No. 18-1022

IN THE

Supreme Court of the United States

JULIUS JEROME MURPHY,
Petitioner,

vs.

STATE OF TEXAS,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner Julius Jerome Murphy sought state habeas relief alleging that the prosecution withheld impeachment evidence and presented false testimony, and that the Eighth Amendment prohibits capital punishment. He was provided the opportunity in state court to substantiate his due process claims during an evidentiary hearing, but he failed to do so. Prior to the hearing, Murphy requested a continuance because he failed to secure the attendance of two witnesses. The trial court denied the request. Murphy's due process claims were denied and his Eighth Amendment claim was dismissed. These facts raise the following questions:

1. Should the Court grant certiorari review of Murphy's claims that the prosecution withheld impeachment evidence and presented false testimony where Murphy failed to substantiate his allegations?

2. Should the Court grant certiorari review of Murphy's claim that the trial court arbitrarily denied his request for a continuance where Murphy's request was the result of his failure to secure the attendance of his witnesses?

3. Should the Court grant certiorari review of Murphy's claim that the Eighth Amendment prohibits capital punishment where the claim is procedurally defaulted, barred by principles of non-retroactivity, undeveloped, and unsupported?

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes and Rules

BRIEF IN OPPOSITION

Petitioner Julius Murphy was convicted and sentenced to death in 1998 for the murder of Jason Erie. Murphy has unsuccessfully challenged his conviction and death sentence in state and federal court. Murphy received a stay of execution from the Texas Court of Criminal Appeals (CCA) in 2015 to litigate two claims he raised in a subsequent state habeas application. The claims alleged that (1) two witnesses, Christina Davis and Javarrow Young, were threatened by police officers and prosecutors with criminal charges related to Mr. Erie's murder and promised leniency in exchange for their testimony against Murphy and (2) Young presented testimony that gave the "false impression" that he did not receive any threats or promises from the prosecution other than the threats he testified about at Murphy's trial. Murphy was provided the opportunity to substantiate his claims during an evidentiary hearing, but he failed to do so. At the outset of the evidentiary hearing, Murphy requested a continuance based on, *inter alia*, his failure to secure the attendance of Davis and Young. The trial court denied the request. Following the evidentiary hearing, the CCA denied Murphy's due process claims and dismissed his Eighth Amendment claim without reaching its merits. Pet'r's App'x A at 3a.

Murphy now seeks review in this Court of the state court's denial of his due process claims and its dismissal of his Eighth Amendment claim. Pet. Cert. at 13–33. Murphy also claims that the trial court's denial of his request for a continuance amounted to a deprivation of his right to due process. Pet. Cert. at 22–

24. Murphy's claims do not warrant this Court's attention.

First, Murphy's *Brady*[1] and *Giglio*[2] claims raise only a complaint that the state court's factual findings were erroneous and that the state court misapplied this Court's holdings in *Brady* and *Giglio*. Such complaints do not warrant certiorari review. Sup. Ct. R. 10. Further, the CCA did not rest its denial of Murphy's due process claims on the trial court's findings. Moreover, the state habeas court provided Murphy the opportunity to substantiate his claims. He simply failed to do so. Second, Murphy's complaint that the state habeas trial court violated his right to due process by denying his request for a continuance fails to raise a due process violation or show that the trial court arbitrarily denied a continuance. Third, Murphy's challenge to the constitutionality of the death penalty is procedurally defaulted, barred by principles of non-retroactivity, undeveloped, and entirely meritless. Therefore, the Court should deny Murphy's petition for a writ of certiorari.

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[1] *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that a petitioner is deprived of his right to due process where the prosecution failed to disclose favorable evidence that was material to the defense).

[2] *Giglio v. United States*, 405 U.S. 150 (1972) (holding that a petitioner is deprived of his right to due process where the prosecution knowingly presents false testimony and where there is a reasonable likelihood that the false testimony affected the verdict).

STATEMENT OF JURISDICTION

The Court has jurisdiction to review the state court's denial of Murphy's due process claims under 28 U.S.C. § 1257. The Court does not have jurisdiction to review Murphy's Eighth Amendment claim because the state court's dismissal of the claim rested on an adequate and independent state procedural bar. *Michigan v. Long*, 463 U.S. 1032, 1041–42 (1983).

STATEMENT OF THE CASE

I. The Facts of the Capital Murder

The CCA summarized the facts of Jason Erie's murder:

> As the State's evidence demonstrated, [Murphy] was in a car riding with friends around Texarkana during the early morning hours of September 19, 1997. There had been a heavy consumption of alcohol and marijuana throughout the previous day. The group passed an individual who appeared to be having car trouble and who had attempted to elicit their help. At the suggestion of a friend, [Murphy] agreed to drive back with an aim to "jack" or rob the stranded driver. After returning to the stranded motorist, [Murphy] and his friends helped jump-start the broken-down vehicle. The driver, Jason Erie, provided a small reward to [Murphy] and his friends for their help and returned to his car. [Murphy] then stepped

> from his vehicle, and, armed with a gun, demanded Erie's wallet. Initially, Erie protested and refused to hand over his property. As he finally began to comply, [Murphy] fired a single shot from close range into [Mr. Erie's] forehead and retrieved the stolen wallet from the spot it had fallen. It was later discovered along a nearby road where [Murphy] told investigators it had been discarded. Erie was alive when rescue workers arrived, but died a short time later.
>
> [Murphy] and his friends fled through Arkansas, to Tennessee, and finally ended up in Arlington, Texas, where they were apprehended by police.

Murphy v. State, No. 73,194, slip op. at 2–3 (Tex. Crim. App. Oct. 12, 1998).

II. The State's Punishment Case

The prosecution presented evidence detailing Murphy's prior criminal history. Murphy was arrested in October 1995 for stealing stereo components. 20 RR 75–76, 78–81.[3] He was also arrested a year later for possession of marijuana. 20 RR 32–35. In January 1996,

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[3] "RR" refers to the "Reporter's Record," the state record of transcribed trial and punishment proceedings, preceded by the volume number and followed by the internal page number(s). "CR" refers to the "Clerk's Record," the transcript of pleadings and documents filed in the trial court, followed by the internal page number(s). "SX" refers to the State's exhibits admitted during the trial.

Murphy was arrested for evading detention. 20 RR 37. He was initially placed on probation for the crime, but that probation was revoked when he was again arrested for possession of marijuana in May 1997. 20 RR 37–41; SX 31. The court then sentenced Murphy to thirty days in jail. SX 31. Finally, in May 1997, Murphy threatened a woman that he would kill her and appeared prepared to physically assault her if not for the intervention of an off-duty police officer. 20 RR 19–20.

III. Murphy's Mitigation Case

The defense presented the jury with evidence of Murphy's turbulent family history, his drug and alcohol dependence, and expert psychological and medical testimony suggesting that Murphy suffered from organic brain damage. He was born to a poor teenage mother who had a series of abusive relationships with men. 21 RR 18–30, 120–21, 152–53. Because of the abuse, Murphy's mother would frequently uproot the children and move to a new location to get away from those relationships. 21 RR 22–28, 36–37, 121–22, 138.

A psychologist who interviewed Murphy testified that Murphy began drinking alcohol as early as eight or nine years old. 21 RR 160. Murphy then started smoking marijuana at the age of ten or eleven, gradually increasing to daily consumption by the age of twelve. 21 RR 161. He soon progressed to smoking marijuana that had been dipped in "embalming fluid" (phencyclidine or PCP), as well as inhaling household chemicals, snorting cocaine, smoking methamphetamine, and experimenting with Kool-Aid that had been laced with hallucinogenic mushrooms. 21 RR 161–62. Murphy's

drug use continued up until the time of his arrest for capital murder. 21 RR 162.

The defense also presented testimony that Murphy had suffered a series of head injuries. As an infant, his mother accidently dropped him down a flight of concrete stairs. 21 RR 30, 156. A psychologist also reported that she found evidence that Murphy had hit his head at least twice as a child, and that he had been involved in two car accidents as a teenager. 21 RR 156–57. Additionally, a neurologist, testified that testing revealed Murphy suffered from some damage to the frontal lobes of his brain, presumably as a result of these injuries and Murphy's chronic substance abuse. 21 RR 49–57, 84–99, 168. A neuropsychologist testified that Murphy scored in the "low average" range of intelligence, but he classified Murphy as "borderline" because Murphy had only completed the eighth grade. 21 RR 86.

IV. Evidence Presented at the State Habeas Court's Evidentiary Hearing

Murphy and the State presented evidence regarding Murphy's claims that the prosecution withheld impeachment evidence and presented false testimony. Murphy presented the testimony of Bill Schubert, Murphy's trial counsel. SHRR at 14–64.[4]

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[4] "SHRR" refers to the Reporter's Record of the state habeas evidentiary hearing. *See generally Ex parte Murphy*, No. 38,198-04. The Reporter's Record is found within the third supplemental volume of the Clerk's Record. The state habeas court's Clerk's Record will be cited to as "SHCR," preceded by the volume number and followed by the page number being cited. The third volume of

Murphy also presented the testimony of Jennifer Hancock, an acquaintance of Javarrow Young. SHRR at 66–77. However, the trial court struck her testimony insofar as she provided hearsay statements of Young. SHRR at 77. Murphy offered, and the trial court admitted, affidavits of Christina Davis and Young.[5] PX 6, 7.[6]

The State presented the testimony of the prosecutors from Murphy's trial, Alwin Smith and Kristie Wright. SHRR at 80–117. The State also presented the testimony of an investigator, Lance Hall. SHRR at 121–34.

A. Murphy's evidence

Mr. Schubert, Murphy's trial counsel, testified that he filed pre-trial motions seeking any threats made against or promises given to any witness. SHRR at 25–30; PX 1–5. Mr. Schubert testified that he had a pretrial meeting with Mr. Smith and Ms. Wright during which he asked the prosecutors why they did not file charges

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the Clerk's Record contains the state habeas court's findings and conclusions. 3 SHCR-04 at 250–83.

[5] Prior to the hearing, Murphy moved for a continuance based on his assertion that he had insufficient time to review documents he received in response to a public records request. 2 SHCR-04 at 76–86. At the outset of the hearing, Murphy requested a continuance because Davis and Young were not present at the hearing. SHRR at 4, 7–9. The trial court denied the requests. 2 SHCR-04 at 102; SHRR at 11.

[6] Murphy's exhibits admitted at the state habeas court's evidentiary hearing will be referred to as "PX," followed by the exhibit number.

against Davis. SHRR at 33. Mr. Schubert was curious as to the reason but was not accusing the prosecutors of withholding any information. SHRR at 33. However, Mr. Schubert had been told by others in the community that Mr. Smith did not play "above board." SHRR at 34.

Mr. Schubert also recalled an argument he had with Mr. Smith that stemmed from a meeting Mr. Schubert had with Davis. SHRR at 36–38. Mr. Schubert spoke with Davis and arranged a meeting with her at his office. SHRR at 36–37. Mr. Smith later called him to say that he knew Mr. Schubert had contacted the prosecution's witnesses. SHRR at 36–37. Mr. Smith told Mr. Schubert that Davis wanted him to be present at the meeting at Mr. Schubert's office. SHRR at 37. Davis was not at Mr. Schubert's office when Mr. Smith arrived, so Mr. Smith left. SHRR at 37. Soon after Mr. Smith left, Davis arrived at Mr. Schubert's office. SHRR at 38. She seemed nervous, but she wanted to proceed with the interview even though Mr. Smith had left. SHRR at 38. During the meeting, Davis asked Mr. Schubert if Mr. Smith was going to charge her with a crime related to Jason Erie's murder. SHRR at 39. Mr. Schubert told her that he did not know. SHRR at 39. Mr. Smith found out that the interview had proceeded without him, which angered him. SHRR at 38.

Mr. Schubert testified that the prosecution did not disclose any threat of prosecution or promise of leniency to Davis or Young. SHRR at 41–42. On cross-examination, Mr. Schubert testified that the prosecution made an affirmative statement to him that no deal had been made with Davis because the prosecution could not charge her with any crime related to Jason Erie's

murder. SHRR at 48. Mr. Schubert also testified that he did not recall whether Davis mentioned the prosecution making any threats or promises to her. SHRR at 52. He testified he would likely remember such a statement if Davis had stated that and would have cross-examined her regarding such a threat or promise. SHRR at 52. Mr. Schubert also testified on cross-examination that he questioned Young during Murphy's trial regarding threats the police had purportedly made to him. SHRR at 55.

Davis's affidavit stated that she dated Murphy for about two years leading up to the capital murder. PX 6. Davis stated that detectives, Mr. Smith, Ms. Wright, and the elected district attorney told her she would be charged with conspiracy to commit murder if she did not cooperate with the prosecution. PX 6. Davis also stated the prosecutors told her she could not speak with Murphy's attorneys because it would interfere with the case. PX 6. She stated that after her testimony, the prosecutors told her she would not be charged with a crime. PX 6.

Young's affidavit stated that police officers threatened him during his interview at the police station. PX 7. He stated the officers called him and his baby racial slurs, "roughed [him] up," and said they would take his baby away. PX 7. Young also stated the prosecutor threatened that he would be charged with murder and he would lose his baby if he did not testify against Murphy. PX 7. He stated that as a result of the threats, he "did not tell the jury the whole truth." PX 7.

B. The State's evidence

Mr. Smith testified that the prosecution did not inform Murphy's trial counsel of any promises made to witnesses because no such promise was made. SHRR at 83. Mr. Smith also testified the prosecutors did not threaten Davis or Young that they would be charged with a crime if they did not testify against Murphy. SHRR at 84. Young did not have criminal liability related to Jason Erie's murder and, even if he did, Mr. Smith would not have made such a threat. SHRR at 86. And if any agreement was made between the prosecutors and a witness, he would have disclosed such an agreement to the defense. SHRR at 86. Mr. Smith testified that in Murphy's co-defendant's—Chris Solomon's—trial, the prosecution offered to reduce a charge against Virginia Wood to aggravated robbery in exchange for her testimony. SHRR 83–84.

Mr. Smith described Davis as an eager witness, recalling that she called the District Attorney's Office regularly. SHRR at 87. Mr. Smith testified that neither he, Ms. Wright, nor the elected district attorney threatened Davis or Young with criminal charges or made any promises in exchange for their testimony. SHRR at 90–92. Mr. Smith testified that he told the defense "repeatedly" that Davis was not going to be charged with a crime related to Jason Erie's murder.

Mr. Smith also recalled the meeting Davis had with Mr. Schubert. SHRR at 87–88. Davis called the prosecutors to inform them of her planned meeting with Mr. Schubert. SHRR at 87–88. The prosecutors told Davis she could meet with Mr. Schubert if she wanted to and that the prosecutors could be present at the

meeting. SHRR at 87. On the day of the meeting, Mr. Schubert told the prosecutors he could not make it to the meeting due to a doctor's appointment. SHRR at 88. The prosecutors called Davis but were unable to reach her. SHRR at 88. Later, Davis called the prosecutors upset that they had not attended her meeting with Mr. Schubert. SHRR at 88. Davis said she had gone to Mr. Schubert's office and was told that Mr. Schubert would be late. SHRR at 88. When Mr. Schubert arrived, he proceeded to interview Davis despite the prosecutors' absence. SHRR at 88. Mr. Smith later spoke with Mr. Schubert who said that he gave Davis the choice of returning at a later date but she chose to proceed with the interview. SHRR at 89. Mr. Smith credited Mr. Schubert's account of his meeting with Davis because Davis was "wishy washy" as to which "side of the fence she was on." SHRR 89, 95.

Ms. Wright similarly testified that she was not aware of any threats or promises made to Davis or Young in exchange for their testimony. SHRR 109. Ms. Wright recalled speaking with Davis several times on the telephone. SHRR 107. Ms. Wright described Davis as anxious but not reluctant to testify. SHRR 107. Ms. Wright also spoke with Young before Murphy's trial. 108. On cross-examination, Ms. Wright acknowledged that she was not present for the interviews conducted by the police and that she did not know whether Mr. Smith had meetings with witnesses without her being present. SHRR 117.

Mr. Hall testified that Young was incarcerated in prison at the time of the evidentiary hearing. SHRR at 122. Mr. Hall also testified regarding Young's criminal

record, which included burglary, forgery, family violence assault, violations of protective orders, reporting a false alarm, theft, and prostitution. SHRR at 127–34.

C. The state habeas trial court's findings and conclusions

The state habeas trial court found that Young was not credible due to his extensive criminal record. 3 SHCR at 271. Further, his trial testimony was consistent with his statement to the police that he did not witness Jason Erie's murder. On the other hand, Young's affidavit, written twenty-years after Murphy's trial, was contradicted by Murphy's confession in which he admitted to shooting Jason Erie. And Young's affidavit did not provide the basis for his statement that he "never told them that Chris [Solomon] pulled the trigger" nor did his affidavit explain how his trial testimony was false. 3 SHCR at 271. Moreover, Murphy's other evidence (i.e., Ms. Hancock's affidavit) that implied Young admitted to shooting Jason Erie was inconsistent with Young's affidavit in which he implied Chris Solomon was the triggerman. 3 SHCR at 272.

The state habeas trial court also found that Davis was not credible. 3 SHCR at 273–74. Specifically, the court found Davis's assertion that the prosecutors threatened to charge her with conspiracy to commit murder if she did not testify against Murphy was contradicted by the testimony at the evidentiary hearing that no such threat was made and that Davis had been a willing and eager witness. 3 SHCR at 274. Her credibility was also undermined by the assertion in her affidavit that the prosecutors did not allow her to speak

with Murphy's trial counsel, which was contradicted by the testimony at the evidentiary hearing. 3 SHCR at 274.

The state habeas trial court found that the testimony of Mr. Smith and Ms. Wright was credible. 3 SHCR at 276–79. The court credited their testimony that no threats of criminal charges or promises of leniency were made to Davis or Young. 3 SHCR at 78–79. Based on those findings, the court concluded that Murphy failed to show the prosecution withheld evidence in violation of *Brady* or presented false testimony. 3 SHCR at 281.

The CCA denied relief based on its own review. Pet'r's App'x A at 3a. In doing so, it did not adopt the trial court's findings and conclusions. Pet'r's App'x A at 3a.

V. Procedural History

Murphy was convicted and sentenced to death for the murder of Jason Erie. CR 2, 277–78; 19 RR 170; 21 RR 284–85. The CCA upheld Murphy's conviction and death sentence on direct appeal. *Murphy v. State*, No. 73,194.

Murphy filed his initial state application for a writ of habeas corpus in the trial court. SHCR-02 at 3. The trial court entered findings of fact and conclusions of law recommending that Murphy be denied relief. SHCR-02 at 90–94. The CCA adopted the trial court's findings and conclusions and denied relief. *Ex parte Murphy,* No. 38,198-02 (Tex. Crim. App.) (unpublished order).

Murphy then filed his initial federal habeas petition. *Murphy v. Thaler*, No. 5:02-CV-086 (E.D. Tex.). The district court denied the petition. *Id*. Murphy then filed an application for a certificate of appealability (COA) in the Court of Appeals for the Fifth Circuit, which was denied. *Murphy v. Dretke*, 416 F.3d 427 (5th Cir. 2005), *cert. denied*, 546 U.S. 1098 (2006).

The convicting court set Murphy's execution date in 2006. Prior to his scheduled execution date, Murphy filed a subsequent state habeas application arguing that he was ineligible for execution because he was intellectually disabled. The CCA stayed Murphy's execution and remanded the application. *Ex parte Murphy*, No. 38,198-03 (Tex. Crim. App.) (unpublished order). Following an evidentiary hearing, the CCA denied relief. *Id*. This Court denied Murphy's petition for a writ of certiorari. *Murphy v. Texas*, 135 S. Ct. 2350 (2015).

Murphy also filed in the district court a second petition for a writ of habeas corpus and a motion to transfer the petition to the Fifth Circuit. *Murphy v. Stephens*, Civ. Act. No. 5:14-CV-146 (E.D. Tex.). The District Court granted Murphy's motion to transfer, and the Fifth Circuit later denied Murphy's motion for authorization to file a successive habeas petition. *In re Murphy*, 14-41311 (5th Cir. Apr. 29, 2015) (unpublished order).

Murphy's execution was then scheduled in 2015. Prior to the scheduled execution, Murphy filed a subsequent state habeas application raising his *Brady* and *Giglio* claims as well as his challenge to the constitutionality of the death penalty. The CCA stayed

Murphy's execution and remanded Murphy's *Brady* and *Giglio* claims to the trial court. *Ex parte Murphy*, 2015 WL 5936938 (Tex. Crim. App. Oct. 12, 2015) (unpublished order); Pet'r's App'x D at 49a–51a. Following an evidentiary hearing, the trial court recommended that relief be denied on Murphy's *Brady* and *Giglio* claims. Pet'r's App'x C at 18a–48a. The CCA denied Murphy's *Brady* and *Giglio* claims based on its own review and dismissed Murphy's claim that the death penalty is unconstitutional. Pet'r's App'x A at 3a.

Murphy then filed a Petition for a Writ of Certiorari. The instant Brief in Opposition follows.

REASONS TO DENY THE PETITION

I. Murphy's Complaint That the State Court Misapplied *Brady* and *Giglio* Does Not Warrant This Court's Attention.

Murphy argues the state court misapplied this Court's holding in *Brady* by concluding that he failed to establish that the prosecution withheld evidence that Davis and Young were threatened with criminal charges and promised leniency in exchange for their testimony against Murphy. Pet. Cert. at 14–17, 20–22. He argues the state court misapplied *Giglio* by concluding that he failed to show Young gave false testimony at his trial. Pet. Cert. at 17–20. But his claims allege nothing more than that the state court misapplied a properly stated rule, which is an insufficient basis for this Court's review. Sup. Ct. R. 10. Moreover, the state court properly rejected Murphy's claims. Consequently, Murphy's petition should be denied.

A. The Standard Under *Brady* and *Giglio*

Irrespective of good or bad faith of the prosecution, a defendant's right to due process is violated when the prosecution fails to disclose evidence favorable to the defendant, which is material to the defense. *Moore v. Illinois*, 408 U.S. 786, 794–95 (1972). The duty to disclose evidence includes impeachment evidence. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 684 (1985).

A petitioner may also establish a violation of the right to due process by showing that the prosecution knowingly presented false testimony. *Giglio*, 405 U.S. at 153–54; *Napue v. Illinois*, 360 U.S. 264, 269–70 (1959). To make such a showing, a petitioner also has the burden of establishing that there is a reasonable likelihood that the false testimony could have affected the jury's verdict. *United States v. Agurs*, 427 U.S. 97, 103 (1976).

B. The state court properly denied Murphy's *Brady* claims.

Murphy claims that the prosecution violated *Brady* by failing to disclose to the defense evidence that Davis and Young were threatened that they would be charged with a crime related to Jason Erie's murder if they did not testify against Murphy. Pet. Cert. at 14–17.

The state court properly rejected the claims because Murphy failed to establish a *Brady* violation.

Murphy rests much of his argument on his assertion that, in its findings, the state habeas trial court improperly discounted Davis's and Young's affidavits because they did not give live testimony at the evidentiary hearing. Pet. Cert. at 14, 20 n.3. But contrary to Murphy's assertion, Pet. Cert. at 14, the CCA did not base its rejection of Murphy's *Brady* claims on that finding. The CCA denied the claims on the merits. Pet'r's App'x A at 3a. In doing so, the CCA did not adopt the trial court's findings. Pet'r's App'x A at 3a. Rather, the CCA denied Murphy's claims "[b]ased upon [its] own review." Pet'r's App'x A at 3a. Any complaint Murphy has regarding the propriety of the trial court's findings, then, is simply beside the point. Moreover, as discussed below, the evidence and testimony at the evidentiary hearing flatly belied Murphy's assertion that the prosecution withheld impeachment evidence regarding Davis or Young.

1. Murphy failed to show the prosecution withheld evidence that Young was threatened or promised leniency in exchange for his testimony.

Murphy argues that Young was threatened or pressured by the prosecution to testify against him and that the prosecution did not disclose such evidence to the defense. Pet. Cert. at 17. He argues that Young was a key witness because he was one of only a few witnesses who could place Murphy at the scene of Jason Erie's

murder. Pet. Cert. at 17. Murphy's claim is based upon Young's affidavit, which was written twenty years after Murphy's trial. PX 7. In his affidavit, Young stated that police officers called him and his baby racial slurs and threatened that he would lose his daughter if he did not testify against Murphy. PX 7. Young also stated that the prosecutors threatened that he would be charged with murder or conspiracy to commit murder and that his baby would be taken from him if he did not testify against Murphy. PX 7. He stated that he did not tell police that Chris Solomon pulled the trigger because he knew the police "were after [Murphy]." PX 7. "Because of this, [he] did not tell the jury the whole truth when [he] testified at [Murphy's] trial." PX 7.

The testimony at the evidentiary hearing flatly contradicted Young's affidavit. Mr. Smith and Ms. Wright both denied threatening Young or promising him leniency in exchange for his testimony. SHRR at 84, 86, 90–91, 97, 109. Mr. Schubert acknowledged cross-examining Young regarding purported threats police officers made to him.[7] SHRR at 52; *see* 18 RR 74–75. Mr. Schubert testified he was most likely informed by the prosecution that the police discussed with Young the possibility that his child would be taken from him. SHRR at 55–56.

Further, Young was simply not credible. His criminal record is extensive. SHRR 121–34. And more importantly, his recitations of the events on the night of the murder have been wholly inconsistent. Neither

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[7] Murphy did not present testimony of any police officers to substantiate Young's assertion that he was threatened by the police.

Young's statement to the police nor his trial testimony indicated he saw the shooting occur. On the contrary, Young explained that he, along with two friends, drove away from Jason Erie's home before the shooting occurred and drove by the home later and saw Mr. Erie laying on the driveway, which prompted Young to flag down a passing ambulance. 3 RR (Young's Voluntary Statement); 18 RR 45–46. Young's trial testimony was corroborated by the driver of the ambulance who testified he was stopped by three people who directed him to Mr. Erie. 18 RR 105.

However, the hearsay statements of Young that Murphy presented at the evidentiary hearing through Ms. Hancock implied that Young shot Jason Erie. SHRR at 72, 272. Young's affidavit, on the other hand, implied that Chris Solomon shot Jason Erie, although the affidavit did not affirmatively state that Solomon pulled the trigger, nor did it explain how his trial testimony was false. PX 7. Young's affidavit and his hearsay statements to Ms. Hancock were contradicted by Murphy's confession to the police to killing Jason Erie. 19 RR 106. The state court was not required to credit nebulous and tenuous assertions from such an incredible witness.

Moreover, Murphy cannot show harm resulting from the alleged failure of the prosecution to disclose to the defense that he was threatened by the police and prosecutors with criminal charges. Again, Murphy confessed to the shooting. 19 RR 106. And Young's statements in his affidavits do not exculpate Murphy. PX 7.

Additionally, as noted above, Young testified at Murphy's trial that the police threatened that his baby would be taken away from him. 18 RR 74–75 ("Q: During your statement did [the police] ever threaten to take your baby away from you and Elena? A: Yes, sir."). Consequently, Young's statement in his affidavit to the same effect is cumulative of the testimony Murphy's jury heard, and Murphy cannot establish a *Brady* violation. *See Turner v. United States*, 137 S. Ct. 1885, 1895 (2017) (holding that *Brady* claim failed where the purportedly undisclosed impeachment evidence "was largely cumulative of impeachment evidence petitioners already had and used at trial"). Therefore, Murphy's petition should be denied.

2. Murphy failed to show the prosecution withheld evidence that Davis was threatened or promised leniency in exchange for her testimony.

Murphy also failed to establish that the prosecution withheld impeachment evidence showing Davis was threatened by the prosecution or promised leniency in exchange for her testimony.[8] Murphy's claim was based on Davis's affidavit in which she stated police officers, the elected District Attorney, and the prosecutors told her she would be charged with

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[8] Murphy states that the prosecution presented false testimony by Davis, but he does not identify any such testimony. Pet. Cert. at 20. Consequently, Murphy's petition does not raise a claim that his right to due process was violated because Davis gave false testimony.

conspiracy to commit murder if she did not cooperate with them. PX6. She also stated the prosecutors told her after she testified that she would not be charged with a crime. PX 6. Murphy argues that Davis's testimony at his trial was material because she was the only witness who placed Murphy at the scene of the murder and who testified that Murphy was holding a gun soon before Jason Erie was shot. Pet. Cert. at 21.

But again, Murphy's assertions were flatly contradicted by the evidence and testimony at the evidentiary hearing. Mr. Schubert recalled being told by the prosecutors that Davis would not be charged with a crime related to Jason Erie's murder and that the prosecutors did not have an agreement with Davis in exchange for her testimony. SHRR at 30, 33, 48. Mr. Smith and Ms. Wright testified that Davis was neither threatened with criminal charges nor promised leniency in exchange for her testimony. SHRR 84, 90–92, 109. This contrasts with Chris Solomon's trial in which the prosecutors agreed to reduce a charge against Virginia Wood in exchange for her testimony. SHRR 83–84, 110; *see Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001) (discussing Wood's trial testimony regarding plea agreement she entered into with the prosecution). Indeed, Mr. Smith described Davis as an eager—although "wishy washy"—witness. SHRR at 87, 90. The only evidence of any threats or promises made to Davis came from her affidavit. But, like Young, Davis was simply not credible.

For example, Davis asserted in her affidavit that the elected District Attorney, Bobby Lockhart, told her she would be charged with a crime if she did not testify

against Murphy. PX 6. But Mr. Smith and Ms. Wright testified that Mr. Lockhart did not attend meetings with witnesses. SHRR 89–90, 109. Similarly, Davis stated in her affidavit that the prosecutors forbade her from speaking with defense counsel. PX 6. But her statement was directly contradicted by the prosecutors' testimony and Mr. Schubert's testimony regarding a meeting Mr. Schubert had with Davis. SHRR 36–38, 87–89. Davis's statement that the prosecutors told her after her testimony she would not be charged with a crime is contradicted by Mr. Smith's testimony that he "repeatedly" told Davis she was not being charged with a crime and by Mr. Schubert's testimony that he was aware Davis was not being charged. SHRR 33, 96.

Further, Murphy cannot show that the purportedly suppressed impeachment evidence was material. As discussed above, Murphy confessed to shooting Jason Erie. Davis's affidavit did not exculpate Murphy. PX 6. Indeed, her affidavit did not assert that she gave false testimony at Murphy's trial; nor did her affidavit contradict her trial testimony that Murphy had a gun, exited the car, and that she soon heard a gunshot.[9] 19 RR 128–29; PX 6.

Murphy failed to show the prosecution withheld impeachment evidence that Davis was threatened or promised leniency in exchange for her testimony. He also failed to show that such evidence was material.

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[9] Notably, Murphy's jury was aware that Davis gave inconsistent accounts of the murder. 18 RR 134. She testified she initially falsely told the police that Chris Solomon shot Jason Erie because she wanted to protect Murphy. 18 RR 134. At trial, Davis testified she did not see the shooting. 18 RR 143–44.

Consequently, Murphy failed to establish a *Brady* violation regarding Davis, and the CCA properly rejected his claim. For the same reason, Murphy's petition should be denied.

C. The state court properly denied Murphy's *Giglio* claim.

Murphy argues the state court erred in denying relief on his claim that the prosecution knowingly presented false testimony of Young. Pet. Cert. at 17–20. He asserts that Young's trial testimony was false because it gave the "false impression" that he was not threatened by the prosecutors (as opposed to being threatened by police officers) with criminal charges and having his baby taken from him and that he expected leniency in exchange for his testimony against Murphy. Pet. Cert. at 18.

First, Murphy's claim does not warrant this Court's attention because it relies on a rule that this Court has not recognized, i.e., that testimony is "false" for purposes of *Giglio* if it gives the jury a "false impression." Pet. Cert. at 18. Murphy does not identify any falsity in Young's trial testimony; nor does Murphy identify any misleading testimony by Young. Young was asked at Murphy's trial regarding statements police officers purportedly made to him that his baby might be taken from him. He was not asked at trial, and did not deny, receiving any other threats or promises of leniency he asserts in his affidavit were made.

Second, as discussed above, Murphy failed to show that any such undisclosed threat or promise of leniency was made to Young. For the same reason,

Murphy cannot show that Young's testimony was either false or misleading.

Lastly, Murphy argues that the state habeas trial court's findings show that it applied an incorrect test when assessing the materiality of Young's testimony. Pet. Cert. at 19–20. But again, the CCA did not adopt the trial court's findings when it denied Murphy's *Giglio* claim. Pet'r's App'x A at 3a. Consequently, Murphy identifies no error justifying this Court's review, his *Giglio* claim does not warrant this Court's attention, and his petition should be denied.

II. The Trial Court's Denial of Murphy's Request for a Continuance Did Not Implicate Due Process.

Murphy claims his right to due process was violated during the state habeas proceedings because the trial court arbitrarily denied his request for a continuance of the evidentiary hearing. Pet. Cert. at 22–24. Murphy's continuance request was based on, *inter alia*, Davis's and Young's absence at the evidentiary hearing. Pet. Cert. at 22. He argues that the trial court's ruling deprived him of the opportunity to present the witnesses' live testimony, which would have provided support for their written affidavits. Pet. Cert. at 23. But Murphy's complaint does not give rise to a due process concern. And even assuming it did, the trial court's denial of Murphy's continuance request was appropriate.

A. Murphy's due process rights were limited in the state habeas proceedings.

First, Murphy's claim alleging a due process violation stemming from the state habeas trial court's denial of his requests for a continuance does not warrant this Court's attention because the claim does not implicate the full protections of due process. As Justice O'Connor stated:

> A post-conviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the States to provide such proceedings . . . nor does it seem [ ] that that Constitution requires the States to follow any particular federal role model in these proceedings.

Murray v. Girratano, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring); *see also Pennsylvania v. Finley*, 481 U.S. 551, 557 (1989) (states have no obligation to provide collateral review of convictions). "State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal." *Giarratano*, 492 U.S. at 10. This Court has explained that "[t]he additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are . . . sufficient to assure the reliability of the process by which the death penalty is imposed." *Id*.

Where a State allows for postconviction proceedings, "the Federal Constitution [does not] dictate[ ] the exact form such assistance must assume." *Finley*, 481 U.S. at 555. Indeed, "[f]ederal courts may upset a State's postconviction procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009). This is quite a different position from cases involving the right to counsel on first appeal and the right to be free from cruel and unusual punishment, i.e., competency to be executed and intellectual disability. Because those rights are firmly grounded in the Constitution, any measures taken by the States to allow vindication of them will necessarily implicate due process. *See Brumfield v. Cain*, 125 S. Ct. 2269 (2015); *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Evitts v. Lucy*, 469 U.S. 387 (1985). But Murphy does not raise such a claim. Consequently, Murphy's complaint regarding the state habeas trial court's denial of his request for a continuance is not worthy of certiorari review.

Murphy relies on this Court's holdings in *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964), and *Morris v. Slappy*, 461 U.S. 1, 11–12 (1983), for support. But each of those cases involved criminal trials and the attendant due process rights. *Ungar*, 376 U.S. at 589–90 (discussing the impact of the trial court's denial of a continuance on the petitioner's ability to retain counsel and prepare a defense); *Slappy*, 461 U.S. at 11–12 (same). As discussed above, such rights are not implicated in state habeas proceedings. Consequently, Murphy fails to identify support for his claim.

B. The trial court did not arbitrarily deny Murphy's requests for a continuance.

Even assuming, arguendo, the state habeas trial court's denial of Murphy's requests for a continuance implicated his constitutional right to due process, Murphy fails to show the court's ruling was so arbitrary as to amount to a due process violation. Most importantly, Murphy was undeniably afforded due process's core protection of the opportunity to be heard. *Ford v. Wainwright*, 477 U.S 399, 413 (1986) ("'[t]he fundamental requisite of due process of law is the opportunity to be heard'") (citation omitted); *Tercero v. Stephens*, 738 F.3d 141, 148 (5th Cir. 2013) (noting that "states retain discretion to set gateways to full consideration and to define the manner in which habeas petitioners may develop their claims" and "'[d]ue process does not require a full trial on the merits'; instead, petitioners are guaranteed only the 'opportunity to be heard.'") (footnotes and citations omitted).

Represented by counsel, Murphy received a stay of execution from the CCA and a remand to the trial court for resolution of his *Brady* and *Giglio* claims. Pet'r's App'x D at 51a. On September 22, 2017, more than one year after the CCA remanded the claims for resolution, the trial court scheduled the evidentiary hearing to take place on October 20, 2017. 3 SHCR-04 at 49–51. Murphy failed to secure the attendance of Davis and Young. Nonetheless, he admitted their affidavits into evidence and presented the testimony of trial counsel and an acquaintance of Young. Based on the evidence presented at the hearing, the trial court

recommended that Murphy's claims be denied. The CCA later denied the claims.[10]

Murphy identifies no infirmity in the state habeas court's proceedings, especially where Davis's and Young's absence was due to Murphy's own failure to secure their attendance at the hearing. Murphy did not secure Young's attendance because Young was incarcerated at the time, and Murphy failed to obtain the requisite bench warrant.[11] SHCR-04 at 259. Murphy simply failed to locate Davis during the month that passed between the date of the trial court's order

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[10] Even if the entirety of the state habeas trial court's proceedings on Murphy's *Brady* and *Giglio* claims occurred without a live hearing, Murphy would have received the process he was due because "a paper hearing is sufficient to afford a petitioner a full and fair hearing on the factual issues underlying the petitioner's claims." *Clark v. Johnson*, 202 F.3d 760, 766 (5th Cir. 2000); *Armstead v. Scott*, 37 F.3d 202, 208 (5th Cir. 1994) (finding that a hearing by affidavit was adequate to allow presumption of correctness to attach to the state court's factual findings); *see also Strong v. Johnson*, 495 F.3d 134, 139 (4th Cir. 2007) ("[C]redibility determinations may sometimes be made on a written record without live testimony."); *Tanberg v. Sholtis*, 401 F.3d 1151, 1161 (10th Cir. 2005) (a trial court's "determination of credibility of affidavits [will not be disturbed on appeal] unless that determination is without support in the record, deviated from the appropriate legal standard, or followed a plainly erroneous reading of the record.").

[11] Murphy asserts that "state officials" failed to transport Young to the evidentiary hearing. Pet. Cert. at 11, 22. But his absence was due to Murphy's failure to request and obtain a bench warrant to secure Young's attendance. Notably, Murphy (who, like Young, was incarcerated in state prison at the time of the hearing) was bench warranted to the evidentiary hearing. 2 SHCR-04 at 52.

scheduling the evidentiary hearing and the date of the hearing.[12] A due process violation does not arise from the petitioner's own actions or inactions. *Cf. Ungar*, 376 U.S. at 590 (upholding trial court's denial of continuance because, *inter alia*, the petitioner waited until the day of the hearing to request a continuance).

Due Process did not require the trial court to sanction further delay, delay that would have been occasioned by Murphy's own failure to secure the presence of Davis and Young. This is especially true where the trial court permitted Murphy to offer the witnesses' affidavits into evidence. PX 6, 7. That Murphy was not able (due to his own failing) to present the live testimony of those witnesses—whose testimony as proffered in their affidavits was facially incredible—does not establish a due process violation.

Murphy had the means and the opportunity to present his claims, marshal evidence in support of his cause, and address the adverse evidence adduced against him. Simply because Murphy did not prevail does not mean that he was denied notice or an opportunity to be heard.

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[12] Murphy does not suggest how additional time would have resulted in his locating Davis and securing her attendance at the hearing. Indeed, Murphy's counsel asserted they had attempted to serve her with a subpoena in multiple locations but were "not able to find her." SHRR at 11.

C. Murphy fails to show the requisite harm to establish a due process violation.

Lastly, Murphy contends he was harmed by the denial of a continuance because Davis's and Young's live testimony would have permitted the trial court to judge their credibility and permitted the witnesses to provide context for their affidavits. Pet. Cert. at 23. But Murphy does not explain how any further context would be helpful. And live testimony by Young would not have rectified any "inconsistencies" between his trial testimony and his affidavit. Pet. Cert. at 23. Rather, his live testimony would surely have highlighted his lack of credibility.[13] Murphy's conclusory and speculative assertions that live testimony from Davis or Young would have meaningfully added to their affidavits are insufficient to establish harm. Consequently, his petition should be denied.

III. Murphy's Eighth Amendment Claim Is Procedurally Defaulted and Meritless.

Murphy claims that the death penalty is unconstitutional. Pet. Cert. at 24–33. He argues that capital punishment is arbitrarily imposed, unreliable, and inhumane and that a consensus has emerged in favor of abolishing it. Pet. Cert. at 25–33. Murphy's

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[13] As discussed above, Young's statements regarding Jason Erie's murder at Murphy's trial and in his affidavit were not his only inconsistent statements regarding the murder. He also provided an inconsistent statement to Jennifer Hancock regarding the murder.

claim is not worthy of this Court's attention because it is procedurally defaulted and unsupportable.

A. Certiorari review of Murphy's Eighth Amendment claim is foreclosed because the claim is procedurally defaulted.

Murphy's Eighth Amendment claim implicates nothing more than the state court's proper application of state procedural rules for collateral review of death sentences. The state court's dismissal of Murphy's claim, which relied upon an adequate and independent state procedural ground, forecloses certiorari review. *Walker v. Martin*, 562 U.S. 307, 315–16 (2011); *Long*, 463 U.S. at 1041–42. Specifically, when Murphy filed a subsequent state habeas application raising his *Brady*, *Giglio*, and Eighth Amendment claims, the CCA found that the *Brady* and *Giglio* claims satisfied the requirements under Texas Code of Criminal Procedure Article 11.071 § 5 for merits review. Pet'r's App'x D at 51a. The CCA did not find the same for Murphy's Eighth Amendment claim. Rather, following the trial court's resolution of Murphy's *Brady* and *Giglio* claims, the CCA dismissed his Eighth Amendment claim. Pet'r's App'x A at 3a.

Necessarily then, the CCA concluded that the claim did not satisfy § 5, and the dismissal of Murphy's claim could not have been a merits adjudication. *See Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997) ("In our writ jurisprudence, a 'denial' signifies that we addressed and rejected the merits of a particular claim while a 'dismissal' means that we declined to consider

the claim for reasons unrelated to the claim's merits."); *see also Rocha v. Thaler*, 626 F.3d 815, 838 (5th Cir. 2010) (holding that the CCA's dismissal of claim does not constitute a merits determination and stating that, "absent an express indication otherwise, the CCA assesses the merits of a successive state habeas application only if it first concludes that the factual or legal basis for the claim was unavailable"); *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008) ("The [CCA] did not need to consider or decide the merits of Hughes's constitutional claims in reaching its decision to dismiss those claims as an abuse of the writ pursuant to Article 11.071, [§] 5."). Consequently, certiorari review of Murphy's Eighth Amendment claim is foreclosed, and his petition should be denied.

B. Murphy's Eighth Amendment claim is barred by principles of non-retroactivity.

Murphy argues that the Court should grant certiorari to create a new rule by holding that capital punishment is unconstitutional. Pet. Cert. at 24–33. Murphy's petition does not present a compelling reason justifying the Court's exercise of certiorari review because, in addition to being procedurally barred, his claim is barred by principles of non-retroactivity, as *Teague v. Lane*, 489 U.S. 288 (1989), prohibits the retroactive application of such rules.

When Murphy's conviction became final, this Court had not (and still has not) categorically prohibited capital punishment. Accordingly, Murphy's argument that he is categorically exempt from the death penalty

seeks the creation of a new rule of constitutional law and relief must be denied under *Teague*. Therefore, the Court should decline certiorari review.

C. Murphy's claim is meritless.

Murphy's Eighth Amendment claim is also patently meritless. It should be noted at the outset that, because Murphy raised this claim in a subsequent state habeas application, he precluded factual development in the lower courts. Nonetheless, Murphy fails to justify the broad new rule he seeks.

Murphy first argues that capital punishment is unconstitutional because it is arbitrarily imposed. Pet. Cert. at 25–28. He asserts that the discretion inherent in criminal prosecutions and sentencing renders capital punishment impermissibly arbitrary. Pet. Cert. at 25. But Murphy's argument flies in the face of this Court's precedent, which recognizes the need for such discretion, properly guided by a constitutionally-permissible sentencing structure. *See, e.g., Johnson v. Texas*, 509 U.S. 350, 373 (1993); *Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988); *McCleskey v. Kemp*, 481 U.S. 279, 307 n.28 (1987); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

Murphy asserts that his case exemplifies arbitrariness because Chris Solomon, Murphy's cohort, did not receive a death sentence. Pet. Cert. at 27. But Murphy, not Solomon, shot Jason Erie. *Murphy v. State*, No. 73,194, slip op. at 6 (quoting Murphy's confession, "I'll bet you never had someone stand straight up and straight up tell you that he killed a mother f---er"); *Solomon v. State*, 49 S.W.3d 356, 361 (Tex. Crim. App. 2001) (discussing witness testimony identifying Murphy

as the shooter). That fact answers any question regarding the sentencing disparity.

Similarly, Murphy asserts that he was more likely to be sentenced to death based on the county in which he committed the murder. Pet. Cert. at 27–28. However, this Court has rejected the notion that factors such as varying law-enforcement capabilities between jurisdictions renders capital punishment impermissible. *McCleskey*, 481 U.S. at 307 n.28.

Murphy also asserts that his race played a role in his prosecution and trial because he was sentenced by an all-white jury. Pet. Cert. at 28. He raised a number of claims on direct appeal alleging that the prosecutor discriminatorily exercised peremptory strikes, but the CCA rejected each claim. *Murphy v. State*, No. 73,194 at 15, 21–24. And he, of course, presents no support for his assertion that his or Jason Erie's race played a role in the prosecutorial or sentencing decisions.

Murphy next argues that capital punishment is unreliable in light of exonerations of some death row inmates. Pet. Cert. at 29–30. This Court has rejected similar arguments. *See Kansas v. Marsh*, 548 U.S. 163, 181 (2006). Further, reliance on compilations of exonerations (especially those by anti-death penalty groups) to draw conclusions regarding the reliability of capital murder prosecutions is dubious, at best. *See id.* at 186–99 (Scalia, J., concurring) (discussing flawed compilations of "exonerations," including a compilation by the Death Penalty Information Center); *Glossip v. Gross*, 135 S. Ct. 2726, 2751–55 (2015) (Thomas, J., concurring).

Murphy also argues that capital punishment is inhumane, as he has served twenty-years on death row. Pet. Cert. at 30–32. But there exists "a wall of cases uniformly rejecting" the argument that confinement on death row for several years constitutes an Eighth Amendment violation. *Ruiz v. Davis*, 850 F.3d 225, 230 (5th Cir. 2017); *see Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting the denial of certiorari). As the Court recently stated, the answer to lengthy stays awaiting execution is *not* "to reward those who interpose delay with a decree ending capital punishment by judicial fiat." *Bucklew v. Precythe*, 139 S. Ct. 1112, slip op. at 29 (2019).

Lastly, Murphy argues a consensus has emerged in favor of abolishing capital punishment. Pet. Cert. at 32–33. He points to the number of states that have either abolished the death penalty or instituted a moratorium on executions. Pet. Cert. at 32. He also points to the purported numbers of death sentences imposed and executions carried out in recent years as evidence of a consensus. Pet. Cert. at 32. As noted above, however, Murphy's claim is presented without factual development. And the statistics he provides are without context. For example, Murphy asserts that forty-two death sentences were imposed in 2018 as compared with 17,000 murders that were committed. Pet. Cert. at 32–33. The relevance of the interplay between those numbers is non-existent. Murphy does not explain whether all 17,000 murders were solved, went to trial, or even qualified as capital crimes. Moreover, even accepting Murphy's numbers, one would expect an appropriate tailoring of capital punishment to result in far fewer death sentences as compared to the sheer

number of murders. Similarly, Murphy points to the purportedly lower numbers of death sentences imposed and executions carried out in recent years as support for his claim. Pet. Cert. at 32–33. But assuming Murphy's numbers are accurate, such could be explained by prosecutors and juries simply exercising their properly-bestowed discretion in declining to impose a death sentence in a particular case.

Murphy's Eighth Amendment claim is simply inadequately presented to this Court to warrant its attention. The claim is procedurally defaulted, *Teague*-barred, undeveloped, and unpersuasive. *See Bucklew*, slip op. at 8 ("The Constitution allows capital punishment."); *Glossip*, 135 S. Ct. at 2732 (recognizing that "it is settled that capital punishment is constitutional"). Consequently, Murphy's petition should be denied.

Conclusion

The petition for writ of certiorari should be denied.

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