

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT EARL BUTTS, JR.,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition for Writ of Certiorari
to the Georgia Supreme Court

**REPLY TO GEORGIA'S OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI AND
MOTION FOR STAY OF EXECUTION**

PHILIP E. HOLLADAY, JR.
J. ANDREW PRATT
KING & SPALDING, LLP
1180 Peachtree St., NE
Atlanta, GA 30309
Phone: (404) 572-3340
Fax: (404) 572-5100
pholladay@kslaw.com
apratt@kslaw.com

PATRICK MULVANEY*
Counsel of Record
KATE MORRIS
SOUTHERN CENTER
FOR HUMAN RIGHTS
83 Poplar Street, N.W.
Atlanta, GA 30303
Phone: (404) 688-1202
Fax: (404) 688-9440
pmulvaney@schr.org
kmorris@schr.org

Counsel for Petitioner Robert Earl Butts, Jr.

May 4, 2018

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CERTIORARI AND MOTION FOR STAY OF EXECUTION**

The Georgia courts’ denial of Petitioner Butts’s proportionality motion warrants this Court’s review. Butts would not be sentenced to death today under current sentencing standards, and the state courts failed to recognize the Eighth Amendment implications of that reality.

**I. CAPITAL SENTENCING STANDARDS HAVE EVOLVED
SUBSTANTIALY SINCE BUTTS WAS SENTENCED TO DEATH.**

Sentencing standards have unquestionably evolved since Butts was sentenced to death in 1998. The State suggests that there have been no legislative changes relevant to the proportionality of Butts’s sentence, and as a result, there has been no shift in standards. State’s Br. at 16. But this Court has frequently looked to sentencing data when evaluating proportionality issues. *See, e.g., Graham v. Florida*, 560 U.S. 48, 62 (2010) (holding that “actual sentencing practices” in jurisdictions that permitted life without parole for juvenile nonhomicide offenders disclosed a consensus against that sentence where its actual imposition was rare when “viewed in proportion to the opportunities for its imposition”); *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976) (plurality opinion) (finding mandatory death penalty statute unconstitutional in part because sentencing data pointed “conclusively to the repudiation of automatic death sentences”). Although legislation can constitute objective evidence of evolving standards of decency, there is no precedent for the State’s proposition that it is the only such evidence.

In his proportionality motion, Butts outlined objective evidence indicating that the death penalty would not be imposed in his case today. That evidence indicated, *inter alia*, that since 2006, death sentences in Georgia have been reserved for cases with multiple decedents and multiple aggravating circumstances. At the low end of that spectrum, cases involving one decedent and one statutory aggravating circumstance are no longer punished with the death penalty in Georgia. The state courts refused to recognize the constitutional implications of this evolution in standards of decency. This Court should grant certiorari and make clear that the execution of a person who would not be sentenced to death today would violate the Eighth Amendment.

II. THE STATE LAW GROUNDS SUPPORTING THE LOWER COURT'S RULING DEPEND ENTIRELY ON THE PROPER RESOLUTION OF THE FEDERAL QUESTION PRESENTED HERE.

There are no adequate and independent state grounds that impede this Court's review. The state law grounds noted by the State depend entirely on the federal question presented in Butts's petition. *See Foster v. Chatman*, 136 S. Ct. 1737, 1746 (2016) (exercising jurisdiction over an issue purportedly decided on state grounds by the Georgia courts because the state grounds hinged on a federal constitutional ruling).

The Georgia Supreme Court's proportionality review on direct appeal does not bar Butts's claim. That review was conducted 17 years ago, and the landscape today is very different. The point of Butts's claim is that he would not be sentenced to death today given changes in sentencing standards since the time of his trial and

direct appeal. As such, the issue presented here is not “substantially the same” as the issue addressed 17 years ago. *See* State’s Br. at 9. The only reason the state court applied Georgia’s “law of the case” doctrine is that it did not recognize the legal viability of a proportionality claim based on standards that have evolved since trial. In other words, the state courts’ procedural analysis was inextricably intertwined with its federal constitutional analysis, and the state law ground therefore does not preclude review. *See Foster*, 136 S. Ct. at 1746–47.

The state court’s due diligence argument also hinges on the notion that a defendant cannot establish an Eighth Amendment violation based on current standards that are different from the standards that were in place when he was sentenced. It would have been impossible for Butts to raise his claim a decade ago because the claim is based on the sentencing standards of the past decade.

Finally, the State suggests that Butts is seeking a constitutional rule that would “strip from the district attorneys of this State the discretion to seek a death sentence.” State’s Br. at 15. But there is no tension between allowing prosecutorial discretion and ensuring that death sentences are not disproportionate. Butts’s case falls on the extreme end of the spectrum—it is a case with one decedent and one aggravating circumstance. No one gets sentenced to death in such cases anymore. Therefore, Butts’s sentence violates evolving standards of decency.

The execution of a person who would not be sentenced to death under current sentencing standards is the definition of an Eighth Amendment violation.¹ Petitioner Butts is such a person, and his execution is set for tonight. These extraordinary circumstances warrant this Court's intervention. Therefore, Petitioner Butts respectfully requests that this Court stay his execution, grant certiorari, reverse the decision below, and remand the case for further proceedings.

Respectfully submitted,

PHILIP E. HOLLADAY, JR.
J. ANDREW PRATT
KING & SPALDING LLP
1180 Peachtree St., NE
Atlanta, GA 30309
Phone: (404) 572-3340
Fax: (404) 572-5100
pholladay@kslaw.com
apratt@kslaw.com

/s/ Patrick Mulvaney
PATRICK MULVANEY*
Counsel of Record
KATE MORRIS
SOUTHERN CENTER
FOR HUMAN RIGHTS
83 Poplar Street, N.W.
Atlanta, GA 30303
Phone: (404) 688-1202
Fax: (404) 688-9440
pmulvaney@schr.org
kmorris@schr.org

Counsel for Petitioner Robert Earl Butts, Jr.

¹ See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (explaining that the Eighth Amendment's protections are defined by "evolving standards of decency").

CERTIFICATE OF SERVICE

I, Patrick Mulvaney, hereby declare that on May 4, 2018, I served the foregoing on the State of Georgia by electronic mail to the following:

Stephen A. Bradley
District Attorney, Ocmulgee Judicial Circuit
Baldwin County Courthouse
121 N. Wilkinson Street, Suite 305
Milledgeville, GA 31061
sbradley@pacga.org

Beth A. Burton
Deputy Attorney General
40 Capitol Square, SW
Atlanta, GA 30334
bburton@law.ga.gov

Respectfully submitted,

/s/ Patrick Mulvaney
PATRICK MULVANEY
SOUTHERN CENTER
FOR HUMAN RIGHTS
83 Poplar Street, N.W.
Atlanta, GA 30303
Phone: (404) 688-1202
Fax: (404) 688-9440
pmulvaney@schr.org