No. 17-7245

IN THE

SUPREME COURT OF THE UNITED STATES

TIMOTHY NELSON EVANS,
Petitioner

v.

STATE OF MISSISSIPPI,
Respondent

Petition for Writ of Certiorari to the
Supreme Court of the State of Mississippi

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

1. Capital Punishment is not per se Cruel and Unusual under the Eighth Amendment.

2. Capital Punishment Comports with all Dictates of the Constitution.

PARTIES TO THE PROCEEDINGS

Respondent is the State is Mississippi.

Petitioner, Timothy Evans, is an inmate at the Mississippi State Penitentiary at Parchman, Mississippi, who has been sentenced to death.

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BRIEF IN OPPOSITION

This matter is before the Court on the Petition of Timothy Nelson Evans ("Petitioner") for a Writ of Certiorari to the Supreme Court of the State of Mississippi wherein he challenges his conviction for capital murder for which he was sentenced to death. Respondent, the State of Mississippi, respectfully prays this Court will deny his Petition for Writ of Certiorari to the Supreme Court of Mississippi.

OPINION BELOW

The Mississippi Supreme Court affirmed Petitioner's capital murder conviction and sentence of death on June 25, 2017. *Evans v. State of Mississippi*, 226 So.3d 1 (Jun. 15, 2017) rehearing

denied (Sept. 28, 2017).

JURISDICTION

The Petitioner seeks to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257 but fails to do so.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner asserts a claim under the Eighth Amendment to the Constitution. His claim fails.

STATEMENT OF THE CASE

Timothy Evans was convicted of the capital murder of Wenda Holling with the underlying felony of robbery. After several days of testimony, on August 23, 2013, a jury determined that the Petitioner should suffer death for the murder of his elderly roommate and former romantic interest. The Petitioner perfected an appeal in which he raised nine (9) issues for consideration. The Mississippi Supreme Court rejected each claim and issued a decision affirming Evans' conviction and sentence. *Evans v. State of Mississippi*, 226 So.3d 1 (Jun. 15, 2017). Rehearing was denied on September 28, 2017, and the mandate was issued on October 28, 2017. Aggrieved by that decision, Evans filed the present petition for writ of certiorari on December 27, 2017.

STATEMENT OF FACTS

In January of 2010, Timothy Evans was going to work with a friend when the van they were riding in broke down. T. 733. The Petitioner called Ms. Holling, the victim, his landlord and former romantic interest, to come pick him up. T. 733-34. Evans told his friend that he was taking Ms. Holling to Baton Rouge because she was going on a cruise. T. 735. Ms. Holing picked up the

Petitioner and the two returned to her home. T. 735.

Once home, seventy year old Wenda Holling was sitting in her favorite chair in the living room when Evans tried to smother her with a pillow. T. 707-08, 846. Petite[1] Ms. Holling fought and the two fell to the floor. Evans realized that the pillow was not working so he sat on Ms. Holling's chest and strangled her to death. State's Trial Exhibits 8, 9, and 10. Evans then showered and took Ms. Holling's credit card and cash. He took Ms. Holling's car and picked up his friend for a night of drinking. T. 736-38. After a night of partying, Evans returned to Ms. Holling's home. T. 739.

The next morning, Evans put Ms. Holling's body in the truck of her car. He drove around looking for a place to dump Ms. Holling's body. That same day, when Ms. Holling did not show up for church, John Compton, Ms. Holling's son, was notified. T. 704. Compton attempted to contact his mother that Sunday and the following Monday without success. On Tuesday, Compton went to his mother's home and noticed that her car was in the drive way, her walking cane that she needed and car keys were in the house and nothing was out of place except his mother was nowhere to be found T. 705-08.

Compton contacted the Petitioner. Evans told Compton that Ms. Holling went to Florida for a reunion with friends. T. 709, 807. Knowing that his mother would not have left without telling him, Compton contacted authorities. T. 806. An investigator contacted Evans. T. 305. Evans told the investigator that he had been out drinking and when he came home Ms. Holling was upset. Evans said that Ms. Holling left for vacation the next morning with the Williams who picked her up.

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[1] Ms. Holling was approximately five feet one inches tall and weighed approximately 100 pounds. T. 814.

While she was on vacation, Evans stated, Ms. Holling told him to move out. Evans admitted that he had used Ms. Holling's debt card Saturday night and explained that he gave her cash to cover the charges. T. 809-10. The next day, January 6, 2010, the investigator found some of Ms. Holling's person things in a garbage can near the street.

On January 10, 2010, a team of 30 people searched for three days in a five-mile radius of Ms. Holling's home to no avail. T. 812. By this time, authorities were looking for Evans who had fled to Florida. T. 813-14. On January 26, 2010, a road crew found the remains of an elderly female in a wooded area near the road. The remains were later identified as Ms. Holling. T. 816-18.

Evans was apprehended in Florida where he provided a statement to local authorities. State's Exhibit 13. Evans concocted a story of an argument and struggle where Ms. Holling accidentally fell and hit her head. He eventually admitted that he strangled Ms. Holling and dumped her body in the woods. Evans later admitted to investigators and a news reporter that he had planned to kill Ms. Holling; a plan that began as early as December 20, 2009.

ARGUMENT

Evans argues that capital punishment is *per se* cruel and unusual and, therefore, violates the Eighth Amendment. Evans' argument that capital punishment is *per se* cruel and unusual is unavailing and contradicted by decades of jurisprudence.

QUESTION ONE: Capital Punishment is not *per se* Cruel and Unusual under the Eighth Amendment.

Evans' claim is not unique. Many other capital litigants have also argued that capital

punishment is unconstitutional and should be abolished.[2] The argument, however, has failed for decades and Evans' case should fare no better.

The Eighth Amendment prohibits "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive." *Kennedy v. Louisiana*, 554 U.S. 407, 419, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008) (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 n.7, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)). As this Court has repeatedly explained, "the Eighth Amendment's protection against excessive or cruel and unusual punishment flows from the basic precept of justice that punishment for a crime should be graduated and proportioned to the offense." *Id.* (quotation and marks omitted). Grounded in that principle, this Court has held that the Eighth Amendment prohibits capital punishment for defendants who either: (1) had a diminished culpability for the crime (*e.g.* juveniles or those with intellectual disabilities); or (2) committed a crime that is disproportionate to a capital sentence (*e.g.* non-homicide offenses against individuals). *Id.* at 420–21.

Evans' culpability and the egregious nature of his crime are apparent. Evans murdered seventy-year-old Wenda Holling, with whom he was living and had previously had a romantic relationship. A murder he had planned. He first tried to smother her with a pillow. *Evans v. State*, 226 So.3d 1, 10 (Miss. 2017). When Holling fought back, Evans sat on her chest and strangled her to death. *Id.* Evans then stole Holling's credit cards and went out drinking and partying. *Id.* The next day, he drove his friend around with Holling's body in the truck, blaming any smell on "run[ning] over a skunk" until he finally dumped her body in the woods. *Id.* Evans' crime was

[2] In fact, Evans even admits that his petition is similar, if not identical, to *Abel Daniel Hidalgo v. State of Arizona*, No. 17-251, presently pending before this Court.

purposeful,[3] egregious, and deserving of capital punishment. *See Kennedy*, 554 U.S. at 420; *see also Tison v. Arizona*, 481 U.S. 137, 156, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) ("Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.").

Even Evans does not argue that the facts of his crimes warrant leniency.[4] Instead, Evans ignores his culpability and the egregious manner in which he committed his crime, arguing instead that this Court should find that capital punishment is *per se* cruel and unusual. Pet. at 21-27. He contends that "a national consensus" now rejects capital punishment, asserting that 31 States have "abandoned" capital punishment and the remaining jurisdictions carry out capital punishment infrequently. *Id.* at 11-12.

Evans' assertions are inaccurate, and there is no national consensus against this form of punishment. The majority of States have democratically adopted and approved of capital

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[3] Evans first made several statements claiming that he killed Holling after she caught him trying to steal her credit cards. However, following his arrest, on March 10, 2010, he wrote a letter to the investigator amending his statement to reveal that she had not caught him stealing her credit cards, but that he had planned to kill her. *Evans*, 226 So.3d at 11 (¶ 8). In June 2010, he also wrote a letter to a journalist describing how he had planned the murder and "planned party time too." *Id.* at ¶ 9. Accordingly, Evans' account that the first time he changed his story was in his letter to the journalist is incorrect. Pet. at 4 n.3.

[4] Although, Evans does hint at it. Evans states that two psychologists testified regarding his long history of alcohol and drug abuse, and one testified that Evans possibly had post-traumatic stress disorder. Evans concludes that "the jury apparently did not find this sufficiently mitigating, and sentenced him to death anyway." Pet. at 3 n.2. However, both psychologists testified that their findings were based solely on information provided by Evans, and neither had been able to corroborate any of the information he had provided. *Evans*, 226 So.3d at 12. Further, one of the psychologists testified that "at the time of the crime, Evans had not been 'suffering from a mental disease or defect that would have prevented him from knowing the nature and quality of his alleged acts or from knowing the difference between right and wrong . . . .'" *Id.*

punishment,[5] some of them affirming that judgment as recently as November 2016.[6] As recently as 2015, this Court stated the inescapable conclusion: "it is settled that capital punishment is constitutional." *Glossip v. Gross*, --- U.S. ---, 135 S. Ct. 2726, 2732, 192 L.Ed.2d 761 (2015); *see also Kennedy*, 554 U.S. at 437–38.

This Court has also recently rejected Evans' assertion that a decline in the number of executions is indicative of States' opposition to capital punishment. As *Glossip* explained, the true reason for a temporary decline is that, after legal and constitutional challenges to capital punishment failed, activists began pressuring pharmaceutical companies to refuse to supply States with the drugs necessary to carry out capital punishment. *Glossip*, 135 S. Ct. at 2733–34. Yet despite the logistical difficulties, States have continued in their unwavering efforts to constitutionally impose and carry out capital sentences. *See, e.g., id.* If anything, the effort States must employ to carry out an execution is proof of their commitment to maintaining capital punishment as a component of their criminal codes.

Evans' narrative also ignores a trio of 2016 enactments in California, Nebraska, and Oklahoma. California voters rejected, for a second time, a proposition that would have repealed its capital sentencing laws and, instead, approved a measure that requires state officials to expeditiously carry out capital sentences.[7] Evans claims that no State has reinstated capital punishment in the last

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[5] Thirty-one states and the federal government still have laws authorizing the death penalty.

[6] *See* National Conference of State Legislatures, States and Capital Punishment (Feb. 2, 2017), http://www.ncsl.org/research/civil-andcriminal-justice/death-penalty.aspx.

[7] *See* Jazmine Ulloa & Julie Westfall, *California voters approve an effort to speed up the death penalty with Prop. 66*, L.A. Times, Nov. 22, 2016, 7:00PM, http://www.latimes.com/politics/essential/la-polca-essential-politics-updates-proposition-66-

fifteen years. *See* Pet. at 13. His statement is flatly incorrect. Nebraska voters overwhelmingly reinstated capital punishment after lawmakers had repealed it.[8] And, in response to the recent difficulties in obtaining the necessary lethal-injection drugs from pharmaceutical companies, Oklahoma voters provided the state legislature with the authority to adopt any execution method that is constitutional.[9] Mississippi, similarly, passed legislation in 2017 providing for alternative methods of execution. *See* Miss. Code Ann. § 99-19-15 (1)-(4), amended Apr. 5, 2017.

Like every other capital petitioner before him, Evans fails to demonstrate a cognizable claim. Evans has offered no new or novel claim worthy of this Court's limited attention. *See generally Gregg v. Georgia*, 428 U.S. 153, 175–76, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) ("In a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.") (joint opinion of Stewart, Powell, and Stevens, JJ.) (quoting *Furman v. Georgia*, 408 U.S. 238, 383, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)).

QUESTION TWO: Capital Punishment Comports with the Dictates of the Constitution.

Evans makes various claims that capital punishment can never be imposed in a constitutional manner and, therefore, should be declared *per se* cruel and unusual punishment. Pet. at 14-27. Evans' claims are not unique. The claims have been presented, addressed, and refuted by various courts and do not support his claim that capital punishment is *per se* cruel and unusual in violation

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death-penalty-passes1479869920-htmlstory.html.

[8] *See* Josh Sandburn, *Nebraska Restores the Death Penalty One Year After Eliminating It*, Time, Nov. 8, 2016, http://time.com/4563703/nebraska-restores-death-penalty-election.

[9] *See Oklahoma voters approve ballot measure affirming death penalty*, Chi. Trib., Nov. 8, 2016, 9:19 PM, http://www.chicagotribune.com/news/nationworld/ct-election-results-death-penalty-20161108-story.html.

of the Eighth Amendment.

First, Evans raises an equal protection claim and argues that a defendant's race and the location of the crime have improperly infected the administration of capital punishment. *Id.* at 14-18. But Evans' cursory citation to various studies is insufficient to support an equal protection claim under this Court's capital jurisprudence.[10] *McCleskey v. Kemp*, 481 U.S. 279, 291–93, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987).

Evans claims that Mississippi's capital punishment scheme is arbitrary because "[t]he principal determinant of whether a defendant will be sentenced to death is typically not his blameworthiness, but . . . the county in which he commits his crime." Pet. at 15. But this Court has repeatedly rejected the argument that the Eighth Amendment limits prosecutors' discretion in determining whether to seek capital punishment. *E.g. McCleskey*, 481 U.S. at 306–07 (denying claim that prosecutorial discretion creates an arbitrary application of the death penalty). No court has held that the Eighth Amendment prohibits different counties within a State from applying state law as best they can, subject to resource constraints. *See Allen v. Stephens*, 805 F.3d 617, 629 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 2382 (2016). That is because, as this Court explained, "[n]umerous legitimate factors may influence the outcome of a trial and a defendant's ultimate sentence," including the capabilities and resources of the particular law enforcement agency. *McCleskey*, 481 U.S. at 307 n.28. Because of the many factors that prosecutors weigh in deciding

[10] Further, Evans offers a spreadsheet of death sentences imposed in Mississippi. Pet. App. D. However, that spreadsheet has never been offered as evidence in the state court, and therefore, cannot be used to support his Petition. "[W]e must look only to the certified record in deciding questions presented." *McClellan v. Carland*, 217 U.S. 268, 30 S.Ct. 501, 54 L.Ed.2d 762 (1910). Likewise, appendix E to the Petition has never been offered in to a state court and must suffer the same fate.

whether to seek a capital sentence, it is difficult to know whether Evans would have been treated identically in each county in Mississippi. Everything in the record demonstrates that the prosecutor objectively and reasonably pursued a capital sentence.

> There is a reason the choice between life and death, within legal limits, is left to the jurors and judges who sit through the trial, and not to legal elites (or law students). That reason is memorialized not once, but twice, in our Constitution: Article III guarantees that "[t]he Trial of all Crimes, except in cases of Impeachment, shall be by Jury" and that "such Trial shall be held in the State where the said Crimes shall have been committed." Art. III, § 2, cl. 3. And the Sixth Amendment promises that "[i]n all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury of the State and district wherein the crime shall have been committed." Those provisions ensure that capital defendants are given the option to be sentenced by a jury of their peers who, collectively, are better situated to make the moral judgment between life and death than are the products of contemporary American law schools.
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> It should come as no surprise, then, that the primary explanation a regression analysis revealed for the gap between the egregiousness scores and the actual sentences was not the race or sex of the offender or victim, but the locality in which the crime was committed. What is more surprising is that Justice BREYER considers this factor to be evidence of arbitrariness. The constitutional provisions just quoted, which place such decisions in the hands of jurors and trial courts located where "the crime shall have been committed," seem deliberately designed to introduce that factor.

Glossip, 135 S. Ct. at 2751–52 (Thomas, J. concurring) (some internal citations omitted).

Second, Evans claims that capital punishment cannot be administered constitutionally because it will always be imposed arbitrarily and capriciously. *Id.* at 14-18. The surprising foundation for this claim is the fact that juries have the discretion to refuse to impose a capital sentence. *Id.* at 16-17. According to Evans, "[b]y granting juries untrammeled discretion to grant mercy to whomever they wish, the law reintroduces into the death penalty system the very sort of arbitrariness that the first 'narrowing' requirement is intended to remove." *Id.* This assertion, however, ignores this Court's pronouncement that "[n]othing in any of our cases suggests that the

decision to afford an individual defendant mercy violates the Constitution." *Gregg*, 428 U.S. at 199.

Third, Evans asserts that the death penalty no longer advances any legitimate penological purpose, nor does it sufficiently limit the class of offenders against whom it is imposed "to those offenders who commit a narrow category of the most serious crimes." Pet. at 18-24.

> Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view. We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent.
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> . . .
>
> The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.

Gregg, 428 U.S. at 184–85.

Evans argues that, "[e]ven if there may be some who do possess the requisite culpability, there remains a serious risk of wrongful execution because judges and juries are ill-equipped to discern exactly who falls into that narrow category." Pet. at 22-23. This Court has consistently refused to micromanage States' and juries' determination of which murders deserve a capital sentence. The standard recognized in every circuit court of appeals is a general requirement that juries may not have unfettered discretion.

In *Furman v. Georgia*, 408 U.S. 238, (1972), this Court held that capital punishment "may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." *Godfrey v. Georgia*, 446 U.S. 420, 427, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). State law therefore cannot allow a jury standardless or unbridled discretion in determining whether to impose capital punishment. *Id.* The law must "channel the

sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." *Id.* at 428 (quotation marks and footnotes omitted); *see also Gregg*, 428 U.S. at 196 ("No longer can a Georgia jury do as Furman's jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die.").

This Court has distinguished between the "two different aspects of the capital decision-making process: the eligibility decision and the selection decision." *Tuilaepa v. California*, 512 U.S. 967, 971, 114 S.Ct. 2630, 129 L.Ed.2d (1994). As to the eligibility decision, "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Lowenfield v. Phelps*, 484 U.S. 231, 244, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983)).

Next, the selection decision must be made through a process that provides for an individualized determination based on the defendant's history and character and the circumstances of the crime. *Zant*, 462 U.S. at 879. If a capital scheme "provides for categorical narrowing at the definition stage, and for individualized determination and appellate review at the selection stage," then the scheme is constitutionally sound. *Id.* In homicide cases, the eligibility decision is constitutionally satisfied by a scheme that requires a jury to convict a defendant of murder and then find at least one aggravating factor beyond a reasonable doubt. *Tuilaepa*, 512 U.S. at 971–72; *see also Kennedy*, 554 U.S. at 437–38.

Fourth, Evans asserts that numerous defendants who received capital sentences "have been formally exonerated of their crimes of conviction." Pet. at 24. He then proclaims, without

identifying a particular case where an individual was executed for a crime that he or she did not commit, that "States have put [innocent] individuals to death." *Id.* at 25. The very same claims have already been presented to this Court, and they do not stand up to constitutional scrutiny. *See Kansas v. Marsh*, 548 U.S. 163, 185–99, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006) (Scalia, J., concurring).

Fifth, Evans argues in passing that a long delay between sentencing and execution constitutes cruel and unusual punishment. Pet. at 23. But "[t]here is simply no authority in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed." *Johnson v. Bredesen*, 558 U.S. 1067, 1071, 130 S. Ct. 541, 545, 175 L.Ed.2d 552 (2009) (Thomas, J., concurring in the denial of certiorari) (quoting *Thompson v. McNeil*, 556 U.S 1114, 1116-17, 129 S.Ct. 1299, 173 L.Ed.2d 693 (2009)).

Finally, Evans points to laws and practices from other countries. Pet. at 26-27. But the laws and practices of other countries are immaterial—"the task of interpreting the Eighth Amendment remains [this Court's] responsibility." *Roper v. Simmons*, 543 U.S. 551, 575–76, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). And this Court has "time and again reaffirmed that capital punishment is not *per se* unconstitutional." *Glossip*, 135 S. Ct. at 2739.

CONCLUSION

Evans has presented nothing new or novel to cause this Court to retreat from decades of precedent. Accordingly, the petition for writ of certiorari should not issue. For each of the above and foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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January 23, 2018

CERTIFICATE OF SERVICE

I, Cameron L. Benton, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day electronically filed the foregoing BRIEF IN OPPOSITION with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

Alison Steiner
Office of the State Public Defender
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This, the 23rd day of January, 2018.

BY: **s/** *Cameron L. Benton*

CAMERON L. BENTON