No. 18-7503

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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ARGUMENT IN REPLY

I. This Court should grant review to decide the first question presented because the death penalty does not and cannot, in practice, ever comply with the Eighth Amendment.

The first question presented asks this Court consider whether, after four decades of experimentation with crafting a constitutionally permissible death penalty under the principles articulated in *Furman*, the time has finally come to assess whether that experiment has failed. Petition for Writ of Certiorari at i (hereafter "Pet."). Petitioner submits that the response to that question should, as at least two members of this Court have already suggested, be "yes." *Glossip v. Gross*, --- U.S. ---. ---, 135 S. Ct. 2726, 2755 (2015) (Breyer, J. dissenting, joined by Ginsburg, J.) *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).

Respondent's Brief in Opposition (hereafter "Opp.") does not make substantive responses to many of the points on which the Petition rests. It does not even attempt to respond to the fact that the death penalty, as it has been implemented over the past four decades, cannot be shown to meet either of the two legitimate penological purposes recognized by this Court, or to the showing in the Petition that the death penalty laws in Mississippi and elsewhere do not meaningfully narrow on whom, or for what homicides, the penalty is actually imposed, Pet. 19-22. *See also Jordan,* 138 S. Ct. at 2570 (Breyer, J., dissenting from the denial of certiorari) (noting that "the statutory criteria States enact to distinguish a non-death-eligible murder from a particularly heinous death-eligible murder and thus attempt to use to identify the 'worst of the worst' murderers are far from uniform.").

Nor does Respondent choose to engage the increasing evidence that death sentences have been imposed by judges and juries upon many who it was later discovered were innocent of the crime of conviction, and that the ultimate punishment has most likely been carried out on wrongfully convicted people. Pet. 22-24. *See also Glossip,* 135 S. Ct. at 2756 (Breyer, J., dissenting from denial of writ of certiorari) (citing the increasing evidence accruing that the death penalty as it is actually practiced lacks the "requisite reliability" demanded by the Eighth Amendment); *Jordan*, 138 S. Ct. at 2571 (Breyer, J., dissenting from denial of writ of certiorari) (same, and noting that this body of evidence had increased in the three years since *Glossip* was decided).

And, as is discussed below, even where it does not entirely ignore an issue, Mississippi's responses evade rather than engage. Contrary to the State's non-responsive, or merely evasive, arguments, now is the time to take up this question, and finally resolve it by ceasing to "tinker with the machinery of death." *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

1. *The Constitutionality of the Death Penalty has not been conclusively settled by this Court*

Mississippi's principal defense on this question is to claim that the constitutionality of the death penalty was finally settled by *Gregg v. Georgia*, 428 U.S. 153 (1976). This basic premise is entirely mistaken. It ignores that *Gregg's* judgment that capital punishment could be imposed constitutionally was, expressly, a provisional one. 428 U.S. at 187. Nor is there any basis to claim that this Court's subsequent jurisprudence has somehow turned the Court's tentative judgment in *Gregg* that the Eighth Amendment dictates of *Furman* could be met, into a conclusive one that they had been.

This Court has never revisited the issue head on; rather, it has been careful to state only that it was proceeding on the premise that *Gregg* was correctly decided. In *Baze v. Rees,* 553 U.S. 35 (2008), for instance, the plurality simply "beg[a]n with the principle, settled by *Gregg*" – and challenged by no party –"that capital punishment is constitutional." *Id*. at 47 (plurality opinion); *see id*. at 63 (Alito, J., concurring) ("As the plurality opinion notes, the constitutionality of capital punishment is not before us in this case, and therefore we proceed on the assumption that the death penalty is constitutional." (emphasis added)). *Glossip*

proceeded on the same unchallenged premise. *See Glossip,* 135 S. Ct. 2726. The Court did not – and could not – conclusively settle what the "[e]volving standards of decency" permit. *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008). *See also Glossip*, 135 S. Ct. at 2755 (Breyer, J., dissenting) ("The circumstances and the evidence of the death penalty's application have changed radically since [*Gregg* and the other cases decided with it]. Given those changes, I believe that it is now time to reopen the question.").

Over the last 40 plus years, this nation's experience with trying to impose and carry out the ultimate punishment, the jurisprudence developed in the course of that experience, and this nation's evolving standards of decency have, as is set forth in the Petition, created a large body of exactly the kind of "more convincing evidence" that *Gregg* anticipated. Pet. 8-25. The time has come for this Court to examine that evidence and conclude that the death penalty cannot be implemented in a way that satisfies the dictates of the Constitution.

2. *Even where Mississippi engages with the issues raised in the Petition, its arguments, at best, establish the need for this Court to decide whether the four decades of constitutional experimentation that commenced with Gregg have established that the death penalty, as implemented, "denies the basic dignity that the Constitution protects."* [1]

Mississippi's attempted rebuttal of the geographical and racial arbitrariness in the use of the death penalty neglects the very things have been the foundation on which Court's death penalty jurisprudence has rested: The empirical experiences that more than four decades of experimentation have provided, and the evolving

[1] *Hall v. Florida*, 134 S. Ct 1986, 2001 (2014)

standards of decency that have developed during that same time period. "The Eighth Amendment is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014) (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)) (internal quotation marks omitted). *See also, e.g., Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008); *Roper v. Simmons*, 543 U.S. 551, 561 (2005), *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002).

Mississippi appears to prefer evasion and misdirection to substantive response. On the issue of racial arbitrariness, Mississippi makes no attempt to deny the uncontradicted empirical evidence that a racial disparity persists in determining what crimes are punished by death: Death sentences continue – despite decades of opportunity to eradicate that disparity – being disproportionately oversought and overimposed where a white person was a victim of the crime relative to cases where the victims are all non-white. Pet. 17-18. It merely claims that *McCleskey v. Kemp*, 481 U.S. 279 (1987), like *Gregg*, need not be revisited in light of the more convincing evidence that has accrued in the decades since *McCleskey* was decided. Opp. 9.

Similarly, Mississippi does not attempt to deny the equally undisputed evidence that geography is increasingly and arbitrarily determining on whom the death penalty is, and is not, sought or imposed. Instead, it rests its opposition to reviewing this question on inapposite and incorrect assertions. Its first is to claim that these facts were never presented to the court below. *See* Opp. 8-9, and n. 5.

This not only evades the issue, but it is not even an accurate representation of the record. This information *was* specifically put before it in support of rehearing the constitutional issue presented here. *See Abdur Rahim Ambrose v. State*, Mississippi Supreme Court No. 2015-DP-1159, Motion for Rehearing and Exhibits A & B thereto (filed August 30, 2018, denied October 18, 2018 (available at https://courts.ms.gov/index.php?cn =82859#dispArea). The Rules of Appellate Procedure governing practice in the Mississippi Supreme Court expressly permit responses to motions for rehearing. Miss. R. App. P. 40 (a). Respondent, however filed none and neither objected to consideration of the information nor made any other reply to the motion in the Mississippi Supreme Court.[2] Moreover, the fact of the increasing geographic concentration of the death penalty – and the places where it is concentrated – is so well established by public records that it is effectively a matter of common knowledge and has been relied upon as recently as last term to call for this Court to address the constitutionality of the death penalty, specifically citing the geographical disparities in Mississippi itself. *Jordan*, 138 S. Ct. at 2570 (quoting *Glossip,*135 S. Ct. at 2755).

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[2] The Mississippi Supreme Court is also where Mississippi's argument that this issue was somehow waived by trial counsel's flattering hyperbole about whether he and his clients had ever been treated personally unfairly due to race by the presiding judge should have been raised by Mississippi's appellate counsel, but was not. Opp. 10-11. This claim is in any event inapposite. It is not in the courtroom *after* the decision to seek the death penalty is made that the racial and geographic arbitrariness complained of occurs. *See* Pet. 16 and n. 23 and authorities cited therein. To the extent that these are attempts to show that this case is not an appropriate vehicle to present this question, Mississippi neglects this Court's jurisprudence. As long as a petitioner has "raised a[n] [Eighth Amendment] claim in the state courts," he can "formulate[ ] any argument [he] like[s] in support of that claim here." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). Indeed, he can "frame the question [presented] as broadly or as narrowly as he sees fit." *Id.; see also Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

Rather than engage this significant evidence of racial and geographical arbitrariness that has accrued since *Gregg*, Mississippi instead attempts to divert this Court's attention to what it contends is the "egregious nature" of the injuries inflicted on the decedent in the present case. Opp. 7. But when the issue is arbitrariness, the question is not the nature of the crime, *per se.* It is, rather, whether the people who commit such crimes are actually selected for capital prosecution because of the nature of those crimes, and not simply because of the happenstance of where those crimes occurred or the races of the perpetrator or victim. As noted above, the race of the victim continues to be a controlling factor in this decision. And the evidence from the last 40 years of experimentation in the states is that geography has also increasingly become a principal determinate – even within and among jurisdictions where such crimes *may* be punishable by death – of whether a death sentence is even sought. *Jordan*, 138 S. Ct. at 2570 (Breyer, J. dissenting from denial of writ of certiorari) (quoting *Glossip,*135 S. Ct. at 2755 (Breyer, J., dissenting). Even a cursory canvass of the reported appellate decisions in capital murder cases in Mississippi makes it clear that crimes of equal or greater claimed brutality or egregiousness to the present one, but prosecuted in one of Mississippi's non-death-penalty-hotspot Circuit Court Districts, have been tried to verdict without the State seeking a death sentence. *See, e.g., Thomas v. State*, 249 So. 3d 331, 336 (Miss. 2018) (stating, in a case with similar characteristics of beating the victim, suffering a lingering death from head injuries, but from the comparator Seventh Circuit Court District cited in the Petition, that "[t]he State did

not seek the death penalty"). *See similarly, e.g., Shepard v. State*, 256 So. 3d 12, 20 (Miss. Ct. App.), reh'g denied (May 8, 2018), *cert. granted*, 250 So. 3d 1267 (Miss. 2018), *Sims v. State*, 93 So. 3d 37, 39-40 (Miss. Ct. App. 2011) (child sex abuse death with stabbing as well), *Fuqua v. State*, 938 So. 2d 277, 280 (Miss. Ct. App. 2006) (acquaintances, beating death, lingering survival after fatal wounds)

Mississippi also evades, rather than engages, the implications for evolving standards of decency of the indisputable waning of support for and use of the death penalty in recent years. Pet. 9-11. Though it claims that there remain 30 states (down from the 31, it acknowledges, since this time a year ago) that still have the death penalty on its books, Opp. 8 & n.4, this is not responsive. As is discussed at some length in the Petition, this Court's "inquiry into consensus" looks to "[a]ctual sentencing practices," not just formal legislation. *Graham v. Florida*, 560 U.S. 48, 62 (2010) (citing cases); Pet. 9-11. Not only have a substantial majority of States abandoned capital punishment in practice, but even those States that retain it administer the penalty "most infrequent[ly]." *Graham,* 560 U.S. at 62. *See also* Daniel Leon Hidalgo v. State of Arizona, Supreme Court of the United States Case No. 17-251, Br. of *Amicus Curiae* Fair Punishment Project 8-17 (filed September 15, 2017).

Mississippi's chief response to these undisputed facts is to assert that this trend is very recent, and that the "actual," and apparently only, reason for this decline is the difficulty in obtaining lethal-injection drugs from pharmaceutical companies that are declining to allow their products to be used for the deliberate

taking of human life. Opp. 8.[3] Neither assertion is accurate. The decline is nearly two decades old, and shows no signs of abating.[4] Furthermore, that decline has continued since *Glossip* permitted States to execute inmates with midazolam, a drug that may be obtained without the cooperation of unwilling pharmaceutical manufacturers. 135 S. Ct. at 2733-35. And it cannot account for the marked decline in new death sentences, in, for example, Houston, Texas, which is located in a state where there are no apparent issues with obtaining lethal injection drugs and regular executions are conducted. Pet. 16, n. 23.

This Nation's four decade experiment with imposing and carrying out the ultimate punishment has created a large body of exactly the kind of "more convincing evidence" that *Gregg* anticipated was needed to pass final judgment on the constitutionality of that punishment. In light of that evidence, the time has

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[3] That multi-national corporations are adopting this position is in and of itself something of a *support* for Ambrose's proposition that evolving standards of decency are calling the legitimacy of the death penalty into question. All the "pressure" in the world from American death penalty opponents, Opp. 8, could not make a pharmaceutical provider refuse to provide drugs for these purposes if the provider's other customers or places of doing business did not independently feel strongly enough about this issue to cease doing business with any pharmaceutical company that persisted in supplying drugs for executions. As Justice Kennedy stated in *Hall v. Florida,* the Eighth Amendment's prohibition against cruel and unusual punishments embodies "our Nation's commitment to dignity and its ***duty to teach human decency as the mark of a civilized world***." 134 S. Ct. at 2001 (emphasis supplied). Admittedly, the "overwhelming weight of international opinion" against the death penalty – which, along with doctors' Hippocratic oath-based concerns, likely does make it uneconomical for pharmaceutical companies to continue doing business with the machinery of death – is not controlling on this Court. *Roper*, 543 U.S. at 578. But neither is it irrelevant. It simply reinforces a conclusion – amply evidenced in the democratic decisions of the people, the precedents of this Court, and decades of experience cited in the Petition – that the death penalty no longer accords with fundamental precepts of decency and the "dignity of man" that are the marks of the civilized world in which our Nation, and its Constitution, have always been leading lights. *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion).

[4] *See* Death Penalty Information Center (DPIC), Executions by Year, https://deathpenaltyinfo.org/executions-year; DPIC, Death Sentences by Year since 1976, https://deathpenaltyinfo.org/death-sentences-year-1977-present

come to take up this question of whether the experiment started with *Gregg* can ever succeed, and finally resolve it by ceasing to "tinker with the machinery of death." *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

II. The authority relied upon by Respondent does not rebut the Petition's showing that the Eighth Amendment is necessarily transgressed when a person is sentenced to death even though neither the crime of conviction nor the *mens rea* factor found by the jury at sentencing require the jury to have found specific criminal scienters for any aspect of the crime.

On the second question presented, Mississippi again attempts to evade, rather than engage, the issues raised for review. Indeed, it makes no response at all to the core Eighth Amendment problem posed by this question: Can a law that lets a death sentence be imposed where the sentencing factfinder has never made any finding that the condemned person had specific criminal intent of any kind ever meet the requirements of that amendment? Instead, it reaches back to precedent that this Court has spent the last two decades abrogating to suggest that the jury's findings of no criminal scienter may simply be rejected and altered at will to let a judge that disagrees with that jury save a sentence imposed under those conditions. *See, most recently, Hurst v. Florida*, ---- U.S. ----, ----, 136 S. Ct. 616, 622 (2016) (invalidating Florida's sentencing scheme because, *inter alia*, it allowed judges to make fact findings necessary to impose a death sentence where the jury had not done so).

Respondent does not, and cannot, dispute that the statutes and decisional law of Mississippi created, in the present matter, the issue presented. Unusually, even among death penalty jurisdictions, Mississippi permits an entirely scienterless crime – felony capital murder – to be sufficiently aggravated to permit a death sentence

solely because the defendant is guilty of the crime. *See Burrell v. State*, 183 So. 3d 19, 23-24 (Miss. 2015) ("Kidnapping 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."); Miss Code Ann. § 97-3-19(2)(e) (making even an unintentional death during a scienterless kidnapping a death punishable offense); § 99-19-101(5)(d) (making participation in the scienterless kidnapping, without more, statutory aggravation sufficient to impose a death sentence for the unintentional death). Nor can or does Respondent dispute that Mississippi's capital sentencing statute then permits the jury that has done nothing other than convict the defendant of that scienterless crime – even as an accomplice – to impose a death sentence on that defendant without finding that the defendant actually, killed attempted to kill, or intended to kill. Miss. Code Ann. § 99-19-101 (7). Nor, of course, can or does Mississippi dispute that this describes what the jury did in the present case: It convicted Ambrose of kidnapping felony murder on instructions that did not require it to find specific intent with respect to either the kidnaping or the homicide. Record [Clerks Papers] at 448 (hereafter "C.P.") (instructing the jury that "kidnapping is not a specific intent crime"); 433-34 (capital murder elements instruction permitting conviction "with or without design to effect death"), but then, at sentencing, found he had neither killed nor intended or attempted to do so.

Finally, Mississippi makes no attempt to dispute that there has been no retreat in the last 30-plus years from standards of decency that impelled this Court's

conclusion in *Enmund v. Florida*, 458 U.S. 782, 798 (1982), and reiterated in *Tison v. Arizona,* 481 U.S. 137 (1987), that the Eighth Amendment forbids inflicting the ultimate punishment on felony murderers who were not found to have a significantly culpable *mens rea.* Pet. 30-33. Indeed, as is discussed at length in connection with the first Question Presented, the journey since *Gregg* this century has been away from the ultimate punishment altogether.

Despite the fact the jury verdict in this case shows that it declined to find that Ambrose either killed, intended to kill, or attempted to kill, C.P. 518, Mississippi claims that this Court can nonetheless deny review of this second question by rejecting those findings. It would have this Court, despite the Sixth Amendment's and Mississippi's statutory jury sentencing requirement, ignore and set aside the jury's actual sentencing fact findings in favor of facts that the jury expressly did not find. Respondent instead relies – in this case where the jury had conflicting evidence before it – on evidence a jury *could* have credited to support a finding of intent, attempt or even actual killing, but that the *jury that* ***actually*** *sentenced Ambrose to death apparently* ***did not credit*** in arriving at its sentencing verdict.[5] Respondent's only jurisprudential support for this dubious argument is *Cabana v. Bullock,* 474 U.S. 376 (1986). Opp. 15. But in the wake of its decision in *Apprendi v. New Jersey*, 530 U.S.

[5] More particularly, Ambrose testified to facts that made him at most an accomplice to the kidnaping (and hence under Mississippi law to the felony murder, even without criminal intent), and a nonparticipant altogether in either planning or making the lethal attack that resulted in the fatal injuries to decedent. Pet. 4. The testifying co-participant, on the other hand, testified to the facts relied upon by the Respondent in its brief. Opp. 2-4, 12-14. The jury that found Ambrose neither killed, intended to kill, nor attempted to kill obviously believed Ambrose and disbelieved the co-participant, but was still, by virtue of Mississippi's statute, permitted to sentence Ambrose to death. And did so. Miss. Code Ann. §99-19-101(7)

466, 476-77 (2000), this Court has expressly repudiated *Bullock* and the view of the Sixth Amendment it relied upon to allow judges, whether appellate or trial, to determine the facts necessary to comply with *Enmund* and *Tison*. *See Ring v. Arizona*, 536 U.S. 584, 598–99 (2002) (overruling *Walton v. Arizona,* 497 U.S. 639 (1990) and, noting that "*Walton* drew support from *Cabana*," also explicitly rejecting Arizona's contention that *Bullock* would allow the scienter requirements of *Enmund* to be met based on facts found only by a judge). *See, similarly, Hurst,* 136 S. Ct. at 622. The mere fact that Mississippi must turn the Sixth Amendment clock back decades in order to make its argument on this point strongly supports the need for this Court to grant review on the second question presented, and stem Mississippi's equally outlying and retrograde approach to the Eighth Amendment.

CONCLUSION

For the reasons set forth above and in his Petition for Writ of Certiorari, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Mississippi Supreme Court on the Questions Presented.

Respectfully submitted,

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