No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2018

ABDUR RAHIM AMBROSE,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent

THIS IS A CAPITAL [DEATH PENALTY] CASE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Does the death penalty in and of itself violate the Eighth Amendment in light of contemporary standards of decency and the geographic and racial arbitrariness of its imposition?

II.

Are the Eighth and/or Fourteenth Amendments violated where a state's capital punishment statutes let a person be sentenced to death for a felony murder that requires no specific criminal intent for either the killing or the underlying felony and where, at the sentencing phase, the jury does not find that he killed, attempted to kill, or intended to kill, but only that he "contemplated that lethal force would be employed"?

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PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

The Petitioner, Abdur Rahim Ambrose, prays for a writ of certiorari to review the judgment of the Supreme Court of Mississippi affirming, on direct appeal, his conviction of capital murder and sentence of death.

OPINION BELOW

The opinion of the Mississippi Supreme Court (Pet. App. A) is reported at *Ambrose v. State*, 254 So.3d 77 (Miss. 2018). That Court's order denying rehearing on October 18, 2018 (Pet. App. B) is unpublished, as is the mandate issued October 25, 2018 (Pet. App. C).[1]

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on August 2, 2018 and rehearing was denied on October 18, 2017. This Petition is filed within 90 days of the latter event. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257 on the ground that a right or privilege of the defendant which is claimed under the Constitution of the United States has been denied by the State of Mississippi.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States, which provides that:

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

The Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part that:

> No state shall … deprive any person of life, liberty, or property, without due process of law . . . .

[1] The opinion below is attached as Appendix A to this Petition. All citations to that opinion will be to "Pet. App. A" by paragraph. Other appendices to this Petition will be cited as "Pet. App." by letter. Citations to the record below are to the Clerk's Papers and Trial Transcript as "C.P." and "T." respectively, by page number.

The Mississippi Code of 1972, as amended, § 97-3-19 (2) which provides in pertinent part that:

> The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases: . . . When done with or without any design to effect death, by any person engaged in the commission of the crime of . . . kidnapping . . . , or in any attempt to commit such felon[y].

The Mississippi Code of 1972, as amended, § 99-19-101, which provides in pertinent part that:

> (5) Aggravating circumstances shall be limited to the following: . . . The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any . . . kidnapping. . . .
>
> (7) In order to return and impose a sentence of death the jury must make a written finding of one or more of the following: (a) The defendant actually killed; (b) The defendant attempted to kill; (c) The defendant intended that a killing take place; (d) The defendant contemplated that lethal force would be employed.

STATEMENT OF THE CASE

A. Proceedings below

On June 18, 2015, Abdur Rahim Ambrose ("Ambrose"), a black man, was convicted by a unanimous Harrison County, Mississippi jury on an indictment accusing him, his brother, and one of their cousins of the April 7, 2013 kidnapping-based felony capital murder of Robert Trosclair, a young white man who had grown up with them in the rural Harrison County community of Delisle, Mississippi. C.P.15, 483-84, T. 547-83. In accordance with Mississippi law, a severance was granted and the case against each defendant proceeded separately. C.P. 293. The prosecution elected to try Ambrose first, and to seek a death sentence against him. He was the only one of the co-defendants to be sentenced to death.[2]

[2] One co-defendant plead guilty to second degree murder and received a sentence of 40 years, with 30 to serve, even though he declined to testify against the other defendants. Trial Ex. D-1, id., T. 68-69, 359-63. After the death sentence was obtained against Ambrose, his brother Stevie, the final co-defendant, was allowed to plead as a principal to capital murder and was sentenced to life imprisonment without the possibility of parole. *See* Case No. B2401-13-800, (Sentencing Order, January 8, 2016).

The jury found Ambrose guilty of kidnapping-based felony capital murder under Miss. Code Ann. C.P. 483. Under Mississippi law, no specific intent had to be proven by the State or found by the jury with respect to either the homicide or the kidnapping elements of the crime in order to return that verdict, and the jury was instructed accordingly. C.P. 433-44.[3] Sentencing proceedings were held before the same jury. It returned a death sentence, again without finding any specific criminal intent on Ambrose's part, or that he killed, intended to kill or attempted to kill, but only that he "contemplated" that lethal force would be used by others. C.P. 518. Miss. Code Ann. § 99-19-101(7)(d).[4] The trial court sentenced Ambrose to death on that verdict. C.P. 519-20. On appeal, Ambrose argued, and the Mississippi Supreme Court decided, the issues raised in both of the Questions Presented in the present petition. *See* Pet. App. A at ¶263, Pet. App. B (as to Q.P. I); Pet. App. A at ¶¶ 74-95 (majority opinion); ¶¶ 278-87 (dissenting opinion).[5]

B. Background

The relevant events began when Ambrose was told by his brother and co-defendant

[3] *See* Miss Code Ann. § 97-3-19 (2) (making kidnaping felony murder punishable by death); *Burrell v. State*, 183 So. 3d 19, 23–24 (Miss. 2015), *reh'g denied* (Jan. 21, 2016) ("Kidnaping is not a specific intent crime. Therefore, it is sufficient that the surrounding circumstances resulted in a way to effectively become a kidnaping *as opposed to the actual intent to kidnap*.") (emphasis supplied).

[4] Mississippi juries are required to make this statutory scienter finding at the threshold, along with a finding of one or more statutory aggravating circumstances. Ambrose's jury found the statutory aggravator that duplicated the no-specific intent elements of the crime of conviction ("the capital offense was committed when the Defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, a . . . Kidnapping") as well as a second statutory aggravator that "the capital offense was especially heinous, atrocious or cruel," which relates to the victim's suffering, not the state of mind of the perpetrator. Miss. Code Ann. § 99-19-101(5)(d) and (i). C.P. 518-20. Hence the aggravating factors found did not contribute any additional culpable mental state finding to the sentencing equation.

[5] The Mississippi Court also reaffirmed its extremely expansive minority view of the one continuous transaction doctrine that exacerbated the error raised in the second Question Presented. Pet. App. A at ¶¶ 224-228 (citing, *inter alia, Evans v. State,* 226 So. 3d 1, 34 (Miss. 2017), *reh'g denied* (Sept. 28, 2017), *cert. denied sub nom. Jordan v. Mississippi*, 138 S. Ct. 2567 (2018); *Batiste v. State,* 121 So. 3d 808, 823 (Miss. 2013), *cert denied*, 572 U.S. 1117 (2014))

Stevie that Robert Trosclair had stolen some drugs and speakers out of Ambrose's parked car in the neighborhood where all had grown up. Ambrose, Stevie, and three others confronted and fist fought with Trosclair about this where the car was parked. When that fight was broken up by a neighbor, the five of them drove in two vehicles to a more secluded place where Trosclair was beaten in the head with a car tire on a rim until he became unconscious. Trosclair was then driven a short distance away and left on the side of a road where a passing motorist found him, still breathing but unarousable. T. 385-99, 437-43, 463-520. Trosclair was taken to a hospital where he was declared brain dead and died after life support was, with his family's permission, withdrawn. The autopsy confirmed that his cause of death was a massive brain injury from blunt trauma consistent with the beating inflicted at the second location. T. 532-47, 681-93.

The State's principal witness, an unindicted co-participant, testified that Ambrose was the ringleader in all these events and personally participated in the fatal beating, though there was no forensic confirmation of this testimony. T. 385-483. Ambrose testified that the others were the principal actors, and that he affirmatively withdrew from any participation in events – though he also did nothing to stop the others from continuing with them – before Trosclair was beaten with the tire when he learned from a still healthy Trosclair that Stevie, not Trosclair, was the person who had taken the drugs and speakers from Ambrose's car. T. 710-38. The jury apparently rejected the State's witnesses testimony and credited Ambrose's accomplice version, finding him guilty of the crime at the culpability phase, but declining to find at the penalty phase that he actually killed, or attempted or intended to kill, Trosclair. C.P. 518.

The crime of which Ambrose was convicted – a dispute among friends over missing drugs and other property that ends in the violent death of one of them in association with some other co-occuring felony such as kidnapping – is as commonplace in the universe of homicides

as it is unfortunate to society as a whole and tragic for the victim and his family. The perpetrators of such crimes are usually identified and convicted, as Ambrose was in this case. This is business as usual in jurisdictions throughout Mississippi, and across America.

What is not usual, even in states where felony murder *may* be punished with a death sentence, is for this kind of crime to actually result in a death sentence for anyone guilty of the crime. *See, e.g., People v. Hopson*, 3 Cal. 5th 424, 426, 430-31, 396 P.3d 1054, 1056, 1059 (2017); *Lambert v. State*, 287 Ga. 774, 774, 700 S.E.2d 354, 355 (2010); *State v. Buggs,* 995 S.W.2d 102, 103,1055 (Tenn. 1999); *Cruz v. State*, 629 S.W.2d 852, 859 (Tex. App. 1982). Indeed, this is also not, at least in the last decade or so, the usual disposition of crimes like this in most jurisdictions in Mississippi, either. *See* Pet. App. D (Spreadsheet of Mississippi Death Sentences Imposed (with Circuit Court District designation), October 5, 1976 –December 31, 2018). That Rahim Ambrose is sitting on death row after being convicted of this kind of crime is a product of two egregious constitutional errors inherent in Mississippi's capital punishment statutory scheme.

First, the fact that a death sentence was even *sought* for this crime was the product primarily of geographic and demographic accident. Ambrose had the misfortune to commit his crime the Second Circuit Court District of Mississippi, comprising three counties – Harrison, Hancock and Stone – on Mississippi's Gulf Coast, where the death penalty is fairly routinely sought in such murders. And he had the further misfortune that the friend who died in this crime interaction was white.

Second, though Ambrose was convicted of a crime that requires no specific criminal intent of any kind, and was found by the jury at the sentencing phase not to have killed, intended or attempted to kill Trosclair he was nonetheless eligible for a death sentence under Mississippi's

sentencing statute because he merely "contemplated" the possibility that his co-defendants would use lethal force in committing the no specific intent required kidnapping. As a dissenting minority of the Mississippi Supreme Court recognized, there are grave constitutional issues with imposing a death sentence where neither the crime itself nor the jury's finding concerning the defendant's role in the crime provide sufficient intentionality regarding the death. App. A at ¶¶ 278-287 (Kitchens, J. dissenting)

Whether separately or in combination, these two aspects of Mississippi's capital punishment scheme render the death sentence imposed upon Ambrose in this case a violation of the Eighth and Fourteenth Amendments. The Writ of Certiorari he seeks in this Petition provides this Court the means to address these important questions of constitutional law.

REASONS FOR GRANTING THE WRIT

I. This Court should grant the writ sought in order to determine the constitutionality of the death penalty in light of, *inter alia,* contemporary standards of decency and the racial and geographic arbitrariness of its imposition

Throughout this Court's now four-decade long post-*Furman* experiment in crafting a constitutional death penalty – an experiment that even at birth could gather no majority consensus as to its parameters, *Gregg v. Georgia*, 428 U.S. 153 (1976) (founded on plurality opinions) – there have been, over the years, calls for its reexamination.

The most powerful have been from jurists who sat for years on the Court believing that the experiment would succeed. Some simply pledge, for themselves, to swear off participating in the process.

> From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor.1 Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally

> and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants "deserve" to die?—cannot be answered in the affirmative.

Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

Others who have similarly tried to make the experiment succeed are now urging this Court to make the clear-eyed decision to revisit the question in light of the four decades of jurisprudential and human experience (and agony) it has engendered. *Glossip v. Gross*, --- U.S. ---. ---, 135 S. Ct. 2726, 2755 (2015) (Breyer, J. dissenting) ("[R]ather than try to patch up the death penalty's legal wounds one at a time, I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution."). *See similarly Jordan v. Mississippi*, --- U.S.---, 138 S. Ct. 2567, 2569-70 (2018) (Breyer, J., dissenting from the denial of certiorari) (specifically addressing Mississippi's death sentencing practices), *Reed v. Louisiana*, 137 S. Ct. 787, *reh'g denied*, 137 S. Ct. 1615 (2017) (Breyer, J. dissenting from denial of certiorari); *Tucker v. Louisiana,* 136 S. Ct. 1801, *reh'g denied*, 137 S. Ct. 16 (2016) (Breyer, J., dissenting from denial of certiorari)

Even this Court's majority holdings have had occasion to remind us that this experiment is about more than just deciding legal niceties about particular individual cases, or discerning whether there is *some* basis on which a state may elect to put someone to death. It implicates who we are as a people and a nation. Hence, even those who have not yet eschewed it entirely agree that the experimentation must be halted where it transgresses the fundamental values upon which our greatness as a nation rests.

> The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes our Nation's

> commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.

Hall v. Florida, 572 U.S. 701, 724 (2014).

The present Question Presented accords this Court the opportunity to admit that this experiment cannot continue without doing the damage this Court has recognized it is possible to do to our very being as civilized nation. "[T]he Constitution contemplates that in the end [the Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Simmons*, 543 U.S. at 590 (internal quotation marks omitted). The time has come to conclude that the death penalty is unconstitutional and cannot be repaired. This Court can and should grant a Writ of Certiorari to review the death penalty imposed on Petitioner because of an arbitrary, capricious, racially discriminatory and unconstitutional system. It should then strike down the punishment in its entirety and remand this matter to the Mississippi Supreme Court for the imposition of a sentence less than death.

A. The Death Penalty Is "Cruel And Unusual" Punishment.

The Constitution's proscription on "cruel and unusual punishments" protects, at its heart, human dignity. *Hall*, 134 S. Ct. at 2001, *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion). The content of that proscription is not frozen in time, but grows in light of "the evolving standards of decency that mark the progress of a maturing society." *Kennedy*, 554 U.S. at 419 (quoting *Trop*, 356 U.S. at 101).

In *Gregg*, the Court found that "contemporary standards" of decency did not then render the death penalty in all circumstances unconstitutional. 428 U.S. at 175. It noted that 35 States had enacted death penalty statutes in the previous four years, and that juries regularly imposed the punishment. *Id.* at 179-182. Moreover, the Court believed that by providing adequate

guidance, States could ensure that the penalty was administered rationally, and restricted only to the worst offenders. *Id.* at 195.

The *Gregg* experiment has failed. A decisive majority of this country has, by various means, turned its face from capital punishment. And *Gregg's* hope that the punishment of death could be administered rationally and in accord with legitimate penological purposes has proved to be empty, a fatal mistake which this Court must now correct.

1. A national consensus rejects the death penalty.

This Court examines "objective indicia of society's standards" to determine whether a national consensus has emerged deeming a punishment cruel and unusual. *Roper v. Simmons*, 543 U.S. 551, 563 (2005). Every such indication now reveals a widespread consensus against the death penalty.

As of the end of 2018, thirty States have effectively abandoned the death penalty. Twenty of those States have formally abolished the punishment, most recently Washington, in 2018. Three States have "suspended the death penalty" through moratoria and ceased to carry out executions. *Hall v. Florida*, 572 U.S. 701, 716 (2014).[6] The remaining seven States have not carried out an execution "[i]n the past 10 years," *Simmons*, 543 U.S. at 565—and three of them (Kansas, New Hampshire, and Wyoming) have not executed a prisoner in twenty years or longer.[7]

Furthermore, even in those jurisdictions that continue impose death sentences, the practice is "most infrequent." *Graham v. Florida*, 560 U.S. 48, 62 (2010). In 2018, for the fourth

[6] *See* Death Penalty Information Center (DPIC), States With and Without the Death Penalty, https://deathpenaltyinfo.org/states-and-without-death-penalty (last visited 1/10/2019)

[7] *See* DPIC, Number of Executions by State and Region Since 1976 (updated through 12/18/18) https://deathpenaltyinfo.org/number-executions-state-and-region-1976, (last visited 1/10/2019)

year in a row, executions remained below 30, and fewer than 30 new death sentences were imposed. Eight States with the death penalty on the books have administered fewer than five executions in the last decade; in most cases, just one or two.[8] And a "significant majority," *Graham,* 560 U.S. at 64, of those executions that do occur—nearly 85 % over the last five years—are concentrated in just five States: Texas, Oklahoma, Florida, Missouri, and Georgia.[9] Within those States, an overwhelming majority of death sentences are issued by a handful of counties. *See Glossip*, 135 S. Ct. at 2779-780 (Breyer, J., dissenting). In 2017, 31% of the death sentences imposed nationwide originated in only three counties, all located in states where no executions were actually conducted in 2017 or 2018.[10] In 2018, even these jurisdictions saw a drop in the total number of death sentences imposed over the annualized five year average.[11]

Even more striking than the magnitude of the consensus is "the consistency of the direction of change" over the years. *Simmons*, 543 U.S. at 566 (quoting *Atkins v. Virginia*, 536 U.S. 304, 315 (2002)). In the past fifteen years, twelve States (including Nebraska) abolished or suspended the death penalty. Only one, Nebraska, has stepped back from that decision.[12] Five

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[8] *Id.* The States are Arkansas (4), Idaho (2), Indiana (1), Louisiana (1), South Dakota (3), South Carolina (3),Tennessee (4), and Utah (1). *See also* DPIC, *The Death Penalty in 2018: Year End Report, infra* n. 11

[9] *See* DPIC, Number of Executions by State and Region Since 1976, *supra* note 7. Although it remains in the top five executing states because of its past history, Oklahoma has not executed anyone since 2015.

[10] *See* DPIC, *The Death Penalty in 2017: Year End Report, available at* https://deathpenaltyinfo .org/YearEnd2017, (identifying Riverside County, CA (5), Clark County, NV (4), and Maricopa County, AZ (3) as the three top death sentencing jurisdictions in 2017); *See also* DPIC, Executions Database, *supra* note 7.

[11] *See* DPIC, *The Death Penalty in 2018: Year End Report, available at* https://deathpenaltyinfo.org /YearEnd2018.

[12] *See* DPIC, States With and Without the Death Penalty, *supra* note 6. New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), Nebraska (2015), Delaware (2016), and Washington (2018). Colorado (2013), Pennsylvania (2015), and Oregon (2011) remain under moratoria on executions. In 2015, the Nebraska legislature closely overrode a gubernatorial

more have also joined the ranks of states that have conducted no executions for a decade or more.[13]

Meanwhile, the numbers of death sentences and executions throughout the country have plummeted. *See Graham*, 560 U.S. at 62 ("Actual sentencing practices are an important part of the Court's inquiry into consensus."). In 1996, 315 people were sentenced to death; by the end of 2018, that number had fallen by 87%.[14] Likewise, the number of executions has fallen by nearly 80%, from 1999, when 98 persons were executed.[15] In just the last five years, the numbers of death sentences have dropped by more than half, and executions by nearly that much.[16]

In short, the death penalty has become a rare and "freakish" punishment. Gregg, 428 U.S. at 206. The frequency of its use "in proportion to the opportunities for its imposition" is infinitesimal. Graham, 560 U.S. at 66. Out of over 10,000 individuals arrested for homicide offenses each year, fewer than two-tenths of one percent ultimately receive the punishment of death. In Mississippi, who ends up in that infinitesimal minority is the product of arbitrary geographical accident, and the race of the victim.

2. The death penalty is routinely, pervasively, arbitrarily and discriminatorily imposed based on considerations irrelevant to a person's culpability, and cannot be conformed to the requirements of the Eighth Amendment laid down in Gregg.

Numerous independent studies – some commissioned by States themselves – have

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veto to enact abolition legislation. The penalty was reinstated after a referendum to repeal that legislation passed on the same ballot as the November, 2016 presidential election.

[13] *See* DPIC, Number of Executions by State and Region Since 1976, *supra* note 7. The States are California (*last execution in* 2006), Montana (2006), Nevada (2006), and North Carolina (2006), Kentucky (2008).

[14] *See* DPIC, Death Sentences By Year: 1976-2017, https://deathpenaltyinfo.org/death-sentences-year-1977-present (last visited 1/10/2019)

[15] *See* DPIC, Executions By Year https://deathpenaltyinfo.org/executions-year

[16] *See* DPIC, Death Sentences by Year, *supra* note 14.

demonstrated that the death penalty is routinely and pervasively imposed based on considerations irrelevant to a person's culpability. *See* Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 Cardozo L. Rev. 1227, 1244-256 (2013); *Glossip v. Gross*, --- U.S. ---, ---, 135 S. Ct. 2726, 2760-63 (2015) (Breyer, J., dissenting) (citing geography, race, gender, resources, and politics as meaningful contributors to this problem.). The facts undergirding the present Petition exemplify the most troubling and egregious of them.

a. Geography arbitrarily determines – and determined in this case –who from among all the people convicted of death punishable crimes should "win" the death sentence lottery

One of the principal determinants of whether a defendant will be sentenced to death is typically not his blameworthiness, but – as is the situation in the instant matter – the county in which he commits his crime. *Jordan v. Mississippi*, ---U.S.---, 138 S. Ct. 2567, 2569-70 (2018) (Breyer, J., dissenting from the denial of certiorari) (specifically addressing the Mississippi Second District as a geographically arbitrary death penalty "hotspot."); *Reed v. Louisiana*, 137 S. Ct. 787, *reh'g denied*, 137 S. Ct. 1615 (2017) (Breyer, J. dissenting from denial of certiorari) ("The arbitrary role that geography plays in the imposition of the death penalty, along with the other serious problems I have previously described, has led me to conclude that the Court should consider the basic question of the death penalty's constitutionality."); *Tucker v. Louisiana,* 136 S. Ct. 1801, *reh'g denied*, 137 S. Ct. 16 (2016) (Breyer, J., dissenting from denial of certiorari) ("Tucker may well have received the death penalty not because of the comparative egregiousness of his crime, but because of an arbitrary feature of his case, namely, geography "); *Glossip*, 135 S.Ct., at 2761 (Breyer, J., dissenting) ("In 2012, just 59 counties (fewer than 2% of counties in the country) accounted for *all* death sentences imposed nationwide"). Scholars are in accord.

Shatz & Dalton, *supra*, at 1253-56; *see also, e.g.,* John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. Empirical Legal Stud. 637, 673 (2014). Researchers have been unable to find any meaningful correlation between the heinousness of a person's offense and the likelihood he will receive a capital sentence. *See, e.g., id.* at 678-679.

The county and circuit court district where Ambrose was tried and sentenced to death is a prime example of this. Since it enacted its post-*Furman* death penalty statutes, the Second Circuit Court District of Mississippi, the district in which this case arose, has obtained 33 death sentences on 28 people.[17] This is the largest number of death sentences of any Circuit Court district in the State. *See* Pet. App. D (Spreadsheet of Mississippi Death Sentences Imposed (with Circuit Court District designation), October 5, 1976 – December 15, 2017).[18] It beats out by five the second place finisher, the Seventh Circuit Court District, where a total of 26 death sentences were meted out to 25 people during the same time period.[19] The Seventh consists only of a single county, Hinds County, where Mississippi's largest city, Jackson, is located, and also includes suburban, rural and small town areas in the parts of Hinds County outside of Jackson. The Second District includes three counties, two that are largely suburban, rural or small town, and one that is home to Mississippi's adjacent second (Gulfport) and fifth (Biloxi) largest cities.

[17] Four people sentenced to death initially had death sentences reversed on appeal (one of them two times) but received the same sentence when the penalty was retried, so these individuals each account for two (and in one case, three) of the total death sentences identified. There is also a defendant who received two death sentences in the same trial where two victims were involved.

[18] Appendix D to this Petition is created from data collected and maintained by the Office of the State Public Defender pursuant to Miss. Code. Ann. § 99-18-15, *available at* http://www.ospd..ms. gov/CapDefSentences.htm

[19] One person had his death sentence reversed, but received the same sentence at the subsequent sentencing retrial, thus counting for two sentences, but only one person, in the Seventh District.

According to the United States Census, population numbers in the two districts are not dissimilar.[20] This might, on first glimpse make it unsurprising that the Second and Seventh Districts had similar numbers of death sentences returned during the relevant period. But according to the FBI, which has been collecting and compiling Uniform Crime Reporting statistics from the law enforcement agencies serving localities since 1985, the numbers of murders and other non-negligent homicides in the Seventh Circuit Court District has been dramatically higher than in the Second.[21]

As is set forth in Appendix E to this Petition, the publically available data maintained by the FBI shows that the three participating law enforcement agencies in the Seventh Circuit Court District (the municipal police departments of Jackson and Clinton, and the Hinds County Sheriff's Office) reported a total of 1688 murders and non-negligent homicides in the Seventh District between the commencement of reporting in 1985 and 2014, the last year in which this data is made available online by the FBI. Pet. App. E. That is over five times the number of murders and non-negligent homicides reported during the same period by the five participating law enforcement agencies from the Second Circuit Court District making such reports (the municipal police departments of Biloxi, Gulfport and Long Beach, and the Harrison and

[20] Both Districts have at all times had populations of around 200,000. At the beginning of the relevant time – when the 1980 census was done – the Seventh district had a larger total population than the Second, 251,000 to 191,000) That margin has consistently narrowed between 1976 and 2010 as the Second District gained population in its two major cities while the Seventh saw significant outmigration from Jackson to suburbs in adjoining counties located in other circuit court districts. In the 2010 census the total population of the Second district finally surpassed that of the Seventh by approximately 2400 people. See United States Census 1980; https://www2.census.gov/prod2/decennial /documents /1980/1980censusofpopu8011u_bw.pdf; 1990, https://www2.census.gov /library/publications /decennial/1990/cp-1/cp-1-26.pdf; 2000, https://www.census.gov /prod/2002pubs/c2kprof00-ms.pdf; 2010, https://www.census.gov/prod/cen2010/cph-2-26.pdf.

[21] The FBI has created an online database containing information on violent crimes, including particularly homicides and non-negligent manslaughters that are reported by local jurisdictions commencing in 1985 and concluding with the most recent reporting year, 2014. https://www.bjs.gov/ucrdata/index.cfm.

Hancock County Sheriff's Offices). There were only a total of 310 murders and non-negligent homicides reported in the Second District between 1985 and 2014. Hence, despite the similarity in total populations, if the death sentences for homicides were proportional to the rate at which homicides are reported in each district, the expected number of death sentences in the second district during this period would likely be five or six such sentences, rather than the record-setting 32 that were actually imposed.

The Second Circuit Court District's arbitrary status as a Mississippi death penalty hotspot becomes particularly apparent if one looks at the downward trend in imposition of the death penalty in Mississippi over the years since *Furman*. Regardless of how one looks at the data, the Second Circuit Court District comes out as the death sentencing leader, and has, indeed, widened its lead considerably, both in actual numbers and in the proportion of all the death sentences in Mississippi that it represents, particularly in comparison to its former number two, the Seventh.

Since 2000, Mississippi has sentenced only 30 people (one of them twice) to death sentences that have survived appellate and post-conviction review as of the date this brief is submitted -- an average of less than two a year. Eight (including the one imposed on Petitioner in the present case) – or over a quarter– were from the Second Circuit Court District. Only two were from the Seventh. *See* Pet. App. D.[22] In contrast, in the 33 years between *Furman*, and the turn of this century, a total of 189 death sentences were imposed, a rate of between five and six per year statewide. The Second District's 25 death sentences during those earlier years – though the largest in absolute number – still represented only a little over one-eighth of the total. *Id.*

Indeed, the Second District's absolute "lead" in the number of death sentences its

[22] Appendix D lists a total of 45 death sentences imposed since 2000, two on the same person after the first was reversed on appeal. Fourteen other sentences (or the convictions undergirding them) have been set aside and the person not resentenced to death as of the date of this Petition. *See* Pet. App. E. (prepared from Pet. App. D and data available at http://www.ospd.ms.gov/CapDefInfo.htm).

prosecutors have elected to seek has grown even larger as more and more prosecutors in other Circuit Court Districts have exercised their discretion and elected not to seek such sentences even when they were available.[23] Between 1976, when the first death sentence was returned under Mississippi's post-*Furman* capital sentencing protocols, and the year 2000, death sentences were obtained by prosecutors in all 22 Circuit Court Districts presently existing in Mississippi. Pet. App. D. Since 2000, however, no death sentences have been imposed in nearly a third of the circuit court districts in Mississippi. *Id.* This paints an even clearer picture of the Second District as one of Mississippi's geographically arbitrary death penalty hotspots.

The present case involves exactly this question. The felony murder for which Ambrose was convicted would not ordinarily have even been prosecuted as a death penalty matter in most locales within Mississippi or in other death penalty jurisdictions. Granting the Writ sought in the instant Petition will accord this Court the opportunity to address and rectify the unconstitutional geographic arbitrariness of the already rare and "freakish" imposition of the death penalty in contemporary America. *Gregg,* 428 U.S. at 206.

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[23] The importance of prosecutorial discretion in the arbitrary existence (or elimination) of death penalty hotspots is not to be gainsaid. *See, e.g.* Tolson, Mike, *A new era of the death penalty in Houston, DA Kim Ogg brings a 'reform mentality' and 'progressive agenda,'* Houston Chronicle, December 20, 2017 ("With a new boss in the corner suite and different priorities unfolding, the local district attorney's office no longer stands out as a tough domain where prosecutors earn their spurs by packing Houston's meanest killers off to death row.") *available at* http://www .houstonchronicle.com/local/gray-matters/article/A-new-era-of-the-death-penalty-in-Houston-12444244.php. *See also* DPIC, *The Death Penalty in 2018: Year End Report, supra* n.11 That the prosecutors in the Second Circuit Court District of Mississippi continue to earn their spurs by seeking the death penalty more frequently than some of their counterparts in, say, Houston, Texas or Jackson, Mississippi, is also reflected in the fact that in addition to the cases they won a death sentence in since 2000, there have also been at least four other cases during that time where the DA sought a death sentence, but did not obtain one. *Radau v. State*, 152 So. 3d 1217, 1220 (Miss. Ct. App. 2014) (life sentence without possibility of parole on conviction of capital murder for robbery felony murder when the jury was unable to unanimously agree on sentencing verdict); *Leagea v. State*, 138 So. 3d 184, 185 (Miss. Ct. App. 2013)(same); *Minter v. State*, 64 So. 3d 518, 519 (Miss. Ct. App. 2011) (same on sexual assault felony murder and robbery) *Husband v. State*, 23 So. 3d 550, 553 (Miss. Ct. App. 2009) (Unanimous jury verdict imposing sentences of life without possibility of parole for murder of two police officers)

b. Racial discrimination is, and was in the present case, another invidious determinate of who receives a death sentence in Mississippi and the nation as a whole.

Robert Trosclair, the victim of the crime for which Ambrose was sentenced to death, was white. Ambrose is black. This fact, especially in conjunction with the happenstance of locale, was as likely to predict the sentence Ambrose received as any other facts related to the actual crime or Ambrose himself.

For decades studies have consistently found that the race of the victim is a critical factor in predicting whether the perpetrator will be sentenced to death. Shatz & Dalton, *supra,* at 1246-51; *see, e.g.,* Raymond Paternoster, et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999*, 4 Md. J. on Race, Religion, Gender, and Class 1, 35 (2004) (study commissioned by Maryland governor). Mississippi is no exception to this. Seventy-five percent of all the death sentences imposed in Mississippi since 1977 have been for crimes that involved one or more white victims, even though Mississippi has at all times during this period been less than 64% white, and that percentage has been shrinking with each census. Pet. App. D.. *See also* United States Census 1980; https://www2.census.gov/prod2/decennial /documents/1980/1980censusofpopu8011u_bw.pdf; 1990, https://www2.census.gov/library /publications /decennial/1990/cp-1/cp-1-26.pdf; 2000, https://www.census.gov/prod/2002pubs /c2kprof00-ms.pdf; 2010, https://www.census.gov/prod/cen2010/cph-2-26.pdf.

Thirty years ago, perhaps hoping that racial discrimination was on the wane in society as a whole, this Court declined to find this an Eighth Amendment violation standing alone, *McCleskey v. Kemp*, 481 U.S. 279 (1987). The time has come to revisit this important question. Not only does this alarming racial disparity persist, but this Court has recently recognized the insidious effect that racial discrimination has not only on individuals whose sentences are

infected with it, but also on the justice system as a whole. In *Buck v. Davis*, this Court abandoned the tone of *McCleskey*, and characterized capital sentencing infected with racial discrimination as

> [a] disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle.
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> ***
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> "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979). Relying on race to impose a criminal sanction "poisons public confidence" in the judicial process. *Davis v. Ayala*, 576 U.S. ——, ——, 135 S.Ct. 2187, 2208, 192 L.Ed.2d 323 (2015). It thus injures not just the defendant, but "the law as an institution, ... the community at large, and ... the democratic ideal reflected in the processes of our courts." *Rose*, 443 U.S. at 556, 99 S.Ct. 2993 (internal quotation marks omitted).

--- U.S. ---, 137 S. Ct. 759, 778 (2017).

This language markedly contrasts with the concern undergirding *McCleskey* that to condemn this kind of discrimination in death penalty matters might "throw[] into serious question the principles that underlie our entire criminal justice system." 481 U.S. at 315. Instead, it suggests that the principles of the criminal justice system may be in even more serious jeopardy if the scourge of racial discrimination in the system is NOT eliminated. And this new attitude cannot be attributed to mere changes in personnel on the Court. It is, rather, built on an additional three decades of experience with a death penalty system that seems unable to shake the invidious influence of race upon how capital punishment is, in the real world, actually being dispensed in this country. This Court's growing concern with the systemic problems of racial discrimination in the administration of the death penalty heightens the enormity of Mississippi's failure to give anything more than two sentences of *en passant* consideration to this important constitutional question. Pet. App. A at ¶ 260. It also invites intervention from this Court to do what Mississippi failed to do by granting the Writ sought in this Petition.

c. *Because of the inherent arbitrariness in its application, the death penalty simply cannot meet the dual Eighth Amendment requisites of serving only legitimate penological purposes and of meaningfully narrowing the crimes and offenders against whom it is sought and imposed.*

The Eighth Amendment commands that a punishment have a legitimate penological purpose. Without that, it is necessarily cruel and unusual. *Kennedy*, 554 U.S. at 441 (2008) (citing *Gregg*, 428 U.S. at 173, 183, 187; *Atkins*, 536 U.S. at 319; *Enmund v. Florida*, 458 U.S. 782, 798 (1982). A death sentence under those circumstances is a "pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." *Furman v. Georgia,* 408 U.S. 238, 312 (1972)

The only social purposes for the death penalty cognizable under the Eighth Amendment are "retribution and deterrence of capital crimes by prospective offenders." *Gregg*, 428 U.S. at 183. The Eighth Amendment also commands that even with such a purpose, the death penalty must "be limited to those offenders who commit a narrow category of the most serious crimes *and* whose extreme culpability makes them the most deserving of execution." *Kennedy,* 554 U.S. at 420 (emphasis supplied). Neither of these constitutional requirements is being met by the death penalty in practice today.

As to the first requirement, there has never been any objective evidence that the death penalty deters murder in any significant way when compared to lengthy imprisonment. That evidence was nonexistent at the time of *Furman*. *See* 408 U.S. at 301, 307, 347-54, 395-96. It remains so today. *See Baze v. Rees*, 553 U.S. 35, 79 (2008) (Stevens, J., concurring in judgment) ("The legitimacy of deterrence as a justification for the death penalty is also questionable, at best. Despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders. In the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe

and irrevocable punishment.") (footnote omitted).[24] Even without resort to scholarly statistical analysis, however, it has long been recognized by this Court that punishment as infrequently imposed or carried out as the death penalty can serve little, if any, deterring purpose. As Justice White articulated in *Furman,* "the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system." 408 U.S. at 311. Justice White's words have never rung more true than when applied to the death penalty in practice today.

Nor, given the exceedingly long times that people are incarcerated on death row without being executed, *See, e.g*., *Jordan v. Mississippi*, ---U.S.---, 138 S. Ct. 2567, 2568-69 (2018) (Breyer, J., dissenting from the denial of certiorari), and the large number of those originally condemned to die who ultimately have had their sentences converted to a life sentence at some point during that incarceration can it realistically be said that a death sentence is any more retributive than a sentence of life in prison without parole would be. Moreover, as this Court has repeatedly recognized, there are some people guilty of even heinous crimes for whom the ultimate retribution would be in all instances be constitutionally prohibited. *Simmons*, 543 U.S. at 572, 574 ("[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished."), *Atkins*, 536 U.S. at 319. The ultimate

[24] Some studies have claimed to measure an effect of executions on the number of homicides committed, *See*, *e.g.*, Dezhbakhsh, Hashem, Rubin, Paul and Shepherd, Joanna, "*Does Capital Punishment Have a Deterrent Effect? New Evidence from Post-Moratorium Panel Data,*" 5 American Law and Economics Review 344 (2003); Mocan, H. Naci and Gittings, R. Kaj, "*Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment,"* 46 Journal of Law and Economics 453 (2003). However, the methodologies used in them have come under attack. Because the studies have not isolated the additional deterrent effect of a potential death sentence over one of lengthy imprisonment and are unable to accurately model the decision-making processes of potential killers, the conclusions of these studies are incomplete and unreliable. Nagin, Daniel S., and Pepper, John V., eds, "*Deterrence and the Death Penalty,"* Committee on Deterrence and the Death Penalty; Committee on Law and Justice; Division on Behavioral and Social Sciences and Education; National Research Council (2012). This study expressly concluded that "research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates."

retribution against a person with diminished culpability would "violate[] his or her inherent dignity as a human being." *Hall*, 134 S. Ct. at 1992. Even where the diminished culpability is not categorical, this Court nonetheless understands that retribution by death may not be acceptable. *Porter v. McCollum*, 558 U.S. 30, 43-44 (2009).

The only possible way to avoid this would be if the death penalty were, as this Court has consistently held that the Eighth Amendment requires, *actually* reserved for only the most aggravated homicides, *Kennedy,* 554 U.S. at 420; *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) committed by the most culpable offenders, *Simmons*, 543 U.S. at 568; *Atkins*, 536 U.S. at 319. However, the experience since *Gregg* demonstrates that the death penalty – though undeniably rare – has not, as Justice Breyer notes in his *Glossip* dissent, actually been so limited, specifically because of the arbitrariness with which it is imposed. "Despite the *Gregg* Court's hope for fair administration of the death penalty, 40 years of further experience make it increasingly clear that the death penalty is imposed arbitrarily, *i.e.,* without the 'reasonable consistency' legally necessary to reconcile its use with the Constitution's commands." *Glossip*, 135 S. Ct. at 2760 (*citing Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).[25]

Even 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

[25] Indeed, even for that rare condemned person who may fall into the" worst of the worst" category, the quality of retribution to which he or she is subjected may in and of itself be unconstitutionally cruel and unusual. A death row prisoner is typically imprisoned for "20 years or more in a windowless cell no larger than a typical parking spot for 23 hours a day; and in the one hour when he leaves it, he likely is allowed little or no opportunity for conversation or interaction with anyone." *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015) (Kennedy, J., concurring). Lengthy terms in solitary confinement cause "numerous deleterious harms" to an inmate's physical and mental health. *Glossip,*135 S. Ct. at 2765; *see also* Haney, Craig, *Mental Health Issues in Long–Term Solitary and "Supermax" Confinement*, 49 Crime & Delinquency 124, 130 (2003) (solitary confinement can cause prisoners to experience "anxiety, panic, rage, loss of control, paranoia, hallucinations, and self-mutilations"). This raises significant Eighth Amendment questions of its own. *See*, *e.g.*, *Ayala*, 135 S. Ct. at 2210 (Kennedy, J., concurring); *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting denial of certiorari).

who falls into that narrow category. *See, e.g., Simmons*, 543 U.S. at 573 ("[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course.). Despite the numerous procedural safeguards in place, a substantial proportion of the executed and condemned consists of those who do not fall into the categorical exclusions of *Simmons* or *Atkins* but who do suffer or suffered from other mental defects or deficiencies, or addiction, or an abusive upbringing, or other things that would render death as neither a just nor a constitutionally proportionate sentence.[26] Mississippi has, in the past, corrected at least two such jury errors. *Coleman v. State*, 378 So. 2d 640 (Miss. 1979) (setting aside, prior to *Simmons*, death sentence as disproportionate due to age (16) and circumstances of offense); *Edwards v. State*, 441 So. 2d 84, 92-93 (Miss. 1983) (Hawkins, J. concurring) (setting aside death sentence and remanding for entry of sentence of life where mental health issues, apparently not accorded sufficient weight in mitigation to preclude a death sentence, attended the defendant). This suggests that, in general, the things that actually impair an individual's moral culpability have been routinely improperly regarded by sentencing juries as increasing it. *Penry v. Lynaugh,* 492 U.S. 302, 324 (1989) (noting that mitigation evidence can be "a two-edged sword: it may diminish his blame-worthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future"). But many more such errors can and do occur, and not get corrected. The only way to prevent their occurrence in the future is to simply eliminate the opportunity for them to occur.

d. There is an unacceptable risk of executing the innocent.

The risk of "sudden descent into brutality, transgressing constitutional commitment to

[26] Smith, Robert J., Cull, Sophie, and Robinson, Zoe, *"The Failure of Mitigation?"* Hastings Law Journal, Vol. 65: 1221 (June 2014).

decency and restraint" *Kennedy*, 554 U.S. at 420, is nowhere more extreme than in the well-established fact that the criminal justice apparatus itself does not, and cannot, entirely prevent conviction of the innocent, or remedy such convictions if they occur.

In the past 45 years, the advent of more reliable forensic techniques—particularly DNA evidence – has revealed that innocent people are sentenced to death with startling frequency. The evidence on this point is unequivocal. Since 1989, 121 individuals who were sentenced to death have been formally exonerated of their crimes of conviction, seven in the last two years, alone.[27] Since 1973, approximately 4% of death row inmates have been determined to be actually innocent. *See* Gross, et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 Proc. Nat'l Acad. Sci. 7230 (2014). This trend, as Justice Breyer noted at the end of the last term of this Court, shows no sign of abating, in Mississippi or elsewhere.

> I note that in the past three years, further evidence has accumulated suggesting that the death penalty as it is applied today lacks "requisite reliability." *Glossip*, 576 U.S., at ——— – ———, 135 S.Ct., at 2755 (BREYER, J., dissenting). Four hours before Willie Manning was slated to die by lethal injection, the Mississippi Supreme Court stayed his execution and on April 21, 2015, he became the fourth person on Mississippi's death row to be exonerated. Id., at ——, 135 S.Ct., at 2755; National Registry of Exonerations (June 25, 2018), https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx. Since January 2017, six death row inmates have been exonerated. See DPIC, Description of Innocence, https://deathpenaltyinfo.org/ innocence-cases# 157. Among them are Rodricus Crawford, Rickey Dale Newman, Gabriel Solache, and Vicente Benavides Figueroa, whose exonerations were based upon evidence of actual innocence. See National Registry of Exonerations (June 25, 2018), https://www.law.umich.edu/ special/exoneration/Pages/detaillist.aspx .

Jordan, 138 S. Ct. at 2571 (Breyer, J., dissenting from denial of certiorari).

There is also little doubt that States have put some such individuals to death. Multiple, painstaking studies have found "overwhelming" evidence that a number of executed prisoners

[27] National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/about.aspx (last consulted 12/6/18).

were actually innocent. *See Glossip,*135 S. Ct. at 2756 (Breyer, J., dissenting) (internal quotation marks omitted). And too many close calls have occurred—including last minute stays by this Court, eleventh-hour reprieves by a governor, or exoneration after decades on death row—to believe that more individuals were not executed before evidence of their innocence came to light. *Id.* at 2757, 2766 (giving examples).

Executing innocents is intolerable. Because of the "finality" of death, the Constitution insists upon "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976). Thus, in *Atkins*, the Court found that the "risk of wrongful executions" provided an important reason why the intellectually disabled could not constitutionally be executed. 536 U.S. at 320-321; see *Hall,* 134 S. Ct. at 1993 (same).

The Court "cannot ignore" that the same risk pertains to all offenders. As the evidence makes clear, every type of defendant—mentally competent or not—faces a substantial risk of receiving an improper sentence of death. The problems that cause such errors are regrettably common: defendants may be induced to give false confessions, receive poor quality defense counsel, face prosecutorial misconduct or suffer from myriad other errors. *See Glossip*, 135 S. Ct. at 2757-58 (Breyer, J., dissenting). The unique dynamics of capital trials—where the pressure to obtain a conviction is enormous—make such problems all the more likely to lead to an erroneous conviction.[28] Perhaps the Constitution can tolerate a risk of wrongful conviction

[28] John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 Cornell L. Rev. 157, 170 (2014) ("The possibility of being sentenced to death, even if it is remote, can lead defendants, even innocent ones, to plead guilty to get the death penalty 'off the table.'"); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 63 & n.197 (1987) (noting five cases in which innocent defendants pled guilty in order avoid the risk of a death sentence).

outside the capital context, where the penalty is not irreversible and justice without error may be unattainable. But "death is different:" States must ensure the penalty is reliably imposed, and decades of evidence reveal that they cannot. *Gregg*, 438 U.S. at 188.[29]

B. The time has come to decide the constitutionality of the death penalty, and the present case is a suitable vehicle for doing so.

It is time for the Court to revisit the death penalty's constitutionality. And Petitioner's circumstances, particularly the racial discrimination and geographical accident that landed him on death row awaiting execution rather than being incarcerated in general population for life or for a term of years – as is almost everyone else convicted of homicide under the circumstances of this case – is a proper vehicle in which to do so.

In *Gregg*, this Court issued a provisional judgment upholding capital punishment, based on "contemporary standards" and the "evidence" available to it at the time. 428 U.S. at 175, 185. In the four decades since, the Court has never reexamined the question. It has noted only that the question was "settled" under existing precedent. *Baze v. Rees*, 553 U.S. 35, 47 (2008) (plurality opinion); *see id.* at 63 (Alito, J., concurring) ("[T]he constitutionality of capital punishment is not before us in this case, and therefore we proceed on the assumption that the death penalty is constitutional.").

The nature of the rights protected by the Eighth Amendment makes clear that *Gregg's* judgment is not static. The "standard of extreme cruelty * * * necessarily embodies a moral judgment" whose application "must change as the basic mores of society change." *Graham*, 560 U.S. at 58 (internal quotation marks omitted). As a result, this Court has often revisited prior

[29] *See, e.g.,* Robert J. Smith et al., *The Failure of Mitigation*, 65 Hastings L. J. 1221, 1228-229 (2014) (finding 87% of the last 100 executed offenders had characteristics akin to juveniles or the intellectually disabled); John H. Blume et al., *An Empirical Look at Atkins v. Virginia and Its Application in Capital Cases*, 76 Tenn. L. Rev. 625, 628-629 (2009) (discussing success rates of *Atkins* claims).

decisions upholding the constitutionality of the death penalty as new consensus and new insights emerge. In *Atkins*, the Court overturned the judgment in *Penry* that States may execute the intellectually disabled, finding that "standards * * * ha[d] evolved" in the intervening 13 years and reinforced its judgment that the penalty was impermissible. *Simmons*, 543 U.S. at 563. Three years later, in *Simmons*, the Court overturned its judgment in *Stanford v. Kentucky*, 492 U.S. 361 (1989), allowing the execution of juveniles, finding that "indicia [of societal consensus] ha[d] changed" and that in the Court's own "independent judgment" the penalty was unacceptably cruel. *Simmons*, 543 U.S. at 574.

The changes wrought since *Gregg* are far more substantial. *Gregg* relied on the fact that 35 States (including Mississippi) "ha[d] enacted new statutes that provide for the death penalty," and that juries regularly sentenced individuals to death, including 254 persons in the two years after *Furman* alone. 428 U.S. at 179-182. Since then, a majority of States have abandoned capital punishment, and the penalty has withered in every State. *See supra* Section A.1. Equally significant, this Court has repeatedly rendered its independent judgment that the pillars on which *Gregg's* judgment rested—that the death penalty is capable of being imposed non-arbitrarily, reliably, and in a humane manner—were severely flawed. 428 U.S. at 206. As the Court made clear in *Kennedy,* "[d]ifficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use" to a dwindling class of persons and offenses. 554 U.S. at 447. Moreover, definitive evidence—which this Court expressly noted it lacked at the time it issued *Gregg*—now confirms that these problems are endemic to the death penalty wherever it is administered.

The instant case presents a particularly glaring example of geographical arbitrariness and racial discrimination that determines who is, and is not, sentenced to death, in an era where the

trend is away from employing the death penalty as the preferred punishment for the tragic, but nonetheless rather ordinary, felony murders that occur regularly in jurisdictions nationwide.

This case also presents an ideal procedural vehicle for this Court to take on this question. The case comes to the Court on direct review with the constitutional issues well-preserved. As a result, the vehicle problems that sometimes afflict criminal cases coming from state courts on post-conviction review are absent here: The AEDPA standard of review is inapplicable, so the Court can get straight to the merits without deference; there is no independent and adequate state ground; and the constitutional question was pressed and passed on below.

II. Mississippi's capital sentencing statutes unconstitutionally fail to sufficiently narrow eligibility for a death sentence because they permitted Petitioner to be sentenced to death for a crime that required no specific criminal intent of any kind and without any sentencing finding of the highly culpable mental state required by the Eighth Amendment.

Even if this Court declines to review this matter on the first Question Presented, it should do so on the second. The majority opinion of the Mississippi Supreme Court upholding the death sentence imposed upon Mr. Ambrose decided an important Eighth Amendment question in a way that conflicts with this Court's decisions in *Enmund v. Florida*, 458 U.S. 782, 798 (1982) and *Tison v. Arizona,* 481 U.S. 137 (1987), and did so over a dissenting opinion on that point. *See* Pet. App. A at ¶¶ 278-287. Alternatively, the Mississippi Supreme Court majority construed *Enmund* and *Tison* a way that presents an important, but unresolved, constitutional question about how thin the states, in their experiments with implementing the death penalty, may stretch the fabric of *Enmund* and *Tison* and still comply with the Eighth and Fourteenth Amendments.

In *Enmund* and *Tison* this Court addressed the constitutionality of a death sentence for a person convicted of felony murder, but who was not found to have themselves actually killed. It expressly announced it was not creating any bright line requirements, but was, rather, setting

forth guidelines for the States to follow in assessing the proportionality of a death sentence in such cases. *Id*. at 158. However, as this Court has cautioned, allowing the states to be "laboratories for experimentation" with how to comply with the Eighth Amendment is subject to constitutional limits. "[T]hese experiments may not deny the basic dignity the Constitution protects." *Hall v. Florida*, 572 U.S. 701, 724 (2014).

One of those basic dignities is that the government may not take the life of someone for a crime where a life was not taken, *Kennedy v. Louisiana*, 554 U.S. 407 (2008). And even where a life was taken, as in the crime of felony murder, the government may not take the life of even a major a participant in the felony who did not himself actually kill unless the sentencing fact-finder determines that the participant, *also* had a "highly culpable mental state" with respect to taking human life, *Enmund,* 458 U.S. at 788 (citing a broad societal consensus based on the weight of legislative and community opinion); *Tison*, 481 U.S. at 157 (same).

In *Enmund*, this Court identified an *intent* to kill or an *intent* that lethal force would be employed as sufficiently culpable mental states to pass Eighth Amendment muster and permit a death sentence. 458 U.S. at 797. In *Tison*, this Court concluded that under certain circumstances intentionality *per se* was not required, but reiterated that a "highly culpable mental state" was. 481 U.S. at 157. It affirmatively rejected the Arizona Supreme Court's attempt to make the mere foreseeability inherent in participating in any violent felony such a "highly culpable mental state," specifically finding that constitutionally unacceptable because it was "little more than a restatement of the felony-murder rule itself." *Id.* at 151. Rather, this Court held that the only way that it would be "sufficient to satisfy the *Enmund* culpability requirement" was if the major participant in the felony "combined" that participation "with reckless indifference to human life" *Id.* at 158. Once again, this Court declined to create a bright line rule, and instead trusted the

States to "implement the[] principles and holding[s]" of *Tison* and *Enmund. See Hall,* 572 U.S. at 709.

But this Court did not leave the States without guidance on the parameters of that implementation. By condemning the approach of the Arizona Supreme Court in *Tison*, this Court made it clear that "reckless indifference" requires significantly more than the danger of lethal force that inheres in any participation in a violent felony. Instead, to be the kind of "highly culpable mental state . . . that may be taken into account . . . in making a capital sentencing judgement" on any particular defendant, this Court requires a finding that the defendant had been "*knowingly* engaging in criminal activities *known* to carry a grave risk of death." *Tison,* 481 U.S. at 157-58 (emphasis supplied). Neither the Mississippi statute meant to implement these requirements, nor the jury verdict based upon it in the present matter, meets this basic requirement.

Mississippi elected to implement the principles and holdings of *Enmund* and *Tison* with a statutory requirement that sentencing juries make a unanimous threshold *Enmund/Tison* finding beyond a reasonable doubt before a death sentence may be imposed. Miss. Code Ann. § 99-19-101(7). The statute requires that the jury find any one (or more) of the following four things: (a) The defendant actually killed; (b) The defendant attempted to kill; (c) The defendant intended that a killing take place; or (d) The defendant contemplated that lethal force would be employed. *Id.* There is little doubt that the findings allowed by (a), (b) & (c) of the statute are sufficient to meet *Enmund's* intentionality requirements, but in the present case, the sentencing jury rejected those three options and found only the fourth one set forth in subparagraph (7) (d) of the statute. C.P. 518-20.

The finding allowed by the Mississippi Legislature in (d), standing alone, complies with

neither *Enmund* nor *Tison*. *Enumnd* held that, in the absence of actual or attempted killing or intent to kill by the participant, the use of lethal force must have been *intended* by the accomplice if the death penalty was to be justified. 458 U.S. at 797. *Enmund* expressly used the term "contemplated" as it was used in *Gregg v. Georgia*, 428 U.S. 153 (1976), where it was a limiting one, requiring that the mental state of with the non-killing participant was of a nature to influence "the cold calculus that precedes the decision to act." 458 U.S. at 799 (citing *Gregg,* 428 U.S. at 186. In that context, only a conscious or knowing contemplation that lethal force would not merely be threatened in order to accomplish the felony, but that such lethality would likely actually be unleashed will suffice to justify imposition of a death sentence on a non-killing participant in that violent felony. The participation alone does not provide that because, this Court found in *Enmund*, "there is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself." 458 U.S. at 799.

In *Tison*, this Court did not step back from this conclusion. Instead, it restated it by rejecting, as a mere restatement of the felony murder rule, the Arizona Supreme Court's theory that the mere foreseeability that death *could* occur if a lethal weapon was used in connection with the felony was enough to render the non-killing participant eligible for a death sentence. *Tison*, 481 U.S. at 151. It expressly required that the participant "*knowingly* engaging in criminal activities *known* to carry a grave risk of death." *Id.* at 157-58 (emphasis supplied). The only change that *Tison* made to *Enmund* was to acknowledge that the "highly culpable mental state" associated with such knowing felonious conduct could, in some cases, be something short of subjective intent that someone die.

Nor has the landscape for executing non-killing felony murder accomplices changed in a

way that would make Mississippi's no-scienter-required statute acceptable under any evolving standards. At the time of *Enmund*, as this Court found and relied upon in reaching its conclusions in that case, very few death penalty states even permitted sentencing someone death where there was no finding by the jury that the person had actually killed or intended to kill. 458 U.S. at 789. Indeed, Mississippi and Florida were two of only eight of 36 then-death penalty states that permitted a non-killing, non-intending-to kill participant in the underlying felony to be sentenced to death at all. *Id.* at n 5.[30] At the time of *Tison*, though the Court concluded that the Eighth Amendment did not categorically exclude all such persons from receiving the ultimate punishment as long as they did have some other "highly culpable mental state," 481 U.S. at 151, the vast majority of states still did not permit a death sentence for anyone who neither killed nor intended to kill. *Id*. at 174-75 ("three-fifths of jurisdictions do not authorize the death penalty for nontriggerman absent finding he intended to kill") (Brennan. J. dissenting.) That number has not increased in the interim, and indeed, as discussed above in connection with the first Question Presented, the use of the death penalty has dramatically declined since this Court's decision in *Tison*. Indeed, in the past five years there have been no executions three of the eight states identified in *Enmund* –California, Mississippi and Wyoming – and only two of those eight states – Florida and Georgia – are among the top five states executing anyone at all. *See* pp. 9-12 and nn. 6-16, *supra*.

Even in Mississippi it is exceedingly unusual to uphold a death sentence premised only on a § 99-19-101(7)(d) "contemplated the use of lethal force" statutory scienter finding. Apart

[30] Citing Cal. Penal Code Ann. §§ 189, 190.2(a)(17) (West Supp.1982); Fla. Stat. §§ 782.04(1)(a), 775.082(1), 921.141(5)(d) (1981); Ga. Code §§ 26-1101(b), (c), 27-2534.1(b)(2) (1978); Miss. Code Ann. §§ 97-3-19(2)(e), 99-19-101(5)(d) (Supp.1981); Nev. Rev. Stat. §§ 200.030(1)(b), 200.030(4), 200.033(4) (1981); S. C. Code §§ 16-3-10, 16-3-20(C)(a)(1) (1976 and Supp.1981); Tenn. Code Ann. §§ 39-2402(a), 39-2404(i)(7) (Supp.1981); Wyo. Stat. §§ 6-4-101, 6-4-102(h)(iv) (1977)).

from Ambrose's case, there is only one other such sentence that has been upheld since the *Enmund/Tison* scienter statute was enacted. *See Bishop v. State*, 812 So. 2d 934, 949 (Miss. 2002) (upholding a death sentence imposed by a judge after jury sentencing was waived, and only after the appellate court concluded that the conviction rested on undisputed evidence that "Bishop took an active role in the killing" and that "[a] jury could have easily found that Bishop killed [or] intended to kill . . . ." as well as the " 'contemplation' found by the judge."). That is not the case here. That the Mississippi scienter statute permitted Ambrose to receive, and that he received, a death sentence under these circumstances is, thus, unconstitutionally "freakish." *Gregg,* 428 U.S. at 206.

Moreover, among even the eight states that *Enmund* found to permit the execution of those who neither killed nor intended to do so, Mississippi is one of only three – the other two are California and Georgia – that both make felony murder without a *mens rea* as to the killing a death punishable offense *and* double count the identical conduct as an aggravating circumstance that, without more, permits the imposition of a death sentence on the person who is convicted of that no-intent homicide. *See* Miss Code Ann. §§ 97-3-19 (2)(e) (capital felony murder); 99-19-101(5)(d) (aggravating circumstance in the commission of the felony); Cal. Pen. Code § 189) (first degree murder); Cal. Pen. Code § 190.2(a)(17)(special circumstances-felony murder); Ga. Code Ann. § 16-5-1 (c) (2014) (murder), Ga. Code Ann. § 17-10-30(b)(2)(2017) (aggravating circumstances - felony murder, *Brockman v. State*, 739 S.E.2d 332 (Ga. 2013).

Finally, because of its kidnaping jurisprudence, Mississippi is even more of an outlier among outliers, and more wanton and freakish, regarding who its "contemplates the use of lethal force" scienter statute permits to be sentenced to death. Under Mississippi law, when the felony murder is based (as it is in the present case) on a kidnapping, not only does the same no-*mens*-

rea-with-respect-to-the *killing*-conduct both capitalize the crime and aggravate it sufficiently to impose a death sentence, there is also no requirement of any specific *mens rea* with respect to the felony, either. *Burrell v. State*, 183 So. 3d 19, 23–24 (Miss. 2015), *reh'g denied* (Jan. 21, 2016) ("Kidnaping is not a specific intent crime. Therefore, it is sufficient that the surrounding circumstances resulted in a way to effectively become a kidnaping as opposed to the actual intent to kidnap."). Hence, in the instant case, Ambrose's jury was allowed to both convict him of a capital murder and sentence him to death for it *without ever finding any specific criminal scienter of any kind at all*. Instead, when combined with Mississippi's extremely expansive "one continuous transaction" rule that unhinges any connection beyond the temporal between the felony and the killing, *Ronk v. State,* 172 So. 3d 1112, 1129 (Miss. 2015), *cert den*. 136 S.Ct. 1657 (2016) the jury in the present case able to impose that sentence based on the temporal proximity of "surrounding circumstances" even though the jury apparently found he took no principal part, assuming as one must from its statutory scienter finding that it believed his testimony that he neither intentionally kidnaped nor actually used or intended himself to use lethal force against the decedent.

That the Mississippi statute permitted this to occur, Ambrose respectfully submits, places it beyond even the most expansive bounds of this Court's Eighth Amendment requirement that the sentencing process "channel and narrow" the circumstances in which that penalty is used. *Furman v. Georgia*, 408 U.S. 238, 249 (1972) (Douglas, J., concurring); *Id*., at 310 (Stewart, J., concurring). *See also Gregg*, 428 U.S. at 188 (concluding that these statements in *Furman* permit imposition of the death penalty only in cases "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and

capricious action.").

Further, this set of circumstances effectively permitted a death sentence to be imposed as a matter of strict liability in violation of the due process clause of the Fourteenth Amendment. While the Constitution does not entirely forbid the use of strict liability as the basis for criminal responsibility, strict liability criminal prohibitions are generally related to "public welfare offenses" and comport with due process only under strictly "limited circumstances." *Staples v. United States*, 511 U.S. 600, 605-07 (1994) (reiterating that "traditionally, scienter was a necessary element in every crime" and quoting *United States Gypsum Co.*, 438 U.S. at 437, for the principle that "the requirement of some *mens rea* for a crime is firmly embedded" in the common law). *See also Morissette v. United States*, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."). This Court has specifically held in the criminal context that the Fourteenth Amendment places significant limitations upon the scope of conduct for which individuals may be held strictly criminally liable where, as with felony murder, the common law antecedents of criminal liability for that kind of conduct had its origins in non-strict liability prohibitions. *See, e.g., Skilling v. United States*, 561 U.S. 358, 408 (2010) ("Reading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine.").

The present case presents a perfect storm of unconstitutionality that has resulted in the imposition of a death sentence without any finding of a criminal scienter or other "highly culpable mental state" sufficient to allow such a sentence. *Tison*, 481 U.S. at 157. The issue was

fully addressed and disposed of in the Mississippi Supreme Court, Pet. App. A at ¶¶ 74-95 (majority opinion); ¶¶ 278-87 (dissenting opinion). The question is thus squarely presented for review, and rectification, in this Court.

CONCLUSION

For the reasons set forth above. Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Mississippi Supreme Court on each of the Questions Presented.

Respectfully submitted,

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