No. 19-____

IN THE
Supreme Court of the United States

JULIUS JEROME MURPHY,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

I. Whether the Texas Court of Criminal Appeals misapplied established federal law when it held that the State's failure to disclose threats and promises made to two critical witnesses in exchange for their testimony did not violate petitioner Julius Murphy's due process rights.

II. Whether the trial court's arbitrary refusal to continue Murphy's habeas hearing violated his due process rights.

III. Whether the death penalty violates the Eighth Amendment.

PARTIES TO THE PROCEEDING

Julius Jerome Murphy, petitioner on review, was the appellant below.

The State of Texas, respondent on review, was the appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Julius Jerome Murphy respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals in this case.

OPINIONS BELOW

The Texas Court of Criminal Appeals' (TCCA) unpublished opinion is available at 2018 WL 5817561. Pet. App. 1a–3a. The TCCA's dissenting opinion is reported at 560 S.W.3d 252 (Tex. Crim. App. 2018). Pet. App. 4a–17a. The trial court's order stating its findings of fact and conclusions of law is unreported. *Id.* at 18a–48a. The TCCA's unpublished order remanding to the trial court two claims from Murphy's second successive habeas petition is available at 2016 WL 4987251. Pet. App. 49a–51a.

JURISDICTION

The Texas Court of Criminal Appeals entered judgment on November 7, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. [U.S. Const. amend. VIII].

The Due Process Clause of the Fourteenth Amendment provides:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law. [U.S. Const. amend. XIV, § 1].

INTRODUCTION

More than two decades ago, two men, Christopher Solomon and Julius Murphy, were charged with the murder of Jason Erie, in the course of a robbery.

At the time of the crime, Solomon was out on bond for armed robbery. The gun used in the crime belonged to him. And by all accounts, it was Solomon who identified the victim and suggested that the group rob him. Murphy had no prior record of violent crime. At the time of the crime, his IQ was measured at 71, which constitutes "evidence of intellectual disability." *Hall v. Florida*, 572 U.S. 701, 707 (2014); *Atkins v. Virginia*, 536 U.S. 304, 310 (2002).

No physical evidence was presented at Murphy's trial. Instead, the prosecution's case largely relied on the accounts of two witnesses. Both subsequently revealed that the prosecution made threats and offered promises of leniency in exchange for favorable testimony. The lead prosecutor at the time, however, concealed these threats. When Murphy's trial counsel asked repeatedly for disclosure of any evidence of threats of charges or promises of leniency, the prosecutor responded that he had made all necessary disclosures and that there were no deals made with the witnesses to secure their testimony. He then put the witnesses he had threatened on the stand, in flat contravention of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States,* 405 U.S. 150 (1972).

Solomon and Murphy were both convicted and sentenced to death. But because Solomon was 17 years old at the time of his crime, his death sentence was reduced to a life sentence under *Roper v. Simmons*,

543 U.S. 551 (2005). Murphy, however, was 18 years old. He remains on death row. That random assignment of life and death exemplifies the modern death penalty in the United States. In affirming the constitutionality of the death penalty in *Gregg v. Georgia*, 428 U.S. 153 (1976), this Court acknowledged that it might someday revisit this question in light of "more convincing evidence." *Id.* at 187. After 45 years of experimentation, the evidence is in. Two Justices of this Court, documenting the flaws in modern capital punishment, have called for the Court to reexamine the constitutionality of the death penalty. *See Reynolds v. Florida,* 139 S. Ct. 27, 29 (2018) (Breyer, J., respecting the denial of certiorari); *Dunn v. Madison*, 138 S. Ct. 9, 13 (2017), *reh'g denied*, 138 S. Ct. 726, 199 L. Ed. 2d 593 (2018) (Breyer, J., concurring on the basis that rather than further develop constitutional death penalty jurisprudence, "it would be wiser to reconsider the root cause of the problem—the constitutionality of the death penalty itself"); *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., joined by Ginsburg, J., dissenting). The time for doing so is now.

At a minimum, this Court should summarily reverse—or grant certiorari to review—the TCCA's denial of postconviction relief in the face of clear constitutional violations.

STATEMENT

A. Factual Background

On September 18, 1997, a group of friends—including Murphy, Solomon, Javarrow Young, Elena DeRosia, Virginia Marie Woods, and Christina Davis—got together in New Boston, Texas. Pet. App. 21a–22a. They drank beer and smoked marijuana.

Id. Solomon and Young rolled a blunt, and gave it to Murphy. Ex. 2 (Davis Aff.) ¶ 4 to Appl. for Postconviction Writ of Habeas Corpus (Sept. 24, 2015) [hereinafter "Davis Aff."]; Ex. 1 (Young Aff.) ¶ 5 to Appl. for Postconviction Writ of Habeas Corpus (Sept. 24, 2015) [hereinafter "Young Aff."]. Recent affidavits indicate that the blunt was "wet," meaning it had been dipped in embalming fluid. *See, e.g.*, Davis Aff. ¶ 4; Young Aff. ¶ 5; *see also* William N. Elwood, Ph.D., *"Fry:" A Study of Adolescents' Use of Embalming Fluid with Marijuana and Tobacco*, Tex. Comm'n on Alcohol and Drug Abuse 5–6 (Feb. 1998).

Unaware that the blunt was laced, Murphy smoked the remainder of it. Davis Aff. ¶ 5. The laced blunt had an "immediate, bad" effect on him. *Id.* The usually "quiet and mellow" Murphy was "loud and belligerent," and seemed "confused." *Id.* When Davis later attempted to speak with Murphy, he didn't seem to be able to understand her, appearing to be "out of his mind." *Id.* ¶ 6; *see also* Elwood at 1–12 (noting that the embalming fluid in "wet" blunts often contain PCP, causing hallucinations, delusions, disorientation, and loss of consciousness).

That same evening, after dark, the group separated into two cars to drive back to Texarkana, Texas. Pet. App. 22a. Young and others took one car; Murphy, Solomon, Woods, and Davis took another. *Id.* During the drive, Murphy began to cut his wrist with Davis's pocket knife, explaining to her that he was trying to kill himself. Trial Tr., vol. 18, 155:18–156:8 (Aug. 10, 1998). Murphy also tried to jump out of the window twice while the car was on the Interstate. *Id.* at 157:24–158:12.

Both cars pulled over to a gas station. Pet. App. 22a. Solomon noticed a man having trouble with his car and told the group they should "jack," or rob, him. *Id*. Young stated that he did not want to get involved, and separated from the group. *Id*.

Solomon then helped the stranded man—Jason Erie—with his car. Solomon got back into his vehicle, and Erie gave him five dollars for his help. *Id.* at 23a. Solomon saw that Erie had more money in his billfold and urged Murphy to "hit a lick" and rob him. Davis Aff. ¶ 9. Murphy did not respond. *Id.* Davis states that at this time, he still appeared unable to hear or understand her. *Id.* Woods got the gun out of the glove compartment of the car and handed it to Murphy. Pet. App. 23a. Murphy got out of the car with the gun. *Id.*

Davis testified at trial that at this point, she put her head down, kept it down, and did not watch what happened. Trial Tr., vol. 18, 129:10–18. About four to five minutes later, she heard a gunshot. *Id.* at 147:6–9. She does not remember Murphy getting back into the car after the gunshot, or anything else that happened in the immediate aftermath of the gunshot. *Id.* at 130:1–3.

Young testified at trial he did not see the shooting, that he and DeRosia did not drive by the scene of the crime while it was occurring, and that he was not present at the time of the crime. *Id.* at 69:13–70:11. He testified that after waiting for Murphy and Solomon for approximately 15–30 minutes, he, DeRosia, their daughter, and another friend drove back across the interstate, and saw Erie lying on the ground. Pet. App. 22a–23a. He got out of the car and saw that Erie was bleeding. *Id.* at 23a. An

ambulance drove by, and the group flagged it down. *Id.*

After the incident, Davis, Murphy, Woods, and Solomon drove to Memphis, Tennessee, and ultimately, to Arlington, Texas. *See* Trial Tr., vol. 18, 131:8–14. Davis and Murphy fought while in Arlington because Murphy had gone over to his ex-girlfriend's house, which upset Davis. *Id.* at 132:12–17. Davis left the group at that point and ended up at the Arlington Police Department. *Id.* at 132:24–133:7. Murphy and Solomon were apprehended in Arlington and returned to Texarkana. Mem. Op. at 2 (E.D. Tex. Aug. 20, 2004), ECF No. 23.

Davis gave Texarkana detectives a statement a few days later. Pet. App. 24a. Davis initially told detectives that Solomon shot Erie. *Id*. She later recanted her statement, and informed the detectives that Murphy shot Erie. *Id*. Young intentionally gave police a false name "because he was on probation at the time" but provided a statement to police a few days later. *Id.* at 23a–24a. And despite Murphy's being unresponsive and "out of his mind" at the time of the crime, investigators were also able to secure a statement from Murphy admitting that he had shot Erie. *Id.* at 25a–26a.

Murphy's trial counsel made five separate written requests that the State disclose evidence of threats of charges or promises of leniency made, directly or indirectly, to the witnesses in the case. *Id.* at 28a. Trial counsel also asked the prosecutors why they did not file charges against Davis; he found it odd that she was the only person in Solomon's car who

was not charged with any crime in connection with the murder.[1] Pet. App. 28a–29a. Trial counsel's persistence was not without reason: He had been warned that the lead prosecutor at the time had "a reputation for not playing above board" and his reputation for truthfulness was not good.[2] Pet. App. 29a. But the prosecutors told trial counsel that the State had disclosed everything and had made no deals with witnesses. *Id*.

In 2015, the TCCA remanded Murphy's successive state habeas petition after he presented newly discovered evidence in the form of sworn affidavits signed by Young and Davis. The affidavits confirmed that the State did *not* disclose all threats of prosecution and promises of leniency made to them. Both witnesses now swear that they were threatened with charges of murder (Young) or conspiracy to commit

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[1] Woods was also indicted for capital murder. She was never tried, never pled guilty, and her indictment was, curiously, dismissed many years later at the request of the DA's Office, in "the interest of justice." *See* Ex. 7 at 15 to Appl. for Postconviction Writ of Habeas Corpus (Sept. 24, 2015) (Mot. to Dismiss, *Texas v. Woods*, No. 97F0634-102 (Tex. Dist. March 8, 2013)); *id.* at Ex. 8 (Order Dismissing Cause, *Texas v. Woods*, No. 97F0634-102 (Tex. Dist. March 8, 2013)).

[2] This would not be the first time that the lead prosecutor in Murphy's trial, Al Smith, violated *Brady*. In the *Loveless-Miller* case, tried in 1989, Smith was faulted for failing to provide defense counsel with copies of relevant documents and photographs. *See* Brandi Grissom, *Nearly a Quarter of Overturned Convictions Involve Prosecutor Error*, Texas Tribune (July 5, 2012), *available at* https://tinyurl.com/y74y36ln. As a result of these errors, Loveless and Miller's convictions were reversed. They were subsequently exonerated.

murder (Davis) if they did not testify against Murphy.

Young's sworn affidavit confirms that both the police investigators and prosecutors threatened him. The police called Young racial slurs, and told Young that they would take away his "nigger baby" during the course of his questioning. Young Aff. ¶ 9. The prosecutor repeated the police's threat that Young would lose his daughter if he did not cooperate, and also threatened to charge Young with murder if he did not testify against Murphy and assured Young that he had "enough evidence" to secure a conviction. *Id.* ¶ 10. Young believed the police and prosecution's threats. *Id.* Under this mounting pressure, Young testified against Murphy out of fear because "I did not want to be charged with conspiracy to commit murder or murder and I did not want to lose my daughter." *Id.* ¶ 11.

The State failed to disclose threats of prosecution and promises of leniency to Davis as well. Davis's sworn statement revealed for the first time that the State threatened more than once to charge her with conspiracy to commit murder if she did not testify against Murphy. *See* Davis Aff. ¶ 12 ("In my interview with the detectives they told me that they would charge me with conspiracy to commit murder if I did not cooperate with them. I believed them."); *Id.* ¶ 13 (stating that the prosecutors "told me that if I did not testify they would charge me with conspiracy to commit murder. I believed them."). It was only after Davis acquiesced to that threat and testified for the State at Murphy's trial that she was assured that she would not be charged with any crime. *Id.* ¶¶ 15–16.

Young and Davis's testimony undoubtedly made a difference to the jury's understanding of Murphy's involvement in the crime. Young was the State's first witness, *see* Trial Tr., vol. 18, 29:4–18, and his testimony spans 75 pages, *id.* at 29–103. Al Smith's closing argument featured and reinforced Young's testimony just before the jury began its deliberations. Trial Tr., vol. 19, 151:3–8 (Aug. 10, 1998). Davis's testimony likewise was crucial for the State. She was the only witness who testified at Murphy's trial who placed him at the scene of the murder. And she was the only eyewitness who testified that—at least as of the time she put her head down, five minutes before she heard shots fired—Murphy was holding the gun used to kill Jason Erie.

B. Procedural History

Solomon and Murphy were charged with capital murder. *See* Pet. App. 19a. Murphy was found guilty and sentenced to death. *Id.*

The TCCA affirmed his conviction and sentence, *Murphy v. State*, No. 73,194 (Tex. Crim. App. May 24, 2000) (not designated for publication), and denied his applications for state habeas corpus relief. *See* Pet. App. 19a–20a. On January 17, 2006, Murphy filed a petition for state habeas raising a claim under *Atkins*. Pet. App. 20a. That petition was ultimately denied after an evidentiary hearing. *Id.* In July 2015, his execution date was set for November 3, 2015. Order Setting Execution Date (Tex. Dist. July 14, 2015).

In September 2015, Murphy filed a Successive Application for Writ of Habeas Corpus in the TCCA based on newly discovered evidence. Pet. App. 20a–21a. In that petition, he raised claims of prosecuto-

rial misconduct under *Brady* and *Giglio* for the withholding of evidence related to Young and Davis's testimony and a claim that his death sentence violated the Eighth Amendment to the United States Constitution. *Id.* The court remanded the prosecutorial misconduct claims for resolution. Pet. App. 21a, 49a–51a.

In September 2017, without any advance notice or opportunity for discovery, the trial court scheduled an evidentiary hearing to begin in less than 30 days. *See* Pet. App. 8a–9a; *see also* Order at 1–2 (Sept. 22, 2017). But the two most critical witnesses—Young and Davis—were not able to attend. *See* Hr'g Tr. at 8:12–11:14 (Oct. 20, 2017) [hereinafter "Hr'g Tr."]. Despite extensive efforts, counsel was unable to locate Davis to serve her. *Id.* at 11:1–8. And while counsel was able to secure a subpoena to compel Young's testimony, state officials failed to transport him from the Wynne Unit of the Texas Department of Criminal Justice, where he was incarcerated. *Id.* at 10:22–11:1. In addition, just one week before the evidentiary hearing, the State disclosed over 10,000 pages of documents requested more than a year earlier by Murphy's counsel under the Texas Public Information Act. *Id.* at 8:7–11, 11:9–14.

Murphy filed an unopposed written motion requesting a continuance to secure the live testimony of these crucial witnesses, and to allow counsel time to review the documents that the State had disclosed. *See* Unopposed Mot. for Continuance (Oct. 12, 2017). Counsel renewed this request orally at the hearing, which the State then opposed. Hr'g Tr. at 4:18–20, 6:21–11:16. The court denied the continuance. *Id.* at 11:17–18.

The hearing—such as it was—went forward without Davis or Young. The trial court explicitly stated in its finding of facts that it discredited both Davis's and Young's testimony because they were absent. *See* Pet. App. 39a, 41a. The court explained that "Mr. Young was not present at the evidentiary hearing to testify; and therefore, the State was not provided an opportunity to cross-examine him." *Id.* at 39a. Because of this finding, in addition to other findings, including that Young failed to elaborate on the statement that he did not tell the jury the "whole truth," and that inconsistencies existed between his affidavit and those of Byrd and Hancock, the trial court found that "Javarrow Young is not credible and neither is his affidavit." *Id.* Similarly, because "Ms. Davis was not present to testify at the evidentiary hearing, and therefore, the State did not have an opportunity to cross-examine her," and because of apparent inconsistencies between her affidavit and the live testimony of Schubert, Smith, and Wright, the trial court found that "Christina Davis is not credible, and neither is her affidavit." *Id.* at 41a.

The court subsequently concluded that Murphy had failed to prove that the State suppressed evidence of threats to Young and Davis, or that Young or Davis gave false testimony at trial. Pet. App. 32a–33a, 39a, 41a.

The TCCA affirmed the trial court. It also dismissed Murphy's Eighth Amendment challenge to the death penalty. Pet. App. 1a–3a.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE TCCA'S MISAPPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW.

The government's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Prosecutors therefore have a duty "to refrain from improper methods calculated to produce a wrongful conviction." *Id.* To give content to that overarching principle, this Court has long held that a defendant's due process rights are violated where the government withholds exculpatory or impeachment evidence that is material to the defendant's guilt or punishment, *see Brady v. Maryland*, 373 U.S. 83 (1963); or uses false evidence which, with any reasonable likelihood, could have affected a conviction or sentence, *see Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959).

The governing principles that emerge from this collection of Supreme Court precedents are twofold, and they are simple: (i) the prosecution must affirmatively disclose to the defense all favorable evidence, including any deals, threats to prosecute, or promises of leniency in exchange for testimony; and (ii) the prosecution must not knowingly advance, or fail to correct, false testimony in its pursuit of a conviction. A prosecutor commits misconduct by failing to adhere to either of these principles.

Murphy's trial was infected by both types of prosecutorial misconduct. The State threatened and made promises of leniency to two key witnesses, Davis and

Young. This was never disclosed to Murphy's counsel. The State also failed to correct both witnesses' testimony to the same effect. And in denying Murphy's constitutional claims, the trial court misapplied this Court's clearly established law.

A. The Prosecution Violated *Brady* When It Withheld Exculpatory and Impeachment Evidence Relating to Young's Testimony.

The State has an affirmative duty to disclose any and all deals or promises of leniency to defense witnesses, irrespective of any request by the defense. *Kyles v. Whitley*, 514 U.S. 419, 423–433 (1995). Where a witness's credibility is "an important issue in the case * * * evidence of *any understanding or agreement as to a future prosecution* would be relevant to his credibility and the jury [is] entitled to know of it." *Giglio*, 405 U.S. at 154–155. A deal with a witness need not be "guaranteed through a promise or binding contract" to trigger *Brady*. *United States v. Bagley*, 473 U.S. 667, 683 (1985). The State must disclose even the mere "possibility of a reward" offered in exchange for testimony. *Id.* Suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87.

In denying Murphy's *Brady* claim, the TCCA adopted the trial court's findings that Murphy failed to show that the State suppressed evidence. *See* Pet. App. 3a. But the trial court reached those findings after discounting Young and Davis's affidavits, due in part to their failure to appear and testify at Murphy's evidentiary hearing. *See* Pet. App. 39a, 41a. For all of the reasons discussed in Section II, *infra*, the trial court's decision to proceed with Murphy's

evidentiary hearing without these key witnesses violated Murphy's due process rights. And a complete inquiry into Murphy's *Brady* claim confirms that the State suppressed evidence that was undoubtedly favorable to Murphy's claim and material to the outcome of the trial.

Cognizant of the then-lead prosecutor's checkered past, Murphy's trial counsel *repeatedly* requested that the State disclose any evidence of threats or promises of leniency made, directly or indirectly, to its critical fact witnesses. The prosecutor assured trial counsel that the State had disclosed everything. They hadn't. The State withheld threats to prosecute Young if he failed to cooperate, and promises of leniency if Young testified against Murphy. That, in turn, meant the jury was never made aware of Young's expectation that if he testified against Murphy, the prosecution would deal with him more leniently.

Such evidence undoubtedly meets the standard of favorability required under *Brady*. Exculpatory or impeaching evidence is *Brady* evidence. *United States v. Cessa*, 861 F.3d 121, 129 (5th Cir. 2017). And impeaching evidence that calls into question the credibility of a government witness meets the favorability requirement. *See United States v. Dvorin*, 817 F.3d 438, 450 (5th Cir. 2016) (prosecutor conceding that evidence of a key witness's plea agreement supplement was favorable to the defendant "because it related to the credibility of a government witness").

Evidence of threats and promises to Young likewise satisfies the *Brady* materiality standard. Materiality requires a showing that there is a reasonable

probability that, had the evidence been disclosed, the result of the proceeding would have been different. *Smith v. Cain*, 565 U.S. 73, 75–76 (2012). "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'" *Id.* (quoting *Kyles*, 514 U.S. at 434) (omission in original). In evaluating the materiality of *Brady* evidence, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434.

Federal courts routinely find that evidence undermining the credibility of a key witness is material under *Brady*'s framework, and that due process violations exist where prosecutors have suppressed such evidence. *See, e.g.*, *Dvorin*, 817 F.3d at 450–451 (nondisclosure of plea agreement supplement that undermined key witness's credibility was material and violated *Brady*); *Eakes v. Sexton*, 592 F. App'x 422, 429 (6th Cir. 2014) (evidence impacting credibility or bias of key witness "was relevant, material and should have been disclosed to [defendant's] counsel prior to trial."); *Benn v. Lambert*, 283 F.3d 1040, 1054–56 (9th Cir. 2002) (*Brady* violation where prosecution's nondisclosure of multiple pieces of impeachment evidence would have seriously undermined credibility of key prosecution witness); *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 293–297 (3d Cir. 2016) (impeachment evidence was material where the witness's uncorrected testimony left the jury with conflicting stories that the undisclosed

evidence could have eliminated). So too here. The potential inference that pressure from the State had motivated Young to testify against Murphy would have aided the defense's case.

Young was the defense's key witness and one of the only witnesses able to place Murphy at the scene of the crime. He was the State's first witness, *see* Trial Tr., vol. 18, 29:4–18, and his testimony spans 75 pages, *id.* at 29–103. The State featured and reinforced Young's testimony just before the jury began its deliberations. Trial Tr., vol. 19, 151:3–8. Any evidence going to Young's potential bias thus was material. *See Tassin v. Cain*, 517 F.3d 770, 778 (5th Cir. 2008) (where "the witness's credibility 'was * * * an important issue in the case * * * evidence of *any understanding or agreement as to a future prosecution* would be relevant to his credibility'") (quoting *Giglio*, 405 U.S. at 154–155) (omissions and emphasis in original). It would have given the jury reason to question the accuracy of Young's testimony, and creates a reasonable probability that they would have decided differently at the guilt or punishment stage.

B. The Prosecution's Presentation of Young's Testimony Violated *Giglio*.

Where the State solicits or fails to correct testimony it knows or should know is false—including when the falsehood goes to the witness's credibility—an accused's due process rights are violated. *Giglio*, 405 U.S. at 153–154; *Napue*, 360 U.S. at 269; *Ex parte Brandley*, 781 S.W.2d 886, 891–892 (Tex. Crim. App. 1989). "[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor." *Giglio*, 405 U.S. at 154.

Federal courts routinely recognize *Giglio* violations where a key trial witness creates a "false impression" in the minds of the jury members by either omitting facts or offering misleading testimony. *See Tassin*, 517 F.3d at 776 (finding *Giglio* violations based on State's failure to correct misleading impression created by key witness during testimony regarding promises of leniency); *Jenkins v. Artuz*, 294 F.3d 284, 294 (2d Cir. 2002) (finding *Giglio* violation where testimony was "probably true" but "misleading"); *United States v. Sutton*, 542 F.2d 1239, 1243 (4th Cir. 1976) (finding due process violation where "the prosecution allowed a false impression to be created at trial when the truth would have directly impugned the veracity of its key witness"); *United States v. Iverson*, 637 F.2d 799, 805 n.19 (D.C. Cir. 1980) ("it makes no difference" for purposes of discerning a *Giglio* violation "whether the testimony is technically perjurious or merely misleading").

The prosecution's failure to disclose threats to Young implicated *Giglio* as much as it did *Brady*. Young never mentioned in his testimony that prosecutors had threatened him with a murder charge and with taking away his child if he did not cooperate. *See* Trial Tr., vol. 18, 29–103. Nor did Young explain that he expected leniency in exchange for his testimony against Murphy. *Id.*; Young Aff. ¶ 11. The prosecutors also never gave jurors or defense counsel reason to believe any such threats or deal had occurred. Pet. App. 29a–30a. The jury was not only left in the dark about those threats and promises; they were given the impression that no deal had been made. The prosecutors' failure to correct that misleading impression—irrespective of any good or bad faith on their part—rendered Murphy's convic-

tion and sentence fundamentally unfair and a violation of this Court's standard set forth in *Giglio*.

The same basic standards of favorability apply to any *Giglio* inquiry. *See Dvorin*, 817 F.3d at 450. And the answer is also the same: Had the prosecutor revealed the promises of leniency offered to Young, such evidence would have been favorable to Murphy's case. It would have allowed the jury to better understand Young's motives and would have affected how they weighed his testimony. *See, e.g.*, *Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1343 (11th Cir. 2011) (evidence of inducement given to key witness was favorable to defense where it could have been used to impeach witness); *see also Williams v. Williams*, 232 F. Supp. 3d 1318, 1329 (S.D. Ga.), *aff'd*, 714 F. App'x 958 (11th Cir. 2017) (evidence of deal gave witness a "powerful leniency incentive to please the State with his testimony"). Because Young's testimony also contained inconsistencies and gaps, such disclosures also would have allowed the jury to evaluate them in light of Young's motive for testifying.

Those omitted disclosures also would have been material. This Court set a standard for assessing materiality in a *Giglio/Napue* claim: whether there is "any reasonable likelihood that the false testimony *could have* affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added); *see also Giglio*, 405 U.S. at 154 ("A new trial is required if 'the false testimony could * * * in any reasonable likelihood have affected the judgment of the jury.'") (omission in original) (quoting *Napue*, 360 U.S. at 271).

Yet the trial court failed to apply this standard to Young's testimony. Instead, the court applied a more burdensome test: whether "there is a reasonable likelihood that it *affected* the judgment of the jury." *See* Pet. App. 46a–47a. The difference between "could have" and "did" is not merely semantics. The trial court's misapplication of this Court's materiality standard for *Giglio* claims infected its conclusions, which the TCCA adopted in full without additional comment.

C. The State's Failure to Disclose Threats and Promises Made to Christina Davis in Exchange for Her Testimony Similarly Violated *Brady* and *Giglio*.

Just as with the State's threats and promises to Young, the State had an affirmative duty to disclose any and all threats of prosecution or promises of leniency to Davis, irrespective of any request by the defense.[3] *Kyles*, 514 U.S. at 432–433. And, just as with Young, the State had an obligation to correct any omissions of facts or other misleading testimony Davis presented at trial. *See Tassin*, 517 F.3d at 776.

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[3] Just as it did with respect to Young, the TCCA denied Murphy's claims with respect to Davis's testimony after adopting the trial court's findings that the State did not suppress evidence in violation of *Brady*, and that Davis did not give false testimony at trial. Pet. App. 3a, 41a. But just as with Young, both of these findings were predicated in part on the trial court's finding that Davis was not credible after she was unable to testify to her affidavit at the live evidentiary hearing. *Id.* at 41a.

The prosecution's threats and promises to Davis—made expressly contingent on her testimony against Murphy—surely satisfy the standards under *Brady*. Undisclosed evidence that undermines the credibility of a key government witness—like Davis—is undoubtedly material. *Dvorin*, 817 F.3d at 451. Davis was the only eyewitness to testify at Murphy's trial who placed him directly at the scene of the murder. And she was the only eyewitness who testified that—at least at the time she put her head down, five minutes before she heard shots fired—Murphy was holding the gun used to kill Jason Erie.

Had the jury known that Davis's testimony was motivated by the prosecution's threats to charge her with conspiracy to commit murder, and her understanding that if she testified against Murphy she would escape all charges, that information unquestionably would have impacted her credibility in the eyes of the jury. *Tassin*, 517 F.3d at 781 (affirming finding of *Brady* violation where "[t]he jury was not informed of a beneficial sentencing agreement that hinged directly on [witness's] testimony, and [where witness] was central to the State's case.").

* * *

The State's misconduct thus robbed Murphy of a "verdict worthy of confidence." *Kyles*, 514 U.S. at 434. Had the State disclosed the threats and promises it made to Young and Davis to procure their testimony at Murphy's trial, it would have "put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435. The Court of Criminal Appeals thus grievously erred. The State's concealment of its threats of prosecution and promises of leniency, and its presentation of false evidence,

resulted in a material violation of Murphy's due process rights. Certiorari should be granted to correct this grave misstep.

II. THIS COURT SHOULD SUMMARILY REVERSE OR GRANT CERTIORARI TO REMEDY A VIOLATION OF MURPHY'S RIGHT TO DUE PROCESS.

A trial court exercises broad discretion when deciding a motion to continue a hearing. But that discretion is not without limits; and one of those limits is a defendant's right to due process. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). Whether the denial of a continuance is so arbitrary as to offend due process must be decided on a case-by-case basis. *Id.* at 589. "[A]n unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel." *Morris v. Slappy*, 461 U.S. 1, 11–12 (1983) (quoting *Ungar*, 376 U.S. at 589).

The request for a continuance was justified. As counsel explained at the hearing, neither Young nor Davis was present for the hearing, despite diligent attempts to secure their appearances in the month between the TCCA's sua sponte order and the evidentiary hearing. Hr'g Tr. 8:11–11:14. Young could not appear because he was incarcerated in a different county, and state officials did not timely transport Young to the hearing in Bowie County. And although counsel "attempted to serve * * * [Davis] in every single location that we know that she lived, ate, or worked at, including multiple residences, including multiple shelters, including multiple other institutions all the way

through this morning," they were unable to locate her by the time of the hearing. *Id.* at 11:2–6.

The court offered no reasons to justify the potential harm its denial of a continuance might cause. And Murphy undoubtedly was harmed. Young's affidavit contained new evidence of threats and promises made by the State that were never disclosed at Murphy's trial. His live testimony would have allowed the court to assess his credibility, and would have permitted Murphy's counsel to put his testimony on the record and to give color and context to his account. *See* Young Aff. ¶¶ 9–11. Davis's live testimony would have provided similar support to her affidavit, and shown that the State coerced her testimony by threat. Davis Aff. ¶¶ 13–16.

Indeed, the trial court explicitly stated in its finding of facts that it discredited both Davis's and Young's testimony because they were absent. *See* Pet. App. 39a, 41a. The court also relied on inconsistencies between Young's 2015 affidavit and his false testimony at trial that Young could have addressed had he appeared in court. *Id*. at 36a–37a. The court went on to find that Murphy failed to prove that the State suppressed evidence of threats to Young and Davis, or that Young or Davis gave false testimony at trial. *Id.* at 39a–41a.

Each of these reasons alone would be sufficient for a continuance. When considered together, and with the minimal harm of a continuance to the court and State, the trial court's denial was exactly the kind of "unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay'" that *Ungar* and *Morris* guard against.

The trial court's decision had the effect of excluding exculpatory testimony from the hearing and violated Murphy's due process rights. The TCCA then ratified the trial court's findings and conclusions in spite of that unconstitutional rush to judgment. Given the grave consequences of that decision, the TCCA's ruling merits review.

III. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE DEATH PENALTY IS UNCONSTITUTIONAL.

Murphy's sentence also suffers from a more fundamental constitutional problem than the State's unconstitutionally procured testimony or its unconstitutionally hasty hearing. The death penalty itself is unconstitutional.

The Eighth Amendment "'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.'" *Atkins*, 536 U.S. at 311–312 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). In *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), those "contemporary standards" led the Court to declare the death penalty, as then administered, unconstitutional. Four years later, this Court reinstated the penalty—on the condition that it not be "inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion). This Court reached this conclusion "in the absence of more convincing evidence." *Id*. at 187.

The evidence is in. And it overwhelmingly shows that the death penalty cannot be administered within constitutional bounds. Cruelty—in the form of arbitrary imposition, unreliable application, and

inhumane conditions—laces the modern death penalty regime. And the half-century since *Gregg* shows a burgeoning nationwide consensus against capital punishment.

A. The Death Penalty Is Arbitrary.

The death penalty's first constitutional defect is its "arbitrary and capricious" application. *Gregg*, 428 U.S. at 188 (reinstating the death penalty on the condition that it not be "inflicted in an arbitrary and capricious manner"). To avoid our "own sudden descent into brutality," the death penalty must be parceled out in a proportional manner. *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008). Accordingly, 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). Evidence spanning nearly half a century, however, suggests that the death penalty is not reserved for the "worst of the worst." *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting op.) (internal quotation marks omitted). It is instead doled out according to irrelevant factors—race and random geography chief among them.

Arbitrariness is, in fact, baked into the very nature of capital punishment. Among other things, the Eighth Amendment requires that States: (1) provide juries with discretion-limiting standards for the imposition of the death penalty, *Gregg*, 428 U.S. at 195 n. 47; and (2) grant juries *complete* discretion to *decline* to impose a death sentence based on the defendant's individual characteristics, *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion). The threat of arbitrary application hangs over each requirement. Creating rational and un-

derstandable discretion-limiting standards—such as aggravating factors or specified capital crimes—"appear to be tasks which are beyond present human ability." *McGautha v.California*, 402 U.S. 183, 204 (1971). And whatever arbitrariness is removed by the first requirement is reintroduced by the second—that juries be granted untrammeled discretion to grant mercy. *See Walton v. Arizona*, 497 U.S. 639, 664–665 (1990), *overruled by Ring v. Arizona*, 536 U.S. 584 (2002) (Scalia, J., concurring in part and concurring in the judgment) ("The latter requirement quite obviously destroys whatever rationality and predictability the former requirement was designed to achieve.").

Nearly 45 years' worth of evidence indicates that such arbitrariness is ineradicable. Researchers have been unable to find *any* meaningful correlation, in fact, between the heinousness of a person's crime and the likelihood he will receive a capital sentence. *See, 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, 678–679 (2014). On the contrary, numerous studies—some commissioned by states themselves—have demonstrated that the death penalty is routinely imposed based on a host of irrelevant factors. *See, e.g.*, Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics:* Furman, McCleskey, *and a Single County Case Study*, 34 Cardozo L. Rev. 1227 (2013); Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. Rev. 161 (2006); Raymond Paternoster et al., *Justice by Geography and Race: The Admin-*

istration of the Death Penalty in Maryland, 1978-1999, 4 Md. L. J. on Race, Religion, Gender, and Class 1 (2004) (commissioned by Maryland governor); *Glossip*, 135 S. Ct. at 2760–63 (Breyer, J., dissenting).

This case is a chilling example of the thin and arbitrary nature at play in every capital case. To begin with, only a few months' time separated Murphy's age from Solomon's, and his death sentence from a life sentence. Murphy and Solomon were convicted of the same murder. But because Solomon was just shy of his eighteenth birthday at the time of the murder, and Murphy was eighteen, only Murphy faces execution.

The location of the murder, as well, tilted the scales. From 1976 to 2013, more than 76% of the Texas's death sentences originated in just 20 (out of 254) counties—less than eight percent of the State. *See* Am. Bar Ass'n, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report* 203 (Sept. 2013).[4] Bowie County—where Murphy was convicted—sentenced to death more people than *ten entire States* did over the same period of time. *See id.* at 204; Death Penalty Info. Ctr. (DPIC), *Death Sentences in the United States From 1977 by State and by Year*.[5] This county-by-county disparity is all the more troubling considering that, as "the capital of capital punishment," Texas "has accounted for 38% of the

[4] *Available at* https://tinyurl.com/ybnoxjkw.

[5] *Available at* https://tinyurl.com/ycsbk4ca (last visited Feb. 1, 2019).

nation's executions" since 1976. *See* Richard C. Deiter, DPIC, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All* 4 (Oct. 2013).[6] Indeed, Arkansas, two miles east of the crime, has over the past 20 years executed 4% as many people as Texas has. *See* DPIC, *Number of Executions by State and Region Since 1976*.[7]

Murphy's race, too, likely played a role in his sentencing. Murphy—a black man—was sentenced to death by an all-white jury. Both the race of the defendant and the victim are significant factors in capital charging and sentencing. *See, e.g.*, Shatz & Dalton, *supra* at 1246–51; Paternoster et al., *supra* at 38; Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. Rev. 513, 530 (2014) ("Researchers also find race-of-defendant effects, though these effects are comparatively more modest than they were forty year ago."). This is especially true in Texas, which has the most racially concentrated death row in the country. *See* DPIC, *Death Row USA*.[8] Texas's disproportionate execution of racial minorities is so notable, in fact, that it has been termed a "legacy of slavery." *See* James W. Marquart et al., The Rope, the Chair, & the Needle: Capital Punishment in Texas: 1923-1990 xi (Univ. of Tex. Press ed., 1998).

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[6] *Available at* https://tinyurl.com/yd2jb7tg.

[7] *Available at* https://tinyurl.com/ydz9q9vl (last visited Feb. 1, 2019).

[8] *Available at* https://tinyurl.com/y7vd39s6 (last visited Feb. 1, 2019).

B. The Death Penalty Is Unreliable.

The death penalty is unconstitutionally cruel for a second reason: It is unreliable. 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. Modern technology belies the notion that only the guilty are executed. In light of the grave risk of executing an innocent person, this Court should grant certiorari and abolish the death penalty.

Current forensic techniques have revealed that innocent people are sentenced to death with startling frequency. Since 1973, 164 individuals who were sentenced to death have been formally exonerated of their crimes of conviction. *See* DPIC, *Innocence and the Death Penalty*.[9] And there is little doubt that states have put some innocent individuals to death. Multiple studies have found "overwhelming" evidence that a number of executed prisoners were actually innocent. *See, e.g.*, *Glossip*, 135 S. Ct. at 2756 (Breyer, J., dissenting) (internal quotation marks omitted).

The causes of this problem are legion: false confessions, ineffective counsel, and prosecutorial misconduct, to name just a few. *See id.* at 2757–58 (Breyer, J., dissenting). The unique dynamics of capital trials make such problems all the more likely to lead to an erroneous conviction. *See, e.g.*, John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually*

[9] *Available at* https://tinyurl.com/ycbpkvux (last updated Nov. 5, 2018).

Innocent Defendants Who Plead Guilty, 100 Cornell L. Rev. 157, 166–170 (2014); Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 Buff. L. Rev. 469 (1996).

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 where human life is concerned, no such risk can be tolerated.

C. The Death Penalty Is Inhumane.

Third, capital punishment is unconstitutionally cruel because it creates profound—and uncalled-for—suffering. Decades-long delays drain capital punishment of any legitimate penological purpose, and the inhumane conditions on death row inflict excessive punishment. For this reason as well, the Court should declare the death penalty unconstitutional.

For starters, death-row inmates are subject to increasingly long delays. In Texas, the average time on death row prior to execution is nearly 11 years. Tex. Dep't of Criminal Justice, *Death Row Facts*.[10] But this average obscures the true length of time many prisoners must wait; Murphy, for instance, has languished on death row for over 20 years. Necessary though these delays may be, the result is that the death penalty has become even more discordant with the Eighth Amendment. Delaying death by

[10] *Available at* https://tinyurl.com/agb85cl (last visited Feb. 1, 2019).

decades waters down any deterrent effect the penalty may have wrought while simultaneously leaching away society's interest in retribution. *See Glossip*, 135 S. Ct. at 2766–70 (Breyer, J., dissenting). It thus serves no purpose. *See Atkins*, 536 U.S. at 319 (explaining that a capital punishment regime that fails to accord retribution or deter future offenders is "'nothing more than the purposeless and needless imposition of pain and suffering.'") (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982)).

Awaiting death, especially in Texas, can be a form of cruel and unusual punishment in and of itself. The agony of waiting for a death sentence for weeks on end—let alone decades—has long been recognized as a barbaric form of punishment. *See, e.g.*, *In re Medley*, 134 U.S. 160, 172 (1890). And death-row inmates typically must bear this delay while housed in medieval conditions. Texas death-row inmates, for example, are automatically placed in solitary confinement, Gabriella Robles, *Condemned to Death —And Solitary Confinement*, The Marshall Project (July 23, 2017)[11]; and are not permitted to have "contact" visits, Tex. Dep't of Criminal Justice, *Offender Orientation Handbook* 103 (Feb. 2017).[12] Similar conditions on Virginia's death row were recently held unconstitutional. *Porter v. Clarke*, 290 F. Supp. 3d 518, 533 (E.D. Va. 2018). Indeed, such conditions frequently drive prisoners to "madness," *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (internal

[11] *Available at* https://tinyurl.com/ybl9dkda.

[12] *Available at* https://tinyurl.com/jzurjnl.

quotation marks omitted), or suicide, *Glossip*, 135 S. Ct. at 2766 (Breyer, J., dissenting).

D. A National Consensus Rejects the Death Penalty.

Finally, the increasing rarity of the death penalty suggests that it has become unconstitutionally "unusual." U.S. Const. amend. VIII. States have abandoned capital punishment—by popular will, executive fiat, and judicial interpretation—in droves since this Court's decision in *Gregg*. This "national consensus" should "inform" the Court's analysis. *See, e.g.*, *Kennedy*, 554 U.S. at 422–434.

Thirty-one States have now retreated from the death penalty. DPIC, *Jurisdictions With No Recent Executions*.[13] Twenty of those States have formally abolished the punishment. *See* DPIC, *States With and Without the Death Penalty*.[14] Three States—Oregon, Colorado, and Pennsylvania—have a "Governor-imposed moratorium." *Id.* The remaining eight States have not carried out an execution in the past 10 years and three of them (Kansas, New Hampshire, and Wyoming) have not executed a prisoner in over twenty years. *See* DPIC, *Jurisdictions With No Recent Executions*, *supra* note 13.

Moreover, in those jurisdictions that continue to mete out death as punishment, the practice is "freakishly" rare. *Furman*, 408 U.S. at 310 (Stewart, J., concurring). Only 42 death sentences—out of over

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[13] *Available at* https://tinyurl.com/y9mmhjqe (last visited Feb. 1, 2019).

[14] *Available at* https://tinyurl.com/mhztjwm (last visited Feb. 1, 2019).

17,000 murders[15]—were imposed in 2018. DPIC, *Death Sentences, supra* note 5. That low number reflects a growing reticence to sentence individuals to death. Indeed, as compared to 1998, 2018 saw 86% *fewer* death sentences imposed. *Id.* Texas, for example, sentenced 48 persons to death in 1999; seven received that same punishment in 2018. *Id.* What is more, a mere five States were responsible for nearly 65% of these sentences in 2018. *Id.*[16] There is even further concentration at the county level. In fact, just five prosecutors are responsible for "one out of every seven individuals on death row." Fair Punishment Project, *America's Top Five Deadliest Prosecutors: How Overzealous Personalities Drive the Death Penalty* 18 (June 2016).

The number of executions across the Nation is even lower. Last year, 25 persons were executed, in only eight States. DPIC, *Number of Executions*, *supra* note 7. Of those, only two States carried out more than two executions. Texas was one of them. It alone carried out *thirteen* last year—more than half of the Nation's total. *Id*. In the last five years, nearly every execution—more than 83%—took place in just five States: Texas, Florida, Missouri, Georgia, and Alabama. *Id*. And in the last ten years, seven States administered fewer than five executions; in most cases, just one or two. *Id*.

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[15] Based on 2017 murder rates. *See* Fed. Bureau of Investigation, *Uniform Crime Reports* (2017), *available at* https://tinyurl.com/y9l3u5gd.

[16] The States are: Florida (7), Texas (7), California (5), Ohio (5), and Alabama (3).

All of this means that the frequency of a death sentence "in proportion to the opportunities for its imposition" has become vanishingly low. *Graham v. Florida*, 560 U.S. 48, 66 (2010). Just in the year in which Murphy was sentenced, out of over 18,000 individuals arrested for homicide offenses, fewer than two percent ultimately received a death sentence. *Compare* Fed. Bureau of Investigation, *Crime in the United States 1997* at 222 (1997)[17] *with* DPIC, *Death Sentences, supra* note 5. The death penalty thus is not only arbitrary in application and cruel in effect; it has become so rare and unusual that this Court should declare it unconstitutional.

* * *

In the years since the death penalty was reinstated, this Court has narrowed the universe of death-eligible defendants, shortened the list of death-qualifying crimes, and erected procedural safeguards in the sentencing process. It has concluded that it is unconstitutional for the government to execute someone who was a minor at the time of the crime. *Roper*, 543 U.S. at 568. It has concluded that it is unconstitutional to execute individuals suffering from severe mental disabilities. *Atkins*, 536 U.S. at 321. It has prohibited the government from executing someone for a crime other than murder, *Kennedy*, 554 U.S. at 437–438, or for felony murder *simpliciter*, *Enmund*, 458 U.S. at 801; *Tison v. Arizona*, 481 U.S. 137, 158 (1987). It has concluded that it is unconstitutional for the government to sentence an individual to death "on the basis of information which" the

[17] *Available at* https://tinyurl.com/y8699fyh.

defendant "had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362 (1977). It has ruled that the government must afford the defendant the opportunity to fully present mitigating circumstances to the sentencer. *Eddings v. Oklahoma*, 455 U.S. 104, 114–115 (1982). It has held that the sentencer must fully understand the choice it faces when sentencing the defendant; if it does not, the government cannot execute the defendant. *Simmons v. South Carolina*, 512 U.S. 154, 161–162 (1994). And the Court has also concluded that it is unconstitutional to execute a defendant who was not sentenced by a jury. *Ring*, 536 U.S. at 589.

The time for chipping away at capital punishment has passed. It is time for the Court to revisit the constitutionality of the penalty itself.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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