No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2017

TIMOTHY NELSON EVANS

Petitioner,

vs.

STATE OF MISSISSIPPI,

Respondent

THIS IS A CAPITAL [DEATH PENALTY] CASE

CERTIFICATE OF SERVICE OF
PETITION FOR WRIT OF CERTIORARI AND APPENDICES

I, Alison Steiner, a member of the Bar of this Court, hereby certify that on the 27th day of December, 2017, I deposited at the main post office at 401 East South Street, Jackson, Mississippi, the Petition for Writ of Certiorari and the appendices thereto for mailing, postage prepaid, to the Hon. Scott S. Harris, Clerk of the Supreme Court of the United States, and to Cameron Benton , Esq., Special Assistant Attorney General, Post Office Box 220, Jackson, MS 39205, telephone number (601) 359-3680, counsel for the respondent herein. I further certify pursuant to Supreme Court Rule 29 that all parties required to be served have been served by this means.

s/ Alison Steiner, MB No. 7832
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QUESTION PRESENTED

DOES THE DEATH PENALTY IN AND OF ITSELF VIOLATE THE EIGHTH AMENDMENT IN LIGHT OF CONTEMPORARY STANDARDS OF DECENCY AND THE GEOGRAPHIC ARBITRARINESS OF ITS IMPOSITION

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THIS IS A CAPITAL [DEATH PENALTY] CASE

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

The Petitioner, Timothy Nelson Evans, 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 *Evans v. State*, 226 So.3d 1 (Miss. 2017). That court's order denying rehearing on September 28, 2017 (Pet. App. B) is unpublished, as is the mandate issued October 5, 2017 (Pet. App. C) [1]

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on June 15, 2017 and rehearing was denied on September 28, 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

[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 "Tr." respectively, by page number, and to trial exhibits as "Trial Ex. S" or "Trial Ex. D" by number.

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 . . . .

STATEMENT OF THE CASE

A. Proceedings below

On August 22, 2013, Timothy Nelson Evans was convicted by a unanimous Hancock County, Mississippi jury on a single count indictment accusing him of the January 2, 2010 robbery-based felony capital murder of his friend and housemate, Wenda Holling. C.P. 9, 669, 704-05. The prosecution elected to seek a death sentence and a sentencing hearing commenced that afternoon before the same jury. At the State's urging, that jury returned a death sentence against Evans and the trial court sentenced him to death on that verdict. C.P. 713-15. Evans appealed that conviction and sentence to the Mississippi Supreme Court and that sentence was affirmed. *Evans v. State*, 226 So.3d 1 (Miss. 2017) (Pet. App. A). Both in the trial court, and before the Mississippi Supreme Court Evans challenged the constitutionality of multiple aspects of Mississippi's death penalty and of the death penalty itself. C.P. 67-75, 620-22, 719, 723-35, 785 , Tr. 221-66, 1058-69. See also Brief of Appellant at 106-22. The Mississippi Supreme Court considered and rejected all those claims, including the general Eighth and Fourteenth Amendment challenge raised here. Pet. App. A at ¶ 100. The Mississippi Supreme Court denied Petitioner's

motion for rehearing on September 28, 2017, its final action on this case, pursuant to which the mandate was issued on October 5, 2017. Pet. App. B, Pet. App. C This Petition is filed within 90 days of the denial of the motion for rehearing.

B. Background

The facts in this case are fairly straightforward. Petitioner Timothy Evans, a lifelong alcoholic, returned to Hancock County Mississippi, on the Mississippi Gulf Coast, from a stint in the Mississippi Penitentiary for a conviction of felony driving under the influence. He was offered a place to live by Wenda Holling, a woman he had formerly dated, because Holling's son had recently married and moved out of her trailer home, located in a rural area outside of the small town of Kiln, Mississippi. Tr. 701-02. While living with Holling, Evans made attempts at working, but his drinking problem made him less than reliable as a worker even when he was working for friends. Tr. 747, 753-57.[2]

By the end of 2009, Evans relationship with Holling had become strained due to his drinking, and the fact that he was financially dependent on charity from Holling to fund it. The day after New Year Day 2010, Evans and Holling got into an argument over Holling's refusal to continue to subsidize Evans's drinking. During that dispute, Evans strangled Holling to death. After she was dead, he concealed her in the trunk of her car and ultimately took her body to an isolated place in neighboring Harrison County, where it was discovered several weeks later. Tr. 714-28. Evans also began using Holling's credit cards to purchase gasoline, food and drink for

[2] Evans's drinking was the dark star of his life. A psychologist appointed by the Court, testified at the sentencing phase of the trial that Evans had an "early onset of substance abuse" involving alcohol "at age 10 and marijuana in the ninth grade" and had advanced within a year or two to a lifelong alcohol addiction so severe that Evans would go through alcohol withdrawal if he was deprived of alcohol for any reason. Tr. 966-68. Another psychologist, who evaluated Evans at the request of Evans's own counsel, confirmed the lifelong substance addiction, and also gave Evans a diagnosis of probable post-traumatic stress disorder. Tr. 1000-02. These doctors testified on Evans' behalf at the penalty phase, but the jury apparently did not find this sufficiently mitigating, and sentenced him to death, anyway.

himself and others. Trial Exs. S-9, 10id, Tr. 739-40, 880-87.

To those who asked about where Holling was, including the police who were alerted by Holling's son, Evans said Holling had gone to Florida for a vacation with people she had formerly worked with. Tr. 709-10, July 31, 2013 Hearing Ex. 5. Shortly after providing this information to police, Evans left Mississippi and went to Florida where he had also once lived. However, after the body and Evans's use of Holling's credit card were discovered, a warrant was issued and police arrested him in Florida. After his arrest, Evans gave several statements all admitting to killing Ms. Holling and to thereafter deliberately taking her credit card and car. [3] These admissions alone, if they were found by a jury as facts beyond a reasonable doubt, are sufficient as a matter of law under Mississippi's death penalty scheme to permit the conviction for capital murder and death sentence that this Court is being asked to grant a Writ of Certiorari to review today. [4]

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[3] The statements Evans made to police in Florida, and again in Mississippi, all described the crime as happening spontaneously in the heat of the argument with Ms. Holling. Tr. 805-41, July 31, 2013 Hearing Exs. S-6, -8, and 10; Trial Exs. S-9, -10id. Some time later, Evans summoned a journalist to visit him in jail and told her that he had planned to kill Ms. Holling and take her card if she continued to resist subsidizing his drinking and partying. Tr. 842-61; Trial Ex. S-13. Whichever version the jury believed, it would meet the requisites of Mississippi's capital murder statute and its capital sentencing scheme because Mississippi requires no intent to kill either to convict a person of capital murder, or to sentence him to death for it. Miss. Code Ann. § 97-3-19 (2)(e)) (defining capital murder as, *inter alia*, "the killing of a human being without the authority of law by any means or in any manner . . . [w]hen done with or without any design to effect death, by any person engaged in the commission of the crime of . . . robbery . . . or in any attempt to commit such felon[y]"), Miss. Code Ann. § 99-19-101 (7)(providing that a jury may proceed to considering the imposition of a death sentence if it finds beyond a reasonable doubt any "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."

[4] Mississippi subscribes to a very expansive, minority, view of the one continuous transaction doctrine in felony murder cases. It does not require any intent to steal at the time of the killing, but only an actual taking after the killing has occurred. *See Ronk v. State*, 172 So. 3d 1112 (Miss. 2015), *reh'g denied* (Sept. 17, 2015), *cert. denied,* 136 S. Ct. 1657, 194 L. Ed. 2d 773 (2016); *Batiste v. State,* 121 So. 3d 808 (Miss. 2013); *Gillett v. State*, 56 So. 3d 469 (Miss. 2010) (death sentence vacated on other grounds by *Gillett v. State*, 148 So. 3d 260 (Miss. 2014), *reh'g denied* (Sept. 18, 2014).

In the universe of homicides, this kind of householder on householder crime – killing a housemate and taking property from the home – is as commonplace as it is tragic for the victim and her family. Because the possible suspects are few and law enforcement agencies are, for the most part, able to do their jobs relatively efficiently, the perpetrator of such crimes is ordinarily discovered, arrested and criminally charged in relatively short order, just as Evans was in this case. And, as was the case with Evans, in most instances the facts are clear enough that the person ends up convicted of homicide or robbery or both. This is business as usual in jurisdictions throughout America.

What is not usual, even in states where felony robbery murder *may* be punished with a death sentence, is for this kind of homicide to result in a death sentence for the person who committed 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).

That Petitioner Timothy Nelson Evans is sitting on death row after being convicted of this kind of crime is a product primarily of geographic accident. He 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.

Since Mississippi enacted its post-*Furman* death penalty statutes, the Second Circuit Court District has imposed 32 death sentences on 25 people.[5] This is the largest number of death

[5] 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.

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).[6] 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.[7] 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.

According to the United States Census, population numbers in the two districts are not dissimilar.[8] 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

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[6] 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

[7] 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.

[8] 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 located 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.

murders and other non-negligent homicides in the Seventh Circuit Court District has been dramatically higher than in the Second. [9]

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 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

[9] 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.

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, only 25 death sentences have been imposed in the State of Mississippi -- fewer than 2 per year on average. Eight of those sentences – including the one on Petitioner in the present case – or nearly a third of all the death sentences imposed, have come out of the Second Circuit Court District. Only two have come from the Seventh. *See* Pet. App. D. 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 – though the largest in absolute number – during those earlier years 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 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.[10] Between 1976, when the first death sentence was returned under Mississippi's post-*Furman* capital sentencing protocols, and the year 2000, death

[10] 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. 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)

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.

REASONS FOR GRANTING THE WRIT

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 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*, 135 S. Ct. 2726, 2755, *reh'g denied*, 136 S. Ct. 20 (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.").

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, 134 S. Ct. 1986, 2001 (2014).

The Mississippi Supreme Court's affirmance of Timothy Evans's conviction and death sentence in the instant matter is a tissue of rationalizations that treat the question of his life or death as a mere legal nicety affecting, at most, him personally. Pet. App. A (rejecting ten separate claims of serious error, some as procedurally barred, at least one as harmless, *id.* at ¶ 84). As long as courts are permitted to experiment with ways to do this, the "basic dignity the Constitution protects" cannot be satisfied. The instant Petition presents this Court with 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.

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 Timothy Nelson Evans because of an arbitrary, capricious 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 on Petitioner Evans.

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, acting through its democratic representatives, has 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.

Thirty-one States have abandoned the death penalty. Nineteen of those States have formally abolished the punishment. Four States—Oregon, Colorado, Washington, and Pennsylvania—have "suspended the death penalty" and ceased to carry out executions.[11] *Hall v. Florida*, 134 S. Ct. 1986, 1997 (2014). The remaining eight States have not carried out an execution "[i]n the past 10 years," *Roper*, 543 U.S. at 565—and four of them (Kansas, Nebraska, New Hampshire, and Wyoming) have not executed a prisoner in twenty years or longer.[12]

Furthermore, in those jurisdictions that continue to carry out death sentences, the practice is "most infrequent." *Graham v. Florida*, 560 U.S. 48, 62 (2010). Last year, 31 death sentences were imposed and 20 executions were carried out across the nation. 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.[13] And a "significant majority," *id.* at 64, of those executions that do occur—more than 85% over the last five years—are concentrated in just five States: Texas, Oklahoma, Florida, Missouri, and Georgia.[14] 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,

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

[12] See DPIC, Number of Executions by State and Region Since 1976, https://deathpenaltyinfo.org/number-executions-stateand-region-1976

[13] *Id.* The States are Arkansas (4), Idaho (2), Indiana (1), Kentucky (1), Louisiana (1), South Dakota (3), Tennessee (4), and Utah (1).

[14] *Id.*

J., dissenting).

Even more striking than the magnitude of the consensus is "the consistency of the direction of change." *Roper*, 543 U.S. at 566 (quoting *Atkins v. Virginia*, 536 U.S. 304, 315 (2002)). In the past fifteen years, seven States have abolished the death penalty,[15] four have formally suspended it, and four have ceased to conduct executions.[16] No State has reinstated the punishment in that time.

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 2016, that number had fallen by 90%.[17]Likewise, the number of executions has fallen by nearly 80%, from 1999, when 98 persons were executed.[18] .12 In just the last five years, the numbers of death sentences and executions have dropped by more than half.[19]

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

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[15] *See* DPIC, States With and Without the Death Penalty, *supra* note 11. The States are New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), and Delaware (2016).

[16] *See* DPIC, Number of Executions by State and Region Since 1976, *supra* note 12. The States are California (2006), Montana (2006), Nevada (2006), and North Carolina (2006).

[17] DPIC, Death Sentences in the United States from 1977 By State and By Year, https://deathpenaltyinfo.org/deathsentences-united-states-1977-present.

[18] *See* DPIC, Number of Executions by State and Region Since 1976, *supra* note 12.

[19] *Id.*

death.

2. The Death Penalty Cannot Be Administered In A Manner That Comports With The Eighth Amendment.

"[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." *Roper*, 543 U.S. at 590 (internal quotation marks omitted). And precedent, logic, and bitter experience all confirm what the people themselves have now concluded: The death penalty simply cannot be imposed in accord with minimum standards of proportionality, reliability, and decency.

a. There is no way to confine the imposition of death sentences in a way that ensures against the arbitrary and capricious application of the death penalty

This Court has long made clear that the Constitution can tolerate the death penalty if, and only if, States are capable of "ensur[ing] against its arbitrary and capricious application" by confining the punishment to "the worst of crimes." *Kennedy*, 554 U.S. at 447; *see Gregg*, 428 U.S. at 188. This requirement follows from the Eighth Amendment's demand for proportionality and humanity. As the Court explained in *Kennedy*, "[w]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." 554 U.S. at 420. In order to serve legitimate penological aims, the "punishment must 'be limited to those offenders'" whose "extreme culpability makes them 'the most deserving of execution.'" *Id.* (quoting *Roper,* 543 U.S. at 568).

After 45 years, the evidence is overwhelming that States cannot satisfy this requirement. Numerous independent studies—some commissioned by States themselves—have 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*, 135 S. Ct. at 2760-63 (Breyer, J., dissenting). The principal determinant 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. *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.

Meanwhile, 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., J*ustice 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).[20] Numerous other factors that should be irrelevant to the question of who lives and who dies—gender, resources, politics – have likewise been found meaningfully determinative. Shatz & Dalton, *supra,* at 1251-53; *Glossip*, 135 S. Ct. at 2761-62 (Breyer, J., dissenting).

These problems are ineradicable. They flow from at least two features intrinsic to the death penalty under our Constitution, features that the Court itself has increasingly recognized are both problematic and incapable of repair.

The first difficulty is that the Constitution imposes two irreconcilable demands on sentencers. On one hand, it requires States to provide guidance to juries so that they impose the death penalty in a consistent and rational manner. *Gregg*, 428 U.S. at 195 n.47 ("[W]here the ultimate punishment of death is at issue a system of standardless jury discretion violates the Eighth and Fourteenth Amendments."). On the other hand, "the fundamental respect for humanity underlying the Eighth Amendment" requires that States leave juries complete discretion to decline to impose death based on a defendant's individual characteristics. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion). As Justice Scalia succinctly explained, "[t]he latter requirement quite obviously destroys whatever rationality and predictability the former requirement was designed to achieve." *Walton v. Arizona*, 497 U.S. 639, 664-665 (1990) (Scalia, J., concurring in part and concurring in the judgment); *see Callins*, 510 U.S. at 1151 (Blackmun, J., dissenting) (similar). By granting juries untrammeled discretion to grant mercy to whomever they wish, the law reintroduces into the death penalty system the

[20] 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. Appendix D. *See also* United States Census Reports for 1980, 1990, 2000, and 2010, *supra,* note 8.

very sort of arbitrariness that the first "narrowing" requirement is intended to remove.

The Court has acknowledged that after four decades, this problem has defied solution short of banning the death penalty's application to whole classes of persons and offenses. In *Kennedy*, it explained that the "[t]he tension between general rules and case-specific circumstances has produced results not altogether satisfactory." 554 U.S. at 436; *see Tuilaepa v. California*, 512 U.S. 967, 973 (1994) explaining that "[t]he objectives of these two inquiries can be in some tension"). The Court proceeded to state that its "response to this case law, which is still in search of a unifying principle, has been to insist upon confining the instances in which capital punishment may be imposed" to increasingly narrow sets of crimes and individuals. *Kennedy*, 554 U.S. at 437. Narrowing the death penalty, however, can only mitigate but not cure this fundamental defect. So long as juries retain open-ended discretion—as the Constitution says they must—the punishment will continue to be subject to an intolerable degree of arbitrariness.

That difficulty is compounded by a second, equally severe problem. The first step of the sentencing process—the narrowing of death-eligible offenders—is also infected with an insoluble degree of caprice. One year before *Furman*, this Court recognized the core difficulty: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability." *McGautha v. California*, 402 U.S. 183, 204 (1971); *see Godfrey v. Georgia*, 446 U.S. 420, 442 (1980) (Marshall, J., concurring in the judgment).

Again, the Court has increasingly recognized this problem. And again it has identified only one solution: banning the penalty's application to classes of offenses and persons altogether. In *Kennedy*, the Court explained that while some persons who commit non-homicide offenses

may rank among the most culpable offenders, States lack the capacity to "identify standards that would guide the decisionmaker so the penalty is reserved for the most severe cases." 554 U.S. at 439. The Court had "no confidence," it explained, that the characteristics of individual cases would not "overwhelm a decent person's judgment," and render "the imposition of the death penalty * * * so arbitrary as to be 'freakis[h].'" *Id.; see also Roper,* 543 U.S. at 572 (rejecting the contention that juries can reliably select those juvenile offenders who have "sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a sentence of death"). That same problem holds *a fortiori* for homicide crimes—offenses whose human cost is all the more likely to "overwhelm a decent person's judgment," and for which distinguishing the most severe and blameworthy crimes is all the more difficult.[21]

b. In operation, no death penalty scheme in existence, including that of Mississippi, has been able to 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 recognized social purposes for the death penalty are "retribution and deterrence

[21] The fact that homicides often "overwhelm a decent person's judgment" also affects the ability of the jurors to constitutionally perform their subsequent decision-making as to ultimate sentence if a court determines that a case surmounts the eligibility threshold. This Court has made it clear that the sentencing jurors must be able to "give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264 (2007). A juror overwhelmed by the mere fact of a tragic homicide may very well actually be unable to do this.

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 Justice Breyer writes in his *Glossip* dissent, the Supreme Court in *Gregg* "delegated significant responsibility to the States to develop procedures that would protect against those constitutional problems." Yet, "[a]lmost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed." *Glossip*, 135 S. Ct. at 2755. 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).[22]

[22]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. *See*, *e.g.*, Fagan, Jeffrey, *"Deterrence and the Death Penalty: Risk, Uncertainty, and Public Policy Choices."* Available at https://www.law.columbia.edu/law_school/communications/reports/summer06 /capitalpunish. Because the studies have not isolated the additional deterrent effect of a potential death sentence over one of

Even without resort to scholarly statistical analysis, however, it is obvious that a punishment as infrequently imposed or carried out as the death penalty can serve little, if any, deterring purpose. "[A]n offender who is sentenced to death is two or three times more likely to find his sentence overturned or commuted than to be executed; and he has a good chance of dying from natural causes before any execution (or exoneration) can take place." *Glossip*, 1135 S. Ct. at 2768. 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 is there any evidence of a significant retributive value to the death penalty beyond that afforded by a sentence of life without parole. Death-condemned and life-with-no-parole-sentenced murderers alike are sentenced to imprisonment till death. The survivors of those killed by either of these offenders likewise know that the murderers will both suffer that fate. The only distinction is in the moment and mechanics by which that death occurs – and whether it is a spectacle that can be observed by the decedent's survivors and other selected representatives of the public.

This is far too narrow a distinction to comfortably ameliorate the reality that when, in the name of retribution, "the law punishes by death, it risks its own sudden descent into brutality, transgressing constitutional commitment to decency and restraint." *Kennedy*, 554 U.S. at 420.

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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."

The only possible way to avoid this would be if the death penalty were, as the United States Supreme Court has consistently held that the Eighth Amendment requires, actually reserved for only the most aggravated homicides, *Id.* (banning the death penalty for non-homicide offenses); *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (requiring states to narrow their homicide statutes so that only aggravated murders are death-eligible) committed by the most culpable offenders, *Simmons*, 543 U.S. at 568; *Atkins*, 536 U.S. at 319 (categorically excluding youth and the intellectually disabled from exposure to a death sentence regardless of their crimes). However, the experience since *Gregg* demonstrates that the death penalty is not so limited.

As Justice Breyer points out, while the imposition of the ultimate sanction of death is undeniably rare, this infrequency does not reflect the identification and punishment of the most aggravated homicides. "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*, 192 L. Ed. at 799 *citing Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).[23] As a result, Justice Breyer has concluded it is unlikely that the death penalty is constitutional. *Id*. at 35. In so doing, he is not alone among justices of the Supreme Court who have wrestled with the question over the four decades since *Gregg. See, e.g., Baze,* 553 U.S. at 82-86 (Stevens, J., concurring in judgment) (stating that the death penalty is unconstitutional and rejecting the assumption "that adequate procedures [are] in place to avoid the danger of discriminatory application . . . of arbitrary application . . . and of excessiveness" of the death penalty) (internal citations omitted); *Callins v. Collins*, 510 U.S. 1141, 1145 (1994)

[23] He also notes that numerous studies "indicate that the factors that most clearly ought to affect application of the death penalty – namely, comparative egregiousness of the crime – often, do not. Other studies show that circumstances that ought *not* to affect application of the death penalty, such as race, gender, or (as in the instant case) geography, often *do*." (emphasis in the original) *Id*. at 33.

(Blackmun, J., dissenting) (refusing to further "tinker with the machinery of death" because it was "virtually self-evident . . . that no combination of procedural rules or substantive regulations can ever save the death penalty from its inherent constitutional deficiencies").

The Court clearly recognizes that these qualms, though not shared in degree by all members of the court in all circumstances, must be addressed in the death penalty context. The Court has long subscribed to the "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). This is because execution of a person with insufficient culpability would serve no retributive purpose; and, therefore, it would "violate [] his or her inherent dignity as a human being." *Hall*, 134 S. Ct. at 1992 ("By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."). It has recognized that there are circumstances such as youth or intellectual disability where "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished." *Simmons*, 543 U.S. at 572, 574 (also recognizing that in the case of youth, "qualities that distinguish juveniles from adults do not disappear when an individual turns 18"). *See also*, *e.g.*, *Porter v. McCollum*, 558 U.S. 30, 43-44 (2009) (recognizing at least the mitigating value of other things that may similarly affect an individual's culpability, such as a defendant's "brain abnormality and cognitive deficits," as well as "the intense stress and mental and emotional toll" that military service can have on an individual).

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

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.[24] 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*, 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,* 492 U.S. at 324 (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").[25] But many more such errors can and do

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

[25] Even those condemned at a time when they are not suffering from some non-death-sentence-precluding mental illness or defect are likely to be doing so by the time they are actually facing execution. 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)

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.

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

The risk of "sudden descent into brutality, transgressing constitutional commitment to 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. This has emerged as a further constitutional problem with the death penalty since *Gregg* began its experiment with conforming capital punishment to the standards of human decency we as a civilization aspire to meet.

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. And it is equally clear that States have actually carried out executions of the innocent. The evidence on this point is unequivocal. Since 1989, 117 individuals who were sentenced to death have been formally exonerated of their crimes of conviction.[26]. 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). The numbers continue to increase each year; three more death-row inmates have

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(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).

[26] National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx

been exonerated in 2017 alone.[27]

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 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,* 428 U.S. at 305. 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). At a time when the number of exonerations was approximately half what it is now, *see Glossip*, 135 S. Ct. at 2757 (Breyer, J., dissenting), the Court explained that it "cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated." *Atkins*, 536 U.S. at 320 n.25. The risk that intellectually disabled defendants would give "false confessions" and be executed because of them, the Court concluded, was too great for the Constitution to bear. *Id.* at 320.

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

[27] *Id.*

common: defendants may be induced to give false confessions, receive poor quality defense counsel, face prosecutorial misconduct (in the instant matter, such misconduct was recognized, but deemed harmless, Pet. App. A ¶84), 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]. 15 Perhaps the Constitution can tolerate a risk of wrongful conviction 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]

d. The United States is nearly alone among nations that aspire to have the kind of fundamental respect for human dignity as this country does in continuing this experiment

Finally, it is "instructive," *Roper*, 543 U.S. at 575, that nearly every other developed Nation, after considering these and other problems, has abandoned capital punishment. One hundred and four countries have formally abolished the death penalty, and more than 30 have ceased to impose it.[30] Only 23 countries imposed the death penalty last year, and more than 85% of those executions (excluding those performed by China) were carried out by four countries:

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[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).

[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).

[30] DPIC, Abolitionist and Retentionist Countries, https://deathpenaltyinfo.org/abolitionist-and-retentionistcountries?scid=30&did=140.

Iran, Saudi Arabia, Iraq, and Pakistan.[31] The "overwhelming weight of international opinion" against the death penalty is not controlling on this Court. *Roper*, 543 U.S. at 578. But it reinforces the judgment—amply evidenced in the democratic decisions of the people, the precedents of this Court, and decades of experience—that the death penalty no longer accords with fundamental precepts of decency and the "dignity of man." *Trop*, 356 U.S. at 100.

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 geographical accident that landed him on death row awaiting execution rather than being incarcerated, as almost everyone else convicted of killing a housemate and taking their property is, in general population for life or for a term of years, is a proper vehicle in which to do so. [32]

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.").

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[31] DPIC, The Death Penalty: An International Perspective, https://deathpenaltyinfo.org/death-penalty-internationalperspective.

[32] This Court presently has outstanding before it at least one other Petition seeking certiorari on the constitutionality of the death penalty. *See* Abel Daniel Hidalgo v. State of Arizona, No. 17-251, Docketed August 16, 2017, record requested December 8, 2017. Petitioner here has, with permission, relied on those efforts where his own case raises the same issues. The Hidalgo petition is also supported by distinguished and knowledgeable *amici curiae.* Petitioner respectfully submits that the amicus briefing supporting the Hidalgo petition is equally relevant to consideration of the instant matter.

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 decisions upholding the constitutionality of the death penalty as new consensus and new insights emerge. In *Atkins*, the Court overturned the judgment in *Penry v. Lynaugh*, 492 U.S. 302 (1989), 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. *Roper*, 543 U.S. at 563. Three years later, in *Roper*, 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. *Roper*, 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, as is discussed more fully in the Statement of the Case, *supra* at pp 4-9, presents a particularly glaring example of geographical arbitrariness, particularly 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.

The call in *Glossip* from two justices of this Court to examine whether, because of factors including freakish geographical happenstance, the punishment accords with the Eighth Amendment should be answered by granting the Writ sought in this case. *See Glossip*, 135 S. Ct. at 2755 (Breyer, J., joined by Ginsburg J., dissenting). *See also Reed*, 137 S. Ct. 787 (Breyer, J. dissenting from denial of certiorari) (renewing that call because of the same kind of geographical arbitrariness as infects the present case), *Tucker,* 136 S. Ct. at 1802 (Breyer, J., dissenting from denial of certiorari) (same).

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.

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 the Question presented.

Respectfully submitted,

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