

No. 24-5192 (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW NICHOLSON,

Petitioner,

v.

STATE OF OHIO,

Respondent.

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On Petition of Certiorari to The Supreme Court of Ohio

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**REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

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No execution date is presently scheduled

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## REPLY IN SUPPORT

### **I. Nicholson did not forfeit his argument that Ohio's death penalty scheme is arbitrary in violation of *Gregg v. Georgia* and therefore unconstitutional.**

Nicholson has not forfeited his argument that the death penalty is being arbitrarily applied in Ohio in violation of *Gregg v. Georgia*, 428 U.S. 153 (1976). In proposition of law 19 in Nicholson's direct review to the Supreme Court of Ohio, Nicholson raised that Ohio's death penalty is unconstitutional because it violated *Gregg* and is being imposed in an arbitrary manner.

Nicholson specifically argued that prosecutors' virtually uncontrolled indictment discretion allows arbitrary and discriminatory imposition of the death penalty. Notably, mandatory death penalty statutes were deemed fatally flawed because they lacked standards for imposition of a death sentence and were therefore removed from judicial review. *Woodson v. North Carolina*, 428 U.S. 280 (1976). And prosecutors' uncontrolled discretion violates that requirement.

Nicholson's case exemplifies how Ohio's death penalty scheme is unconstitutional. Geography—and accordingly—unfettered prosecutorial discretion is dictating whether an individual is indicted with death penalty specifications, rather than the severity of the offense. Ohio is not reserving the harshest penalty for the “worst of the worst.” *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting). Rather, most aggravated murders are eligible for the death penalty in Ohio because Ohio's aggravating factors broadly encompass almost all offenses included in the aggravated murder statute. *Compare* Ohio Rev. Code Ann. § 2903.01

*with* Ohio Rev. Code Ann. § 2929.04(A); *see also* *State v. Graham*, 172 N.E.3d 841, 890 (2020) (Donnelly, J., concurring). Whether a defendant is charged with aggravated murder with or without death penalty specifications is therefore left to the county prosecutor. As such, geographic disparity has created an unconstitutional death penalty scheme in Ohio.

Because Ohio's death penalty is being applied arbitrarily in violation of *Gregg*, this Court should accept Nicholson's case to correct the state's unconstitutional death penalty scheme.

### CONCLUSION

For the foregoing reasons and the reasons put forth in his petition, this Court should grant Nicholson's petition for writ of certiorari.

Respectfully submitted,

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