No. 17-251

# In the Supreme Court of the United States

ABEL DANIEL HILDAGO,
*Petitioner*,

v.

STATE OF ARIZONA,
*Respondent*.

*On Petition for Writ of Certiorari to the Supreme Court of Arizona*

## BRIEF IN OPPOSITION


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## CAPITAL CASE

## QUESTIONS PRESENTED

1. Did the Arizona Supreme Court err in applying a capital sentencing scheme that protects against the arbitrary imposition of capital punishment by providing objective standards to guide the jury's discretion and that makes capital sentences reviewable by the courts?

2. Did the Arizona Supreme Court err in following decades of this Court's jurisprudence, which recognizes that capital punishment is not *per se* cruel and unusual in violation of the Eighth Amendment?

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The Arizona Supreme Court affirmed Abel Daniel Hidalgo's convictions and sentences in an opinion reported at *State v. Hidalgo*, 390 P.3d 783 (Ariz. 2016), and included in the Appendix to Hidalgo's petition for writ of certiorari. Petition Appendix ("App.") 1a–31a.

## JURISDICTION

The Arizona Supreme Court entered its judgment on March 15, 2017. App. 1a. After several extensions, Hidalgo timely filed the instant petition on August 14, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

## STATEMENT OF THE CASE

Almost seventeen years ago, Hidalgo killed Michael Cordova in exchange for $1,000. App. 2a. He now awaits the capital sentence lawfully imposed by the people of Arizona and affirmed by the Arizona Supreme Court on direct appeal.

On the morning of his crime, Hidalgo laid in wait outside the auto repair shop belonging to his victim. App. 2a. When Cordova arrived to open the shop, Hidalgo approached and pretended to have business for Cordova. App. 2a. During the conversation, Jose Rojas, an independent upholsterer who occasionally worked for Cordova, arrived at the shop. App. 2a. Hidalgo then entered the shop with them and promptly shot Rojas in the back of his head before fatally shooting Cordova in the forehead. App. 2a. Although both shots were fatal, Hidalgo shot both men five additional times. App. 2a.

After the two murders—one paid, and one complimentary—Hidalgo went to the home of Frank and Barbara Valenzuela. App. 2a. Barbara overheard Hidalgo explain that he had murdered two men and wanted to sell his car to Frank because a witness had seen him drive away in it. App. 2a. Frank purchased the car, and Hidalgo fled Arizona a few days later. App. 2a.

A year later, Barbara alerted law enforcement that Hidalgo had murdered Cordova and Rojas. App. 2a. Locating Hidalgo was not difficult, as he was then incarcerated in Idaho for the subsequent murders of two women in January 2002. App. 2a.

Upon questioning, Hidalgo confessed to murdering Cordova and Rojas. App. 2a. He pleaded guilty to two counts of first-degree murder and one count of first-degree burglary. App. 2a. At sentencing, the jury found four aggravating circumstances with respect to Cordova's murder and three with respect to Rojas's. App. 3a. Among the aggravating factors were the facts that Hidalgo had committed two double-murders and Cordova's murder was a murder for hire driven by pecuniary gain. App. 3a. These factors, when considered with Hidalgo's proffered mitigation evidence, led the jury to impose a capital sentence for each murder. App. 3a.

On appeal, Hidalgo argued that Arizona's current capital sentencing scheme is facially unconstitutional because it contains too many aggravating factors and does not adequately narrow the class of defendants eligible for capital punishment. App. 3a–4a. The Arizona Supreme Court rejected that argument, finding that the individual aggravating factors are

constitutionally sound and that they sufficiently narrow the class of eligible defendants. App. 10a–11a. Additionally, Arizona law guards against arbitrariness in the capital sentencing process by requiring juries to consider any mitigation and mandating appellate review by the Arizona Supreme Court. App. 13a–14a. The Arizona Supreme Court further observed that "the vast majority of courts" have similarly considered and rejected corresponding challenges to other capital sentencing schemes. App. 8a.

## REASONS FOR DENYING THE WRIT

Hidalgo provides no compelling reason for this Court to grant the writ of certiorari. *See* Sup. Ct. R. 10. First, this case is riddled with vehicle problems. Hidalgo curiously attempts to challenge Arizona's *current* capital sentencing rules rather than the prior rules—*i.e.,* the ones under which he was sentenced. He also does not challenge the individual aggravators that were applied in his case; rather, he asserts only a vague and cumulative objection to those factors' collective effect.

Second, the Arizona Supreme Court's holding is consistent with a lopsided majority of precedent on the topic of capital sentencing. Contributing to the consensus are decisions from this Court recognizing that the capital eligibility decision is constitutionally satisfied in homicide cases if, as Arizona requires, a jury convicts a defendant of first-degree murder and finds at least one statutory aggravating factor beyond a reasonable doubt, and the aggravator is itself constitutionally sound.

Finally, this Court has repeatedly affirmed the constitutionality of capital punishment, and Hidalgo's case does not provide any reason to overrule decades of voluminous capital jurisprudence to hold for the first time that capital punishment is *per se* cruel and unusual in violation of the Eighth Amendment.

Hidalgo's petition for writ of certiorari should be denied.

### A. Hidalgo's Case Is a Poor Vehicle Because He Was Not Sentenced Under the Rules He Seeks to Challenge.

Hidalgo's claim arises from a motion in which he joined 17 other defendants in challenging Arizona's capital sentencing scheme. App. 32a–33a. He is the first of those defendants to be found guilty of first-degree murder and to receive a capital sentence. App. 32a–33a. Unlike the other defendants, however, Hidalgo committed his crimes in 2001, App. 2a, when Arizona had only ten aggravating factors. *Compare* Ariz. Rev. Stat. § 13–703(F) (West 2000) (ten aggravators) *with* Ariz. Rev. Stat. § 13–751(F) (West 2016) (14 aggravators). Oddly, Hidalgo relies on a survey that reviewed Arizona's current capital scheme—which is inapplicable to Hidalgo—to argue that 14 aggravating factors are too many. Pet. at 5–7. Thus, even if his legal argument is sound (which it is not), he would not be entitled to relief. This simple fact makes the present case a disastrous candidate for certiorari, as this Court will need to grapple with questions of standing before it ever reaches the substantive issue on which Hidalgo premises his Petition.

Additionally, Hidalgo has not challenged the constitutionality of the individual aggravating factors that were applied in his case. App. 11a. Nor has he contended that insufficient evidence supported the aggravators found in his case, or that they failed to distinguish his murders from other homicides for which capital punishment may be inappropriate. *Id.* Consequently, Hidalgo has not even alleged—let alone demonstrated—that the capital scheme under which he was sentenced was either facially unconstitutional or applied unconstitutionally in his case. *See Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973) ("Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court."). Presumably this deficiency arises because this Court expressly approved a capital scheme that mirrored the one applicable to Hidalgo, which included parallels of the very aggravators that made Hidalgo eligible for capital punishment. *Gregg v. Georgia*, 428 U.S. 153, 164–65 n.9. (1976); *see also infra* Part B.1.

Hidalgo seeks to challenge a sentencing process different than the one under which he was sentenced. Even in his own case, he has not contested any of the aggravating factors that led a jury to find his depraved history of serial murdering sufficient for a capital sentence. Nor could he. This Court should deny the Petition and await a case with a petitioner who seeks to challenge current laws or who has argued against a particular factor or factors.

### B. The Arizona Supreme Court Affirmed a Sentencing Process that Comports with Precedent from this Court and Others.

Hidalgo asserts that the Arizona Supreme Court's decision is mistaken. As he acknowledges, however, this Court's capital jurisprudence is "clear": a capital sentencing process is constitutional so long as it protects against the wanton imposition of capital punishment. Pet. at 10. The Arizona Supreme Court applied that same standard when it correctly found that Arizona's capital scheme is constitutional. Every other court to have faced the same question has applied the same rule. Certiorari is unnecessary.

#### 1. The Arizona Supreme Court's Decision Is Consistent with this Court's Precedent

This Court has consistently refused to micromanage States' and juries' determination of which killers deserve a capital sentence. The standard recognized in every circuit court of appeals is a general requirement that juries may not have unfettered discretion. The Arizona Supreme Court's decision below is consistent with this universally acknowledged but inherently open-ended standard.

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

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

This Court has distinguished between the "two different aspects of the capital decision-making process: the eligibility decision and the selection decision." *Tuilaepa v. California*, 512 U.S. 967, 971 (1994). As to the eligibility decision, "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)). Next, the selection decision must be made through a process that provides for an individualized determination based on the defendant's history and character and the circumstances of the crime. *Zant*, 462 U.S. at 879. If a capital scheme "provides for categorical narrowing at the definition stage, and for individualized determination and appellate review at the selection stage," then the scheme is constitutionally sound. *Id.*

In homicide cases, the eligibility decision is constitutionally satisfied by a scheme that requires a jury to convict a defendant of murder and then find at least one aggravating factor beyond a reasonable doubt. *Tuilaepa*, 512 U.S. at 971–72; *see also Kennedy v.*

*Louisiana*, 554 U.S. 407, 437–38 (2008). An aggravator that makes a defendant eligible for capital punishment may not be overly broad—that is, the aggravator "must apply only to a subclass of defendants convicted of murder"—and must not be unconstitutionally vague. *Tuilaepa*, 512 U.S. at 972.

Arizona's current capital scheme requires a jury to convict a defendant of first-degree murder and find at least one of 14 enumerated aggravating factors beyond a reasonable doubt before the defendant becomes eligible for capital punishment. Ariz. Rev. Stat. § 13–751 (West 2016). Moreover, the Arizona Supreme Court correctly found, *and Hidalgo does not dispute*, that all 14 aggravators in Arizona's capital scheme are constitutionally sound—they are neither overly broad, nor unconstitutionally vague. App. 11a. Therefore, the Arizona Supreme Court followed this Court's precedent and correctly concluded that Arizona's capital sentencing procedure satisfies the narrowing requirement for the eligibility decision. *See Tuilaepa*, 512 U.S. at 971–72.

Again ignoring that he was sentenced under a prior rule, Hidalgo argues that this Court should nonetheless reverse the Arizona Supreme Court's decision and declare Arizona's current capital sentencing scheme unconstitutional because the 14 aggravating factors that are otherwise constitutional nevertheless become unconstitutional because 14 is too many. Pet. at 10–16 (failing to apply even this flimsy theory to the 10-factor scheme under which Hidalgo himself was sentenced). To support this claim, Hidalgo cites a survey that alleges 856 out of 866 first-degree-murder cases have

facts that *could* support at least one of the 14 constitutional aggravating factors. *Id.* at 7.

But as the Arizona Supreme Court noted, "Observing that at least one of several aggravating circumstances could apply to nearly every murder is not the same as saying that a particular aggravating circumstance is present in every murder." App. 11a–12a. And while the survey purported to identify facts in first-degree murder cases that could support at least one aggravating factor, proving both a defendant's guilt and at least one aggravator beyond a reasonable doubt is not a foregone conclusion. Furthermore, this Court's capital jurisprudence has never suggested that capital sentencing laws must perform a particular numerical narrowing, as Hidalgo's argument presupposes.[1]

This Court's rule for aggravating factors is not nearly as intrusive as the test Hidalgo would invent. *Furman* rejected a *standardless* capital scheme because it created "a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." *Godfrey*, 446 U.S. at 427. Standardless sentencing provides "no meaningful basis for distinguishing" cases in which capital sentences are appropriate from those in which it is not. *Gregg*, 428 U.S. at 188. As a result, this Court required legislatures to create clear, objective standards that: (1) identify a class of eligible

[1] It is illogical to suggest that a capital sentencing scheme *can* perform a precise numerical narrowing. There are infinite circumstances under which an individual can commit first-degree premeditated murder. This variety makes it impossible to announce a rule that will narrow the field of actual murders by a preordained amount.

defendants; (2) channel the jury's discretion in making the eligibility decision; and (3) make rationally reviewable the process for imposing a capital sentence. *Arave v. Creech*, 507 U.S. 463, 470 (1993).

Hidalgo does not claim that Arizona's capital sentencing scheme is standardless or functionally equivalent to a standardless scheme. Pet. at 10–15. Arizona's rules narrowly prescribe the class of defendants eligible for capital punishment as those who have committed first-degree murder and to whom at least one of the enumerated aggravating factors applies. Ariz. Rev. Stat. § 13–751. The Arizona Supreme Court must also review the propriety of all capital sentences imposed. Ariz. Rev. Stat. §§ 13–755, 13–756. Thus, by clear, objective standards, Arizona's capital scheme narrows the class of eligible defendants, channels the jury's eligibility and selection decisions, and provides for the review of any capital sentences that are imposed—thereby complying with this Court's capital jurisprudence. *See, e.g.*, *Arave*, 507 U.S. at 470.

Hidalgo, however, maintains that the Arizona Supreme Court erroneously upheld Arizona's capital sentencing scheme because, according to Hidalgo, state legislatures must craft rules that effect a particular numerical, or quantitative, narrowing. Pet. at 12–16. He is incorrect. This Court's capital jurisprudence requires a "categorical narrowing" at the definition stage, which is a qualitative measure—*not* a quantitative one. *Zant*, 462 U.S. at 879. And Hidalgo does not claim that Arizona's capital sentencing rules fail to qualitatively distinguish among the first-degree murderers who are sentenced under those rules.

Moreover, even if this Court's capital jurisprudence could somehow be interpreted to require a precise quantitative narrowing—which it cannot—Hidalgo does not identify a measure that would satisfy his novel rule. Pet. at 10–15. This is because, as noted above, it is simply illogical to suggest that aggravators could be crafted in a way that would assuredly narrow the field of first-degree murders by a known percentage.

Hidalgo further asserts, incorrectly, that the Arizona Supreme Court erroneously upheld Arizona's capital sentencing scheme because it affords prosecutors broad discretion. Pet. at 13–14. That very argument has been addressed and rejected by this Court. *See, e.g.*, *Gregg*, 428 U.S. at 199 (stating the Constitution is concerned with the sentencer's discretion to impose capital punishment, not with a prosecutor's discretion to seek capital punishment). As a result, Hidalgo's complaints are without merit and do not undermine the Arizona Supreme Court's decision.[2]

Ultimately, this Court's capital jurisprudence prohibits standardless capital sentencing schemes that provide a jury with unguided and unbridled discretion

[2] Hidalgo also erroneously asserts that the decision by the Arizona Supreme Court would permit a capital scheme that is comprised of "two aggravators: one that covers all murders with a particular feature, and the other that covers all murders that *lack* the particular feature." Pet. at 14–15. That is a straw man argument. The court below correctly stated and applied this Court's requirement that aggravating factors must "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Lowenfield*, 484 U.S at 244 (quotation omitted). It is a long walk from the principles on which the Arizona Supreme Court relied to the imaginary holding of which Hidalgo seeks review.

in determining whether to impose a capital sentence. *See, e.g.*, *Godfrey*, 446 U.S. at 427. Arizona's capital sentencing process does no such thing. It provides clear, objective standards that guide and channel the jury's discretionary decisions and enable review of the jury's decision to impose a capital sentence. *See* Ariz. Rev. Stat. § 13–751. This Court has repeatedly and consistently held that such laws adequately guard "against the wanton and freakish imposition of the death penalty." *See Zant*, 462 U.S. at 876; *see also, e.g.*, *Kennedy*, 554 U.S. at 440 (stating this Court has spent more than 32 years articulating limiting factors that channel the jury's discretion to avoid [the arbitrary imposition of capital punishment] in the case of capital murder," and "that practice remains sound"). Because Arizona's current capital sentencing scheme limits jurors' discretion and allows for judicial review, it complies with an unbroken line of precedent from this Court. Certiorari is unnecessary.

### 2. The Arizona Supreme Court's Decision Is Consistent with the Vast Majority of Lower Courts.

Hidalgo asserts this Court should grant the writ because "the Arizona Supreme Court's decision is inconsistent with the holdings of other state supreme courts[.]" Pet. at 16. To advance this argument, Hidalgo cites *McConnell v. State*, 102 P.3d 606 (Nev. 2004), *People v. Ballard*, 794 N.E.2d 788 (Ill. 2002), and *Steckel v. State*, 711 A.2d 5 (Del. 1995). These three cases, however, are consistent with the decision below.

In *McConnell*, for example, the Nevada Supreme Court answered an entirely different question than the facial challenge on which Hidalgo seeks review. The

*McConnell* court considered only whether a particular aggravator was unconstitutionally overbroad. 102 P.3d at 611. Specifically, the court considered whether it would be constitutional to aggravate a first-degree felony-murder conviction, thereby making the defendant eligible for capital punishment, based solely on the State's felony aggravator. *Id.* The *McConnell* court held that it would be unconstitutional because "although the felony aggravator [ ] can theoretically eliminate death eligibility in a few cases of felony murder, the practical effect is so slight that the felony aggravator fails to genuinely narrow the death eligibility of felony murderers . . . ." *Id.* at 624. That is, the Nevada Supreme Court found that a particular aggravating factor was unconstitutionally overbroad when used as the sole aggravator to make a felony first-degree murderer eligible for capital punishment. *Id.* The *McConnell* court, however, confirmed that Nevada's felony aggravator does not run afoul of the Constitution if applied as the sole aggravator for a first-degree premeditated-murder conviction. *Id.* Moreover, it did nothing to undermine the constitutionality of using multiple aggravating factors to identify individuals eligible for capital sentences.

More fundamentally, *McConnell* fails to create a split with the decision below because Hidalgo pleaded guilty to two counts of first-degree premeditated murder—not felony murder—and the jury found multiple aggravating factors with respect to each murder. App. 2a–3a. As a result, *McConnell* is readily distinguishable from the Arizona Supreme Court's decision in the instant case.

The Illinois Supreme Court in *Ballard* rejected the argument that Illinois' capital sentencing scheme was facially unconstitutional because it contained 20 aggravating factors, which the defendant deemed "too many" and opined that it was "difficult to imagine a first degree murder defendant who does not qualify under at least one, if not several factors." 794 N.E.2d at 817. The *Ballard* majority concluded that the scheme's individual aggravators were narrowly tailored and that the overall scheme narrowed the eligible defendants by means beyond the enumerated aggravators. *Id.* at 817–18. The majority also observed that the defendant had not proved his claims were "empirically accurate," but, even so, the court stated that it would be impossible to consider aggravating factors in the aggregate and identify how many aggravators would be too many for constitutional purposes. *Id.* at 818–19. Far from creating a split, this holding places the Illinois Supreme Court in square agreement with the court below.

The Delaware Supreme Court in *Steckel* similarly rejected an argument that its capital sentencing scheme was unconstitutional for failing to genuinely narrow the eligible defendants because it contained too many aggravating factors. 711 A.2d at 12–13. As in *Ballard*, the *Steckel* court declined to consider the aggravating factors in the aggregate, as the defendant urged, because this Court's jurisprudence instructs that the relevant question is whether a scheme's *individual* aggravating factors could apply to every defendant convicted of murder. *Id.* The court then found that the individual aggravators were narrowly tailored, as required, and therefore, the state's capital scheme did not run afoul of the Constitution. *Id.* at 13.

Overlooking the reasoning and holdings from *Ballard* and *Steckel*, Hidalgo cites dictum from each and asserts, on the basis of his survey, that Arizona's capital sentencing scheme has exceeded the constitutional "limit on too many aggravating factors" that the *Ballard* and *Steckel* courts surmised. Pet. at 18 (quotation marks omitted). But speculative dictum by state courts does not create a split in authority. *E.g. Pacific Coast Supply, LLC v. N.L.R.B.*, 801 F.3d 321, 334 n.10 (D.C. Cir. 2015) ("[D]icta does not a circuit split make.") And the *Ballard* and *Steckel* courts considered their respective aggravating factors individually—*not* in the aggregate—when concluding that their capital schemes sufficiently narrowed the class of defendants eligible for capital punishment. *Ballard*, 794 N.E.2d at 817–18; *Steckel*, 711 A.2d at 12–13. That is precisely the approach taken and conclusion reached by the Arizona Supreme Court. App. 11a–13a.

In fact, as the Arizona Supreme Court noted, App. 8a, its analysis and conclusion are consistent with the vast majority of courts that have addressed similar challenges. *See, e.g.*, *Karis v. Calderon*, 283 F.3d 1117, 1141 n.11 (9th Cir. 2002); *Roybal v. Davis*, 148 F.Supp.3d 958, 1112–13 (S.D. Cal. 2015); *United States v. Le*, 327 F.Supp.2d 601, 608–09 (E.D. Va. 2004); *Lawlor v. Commonwealth*, 738 S.E.2d 847, 893 (Va. 2013); *Archuleta v. Galetka*, 267 P.3d 232, 253–54 n.6 (Utah 2011); *Thomas v. State*, 148 P.3d 727, 735–36 (Nev. 2006); *People v. Stitely*, 108 P.3d 182, 221 (Cal. 2005); *Ballard*, 794 N.E.2d at 817–18; *State v. Rhines*, 548 N.W.2d 415, 437 (S.D. 1996); *Steckel*, 711 A.2d at 12–13. No division exists that requires certiorari.

### 3. Arizona's Capital Sentencing Laws Do Not Result in the Arbitrary and Capricious Imposition of Capital Punishment.

As if to demonstrate that his Petition is a long-shot attempt to delay or avoid a constitutional sentence, Hidalgo litters his Petition with every conceivable claim of racism and inequitable enforcement. As this Court knows, claims of this nature are routine in capital appeals, and these particular claims do nothing to make this flawed Petition worthy of review.

Hidalgo argues that this Court should grant certiorari to "end the havoc that arbitrariness is wreaking on the administration of justice in Arizona." Pet. at 21. Hidalgo claims Arizona's capital scheme is arbitrary because it results in "troubling racial disparities." *Id.* at 18–20. Hidalgo, however, does not allege that the State engaged in any purposeful discrimination in his case. *Id.* Hidalgo's claim is therefore foreclosed by *McCleskey v. Kemp*, 481 U.S. 279, 291–99 (1987) (stating a capital defendant asserting discrimination contributed to a death sentence must prove that purposeful discrimination impacted the defendant's sentence).

Hidalgo also claims that Arizona's scheme is arbitrary because it "turns on accidents of geography and county resources, rather than characteristics of the offense." Pet. at 20. But again, this Court has repeatedly rejected the argument that the Eighth Amendment limits prosecutors' discretion in determining whether to seek capital punishment. *E.g.* *McCleskey*, 481 U.S. at 306–07. And no court has held that the Eighth Amendment prohibits different

counties within a State from applying state law as best they can, subject to resource constraints. *See Allen v. Stephens*, 805 F.3d 617, 629 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 2382 (2016). That is because, as this Court explained, "[n]umerous legitimate factors may influence the outcome of a trial and a defendant's ultimate sentence," including the capabilities and resources of the particular law enforcement agency.[3] *McCleskey*, 481 U.S. at 307 n.28.

Because of the many factors that prosecutors weigh in deciding whether to seek a capital sentence, it is difficult to know whether Hidalgo would have been treated identically in each county in Arizona. Given his crime—a murder for hire and the additional killing of an unsuspecting third party—and his subsequent double-murder in Idaho, it is doubtful that his case would have escaped a capital sentence anywhere. In fact, Hidalgo does not allege that the prosecutor purposefully discriminated against him, nor does he attempt to argue that his crimes were not especially grievous and deserving of capital punishment. Pet. at

[3] In any event, Hidalgo simplistically declares that particular counties in Arizona choose not to pursue capital punishment for purely financial reasons. Pet. at 20. Hidalgo's declaration ignores that available resources is only one of many factors that influence the decision to seek capital punishment in a given case. Among other things, Arizona prosecutors look to: (1) the facts of the offense; (2) the complexities of the case; (3) the heinousness of the crime; (4) the victim's vulnerabilities; (5) when and where the crime occurred; (6) the defendant's participation in the crime; and (7) any possible mitigation. *See Holmberg v. De Leon*, 938 P.2d 1110, 1111 (Ariz. 1997) ("A decision to seek the death penalty requires careful and thoughtful consideration of [Arizona's] death penalty statute . . . , [ ] cases construing it, and all evidence relevant to aggravating and mitigating circumstances.").

18–21. Everything in the record demonstrates that the prosecutor objectively and reasonably pursued a capital sentence. As a result, this Court should not grant certiorari on Hidalgo's claims of impropriety and discrimination.

### C. This Court Should Not Overrule Decades of Precedent To Find that Capital Punishment *Per Se* Violates the Eighth Amendment.

Hidalgo next argues that capital punishment is *per se* cruel and unusual and, therefore, violates the Eighth Amendment. This argument is waived. Hidalgo failed to present this claim to the Arizona Supreme Court, and, as a result, this Court should decline to consider it. *See, e.g.*, *United States v. Alvares-Sanchez*, 511 U.S. 350, 360 n.5 (1994). Regardless, Hidalgo's argument that capital punishment is *per se* cruel and unusual is unavailing.

#### 1. Capital Punishment Is Not *Per Se* Cruel and Unusual.

Hidalgo concludes his Petition as many other capital litigants do: by claiming that capital punishment is unconstitutional. That argument has failed for decades, and this case is no different.

The Eighth Amendment prohibits "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive." *Kennedy*, 554 U.S. at 419 (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 n.7 (2002)). As this Court has repeatedly explained, "the Eighth Amendment's protection against excessive or cruel and unusual punishment flows from the basic precept of justice that

punishment for a crime should be graduated and proportioned to the offense." *Id.* (quotation and marks omitted). Grounded in that principle, this Court has held that the Eighth Amendment prohibits capital punishment only for defendants who either: (1) had a diminished culpability for the crime (*e.g.* juveniles or those with intellectual disabilities); or (2) committed a crime that is disproportionate to a capital sentence (*e.g.* non-homicide offenses against individuals). *Kennedy*, 554 U.S. at 420–21.

Again, Hidalgo's culpability and the egregiousness of his crimes are not disputed. Hidalgo agreed to murder a man for $1,000, and he then plotted a scheme to carry out the hired hit. App. 2a. When another person appeared at the scene of his planned killing, Hidalgo simply killed him as well. App. 2a. Hidalgo then fled Arizona and further demonstrated his complete indifference to human life by murdering two more individuals in an unrelated case. App. 2a. Hidalgo's crimes were purposeful, egregious, and deserving of capital punishment. *See Kennedy*, 554 U.S. at 420; *see also Tison v. Arizona*, 481 U.S. 137, 156 (1987) ("Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."). Even Hidalgo does not argue that the facts of his crimes warrant leniency.

Instead, Hidalgo ignores his culpability and the egregious manner in which he committed his crimes, arguing instead that this Court should find that capital punishment is *per se* cruel and unusual. Pet. at 21–25. He contends that "a wide-spread consensus" now

rejects capital punishment, asserting that 31 States have "abandoned" capital punishment and the remaining jurisdictions carry out capital punishment infrequently. *Id.* at 22–25.

Hidalgo's assertions are inaccurate. The majority of States have democratically adopted and approved of capital punishment, some of them affirming that judgment as recently as November 2016.[4] As recently as 2015, this Court stated the ineluctable conclusion: "it is settled that capital punishment is constitutional." *Glossip v. Gross*, --- U.S. ---, 135 S. Ct. 2726, 2732 (2015); *see also Kennedy*, 554 U.S. at 437–38.

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

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

Hidalgo's narrative also ignores a trio of 2016 enactments in California, Nebraska, and Oklahoma. California voters rejected, *for a second time*, a proposition that would have repealed its capital sentencing laws and, instead, approved a measure that requires state officials to expeditiously carry out capital sentences.[5] Nebraska voters overwhelmingly reinstated capital punishment after lawmakers had repealed it.[6] And, in response to the recent difficulties in obtaining the necessary lethal-injection drugs from pharmaceutical companies, Oklahoma voters provided the state legislature with the authority to adopt any execution method that is constitutional.[7]

Like every other capital petitioner to raise this claim, Hidalgo has failed to prove a consensus against capital punishment. There is no reason for this Court to take this case and affirm once again what it has consistently announced. *See generally Gregg*, 428 U.S. at 175–76 ("In a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.") (joint

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[5] *See* Jazmine Ulloa & Julie Westfall, *California voters approve an effort to speed up the death penalty with Prop. 66*, L.A. Times, Nov. 22, 2016, 7:00PM, http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-proposition-66-death-penalty-passes-1479869920-htmlstory.html.

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

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

opinion of Stewart, Powell, and Stevens, JJ.) (quoting *Furman*, 408 U.S. at 383).

### 2. Capital Punishment Can Be Administered Constitutionally.

Hidalgo finally makes various claims that capital punishment can never be imposed in a constitutional manner and, therefore, should be declared *per se* cruel and unusual punishment. Pet. at 25–34. Hidalgo's claims are not unique, however; they have been presented, addressed, and refuted by various courts and do not support his claim that capital punishment is *per se* cruel and unusual in violation of the Eighth Amendment.

First, Hidalgo again raises an equal protection claim and argues that a defendant's race and the location of the crime have improperly infected the administration of capital punishment. *Id*. at 25–27. But Hidalgo's cursory citation to various studies is insufficient to support an equal protection claim under this Court's capital jurisprudence. *McCleskey*, 481 U.S. at 291–93. And, as discussed above, Hidalgo has proffered no evidence, specific to his case, which could possibly suggest that his capital sentences were the product of purposeful discrimination. Pet. at 25–27.

Second, Hidalgo claims that capital punishment cannot be administered constitutionally because it will always be imposed arbitrarily and capriciously. *Id*. at 25–29. The surprising foundation for this claim is the fact that juries have the discretion to refuse to impose a capital sentence. *Id.* at 27. According to Hidalgo, "[b]y granting juries untrammeled discretion to grant mercy to whomever they wish, the law reintroduces . . .

the very sort of arbitrariness that the first 'narrowing' requirement is intended to remove." *Id.* This assertion, however, ignores this Court's pronouncement that "[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." *Gregg*, 428 U.S. at 199.

Third, Hidalgo asserts that numerous defendants who received capital sentences "have been formally exonerated of their crimes of conviction." Pet. at 29–30. He then proclaims, without identifying a particular case where an individual was executed for a crime that he or she did not commit, that "States have put [innocent] individuals to death." *Id.* at 30. The very same claims have already been presented to this Court, and they do not stand up to scrutiny. *See Kansas v. Marsh*, 548 U.S. 163, 185–99 (2006) (Scalia, J., concurring).

Fourth, Hidalgo argues in passing that a long delay between sentencing and execution constitutes cruel and unusual punishment. Pet. at 33. But "[t]here is simply no authority in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed." *Johnson v. Bredesen*, 558 U.S. 1067, ---, 130 S. Ct. 541, 545 (2009) (Thomas, J., concurring in the denial of certiorari) (quotation omitted).

Finally, Hidalgo points to laws and practices from other countries. Pet. at 33–34. But the laws and practices of other countries are immaterial—"the task of interpreting the Eighth Amendment remains [this Court's] responsibility." *Roper v. Simmons*, 543 U.S.

551, 575–76 (2005). And this Court has "time and again reaffirmed that capital punishment is not *per se* unconstitutional." *Glossip*, 135 S. Ct. at 2739.

## CONCLUSION

The Court should deny Hidalgo's petition for writ of certiorari.

Respectfully submitted

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