No. 14-7955

IN THE

Supreme Court of the United States

RICHARD E. GLOSSIP, ET AL.,
Petitioners,

v.

KEVIN J. GROSS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR REHEARING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—continued

Pursuant to Rule 44.1, petitioners respectfully petition this Court for rehearing of this case following the Court's decision of June 29, 2015. Petitioners submit that this case is an appropriate vehicle for ordering the full briefing on the constitutionality of the death penalty that Justice Breyer called for in his dissenting opinion.

A. The Court Should Grant Rehearing To Consider Whether The Death Penalty Is Unconstitutional Per Se.

This case did not originally challenge the constitutionality of the death penalty. In a dissenting opinion joined by Justice Ginsburg, however, Justice Breyer stated that he "would ask for full briefing on a more basic question: whether the death penalty violates the Constitution." *Glossip* v. *Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., joined by Ginsburg, J., dissenting); see *id*. at 2777. As the Court very recently held, "[a]n individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act." *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2605 (2015). In exceptional circumstances, which petitioners believe are present here, this Court will address issues not raised or passed on below. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

It would be appropriate for the Court to use this case to address the constitutionality of the death penalty because the outcome will turn not on facts specific to any single litigant, but on circumstances common to the administration of the death penalty. As Justice Breyer's opinion explains, the "circumstances and the evidence of the death penalty's application have changed radically" since this Court upheld the constitutionality of the death penalty nearly

forty years ago. *Glossip*, 135 S. Ct. at 2755 (Breyer, J., dissenting). The three petitioners here are well suited to present the full briefing for which Justices Breyer and Ginsburg called, on issues such as the unreliability, arbitrariness, delay, and decline in the application of capital punishment, which render such punishment unconstitutional under the Eighth and Fourteenth Amendments.

B. Petitioners Exemplify Important Reasons Why The Death Penalty Is Unconstitutional.

Although the constitutionality of the death penalty per se would not turn on the facts of any one litigant's case, petitioners' experiences with the capital sentencing system do illustrate many of the central concerns that underlie Justice Breyer's call for further briefing.

1. Richard Glossip – Reliability and Innocence: As the first of several reasons that the death penalty may violate the Eighth Amendment, Justice Breyer emphasized that the death penalty is not reliably reserved for those who commit the worst offenses, noting the "convincing evidence" that even "innocent people have been executed." *Glossip*, 135 S. Ct. at 2756 (Breyer, J., dissenting); see *id.* at 2756-59. Mr. Glossip is well-positioned to challenge the reliability of the death penalty as punishment for those who commit the most reprehensible crimes. He has always maintained his innocence.

Richard Glossip was 33 years old with no criminal record and a solid work history when he was charged with the murder of his employer, Barry Van Treese, the owner of the Oklahoma City motel where Mr. Glossip had worked as a live-in manager for over a year and a half. It is undisputed that a 19-year old

maintenance worker at the motel, Justin Sneed, used a baseball bat to kill Mr. Van Treese in one of the motel rooms. The State's theory was that while Mr. Glossip had no part in the actual killing of Mr. Van Treese, he asked Mr. Sneed to kill Mr. Van Treese and Sneed acquiesced. To avoid the death penalty, Mr. Sneed agreed to testify against Mr. Glossip. The only evidence that Mr. Glossip enlisted Sneed to kill Mr. Van Treese came from the admitted killer Sneed; as the Oklahoma Court of Criminal Appeals observed in vacating Mr. Glossip's conviction after his first trial: "The State concedes the only 'direct evidence' connecting Appellant to the murder was Sneed's trial testimony. No forensic evidence linked Appellant to murder and no compelling evidence corroborated Sneed's testimony that Appellant was the mastermind behind the murder." *Glossip* v. *State*, 29 P.3d 597, 599 (Okla. Crim. App. 2001).

In the words of the federal district court judge who reviewed his case in habeas, "[t]he State's case against [Mr. Glossip] hinged on the testimony of one witness, Justin Sneed, [Mr. Glossip's] accomplice, who received a life sentence in exchange for his testimony. Unlike many cases in which the death penalty has been imposed, the evidence of [Mr. Glossip's] guilt was not overwhelming." Order at 1-2, *Glossip* v. *Sirmons*, No. 5:08-cv-00326-HE (W.D. Okla. Sept. 29, 2010), ECF No. 66. Mr. Glossip's death sentence is based on only one aggravating factor—murder for remuneration—the evidence for which comes solely from the testimony of Sneed. *Glossip* v. *State*, 157 P.3d 143, 161 (Okla. Crim. App. 2007). Yet last fall, Mr. Sneed's daughter came forward and stated that her father has been afraid to recant his testimony about Mr. Glossip because he fears he would himself then be sentenced to death. She states: "I am sure

that Mr. Glossip did not do what my father originally said, that he did not hire my father to kill Mr. Van Treese . . . ."[1]

2. John Grant – Arbitrariness and Mitigation: Justice Breyer's dissent also discusses the concern that the death penalty is imposed arbitrarily, noting that counsel's resources may factor into the arbitrariness of sentencing. *Glossip*, 135 S. Ct. at 2759-64 (Breyer, J., dissenting). Mr. Grant's counsel lacked the necessary resources, experience, and judgment to present the relevant mitigating evidence. It is defense counsel's duty to present mitigating evidence to support a case for a life sentence because "it remains the jury's task to make the individualized assessment of whether the defendant's mitigation evidence entitles him to mercy." *Id.* at 2763. In Mr. Grant's case, however, inexperienced counsel failed to present the jury with mitigation evidence that some judges who have since reviewed the case have opined would likely have affected the jury's decision.

Mr. Grant was represented by a lawyer who was new to the bar, who was self-medicating for untreated bipolar disorder, who married and then divorced her co-counsel in Mr. Grant's case in less than one year—all during her representation of Mr. Grant—and who later voluntarily resigned from the bar after being suspended from practice.[2] A majority of judges on the

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[1] Amended Petition for Writ of Habeas Corpus at 9, *Glossip* v. *Sirmons*, No. 5:08-cv-00326-HE (W.D. Okla. Jan. 8, 2015), ECF No. 84 (Letter from O'Ryan Justine Sneed dated Oct. 23, 2014)

[2] *See State ex rel. Okla. Bar Ass'n* v. *McTeer*, 295 P.3d 1135 (Okla. 2013) (mem.); *see also* Affidavit of Amy McTeer, ¶2, Nov. 18, 2014, attached as Ex. 29 to Clemency Petition for John Marion Grant submitted to the Oklahoma Pardon and Parole Board on Dec. 12, 2014.

Oklahoma Court of Criminal Appeals affirmed Mr. Grant's sentence, despite this Court having vacated and remanded his case for further consideration in light of *Wiggins* v. *Smith*, 539 U.S. 510 (2003). See *Grant* v. *Oklahoma*, 540 U.S. 801 (2003) (mem.). But the state-court opinion was not without dissent, which concluded, *inter alia*, that it believed that a jury, had it been presented with "the array of mitigating evidence that Grant's original jury never heard," may have been "sufficiently moved by the circumstances" to spare Mr. Grant's life. *Grant* v. *State*, 95 P.3d 178, 190 (Okla. Crim. App. 2004) (Chapel, J., dissenting).

Similarly, in reviewing Mr. Grant's habeas petition, the Chief Judge of the Tenth Circuit explained, "[h]ad Grant actually received the individualized consideration that the Constitution entitles him to, I believe that the testimony of Grant's family members would have placed not only the murder, but Grant's entire criminal history, into a different, and more sympathetic context for the jury." *Grant* v. *Trammell*, 727 F.3d 1006, 1042 (10th Cir. 2013) (Briscoe, C.J., dissenting). Because Mr. Grant was not provided adequate counsel to develop mitigating evidence, his sentence demonstrates the arbitrariness of capital sentencing—especially given the position of the dissenting judges who believe such information may have made a difference in his sentence.

3. Benjamin Cole – Delay and Dehumanization: Finally, the facts surrounding Mr. Cole's confinement illustrate Justice Breyer's concern regarding the "dehumanizing effect" of a lengthy term of solitary confinement. *Glossip*, 135 S. Ct. at 2765 (Breyer, J., dissenting). Mr. Cole has been confined on death row for over a decade. Like all condemned Oklahoma prisoners, he is housed in the H-Unit of the Oklahoma State

Penitentiary, which is underground housing with windowless cells and no access to open air or natural sunlight. See Rachel Petersen, *OSP's H-Unit, Life on Death Row*, McAlester News-Capital (Dec. 6, 2011 11:20 PM), http://www.mcalesternews.com/news/local_news/osp-s-h-unit-life-on-death-row/article_1fe445ba-3c8b-5843-a129-ef06d00367fc.html. The prisoners generally must spend 23 hours a day in their cell, which is 7'7" x 15'5"—no bigger than most bathrooms. *Id.*; see also Amnesty Int'l, *Conditions for Death Row Prisoners in H-Unit, Oklahoma State Penitentiary* 5 (1994). Five days per week, they have the option of spending an hour alone in a larger "cement room, approximately 20 feet by 20 feet, with a clouded skylight-type ceiling . . . ." Rachel Petersen, *OSP's H-Unit, Life on Death Row*, McAlester News-Capital (Dec. 6, 2011 11:20 PM), http://www.mcalesternews.com/news/local_news/osp-s-h-unit-life-on-death-row/article_1fe445ba-3c8b-5843-a129-ef06d00367fc.html. They are never permitted to have physical contact with family or loved ones and communicate with visitors "through a set of steel bars and a window — and a telephone." *Id.* They are offered a 15-minute shower three times per week. Amnesty Int'l, *supra*, at 5.

Mr. Cole has schizophrenia, paranoid type. His illness has worsened without treatment over the years and has been exacerbated by the isolation on death row. He has not left his cell for years at a time. Test results show that he has an 11 millimeter lesion in the globus pallidus region of his brain.[3] The synergistic effects of his brain lesion and schizophrenia pro-

[3] Defense counsel discovered Mr. Cole's brain abnormalities three weeks before trial, and requested a continuance, which the State opposed. *Cole* v. *State*, 164 P.3d 1089, 1093 (Okla. Crim. App. 2007). The trial court denied the continuance. *Id.*

vide an explanation for his behavior, including his lack of interest, his blank looks, and his monotone speech. See Affidavit of Linda Anne Hayman, M.D. at ¶¶ 5-6, *Cole* v. *Trammell,* No. 4:15-cv-00049-GKF-PJC (N.D. Okla. Jan. 30, 2015), ECF No. 2-43; see also Updated Report of Dr. Raphael Morris, *Cole* v. *Trammell*, No. 4:15-cv-00049-GKF-PJC (N.D. Okla. Jan. 30, 2015), ECF No. 2-42. Due to his illness, Mr. Cole has never been capable of meaningfully conferring with any of the attorneys who have attempted to represent him. At his trial, Mr. Cole "had withdrawn into extreme religiosity, made little if any effort to assist his attorneys or to prepare his defense while awaiting inspiration from God, and sat through the entire trial at counsel table literally not moving a muscle for hours on end while reading the Bible." *Cole*, 164 P.3d at 1093 (internal quotation marks omitted). He is currently represented by a next friend in this action, refuses to leave his cell, and fails to groom himself. See Okla. Dep't of Corrections, Offender Search, Benjamin R. Cole Sr., ODOC #489814, http://tinyurl.com/ohxeron (last visited July 23, 2015).

"[E]ven for prisoners sentenced to death, solitary confinement bears 'a further terror and peculiar mark of infamy.'" *Davis* v. *Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (citation omitted). Often, years in isolation can result in "a terrible price." *Id.* at 2210; see also *Glossip*, 135 S. Ct. at 2766-67 (Breyer, J., dissenting) (referencing the inhumane conditions on death row). The conditions under which Mr. Cole and the other petitioners live day-in and day-out also support rehearing and plenary consideration of the constitutionality of the death penalty.

C. The Petition Is Not For The Purpose Of Delay.

The Oklahoma Court of Criminal Appeals has now set execution dates for each of the petitioners, with the first such date being the execution of Richard Glossip on September 16, 2015, which is one of the dates that the State proposed. In setting these execution dates, the Oklahoma court stated that the pendency of a rehearing petition alone would not, as a matter of state statutory law, interfere with the State's ability to carry out the executions, and that the execution dates it has chosen are sufficiently far in the future to allow time so that petitioners "may file for rehearing with the United States Supreme Court" if they so choose.[4] The submission of this petition, therefore, is not for the purpose of delay, but rather to ask the Court to use this case to call for the briefing discussed in Justice Breyer's dissenting opinion. Should the Court grant this petition, however, it is petitioners' understanding that the proceedings in this Court would not yet be final, and the stay of execution that this Court previously granted would remain in place.

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[4] *See* Order Setting Execution Date, *Glossip* v. *State*, No. D-2005-310 (Okla. Crim. App. July 8, 2015) (setting execution date of September 16, 2015); Order Setting Execution Date, *Grant* v. *State*, No. D-2000-653 (Okla. Crim. App. July 8, 2015) (setting execution date of October 28, 2015). *But see* Order Setting Execution Date, *Cole* v. *State*, No. D-2004-1260 (Okla. Crim. App. July 8, 2015) (setting execution date of October 7, 2015, but finding that although Mr. Cole referenced the arguments made by Mr. Glossip and Mr. Grant regarding filing for rehearing, the court found the argument waived because he provided no independent argument in his papers). All orders are available on PACER, filed in *Glossip* v. *Gross*, No. 5:14-cv-00665-F (W.D. Okla. July 8, 2015), ECF No. 210-1.

CONCLUSION

For the foregoing reasons, petitioners pray that this Court grant rehearing of its decision.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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