No. 17-7245

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
REPLY BRIEF IN SUPPORT OF CERTIORARI

I, Alison Steiner, a member of the Bar of this Court, hereby certify that on the 30th day of January, 2018, I deposited at the main post office at 401 East South Street, Jackson, Mississippi, the Reply Brief in Support of Certiorari 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, and that a copy of this document has also been submitted to the Court's electronic filing system and served by those means, as well.

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ARGUMENT IN REPLY

Introduction

Mississippi's opening salvo in its Brief in Opposition is that "Evans' claim is not unique," Opp. 5. This, in effect, concedes exactly the point of the Petition. Evans' crime was one of thousands of robbery felony murders that were committed in the United States the year it happened, and one of the scores of those – all potentially chargeable as a death-punishable crime -- committed in Mississippi that year. What gives rise to Evans' claim is that despite the similarity of his crime to so many of these other robbery murders –potentially chargeable as a death-punishable crime in any jurisdiction with laws like Mississippi's on its books making robbery-based felony murder a death-punishable offense – Petitioner was one of the arbitrary few against whom a death sentence was sought and upon whom it was "freakishly imposed." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). Pet. 5-9.

The State then continues with a brief that is notable for what it does not do. Other than repeatedly, but incorrectly, asserting that the constitutionality of the death penalty has been set in stone by this Court, Mississippi offers no significant rebuttal to Petitioner's arguments for why now is the time, and this is the case, for this Court address whether America's four-decade long experiment with conforming the death penalty to the Eighth Amendment has, or ever can,

succeed. Pet. 27-29. The State makes a bit more response to Petitioner's substantive arguments setting forth how and why the experiment has failed and must be ended. Pet. 9-27. But even that the response is little off kilter.

For example, the State chooses to respond to two straw man arguments not even made by Petitioner. *See* Opp. 10 (citing to Pet. 14-18 attempting to rebut an equal protection claim not advanced); Opp. 14 (citing to Pet. 23 and attempting to rebut an unadvanced claim that delay between sentence and execution, without more, is cruel and unusual).[1] It makes no rebuttal, however, to the claims actually made at those places in the Petition *See* Pet. 14-18 (discussing multiple ways in which the death penalty is imposed without meaningful narrowing, and entirely arbitrarily and capriciously in violation of the *Eighth* Amendment); Pet. 23 (advancing a claim that it is disproportionate to impose death sentences on those who suffer from mental illness, and noting the particularly cruel and deleterious effects on those persons, in particular, of the conditions of perpetual solitary confinement typical employed for death sentenced prisoners). The State also offers no significant rebuttal to Petitioner's discussion of the specific ways that the death penalty has, over the past 40 years, failed to meet any of the legitimate penological purposes recognized by this Court. Pet. 18-22.

But more significantly, even the responses the State does offer do not address much of the evidence and arguments marshaled by Petitioner or by Justice Breyer in his *Glossip* dissent. Instead the State relies almost entirely on variations of its claim that the constitutionality of the death penalty was finally settled by *Gregg.* But as *Gregg* itself recognized, that decision was

[1] And even had Petitioner argued that delay alone was a constitutional problem, the State's assertion that decades-long delays in imposing capital sentences has no bearing on the cruelty or penological utility of the punishment does not stand up. This Court has long suggested otherwise. *See, e.g., In re Medley*, 134 U.S. 160, 172 (1890). The notion that such delays are a luxury afforded to a prisoner who wishes to "avail himself * * * of appellate and collateral procedures," Opp. 14, is belied by the fact that such procedures have prevented the execution of hundreds of wrongfully convicted inmates. Pet. 24-26.

only the beginning of the experiment to see whether *Furman's* requirements could be met; it expressly reserved the possibility of revisiting the issue in light of "more convincing evidence." 428 U.S. at 187.

And over the last forty 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 created a large body of exactly the kind of "more convincing evidence" that *Gregg* anticipated. 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).

A. The Brief In Opposition Does Not Refute The Conclusion That The Death Penalty Is In All Instances "Cruel And Unusual" Punishment

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

The State's 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 for the State's claim that this Court's subsequent jurisprudence as having 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. Opp. 7-9. But 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 v. Gross*, 135 S. Ct. 2726, 2732-33 (2015). 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.")

2. Mississippi fails to rebut the Petition's arguments for why death penalty cannot be conformed to the Constitution in light of contemporary standards of decency.

The State's attempted rebuttal of Petitioner's claim of geographical arbitrariness is a perfect example of its mistaken view that the constitutionality of the death penalty under the Eighth Amendment was fossilized at some point in the past and may not be reviewed in light of the evolving standards and/or empirical experience of the last 40 years. This ignores that these very things have been the foundation on which Court's death penalty jurisprudence over the years has rested. "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).

It is telling, in this regard, to look at the only jurisprudence of this Court the State could muster to support its doubtful assertion that it is cast in stone that geographical variations in death sentences are nothing more than legitimate exercises of presumptively benign prosecutorial discretion. *McCleskey v. Kemp*, 481 U.S. 279 (1987) is a 30 year old decision premised largely on the degree to which equal protection analysis governing claims of racial discrimination could

then be imported into the Eighth Amendment. But crucially, *McCleskey* was decided at a time when, as both Justice Breyer and scholars note, there was far less geographical concentration in the use of the death penalty than there is today. Pet. 15. Nor does the concurring opinion in *Glossip* quoted at length by the State, 135 S. Ct. at 2751-52, Opp. 11, offer support for any conclusion other than that the question of the Eighth Amendment implications of geographical arbitrariness is one that is in evolutionary flux and warrants review. Those views, held by exactly the same number of justices who suggest that the experiment has likely failed, did not get any more support from three members of the narrow majority that voted to uphold Oklahoma's problematic lethal injection methods than it did from the four dissenters who would have struck them down. This kind of disagreement among the members of this Court on a question does not defeat certiorari review – it favors it. *See* U.S. Sup. Ct. Rule 10(c) (one factor supporting certiorari review is that "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court").

The State, in a footnote, cavils inappropriately at the factual basis for any claim in the present case of geographic arbitrariness. Opp. 10, n. 10. But 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. Indeed, the existence of this troubling phenonmen is not only set forth, but is also relied upon as the basis for reviewing the constitutionality of death penalty in recent published opinions by members of this Court *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) *Glossip*, 135 S.Ct., at 2761 (Breyer, J., dissenting).

To the extent that Petitioner has supported his claim with census data, FBI collected crime statistics, and data on death penalty cases in Mississippi maintained under its own state law, Pet. App. D, E, these are exactly the kinds of facts of which this Court has long taken judicial notice. *Fong Yue Ting v. United States*, 149 U.S. 698, 734 (1893) ("We must take judicial notice of that which is disclosed by the census, and which is also a matter of common knowledge."). *See also, e.g., Gaston Cty., N. C. v. United States*, 395 U.S. 285, 291 (1969) ("We can take judicial notice that the segregated school system was the prevailing system throughout the South.'). Especially where it is addressing important constitutional questions that affect the core values of this nation – as death penalty clearly does, *Hall,*134 S. Ct. at 2001 – this Court does not hesitate to consider the larger factual context that presents those questions to it. *See, e.g., Roe v. Wade,* 410 U.S. 113, 130-147, 149 (1973); *Keyes v. School District No. 1,* 413 U.S. 189, 197 (1973); *Gaston City*, 395 U.S. at 291, *Beauharnais v. Illinois,* 343 U.S. 250, 258-61 (1952); *Moore v. East Cleveland,* 431 U.S. 494, 508-09 & n.4 (1977) (Brennan, J., concurring); *cf*. *United States v. Carolene Products Co.,* 304 U.S. 144, 148-50 (1938).

The State likewise offers little to rebut Petitioner's showing that a widespread consensus has emerged that the death penalty is categorically impermissible. The State does not dispute that 31 States have abandoned capital punishment, that the frequency of death sentences and executions has plummeted, and that the rate of abolition has continued to grow. Pet. 11-13. The State asserts that "[t]he majority of States" still have capital punishment on the books. Opp. 7-8. But 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). 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]." *Id.; see* Pet. 12. *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).

The State claims (at 8) that this decline is "temporary" and attributable to the difficulty in obtaining lethal-injection drugs from pharmaceutical companies. Neither assertion is accurate. The decline is nearly two decades old, and shows no signs of abating.[2] 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. 8.

None of the recent developments the State points to – including the recent referenda outcomes in California (failing to abolish the death penalty) and Nebraska (overturning legislative abolition), or recent tweaks in Oklahoma's or Mississippi's lethal injection protocols – undermine this trend. *See* Opp. 8-9. California and Nebraska have not executed a single inmate in 10 and 20 years, respectively.[3] Oklahoma continues to be one of only five States that carries out the death penalty with any regularity. Pet. 12. And Mississippi has not conducted any executions since 2012, even during times when there were sufficient supplies of lethal injection drugs to have done so.[4]

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[2] *See* Death Penalty Information Center (DPIC), Executions by Year, https://deathpenaltyinfo.org/executions-year; DPIC, Death Sentences by Year: 1976-2015, https://deathpenaltyinfo.org/death-sentences-year-1977-present.

[3] DPIC, Number of Executions by State and Region Since 1976, https://deathpenalty info.org/number-executions-state-and-region-1976.

[4] *Id.*

Similarly, the State musters little substantive response to petitioner's argument, based on decades of experience, that it is clear that capital punishment cannot be administered in accordance with even the minimum standards of rationality, reliability, and humanity that this Court has acknowledged are necessary to ensuring "the basic dignity the Constitution protects." *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014). All the State does is assert (at 12-13) that *Gregg* resolved forever that the tension at the heart of the administration of the death penalty – between the untrammeled discretion afforded capital juries, on the one hand, and the need to articulate aggravating factors with reasonable determinacy, on the other, Pet. 16-18 – presents no constitutional problem. That is incorrect. This Court itself has recognized that these features have "produced results not altogether satisfactory," and has sought to mitigate their obvious defects by "confining the instances in which capital punishment may be imposed." *Kennedy*, 554 U.S. at 436-437; *see id.* at 439.

Finally, the State also dismisses, in a single paragraph, the "overwhelming" evidence that States have executed the innocent. *Glossip*, 135 S. Ct. at 2756 (Breyer, J., dissenting). While the State does not dispute the number of death row exonerations, it claims (at 13-14) that no "particular case" has been identified in which an innocent person was executed—notwithstanding that multiple painstaking studies identified multiple cases of exoneration. *See id*. at 2757, 2766. Instead, it relies on Justice Scalia's solo concurrence from a dozen years ago, dismissing reports of wrongful executions in a case where the parties did not brief the question and when unambiguous DNA evidence of such errors was still new. *See Kansas v. Marsh*, 548 U.S. 163, 188 (2006) (Scalia, J., concurring); *see id*. at 207-208 (Souter, J., dissenting). A problem of such moral gravity deserves a full briefing on the merits, not two sentences of casual dismissal.

B. The State Raises No Significant Challenge to the Suitability of the Instant Matter As a Vehicle to Resolve the Constitutionality of the Death Penalty

The State's objections to this matter as a vehicle for deciding this question are negligible. The facts undergirding the State's quite literally marginal claim (*i.e.* made only in a footnote) that the court below did not have the record before it to pass on this question is disposed of in part A. of this Reply, at pp. 5-6. Moreover, however he did or did not choose to argue the claim below, 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).

The State's lengthy exegesis of and repeated observations about the facts of this case – particularly those relating to the age of the victim, the intentionality of her death, or the unfeeling actions of Evans in abandoning her body in a field and lying to her family and police about her whereabouts, Opp. 3-5 – are immaterial to its suitability as a vehicle for considering this question. Indeed, it is just the opposite. None of those things, alone or in combination, are sufficient, without more, to make a homicide the crime of "capital murder" in Mississippi – the only death- punishable homicide under Mississippi law. Miss. Code Ann. § 97-3-19(2).[5] The problems that afflict the death penalty – the arbitrariness, the errors, the cruelty – are systemic. This otherwise unexceptional case, for the very reason of its unexceptionality, properly presents those problems for review.

[5] Evans' crime of conviction was only punishable by death because *in addition to* the facts dwelled upon by the State, the crime also involved taking property from the victim after her death. *Batiste v. State*, 121 So. 3d 808 (Miss. 2013). That alone made it a death-punishable robbery-based felony capital murder, § 97-3-19 (2)(e), rather than a first degree (deliberate design) or second degree (depraved heart) murder, neither of which is punishable by death under Mississippi law. § 97-3-19 (1)(a)-(d).

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 Question presented.

Respectfully submitted,

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