague death penalty jurisprudence¹ in violation of *Gregg*. Though some geographic differences are permissible, as evidenced by only some states allowing the death penalty, the significant disparities between counties in Ohio demonstrate that Ohio's death penalty is being arbitrarily applied.

Cuyahoga County is one of the most likely counties in the country to impose death. In 2019, the death penalty was imposed seven times across all of Ohio's 88 counties.² Four of those sentences—57%—were imposed in Cuyahoga County. *Id.* At that time, Cuyahoga County had more death sentences “than any other county in the

¹ See The Death Penalty in 2019: Year End Report, <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report#execution-and-sentencing-trends>; The Death Penalty in 2020: Year End Report, <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2020-year-end-report>; The Death Penalty in 2021: Year End Report, <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2021-year-end-report#death-penalty-developments-in-the-states-and-counties>; The Death Penalty in 2022: Year End Report, <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2022-year-end-report>.

² Ohio Attorney General, Annual Report, 2019 Capital Crimes, State and Federal Cases, at 27 (2019), available at <https://www.ohioattorneygeneral.gov/Files/Reports/Capital-Crimes-Annual-Reports/2019-Capital-Crimes-Annual-Report> [<https://perma.cc/5DC5-X3T6>].

country.”³ Those four new death sentences were equivalent to the prior eight years *combined* in Cuyahoga County. And yet, there was no corresponding spike in homicide cases to explain this disparity.

Ohio’s death penalty statute creates a situation where most aggravated murders are eligible for the death penalty because the list of aggravating factors broadly encompasses almost all offenses included in the aggravated murder statute. *State v. Graham*, 172 N.E.3d 841, 890 (2020) (Donnelly, J., concurring). This affords broad discretion to prosecutors throughout the state of Ohio in determining whether to seek a death sentence. Under the same or similar facts, prosecutors in one county may elect to seek death, where prosecutors in another county may not. At first blush, this may appear constitutional, perhaps even beneficial. But the result of this scheme is the arbitrary imposition of death in Ohio.

In 2018, when Nicholson was indicted, 90% of Ohio’s counties had no death indictments. Cuyahoga had three death indictments. In 2019, 76% of Ohio’s counties had no death indictments. Cuyahoga had eight. Those eight indictments accounted for half of the total indictments for the entire state. Last year, 94% of Ohio’s counties had no death indictments. Cuyahoga had two. Cuyahoga continues to indict new death sentences even though no Ohio jury has sentenced an individual to death since Nicholson in 2019.

³The Death Penalty in 2019: Year End Report, <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report> [https://perma.cc/T388-J7BX]

“The fundamental respect for humanity” underlying the Eighth Amendment’s prohibition against cruel and unusual punishment gives rise to a heightened need for reliability when determining whether death is the appropriate punishment. *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988). Capital cases require heightened protections against arbitrariness and demand reliability beyond the typical criminal case. This includes a requirement that defendants receive individualized consideration to determine whether the death penalty should be imposed. And the death penalty is supposed to be reserved for the “worst of the worst.” *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting). Instead, however, the severity of the crime and the culpability of the defendant frequently take a backseat to *where* the trial occurred when determining the sentencing result.

A. Significant sentencing disparities exist among counties throughout the country.

Geographic arbitrariness is a problem that plagues the imposition of the death penalty throughout the 27 states that still make use of the death penalty. In 2019, 11 states imposed death sentences. *See* DPIC, The Death Penalty in 2019: Year End Report. Of those eleven, only eight states imposed more than one death sentence. *Id.* Ohio and Florida imposed the most, with 7 each.⁴ Cuyahoga County alone imposed

⁴ The DPIC 2019 report states that Ohio only had six death sentences and only three were from Cuyahoga County. This is likely an oversight due to the fact that George Brinkman was separately sentenced to death in both Stark and Cuyahoga counties. Thus, while six individuals were sentenced to death, death sentences were handed down in seven distinct cases, and four of those cases are out of Cuyahoga County. These details can be found in the Ohio Attorney General’s Annual Report. Ohio

the same number of death sentences as the entire state of Texas. Every other state in the country, as well as the federal government, issued less death sentences than Cuyahoga County in 2019. *Id.*

While Cuyahoga County was an extreme outlier in 2019, it is not the only time or place that a county was an extreme outlier in terms of death sentences. In the period from 2016-2020, five counties had more death sentences than any others. Riverside, CA had 11; Los Angeles, CA and Maricopa, Arizona had seven each; and Clark, Nevada and Cuyahoga, Ohio each had six. *See* DPIC, The Death Penalty in 2020: Year End Report.

Since 1972, half of all death sentences imposed in the United States were imposed by just 75 counties (2.4% of the total counties in the United States). *See* DPIC, The Death Penalty in 2022: Year End Report. As of 2022, 34 counties (1.1% of all U.S. counties) accounted for half of the population of death row for the entire country. *Id.* During the years 2018-2022, the six counties responsible for the most death sentences were Riverside, CA (5); Cuyahoga, OH (5); Los Angeles, CA (4); Maricopa, AZ (4); Tulare, CA (4), and Oklahoma, OK (3). *Id.*

To suggest that Riverside, Cuyahoga, Los Angeles, and Maricopa counties are consistently experiencing the worst of the worst murders in the entire country, thus justifying their continued presence at the top of this list, strains credulity. The same

Attorney General, Annual Report, 2019 Capital Crimes, State and Federal Cases, at 27 (2019), available at <https://www.ohioattorneygeneral.gov/Files/Reports/Capital-Crimes-Annual-Reports/2019-Capital-Crimes-Annual-Report>.

few counties being regularly responsible for such high numbers of death sentences demonstrates that death sentences are being arbitrarily and freakishly handed down.

B. The legal status of counties does not justify such broad differences in how defendants are treated based on their location within a given state, making the imposition of the death penalty arbitrary when its use varies so wildly.

These vast differences in imposition of the death penalty at the county level within a given state cannot be tolerated in a system intent on non-arbitrary death sentences. The geographic disparity in death sentences on the county level leads to an absurd result where, had a murder occurred on a different street, and thus a different county, the defendant will be subjected to an entirely different legal process. Due to the level of discretion that county prosecutors have in charging decisions, those few feet could mean the difference between being tried for a death eligible offense or not. It is an absurd result to see from county to county within one state.

Because each state is a separate legal sovereign, states are empowered to create their own death penalty schemes, and this Court has a long history of entrusting states to enact *constitutional* death penalty laws. *See e.g., Atkins v. Virginia*, 536 U.S. 304, 317 (2002); *Ford v. Wainright*, 477 U.S. 399, 405 (1986). Counties, however, must enforce the law of the state in which they reside. Civil case law demonstrates how counties are legally distinct from states and lack the power of state government.

For example, counties are not entitled to proportional representation in state legislative bodies as states are in the United States senate. *See Baker v. Carr*, 369 U.S. 186 (1962). Likewise, counties and county officials are treated differently from

the state and state officials in issues of immunity from suit. *See Monell v. Department of Social Services of City of New York et al.*, 436 U.S. 658 (1978) (unlike state governments, local government entities do not have absolute immunity; they are “people” for purposes of § 1983 litigation); *Owen v. City of Independence*, 445 U.S. 622 (1980) (municipalities are not entitled to qualified immunity); *McMillian v. Monroe County*, 520 U.S. 781 (1997) (even if an official is acting at the county level, municipalities cannot be found liable for purposes of § 1983 litigation if the official is classified as a state official under state law). Counties are also recognized differently in law when acting on state policy as opposed to local policy. *Los Angeles County v. Humphries*, 562 U.S. 29 (2010) (no municipal liability for enforcing a state policy).

All of these decisions establish that counties are legally inferior, and in fact subordinate, to the states in which they are located. When enforcing state law, all counties and county officials are enforcing the same law. There should not be wide disparity in the treatment of individuals charged with death eligible offenses within the same state.

If imposition of the death penalty was not geographically arbitrary, it would not be used in only a few counties within one state at an alarming frequency, while rarely, if ever, imposed in other counties within that same state.

C. Nicholson’s case provides this Court with the opportunity to address and prevent arbitrariness plaguing death penalty jurisprudence in Ohio.

Nicholson’s death sentence was not a result of him being “the worst of the worst,” nor having committed a particularly heinous crime. Rather, Nicholson’s death

sentence was determined by the county in which his crime was committed. When Nicholson was sentenced to die in Cuyahoga County, Ohio in 2019, only four of Ohio's 88 counties issued death sentences that year. And while the other three counties issued one death sentence each, Cuyahoga County issued four. This is an enormous disparity in treatment from county to county within Ohio.

Three of Ohio's Supreme Court Justices expressed their concern with the death penalty being imposed in Nicholson's case and did not feel it was an appropriate sentence. *See A-135-51.* In their partial dissents, they recognized the geographic disparity permeating his case, their inability to appropriately compare Nicholson's case to similarly situated offenders who were convicted of aggravated murder, and that the sole aggravating circumstance did not outweigh the substantial mitigation presented by Nicholson. *Id.*

In Ohio, geography is dictating whether an individual is indicted with death penalty specifications. Nicholson's case exemplifies this geographic disparity. It did not matter how severe his crime was compared to other aggravated murders committed throughout Ohio, but rather that it was committed in Cuyahoga County. Had his same conduct occurred in a different county, or in perhaps only a different year, he would not have been subjected to the death penalty.

CONCLUSION

For the foregoing reasons, Petitioner Matthew Nicholson respectfully asks this Court to grant his petition for writ of certiorari.

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